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Elder and Special Needs Law Journal

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of the New York State Bar Association

Inside

Table of Contents

Message from the Chair

As you are reading this Chair's Message, the Elder Law Section has just completed another successful and highly enjoyable Summer Meeting at the Marriott Longwharf in Boston, Massachusetts. Thanks to the efforts of our program Co-Chairs, **Beth Polner Abrahams** and **Salvatore M. DiCostanzo,** we were entertained to three days of highly informative CLE programs as well as enjoyable sightseeing excursions to such venues as the New England Aquarium, the Museum of Science, the Freedom Trail and, of course, Boston's world renowned "Duck Tour." One of the highlights of the meeting was a wonderful evening of "Lobsters and Laughs" on the beautiful terrace of the New England Aquarium overlooking Boston Harbor. Peter Grim of the Boston Hysterical Society provided the comedic entertainment, often making the legal profession the butt of his jokes. In spite of their losing baseball record, the Bostonians played gracious hosts to the legions of Yankee fans that had descended upon their beloved city. A warm thank you to all our members and their families who attended. I am confident a good time was had by all.

I would be remiss if I didn't express our collective appreciation to all of the excellent speakers who devoted their time and efforts to the program as well as to **Lisa Bataille, Kathy Heider, Kathy Plog** and all of the NYSBA staff that played an integral role in making the 2012 summer meeting a success. Their hard work and efforts truly paid off. Additionally, we also owe a debt of gratitude to our many sponsors, who without their financial support the costs of this event to our Section would be significantly higher. A special thank you to **NYSARC Trust Services** (sponsor of the Program Favors), **RDM Financial Group** (sponsor of the Cocktail Reception) and **Enea, Scanlan & Sirignano, LLP** (sponsor of the Thursday evening comedy show) and all of our other loyal sponsors, the **Arthur B. Levine Company**, **Elder Counsel**, **Interim Health Care**, **Krause Financial Services, Inc.**, **New York and National Long Term Care Brokers** and **Personal Touch Home Care**. Finally, as far as sponsorship is concerned I want to thank **Salvatore M. DiCostanzo** who has completed his tenure as our Sponsorship Committee Chair. Sal has for years diligently worked to ensure that our meetings are appropriately sponsored.

In keeping with my discussion of our Section Meetings, I would like to remind you to mark your calendars for our Fall Meeting which is scheduled for October 24th and 25th at the Doubletree Hotel in beautiful Tarrytown, New York. For those of you not familiar with Tarrytown it is a scenic Hudson River town in Westchester County with great shopping, antiquing, dining and sightseeing, all within a few

minutes of travel from the hotel. It is also within a few miles of the Village of Sleepy Hollow, which is famous for being the home of the legend of the Headless Horseman. Some have speculated that the Headless Horseman was an elder law attorney on a busy day.

Program Co-Chairs **Matt Nolfo** and **Tara Pleat** have assured me that they have assembled a panel of distinguished speakers who will be addressing numerous timely topics, with the first day of the program being a day of roundtable discussions moderated by highly experienced elder law practitioners. This will be a program that elder law attorneys will be talking about for years to come. Practitioners throughout the state will be asking "Were you at the Fall Meeting in Tarrytown?" You will not want to be the person who embarrassingly has to answer in the negative.

Please also remember to save the date for our Annual Meeting on January 22, 2013 at the New York Hilton in New York City.

Update of New Section Initiatives

As you may recall at our Annual Meeting in January I presented to the Section a number of proposed initiatives which I believed were of importance to the future success of our Section. The following, for purposes of brevity, is an update on some of the most important of these initiatives:

A. Enhancing the Practice Management Skills of Our Members

I am pleased to announce that our Section is partnering with the New York State Bar Association to present a series of CLE programs throughout the State entitled, "Developing an Elder Law Practice." The programs will be held in November and December of this year in Westchester County, New York City, Long Island, Rochester and Albany. Practice Management and Technology Committee Co-Chairs, **Ronald Fatoullah** and **Robert Kurre,** are the program Co-Chairs. We have collaborated to formulate a program agenda that will explore such topics as Building a Successful Elder Law Practice, Marketing, Networking and Public Relations for the Elder Law Practitioner, the Computer Software and Technology needs of an elder law practice, hiring and staffing needs as well as how to conduct elder law research.

Please stay tuned for the dates and specific locations of the programs. Other than missing the Fall 2012 meeting, this could be the biggest mistake you ever make if you don't attend. In fact some have opined that non-attendance may be negligence per se.

B. Unauthorized Practice of Law

As you may be aware, the Unauthorized Practice of Law Task Force, which I chair, recently surveyed the membership to determine whether they believed non-attorneys were engaged in the practice of elder law, and specifically what type of work they were doing, and whether the public was being financially harmed by their actions.

We received 191 responses to our survey, some of which provided detailed responses to the questions posed. While the survey results indicated that non-attorneys were involved in the Medicaid applications process, however, as to the issue of whether non-attorneys were specifically engaged in Medicaid and estate planning there was less clarity and certainty. As was previously reported the Task Force's research has determined that it is permissible for a non-attorney to prepare and file a Medicaid application and to provide counsel with respect thereto, and to even provide representation at a fair hearing. However, the non-attorney may be engaging in the unauthorized practice of law if he or she is providing counsel in areas that require specialized legal knowledge such as Medicaid planning and wills, trusts and estates/tax planning.

The Task Force was cognizant that particularly with Medicaid applications, where a spousal refusal is required, it is likely that some level of legal advice is being provided, and that if the non-attorney is providing this advice and/or any other advice relevant to Medicaid and/or estate tax planning he or she may be engaged in the unauthorized practice to some extent.

In light of all the above it is the recommendation of the Task Force that the Section continue to raise member awareness and attention to this issue, and that Section members encourage the non-attorneys involved in this practice to work with elder law attorneys. The Task Force also believes that the Section should open a dialogue with the Nursing Home Association leaders statewide as to the inherent dangers and problems with non-attorneys and particularly nursing homes handling the preparation and filing of Medicaid applications. The Task Force is currently exploring how best to approach this dialogue and whether NYSBA permission is required to do so.

In conclusion, it was the opinion of the Task Force that we presently don't have sufficient evidence to make this an issue to be brought to the State Bar's Unlawful Practice of Law Committee. That doesn't mean we will cease monitoring this issue or that we will not do so at a later date.

C. Study Group's Database

I am pleased to announce that my initiative to encourage the formation of Study Groups and to develop a database of Study Groups statewide has received an enthusiastic response from the Co-Chairs of both the Membership Services and Mentoring Committees.

Both Committees are working together to formulate a strategy to encourage our membership to form and actively participate in Study Groups. I will provide more details about this initiative in the near future.

D. Committee Projects/Initiatives

In recent months I have reached out to virtually all of our Section Committee Chairs and Co-Chairs to review with them their various initiatives and projects for the upcoming twelve months.

As I have discussed with the Committee Chairs and Co-Chairs I believe it is imperative that the Committees formalize in writing their initiatives and projects and set a timetable for their implementation.

It is my expectation and that of our Section Officers that Committee Reports will be timely submitted for all Executive Committee meetings, and that a Committee Chair or Vice Chair will be in attendance at said meeting to provide us with a status Report.

In my forthcoming Chair's Message I will be providing you with a detailed summary of some of our most important Section initiatives and projects.

In conclusion, I look forward to seeing you at the Fall Meeting. It is truly an honor to serve as your Chair. I would appreciate your feedback, questions, comments and concerns, if any.

Anthony J. Enea

Message from the Co-Editors in Chief

We at the *Journal* are always searching for ways to encourage submissions from new authors and to invite new and diverse members to join our Section. This goal is also consistent with the initiatives of Vincent E. Doyle and Seymour W. James, Jr., the former and current Presidents of New York State Bar Association and our own Section Chair Anthony Enea. Since the Fall season brings the beginning of another school year for many law school students throughout New York State we are pleased to announce the *Elder and Special Needs Law Journal* Diversity "Write-On" Competition for students currently enrolled in New York State law schools. By the time you are reading this message, invitations will have been sent to all law schools in New York State with the rules and guidelines of the competition. We will continue to keep our readers updated regarding the status of this exciting new competition. Now let's get to our Fall 2012 issue.

To begin, Jim Sarlis examines the intricacies of digital estate planning in his article *Your Online Afterlife: Digital Estate Planning in the Facebook Age*, as technology continues to ingratiate itself within our daily lives, from Gmail to Twitter. Lainie Fastman further investigates another ever-changing area of the legal paradigm in her article, *The Bypass or Credit Shelter Trust,* investigating the potentiality of bypass credit and credit shelter trusts and estate planning in relation to the continuously changing Internal Revenue Code. Next, Robert Kruger scrutinizes the current confines of guardianship spending in his Guardianship News column, advocating for a more holistic approach regarding the allocation of funds between the IP and his or her family. Nancy Levitin and Moriah Adamo also analyze familial issues in their article *The Provider's Role in Proving Undue Hardship*, navigating the legal consequences of applying for medical assistance without the cooperation of your client's spouse. As attorneys for nursing homes, Ms. Levitin and Ms. Adamo offer a unique perspective for our readers. We look forward to more contributions from them in coming issues.

Continuing in this addition, Ellen Makofsky explores the necessity of forward thinking in her Advance Directives column, highlighting the need for attorneys to draft a Health Care Proxy that is flexible and accommodates a client's changing circumstances. Robert Mascali keeps us in the SNT loop with his *Pooled Trusts and the Preemption Doctrine—An Update*, noting the impact of *Lewis v. Alexander* on the subject of Medicaid planning. Providing practitioners with an additional dose of practice management advice, Kameron Brooks details the minutiae and legal ramifications of faulty file keeping in his article *The Care, Upkeep and Planned Death of a Client File*. Moreover, Judith Raskin imparts important case decisions within her Recent New York Cases column, helping us remain up to date. David Okrent, immediate past Co-Editor in Chief of this *Journal*, follows suit, with his new column *Recent Tax Bits and Pieces*, which dissects pertinent decisions impacting the field of tax law. And lastly, on a lighter note, Natalie Kaplan explores what makes David Goldfarb tick, both in and out of New York's capital.

We continue to be indebted to all our student editors, our editorial board, our production editors and everyone involved in this publication. We also send warm thanks to the amazing NYSBA production team of Lyn Curtis and Wendy Harbour. Thank you for all of your assistance with this endeavor. We await submission of articles for upcoming issues and welcome your ideas for future issues.

David and Adrienne

Your Online Afterlife: Digital Estate Planning in the Facebook Age

By Jim D. Sarlis

Like most people these days, you probably do at least some of your banking online. You may have e-mail accounts on multiple providers, such as Gmail, Yahoo! and AOL. You likely spend more time on Facebook and Twitter than you would care to admit. You post on LinkedIn and Pinterest. You buy and sell on Amazon and eBay, using PayPal. You pay your mortgage and utility bills by automatic withdrawal. You have a website and a blog. You may even have investments with a company that has no "bricks-and-mortar" location. In fact, not only are your photo, music, and video collections stored online, your documents may even be stored on a "cloud" server.[1]

By now, most people realize how easy it is to accumulate a significant online presence, given the multitude of web interactions we engage in regularly. By now, most people also realize how important it is to protect usernames and passwords, to avoid having online accounts and other activities compromised, which could lead to identity theft and other disastrous results. What most people don't realize, however, is that the very same precautions taken to secure online data and protect passwords could result in a denial of access to fiduciaries and loved ones in the event of incapacity or death.

Digital estate planning addresses these concerns. It is meant to create a plan whereby access to your digital assets is given to a person chosen by you, your wishes are expressed, and authority to carry them out is conferred.

Digital Assets Defined

Digital assets are online accounts and information stored on a computer, server, or other electronic storage medium. These include social networking sites (e.g., Facebook, Twitter, LinkedIn), e-mail accounts (e.g., Gmail, Hotmail, Yahoo!), online banking, financial or brokerage accounts (e.g., E-Trade, ING, ScottTrade), video and image storage sites (e.g., YouTube, Picasa, Flickr), online consumer transaction sites (e.g., eBay, Yelp, PayPal), and blogs, domain names and URLs (from sites like GoogleBlogger, GoDaddy, or 1and1). They can even include things like avatars[2] on video games and virtual worlds such as Second Life. Of course, digital assets also include files stored on a personal computer, laptop, notebook, tablet, smartphone, or server, such as business documents, financial records, customer lists, contact information, even family photos, diaries and journals, personal stories, family recipes, and just about any other items that people would want their heirs to eventually have—*i.e.*, any content that is economically or sentimentally valuable to the user. While this applies to the average user, for some people—notably computer programmers, graphic or web designers, photographers, writers, musicians, and artists—such digital assets may have substantial monetary and intellectual property value. An interesting example of a digital asset (and a good illustration of why digital planning is so important) is that when famed composer-conductor Leonard Bernstein died in 1990, he left only an electronic, password-protected, draft of his memoir, *Blue Ink*; unfortunately, the manuscript is so well-protected that no one has yet been able to crack the password.[3]

The Policies of Some Online Sites

Online sites have started addressing these issues. However, their policies vary considerably. Facebook, for example, essentially has three options in the event of a user's death: convert the account into a memorial site, terminate the account, or do nothing. If a decedent's family converts a user's account into a "memorial state," this removes features like status updates and lets only confirmed friends view the profile and post comments on it.[4] If the next-of-kin ask to have deceased user's profile terminated, Facebook will comply; however, it will not turn over a user's password to let family members access the account, ostensibly so that privacy can be maintained. The personal representative of a decedent's estate can have access to a download of account data as long as he or she has prior consent from the deceased or if the law mandates it.

Twitter will, upon a family member's request to its Trust & Safety Department, close a deceased user's accounts and provide archives of public Tweets.[5] Microsoft (which is the owner of Hotmail and a few other services) lets relatives order a CD of the account's content upon submitting a user's death certificate or certified proof of incapacity, and proof of kinship.[6] As to Gmail, Google requires not only a death certificate, but also a copy of an e-mail that the deceased had sent to the person who is requesting the information.[7]

By contrast, Yahoo! terminates an e-mail account upon a user's death and fights to keep such accounts private,[8] even going to Court to protect this policy. In fact, Yahoo! was criticized by many for its actions when, in 2005, relatives of Cpl. Justin Ellsworth, a 20-year-old Marine killed in Iraq, requested access to his e-mail account so that they could make a scrapbook. Yahoo! refused, but the family sued and prevailed.[9] However, when Yahoo! was ordered by the Probate Court of Oakland County, Michigan to release Cpl. Ellsworth's e-mails to his father, John Ellsworth, Yahoo! complied by copying the messages to a CD but did not turn over the account's password.[10]

The Evolving Law on the Subject

There is not yet much established law in the field of digital estate planning. Only five states, for example, have enacted statutes on the subject. Connecticut's statute[11] was among the earliest. Enacted in 2005, it only covers e-mail, which is not surprising since the explosion of social networks and other online services was just beginning at that time. For example, Facebook was just getting started in 2004 as a site for use only by students attending certain colleges, and Twitter began in 2006. The Connecticut statute allows access to a decedent's e-mails by an executor or an administrator.[12] Rhode Island's statute,[13] enacted in 2007, is also limited to e-mail and is very similar to Connecticut's.

Indiana's statute,[14] enacted in 2007, covers electronically stored documents of the deceased that could include e-mails and other digital assets. The statute provides that the "custodian" of the electronically stored documents is to provide access or copies of the decedent's documents or information to the personal representative to the decedent's estate.[15]

Oklahoma's 2010 statute[16] is more comprehensive and provides that the executor or administrator may take over the decedent's social networks, blogs, e-mails, and Twitter-like accounts.[17] Idaho's 2011 statute[18] is virtually identical to that of Oklahoma. Two other states—Nebraska and Oregon—are considering similar laws. For example, on January 5, 2012, Senator John Wightman of Nebraska introduced a bill[19] in his state legislature that would be similar to that of Oklahoma and Idaho.

In addition, the National Conference of Commissioners on Uniform State Laws (commonly known as the Uniform Law Commission)[20] recently approved a study committee on fiduciary power and authority to access digital property and online accounts during incapacity and after death, with the goal of creating uniform law on the subject. Although the uniform law process takes years, it would ultimately provide much-needed clarity and uniformity to how digital assets would be handled in these situations.

New York has not enacted a statute directly addressing these issues.[21] However, research of related case law reveals that there have been some developments that may affect these issues. For example, in a recent pivotal case,[22] the Court of Appeals abandoned long-standing precedent requiring tangible physical property to be the subject of a conversion action, and permitted a conversion action based upon intangible electronic computer data. Acknowledging the need to update the common law to reflect modern realities of widespread computer usage, the Court recognized that such digital data has intrinsic value, in and of itself, and need not be printed out or otherwise made tangible for property rights to attach.

Similarly, the New York Supreme Court has held that "E-mail is 'comparable in principle to sending a first-class letter[,]'"[23] thereby presumably extending to e-mails the body of law conferring property rights with respect to letters, including copyright protection to the author as well as possession and succession rights to the recipient.[24]

While the law surrounding digital assets is unsettled or even nonexistent in most jurisdictions, there is considerable legal scholarship advocating for the treatment of digital assets in the same way as traditional assets, including the crucial concept that digital assets are the property of the author, creator or account user, rather than the online sites that service or store them.[25]

Online Services Offer Afterlife Help with Digital Assets

An interesting online industry has sprung up that caters to people looking to pass on their online presence in the event of disability or death. On a typical site, users sign up and pay a fee to upload everything from online passwords to gym locker combinations into a private account. Upon the user's disability or death, the individuals they have designated to receive this private information are notified about how to open the account and access the information. These people may also receive final wishes and a farewell e-mail from the deceased.

Some sites even allow users to store estate planning documents such as wills and advance directives. For example, AsssetLock (formerly YouDeparted.com) offers a "secure safe deposit box" to hold such things as digital copies of important documents, final messages for family and friends, passwords, hidden accounts, and lock combinations. Once a minimum number (set by the owner) of recipients sign in and confirm the owner's death, the account is unlocked after a time delay (which also can be set by the owner). Similar services are offered by Deathswitch, LegacyLocker and Slightly Morbid.

Other services focus on sending final messages to loved ones. GreatGoodbye allows users to store e-mails, photos and videos that will be sent to a list of people selected by them in the event of their confirmed death. Similar services are offered by EternityMessage and Last Post.

Among the issues to consider with these types of sites are: How safe is it to give such a site all of your security information? Just how reliable is the site to do what it says it will do? Will the site even exist and have the resources to complete the tasks involved when a disability or death arises?

Why Leave It to Chance? The Need to Do Digital Estate Planning

Just as we recommend to our clients that doing a will is more prudent than letting the laws of intestacy dictate what happens to traditional assets after death, we should also explain that doing digital estate planning is more prudent than letting the uncertain and fluctuating state of the law, or the policies of individual online services, dictate what happens to digital assets. For one thing, just as in the case of doing a will, the reasonable cost and minor inconvenience of doing a will is minuscule compared to the potential for financial injury and undesirable outcomes of not having one. Moreover, the value of digital assets cannot be underestimated. First, there are the things of priceless sentimental value: photos, videos, stories, recipes, etc. Then, there are the accounts holding money and investments that have to be secured. Finally, there will be instances—especially with celebrities, certain professionals, politicians, and athletes—where e-mails, images, memoirs, diaries, manuscripts, and other digital assets will have significant monetary value.

Step 1: Take Inventory of Your Digital Assets

The first thing that digital estate planning involves is taking inventory of your online presence. Needless to say, when you take into account all of the possible digital assets discussed above, that can be quite a lengthy list. After assembling the inventory, the next step is ensuring that your agent or executor is aware of these assets and is able to get access to them.

Step 2: Create a List and Leave Instructions

The best plan is probably the simplest: make a list of all your devices and accounts and their usernames, passwords, PINs, and the answers to those prompt-questions many sites have (you know, your mother's maiden name, your first pet, etc.), and then make sure the right person knows how to get access to it. The hardest part will likely be remembering all the passwords you have accumulated, and keeping the list up to date. You will want to include information on how to access:

- Computers, laptops, notebooks, tablets, and smartphones;
- Internet service providers and Web hosting services;
- E-mail accounts;
- Blogs;
- Photo, music, video, and other information/media storage sites;
- Social networking sites such as Facebook, Twitter, and LinkedIn;
- Online subscriptions (for example, magazine subscriptions that renew automatically);
- Financial sites such as banks, brokerages, college savings plans, and retirement accounts;
- Mortgage lenders and their servicers;
- Entities (such as banks or utilities) where you have set up automatic bill-paying; and
- Software programs.

One way to handle this is to include a "Letter of Instructions" as part of your estate plan and keep it in a safe place together with your will, advance directives, and other estate planning documents. The Letter of Instructions would convey information that an agent or executor would need, including logins and passwords. You should also consider storing this information on a CD, flash drive, or other storage medium, that can be kept with your estate planning documents. You must update this information regularly.

Step 3: Consider Granting Authority to Your Fiduciaries

It would also be a good idea to include language in your Power of Attorney, will, or trust that allows your agent or executor to handle your digital assets.[26] In delegating who will handle your digital assets, some care must be exercised. Just like any other fiduciary, the person you select must be available, knowledgeable, and trustworthy. It may also be a good idea to make a bifurcated or split delegation of authority; this would be just like when there is a split between the individual put in charge of the "person" versus the individual put in charge of the "property" in situations involving minors or incapacitated persons. The person who is best able to read the media, navigate online and manage access may not be the best person to decide what is important or how to fulfill your wishes.

The delegation of authority may require more than one fiduciary so that there is appropriate competence to handle the digital aspects of the estate as well as the other assets. Alternatively, the fiduciary may need to delegate agents for certain tasks and the estate plan should give the fiduciary that authority. You could even create a separate Power of Attorney addressing only the digital assets.

For more valuable assets, storage with an attorney or in a safe deposit box may be appropriate. In fact, for assets that have significant importance—financial or otherwise—transfer of the account or information from where it is currently held to an online provider that is more flexible to your needs could be warranted. In some cases, it may even be a good idea to transfer ownership to an LLC or solely held corporation or some similar form of ownership—or form one if necessary—so that, if possible, the assets are owned by an entity with perpetual life. Needless to say, this would be a significant undertaking, but for blogs, domain names or other assets of significant value, the investment may be well worth it.

What Not to Do

It is not a good idea to put private information like usernames and passwords in your will; a will becomes a public document after your death, when it is filed with the local probate court. Although your agent or executor could change all the passwords once he or she got access, why go through all the trouble and why take chances? Similarly, although you could theoretically include your passwords in an Inter Vivos Trust Agreement, which is a private document, given how often online accounts and their related passwords change, that is probably not an optimal idea either. Instead, keeping the information on a separate document makes the most sense.

Conclusion

As our online presence continues to occupy more and more importance in our lives, the value of digital estate planning will certainly grow. The laws governing such situations will inevitably evolve to keep up with the changing times, online providers will become more attuned to their users' concerns in order to stay competitive, and consumers will become more savvy and demanding. In the meantime, putting digital planning in place when you are doing traditional estate planning is the prudent thing to do.

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Endnotes

1. *I.e.*, remote storage of computer information by a third-party provider via the Internet.
2. For the uninitiated, an avatar is the digital or on-screen representation of the user (or the user's alter-ego or character) in a computer game or virtual world.
3. Helen W. Gunnarsson, *Plan for Administering Your Digital Estate*, 99 Ill. B.J. 71 (2011).
4. Report a Deceased Person's Profile, Facebook, *available at* http://www.facebook.com/help/contact. php?show_form=deceased, last visited August 14, 2012.
5. How to Contact Twitter About a Deceased User, Twitter, *available at*: http://support.twitter.com/groups /33-report-a-violation/topics/148-policy-information/articles/87894-how-to-contact-twitter-about-a-deceased-user, last visited August 14, 2012.
6. *See* My family member died recently/is in coma, what do I need to do to access their Hotmail account?, Microsoft Answers, *available at* http://answers.microsoft.com/en-us/windowslive/forum/hotmail-profile/my-family-member-died-recently-is-in-coma-what-do/308cedce-5444-4185-82e8-0623ecc1d3d6, last visited August 14, 2012.
7. *See* Accessing A Deceased Person's Mail, Google Gmail, *available at* http://support.google.com/mail/ bin/answer.py?hl=en&answer=14300, last visited August 14, 2012.
8. When you sign up for a Yahoo! e-mail account, you have to agree to their "Terms of Service and Privacy" contract. It states: "No Right of Survivorship and Non-Transferability. You agree that your Yahoo! account is non-transferable and any rights to your Yahoo! ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted." This policy is set forth *available at* http://info.yahoo.com/legal/us/yahoo/utos/utos-173.htm.
9. *In re Ellsworth*, No. 2005-296, 651-DE (Mich. Prob. Ct. 2005).
10. *See* Tresa Baldas, *Slain Soldier's E-Mail Spurs Legal Debate: Ownership of Deceased's Messages at Crux of Issue*, 27 Nat'l L.J. 10, 10 (2005); *see also* Yahoo Releases E-Mail of Deceased Marine, CNET, *available at* http://news.cnet.com/Yahoo-releases-e-mail-of-deceased-Marine/2100-1038_3-5680025.html, last visited August 14, 2012.
11. Connecticut Public Act No. 05-136: An Act Concerning Access to Decedents' Electronic Mail Accounts codified at Conn. Gen. Stat. Ann § 45a-334a (2005).
12. Connecticut's law states: "An electronic mail service provider shall provide, to the executor or administrator of the estate of a deceased person who was domiciled in [Connecticut] at the time of his or her death, access to or copies of the contents of the electronic mail account of such deceased person upon receipt...of: (1) A written request for such access or copies made by such executor or administrator, accompanied by a copy of the death certificate and a certified copy of the certificate of appointment as executor or administrator; or (2) an order of the court of probate that by law has jurisdiction of the estate of such deceased person."
13. Rhode Island HB5647: Access to Decedents' Electronic Mail Accounts Act, codified at Rhode Island General Laws Title 33 Chapter 33-27 (§33-27-1 et seq.).
14. Indiana SB 0212, 2007: Electronic documents as estate property, codified at Indiana Code 29-1-13.
15. Indiana's law states that the "custodian shall provide to the personal representative of the estate of a deceased person, who was domiciled in Indiana at the time of the person's death, access to or copies of any documents or information of the deceased person stored electronically by the custodian upon receipt...of: (1) a written request for access or copies

made by the personal representative, accompanied by a copy of the death certificate and a certified copy of the personal representative's letters testamentary; or (2) an order of a court having probate jurisdiction of the deceased person's estate."

16. Oklahoma HB2800: Control of certain social networking, micro-blogging or e-mail accounts of the deceased, codified at Oklahoma Statutes Section 269 of Title 58 (§58-269).

17. Oklahoma's law states: "The executor or administrator of an estate shall have the power...to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any micro-blogging or short message service website or any e-mail service websites."

18. Idaho SB1044: Control of certain social networking, micro-blogging or e-mail accounts of the deceased, amending Idaho Code Section 15-3-715.

19. Legislative Bill 783.

20. The National Conference of Commissioners on Uniform State Laws (NCCUSL) is a non-profit organization commonly referred to as the U.S. Uniform Law Commission. It consists of commissioners appointed by each state, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands. Its purpose is to discuss and debate areas of law in need of uniformity among the states and territories and to draft acts accordingly. The results of these discussions are proposed to the various jurisdictions as model legislation or uniform acts. NCCUSL is perhaps best known for its work on the landmark Uniform Commercial Code (UCC), drafted in conjunction with the American Law Institute.

21. New York has enacted criminal legislation entitled "Offenses Involving Computers," New York Penal Code Article 156 (§§156.00 *et seq.*), and has for quite some time had the estate law statutory exemption intended to protect the surviving spouse and children by preserving a modicum of certain useful personal effects for them, New York Estates, Powers and Trusts Law § 5-3.1, but these statutes do not directly or comprehensively address the concerns at issue here.

22. *Thyroff v. Nationwide Mutual Insurance Company*, 832 N.Y.S.2d 873 (2007).

23. *People v. Lipsitz*, 663 N.Y.S.2d 468, 473 (Sup. Ct. 1997) (*quoting ACLU v. Reno*, 929 F. Supp. 824, 834 (E.D. Pa. 1996)).

24. *See, e.g.,* analysis at Jonathan J. Darrow and Gerald R. Ferrera, *Who owns a Decedent's E-mails: Inheritable Probate Assets or Property of the Network?* 10 N.Y.U. J. Legis. & Pub. Policy 281 (2007); also *available at* http://www.law.nyu.edu/ecm_dlv/groups/public/@nyu_law_website__journals__journal_of_legislation_and_public_policy/documents/documents/ecm_pro_060742.pdf.

25. *Id.*

26. Expanding upon the pattern of the more comprehensive state statutes would probably be the recommended way to go; for example, something along these lines:

> I hereby grant to my [agent/executor/trustee] the power and authority (1) to take over, take control of, conduct, continue, or terminate any online accounts that are in my name, or over which I have control, including on any e-mail service website, any social networking website, any micro-blogging or short message service website, any banking, financial or brokerage website or entity, any music, video or image storage website, any online consumer transaction site, any blogging website, as well as any domain names and URLs on any website or entity, and avatars on video game and virtual world websites; and (2) to access, take possession and control of, copy, or transfer the data and information (including but not limited to personal and business data files, word processing files, customer lists and contact information, calendars and schedules, electronic mail, tweets, blog entries, software, and other stored content or data) located on any websites, computers, servers, hard drives, workstations, laptops, notebooks, tablets, smartphones, and other storage devices or items containing digital data, including flash-drives, disks of any kind, and electronic storage media (including in any and all directories or subdirectories), that I own, that are in my name, or over which I have control.

Needless to say, any wording would have to be tailored to suit the particular people, situations and assets involved. Some people would want a more narrow power given, while others would want the broadest power possible.

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The Bypass or Credit Shelter Trust

By Lainie R. Fastman

Notwithstanding uncertainty about estate taxes, making long term planning difficult, many have commented about the continued viability of the bypass or credit shelter trust. Accordingly, it may be useful to explore, in some detail, how it is arrived at, what its properties are and how one avoids the myriad minefields it may present.

Federal or State Exemption and Other Considerations

To recapitulate briefly, the basis of the bypass or credit shelter trust Will is found in the Internal Revenue Code which permits an estate to deduct on the estate tax return the value of assets which pass to the surviving spouse.[1] Thus, when a testatrix provides that her Executor is to set aside, in a trust, the amount exempt from estate tax, and the balance is to be paid to her spouse, she has created an estate tax free estate.

The trust may be created by a formula clause like the following:

> I give and bequeath to my Trustees, hereinafter named, a sum equal to the maximum amount, if any, by which my federal taxable estate (determined without regard to this Article of my Will) may be increased without causing an increase in federal estate tax payable by reason of my death....

Should one define its parameters as embracing the federal exemption, as above, or the New York State exemption? Uncertainty surrounding the current federal estate tax statute is not the only issue to consider. Two couples owning assets having identical value may, nevertheless, live under completely different financial circumstances. One couple may own a modest home and possess other, substantially liquid assets. Another couple may have tied up in their family home a goodly portion of their fortune, a non-income-producing asset, and much of the balance consists of the husband's IRA. The IRA is subject to mandatory distributions; will be greatly diminished by income taxes over time; thus the surviving spouse may be left with insufficient flexibility if the bulk of the assets are held in trust upon the death of the first spouse. Counsel's recommendation depending on these circumstances may differ.

The outright gift to the spouse can be created as a pre-residuary bequest (results: a pecuniary gift) and the bypass trust is then the residuary (result: any growth during administration ensures to the trust).[2] The distinction, however, is far from clear cut. In a Will involving a pecuniary legacy to the spouse, cases do permit the spouse to share in appreciation.[3]

In deciding whether to create the bypass trust effective without any action by the surviving spouse, remember to consider inter vivos gifts made by the testator. Has the unified credit been exhausted during the testatrix's life time? If so, the trust will not be funded. Generally, formula clauses creating the bypass trust take the possibility of exhaustion of the unified credit into account:

> I direct my executors to set apart a sum equal to the largest amount, if any, that can pass free of federal estate tax…reduced by all other bequests and devises under my will for which no marital or charitable deduction is allowable and any property passing outside my will included in my gross estate for federal estate tax purposes.... (*Be sure to purge the formula clause of language referring to a "credit for state death taxes." There is no such credit, rather, a deduction is allowed on the federal estate tax return for state death taxes.)*[4]

Many a Last Will is extant which creates the bypass trust based on the federal exemption when it was substantially less than the present exemption of $5,000,000.00 (in 2011 and 2012), or even less than the currently set exemption effective on January 1, 2013 ($1,000,000.00).[5]

If, given all the circumstances, a bypass trust is selected with reference to the New York State exemption only, but there are substantial assets exceeding this amount, some practitioners recommend a so-called "gap" trust, which will be funded with the difference between the New York State and federal exemptions. This trust may be fashioned as a trust which will qualify as QTIP under the New York Statute and thus is not subject to New York State estate tax,[6] nor will it be taxable in the federal estate tax return of the surviving spouse, as the decedent's total assets did not exceed the decedent's federal exemption and no federal estate tax return need be filed.[7]

Generally, the bypass trust provides that all the income is payable to the surviving spouse during his lifetime. Furthermore, the Trustee/spouse is often granted

the power to withdraw $5,000.00 per year or five percent (5%) of the trust property over which the power is exercisable. This power, commonly known as the "five and five" power, will not cause the trust property to be taxed in the estate of the surviving spouse.[8]

Care should be taken not to grant the surviving spouse who serves as sole Trustee a power of appointment over the trust property. Assume, for example, that the Trustee/spouse has the power to make discretionary distributions to the trust beneficiaries consisting of the spouse herself and the parties' children. The decedent has granted spouse/Trustee a general power of appointment which results in the property being potentially taxable in the surviving spouse's estate.[9] If the power holder spouse exercises the power and distributes property to a beneficiary, she has made a taxable gift.[10]

Disclaimer Activated Bypass

Another approach to dealing with uncertainty is the disclaimer Will. Testator bequeaths his entire estate to his spouse and provides that if the spouse disclaims a portion or the entire estate, such disclaimed assets fund a bypass trust waiting in the wings.

A disclaimer must be qualified pursuant to the Internal Revenue Code and New York State law and must be made within nine (9) months of testator's death.[11]

Remember that, in deciding what assets to disclaim, the surviving spouse may consider the interest passing to her from property held jointly (or in tenancy by the entirety) with the deceased spouse. The survivor's interest in jointly held assets is one-half of the total value of the interest. The interest in the survivorship is not created until the death of the first joint tenant and a disclaimer within nine (9) months of death is thus timely.[12]

A surviving spouse may disclaim other property passing to him by operation of law, such as insurance proceeds payable to him, or his interest in retirement benefits. In both instances, if there are named alternate beneficiaries, the interest would pass to such named beneficiary. Accordingly, the attorney draftsman must ensure that beneficiary designations are coordinated with a disclaimer provision in the will. Example:

> Primary beneficiary, my wife, Jane. Alternate beneficiary—if my wife, Jane, survives me, but disclaims any part or all of her interest in _____, then the John Smith Family Trust created in my Last Will & Testament, dated _____. etc.

Clearly, no disclaimer may be contemplated if the estate tax picture at the time of the first spouse to die does not make it desirable as a tax avoidance technique. Some attorneys opine that they have never encountered a surviving spouse who willingly disclaims. My experience does not confirm this view. Where husband and wife have a marriage of long duration and there are children from that marriage, the surviving spouse is well motivated to save ultimate estate taxes payable upon her death and make the disclaimer. A disclaimer Will may not be suitable for a second marriage where the couple do not have children in common.[13]

There are advantages to the disclaimer Will. The disclaimer activated bypass trust may be funded with an amount less than the unified credit amount, a flexibility not present in the standard formula created bypass trust, as, typically, the disclaimer Will provides that the surviving spouse may disclaim "such amount or such portion" of the legacy otherwise passing to the spouse.

In drafting a disclaimer Will, counsel should carefully consider the terms of the bypass trust. Are there non-permissible powers of appointment lurking in the recipient trust which may cause the trust property to be included in surviving spouse's estate, thereby completely defeating the purpose of the plan and, furthermore, causing the disclaimer to be non-qualified? Some attorneys like to provide flexibility to the surviving spouse and include in the bypass trust a limited power of appointment. Example:

> Upon the death of my husband, Jim, my Trustee of the Sally Quakes Family Trust is directed to distribute the Trust estate to such of my children, as my husband, Jim, in his Last Will & Testament duly admitted to probate, shall direct...

(*or words to that effect*). Such power may not be contained in the recipient trust of disclaimed property.[14] The reason for this is as follows: Special rules are in place for disclaimers by a surviving spouse with respect to the property derived from the deceased spouse's estate. The disclaimer is qualified if the interest disclaimed passes without direction on the part of the surviving spouse either to the surviving spouse himself or to another person. If, however, the surviving spouse, upon disclaiming, retains the right to direct the beneficial enjoyment of the property, the disclaimer is not "qualified."[15]

In the above example, husband, Jim, has the right to direct which of the couple's children will inherit. If, on the other hand, the recipient bypass trust were to provide that husband, Jim, will get all the income from the trust during his lifetime, or, say, twenty thousand dollar ($20,000.00) per year, the disclaimer is qualified. Husband's, Jim's, limited power of appointment to leave the trust property to those of the couple's children he desires could have been retained in the recipient trust by providing that if the surviving spouse were to disclaim assets, the bypass trust splits into two trusts, one with the power of appointment and the second, recipient of

the disclaimed assets, without the power of appointment.[16] It would seem that the problem may also be addressed by the spouse also disclaiming the power of appointment in the recipient trust.

Similarly, if the Trustee/spouse can discharge her duty of support of minor children by means of a power in the recipient trust (e.g. surviving spouse as Trustee of bypass trust authorized to pay for the support of the couple's minor children), such exercise would be deemed an exercise in favor of spouse's "creditors" and therefore a general power of appointment, resulting in the inclusion of the property in the surviving spouse's estate.[17] In general, if a power is exercisable only with the consent of an adverse party (e.g., a child remainderman—a person whose interests would be adversely affected by the Trustee/spouse's exercise of the power), the power will not be deemed a general power of appointment. (A general power of appointment should be avoided at all cost in any bypass trust, whether or not the trust is a recipient trust of a possible disclaimer, as the estate tax purpose of creating a bypass trust is completely defeated.)

The statute specifically excludes from its application a power surviving spouse could exercise limited by an "ascertainable standard." Provisions may be included granting the Trustee/spouse the authority to invade the trust for her health, support, education and maintenance. It is important not to get too fanciful in describing spouse's benefits under this provision, but to adhere to the language approved in the Internal Revenue Code and insure that there is an "ascertainable standard" for the Trustee/spouse to follow.[18] Examples set forth in the Regulations amply demonstrate how easy it is to bring about an unhappy result. A power that Trustee/spouse may pay principal to himself for "support in reasonable comfort" is limited to an ascertainable standard, but one to distribute for his "comfort" is not deemed limited to an ascertainable standard. Inadvertently, the Trustee/spouse has then been granted a power of appointment, causing the bypass trust property to be taxable in his estate.[19] A recent case is instructive. The bypass trust in Lester Chancellor's Last Will & Testament provided that his wife, Ann, and her Co-Trustee, a local bank, could invade the trust principal for Ann and the parties' descendants, for

> the necessary maintenance, education, health care, sustenance, welfare or other appropriate expenditures needed...taking into consideration the standard of living to which they are accustomed..."[20]

Although the estate prevailed in its position that Trustee/spouse was bound by an ascertainable standard, the estate was embroiled in litigation and the decision could have easily gone the other way.

Same-Sex Couples; Portability

Although New York State now recognizes same-sex marriage, and the estate of the deceased same-sex spouse may be entitled to a marital deduction for New York estate tax purposes, the deduction does not apply for federal estate tax purposes. Accordingly, the classical bypass trust principles may not always be helpful in planning for same-sex spouses. This does not obviate all planning opportunities, but a discussion is beyond the scope of this article.[21]

Similarly, we did not address the current so-called "portability" provision of the 2010 amendments to the federal estate tax statute, permitting the surviving spouse to make use of the unused portion of the deceased spouse's exclusion amount. Unless the statute is amended, by January 1, 2013, the portability provision is no longer effective, although the President's proposed budget seeks to make portability permanent. Predictions about what actually will happen here are akin to divination.

Implementing the Trust

Clients (and occasionally their lawyers) have a hard time envisioning the implementation of the bypass trust, that, we hope, has been decided upon after considerable reflection and drafted with care. The trust does not spring into being by virtue of the probate of the Will (or by virtue of decedent having created it in his inter vivos trust). It must be funded. Counsel must obtain a tax ID number from the IRS, which can now be done online. Important decisions about funding must be made. We have already determined the value of the assets funding the trust, but how to select the precise components? If the decedent's property is mostly liquid, the decision is simple. Often, however, this is not the case. If the bypass trust provides for a life estate to the spouse in the trust property and the parties' home, in which the surviving spouse resides, was in the deceased spouse's name, and if the surviving spouse wishes to live in the house, funding the trust with the house may be an excellent choice. A deed from the Executor to the Trustee should be executed. This is not a case where no deed is required because the probate of the Will is evidence of the vesting of specifically devised real estate.[22] The fact that the trust assets have obtained the decedent's date of death value as their basis may be another factor in the Executor's decision.[23] In any event, funding should take place as soon as practicable. An account or accounts should be created bearing the title of the trust and the name of the Trustee. Although a receipt and release is required if the presumptive remaindermen of the trust are persons under disability (infants, incarcerated persons, incapacitated persons), typically, the couple's children are adults. Nevertheless, it would be useful for the Executor/spouse/Trustee to present them with an informal accounting after the administration of the estate is com-

pleted, whether or not it would otherwise be required. The adult children should sign off on the account; their signatures duly acknowledged. Counsel may consider an advisory letter to the children explaining how the estate was administered; what the future administration of the trust entails; what decisions the Trustee/spouse is entitled to make; when the remainder will be distributed, and so on.

It is essential for the Trustee to keep excellent records. The Trustee should be armed with counsel's advisory letter concerning his or her fiduciary duties. It is useful for the Trustee/spouse to send a copy of the fiduciary income tax returns, as well as all 1099s and end-of-year bank statements to the presumptive remaindermen. This may avoid an action by a disgruntled remainderman once the surviving spouse has died.

Joint Representation

Counsel may have been the attorney draftsman. Both spouses' Wills contain the bypass trust. Both spouses will be involved in planning conferences. On occasion, this can present a problem. You may have heard: "My wife will do as I think best...," or "...My wife does not need to be involved..." or other choice comments. Counsel should take care that both spouses fully understand the concepts discussed and are on board with the plan. Consider a letter addressed separately to each spouse with a requests to sign. If there are intractable problems, counsel may advise one or both of the parties to obtain separate attorneys. In the alternative, continue to represent one of the spouses and advise the other to seek his or her own attorney.

Conclusion

Finally, consider the possibility of having the bypass trust continue after the surviving spouse's death, not only for the couple's minor children, but also in the form of a Supplemental Needs Trust for an incapacitated beneficiary; as a recipient for proceeds of insurance on the life of the surviving spouse but owned by an independent insurance trust; as a support trust for an improvident beneficiary. Special drafting issues of the bypass trust are then applicable. The possibilities are endless. Remember, a trust provides protection from creditors; shields the assets from the claims of the spouse of a divorcing beneficiary; and can purchase assets held for the benefit of a beneficiary, but which may not be owned by the beneficiary. This brief discussion merely touches on some of the issues involved in drafting and administering an old war horse of the married couple's Last Wills, the bypass or credit-shelter trust.

Endnotes

1. IRC § 2056.
2. See, in general, EPTL 11-2.1, c.f. EPTL 2-1.9. Executor may satisfy pecuniary bequests with assets valued on date of distribution.
3. See, e.g., *Matter of Bush*, 2 AD2d 526, aff'd, 3 NY2d 908 (4th Dept. 1956); *Matter of Leonard*, 45 Misc.2d 534, 257 NYS2d 409 (N.Y. Surr. Ct. 1965).
4. Where state death tax is a "deduction" rather than a "credit," the state death tax need not be paid out of the sheltered assets. For a problem with shelter formulas, see *Matter of Ettinger*, 149 Misc.2d 308 (Sur. Ct., New York Cty. 1990).
5. Tax Relief, Unemployment, Insurance Reauthorization and Job Creation Act of 2010 (Pub. L. 111-312; 124 Stat. 3296, 12/17/2010).
6. NYS Dept. of Taxation and Finance, TSB-M-10(1)M; c.f. Laurence Keiser, NYSBA Trusts and Estates Law Section Newsletter, Summer 2011, Vol. 44, No. 2. Separate New York State QTIP election permissible where no federal return is required to be filed.
7. C.f. Catherine Grievers Schmidt and Jill Choate Beier, NYLJ, Jan. 26, 2009.
8. In general, see IRC §§ 2041(b)(2) and 2514(e).
9. Reg. § 20.2041-1(b)(1).
10. Reg. § 25.2514.
11. IRC § 2518; EPTL 2-1.11.
12. IRC § 2518.
13. There are many options to deal with that situation. Consider, e.g., creating, in the planning stage, upon consent/waiver of the second spouse, a marital trust, in which the Executor may decide what portion to qualify for the marital deduction as a marital trust pursuant to IRC § 2056(b)(7); the balance, in fact, to constitute a bypass trust.
14. IRC § 2518(b)(4); Reg. § 25.2518(e)(2).
15. Reg. § 25.2518-2(e)(2).
16. See, Alan S. Gassman and Christopher J. Denicolo, Estate Planning, June 2011, Vol. 38, No. 6.
17. IRC Reg. § 20.2041-1(c)(1).
18. IRC Reg. § 20.2041-1(c)(2).
19. For a good discussion, see Alexander A. Bove, Jr., "Powers of Appointment: More (Taxwise) Than Meets the Eye," Estate Planning, Vol. 28, No. 10.
20. *Estate of Chancellor v. Commissioner*, T.C. Memo. 2011-172. No. 7973-09, 7/14/11.
21. For helpful hints, see Nicole M. Pearl and Carolyn S. McCaffry, "Effect of Same-Sex Marriage Laws on Estate Planning," Estate Planning, January 2012.
22. Upon the decedent's death, title to real property vests in decedent's distributees, or in his devisees if he dies testate and title "descends immediately upon death." *In re Frank's Will*, 123 N.Y.S2d 452 (Sur. Ct., Erie Cty. 1953); c.f. *Waxson Realty Corp. v. Rothschild*, 255 N.Y. 332 (1931).
23. IRC § 1014.

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Guardianship News: Problems with Disbursements

By Robert Kruger

Can a guardian make a disbursement that benefits not only the IP, but members of the IP's family? The answer should be an unequivocal yes. That is an easy question. Certainly, MHL §81.21 allows a variety of transactions with judicial approval such as, but not limited to, Medicaid gifting, tax planning and support for individuals for whom the IP has no legal responsibility to support.[1] The hard question is "when is it appropriate to do so?"

The author, once upon a time, was confident about his ability to accurately intuit what would pass muster and what would require a judicial application. And the "problem" did not arise on the aforementioned MHL §81.21 transactions, because a judicial application was clearly mandated. Instead, the problems have arisen with disbursements in a shadow land; so called "mixed" disbursements which benefit not only the IP but also members of the IP's family, such as auto insurance, repairs to the house or car, vacations and such.

I start with a recent letter decision in one of my guardianships/SNTs.[2] The Court Examiner and I were developing a stipend for the mother of the IP, knowing that the court was not inclined to be generous. The IP is 41 years old, 340 pounds, developmentally disabled and paranoid, with a volatile temperament. For example, if he decides not to attend his day program, he cannot safely be prodded to attend. Because he cannot be left unattended if he stays home during the day, because his mood swings are unpredictable, his mother must be available to babysit him. A woman of limited work skills, with no education, who is over 60 years old, in a constantly shifting and unpredictable schedule, she is essentially unemployable.

Before I was appointed successor guardian/trustee, a house was purchased with guardianship funds and an outstanding court order awarded her a stipend of $2,500.00 monthly. The judge who now has jurisdiction over this guardianship was intent on limiting disbursements exceeding the stipend. She was uncomfortable that the IP's funds were supporting the entire family (three siblings have now reached their majority). Certainly, no judge I know is thrilled with the IP supporting the entire family. The family is not poverty stricken. So this matter falls in the middle…the family will get by and the IP's funds will continue to accumulate. But extras are difficult to get approved.

At this moment, the family's refrigerator chose to become mortally ill. I decided that discretion was the better part of valor and notified the court of this problem. Frankly, I sensed personal vulnerability if I simply went ahead and purchased a new refrigerator. I, therefore, made a short letter application and received the letter/decision which I quote in full here:

> The court is in receipt of Mr. Kruger's request for permission to purchase a refrigerator in the sum of up to $1,200 in the above-captioned matter. The court is concerned about the rapid rate at which Mr. _____'s monies are being expended, and reminds the Successor Property Guardian and Supplemental Needs Trustee of his fiduciary responsibility to exercise restraint in the expenditure of Mr. _____'s monies. The court recently approved a very generous budget in which, due to the inextricable link between the needs of Mr. _____ and those of his family, most of the expenditures inure to the benefit of his entire family. Mr. Kruger is directed to take this into account when assessing the necessity of proposed purchases, and to seek prior court approval for any expenses outside of said budget, pursuant to letter application setting forth the purpose and cost of the proposed expense, and including the guardian's verification of the need for the proposed expense. With respect to expenditures made pursuant to the budget, such as the $5,000 per year permitted for Mr. _____'s clothing and other expenses, those will, of course, require appropriate supporting documentation.

Of course, the reader would not know that we receive an annuity for 25 years and life paying the guardianship/SNT the sum of $16,000.00 monthly. Nor would the reader be aware that there is a projected surplus of income over disbursements of $100,000.00 for 2012. Of course, the fact that we have an SNT complicates disbursement decisions. Nevertheless, historically, when ample reserves existed, the courts tended to rule with a light hand. No longer is that the case, at least with one judge.

Does it truly matter if the mother's budget gives her a little flexibility, accepting the fact that the family is residing in a house purchased with the IP's funds, the maintenance of which is also paid for with the IP's

funds? Perusal of the mother's budget, which I set forth below, reflects modest use of her stipend with limited flexibility.

Monthly food expense—supermarket	$1,200.00-$1,350.00
Gasoline for automobile	$135.00-$200.00
Miscellaneous household repairs and upkeep; cleaning items	$200.00
Cash payments to handymen, plumber, carpenter, etc.; snow removal, leaf removal	$100.00
Miscellaneous	$200.00
Auto insurance	$125.00-$150.00
Games	$50.00
TV Cable & Internet	$200.00
TOTAL	**$2,210.00-$2,450.00**

I suggest that this court and other courts, which focus so intently on the finances, ignore another important consideration. More than finances alone support the IP. His family supports him in countless ways. It is impossible, as I see it, to support the IP alone without considering the circumstances of the family.

If the finances were less, I would be concerned that any future Medicaid lien might be compromised by generosity. While I do not know, as this is written, the size of the present Medicaid lien, I am confident as one can reasonably be that the "payback" provision of the SNT will not be compromised. But that was not the court's concern. Rather, it seemed to me that the court's decision was grounded in the court's distaste with the support that the IP was providing his family. Unfortunately, we fiduciaries have a choice (short of placing the IP in an institutional residence) about supporting the family of the IP. I focus on this matter because I think that attorneys-guardians probably must begin to think defensively. I always was acutely conscious of the likely reaction of the supervising judge; I have begun to pass the buck to the court if I sense a potential problem…for me.

The same uneasiness can be stated with greater confidence for SNTs. While the federal enabling statute (42 U.S.C. §1396p(D(4)(A)) makes no mention of SNTs being for the sole benefit of the beneficiary[3] and 96 ADM 8 speaks of SNTs being for the "primary" but not the "sole" benefit of the beneficiary, authority does not run uniformly in that direction. HRA in New York City consistently argues that SNTs be used for the sole benefit of the beneficiary, and the Social Security Administration take the same position, although the POMs state that the trust is established for the beneficiary if the beneficiary derives "some benefit" from a payment.

The drumbeat of agency opposition creates a distinct possibility that the courts, uncomfortable interpreting a statute famously opaque, will defer to the interpretation of the agency. As more and more unfavorable decisions are made, HRA's position could become a self-fulfilling prophecy.

This discussion about disbursements was prompted by a troubling decision involving the author, who was surcharged in a guardianship (not an SNT) for making various disbursements which benefited the IP and his family. The surcharge order is on appeal to the Appellate Division, Second Judicial Department and will be reported in a subsequent column, probably next spring. But the surcharge order was sufficiently troubling to the downstate bar, and two amicus curiae briefs have been submitted, one by New York NAELA, on my behalf.

The facts are as follows: I am the co-guardian for property management for a profoundly disabled eight-year-old child whose father, the sole wage earner in the family, abandoned the family in the fall of 2008. The mother, the personal needs guardian, reported that she lacked funds to purchase food, to avoid a National Grid shutoff notice due to take effect on December 1, 2008, or to pay for auto insurance necessary to transport the child to school. Because of the perceived emergency, I supplied funds at that time for these and other items without requesting judicial approval beforehand.

The Court Examiner (a relatively new appointee[4]) harshly criticized me for making disbursements that benefited the entire family without asking for judicial sanction for these disbursements, despite the fact that the emergency appeared genuine and that nunc pro tunc approval is available if the disbursements are justifiable. I believe that the surcharge was grounded on the fact that the disbursements were not for the sole benefit of my IP. Otherwise, retroactive approval would have been granted.

The order and judgment of appointment authorized me to support and maintain the IP. I was also authorized to provide for the comfort and well-being of the IP. I would have been harshly criticized had I failed to provide for the comfort and well-being of the IP by making these disbursements, and I question how the exercise by the guardian of his discretion under the circumstances presented can be an abuse of discretion. We can argue that the decisions were wrong, but an abuse of discretion imposes a higher standard.

Is the guardian required to ask for judicial approval for disbursements that, historically, would have clearly been within the purview of a guardian's discretion? What if the guardian is confronted with an emergency? Will a guardian in an Article 81 proceeding be forced to operate as an Article 17 and 17A SCPA guardian does,

within the confines of a budget, requiring the guardian to seek judicial sanction for deviations from the budget? I do not have an answer for this but I wonder why attorneys will accept appointments if we put ourselves at risk for second guessing for exercising our discretion in difficult situations.

This matter is the first one I recall being faced with an emergency with no time to investigate. I did not believe then, nor do I believe now, that the mother was playing a game for the purpose of extracting guardianship funds for items that she could otherwise afford. After the fact, I subpoenaed her bank records, which revealed that the monies that she received on her cause of action were exhausted prior to the time the IP's father walked out on the family. Guardians are not proctologists; some families are giveaways but it usually takes time to know our customer. Even then, we exercise our discretion.

No one can predict with confidence how the Appellate Division will decide but if the decision is affirmed, it must have a chilling effect on guardians now serving, and on guardians contemplating accepting future appointments.

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Endnotes

1. *See Matter of Shah*, 95 N.Y.2d 148 (2000).
2. The problems presented by an SNT are discussed *infra* at page 5.
3. The only "sole benefit" language appearing in the enabling statute appears in 42 U.S.C. §1396 (D)(4)(C), which applies to pooled trusts, not first party SNTs.
4. There are many new Court Examiner appointees, many of whom do not know what the job entails.

Robert Kruger is an author of the chapter on guardianship judgments in *Guardianship Practice in New York State* (NYSBA 1997, Supp. 2004) and Vice President (four years) and a member of the Board of Directors (ten years) for the New York City Alzheimer's Association. He was the Coordinator of the Article 81 Guardianship training course from 1993 through 1997 at the Kings County Bar Association and has experience as a guardian, court evaluator, and court-appointed attorney in guardianship proceedings. Mr. Kruger is a member of the New York State Bar (1964) and the New Jersey Bar (1966). He graduated from the University of Pennsylvania Law School in 1963 and the University of Pennsylvania (Wharton School of Finance (B.S. 1960)).

The Provider's Role in Proving Undue Hardship

By Nancy Levitin, assisted by Moriah Adamo

Nursing home and elder law attorneys alike find themselves in a pickle when a Medicaid applicant's spouse refuses to cooperate with documenting his or her partner's application for medical assistance. Such cases present lawyers on both sides of the long-term care system with an opportunity to work together to meet the shared goal of securing a Medicaid budget.

Nancy Levitin

Even if only the institutionalized spouse is applying for Medicaid, the community spouse is required to verify his or her own resources.[1] When the community spouse withholds this information and documentation from the Medicaid caseworker, the applying spouse is at risk of being denied medical assistance.[2]

This article will discuss spousal obligations in the context of nursing home Medicaid applications, and explore how attorneys for long term care providers and consumers can work together to overcome denials based on missing spousal documentation.

Distinguishing Spousal Obligations

As a preliminary matter, it is important to distinguish two distinct obligations that fall to a community spouse with a husband or wife applying for nursing home Medicaid coverage. One obligation requires the well spouse to make a financial contribution from his or her own funds to defray the ill spouse's medical expenses. The second obligation requires the well spouse to produce his or her own financial records to complete the documentation of the ill spouse's Medicaid application.

In the case of a financial contribution, the institutionalized spouse's Medicaid application cannot be denied because the community spouse has refused to make her funds available to pay for the applying spouse's nursing home bill. In such a case, the Department of Social Services can assess the relative net worth of the husband and wife, and pursue the refusing spouse in court for a financial contribution after conferring Medicaid coverage to the applying spouse.[3]

Contrast the obligation of a community spouse to produce her own financial records to complete her institutionalized mate's Medicaid application. Community spouses cannot simply refuse to release their financial records, and opt for a determination of the applying spouse's Medicaid eligibility based exclusively on the applying spouse's financial records.[4] Proceeding in this manner is not an option under the regulations.

Moriah Adamo

When the non-applying spouse refuses to divulge her income and resources to Medicaid, the institutionalized spouse's eligibility for medical assistance is indeterminable because the income and resources of *both* members of a co-habiting couple are generally considered available and countable for Medicaid budgeting purposes.[5] As stated in the Medicaid Reference Guide: "When a community spouse fails or refuses to provide information concerning his/her resources, the institutionalized spouse's eligibility cannot be determined and the A/R may be denied Medicaid."[6]

In short, a community spouse can refuse to fulfill his/her obligation of financial support without dooming the spouse's Medicaid application, the obligation to produce financial documentation cannot be refused, and almost always results in a denial of the applying spouse's application based on missing documentation.

Assignments of Support

While a spouse's obligation to make a financial contribution *can* be refused, and the spouse's obligation to produce documentation *cannot* be refused, whenever a community spouse fails to make his/her money *or* documentation available for Medicaid purposes the applying spouse is required to sign an assignment of support.[7]

Even though assignments of support are required when a spouse fails to fulfill the financial contribution or documentation production obligation, it is important to note that in neither case is the absence of an assignment fatal. Spousal refusal works even when the resident has not signed an assignment, and in this author's experience assignments are not even requested in cases of missing spousal documentation.

In the case of a community spouse who refuses to contribute financially to her institutionalized spouse's cost of care, New York State has the right to pursue that legally responsible relative for support even without an assignment of support. Accordingly, assignment or no assignment, institutionalized applicants are entitled to have their Medicaid eligibility determined without regard to the finances of their refusing spouse.[8]

When the spouse fails or refuses to provide necessary information about his or her finances, Medicaid does not even reach the issue of an assignment or a support suit. Instead, the Medicaid district almost always summarily denies coverage for "missing documentation." Since no Medicaid is provided, no support suit is needed.

The requirement of an assignment of support is, in other words, pretty much a non-issue in cases involving refusing spouses (who refuse to contribute financially) as well as uncooperative spouses (who are uncooperative in releasing their financial records).

Overcoming Denials for Missing Spousal Documentation

Despite the common understanding of how a withholding husband or wife can sabotage an applying spouse's Medicaid application, a 1993 Administrative Directive (ADM) opens the door to securing Medicaid coverage for an applicant with a non-compliant spouse. The ADM provides as follows:

> An A/R must not be denied solely because a non-applying legally responsible relative refuses to provide required verification.[9]

The Medicaid Reference Guide (MRG) similarly holds out hope that a married applicant can be approved for Medicaid despite a paucity of information about the spouse's income and resources:

> When the LRR [legally responsible relative] refuses to provide financial information, eligibility is generally indeterminable. However, if the A/R provides complete information concerning his/her own income and resources, as appropriate, including any jointly held resources, eligibility is determined based on the available information.[10]

Nevertheless, despite these promising sources of authority, most Medicaid districts will quickly deny Medicaid coverage to a married applicant who submits an application without spousal documentation. To overcome a denial where the community spouse has not been forthcoming in providing necessary information about his/her income and resources, the applying spouse must prove that "to deny assistance would be an undue hardship."[11]

Undue hardship exists when:

(i) a community spouse fails or refuses to cooperate in providing necessary documentation about her resources;

(ii) the institutionalized spouse is otherwise eligible for MA;

(iii) the institutionalized spouse is unable to obtain appropriate medical care without the provision of MA; and

(iv) (a) the community spouse's whereabouts are unknown;

(b) the community spouse is incapable of providing the required information due to illness or mental incapacity;

(c) the community spouse lived apart from the institutionalized spouse immediately prior to institutionalization;

(d) due to the action or inaction of the community spouse, other than the failure or refusal to cooperate in providing necessary information about his/her resources, the institutionalized spouse will be in need of protection from actual or threatened harm, neglect, or hazardous conditions if discharged from an appropriate medical setting.

Proving the third element of the undue hardship regulation requires the joint efforts of the attorneys who are representing both consumers and providers of long-term care.

Inability to Obtain Medical Care

For an institutionalized Medicaid applicant, proving undue hardship entails the submission of evidence that the resident is in danger of losing his or her placement at the long-term care center if Medicaid is not approved.[12]

According to one Administrative Law Judge:

> The interpretation of the prevailing law is that there must be a showing that the Appellant is actually pending eviction and that was not demonstrated in this instance. A threat of possible eviction proceedings from the nursing home as evidenced in this case does not suffice to meet the criteria. There has to be an actual order of eviction and a showing that the eviction is pending.[13]

Unfortunately, this restrictive interpretation of the undue hardship regulation, when read in conjunction with the regulation limiting the conditions under which a nursing home may discharge a resident, makes proving undue hardship impossible, literally.

Under 10 N.Y.C.R.R. Sec. 415.3 (h) (1) (i) (b) a nursing home may only permissibly discharge a resident for non-payment if "no appeal of a denial of benefits is pending." The New York State Department of Health has interpreted this regulation to permit discharges for non-payment only when the nursing home resident does not have a Medicaid application or administrative appeal pending.[14]

How can institutionalized Medicaid applicants or appellants establish their entitlement to Medicaid coverage under the undue hardship regulations when they are protected against being involuntarily discharged from the nursing home for non-payment during the pendency of their applications and appeals? In short, they can't.

While an agency's interpretation of a statute that it administers and the implementing regulations are entitled to judicial deference, well-settled law requires the agency's interpretation to have a rational basis and not be arbitrary and capricious.[15]

There is no rational basis for requiring an eviction in order to prove undue hardship and overcome a denial for missing spousal documentation. Indeed, 10 N.Y.C.R.R. Sec. 415.3 (h) (1) (i) (b) prohibits the discharge or eviction of a resident for non-payment until an application has been denied or a Fair Hearing decision has been rendered. Accordingly, under the agency's interpretation, it would be impossible for any nursing home applicant or appellant to ever prove undue hardship.

Commonality of Interests

Attorneys for nursing homes and applicants/appellants alike share an interest in being able to secure Medicaid coverage for residents who are eligible for medical assistance, but for missing information about their spouse's finances. In such cases, nursing home attorneys can be instrumental in securing the documentation needed to support an elder law attorney's claim of undue hardship.

Although eviction proceedings cannot be initiated for non-payment while a resident is Medicaid pending, the facility's intentions regarding a discharge can be memorialized in an affidavit that will support an undue hardship claim. In this author's experience, even when an undue hardship case has been denied at the agency level and at a Fair Hearing, the State will recognize in the context of a judicial appeal that an administrator's affidavit regarding the risk of discharge satisfies the third element of the undue hardship regulation.

Working cooperatively to prove undue hardship so applicants with non-compliant spouses can benefit from the Medicaid program is just another example of the natural affinity that exists between attorneys for health care providers and the elder law bar.

Endnotes

1. For purposes of this article, if not stated otherwise, the husband is the institutionalized spouse.
2. New York State Medicaid Update, December 2011 (Volume 27 - Number 16) ("Refusal to provide the necessary information shall be reason for denying Medicaid for the institutionalized spouse because Medicaid eligibility cannot be determined.").
3. Soc. Serv. Law Sec. 366(3)(a), 18 N.Y.C.R.R. 360-4.3(f)(1)(i).
4. 18 N.Y.C.R.R. 360-4.10(c)(3); New York State Department of Health Medicaid Reference Guide, Page 333.1 (Updated: November 2009).
5. Soc. Serv. Law Sec. 366(3)(a); 18 N.Y.C.R.R. 360-4.3(f)(1).
6. New York State Department of Health Medicaid Reference Guide, Page 501 (Updated: November 2009).
7. 18 N.Y.C.R.R. 360-4.10(c)(3) and (4).
8. Morenz v. Wilson-Coker, 415 F.3d 230 (2d Cir. 2005).
9. 93 AMD-29 at page 4.
10. New York State Department of Health Medicaid Reference Guide, Page 501 (Updated: June 2010).
11. 18 N.Y.C.R.R. 360-4.10 (c)(3).
12. Fair Hearing Decision dated October 23, 2009 (Fair Hearing Number 5325375H).
13. Fair Hearing Decision dated September 9, 2010 (Fair Hearing Number 5458792Q).
14. October 15, 1998 letter of Terry Friedland, Senior Attorney, New York State Department of Health.
15. Matter of Pell v. Board of Education of Union Free School District, 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 839 (1974).

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Advance Directive News: Circumstances Change

By Ellen G. Makofsky

Brain dead: faced with this predicament most of us would direct our health care agent to cease all medical efforts to intervene and order the removal of all life support apparatus. Change the facts and the likelihood is that each of us would have a different definition of when all efforts to prolong existence should cease. Our conception of what is appropriate as an end of life decision does not remain fixed as we journey down the path of life. The life and lifestyle acceptable to a 20-year-old, is different from that of a 40-year-old, is different from that of an 80 year old, and yes, is different for a 100-year-old.

This concept was illustrated to me very clearly by one of our clients, Mrs. S. Mrs. S is a delightful articulate woman who has consulted my office numerous times over the years in regard to various legal issues. One of the documents she executed nearly two decades ago was a Health Care Proxy. As she did this, she turned to her daughter, who was her health care agent, and noted that she no longer wanted to be kept alive if she couldn't take another trip to Japan. She said this with a great deal of seriousness. Travel was a very important part of Mrs. S's life and she could not picture her life without the joys of exploring the exotic. Circumstances change. Mrs. S is older and frailer and is no longer trotting off to new and strange places at her whim. Recently during a visit to the office, she executed a new Health Care Proxy. When asked to guide her agent in making an end of life decision for her, again Mrs. S. focused on a defining event which was no longer travel to Japan but the ability to attend her granddaughter's wedding. If she no longer had the physical ability to be present at this milestone event, she was no longer interested in living.

Mrs. S's shift is instructive. Most 20-year-olds would not be satisfied with a life spent solely reading newspapers and watching television. Yet, many of our older clients feel very much a part of life doing just that.

Circumstances change, wishes change, and so does the basis for end of life decision-making. The ability of the Health Care Proxy to shift and continue to be a meaningful document for an individual through different life stages is one of the greatest strengths of the Health Care Proxy law.

The Health Care Proxy law requires that the agent act according to the principal's wishes. Where the wishes are not reasonably known, a best interest standard is used, except where the decision relates to artificial nutrition and hydration.[1] If decisions are to be made regarding tube feeding, those decisions must be made within the framework of what the principal would have wanted. Every legal document requires a consultation with a client to determine how to construct the document. As part of an advance directive consultation, it is important to explain how the Health Care Proxy can provide for an evolution of wishes. Where the principal wants to provide for flexibility in decision-making within the boundaries of his or her wishes, I try to allow the agent the greatest latitude for decision-making. To accomplish this, I purposefully hold back written descriptions reflecting the type of care the principal might want in particular situations.[2] I do this to preserve the flexibility of the Health Care Proxy. Wishes change and a document that allows the agent to verbally reflect the principal's current wishes is a valuable one. When withholding descriptive language regarding artificial nutrition and hydration in the Health Care Proxy, it is important to carefully counsel the client to periodically discuss end of life decision-making thoughts with the named agent and successor agent.

It is our job to help our clients effectuate their decisions even when those decisions and wishes change with the passage of time. As for me, I am still hoping to travel to Japan.

Endnotes

1. N.Y. Pub. Health Law § 2982(2) (McKinney 2012).
2. It is my practice to prepare a living will only when the client lacks a suitable health care agent, or when the client requests specific health care directions for the agent. In reviewing executed living wills that clients bring to the office, most contain broad pre-canned language failing to reflect the client's thoughts after discussion. These documents often do not reflect the nuances the client is interested in, nor do they actually reflect what the client wants. Time and again, I find that these living wills are a barrier towards ensuring that the client's wished for outcome will be provided.

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Pooled Trusts and the Premption Doctrine—An Update

By Robert P. Mascali

The Winter 2012 edition of *the Elder and Special Needs Journal*[1] contained an article which discussed the preemption doctrine as it related to pooled trusts and discussed the Pennsylvania case of *Lewis v. Alexander*.[2] Subsequently, the United States Court of Appeals for the Third Circuit issued an affirmance in *Lewis*, and although its holding seems to conflict with the law in the Second Circuit under *Wong v. Doar,* 571 F.3d 247, what the Court said about preemption remains noteworthy generally and in particular to the area of pooled supplemental needs trusts.[3]

As most of our readers know, pooled trusts are specifically authorized by federal law, which lists the requirements necessary for the assets in a beneficiary's pooled trust subaccount to be considered exempt for purposes of Medicaid eligibility.[4] The New York Social Services Law contains similar provisions.[5] In 2005 Pennsylvania enacted a statute which added a number of additional provisions in order for a pooled trust to be qualified in that state.[6] Specifically, Section 1414 added the following requirements:

(a) The "Special Needs" requirement which goes beyond the federal requirement that the beneficiary of such a pooled trust account be "disabled" as defined by the Social Security Act and crafts a further requirement dealing with the individual's condition and ability to otherwise pay for special needs;

(b) The "Age" requirement which limits the availability of pooled trusts to disabled individuals who are younger than 65 years of age;

(c) The "Expenditure Restrictions" adding a "reasonable relationship to the needs of the beneficiary" requirement to the **sole benefit** requirement in federal law;

(d) The "Fifty-Percent Payback" provision, in effect limiting the amount that can be retained by the non-profit upon the death of the beneficiary to only one-half of the remainder funds and directing the other half to be used to reimburse the state for Medicaid provided during the lifetime of the beneficiary.

(e) The "Enforcement" provision allowing Pennsylvania to seek to judicially terminate the entire trust in the event the trust is not properly administered.

Procedurally, the Court of Appeals concluded that the Supremacy Clause[7] creates a private right of action for these plaintiffs who were challenging a state law on the grounds of federal law preemption. The Court then went on to examine the state statute to determine whether it was in conflict with the federal law on pooled trusts and explained the basic principles of preemption which guided its analysis.

1. That the intent of Congress is the ultimate touchstone of any preemption analysis, and
2. That the starting point assumption is that in enacting a specific federal law, the Congress did not intend to displace "state law," and
3. That in the area of spending, Congress must speak in "unambiguous" language.

While disagreeing with the lower court's reasoning which was based in part on the ground that a state cannot adopt a "more restrictive" Medicaid methodology than is utilized under the federal supplemental security program, the Court nonetheless did strike down four of the five requirements in the state statute as it found them to be preempted by the federal Medicaid statute. Specifically, the Court found the requirements dealing with age, expenditures, the special needs requirement and the 50% Medicaid payback were an improper preemption of federal law but allowed the enforcement requirement to stand subject to possible challenge based upon particular situations.

As mentioned above, the holding in *Lewis* may be of limited value in New York given the Second Circuit's holding in *Wong* as to whether 42 U.S.C. § 1396p (d)(4) is mandatory upon the states and to what extent a state may add to, or subtract from, the federal statute and at some point the divergent views of the Circuits may need to be addressed by the Supreme Court. However, in the interim, the court in *Lewis* has given us a very helpful roadmap with which to decipher some of these vexing jurisdictional and substantive problems, which will only become more pronounced as the entire Medicaid system responds to the economic challenges and the impact of the new Health Care Law.

Endnotes

1. NYSBA *Elder and Special Needs Law Journal*, 40 Winter 2012.
2. *Lewis et al v. Alexander, et al.*, 276 F.R.D 421 aff'd. 2012 WL 2334322 (3d Cir. 2012).
3. *Lewis et al v. Alexander et al* (3d Circuit) *supra*.
4. 42 U.S.C. § 1396(d)(4)(C).
5. NY Social Services Law Section 366 (2)(b)(iii)(B).
6. 62 PA Cons. Stat. Ann Section 1414 (2005).
7. U.S. Const. Art. VI Clause 2.

Mr. Mascali is Associate General Counsel at NYSARC, Inc. in Delmar, NY and serves as counsel to NYSARC Trust Services. Prior to his current position, Mr. Mascali was Managing Attorney for the New York State Office of Mental Retardation and Developmental Disabilities (now the Office for People with Developmental Disabilities) and was primarily responsible for providing legal advice on guardianship matters and supplemental needs trusts. Before his government service Mr. Mascali was engaged in private practice in the New York metropolitan area concentrating on real property and estate and trust matters.

Mr. Mascali currently serves on the Board of Directors of Northern Rivers Family Services, Inc., a not-for-profit agency providing supports and services for vulnerable children and their families in New York State. He is a member of the NYS Bar Association and its Elder Law Section and its Executive Committee as well as the Trusts and Estates Law Section. He is currently the Co-Chair of the Special Needs Planning Committee of the Elder Law Section and is also a member of the National Academy of Elder Law Attorneys and the Board of Directors of New York Chapter of NAELA.

He is a graduate of St. John's University (1973) and its law school (1976). Mr. Mascali has lectured at a number of NYSBA and NAELA sessions dealing with planning issues for the elderly and for individuals with special needs and for their families and caretakers and has authored and co-authored a number of publications on these and related issues.

NOTE: The opinions herein are those of the author only and do not reflect the opinion or position of NYSARC, Inc.

The Care, Upkeep and Planned Death of a Client File

By Kameron Brooks

My hope is that this article will give some guidance to those required to keep a "Client File," whether they be seasoned practitioners or newly admitted attorneys. It is important to keep in mind, even with fifty years of experience, you may not have better client and file management skills than an associate of fifty days. You may read this article and say under your breath, "I already do all this stuff!" And if you do, then you've just received a confirmation that you're doing a lot of things right. If you read this and mutter under your breath "Oh my malpractice carrier, I never thought of some of this stuff," then maybe I have helped in some way. I do not pretend to know everything there is to know about file management and client relations, but after 34 years, I've at least made enough mistakes to learn a few things and share them with you. As you read this article, you may even have some additional ideas than those expressed…great, develop and implement them. In any event, let us explore the six rules of file management I have discovered thus far.

Rule #1: Know Where the File Will End Up Before You Begin

Know the answer before the question: Where and how is the file (paper and/or digital) going to wind up in your office or storage facility? As important as it is to know how to open a new file in a logical manner, an equally important question is how to close it and where its final resting place will be. In the usual case, we are consumed with how to properly create the file and set up the client in whatever system we are using. Like little children at Christmas time, we can't wait to begin work and start producing for the client—that's the technician in us. However, equally important is planning for that time in history when work on the file is over and someone—not you of course—must accept the responsibility to remove the file from the "active" area (file wall or cabinet) and place it storage, that abyss that all "closed" files find themselves after no one wants to see them anymore.

Arguably, the way in which one determines to close a file is largely a function of age and technological sophistication. If you are a "paper" person (ok, the implication is that you're older), the file will consist largely of paper product that will have to be physically "shelved" in some office/warehouse location…there to collect dust for eternity or until someone (whose job it is to identify and locate this type of dinosaur) removes it for destruction.

If you are among the more technologically advanced, then your files are more digital than paper. Saving valuable client information is easier when it's right there in the computer…somewhere? O.K., we know exactly where it is and can retrieve it anytime. But how long is "anytime"? Just how long do we obligate ourselves to keep client information, and what about changes in technology, from the 5¼ floppy drives to flash drives? If we have stored client information on 5¼ floppies, how do we retrieve the information in a world of no "A" drives (let alone 5¼ drives)?

Either way, we need to figure out what considerations are made when slimming down the file before it hits its final resting place, and how long does it rest there? Are there multiple copies of the same document in the file? Are there extraneous letters or notes kept in the file that are no longer of use? For example, should we hold on to the enclosure letter to the county clerk regarding the recording of a deed, long after the deed has been recorded? If your file is digital, maybe you don't really care about space, but if your file is paper, size does matter. My practice is to keep what I determine to be important, and delete/shred what is not.

It is my experience that most firms do not have a "file destruction" policy and are therefore seemingly committed to keep their clients' files forever. Experience tells me that this is exactly what clients believe. Unless there is a clear understanding with our clients regarding the upkeep and holding of their files, then we remain open to the interpretations of judges, and the like, concerning our liability. As a result, I recommend that clients are provided with a contractual agreement determining what documents will be kept and for how long. For example, we use language in our final "disengagement" letter that lets the client know that we will be storing their file for seven years, noting that after that time it is subject to destruction in accordance with our firm's policy. We do not tell a client that his or her file *will* be destroyed; we only explain that it is subject to the firm's destruction policy. Refraining from automatic destruction, we retain a level of flexibility and control, and we abstain from making any concrete promises. Moreover, we know that some of our clients' files will not be destroyed, due to the nature of the client, and thus, this policy allows us the leeway to

make client-based decisions (a class AA client may be deserving of more special attention than others).

Rule #2: Set Up All the Basic Information You Need First in an Organized Manner on a Client Information Sheet

A client information sheet is a must, it a way to organize basic details about a client in a clear and concise manner, creating a client snapshot. When beginning a case, it is imperative that you obtain as much information as possible, because it will only serve to help you later. Depending on the nature of your client's matter, the information will vary. For instance, I practice in the estate and asset protection planning field, so I find that I need additional information beyond the usual name, address, and telephone number, but also those of their children and other close relatives involved in the estate plan. This information can then be printed on a client information sheet for the file, so that it becomes an efficient reference. The sooner that you are able to capture this information, the more proficient your work flow becomes. Usually, I find that requesting this information in writing yields the best results, because if a mistake is made, better it be in the client's handwriting than your own. You know your practice and a quick reflection of your "typical" case will reveal the type of information most commonly needed.

Use a system that makes sense. Most of us use computer accounting systems that keep track of our time and general ledger items (income and expenses). If you do not, then there should be further reflection regarding its absence, and I strongly recommend that such a system be adopted. Software can keep track of clients by either name or number, however, I recommend using numbers. A good tracking system can assign a "client number" and then a "matter number." It works well to keep the same number for a client, while keeping track of separate matters (or cases) for that client. As Kameron Brooks may have a client number of 1263, while a matter number for a particular case may be 11001; yielding a file number on that file as 1263.11001 (client number plus the case number, which by the way indicates that it was matter number 1 in 2011).

Rule #3: Create a System to Keep Track of the File as It Goes from Opening to Closing—With All Stops in Between

Once your file system is set up, then it's time to create a mechanism to keep track of it, from beginning to end. You should never be wondering where a physical file is located, or what's being done on it, especially since there will likely be several timekeepers working on it during its active life. Further, if you are not the only person working on the file, it's nice to have the status kept electronically within an office network, and that way all persons have access to the "status board" simultaneously.

In our office, the above is accomplished via a program which allows each user to submit and access journal entries regarding its current state, and this information is saved on the server. We utilize STI's Practice Master™ program for this, although Microsoft Outlook™ has a function to make client notes and save them to a client folder (I've used this and saved the information in a "Notes" folder I created in WordPerfect as a sub-folder in the client's WP folder [you can do the same in Word]). These platforms let others (and remind me) of where the file is and who is doing what with it. Thus, if someone needs to know what's going on, he or she can check the notes on the file to find out. I cannot tell you how many times a client has called with a question that can be answered by almost anyone in the office, simply because they are able to instantly look up the information within the "system." Eliminating the commitment of calling the client back for quick answerable questions leads to a more efficient workplace, for the need to search the entire file and interrupt one's coworkers is minimized.

Note-taking is a matter of taste, and in our case, we try to minimize keystrokes in an effort to avoid reading superfluous verbiage. Oftentimes, cryptic notes seem to work best, designating abbreviations the order of the day. A telephone call with a client becomes "tcw/client" in the status board notes, and affidavit becomes "aff." Obviously, a system of abbreviations that everyone in the firm can identify becomes necessary, but with some work, you and your team members will come up with them. I recommend involving your team members in the process, because you might just find that the word "affidavit" intuitively is shortened to "aff" by all of your team members, even though you (me in my case) thought "afdt" was the obvious choice. As a consequence of involving the team, I now use "aff" (besides, it's one character shorter).

Your system of choice should also accommodate the final conclusion of the file. Our system (Practice Master) has a "completed" date you can select, which drops the matter from the "active" list. We can still access the notes by using the client and matter number to see all of the activity associated with the file, but it no longer appears on our "To Do" list. It is effectively added to the "To Done" list and we don't have to be concerned with it thereafter, save noting when the file may be destroyed after a certain date, usually seven years later.

Rule #4: Create a System to Give Client Copies of Relevant Contents During the Life of the File and Adopt a "File Destruction Policy"

It is important to remember that much of your file belongs to the client. Your worksheets do not, but copies of documents, pleadings and correspondence do. I believe the best practice is to give a copy of these to the client as they are generated or received. This keeps the client informed as to what is happening and allows him or her to "build" a file that is a companion to yours. I have even given clients a file folder with a matter label, to keep these copies (or originals, if appropriate) as I send them. I advise them to keep all copies of documents in their file, so at the end of the case they will have a complete copy of my file (except for the attorney work papers). I have also let them know that at the end, there would be no reason for them to contact me for copies of documents, since they will have them right along as the case proceeds.

I have to admit I also do this for my own selfish reasons. I usually don't want clients calling me one or two years later asking for a copy of this or that. Instead, I want to be able to tell them we already gave it to them…remember? If they still need the copy, then at least we are in the position to charge a search fee to retrieve the closed file from what staff members refer to as "the dungeon," and make the copies to mail them off. Do the math—how much time and expense is required to comply with the client's request? I would argue that the task takes far more time than one would think without studying the issue. What's worse is when clients from ten years earlier call for copies of a particular document. This would be the point when your firm's file destruction policy would come in handy. If you previously advised those clients that you will store their file for seven years, and then apply your firm's destruction policy, then you may with full legitimacy explain that you no longer have their file. It is my personal belief that without a destruction policy, one has the everlasting liability to preserve information we have chosen to keep on hand long after its usefulness has passed.

It is imperative that you develop a system for retrieving closed files, along with a set of applicable charges. However, there should be no reason for the client to call with such a request, if you have provided him or her with documents along the way, as I have recommended above. Nevertheless, the average client is likely not as organized as you are, and he or she *will* invariably lose, misplace or forget to file copies of the documents you have provided them. And if that is the case, and in my experience it surely is, who should shoulder the burden of replacing the document? The attorney, who did everything right, or the client, who lost the document? Having said all this, I realize that there are some clients that I would never charge for copies. They are AA clients who have paid large fees to me for their legal work. But again, in my experience, they are not the worst offenders.

Rule #5: Create Sufficient Subfolders

Another aspect of this process is the organization of the file itself because it is important to keep separate folders for different categories of work; this aids efficiency and allows for greater accessibility to other timekeepers. What makes the world go round is the separation of estate planning documents from funding documents. In our office, we keep a file for trust or estate work with the attorney and the legal assistants keep a journal file of their own with all of the information necessary for legal accounting and income tax reporting. Frequent meetings should be scheduled, about every two weeks (with notes in the status board), to keep everyone in the loop. If you practice in litigation, you may want subfiles for correspondence, original pleadings, notes and research, etc.

Working copies of documents are another helpful thing to have, and a subfolder with photocopies of a document that you can write on or otherwise abuse without damaging the original is, as Martha Stewart would say, "a good thing." Years ago I practiced with a litigation attorney who would immediately begin making notes on copies of litigation documents he received from opposing counsel, only to have a legal assistant liquid paper out his comments months later because he needed a clean copy to attach to his pleadings. That example really applies to the rest of us, and thus, one must make a photocopy first, and then color away like a kindergartener, keeping the original pristine.

Rule #6: Send Closing Letters to Clients at the End of Each Case

In two words…**use them**. We all know (or should know) that the statute of limitations for legal malpractice begins to run when our representation ends. So, when does it end? A closing letter to the client will identify that date. The purpose of a closing letter, in my opinion, is to reaffirm to the client the work you have performed, to thank the client for entrusting you, and to make sure that the client understands that your representation on that particular matter has concluded. I mean finished, done, finito, fini, complete, fin if you're French or if your client is…you get the picture.

A closing letter is vital for several reasons, legal liability issues being one of many. Both you and your staff need to know when it is time to stop working on the file, so you can measure the profitability of the

firm's work. You can only determine if a matter was a win or a loss if you can shut off the time charged to it, and compare the total time to the fees realized. Additionally, the client needs to know when your services will end for the fee the client was quoted. This is true even if you bill by the hour, unless your client has given you a blank check to bill against. I do not believe hourly billing is a true measure of an attorney's work product worth; however, I do recognize that at least some client matters may be best served via an hourly rate. Having said that, usually the clients want to have some range that their fees will fall into, and if you commit to a range, then it becomes very important to know when the fees should end and the work has finished. The closing letter is the device that will help identify this point in time to the client, and it also provides the attorney with an opportunity to quote and begin billing the cycle again for the next round of work.

Without declaring an end to the first engagement, the attorney (and his or her staff) will be continuing the record and billing for what will then be considered additional work, which may keep the "continued representation" argument ongoing regarding the old case. Once you identify that all the required work is finished on the original matter, it's time to let the client know that the matter has been concluded, and so is your representation regarding it—and in the words of Professor Seigel, "be sharp about it!" The closing letter should also dovetail into your firm's file destruction policy—see Rule 4 above.

Every article has a good conclusion, so this is mine. Leroy Jethro Gibbs (for you NCIS fans) always adheres to his 50-some odd rules of work, only violating one when absolutely necessary and with aforethought, so your office and mine should do the same when it comes to our files.

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Recent New York Cases

By Judith B. Raskin

Trustee Sought Approval for Extraordinary Expenditures from a Court Ordered SNT

Geraldine R., age 19, was a beneficiary of a court-ordered Supplemental Needs Trust (SNT) and a Medicaid recipient. Her mother, Article 81 guardian and trustee of the trust, sought leave as trustee to make extraordinary expenditures from the trust for her daughter's benefit. These included a trip to Walt Disney World, a television and a $2,000 graduation party. On two prior occasions the trustee sought approval for similar payments without objection.

This time, the Department of Social Services of the City of New York (DSS) opposed the application, arguing that these payments should be left to the discretion of the trustee and not require court approval unless the court is aware of malfeasance by the trustee. The agency did not see the need for a trustee if the court was "micromanaging" distributions.

The court granted the trustee's request with some modifications. Because the court authorized the creation of the trust, the court was responsible for seeing that the funds were properly used for the benefit of the beneficiary. The trust incorporates protections similar to the protection of guardianship funds and must be viewed by the court with the same concerns.

Matter of Geraldine R., 91285-2000 NYLJ 1202553096112, at *1 (Sup.Ct., Bronx County, April 19, 2012)

Agent Appealed Summary Judgment to Nursing Home for Collection of Its Fees

Plaintiff nursing home sued a resident, Mr. Naylor, and his daughter, who was his attorney in fact, for payment of its charges of $80,509.55. The daughter had signed an agreement with the nursing home to use her authority as agent to access her father's funds to pay the facility's charges and to pay damages if she failed to do so. She then used her father's income for other purposes such as maintaining his prior residence (including telephone, housecleaning, newspaper and cable costs) for which neither she nor her father had any responsibility as the house had been placed in an irrevocable trust prior to his entry into the facility. Mr. Naylor died before the court issued its order. The court granted summary judgment to plaintiff nursing home.

The Appellate Division reversed and remitted the matter back to the Supreme Court for 1) the necessary substitution of the decedent with a representative of his estate; and 2) a determination of the assets that were owned by the decedent and that now are part of his estate.

Troy Nursing & Rehabilitation Center, LLC v. Naylor and Gaetano, 2012 NY Slip Op 03243, 512311 (App. Div. 3d Dept., April 26, 2012)

Bonding Company Sued Court Examiner for Damages

Plaintiff bonding company, United States Fire Insurance Company, appealed from an order dismissing its claim against a Court Examiner for his delay in discovering the property management guardian's misuse of guardianship funds. The plaintiff bonding company sought damages for legal malpractice and breach of fiduciary duty.

The court affirmed the lower court's dismissal of the action against the Court Examiner finding 1) no attorney-client relationship between the bonding company and the Court Examiner; and 2) the complaint failed to state the basis of the fiduciary relationship.

U.S. Fire Ins. Co., etc. v. Raia, 2012 N.Y. App. Div. LEXIS 2439, 2012 Slip Op 2482 (App. Div. 2d Dept., April 3, 2012)

Medicaid Eligibility for a Disabled Person Who Received a Lump Sum Payment

Adele Y., a disabled Medicaid recipient with severe mental retardation, was residing at an intermediate care facility. The facility received $126,845 in SSA retroactive payments on her behalf of which $25,472 was used to prepay a burial account. Adele Y.'s Medicaid was then terminated due to excess resources. At the time this application was made $36,885.38 remained in Adele Y.'s account.

Mental Hygiene Legal Service (MHLS) made this application upon finding that the facility failed to take protective action to preserve Adele Y.'s Medicaid benefits. MHLS requested that the court order placement of the remaining funds into a Medicaid qualifying pooled trust or a Medicaid qualifying "under 65" payback trust. The court ordered that the funds be placed in a pooled trust with NYSARC, citing Mental Hygiene

Law Sec. 81.16 which permits the court to authorize the creation of a trust without the appointment of a guardian.

Matter of Adele Y., 2012 NY Slip Op 50904 (U) (Sup. Ct., Bronx County, May 14, 2012)

Petitioner Sought Approval for Transfer of Beneficiary's Structured Settlement Rights

Ricardo Sprauve received a structured settlement as a result of a personal injury claim. He relied on the payments from the settlement for his support. In this motion petitioner sought approval of the transfer of a portion of Mr. Sprauve's structured settlement payment rights to itself. In exchange petitioner would pay Mr. Sprauve $37,000. Mr. Sprauve explained that he needed to make this transfer of future settlement payments to provide him with funds for necessary medical treatments as well as payment of maintenance and utility arrears on his coop and prepayment of future maintenance. The court on three previous occasions approved the transfer of a portion of Mr. Sprauve's settlement rights. In those instances Mr. Sprauve used the payments for purposes similar to those stated in this matter and also for the purchase of his cooperative apartment.

Court approval of these transfers is made pursuant to the Structured Settlement Protection Act (SSPA) under General Obligations Law, Title 17, enacted in 2002. This law was enacted to protect beneficiaries of a settlement agreement from making transfers at substantial discounts, resulting in a loss to the beneficiary. Pursuant to the statute, certain requirements must be met and findings must be made by the court, most importantly the court must consider the reasonableness of the transaction and the benefit to the recipient.

The court approved the transfer based on the stated need for medical treatment. Only one lump sum payment of $125,633 remained to be paid to Mr. Sprauve in 2028. The court denied any further transfers for the purpose of outstanding maintenance or utility bills, noting that Mr. Sprauve could not afford his cooperative apartment.

Matter of Stone Street Capital, L.L.C. v. Sprauve, 2012 N.Y. Misc. LEXIS 2427; 2012 NY Slip Op 50920U (Sup. Ct., Bronx County, May 18, 2012)

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Recent Tax Bits and Pieces

By David R. Okrent

Can a Losing Claim by Co-Workers to Share in Winnings Reduce the Value of a Gift of Interest in Winning Lottery Ticket—Yes—*Tonda Lynn Dickerson*, T.C. Memo 2012-60 (Mar. 6, 2012)

In this case Ms. Dickerson, the winner of a lottery, was sued by her co-workers for a portion of the proceeds under an oral agreement to share; they lost and Ms. Dickerson was awarded the proceeds. However, Ms. Dickerson contributed her winning ticket to a corporation and the Internal Revenue Service (IRS) determined that she made a gift to the other shareholders. The most interesting part is that the Tax Court determined the value of the gift was reduced by 67% due to the potential liability of the claims of her co-workers who ultimately lost.

Tax Court Approves Two More Defined Value Gift Clause Cases

The first is *Joanne M. Wandry et al. v. Commissioner,* T.C. Memo. 2012-88 (March 26, 2012). In this federal gift tax case, the Tax Court determined in a memorandum opinion that the taxpayers' respective defined value gift clauses were enforceable under state law, were defined value gifts of LLC membership interests instead of gifts of percentage interests, and were to be respected for federal gift tax purposes. The case has a very good review of the law and description of what needs to be in the transfer documents. It is also makes it clear that a charity does not need to be involved.

The second defined value case is *Hendrix v. Commissioner,* T.C. Memo. 2011-133 (Dec. 15, 2011). In this case the Tax Court here considered whether defined value clauses were the result of arm's-length transactions and whether they were void as against public policy. This case had the unique feature of including gifts to a charity which independently reviewed the appraisal. The valuation underlying the dispute was whether the taxpayers' transfers of the John H. Hendrix Co. (JHHC) stock were valued at fair market value. The court concluded in favor of the taxpayer on all issues.

IRS Allows Husband to Roll Over Proceeds from Deceased Spouse's IRA

In Private Letter Ruling [hereafter referred to as PLR] 201212021, the decedent fell ill before she could change the beneficiary designation within her IRA from her estate to her husband. The IRS did not apply the general rule here, which would treat the IRA as an inherited IRA to the husband, because the surviving husband was the only beneficiary and the sole executor of the estate. The IRS allowed the husband to roll over the proceeds into a separate IRA.

Insurance Policy Proceeds Are Includable in Estate But Deductible Because of Debt to Ex-Wife

In Estate of David A. Kahanic et al. v. Commissioner, T.C. Memo. 2012-81(March 21, 2012), the Tax Court concluded that the decedent possessed at his death incidents of ownership in a $2,495,000 life insurance policy, thereby making the policy proceeds includible in the value of decedent's gross estate under § 2042(2). However, when decedent died, an indebtedness existed, due to divorce proceedings and settlement agreements which were ultimately court ordered prior to his death, obligating him in respect of the policy proceeds which the Tax Court determined entitled the estate to a deduction of $1,995,000 under § 2053(a)(4). An additional set of issues were discussed in this case since the estate was illiquid at the time estate taxes were due and the estate had to borrow money from the divorced surviving spouse. The court discussed in this regard the validity of the debt and propriety of deducting interest to be paid on same.

Court Finds Estate Tax Special Use Valuation Regulation Invalid

Carolyn Finfrock v. United States, Docket No. 3:11-cv-03052, the U.S. District Court for the Central District of Illinois found Treasury Regulation 20.2032A-8 (a)(2) (26 C.F.R. § 20.2032A-8 (a)(2)) is an invalid regulation and is contrary to the underlying statute because it imposes an additional requirement that special use valuation be elected for qualified property constituting at least 25 percent of the adjusted gross value of the estate.

To qualify for the special use valuation, several conditions must be met. One of those conditions is that "25 percent or more of the adjusted value of the gross estate consists of the adjusted value of real property which meets the requirements of subparagraphs (A)(ii) and (C)." 26 U.S.C. § 2032A(b)(1)(B). The Treasury Regulations, however, provide that while an estate need not elect special use valuation with respect to all of the qualifying property, the property actually elected for the special use valuation must constitute at least 25% of the adjusted value of the gross estate. *See* 26 C.F.R. § 20.2032A-8(a)(2). It is this additional provision contained with the regulations that led the court to invalidate this regulation.

Property Transferred to FLP Not Included in Decedent's Estate

In *Estate of Beatrice Kelly et al. v. Commissioner,* T.C. Memo. 2012-73 (March 19, 2012), the Tax Court concluded that the decedent's transfer of assets to the limited partnerships was a bona fide sale for full and adequate consideration, and thus the value of the transferred assets is not includable in decedent's gross estate pursuant to I.R.C. sec. 2036(a). This is a very good case on what to do right in handling family limited partnerships.

IRS Rules a Testamentary Non-General Power of Appointment Does Not Make a Gift Incomplete, an Arbitration Clause Together with an in Terrorem Clause Interferes with "Crummey" Power of Withdrawal Rights, and Tops It Off with IRC § 2702

In Chief Counsel Advisory 201208026, "Delaware Incomplete Non-grantor" (DING) trusts were created by taxpayers who want to shift state income taxation to a tax-favorable entity without creation of a taxable gift. In this CCA, the IRS ruled that a transfer to a trust was complete for Federal gift tax purposes where the donors retained a testamentary (exercisable at death) special power of appointment but named someone other than the donor as trustee who had the authority prior to the donors' deaths to distribute all of the income and corpus of the trust to persons other than the donors, or to distribute it to charity.

The Trust emphasized that the Donors did not retain any powers or rights to affect the beneficial term interests of their children, other issue, and their spouses (and charities) during the Trust term. With respect to those interests, the Donors fully divested themselves of dominion and control of the property when they transferred the property to the Trust. Indeed, during the period extending from the creation of the Trust until the Donors' deaths, the trustee, Child A, has sole and unquestionable discretion to distribute income and principal to the beneficial term interests. He may even terminate the Trust by distributing all of the property.

This ruling has an interesting approach to valuing the gift by applying IRC § 2702.

Another Family Limited Partnership Taxpayer Victory

Estate of Stone v. Commissioner, T.C. Memo 2012-48. In this case the decedent and her husband owned woodland parcels near a lake developed by their family. They told their attorney that they wanted to give real estate to various family members and the attorney recommended using a limited partnership to simplify the gift-giving process, and to guard against partitions, though that factor was not addressed by the court. After creating the partnership and transferring the woodland parcels to the partnership, the Stones gave all of the limited partnerships to their children, their spouses, and their grandchildren over a four-year period.

The gifts of limited partnership interests were completed about five years prior to the decedent's death. No distributions were ever made from the partnership. There were a few situations in which appropriate formalities regarding the partnership were not followed, but those lapses in following formalities seemed rather benign. The IRS apparently contended that the portion of the property's value represented by the contribution from the decedent was included in the decedent's estate under § 2036. The court (Judge Goeke) disagreed, finding that the bona fide sale exception to § 2036 applied.

Long-Term Care Rider Is Treated as Life Insurance Contract

In PLR 201213016, the IRS concluded that a long-term care rider offered with certain annuity contracts constitutes an insurance contract within the meaning of § 7702B(b)(1). The taxpayer requested that: 1) the rider constitutes an insurance contract within the meaning of § 7702B (b)(1); 2) all long-term care benefits will be excludable from the Owner's gross income under § 104(a)(3); and, 3) the investment in the contract (within the meaning of § 72) of the Annuity Contract to which the Rider is attached will not be reduced by the payment of LTC Benefits. IRS granted (1) and (2) and declined to rule on number (3).

Estate Liability for Foreign Trust Filing and Penalties

In IRS Legal Memorandum 201208028, the IRS addressed the applicability of foreign trust filing and reporting penalties against a decedent's estate, conclud-

ing that the estate is responsible for paying § 6677(a) and (b) initial and additional penalties for some tax years ending prior to the Decedent's death.

Disability Planning for IRAs

This PLR 201150037 dealt with a unique IRA fashioned as part of a divorce agreement. Designed to protect a participant from the excessive spending that can be a byproduct of the mental illness known as bipolar disorder, the "restricted IRA" in PLR 201150037 may open a new path for all IRA owners who want to plan for the possibility of their own future disability. PLR 201150037 focuses on an IRA agreement in which the participant and the IRA provider agree to a series of "directions" that somewhat restrict the participant's access to the funds. Though the precise formula used in this PLR is not helpful for most clients, it suggests the potential for an irrevocable trusteed IRA under which distributions to the participant (beyond the required annual minimum distribution) are entirely in the trustee's discretion.

Trust May Receive Annuity Payments and Still Avoid Accrual Taxation

In PLR 201124008 the IRS reviewed IRC § 72, which provides deferral of income tax for qualified annuities. Section 72(u) disallows such favorable treatment when the annuity is owned by someone other than a natural person, such as a trust. In that situation, the owner is essentially put on the accrual basis of taxation and is taxed each year on the growth that occurs in the annuity policy (regardless of amounts distributed). An exception to the exception allows a trust or other entity to hold the annuity as an agent for a natural person.

In this ruling, a surviving spouse was a trustee and current beneficiary of a testamentary trust established by her deceased husband. The six remaindermen were descendants of husband and wife. The trustee wanted to purchase deferred annuity contracts on the respective lives of the remaindermen, with the trust as owner and beneficiary of the contracts. If a remainderman-annuitant died during the term of the trust, the proceeds of his or her contract would be paid to the trust. At the termination of the trust each remainderman will receive his or her annuity contract. While it is anticipated that no payouts on the annuities will occur during the term of the trust, it is possible that they may occur either by reason of reaching the annuity start date prior to the termination of the trust or the death of a remainderman-annuitant.

Form 706 Protective Refund Claim Guidance

In Revenue Procedure 2011-48, the IRS provides detailed and precise rules to address most of the basic protective claim filing issues. The ability to make a protective claim on a Schedule PC on the Form 706 is especially welcomed. This will make it easier for taxpayers to comply with the requirements and help taxpayers avoid statute of limitations deadline issues.

Presently, many estates adopt a wait-and-see attitude to see if claim and expense issues resolve themselves before the statute of limitations expires and hopefully avoiding the bother of a Form 843 filing. By easing the process for filing the protective claim, more taxpayers should take advantage of the procedure at the time the estate tax return is filed and thus avoid missing the deadline later. Indeed, the existence of the Schedule PC will likely educate some preparers who might not be knowledgeable of the protective claim procedure or its availability.

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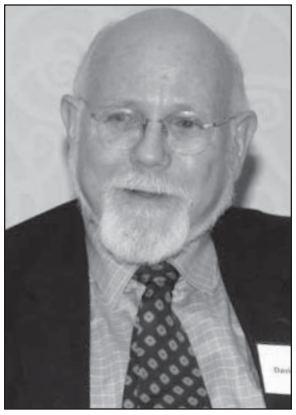
David Goldfarb Talks with Natalie Kaplan About: Lobbying in Albany and 14 Chickens in the Bathroom



Q David, anyone who knows you and your activities—your lobbying, your firm, your book that needs constant updates, your listserv contributions—has to wonder: When do you sleep?

A Usually, from 2 or 2:30 to 6:00 o'clock. I get home about 8 and have dinner. Then, around 10, I start on the listserv and try to finish up by 12. I love to listen to NPR news at 11, but, when I do the listserv and other things at the same time, it takes me longer. That's how it sometimes ends up being 2:30 before I'm asleep. But I'm usually up by 6, so I can get the 8:00 o'clock ferry from my home in Staten Island to the City.

Q What kind of work habits allow you do so much at once? Are you a good delegator?

A I do delegate. And I have some very good people including partners, associates, paralegals and support staff who make my life much easier. But I also have to keep track of who is doing what. Mostly, I'm very organized.

The truth is, I don't have great recall. If you have a great memory, it doesn't matter if you're not that well organized. With me, it matters. I have ready access to everything in my files through Time Matters. And then, I also keep my To Do lists. I persist and get everything done, although I'm a little bit behind, some of the time.

Q Let's talk about the lobbying effort that you and the Legislation Committee just carried off so successfully. Did you have any previous experience?

A Yes. I did some lobbying when I was still with the Legal Aid Society (from 1972 to 1989). We drafted legislation dealing with public benefits and housing issues. One bill took three years of lobbying, but it was finally enacted into law.

I also worked on the state's supplemental needs trust legislation (EPTL 7-1.12) as chair of the City Bar's Legal Problems of the Aging Committee. With the Elder Law Section, though, I've been going to Albany for "Lobby Day" for the last five years. The last two years have been more intense because of the Governor's Medicaid Redesign Program. Between the regulatory changes and this last Budget Bill, we were in Albany three times: once to meet with the Governor's Office and the Department of Health; once to meet with some of the Senate legislative staff; and then again for the annual Lobby Day.

Q Do you prepare for these meetings?

A Absolutely. The [Elder Law Section's] Legislation Committee spends many hours in conference calls, meetings, research, writing, editing, re-editing and, then, preparing our presentations.

Q Please be a little more specific. What do you ree search and write, and what presentations are you referring to?

A Well, this year we focused on two issues: repealing expanded estate recovery and keeping spousal refusal for home care. Take, for example, estate recovery, expanded to include life estates. In New York, life estates are "alienable," meaning, they can be sold separately from the remainder interest. There are examples of Manhattan townhouses where the remainder interest is sold to a buyer in good faith. When we talked to title company attorneys about insuring such titles, they said that Medicaid post-mortem attempts to recover against life estates with alienated remainder interests would cause huge legal problems.

People upstate had different scenarios. When we spoke with some of the legislators who practice elder law themselves, they had no idea of the problems that could be created.

There were also various aspects of the life estate problem that needed research. First, the attempt to make the law retroactive raised a possible constitutional question. Then, the Department of Health's regulatory lien was enacted without the necessary legislative authority. Issues of title insurance added to the confusion. Members of the Real Property Law Section and the Trusts and Estates Law Section also got involved at one point.

In our Committee, we divided the issues among ourselves and one or two of us took each issue to research and write about. I acted as "Secretary," to assemble the work into one long memo. After editing, circulating and re-editing, this version was sent to legislators, their staffs, the Department of Health and the Governor's Office. We also did a one-page summary to hand out on Lobby Day.

When we prepared for our Lobby Day presentation, we pretty much each took the same aspect of the issue we'd written about and decided in what order we would speak.

Q Please expand on that. Where were you speaking?

A On Lobby Day, we were in the Capitol from 10 AM to 4 PM. About every hour, we met with a new group to present our arguments and take questions. We met, sometimes with legislators, sometimes with their staffs, sometimes with people from the Department of Health and the Governor's Office. That's where we made our arguments and clarified whatever they didn't fully understand.

This year, it was really striking how well prepared many of the legislators and their staffs were. Unlike the past, this year almost everyone really understood the issues and how they played out.

Q You must enjoy it to keep doing it year after year.

A I do. It's part of the plan that my partner, Jeff Abrandt, and I had when we started our firm, to do well by doing good. I'm generally in favor of grassroots efforts that aid our clients, as you know.

It's also a kind of substitute for appellate arguments that I don't often get to do anymore. Preparation for Lobby Day is the same kind of preparation, and answering questions from the legislators and staffs is reminiscent of arguing in court. It's just a different form of advocacy.

Q You're involved in other kinds of grassroots movements on Staten Island, aren't you?

A Yes, I've been interested in historic preservation for a long time and I sit on a number of boards. I'm currently President of the Alice Austen House Museum and we've been working on a grant competition sponsored by the National Trust. My wife, Liz, and I have restored three houses, each over a century old, including most recently our farmhouse in Pennsylvania.

Q Do you ever waste time? Just do nothing?

A Well, I don't work weekends, when I'm at the farm. I don't even read the listserv! Right now we have 14 baby chicks in our bathroom which is heated to 95 degrees to keep them warm. We're going to raise chickens with our neighbor who can take care of them during the week.

Q Are you planning to sell eggs as an alternate career?

A Not sell them, but we expect to be giving away a lot. With these chickens, the eggs will be green, brown, white, and blue.

Thank you. We've covered a great deal.

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 the co-author of *New York Elder Law* (Lexis-Matthew Bender, 1999-2012) now in its eleventh release. Mr. Goldfarb formerly worked for the Civil Division of The Legal Aid Society (New York City). He was the Chair of the Association of the Bar of the City of New York's Committee on Legal Problems of the Aging from 1996-1999. He is the treasurer of the Elder Law Section of the New York State Bar Association. He is chair of the Technology Committee of the Trusts and Estates Law Section of NYSBA. He has written extensively on legal and civic issues including two op-eds in the *New York Times*.

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