

Elder Law Attorney

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

Message from the Chair

It is with great sadness that I report to you that **Ken Grabie**, an active member of our Section and Co-Vice Chair of the Legislative Committee of our Section, passed away. Anyone who knew Ken knew that he was a great lawyer and a great man. He will be sorely missed by his family, his friends and the Elder Law Section.



As I write this message, I am returning from the fantastic 2007 Fall Elder Law Section Meeting at the Turning Stone Casino and Resort in Verona, New York. The Fall Meeting was co-chaired by **Sharon Gruer** and **Joe Greenman**. The Advanced Institute, which was held on October 20, 2007, was co-chaired by **Anthony Enea** and **Bob Kurre**. The turnout was great, the programming was stupendous and the receptions, lunch and dinner provided great fun and great networking for all involved. It was also nice to see so many new faces, and the consensus, from upstaters as well as downstaters, was that the location was not only scenic but was easy to get to and inexpensive as well (assuming no gambling was going on).

The programming covered the usual legislative updates, pearls and gems, and discussion of the state of the law as it relates to personal care contracts, promissory notes and annuities. The programming also covered the administration of special needs trusts, New York-Florida issues, tax implications of life estates, Surrogate's Court litigation and some topics not often covered in our meetings such as public benefits other than Medicaid, planning for individuals with psychiatric illnesses, setting up group homes, insurance claims and the real world of advanced care planning from the perspective of a physician. The Advanced Institute

on Saturday was also well received and was an open, guided exchange of questions and issues relating to Medicaid eligibility and Medicaid lien and recovery issues.

The presenters all did an excellent job and on behalf of the Section I wish to thank them: **Michael Amoruso, Cora Alsante, Tim Casserly, Ellen Makofsky, Joan Robert, Gayle Eagan, Howard Krooks, Stephen Silverberg, Richard Weinblatt, Lou Pierro, Gary Freidman, Valerie Bogart, Carolyn Reinach Wolf, Saundra Gumerove, Hermes Fernandez, Bruce Reinoso, Dr. Warren Greenspan, Michael Cathers, David Goldfarb, and Rene Reixach**. All of the speakers were well received; and the co-chairs did an excellent job of putting together a great program, and I thank all of them for that. A special thanks also goes

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out to **Kathy Heider**, our meetings coordinator at the New York State Bar Association, who yet again behind the scenes, helped make the fall program the success that it was.

The Annual Meeting will be held in New York City on January 29, 2008. I encourage as many of you as possible to attend, as the hard work of **Judie Grimaldi** has paid off in great programming and speakers focusing on new developments in Elder Law, post DRA, Medicaid issues, the ever-popular panel discussion with representatives from the Department of Health and County Departments of Social Services, and a panel discussion of a real-life view of end-of-life decision making.

The Pro Bono Senior Clinic Project, the brainchild of **Ellen Makofsky**, is this year chaired by **Dave Stapleton**, the Treasurer of our Section. Virtually all of the District Delegates have again scheduled a Fall Clinic and by all accounts this program is a huge success. Our Section has been recognized by the Bar Association for its work on this project, and the seniors in our communities also greatly appreciate it. I encourage any of you interested in volunteering for this worthy project to contact your District Delegate and to volunteer to participate.

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

1. Proposed Legislation

Sharon Gruer, with the assistance of **Ellyn Kravitz** and **Steve Silverberg**, drafted proposed legislation to amend EPTL 5-1.1A(a)(4). The purpose of the proposed amendment is to preserve the right of a surviving spouse to benefit from the elective share of a predeceased spouse's estate, while being able to obtain governmental benefits so that his or her care is not interrupted or diminished by being removed from the Medicaid program or becoming ineligible for it. The proposed legislation would amend 5-1.1A(a)(4) pertaining to the elective share to provide that the elective share may be held in a qualifying supplemental needs trust. At the Fall Meeting the Executive Committee of our Section unanimously approved, with certain friendly amendments, the proposed legislation.

2. Client and Consumer Affairs

Fran Pantaleo, as Chair of this Committee, completed the revisions to the "Seventeen Benefits for Older New Yorkers" brochure that the Bar Association distributes extensively to New Yorkers age 60 or older to alert them to the many benefits and community services that may be available to

them. The brochure describes how financing and age affect eligibility and little-known rules regarding eligibility for the numerous benefits available.

3. The Financial Planning and Investments Committee

Co-chaired by **Walter Burke** and **Laurie Menzies**, this committee is focusing on the following: (a) a possible CLE session or newsletter article on how to help a client implement a five-year look-back plan with their current assets; (b) possible investment presentations at the Summer 2008 Meeting in Baltimore; and (c) continued work with the Annuity Task Force to implement legislation to protect our seniors against abusive sales practices involving annuities.

4. Guardianships and Fiduciaries Committee

Anthony Enea and **Ira Miller**, as co-chairs, continue to be active on two matters, one being the compilation of a Guardianship Court Grid which would provide attorneys practicing in various guardianship courts throughout the state with basic information as to the practices and procedures followed by a particular guardianship court. The Committee has also finalized an updated version of the guidelines for guardians. The guidelines have been printed in both English and Spanish. They have been sent to OCA for distribution through the courts and will be available on-line for our members. The Committee is also working with Wallace Leinhardt of the Trusts and Estates Law Section to prepare a detailed analysis of Article 81 of the Mental Hygiene Law, with recommendations for additions and modifications thereto.

5. Legal Education Committee

This Committee, co-chaired by **Ellen Makofsky** and **Maria Elena Puma**, is working with NYSBA to plan three programs. There will be spring (six locations) and fall (five locations) programs. The spring program will be focused on financing long-term care other than Medicaid, and the Fall 2008 Program's focus will be on planning for retirement accounts. An extra set of programs is also being considered for Spring 2008 in response OCA's Office of Fiduciary Services request to provide a program for updates on the Part 36 Fiduciary Training from 2003, as well as new basic training on Article 81.

6. Medicaid Committee

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

- (a) **Elimination of spousal impoverishment protections in Lombardi and other waived programs.** CMS is adamantly refusing to alter its new view that the spousal impoverishment protections do not apply to medically needy people in waived programs. The Medicaid Committee has worked closely with Gene Coffey at the National Senior Citizens Law Center and succeeded in getting a provision inserted in the House version of a bill that would fix this problem. Unfortunately, this provision did not make it into the final conference version that was vetoed by the President. The Medicaid Committee is setting up a meeting with DOH to strategize how to preserve protections for renewal of Lombardi. The threat of eliminating the protection has already had a chilling effect, as Lombardi programs, fearful of being stuck with clients who have high spend downs without the spousal protections, are refusing to admit them for services at this time.
- (b) **NYSARC Trusts.** There are questions as to whether deposits of the spend down are considered a transfer that would trigger a penalty period if the individual later enters a nursing home. At the Elder Law Section January Meeting, **Greg MacMillan** announced that these deposits would not trigger a penalty. At least one county attorney has stated that the state is now saying that these transfers would be penalized. The Medicaid Committee is working on clarifying this apparent discrepancy.
- (c) **DRA and Waivers.** An unresolved issue under DRA was whether someone who made a transfer could get the penalty period to start running by entering a waiver program, rather than a nursing home. DOH had said no to this question, reportedly as dictated by CMS. There was a problem because DOH's policy was that the transfer disqualified the individual from the waived services, but the individual could not start the running of the penalty period. This problem was partly remedied by GIS 07 MA/018 (9/24/07). This GIS provides that no transfer penalties will apply to waived services. This is good news.

The bad news is that the only way to start running the penalty period is through nursing home care. The Medicaid Committee is discussing with Gene Coffey at the National Senior Citizens Law Center whether there is a possible challenge to this. He is monitoring DRA implementation nationally.

- (d) **Hearing Corrected Decision on Restitution.** Selfhelp won an amended decision in Fair Hearing No. 4433606Z (Rockland County, September 9, 2007) which had originally held that Holocaust restitution funds were not exempt if the recipient could not prove that the funds in the restitution account were the very restitution payments originally received. In this case the individual had commingled funds over the fifty plus years of receiving them. The amended decision, posted on WNYLC.net agreed with Selfhelp's interpretation that the funds were identifiable as shown by the documentation from Germany of payments made, and that it was not necessary for the funds to be kept separately all along.

7. Compact for Long Term Care

Ellen Makofsky and the other members of the compact working group developed a resolution which was presented to the Commission on Law and Aging of the ABA for co-sponsorship. Ellen traveled to Washington, D.C., to present the resolution to the Commission and was very favorably received. With some revision to our resolution, the Commission on Law and Aging has agreed to co-sponsor the resolution presented to them by Ellen. Additionally, the Senior Lawyers Division and the State and Local Government Law Section have also agreed to co-sponsor the resolution.

As can be seen, the members of the various committees of the Elder Law Section have been very active volunteering their time to forward numerous valuable projects. Please feel free to contact me or any of the chairs of the various committees that you may be interested in participating in, and I am confident they will welcome your participation.

I hope to see as many of you as possible at the next Section Meeting at the Marriott Marquis in New York City.

Ami S. Longstreet

Editor's Message

As the Winter's Edition of the *Elder Law Attorney* is being readied for print in late October, a definite winter chill is in the air. By the time this edition is published in January 2008, you will be able to cuddle up in front of the fireplace with a cup of hot cocoa and a copy of the Winter Edition of the *Elder Law Attorney*.



All kidding aside, the *Elder Law Attorney* is again blessed with numerous articles in diverse areas of interest that are both timely and thought provoking. For example, we have an excellent submission by David Goldfarb analyzing Medicaid Estate Recovery where there is a surviving disabled child. Our former Section Chair, Ellen Makofsky, has written a wonderful piece about newly enacted legislation which makes surrogate health care decision making more accessible to both the mentally and developmentally disabled.

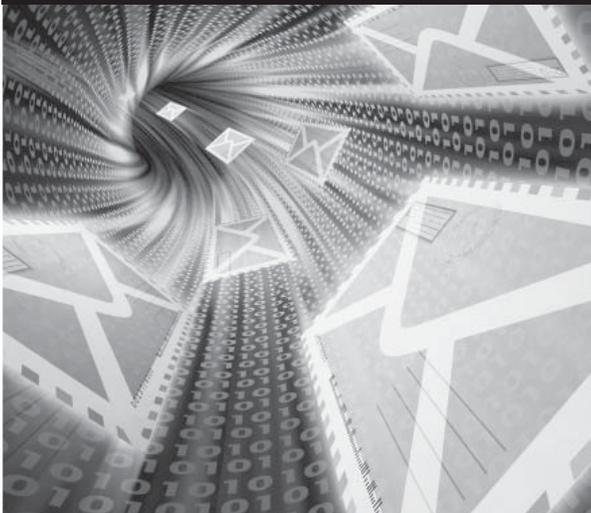
Robert Kurre has written an interesting piece about utilizing a trigger trust in will drafting, a topic which I have not seen addressed in a number of years, while Matt Nolfo has written a piece pondering "What Is So Irrevocable about an Irrevocable Trust?"

In addition to the above, we have excellent articles from our regular contributors, Judith Raskin and Robert Kruger. I am also pleased to introduce a new contributing author, Salvatore M. Di Costanzo. Sal will on a regular basis keep us up to date on various tax issues of interest and their impact on our elder law and estate planning practices. For starters, he has written an excellent piece on the interplay between IRAs and SNTs, and the relevant tax issues that need to be addressed when dealing with both.

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

Anthony J. Enea

Request for Articles



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

Anthony J. Enea, Esq.
Enea, Scanlan & Sirignano LLP
245 Main Street, 3rd Floor
White Plains, NY 10601
aenea@aol.com

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

www.nysba.org/ElderLawAttorney

Medicaid Estate Recovery Where There Is a Surviving Disabled Child

By David Goldfarb

New York law on Medicaid estate recovery requires that “any such adjustment or recovery shall be made only after the death of the individual’s surviving spouse, if any, and only at a time when the individual has no surviving child who is under twenty-one years of age or is blind or permanently and totally disabled.” N.Y. Social Services Law § 369(2)(b)(ii); 18 N.Y.C.R.R. § 360-7.11(b)(2) However in *In re Samuelson*, 110 A.D.2d 187, 493 N.Y.S.2d 784 (2d Dep’t 1985), the Second Department upheld a Medicaid claim because the disabled child was not financially dependent on the decedent and was not a beneficiary of the estate. In *Samuelson* the decedent made no provision for her disabled daughter, and gave her entire estate to her son. The Court in *Samuelson* did not give any consideration to the nonbinding statement in the decedent’s will that she was not providing for her disabled daughter because she hoped her other child would provide for her.



Samuelson finds that the “legislative concern [was] for the protection of those individuals who were financially dependent on the deceased recipient, namely, the recipient’s surviving spouse, infant issue, or blind or disabled children.” However, Joan Robert, an experienced and respected practitioner, has stated that *Samuelson* was based on an error of law. In her opinion *Samuelson* (a 1985 decision) was based on 1965 Medicaid law which, prior to the SSI statute made a parent legally responsible for the support of an adult disabled child. When the *Samuelson* Court read the legislative history they did not address the SSI statute that no longer made the parent responsible for the adult child with a disability.

Local agencies following *Samuelson* will often seek recovery from an estate if a decedent is survived by a financially independent disabled child or one who is not a beneficiary of the estate, or if part of the estate passes to other beneficiaries. The agency will sometimes ask for a “Samuelson Affidavit” to demonstrate that the disabled person was financially dependent on the decedent and that estate recovery will hurt the disabled child by reducing the property available as an informal means of support for the disabled child.

It should be noted that other courts outside the Second Department have not followed *Samuelson*. In

Estate of Andrews, 234 A.D.2d 692, 650 N.Y.S.2d 470 (3d Dep’t 1996), the Third Department held that the existence of a surviving disabled child prevents the local department from recovering any property from an estate. In *Andrews*, the local Department of Social Services conceded that it could not recover against the intestate share of the disabled son but sought recovery against the nondisabled daughter’s share. The Court rejected the claim in its entirety, reaffirmed that recovery against the share of the disabled child is prohibited, and stated that recovery against the daughter is not allowed because she was not a responsible relative of her deceased parent.

In *Estate of Burstein*, 160 Misc. 2d 900, 611 N.Y.S.2d 739 (Sur. Ct., New York County 1994), the Surrogate’s Court of New York County held that recovery against an estate is prohibited if the decedent is survived by a disabled child who is a beneficiary of the estate, even if a portion of the estate passes to other beneficiaries. The Court rejected the additional criteria set forth in *Samuelson* as outside the scope of the statute’s plain language and purpose.

The practitioner should not confuse the limitations on estate recovery against a Medicaid recipient in N.Y. Soc. Serv. Law § 369 with the “responsible relative” standard that governs recovery against the estate of a spouse. However in *Matter of Schneider*, 15 Misc. 3d 1146A, 841 N.Y.S.2d 823 (Sur. Ct., Nassau County 2007), the Court did apply *Samuelson* to a claim against a spouse’s estate. The Court upheld the claim except to the extent payment of the claim would impinge on the bequest to a disabled child to be placed in a supplemental needs trust. The Court in *Schneider* also found that the restrictions in *In re Craig*, 82 N.Y.2d 388 (1993) apply to the estate of a legally responsible spouse.

David Goldfarb is a partner in Goldfarb Abrandt Salzman & Kutzin LLP, a firm concentrating in health law, elder law, trusts and estates and the rights of the elderly and disabled. He is a Committee Chair and member of the Executive Committees of the Elder Law Section and Trusts and Estates Law Section of the NYSBA. He is co-author of *New York Guide to Tax Estate and Financial Planning for the Elderly* (Lexis-Matthew Bender 1999-2006). He has written numerous articles including articles for the *New York Times*, *New York State Bar Journal*, the *National Academy of Elder Law Attorneys’ NAELA News* and the *New York Law Journal*. Mr. Goldfarb’s e-mail address is goldfarb@seniorlaw.com and his home page is <http://www.seniorlaw.com>.

Advance Directive News: New Legislation Expands Surrogate Health Care Decision Making

By Ellen G. Makofsky

The New York State Legislature recently amended the Surrogate's Court Procedure Act making surrogate health care decision making more accessible to the mentally retarded and the developmentally disabled.¹ The Health Care Decisions Act for Persons with Mental Retardation was enacted in 2002 and provided that where a mentally retarded person lacked sufficient capacity to make health care decisions, a 17-A guardian could make health care decisions for that person including the right to withhold or withdraw life-sustaining treatment. The statute as enacted was an incomplete solution as it applied only to mentally retarded individuals who had guardians appointed to act on their behalf and was not applicable to the developmentally disabled.² Under the old law where a mentally retarded person was embroiled in a life-threatening crisis, a family member would not only have the pressure of dealing with the impending loss of a loved one but also would be required to bring a guardianship proceeding to secure the right to make end-of-life decisions. As difficult a task as the retarded person's family had, the families of the developmentally disabled were in a worse position because they had no option which would lead to appointment as a surrogate health care decision maker.



Surrogate health care decision making for the mentally retarded and developmentally disabled is problematic in New York State. New York sets a high bar and requires that a person's wishes in regard to advance directives be established by "clear and convincing evidence" of what an incapacitated person would have wanted.³ An individual who possesses capacity can execute a health care proxy to appoint an agent to make health care decisions. Similarly a carefully drafted living will can meet the "clear and convincing evidence" standard. By definition, a developmentally disabled person lacks the capacity to execute an advance directive.⁴ Prior to 2002, where a person's mental retardation was so severe that he or she never had the capacity to execute an advance directive that individual was also disenfranchised from surrogate health care decision making.

Chapter 105 of the Laws of 2007 was enacted on July 3, 2007, and becomes effective on December 30, 2007. The new law increases the scope of The Health Care Decisions Act for Persons with Mental Retarda-

tion by amending SCPA 1750 to include both the mentally retarded and developmentally disabled. It further expands the reach of the original legislation by allowing nonguardian family members to act as surrogate health care decision makers. In order to determine which family member will have the authority to act, the amendment directs that a prioritized list of family members be developed by the Commissioner of Mental Retardation and Developmental Disabilities in conjunction with parents, advocates and family members of persons who are mentally retarded. As a further safeguard, the legislation requires that the nonguardian family member appointed as surrogate decision maker be a person with "a significant and ongoing involvement in a person's life so as to have a sufficient knowledge of their needs and, where reasonably known or ascertainable, the person's wishes, including moral and religious beliefs."

The new law improves the ability of families of the mentally retarded and developmentally disabled to act as surrogate health decision makers. It allows qualified family members to make timely decisions for their loved ones without the psychic trauma and expense of a guardianship proceeding. End-of-life decision making for another is a tortuous decision to have to make. Bureaucratic impediments to implementing the decision once it is made, makes a difficult decision only more difficult. The legislature and the governor should be commended for providing families of the mentally retarded and developmentally disabled an easier path in the face of a very difficult road.

Endnotes

1. Chapter 105 of the laws of 2007.
2. Chapter 500 of the laws of 2002.
3. *In re O'Connor*, 72 N.Y.2d 517, 534 N.Y.S.2d 886 (1988).
4. SCPA 1750.

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

Use of a Trigger Trust in Will Drafting

By Robert J. Kurre

It is a common occurrence for an elder law attorney to draft a Last Will and Testament which establishes a supplemental needs trust for the benefit of a client's ill or incapacitated spouse. What about the situation where the elder law attorney is consulted by clients who are aging but whose health does not presently require specialized services? What provisions might a Will have to protect the inheritance of a spouse (or any beneficiary for that matter) who may *become* ill or incapacitated?



Example: Bill and Bernice executed Wills twenty-five years ago shortly after their son was born. Their Wills provided that they leave their respective estates to each other and, upon the death of the second of them, then to their son. Bill and Bernice never revised their Wills after Bill was diagnosed with dementia and, ultimately, entered a skilled nursing facility. In order to qualify Bill for Medicaid institutional benefits, his assets were transferred to Bernice who executed a spousal refusal as her countable assets exceeded the community spouse resource allowance. Bernice died shortly after Bill entered the nursing home, leaving her entire estate to Bill. Bill was rendered ineligible for Medicaid and his inheritance was spent down on the cost of his care.

Now let us change the example: Bill and Bernice had met with an elder law attorney when they were each in relative good health. The attorney added language to their Wills that effectively changed the disposition to Bill from an outright bequest to a bequest to a trustee of a supplemental needs trust for Bill's benefit. The language—a "trigger trust"—provided that if any beneficiary under Bernice's Will was severely and chronically or persistently disabled at the time of her death, that beneficiary's share would no longer pass outright to the beneficiary but instead would pass to the trustee of a supplemental needs trust pursuant to EPTL 7-1.12. The supplemental needs trust was, in fact, triggered because of Bill's mental impairment which gave rise to a long-term need for specialized health and mental health services.

It is important to note that although an initiative is under way to amend New York law so a supplemental needs trust for a surviving spouse can satisfy the elec-

tive share, assets left in a trust to a surviving spouse do not presently satisfy the elective share. Thus, notwithstanding the presence of a trigger trust in a Will, a surviving spouse has a statutory right of election which entitles the spouse to an outright distribution of one-third of the decedent's estate or \$50,000, whichever is greater. If the surviving spouse is unable to exercise the right of election because of a lack of mental capacity, the local Medicaid agency may petition the court to have a guardian appointed with the authority to exercise the right of election. If the right of election is exercised, the surviving spouse would be entitled to an outright distribution of the statutory share (one-third of the decedent's estate or \$50,000, whichever is greater).

"What provisions might a Will have to protect the inheritance of a spouse (or any beneficiary for that matter) who may become ill or incapacitated?"

Language can be added to a Will which provides that, in the event the right of election is exercised, the elective share amount would be paid outright with the balance of the bequest being preserved in the supplemental needs trust. Thus, the surviving spouse will generally be in a much better position if that person's share is diverted to a supplemental needs trust rather than received as an outright bequest. Moreover, additional planning may be conducted which may minimize or even eliminate the adverse consequences which could result from the surviving spouse's right of election.

EPTL 7-1.12 defines the beneficiary of a supplemental needs trust as "a person with a severe and chronic or persistent disability." That statute further defines "[a] person with a severe and chronic or persistent disability" as a person with mental illness, developmental disability, or other physical or mental impairment; whose disability is expected to, or does, give rise to a long-term need for specialized health, mental health, developmental disabilities, social or other related services; and who may need to rely on government benefits or assistance. This language should allow a bequest to be paid to a trustee of a supplemental needs trust pursuant to EPTL 7-1.12, if an individual passes away and leaves assets to an aging spouse (or other beneficiary) who is in declining health but not yet receiving the type of specialized services described in the statute.

A trigger trust provision in a Will is permissible since it is not violative of EPTL 7-3.1(c). Under that statute, a provision in a testamentary trust is not void as against public policy if it provides for the suspension, termination, or diversion of trust principal, income or beneficial interests of either the creator of the trust or the creator's spouse in the event that the creator or the creator's spouse applies for Medicaid or long-term custodial, nursing or medical care.

In my firm's practice, every Will that we prepare contains a trigger trust to prevent a decedent's assets from being spent down on the costs of a disabled beneficiary's medical care. By having this language in a Will, inherited assets can be used to supplement and not supplant any benefits a disabled beneficiary may receive from means-tested government benefit programs. The result is an enhancement of the disabled beneficiary's quality of life. The trigger trust is a valuable asset protection technique in Will drafting that can act as a safety net to protect unwary or unwitting clients who are not diligent in updating their Wills, or no longer have the requisite capacity to do so, following the decline in a beneficiary's health.

Robert J. Kurre, Esq. devotes his practice to elder law, estate planning, estate administration, guardianships, planning for elderly and disabled clients, and estate and trust litigation. He is the principal of Robert J. Kurre & Associates, P.C. located in Great Neck, NY. Mr. Kurre is certified as an Elder Law Attorney by the National Elder Law Foundation and a member of the Executive Committee of the Elder Law Section of the NYSBA, where he serves as the Co-Chair of the Elder Law Practice Committee. He is also a member of the National Academy of Elder Law Attorneys. He is a past Chair of the Elder Law, Social Services and Health Advocacy Committee of the Nassau County Bar Association. He is also a member of the NYSBA's Trusts and Estates Law Section and the Surrogate's Court, Estates & Trusts Committee of the Nassau County Bar Association. Mr. Kurre was admitted to the practice of law in New York State in 1991.

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What Is So Irrevocable About an Irrevocable Trust?

By Matthew J. Nolfo

They say that you can't go home again.

This old expression would seem to certainly apply to a grantor's desire to change the terms of an irrevocable instrument. However, despite the irrevocable nature of living trusts with which many of us plan for our clients, there is ample authority in the law that allows for grantors either to amend, revoke, reform or to effectively replace irrevocable living trusts with more favorable terms.



While there are certainly restrictions as to how extensively such irrevocable agreements can be modified, the courts appear to be quite liberal in allowing for these forms of relief. Although most of the statutory and case law authority that pertain to these modifications do not specifically require court approval to confirm such changes, it often appears to be the best practice to pursue judicial approval.

Trust Amendment

EPTL 7-1.9 allows for the amendment or revocation of irrevocable trusts. The statute, in pertinent part, holds as follows:

(a) Upon the written consent, acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property, of all the persons beneficially interested in a trust of property, heretofore or hereafter created, the creator of such trust may revoke or amend the whole or any part thereof by an instrument in writing acknowledged or proved in like manner, and thereupon the estate of the trustee ceases with respect to any part of such trust property, the disposition of which has been revoked. If the conveyance or other instrument creating a trust of property was recorded in the office of the clerk or register of any county of this state, the instrument revoking or amending such trust, together with the consents thereto, shall be recorded in the same office of every county in which the

conveyance or other instrument creating such trust was recorded.

(b) For the purposes of this section, a disposition, contained in a trust created on or after September first, nineteen hundred fifty-one, in favor of a class of persons described only as the heirs, next of kin or distributees (or by any term of like import) of the creator of the trust does not create a beneficial interest in such persons.

(c) A testamentary or lifetime trust wholly benefiting one or more charitable beneficiaries may be terminated as provided for by subparagraph two of paragraph (c) of section 8-1.1 of this chapter.

Essentially, EPTL 7-1.9 provides that an irrevocable trust can be terminated or amended on the consent of all parties that have a "beneficial interest in the trust." The written consent must be acknowledged before a notary public.

Moreover, the consent requirement has been limited to identifiable, living beneficiaries (mention of unborn beneficiaries in the trust does not present a problem).

A strict reading of the statute and the annotations that follow it do not require anything more than a written consent for all adult, living beneficiaries. Thus, if there are no minor or disabled beneficiaries who do not have capacity to formulate consent to the modifications being proposed, then the trust can be amended or revoked without any further requirements.

The problem arises when there are living, identifiable beneficiaries who are not capable of formulating consent. These are disabled beneficiaries and minor beneficiaries. Traditionally, these beneficiaries could not consent to the change even through a guardian. See *Whittemore v. Equitable Trust Company*, 250 N.Y. 298 (1929).

It has been suggested that one of the ways to get around this difficulty is for the court to allow for an amendment to an irrevocable trust when there is an "identity of interest" as between the consenting adult beneficiaries and the infants or, where the governing instrument provides for "virtual representation" of a person under a disability by a party to the proceeding who has the same interest as the disabled person.

While this is a distinct possibility, it is not certain that this argument would succeed in a proceeding to have an irrevocable trust amended or terminated.

Instead, there is an established line of cases that render the consent of a minor or disabled beneficiary unnecessary upon a demonstration that the modification in question is favorable to such beneficiary.

The leading case in this regard is *In re Cord*, 58 N.Y.2d 539 (1983). *In re Cord* involved an irrevocable living trust which directed that the trust assume payment of any estate taxes assessed because of its existence. Several years after the trust was established, the creator of the trust executed a Will which contradicted the provisions of the trust and directed that all estate taxes be paid out of the general estate as an expense of administration. The Will provisions modified the part of the trust that addressed the payment of the estate taxes.

All the adult trust beneficiaries consented. However, there were minor beneficiaries who were contingent remaindermen in the trust who could not have consented.

However, the court concluded that EPTL 7-1.9 may be applied, even without the written consent of the minor beneficiaries, if the change attempted by the grantor "could only have added to and not cut down on the benefits available to the (minor) beneficiaries." 58 N.Y.2d 539, 546.

Importantly, the court in *In re Cord* observed that EPTL 7-1.9 was intended to protect trust beneficiaries against "unauthorized or unwarranted invasions" of the trust property and not to prevent them from receiving any benefits.

There have been several cases that have followed the logic set forth in *In re Cord*. In *In re Davidowitz*, N.Y.L.J., October 8, 2003, p. 24 (Sur. Ct., N.Y. Co.), the grantor of the irrevocable trust sought to amend certain provisions with regard to paying out income as opposed to allowing it to accumulate in the trust. Infant beneficiaries were involved. All the adult beneficiaries consented to the proposed amendment. The grantor brought a court proceeding within which a guardian ad litem was appointed for the minor beneficiaries. The guardian ad litem confirmed that the relief requested would only benefit the minor beneficiaries. Under these circumstances, the infants' consent was not required and the change was permitted.

In *In re Uhlendorf*, N.Y.L.J., November 24, 2000, p. 33, col. 5 (Sur. Ct., Nassau Co.), an application to amend an irrevocable trust to avoid potential adverse capital gains tax consequences was granted despite the existence of infant beneficiaries as the court ruled that EPTL 7-1.9 provides for the amendment of an ir-

revocable trust on the consent of all persons interested and those unable to give their consent "if the amendment is favorable to them." In that matter, the guardian ad litem confirmed that the recommended change "does not adversely affect his wards but is favorable to them." In this situation, the proposed modification was allowed. See also *In re Paula Levy*, N.Y.L.J., April 30, 1999 p. 32, col. 2 (Sur. Ct., N.Y. Co.).

In *In re Susan P. Thomases*, N.Y.L.J., April 7, 1998, p. 26, col. 5 (Sur. Ct., N.Y. Co.), the grantor was allowed to amend provisions of her irrevocable living trust based upon a finding that the proposed amendment was favorable to the minor beneficiaries pursuant to the report of the appointed guardian ad litem.

In *In re Hausman*, N.Y.L.J., November 15, 1995, p. 26, col. 2 (Sur. Ct., N.Y. Co.), the grantor sought to amend an irrevocable life insurance trust. The court allowed for the amendment of the trust without the consent of infants "or other beneficiaries unable to give their consent" where the change was beneficial to their interest. Again, confirmation of same was made by the appointed guardian ad litem's report which showed that the proposed change was favorable to the interest of his wards.

Further, in *In re Pivnick*, N.Y.L.J., August 24, 1992, p. 25, col. 5 (Sur. Ct., N.Y. Co.), the grantor sought to amend three separate irrevocable trusts to qualify them as "grantor trusts" for income tax purposes. The court allowed for the changes and ruled that "it would be unreasonable to require consent of the infant beneficiary where the modification of the trust was beneficial and not detrimental to the beneficiary." The court went on to provide that "[t]he holding in *Cord* dispenses with the requirement of consent of beneficially interested parties whether or not they are infants whenever the amendment or revocation of an inter vivos trust benefits them."

While all of the aforementioned cases follow the reasoning in *In re Cord*, only a few months after the Court of Appeals rendered the decision in *Cord*, the Court affirmed a holding in a different matter which provided that EPTL 7-1.9 could not be invoked in a case involving minor beneficiaries in which the parties had attempted to change the trust so as to authorize the grantor of the trust to designate substitute trustees. See *Rosner v. Kaplow*, 90 A.D.2d 44 (1st Dep't 1982), *aff'd*, 60 N.Y.2d 880 (1983).

However, as is set forth above, it appears that the courts have continued to apply the holdings set forth in *Cord* liberally.

Although there is ample authority to utilize for amending irrevocable living trusts, there are certain requirements that must be satisfied for the applications to be granted.

First, the grantor that acts to effectuate the termination or modification of the trust must do so during his or her lifetime.

Second, where there are minor or disabled beneficiaries, although EPTL 7-1.9 does not require any court proceeding to confirm approval, it appears to be the best practice to secure judicial approval of such a proposed termination or modification. Generally, the existence of such beneficiaries would necessitate the need for the appointment of a guardian ad litem.

Amendments of Trusts by Trustees

EPTL 10-6.6 (b)(1) provides that a trustee can amend an irrevocable living trust or a testamentary trust (which is not the case with EPTL 7-1.9) without the consent of any interested persons and without court approval. The statute holds as follows:

(b) Unless the terms of the instrument expressly provide otherwise:

(1) A trustee who has the absolute discretion, under the terms of a testamentary instrument or irrevocable inter vivos trust agreement, to invade the principal of a trust for the benefit of one or more proper objects of the exercise of the power, may exercise such discretion by appointing all or part of the principal of the trust in favor of a trustee of a trust under an instrument other than that under which the power to invade is created or under the same instrument, provided, however, that the exercise of such discretion (A) does not reduce any fixed income interest of any income beneficiary of the trust, (B) is in favor of the proper objects of the exercise of the power, and (C) does not violate the limitations of 11-1.7; and

Paragraph (d) addresses the procedure to be used under (b)(1)

(d) The exercise of the power to invade the principal of the trust under subparagraph (1) of paragraph (b) of this section shall be by an instrument in writing, signed and acknowledged by the trustee and filed in the office of the clerk of the court having jurisdiction over the trust; and a copy thereof shall be served on all persons interested in the trust (or on the guardian of the property, committee, conservator or personal representative of such persons or the parent or person with

whom a minor resides), by registered or certified mail, return receipt requested, or by personal delivery or upon application of the trustee in any other manner directed by the court.

(e) For the purposes of this section, the phrase "all persons interested in the trust" shall mean all the persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee, taking into account *section three hundred fifteen of the surrogate's court procedure act*.

However, in order to secure relief provided under EPTL 10-6.6(b)(1), several conditions must be met.

First, the trustee must have absolute discretion under the terms of the existing trust to invade principal for the benefit of one or more persons. This power cannot be limited by an ascertainable standard such as "health, education, maintenance, or support." Even if the Trust provides that the Trustee can invade principal "in his sole and absolute discretion, as he deems necessary and advisable for the health, education, maintenance and support of the beneficiaries," the discretion of power to invade principal is not broad enough to invoke EPTL 10-6.6. See *In re Mayer*, 176 Misc. 2d 562 (Sur. Ct., N.Y. Co. 1998).

Second, the exercise of discretion can only be in favor of proper objects of the exercise of the power and cannot reduce any fixed-income interest of any income beneficiary of the trust.

A trust wherein the trustee has absolute discretion to pay income among a group of beneficiaries or to accumulate income does not translate into a "fixed-income interest."

Third, the statute cannot be used to exonerate an executor or a testamentary trustee from liability from negligence or grant such a person the power to make a binding and conclusive fixation of value for the purposes of distribution.

It is also advisable for the amending trust document to recite that all these statutory conditions have been satisfied.

A reading of the statute and the annotations and cases that have followed the statute suggest that the change desired can be effectuated either in an appointment of principal in favor of a new trustee and an actual new trust or in an amendment to an existing trust. Moreover, as set forth above, a modification under EPTL 10-6.6 (b)(1) does not require prior court approval or the consent of the beneficiaries. However,

the amending documents do have to be filed in a court which would normally have jurisdiction over the trust. Moreover, a copy of the new document must be served "on all persons interested in the trust." The statute seems to incorporate the "virtual representation" provisions of Section 315 of the Surrogate's Court Procedure Act. Moreover, it provides that a person suffering from a disability may be served by service upon the person's guardian or conservator. Further, a minor may be served by service on the parent or the person with whom a minor resides. Actual service is to be made by registered or certified mail, return receipt requested, or can be done by personal delivery or upon application of the trustee, in any manner that could be directed by a court, if necessary.

Trust Reformation

The final means of attempting to change the terms of an irrevocable trust is through an application for the reformation of the document.

Unlike an attempt to change or revoke an irrevocable trust under EPTL 7-1.9 or an attempt to replace an old trust with a new trust in order to modify such trust under EPTL 10-6.6(b)(1), the right to reformation appears to be based in common law.

The ability to reform a trust is well supported by precedent. See *In re Mainzer*, 151 Misc. 2d 203 (Sur. Ct., N.Y. Co. 1991); *In re Martin*, 146 Misc. 2d 144 (Sur. Ct., N.Y. Co. 1989); *In re Choate*, 141 Misc. 2d 489 (Sur. Ct., N.Y. Co. 1988); *In re Khadad*, 135 Misc. 2d 67 (Sur. Ct., N.Y. Co. 1987); *In re Lepore*, 128 Misc. 2d 250 (Sur. Ct., N.Y. Co. 1985); *In re Stalp*, 79 Misc. 2d 412 (Sur. Ct., N.Y. Co. 1974).

For example, in *In re Mainzer*, the Surrogate's Court allowed the trustee of an irrevocable living trust to amend the trust for it to achieve "grantor trust" status, which was initially intended by the grantor but not effectuated by the drafters of the trust. Interestingly, in *Mainzer*, the court considered whether the irrevocable living trust could be amended under EPTL 7-1.9. Although all the adult beneficiaries had consented to the amendment, the consent of the minor contingent beneficiaries of the trust was also required. A guardian ad litem was appointed who in this instance found that the initial proposed reformation of the trust would not, in fact, be favorable to the infant grandchildren. Thus, EPTL 7-1.9 was not permitted to be utilized.

In this case, the court considered another type of reformation that would allow for the trust to be considered a "grantor trust" for income tax purposes but would not adversely affect the interest of the infant grandchildren, and a reformation was permitted.

Most of the cases that involve reformations are generally focused on ensuring that the grantor's intent is actually expressed.

In *In re Rubin*, 4 Misc. 3d 634 (Sur. Ct., N.Y. Co. 2004), the court held that reformation is generally available to correct mistakes in an inter vivos instrument so that the written instrument accurately expresses the grantor's intent. However, the court cautioned that reformation may not be used to change the terms of a trust to effectuate what the grantor would have done had the grantor foreseen the change in circumstances that had occurred.

In a more recent decision, *In re Scheib*, 14 Misc. 3d 1222(A), (Sur. Ct., Nassau Co. 2007), the grantor requested that a paragraph within an irrevocable trust be reformed to reflect her intent that she receive distributions from the trust of income only and that the trustee be expressly precluded from invading the trust's principal for the grantor's benefit. It appeared that the attorney who drafted the trust committed an error so that that particular intent was not fully carried out.

The court held that "although courts will rarely reform a trust to correct mistakes, in the case of an inter vivos trust, reformation to reflect the Settlor's intent is allowed upon clear proof of mistake. Where the Settlor's intention is clear, the draftsmen's mistake should be corrected." 14 Misc. 3d 1222(A). The court held that the letter of the attorney draftsman which predated the execution of the trust evidenced the grantor's intent at the time that she created the trust for the trust to pay her distributions of income only. As such, the reformation was granted.

In *In re Shapiro*, 10 Misc. 3d 1071 (A) (Sur. Ct., Nassau Co. 2006), the trust in question was an irrevocable life insurance trust which allowed the grantor to appoint a successor trustee to fill a vacancy. The grantor was concerned that the assets in the trust could be includable in her estate for Federal and State estate tax purposes since the trust instrument did not expressly prohibit the grantor, in the event of a trustee vacancy, from appointing as a successor trustee a person who is related or subordinate to her within the meaning of Section 672(c) of the Internal Revenue Code.

The court allowed for the proposed reformation which was for a qualification of the persons that could be appointed by the grantor as being persons that were "not related or subordinate" to her.

In doing so, as an ancillary matter, the court allowed for the grantor to retain jurisdiction over the minor beneficiaries in applying the concept of "virtual representation" because the adult and minor beneficiaries had similar economic interests and there was

no conflict of interest and there was adequacy of representation.

More importantly, the court held that reformation should be effectuated to follow the grantor's intent. "The courts have generally been sympathetic where the reformation is requested to cure various tax defects." 10 Misc. 3d 1071(A). In particular, the courts have allowed reformations to allow a charitable remainder trust to qualify for a charitable deduction (*In re Stalp, supra*), to maximize generation skipping transfer tax exemptions (*In re Choate, supra*), to maximize the utility of a Credit Shelter Trust (*In re Quigan, N.Y.L.J., November 17, 1994, p. 34*), to cure the trust so it would qualify as a subchapter S shareholder (*In re Mainzer, supra*), and to limit a power in a trust instrument in order to avoid inclusion for estate tax purposes (*In re Gottfried, N.Y.L.J., April 11, 1997, p. 25, col. 2*).

In *Shapiro*, the language which would have prohibited the appointment of a successor trustee that could be subordinate or related to the grantor was omitted by the attorney draftsman. Moreover, the irrevocable nature of the agreement clearly indicated that the grantor did not intend for the assets to be part of her estate. Thus, the reformation was allowed.

Conclusion

Although it is obviously important to contemplate all possible pitfalls in drafting irrevocable instruments, it is not always possible to effectuate the exact type of planning that may have been originally intended or that could contemplate future circumstances. Although it is certainly not prudent to lead clients to believe that irrevocable trusts can be freely amended, revoked, reformed or replaced without difficulty, it is somewhat

comforting to understand that there are mechanisms in the law that allow for certain modifications if the criteria set forth above in each particular instance is satisfied.

Matthew J. Nolfo is the principal of Matthew J. Nolfo & Associates. Mr. Nolfo received his law degree from Fordham University School of Law in 1991. He specializes in the areas of Estate Planning and Elder Law. He is principally involved in planning for individuals, families and businesses in preserving assets against estate, gift and income taxation as well as the costs of long term care. Mr. Nolfo is past Chair of the Committee on the Problems of the Aging at the Association of the Bar of the City of New York. He has chaired and lectured at various symposiums on Estate Planning and Elder Law issues at the Association of the Bar of the City of New York, the New York State Bar Association, the New York County Lawyers Association, the Jewish Lawyers Guild, the Metropolitan Women's Bar Association, the Columbian Lawyers Association, the Suffolk County Bar Association, the National Kidney Foundation, the Archdiocese of New York and The Practising Law Institute, as well as various other civic and community organizations. Mr. Nolfo is also an adjunct professor at New York University's School of Continuing Education and Professional Studies where he teaches courses in Estate Planning and Asset Protection Planning. He has also been quoted by the *Wall Street Journal*, the *Daily News* and *New York Newsday* and has appeared on NBC News, CBS News and ABC/Business Week News to discuss estate Planning and Elder Law issues. Mr. Nolfo also serves on the Planned Giving Committee of the Archdiocese of New York.

Attention All Section Members

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

Recent New York Cases

By Judith B. Raskin

Article 81

An Article 81 guardian sought to vacate a judgment against her ward where the collection agency should have known the defendant was an incapacitated person. Granted. *In re Garcia*, 2007 NY Slip Op. 51554U; 2007 N.Y. Misc. LEXIS 5762 (Sup. Ct., Queens Co., August 14, 2007).



In July 1999, Lucia Garcia, as Article 81 guardian for Tomas Garcia, settled Mr. Garcia's credit card debt with Fleet Bank. She also gave clear notice of her appointment as guardian to several bank employees who confirmed to her in writing that Mr. Garcia's accounts with Fleet were closed. The guardian then opened a guardianship account with Fleet. Shortly thereafter, without the guardian's input, Mr. Garcia's personal account was reopened and charges were made to the account. The guardian and the court examiner advised the bank in many documented ways that Mr. Garcia was an incapacitated person, that the account should not have been reopened and that the charges were not his. Despite these communications, Fleet sent the matter to collection for a debt of \$6,116.53. The Asset Acceptance LLC (Asset) pursued collection of the debt even after the guardian advised the company's attorneys of the situation. The company filed for and received a default judgment against Mr. Garcia individually.

The court found Fleet and Asset's conduct "most egregious." Before an action can be brought against a judicially declared incapacitated person, the plaintiff must obtain leave of the court that appointed the guardian. The action must be commenced against the guardian, not the incapacitated person. Fleet and Asset brought this action against Mr. Garcia individually and did not seek leave of the court, although they had been well advised of the situation.

The court also found the judgment to be invalid and ordered the guardian to retain counsel to vacate the judgment. The law firm representing Asset was ordered to pay all fees for vacating the judgment and all other costs to Mr. Garcia as a result of bringing the action. The court prohibited further suit against the guardian on the invalid judgment.

The court ordered Asset's officers and its law firm to show cause why they should not be held in contempt for improperly bringing suit against an incapacitated person.

An Article 81 guardian sought return of funds transferred to the incapacitated person's spouse when the spouse did not use the funds as the court had directed. Granted. *In re "Jane Doe,"* 2007 NY Slip Op. 27274; 16 Misc. 3d 894; 2007 N.Y. Misc. LEXIS 4712 (Sup. Ct., Kings Co., July 5, 2007).

This case presented an issue of first impression in New York. In an Article 81 proceeding, the court appointed a guardian for Jane Doe who had severe mental and physical disabilities. At the time of the hearing Jane Doe was in a hospital. The discharge plan was to transfer her to a nursing home where she would require one-on-one nursing care. The court authorized the transfer of Jane Doe's funds to her husband in order to make Jane Doe eligible for Medicaid and provide the private funds for the one-on-one care. Although Jane Doe's husband was at the hearing and agreed to the plan, he refused to cooperate once he received the funds. Because funds were not available, Jane Doe could not be safely discharged from the hospital. The guardian then sought an order requiring return of the funds to Jane Doe, arguing that the funds were held by the husband in a constructive trust.

The court found all the elements of a constructive trust and ordered transfer of the assets back to Jane Doe. Constructive trusts can be based on oral agreements as well as written ones. Guidelines to be considered are: a confidential or fiduciary relationship, a promise, a transfer of assets in reliance on the promise and unjust enrichment.

The AIP appealed from court orders appointing a court evaluator and requiring her to meet with the court evaluator or be held in contempt of court. Granted. *In re Heckl*, 2007 NY Slip Op. 6089; 840 N.Y.S.2d 516; 2007 N.Y. App. Div. LEXIS 8545 (App. Div. 4th Dept., July 18, 2007).

Petitioner children sought appointment of an Article 81 guardian for their mother, Mrs. Heckl. Mrs. Heckl appealed the court's appointment of a court evaluator. When this was denied she appealed on the basis that meeting with the court evaluator would be a violation of her constitutional rights. She argued she would be a witness against herself if she spoke with the court

evaluator and her statements were then used against her in the proceeding. She also argued that the court pursuant to 81.10(g) has the option of not appointing a court evaluator where the court appoints counsel for the AIP. Mrs. Heckl had retained counsel who would see that the court had all necessary information. This appeal was also denied. After avoiding court orders to meet with the court evaluator, the court ordered, on petitioner's motion, that Mrs. Heckl must meet with the court evaluator within ten days or be held in contempt. Mrs. Heckl appealed from this order.

The court held that 1) the Article 81 proceeding requires the appointment of a court evaluator except in circumstances not present here, 2) the appointment of a court evaluator did not violate Mrs. Heckl's constitutional rights, and 3) the court could not order Mrs. Heckl to meet with the court evaluator nor could it hold her in contempt for failure to do so.

As to Mrs. Heckl's first appeal, Sec. 81.10(g), allowing the court to dispense with the appointment of a court evaluator was to be used only in cases where the AIP's estate would be burdened by the expense of counsel and court evaluator which was not the concern here. Mrs. Heckl's constitutional rights against self-incrimination were not violated because any resulting confinement would be for care and assistance and not punishment. There is no requirement in the statute that the AIP meet with the court evaluator. The statute requires that the court evaluator meet with the AIP, not the other way around.

Nursing Home Admission Agreement

Plaintiff nursing home sought judgment against the defendant who signed its admission agreement as Legally Authorized Representative. Denied. *Amsterdam Nursing Home Corp. v. Lang*, 2007 NY Slip Op. 5172U; 2007 N.Y. Misc. LEXIS 6255 (Sup. Ct., N.Y. Co., September 13, 2007).

Plaintiff nursing home sought a default judgment against the defendant, Mr. Lang, who had signed his grandmother's admission agreement to the facility as "Legally Authorized Representative." The nursing home claimed that Mr. Lang, as the Legally Authorized Representative, was responsible for payment of his grandmother's unpaid net available monthly income (NAMI) of \$18,574.53.

The court held that Mr. Lang was not personally liable for the payment. The nursing home cannot by law require a third party guarantee of its payment. Mr. Lang would be responsible for paying his grandmother's bill from her funds if he had access, but the nursing home failed to show that he had access or that it requested that he seek access.

Medicaid Recovery

The executor of the estate of a refusing spouse brought this proceeding to determine the validity of a DSS claim where, among other issues, the decedent was survived by a disabled child. Claim deemed valid. *In re Estate of Schneider*, 2007 NY Slip Op. 51185U; 15 Misc. 3d 1146A; 2007 N.Y. Misc. LEXIS 4168 (Sur. Ct., Nassau Co., June 12, 2007).

The executor argued that the DSS claim against the estate of a refusing spouse for care costs of the institutionalized spouse was not a valid claim for many reasons that were rejected by the court, including the argument that the decedent had a disabled child. She cited New York decisions that have adhered to the literal reading of Social Services Law Sec. 369(2) that recovery for costs paid on behalf of a Medicaid recipient can only be made "after the death of the . . . surviving spouse, if any, and only at a time when the individual has no surviving child who is . . . permanently and totally disabled."

The court held that the claim was valid. Although the literal meaning of the statute would invalidate the claim, the statute had to be interpreted so that it complied with the legislative intent. Where the incapacitated child did not depend on the decedent for his support, the estate should not be protected against the claim. The decedent left a bequest to his son of \$15,000 in a supplemental needs trust. The court held that this trust would not be subject to the DSS claim.

Medicaid Denial

A community spouse appealed from a dismissal of her Article 78 application to review the denial of her husband's Medicaid application based on her excess resources. Remitted for consideration of her spousal refusal statement. *Lopez v. Comm'r NYS Dept. of Health*, 2007 NY Slip Op. 5817; 42 A.D.3d 638; 839 N.Y.S.2d 827; 2007 App. Div. LEXIS 8131 (App. Div. 3d Dep't, July 5, 2007).

Mr. Lopez submitted a Medicaid application to pay for his nursing home costs. Petitioner, his wife, had resources above the community spouse resource allowance (CSRA) but income below the minimum monthly maintenance needs allowance (MMMNA.) The application requested a raised CSRA for Mrs. Lopez in order to generate additional income to bring her income up to the MMMNA. DSS rejected that request based upon petitioner's ability to withdraw additional income from her annuity account. DSS did not consider petitioner's fallback position of refusing spouse and her submission of a statement of spousal refusal with the application. The decision at fair hearing upheld the denial. The Supreme Court in the Article 78 proceed-

ing dismissed petitioner's application to review the determination. Petitioner appealed.

The court held that because petitioner did not produce evidence of the income generated by the annuity she could not argue that there was insufficient income generated to raise her income to the MMMNA. However the court found that DSS did not consider her statement of spousal refusal. The matter was remitted to consider the spousal refusal statement.

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

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Guardianship News

By Robert Kruger

This column is devoted, unlike most previous columns, to news . . . recent developments in Guardianship practice and administration.

First, many readers are aware of the existence of the OCA Surrogate's Court Advisory Committee, a committee chaired by Surrogate Renée R. Roth of New York County, the function of which is to gather a representative number of judges, administrators and practicing lawyers to address problems in Surrogate's Court practice. One example of the work of this committee is the drafting of legislation designed to smooth and clarify the transition between Guardianships and Estates, legislation that has passed the senate in Albany but, apparently, has yet to be introduced in the assembly.

Through the persistent efforts of New York State Bar Association President Kate Madigan, past President Mark Alcott and others, Chief Administrative Judge Ann Pfau, who is now Chief Administrative Judge of the State of New York, has authorized the formation of an analog to the Surrogate's Court Advisory Committee, to wit, a statewide Guardianship Advisory Committee. This committee is still in formation; Judge Pfau has not (to the author's knowledge) named the Chair of this committee.

However, the representatives from the bar have been named. They are: Alyssa Barreiro of Binghamton, a member of Levene Gouldin & Thompson LLP, and Joan Robert of Rockville Centre, a name partner of Kassoff, Robert & Lerner and a past-Chair of the Elder Law Section, both of whom were selected by Kate Madigan; Anthony Enea of White Plains, a name partner of Enea, Scanlon & Sirignano, present Chair of the Committee on Guardianships and Fiduciaries of the Elder Law Section of the Bar Association and Vice-Chair of the Committee on the Elderly and Disabled of the Trusts and Estates Law Section of the State Bar Association, who was selected by Ami Longstreet, Chair of the Elder Law Section; and your author of Manhattan, Chair of the Committee on the Elderly and Disabled of the Trusts and Estates Law Section and Vice-Chair of the Committee on Guardianships and Fiduciaries of the Elder Law Section, selected by Phil Burke, Chair of the Trusts and Estates Law Section.



This is the first time in eight years, since the scandal on fiduciary appointments first surfaced, that OCA is willing to tap the knowledge and experience of the practicing Bar. It is essential that the bar be constructive in this area; income caps and fees must not be our focus, or our credibility will be lost.

Second, Wally Leinhardt, Chair-Elect of the Trusts and Estates Law Section, has formed an ad hoc group of Trust and Estate and Elder Law attorneys, of which your author is Chair, to propose corrective legislation regarding perceived problems and anomalies of the Mental Hygiene Law.

I would invite all members of the Bar to e-mail their concerns to the Bar members of this Guardianship Advisory Committee and the ad hoc group, composed initially of John Dietz, Anthony Enea, Tony Lamberti, Ira Miller and the author, so that we might better represent the interests and concerns of the practicing Bar.

A few of the issues to be addressed by the ad hoc group include:

- 1) Lack of uniformity in the practice and procedure for appointing an "ancillary" Guardian under MHL § 81.18;
- 2) The lack of uniformity in dealing with the appropriate venue for real estate transactions. For example, if a Nassau IP owns a vacation/week-end home in Dutchess County, should the proceeding to sell that home be brought in Nassau? Dutchess? Why not either? An amendment/clarification under § 81.04 might be desirable.
- 3) There is a proposed uniform law that addresses the "granny-napping" issue . . . also a venue issue under MHL § 81.04. The proposal would allow a New York State Court, under certain circumstances, to entertain an Article 81 proceeding for a New York resident who had moved, or been removed, from the geographical boundaries of New York State.
- 4) Simplifying annual and final accountings will inevitably be addressed; and
- 5) The applicability of the Fifth Amendment right against self-incrimination will be considered.

This would, also, be a promising project for attorneys who wish to become involved in Bar Association committee work.

I note that New York County, without waiting for the State Bar Association, has formed a Guardianship Advisory Committee of its own. If states are useful incubators of legislation for our federal system, by parity of reasoning, the counties are no less useful to the state.

Among the projects that the New York County Advisory Committee is considering are:

- 1) An instruction booklet for lay guardians;
- 2) The perennial problem of the indigent IP;
- 3) A simplified annual accounting for guardianship estates below \$100,000; and
- 4) A checklist for judges . . . to highlight recurring issues.

As these projects mature, I will report further.

Once again, I invite letters and comments from the bar and the judiciary. I can be reached at 225 Broad-

way, Suite 4200, New York, New York 10007; phone number: (212) 732-5556; Fax number: (212) 608-3785; and E-mail address: robertkruger@aol.com

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



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IRAs and SNTs—Between a Rock and a Hard Place

By Salvatore M. Di Costanzo

With increasing frequency, individual retirement arrangements (IRAs) constitute a significant portion of a client's estate. Advances in medicine and technology are extending longevity. Couple these facts with the fact that a greater number of children are being classified as disabled, and you will conclude that there is a growing number of adults who should incorporate testamentary planning that provides for their disabled children typically through the use of testamentary supplemental needs trusts (SNTs).¹ Where the assets used to fund an SNT consist of IRAs, it is imperative to ensure that the trust qualifies as a designated beneficiary to maximize the deferral of income tax payable on IRA benefits. Moreover, a basic understanding of the often diametrically opposed income tax consequences of leaving IRA benefits to an SNT is necessary to properly advise your client.

The goal when planning for any client with an IRA is to "stretch" the payout of the retirement benefits to the beneficiaries of the IRA after the client's death. For this to occur, the beneficiary must be a "designated beneficiary."² In order for a trust to be considered a designated beneficiary, it must meet the requirements of a "see-through trust" under the Internal Revenue Code ("Code").

Once a trust qualifies as a designated beneficiary, the retirement benefits can be distributed over the life expectancy of the oldest trust beneficiary.³ If the trust does not qualify as a designated beneficiary, however, the IRA must be distributed to the trust over (i) a five-year period or (ii) the remaining life expectancy of the owner of the IRA, known as the "participant," depending on whether the participant died before reaching the date on which he or she would be required to start taking required minimum distributions.⁴

A trust will be considered a see-through trust, and thus a designated beneficiary if it meets certain requirements.⁵ One of those requirements is that all trust beneficiaries must be individuals.⁶

In the case of an SNT, the aforementioned requirement requires careful planning. Consider the following facts. A parent establishes a testamentary SNT for the benefit of a disabled child where the disabled child is the only issue of the parent. The parent wishes to benefit a group home that has cared for the disabled child. Thus, the trust provides that upon the death of the disabled child, the trust property passes to the group home which is a qualified charitable organization under the Code.

Although the charity is only a contingent remainder beneficiary, it may still be considered a beneficiary by the IRS. And since the beneficiary is not an individual, this hypothetical SNT will not satisfy the requirement that all beneficiaries be individuals unless the SNT is drafted as a conduit trust which is more fully discussed below.

Even if the trust qualifies as a designated beneficiary, the income of the trust (that being the IRA distribution) will likely be taxed at the trust level, and as a result, will likely be taxed at the highest tax rates since the tax brackets for a trust are compressed. Net income of only \$10,050 will result in the trust being taxed at the highest tax rate of 35%, whereas a single individual with the same amount of income is taxed at only 15%.

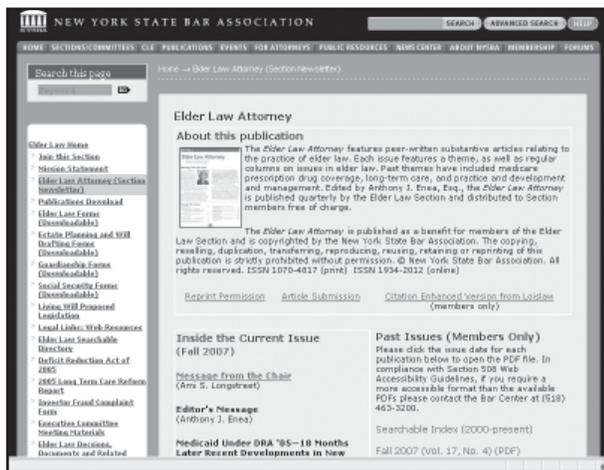
Taxation at the trust level can be avoided if the trust is a conduit trust. A conduit trust would be a trust that requires the trustee to distribute to the trust beneficiaries any distribution it receives from a retirement plan causing the income to be taxed at the beneficiary's tax rates. However, making the trust a conduit trust can destroy the primary purposes of an SNT, i.e., discretionary distribution of income and principal, and the retention of government assistance. If the payments from a conduit trust are too high, the disabled child may be disqualified from government assistance in its entirety.⁷

However, as stated above, the unintended consequence of a conduit trust may be to enrich a disabled beneficiary to the point where he or she no longer qualifies for government benefits.

Therefore, the difficult planning choice is whether it is more important to "stretch out" the income tax consequences resulting from IRA distributions or to pay the tax and keep the disabled child's government assistance intact.

One of the ways to ensure that the income of a testamentary SNT is taxed at the individual level is to make the SNT a grantor trust to the beneficiary. If the trust is a grantor trust the beneficiary is treated as the owner of the trust and consequently, all items of income, deduction, credit, etc. are taxable at the individual level.⁸ However, drafting the SNT as a grantor trust would require giving certain powers to the beneficiary which would likewise disrupt the inherit purpose of the SNT.

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Where IRA distributions are relatively small, the trustee may be more willing to distribute the retirement benefits to the trust beneficiary since it will likely have no effect on the beneficiary's government benefits. However, where the retirement benefits are substantial, the client may again be forced to accept paying taxes out of the trust property so as to preserve the inherit benefits of an SNT for the disabled child.

Coupling an SNT with retirement benefits is an opportune plan to preserve such benefits for a disabled individual; however, one must be aware that there most likely will be unavoidable income tax consequences. Most of the time, it is prudent to protect the funds and take the tax hit.

The author would like to thank William Maker Jr., Esq. for his insight into the writing of this column.

Endnotes

1. In 2007, the Centers for Disease Control reported that 1 out of every 150 children is diagnosed with autism. For decades prior, this statistic was closer to 1 out of every 2,000 children.
2. The minimum distribution rules pertaining to individuals are outside the scope of this column. For a comprehensive review of such rules, *See Life and Death Planning for Retirement Benefits*, Natalie Choate, 6th edition 2006.
3. Treas. Reg. § 1.401(a)(9)-5,A-7(a)(1).
4. With certain exceptions, an individual is required to begin taking required minimum distributions by April 1 of the year following the year in which the participant attains 70½ years of age. *See* Treas. Reg. § 1.401(a)(9)-5,A-1(c).
5. *See* Treas. Reg. § 1.401(a)(9)-4,A-5(b)(1)-(5).
6. Treas. Reg. § 1.401(a)(9)-4,A-5(b)(5).
7. There may be other strategies that can be explored to continue designated beneficiary status, such as naming a charitable remainder trust as the beneficiary.
8. *See* I.R.C. § 678(a)(1).

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Joan L. Robert
Kassoff, Robert & Lerner LLP
100 Merrick Road, Suite 508w
Rockville Centre, NY 11570
joanlenrob@aol.com

Client and Consumer Issues

Frances Pantaleo
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2900 Westchester Avenue, Suite 205
Purchase, NY 10577
FMP@walsh-amicucci.com

Communications

Howard S. Krooks
Elder Law Associates, PA
7000 W. Palmetto Park Road, Suite 205
Boca Raton, FL 33433
hkrooks@elderlawassociates.com

Michael J. Amoruso
Amoruso & Amoruso, LLP
800 Westchester Avenue, Suite S-608
Rye Brook, NY 10573
michael@amorusolaw.com

Compact Legislation

Vincent J. Russo
Vincent J. Russo & Associates, P.C.
1600 Stewart Avenue, Suite 300
Westbury, NY 11590
vincent@vjrussolaw.com

Howard S. Krooks
Elder Law Associates, PA
7000 W. Palmetto Park Road, Suite 205
Boca Raton FL 33433
hkrooks@elderlawassociates.com

Elder Law Practice

Robert J. Kurre
Robert J. Kurre & Associates, P.C.
1010 Northern Blvd., Suite 232
Great Neck, NY 11021
rkurre@kurrelaw.com

David Goldfarb
Goldfarb Abrandt Salzman & Kutzin LLP
350 Fifth Avenue, Suite 1100
New York, NY 10118-1100
goldfarb@seniorlaw.com

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90 Merrick Avenue, 8th Floor
East Meadow, NY 11554
ssilverberg@certilmanbalin.com

Sharon Kovacs Gruer
Sharon Kovacs Gruer, P.C.
1010 Northern Blvd., Suite 302
Great Neck, NY 11021
skglaw@optonline.net

Family Law Issues

Marcia J. Boyd
Law Office of Marcia J. Boyd
290 Linden Oaks Office Park
Rochester, NY 14625
mjboyd@aol.com

Financial Planning and Investments

Laurie L. Menzies
Pfalzgraf Beinhauer & Menzies LLP
455 Cayuga Road, Suite 600
Buffalo, NY 14225
lmenzies@pbmlawyers.com

Walter T. Burke
Burke & Casserly, PC
255 Washington Ave. Ext.
Albany, NY 12205-5504
wburke@burkecasserly.com

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Enea, Scanlan & Sirignano LLP
245 Main Street, 3rd Floor
White Plains, NY 10601
aenea@aol.com

Ira K. Miller
26 Court Street, Suite 400
Brooklyn, NY 11242-0103
ikmesq2@aol.com

Health Care Issues

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Freedman Fish & Grimaldi LLP
9201 Fourth Avenue, 5th Floor
Brooklyn, NY 11209
jgrimaldi@ffglaw.com

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Sharon Kovacs Gruer
Sharon Kovacs Gruer, P.C.
1010 Northern Blvd., Suite 302
Great Neck, NY 11021
skglaw@optonline.net

Michael J. Amoruso
Amoruso & Amoruso, LLP
800 Westchester Avenue, Suite S-608
Rye Brook, NY 10573
michael@amorusolaw.com

Legal Education

Ellen G. Makofsky
Raskin & Makofsky
600 Old Country Road, Suite 444
Garden City, NY 11530-2009
egm@raskinmakofsky.com

Marie Elena Rosaria Puma
Vincent J. Russo & Associates, P.C.
3740 Expressway Drive South
Hauppauge, NY 11749
mepuma@vjrussolaw.com

Legislation and Liaison to Public Agency

Michael J. Amoruso
Amoruso & Amoruso, LLP
800 Westchester Avenue, Suite S-608
Rye Brook, NY 10573
michael@amorusolaw.com

Liaison to Legal Services and Nonprofit Organizations
Ellen P. Rosenzweig
Independence Care System
257 Park Avenue South, 2nd Floor
New York, NY 10010
rosenzweig@icsny.org

Liaison to the Judiciary
Colleen Lundwall
Supreme Court of State of N.Y.
140 Grand Street
White Plains, NY 10601-4834
clundwal@courts.state.ny.us

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LOB Room 656
Albany, NY 12248
anncarrozza@aol.com

Litigation
Rene H. Reixach Jr.
Woods Oviatt Gilman LLP
2 State Street, Suite 700
Rochester, NY 14614
rreixach@woodsoviatt.com

Long Term Care Insurance
Louis W. Pierro
The Pierro Law Group, LLC
20 Corporate Woods Blvd., 3rd Floor
Albany, NY 12211
lpierro@pierrolaw.com

Long-Range Planning
Sharon Kovacs Gruer
Sharon Kovacs Gruer, P.C.
1010 Northern Blvd., Suite 302
Great Neck, NY 11021
skglaw@optonline.net

Michael J. Amoruso
Amoruso & Amoruso, LLP
800 Westchester Avenue, Suite S-608
Rye Brook, NY 10573
michael@amorusolaw.com

Medicaid
Valerie J. Bogart
Selfhelp Community Services Inc.
520 Eighth Avenue, 5th Floor
New York, NY 10018
valbogart2@aol.com

Ira Salzman
Goldfarb Abrandt Salzman & Kutzin LLP
350 Fifth Avenue, Suite 1100
New York, NY 10118
salzlaw@aol.com

Membership Services
Ellyn S. Kravitz
Littman Krooks LLP
655 Third Avenue, 20th Floor
New York, NY 10017
ekravitz@littmankrooks.com

Persons Under Disability
Lisa K. Friedman
Law Office of Lisa K. Friedman
370 Lexington Avenue, Suite 1205
New York, NY 10017
lkleef@aol.com

Publications
Anthony J. Enea
Enea, Scanlan & Sirignano LLP
245 Main Street, 3rd Floor
White Plains, NY 10601
aenea@aol.com

Real Estate and Housing
T. David Stapleton Jr.
Karpinski Stapleton Galbato & Tehan
110 Genesee Street, Suite 200
Auburn, NY 13021
david@ksgtlaw.com

Technology
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101 S. Salina Street, Suite 600
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alongstreet@mackenziehughes.com

Chair-Elect

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Burke & Casserly, P.C.
255 Washington Avenue Ext.
Albany, NY 12205
tcasserly@burkecasserly.com

Vice-Chair

Michael J. Amoruso
Amoruso & Amoruso, LLP
800 Westchester Avenue, Suite S-608
Rye, NY 10573
michael@amorusolaw.com

Secretary

Sharon Kovacs Gruer
Sharon Kovacs Gruer, P.C.
1010 Northern Boulevard, Suite 302
Great Neck, NY 11021
skglaw@optonline.net

Treasurer

T. David Stapleton, Jr.
Karpinski Stapleton Galbato & Tehan
110 Genesee Street, Suite 200
Auburn, NY 13021
david@ksgtlaw.com

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 **NEW YORK STATE BAR ASSOCIATION**
ELDER LAW SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

Editor-in-Chief

Anthony J. Enea
Enea, Scanlan & Sirignano LLP
245 Main Street, 3rd Floor
White Plains, NY 10601
aenea@aol.com

Board of Editors

Lee A. Hoffman, Jr.
Hoffman, Wachtell, Koster & Maier
399 Knollwood Road
White Plains, NY 10603
lhoffman@hwkmlaw.com

Andrea Lowenthal
Law Offices of Andrea Lowenthal PLLC
541 Warren Street
Hudson, NY 12534
andrea@lowenthallaw.com

Vincent Mancino
Littman Krooks LLP
399 Knollwood Road, Suite 114
White Plains, NY 10603
vmancino@littmankrooks.com

Joan L. Robert
Kassoff Robert & Lerner LLP
100 Merrick Road, Suite 508W
Rockville Centre, NY 11570
joanlenrob@aol.com

Brian Andrew Tully
Law Office of Brian A. Tully
444 New York Avenue
Huntington, NY 11743
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