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Elder and Special Needs Law Journal

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

Inside

NEW YORK STATE BAR ASSOCIATION

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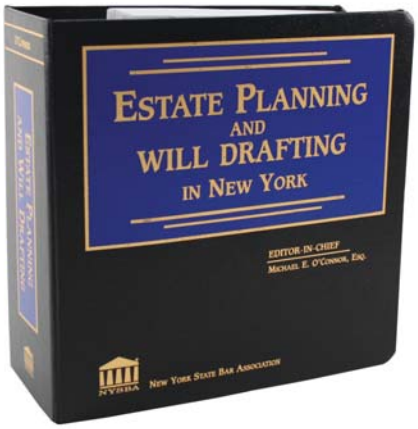
With 2013–2014 Supplement



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Contents at a Glance

Estate Planning Overview
Federal Estate and Gift Taxation: An Overview
The New York Estate and Gift Tax
Fundamentals of Will Drafting
Marital Deduction/Credit Shelter Drafting
Revocable Trusts
Lifetime Gifts and Trusts for Minors
IRAs and Qualified Plans—Tax, Medicaid and Planning Issues
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NYSBA

Table of Contents

Message from the Chair

I have been thinking a lot about change recently. I suppose this is natural for an Elder Law attorney. In our professional lives, we meet every day with people who are encountering the inevitable changes occasioned by the aging process: declines of health and vitality, loss of friends and loved ones, dislocation. I am always amazed at the range of reactions to these upheavals. Some are cheerful and resilient in the wake of devastating personal loss and others are consumed with rage and bitterness about their powerlessness to alter their situation.

How we deal with change is one of the most significant challenges for individuals and society. Not surprisingly, there are many wonderful quotations about change, from philosophers, novelists, historians and even comedians. Here are a few:

> "He who rejects change is the architect of decay. The only human institution which rejects progress is the cemetery."
> —Harold Wilson

> "When we are no longer able to change a situation, we are challenged to change ourselves."
> —Viktor Frankl

> "The only difference between a rut and a grave is their dimensions."
> —Ellen Glasgow

> "If nothing ever changed, there'd be no butterflies."
> —Author Unknown

> "If you want to make enemies, try to change something."
> —Woodrow Wilson

> "The only man I know who behaves sensibly is my tailor; he takes my measurements anew each time he sees me. The rest go on with their old measurements and expect me to fit them."
> —George Bernard Shaw

> "Change is inevitable—except from a vending machine."
> —Robert C. Gallagher

You are probably wondering what it is that has caused me to wax philosophical in this message? It is time for the Elder Law Section of the New York State Bar Association to undergo a change. Our Section was established in 1991 to provide a voice for attorneys who were beginning to develop practices devoted to the unique needs of the elderly. However, over the past 22 years many of our members also cultivated expertise in the special needs of individuals with disabilities and their families. It is now time for the name of our Section to include this emerging practice area. At the Fall Meeting, our Executive Committee voted to change the name of the Elder Law Section to the Elder Law and Special Needs Section. This will require a change in our Bylaws and approval by the New York State Bar Association. The Bylaws amendment is scheduled to be voted upon at our Annual Meeting on Tuesday, January 28th. I invite all of our members to embrace this change, which will enable us to more effectively market our expertise to the individuals and families who seek our assistance.

With the able assistance of program chairs **JulieAnn Calareso** and **Matt Nolfo**, the program for the Annual Meeting has been finalized. The program will focus on a host of interesting and timely topics. NAELA President and former Chair of the Elder Law Section, **Howard Krooks**, will be doing the Elder Law Update which will feature national developments in the practice of Elder Law, as well as updates regarding New York practice. **Valerie Bogart** will present the latest developments regarding Managed Long Term Care Plans and the upcoming changes which will be required for individuals who are dually eligible for both Medicare and Medicaid. **Joy Solomon** will lead a panel on Elder Abuse. **Anthony Enea** will chair a panel which will discuss nursing home issues, including the unauthorized practice of law, financial constraints on the industry and new models for delivery of quality care. **Bruce Steiner** will discuss issues relating to planning with retirement accounts, with questions specifically related to elder law and special needs practice posed by **Matt Nolfo**.

The Unprogram is returning! Chairs **Shari Hubner** and **Judith Nolfo-McKenna** will be soliciting your recommendations for topics to be explored at this innovative non-CLE program which will take place in Poughkeepsie on March 20th and 21st. The Unpro-

gram is a two day feast of small group discussions of both substantive law and law practice management. All topics are selected by the Program participants who come prepared to share forms, strategies and talents. There is something for everyone, from the newbie to the highly seasoned practitioner. If you haven't sampled an Unprogram, I highly recommend that you give it a try. If you have been to one before, please tell your friends and join us once again.

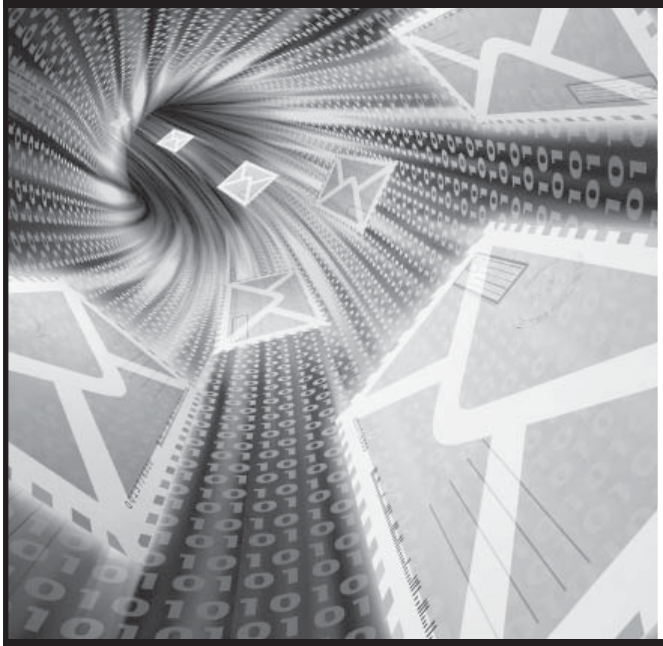
As we enter the new year, our Legislation Committee, ably chaired by **Amy O'Connor** and **Ira Salzman,** will be gearing up for the legislative season. In addition to protecting the right to spousal refusal for community Medicaid recipients, our Legislation Committee is examining affirmative legislative proposals, including technical amendments to the Family Health Care Decisions Act. I have revived our Power of Attorney task force to examine proposals by the Law Reform Commission relating to modifications of the General Obligations Law relating to powers of attorney.

Another change to report. In October, NYSBA rolled out its newly designed website. As with the national experience with enrollment in the health care exchanges, there have been some technical glitches which are still being ironed out. The new format will permit Sections to create online communities and new ways to access the listserve, allow us to establish a Section blog, which could be accessible to the general public, and will enable members to upload their Linked-In content to the NYSBA website. There is a new NYSBA mobile app which provides easy access to the content on the website. I encourage everyone to become acquainted with the newly designed website and to take advantage of the mobile app, which even includes a Twitter feed.

I am sure that we will face many challenges and opportunities during the remainder of my term as Chair of the soon to be renamed Elder Law and Special Needs Section. In the wise words of Bob Dylan, "For the times, they are a-changing." Let's embrace change together. Effective January 1, 2014, I can be reached at my new firm Bleakley Platt & Schmidt LLP in White Plains, New York. You can reach me at fpantaleo@bpslaw.com or by telephone at 914-949-2700. I am very excited about this personal change.

Fran Pantaleo

Request for Articles



If you have written an article you would like considered for publication, or have an idea for one, please contact *Elder and Special Needs Law Journal* Co-Editors:

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

www.nysba.org/ElderJournal

Message from the Co-Editors in Chief

Happy New Year! As we commemorate the holidays and the coming of the New Year we also take a moment to celebrate our second year anniversary as Editors of the *Journal*. It remains an incredible collaborative experience for us that enriches our law practices and our sense of community with our colleagues in the Section. We once again take this opportunity to acknowledge and thank all of the authors who contributed to the *Journal* this past year. The submissions included diverse topics in elder and special needs law and we continue to admire the research and writing skills of the writers. In addition, we thank our Editorial Board, production editors and law student editors for all of their hard work on each and every issue. We could not do this without them. Thank you, team!

So, once again this year, we make this pitch to our readers: We think of the *Journal* as the "town hall" of the Elder Law Section, and accordingly, we encourage all of our members to submit articles and ideas to continue to improve the publication. This is *your Journal*. As authors ourselves, we know that you will learn a tremendous amount from the endeavor of writing an article. Accordingly, if you have any interesting case, practice tip, planning idea, or any topic that relates to elder or special needs law, you may have the subject of an article that will benefit the Section. Please reach out to us and contribute.

In 2014 we intend to continue to raise the bar at the *Journal*. We will conduct the second annual writing competition for New York law students and recent graduates to encourage the participation and enrollment of energetic and diverse Section members. We will continue to include Committee Highlights to inform the entire Section of the various activities and projects of our numerous committees as well as attract new participants. We will also continue to include our regular columns in the areas of Guardianships, Advance Directives News, Recent New York Cases, Tax Update and Medicare.

Now let's dust off that snow and get to our Winter issue.

We begin with *Estate Planning for Same-Sex Married Couples After the Demise of DOMA*, a timely article written by Jeffrey A. Asher exploring planning options in light of the Supreme Court's decision in *United States v. Windsor*. Next, Stephanie Braunstein provides a valuable description of the STAR Program with practice tips in her article *Take Action to Maintain Reduction in Real Estate Taxes*. We follow with guest author and Certified Financial Planner, Henry Montag, and his article *The Paramount Importance of a Life Insurance Audit* in which he provides numerous specific reasons why we all need to review and reevaluate our clients' life insurance policies in light of the current market.

David Goldfarb provides a Medicaid update regarding recent amendments to New York laws on spousal impoverishment in his article *Calculations Under the "Spousal Impoverishment" Budgeting Rules for Managed Long Term Care*. We include two pieces that relate to Brooklyn Law School. First, Deirdre Lok and Jane Landry-Reyes introduce us to the new Elder Rights Clinic at the school. Second, an excellent in-depth article from Brooklyn Law School student Stephen Donaldson entitled *Article 81 Guardianship: Termination, Modification, and Removal*.

We include four of our regular columns. Judith B. Raskin's *Recent New York Cases*; Ellen G. Makofsky's *Advance Directive News: Hard Choices*; David R. Okrent's *Recent Tax Bits and Pieces* and Robert Kruger's *Guardianship News*. We once again thank these authors for their consistent contributions to the *Journal* throughout the years. They really are the backbone of our publication.

Finally, Andrea F. Blau shares her personal experience as a hospital patient in her article *Insider Experience within the Health Care System: Prepare for the Unexpected!!*. We end the issue with the latest poll (Poll # 8) and commentary from the NYSBA Elder Law Section Ethics Committee.

Happy New Year and happy reading (and writing) from all of us at the *Journal*!

Adrienne and David

Estate Planning for Same-Sex Married Couples After the Demise of DOMA

By Jeffrey A. Asher

The need for legal and estate planning advice for same-sex couples is more critical than ever after the Supreme Court's recent decision striking down the Defense of Marriage Act of 1996 (DOMA), the federal law that prohibited the federal government from recognizing same-sex marriages legalized by the states, and allowing states to refuse to recognize same-sex marriages performed under the laws of other states.

The Supreme Court's recent decision in *United States v. Windsor*[1] struck down the parts of DOMA that prohibited the federal government from recognizing same-sex marriages legalized by the states.

DOMA contained two operative provisions: Section 2 of DOMA, codified at 28 USC § 1738C, allows states to refuse to recognize same-sex marriages performed under the laws of other states. It provides that "[n]o State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." The Supreme Court's decision did not address the constitutionality of Section 2.

Section 3 of DOMA, codified at 1 U.S.C. § 7, which was the subject of the challenge before the Supreme Court, defined "marriage" and "spouse" as excluding same-sex partners. Section 3 provides that "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

While DOMA did not, by its terms, forbid states from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status, its definition of marriage for purposes of more than 1,000 federal laws, regulations, and/or directives denied federal benefits to same-sex married couples.

United States v. Windsor began as follows: Edith Windsor and Thea Spyer met in New York City in 1963. In 2007, Edith and Thea were married in Canada where same-sex marriages were, and still are, legal. And, since New York recognizes valid marriages from other states and countries, Edith and Thea were legally married as far as New York State was concerned.

"The need for legal and estate planning advice for same-sex couples is more critical than ever after the Supreme Court's recent decision striking down… DOMA…"

In 2009, Thea died and left her entire estate to Edith. On Thea's federal estate tax return, Edith claimed the federal unlimited, dollar-for-dollar marital deduction, which would have resulted in a zero taxable estate. However, because DOMA denied federal recognition to same-sex marriages, Thea's estate did not qualify for the federal marital deduction. Edith paid $363,053 in estate taxes and sought a refund from the Internal Revenue Service ("IRS"). The IRS denied the refund—under DOMA, Edith was not a "surviving spouse." Edith commenced a refund suit in the United States District Court for the Southern District of New York, where she argued that DOMA violated the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment to the U.S. Constitution. While the tax refund suit was pending, on February 23, 2011, the U.S. Attorney General issued a statement agreeing with Edith's position that DOMA violated the U.S. Constitution and stating that the U.S. Department of Justice ("DOJ") would no longer defend the constitutionality of DOMA's definition of marriage and spouses which excluded same-sex partners (i.e., Section 3 of DOMA). On June 6, 2012, the United States District Court for the Southern District of New York issued its opinion agreeing with Edith and ruled that Section 3 of DOMA was unconstitutional under the due process guarantees of the Fifth Amendment and ordered the federal government to issue the tax refund, including interest. On October 18, 2012, the U.S. Second Circuit Court of Appeals affirmed the decision.

The Bipartisan Legal Advisory Group (BLAG), which intervened in the lawsuit to defend the constitutionality of DOMA, and the DOJ appealed the decision to the U.S. Supreme Court, which granted a writ of certiorari in December 2012. On March 27, 2013, the court heard oral arguments. On June 26, 2013, the U.S. Supreme Court issued a 5-4 decision declaring Section 3 of DOMA to be unconstitutional "as a deprivation of the liberty of the person protected by the Fifth Amendment."

The Supreme Court's decision in *Windsor* held that DOMA's operation in practice created two different classes of married couples in states that allow same-sex marriage. The Court stated that same-sex couples were forced to "live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of a basic personal relationship the state found proper to acknowledge and protect." And because, as the Supreme Court held, DOMA's principal purpose and practical effect was to create inequality among state-sanctioned marriages whereas federal law is normally supposed to create equality among U.S. citizens, the Supreme Court struck down Section 3 of DOMA as unconstitutional.

Following on the heels of the Supreme Court's decision, on July 17, 2013, the Office of Personnel Management, the federal government's Human Resource Agency, issued its Benefits Administration Letter,[2] which announced that the federal government is extending federal benefits to legally married same-sex spouses of federal employees and children of legally married same-sex spouses of federal employees. These federal benefits include, but are not limited to, health care benefits, life insurance, dental insurance, vision insurance, flexible spending accounts, long-term care insurance, and retirement benefits.

On August 29, 2013, the Treasury Department (a/k/a the Internal Revenue Service) issued Revenue Ruling 2013-17,[3] which announced that, for federal tax purposes, the terms "spouse," "husband and wife," "husband," and "wife" now include an individual legally married to a person of the same sex, and the term "marriage" now includes a legal marriage between individuals of the same sex, even if the couple now lives in a state that does not recognize same-sex marriages.

For the first time, same-sex married couples, and their families, are entitled to various federal benefits they otherwise were denied because of DOMA. For example, same-sex spouses of government employees are now entitled to government health care benefits without additional costs and taxes. Same-sex married couples are now able to jointly file their federal income tax returns—no longer forced to file state income tax returns one way and federal income tax returns another. Same-sex married couples are now able to inherit federal pensions and retirement accounts the same way opposite-sex married couples can; may now be buried together in veterans' cemeteries; and are now entitled to the Bankruptcy Code's special protections for domestic-support obligations.

The Supreme Court's decision in *Windsor* also guarantees Social Security benefits to families upon the loss of a spouse and parent, benefits that were previously denied because of DOMA's across-the-board effect. It also serves to resolve problems in immigration cases where same-sex couples may have been legally married but the federal government, because of DOMA, refused to acknowledge the marriage.

The Supreme Court's decision also allows same-sex married couples the benefit of the federal marital deduction, thus potentially saving millions of dollars in federal estate and gift taxes.

Federal gift and estate tax law enables married couples who are U.S. citizens to make gifts and bequests to one another entirely federal gift and estate tax free. These gifts/bequests may be made in unlimited amounts and may be made outright or in trust, all because of the federal unlimited dollar-for-dollar marital deduction. The marital deduction, however, requires that the spouses be legally married. Prior to the Supreme Court's decision in *Windsor*, same-sex couples were not entitled to the federal unlimited marital deduction because they were not legally married in the eyes of the federal government. With the demise of DOMA, a same-sex married couple is entitled to the same federal marital deduction as an opposite-sex married couple, thus paving the way for same-sex married couples to properly and effectively plan their estates to save as much in federal estate and gift taxes as opposite-sex married couples already do.

Now, a same-sex married couple is able to avail themselves of the same basic estate planning an opposite-sex married couple routinely receives from their estate planning attorney. For example, in a typical marital estate plan, each spouse might leave to the surviving spouse the totality of his or her testamentary estate, with a carve-out either (a) of an amount up to the first-deceased spouse's exclusion from estate taxes ($5,250,000 in 2013), known as the "Applicable Exclusion," or (b) allowing the surviving spouse to "disclaim" (into a "disclaimer trust" usually for the benefit of the surviving spouse) a portion of the inheritance, which disclaimer would typically be up to the amount of the first-deceased spouse's Applicable Exclusion. This allows the surviving spouse to maximize the first-deceased spouse's full use of the Applicable Exclusion, knowing that whatever is in excess of that amount would pass to the surviving spouse estate tax free be-

cause of the marital deduction. Prior to the *Windsor* decision, that basic building block of an estate tax savings plan was out of reach for same-sex married couples.

Another new benefit to same-sex married couples is the use of "portability." Portability, or the "portability election,"[4] is a tax election to use a deceased spouse's unused Applicable Exclusion on the surviving spouse's estate tax return. Imagine the same example above, but this time the first-deceased spouse provided no estate tax planning and merely left everything to his or her spouse, outright, free of trust, and subject solely to the marital deduction. The surviving spouse would typically not disclaim because doing so would deem the surviving spouse as having died before the first-deceased spouse, thus causing the disclaimed portion to pass to the couple's child(ren) or other beneficiary(ies). With the proper exercise of the tax election, portability allows the surviving spouse to inherit the entirety of the first-deceased spouse's estate, even subject wholly to the marital deduction, and still be allowed the first-deceased spouse's unused Applicable Exclusion on the surviving spouse's estate tax return. Thus, portability ultimately gives the surviving spouse's estate the full benefit of the first-deceased spouse's Applicable Exclusion, as if the first-deceased spouse properly provided for proper estate tax planning in his or her Will or other testamentary document. With the *Windsor* decision, same-sex married couples are now married for tax purposes, and thus entitled to the full benefits of the portability election.

Another new benefit is the ability of a same-sex married couple to name each other as beneficiaries of their life insurance policies, knowing that the life insurance proceeds paid to the surviving spouse would be free of federal (and most probably state) estate tax because of the marital deduction.

As a final example, equalizing taxable estates to take full advantage of available Applicable Exclusions tends to require use of the gift tax marital deduction. Imagine one spouse owns the marital home, together with the majority of the investment accounts, such that if the less than financially endowed spouse dies first he or she may not have enough assets in his or her taxable estate to take full advantage of his or her Applicable Exclusion. To ensure full use of the first-deceased spouse's Applicable Exclusion, one technique is to make gifts from the financially endowed spouse to the less than financially endowed spouse during life which, in essence, "equalizes" the estates of both spouses. Prior to *Windsor*, such equalization was not possible for same-sex married couples because it would result in federal (and maybe state) gift taxes on the gifts.

In conclusion, while the Supreme Court's decision in *United States v. Windsor* is certainly a historic decision, let us not forget its real-world application for some of our clients. This decision brings real, practical estate and gift tax savings to same-sex married couples that were only recently off limits to them. This may afford you, the good practitioner, the opportunity to provide qualified legal services and estate planning advice to same-sex married couples, or work with attorneys who will provide qualified legal services and estate planning advice to same-sex married couples, for the benefit of your clients.

*"[W]hile the Supreme Court's decision in…*Windsor *is certainly a historic decision, let us not forget its real-world application for some of our clients. This decision brings real, practical estate and gift tax savings to same-sex married couples that were only recently off limits to them."*

Endnotes

1. 570 U.S. __ (2013) (Docket No. 12-307).
2. Which can be found at http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf.
3. Which can be found at http://www.irs.gov/pub/irs-drop/rr-13-17.pdf.
4. A key provision of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (Pub. L. 111–312, H.R. 4853, 124 Stat. 3296), which was passed by the U.S. Congress on December 16, 2010 and signed into law by President Obama on December 17, 2010, and made permanent by the American Taxpayer Relief Act of 2012.

Jeffrey A. Asher is a Partner in the Trusts and Estates Group and head of the Elder Care Practice at Robinson Brog Leinwand Greene Genovese & Gluck P.C. Mr. Asher is a frequent lecturer for various financial institutions, civic groups and community organizations, has been featured on radio shows across the country, and is often presented by the New York State Bar Association as a community educator on various topics. Mr. Asher recently appeared in the HBO Documentary "Bobby Fischer Against the World: Fight for the Fischer Estate." Mr. Asher also is a legal commentator on trusts and estates and elder law matters for TruTV, Court TV, CNN Headline News and The CBS Early Show. Mr. Asher is a frequent speaker at and contributor to the National Business Institute, Inc.

Take Action to Maintain Reduction in Real Estate Taxes

By Stephanie Braunstein

If homeowners want to keep their Basic School Tax Relief (STAR) exemption and its reduction in taxes, they need to register with the New York State Tax Department.

Section 425 of the Real Property Tax Law provides a partial exemption from school taxes and is available for owner-occupied, primary residences where the combined income of the resident owner and spouse is $500,000 or less. This exemption is known as the Basic STAR exemption.

The STAR Program was proposed by Governor Pataki and signed into law by the Legislature on August 7, 1997. New legislation included in the 2013-14 state budget requires all homeowners receiving a Basic STAR exemption to register with the New York State Tax Department in order to continue receiving the exemption in 2014 and subsequent years.

Owners of one- two- and three-family houses, condominiums, cooperative apartments, and mobile homes are all eligible for the STAR exemption. To qualify, the property must be the primary residence of at least one owner. Local assessment offices consider many factors to determine whether a property is considered a "primary residence," but the most important factor is the length of time the person resides on the property. According to the STAR Assessor's Guide, published by the New York State Department of Taxation and Finance, other factors include a person's voting residence, driver's license, filing status for purposes of state income taxes, and other conduct and behavior that provide evidence as to which property the applicant considers to be his or her primary residence.[1]

In 2012, eligible homeowners saved a statewide average of $700 through the STAR program. The registration process, the first registration requirement since the program was enacted, is designed to protect taxpayers from the costs of fraudulent STAR exemptions that cost taxpayers millions of dollars each year. It is estimated that the cost of duplicate and improper exemptions could increase taxes by $73 million in the next three years without implementation of the new registration process.[2]

For example, there are many cases of "double dipping" where homeowners receive duplicate STAR rebates on both their primary residence and second home. The application for School Tax Relief (STAR) Exemption (RP-425) specifically asks whether "you or your spouse own any other property that is currently receiving the STAR exemption." Married couples who own more than one home are entitled to a STAR exemption on no more than one residence, unless they are living apart due to legal separation. Those married couples who are not legally separated, but maintain separate residences, whether for business or personal reasons, are only entitled to one STAR exemption.

In other instances, the state found evidence of improper exemptions where a relative inherits property and continues to receive the exemption, even though the relative is ineligible.

Assessment offices monitor Basic STAR in their local communities, but do not have the ability to determine whether an individual is receiving the STAR exemption outside of that jurisdiction. Based on the information provided this year, the New York State Tax Department will confirm eligibility for future years and eliminate some of the "double dipping" while providing a method for qualified homeowners to retain their exemption through registering with local assessors.

Homeowners who currently receive the Basic STAR exemption should receive instructions in the mail from the New York State Tax Department, which includes a "STAR code" necessary for registration.[3]

Registration can be completed either online (www.tax.ny.gov) or by calling the New York State Tax Department (518-457-2036). Homeowners will need to provide some basic information: (1) STAR code and confirmation of property address; (2) names and social security numbers for the owner(s) of the property and spouse; (3) confirmation that the property is the primary residence of one of its owners; (4) confirmation that the combined income of the owner and spouse who reside at the property does not exceed $500,000; and (5) confirmation that no resident owner receives a residency-based tax exemption from another state.

Those homeowners should receive letters from the New York State Tax Department advising them that the assessor will remove the STAR exemption unless they act promptly and complete late registration. The property owners will have forty-five (45) days to respond or else the assessor will be directed to remove the STAR exemption.

Most homeowners who receive the STAR exemption will see the tax savings directly on their school tax bills. However, for cooperative apartment share-

holders, the tax savings appears on the school tax bill for the cooperative corporation. Those who receive the Basic STAR exemption related to an interest in a cooperative apartment must register under the new legislation. Local assessors provide a breakdown of the exemptions to the cooperative manager, or managing agent, who should then credit the tax savings against the maintenance fees of the shareholder who receives the exemption.

For homeowners who transferred their primary residence into the name of a trust, the property must also be registered under the new legislation. Transfers into certain types of trusts, such as revocable trusts, in which the Settlor retains the right to reside in the property, do not affect eligibility for the STAR exemption, as long as the other requirements listed above are met. Although the trust is the legal owner of the property, for STAR purposes the trust beneficiary is treated as the owner and remains eligible for all property exemptions. The same rule applies for a life estate interest in property. The life tenant (the homeowner) is deemed to own the property for purposes of the STAR exemption and STAR eligibility is based on the life tenant's qualifications. Not all trusts afford the trust beneficiaries the right to STAR exemption, however, and the terms of the trust must be reviewed.

Homeowners applying for a Basic STAR exemption for the first time are not affected by this year's registration procedure. To apply for the STAR program, the homeowner should complete form RP-425, "Application for School Tax Relief [STAR] Exemption," available on the Tax Department's website and file the application with the local assessor.

Those receiving Enhanced STAR are also not affected by the new registration procedure.

For the 2013-14 school year, Enhanced STAR is available to seniors, age 65 and older, whose combined earnings were less than $81,900 in 2013.

In addition to the requirements listed above for the Basic STAR exemption, for the Enhanced STAR exemption, all owners of the property must be 65 years of age or older as of December 31 of the applicable assessment roll year. Certain exceptions have been legislated as follows: (1) for property owned by a married couple, one of the owners must be 65 years of age or older as of December 31 of the assessment roll year, (2) for property owned by siblings, one of the siblings must be 65 years of age or older as of December 31 of the assessment roll year, and (3) for property owned by a surviving spouse where a STAR exemption was previously granted, the spouse must be 62 years of age or older as of December 31 of the assessment roll year.

In order to receive Enhanced STAR, seniors must continue to apply annually or participate in the Income Verification Program. In order to enroll in the Income Verification Program homeowners needs to complete form RP-425-IVP "Optional Income Verification Program Application" and submit it to the Assessor along with a traditional STAR application. By enrolling in the Income Verification Program homeowners no longer have to reapply each year and instead authorize the New York State Department of Taxation and Finance to verify income eligibility on an annual basis. Seniors who do not choose to enroll in the income verification program must reapply each year to keep the Enhanced exemption in effect.

Along with the Basic STAR registration requirement, and in an effort to discourage fraud, there are also increased penalties for intentionally providing misinformation (increased from $100 to as much as $2,500) and a taxpayer whose STAR exemption is revoked will be unable to receive the exemption for six years after the revocation. Homeowners found ineligible for the exemption will have the right to administrative review within the Tax Department and before the state Board of Real Property Tax Services.

In order to remain eligible for the Basic Star exemption it is advisable for all homeowners currently receiving the Basic STAR exemption, including those with an interest in a cooperative apartment or who transferred the home into a trust or a life estate, to register with the New York State Tax Department as soon as possible.

Endnotes

1. Reference the STAR Assessor's Guide, http://www.tax.ny.gov/pit/property/star/assessorguide.htm (October 16, 2012) for more information regarding specific qualifications and questions regarding the STAR exemption.
2. Reference "DiNapoli Audit Finds Errors and Potential Abuses in STAR Program," http://www.osc.state.ny.us/press/releases/feb13/022813.htm (February 28, 2013) for the full press release.
3. Homeowners who do not receive the necessary "STAR code" can find the information using the STAR code lookup: http://www.tax.ny.gov/pit/property/star13/lookup.htm.

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The Paramount Importance of a Life Insurance Audit

By Henry Montag, CFP, CLTC

Have you ever discovered a bank entry error in your checking register, resulting in a balance $100 or $1,000 less than what it should be? Imagine how much worse you would feel if your or a client's life insurance policy worth $1,000,000, or more, that you thought would be available to a spouse, child or others upon death were rendered unavailable due to a technicality.

Universal Life Insurance: The Industry's "Dirty Little Secret"

Among the important reasons that a life insurance contract should be reviewed is to determine how much longer the contract is expected to remain in force. The reason you need to be proactive, whether you are an individual who owns your own life insurance contract, or a Trustee protecting the best interest of your trusts beneficiaries, is because a great majority of life insurance contracts that were purchased over the last 25 years are in danger of expiring years earlier than originally anticipated. These universal life or variable life insurance contracts, unlike their more expensive whole life counterparts, which in certain situations have some lifetime guarantees, are not guaranteed to last for a lifetime because their performance was tied to an anticipated annual interest rate, or an anticipated stock index, neither of which are guaranteed.

The problem is very few lay people and professionals are aware that their life insurance contracts can expire years earlier than originally anticipated. The client and trustee often incorrectly assume that either the agent or insurance company is monitoring the situation to make sure the Insurance contract will always remain in force. As a matter of fact it would be in the insurance company's best interest if after all those years of your paying the yearly premiums it became exorbitantly expensive to maintain the contract and the death benefit had to be reduced or surrendered.

Allow me to explain: back in the mid-1980s, when prevailing interest rates were as high as 14%-15%, there were only two types of life insurance contracts: term life insurance, in which a specific dollar amount of life insurance was guaranteed to remain in force for a specific period of time at a specific guaranteed premium; and Whole life insurance, which was guaranteed to remain effective for the entire life of the insured. These whole life contracts contained an accumulation account known as cash value, which was typically earning 3% annually. The cash value was available to be withdrawn and used for any purpose, so long as the owner paid a contractual 5% interest charge on the money that was withdrawn.

In a whole life contract, if a person had an accumulated cash value of $50,000 earning 3% interest, the owner had the ability to borrow the money at 5% and then place those dollars in a money market or savings account, where they could have earned 14%. Thus, without any additional risk, the owner would be able to earn an additional 9% on his or her $50,000 of cash value.

Due to the competition from banks' significantly higher interest rates, the insurance industry watched billions of dollars in their cash value coffers being withdrawn and transferred to the individual bank accounts of the people it insured. In order to stop these outflows, the life insurance industry created a new product called "Universal life insurance," which paid an interest rate based on prevailing market interest rates instead of a fixed rate, as had been the case in whole life contracts. If interest rates rose, then one's insurance coverage would become less expensive or last for a longer period of time as a result of the larger amount of accumulated cash value. What was not as clearly understood, however, was that if interest rates decreased, then the length of time the coverage would remain in force would consequently be reduced, or a greater annual premium deposit would be required to prevent the earlier expiration of this coverage. In other words, the universal life contract provided no guarantee as to how long it would remain in force. If interest rates maintained their projected growth, everything was fine, but if interest rates fell below their projections there would be a problem.

The problem faced by many Insureds today materialized because of the steadily steeply declining interest rates following the higher interest rates of the mid-1980s. This resulted in 30-35% of today's universal life coverage on pace to expire years earlier than originally projected. When universal life was first offered, agents and brokers would ask their clients how long they wished the coverage to remain in force. Clients would typically respond that they wanted the coverage to last until age 92-95. Next an average interest rate was then assumed for the 20-30-year period it took to get to the specified age after the policy was issued and that interest rate was plugged into a computer. The resulting

computer illustration would provide the anticipated premium needed to keep that particular amount of life insurance in force for the desired period, but that time period was not guaranteed, only assumed.

While this interest-sensitive product stopped the tremendous outflow of monies from the insurance industry's cash value coffers to the banks, the solution was not a long-term fix because it created other problems that have just began to surface over the last 5-6 years as a result of today's record-low interest rates. Let me explain. In the late 1980s, when interest rates were 14-15%, many assumptions were made that interest rates would remain in the 10-12% range for a long period of time. Even the more conservative agents and brokers were projecting 7-10% rates. Although those assumptions seemed perfectly reasonable at the time, our staggeringly low interest rate environment has decimated universal life contracts with even the most conservative projections. As a result, the original assumption that a life insurance contract would last until the person was age 92 has been shortened by as many as 8-9 years. While universal life has received most of the blame in the insurance industry, it needs to be pointed out that double and triple A rated Insurers are now beginning to also feel the effects of low interest rates as their whole life contract holders are being asked to either reduce their death benefits or increase their premiums as a result of poorly performing dividends which are not guaranteed.

An audit of a universal life contract examines the actual interest rate return earned each year since the policy was purchased and actuarially determines exactly how long the contract will last based on (1) the historic actual return, and (2) the current age of the insured, and (3) any outstanding loans. Many individuals and trustees neglect to request this historical projection, and are not even aware that as a result of a poorer than expected performance, their contracts are now in danger of expiring earlier than originally expected. The more advance notice an insured or trustee has about a potential shortfall, the less additional monies are needed to adjust the coverage back to its originally projected level. I have often referred to the hidden risk of premature expirations of coverage shortfalls in universal life contracts as the insurance industry's "dirty little secret" because there was not sufficient disclosure initially provided stating that this new product was not guaranteed to last for one's lifetime.

As a practitioner, I can say that the combination of a low interest rate environment and the fact that the octogenarian demographic is the fastest growing segment of the population is a ticking time bomb for the life insurance industry. My greatest concern is that individual trustees, many of whom are the sons and daughters of the insured (or the grantor of a trust), are not even aware that they need to review their parents' existing life insurance contracts, nor is there a mechanism in place to conduct such a review. This inaction can be viewed as a failure of their fiduciary responsibility as a trustee leaving them vulnerable to litigation from other family members/beneficiaries that may lose trust assets in the process.

That being said, this article is primarily meant to draw attention to the professional or institutional trustees, who are now responsible for well over three trillion dollars of trust-owned life insurance (T.O.L.I) contracts. Many of these T.O.L.I contracts are ones in which the insured or grantor may have incorrectly assumed years ago about how interest rates would behave going forward. Historically 35% of those contracts contain death benefits that are no longer projected to remain in force due to continuously lowered interest rates. While some institutional trustees are aware of this problem and are employing third parties to conduct independent reviews, there remain problems with theses reviews, namely: 1) 83% of professional trustees surveyed admitted that they had no guidelines or procedures for handling these problems, 2) 96% had no policy statements on how to handle life insurance investments, and 3) too many are relying on policy reviews not consistent with the prudent investor principles which fiduciaries are required to follow and liable if they don't.

The frightening aspect of this situation is that according to recent Office of the Comptroller of the Currency (O.C.C.) guidelines, these trustees may be negligent in fulfilling their fiduciary obligation to protect trust assets for their beneficiaries. The O.C.C continues to require bank fiduciaries to follow 12 CFR 9.6(c) and 12 CFR 150.220, which direct them to conduct annual investment reviews of all assets within each fiduciary account for which the bank or trust company has investment discretion. This review should evaluate the financial health of the issuing insurance company, and it should also examine whether the policy is performing as illustrated. If the policy is underperforming, or if the policy can be improved upon, the fiduciary should consider replacement or remediation. If the trustee does not have the necessary skills to make this determination, it is the trustee's fiduciary obligation to obtain this expert service from an outside source.

Harvey Pitt, the former SEC Chairman, cautioned banks that in today's heavily regulated post Sarbanes–Oxley environment, they should learn from their sector's past mistakes and replace inadequate and outdated processes with ones that are more efficient and up-to-date. Many of these flawed, outdated processes merely document and focus on the health of the insurance company instead of the shortcomings of the particular life insurance policy. Unfortunately, the mere analysis of the life insurance company fails to consider the appropriateness of policy expense as required under Section 7 of the Uniform Prudent Investor Act

(UPIA) and the reasonableness of performance expectations as required under UPIA Section 2, and thus will not provide a strong defense in the event of litigation. In accordance with O.C.C Reg. 9.6c.11, if a trustee determines that it lacks the expertise to evaluate the premium adequacy risk or the contract's appropriateness to fulfill the beneficiary's objectives, the trustee has an affirmative duty to bring in the necessary experts and inform the beneficiary of the suggested remediation steps.

Other Reasons to Review Your Life Insurance Contract

While the foregoing considerations are compelling enough by themselves to highlight the importance of regularly reviewing a life insurance contract, individual policyholders and trustees should also consider conducting such reviews for other reasons as well. One such reason is that the options and riders available in today life insurance contracts were simply not available when they first purchased their life insurance contracts.

One example of such an advantage is the chronic care rider. Notably, the chronic care rider first became available at the end of 2011, so any universal life contract purchased prior to 2012 does not have this rider available. The chronic care rider allows an individual to withdraw up to $116,000 tax free in 2013 annually adjusted for inflation from the death benefit of his or her life insurance contract to pay for qualifying long-term care expenses. The chronic care rider is a major new benefit that everyone should consider because of the added leverage and flexibility it provides, assuming they meet two criteria: (1) the individual is healthy enough to purchase a new contract from an insurance company that contains these provisions, and (2) the premium on the new contract would be similar to the premiums they are currently paying.

Another important consideration during an audit is ascertaining whether the life insurance contract you currently have is competitive in terms of net expenses and costs and whether it still fits your current objectives. That may involve measures as simple as evaluating whether the beneficiary and owner designations are still accurate and correct. If a life insurance contract is owned or controlled by the insured, he or she may have to unnecessarily pay a New York State estate tax, which can be as high as 16%. While the federal estate tax has been eliminated for estates under $5,250,000, the New York State estate tax is still required for estates valued over $1 million. This tax, however, can potentially be avoided by simply using an Irrevocable Life Insurance Trust (ILIT), as the owner of the life insurance contract rather than the individual insured. Trusts are wonderful tools as they provide management, distribution instructions, tax savings and flexibility for the trustee. However to be most efficient trusts must be updated and reviewed in terms of today's planning options, and trustees must be better educated in terms of what those obligations and options are and how they can best be executed for the benefit of the individuals they are protecting.

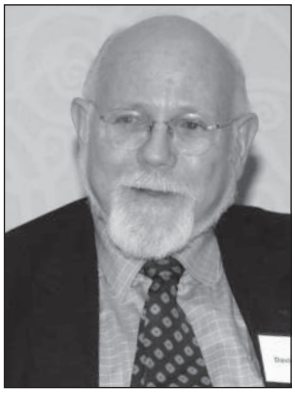
In conclusion, being aware of the potential problems and opportunities within the life insurance arena should be a major point of emphasis for individual trustees and professional or institutional trustees in order to protect the assets for the benefit of their beneficiaries. This is especially important for professional and institutional trustees due to the risk of litigation from a disgruntled beneficiary. A beneficiary can allege a cause of action in several situations. First, if the life insurance coverage prematurely expires, and the beneficiary is never made aware that a shortfall that could have been made up much easier years earlier existed. Secondly, if the proceeds of the life insurance contract are mistakenly included in the gross estate of the insured, resulting in their being unnecessarily subject to state or federal estate taxes. And lastly if the trustee does not examine policy expenses as required under UPIA Section 7, since beneficiaries can claim the trustee was overcharged and the beneficiaries could/should have had greater death benefits for the same premium paid.

An independently conducted, actuarial life insurance audit not only inoculates a trustee against litigation risk brought about by other family members, but equally important is that it is also highly likely to benefit the entire family if a better option costing less, with potentially higher death benefits, with a longer guarantee and new riders not previously available, were found to be available.

Henry Montag is an Independent Certified Financial Planner who has been in practice since 1976, with offices in Long Island and New York. He has held insurance and securities licenses for over thirty-five years. He is a principal of Financial Forums Inc., which provides workshops, seminars and conferences for professional and consumer markets. He is a Board member of the Intergenerational Practices and Policies at Dowling College, as well as an Advisory Board Member of the Academy of Finance at Northport High School. He has lectured extensively on the subject of the proper utilization of financial products used to protect and preserve business interests and personal assets, to organizations such as the New York State Bar Association, the New York State Society of CPAs, National Conference of CPA Practitioners and numerous associations and business groups. As a source for the media he has been quoted in *The Wall Street Journal*, *Investors Business Daily*, *Newsday*, and *Long Island Business News*, and has appeared as a guest on Fox News, News12 & FIOS, Money & Main St. To contact Henry: henry@financialforumsinc.com; (516) 695-4662.

Calculations Under the "Spousal Impoverishment" Budgeting Rules for Managed Long Term Care

By David Goldfarb



New York will apply Medicaid "spousal impoverishment" budgeting rules for home care under the Managed Long Term Care (MLTC) program.

New York's laws on spousal impoverishment budgeting, New York Social Services Law § 366-c(2)(a), was amended in 2013 to include for the purposes of budgeting under the definition an "institutionalized spouse" a person who is receiving care, services and supplies under the Managed Long Term Care (MLTC) Program to the extent that federal financial participation is available therefor. 2013 N.Y. Laws Ch. 56, Part A, § 68. The law had previously been amended to apply to other community-based waiver programs (2009 N.Y. Laws Ch. 58, Part D, § 42).

Couples, where one person is receiving Medicaid home care through the Managed Long Term Care program, will now be able to use the "spousal impoverishment" budgeting rules or the old community-based budgeting rules—whichever is more favorable. On Sept. 24, 2013, the New York State Department of Health announced in GIS 13 MA/018 that "spousal impoverishment protections" are available to married participants in all Managed Long Term Care (MLTC) plans, including PACE and Medicaid Advantage Plus plans. These rules were previously expanded to the Traumatic Brain Injury (TBI) and Nursing Home Transition and Diversion (NHTD) waiver programs and had previously been applied to the "Lombardi Program" (Long Term Home Health Care Program). See GIS 12 MA/013, which explains the methodology for calculating spousal impoverishment budgeting in Home and Community-Based Waiver Programs.

These "spousal impoverishment protections" have been used since 1988 by couples where one spouse is in a nursing home. Under these rules income can be shifted from the spouse receiving Medicaid to the well spouse to bring his or her income up to a Minimum Monthly Maintenance Allowance (MMMNA) ($2,931 in 2014). However, in community-based programs the Medicaid spouse can keep a calculated personal needs allowance (PNA) (in 2014 $383). GIS 12 MA/013 explains the methodology for calculating the personal needs allowance: The PNA for a community-based or waiver recipient is the difference between the two-person and one-person income levels. In 2014 it is $383 ($1,192 minus $809).

It is necessary to determine how much in addition to the recipient's PNA can be shifted to the spouse. You need to calculate the Community Spouse Monthly Income Allowance (CSMIA), which is the difference between MMMNA and the Community Spouse's net income. For example, if the Community Spouse's gross income from pension, Social Security and Minimum Required Distribution from an IRA is $2,000 per month and he or she has a $240 deduction for Medicare Supplemental Insurance, the CS's net income is $1,760 ($2,000 minus $240) and the CSMIA is $1,153 (MMMNA $2,913 - $1,760). Therefore, in addition to the CS's income the couple gets to keep $1,536 (PNA $383 + CSMIA $1,153). Or, for example, if the Applicant/Recipient's income (after deduction for Medicare Supplemental Insurance) is $2,000, then the A/R keeps $383, and he shifts $1,153 to the CS and his remaining Medicaid spenddown is $464.

"Couples, where one person is receiving Medicaid home care through the Managed Long Term Care program, will now be able to use the 'spousal impoverishment' budgeting rules or the old community-based budgeting rules—whichever is more favorable."

Alternatively under single-person budgeting the A/R could have kept only his or her single person PNA of $809 plus a $20 disregard and his spenddown would have been $1,171 ($2,000 - $829).

NYC HRA has said a pooled trust cannot be used with spousal impoverishment budgeting. If not using spousal impoverishment budgeting, the spouse could exercise her right to "spousal refusal." Under both budgeting options, spousal impoverishment rules are to be applied to the couple's resources. In 2014 the A/R may keep $14,550 in his own name. As for the CS, the minimum resource allowance is $74,820. However, it is unknown how the maximum would be calculated since it is one-half of the combined resources "as of the first day of institutionalization" up to a maximum (for 2014) of $117,240. Of course, in community-based care there is no first day of institutionalization. Other resource exemptions apply.

The rules are complex and there are advantages and disadvantages. Generally, according to the GIS, if the sum of the recipient's Personal Needs Allowance ($809 in 2014), Community Spouse Monthly Income Allowance (Difference between MMMNA and the Community Spouse's net income) and a Family Member Allowance, if applicable, is less than or equal to the sum of the Medicaid income level for a household of one and the $20 unearned income disregard, spousal impoverishment budgeting with post-eligibility rules is not more advantageous. In cases where the spousal impoverishment budgeting will eliminate a spenddown and eliminate the use of a pooled trust, it may be more advantageous.

David Goldfarb is a partner in Goldfarb Abrandt Salzman & Kutzin LLP, a firm concentrating in health law, elder law, trusts and estates, and the rights of the elderly and disabled. He is the co-author of *New York Elder Law* (Lexis-Matthew Bender, 1999-2012) now in its thirteenth release. Mr. Goldfarb formerly worked for the Civil Division of the Legal Aid Society (New York City). He was the Chair of the Association of the Bar of the City of New York's Committee on Legal Problems of the Aging from 1996-1999. He is the Secretary of the Elder Law Section of the New York State Bar Association. He is vice-chair of the Technology Committee of the Trusts and Estates Law Section of NYSBA. He has written extensively on legal and civic issues including two op-eds in the *New York Times*.

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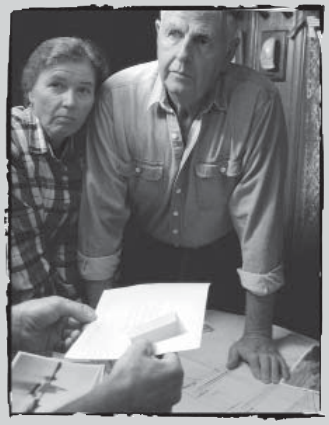

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Brooklyn Law School Launches Elder Rights Clinic

By Deirdre M.W. Lok and Jane Landry-Reyes

This fall marked the launch of the Elder Rights Clinic at Brooklyn Law School. The news is timely as more baby boomers enter the 60+ age bracket. The legal needs of older adults will continue to expand dramatically and by 2030, it is estimated by the Department of City Planning that the borough of Brooklyn alone will have as many as 410,000 residents over the age of 65. Yet today, 53 percent of Brooklyn residents in that same demographic struggle with desperately low incomes.

To address these pressing needs, Brooklyn Law School has collaborated with the Brooklyn Legal Services Elderlaw Project and the Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale to create the new clinic. It is the latest in the Law School's 30-year history of clinical and externship programs to benefit from close partnerships with community-based organizations, allowing fresh legal minds to polish their craft in the service of some of Brooklyn's most needy residents. Jane Landry-Reyes, Senior Housing Attorney with Brooklyn Legal Services, is responsible for assigning and supervising caseloads while Deirdre Lok, Assistant Director and General Counsel for the Weinberg Center, is teaching the seminar that will provide students with substantive exposure in this swiftly growing field, one driven by the numerous aging-related legal crises facing older adults.

In-depth familiarity and experience with this burgeoning area of law is a wonderful asset for students, especially at a time when students are focused on building skills and making connections that will translate to increased job marketability. The Elder Rights Clinic allows for hands-on work across diverse projects and cases. At Brooklyn Legal Services, students will handle eviction cases specific to senior citizens and take on client representation—from case intake through strategic case assessment, motion practice, court appearances, and possibly even hearings or trial. This direct client interaction with the older adult population will build invaluable client-interviewing skills and an ability to assess client capacity. Students may also have the opportunity to identify and intervene in cases of elder abuse, and to evaluate other basic food, housing, and health care needs. The process of advocating for an older adult at an administrative hearing offers another invaluable experience for learning. The ever-changing laws and regulations surrounding Medicaid benefits, healthcare and insurance provides an area ripe for students to position themselves on the cutting edge of a practice that most long-time practicing attorneys are learning as well.

The weekly seminar will complement the case and project work by exploring foundational legal concepts and developing necessary skills. Topics will include advance legal planning, older adult benefits, eviction proceedings, and the guardianship process. In addition, students will work on projects assigned through their seminar that focus on older adults' rights including attorney-client ethics, privacy rights, consent to sexual activity, and access to justice. The Elder Rights Clinic will be excellent exposure for any law student interested in public interest law, health law, criminal law, government, the courts and agencies, or working as court evaluators, guardians, or in private practice with an older adult or family-oriented client-base. The needs of the elderly encompass the full range of legal tools, and this clinic provides an excellent training ground for students as they begin their legal careers.

Deirdre M.W. Lok, Esq. is the Assistant Director and General Counsel for The Harry and Jeanette Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale. Prior to joining The Weinberg Center, she spent several years as an Assistant District Attorney in New York City at the Queens County District Attorney's Office, where she focused on domestic violence cases. Ms. Lok graduated Magna Cum Laude from New York University and received her law degree from Brooklyn Law School. Ms. Lok is an Adjunct Professor at Brooklyn Law School and is co-directing the law school's Elder Rights Clinic.

Jane Landry-Reyes has been a legal services attorney for approximately 20 years. For the past 9 years, she has been a Senior Staff Attorney in the Housing Law Unit at South Brooklyn Legal Services. Her work is primarily in eviction prevention and low income housing subsidy preservation. Ms. Landry-Reyes also worked for approximately 8 years as a Clinical Instructor/Senior Staff Attorney with the Elderlaw Legal Clinic at Brooklyn Law School. She is a 1993 graduate of Brooklyn Law School.

Article 81 Guardianship: Termination, Modification, and Removal

By Stephen Donaldson

The past forty years have witnessed a significant increase in the attention placed on legal issues surrounding our growing elderly population, some of which has focused on guardians and the shortcomings that guardianship proceedings have created. In 2003, Senator Larry Craig, Chairman of the U.S. Senate Special Committee on Aging, stated, "Ironically, the imposition of guardianship without adequate protections and oversight may actually result in the loss of liberty and property for the very persons these arrangements are intended to protect." This came thirty-one years after G. Alexander and T. Lewin noted episodes of court-appointed guardians abusing, neglecting, and manipulating incapacitated adults.[1]

While these findings have resulted in many proposals for reform, two strategic areas for change consistently include due process and guardianship monitoring, both of which New York's Article 81 of the Mental Hygiene Law have attempted to address. Because Article 81's overarching purpose is the incapacitated person's best interests, the law grants a Court broad discretion over a guardian's removal, discharge, and resignation. One of the more significant features of an Article 81 guardianship is that a guardian, or anyone concerned with the incapacitated person's welfare including the incapacitated person, may petition the court to request that the guardian's powers be modified or that the guardian be discharged or removed *at any time*.

Three sections within Article 81 address how a guardianship may reach an end,[2] all of which will be discussed in detail.

A. § 81.37 Resignation or Suspension of Powers of Guardian

While the statutory language is straightforward in that subsection (a) states that the court "appointing a guardian may allow the guardian to resign or may suspend the powers of the guardian,"[3] the Appellate Division, First Department addressed a guardian's resignation ten years ago.[4] After having differences with the court examiner who took issue with the guardian's fees in the annual report, the guardian, by an order to show cause, moved to resign, citing reasons that the obligations placed a strain on his practice and personal life.[5] Acting on a special referee's report, the Court granted a motion to permit the guardian to resign, but found the guardian personally liable for fees: $3,000 due an accountant and $4,500 owed to the guardian ad litem.[6] On appeal, the Appellate Division reversed, holding that "[§ 81.35] contains no indication that a guardian's resignation warrants the imposition of a fee or surcharge.…"[7]

However, unlike the situation of a guardian's resignation, Article 81 does grant a Court the authority to hold a guardian liable for the costs associated with a motion to remove the guardian.[8]

B. § 81.35 Removal of Guardian

Unlike resignation, an event that only the guardian can put into motion, a guardian's removal is significantly more complex because any person entitled to "commence a proceeding under this article, including the incapacitated person"[9] can petition the Court to have a guardian removed.

Containing no subsections, § 81.35 expresses several key points:

1. Who has the authority to remove a guardian?
   a. Only the Court, yet any person entitled to bring a proceeding under Article 81 may petition the Court to remove a guardian.
2. Under what circumstances does the Court have the authority to remove a guardian?
   a. For any cause which appears just to the Court,

including failing to comply with an order or when a guardian is guilty of misconduct.

3. What is the procedure under which the Court may remove a guardian?

   a. Notice of a motion to remove a guardian must be made on the guardian and any other persons entitled to receive notice per § 81.16(c)(3).[10]

4. Costs associated with removing a guardian:

   a. The Court may fix compensation for any person who prosecutes the motion.

   b. If granted, the Court may hold the guardian personally liable for the costs of the motion.

A final point also applies to attorneys who defend guardians in removal actions. In *In re Brown*,[11] the attorney who defended the guardian in a removal action submitted an application to the court for $137,000 in legal fees after the Court found that the guardian had breached her fiduciary duties to the incapacitated person.[12] The Court denied the application and disallowed payment from the incapacitated person's estate. Because the facts supported the finding that the guardian had breached her fiduciary duty, the Court held, "it would now be [in]appropriate for the court to order that the attorney's fees…for [the guardian's] defense be paid from the estate of the incapacitated person."[13]

Similarly, § 81.35 grants the Court considerable discretion in deciding *when* a guardian should be removed. When the appointing Court removes an Article 81 guardian, the most common reason is breach of fiduciary duty: failing to act in the incapacitated person's best interests.

Cases that cite breach of fiduciary duty circumstances are numerous. Overall, misappropriation of an incapacitated person's money is the most common thread that weaves through each case where a Court has removed a guardian. Put simply, if a guardian uses money from an incapacitated person's estate to attempt to compensate himself or herself unfairly or for any self-dealing purposes, or if the guardian uses the estate's money for purposes that fail to fit within Article 81's purpose of achieving what is in the incapacitated person's best interests (or absent Court approval), then the guardian is very likely breaching his or her fiduciary duty.[14]

Moreover, failing to adhere to Court-ordered visitation schedules can provide grounds for a Court to remove a guardian. In *Matter of Cheryl H.*,[15] the mother of an autistic child petitioned the Supreme Court for guardianship of her son during a matrimonial action that involved a custody dispute. After refusing to provide the father with access to their son, refusing to provide the Court with reports concerning her son, and refusing to cooperate with a Court-appointed parent coordinator, the Court granted the father's petition to remove the mother as guardian and to be appointed successor guardian.[16]

Failing to act in the incapacitated person's best interests also arises in other contexts. In *Matter of Francis M.*,[17] two brothers served as co-guardians of an incapacitated third brother. Both brothers eventually moved to have the other removed. On appeal, the brother who had spent the most time attending to his brother's personal needs argued that the evidence establishing his history of demeaning and condescending behavior toward his incapacitated brother was insufficient to support removal.[18] The Appellate Division reiterated that, in Article 81 proceedings, the best interests of the incapacitated person are always the overarching concern. As a result, the trial Court decided to remove both co-guardians due to the considerable discretion Article 81 grants a Court.[19]

Similarly, in *Matter of Candace C.*,[20] the record demonstrated a long, chaotic relationship between a mother, serving as a co-guardian, and her incapacitated daughter. Notwithstanding evidence of the daughter having previously petitioned for and receiving an order of protection against her mother and the fact that the mother had been convicted of grand larceny, additional evidence of excessive alcohol consumption and drug use were sufficient causes for the Court to exercise its discretion in removing her as guardian.[21]

The Appellate Division addressed two more issues—the propriety of fees and the court's discretion when removing a guardian in *In re Estate of Gustafson*.[22] In *Gustafson*, the Appellate Court reversed an order from the lower Court that removed the incapacitated person's son as guardian "due to his failure to file promptly annual reports…and the failure to seek leave of court prior to disbursement of fees from [his father's] estate.…"[23] Because the guardian and his attorney failed to adhere to the strict statutory filing deadlines due to a lack of an available court examiner, and because the guardian explained to the Court the reason for the delay, the guardian's removal was unwarranted.[24] Moreover, an order to remove a guardian for disbursements without prior Court approval is also unwarranted when the fees were disbursed for services that benefit the incapacitated person and his or her estate.[25]

Two key points to highlight regarding evidence in Article 81 guardianship proceedings, specifically as it relates to removal. First, every determination of incapacity must be based on a clear and convincing standard.[26] Second, conclusory allegations are insufficient for a Court to remove a guardian under § 81.35.[27]

The Appellate Division addressed the evidentiary issue in *In re Lee "I."*[28] In *Lee "I.,"* two physicians and a

registered nurse testified that the alleged incapacitated person was unable to remember three words after two minutes time, refused to get out of bed to bathe when physically able to do so, and was unable to identify the current year when asked.[29] These factors, the Court held, established clear and convincing evidence of incapacity under §§ 81.12(a)[30] and 81.36(d)[31] which was sufficient to further expand the scope of the guardian's powers.

Procedurally, due to the fact that a guardian can be removed for any cause that appears just to the Court under § 81.35,[32] a guardian does not have a due process right to a full hearing before removal.[33] As long as the procedural requirements are met, i.e., the guardian is given notice of the motion pursuant to § 81.16,[34] and the record establishes "just cause" for a guardian's removal, the discretion granted a Court, as well as Article 81's primary concern of the incapacitated person's best interests, precludes a due process right to a full hearing prior to removal.[35]

A similar issue arose in *Mildred "O" v. Arnold "O"* (*In re Arnold "O"*),[36] where the petitioner guardian, after a dispute with the hospital in which his incapacitated brother was a patient, consented to the appointment of an attorney as replacement guardian. Despite the brother's consent, he continued to quarrel with the hospital, including a "constant barrage of threats, insults and complaints directed at the staff." When the brother refused to turn over property belonging to his incapacitated brother, the attorney guardian moved to compel the brother to relinquish the property. The brother cross-moved to remove the attorney as guardian. After the Court granted the attorney's motion and denied the brother's motion, the brother and his mother again petitioned for the guardian's removal. This second petition was denied, which prompted the appeal.[37]

In *Arnold "O,"* the Appellate Division held that orders executed in Article 81 proceedings circumvent the doctrine of res judicata and remain subject to ongoing judicial scrutiny because Article 81 and the circumstances that surround a guardianship mandate as much.[38] The express language in § 81.36 supports a Court's authority to modify a guardian's powers in the face of clear and convincing evidence that the incapacitated person's abilities have either improved[39] or deteriorated.[40]

Accordingly, the Court's denials of the petitioner's earlier motions to remove his brother's guardian were not "entitled to any preclusive effect."[41] A holding to the contrary would stand at odds with the primary purpose of § 81.35.

However, if a third party is involved in separate litigation with an incapacitated person, that third party, as an adversary, may not commence a proceeding to remove the guardian under § 81.35.[42] Moreover, if the outcome of the litigation may hold some future benefit for the guardian who initiated the litigation for the benefit of the incapacitated person, such outcome does not represent a conflict of interest and, accordingly, does not automatically warrant removal.[43]

Finally, § 81.35 does not require that a guardian receive notice when a Court signs an order to schedule a hearing regarding removal. In *In re Bomba*,[44] the Court Examiner submitted an application that questioned whether the guardian had properly reimbursed herself without Court approval.[45] When the guardian moved to vacate the order as violative of her due process rights, the Court denied the motion, holding that the statute does not require a guardian be given notice of an order resulting from an application submitted by a Court Examiner. Rather, the rule requires that a guardian be given notice *only if* a hearing is scheduled to determine the matters raised by the application (emphasis added).[46]

The following list offers an overview of removal under Article 81:

1. Under Article 81, the incapacitated person's best interests are always the Court's overarching concern.
2. Accordingly, a Court has broad discretion when adjudicating matters in the best interest of an incapacitated person.
    a. Guardians and their attorneys may be personally liable for fees associated with defending a motion to remove when the guardian is found guilty of misconduct.
    b. Failure to adhere to strict statutory compliance when filing annual reports does not always warrant a guardian's removal when Court resources make timely filing impossible, the reasons are explained, and the disbursements in issue enhanced the incapacitated person's estate.
    c. A guardian is not entitled to a full hearing in the face of a petition for removal when the record establishes "just cause" for removal.
    d. Due to the nature of incapacitation and the purpose Article 81 seeks to achieve, the doctrine of res judicata does not apply to guardianship proceedings.
    e. A guardian is entitled to notice under § 81.35 only if a hearing is scheduled to determine whether the guardian should be removed.

C. § 81.36 Discharge or Modification of Powers of Guardian

As it relates to the termination of a guardianship under Article 81, section 81.36 is the proverbial meat and potatoes. The statute is broken out into five subsections which, when translated, communicate the following:

1. The Court has the authority to either discharge a guardian or modify a guardian's powers when the Court is satisfied that:
   a. The incapacitated person's abilities have improved and a guardian is no longer needed, or the scope of services the guardian had been providing is no longer needed;
   b. The incapacitated person's abilities have deteriorated even further and the scope of services the guardian had been providing should be modified to meet the incapacitated person's needs;
   c. The "incapacitated person has died"; or
   d. For some other reason, the circumstances are such that the guardian should be discharged or his or her powers should be modified.
2. Any person who is entitled to commence a proceeding under Article 81[47] may apply to the Court for discharge or modification.
3. Once an application is filed, the Court will schedule a hearing and must provides notice to the relevant parties.[48] However, the Court can forgo a hearing if "an order of modification increasing the powers of the guardian [sets] forth the factual basis for dispensing with the hearing."
   a. Yet if the incapacitated person or his or her attorney "raises an issue of fact" regarding the IP's abilities and requests a jury trial, the Court shall accommodate the request.
4. Burden of proof
   a. If A applies to the Court to terminate a guardianship or reduce the guardian's authority and B disputes the application, the burden of proof falls on B.
   b. If A applies to the Court to request the guardian be granted increased powers to manage the incapacitated person's affairs, the burden of proof falls on A.
      i. The burden of proof requirements illustrate one of the underlying themes behind Article 81 guardianship law: the legislature, in enacting these provisions, has sought to fashion remedies that are the least restrictive to the incapacitated person.
5. If a guardian is discharged due to the fact that the incapacitated person no longer requires a guardian, the Court shall order the guardian to return all of the incapacitated person's property.
   a. In the unfortunate event that the incapacitated person dies, the guardian is responsible for providing a burial "or other disposition, the cost of which shall be borne by the estate of the incapacitated person."

Similar to §§ 81.35 and 81.37, the above statutory provisions mirror the legislative purpose behind Article 81: the incapacitated person's best interests are always a Court's primary concern and, accordingly, the obligations imposed upon a guardian may be modified according to the incapacitated person's needs so as to always represent the least restrictive form of intervention.

Despite Article 81's primary purpose, the statute does not expressly provide a right for an incapacitated person to review an initial finding of incapacity. However, this problem is overshadowed by the fact that § 81.36 permits any person, including the incapacitated person, to request a hearing on the "continued need" for a guardian.[49] Moreover, only the Court that appoints a guardian has the power to modify that guardian's powers.[50]

Under § 81.36(a)(4), a Court can discharge a guardian "for some other reason…based upon changes in the circumstances of the incapacitated person." Such a change arose in *In re N.Y. Found. for Senior Citizens*.[51] After the incapacitated person threatened to shoot the guardian's caseworkers, the Court granted the guardian's motion of resignation. Despite Mental Health Legal Service's argument that the Court lacked authority to restore powers to the incapacitated person absent a hearing, the Appellate Division affirmed the Supreme Court's order, holding that when the record adequately shows that the incapacitated person's "resistance to guardianship" makes providing services "impossible," then no hearing is necessary to modify a guardian's responsibilities.[52]

When an incapacitated person dies, § 81.36(a)(3) requires the Court to discharge the appointed guardian. However, requiring a Court to immediately discharge a guardian when the circumstances dictate that doing so would be misaligned with the best interests of the decedent's estate, discharge would stand in contrast to the purpose of the statute.

In 1995, an incapacitated person's violin with a $3,000,000 estimated value went missing immediately

after the Court appointed a guardian.[53] When the incapacitated person died, the criminal matter regarding the violin was still pending, so the court continued the guardian's powers.[54] In *Saphier*, in order to serve the best interests of decedent's estate, the Court looked to other Article 81 provisions such as § 81.36(e),[55] § 81.20(a)(6)(iii)[56] and 81.20(a)(6)(v),[57] all of which provide the Court enough flexibility to continue a guardianship after the death of the incapacitated person despite § 81.36(a)(3).

Several years later, the Appellate Division reinforced this rule in *In re Rose "BB,"*[58] when the Court held that the death of an IP does not require immediate discharge of the guardian "particularly where…there is a dispute regarding the preservation of the incapacitated person's property."[59]

Also upon the death of an incapacitated person, a guardian of the person's property loses the authority to enter into settlement agreements involving the decedent's estate.[60] Hence, if the guardian fails to petition the Court to continue the guardianship due to exceptional circumstances,[61] the guardian's authority is limited to the language set forth in § 81.36(e) which requires the guardian to oversee the decedent's burial "or other disposition."[62]

Finally, where § 81.36(e) expresses that a Court shall order a guardian to return an incapacitated person's property if the person becomes able to care for his or her own needs, the statute also applies when a Court appoints a guardian in error. In *In re Isadora R.*,[63] the Supreme Court appointed a guardian of an alleged incapacitated person's property despite evidence that the person had planned ahead by executing a power of attorney and health care proxy.[64] On appeal, the Appellate Division held that, absent any evidence of the agent appointed under the power of attorney engaging in misconduct, the Supreme Court erred in appointing a guardian and ordered that the guardian who had been appointed return all of the incapacitated person's property.

Under § 81.36(a)(1),[65] a Court has the authority to either discharge a guardian or modify the guardian's powers when the Court is satisfied that a change has occurred in the incapacitated person's circumstances so that he or she can now manage his or her own personal or property needs. It is not improper for Court to confirm an alleged change in circumstances by requiring the incapacitated person to appear for a psychological evaluation and a deposition before executing an order to discharge the guardian.[66] The statute, however, fails to *require* judicial reassessment of the incapacitated person's functional limitations at any point in the future, especially as it relates to medical treatments, specifically the administration of psychotropic drugs or electroconvulsive therapy.

In *Rhodanna C. B. v. Pamela B.*,[67] the Second Department addressed the statute's failure to obligate a Court which appoints a guardian to make future reassessments of the incapacitated person's limitations. In *Rhodanna*, two children filed a petition with the Supreme Court requesting to be appointed co-guardians of their middle-aged mother's personal needs because she had previously "undergone psychiatric hospitalization" and was living at home at the time of the petition.[68]

Because the powers which the Court granted the children lacked an expiration or set forth a specific time when the Court would again review their mother's incapacity, the Appellate Division ruled that the powers granted the children to consent to the administration of their mother's medication violated the due process requirements outlined in *Rivers v. Katz*.[69]

In *Rivers*, patients who had been involuntarily committed to psychiatric centers objected to the forced administration of antipsychotic medications on the basis that doing so violated their state constitutional rights.[70] The State argued that involuntary commitment raises a presumption that the patient is "incapable of making decisions regarding treatment and care."[71] The Court, however, disagreed, noting in its analysis that a patient's mental illness or involuntary commitment were circumstances insufficient to support a conclusion that the patient lacked the capacity to understand the consequences of refusing medication and the risks associated with such behavior.[72] The Court reached this conclusion by relying upon a "nearly unanimous modern trend" across the judiciary, in addition to medical psychiatric community authorities that identified a disconnect "between the need for commitment and the capacity to make treatment decisions."[73]

However, the Court recognized that a patient's right to refuse treatment is not absolute and that such right yields when the State's police power is implicated.[74] Applying this reasoning, when a patient represents a danger, either to himself or to others, or exhibits "potentially destructive conduct" in the hospital, a patient may be forcibly medicated despite his or her objections without implicating the patient's due process rights.[75]

A key part to the Court's analysis in *Rivers* was to identify who held the authority to make a determination regarding a patient's capacity to refuse treatment. Accordingly, the *Rivers* Court held that where the State's police power is not implicated, "there must be a judicial determination" to identify whether the patient has the capacity to appreciate the risks and consequences associated with refusing the proposed treatments.[76]

This decision is important because it has substantial impact on how a guardian's responsibilities may be

modified when obligated with an incapacitated person's personal needs. As such, when an incapacitated person objects to the administration of psychotropic medication, such objection serves as a constructive petition because, unless the court order that identifies the guardian's specific powers is clearly marked as having granted the "additional power to consent to the administration of psychotropic medication or electroconvulsive therapy over the objection of the Incapacitated Person,"[77] the objection triggers the need for a Court hearing in order for the guardian to have the power to consent to the treatment.

Conclusion

With Article 81, the New York legislature has fashioned a comprehensive solution that seeks to provide help to those persons with functional limitations while doing so in a manner that least restricts their rights and freedom. Tactically, the authority that Article 81 grants a guardian-appointing court is extremely broad, especially as it relates to either removing, discharging, or modifying a guardian's authority. Absent such discretion, part of the statute's legislative purpose would fail because incapacitated persons could find themselves bound to a guardian's powers unnecessarily and even unfairly when the circumstances are such that there is no longer a need for a guardian or the guardian has breached his or her fiduciary duties.

Endnotes

1. G. Alexander and T. Lewin, *The Aged and the Need for Surrogate Management*, Syracuse, New York: Syracuse University Press, 1972.
2. Because this article is focused primarily on guardianship removal and termination, a detailed review of the history and purpose of Article 81 is excluded.
3. N.Y. Mental Hyg. § 81.37(a).
4. *In re Turner*, 307 A.D.2d 828 (1st Dept. 2003).
5. *Id.* at 829.
6. *Id.* at 830.
7. *Id*.
8. N.Y. Mental Hyg. § 81.35.
9. *Id*.
10. The order of appointment shall identify all persons entitled to notice of all further proceedings.
11. 182 Misc. 2d 172 (1999).
12. *Id.* at 173.
13. *Id.* at 174.
14. *See Matter of Albert K. (D'Angelo)*, 96 A.D.3d 750 (2d Dept. 2012); *Matter of Carl R.*, 93 A.D.3d 728 (2d Dept. 2012); *Matter of Gilvary*, 93 A.D.3d 148 (2d Dept. 2012); *Matter of Jones (Josephine R.)*, 31 Misc. 3d 1239A (2011); *Matter of Jones (Lantigua)*, 31 Misc. 3d 1205A (2011); *Matter of Candace C.*, 27 Misc. 3d 1221A (2010); *Matter of Joshua H. (Anonymous)*, 80 A.D.3d 698 (2d Dept. 2011); *Matter of Joshua H.*, 62 A.D.3d 795 (2d Dept. 2009); *Matter of Joos*, 24 Misc.3d 980 (2009); *Matter of Lillian A. (Wells)*, 56 A.D.3d 767 (2d Dept. 2008); *Matter of Phillips*, 20 Misc. 3d 1111A (2008); *Matter of Charles Butin*, 301 A.D.2d 193 (2d Dept. 2002); *Matter of Luckert*, N.Y.L.J., 4/15/97, p. 25, col. 3 (Sup. Ct., Nassau Co.) (Rossetti, J.); *Matter of Wingate (Mascalone)*, 169 Misc.2d 874 (1996).
15. N.Y.L.J., Jul. 21, 2010 at 26, col. 3 (Sup Ct, Nassau Co. 2010, Diamond, J.).
16. *Id*.
17. 58 A.D.3d 937 (3d Dept. 2009).
18. *Id.* at 938-39.
19. *Id*. *See also Matter of Shari P.*, 24 Misc. 3d 1222(A) (2009) (holding that a court will not remove a guardian when the guardian has fulfilled his or her responsibility and the party seeking removal is primarily seeking to interrupt other litigation matters).
20. 27 Misc. 3d 1221(A) (2010).
21. *Id*.
22. 308 A.D.2d 305 (1st Dept. 2003).
23. *Id.* at 305.
24. *Id.* at 308.
25. *Id*.
26. N.Y. Mental Hyg. § 81.02(b) The determination of incapacity shall be based on clear and convincing evidence.
27. *See Matter of Mary Alice C.*, 56 A.D.3d 467 (2d Dept. 2008); *Matter of Beverly YY. (Patricia ZZ.)*, 79 A.D.3d 1442 (3d Dept. 2010).
28. 265 A.D.2d 750 (3d Dept. 1999).
29. *Id.* at 751.
30. N.Y. Mental Hyg. § 81.12(a). A determination that a person is incapacitated under the provisions of this article must be based on clear and convincing evidence. The burden of proof shall be on the petitioner.
31. N.Y. Mental Hyg. § 81.36(d) states, in part, "To the extent that relief sought under this section would further limit the powers of the incapacitated person, the burden shall be on the person seeking such relief."
32. N.Y. Mental Hyg. § 81.35.
33. *In re Conservatorship of Bauer*, 216 A.D.2d 25, 26 (1st Dept. 1995).
34. N.Y. Mental Hyg. § 81.16(c)(3). The order of appointment shall identify all persons entitled to notice of all further proceedings.
35. *Id*.
36. 226 A.D.2d 866 (3d Dept. 1996).
37. *Id.* at 867.
38. *Id.* at 868.
39. N.Y. Mental Hyg. § 81.36(a)(1). The incapacitated person has become able to exercise some or all of the powers necessary to provide for personal needs or property management which the guardian is authorized to exercise.
40. N.Y. Mental Hyg. § 81.36(a)(2). The incapacitated person has become unable to exercise powers necessary to provide for personal needs or property management which the guardian is not authorized to exercise.
41. *Mildred "O" v. Arnold "O"* at 867.
42. *Nostro v. Dafni Holdings, LLC*, 23 Misc. 3d 1128(A) (2009).
43. *Id*.
44. 180 Misc. 2d 977 (1999).
45. *Id.* at 978.
46. *Id*.
47. N.Y. Mental Hyg. § 81.06. Who may commence a proceeding.
48. N.Y. Mental Hyg. § 81.16(c)(3). The order of appointment shall identify all persons entitled to notice of all further proceedings.

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49. *In re Diurno*, 182 Misc. 2d 205 (1999).
50. *Matter of William J.J.*, 32 A.D.3d 517 (2d Dept. 2006).
51. 14 A.D.3d 317 (1st Dept. 2005).
52. *Id.* at 318.
53. *In re Saphier*, 167 Misc. 2d 130 at 131 (1995).
54. *Id.* at 133.
55. N.Y. Mental Hyg. § 81.36(e). If the incapacitated person dies, the guardian shall provide for such person's burial or other disposition the cost of which shall be borne by the estate of the incapacitated person.
56. N.Y. Mental Hyg. § 81.20(a)(6)(iii). A guardian who is given authority with respect to property management for the incapacitated person shall determine whether the incapacitated person has executed a will, determine the location of any will, and the appropriate persons to be notified in the event of the death of the incapacitated person and, in the event of the death of the incapacitated person, notify those persons.
57. N.Y. Mental Hyg. § 81.20(a)(6)(v). A guardian who is given authority with respect to property management for the incapacitated person shall, at the termination of the appointment, deliver such property to the person legally entitled to it.
58. 262 A.D.2d 805 (3d Dept. 1999).
59. *Id.* at 808.
60. *In re Glener*, 202 A.D.2d 503 (1994).
61. *See In re Saphier*, *supra* note 53.
62. *Id*.
63. 5 A.D.3d 494 (2d Dept. 2004).
64. *Id*.
65. N.Y. Mental Hyg. § 81.36(a)(1). The court appointing the guardian shall discharge such guardian, or modify the powers of the guardian where appropriate, if it appears to the satisfaction of the court that the incapacitated person has become able to exercise some or all of the powers necessary to provide for personal needs or property management which the guardian is authorized to exercise.
66. *In re Donald F. L.*, 662 N.Y.S.2d 75 (1997).
67. 36 A.D.3d 106 (2d Dept. 2006).
68. *Id.* at 107.
69. 67 N.Y.2d 485 (1986).
70. *Id.* at 490-92.
71. *Id.* at 493.
72. *Id.* at 494.
73. *Id.* at 494-95.
74. *Id.* at 495.
75. *Id*.
76. *Id.* at 497-98.
77. The Brookdale Center for Healthy Aging & Longevity of Hunter College Sadin Institute on Law, Public Policy & Aging & The New York State Law Revision Commission, *Guide to Adult Guardianship* at 154 (2005).

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Recent New York Cases

By Judith B. Raskin

Medicaid Eligibility Appeal

The administrator of a decedent's estate appealed in this Article 78 proceeding a fair hearing decision which confirmed the Medicaid agency's determination of a seven-month penalty period for gifts made by decedent and the inclusion of his civil service pension in the net available monthly income (NAMI) calculation. The administrator argued that a $6,500 gift made one month prior to the decedent's death was for decedent's expenses but failed to provide proof evidencing that fact. The Administrator also claimed that other gifts that fell within the look-back period were consistent with an established pattern of gifting but did not offer any proof of the pattern. The civil service pension was payable to the decedent on a monthly basis during his lifetime but it had not been deposited in decedent's account since 2011. The administrator could not explain the reason for the termination of the pension deposits or how the funds were expended.

As expected, given the wholesale lack of proof offered by the Administrator to back up his contentions, the court upheld the fair hearing decision.

Donvito v. Shah, et al., 2013 N.Y. App. Div. LEXIS 5345; 2013 NY Slip Op. 5393 (App. Div., 4th Dept., July 19, 2013).

Acceptance of Power of Attorney

Petitioner agent brought a special proceeding to require Merrill Lynch to accept his authority under his principal's power of attorney. The principal signed the document on December 18, 2010 and then entered a nursing home approximately one month later, on January 19, 2011. Upon entry to the facility, a doctor wrote: "Ms. R. suffers from moderate to severe dementia. At this time she is unable to care for herself or make sound legal decisions."

The court directed Merrill Lynch to accept the power of attorney. There was no evidence as to capacity on the date of signing and the diagnosis did not necessarily preclude capacity at the time. The court opined that the diagnosis "does not in and of itself create an issue of fact as to her mental capacity."

Matter of Imre B.R., 2013 N.Y. Misc. LEXIS 3912; 2013 NY Slip Op. 51466(U) (Sup.Ct., Dutchess County, September 5, 2013).

Article 81/Matrimonial Matter

In the process of a divorce proceeding, defendant wife did not appear able to participate in her own interest. The presiding judge suggested commencing an Article 81 proceeding and the case was transferred to the Model Integrated Guardianship Part with the same judge. At the hearing, the defendant wife agreed to the appointment of a guardian. Her brother was appointed her guardian with the authority to participate in the matrimonial matter including the ability to negotiate a settlement or go to trial.

Christopher C. v. Bonnie C., 2013 N.Y. Misc. LEXIS 2636; 2013 NY Slip Op. 23210 (Sup. Ct., Suffolk County, June 26, 2013).

Asset Transfers in Article 81

Maya V. had been appointed personal needs guardian for her mother pursuant to Article 81 of the Mental Hygiene Law. She petitioned the court to direct her mother's property management guardian to transfer her mother's assets to herself in an effort to facilitate Medicaid eligibility. The petition was denied.

On appeal, the court upheld the denial. No evidence was submitted to the court by any party, including the guardian of the property, to support the transfer. The court held that in order to grant substituted judgment, it must find that a person situated in the position of the ward would have been likely to make this transfer.

Matter of Modesta V., 2013 N.Y. App. Div. LEXIS 4734; 2013 NY Slip Op. 4818 (App. Div., 2d Dept., June 26, 2013).

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Advance Directive News: Hard Choices

By Ellen G. Makofsky

Thoughts regarding appropriate medical directives change over time as individuals deal with new realities. Adapting to changed circumstances is difficult for both the patient and the health care agent.

We first met when our children were toddlers. L was the husband of my new friend with a daughter the same age as my own. The girls liked one another and our friendship evolved. Play groups became dinner parties and joint vacations filled with fun. In our circle, L was the analytic one, the person who examined all the four corners of each matter at hand. He was the family decision maker and his wife enjoyed relying on his judgment and directions.

"Adapting to changed circumstances is difficult for both the patient and the health care agent."

Last year I received a call. L was having problems with his arm and then his gait. Test after test was performed with no resulting diagnosis. Then it happened, arterial lateral sclerosis ("ALS"), a progressively debilitating disease where the muscles of the body waste away but the mind remains intact. Eventually the muscles controlling the lungs are unable to do their job and the patient is unable to breathe unassisted. Accepting or refusing a ventilator is a choice that will have to be made somewhere along the way. Not surprisingly, both L and his wife are terrified about his future.

I have spent much time discussing advance directives with L and his wife. L executed a health care proxy naming his wife as his agent. I have asked them to consult their physicians and have instructed L that he must have a full discussion with his wife about what his wishes are. I explained what a MOLST is and how it works and asked L to initiate a discussion with his physician about filling in the form.

Decisions about appropriate health care change as circumstances change. L can no longer ambulate and is confined to a motorized wheelchair. A feeding peg is on the horizon for when he can no longer swallow. L recently spent a day in consultation with computer experts who helped him synchronize his eye movements to a laptop so that when he can no longer speak or move, he will be able to spell out words on a computer which will synthesize the eye movements into the spoken word. This is an existence L never could have conceived of, and 30 years ago he would never have agreed to. Everyday life is so much more difficult. No adventure or visit to family or friends can be undertaken on the spur of the moment. There are no more exotic vacations or trips to the beach. That said, L still has many daily pleasures. Life, while not good, brings him joy. L is adjusting to different expectations as his body can do less and less.

Eventually, the muscles that control L's lungs will fail. A ventilator will be necessary. At that point, L's expectations of an acceptable life will have changed. His wishes regarding artificial respiration may be different from those he expressed this past year. There may still be joys in life to be derived while on a ventilator. L was always the analytical one. He will measure and examine. As he has always done, he will communicate with his wife as he slides down the slippery slope. Armed with the knowledge of what L wants, his wife will hopefully have the strength to follow L's last direction.

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Recent Tax Bits and Pieces

By David R. Okrent

Estate of James A. Elkins, Jr., et al. v. Commissioner, 140 T.C.—No. 5 (2013)

In this case, the United States Tax Court held that the discount in valuation for estate tax purposes of fractional interests in works of art the decedent owned with his children was ten (10%) percent. The evidence presented to the court that the children would pay a high price to prevent an outsider from acquiring their father's interests was used by the court to limit the discount. Had the facts been different, or perhaps presented in a different way, the discount might well have been greater. The question here is whether it was appropriate for the court to consider the children's discount under the valuation standard of "willing buyer/willing seller."

Estate of John F. Koons III et al. v. Commissioner, T.C. Memo. 2013-94, Nos. 19771-09, 19772-09—Estate Cannot Deduct Expenses on Loan to Revocable Trust

In *Estate of Koons*, the Tax Court concluded that an estate cannot deduct interest expenses incurred on a loan to a revocable trust. The Court also agreed with the IRS expert on the fair market value of the trust's interest in an LLC on the decedent's date of death. Of particular interest is the Court's discussion on the non-deductibility of the interest expense. In its opinion, the Court noted that "Section 2053(a) provides that for the purposes of the estate tax, the taxable estate is determined by deducting from the value of the gross estate various amounts, including administration expenses, as are allowable by the laws of the jurisdiction under which the estate is being administered." Administration expense deductions against the gross estate are limited by regulation to "such expenses as are actually and necessarily incurred in the administration of the decedent's estate; that is, in the collection of assets, payment of debts, and distribution of property to the persons entitled to it." 26 C.F.R. sec. 20.2053-3(a) (2009). The regulation further provides: "Expenditures not essential to the proper settlement of the estate, but incurred for the individual benefit of the heirs, legatees, or devisees, may not be taken as deductions." *Id.* Interest payments on loans can be deducted if the loan is necessary to raise money to pay the estate tax without liquidating the assets of the estate at forced-sale prices. *See Estate of Huntington v. Commissioner*, 36 B.T.A. 698, 726 (1937); *Estate of Gilman v. Commissioner,* T.C. Memo. 2004-286 (collecting cases). In that case the executors chose to borrow money from an LLC controlled by revocable trust(s) created by the decedent. The Court held that the LLC could have made a distribution to the estate to pay the tax instead of borrowing it from the LLC and therefore the interest on the loan was not necessary to the administration of the estate.

Schwab v. Comm'r, 2013 U.S. App. LEXIS 8309—Determining Fair Market Value of Life Insurance, Surrender Charges Could Be Considered

The taxpayers each purchased, inside a nonqualified deferred compensation plan, a variable universal life insurance policy that was subject to significant surrender charges. These surrender charges were fees that they would incur if the policies were terminated prior to a contractually specified date. The distribution of the taxpayers' policies to them was a taxable event, for which the IRS contended that the full stated policy values had to be treated as income, even though the net cash surrender values were negative due to the surrender charges. The 9th Circuit Appeals Court held that for section 402 of the Internal Revenue Code the "amount actually distributed" when the taxpayers received ownership of the life insurance policies was their fair market value, and that surrender charges associated with a variable universal life insurance policy could be considered as part of the general inquiry into a policy's fair market value, but that the cash value was not sole determinable value.

Lawrence F. Peek et ux. et al. v. Commissioner, 140 T.C. No. 12, Nos. 5951-11, 6481-11—Taxpayers Engaged in Prohibited Transactions with IRAs

In 2001 Ps established traditional IRAs. Ps formed FP Corp. and directed their new IRAs to use rolled-over cash to purchase 100% of FP Corp.'s newly issued stock. Ps used FP Corp. to acquire the assets of AFS Corp. Ps personally guaranteed loans of FP Corp. that arose out of the asset purchase. In 2003 and 2004 Ps undertook to roll over the FP Corp. stock from their traditional IRAs to Roth IRAs, including in Ps' income the value of the stock rolled over in those years. In 2006 after the FP Corp. stock had significantly appreciated in value, Ps directed their Roth IRAs to sell all of the FP stock. Ps' personal guaranties on the loans of FP Corp. persisted up to the stock sale in 2006. R contends that

Ps' personal guaranties of the FP Corp. loan were prohibited transactions, and, as a result, the gains realized in 2006 and 2007 from the 2006 sales of FP stock should be included in Ps' income. The Court held that each of Ps' personal guaranties of the FP Corp. loan was an indirect extension of credit to the IRAs, which is a prohibited transaction; the Court further held that under I.R.C. sec. 408(e), the accounts that held the FP Corp. stock ceased to be IRAs. The gains realized on the sale of the FP Corp. stock are included in Ps' income and Ps were liable for the accuracy-related penalty under I.R.C. sec. 6662.

ILM 201208026; *Rachal v. Reitz*, 347 S.W.3d 305 (Tex. Ct. App. 2011), *rev'd*, 2013 WL 1859249 (Tex.)—IRS Position That Arbitration Clause and No Contest Clause Defeats *Crummey*—No Annual Exclusion

In ILM 201208026 the government articulated that both an anti-contest (in this case, a forfeiture style in terrorem clause) and a mandatory arbitration clause—both designed to either preclude litigation entirely, or to divert legal actions by beneficiaries into an alternative dispute resolution forum—defeated beneficiaries *Crummey* rights and created a taxable event. However, a majority of courts hold that binding arbitration provisions are not valid in wills and trusts, which will cause the government's ILM conclusion to be invalid. The problem this raises is that a taxpayer would need to argue against the very provision that the taxpayer included in the trust, and new authority in Texas, in *Rachal v. Reitz*, states that the government is correct to deny the annual exclusion for withdrawal rights in such trusts.

Rev. Proc. 2001-38; 2001-24 IRB 1335 IRS Addresses Q-TIP Plannng and How to Void a Prior QTIP Election

The Service has decided that a QTIP election is void in a situation where the election was not needed to reduce estate tax liability. It should be noted that the property for which the election was made (and is being disregarded by the Service) won't be included in the surviving spouse's estate, nor will the surviving spouse be subject to gift tax or GST if this property is transferred during her lifetime.

In re Huber, 201 B.R. 685, 701 B.R.—(Bankr. W.D.WA. May 17, 2013) Alaska Self-Settled Trust Held Subject to Claims of Creditors of Grantor-Beneficiary

In *Huber*, the Bankruptcy Court for the Western District of Washington concluded that an Alaska self-settled trust essentially was invalid with respect to claims of the grantor's creditors in bankruptcy. One consequence of the Court's broad reasoning on the validity of the Trust may well be that it may drive Americans who want to obtain asset protection by creating self-settled trust to create them outside of the United States over which no U.S. court will have jurisdiction.

PLR 201320021 (19 February 2013) IRS Rules on Validity of See-Through Trust

In Private Letter Ruling 201320021, the IRS concluded that Trust A, the named beneficiary of IRA X, is a "see-through trust" within the meaning of Section 1.401(a)(9)-4, Q&A-5, of the Regulations. Thus, the beneficiaries of Trust A are the designated beneficiaries of IRA X for purposes of Section 401(a)(9) of the Code.

Hillman v. Maretta, 133 S. Ct. 928: Life Insurance Paid to X-Spouse Under Federal Preemption

The Supreme Court's decision in *Hillman v. Maretta*, concluded that a federal statute trumps state law. The Federal Employees' Group Life Insurance Act ("FEGLIA") establishes a life insurance program whereby the insured employee designates a beneficiary to receive the proceeds of his or her Federal Employees' Group Life Insurance ("FEGLI") on death. This federal law conflicts with Virginia's conventional statute, which provides that a divorced spouse will be considered as removed as a designated beneficiary. Justice Sotomayor delivered the unanimous opinion of the Court, which affirmed the Virginia Supreme Court decision on this subject. Mr. Warren Hillman and respondent Ms. Judy Maretta were married and in 1996. Mr. Hillman named Ms. Maretta as the beneficiary of his FEGLI policy. They later divorced and Mr. Hillman married petitioner Ms. Jacqueline Hillman. Upon Mr. Hillman's sudden death in 2008 Ms. Maretta was still named as the beneficiary for his FEGLI policy, though the two were divorced and Mr. Hillman had already remarried. As such, Ms. Maretta received benefits from his FEGLI plan amounting to $124,558.03. Ms. Hillman brought an action to claim the benefits of the insurance plan under a Virginia statute, Va. Code Ann. § 20-111.1(A), which states that divorced spouses cease to be the designated beneficiaries of each other's life insurance policies. Instead, the statute appropriately directs that decedent's widow or widower at the time of death, or if none, descendants, become entitled to the benefits. Thus, this was a question of preemption between the state statute and the antiquated FEGLIA statute, which provides that the benefits follow in the order of precedence, with the designated beneficiary as the first person in line to receive the proceeds of the policy upon the employee's

death. The Supreme Court had no choice but to find that the Virginia state law statute was preempted by a federal statute providing for an order of precedence of beneficiaries under FEGLI policies. The ex-spouse therefore remained as the beneficiary of the decedent's life insurance policy, notwithstanding that they had divorced since she was named as the beneficiary of the policy, and that Virginia state law provided otherwise.

Estate of Virginia V. Kite et al. v. Commissioner, T.C. Memo. 2013-43, Nos. 6772-08, 6773-08—Effect of Early Termination of QTIP Trust Plus

The Tax Court concluded that the portion of an annuity's value that is attributable to qualified terminable interest property trusts' interest in a partnership, less the value of the beneficiary's qualifying income interests, was subject to gift taxes when the trusts were terminated and their assets were transferred to a revocable trust for the beneficiary.

Estate of Thelma G. Hurford v. Commissioner, T.C. Memo. 2008-278, Nos. 23954-04, 23964-04 Transferred Property to a FLIP Included in Estate Due to Attorney's Failures

The Tax Court concluded that property transferred by the decedent to an FLP prior to her death would be included in her estate because there was no bona fide sale and she retained control over the assets. Attorney implementing the estate plan was not careful, made mistakes with documents, had no support for his valuations and did not implement his estate plan timely.

Thomas Lane Keller et al. v. United States, No. 10-41311 Fifth Circuit Affirms $115 Million Estate Tax Refund

The Fifth Circuit Court of Appeals concluded that a decedent had successful transferred certain assets to a family limited partnership prior to her death and thus, the estate was entitled to a $115 million refund. Maude Williams passed away in May 2000, leaving behind both a substantial fortune and incomplete estate-planning documents. Originally believing this omission precluded transfer of the relevant estate property to a limited partnership, her estate paid over $147 million in federal taxes. The estate later discovered Texas state authorities supporting the notion that Williams sufficiently capitalized the limited partnership before her death, entitling the estate to a substantial refund. In this refund suit, the estate claimed a further substantial deduction for interest on the initial payment, which it retroactively characterized as a loan from the limited partnership to the estate for payment of estate taxes. The District Court upheld both of the estate's contentions and the Fifth Circuit Court of Appeals affirmed.

Estate of Lois L. Lockett et al. v. Commissioner, T.C. Memo. 2012-123, Nos. 8922-09, 8940-09 FLP Assets Included in Decedent's Estate

The Tax Court concluded that decedent's estate is also liable for a Federal estate tax deficiency for failing to include the fair market value of the family's limited liability corporation's assets on decedent's date of death in the value of her gross estate.

PLR 201325019 (27 March 2013) IRS Addresses Consequences of Early Termination of CRT

In Private Letter Ruling 201325019, the IRS concluded that the early termination of a charitable remainder trust will not constitute an act of self-dealing by the grantors (husband or wife) under §4941(d)(1) with respect to the trust.

Family Trust of Massachusetts Inc. v. United States, No. 12-5360 Special Needs Trust Doesn't Qualify as Tax-Exempt Entity

In *Family Trust of Massachusetts*, the District Court of D.C. concluded that the Family Trust of Massachusetts, a pooled-assest, special needs trust, is not operated exclusively for charitable purposes. Code IRC Sections 501, 501(c)(3), 7428. The Family Trust of Massachusetts, Inc. (FTM) manages a pooled trust established pursuant to 42 U.S.C. § 1396p(d) to provide supplemental services and benefits to disabled individuals receiving Medicaid, Supplemental Security Income (SSI) or other public benefits. FTM applied to the United States Internal Revenue Service (IRS) for a charitable tax exemption under I.R.C. § 501(a) and (c)(3) based on its trustee services. After the IRS preliminarily denied FTM's application, FTM filed this action seeking a declaration that it is a tax exempt charitable organization. The District Court granted summary judgment to the government, concluding that FTM failed to satisfy two of the statutory requirements to constitute a charitable organization: (1) that it be "operated exclusively for…charitable…purposes" and (2) that "no part of [its] net earnings…inure[ ] to the benefit of any private shareholder or individual." I.R.C. § 501(c)(3); *see Family Trust of Mass., Inc. v. United States*, 892 F. Supp. 2d 149 (D.D.C. 2012). We agree with the District Court that FTM is not operated exclusively for charitable purposes and, accordingly, affirm the grant of summary judgment on that ground.

PLR 201326011 (21 March 2013) Grantor Treated as Owner of Trust

In Private Letter Ruling 201326011, the IRS concluded that because the net income of a trust must be paid to the grantor at least annually, the grantor will be treated as the owner of the income of Trust during

the trust term under § 677(a). In addition, because the grantor has a testamentary power of appointment over the corpus of the trust (and any accumulated income allocable to corpus), grantor will be treated as the owner of the corpus of the trust during the trust term under § 674(a).

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

In Private Letter Ruling 201310002, the IRS concluded that a grantor's transfer of property to a trust will not be deemed a Grantor Trust or 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.

United States v. Hazel Ruth Anderson et al., No. 2:13-cv-00093 Government Can Sue Beneficiaries and Personal Representative for Unpaid Estate Taxes

In *U.S. v. Anderson*, the District Court refused to dismiss the government's suit against an estate's personal representatives and beneficiaries to collect the estate's unpaid federal tax liabilities. The Government sought to recover the estate assets from Defendants under two theories: (1) Count I—fiduciary liability under 31 U.S.C. § 3713(b) for the unpaid tax liabilities of the Estate; (2) Count II—transferee liability pursuant to the Uniform Fraudulent Transfer Act. Defendants argued that both counts are time barred by the ten-year statute of limitations found in 26 U.S.C. § 6502(a). The Government responded that the limitations period of 26 U.S.C. § 6502(a) was extended by the May 24, 2011 collection proceeding against the estate. The Government was correct.

Cozen O'Connor PC v. Jennifer J. Tobits et al., No. 2:11-cv-00045 Spousal Death Benefits Award to Same-Sex Spouse

In *Cozen O'Conner v. Tobits*, the U.S. District Court for Eastern District of PA concluded that the United States Supreme Court's decision in *United States v. Windsor*, declaring Section 3 of the Defense of Marriage Act unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment, requires recognition of a valid Canadian same-sex marriage for purposes of benefits distribution pursuant to ERISA, a federal statute.

ILM 201330033 (24 February 2012) Stock Transferred in Exchange for Self-Cancelling Notes Is Taxable Gift

In Legal Memorandum 201330033, the IRS concluded that: 1. If the fair market value of self-cancelling notes is less than the fair market value of the property transferred to the grantor trusts, the difference in value is a deemed gift; 2. The notes should be valued based on a method that takes into account the "willing buyer, willing seller" standard of § 25.2512-8, and should also account for the decedent's medical history on the date of the gift; and 3. There is no estate tax consequence associated with the cancellation of the notes with a self-cancelling feature upon the decedent's death.

Revenue Ruling 2013-17, 2013-38 IRB: FAQ on Same-Sex Couples Married Under State Law

The IRS has issued a series of questions and answers to provide information to individuals of the same sex who are lawfully married (same-sex spouses). These questions and answers reflect the holdings in Revenue Ruling 2013-17, 2013-38 IRB.

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Guardianship News: Investments

By Robert Kruger

I write here on a subject that I have not previously addressed in this column, and rarely in my practice—that of objections regarding investments in contested accounting proceedings. The objections typically concern investments which, obviously, were not doing well. In my experience, investment decisions are not high in the consciousness of guardianship attorneys.

I decided to address this issue, and the Prudent Investor Act (EPTL 11-2.3) because of a few recent anecdotes that have, so to speak, taken up residence in my brain. It seemed timely to consider the responsibility of attorney fiduciaries to properly invest guardianship funds.

My broker/advisor, at my request, forwarded an article first published in *U.S. Banker* in the January 1996 issue.[1] Seventeen years later, my broker considers the article the most thoughtful analysis of Prudent Investor Law. Therefore, before discussing the anecdotes, I use this Article for context. The title of this article is "Preparing for the Prudent Investor Rule." This article, all of three pages long, was co-authored by Bernard Karol and M. Antoinette Thomas, both of whom are partners in Carter, Ledyard & Milburn.

Investment rules deal with risk…what is acceptable risk and what is unacceptable risk. Under the predecessor of the Prudent Investor Law, the Prudent Man Rule, the investor risked surcharge for losses incurred by investing in common stocks (which were, prior to 1940, per se improper) as well as losses to portions of a portfolio which, as a whole, was doing well. Risk of surcharge encouraged "safe harbor" investing, where preservation of principal was the "Holy Grail"; investments from "legal lists"—a list of permissible fixed income investments—was encouraged. As recently as 1994, I recall a judge suggesting that I simply park a portfolio in U.S. Treasuries because the portfolio would not lose and I would not be exposed. This is "yesterday."

The Prudent Investor Act revolutionized investment theory by liberating trustees from the shackles of the Prudent Man Rule. The Prudent Investor Standard is set forth in EPTL 11-2.3(b)(1):

> The prudent investor rule requires a standard of conduct, not outcome or performance.

Judge Ellen Spodek, writing *In the Matter of the Annual Accountings of Ray Jones, Esq. as Guardian*,[2] stated:

> In determining overall investment strategy, EPTL 11-2.3(b)(3) requires that the fiduciary consider several factors when investing assets. Specifically, EPTL 11-2.3(b)(3)(B) requires a fiduciary to consider:
>
> the size of the portfolio
>
> the nature and estimated duration of the fiduciary relationship, the liquidity and distribution requirements of the governing instrument
>
> general economic conditions
>
> the possible effect of inflation or deflation
>
> the expected tax consequences of investment decisions or strategies and of distributions of income and principal
>
> the role that each investment or course of action plays within the overall portfolio
>
> the expected total return of the portfolio (including both income and appreciation of capital)
>
> and the needs of beneficiaries (to the extent reasonably known to the trustee) for present and future distributions authorized or required by the governing instrument.
>
> Pursuant to the Prudent Investor Act, the fiduciary is required to diversify assets unless the fiduciary reasonably determines that it is in the interest of the beneficiaries not to diversify. EPTL 11-2.3(b)(3)(C). Courts have considered the failure to diversify as a factor when determining whether assets were invested with prudence. See *Matter of Janes*, 223 A.D.2d 20, 643 N.Y.S.2d 972 [4th Dept. 1996]; *Matter of Saxton*, 274 A.D.2d 110, 712 N.Y.S. 2d 225 [3d Dept.

2000]; *Matter of Newhoff*, 107 AD2d 417 486 N.Y.S.2d 956 [2d Dept. 1985]. For example, a portfolio concentrating almost exclusively with high tech stocks demonstrated poor financial judgment and warranted removal of guardians. *In re: Huang*, 2003 N.Y. Misc. LEXIS 536, 2003 WL 21048965 (Sup. Ct. NY County 2003].

We can't control the market; all we can do is invest with care. If we do so, we will not be punished personally by a down market if, as the authors of the article state, the focus of modern portfolio theory is on the whole portfolio rather than on each individual asset in the portfolio. If we have unrealized or realized losses, perhaps we also have gains, and if we don't, perhaps the market, not the fiduciary, is the reason why.

We cannot gauge the prudence of an investment plan until we determine the needs of the ward/beneficiary. What are the mandatory expenses…the cost of care. If the elderly beneficiary has substantial income sufficient to cover the costs of care, we might, e.g., tilt the portfolio in the direction of equities…common stock mutual funds. If we are depleting principal, as often occurs in guardianships, we might readjust the portfolio toward fixed income.

One size does not fit all. The portfolio should flexibly address the varying needs of Beneficiaries, rather than being confined to Legal Lists.

This leads to a cardinal principal of the Prudent Investor Act…diversification. Today, five years after the collapse of Lehman Brothers, interest rates remain at historic lows. Banks are offering ¼ of 1% interest on many accounts. 30-year Treasury bills offer less than 4% interest. If interest rates rise, as they inevitably will, the value of that 30-year Treasury bill will decline. If a portfolio is exclusively in fixed income securities, the earnings will be modest, and years from now, when interest rates rise, the portfolio will suffer significant depreciation in value.

Conversely, today, the equity market is doing well. If one-third or so of your portfolio is in equities, you can grow your portfolio and reduce risk.

* * *

I will now turn to two fact patterns that have actually occurred. The first was the product of the recession associated with the failure of Lehman Brothers.

What interests me is the actions taken by the fiduciaries. After the Lehman debacle, certain guardians, I am told, liquidated their portfolios and held their accounts in cash….essentially uninvested, for over four years, earning ¼ of 1% or less in the money market account of the brokerage house. Unrealized losses were thus realized.

Losses that could have been avoided with greater steadiness of purpose were locked in. Yet, had there been a worldwide depression, these guys would have been the smart ones and your author would have been the fool. Of course, this is a laboratory scenario. One critical fact omitted, because I do not know it, is when did liquidation occur? Was the crisis past or were we in the midst of the panic, with the outcome unknown? I raise the issue from a fiduciary point of view, of the wisdom of the decision to liquidate, but I do not answer it.

I feel more secure opining about the failure to invest for over four years post-Lehman. The panic was over; we were not going to fall into a great depression. That was clear. Failure to invest may have been a classic Prudent Man response. After all, some continuing market decline, even in the Legal Lists, certainly occurred post-2008.

I represent an estate fiduciary…a hedge fund guy, who held cash for two years because he did not like the investment opportunities. He had a plan. The fiduciaries of whom I write almost certainly had no plan. They panicked, and remained locked in place long after fear was an appropriate or understandable response. For four-plus years, their portfolio lost value. They made no effort to have their accounts keep pace with inflation. Therefore, even if we discount the lost opportunity costs of not investing, they did a major disservice to their wards.

The second fact pattern that I address involves the unnecessary liquidation of appreciated securities. In this (real life) scenario, the IP had substantial pension and investment income, more than enough to cover his cost of care.

The guardian, I am informed, liquidated a portfolio of blue chip securities having a market value in the range of $500,000.00. The proceeds of sale slumbers on as cash in the investment account. The cost to the IP, besides lost income, and potential increase (or decrease) in market value, was close to $70,000.00 in capital gains taxes. There are no offsetting income tax deductions available to reduce the tax; also forfeit is the possibility that the IP might die, allowing a step-up in basis or sale, and a zero capital gain tax.

I confess that I am puzzled; why would a guardian do this? Short of a looming major depression, and we are years past that fear, how does precipitous sale benefit the IP? Cash flow is ample; there is no looming nursing home placement. Even if there were, why liquidate entirely and at once? Rather than speculate about motive, I am left with the question, why.

* * *

This article is not intended as a comprehensive analysis of prudent investing. It is anecdotal. The problems presented, however, seem to call for common sense, not highly sophisticated analysis. Therefore, I hope the reader finds this article useful.

I can be reached at rk@robertkrugerlaw.com or (212) 732-5556.

Endnotes

1. I also acknowledge the assistance of Michael Fenton, Esq. of Mait, Wang & Simmons, whose focus is representing sureties in surcharge proceedings.
2. 31 Misc. 3d 1239A, 930 N.Y.S. 2d 175 (2011).

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

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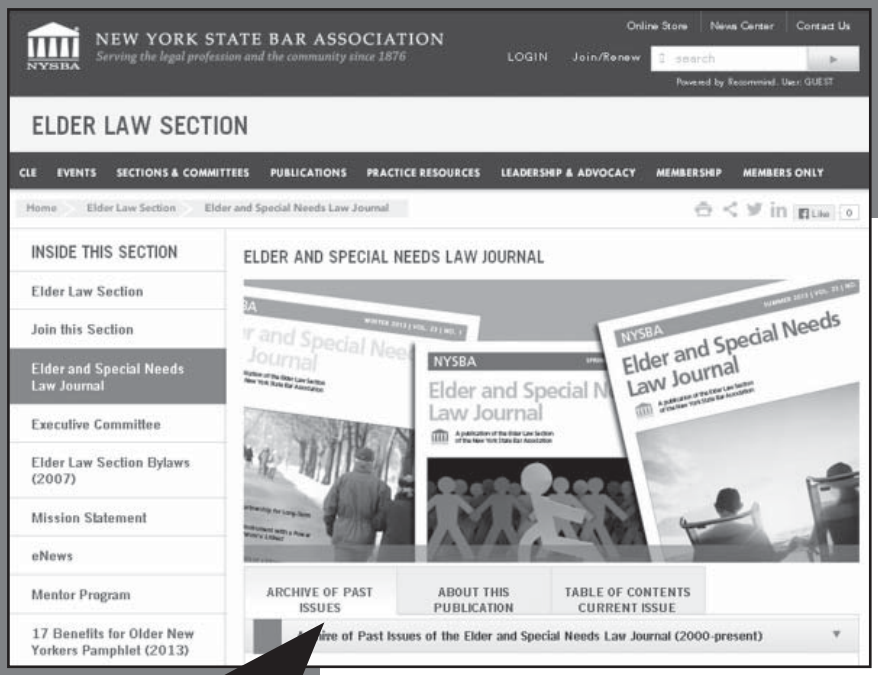

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Insider Experience Within the Health Care System: Prepare for the Unexpected!!

By Andrea F. Blau

Well, the last thing I thought I'd be doing is investigative journalism, but there you have it!

Like many of you, I am an attorney dedicated to advocating for people who face complex challenges that impact their ability to be independent.[1] Like a few of you, I am also a rehabilitation specialist with quite a bit of experience under my belt (forty years) customizing developmental, educational, and rehabilitation programs for children and adults with complex neurological needs.[2] And I sincerely hope that there may be less than a sprinkling of you that share my "insider" experience as an eldercare patient, mistreated within the New York State health care system. It's this latter "area of expertise" I wish to share with you now.

To show that I am not writing this article with malice, I will not identify the hospitals, physicians, nurses, attendants, therapists, et al. who were responsible for my care. What I will share, however, is a brief accounting of my experience during my initial hospitalization, the "parade of horribles" that accompanied my stay, its impact on my recovery, and what we, as eldercare attorneys, might learn from this experience.

On a cold winter morning, while walking at a nice clip down a hill in my neighborhood, I suddenly found myself airborne, having stepped with my right foot on a patch of "invisible" black ice. The landing was a hard one, impacting my entire right side. Try as I might, I was unable to use my right arm, hip, or bear any weight on my leg but, as I had my cell phone in my left jacket pocket, was able to call for help and within 15 minutes an ambulance arrived and I was driven to the "closest" hospital. As the hospital was a subsidiary of a well-known New York hospital, I felt secure that I would receive sound medical care. That was my first misconception, which I would soon learn to be only the first of many.

I spent the next thirteen hours in the emergency room, while the doctor on call and the orthopedic resident attempted to attend to my care. The ER, actually, was quite pleasant, especially as the physician on call, aware of my intensive level of pain, immediately suggested an injection and several IV pushes to follow of Dilaudid—an opiate-based drug that leaves most patients so high that they are too disconnected from their bodies to essentially care about the pain. And as I was not able to move, there was no risk of my wandering off! During the first part of those thirteen hours, my arm, pelvis and hip were x-rayed. The results indicated a fracture of my right olecranon (elbow), and the orthopedic resident consulted with the chief ortho surgeon (who was not at the hospital, given its "subsidiary" status), who advised surgery so that a pin and plate might be inserted. Without the surgery, they stated, the elbow would likely not heal properly and I would potentially have lifelong pain. Of course I agreed to the surgery and preparations were made to admit me to the orthopedic ward for surgery with the orthopedic surgeon during his "appearance" the next morning. I was still in intensive pain in my pelvis and hip areas, and could not move, but I was told that no additional fractures were revealed.

As I waited to be moved to the proper floor, the resident returned with casting material. She announced that the orthopedic surgeon (again, whom I never met) decided that due to my size (I am, and have always been, slim), he did not want to operate as the pin and plate would be too large and therefore I would be fitted in a long arm cast (a protocol rarely used these days). I balked, and suggested that we customize a plate or use a smaller one (after all children break their elbows), but the resident said she suggested that to the surgeon and he refused. I was to be casted and sent home.

So, I was casted, but was still in excruciating pain in my pelvis and hip areas. I was in a bit of a panic as I am in my 60s, live alone, and had no idea how I was going to manage, as I was still unable to move and had been lying on my back on a gurney since the ambulance lifted me from the ground. Finally, an attendant said to the doctor on call, "You can't send this poor woman home, she is in extreme pain!" Since ER protocol necessitated another x-ray of my casted arm, the physician decided to order a CAT scan of my pelvis and hip and agreed to keep me in the hospital overnight so that the physical therapists might advise me how to manage my transfer and transition home the next morning. I waited another three hours for the CAT scan to be done and the results read. The ER physician again said that there were no additional fractures and I was sent to the general ward. It was now 11:30 p.m., thirteen hours after my arrival.

That was February 10, 2013. I was then "stuck" on the general ward until my discharge (upon my insistence) on February 21st. In reality, which I found out by asking a physician who happened to be "on call" in the wee hours that evening, the CAT scan and x-rays actually revealed that I had not one but three fractures on my right side. In addition to my olecranon fracture, my right pubic bone (apparently one of the most painful bones to

fracture) in my pelvis and my right sacral bone (which is located near the juncture of the base of my spine and the hip/pelvis area) were also fractured. But even once that was revealed, despite my repeated requests, I was never transferred to the orthopedic ward, never seen by an experienced orthopedic surgeon or by a certified pain management specialist. Instead, I was assigned to a semi-private and later to a private room on the general ward, left in the "care" of hostile attendants, physician trainees with little to no experience with orthopedic fractures, and inexperienced albeit well-meaning social workers, all of whom were responsible for my daily care, therapy, and placement into an acute rehabilitation facility.

What was the result? For twelve days, I was not washed, left on a bedpan or in wet sheets for hours, and given inappropriate pain medication with resultant severe gastrointestinal distress and weakness. Therapists and attendants, who would not listen to my perspective and caused my body to break down in shock, exacerbated my injuries. I was forced to hire (and privately pay) my own 24-hour attendant care for my physical safety. "The piece de resistance" was the ultimate rejection by four acute care rehabilitation facilities because the social worker and "assigned" physicians were not able to accurately represent my needs or even send the correct files to the acute rehabilitation facilities. Add to that, the inexperienced physician whom I battled with daily over appropriate pain management was not able to put forward my case successfully during a peer review with my private insurance company, which rejected funding acute rehab due to age discriminatory practices (I was a spry 63, still not Medicare age), and/or their sheer ignorance in stating that given my age and the fact that I had three fractures, I could not adequately participate in my own acute rehab and should therefore be placed in a Skilled Nursing Facility for longer term care.

I'll spare you the long litany of ailments that resulted from the hospital stay (including pulmonary problems and esophageal reflux due to the forced feeding at all hours by the overzealous nutritionists, and complex skin allergies and chronic pain due to the long arm casting). But once I left the hospital (in a wheelchair as I was still unable to bear weight on my affected side), due to my decades of experience as a rehabilitation specialist, I was able to find a top-notch orthopedic surgeon and design my own therapeutic rehabilitation program and am now (six months later) a miracle of recovery.

The hospital charged over $85,000 for my "stay" and the current medical charges that have all been a direct result of my February accident are well over $100,000. Had I not had private medical insurance, or had I required "out of network" medical care, even with the "double standard" unofficially charged by some facilities and practitioners when billing private patients vs. insurance companies, you might imagine how much of my savings would have been consumed and my rehabilitation impacted.

Some final advice to my colleagues is now in order, to take or leave as you wish.

Let's prepare our clients (and ourselves) for the unexpected. All it takes is a "New York minute," and life as we know it may be altered forever.

We are accustomed to planning for our clients as they approach Medicare age. Perhaps a comprehensive emergency care plan needs to be put in place for our clients (and ourselves) when we reach 50, a good decade-and-a-half earlier.

And probably the most important lesson to be learned from my experience is this. In addition to the traditional health care proxies, long term health plans, power of attorney, Wills, Medicaid or revocable trusts, and other estate planning we do, make sure our clients (and ourselves) have selected advocates who actually have the competency as well as knowledge to challenge the physicians, social workers, nurses, and attendants in charge of our clients/our care. In my case, I am blessed with many people and family members who care about me, but not one with the actual skills to care for me or know specifically what to advocate for. I alone had those skills, both as a specialist in the field of rehab and also as a specialist in knowing my own body for six decades. Yet when you are the patient, in severe distress, and hospitalized, far too frequently neither the physicians nor your loved ones give enough actual credence to your perspective. Your loved ones or representatives may not have the time needed or resources available to advocate for your rehabilitation program adequately. Best to select your advocates wisely and perhaps set aside accessible emergency funds and written instructions to guide them.

Endnotes

1. Blau, A.F. Court Evaluator Creativity in the Distribution of Justice: Providing a Voice to the Voiceless, *NYSBA Elder and Special Needs Law Journal*, Vol. 22, No. 1 8-10, Winter 2012.
2. Blau, A.F. Advocating for "Appropriate" Special Education Services: Focusing on the IEP, *NYSBA Elder and Special Needs Law Journal*, Vol. 21, No. 3 20-24, Summer 2011.

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Elder Law Section Ethics Committee Poll #8 Results

By Judith B. Raskin, Chair, and Natalie J. Kaplan, Vice Chair

Poll #8 was emailed to the Elder Law Section membership on October 29, 2013. The Answer and Commentary followed on November 1, 2013.

Judith B. Raskin

250 Section members responded to the poll as follows:

Yes	63 (25.2%)
No	172 (68.8%)
I don't know	15 (6%)

Scenario

Elder Law attorney, Kattorney ("Katt") Oglethorp, referred Clem Clienti to Drattinger ("Dratt") Rattinger, a colleague in another firm.

Dratt told Katt he would share one-third of the fee with her if he won the case. Katt informed Mr. Clienti in writing of the fee sharing agreement and the share each attorney would receive. Mr. Clienti agreed in writing to the disclosed arrangement and retained Dratt who successfully settled the case. Katt performed no services.

Question

Under the Rules of Professional Conduct (RPC) may Katt receive one-third of Dratt's fee?

Yes

No

I don't know

Answer

No. Dratt and Katt failed to disclose to Mr. Clienti in writing that they would be assuming joint responsibility for the matter, as required by Rule 1.5(g).

Analysis

An attorney may refer a matter to a colleague and receive a share of the fee, without performing legal work, provided certain requirements are met. Rule 1.5(g) states:

Natalie J. Kaplan

> A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:
>
> (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;
>
> (2) the client agrees to the employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and
>
> (3) the total fee is not excessive.

Note the (somewhat jumbled) three-stage procedure for splitting a fee where the work is not divided, set forth in the Rule:

(1) The client must receive written notice that each lawyer is assuming joint responsibility.[1]

(2) Full disclosure must be made to the client of the division of fees, including the share to each attorney.[2]

(3) The client must accept, in writing, the fee agreement between the lawyers.[3]

Professor Simon frowns upon the use of a blanket consent to the use of outside counsel within a retainer agreement. He notes the rights of the client to know who will be working on the matter and to rely on the firm's reputation, pride, supervisory obligations and vicarious liability, to ensure quality service. He concludes that the client should have the opportunity to ask why another lawyer is needed and how the outside lawyer will be monitored.

Simon's Rules provide several rationales underlying this Rule:

(1) Attorneys are less likely to handle a matter for which they are unprepared when a referral fee to another attorney will generate a fee.

(2) Attorneys are more likely to refer to an experienced, competent attorney in the relevant area of the law and to check as to the status from time to time.

(3) Attorneys in small and solo firms should have the same opportunity for referrals as attorneys in large firms who commonly refer within the firm.

(4) A previous rule against all referrals was impossible to enforce.

The scope of responsibility that is jointly assumed by the referring attorney is not uniformly interpreted. Some ethics sources include exposure for ethical breaches and other improprieties in addition to financial liability. There have been some opinions limiting exposure to financial liability.

Comment [7] to RPC 1.5 states: "Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership." The ABA, too, requires the assumption of responsibility as if they were partners.[4] The NYSBA Ethics Committee has stated that joint responsibility is "more than financial accountability and malpractice liability" while not fully defining the term (Op #745, 2001). Simon refers to a contrary position of the New York County Lawyers Association (Op #715, 1996), however, which found that joint responsibility includes only financial responsibility. The Bronx County Supreme Court in 2002 agreed with the narrower view of the NYCLA.[5]

*Simon's Rule*s support the broader scope expressed by Comment [7] and Rule 5.1, concerning responsibilities of partners, *inter alia,* which would place a supervisory burden on the referring attorney under some circumstances.

Referrals to "of counsel" attorneys are not specifically addressed in the Rule. Simon points out, however, that since the Rule allows for unrestricted fee sharing among attorneys "associated in the same firm" the client should have notice of the firm relationship when "of counsel" appears on the letterhead or in some other way the referred lawyer is identified with the original firm. (Simon's Rules at 146.)

In sum: Rule 1.5(g), in general, requires two statements by the attorneys and a statement from the client.

- Written notice from the attorneys that both attorneys have assumed joint responsibility,
- Disclosure by the attorneys of the division of fees including the share to each attorney, and
- The client's written acceptance of the referred attorney under the agreed fee arrangement.

Endnotes

1. In Simon's New York Rules of Professional Conduct Annotated, 2012 edition ("*Simon's Rules*") Simon opines that the writing need be given "only by the lawyer who is receiving fees out of proportion to his work because the lawyer who is doing the work is liable by operation of law."
2. Apparently oral disclosure is sufficient.
3. "Confirmed in writing" is defined in Rule 1.0(e) to mean:

   (i) a writing from client to attorney confirming consent;

   (ii) a writing promptly transmitted from lawyer to client confirming the client's oral consent; or

   (iii) a statement of the client on the record of any proceeding before a tribunal.
4. Comment 4 to ABA Model Rule 1.5.
5. *Accord: Aiello v. Adar,* 750 N.Y.S.2d 457 (S. Ct., Bx. Co. 2002).

Judith B. Raskin is a partner in the firm of Raskin & Makofsky located in Garden City and practices in the areas of elder law and trusts and estates. She is a Certified Elder Law Attorney (CELA) by the National Elder Law Foundation. She maintains membership in the National Academy of Elder Law Attorneys, Inc., the Estate Planning Council of Nassau County, Inc., and the New York State and Nassau County Bar Associations. Judy is a past Chair and current member of the Alzheimer's Association, Long Island Chapter Legal Committee. Judy has been writing the Recent New York Cases column since 1995.

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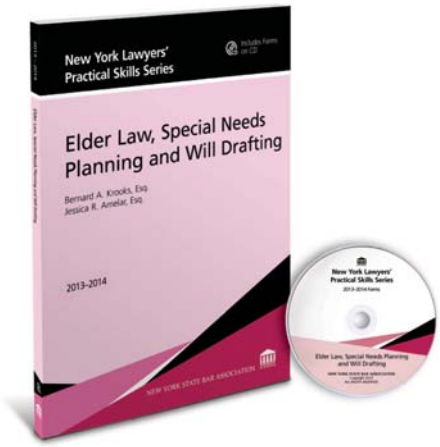

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Elder law is one of the most challenging and rewarding practice areas. With the aging of the baby boomers, and the rapid growth of the number of senior citizens, elder law practitioners have stepped in to fill the gaps in the more traditional practice areas. This text provides an introduction to the scope and practice of elder law in New York State. It covers areas such as Medicaid, long-term care insurance, powers of attorney and health care proxies, and provides an estate and gift tax overview.

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