

Elder Law Attorney

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

Message from the Chair

As we speed past the midpoint of my term as your Chair, I thought it would be a good time to update you on various Elder Law Section activities. As you know, we are fortunate to have a vibrant and growing Section full of active members who are working very hard on numerous projects.



The Honorable Edwin Kassoff, who recently retired as the Presiding Justice of the Appellate Term, Second Department, is Program Chair of our 2001 Annual Meeting. The program will focus on future trends in the practice of elder law as well as a panel discussion on Supplemental Needs Trusts (SNTs). The panel will include distinguished members of our Section, Joan Robert and Renè Reixach, as well as the Honorable C. Raymond Radigan, former Surrogate of Nassau County, and representatives from the New York State Bureau of Civil Recoveries and New York City Human Resources Administration. The panel will address complex SNT issues, including repayment of Medicaid liens, who should be the trustee of the SNT, and transfers of income into an SNT, among others. In addition, Judge Kassoff will present his practice pitfalls in guardianship practice. The program will be highlighted by a special presentation to

the Honorable Judith S. Kaye, Chief Justice, New York State Court of Appeals. The program will be followed by a cocktail reception where you will have the opportunity to meet the speakers in an informal and relaxed atmosphere. I look forward to seeing you there.

Neil T. Rimsky, Chair of our Real Estate Committee, has prepared, along with Elisabeth N. Radow, an outstanding report on Governor Pataki's assisted living bill. The bill proposes major changes to the laws governing assisted living facilities in New York State and our report contains a very detailed analysis of the bill along with proposed modifications. We hope to garner the support of other Sections of the New York State Bar Association (NYSBA) and ultimately receive NYSBA approval of our report. Subsequent thereto, we plan to circulate our report among New York State legislators with the hope of having a positive impact on the final bill.

Bob Kruger, Chair of our Guardianship Committee, is working diligently on our Section's proposed modifications to Article 81 of the Mental Hygiene Law. Although Article 81 represents a significant improvement over its predecessor statute(s), there still remains much room for improvement to make the proceedings more workable for all parties involved in the process.

Speaking of Article 81, Howard S. Krooks has been appointed as Chair of a special Section task

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force on fiduciary appointments. As many of you may know, Chief Justice Kaye has appointed a special commission to study the issue of fiduciary appointments. Howard, on behalf of our Section, has testified before the special commission and has submitted written comments regarding certain issues surrounding Article 81. The Elder Law Section will continue to work with the special commission as this process evolves.

Dan Fish, Chair of our Elder Law Practice Committee, is working on a report regarding attorney specialization, in particular, certification for elder law attorneys. Our newsletter editor, Lawrence E. Davidow, continues to do an outstanding job with the *Elder Law Attorney*. If you are interested in writing an article for the newsletter, please contact Lawrence. I am sure he will be happy to hear from you. Martin Petroff, Chair of our Membership Committee, has compiled our membership directory. If you haven't received your directory, please contact us. I have found this to be a very useful resource. Ellyn Kravitz, our CLE Chair, is busy planning future programs. If you would like to participate as a speaker or if you have ideas for a future program, please contact Ellyn.

I hope you have had the chance to participate in the Elder Law Section Listserv which has been operating under the direction of our Technology Committee Chair Stephen J. Silverberg. To subscribe, simply send a blank e-mail to join-elderlaw@lists.nysba.org. I am sure that you will find the discussions on the Listserv to be both interesting and informative. Check it out! While you are online, please visit the Elder Law Section's Web site which is in the process of being upgraded by Steve and Ira K. Miller.

I would also like to remind you that our Section recently instituted a policy of having open executive committee meetings. This is your Section and we welcome your valuable input and ideas. Please contact L. Beth Krueger at the State Bar Association for a schedule of upcoming executive committee meetings.

As you can see, we have a lot going on in our Section. If you would like to volunteer for any activity, please let me know. I promise to get you involved.

Bernard A. Krooks

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Editor's Message

I am pleased to present to you the 2001 Winter edition of the *Elder Law Attorney*.

It sure has gotten cold outside. Winter is sure upon us. As much as I love New York, I cannot stop myself from thinking what it would be like to live in a warmer climate. What if I just packed my bags and went south for the winter? The fact of the matter is, I just can't. I have too many responsibilities in New York that keep me here all winter.

But that does not stop our retired clients. They seem all too happy to tell us all about the sun shining down on their winter homes. The most popular of these homes can be found in Florida, Arizona, California and North and South Carolina.

The truth is that I am very happy for my "snow-bird clients." In fact, I hope to join their ranks someday.

However, their wintering in another state only leads them to ask us hundreds of questions to which we do not know the answers. It is hard enough keeping track of New York law, now our clients are asking us questions about the laws of their winter homes.

As such, I thought it appropriate to dedicate this issue to the LAWS OF THE RETIREMENT STATES:



Florida, Arizona, California and North and South Carolina.

To facilitate this theme, I presented a single questionnaire to a prominent attorney in each of the five selected retirement states. What follows is their answers to my questions. I hope you will find the information helpful.

There are also many articles to read in the expanded News Section of our journal. I am very fortunate to work with such a dedicated and enthusiastic group of attorneys.

I would like to take this opportunity to publicly thank Jennifer Sessler, Esq. for her excellent article submitted in the Fall edition of our journal, entitled *Medicaid Planning in New York: Can an Unequal Joint Tenancy Protect the Family Home?* I have received wonderful feedback about her article, but was upset to learn that we left her biography out of the article by accident. As such, I have included her biography in this edition at the end of the News Section. If anyone has a question for Jennifer about her article, she can be reached at the address and numbers listed at the end of her biography. Thank you, Jennifer.

I hope you enjoy reading this edition of our journal. It was fun to work on.

All my best! Keep smiling!

Lawrence Eric Davidow

REQUEST FOR ARTICLES

If you would like to submit an article, or have an idea for an article, please contact

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Articles should be submitted on a 3 1/2" floppy disk, preferably in WordPerfect or Microsoft Word, along with a printed original and biographical information.

The Laws of the Retirement States: Florida

By Julie Osterhout

I. Medical Advance Directives

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

Yes.

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

Probably, our statute allows next of kin to make medical decisions without the designation being in writing.

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

Yes, they must be signed in the presence of two witnesses, one of whom cannot be a relative. However, oral declarations of a person's intent are also accepted.

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

Health Care Surrogate Appointment, Living Will Declaration.

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

We also have a do not resuscitate (DNR) statute. If there is a signed DNR then no medical attention will be given by EMS, nurses, home health aides or others.

II. Durable General Powers of Attorney

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

Yes, however, because the New York statute only requires notarization, they cannot be used to transfer Florida real property. Our statute requires the Durable Power of Attorney be signed with the same formality as a deed to be used in relation to real property; i.e., two witnesses and a notary.



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

I believe that it would be honored for most items except real property.

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

A durable power of attorney for property management.

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

To be used for gifting, it must be so stated; also, to set up a trust, it must specifically be authorized.

E. Does Florida allow spring powers of attorney?

No, however, there is a bill being proposed in this legislative session.

III. Probate and Trusts

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

\$5,000—\$7,000.

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

Attorneys charge by both methods.

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

Usually a formal administration for a non-taxable estate takes approximately eight months. Clients believe that is lengthy!

The cost varies (see below), but regardless, clients think any amount is expensive.

Florida statute has a presumed reasonable attorney fee, it is:

\$1,500: estates \$40,000 or less;

Additional \$750: estates up to \$70,000;

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Additional \$750: estates up to \$100,000;

Additional 3%: estates up to \$900,000;

Additional 2.5%: estates up to \$3,000,000;

And so on.

Plus hourly fees for extraordinary functions.

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

Summary Administration: Assets up to \$25,000

Family Administration: All assets (not just probate) don't exceed \$60,000 and go to "family members"

Formal Administration: Assets over \$25,000

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

Many attorneys routinely prepare living trusts to avoid probate. Generally a trust reduces the cost and the time marginally unless it is a small estate with one child.

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

Trusts must be signed with the same formalities as a will. The testator must sign the document at the end. The two witnesses must sign the document in the presence of the testator and in the presence of each other. Any trust or will executed by a nonresident of Florida is valid in Florida if valid under the laws of the state where the testator was at the time of execution.

A will that is self proved is automatically accepted by the court. If it is not self proved, then one of the witnesses must be located and then attest their signature. Therefore, it is much better for the will or trust to be self proved.

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

Homestead real property should not be transferred into a living trust without a thorough understanding of the Florida homestead laws. By constitutional provision a homestead must pass in fee simple to the spouse, therefore this asset cannot be used to fund a credit shelter trust without a postnuptial agreement waiving homestead. This is the most com-

mon mistake I see made by attorneys without a thorough understanding of the homestead laws. Even if the property was non-homestead when you put it in the trust, the moment the individual becomes a Florida resident it is considered homestead and must be treated as such. After death, non-homestead real property transferred to a trust cannot be sold without a probate until the expiration of the two years creditor claim period. This is because there is no mechanism for a title company to know whether the creditors have been paid by the trustee and they will not accept a statement from the trustee to that effect.

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

In addition to the above stated issues, the deed must comply with the requirements of the recorders office, as well as, have two witnesses and a notary. As we all are aware, preparing a deed for real property in a state where you are not licensed to practice is considered unauthorized practice, so retaining an attorney in Florida to prepare the deeds is the better way to proceed.

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

1. Creditor's rights?

No.

2. Community property laws?

No, we are not a community property state.

3. Other spousal rights?

Currently there are no spousal rights as to the assets in a living trust. Effective October 1, 2002, there will be. It is a very complicated formula.

4. Real property laws?

No, you still must pay the real estate taxes.

5. Local taxes?

Transferring homestead real property to a living trust does not affect the homestead exemption for real estate tax purposes.

6. Homesteads or other constitutional rights?

See above. An attorney should not be advising anyone regarding homestead real property in Florida without a very thorough understanding of the law. Transferring homestead real property to a living trust does not affect the homestead exemption for real estate tax purposes.

IV. Taxes

A. Does Florida have an income tax?

Heavens, no, we depend on our visitors from New York!

B. Does Florida have an estate tax?

We are a “pick-up” state.

C. Any other taxes we should know about?

We have an intangible tax on stocks and bonds, it is quite nominal and it appears that it may be totally repealed in the near future. See my article in the Snowbird News section on page 64 of this edition of the *Elder Law Attorney*.

D. In what way do Florida state taxes impact the drafting of documents for clients?

You can draft trust in a way to avoid the intangible tax, however, that requires giving up most control over your assets.

V. Nursing Homes and Long-Term Care Financing Issues

A. What is Medicaid called in Florida?

Institutional Care Program (ICP) Medicaid.

B. Is Florida an income cap state?

Yes.

C. 2000 Numbers

1. What are the rates for Medicaid transfer penalty purposes in Florida?

\$3,300 for the entire state.

2. What is the MMMNA and CSRA in Florida?

\$1,407 and \$89,120.

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

\$4,500 room and board only.

E. Does Florida allow the rule of halves?

Yes, in fact we can do monthly gifts of \$6,500 because we round down, i.e., \$3,300 divided into \$6,500 is 1.9, so that shelters twice as much as “half a loaf.”

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

Yes, we also use annuities, raising the community spouse resource allowance and sole benefit trusts. IRAs are not counted as an asset if the individual is receiving the minimum withdrawal mandated by the IRS on a monthly basis. (This is not true in all areas of Florida!)

G. Does Florida allow income only trusts?

Yes, but I do not believe they are widely used as a planning vehicle because there are so many other options that do not restrict the principal so drastically.

H. What type of Medicaid planning trusts are popular in Florida?

I don't believe Florida practitioners use trusts routinely for Medicaid planning, other than d4A trusts.

I. Does Florida Medicaid cover assisted living facilities?

Yes, but the program has very limited funds.

Currently there are 95 people on the waiting list in Lee County alone.

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

Yes, but the transfer of the remainder interest creates an ineligibility period. In Florida, homesteads are exempt, even at death, therefore, we rarely take any action as to the homestead. Recently, many attorneys have been using an enhanced life estate deed which allows the owner to keep the life estate and the right to sell, mortgage or lease. Medicaid does not consider the use of this deed to be a transfer and probate is avoided at death.

K. What significant assets are exempt from Medicaid in Florida?

IRAs, rental real estate, jointly titled assets that require both signatures to sell.

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

Very little, and there is a waiting list.

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

The nursing home industry is attempting to get a law passed to limit the rights of an individual to recover damages if injured or killed in a nursing home.

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

It is important that a Florida attorney provide all information pertaining to Medicaid eligibility because the Florida law as in the other states is constantly in flux. Additionally, the way the law is interpreted varies from district to district!

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

If the client is retiring to Florida, and will consider themselves a Florida resident, then they should have a Florida attorney prepare all their legal documents. Currently in Florida we do not have an elective share as to the augmented estate. Effective October 1, 2001, *all* assets of the deceased individual regardless of how titled will be subject to the elective share.

Julie Osterhout has been practicing law in the Fort Myers area since 1980. She received her Juris Doctorate in 1980 from Mercer Law School and opened her private practice in 1990. She has concentrated on the laws and issues affecting the elderly since 1982. Her practice includes estate planning, probate, guardianship, asset protection planning and Medicaid qualification. In 1995 she was one of the first individuals nationally certified as an Elder Law Attorney by the National Elder Law Foundation. In 1998 she was one of the first individuals certified by The Florida Bar as an Elder Law Attorney. She is very active in the community and championed the formation of the Alvin A. Dubin Alzheimer's Resource Center, Inc. She is the immediate past chair of the Elder Law Section of The Florida Bar and is a current member of the Board of Directors of the National Academy of Elder Law Attorneys. She was named a Fellow of the National Academy of Elder Law Attorneys in 1997 for outstanding service to the legal community and to seniors.

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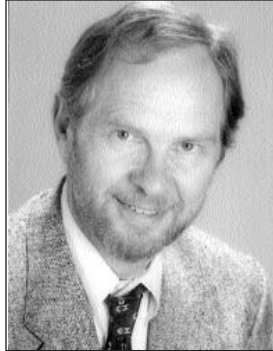
The Laws of the Retirement States: Arizona

By Robert B. Fleming

I. Medical Directives

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

Yes. Arizona law recognizes the validity of any document that is valid in the state and at the time it is executed. A health care proxy probably also complies with Arizona's own health care power of attorney statute, so long as it is witnessed (two witnesses, neither of whom is a health care provider for the declarant—one witness will actually suffice in most cases, as long as the sole witness is not a person who will inherit from the declarant).



B. Will it be honored in practice?

Yes, although it is conceivable that there might be some time delay if a given health care provider decides it is necessary to determine the meaning or effect of New York law. That is unlikely to be a problem, however.

C. Does Arizona honor living wills?

Yes. A living will is valid if valid where executed, but if you want to avoid any confusion on that score simply include a clear statement of intent and two witnesses (the witnessing requirements are the same as for health care powers of attorney as described above).

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

Most Arizona attorneys prepare both a health care power of attorney and a living will in most situations. In fact, it is common to have the two types of documents combined into a single form. Although the statute itself is silent on these points, the statutory form also includes autopsy and organ donation provisions.

E. Is there anything else about medical advance directives that are peculiar to Arizona?

Arizona's advance directives law is much more progressive than New York's. There is no statutory

requirement of terminal condition, or certification by physicians—though an advance directive containing such provisions will only be effective if its terms are met. Arizona also permits two other special kinds of advance directives: (1) a mental health power of attorney, which can permit the agent to consent to inpatient psychiatric treatment and which can be made irrevocable, and (2) a “prehospital medical care directive,” by which a person can refuse resuscitation by paramedics or emergency room personnel. The latter form must be executed precisely as provided by the statute (including being on orange paper), and is not a DNR order, though it is similar in effect. The “prehospital medical care directive” is the patient's own directive, not the physician's order, though it does require a health care provider to sign indicating that the patient has been advised that the form—and the resultant lack of resuscitation—could result in death.

II. Durable Powers of Attorney

A. Will a New York Durable Powers of Attorney be honored in Arizona?

Yes.

B. Will a New York Durable Powers of Attorney be honored in practice?

Yes.

C. What do you commonly prepare in Arizona?

Assuming it is appropriate for the client and they wish to do so, we usually prepare a single durable general power of attorney listing broad and extensive powers.

D. Is there anything peculiar about Arizona trust law?

Yes. Although an out-of-state power of attorney will be recognized in Arizona, any authority which could be used other than for the benefit of the principal (e.g., gifting powers, power to pay fees to the agent, etc.) must be separately initialed by the principal and the witness. Arizona requires both a witness and notarization for powers of attorney executed in Arizona (though out-of-state powers need only comply with the requirements of the state of execution), but the initialing requirements for gifting and similar

powers probably must be met even in out-of-state documents.

E. Does Arizona permit springing powers of attorney?

Yes. Arizona is a Uniform Probate Code state, and our durable power of attorney statute comes from § 5-501 of the Code, though it has been extensively modified (and expanded), especially in the past three years.

III. Probate and Trusts

A. What is a typical cost for a \$250,000/\$250,000 probate?

I would predict total fees and costs in the range of \$3,000 to \$10,000, with fees clustered at the lower end of that range. Although we do not have a statutory fee schedule, I suggest that clients expect 1% as a rule-of-thumb approximation of costs—though with wide variations.

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

With no statutory authority for percentage fees, they have become uncommon (though not unheard of).

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

Not by lawyers. My personal bias is that the important perception here is that of clients, however, and they consider it both expensive and lengthy. We were one of the first states to adopt the Uniform Probate Code (in 1974), and informal and summary proceedings are by now the rule.

D. Is there a minimum value requiring probate?

We have a procedure for collecting small estates by affidavit, with a limit of \$50,000 of total assets. In addition, we have a simplified procedure for real estate up to another \$50,000 in value, so an estate with the precise mix of assets up to a total of \$100,000 could be collected by simplified procedures.

E. Do Arizona lawyers think probate avoidance is important?

Not particularly, but clients do.

F. Are there trust formalities required in Arizona?

Arizona subscribes to the Restatement principle that a trust can even be created orally.

G. Is there anything else peculiar about Arizona trust law?

No. We are inclined to adopt Uniform laws, and so we have the Uniform Principal and Income Act, the Uniform Prudent Investor Act, the Uniform Transfers to Minors Act and others.

H. Are there pitfalls to transferring property into trust in Arizona?

Because of a famous case involving the death of a reporter in the '70s, Arizona law now requires that any trust which owns real property must disclose the names of trustees and beneficiaries. That requirement is usually satisfied by contemporaneous recording of a certificate of trust existence or similar document. Arizona also requires transfers of real property to include updated valuations of the property, with statutory exceptions that usually apply to trust transfers—but the deed must include the citation to the appropriate statute.

I. Does placing assets in a self-settled trust affect:

1. Creditor's claims?

No.

2. Community property laws?

No—the property in a trust can be separate or community.

3. Other spousal rights?

Yes, to the extent that those rights would ordinarily be asserted in a probate proceeding. Arizona does not have an “augmented estate” concept.

4. Real property laws?

No, except as indicated above (re: recording requirements).

5. Local taxes?

No.

6. Homesteads or other exemptions?

No.

IV. Taxes

A. Does Arizona have an income tax?

Yes.

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B. Does Arizona have an estate tax?

Yes, but it is a pure “sponge” tax (that is, there are no additional taxes on non-relative transfers or smaller estates).

C. Are there any other taxes New York practitioners should know about?

Yes—we have the usual outrageous taxes on hotel rooms and rental cars when you visit for golf vacations. We use the proceeds to build sports arenas and the like.

D. What effect do state taxes have on drafting?

Not much, since the income tax is so similar to the federal income tax and the estate tax is a sponge tax.

V. Nursing Homes and Long-term Care

A. What is Medicaid called?

The Arizona Health Care Cost Containment System (AHCCCS), with an administrative division called the Arizona Long Term Care System (ALTCS) handling long-term care.

B. Is Arizona an income cap state?

Yes—300% of the maximum federal benefit rate (e.g., \$1,536 in 2000).

C. 2000 numbers

1. Average cost of care (transfer penalty divisor): \$3,352.91 in Maricopa (Phoenix), Pima (Tucson) and Pinal (between the two) counties. Elsewhere in the state, the figure is \$3,115.69.
2. MMMNA and CSRA: MMMNA is \$1,383/month, with adjustments up to a cap of \$2,103. CSRA is one-half of total available assets at time of first eligibility for institutionalization, up to \$84,120 (and with a minimum of \$16,824).

D. What is the true cost of nursing home care?

I usually use about \$4,000 per month, though it may be higher depending on level of care required.

E. Does Arizona allow the rule of halves?

Yes.

F. Does Arizona recognize spousal refusal?

No. We do use annuities, but Arizona regulations require them to be level-payment, commercial annuities. Community spouse’s retirement assets are treat-

ed as available, though they can be annuitized to avoid inclusion.

G. Does Arizona allow income-only trusts?

Yes, though they are not commonly used (we are an income cap state).

H. What types of Medicaid trusts are popular?

d(4)(A) trusts and d(4)(B) trusts are common, but few others.

I. Does Medicaid cover assisted living facilities?

Yes, with some limitations. At the present time, fully one-half of all long-term care Medicaid recipients in the Tucson area receive their care in settings other than nursing homes (though the dollars spent on nursing home placements are much higher), with assisted living facilities being one of the three common settings (adult foster care homes and home care are the other two).

J. Does a life estate protect the home from Medicaid?

Yes, though the transfer of a remainder will be a disqualifying transfer. We have begun to use life estate deeds with retained powers to sell the property.

K. What is exempt for Medicaid purposes?

We are limited to the federal list—home, auto, household furnishings, burial and \$1,500 for funeral, tools of trade, etc.

L. Does Medicaid pay for home health care services?

Yes, to a limited extent. See the explanation under assisted living facilities above.

M. What are the biggest long-term care issues?

Wow. What an opportunity. The system is spiraling out of control, and no one seems to have the political will to fix it. Costs for long-term care will presumably escalate with the aging of the baby boomers, even as the pool of prospective contributors to the cost of care temporarily shrinks. As constructed, the system forces all long-term care to be medicalized, and discourages innovation or development of home care options. States are only contributing 30-40% of the cost of care, but are being bankrupted. Meanwhile Republicans beat their chests about too-big government and promise tax cuts in what George W.’s daddy once called “voodoo economics.” Other than that, everything is fine.

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N. Anything else peculiar about Arizona trust law?

Not really, except for the general observation that our Medicaid rules are purposely set at the federal minimum in most cases, so eligibility and benefits both tend to be stingy (with the notable exception of our substantial Home and Community Based Services program).

VI. Do You Have Other Advice for New York Transplants?

Look into the value of community property titling for the stepped-up basis. Move assets firmly out of New York so that there is neither a New York estate tax claim (not a problem when New York's sponge tax gets fully phased in) nor a New York Surrogate Court proceeding. Revise both financial and medical directives, since Arizona's power of attorney statute is more restrictive and its advance directive statute more liberal.

Robert B. Fleming, partner in the Tucson firm of Fleming & Curti, P.L.C., has practiced law for 24 years and focused exclusively on elder law and estate planning for the past 19 of those. He is the author of the recently-released *Elder Law Answer Book* (Panel Publishers) and is a fellow of both the American College of Trust and Estate Counsel and the National Academy of Elder Law Attorneys. He is a private pilot, a second *dan* (degree) black belt in *Chayon Ryu* (a combination martial arts discipline) and a dedicated scuba diver. A committed technology aficionado, he also is webmaster of the Fleming & Curti Web site (www.elder-law.com), which was named the number one small-firm legal Web site by *Law Office Computing* in October 2000.



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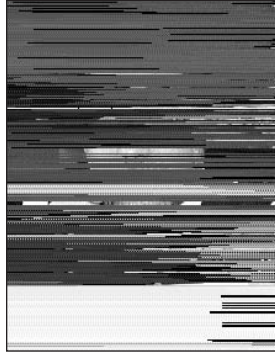
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The Laws of the Retirement States: California

By Neil A. Harris

I. Medical Advance Directives

Effective July 1, 2000, California repealed its existing laws related to Durable Powers of Attorney for Health Care and the California Natural Death Act, recasting those provisions as part of the new Health Care Decisions Law (California Probate Code §§ 4600–4805). The Health Care Decision Law was inspired by and draws heavily from the Uniform Health Care Decisions Act of 1993. Under the new Health Care Law, the terms “advance health care directive” or “advance directive” means either an individual health care instruction or a power of attorney for health care.



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

A properly drafted and executed New York Health Care Proxy is valid in California. As provided under the new Health Care Law, a written advance health care directive or a similar instrument executed in another state or jurisdiction in compliance with the laws of that state, is valid and enforceable in California to the same extent as a written advance directive validly executed in California. Further, in the absence of knowledge to the contrary, a physician or health care provider may presume that a written advance health care directive or similar instrument is valid whether executed in California or another state or jurisdiction.¹

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

Although the new Health Care Law has been in effect for less than four months and I have not had a client attempt to use an out-of-state advance health care directive, I do not believe that such use will be problematic. The new Health Care Law provides civil damages to the aggrieved party in the amount of \$2,500 or the amount of actual damages, whichever is greater, plus attorney’s fees where the intentional conduct of a health care provider violates the law.²

C. Does California honor living wills? If so, are there any formal requirements?

A living will, formerly known in California as a Declaration Concerning Life Sustaining Treatment, is considered an individual health care instruction under the new Health Care Law. As stated above, if the New York living will is valid under New York law, California will honor it. Further, an adult having capacity may make an oral or written individual health care instruction which may be limited to take effect only if a specified condition arises.³ If the individual health care instruction is written, it must contain the date of execution, be signed by the instructing person or by another acting at the direction of the instructing person and in his or her presence and be acknowledged before a notary public or signed by at least two witnesses who meet statutory witness requirements.⁴

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

By far, I prepare more Durable Powers of Attorney for Health Care than any other form of advance health care directives. It goes without saying that, whenever possible, it is best to have the patient make his or her own health care decisions. Where the patient’s involvement is not possible, however, I believe that it is far more advantageous to have a surrogate decision maker consider all of the factors prior to making the required health care decision. All too often, I find written individual health care instructions of limited value given the information available at the time of the health care decision.

E. Is there anything else about medical advance directives that are peculiar to California?

The failure to revise existing Durable Powers of Attorney for Health Care and the use of outdated preprinted Durable Powers of Attorney for Health Care continue to be problematic in California. Any Durable Power of Attorney for Health Care executed prior to January 1, 1992 is statutorily limited to a seven-year period of effectiveness. If the principal is not competent at the end of that seven-year period, the Durable Power of Attorney for Health Care remains in effect until such time as the principal regains the requisite capacity to execute a new Durable Power. If, however, the principal is competent at the end of the seven-year period, the Durable

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Power of Attorney for Health Care becomes ineffective at the end of the seven-year statutory period. All preprinted Durable Powers of Attorney for Health Care created prior to January 1, 1992 include an express seven-year limitation which limits the useful life of the document even if the Durable is executed subsequent to January 1, 1992.

II. Durable General Powers of Attorney

California does not have a specific statutory scheme for Durable General Powers of Attorney. Instead, California includes Durable General Powers of Attorney under the laws related to all forms of powers of attorney.⁵ Other than a health care power of attorney, no power of attorney is presumed to be durable. To be durable, the document must include an express statement of the principal's intention to make the power durable.⁶ Other than a power of attorney for health care, all powers of attorney are presumed to be general.⁷

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

A durable power of attorney executed in New York in compliance with the law of that state or which complies with the laws of California is valid and enforceable in California to the same extent as a durable power of attorney executed in California, regardless of whether the principal is a domiciliary of California.⁸

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

While California law may allow for the acceptance of a New York Durable General Power of Attorney, most California-based institutional third parties routinely refuse to honor out of state durable powers. In fact, many California based institutionalized third parties are reluctant to honor California durable powers of attorney. In an effort to encourage acceptance of both California and foreign durable powers by third parties, California law affords protection to third persons who, acting in good faith, rely on the agent's representations.⁹ California law also provides for enforcement of the durable general power of attorney, including attorney's fees, against a third party who unreasonably refuses to honor the power of attorney.¹⁰

C. What financial advance directives do you commonly prepare for your clients?

As much of my practice involves long-term care planning, Medicaid eligibility and asset preservation,

I commonly prepare durable general powers of attorney for my clients. Properly prepared durable general powers executed while my client is competent, allow my client's agent to implement or continue a prearranged plan should my client lose his or her capacity prior to completion or enactment of the plan.

D. Is there anything a New York attorney should know about financial advance directives that are peculiar to California?

While an agent under a properly drafted durable general power of attorney is afforded a wide range of statutory authority to act on behalf of the principal, there are certain acts of the agent that must be expressly provided for in order to be effective. Absent express authority, an agent under a durable general power of attorney cannot: (1) create, modify or revoke a trust; (2) fund with the principal's property a trust not created by the principal or a person authorized to create a trust on behalf of the principal; (3) make or revoke a gift of the principal's property in trust or otherwise; (4) exercise the right to make a disclaimer; (5) create or change survivorship interests in the principal's property; (6) designate or alter the designation of beneficiaries to receive any property, benefit or contract right on the principal's death; and, (7) make a loan to the attorney in fact. As many of the above powers may be needed to protect the principal's assets should the principal require long-term care benefits under Medicaid, it is important to expressly include such authority where appropriate.

E. Does California allow springing powers of attorney?

California law provides that a power of attorney may become effective at a specified future time or on the occurrence of a specified future event or contingency including, but not limited to, the subsequent incapacity of the principal.¹¹ Further, the principal may designate a person or persons, including the agent, who may, by written declaration, indicate that the specified event or contingency has occurred.¹²

III. Probate and Trusts

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

Under California's statutory probate attorney's fee schedule, the above probate would result in ordinary compensation to the attorney in the amount of \$11,150. The personal representative would be entitled to the same statutory fee. Probate fees are calcu-

lated on the total appraised value of the estate in the inventory, plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales without reference to encumbrances or other obligations. The attorney for the personal representative and the personal representative each receive: 4% of the first \$15,000 plus 3% of the next \$85,000 plus 2% of the next \$900,000 plus 1% of the next \$9,000,000 plus 1/2% of the next \$15,000,000 and an amount determined to be reasonable by the court for everything over \$25,000,000.¹³ The attorney and/or personal representative may also be reimbursed for expenditures made on behalf of the estate including, but not limited to, filing fees, appraisal fees and publication costs. Where the services rendered by the attorney are extraordinary and, where the attorney has not been adequately compensated by the ordinary statutory fee, the attorney may petition the court to receive additional fees for all extraordinary services rendered.¹⁴

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

Probate fees are either calculated statutorily as described above or may be charged by the hour. In this area, most attorneys still prefer the statutory fee calculation to hour by hour record keeping. On the average, however, it is more advantageous to bill under the statutory scheme for larger less complex estates and bill smaller estates (approximately \$100,000 to \$250,000) by the hour.

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

As more and more financial planners, financial commodity salespersons and "trust mills" push the need for trusts, the public becomes more convinced that the probate process is extremely expensive, intrusive and time consuming. In reality, the cost of a probate and the time required to complete the process is not different than that of establishing and administering a living trust.

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

The minimum gross value of an estate subject to probate is \$100,000. That amount does not include the value of property passing to the decedent's surviving spouse, assets held by the decedent as a joint tenant, property in which the decedent held a life or other interest terminable upon the decedent's death, property held by the decedent in a living trust, a multi-party account to which the decedent was a party at the time of death, sums held by decedent on deposit

to be paid to another on the death of the decedent, motor vehicles registered to the decedent and mobile, manufactured and/or floating homes registered by the decedent with the Department of Housing.¹⁵

E. What is the general attitude toward avoiding probate in California?

It appears that the overwhelming consensus among California attorneys is to avoid probate where possible and practical. Most attorneys now recommend living trusts to many, if not all, of their clients. That recommendation is based, in part, on probate avoidance. Of equal importance, however, is the uninterrupted management of the trustor's affairs should the trustor become incapacitated and the privacy available by administering the trust estate within the family. But as should be expected, avoidance of probate is not advisable in all cases. Until recently, the only method available to shorten a professional decedent's liability was to open a small probate while administering the bulk of the professional's assets under the living trust. California recently rectified that problem by making the probate creditor's claim process available to trustees during the trust administration. In an effort to further reduce some of the disadvantages of probate and to begin to standardize the probate and trust administration process, the California Law Revision Commission proposed to make an informal probate process available in certain circumstances. That proposal was soundly rejected by California attorneys and legislators. In its place, the California Law Revision Commission has had several bills passed that more formalize the trust administration process.

F. What are some of the formalities in executing a trust in California?

As strange as it sounds, there are very few formalities required in establishing a living trust in California. The major requirements in forming a California trust are trustor capacity and intent. The lack of formality in establishing a California trust is thoroughly discussed in *Estate of Heggstad*¹⁶ where the court concluded that, except where prohibited by the Statute of Frauds, a person can orally establish a trust in all of his or her personal assets. That position was codified in California Probate Code § 17200(a). It seems to me, however, if the trust is a will substitute, testamentary capacity is required and the trust should be in writing, signed by the trustor (or in the testator's name by some other person in the trustor's presence and at the trustor's direction) and be witnessed by at least two persons who are present at the same time, who witnessed the trustor's execution or

the trustor's acknowledgment of the signature and who understand that the document is the trustor's trust.¹⁷ If, as is the more common approach, the trust is considered a contract, contractual capacity is required, the trust should be in writing, executed by the trustor and that signature acknowledged by a notary public.

G. What may be peculiar about California trusts?

While maybe not unique to California, the formal requirements placed on the successor trustees of a family trust appear to surprise many Californians. As alluded to above, Californians, and especially the elderly, have been the target of mass marketing "trust mills" and non-attorney estate planners for many years. As a result, more Californians pass their assets at death by means of a living trust than by a will. Unfortunately, many of the trustors and trustees of these trusts were led to believe that very little needed to be done at the death of the trustor. As a result, the decedent's creditors and charitable beneficiaries were often overlooked in the administration process following the death of the trustor. In direct response to this problem, California formalized the duties and requirements of the successor trustees following the death of the trustor/settlor. California trustees of even the smallest family trust are now held to a much higher standard than in the past. While this much stricter requirements serve to protect trust beneficiaries and creditors, they do place a heavier burden and increased liability on the unsuspecting and often unrepresented successor trustee.

H. What are some of the pitfalls in placing California real property in a New York trust?

In order to fund a trust with California real property, the title to that property must be transferred to the trustees of the trust. This transfer can be accomplished using a grant or warranty deed, a quit claim deed or, in some cases, merely by including the property description on a trust schedule or exhibit incorporated into the trust by reference.¹⁸ The transfer document should be recorded in the county in which the property is located and, if so recorded, requires that the transfer document be notarized. All deeds submitted to a California county recorder's office for recording must be accompanied by a Preliminary Change of Ownership Report (PCO).¹⁹ The PCO is available from most recorder's offices or on a California Non-Judicial Form. Failure to include a PCO with the deed may result in the imposition of an additional fee. Unless otherwise indicated, the filing of the PCO will trigger a reassessment of the transferred property

for tax purposes. To avoid such a reassessment, an exemption in Part 1 of the PCO must be marked. Transfer of the property to a trust for the benefit of the grantor or his or her spouse and/or transfer to a trust revocable by the transferor are exemptions from reassessments.²⁰ Thereafter, whenever a change in ownership occurs, as in the case of the death of a settlor, a new PCO must be submitted. Further, at such time as the trust becomes irrevocable, the real property may be reassessed for property tax purposes unless an exclusion is indicated. Where a principal residence and/or the first \$1,000,000 of other real property passes between a parent and child, California excludes reassessment.²¹

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

1. Creditor's rights?

The settlor of a California revocable trust may make voluntary transfers of trust income or principal (revocation as to each transfer) without restraint. The settlor may even reserve that power in the trust instrument.²² The assets of the trust, however, remain subject to the claims of the settlor's creditors to the extent of the settlor's power to revoke.²³ The California Law Review Commission's comments to that section unambiguously state that the effect of § 18200 is to permit the settlor's creditors to ignore the trust to the extent that it is revocable.

2. Community property laws?

Unless the trust or the instrument of transfer expressly provides otherwise, community property transferred into a trust retains its community character during the marriage regardless of the identity of the trustee. Any subsequent modification of the trust as to the rights and interests in that property during marriage can only be exercised with the joinder or consent of both spouses.²⁴

3. Other spousal rights?

Although transferring an asset into a revocable living trust does not effect spousal rights during the joint lives of the settlors, certain spousal protections afforded the surviving spouse in the probate administration process are not available rights under the trust administration process. These protections include, but are not limited to: (1) temporary possession and a set aside of some of the decedent's personal property including a vehicle, household furnishings, jewelry, works of art, etc.; (2) the use of the decedent's home; and, (3) a family allowance.²⁵ Cali-

California also offers some protection for a spouse or child omitted from the decedent's will.²⁶

4. Real property laws?

The laws affecting real property remain unchanged upon transfer of that property to a revocable trust.

5. Local taxes?

As discussed above, local property and other taxes are not affected by transfer of those assets into a living trust.

6. Homesteads or other constitutional rights?

There appears to be little or no effect on the homestead or other constitutional rights of a trustor who transfers assets into his or her revocable trust.

IV. Taxes

A. Does California have an income tax?

Yes.

B. Does California have an estate tax?

Although California does not have an inheritance tax, it does levy an estate "pick-up" tax equal to the amount of the federal estate tax credit attributable to the decedent's California property. Thus, the estate cannot pay more death taxes than it would if there were no pick-up tax.²⁷

C. Any other taxes unique to California?

See the above discussion on California property tax and reassessment.

D. In what way do California state taxes impact the drafting of documents for clients?

While California state taxes have little or no impact on the preparation of legal documents for my clients, the same cannot be said for our community property laws. For example, since California is a community property state, we routinely use a single family trust format that divides into two or more sub-trusts (A/B/C format) at the death of the first spouse.

V. Nursing Homes and Long-term Care Financing Issues

A. What is Medicaid called in California?

Since California contributes a significant amount of state funds to the Medicaid system, the State refers to its Medicaid program as Medi-Cal (just imagine if Mississippi took a similar approach).

B. Is California an income cap state?

California does not consider income in determining Medi-Cal eligibility. Instead, eligibility is based on the value of the applicant's assets. Income is used to calculate the recipient's monthly share of cost or co-payment.

C. Year 2000 Medi-Cal numbers

1. Transfer penalty rates

California imposes a transfer penalty on all assets transferred within 30 months of application for long-term care benefits. The penalty period is calculated by dividing the value of the asset transferred by the Average Private Pay Rate (APPR) in a skilled nursing facility, rounded down to the nearest whole number. The APPR is a statewide average provided by the California Department of Health Services every February. The current APPR is \$3,836. There is no transfer of assets penalty when applying for Community Based (At Home) Medi-Cal.

2. What is the Minimum Monthly Maintenance Needs Allowance (MMMNA) and Community Spouse Resource Allowance (CSRA) for California?

The 2000 MMMNA rate is \$2,103 and the CSRA is \$84,120.

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

While the average statewide rate (APPR) appears fairly accurate, I am more familiar with the average private pay rate in this area of the state. In the northeastern portion of California and, in fact, in many other rural areas of the state, the average private pay rate can be divided into two categories: (1) "stand alone" skilled nursing facilities; and, (2) skilled nursing facilities associated with a local hospital. On the average, my clients pay between \$3,100 to \$3,500 per month for a shared room in a "stand alone" skilled nursing facility. That same room costs approximately \$5,500 to \$6,500 per month if the facility is located in or associated with a hospital. Unfortunately, in many of the more remote communities in this area, there are no "stand alone" skilled nursing facilities.

E. Does California allow the rule of halves?

While California allows "the rule of halves" or "the half loaf" approach, that technique is not widely used nor is it really necessary at this time. With the exception of those rules related to trusts and annuities, California has not adopted the remainder of OBRA '93. For that reason, California still allows

multiple and overlapping gifts to be made while treating and penalizing each individual gift as a separate transfer. Further, California runs each individual gift penalty period concurrently with all other individual gift penalty periods. Therefore, it is more expedient and cost effective to make a series of small, overlapping gifts rather than one large transfer.

F. Does California allow spousal refusal?

I am not aware of an attempt to use spousal refusal in California so I cannot comment on whether it would be accepted or not. Instead, we use a variety of other methods to protect the Community Spouse:

1. **Increase the CSRA:** Where the Community Spouse does not receive the entire MMMNA through his or her fixed income alone, a petition is filed with the superior court in which the couple resides authorizing the Community Spouse be allowed to retain sufficient CSRA assets with which to generate the additional MMMNA amount. For example, if H and W have \$250,000 of Medi-Cal non-exempt assets, the CSRA is \$84,120, the MMMNA is \$2,103. W receives a Social Security payment of \$1,000 in her name and the average rate of return on funds held in local certificate of deposits (CD) accounts is 4.5%. I can seek a court order to raise the CSRA to amount in excess of \$250,000, thereby qualifying H immediately $(\$2,103 \text{ (MMMNA)} - \$1,000 \text{ (W's SSA)}) = \$1,103$ (additional monthly income needed) $\times 12$ (annual amount of income needed) $/ 0.045$ (average CD rate of return on invested funds) = \$294,133.33.) The local courts do not consider the actual current income from the couple's non-exempt funds nor are the awarded additional funds required to be invested in a CD. This same approach is available at fair hearing upon denial of the couple's Medi-Cal application for excess resources.
2. **Purchase an immediate annuity in the name of the Community Spouse:** Where increasing the CSRA is not possible or does not, by itself, qualify the couple, it is permissible to purchase an immediate annuity with the excess and/or non-exempt assets in the name of the Community Spouse. The annuity must be actuarially sound and pay out equal payments. In calculating the share of cost, the Community Spouse will normally elect to retain all income in his or her name alone (Name on Check Rule) and pay the Institutionalized Spouse's income to the skilled nursing home.

3. **Gifting of excess non-exempt assets:** As discussed above, the couple can transfer their excess non-exempt assets to a trusted love one in small, overlapping gifts to hasten eligibility. The recipient can, without direction and absent the transferor's authority, establish a fully discretionary special needs trust and/or support trust for the transferor with the transferee's own funds.

4. **Transfers of Income:** As stated above, California has not adopted most of OBRA '93. For that reason, California still distinguishes between assets (resources) and income. All of California's transfer penalties relate to the transfer of assets but not income. By definition, certain inheritances and insurance benefits are income in the month received. For that reason, it is often possible for a Medi-Cal recipient or applicant to transfer an inheritance or the insurance benefits from a deceased person during the month of receipt and not suffer any period of ineligibility.

5. IRAs and Qualified Pension Plans:

- (a) Community Spouse: All IRAs and Qualified Pension Plans, whether paying out or not, are exempt assets. If paying out minimum distribution, the income is considered in determining the share of cost but the principal is protected.
- (b) Institutionalized Spouse: IRAs and Qualified Pension Plans belonging to the Institutionalized Spouse are considered available unless the Institutionalized Spouse is receiving periodic payments of principal and income. If paying out, the Institutionalized Spouse's IRAs and Qualified Pension Plans are considered unavailable but not exempt. The income is used in determining share of cost.

G. Does California allow an income trust?

Since California does not consider income in determining eligibility, there is no need to establish an income trust for eligibility purposes.

H. What type of Medi-Cal planning trusts are popular in California and why?

As with many areas of the country, many Medi-Cal planners use the d(4) trusts to help protect assets during the recipient's life. I am aware of a few planners who continue to use irrevocable trusts as a means of insuring that the assets will be available for

the ill person's needs. As my practice involves a substantial amount of gifting, I make use of donee settled discretionary trusts. While the donor is not fully protected by such a trust, it does offer the donor some peace of mind especially where the donor wishes gifts be made to all of his or her children but managed by one or more trustworthy child. The donee discretionary trust also allows the trustee to provide for the donor until such time as the donor is placed in a skilled nursing facility and Medi-Cal benefits are needed.

I. Does Medi-Cal cover assisted living facilities in California?

Medi-Cal offers two types of benefits, Community Based and Long Term Care. Neither program provides toward the cost of residing in anything other than a skilled nursing facility.

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

The use of a life estate in California does not and is not used to protect the home from a Medi-Cal recovery. Under Medi-Cal law, the principal residence is exempt and thus protected as long as the Medi-Cal recipient maintains a subjective intent to return. At the Medi-Cal recipient's death, however, the California Department of Health Services (DHS) has the right to recover against that home for all Medi-Cal benefits paid to or on behalf of the recipient up to the value of the recipient's interest in the home. That recovery cannot occur if any portion of the house passes to a dependent or disabled child. Where the house passes to a surviving spouse, DHS retains the right to recover that interest passing to the surviving spouse at his or her death. Property passing in a trust, by joint tenancy or by any other similar legal devise is not protected. Other than the limited exception for assets passing to dependent or disabled children, the only method to fully protect the house from recovery is to transfer the house prior to the Medi-Cal recipient's death. As California does not penalize the transfer of any exempt asset to any person, gifting the house is not particularly problematic for Medi-Cal purposes. An inter vivos gift of an appreciated asset may, however, create a capital gains tax problem. For that reason, the grantor often retains an interest in his or her transferred house in the form of a life estate or a retained right of occupancy to insure a basis step up at the grantor's death.

K. Exempt assets under Medi-Cal

California exempts the Medi-Cal recipient's principal residence where the recipient is living in that residence or is absent but maintains a subjective intent to return. The principal residence includes, but is not limited to, a house, the entire multiple unit dwelling if any portion of the dwelling serves as the principal residence, all of the land or building surrounding, contiguous or appertaining to the principal residence. In addition to the principal residence, the following items belonging to the Medi-Cal recipient or his or her spouse are routinely exempted: household furnishings and furniture, personal collectibles and art, jewelry (limit \$100 if single, unlimited if married), equipment necessary for the upkeep of the residence, one vehicle used to meet the recipient's transportation needs (unlimited value), business property, equipment and inventory (if business is providing a means of support for recipient), unlimited prepaid burial arrangements, \$1,500 in a designated burial fund and Community Spouse's IRA and qualified retirement plan. Non-exempt assets must be available to be considered as part of the resource limit. Jointly held real property where one or more of the co-owners refuse to sell or purchase the recipient's share is considered unavailable.

L. Does Medi-Cal pay for any home care services in California?

Community Based Medi-Cal provides In-Home Support Services where required. In order to determine the level of in-home assistance required, an at home assessment is conducted. Based on the need of the recipient, the program will provide some basic assistance in the home (in our area, the maximum assistance ranges from 50 to 150 hours per month). The program will pay for the assistance but the recipient normally will find the assistant. As with Medi-Cal Long Term Care, the recipient may have to pay a share of cost prior to Medi-Cal allocating any resources.

M. What is the biggest issue facing California concerning Medi-Cal and long-term care?

Perhaps the greatest problem facing California concerning Medi-Cal and long-term care is the low rate of Medi-Cal reimbursement paid to the nursing home for the care of our elderly. In many of the rural areas of California, the percentage of skilled nursing facility residents on Medi-Cal exceeds 75%-80%. While the number of facility residents has steadily increased during the past ten years, the number of nursing home failures and closures has also increased. Often, those facilities that have been able

to survive have done so by cutting the number and quality of direct service staff. Unless Medi-Cal increases its reimbursement rate to skilled nursing facilities for the proper care of Medi-Cal recipients, the availability of Medi-Cal beds in rural California will continue to decrease, thereby forcing those rural elderly in need of skilled nursing to the more distant and larger urban centers of the state.

N. Is there anything else New York attorneys should know about Medi-Cal and long-term care in California?

Until California adopts OBRA '93, much of the Medi-Cal system will remain unique but offer substantial planning opportunities. California has announced, however, that it is currently drafting new OBRA '93 compliant regulations. Unclear is how actions taken under the old rules will be treated upon application for assistance under the new rules. Planning during this transitional period is and will become more complicated and hazardous. Out of state attorneys should consult with a qualified California Elder Law Attorney prior to taking any action involving California's Medicaid system.

VI. Elder Law Advice

Like many areas of the country, it appears that many California attorneys now practice Elder Law. It is important, however, that you advise your clients who are considering retirement in California to seek out and use a qualified (Certified) California Elder Law Attorney to routinely review existing estate and long-term care plans that may be used in California.

Endnotes

1. California Probate Code § 4676.
2. California Probate Code § 4742(a).
3. California Probate Code § 4670.
4. California Probate Code § 4673.
5. California Probate Code §§ 4000-4545.
6. California Probate Code § 4124.
7. California Probate Code § 4261.
8. California Probate Code § 4053.
9. California Probate Code § 4303.
10. California Probate Code § 4306.
11. California Probate Code § 4030.
12. California Probate Code § 4129.
13. California Probate Code §§ 10800, 10810.
14. California Probate Code § 10811.
15. California Probate Code § 13050.
16. (1993) 16 Cal.App.4th 943.
17. California Probate Code § 6110.
18. *Estate of Heggstad*, (1993) 16 Cal.App.4th 943; California Probate Code § 17200.
19. California Revenue and Taxation Code § 480.3.
20. California Preliminary Change of Ownership Report, Part 1, H(1) and H(2).
21. California Revenue and Taxation Code § 63.1.
22. California Probate Code §§ 16001, 16462.
23. California Probate Code § 18200.
24. California Family Code § 761(a).
25. California Probate Code §§ 6500-6545.
26. California Probate Code §§ 21600-21630.
27. California Revenue and Taxation Code §§ 13302-13304.

Neil A. Harris maintains an Elder Law practice in Chico, California, where he provides legal services to the elderly population of northeastern California, an area that encompasses approximately one-fifth of the total geographic area of California. Mr. Harris was certified as an Elder Law Attorney in 1995 and, as required, was re-certified five (5) thereafter. Mr. Harris is a Fellow of the National Academy of Elder Law Attorneys and a past Chairperson of the State Bar of California's Elder Law Committee. He now serves as an appointed member of the Executive Committee of the State Bar of California Estate Planning, Trust and Probate Law Section. Mr. Harris has also served as a member of the State Bar of California Legal Problems of the Elderly Standing Committee.

Mr. Harris, a graduate of California State University, Chico, and the University of California Hastings College of the Law, established a ten-county Information and Referral and Legal Program for the elderly of northeastern California in 1974. That program was later distinguished as a California Model Project. In 1978, Mr. Harris established and directed a five-county Area Agency on Aging in Chico. In 1980, he served as a special consultant to the Inter-Tribal Council of California to assist in the development of programs for American Indian elders living on California's reservations. In 1981, in recognition of his contributions to the elderly of rural California, Mr. Harris was selected as a California delegate to the 1981 White House Conference on Aging.

Mr. Harris has authored several articles concerning Elder Law and has served as an instructor of Elder Law with the State Bar of California and the University of California Continuing Education of the Bar.

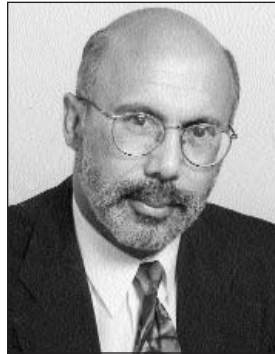
The Laws of the Retirement States: North Carolina

By A. Frank Johns

I. Medical Advance Directives

A. Will New York Health Care Proxy be honored in North Carolina?

Yes, to the extent it follows the N.Y. statute governing health care powers of attorney and is properly executed under N.Y. law.



B. Will a New York Health Care Proxy be Honored in practice?

Yes, if "A" is followed. But if "honored" refers to doctors or other professionals, that would depend on the practitioner—a practitioner may be persuaded or ordered to honor a directive, but it may require court action.

C. Does North Carolina honor living wills? If so, what are the requirements?

Yes. Requirements include signing, witnessed, but not by relatives or those who would directly benefit upon death, and notarization.

"Living will" is an oxymoron in more ways than one. A will is usually defined as an instrument that speaks at death. Living will implies the converse—that the instrument declares a will to live. The concept of "living will" developed because individuals wanted to control the decisions that determine when the instrument will speak. Luckily, North Carolina does not have a living will. North Carolina does have the Right to Natural Death Act that addresses an individual's right to peaceful and natural death.

N.C. Gen. Stat. § 90-321(d) is the nonexclusive statutory form that may be used to execute a Declaration of a Desire for a Natural Death. The document is set out so that it may be self proving after being signed by two witnesses, and either notarized, or executed and sealed by the Clerk (assistant) of Superior Court. There is a careful explanation of how the declaration and certificate may be probated by a clerk, assistant clerk or notary public after finding that there is sufficient evidence to satisfy the genuineness and due execution of the declaration.

The natural death declaration may be revoked by the declarant as provided in N.C. Gen. Stat. §

90-321(e). The declaration of revocation may be made in any manner in which the declarant is able to communicate his intent to revoke. The sentence in paragraph (e) goes on to declare that the communication may be made without regard to the declarant's mental or physical condition. The revocation becomes effective, however, only upon communication to the attending physician by the declarant or by an individual acting on behalf of the declarant. Further, it is explicitly declared that such declarations may not be executed or consummated if they constitute a suicide for a purpose. Additionally, in N.C. Gen. Stat. § 90-321(g), a Declaration of a Desire for Natural Death can in no way become a condition for any insurance contract or for receiving medical treatment. Further, compliance with the section may be interposed as a defense in any criminal or civil prosecution asserting claims or liability because of the conduct of any person, institution or facility complying with the act.

In the absence of written declaration in compliance with N.C. Gen. Stat. §§ 90-320 and 321, N.C. Gen. Stat. § 90-322 provides the procedures for a natural death in the absence of a declaration. Careful compliance must be met, and it must be shown that the person is comatose (and there is no reasonable possibility that he will return to a cognitive sapient state) or is mentally incapacitated. The section goes further and requires the attending physician to determine the person's present condition as terminal; incurable; irreversible; confirmed by another physician (other than the attending physician) in writing. It also requires the confirmation that a vital function could only be restored by extraordinary means or is only being maintained by extraordinary means. These conditions having been met, then extraordinary means may be withheld or discontinued in accordance with the act as long as the attending physician obtains the concurrence (i) of the person's spouse or (ii) of a guardian of the person, or (iii) of a majority of the relatives of the first degree in that order. If none are available, then the attending physician may withhold or discontinue the extraordinary means at his discretion and under his supervision.

The act specifically declares that if any person, institution or facility withholds or discontinues extraordinary means of artificial nutrition or hydration as mandated by this section of the statute, then such action "... shall not be considered the cause of death for any civil or criminal purpose nor shall it be considered unprofessional conduct. Any person, institution

or facility against whom criminal or civil liability is asserted because of conduct in compliance with this section may interpose this section as a defense.”¹

D. What directives do you prepare?

We prepare living wills, health care powers of attorney and advance instruction for mental health treatment.

North Carolina enacted health care and natural death acts. The provisions of the health care power of attorney (HC-POA) sections of the POA statute provides an adult (one maintaining the requisite understanding and capacity to make and communicate health care decisions) with authority to designate any entity or person as health care agent, except one who provides health care to the principal for remuneration. If using the statutory HC-POA form, be careful—witnesses to the HC-POA must declare to the notary that they are not related to the principal to the third degree, and to their knowledge will not benefit from the principal’s will, codicil or by way of intestate succession.

The powers granted to the health care agent are broad.

A principal may grant to the health care agent full power and authority to make health care decisions to the same extent that the principal could make those decisions for himself or herself if he or she had understanding and capacity to make and communicate health care decisions, including without limitation, the power to authorize withholding or discontinuing life-sustaining procedures.

If the principal creates any lawful guidelines or directions relating to the health care of the principal as the principal deems appropriate, then the agent will have the legal power to carry them out.

North Carolina’s statute defines life-sustaining procedures broadly, including care or treatment which only serve to artificially prolong the dying process and may include mechanical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and other forms of treatment which sustain, restore or supplant vital bodily functions, but do not include care necessary to provide comfort or to alleviate pain.

Activation of the HC-POA occurs when the attending physician or doctor designee of the principal makes a written determination that the principal “lacks sufficient understanding or capacity to make or communicate decisions relating to the health care of the principal. . . .”² Once activated, the HC-POA continues during the principal’s incapacity. If the principal regains capacity to make and communicate health care decisions, then the HC-POA may be revoked.

If there are created financial POAs granting non-health care powers to an attorney-in-fact other than the health care agent, the health care matters will still be under the powers granted to the attorney-in-fact named in a prior executed HC-POA if still active. Principals may grant both general powers and health care powers to one individual in one instrument.³ The HC-POA instrument may follow the statutory form. However, the statutory form for HC-POA is not exclusive. If the statutory form is implemented, then it assures the principal that the language is consistent and the actions of the attorney-in-fact are in accordance with standards of community practice.⁴

Health care providers relying on the authority of health care agents contained in HC-POAs have immunity unless they have knowledge of revocations. If a health care provider acts in good faith on the authority of a health care agent, then the HC-POA statute protects the health care provider to the full extent of the power conferred. Defenses may be raised for any liability otherwise described in the HC-POA.⁵

North Carolina also recently enacted a Mental Health Power of Attorney as an advance instruction for mental health treatment.

The advanced instruction for mental health must be a written instrument signed in the presence of two qualified witnesses who believe the principal to be of sound mind at the time of signing and acknowledged before a notary public. Further, the principal must state that he/she was aware that the advance instruction authorizes a mental health treatment provider to act according to the instruction. The witnesses must qualify by affirming that the principal is personally known to the witness, that the principal signed or acknowledged the principal’s signature in the presence of the witness, that the witness believes the principal to be of sound mind and not to be under duress, fraud, or undue influence; and, the witness is not the attending physician or mental service provider or an employee of the physician or health treatment provider, an owner, operator, or employee of an owner or operator of a health care facility in which the principal is a patient or resident, or related within the third degree to the principal or to the principal’s spouse.

The Mental Health power of attorney is effective upon its proper execution and remains valid unless revoked and may be combined with a health care power of attorney. A health care agent’s decisions about mental health treatment shall be consistent with any statements the principal has expressed in an advance instruction for mental health treatment if one so exists, and if none exists, shall be consistent with

what the agent believes in good faith to be the manner in which the principal would act if the principal did not lack sufficient understanding or capacity to make or communicate health care decisions. A health care agent is not subject to criminal prosecution, civil liability, or professional disciplinary action for any action taken in good faith pursuant to an advance instruction for mental health treatment.

E. Anything else regarding advance directives?

Again, any foreign jurisdiction instrument must track the state of domicile's statute. Also, at least for HC-POAs, they must be witnessed by two disinterested persons. That is, if the principal is institutionalized, witnesses may not be employed by that institution (hospital, nursing home, etc.), or by any other person who might benefit by the principal's death.

II. Durable Powers of Attorney

A. Will a New York Durable General Power of Attorney be honored in North Carolina?

Yes, to the extent it tracks the N.Y. statutes governing DPOAs and is properly executed.

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

Usually. The original DPOA must be recorded in all North Carolina counties where real property of the grantor is situated and where the grantor is resident.

C. What financial advance directives do you prepare?

We prepare DPOAs and inter vivos trusts (including special needs trusts, income diversionary trusts, pooled trusts to aid present or contemplated future eligibility for state and federal benefits).

While the provisions of the chapter are not exclusive, the usual application of these sections primarily confers financial power to deal with everything from banking accounts and insurance to taxes.

The durable power of attorney may be activated upon execution. Regardless of future incapacity, or any subsequent directive by the principal, or the principal's designee, the powers conferred on the attorney-in-fact may be declared immediately exercisable. However, upon the principal's incompetence or incapacity, the power of attorney must be registered. "No power of attorney executed pursuant to provisions of the (durable power of attorney article) shall be valid subsequent to the principal's incapacity or incompetence unless it is registered in the Office of the Register of Deeds of the county in the state designated in the power of attorney" It is appropriate legal practice

upon the signing of a non-springing, immediately active power of attorney, to instruct the client to record the power of attorney in all appropriate county Register of Deeds' offices where the principal is a resident or holds title to real property.

While most jurisdictions require the execution of a power of attorney before a notary public, with proper notarial acknowledgment, North Carolina does not express in its statute how a power of attorney must be executed. To make best practical use of the power of attorney, however, the principal must be able to have it recorded at the Register of Deeds office. If that is true, then what is necessary to perfect the probate of recordation in the Register of Deeds office requires the original document to be properly notarized. In exigent situations, the execution of a power of attorney without notarization would still make it a valid transfer of powers from the principal to the attorney-in-fact. As long as the principal remains competent, and if no real property were involved, then the power of attorney could be presented to banks and to others, depending upon the breadth of the powers granted, and impose the authority of the attorney-in-fact on third parties.

Usually the attorney-in-fact does not have to sign the power of attorney (this was not so for the health care power of attorney form prior to 1993). It is still advisable for the designated attorney-in-fact to sign the power of attorney along with the principal, before a notary public, providing for authenticated signatures of not only the principal and witnesses, but also the attorney-in-fact. As mentioned later in the text, this would also serve as a writing necessarily acknowledged by spouses.

D. Is there anything a New York attorney should know about financial advance directives that are peculiar to North Carolina?

The principal may elect when the power takes effect (immediately, on a specified date, or only after incapacity—for latter, see below).

E. Does North Carolina allow springing powers of attorney?

Yes. Many elder citizens are justifiably leery of giving a currently exercisable power of attorney. It tends to create the inference that life is about to end, or that they are not capable of managing their own affairs. North Carolina, along with most jurisdictions, permits a durable power to be drafted so that it becomes effective only in the event of the principal's disability. Of course, the advantage of the springing power is that the principal, without having capacity questioned, is currently capable of granting the powers and executing documents with informed consent, but not activating

the broad powers over property and person to a third person until the onset of disability and only during the term of impairment. Of course, the disadvantage is determining with some degree of conclusiveness that there has been an onset of disability sufficient to trigger the springing of the power of attorney into an active state. The springing power of attorney should therefore contain a clear, carefully constructed definition of disability. Additionally, there should be a procedure or mechanism incorporated into the terms of the springing durable power of attorney that objectively certifies the onset of disability.

With the onset of disability often occurring many years after the instrument is executed, it is advisable to name alternate individuals to act, both for designating the disability, and for exercising the powers. It is interesting to note that if disability is disputed, then the case may end up in a guardianship contest, the very process and expense that the power of attorney was meant to avoid. The more careful the procedure for declaring disability, and for defining disability, the greater potential for escaping the pitfall.

III. Probate and Trusts

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

There is either a statutory fee up to 5% for both the executor and the attorney, or the attorney petitions for fees at an hourly rate.

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

Same as "A" above.

C. Is probate considered an expensive or lengthy procedure in North Carolina?

Six months to one year, with expense nothing close to New York.

D. What is the minimum amount of assets for probate?

\$10,000.

E. Should avoiding probate be a central part of the estate plan?

Depends in part on the size of the estate, for estate tax purposes. It often occurs when pursuing governmental benefits.

F. Are there formalities to form a trust?

For documents drafted in our office, the signatures are notarized, but need not be witnessed.

G. Is there anything else regarding trusts we should know about?

We have set up income diversionary and special needs trusts for certain clients. Because these trusts are untested by the N.C. courts, we also file a notice with the clerk of courts stating that we have created such trust. In the notice we give the clerk ten days to respond denying the validity of the trust; otherwise, if the county at some later time disputes the trust, we will plead their silence as a waiver of any criticism or denial of the trust.

IV. Medicaid Trusts

A. Does North Carolina allow income only trusts?

Yes, but not if it is needed for Medicaid eligibility.

B. Does North Carolina have Medicaid planning trusts?

See above (IIIG) for types. The inter vivos Special Needs Trust (SNT) puts a person's assets in trust so that they may qualify for benefits. The trust corpus and income are there only to supplement governmental benefits. A statutory requirement is that the trust provide that all monies in it will be used to reimburse Medicaid at the beneficiary's death, up to the full amount paid by Medicaid, thereby allowing the person to have the benefit of the money while moving all other assets out of her name (and out of the reach of Medicaid reimbursement). Testamentary SNTs are not required to contain reimbursement language, and are not reached by reimbursement.

The income diversionary trust can help a person qualify for Special Assistance, an intermediate program for persons not presently requiring skilled nursing care (and can also help a person who's close to the Medicaid income cap). The person's income stream is diverted to the trust, and the trustee pays out no more than \$20 less than the income cap for the assistance program for which the beneficiary is applying or eligible.

Again, both trusts are fairly new, and so we file notice with the clerk of courts of the creation of any such trust.

V. Funding Trusts

A. What are the pitfalls if placing North Carolina property in a New York trust?

No pitfalls, however, there is always the tension of which state law applies and conflict of laws create modest difficulty.

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

1. Creditor's rights?

Depends on what kind of creditor—N.C. prioritizes creditors based on type of debt and creditor. Also depends on type of trust. Spendthrift trust assets are not reached by creditors. Since the SNT and income diversionary trusts are spendthrift trusts, their assets are not reachable (except by Medicaid as provided in the trust document).

2. Community property laws?

Not in N.C.

3. Other spousal rights?

Widows allowance of \$10,000, and usual right to dissent from will, and equitable distribution.

4. Real property laws?

Tenancy by Entirety; plus right to elect a life estate under certain circumstances.

5. Local taxes?

None.

VI. Taxes

A. Does North Carolina have income tax?

Yes.

B. Does North Carolina have estate tax?

Inheritance tax—an estate “sponge tax.”

C. Does North Carolina have other taxes?

No, but gift tax does not track federal gift tax.

D. Tax impact on document drafting?

For wills and trusts, what basis the beneficiary can use is crucial (i.e., stepped up versus testator's/settlor's original basis). Be careful with the tax allocation clause.

Endnotes

1. N.C. Gen. Stat. § 90-3322(b).
2. N.C. Gen. Stat. § 32A-20.
3. *Id.*
4. N.C. Gen. Stat. § 32A-25.
5. N.C. Gen. Stat. § 32A-24.
6. N.C. Gen. Stat. § 32A-9(b).

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Johns is a leading expert in disability and special needs advocacy, elder law, ethics in law and aging and capacity and guardianship, having published dozens of articles and manuscripts. He has given national lectures and training sessions to professionals in the medical, health care and legal professions, as well as in the financial, banking, trust and insurance industries.

Johns has received many awards, including the 1991 Paul Lichterman Award, the 1993 N.C. Bar Pro Bono Service Award, the 1996 Theresa Foundation Award and the 1998 North Carolina Learning Disabilities Association Outstanding Professional Award.

Johns has recently been lecturing lawyers, consumer groups, disability and personal injury advocates, medical, health care providers, and financial and institutional professionals on the holistic, multidisciplinary and intuitive, analytical scope of capacity and guardianship, disability, special needs and elder law. Currently, the focus of his attention is in four areas: (1) the due process of guardianship, adjudication and the future need of guardians for poor, vulnerable elders; (2) the ethical duty of attorneys to embrace the communitarian approach to client engagement; (3) the integration of long-term care insurance as an appropriate option available to clients for diversion from, or reduction of, the need to preserve assets and gain governmental benefits; and (4) the comprehensive development of multiple trusts in personal injury settlements, including Qualified Settlement Trusts, Medicare set aside trusts and individually crafted Special Needs Trusts with appropriately structured annuities.

The Laws of the Retirement States: South Carolina

By Dennis J. Christensen

I. Medical Advance Directives

A. Will a New York Health Care Proxy be honored in South Carolina?

Yes. The South Carolina statute authorizing Advance Directives mandates recognition of Advance Directives created under the laws of other states. If an Advance Directive is substantially similar to the South Carolina statutory Advance Directive, it will be interpreted and enforced in accordance with South Carolina law. Unfortunately, there have been no cases which have interpreted what "substantially similar" means.

South Carolina allows individuals who are at least 18 years old to appoint a person to make medical decisions for them if they are unable to make medical decisions for themselves. The statute only applies to persons who have executed a statutory form Health Care Power of Attorney. Courts have the authority to allow a non-statutory Health Care Power of Attorney to be interpreted as if it was the statutory form.

To be valid, a Health Care Power of Attorney must be signed, witnessed, and dated. Two persons are required who are not related to the principal by blood, marriage, or adoption, and who are not directly financially responsible for the person's care, are not heirs by will or intestacy, and are not the principal's physicians or their employee, or creditors of the principal. There is no requirement that the document be notarized or that the state Ombudsmen be a witness.

A Health Care Power of Attorney does not become operative until two physicians certify, in writing, that the principal is unable to make medical decisions for himself. Each medical decision requires a separate assessment of the principal's capacity to make medical decisions in question.

A Health Care Power of Attorney, in addition to authorizing someone to make medical decisions in the event of incapacity, also permits the principal to provide instructions about organ donation, life support, nutrition, and hydration. Specifically, it allows the principal to instruct the agent about whether they



want life support continued and nutrition and hydration provided. The agent is required to follow those instructions.

If a person has executed both a Health Care Power of Attorney and a Living Will (more fully described below) the Living Will controls.

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

Generally, yes. Advance Directives have received widespread acceptance in South Carolina. However, there are some doctors who do not believe in Advance Directives and will try to convince the family to try to keep the family member alive for as long as possible, even if there is no hope of the patient ever getting any better.

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

Yes. South Carolina, by statute, has recognized living wills. Living wills created under the laws of another state are recognized so long as they are substantially similar to the statutory Living Will.

A living will, or a "Declaration of Desire for a Natural Death," as South Carolina calls it, is a document which only addresses the issues of withdrawal, or non-starting of life support and the providing of nutrition and hydration for people who are in a state of permanent unconsciousness or who have a terminal illness. Those terms are defined by statute. If two physicians, one of which must be a treating physician, finds either condition to exist, the instructions in the living will regarding life support and nutrition and hydration are to be implemented without any action by an agent of the principal being required.

A living will, in addition to being signed by the person, must be accompanied by an affidavit signed by two witnesses and notarized. In addition, if the person is in a hospital or nursing home, no more than one of the witnesses can be an employee of the institution and one of the witnesses must be a representative from the state Ombudsmen's office.

Certain other people cannot be witnesses. They include persons related to the person by blood, marriage, or adoption, persons directly financially responsible for the person's medical care, a person entitled to any portion of the person's estate by will or through intestate succession, the person's physi-

cian or any employee of the physician, or a person who has a claim against the person's estate at the time.

Living wills can be revoked by physical destruction or mutilation, written revocation, oral expression of an intent to revoke communicated to the physician, authorization of an agent to revoke the living will, and the execution of a new living will. None of these methods are effective until the revocation is communicated to the physician.

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

South Carolina recognizes both living wills and health care powers of attorneys. Both documents address the issue of whether life support should be initiated or continued if a person is terminally ill or permanently unconscious with no chance of getting better. Both also address the issue of whether nutrition and hydration should be initiated or continued if someone is terminally ill or permanently unconscious.

South Carolina permits a person to either create his own living will or Health Care Power of Attorney or to use a statutory form. Most lawyers use the statutory form because it is more familiar to hospitals and doctors and is more likely to receive immediate acceptance without being reviewed by hospital counsel or an ethics board. The statutory health care power attorney form also provides an opportunity to spell out specific directions although few attorneys do so because of the concern that the unfamiliar can cause delay in its acceptance.

Most lawyers use only the Health Care Power of Attorney. The Health Care Power of Attorney provides the ability to provide direction about end of life decisions and provides the additional benefit of allowing a person to designate an individual to make any medical decision in the event two doctors certify that person who has signed a Health Care Power of Attorney is unable to make the medical decisions. It allows the agent to make any medical decision for the principal if the principal cannot.

Because the living will becomes effective only upon a finding by two physicians that a person is terminally ill or permanently unconscious, a physician can prevent a living will from becoming operational by refusing to find a person to be terminally ill or permanently unconscious. Some hospitals in the state, as well as some doctors, are very reluctant to make those triggering findings. As a result, the living will never becomes operational. For that reason alone, many lawyers do not have their clients sign living wills and

use Health Care Powers of Attorneys instead. With a Health Care Power of Attorney, the doctor has to decide only whether the person can make the medical decision in question, not just end of life decisions. If the person cannot, the document becomes operational and the agent is then free to make the medical decision and require the health care professionals to follow the instructions of the client regarding life support and nutrition and hydration.

Few attorneys have clients sign both the Health Care Power of Attorney and the living will, because South Carolina law provides that if a person has both documents, the living will prevails over end of life decisions.

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

Living Wills must be witnessed by the state Ombudsmen and one other witness when a living will is signed in a nursing home or hospital. The Health Care Power of Attorney has no requirement that the Ombudsmen be a witness. As a result, most attorneys do not have clients sign living wills in hospitals and nursing homes because the involvement of the Ombudsmen can mean delays and non-medical professionals making determinations as to whether a person is competent to sign the document.

South Carolina provides an "out" for a health care provider who does not believe in Advance Directives. If a health care provider does not want to follow or implement an advance directive for any reason, the health care provider does not have to do so, provided they find someone who will.

II. Durable General Powers of Attorney

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

Yes. South Carolina law implicitly requires powers of attorney from other states be honored in accordance with their terms. Unlike the law regarding advance directives, there is no requirement that a foreign power of attorney be interpreted using the statutes governing powers of attorney executed in South Carolina.

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

Probably. The statutory form commonly used in New York very briefly describes the powers of the agent. South Carolina has no statutory form. Financial institutions sometimes go out of their way to

refuse to honor a financial power of attorney. One of the most often used reasons is the lack of specificity of the powers. As a result, it is somewhat more likely that a Power of Attorney like the statutory form used in New York would not be honored.

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

South Carolina does not have a statutory power of attorney. The financial power of attorney we use is an extensive document (18 pages) which fully sets forth with great specificity the authority being given the agent. Detailed powers of attorney have become necessary because of the unwillingness of some financial institutions to honor a Power of Attorney unless there is specific authorization for the power sought to be exercised.

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

Yes. In order for a financial power of attorney to survive the incompetency of the principal there must be specific language in the document stating that the document remains effective after the principal is incompetent. State law is specific as to what language must be used to satisfy this requirement. No mention in the statute is made of whether the same language must be used in powers of attorney used in other states. In my experience, financial institutions do not require the same verbiage.

All powers of attorney must be recorded in order to be valid. In South Carolina this requires that the document have all the formalities of a deed. This means two witnesses and a notary signature is required. The notary can be one of the witnesses. Signatures by the making of an "X" or someone signing the document at the direction of the principal are permitted.

Not all states have these requirements. South Carolina provides relief for powers of attorneys executed in other states that are not recordable in South Carolina because they are not properly witnessed and probated by allowing them to be recorded so long as the document is valid in the state in which it was executed.

South Carolina is very strict about gifting powers in financial powers of attorneys. By Supreme Court decision, an agent is not permitted to make gifts using a power of attorney unless there are some spe-

cific provisions in the power of attorney allowing gifts to be made by the agent.

Many people execute financial advance directives to avoid having a conservator being appointed in the event of incapacity. South Carolina law allows a judge in a conservatorship to revoke a financial advance directive. However, South Carolina law also allows a principal to provide in the power of attorney that the financial advance directive is to remain in effect even if a conservatorship is established and bestow the agent with the highest priority for conservator.

E. Does South Carolina allow springing powers of attorney?

Yes. Most attorneys do not use springing powers of attorney because of the burden imposed upon the agent to prove incapacity in order for the document to become effective.

III. Probate and Trusts

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

According to a recent article in *Money* magazine, the average cost of probate in South Carolina is \$2,000-\$3,000. Because South Carolina does not have a complicated probate system, many people do probate themselves.

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

Most attorneys charge by the hour.

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

Probate is not considered expensive, although many clients would say otherwise. The average probate takes 12 to 18 months to complete. This is largely due to the eight-month period that is given creditors to file claims against the estate.

Although the probate process could easily be completed within a few months after the creditors claim period has run, taxable estates cannot be closed until the federal estate tax closing letter has been received and the state of South Carolina estate tax closing letter has been sent to the personal representative. With federal tax letters taking a year or more and the state tax letter not being issued until after the federal letter is forwarded to the state of South Carolina, probate can easily last two years or more.

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

No. If the probate assets, which exclude assets held in joint tenancy, POD accounts, life insurance, annuities, IRA and 401(k) or other assets which have beneficiary designations are less than \$10,000, "regular probate" is not required. Regular probate requires the publication of a creditor's note, filing of an inventory of assets, a final accounting, and closing documentation. The eight month creditors' period is the most significant delay in the process.

If there are less than \$10,000 of probate assets, informal and administrative probate is permitted. Under these expedited procedures, many of the procedural requirements of probate are eliminated, including the eight-month period for creditors to file claims against the state. As a result probate can be completed in weeks or a few months.

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

Most attorneys in South Carolina do not feel that probate should be avoided at all costs. Many draft deeds that name both husband and wife as tenants in common guaranteeing probate upon the death of one of the spouses even though probate could be avoided if they added a right of survivorship to the surviving joint owner.

Clients, on the other hand, often want to avoid probate. Although probate does not have to be a trying experience, having the wrong estate clerk assigned to your file can make it a nightmare. Also, many want to be able to distribute assets without waiting for the eight month creditors period to run. Under South Carolina law, a Personal Representative is personally liable to creditors for distributing assets to beneficiaries during the creditors' claim period if there are not enough assets remaining to pay all creditors' claims. Another reason people dislike probate is the difficulty that can arise if a spouse or family member needs some of the probate assets to use for living expenses or if real estate needs to be sold to create funds to pay for living expenses. Most title insurance companies in South Carolina will require that the proceeds of real estate sales be escrowed until after the creditors' claim period has expired.

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

1. Signatures notarized?

There is no requirement that the signatures be notarized. However, because some trust companies, title insurance companies, and financial institutions may try to require that the trust be recorded, even though there is no legal requirement that one do so, most lawyers will require two witnesses and signatures to be notarized.

2. Signatures witnessed?

There is no requirement that signatures be witnessed. That being said, all signatures are witnessed.

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

No.

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

The most significant consequence is that a residence held in a trust loses its exempt status for Medicaid purposes.

The second is that a new application may have to be filed with the county where the property is located to receive the 4% owner occupied tax rate instead of the 6% rate for all other real property.

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

1. Creditor's right?

No. A self-settled trust will not provide protection against creditors. Trusts created by a third party can protect the trust from the creditors of the beneficiary if properly drafted.

2. Community property laws?

Uncertain. South Carolina is a common law property state.

3. Other spousal rights?

South Carolina long ago abolished dower and curtesy. In the context of family law rights, property in a trust is still considered marital property for property division purposes unless it is inherited property and the property has been maintained as separate property since marriage or its inheritance.

South Carolina has an elective share law. The spouse's elective share is 1/3 of the probate assets. Assets in a trust are subject to a spouse's elective share rights even though property in a trust is not a

probate asset and passes to the named beneficiaries outside probate.

4. Local taxes?

A property owned by a trust can still be taxed, for property tax purposes, at the owner-occupied rate of 4% instead of the 6% non-owner occupied rate. In some counties, reapplication for the 4% rate is required.

South Carolina has a homestead tax credit that has been increased to \$50,000. This credit exempts the first \$50,000 from property taxes. It is available to property owners who have attained the age of 65. The grantor of a trust who is otherwise eligible for the tax will continue to be able to claim the tax credit even if the property is owned by the trust.

5. Homestead or other constitutional rights?

South Carolina homestead rights are limited to protecting the first \$25,000 value of a homestead from creditor confiscation.

IV. Taxes

A. Does your state have an income tax?

Yes. The tax rate is 7% for taxable income in excess of \$10,000.

B. Does your state have an estate tax?

Yes. South Carolina has a "pick up tax." In other words, the amount of the estate tax is the amount of the state tax credit allowed for federal estate tax purposes.

C. Are there any other taxes we should know about?

Yes. South Carolina has a personal property tax on automobiles, boats, and other titled vehicles. There is also a transfer fee on real estate transfers. Some real estate transfers are not subject to the transfer fee.

D. In what way do South Carolina taxes impact the drafting of documents for your clients?

In deciding who should own the residence, the homestead tax should be a consideration for couples where one is older than 65 and the other is not. Since the homestead tax is available only if one of the owners is older than 65, putting ownership in the name of the spouse who is less than 65 will cause the tax credit to be lost. This is not always a significant issue because the credit is usually worth less than \$500 and other tax savings can more than offset the loss of this credit.

V. Nursing Home and Long Term Care Financing Issues

A. What is Medicaid called in South Carolina?

Medicaid.

B. Is South Carolina an income cap state?

Yes. The current income limit is \$1,536. If an applicant's income exceeds that amount, an income trust can be created to cure the problem. There is no upper limit for income.

C. 2000 Numbers

1. What are the regional rates for Medicaid transfer penalty purposes in South Carolina?

\$3,386.

2. What is the MMMNA and CSRA in South Carolina?

The MMMNA is \$1662. The CSRA is \$66,480. A fair hearing can be used to increase the CSRA but is rarely pursued. South Carolina has taken the position that income is considered first but it has not been challenged.

D. What is the true average cost of nursing homes throughout South Carolina?

The average rate of nursing homes in the state is \$3,386 per month. However, since South Carolina has some very poor rural areas, the difference in cost between those rural areas and cities like Charleston, Columbia, and Myrtle Beach can be significant. For example, the total monthly cost in the Charleston is probably closer to \$3,800 per month with the rates in rural counties being hundreds of dollars less.

E. Does South Carolina allow the rule of halves?

Yes.

F. Does South Carolina allow spousal refusal? If not, what techniques do you use in South Carolina to protect the surviving spouse? Annuities? Trusts? How are the community spouse's IRAs or qualified plans treated?

South Carolina does not recognize spousal refusal. Annuities can be used although their use in South Carolina is rare. That is because self-canceling installment notes and non-negotiable notes are the most often used technique when immediate eligibility is needed. In order for these notes to not count as assets, the term of the note must be less than the life expectancy of the payee, using HCFA tables; the interest rate must be less than the rate prescribed by the state, and the total income of the community

spouse, including the interest income from the note cannot exceed the average nursing home rate for South Carolina.

Income trusts are used in South Carolina to get around the income cap. There is nothing to prohibit their use as a resource divestment strategy. However, they are not used and their viability has never been tested. Non-negotiable notes are the strategy of choice because no period of ineligibility results from their use whereas there is a five-year look-back for trusts.

Until recently IRAs and other tax deferred assets of the community spouse were considered as an available asset. However, a recent private letter from counsel for Medicaid opines that they are not an available resource and should not be counted for eligibility purposes.

G. Does South Carolina allow income only trusts?

Yes. South Carolina allows a person to create an irrevocable income only trust. There is a five-year look back for the assets transferred into the trust.

Income trusts are also used for applicants who have income in excess of the income cap (\$1,536). The state has developed a form income trust that is used by most attorneys creating income trusts to avoid the income cap.

H. What type of Medicaid planning trusts are popular in South Carolina and why?

Trusts, other than income trusts for income cap avoidance, are not used very often in Medicaid planning as a receptacle for transferred assets. They are unavailable to protect a residence from estate recovery because South Carolina takes the position that a residence owned by a trust is not an exempt asset. Revocable or living trusts created by a spouse to hold marital assets for the benefit of the institutionalized spouse are considered available to the institutionalized spouse if the trustee has the discretion to make any distributions to the institutionalized spouse.

If a revocable trust is needed to manage assets in the event of incapacity, it is possible for the revocable trust to provide for the payback of the trust assets to a testamentary trust that provides for distribution of income and principal to the institutionalized spouse. The testamentary trust is not considered an available asset so long as distributions are discretionary.

Trusts established for the sole benefit of the institutionalized individual are not used as a planning tool so their viability is uncertain.

I. Does Medicaid cover assisted living facilities in South Carolina?

Medicaid does not provide financial assistance to the traditional assisted living facilities. However, it does provide assistance for board and care homes. These are more akin to group homes and have residents who are quite independent.

J. Does the creation of a life estate with one's home protect the home in South Carolina?

Yes. Life estates are exempt assets in South Carolina. However, the resulting remainder interest is considered a transfer and subject to a period of ineligibility. Under current law there is no estate recovery in the life estate or remainder interest.

K. What significant assets are exempt from Medicaid in South Carolina?

- 1. Non-negotiable promissory notes, including self-canceling promissory notes:** The interest rate must not be less than a rate tied to federal law. The term of the note must be less than the life expectancy of the payee. Interest only monthly payments with a balloon payment at the end of the term of the note is permitted.

Recent legislation has placed some restrictions on use of this widely used planning vehicle. A non-negotiable note will not be accorded exempt status if the interest on note, when added to all of the other income of the payee, exceeds the average nursing home rate for the state.

- 2. Annuities:** Annuities are considered an exempt asset if they are annuitized over a period equal to or less than the life expectancy of the owner. They are not typically used very often because of the availability of non-negotiable self-canceling installment notes.
- 3. Heir's property:** Probate assets that have not been distributed out of an estate are exempt assets. In South Carolina, many estates are not probated for years.
- 4. Life insurance:** The cash values of all life insurances are exempt if the combined face value is \$5,000 or less.
- 5. Assets essential to employment:** All tools, equipment and assets required by an employer or used for self employment are excluded so long as there is work performed or an intent to return if there is temporary unemployment.

6. **Real estate up for sale:** Real estate in the process of being sold is not considered an available asset and is not considered countable so long as a reasonable effort is being made to sell the property. At a minimum, advertising the property for sale in a local paper is required. If the property does not sell, it may be then considered unsalable and not counted. However, the property will be subject to estate recovery at the death of the Medicaid recipient if the asset is owned by the recipient.

L. Does Medicaid pay for any home care services in South Carolina?

Yes. South Carolina has a home waived services program for persons who qualify for nursing home care but prefer to live at home and receive care. However, the benefits are limited. Typically, a recipient will receive two hours of home care per day, five days a week. In addition, the program can provide case management, home delivered meals, adult day health care, limited respite care, attendant care, and limited incontinence supplies. This is in addition to all other medical benefits available to persons qualified for Medicaid benefits.

The home waived services program has a limited number of slots available. There is usually a waiting list. Therefore, it is very important to apply for the program as soon as the need is determined.

If a person wants to eventually receive Medicaid nursing home benefits, careful thought must be given to obtaining home services from Medicaid and then applying for nursing home benefits. It is very difficult to find a nursing home willing to admit a person who is already receiving Medicaid benefits.

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

One of the issues South Carolina faces is the care being provided by assisted living facilities. There has

been a proliferation of these facilities in the last few years. They are largely unregulated and are free to provide care for people who require intermediate and skilled nursing care if they choose. Many have Alzheimer's units that are advertised to provide care to the end of life. A careful review of the facility is needed to make sure the facility can, in fact, provide the level of services needed for the individual.

Another critical issue is the lack of qualified care providers available to provide care in the nursing homes. The provider/resident ratio needs to be reduced so that good quality care can be provided. Better pay has to be offered to attract more people to work in the nursing homes. Many facilities have problems finding qualified people to provide the necessary care.

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

South Carolina has a limited estate recovery program. Recovery is limited to probate assets. As a result, life estates, annuities, assets held for the benefit of the Medicaid recipient are not available for repayment for services provided.

South Carolina has also defined, by statute, circumstances where estate recovery against the residence can be avoided even if the residence is in the probate estate. If the Medicaid recipient's will names the spouse as the beneficiary, the house can be transferred to the spouse free of any Medicaid claim. If the Medicaid recipient's will names a person who qualifies for the caregiver exception, has an equity interest in the house, or is a disabled child, the property can also be transferred by the will free of any Medicaid claim. However, this Medicaid claim is only waived for the first \$100,000 of equity owned by the Medicaid recipient. To the extent the equity of the recipient exceeds \$100,000 the claim remains.

Dennis J. Christensen is a solo practitioner with an office in the Charleston, South Carolina area. He is a graduate of Michigan State University and the Marquette University School of Law. His practice is concentrated in the areas of elder law and estate planning. Dennis is currently a member of the National Academy of Elder Law Attorneys (NAELA) and is also a member of its Board of Directors. He is on the Advisory Board for the Coastal Alzheimer's Chapter for South Carolina and was a founding member and President of that organization. Dennis is currently a member of the Institutional Review Board for Human Research at the Medical University of South Carolina. He was also appointed by the Governor of South Carolina to the Governor's Commission on Advance Directives. He is a past board member and Vice President of Palmetto Pathways Homes, which is a non-profit organization dedicated to caring for people suffering from paranoid schizophrenia in the community instead of placing them in mental institutions. Dennis is also a member of the Charleston Estate Planning Council and is a frequent lecturer to the public and legal community on issues involving estate planning and elder law.

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CASE NEWS

Selected Recent New York Cases

By Judith B. Raskin

Article 81

Petitioners appealed from a decision appointing the court evaluator as Article 81 guardian while denying the appointment of family members. Reversed. *In Re Application of Robinson*, __ A.D.2d __, __ N.Y.S.2d __ (1st Dep't, 2000).



Petitioners sought appointment as Article 81 property management guardians for their father. The court instead appointed the court evaluator, an attorney, as property management guardian based upon the petitioners' lack of experience in managing large sums of money and the son's residence in England.

On appeal, the Appellate Division reversed and appointed the petitioners as property management guardians. The court found the failure of the lower court to appoint the family members was an abuse of the court's discretion. There was no evidence of a conflict of interest, that the petitioners failed to care for their father, that the court evaluator had experience managing funds or that the petitioner son was not suitable because he resided in England. If property management guardians had to have money management experience, very few family members would qualify. All guardians should seek professional advice and services when needed and the petitioners had already done so.

Medicaid

Respondent appealed a determination that New York Social Services Law § 122, denying medical assistance to legal immigrants, is unconstitutional. Reversed. *In Re Aliessa, et al v. Novello*, __ A.D.2d __, __ N.Y.S.2d __ (1st Dep't, 2000).

In 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) (8 U.S.C. §§ 1601 *et seq.*) which limits certain benefits to legal immigrants. In response, New York enacted the New York State Welfare Reform Act of 1997. A portion of the Welfare Reform Act, Social Services Law § 122, denies medical assistance to legal immigrants except for emergency services. However, if the immigrant meets certain criteria, he can receive full medical coverage.

The Supreme Court, New York County, granted summary judgment to the plaintiff class of legal immigrants on that portion of their motion seeking a declaration that Social Services Law § 122 is unconstitutional. The plaintiffs had successfully argued that this section denies medical assistance to them for reasons unrelated to need. The respondent appealed.

The Appellate Division reversed. The statute does provide for emergency care needs and therefore does not totally deny medical coverage. It affects only those legal immigrants that do not qualify based upon federally defined criteria. The constitutional mandate that the state protect and promote public health needs is not violated by § 122 because the legislature has broad discretion in determining how public health is protected.

Service on Nursing Home Resident

A landlord sought a warrant of eviction for a tenant who was then residing in a nursing home without serving notice to the tenant at the home. Case dismissed. *Parras v. Ricciardi*, __ Misc. 2d __, __ N.Y.S.2d __ (Civil Ct., City of New York, June 6, 2000).

A tenant was residing in a nursing home when her landlord filed a motion for permission to file duplicates of required notices in lieu of the originals and for a warrant of eviction. Upon review of the matter, the court found unsettling behavior on the part of the attorneys for the landlord and lack of proper service upon the tenant and dismissed the case.

The court was incensed and began this opinion by saying "... the Court suggests the members of the bar think of their grandparents, to better understand the Court's ire." The opinion then addressed several "egregious" acts by the attorneys: the duplicates were mere attempts to correct defects in the originals; the landlord stated in an affidavit that the respondent was 90 years old, mentally incompetent and residing at the nursing home. Yet the attorneys (who claimed they did not know this) did not attempt to serve the respondent at the nursing home. The attorneys sought a default judgment after only "nail and mail" service at the tenant's apartment; the attorneys failed to inform the court that the respondent may be mentally incapacitated and unable to defend herself.

The Court discussed the service requirements where a tenant is in a nursing home and may be

mentally incapacitated. RPAPL § 735 Real Prop. Acts requires service at the current address if a tenant is residing elsewhere at the time of service. This is important to avoid eviction of tenants temporarily living elsewhere or in a health-related facility on a temporary basis. Attorneys have a duty to inform the Court that a respondent may be mentally incapacitated and not able to defend himself. Any judgment against a mentally incapacitated person will be invalid unless that person was represented by a guardian ad litem.

The Court noted that in similar situations, there are other, more prudent, ways for a landlord or his attorneys to pursue the landlord's concerns. He can first ask the nursing home whether an agent was acting under a power of attorney for the tenant and if so, discuss vacating the premises with the agent. If an agent was not acting, the landlord could ask the nursing home to bring a guardianship proceeding. The Court withheld sanctions based upon the attorneys' statements of apology, future assurances and denial of certain knowledge.

Judith B. Raskin is a member of the law firm of Raskin & Makofsky, a firm devoted to providing competent and caring legal services in the areas of Elder Law, Trusts and Estates and Estate Administration.

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

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

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FAIR HEARING NEWS

By Ellice Fatoullah and René Reixach

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

Copies of the Fair Hearing decisions analyzed below may be obtained by writing to Joyce Kimball at the New York State Bar Association, One Elk Street, Albany, NY 12207, or by calling her at (518) 487-5561. You can also visit the Web site of the Western New York Law Center, www.wnyc.com/fairhearingbank. The key word for *In re Appeal of Anna W.* is "caregiver child," and *In re Appeal of D.C.* is "life estate."

In re Appeal of Anna W.

Holding

Where the appellant transferred the remainder interest in her former residence to a foster child who had resided in the home for two years immediately before the appellant's institutionalization and had provided care to the appellant which permitted the appellant to continue residing at home rather than enter into a facility for long-term care, the application was properly denied because a foster child does not qualify for the exception for such transfers to a caregiver "child."

Facts

The appellant is age 93 and had been receiving care in a nursing facility since February 1999. A Medicaid application to cover her nursing facility care was denied because assets valued at \$173,000 had been transferred by the appellant for less than fair market value. The decision was subsequently amended to reduce the value of the transferred assets to \$126,189.30, and to accept appellant's application for ancillary medical services effective April 1, 1999.

The appellant had transferred her homestead to her foster son on March 8, 1999 in return for a life estate. The appellant had no biological or adopted children. Her foster son, age 60, had been residing at the homestead since he was placed with the appellant in 1940. The foster child always resided at the homestead, and he had retired from his job in 1994 in order to take care of the appellant, who was in declining health. The only reason the foster child was never adopted was because his parents, who placed him in foster care, refused to sign the requisite releases.

The agency determined that the value of the transferred remainder interest in the homestead was



Ellice Fatoullah

\$126,189.30. Based on the regional penalty rate then in effect, \$7,225 per month, the agency determined to impose a penalty period of ineligibility for nursing facility services of 17.46 months until September 2000.

The appellant requested a fair hearing to review the decision denying her application.



René Reixach

Applicable Law

Sections 360-4.1 and 360-4.8(b) of 18 N.Y.C.R.R. (the "Regulations") provide that all income and resources actually or potentially available to a Medicaid applicant must be evaluated, but only those which are found to be available may be considered in determining eligibility for Medicaid. A Medicaid applicant whose available non-exempt resources exceed the resource standards will be ineligible for Medicaid coverage until he or she incurs medical expenses equal to or greater than the excess resources.

Section 366.5(d) of the Social Services Law and § 360-4.4(c)(2) of the Regulations govern transfers of assets made by an applicant on or after August 11, 1993. Generally, in determining Medicaid eligibility of a person receiving nursing facility services, any transfer of assets for less than fair market value made by the person within or after the "look-back" period will render the person ineligible for nursing facility services. The "look-back period" is the 36-month period (60 months for payments to or from a trust which may be deemed assets transferred by an applicant) immediately preceding the date that a person receiving nursing facility services is both institutionalized and has applied for Medicaid.

However, a person will not be ineligible for Medicaid as a result of a transfer of assets if the asset

transferred was a homestead, and title to the homestead was transferred to the person's child, who was residing in the homestead for a period of at least two years immediately before the date the person became institutionalized, and who provided care to the person which permitted her or him to continue residing at home rather than enter into a facility for long-term care. A transfer for less than fair market value, unless it meets this or another exception, will cause an applicant to be ineligible for nursing facility services for a period of months equal to the total cumulative uncompensated value of all assets transferred during or after the look-back period, divided by the average cost of care to a private patient for nursing facility services in the region in which such person seeks or receives nursing facility services, on the date the person first applies for Medicaid as an institutionalized person.

The period of ineligibility begins with the first day of the first month during or after which assets have been transferred for less than fair market value, and which does not occur in any other period of ineligibility for any other prohibited transfer.

Fair Hearing Decision

The agency's determination to deny the appellant's application for Medicaid on the ground that the appellant had made a transfer of property worth \$126,189.30 for less than fair market value is correct and is affirmed.

Discussion

This decision adopts a very literal and restrictive reading of the term "child" in the Regulations. While admitting that the Regulations "do not differentiate between biological, adopted or foster children," it goes on to rely on the conclusion that "the term child is commonly meant to be a biologic or adopted child." It then states, "While extremely sympathetic to the relationship between Appellant and her foster child, the Regulations do not allow the transfer of the household as exempt household under these circumstances."

Editor's Comment

The decision in this case could have gone the other way. The Commissioner could have adopted a reading consistent with the statement in the decision that the regulations did not limit the meaning of "child" to biological or adoptive children.

The problem the appellant now faces is that in any article 78 proceeding to review the decision the Commissioner's interpretation of the meaning of the word "child" in her regulations, it will be difficult to get the court to overturn the decision since the interpretation, while strict, may be a reasonable construc-

tion of the word, and that interpretation by the Commissioner of her own regulations should only be overturned if the interpretation is unreasonable. On the other hand, this is the sort of decision that may cause an elected judge to look for a reason to apply a different approach to this situation. Perhaps, given the decision's recognition that the regulations do not draw any distinction among different categories of children, a trial court might strike it down as arbitrary and capricious.

The appellant at this fair hearing was represented by Harry Glick, Esq., of Garden City, New York.

In re Appeal of D.C.

Holding

Where the appellant owned life estates in two pieces of real property with a value in excess of the Medicaid resource allowance, the inclusion of the real property as countable resources on the ground that they are not homestead property is incorrect.

Facts

The appellant was age 75 and had been residing in a residential health care facility since December 1997. In February, 1998 the appellant applied for Medicaid to cover the cost of care in that facility, seeking coverage effective December 1, 1997. The appellant owned life estates in two pieces of real property in Queens with a total value of \$156,042.

On November 5, 1998 the agency denied the application on the ground that the appellant had non-exempt resources with an equity value in excess of the Medicaid resource allowance for a household of one person. As a result, the agency determined that it would delay accepting the appellant's application until September 30, 1999. On December 7, 1998 the appellant requested a fair hearing.

On June 4, 1999, six days before the date the hearing was held, the agency issued a revised notice of denial stating that the agency would delay accepting the application until August 11, 1999 and correcting the address of one of the pieces of real property. At the hearing that determination was added as an issue for review.

Applicable Law

In accordance with Social Services Law § 366.1(a)(5), a person who is 65 years of age or older, blind or disabled, who is not in receipt of public assistance and has income or resources which exceed the standards of the federal Supplemental Security Income (SSI) program, but who otherwise is eligible for SSI may be eligible for Medicaid, provided that such person meets the financial and other eligibility

requirements of the Medicaid program. To determine eligibility, an applicant's net income and net resources must be calculated.

Under 18 N.Y.C.R.R. § 360-4.1, if the applicant's resources exceed the resource standards, the applicant will be ineligible for Medicaid until he or she incurs medical expenses equal to or greater than the excess resource standards. In 1998 the resource allowance for one person was \$3,500.

Resources of an SSI-related Medicaid applicant are defined in 18 N.Y.C.R.R. § 360-4.4(a). They include property of all kinds, including real and personal property, both tangible and intangible. An applicant's available resources include all resources in his or her control, and also any resources in the control of anyone acting on the applicant's behalf such as a guardian, conservator, representative or committee.

For those subject to resource limits, 18 N.Y.C.R.R. §§ 360-4.6 and 360-4.7 provide that certain resources may be disregarded in determining Medicaid eligibility. Among those exempt resources is a homestead which is essential and appropriate to the needs of the household. For persons age 65 or older, blind or disabled, a homestead loses its exempt status if the owner moves out of the home without the intent to return and no spouse, child under 21 years of age, blind or disabled child, or other dependent relative is living in the home. 18 N.Y.C.R.R. § 360-4.6 further provides that for an applicant age 65 or older, blind or disabled, the resource disregards include all property which is contiguous to the applicant's homestead.

N.Y.S. Dept. of Social Services Administrative Directive 96 ADM-8 states at page 21 that, for the purpose of determining net available resources, a life estate will not be considered a countable resource, and no lien may be placed on the life estate. Local social services districts cannot require an applicant possessing a life estate to try to liquidate the life estate interest or to rent the life estate property.

Fair Hearing Decision

The agency's determinations to deny the appellant's application for Medicaid and to include the appellant's life estates as resources for Medicaid eligibility purposes are not supported by the record and must be reversed. The agency is directed to continue to process the appellant's Medicaid application, and in its evaluation, the agency is directed not to consider any life estate held by the appellant during relevant time periods as a countable resource.

Discussion

Despite the provision in Administrative Directive 96 ADM-8 that for the purpose of determining net

available resources "a life estate will not be considered a countable resource," the agency's attorney contended that this should only apply to a life estate in a homestead. No such limitation is stated in the ADM, nor in any relevant statute or regulation cited by the agency, so this contention must be rejected.

The agency's attorney argued that it was unwise for the State Department of Social Services to promulgate this portion of the ADM, because this increases the amount of institutional medical care and services for which the state and federal government must pay, and this is purported to be bad fiscal policy. If that is the agency's position, the agency should have filed its objection to the State Department of Social Services to have that part of the ADM revised, changed or omitted. It is not within the power of an Administrative Law Judge to do this.

The attorneys for the appellant placed into evidence a letter from a senior attorney at the New York State Department of Health, which now administers Medicaid in the state, adopting and ratifying the provision of 96 ADM-8 in dispute. The senior counsel's opinion is that to count a life estate as a resource would be inappropriate because a life estate is not readily, if at all, marketable. Even if for some reason the letter from counsel for the Health Department were not to be given weight, the record contains no evidence that the ADM or any portion thereof has been rescinded. Thus, the policy stated in the Directive remains in effect.

The policy argument by the agency's counsel, as well as his additional argument that the portion of 96 ADM-8 in controversy is inconsistent with statutes that establish Medicaid as an insurer of last resort, have been considered and are rejected. The former State Department of Social Services in creating the policy directive, and the State Department of Health in ratifying it, have weighed the relevant policy concerns in executing their statutory mandate of administering Medicaid in New York.

Editor's Comment

This decision raises a number of issues, some discussed and some not, as well as some practice pointers. An issue which is not discussed, but could have been, is the decision by the agency to delay accepting the application for almost a year, while at the same time denying it. Given the over \$150,000 value set on the life estates by the agency, it is not at all clear why the appellant would have been any more eligible then. Presumably this was an informal attempt to recognize the concept of a resource spend-down by estimating the time by which the appellant would have incurred nursing home bills equal to the valua-

tion set for the life estates. However, given the requirements for timely processing of applications, and requiring the agency to accept any application as of its filing, the procedure for delaying acceptance is completely unauthorized.

The decision reflects the zeal with which some attorneys for local social services districts will pursue issues which are demonstrably without merit. The ADM contains no exception such as that sought by counsel for the district. Undaunted by the adverse decision, counsel for the district persisted by requesting that the decision be reconsidered, again making the policy arguments rejected in the decision. Given the language of the ADM and the opinion by Health Department counsel about its meaning, there was no possibility that this request would have been granted.

Unfortunately, appellants faced with such behavior have little recourse, and have to incur substantial attorney's fees to justify the obvious. Perhaps the only solace for an appellant in such a case is that the law is

clear that a local agency has no standing to bring an article 78 proceeding to review a fair hearing decision adverse to the agency, so if agency counsel persisted by going to court, some sort of sanctions might have been imposed.

The decision also reflects the utility of trying to obtain documentation from the supervisory agency, here the State Department of Health, but in other cases from the federal Health Care Financing Administration, supporting the appellant's position. The letter from counsel for the State Department of Health supporting the appellant made it well nigh impossible that the decision could have upheld the local agency. Surely it would have been arbitrary and capricious to have done so. Of course, before asking for such a formal statement of state or federal policy, it helps to have obtained an informal reading of what that policy will be.

The appellant at this fair hearing was represented by Ronald A. Fatoullah, Esq. and Stacey Meshuick, Esq., of Great Neck, New York.

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

René H. Reixach, Jr. is an attorney in the law firm of Woods, Oviatt, Gilman, Sturman & Clarke LLP, where he is a member of the firm's Health Care Law Practice Group and responsible for handling all health care issues. He is 7th District Delegate to the Executive Committee of the Elder Law Section. Prior to joining Woods, Oviatt, Mr. Reixach was the Executive Director of the Finger Lakes Health Systems Agency. Mr. Reixach authors a monthly health column in the *Rochester Business Journal* and has written for other professional, trade and business publications. He has lectured frequently on health care topics. Mr. Reixach has been an Adjunct Assistant Professor in the Department of Health Science at SUNY Brockport. He also appeared as an expert witness on Medicaid eligibility for the New York State Supreme Court. Mr. Reixach also has served on many advisory committees, including the New York State Department of Health Certificate of Need Reform Advisory Committee, and the Community Coalition for Long Term Care. Among Mr. Reixach's civic and charitable involvements are serving as a board member and president of the Foundation of the Monroe County Bar, president of Greater Upstate Law Project, Inc., and board member of the Yale Alumni Corporation of Rochester.

LEGISLATIVE NEWS

Protections for the Elderly: "Seniors Safety Act"

By Steven H. Stern and Howard S. Krooks

Currently pending before the Congress is the Seniors Safety Act (H.R. 1862, S. 751), which is a major effort to combat nursing fraud and abuse, increase protections for victims of telemarketing fraud, enhance safeguards for pension plans and health care benefit programs, and enhance penalties for the most prevalent crimes against seniors. The Act contains provisions to develop new strategies to deter crimes against seniors and also authorizes comprehensive examination of the factors associated with crimes against seniors.



Howard S. Krooks

According to the National Institute of Justice, telemarketing fraud disproportionately impacts Americans over the age of 50. Building upon the Telemarketing Fraud Prevention Act, this Act would provide the Attorney General with the authority to block or terminate telephone service to telephone facilities that are being used to conduct such fraudulent activities. In addition, the Act would establish a procedure to provide information to seniors about telemarketers, such as prior complaints and/or convictions for telemarketing fraud.

The Seniors Safety Act provides enhanced penalties for crimes targeting the elderly. Within the legislation, the U.S. Sentencing Commission is directed to review the sentencing guidelines and enhance penalties, as appropriate, to adequately reflect the economic and physical harms associated with crimes targeted at seniors, and with health care offenses. The bill also would increase penalties under the mail fraud statute and wire fraud statute for fraudulent schemes in serious injury or death.

Another focus of the bill is to protect the rights of senior crime victims. The Attorney General would be authorized to use forfeited funds to pay restitution to victims of fraud, and further, to ensure that debts due the U.S. from false claims law actions are not dischargeable in bankruptcy, in order to pay restitution to seniors.

In addition to the provisions aimed at consumers and the elderly within the community, the legislation also seeks to add protections for nursing home residents. The Seniors Safety Act, which contains the "Nursing Home Resident Protection Act of 1999," establishes a new federal crime, with substantial criminal and civil penalties against operators of nursing homes. These penalties apply to those who engage, knowingly and willfully, in a pattern of health and safety violations that results in "significant physical or mental harm to persons residing in residential health care facilities." In addition, whistleblowers who tip off officials about poor nursing home conditions would be authorized to sue for damages in the event of retaliation.



Steven H. Stern

"The Act contains provisions to develop new strategies to deter crimes against seniors and also authorizes comprehensive examination of the factors associated with crimes against seniors."

Sponsor Senator Patrick Leahy (D-VT) states that this legislation "provides a new safety net for seniors to protect them from the criminal activity that affects them the most." With similar legislation pending in the House and the Senate, the hope is that many seniors will have the additional protections they desperately need.

Update on the Older Americans Act

The Older Americans Act (OAA) has recently been reauthorized with bipartisan support and will continue to provide services and protections for our nation's seniors. Passed by Congress in October 2000, the legislation contains many new provisions in addition to continuing existing programs.

One of the most important sections of the OAA has been and continues to be legal services for the elderly. Contentious debate has resulted in the retention of legal assistance under Title III-B of the Act. Indeed, this version of the OAA goes further and adds language which requires each state to evaluate the need for supportive services and determine the extent to which volunteer programs have the ability to meet the need. In addition, the OAA continues ombudsman services (Title VII) and national legal services support (Title IV).

Perhaps the most important development in this most recent reauthorization is the inclusion of the National Family Caregiver Support Program (Title III). This program had been proposed by the Clinton Administration and was considered a top priority for this legislation. This plan will assist hundreds of thousands of family members who are struggling to care for their older loved ones who are ill or who have disabilities. Specifically, this new program includes:

- Information about resources that will help families in their caregiver roles;
- Assistance to families in locating services from a variety of private and voluntary agencies;
- Caregiver counseling, training and peer support to help them cope with the physical and emotional stress of care;
- Respite care;
- Additional services to help fill the gaps.

According to HHS Secretary Donna Shalala, this most recent reauthorization will “usher the Older Americans Act into the 21st century by providing new flexibility throughout the Act.” One other note: the OAA legislation authorizes a White House Conference on Aging in 2005.

New York State’s Work and Wellness Bill

In 1999, the Congress passed and the President signed the “Work Incentives Improvement Act,” which provided \$250 million in federal funds to permit states to extend Medicaid eligibility to disabled individuals with jobs who would otherwise lose Medicaid benefits. Ordinarily, persons with disabilities who are capable of holding down a job are forced to keep their earnings to a minimum in order to retain their Medicaid benefits to cover needed medical services. Health insurance in the marketplace is inadequate to address the health needs of many disabled individuals, who often require long-term personal

care services or ongoing psychiatric care as well as assistance in paying for necessary prescription drugs. Even if there was insurance coverage for such items, most disabled individuals would not be in a position to sustain the ongoing insurance premiums. Although Congress responded to this problem by enacting the Work Incentives Improvement Act, New York State must do its part by enacting state legislation in order for the program to take effect.

“Under the Work Incentives Improvement Act, disabled persons could buy into the Medicaid program by paying amounts on a sliding scale based upon the amount of income earned.”

On June 5, 2000, the Assembly passed a bill (A10159) known as the “Work and Wellness Act of 2000” and the bill was delivered to the Senate for consideration on the same day. This bill was sponsored by Assembly Mental Health Committee chair James Brennan and Health Committee chair Richard Gottfried. Existing Medicaid income and resource restrictions prevent disabled persons from earning sufficient income to support themselves and their families. The same income and resource limitations make it difficult for disabled individuals to save for a home and frequently prevent disabled persons from marrying. The bill would enable disabled individuals to keep higher paying jobs without a consequent loss of Medicaid benefits. Under the Work Incentives Improvement Act, disabled persons could buy into the Medicaid program by paying amounts on a sliding scale based upon the amount of income earned.

Although the Assembly passed the Work and Wellness Bill, it was blocked from going any further by the Senate and Governor Pataki.

Sources—Health Update, New York State Assembly Health Committee, Richard N. Gottfried, Chair; and Memorandum accompanying the Work and Wellness Bill (A10159).

Congress Considers a Raise in 401(k) and IRA Contribution Limits

The Senate Finance Committee has approved a bill that would increase both the amount that an individual could contribute to a 401(k) plan and the amount that an individual could contribute to an

IRA. Known as the Comprehensive Retirement Security and Pension Reform Act, the bill was passed by the House on July 19, 2000 by a vote of 401-25. It is presently on the Senate Legislative Calendar awaiting a vote by the Senate. The bill would increase 401(k) contribution limits from \$10,500 to \$15,000 per year. The bill increases the maximum annual dollar contribution limit for IRA contributions from \$2,000 to \$3,000 in 2001, \$4,000 in 2002, and \$5,000 in 2003. The limit is then indexed in \$500 increments in 2004 and thereafter. Under a "catch-up" provision, individuals who have attained the age of 50 may make IRA contributions of up to \$7,500.

In the Report of the Committee on Finance to accompany H.R. 1102, the Committee expresses con-

cern for the low national savings rate and the impact of individuals not saving adequately for retirement. The Finance Committee states that "[t]he present-law IRA contribution limit has not been increased since 1981. The Committee believes that the limit should be raised in order to allow greater savings opportunities."

As indicated above, the bill currently is on the Senate Calendar awaiting a vote. If the bill is approved by the Senate, it will then go to the President for signature.

Sources—H.R. 1102 and Report of the Committee on Finance, United States Senate, to accompany H.R. 1102.

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

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REGULATORY NEWS

The Foster Care Independence Act of 1999 and the SSI Program: Just What We Needed—More Transfer of Asset Rules

By Louis W. Pierro and Edward V. Wilcenski

Most elder law practitioners find themselves representing non-elderly individuals with disabilities, a natural ancillary practice given the fact that both the elderly and non-elderly disabled are supported by many of the same government benefit programs. Two important programs for these clients are the Supplemental Security Income (SSI) and Medicaid programs, which often serve as the sole source of income and medical care. In New York State, establishing eligibility for SSI will render an applicant “categorically eligible” for Medicaid;¹ and thus, for the practitioner representing a client whose Medicaid eligibility is linked to participation in the SSI program, it is important to have a working knowledge of the eligibility and program rules for both programs.



Louis W. Pierro

Until December 14, 1999, the effective date of the Foster Care Independence Act of 1999, Pub. L. 106-169 (FCIA), arguably the most difficult part of representing persons who were receiving SSI was ensuring compliance with the program’s general income and resource rules, specifically the “In Kind Support and Maintenance” or “ISM” rules which govern the treatment of food, clothing, and shelter payments made by third parties for the benefit of an SSI recipient. The rules were (and continue to be) extremely intricate, often confusing, and always difficult to negotiate. However, one of the benefits of dealing directly with the SSI system was that it did not penalize transfers of assets made by an SSI applicant. Thus, for clients receiving an unexpected inheritance or personal injury award, the funds could often be gifted immediately upon receipt without a disruption of benefits or services (note that such a transfer could have affected eligibility for Medicaid waiver services, but the impact of such a transfer was governed by the more familiar Medicaid rules, not the SSI rules).

With the enactment of the FCIA, this has changed. Effective December 14, 1999, transfers of resources by an SSI recipient or applicant may result in a period of ineligibility for SSI benefits. The new transfer penalty provisions superimpose on the SSI

program many of the same Medicaid asset transfer rules found in 42 USC 1396p(c) *et seq.*; but there are some significant differences, as well as some gaps in the statutory language that required clarification from the Social Security Administration (SSA). In September 2000, the SSA issued Transmittal No. 13 (SSA Pub. No. 68-0501150), which revised and expanded subchapter 50 (“Other Resource Provi-



Edward V. Wilcenski

sions”) of Chapter 11 of the Program Operations Manual System (POMS). The new section purports to be a “plain language” guide to applying the resource transfer provisions of the FCIA, something akin to the Administrative Directive issued by the New York State Department of Social Services after Congress enacted OBRA ‘93, entitled “OBRA ‘93 Provisions on Transfers and Trusts (96 ADM-8, March 29, 1996). The new section of the POMS is quite long and detailed, and elder law practitioners will recognize many of the provisions from the rules and regulations governing transfers of assets within the Medicaid system. Following are a few of the highlights (note that citations beginning with the letters “SI” refer to the SSI section of the POMS):

Penalty Period Calculation

An “uncompensated transfer” made by an SSI applicant or recipient within the 36-month period prior to application (the familiar “look-back period”) will generate a period of ineligibility for SSI for a period of time determined by dividing the fair market value of the transferred resource by the total of the full Federal Benefit Rate in effect during the month of filing plus the applicable State Supplement (a total of approximately \$600 in New York State for SSI recipients who are living alone).² The result will be a period of ineligibility for SSI, with a maximum penalty of 36 months.³ Because the divisor is so small, an applicant or recipient will reach the 36-month maximum with an uncompensated transfer of just over \$21,000. It is important to note that unlike the Medicaid transfer penalty system, the maximum penalty of 36 months applies regardless of the amount transferred, and whether the penalty

occurred before or during the look-back period. There is no 50-month look back for transfers to trusts.

Under the Medicaid program, uncompensated transfers generate a period of ineligibility for institutional level services (including services received in the community through a waiver) for a period of time determined by dividing the value of the transferred funds by the regional nursing home rate, determined annually in New York by the Department of Health.⁴ The look-back period is 36 months for outright transfers and 50 months for transfers to trusts. The look-back periods serve as an informal limit on a Medicaid penalty, as transfers made outside the look-back period will not be discoverable upon application, regardless of amount. Transfers which are discovered upon the filing of a Medicaid application and which have been made within the look-back period are fair game however, and the penalty will be for the full period determined by the calculation, with no maximum.

Adjusting the Penalty by Returning the Gifted Resources

In order for an SSI applicant or recipient to avoid the period of ineligibility, the *entire* resource must be returned. According to the POMS, “reacquiring a lower ownership interest is not sufficient to meet this exception [to the penalty].”⁵ If the entire amount is returned in the month of transfer, then no penalty is assessed. If the entire amount is returned in a subsequent month, the penalty continues through the month during which the resource is returned.

In New York, returning a portion of an uncompensated transfer will reduce the penalty period by a proportionate amount based on the value of the returned assets.⁶ This can be a useful tool for practitioners who do not become involved with a client until well after a significant transfer has already been made. The lack of similar flexibility in the SSI program will inevitably present some problems, as often a portion of the transferred assets are spent soon after the initial gift.

Special (Supplemental) Needs Trust (SNT) Exception

Transfers to a First Party SNT (i.e., trusts funded with the resource of the SSI applicant or recipient) will not be subject to penalty under the new SSI transfer of asset rules if the trust qualifies as an “exception trust” under the Medicaid program pursuant to 42 USC 1396(p)(d)(4)(A) or (C).⁷

What is not entirely clear from Transmittal 13 is whether a transfer by an SSI applicant or recipient to a *Third Party* SNT (i.e., established for the benefit of a

disabled beneficiary who is *not* the SSI applicant or recipient) will qualify for the exception. The issue arises because in addition to the exception for transfers to a First Party SNT, the FCIA contains other transfer penalty exceptions similar to those in the Medicaid program, including homestead transfers to a caregiver child, to a sibling with an equity interest, and transfers of any resource for the “sole benefit” of a disabled child.⁸ What about transfers to a Third Party, Escher-type SNT for the benefit of a disabled child? Is the “sole benefit” requirement satisfied?

Looking to the Medicaid rules for guidance, one can see that the Health Care Financing Administration (HCFA) in Transmittal 64 explained that a transfer to a trust will be considered to be established for the “sole benefit” of a beneficiary if the trust provides “for the spending of the funds involved for the benefit of [the beneficiary] on a basis that is actuarially sound based on the life expectancy of the individual involved.”⁹ This language has been interpreted to require the purchase of an actuarially sound annuity by the Trustee based on the beneficiary’s life, or payment of any remaining funds at the death of the beneficiary directly to the beneficiary’s estate. Either technique would undercut one of the primary benefits of the Third Party SNT—the ability to pass the remainder to other heirs upon the primary beneficiary’s death.

The restrictive language found in the HCFA transmittal was not included in the SSA’s Transmittal 13. Moreover, prior to issuing Transmittal 13, the SSA issued an Emergency Message (EM-00067) on May 26, 2000 entitled “Supplemental Security Income-Processing Medicaid Trust Exceptions to the new SSI Trust Provisions.” Section (C)(2) of the EM, in defining “sole benefit,” explained that a trust will be considered as being created for the sole benefit of an individual as long as “the trust benefits no one but that individual . . . for the remainder of the individual’s life.” The section further states that a “transfer of the remaining trust corpus to a residual trust beneficiary after the individual’s death” will not disqualify the trust. This language would appear to allow an exempt transfer by an SSI applicant or recipient to a Third Party SNT. Unfortunately, this clarifying language was not carried forward in Transmittal 13, and as such it remains to be seen whether the SSA will honor the interpretation found in EM-00067 for transfers to a Third Party SNT.

Transfer of “Resources” Equals Transfers of “Income”

Soon after the FCIA was enacted, practitioners perusing the statute noticed an apparent discrepancy in the transfer penalty provisions that might have

provided a “loophole” of sorts for those SSI recipients who found themselves with an unexpected windfall in the form of an inheritance, gift, or other non-recurring payment. These payments are generally considered “income” in the month received under traditional SSI rules.¹⁰ However, the FCIA only discussed transfers of “resources.” Given the well-established SSI rules distinguishing “income” from “resources,” did the omission of the term “income” mean that an unexpected inheritance could be gifted before the end of the month without penalty? Elder Law practitioners are certainly familiar with the Medicaid program’s definition of the term “assets,” which includes both income and resources, and which precludes a transfer of either without penalty under the Medicaid program.¹¹ Will these two programs treat transfers of income differently?

Transmittal 13 purports to end the discussion. SI 01150.001(B)(5) discusses the transfer of an inheritance, explaining that although an inheritance is traditionally considered income during the month of receipt, and not counted as a resource until the first day of the following month, “an inheritance meets the definition of a resource the moment after it is received.” SI 01150.114(B) provides an example of a transfer of inherited funds generating a penalty, and one would assume that the same would apply for other sporadic forms of income, such as gifts. Nonetheless, in light of the clear statutory omission of the term “income” from the transfer penalty section of the FCIA, it certainly seems as if the SSA is trying to regulate over a clear drafting error.

Conclusion

Attorneys representing the disabled should be accustomed to conflicts in the rules governing different government benefit programs, especially when dealing with the different financial eligibility criteria. Each program—including Supplemental Security Income, Medicaid, Section 8, Food Stamps—seems to have its own independent fiefdom, with little if any communication with the others. This can be especially troublesome when the disabled client relies on a patchwork of benefits from the various programs to remain in the community. As advocates, the best we can do is hope that the agency administering the program provides sufficient guidance so that we might assist our clients in negotiating the various program rules. While not perfect, Transmittal 13 certainly provides some well-needed illumination.

Endnotes

1. 18 N.Y.C.R.R. 360-3.3(a).
2. SI 01150.111(D).
3. SI 01150.110(D).
4. 18 N.Y.C.R.R. 360-4.4(c)(2)(iv)(a).
5. SI 01150.125(A).
6. 96 ADM 8(IV)(L)(5).
7. SI 01150.121(A)(3).
8. SI 01150.120–01150.123.
9. HCFA Transmittal 64, § 3257.6.
10. SI 00810.030.
11. 18 N.Y.C.R.R. 360-4.4(c)(2)(i).

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

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

PRACTICE NEWS

Are You Looking for New Clients? (It Is Time to Look Within)

By Vincent J. Russo

We are constantly thinking and sometimes we are even worrying about where we will get our next client. How do we ensure a constant stream of work? How do we keep associates and staff busy? For most of us, our efforts concentrate on *new* clients. We do a number of things to market our practices. We do seminars and write articles for publication. We have law firm brochures and newsletters. We advertise who we are and what services we provide. We network with elder law attorneys around the state and the country as well as other professionals such as geriatric care managers. We volunteer our services with aging organizations such as the Alzheimer's Association. We may be doing some or all of the above.



Well, we may be missing the boat! We have the potential of tapping new referrals and new matters right before our eyes. How much effort and cost went into obtaining your existing client base? Have you maximized these clients?

Client New Matters

When you conclude your services for a client, have you made sure that there are no services that your client can currently benefit from? I always go back and review my initial recommendations to make sure that the client has implemented all of the recommendations, not just a few of them. For example, the client executed advance directives and a new will but did not transfer the residence with a retained life estate.

Do not take for granted that your client knows what services you can provide. Just because you do, does not mean that they do. For example, in our office we handle real estate closings as an ancillary service of our elder law practice. Every once in a while, a client will inform me after the fact that they sold their residence. When this first occurred, I questioned the client as to why they did not retain our services since they were happy with the services that we previously provided to them. Their response was: "I wish I had known. I didn't realize that you handled sales of residential homes." In response to this, we have developed brochures on each of our services. We display them in our reception area when clients come in. We

also mention our services to our clients when we send a letter which concludes the services rendered on the matter at hand. This may come as a surprise to you, but I have even had clients ask me if we do Wills after I have met with the client as to Medicaid planning.

It is also important to make clients aware of the various services you provide because they may be in need of them in the future. You should have a strategy as to how you will educate your clients as to what those services are.

Clients as a Referral Source

When you provide quality services and meet the objectives of a client, you have a happy client. You give a sigh of relief. You have done a good job and you can feel good about it. But it should not end there. Have you asked your happy client to refer you to other relatives and friends? Clients feel good when they can help a relative or a friend, especially when they can recommend them to competent counsel. As you are well aware, an unhappy client will definitely be talking to their relatives and friends about their experience. I have heard that it takes ten happy clients to undo the bad will created by one unhappy client. Your client will feel tremendous satisfaction when he or she gets the call from their relative or friend who raves about what you have done for them.

In this situation, do not fail to recognize the good deed of your existing client by sending an acknowledgment of gratitude. You may even want to send a token of your appreciation. Perhaps, you want to offer your client a free follow up meeting or a discount on your legal services that you may provide to them in the future.

Another way to increase your client base is to offer your services to the children of your senior clients. Often they have not implemented appropriate estate planning for themselves. It is our practice in our office to ask the children if they have implemented planning and to schedule a follow up meeting with them to discuss their own personal situation. If the senior is making significant gifts to a child, it is good practice for the child to revise his or her will to include a Supplemental Needs Trust for the parent in case they predecease the parent. In order to make this more worthwhile for the children while acknowledging the seniors for being a client of

the firm, you may want to discount your fees as to the services that you provide to the children.

If you do not ask your client to refer you, then you are missing a golden opportunity. Clients may be happy to refer you but they may not think to do so. Nothing ventured, nothing gained. If you ask clients to refer you, you will be surprised that most of them are happy to do so.

Ways to Market Your Existing Clients

In connection with maximizing the services that you can provide to existing clients and gaining new clients from your existing clients, you must have a marketing plan. There are a number of different techniques you can consider in this regard.

Newsletters

The law firm newsletter is an excellent opportunity for you to provide current information to your clients as to your services. You may want to focus on one subject area of your practice for each newsletter. It is also an opportunity to inform them as to recent changes in the laws which may require their immediate attention. The newsletter can also allow you the opportunity to notify your clients of any seminars that you are presenting and to provide updates on your firm's activities and accomplishments of law firm's attorneys and staff. In our law firm, we send our clients four newsletters each year.

Seminars

Seniors are always interested in getting more information on the type of services which directly impact their quality of life. Seniors are driven in their desire to protect their assets and preserve their dignity. Through seminars, you can make contact with your clients that you may not have seen for quite some time. Here again, you have the opportunity to educate your clients to your services that they may want to take advantage of. It may be that a client did not fully understand a particular planning technique when he or she first met with you but after attending the seminar, they now understand the benefits of that planning technique and are anxious to proceed with you in implementing such a plan.

Your clients will be able to bring a relative or a friend to the seminar at no cost to them. This gives

you the opportunity to make contact with these potential clients in a forum where the prospective clients can feel comfortable. This is no pressure on them to retain your services.

In our office, we stress the need to review one's estate plan on a regular basis. We are able to offer a free service to our clients by inviting them to our seminars for updates. At the same time, it allows us to identify a client in need of additional services.

Alerts

When a dramatic change in the law occurs or if there is an issue of importance that is time sensitive, the alert can be a wonderful way of showing your clients that you care by giving them vital timely information. This can be accomplished with a one-page mailing to clients. Clients are most appreciative of your going out of your way for them and it did not cost them for this service. For example, we prepare gift tax returns. In December each year, we remind our clients of the need to file gift tax returns if taxable gifts were made in the current year. Each year, we pick up a number of returns because we reminded our clients of the need. Even if we do not get retained for this work, we see it as a valuable service to our clients. We also have the opportunity to network with accountants of our clients because of our alert (but that is the subject of another article). In our office, we may send out one or two alerts each year to our clients.

Summary

By looking internally rather than externally, you can reap the benefits of expanding on the services that you provide to existing clients while increasing your client base by client referrals. When you do a good job for your clients, there is the opportunity to provide additional services to your clients and provide services to your clients' friends and family. This opportunity should not be lost. Through a marketing plan which incorporates some of the above suggestions, you can be a resource to your clients and they can be a referral source for you. You can stay in front of your clients so that if they need services they will think of you because you care about them.

So before you step out to that next seminar, have you taken care of your clients first?

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TAX NEWS

When Your Client Moves to Florida, Are Their Income Tax Worries Over? A Summary of Income (and Other) Taxes of the Retirement States

By Ami S. Longstreet and Anne B. Ruffer

I. Florida—A No Income Tax State

Florida has historically been a very popular destination with New York residents who are or have considered moving out of state at retirement.

For many years, the exodus from New York resulted in part, from the imposition of the New York State Estate Tax. As the New York State Estate Tax was repealed in 1997, effective for estates of decedents dying on or after February 1, 2000,¹ the avoidance of estate tax should no longer be the reason high net worth clients leave New York. The estate tax for New York State decedents on or after February 1, 2000, mirrors that of most states, in that it is now a “sop-up” tax. In other words, the New York State Estate Tax is now equal to the amount of state credit allowed on the federal estate tax return. New York is now on par with the common retirement states, Florida, California, Arizona, North and South Carolina, which also have a “sop-up” estate tax.

One common cause of continued frustration for clients is the New York State personal income tax. The New York income tax rates for 1999 for married taxpayers filing jointly is graduated from approximately 4 to 6.85%.²

The good news for clients who are New York State residents, and thinking of moving to Florida, is that, in addition to the warmer climate, Florida does not impose a personal income tax. But a former New York State resident should not rest comfortably, secure in the knowledge of never having to file a state tax return again. While Florida does not have a personal income tax, the state does impose a personal property tax on intangible assets.

As a potential starting point for attorneys whose clients have raised the possibility of relocating, this article will provide an overview of the Florida intangibles tax, a caution regarding the New York taxation of nonresidents and finally a discussion of the income tax imposed by the other common retirement



Ami S. Longstreet

states: California, Arizona, North and South Carolina.

II. New York State Taxation of Nonresidents

New York State continues to tax nonresidents on the individual's New York source income. New York source income includes:

- income from real or intangible personal property located in New York;
- income from services performed in New York;
- income from a business, trade, profession or occupation carried on in New York;
- income from a New York State S corporation;
- income from a New York State partnership;
- income from a New York State estate or trust.³



Anne B. Ruffer

Individuals who are semi-retired and continue to perform some services for their former New York business should note that they are not protected from New York State income tax if they merely stay out of the state for the requisite 183 days. New York State will tax nonresidents for work that is performed outside of New York State, when the work is determined to be performed out of state for the employee's convenience.⁴ It should also be noted that while at one time husband and wife were often considered to have the same domicile, this is no longer the case. Clients who have moved from New York State but do continue to do some work for their former New York company should be advised to review their status to determine whether indeed they may be subject to New York State nonresident income tax.

A logical question from clients who are former New York residents may well be: how would/does New York know of my income when I move out of state, and no longer file tax returns in New York? The answer is through the use of technology, and information sharing with the federal government. It is not difficult for New York State computers to identify former New York residents by social security numbers. Therefore, a client who is a former New York State

resident should confirm that no income could be considered New York source income, before saying farewell to the New York State personal income tax.

III. Florida Intangible Tax

Florida established a tax in 1931 on intangible personal property.⁵ This tax is applied to the January 1 value of mutual funds, stocks, bonds, certain money market funds and limited partnerships and other financial assets. Both individuals and businesses are subject to this tax if they own more than \$20,000 of taxable assets.⁶ The 2001 rates for those individuals who file a joint return and have taxable assets over \$40,000 are \$1 in intangible tax for every \$1,000 in assets.⁷ The following common assets and/or investments are **not** subject to the Florida intangible tax:

1. cash (checking and savings accounts);
2. individual retirement accounts;
3. employee stock options from an employee incentive plan;
4. certificates of deposit;
5. money market accounts (offered through financial institutions);
6. U.S. or Florida government bonds;

The following assets **are** considered taxable assets for Florida intangible tax purposes:

1. notes receivable;
2. loans and advances receivable;
3. beneficial interest in any trust;
4. bonds (except as noted under exemptions above);
5. stocks, mutual, certain money market funds and certain limited partnership interests.⁸

The tax is due on June 30 of each year. A taxpayer can receive a discount if the return is filed before this date. A return filed in January or February receives a 4% discount, 3% in March, 2% in April and 1% in May. Failure to file penalties will be imposed by the State of Florida of up to 10% a month, with a maximum penalty for filing and paying late of 50%.

A client who is a former New York State resident who is looking forward to the sunny climate of Florida and to the freedom from New York State income tax filing, may become disheartened after learning of the Florida intangible tax. Upon closer inspection, counsel and client will see that relatively speaking, compared to the New York State income tax, the Florida intangible tax is not significantly onerous. For example, a single individual with \$250,000 of assets

(determined to be taxable assets for intangible tax purposes) will (for January 1, 2001) pay an intangible tax of approximately \$180. This tax, of course, can be reduced if paid before the June 30 deadline. A married couple with assets of \$1,250,000 (determined to be taxable for intangible tax purposes) would pay a Florida intangible tax of approximately \$1,110 as of January 1, 2001 if paid on June 30.

As indicated by the examples above, while this tax will not likely be the deciding factor in a client's move, it is a cost that should be pointed out and reviewed with clients considering moving to Florida. In addition, those clients who are considering moving to Florida may become aware of techniques available for reducing the Florida intangible tax. By taking advantage of certain constitutional restrictions, some taxpayers have been transferring intangible assets to partnerships or short term trusts which have their situs outside the state of Florida. As Florida has no jurisdiction to tax these non-Florida entities, these individuals have been able to significantly reduce their tax obligations. As with any loophole, this has come to the attention of the Florida Department of Revenue which has established new rules in an attempt to tighten these loopholes. Any clients who are considering such tax avoidance techniques would be well advised to review such tax techniques with a Florida tax advisor.

IV. Income Taxation in the Other Retirement States

If the tax aspects of moving to Florida are not quite as a retiring client may hope for, the next question the client may have is what are the income tax ramifications in some of the other retirement states. The following is a brief overview of the personal income tax imposed by Arizona, California, North and South Carolina.

Arizona does impose an income tax on both residents and nonresidents on income earned in Arizona using the federal adjusted gross income as the starting point.⁹ Arizona's personal income tax rates range from 2.87% to 5.04%.¹⁰ With its budgets for the years 2000 and 2001 being approved by Governor Jane Dee Hull, Arizona is in its eighth and ninth straight years of tax reductions. This, in addition to business tax reductions and credits being increased, is likely one of the reasons for attracting high tech companies to Arizona.

California also imposes a personal income tax on California income earned by both residents and nonresidents.¹¹ The tax rate for 1999 goes from approximately 1% to 6%.¹² It should be noted that California is the only state in this discussion which is a community property state. This by itself is an area for

detailed discussion. If a client proposes moving from a non-community property state to a community property state, client counsel should advise as to how community property laws will affect both the client's income taxes and estate planning.

North Carolina imposes a personal income tax on residents and nonresidents.¹³ The 1999 North Carolina income tax rates range from 6% to 7.75%.¹⁴ At one point in time, North Carolina did also impose an intangible tax but this has been repealed.

South Carolina imposes a personal income tax also on residents and nonresidents which mirrors the federal income tax law.¹⁵ The 1999 tax rates graduate from 2.5% to 7%.¹⁶ South Carolina does have a vehicle property tax which is collected annually based on the fair market value of cars, trucks, motorcycles, recreational vehicles, boats and airplanes.¹⁷ For example, a \$10,000 car would have a personal property tax of approximately \$270.

V. Issues to Be Considered When a Client Is Moving to Florida or Any State

If a client who is a New York State resident does decide to move to Florida, the intangible tax and the cost thereof is an issue which should be discussed with the client. The income tax filings for the year of moving can be complicated as the taxpayer will be considered a part-year resident of both states. Clients contemplating a move should be consulted regarding their estate planning and what effect a change in residency will have on the plans established to date. In addition as discussed above, clients who are former New York State residents should not assume that the change of domicile will exempt them from any New York State income tax. Their income should be reviewed for any which could be classified as New York State source income.

When an attorney has a client who is moving to Florida or any other state, the attorney should acquaint themselves with the tax regime of that state to be able to fully advise the client. All the states discussed above do have Web sites specifically for explanations of taxes and issues applicable to recent arrivals.¹⁸ These Web sites would be a good starting point for counsel's research and introduction to that state's laws.

Endnotes

1. N.Y. Tax Law § 952(9), am'd 1997, C. 389, § 9.
2. N.Y. Tax Law § 601(a)(1).
3. New York State law regarding the taxation of nonresidents is codified in tax law §§ 631-638.
4. 20 N.Y.C.R.R. 131.18.
5. Fla. Stat § 199.032.
6. Fla. Stat § 199.052.2.
7. Fla. Stat § 199.032.
8. Fla. Stat § 199.023.1.
9. A.R.S. § 43-102.
10. A.R.S. § 43-1011.
11. CA. Rev. & Tax C. 17041.
12. *Id.*
13. N.C.G.S.A. § 105-34; § 105-134.2.
14. N.C.G.S.A. § 105-34.2 .
15. SC ST § 12-6-40 .
16. SC ST § 12-6-510 .
17. SC ST § 12-37-210.
18. The tax Web sites for the states discussed are:
New York: <http://www.tax.state.ny.us/>
Florida: <http://sun6.dms.state.fl.us/dor/>
Arizona: <http://www.revenue.state.az.us/>
California: <http://www.taxes.ca.gov/>
North Carolina: <http://www.dor.state.nc.us/taxes/>
South Carolina: <http://www.sctax.org/>

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PUBLICATION NEWS

"A Family Disease Does Not Have to Become a Family Curse"

By Daniel G. Fish

A review of *Hard to Forget: An Alzheimer's Story*

By Charles P. Pierce (Random House, New York, 2000)

Every elder law case has a beginning point, a pivotal event from which the rest of the matter flows. It may be a fall and a hip fracture, a stroke or confusion after elective surgery. Everything is different thereafter, a clear line of before and after is drawn.



For Charles P. Pierce, it was the day his 70-year-old father drove to the neighborhood store to buy flowers. A temporary construction project forced the traffic to be rerouted and on the way home John Pierce got lost, so lost that he ended up 200 miles from home and was missing for three days. That trip to the flower store was the pivotal event for the Pierce family. Nothing would be the same thereafter. They would be forced to acknowledge that John Pierce had Alzheimer's disease, a fact they had refused to confront before. There are painful-to-read descriptions of the author's denial, his wife's taking on the role of primary caregiver and his mother, angry that her husband has not lived up to his end of the bargain. This is the added burden of the family curse.

Hard to Forget combines the brutally honest Pierce family history with the equally harsh description of the infighting within the scientific community in the race for the prestige and power to discover the cause and cure of Alzheimer's.

The strength of the book is found in the fact that Charles P. Pierce is first and foremost a journalist. He knows how to tell a story and hold a reader's interest. This nonfiction book reads like a novel. This is not one of the many "how to" books that are so popular today. This is a "how it was" book. John Pierce has died and this is a retrospective view.

On page 141 of *Hard to Forget*, the book addresses the issue of elder law.

Earlier, by dragging my mother to the lawyer, Margaret had managed to get the finances arranged so that my

father's illness would not necessarily leave my mother penniless. However, my mother had delayed so long in seeking assistance that it would probably leave her close to it.

If my father went into a nursing home, the lawyer had estimated, my parents' savings might last as long as a year. After that my father would qualify for Medicaid. Their house was protected, and my mother would survive on Social Security, and on her portion of my father's pension.

"Hard to Forget combines the brutally honest Pierce family history with the equally harsh description of the infighting within the scientific community in the race for the prestige and power to discover the cause and cure of Alzheimer's."

Hopefully the lesson of the benefit of early legal intervention will be obvious to the reader.

Charles P. Pierce writes openly about his fear that the disease which took his father's life would affect him and on to the next generation, his own children. He describes his exercise of remembering, constantly testing his own memory, afraid that he will lose his mind bit by bit. This fear of the genetic component of Alzheimer's leads the author to explore the scientific side of the disease.

The scientific story has a pivotal point also. It was the day in 1906 in Frankfurt, Germany when Frau August D., who was screaming in the streets and embarrassing the family, was taken to see a physician named Alois Alzheimer. That was the day that such inappropriate behavior was no longer simply dismissed as senility for which there was no

treatment; the dawning of the day when it would be seen as a discrete pathology potentially capable of being understood and treated.

"The research indicated that there were signs of Alzheimer's disease even at a young age."

Pierce introduces the reader to a world where the desire to win a Nobel Prize controls the direction of scientific research. This is a world where the first scientist to understand the mechanism of Alzheimer's, the genetics of Alzheimer's, is likely to win worldwide acclaim.

The book provides a good explanation of the highly technical research to date. The scientific studies of special populations, the Amish and the School Sisters of Notre Dame are particularly enlightening.

The Indiana Amish population was ideal because it eliminated most environmental factors. This is an isolated group with a high degree of intermarriage. The Alzheimer's disease was clustered in a small number of specific families.

The School Sisters of Notre Dame were selected for study because they were reliable record keepers who shared the same environment and eliminated many variables since they never married and did not have children. The nuns had each written autobiographies when they entered the convent. The research indicated that there were signs of Alzheimer's disease even at a young age. This was done by comparing the language, complexity of the letters against the letters of those who did not develop Alzheimer's disease. If that study is accurate, Charles P. Pierce's writing style would strongly indicate that he will not develop the illness.

You can expect that many of your clients will have read this vivid portrayal of the stigma of Alzheimer's. It is recommended reading for attorneys and staff who deal with families of Alzheimer's victims. It will give your office a greater insight into the forces tearing at the families who sit across the desk. It is a potent reminder that the legal aspects of the disease are only a part of the picture. The book is a plea that others avoid the family curse. If the illness does occur, the patient's family should not be shamed like the family of Frau August D or the family of John Pierce.

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

He has authored several articles on the legal issues of Elder Law. He has been quoted in the *New York Times*, *Business Week*, *Fortune Magazine* and *Lawyers Weekly USA*. He has conducted seminars for Time Warner, PaineWebber, Champion International, HBO, Ciba-Geigy, Consolidated Edison, The Alzheimer's Association, TIAA-CREF, William Doyle Galleries, Lenox Hill Hospital, Ogilvy and Mather, Chase Manhattan Bank and Conde Nast.

TECHNOLOGY NEWS

By Stephen J. Silverberg

I am pleased to announce the beginning of the operation of the Elder Law Section Listserv. For those of you who are not familiar with this concept, a Listserv is a form of e-mail that allows a widespread exchange on legal topics. By posting a message to the Listserv, it is automatically delivered to all members of the Listserv; this makes it an extremely efficient way of reaching other attorneys and exchanging information with them. Just think of the Listserv as sending one e-mail that automatically goes to hundreds of recipients.



"Just think of the Listserv as sending one e-mail that automatically goes to hundreds of recipients."

Here are some examples of uses of the Listserv. Suppose you have met with a client and after reviewing the statutes you are not sure how a particular strategy might suit that client. You can post your question to the Listserv. All members will receive this question and those who feel they can help you will respond. If you need a referral to an attorney in another part of the state, the Listserv can prove invaluable. Not only can you post a request for a referring attorney, but after being on the Listserv for a while, you become familiar with the attorneys who

can be helpful and seem to be knowledgeable in the area in which you need assistance.

Joining the Listserv is easy. Simply go to the Elder Law Section site on the NYSBA Web site. In the member area you will find a button to click to subscribe. You will be prompted to enter your e-mail address. It is as simple as that. You can choose to receive your Listserv information in different formats. If you wish, you can receive each message as sent. This way you can read each message and respond if you choose the same as if you are sending e-mail. Another method is the digest. Many people use the digest because it downloads all the messages for one week. This gives you the ability to review the messages all at one sitting. The downside to this method, however, is that if you wish to respond you must do so via separate e-mail.

I strongly urge all Section Members to give the Listserv a try. While it may seem a daunting task to review all these messages at first, if you follow a few simple rules you will find it to be extremely rewarding.

Always be polite.

Make sure your subject line on your message clearly reflects your issue.

When responding to a message, try not to repeat the entire original message in your response. Include only those portions pertinent to your response.

The Listserv is not to be used for any commercial purposes, chain letters, jokes, or similar spam.

Stephen J. Silverberg is the managing partner of Silverberg & Hunter, LLP, a Long Island, New York, firm concentrating in business succession, tax planning and elder law. He is past Chairman of the Tax Special Interest Group of the National Academy of Elder Law Attorneys, and Chairman of the Technology Committee of the New York State Bar Association Elder Law Section.

ADVANCE DIRECTIVE NEWS

By Ellen G. Makofsky

Many of my clients are snowbirds who winter in warmer climes. As an attorney concentrating in elder law, I try to incorporate a discussion of advance directives into most conferences. Often the question comes up, "What happens if I need a surrogate to make medical decisions for me this winter?" This is an interesting question and I thought it would be a worthwhile exercise to compare the statutory requirements for the appointment of a health care agent in the retirement states of Florida, North Carolina, South Carolina, Arizona and California to determine if properly executed documents in New York would suffice in these other states.



The requirements for a valid health care proxy in New York are pretty straightforward. The statute requires that, at a minimum, the document identify the principal and agent and that the document indicate that the principal intends the agent to have authority to make health care decisions on the principal's behalf.¹ The health care proxy must be signed in the presence of two adult witnesses and the appointed health care agent may not serve as a witness. Finally, a statement from the witnesses that the principal appeared to execute the proxy willingly and free from duress must be incorporated into the health care proxy.² The New York statute places certain restrictions on who may serve as health care agent. An operator, administrator or employee of a hospital may not be appointed as a health care agent if the principal is a patient, resident or applied for admission to such hospital unless the proposed health care agent is related to the principal by blood, marriage or adoption. A physician may be appointed as the health care agent but cannot serve the dual roles of attending physician and health care agent simultaneously. An individual may not serve as health care agent for more than ten persons unless the proposed agent is a spouse, child, parent, brother, sister or grandparent of the principal.³

Florida, North Carolina, South Carolina, Arizona and California each have differing laws regarding the appointment of a health care agent. Set forth below are the statutory requirements for the snowbird states along with an analysis of whether a health care proxy created pursuant to New York State law is likely to be honored in those states.

Florida

A standard New York State health care proxy form, properly executed, should be recognized as a valid document in the State of Florida. Although the Florida statute provides a suggested form for the designation of a health care surrogate,⁴ the suggested form is not mandatory. What Florida law requires is that the health care surrogate designation be in the form of a writing which identifies the agent authorized to make health care decisions for the principal. The principal, in the presence of two subscribing adult witnesses, must sign the written designation. There are some restrictions regarding appropriate witness to the document. First, as in New York, the person appointed as the health care surrogate may not act as a witness. Second, the principal's spouse and/or a blood relative may serve as one of the two required witnesses, but not both.⁵

North Carolina

North Carolina provides for a statutory health care power of attorney form but the use of the form is optional. Although the North Carolina statute does not bar the use of any other form that meets the statutory requirements,⁶ it is unlikely that the standard New York State health care proxy will meet North Carolina's statutory requirements as a matter of course. The North Carolina statute requires that the health care power of attorney be in writing and executed in the presence of two qualified witnesses and acknowledged by a notary public. In order to be a qualified witness, the witness must affirmatively state in the document that he (1) is not related within the third degree to the principal or the principal's spouse, (2) does not know nor does he have a reasonable expectation that he would be entitled to any portion of the estate of the principal upon the principal's death, (3) is not the attending physician or mental health treatment provider of the principal, nor an employee of the attending physician or of a health facility in which the principal is a patient, nor an employee of a nursing home or any group-care home in which the principal resides and (4) does not have a claim against any portion of the estate of the principal at the time of the principal's execution of the health care power of attorney.⁷

South Carolina

Although the South Carolina statute mandates that a health care power of attorney must substantially follow a prescribed form and puts numerous limi-

tations on who may act as a witness,⁸ a properly executed and recorded New York State power of attorney should be recognized in South Carolina.⁹ According to South Carolina Code, a power of attorney for health care is valid if its execution complies with the law of the jurisdiction where the instrument was executed at the time of execution and it is recorded in South Carolina as required by statute.¹⁰

Arizona

Most New York State health care proxies will meet the criteria set by Arizona for a health care power of attorney. As in New York, the Arizona statute requires that the designation of a health care agent be in writing and contain language that clearly indicates the principal's intent. The health care power of attorney must be dated and signed or marked by the principal. Where New York State requires two witnesses, the Arizona statute requires either one witness or notarization of the principal's signature or mark. As is the requirement in New York State, the witness or notary must state that the principal appeared to be of sound mind and free from duress at the time of the execution of the health care power of attorney. Arizona statute provides that a person does not qualify as a witness where the person is directly involved with providing health care to the principal or is related to the principal by blood, marriage or adoption or is entitled to any part of the principal's estate at death.¹¹

California

Although the requirements for a validly exercised power of attorney in California are complex, a properly exercised New York health care proxy is valid in

California. California statute specifically provides that a durable power of attorney for health care or similar instrument executed in another state in compliance with the laws of that state is valid and enforceable in California.¹²

After reviewing the choices other states have made in regard to advance directives what advice can be given to the out of state visitor to New York? The New York perspective is clear in regard to those who have executed advance directives in other states. New York State law provides that a health care proxy or similar instrument executed in another state in compliance with the law of that state is considered validly executed and will be honored in New York State.¹³

So what is my advice to snowbird clients who ask do I need to execute new documents this winter? A very lawyerly, "it depends."

Endnotes

1. N.Y. Consolidated Laws § 2981(5).
2. N.Y. Consolidated Laws § 2981(2).
3. N.Y. Consolidated Laws § 2981(3).
4. Florida Health Care Surrogate Act § 765.203.
5. Florida Health Care Surrogate Act § 765.202.
6. North Carolina General Statutes 32A-205.
7. North Carolina General Statutes 32A-16.
8. South Carolina Code § 62-5-504.
9. South Carolina Code § 62-5-501.
10. South Carolina Code § 62-5-501(D)(2).
11. Arizona Statutes 36-3221(A)(C).
12. California Code § 4653.
13. N.Y. Consolidated Laws § 2990 Pub. Health.

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Ms. Makofsky is a member of the New York State Bar Association (NYSBA) and serves on its Elder Law Section's Executive Committee. She is Chair of the Health Care Committee of the Elder Law Section. She is also a member of the NYSBA's Trusts and Estates Law Section. Ms. Makofsky is a member of Nassau County Bar Association, Elder Law, Social Services and Health Advisory Committee and the Surrogate's Court Trusts and Estates Committee. She is a member of the National Academy of Elder Law Attorneys, Inc. (NAELA).

Ms. Makofsky serves on the Long Island Alzheimer's Foundation (LIAF) Legal Advisory Board and is the current president of the Gerontology Professionals of Long Island, Nassau Chapter. She is the former Co-chair of the Senior Umbrella Network of Nassau. Ms. Makofsky is the First Vice President of the Port Jewish Center in Port Washington, New York.

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

CAPACITY NEWS

Finding Information About Incapacity on the Worldwide Web

By Michael L. Pfeifer

We live in a world where information is instantly available to us on the worldwide Web. Although care must be taken to ensure the information we receive is reliable, the Web can short-cut our research and give us instant access to the information we need. In this article, I will discuss Web sites that offer general information about medical conditions that make us incapacitated and finding law on incapacity in the retirement states.



Incapacity on the Internet

Suppose a family comes to you because their loved one is deteriorating mentally. You would like to know more about his or her condition. Or your client is aware that he or she has some condition that will cause dementia and wants more information about this condition. Or, perhaps, the family wants to know where they can get help or housing for their loved one. You or your client most probably can find the information you need fairly quickly on the Internet. What follows are some Web sites that contain information that would be useful to an attorney or a family who is working with someone suffering from declining capacity.

The first stop on the Internet might be a search engine such as www.dogpile.com (yes this is a legitimate search site and despite its name, a good one) or www.yahoo.com. For instance, I found many Web sites using yahoo. I typed "'new york' 'long-term care'" in the search bar and was provided with a listing of long-term care facilities that care for persons with limited capacities, including Alzheimer's disease and other dementias.

By searching dogpile, I found many sites that contained information about dementia. One of the sites I found was www.dana.org/brainweb/. The Dana Foundation is a private, philanthropic organization with interests in health and education. This site contains information about Alzheimer's, Parkinson's, stroke, depression, mental illness, mood swings, schizophrenia, head/brain injuries, genetics, imaging, addiction, learning, memory, pain, sleep, stress and

aging. There are also numerous links to other Web sites where one can obtain further information about the foregoing topics.

www.sfn.saskatoon.sk.ca/health/alzheimer/tfn-general-information.html. This site gives good general information about Alzheimer's including symptoms, statistical information, treatment and current research efforts. (Unfortunately at this time there is no cure.)

"You or your client most probably can find the information you need fairly quickly on the Internet."

www.noah.cuny.edu/illness/mentalhealth/cornell/conditions/dementia.html. This is the New York Presbyterian Hospital site. There is much interesting information on this site including the following definition of dementia: "Dementia is a progressive, degenerative disease that attacks the brain and results in problems with memory, thinking and behavior and becomes severe enough to interfere with a person's ability to work and to take care of everyday tasks such as bathing, cooking, dressing and grooming. Dementia is not a normal part of aging."

www.hebs.scot.nhs.uk/publics/dement/dem1.htm. This is the Health Education Board for Scotland's Web site. This Web site is a booklet that informs those who have been diagnosed with dementia what to do. It tells about dealing with the doctor, what changes one can expect in someone who has dementia, how dementia will affect the individual, how to cope with it, getting emotional support, getting practical help, planning for a future of diminishing capacity, making financial and legal plans and about the latest medical research.

www.alz-nova.org/aboutalz/fyi.asp. This site is the Alzheimer's Association, Northern Virginia Chapter. It contains much information about degenerative diseases, divided into sections. If you are looking for a comprehensive site that covers most, if not all, of the causes of dementia, this is it.

www.geocities.com/HotSprings/3004/alzlinks.htm. Provides links to worldwide Alzheimer's organizations.

www.alzheimers.com/This Web site contains information about alternate treatments for Alzheimer's disease.

www.home.mira.net/~dhs/ad2.html. This Web site gives information about Alzheimer's, its occurrence, diagnosis, treatment, etc. Unfortunately, the Web site is divided into separate links that contain only a small amount of information at each link. It would have been better to combine several topics in one place and save the reader from having to come back to the home page and then click on another link to get information about the next topic.

www.healthcentral.com/home/home.cfm. This is a medical information site that includes information about Alzheimer's. The Alzheimer's section provides links to news, the people's pharmacy, best doctors, library, books and tapes and other recommended Web sites.

www.encarta.msn.com/find/Concise.asp?ti=024B0000. This site gives an overview of dementia and its most common cause, Alzheimer's disease.

www.ccc.nottingham.ac.uk/~mpzjlowe/lewy/lewyinfo.html. This is the University of Nottingham site. It gives information about "Dementia with Lewy Bodies." This form of dementia is the most common, second only to Alzheimer's. "The name for the disease comes from the presence of abnormal lumps which develop inside nerve cells called Lewy bodies." The symptoms of Dementia with Lewy Bodies overlap Alzheimer's and Parkinson's diseases and there is an "early development of hallucinations."

www.alz.co.uk/. This is the Alzheimer Disease International site, which is an umbrella organization for Alzheimer's organizations throughout the world. The Web site gives information about the disease and has a help for care givers section.

www.intercountyhealth.com/search.shtml. If you are looking for a nursing home for someone with dementia on Long Island, the Undercount Health Facilities Association, Inc., an organization of 58 health care facilities, may be a good place to start. You can obtain the name and addresses of the associated facilities and a listing of the services they provide.

www.dementiacrewinc.com/. This Web site will not tell you anything about dementia but if you are into a "hop/heavy/hardcore band" (according to yahoo) and wish to download their music, this site is for you.

Finding Law on the Worldwide Web

Suppose you need to know whether a will or a trust would be considered valid in a retirement state or what the rules are concerning guardianship proceedings. Can you find the answers on the worldwide Web?

Yes and no. If you subscribe to a commercial service, such as Lexis, Westlaw or Loislaw, you can find the law fairly easily in any state. You can also rely on the accuracy of what you find. However, with respect to free Web sites, you can generally find statutory law, but case law availability is limited. Even when you find statutory law, most Web sites will warn you that the law may not be up to date. The official versions of the statutes are contained in books and thus, there is no guarantee that the statutes you are finding online are accurately reported. Thus, an attorney should use caution in relying on law found for free. Still, research on the Web may provide a good starting point. Most sites will allow you to search by scrolling through a listing of the statutes or by conducting a search by typing in key words.

"... an attorney should use caution in relying on law found for free."

If you wish to find statutes in North Carolina, go to www.ncga.state.nc.us. To find statutes in South Carolina, Florida, Arizona and California go to www.state*.us, where * is the state code. (For example, South Carolina would be www.state.sc.us.) Most state statutes can be found by using this formula, including New York's statutes. You will open to the state's government site and from there you can find the state's statutory law. Usually, the statutory law will be found in the legislative section of the site.

North Carolina

In North Carolina, "Any person of sound mind, and 18 years of age or over, may make a will." NC General Statutes, § 131-1. I found this statute on the North Carolina Web site. The law of wills is found in chapter 31 of the NC General Statutes. Powers of Attorneys and Health Care Powers of Attorney are addressed in chapter 32A, Fiduciaries in chapter 32, Trusts and Trustees in chapter 36A and Incompetency and Guardianship in chapter 35A.

To access the North Carolina statutes, go to www.ncga.state.nc.us. Click "NC Statutes." You can

then conduct a search of the statutes or go to a table of contents.

South Carolina

To find South Carolina statutes, go to www.state.sc.us. Click the "South Carolina Code of Laws." Before you can view the South Carolina statutes, you must accept its disclaimer. By accepting the disclaimer you are agreeing that you will not use the statutes for commercial purposes and that you understand that the statutes reproduced on the site may not be completely accurate. I found searching through the statutes somewhat difficult, not so much because of the Web site, but because of the way in which South Carolina law is organized.

Florida

For Florida statutes, go to www.state.fl.us. Click "Select an Area of Government." Then, click "legislation." Then, "Statutes and Constitution."

Arizona

To access Arizona statutes, go to www.state.az.us. Click "Select a Category" and scroll down to "Bills,

Laws and Legislation." Click "Go." Scroll down to "Legislature." Click "Statutes."

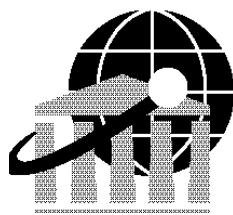
California

To find the California code and statutes, go to www.state.ca.us. Click "Government." Click "Senate." (You cannot find the statutes by clicking "Assembly.") Click "Legislation." "California Law consists of 29 codes, covering various subject areas, the State Constitution and Statutes." "California Statutes are the Chaptered Bills. A bill is 'chaptered' by the Secretary of State after it has passed through both houses of the Legislature and has been signed by the Governor or becomes law without the Governor's signature. Statutes are available starting from 1993."

Conclusion

There is much information that can be obtained fairly quickly about conditions of dementia that affect the capacity of our clients. Unfortunately, researching of the law of incapacity is quite limited at this time (at least for free) but new sites are popping up all the time and who knows what will be found a year or even six months from now.

Michael L. Pfeifer, Esq. practices in Garden City in the areas of Estate Planning, Probate, Elder Law and Real Estate. He frequently writes and lectures on these topics. He is currently serving as Chairperson of the Solo/Small Firm Practice Committee at the Nassau County Bar Association.



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GUARDIANSHIP NEWS

By Robert Kruger

When should the appointment of a guardian be made?

This article will focus on a number of decisions by Hon. Edwin Kassoff, Justice of the Supreme Court, Queens County. The decisions discussed involve factual patterns that appear with sufficient frequency in guardianship cases to offer some guidance on whether a guardian should be appointed.



The first decision discussed is *In re Kustka*,¹ almost a metaphorical case of a highly functional AIP where the AIP was an 81-year-old widower who had, shortly after his wife's death, married his late wife's live-in home companion. Shortly thereafter, substantial withdrawals were made from the AIP's accounts, the money being transmitted to the companion's daughters in Czechoslovakia.

The AIP could manage his activities of daily living acceptably . . . he could drive and keep his house clean and express his thoughts clearly, but he could not keep his finances straight.

The decision noted that Article 81 provides a two-pronged test to determine whether a guardian should be appointed. First, under § 81.02(a), the court must determine that the appointment is necessary to provide for the personal needs or property management of the AIP. Secondly, the determination of incapacity must be based on clear and convincing evidence (unless the AIP agrees to the appointment) that the AIP is likely to suffer harm because of inability to manage his or her personal needs or property, and is unable to understand or appreciate the nature and consequences of his inability.

Even though the AIP in this case was high functioning, he was sufficiently confused about his finances, and they had been sufficiently depleted, to demonstrate both necessity and the likelihood of harm if no guardian was appointed.

Kustka presents a situation that is all too common: how many of us have had calls from e.g., one daughter who was convinced that the other daughter was hatching a scheme to appropriate the assets, by *inter vivos* transfer or by will, of their not quite intact mother? I do not suggest that *Kustka* was easy to decide. I

do suggest that it was easier because some exploitation had occurred.

When a child only anticipates a scheme by her sister, but before the scheme has hatched, it requires a very determined client to start the guardianship process. Obviously, if the degree of impairment of the parent is neither significant nor visible, the proceeding may be dismissed leaving a very angry mother and potential assessment of costs and attorney's fees. Moreover, the putative financial abuser may have positioned herself to be the caregiver-custodian of her mother, threatening access in a variety of ways and isolating the parent, who may have become dependent on her. There is no answer or, to put it differently, the courts may not provide a cure for a long-standing manipulative relationship, which has gone unchecked for a period of years, resulting in dependency and exploitation. This case should not be brought for an ambivalent client; a determined client is an absolute necessity here.

Another facet of this issue may be found in Judge Kassoff's decision in *In re Lowe*,² where a wife petitioned for guardianship of her admittedly incapacitated husband. Focusing on the point of this article to the exclusion of other issues in the case, Judge Kassoff denied the petition to appoint a guardian. The reason: the husband had executed a durable power of attorney and a health care proxy, and the wife was the attorney-agent in both instances. Therefore, he did not "need" a guardian.

Judge Kassoff stated that "in most instances" where a power of attorney and health care proxy have been executed, the court will not appoint a guardian. Well, what are the exceptions? The *Lowe* case involved a spouse; in *In re O'Hear*,³ a case cited by Judge Kassoff, the putative AIP appointed his adult son. What if the attorney-in-fact and proxy is a friend? An attorney? A collateral relative? And suppose further that, thus far, there has been no abuse of the power of attorney, and the petitioner is simply uncomfortable acting without bonding or judicial supervision.

Lest this be thought purely hypothetical, many attorneys (and the author is one) are uncomfortable acting without supervision. There are too many heirs at law, with no connection to the putative AIP but one: an emotional commitment to an increased inheritance.

Of course, what an attorney does depends on the attitude of the judge(s) in your county. Doing the right thing may not insulate you from an attack. Was the home attendant/companion you hired for your principal necessary? Did you obtain a medical or psychiatric recommendation for this? In writing? One need not go on. The possibilities for attack by a disgruntled heir at law are many.

My next choice for discussion is a decision by Judge Kassoff in *In re Koch* (unreported). Louis Koch, a patient at Mt. Sinai Hospital in Queens, is not cognitively impaired. He is a diabetic, he suffered a partial amputation of his leg and he refused to leave the hospital (although he no longer needed acute care) until his leg had healed. His insurance company declined to pay for his care at Mt. Sinai, and he was ineligible for Medicaid (too young).

Despite several reasonably creative efforts by Mt. Sinai to convince him to leave the hospital, he simply refused to go. This refusal precipitated a guardianship petition and a dismissal of the petition by Judge Kassoff.

He is lucid; he has no cognitive impairment and he manages his own finances. He certainly understood the nature and consequences of his situation and his insight and judgment of his own condition and situation appeared to be keen, if one may summarize Judge Kassoff's findings.

It is hard to quarrel with the Judge's conclusion. Whatever remedies the hospital has, and an action on the account was apparently not one of them, the appointment of a guardian for someone who has judgment but exercises it badly appears to be an abuse of Article 81. If the Court entertained guardianship petitions for people who exercise poor judgment, we would never lack for work.

Hence, the stress on functional limitations and necessity as criteria for granting guardianship petitions. My personal favorite case on this subject, from Kings County, is one where the author was the court-appointed attorney for an 84-year-old woman who married a 48-year-old gay man, who proceeded to help himself to \$250-350,000 of her \$600,000 estate. Her judgment was deplorable but she was verbal, lucid and cognitively intact. She needed a psychiatrist, not a guardian. Because the case was resolved short of trial, no determination of incapacity was made. Yet, it was awfully close to *Kustka*, except (no small matter), the AIP had less cognitive impairment or functional limitations. I believe that the appointment of a guardian for this woman was unlikely. There may have been necessity, but were there functional limitations? I doubt it.

We may bridle at the result, but the appointment of a guardian for a relatively intact AIP is a tough sell to any court.

Medicaid Lien Legislation

By way of background: In July 1997, the New York Court of Appeals, in *Cricchio v. Pennisi*,⁴ ruled that a preexisting Medicaid lien must be "satisfied" before a Supplemental Needs Trust is created for an adult beneficiary. In April 1999 the New York Court of Appeals, in *Calvanese v. Calvanese*,⁵ ruled that the lien, to be satisfied, must be paid in full.

In February 2001 the New York Court of Appeals will hear argument on *Gold v. United Health Services Hosps.*,⁶ a Third Department case, and in *Santiago v. Craig Band Realty Corp.*, a First Department case, both of which held that *Cricchio* and *Calvanese* apply to infants, as well as adults, and that *Baker v. Sterling*,⁷ which ruled that infant's obligations to repay Medicaid liens were limited to that portion of the recovery allocated for medical expenses, no longer controls.

Legislation introduced in the legislature last session to roll back *Cricchio* and *Calvanese*, and of necessity preserve *Baker*, passed the Assembly and failed to come up for a vote in the Senate, where the counties, as well as the New York State Department of Health, were opposed.

Conversations with DOH lead one to believe that anecdotal evidence from the counties that liens are compromised equitably was persuasive in DOH's opposition. Alternative legislation designed to guarantee families no less than one-third of the recovery elicited interest at DOH but time was too short and anecdotal evidence of overreaching by the counties too sparse to generate necessary support from DOH.

Therefore, I request anecdotal evidence from our members reflecting overreaching by the counties. For example, the author recently settled a Medicaid lien in Westchester County Surrogate's Court. This case, *In re Viviano*, involved a \$625,000 recovery, an attorney's fee of \$200,000 and a settlement of \$300,000 to Westchester County, leaving \$125,000, or 20%, for the family. Similar anecdotes should be forwarded to the author who, with Anthony Enea and Dean Bress, is working in conjunction with NYSARC, the lead proponent of a legislative remedy.

Common sense tells us that families will not commence actions if there is nothing in it for them and common decency tells us that they deserve compensation for their loss. Therefore, please write.

Update on the Birnbaum Commission

As most guardianship attorneys know, Judge Kaye appointed Sheila Birnbaum, Esq. of Skadden, Arps to investigate fiduciary appointments in receiverships, estates and guardianships, with an eye to the politicization thereof.

The Elder Law Section appointed a Committee, chaired by Howard Krooks, to articulate the position of this section. Our position paper will (we hope) have been endorsed by the Executive Committee of the Elder Law Section in October 2000.

To summarize a few of the salient points in the position paper, the Section notes that guardianship involves living people at risk. There may be a *pre-mortem* estate fight involved, but at its core there is a helpless, living person, who might be at risk because of

1. an inability to care for himself or herself;
2. financial abuse;
3. a warring family who has lost sight of the alleged incapacitated person;
4. difficult care needs and limited resources;
5. developmental disability; or
6. mental illness.

The paper points to the various interdisciplinary skills a skilled guardianship attorney must possess, including facility with trust and estates law, tax law, benefits law, real estate and matrimonial law, supple-

mental needs trust laws, the laws of substituted judgment for finances and health care and more.

The point is that guardianship fiduciary appointments, far more than estate fiduciary appointments, and far more than receivership appointments, require a host of skills and delicate care management and personal diplomacy. In no other specialty is there an educational requirement to serve as a judicial appointee. No other specialty does as much *pro bono* work in low asset cases as does the elder law bar. Therefore, the perception that fiduciary appointments in guardianship cases are heavily political is wrong and places the elderly, the youthful disabled and the mentally ill at risk. Our Section is lobbying the Birnbaum Commission in an effort to demonstrate the very human values which we, in the elder law bar, believe distinguish us from the political appointees and the purely mercenary.

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

Endnotes

1. 163 Misc. 3d 694, 622 N.Y.S.2d 208 (1995).
2. 180 Misc. 2d 404, 688 N.Y.S.2d 389 (1999).
3. 219 A.D.2d 720, 631 N.Y.S.2d 743.
4. 90 N.Y.2d 296, 660 N.Y.S.2d 679.
5. 93 N.Y.2d 111, 672 N.Y.S.2d 410.
6. 261 A.D.2d 67, 710 N.Y.S.2d 123.
7. 39 N.Y.2d 397, 384 N.Y.S.2d 128 (1976).

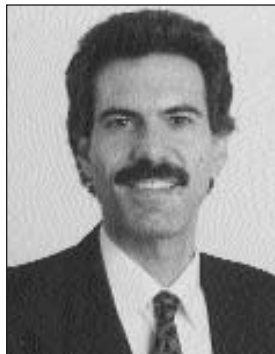
Robert Kruger is the Chairman of the Committee on Guardians and Fiduciaries, Elder Law Section of the New York Bar Association. He is also Chairman of the Subcommittee of Financial Abuse of the Elderly, Trust and Estates Section, New York State Bar Association. Mr. Kruger is author of the Chapter on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

PUBLIC POLICY NEWS

Spousal Litigation

By Ronald A. Fatoullah

As I was having breakfast on September 14th, I quickly flipped through the *New York Times* looking for interesting and relevant news. My eye caught a headline: "City Called Too Aggressive on Health Care." Could this be, I wondered? Yes! Finally, a *New York Times* article that exposed the trials and tribulations of our clients who have signed spousal refusals, and who are then sent collection letters and/or sued for support and recovery by local departments of social services. The article began its story as follows: "The Giuliani administration's pursuit of reimbursements from city residents whose spouses benefited from government-paid nursing home care drew charges of cruelty and insensitivity yesterday. . . ."



An NBC reporter experienced this situation with a parent of her own, and decided that the public should be aware of the problems that many refusing spouses face in order to remain financially secure and independent. This reporter started the ball rolling. Public Advocate Mark Green stated at a news conference on September 13, 2000 at the steps of City Hall: "Be smart, have a heart, stop this cruel and unusual policy of threatening to sue and seize the lifetime earnings of widows at their moment of grief." Bruce Vladeck, the administrator of HCFA from 1993 to 1997, was quoted at the press conference as saying that these lawsuits make "no sense on policy grounds, on economic grounds and certainly not on humane grounds."

At the news conference, Mark Green spoke about a Queens woman who had \$300,000 in assets and who received a bill for \$144,000 from NYC representing her husband's nursing home expenses. She received this bill just a few weeks after her husband died.

The *New York Times* article cited a case in which HRA moved to collect \$15,836 from a 79-year-old woman who had only \$94,856 in assets, in order to cover part of her husband's nursing home bills that grew to \$187,610.

As most elder law attorneys know, these cases are certainly not unusual. The same day that the *Times* article was published, my office was in the process of negotiating the settlement of a spousal case with NYC. Our client, the well spouse, had only \$72,000 in assets, which was below the CSRA of \$74,820 in her situation. However, she *did* sign a spousal refusal in which she refused to use her *income* towards her husband's care in the nursing home. She was in her early sixties and continued to work. Her salary was approximately \$3,600 per month. HRA demanded 25% of her income over the "Minimum Monthly Maintenance Needs Allowance" (MMMNA) of \$2,103 (for 2000). However, once income taxes were paid on the income she earned, it would be nearly impossible for her to meet her monthly expenses. After numerous discussions, HRA finally agreed not to pursue this matter.

This result was well and good for our client. What about all the demand letters that go out to individuals who are not represented by counsel? On her own, my client would have likely paid 25% of her MMMNA towards her husband's care. Consequently, she would have had to substantially dip into her principal in order to make ends meet on a monthly basis: she would have slowly impoverished herself, one month at a time.

Nassau County began sending demand letters to refusing spouses in September, 2000. Shortly thereafter we met with a client who received such a letter. Our client was elderly, frail and petrified to proceed with litigation. Against our advice, our client decided *not* to retain us to represent him with regard to Nassau County's demand. Rather, he settled the case with the County on his own because litigation was simply out of the question for him. I have no doubt that this is not an isolated case.

Can we deduce that the mere receipt of these demand letters by seniors, many of who are quite elderly and frail, is a form of harassment? Merriam-Webster defines harass as to "exhaust, fatigue." I believe that the receipt of these letters does rise to the level of harassment for many seniors. There is undoubtedly a segment of seniors who will settle these cases upon receipt of a demand letter, because of their age and their physical, mental, and emotional states.

There is also the issue of uniformity. Each county or Medicaid region throughout NYS handles the issue of refusing spouses in their own way. Some rarely sue spouses, while some will settle for a *monthly* payment from the community spouse, often 25% of his or her income over the MMMNA. Bernie Krooks, our Section Chair, was quoted at the press conference as saying: "The city (New York City) is more aggressive than other counties in seeking reimbursements." We have had elderly spouses that have seriously considered moving from one county to another in order to

avoid a lawsuit and preserve their future financial security.

We don't know where all of this will lead. However, we do know that the publicizing of the plight of refusing spouses has led to more discussions on this issue. For example, the NYC Council held a hearing on this matter on October 17, 2000. Further, other members of NYC government are now reviewing this issue. Our voices do have an impact and should be heard.

Ronald A. Fatoullah, Esq. is the senior attorney of Ronald Fatoullah & Associates, an elder law and estate planning law firm with offices in Forest Hills, Great Neck and Brooklyn. Mr. Fatoullah serves on the board of directors of the National Academy of Elder Law Attorneys, where he co-chairs its Public Policy Committee. He is chair of the Legal Advisory Committee of the Alzheimer's Association, LI Chapter, and is a member of the Executive Committee of the Elder Law Section of the New York State Bar Association. Mr. Fatoullah has also been certified as an elder law attorney by the National Elder Law Foundation.

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Florida Intangible Tax—Past Liability and Future Compliance

By Julie Osterhout

The State of Florida has one of the largest growing populations in the nation. Florida is also considered a retirement state, attracting thousands daily to relocate for the golden years and the enjoyment of the wealth created during a lifetime. The State has gone through many political pendulum swings, but in all permeations, any effort to create a state income tax has been avoided. The State is principally financed by ad valorem real property taxes at the county level and by sales taxes on goods, at a state-wide level. As the number of residents grow and the infrastructure required to meet the needs of the citizens fails, increasing demands are made for funds to be generated for this purpose. As a result, Florida has enacted a number of miscellaneous "taxes" to pay for these needs. They range from impact fees for new construction to impact fees on automobiles (which was held unconstitutional under the Florida constitution) and a long-standing provision for taxes on intangible personal property. The intangible personal property tax has been very unpopular with the retiring residents of the state as it essentially imposes an annual tax on the wealth accumulated by them for their retirement years. The intangible personal property tax can be divided into two main groups. The first is a tax on mortgages, which is a one-time charge due at the time that the promissory note and mortgage are created and recorded, and an annual tax on all other intangible personal property owned by the citizens.



This article reviews the Florida intangible personal property tax as it has existed in the past with an eye toward liability that may be incurred by residents of other states as a result of using trust instruments. In addition, this article will review the efforts of the most recent conservative legislature in its attempts to gradually repeal what is a very unpopular tax to the aging residents of the state.

The Florida statutes define intangible personal property very broadly to include all personal property which is not in itself intrinsically valuable, which derives its chief value from that which it represents, including, but not limited to the following:

All stocks or shares of incorporated or unincorporated companies, business trust and mutual funds;

All notes, bonds or other obligations for the payment of money;

All condominium and cooperative apartment leases of recreation facilities, land leases and leases of other commonly used facilities.

A person is defined to include any individual, firm, partnership, joint venture, . . . estate, trust, business trust, trustee, personal representative . . . or other fiduciary.

"The State has gone through many political pendulum swings, but in all permeations, any effort to create a state income tax has been avoided."

Prior to January 1, 2001, the annual tax on intangible personal property is 1.5 mils on each dollar of intangible property sited in this state.¹ An annual intangible tax return must be filed with the Department by every corporation authorized to do business in the state or otherwise doing business and by every person regardless of domicile who on January 1st of each year owns, controls or manages intangible personal property which has a tax situs in this state. The return is due on June 30th of each year.² The Florida statutes have exempted some significant assets from this taxation. The most common include:

1. Money (Money is defined to include all United States legal tender, certificates of deposit, cashier's and certified checks, bills of exchange, drafts, the cash equivalent of annuities and life insurance policies, and similar instruments which are held by a taxpayer or deposited with or held by a banking organization or other person.);
2. Franchises;
3. Partnership interests, either general or limited, other than any interest as a limited partner in a limited partnership registered with Securities and Exchange Commission;

Notes, bonds and other obligations issued by the State of Florida, or its municipalities, counties and taxing districts, or by the U.S. Government and its agencies;

Intangible personal property held in trust pursuant to any stock bonus, pension or profit-sharing plan or any individual retirement account which is qualified under §§ 530, 401, 408, or 408A of the U.S. Internal Revenue Code;

Intangible personal property held under a retirement plan of a Florida-based corporation exempt from federal income tax under § 501(c)(6) if the primary purpose of the corporation is to support the promotion of professional sports and the retirement plan is either qualified under § 457 of the U.S. Internal Revenue Code or the contributions to the plan are not taxable to plan participants until actual receipt or withdrawal by the participant;

Notes and other obligations, except bonds, to the extent that such are secured by mortgage, deed of trust, or other lien upon real property situated outside of the state;

The assets of a corporation registered under the Investment Company Act of 1940;

Two-thirds of the accounts receivable arising or acquired in the ordinary course of a trade or business which are owned, controlled or managed by a taxpayer on January 1, 2000 and thereafter.

Stock options granted to employees by their employer pursuant to an incentive plan, if the employees cannot transfer, sell or mortgage the options.

Further, the statutes also provide that any return in which \$60 or less is due is de minimus and no return or payment is due. Agents and fiduciaries must report to the Department of Revenue any person for which they hold intangible personal property if the aggregate annual tax on that person is more than \$60.

In addition, the statute exempts out certain dollars amounts of non-exempt assets. Prior to December 31, 2000, each individual had an exemption of the first mil on the first \$20,000 of intangible personal property. A husband and wife filing jointly have an exemption of \$40,000. Additionally, each natural person had an exemption as to the remaining one-half mil on property valued up to \$100,000, with a husband and wife filing jointly having \$200,000.³

A husband and wife may file a joint return with regard to all intangible personal property held jointly or individually by them. If they file a joint tax return,

then they are jointly liable for the payment of the annual tax.

As of January 1, 2001 the intangible tax rate has been reduced to one mil per dollar of value. With this reduction the exemption for the \$100,000 has also been eliminated. In addition, beginning January 1, 2001, all accounts receivable arising or acquired in the ordinary course of trade or business become exempt raising the previous exemption from two-thirds of the accounts receivable.⁴

"Any intangible personal property is taxable when it is owned, managed or controlled by any person domiciled in this state on January 1 of the tax year."

Prior to the new legislation which is effective January 1, 2001, the Florida statutes placed the primary duty to pay the intangible tax on the fiduciaries. This included the trustee, personal representatives, and guardians. The recent revisions have removed the primary duty from the trustee as fiduciary and placed that burden on the individual beneficiary of the trust instrument.

Any intangible personal property is taxable when it is owned, managed or controlled by any person domiciled in this state on January 1 of the tax year. This can be the case even when the evidence of the intangible property is kept, created, approved, or paid, or where the business may be conducted outside of the state.⁵ A person is domiciled in the state if they are a natural person and a legal resident of the state, or if it is an artificial entity organized or created under the law of this state, except for a trust. Prior to January 1, 2001, trusts that were sited in the State of Florida had a duty to file a return and pay the tax. A trust was sited in the State of Florida if all the trustees were residents of the state; the majority of the trustees are residents of the state; or if the trustees consist of both the residents and non-residents, the management and control of trust is with the trustee residing in Florida.

The revisions effective January 1, 2001 exempt from the annual intangible tax any intangible personal property that is owned, managed or controlled by a trustee of a trust. Instead the focus is now on the beneficial interest of any beneficiary that is a resident of the state. The resident has a beneficial interest if the resident has a vested interest, even if subject to divestment, which includes at least a current right to income *and* either a power to revoke the trust or a

general power of appointment, as defined under 26 U.S.C. § 2041(b)(1). Under either version of the law, any beneficial interest that is limited to income only is not taxable, as a state income tax is prohibited by the Florida Constitution.

Advisors should caution their clients who spend time in Florida or have retired to Florida or are planning to in the future that an intangible personal property tax exists. Only certain types of assets are non-exempt and taxable. Assets in employer retirement plans or individual retirement plans are exempt. In addition, money (which includes Certificates of Deposit) is exempt. Therefore, clients with stocks and bonds not in a retirement fund or profit sharing plan that exceed \$80,000 (\$100,000 if married and filing jointly)⁶ are the ones that need to consider Intangible Personal Property Tax. Counsel should also be given to clients who may be trustees of family trusts. As the trustees move to Florida, the assets in the trust may

have become taxable. In the statutes as they exist until December 31, 2000, the trustee fiduciary is primarily responsible for paying the tax on all trust assets located in the State, which may occur as a result of the trustee moving to the State of Florida. Under the statute effective January 1, 2001, the trustees are no longer responsible to file the return and remit the tax as that responsibility has been moved to any resident having a beneficial interest in a trust.

Endnotes

1. § 199.032
2. § 199.052(1)
3. § 199.185(2)
4. § 199.195(1)
5. § 199.175
6. $\$20,000 + (\$60,000 * .001) = \text{exempt value plus amount ignored under the de minimus rule.}$

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



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PUBLIC ELDER LAW ATTORNEY NEWS

Supreme Court Hears Argument on Legal Services Restrictions

By Valerie J. Bogart

On October 4, 2000, the United States Supreme Court heard the government's appeal of *Velazquez v. LSC*,¹ which invalidated Congress' 1996 restriction that bars legal services lawyers from making constitutional arguments when they represent welfare recipients. The Second Circuit had upheld all the other restrictions, including the ban on class actions and attorneys fees, which were not specifically in issue on this appeal. Justices Ginsburg, O'Connor and Souter were most disturbed at the idea of prohibiting a lawyer from making any particular argument for a client. Pressed on the reach of the law, the LSC attorney conceded that a legal services lawyer could not argue that a regulation should be interpreted in a way that avoids a finding that it is unconstitutional, since even the suggestion that a regulation was invalid would fall under the prohibition. The restriction means in effect that the law is whatever the government says it is, Justice Souter said, adding, "It limits more than I thought."



To the deputy solicitor general Justice Souter said, "You're getting just about to the molten core of the First Amendment" when the government "disfavors speech" that disagrees with existing government policy. "There's something very risky going on here." Justice Souter's strong comments gave particular hope to legal services backers because his view of the case could well determine the outcome. In 1991, during his first term on the Court, he joined the 5-to-4 majority in *Rust v. Sullivan*, which upheld against a First Amendment challenge a ban on abortion counseling by family planning clinics that received federal money. There is speculation that he would take a different view now, if not to overturn *Rust*, then at least to limit its breadth.

Burt Neuborne, the lawyer for the plaintiffs who are legal services lawyers and clients in New York City, said that though *Rust* was wrongly decided, it did not have to be overturned. He distinguished the arguably narrower free speech rights of doctors in federally funded family planning clinics, whose job is defined as "disseminating one point of view and not another" on abortion as a method of family planning. In contrast, the legal services lawyer is not hired to give the government's message—the government's

own lawyer appears in court to defend a government policy in a lawsuit. The legal services lawyer "doesn't speak for the state," Mr. Neuborne, legal director of the Brennan Center for Justice at New York University Law School, told the Court. "The government has hired one lawyer for the government's message and commandeers the voice of the other lawyer as well," he said. The restriction was "a core interference with what attorneys ordinarily do for clients," he said, noting that it was very difficult for a lawyer to know in advance what kinds of arguments would serve a client's case. "Legal services clients don't appear on your doorstep color-coded by argument," he said.

While the Court did not officially hear argument on the class action and other restrictions, it is hoped that, with a favorable ruling on the welfare prohibition, the entire case would be remanded to the lower courts to reconsider all the restrictions.

In the days following the argument, many newspapers and leading legal academics called on the Supreme Court to overturn the restriction. Georgetown University Law Center Professor David Cole, writing in *American Lawyer Media*,² asserted that the restriction forces poor people into an "unconscionable bargain. . . . If lawyers for the poor have to argue with one hand tied behind their back because they can't challenge the status quo the legal process will be fatally compromised." Albany Law School Professor and NOW Legal Defense and Education Fund Legal Director Martha Davis, writing in the *Times Union*,³ calls the restriction a "misguided law, which tips the balance of justice against the poor," and asserts that "providing only half a lawyer to the poor simply protects government interests by hobbling the legal system." An editorial in the *New York Times* says, "Congress trampled on free speech and the principle of equal justice under law when it sought to muzzle Legal Services lawyers, and the court's ultimate ruling should mince no words in saying so."⁴

Supreme Court Denies Cert. in *Rodriguez v. City of New York*

In its first week of the October 2000 term, the Supreme Court denied certiorari in *Rodriguez v. City of New York*.⁵ *Rodriguez* allows the New York Medicaid program to refuse to provide Medicaid personal

care services for “safety monitoring” when needed because of cognitive impairments such as Alzheimer’s disease, limiting personal care to hands-on physical assistance. Plaintiffs had based their appeal solely on the claims under the federal Medicaid regulations, deferring to the fears of national disability advocates that it was too risky to address Americans with Disabilities Act (ADA) claims so soon after the *Olmstead* decision found that unjustified institutionalization by states constitutes discrimination based on disability.⁶ Also, by illustrating the financial “burden” the ADA imposes on state governments, *Rodriguez* could have hurt the awaited outcome in the *Garrett* case, which will decide whether the ADA is binding on state governments at all.

Now final, *Rodriguez* poses a severe threat not only to elderly and disabled New Yorkers who depend on Medicaid personal care, who may now be forced into institutions; its distortions of both the Medicaid and ADA statutes now stand as dangerous precedents in the Second Circuit. *Rodriguez* interprets the federal “amount duration and scope” regulation to give total latitude to states to define the scope of their Medicaid services without any regard to whether the state’s coverage meets the overall purpose of the service. This interpretation removes any federal minimum standard for the scope of a state’s Medicaid coverage, which many other Courts have consistently enforced. Regarding the ADA, the Second Circuit found no discriminatory impact on people with cognitive impairments by falling into a common semantic trap wisely anticipated by the United States Supreme Court in *Alexander v. Choate*.⁷ The Court there warned that, “Antidiscrimination legislation can obviously be emptied of meaning if every discriminatory policy is ‘collapsed’ into one’s definition of what is the relevant benefit.”⁸ That is exactly what happened in *Rodriguez*, where New York was allowed to invent its own definition of the relevant benefit—“personal care”—as care that is solely physical assistance. With the relevant benefit so defined, people with cognitive impairments can never complain that they are being denied “personal care,” since what they need is the so-called “separate service” of safety monitoring.

Three strategies exist to minimize the harm of *Rodriguez*: (1) For individual clients, be sure to characterize their needs in terms of “activities of daily living” such as ambulating and toileting, rather than as “safety monitoring.” Prevention of wandering can be described as “cueing and prompting assistance for safe ambulation.” Emphasize physical impairments and dangers, such as falling. (2) The NYSBA Elder Law Section is supporting Assembly Bill 10424 proposed last year that would amend the state Social Services Law to clarify that personal care includes safety monitoring. (3) Advocates are pressing the federal Health Care Finance Administration to clarify the errors in the opinion to limit its damage nationwide.

On-line Fair Hearing Bank on WNYLC.com Web Site

The Western New York Law Center now has a searchable fair hearing bank on its Web site at WNYLC.com, with digests and full copies of Medicaid and other public assistance decisions. The process of scanning and digesting past and current decisions is ongoing. Once you register, you can use the list of keywords or a specific fair hearing number to find decisions on any topic. Legal Services for the Elderly in NYC has a digest of home care decisions that are or will soon be posted on the site that can make your search easier—send a request to valbogart2@aol.com. Please send your favorable Medicaid decisions for posting on this site to Susan Antos, Greater Upstate Law Project, 119 Washington Ave., Albany, N.Y. 12210.

Endnotes

1. 164 F.3d 757 (2d Cir. 1999).
2. Oct. 4, 2000, at 5.
3. Oct. 1, 2000, at B3.
4. Oct. 7, 2000, at 14A.
5. 197 F.3d 611 (2d Cir. 1999).
6. 527 U.S. 581 (1999).
7. 469 U.S. 287 (1985).
8. 469 U.S. at 301 n. 21.

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

GRANDPARENT RIGHTS NEWS

Alleged Child Abuse: How to Proceed

By Gerard Wallace

Whether because of parental substance abuse, mental illness, incarceration, or other cause, grandparents and other relatives start caring for children because they share a common concern—the actual or potential abuse or neglect of children. If grandparents have suspicions that their grandchild is abused or neglected by a parent, an elder law attorney should have basic knowledge of the standards for abuse and neglect and the procedures for alleviating the situation. The right response can have long-term effects for the concerned family members and the children's parents. Unfounded intervention can damage family relationships irreparably. On the other hand, appropriate intervention can result in a lifetime of benefit for the child.



A major problem in allegations of abuse or neglect are the sparse statutory definitions. According to the Social Services Law, a *neglected child* is a child less than 18 years of age “whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired.” The statute then lists conditions which may result in impairment. These include inadequate food, clothing, shelter, educational and medical care, improper supervision, including “excessive corporal punishment,” loss of parental control due to substance abuse, or “any other acts of a similarly serious nature requiring the aid of the court.”¹ Often, maltreatment of a child does not rise to the level of abuse unless linked to substance abuse, since substance abuse may indicate inability to provide proper parental supervision.

An *abused child* is a child whose parent or legally responsible caregiver “inflicts or allows to be inflicted physical injury which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ,” or involves an act of sexual abuse as defined in the penal law.²

A degree of corporal punishment and verbal abuse are tolerated by law, but marks (bruises, lacerations,

swellings, redness) or conditions that require medical intervention will in all likelihood lead to intervention by Child Protective Services (CPS). As a result, the child welfare department may remove the child from the home or implement a program of rehabilitative services.

If a grandparent suspects neglect or abuse, the grandparent has two choices: 1) to make a report to CPS via the child abuse hot line³ (or, in dire instances, by calling the police department), or 2) to start a private petition for custody based on the allegations of abuse or neglect.

When CPS finds the allegations to be “found,” and takes the child into custody, the preferred placement is with “suitable relatives.”⁴ Unfortunately, child welfare personnel may attempt to place the child with relatives without informing them of the opportunity to become foster parents.⁵ Since foster parents receive a substantial stipend for providing care, a grandparent who wishes to become a foster parent must make arrangements with child welfare *before* taking a child into their home. If they agree to take the child into their home without state agreement that the home may qualify as a foster home, once the child is removed from an abusive home, child welfare departments do not have to grant foster care status to the grandparent.

Any private person can petition for custody. If certain “extraordinary circumstances” such as abuse or neglect are found,⁶ then the custodial issue is decided using a best interest of the child standard. Such disputes involve enormous invasion of family privacy and invariably exacerbate family discord. Grandparents who do not want to risk the placement of their grandchild in a stranger's foster home may want to consider this option.

Endnotes

1. N.Y. Soc. Serv. L. § 371(4-a).
2. N.Y. Soc. Serv. L. § 371(4-b).
3. Attorneys are not mandated reporters. N.Y. Soc. Serv. L. § 413-19. Mandated Reporter Hot Line 800-635-1522; Public Hot Line 800-342-3720; Public Information 518-473-7432.
4. N.Y. Fam. Ct. Act § 1017.
5. New York State Office of the Comptroller, Division of Management Audit, *Department of Social Services Kinship Care Report 95-S-106* (Nov. 1996).
6. *Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976).

Gerard Wallace is the Director of the Grandparent Caregiver Law Center at the Brookdale Center on Aging of Hunter College in New York City. He is a member of the New York City KinCare Task Force, the New York State Bar Elder and Family Law Sections and the Advisory Council to Catholic Charities Grandparent Caregiver Program in Albany and Generations United in Washington, D.C. He graduated from Albany Law School in 1997 where, as a Sandman fellow, he published a monograph on the legal issues of grandparent caregivers. In private practice, he continued to concentrate on this issue.

BONUS NEWS

Using the NAMI to Pay the Personal Needs Guardian

By Beth Polner

On of the more difficult issues in Article 81 guardianships is how to protect an indigent incapacitated person who does not have a family member available to serve as a personal needs guardian. The factual scenario in which this issue arises is a familiar one. An indigent individual is determined to be incapacitated pursuant to Article 81 of the New York Mental Hygiene Law and requires a personal needs guardian. The guardian of the person is given specific powers by a court to provide for the ward's care and assistance. These powers often include the ability to consent to or refuse generally accepted routine and major medical and dental treatment and to select the residence, such as a nursing home.¹



While a court may designate an attorney, other professional, or even a community guardian program to act as a personal needs guardian,² many of these qualified professionals cannot afford to continue to accept court appointments *pro bono* as personal needs guardians. How can these court-appointed guardians be compensated for services rendered on behalf of their wards?

Although this issue has not yet fully been addressed in New York, in 1999, a Massachusetts court determined that the incapacitated person's monthly income could be used to compensate a personal needs guardian even where the ward was a resident of a nursing home and receiving Medicaid. That court determined that fees associated with a personal needs guardian constituted "expenses incurred for medical care, services, or supplies and remedial care" for the incapacitated person under the Medicaid statute.

In the Massachusetts case, *Rudow v. Commissioner of the Division of Medical Assistance*,³ the court was asked to resolve whether judicially approved guardian fees constituted health care coverage and incurred expenses for necessary medical or remedial care not payable by a third party.⁴

In this case, a guardian had been appointed to make decisions regarding medical treatment and care for their institutionalized ward, who was a recipient of Medicaid and residing in a nursing home.

Like New York, Massachusetts requires institutionalized Medicaid recipients to contribute their income

monthly to the cost of their long-term care.⁵ The Medicaid recipient may deduct, as applicable, from monthly income, a personal needs allowance and expenses related to "health-care coverage and incurred expenses."

The *Rudow* court determined that a guardian's fees were a necessary medical expense under the Medicaid statute and directed the fees be paid from the incapacitated person's monthly income to compensate the personal needs guardian. The court, citing a lower court's decision, stated:

When legal fees and costs associated with guardianship are necessary in order to authorize any medical treatment for an incompetent . . . they are medical expenses, and as such are properly deductible from the income of an institutionalized Medicaid recipient. . . . *Rudow* at 223.

Rudow also examined the Internal Revenue Code to support its decision, citing *Gerstacker v. Commissioner of Revenue*.⁶ Section 213 of the Code permits an income tax deduction for expenses paid for medical care. Medical care is defined in the Code as amounts paid for the "diagnosis, cure, mitigation, treatment or prevention of disease, or for the purpose of any structure or function of the body."⁷ In the *Gerstacker* case, the federal court examined the deduction for legal expenses incurred when a taxpayer was required to have his spouse committed to an institution for purposes of treatment of mental illness. *Gerstacker* held that where legal expenses are necessary to obtain a method of medical treatment for mental illness, they are amounts paid for diagnosis, cure, mitigation, or treatment of a disease and are deductible under I.R.C. § 213 as expenses for medical care.

Support for adopting or utilizing the *Rudow* decision in future Article 81 matters can also be found in New York State's doctrine of informed consent in medical treatment decisions, and the requirements surrounding surrogate decision making in health care.

In New York, as in many jurisdictions, competent adults have a right to determine the course of their own medical treatment and to refuse treatment even if it would save their own life. Similarly, physicians and health care providers have a duty to adequately inform a competent patient of the risks of treatment and alternatives under the doctrine of informed consent.⁸

So central is this principle to medical treatment that even where an individual has been diagnosed as permanently disabled because of mental retardation, there must be a determination as to whether such individual can give informed consent prior to the appointment of a surrogate decision maker.⁹ Moreover, there can be no substituted judgment or best interests test for consent to medical treatment by a surrogate decision maker unless the competent adult has executed an advance directive in the form of a health care proxy.¹⁰

Given this framework for health care decision making, the need for a court-appointed personal needs guardian to continue his or her duties after their ward is on Medicaid and in a nursing home becomes even more critical. The *Rudow* decision leads the way in permitting payment for the services rendered by the personal needs guardian to continue. At least one court has already expressed concern where a guardian of an indigent incapacitated person asked to be discharged. The court noted that this would leave the ward without a representative to make treatment and health care decisions. In her decision in *In re Jewish Association for Services for the Aged as Conservator of Cedeno*¹¹ Judge Emily Jane Goodman emphasized the importance of the personal needs guardian as ensuring that the nursing home resident is also receiving “the foods they prefer, fresh air, reading materials, and the innumerable other components of a meaningful life.” Judge Goodman’s decision not to permit the discharge of the personal needs guardian was reversed on appeal.

Social Services Law § 366-c(4) clearly permits deductions from income for expenses incurred for medical care or services. A personal needs guardian appointed pursuant to Article 81 of Mental Hygiene Law is essential to permit health care decisions and judgments to be made on behalf of the incapacitated person because the ward may not be able to consent to treatment. Judicially approved and determined personal needs services rendered by the personal needs guardian should be paid from the ward’s monthly income even where the ward is a resident of a nursing home and receiving Medicaid. Ultimately, the use of *Rudow* in New York will permit the elderly poor and disabled nursing home population to receive informed health care and treatment from qualified guardians who are compensated for their time, expertise and personal involvement with their ward’s lives.

Endnotes

1. Mental Hygiene Law § 81.22.
2. Mental Hygiene Law § 81.19.
3. 429 Mass. 218, 707 N.E.2d 339 (Mass. 1999).
4. *See id.* (citing 42 U.S.C. 1396a(r)(1)(A)).
5. In New York, an institutionalized Medicaid recipient must generally contribute to the cost of his or her long-term care on a monthly basis from income. This is referred to as the net available monthly income (NAMI). S.S.L. § 366-c and *see* 42 U.S.C. 1396a(r)(1)(A), “Disregarding payment for certain medical expenses by institutionalized individuals. Amounts incurred as expenses for medical or remedial care not subject to payment by a third party including (i) medicare and other health insurance premiums, deductibles or co-insurance and (ii) necessary medical or remedial care recognized under State law but not covered under the State plan . . . subject to reasonable limits the State may establish on the amount of these expenses.” Specifically, S.S.L. § 366-c(4) provides that in determining the amount of income to be applied toward the cost of medical care, services and supplies of the institutionalized individual, “the following items shall be deducted from monthly income . . . in the following order:
(a) personal needs allowance . . .
(d) any expenses incurred for medical care, services, or supplies and remedial care. . . .”
6. 414 F.2d 448 (6th Cir. 1969). In *Rudow*, the court examined I.R.C. § 213 in response to an objection by HCFA that for “tax purposes” guardianship related expenses would not be recognized under federal taxation laws.
7. I.R.C. § 213(1)(A).
8. For an excellent overview of the doctrine of informed consent, *see* Thomas A. Moore, *Informed Consent*, N.Y.L.J. 9/15/95 (p. 3, col. 1), 10/3/95 (p. 3, col. 1) and 11/7/95 (p. 3, col. 1).
9. *In re Franny Dreythaler*, 702 N.Y.S.2d 799 (Supreme Court, Monroe Co. 1/26/2000) where the court ordered a hearing to determine if retarded adult can give informed consent for dental treatment prior to use of Mental Hygiene Law Section 33.03, which permits a guardian, spouse, surrogate decision-making committee or court of competent jurisdiction to consent to a treatment decision .
10. Public Health Law §§ 2981, *et seq.* In *In re Barsky*, N.Y.L.J. 6/6/95 (Sup. Ct., Suffolk Co.), Judge Luciano reiterated the issues reflected in MHL 81.29. The commentary to that statutory section states: “This section also makes clear that Article 81 does not change the current law in New York regarding whether a guardian has the authority to make decisions regarding the withholding or withdrawal of life sustaining treatment . . . the right to declare treatment is a personal one where exercise has been denied to a third party when the patient is unable to do so unless a health care proxy . . . is in place or there is otherwise clear and convincing evidence of the patient’s wishes regarding such treatment expressed while the patient was competent.” citing *In re O’Connor*, 72 N.Y.2d 517 (1988).
11. 655 N.Y.S.2d 283 (S. Ct., NY Co. 1997); reversed, and community guardian discharged in 674 N.Y.S.2d 34 (1st Dep’t 6/11/98).

Beth I. Polner is an associate with Davidow, Davidow, Siegel & Stern and practices in the areas of estate planning and estate administration, Article 81 guardianship litigation, and elder law (including Family Court litigation under *Gomprecht* and Medicaid fair hearings). Ms. Polner, who has worked for Nassau/Suffolk Law Services Committee, Inc., L.I. Housing Services, and the FDIC during the past 18 years, devotes a significant amount of time *pro bono* representing disabled clients in the guardianship and SNT subject areas, and advising nonprofit advocacy and service providers who assist the disabled. She is a member of the Nassau and Suffolk Bar Associations, and the NYS Bar Association, is currently Secretary of the Senior Umbrella Network of Nassau, and is a member of the Board of Trustees of North Shore Synagogue in Syosset, New York. Ms. Polner is a 1981 graduate of Franklin Pierce Law Center, in Concord, New Hampshire.

Below is biographical information for Jennifer Sessler. Jennifer wrote the article entitled *Medicaid Planning in New York: Can an Unequal Joint Tenancy Protect the Family Home* which appeared in the Fall edition of our journal.



Jennifer R. Sessler is a partner in the law firm Sessler & Sessler LLP of New York, New York. She earned her law degree from Brooklyn Law School in 1992 where she interned for Brooklyn Legal Services for the Elderly providing legal services for elderly indigent clients. She is a member of the New York State Bar Association; Elder Law Section and Medicaid Committee, the New York County Lawyer's Association and the National Institute for Trial Advocacy. She is admitted to the New York and Massachusetts Bars. Jennifer's areas of practice include: Elder Law, Medicaid Qualification, Estate Planning, Probate, Asset Protection Planning, Real Estate and Commercial Litigation.

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Elder Law Attorney is published by the Elder Law Section of the New York State Bar Association. Members of the Section receive a subscription to the publication without a charge.

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ISSN 1070-4817



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