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Elder and Special Needs Law Journal

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

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Message from the Outgoing Chair

As this is my final message as your Section Chair I would like to first express my sincere gratitude and appreciation to my fellow officers, **Fran Pantaleo, Richard Weinblatt, JulieAnn Calareso** and **David Goldfarb** for all of their help and assistance in making my term as enjoyable and successful as possible. I also wish to thank Past Chair **David Stapleton**, who was also of invaluable assistance and generous with his time. Additionally, I wish to acknowledge the efforts of two individuals who have been an integral part of our success for many years, **Lisa Bataille**, our NYSBA Section Liaison, and **Kathy Heider**, the NYSBA Director of Meetings. Their help and assistance have been immeasurable.

Clearly, the success of the Elder Law Section has been and will always be a team effort. A team comprised of its Officers, Past Chairs, Executive Committee members, Committee Chairs, Vice-Chairs and members. Our future success will be contingent upon our remaining focused on our stated goal of insuring that we are always doing all that is possible to advocate and protect the rights of the elderly, infirm and disabled.

As Section Chair, one of my first priorities was to leave the Section as fiscally sound as I found it. I am pleased to inform you that as of March 2013, the Section has a surplus in excess of $154,000 which is a bit larger than the surplus at the beginning of my term. Clearly, the efforts of all that helped make our Summer and Fall meetings a financial success played a significant role in the fiscal well-being of our Section.

This large surplus in many ways is both a blessing and a curse. Fiscally, the surplus allows us the opportunity to engage in programs and activities that we might not be able to afford. However, it also requires the Section leadership to be disciplined in determining how the surplus will be utilized. While there always appears to be an abundance of ideas as to how the surplus can be used, many of these ideas are not beneficial to our entire membership, and not in keeping with our stated mission and goals (this is the "curse" part). I am confident that our Section leaders and Executive Committee will find the appropriate projects for this surplus while also maintaining a sufficient surplus for any rainy days.

At the commencement of my term I had expressed the desire to accomplish some specific objectives, which I believed would have a direct and immediate impact upon the well-being of our members. Thanks to the support of various Committee Chairs and our Executive Committee these initiatives have been successful:

A. **Study Group Initiative—**The goal of this initiative was to develop a plan for our members who were not already participating in a study group to be able to form study groups statewide with the aid and assistance of our Section. Thanks to the efforts of our Membership Committee and its Co-Chairs, **Matt Nolfo** and **Ellen Makofsky**, approximately ten (10%) percent of our membership (214 attorneys) have expressed a desire to participate in a Study Group.

   This initiative is truly an example of a team effort, as it not only required the herculean efforts of Matt and Ellen, but, many of the members of our Executive Committee who have volunteered to act as liaisons to the Study Groups.

   As I am writing this message, Matt and Ellen have prepared an email to all who have expressed an interest in joining a Study Group, pairing them with an Executive Committee liaison who will assist them in the formation and organization of the Study Group. It is this kind of effort which helps make the Elder Law Section one of the preeminent sections of the State Bar.

B. **Unauthorized Practice of Law Task Force—**The Unauthorized Practice of Law is clearly a growing problem that will have a detrimental impact upon the practice of elder law and the general public if not vigorously monitored. Throughout the state we have heard of the proliferation of private entities, geriatric care managers and now, managed long term care providers, touting their services relevant to Medicaid nursing home and home care applications. Unfortunately, on a daily basis the general public is being provided with inaccurate, incomplete and in many instances false and incorrect advice as to their rights, obligations and planning options. All too often the general public is being saddled with the unnecessary cost of home care or nursing home care because of the lack of proper legal advice and counsel.

   While the preparation and filing of a Medicaid Application by a non-attorney is permitted, caution should be exercised by the non-attorney when handling cases that involve spousal refusal, post eligibility planning, Medicaid planning and the gifting /transfer of assets. These are circumstances which in my opinion warrant the advice and counsel of an attorney.

The goal of the Task Force has been to educate nursing homes, geriatric care managers, social workers, day care agencies, managed long term care providers and the public as to the benefits and advantages of utilizing an elder law attorney. In keeping with our stated goal, **JulieAnn Calareso** and I will be meeting with the Presidents of both the Not-for-Profit and For-Profit nursing home associations in Albany to address our concerns. Additionally, the Task Force will be soon reaching out to the Geriatric Care Managers, Managed Long Term Care providers, and other related organizations. If you are interested in assisting the Task Force please feel free to contact me.

C. **Diversity Initiative—**One of my stated goals was to insure that our Section was a strong participant in the Diversity Initiative of NYSBA President **Seymour James**. Thanks to the efforts of the Committee Co-Chairs, **Elizabeth Valentin, Tanya Hobson-Williams** and Vice Chairs, **Pauline Yeung** and **Deepankar Mukerji**, our Section prepared and submitted an impressive report describing the diversity within our Section and how our Section can improve its diversity. I am confident that in years to come the diversity within our Section will be truly reflective of the diversity within the Bar, and that our Section will be at the forefront of this initiative.

D. **Legislative Initiatives—**Our Section has been blessed with having an excellent Legislation Committee for a number of years. This past year was no exception. Thanks to the dedication, brilliance and hard work of the Committee led by **Amy O'Connor, Ira Salzman, David Goldfarb, Matt Nolfo** and **Deepankar Mukerji**, we have again defeated another legislative attempt to eliminate spousal refusal for Medicaid Homecare.

The aforestated legislative victory was soon followed by an equally impressive legislative victory which resulted in the Uniform Guardianship Act being adopted in New York. **Ron Fatoullah** was also instrumental in this endeavor. Additionally, the Legislation Committee has recently opined on the proposed redaction of certain confidential information in Guardianship proceedings and a change in a real property tax abatement laws on co-ops and condos in New York City, which is no longer available to those properties owned in a trust or subject to a life estate.

While it's inevitable that we will face many legislative challenges in the future, it is also clear that as long as our Legislation Committee is led by dedicated and motivated Elder Law Section members, we will have many more legislative victories in our future.

It would require a significant portion of this edition of the *Journal* for me to thank all Committee Chairs, Vice-Chairs, and members for their efforts and numerous successes. However, I believe that a few of the Committees and their leaders deserve special recognition:

(a) **Mediation Committee—**Co-Chairs **Laurie Menzies** and **Judie Grimaldi,** through hard work and persistence, successfully organized and held a four-day Mediation training program for our members wishing to become mediators. The program was sold out and there are now plans are in the works to have an upstate mediation training program;

(b) **Mentoring Program—**Co-Chairs **Joan Robert** and **Tim Casserly** have for the second year successfully paired thirty (30) mentees with mentors. If you are interested in being a mentor or a mentee please feel free to contact Joan or Tim;

(c) **Elder Abuse Special Committee—**Chair **Joy Solomon** brought to the attention of our Section the need for elder law attorneys to pay special attention to the issue of potential physical and financial abuse of seniors. As a result, we have formed this special committee to learn how we can become more proactive when confronted with these issues;

(d) **Publication Committee—**Co-Chairs **Adrienne Arkontaky** and **David Kronenberg** and the committee members have taken our *Journa*l to new heights. Each and every edition is interesting, educational and entertaining. They have helped insure that our Section has a quality publication for years to come.

In conclusion, it has been truly a privilege and honor to serve as your Chair. I have learned much in the past year about the dedication and perseverance of our Section members to our mission as elder law attorneys. I look forward to working with all of you for years to come.

Anthony J. Enea

Message from the Incoming Chair

I begin my term as Chair of the Elder Law Section with a great deal of excitement and enthusiasm, along with a bit of trepidation. It has been my pleasure to be a member of the Elder Law Section of the New York State Bar Association since its inception. The New York State Bar Association was one of the first in the country to include a Section or Committee dedicated to the practice of elder law. The Elder Law Section was formed in 1991 and has grown to over 2,700 members. We are the fifth largest Section of the New York State Bar Association.

As I mentioned in my brief remarks at the Annual Meeting, Elder Law is my “family business.” My husband, Robert Freedman, is a founder of the National Academy of Elder Law Attorneys and one of the first Chairs of the Elder Law Section of the New York State Bar Association. Bob and I are not the first married couple to have both served as Chairs of a Section of the New York State Bar Association. However, we may be the only married couple in which both members have been Chairs of the same Section, without practicing together. Our decision to practice the same area of law but in different firms has played a significant role in the success of our marriage of over thirty years. I like to joke that following Bob as Chair of the Elder Law Section allows me to have the last word, as I have in all other areas of our marriage. However, in all seriousness, I know that I will rely tremendously on Bob’s wisdom and judgment in my year as Chair. Bob has always been my standard-bearer for what it means to practice law with grace, intelligence and the highest standards of personal and professional integrity.

The Bylaws of the Elder Law Section describe the mission of the Section as follows:

> (a) to bring together for furtherance of their mutual interests such members of the New York State Bar Association as are interested in Elder Law; (b) to plan and conduct such continuing legal education programs, collect, publish and distribute such educational and professional materials and undertake such other and diverse activities authorized from time to time by the Association and the officers and Executive Committee of the Section as shall enhance the competence and skill of lawyers engaged in the practice of Elder Law and improve their ability to deliver the most efficient and highest quality services to their clients and thereby (c) to establish a clearing house for the Bar and the public on legal issues relating to the elderly.

In my humble opinion, my predecessors as Chairs and Officers of the Elder Law Section have done a phenomenal job of fulfilling this mission over the past twenty-two years. The Elder Law Section has provided me with the tools that I have needed to grow my practice and to provide my clients with high quality legal services. We are a tremendously collegial and friendly group of attorneys. The friendships that I have made through regular attendance at Section meetings and continuing education programs have enabled me to develop a circle of trusted colleagues that I turn to with confidence when a thorny legal or ethical problem arises in my practice. Moreover, the collective experience of our members in dealing with the challenges faced by our clients has enabled the Elder Law Section to advocate for the needs of the elderly and those facing chronic and debilitating illnesses with the legislature and governmental officials.

It will indeed be a challenge to take over leadership of the Section from the able hands of Anthony Enea, our outgoing Chair. Anthony is one of the hardest working people that I know. His dedication to development of the practice of Elder Law and the needs of our members is unparalleled. Over the years I have received many emails sent to me by Anthony at 11 p.m. and over the weekend. I have come to the conclusion that he never sleeps or has a doppelganger. He has set high expectations for me and my fellow officers, but never higher than the standards he sets for himself. I am privileged to call Anthony my friend and colleague and would like to take this opportunity to thank him publicly for his guidance and encouragement over the past several years.

I would also like to take this opportunity to thank the past Chairs that I have been privileged to serve under during my tenure as an Officer of the Section: Tim Casserly, Michael Amoruso, Sharon Kovacs Gruer and David Stapleton. I have learned a tremendous amount about dedication and leadership from them. I am fortunate that my term as Chair will enable me to work together with a complement of tremendously accomplished and organized fellow Officers: Richard Weinblatt, JulieAnn Calareso, David Goldfarb and Martin Hersh. I know that I can count on them to keep my feet on the right path and the needs of our members and clients always first on my mind.

The success of our Section depends upon the hard work and contributions of our Executive Committee and the many Committee Chairs, Vice-Chairs, Liaisons, District Delegates and dedicated members who help us to achieve our goals. There is much work to be done and we cannot move the ball forward without active participation from the members of our Section who volunteer to positions of responsibility. By the time this article goes to press, I will have appointed Committee Chairs and Vice-Chairs and solicited your recommendations regarding ways that we can better serve our members.

During my tenure as Chair, I intend to continue the following initiatives begun by my predecessors:

A. Continuing efforts to improve the diversity of our membership. We have risen to the challenge posed by former NYSBA Presidents Vincent E. Doyle, III and Seymour E. James to make our Section as inclusive and diverse as possible. Over the past year, we have striven to quantify the extent of diversity in our Section and to identify the steps we can take to improve in this area. Although we have achieved a high degree of inclusiveness of women in leadership roles within our Section, we need to improve the participation of attorneys of diverse ethnic and racial backgrounds among our committees and our leadership. We will also be making efforts to communicate that we are welcome to members of all sexual orientations. Our efforts to diversify our membership will strengthen our ability to serve all seniors and individuals with disabilities.

B. We will continue the work of our Membership Committee to support the growth of our members through our Study Group Initiative. We have identified attorneys throughout the state who desire to participate in a study group and have matched these attorneys with an experienced practitioner in each district who has agreed to serve as a mentor to the new study group for the first year.

C. We will continue the efforts of our Mentorship Committee, which pairs attorneys who are newly admitted or new to the practice of Elder Law with experienced attorney mentors. It is hoped that this initiative will enhance our Diversity and Membership initiatives.

D. We will continue the work of the Unauthorized Practice of Law Task Force begun by past-Chair, Anthony Enea. We will focus our energies on education of nursing home administrators and geriatric care managers regarding situations which justify engagement of an elder law attorney. We hope to develop a pamphlet which can be distributed to consumers about the benefits of using an elder law attorney in the Medicaid eligibility process.

E. We will continue to develop high quality continuing legal education programs which meet the needs of our members. We will continue to provide programs that combine the latest developments in the law with content that will support the management of your practice. We will continue to explore new manners of delivering information to our members through regular CLE programs, Section programs, webinars, e-blasts and our listserve.

F. We will continue to actively monitor legislative developments and to advocate, with the support of the New York State Bar Association, to promote legislative initiatives which benefit our members and our clients. Our Legislation Committee continues to be one of the hardest working committees, thanks to the efforts of Chairs Amy O'Connor and Ira Salzman and the many members who have worked diligently on our legislative agenda. We anticipate that we will need to remain diligent in our efforts to defeat continuing proposals to eliminate spousal refusal for community Medicaid.

G. Although we are one of the youngest sections of NYSBA, our members are growing older. Only 20% of our members are under the age of 45 with more than 58% of our members over the age of 55. We need to encourage young attorneys to consider elder law as an exciting and potentially profitable practice area. To do this, we need to reach out to law school professors and students and provide speakers and mentorship for students and newly admitted attorneys. Our population is aging and there continues to be a need for well-qualified and well-trained elder law attorneys. We need to assure that this need will continue to be met as those of us who built this practice area begin to transition to our own retirement.

H. We will be examining our website with an eye to re-vamping and updating the content that is available to the general public and to our members. This effort will be coordinated with the upcoming update of the NYSBA website. We will consider implementation of an Elder Law Section blog which will be updated with regular contributions from our members and will be accessible to the general public.

In addition to continuing these initiatives which began during the terms of my predecessors, I will explore non-traditional ways to support the personal and emotional lives of our members. Long hours, time spent in the office instead of with family, financial pressures, the pressure to meet billable hours and to make partner, even the low esteem in which lawyers are held by the public, all contribute to the stress of being an attorney. Attorneys struggle with depression, alcohol and substance abuse at rates which exceed many other professions. There is no reason to believe that the members of our Section are more immune to these stressors than attorneys who practice in other areas. Over the coming year, I hope to shine a spotlight on our need provide emotional support to our members. We will have an optional breakfast meeting on stress management at our Summer Meeting. I will assure that our summer and fall programs include a meeting of the Friends of Bill W. I hope to draw upon the expertise of NYSBA's Lawyer Assistance Program as we explore ways in which we can support our members.

Lastly, I believe the time has come to re-examine the name and mission of our Section. A significant portion of our members devote a substantial portion of their practice to the legal problems of the disabled and their family members, in addition to the legal problems of the elderly. We draft Supplemental Needs Trusts to assure that inheritances will be protected for loved ones with disabilities. We commence Article 17A guardianship proceedings to assure that family members will be able to make legal and financial decisions for children and siblings with developmental disabilities. We settle Medicare claims and Medicaid liens imposed against personal injury lawsuits and assist our clients to create self-settled trusts which will allow them to keep the valuable government benefits which enable them to remain in the community. We counsel clients and their family members about a myriad of governmental benefits which are available to individuals with disabilities. We advocate for the educational rights of children with disabilities and chronic health conditions. We represent clients in Article 81 guardianship proceedings involving individuals with psychiatric illnesses. Our areas of practice go far beyond the confines of "elder law." Last year, we changed the title of our quarterly publication to the *Elder and Special Needs Law Journal*. I believe it is time to examine changing the name of our Section as well. I will be forming a task force to examine this issue in more detail. I believe that re-naming our Section will provide our members with an enhanced ability to market our practices to the public we serve. I hope that this re-branding will also bring new energy and additional members to our Section who may not have realized that we have expertise in this area. Our Fall Meeting on October 31 and November 1 in Albany will be entirely dedicated to special needs practice. I hope this will be an opportunity to highlight this area of our practices.

My year as Chair will not be fruitful unless I am able to draw upon the energies and enthusiasms of our members. If you are interested in becoming more involved in the Section, please take the time to contact me, one of the other officers or one of our committee chairs or vice-chairs. We are always looking to identify new leaders for our Section. If you would like to become more involved in our Section, please identify yourself to myself, my fellow Officers and the Chairs and Vice-Chairs of our many committees and task forces. Volunteer to speak at a local continuing legal education program or one of our Section meetings. Volunteer to participate in a committee or to write an article for our *Journal*. We need and encourage your involvement.

We welcome your involvement. I can be reached at 914-251-1115 or fmp@walsh-amicucci.com. I am looking forward to the challenges and rewards of the coming year.

Frances M. Pantaleo

Message from the Co-Editors in Chief

Welcome to ***your*** *Journal*! We hope you are enjoying your summer thus far. As many of you know, this is the season where we welcome the new Section Officers of the Elder Law Section and give a wholehearted thank you to those who just served. Here at the *Journal* we would like to especially thank the outgoing Chair Anthony J. Enea for his dedicated and astute leadership of our Section. We specifically appreciate Anthony for being a great supporter of our work here at the *Journal*. We congratulate Frances M. Pantaleo as the new Chair of the Elder Law Section and look forward to working with her to support her goals and initiatives. Please take the time to thank Anthony and congratulate Fran when you see them at upcoming events.

Before delving into this issue we would like to announce the winners of the first *Elder and Special Needs Law Journal Diversity Writing Competition*. This competition was open to all students attending an accredited law school in New York State and recent law graduates seeking employment. We thank all of the authors for their submissions. We are pleased to congratulate Gloria R. Tressler from Pace University School of Law, for her article, *Status of Liberty Rights for Persons with Mental Retardation in View of the Structure and Reporting Requirements of the SCPA Article 17-A* and Logan M. Cook from Albany Law School for her article, *Domestic Abuse of the Elderly: Observations, Explanations and Recommendation*s. Both of these articles will be published in our Fall 2013 issue and; in addition, Gloria and Logan will each receive a $500 prize and a complimentary one-year membership in the Elder Law Section. Please introduce yourself to these fine young advocates and new members of our growing Section.

Now let's get to our Summer issue…

This issue begins with a fitting tribute and memorial to Honorable Joel K. Asarch, written by Joan Lensky Robert, Esq., a past Chair of the Elder Law Section. Judge Asarch was an intelligent and compassionate jurist who was also a dear friend of our Section. He will be sorely missed.

Next, we include an informative and extremely practical article, co-written by Lawrence J. Peck, Esq. and Peter Aronson, Esq., entitled *Estate Planning 2013 and Beyond*, which examines the American Taxpayer Relief Act of 2012 in relation to the practice of estate planning. We then include two articles related to real estate issues. First an article by Wayne R. Bodow, Esq. entitled *Foreclosure Settlement Strategies for Seniors*. Mr. Bodow is a repeat contributor to the *Journal* and we thank him for an in-depth piece on a difficult subject. Second, an article by Lori R. Somekh, entitled *Reverse Mortgages: Dispelling the Myths*, which should be of great interest to many of us representing clients who seek options for remaining in their homes.

We include two pieces which highlight some of the vital advocacy work of members of our Section. First, David Goldfarb, Esq. offers *Changes in the 2013 New York Budget Bill* to provide a brief summary of key components of the final Budget Bill. Our Legislation Committee deserves our sincere gratitude for its tireless work lobbying the State Legislature on issues, such as Spousal Refusal, that are so vital to our clients. Next, we include the Executive Summary from *New York 2012 Managed Long Term Care Report: An Incomplete Picture*, co-written by Valerie Bogart, Esq., Trilby de Jung, Esq. and Leah Farrell, Esq. on behalf of the Coalition to Protect the Rights of New York's Dually Eligible. Due to publishing limitations we could not include the entire report, which can be found at http://www.wnylc.com/health/download/401/. Please take the time to review this critical analysis of the State Legislature's reporting requirements for Managed Long Term Care Plans. We thank these advocates for their work on behalf of our clients and we ask our readers to support their organizations in any way possible.

We include three articles related to the subject of community Medicaid and specifically home care. Mia Kandel, Esq. and Carolyn Silver, Esq. contribute their article entitled, *The Importance of Using Pooled Supplemental Needs Trusts in the New Era of Medicaid Managed Long Term Care*, an informative piece for any advocate representing clients in the area of community Medicaid benefits. Doug Goggin-Callahan, Esq. provides a timely article entitled, *Coverage Confusion: Untangling Myths About the Medicare Home Health Benefit,* and finally, Lory Alissa Skwerer, Esq. examines family relations in her article entitled, *Knowledge of Family Dynamics: Useful or Not When Your Client or Your Client's Parent Is Receiving Home Care?*

Our featured "guest" writer in this issue is Eric G. Mart, Ph.D., ABBP (Forensic) from New Hampshire. In his article entitled *Problems in the Assessment of Testamentary Capacity*, Dr. Mart provides a unique perspective on this challenging topic familiar to all of our members. We thank Dr. Mart for reaching out to us to contribute to our publication.

We close out this issue with three pieces from long-time contributors to the *Journal*. Judith B. Raskin, Esq. once again keeps us updated with her column *Recent New York Cases*; David R. Okrent, CPA, Esq. provides us with his column, *Recent Tax Bits and Pieces*; and finally, Natalie Kaplan, Esq. continues her series of interviews with interesting practitioners of our Section with a feature on litigation expert René Reixach, Jr., Esq.

We continue to encourage Elder Law Section members to contribute to the *Elder and Special Needs Law Journal*. We believe that Section members have a duty to the community at large to educate, advocate and share ideas with each other. As we have stated before, there is no better way to accomplish this than contributing to this *Journal*. We welcome all submissions and ideas.

Thank you for reading!
Adrienne and David

Remembering Hon. Joel K. Asarch

The funeral home was overflowing—the main chapel, three other rooms and the street were filled with people who came to acknowledge the passing of a great man, Honorable Joel K. Asarch. The Judiciary was there, including Chief Administrative Judge A. Gail Prudenti. Elder Law attorneys were there, taking time from their schedules to honor a kind and compassionate jurist. Incapacitated people were there to pay homage to their protector. Court personnel were there to acknowledge the passing of a great presence in the courts. And, of course, family and friends were also there, grieving from their personal loss. The death of Joel K. Asarch was a blow to all who knew him and to all whom he touched.

The Elder Law Section lost a wonderful friend on March 3, 2013. The principal judge hearing Guardianship matters in Nassau County, he participated in numerous Bar Association programs, generously conveying his knowledge with humor and intelligence. Justice Asarch attended Section meetings, presented at the programs and remained approachable to the practitioners. This distinguished jurist bridged the gap between the judiciary and the practicing bar, creating an open dialogue with his friendly demeanor.

Joel K. Asarch packed a very full life into sixty years. A graduate of Baldwin High School, he received his undergraduate degree and Master's in English from the University of Pennsylvania. His thesis was on Edgar Allan Poe. His leisure reading was eclectic—science fiction and fantasy among his preferred genres. Instead of pursuing a Ph.D. in literature, he went to NYU and earned his law degree. He then joined the "family business." Asarch & Asarch was a firm headed by father and son, practicing most aspects of civil law.

Civic minded Joel K. Asarch became active in the Nassau County Bar Association. His writing ability made his monthly column on the CPLR one of the most entertaining and instructive in the *Nassau Lawyer*, incorporating his family and his law practice in narratives that illustrated legal issues. He served as Dean of the Nassau Academy of Law, initiating the innovative Dean's Hour, where one could lunch and learn, among his many accomplishments. He served as a delegate from the Nassau Bar to the NYSBA House of Delegates and then was elected President of the Nassau County Bar Association. He led with humor, grace and intelligence, qualities he also demonstrated when serving as Corporation Counsel for the City of Long Beach.

A natural teacher, Joel K. Asarch taught Elder Law, New York Practice and Pre Trial Litigation at Touro College School of Law. There his hypotheticals often reflected his sense of humor and eclectic literary taste. Students were asked, for example, to prepare pleadings while representing claims by The Three Bears against Goldilocks. A brilliant mind able to convey difficult ideas in a concrete manner—qualities perfect for the judiciary.

In 2000 Joel K. Asarch was elected District Court Judge in Nassau County. Having been a Court Examiner and experienced Conservatorship/Guardianship attorney, he was then appointed Acting County Court Judge to handle the majority of the Guardianship cases in Nassau County. There he compassionately decided cases with thorny legal issues, never losing sight of the mission of Article

81—providing for the safety of an Incapacitated Person while maintaining the dignity and as much independence of that person as possible. Elected to the 10th judicial district Supreme Court in 2006, he became legendary in the courthouse for his warm demeanor and quirky neckties. As he often noted, wrestling with the issues and working to reach the best solution for Incapacitated Persons often "twisted his kishkas," a Yiddish phrase that expressed the gut-wrenching nature of the Guardianship Part. He worked late into the night and on weekends and holidays to write decisions and move his caseload along.

When the news of his passing appeared on the Elder Law Section listserve, our members were quick to share their sorrow and show their admiration. The testimonials noted "I knew him as a legal expert and passionate advocate"; "We need people like Judge Asarch to remind us about what really matters sometimes…. We come as empty slates but we leave as heroes to those around us." "The qualities that people have extolled about him are not simply about his stature and knowledge; rather his humanity and compassion"; "I'm not sure he ever gave himself a break and stopped thinking about the people who came into his courtroom; Just an amazing judge and a wonderful person." "My favorite thing about Judge Asarch, aside from his ties, was how he spoke to the non-attorneys who came before him"; "Judge Asarch brought a sense of humanity to the Courtroom."

The loss that the Elder Law Section members feel, of course, is minor compared to the void left in his family. His children reflect some of his best qualities. Son Steven, 21, is a full-time student at Baruch College who does stand-up in New York City comedy clubs. Michelle, 19, attends SUNY Binghamton. In addition to her academic achievements, she is a talented artist whose works often embody the fanciful. His lovely mother, Helen, and his two sisters and their families and schnauzers all miss the young spirited patriarch. And, of course, his many pets feel his absence—who else will take out the hamsters and play with them and who else will care so well for the fish?

The answer, of course, is that his wife, Malky, will. She carries on with her sense of humor and faith intact. Hon. Joel K. Asarch was truly a "mensch on the bench"—a term coined by Malky during his 2006 election campaign that reflects the warm human being who did so much good and who left us much too soon. In his memory, the Elder Law Section has renamed its scholarship awarded annually to a second-year law student who has demonstrated an interest in Elder Law in his honor. The Hon. Joel K. Asarch scholarship reflects the strengths and values of this consummate teacher, jurist, thinker and just man whom we will miss but not forget.

—Joan Lensky Robert

Joan Lensky Robert is a member of Kassoff, Robert & Lerner, LLP in Rockville Centre. She is a past Chair of the Elder Law Section. Malky Asarch works in her firm.

Estate Planning 2013 and Beyond

By Lawrence J. Peck and Peter Aronson

Lawrence J. Peck

When the dust settled on the fiscal cliff on January 2, 2013, Congress had approved and President Obama signed into law the American Taxpayer Relief Act of 2012 (ATRA). ATRA maintained the favorable framework of estate, gift and generation-skipping transfer (GST) tax established under the Tax Relief, Unemployment Reauthorization, and Job Creation Action of 2010 (TRA 2010), which had been set to expire on December 31, 2012. Unlike the tax overhauls in 2001 and 2010, ATRA does not include a "sunset" clause and, thus, will not automatically expire, and is "permanent" until Congress passes a new law which the President signs.

> *"At first blush, it might seem that the increase in the federal exemption amount to $5 million, combined with portability, will discourage most clients from engaging in estate planning.… [T]he authors believe that neither of these factors should lead to a reduction in estate planning."*

Key Provisions

ATRA puts into place the following key provisions:

1) The $5 million gift, estate and GST exemptions of TRA 2010 have been retained,[1] indexed for inflation.[2] The inflation-adjusted exemption for 2013 is $5,250,000 ($10,500,000 for married taxpayers).[3]

2) The spousal "portability" provisions, first adopted under TRA 2010,[4] also have been retained.[5] Generally, portability allows surviving spouses to elect to take advantage of the unused portion of the estate tax exemption (but not any unused GST tax exemption) of their predeceased spouses.

3) The top gift, estate and GST tax rate has been increased from the 35% established by TRA 2010 to 40%.[6]

Planning Under ATRA

Peter Aronson

At first blush, it might seem that the increase in the federal exemption amount to $5 million, combined with portability, will discourage most clients from engaging in estate planning. However, as will be discussed, the authors believe that neither of these factors should lead to a reduction in estate planning.

New York Estate Taxes Could Result Where Not Contemplated

New York, like many other states, has its own estate and GST tax system. While based in large part upon the federal system, New York's exemptions and rates are very different from those under federal law.

While New York repealed its gift tax in 2000, New York taxes any estate over $1 million at a floating rate up to 16%.[7] For many New York residents, $5 million is out of reach, but the $1 million New York estate tax threshold affects many more families. Further, the $1 million exemption has no inflation adjustment provision, and New York does not have a "portability" provision to permit the surviving spouse to use his or her deceased spouse's unused estate tax exemption. Estates of New York residents (or nonresidents owning property in New York) could pay significant New York estate tax where none was contemplated. Thus, it is critical that the estate plans of individuals living in or owning property located in New York address such potential estate tax exposure. For example, in New York the traditional credit shelter trust planning continues to be necessary to avoid wasting the New York exemption amount on the death of the first spouse to die.

Credit Shelter Trusts Are Better Than Relying on Portability

How the Credit Shelter Trust Works. Traditional estate planning for a husband and wife involves ensuring that each spouse takes full advantage of the federal estate tax exemption (sometimes called unified credit), typically by having the first spouse leave assets equal to the exemption amount either directly to the couple's children (and/or grandchildren) or to a trust for their ultimate benefit. The surviving spouse typically is a beneficiary of this trust, but does not have sufficient "tax control" over it to make it includible in his or her estate. Thus, the trust assets escape estate tax at both deaths. It is not taxed in the first spouse's estate because it was sheltered by the first spouse's exemption amount; and it is not taxed in the surviving spouse's estate because he or she does not own it. Because that trust (including any appreciation on its assets) is "sheltered" by the first spouse's exemption (credit) amount, this type of trust is called a "credit shelter trust." Sometimes, it also is called a "bypass trust" because it "bypasses" the surviving spouse's taxable estate and passes at the surviving spouse's death to the couple's children (and/or grandchildren) free of federal estate tax. The surviving spouse then can use his or her own estate tax exemption on additional assets that pass to children and grandchildren. Thus, the credit shelter trust allows each spouse's estate tax exemption to shield assets from the estate tax, effectively doubling the amount that passes free of estate tax. Until the portability concept became law, if the first spouse left assets outright to a surviving spouse, the estate tax exemption would be "wasted" because, although the outright distribution to the surviving spouse typically would pass estate tax free by virtue of the estate tax marital deduction, the assets received outright by the surviving spouse would increase his or her own estate that would be subject to estate tax at his or her subsequent death.

Portability "Wastes" the New York Estate Tax Exemption. As noted above, for federal estate tax purposes, ATRA's portability feature now permits the Executor of the estate of the first spouse to die to "give" any unused federal estate tax exemption amount to the surviving spouse. So, with the new portability feature of the federal estate tax law, is it still necessary to use credit shelter trusts? Absolutely. New York does not recognize the portability concept and has a separate estate tax regime. Thus, in New York, a credit shelter trust remains necessary to avoid wasting New York's $1 million exemption amount on the death of the first spouse to die. However, with the advent of portability, clients may wish to consider sheltering only the New York $1 million estate tax exemption (so as not to incur immediate New York estate tax) and electing portability for the rest of the first spouse's federal $5 million exemption because portability is not an all or nothing proposition. This is not a hard and fast rule. Though New York estate tax will be deferred in this situation until the second death, the marginal New York estate tax rate on the second death may be higher than it would have been had New York estate tax been paid at the first death.

Other Reasons a Credit Shelter Trust Is Superior to Portability. From a policy perspective, a "portable" exemption between spouses, even if unavailable for New York estate tax purposes, is an important development, because it reduces the economic costs of failing to obtain good tax advice and implements a tax-efficient estate plan. In that sense, a "portable" exemption acts as a savings provision. Nonetheless, it does not eliminate the advantages of a credit shelter trust and, thus, the benefits of good advice. We do not recommend that our clients rely on a "portable" exemption in their estate plan, as the traditional credit shelter trust has a number of advantages over portability. The fact that a credit shelter trust is necessary to avoid wasting New York's $1 million exemption amount on the death of the first spouse to die alone is sufficient reason for credit shelter trust planning. However, there are many other reasons why a credit shelter trust may be superior to portability. These include the following:

Unused Exemption May Be Lost if Surviving Spouse Remarries. Because the federal exemption is portable only from the last deceased spouse,[8] portability may be lost if the surviving spouse remarries and survives the new spouse. In that case, the unused exemption of the first deceased spouse is no longer available to the surviving spouse. If the new spouse has substantial property destined for his or her own children, the surviving spouse may end up with no carryover exemption. This result can be avoided with credit shelter trust planning.

Example: Husband dies in 2013 leaving all of his $5 million federal exemption to his wife, having used none of it and relying on portability. At this point, the wife has a $10 million exemption because she has her own $5 million exemption and the $5 million exemption that ported over from her deceased husband. However, wife now remarries and her second husband dies before her. Her second husband leaves everything to his children, completely using up his $5 million exemption. Since the second husband is the wife's last spouse, the $5 million that transferred from her first husband completely disappears.

If portability is elected, the potential loss of exemption upon remarriage might be addressed in premarital agreements. In the example above, the widow might require that her new husband, if he predeceased her, leave her an amount at least equal to the projected estate tax loss to her estate by the loss of her first husband's unused exemption (e.g., 40% of $5 million).

Unused Exemption May Be Reduced. The unused federal estate tax exemption available to a surviving spouse is limited by the amount of the federal estate exemption which is in effect at the *surviving spouse's* death.[9] Thus, a later reduction of the federal estate exemption will decrease the unused exemption amount.

Example: Husband dies in 2013 leaving all of his $5 million federal exemption to his wife, having used none of it and relying on portability. Wife dies in 2015, when Congress has reduced the federal exemption to $1 million. The federal exemption passing from the husband to wife by virtue of the portability election is reduced to $1 million. By contrast, if the husband had created a credit shelter trust in his Will and funded it with the full $5 million, the full amount, plus any appreciation, would have escaped federal estate tax.

Credit Shelter Trusts Shelter Asset Appreciation. A credit shelter trust should protect more property at the survivor's death than simply relying on the portability rule. This is because any appreciation in value of the assets of the credit shelter trust that occurs between the death of the first spouse and the death of the second spouse will avoid estate tax. Relying solely on the portability rule will not allow such increase between deaths to avoid estate tax because the carryover exemption is not indexed to inflation.[10]

***Example*:** If 10 years goes by between the spouses' deaths, assuming a 5% return, a $5 million credit shelter trust reinvesting its income will have a value of $8,144,473. This would save $1,257,789 (40% x $3,144,473) more in federal estate tax than a $5 million carryover exemption. Contributing to the credit shelter trust's advantage in this regard are the New York estate tax savings on the appreciation in value of the assets of the credit shelter trust.

This will be especially important for married couples whose combined assets exceed (or may be expected to exceed) two federal exemption amounts (presently, $10.5 million).

Credit Shelter Trusts May Better Provide for Decedent's Children Than the Surviving Spouse. A spouse may prefer to use a credit shelter trust for purposes of controlling the ultimate distribution of his or her assets. For example, the wife may wish to ensure that any assets remaining after her husband's death pass to their children rather than a new woman the husband meets after her death. Similarly, in a second marriage situation, the wife may wish to ensure that any assets remaining after her second husband's death pass to her children from a prior marriage rather than the second husband's children.

Credit Shelter Trusts Provide Asset Protection. Assets in a credit shelter trust are protected from the creditors of the surviving spouse, including any marital claims of future spouses. Property inherited outright from the predeceased spouse is subject to the claims of the surviving spouse's creditors, but assets held in a properly designed credit shelter trust generally are exempt from the surviving spouse's creditors.

Credit Shelter Trusts Protect Against Wasting of Assets. A credit shelter trust can provide for wise distribution of trust assets where the surviving spouse is a spendthrift, is easily influenced by outside parties, or suffers from dementia or other loss of judgment. With portability, consumption of the inherited assets is entirely within the surviving spouse's discretion.

Credit Shelter Trusts Offer Professional Investment Management. A credit shelter trust can provide for professional management of trust assets where the surviving spouse is financially unsophisticated. With portability, investment of the inherited assets is entirely within the surviving spouse's discretion.

There Is No Portability for Non-Citizen Spouses. There is no portability if *either* spouse is not a U.S. citizen,[11] a common occurrence in New York. Thus, in this situation a credit shelter trust is necessary to avoid wasting both the federal and New York applicable exclusion amount on the death of the first spouse to die.

There Is No Portability for Same-Sex or Unmarried Partners. Same-sex or unmarried partners will need to use a credit shelter trust for the benefit of the surviving partner to avoid wasting the exemption amount of the first partner to die because portability is available only between married opposite-sex partners.[12] Though New York's Marriage Equality Act (effective June 24, 2011) treats same-sex married couples and different-sex married couples equally under all New York laws, portability is not a New York law but a federal one.

Credit Shelter Trusts Provide Gift Tax Benefits. There may be gift tax savings if distributions are made to children and grandchildren from the credit shelter trust. If portability is relied on and the decedent leaves everything outright to the surviving spouse, the spouse will be limited to annual exclusion gifts (presently, $14,000) and his or her federal exemption amount. On the other hand, the trustee of a properly drafted credit shelter trust could make distributions to children and grandchildren without gift tax implications for the surviving spouse.

GST Exemption Is Not Portable. The GST exemption is not portable to the surviving spouse.[13] Where grandchildren and future generations are part of an estate plan, portability will not save the unused GST tax exemption of the first spouse to die. In such cases, allocating the decedent's GST exemption to the credit shelter trust may be wise.

For all the reasons stated above, we are advising clients to continue to use estate plans that incorporate credit shelter trusts.

Be Careful of Overfunding a Credit Shelter Trust

Credit shelter trust planning has been a traditional part of estate planning in the past and, for the reasons mentioned above, likely will remain so. However, the funding of the credit shelter trust likely will change given the increased federal exemption amount and the "portability" feature. In the recent past, the estate plan of a typical married couple frequently would have been drafted using a formula clause providing that the maximum federal estate tax exemption amount will pass to a credit shelter trust upon the death of the first spouse and the balance of the estate either will be distributed outright to the surviving spouse or, alternatively, pass to a marital trust. Because the federal estate tax exemption has increased a number of times since 2001, a formula clause typically was used instead of referencing a particular dollar amount in order to avoid the necessity of revising the will whenever the exemption amount changes. However, with the significant increase in the federal estate tax exemption to $5 million, the use of such a formula clause will result in more New York estate tax upon the death of the first spouse to die than had been the case in prior years. For example, for individuals living in New York with existing wills that establish credit shelter trusts, their estate plan may no longer operate as intended under the new law. A New York resident who dies in 2013 with a will that provides for the funding of a credit shelter trust equal to the full federal exemption will pay no federal estate tax to fully fund this $5.25 million credit shelter trust, but will pay a New York estate tax of $420,800 that could have been deferred until the death of the surviving spouse. Moreover (as discussed in **Preserving the Opportunity to Step-Up the Basis of Property in the Credit Shelter Trust**, below), the assets in the credit shelter trust will be stuck with the old income tax basis that existed at the first death, which will not reflect any appreciation in value of those assets between the first and second deaths. By contrast, relying on portability would step-up the basis of assets that had appreciated between the first and second deaths.

A more flexible plan that does not mandate the full use of the federal $5 million exemption could at the very least delay New York estate taxes and potentially result in a capital gains tax advantage, although full funding of the credit shelter trust in other cases may be worth the up-front New York estate tax cost and potential increase in capital gains tax. In particular, couples with combined assets of less than $10.5 million whose wills require the full use of the federal estate tax exemption should consider making changes that allow for greater flexibility. It is more desirable to leave the precise funding of the credit shelter trust to the Executor rather than "hardwiring" it into the will. This can be accomplished in several ways, the most common of which likely are the use of a "contingent (Clayton) QTIP" trust (which allows any part of a marital bequest not elected for the marital deduction to pass to a credit shelter trust)[14] or "disclaimer" trust (which involves giving most or all of the estate to the surviving spouse who determines trust funding by disclaiming an appropriate portion of his or her bequest, which then passes under the terms of the will to a credit shelter trust).[15] Both of these methods of funding the credit shelter trust at the first spouse's death permit post-mortem adjustments for optimal tax planning. Although both funding approaches have advantages and disadvantages depending on the particular situation, an analysis of these approaches is outside of the scope of this article.

Preserving the Opportunity to Step-Up the Basis of Property in the Credit Shelter Trust

Despite the portability feature of ATRA, for all the reasons mentioned above, most married couples will wish to continue to leave some portion of their estates in a credit shelter trust for the surviving spouse with eventual distribution to the children on the surviving spouse's death. However, there is a potential disadvantage with this very common estate planning technique. If the surviving spouse lives for many years after the death of the first spouse and some of the assets in the credit shelter trust have significantly appreciated in value, the assets held in the trust will not receive a new, higher income tax basis on the survivor's death equal to their date of death value.[16] By contrast, if a portability election were made, all appreciation in the assets between the first and second deaths would obtain a higher income tax basis (a "step-up" in basis), though possibly at the cost of incurring additional estate tax. Thus, married clients will wish to consider techniques to preserve the possibility of stepping-up the basis of the assets in the credit shelter trust.

There are a number of techniques to achieve a step-up in basis of appreciated assets in the credit shelter trust. While a full discussion of them is beyond the scope of this article, at least a couple deserve to be mentioned.

Granting broad distribution standards in favor of the surviving spouse so that significant appreciated property can be distributed to the surviving spouse and qualify for the step-up in basis at his or her death. The advantage of this approach is its simplicity, but the surviving spouse might be elderly and disabled, subject to creditor claims, easily influenced by others, a spendthrift, or have remarried.

Giving an independent trustee the discretion to give to the surviving spouse a "testamentary general power of appointment" that applies only to the appreciated trust assets, so that those assets are subject to estate tax inclusion and receive a step-up in basis at the surviving spouse's death.[17] This power might be limited, so to be exercisable only with the consent of a third party,[18] to place some control over the surviving spouse's ability to redirect the trust assets to someone other than the children (or first spouse's children).

Because any technique that steps-up the basis of appreciated assets in the credit shelter trust necessarily will result in those assets being included in the estate for estate tax purposes, clients will have to weigh avoiding capital gains tax on the stepped-up assets against any potential increase in estate tax resulting from their inclusion in the estate.[19]

When Portability May Be Useful

Although conceptually attractive, portability is not a planning tool in and of itself. However, there are at least two situations where it may be appropriate to rely on portability in addition to a credit shelter trust.

Avoid Funding a Credit Shelter Trust with Retirement Assets. Using qualified retirement accounts to fund a credit shelter trust results in the loss of the income tax deferral opportunities offered by a spousal rollover. A credit shelter trust for the benefit of the surviving spouse generally must start distributions the year after the year of the predeceased spouse's death,[20] must take minimum required distributions over the surviving spouse's life expectancy,[21] and cannot change to a payout period based on the life expectancy of the children when the surviving spouse dies.[22] By contrast, the surviving spouse would not have to take any distributions on a rollover retirement account until reaching age 70½[23] and can change to a payout period based on the life expectancy of the children when the surviving spouse dies (by naming the children as his or her designated beneficiaries).[24]

In addition to the loss of spousal rollover opportunities, qualified retirement benefits are considered "income in respect of a decedent" (IRD).[25] As such, generally they are included in the recipient's gross income when received.[26] IRD paid to a trust typically is taxed at higher rates than IRD paid to an individual. Thus, for example, in 2013[27] a trust's taxable income over $11,950 is taxed at 39.6%,[28] while a surviving spouse must receive income in excess of $450,000 before the 39.6% rate applies.[29]

Using retirement benefits to fund a credit shelter trust, though not income tax efficient, often makes sense when necessary to avoid the imposition of the much more expensive federal estate tax. However, if federal estate tax can be avoided through the use of portability, then it may be inappropriate in many situations to leave retirement assets to a credit shelter trust. Portability allows a married couple to get both spouses' federal estate tax exemptions without giving up the income tax advantages of a spousal rollover. Of course, to achieve this result, portability has to be available at the surviving spouse's death. Thus, for example, both spouses must be U.S. citizens and be of the opposite sex, and the surviving spouse must not have forfeited the ability to use the first spouse's exemption through remarriage. If portability is unavailable, then leaving retirement assets outright to the surviving spouse may risk additional estate taxes on the second death due to loss of the first spouse's federal estate tax exemption. Moreover, non-tax factors may outweigh income tax considerations and dictate placing retirement benefits in a credit shelter trust, such as where the surviving spouse is a spendthrift, is subject to large creditor claims, is easily influenced by others, or where the first spouse wishes to ensure that the estate is not subject to a divorce division if the surviving spouse remarries or if the first spouse wishes to ensure that any assets remaining after the surviving spouse's death pass to the first spouse's children from a prior marriage rather than to the surviving spouse's children.

Portability for Excess of Federal Exemption Over New York Exemption. In certain cases it may be appropriate to fund the credit shelter trust with only the $1 million New York estate tax exemption amount and rely on portability for the rest of the decedent's federal exemption amount up to $5 million. As noted above, this is because appreciated assets in the credit shelter trust will not have their income tax basis stepped up to fair market value at the death of the surviving spouse.

Whether either of the reasons above are sufficiently compelling to rely on portability can only be determined on a case-by-case analysis.

Advantages of Lifetime Gifting

Giving away assets, whether outright or in trust, may be advantageous. In New York, which has an estate tax but not a gift tax, gifts may substantially reduce the New York estate tax liability. Thus, for example, a New York client can gift $5,250,000 during 2013 without New York tax, while the same gift at death would incur a $420,800 New York tax.[30]

In determining whether it is beneficial to make lifetime gifts, it is important to note that the recipient of the gift takes the donor's income tax basis in the gifted property. By contrast, the heir of property transferred at death receives the income tax basis equal to date of death value. If the gifted property substantially appreciates in value after the gift, the beneficiary will forfeit the opportunity to obtain the higher date-of-death income tax basis. Thus, the donor must balance the potential negative capital gain consequences against potential gift and estate tax savings.

In a smaller estate where only New York estate taxes are of concern, the differential between the New York estate tax rate and the maximum[31] 20% capital gains rate[32] makes the basis concerns of lifetime gifting significant. There may have to be a substantial amount of appreciation in order for estate tax savings to offset the loss of basis step up. If the appreciation was not enough so that it would have triggered the federal estate tax had the asset been retained until death, then the New York estate tax savings of making an outright gift may not outweigh the loss of a basis step up.

Example: A lifetime gift is made of a $2 million asset with a $1 million basis. Assume that the asset appreciates to $3 million by the time of the donor's death. The gift saves New York estate tax of $182,000. However, by gifting the asset, the donee will lose the step up in basis and, at a 20% rate (assuming the donee is in the top tax bracket), the donee will receive a net value of $2.6 million from selling the asset. Thus, giving the asset away saves New York estate tax of $182,000 but the step up in basis by holding the asset until death saves $400,000.

Example: A lifetime gift is made of a $4 million asset with a $2 million basis. Assume that the asset appreciates to $7 million by the time of the donor's death. The gift saves New York estate tax of $638,000 and federal estate tax of $700,000 (40% x $1.75 million), or a total of $1,338,000 in estate taxes. The loss of the step-up in basis will result in a $1 million capital gains tax if the asset is sold (20% x $5 million). Thus, because giving away the asset saves both New York and federal estate tax (i.e., $1,338,000), it more than offsets the cost of the loss of basis step-up (i.e., $1,000,000).

The impact of the loss of a basis step up will be less significant if the 15% or 0% capital gains rate applies to the donee.[33] Moreover, an income tax is incurred only if the donee sells the asset. If the donee will retain the asset indefinitely or if the asset is real estate which may be rolled repeatedly into other parcels of real estate under Section 1031 without recognizing gain, basis step-up is less important.

Grantor Trusts as the Optimal Gifting Technique

The loss of basis step up might be avoided by making gifts to a grantor trust rather than outright. This might result in obtaining the best of both worlds, i.e., reducing estate tax liability and at the same time stepping up the basis of the trust assets at death. While a full discussion of such trusts is beyond the scope of this article, it is worthwhile noting them. Basically, the grantor would transfer property during his or her lifetime to an irrevocable trust that is complete for gift tax purposes (i.e., outside of the grantor's taxable estate) but incomplete (i.e., structured as a "grantor trust")[34] for federal income tax purposes. Thus, transactions between the trust and grantor, as the "owner" of the trust for income tax purposes, are free of income taxes.[35] The fact that transactions between the grantor and the trust are ignored for income tax purposes makes possible certain basis preserving strategies. For example, the grantor is able to exchange high basis property, or cash, for trust-owned low basis property to gain a step-up in basis at death.[36] Conversely, the grantor may exchange stock with a built-in loss for trust-owned property in order to preserve the built-in loss. Had the grantor held the stock until death, the step-down in basis would eliminate the loss. However, by swapping the built-in loss stock, the trust would obtain a carryover basis and the built-in loss is preserved for income tax purposes.

Moreover, the grantor's payment of the income tax attributable to the trust's assets allows all of such income to remain in the trust without making any additional gift.[37] Where the trust is a separate taxable entity, the grantor would have to make an additional wealth transfer to the trust to restore the amount lost to taxes. By paying the taxes directly, the grantor effectively makes a tax-free wealth transfer to the trust.

"Non-Reciprocal" Spousal Lifetime Access Trusts

Despite the opportunity such grantor trusts present, many clients with substantial wealth are concerned about making large gifts that will diminish their liquid assets and cash flow. However, with proper planning, estate tax can be reduced and trust assets can receive a basis step-up while at the same time satisfying liquid net worth and cash flow concerns. This can be done through "spousal lifetime access trusts" (SLATs)—a trust which permits one spouse to create a trust from which the other spouse can receive distributions of income and even principal, and at the same time remove the trust assets from both of their taxable estates.

How do SLATs work? In its simplistic form, a married couple sets up reciprocal trusts, in which the husband gives up to his remaining $5 million to an irrevocable trust for the benefit of his wife and descendants, and the wife gives up to her remaining $5 million to a trust for the benefit of her husband and descendants. As previously noted, New York does not have a gift tax, and therefore lifetime transfers are not subject to New York tax. Thus a $5 million lifetime gift to a trust that utilizes the federal exemption is not subject to federal gift or estate tax and is not a taxable transfer under New York law. Each spouse is a discretionary beneficiary of the trust created by the other spouse, and children and grandchildren are additional beneficiaries. Thus, the property may be invested and held as a safety net for the beneficiary-spouse or accumulated for the eventual benefit of children and grandchildren. With careful drafting so as to avoid potential estate tax inclusion, the beneficiary-spouse also may be a trustee of the trust for his or her benefit, thereby giving that spouse the authority to determine if and when distributions should be made. The trust property is not subject to estate taxes upon the death of either spouse. Moreover, each spouse may allocate his or her generation-skipping transfer tax exemption to his or her trust, which will shelter the trust assets from gift, estate and GST taxes at each generation for as long as the trust is permitted to last under state law ((in perpetuity in some states, such as South Dakota and Delaware[38]). In addition, the trust may be structured to provide multiple generations of beneficiaries protection from creditors, bankruptcy and former spouses.

Planners must be careful to draft around the "reciprocal trust doctrine," which may result in "uncrossing" the trusts. The doctrine states that if a husband creates a trust for his wife, and the wife creates an identical trust for the husband, then the two trusts may be "uncrossed" and treated for tax purposes as if each spouse had created a trust for himself or herself.[39] Because this would result in each spouse being able to make discretionary distributions from a trust he or she was deemed to have created, estate tax inclusion of the trust assets would result[40] and the potential for the trust assets to be reachable by creditors would be greatly increased.[41]

> *"In a world of second marriages, creditors, non-citizen spouses, and for a host of other tax and non-tax reasons, credit shelter trusts will continue to be used other than to minimize New York estate tax."*

Conclusion

ATRA certainly provided much relief when compared to the estate and gift tax provisions which would have returned without its enactment. However, as this article has pointed out, it did not sweep away gift, estate and GST tax planning concerns, or income tax considerations. New York's estate tax laws will continue to be relevant for New York residents, and credit shelter trusts will be necessary to avoid "wasting" the New York estate tax exemption. In a world of second marriages, creditors, non-citizen spouses, and for a host of other tax and non-tax reasons, credit shelter trusts will continue to be used other than to minimize New York estate tax. Clients establishing credit shelter trusts, as well as clients making lifetime gifts to reduce their New York estate tax liability, will have to be mindful of strategies to obtain a step up in basis at death. Clients who already have done estate planning should have their existing estate planning documents reviewed for possible changes necessitated by ATRA, such as possible overfunding of the credit shelter trust. For those who have yet to do planning, the use of traditional planning techniques, such as credit shelter trusts, still remains in the family's best interests for tax and non-tax purposes.

Endnotes

1. TRA 2010 § 302(a)(1); IRC § 2010(c)(3).
2. ATRA § 101(a).
3. Rev. Proc. 2013-15, 2013-5 I.R.B. 444.
4. TRA 2010 § 302(a)(1); IRC § 2010(c)(2).
5. ATRA § 101(a).
6. ATRA § 101(c); IRC § 2001(c).
7. Tax Law § 952; IRC § 2011.
8. IRC § 2010(c)(4)(B)(i).
9. IRC § 2010(c)(4)(A) ensures that the inherited exclusion amount cannot exceed the basic exclusion amount at the surviving spouse's death.
10. IRC § 2010(c)(4)(B).
11. The unified credit of a non-resident alien is not governed by IRC 2010, but by IRC 2012, so non-resident aliens cannot give or receive an inherited exclusion amount. Also, Notice 2011-82, 2011-42 I.R.B. 516 (September 29, 2011) provides that the portability election can be made only on Form 706 and an non-resident alien files Form 706-NA.
12. The Defense of Marriage Act enacted September 21, 1996 excludes same-sex spouses from any estate tax benefits accorded opposite sex married couples. *See* 1 U.S.C. § 7 and 28 U.S.C. § 1738(C).
13. IRC § 2631(c) limits the GST exemption to the "basic exclusion amount under § 2010(c)."
14. This tax planning strategy is named after *Clayton v. Commr*., 976 F.2d 1486 (5th Cir. 1992); *see also* Treas. Reg. § 20.2056(b)-7(d) & 7(h).
15. *See* IRC § 2518.
16. *See* IRC § 1014.
17. *See* IRC § 2041.
18. *See* Treas. Reg § 20.2041-3(c)(2).
19. It should be noted that the recent financial and housing crisis has made it sufficiently clear that real estate and stocks do not always go up in value. If assets go down in value, then electing portability means that estate assets get a step-down in basis for income tax purposes. Assets in a credit shelter trust, on the other hand, get a step-up (or step-down) in basis at the first death, but not at the second spouse's death.
20. IRC § 401(a)(9)(B)(iii).
21. Treas. Reg. § 1.401(a)(9)-5.
22. IRC § 408(D)(3)(C).
23. IRC § 401(a)(9)(B)(iv)(I).
24. IRC § 408(d)(3)(C)(iii).
25. IRC § 691.
26. *Id*.
27. Rev. Proc. 2013-15, I.R.B 2013-5, sets forth the inflation adjusted tax rate tables for taxable years beginning in 2013.
28. IRC § 1(e).
29. IRC § 1(a).
30. Unlike the federal system, New York does not take lifetime gifts into account in the New York estate tax transfer base at death.
31. The 20% maximum capital gains tax rate applies to individuals in the 39.6% maximum income tax bracket. For individuals not in the 39.6% income tax bracket, the 15% and 0% capital gains rates apply. Thus, for example, married taxpayers filing jointly in 2013 with income up to $72,500 benefit from the 0% capital

gains tax rate while those with income from $72,500 up to $450,000 pay a 15% capital gains tax rate. *See* IRC § 1(h).

32. Actually 23.8%, after including the Medicare tax on net investment income. *See* IRC § 1411. That is because, if the donee has enough taxable income to be in the top income tax bracket, the donee will meet the AGI threshold to be subject to the 3.8% Medicare tax on net investment income.
33. *See* footnote 31.
34. The “grantor trust” rules are set forth in IRC §s 671-679.
35. *See* Rev. Rul. 85-13, 1985-1 C.B. 184.
36. If the client lacks sufficient other assets, the client might borrow funds from a third party and use the funds to purchase the appreciated trust assets. Alternatively, the client might use a promissory note to repurchase property from the trust, though the income tax consequences on paying the note remain uncertain.
37. *See* Rev. Rul 2004-64, 2004-2 C.B. 7.
38. At least 18 states and jurisdictions allow trusts to last forever.
39. *See United States v. Grace*, 395 U.S. 316 (1969).
40. *See* IRC § 2036(a)(2) and 2038.
41. *See* New York EPTL 7-3.1, which provides that a grantor’s creditors may attach property the grantor places in trust for himself or herself even if the grantor may receive trust distributions only in the discretion of an independent trustee.

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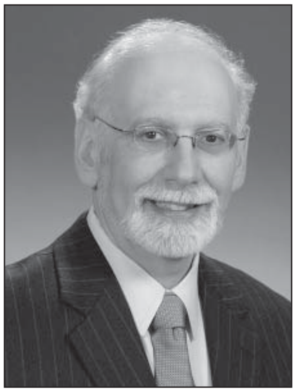
Foreclosure Settlement Strategies for Seniors

By Wayne R. Bodow



What advice do you give to a senior who has no home equity and is behind several months with his or her mortgage payments or has already been served with a foreclosure proceeding or a notice to foreclose? Is a happy ending possible where a reverse mortgage settles the entire claim? Hocus-Pocus-Poof, some attorneys magically create significant equity enabling this dream result through the combined use of rescission, recoupment, bankruptcy and/or lack of standing.

Most mortgages today are held in the nominee, Mortgage Electronic Registration Systems, Inc. (MERS). Recent New York decisions have held the MERS "is unable to assign the right to foreclosure upon a mortgage…absent MERS's right to, or possession of, the actual underlying promissory note."[1] The notice required by § 1304 of the Real Property Actions and Proceedings Law prior to the commencement of residential foreclosure action must be strictly followed.[2] C.P.L.R § 3408 also requires settlement conferences.[3]

A. The Basics of TILA, Recoupment and Bankruptcy

A transaction may be rescinded only when all of the following criteria are met:

1. The transaction must be for consumer credit;[4]
2. The lien or security interest must be for a NON-Purchase;[5]
3. The lien or security interest must be placed on the consumer's principal dwelling;[6] and
4. A Truth in Lending (TILA) violation has occurred, i.e., the Good Faith Estimate of finance charges exceeds the thirty-five dollar limit or required disclosures were defective.

When successful rescission voids the security interest, the bank is no longer a mortgagee, its claim is unsecured and possibly can be discharged in a Chapter 7 bankruptcy!

Recoupment is an equitable action authorized by a tribunal that enables a setoff. A TILA claim has a short one-year statute of limitations. However the TILA statute references a setoff extension through recoupment when permitted by state law.[7] When recoupment is exercised under state law it may be possible to extend the Statute of Limitations to enable only a setoff and not an independent cause of action. This may result in the extended right to rescind the mortgage. The U S. Supreme Court decision in *Beach v. Ocwen Fed. Bank*[8] denies the extension of the Statute of Limitations beyond three years from the date of the commencement of the transaction[9] through recoupment under federal law but state actions may remain viable beyond three years.[10] The following list of states have case law that supports recoupment beyond three years: (For the specific case law reference see § 12.2.5.3 of the treatise, Truth in Lending, 7th ed. from the National Consumer Law Center) Alabama, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, West Virginia and Washington.

Occasionally a quick resolution occurs when the attorney makes an offer to settle the sum due based on what the mortgagee would receive from a tender offer. An early resolution is preferable to all parties as it avoids protracted litigation. The mortgagee is entitled to recover the real proceeds of new money given directly to the consumer less additional statutory penalties and legal fees.[11] Here is an example of an early starting point offer:

> The mortgagee may be seeking $170,000.00 (based on accumulated charges for legal fees, advances, late charges and miscellaneous add-on charges); the fair market value of the property is $160,000.00. The age of the youngest homeowner is 64. The new proceeds available from a reverse mortgage ranges from $94,000 to $97,000.00[12] depending on product choice and closing costs. (Note, the property or the borrower may not qualify for a reverse mortgage, both qualification standards and loan-to-value ratios are frequently changed by HUD and respective mortgagees.[13])
>
> Assume that the:

net sum received by the mortgagors from the refinancing of their mortgage was	$100,000.00
total payments and financing charges paid	– $18,000.00
Tender amount	$82,000.00

If the case proceeds to full litigation and the consumer prevails, statutory fines and recoverable legal fees will significantly reduce the mortgagee's recovery. The mortgagee/bank also will not be able to be reimbursed for the loss from FHA or FDIC, as claims made for reimbursement must be free of any violations.

The logic for settlement is stronger when the holder of the mortgage has purchased the loan in a bulk sales transaction; possibly paying 48% on the dollar[14] for a portfolio that included thousands of loans. Under that scenario the bank would be making a small profit over the cost of acquiring this loan ($76,800.00)! Everyone wins. Magic results as early as 60 days after initial consultation.

The time constraints of a foreclosure demands that the best practice is to first file a Chapter 13 Bankruptcy to obtain the automatic stay. The filing should include recoupment and setoff notices. Recoupment and setoff in Bankruptcy can occasionally be achieved with nominal legal effort.

The Federal Rules of Bankruptcy Procedure 3004 set a deadline for filing a proof of claim to be thirty days after the bar date applicable to the case. If the mortgagee fails to file a proof of claim, the debtor's attorney should file the claim prior to the bar date. The claim filed by the debtor's attorney should detail the full claim but also credit setoffs and all recoupment rights of the debtor. The debtor's attorney should then seek either a declaratory judgment that the claim is allowed as filed or a plan confirmation order.[15]

Once foreclosure is started, the finance charge tolerance for the purpose of rescission is $35.00.[16] But how do you find the violations?

The first step is discovery. I recommend using a Qualified Written Request as the starting point. Below is a sample of such a request:

Dear Sir or Madam:

Please treat this letter[17] as a "qualified written request" under the Federal Servicer Act, which is a part of the Real Estate Settlement Procedures Act, 12 U.S.C. 2605(e). This request is made on behalf of my Clients, the above-named debtors. This request is based upon Violations of the Truth in Lending Act (TiLA); Violations of the Real Estate Settlement Act; Lack of Standing based on Securitization and MERS relationship. "….Since neither MERS nor the servicer have a beneficial interest in the note, nor do they receive income from the payments, and since it is actually an employee of the servicer signing the assignment in the name of MERS, the assignment executed by the MERS employee is illegal. The actual owner of the note has not executed the assignment to the new party. An assignment of note in the absence of the assignment and physical delivery of the note will result in a nullity."[18] My clients also disputes matters related to their Chapter 13 case which includes disputes about the proper application of payments from the Chapter 13 Trustee; and from the debtors as to how the payments should be allocated i.e. to interest, principal, escrow advances and/or expenses (in that order of priority as provided for in the loan instruments); about your use of suspense accounts in connection with your receipt of Trustee's and debtors' payments; about your use of legacy late charges with respect to post-petition mortgage payments; about your use of automatically triggered property inspections and broker price opinion charges and fees based on pre-petition legacy accounting for pre-petition arrears; and about legal fees and expenses that have been attached to or otherwise assessed to this account in the form of corporate advances that have neither been applied for nor approved by the United States Bankruptcy Court and finally about the origination standards that must be complied with in conjunction with any claim for FHA insurance benefits under 24 CFR 203 Part B § 203.350- §203.414. [Note: An explanation of the dispute is a requirement of the QWR and should be applicable to the facts and circumstances.] Specifically, I am requesting the following information:

1. A copy of the loan application(s), good faith estimate(s), loan commitment letter, Truth in Lending Disclosure Statements, Notice of Right to cancel, HUD-1, final settlement statements, Promissory Note, mortgages (deeds of trust).
2. All assignments, transfers or other forms of evidence of transfer or sale or assignment of the mortgage or deed of trust, promissory note or other documents that secure payment by the mortgagors of this obligation for this account from the inception of the loan to the present date.

3. The amount of any legal fees added to the principal debt in this case or charged against the account or tracked for any purpose in any account for any post-filing legal services, paralegal services, accounting services, claim preparation services, case review services, plan review services, or for any other similar service, professional or otherwise.
4. The amount of any property inspection fees, property preservation fees, broker price opinion fees, bankruptcy monitoring fees, or other similar fees or expenses added to the principal debt or charged against the account or tracked for any purpose post-petition or associated with any account related to this loan.
5. The total amount of any post-petition arrears including a complete explanation of the months in which payments were allegedly missed, the aggregate late charges imposed for all such payments, the date and amount of all account payment postings post-petition, and the basis for the imposition of each late charge fee.
6. The current amount needed to pay off the loan in full in the form of an itemized printed payoff report.
7. A complete post-petition payment and transaction history for this loan, including all entries of any nature in the form of a debit, a credit, a transfer or otherwise. A complete copy of all transaction codes associated with this loan and the plain English definitions for each such code. Also, please identify the mortgage servicing software you use in connection with this loan (MSP, LSAMS, etc.).
8. The amount of any funds deposited in any post-petition suspense accounts or corporate advance accounts or any other similar accounts (including the amount and date of each transaction, the source of funds, and a description of the deposit account) and a description of all payments from any such accounts including the date of the payment, the purpose or nature of the payment, and the amount of each such payment.
9. A copy of any master pooling and servicing agreement, master servicing agreement, primary servicing agreement, default servicing agreement, or sub-servicing agreement that the creditor has with any party.
10. A copy of all of your loss mitigation rules, regulations, and protocols as the same apply to this loan and a description of your efforts to implement the same in connection with the servicing of this loan.
11. A copy of statements or bills for services submitted and paid by you to any attorney, law firm or third-party for any form of legal services rendered post-petition with respect to this mortgage loan.
12. A copy of the most recent audit of your Bankruptcy or Default Mortgage Servicing Department by any rating agency such as Fitch or any internal unit.
13. All records, ledger cards, documents, books, papers and accounts relating to the transaction.

To the extent that the servicer of this mortgage loan has charged the debtor(s)' mortgage loan account, subsequent to the filing of their bankruptcy case, any appraisal fees, broker price opinion fees, property inspection/preservation fees, legal fees, bankruptcy/Proof of Claim fees, recoverable corporate advances and other fees or costs that were not disclosed to the debtor(s) and approved by the bankruptcy court, the debtor(s) dispute(s) any such fees and costs and specifically requests that the mortgage loan account be corrected to remove any such fees that have not been approved by the Bankruptcy Court after the filing of a proper application for the same with notice and hearing and an order of approval.

Sincerely Yours,

Attorney

Next, analyze the loan documents. The Consumer Financial Protection Bureau includes on its website TILA Examination Procedures. I also recommend obtaining an independent forensic analysis. Numerous options for this service are available and easily found through a computer search.

Section 1463 of the Dodd-Frank Financial Reform Act strengthened § 6 of the Real Estate Settlement Procedures Act (the authority for the Qualified Written Request "QWR") shortening the required response time and enhancing the fine for non-compliance from $1000.00 to $2000.00 per violation.[19] Additionally if a pattern of non-compliance is established the statutory fine can rise to $4,000.00, plus actual damages and attorney fees.[20] When time permits, i.e., the foreclosure sale is not imminent, the QWR should be serviced prior to the bankruptcy filing as the information recovered will help determine the best strategies for defense and settlement possibilities.

The Federal Helping Families Save Their Homes Act of 2009 amended the Truth in Lending Act by requiring that mortgagees notice the homeowner whenever the ownership of the mortgage has been transferred, detailing contact information for a party with authority to act on behalf of the new holder.[21]

State Attorneys General do not have pre-litigation subpoena powers, but private attorneys have this ability with the QWR.[22] The Dodd Frank Act more broadly codified that Attorneys General can enforce non-preempted state laws.[23] My recommendation is to forward all discovered violations to the State Attorney General (AG). If a pattern of conduct is documented by collective submissions to the AG's office, enforcement and subpoena power though litigation will be enhanced. The QWR is a powerful pre-litigation discovery tool that may enable future settlements as the civil attorney's reputation is enhanced.

The best forum may be state court. A TILA violation may be classified as a per se Unfair and Deceptive Acts and Practices (UDAP) violation under state law. Under state law recoupment should be pleaded as an equitable set off defense to a pending state foreclosure proceeding enabling the extended right to rescind the mortgage based on the $35.00 finance charge tolerance limit. This strategy is detailed at § 10.3.3.4 in the Treatise published by National Consumer Law Center Truth in Lending.[24] This treatise is an essential resource for any consumer attorney pursuing these remedies.

The combined issues raised from TILA (federal law), Recoupment (equitable doctrine) and UDAP (state law) are complex, which translates to significant legal fees that the mortgagee will be required to pay to litigate the foreclosure to completion. A settlement will be desired. Now we have new authority on behalf of the servicer to consider a settlement.

The Helping Families Save Their Homes Act included a safe harbor for servicers. If the return for loss mitigation is greater than the potential recovery from foreclosure, the servicer is deemed to have met its obligation.[25] The servicer is empowered to make a business decision to settle or not on behalf of its investor pool. Clearly part of that decision is a determination that the investors will not recover the FHA or FDIC insurance and will incur substantial legal fees pursuing the foreclosure.

If FHA or FDIC determines that violations existed at the time of the origination of the loan, the loan will lose its status as an insured loan (void ab initio), also requiring a refund of all FHA insurance dollars paid by the borrower.[26] Self-curtailment of claims for FHA insurance recovery by either mortgagees or servicers is detailed in a mortgagee letter.[27]

B. MERS and Lack of Standing

Do lenders make a larger profit via the foreclosure remedy? The answer is yes, unless the foreclosure process is defended.

The lack of standing issue has mixed results with decisions on both sides of this ledger. In non-judicial foreclosure states, the borrower must commence a legal proceeding and allege that an incorrect party initiated the foreclosure. This pleading has resulted in case law findings that the burden to establish authority to foreclose under applicable state statutes and loan documents shifts back to MERS servicer.[28]

Decisions confirming MERS standing to foreclose have been based on non-judicial foreclosure statutes confirming standing in Minnesota.[29] [This article is intended to primarily address lack of standing in judicial foreclosure states.]

First let's follow the money. The securitization trail is so complex that in most instances it would be impossible to determine who holds the note. A forensic audit documenting the source of the note or funds may be impossible at any costs. Without a note holder, there may be no right to foreclose.[30]

The Federal Trade Commission established the FTC Holder Rule[31] to preserve consumer claims from holder in due course immunity. A successful rescission claim voids the transaction.[32]

Nevertheless, the holder in due course claims of protections will generally be raised by the banks citing the U.S. Supreme Court's 1942 decision, *D'oench*[33] and its partial codification.[34] Justice Scalia, in his *Langley*[35] case. expanded the word "agreement" to include fraudulent misrepresentations, resulting in a finding that holder in due course protected the insurer FDIC.[36] The FDIC is likely to be the ultimate payor of a foreclosed mortgage to the holder when the notes have been assigned. But the case also established that when the asset is void there is no underlying insurance. You win the rescission claim, you void ab initio the underlying security interest; hence no FDIC recovery.

The MERS system was designed in part to enable a nominee to act on behalf of numerous holders of securitized paper. Under the MERS system, transfers occur without a paper trail. Servicers often cannot produce the original signed note, as illustrated by the robo signing notorious frauds of foreclosure mills.[37]

The design of MERS as a nominee precludes the application of any MERS-held mortgage to the claim of protection as a holder in due course, because Section 1823(e) is based on the statute of frauds, which is strictly construed. *FDIC v. Wright* (Seventh Circuit, cert. denied) details requirements necessary to claim holder protection:

> Any agreement, to be enforceable, must be in writing, and must have been executed by the bank and the party claiming the adverse interest thereunder contemporaneously with the acquisition of the asset by the bank. The agreement must have been approved by the board of directors or the loan committee and recorded in its minutes, and the writing must have been kept continuously as an official record of the bank from the time of its execution. Failure to meet any one of the four requirements is fatal.[38]

In a judicial foreclosure state, after this issue is joined in the pleading, the lender must establish that it was both the assignee of the subject mortgage and had the right to enforce the promissory note at the time the action was commenced.[39] But the lack of standing can be waived unless it is affirmatively raised in the answer.[40] Likewise, a filed proof of claim in bankruptcy is a final determination unless a timely objection is filed.[41] In New York State a default foreclosure judgment that has been vacated pursuant to C.P.L.R. § 5015(a)(1) or (a)(4) and motions under C.P.L.R. § 317 will not preserve the affirmative defense of lack of standing.[42]

In non-judicial foreclosure states, the case law and burden of proof decisions are detailed in § 5.1.4.3–§ 5.5.1 in the National Consumer Treatise, Foreclosures, Fourth Edition (published September 2012). The two lead cases should be studied, *U.S. Bank v. Ibanez*, 941 N.E.2d 40 (Mass.) [judicial foreclosure state] which includes a good discussion of § 3-30 of the Uniform Commercial Code, and *Gomes v. Countrywide Home Loans*, 121 Cal. Rptr. 3d 819 (Cal. Ct App. 2011), which shifts the burden of proof back to the consumer [non-judicial foreclosure state].

If consumers prevail in more states on this "standing issue," future consumer defenses may ultimately include a frivolous claim and fraud, which should result in Rule 11 Sanctions. In my opinion, Rule 17 A of the Federal Rules of Civil Procedure, which allows amendments and substitutions of parties, should be challenged with pattern evidence, and demands for accurate ownership of claims, which is unlikely to be provided.

A MERS foreclosure claim paid by FDIC or FHA is ultimately a claim that is paid by the taxpayer, which may add credence to an Attorney General's discovery demands. It is unlikely that MERS, as a nominee, can meet the holder in due course standards or produce the original note. The production of the original note is an evidentiary requirement under the principles of law based on Negotiable Instruments and Uniform Commercial Code.

When the standing issue succeeds, a stalemate has occurred. The homeowner has a non-transferable title and the lender has no cash flow and continues to hold a "bad loan." Settlement options are available to seniors' owners over the age of 62 through a reverse mortgage.[43]

If neither FDIC nor FHA is a guarantor to the banks, will the banks fail?

Unfortunately, most consumers facing foreclosure will not find knowledgeable consumer advocates. As a result, banks will not be forced to settlements or charge, offs. Ultimately, the taxpayer pays either as a result of Congress passing new laws to protect the banks or the taxpayer pays to subsidize the costs to the government-owned guarantors.

In summary, my thesis herein is that well represented consumers can save their home from a pending foreclosure. I also believe that the servicers will accept the proceeds of a reverse mortgage to limit the losses that will occur when confronted by knowledgeable and capable consumer advocates.

C. How to Obtain a Reverse Mortgage Commitment That Can Be Timely Used to Settle a Foreclosure Proceeding

1. Discuss the facts and obtain a quotation. The loan officer will need to know:

    a. The age of the youngest borrowers (ideally that should include the dates of birth of all borrowers).

    b. The property address including zip code and County.

    c. An estimate of the real property taxes.

d. If a bankruptcy has been filed or is anticipated (Note: An open chapter 7 will disqualify the applicant for a reverse mortgage. The chapter 7 must be discharged. A chapter 13 requires a court order to enable refinancing).

e. Contact information for the clients to discuss property conditions, i.e., public or private utilities (Note: Private utilities must meet HUD standards).

f. How title is held? (Note: Some lenders accept irrevocable trusts holding the title).

g. Do the homeowner have homeowners insurance?

h. Is the property a condominium? (Note: HUD has established approval standards that condominiums must meet before a condominium owner can apply for a reverse).

i. General strategy to clear title and create necessary equity such as a short settlement with the current mortgagee.

j. Health factors of mortgagors.

k. Do the mortgagors want to age in place?

2. A quotation is prepared and sent to the referring attorney and the borrowers that includes:

    a. A list of independent counselors. (Note: All borrowers must be counseled and receive a certificate of counseling completion from a HUD-approved counselor, which must be counter-signed by the applicants and remitted to the loan officer at the time the application for the reverse mortgage is made. Fees for counseling vary. The typical charge is $125.00.)

    b. Various disclosures are sent to the homeowners: including HUD pamphlets "Using your home to stay at home," broker disclosures, detailed loan option scenarios, numerous federal and state disclosures, the most important being the Truth In Lending and the Good Faith Estimate.

3. The application is either taken face to face or returned via mail, fax or email. Supporting documents that must accompany the completed application to enable the processing to continue include:

    a. Photocopies of the applicants Social Security cards.

    b. Photocopies of the applicants picture id (i.e., driver's license).

    c. Photocopy of deed.

    d. Photocopy of last mortgage statement.

    e. Photocopy of homeowners insurance (declaration page), plus the name address and telephone # of the insurance agent.

    f. Survey is not required but helpful to identify location of non-public utilities (well and septic).

    g. Photocopy of real estate tax bills, common charges or condo fees.

    h. A credit card authorization to pay for the appraisal (estimated at $450.00 for a single family).

    i. Photocopy of death certificate (if a deceased spouse was on title).

    j. The original signed and dated counseling certificate signed by all parties.

    k. Other documents may be required such as a POA, guardianship appointment, list of creditors included in a chapter 13.

4. The appraisal is ordered from an independent blind pool.

5. The appraisal is received.

6. A title report is ordered.

7. The application including the appraisal, counseling certificate, supporting documents and the title report is submitted to a mortgage company for processing.

8. The mortgage company issues a list of conditions that must be met before the loan can be closed (the conditions list will include time frames limitations that may require the conditional commitment to expire, i.e., the appraisal is good for a limited time frame). Note that most mortgage companies issue a "floating rate" commitment so that the final interest rate is not known until the closing is scheduled, which will require a new good faith estimate and new disclosures if the rates change.

    [Practice Point] The timing of the application should be approximately 2 to 3 months prior to the anticipated date that title can be cleared and liens settled and sufficient equity is realized. The risk is that the mortgage commitment will expire and the application will have to be started again incurring duplicate costs for new appraisals and counseling fees.

9. Once all conditions have been met a closing is scheduled.

10. The closing occurs.

11. The borrowers have three business days to cancel. Two copies of TILA disclosures are given to all homeowners and all mortgagors.

12. After the right of rescission has lapsed three business days, the new mortgage is recorded and funds are released.

13. The loan is non-recourse, any action for collection is limited to an in-rem proceeding.

D. The Ever-Changing Landscape

This article was written in November 2012 and last edited in May 2013. I subscribe to an online publication Reverse Mortgage Daily (reversemortgagedaily.com/). Two headlines in November 2012 are of keen interest: On a positive note CoreLogic reported that home prices are up 5%. But an FHA audit has revealed that the FHA insurance fund is at a negative $13.48 billion. It is likely that changes will be made to the reverse mortgage program such as reducing the principal limits (lowering the loan-to-value payouts) and raising the costs of the required FHA insurance, now 1.25%.

The House of Representatives passed H.R. 4264 on September 14, 2012.[44] I recommend following this bill which includes: requirements that mortgagees indemnify FHA for losses if there was fraud or misrepresentations in a paid claim; provisions that could revoke a mortgagee's authority to participate in the FHA insured loan programs.

Richard W. Fisher, a member of the Federal Reserve Bank of Dallas, in an address to the Committee for the Republic on January 16, 2013, said that the board is considering eliminating future government guarantees to banks. On January 17, 2013, the *Wall Street Journal* reported that "…Currently no national standard exists for how mortgage servicers must treat defaulting borrowers..." The *Journal* then quoted Richard Cordray, the consumer bureau director: "[The lending industry]… must consider all options available from the mortgage owners or investors to help the borrower retain the home."

It is my opinion, based on the current political landscape, that settlements will become easier and that excellent advocacy on behalf of senior consumers will create more settlements.

Endnotes

1. Silverberg, 86 A.D.3d at 279-283.
2. Aurora Loan Services., 85 A.D.3d 95.
3. Mark C. Dillon, "The Newly Enacted C.P.L.R. 3408 for Easing the Mortgage Foreclosure Crisis: Very Good Steps, but not Legislatively Perfect," 30 Pace L. Rev. 855 (2010).
4. 15 U.S.C. § 1635(a).
5. 15 U.S.C. § 1635(e)(1); Reg. Z § 226.23(f)(1.)
6. 15 U.S.C. § 1602(v) *See also* Reg. Z § 226.2(a)(19). The definition of "dwelling" also limits the property to one to four units which includes condominiums or co-ops or mobile homes. The same definition applies to reverse mortgages with a requirement that the property must be the consumer's principal residence. Also a reverse mortgage is not available for either co-ops or mobile homes; and certain lending restrictions apply to condominiums and manufactured homes.
7. 15 U.S.C.§ 1640(e) *also see* National Consumer Law Center: Truth in Lending, 7th ed. § 12.2.5.1.
8. Beach v. Ocwen Fed. Bank, 523 U.S. 410 (1998).
9. 15 U.S.C. § 1635(f).
10. *See generally* National Consumer Law Center: Truth In Lending, 7th ed. § 10.3.3; 523 U.S. 410, 118 S. Ct. 1408.
11. 15 U.S.C. § 1635(e)(2).
12. The sum available from the proceeds of a reverse mortgage can only be estimated with a timely provided Good Faith Estimate. The sum used in this article is hypothetical and intended as an illustration of a concept. Factors include: in addition to loan options, age of the youngest borrower, property values, liens to be paid, and interest rates, property qualification standards, and the possibility that the government may change the rules of qualification and the formulas that determine the available principal limits factors.
13. As of November 2012 the youngest borrower must be age 62 at time of closing; the property is limited to 1-4 family dwelling which must be occupied as the principal residence of the mortgagor; there are no required principal or interest payments, but the mortgagor must continue to pay the real property taxes, assessments, homeowners insurance, flood insurance if required, and maintain the property. Failure to meet these obligations may result in foreclosure and loss of the property. HUD safety and appraisal standards and conditions apply to determine if the property meets the guidelines, which conditions may be changed by HUD. Additionally HUD is considering a new financial assessment standard that may be implemented by the time this article is published. Under consideration are assessment standards to determine both feasibility and appropriateness of a reverse mortgage, taking into consideration the ability of the borrowers to continue to meet the requirements of paying insurance, assessments and taxes and maintaining the property.
14. *See generally* "The Rise and Fall of the U.S. Mortgage and Credit Markets: A Comprehensive Analysis of the Meltdown" sponsored by the Milken Institute, published by John Wiley & Sons 2009; *see also* Google "Term Auction Facility." The federal government weekly sells mortgage-backed securities and publishes the results of the bulk sale.
15. The Consumer Credit and Sales Legal Practice Series: Truth in Lending, vol. 1, 7th ed. § 12.2.5.5.3, published by the National Consumer Law Center.
16. 15 U.S.C. § 1635(i)(2).
17. The chapter 13 references in this example were offered on the NACBA list server by Max Gardner and have been edited by Wayne Bodow.
18. This language is quoted from a sample QRW on the website of Certified Forensic Loan Auditors, LLC. Their actual QRW is 8 pages long. They can be contacted at info@CertifiedForensicLoanAuditors.com.
19. 12 U.S.C. § 2605.
20. 15 U.S.C. § 1641 (f)(2).
21. 75 Fed. Reg.58,489 (Sept.24, 2010).
22. Cuomo v. Clearing House Association, 129 S.Ct. 2710; 557 U.S. 519.

23. 12. U.S.C. §§ 3802, 3803.
24. National Consumer Law Center, Truth in Lending, 7th ed.
25. 15 U.S.C. § 1641(g)(1)(A)-(E).
26. *See* Mortgagee letter 2003-17; HUD form 2701 Part B. (This form details the supported evidence necessary to submit a claim which essentially includes an affidavit of "clean hands" and no known violations.) FHA is essentially an insurance agency and maintains the rights to verify that a claim is properly founded. See Chapter 8, Mortgagee Monitoring and administrative sanctions, HUD Handbook for Lenders, available on the HUD site.
27. *See* Mortgagee letter 1997-18.
28. *See* Generally National Consumer Law Center, Foreclosures, 4th ed. § 5.5.1 (includes numerous case citations).
29. 770 N.W.2d 487 (Minn. 2009).
30. *Supra* Silverberg.
31. 16 C.F.R. pt 433 (Preservation of Consumer Claims and Defenses) (authorized by 15 U.S.C. §§ 41-58).
32. 15 U.S.C. §1641 (c).
33. D'Oench, Dyhme & Co., Inc., 315 U.S. 447 (1942).
34. 315 U.S.C. § 447; 12 U.S.C. § 1823 (E).
35. W.T. Langley, et. ux. v. Federal Deposit Insurance Corporation 108 S.Ct. 396, L.Ed. 2d 340 (1987).
36. Langely, 484 U.S. at 90-93.
37. 910 N.Y.S. 2d 857; 2011 WL 1337249; 780 F.Supp. 2d 118 (Maine); 2011WL 3501883 (NJ); 201 WL 188453 (Ohio); 2022 WL2734603 (Conn.); 27 A.3d 1087 (Vt.). See § 5.5.2 Foreclosures, 4th ed., a treatise published by the National Consumer Law Center.
38. Chris Atkinson, Defending the Indefensible: Exceptions to D'oench and 12 U.S.C. § 1823(E), 63 Fordham L. Rev. 1337 (1995). p.1357-1359; FDIC v. Wright, 942 F.2d 1089, 1101 (7th Cir. 1991), cert. denied, 501 U.S. 1250.
39. 934 N.Y.S.2d 182 (N.Y. App. Div).
40. 837 N.Y.S. 2d 247 (N.Y. App.Div. 2007).
41. 450 B.R. 897 (B.A.P. 9th Cir. 2011).
42. *See generally* Mark C. Dillion, "Unsettled Times Make Well-Settled Law: Recent Developments in New York State's Residential Mortgage Foreclosure Statutes and Case Law," Albany Law Review, vol. 76, 2 (April 2013); Mastropaolo, A.D.3d at 241-42; *see also* David D. Siegel, *Practice Commentaries*, C317: 1.
43. *See id*. notes 8 and 9.
44. The status of this bill as of May 2013 is: Received in the Senate and read twice and referred to the Committee on Banking, Housing, and Urban Affairs.

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The views and opinions contained in this article are those of the author and do not necessarily represent the views or opinions of any entity that Wayne Bodow has been or is currently employed by or associated or affiliated. Wayne R. Bodow is registered with NMLS. You can contact him with questions at 315-440-0124 or wrbodow@gmail.com.

Reverse Mortgages: Dispelling the Myths

By Lori R. Somekh

The reverse mortgage remains one of the most misunderstood tools among those of us who seek to help seniors and their families. To this day, I hear comments from colleagues that run the gamut from "I recommend these regularly to help my clients," to "These are a ripoff," "Reverse mortgages exploit seniors," to, "The fees they charge are unconscionable."

These are only a few of the common misconceptions floating around about a product that could be a real life-saver for the right clients. Once upon a time, I had a client with a credit score of 423. She was living on a very, very small fixed income. Once we got her house out of foreclosure by litigating the validity of a predatory loan, she could not afford to live in the home. Nor could she afford to go out and rent an apartment. A reverse mortgage with a lump sum sufficient to pay off the loan, as well as monthly installments paid to her, enabled her to pay off the mortgage and pay the taxes and household expenses, hopefully for the rest of her life. Without the lifeline of a reverse mortgage, that senior could have ended up homeless.

It should be understood that no product or technique is right for all the people all the time. We are always matching our clients' needs with the best possible solutions. However, if we examine reverse mortgages, we will find that there are some important safeguards built into the law to protect seniors from jumping into one of these loans against their best interests.

I. What Is a Reverse Mortgage?

A reverse mortgage is a special type of home loan that allows homeowners to convert the equity in their homes into cash. Reverse mortgages were first introduced in the late 1980s.[1] They serve the purpose of helping homeowners who are "house rich and cash poor" stay in their homes. Generally speaking, the proceeds of a reverse mortgage are tax free (although, by the same token, the interest is not tax deductible) and they do not *necessarily* hinder government benefit eligibility.[2] Reverse mortgages tend to be slightly more costly than regular mortgages. No repayment is required for as long as the homeowner lives in the home. The loan must be repaid when the last living borrower dies, sells the home or permanently moves out. Reverse mortgages are offered by both the private sector, i.e., banks and mortgage companies, and the public sector, i.e., the government. This article primarily deals with the government-backed reverse mortgages, which are offered by private sector lenders, by far the most common.

Reverse mortgages are available for single family homes or owner-occupied two- to four-family homes, condominiums or Planned Unit Developments (PUDs). Mobile homes and co-ops are generally not eligible for reverse mortgages.

II. How Does a Reverse Mortgage Work?

A. Like a regular mortgage—only better. Like a traditional forward mortgage, a reverse mortgage is money borrowed against the equity in a borrower's home. Like a forward mortgage, a security interest is recorded against the home, and the loan must eventually be paid back. This is basically where the similarities end.

B. You do not have to make monthly payments. Unlike a forward mortgage, the borrower does not make payments on the loan. Conversely, a reverse mortgage is often structured so that the bank makes monthly payments to the borrower. Interest is calculated on a negative amortization schedule. This means that instead of being gradually reduced, the principal balance is gradually increased, because interest is accruing and no payments are being made.

C. Eligibility requirements. To qualify for a reverse mortgage, a borrower must be at least 62 years old and living in the house as his or her primary residence. The loan does not become due until the one of two things happens: the borrower either dies or moves out of the house. One main difference between reverse mortgages and forward mortgages is that the borrower is not required to have good credit or a sufficient source of income. This, of course, is because there is no repayment requirement. Here is where the major benefit to the reverse mortgage lies. Very often, indeed usually, a senior with a fixed income cannot qualify for a mortgage, because the senior's income is insufficient to support the loan payments. For the senior who can no longer afford to remain in the home, a reverse mortgage is really the only way to convert that home's equity into cash and allow the senior to remain there.

D. Determining the amount of the loan. The amount of money available depends on the age of the borrower and the value of the home. First, the actuarial life expectancy of the borrower is estimated. There is an inverse relationship between life expectancy and the amount of money that can be borrowed. The older the borrower, the greater the possible loan amount. This is because, from an actuarial and business standpoint, the shorter the projected life span, the fewer years the mortgage debt will be increasing. Using this same reasoning, the lenders are typically willing to increase the amount of money available as the borrower ages.

The other factor used to determine the maximum amount the lender will lend is the home value. The higher the home value the greater the potential loan amount. Notwithstanding, there is an overall cap on the maximum loan available. The maximum house value the loan to value ratio (LTV) can be applied to is $625,000.00. Although this is commonly, but incorrectly, referred to as the lending limit, it should be thought of as the *house value limit*. For example, if the house value is $2,000,000.00, the lender will not base its LTV on $2,000,000.00. It will base its LTV on $625,000.00.

E. The borrower retains home ownership. Contrary to a common misconception, the reverse mortgage borrower retains ownership of the home and continues to pay taxes, insurance and repairs. The borrower still has all indicia of ownership. There is also an increasing willingness on the part of lenders to permit the homes to be owned by grantor trusts as well.

III. Characteristics of a Reverse Mortgage

A. A reverse mortgage *must* be a first mortgage. In other words if there is any existing mortgage or financing on the home, it must be paid off. It may be paid off with the proceeds of the reverse mortgage, or to put it another way, the home is refinanced by the reverse mortgage.

B. The reverse mortgage is a *non-recourse* loan. This means that the lender cannot look anywhere but to the home for repayment. If the amount due when the borrower dies or moves out is greater than the home's value, the lender cannot seek to recover the deficiency from the borrower or his estate. Thus, the homeowner can never owe more on the reverse mortgage than the value of the home. The homeowner is not liable for any deficiency judgment and cannot be sued personally to recover on the loan. The loan is due when the last surviving borrower dies, sells or permanently moves out.

C. There is a rescission period. Like refinances and home equity loans, reverse mortgages are subject to a three-day right of rescission.

D. What constitutes default? As is the case with a traditional mortgage, there are several acts which may constitute a default and cause the reverse mortgage to become and due and payable immediately. Examples of such defaults are:

1. Failure of the homeowner to pay property taxes or homeowners insurance. In such a case the lender may elect to pay the tax or insurance premium and reduce the loan advance available;
2. The filing of a bankruptcy;[3]
3. Abandonment;
4. Fraud or misrepresentation;
5. Eminent domain;
6. Condemnation;
7. Renting out a portion of the home;
8. Adding a new owner;
9. Changing the zoning classifications;
10. Taking out new debt against the home.

When representing borrowers, it is important to make sure they clearly understand the ramifications of defaulting in the above obligations.

IV. Types of Reverse Mortgages

Initially, there were four types of reverse mortgages: the federally insured Home Equity Conversion Mortgage (HECM) (this is the most common type of reverse mortgage), the Federal National Mortgage Association (FNMA or Fannie Mae) conventional reverse mortgage, the public sector reverse mortgage and the proprietary reverse mortgage. The Fannie Mae conventional reverse mortgage was discontinued several years ago; therefore, now there are three main types of reverse mortgages.

A. Home Equity Conversion Mortgage (HECM): The vast majority of reverse mortgages in the marketplace are the HECMs. The HECM is written by private lenders and federally insured by the Department of Housing and Urban Development (HUD). This type of loan represents over ninety percent (90%) of reverse mortgage products. The money can be used for any purpose, and HECMs are available in all 50 states, the District of Colombia and Puerto Rico. The only caveat is that the home must be at least one year old and meet HUD's minimum property standards with respect to the condition of the home. If these standards are not met, the home can be brought into compliance with HUD standards by the time of closing.

There are five different ways in which HECM reverse mortgage proceeds can be paid to borrowers:

1. Tenure—equal monthly payments for as long as at least one borrower lives and continues to occupy the home at the principal residence;

2. Term—equal monthly payments for a fixed period of months selected by the borrower;

3. Line of Credit—This option allows unscheduled payments or installments at times and in amounts of the borrower's choosing until the line is exhausted;

4. Modified Tenure—This is a combination of Line of Credit with monthly payments for as long as the borrower remains in the home;

5. Modified Term—This provides a combination of Line of Credit with monthly payments for a fixed period of months selected by the borrower.

The interest rate on an HECM will be either annual adjustable rates or monthly adjustable rates. Rates are tied to the one-year U.S. Treasury Security Rate which is published weekly in most major newspapers, such as the *Wall Street Journal*.[4] The rate adjustments do not affect the amount or number of loan advances a borrower may receive, but they do cause the loan balance to grow at a faster or slower rate.

The annual adjusted rate cannot increase more than five percent (5%) over the life of the loan, and cannot increase by more than two percent (2%) in any year. The monthly adjusted rate cannot increase by more than ten percent (10%) over the life of the loan, but there is no limit to the amount the rate can change at each monthly adjustment.

The basic fees applicable on an HECM include: 1) an origination fee, 2) initial and monthly mortgage insurance premiums (MIP), 3)other closing costs, and 4) a monthly service fee.

The origination fee is limited to the greater of $2,000.00 or two percent (2%) of the maximum claim amount on the mortgage. The borrower is not permitted to pay any additional origination fees of any kind to any mortgage broker or corresponding lender. Mortgage insurance premiums protect the lender against the risk that the loan balance might exceed the value of the home (because the balance is insured by HUD). Mortgage insurance premiums consist of two types of charges: a one time premium at closing at two percent (2%) of the maximum claim amount, and an annual premium of one half percent per year on the mortgage loan balance.

The category of "other closing costs" includes other services and charges such as title insurance, appraisals, surveys, credit reports inspections, taxes and recording fees. The costs vary from one jurisdiction to another. A borrower is permitted to finance one hundred percent (100%) of the closing costs.

The servicing fee is a flat fee charged to the loan balance each month, covering the cost of record keeping and processing of the loan advances and mortgage insurance premiums. If the homeowner selects an annual adjusted interest rate, the service fee can be no more than $30.00 per month. The service fee for a monthly adjusting interest rate can be no more than $35.00 per month. These service fees are usually paid up front upon closing of the loan.

A borrower may re-pay all or part of the outstanding balance at any time without a prepayment penalty. Full re-payment will terminate the loan agreement. An HECM can be obtained through any FHA-approved lender.

B. Public Sector Reverse Mortgage: These are reverse mortgages offered by state and local governments, generally at a low cost and generally to be used for a specific purpose only—for instance, to make repairs or pay property taxes. These are often available only to homeowners with low or moderate income. They are the cheapest type of reverse mortgage but also the most difficult to find or qualify for. They also come with the most limitations. Many state and local government agencies offer "Deferred Payment Loans" (DPLs) for repairing and improving the home. These are one-time lump-sum advances with no repayment required as long as the borrower lives in the house. These DPLs are called different things by different agencies and may be difficult for a borrower to find. A borrower can start by calling city or county housing departments or state housing finance agencies to make inquiries. The eligibility rules for public sector reverse mortgages vary from program to program. Generally, there is no origination fee or mortgage insurance premiums and low or no closing costs. They also tend to have low interest rates, or carry no interest at all. Some DPL programs forgive either part or all of the loan if the borrower lives in the home beyond a certain amount of time. If a borrower's needs and eligibility match these criteria, these private sector reverse mortgages can be very valuable.

C. Proprietary Reverse Mortgage: These products are owned and backed by private companies. They can generally be used for any purpose, and they are usually the most expensive type of reverse mortgage product. Proprietary reverse mortgages represent a small percentage of the reverse mortgage market.

V. Safeguards and Counseling Requirements

Unlike any other type of home mortgage, reverse mortgages have some very stringent federally mandated safeguards built into the lending process. To be eligible for Federal Housing Administration (FHA) insurance, an HECM must be executed by a mortgagor who received "adequate counseling by a third party (other than the lender)."[5] HUD must provide, or cause to be provided by entities other than the lender, housing counseling for HECM mortgagors.[6] "At the time of the initial contact with the prospective mortgagor, the mortgagee shall give the mortgagor a list of the names, addresses, and telephone numbers of housing counselors and their employing agencies, which have been approved by the Secretary" of HUD.[7] The law requires borrowers to discuss the program with a HUD-approved counseling agency as a condition of securing the loan.

HUD counselors are required to discuss the following information with each mortgagor:

1. Options other than an HECM, such as other housing, social service, health and financial options;
2. Other home equity conversion options that are or may become available to the homeowner, such as sale-leaseback financing, deferred payment loans and property tax deferral;
3. The financial implications of entering into a HECM;
4. A disclosure that an HECM may have tax consequences, affect eligibility for assistance under federal and state programs and have an impact on the estate and heirs of the homeowner;
5. Any other information the Secretary of HUD may require.[8]

Additionally, reverse mortgages fall under the protection of the Federal Truth In Lending Act (TILA). TILA requires lenders to disclose the annual cost of a reverse mortgage. The total annual loan cost is the projected annual average cost of a reverse mortgage, including all itemized costs.

Pursuant to the Housing and Economic Recovery Act of 2008, the loan origination fee limit is the greater of $2,500.00 or two percent (2%) of the maximum claim amount of the mortgage, up to a Maximum Claim Amount[9] of $200,000.00, plus one percent (1%) of any claim amount over $200,000.00. In any event, the total origination fee amount may not exceed $6,000.00.[10]

Conclusion

Reverse mortgages are an important tool that, when used judiciously, can greatly improve the quality of life for seniors and their families. As elder law professionals, we owe it to our clients to learn about them, and not allow myths, misconceptions, and outdated concerns to keep us from using them if they can better our clients' lives. Since reverse mortgages are a relatively specialized field, all members of the refinance team, from the mortgage professionals and attorneys to the accountants, should ideally be well-versed in the nuances and special rules affecting reverse mortgages.

Endnotes

1. The Home Equity Conversion Mortgage (HECM) Insurance Demonstration was authorized by Housing and Community Development Act of 1987, Sec. 417, Pub.L. 100-242, 101 STAT. 1908, amending the National Housing Act, Pub.L. 73-479, 48 STAT. 1246 (12 U.S.C. 1715z-20), adding Sec. 255, authorizing elderly homeowners to borrow against the equity in their homes. The regulations for the HECM program were established as part 206 of title 24 of the Code of Federal Regulations (June 9, 1989, 54 FR 24833).
2. More particularly, as summarized in the guide on the subject published by the American Bar Association: the Internal Revenue Service does not consider loan advances to be income; annuity advances may be partially taxable; interest charged is not deductible until it is actually paid— that is, at the end of the loan; and the mortgage insurance premium is deductible on the 1040 long form. *Reverse Mortgages: A Lawyer's Guide*, American Bar Association, 1997. An exhaustive discussion of these topics is beyond the scope of this article and varies from state to state. A knowledgeable accountant or other tax professional should be consulted regarding these and other tax considerations in the jurisdictions relevant to the particular borrower. Similarly, the Guide explains that, although monthly payments received by a borrower does not count to disqualify him or her for government benefits, if the borrower receives Medicaid, SSI, or other public benefits, loan advances will be counted as "liquid assets" if the money is kept in an account (savings, checking, etc.) past the end of the calendar month in which it is received; the borrower could then lose eligibility for such public programs if total liquid assets (cash, generally) is then greater than those programs allow. *Id.*
3. This *ipso facto* clause is unenforcebale in any Bankruptcy setting. See §§ 541(c) and 365(e)(1) of Bankruptcy Code.
4. The annual adjusting rate cannot increase more than 5 percent over the life of the loan and cannot increase by more than 2 percent in any year. The monthly adjusting rate cannot increase by more than 10 percent over the life of the loan, but there is no limit to the amount the rate can change at each monthly adjustment.
5. Section 255(d)(2)(B) of the National Housing Act (12 U.S.C. 1715z-20(d)(2)(B).
6. *Id*. at subsection 255(f).
7. 24 CFR, Part 206.41.
8. National Housing Act (12 U.S.C. 1715z-20).
9. The Maximum Claim Amount is the least of: 1) the appraised value; 2) sale price; or 3) FHA mortgage limit for a one-family residence.
10. Mortgagee Letter 2008-34.

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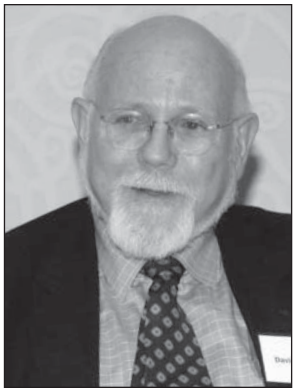
Changes in the 2013 New York Budget Bill

By David Goldfarb



Spousal Refusal Maintained

Once again in 2013 the Governor's Budget Bill (2013 N.Y. Laws 56) proposed eliminating spousal refusal for community based care (spousal refusal in institutional care is protected by federal law). The proposal was eliminated by the legislature before the final budget bills were passed. Defeating this change had been a priority of the Elder Law Section of the New York State Bar Association.

In addition Soc. Serv. Law § 366-c(2)(a) was expanded to include for purposes of spousal impoverishment budgeting under the definition of an "institutionalized spouse" anyone "*receiving care, services and supplies in a managed long-term care plan pursuant to section eleven hundred fifteen of the social security act*." This provision is however subject to the state getting a waiver from the federal CMS. It is not known how this provision would work if ever implemented.

Immediate Needs

The Governor's Budget bill (Part A § 34) had proposed amending Soc. Serv. Law § 364-i to eliminate for purposes of Medical Assistance the obligation created by Soc. Serv. Law § 133 to provide for "immediate needs" while an application is pending. The revised language that was adopted limits Medicaid reimbursement prior to an eligibility determination to the 90-day retroactive period. It is not clear how this will be implemented.

Reorganizing Medicaid Into "Benchmark Coverage" and "Standard Coverage"

The 2013 New York Budget Bill made changes to the Medicaid program, primarily reorganizing Social Services Law § 366 to include two categories of Medicaid: Benchmark Coverage and Standard Coverage. These are primarily found in 2013 New York Laws Ch. 56 Part D.

"Benchmark Coverage" as is now defined in Soc. Serv. Law § 365-a Subd. 1 is the expanded coverage under the federal Affordable Care Act. It is based on Modified Adjusted Gross Income (MAGI) as defined in the new provisions of Soc. Serv. Law § 366. It will eventually replace Family Health Plus. The Benchmark Benefit is similar to the Medicaid Standard Coverage benefit but does not include institutional long term care.

"Standard Coverage" replaces the prior Medicaid categories and is now also defined in Soc. Serv. Law § 365-a Subd. 1.

Family Health Plus (Soc. Serv. Law § 369-ee) is repealed effective January 1, 2015; Employer Partnerships for Family Health Plus (Soc. Serv. Law § 369-ff) is repealed effective Jan. 1, 2014. It is meanwhile phased out as persons receive coverage under the Affordable Care Act. See Soc. Serv. Law 369-ee(5)(d) added by 2013 NY Laws ch. 56 Part D § 14-a.

MAGI-based income is based on IRC § 36B(d)(2)(B). Benchmark Coverage will generally be available for individuals whose MAGI is under 133% of the federal poverty line. See Soc. Serv Law § 366(1)(b)(1). For pregnant women and children under one year MAGI can be up to 200% of the federal poverty line. Soc. Serv. Law § 366(1)(b)(2).

For Standard Coverage, the existing Medicaid rules apply, although the statutory subdivisions have been changed:

Type of Standard Coverage	Old Section	New Section
Eligible for SSI	366(1)(a)(2)	366(1)(c)(1)
SSI Related (65+, blind, disabled)	366(1)(a)(5)	366(1)(c)(2)
Medicaid Buy-in (working disabled)	366(1)(a)(12) & (3)	366(1)(c)(5) & (6)

Spenddown provisions for SSI related remain in Soc. Serv. Law § 366(2)(b)(3).

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New York's 2012 Managed Long Term Care Report: An Incomplete Picture

April 2013

By Valerie Bogart, Trilby de Jung and Leah Farrell

This is a reprint of the Executive Summary. The full report can be downloaded at http://www.wnylc.com/health/download/401.

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Executive Summary

The *Coalition to Protect the Rights of New York's Dually Eligible* is a coalition of consumer advocates focused on protecting the rights of some of the most vulnerable in our communities—elderly or disabled Medicare recipients who also meet the income threshold for Medicaid, also referred to as the dually eligible. Currently, this population is being enrolled into Managed Long Term Care (MLTC) in New York City, Long Island, and Westchester with expansion planned upstate. Additionally in 2014, contingent on Federal approval, this same population will be enrolled into new health insurance plans that provide dually eligible New Yorkers with their Medicare and Medicaid benefits. As such it is critical to ensure that private health plan performance metrics are collected by the State, analyzed and distilled by the State, and presented to dually eligible beneficiaries so they are able to make informed choices about their health care.

To this end, the State Legislature enacted a reporting requirement to ensure that MLTC plans provide required services and that consumers have the information they need to make meaningful choices between plans. Specifically, Section 4403-f(7)(b)(vii) of the Public Health Law requires the Commissioner of Health to issue biannual reports on enrollee satisfaction, service utilization, enrollment data, quality data, and continuity of care. The reports must be published on the New York State Department of Health's (the Department's) website and formatted to allow consumers to make comparisons between plans.

Although the Department recently released the 2012 Managed Long Term Care Report (2012 MLTC Report)[1] we believe it does not provide the full spectrum of information that beneficiaries need to make informed health care choices. More specifically, we believe that improvement in the following areas is needed to comply with the Public Health Law:

A. *Enrollee Satisfaction*—**The report must contain all of IPRO's findings, not simply the most positive.** The 2012 Report presents the most favorable findings of consumer surveys, but fails to mention less positive but important findings from IPRO's report, including the fact that higher need respondents in poorer health were significantly more likely to raise concerns about services than those in good health.

B. *Service Utilization Data*—**To facilitate informed choice, the report must include both assessment and utilization data, and raw data must be distilled by the Department.** The 2012 Report did not include much of the data that plans are required to report to the Department and did not analyze the data or draw meaningful conclusions from the metrics. Quarterly Managed Medicaid Cost and Operating Reports (MMCOR) data available to the Department includes the medical loss ratio (percentage of premium spent on medical care compared to administrative expenses), plan spending in different care settings, amount of capitation rate spent on administrative expenses compared to services, the types, level and cost of various services provided to members, the number of members receiving different types of services

Coalition to Protect the Rights of New York's Dually Eligible

or no services, and a variety of other elements which should be subject to regression analysis to determine important correlations.

C. *Enrollment Data*—**The report must include information about disenrollment, such as the number of members who sought disenrollment, reasons for disenrollment and the number of members involuntarily disenrolled from plans. In future reports, information about autoenrollment must also be included.**

D. *Quality Data*—**The report must include additional information related to health outcomes, including how service utilization correlates with incidences of falls and the number of members with skin breakdowns (bedsores).**

E. *Continuity of Care*—**Data about coverage disruptions or gaps in coverage as beneficiaries transition into managed care should be included in the report.** This data point will be even more critical in future years as more New Yorkers are enrolled into MLTC plans. Additionally, the 2012 Report also does not report on Plans' compliance with the Americans with Disabilities Act (ADA), a central component of a successful long term care program for the consumer's perspective.

F. *Comparisons Between Plans*—**Both the existing data in the report and the additional data we've identified for inclusion in the report must be presented in a way that allows beneficiaries to make meaningful comparison between plans.**

The data and analysis that are missing from the 2012 Report are critical for assessing health disparities and compliance with the community integration mandate in *Olmstead v. L.C.*,[2] as well as monitoring health plan compliance and providing beneficiaries with the information and tools to make meaningful choices. **As such, the *Coalition to Protect the Rights of New York's Dually Eligible* requests that a supplemental report be prepared immediately and that new quality and consumer survey measures be employed, as detailed in the following analysis.** Because of the importance of the report to beneficiaries, we also ask that stakeholders including beneficiary advocates have the opportunity to comment on the reports in advance of their public release. We believe this is particularly critical and time sensitive, because over the next six months tens of thousands of dually eligible New Yorkers will enroll into MLTC plans.

Endnotes

1. Report dated December 2012 posted at http://www.health.ny.gov/publications/3389_2012.pdf. [Hereafter referred to as "2012 MTLC Report" or "the Report"].
2. 527 U.S. 581 (1999).

Valerie Bogart has been Director of the Evelyn Frank Legal Resources Program (EFLRP) since June 2002. EFLRP was originally founded in the 1990s by Selfhelp Community Services, Inc., in memory of the daughter of the late Hans Frank, a Holocaust survivor and a board member of Selfhelp. Evelyn Frank was a passionate legal services attorney in California who specialized in Medicaid. In April 2013, the entire Evelyn Frank Legal Resources Program moved to the New York Legal Assistance Group (NYLAG), where Valerie continues to serve as Director of the program. EFLRP is a comprehensive legal services program that advocates for access to long-term care and other health care services for seniors and people with disabilities through a combination of direct representation, policy advocacy, professional legal education, and online resources through the website NYHealthAccess.org. Earlier, Valerie was a litigator and trainer on Medicaid long term care for the Legal Aid Society Brooklyn Office for the Aging and Legal Services for the Elderly in Manhattan (part of Legal Services-NYC) and was a Reginald Heber Smith Fellow at the Legal Aid Society in Minneapolis

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The Importance of Using Pooled Supplemental Needs Trusts in the New Era of Medicaid Managed Long Term Care

By Mia Kandel and Carolyn Silver

Mia Kandel

For the past 10 years, pooled supplemental needs trusts have been utilized by Medicaid recipients to eliminate their spend down; however, their use has become increasingly valuable in light of New York State's transition to Medicaid Managed Long Term Care. In September 2012, the Centers for Medicare and Medicaid Services (CMS) approved New York State's request to drastically change the way in which most Medicaid recipients receive long term care services. Prior to this change, Medicaid recipients in need of home care could elect to get services through a home attendant vendor that contracted with a Department of Social Services (or Human Resources Administration (HRA) in New York City) or a Certified Home Healthcare Agency (CHHA). Now, Medicaid recipients who also have Medicare, are age 21 or older and who need community-based long term care for more than 120 days must enroll in a Managed Long Term Care plan (MLTC) to receive the vital services they require.[1]

The transition to managed care has proven difficult for all individuals in need of long term care, yet it is of particular concern for low income people who have a Medicaid spend down.[2] These individuals are now at risk of losing their home care services if they are unable to pay the spend down amount to the MLTC. Pursuant to the MLTC Model Contract, a contractor can disenroll a patient who "fails to pay for or make arrangements satisfactory to Contractor to pay the amount, as determined by the LDSS, owed to the Contractor as spend down/surplus…within thirty (30) days after such amount first becomes due."[3] Prior to this change, home attendant vendors who contracted with the Human Resources Administration (HRA) in New York City were not permitted to terminate home care services if a patient failed to pay his or her spend down to the agency. Likewise, CHHAs were prohibited by state regulation from terminating services based on nonpayment of the spend down.[4] Thus, previously if a client could only pay a portion of his or her spend down or could not afford to pay at all, he or she was not at risk of losing care. Under managed care all services will be terminated for non-payment.

Carolyn Silver

The first group of Medicaid recipients was enrolled in MLTC plans by mandate in November 2012. Our office has already seen clients whose plans have threatened to terminate care due to their failure to pay the spend down. Similarly, prospective enrollees have contacted us for assistance because they have been told that they will not be enrolled in a plan unless they agree in writing to pay the spend down every month. These low-income, disabled New Yorkers are now being forced to choose between their medical care and their other basic needs, such as housing and food—an untenable situation for most of our clients.

Supplemental Needs Trusts: A Spend Down Solution

One solution to this problem is for disabled Medicaid recipients to join a pooled supplemental needs trust. Authorized under federal law by the Omnibus Budget Reconciliation Act of 1993 ("OBRA 93"),[5] income deposited into a trust account is exempt for Community-based Medicaid eligibility budgeting purposes, thereby eliminating the client's spend down. There are several pooled supplemental needs trusts in New York State, including those administered by New York State Association for Retarded Children (NYSARC); United Community Services (UCS); and Center for Disability Rights (CDR).[6]

By way of illustration, consider the case of our client, Ms. S. Ms. S is a frail 84-year-old woman living alone who needs assistance with activities of daily living. She has Medicaid with a monthly spend down of $750 and has been receiving home care for the past five years. She has been mandatorily enrolled in a MLTC and was told by her plan that if she does not begin to pay her spend down, her home care will be terminated. Ms. S cannot afford to pay her spend down as she uses every dollar she receives from her Social Security retirement benefits to pay for rent, electricity, food, and other living expenses. By joining a pooled trust and depositing the amount of her spend down into the trust each month, Ms. S's spend down is eliminated for community-based Medicaid budgeting purposes. She can use the money she deposits into the trust each month for her living expenses while Medicaid fully covers her home care costs. Without the use of the trust, Ms. S would have been terminated by her MLTC plan and may have been forced to move into a nursing home in order to receive the care she needs.

Pooled Trust Requirements and Procedures

Joining a pooled supplemental needs trust is not complicated, but several requirements must be met for such a trust to be approved by Medicaid.

Joining a Trust

To join a trust, an individual must be deemed disabled by the State.[7] The disabled person (or his or her power of attorney or legal guardian) must complete and sign a Beneficiary Profile and Joinder Agreement that is drafted by the trust of his or her choosing. Certain trusts require additional documentation to be submitted along with the Joinder Agreement, such as a copy of the beneficiary's social security card and social security award letter with claim number. Each trust requires a non-refundable initiation fee (approximately $200) and monthly administrative fees. The trustee then signs the Joinder Agreement, which can take a week to 45 days depending on the specific trust used.

Using a Pooled Trust

An individual must deposit his or her spend down amount into the trust account each month and forward the monthly bills to the Trust provider. The client can then request that the funds be used to pay certain expenses. The trust must pay bills directly to vendors or third parties and the client cannot withdraw cash from the trust. Upon death, funds in the trust account can be used to pay for bills that accrued prior to death; any funds remaining will inure to the trust.

Obtaining Medicaid Approval

Medicaid must approve the use of the trust in order for a Medicaid recipient's spend down to be eliminated. The approval process can take three to six months, and often requires advocacy to ensure prompt and correct approval. Ultimately the spend down will be eliminated back to the date of joining the trust. Trust documents, including the Beneficiary Profile, Joinder Agreement and Master Trust, must be submitted to Medicaid, along with proof of disability.

Proving disability is simple if an individual has already been deemed disabled by the Social Security Administration (SSA). He or she must merely submit proof of the SSA determination to Medicaid. However, if the individual was never deemed disabled by SSA, he or she will need to submit additional documentation to have a disability determination made by the state. Thankfully, this requirement was streamlined in January 2013. Two forms must still be completed: the Medical Report for Determination of Disability, which is completed by the treating physician, and the Disability Questionnaire, which will be completed by the Medicaid recipient or family member.[8] The Medical Report for Determination of Disability was recently shortened from a 25 page document to a one page form, making it much easier for doctors to complete without error, and therefore makes for faster disability determinations. In New York City, HRA also requests that three signed HIPAA forms be submitted with the trust paperwork in the event that HRA needs to request additional documentation from physicians.[9]

Once the disability determination is made by the State and the trust documents are reviewed by the Medicaid Program's Office of Legal Affairs, the case is re-budgeted to eliminate the spend down.

Ongoing Requirements

The Medicaid recipient must continue to deposit his or her spend down each month into the trust. Failure to do so will result in once again having a spend down.

Each year, upon recertification for Medicaid, the individual must submit proof of deposits into the trust to ensure proper budgeting and continued elimination of the spend down. One must also remember to increase the deposit into the trust as his or her income increases, such as it often does yearly with the Social Security cost of living adjustment. Failure to do so can result in once again being assessed a spend down.

Creative Community Solutions: Training Pro Bono Attorneys to Help Clients Join Supplemental Needs Trusts

Being able to remain at home in their communities with the care they need is of paramount importance to our clients and their families. To meet this need, our Legal Advocacy & Organizing department has created a unique partnership with the law firm of Mayer Brown in order to maximize the resources available to help low income disabled Medicaid beneficiaries join these trusts. This project, the first of its kind in New York City, links trained pro bono attorneys who receive training and mentoring from Lenox Hill Neighborhood House with low-income disabled older adults who cannot meet their Medicaid spend down. Since its launch in 2009, more than 45 attorneys have been trained and 58 disabled older adults have been assisted in joining pooled supplemental needs trusts.

Using a pooled supplemental needs trust is a valuable tool to enable disabled Medicaid recipients to receive the care they need in the community. This solution, as carved out under federal law, has allowed a myriad of Medicaid recipients to continue living with dignity in their own homes. In light of the move to Medicaid managed long term care, we anticipate that these trusts will be an increasingly vital asset to those in need of long term care at home.

Endnotes

1. http://www.health.ny.gov/health_care/medicaid/redesign/1115_waiver_amendment_for_managed_long_term_care.htm.
2. A spend down refers to the amount a person's countable income exceeds the Medicaid income limit. The 2013 Medicaid income limit for an individual is $800/month. *See* http://www.nyc.gov/html/hra/downloads/pdf/MICSA/MAP/income_level.pdf.
3. http://www.health.ny.gov/health_care/medicaid/redesign/docs/mrt90_partial_capitation_model.pdf at page 15-16, Article V, Section D, 5(b).
4. 10 NYCRR 763.5(f).
5. 42 USC 1396p (d)(4)(c). *See also* N.Y. Social Services Law § 366(2)(b)(2)(b)(2) (iii).
6. http://www.nysarc.org/trust-services/our-trusts/community-trusts/trust-ii;, http://www.ucstrustservices.org/establishment-of-trust.php#content, http://cdrnys.org/index.php?option=com_content&view=article&id=71&Itemid=58&showall=1.
7. 42 USC 1396p (d)(4)(c). *See also* http://www.health.ny.gov/health_care/medicaid/publications/docs/inf/05inf-01.pdf.
8. http://www.health.ny.gov/health_care/medicaid/publications/docs/gis/12ma027.pdf; *see also* http:/www.wnylc.com/health/afile/134/402/.
9. *Id.*

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Coverage Confusion: Untangling Myths About the Medicare Home Health Benefit

By Doug Goggin-Callahan

The rules that govern Medicare's home health care coverage can be misunderstood by health plans, health providers and clients. These misinterpretations can result in a denial of coverage or a service disruption for a client. Although there are a number of misconceptions about home health care services, two of the most common are: Medicare does not cover home health care, and if a patient's condition stabilizes or "plateaus" he or she is no longer entitled to Medicare home health services. Although both are not true, the latter was a standard utilized by some Medicare contractors until a recent settlement in the case *Jimmo v. Sebelius*.[1] This article will explore when and under what circumstances Medicare covers home health services and how the *Jimmo* settlement may affect your clients.

One of the most pervasive myths about Medicare's home health coverage is that Medicare does not offer home care benefits and that home care is only provided by Medicaid or private payment. This is not true. Medicare does cover medically necessary home health services if four criteria are met[2]:

- The client is homebound;
- The client needs skilled nursing care on an intermittent basis, or needs physical or speech therapy, or occupational therapy if the client has already received skilled home care and continues to need occupational therapy after the skilled nursing care or physical or speech therapy has ended;
- The client's doctor signs a home health certification with an accompanying plan of care, which is periodically reviewed by the doctor; and
- The home health services are provided by a Medicare certified home health agency.

Although these requirements appear straightforward at first blush, attorneys must break down some of these conditions further when determining whether a client qualifies for the Medicare home health benefit.

When Is a Client Homebound?

The statute makes clear that a client does not need to be bedridden to be considered homebound.[3] Moreover, leaving the home for medical treatments, religious services, and even social adult day-care programs does not disqualify an individual from being considered homebound. Although it is clear that homebound does not literally mean confined to the home, the statute states that a client's condition must be such that there is a "normal inability to leave the home."[4] Sub-regulatory guidance provides a list of examples which shed light on what constitutes a "normal inability to leave the home." The list includes:

- A patient paralyzed from a stroke who is confined to a wheelchair or requires the aid of crutches in order to walk;
- A beneficiary who is blind or senile and requires the assistance of another person in leaving his or her place of residence; and
- A beneficiary who has lost the use of his or her upper extremities and, therefore, is unable to open doors, use handrails on stairways, etc., and therefore, requires the assistance of another individual in leaving his or her place of residence.[5]

Although absences for medical care and religious services are always acceptable absences from the home, absences do not need to be related to the provision of medical services or religious practice. Medicare guidance provides several examples of trips which would not preclude a client from being considered homebound, for example, occasional trips to the barber, walks around the block, or attendance at graduations.[6] In sum, a homebound client is a person for whom leaving the home requires a considerable or taxing effort, but who may leave the home for short periods of time, for medical and religious services, and some infrequent non-medical events.

What Is Skilled Care, and How Much Is Too Much?

In addition to being homebound, clients must also require skilled care on an intermittent basis, or speech or physical therapy. If the client needs physical or speech therapy the requirement is met.[7] However, many clients require skilled care other than speech or physical therapy, and for these clients the question of what is skilled care and how much skilled care can be provided is more complicated.

Medicare defines a skilled service as one that cannot be performed safely and effectively absent the assistance or supervision of a nurse.[8] When determining whether a service requires a nurse to perform or supervise its administration, Medicare will consider the complexity of the service, the condition of the patient and the accepted standards of medical practice.[9] The sub-regulatory guidance is clear that a client's diagnosis should never be the sole factor in deciding whether the home care service is skilled or unskilled.[10] Moreover, a doctor should evaluate the need for skilled care based on the patient's unique condition and needs, without regard to whether the injury is acute, chronic, terminal or stable.[11]

The individualized nature of the medical necessity determination extends so far that depending on the condition of the patient a service that is usually considered unskilled may be considered skilled. For example, although maintenance of a plaster cast would not be considered skilled in most circumstances, a patient with a preexisting vascular or circulatory condition may need a nurse to monitor the cast, administer medication for pain control, and teach proper skin care to prevent breakdown.[12] In this instance the monitoring of the case would be considered a skilled service and a covered home health care benefit.

In addition to determining whether the service being provided is skilled or unskilled, there must also be a determination as to whether the level of care provided is intermittent. Generally, intermittent care is defined as care needed six or fewer days per week.[13] If a client needs skilled care on a seven-day-per-week basis, the client will be found to exceed the intermittent requirement and will not have his or her home health care covered by Medicare. There is an exception, however, if the client can show that he or she will only need care seven-days-per-week on a temporary basis.[14]

Clients who receive nursing care for fewer than eight hours each day can have Medicare covered skilled nursing services seven-days-per-week for a period of 21 days or less.[15] This care maybe extended beyond the 21-day period in exceptional circumstances where the need for additional seven-day-per-week care is finite and predictable.[16] For clients who do not require care every day of the week, intermittent care is defined as less than eight hours of care each day and 28 or fewer hours each week.[17] On a case-by-case basis, however, weekly hours can go beyond 28 hours up to 35 hours per week.[18]

The Improvement Standard

A second myth regarding Medicare's coverage of home health care is that the number of hours of care must be decreased or eliminated entirely if a patient's condition stabilizes or "plateaus." Medicare contractors would routinely deny coverage to patients who continue to need home health services to maintain or prevent deterioration of their conditions. Contractors would apply, this so called "improvement standard" despite the fact that Medicare regulation and sub-regulatory guidance explicitly states that skilled care may continue to be necessary and covered by Medicare for beneficiaries whose condition is stable.[19]

Like all home health coverage determinations, whether coverage should continue if someone has stabilized will depend on the individual circumstances and health of that person. There is, however, no bright line rule which prohibits skilled nursing services from continuing if a person's condition stabilizes. In 2010, the Centers for Medicare & Medicaid Services (CMS) issued new regulations affirming this, stating that there are no "rules of thumb" for determining if care is covered.[20]

More recently, the Center for Medicare Advocacy (CMA) brought suit, *Jimmo v. Sebelius*, alleging skilled care was being inappropriately denied by Medicare contractors based on a rule of thumb—the improvement standard—that disallowed care if no restorative potential existed, even if the skilled care would prevent deterioration or stabilized the patient.[21] In January of 2013, CMS and CMA settled the suit; the settlement outlined a number of steps CMS will undertake in the coming year to clarify its existing policy making clear that the "improvement standard" is not a permissible coverage rule.

The settlement applies immediately in the sense that CMS clarified no such "improvement standard" exists or had existed in the past. Clients whose conditions have stabilized and require skilled care should continue to receive that skilled care without incident. If your client received care in the past, which was denied or discontinued under the improvement standard, he or she may be entitled to reimbursement.[22] Clients who received Medicare denials which were final and non-appealable after January 18, 2011 may invoke a re-review process. CMS will disseminate information on the re-review process and pathway for clients to utilize the process later in 2013.

Before re-reviewing claims, CMS' first action under the settlement is to update program manuals and other materials used by Medicare contractors.[23] These materials will be reworded to reinforce the existing policy and make clear that rules of thumb such as the "improvement standard" may not be utilized when making decisions about coverage. CMS will also undertake an educational campaign for contractors, providers, and adjudicators like Administrative Law Judges (ALJs). This process will take place throughout 2013 and per the terms of the settlement will conclude by January 23, 2014.[24] It will include national conference calls, updated written materials such as Medicare program transmittals and scripts used by counselors at 1-800-MEDICARE. CMA has developed a one-page fact sheet, which can be found on its website www.medicareadvocacy.org. It is a useful tool for both you and your clients in understanding the impact of the case on the Medicare home care benefit.

Although Medicare's home care benefit is often misunderstood, it provides a robust set of benefits and can help prevent the hospitalization or institutionalization of your clients. As such, it is critical to know the terms of coverage and some of the most common misperceptions so that you can effectively counsel your clients and guard against inappropriate health care denials.

Endnotes

1. No. 5:11-cv-17 (D.Vt.).
2. 42 C.F.R. §§ 409.42 (a)-(e).
3. 42 U.S.C. § 1395 (a)(F).
4. *Id.*
5. Medicare Benefit Policy Manual, Centers for Medicare & Medicaid Services (CMS), Ch. 7, available at: www.cms.gov/regulations-and-guidance/guidance/manuals/downloads/bp102c07.pdf (last visited April 14, 2013) (hereinafter, Medicare Benefit Policy Manual).
6. *Id.* at 21.
7. 42 C.F.R. §409.44 (b).
8. Medicare Benefit Policy Manual, Ch. 7, 40.1.1.
9. *Id.*
10. *Id.* at 40.1.1(4).
11. *Id.*
12. *Id.* at 40.1.1.
13. *Id.* at 50.7.
14. *Id.*
15. Social Security Act, § 1862m.
16. *Id.*
17. *Id.*
18. *Id.,* 42 U.S.C. § 1395x(m).
19. Medicare Benefit Policy Manual, Ch. 7, 40.1.1.
20. 75 Fed. Reg. 70,395 (Nov. 17, 2010).
21. *Jimmo v. Sebelius*, No. 11-cv-17 (D.Vt., filed Jan. 18, 2011).
22. Proposed Settlement Agreement, *Jimmo v. Sebelius*, No. 11-cv-17 (D.Vt., filed Nov. 29, 2012).
23. *Id.*
24. *Id.* (noting that the educational campaign will last up to one year following the date of the final settlement).

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Knowledge of Family Dynamics: Useful or Not When Your Client or Your Client's Parent Is Receiving Home Care?

By Lory Alissa Skwerer

When a parent has home care and an adult child is her or his primary caregiver, how useful to an attorney is understanding the family dynamics that accompany the parent's aging and death?

This question was sparked by several recent articles in this *Journal*. It is no secret that the cases we see often involve family dynamics gone awry. Martinez and Shaw point to the validity of mediation when "[f]amilial 'issues' going back to childhood are often the real reasons behind hardened positions. These are relationship conflicts not only between parent and child, but between siblings."[1] Mediators, counselors, and court evaluators all work with psychological dynamics in getting to the truth of a situation and in resolving conflict. Would a general understanding of these help an attorney?

The family experience of the aging and dying of a parent actually contains the history of the siblings and their relationship with each other and the parent. It intensifies when the parent is in home care because usually one sibling has the dominant caregiver role and the most access to the parent. Often the parent is in the sibling's home. In a way, this sibling has captured the parent, with all that represents. This can be painful to the other siblings—even if their relationships with the parent are negative, even if being let off the hook as care providers is a relief. If the parent has chosen the sibling as the caretaker, it can be even more painful.

In addition, this situation will end in the parent's death. All care for an aging parent is given under that shadow, which means the end of the parent, of any hopes for resolution of conflict in the parent-child relationship, and of the parent as a source of emotional and material support. All of these are losses on very basic psychological levels. It also means that the children have moved one generation closer to their own deaths. Not only the good children, but also the predatory or "bad" children can experience this loss and change.

Because, as we all know, "every unhappy family is unhappy in its own way,"[2] my purpose here is to stimulate dialogue rather than provide quick, shallow answers. I will summarize some of the applicable dynamics and, in the hope of hearing readers' thoughts about whether insights from these might influence practice, I will share some of my own musings.

A. Family Dynamics

1. Caregiving as a Positive Experience

In spite of the evidence of all the stress being a primary caregiver can cause to an adult child, caregiving is also gratifying. Ann Burack-Weiss writes that it has "multiple meanings."[3] She adds, "[t]he patient and caregiver resume some of their old tasks and add new ones, always within the context of past relationships and roles."[4] Donorfio and Sheehan criticize the literature for being "slow[] to describe the positive outcomes that derive when daughters care for their aging mothers."[5] The authors say "[s]ome of the benefits linked to filial caregiving include a sense of purpose...feelings or mastery in the caregiving role...and increased emotional closeness in the parent-child relationship. For some mothers and daughters, caregiving offers an opportunity to rework their relationship."[6] Along with the burden of stress and the burden and perhaps opportunity of control, the primary caregiver is also in a unique emotional relationship with the parent. But like the course of true romantic love, that other unique emotional relationship, it does always not run smooth.[7]

2. The Caregiver and the Parent

One of the most interesting findings about elderly parent/caregiver child dynamics sheds some light on one of the most common sources of sibling conflict about an aging parent. This is conflict about the quality of the job the caregiver is doing based on how happy the parent is. When the source of negative information is the parent, this can indicate a predatory or self-interested caregiver; but it might be based in aspects of elderly parent/caregiver child dynamics. When the elderly do not require much help—or do not perceive themselves as requiring it—they have positive views of multi-generation households, most particularly that grandparents help to look after their grandchildren.[8] Caring for grandchildren is a positive contribution, a way in which the elderly contribute to the household and know that they are contributing. This is satisfying.

But studies seem to indicate that as the elderly continue to age, contribute less help, and require more help, their satisfaction can decrease. Lowenstein *et al.*, in a cross-national five-country study,[9] found that "the capacity to be an active provider in exchange relations enhances elders' life satisfaction. Being mainly a recipient of help from adult children is related to a lower level of life satisfaction. Filial norms are negatively related to life satisfaction."[10] The authors write, "the research highlights the importance of reciprocity in intergenerational relations between older parents and their adult children."[11] They refer to equity theory, which "maintains that balanced relationships contribute to higher levels of well being."[12] But their findings from their studies of elderly parents went beyond this. They found that "[r]espondents who provided more help to their adult children than received (i.e., under-benefitted intergenerational exchange pattern) reported the highest life satisfaction."[13] It appears that keeping parents happy, that is, helping them to feel important, valuable, needed, and possibly powerful, while caring for them is no easy thing.

The loss of power that accompanies role-reversal between parents and children isn't easy for parents. They have been the source of knowledge, power and money. Israeli researchers Roll and Litwin found a significant inverse relationship between parents' number of depressive symptoms and their giving financial transfers to children. Financial transfers correlate with fewer depressive symptoms.[14] The authors used social exchange theory and altruism to explain this. In spite of the fact that transfers can involve "stress, disputes and anger...when the adult child expects more help than he or she actually receives or when the siblings argue over the division of financial transfers from their parents,"[15] they did not find that reasons for giving mattered.[16] They concluded that their "findings suggest a positive association between the practice of financial transfer-giving and the mental health of older adults, with the condition that parents set acceptable boundaries as to the amount of the transfer."[17] Imagine your sibling caring for a parent who feels important to the household when the parent writes that sibling checks. Does it feel like time to petition for guardianship—or are you just happy they're both happy? This also raises a question of how a caregiving child who is not a predator should handle this and how to refuse money while preserving the parent's dignity.

Elderly parents also like to be cared for with a certain attitude. Lang and Schütze, who studied German families, examined adult children's supportive behavior and parents' well being. They found that "[o]lder parents' satisfaction improved when children expressed affection or gave emotional support."[18] "However, informational support from children was associated with decreased satisfaction among parents."[19] They also suggested that "older parents may benefit most if adult children focus on providing meaningful social encounters while leaving the more instrumental tasks of caregiving routines to professional caregivers,"[20] though they acknowledged that there is government funding for this readily available in Germany.[21]

All of this tells us something we intuitively know: that it is important to preserve people's experience of retaining dignity and autonomy, especially when due to mental and physical deterioration, they are losing it. New York State's range of support for those elderly who want to age in their own homes[22] and state law, in trying to offer least restrictive alternatives and in letting people choose their guardians when able to, certainly seem to recognize this.

Lang and Schütze wanted to know if a child's goals when interacting with parents were tied to that child's sense of autonomy from parents. A child who can separate from aging parents, who feels emotionally independent, can understand and accept parents as separate people. They write: "An autonomous daughter may feel pleased when her mother expresses joy of life...[a] dependent son, in contrast, may feel pleased when his mother praises him."[23] They found that filial autonomy may facilitate supportive behaviors that correspond to older parents' socioemotional needs.[24] In addition, filial autonomy is associated with resistance to strain.[25] Children who are not looking for emotional validation from parents are in a better position to give emotionally to those parents. Daughters gave more informational support to parents than sons.[26] Dependent siblings gave more informational support when expecting to have pleasure in their interaction with parents; but in this situation, autonomous children gave less.[27] The authors also report that, over time, parents' well-being improved "when children reported giving emotional support [and] decreased when children gave informational support."[28] Donorfio and Sheehan explored a related issue and created a typology of "three approaches to caregiving"[29] in their study of mothers and daughters: "undifferentiated, dispassionate, and mutually balanced."[30] The first group is the daughters who will do anything for their mothers, and who appear to be the least separated from them. Some mothers interviewed found this approach overwhelming.[31] The second type of daughter appeared to be rather emotionally distanced and focused on the tasks involved in the caregiving relationship. The mothers interviewed spoke of their daughters' help with ambivalence.[32] The third is the mutually balanced approach, a "relationship...more emotion-based and companionship [based] than task-oriented...[where] instrumental caregiving tasks were secondary to emotional support."[33] There was mutuality and mothers seemed to speak well of these daughters and the relationship.

I took a multicultural approach here because New York practice is increasingly multicultural and because I thought these studies showed that the need to be valued and important is part of human nature. I think these studies also show that it is possible to be a very good caregiver and still have a parent who gives one's siblings an extremely negative impression, engendering who knows what responses in them. If my client were the caregiver, I wondered if it would be appropriate to discuss some of this material with her, in an effort to give her parent the most positive experience as well as to ward off possible litigation from siblings. If my client were the parent, would it be appropriate to meet with the caregiving child, with the parent's permission and possibly in her presence? Is it appropriate to discuss sibling access to the parent (unless that is threatening to the parent), so that siblings can see the parent's situation first hand? As counselor to my client, could I draw on this information when deciding whether to spend resources or apply for help with daily task-oriented care? Would not all of this in some way protect my client, whether he was the parent or she was the primary caregiver? And if I were the sibling's attorney, hired because of parental complaints, would it be appropriate to draw on any of this information, or is my job simply to sue or litigate and let the court evaluator sort it out? What is the ethical way to proceed?

3. The Caregiver and the Siblings

And this child who has the autonomy, the distance, the separation and the ability to handle stress, how often is this the child who ends up as the parent's primary caregiver? Compared, say, to the child who might be more emotionally entangled, have something to prove, want control over the parent and possibly the parent's finances, or simply live closer to the parent? I do not know.

What do we know about this favorite and burdened child, the primary caregiver? Most often, the daughter is the caretaker.[34] Parents are not supposed to have favorites but they do and it starts when the children are young. Aldous *et al*. "compared the characteristics of children who provide comfort and sympathy and serve as confidants to parents with those parents perceive as disappointing."[35] They found that "[i]n thirty-eight of fifty-six families one child exceeded the others in number of times giving comfort and sympathy."[36] Though daughters who lived nearby were found to be the most understanding, intergenerational shared interests and values were more important than proximity.[37] Though mothers and fathers picked the children they chose as confidants and the most sympathetic children differently, both preferred children who had more education than their siblings, and both least liked children whose treatment of them they did not like, who criticized their (the parents) child-raising, and who did not share their interests.[38]

What happens when the disappointing child becomes the primary caregiver while the parent reaches out to another child as favored confidant? Is the disappointing child almost "set up" to treat the parent badly—or to treat the parent better, to finally earn respect? Or is this the child who does too much, or becomes authoritative, and thereby gives the parent the bad experience that the parent expected from this child? And how might that play out legally?

Sibling dynamics are exacerbated by the personalities of the children involved, especially as those were formed by the family matrix. One of the painful realities of this, as every attorney knows, is that parents who produce difficult, needy, aggressive children are often unpleasant people themselves, and remain that way throughout their lifespan. Finzi-Dottan and Cohen (in a study in Israel) write about how perceived parental favoritism and narcissism affect young adult sibling relationships.[39] Not only did they find that parental favoritism was a big factor in conflict between siblings,[40] but that parental narcissism can shape narcissistic traits and thus siblings themselves.[41] When parents treat siblings differently, they shape the dynamics between the siblings.[42] When parents are narcissistic, often the favored child is a narcissist as well, feeling entitled and grandiose, while the disfavored child has low self esteem and is "sensitive to personal slights and criticism."[43] These often remain life-long emotional stances. Both types of children remain needy in different ways, with baggage they carry into adulthood, as they continue to relate to each other and to their aging narcissistic parents. A child who feels entitled can make a dangerous caregiver and a worse enemy; a child who is disfavored has a lot of feelings of inadequacy to defend, with parents or with siblings, and it might be that the last years of his or her parent offer the last chance to gain material resources that substitute for love. I think of Mrs. Astor's son here and the unfortunate moral decisions that he made, and I wonder about the history of his relationship with his mother. If his mother's attorney had not been so co-operative with him, would there have been a way not only to refuse to help him, but also to persuade him that another course of action could be not only morally sound but emotionally gratifying? Or does the role of an attorney end with the refusal to help someone carry out what appear to be unethical actions?

The caregiver's relationship with siblings grows out of the family matrix and depends in large part on how the siblings have handled their relationships as adults, how satisfied they are in their lives, and what they want and need emotionally and materially from the aging parent. It is this, I think, that can lead to conflict, just as much as genuine concern for a parent who has fallen into the hands of a predatory or simply inadequate caregiver. It also depends on the parent's continuing relationship with the siblings. Unfortunately, parents often get the children they deserve; more unfortunately, lovely people can also raise selfish or emotionally disturbed or simply unethical offspring. Perhaps as part of planning ahead and completing wills, living wills, DNRs, and powers of attorney,[44] there is a place for asking clients where and how they would like to age, and with whom, when they need care. Is it wise or unwise to put in writing a person's reasons for choosing the guardian he or she would want, should one be necessary? Does it fall within Rule 2.1 of the new rules of professional conduct to remind a client that family relationships will be critical to his old age, to inquire about those, and to drop gentle hints about how he might talk to and prepare his children for his old age, out of his own self-interest, if not his interest in his children's relationships with each other? In a recent article, JulieAnn Calareso in her discussion of Rule 2.1 of the new rules of professional conduct[45] states that elder care attorneys face issues of "[t]he morality of asset preservation techniques, the spiritual components to end-of-life decision making and the emotional toll some decisions may take on a family"[46] and states that she believes it "permits us to highlight other considerations a family or client may wish to address in connection with the legal issues at hand."[47] Are there practical and ethical reasons why these cannot include issues of sibling and parent relationships and the value of seeking possible remedies for these as needed? Though it is wise not to practice outside of one's scope, referring clients to counseling is not a panacea. When, as an attorney, I see situations that are rife with dynamics and possibilities that are likely to result in conflicts with legal dimensions, is it appropriate for me to address these?

B. So What?

When I reread this, I had two responses. First, I think of families who epitomize the situations discussed. But then I say, "So what?" It is crystal clear to me that sometimes the motives and emotional complexities of the people we deal with do not matter. What is important are their actions and our timely responses to those, with the goal of excellent representation of our clients. It might be that most of the *sturm und drang* in eldercare situations originates from a small group of people who might best be described as predatory, sociopathic or both. Certainly several of Robert Kruger's Guardianship News[48] columns present people who, regardless of whether they can be considered psychologically "normal," have made moral choices to act in reprehensible ways that need to be responded to with the kind of legal actions that would not be changed by insight into the origins of their behavior. In fact, insight would not even be useful as a basis for counseling the caregiver, were she or he dealing with people like this, and it should certainly never be used to discourage assertive responses.

On the other hand, many people are not pathological, and perhaps there is a place for using psychological insight in offering advice, planning and representation, even in an adversarial context and always to protect our clients. Good attorneys decrease hostility rather than ratchet it up. When dealing with "normal" people, understanding could affect how I listen and respond and thereby affect my clients' responses to their situations. I don't know why discussion of relevant factors would not include psychological dimensions, especially as these can lead to legal actions (for example, will contests, petitions for guardianship, or claims of elder abuse).

Endnotes

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Problems in the Assessment of Testamentary Capacity

By Eric G. Mart, Ph.D., ABBP (Forensic)

A good deal of anecdotal evidence suggests that the number of challenges to wills and trusts by family members is increasing. Several factors may explain this trend. The first is demographic; the parents of baby-boomers are aging and dying, and the boomers make up a large portion of the population. Additionally, the baby-boom generation has been associated with an increase in litigiousness in American society generally. For these reasons, it is not surprising that this generation would react by accessing the courts when there are disagreements among family members regarding the distribution of an estate. While it is only possible to speculate regarding the underlying reasons for the increase of these challenges in probate courts, the large numbers of cases have created a heightened need for assessments and expert testimony by medical and mental health professionals.

Unfortunately, as with any rapidly developing area of forensic practice, empirical research on the subject of testamentary capacity is not well developed. As a result, courts are often placed in the position of having to weigh the relative merits of expert testimony that is based on clinical judgment unsupported by well-established standards or hard research. Nowhere is this more apparent than when physicians, psychiatrists and mental health professionals provide opinions about the capacity to execute planning documents of a living or deceased individual when the disputed will or trust was executed at some time in the past. This lack of standards and the misunderstanding of issues related to capacity can lead to conclusions and testimony that have the potential to mislead the court and create questionable retrospective judgments about testamentary capacity.

This article will explore problems and misconceptions in the retrospective assessment of testamentary capacity and provide suggestions for more accurate and forensically defensible expert testimony in this area of practice.

Capacity General Definitions

In *Assessment of Older Adults with Diminished Capacity: a Handbook for Psychologists*,[1] the authors note that there has been ongoing confusion regarding the use of the terms *capacity* and *competency*. Many clinicians differentiate between the terms by defining the former term as a clinical descriptor and the latter as a legal term. The authors of the handbook suggest that this confusion can be avoided by using the terms *legal competency* and *clinical capacity*. Regardless of the term which is used, what is generally being assessed is an individual's ability to perform a specific task. Further, the individual being assessed must have a rational understanding of the nature of the task and the decisions being made. For example, in order to make a rational decision about whether or not to have a medical procedure, an individual would need to possess certain information and capabilities. Some of the issues involved in such a decision include the following:

1. An understanding of one's medical status generally
2. An understanding of the condition to be treated by the procedure
3. The possible benefits of having the procedure
4. The risks of having the procedure
5. The risks of not having the procedure
6. A general understanding of the probability of (4) and (5)
7. The ability to hold factors 1-6 in consciousness long enough to make a decision
8. The absence of any condition or process which would significantly affect one's ability to make such a decision (e.g., severe depression, psychosis, cognitive dysfunction) in a rational manner

A distinction must be made between decisional capacity (the process outlined above) and executional capacity. Executional capacity refers to an individual's ability to carry out specific capacities. For example, an individual who has suffered a stroke may be physically unable to pay a bill or transfer money from one account to another, but may be able to tell another person what he or she wants done.

In the past, legal and clinical capacities were viewed globally; individuals were generally deemed to be either capable or incapable of managing their affairs generally. However, in recent years there has been recognition that individuals may have capacity in one area and lack capacity in another. This has led to greater specificity in the assessment of clinical capacities. Some examples of specific capacities include:

1. The capacity to make donations or financial gifts
2. The capacity to enter into a contract
3. The capacity to consent to sexual relations
4. The capacity to live independently
5. The capacity to make or amend a will or trust

An individual may have capacity in some or all of the areas noted above. Further, his or her capacity may vary at different times as a function of changes in psychological or medical condition.

While the legal standards for testamentary capacity are not particularly complex or stringent, problems still arise in making such determinations. One problem which I have observed in such cases relates to the fact that such determinations have both legal and clinical aspects. In cases in which an elderly testator/testatrix wishes to create a will or amend a pre-existing will or trust, the lawyer must make an initial determination regarding the client's capacity. In some cases, the client may be obviously incapacitated. A testator/testatrix may appear disoriented, exhibit bizarre delusional beliefs or paranoia, or have gross deficiencies in memory, such as an inability to recall the names of his or her children or the fact that he or she is married. In such cases it should be obvious to the attorney that some type of mental health assessment is required before changes can be made in estate planning. (NOTE—ethical considerations guide the attorney—the client makes the changes.) In other cases the client may have more subtle cognitive or mental health problems that are difficult for non-clinicians to detect.

In the course of my practice, I have observed a number of common errors which contribute to confusion in cases in which the issue of testamentary capacity is raised. These issues generally stem from the failure of legal and mental health professionals to clearly conceptualize the issues underlying the construct of testamentary capacity. (In the discussion which follows, we use the term "testamentary capacity" to cover all situations in which there is a question about an individual's understanding of an action which affects the individual's property. We understand that the level of capacity required to effectively create legally binding documents varies with the type of document.)

A. Failure of Attorneys to Screen for Testamentary Capacity

In many cases in which an elderly client wishes to create a will or modify an existing will or trust, the attorney who does the work has had an ongoing relationship with the client. Having familiarity with a client can be helpful, since the lawyer may be sensitive to any major changes in the client's mental status. Perceived changes in speech, language, cognition, and responsiveness may alert the attorney to the possibility that the client may lack testamentary capacity and trigger an appropriate referral to a medical or mental health professional. However, in my experience, even attorneys who know their clients well may fail to adequately assess for capacity. This can also be the case when a client seeks out a new attorney to assist with estate planning.

This failure to properly assess the client can occur for many reasons. In some cases, cognitive changes may be relatively subtle and easy to miss, particularly by persons not trained in psychological/psychiatric assessment. Individuals with cognitive deficits often develop ways of disguising their deficits in reasoning or comprehension.

One common way of doing this has been referred to as *acquiescence*; this occurs when the client simply agrees with the statements made by others, giving a false impression of comprehension.[2] By way of example, I was able to observe this in a recent case in which I performed a posthumous assessment of testamentary capacity and possible undue influence. In that case, the testator was profoundly hard of hearing. Records indicated that this individual had suffered a stroke subsequent to an episode of endocarditis (inflammation of the inner lining of the heart). He did not fully recover and developed paranoid delusions, the aforementioned hearing loss, and homonymous hemianopsia (the loss of half the visual field in both eyes). One unusual aspect of the case was that an autopsy was performed because of potentially suspicious circumstances surrounding his death. The autopsy revealed serious damage to the client's left frontal lobe and occipital lobes of his brain. Obviously, this information was unavailable to the attorney who made changes to the client's estate plan. Further, because of the client's hearing problem he and his lawyer communicated by writing on a notepad. This individual had a simple trust and was brought to see the attorney by a female friend who had served as his caregiver for a number of years to consult about his estate plan. The attorney was under the impression that the residue of the client's estate would be evenly distributed between his client's three daughters when the client died, as stated in the trust. The attorney was not aware that the client had already transferred all of his money to a series of joint checking accounts and that the client's caregiver had been designated as the co-owner of the accounts. As a consequence, when the client died, the ownership of the accounts would pass to the caregiver and not to the children. Laboring under this misunderstanding, the lawyer asked the client a series of questions that were predicated on the idea that the money in the estate would pass to the children when this was not the case. These included questions such as "Do you still want the money that goes to your children to be evenly distributed?" and "You have no wish to make any special bequests to anyone else?" The client answered all of the questions in the affirmative, despite the fact that the attorney's questions were unintentionally counterfactual. The result of this process was the production of an estate plan which was meaningless, since there were no longer any assets to be distributed.

This could have been avoided if the attorney had asked more probing and open-ended questions, which would have allowed an assessment of the extent to which the client actually understood his financial situation and his reasons for amending his trust. For example, the client could have been asked to describe his assets and his rationale for making changes in his estate plan. At a minimum, some of the questions could have been asked so that a "no" would be required to preserve the original meaning. For example, the question "Do you want your sons to share equally in your property?" could have been asked as "Do you want any of your sons to inherit a larger portion of your property?" Mental health professionals who assess the mental state of elderly clients they suspect of acquiescent responding sometimes address this by asking nonsensical questions such as "Do helicopters eat their young?" to see if the subject answers in the affirmative, and this could also be done by attorneys.

There are many other reasons why possible lack of testamentary capacity may be missed by attorneys. A client may appear oriented and cheerful, and his or her remote memory may appear to be intact. Even input from family members may not help reveal deficits. In my experience, family members who interact with the testator/testatrix may not be aware of substantial cognitive deficits. In some cases, the deficits associated with a dementing condition may have developed insidiously and family members simply became accustomed to these slowly progressing problems. Further, they often do not understand the significance of signs and symptoms they observe. Family members frequently make statements such as "Sometimes grandmother gets lost when she is driving, but she generally does pretty well, and after all, she is in her 80s." The same thing can occur with other symptoms, such as the elderly relative having spoiled food in his or her refrigerator, dressing inappropriately, or frequently misplacing belongings.

Because problems associated with a lack of testamentary capacity can be so easy to overlook, it has been recommended that attorneys working with the estate plans of the elderly routinely perform more comprehensive assessment of possible cognitive deficits. In *The Assessment of Older Adults With Diminished Capacity: A Handbook for Lawyers*,[3] a methodology for attorneys to assess testamentary capacity is provided, including a worksheet developed specifically for attorneys to help structure the assessment. The first component of the worksheet outlines common cognitive, emotional and behavioral signs of diminished capacity which raise potential concerns. Other factors that can produce signs of potential incapacity, such as grief, depression, reversible medical conditions, hearing or vision loss, or low education level, are also addressed. The attorney is then directed to consider any observed signs of potential incapacity in the context of the relevant legal issues in the case. In estate planning, this would involve an assessment of the client's understanding of the act of making or amending a will or trust, their knowledge of their assets, the natural objects of their bounty, their reasoning with regard to any contemplated changes and the consistency of the changes with previously expressed values and desires. In estate planning, this would involve assessing the client's understanding of the act of making or amending a will or trust, reasoning with regard to any contemplated changes, and knowledge of his or her assets and the natural objects of his or her bounty, as well as the consistency of the requested changes with the client's previously expressed values and desires. Finally, the worksheet helps the attorney determine an appropriate course of action based on the information gathered in the previous steps. These may involve proceeding with the contemplated changes to the estate, obtaining a formal assessment from an appropriate medical or mental health professional, or not proceeding based on a conclusion that the client lacks the requisite capacity.

It should be noted that the members of the joint task force strongly caution attorneys not to use psychological procedures such as mental status examinations in performing these types of assessments. They conclude that the use of such instruments by attorneys in this context can create serious problems for a number of reasons, including possible false positive and false negative conclusions, over-reliance on the limited data these instruments produce, and the lack of a strong nexus between the data these instruments produce and the relevant psycho-legal issues being assessed.

B. Conflation of Diagnosis and Functional Capacity

Another problem I have observed with some frequency in cases involving posthumous assessment of testamentary capacity is the tendency of mental health professionals, attorneys and courts to conflate a particular diagnosis in the testator/testatrix with his or her level of functional capacity. In such cases, the fact that an individual has been diagnosed with some form of dementia, brain damage or mental illness is taken as prima facie evidence of lack of testamentary capacity. This is problematic for a number of reasons. The most obvious problem is that a diagnosis, in and of itself, tells the court very little about the testator/testatrix's actual abilities in regard to the psycho-legal issue. Further, most jurisdictions apply a functional capacity test for testamentary capacity rather than a requirement that the testator/testatrix not suffer from a specific disease or condition. This differs from the standards applied in other types of legal cases in which mental health assessments and expert testimony are utilized. For example, with regard to legal insanity, U.S. Federal Law states:

> It is an affirmative defense under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.[4]

Clearly, a mental health professional providing expert testimony that a defendant lacked the ability to appreciate the wrongfulness of his or her actions during the commission of a crime would be required to specify the severe mental disease or defect underlying this lack of appreciation, and a formal diagnosis would be required.

On the other hand, a determination that an individual lacked testamentary capacity at the time a will or trust was created or modified does not require a particular diagnosis. In Case No. 2007-0048, *In re Estate of Frederick W. Whittemore*,[5] on December 26, 2007, the Supreme Court of New Hampshire cited the following definition of testamentary capacity:

> The standard for testamentary capacity requires that the testator: at the time of making [his will], must have been able to understand the nature of the act [he] was doing, to recollect the property [he] wished to dispose of and understand its general nature, to bear in mind those who were then [his] nearest relatives as such, and to make an election upon whom and how [he] would bestow the property by [his] will,…

The language of this decision is typical of the language used in many jurisdictions, in that it emphasizes the testator/testatrix's ability to satisfy the definitions of capacity while de-emphasizing the underlying diagnoses that might be causing any areas of observed clinical or legal incapacity. This is not to suggest that diagnoses have no place in such an evaluation, as the court may wish to know the cause of any observed functional deficits and the probability of remediation. That being said, the presence or absence of a specific diagnosis should not be over-emphasized. This view was put forward persuasively by Greenberg, Shuman and Meyer in their 2004 article "Unmasking Forensic Diagnosis"[6] (Greenberg, Shuman & Meyer, 2004). These authors describe how the use of diagnoses can create more problems they solve:

> In other cases, parties use the existence of a mental disorder as circumstantial evidence of a condition or an event. To prevail on a tort claim for negligence seeking damages for mental or emotional distress does not require that the plaintiff suffer from a particular psychiatric disorder. Substantive tort law does not condition a plaintiff's right to recover damages for mental or emotional distress on the presence of a psychiatric diagnosis. Yet litigants frequently use the presence or absence of psychiatric diagnoses circumstantially to support or defeat a damage claim (Shuman, 1995). What the law calls for and what judges and juries need in such cases is a functional analysis of a litigant: How, if at all, the defendant's actions have affected the plaintiff's life? When used for this purpose, psychiatric diagnosis is both ethically and legally precarious because it is misleading and risks distorting a candid assessment of a litigant's functioning (p. 11).

These authors go on to apply this reasoning to the issue of testamentary capacity:

> The same holds true for other instances in which the law calls for a functional analysis of the litigant rather than a clinical diagnosis. In most competence determinations—testamentary capacity and contractual capacity—the law is concerned with functional capacity. Indeed in such cases not only is a formal psychiatric diagnosis not dispositive of competence, but a finding of incompetence may be based on a condition other than a formal diagnosis (p.11)

It has been my experience that in many cases in which testamentary capacity is at issue, attorneys send the testator/testatrix to a clinical neuropsychologist for assessment. In reviewing the data from these cases, I am often impressed by the quality and comprehensiveness of these assessments. The subjects are administered a large number of well-established neuropsychological tests, sometimes over several days. The reports from these assessments provide a wealth of data about the subject's memory (short term, intermediate and remote), language skills, computational abilities, grapho-motoric skills, and executive functioning. In some cases, hypotheses are put forward about the relationship of observed deficits to medical events (head injury, stroke, depression, etc.), and the results are linked to injuries or degeneration of specific regions of brain anatomy. Probable diagnoses such as Alzheimer's dementia, traumatic brain injury or organic personality disorder are provided. Unfortunately, there is often little information in these reports regarding the forensically relevant issues. For example, does the subject have a general idea of his or her assets, know his or her family members, or have a rationale regarding any changes to the distribution of his or her bounty? These issues, which would be better described by direct assessment using issue-focused interviews or more forensically relevant instruments, such as the Hopemont Capacity Interview or the Independent Living Scales,[7] are neglected in favor of diagnostically-related instruments that do little to provide the court with relevant information.

C. Over-Reliance on Inadequate Data and Ignorance of Relevant Legal Standards

A different but related problem can arise in cases involving testamentary capacity when medical or mental health professionals place too much reliance on inadequate data. An example from the previously described case will help to illustrate this type of problem. In that case, the testator had been seen for routine examination by his primary care physician some months before he had passed away. In the subsequent trial, this physician testified that in his opinion, the client had testamentary capacity at the time he revised his trust. This opinion was based on the fact that the client had recognized the doctor, seemed cheerful, was oriented to person, place and time, and was able to answer several questions designed to assess remote memory. There was no discussion of the client's financial situation in the session; in fact, it would have been very difficult to have had such a conversation. The client's hearing was so impaired that several witnesses stated that they had to yell in order to make him understand anything they said to him, and that frequent repetitions were also necessary. The physician did not elicit information about the patient's intentions with regard to the disposition of his property, knowledge of the natural objects of his bounty, or reasoning process about his choices. Despite the paucity of any real data about the forensically relevant issue, his physician was convinced that his patient had the capacities necessary to make changes to his estate plan at the time those changes were made. In his cross examination at the probate hearing on the will, it became clear that the physician did not know the elements of testamentary capacity, and his conclusions regarding his patient's capacity were given little weight by the court.

This type of scenario is not unusual, and it is not uncommon to see inadequate instruments and examination techniques used to draw conclusions regarding testamentary capacity and other civil competencies. The problems stem from a number of underlying misunderstandings. One of these is related to the previously discussed conflation of diagnosis with capacity, but for different reasons. For example, some physicians will administer the Mini Mental State Examination (MMSE),[8] or a similar screening instrument such as the Montreal Cognitive Assessment[9] and the Frontal Assessment Battery,[10] to an elderly patient and conclude that a passing score implies (a) the absence of cognitive dysfunction or dementia, and (b) the presence of testamentary capacity. The converse can also occur. There have been studies that demonstrate that scores indicative of moderate dementia are correlated with lack of decisional capacity, but the relationship is modest when scores indicate mild cognitive problems.[11]

A related issue in this type of testimony is related to the provision of forensic testimony by medical or mental health professionals who lack forensic training. Individuals who specialize in forensic work understand that they are working at the intersection of the clinical and legal realms, and they tailor their examinations and testimony to match, to the extent possible, the needs of the legal system. The Specialty Guidelines for Forensic Psychology (Adopted by APA Council of Representatives, August 3, 2011) state in Section 2.04—Knowledge of the Legal System and the Legal Rights of Individuals:

> Forensic practitioners recognize the importance of obtaining a fundamental and reasonable level of knowledge and understanding of the legal and professional standards, laws, rules, and precedents that govern their participation in legal proceedings and that guide the impact of their services on service recipients.

In cases in which testamentary capacity and related matters are at issue, it is important to have a basic understanding of the laws that inform assessments. Clearly, a primary care physician who knows that having testamentary capacity involves knowing the nature and purpose of a will, having a basic understanding of one's financial situation, knowing the natural objects of one's bounty, and having a non-delusional rationale to make changes in a will would never opine that an individual had testamentary capacity on the basis of the patient being oriented to person, place and time. In cases where such testimony is offered by non-forensic witnesses, it has been my clear impression that these witnesses do not know that such legal standards exist. When this occurs, it would be helpful for the attorney to ask explicit questions of the witness to determine the extent to which he or she understood and applied the appropriate legal standard in coming to a conclusion regarding capacity.

A final issue that arises in reports and testimony in cases in which testamentary capacity is at issue is that of ultimate issue conclusions and testimony. There has been a long-standing disagreement among forensic practitioners regarding the appropriateness of such testimony. This issue is moot in jurisdictions in which such testimony is prohibited, but most courts allow experts to testify regarding the ultimate issue. On one side there are those who feel strongly that such testimony is inappropriate for a number of reasons. Those holding this opinion believe that the ultimate issue (in this case the presence or absence of testamentary capacity) is a legal issue and the province of the court. They point out that such determinations are made on the basis of information that goes beyond the scope of medical or mental health evaluations. Further, they generally hold to the opinion that by offering opinions regarding the ultimate issue, experts usurp the prerogatives of the court and are over-reaching. Those who feel that such testimony is appropriate point out that since the ultimate decision on this issue already rests with the court, the presiding justice is free to give such testimony whatever weight he or she decides is warranted. In my personal experience, I have never seen an expert refuse to answer when asked questions regarding the presence or absence of testamentary capacity. Some authorities have suggested that problems with such testimony can be avoided by using the term "clinical capacity" rather than "competence," since the former is a clinical term of art while the latter is a legal term, but this strikes me as a distinction without a difference. I am inclined to believe it is appropriate to testify to the ultimate issue as long as the expert is careful to make clear the data and conclusions that support such conclusions. In practice, this requires that there is an explicit logical nexus between the data developed in the assessment and the conclusion reached regarding the ultimate issue. The Supreme Court of New Hampshire has required this logical nexus in a decision that has been influential in the field of forensic psychology.[12] In the case referenced, a psychologist was asked what data she relied upon in coming to the conclusion that a child had been sexually abused. She replied that there was no particular fact or facts upon which she relied in coming to her conclusion, but that instead she relied upon the totality of the data she had elicited. The court responded that since there was no explicit logical nexus linking the data to her conclusions, the expert's reasoning remained opaque to the court, and there was no way for the justices to independently evaluate her thought process; in effect, she did not "show her work." In cases involving the issue of testamentary capacity, the court should not have to rely on the *ipse dixit* testimony of an expert witness.

This problem can be remedied when experts make the logical link between data and conclusions clear. Some forensic psychologists have suggested that in the conclusions of a psychological report the expert should list each conclusion that leads to an opinion on the ultimate issue and link it to the supportive data. An example of this might look like this example:

> Based on the results of my evaluation, it is my opinion, held to a reasonable degree of psychological certainty, that Mr. Smith lacked testamentary capacity when he amended his will on 12/13/2011. I base this on the following facts:
>
> 1. Mr. Smith was assessed by his neurologist on 10/3/2011 and found to have moderate dementia of the Alzheimer's type. He had a score of 18 on the MMSE and appeared confused and depressed. He was oriented only to person and not to time or place. He appeared to believe he was still married to his first wife, who had passed away in 1996, when in fact he remarried in 1998. He gave clear signs of significant memory deficits.
> 2. In my examination of 1/10/12, Mr. Smith told me he was in excellent physical condition and was not taking any prescribed medications, when in fact he was being treated for congestive heart failure, high blood pressure, cataracts, depression and diabetes, and was prescribed Paxil, Toprol , Lasix and Aricept. He thought he had only one son when he actually has a son and two daughters. He told me that he had made the changes in his will because his son was stealing his money when this was not the case; his son lives out of state, sees his father only a few times per year, and has nothing to do with his finances, which are managed by his younger daughter. Mr. Smith has a limited understanding of his estate. He told me that he owns his home, which was actually sold one year ago, and he did not know that he has $500,000 in securities and owns property in Florida worth $300,000.

In the example above, the presiding justice would have no difficulty understanding the basis of the expert's opinion and making an independent evaluation of the adequacy of both the data on which the expert relied and the reasonableness of the conclusions drawn.

In conclusion, many of the problematic aspects of expert opinions could be avoided by the use of an explicit methodology that employs adequate methods and emphasizes functional abilities rather than relying on diagnosis. Further, expert conclusions must be informed by an adequate grasp of the psycho-legal issues that guide decisions regarding testamentary capacity. Finally, such evaluations and testimony should allow the court to follow the expert's thought processes sufficiently to be able to make independent judgments regarding the strengths and weaknesses of his or her analysis. Testimony that does not meet these standards may lead to judgments that do not reflect the underlying facts of the case accurately and mislead the court into making flawed decisions about an individual's true intentions and state of mind.

Endnotes

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Recent New York Cases

By Judith B. Raskin

Review of SNT Payments

The court addressed, inter alia, a claim by Suffolk County DSS that in 2010 the trustees of a court-ordered Special Needs Trust exceeded the budget previously agreed to in a letter agreement with DSS. The trustees, who were also article 81 co-guardians, argued that they and not DSS were the trustees and could exercise their broad discretion as stated in the trust.

This raised the issue for the court as to the level of court control over the use of trust funds by court-appointed trustees.

The court found that its obligation to the infant who remained a ward of the court superseded the trustees' discretion as well as the interest of DSS to satisfy its ultimate lien. The court set a hearing to establish the validity of the expenses.

***Matter of Martin*, 2012 NY Slip Op 223389 (Sup. Ct., Suffolk County, December 12, 2012).**

Medicaid Transfer

The Medicaid applicant's daughter, acting as agent, opened a joint account in the name of mother and daughter and transferred her mother's inherited funds to that account. Daughter then transferred over $100,000 from the joint account to herself. DSS assessed a 13-month period of ineligibility for those transfers. This determination was upheld at a fair hearing.

The nursing home, as temporary administrator of its deceased resident's estate, appealed the imposition of the penalty. It argued that the decedent's daughter opened the joint account acting as agent for her mother under a power of attorney without gifting authority. As the transfer was not made by the applicant, the transfer was not made for the purpose of getting Medicaid.

The court upheld the fair hearing decision imposing the penalty, holding that the applicant may have been in agreement with her daughter's actions and no evidence was presented to the contrary.

***Absolut Care of Three Rivers v. Shah*, 2012 NY Slip Op 08613 (App. Div., 3d Dept., December 13, 2012).**

Section 8 Eligibility

Violations found at Melody Coleman's section 8 residence required her to relocate. She failed to complete a transfer voucher within the required 4 months. That failure resulted in the termination of her section 8 subsidy. Her article 81 guardian argued that Ms. Coleman's incapacity tolled the 4-month statute of limitations.

The respondents opposed the petition and cross-moved to dismiss the proceeding.

The court denied the motion to dismiss and directed the respondents to file their answers to the petition prior to the court calendaring an article 78 oral argument. The supporting information in the guardianship proceeding evidenced Ms. Coleman's inability to function. Insanity is a defense which tolls the statute of limitations, and is held to protect parties "…who cannot protect their legal rights due to their general inability to function in society," including those deemed incompetent by a court of law.

***New York Foundation for Senior Citizens v. Rhea*, 2012 NY Slip Op 32902(U) (Sup. Ct., New York County, November 26, 2012).**

Medicaid Application Form Required

Violet Hall had been receiving benefits under the Medicare Savings Program since 2003. On May 22, 2008, the nursing home where Ms. Hall resided sent a letter to the Medicaid agency with accompanying documentation requesting institutional Medicaid for Ms. Hall. The submission did not include a completed Medicaid application form. It appears that the nursing home eventually understood that the Medicaid application form was required. A Fair Hearing decision denied eligibility as of the original nursing home request and determined an eligibility date of July 1, 2009 based on the filing of the Medicaid application form.

Petitioner asserted that eligibility for public assistance generally did not require submission of the state form because there was ongoing care being provided by the same district. This conflicts with Medicaid regulations requiring the submission of the required form.

The court dismissed the petition. The agency's determination was upheld as it was "based on substantial evidence and not affected by an error of law."

***Hall v. Shah and Bauso*, 2012 N.Y. App. Div. LEXIS 7364; 2012 NY Slip Op 7437 (App. Div., 4th Dept., November 9, 2012).**

Right to Fair Hearing and Emergency Services

The Appellate Division, First Dept., upheld a Supreme Court decision entered July 29, 2010 confirming the following:

1. A private right to a fair hearing can be enforced under 42 USC Sec. 1983. A Medicaid claim must result in a final administrative determination within 90 days of the request for the fair hearing. The exception is, as interpreted by CMS, "…where the agency grants a delay at the appellant's request, or when required medical evidence necessary for the hearing cannot be obtained within 90 days." Any remand to the agency must be given a time line so that the 90-day window will be adhered to;

2. Applications for personal care services by persons showing immediate need shall be addressed immediately pending investigation; and

3. The agency must notify applicants of the availability of the temporary emergency services and develop procedures for obtaining those services.

***Konstantinov v. Daines*, 2012 NY Slip Op 08777 (App. Div., 1st Dept., December 20, 2012).**

Least Restrictive 17A Intervention

In March 2009, Cruz Maria S. filed for 17A guardianship of her daughter, Dameris. Dameris was described as mild to moderately retarded. She was unable to make medical and financial decisions. A few weeks later, Dameris married Alberto. Cruz sought an immediate hearing at which Alberto appeared. The parties reached a settlement giving authority to Cruz and Alberto to act for Dameris. The couple then experienced financial hardships and received assistance from a social worker and other sources.

A few years later, the family moved to Pennsylvania temporarily with court approval and then made the move permanently. The couple returned to court, now with two children added to the family, to show that they had a support network in place sufficient to provide assistance to the family including Dameris. With the family permanently living in Pennsylvania and the support network in place, the court, although then with no jurisdiction over Dameris, terminated the guardianship. Removing the guardians was the least restrictive form of intervention as required under article 81. The court stated that the least restrictive alternative should be applied to article 17A guardianships and that it is unconstitutional not to do so. The court also cited Article 12 of the United Nations Convention on the Rights of Persons with Disabilities as supportive of the need to provide the least restrictive alternative in 17A determinations.

***Matter of Dameris L.*, 2012 NY Slip Op 22386 (Surr. Ct., New York County, December 28, 2012).**

SNT Trustees Must Act and Account

In a prior 17A guardianship proceeding, the court became aware that the decedent, Marie H., left her severely disabled son Mark C.H. considerable funds in trust. The trustees, JP Morgan Chase and attorney H.J.P., had been appointed trustees to use their discretion in providing for Mark's needs. The trustees had done absolutely nothing for Mark, had not used trust funds for his benefit, never inquired about him or visited the facility where he resided. Judge Glen's opinion in that guardianship matter required the trustees to take action to benefit Mark and to employ a care manager to see to his needs. These efforts produced remarkable results significantly improving Mark's quality of life.

In this proceeding the court found the trustees' accounting insufficient. Judge Glen stated in the opinion that the trustees should not receive any commissions for the period in which they failed to take action. The court ordered the attorney, as executor of the will, and the co-trustees of the decedent's revocable trust, to provide accountings for the estate and trust assets within 90 days of the court order. Judge Glen also ordered the co-trustees of the trust to provide a supplemental and revised accounting with updated and more accurate information.

***JP Morgan Chase Bank, N.A. v. Marie H.*, 2012 NY Slip Op 22387 (Surr. Ct., New York County, December 31, 2012).**

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Recent Tax Bits and Pieces

By David R. Okrent

IR-2013-6 Tax-Free Transfers to Charity Renewed for IRA Owners 70½ or Older—Code IRC Sections 401, 401(k), 408

This release alerted taxpayers that IRA owners age 70½ or older had until Thursday, Jan. 31 to make a direct transfer, or alternatively, if they received IRA distributions during December 2012, to contribute, in cash, part or all of the amounts received to an eligible charity and make then tax-free transfers to eligible charities and have them count for tax-year 2012.

Rev. Proc. 2013-13, 2013-6 IRB 1 (15 January 2013) IRS Safe Harbor Method for Valuing Home Office—Code IRC Section 280A

Revenue Procedure 2013-13 provides an optional safe harbor method that individual taxpayers may use to determine the amount of deductible expenses attributable to certain business use of a residence during the taxable year. This safe harbor method is an alternative to the calculation, allocation, and substantiation of actual expenses for purposes of satisfying the requirements of § 280A of the Internal Revenue Code. This revenue procedure is effective for taxable years beginning on or after January 1, 2013.

Rev. Proc. 2013-15, 2013-5 IRB 1 (11 January 2013) IRS Inflation-Adjusted Amounts for 2013 under American Taxpayer Relief Act of 2013

One of the amounts reported is for estates of any decedents dying during calendar year 2013, the basic exclusion amount is $5,250,000 for determining the amount of the unified credit against estate tax under § 2010.

PLR 201304003 (15 October 2012) Decanting of a Life Insurance Policy to a New Trust and a New Policy—IRS Rules on Tax Consequences

An original trust held a Trust-Owned second-to-die life insurance policy. After the death of the first insured, the survivor created a new trust, had the old policy transferred to a new trust and then had the new trust exchange the old policy for a new one. The IRS concluded that a new trust does not have to recognize any gain or loss from the assignment of an old life insurance policy in exchange for a new policy because the transaction is described by section 1035.

PLR 201307003 (13 November 2012) Taxpayer Granted Extension to Defer Tax on Canadian Retirement Plan

The IRS concluded that taxpayer could have an extension of time to make an election under Rev. Proc. 2002-23 to defer tax on a Canadian retirement plan. Taxpayer became a U.S. resident in Year 1 and a U.S. lawful permanent resident in Year 2. Prior to becoming a U.S. resident, Taxpayer was a resident of Hong Kong. Prior to that, Taxpayer was a Canadian resident who established and contributed to two Canadian Registered Retirement Savings Plans (RRSPs) with Financial Institution, RRSP 1 and RRSP 2. Taxpayer continued to maintain RRSP 1 and RRSP 2 with Financial Institution after moving to the United States. Taxpayer's timely filed joint Federal income tax returns for Tax Years were prepared by Tax Preparer. Tax Preparer did not advise Taxpayer to elect to defer current U.S. income taxation on earnings in RRSP 1 and RRSP 2 pursuant to Article XVIII(7) of the U.S.-Canada Income Tax Treaty (Treaty) for Tax Years. Taxpayer became aware of the need to file Form 8891, "U.S. Information Return for Beneficiaries of Certain Registered Retirement Plans," to defer current income taxation of the earnings in the RRSPs pursuant to the Treaty only in Year 3. Taxpayer requested the consent of the Commissioner of the Internal Revenue Service for an extension of time under Treas. Reg. § 301.9100-3 to make an election pursuant to Rev. Proc. 2002-23, to defer U.S. federal income taxation on income accrued in the RRSPs, as provided for in Article XVIII(7) of the Treaty, for Tax Years.

PLR 201309020 (7 December 2012) Failure to Make Annual Periodic IRA Payment Won't Trigger Tax Penalty

The IRS concluded that the failure to make the annual payment from an IRA in 2011 and a subsequent make-up payment in 2012 will not modify the series of substantially equal periodic payments under section 72(t)(2)(A)(iv) of the Code, and the make-up payment will not be subject to the 10% tax under on early distributions under section 72(t)(1) of the Code. The Taxpayer in 2004 established an arrangement under which it would receive annual IRA distributions in Amount 1, which was calculated using the fixed amortization method described in Notice 89-25,1989-1 C.B. 662. The annual payments were intended to be a series of substantially equal periodic payments as described in section 72(t)(2)(A)(iv) of the Code. Based on these factors, from 20* * * through 20 * * *. Taxpayer A received annual IRA B distributions in Amount 1. The Custodian erroneously failed to make an annual payment to Taxpayer A in 20* * *. The Taxpayer was unaware that Amount 1 had not been distributed for year 20* * * until she received her 1099-R from Custodian in 20* * *. Taxpayer immediately contacted Custodian, and Custodian issued a letter dated March * * *, 20* * * acknowledging that the administrative error resulted in the failure of Custodian to make a payment of Amount 1 to Taxpayer in calendar year 20* * *. Taxpayer took a distribution in 20* * * of Amount 1 as a "make-up" distribution for the missed distribution from 20* * *.

Section 408(d)(1) of the Code provides that, except as otherwise provided in section 408(d) of the Code, any amount paid or distributed out of an IRA shall be included in gross income by the payee or distributee, as the case may be, in the manner provided under section 72 of the Code. Section 72 of the Code provides rules for determining how amounts received as annuities, endowments, or life insurance contracts and distributions from qualified plans are to be taxed. Section 72(t)(1) of the Code provides for the imposition of an additional 10% tax on early distributions from qualified plans, including IRAs. The additional tax is imposed on that portion of the distribution that is includible in gross income. Section 72(t)(2)(A)(iv) of the Code provides that section 72(t)(1) of the Code shall not apply to distributions that are part of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the employee or joint lives (or joint life expectancies) of such employee and her designated beneficiary. Section 72(t)(4) of the Code imposes the additional limitation on distributions excepted from the 10% tax by section 72(t)(2)(A)(iv) of the Code that, if the series of payments is subsequently modified (other than by reason of death or disability) before the employee's attainment of age 59 1/2, then the taxpayer's tax for the first taxable year in which such modification occurs shall be increased by an amount determined under regulations, equal to the tax that would have been imposed except for the section 72(t)(2)(A)(iv) of the Code exception, plus interest for the deferral period. In the absence of regulations Notice 89-25 provides guidance with respect to the exception to the tax on early distributions provided under section 72(t)(2)(A)(iv) of the Code. Q&A-12 of Notice 89-25 provides three methods of determining substantially equal periodic payments for purposes of section 72(t)(2)(A)(iv) of the Code. Revenue Ruling 2002-62, 2002-2 C.B. 710, modified Q&A-12 of Notice 89-25 and provides, among other things, that payments are considered to be substantially equal periodic payments within the meaning of section 72(t)(2)(A)(iv) of the Code if they are made in accordance with the required minimum distribution method, the fixed amortization method or the fixed annuitization method (the three methods described in Q&A-12 of Notice 89-25). Section 2.02(e) of Rev. Rul. 2002-62 provides, in part, that under all three methods, substantially equal periodic payments are calculated with respect to an account balance as of the first applicable valuation date. Thus, a modification to the series of payments will occur if, after such date, there is (i) any addition to the account balance other than gains or losses, (ii) any nontaxable transfer of a portion of the account balance to another retirement plan, or (iii) a rollover by the taxpayer of the amount received resulting in such amount not being taxable.

PLR 201310002 (7 November 2012) IRS Addresses Gift Tax Issues of Grantor's Transfer to Trust

The IRS concluded that a grantor's transfer of property to a trust will not be deemed a completed gift and that the trust's distributions to beneficiaries will be deemed completed gifts of the grantor, not the members of the distribution committee.

On Date 1, Grantor created an irrevocable trust (Trust) for the benefit of himself and his issue, Son 1, Son 2, Son 3, and Son 4, and their issue. A corporate trustee (Trustee) is the sole trustee. During Grantor's lifetime, Trustee must distribute such amounts of net income and principal to Grantor and his issue as directed by the Distribution Committee and/or Grantor, as follows: (1) At any time, Trustee, pursuant to the direction of a majority of the Distribution Committee members, with the written consent of Grantor, shall distribute to Grantor or Grantor's issue such amounts of the net income or principal as directed by the Distribution Committee (Grantor's Consent Power); (2) At any time, Trustee, pursuant to the direction of all of the Distribution Committee members, other than Grantor, shall distribute to Grantor or Grantor's issue such amounts of the net income or principal as directed by the Distribution Committee (Unanimous Member Power); and (3) At any time, Grantor, in a nonfiduciary capacity, may, but shall not be required to, distribute to any one or more of Grantor's issue, such amounts of the principal (including the whole thereof) as Grantor deems advisable to provide for the health, maintenance, support and education of Grantor's issue (Grantor's Sole Power). The Distribution Committee may direct that distributions be made equally or unequally and to or for the benefit of any one or more of the beneficiaries of the Trust to the exclusion of others. Any net income not distributed by the Trustee will be accumulated and added to principal. The Distribution Committee is initially composed of Grantor and Sons 1 through 4. The Distribution Committee will cease to exist upon Grantor's death.

The Trust provides that at all times at least two "Eligible Individuals" must be members of the Distribution Committee. An "Eligible Individual" means a member of the class consisting of the adult issue of Grantor, the parent of a minor issue of Grantor, and the legal guardian of a minor issue of Grantor. A vacancy on the Distribution Committee must be filled by the eldest of Grantor's adult issue other than any issue already serving as a member of the Distribution Committee, or if none of Grantor's issue not already serving as a member of the Distribution Committee is an adult, then the legal guardian of the eldest minor issue shall serve, or if such minor issue does not have a legal guardian, then the parent of such minor issue. If at any time fewer than two Eligible Individuals are members of the committee, the Distribution Committee shall be deemed not to exist.

Upon Grantor's death, the remaining balance of Trust shall be distributed to or for the benefit of any person or persons or entity or entities, other than Grantor's estate, Grantor's creditors, or the creditors of Grantor's estate, as Grantor may appoint by will. In default of the exercise of this limited power to appoint (Grantor's Testamentary Power), the balance of Trust will be distributed, per stirpes, to Grantor's then living issue in further trust. If none of Grantor's issue is then living, such balance shall be distributed, per stirpes, to the then living issue of Grantor's deceased father.

With respect to income tax, the IRS concluded, based solely on the facts submitted and representations made, none of the circumstances would cause Grantor to be treated as the owner of any portion of Trust under §§ 673, 674, 676, or 677. Because none of the other Distribution Committee members has a power exercisable solely by himself to vest Trust income or corpus in himself, none shall be treated as the owner of any portion of the Trust under § 678(a) and further concluded that an examination of Trust revealed none of the circumstances that would cause administrative controls to be considered exercisable primarily for the benefit of Grantor under § 675. As to gift issues, the Grantor retained the Grantor's Consent Power over the income and principal of Trust and since the Distribution Committee members are not takers in default for purposes of § 25.2514-3(b)(2) and are only co-holders of a power the IRS determined the Distribution Committee members do not have interests adverse to Grantor under § 25.2514-3(b)(2) and for purposes of § 25.2511-2(e). Therefore, Grantor is considered as possessing the power to distribute income and principal to any beneficiary himself because he retained the Grantor's Consent Power. The retention of this power causes the transfer of property to Trust to be wholly incomplete for federal gift tax purposes. In addition, the Grantor also retained the Grantor's Sole Power over the principal of Trust to name new beneficiaries or to change the interests of the beneficiaries, and the Grantor retained Grantor's Testamentary Power to appoint the property in Trust to any person or persons or entity or entities, other than Grantor's estate, Grantor's creditors, or the creditors of Grantor's estate. Under § 25.2511-2(b) this power causes the transfer of property to be incomplete with respect to the remainder in Trust for federal gift tax purposes. As to the tax effect to the Distribution Committee, since its Unanimous Member Power over income and principal is not a condition precedent to Grantor's powers the Grantor retains dominion and control over the income and principal of Trust until the Distribution Committee members exercise their Unanimous Member Power. Accordingly, this power does not cause the transfer of property to be complete for federal gift tax purposes. Since the transfer is not complete for gift tax purposes the IRS concluded that any distribution of property by the Distribution Committee from Trust to Grantor will not be a completed gift subject to federal gift tax. Further, upon Grantor's death, the fair market value of the property in Trust is includible in Grantor's gross estate for federal estate tax purposes. As to the powers held by the Distribution Committee members under the Grantor's Consent Power, these powers are powers that are exercisable only in conjunction with the creator, Grantor. Accordingly, under § 2514(c)(3)(A), the Distribution Committee members do not possess general powers of appointment by virtue of possessing this power. Further, the powers held by the Distribution Committee members under the Unanimous Member Powers are not general powers of appointment. As in the example in § 25.2514-3(b)(2), the Distribution Committee members have substantial adverse interests in the property subject to this power. Accordingly, any distribution made from Trust to a beneficiary, other than Grantor, pursuant to the exercise of these powers, the Grantor's Consent Power and the Unanimous Member Powers, are not gifts by the Distribution Committee members. Instead, such distributions are gifts by Grantor.

Matthew James Nasuti v. Commissioner, No. 12-1943—Additional Tax Due on Early IRA Distribution—Code IRC Section 72(t)

Results: In *Nasuti*, the First Circuit Court of Appeals concluded that a Tax Court decision that held an individual liable for the section 72(t) additional tax on an early IRA distribution should be upheld. Petitioner alleged that he was "coerced" to withdraw $19,030 in 2008 from an IRA. In 2008 petitioner was under the age of 55. Petitioner argued that he was illegally terminated from his employment and that he is currently in litigation for reinstatement. He argued that his termination was illegal. He needed the money he withdrew from his retirement account to pay expenses and due to his unemployment his withdrawal of the money was not voluntary, thus the section 72(t) addition to tax does not apply. The Court noted that contrary to petitioner's belief, "there is no financial hardship exemption in § 72(t)." Dollander v. Internal Revenue Service, 383 Fed. Appx. 932, 933 (11th Cir. 2010), aff'g T.C. Memo. 2009-187; Robertson v. Commissioner, T.C. Memo. 2000-100 (no exception exists to additional tax for withdrawal to provide for taxpayer's own subsistence and that of her family), aff'd 15 Fed. Appx. 467 (9th Cir. 2001). Taxpayers are limited to the exceptions in the statute. Venet v. Commissioner, T.C. Memo 2009-268.

In re Yerushalmi, 2012 WL 5839938 (Bkrtcy. E.D.N.Y., Slip Copy, Nov. 19, 2012) Qualified Personal Residence Trust Survives Alter Ego Challenge Brought by Bankruptcy Trustee

Results: In *Yerushalmi*, in the Bankruptcy Court for the Eastern District of New York concluded that a Qualified Personal Residence Trust ("QPRT") holding a Great Neck Home survives an alter ego challenge in an adversary action brought by the Bankruptcy Trustee of a co-settlor's bankruptcy estate. The facts of this case are particularly interesting. The Debtor, Joseph Yerushalmi, and the Defendant, Malka Yerushalmi, his wife, in 1983 purchased a single family home located on West Shore Road in Great Neck, New York ("Great Neck Residence"), which served as their marital residence. In 1989, they borrowed over $1 million from Citibank secured by a first and second mortgage in order to renovate the Great Neck Residence to fit the needs of their family, including their youngest son who had special needs. They subsequently refinanced but did not take any equity out of the property at the re-finance. As of the date of the bankruptcy filing there was approximately $4.8 million of equity in the Great Neck Residence.

In or around 1989, the Debtor began implementing estate planning strategies. On July 26, 1989, the Debtor executed a trust document called the July 31, 1989 Yerushalmi Family Trust. The beneficiaries of the Yerushalmi Family Trust are the Yerushalmis' children, and the trustee, a family friend. In addition, in 1995, an irrevocable qualified personal residence trust ("QPRT") was created in order to facilitate the ultimate transfer of the Great Neck Residence into the Yerushalmi Family Trust with a reduced gift and estate tax consequence to the Yerushalmis' children. Malka and the Debtor are co-trustees of the QPRT, but neither is a beneficiary. The term of the QPRT was 23 years. In furtherance of the plan the Debtor transferred his 50% ownership interest in the Great Neck Residence to Malka by deed dated March 28, 1996. On May 9, 1996, Malka, as grantor, transferred her 100% interest in the Great Neck Residence to the QPRT.

The Debtor is an attorney. Beginning in June 1987, he practiced law with Amnon Shiboleth at the law firm Yerushalmi, Shiboleth, Yisraeli and Roberts, LLP ("YSYR"). The partnership dissolved sometime in 1995, and in April 1997 the Debtor started practicing law under the name Yerushalmi & Associates, LLP ("Y&A"). Shiboleth practiced law under the name Shiboleth, Yisraeli, Roberts and Zisman, LLP. In January 1998, Shiboleth commenced a partnership accounting action against Y&A and the Debtor individually ("Accounting Action"). On November 17, 2011, the state trial court issued an opinion pursuant to which the allocation of fees among the parties resulted in a net judgment in favor of the Debtor and Y&A in the approximate amount of $600,000. In April 2002, Malka commenced a divorce action. On July 25, 2007, the Debtor filed separate chapter 11 bankruptcy petitions for himself and his law firm, Y&A, and both were converted to chapter 7. According to the Trustee, on the date of the petition the Great Neck Residence was worth approximately $5.2 million and the outstanding balance on the Citibank mortgage was $407,000.

On January 5, 2009, the Trustee sought to avoid the Debtor's transfer of his interest in the Great Neck Residence to Malka in March of 1996, and Malka's subsequent transfer of her 100% interest in the Great Neck Residence to the QPRT in May of 1996, as fraudulent conveyances which it later withdrew (the "Property Transfers"). The Trustee amended its complaint and added a claim under Bankruptcy Code sections 541 and 542 for a declaratory judgment that the QPRT is the alter ego of the Debtor and the assets of the QPRT, or the value thereof, should "revert to the Estate" in their entirety.

The Court reviewed the law and found that (a) if the alter ego claim could have been asserted by the Debtor pre-petition, and (b) if the claim does not involve a direct injury to a particular creditor, then the bankruptcy trustee is the proper party to assert the alter ego claim and all other creditors are stayed by section 362. The Court found that the Debtor in this case could have asserted an alter ego claim against the QPRT prior to filing bankruptcy. With regard to a "statute of limitations" defense the court noted that the Trustee's action was equitable in nature and the consequences of a determination would be that the Trustee is entitled to demand turnover of the assets held by the QPRT because those assets are property of the estate under section 541. The Court found that an alter ego claim is subject to neither the six-year statute of limitations for fraud under New York law, nor the 20-year statute of limitations to enforce a judgment.

The Court addressed whether a validly formed estate planning trust can ever be "pierced." The Court found that the weight of the case law in the state of New York supports a ruling that estate planning trusts generally are susceptible to attack if used for a fraudulent purpose. However, the Court found that the facts of this case do not rise to the level necessary to "pierce" the veil of the QPRT. Under prevailing New

York law, in order to pierce the veil of a corporation, a plaintiff must show that: "(1) the owner exercised complete domination of the corporation with respect to the transaction at issue; and (2) the owner used this domination to commit a fraud or wrong against the plaintiff which resulted in injury to the plaintiff." The Debtor caused the QPRT to be formed in 1995 and the Great Neck Residence was transferred into the QPRT in 1996 at a time when the Debtor had significant assets and disposable income.

In re James, 111 AFTR 2d 2013-XXXX, (Bktcy Ct TN) Debtor's IRAs Exempt from Bankruptcy Claims

In this case the Court addresses the issue of whether the debtor engaged in a prohibited transaction that resulted in her IRAs losing their tax-exempt status. The Debtor signed applications to open the IRAs which incorporated the terms of a customer agreement. The customer agreement contained a provision granting a security interest in the assets in her IRAs to secure any debt she owed to the custodian of the accounts and to the brokerage firm which handled the transactions for those accounts. The Trustee contends that the mere granting of a security interest, regardless of whether there was any indebtedness for the lien to secure, is a prohibited transaction under the Internal Revenue Code. If the Debtor engages in a prohibited transaction, the IRAs lose their tax exempt status. The Trustee relies on case law that holds the loss of that tax exempt status also results in a loss of the accounts' exempt status under bankruptcy law and applicable state exemptions. The Debtor admits she signed the applications, but argues that the customer agreement also provides that the lien provisions will not apply if they are in conflict with the requirements of the Employment Retirement Income Security Act of 1974, or the IRC. Based on the language of the operative documents, the court finds that the Debtor did not grant a security interest in the accounts' assets. Therefore, she did not engage in a prohibited transaction, and the IRAs are exempt. Accordingly, the Trustee's objection will be OVERRULED.

In re Woodworth, 2013 WL 486669 (Bk. E.D.Va., Feb. 6, 2013) Bankruptcy Court Addresses Fraudulent Transfer

In this case parent transfers to child (the debtor in this case) the parent's life savings. Some eight years later, the child engages in complicated, but ill-fated, asset protection planning with a non-attorney planner using the money received from her parent. The debtor admitted to the Court she made a fraudulent transfer, but argued the funds transferred were not hers and not part of the bankruptcy estate. The debtor's parent testified she never intended to make a gift to her child and at the same time stated she gave the money to her daughter to render herself eligible for Medicaid. Predictably, the Court held for the bankruptcy trustee and against the transferee.

David R. Okrent, Esq., CPA. Managing Attorney. David is currently serving as the tenth district (Long Island) delegate of this Elder Law Section of the New York State Bar Association. He is also the immediate past Co-Chief Editor of this publication and a past Vice-Chair of the Elder Law Section Estate and Tax Planning Committee. He is a past Co-Chair of the Suffolk County Bar Association Legislation Review Committee, Elder Law Committee, and Tax Committee and is an advisory member to its Academy of Law. He is a member of the National Academy of Elder Law Attorneys, a past long-time Chairman of the Long Island Alzheimer's Foundation's Legal Advisory Board, and is a former IRS Agent.

René Reixach, Jr. Discusses His Law School Admission, Dating, and Ideal Drinking Companion with Natalie Kaplan

Q Please tell me, what is the correct pronunciation of your last name and where does it come from?

A Sure. It's simply RAY-SHACK, "Radio Shack" without the "dio." It's Catalan. My grandparents came from Catalonia in northern Spain, not far from France. Hence, the René. (one "e," accent agu) and the "x" pronounced "SH."

I've gotten all kinds of pronunciations though: REX-ATCH, RICE CHEX, and my favorite, from a landlord-tenant client, was RENT CHECKS!

Q Landlord-tenant client? When was that?

A I have a Legal Services background, during and after law school.

Q Did you always want to be a lawyer?

A No. I wanted to be an actor. In high school, I was forced to confront my limited future in that profession, so I got involved for a long time with the business end of theater. Oral argument is as close as I come to an acting performance. But people had always said I'd be good at law, so I ended up applying to law school.

Q Let's get placed in time and space. Where were you when you applied for law school and what had you been doing before that?

A It was 1967. I had been in New Haven at Yale for college and during two summers I ran lights in a summer stock theater. After college, I worked in a theater in central Pennsylvania and then went into the Army Reserves at Fort Knox. Afterwards, I went back to Washington D.C., where I grew up, and I worked there for a while as the Publicity Director of the National Ballet.

In 1967, I went to Harvard to do city planning but didn't like it. But by that time, I was tired of moving.

The thought of applying to law school revives a funny memory. When I finished my application, it was a nice day and I decided to deliver it by hand to the admissions department. I went there and handed it to the receptionist. She examined it briefly, looked up, with the strangest expression on her face, and asked: "Did your father work for the Park Service in the 1930s ?" She grinned at me—a René Reixach, Jr. She had been my father's secretary! I've always figured that that's how I got in.

Q (Surely you jest.) Was law school a special experience?

A Well, nothing was too special until the second year, when I got involved with the Community Legal Assistance program. I later also had a wonderful professor, Benjamin Kaplan, who, remarkably, made Advanced Civil Procedure my favorite course.

I also remember a unique statement from Archibald Cox, who was my Con Law professor. One day in the middle of class, he stopped and made the announcement: "Sorry, folks. I have to leave class now. Students have just seized the administration building."

Q What other high spots have you had, like the Law School receptionist?

A Oh yeah. I can tell you of at least two other times where I had strokes of sheer luck. After law school I worked at Kaye Scholer in New York where I was defending class action antitrust suits. One day I was reminiscing about my days at the Legal Services Clinic. I picked up a New York State Bar *Journal* and there was an ad for attorneys needed for the Legal Services back-up center at GULP (Greater Upstate Law Project). That was exactly what I wanted to do! So I packed my bags for Rochester and joined five or six other new lawyers who had set up an appeals bureau and resource center, for legal services offices all around upstate New York. I remember some of our offices were working with a "library" containing nothing more than a set of McKinneys.

But I had a real eureka moment when I was doing research on *Tucker v. Toia*. It was a case I worked on with Wade Eaton, claiming a New York State constitutional right to welfare benefits for poor families. I was slogging through the records of the State constitutional convention of 1937, and I came across a statement by Winthrop Aldridge. (You know, Aldridge as in Nelson Aldridge Rockefeller.) Well, Winthrop Aldridge said, roughly: "Rest assured, New York will never be one of those states where the poor will be unprotected. New York will always take care of its needy people."

With that, we'd struck gold. Talk about helpful expressions of legislative intent. We later won the case in the Court of Appeals, establishing the State constitutional right for all needy residents. It's the case I'm proudest to have participated in.

Q Have you ever argued in the U.S. Supreme Court?

A Yes. I argued in the Supreme Court, but it was only because of a backache. It was a Massachusetts case very much like one I'd done in New York. The lawyer with the case had a terrible back problem, so he asked me to argue it. That case generated the theory that "whoever has the [supportive] letter from HHS wins." We didn't have the letter.

Our recent case in the Second Circuit, happily, confirmed my theory. In *Lopes*, the Court asked for an amicus brief on the issue of whether annuity payouts were resources for Medicaid purposes, or income, as we'd argued. HHS took the position in their brief that they were income, and we won the case.

Q And the other strokes of luck that you mentioned?

A The most recent one was personal. After my divorce, I signed up for e-Harmony. The first person I met was Edith Lord, a Senior Associate Dean for Graduate Education at the University of Rochester School of Medicine and Dentistry. She was terrific! It was the fastest beginning and end possible to my e-Harmony career.

We've been together for four years now. Edith weaves and spins when she has a free moment. In my old age, I'm planning to be the business manager of the yarn store she's going to run. For now, we're both too busy even to see much of each other.

Take this week, a classic. She left on Sunday for Boston to give a talk at Harvard Medical School. She returned on Wednesday, when I left for the State Bar program in Tarrytown. I'm going back home tonight, but she goes off to someplace else.

Q When you're both in the same town, what do you do for entertainment?

A We both enjoy the theater, the symphony and the opera, so we go as much as possible.

Q What is your favorite music?

I love La Bohème. And Mahler is my favorite composer. But the real magical work is "Transfigured Night" (Verklarte Nacht) by Schoenberg…the Budapest String Quartet version. The symphonic version doesn't do it, but the quartet performance is exquisite.

Q Do you also like to travel?

A Absolutely, I have generations of cousins in Spain on the Costa Brava and in Barcelona. In a few weeks, I'm going to Guadalajara to see my new granddaughter, Janey, and my daughter, Patricia, and her husband. (They teach in the American School there.) Next, I'll go to Bethesda for my 50th high school reunion, then rendezvous with Edith who has a conference in Washington and whose daughter lives there.

Q One more question: If you could have your pick of anyone living or dead, who would be your choice of a drinking companion?

A That's easy. Hands down it would be Justice Brennan. He had an expansive view of the power of the federal courts. He was a giant in the field of civil rights.

Natalie J. Kaplan is an elder law attorney in New York City and Westchester County, practicing as "Elder Law on Wheels." She is a Fellow and founding member of the National Academy of Elder Law Attorneys (NAELA) and former Adjunct Professor of Elder Law at New York Law School. She was editor of NAELA's first newsletter and co-chaired its first Health Care Decision-Making Section. She has sat on bioethics committees at Phelps Memorial Hospital Center, Jansen Memorial Hospice and Sound Shore Medical Center in Westchester County. Since 1990, she has published and lectured widely to professional and lay audiences on various elder law subjects.

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NYSBA

Elder Law Section

Summer Meeting

Grand Cascades Lodge
Hamburg, NJ

August 8-11, 2013

The New York State Bar Association's Meetings Department has been certified by the NYS Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York. The summer meeting has been approved for up to **11 MCLE CREDIT HOURS. THIS PROGRAM WILL EARN 10.0 CREDITS IN AREAS OF PROFESSIONAL PRACTICE AND 1.0 CREDITS IN ETHICS. THIS IS NOT A TRANSITIONAL PROGRAM AND WILL NOT APPLY FOR CREDIT FOR NEWLY ADMITTED ATTORNEYS BECAUSE IT IS NOT A BASIC PRACTICAL SKILLS PROGRAM.**

SCHEDULE OF EVENTS

Thursday, August 8

9:30 a.m. - 5:40 p.m.	**Registration –** Ballroom Foyer **The program favors are sponsored by NYSARC Trust Services, Inc.**
11:00 a.m. - 12:00 p.m.	**Executive Officers' Meeting –** Gallium
12:00 - 1:45 p.m.	**Executive Committee Meeting and Luncheon –** Silver Springs
1:45 - 5:40 p.m.	**General Session –** Emerald Ballroom
1:45 - 2:00 p.m.	**Welcoming Remarks** **Frances M. Pantaleo, Esq.**, Elder Law Section Chair **Program Introduction** **Deepankar Mukerji, Esq.** Program Co-Chair
2:00 - 2:50 p.m.	**Elder Law Update**
Speaker:	**Richard A. Weinblatt, Esq.** Haley Weinblatt & Calcagni Islandia
2:50 - 3:40 p.m.	**Tax Topics: Ever Wonder How To.....?**
Speaker:	**Salvatore M. DiCostanzo, Esq.** McMillan, Constabile, Maker & Perone, LLP Larchmont
3:40 - 4:00 p.m.	**Refreshment Break with Exhibitors -** Ballroom Foyer **Sponsored by ElderCounsel**
4:00 - 4:50 p.m.	**Current Issues in Long-Term Care Insurance**
Facilitator:	**William D. Pfeiffer, Esq.** Girvin & Ferlazzo, PC Albany
Panelists:	**Charles J. Newman** The Charles J. Newman Co., LLC Hawthorne **Robert M. Vandy** New York Long Term Care Brokers, LTD Clifton Park
4:50 - 5:40 p.m.	**The Marriage Equality Act - Special Considerations for Elder Law Attorneys**
Speaker:	**Ralph M. Randazzo, Esq.** Randazzo & Randazzo LLP Huntington
6:30 - 7:30 p.m.	**Cocktail Reception –** Grand Rotunda & Chef's Garden
7:30 p.m.	**Dinner –** Grand Cascades Deck **Dinner sponsored by RDM Financial Group** **Come and be entertained by Nick the Balloonatic!** *With a focus on education, the Balloonatic will perform while children and adults learn about history, art, science, math, geography and safety with balloons. Do not leave empty handed; the balloonatic raffles off all the balloons that he made during the show!*

For More Information, Go to WWW.NYSBA.ORG/ElderSummer2013

Friday, August 9

7:30 a.m. - 12:40 p.m.	**Registration –** Ballroom Foyer
7:30 - 8:30 a.m.	**Committee Breakfast Meetings**
7:30 - 8:30 a.m.	**Friends of Bill W. Meeting –** Flora Springs
7:30 - 9:00 a.m.	**Coffee Break with Exhibitors –** Ballroom Foyer **Sponsored by Center for Disability Rights, Inc.**
8:30 a.m. - 12:40 p.m.	**General Session –** Emerald Ballroom
8:30 - 8:45 a.m.	**Welcoming Remarks** **Frances M. Pantaleo, Esq.**, Elder Law Section Chair **Program Introduction** **Donna M. Stefans, Esq.**, Program Co-Chair
8:45 - 9:35 a.m.	**Medicaid Managed Long-Term Care Update**
Speaker:	**David Silva, Esq.** New York Legal Assistance Group New York City
9:35 - 10:25 a.m.	**Private Home Care Aides & Legal Staff - What Does the Employer Have to Do?**
Speaker:	**Lee A. Hoffman, Jr., Esq.** Law Offices of Lee A. Hoffman New York City
10:25 - 10:40 a.m.	**Refreshment Break with Exhibitors –** Ballroom Foyer
10:40 - 11:50 a.m.	**Residential Alternatives: Reviewing Agreements for Independent and Assisted Living, CCRCS and Nursing Homes. Liability of Responsible Parties and Agents**
Panelists:	**Jeffrey G. Abrandt, Esq.** Goldfarb Abrandt Salzman & Kutzin LLP New York City **Angela C. Bellizzi, Esq.** Abrams Fensterman Lake Success **Nancy Levitin, Esq.** Abrams Fensterman Lake Success **Nina Keilin, Esq.** New York City
11:50 a.m. - 12:40 p.m.	**Securing Retirement – Strategies for Optimizing Social Security Retirement Benefits**
Speakers:	**Donna M. Stefans, Esq.** Stefans Law Group P.C. Woodbury **Paulette Walz** Social Security Specialist BlackRock Investments New York City

For More Information, Go to WWW.NYSBA.ORG/ElderSummer2013

Friday, August 9 (Continued)

1:30 p.m. **Mixed Golf Tournament –** Wild Turkey Golf Course

Jeffrey A. Asher, Esq., Golf Chair
Robinson Brog Leinwand Greene Genovese & Gluck P.C.
New York City

The layouts, two distinct terrain types, combine the sheer expansiveness of Ballyowen with the rugged, multi-elevated nature of Crystal Springs. While it may be easy to classify Wild Turkey as a combination of its two sister courses, Wild Turkey stands on its own merit as a uniquely designed golf course, named one of NJ's Top New Public Courses by NJGCOA. $140.00 per person, boxed lunch included.
Prior sign-up required on registration form.

2:00 - 4:00 p.m. **Tennis Tournament**
Jeffrey G. Abrandt, Esq., Tennis Co-Chair
Goldfarb Abrandt Salzman & Kutzin LLP, New York City

Ellyn S. Kravitz, Esq., Tennis Co-Chair
Abrams Fensterman, New York City
$15.00 per person.
Prior sign up required on registration form.

2:30 - 3:30 p.m. **Wine Tasting**
Join us and experience the passion for wine! One of the world's premier wine collections with more than 135,000+ bottles. Thousands of labels from around the world. Numerous awards and accolades from publications such as Wine Spectator and The New York Times. $35.00 per person.
Prior sign up required on registration form.

7:00 - 8:00 p.m. **Cocktail Reception –** Grand Rotunda
Sponsored by The Centers

8:00 p.m. **Dinner & Dancing –** Emerald Ballroom
Wine Sponsored by The Law Office of Stephen J. Silverberg, P.C.

Music by The Bernadettes

The Bernadettes started out in the early 1990s as a traditional-style blues band, covering songs by the likes of John Lee Hooker, Howlin' Wolf, as well as later bluesmen like Stevie Ray Vaughn, Buddy Guy and Eric Clapton. But the band soon began experimenting with its own unique versions of R&B classics from James Brown, Otis Redding, Ray Charles, Marvin Gaye and their contemporaries. This evolved further with the addition of classic Motown hits, contemporary funk, soul, and R&B-flavored rock songs to its large and varied dance-oriented song list. The resulting mix has become the staple of the band's offering to live audiences.
Music sponsored by NYSARC Trusts Services

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Saturday, August 10

7:30 - 11:30 a.m.	**Registration –** Ballroom Foyer
7:30 - 8:30 a.m.	**Friends of Bill W. Meeting –** Gallium Boardroom
8:45 - 11:30 a.m.	**General Session –** Emerald Ballroom
8:45 - 9:00 a.m.	**Introductory Remarks** **Deepankar Mukerji, Esq.,** Program Co-Chair
9:00 - 9:50 a.m.	**Medicaid Nuts and Bolts: Frequently Forgotten Items (or Items We Wish We Could Forget) – Legal Impediments, Time Shares, Vacation Homes, Copyrights, Royalty Agreements**
Speaker:	**Patricia J. Shevy, Esq.** The Shevy Law Firm, LLC Albany
9:50 - 10:40 a.m.	**Making "Ethics" a Habit in Your Practice**
Speaker:	**Sheryl Randazzo, Esq.** Randazzo & Randazzo LLP Huntington
10:40 - 11:30 a.m.	**The Affordable Care Act – The Changing Health Care Landscape for New Yorkers With Medicare and Medicaid**
Speaker:	**Douglas Goggin-Callahan, Esq.** Medicare Rights Center New York City

CLE Information

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Discounts and Scholarships: New York State Bar Association members and non-members may apply for a discount or scholarship to attend this program, based on financial hardship. This discount applies to the educational portion of the program only. Under that policy, any member of our Association who has a genuine basis for his/her hardship, and if approved, can receive a discount or scholarship, depending on the circumstances. To apply for a discount or scholarship, please send your request in writing to Kathleen M. Heider at: New York State Bar Association, One Elk Street, Albany, New York, 12207 or e-mail at kheider@nysba.org.

Special Discounts: The Elder Law Section has approved a policy which allows for a 50% discount on the registration fees for all Elder Law Section members who practice in the public sector or as Court personnel. **This discount is not automatic and must be requested in writing as stated above under Discounts and Scholarships. Where applicable, members of the Judiciary may also register as a guest and pay the reduced guest registration fee.**

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