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Elder and Special Needs Law Journal

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

Inside

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Message from the Chair

I am pleased to report that the Elder Law Section just completed another successful Annual Meeting, CLE and Cocktail Reception at the New York Hilton on January 22, 2013. With a crowd of 400 in attendance, the Section nominated and elected the following slate of Officers for the 2013/2014 term, **Frances M. Pantaleo** as **Chair, Richard A. Weinblatt** as **Chair-Elect, JulieAnn Calareso** as **Vice-President, David Goldfarb** as **Secretary,** and the newly elected **Martin Hersh** as **Treasurer.** Additionally, the following individuals were elected as District Delegates, **Matthew J. Nolfo,** for District 1, **Robert Mascali** for District 7 and **Richard A. Marchese** for District 7. I wish to congratulate all of the elected officers and district delegates. I look forward to working with them in the upcoming year.

I wish to thank Immediate Past Chair **T. David Stapleton** and the members of the Nominating Committee for all of their hard work and efforts. David not only chaired the Nominating Committee but also did double duty with the Awards Committee. This year the Section honored Past Chair **Sharon Kovacs Gruer** by awarding her the "Friend of the Section" Award in recognition of her many years of hard work and efforts on behalf of our Section and its mission. The Awards Committee also honored **Ira Salzman** and **Ronald Fatoullah** for all of their hard work and efforts relevant to the adoption of the Uniform Guardianship Act in New York. Their efforts were truly in furtherance of the rights of the elderly and persons with disabilities. I wish to express my personal Congratulations to **Sharon, Ira** and **Ron** for their contributions to our Section and the mission of elder law attorneys. You are each an asset to our Section.

I would also be remiss if I did not share more good news with you. On January 25, 2013 at the Annual Meeting of the New York State Bar Association and the meeting of the State Bar House of Delegates, Section Past Chair, **Kathryn Grant Madigan** was awarded the prestigious **Ruth G. Schapiro Award** for 2012 presented by the State Bar Committee on Women in the Law. This award was presented to Kate in recognition of her significant contributions to addressing the concerns of women and her efforts in promoting women in the law. For all of you who do not know Kate, she has for decades worked tirelessly on behalf of our Section and on numerous and varied legal causes. She is a role model not only for women attorneys, but for any attorney who wishes to lead by example. It is truly an honor and privilege to have Kate as one of our own.

I also want to thank **Robert J. Kurre** and **Amy O'Connor** for organizing an excellent CLE Program that covered many timely and important topics. Every presenter and panelist was excellent. We owe Bob, Amy and all the presenters a debt of gratitude.

Our Section has just completed a financially successful 2012. Both our Summer and Fall Meetings

were profitable and well attended. As of year end 2012 our Section had a surplus in excess of one hundred and forty thousand dollars ($140,000.00). This surplus will give us the flexibility to tackle some new initiatives such as the planned Spring Mediation Committee CLE, which will train our members to be certified mediators in Elder Law and Trusts and Estates disputes. If you are interested in attending this CLE please contact **Judy Grimaldi** and **Laurie Menzies**, the Mediation Committee Co-Chairs. Our surplus will also allow us the ability to promote other initiatives such as Diversity, Mentoring, Study Group, Practice Management and our new Elder Abuse initiative.

I am also pleased to inform you that our Executive Committee has just authorized the formation of a special Elder Abuse Committee. This Committee will be chaired by **Joy Solomon** and will focus on educating our members to identify and report suspected cases of elder abuse, whether it be physical or financial. We are all hopeful that this Committee will receive the support of the membership and will eventually become a permanent Committee. I encourage you to contact **Joy Solomon** if you are interested in becoming a Committee member and assisting her with this endeavor.

In February and March, our Legislation Committee, Co-Chaired by **Amy O'Connor** and **Ira Salzman,** prepared our response to Governor Cuomo's proposed 2013/2014 Budget which contained a renewed proposal to eliminate spousal refusal for Medicaid home care. I am most pleased to report that we have again defeated the proposed legislative attempt to eliminate spousal refusal for Medicaid home care. The final budget did not included the Governor's proposal. Please join me in congratulating our Legislative Committee.

Additionally, there are many important legal issues being raised relevant to the implementation of Managed Long Term Care in New York. We traveled to Albany on February 12, 2013 to lobby our state legislators as to all of the issues we are most concerned with as a Section. Additionally, our Legislation Committee will be working to renew the legislative proposal that would permit one to utilize a Special Needs Trust to fund the elective share for his or her disabled spouse.

In conclusion, I respectfully urge you to become an active participant in our Section. I can personally assure you that it will be personally and professionally rewarding. If I can be of any assistance to you or if you have any questions or concerns, I am at your disposal. I can be reached via email at aenea@aol.com or at (914) 948-1500.

Anthony J. Enea

Message from the Co-Editors in Chief

With memories of Super Storm Sandy still fresh in our minds, the work of our Section is never more important than in times of such difficulty. Our clients with special needs face unique challenges and effective planning and advocacy is crucial. As we greet spring with the anticipation and optimism of rebuilding and refreshed energy we center this issue of the *Elder and Special Needs Law Journal* on Special Needs planning for those with disabilities.

The articles included in this issue include topics of interest inside and outside the legal arena. In order to effectively plan for those with special needs, we need to recognize what is happening outside the legal field and stay informed of services and programs available to those with special needs and the challenges facing our clients with disabilities. Our "guest authors" give us insight into some important concerns and initiatives.

On the special education front, Mordecai and Elana Simha co-author an article on the use of 529 plans when a beneficiary has a disability. Maria McGinley discusses the importance of express provisions of an Individualized Education Plan and the impact of a recent federal court decision. Robert Mascali and co-editor in chief, Adrienne Arkontaky, examine planning opportunities to work with special education attorneys on the use of special needs trusts in special education litigation matters.

On that note, as special needs practitioners look for new and innovative ways to plan for clients with disabilities, we have an article from Elizabeth C. Briand and Sarah Moskowitz on the New York decanting statute. Lauren Mechaly provides a very informative piece on special needs planning for young adults over the age of eighteen and Susan Morris provides the "top 10" planning essentials for families with children with disabilities.

An article by Rosanna Roizin provides us with the most recent information on the initiative to move Medicaid recipients to managed care and the impact on our clients.

Our regular columnists, Judith Raskin and Natalie Kaplan, provide a great ethics poll on the important topic of protecting client confidentiality in the world of "cloud" storage and cyber technology. Ellen Makofsky recently visited Cuba and provides us with a perspective on how this country addresses the need for advance directives. Judith Raskin also provides us with an update on important cases in the world of elder and special needs law.

Guardianship is an important part of many of our members' practices and we thank Elizabeth Valentin and Robert Kruger for their article on the Role of Counsel in Article 81 proceedings. In addition, remembering our elder law roots, we have a great piece on a law student's perpective regarding practice in the field by Malya Levin, JD, Deirdre Lok, Esq. and Joy Solomon, Esq.

We are pleased that we have "guest authors" from outside our Section. Paul and Susan Yellin co-author "Concussions in Children and Adolescents," while David Myers examines the options available to our clients with hearing impairments in an article titled "Hearing Assistance That People Love and Will Use.

We are also proud to present two new additions to the *Journal*—"What's Happening in Our Committees" AND "Spotlight On…" Since this issue focuses on Special Needs planning, we found it only fitting to spotlight our *SPECIAL NEEDS PLANNING COMMITTEE*. We hope these two columns will prompt those who are not presently involved in the various committees to consider joining one. You will see active, vibrant groups with knowledgeable members, both seasoned and "new to the field" practitioners.

Finally, we include pictures from our recent Annual Meeting. Thanks to all who presented, attended and the Program Co-Chairs, Amy S. O'Connor and Robert J. Kurre, for a wonderful program.

We are so proud of the work our Section does. We are also proud of the hard-working members of our publications committee including our student editors, our Board of Editors and our Production editors.

It is a very bittersweet time for us. Our long-time Production Editor, Kim Trigoboff, who recently opened her own practice, has decided to move on. We are eternally grateful to Kim, who has worked tirelessly on the *Journal.* She assisted the Editors before us and without her guidance, our transition into the role of Co-Editors in Chief would have been extremely difficult, if not impossible. Kim, thank you for your time, your wisdom and your patience. We wish you much success in your future endeavors. We dedicate this issue of the *Journal* to you with heartfelt thanks.

Sincerely,
Adrienne and David

Putting the Pieces of the Puzzle Together: Special Needs Planning for the Special Needs Young Adult

By Lauren I. Mechaly

Planning for a child with special needs is a lifelong process. This article will focus on disabled[1] young adults who are 18 or older, and the tools and resources available to their families to best protect their futures.

Special needs planning is like assembling a jigsaw puzzle. Looking at the front of the puzzle box is always helpful because one knows what the picture will look like when the puzzle is complete. Similarly, establishing the goals of the planning first ensures that everyone works towards the same end result. I consider the attorney who focuses on special needs planning as the front of the box. An attorney who concentrates in this area of the law provides the pieces of the puzzle to parents—guiding and advising as to where the pieces should be placed and how the particular pieces will fit in the overall puzzle. Each piece has its own place in the puzzle, and each piece is crucial to the puzzle's completion. If any pieces are missing or fail to fit together, the puzzle will be unfinished. One of the central pieces of the special needs puzzle is government benefits, and special needs planning will include the consideration of any government benefits for which the child may be eligible, either now or in the future. When planning for a child with special needs, many parents and grandparents seek to gift funds to the minor for the minor's future benefit. There are a number of options for gifts to minors, but transfers and gifts to disabled minors may affect future government benefits, which is why the planning puzzle needs to be put together one piece at a time.

A. Financial Eligibility for Government Benefits

There are various government programs available to disabled individuals, chief among them Supplemental Security Income (SSI) and Medicaid. Both are means-tested programs, and each has strict guidelines for resources and income considered available in determining financial eligibility. The resource limitation for SSI in 2013 is $2,000 (for an individual), while the resource level for Medicaid in New York in 2013[2] is $14,400 (for a disabled individual aged 21-64). At the core, SSI is a monthly stipend that should be used for food and shelter, while Medicaid is a health insurance program.

Parents of an individual with special needs must pay careful attention to the rules for eligibility for these programs. In order to maintain government benefits, the disabled individual's resources cannot exceed the allowable thresholds. Very often, access to government benefits is a lifeline for a disabled individual, as services and supports are available through government-funded programs that may not be available through private insurance coverage. For example, post-secondary programs (programs after high school), whether educational in nature or not, are very often available only to recipients of government benefits. Many facilities and organizations will not accept "private pay" for individuals entering their programs and thus, without government benefits, the young adult's application will not even be entertained, despite his or her special needs.

B. Gifting to Minors with Special Needs

1. Uniform Transfers to Minors Act

The use of a Uniform Transfers to Minors Act (UTMA)[3] account is popular among parents and grandparents alike. The money transferred to an UTMA account is a gift to the minor, but is held under the control of the custodian.[4] Only one custodian may serve, but the donor may appoint a successor custodian in the event that the individual appointed is unable or unwilling to serve. Although a parent can act as custodian of the account, there may be income and estate tax implications so it is not usually recommended. The tax implications of an UTMA account are beyond the scope of this article, but should be considered and addressed by the practitioner with the help of an accountant familiar with this tool.

The UTMA account is held in the name of the custodian for the benefit of the minor (i.e., "as custodian for Minor under the New York Uniform Transfers to Minors Act"). A custodian has broad discretion in the distribution of funds from the UTMA account. When the individual reaches the age of majority (usually 21), the funds are distributed to him or her. It is important to note that if the individual is under 18 years old, the funds held in the account are generally not considered available for purposes of financial eligibility for means-tested government benefit programs. However, once the individual turns 18, the money is considered fully available.[5] If the minor passes away before reaching the age of majority (i.e., the age of distribution), any undistributed funds held in the account are distributed to his or her estate.[6]

A transfer to an UTMA account is an irrevocable gift and becomes the property of the minor at the time of the transfer. That means that once the account is distributed at age 21, the beneficiary can decide what to do with the funds. Distributions from the UTMA account for goods or services on behalf of the minor are considered income. However, UTMA accounts are otherwise considered unavailable to the minor until he or she reaches the age of majority. At that time, it is considered unearned income in the first month and thereafter a resource. Thus, when planning for a child with special needs, establishing an UTMA account may have serious implications on financial eligibility for government benefits and programs if the value of the account at the time it is distributed surpasses the resource thresholds.

It should be noted that the existence of an UTMA account does not relieve a parent of his or her obligation of support.[7]

2. First Party Special Needs Trusts

In the event that a parent established an UTMA account for the benefit of a special needs child, or that the special needs child is the beneficiary of a life insurance policy, retirement account, inheritance, lawsuit award or settlement, or other asset, there are planning tools available to protect the young adult's eligibility for government benefits. The Omnibus Budget Reconciliation Act of 1993 (OBRA '93) provides for certain "exception" trusts. One such trust is a type of Special Needs Trust (SNT), also referred to as a payback trust, self settled trust, or (d)(4)(A) trust.[8] This type of SNT, established by a parent, grandparent, legal guardian, or the court, for the benefit of a disabled individual under age 65, must be funded with the individual's assets, and must include a payback provision for Medicaid.[9] Details of this SNT should be discussed at the consultation if the parents approach the practitioner when the individual owns any of the above assets or is scheduled to receive a distribution.

It is also important to discuss with families the prepayment of funeral costs for the disabled individual. This can be accomplished once the SNT is funded, and if an irrevocable pre-need contract is established, the cost is considered exempt for Medicaid eligibility purposes. It is also a legitimate form of spend down for purposes of Medicaid eligibility. Although sometimes too morbid to think about, it is a planning tool that should, at the very least, be considered.

3. Third Party Supplemental Needs Trusts

With the exception of a spouse or someone with a legal obligation of support,[10] New York State allows for the establishment of a third party Supplemental Needs Trust, which is a trust established for the benefit of a disabled individual but funded with the assets of a third party.[11] A third party Supplemental Needs Trust can be an *inter vivos* or testamentary trust. The law provides for various modifications so that the trust can be somewhat tailored to meet the needs and circumstances of the disabled individual. An *inter vivos* Supplemental Needs Trust is recommended if there are lifetime gifts to be made to the special needs individual. However, certain issues arise if the beneficiary of the trust is under 18, especially when the parent is funding the trust, since the parent is not relieved of the obligation of support until the child turns 18. Thus, this tool should be incorporated into the planning for a disabled individual who is 18 or older, unless established by an individual other than the parent. A testamentary trust will ensure that upon the testator's death, any inheritance passing to the disabled individual will be held in a Supplemental Needs Trust structured to protect present or future eligibility for government benefits. It is equally important for the grandparents of the special needs individual to have their estate planning in place as it is for the parents for the special needs individual. The same holds true for any family member or friend who wishes to leave any assets (personal property or otherwise) to the disabled individual. Often, an *inter vivos* trust is a good receptacle for assets received by the disabled individual from multiple family members.

4. Qualified Tuition Plans

A Qualified Tuition Plan (more commonly known as a 529 Plan)[12] may also be considered instead of an UTMA account, because money held in this type of account is not considered the child's money, and could be used as an alternative method of payment for college programs. Because a 529 Plan is considered the grantor's asset, the existence of the account does not have an impact on the eligibility of government benefits for the disabled individual. However, distributions from the account could have an impact on the individual's SSI if not appropriately made. Funds held in a 529 Plan are to be used to cover the costs of higher education including room, board, and tuition. If the beneficiary of the account is a disabled individual receiving SSI, the distributions from the account will not be considered income in the month received assuming the funds are used for the above-noted costs. If, however, the funds are used for other purposes in the month received, or are not used for these purposes within 9 months of receipt, the distribution will be treated as income and thus impact the individual's SSI.[13]

5. Alternative Planning Tools

If the beneficiary of an asset (such as an UTMA account, life insurance policy, retirement account, inheritance, or other asset) is a disabled individual, it is important to be familiar with the planning tools available so that the beneficiary is best protected. For example, when the asset is an UTMA account, some-

times it may make sense for the custodian to spend the funds held in the UTMA account before the child turns 21 (i.e., when the funds in the account are considered an available resource), so that any potential ineligibility for benefits is avoided when he or she reaches 21. Remember, the custodian of an UTMA account has complete discretion over the distribution of funds from the account before the disabled individual turns 21. If a parent consults with a special needs attorney and is considering establishing an UTMA account, the practitioner may want to suggest a third party Supplemental Needs Trust instead.

C. Life After High School

Many families spend the school-age years relying on (and fighting with) their local school districts to ensure that their special needs children get the most appropriate education available. Whether this education is provided at the community public school, or at a private school whose tuition has in turn been funded by the school district, a lot of parents face a seemingly never-ending uphill battle when it comes to special education.

Under New York State law, a special needs child is entitled to a free appropriate public education until he or she graduates high school or turns 21, whichever happens first. Thus, a lot of parents grow increasingly concerned with "what happens next." Although a transition plan was (or should have been) developed and implemented during high school, many young adults with special needs require continued structure and a typical post-secondary program will not provide that structure.[14] It is during this time that the importance of government benefits, specifically SSI and Medicaid, becomes evident to many families. Many programs that provide services and supports to disabled adults are paid for by government programs. Thus, placement is often easier if the individual is a recipient of these benefits.

1. Letter of Intent

It is highly recommended that the parents of a special needs individual prepare a letter of intent, especially before the individual reaches the age of majority. While it is not a legal document, and thus not binding in any way, it will guide anyone who may be responsible for the disabled individual in the future, whether it is a guardian, sibling, relative, friend, or caretaker. The letter of intent should include important information such as a physician contact, but also information regarding day-to-day life: medication management, allergies or other dietary restrictions, likes and dislikes, family clergy and house of worship, and names of friends. In this way, when the parents are no longer able to care for their disabled child, the responsible person will be familiar with his or her special needs. This is especially beneficial for a severely disabled individual who cannot express his or her needs due to a physical or cognitive impairment.

2. Transition Programs

The Adult Career and Continuing Education Services-Vocational Rehabilitation (ACCES-VR)[15] is a program initiated by the New York State Education Department to provide assistance and transition to individuals with disabilities. The program focuses on employment and independent living. ACCES-VR is not an entitlement program. Documentation must be provided to prove a medically diagnosed disability (physical, developmental, or emotional) that significantly impedes the individual's ability to work. The applicant must also be prepared to show that the services are necessary for his or her employment, and that ACCES-VR services will enable him or her to work. Receipt of SSI is not a factor for eligibility. If accepted, a counselor will be assigned to guide the individual and develop a program that is appropriate to meet his or her needs. It is not limited to employment opportunities; rather the counselor can also assist in securing independent living, government benefits, and other services.

These programs are appropriate for individuals who have physical disabilities or moderate cognitive impairments, as their participation in developing an appropriate post-secondary program that meets their needs is paramount.

The New York State Office for People with Developmental Disabilities (OPWDD) is also available to qualifying individuals for services and support in transition. Determination of eligibility for OPWDD services includes a three-step review process. The individual must have been disabled prior to the age of 22. For an individual with an intellectual disability, the family must provide a psychological report, including the individual's IQ score. For an individual whose disability is other than intellectual disability, a medical or specialty report must be provided to explain the individual's health and diagnoses. OPWDD offers a range of programs, some of which are described in greater detail below.

3. Residential Programs

If a student has resided in a residential program for much of his or her young adult life, the likelihood is that he or she will continue to require such a setting after high school. Many residential programs offer post-secondary residential opportunities.

There are various programs in New York State and elsewhere that support the needs of disabled adults. Every individual has unique needs, and placement in a program must be geared towards those needs. Not only must the family feel comfortable with the program,

but the program staff must feel confident that they can meet the unique needs of that individual. Further, funding for these programs varies. Some facilities accept private pay, while others accept only individuals on government benefits. If the appropriate program only accepts residents receiving government benefits, the planning tools mentioned will be useful in qualifying an otherwise financially ineligible individual for government benefits. When appropriate, the practitioner should discuss the potential for a residential post-secondary program in advance so that the proper planning strategy can be developed and then implemented.

Although this list is not nearly exhaustive, some facilities to consider are:

- The Center for Discovery (www.thecenterfordiscovery.org) in Harris, New York;
- Crystal Run Village (www.crvi.org) in Middletown, New York;
- HeartShare Human Services (www.heartshare.org) in Brooklyn, New York;
- Riverview School (www.riverviewschool.org) in Cape Cod, Massachusetts;
- LIFE Cape Cod (www.lifecapecod.org) in Cape Cod, Massachusetts.

4. Life Skills, Day Programs, and Care Facilities

OPWDD provides programs and services which include adaptive skill development; assistance with activities of daily living; training and support for travel; and educational supports.[16] Of course, where the disabled individual resides depends wholly on the individual's disability and how it presents in the home and community.

OPWDD offers varying levels of supports and services for adults with disabilities. For example, the "Community Residence" model provides supervised or supportive living,[17] where staff is available 24/7, but does not provide pre-vocational or supported employment services. Similarly, the "Individualized Residential Alternative" offers supervised or supportive housing. The supervised residence may have up to 14 disabled individuals and has 24-hour support, whereas the supportive residence has up to 3 disabled individuals and provides support as needed. This program provides day-habilitation, pre-vocational and supported employment services. If an individual's disability is so severe as to prohibit independent living, OPWDD offers "Family Care" (care in the private home) or "Intermediate Care Facility" (care in an institutional setting). Through these programs, the disabled individual has access to direct clinic care, as well as therapy and supervised activity.

For more information on these programs, and for assistance with the application process, families should be encouraged to contact their local Developmental Disability Regional Office (DDRO).

D. Financial and Medical Decision Making

Although the last piece of this puzzle should have been the first piece, we understand that parents do not always seek timely advice. In New York State, when a child turns 18, he or she becomes a legally emancipated adult. That means that the parent(s) can no longer make financial or medical decisions on behalf of the now young adult. The same rule applies to disabled individuals. In order to obtain authority to continue making financial and medical decisions on behalf of the disabled individual, the two options are Advance Directives and Guardianship.

1. Advance Directives

If the individual is able to understand the nature and consequences of signing advance directives, and the individual's physician agrees, a Power of Attorney and Health Care Proxy should be executed as soon as he or she turns 18. A HIPAA Release should also be executed. The special needs practitioner should also consider the individual's capacity to execute a Last Will and Testament. The special needs practitioner should be aware of the potential conflict of interest in representing the young adult and his or her parents. Said conflict should be disclosed to the clients immediately, and independent counsel should be suggested.

2. Guardianship

If a disabled individual cannot execute Advance Directives due to a cognitive impairment, a guardianship is necessary. If the individual suffers from a developmental or intellectual disability (i.e., Down Syndrome, Cerebral Palsy, or Fragile X), a 17-A[18] Guardianship should be recommended. If the individual does not suffer from a developmental or intellectual disability, but still suffers from a cognitive impairment that impedes his or her ability to execute Advance Directives (i.e., Dementia), an Article 81[19] Guardianship should be considered.

Individuals on the Autism Spectrum fall in a gray area. Because it is a spectrum disorder, the practitioner should seek the advice of the individual's physician, more specifically the neurologist or psychologist treating the individual. The medical professional should be able to provide an opinion (in writing) as to whether the individual can execute legal documents. Although some Surrogates will entertain a 17-A proceeding for a young adult on the Autism Spectrum, others will not. If the medical professional and the parents agree that a guardianship is warranted (as opposed to the execution

of Advance Directives), the practitioner should provide the court with sufficient information and documentation to support the developmental disability and the need for a legal guardian.

A legal guardian cannot compel medication or treatment. Thus, if the individual suffers from mental illness, it is possible that a guardianship would not be appropriate.

3. The Family Health Care Decisions Act

The Family Health Care Decisions Act[20] established the authority of a surrogate to make health care decisions if there is no court-appointed Article 81 guardian in place[21] and if the patient did not or could not execute a Health Care Proxy and/or Living Will. Said decisions include the withdrawal or withholding of life-sustaining treatment. The statute provides a list of individuals who may be appointed as surrogate, including a court-appointed guardian; a spouse or domestic partner; an adult child; a parent; a sibling; or a close friend. The surrogate is appointed based upon the availability and willingness of an individual in the category above. Certainly the existence of this law does not diminish the importance of Advance Directives or a Guardianship (as appropriate). Instead, this law should be considered as a plan "C"—in the event a disabled individual is in a hospital or nursing home and a decision must be made, but no prior planning has been done.

E. Conclusion

This article focused on disabled young adults who are 18 or older, and the tools and resources available to their families to best protect their futures. In putting a jigsaw puzzle together all of the pieces are necessary to create a perfectly assembled puzzle. In the special needs planning puzzle, the help and support of family and friends are necessary to create a secure and stable future for the disabled individual.

Endnotes

1. The Social Security Administration defines a disabled individual as one that is unable to sustain gainful employment as a result of a mental or physical disability, and whose disability is expected to result in death or has lasted or is expected to last for a period of at least 12 consecutive months.
2. SA 2012-00737-00; GIS 13 MA/01.
3. Est. Powers & Trusts L.§ 7-6.1, *et seq*. The practitioner should note that the law may differ in each state. The account is governed by the laws of the state where the account is held. In 1996, the New York Uniform Transfers to Minors Act (UTMA) replaced the Uniform Gifts to Minors Act (UGMA) and applied to transfers to minors on or after January 1, 1997. The age of majority was increased from 18 to 21 years, unless the donor specifically stipulated to 18. The age of majority remained 18 for transfers made to a previously established UGMA account. An UTMA account is a common tool for planning for a minor. However, if the minor is disabled, there are certain consequences to consider.
4. The term custodian includes an individual, corporation, or legal entity. The custodian is in place to accept funds on behalf of the minor. Est. Powers & Trusts L. §§ 7-6.1 (f); 7-6.9.
5. *See generally* Soc. Serv. L. § 366.
6. Est. Powers & Trusts L. § 7-6.20.
7. SSL § 366(c).
8. 42 USC § 1396p(d)(4)(A).
9. *Id.*; N.Y. Soc. Serv. L. §366(2)(b)(2)(iii).
10. Est. Powers & Trusts L7-1.12(a)(5)(iv) and (c)(1)(i).
11. Est. Powers & Trusts L § 7-1.12. *See also* Matter of Escher, 52 N.Y. 2d 1006 (1981).
12. 26 USC § 529.
13. POMS SI 00830.455(C)(1), *available at* www.ssa.gov.
14. The practitioner should know that any education provided after age 21 is no longer regulated by the Individuals with Disabilities Education Improvement Act, rather by the Americans with Disabilities Act (ADA).
15. *See generally* http://www.acces.nysed.gov/vr/.
16. *See generally* http://www.opwdd.ny.gov/index.php.
17. Supportive living provides up to 20 hours per week of staff on site.
18. Surr. Ct. Proc. Act § 1750-A.
19. Mental Hyg. L. § 81.
20. N.Y. Pub. Health L. § 29-CC.
21. It is important to note that the Surrogate's Court Procedure Act, not the Family Health Care Decisions Act, governs for individuals with developmental disabilities.

Lauren I. Mechaly is an associate with the law firm of Mazur Carp & Rubin, P.C. She focuses her practice on elder law, special needs planning, estate planning, and estate administration. Lauren also has significant experience in Special Education Law. Lauren received her B.A. from Boston University and her J.D. from Albany Law School. She has also taken courses at Fordham University's Graduate School of Social Services. While studying for her law degree, Lauren was an intern at the Albany Law School Civil Rights and Disabilities Law Clinic. Through the clinic, Lauren represented clients with developmental disabilities and advocated for appropriate educational services for students with special needs. She also worked with a coalition of special education attorneys addressing due process violations at the Office of State Review. Lauren is admitted to practice law in New York and New Jersey, and is a member of the Elder Law, Trusts and Estates Law, and Young Lawyers Sections of the New York State Bar Association.

The author would like to thank Robert M. Freeman and Barry I. Lutsky for their assistance in the preparation of this article.

Qualified Tuition Programs / 529 Plans and the Individual with Disabilities

By Mordecai Y. Simha and Elana M. Krupka Simha

529 plans, or *qualified tuition programs,* are designed to help families save for their children's future college expenses by providing a myriad of tax incentives. Each state offers its own version of the 529 plans, with concomitant state-specific advantages and disadvantages.

The flipside of the various tax advantages of the 529 plan is the imposition of a ten percent penalty on the distribution of income from the account for any "non-higher education" purpose. The ten percent penalty may be waived if the non-higher education-related distribution is directly attributable to the designated beneficiary's disability.

What, however, constitutes a disability that warrants a waiver of the penalty? For parents and relatives of children with special educational needs and the planners advising them, it is important to note that the definition of disability as found in the tax regulations[1] differs from the definition under the Individuals with Disabilities Education Act.[2] Children who fit the definition of disability while in elementary, secondary and high school may not be considered "disabled" for purposes of receiving a waiver of the ten percent penalty. This article will explore 529 plans, the definition of disability in that context and the ramifications for relatives of children with disabilities who have or are considering investing in a 529 plan.

Understanding the 529 Plan

Passed in 1996 by Congress as 26 USC 529, qualified tuition plans, or 529 plans, are available in two forms, prepaid tuition plans[3] or savings plans.[4]

Prepaid tuition plans allow investors to "purchase tuition credits or certificates on behalf of a designated beneficiary which entitle the beneficiary to the waiver or payment of qualified higher education expenses of the beneficiary."[5] The prepaid tuition plan locks in the tuition rates on the date the plan is funded for use at a later date, when the designated beneficiary is ready to go to college. Prepaid plans are available through the states or higher education institutions.

Savings plans allow investors to "make contributions to an account which is established for the purpose

of meeting the qualified higher education expenses of the designated beneficiary of the account."[6] Practically, the savings plans function as regular investment accounts. Savings plans are only available from the states. Savings plans may contain age-based investments, where the investments becomes more conservative as the beneficiary gets closer to college-age, or risk-based investments, where the investments remains in a fund and at the same level of risk up until the time the beneficiary is ready to attend college.[7] When the beneficiary reaches college age, money from the savings plan may be used for tuition, certain room and board expenses, fees, books, supplies and equipment required for enrollment or attendance at the institute of higher education.[8] Funds are also available for "expenses for special needs services in the case of a special needs beneficiary."[9] Qualifying institutions include typical two- and four-year colleges and vocational programs.[10]

There are tax advantages to the 529 plan regardless of whether an individual chooses the prepaid tuition or the savings plan. On a *federal income-tax level*, assets of a 529 plan grow income tax free, and withdrawals remain tax free if they are made for qualifying purposes. On a *federal gift tax level*, if an investor contributes an amount up to the amount of the annual gift tax exclusion[11] (in 2013, $14,000 for an individual and $28,000 for a couple filing jointly), the contribution will be treated as a gift of a present interest which is eligible for the annual exclusion.[12] Alternatively, in 2013 an investor may make a special election and in one year contribute up to $70,000 ($140,000 for a couple filing jointly) to the 529 plan, and said contribution is considered as if it were made over a five-year period.[13]

On a *state income-tax level*, New York State permits a New York resident who invests in a 529 plan to deduct up to a $5,000 from state income taxes; for a couple filing jointly, the deductible amount is raised to $10,000. In this manner, depending on the amounts invested, both the principal and income of the plan may be tax free.

States vary in how they construct their individual 529 plans and careful investors should research various states to determine which state's 529 plan suits his or

her needs.[14] Benefits may exist in investing in a plan in one's state of residence, as many states offer resident-specific benefits, including but not limited to state-tax benefits, matching grant and scholarship opportunities, protection from creditors and exemption from state financial aid calculations.[15]

In addition to the risks inherent in any investment, 529 plans carry the potential for penalties. In New York, investors will incur a "rollover penalty" if they want to transfer their New York 529 plan to another state. The rollover penalty requires an investor to pay New York state income tax on any earnings made on the investment, and also allows the state to recapture all previous deductions made on the account.

On a federal level, if an individual needs to use money in a 529 plan for non-education-related expenses, said distribution is taxable as gross income and incurs a ten percent penalty. Of note for families of individuals with special needs, 29 USC 530(d)(4)(b) enumerates five instances in which the penalty may be waived, the second of which is if said non-education-related distribution is "attributable to the designated beneficiary's being disabled (within the meaning of Section 72(m)(7)."[16]

In addition to the disability exception, no penalty is incurred for rolling over a 529 plan into a different qualified tuition plan for the same beneficiary[17] or for changing the beneficiary of the plan if the new beneficiary is a family member[18] of the previous beneficiary.[19]

529 Plans and Children with Disabilities

The definition of disability under 529 plans is found in 26 USC 72(m)(7):

> (7) Meaning of disabled. For purposes of this section, an individual shall be considered to be disabled if he is *unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration.* An individual shall not be considered to be disabled unless he furnishes proof of the existence thereof in such form and manner as the Secretary may require. *Emphasis added.*

Federal regulations expand on the (m)(7) definition of disability,[20] noting in 26 CFR 1.72-17A that:

> In determining whether an individual's impairment makes him unable to engage in any substantial gainful activity, primary consideration shall be given to the *nature and severity of his impairment*." *Emphasis added.*

The regulations go on to list eight examples of disabilities that would ordinarily constitute inability to engage in substantial gainful activity:

- loss of use of two limbs;
- progressive diseases which have resulted in the physical loss or atrophy of a limb, diseases of the heart, lungs, or blood vessels which have resulted in major loss of heart or lung reserve so that despite medical treatment breathlessness, pain, or fatigue is produced on slight exertion;
- cancer which is inoperable and progressive;
- damage to the brain or brain abnormality which has resulted in severe loss of judgment, intellect, orientation, or memory;
- mental diseases (e.g. psychosis or severe psychoneurosis) requiring continued institutionalization or constant supervision of the individual;
- loss or diminution of vision;
- permanent and total loss of speech;
- total deafness uncorrectible by a hearing aid.[21]

The regulations explicitly state that each case will be judged individually, and the existence of one of the above impairments will not necessarily constitute a waivable disability in every instance. For the condition to be a disability for tax purposes, it must be expected to last indefinitely or to result in death. Further, it may not be a remediable condition:

> An impairment which is remediable does not constitute a disability within the meaning of section 72(m)(7) *[26 USCS § 72*(m)(7)]. An individual will not be deemed disabled if, with reasonable effort and safety to himself, the impairment can be diminished to the extent that the individual will not be prevented by the impairment from engaging in his customary or any comparable substantial gainful activity.

72(m)(7) and its regulations are often litigated in the context of early distributions from individual retirement plans (IRAs). In determining whether the ten percent penalty should have been imposed, the tax courts places great emphasis on whether a particular disability is indefinite[22] and/or remediable.[23] The tax court has found that severe depression leading to hospitalizations,[24] fatigue which required an individual to switch to a less demanding job[25] and physical injuries[26] did not constitute a waivable disability, as the disabilities were remediable and did not last indefinitely.

There seems to be no case law specifically defining disability under 529 plans, and the examples listed in

26 CFR 1.72-17A are far more relevant to defining disability in the context of employment and early IRA distributions than to 529 plans. While certain educational disabilities, such as severe autism or intellectual disabilities, would likely fall in the categories of "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment," expected to last indefinitely and without the possibility of remediation, other educational disabilities are not as clear. Consider:

> *Julie is an 18-year-old woman who was classified as a child with a learning disability at age six, and received special education services throughout elementary school and high school. With individualized attention, she can succeed on an academic level. Julie, however, does not want to attend college. Julie's parents funded a 529 savings plan for her when she was two years old, and there is now a sizable sum in their account. Will her parents incur a penalty if they use the 529 funds for non-education-related expenses, or is Julie "disabled" for purposes of the penalty waiver? What if instead of a learning disability, Julie was classified as a child with an intellectual disability in the mild range? Alternatively, what if her classification was emotional disturbance, for clinical depression and oppositional defiant disorder?*

Julie is clearly "disabled" for purposes of the Individual with Disabilities Education Act. In the tax context, however, it is unclear whether she would fall into the same category for purposes of the ten percent penalty waiver. If a child can complete college or vocational school with support, is his or her disability then considered "remediable"? Are consistent bouts of depression considered "indefinite"? There are not yet any decisions available which clarify these "grey area" cases.

As noted above, even if disability is proven and the penalty is waived due to disability, an investor using the funds in a 529 plan for non-education related expenses is required to pay federal tax on the earned income. The lack of case law defining disability in the context of 529 plans may be because there are alternatives to using the funds for non-qualifying matters that avoid the penalty **and** retain the income tax advantage. Such alternatives include changing designated beneficiaries or using the funds for vocational services or for special education support services for the beneficiary. Where those alternatives are not viable options, however, it is important for parents to know that they may be able to avoid the penalty upon proof that the designated beneficiary is disabled.

A possible future alternative for families of individuals with disabilities has been introduced in Congress, in a bill known as the Achieving a Better Life Experience Act ("ABLE") Act.[27] The ABLE Act would allow for a 529-like tax advantaged plan that allows families to save for the educational, medical, housing and other expenses of adults with disabilities.[28] The ABLE Act defines disability as either those who qualify for Social Security Income or Disability money or those who file disability certifications with the Secretary of the Treasury on an annual basis.[29]

Conclusion

Despite the fact that there is no clear definition of "disability" in the context of 529 plans, said plans remain a great way for families to save for the future educational expenses of their children. One should not be dissuaded from investing in a 529 plan or continuing to fund a 529 plan for a beneficiary with disabilities, as the money thus invested may be used to fund special education services in institutions of higher learning for said beneficiary, fund a related family member's education or possibly for any purpose without the usually imposed ten percent penalty.

Endnotes

1. 26 USC 72(m)(7).
2. 26 USC 1400.
3. 26 USC 529(b)(1)(A)(i).
4. 26 USC 529(b)(1)(A)(ii).
5. 26 USC 529(b)(1)(A)(i).
6. 26 USC 529(b)(1)(A)(ii).
7. http://www.collegesavings.org/whatIs529.aspx.
8. 26 USC 529(e)(3).
9. *Id.*
10. See 26 USC 529(e)(5), which references 20 USC 1088.
11. 26 USC (c)(2) and 26 USC 2503(b).
12. 26 USC 529(c)(2).
13. https://uii.nysaves.s.upromise.com/content/taxbenefits.html.
14. See https://uii.nysaves.s.upromise.com/content/taxbenefits.html.
15. See http://www.collegesavings.org/whatIs529.aspx.
16. Other listed exceptions include distributions made on account of a scholarship and attendance of the beneficiary at the United States Military Academy, the United States Naval Academy, the United States Air Force Academy, the United States Coast Guard Academy, or the United States Merchant Marine Academy.
17. 26 USC (c)(3)(C).
18. 26 USC 529(c)(3)(C) defines a family member as "(A) the spouse of such beneficiary (B) an individual who bears a relationship to such beneficiary which is described in subparagraphs (A) through (G) of section 152(d)(2) [*26 USCS § 152(d)(2)*]; (C) the spouse of any individual described in subparagraph (B); and (D) any first cousin of such beneficiary." 26 USCS § 152(d)(2) describes a family member as (A) A child or a descendant of a child. (B) A brother, sister, stepbrother, or stepsister. (C)

The father or mother, or an ancestor of either. (D) A stepfather or stepmother. (E) A son or daughter of a brother or sister of the taxpayer. (F) A brother or sister of the father or mother of the taxpayer. (G) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law. (H) An individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to section 7703, of the taxpayer) who, for the taxable year of the taxpayer, has the same principal place of abode as the taxpayer and is a member of the taxpayer's household.

19. 26 USC 529(c)(3)(C).
20. 26 CFR 1.72-17A.
21. *Id.*
22. 26 CFR 1.72-17(A)(f)(3). Indefinite is defined as, "cannot reasonably be anticipated that the impairment will, in the foreseeable future, be so diminished as no longer to prevent substantial gainful activity." *Id.*
23. 26 CFR 1.72-17(A)(f)(4). "An individual will not be deemed disabled if, with reasonable effort and safety to himself, the impairment can be diminished to the extent that the individual will not be prevented by the impairment from engaging in his customary or any comparable substantial gainful activity."
24. *Kovacevic v. Commissioner,* T.C. Memo 1992-609.
25. *Dykes v. Commissioner,* T.C. Summary Opinion 2007-101.
26. *Leonard v. Commissioner,* T.C. Summary Opinion 2005-114; *Rideaux v. Commissioner,* T.C. Summary Opinion 2006-74.
27. For a thorough analysis of the ABLE Act, see: Tara Anne Pleat and Edward V. Wilcenski, *Achieving a Better Life Experience (ABLE) Act of 2011: Good Intentions, Questionable Results,* NYSBA Elder and Special Needs Law Journal, Winter 2013, 23-1, 18.
28. See the text of the ABLE Act (H.R. 3423 / S. 1872) at http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN01872:@@@K.
29. H.R. 3423 §3(a)(1)(C)(iii), 112th Cong. (2011).

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Hearing Assistance That People Love and Will Use

By David G. Myers

As a person with hearing loss, I often find lectures, plays, and PA system announcements indecipherable. But who else notices? Unlike someone visibly left outside because of wheelchair inaccessibility—which would leave others appalled—inaccessibility due to hearing loss is invisible and thus often unremedied.

The Americans with Disabilities Act does, however, mandate hearing assistance in public settings where audio amplification is provided. Such assistance typically takes the form of a checkout FM or infrared receiver with earphones. Alas, because well-meaning sound engineers fail to consider the human factor—how real people interact with technology—most such units sit unused in storage closets.

To empathize, imagine yourself struggling to carve meaning out of sound as you watch a movie, attend worship, listen to a lecture, strain to hear an airport announcement, or stand at a ticket window. Which of these hearing solutions would you prefer?

1. Taking the initiative to go locate, check out, wear, and return special equipment (typically a conspicuous headset that delivers generic sound)?
2. Pushing a button that transforms your hearing aids (or cochlear implant) into wireless loudspeakers that deliver sound customized to your own needs?

Solution 1—the hearing-aid-incompatible solution—has been America's prevalent assistive-listening technology. Solution 2—the hearing-aid-compatible solution—has spread to Scandinavian countries and across the United Kingdom, where it now exists in most cathedrals and churches, in the back seats of all London taxis, and at 11,500 post offices and countless train and ticket windows.

Twelve years ago I first experienced this hearing technology at Scotland's Iona Abbey. As the spoken word reverberated off the 800-year-old stone walls, it was, for me, an unintelligible verbal fog. My wife then noticed a sign indicating a "hearing loop"—a magnetic communication system that transmits PA system output via a room-surrounding wire loop to a hearing instrument "telecoil" sensor. (Telecoils now come, cost-free, with most new hearing aids and all new cochlear implants.) Push a button to activate the telecoil and, voila!, the hearing instrument becomes a wireless in-the-ear loudspeaker for magnetic signals sent from hearing loops (as I discovered that day), as well as from many modern telephones.

The result was stunning: Suddenly I was hearing a clear voice speaking from the center of my head. The delicious sound (is this what others hear?) put me on the verge of tears. On returning home, I installed a $250 hearing loop in my home TV room. If someone watches TV with me, they hear sound from the TV while I hear it broadcast by my hearing aids (which can simultaneously pick up room conversation). My office phone likewise connects to a hearing loop, which transmits amplified phone conversation to both my ears, with greatly increased clarity. (When taking voice mail messages, I can leave the handset on the desk.)

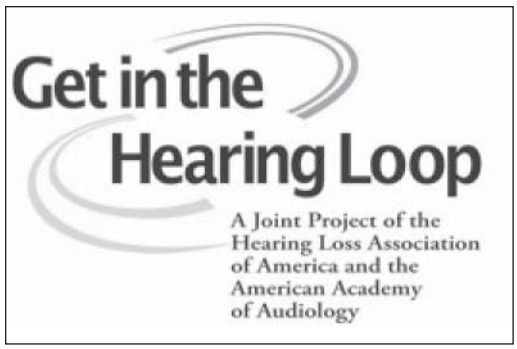
Given how well this simple technology works in other countries and in my home and office, why not loop my community? So, with support from some local companies, foundations, and media, I introduced hearing loops to West Michigan. Nearly a decade later, we now have them in hundreds of locations, including most worship places, many school and senior citizen center auditoriums, the convention center and airport in Grand Rapids, and even Michigan State University's basketball and special events arena.

The response has been gratifying, with use of hearing assistance multiplying and with words of appreciation flowing from audiologists ("Never in my audiology career has something so simple helped so many people at so little cost"), audio professionals ("After installing our first loop system and seeing the reaction from the individuals with hearing loss, we immediately shifted our sales focus to loop systems"), and consumers ("The experience of actually hearing such clear sounds was thrilling and hard to describe").

A California audiologist, Bill Diles, has installed hearing loops in the TV rooms of more than 1,800 patients. His patient surveys reveal markedly increased satisfaction, given the hearing loop, with both their TV listening and their hearing aids.

Given the appreciative response to this user-friendlier technology, why not "loop America?" I wondered. Why not effectively double the functionality of hearing instruments?

That ambition—my avocational passion of the last decade—presents a grand challenge in applied social psychology. How, given the cultural inertia supporting America's existing hearing-aid-*in*compatible assistive listening, does one effectively persuade hearing and audio professionals to consider the human factor—the practical benefits of simplicity and no-fuss ease of use?



On behalf of Americans with hearing loss, my answer has been a persuasive message that shares the vision and tells the story to every audience I can reach—via an informational Web site (www.hearingloop.org), through 30 articles for hearing and audio professionals and the general public, and by invited talks and nearly 9,000 e-mails to whomever will listen. Thanks partly to message repetition, and with the collaboration of energetic kindred spirits in other states, a grassroots movement is gaining momentum. New companies have formed to produce and market hearing loop products. Effective hearing loop advocates in Wisconsin, Arizona, New Mexico, Rochester (NY), Silicon Valley, and New York City (where hearing loops are installed at 488 subway information booths) have undertaken initiatives in their locales and are networking through a national listserv. (This is prosocial group polarization.) Various national media—from *Scientific American* to the *AARP Bulletin* to NPR *Science Friday* to the *New York Times*—have featured our collective social entrepreneurship.

And, to my delight, the Hearing Loss Association of America ("the nation's voice for people with hearing loss") and the American Academy of Audiology have undertaken a joint campaign to "enlighten and excite hearing-aid and cochlear-implant users, as well as audiologists and other hearing health care professionals, about telecoils and hearing loops and their unique benefits."

Is this the ultimate wireless hearing solution? The cost, limited range, and power demands of alternative wireless technologies, such as Bluetooth, make hearing loops today's technology of choice for public access. But if some future wireless technology is similarly affordable, miniaturized for most hearing instruments, simple to use, inconspicuous, and able to cover a wide area with a universally accessible signal, then bring it on. Our advocacy is less for hearing loops per se than for hearing technology that appreciates the human factor—by enabling hearing instruments to serve an important second function, as simple, affordable, wireless loudspeakers. Happily, we are now approaching a cultural tipping point where that dream looks like an achievable reality.

David G. Myers is the author of *A Quiet World: Living with Hearing Loss* (Yale University Press) and the creator of www.hearingloop.org. In recognition of his collaborative efforts to transform American assistive listening he received a 2011 Presidential Award from the American Academy of Audiology and the Walter T. Ridder Award from the Hearing Loss Association of America.

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ADA General Guidelines (2010)

219 Assistive Listening Systems

219.1 General. Assistive listening systems shall be provided in accordance with 219 and shall comply with 706.

219.2 Required Systems. In each assembly area[1] where audible communication is integral to the use of the space, an assistive listening system shall be provided.

EXCEPTION: Other than in courtrooms, assistive listening systems shall not be required where audio amplification is not provided.

219.3 Receivers. Receivers complying with 706.2 shall be provided for assistive listening systems in each assembly area in accordance with Table 219.3. Twenty-five percent minimum of receivers provided, but no fewer than two, shall be hearing-aid compatible in accordance with 706.3.

EXCEPTIONS:

1. Where a building contains more than one assembly area and the assembly areas required to provide assistive listening systems are under one management, the total number of required receivers shall be permitted to be calculated according to the total number of seats in the assembly areas in the building provided that all receivers are usable with all systems.
2. Where all seats in an assembly area are served by an induction loop assistive listening system, the minimum number of receivers required by Table 219.3 to be hearing-aid compatible shall not be required to be provided.

219.3 Receivers for Assistive Listening Systems

Capacity of Seating in Assembly Area	Minimum Number of Required Receivers	Minimum Number of Required Receivers Required to be Hearing-aid Compatible
50 or less	2	2
51 to 200	2, plus 1 per 25 seats over 50 seats*	2
201 to 500	2, plus 1 per 25 seats over 50 seats*	1 per 4 receivers*
501 to 1000	20, plus 1 per 33 seats over 500 seats*	1 per 4 receivers*
1001 to 2000	35, plus 1 per 50 seats over 1000 seats*	1 per 4 receivers*
2001 and over	55 plus 1 per 100 seats over 2000 seats*	1 per 4 receivers*

*Or fraction thereof.

Endnote

1. "A building or facility, or portion thereof, used for the purpose of entertainment, educational or civic gatherings, or similar purposes ['religious entities' are exempt from ADA]. Assembly areas include, but are not limited to, classrooms, lecture halls, courtrooms, public meeting rooms, public hearing rooms, legislative chambers, motion picture houses, auditoria, theaters, playhouses, dinner theaters, concert halls, centers for the performing arts, amphitheaters, arenas, stadiums, grandstands, or convention centers."

http://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards.pdf

New York City Recipients of Community-Based Long Term Care Begin Transition to Managed Long Term Care

By Rosanna Roizin

The Medicaid Redesign Team (MRT), commissioned by Governor Cuomo by executive order on January 5, 2011, has already drastically changed the landscape of New York's Medicaid program by expanding the enrollment to previously exempt populations. This fall, after the Center for Medicare and Medicaid Services (CMS) approved a "waiver," dual eligible Medicare/Medicaid consumers in New York who receive long term care in the community for more than 120 days became another segment of the population that is being transitioned into managed care plans.

Individuals who are receiving community-based long term care services, particularly personal care services or home attendant services, or those who plan to enroll for these services, will now have to enroll in a Managed Long-Term Care (MLTC) plan. The MLTC plan will be in charge of enrolling all new clients and coordinating the home care services.[1]

The overall goal of the MRT is to reduce costs of Medicaid services in New York, and, not surprisingly, community-based long term care is an area of target. According to the New York State Department of Health, the cost for long term care services "continues to grow at a significant rate while the total number of Medicaid recipients receiving long term care services has remained flat."[2]

The mandatory enrollment into MLTC plans began in New York City in October 2012. It is expected that during a 36-month phase-in-period, approximately 2,000 people per month will transition to an MLTC plan or other care coordination model.[3] The program will expand to Long Island and Westchester in January 2013 and then to other counties.

The real ramifications of the transition to MLTC have yet to be seen. Thankfully, in New York City, there is a policy requiring continuity of care, so that recipients of home care will not have their hours reduced within the first 60 days of their enrollment, nor will their aid change at least until March 2013.[4] In order to ensure this, MLTC plans are required to contract with all home attendant vendors that have contracts with the Human Resources Administration (HRA) and provide the same published rate as is currently paid by HRA.[5]

However, as advocates have noted during the public comment period,[6] the incentive for MLTC plans to reduce hours for consumers is a stark possibility that may become a reality shortly. Since the reimbursement will no longer be fee-for-service but rather a capitated rate, the only way for MLTC plans to control costs will be to reduce reimbursement rates for the home attendant vendors and probably simultaneously approve as few hours as possible for the home care.

One of the home attendant vendors in New York City, CIDNY-Independent Living Services, a non-profit organization, is both concerned and actively planning for the changes happening in long term home care. As one of the smaller vendors of home care services in New York, with 450 active clients currently, this entity is concerned that the anticipated lower reimbursement rates and decreased hours per client will force them to cut benefits and salaries to their employees. "As a small organization we do not have the bargaining power with the MLTCs like some of the bigger vendors," said Alexei Khamarkhanov, the Assistant Director of Administration at CIDNY, during a recent interview. "Some of the MLTC plans are already stating that they plan to decrease their hourly reimbursement rates to $15 an hour, which is $2.25 less than our current rate."

In response to the changing landscape, CIDNY has expanded its services to also provide physical therapy, occupational therapy, and other services to become a "one-stop shop" and as such be more attractive for the MLTC plan. Another area that CIDNY plans to expand into is the provision of Social Adult Day Care (SADC).

The SADCs have become extremely popular in certain communities, such as Brighton Beach, Brooklyn where there is a high density of elderly people. There is no license requirement to open a SADC; however, one must adhere to program standards issued by the local agency on aging.[7] Since the staffing requirements are minimal and the reimbursement rate is a fixed rate per person per day, the model is becoming more attractive for home care vendors to control costs.

But for those clients who are in most need of one-on-one attention and are homebound, the home attendant is still their only lifeline to age in their community with dignity. Mr. Khamarkhanov states that about 25 percent of their current clients need 24-hour care or "sleep-ins."

For those neediest clients, the next few months will be most telling as they navigate the newly privatized

system. First, clients will have to choose an MLTC that will include their current vendor or be auto-enrolled into a plan. After that, a nurse from the plan will come to evaluate the client and recommend the amount of hours of home care to be approved.

If the client does not agree with the reduction, he or she cannot automatically request a fair hearing with an Administrative Law Judge. Instead, the client must navigate a grievance[8] and internal appeal process[9] within the MLTC plan before he or she may request a fair hearing. A grievance is defined in the Model Contract as "an expression of dissatisfaction…about care and treatment that does not amount to a change in scope, amount or duration of service."[10] For example, if a client is dissatisfied with the particular home health aide that was assigned to him or her, a grievance may be the appropriate mechanism for addressing that issue.

A grievance can be submitted either orally or in writing and can be appealed either as an expedited or standard appeal, each with stringent time frames for when a decision should be rendered.[11] The main crux of the grievance route is that it does not give the client a further appeal right to a fair hearing; for that the client must utilize the internal appeal process.

The internal appeal process is for "a review of an action taken by the plan"[12] and would be the appropriate vehicle for contesting a cut to a client's hours or a denial in services. The internal appeal process can be either expedited[13] or standard,[14] each with specific time frames for when a decision must be rendered. If the client is not satisfied with the internal appeal decision, he or she can request an external appeal or a fair hearing.

The issue of whether exhaustion is required before one can get to an external appeal or a fair hearing is still unclear. According to the Model Contract it appears that New York has opted to require exhaustion; however, there have not been any laws or regulations passed to implement this requirement.[15] An external appeal is reviewed by the New York Department of Financial Services and a client may request a fair hearing following the external appeal if he or she is not satisfied with the decision.[16]

While the increased layer of accountability may come as relief to some advocates, the steps involved in navigating the grievance and internal appeal process have become numerous and more burdensome, some may argue. Advocates will also be relieved to learn that aid to continue is still available for clients as long as a timely request is made.[17]

As the privatization of community-based long term care services unfolds, advocates working with the elderly and disabled will have to diligently assist their clients to navigate this new landscape and hopefully maintain these home care services that have allowed so many New Yorkers to maintain their quality of life.

The changes to community-based long term care are far-reaching and will likely change the landscape of the businesses providing the services as well as the delivery of the services. As these changes come into play in the spring of 2013, advocates should be ready to use all the tools in their toolbox to ensure their clients' needs are being met.

Endnotes

1. For detailed information about how to enroll in a MLTC plan and how to choose a plan, visithttp://wnylc.com/health/entry/114/.
2. http://www.health.ny.gov/health_care/managed_care/appextension/mrt_waiver_materials/docs/medicaid_redesign_initiatives.pdf. Specifically, "[b]etween 2003 and 2009, Medicaid long term care expenditures increased by 26.4% from $9.8 billion to $12.4 billion annually while there was only a .1% change in the number of recipients. The average cost of services per recipient has increased from $30,769 in 2003 to $38,839 in 2009." *Id*.
3. http://www.health.ny.gov/health_care/managed_care/appextension/mrt_waiver_materials/docs/medicaid_redesign_initiatives.pdf.
4. New York State Department of Health, *Continuity of Care Policy for Managed Long Term Care,* http://www.health.ny.gov/health_care/medicaid/redesign/docs/2012_04_26_continuing_of_care_policy.pdf.
5. *Id*.
6. http://wnylc.com/health/news/39/.
7. Newly Adopted Social Adult Day Care Regulations, http://www.aging.ny.gov/LTC/SADS/AdultDayCareCenters/SocialADSRegulations.pdf.
8. 42 CFR Part 438 Subpart F, NY Pub Health L. § 4408-a; 10 NYCRR § 98-1.14.
9. 42 CFR Part 438 Subpart F; NY Pub Health L. § 4904; 10 NYCRR § 98-1.14.
10. 2007 MLTC Model Contract (updated January 1, 2011), Appendix K, ¶ (1)(A), http://www.health.ny.gov/health_care/managed_care/mltc/pdf/mltc_contract.pdf.
11. *Id.*
12. *Id.* at ¶ (1)(B).
13. *Id*. An expedited appeal "must be decided as fast as member's condition requires," specifically "within 2 business days of receipt of necessary information, but no later than 3 business days of receipt of appeal request."
14. *Id*. A standard appeal "must be decided as fast as member's condition requires" but "no later than 30 calendar days of receipt of appeal request."
15. *Id.*
16. NY Pub Health L. § 4910; 10 NYCRR § 98-2.
17. *Id.* Aid to continue will be available to those who request it "within 10 days of the notice's postmark date or by the intended date of the action if aid to continue is requested and appeal involves the termination, suspension or reduction of a previously authorized service."

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Special Needs Planning and New York's Amended Decanting Statute

By Elizabeth C. Briand and Sarah C. Moskowitz

I. Introduction

Elizabeth C. Briand

Much has been written on New York State's decanting statute since it was amended in August of 2011. Most of these articles have been geared toward tax planners and discuss the tax advantages and potential pitfalls under the amended statute. This article is focused on how decanting affects Special Needs and Elder Law planners and their clients.

II. Background

Special Needs and Elder Law planners frequently rely on the irrevocable trust as a planning tool. An irrevocable trust can facilitate lifetime gifts and remove assets from one's estate while providing creditor protection and asset management for beneficiaries. Although an irrevocable trust can be amended or revoked the process is onerous and sometimes impossible. This can be problematic when changed circumstances may call for modifications to the trust. It is under this umbrella that attorneys use a technique called "decanting." When a trust is decanted, the trust corpus is transferred to a new trust established by the trustees. The trustee's power to decant is not rooted in a power to amend the trust, but rather in the trustee's ability to invade principal on behalf of a beneficiary.[1] The law recognizes that such an invasion power is a limited power of appointment over the trust corpus.

There are various reasons for exercising the power to decant, including: to extend the term of the trust; to remove beneficiaries; to change the governing law; to change administrative provisions; to consolidate two or more trusts or create separate trusts; to correct drafting errors; and to segregate assets subject to state income tax.

Decanting is especially effective in planning when government benefits become necessary. Take a situation in which grandparents establish and fund irrevocable trusts for each of their grandchildren. Sometime in the future a grandchild develops a condition that can lead to the need for government programs. The trustees of the trust for the disabled grandchild can decant the trust corpus into a Special Needs Trust (SNT) that will not disqualify the grandchild for government benefits and can be used to supplement his or her care.

III. History of Decanting in New York

Sarah C. Moskowitz

New York State was the first state[2] to enact a decanting statute on July 24, 1992. Under the initial statute, a trustee of an irrevocable lifetime trust or testamentary trust could decant some or all of the principal to a separate trust if:

a. The invaded trust gave the trustee absolute discretion to invade principal, unfettered by any ascertainable or non-ascertainable standard;

b. The decanting did not reduce any fixed income interest in the invaded trust;

c. The decanting was in favor of the "proper objects of the exercise of the power" to invade; and

d. The appointed trust did not violate the limitation of EPTL 11-1.7 (which prohibits, among other things, a trustee's exoneration from liability for failing to exercise reasonable care, diligence and prudence).[3]

The original statute allowed the trustee to exercise the trustee's fiduciary powers and decant assets from one trust to another *only if* the trustee had absolute discretion to invade the trust principal. Additionally, the statute required a trustee to obtain either court approval or the beneficiaries' consent in order to decant. In 2001, the Legislature amended EPTL 10-6.6 and did away with this requirement.[4] This effectively barred any trust with principal invasions limited to ascertainable standards under §2041 of the Internal Revenue Code from decanting.

IV. New Decanting Statute

As of August 17, 2011, the amended statute significantly changed the decanting statute of 1992. From a Special Needs planning standpoint the most noteworthy changes are:

- Decanting is not permitted if it reduces, limits, or modifies a beneficiary's current mandatory right to receive or withdraw income or principal, unless the appointed trust is an SNT under the criteria set forth in EPTL 7-1.12.[5]

- Trustees may decant whether or not the trustee has unlimited discretion, provided there is some ability of the trustee to distribute principal.[6]
- There is no court filing requirement for decanting a trust unless either the trust is a testamentary trust or it is a lifetime trust which has already been the subject of a Surrogate's court proceeding.[7]
- In terms of notice, a copy of the instrument exercising the power and a copy of each of the invaded trust and the appointed trust shall be delivered to the creator of the invaded trust, if living; any person having the right, pursuant to the terms of the invaded trust, to remove or replace the authorized trustee exercising the power to decant; and any persons interested in the invaded trust and the appointed trust (or, in the case of any persons interested in the trust, to any guardian of the property, conservator or personal representative of any such person or the parent or person with whom any such minor person resides).[8]
- An appointed trust may have longer term than its corresponding invaded trust.[9]

V. How Decanting Benefits Our Special Needs Clients and Their Families

Special Needs planners are often faced with the task of correcting drafting errors or assisting a client address changed circumstances. Corrections or re-configuring an estate plan often occurs in the context of a testamentary marital or descendant's separate trust. It is not uncommon for attorneys unfamiliar with state and federal laws pertaining to the Elder and Special Needs communities to fail to include provisions in a trust to protect against a catastrophic illness or the onset of a medical condition. This can subject a surviving spouse or disabled beneficiary to the possibility of spending all assets before becoming eligible for much needed government benefits. The expanded decanting statute provides Special Needs planners with a relatively simple method to alter an irrevocable trust for the benefit of a disabled beneficiary and protect the trust assets.

Under the previous incarnation of EPTL 10-6.6 an irrevocable trust for the benefit of a disabled beneficiary could prevent that beneficiary from qualifying for government benefits. If the trustee's power to invade the trust in question was limited to an ascertainable standard, e.g. health, education, maintenance and support (HEMS), decanting was not an option.

One of the primary differences between the former and current statute is the ability to decant even when the trustee does not have unlimited discretion to invade principal.[10]

Under the former EPTL 10-6.6, a trustee with invasion powers limited to an ascertainable standard was not permitted to decant trust assets. Now, the trust assets can be decanted. The Special Needs planner must keep in mind, however, that if a trustee whose ability to decant assets in the original or "invaded" trust is subject to limited invasion powers, the new or "appointed" trust must be subject to the same limitations (i.e., HEMS).[11] In addition, the current, successor and remainder beneficiaries of the appointed trust must be the same as the current, successor and remainder beneficiaries of the invaded trust.[12]

Despite the above restrictions, this change is beneficial to Special Needs planners. While the appointed trust may be subject to some previous restrictions, this is still a chance to make necessary changes to the provisions that were preventing a disabled client from receiving government benefits or to make any other change deemed necessary for the benefit of the beneficiary.

If the term of the appointed trust extends past the date on which the invaded trust would otherwise have terminated, as permissible under EPTL 10-6.6(e), then the appointed trust may give the trustee the unlimited discretion to invade principal after that termination date even if the invaded trust limited invasions.[13] This change affords Special Needs planners a unique opportunity in a trust that is set to terminate on a set date, e.g., decant a testamentary trust for the benefit of a disabled beneficiary set to be available to the beneficiary at age 30, into a lifetime SNT.

Moreover, if the invaded trust has defective ascertainable standards, it will be treated as a trust in which the trustee has full discretionary invasion and the trustee is free from any restrictions on decanting. The concept of ascertainable standards arises from §2041 of the Internal Revenue Code. This section defines ascertainable standards as HEMS. If additional standards are named, the entire HEMS provision is deemed void. Courts have consistently held that words such as "welfare" and "comfort" will render an ascertainable standard void. As the New York statute uses the standards set forth in IRC §2041, if the ascertainable standard fails the provisions of IRC §2041, it cannot be treated as an ascertainable standard for trust decanting purposes. Based on this, Special Needs planners may often have the opportunity to decant a trust subject to an ascertainable standard to a trust with unlimited invasion powers.

Planners should always consider the restrictions that come with limiting a trustee's power to invade when drafting an irrevocable trust. Under EPTL 10-6.6(b), the trustee of a fully discretionary trust can decant the trust corpus for the benefit of one of the current beneficiaries without regard to other beneficiaries of the invaded trust. The remainder beneficiary of the

appointed trust must be at least one of the remainder beneficiaries of the invaded trust.[14] As a result, decanting could be especially useful in a situation in which a grantor decides that he or she would now like all of the trust assets to benefit a disabled spouse or child, and that the remainder should pass to a non-disabled beneficiary. In order to avail themselves of this opportunity, Special Needs and Elder Law planners must carefully consider any limitations on the trustee's invasion powers.

VI. Possible Abuse and Procedural Safeguards Under the Revised Statute

As advocates for elderly and disabled individuals, Special Needs and Elder Law planners must be aware of possible abuses of discretion that can affect their clients. The entire concept of decanting brings potential abuse to mind. The notion of a trustee having the power to remove assets from one trust to another trust evokes images of beneficiaries being robbed of trust assets—a particularly frightening notion when a beneficiary is elderly or disabled.

EPTL 10-6.6(b) provides that a trustee with absolute discretion to invade principal can decant if the appointed trust is solely for the benefit of any one or more of the current beneficiaries of the invaded trust. Decanting may not be used to create a beneficial interest in any entirely *new* beneficiary. The successor and remainder beneficiaries of the appointed trust must be at least one of the successor and remainder beneficiaries of the invaded trust.

There seems to be particular potential for abuse under this provision. Imagine a trustee appointing all or part of the invaded trust to one beneficiary to the detriment of several other current or remainder beneficiaries, including a disabled beneficiary. While the statute does provide that a court could block or reverse decanting as the trustee's action can be challenged in court under the "best interests of one or more proper objects" prong of the statute, it seems that a trustee could be in compliance with the notice provisions under the statute, and that a disabled beneficiary's situation could potentially go unnoticed for a significant amount of time.

The statute does have several notice and filing provisions to protect against potential abuse.

Firstly, the exercise of the power to decant must be by a written instrument that is signed, dated, and acknowledged by the trustee exercising the power. The instrument that creates the decanted trust must state whether the decanting comprises some or all of the invaded trust's assets.[15]

Secondly, a trustee who is exercising the trustee's power to decant must give notice not only to all persons interested in the invaded trust and the appointed trust, as required in the former version of EPTL 10-6.6(d), but he or she must provide notice by providing a copy of the decanting instrument, the invaded trust, and the appointed trust to the following individuals:

i. The settlor, if living; and

ii. Any person having a right in the invaded trust to remove or replace the trustee exercising the power.[16]

All persons interested in the invaded trust are granted automatic standing prior to the date the decanting becomes effective, which is 30 days after service of the requisite notice, to object to the decanting and may serve the trustee with written notice of objection prior to the effective date.[17] However, it should be noted that while a trustee may decant without the consent of any interested party, an objection itself cannot compel a trustee to abandon the proposed decanting. A failure to object does not constitute consent and does not foreclose an interested party's ability to compel a trustee to account.[18] Effectively, all an objection does is caution the trustee that he may be called to account for the decision to decant, which may lead to the trustee seeking court approval for the proposed decanting.

In the event that the invaded trust is a lifetime trust that has never been the subject of a proceeding in the Surrogate's Court, under the amended EPTL 10-6.6(j), the instrument effectuating the decanting need not be filed; however, under almost every other circumstance, filing is required.

While EPTL 10-6.6(j) provides some protection to current and remainder beneficiaries, it seems that this section was not drafted with disabled or elderly beneficiaries in mind. If a beneficiary does not have the wherewithal to seek the services of his or her attorney upon receiving the notice of decanting, serious damage may occur long before the trustee is required to account. The fact that a failure to object does not constitute consent is potentially helpful to a beneficiary in litigation that may arise, but there does not seem to be enough protection for vulnerable individuals who may be robbed of much-needed assets.

Similarly disquieting is the fact that a court filing is only required for testamentary trusts and trusts that have previously been the subject of Surrogate's Court proceedings.[19] Consequently, the court may not be put on notice about potential abuse when it is occurring. When a filing is required, only the instrument effectuating the decanting must be filed—not the invaded and appointed trusts. It is likely that the bulk of the evidence regarding for whom the trust is and isn't being appointed will be found in the appointed instrument, as would any "substantial evidence" regarding the grantor's intent. Thus, even though trustees are forbidden from decanting if there is "substantial evidence of a

contrary intent of the creator and it could not be established that the creator would be likely to have changed such intention under the circumstances existing at the time of the exercise of the power,"[20] there is a strong possibility that abuse under EPTL 10-6.6(b) could go unnoticed based on the lack of protection provided in EPTL 10-6.6(j). In addition, "substantial evidence" has yet to be interpreted, and future cases are likely to come long after disabled beneficiaries have already suffered.

VII. Conclusion: How to Protect Our Clients

Special Needs and Elder Law planners are often presented with trusts drafted by attorneys who are unfamiliar with legal issues regarding the Special Needs community; decanting provides a relatively simple and cost-effective method for revising the trust terms. The amended statute gives attorneys and their clients freedom to change a plan when circumstances and/or the law changes; because of this, it is important to empower trustees with unlimited power to invade so that clients' goals can be fully achieved.

There are certain circumstances in which giving a trustee unlimited discretion would not be beneficial; therefore, Special Needs and Elder Law planners must keep potential abuse under the decanting statute in mind when considering how to plan for a disabled or elderly individual who requires government benefits. The statute applies to all trusts in New York State unless specific language in a trust says otherwise. If an attorney has reason to suspect that a trustee may want to divest a disabled individual of assets under a trust, the attorney should consider including limiting language, or suggest to the client that a co-trustee may be necessary. This is especially important in the case of a testamentary trust where the drafting attorney may not necessarily be handling the estate administration.

The lack of protection under some of the provisions of the New York EPTL, i.e. *Id.* § 10-6.6(j), underscores the importance of making sure clients are truly comfortable with the fiduciaries they select, and not just doing so to appease a family member they may fear or feel indebted to. When crafting a plan, Special Needs planners must keep in mind both the benefits of increased freedom from court involvement and the potential disadvantages of a lack of court involvement. The goal is to provide disabled individuals with the best quality of life possible, and decanting has the potential to both further and hinder this end.

Endnotes

1. *See* EPTL 10-6.6.
2. *See* New York EPTL Section 10-6.6. *See* also Halperin and O'Donnell, "Modifying Irrevocable Trusts: State Law and Tax Considerations in Trust Decanting," 42nd *Ann. Heckerling Ins. On Est. Plan* [2008].
3. *See* New York EPTL 10-6.6.
4. This requirement was removed in 2001, a year after the Treasury Dept. issued regulations indicating that the requirement would disallow continued exemption from the GST tax.
5. *See* New York EPTL 10-6.6(n).
6. *See* New York EPTL 10-6.6(c).
7. *See* New York EPTL 10-6.6(j).
8. *See* New York EPTL 10-6.6(j)(2).
9. *See* New York EPTL 10-6.6(e).
10. *See* New York EPTL 10-6.6(c).
11. *See* New York EPTL 10-6.6(c)(1).
12. *See* New York EPTL 10-6.6(c).
13. *See* New York EPTL 10-6.6(c)(2)
14. *See* New York EPTL 10-6.6(b)(1).
15. *See* New York EPTL 10-6.6(j)(3).
16. *See* New York EPTL 10-6.6(j)(2)
17. *See* New York EPTL 10-6.6(j)
18. *See* New York EPTL 10-6.6(j)(4); 10-6.6(j)(5).
19. *See* New York EPTL 10-6.6 (j)(6).
20. *See* New York EPTL 10-6.6(h).

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The Importance of the Express Provisions of the IEP for Students with Disabilities and the Impact of *R.E. v. N.Y.C. Dep't of Educ.*

By Maria C. McGinley

Parents of children with disabilities often face many hurdles and challenges when addressing the specialized educational needs of their child. Frequently, parents rely on their school district to provide them with educational expertise, guidance and recommendations to guide their child's educational program. Students with disabilities are entitled to a free appropriate public education (FAPE) under the federal Individuals with Disabilities Education Improvement Act (IDEIA, more commonly known as IDEA). An Individualized Education Program (IEP) is mandated by the IDEA and must be tailored to meet the individual student's needs. The IEP should describe a student's present levels of performance, how the student learns, what goals and objectives the student should be working on, and what supports, modifications and services are needed to assist the student in making educational progress.

At the time that parents have to choose whether to accept or reject their school district's proposed program and placement, parents must necessarily rely upon the written recommendations and information their school district has provided. If parents are dissatisfied with their school district's recommendations for their child for a given school year, parents may unilaterally place their child in a private school and then seek retroactive tuition reimbursement (or, under some circumstances, direct tuition payment) from their school district.[1]

A school district is required to pay for the program selected by parents only if (1) the educational program recommended by the school district was inadequate or inappropriate; (2) the program selected by the parents was appropriate, such that the private program meets the student's special education needs; and (3) the equities support the parents' claim. These three factors, or "prongs," comprise the *Burlington/Carter* test.[2]

During the due process hearing, each party has the opportunity to present its case in a formal (administrative) legal setting putting forth witnesses, testimony, documents and legal arguments. In New York State, the school district bears the initial burden at the due process hearing of establishing that its IEP program and placement recommendations provided the student with a FAPE (Prong I).[3] The student's parents bear the Prong II burden of establishing that their unilateral program and/or placement is appropriate for their child.

The recent Second Circuit case, *R.E. v. N.Y.C. Dep't of Educ.* (*R.E.*), involved three appeals that were heard *in tandem*, in part due to common questions of law.[4] The Second Circuit held that courts must evaluate the adequacy of an IEP *prospectively* as of the time of the parents' placement decision and may not consider "retrospective testimony i.e., testimony that certain services not listed in the IEP would actually have been provided to the child if he or she had attended the school district's proposed placement."[5]

> *"Students with disabilities are entitled to a free appropriate public education under the federal Individuals with Disabilities Education Improvement Act…"*

In each of the cases in *R.E.*, the Second Circuit held that the New York City Department of Education (DOE) offered retrospective testimony at the impartial hearing stage to overcome deficiencies in the IEP, and on appeal to the Office of State Review, the State Review Officer (SRO) relied on this retrospective testimony in varying degrees to find that the DOE had provided a FAPE. The Circuit adopted what is the majority view across other Circuits in holding that "the IEP must be evaluated prospectively as of the time of its drafting [and]…retrospective testimony that the school district *would have* provided additional services beyond those listed in the IEP may not be considered in a *Burlington/Carter* proceeding"[6] (emphasis added).

The Second Circuit also observed that where Prong I is established in favor of the student, the student's Prong II placement is subjected to a somewhat more relaxed and less stringent standard.[7]

In *R.E.* the Second Circuit upheld *R.K. v. N.Y.C. Dep't of Educ.*, No. 11-1474, decided by Judge Kiyo A. Matsumoto upon a Report and Recommendation rendered by Magistrate Judge Roanne Mann. R.K., a female student with autism, was first diagnosed with

autism at age two. By age three, R.K. was receiving 10 hours of 1:1 Applied Behavior Analysis (ABA),[8] as well as individual 1:1 sessions for speech and occupational therapy. Numerous reports concluded that the ABA method was effective for R.K. and that it should continue. Other reports recommended that R.K. receive five hours per week of 1:1 speech therapy, five hours per week of occupational therapy, and two hours per week of parent training and counseling. In preparing R.K.'s "turning five" IEP, the Committee on Special Education (CSE) recommended for R.K. a 6:1:1 classroom, supplemented with three half-hour sessions per week of speech therapy and occupational therapy.

At the time of the IEP meeting, R.K. presented with self-stimulatory behaviors that included hand-flapping, tantrumming, and non-contextual speech, as well as a limited attention span, non-responsiveness, task avoidance behaviors, and dangerous behaviors that included "eloping" or "fleeing" into the community. Despite these significant interfering behaviors, the DOE failed to develop a Functional Behavior Assessment (FBA) or Behavior Intervention Plan (BIP) ostensibly because the CSE team concluded that R.K.'s behavior "does not seriously interfere with instruction."[9]

On May 7, 2008, after R.K.'s IEP meeting, R.K.'s parents signed a contract to enroll R.K. at the Brooklyn Autism Center (BAC) pursuant to a contract that allowed withdrawal in the event that defendant timely offered an appropriate placement. R.K.'s parents filed for due process. On February 25, 2009 the Impartial Hearing Officer (IHO) found in R.K.'s favor for partial tuition reimbursement at the BAC, holding, inter alia, that because R.K. needed an ABA program, and because the IEP's program was a 6:1:1 program that provided only 25 minutes of 1:1 ABA per day, it was not adequate for R.K.

On an appeal and cross-appeal to the State Review Officer (SRO), the SRO, relying extensively on retrospective testimony by defendant's teacher that she "would have conducted an FBA and developed a BIP" once R.K. arrived, reversed the IHO and held that defendant had done nothing wrong. The SRO then "dismissed the concern that the IEP did not include parent training or counseling…because of [the DOE teacher's] retrospective testimony that the [recommended school site] *would have* provided parent training"[10] (emphasis added). Similarly, the SRO "found that although the IEP did not include the statutorily mandated 30-60 minutes of daily speech therapy, [defendant's witness] had testified that this therapy was incorporated into her class, and the [statutory] requirement was therefore satisfied."[11]

The district court rejected the SRO's extensive reliance upon retrospective testimony. It concluded that the SRO had ignored the clear consensus of R.K.'s evaluators and failed to consider the "cumulative effect" of the numerous procedural defects. The Second Circuit affirmed, holding that "the SRO's reliance on [the DOE's retrospective] testimony was inappropriate.…" The Court further explained that there was a "clear consensus that R.K. required ABA support," and then turned to address the "serious" failure to conduct an FBA. Ultimately, the Second Circuit concluded: "we therefore defer to the IHO's conclusion that the IEP was not reasonably calculated.…"[12]

The Second Circuit adopted some landmark principles in *R.E.* Among other rulings, the Court held once and for all that in reviewing the Prong I adequacy of a challenged IEP, the focus is on what the school district's IEP *expressly* provides. Therefore, testimony from the school district as to what the district allegedly "would do" is impermissible unless there is some corresponding reference in the IEP documents that the district can further explain by testimony. Thus the court is taking a parol evidence-type approach. By way of example, the Court held that in instances where the school district recommends a 6:1:1 staffing ratio, the school district may not introduce evidence that modifies this staffing ratio or otherwise rely upon testimony that—despite what the IEP says—the student would have received 1:1 instruction.[13]

The Court spoke of the cumulative impact of violations and that "even minor violations may cumulatively result in a denial of FAPE."[14] The Court also addressed that the failure to conduct an adequate FBA is a "serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all."[15] The Court further considered the importance of framing the methodology or methodologies that would be anticipated to work with the student.

The Second Circuit also spoke of a school district's opportunity to mitigate or avoid claims by appropriate remedial action taken after parents send in the ten-day letter, and later, after the parents' due process filing has triggered the statutory thirty-day resolution period. At the end of the day, the Court upheld the importance of an appropriate IEP document for a student. "By requiring school districts to put their efforts into creating adequate IEPs at the outset, IDEA prevents a school district from effecting [a] "bait and switch," even if the baiting is done unintentionally. A school district cannot rehabilitate a deficient IEP after the fact."[16]

The Second Circuit made landmark findings with respect to the importance of a student's IEP. Subsequent to the Court's decision in *R.E.*, a motion was filed seeking rehearing and clarification as to five designated issues. Thus, the matter is still ongoing.

Endnotes

1. 20 U.S.C. § 1412(a)(10)(C).
2. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993) (quoting *Sch. Comrn. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 373-74 (1985)); *see also Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 129 (2d Cir. 1998).
3. *See Schaffer v. Weast* 546 U.S. 49 (2005) (While the IDEA is silent on the issue of burden of proof, the Supreme Court has held that, unless state law assigns the burden of proof differently, in general, the party who requests the hearing will have the burden of proving his or her case); *see also* New York Education Law Section 4401(1)(c) (McKinney 2009).
4. No. 11-1266, 11-1474, 11-655, 2012 U.S. App. LEXIS 19816 (2d Cir. Sept. 20, 2012).
5. *Id.* at 35.
6. *Id.* at 37.
7. *See also* Frank G., 459 F.3d 356 (2d Cir. 2006) (holding that the parents' Prong II burden is slightly less stringent than the school district's Prong I burden and "parents seeking reimbursement for a private placement bear the burden of demonstrating that the private placement is *appropriate*").
8. Applied Behavior Analysis (ABA) is a scientifically validated approach that involves using modern behavioral learning theory to modify behavior. ABA is defined as the science in which the principles of the analysis of behavior are applied systematically to improve socially significant behavior, and in which data-based analyses are used to identify the variables responsible for changes in behavior. ABA has proven effective with many students and individuals with autism spectrum disorders.
9. *R.E.* at 19. A Functional Behavioral Assessment is an assessment of the frequency, duration and antecedents of behavior to ascertain, among other things, the causes and "function" of behaviors of a student with a disability that interferes with the student's learning process. The New York State legislature has mandated that a school district develop a FBA and BIP for "a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, [or] (ii) the student's behavior places the student or others at risk of harm or injury." *See* N.Y. Comp. Codes R. & Regs., tit. 8 § 200.22(b)(1). So, too, have the federal regulations. 34 C.F.R. § 300.346(a)(2).
10. *R.E.* at 22.
11. *Id.*
12. *Id.* at 62.
13. *Id.* at 40.
14. *Id.* at 54.
15. *Id.* at 51.
16. *Id.* at 39.

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Concussions in Children and Adolescents: A Shifting Medical and Legal Landscape

By Paul B. Yellin, M.D. and Susan Yellin

We have all heard news reports about the damage that concussions have done to professional athletes, whose cognitive and physical functioning can be severely impaired after a career of hits to the head.[1] Given the particular vulnerability of the developing brain to injuries of all kinds, parents, coaches, health care professionals and educators have serious concerns about how to protect students from head injuries and how to deal with students once they receive an injury to the brain, even a mild one. Attorneys who work with families and schools need to understand the medical and legal issues surrounding this increasingly recognized condition, become familiar with new laws and guidelines that are presently in place to deal with concussions in children and adolescents, and recognize the limitations of traditional disability laws when applied to concussions.

A. The Medical Aspects of Concussion

A concussion is a traumatic brain injury caused by mechanical forces resulting from impact either directly to the head, neck, and face or indirectly to other parts of the body with an "impulsive" force transmitted to the brain. The resulting brain injury sets off a cascade of metabolic events at the cellular level that results in impaired brain function. There is increasing evidence that local inflammation and immunological activation play a significant role in post-concussion clinical syndromes, including those that result from repetitive, sub-concussive injury.[2] In addition, concussions can cause temporary disruption of cerebral autoregulation, the mechanisms that control the flow of blood and delivery of oxygen to the brain. Loss of autoregulation is implicated in Second Impact Syndrome, a potentially fatal complication that occurs in adolescents who sustain a second concussion before a prior concussion has resolved completely.

Children and adolescents may experience a wide range of physical, cognitive, emotional, and sleep-related post-concussion symptoms. Common physical symptoms include headache, blurry vision, fatigue, sensitivity to light and sound, loss of balance, vomiting, ringing in the ears, and dilated pupils. Cognitive symptoms can look much like attention deficit or other learning problems and include confusion, memory loss, difficulty with focus/concentration, and slow rate of processing information. Emotional symptoms, such as irritability, emotional lability, anxiety, and depression can be particularly unsettling. Finally, a wide variety of sleep disturbances have been described, including sleeping less than or more than usual, difficulty falling asleep, and daytime drowsiness. The duration of symptoms is variable and unpredictable in individual cases. They may resolve within a few minutes, but not uncommonly can last for seven to ten days. However, for many students symptoms persist for weeks or months, and occasionally even longer.

"Attorneys who work with families and schools need to understand the medical and legal issues surrounding [concussions], become familiar with new laws and guidelines that are presently in place to deal with concussions in children and adolescents, and recognize the limitations of traditional disability laws when applied to concussions."

It is now believed that the overwhelming majority of concussions, perhaps 90%, do not result in loss of consciousness. Children with concussions account for nearly 250,000 emergency room visits annually in the United States.[3] According to a study published in 2011 in the *American Journal of Sports Medicine*,[4] examining trends over the previous 11 years, football accounted for more than half of all concussions. However, girls' soccer had the most concussions among girls' sports and the second highest incidence of all 12 sports examined. Concussion rates increased more than four-fold over the years surveyed, with increases noted in all of the sports that were studied. Significantly, in sports played by both boys and girls (e.g., baseball/softball, basketball, and soccer) girls had approximately twice the concussion risk as boys.[5]

B. Current Perspectives

One way or another, most of the current assumptions, recommendations, standards, and protocols regarding sports-related concussions are based on the *Consensus Statement* promulgated at the Third International Conference on Concussion in Sport that was held in Zurich in November of 2008.[6] It is an excellent, comprehensive document that includes criteria for on-field or sideline evaluation, emergency room and physician's office evaluation, and other investigations, such as neuroimaging, objective balance assessment, neurophysiologic assessment, genetic testing, and even experimental concussion assessment modalities.[7]

Until recently, much of the focus of post-concussion management for children and adolescents has been on decisions about resuming physical activities, such as returning to practice and to play. However, there is much more at stake for these students with concussions than their performance on the playing field. Post-concussion symptoms can interfere with students' ability to attend school, limit their participation in academic activities, and undermine their performance in class and on examinations.

Computerized neurophysiologic tests have become routine for high school contact sports, with most athletes participating in pre-competition baseline testing. Therefore, objective data about post-injury changes is often available and each student's return to baseline can be monitored. While these results are often available to coaches, trainers, and other school personnel on-site, decisions about resuming activities, including returning to practice and play, are medical decisions. The student must be examined and testing results interpreted by a physician who can then develop and monitor a gradual, staged return to regular activities. Furthermore, while neurophysiologic and symptomatic recovery often occurs at around the same time, this is not always the case.

Currently, most experts recommend "cognitive rest" for post-concussion symptoms. Cognitive rest typically includes shortened school days and opportunities for rest during the school day. Avoidance of video games, texting, driving, surfing the Internet, attending amusement parks, movies, concerts, and sporting events are common recommendations. In addition, some students may benefit from specific treatments or interventions, such as short-term treatment with medications for attention deficit.

Beyond cognitive rest, students with persistent symptoms commonly require accommodations, although the specific accommodations required and their duration will depend on the individual student's symptoms. Initially, symptomatic students may be unable to attend school at all. As their symptoms remit, they may begin a graduated return to school, typically progressing from half-day attendance with accommodations to full-day participation with no accommodations. As with physical activity, cognitive activities may need to be curtailed if they are associated with exacerbation of symptoms. However, at present there are no widely accepted criteria or objective standards for determining what accommodations are required and for how long. Generally, the student's physician is looked to for direction, such as providing written instructions for a gradual return to academic activities, while monitoring for any setbacks in symptom resolution.

C. New York State Law and Guidelines

New York State has responded to current concerns by passage of the Concussion Management and Awareness Act, which went into effect on July 1, 2012 and applies to all public schools in the State.[8] It specifically notes that it is a minimum standard and that more stringent standards may be adopted by schools that wish to do so. The Act requires the Commissioner of Education, in conjunction with the Commissioner of Health, to promulgate rules and regulations for dealing with students who have incurred "a mild traumatic brain injury, also referred to as a 'concussion'" while engaging in any school-sponsored activity and specifically requires the "immediate removal from athletic activities of any pupil believed to sustain a mild traumatic brain injury [and] in the event that there is any doubt as to whether a pupil has sustained a concussion, it shall be presumed that he or she has been so injured until proven otherwise."[9]

The law further requires that all coaches, physical education teachers, school nurses, and trainers undergo training related to recognizing the symptoms of a concussion and seeking proper medical treatment when a concussion is suspected to have occurred. The mandated training includes instruction in concussion prevention, and in understanding when a student with a concussion may return to school, even when such an injury occurs outside of school.

The new law requires the New York State Departments of Education and Health to each maintain sections on their websites with information about concussions and mandates similar information to be included in school permission forms for participation in interscholastic athletic activities.[10] Districts or individual schools must establish a Concussion Management Team, consisting of the athletic director, coaches, trainers, the school physician, and a school nurse, as well as other appropriate personnel, to oversee district or school implementation of the rules and regulations required under the law.[11]

The guidelines to be followed in implementing the law were released by the New York State Education Department in June, 2012 and were developed by an

advisory group consisting of health care professionals, educators and coaches, students, and other individuals involved in brain injury prevention and remediation.[12] They begin with a discussion of the need to prevent concussions and the importance of making students aware of the need to report concussion symptoms. They go on to list symptoms of concussion, including those that require immediate emergency attention. Schools are given the option to use computerized or other sideline assessment tools to help determine whether a concussion has occurred, but the guidelines stress that they are not a replacement for a medical assessment. Even though the statute refers to concussions incurred during school activities, the guidelines include management of any concussion, including those that arise outside of school settings.[13]

The bulk of the guidelines set out the responsibilities of parents and of the members of the Concussion Management Team in each school or district.

Once students have been diagnosed with a concussion, the guidelines provide for both physical and cognitive rest. The recognition of the need for cognitive rest reflects an understanding of current medical standards and the importance of rest in the recovery process.

D. Academic Issues and Accommodations

Managing the students' return to academic activities can be very challenging for all involved. Unlike typical absences, students staying home for cognitive rest are not permitted to keep up with their work, and therefore will be behind their classmates when they return. If they are unable to fully participate once they do return, they will undoubtedly fall further behind in some classes. If they remain symptomatic, "keeping up while catching up" can quickly become overwhelming, particularly for students who have been accustomed to performing at a high level academically. Beyond the logistical challenges, students will require a great deal of sensitivity and support in dealing with the emotional upheaval they are likely to experience, particularly if they find that they cannot focus, have trouble remembering what they just heard, cannot sleep, and are already hopelessly behind.

Therefore, even if they recover rapidly, successful transition back to school will likely require some academic modifications, accommodations, and other support. For those with more persistent symptoms, creativity, communication, and collaboration will be required to determine which modifications and accommodations are appropriate. These decisions are particularly compelling because they may have long-term consequences. They may affect students' eligibility to sit for Advanced Placement examinations or require them to re-examine their post-secondary plans. The College Board, which administers the SAT and AP examinations, offers very limited opportunity to reschedule exams or take them with accommodations when a student has a temporary disability.[14]

Section 504 of the Rehabilitation Act of 1973, which governs the procedure for offering accommodations for students with medical disabilities, does not apply to temporary impairments, which it defines as those of six months or less duration.[15] School principals have some authority under New York law to offer testing accommodations to students who incur an injury that falls outside the definitions of Section 504 (although the Department of Education policy notes that it applies to situations that arise within 30 days of an examination) and there are provisions under State law for make-up tests and medically excused absences.[16] Of course, classroom teachers and others can provide informal accommodations to students who need them, and the guidelines note that "districts should have policies and procedures in place related to transitioning students back to school and for making accommodations for missed tests and assignments."[17]

One of the best discussions of accommodations and academic support we have seen appears in *An Educator's Guide to Concussions in the Classroom*, an online publication of Nationwide Children's Hospital in Columbus, Ohio.[18] It makes clear that return to full academic activity is a gradual process, and that each step along the way needs to be individualized to the needs of the particular student and his or her rate of recovery.

Perhaps the most important thing to bear in mind when considering concussions in children is that new information is emerging all of the time. Much of what is now the standard of care, including computerized testing and "cognitive rest," represents the consensus "best judgment" for managing a complex and serious problem without the benefit of systematic study of their efficacy with regard to long-term outcomes. As Dr. Frederick A. Rivara eloquently points out in an editorial published this past July in the *Archives of Pediatric and Adolescent Medicine*, "There are currently no good biomarkers for recovery from traumatic brain injury that can be used…to answer the questions that parents have about their children."[19]

Furthermore, there are no specific legal protections for students with concussions that fall outside the six month applicability of Section 504 and beyond the specific authority given to school principals under the Education Law. Therefore, it will be critical for everyone involved—physicians, schools, parents, and the attorneys who counsel them—to think creatively and collaboratively to make the best decisions that we can while continually monitoring emerging knowledge to better inform our decisions going forward.

Endnotes

1. *See, e.g.,* Joseph M. Hanna, *Players' Class Action Suit Places a Bounty on the League*, 84 N.Y.S. Bar Ass'n J., n. 8, Oct. 2008, at 10 (the discussion of concussions in the NFL by Joseph M. Hanna in the New York State Bar Association Journal).
2. Akira Korn, et al., *Focal Cortical Disfunction and Blood Brain Barrier Disruption in Patients with Postconcussion Syndrome*, 22 Journal of Clinical Neurophysiology 1 (2005).
3. Centers for Disease Control, *Nonfatal Traumatic Brain Injuries Related to Sports and Recreation Activities Among Persons Aged 19 Years—United States, 2001–2009* 60(39) Morbidity and Mortality Weekly 1337 October 7, 2011.
4. Andrew E. Lincoln, et al., *Trends in Concussion Incidence in High School Sports*, 39 American Journal of Sports Medicine 958 (2011).
5. *Id.*
6. *See generally,* P. McCrory et al., *Consensus Statement on Concussion in Sport—The 3rd International Conference on Concussion in Sport, Held in Zurich, November 2008*, 16 J. Clinical Neuroscience 755 (2009).
7. *Id.*
8. The Concussion Management and Awareness Act, 2011 N.Y. Laws ch. 496; *see also* N.Y. Educ. Law § 305(42).
9. *Id.*
10. *Sports Related Concussion,* NY State Department of Health (Dec. 7, 2012), http://www.health.ny.gov/prevention/injury_prevention/concussion.htm.
11. *Id.*
12. *Guidelines for Concussion Management in the School Setting,* Univ. of the State of NY, State Ed. Dep't (2012), http://www.p12.nysed.gov/sss/schoolhealth/schoolhealthservices/ConcussionManageGuidelines.pdf.
13. *Id.*
14. Testing, *Temporary Medical Condition,* CollegeBoard (Dec. 7, 2012), http://professionals.collegeboard.com/testing/ssd/application/apply/medical.
15. Rehabilitation Act of 1973, Pub. L. No. 93-112, §504, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. § 794).
16. Univ. of the State of NY, State Ed. Dep't, *Test Access and Accommodation* (Dec. 8, 2012), http://www.p12.nysed.gov/specialed/publications/policy/testaccess/guidance.htm.
17. *Guidelines for Concussion Management in the School Setting,* Univ. of the State of NY, State Ed. Dep't (2012), http://www.p12.nysed.gov/sss/schoolhealth/schoolhealthservices/ConcussionManageGuidelines.pdf.
18. Concussion Clinic at Sports Medicine, *An Educator's Guide to Concussions in the Classroom*, Nationwide Children's Hosp., (Dec. 9, 2012), http://www.nationwidechildrens.org/concussions-in-the-classroom.
19. Frederick P. Rivara, *Concussion: Time To Start Paying Attention*, 166 Archives Pediatric & Adolescent Med. 666 (2012).

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The Role of Counsel

By Elizabeth Valentin and Robert Kruger

Introduction

I

The role of counsel to an Alleged Incapacitated Person (AIP) is a difficult one in an Article 81 Guardianship proceeding, because of the tension between the best interests of the AIP and the rights of the AIP. Recently, Elizabeth was attorney for Petitioner and Bob was counsel for the AIP in a proceeding that offers a glimpse into the ambiguities of counsel's role.

Because the proceeding starts with a filing by petitioner's counsel, we start with Elizabeth.

II

Arlene and her sister, Rosalind, are the agents under a power of attorney for their aunt, Harriet, who is 79 and blind. They received a letter from an attorney announcing that Harriet had revoked her power of attorney and requested an accounting of all financial transactions undertaken on Harriet's behalf over the course of the last five years. Enclosed with this letter was a Notice of Revocation signed by Harriet.

Rosalind is Harriet's health care proxy; Arlene is the alternate. Both are co-trustees of the Testamentary Supplemental Needs Trust created for Harriet under her late husband's will; he died in 2007.

The trustees had been paying all of Harriet's monthly bills and providing for her care for five (5) years. When the trust had approximately six (6) to eight (8) months principal remaining, the trustees became concerned about being able to provide for her future care, and had discussed the possibility of moving Harriet to an assisted living facility near Arlene (in eastern Pennsylvania).

Harriet, who presents well, nevertheless suffers from dementia, depression, chronic colitis and is legally blind. She also has difficulty ambulating and often uses a wheelchair. She requires assistance with all of her activities of daily living. Her physician strongly recommended residence in an assisted living facility and/or nursing facility. To avoid placement years earlier, the trustees hired a home attendant to assist Harriet round the clock. The home attendant, Malanie,[1] had served as Harriet's housekeeper for many years.

In response to the letter of revocation, Elizabeth attempted to persuade the attorney-draftsman that the revocation was not in Harriet's best interests. He stated his belief that Harriet was not only able to communicate and express her wishes, but that she had no cognitive deficits that would make her unable to provide for her personal needs or financial management. In short, he had no clue.

Concerned that the financial institutions would stop honoring the checks written against Harriet's accounts if notified about the revocation, Elizabeth commenced an Article 81 Guardianship proceeding.

On the first return date, the persons appearing were the petitioners, the Court Evaluator, and the attorney who drafted the revocation, claiming not to represent the AIP but wanting to be heard. The AIP was not present. In Chambers, the attorney, driven more by his ego than by contributing relevant information, informed the Court of his exalted status as an experienced old hand; he also informed the Court that he is a very old family friend and that Harriet is not in need of a guardian. Eventually, the hearing was adjourned for the purpose of serving interested parties not heretofore served.

III

Now Bob reluctantly enters the scene. Bob has a relationship with this attorney's law firm. Bob is approached to represent Harriet. With all the joy one feels contemplating a public shaming, Bob finds no truthful way to avoid this assignment.

Bob knows that he is a stranger to the AIP and that she did not select him. He expects that the Judge presiding will not hesitate to accuse him of chasing a fee and he expects to be summarily ejected from the case. However, his first call is to Elizabeth and the Court Evaluator to determine whether either will object to his initial appearance, but they won't. Then, accompanied by an associate from the old friend's law firm, Bob visits the AIP.

Blending several conversations with the Court Evaluator and the AIP into one narrative, Bob learns that Harriet is a childless widow, aged 79, with one

surviving (and intellectually disabled) sibling, and seven nieces and nephews, none of whom (except Arlene), were willing to serve as guardian should one be appointed.

At this stage, we were a long way from reaching that conclusion. Harriet vehemently opposed the appointment of a guardian. Moreover she vehemently opposed selling her co-op apartment (the only way to replenish her trust) and moving into some form of supportive housing. She also vehemently opposed moving to eastern Pennsylvania, and accused Arlene and Rosalind of stealing her jewelry, stating that the only person she trusted was her companion, Malanie.

While Bob was digesting all of this, despite Harriet's surface sophistication (she worked for many years at the Lighthouse for the Blind in a social work capacity) it was unavoidably clear that she would soon be broke.

Her wishes notwithstanding, she would soon be forced to sell the co-op and move in with Malanie. Therefore, in his first meeting with Harriet, Bob focused on this financial reality. Ultimately, Harriet agreed to sell the apartment. Nevertheless, Bob expected her to renege in court.

IV

In court, the presiding judge is casting a gimlet eye at Bob, who explains how he managed to arrive in this place at this time. There is much discussion about Harriet's capacity to retain counsel and there is some discussion, as well, whether counsel should be appointed. Finally, the court addresses Harriet and asks her if she has an opinion about the selection of counsel. She says yes and nominates Bob, whose jaw, if not firmly attached, would have fallen to the floor. The matter is then adjourned to enable the parties, if possible, to work things out.

V

It was during the period between hearings that many calls were made to the nieces and nephews to ascertain if anyone would step up and serve as guardian, as Arlene was persona non grata, because no one came forward. Elizabeth was arguing that, if not Arlene, who? All were informed that if no relative stepped forward, an attorney from the fiduciary list would be appointed by the Court.

Initially, out of respect for Harriet's relationship with Malanie, we were considering the appointment of a special guardian for the limited purpose of selling the co-op and renting a new apartment for Harriet. The turning point arrived when the doorman in her building reported that Harriet often wanders out of her apartment in her night garments and that she is left home alone for hours at a time during the day. When asked, Harriet acknowledges that the home attendant is not always present.[2] Apparently not realizing that she was paying Malanie, Harriet stated that the home attendant needs to work and thus cannot always be there. When the home attendant was confronted, she denied the allegations.[3] Obviously, Harriet was very emotionally dependent on Malanie. But the spell was broken: Bob could not countenance employing a liar who abandoned her charge, no matter how attached Harriet was to her.

All of the attorneys reached the conclusion that Malanie, to prevent the loss of her position, was poisoning Harriet's relationship with Arlene.[4] This was illustrated for us, besides the second job, by "l'affaire jewelry," which had been removed, apparently with Harriet's consent, for safekeeping. Harriet's attitude had morphed into accusations of theft and, though the box of jewelry was returned, her hostility towards Arlene and Rosalind did not diminish.

Ultimately, it was the second job that changed the dynamic of Bob's representation of Harriet. It was now apparent that Harriet's judgment and insight were fundamentally flawed, that her allegiance was to the exploiter and her hostility to Arlene and (to a lesser extent) Rosalind was directed at the people who were trying to protect her. Since Arlene was going to be in the picture as Co-Trustee, it made complete sense to consider Arlene for the role as guardian, despite Harriet's opposition.

The decision to appoint Arlene by the Court was far from as easy one. It was by now clear to the Court that Harriet lacked capacity and was in need of a guardian and that the apartment must be sold to continue to pay for Harriet's future care in either an assisted living facility or a nursing facility. It was also clear that Malanie had to go, and that no relative other than Arlene was willing to serve as guardian. There were but two open issues: (1) should the guardian be Arlene or should the guardian come from the fiduciary list, and (2) should Harriet remain in New York or move to Pennsylvania?

VI

Conclusion

The care manager retained by Arlene at Bob's suggestion immediately discharged Malanie. She came to Harriet's apartment with a locksmith when Malanie was working her second job and changed the locks. Also, at her suggestion, Arlene retained a new companion.

The court appointed Arlene, rather than an attorney off the list. Was this suitably respectful of Harriet's wishes? To reach this point, the Court Evaluator, Counsel and Elizabeth had numerous, time-consuming, unproductive calls with Harriet's nieces and nephews. In the ongoing conflict between Harriet's rights and her best interests, we opted for the caring relative over a stranger. Thereafter, the care manager arranged for Harriet to move to supported housing in New York. The co-op is now on the market.

Lastly, there has been no transformation in Harriet's character. The care manager reports that she is oppositional and abusive, and keeping a companion to assist her is difficult.

In the form of old news, Bob is pleased to report that the Second Department reversed the order which surcharged Bob for disbursements he made to protect his ward after the child's father, the sole breadwinner in the household, walked out on the family. Bob's basic argument was that a mistake, if one was made, was not an abuse of discretion. See the business judgment rule and the Prudent Investor Act. Bob suggests that, when considering disbursements that may be challengeable, particularly disbursements that benefit the entire family, not merely the IP, if time permits (1) ask permission of the court (2) bring in the Court Examiner if you can't reach the court; and (3) prepare an *ex parte* order and affidavit.

Otherwise, along with hunting season for deer and bear, you may experience hunting season for attorneys.

Endnotes

1. The spelling is correct.
2. Indeed, when the care manager retained by Arlene visited Harriet, it was Harriet, not Malanie, who let her in.
3. Malanie had the nerve to request a substantial pay increase at this juncture.
4. Also, Harriet's insistence that Malanie be present at all interviews with Harriet certainly insured that Malanie would be current regarding all developments.

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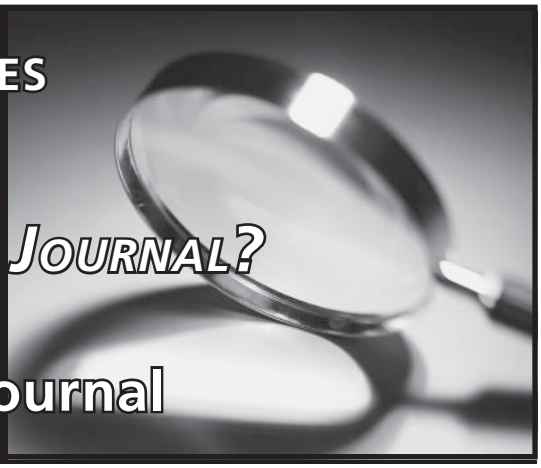
Robert Kruger is an author of the chapter on guardianship judgments in *Guardianship Practice in New York State* (NYSBA 1997, Supp. 2004) and Vice President (four years) and a member of the Board of Directors (ten years) for the New York City Alzheimer's Association. He was the Coordinator of the Article 81 Guardianship training course from 1993 through 1997 at the Kings County Bar Association and has experience as a guardian, court evaluator, and court-appointed attorney in guardianship proceedings. Mr. Kruger is a member of the New York State Bar (1964) and the 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)).



Ten Planning Essentials as Your Developmentally Disabled Child Turns 18

By Susan W. Morris

1. Register with OPWDD (formerly OMRDD). This should be done by age 14 and must be done by 18/21 to obtain services after high school.
2. Prepare and implement a transition plan (appropriate measurable postsecondary goals) for your child to make a successful transition to life after school (training, education, employment, and independent living skills). Transition services must be included in the first IEP in effect when a child turns 16.
3. Have no more than $2,000 in child's name (i.e., UTMA accounts). No 529 accounts.
4. Apply for Guardianship to be effective at 18 (begin paperwork at 17½).
5. Apply for SSI at 18 (easy if registered with OPWDD and less than $2,000).
6. Obtain Medicaid (automatic with SSI)—mandatory for your child to receive a Medicaid Service Coordinator, Acces-VR (vocational services) and group home eligibility for their entire lifetime. The Medicaid Service Coordinator is your "access to agencies" and will obtain Medicaid Waivers, when necessary.
7. Have your child placed at no cost on your private health insurance (before he/she is 26)—this way, you will not have to pay COBRA costs.
8. Consult with an Estate Planning attorney for creation of a supplemental needs trust (SNT) appropriate for your family's situation. The SNT will provide for your child and ensure that your child will remain eligible for governmental entitlements (third party SNT—*inter vivos* or testamentary and first party SNT).
9. Prepare a Letter of Intent for your child—your outline of your hopes and desires for your child. This is your opportunity provide future guardians and trustees a unique "Road Map" that will guide them in understanding your child. Update your Letter of Intent every year and place this in the Notebook, described below. Keep a Notebook with all relevant information for your child in one place (i.e., health information, emergency contacts, social security card, IEP, OPWDD acceptance, etc.). Let everyone know where your child's Notebook is kept. The Notebook and your Letter of Intent will help maintain the quality and consistency of your child's care for his or her lifetime.
10. Obtain a NYS non-driver's ID (at 16); if male, register for the draft—your son will not serve, but he must register (at 18) and register your child to vote.

Susan W. Morris, Esq., with an office in Hawthorne, New York, focuses on estate planning, special needs planning, elder law, estate administration, residential real estate, and business transactions. Ms. Morris received her law degree from Boston University after spending her third year at New York University, and was admitted to the New York State Bar in 1984. She is a member of the Education Committee of the Westchester Women's Bar Association; the Westchester County Bar Association; the Trusts and Estates Law Section and Elder Law Section of the New York State Bar Association; the National Academy of Elder Law Attorneys; and the American Bar Association. She is a frequent lecturer on special needs planning for developmentally disabled children.

Why Elder Law? A Recent Graduate's Perspective

By Malya Levin, Deirdre Lok and Joy Solomon

Malya Levin

Deirdre Lok

Joy Solomon

The challenges and obstacles facing today's cadre of new attorneys are well known. A simple Internet search reveals a plethora of longtime practitioners dispensing much needed advice to these nascent lawyers regarding which skills to develop, what experience to seek to distinguish themselves and help create a path for a successful career. In 2012, the American Bar Association (ABA) created a Task Force on the "Future of Legal Education." The group consists of two sub-committees. One is charged with "examining the potential for innovation and improvement in how law schools deliver education," while the other will focus on "the economics of legal education and its impact on individual graduates and the profession." Both committees are currently soliciting comments from legal professionals, with the goal of producing a report by fall 2013.[1]

These developments indicate a growing realization among recent graduates that waiting for their law schools to steer them into a rewarding career is not a realistic expectation. Students and new lawyers must balance the needs of the job market with their own professional ambitions and proactively seek out fields of practice that, while perhaps underemphasized in an academic setting, will provide them with many of the tools and practical skills they seek.

This backdrop creates a timely framework for analyzing the enriching and attractive aspects of a career in elder law. Both experienced practitioners and institutional gatekeepers like the ABA believe that the unique facets of elder law can help new lawyers to find a career in a growing field, gain varied experience, learn how to apply legal ethics, develop professional connections and continuously master new skills. Here is an analysis of the ways in which some of these words of wisdom are actualized in the field of elder law.

Find a Growing Field with Ever-Increasing Legal Needs

Much is made of the fact that there are an increasing number of law school graduates and a decrease in the number of jobs available. The irony, however, is that there are also large swaths of the population who do not have access to quality legal representation. New attorneys are therefore seeking to position themselves in under-recognized growth areas. The elderly are often particularly vulnerable and in need of legal safeguards. Also, their numbers are poised to swell in the coming decades. Gaining the skills that will be useful in servicing the increasing legal needs of senior citizens will allow new law school graduates to carve out a client base for themselves and to buck the trend experienced by many new lawyers who are having difficulty putting their degree to use.

"[There is] a growing realization among recent graduates that waiting for their law schools to steer them into a rewarding career is not a realistic expectation."

Experience a Variety of Substantive Practice Areas

The legal needs of older adults are as varied and individualized as the range of legal remedies itself. The practice of elder law extends far beyond the stereotypical conceptions of trusts, estates and guardianships. A new elder law attorney might be exposed to issues of criminal law, property, tort, trial litigation and civil procedure, family law, health law, civil rights issues, and domestic and family violence.

> Elder law is the coming together of all aspects of law. During my time working with the clients at the Weinberg Center's elder abuse shelter, it was not uncommon to use my knowledge of state civil procedure, property issues, contracts, and wills all in a single case.
>
> *Bradley Trisch*
> *3L, Dickinson School of Law*

Achieving a level of mastery over these varied areas gives new lawyers practical skills that will make them increasingly valuable in the job market. While some of these areas are emphasized in a traditional law school curriculum, many of the most practically applicable ones are not. For example, administrative regulations surrounding access to public benefits such as social security, public assistance and housing are complex and ever-changing. Navigating Medicare, Medicaid and other legal issues surrounding the health care system, including the laws and regulations that govern interactions with geriatricians, psychiatrists and other medical personnel, can also be a daunting task that is almost guaranteed to require the assistance of a qualified professional. Mastery of these systems is an extremely valuable asset and is given short shrift in law school.

Another example of a desirable area of expertise is prevention and remedy of financial exploitation of the elderly. This is an astoundingly prevalent phenomenon, with 4.1% of all older adults in New York State experiencing a major financial exploitation event[2] and a national annual financial loss to victims of $2.9 billion.[3] Experience in combating this epidemic will also involve interaction with the District Attorney's office, law enforcement and other multi-disciplinary teams.[4] Practicing elder law inevitably involves navigating this maze of interlocking systems, and that ability will prove increasingly invaluable to employers in a variety of practice areas.

Gain Exposure to Professionalism/Ethics Issues

This advice is linked to the other frequent charge to focus on interpersonal/communication skills. The stereotype of a new lawyer who spends the first years of his career reviewing documents in a windowless room is based largely on the traditional paths emphasized by law schools. However, this sort of experience can leave a skill set gap that is deleterious to a lawyer's employment prospects. Employers want a new team member who is capable of interacting with clients in a way that reflects positively on the firm and the profession, and of handling ethical issues that often arise in a timely and sophisticated way. The practice of elder law involves a good deal of client interaction, and those clients, and by extension their attorneys, are generally engaged in critical decision making that often involves the divergent interests of many different parties. An elder law attorney therefore becomes practiced at interacting professionally and productively with clients and/or their families who are often stressed or distressed.

Since aging is linked to increasingly complex medical needs as well as decreased cognitive capacity, lawyers in this field gain expertise in managing relationships with clients whose demeanor and demands might be difficult to interpret. New lawyers will learn the skill of forming relationships and building trust, breaking through the suspicion and wariness that older adults can understandably exhibit. Competence in these areas will set a young lawyer apart from his peers and allow him easier access to further career opportunities.

Find a Mentor and Forge Relationships and Connections

This is an area in which the new lawyer who begins his career in a large transaction or litigation firm setting may in fact not have the opportunities that lead to long term career success and fulfillment. Large firms with traditional hierarchies often provide little time for one-on-one protracted interactions with more experienced attorneys. Elder law, on the other hand, is a smaller field composed mostly of smaller and more specialized practices and firms. New lawyers are able to form closer working relationships with the lawyers in the firm's upper strata and can cultivate a mentor relationship. A mentor can help a new lawyer to pinpoint and focus on skill areas that need improvement, further sharpen strengths, navigate difficult assignments or political issues and strategize around long-term career goals. Studies link mentoring with job satisfaction across careers,[5] and the field of elder law allows new lawyers to forge this critical connection more quickly and easily than more traditional paths.

In a traditional firm setting, where roles tend to be more rigid and hierarchical, the opportunity to advocate for change or progress in a particular arena is rare to non-existent. Elder law practitioners, by contrast, make up a small and intimate community, and so there are a plethora of opportunities for even new lawyers to join collaborative projects and committees and begin to build connections in the field. Precisely because of the wide variety of legal areas implicated in the practice of elder law, the community is constantly collaborating to digest and synthesize new developments, address emerging problems and make recommendations for future change. These groups welcome new voices and eager hands, and provide opportunities for new attorneys that others may not have access to until well into their careers.

Take Risks and Keep Learning

As discussed above, the legal needs of older adults are extremely varied and each client presents a new and often dramatically unique story. Therefore, it is difficult for the elder law attorney to master a particular set of legal tools and then remain within that comfort zone, utilizing the same legal arsenal over and over. While this experience might be common in a larger

firm or a different practice area, the opposite is generally true for the elder law practitioner. An elder law attorney accustomed to preparing probate documents might suddenly find herself representing a client in housing, family or civil court. An attorney whose last ten cases were petitions for guardianship in civil court might have to file a divorce petition for the eleventh case. This nearly constant need to quickly navigate and master new legal arenas will ensure that new attorneys acquire both a wider skill base as well as the qualities of flexibility, adaptability, and resourcefulness sought by legal employers of all sorts.

Endnotes

1. http://www.americanbar.org/groups/professional_responsibility/taskforceonthefuturelegaleducation.html, last visited December 10, 2012.
2. Lifespan of Greater Rochester, Inc., Weill Cornell Medical Center of Cornell University, New York City Department for the Aging, *Under the Radar: New York State Elder Abuse Prevalence Study*, May (2011) *at* http://www.ocfs.state.ny.us/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf, pg. 3.
3. Metlife Mature Market Institute, *The Metlife Study of Elder Financial Abuse*, June (2011) *at* https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf, pg. 2.
4. In New York City, some of these teams include: New York City Elder Abuse Network (NYCEAN), Brooklyn Elder Abuse Meeting at the Brooklyn DA's office (BEAM), Bronx Elder Abuse Task Force Meeting at the Bronx DA's office, Elder Abuse Case Coordination and Review Team (EACCRT), Brooklyn Multi-Disciplinary Team and New York City Elder Abuse Center Multi-Disciplinary Team.
5. Tammy D. Allen, Lillian T. Eby, Elizabeth Lentz, Lizzette Lima and Mark L. Poteet, *Career Benefits Associated with Mentoring for Protégés*, Journal of Applied Psychology, Vol. 89, No. 1, 127, 130 (2004).

Malya Levin is the inaugural recipient of the Weinberg Center's Brooklyn Law School and David Berg Center Law and Aging Fellowship. She graduated from Brooklyn Law School *cum laude* in June 2012. She began working at the Weinberg Center for Elder Abuse Prevention at the Hebrew Home as a law student intern, and also held internships in the areas of family law, immigration and state Supreme Court.

Deirdre M.W. Lok, Esq., is the Assistant Director and General Counsel for The Harry and Jeanette Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale. Prior to joining The Weinberg Center, Ms. Lok was a Deputy Prosecuting Attorney in Oahu, Hawaii. Ms. Lok supervised and trained incoming deputy prosecutors on trial procedure and was the first prosecutor in Hawaii to manage the Mental Health courtroom. She spent several years as an Assistant District Attorney in New York City, at the Queens County District Attorney's Office where she focused on domestic violence cases. Ms. Lok graduated *magna cum laude* from New York University and received her law degree from Brooklyn Law School. Ms. Lok is a frequent speaker on the issue of elder abuse and the law, and has guest lectured at Penn State Dickinson School of Law, Cardozo Law School, and CUNY Law School and has provided training to attorney's through the New York State's Judicial Institute, the Queens Bar Association, and the Bronx Bar Association. Ms. Lok was past co-chair and is now on the Executive Committee of the New York City Elder Abuse Network.

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Ten Tips for Serving as an Article 81 Guardian

By Christine Mooney and Leslie Nydick

Christine Mooney

The appointment to serve as either the Personal Needs or Property Management Guardian pursuant to Article 81 of the Mental Hygiene Law (MHL) is a challenging and rewarding task. In all cases, it is important that the individual or entity appointed by the Court have the requisite expertise to meet the needs of the Incapacitated Person. Our individual appointments to serve as the Personal Needs and Property Management Guardian came with the assignment of very different tasks; however it very quickly became apparent for the need to work as a team that operated as one. This article provides a series of informational tips for anyone serving or considering service as a guardian.

Topic 1—Upon Notification of Appointment Review All Guardianship Documents

Upon notification of appointment by the Court as a guardian, the proposed appointee should review the requisite papers prior to the acceptance of the appointment. The eligibility requirements to serve as a guardian are outlined in MHL §81.19.[1] More specifically, the proposed guardian should request a copy of the original Order to Show Cause, the Court Evaluator's Report, Cross Petitions, if any, and the hearing transcript, if available. The Order to Show Cause will contain a supporting affidavit which outlines the needs and relevant personal history of the alleged incapacitated person. The Court Evaluator's report provides a detailed outline of the alleged incapacitated person's medical history, assets, and familial information. Additionally, the Court Evaluator's report contains recommendations to the Court regarding the needs and limitations of the alleged incapacitated person. It is important to read the report in detail to become aware of the potential issues and requirements to serve as a guardian for that individual. The cross petition, if any, may convey potential conflicts among those involved. The transcript, if available, will provide further insight into the matter. These documents can easily be obtained by contacting the Petitioner's attorney. A thorough review of materials prior to obtaining a commission can ensure that a new guardian is prepared for the appointment, or can help to save time for the guardian, the court and all involved if the guardian is unable to accept appointment.

Leslie Nydick

Topic 2—Upon Appointment Request a Professional Clinical Needs Assessment

The needs of an incapacitated [IP] person vary from case to case. When an incapacitated person resides in the community, a guardian can benefit from the external assessment of a clinical professional. The same may be true for an IP who resides in a facility to determine suitability of the existing arrangement. In the guardianship case for which we were appointed to serve as guardians of a young woman who suffered from cerebral palsy and mental retardation, the original order and judgment appointed a social worker to assist the guardians. However, the proposed appointee did not accept the case. This created a multitude of problems for the guardians. The IP had been out of the New York City Public School system since the age of eighteen. For the next few years, the IP did not receive any services. The deprivation of services severely impacted the potential growth of the IP. Furthermore, it became virtually impossible to immediately arrange for a day program for the IP since the IP had no recent clinical, medical or psychological assessments. The appointment of a clinical professional would have greatly reduced the time and work of the Personal Needs Guardian. It also would have reduced the lengthy admissions process for the day program.

Topic 3—Visit the IP's Current Home and Evaluate Its Suitability

If an IP resides in the community, it is incumbent upon the guardian to visit the IP in his or her home. If the IP is in a facility, it is just as important to visit the IP in the current environment. A guardian is required pursuant to MHL §81.20[2] to visit the IP not less than four times a year. The guardian should assess the suitability of the current living situation, the familial support system and, if necessary, accessibility if the IP is physically disabled. The guardian should request a copy of the lease and contact information for the landlord if the property is a rental. In the event the IP owns the real property, the guardian should ensure that the petitioning attorney placed a lis pendens on the property.[3] The lis pendens places legal notice on the property that transfers may not be made. Furthermore, the guardian is required to file a property notice with the New York City County Clerk.[4] This notice is recorded and pro-

vides notice for any potential title search that a guardian has been appointed. A guardianship where the IP is the owner of real property presents an additional series of responsibilities for the guardian. The guardian is responsible for ensuring the payment of property and water usage taxes. Additionally, the guardian must ensure that the property is properly insured and maintained. It is particularly important to further assess the situation when there are other residents in the home with regard to familial status, non-family members, service providers, their level of cooperation, their ability to manage the home/apartment, and any existing agreements for their occupancy.

Topic 4—The Familial Relationship

As a guardian, one of the most important roles you will have is to enlist the support of the IP's family. In some cases if an independent guardian is appointed, there may be a family member who was ineligible to serve. This creates feelings of animosity on the part of the family toward the guardian. This can cause additional obstacles to the independent guardian. During the course of our guardianship, we encountered a multitude of difficulties with the IP's family. Upon our appointment, we met with the family and tried to establish a good working relationship. From the outset, the relationship was challenging due to the expectations and desires of the IP's family. The familial wishes were not in the best interests of the IP and thus created a tenuous working situation.[5] Over the course of several years the relationship moved through a variety of stages. At each stage of the process, the guardians sought to build a better relationship. However, the reluctance of the family to comply with the requests of the guardian further complicated the issues.

For example, the father was given a monthly allowance for the purchase of household supplies for the IP. The guardian requested receipts to document the expenditure of the funds. The IP's father was unwilling and unable to comply with this request. This refusal caused problems for the guardian because the Court Examiner requested the receipts to document the expenditures. The guardians were unable to provide receipts for significant amounts of cash spent by the IP's father. Additionally, it is the property guardian who is ultimately accountable for the expenditure of guardianship funds. Therefore, it is very important to keep organized records. All receipts should be kept in an organized file and divided into the various categories.

If the family does not comply with the guardian's request to maintain records then we suggest that the guardian suspend the provision of funds and make other arrangements for the particular task. As difficult as that decision is, it may be necessary because, ultimately, the guardian is responsible for protecting the IP's interests, financial and otherwise.

Although a family member may have failed at a particular task, it is still incumbent on the guardian to attempt to involve the family. There are typically many more tasks to be assigned such as oversight of home care schedules, coordinating therapy appointments, scheduling of medical appointments, monitoring the physical status of the household, maintenance of equipment, monitoring the IP's diet, managing medication, and so much more. Besides assessing the needs of the IP, the guardian must also assess the abilities of the family members so that tasks are appropriately assigned. It is always a goal to involve the family. Therefore, be as creative as necessary so that you can facilitate a supportive network for the IP. A supportive network of family members in the home and in the community will always benefit the IP, while it also can ease the guardian's job.

Topic 5—Court-Approved Expenditures and Legal Documentation

A guardian must carefully read the order and judgment signed by the Court. The order will provide financial guidelines for the guardian regarding payments and approved expenses. For example, the order may award a parental stipend or monthly living allowance for the parent. It is important that the guardian request and verify the social security number for the recipient of any funds paid from the guardianship account. This is necessary in the event that any payments may serve as tax deductions for the IP. It is also very important because the immigration status of the parents may determine their eligibility to receive any payments from the guardianship. Our case presented a serious dilemma in this arena. Unfortunately, it only came to our attention after a tax return had been filed on behalf of the IP. The IP's parent was unable to receive payments as a result of the parent's immigration status. We were advised by the accountant of the potential liability this presented for us as the guardians. The IP's other parent was a recipient of Medicaid and this also presented problems in terms of the payment of a stipend. Therefore, it is incumbent upon the guardian to verify more than just the Court's approval of a stipend or payment to the family members. The inability of the guardian to make these payments to the parents created an extremely hostile environment between the guardians and the family.

An Order and Judgment should also specify acceptable expenditures for the household from the guardianship account. For example, if the property guardian is authorized to pay the entire household expenses for the family, this must be clearly outlined in the Order and Judgment. If the potential guardian ascertains that the guardianship will require a tremendous dedication of time and services, the guardian should request that the Court award a monthly stipend to the guardian. Otherwise, in many cases, it can take several months, or even longer, from the time a guardian files the Annual Report

and the receipt of a signed order to award guardianship fees. This presents a hardship to the guardians who serve in some cases for more than a year without being paid for their services.[6] This delay only serves to frustrate an individual or firm who provides outstanding service to the IP. The pool of individuals who are willing to serve as guardians has continued to decline due to the delays in receiving payment. It is a serious flaw in the system that removes dedicated individuals from the Office of Court Administration list of potential appointees. Therefore, a guardian must ensure timely payment for his or her services.

The guardian should also request the original social security card for the IP and maintain the card in the guardianship files. While the family should maintain records of the IP, the guardian should also maintain a certified copy of the IP's birth certificate. If the IP is over the age of 65, the guardian should be sure to have the IP's Medicare card and medical insurance card. These records will be necessary for program enrollment, Medicaid applications and any other type of assistance that the guardian will apply for on behalf of the IP.

Topic 6—Developing a Care Plan

Whether the IP is already receiving needed services or not, it is important to review the current situation and the history to determine what is best for the IP in the short term, and the long term. Developing a plan will involve assessing existing services and providers. The next step will be to explore all other opportunities by reaching out to community organizations, government agencies, private entities, experts and the like to be fully informed of available services to meet the particular needs of the IP. Simultaneously, it is critical to assess available financial assets and benefits.

The short term plan will likely include maintaining or stabilizing the existing services that are in place with a focus on health and safety. You will also need to review and revise the current emergency plan to ensure the best interests of the IP. The development of a longer term care plan may require many steps, phases, and revisions to adapt to the changing needs of the IP. Most importantly, the development of a plan, along with addressing the related financial issues, requires not only patience but extreme diligence. For example, if you need to reach a particular agency to obtain services, and you don't get a call back, then you may need to call again, again, and again. The guardian will often have to be relentless to obtain all the services that the IP needs and deserves.

Similar to the need for organizing receipts and financial documents, it is imperative that the guardian organize the care plan information. The process is particularly time consuming at the beginning, and may always be time consuming depending on the needs of the IP, but being organized will most definitely increase the guardian's efficiency and effectiveness. Moreover, with our case, working as a unified and cohesive team proved to increase our efficiency and our effectiveness. We were each other's back up. That was so important for this demanding and complicated case since we did not have someone in the household who could be depended on as even a point of a contact.

Topic 7—Notifications to Service Providers, Benefit Providers, Financial Institutions, etc.

As soon as you have your commission,[7] it is critical that you notify all involved that you are the guardian. The notification should be written, and often also verbal. Depending on the case, there could be a wide range of those who need to receive communication of the guardianship. There are the banks, credit cards, financial institutions, the landlord, the telephone service provider, and utilities. There may also be pension systems, public and private ones. There are service providers, such as the homecare agency, supply vendors, medical insurance, doctors, other family members, and many others. Other critical notifications may need to go to Medicaid and Social Security. Depending on the situation, if the IP is receiving benefits from any private or public agencies, you will want to be sure that the guardian is designated as the representative payee. Moreover, if the IP is or will be the recipient of a settlement, you will need to address such issues of terminating benefits for which the IP may no longer be eligible and negotiating reimbursements to those organizations. The best advice is to remember that everything is negotiable even when dealing with a government agency.

You should always keep in mind that all recipients of the guardianship notification are likely to either be confused or even surprised by the information. Although there are many cases where an independent guardian is appointed, it is still not that common among those whom you are informing of the guardianship. Some will bluntly ask why and how you could be the guardian when the IP does have family. Please keep in mind that you do want to maintain a working relationship with the family members so your responses must respect the family. There is a very delicate balance between informing providers that you, as the guardian, are the decision maker while also involving the family in the management of the IP's care. Each case will have its own unique solution for the best way to manage the communications.

Topic 8—Negotiating Fees and Costs for the IP's Care

The role of a guardian can be easier when there are sufficient assets to handle the IP's needs. This also ensures that there will be funds to pay the guardianship commissions. However, whether the IP has significant assets or minimal, the guardian's duty is to negotiate all

fees for the IP's care. In the case of our guardianship the IP had private pay homecare. The guardians were able to negotiate reduced home care fees with the agency because they were not subject to Medicaid regulations. Whether you are negotiating a rate with a homecare agency, a day program, a landlord, or a supply provider, the guardian should negotiate the best rates possible for the IP. The best advice is to remember that you were appointed for the IP because the IP is unable to manage for him/herself, so you need to manage all of the aspects of your duties at the highest level of quality and efficiency. As mentioned previously, never forget that everything is negotiable. Even if you are addressing a financial issue with the government, it is also negotiable.

Topic 9—Documentation and Organization

It seems obvious that the guardian of the property will need to maintain detailed and organized financial records for the IP. That is just the beginning. It is also important to maintain a record of communications with and on behalf of the IP, visits, contact information for all service providers, documentation of emergency plans, and so much more. At the beginning, you may think "mental notes" will be sufficient but it is likely that much more will be needed. As guardian, you are essentially the project manager of all information related to the IP. Select your best methods of organization and maintain them throughout your appointment. Maintain and update the documentation on a routine basis. Thus, when it comes time to do the annual report, to provide a status to the court, to manage an emergency situation, or to even transition the case to a successor guardian, it will be relatively easy to access and provide the required information.

Topic 10—Communication and Survivorship Techniques for Guardians

An Article 81 guardian is required to submit a report within 90 days of the issuance of the guardian's commission.[8] Subsequent to the submission of the initial report the guardian is required to submit an annual report.[9] This report includes information about the IP's living arrangements, home and medical care and the financial expenditures of the guardianship. These reports are typically the sole method of communication between the guardian and the Court. Therefore, a guardian will frequently find himself or herself alone in his or her ability to handle many matters. Under some circumstances, a motion may be filed with the Court to request some necessary legal relief for the guardianship. It is important to get as many things as possible in writing at the outset of the guardianship. This will alleviate uncertainty for the guardian and the IP. Unfortunately, during the course of our tenure as guardians many issues arose that required the involvement of the Court. However, with a multitude of appearances we failed to reach agreement among all the involved parties with regard to the best interests of the IP. This delay only served to hurt the IP. Therefore, for any guardian it is imperative to leave each Court appearance with a clear timetable for the implementation of a plan and the expectations of the guardians and the Court. In some circumstances it may be necessary for the guardian to request the appointment of counsel for the IP to ensure that the best interests of the IP are being met. Time is a major factor in ensuring the best interest of the IP and waiting for others to make decisions will not only be frustrating, the wait may have a negative impact on the IP. Thus, it is imperative that the guardian do everything possible to ensure timely resolution of any issues.

Last, but not least, when a guardian isn't sure of what to do, seek advice from others. There are so many who are willing to provide advice, guidance and ideas if you just ask them. Depending on the case, there are many people you can contact including other guardians, the court examiner,[10] the court staff, guardianship attorneys, social workers, service providers, government agencies, private agencies, charitable organizations, medical providers, etc. For this particular case, we sought advice and feedback from all involved in the case, as well as experts who were not involved in the case. We were then able to review an abundance of information so that we could choose the best care for an IP who had previously been deprived of needed services, and who is now thriving in an outstanding day program. The Incapacitated Person is *always* the priority.

Endnotes

1. N.Y. Men. Hyg. Law. § 81.19.
2. N.Y. Men. Hyg. Law. § 81.20.
3. N.Y. Men. Hyg. Law. § 81.24.
4. N.Y. Men. Hyg. Law. § 81.20(a)(6)(vi).
5. N.Y. Men. Hyg. Law. § 81.20(a)(6)(ii).
6. N.Y. Men. Hyg. Law. § 81.28.
7. N.Y. Men. Hyg. Law. § 81.27.
8. N.Y. Men. Hyg. Law. § 81.30.
9. N.Y. Men. Hyg. Law. § 81.31.
10. N.Y. Men. Hyg. Law. § 81.41.

Since 2007 respectively, Christine Mooney, Esq. and Leslie Nydick have each been individually appointed as court evaluators and guardians. For the last four years, they have served as co-guardians on a complicated case which initiated their desire to share their experience and tips in this article. Christine Mooney is also an Assistant Professor at Queensborough Community College in Bayside, New York. Leslie Nydick also provides conflict resolution services for businesses and individuals. Leslie shares her expertise with students as an Adjunct Faculty for several mediation courses at New York University.

Advance Directives: A Step Back Into the Fifties, the View from Cuba

By Ellen G. Makofsky

I left from the Miami International Airport in the dark of early morning. I was part of a small NAELA delegation to Cuba investigating Cuban society and Cuba's legal system as it relates to seniors. The flight was smooth but as I disembarked I knew I was really someplace else. I made my way down the gangway and entered the line. I stepped up to the glass and faced the immigration officer. He studied my passport and visa again and again; when he was satisfied, and all stamps were affixed, I was allowed to pass through a narrow corridor and buzzed through an extremely tiny door. When that door opened, I felt like Alice in Wonderland who had fallen through some mysterious chute.

"Cuba is a country whose economy is thin, but whose people are so proud of what they have created with so few available resources."

Once out of the airport I was treated to soft warm Caribbean breezes and to a place where, in some sense, time had stood still. There were glorious old automobiles parked in the lot. Some were spiffy classic cars lovingly cared for and others were really old cars that some brilliant mechanic kept in operating condition. In Cuba modern architecture is architecture from 1959, the year of the Cuban revolution. As I got close to Havana, I saw many large homes lining the streets which were built in the early 1900s by sugar barons and local industrialists. Most of these homes needed paint and repair, but they were stately. Cuba is a country whose economy is thin, but whose people are so proud of what they have created with so few available resources.

Just as time has stopped in Cuba in regard to the material world, there is a feeling that you are back in the fifties when learning of the Cuban view and practice regarding medical decision making. While in Cuba, our delegation met with many different panels for discussions regarding legal and aging issues. We were often reminded that Cuba provides free medical care to all its citizens and has a well-regarded health care system. Early on, a panel member was asked what happened to seniors who found themselves very ill with no hope of recovery. The immediate answer was that Cuba does not allow euthanasia or assisted suicide. It was apparent that the panel was uncomfortable discussing end of life decision-making and wanted to shut down the conversation. With persistence, we learned that Cubans who have full mental capacity can designate, in writing, a person to make medical decisions for them in the event they are unable make their own medical decisions. There is no set form or document to accomplish this.

"[In Cuba,] making a decision to refuse further medical treatment or to disconnect from life sustaining treatment is an unusual event.… [F]amily and friends feel a responsibility to provide all available health care for the patient until the last moment. They hope for a miracle."

As the questions continued, our delegates finally realized that making a decision to refuse further medical treatment or to disconnect from life sustaining treatment is an unusual event. Philosophically, family and friends feel a responsibility to provide all available health care for the patient until the last moment. They hope for a miracle. The session concluded with a panelist's comment that we should think more about life and less about death.

Several days later, we met with Dr. Jesus Menendez, advisor to the Cuban Minister of Health and the Director of Geriatrics for Cuba's National System of Health. Dr. Menendez advised that Cuba does not have a system that embraces advanced directives in the same manner as the United States does. Often the patient and/or family do not ask about the patient's prognosis and Cuban physicians tend to postpone talking to patients and families about bad news.

Cultural dimensions shape end of life decision-making. As I listened to our speakers during my Cuban visit, it became evident that surrogate end-of-life decisions were rare in Cuba. Dr. Menendez repeated what we had heard before from the panel, culturally, Cubans hesitate to withdraw medical treatment because they want to wait until the last moment for a life-saving medical miracle to happen. What's more, Cubans, for the most part, are unaware that they have a choice to advise the doctor to stop aggressive treatment. Dr.

Menendez also related that many patients and/or their families are afraid to make their own medical decisions and that the physician is expected to be the decision-maker. Accordingly, Dr. Menendez explained that he tries to prevent physical and spiritual suffering for the patient and his or her family by taking "away the decision from the son or daughter to turn off the light."

"The Cuban legal system does not recognize any specific form for living wills and has nothing analogous to New York State's health care proxy law, MOLST, or Family Health Care Decisions Act."

The Cuban approach to advance directive issues is very different than the approach taken in the United States. The Cuban legal system does not recognize any specific form for living wills and has nothing analogous to New York State's health care proxy law, MOLST, or Family Health Care Decisions Act. In the United States, the law requires that medical information be given to patients and those they delegate as their surrogates. Also, the practice of physicians making medical decisions for their patients is gone.

Those Cuban classic cars do allow the viewer to reminisce about the glories of steel and chrome and even fins. Some might like to be transported back to that age when times seemed simpler, but surely we attorneys appreciate our developed system of advanced directives for our clients. Viva Cuba…but not its mechanism for health care decision-making.

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Elder Law Section Ethics Committee Poll #5

By Judith B. Raskin, Chair, and Natalie J. Kaplan, Vice Chair

The Ethics Committee posted its fifth poll question with the answer concluded by the Committee based on the Rules of Professional Conduct and other sources. The members responded as follows:

Yes:	26
No:	145
I don't know:	53
Total responders:	**224**

Judith B. Raskin

Scenario

Attorney Alice is a solo elder law practitioner. She decides to back up her client files online or, as it is called, in the cloud. When she hears that Oliver's Offsite Data Storage Company provides cloud storage at a decent price, she calls to ask its rates. She finds them affordable, immediately signs up for the service and transmits her files.

Question

Do her actions comply with the New York Rules of Professional Conduct ("RPC")? a) Yes; b) No; c) I don't know.

Answer: b) No.

The use of cloud storage for client files is fraught with invisible ethical issues due to the confidential nature of their contents. Concerns with security from hackers are paramount in the minds of the legal community.

Rules of Professional Conduct, Rule 1.6 requires that lawyers protect confidential client information when transmitting it electronically by taking "reasonable precautions" to prevent the information from coming into the hands of unintended recipients. The transmission method used must afford a "reasonable expectation of privacy."[1]

Since Alice did not take reasonable or, indeed, any precautions to protect against access by unintended recipients, she is in violation of Rule 1.6.

But the discussion only begins here. New ABA Model Rules and at least one NYSBA Ethics Opinion provide more enlightenment.

Analysis

Natalie J. Kaplan

In August, the ABA approved amendments to its Model Rules of Professional Conduct. Among them is a new subsection (c) to Rule 1.6, relating to technology and the inadvertent disclosure of client information. It requires a lawyer to make "reasonable efforts to prevent inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Comment 16 to the new subsection provides a list of at least five factors to consider in determining reasonableness: 1) the sensitivity of the data; 2) the risk of disclosure without further protections; 3) the cost; 4) difficulty of implementing further protections; and 5) the degree to which the protections interfere with representing clients.[2] This is not a telling list to an elder law practitioner who is considering storage in the cloud.

The New York State Bar Ethics Committee considered this issue in Opinion #842 (9/10/10) ("the Opinion"). Its digest lists three requirements for the use of cloud computing: 1) *Take "reasonable care"* to comply with the requirements of confidentiality under Rule 1.6; 2) *Stay abreast of technological advances* to ensure that the storage system remains sufficiently advanced to remain secure; and 3) *Monitor the changing law of privilege* to ensure that cloud storage won't result in a loss or waiver of any privilege.

Monitoring the changing law of privilege is legal work, which we know how to do. But the Opinion returns us to the question of what care is reasonable to comply with Rule 1.6. And, how can a lawyer—even reading voraciously in the cyber-security field—assess whether a cloud company has sufficiently advanced protection?

A. What Care Is "Reasonable"?

More directive than the ABA factors, the Opinion offers several examples of reasonable care. It notes that the lawyer should: 1) affirmatively instruct the company to keep the information confidential; 2) ensure that the company has an enforceable obligation to protect confidentiality; 3) have the company agree to notify the attorney, if served with a subpoena for the files; and 4)

investigate any security breach, notify the client, and discontinue the service, unless assured of sufficient remediation. The Opinion further suggests the investigation of the security measures, policy, recoverability and other processes to determine the adequacy of security. These standards appear more demanding than those of the new ABA Rule, 1.6(c).

To get an idea of how this could all be managed with a full-time job, we did what most busy lawyers will have to do. We talked to our IT people.

Their take was practical and provided a checklist of safety standards to apply when evaluating a cloud company. The company most likely to provide reasonable protection, they pointed out, is a reputable company, one that has been in business many years and has a good reputation among computer experts. A reputable company will offer good support services and also provide clear explanations in lay terms to its customers. It should also do its upgrading without prolonged interruption of service.

Next, its server should have multiple backups in secure, well-protected buildings at several locations. It should have good encryption, meaning that the coded, digital language in which the files are maintained should be difficult to crack. The quality of encryption is described informally by the number of bytes, with 512 bytes about average and 1,024 bytes usually better.

B. What Is a "Sufficiently Advanced" Storage System?

Turning to the question of what constitutes sufficient technological advances for a cloud company to remain secure, we learned that, with technology, better means newer. Yearly upgrades should include new computers and more complex encryption. With newer and better systems usually comes faster performance, an indicator of improvement, though not a security factor in itself.

Online consumer ratings of the various cloud companies are readily available and they address many of the necessary issues.

C. The Changing Law of Privilege

What happens if privileged matter is hacked into? Two recent articles in the *New York Law Journal* examined the evidentiary consequences of disclosing privileged material.[3] Professor Michael Hutter, Professor of Evidence and New York Practice at Albany Law School, noted that New York law lacks statutory guidance in this area. He reviewed case law and concluded that attorney-client privilege, for *inadvertently* disclosed matter, is not likely waived if a "dual reasonableness" standard is met. First, reasonable efforts must have been made to prevent the disclosure; and second, prompt efforts must be made to remedy the situation.[4]

Although his analysis relates primarily to disclosure during litigation, his recommendation can serve us all. "Counsel should consider the use of a confidentiality agreement," he says, where the "parties agree that if privileged matter is inadvertently disclosed the disclosing party can, by timely notice, assert the privilege and obtain return of the disclosed matter without waiver."[5] This same concept was included with the commentary to former Disciplinary Rule 4-101(D).

It is not a large step to see that elder law attorneys concerned with the risk of disclosure through a porous cloud can similarly seek waivers of liability as part of their client retainer agreements.

Endnotes

1. Rules of Prof'l Conduct R. 1.6, cmts. 16, 17 (2009).
2. While not yet applicable to New York attorneys, the New York Rules may ultimately incorporate them, particularly since the NYSBA co-sponsored the ABA amendments.
3. M.J. Hutter, *Evidence: Scope of Waiver Effected by Disclosure of Attorney-Client Privileged Matters*, New York Law Journal, Aug. 2012, at 3, and "*Evidence: Inadvertent Waiver of Attorney-Client Privilege*, New York Law Journal, Oct. 2012, at 3.
4. By contrast, an *intentional* disclosure often results in the waiver of all communication on the same subject (so-called "subject matter" waiver). This occurs when the party making the disclosure gains an advantage to the prejudice of an opponent—as when a partial disclosure conveys a misleading impression of the facts.
5. *See supra* text accompanying note 3.

Judith B. Raskin is a partner in the firm of Raskin & Makofsky located in Garden City and practices in the areas of elder law and trusts and estates. She is a Certified Elder Law Attorney (CELA) by the National Elder Law Foundation. She maintains membership in the National Academy of Elder Law Attorneys, Inc., the Estate Planning Council of Nassau County, Inc., and the New York State and Nassau County Bar Associations. Judy is a past Chair and current member of the Alzheimer's Association, Long Island Chapter Legal Committee. Judy has been writing the Recent New York Cases column since 1995.

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Recent New York Cases

By Judith B. Raskin

Article 81/ Guardian of the Person

Petitioner did not request appointment of guardian of the person. Appointment required.

The administrator of the Holly Patterson Extended Care facility petitioned for a special guardian to be appointed to prepare a Medicaid application for its resident. The court questioned why the facility did not also ask for the appointment of a guardian of the person as the resident had not executed a Health Care Proxy. The facility responded that the Family Health Care Decisions Act ("FHCDA") would allow the resident's son to make medical decisions.

The court rejected the facility's position and appointed the facility's administrator as special guardian of the property and the resident's son as guardian of the person. The FHCDA was not intended to be a substitute for the appointment of a personal needs guardian for an incapacitated person. Decisions may be needed in matters such as future placement. In addition, in the event the resident refuses treatment, the FHCDA will require a determination of the resident's incapacity before her son could act on her behalf. If the court awards this authority to a guardian of the person, the determination of incapacity is not required.

***Matter of Restaino*, 2012 N.Y. Misc. LEXIS 4162; 2012 NY Slip Op 22236 (Sup. Ct., Nassau County, August 29, 2012).**

Article 81/AIP Testimony

Petitioner's attorney sought AIP's testimony. Denied.

At a hearing to determine the need for a property and personal needs guardian, Dept. of Social Services (DSS) called the alleged incapacitated person (AIP) to testify. The AIP's attorney objected. The court sustained the objection and the AIP did not testify.

Prior to a hearing set to determine whether the appointed temporary guardian of the property should be made permanent, DSS, in order to assure that the AIP would testify at that hearing, submitted support for its right to require the AIP's testimony. The court, after review of statutory language and prior case law, held that the AIP was not required to testify. Article 81 promotes independence, self determination, participation and procedural due process safeguards. While the statute is silent on the AIP's right to refuse to testify, the AIP's civil rights must be retained when "personal liberty is at stake." Article 81 places the burden on the petitioner to prove incapacity, not on the AIP to argue otherwise. The DSS argument relied on a standard that was repealed under prior law (articles 77 and 78) when article 81 was enacted.

***Matter of Allers*, 2012 N.Y. Misc. LEXIS 3571; 2012 NY Slip Op 22204 (Sup. Ct., Dutchess County, July 26, 2012).**

Article 81/Health Care Powers

Petitioner sought authority for guardian to make end of life decisions. Dismissed.

A hospital administrator petitioned for the appointment of a guardian for Jean C. The court's order appointed Jean C.'s stepdaughter and stated that the guardian's health care powers were limited. She was not authorized to make end-of-life decisions related to artificial nutrition and hydration. The petitioner appealed, arguing that the limitation violated the Family Health Care Decisions Act.

The court dismissed the appeal. The appellant petitioner was not "aggrieved" by the limitations and neither the guardian nor Jean C. had appealed the limitation.

***Matter of Goldstein*, 2012 NY Slip Op 066494 (App. Div., 4th Dept., Oct. 5, 2012).**

Estate Attorney Fees

Executor objected to an attorney's requested fees. Fees reduced.

Executor's attorney objected to fees charged to the estate by an attorney who previously represented co-executors of the estate. The court cited several instances where the attorney's fees were unwarranted: brief phone calls billed at .2 hours each (such as for setting up a meeting), charges for services ministerial or executorial in nature (the executor must pay privately to the attorney if requesting those services), charges for time spent preparing his affirmation of legal services. The fee was reduced from $31,000 to $17,500.

***Estate of Cook*, 2012 Slip Op 32400(U) (Surr. Ct., Nassau County, Sept. 4, 2012).**

Article 81/ After Death Powers

An article 81 guardian brought suit to recover the incapacitated person's (IP's) property. The IP died 2 days after the conclusion of a nonjury trial. The court decision, dated over 6 months later, found in favor of the guardian, awarding a judgment of $200,944.32 plus interest. The appellants moved in the Supreme Court to vacate the decision as the guardian was not substituted by a representative of the estate prior to the date of the decision. The Supreme Court denied the motion. This appeal followed.

The Appellate Division voided the award to the guardian. The matter was not stayed until an authorized representative for the estate could step in. The court that appointed the guardian should have modified the guardian's powers or discharged the guardian to allow substitution by a representative of the estate.

***Matter of Vita V.*, 2012 N.Y. App. Div. LEXIS 7976; 2012 NY Slip Op 8021 (App. Div. 2d Dept., November 21, 2012).**

Article 81/Pooled Trust

Non-parties appealed guardian's authority to create a pooled trust and pay attorney from trust funds. Appeal denied.

The Supreme Court, Nassau County, appointed a guardian for Lisa D. with the authority to manage property, create a pooled trust and pay the petitioner's attorney fees from the pooled trust. The non-parties, Office for People with Development Disabilities and the Consumer Advisory Board, appealed.

The Appellate Division, Second Dept., upheld the lower court decision. The decision did not violate Mental Hygiene Law and the court properly used its discretion in ordering creation of the pooled trust and payment of attorney fees from the trust.

***Matter of Lisa D.*, 2012 N.Y. App. Div. LEXIS 6906; 2012 NY Slip Op 6950 (App. Div., 2d Dept., October 17, 2012).**

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Using a Supplemental Needs Trust in Special Education Litigation

By Adrienne Arkontaky and Robert P. Mascali

Introduction

Since 2009, Ms. Smith has been arguing with the local school district (the "District") regarding the provision of special education services to her daughter, Jane. After moving in her mother (Mrs. Jones) from another state, Ms. Smith concluded that the school district could not facilitate a placement in an appropriate special education program. As a result, Jane was without a special education program for months and remained at home. Jane regressed emotionally, socially and academically. Her reading comprehension was far below what it should be and she was far below grade level in every area. In addition, she did not receive the related services that were mandated on her Individualized Education Program (IEP) because the District was not able to secure providers for an extended period of time. After trying to work with the District for several months, Ms. Smith secured the services of a special education lawyer who subsequently filed a request for an impartial hearing with the District and the New York State Department of Education.

After three days of the due process hearing, it became evident that there was a very good chance that the District would be found liable for a denial of a free appropriate public education (FAPE). In an effort to resolve the case without further litigation and associated legal costs, the District offered to settle the case. As part of the negotiation and eventual settlement, the District agreed to pay the parent and/or student a monetary amount that could be used to fund the provision of various special education services to the student and agreed to an appropriate placement in a state-approved private school immediately.

The special education attorney consulted with a special needs planning attorney to draft a special needs trust ("SNT") that would be funded with the proceeds of the settlement. However, there were many questions that needed to be addressed before the trust was established and funded. Who could establish the trust? Should the trust be a first party, third party of pooled special needs trust? Should there be restrictions (in addition to the statutory ones)? Is a special needs or supplemental needs trust appropriate for this purpose? Who would be the Trustee? Should Ms. Smith consider using a "pooled trust"?

Recently several special education attorneys have sought to use special needs trusts in situations such as our hypothetical. Perhaps the family wanted to fund private services for the student and/or the school district realized that the denial of certain aspects of the special education program was so extreme that the services that had to be retroactively provided could not be given directly through the school district. Perhaps both the school district and the parent were concerned with the possibility that payment of funds would affect a child with special needs' eligibility for government benefits. Perhaps the school district wanted an assurance that the funds would in fact be used for the benefit of the student if prospective amounts were paid. Perhaps, given her financial situation, Ms. Smith may require public benefits in the future?

Although the funding of a special needs trust may be a very effective way to handle the situation, there are many questions and issues that need to be addressed before a special needs practitioner proceeds down this road.

As most practitioners are aware, a supplemental needs trust (also often referred to a "special needs trust") can be either a first party or third party SNT depending upon the source of the funds that will be deposited into the trust. In cases of special education challenges brought against school districts if there is a monetary settlement it will be imperative to properly identify for whose benefit the funds are being paid. When settling such a case, the attorney must investigate what public benefit programs the parents and/or the student-child may be on, or entitled to in the future, to ensure that the receipt of any funds will not interfere with those benefits, currently or prospectively. If public benefit programs are part of the family scenario, then the attorney must consider the need to use a SNT.

If the parent or the student/child is the beneficiary and the funds are to be deposited into a SNT, it is

important to determine which type of SNT should be used. It is conceivable that this could result in two or even three separate trusts, one being a first party SNT where the award is specific to the child and/or the parent and another trust set up for the child as a third party SNT. It is also quite possible that the school district as part of the settlement will want all, or a portion, of the funds earmarked solely for the specific benefit of the student/child for supplemental purposes, such as for assistive technology.

In addition, questions may arise where there are issues dealing with the parental obligation of support and care must be taken by the attorney to advise the parties that the SNT funds should not be used to pay for items that would otherwise be considered the obligation of the parents to provide. In many instances, especially in less affluent families, the dividing line between appropriate and inappropriate items is not that clear and thought should be given up front to citing specific examples in the trust document.

While some attorneys may consider drafting a single hybrid document to cover these scenarios, the authors' experience is that this type of hybrid trust can cause considerable problems in the future such as an unintended Medicaid payback requirement, and should be avoided at all costs. The extra cost necessitated by separate trusts will be minimal when compared against the possible loss of public benefits or the unintended requirement of a Medicaid payback.

In our hypothetical, Ms. Smith paid privately for the cost of special education services during the litigation. In addition to the cost of the services, Ms. Smith claimed that because the District could not initially provide a special education program, she was forced to leave her position as a receptionist in a corporate office to home school her daughter while waiting for the school district to identify an appropriate program. Ms. Smith also raised the possibility that she would file a civil rights claim against the District. For these reasons, the District (hypothetically) agreed to a monetary amount that took into consideration the fact that in addition to Jane's denial of an appropriate education, the family was also adversely affected and that additional civil rights litigation might be looming. Perhaps the amount allowed the District to settle all potential claims against the school district without the risk of future litigation (such as any civil rights claims). In such cases, the District may seek to obtain a general release of all claims and the parents may seek to earmark the funds for the child with special needs. Therefore it is important to decide whether a third party/first party or pooled trust or a combination should be used.

As indicated above, the funding of a special needs trust with settlement funds from a special education litigation settlement ensures that the funds will not be used improperly and in a manner that will jeopardize the child's right to government benefits. The trust can allow the Trustee to pay for special services that the school district might not be able to provide (Applied Behavioral Analysis, Vision Therapy, one-one reading instruction with a private tutor, vocational training).

A payment into a special needs trust allows a school district to bring closure to a case and focus on providing an appropriate program going forward without having to monitor the provision of compensatory services and handle future payments that might extend years from the resolution of the case. It eliminates bookkeeping and enforcement problems and additional litigation if the school district fails to comply with the terms of any settlement.

As mentioned above SNTs are a classified as either **first party** (where the funds deposited to the trust consist of property belonging to the disabled beneficiary)[1] or third **party** (where the funds deposited to the trust belong to a third party not legally obligated to support the disabled individual). These trusts allow for funds to be set aside for the benefit of an individual with a disability during his or her lifetime and as long as the funds are properly managed and disbursed, the value of the funds will not impact the eligibility of the individual for various public benefit programs. A first party SNT can be established by either a parent, grandparent, and guardian or through a court order and the trust must contain a provision that any funds remaining upon the termination of the SNT are subject to reimbursement for benefits received by the beneficiary.[2] Consequently, in the hypothetical, Ms. Smith could establish a first party SNT for her daughter and if it was determined that a SNT might be appropriate for any funds paid to or for the benefit of Ms. Smith, the SNT could be established by Mrs. Jones.

However, a third party SNT may be established by any interested person or persons and the remainder can be distributed free of any such reimbursement requirement. In the hypothetical, if a first party SNT was ruled out for Ms. Smith all or a portion of the funds could be used to establish a third party SNT for the benefit of her daughter. In addition, if Ms. Jones at some point wanted to set aside some funds for the benefit of her granddaughter, she could deposit those funds into the third party SNT.

Each type of SNT requires an individual or corporate entity to act as the trustee. However, in some instances there is no one available to serve as a trustee or for one reason or another, the traditional, individually established SNT, may be unavailable or inappropriate and in those instances, what is referred to as a "pooled trust" may be a solution.[3]

A **pooled first party supplemental needs trust** is specifically authorized by both federal and New York State law. While similar to the traditional supplemental needs trust referred to above, as to the treatment of the trust funds for public benefit eligibility, the pooled trust has a number of requirements, specifically:

1. The funds of multiple individuals are pooled for investment and management purposes but separate sub-accounts must be established and maintained for each beneficiary;

2. The pooled trust must be administered and managed by a not for profit organization;

3. The beneficiary must be disabled as defined under the Social Security Act;

4. The account can be established by the disabled individual, or his/her parent, grandparent, guardian or by court order;

5. To the extent that the pooled trust provides, any funds that remain upon the termination of the sub-account can be retained by the not for profit organization and do not need to be used for reimbursement for benefits provided to the beneficiary.

In addition, some nonprofit organizations operate third party pooled supplemental needs trusts.

In New York State there are a number of both first and third party pooled trusts that are available with different fee structures, remainder policies and minimum requirements. A listing can be found at www.wnylc.com/health/entry/4.

One of the key components of either the first or third part SNT is the requirement that the trust funds be used for the benefit of the disabled beneficiary. A discussion of whether the use must be for the "sole benefit" of the disabled beneficiary or for that matter what is even meant by "sole benefit" is better left for another article. Nonetheless in all events, the trust funds must primarily benefit the disabled beneficiary and cannot be used to directly benefit another person, although some tangential benefit to a third party may be permissible. Nowhere does this issue arise more often than in the area of parental support and the obligation of a parent under New York State law to provide for the support of a child. Care must always be taken to advise the parent that the funds in the SNT must not be used to satisfy obligations that are otherwise a part of the parent's legal obligation. A discussion at the outset is helpful so the parent knows what types of items for the child may be acceptable to be paid from the SNT.

Conclusion

The authors believe that the use of special needs trust in special education litigation will become more popular as school districts and parents look for ways to minimize litigation costs and provide effective ways to resolve special education challenges in more efficient ways. After being involved in these matters, we understand all too well, the time, expense and emotional tolls these cases take on both school districts and families. We also believe that in addition to school districts and parents using SNT's, Impartial Hearing Officers and Courts may utilize SNT's to protect a student's government benefits while securing desperately needed funds for special education services.

Endnotes

1. 42 USC 1396p (d)(4)(A), see also NY EPTL Sec. 7-1.12.
2. See NY EPTL Sec. 7-1.12.
3. 42 USC 1396p (d)(4)(C); see also NY Social Services Law Sec. 366(2)(b)(2)(iii)(B).

Adrienne J. Arkontaky is the Managing Partner of the White Plains office of the Cuddy Law Firm, P.C. Adrienne's practice focuses on special needs planning, special education advocacy and litigation, guardianship, Medicaid, OPWDD and other administrative appeals. She received her JD degree from Pace University School of Law and her B.S. degree from Iona College. Adrienne is the Co-Chair of the Special Needs Planning Committee of the Elder Law Section of the New York State Bar Association, the Co-Editor of the *Elder and Special Needs Law Journal*, and Co-Chair of the Education Committee and Lawyering and Parenting Committee for the Westchester Women's Bar Association. Adrienne lives in Hawthorne with her husband, Peter, and three children. She is the parent of a special needs child.

Bob Mascali is an attorney with the Pierro Law Group in Latham, NY and concentrates in the areas of Special Needs Planning for persons with disabilities, Long-Term Care Planning, and Estate Planning. He previously served as the Associate General Counsel at NYSARC, Inc., Counsel to NYSARC Trust Services, and Deputy Counsel and Managing Attorney for the New York State Office of Mental Retardation and Developmental Disabilities (now the Office for People with Developmental Disabilities). Mr. Mascali is a member of the New York State Bar Association and its Elder Law and Trusts and Estates Law Sections. He is a member of the National Academy of Elder Law Attorneys (NAELA), a member of the Board of Directors of the New York Chapter and currently serves as Secretary. He is a graduate of St. John's University (1973) and its law school (1976).

Committee News

What's Happening in Our Committees

With over twenty-five active committees in the Elder Law Section, there is always something going on. In the coming editions of the *Journal*, we hope to highlight some of the initiatives of the committees. In this inaugural column, we will give you an overview of the committees. We would also like to share highlights of some of our committee activities that have been happening over the past few months.

If you are not a committee member yet, this forum will provide you with an opportunity to learn more about committee efforts. Participation in committees is a great way to meet colleagues, promote important causes and gain knowledge in the practice area of elder and special needs law.

Our ***Client and Consumer Issues Committee*** reports that it is planning an initial meeting and its first priority will be to update the "17 benefits" pamphlet.

Our ***Ethics Committee*** continues to monitor important ethical issues that arise in our practice and the *Elder and Special Needs Law Journal* provides the results of the most recent poll.

Our ***Financial Planning and Investments Committee*** scheduled a call to discuss partnership reciprocity. It hopes to publish an article on the topic in an upcoming edition of the Section's *Journal*.

The ***Guardianship Committee*** coordinated a meeting with Judge Prudenti recently to discuss several issues such as the submission of short-form orders. The Committee felt that the meeting was extremely helpful and hopes to continue the important dialogue between the Section and the courts.

The ***Committee on Health Care Issues*** has been discussing the Stein case and the Affordable Care Act and may possibly put together guidelines for practitioners and clients.

The ***Legal Education Committee*** continues to try to coordinate and monitor programs and promote programs hosted by the Section and various committees.

The ***Legislation Committee*** continues to monitor and advocate for the needs of our clients. The committee's work is crucial to identifying pieces of legislation that affect the needs of those with disabilities and the elderly. This committee has been a very active part of our Section and its tireless advocacy is greatly appreciated.

The ***Liaisons to the Health Law Section, Law Schools, NY NAELA, Trusts and Estates Section, Young Lawyers and Senior Lawyers*** are busy making important connections and working to keep us updated on what is happening in each of their respective areas.

The ***Medicaid Litigation and Fair Hearings Committee*** continues to keep us informed of new decisions and legislation.

The ***Medicaid Benefits Committee*** notes that we should keep our eye out for a decision on emergency Medicaid and continues to identify and tackle issues associated with Managed Long Term Care.

The ***Mediation Committee*** is planning 30-Hour OCA 4 day mediation training in May. This is an important program. Feel free to reach out to the Chairs, Laurie Menzies and Judy Grimaldi for more information.

The ***Membership Services Committee*** reports that Chair-Elect Fran Panteleo provided an Elder Law Update recently to the Nassau County Bar Association. Fran's presentation sparked interest from members who are not part of the Section. The Committee's hope is to continue to promote the benefits of membership.

The ***Mentoring Committee*** is busy trying to match mentors and mentees. This project has been a wonderful initiative to assist new practitioners gain greater knowledge in the field and provides mentors the opportunity to share their knowledge.

The ***Practice Management and Technology Committee*** continues to help the Section members build better practices offering techniques on law office management and updates on technology.

Our ***Publications Committee*** introduced a student writing competition. Letters went out to law schools throughout New York State asking for submissions.

The ***Real Estate and Housing Committee*** is working on identifying new issues affecting the elderly and those with disabilities. Its hope is to put forth a new mission statement identifying the challenges. There has been a discussion of some joint effort with the Special Needs Planning Committee

The ***Social Security, Disability and Supplemental Security Committee*** is planning to develop an article on the huge number of clients affected by unemployment and the spike in disability applications. The Committee would also like to work with other committees to identify planning techniques to share with committee members and of course clients.

Members of the ***Special Needs Planning Committee*** spoke recently at a CLE focused on "Caring and Planning for Aging Individuals with Disabilities and Mental Illness." The Committee continues to plan Pro Bono Clinics and its monthly calls will include guest speakers who will speak on the many issues affecting individuals with disabilities.

The Chairs of ***Sponsorship*** have been busy identifying sponsors for future meetings. This is always a challenge but the Committee has brought in terrific sponsorship opportunities. If you have anyone in mind for future programs, contact Jeanette Grabie and Martin Hersh.

The ***Veteran's Benefits Committee*** held its first conference call recently. The Chairs report it was a great success and hope to build further participation in the Committee's efforts to serve our veterans.

—Adrienne J. Arkontaky

For further information on any of the Committees, go to the NYSBA website at www.nysba.org/Elder or contact the chairpersons listed in the *Elder and Special Needs Law Journal.*

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Spotlight on the Special Needs Planning Committee

The Special Needs Planning Committee's members include practitioners who are concerned with issues affecting individuals with disabilities and their families. Members come from private practice, government organizations, law schools and non-profits. Given the challenges facing individuals with disabilities, this committee has grown tremendously over the past several years.

Our members have organized pro-bono clinics throughout the state and offered no-cost consultations to those in need. Our Committee drafted "Guidelines for SNT Trustees" to assist Trustees and practitioners in administration of First Party Special Needs Trusts. The Committee is committed to regular updates of the guidelines given recent developments in the law. Co-Chair Bob Mascali and Co-Vice Chair Joseph Greenman plan to further expand the guidelines to include Third Party SNTs.

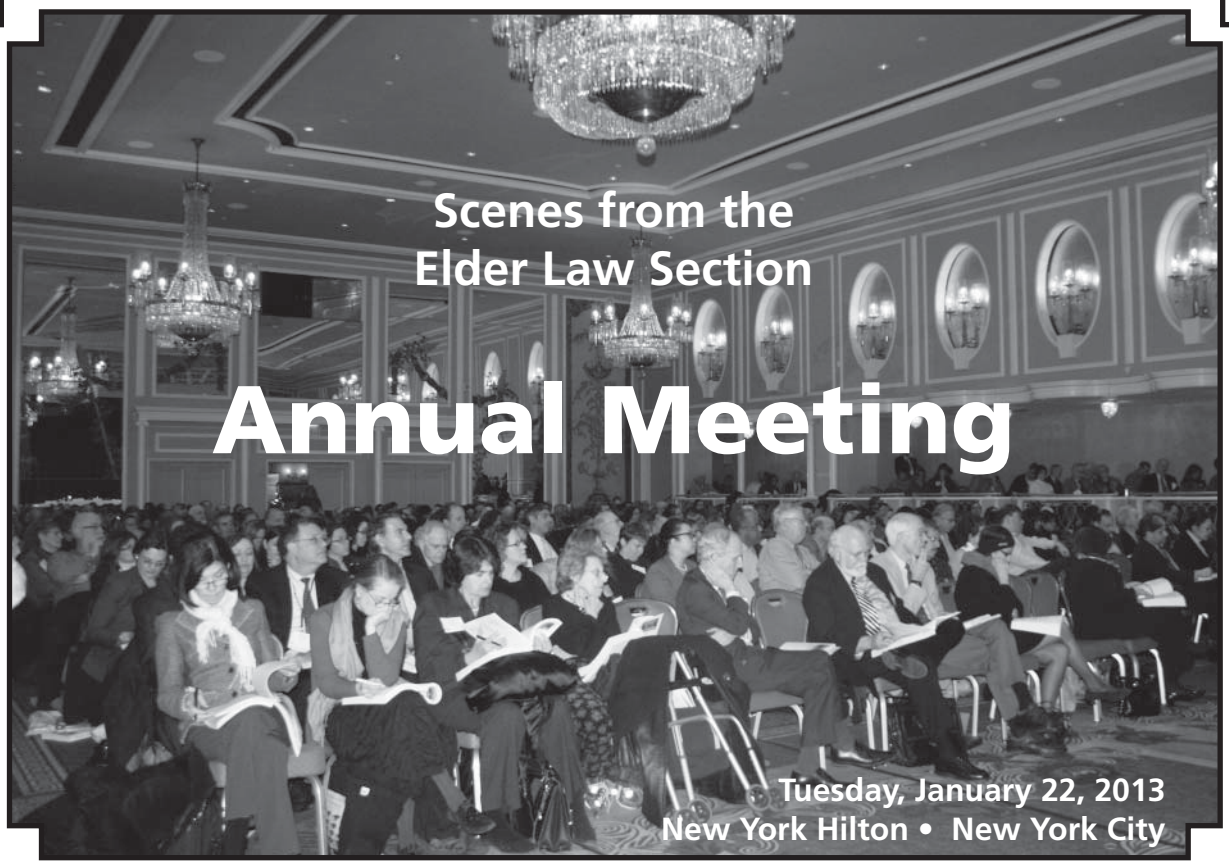
The Committee continues to focus on housing efforts. Lisa Friedman and Co-Chair Adrienne Arkontaky plan to provide information on housing initiatives for individuals with disabilities in the coming months and a subcommittee is being formed to create a guide of regulations, laws and resources for families with relatives residing in OPWDD facilities.

Co-Vice Chair Tara Anne Pleat recently chaired the Fall Meeting held in Tarrytown and recently co-authored an article discussing the ABLE Act. Look for articles by committee members Lauren Mechaly, Elizabeth Briand and Sarah Moskowitz in this edition of the *Journal*.

In connection with the Section's efforts to expand familiarity with special needs planning, the Fall 2013 Elder Law Section Meeting in Albany will have a special needs focus and is being co-chaired by Adrienne Arkontaky and Joe Greenman.

The Committee also explores issues related to special needs estate planning, guardianship, special education issues and other concerns that affect clients with disabilities. The Committee currently holds a conference call on the second Wednesday of the month at 4:00 pm. For more information on the Committee contact Robert Mascali, Adrienne Arkontaky, Joseph Greenman, Tara Anne Pleat or David Okrent.

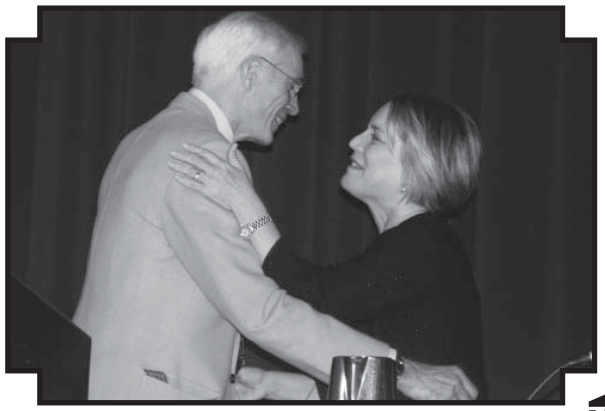
—Adrienne J. Arkontaky



Scenes from the Elder Law Section

Annual Meeting

Tuesday, January 22, 2013
New York Hilton • New York City









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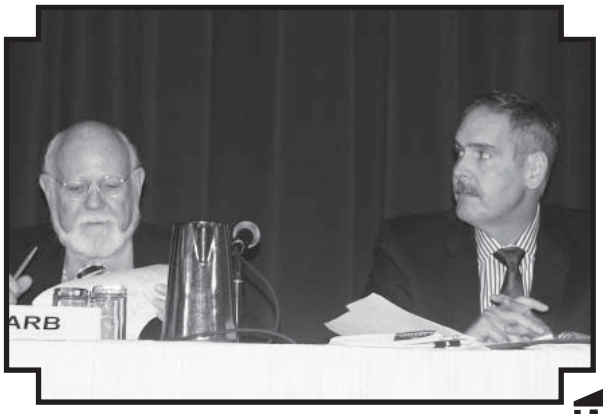
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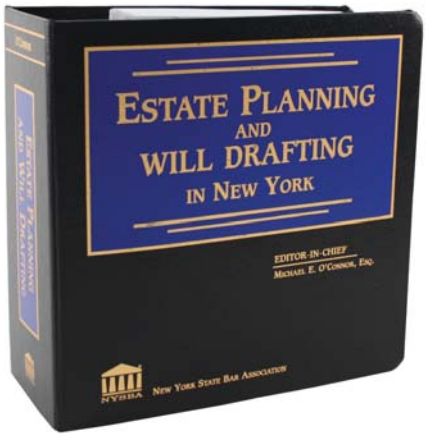

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