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Elder Law Attorney

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

Message from the Chair

Timothy E. Casserly

This summer we are approaching our 20th year as a Section of the New York State Bar Association. At the same time, I am approaching the 25th anniversary of my law school graduation, which makes it hard to believe that with only a five-year difference, there was really no such course of study or area of practice known as "Elder Law" when I attended law school. (As an aside, several of my classmates have suggested what is harder to believe is that I could actually be chairing this or any Section within the Bar.) In that span, our status has grown from being a Special Committee to a Section with almost 3,000 members. In connection with this milestone, all past chairs (except our late Founding Chair, Mortimer Goodstein) attended our Annual Meeting in New York City in January to be interviewed about their experiences with the Section, the growth of Elder Law and future issues elder law attorneys might face. These interviews will be the basis for a video being made by our Chair-Elect Michael Amoruso for our Summer Meeting in Washington, D.C., July 23 through 26. Hopefully, you will join us in Washington, D.C., to see the finished product, which will certainly be pared down and edited so as to not leave you feeling as if you are watching someone else's home movies. From January's gathering of past Chairs, I was reminded not only of how much our Section's leadership has contributed to the evolution and development of Elder Law as its own distinct Section and area of practice, but that they continue to stay very active in our Section's activities and committees. Shortly, I will be highlighting some of these activities and projects under way with the committees comprised of both past Chairs and many new members of our Section, but, before doing so, I want to congratulate in writing several individuals recognized by our Section at the Annual Meeting.

Inside this Issue

NYSBA

Each year, our Section accepts nominations for recognizing individuals or organizations whose actions further the rights of the elderly and persons with disabilities. This year, there was an exceptionally strong group of nominees. Consequently, it was a nice honor to have an audience of over 400 people present to congratulate Walter Burke and Ellen Makofsky (for their tireless efforts in getting The Compact unanimously approved by the ABA), Valerie Bogart (for her selfless sharing of valuable information to Section members and advocacy regarding home- and community-based care issues), and Beth Polner Abrahams (for her tireless Pro Bono representation). In addition to these awards, the Section from time to time has given an award to a "friend" to the Section. This is for someone who has been particularly helpful and/or supportive to our Section members on a specific issue or event. This year, the Section presented such an award to Daniel Tarantino, Deputy Counsel of the New York State Department of Health, for his guidance and counsel to the Section members regarding implementation and interpretation of the Deficit Reduction Act.

Another agenda item at our Annual Meeting was the report of the Nominating Committee (chaired by Ami Longstreet) and the election of new members to our Executive Committee. These include five of our thirteen District Delegates: Pauline Yeung-Ha–Second District, Jeffrey Rheinhardt–Fifth District, Charles W. Beinhauer–Eighth District, Batya Levin–Twelfth District, and David Goldfarb–Thirteenth District; three Members at Large: Russell Adler, Matt Nolfo and Anne Ruffer; and the new slate of officers: Michael Amoruso–Chair, Sharon Kovacs Gruer–Chair Elect, T. David Stapleton, Jr.–Vice-Chair, Anthony Enea–Secretary and Frances M. Pantaleo–Treasurer. In each case, these terms commence June 1, 2009. Congratulations.

In addition to the business portion of the meeting, we had several hours of excellent programs for which I want to thank Ellyn Kravitz as the meeting Chair. Having more than half of the speaker lineup being new to Section audiences, Ellyn did a great job of maintaining the high quality of our Section programs. As I have written previously, we are constantly looking to expand the number of presenters and authors that our Section may call on for future programs, so please let me know if you would like to join this group.

I realize everyone knows that in addition to our Section's one-day Annual Meeting, the NYSBA's Annual Meeting is a week-long series of events, Section meetings, and education sessions, but since many of us can make it for only one day, I want to note several events in which our Section had active involvement. Section members Elizabeth Valentin and Ellyn Kravitz joined me at the start of the week by attending the reception for "Celebrating Diversity in the Bar." This was a good opportunity for us to network with other Sections and recruit new Section members. Another event was the symposium sponsored by the Committee on Women in the Law, entitled "Advancing Women in the Law: Past Triumphs, Present Accomplishments and Future Challenges," for which our Section was a Gold Sponsor. Several Section members were featured as speakers for other Section programs throughout the course of the meeting. The conclusion of the week's events came with the Judicial Section holding its annual reception and luncheon. Our Section sponsored this luncheon and featured Walter Burke speaking to close to 250 judges from across the state on a program entitled "There Is a Financial Life After We Hang up Our Robes." Overall, I must say that our Section was well represented at the entire Annual Meeting.

Committee Updates

With 20 active committees engaged in various projects, legislation, publications, seminars and resources for our own practices, I cannot detail all of the activities of each committee. However, I do want to provide several highlights of what our Section members are working on.

Legislation

On January 30, 2009 Governor Paterson signed a bill which recodified provisions of law related to establishing powers of attorney that substantially changes the statutory form. Briefly stated, the new form basically divides our existing statutory short form into two (2) separate forms. The first form is similar to the statutory power of attorney we presently have but will now provide mainly for non-gifting powers of an agent. The second form, known as the Statutory Major Gift Rider (SMGR) provides optional gifting powers and limits on an agent. The new form also addresses many other power of attorney issues including compensation of an agent, revocation of a power of attorney, record keeping, access to records and the standard of care for an agent. You will also see a change in the execution requirements for the power of attorney whereby the form will now require signing by the principal as well as the agent.

In addition to the two new forms, the bill also includes several modifications to the General Obligations Law which provide direction and guidance for principals and agents as well as 16 new definitions for terms such as *agent*, *capacity*, *monitor*, *record*, *third party* and *compensation*. As signed, the effective date of this legislation is March 1, 2009. However, as of this writing, I, Amy O'Connor and Ron Kennedy of the NYSBA along with members of the Trusts and Estates Law

(continued on page 39)

Editor's Message

As the Spring edition of the *Elder Law Attorney* (*ELA*) is being readied for print (it doesn't feel like Spring), the Elder Law Section under the leadership of its Chair, Tim Casserly, has just completed another successful Annual Meeting at the New York Marriott Marquis. Ellyn Kravitz, the Program Chair for the CLE portion of the Annual Meeting, and all of the speakers deserve our gratitude for an excellent and enlightening program.

Hopefully, after reading the Winter edition of the *Elder Law Attorney*, we are all less intimidated by the world of Veterans' benefits and affairs. In this edition, rather than focus on a particular theme, we have decided to provide you with a virtual smorgasbord of topics for your reading pleasure.

Our first featured article is a very timely piece by Rose Mary Bailly, Esq. and Barbara S. Hancock, Esq. relevant to the newly enacted changes to powers of attorney. Judith Grimaldi, Esq. and Tammy R. Lawlor, Esq., Co-Chairs of our Health Care Issues Committee, have provided us with a primer on the MOLST form relevant to the recently enacted legislation recognizing the use of a Medical Orders form to honor the wishes of a seriously ill patient. Additionally, we are fortunate to have two pieces by Valerie J. Bogart, Esq., the Director of Selfhelp Community Services, Inc., relevant to New York City DSS's revised M11q form as well as another excellent piece co-authored by Valerie with Ronald C. Mayer, Esq., entitled "Transfer Strategy Tip Under the DRA—Transfer to Adult Disabled Children." Arlene Kane, Esq. has submitted an interesting piece entitled "Social Security Administration Establishes the Ticket to Work Program." Whatever happened to just wanting a "Ticket to Ride"?

As a new feature to the *ELA*, Vice-Chair Sharon Kovacs Gruer, Esq. has provided us with a review of the book authored by 22 practitioners entitled *Special Needs Trusts: Planning, Drafting and Administration*, which was edited by Kevin Urbatsch.

We also have a piece by JulieAnn Calareso, Esq. and Lisa DeKenipp, Esq. of the Special Needs Planning Committee to our Section describing valuable online tools for the Special Needs Practitioner. Of course, we are blessed with excellent pieces from our regular contributors, Adrienne Arkontaky, Robert Kruger and Judith Raskin.

In conclusion, I wish to congratulate Sara Meyers, Esq. for her appointment as Co-Editor-in-Chief, and David R. Okrent, Esq. for becoming a member of our Board of Editors.

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

Anthony J. Enea

Changes for Powers of Attorney in New York

By Rose Mary Bailly and Barbara S. Hancock

On January 27, 2009, Governor David Paterson signed Chapter 644 of the Laws of 2008, amending the General Obligations Law to provide significant reforms to the use of powers of attorney in New York. Chapter 644 was the result of eight years of study by the New York State Law Revision Commission and was the subject of much debate and comment by several Sections of the New York State Bar Association.

The power of attorney is an effective tool for attorneys and the public at large for estate and financial planning and for avoiding the expense of guardianship. The power of attorney is also a simple document to create. It can be obtained from any number of Web sites on the Internet or in a stationery store, and its execution merely requires the principal's signature and its acknowledgment before a notary public. But this simplicity belies the extraordinary power that the instrument can convey, and its popularity has also led to its use for transactions far more complex than were originally contemplated by the law, particularly in the areas of gift giving and property transfers.

"Chapter 644 was the result of eight years of study by the New York State Law Revision Commission and was the subject of much debate and comment by several Sections of the New York State Bar Association."

The instrument's power is also demonstrated by the potential authority the agent can hold. This can include power to transfer assets that pass by will as well as those that usually pass outside a will, such as joint bank accounts, life insurance proceeds and retirement benefits.

The principal can delegate these sweeping powers to the agent without fully recognizing their scope (particularly if the principal executes the document without the benefit of legal counsel). The agent can act immediately, unless the instrument is a springing power of attorney, i.e., one that becomes effective upon the occurrence of a specified event such as the principal's incapacity. In all cases, the agent can act without notifying the principal. Under a durable power of attorney or springing durable power of attorney, which continues in effect after the principal's incapacity, the agent acts without oversight when an incapacitated principal is no longer able to control or review the agent's actions – a situation which under common law would have terminated the power of attorney.

Despite the broad authority associated with this important, popular and powerful tool for financial management, the N.Y. General Obligations Law (GOL), which governs powers of attorney, has been silent as to a number of matters. These omissions include descriptions of the agent's fiduciary obligations and accountability, the manner in which the agent should sign documents where a handwritten signature is required, the limits of the agent's authority to make gifts to third parties and to himself or herself, the manner in which the principal can revoke the document, the circumstances under which a third party may reasonably refuse to accept a power of attorney, and the effect on powers of attorney of the 2003 Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule regarding medical records. The statute's provisions have been ambiguous in other areas such as gift-giving authority and authority to make other property transfers.

Based on its study, the Commission concluded that while a power of attorney should remain an instrument flexible enough to allow an agent to carry out the principal's reasonable intentions, the combined effect of its potency and easy creation, the General Obligations Law's silence about several significant matters, and ambiguities about the authority to transfer assets can frustrate the proper use of the power of attorney, particularly when a principal is incapacitated and can no longer take steps to ensure its proper use. Chapter

The revised Power of Attorney Law has an original effective date of March 1, 2009. However, the effective date was delayed until September 1, 2009, after the extension was passed by the Senate (S.1728) on February 24 and by the Assembly (A.4392) on February 10. The bill was signed into law by the Governor as Chapter 4 of the Laws of 2009.

The New York State Bar Association supported this extension in order to provide practitioners with sufficient time to prepare for these significant changes.

For more information please visit our Web site, www.nysba.org.

This article is based on the New York State Law Revision Commission's *2008 Recommendation on Proposed Revisions to the General Obligations Law – Powers of Attorney*. The Commission's 2008 Recommendation, Chapter 644 and other material related to Chapter 644 can be found at the Commission's Web site: http://www.lawrevision.state.ny.us.

644 addresses these statutory gaps and clarifies the ambiguities to assist parties creating powers of attorney and third parties asked to accept them.

General Provisions

Chapter 644 creates a new statutory short form power of attorney. On or after the chapter's effective date, to qualify as a statutory short form power of attorney, an instrument must meet the requirements of GOL § 5-1513.[1] The statutory short form is not valid until it is signed by both the principal and agent, whose signatures are duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property.[2] The date on which an agent's signature is acknowledged is the effective date of the power of attorney as to that agent; if two or more agents are designated to act together, the power of attorney takes effect when all the agents so designated have signed the power of attorney and their signatures have been acknowledged.[3]

A power of attorney executed prior to the effective date of Chapter 644 will continue to be valid, provided that the power of attorney was valid in accordance with the laws in effect at the time of its execution.[4]

Major Gifts and Other Property Transfers

Chapter 644 requires that a grant of authority to make major gifts and other asset transfers must be set out in a major gifts rider to a statutory power of attorney, which contains the signature of the principal duly notarized and which is witnessed by two persons who are not named in the instrument as permissible recipients of gifts or other transfers, in the same manner as a will.[5] In the alternative, the principal may grant such authority to the agent in a nonstatutory power of attorney executed in the same manner as a major gifts rider.[6] The creation of a major gifts rider or its alternative nonstatutory power of attorney allows the principal to make an informed decision as to whether the agent may make gifts or other transfers of the principal's property to third parties as well as to the agent. The execution requirements alert the principal to the gravity of granting the agent this type of authority. An agent acting pursuant to authority granted in a major gifts rider or a nonstatutory power of attorney must act in accordance with the instructions of the principal or, in the absence of such instructions, in the principal's best interests.[7] All statutory provisions relating to major gifts and property transfers have been located in a new GOL § 5-1514, rather than spread throughout the statute.

Powers of attorney often serve two very different purposes: management of the principal's everyday financial affairs and reorganization or distribution of the principal's assets in connection with financial and estate planning. The General Obligations Law has allowed the use of the statutory short form power of attorney for both purposes.

The former statutory language and statutory form made it difficult for a principal to make an informed decision about what, if any, authority he or she wants to give the agent with respect to making gifts and transferring property interests in connection with financial and estate planning.

First, the gifting and transfer provisions were scattered among other arguably more routine provisions. The statutory gifting authority was listed 13th (M) of 16 powers, and authority over insurance transactions and retirement benefit transactions, which can include changing beneficiaries, were listed sixth (F) and 12th (L) respectively; all of these could easily be overlooked. Unlike the gifting power, the insurance and retirement benefit powers listed on the form gave no hint that their construction sections allow the agent to change beneficiary designations. In giving the agent authority over insurance policies and retirement benefits, the principal might have been thinking of more routine matters, such as the need for more insurance or a different type of insurance and might have been unaware that he or she had given the agent authority that could alter the estate plan or reduce his or her property.

Second, the statutory short form did not indicate that the agent may be able to engage in self-gifting or designate himself or herself as the beneficiary of the principal's insurance policies and retirement benefits.

The potential for confusion was compounded by a third factor, namely, the ambiguity of the law regarding these types of transactions. The statutory construction sections for the authority to open joint bank accounts, and to change beneficiaries of insurance policies and retirement plans, did not require on their face that in order to exercise such authority the agent also be granted authority to make gifts or vice versa. So it might appear from a reading of the statute, that the agent could open a joint bank account and make changes in beneficiary designations without having separate gifting authority. However, cases interpreting the statute appeared to hold that if the principal intends to authorize the agent to open joint bank accounts with the principal and change the beneficiaries of the principal's insurance policies and retirement benefits, the principal must grant gifting authority in addition to authority over joint bank accounts, and insurance and retirement benefits.

Finally, the statute permitted modifications to the statutory short form to authorize significant transfers; but, like the powers listed explicitly on the form, they could be buried amid masses of legal text and could fail to attract the principal's attention to the significance of these modifications.

HIPAA Privacy Rule

Chapter 644 adds the term "health care billing and payment matters" to the term "records, reports and statements" as those terms are explained in construction § 5-1502K,[8] so that an agent can examine, question, and pay medical bills in the event the principal intends to grant the agent power with respect to records, reports and statements, without fear that the HIPAA Privacy Rule would prevent the agent's access to the records. This provision is applicable to all powers of attorney executed before, on or after the effective date of Chapter 644.[9] It does not change the law forbidding the agent from making health care decisions.[10]

The General Obligations Law has been silent as to the relationship between the power of attorney, an agent's authority to access medical records under New York law, and the Privacy Rule, a federal regulation regarding individual medical information promulgated in April 2003 pursuant to HIPAA. The ambiguity about an agent's authority to access medical records under New York law arose out of several factors. Neither subdivision K on the statutory short form (power to access records), nor § 5-1502K, which construed the term "records," contained an express reference to medical records. Moreover, § 18 of the Public Health Law, which identifies qualified persons who are entitled to access to a patient's health records, does not include all agents acting pursuant to a power of attorney.[11] As a result, health care providers have refused to make records available to an agent seeking clarification of a medical bill, without the express language in the power of attorney document authorizing such release.

The ambiguity thus created is exacerbated by the HIPAA Privacy Rule, which creates national standards limiting access to an individual's medical and billing records to the individual and the individual's "personal representative." Under the Privacy Rule, health information relating to billings and payments may be available to an agent if the agent can be characterized as the principal's "personal representative" as defined in the Privacy Rule. Under the regulations, the "personal representative" for an adult or emancipated minor is defined as "a person [who] has authority to act on behalf of a individual who is an adult or an emancipated minor in making decisions related to health care."[12]

The General Obligations Law has limited the authority of the agent to financial matters, and expressly prohibits the agent from making health care decisions for the principal. The Public Health Law defines a health care decision as "any decision to consent or refuse to consent to health care."[13] "Health care," in turn, is defined as "any treatment, service or procedure to diagnose or treat an individual's physical or mental condition."[14]

The principal may grant health care decision making authority to a third party only by executing a health care proxy pursuant to § 2981 of the Public Health Law. The health care proxy law makes clear that financial liability for health care decisions remains the obligation of the principal.[15] As a practical matter, payment issues are left to the principal or the principal's agent. The Privacy Rule regarding access to records does not take into account a statutory structure such as New York's, which permits the division of the responsibilities for health care decisions and bill paying between two representatives, the health care agent and the agent.

Agent

Chapter 644 includes a statutory explanation of the agent's fiduciary duties, codifying the common law recognition of an agent as a fiduciary.[16] A notice to the agent is added to the statutory short form explaining the agent's role, the agent's fiduciary obligations and the legal limitations on the agent's authority.[17] If the agent intends to accept the appointment, the agent must sign the power of attorney as an acknowledgment of the agent's fiduciary obligations.[18]

Chapter 644 also requires that, in transactions on behalf of the principal, the agent's legal relationship to the principal must be disclosed where a handwritten signature is required.[19] In all transactions (including electronic transactions) where the agent purports to act on the principal's behalf, the agent's actions constitute an attestation that the agent is acting under a valid power of attorney and within the scope of the authority conveyed by the instrument.[20] Chapter 644 allows for the principal to provide in the power of attorney that the agent receive reasonable compensation if the principal so desires.[21] Without this designation, the agent is not entitled to compensation.[22]

Both the durable and springing durable power of attorney permit the agent to continue to act after the principal has become incapacitated. The intent behind this change to the common law was laudable – to allow an agent to act for the principal precisely at a time when the principal needs assistance, to permit the principal to plan for possible incapacity, and to eliminate the need for expensive alternatives such as a trust or guardianship. However, the principal's incapacity leaves the principal unable to monitor the agent's actions and to revoke the power if he or she is not satisfied with the agent's conduct. Thus an agent could take actions on behalf of the principal for months or years, without any supervision and not always to the benefit of the principal. Recognizing that the potential for financial exploitation was inherent in the delegation of authority to an agent, public hearings in the early 1990s led to a two-pronged recommendation for reform—educating the principal and holding the agent accountable. Changes to the law regarding the principal's

education were adopted but the statute was not revised to reflect the agent's accountability until now.

Principal

Chapter 644 adds a section to the statute that explains how the power of attorney can be revoked.[23] It expands the "Caution" to the principal so that the principal will be better informed about the serious nature of the document.[24] Chapter 644 also permits the principal to appoint someone to monitor the agent's actions on behalf of the principal,[25] and gives the monitor the authority to request that the agent provide the monitor with a copy of the power of attorney and a copy of the documents that record the transactions the agent has carried out for the principal.[26] Such accountability is consistent with the common law requirement that where one assumes to act for another he or she should willingly account for such stewardship.

Third Parties

Chapter 644 provides that third parties have the ability to refuse to accept powers of attorney based on reasonable cause.[27] The basis for a reasonable refusal includes, but is not limited to, the agent's refusal to provide an original or certified copy of the power of attorney and questions about the validity of the power of attorney based on the third party's good faith referral of the principal and the agent to the local adult protective services unit, the third party's actual knowledge of a report to the local adult protective services unit by another person, actual knowledge of the principal's death, or actual knowledge of the principal's incapacity when he or she executed the document, or when acceptance of a nondurable power of attorney is sought on the principal's behalf.[28] When a third party unreasonably refuses to accept a power of attorney, the statute authorizes the agent to seek a court order compelling acceptance of the power of attorney.[29] Chapter 644 expands the definition of "financial institution" to include securities brokers, securities dealers, securities firms, and insurance companies[30] and provides that a financial institution must accept a validly executed power of attorney without requiring that the power of attorney be on the institution's own form.[31] The third party does not incur any liability in acting on a power of attorney unless the third party has actual notice that the power is revoked or otherwise terminated.[32] A financial institution is deemed to have actual notice of revocation after the financial institution receives written notice at the office where the account is located and has had a reasonable opportunity to take action.[33]

One of the goals of the original creation of a statutory short form was to encourage financial institutions to accept such documents. The anticipated results did not follow. Many institutions instead required that the principal execute a document prepared by the institution. The enactment of the durable power of attorney actually exacerbated the situation. If the financial institution would not accept a statutory short form durable power of attorney and the principal had already lost capacity, serious difficulties could ensue because the principal could not legally execute another document. In 1986, the General Obligations Law was amended to make it unlawful for a financial institution to refuse to accept a statutory short form. Notwithstanding this statutory provision, financial institutions apparently continue to refuse to accept statutory short form powers of attorney and continue to demand that the institution's own form be completed.

"An attorney can certify a copy of a power of attorney instead of having to record it to get certified copies from the county clerk, which result protects client's privacy and limits costly trips to the county clerk's office."

Other Major Provisions

Chapter 644 increases the amount of the gifting provision to that of the annual exclusion amount under the Internal Revenue Code.[34] It adds a provision allowing gifting to a "529" account, up to the annual gift tax exclusion amount.[35] These "529" accounts, authorized in the Internal Revenue Code at § 529, are popular tax-advantaged savings accounts for education expenses. Chapter 644 amends the provisions regarding gift splitting to allow the principal to authorize the agent to make gifts from the principal's assets to a defined list of relatives, up to twice the amount of the annual gift tax exclusions, with the consent of the principal's spouse.[36]

Other Provisions

An attorney who has been instructed by the principal not to disclose the document to the agent at the time of the agent's appointment may do so without concern that it is already a legally effective document because the instrument does not become effective until the agent signs.[37] An attorney can certify a copy of a power of attorney instead of having to record it to get certified copies from the county clerk, which result protects client's privacy and limits costly trips to the county clerk's office.[38] In addition, the default statutory provisions regarding annual exclusion gifting will always be up to date with federal law.[39]

Financial institutions may demand an affidavit that the power of attorney is in full force and effect when they are asked to accept it.[40]

Investigative agencies and law enforcement officials can request a copy of the power of attorney and the records of the agent[41] and bring a special proceeding to compel disclosure in the event of the agent's failure to comply.[42]

Additionally, the basis for termination and revocation of a power of attorney and resignation of an agent are described,[43] as are the relationships among co-agents and the initial and successor agents.[44]

Conclusion

With these changes, New York's law has been updated and refined to reflect the complexities that surround the use of powers of attorney in financial and estate planning matters.[45]

Endnotes

1. 2008 N.Y. Laws ch. 644, § 2, 5-1501B; § 19, 5-1513. All statutory references for amendments to the General Obligations Law are to the sections in Chapter 644.
2. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(1).
3. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(3).
4. 2008 N.Y. Laws ch. 644, § 21.
5. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(2)(a), § 19, 5-1514.
6. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(2)(b), § 19, 5-1514.
7. 2008 N.Y. Laws ch. 644, § 19, 5-1514(5).
8. 2008 N.Y. Laws ch. 644, § 12.
9. 2008 N.Y. Laws ch. 644, § 21.
10. 2008 N.Y. Laws ch. 644, § 12, 5-1502K(1).
11. *See* N.Y. Public Health Law § 18(1)(g) (PHL) (refers only to attorneys who hold a power of attorney from an otherwise qualified person or the patient's estate specifically "authorizing the holder to execute a written request for patient information." An otherwise qualified person is the patient, Article 81 guardian, parent of an infant, guardian of an infant, or distributee of deceased patient's estate if no executor or administrator has been appointed).
12. 45 C.F.R. § 164.502(g)(2).
13. PHL § 2980(6).
14. PHL § 2980(4).
15. *See* PHL § 2987.
16. 2008 N.Y. Laws ch. 644, § 19, 5-1505.
17. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(1)(d)(2); § 19, 5-1513(n).
18. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(1)(c); § 19, 5-1513(o).
19. 2008 N.Y. Laws ch. 644, § 19, 5-1507(1).
20. 2008 N.Y. Laws ch. 644, § 19, 5-1507(2).
21. 2008 N.Y. Laws ch. 644, § 19, 5-1506(1).
22. *Id.*
23. 2008 N.Y. Laws ch. 644, § 19, 5-1511.
24. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(1)(d)(1); § 19, 5-1513(a).
25. 2008 N.Y. Laws ch. 644, § 19, 5-1509.
26. *Id.*
27. 2008 N.Y. Laws ch. 644, § 18, 5-1504.
28. *Id.*
29. 2008 N.Y. Laws ch. 644, § 19, 5-1510(2)(i).
30. 2008 N.Y. Laws ch. 644, § 2, 5-1501(5).
31. 2008 N.Y. Laws ch. 644, § 18, 5-1504(1)(b)(1).
32. 2008 N.Y. Laws ch. 644, § 18, 5-1504(3).
33. *Id.*
34. 2008 N.Y. Laws ch. 644, § 19, 5-1514(6)(1).
35. *Id.*
36. 2008 N.Y. Laws ch. 644, § 19, 5-1514(6)(2).
37. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(3)(a).
38. 2008 N.Y. Laws ch. 644, § 18, 5-1504(1)(a)(1).
39. 2008 N.Y. Laws ch. 644, § 19, 5-1514(6)(1).
40. 2008 N.Y. Laws ch. 644, § 18, 5-1504(5).
41. 2008 N.Y. Laws ch. 644, § 19, 5-1505(2)(a)(3).
42. 2008 N.Y. Laws ch. 644, § 19, 5-1510(1).
43. 2008 N.Y. Laws ch. 644, § 19, 5-1511.
44. 2008 N.Y. Laws ch. 644, § 19, 5-1508.
45. In so doing, New York's law has come in line with the laws of many other jurisdictions and the recent amendments to the Uniform Power of Attorney Act, available at http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2008_final.htm.

Rose Mary Bailly is the Executive Director of the New York State Law Revision Commission. Barbara S. Hancock is the Counsel to the Commission.

***This article originally appeared in the March/April 2009 issue of the NYSBA* Journal.**

Power of Attorney New York Statutory Short Form

(a) CAUTION TO THE PRINCIPAL: Your Power of Attorney is an important document. As the "principal," you give the person whom you choose (your "agent") authority to spend your money and sell or dispose of your property during your lifetime without telling you. You do not lose your authority to act even though you have given your agent similar authority.

When your agent exercises this authority, he or she must act according to any instructions you have provided or, where there are no specific instructions, in your best interest. "Important Information for the Agent" at the end of this document describes your agent's responsibilities.

Your agent can act on your behalf only after signing the Power of Attorney before a notary public.

You can request information from your agent at any time. If you are revoking a prior Power of Attorney by executing this Power of Attorney, you should provide written notice of the revocation to your prior agent(s) and to the financial institutions where your accounts are located.

You can revoke or terminate your Power of Attorney at any time for any reason as long as you are of sound mind. If you are no longer of sound mind, a court can remove an agent for acting improperly.

Your agent cannot make health care decisions for you. You may execute a "Health Care Proxy" to do this.

The law governing Powers of Attorney is contained in the New York General Obligations Law, Article 5, Title 15. This law is available at a law library, or online through the New York State Senate or Assembly websites, www.senate.state.ny.us or www.assembly.state.ny.us.

If there is anything about this document that you do not understand, you should ask a lawyer of your own choosing to explain it to you.

(b) DESIGNATION OF AGENT(S):

I, _____, hereby appoint:
[name and address of principal]

_____ as my agent(s)
[name(s) and address(es) of agent(s)]

If you designate more than one agent above, they must act together unless you initial the statement below.

(___) My agents may act SEPARATELY.

(c) DESIGNATION OF SUCCESSOR AGENT(S): (OPTIONAL)

If every agent designated above is unable or unwilling to serve, I appoint as my successor agent(s): _____

_____
[name(s) and address(es) of successor agent(s)]

Successor agents designated above must act together unless you initial the statement below.

(___) My successor agents may act SEPARATELY.

(d) This POWER OF ATTORNEY shall not be affected by my subsequent incapacity unless I have stated otherwise below, under "Modifications".

(e) This POWER OF ATTORNEY REVOKES any and all prior Powers of Attorney executed by me unless I have stated otherwise below, under "Modifications".

If you are NOT revoking your prior Powers of Attorney, and if you are granting the same authority in two or more Powers of Attorney, you must also indicate under "Modifications" whether the agents given these powers are to act together or separately.

(f) GRANT OF AUTHORITY:

To grant your agent some or all of the authority below, either (1) Initial the bracket at each authority you grant, or (2) Write or type the letters for each authority you grant on the blank line at (P), and initial the bracket at (P). If you initial (P), you do not need to initial the other lines.

I grant authority to my agent(s) with respect to the following subjects as defined in sections 5-1502A through 5-1502N of the New York General Obligations Law:

(___) (A) real estate transactions;
(___) (B) chattel and goods transactions;
(___) (C) bond, share, and commodity transactions;
(___) (D) banking transactions;
(___) (E) business operating transactions;
(___) (F) insurance transactions;
(___) (G) estate transactions;
(___) (H) claims and litigation;
(___) (I) personal and family maintenance;
(___) (J) benefits from governmental programs or civil or military service;
(___) (K) health care billing and payment matters; records, reports, and statements;
(___) (L) retirement benefit transactions;
(___) (M) tax matters;
(___) (N) all other matters;
(___) (O) full and unqualified authority to my agent(s) to delegate any or all of the foregoing powers to any person or persons whom my agent(s) select;
(___) (P) EACH of the matters identified by the following letters: _____

_____

You need not initial the other lines if you initial line (P).

(g) MODIFICATIONS: (OPTIONAL)

In this section, you may make additional provisions, including language to limit or supplement authority granted to your agent. However, you cannot use this Modifications section to grant your agent authority to make major gifts or changes to interests in your property. If you wish to grant your agent such authority, you MUST complete the Statutory Major Gifts Rider.

_____

_____

(h) MAJOR GIFTS AND OTHER TRANSFERS: STATUTORY MAJOR GIFTS RIDER (OPTIONAL)

In order to authorize your agent to make major gifts and other transfers of your property, you must initial the statement below and execute a Statutory Major Gifts Rider at the same time as this instrument. Initialing the statement below by itself does not authorize your agent to make major gifts and other transfers. The preparation of the Statutory Major Gifts Rider should be supervised by a lawyer.

(___) (SMGR) I grant my agent authority to make major gifts and other transfers of my property, in accordance with the terms and conditions of the Statutory Major Gifts Rider that supplements this Power of Attorney.

(i) DESIGNATION OF MONITOR(S): (OPTIONAL)

I wish to designate _____, whose address(es) is (are) _____ as monitor(s). Upon the request of the monitor(s), my agent(s) must provide the monitor(s) with a copy of the power of attorney and a record of all transactions done or made on my behalf. Third parties holding records of such transactions shall provide the records to the monitor(s) upon request.

(j) COMPENSATION OF AGENT(S): (OPTIONAL)

Your agent is entitled to be reimbursed from your assets for reasonable expenses incurred on your behalf. If you ALSO wish your agent(s) to be compensated from your assets for services rendered on your behalf, initial the statement below. If you wish to define "reasonable compensation", you may do so above, under "Modifications".

(___) My agent(s) shall be entitled to reasonable compensation for services rendered.

(k) ACCEPTANCE BY THIRD PARTIES: I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Power of Attorney. I understand that any termination of this Power of Attorney, whether the result of my revocation of the Power of Attorney or otherwise, is not effective as to a third party until the third party has actual notice or knowledge of the termination.

(l) TERMINATION: This Power of Attorney continues until I revoke it or it is terminated by my death or other event described in section 5-1511 of the General Obligations Law.

Section 5-1511 of the General Obligations Law describes the manner in which you may revoke your Power of Attorney, and the events which terminate the Power of Attorney.

(m) SIGNATURE AND ACKNOWLEDGMENT: In Witness Whereof I have hereunto signed my name on _____ _____,20____.

PRINCIPAL signs here: ==>_____

(Acknowledgment)

[STATE OF)

) ss.:

COUNTY OF)

On the _____ day of _____, in the year _____, before me, the undersigned, a Notary Public in and for said state, personally appeared _____ _____, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the person or the entity upon behalf of which the person acted, executed the instrument.

_____

Notary Public]

(n) IMPORTANT INFORMATION FOR THE AGENT:

When you accept the authority granted under this Power of Attorney, a special legal relationship is created between you and the principal. This relationship imposes on you legal responsibilities that continue until you resign or the Power of Attorney is terminated or revoked. You must:

(1) act according to any instructions from the principal, or, where there are no instructions, in the principal's best interest;

(2) avoid conflicts that would impair your ability to act in the principal's best interest;

(3) keep the principal's property separate and distinct from any assets you own or control, unless otherwise permitted by law;

(4) keep a record or all receipts, payments, and transactions conducted for the principal; and

(5) disclose your identity as an agent whenever you act for the principal by writing or printing the principal's name and signing your own name as "agent" in either of the following manner: (Principal's Name) by (Your Signature) as Agent, or (your signature) as Agent for (Principal's Name).

You may not use the principal's assets to benefit yourself or give major gifts to yourself or anyone else unless the principal has specifically granted you that authority in this Power of Attorney or in a Statutory Major Gifts Rider attached to this Power of Attorney. If you have that authority, you must act according to any instructions of the principal or, where there are no such instructions, in the principal's best interest. You may resign by giving written notice to the principal and to any co-agent, successor agent, monitor if one has been named in this document, or the principal's guardian if one has been appointed. If there is anything about this document or your responsibilities that you do not understand, you should seek legal advice.

Liability of agent:

The meaning of the authority given to you is defined in New York's General Obligations Law, Article 5, Title 15. If it is found that you have violated the law or acted outside the authority granted to you in the Power of Attorney, you may be liable under the law for your violation.

(o) AGENT'S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT: It is not required that the principal and the agent(s) sign at the same time, nor that multiple agents sign at the same time.

I / we _____, have read the foregoing Power of Attorney. I am / we are the person(s) identified therein as agent(s) for the principal named therein.

I / we acknowledge my / our legal responsibilities.

Agent(s) sign(s) here:==>_____

(acknowledgement(s))

[STATE OF NEW YORK)

) ss.:

COUNTY OF)

On the _____day of _____, in the year _____, before me, the undersigned, a Notary Public in and for said state, personally appeared _____ _____, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he / she executed the same in his / her capacity, and that by his / her signature on the instrument, the person or the entity upon behalf of which the person acted, executed the instrument.

_____

Notary Public

STATE OF NEW YORK)

) ss.:

COUNTY OF)

On the _____day of _____, in the year _____, before me, the undersigned, a Notary Public in and for said state, personally appeared _____ _____, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he / she executed the same in his / her capacity, and that by his / her signature on the instrument, the person or the entity upon behalf of which the person acted, executed the instrument.

_____

Notary Public]

2008 N.Y. Laws ch. 644, § 19, 5-1513; 2009 N.Y. Laws ch. 4 (amending effective date from March 1, 2009 to September 1, 2009).

Editor's Note: This form is a draft POA which is being distributed for comment/suggestions. If you have any comments/ suggestions, please e-mail them to Dan McMahon, NYSBA Publications Director at dmcmahon@nysba.org. A final version of the new POA form will be distributed once any necessary changes (if any) have been made. Final spacing has not been determined by the official publishers. Italics have been added to the portions of the new Statutory Short Form Power of Attorney and Major Gifts Rider that are instructional. Lines representing spaces and acknowledgments in brackets are illustrative only and have been added for clarity and convenience.

Power of Attorney New York Statutory Major Gifts Rider Authorization to Make Major Gifts or Other Transfers

CAUTION TO THE PRINCIPAL: This OPTIONAL rider allows you to authorize your agent to make major gifts or other transfers of your money or other property during your lifetime. Granting any of the following authority to your agent gives your agent the authority to take actions which could significantly reduce your property or change how your property is distributed at your death. "Major gifts or other transfers" are described in section 5-1514 of the General Obligations Law. This Major Gifts Rider does not require your agent to exercise granted authority, but when he or she exercises this authority, he or she must act according to any instructions you provide, or otherwise in your best interest.

This Major Gifts Rider and the Power of Attorney it supplements must be read together as a single instrument.

Before signing this document authorizing your agent to make major gifts and other transfers, you should seek legal advice to ensure that your intentions are clearly and properly expressed.

(a) GRANT OF LIMITED AUTHORITY TO MAKE GIFTS

Granting gifting authority to your agent gives your agent the authority to take actions which could significantly reduce your property. If you wish to allow your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.

To grant your agent the gifting authority provided below, initial the bracket to the left of the authority.

(____) I grant authority to my agent to make gifts to my spouse, children and more remote descendants, and parents, not to exceed, for each donee, the annual federal gift tax exclusion amount pursuant to the Internal Revenue Code. For gifts to my children and more remote descendants, and parents, the maximum amount of the gift to each donee shall not exceed twice the gift tax exclusion amount, if my spouse agrees to split gift treatment pursuant to the Internal Revenue Code. This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(b) MODIFICATIONS:

Use this section if you wish to authorize gifts in excess of the above amount, gifts to other beneficiaries or other types of transfers. Granting such authority to your agent gives your agent the authority to take actions which could significantly reduce your property and/or change how your property is distributed at your death. If you wish to authorize your agent to make gifts or transfers to himself or herself, you must separately grant that authority in subdivision (c) below.

(____) I grant the following authority to my agent to make gifts or transfers pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest:

_____

_____

(c) GRANT OF SPECIFIC AUTHORITY FOR AN AGENT TO MAKE MAJOR GIFTS OR OTHER TRANSFERS TO HIMSELF OR HERSELF: (OPTIONAL)

If you wish to authorize your agent to make gifts or transfers to himself or herself, you must grant that authority in this section, indicating to which agent(s) the authorization is granted, and any limitations and guidelines.

(____) I grant specific authority for the following agent(s) to make the following major gifts or other transfers to himself or herself:

_____

_____

_____

This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(d) ACCEPTANCE BY THIRD PARTIES: I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Major Gifts Rider.

(e) SIGNATURE OF PRINCIPAL AND ACKNOWLEDGMENT:

In Witness Whereof I have hereunto signed my name on _____, 20____.

PRINCIPAL signs here:

_____

(acknowledgment)

[STATE OF NEW YORK)

) ss.:

COUNTY OF)

On the _____ day of _____, in the year _____, before me, the undersigned, a Notary Public in and for said state, personally appeared _____ _____, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he / she executed the same in his / her capacity, and that by his / her signature on the instrument, the person or the entity upon behalf of which the person acted, executed the instrument.

_____

Notary Public]

(f) SIGNATURES OF WITNESSES:

By signing as a witness, I acknowledge that the principal signed the Major Gifts Rider in my presence and the presence of the other witness, or that the principal acknowledged to me that the principal's signature was affixed by him or her or at his or her direction. I also acknowledge that the principal has stated that this Major Gifts Rider reflects his or her wishes and that he or she has signed it voluntarily. I am not named herein as a permissible recipient of major gifts.

_____	_____
Signature of witness 1	Signature of witness 2
_____	_____
Date	Date
_____	_____
Print name	Print name
_____	_____
Address	Address
_____	_____
City, State, Zip code	City, State, Zip code

(g) This document prepared by: _____

2008 N.Y. Laws ch. 644, § 19, 5-1514; 2009 N.Y. Laws ch. 4 (amending effective date from March 1, 2009 to September 1, 2009).

Editor's Note: This form is a draft POA which is being distributed for comment/suggestions. If you have any comments/ suggestions, please e-mail them to Dan McMahon, NYSBA Publications Director at dmcmahon@nysba.org. A final version of the new POA form will be distributed once any necessary changes (if any) have been made. Final spacing has not been determined by the official publishers. Italics have been added to the portions of the new Statutory Short Form Power of Attorney and Major Gifts Rider that are instructional. Lines representing spaces and acknowledgments in brackets are illustrative only and have been added for clarity and convenience.

MOLST: New York State's Medical Orders to Honor the Wishes of a Seriously Ill Patient

By Judith D. Grimaldi and Tammy R. Lawlor

An 80-year old woman with a terminal illness had made clear to all those who knew her that she wanted to remain in her home and did not want any life-sustaining treatment in the event something occurred. The frail woman collapsed, her aide instinctively, and as trained, called 911, and EMS responded to her residence. Fortunately, she had her bright pink MOLST form hanging on her refrigerator. The form signed by her treating physician weeks before in consultation with her and her family stated that she did not want to be resuscitated and not to do CPR. The EMS responder immediately searched for this pink form upon entering the residence. He had been informed and trained on carrying out the MOLST medical orders and knew to look at the preferred location on the refrigerator. The responder did not revive the woman, because he reviewed said form for the medical directives. His actions honored her wishes as he had the medical orders authorized by her licensed physician. It was unnecessary for the EMS responder to contact the woman's health care agent, to conduct CPR or have her transported to the hospital awaiting the health care agent's response or, worse, provide unwanted emergency treatment and resuscitation.

MOLST is the newest addition to the end-of-life medical directives now available to our clients and to which we as elder law attorneys will be exposed. MOLST means **M**edical **O**rder for **L**ife **S**ustaining **T**reatment. As such it is our responsibility to educate and inform our clients as to the importance of the MOLST form. Although we cannot complete said forms with our client, as it is an active medical order, we can discuss said form and advise him or her of its potential value. MOLST gives our clients the power to make their wishes known, while providing the health care professionals with the authority to carry out their wishes using a medical directive. It is an agreement between a doctor and patient as a result of a proscribed decision-making process. This does not require further conversations with the patient or their health care agent at the time of the health emergency or need for treatment. It is an actionable order to be followed because it is an accurate reflection of the patient's wishes. The immediacy of MOLST as a medical order is both its strength and its possible weakness. Therefore training, education and care must accompany the implementation of MOLST to ensure it truly reflects the patient's wishes and is the result of careful consideration of all parties involved. As a medical order it is intended to be used by those who have serious health conditions and are nearing the end of life. This form is completed by a health care professional based upon the patient's wishes for life-sustaining treatment. The patient and a medical doctor licensed in the State of New York must sign the MOLST form. The form is on bright pink paper so that it can be easily identified in case of an emergency. The MOLST/DNR is not hospital or admission specific, but can be transferred from one health care setting or care level to another. The original MOLST form should travel with the patient to different care settings.

Governor Pataki signed the MOLST bill (A.8892, S.5785) establishing this pilot MOLST program on October 11, 2005 which was initiated in Monroe and Onondaga Counties. Said bill allowed for the use of the MOLST form in lieu of the New York State Nonhospital Do Not Resuscitate (DNR) form.

Governor Pataki established a carve-out for the Office of Mental Health (OMH) and Office of Mental Retardation and Developmental Disabilities (OMRDD). Under the Surrogate's Court Procedure Act § 1750-a and § 1750-b, individuals with mental illness and/or developmental disabilities with capacity are allowed to complete a MOLST form.

A Chapter Amendment (A.9479, S.6365) signed by Governor Pataki on July 26, 2006 permitted EMS to honor Do Not Intubate (DNI) instructions prior to full cardiopulmonary arrest. Use of MOLST was passed by the NYS legislature in June 2008, becoming statewide and permanent when Governor Paterson signed it into law on July 8, 2008 in the Public Health Law § 2977 (13). This action amended the public health law and allowed the MOLST form to be used in community and hospital settings and EMS services across New York State.

The MOLST tool was created by a workgroup of the Community-Wide End of Life/Palliative Care Initiative in Rochester, New York and was incorporated into the recently passed statewide program. They implemented an 8-Step MOLST Protocol to encourage and foster discussions between terminal patients, their families and their physicians. It reinforces the importance of treating these patients with dignity, respect and compassion. It provides the families with the support they need and deserve. The workgroup wanted to strongly encourage those with life-threatening illness to embrace the process of life and death. It is extremely important for the patients to engage in certain thought processes and discussions to appropriately reach decisions that they are comfortable with and that they can be sure will be carried out. With the 8-Step Protocol, it allows the individual to plan ahead, know their choices, make sound decisions and share their wishes with their family and physicians.

The MOLST form cannot be changed if the patient or doctor does not like the form. The form is consistent with New York State Law and conforms to New York State Public Health Law. The original MOLST forms underwent an extensive review process with the New York State Department of Health (NYSDOH) in 2005. The current MOLST form revised in August 2008 includes the amendment to the Public Health Law signed in July 2008.

There is a primary MOLST form and two supplemental forms available. The basic form is the "MOLST for DNR and other Life Sustaining Treatments" (see attached). The types of treatment that are included in the form are comfort care; limited medical intervention; hospitalizations and transfers; artificial nutrition and hydration; and/or antibiotics. There is sufficient room to describe the specific wishes of the individual.

One of the supplemental forms is the "MOLST for MINORS" which is completed in consultation with the parent or legal guardian. There are specific instructions regarding efforts to contact the noncustodial parent. The second supplemental form is the "MOLST for ADULTS" which is for adults who lack capacity. This form requires the physician to determine who the proper surrogate to make decisions is, and it requires the surrogate to sign before witnesses.

The MOLST is divided into sections to address each health care directive separately. Section A provides for resuscitation instructions and is equivalent to the Hospital DNR. If Section A is **not** completed, the patient will be revived. Section B addresses DNR as it applies to cardiac arrest (CPR). Section E provides for the ability to set trial periods for treatment. For example, trial periods for artificial feeding, intubations and ventilation and methods of pain relief and comfort care are provided in an easily understood method. MOLST can also limit future hospitalizations to instances when pain or severe symptoms cannot be controlled at home or in a long-term-care facility. Additional instructions can also be included to address treatment decisions concerning such care as: dialysis, implantable defibrillators and the duration of time-limited trials. The form is intended to be periodically reviewed and renewed based upon any changes in the current medical condition. An entire section F is dedicated to changes to the MOLST form. The entire MOLST form should be reviewed and renewed by a physician when the patient is transferred from one facility to another; there is a substantial change in the person's health status; or the patient's/resident's treatment preferences change.

Certain deadlines have been established outlining when the physician should review the form according to the patient's treatment setting:

- Hospital: at least every seven (7) days
- Nursing Home/Skilled Nursing facility: at least every sixty (60) days
- Nonhospital/community setting: at least every ninety (90) days

When completing the MOLST form, the issue of capacity may arise and the physician must make a determination as to capacity. Under NYS Public Health Law, before using a DNR order, a determination of capacity to consent to a DNR order must be made. For a patient who lacks decision-making capacity and does not have a valid DNR order executed, a doctor must first document the cause, nature and extent of the lack of capacity. With patients who lack capacity due to "mild dementia," the determination must be affirmed by a concurring physician before issuing a DNR order. The concurring physician does not need to be board certified or board eligible in psychiatry. Other types of patients who may lack decision-making capacity are individuals with mental retardation, developmental disabilities, head injury, delirium or mental illness. For those individuals with mental retardation or developmental disability, the concurring opinion must be provided by a physician or psychologist with special experience or training in the field of developmental disabilities. If the individual lacks capacity because of mental illness, the concurring physician must be board certified in psychiatry.

If the individual had capacity when the original MOLST form was completed, but no longer has capacity at renewal, the health care professional must rely on information in the medical record. The reviewer will seek documentation that the patient fully participated in the prior conversations which created the order. There will be a presumption that the patient had decisional capacity at the time of the MOLST completion. The Health Care Agent, if available, can also renew the MOLST with the physician and affirm the patient's prior decisions. Health care professionals are directed to take the following steps before using MOLST when the patient cannot verify the directions given in the MOLST form:

- Assess the patient's capacity at the time of signing the form.
- Review admission or transfer papers for evidence of documentation of the conversations at the original execution of the MOLST form.
- If no documentation is available, verify information through the physician who completed the MOLST form, as the physician's license and phone number are on the form.

In the event changes are not able to be made directly on the MOLST form, verbal orders are acceptable if followed later by a physician signature and documentation. Hospitals can rely solely on the MOLST form to withhold and discontinue life-sustaining treatments. The form clearly states to follow these orders first, and then contact the physician. The state's basis for the su-

perior weight given to MOLST over other directives is based on the fact that MOLST's creation was preceded by thoughtful prior discussions between the patient and the health care professionals. It is presumed that the MOLST discussions were shared with the family and the appointed surrogate. The resulting form is based on informed medical decision-making and documented patient preferences.

The MOLST form is not intended to replace traditional advance directives including the Health Care Proxy and Living Will. A Health Care Proxy and Living Will are for all adults over the age of 18. These documents apply only when the patient is unable to make his or her own health care decisions. Said documents are signed by the patient and witnessed by two individuals; however, a physician does not need to be involved in the completion of said documents. These documents are future directives and can be dormant but in existence for many years. In the alternative, MOLST is intended to apply immediately for treatment of a serious illness. MOLST is not conditional on losing decision-making capacity but is an active consent to a present situation.

In signing the legislation, Governor Paterson said, "People should be allowed as much say in their end-of-life care as they would have at any other time. This bill will allow many people who are critically ill to make enduring decisions on the care they will receive. These will be difficult decisions for every person to make, but they should have the freedom to make them." The Governor was supported by State Health Commissioner Richard F. Daines, M.D.: "I congratulate Governor Paterson on signing this bill. This will give patients more choices for end-of-life care. It expands patients' instructions beyond a do-not-resuscitate order into areas of intubation and medication, which many end-stage patients would like to control for themselves as much as possible."

As with any new form, there is bound to be some institutional hesitancy and confusion. Dr. Patricia Bomba, the Medical Director of BC/BS Excellus in Rochester, NY, who spearheaded the introduction of MOLST through the Community-Wide End of Life Palliative Care Initiative in Monroe and Onondaga Counties, is working on trainings statewide to introduce the proper use and benefits of MOLST. Dr. Bomba states, "We are encouraging implementation of MOLST through use of our comprehensive website with over 40 detailed FAQs and through a series of all day MOLST conferences for hundreds of New York State professionals. We are trying to ensure that everyone across New York State has access to the MOLST program when needed."

Elder law practitioners will need to become familiar with the form and the projected use in home, nursing homes, home care agencies, and hospitals for individuals who are facing end-of-life issues. As attorneys, it is our responsibility to encourage our clients to engage in these discussions with their family and physicians. Extensive training materials and information are readily available on the MOLST website developed by Dr. Bomba at www.CompassionandSupport.org. This site provides insightful scenarios to consider which will promote productive conversations about care choices between our clients, their families and physicians.

The concern in the elder law community is that the documentation needed to keep the MOLST accurate is too ambitious for the present chaotic medical system. The fear is that the forms will be completed as routine admission forms and not as a stimulus to necessary end-of-life decision making. Many patients arrive at nursing homes with inadequate documentation on their primary condition and general medical orders. It seems unlikely that the MOLST will survive the transfer from hospital to nursing home any better. Families often report that the patient is discharged to the facility with bare bones medical information and the family often must report the history. They are often asked by the nursing home and rehabilitation facility to sort out the medications and care issues. It is optimistic that the transferring of detailed documentation of MOLST conversations will routinely occur. Yet, it is a goal worth striving for; but we should be prepared for some failures. Thus, our clients should be warned that MOLST may need to be completed again in the nursing home setting and renewed if the end-of-life order is central to the care needed at the new facility. Many people are concerned that the MOLST will invalidate or undermine the Health Care Proxy; however, this is unfounded in that the agent is expected to be involved in this order and will be required to consent if the patient is unable to do so.

MOLST can be a welcomed source of end-of-life planning for the individual who faces a terminal illness or end-stage chronic illness where there is no hope of improvement. MOLST, when executed with the care and support of the treating physician, can ensure dignity and efficiency in the end of life treatment. The immediacy of the "Medical Order" can deliver treatment in the manner preferred and eliminate the negotiations, angst and often uncertainty which can accompany this stage of care. Copies of the MOLST form are available at www.CompassionandSupport.org. As attorneys we do not have the power to complete said forms, but we do have the power to inform and suggest that our clients engage in the process with their physicians. Look for the formal introduction of MOLST statewide as part of National HealthCare Decisions Day set for April 16, 2009.

Judith D. Grimaldi and Tammy R. Lawlor are Co-Chairs of NYSBA's Elder Law Section's Health Care Issues Committee.

SEND FORM WITH PATIENT/RESIDENT WHENEVER TRANSFERRED OR DISCHARGED

MOLST

Medical Orders for Life-Sustaining Treatment

Do-Not-Resuscitate (DNR) and other Life-Sustaining Treatments (LST)

This is a Physician's Order Sheet based on this patient/resident's current medical condition and wishes. It summarizes any Advance Directive. If Section A is not completed, there are no restrictions for this section. When the need occurs, *first follow* these orders, then contact physician. Review the entire form with the patient. Any section not completed implies full treatment for that section. ***WARNING**: If patient lacks medical decision-making capacity as a result of mental retardation or developmental disability or has a legal guardian, specific, mandatory procedures need to be followed. Review information and seek legal counsel.*

Last Name/First/Middle Initial of Patient/Resident
Address
City/State/Zip
Patient/Resident Date of Birth (mm/dd/yyyy)
Gender ☐ M ☐ F
Unique Patient Identifier (Last 4 SSN)

This form should be reviewed and renewed periodically, as required by New York State and Federal law or regulations, and/or if:

- The patient/resident is transferred from one care setting or care level to another, or
- There is a substantial change in patient/resident health status (improvement or deterioration), or
- The patient/resident treatment preferences change

Section A *Check One Box Only*

RESUSCITATION INSTRUCTIONS (ONLY for Patients in Cardiopulmonary Arrest):

(If patient/resident has no blood pressure, no pulse and no respiration) This form can be used in all settings, including community.

☐ **Do Not Resuscitate (DNR)*/Allow Natural Death** *[DNR = No CPR, endotracheal intubation or mechanical ventilation]

☐ **Full Cardio-Pulmonary Resuscitation (CPR)** [No Limitations; accepts intubation and mechanical ventilation]

* For incapacitated adults; and/or for therapeutic or medical futility exceptions; and/or for residents of OMH, OMRDD or correctional facilities, also complete relevant sections of Supplemental DNR Documentation Form for Adults. For residents of OMRDD without capacity in the community, also complete NYSDOH Nonhospital DNR form. For minor patients, also complete Supplemental DNR Documentation Form for Minors.

Section B *Patient/ Resident/ Health Care Agent or Surrogate Decision-Maker Consent for Section A*

DNR (CPR) CONSENT OF PATIENT/RESIDENT WITH DECISION-MAKING CAPACITY:

Section A reflects my treatment preferences.

Patient/Resident Signature ☐ Check if verbal consent *	Print Patient/Resident Name	Date
Witness of Patient/Resident Signature or Verbal Consent	Print Witness Name	Date
Witness of Patient/Resident Signature or Verbal Consent	Print Witness Name	Date

*Patient with capacity can provide verbal consent in the presence of two adult witnesses. Written consent requires only one witness signature. If verbal consent, one witness must be a physician. In facility, physician must be affiliated with the facility, e.g. resident physician qualifies.

Complete one of the subsections of Section B

DNR (CPR) CONSENT OF HEALTH CARE AGENT (HCA) OR SURROGATE DECISION-MAKER FOR PATIENT / RESIDENT WITHOUT DECISION-MAKING CAPACITY: This document reflects what is known about the patient/resident's treatment preferences. For Patient/Resident without decision-making capacity, or when medical futility or therapeutic exception is used, Supplemental MOLST Documentation Form MUST be completed and should always accompany this MOLST Form. If patient/resident has a legal and valid DNR previously completed while patient/resident had capacity, attach to MOLST. ☐ **Prior DNR form attached** ☐ **Supplemental Documentation Form completed**

HCA/Surrogate Signature ☐ Check if verbal consent	Print Name	Date

Relationship to Patient/Resident: _____

Witness Signature	Print Witness Name	Date

(Must witness HCA/surrogate signature or verbal/telephone consent)

Section C *Physician Signature for Section A and B*

Physician Signature for Sections A and B:

Physician Signature	Print Physician Name	Date

(Must Witness Patient/Resident Signature or obtain Verbal Consent. Resident physician signature must be co-signed by licensed physician.)

Physician License #: _____ **Physician Phone/Pager #:** _____

It is the responsibility of the physician to determine, within the appropriate period, (see below) whether this order continues to be appropriate, and to indicate this by a note in the person's medical chart. The issuance of a new form is NOT required, and under the law this order should be considered valid unless it is known that it has been revoked. This order remains valid and must be followed, even if it has not been reviewed within the appropriate time period. The **physician must review these orders** as follows: **Hospital: at least every 7 Days; Nursing Home/Skilled Nursing Facility: at least every 60 Days; Nonhospital/Community Setting: at least every 90 Days**

Section D

ADVANCE DIRECTIVES: Patient/Resident has completed an additional document that provides guidance for treatment measures if he/she loses medical decision-making capacity:

☐ **Health Care Proxy** ☐ **Living Will** ☐ **Other Written Documentation or Oral Advance Directive**

Section E

HIPAA Permits Disclosure of MOLST to Other Health Care Professionals & Electronic Registry as necessary for treatment.

ORDERS FOR OTHER LIFE-SUSTAINING TREATMENT AND FUTURE HOSPITALIZATION: (If patient/resident has pulse and/or is breathing)

Review patient's goals and patient's choice of interventions and then complete orders for appropriate subsections. Blank subsections can be completed at a later date. If patient has decision-making capacity, patient should be consulted prior to treatment or withholding thereof. *After confirming consent of appropriate decision-maker, obtain signature or verbal consent and complete the consent section of Section E, at the bottom of this page.* Physician must sign and date each subsection at the time of completion.

Physician may complete form with patient who has capacity or with Health Care Agent. Include Section E consent.

ADDITIONAL TREATMENT GUIDELINES: (Comfort measures are always provided.)

☐ **Comfort Measures Only** – The patient is treated with dignity and respect. Reasonable measures are made to offer food and fluids by mouth. Medication, positioning, wound care, and other measures are used to relieve pain and suffering. Oxygen, suction and manual treatment of airway obstruction are used as needed for comfort. *Do Not Transfer to hospital for life-sustaining treatment. Transfer if comfort care needs cannot be met in current location.*

☐ **Limited Medical Interventions** - Oral or intravenous medications, cardiac monitoring, and other indicated treatments are provided except as specified in Sections A or E. Guidance about acceptable/unacceptable interventions relevant to this patient/resident may be written under "Other Instructions" below. May consider less invasive airway support (e.g. CPAP, BIPAP). *Transfer to the hospital as indicated.*

☐ **No Limitations on Medical Interventions** - All indicated treatments are provided except as specified in Sections A. *Transfer to the hospital is indicated, including intensive care.*

MD Signature: *Date:*

Physician may complete form for incapacitated patients without Health Care Agent only with clear and convincing evidence. Include Section E consent.

ADDITIONAL INTUBATION AND MECHANICAL VENTILATION INSTRUCTIONS: If patient/resident chooses DNR, review all options if patient/resident has progressive or impending pulmonary failure without acute cardiopulmonary arrest. If patient chooses full CPR, review options of trial and long-term intubation & mechanical ventilation:

☐ **Do Not Intubate (DNI)**
(Review available symptomatic treatment of dyspnea: oxygen, morphine, etc.)

☐ **A trial period of intubation and ventilation** ☐ **A trial of BIPAP** ☐ **A trial of CPAP**
(Discuss duration of trial and document in other instructions.)

☐ **Intubation and long-term mechanical ventilation, if needed**

MD Signature: *Date:*

Physician should consult legal counsel for MR/DD patients without capacity. See Surrogate's Court Procedure Act §1750-b.

FUTURE HOSPITALIZATION / TRANSFER: (For long-term care residents and home patients)

☐ **No hospitalization unless pain or severe symptoms cannot be otherwise controlled.**

☐ **Hospitalization with restrictions outlined in Sections A and E.**

MD Signature: *Date:*

ARTIFICIALLY ADMINISTERED FLUIDS AND NUTRITION: (If Health Care Agent makes decision, it must be based on reasonable knowledge of patient/resident's wishes.)

☐ **No feeding tube** (offer food/fluids as tolerated) ☐ **No IV Fluids** (offer food/fluids as tolerated)

☐ **A trial period of feeding tube** ☐ **A trial of IV fluids**

☐ **Long-term feeding tube, if needed**

MD Signature: *Date:*

ANTIBIOTICS:

☐ **No antibiotics** (except for comfort) ☐ **Antibiotics**

MD Signature: *Date:*

OTHER INSTRUCTIONS: (May include additional guidelines for starting or stopping treatments in sections above or other directions not addressed elsewhere.)

_____

_____

_____

MD Signature: *Date:*

Section E Consent

CONSENT FOR SECTION E OF PERSON NAMED IN SECTION B: Significant thought has been given to life-sustaining treatment. Patient/resident preferences have been expressed to the physician and this document reflects those treatment preferences. As the medical decision-maker, I confirm that the orders documented above in Section E reflect patient/resident's treatment preferences.

_____ _____ _____

Signature ☐ **Check if verbal consent** **Print Name** **Date**

SEND FORM WITH PATIENT/RESIDENT WHENEVER TRANSFERRED OR DISCHARGED

RENEW / REVIEW INSTRUCTIONS	
MOLST (DNR and Life-Sustaining Treatment)	Last Name/First/Middle Initial of Patient/Resident
	Address
	City/State/Zip
	Patient/Resident Date of Birth (mm/dd/yyyy)
	Gender ☐ M ☐ F
	Unique Patient Identifier (Last 4 SSN)

RENEW / REVIEW INSTRUCTIONS

MOLST (DNR and Life-Sustaining Treatment)

This form should be reviewed and renewed periodically, as required by New York State and Federal law or regulations, and/or if:

- **The patient/resident is transferred from one care setting or care level to another, or**
- **There is a substantial change in patient/resident health status (improvement or deterioration), or**
- **The patient/resident treatment preferences change**

How to Complete the MOLST Form

- **MOLST must be completed by a health care professional, based on patient preference and medical indications.**
- **Follow the 8-Step MOLST Protocol found at www.CompassionandSupport.org.**
- **MOLST must be signed by a NYS licensed physician to be valid. Verbal orders are acceptable with follow-up signature by a physician in accordance with facility/community policy.**
- **If patient/resident has a legal and valid DNR previously completed while patient/resident had capacity, attach to MOLST.**
- **Use of original form is strongly encouraged. Photocopies, FAXes and an electronic representation of the original signed MOLST are legal and valid.**

How to Review MOLST Form:

Step 1: **Review Sections A through E**

Step 2: **Complete Section F below:**

2a. If no changes, sign, date and check the "No Change" box.

2b. For additions to Section E "optional" directives, complete the relevant subsections(s) after securing consent from the appropriate decision-maker, sign and date subsection(s) in Section E. Then sign, date and check "Changes-Additions only" in box below.

2c. For substantive changes, (i.e. reversal of prior directive), write "VOID" in large letters on pages 1 and 2, and complete a new form. Check box marked "FORM VOIDED, new form completed". (RETAIN voided MOLST form in chart or medical record, or as required by law.)

2d. If this form is voided and no new form is completed, full treatment and resuscitation will be provided. Write "VOID" in large letters on pages 1 and 2 and check box marked "FORM VOIDED, no new form." (RETAIN voided MOLST form in chart or medical record, or as required by law.)

For detailed information about the MOLST Program, view www.CompassionandSupport.org.

Section F

(Review of this Form)

Review of this MOLST Form

Date	Reviewer's Name and Signature	Location of Review	Outcome of Review
			☐ No Change ☐ Changes – Additions only ☐ FORM VOIDED, new form completed ☐ FORM VOIDED, ***no*** new form
			☐ No Change ☐ Changes – Additions only ☐ FORM VOIDED, new form completed ☐ FORM VOIDED, ***no*** new form
			☐ No Change ☐ Changes – Additions only ☐ FORM VOIDED, new form completed ☐ FORM VOIDED, ***no*** new form
			☐ No Change ☐ Changes – Additions only ☐ FORM VOIDED, new form completed ☐ FORM VOIDED, ***no*** new form
			☐ No Change ☐ Changes – Additions only ☐ FORM VOIDED, new form completed ☐ FORM VOIDED, ***no*** new form

Pages 3 & 4 contain directions and renewals only. **Continue Section F on Page 4**

B-1620 Revised August 2008 MOLST is consistent with PHL§2977(13) and cannot be altered. Page 3 of 4 MOLST-001-main-4-3

SEND FORM WITH PATIENT/RESIDENT WHENEVER TRANSFERRED OR DISCHARGED

Section F *(Review of this Form)*

Review of this MOLST Form *(Con't from Page 3)*

Date	Reviewer's Name & Signature	Location of Review	Outcome of Review
			☐ No Change ☐ Changes – Additions only ☐ FORM VOIDED, new form completed ☐ FORM VOIDED, ***no*** new form
			☐ No Change ☐ Changes – Additions only ☐ FORM VOIDED, new form completed ☐ FORM VOIDED, ***no*** new form
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B-1620 Revised August 2008 MOLST is consistent with PHL§2977(13) and cannot be altered. Page 4 of 4 MOLST-001-main-4-4

NYC Medicaid Program Revises M11q Form—Medical Request for Home Care

By Valerie Bogart

For the first time in over 20 years, the New York City Medicaid Home Care Services Program has revised the Form M11q, the Medical Request for Home Care. This is the form signed by the treating physician that describes the medical and functional need for Medicaid personal care services (a/k/a home attendant services) in New York City. Each local county's Medicaid program designs its own "physician's order" form, which is a required part of the assessment process for personal care services.[1] The M11q is New York City's version of the form.

- The new M11q can be found at http://onlineresources.wnylc.net/healthcare/docs/M-11Q_fillable.pdf (11/08 version). See explanation below re this electronic version.

1. When is new form effective, and can I still use the old M11q?

According to the NYS Department of Health "Medicaid Update," the new form has been implemented since December 1, 2008. "The Home Care Services Program will continue to accept the current M11q form until May 31, 2009. Providers may obtain a copy of the revised (11/08) M11q form by contacting the Home Care Services Program at (212) 360-5030 or (212) 360-5434. Providers are encouraged to reproduce the form for their use."[2]

2. How is the new form different from the old form?

- The main change is that the "Physician's Certification" section, which is where the treating physician signs the form, has been moved from the bottom of Page 3 to the top of Page 4, and has been significantly enlarged. This change is discussed at length below. As a result, the space for additional comments on Page 4, which was formerly the entire page, has been significantly reduced. A fifth page for comments will have to be submitted. (See Template for comment page, created by Selfhelp, posted at http://onlineresources.wnylc.net/healthcare/docs/M-11q%20Continuation.dot.
- The Physician's Certification on page 4 now has a helpful reminder that the physician's signature must be within 30 days after the medical exam of the patient, which is a requirement in the state regulation.
- Page 1:

  has a new NYC HRA logo,

  - requests that the Client's Name be stated LAST NAME first, and
  - Section II—Medical Status, page 1: ICD Code must be entered next to the primary and secondary diagnosis.

3. How has the Physician's Certification changed?

The old certification was written in a small typeface at the bottom of page 3 and provided:

> I, the undersigned physician, do certify that all the medical information contained within this form is both true and complete to the best of my knowledge and that I may be contacted for further clarification.

The new certification is written in large bold typeface and takes up nearly a third of page 4:

> I, the undersigned physician, certify that this patient can be cared for at home, and that I have accurately described his or her medical condition, needs and regimens, including any medication regimens, at the time I examined him or her. I understand that I am not to recommend the number of hours of personal care services that patient may require. I also understand that this physician's order is subject to the New York State Department of Health regulations at Part 515, 516, 517, and 518 of Title 18 NYCRR, which permit the Department to impose monetary penalties on, or sanction and recover overpayments from, providers or prescribers of medical care, services or supplies when medical care, services or supplies that are unnecessary, improper or exceed the patient's documented medical condition are provided or ordered.

4. What are at Parts 515, 516, 517, and 518 of Title 18 N.Y.C.R.R mentioned in the Certification?

These are rules that have been in effect since at least the early 1990s that provide sanctions and penalties for physicians who commit fraud, abuse, or who knew or had reason to know that services they prescribed were unnecessary, improper, or exceeded the patient's medical condition.

Part 515 Provider Sanctions—general section about sanctions against providers for "unacceptable practices," which include "Furnishing or ordering medical care, services or supplies that are substantially in excess of the client's needs." Sec. 515.2 (11).

Part 516 Monetary Penalties against providers for unacceptable practices

Part 517 Provider Audits—requires providers who bill Medicaid fee-for-service to retain records for six years

Part 518 Overpayments—Providers may be required to repay the state for inappropriate, improper, unnecessary or excessive care furnished directly or that the physician prescribed. "Medical care, services or supplies ordered or prescribed will be considered excessive or not medically necessary unless the medical basis and specific need for them are fully and properly documented in the client's medical record."

5. If these sanctions have been on the books since the early 1990s, why is HRA now highlighting them?

A high-level HRA administrator explained that a recent federal audit found that some physicians who signed M11q forms had *no record* of ever seeing the individuals described in the M11q's as patients. Signing an M11q for a patient whom the doctor never saw would, of course, be a violation of the rules and subject to sanctions. However, the new certification goes further and warns doctors against prescribing services that are "unnecessary, improper or exceed the patient's documented medical condition." As long as a physician retains records of their treatment of the patient for the requisite six years, these records reflect the patient's medical condition as described in the M11q, and the physician uses his or her reasonable professional judgment in recommending the amount of personal care services as medically necessary, he or she could not be subject to any sanctions.

- Advocates can tell physicians that the warning must meant to weed out fraud—not good faith assessments of necessary services.

6. What about the part of the Certification that states, "I understand that I am not to recommend the number of hours of personal care services that patient may require"?

Since 1992, state regulations have provided that in the physician's order (M11q in NYC), the "medical professional must not recommend the number of hours of personal care services that the patient should be authorized to receive**."** 18 N.Y.C.R.R. § 505.14(b)(3)(i)(3). The rule was unsuccessfully challenged in court, so remains on the books.[3] However, later developments in the personal care assessment process give authority for the treating physician to recommend, if not the number of hours, the "**span of time**" during which the need for personal care services arises. Also, the regulation requires that the physician "certify that the patient can be cared for at home." The physician could believe it necessary to qualify that the patient can be cared for at home provided that home care is provided during x times of day.

1. Local districts may not use "a task-based assessment when the applicant or recipient of personal care services has been determined by the social services district or the State to be in need of 24-hour personal care, including continuous (split-shift or multi-shift) care, 24-hour sleep-in care or the equivalent provided by formal or informal caregivers. The determination of the need for such 24-hour personal care, including continuous (split-shift or multi-shift) care, shall be made without regard to the availability of formal or informal caregivers to assist in the provision of such care." 18 N.Y.C.R.R. § 505.14(b)(5)(v)(d), as amended effective Nov. 1, 2001.[4]

   COMMENT: Since the physician's order (M11q) is a key part of the assessment process, the district cannot determine the need for 24-hour personal care without the treating physician's assessment.

2. While this regulation does not expressly state that the treating physician must be consulted as to whether 24-hour care is needed, other parts of the regulations state:

- The physician "must complete the physician's order form accurately describing the patient's medical condition and regimens, including any medication regimens, and the patient's need for assistance with personal care services tasks. . . ." 18 N.Y.C.R.R. § 505.14(b)(3)(i)(a)(2).

  COMMENT: Accurate description of the "patient's need for assistance" with tasks such as ambulation, transfer and toileting would necessarily include discussion of the frequency of such needs over a 24-hour span.

- "A physician must sign the physician's order form and certify that the patient can be cared for at home." 18 N.Y.C.R.R. § 505.14(b)(3)(i)(b).

  COMMENT: A physician could believe it professionally necessary to qualify this certification by certifying that the patient can be cared for at home provided that 24-hour or x hours of care are provided.

- In the statewide settlement in *Rodriguez v. Novello*, Stipulation and Order of Settlement, dated December 19, 2002, the State agreed to modify procedures for task-based assessment. The directive that implements the settlement, called GIS 03 MA/003, dated 1/24/03,[5] clarifies that "The assessment process should evaluate and document when and to what degree the patient requires assistance with personal care services tasks and **whether needed assistance with tasks can be scheduled or may occur at unpredictable times during the day or night**." In addition, the GIS provides that "**a care plan must be developed that meets the patient's scheduled and unscheduled day and nighttime personal care needs**." It also provides that personal care services include "the appropriate monitoring of the patient while providing assistance with the performance of a Level II personal care services task, such as transferring, toileting, or walking, to assure the task is being safely completed."

  COMMENT: Since the treating physician must, in the M11q, describe the "patient's need for assistance with personal care services tasks" (see above), discussion of whether these needs occur "at unpredictable times during the day or night" is a necessary part of the physician's description. Likewise, the physician should discuss whether and during what span of time the patient needs monitoring (also called "cueing," "prompting," or "contact guarding") to assure safe completion of tasks of transferring, toileting, or walking.

- Part of the settlement in *Rodriguez* applies only to New York City, since it involved claims against the NYC Medicaid program. The City agreed to modify the City's nurse's assessment form[6] so that if the nurse identifies a need for assistance with any of the three key activities of ambulating, transferring or toileting, **the nurse must "indicate the span of time** over which the assistance of a home attendant is required" or explain why assistance is not needed over a span of time.

  COMMENT: Since state regulations require that the nurse's assessment must include **"**a review and interpretation of the physician's order," 18 N.Y.C.R.R. § 505.14(b)(3)(iii)(b)(1), the physician's opinion of the "span of time" during which there are needs with ambulating, transferring or toileting would have to be considered.

COMMENT—An informal poll of advocates, including Selfhelp staff, found they have never heard of an M11q being rejected because the physician stated the number of hours that are needed, despite the 1992 regulation. We believe that if it was rejected, the case developments described above that require consideration of the "span of time" in which needs arise supersedes the regulation and justifies the physician's recommendation.

7. Can the form be completed electronically?

To our knowledge, HRA has not made the form available electronically. Selfhelp created an electronic version of the M11q which can be filled in electronically and can be downloaded at http://onlineresources.wnylc.net/healthcare/docs/M-11Q_fillable.pdf. This formatting (which is thanks to David Silva, Ass't. Director of Selfhelp's Evelyn Frank Legal Resources Program) is not a feature of the official form. Though you can download the blank form and make copies, you cannot save changes typed into the form unless you have an advanced version of Adobe Acrobat (not just the free Reader) or similar PDF program.

COMMENT PAGE: Since the Comment section on page 4 is now so short, you will probably want to attach extra comments. David Silva of Selfhelp has created a template for this extra page, posted at http://onlineresources.wnylc.net/healthcare/docs/M-11q%20Continuation.dot.

Endnotes

1. 18 N.Y.C.R.R. § 505.14(b).
2. NYS DOH Medicaid Update, December 2008, Vol. 24, Issue 14, p. 9 (posted at http://www.health.state.ny.us/health_care/medicaid/program/update/2008/2008-12.htm).
3. *Kuppersmith v. Perales*, 688 N.Y.S.2d 96 (1999), affirming 668 N.Y.S.2d 381 (App. Div., 1st Dept. 1998).
4. This regulation was amended pursuant to the Stipulation in *Mayer v. Wing*, and is known as the "Mayer-Three" exception to Task-Based Assessment. See GIS Message 01 MA/044. *Mayer v. Wing*, 922 F. Supp. 902 (S.D.N.Y. 1996), *modified in part*, unpublished Orders (May 20 and 21, 1996), Stipulation & Order of Discontinuance (Nov. 1, 1997)(Agreement to amend this regulation is in 11/1/97 Stipulation).
5. http://www.health.state.ny.us/health_care/medicaid/publications/docs/gis/03ma003.pdf.
6. Nurse's assessment is required under 18 N.Y.C.R.R. 505.14(b)(3)(iii).

Valerie J. Bogart is Director of the Evelyn Frank Legal Resources Program Selfhelp Community Services Inc. in New York City. She received her J.D. from the New York University School of Law.

Transfer Strategy Tip Under the DRA—Transfer to Adult Disabled Children

By Valerie J. Bogart and Ronald C. Mayer

Every Medicaid planning lawyer knows the exceptions to the transfer penalties for Medicaid, and the vital importance of ascertaining whether one of these exceptions exists. For one of the key exceptions, most lawyers ask the client, "Do you have any children who are disabled?" The image that this question conjures up in the minds of both the lawyer and the client is of a younger child, perhaps in his or her 30s or 40s, but definitely under age 65, who receives Social Security Disability or Supplemental Security Income benefits.

Lawyers need to think outside the box and expand this inquiry into whether the client may have a "disabled child" over age 65 for purposes of the transfer penalty exceptions. Many of our senior clients about to or planning to enter a nursing home are of very advanced age, and their children are also elderly—in their 60s and 70s. These children are now receiving Social Security retirement benefits based on having attained the age of 65. Many worked until they reached retirement age, so never received Social Security disability benefits. However, with aging, many of these elderly children are now "disabled" within the meaning of the Social Security disability standards. They are not working now, and they cannot go back to their past work because of physical and/or mental impairments.

For adult children who were not determined "disabled" before reaching age 65, a transfer to the adult child will be exempt only if the Medicaid program determines the child "disabled." You must request this determination when you file the institutional Medicaid application, asserting that a transfer is exempt based on this disabled adult child exemption. A new State Department of Health directive issued on December 29, 2008 confirms that Medicaid disability reviews must be conducted for a non-applying adult child where the applicant asserts that a transfer of assets to the child is exempt based on the child's disability. NYS DOH GIS 08-MA-036, "Disability Reviews for Adult Children over 65."[1] Prior to issuance of this GIS directive, advocates encountered instances where the Medicaid office refused to determine the disability of an adult child who was not herself applying for Medicaid.

The Process for Determining Disability

The Medicaid program has long had a procedure for determining disability for individuals who have not yet been determined disabled by the Social Security Administration.[2] The procedure is primarily used for Medicaid recipients between ages 21 and 65 who are in the "single adult or childless couple" category (S/CC). Not having children in their care who are under age 21, these individuals are eligible only for state-funded Medicaid, which does not allow spend-down of income, and uses less favorable budgeting rules than the federally funded Medicaid groups—the aged, blind and disabled, and families with children under age 21. A determination of disability for these individuals, who are often pursuing appeals of denials of Social Security or SSI disability benefits, helps both the individual and the state, by drawing down federal funding.

Many elder lawyers have become familiar with the procedure for requesting the Medicaid program to make a determination of disability when they enroll a client in the NYSARC or other pooled trust to eliminate the Medicaid spend-down for Medicaid recipients over age 65.[3] The same procedure is used to determine an adult child's disability for establishing an exemption from the transfer penalty. Two forms must be completed and submitted:

(1) LDSS-486T, or Medical Statement of Disability, which is completed and signed by the treating physician, describing diagnoses, symptoms, functional limitations, and medical history and

(2) LDSS-1151, Disability Interview, completed by client or her advocate or family member, describing the disabled child's education, work history, and functional limitations.[4]

The elder lawyer should become versed in the standards used by the Social Security Administration to determine disability, which are the same standards used by Medicaid, to present the evidence in an organized, thorough manner. The New York State Dep't of Health Medicaid Disability Manual[5] describes the five-step "sequential evaluation" process.[6] The state has expressly acknowledged that various steps of this process must be slightly modified for people over age 65, and especially those over age 72, pursuant to Social Security Administration Ruling SSR 03-3p, Evaluation of Disability and Blindness in Initial Claims for Individuals Aged 65 or Older [hereinafter SSR 03-3p].[7]

A short summary of the sequential evaluation follows.

1. *Is the allegedly disabled individual working, that is, performing "substantial gainful activity" [SGA] as defined in Social Security regulations?* If the individual is not earning an average of $980/month,

she is not performing SGA. Continue to the next step.[8]

2. *Does the individual have any severe medically determinable impairment?* If so, continue to the next step. On this factor, SSR 03-3p is helpful. It provides that "If an individual aged 72 or older has a medically determinable impairment, that impairment will be considered to be 'severe.'" Moreover, the ruling requires consideration of any impairments the individual has, including those that are often found in older individuals.

3. *Does the impairment meet or equal the medical "Listing" of impairments?* If so, the individual is disabled. The listings are criteria for clinical and laboratory signs and symptoms of impairments of the various body systems that, if met, indicate an impairment so severe that the individual is found disabled without considering his or her age, education, or work experience.[9] Advocates should review the listings applicable to the disabled adult child's impairments, and work with the physician to document the criteria. The DSS-486 form attachments track the listings. If the listings are not met, go to the next step.

4. *Does individual retain the Residual Functional Capacity [RFC] to perform past relevant work?* This step asks whether the individual can perform his or her last actual job. Social Security regulations define "relevant" work as work performed within the last 15 years. If the individual last worked more than 15 years ago, then continue to the next step. If the individual did work in the last 15 years, then the ability to meet the physical, exertional and mental demands of the relevant past work—heavy, medium, or sedentary—is assessed. If the individual lacks the RFC to return to past work, go to the next step.

5. *Does the individual meet one of the special medical-vocational work profiles that are deemed to indicate that the individual cannot work?*

   A. There are three medical-vocational work profiles that apply to adults of all ages seeking to prove disability.[10]

      (1) If the individual has no more than a marginal education (6th grade or less) and work experience of 35 years or more during which he or she did only arduous unskilled physical labor, or

      (2) If the individual is at least 55 years old, has no more than a limited education (11th grade or less), and has no past relevant work experience, or

      (3) If the individual is age 60 or older, has no more than a limited education, has a lifetime commitment (30 years or more) to a field of work that is unskilled, or is skilled or semi-skilled but with no transferable skills,

   B. SSR 03-3p establishes an additional medical-vocational profile that applies to people age 72 and over. If the individual is age 72 or over, any medically determinable impairments are deemed to be severe. If he or she is limited to "sedentary" or "light" work, has no transferable skills from any past relevant work done in the last 15 years, and is not a high school graduate, he or she is disabled.[11]

6. *If no special profile is met, then the Medical-Vocational Guidelines, known as "the grid," are used* to determine whether the individual can work, based on his or her ability to perform medium, light or sedentary work, level of education, and skill level.[12] If the result on the "grid" is unfavorable, non-exertional impairments such as allergies, environmental restrictions, and mental and sensory impairments must be considered.[13]

Case Example

Selfhelp Community Services, Inc. represented Mrs. D, who was 96 years old when she was admitted to a nursing home, having lived with her daughter, then 76 years old, for many years. Mrs. D had done no Medicaid planning, and Mrs. D transferred most of her modest cash assets to her daughter at the time of nursing home admission. Partial return of the transferred assets, with a gift and a promissory note, was the only obvious strategy. We asked whether she had any disabled children and the answer was "no." Her daughter had worked as a nurse's aide for 26 years, and retired in 1994, about 12 years before. Because she worked until reaching retirement age at 65, neither our client nor her daughter thought of her as "disabled." However, when we inquired further, we learned that the 76-year-old daughter was physically unable to return to her work, due to osteoarthritis with extensive degenerative changes in her knees and hips, chronic low back pain, and hypertension.

In the sequential evaluation process, since the daughter was not currently working, she proceeded to Step 2. The impairments described by her physician were deemed to be "severe" because of her age, under SSR 03-3p. We did not allege she met a "listing" so skipped past Step 3. For Step 4, we had to prove that she could not return to her past work as a nurse's aide, since it was performed in the last 15 years. We argued

that the exertional level of her nurse's aide work was classified as "medium," and that the medical evidence showed she could no longer lift, carry, sit and stand to the extent required. None of the special profiles in Step 5 applied, so we proceeded to Step 6, the "grid." Arguing that the medical evidence showed that she was limited to "sedentary" work, the Medical-Vocational Guidelines dictated a finding of DISABLED (Table 1, Line 201.04),[14] based on her high school education and unskilled work experience, which do not provide for direct entry into skilled work. Based on this evidence and argument, the local Medicaid program found that the transfer penalty exception applied.

Note on Problems Requesting Doctors to Complete DSS Form 486

In this case, the daughter's treating physician wrote a detailed letter describing her impairments, but refused to complete DSS Form 486. In such cases, advocates can cite the NYS Disability Manual, which provides, "While the forms . . . are not mandated, the information they solicit is generally necessary in order to make a determination of disability." Footnote 2 at page 10. Based on this provision, a detailed letter should be sufficient.

Conclusion

The state's recent directive reminding Medicaid districts that a disability determination is required for a non-applying adult child of a Medicaid applicant / recipient if the certification of disability would exclude an asset from a transfer penalty is a useful tool for Medicaid planning.

Endnotes

1. http: / / www.health.state.ny.us / health_care / medicaid / publications / docs / gis / 08ma036.pdf.
2. DOH GIS 08 MA / 004; DOH GIS 06 MA / 005.
3. NYS DOH 05 INF-01, Pooled Trusts and Disability Determinations for Individuals 65 Years of Age and Over, Apr. 19, 2005, *posted at* http: / / www.health.state.ny.us / health_care / medicaid / publications / docs / inf / 05inf-01.pdf.
4. Both forms can be downloaded at http: / / www.wnylc.net / pb / docs / DSS_486-New.pdf; http: / / www.wnylc.net / pb / docs / DSS_1151-New.pdf.
5. New York State Dep't of Health Medicaid Disability Manual, posted at http: / / www.health.state.ny.us / health_care / medicaid / reference / mdm / index.htm. Also see the Online SSA Handbook, http: / / www.ssa.gov / OP_Home / handbook / handbook.06 / handbook-toc06.html. There are also numerous legal treatises and manuals by the various legal publishing companies on Social Security Disability advocacy.
6. http: / / www.health.state.ny.us / health_care / medicaid / reference / mdm / mdm-officialpolicy.pdf at pp. 14 *et seq.*
7. http: / / www.ssa.gov / OP_Home / rulings / di / 01 / SSR2003-03-di-01.html, cited in NYS DOH 05 INF-01, *supra.*
8. http: / / www.health.state.ny.us / health_care / medicaid / reference / mdm / mdm-officialpolicy.pdf p. 41.
9. The Listings are codified in the NYS Disability Manual at http: / / www.health.state.ny.us / health_care / medicaid / reference / mdm / mdm-app1and2.pdf.
10. http: / / www.health.state.ny.us / health_care / medicaid / reference / mdm / mdm-officialpolicy.pdf at pp. 15–16.
11. Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like files and ledgers. http: / / www.ssa.gov / OP_Home / cfr20 / 404 / 404-1567.htm. Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. http: / / www.ssa.gov / OP_Home / cfr20 / 404 / 404-1567.htm.
12. NYS Disability Manual, Appendix 3, http: / / www.health.state.ny.us / health_care / medicaid / reference / mdm / mdm-app3.pdf page 6.
13. *Id.*, NYS Disability Manual, Appendix 3, pp. 2–3.
14. NYS Disability Manual, Appendix, http: / / www.health.state.ny.us / health_care / medicaid / reference / mdm / mdm-app3.pdf page 6.

Valerie Bogart is Director of the Evelyn Frank Legal Resources Program at Selfhelp Community Services, Inc. in New York City. Ronald C. Mayer has volunteered as a pro bono attorney at Selfhelp Community Services since retiring as Senior Vice President and Associate General Counsel of JPMorgan Chase in 2006.

Social Security Administration Establishes the Ticket to Work Program

By Arlene Kane

There are nearly 12 million people receiving Social Security Disability benefits in the United States. Many of these individuals, in particular those ages 19–39 and those who have a work history, do have work goals. Fear of losing health benefits provided by Medicare and Medicaid programs, as well as the loss of benefits due to the impact of strict income rules, has had a chilling effect on the work goals of these individuals. The new "Ticket to Work" program could be a shining light for those individuals who are disabled and those who may be dependent upon them.

History

The purpose of the Ticket to Work program is to provide individuals with the services and support needed to return to work. The scope of the Program is described at 20 C.F.R. § 411.100.

The Ticket to Work Regulations were specifically designed to eliminate some of the barriers deterring individuals from returning to work, thereby assisting them to once again be productive members of society. Concurrently the legislation would reduce or eliminate their dependence on Social Security Disability and / or SSI benefits, based on disability or blindness, by getting more beneficiaries back into the workplace and out of the Social Security system. This would alleviate an already overburdened Social Security system at least for some years and at best until the individual reaches retirement age.

The new Ticket to Work program became effective July 21, 2008.The development of this program took nearly six years and is continuously changing. President Clinton signed the final bill on December 17, 1999 and the Final Regulations were published May 20, 2008.

Eligibility for the "Ticket"

Only those individuals who have met the standard of "disability" set forth by the SSA and are presently receiving cash benefits through the Social Security Disability Program (SSDI) Title II or Social Security Supple Supplemental Income (SSI) Title XVI may be eligible provided they are:[1]

- Youth who have been determined disabled and awarded benefits under *Adult Rules* after age 18
- Adult Social Security disability beneficiaries who are Childhood Disability Beneficiaries (CDB), formerly referred to as Disabled Adult Children (DAC)
- Adults under age 65 who receive Social Security Income (SSI) and or Social Security Disability Insurance (SSDI)
- Resident Immigrants (legally residing)

How the Program Works

Employment Networks (EN)[2] provide the services necessary to assist beneficiaries in reaching their work goals. The Social Security Administration certifies and regulates as well as funds these Networks. Although the Social Security Administration administers the Program, a private firm, MAXIMUS, performs the day-to-day management. As program manager, MAXIMUS provides outreach, teaching, training and recruitment, and processes payments to the authorized EN.[3] The disabled individual can select an authorized service provider to assist him or her in reaching employment goals with training, vocational rehabilitation, job coaching, job readiness and transportation all as part of a planned agreement with the beneficiaries' monies paid to the EN, which is all funded by the SSA.

The Beneficiary/EN Agreement

Once receiving the ticket, the beneficiary selects an authorized EN from a list provided by the SSA. The beneficiary communicates his or her goals to the EN to determine what services will be required. Once an agreement is reached, a written Individual Work Plan (IWP)[4] is drafted and developed. This formal agreement with the EN details how the individual will utilize the services to achieve their goal.

Timely Progress

The plan (IWP) lays out the specific steps and time frames, which may involve several years. "Timely Progress" must be established as well as adherence to training rules.

> We consider timely progress toward self-supporting employment when you show an increasing ability to work at levels which will reduce or eliminate your dependence on social security benefits.[5]

As long as there is "timely progress," the individual need not be subject to any Continuing Disability Reviews (CDRs). Although the beneficiary participating in the Program may show improvement in their *impairment*, CDRs are suspended during participation in the Program.[6]

Benefits may continue for 60 months. Wage earning, however, is subject to the same effect on eligibility standards for "substantial gainful employment" whether or not the individual participates in the ticketed program. The amount of earnings, not the number of hours, is determinative.[7]

Conclusion

This article is intended to serve as an overview of the new Program. Our clients want to be productive and can now further their goals without fear of losing their medical benefits and continuing disability review while attempting to work.

It is incumbent upon us as attorneys representing disabled individuals to encourage our clients to evaluate whether the program is suitable for them.

Endnotes

1. 20 C.F.R § 411.125.
2. 20 C.F.R. § 411.300.
3. 20 C.F.R. § 411.450.
4. 20 C.F.R. § 411.180.
6. 20 C.F.R. § 411.165.
7. 20 C.F.R. § 411.155.

Arlene Kane is a registered nurse and a graduate of St. John's School of Law. She maintains an office in Roslyn, NY and practices of counsel to the law firm of Raskin & Makofsky in Garden City, NY.

A Text on Administering Special Needs Trusts

By Sharon Kovacs Gruer

Special Needs Trusts: Planning, Drafting and Administration, edited by Kevin Urbatsch and authored by 22 practitioners, many of them well-known members of the National Academy of Elder Law Attorneys, provides a primer on how to administer special needs trusts. The two-volume series, in loose-leaf form, discusses the various issues pertaining to supplemental needs trusts.

The text provides a good introduction to the various types of public assistance available and the criteria for each. The chapter on family law provides information regarding the implications of the marriage, divorce or domestic partnership of a trust beneficiary, the character of various property for purposes of matrimonial law and issues specific to support payments.

Three separate chapters deal with trust provisions, and the series provides various clauses and sample forms with explanations. This provides good information to the new practitioner, and is also helpful to the seasoned practitioner who needs to find a particular clause for a specific trust.

The taxation of special needs trusts is covered, including income tax issues, gift and estate tax issues, trustee responsibilities, and the procedures for filing and paying taxes. Another chapter deals with the accounting for a supplemental needs trust.

Two chapters are devoted to administration and distribution issues, including but not limited to hiring caregivers, purchase of a home, purchase of a vehicle and paying the expenses of a vehicle.

Trust termination is also covered, including the trustee responsibilities on termination, paying debts and expenses, accounting and distribution.

The two-volume set provides a primer on how to handle supplemental needs trusts. It provides a good introduction into this area of the law, and is also useful for checking a specific issue. Although the publication describes California law, it is helpful to New York practitioners as well.

Sharon Kovacs Gruer, Esq., LL.M., CELA, Chair of the Trust Section of NAELA, maintains offices in Great Neck, NY. Ms. Gruer holds a master's of law in taxation (LL.M.) from NYU and is Vice Chair of the Elder Law Section of NYSBA, is a member of the Council of Advanced Practitioners of the NAELA, is the Immediate Past President of the Great Neck Lawyers Association and past Chairperson of the Nassau County Bar Association Taxation Committee. Ms. Gruer also reviewed this publication for the NAELA.

Valuable Online Tools for the Special Needs Practitioner

By JulieAnn Calareso and Lisa DeKenipp

It is vital that any practitioner involved in planning for persons with special needs be familiar with what resources are available to serve their clients and their families. The Special Needs Planning committee of the Elder Law Section has devoted some of its efforts to gathering information pertaining to the various not-for-profit agencies serving the special needs community. The Committee believes that Elder Law practitioners and those working with the special needs community should be familiar with the different services available to be able to best inform clients of possible resources.

The members of the subcommittee working on this project set out to provide a comprehensive listing of the agencies and services available. However, in our efforts, we discovered that our time would be better served informing the Section's members of some already existing research tools that can point a family in the direction of needed services.

One terrific tool is the searchable database on the website for the New York State Office of Mental Retardation and Developmental Disabilities—www.omr.state.ny.us. This website has a listing, by county, of various not-for-profit agencies serving the special needs community. A geographical search can be done, as well as a search by type of service. To start a simple geographic search, start at the home page of the OMRDD website, and follow the link under "Services." Select "Map the Agencies" and follow the prompts to select a particular county, a particular service, or a combination thereof. In addition, you can search for all services within one particular county for all services within a geographic radius of a particular location. This will be most beneficial in some of the more rural areas, where it may be necessary to expand the scope of the search in order to find the most appropriate services.

This website is incredibly helpful, as it lists the various services that can be searched for. These services include: Camp, Counseling, Crisis Intervention, Day Services / Day Habilitation, Employment Services, Environmental Modifications (E-Mods) / Adaptive Equipment, Evaluation, Intake and Referral, Family Care, Family Support Services, Financial Assistance, Forensic Services, Health Care, Housing / Individual Support Services, In-Home Services, Parent Advocacy and Training, Recreation, Residential Services, Respite Services, Service Coordination, Transportation, and Waiver Services.

In addition to the terrific research tool at the OMRDD website, the New York State Office of Mental Health also has a terrific website with searchable features. This website is www.omh.state.ny.us. This website also has a "locate provider by county" feature. Starting at the home page, look at the center of the page under "Mental Health Resources." Select the second tab, called "Find a Program." Click on "Find a Mental Health Program in Your Community" and follow the prompts to enter a county and subcategory of services.

The OMH searchable directory covers five main categories of services, with 22 subcategories, as follows: Emergency (including Comprehensive Psychiatric Emergency Program and Crisis); Inpatient (including General Hospital Psychiatric IP Unit, Private Psychiatric Hospital, Residential Treatment Facility, and State Psychiatric Hospital); Outpatient (including Assertive Community Treatment, Clinic Treatment, Continuing Day Treatment, Day Treatment, Intensive Psychiatric Rehabilitation, Partial Hospitalization, and Personalized Recovery-Oriented Services); Residential (including Support Program, Treatment Program and Unlicensed Housing); and Support (including Care Coordination, Education, Forensics, General Support, Self-Help and Vocational).

In addition to offering the searchable databases on services, these two websites also have valuable information for practitioners who are familiarizing themselves with the services available to persons with special needs. The websites are very user friendly, and should be a terrific starting point for Elder Law practitioners who need to familiarize themselves with the services of OMRDD and OMH.

The Special Needs Planning Committee thanks JulieAnn Calareso of Burke & Casserly, P.C., and Lisa DeKenipp of Mazur, Carp, Rubin & Shulman for compiling this information.

Transition Planning for Children with Disabilities

By Adrienne Arkontaky

Two weeks ago, my daughter Jordan began school at a residential program in upstate New York. She is 17 and has multiple disabilities. She has lived at home until now. We are excited that Jordan is able to spend time with her peers and an incredible, nurturing staff in a fun and stimulating environment. However, we are also nervous that we no longer have control over her everyday life. This is a period of true "transition" for all of us.

When a child with disabilities approaches the age of majority, families face many challenges. It can be a very unsettling time and I believe we, as special needs planning attorneys, should be familiar with the issues families face and understand some of the options and strategies that exist to address a family's concerns We can take what I like to call a "holistic approach to special needs planning." We can offer referrals to organizations and agencies able to work with families to assist children transition into the adult world by taking into consideration the unique needs of the child and concerns of the family. Being able to address issues revolving around transition planning will add value to and distinguish your practice. A family very often looks to a legal advisor for advice on transition planning for children with disabilities, and with some research you will be able to assist.

Families of children with disabilities are often faced with decisions regarding appropriate housing for their children, post-secondary education, employment concerns, health care coverage and guardianship. I will devote this column to discussing the challenges families face and identifying possible solutions that are available to families. I will also discuss the legal protections that may be asserted by young post–high school adults with disabilities and how to invoke these protections.

In a previous column, I discussed the Individuals with Disabilities Education Act (IDEA). The IDEA protects students with disabilities until a child graduates from high school or reaches the age of 21. The exact age depends on the level of disability of the child and the program the child is enrolled in. Parents of children with disabilities are often surprised to learn that once their child leaves high school the child is no longer eligible for services and the protections under the IDEA. After high school, a young person with disabilities is protected from discrimination under Section 504 of the Rehabilitation Act (Section 504) and the Americans with Disabilities Act (ADA).

Section 504 asserts that no otherwise qualified person due to a disability may be denied participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance (29 U.S.C. § 794(a)). It should be noted that this statute applies to only private and public entities receiving federal aid. However, since almost all public and private colleges receive federal aid, most post-secondary institutions must abide by the requirements of Section 504. The federal Office for Civil Rights is responsible for enforcement of Section 504 requirements.

The Americans with Disabilities Act prohibits entities that operate places of public accommodation from discriminating against persons with disabilities by denying them full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations they provide (42 U.S.C. § 12182(a)). Discrimination, harassment, constructive dismissal and retaliation claims are brought under the ADA as well as Section 504.

It is important to remember that in suits brought under these statutes, the claimant must show that he or she is disabled and is qualified for the protections afforded. For the purposes of the ADA and Section 504, a person with a disability is anyone who has a physical or mental impairment that substantially limits one or more life activities, has a record of such impairment or is regarded as having such impairment. With respect to post-secondary education, a qualified student with a disability is one who is able to meet a program's admission, academic, and technical standards either with or without accommodation. I like to say that the ADA and Section 504 "level the playing field."

More than ever before, students with disabilities are entering colleges and other post-secondary educational programs. Colleges, universities and vocational programs are beginning to realize that they must address the needs of students with disabilities. Many institutions have developed programs geared specifically toward students with learning and other disabilities. Many post-secondary programs have departments and administrators specifically devoted to supporting and addressing the concerns of students with disabilities. We work with educational consultants who explore post-secondary options and advise families on appropriate choices for a child with special needs. They also assist families seeking appropriate housing and vocational opportunities.

Families must remember that post–high school, the young person must provide documentation "proving" they have a disability in order for the college or other educational or vocational program to consider a request for accommodation. Many post-secondary institutions will provide accommodations to students with disabilities as mandated under Section 504. Testing accommodations may include provisions such as large print, Braille, additional time, oral instruction, readers and guides. Under the statute, dormitory rooms and classrooms must be accessible. Schools must provide reasonable accommodations and there is much case law dedicated to determining what is reasonable. In one case, *Maczaczyi v. New York*, 956 F. Supp. 403 (W.D.NY. 1997) a college applicant suffered from an anxiety disorder, panic attacks and had extreme difficulty with social interaction. To accommodate the disability, the student requested that the master's program at the university be made available to him through distance learning. The admissions committee opined that the delivery of the program in that manner would alter the design of the program to the extent that it would have to be developed and approved by the state education department prior to implementation. The university did offer the student several other accommodations such as bringing a friend or advisor to class for support or allowing the student access to a separate vacant room if he felt anxious. The court found that the student failed to show that his requested accommodations were reasonable, and the court noted that the university had offered reasonable alternatives.

When students apply to colleges or other post-secondary education programs, they may obtain accommodations but they often must provide documentation from a qualified professional documenting the disability. A prospective student may choose to, but is not obligated to, provide the school with information about the disability. The disclosure of a disability is strictly voluntary. If a student would like to take advantage of academic adjustments, he or she should tell the school as soon as possible that he or she needs the accommodations. It is very important for a student and family to be proactive.

Post-secondary education programs are not required to pay for testing to prove a student has a disability so it is important that the family obtain the necessary testing prior to the time the student leaves high school. The school district may conduct the testing, which will minimize the cost to the family. If a child uses assistive technology in high school, the family should speak to the school district about the possibility of purchasing the equipment. The post-secondary program can not charge a student for the accommodations but they are allowed to ask for testing, evaluations, etc., to prove the need for the accommodation.

Although the IDEA does not extend to post-secondary education, there are some protections afforded under the IDEA that can assist with transition issues. The purpose of IDEA is to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and *prepare them for further education, employment and independent living*. In fact, the IDEA defines and provides for the implementation of transition services. In essence, transition planning for students with disabilities should began many years before the child leaves high school.

Because our firm practices in the area of special education law in addition to special needs planning and guardianship, we are able to work with families to ensure that school districts are providing transition planning to children with special needs. For those practitioners who do not focus on special education law as a part of their practice, I believe that you must raise the issue to be sure that families are aware of the need to plan for post-secondary activities and address whether the school district has appropriately addressed this issue.

Transition planning can take many forms. A student can seek accommodations in college. For special needs children, the attorney should assess whether a child needs a guardianship or whether that child can sign advance directives. When I speak to families of children approaching the age of 18, I stress the need for a competent young person to have advance directives in place. I tell the story of my 18-year-old daughter who left for college in Buffalo, New York, and unfortunately was in an accident. She had to make a trip to the emergency room while she was away. She did not have a health care directive in place and therefore I was unable to obtain information from the doctor until my daughter was able to give her permission. As you can imagine, during her next visit home, we immediately arranged for her to sign a health care proxy and power of attorney. Every practitioner should inquire whether a client's children over the age of 18 have advance directives in place. Parents are extremely thankful for the inquiry. For a child with disabilities going off to college, advance directives can serve many purposes. The young person can feel empowered but still have the security of knowing that a parent or other trusted agent can assist with decisions if need be.

A child with disabilities should apply for supplemental security income (SSI) and the services of Vocational and Educational Services for Individuals with Disabilities **(**VESID**).** In New York, VESID may be able to provide additional supports to young adults entering the workforce or post-secondary education. The Office of Mental Retardation and Developmental Disabilities (OMRDD) can offer some supports under

their waiver programs and explore housing options for individuals with disabilities. Practitioners should advise clients to seek over-age dependant health coverage for children with disabilities under a parent's private health insurance policy. A determination by the Social Security Administration of disability and a doctor's affidavit is usually enough to secure coverage. Families can seek out information from private organizations that support the needs of individuals with disabilities in obtaining supported employment options. Many agencies offer job coaches and sheltered workshop alternatives. I encourage practitioners to keep a resource library of resources in their offices.

It is important to remember that the most important aspect of transition planning is to encourage the young person with disabilities to learn self-advocacy. This can happen in different ways. A student with a disability controlled by medication should learn to self-medicate. A student with mental illness should learn the warning signs of an onset and be able to seek out the appropriate help quickly. A student with physical disabilities should take time to research programs that are easily accessible and open to the needs of such a student. Students with disabilities should seek out advisors and professionals to assist them secure the necessary supports. Parents and caregivers should strive to make the young person as independent as possible.

Finally, the most obvious assistance we can offer as special needs planning attorneys is to assist a family in protecting the child's ability to secure government benefits, through the use of proper estate planning and special needs trusts. We need to work with families to determine the cost of providing care for the child throughout the child's lifetime. Once we analyze the needs of the child and the cost of care, we can develop a life plan. This is all part of transition planning and the families you serve will recognize and appreciate your attention to the issues they face.

As always, I welcome your comments and suggestions for future articles.

Adrienne Arkontaky is an attorney with Littman Krooks LLP with offices in New York City, Westchester and Dutchess counties. Adrienne's areas of practice include Special Needs Planning, Special Education Law and Guardianship. She represents parents of children with special needs throughout New York State in Special Education advocacy matters. She is a member of the New York State Bar Association, Westchester Bar Association and Westchester Women's Bar Association. She is also a member of the Council of Parent, Advocates and Attorneys (COPAA).

Adrienne lectures to parents and organizations throughout New York State on issues affecting families of loved ones with special needs.

Guardianship News: Guardianship Can Have Unusual Uses

By Robert Kruger

Lenny is 16, incapacitated and, as of late June 2008, an orphan. His mother and my co-guardian, and co-trustee, died in her sleep one early summer night. The household consisted of a 19-year-old adopted sister, a 17-year-old brother and the mother's long-term (approx. 10 years) fiancé.

Lenny's father, probably with gold dust in his eyes (Lenny had received a substantial medical malpractice recovery) shortly after the mother's funeral filed a custody petition in Family Court for each child. Lenny and his brother had a limited and strained relationship with their father. Both expressed as clearly as each could that they most certainly had no wish to join their father, who had remarried and had his wife and young child living with him.

The fiancé wanted to be the custodian for the boys, who felt quite strongly that the fiancé should be the custodial parent. The subjective does matter here: both Lisa Friedman, who was appointed counsel to secure OMRDD services for Lenny, and I, like the fiancé . . . a lot. Between the fiancé and the father it was no contest . . . the boys had to stay. How?

First, I moved, on notice to the father, to appoint the fiancé as successor Personal Needs Guardian to Lenny's mother. The situation was laid out in full to the guardianship judge, who agreed to accept a transfer of the custody proceedings from the Family Court (slightly irregular since Lenny's brother was not the subject of a proceeding in the Guardianship Court).

Next, the Family Court Judge was advised on the adjourned hearing date of the receptivity of the Guardianship Court. The Family Court judge willingly agreed to transfer both custody proceedings to the Supreme Court. By now, the father, who is far from stupid, knew that custody was not going his way. Therefore, he withdrew both custody proceedings.

He had three strikes against him from the start: (1) a poor relationship with both sons, (2) a 17-year-old son who emphatically wanted to remain with the fiancé, and (3) both courts' desire that, having suffered the loss of his mother, Lenny should not lose his brother as well. Add a very tuned-in guardianship judge to the mix and the promise of a good outcome became the reality.

A thought: on the horizon, if Lenny's older brother files for adoption by the fiancé, can Lenny do the same? Without delving deeply into Lenny's retardation, he can convincingly state that he wants the fiancé to be his father rather than his birth father. This issue requires far more thought than I am giving it in this article. It is, however, worth noting.

Lenny is not yet a client of OMRDD; a home worker is required since the fiancé works, and other relatives are covering the home and Lenny, in particular, as needed. Therefore, the benefits are a work in progress and we are not ready to take a victory lap around the track. Still . . . the matter has a good feel to it.

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)).

Recent New York Cases

By Judith B. Raskin

SNT Recovery

The parent of an SNT beneficiary appealed to recover payments she made to Medicaid for benefits provided to her son prior to the establishment of the SNT. *In re Abraham XX*, 2008 Slip Op. 90995 (Ct. of Appeals November 20, 2008).

Abraham XX, born with severe disabilities, entered the Broome Developmental Center at the age of 2. Medicaid paid for his care. After Abraham's mother, Kathleen, settled a lawsuit on her son's behalf, Medicaid recouped its costs to March 23, 1998, the date of the settlement, in the amount of $1,707,884.95.

Litigation continued. It was not until September 12, 1999 that settlement proceeds of $2.17 million were retroactively placed in a Special Needs Trust (SNT) for Abraham's benefit. Medicaid paid the costs of Abraham's care until his death in 2003. Medicaid then claimed reimbursement from the date of the settlement in 1998 to the date of death. Kathleen paid the claim of $1.5 million in full and then asked for return of a portion of her payment. She argued that Medicaid was not entitled to reimbursement for the period from the date of settlement to the creation of the SNT (the "gap" period). Medicaid's position focused on the language of the SNT, which stated that reimbursement shall be "such amount as shall be necessary to provide reimbursement for expenditures made for medical assistance for Abraham."

The Appellate Division held that Medicaid was entitled to its full payment pursuant to the terms of the SNT. The Court of Appeals affirmed, holding that the state can recover its total costs from an SNT even though those costs were incurred prior to the creation and funding of the SNT. In addition to the plain language of the trust, Medicaid is never certain that it will recover its costs as it must wait until the death of the beneficiary to find out if sufficient funds remain in the trust. Meanwhile, the beneficiary benefits by protecting the trust funds for his use and benefit during his lifetime.

Nursing Home Payment

A nursing home sought payment of a resident's fees from the person who signed its agreement as designated representative and then gifted the resident's assets. Summary judgment denied. *New York Congregational Nursing Center v. Gilchrist*, 2008 Slip Op. 52394U, 2008 N.Y. Misc. LEXIS 6816 (Sup. Ct., Kings County November 25, 2008).

The defendant stepdaughter of a nursing home resident signed an agreement with the nursing home as "designated representative." Although the agreement requested that the resident appoint someone in this capacity to act on her behalf in financial matters, the resident never signed that she was appointing her stepdaughter. Nursing home bills accumulated while the sale of the resident's real property was pending. At the time of sale the resident was sole owner of the property as surviving tenant by the entirety. The defendant gave one-half of the sale proceeds to her child and applied the other half to a portion of the resident's nursing home bill.

The nursing home sought payment from the defendant. She had agreed that as the designated representative she would use the resident's assets to pay the nursing home.

The Supreme Court denied summary judgment as issues of fact remained. There was no account stated between the parties. Did the resident authorize the defendant to act on her behalf with the nursing home and did the defendant hold a power of attorney for the resident? The plaintiff was directed to amend the complaint to add the resident as a defendant and to add a cause of action for equitable relief with the new property owners as defendants. Their title to the property might be affected.

Article 81 Gifting Authority

Daughters of an Article 81 ward sought significant gifts from their mother's assets. Minimal gifting granted. *In re Appointment of Franchina*, 2008 NY Slip Op. 52162U, 2008 N.Y. Misc. LEXIS 6349 (Sup. Ct., Nassau County October 7, 2008).

In an Article 81 proceeding Emily Franchina, Esq., was appointed guardian for Mildred A. Mildred A.'s two daughters requested significant loans and gifts from their mother's funds, then $750,000, to alleviate their serious financial difficulties. They also sought funds from trust accounts Mildred A. had established for her grandchildren.

Mildred A. was then a resident of an assisted living facility at a cost of approximately $90,000 per year. The

guardian was concerned that if Mildred A.'s care needs increased, her $750,000 would likely be insufficient to provide for her care. Although the court recognized the financial needs of the daughters and the likelihood that Mildred A. would want to assist them, Mildred A.'s future needs had to be taken into consideration. And the court would not agree to allow the funds set aside for the grandchildren to be used to support their mothers.

The court directed the guardian to gift $12,000 to each daughter in 2007 and 2008. Because of the concern that these gifts would affect Mildred A.'s eligibility for Medicaid under the DRA, the Court's decision clearly stated that these gifts were made for a purpose other than qualifying for Medicaid.

Removal of SNT Trustee

The beneficiary of a third party SNT sought court order removing the trustee. Granted. *In re Parker*, 2008 N.Y. Misc. LEXIS 6234, 240 N.Y.L.J. 67 (Surr. Ct., New York County October 3, 2008).

The beneficiary of a special needs trust petitioned to have her brother removed as trustee. The beneficiary showed that the trustee was not providing for her needs as the trust directed. The court removed the trustee and appointed successor trustees suggested by the beneficiary.

When a will or trust does not specify the standard to be used to remove a trustee, the court looks to whether the removal would "undermine the purpose for which the trust was created. . . ."

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

A Message from the Chair

Continued from page 2

Section are seeking to have the effective date postponed through the Governor's office, Senate and Assembly agreeing to a Chamber amendment. Regardless of the outcome of our most current efforts, the changes will be effective eventually so we will be looking to address these major changes in upcoming programs and Section communications.

David Okrent and Matt Nolfo are working on a proposal to modify the CPLR to protect inherited IRAs from creditor claims. The Estate and Tax Planning Committee is proposing an amendment to EPTL 6-2.2 seeking to extend the tenants by the entirety protections in cases where husband and wife implement an estate plan that entails transferring real property or shares in a co-op apartment to a joint or separate trust. Sharon Kovacs Gruer Chairs this committee while she continues her efforts to pass legislation involving the Elective Share Statute and its interplay in planning for long-term care.

Other aspects of our legislative efforts will include our continuous monitoring of Governor Paterson's budget as it affects members of our Section and our clients. While there is nothing as sweeping as what we faced a few years ago with the Deficit Reduction Act, there are several provisions we are following. In particular, we have submitted written testimony before the Joint Fiscal Committees of the New York State Legislature, Hearing on Health Medicaid pertaining to pooled trusts and Medicaid recoupment from personal injury lawsuits. Additional testimony was submitted recommending the state give further consideration to the Compact for Long Term Care.

On the federal front, we are addressing the application of spousal impoverishment rules to the long-term home health program in the home- and community-based waiver programs. Of special concern with this item is the insistence of CMS to reverse a policy change that could impoverish thousands of our clients receiving home- and community-based Medicaid waiver services. With the help of Valerie Bogart, we have written to President Obama's administration asking for further review of this matter before such a change might be implemented in New York.

Continuing Legal Education

Several committees are working on programs to be presented in the traditional live lecture format including "Basics in Elder Law" as part of the Bar's Practical Skills Series, which will be held at six sites in New York State in early May. Additionally, the Legal Education Committee co-chaired by Ami Longstreet and Ellen Makofsky is working on a series of one- to two-hour programs to be presented online. The first of these Webinars will be on veterans' benefits. Future Webinar topics in development include Special Needs Trusts, Mental Health Issues and the new Power of Attorney statute. We will also be looking to incorporate the New York Rules of Professional Conduct which will replace our existing rules on April 1, 2009 that are particularly relevant to elder law practice. It is our goal to develop this electronic format further to make CLE credits more conveniently obtained and to cover more specialized areas that may not be suited for full- or half-day programs.

Consumer Programs

Several years ago, our Section initiated what has become known as the Mitchell Rabino National Healthcare Decisions Day. This is a program presented statewide in numerous locations wherein Section members discuss the importance and use of advanced directives with the general public. Last year, the American Bar Association began a similar program, and this year we will combine our efforts with the ABA as part of their National Healthcare Decisions Day on April 16, 2009. The staff at the New York State Bar Association does a great job securing locations and providing materials, but we can always use additional presenters. Please contact your District Delegate if you are interested in giving us an hour of your time to hold a presentation in your area.

We will continue to hold our pro bono clinics across the state as we have been doing for the past two years running. This has provided a great service to many seniors, and we are always looking for additional volunteers to help for a few hours at the sites set up by the District Delegates. For more details on dates and site locations, please contact your District Delegates directly.

Our progress on updating a new edition of the *Senior Resource Guide* is continuing with great enthusiasm as we now have lead authors on each of the *Guide*'s nine chapters. With the leadership of the Young Lawyers Section and, in particular, James Barnes and Anne Dello-Iacono, we will be compiling and editing the chapters so as to have this *Guide* available to the general public later this year.

The Financial Planning and Investment Committee, chaired by Laurie Menzies and Walter Burke, is developing a program to be presented jointly with chapters of the Financial Planning Association across the state.

The theme of the program to be made available to the public is on three financial literacy topics which they have found to be of particular interest to older New Yorkers. These include living trusts, annuities and long-term-care insurance.

Scholarship Fund

Most NYSBA members are aware of and support the New York Bar Foundations with annual donations. Our Section has agreed to expand the number of great programs and initiatives supported through the Foundation with a gift of $10,000 from our Section's surplus. The purpose of this gift is to provide funding for four years of a $2,500 scholarship to a second- or third-year law student who is enrolled in a New York State law school and is actively participating in an Elder Law Clinic at the school. For details and an application for the scholarship please contact the Bar Foundation directly. This scholarship will be effective beginning with the 2009/2010 academic year, so applications will be accepted this spring.

Upcoming Programs

As you can see, our Section members are involved with a number of different programs and initiatives and there is no shortage of new ideas or benefits for our members. Consequently, we can always use more participation, and an easy way to start is by joining us at our Spring Meeting in Poughkeepsie on April 22. As you may or may not know, our Executive Committee meetings are open to all members, so if interested join us at 6:00 pm at the Hampton Inn & Suites. Another excuse to come is our Unprogram on April 23 and 24, which is a great opportunity to meet with attorneys from around the state to discuss issues ranging from practice management to marketing to planning strategies. Program Chairs Shari Hubner and Martin Hersh have also arranged for attendees to continue the day's discussions while dining at the nearby Culinary Institute of America in Hyde Park on April 23.

As I mentioned at the start, our Summer Meeting, besides providing CLE credits, will be a celebration of our 20th year as a Section. Mike Amoruso has put together a great program and party with the help of Anthony Enea and Robert Kurre. With the help of Kathy Heider, he has also arranged a great price for us to be in Washington, D.C., at the Ritz-Carlton from July 23 through 26. I look forward to seeing you there.

Timothy E. Casserly

Section Committees and Chairs

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

Client and Consumer Issues
Lee A. Hoffman Jr.
Law Offices of Lee A. Hoffman
82 Maple Avenue
New City, NY 10956
lhoffman@LeeHoffmanNYElderlaw.com

Frances M. Pantaleo
Walsh & Amicucci LLP
2900 Westchester Avenue, Su. 205
Purchase, NY 10577
FMP@walsh-amicucci.com

Communications
Rose Mary K. Bailly
Law Revision Commission
80 New Scotland Ave.
Albany, NY 12208-3434
rbail@albanylaw.edu

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

Estate and Tax Planning
Ami S. Longstreet
Mackenzie Hughes LLP
101 South Salina Street, Su. 600
Syracuse, NY 13202
alongstreet@mackenziehughes.com

Sharon Kovacs Gruer
Sharon Kovacs Gruer, PC
1010 Northern Boulevard, Su. 302
Great Neck, NY 11021
skglaw@optonline.net

Financial Planning and Investments
Walter T. Burke
Burke & Casserly, P.C.
255 Washington Avenue Ext.
Albany, NY 12205-5504
wburke@burkecasserly.com

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

Guardianship
Anthony J. Lamberti
435 77th Street
Brooklyn, NY 11209
ajlesq@alamberti.com

Health Care Issues
Judith D. Grimaldi
Grimaldi & Yeung, LLP
9201 Fourth Avenue, 5th Fl.
Brooklyn, NY 11209
jgrimaldi@gylawny.com

Tammy Rose Lawlor
Miller & Milone, P.C.
100 Quentin Roosevelt Boulevard, Su. 205
Garden City, NY 11530
TLawlor@millermilone.com

Legal Education
Ami S. Longstreet
Mackenzie Hughes LLP
101 South Salina Street, Su. 600
Syracuse, NY 13202
alongstreet@mackenziehughes.com

Ellen G. Makofsky
Raskin & Makofsky
600 Old Country Road, Su. 444
Garden City, NY 11530-2009
EGM@RaskinMakofsky.com

Legislation
Amy S. O'Connor
McNamee, Lochner, Titus & Williams, P.C.
PO Box 459
Albany, NY 12201-0459
oconnor@mltw.com

Michael J. Amoruso
Amoruso & Amoruso, LLP
800 Westchester Avenue, Su. S-320
Rye Brook, NY 10573
michael@amorusolaw.com

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

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

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

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

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

Mental Health Law
Sharon Kovacs Gruer
Sharon Kovacs Gruer, PC
1010 Northern Boulevard, Su. 302
Great Neck, NY 11021
skglaw@optonline.net

Practice Management and Technology
David Goldfarb
Goldfarb Abrandt Salzman
& Kutzin LLP
350 Fifth Avenue, Su. 1100
New York, NY 10118-1100
goldfarb@seniorlaw.com

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

Robert J. Kurre
Robert J. Kurre & Associates, PC
1010 Northern Boulevard, Su. 232
Great Neck, NY 11021
rkurre@kurrelaw.com

Real Estate and Housing
Neil Rimsky
Cuddy & Feder LLP
445 Hamilton Avenue, 14th Fl.
White Plains, NY 10601-5105
nrimsky@cuddyfeder.com

Special Needs Planning
Vincent J. Russo
Vincent J. Russo & Associates, PC
1600 Stewart Avenue, Su. 300
Westbury, NY 11590
vincent@vjrussolaw.com

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

Trust and Estate Administration
Marie Elena Rosaria Puma
Vincent J. Russo & Associates, PC
3740 Expressway Drive South
Hauppauge, NY 11749
mepuma@vjrussolaw.com

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

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