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Elder and Special Needs Law Journal

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

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Message from the Chair

Where does the time go? It is hard to believe that I am writing my final message as Chair of the Section. A lot has happened to me professionally and personally over the last twelve months. Although the road has occasionally been bumpy, I have truly enjoyed the ride.

I am so pleased to report that the name of our Section has been changed to the Elder Law and Special Needs Section of the New York State Bar Association. The name change was approved in principle by our Executive Committee at our Fall Meeting. Our Executive Committee adopted a formal change to the Section bylaws at the Annual Meeting in January and the bylaws amendment was unanimously ratified by the membership at the Annual Meeting. I would like to thank all of you for responding so favorably to this initiative which will enable us to market our practices more effectively to individuals with disabilities and their families. Our next step on this journey will be to update the Section's Mission Statement to reflect our change in name and the expanded breadth of our practice areas.

Our Annual Meeting, ably chaired by **JulieAnn Calareso** and **Matt Nolfo,** was a resounding success. The program included a comprehensive Elder Law Update by our former Chair and current NAELA President, Howard Krooks. In addition to the usual update regarding recent statutory and regulatory changes and a review of recent significant case law, Howard reported on pending federal legislation. Most significantly, Howard reported that NAELA has introduced its first affirmative legislative proposal, **The Special Needs Trust Fairness Act** (S.1672 / H.R. 2123), which will permit individuals with disabilities to create their own supplemental needs trust. The bill was proposed by our former Chair, **Mike Amoruso**, and has now been introduced in both the House of Representatives and the Senate. As of this writing, the bill has eighteen sponsors in the House and three in the Senate. I urge you to take a few minutes to write a letter of support for the legislation to your representatives. In order for this bill to make it out of committee, it will need a groundswell of support from the disability community. A sample template and additional information regarding the legislation can be found on the NAELA website under the Advocacy portal.

In addition to the Elder Law Update by incoming Chair **Richard Weinblatt**, the Annual Meeting contained presentations by **Valerie Bogart**, on the latest developments in managed long term care; **Joy Solomon**, who moderated a panel on identifying and responding to elder abuse; **Anthony Enea**, who led a panel on issues affecting the nursing home industry, and **Matt Nolfo** and **Bruce Steiner,** who discussed issues relating to the naming of beneficiaries on retirement accounts.

The UnProgram returned this year and was offered on March 20th and 21st. Chairs **Shari Hubner** and **Judith Nolfo McKenna** worked diligently to organize this program, which enabled participants to share materials, questions and expertise on a wide variety of topics self-selected by the participants. This year, we used the new NYSBA Communities to enable the program participants to download forms and documents that they wished to share with the other participants. The UnProgram Community is available exclusively to UnProgram participants and will remain active until the end of the year.

Our Legislation Committee, chaired by **Amy O'Connor** and **Ira Salzman**, has remained diligent throughout the year, but has been particularly active since the announcement of the Governor's proposed budget bill in February. (S.6358 / A. 8558). As many of you are aware, the Governor's office has introduced bills which would eliminate the option of spousal refusal for community Medicaid services for the past twenty-six years. This year, once again, the Governor's budget bill contained a provision which eliminated the option of spousal refusal for individuals who live together in the community. However, in an unusual twist, spousal refusal would continue to be permitted where the spouse is a "community spouse," a term used to define who may benefit from "spousal impoverishment" protections. Last year, the legislature expanded the definition of "community spouse" in Social Services Law §366-c to include the spouse of someone receiving community-based long-term care from a managed long-term care (MLTC) program. Because mandatory enrollment in MLTC is now being extended statewide, this would provide the protection of both spousal impoverishment budgeting rules or the recourse of spousal refusal to persons living in the community throughout the state. Thus, the Governor's proposal to eliminate spousal refusal in the community would not affect the vast majority of married Medicaid recipients of community home care services once MLTC is enacted throughout the state. The Governor's proposal would, however, enact substantial hardship on other individuals who have exercised the right of refusal, including people who use it to access benefits under the Medicare Savings Program or who have substantial surplus income and utilize the "spend down" provi-

sions of the Medicaid program to pay for expensive medical treatment and prescription drugs. Additionally, the proposed bill would eliminate the option of parental refusal for parents of critically ill children who do not receive care through a Medicaid waiver program. I would like to thank **Ira Salzman, David Goldfarb, Richard Weinblatt, Valerie Bogart, Matt Nolfo** and **Judith Grimaldi,** who joined me in Albany to lobby the legislature and the Governor's office to advocate that the proposed legislation be defeated, unless amended to include the vulnerable populations who have been omitted from the legislation. We have advocated for a delay in the implementation of the legislation until MLTC is implemented throughout New York State. I am happy to report that our efforts were successful and that the final budget bill removed the elimination of spousal refusal for community medicaid recipients in its entirety.

There are so many people to thank as I look back upon the last year. I don't have room to name every committee chair and vice-chair by name, or to single out each district delegate who has hosted a pro-bono presentation throughout the state. However, I would like to single out **David Kronenberg** and **Adrienne Arkontaky** for the fabulous job that they do putting out a high quality *Journal* four times a year.

I will be turning over the stewardship of the Elder Law and Special Needs Section to **Richard Weinblatt** on June 1st. It will be easy to turn over the leadership of the Section to Richard, as I know that he will work diligently to protect and advocate for the interests of our members. I am confident that he will have a successful year as Chair. I will step down with a mixture of relief and sadness, coupled with tremendous pride in the accomplishments of our members. It has been an honor to serve as the Chair of this Section for the past year. I know that Richard and his fellow officers, **JulieAnn Calareso**, as Chair-Elect, **David Goldfarb**, as Vice-Chair, **Martin Hersh**, as Secretary, and **Judith Grimaldi**, as Treasurer, will do a fantastic job steering the Section through whatever challenges lie ahead. As for me, I know that I will continue to be involved in the work of the Section in the years ahead. However, you can expect to find me lying on a beach on a Greek Island mid-June taking a well-deserved rest.

Frances M. Pantaleo

Message from the Co-Editors in Chief

Finally, there is hope that winter is really behind us and temperatures will rise above freezing for more than one day. As we write this message, it is still daylight at 7:44 in the evening. Spring is upon us!

The last few months have been exciting ones. First, our Section has a new identity. The "Elder Law and Special Needs Section" of the New York State Bar Association is now officially our new name. This change has been coming for a long time and we believe everyone is excited about this development. We also believe the new name will better encompass the nature of the work we do and draw new members to our already robust community. We thank Fran Pantaleo for her support of the change. We also would like to thank Fran for her incredible leadership and dedication to our Section. During Fran's tenure, she introduced many great initiatives for the Section, including the "Friends of Bill" meetings at our quarterly meetings; she also supported the development of a special education committee, increased membership and increased diversity. Fran's legacy is one of determination, compassion, resolve and hard work. We are truly better and stronger as a Section because she was our leader. Thank you, Fran!

We have great articles for the Spring *Journal* that address many issues that are of great concern to our clients and to practitioners. Housing for seniors and individuals with disabilities has become extremely challenging and the lack of appropriate options has hit crisis levels. Jota Borgmann, Senior Staff Attorney, MFY Legal Services, Inc., provides an overview of the landmark settlement between adult home residents in New York City and New York State in her article, *After a Decade of Litigation, Relief for New York City Adult Home Residents.* Neil Rimsky also provides us with innovative ideas for housing initiatives in *Developments for Aging in Place.*

As we recognize the importance of appropriately educating students with disabilities, special needs planners strive to understand the special education laws. In *Least Restrictive Environment: The Integration Presumption 35 Years Later,* Lenore Davis provides very interesting commentary on a longstanding doctrine intended to assimilate students with disabilities into mainstream education.

Many practitioners are seeing an influx of contested 17-A guardianships. Stress on families caring for loved ones with disabilities may cause an inability to work together and ultimately complicate the 17-A guardianship process. Naomi Levin offers very sound advice on how to deal with these types of cases in *The Contested 17-A Guardianship: An Overview.*

William Doherty takes a very sobering look at elder abuse and the abuse of those with disabilities in *Protecting the Most Vulnerable of Our Communities.* This article discusses the problems and criminal statutes designed to protect the most vulnerable in our society. While we look at this very disturbing issue, Toby Edelman of the Center for Medicare Advocacy examines the issue of antipsychotic drugs and nursing homes in *Misuse of Antipsychotic Drugs in Nursing Homes.* Although these are very serious issues, our hope is that we may find better solutions by fully understanding the problems.

In addition to these articles, our regular columnists, Judith Raskin, David Okrent, Robert Mascali, Ellen Makofsky and Robert Kruger, provide us with updates in Recent New York Cases and the areas of Tax, Special Needs Planning, Advanced Directives, and Guardianship. We thank each of the columnists for taking time out of their busy schedules to write. Typically authors write once or twice a year; these folks write for every issue. We are very grateful for their efforts.

We also would like to remind everyone that, once again, we are hosting a writing competition for law students. If you know of a law student interested in elder law or special needs planning who would like to submit an article, please have him or her contact us before the deadline of June 1, 2014.

In conclusion, as we welcome the renewal of spring, we welcome our new chair of the Section, Richard Weinblatt. We are so fortunate to have such incredible leadership. So now, sit back, enjoy the sunshine and happy reading (and writing…).

David and Adrienne

After a Decade of Litigation, Relief for New York City Adult Home Residents

By Jota Borgmann

Introduction

On July 23, 2013, adult home residents in New York City reached a landmark settlement with New York State. The settlement ensures that thousands of residents of 23 large adult homes will have the opportunity to live in their own homes with the services they need to succeed and be part of their communities.

The settlement follows nearly a decade of litigation in a related case, *Disability Advocates, Inc. v. Paterson* ("the DAI case"). A new class action, *O'Toole v. Cuomo*, was brought by residents of three adult homes on behalf of approximately 4,000 residents citywide. The plaintiffs alleged that New York State unnecessarily segregates people with mental illness in adult homes in violation of the Americans with Disabilities Act ("ADA"). The United States Department of Justice filed a related case and joined in the settlement.

This article provides a brief history of adult homes in New York State and the work of the Adult Home Advocacy Project at MFY Legal Services, Inc. ("MFY"). It then describes the litigation history of the DAI case and background on the *O'Toole* settlement. Finally, it describes the *O'Toole* settlement's provisions in detail and its current procedural status.

The History of Adult Homes

Adult homes are intended to house individuals who "are by reason of physical or other limitations associated with age, physical or mental disabilities or other factors, unable or substantially unable to live independently." New York Social Services Law § 2(21). Adult homes were originally envisioned as housing for seniors who needed assistance with activities of daily living, but not skilled nursing care. With the advent of the deinstitutionalization movement—the movement of people with mental illness out of state hospitals—adult homes became the default alternate housing. This effectively resulted in "transinstitutionalization"[1] of people with mental illness because adult homes share many of the characteristics of psychiatric wards.

Adult homes are typically large, segregated, isolated places with regimented schedules, lines for receiving medication and allowances, and little autonomy or privacy.[2] Their institutional conditions and inadequate services were described in reports beginning in the 1970s.[3] A decade later, the New York Commission on Quality of Care and Advocacy for Persons with Disabilities (the "CQC")[4] reported that the conditions in adult homes jeopardized residents' safety and health.[5]

In 1992, MFY founded its Adult Home Advocacy Project, which provides free legal services to adult home residents throughout New York City. Using a lawyer-organizer model, MFY began working collaboratively with Coalition of Institutionalized Aged & Disabled ("CIAD") to reach out to adult home residents. Through outreach and know-your-rights trainings, MFY and CIAD were able to identify systemic problems that could be addressed through organizing or legal advocacy. MFY began representing residents in cases addressing poor conditions, financial abuses, and other civil rights violations. The most egregious violations are exemplified by the Leben Home case, which MFY litigated on behalf of 17 residents who were subjected to unnecessary prostate surgery as a result of a fraudulent Medicaid-billing scheme.[6]

In 2002, the *New York Times* published a Pulitzer Prize-winning series of articles about the squalid conditions and rampant exploitation occurring in New York City adult homes.[7] In response to the series, Governor George Pataki convened an "Adult Care Facilities Workgroup" consisting of mental health advocates and professionals, adult home operators, and state officials. The Workgroup found that many residents could live in more integrated housing settings and recommended that the State create more community housing. Specifically, it found that 12,000 people with mental illness resided in adult homes in New York State and that at least 50% could reside in more integrated settings.[8] In response to the Workgroup recommendations, the State enacted a budget providing some funding for 100 to 900 community housing beds that required dollar-for-dollar local matching funds.[9]

Prior Litigation: *Disability Advocates, Inc. v. Pataki*

In 2003, Disability Advocates, Inc. ("DAI"),[10] a nonprofit protection and advocacy organization, sued the State on behalf of people with serious mental illness

residing in large, "impacted"[11] adult homes in New York City or at risk of placement into such homes.[12] It alleged that the State had discriminated against people with mental illness in violation of the ADA and Section 504 of the Rehabilitation Act by unnecessarily segregating them in large adult homes in New York City. DAI alleged violations of the "integration mandate" of the ADA and Rehabilitation Act. The integration mandate was articulated in the Supreme Court's decision in *Olmstead v. L.C.*[13] In *Olmstead*, the Supreme Court ruled that, under the ADA and Rehabilitation Act, states are required to provide services to people with disabilities in the most integrated setting appropriate to their needs.

The DAI case went to trial in 2008. Over 18 days, 52 witnesses testified and over 300 exhibits were admitted into evidence. The district court held that the defendants violated the ADA and the Rehabilitation Act.[14] The court found that virtually all adult home residents were qualified to receive services in supported housing, which it found to be a much more integrated setting. The Department of Justice intervened during the remedy phase of the case and the court ultimately ordered the State to transition every adult home resident with mental illness who qualified for and wanted supported housing over three years.

The State then appealed the case to the Second Circuit and arguments were heard in December 2010. In February 2011, the Second Circuit stayed the district court's remedial order. In April 2012, the Second Circuit ruled that DAI lacked standing, and that the intervention by the United States of America as a plaintiff after the liability phase of the action did not cure DAI's lack of standing. Nonetheless, the Second Circuit did not question the district court's findings.

Settlement of the New Class Action *O'Toole v. Cuomo*

After the Second Circuit issued its decision, negotiations began almost immediately between counsel for the adult home residents, the United States, and the State. Negotiations lasted until July 2013 when a settlement agreement was executed.[15] The named plaintiffs brought the action on behalf of a class of "all individuals with serious mental illness who currently, or who may in the future, reside in impacted adult homes in New York City with more than 120 beds." The class action complaint and settlement agreement were filed simultaneously, the case was deemed related to the DAI case, and the same district court judge, Judge Nicholas Garaufis, was assigned to the matter.

The State agreed to fund at least 2,000 units of supported housing for adult home residents, and more if needed. Every adult home resident who qualifies will have the choice to move to community housing within five years. Supported housing is an apartment in the community that comes with rent assistance and support services. Residents can live alone or with roommates if they choose. The support services may include visits from case managers or help with moving, health care, shopping, medication, or personal care.

In addition to community housing, the other major provisions of the settlement include: "in-reach" to adult home residents to ensure they are able to make an informed choice about their housing options; individual assessments of adult home residents that emphasize self-determination of the resident and community integration; continued access by adult home residents to community health services that ensure their success in transitioning to community living, including services covered by Medicaid; an independent reviewer, Clarence Sundram, to oversee the implementation of the settlement and regular reporting on its progress by the State; and court enforceability of all settlement terms.

In November 2013, the court granted preliminary approval of the settlement and scheduled a fairness hearing for January 9, 2014, in which class members were afforded the opportunity to tell the court their views of the settlement. Dozens of adult home residents from adult homes throughout New York City came and spoke at the fairness hearing and there were more than 200 written submissions from residents to the Court. The comments on the settlement were overwhelmingly supportive. Residents described the conditions in their adult homes as "infantilizing" or like a "psychiatric ward." They described the ill treatment they sometimes received from staff or how they felt like a "second-class citizen" or "domestic farm animal." And many spoke of their strong desire to live on their own, take care of themselves, and be in charge of their lives again.

Next Steps

On March 17, 2014, the district court approved the settlement. Supported housing providers have already begun in-reach in three adult homes in Coney Island under contracts awarded by the State to fund 1,050 units of supported housing.

Endnotes

1. Ira Burnim and Jennifer Mathis, *The Olmstead Decision at 10: Directions for Future Advocacy*, Clearinghouse Review Journal of Poverty Law and Policy, Vol. 43, Nos. 7-8, at 391 (November-December 2009).
2. *O'Toole v. Cuomo*, 13-CV-4166, Compl. ¶ 3.
3. *See, e.g.*, Charles J. Hynes, Deputy Attorney General, *Private Proprietary Homes for Adults*, 37-38 (March 31, 1979); New York City Council Subcommittee on Adult Homes, *The Adult Home Industry: A Preliminary Report, Summary of Preliminary Findings*, at 2 (1979).

4. The CQC "was dissolved on June 30, 2013 and its responsibilities, programs and functions were transferred to the New York State Justice Center for the Protection of People with Special Needs." *See* http://cqc.ny.gov; New York Executive Law § 551.

5. New York State CQC, *Adult Homes Serving Residents with Mental Illness: A Study of Conditions, Services and Regulation* 12-21, 30, 32-36 (Oct. 1990).

6. Sarah Kershaw and Clifford J. Levy, *Inquiry Finds Mentally Ill Patients Endured 'Assembly Line' Surgery*, N.Y. Times, March 18, 2001.

7. Clifford J. Levy, *For Mentally Ill, Death and Misery*, N.Y. Times, Apr. 28, 2002, § 1, at 1; Levy, *Here, Life Is Squalor and Chaos*, N. Y. Times, Apr. 29, 2002, at A1; Levy, *Voiceless, Defenseless and a Source of Cash*, N.Y. Times, Apr. 30, 2002, at A1.

8. *Disability Advocates, Inc. v. Pataki*, No. 03-Cv-3209, Compl. ¶ 113 ("DAI Compl.").

9. *Id.* at ¶ 114.

10. Disability Advocates, Inc. became Disability Rights New York in 2013.

11. "Impacted" adult homes were defined by the State as homes with 120 or more beds where at least 25% of residents were people with a serious mental illness. DAI Compl. ¶ 33.

12. DAI litigated the case along with co-counsel from MFY, the Bazelon Center for Mental Health Law, New York Lawyers for the Public Interest, Urban Justice Center and Paul, Weiss, Rifkind, Wharton & Garrison, LLP.

13. 527 U.S. 581 (1999).

14. *DAI*, 653 F. Supp. 2d at 314.

15. Before the settlement was reached, the New York State Office of Mental Health made a clinical determination that congregate settings such as the adult homes at issue in *O'Toole* are not conducive to the recovery or rehabilitation of the residents and issued a regulation that prohibits hospitals from discharging patients with serious mental illness to "transitional adult homes" as defined in 18 NYCRR § 487.13. *See* 35 N.Y. Reg. 6 (Jan. 16, 2013); 14 NYCRR § 582.6(c).

Jota Borgmann is a Senior Staff Attorney in the Disability and Aging Rights Project at MFY Legal Services, Inc. MFY represents the *O'Toole* class plaintiffs with co-counsel from New York Lawyers for the Public Interest, Disability Rights New York, the Bazelon Center for Mental Health Law, Urban Justice Center and Paul, Weiss, Rifkind, Wharton & Garrison, LLP. Adult home residents in New York City who have questions about the settlement may call MFY toll-free at (877) 417-2427.

NYC HRA Has Gotten It Wrong: Medicaid's Misapplication of the Spousal Impoverishment Rules in Spousal Refusal Cases

By Elizabeth Forspan and Sarah C. Moskowitz

I. Introduction

Elizabeth Forspan

As most elder law attorneys know, New York's application of Federal Medicaid rules provides for safeguards to protect an institutionalized Medicaid recipient's spouse and minor children. As we will describe in this article, some of those safeguards have recently come under attack by the New York City Human Resources Department's Nursing Home Eligibility Department ("HRA").

Under Federal Medicaid law, in order to qualify for Medicaid, an applicant is required to meet resource and income standards. The resource threshold for individuals applying for nursing home or community Medicaid coverage in New York State for 2014 is $14,550 and $21,450 for a couple.[1] Certain assets, such as a home, are exempt assets, provided that either the Medicaid applicant or his / her spouse occupies the premises as their primary residence.[2] The monthly income eligibility threshold for community Medicaid is $809 for an individual and $1,192 for a couple.[3] The income rules, as we describe in greater detail below, are significantly different with an institutional Medicaid recipient. The institutionalized spouse may keep only $50.00 per month.[4] As we describe in further detail below, New York permits the "healthy spouse," also known as the community spouse, to execute a spousal refusal, which allows the healthy spouse to refuse to contribute to the cost of the unhealthy spouse's care. These spousal refusal rights apply in both nursing home and community Medicaid scenarios. This article will focus on institutional, or nursing home, Medicaid cases.

Besides its spousal refusal rules, New York also provides certain spousal impoverishment rules, which permit the community spouse to retain a portion of the institutionalized spouse's monthly income. This impoverishment provision applies to the extent the community spouse is below a certain income threshold. As described herein, HRA has been instructing nursing homes to disallow any spousal impoverishment claims by community spouses who have executed a spousal refusal. According to many practitioners that the authors have spoken to and based on the authors' personal client experiences, the nursing homes are insisting Medicaid is requiring them to budget the institutionalized spouse's monthly income in a way that is inconsistent with the current law. This is a misapplication of the law, which has been successfully challenged, and continues to be challenged by elder law attorneys. It is incumbent on all practitioners to know of improper application of the rules in order to protect our clients.

Sarah C. Moskowitz

II. NY's Spousal Refusal Law

Current Medicaid law permits a certain amount of income and assets to be exempt where a Medicaid applicant has a spouse. Under current New York State Medicaid rules, the community spouse is permitted to keep a certain amount of *combined* income each month, as well as an amount of the couple's assets or resources, the rationale being that Medicaid rules take into consideration the fact that the community spouse has the right to continue to live and maintain his or her independent lifestyle while the institutional spouse is receiving care.

The Community Spouse Monthly Income Allowance ("CSMIA") is an amount of income that the community spouse is guaranteed to keep while his or her spouse is institutionalized. The CSMIA allows the community spouse to retain monthly income from the institutionalized spouse if her income is not above the CSMIA. As of January 1, 2014, the CSMIA is $2,931. The only limitation on this is the $50 per month individual incidental allowance requirement for the institutionalized spouse.[5]

In 1989, Congress enacted the Community Spouse Resource Allowance ("CSRA") which provided that the community spouse would not be subject to a claim by Medicaid for a contribution of any excess resource unless the community spouse's resources exceeded the CSRA.[6] Where the community spouse has assets totaling less than the CSRA, he or she can keep those assets. Where the community spouse has resources over this amount, the community spouse would likely execute

a spousal refusal. The 2014 CSRA minimum is $74,820, and the maximum is $117,240.[7] All assets of the community spouse above the CSRA may be subject to a Medicaid claim.

The limitations set by Medicaid on income and resources do not reflect the reality faced by many of our clients. Under the spousal refusal rules, the Medicaid eligibility of the applicant must be determined without considering the income or assets of the refusing legally responsible relative.[8]

Medicaid permits a community spouse to keep all of his or her income and resources by simply saying "no." Medicaid cannot legally deny the institutional spouse in need of care based on the excess resources of the community spouse. Effectively, upon a spouse's refusal to contribute his or her income or resources towards the cost of care of the institutional spouse, Medicaid must determine the eligibility of the nursing home spouse solely based on the applicant's income and resources.

Under the Medicare Catastrophic Coverage Act of 1988 ("MCCA"), Medicaid eligibility cannot be denied where the community spouse refuses to make his or her resources available for the cost of care of the institutionalized spouse.[9] The New York Court of Appeals in the *Matter of Shah (Helen Hayes Hosp.)*, 95 N.Y.2d 148, 711 N.Y.S.2d 824, 733 N.E.2d 109 (2000), held that the state must allow spousal refusal for institutional Medicaid under federal Law.[10]

While HRA is permitted to institute a legal proceeding to recover the cost of care from the refusing spouse, as many practitioners can attest to, if the Department of Social Services invokes this right, the amount that the community spouse will be obligated to pay will likely be at a reduced Medicaid reimbursement rate, and not the private pay rate. While beyond the scope of this article, surviving spouses of individuals who had been receiving institutional Medicaid do have options that can help them protect against significant estate recovery by Medicaid.

III. Impoverishment

In conjunction with spousal refusal, Congress considered the fact that the institutionalization of one spouse could lead to the financial harm of the community spouse, possibly leaving him or her impoverished. The MCCA provides that a spouse who is still living at home in the community cannot be left with little or no income or resources in order to provide that his or her spouse can receive institutional care. The Act permitted states to establish income and resource levels for a community spouse. The law set a maximum level to be used by the states.

Under current Medicaid rules, a certain amount of the couple's combined income is protected. Section 366-c of the New York Social Services Law ("SSL") provides the income of both spouses must be protected to meet the needs of the family, which includes the community spouse, before applying any income to the institutionalized spouse's costs of care.

As stated above, as of January 1, 2014 a community spouse is permitted to keep up to $2,931 in income and resources of up to $117,240, in addition to the spouse continuing to reside in the home. The institutionalized spouse can keep $50 per month plus $14,550 in resources.[11] Although a community spouse's IRA is exempt, it is the first asset applied to the CSRA. If the spouse has a $150,000 IRA, he or she already over the resource limit.

Effectively, a community spouse with less than the permissible monthly income is entitled to a portion of the institutionalized spouse's income to bring the community spouse up to the income allowance level. The combined community spouse's income and the institutional spouse's contribution is called the community spouse minimum monthly maintenance needs allowance ("MMMNA").

Where the community spouse has income over the income allowance level, Medicaid's policy has been it will not permit any contribution from the institutionalized spouse. Medicaid may seek a contribution from the community spouse from the excess income, up to 25% of that excess income.[12]

IV. Misinformation

It has recently come to the attention of many elder law attorneys who have submitted institutional Medicaid applications in New York City that the HRA has been denying the CSMIA to the community spouse who has signed a spousal refusal. When a spousal refusal has been filed, HRA has been notifying nursing homes that no portion of the NAMI of the institutionalized spouse can be budgeted for the community spouse, a direct violation of both the law and the New York State Medicaid Manual. Many attorneys have taken the word of the nursing homes and have not appealed these decisions. Thankfully, however, this issue is gaining notice and there are attorneys who have recently requested fair hearings on the issue.

In Fair Hearing Decision Number 6208131N, dated March 1, 2013, a nursing home applicant contended that the New York City Social Services Agency ("Agency") incorrectly calculated his NAMI because the Agency failed to consider the CSMIA for the community spouse. The Agency contended that its calculation of the applicant's NAMI without accounting for the CSMIA was correct because the spouse executed a spousal refusal and refused to make her excess resources available toward the cost of the institutionalized spouse's care.[13]

Arguing well-established law and precedent, the appellant disagreed with the Agency's decision, citing to Administrative Directive 91 ADM-33, which states that every district must determine entitlement to the CSMIA without regard to the resources owned by the community spouse, other than to determine the income generated from the resources. Under 91 ADM-33 (IV) (B), "A community spouse who refuses to make his or her resources which exceed the maximum CSRA available to the cost of care of the institutionalized spouse must be allowed the appropriate CSMIA."

According to the New York State Medicaid Reference Guide, "A community spouse who refuses to make his or her resources (in excess of the community spouse resource allowance) available to the cost of care for the institutionalized spouse is allowed the appropriate community monthly income allowance."[14]

At the hearing, the Agency cited 89 ADM-47, which states that if a community spouse refuses to make her assets above the CSRA available, she shall not be entitled to the CSMIA. However, as the appellants in the fair hearing correctly point out, 91 ADM-33(II)(B) provides that even though 89 ADM-47 disallowed the CSMIA to the community spouse, the Division of Legal Affairs has since clarified that Section 1924 of the Social Security Act does not require that the community spouse's resources be at or below the maximum CSRA to be entitled to the CSMIA. A community spouse who executes a spousal refusal and refuses to make her resources available is still entitled to the CSMIA. The administrative judge accordingly ruled in favor of the appellant. As the judge properly concluded, the Agency's failure to calculate the spouse's CSMIA based on the execution of a spousal refusal was not consistent with current law.[15]

On December 18, 2013 the Elder Law Section of the New York State Bar Association ("NYSBA") sent a letter to HRA requesting, in part, that "the HRA immediately cease its illegal practice of denying the CSMIA to community spouses who executed a spousal refusal in all future determinations." The letter continues by demanding that "HRA identify, reopen and retroactively redetermine all eligibility notices issued since September 2012, or such other date on which HRA began this illegal practice…"[16] HRA responded by letter dated December 23, 2013, by Roy A. Esnard Esq,, General Counsel for the NYC HRA Department of Social Services, to Valerie Bogart, Esq., the Vice-Chair of the Medicaid Committee of the NYSBA Elder Law Section, stating, "The policies and practices regarding budgeting for…(CSMIA) you reference in your letter are not currently that of the HRA…HRA's Nursing Home Eligibility Division (NHED) budgets CSMIA to meet the Minimum Monthly Maintenance Allowance (MMMNA) for a Community Spouse who provides income and resources information, even if a spousal refusal has been submitted. Staff training will be conducted to re-emphasize this policy."[17] Mr. Esnard wrote that the current policies and practices of the Nursing Home Eligibility Division ("NHED") in this regard are in compliance with New York State regulations.[18]

Mr. Esnard's letter, referenced above, is written confirmation from the HRA that the practice of denying the MMMNA to the community spouse is improper. Thus, it is the hope of the authors and other elder law attorneys that the HRA will cease this practice immediately.

V. Conclusion

As described above, Medicaid offices in New York City have been instructing nursing homes to tell their residents that refusing spouses cannot keep the income they are legally entitled to. In some circumstances, nursing homes are instructing community spouses to withdraw their spousal refusals. This cannot be the end of the conversation. Elder law attorneys must inform the nursing homes that HRA is not acting within the law. Once the Medicaid application is accepted, the attorney must ensure that HRA is calculating the budget correctly. The NYSBA has further instructed members of the Elder Law and Special Needs Section with clients who are budgeted without a CSMIA to first request that the NHED unit rebudget the case and if they are not successful, to directly send a request for a rebudget to HRA's Deputy General Counsel, Marguerite Camaiore, who can be reached at camaiorem@hra.nyc.gov.[19]

Endnotes

1. GIS 13/MA/022 (1/1/2014).
2. 18 NYCRR Section 360-4.7(a)(1). Note that under SSL 366.2(a)(1), Medicaid will not provide services for those with a home equity value above $814,000 unless the individual's spouse or minor, disabled or blind child is residing in the home.
3. GIS 13 MA/022 (1/1/2014).
4. *Id.*
5. *Id.*
6. 42 USC 1396r-5.
7. GIS 13 MA/022 (1/1/2014).
8. SSL 366 (3)(a); 18 NYCRR 360-4.3(f)(1)(i).
9. 42 USC 1396r-5 (c) (3).
10. Connecticut followed the same holding. *Morenz v. Wilson-Coker*, 415 F.3d 230 (2d Cir. 2005).
11. GIS 13 MA/022 (1/1/2014).
12. 18 NYCR 360-4.10(b)(5).
13. Fair Hearing Decision #6208131N.
14. New York State Medicaid Reference Guide, page 396.
15. While the authors only examine one fair hearing decision, the following cases are further illustrative of the misapplications and the need for examination by practitioners: Fair Hearing

Decision #6208131N; Fair Hearing Decision # 6258047L; Fair Hearing Decision #6291138Y; Fair Hearing Decision #6318971R.

16. Letter from the NYSBA Elder Law Section to Karen Lane, Acting Executive Deputy Commissioner of NYC HRA Medical Insurance and Community Services Administration, and Sabra Kaszynski, Associate General Counsel and Managing Attorney of HRA Office of Legal Affairs (Dec. 18, 2013) (on file with author).
17. Letter from Roy A. Esnard, General Counsel of the New York City Human Resources Administration Department of Social Services, to Valerie Bogart, Esq., Vice-Chair of the Medical Committee of the New York State Bar Association Elder Law Section (Dec. 23, 2013) (on file with author).
18. *Id.*
19. E-mail from New York State Bar Association to Elder Law Section members (Jan. 7, 2014, 15:02 EST) (on file with author).

Elizabeth Forspan, Esq. is an associate at Capell Barnett Matalon and Schoenfeld, LLP, attorneys at law in Jericho, New York. Elizabeth's practice areas include asset preservation planning, estate planning, tax planning and elder care planning. Prior to joining Capell Barnett Matalon & Schoenfeld, Elizabeth was a Tax Manager at Ernst & Young LLP. Elizabeth graduated summa cum laude from Queens College of the City University of New York and received her J.D. from Fordham University School of Law. Elizabeth is a member of the Elder Law and Special Needs, Tax, and Trusts and Estates Law Sections of the New York State Bar Association. Elizabeth can be reached at eforspan@cbmslaw.com.

Sarah C. Moskowitz, Esq. is an associate with the Law Office of Stephen J. Silverberg, PC, where she focuses her practice on Elder Law, Special Needs Planning, Estate Planning, Estate Administration, and Estate Litigation. She graduated, magna cum laude, from Brooklyn College of the City University of New York and holds a J.D. from New York Law School, where she was a member of the New York Law School Elder Law Clinic and the 2008 recipient of the Joseph Solomon Public Service Fellowship. Sarah is a member of the Elder Law and Special Needs and Trusts and Estates Law Sections of the New York State Bar Association and the National Academy of Elder Law Attorneys. Sarah can be reached at SMoskowitz@sjslawpc.com.

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Protecting the Most Vulnerable of Our Communities: Legislative Responses to Particularly Offensive Crimes—Criminal Statutes Aimed at Protecting the Health and Welfare of Incompetent, Physically Disabled and Vulnerable Elderly Persons

By William A. Doherty

I. Introduction

From priests to theologians and philosophers to civil rights activists, some of history's most prominent thinkers have expressed the same refrain, albeit in different forms: Societies are judged by how they treat the weakest members among them.[1] Abuse of powerless elderly persons and incompetent younger persons has been a societal blight forever. Whether it is for pecuniary gain, amusement or even some other prurient interest, it cannot be denied that those among us who cannot adequately defend themselves have long been a ripe target for criminals. In their purest form, one of the most important purposes of legislatures is to respond to problems in society and pass laws to prevent or mitigate them. This article will discuss and explain how the New York State legislature has responded to this problem and how practitioners may assist clients who are, or may be, experiencing abuse. Moreover, this article is meant to call attorneys' attention to criminal statutes that are new, or not well-known, that they can be mindful of when encountering situations that may be well served by a referral to criminal justice authorities in addition to whatever services the attorney can render.

Many of us have elderly clients who come to our offices seeking advice about end of life planning, estate planning, long-term care planning and other traditional elder law issues. However, there are also certainly clients who come to us for reasons that are more odious. Maybe a sibling or child has taken money from them. Maybe a home health care attendant has taken property. The permutations of what can happen to an elderly person are numerous. Then there are the cases of outright abuse that attorneys encounter. In these circumstances, knowing what the client's options are is important, especially since there is potential that a crime has been committed and that the authorities should be alerted. These scenarios hold true not only for the elderly, but also for individuals who are disabled, incapacitated or alleged to be incapacitated.[2]

While crimes of any type can be committed against the elderly and people with disabilities, there are specific enumerated criminal laws that attempt to protect this population from such abuse.[3] This article will provide a brief discussion of the national scope of this problem as well as provide an in-depth review of how the State of New York has recognized and is working to address this problem.

A. The Problem in a National and State-Specific Context

There are generally two broad classifications of people who may be targets for this type of abuse: the elderly and other, younger individuals with disabilities. Preying on a population that may put its trust in the perpetrator, or simply has no awareness of what is going on, seems to be an evil enterprise that is hard to pass up for those inclined to take advantage of the these vulnerable individuals.

In 2000, the national census reported that the population of American citizens age 65 and older was 34,991,753 and in 2010, the American population over age 65 was 40,433,525.[4] The over-65 population in the State of New York in 1998 was 2,407,395 and it rose to 2,617,943 in 2010.[5] Data reported by the U.S. Census suggests that the elderly population will rise to 20% of citizens by the year 2030.[6]

1. Elder Abuse: A National Problem

Quantifying the amount of actual elder abuse cases on a national scale is a difficult task. Among the reasons for this difficulty are that a true definition of what constitutes "elder abuse" is difficult to compile; states record the problem differently insofar as their state crime reporting models are concerned and there is no uniformity nationwide in the nomenclature of elder abuse-related crimes.[7] In fact, it has been estimated that only 1 in 14 incidents of elder abuse even get reported to authorities.[8] An interesting, but sad, statistic states that in 1996 approximately 450,000 elderly people were abused in a domestic setting in the United States.[9] However, these incidents do not always occur in a domestic setting; sometimes the abuser is a caretaker or an employee of an institution entrusted with the victim's care.

According to the National Center on Elder Abuse, there may be as many as 16,639 nursing homes in the United States, with 1,736,645 beds in them. That statistic is exclusive of board and care homes and elderly people being cared for in the community (i.e. in a family home).[10] The National Center also reports that 6 out of 7 residents of long term care facilities are over age 65.[11] According to the 2001 report prepared for the U.S. House of Representatives, *Abuse of Residents Is a Major Problem in U.S. Nursing Homes*, over 30% of the nursing homes nationwide were cited for cases of abuse that had the "potential to cause harm."[12] Keep in mind that these abuse violations are for cases of active, possibly intentional, abuse—neglect is another serious issue. Some residents, or patients, of these facilities cannot communicate. They cannot ask for help, and they cannot report to someone when their basic needs are not being met. Accurately reporting abuse or neglect of these people, in the absence of obvious signs, is difficult. In some cases, visiting loved ones notice a change in the person's personality or attitude; in other cases, the patient may also exhibit some form of physical abuse. The confusion surrounding what may have led to these changes will often lead the family to seek legal advice.

2. Elder Abuse in New York

Cases of elder abuse in New York State are tracked variously by many different state agencies. The agencies that are involved with this issue include, but are not limited to, local police departments, the New York State Office of the Aging, Adult Protective Services, Division of Criminal Justice Services, the Office of the Attorney General, the Office for the Prevention of Domestic Violence and/or the Department of Health. The way in which cases come to these agencies' attention may be through arrest reports, Domestic Incident Reports (NYS Form DCJS 3221), Uniform Crime Reports (UCR) and individual complaints.

In May of 2011, a study was commissioned by the New York State Office of Children and Family Services which found that there could be as many as 260,000 cases annually of elder abuse in New York State.[13] The forms of elder abuse tracked were emotional, physical, financial as well as cases of neglect. It is important to note that New York specifically codifies some of the ways in which elder abuse can be committed, and they are not limited to physical injuries. Along with physical and sexual abuse, emotional abuse, active neglect, passive neglect and financial exploitation are specifically enumerated and defined within the New York State Social Services Law.[14] These provisions confirm the legislature's intention that non-traditional forms of abuse such as causing emotional harm, failure to care for a compromised individual and financial exploitation, are still considered abuse worthy of reporting to Adult Protective Services. As discussed below, unfortunately these actions will not always be considered criminal in nature but the New York State legislature has made efforts to create better solutions.

Taking into consideration the vast numbers of offenses in the New York State Penal Law, it is possible to charge any one of dozens of crimes (or even petty offenses) when an incident involves a victim who is elderly. The criminal justice system generally defines elder abuse as an incident involving a victim who is 60 years of age or older and who is the victim of a crime or petty offense.[15] A "vulnerable elderly person" is defined as someone over age 60 who suffers from disease or mental infirmity that is associated with advanced age and are manifested by "demonstrable physical, mental or emotional dysfunction to the extent that the person is incapable of adequately providing for his or her own health or personal care."[16]

The New York State legislature has enacted laws *specifically* designed to address crimes committed *against* elderly persons by persons to whom the care of the victims are entrusted. These crimes are called Endangering the Welfare of a Vulnerable Elderly Person, or an Incompetent or Physically Disabled Person in the Second Degree[17] and First Degree.[18] Additionally, in 2008, the legislature amended the Penal Law's Assault Second Degree statute by adding subsection 12, which made it a crime to intentionally cause physical injury to a person who is sixty-five years of age or older when the perpetrator(s) is more than ten years younger than the victim.[19] Also in 2008, the legislature amended the crime of Scheme to Defraud First Degree to include circumstances when a perpetrator engages in an ongoing scheme to defraud more than one person, more than one of whom is a "vulnerable elderly" person as described by the Penal Law.[20]

The elderly have been, and continue to be, easy targets for criminals. Generally speaking, the elderly tend to be more trusting and in many cases they may be less sophisticated in arenas such as finance and personal security than younger generations. This trust often stems from the elderly person's dependence on others for basic necessities and care. In some cases, the abuser is a family member who the elderly person knows and trusts. In other cases, the elderly person is at an age where the faculty of suspicion that a younger person may possess as a defense mechanism may no longer be as acute. People who are, or become close to, the elderly whose care they are responsible for are often in a position to easily take advantage of the situation. In fact, in some criminal prosecutions defendants have raised the issue of donative intent on the part of the victim when the defendant is accused of taking property.[21] This becomes a corroboration issue when a victim is clearly elderly and suffering from diminished capacity.[22] If a client's property has already been imperiled, recognizing that it may involve criminal behavior can

also lead an attorney to seek the assistance of local police or district attorneys' offices. These authorities can often be of great assistance to the victim.

A recent case highlights the reality of elder abuse at the hands of people close to the victim. *In Re Doar*[23] was decided by the New York Supreme Court, Kings County, in June of 2013. The case involves the abuse of an elderly incapacitated man by his wife. In the opening paragraph of the decision, the Court refers to the elderly incapacitated person's wife as a predator and describes her as having "through seduction and feigned concern for him gained the incapacitated person's total co-operation in her scheme to convert of all his assets to herself."[24] In this case, Adult Protective Services had petitioned the Court for guardianship for an 83 year old man who had dementia. One year prior to the petition, the elderly man had married his former health aide, who was 46 years old. The elderly man had been befriended by the new wife and her then-boyfriend when she worked at the Veteran's Administration hospital where the elderly man had been admitted for long-term treatment. After his release from the hospital, she became the pay-on-death designee on his bank accounts as well as his attorney-in-fact on a power of attorney. The Court noted that the wife's "strictly pecuniary interest for insinuating herself into the AIP's life was utterly apparent."[25] Ultimately, the elderly man's entire net worth disappeared. The Court described this as his "rapid pauperization."[26] Furthermore, the Court noted that it was apparent from the bench that the elderly man had impairments because he fell asleep and blurted statements in open court relative to his suffering from dementia. The Court further noted that it was "uncontroverted" that he was physically and cognitively impaired and that his safety and welfare were imperiled. The Court also noted that the gentleman could not handle his finances. The Court refused the wife's cross-petition for appointment as guardian and, instead, appointed the Jewish Association of Services for the Aged as guardian of the person and property of the elderly man. The commentary of the Court decried the abuse of the elderly in the twilight of their lives and when their impairments permit them to be "lulled into a trusting relationship and a false sense of security by a predator."[27]

3. Another New York Problem: Abuse of Younger People Who Cannot Defend Themselves

The legislature has also responded to the need to criminalize conduct that would injure persons who may not be elderly, but are nonetheless unable to care for themselves due to cognitive or physical impairment. The crime of Endangering the Welfare of an Incompetent or Physically Disabled Person was passed in 1998 and amended in 2012.[28] These amendments were made in order to safeguard those members of the population who were unable to care for themselves due to physical impairment, not just mental impairment.[29]

B. A Discussion of New York's Penal Law §§ 190.65-1(c), 120.05(1), 260.24, 260.25, 260.32 and 260.34

1. The New York State Legislature's Response to the Abuse of Elderly and Special Needs Persons

In 1998, the legislature amended the crime then known as Endangering the Welfare of an Incompetent Person (PL § 260.25) by adding "or Physically Disabled" before "Person" in the title. The legislature also established the two felonies of Endangering the Welfare of a Vulnerable Elderly Person in the first and second degrees (PL § 260.34 and 32 respectively). In the legislative history for the bill its justification is described as, among other things, ensuring "that vulnerable elderly persons entrusted to the care of paid or court-appointed caregivers are protected by New York's penal law and that offenders will face stiff criminal sanctions." The problem of this population's inability, or difficulty, in accessing the criminal justice system and civil court system in order to obtain redress is also noted. Further, "added incentives for law enforcement intervention by enacting stronger penalties and prison terms" is listed as part of the legislative intent. Finally, the notion that these caregivers are also fiduciaries to the victims served as further reasoning for enacting specific statutory offenses regarding caregiver abuse.[30]

Until 1998, Penal Law § 260.25 was a stand-alone statute called "Endangering the Welfare of an Incompetent Person." The 1998 amendment described above embraced the concern of protecting physically disabled people as well. In 2010, the legislature amended PL §§ 260.32 and 260.34 to add incompetent and physically disabled people to the protection afforded by these statutes. Additionally, in 2012, section 260.25 was amended, and a new statute, section 260.24, was added by the legislature. This amendment divided this crime into first and second degree offenses. In this amended iteration, section 260.24 was designated the Class A misdemeanor and the existing crime (PL § 260.25) was made a first degree crime and designated an E felony.

A brief summary of the differences between felonies and misdemeanors, and their accompanying penalties, may be instructive. In general, felonies in the New York State Penal Law are subject to sentences of imprisonment of more than a year in prison. This is a general rule, because sentence enhancements involving hate crimes, sex crimes, particularly violent crimes and other aggravating factors affect how long the sentences for felonies will be, ranging from more than a year to life in prison.[31] Class A misdemeanors are subject to determinate sentences of up to a year in jail.[32] Class B misdemeanors are subject to sentences of up to three months in jail.[33] Different crimes in the Penal Law are assigned different subdivisions of degrees. Some are simply divided between felony and misdemeanor. A

first degree crime is the most serious degree designation that a crime can be assigned.

These latest amendments were passed as part of the Protection of People With Special Needs Act of 2012.[34] The Act brought about several sweeping changes and it could be the subject of its own article. The preamble to the bill recites that the bill and its components were "necessary for the protection of persons who are vulnerable because of their reliance on professional caregivers to help them overcome physical, cognitive or other challenges." In his memorandum in support of the legislation that enacted these amendments, John V. Tauriello, Deputy Commissioner and General Counsel of the New York State Office of Mental Health, noted that the legislation established "the strongest safeguards and practices in the nation to protect persons with special needs or disabilities who are served by human services programs operated, licensed or certified by the State."[35]

In addition to the changes and additions made to the Penal Law, the Act also established the New York State Justice Center for the Protection of People with Special Needs. This agency is tasked with implementing New York's standards and practices with regards to protecting this population from abuse and neglect. Among other things, mandatory reporting laws with qualified immunity provisions, oversight for facilities and a 24/7 statewide hotline and incident reporting system was put in service. The Vulnerable Persons Central Register Hotline is now available to receive telephone notification from mandatory reporters much like the Child Abuse Hotline. Cases of abuse and neglect can be followed up on by investigators from the Justice Center or referred out to law enforcement.

2. Endangering the Welfare of an Incompetent or Physically Disabled Person

The crime of Reckless Endangerment has been on the books for decades. It can be committed in innumerable ways, from speeding in a motor vehicle to playing with firearms. Typically, the connotation involved some kind of violent or tumultuous behavior. However, it was not thought of as the first line of enforcement when the victim was an elderly, disabled or incompetent person and the criminal behavior involved the possibility of long-term, discreet abuse. Passage of sections 260.24 and 260.25, as amended, of the Penal Law was a response to the burgeoning incidences of abuse of this population in circumstances that were not so much violent as they were cruel, such as maltreatment for the perpetrator's entertainment or pecuniary gain.

Now, the New York State Penal Law makes it a crime to *recklessly* engage in conduct that is likely to cause injury to the physical, mental or moral welfare of a person unable to care for him or herself due to physical disability, mental disease or defect.[36] Furthermore, it is a class E felony to engage in this conduct *intentionally*.[37] Recklessness and intentional behavior are culpable mental states discussed later in this article.

A significant problem with the charge of Reckless Endangerment was that in order to make a prima facie showing of commission of the offense, the perpetrator had to have been shown to have acted with behavior that created a substantial risk of serious physical injury to the victim[38] or acted with depraved indifference to human life in such a way as to create a grave risk of death to the victim.[39] Absent this, authorities could not use this charge against the abuser.

3. Endangering the Welfare of a Vulnerable Elderly Person, or an Incompetent or Physically Disabled Person

It is also a specifically enumerated crime for the ***caregiver*** of a person who is a vulnerable elderly person, an incompetent or a physically disabled person to intentionally cause a physical injury to such person, recklessly cause physical injury to such person, or subject such person to sexual contact without such person's consent. Emphasis is added to the word "caregiver" because here the legislature specifically addressed the concern that this vulnerable population was sometimes suffering at the hands of abusers who were tasked with helping those victims with aspects of their everyday lives, and used their role as an opportunity to abuse a captive audience. In addition, this crime is also committed if a caregiver causes a physical injury to the victim through criminal negligence by means of a deadly weapon or dangerous instrument.[40] An example of this abusive behavior might be an abuser overmedicating an elderly person charged to the abuser's care with sedative medications so as to keep the elderly person quiet, but in so doing, causing an unintended physical injury. In that example, the medication could arguably be a dangerous instrument.[41] This crime rises to a class D felony when the caregiver intends to cause a physical injury and causes a serious physical injury, or recklessly causes a serious physical injury to such person.[42]

As described above, the addition of this statute and Endangering the Welfare of an Incompetent or Physically Disabled Person enabled law enforcement to take action against abusers when the risk resulting from the abusive behavior was less than serious physical injury or death. With the addition of these statutes, a void was filled between causing an unintentional physical injury and risking a serious physical injury. There was always the possibility that one of the New York State Penal Law assault statutes could have been used with an *attempt* theory, but these newer statutes more specifically describe criminal behavior found to be rampant in our society. Additionally, inchoate crimes such as *attempts* are lesser-degreed offenses with lesser potential punishments attached to them. Here, again, are

statutes that a practitioner who serves the elderly can think of when elderly clients or their family members seek legal advice and the attorney finds what looks like abuse.

4. Scheme to Defraud in the First Degree

Falling within the broad category of financial crimes against the elderly, New York State enacted an amendment to the pre-existing statute of Scheme to Defraud in the First Degree in 2008. A new subsection "(c)" was added that raises to a felony engaging in a scheme to defraud more than one vulnerable elderly person as defined in the Penal Law. Prior to the enactment of this amendment, in order to prosecute this crime as a felony, it had to be proven by the prosecution that the defendant engaged in a scheme to defraud more than ten people. In a further effort to protect the senior citizens of New York, the law was amended to allow for the felony prosecution of a defendant who schemed to defraud more than one person who is a vulnerable elderly person as defined by the Penal Law. The bill jacket for this amendment states that these senior citizens are "particularly susceptible to those who prey on the weak and helpless."[43]

5. Assault Second Degree (Subdivision 12)

As long as New York's Penal Law has had an assault statute, it has been a crime to intentionally inflict a physical injury on another person. According to the bill jacket for 2008's amendment to Assault in the Second Degree, it is well known that senior citizens are more vulnerable to injury at the hands of another person and less likely to be able to defend themselves. The intention of this legislation was to protect New York's senior citizens by increasing the penalty for hurting them physically, thereby hopefully serving to deter this form of abuse.[44] Interestingly, there is no requirement that the defendant knew the victim's age at the time of the assault and there is no requirement that the defendant have any knowledge of the victim's status as a "vulnerable elderly person" as defined by the Penal Law. This is seemingly a strict liability offense, an argument raised in *People v. Riley* (32 Misc. 3d 626, 920 N.Y.S. 2d 617 (2011)), discussed below. The New York State Office for the Aging filed a Memorandum in Support of this amendment stating that the law would provide the judiciary with a tool designed to address the problem of "predatory attacks on New York's seniors."[45] Additionally, the District Attorneys Association of the State of New York called the Governor's attention to "serial muggings of elderly Queens County residents in 2007" which served to "highlight the increased danger of predatory attack faced by New York's senior citizens."[46]

C. A Discussion of Specific Aspects of These Statutes

The major differences between the crimes enumerated above focus on who the perpetrator (or abuser) is, the victim's circumstances, the criminal intent (or mental state) and the resulting harm. "Caregiver" is someone who assumes responsibility for the care of a vulnerable elderly person, or an incompetent or physically disabled person pursuant to court order or for monetary or other valuable consideration.[47] "Sexual contact" means another person touching the sexual or other intimate parts of a person for the purposes of the actor's gratification; it includes touching of the actor by the victim.[48] A "physical injury" results when there is impairment of physical condition or substantial pain.[49] A "serious physical injury" results when there is a physical injury which creates a substantial risk of death, serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of a bodily organ's function.[50]

Generally speaking a person acts with intent as far as a result or conduct when he or she has the objective to cause such result or engage in the enumerated conduct.[51] Recklessness is the condition of an actor being aware of a substantial and unjustifiable risk that some result will occur but consciously disregarding that risk.[52] The disregard of this risk must be a gross deviation from the standard of care of a reasonable person in the same situation. Criminal negligence is the result of a person failing to perceive a substantial and unjustifiable risk with regard to resulting circumstances.[53]

As stated above, abuse may not be physical or lead to physical injury, serious physical injury or death. Abuse may come in the form of larceny (for which there are other criminal statutes), embezzlement (codified in New York as a form of larceny[54]) or any of the numerous crimes codified in the New York State Penal Law. However, it is now possible that under a theory of financial devastation due to larcenous behavior leading to severe financial destitution of the victim, a charge of Endangering the Welfare of an Incompetent or Physically Disabled Person, or Scheme to Defraud may be additionally appropriate. If this financial abuse is deliberate and leads to serious financial ruin for the victim, the theory might be that this ensuing financial ruin is injurious to the physical welfare of the victim, thereby allowing for an E felony to be charged, whereas a misdemeanor might have been the only appropriate charge before enactment of this statute.

Since these laws were passed, the numbers of arrests for these crimes have steadily increased statewide (*see Table 1*). This is not likely due to more of the offenses being committed. It is more likely that those investigating the events (either police or attorneys to whom concerned families turn) or making the arrests are being trained to recognize the problem and look to a more appropriate substantive crime. It also may well be that counselors and service organizations are becoming more cognizant of these statutes and encouraging reports to be made to police agencies.

ARREST YEAR

PL Charge	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
260.24	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0	9
260.25	57	56	49	53	67	97	100	83	116	132	143	100	107	108	106	109
260.32	0	1	5	3	7	7	9	13	11	24	18	26	31	23	47	30
260.34	0	1	5	1	0	0	1	0	3	1	10	4	1	5	4	5
120.05(12)	-	-	-	-	-	-	-	-	-	-	5	24	29	55	195	215
190.65-1(c)	-	-	-	-	-	-	-	-	-	-	0	0	0	2	0	0
Total	57	58	59	57	74	104	110	96	130	157	176	154	168	193	352	378

Table 1[55]

Generally, when new laws are passed that affect members of the law enforcement community, they are the subject of departmental legal bulletins.[56] Members of local police departments, district attorneys' offices and other enforcement agencies are always on the lookout for new laws. Upon being notified of new laws, these agencies will promulgate their own internal legal bulletins for dissemination to their employees. In-service training, Police Academy training, roll-call training sessions or any number of other training venues are used to make the necessary personnel aware of the new law(s). These tools enable law enforcement to respond administratively to a criminal complaint more appropriately and charge an abuser in such a manner as to assist the local district attorney's office with developing a case against the abuser. The same surely holds true for members of the Bench and Bar vis-à-vis becoming aware of newly enacted statutes.

Table 1 shows a trend of relatively few (or no) arrests for Endangering the Welfare of a Vulnerable Elderly Person in 1998 and a gradual increase throughout the succeeding decade for arrests made for its successor statute as amended. This is likely a function of law enforcement becoming more aware of a new, more appropriate crime, to charge as it is more probable that before the law was passed, charges such as Assault and Reckless Endangerment were used. There is also the potential that no criminal charges were brought against abusers in certain circumstances. The table also shows that there are a much larger number of arrests for Endangering the Welfare of an Incompetent or Physically Disabled Person during that time period. This is possibly due to the fact that it was essentially already a crime that law enforcement was aware of, albeit with a slight change in the titled name of the Penal Law charge. Scheme to Defraud First Degree, as related to vulnerable elderly victims, is also such a new offense that it will take some time for responsible parties to begin taking relevant cases and applying that statute to them. In the case of the 2008 amendment to the Second Degree Assault statute (PL § 120.05(12)), it is possible that when the law was newer, abusers were under-charged with simple assault (Assault Third Degree, PL § 120.00) and as more agencies became aware of the new statute, abusers were charged more appropriately, reflecting the age disparity of victim and abuser when necessary.

D. Noteworthy Cases

In *People v. Rolston*, a defendant's conviction for assault and endangering the welfare of an incompetent was upheld by the Fourth Department. In *Rolston*, the defendant offered money to a 29-year-old incompetent to repeatedly do push-ups and sit-ups in a well-traveled street. Ultimately the victim was struck by a motor vehicle and suffered serious injuries. The Fourth Department ruled that the defendant knew or should have known about the risks involved and that the victim lacked the capacity to care for himself.[57]

In *People v. Jordal*, the evidence established that the victim, the daughter of defendant's live-in companion, was mentally retarded and resided in a group home for mentally retarded adults. She was unable to consent to sexual contact as a result of her mental retardation. On appeal, the evidence that defendant subjected the victim to sexual contact without her consent was held to be legally sufficient to establish that the defendant knowingly acted in a manner likely to be injurious to the physical, mental or moral welfare of the victim who was unable to care for herself because of mental disease or defect.[58]

In *People v. Johnson-Noble*, the defendant, a Certified Nurse's Aide, was on duty in a residential facility when the victim, an 86-year-old dementia patient, threw a bowl of cereal at her. The defendant then slapped the victim in the face and struck her arm. The defendant was charged with Endangering the Welfare of an Incompetent or Physically Disabled Person in the 1st degree. In declining to dismiss the charges against the defendant, the New York City Criminal Court, Queens County, held that the mere fact that the victim did not sustain a physical injury was not enough to rule that no harm was caused to the victim.[59]

In *People v. Riley*, the defendant moved to dismiss that count of his indictment charging him with Assault in the Second Degree (PL § 120.05(12)) against a 68 year old victim. The defendant's argument was that his indictment violated due process because the statute was too broad, arbitrary, capricious and vague. Citing the statute's legislative history's discussion of the vulnerabilities of the aged and the legislature's legitimate need to protect our older citizens from harm, the Court held that the statute was not void for vagueness or unconstitutional and upheld that count of the defendant's indictment.[60]

Courts have found that victims who may not even have been aware of the abuse are nonetheless victims and defendants can be found guilty for these crimes. In *People v. Neville*, the defendant was charged with Endangering the Welfare of an Incompetent Person (N.Y.S. PL § 260.25, the predecessor to the present statute), after he was caught masturbating in front of a sleeping 82-year-old Alzheimer's Disease patient. The defendant argued that the victim could not have known what he was doing. The Court held that the issue was not whether the victim was aware of the defendant's conduct, but rather whether the defendant knew, or should have known, that his actions were likely to be injurious to the well-being of the victim. The Court denied the defendant's motion to dismiss.[61]

E. Discussion of Statistics as Reported to Authorities

It is difficult to track the number of incidents reported (but that do not result in arrest) for the aforementioned crimes because they are not what are called "index crimes." Law enforcement agencies are required to report index crimes to both the State of New York Division of Criminal Justice Services and the Federal Bureau of Investigation.[62] "Part I" crimes that get reported fall into eight general, but serious, categories.[63] For the purposes of this discussion, abuse that does not rise to the level of these serious offenses does not fall into the category of Part I reportable crime. UCR "Part II" crimes are for less serious offenses, and are categorized more generally, such as "Other Assaults." The new Assault Second Degree crime above (PL § 120.05(12)) would be reported as a felony assault and would fall into the Part I category.

An interested practitioner may be able to survey each state for a summary of reported incidents such as these and resulting arrests. However, it should generally be noted that this is a national problem and that New York is responding to its share of the problem within its own borders and within the context of New York's Penal Law as well as Social Services Law, Mental Hygiene Law, etc.

II. Conclusions

An interesting suggestion was made by the Court in the *Doar case*. The Court suggested in a footnote to its decision that a protocol should be put in place whereby financial institutions, health care providers, licensed home care providers, banks, hospitals, doctors, and designated agents would become mandatory reporters of abuse of the elderly.[64] This would be akin to the responsibility of police officers, nurses, school teachers and other professionals who are mandatory reporters of suspected child abuse (and now abuse of persons with special needs). With this responsibility would come a level of immunity when the report is made in good faith.

It is important to note that there are numerous organizations and service providers that care for the elderly, the infirm, the disabled and the incapacitated with professionalism, care and compassion. Additionally, there are undoubtedly thousands of families statewide that care for these people in their homes and do so honorably and with love. Clearly, this article is not directed at these people.

It may also prove useful for the legislature to include within the definition of "caregiver"[65] persons who take care of these vulnerable elderly people, but who do so without court order and without any specific compensation or consideration. This may fill a loophole that fails to take into consideration caretakers who commit abuse but who are not paid caretakers or court-appointed caretakers.

Along with tailoring representation to the specific situation, when a case of abuse is of such a nature that other resources must be turned to, referrals can be made to local Adult Protective Services Offices, district attorneys' offices, county Social Services Departments or social welfare organizations such as the New York City Elder Abuse Center. No matter what part of the state the practitioner is in, there is an organization that is able and willing to assist the abused elderly person. For people with special needs, referrals should also be made to the Vulnerable Persons Central Register.

There can be no doubt that this is an issue worthy of attention from our profession. It is possible that when clients come to our offices to report abuse, or when families come to report the abuse of a loved one, tort law may be the first idea that comes to the attorney's mind. The fact remains that there are many circumstances when law enforcement should be involved as well. To this end, attorneys would do well to contact their local police agencies. These police agencies can investigate the situation and make referrals to social services agencies, the local district attorney's office or both. These police agencies may then be able to make an arrest and get the victim much needed help. The police can thereby be an important additional tool for the elder law or special needs practitioner. Redress to civil

courts can also be turned to, albeit in tandem with the criminal justice system.

Endnotes

1. "A nation's greatness is measured by how it treats its weakest members—," Mahatma Ghandi; "Our society must make it right and possible for old people not to fear the young or be deserted by them, for the test of a civilization is the way that it cares for its helpless members—," Pearl S. Buck.
2. *See generally People v. Rolston*, and *People v. Jordal*, which are discussed in more detail *infra*.
3. *See generally* N.Y. PL §§ 260.24, 260.25, 260.32, 260.34, 120.05(12) and 190.65-1(c) which are discussed in more detail *infra*.
4. This information is available using a search of the United States Census Bureau website factfinder2.census.gov.
5. This information is available at www.health.ny.gov / statistics / vital_statistics. The author chose statistics from the year 1998 because that is the year that some of the laws which are the subject of this article were initially passed.
6. *Elder Justice: Stronger Federal Leadership Could Enhance National Response to Elder Abuse*, United States Government Accountability Office, 2011.
7. National Center on Elder Abuse, *Elder Abuse Prevalence and Incidence Fact Sheet*, 2005.
8. *Id. citing* Pillemer, Karl and Finkelhor, David, *The Prevalence of Elder Abuse: A Random Sample Survey*, The Gerontologist, 28: 51-57 (1988).
9. The National Center on Elder Abuse at the American Public Human Services Association, *The National Elder Abuse Incidence Study*, 1998.
10. National Center on Elder Abuse, *Research Brief: Abuse of Residents of Long Term Care Facilities*, available at: http: / / www.ncea.aoa.gov / Resources / Publication / docs / NCEA_LTCF_ResearchBrief_2013.pdf.
11. *Id.*
12. Minority Staff Special Investigations Division, Committee on Government Reform, U.S. House of Representatives, *Abuse of Residents is a Major Problem in U.S. Nursing Homes*, July, 2001.
13. Lifespan of Greater Rochester, Inc., Weill Cornell Medical Center and New York City Department for the Aging, *Under the Radar: New York State Elder Abuse Prevalence Study*, 2011.
14. N.Y. SSL Art. 9B, § 473(6).
15. Elizabeth Loewy, *Elder Abuse: Domestic Violence, Self-Neglect and Financial Exploitation*, June, 2006 (presentation made by the Manhattan District Attorney's Office.).
16. N.Y. PL § 260.31(3).
17. N.Y. PL § 260.32 (E felony).
18. N.Y. PL § 260.34 (D felony).
19. N.Y. PL § 120.05(12) (D felony).
20. N.Y. PL § 190.65-1(c) (E felony).
21. For an example see *People v. Camiola*, 225 A.D.2d 380, 639 N.Y.S.2d 35 (1st Dep't 1996).
22. *Id.*
23. *In re Doar*, 39 Misc.3d 1242(A), 2013 N.Y. Slip Op. 50988(U) (2013).
24. *Id.* at *2.
25. *Id.* at *5.
26. *Id.* at *3.
27. *Id.* at *2.
28. L. 1998, Ch. 381; L. 2012, Ch. 501.
29. William C. Donnino, Practice Commentary, McKinney's Cons Laws of New York, 2012 Electronic Update, PL § 260.25.
30. *See generally* bill jacket for L. 1998, Ch. 381.
31. *See generally* N.Y. PL § 70.
32. N.Y. PL § 70.15(1)
33. N.Y. PL § 70.15(2)
34. L. 2012, Ch. 501.
35. *See generally* bill jacket for L. 2012, Ch. 501.
36. Endangering the Welfare of an Incompetent or Physically Disabled Person 2nd deg., N.Y. PL § 260.24 (A misd.) eff. 1 / 16 / 2013, Ch. 501, L. 201.
37. Endangering the Welfare of an Incompetent or Physically Disabled Person 1st deg., N.Y. PL § 260.25 (E fel.) eff. 1 / 16 / 2013, Ch. 501, L. 2012.
38. N.Y. PL § 120.20.
39. N.Y. PL § 120.25.
40. Endangering the Welfare of a Vulnerable Elderly Person, or an Incompetent or Physically Disabled Person 2nd deg., N.Y. PL § 260.32 (E fel.).
41. A "dangerous instrument" is defined in the Penal Law as "any instrument, article or substance, including a 'vehicle' as that term is defined in this section, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury." (N.Y. PL § 10.00-13).
42. Endangering the Welfare of a Vulnerable Elderly Person, or an Incompetent or Physically Disabled Person 1st deg., N.Y. PL § 260.34 (D fel.).
43. *See generally* bill jacket for L. 2008, Ch. 291.
44. *See generally* bill jacket for L. 2008, Ch. 68.
45. Memorandum in Support, Jennifer Seehase, Gen. Counsel., March 24, 2008.
46. Memorandum in Support, James A. Murphy, III, President, May 1, 2008.
47. N.Y. PL § 260.31(1).
48. N.Y. PL § 260.31(2).
49. N.Y. PL § 10(9).
50. N.Y. PL § 10(10).
51. N.Y. PL § 15.05(1).
52. N.Y. PL § 15.05(3).
53. N.Y. PL § 15.05(4).
54. N.Y. PL § 1550.05-2(a).
55. Source: New York State Division of Criminal Justice Services, Computerized Criminal History System as of October 22, 2013.
56. Most large police departments in New York State have Legal Bureaus. These may be staffed with civilian attorneys, members of the County Attorney's Office, city Corporation Counsel or police officers who are attorneys. When new laws are passed or regulations promulgated, these offices will write and distribute bulletins that are instructional in nature to call the attention of this new information to the police officers in the street that will be tasked with implementing or enforcing them. In the case of a smaller police department, typically the county police department that encompasses the surrounding area will distribute these to those departments as well.
57. *People v. Rolston*, 190 A.D.2d 1000, 593 N.Y.S.2d 383 (4th Dep't 1993).
58. *People v. Jordal*, 294 A.D.2d 953, 742 N.Y.S.2d 760 (4th Dep't 2002).
59. *People v. Johnson-Noble*, 21 Misc.3d 1140(A), 2008 N.Y. Slip Op. 52436(U) (Crim Ct, Queens County 2008).
60. *People v. Riley*, 32 Misc. 3d 626, 920 N.Y.S.2d 617 (2011).
61. *People v. Neville*, 31 Misc. 3d 1245(A), 934 N.Y.S.2d 36 (Crim Ct, Kings County 2011).

62. Index crimes are reported within the Uniform Crime Report (UCR) system and generally include violent crimes, murder, forcible rape, robbery, aggravated assault, property crime, burglary, larceny, larceny of motor vehicles and arson. Because these categories are broad, it is difficult to determine whether they were committed as elder abuse-related crimes.

63. These Part I offenses are: Criminal Homicide, Forcible Rape, Robbery, Aggravated Assault, Burglary, Larceny-theft (not motor vehicle theft), Motor Vehicle Theft and Arson. This information is available in the FBI UCR Handbook located at FBI.gov.

64. *Doar, supra* note 23, at page *11 n22.

65. N.Y. PL § 260.31(1).

Mr. Doherty is a 2007 graduate of Pace University School of Law admitted to practice in New York State. He was a police officer in the NYPD from 1998-2000 and transferred to the Floral Park Police Department (Nassau County) in 2000. He currently serves as a Police Sergeant in Floral Park supervising patrol functions and as liaison to community organizations. He also teaches Criminal Law at Queensborough College.

Misuse of Antipsychotic Drugs in Nursing Homes: Are We Making Any Progress?

By Toby Edelman

The recent settlement of criminal and civil charges against Johnson & Johnson for off-label marketing of Risperdal for nursing home residents once again brings the issue of antipsychotic drugs and nursing homes to public attention. A group of residents' advocates working to reduce the inappropriate use of antipsychotic drugs in nursing facilities recently issued a joint Statement about the settlement.[1] This Alert discusses the Johnson & Johnson settlement and three additional developments that are troubling to advocates who describe the misuse of antipsychotic drugs as a form of elder abuse. These developments are:

- Recent data from the Centers for Medicare & Medicaid Services (CMS) indicating that nursing facilities have fallen far short of the goal set in July 2012 for reducing the inappropriate use of antipsychotic drugs;
- The Inspector General's cancellation (as a result of sequestration) of a study of antipsychotic drug use in nursing homes; and
- CMS' decision not to require that consultant pharmacists (required by the federal Nursing Home Reform Law) be independent of long-term care pharmacies and pharmaceutical manufacturers.

Background

The misuse and overuse of antipsychotic drugs in nursing homes have been recognized as serious problems for many decades.[2] In December 2007, Lucette Lagnado brought attention to atypical antipsychotic drugs in her *Wall Street Journal* article "Prescription Abuse Seen In U.S. Nursing Homes; Powerful Antipsychotics Used to Subdue Elderly; Huge Medicaid Expense."[3] Lagnado reported that the drugs, while intended for only a small portion of the population, were often used instead as a substitute for adequate nurse staffing levels. The Office of Inspector General analyzed the use of atypical antipsychotic drugs in nursing facilities and found in 2011 that more than 90% of the atypical antipsychotic drug use violated one or more federal laws (*i.e.*, is prescribed off-label or is otherwise illegal).[4]

Johnson & Johnson Settlement

On November 4, 2013, the U.S. Department of Justice announced that Johnson & Johnson, in a global settlement, had agreed to pay more than $2.2 billion to resolve criminal and civil charges involving the misuse of antipsychotic drugs. Johnson & Johnson was alleged to have engaged in off-label marketing of the atypical antipsychotic drug Risperdal for nursing home residents who have dementia, but no diagnosis of psychosis, and to have paid kickbacks to physicians and pharmacists to prescribe Risperdal.[5]

A criminal information, to which a Johnson & Johnson wholly-owned subsidiary pleaded guilty, charged the company with directing its ElderCare sales force, from May 1, 1998 through November 2005, to market Risperdal for use with nursing home residents who had dementia.[6] Marketing materials emphasized use of the drug to treat symptoms, despite the Food and Drug Administration's (FDA) approval of Risperdal solely for patients with a diagnosis of schizophrenia and the FDA's Black Box warnings for both atypical and conventional antipsychotic drugs (warning that antipsychotic drugs may cause the death of older people with dementia).

A related civil complaint charged the company with providing false and misleading information about Risperdal and paying kickbacks to physicians to prescribe the drug. The civil settlement also resolved allegations made in a separate 2010 lawsuit that Johnson & Johnson paid kickbacks to Omnicare, the largest pharmacy company in the country serving nursing homes, "under the guise of market share rebate payments, data-purchase agreements, 'grants' and 'educational funding'" and that Omnicare treated its consultant pharmacists as part of its sales force to promote off-label use of Risperdal.

On November 4, 2013, *The New York Times* reported that Risperdal was among Johnson & Johnson's top-selling drugs, accounting for $3.1 billion in sales (and 5% of the company's revenues) in 2004.[7] In the past five years, the *Times* reported, other drug companies have settled similar cases with the Federal Government for marketing antipsychotic drugs for nursing home residents—Eli Lilly (Zyprexa) and AstraZeneca (Seroquel).[8]

The Wall Street Journal reported that in 2011, Medicare Part D (Medicare's prescription drug program) spent $7.68 billion on antipsychotic drugs (not all for nursing home residents and not including Medicare Part A spending for residents), an increase from $4.5 billion in 2007.[9]

Partnership to Improve Dementia Care Goal Not Met

In March 2012, the Centers for Medicare & Medicaid Services initiated a campaign (with nursing facilities, ombudsman programs, Quality Improvement Organizations, and others) to reduce the misuse of antipsychotic drugs in nursing homes. As part of its *Partnership to Improve Dementia Care in Nursing Homes*, CMS set a goal of reducing antipsychotic drug use for long-stay residents by 15% by the end of calendar year 2012.[10] The 15% reduction meant that the rate of antipsychotic drug use would be reduced from 23.9% in July 2012 to 20.2% by the end of 2012.[11]

When the goal was not reached in 2012, CMS continued the goal for calendar year 2013. As reported by *The Wall Street Journal*, the decline from 23.9% to 21.7% (as of March 31, 2013) represented only a 9% decrease in the use of antipsychotic drugs.[12] More recently, CMS reported in October 2013 that, as of June 30, 2013, the antipsychotic drug rate for long-stay residents was 21.14%, still far above the initial goal that CMS set for December 2012. The 21.14% rate means that more than one-in-five residents nationwide—more than 300,000 people—continue to be given antipsychotic drugs.

Inspector General's Cancellation of Audit

In its Fiscal Year 2013 Work Plan, the Office of the Inspector General (OIG), Department of Health and Human Services, described a proposed study of nursing homes' use of antipsychotic drugs—specifically, "nursing homes' administration of atypical antipsychotic drugs, including the percentage of residents receiving these drugs and the types of drugs most commonly received" and a description of "the characteristics associated with nursing homes that frequently administer atypical antipsychotic drugs."[13] However, in July 2013, the Center for Public Integrity reported that, as a result of sequestration and the loss of 20% of its workforce, OIG cancelled the antipsychotic drug project, among others.[14]

CMS' Decision Not to Require the Independence of Consultant Pharmacists

The federal Nursing Home Reform Law requires facilities to employ or obtain the services of a consultant pharmacist to review each resident's entire drug regimen monthly and to make recommendations to the attending physician.[15] The Reform Law also requires the attending physician to respond to the consultant pharmacist's recommendations.[16]

Describing the role of consultant pharmacists, CMS reports that physicians adopt the recommendations of consultant pharmacists in 74% of cases, and that long-term care pharmacies often provide consultant pharmacist services as part of their contracts with facilities, often at cost and below fair market value.[17] Accordingly, CMS indicated in the Federal Register in October 2011 that it was considering requiring that consultant pharmacists be independent of long-term care pharmacies and pharmaceutical manufacturers.[18]

Although CMS reported receiving overwhelming evidence from commenters that conflict-of-interest problems are pervasive and serious, and concluded that changes were necessary to assure the independence of consultant pharmacists, CMS did not act on its proposed recommendation.[19] Instead, it stated that requiring independent consultant pharmacists would not solve the entire problem of the misuse of antipsychotic drugs and would be "significantly disruptive for much of the LTC industry."[20] CMS declined to publish rules requiring the independence of consultant pharmacists and called on the long-term care industry, voluntarily, to adopt changes, but warned, "[s]hould marked improvement in inappropriate utilization not occur, we will use future notice and comment rulemaking to propose requirements to address these concerns."[21]

Conclusion

Inappropriate use of antipsychotic drugs by nursing facilities remains a significant problem. While this misuse is slowly declining, CMS must do more to protect the more than 300,000 residents who are given these drugs. The failure to act more aggressively risks the life and health of nursing facility residents and adds to the spiraling cost of nursing home care.

Endnotes

1. *See* Statement at http://www.medicareadvocacy.org/2-2-billion-johnson-johnson-settlement-sends-new-warning-antipsychotic-drugs-should-not-be-used-to-treat-dementia/.
2. *See* Center for Medicare Advocacy (the Center), "Antipsychotic Drugs," http://www.medicareadvocacy.org/medicare-info/skilled-nursing-facility-snf-services/antipsychotic-drugs/. In addition, the Center recently completed, with Dean Lerner Consulting, a study of antipsychotic drug deficiencies in seven states, finding that 95% of antipsychotic drug deficiencies are cited as causing "no harm" to residents. Additional findings of this study will be reported in a future Weekly Alert.
3. http://online.wsj.com/news/articles/SB119672919018312521.
4. OIG, *Medicare Atypical antipsychotic Drug Claims for Elderly Nursing Home Residents*, OEI-07-08-00150 (May 2011), http://oig.hhs.gov/oei/reports/oei-07-08-00150.pdf.
5. U.S. Department of Justice, "Johnson & Johnson to Pay More Than $2.2 Billion to Resolve Criminal and Civil Investigations,"

(News Release, Nov. 4, 2013), http://www.justice.gov/opa/pr/2013/November/13-ag-1170.html.

6. http://www.justice.gov/opa/documents/jj/janssen-info.pdf.

7. Katie Thomas, "J.&J. to Pay $2.2 Billion in Risperdal Settlement," *The New York Times* (Nov. 4, 2013), http://www.nytimes.com/2013/11/05/business/johnson-johnson-to-settle-risperdal-improper-marketing-case.html?_r=0.

8. *Id*.

9. Lucette Lagnado, "Nursing Homes' Drug Use Falls; Effort to reduce use of antipsychotic drugs falls short of goal," *The Wall Street Journal* (Aug. 27, 2013), http://www.lucettelagnado.com/news/nursing-homes-drug-use-falls.

10. CMS, *Description of Antipsychotic Medication Quality Measures on Nursing Home Compare*, http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/Downloads/AntipsychoticMedicationQM.pdf.

11. In announcing the goal, CMS stressed that the 15% reduction was just a beginning: "The initial target for the national partnership was to ensure that we made rapid progress and put systems and infrastructure in place to continue to work toward lower antipsychotic medication use. It does not mean that we believe that a rate of 20.3% is acceptable. We will set 2013 goals with our partners toward the end of 2012." *Description of Antipsychotic Medication Quality Measures on Nursing Home Compare*, http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/Downloads/AntipsychoticMedicationQM.pdf.

12. Lucette Lagnado, "Nursing Homes' Drug Use Falls; Effort to reduce use of antipsychotic drugs falls short of goal," *The Wall Street Journal* (Aug. 27, 2013), http://www.lucettelagnado.com/news/nursing-homes-drug-use-falls.

13. HHS Office of Inspector General, *HHS OIG Work Plan FY 2013*, https://oig.hhs.gov/reports-and-publications/archives/workplan/2013/Work-Plan-2013.pdf.

14. The Center for Public Integrity, Fred Schulte, "ObamaCare oversight among health watchdog cuts; Budget squeeze, staff departures force HHS inspector general to trim investigative targets" (July 25, 2013), http://www.publicintegrity.org/2013/07/25/13048/obamacare-oversight-among-health-watchdog-cuts. *See also* Fred Schulte, "Advocates for nursing home reform push back against proposed health watchdog cuts; Groups alarmed by IG's plans to scrap audit of how drugs are prescribed for patients" (Aug. 1, 2013), http://www.publicintegrity.org/2013/08/01/13091/advocates-nursing-home-reform-push-back-against-proposed-health-watchdog-cuts.

15. 42 C.F.R. §483.60(c).

16. *Id*.

17. 76 Fed. Reg. 63017, 63038-63041 (Oct. 11, 2011), http://www.gpo.gov/fdsys/pkg/FR-2011-10-11/pdf/2011-25844.pdf.

18. *Id.*

19. 77 Fed. Reg. 22071, at 22110-22107 (Apr. 12, 2012), http://www.gpo.gov/fdsys/pkg/FR-2012-04-12/pdf/2012-8071.pdf.

20. 77 Fed. Reg., 22106.

21. *Id.*

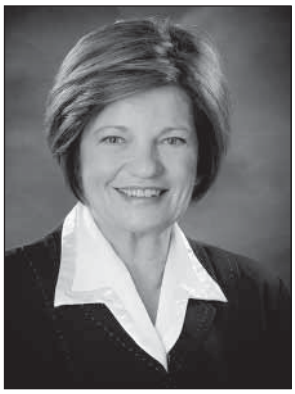
Toby S. Edelman is a Senior Policy attorney in the Washington, DC office of the Center for Medicare Advocacy. She has advocated on behalf of nursing home residents since 1977. From 1977 through 1999 she was a staff attorney with the National Senior Citizens Law Center in Washington, DC, where she was involved in the development and drafting of the nursing home reform law that was enacted by Congress in December 1987. Active in the law's implementation, she has represented residents in a variety of task forces and workgroups convened by the Health Care Financing Administration (now the Centers for Medicare & Medicaid Services) to address survey issues and enforcement of federal standards for nursing facilities.

Ms. Edelman is a member of the Board of Directors of the National Citizens Coalition for Nursing Home Reform, the Leadership Counsel of Consumer Voice, a national advocacy organization that works to improve quality of care and quality of life for nursing facility residents.

Ms. Edelman received an A.B. from Barnard College, an Ed.M. from the Harvard Graduate School of Education, and a J.D. from the Georgetown University Law Center.

Advance Directive News: Polar Opposites but the Same Sad Story

By Ellen G. Makofsky



The sad news for both families was the same: the patient was declared brain-dead and the hospital ignored the family's wishes in regard to treatment. In California, the parents of Jahi McMath fought to keep their daughter connected to a ventilator, while in Texas the husband of Marlise Munoz fought to turn off his wife's life support. Each family was confronted with a similar circumstance; however, each family had a very different reaction to that circumstance. State law played an important part in the ongoing decision-making process in each instance.

Jahi McMath was 13 years old and a California resident when she underwent surgery to remove her tonsils along with her adenoids and parts of her upper throat to try and improve a sleep apnea condition. As a complication of the surgery, Jahi began to bleed profusely, went into cardiac arrest and was declared brain-dead. Jahi's parents sued to place her on life support and then to move Jahi's body to a facility where she could continue to be kept on life support.

Jahi's family petitioned the Alameda County Superior Court to issue a Temporary Restraining Order and to issue a court order to force the hospital to provide medical treatment for Jahi. In addition, the family requested additional time to obtain another opinion on treatment and prognosis for Jahi. The Court appointed Dr. Paul Graham Fisher, the chief of child neurology at Stanford University School of Medicine, as the independent second opinion. Dr. Fisher reaffirmed the diagnosis of brain death.[1] The family appealed and requested that life support continue until they could make other arrangements for Jahi. The Court granted an extension to keep Jahi on a ventilator until January 7, 2014,[2] but refused the family's request to perform a tracheotomy and insert a feeding tube.[3] On January 5, 2014, Jahi's body was released to the Alameda County coroner which then released Jahi's body to the custody of her mother.[4]

Marlise Munoz was a 33-year-old woman who lived in Fort Worth, Texas and collapsed on her kitchen floor from what appeared to be a blood clot in her lungs. She was brought to the local hospital and placed on life support. After reflecting on Marlise's wishes, her husband asked that the ventilator be disconnected. The hospital initially chose not to comply with these directions because of a Texas law[5] that prohibits medical officials from removing life support to a pregnant patient. Marlise was 14 weeks pregnant with her second child when the incident occurred. The controversy continued for two months and Ms. Munoz's body remained in the hospital and was sustained by the ventilator. On January 26, 2014, a Court Order was issued ordering the hospital to remove Marlise Munoz from life support. The Court ruled that the Texas state law barring doctors from withdrawing life-sustaining treatment to pregnant woman did not apply to Ms. Munoz because she was brain-dead and therefore legally dead.[6]

These cases are very different from the Karen Ann Quinlan,[7] Nancy Cruzan[8] and Terri Schiavo[9] cases. In the instances of Ms. Quinlan, Ms. Cruzan and Ms. Schiavo, each was able to breathe unassisted. They were not declared brain-dead but instead were found to be in a persistent vegetative state.[10] An individual in a vegetative state is one who has no higher cognitive awareness of what's going on, but the individual still has some brain stimulation. A brain-dead person, on the other hand, cannot even maintain normal blood pressure or body temperature and requires medications and life-support technology to keep breathing.[11] Once cessation of all brain activity is confirmed and neurological tests show no blood flowing to the brain there is no chance of recovery for a brain-dead individual and this is true even though spinal reflexes can cause the body to move.[12]

Brain death is defined under New York State statute. The statute defines brain death as, "An individual who has sustained…irreversible cessation of all functions of the entire brain including the brain stem, is dead."[13] The determination must be made in accordance with accepted medical standards and the death is deemed to have occurred as of the time of the completion of the determination. The statute requires that each hospital within the state establish a written policy regarding determinations of brain death. Such policy must include a description of the tests to be employed in making the determination, a procedure for the notification to the individual's next of kin, and a procedure for the reasonable accommodation of the individual's religious or moral objection to the determination as expressed by the individual or family member or a close friend.[14]

New York State clearly defines when brain death has occurred. Both the McMath and Munoz cases are very sad. One can only have empathy for the McMath and Munoz families.

Endnotes

1. David DeBolt and Rick Hurd, *Jahi McMath: Judge denies petition to keep girl on ventilator past Dec. 30*, San Jose Mercury News, December 24, 2013 (*see* http://www.mercurynews.com/breaking-news/ci_24787952/jahi-mcmath-neurologist-present-test-results-at-closed?source=pkg).
2. NBC Bay Area Staff, *Extension Granted to Keep Jahi McMath on Life Support*, NBC, December 31, 2013 (*see* http://www.nbcbayarea.com/news/local/Jahi-McMath-Family-Granted-Extension-to-Keep-Girl-on-Life-Support-238139271.html).
3. Associated Press, *Jahi McMath Family Cleared to Take Brain-Dead Teen From Hospital*, NBC, January 4, 2014 (*see* http://www.nbcbayarea.com/news/local/Jahi-McMath-Family-Back-in-Court-Lawyer-Declares-Hearing-A-Victory-238627721.html).
4. Hailey Branson-Potts, *Jahi McMath's body released from hospital*, Los Angeles Times, Jan. 5, 2014. (*see* http://www.latimes.com/local/lanow/la-me-ln-jahi-mcmaths-body-released-from-hospital-20140105,0,6253257.story#axzz2seFpetRu).
5. Tex. Health & Safety Code Ann. § 166.049 (2013).
6. Ed Lavandera, Josh Rubin and Greg Botelhom, *Texas judge: Remove brain-dead woman from ventilator, other machines*, January 24, 2014. (*see* http://www.cnn.com/2014/01/24/health/pregnant-brain-dead-woman-texas/).
7. *In re Quinlan*, 70 N.J. 10 (1976).
8. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).
9. *Schiavo ex rel. Schindler v. Schiavo*, 358 F. Supp. 2d 1161 (M.D. Fla.), *aff'd*, 403 F.3d 1289 (11th Cir.) (denying injunction), *reh'g en banc denied*, 404 F.3d 1270 (11th Cir.), *reh'g denied*, 404 F.3d 1282 (11th Cir.), *stay denied*, 125 S. Ct. 1722 (2005).
10. The New England Journal of Medicine defines a persistent vegetative state as "a clinical condition of complete unawareness of the self and the environment, accompanied by sleep-wake cycles, with either complete or partial preservation of hypothalamic and brain-stem autonomic functions." N. Engl. J. Med. 1994 May 26;330(21):1499-508.
11. Erik Ortiz, *Case of Jahi McMath raises questions about life after brain death*, NBC News, January 20, 2014.
12. Lee Romney, *Jahi McMath Q&A: Can brain death be reversed?*, Los Angeles Times, January 6, 2014.
13. N.Y. Comp. Codes R. & Regs. tit. 10, § 400.16(a)(2) (2013).
14. *Id.* § 400.16(e)(1)-(3).

Ellen G. Makofsky is a partner in the law firm of Raskin & Makofsky LLP with offices in Garden City, New York. The firm's practice concentrates in elder law, estate planning and estate administration. Ms. Makofsky is a past Chair of the Elder Law Section of the New York State Bar Association ("NYSBA") and served as an At-Large Member of the Executive Committee of the NYSBA. She is the current Co-Chair of NYSBA's Women in the Law Committee. Ms. Makofsky has been certified as an Elder Law Attorney by the National Elder Law Foundation and is a member of the National Academy of Elder Law Attorneys, Inc. ("NAELA") where she serves as the Chair of its Health Care Section. She is a Past President of the Estate Planning Council of Nassau County, Inc.

The Contested 17-A Guardianship: An Overview

By Naomi Levin

The Article 17-A guardianship proceeding allows parents with an intellectually or developmentally disabled child to retain decision-making authority for the child once he or she is 18 years old.[1] The proceeding, which encourages *pro se* legal representation, can become complicated if the parents do not agree on who should serve as guardian because the statute presupposes agreement on whether one or both parents will serve.[2] The statute does not offer significant guidance for handling a contested 17-A proceeding. Thus, faced with parents who have had an acrimonious divorce, or a potential cross-petitioning family member alleging that a parent is unfit to serve as guardian, a legal practitioner will have to look elsewhere for guidance. This article will examine some of the factors courts have relied on to decide between adverse parties in SCPA 17-A proceedings.

I recently experienced both the legal constraints of a contested 17-A proceeding and, with the court's encouragement, the benefits of a settlement. Our law office was retained to handle an Article 17-A petition on behalf of the divorced father of a developmentally disabled young adult, VC. The father had been awarded custody of all his children, including VC, in the earlier matrimonial proceeding. Although the forensic report from the divorce was confidential, other court records demonstrated the mother had a history of substance abuse, non-violent felony convictions, and mental health issues. Supervised visitation during her children's minority years was conditioned on VC's mother continuing in treatment programs; however, evidence showed that she continued to struggle with substance abuse. Additionally, a Long Island psychiatric facility restricted the mother's access to VC when it became clear that her visits had a medically harmful impact on his treatment.

Our client's goal was to be appointed VC's co-guardian, with his second wife (of more than 10 years). VC's mother refused to sign the Article 17-A *Waiver, Renunciation and Consent*, consenting to the father's 17-A petition. She was subsequently served with a Citation, and thereafter retained counsel, filed verified objections, and sought her own appointment as sole guardian for her son.[3]

When the parties do not agree about whether a 17-A guardian is needed, or who the guardian, standby guardian, or even alternate standby guardian should be, the proceeding is contested. One option for addressing this situation is to ask the court to dismiss the petition and, thus, give the parties the opportunity to do their battle in Supreme Court under Mental Hygiene Law Article 81.[4] Assuming, however, that the Surrogate's Court retains jurisdiction over the case, a contested 17-A proceeding can only be resolved by a trial or stipulation of settlement between the parties.

The "Best Interests" Standard for Appointing a Guardian

Contested or not, the court's decision to appoint a 17-A guardian is based on whether the appointment of a guardian (in general) and of the specific, proposed guardian(s) (in particular), would be in the adult child's best interests.[5] The 17-A statute does not define "best interests"; however, case law articulates various factors. In *Matter of Katherine Ann Nolan*, the aunt of Katherine, an adult with developmentally disabilities, obtained custody of her niece through a family court order and remained her *de facto* guardian after her 18th birthday for a total of 27 years. Eventually, Katherine's biological father and stepmother petitioned to be appointed 17-A guardians. The aunt objected. In its decision, the Suffolk County Surrogate compared each party's ability to meet Katherine's short- and long-term needs. The court found that the father had made short- and long-term arrangements for Katherine's supervision and care, including arranging for someone to be with Katherine in the mornings and afternoons when the father was not home and Katherine was not attending a day habilitation-type program. The father also had placed Katherine on a wait-list for future residential placement.

By comparison, the Surrogate found that the aunt did not have assistance or contingency plans for Katherine's short-term care, and that she was opposed to Katherine's eventual placement in a residential facility (which was recommended by the Director of Family Service for Long Island's OMRDD's office).[6] The Surrogate also expressed "serious doubts" as to the aunt's fitness to serve as 17-A guardian, citing examples of her unwillingness to cooperate with Katherine's day program staff and case managers, and refusal to consider the input of professionals involved with Katherine's care and services. Significantly, the Surrogate stated that "while no one factor may be determinative and each appointment must be evaluated on a case by case

basis, certain elements are essential to the equation. In determining what constitutes the 'best interests' of an individual under Article 17-A of the SCPA, the court must consider the emotional needs of the incapacitated individual, her physical and intellectual needs and the limitations imposed upon her as a result of her disability."[7]

Presumption that Best Interests Are Served by Appointing Parent as Guardian

There is an initial presumption that it is in the best interests of the disabled person for the parent to be appointed as guardian. However, "this presumption is rebutted by a showing that the parent does not possess the qualifications required of a fiduciary by reason of a want of understanding, or that the parent is not capable of providing a safe, nurturing, and stable environment, even where that parent shows genuine love for the child."[8]

In the 1999 Appellate Division decision in *Matter of Darius Ignatius*, the First Department reversed and vacated a New York County Surrogate's order that conditionally issued 17-A Letters of Guardianship to the father of a young man diagnosed with severe mental retardation, autism, and behavioral disturbances.[9] Finding that the parental presumption was rebutted, the court stated that "evidence of poor judgment on the part of a prospective guardian, whatever the family relationship, should be a factor precluding appointment."[10] The court found that the father had exhibited poor judgment by refusing to consent to surgery for his son's broken teeth and jaw anywhere but in Manhattan (although the injury occurred in Schenectady, New York) resulting in delay of treatment for six or seven days. Additionally, the father refused to cooperate with an agency's advice and counsel on his son's care, a condition of the original Surrogate's order appointing him temporary guardian.[11] The Appellate Division held that the father's behavior rose to the level of poor judgment, making him unsuitable to serve as guardian, and thereby revoked his appointment.

Similarly, in *Matter of Boni P.G.*, another case in which a parent was not appointed guardian, the Bronx County Surrogate's Court found "extraordinary circumstances" that warranted a denial of the mother's guardianship petition, despite the initial presumption in her favor.[12] Specifically, the court held that the mother's "alternatively hostile and ostrich-like approach to her son's care and treatment needs," including refusal to meet with her son's doctors and teachers, prevented her from making informed decisions about her son's medical, educational and day-to-day needs. The court granted Letters of Guardianship to the cross-petitioner, a sister, who demonstrated her willingness to consult with her brother's teachers and doctors and make informed decisions about her brother's health and well-being.

In a 2009 decision, the New York County Surrogate granted the petition of a disability agency to revoke Letters of 17-A Guardianship issued to the mother of a man with intellectual disabilities.[13] In this interesting case, an Article 81 guardian had been appointed subsequent to the Article 17-A proceeding, but the 17-A Letters were never revoked or amended to address any potential conflicts between the guardians' roles. Eventually, the mother decided to remove her son from a group home despite evidence that he was thriving there. The mother petitioned the Supreme Court to remove the Article 81 guardian, but refused to consent to a home visit so that a guardian ad litem could assess the proposed living arrangement. The mother also refused to divulge her address to the court, or to tell the court where she planned to bring her son after removing him from the residential facility. Ultimately, this refusal to cooperate led the court to conclude that the mother lacked understanding of her role as a guardian, and her previous erratic and inappropriate behavior toward her son raised additional concerns about his safety in her care. On the basis of this evidence, the Surrogate found that the initial presumption favoring appointment of the parent was overcome, and revoked the mother's 17-A Letters of Guardianship.[14]

Selecting a Guardian Between Cross-Petitioning Parents

There does not appear to be an analogous presumption for selecting the 17-A guardian in a contest between parents. In a 1999 Nassau County Surrogate's decision, the court found that it was in the best interests of a young woman with developmental disabilities to appoint both her divorced, cross-petitioning parents as co-guardians.[15] The appointment divided the guardian powers between the parents. The father was granted authority over his daughter's therapy, life planning, and service coordination. The mother was given physical custody and decision making authority over the nature and quality of the daughter's interpersonal relationships. The court explained that the division of powers reflected the areas over which each parent had exerted control prior to the Surrogate's order.[16] The decision also contained a warning to the mother: the court had "tolerated her intemperate outbursts and her disingenuous excuses only because of its concern for her daughter's well-being" and that "any future failures to comply with this decision must lead the court to conclude that the mother is incapable of subordinating her animosity to her concern for her child's best interests." The court held that "[t]he cumulative effect of these repeated failures will compel the court to order a change of custody immediately in order to salvage the father's efforts to make their daughter more self-reliant."[17]

Substantially different facts and a different result are found in the 2007 New York County Surrogate decision in *Matter of Natalie Stevens*.[18] Here, Natalie's natural mother sought appointment as co-guardian with her husband, Natalie's stepfather (of twenty years). Natalie's natural father objected and asked to be appointed as co-guardian with Natalie's mother.[19] Natalie's mother had been her primary caretaker for her lifetime. Natalie's natural father did not participate in her care or provide any financial support. Although the court found that the natural father and his wife could provide a good home for the Natalie, it determined it was in her best interests to have her mother appointed as sole guardian, citing an analogous preference against shifting custody. The Court also acknowledged the "sacrifices and devotion of a loving family" that had created the high quality life that Natalie enjoyed.[20]

Despite acknowledging her stepfather's contribution to Natalie's care, the Surrogate did not appoint him co-guardian. Citing his age and health problems, the court found that if Natalie's mother predeceased him, there was no assurance that Natalie's best interests would be served by her stepfather alone. Instead, the court appointed him standby guardian. The decision articulates the reason: because he lived with Natalie and was familiar with her care, he was the person best situated to take short-term, immediate responsibility, should the guardian pass away or become incapacitated. Since a standby guardian stepping into the role of guardian must have his permanent appointment confirmed by the court, Natalie's natural father could then apply for guardianship.[21] At that time, the court would "make a best interests determination appropriate to the circumstances as they might then exist."[22]

In its 2013 decision in *Matter of Kevin Z.*, the Appellate Division, Third Department indicated that a divorced couple's custody arrangement will not preclude a trial if both parents do not consent to the guardianship arrangement.[23] In this case, the mother of a young man with developmental disabilities challenged the Surrogate's Court decree that granted sole guardianship to the young man's father with alternate weekend parenting time for her. The court's decision paralled a prior Family Court order that provided for the same custody arrangement.

In its decision, the Appellate Division held that, generally, child custody and visitation orders are not entitled to *res judicata* effect, as they are subject to modification, and that the Surrogate's Court was wrong to suggest that the order deserved special weight.[24] Nonetheless, the Appellate Division sustained the Surrogate's order, holding that notwithstanding its incorrect application of *res judicata*, the Surrogate actually "undertook an appropriate and complete best interests analysis," conducting a full hearing and considering all of the evidence presented, including the fact that the father had been the *de facto* guardian for almost ten years and had a better plan for Kevin's future than his mother, who often failed to visit with him, was minimally engaged in his care and education and was unable to cope with his behaviors. The Appellate Division did reverse that part of the Surrogate's Court decision which provided less visitation time for the mother than she had been entitled to under the Family Court order. The Court held that since there had be no change in circumstances to warrant a change in custody / guardianship, there was likewise no justification for decreasing the mother's visitation time and that "broader and more specific parenting time order" would be in Kevin's best interests.[25]

Stipulation of Settlement to Resolve the Contested 17-A Without Trial

My recent contested 17-A case was resolved by a written, detailed, stipulation of settlement between the parties. A stipulation of settlement can address a wide array of issues, including who the guardian and standby guardian are, visitation rights, and access to medical information.[26] When preparing the 17-A guardianship petition, it is important that the legal practitioner and client be prepared for any possible contests and objections. The practitioner should be familiar with his or her client's personal and familial history, the client's objectives in filing the 17-A petition, whether there is a history of family conflict, and with the care plan for the child. In particular, if the client wishes to avoid a contested trial, it may be the legal practitioner's role to navigate and negotiate a settlement agreement that achieves the client's objectives, and is in the best interests of the person with developmental or intellectual disabilities. In my recent case, the ultimate resolution by stipulation meant my client was appointed as sole guardian for his son, and serves as a good example of the contested 17-A process and the considerations discussed in this article.

Endnotes

1. See SCPA Article 17-A (Surrogate's Court Procedure Act § 1750 *et seq.*)
2. See *In re Chaim A.K.*, 26 Misc.3d 837, 885 N.Y.S.2d 582 (Sur Ct., NY Co. 2009). An Article 17-A guardianship proceeding "is thought to be faster than Article 81; petitioners are often pro se, and the combination of simplified forms, service requirements, and assistance by the clerks in Surrogate's Courts mean that a lawyer is not necessary." *Id.* at 842.
3. Form GMD-3 (1 / 2004), available online from http: / / www.nycourts.gov / forms / surrogates / omni / gd17A.pdf.
4. For Article 81 proceedings, see Mental Hygiene Law § 81.01 *et seq.* "When it appears that the subject's inability to 'manage him or herself and / or his or her affairs' is not necessarily attributable to mental retardation or developmental disability, an appointment under article 17-A may not be in the 'best interest' of the subject[.]" *In re Chaim A.K.*, 26 Misc.3d 848. "Article 17-A is almost purely diagnosis driven, while Article

81 requires a more refined determination linking functional incapacity, appreciation of danger, and danger itself." *Id.* at 842.

5. See SCPA 1754(5), which provides that the court shall appoint a guardian if it is satisfied the respondent's best interests are promoted by said appointment.

6. Interestingly, on October 2013, New York Governor Andrew Cuomo issued the Olmstead Report, which establishes a priority for community-based, non-institutional residence and services for persons with developmental and intellectual disabilities. [Note that OMRDD is currently referred to as OPWDD, Office of Persons with Developmental Disabilities.] *Report and Recommendations of the Olmstead Cabinet: A Comprehensive Plan for Service New Yorkers with Disabilities in the Most Integrated Setting,* New York State, Andrew M. Cuomo, Governor (Oct. 2013), available at http://www.governor.ny.gov/assets/documents/olmstead-cabinet-report101013.pdf.

7. *In re Katherine Ann Nolan,* N.Y.L.J. Oct. 2, 2003, at 29, col. 3 (Sur Ct., Suffolk Co. 2003).

8. *In re Fausto Miguel O. III,* N.Y.L.J. Aug. 10, 2009 at 26, col. 4 (Sur Ct., NY Co. 2009) citing *Matter of La Fountain,* 22 A.D.2d. 566 and *Matter of Patricia M.D.,* N.Y.L.J. March 16, 1995 at 34, col. 1, *affd.,* 223 A.D.2d 326, for the proposition that there is an initial presumption in favor of appointing parent(s) as Article 17-A guardian(s), and *Bennett v. Jeffries,* 40 N.Y.2d 543 and SCPA 707[1][e] for the proposition that this presumption is rebuttable. For a recent example of a case applying this standard, see *In re Timothy R.R.,* 2013 N.Y. Misc. LEXIS 6008, 2013 NY Slip Op 23442 (Sur Ct., Essex Co. 2013). After the mother died of a terminal illness, the court held a trial to consider competing 17-A petitions filed by the natural father and maternal aunt. The Surrogate appointed the father 17-A guardian, citing the preference for parents as guardians, and the rule that "'strangers will not be appointed as [guardian] of the person or property of the incompetent, unless it is impossible to find within the family circle, or their nominees, one who is qualified to serve.' (*In re Dietz,* 247 A.D. 366, 367, 287 N.Y.S. 392, 394 [1st Dept., 1936]). Based upon various provisions of SCPA articles 17 and 17-A, and the circumstances of this case, the status of the aunt is that of a stranger rather than a member of the 'family circle.'" *In re Timothy R.R.* at 10-12.

9. *In re Darius Ignatius M.,* 202 A.D.2d 1, 615 N.Y.S.2d 367, 368 (1st Dep't 1994).

10. "As a father [the petitioner] has certain rights with respect to the proposed medical and other treatment of his son, but as *guardian* his consent or objection to treatment will deprive the ward of a court hearing in the case of objection." *Id.* at 368 [internal citations omitted].

11. *Id.* at 369.

12. *In re Boni P.G.,* 2006 N.Y. Misc. LEXIS 4699; 236 N.Y.L.J. 96 (Sur Ct., Bronx Co. 2006). "The presumption that it is in the best interests of infants that their parents prevail in a contest with a non-parent in guardianship, custody or similar proceeding may be overcome only where the non-parent establishes extraordinary circumstances… As a matter of common sense, [this] presumption favoring the parent in infant guardianships is also applicable to SCPA Article 17-A guardianships proceedings where the respondent is an adult."

13. *In re Fautso Miguel O. III,* N.Y.L.J., Aug. 10, 2009, at 26, col. 4 (Sur Ct., NY Co. 2009).

14. See also *In re Garrett YY,* 258 A.D.2d 702, 684 N.Y.S.2d 700 (3rd Dep't 1999), affirming the Surrogate's Court (Delaware County) order modifying a prior order that appointed parents as co-guardians by revoking the mother's Letter of Guardianship. The court determined that joint guardianship became unworkable after the parents' divorce, and that the mother was incapable of subordinating her own interests in favor of her son's. Additionally, the court found that the father had an age appropriate relationship with the his son, and worked to develop his independence and self-reliance, while the mother had a history of alcoholism and verbal abuse, treated her son like a toddler and exhibited inappropriate affection toward him.

15. *In re Haley M.,* N.Y.L.J., June 1, 1999, at 32, col. 3 (Sur Ct., Nassau Co. 1999).

16. The court determined that the father was entitled to visitation identical what he enjoyed under the minority visitation schedule. *Id.*

17. *Id.*

18. *In re Natalie Stevens,* 17 Misc.3d 1121(A), 851 N.Y.S.2d 66, 2007 N.Y. Slip Op. 52097(U) (Sur Ct., NY Co. 2007).

19. One basis for the natural father's objection was that Natalie's mother (the petitioner) was a Jehovah's Witness and had a religious objection to blood transfusions. The court was satisfied by the petitioner's statement that she would acquiesce to a transfusion if the state courts ordered one. Additionally, the need for a blood transfusion was a purely hypothetical one—there was no indication that Natalie had ever needed one, or that she was likely to need one in the future. *Id.* at 2-3.

20. "[A] child's welfare dictates that a shifting of custody should be avoided whenever possible." *Id.* at 4, citing *Matter of Kevin M. v. Alice A.,* 50 A.D.2d 959, 960 (3rd Dep't 1975).

21. "The law provides that a standby guardian may serve for up to 60 days before returning to court, either to seek permanent guardianship, or cede that responsibility to another (*see* SCPA 1757[2])" *Id.*

22. *Id.* at 5.

23. *In re Kevin Z.,* 105 A.D.3d 1269, 2013 N.Y. App. Div. LEXIS 2721; 2013 NY Slip Op 2788 (3rd Dep't 2013).

24. Despite stating that custody and visitation orders are not entitled to *res judicata* effect, the Court indicated that "where modification of an existing custody decree is sought, the prior decree and the circumstances on which it was based must be given due consideration because stability is in a child's best interest" *In re Kevin Z.* citing *Matter of Robb v. McIntosh,* 99 A.D.2d at 571 and *Friederwitzer v. Friederwitzer,* 55 N.Y.2d 89, 94-95 [1982]). *Matter of Kevin Z.,* citing *Matter of Robb v. McIntosh,* 99 A.D.2d 571, 571 [1984] and *Matter of Fraczek v. Syczyk,* 12 A.D.3d 973, 975 [2004]).

25. *In re Kevin Z.,*105 A.D.3d 1269. The matter was remitted to the Surrogate's Court for creation of a visitation schedule modeled on the Family Court order.

26. My case was in Suffolk County, but Surrogate's Courts in other counties have ratified stipulations. For example, in *Matter of Cory Vazquez,* the Bronx County Surrogate's Court approved a stipulation amending the petition to appoint respondent's father and stepmother as co-guardians and instead authorized temporary Letters of Guardianship to the father alone, subject to the mother being permitted to visit her son (see *In re Corey Vazquez,* N.Y.L.J., March 3, 2000, at 30, col. 5 (Sur Ct., Bronx Co. 2000)).

Naomi Levin is an associate attorney with the Polner Abrahams Law Firm, an Elder Law, Estate Planning & Special Needs law firm on Long Island, NY. Ms. Levin focuses on 17-A guardianship legal proceedings and Medicaid applications, estate administration and accountings.

Least Restrictive Environment: The Integration Presumption 35 Years Later

By Lenore Davis

There are undoubtedly numerous ways of characterizing what the Education for All Handicapped Children Act of 1975 is really all about. I am reminded of these lines from Ralph Ellison's *Invisible Man*:

> I am…invisible…I am a man of substance, of flesh and bone, fiber, and liquids—and I might even be said to possess a mind. I am invisible, understand, simply because people refuse to see me.[1]

A. Introduction

There is dialogue amongst those in special education law regarding the effectiveness of the Least Restrictive Covenant presumption, a.k.a., the "Integration Presumption." While the debate on the purpose of the Presumption is outstanding and, therefore, there is a debate as to whether the Presumption is fulfilling its purpose, there is agreement that there is more work that has to be done in the area.

This article will discuss the dialogue amongst three professors in this area. Professor Ruth Colker feels that the purpose of the presumption was to deinstitutionalize those in special education. Mark C. Weber feels that the Integration Presumption's real issue is focusing on proper related services so that integration can be effective. Samuel Bagenstos feels that while there has been proper lip service to integration, it has not idealistically occurred.

B. Background

Congress has found the following:

1. Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving education results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.
2. Before the date of enactment of the Education for All Handicapped Children Act of 1975(EAHCA), the educational needs of millions of children with disabilities were not being fully met…"[2]

For a State to receive Federal funding for educating children with disabilities, among the conditions of education, a child must be placed in the Least Restrictive Environment:

> In general. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[3]

The debate starts with the question of what was Congress' purpose in including the Integration Presumption in the Individuals with Disabilities Act ("IDEA").[4] Ruth Colker, in her article, *The Disability Integration Presumption: Thirty Years Later*,[5] argues that the Integration Presumption "was created by Congress to mandate the closing of inhumane, disability-only educational institutions but not to require fully inclusive education for all children with disabilities."[6] She argues that "modification of the integration presumption can help it better serve the substantive goal of according an adequate and appropriate education to the full range of children who have disabilities while still protecting disabled children from inhumane, disability-only educational warehouses."[7] These institutions took children far from their homes, isolating them from regular education children and their own families, and offered them little or no education. The Integration Presumption helped achieve the goal of closing these institutions, and it hastened structural change in the alternatives available to children with disabilities.[8] The Integration Presumption has the structural purpose of encouraging the creation of a range of programming and continuum of services.[9]

In 1974, 1 million disabled children were excluded from public school education, and of the 6 million disabled children in public school, nearly half were receiving no special education.[10] Colker argues that there should have been no requirement for the school to justify its position when deciding to place children in segregated environments, because it interferes with the mandate that each child receives what is appropriate for him.[11] This tipping of the scales in favor of integration to move schools to develop programs at times sacrificed what was in the best interest of a child for the common good. But now that disability-only institutions are used infrequently,[12] it is time to refine the Integration Presumption to help it better achieve an adequate and appropriate education for children with disabilities.[13]

Colker uses *Roncker v. Walter*[14] to reveal the rigidity of the Integration Presumption, where the severely mentally retarded student, Neil Roncker, was to be placed by the school district in a segregated school where he would be educated with children of the same educational and chronological age. During the pendency of the action, Neil was placed where his parents wanted him, in a class for severely mentally retarded children at a regular elementary school. Neil made no progress, in fact, he regressed, and the school district felt that he would progress in a segregated school.

The Sixth Circuit stated that even where the segregated school was superior, those services which make it superior should be provided in the integrated setting. Neil's progress or lack thereof was considered a "relevant factor," but "not dispositive" of the placement issue. The fact that Neil did not really have the ability to interact with other children was not even a factor in applying the Integration Presumption. The Dissent stated that Neil's parents argued that he should be educated in the regular school environment even "if the only benefit from such placement is to avoid the stigma of attending a special school…. His parents simply needed to invoke the mainstreaming presumption for Neil to be placed in a regular school."[15]

Colker asserts that the issue in *Roncker* should have been whether the disability-only institution was a high quality institution or a warehouse which provided little educational benefit to children. Roncker was placed in a regular public school irrespective of whether it could offer him more educational benefit than the segregated school. Despite the requirement that he receive an "individualized" educational plan, the outcome of the case was decided on the basis of a presumption rather than individualized evidence of what program was most likely to benefit him.

Although students with obvious and severe disabilities may well be accepted in the regular classroom, surveys of regular classroom teachers reveal that they "do not know how to provide instruction that meets the unique needs of students with obvious disabilities." Teachers tolerate the students which should not be equated with genuine education.[16] Studies indicate that "regular classroom teachers perceive handicapped children to be socially and academically inferior to regular children. However, these are the very teachers who will be required to accept handicapped children into their classrooms. By contrast, special education teachers have usually become educators in order to teach children with special needs. Because of their educational background and interests, they are more likely to have a positive attitude about children with disabilities.[17]

It may be better for children's self esteem to be clustered with children like themselves in terms of ability and chronological age, rather than be clustered with children who are substantially different from them. That self-esteem benefit, however, only makes sense if the children are taught by teachers who have high expectations for the children's achievement. By virtue of their training, special education teachers may be inclined to have higher expectations for children with disabilities than regular classroom teachers.[18]

The Integration Presumption should continue its function as the element that ensures that States evolve a continuum of services which would provide more individualization of each child's needs, but as part of that continuum and giving precedence to what is in the child's best interest, the continuum should include segregated education if that is most appropriate.[19] Brian L. Porto, J.D., in his comment on Least Restrictive Environment ("LRE"), summed up the issue by stating that it is often difficult for schools to reconcile integration with individualized programs. The tension between the two is the cause of most litigation concerning LRE.[20]

We move from Colker's arguments to two responses to Colker and then to an analysis of all three arguments.

The first response to Colker's paper was an article written by Mark C. Weber,[21] wherein he argued that there is no basis to Colker's finding that the objective of the IDEA was to force deinstitutionalization. Rather, he asserts that the sources focus on "getting students out of self-contained public school classes and into regular education classes, either part-time or full-time, with adequate support to enable the children to thrive there."[22] Yet, Weber contradicts himself in footnote 18, where he cites H.R. Rep. No. 93-805, "It is the Committee's hope that this provision will afford the greatest encouragements to the states to initiate and accelerate programs designed to de-institutionalize as many of these children as possible."[23] He argues that integration was meant not to close institutions, but to place children in regular education classrooms.

Weber argues that the

> real issue in the debate over the application of the disability integration presumption is the presence or absence of related services for the child in the integrated setting. The educational literature identifies related services as the means to success in a mainstreamed placement…it is the key to resolving the current controversies in the schools.[24]

Yet, Weber raises issues more significant than the availability of services which relate to the success of a child's integration into a regular education classroom:

1. Children with special needs are generally placed in the worst facilities with the least capable teachers and poor funding;[25]
2. These children experience harassment by their classmates;[26]
3. They tend to have lesser service provider quality;[27]
4. A general education teacher can be non-cooperative in making accommodations;[28]
5. Class sizes are often too large.[29]

Weber asserts that there should be a nuanced approach to integration. Presently, if the school district or the parent wants the child to be integrated, the Courts will generally require integration. Weber feels that

1. When parents resist integration when the school district wants it, the presumption in favor of the integrated option proposed by the school should not be a strong one. It should be dispelled by evidence that the school's specific proposal, as likely to be implemented, will not be successful for a given child.

Unlike Colker, who emphasizes whether a school has a continuum of services, Weber feels that the issue is whether the option offered by the school is good for the individual child.

2. When the parent wants more integrated services and the school district resists, "the balance of probabilities tips in favor of the parents' position. There is enough risk that the district is motivated by cost, internal politics, or standard operating procedure to call for a strong presumption in favor of the integrated option."[30]

The second response to Professor Colker was from Samuel Bagenstos, who asserts that facts, not abstract ideology, should drive policy.[31] He feels that the failure of segregation reflects the educational system's refusal to provide true integration, and the school's real desire to take the easy way out by placing the child in a segregated, designated class.

Bagenstos returns to the statutes and reads them favorably, and maybe a bit idealistically. He feels the courts are misreading and misinterpreting the statutes. The integration is merely a presumption rebuttable by a showing that it is not appropriate for a child. The statute states simply that there should be segregation to the maximum extent appropriate for the child.

Where Professor Colker uses *Roncker* to prove that the Integration Presumption appears to be irrebuttable, Bagenstos uses the case to reveal that the presumption was indeed rebuttable when the Sixth Circuit remanded, stating "that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, or because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting."[32]

Bagenstos supports Weber and Colker in questioning whether the failure of a child in a regular education setting is a reflection of the needs and capabilities of the child, or the failure of the school district to properly support the child in the regular education class.[33] He supports the continued use of the Integration Presumption in continued evolution of accommodation of students in the classrooms which can benefit regular education students as well, and to continue to break the school districts "inertia" in creating additional services for the continuum.[34] Colker asserts that kids often are not accepted in the classroom.[35] Bagenstos' response is that the schools and teachers are failing to force the children to accept the disabled in their classrooms.

Bagenstos concludes that regarding the Integration Presumption:

1. If the Integration Presumption is harming children we need to know;
2. Not all disabled students are best served in integrated settings;
3. Colker hasn't shown that the Presumption pushed children into inappropriate settings in significant numbers; and
4. There is still concern that abolishing Presumption would re-segregate the disabled.[36]

C. Analysis

There need not be an argument as to what Congress intended in passing the EAHCA. There is some legislative history that reveals Congress' intent. Congress' perception that a majority of handicapped in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms

awaiting the time when they were old enough to 'drop out.'"[37]

Senator Robert T. Stafford, then Senator of Vermont, wrote about the background to the EAHCA and what prompted Congress to enact the legislation. The Act "tackles the delicate mission of prodding, through legislation, those regions which are not correctly serving their handicapped population…."[38]

> The law also provides for an "appropriate" education to take place in the least restrictive environment. Some call this 'mainstreaming', but that is not, in my view, a good expression because it implies that all handicapped children must be educated in the regular classroom. That is not at all what we in the Congress sought or intended. Rather, we had a view to integration with non-handicapped children as the governing principle, especially where there is clear evidence that just the opposite was what was occurring in the past. We recognized, however, that there are many instances when it would be harmful to a handicapped child to force him or her into a regular classroom situation.[39]

What the three authors referenced in this discussion are struggling with is not whether the Integration Presumption was historically necessary, or the progress that has been made with the Presumption in place, but where the Integration Presumption is today, and where the Presumption should be going to make further progress towards Congress' goals in enacting the IDEA.

All three authors agree that broad integration has occurred. They also agree that it must be fine-tuned. There are still very real problems with integration identified by each author that have to be addressed:

1. Colker notes that teachers do not know how to instruct those with disabilities. Bagenstos feels that if we provide all teachers with instruction on how to teach those with unique needs, that it would benefit not only disabled children, but all children.
2. Weber focuses on the general education teacher who is not cooperating;
3. Colker emphasizes that it might be better for children to be clustered with those who are like themselves in terms of ability and chronological age; it would improve their self-esteem.

For a discussion on whether integration is beneficial to those who do not want or understand integration, see, *Normalization and Idealism*, Charlotte Schwartz, MSW, CSW, Assistant Professor and Supervisor of Social Work Training, Mental Retardation Institute, New York Medical College (1977). Mrs. Schwartz decries society's attempts to force "normalization" on those who clearly are not prepared for it:

> The trend of the 1960s has left us idealistically blinded to the harsh facts of social reality and more important, to the painful truths of psychological reality. Man is not created equal in all respects…. We [mental health providers] became enmeshed in a policy of normalization and deinstitutionalization, that I fear reflected fanciful wishes rather than sound reality. Was it our guilt for the shame of the Willowbrooks; are we now apologizing, making retribution by the drive for mainstreaming? It is true that we did not fight sufficiently to qualitatively change the lives of the retarded. We did not expand the possibilities for emotional…work experiences that enhance self-esteem, gratify basic impulses and provide opportunities for a more human existence. But one cannot change one evil by creating another in its image…we have failed to examine the capacity of retarded persons to adapt to the pressure of this highly industrialized and competitive society…. I suggest that the entire program of "normalization," as conceived, has placed an undue burden upon the retardate's psychic structure by exposing him to constant and repeated frustrations of enormous magnitude in the everyday world…. Normalization is possible only within a setting that can provide security, a means of achieving self esteem, the possibility of emotional…gratification, real friends, marriage and a common level of achievement. I do not believe that normalization is possible in a society that is basically alien and for whom the ideals are essentially unattainable. What exist currently are enormous loss, isolation, self-hatred and denigration. We have established group living but without the basic and inherent qualities of a group. The pretense of equality of mainstreaming leads…ultimately to social maladaptation.

4. Colker: Special education teachers, by virtue of their training, may be inclined to have higher expectations for children with disabilities than regular classroom teachers. Studies indicate that regular classroom teachers perceive handicapped children to be socially and academically inferior to regular children;

5. Weber: Children with special needs are generally placed in the worst facilities with the least capable teachers and poor funding;

6. Weber: Harassment of students by their classmates needs to be addressed;

7. Colker: Disabled children are often not accepted in the standard education classroom;

8. Bagenstos: The schools and teachers are not working to have the children accepted in the classroom;

9. Weber: Service provider quality should be improved;

10. Weber: Classes sizes should be managed better;

11. Weber: The risk that a school district is motivated by costs, internal politics or standard operating procedures must be monitored and controlled;

12. Bagenstos: School districts are still paying lip service to the statutes, since it is easier for them to provide segregated services. School inertia must be addressed.

13. Colker, Weber and Bagenstos: If a child fails in a regular education class, it is not because the child is inappropriate for the class, but because the school district is not providing the proper (real) support;

14. Bagenstos: Courts are misreading the statutes: "appropriate" should trump LRE.

Each one of these issues that are presently rampant in the school systems allow us to really understand why some parents nowadays are looking to pull their more severely handicapped children from regular classes. Additionally, the more severely handicapped children can never attain social acceptability and real educational goals as their regular peers, and placing them in integrated classrooms can lead to constant frustration and lowering of self-esteem in their struggle to keep up with their regular education peers. In segregated schools they can be with true peers.

Statutes and lawsuits can force school districts to act to integrate, but the backlash comes when it is in the best interest of the child to be in a segregated environment, where it would cost the school district more to educate the child, that the school district uses the LRE to hold the child back from a segregated school even if it is superior to what the school district can provide.

As a paradigm of this issue, I bring forth the example of Gallaudet University, a university established for furthering the interests of those who are deaf. They are a community for the deaf, where the deaf feel absolutely accepted. Only 5% of each class may be made up of those who are not deaf, as a policy. It is an empowering school where students feel they can accomplish with pride in their deafness. In recent years, with the advancement of technologies and therapies that would allow students to hear and to integrate into society more, there is a vocal view within Gallaudet not to change. Many have resisted cochlear implants, feeling that even raising the question of change means that society feels that there is something inherently wrong in being deaf. Many have resisted learning how to lip read, preferring sign language, a natural barrier to integrating into the general society. So strong is this feeling that they forced out of office a university President who was pro-lip reading. The students felt that society was not accepting them as is, but was asking / requiring / forcing them to accommodate society at large. This made them feel inadequate or inferior.

The Civil Rights mandate requires that society accommodate those with handicaps, not vice versa. Yet our desire to integrate those who are different into a normal society has really been a struggle to get those who are different to accommodate the non-disabled society. "If you want to be with us, tolerated by us, you must act like us to the best of your ability." When we ask the deaf to implant cochlear implants, we are saying to them we want you to hear like we do so that we can talk to you the way we usually do. When we ask them to lip read, we say to them, we will not as a society learn how to hand signal so that we can talk to you, you must learn how to lip read so that you can accommodate us. On a practical level, the numbers would indicate that it is easier to ask a smaller group to change for a larger group, and that is what general population wants, but that is not how the law is written. The mandate is that we as the majority have to accommodate those in the minority who are handicapped.

What parents want for their children is maximizing educational benefits, socialization for children, and to ensure that their children's self-esteem remains intact. Private schools and their special education teachers, facilities and programs allow children to attain real goals for themselves, not impossible goals aimed at general education children. Children can feel good about themselves, instead of struggling to attain social acceptance and working almost impossibly to fit in with general education students, when they realistically cannot.

The real questions should be:

1. Can a child in general classes attain the same goals as the general education students in the class?
2. Can this child ever hope to be accepted by his peers, or will he always feel inferior and rejected?

We have seen success with racial integration, in that the white population has accepted the black population, and we live and work and study together as one. There is a hope that the same would occur with those who are disabled. Integration is probably easier to achieve for those who have physical handicaps, because they can communicate and establish friendships with their peers. But for those with cognitive disabilities, interacting and bonding is more difficult.

For as long as a disabled child struggles to catch up cognitively with general education children, and as long as their general education peers are allowed to harass and tease them, it merely harms the disabled child to be with these peers, and they should be segregated until such time as it is determined that they can function successfully with general education students. This is my interpretation of the lesson of Gallaudet University.

The first stop for a mildly disabled child should be a general education class. But as Weber points out, if parents determine that their children should be segregated, we should give them the benefit of the doubt that they want segregation because the integrated program is not being implemented properly.

D. Conclusion

The Integration Presumption has come a long way to ensure that disabled children have access to the general population. Somehow the "having access to" doctrine has turned the Integration Presumption into an integration mandate, which might be harming special education children forced to be with their general education classmates.

Integration as a statute and case law is different than true internal integration and acceptance by teachers and peers. Disabled children need to feel secure and accepted, and in this sense, there is a long way to still go in attaining true integration.

Endnotes

1. Senator Robert T. Stafford, United States Senator, Vermont, *Education for the Handicapped: A Senator's Perspective*, 3 Vt. L. Rev. 71 (1978).
2. 20 U.S.C.S. 1400 (2004).
3. 20 U.S.C.S. 1412 (a)(5)(A) (2004).
4. The precursor to the IDEA was the Education for All Handicapped Children Act of 1975.
5. 154 U. Pa. L. Rev. 789 (2006). Ruth Colker was the Heck-Faust Memorial Chair in Constitutional Law, Michael E. Moritz College of Law, The Ohio State University.
6. *Id.* at 789.
7. *Id.*
8. *Id.* at 795.
9. *Id.* at 821.
10. *Id.* at 802.
11. *Id.* at 796..
12. Only 5% of disabled children are in segregated institutions; see note 21.
13. *Colker* at 797–98; see note 29.
14. 700 F.2d 1058 (6th Cir. 1983).
15. *Colker* at 815.
16. *Id.* at 827.
17. *Id.* at 834.
18. *Id.* at 843.
19. *Id.* at 856.
20. 189 A.L.R. Fed. 297.
21. *A Nuanced Approach to the Disability Integration Presumption*, 156 U. PA. L. Rev. 174 (2007).
22. *Id.* at 177.
23. H.R. Rep. No. 93-805 at 24 (1974).
24. *Id.* at 182.
25. *Id.* at note 13.
26. *Id.* at 180.
27. *Id.* at 185.
28. *Id.*
29. *Id.*
30. *Id.* at 185–86.
31. 156 U. PA. L. Rev. 157 (2007) at 158.
32. *Id.* at 160.
33. *Id.*
34. *Id.* at 162.
35. *Colker* at *supra* note 3, at 834.
36. *Bagenstos* at 164.
37. H.R. Rep. No. 94-332. p. 2 (1975).
38. *Stafford*, *supra* note 1, at 75.
39. *Id.* at 76.

Lenore Davis has been a Trust and Estate/Elder Law attorney in New York and New Jersey for over twenty years. She is an adjunct professor at New York Law School's Graduate Tax Program and a frequent lecturer on Elder Law and Special Education.

Developments for Aging in Place

By Neil T. Rimsky

The scope of housing options for seniors has expanded beyond the traditional models. In the 1980s and 1990s we saw the growth of assisted living and multi-level facilities, such as continuing care retirement communities. Assisted living offered a more active and dignified care for persons who could benefit from an institutional setting, but did not require intense nursing home care. Continuing care retirement communities gave residents the comfort of one-stop shopping, with the understanding that their care would be provided under all circumstances.

The services provided by institutions are important and will remain an important component of housing for seniors who cannot care for themselves. However, seniors want to age in place. To the extent that they can, seniors want to remain independent. They want to be more active in their communities. Seniors want to be stimulated with intellectual and physical activity, yet they want to know that long-term care alternatives are possible should they become ill.

What we have seen in most recent years is the dramatic growth of aging-in-place communities. The trend towards aging in place reflects three significant shifts in societal attitude towards aging. The first is self-reliance. Seniors who want to age in place accept and desire a significant amount of self-reliance. A second change is the expansion of a desire of persons to help each other. Neighbors help each other meet challenges. Sometime the neighbors are fellow seniors who share the common goals, needs and desires of their senior neighbors. On other occasions, persons of different generations offer themselves to assist seniors in their community. The result is a pact where the seniors may provide benefits to their younger neighbors, while the more youthful members of the community assist seniors in some of their basic needs.

The third development is a public-private partnership where community services are devoted to seniors. These may include senior centers, transportation assistance, development of community services, including referrals to community resources, organized by a governmental agency, a not-for-profit, or sometimes both, working for a common purpose. While there are undoubtedly costs, the benefits to the public are significant. Needs that can be met on a communal level are far less costly than on a one-to-one basis.

There are several models we will explore, including: "Village community," livable communities and "Co-housing." These models differ from traditional "Over age 55" communities, which are housing arrangements built on the needs of persons over 55. The exciting developments we have seen are models which actively provide services to improve the lives of seniors, at the same time significantly enriching the community as a whole.

The first model, the Village model, is a private option. The Village, as a housing concept, was born in Boston, with the Beacon Hill Village. Each Village offers "members" access to activities and to services. For an annual fee,[1] Village members are provided with a list of services and service providers vetted by the organization. The Village negotiates a discount for its members. Service providers can range from contractors and repair persons to accountants, attorneys or money managers. Village members may also be entitled to discounts at local health clubs or restaurants. The Village may also arrange for an array of cultural activities such as trips to shows, concerts or museums as well as transportation.

Each Village is a separate not-for-profit entity. As Beacon Hill forged the path, the basic model is available to provide knowledge and assistance in the development of these communities. A Village-to-Village Network is available to provide assistance and guidance to communities which want to establish villages. In New York State, there are 22 identified Villages, either open and functioning or in stages of development. Many are in the Hudson Valley Region, with two in New York City. There are also Villages in Kingston, Syracuse, Rochester and Buffalo.

"Livable communities" rarely involve new housing. Instead, the essence of the livable community is a public-private partnership. These initiatives can involve grants from the state, forms of technical assistance, development of accessibility standards. There are also demonstration programs to attract interest. Livable community programs emphasize access to transportation as well as diverse housing options.

Some municipalities in New York State have extensive livable communities programs. Westchester County supports a public-private partnership. Its website boasts health and wellness programs, educational and cultural programs, support services such as accessible and adequate transportation, personal safety, and consumer protection / advocacy for affordable housing, safe sidewalks and roads.

The City of White Plains has a program to encourage aging in place. The City offers a senior center with a nutrition support program, and sponsors a membership

organization which provides services, transportation, home maintenance and meal assistance.[2]

Equally exciting is the coordination of services through not-for-profit entities. Also based in White Plains, the Westchester Jewish Community Services, a social service not-for-profit, part of the UJA Federation network of agencies, coordinates multiple programs and services for seniors.

A third approach which has developed is senior co-housing. Co-housing, generically, is a form of collaborative housing. The early co-housing communities were designed as small cluster communities. Units were functionally independent. However, there were common services available. There was a communal dining area, laundry, play areas, pools, etc. The idea is that the community is self sufficient. It is, in many ways, a variation of the model of the early 20th century where multiple generations lived in close proximity, many in the same residence.

Co-housing was designed to offer a multi-generational approach. Residents of co-housing communities provide services for each other. For example, seniors could serve to watch some of the children while parents were at work. At the same time, younger families could assist seniors with some of the heavier tasks. There has been some recent development of senior co-housing.

There is a national trend towards aging in place. The models explored above are early efforts. The challenge, as these models develop, will be the delivery of long-term care services in an affordable model. The Villages may work well for persons who remain independent. It is critical that aging in place evolve to incorporate long-term care services.

The Real Estate and Housing subcommittee of the Elder Law and Special Needs Section is looking at efforts the Elder Law and Special Needs Section can make to encourage and support the development of these communities. We intend to reach out to the communities, the municipalities and the not-for-profit entities to make residents aware of the programs available to age in place, particularly in those cases where residents become frail and need assistance with basic activities of daily living.

A more extensive look at aging in place is available in the Fall Edition of the *NAELA Journal*.

Endnotes

1. Annual fees, although modest, are usually reduced for persons with limited incomes.
2. Details can be seen at Aipwhiteplains.org.

Neil Rimsky, CELA, is a member of the firm of Cuddy & Feder, LLP in White Plains. Mr. Rimsky has served on the board of Westchester Jewish Community Services, a not-for-profit agency which serves seniors and persons with disabilities, since 1985.

Guardianship News: What Does a Guardian Do?—Teresa

By Robert Kruger

A decade ago, when the Birnbaum Commission was active, many of the members of that Commission, reportedly, were heard to say that an appointment as a guardian was political patronage. While a few appointments may fall into that category, most do not.

In thinking about this, I decided to devote this column, and a few subsequent columns, to a description of what a guardian does. Of course, I draw on my experiences and hope to describe a situation that bears some resemblance to the experiences of my colleagues.

I start with the guardianship of Teresa, largely because it encompasses many of the difficulties that guardians experience.

Teresa is now 23; she was 13 when I accepted the appointment. As a result of medical malpractice, Teresa is developmentally disabled. Her IQ is about 60. She has stunted growth; she is about four feet tall. She is ambulatory and she is able to perform all activities of daily living.

She is also blind; she has perhaps 10% vision. She also had a kidney transplant which eventually failed. Therefore, she was on dialysis, three times a week, sometimes four.

Teresa resided with her father, her sister (about one year older than Teresa) and her brother (about one year younger). Her mother died when Teresa was a baby. Over time, the father would have girlfriends, one of whom (the latest) appears to be permanent. The father has two children with her, a boy with psychiatric issues, about eight, and a girl close to three. They all reside in a one-family house purchased with guardianship funds and with judicial approval.

The drama begins in early 2010 with a series of calls I received from a social worker / discharge planner from New York Presbyterian Hospital, who advised me that Teresa was hospitalized and was threatening suicide. That got my attention.

My first step was to hire a care manager, to find out what was troubling Teresa and what was going on in the house. We learned early that Teresa had a ferocious temper. If she was upset at 2 or 3 a.m., as she often was, she would demand a double cheeseburger, and a soda or orange juice, which is a lethal diet for a diabetic. Because the family was exhausted, they appeased her to the extent possible at 3 a.m. and gave in to get some sleep. Diet was the first identifiable reason why Teresa was a frequent visitor to the emergency room. To address this by the spring of 2010, we hired a companion for Teresa, to shop for her and to prepare meals for her.

The family's response was to sabotage the companion, whom they perceived to be my spy in the house. Food prepared for Teresa was often discarded; efforts to control her intake of liquids were often sabotaged.

Given who the father was, the resistance was not surprising. He is probably borderline retarded, and a schemer, albeit a clumsy one. I often describe him as a petty chiseler, as a result of several attempts on his part to pry some of Teresa's money from me. I will spare you those anecdotes.

Thus far, I have focused on our initial efforts to control Teresa's diet. To access services, a Supplemental Needs Trust was authorized and, because of her dialysis, we applied for Medicare and Medicaid. It took an ungodly period of time, over a year, to obtain Medicare. Those of you who have had dealings with the Social Security Administration will have experienced the frustration of dealing with that bureaucracy.

Services were required because, at age 21, Teresa was aging out of the school system. We explored day programs for her but failed to connect because her attendance was infrequent because of her dialysis. The provider would be paid less if her attendance fell below certain levels, as it necessarily would.

We also considered and rejected a residential solution. Teresa would not be accepted because of her temper tantrums and frequent hospitalizations. Besides the dietary issues, she frequently spiked a fever, developed an infection and required hospitalization without delay. On two occasions, we thought we might lose her. We could not place her on a kidney transplant list, because she had to be medically stable for six months to qualify which, of course, she was not.

A brief digression about her temper tantrums: One incident should suffice. In 2011, she attempted to stab her aide with a knife. She did cut her but the damage was minor. Imagine, however, a round the clock companion asleep…perhaps subconsciously waiting for a shiv to be inserted. Teresa does not handle frustration

well. And a companion, of necessity, particularly in the beginning, had to say "no" to her a lot.

By the fall of 2010, the care manager and I concluded that, as long as Teresa remained in the household, we would experience repeated temper tantrums by her, dietary extortion by her, increased dialysis and frequent hospitalizations, potentially with fatal consequences. In addition, there was a revolving door of compaions who burned out working on a 24 x 7 basis. The threat of suicide receded, but she was extremely vulnerable medically.

The solution (after persuading a skeptical judge): we rented an apartment for Teresa in December 2010, and finally found a companion who could handle her in January 2013. We imposed a visitation schedule on the family in 2012, so that she didn't destabilize. We hired a Spanish-speaking interpreter in mid-2013 to check her father's poisoning of our relationship with Teresa. One reason for his hostility was that he sensed, quite correctly, that the Court would not tolerate his living in the house without her. His bad-mouthing of the care manager and myself destabilized Teresa and led to tantrums.

After Teresa aged out of school, and been rejected for programs run by the not-for-profits, the care manager created a program for Teresa (in early 2013) that stimulates her but doesn't exhaust her. Central to this is art class, because Teresa loves to draw. She also loves to shop and is given a small amount of money to buy things.

All of this took years, but the results thus far show:

- Her diet has improved to the point that she no longer requires dialysis;
- Her hospitalizations are greatly reduced but not eliminated;
- The tantrums are, similarly, greatly reduced but not eliminated;
- The family visits are far more tranquil;
- We have a wonderful companion for her who can control her;
- In the fall of 2013, the judge has ordered me to sell the house, since Teresa is not going back to that environment.

Central to any plan for Teresa is the care manager, who has become Teresa's de facto parent. Without her firmness in dealing with Teresa and the family, Teresa would have remained unmanageable and might well have died.

Although each case is singular, the reader, hopefully, will be all too familiar with certain recurring problems:

- Medical care and home care (stable for now);
- A father with designs on the money;
- No understanding that the money is for Teresa, not for them;
- Resentment that an outsider, an attorney, has financial power over the family;
- Finding other resources for a child aging out of the school system at a time of budgetary stress;
- Simply dealing with a child who remains explosive emotionally;
- Some of the more unique aspects of this guardianship include:
- Threat of suicide;
- Tantrums du jour;
- Frequent hospitalizations;
- Kidney failure;
- Teresa's violence;
- Of course, moving Teresa when she already owns a home.

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

New York NAELA Niche: The Bipartisan Budget Act of 2013 and *Ahlborn*

By Robert P. Mascali

Most practitioners are familiar with the 2006 decision in *Arkansas Department of Human Services v. Ahlborn*,[1] which holds that under the Medicaid anti-lien statute a Medicaid agency is only entitled to recover a portion of a personal injury judgment or settlement that is "designated as payments for medical care." (*Ahlborn*, 547 U.S. 268 at 284). Recently, the United States Supreme Court reaffirmed that holding in the North Carolina case of *WOS v. E.M.A.*[2] by rejecting a North Carolina statute that provided for a statutory presumption that 1/3 of a tort recovery was the amount due under the state's Medicaid subrogation claim because of the provisions of the anti-lien statute.

According to a CMCS Informational Bulletin dated December 27, 2013, the Medicaid provisions in the Bipartisan Budget Act of 2013 (H.J. 59) passed by Congress and signed by the President on December 26th, found at Section 202, make a number of changes to Medicaid Third Party liability law in order "to affirm Medicaid's position as payer of last resort." The first two provisions make changes as to the ability of states to delay payments to providers in certain circumstances. However, the major change, and the one most important to our members, is in regard to the state's ability to recover costs from the full amount of a tort award, rather than only the portion of the award allocated to the medical expenses. Thus, the entire tort recovery may be subject to a Medicaid lien for a broader range of causally related expenses. In addition, it appears that a state's right of recovery is expanded so that it will be reimbursed for non-medical expenses, such as benefits provided under the home and community-based waiver programs. These changes take effect on October 1, 2014 and, according to to the Congressional Budget Office, the results will save the federal government approximately $1.4 billion over the next ten years.

As background, federal law known as *The Medicaid Secondary Payer* statute[3] generally held that if there is another primary payer such as a tortfeasor or insurer, otherwise obligated to pay for a **health care item or service,** that payer is supposed to be billed in the first instance and, as a result, this statute allows for a payer of a tort award to be considered a "primary payer" and in effect obligates Medicaid to recover amounts expended for the Medicaid recipient 's costs related to the injury. *Ahlborn* and *WOS* consistently supported the position that those costs were only the costs attributed to medical care. Due to the financial stresses caused by the Medicaid program since these cases were decided, there has been considerable pressure exerted by the various states to expand the right of recovery under the secondary payer statute, and this recent change is the result.

The mechanism that ensures a Medicaid recovery is the requirement that a Medicaid recipient assign over his/her rights pursuant to 42 U.S.C 1396k(a)(1)(A) which is now amended to require an assignment that is no longer limited solely to payment for medical care. The new provision provides:

> (a) "…a State plan for medical assistance shall (1) provide that as a condition of eligibility for medical assistance under the State plan to an individual who has legal capacity to execute an assignment for himself, the individual is required—
>
> (A) to assign the State any rights…**to any payment from a third party that has a legal liability to pay for care and services available under the plan**"

Furthermore, the amended statute also changes the extent to which a Medicaid lien may attach. Whereas the current statute provides that the lien may attach to "the judgment of a court on account of benefits incorrectly paid on behalf of [such] an individual," the amendment now adds that that the lien can attach to "the rights acquired by or assigned to the State in accordance with" the provisions dealing with the required assignment of a Medicaid recipient's rights of recovery as now changed and as mentioned above.

It should be left to legal professors to debate whether these changes actually overrule, reverse or substantially emasculate *Ahlborn* and its progeny. However, what is not in dispute is that these changes, if not repealed or modified by State regulatory action, will dramatically change the landscape of personal injury litigation and special needs planning.

Congress has recently passed H.R. 4302 and has delayed by two years a provision in last year's budget bill that gives states the ability to recover Medicaid costs

from a beneficiary's full personal injury settlement or award. The law, which amends the Social Security Act to negate the U.S. Supreme Court's decisions in *Arkansas Department of Health and Human Services v. Ahlborn* and *Wos v. E.M.A.*, was set to take effect October 1, 2014.

Endnotes

1. 547 U.S. 268 (2006).
2. 133 S. Ct 1391 (2013).
3. 42 U.S.C 1396p(a)(25).

Robert P. Mascali is an attorney with the Pierro Law Group in Latham, NY. Previously he served as the Associate General Counsel at NYSARC, Inc. and served as Counsel to NYSARC Trust Services. Mr. Mascali is a member of the New York State Bar Association and its Elder Law and Special Needs and Trusts and Estates Law Sections. He serves on the Executive Committee and is Co-Chair of the Special Needs Planning Committee of the Elder Law and Special Needs Section. In 2013, Mr. Mascali was elected as the Third District Representative for the Elder Law Section to the NYSBA House of Delegates. He is a member of the National Academy of Elder Law Attorneys (NAELA), a member of the Board of Directors of the New York Chapter and currently serves as Secretary.

Editor's note: Details of the lien and recovery statutes, regulations and procedures will be discussed in future publications. This preliminary discussion is intended to make readers aware that there has been a significant change in the law involving the intersection of tort recovery and Medicaid.

Recent Tax Bits and Pieces

By David R. Okrent

Laura Harris Winford v. United States, No. 2:12-cv-00322 District Court Denies Estate Tax Refund

In this case, the U.S. District Court for the Western District of Louisiana concluded that an estate was barred by the section 6511 limitations period from recovering an estate tax overpayment. The Court found that the estate's remittance was an estimated tax payment and not a deposit as demonstrated by the facts and circumstances of the case.

U.S. v. Simon, 11-1837 (7th Circuit 2013) 7th Circuit Court of Appeals Affirms Lower Court Conviction of CPA/Professor for Untimely Filed Forms TD F 90-22.1

In this case the 7th Circuit Court of Appeals affirmed a lower district court's criminal conviction of a taxpayer for filing form TD F 90-22.1 (FBARs) late for several years. In doing so, the court rejected the taxpayer's argument that certain IRS notices (granting relief for the late filing of FBARs under certain conditions) and his alleged eligibility for the IRS 2009 Offshore Voluntary Disclosure Program (OVDP) should require the 7th Circuit Court of Appeals to overturn his conviction.

Rachal v. Reitz, 347 S.W.3d 305 (Tex. Ct. App. 2011), *rev'd*, 2013 WL 1859249 (Tex.) Court Addresses Arbitration Clause and Annual Exclusion for Trust Withdrawal Rights

The Texas Supreme Court held that the arbitration provision contained in the trust at issue is enforceable against the beneficiary for two reasons. First, the settlor determines the conditions attached to her gifts, and the courts enforce trust restrictions on the basis of the settlor's intent.

The settlor's intent here was to arbitrate any disputes over the trust. Second, the Texas Arbitration Act (TAA) requires enforcement of written agreements to arbitrate, and an agreement requires mutual assent, which this court previously concluded may be manifested through the doctrine of direct benefits estoppel. Thus, the beneficiary's acceptance of the benefits of the trust and suit to enforce its terms constituted the assent required to form an enforceable agreement to arbitrate under the TAA.

PHL Variable Insurance Company v. 2008 Christa Joseph Irrevocable Trust, by and Through Its Trustee, BNC National Bank, and Midas Life Settlements LLC, United States District Court, District of Minnesota, Case No. 10-CV-3001 (10 Sept. 2013) District Court

PHL Variable Insurance Company filed this lawsuit against the Christa Joseph Irrevocable Trust to rescind a $10 million life-insurance policy on the basis of fraud and lack of insurable interest. The case involved multiple material fraudulent misrepresentations made in the application with respect to the net worth and income of the applicant. This was a classic Stranger Originated Life Insurance (STOLI) policy. The U.S. District Court for Minnesota upheld the rescission of the policy. It also allowed the insurer to retain premium.

Notice 2013-61, 2013-42 IRB 1 (23 September 2013) IRS Guidance on Affect of Windsor on Employment Taxes

The notice provides guidance to employers and employees to make claims for refund or adjustments of overpayments of FICA taxes and Federal income tax withholding (employment taxes) resulting from the Supreme Court decision in *United States v. Windsor*, 570 U.S. __ (2013), *aff'g* 699 F.3d 169 (2d Cir. 2012), *aff'g* 833 F. Supp. 2d 394 (S.D. N.Y. 2012) and the holdings of Rev. Rul. 2013-17, 2013-38 I.R.B. 201. The notice also provides special administrative procedures that can be used by employers to claim refunds or make adjustments of overpayments of employment taxes paid with respect to same-sex spouse benefits for 2013, and also a special administrative procedure that can be used with respect to overpayments of FICA taxes for years before 2013. The special administrative procedures provided in the notice are optional.

INFO 2013-0030 IRS Addresses Charitable Deductions for Non-Cash Property

In this Information Letter, the IRS explains the process for determining the amount of a charitable deduction for property other than money.

Jean Steinberg v. Commissioner, 141 T.C. No. 8, No. 23865-11 Summary Judgment Denied on Gift Valuation Issue

The Tax Court concluded that the IRS was not entitled to summary judgment on a gift valuation issue. Because the value of the obligation assumed by the daughters is not barred as a matter of law from being consideration in money or money's worth within the meaning of I.R.C. sec. 2512(b), the fair market value of the taxable gift may be determined with reference to

the daughters' assumption of the potential I.R.C. sec. 2035(b) estate tax liability.

Estate of Franklin Z. Adell v. Commissioner, T.C. Memo. 2013-228, No. 20911-12 Estate Tax Deferral Election Properly Terminated

The Tax Court concluded that the IRS did not abuse its discretion in terminating the estate's election under section 6166. The record established that the estate did not pay interest for certain years on the deferred estate tax when required to do so and that thereafter respondent issued a final notice and demand for that interest. In *Estate of Bell v. Commissioner*, 92 T.C. 714, 723 (1989), *aff'd*, 928 F.2d 901 (9th Cir. 1991), the benefits that section 6166 confers "are privileges granted to the taxpayer by Congress as a matter of legislative grace." As a result, "the provisions of section 6166 which grant such privileges should be given a strict and narrow construction."

ILM 201328030 (18 March 2013) Decedent Did Not Possess Incidents of Ownership in Life Insurance Policies

The IRS concluded that insurance proceeds are not includible in the decedent's gross estate because, at death, he held only a right to receive the policies' dividends, which by itself is not an incident of ownership for purposes of § 2042.

Decedent and Former Spouse were married on Date 1. Former Spouse instituted an action for divorce in State Court. On Date 2, Decedent and Former Spouse executed a property settlement agreement (Agreement) with respect to all marital and separate property. Under the Agreement, Decedent was to maintain life insurance policies having an aggregate death benefit of $x for the sole benefit of Former Spouse. Decedent was to pay all premiums, dues and assessments on the policies. Decedent could not borrow against or pledge the policies. Dividends from the policies belonged exclusively to Decedent. Decedent and Former Spouse were divorced within three months of executing the Agreement. The State Court judgment of divorce incorporated the Agreement and ordered that the property of Decedent and Former Spouse be distributed as set forth in the Agreement. Decedent died on Date 3, and the insurance company paid the proceeds of the insurance policies to Former Spouse. On the Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return filed for Decedent's estate, Decedent's executor included the policies' proceeds in Decedent's gross estate.

PLR 201332001 (10 May 2013) Trust's Purchase of Life Insurance Policy Doesn't Affect Income Exclusion

The IRS concluded that a trust's proposed purchase of another trust's interest in a life insurance policy on the joint lives of husband and wife will fall within the exceptions to the transfer for value rule provided in § 101(a)(2)(B), and, therefore, will not affect the application of § 101(a)(1) to proceeds of the policy payable to the purchasing trust as the beneficiary of the policy upon the last to die of husband and wife. The purpose of the sale was to eliminate a child who had become disabled after the trust was drawn. The transaction was completed using a partnership.

PLR 201332012 (14 May 2013) IRS Address Implications of Changes to Charitable Remainder Unitrust

The IRS concluded that reformation of a trust agreement as ordered by a court will not cause the trust to fail to qualify as charitable remainder unitrust under I.R.C. § 664 and reformation of the a trust agreement as ordered by a Court will not constitute an act of self-dealing under I.R.C. § 4941(d)(1) which would subject the trust to taxation under I.R.C. § 4947(a)(2).

Estate of Helen A. Trombetta et al. v. Commissioner, T.C. Memo. 2013-234, No. 23892-10 Properties Transferred to Trusts Must Be Included in Gross Estate

The Tax Court concluded that the value of property transferred by the decedent to the Helen Trombetta Personal Residence Trust (residence trust) is includable in the gross estate pursuant to section 2036(a). This case is a good review of decisions under section 2036(a) and how they apply to retained annuity trust and personal residence trust.

Brett Van Alen et al. v. Commissioner, T.C. Memo. 2013-235, Nos. 22328-09, 4075-10 Beneficiaries Have to Use Value as Reported for Estate When Property Later Sold, Even Though Value May Have Been Wrong

Siblings inherited part of a family ranch from their father. Their interest was in a trust, and their stepmother valued that interest at less than $100,000 when she prepared her late husband's estate-tax return. That value was low because the Code gives a break to those who inherit a ranch and promise to keep it in agricultural use. Years later, the trust sold a conservation easement on the ranch for more than $900,000. The sale created a capital gain that passed through to the siblings, and the dispute here is over the proper basis to report for that sale. The siblings argue that through no fault of their own the estate greatly understated the value of their interest in the ranch, which greatly

understated their basis, which greatly inflated their taxable capital gains. The Commissioner says this doesn't matter, and that the tax break they got then by using a very low value on their father's estate-tax return has to be matched now by a hefty capital-gains tax burden. The Court found that the duty of consistency applied and their basis in the property was established by the value reported on the estate tax return based on a section 2032A election. The court reviews Revenue Ruling 54-97 which says: "For the purpose of determining the basis under section 113(a)(5) of the Internal Revenue Code of property transmitted at death (for determining gain or loss on the sale thereof or the deduction for depreciation), the value of the property as determined for the purpose of the Federal estate tax shall be deemed to be its fair market value at the time of acquisition. Except where the taxpayer is estopped by his previous actions or statements, such value is not conclusive but is a presumptive value which may be rebutted by clear and convincing evidence."

PLR 201340013 (5 June 2013) Executor Allowed Extension to Allocate GSTT Exemption

The IRS concluded that the executor of decedent's estate was entitled to an extension to allocate the decedent's generate-skipping transfer tax exemption. The Decedent established three irrevocable trusts (Trust 1, Trust 2, and Trust 3) for the benefit of her issue. In Year 1, the trusts were established on Date 1 and funded on Date 2. Trust 1, was established for the benefit of Child 1, Trust 2 for the benefit of Child 2, and Trust 3 for the benefit of Child 3. Attorney assisted Decedent with her estate planning and informed her of the advantages of creating GST trusts. Trust Company was co -trustee of Trusts 1, 2, and 3. Trust Company had prepared all of Decedent's previous returns, including Forms 709, United States Gift (and Generation-Skipping Transfer) Tax Returns. Attorney sent the trust instruments to Trust Company and, in the accompanying letter he confirmed his understanding that Trust Company would be responsible for filing the Year 1 Form 709 as in prior years. In an affidavit, Trust Company swore that its failure to file the Year 1 Form 709 was unintentional and inadvertent. No return was filed for the Year 1 transfers to Trust 1, Trust 2, and Trust 3. The error was discovered during the administration of Decedent's estate.

Terry L. Ellis et ux. v. Commissioner, T.C. Memo. 2013-245, No. 12960-11 Prohibited Transaction Disqualifies IRA

The Tax Court concluded that the taxpayer participated in one or more prohibited transactions under section 4975 with his individual retirement account (IRA) in 2005 when he directed his IRA to invest in CST Investments, LLC (CST), pursuant to an arrangement or understanding whereby he was designated the general manager and would subsequently receive compensation and other benefits from that company. This case may have far-reaching effects.

ILM 201343021 (17 June 2013) Grantor Trusts Are Not Separate Entities for Tax Purposes, Capital Loss Disallowed. Application of Grantor Trust Rules and Ownership Attribution Rules of §§ 267 and 707(b)(1)(A)

This Chief Counsel Advice responds to: 1. Whether grantor trusts are disregarded as entities separate from their owners for all federal income tax purposes, including §§ 267 and 707(b)(1)(A); 2. Whether a short-term capital loss that was recognized upon the sale of partnership property to certain grantor trusts, under the facts described below, may be disallowed under §§ 267 and / or 707(b)(1)(A); and 3. Whether a short-term capital loss that was recognized upon the sale of partnership property to certain grantor trusts, under the facts described below, may be disallowed under § 165. It concludes: 1. Yes. Grantor trusts are disregarded as entities separate from their owners for all federal income tax purposes, including §§ 267 and 707(b)(1)(A); 2. Yes. A short-term capital loss that was recognized upon the sale of partnership property to certain grantor trusts, under the facts described below, may be disallowed under §§ 267 and / or 707(b)(1)(A); and 3. No. A short-term capital loss that was recognized upon the sale of partnership property to certain grantor trusts, under the facts described below, may not be disallowed under § 165.

PLR 201343013 (22 July 2013) Certain Retirement Income Excludable from Gross Income

The IRS concluded that the portion of the taxpayer's retirement income equal to his service connected disability allowance (one-half of the taxpayer's final compensation) is excludable from gross income under section 104(a)(1) of the Code. Any amount in excess of 50 percent of the taxpayer's final compensation is not excludable under section 104(a)(1) of the Code because such amount is based upon age and years of service. Taxpayer was injured while employed as a police sergeant. Taxpayer's application for duty disability income was approved and he was medically separated from employment. Employer informed Taxpayer that he must elect to receive either retirement income or disability income. Taxpayer elected the retirement income amount because it exceeded the disability income amount.

William M. Daniels v. Warren E. Agin et al., No. 12-2376 Assets in Profit-Sharing Plan Includable in Bankruptcy Estate

The Fifth Circuit Court of Appeals affirmed the finding of the Bankruptcy Court that the debtor failed

to maintain his profit-sharing plan in substantial compliance with the applicable tax laws, and that the assets in the profit-sharing plan and two IRAs funded with plan assets were part of the bankruptcy estate, available to satisfy the claims of creditors.

In re: Brandon C. Clark et ux., Nos. 12-1241 and 12-1255 (23 April 2013) 7th Circuit Rules Inherited IRA Not Exempt from Bankruptcy Estate

The Seventh Circuit Court of Appeals reversed the District Court and held that a non-spousal inherited individual retirement account is not exempt from the bankruptcy estate.

PLR 201322010 (24 January 2013) IRS Rules on GSTT Consequences of Trust Merger

The IRS concluded that that the proposed division, modification, and merger of certain trusts won't subject the assets of the original or severed trusts to the generation-skipping transfer tax under section 2601 by forfeiting the effective date exempt status of those assets.

PLR 201349002 (30 August 2013) Tax Implications of Proposed Division and Modification of Trust

The IRS concluded that division and modification of a trust wouldn't subject the divided trusts to the generation-skipping transfer tax or trigger gift tax consequence. Further, trust property will not be includable in the beneficiaries' estates, cause the recognition of gain or loss, or affect the basis for trust assets.

Gluckman v. Commissioner, TC Memo 2012-239 (11/28/2012), *aff,d*, F.3rd __, 112 AFTR2d __, No. 13-761 (CA2 11/22/13) Second Circuit Views Life Insurance Policy Valuation Differently from the Ninth Circuit

The United States Court of Appeals for the Second Circuit has weighed in on a fact situation similar to what has recently been reviewed by the United States Court of Appeals for the Ninth Circuit. The end result is that different policy valuations were reached in both cases. The net result is that the murky area of policy valuations has become even more ambiguous and uncertain.

PLR 201352001 (11 September 2013) Annuity Payments Won't Be Subject to GSTT

The IRS concluded that the GST tax resulting from the direct skip of X percent of an annuity to a trust for the benefit of the decedent's grandchild on a certain date is the value of the interest on that date multiplied by zero.

PLR 201403005 (19 September 2013) Disclaimer of Interest in Trust Property Won't Trigger Gift Tax

The IRS concluded that the taxpayer's proposed disclaimers of a contingent right to an interest in two trusts will not constitute a transfer subject to federal gift tax.

Estate of Diane Tanenblatt et al. v. Commissioner, T.C. Memo. 2013-263, No. 26176-10 IRS Determines LLC Value for Estate Tax Purposes

The IRS determined the value of decedent interest in a limited liability company (LLC), excluding from evidence the appraisal the plaintiff provided for failure to satisfy the IRS's preconditions to receiving expert testimony. Petitioner in this case transferred a members interest to a revocable trust and argued therefore the interest should be valued for estate tax purposes as an assignee interest which had no management or voting rights. The court disagreed and the decision contains an interesting discussion on this point. In addition, the decision contains a review of the methodologies to be used in valuing a an LLC which contains rental real estate.

PLR 201345026 (1 August 2013) IRS Addresses Estate, Gift Tax Implications of Trust Modification

The IRS concluded that the proposed modifications of three irrevocable trusts won't cause the interest of any beneficiary to be includable in their gross estate. In addition, neither the Settlor nor beneficiaries will be treated as having general powers of appointment, and the trusts won't lose their exempt status for generation-skipping transfer tax purposes.

Under this ruling the Settlor created three irrevocable trusts, one for each child created prior to September 25, 1985. Independent Trustee, a corporate trustee, is the trustee of all three trusts. Each trust is identical, except for beneficiaries. Each trust provides that, during the life of a child, the trustees may distribute so much of the net income to the child as the trustees, in their discretion, deem necessary or advisable. Upon the death of a child, the trustees, in their discretion, may pay so much of the net income in equal shares, per stirpes, to the then living issue of a child for their health, happiness, maintenance, education, welfare, or comfort. In addition, the trustees at any time may pay so much of the principal to a child and his issue as the trustees, in their discretion, deem necessary or advisable; provided, that the purpose for which payment is made justifies, in the sole discretion of the trustees, a reduction in the principal of the trust estate. Each trust will terminate on the first to occur of (i) 20 years after the death of the last survivor of the child and those of his siblings who were living when the trust was created, or (ii) the death of the last survivor of the child and his issue. On the termination of the trust, the ac-

cumulated income and principal will be distributed to the issue of the child, per stirpes. If none of the child's issue is then living, the trust principal and accumulated income is to be distributed to the other issue or trusts for the other issue of the Settlor. If all issue of Settlor are deceased, the undistributed income and principal will be distributed to a Foundation. Each trust also provides that in no event shall any of the trust estate vest in the Settlor, the Settlor's parents, or any individual trustee named in their individual capacity.

Each trust originally required that all investment decisions be made jointly by the Independent Trustee and the individual trustee. Each trust was subsequently modified to provide that: (i) the Independent Trustee would have exclusive power regarding distribution decisions, (ii) the individual trustee (Investment Trustee) would have exclusive power regarding investment decisions, (iii) the primary beneficiary will have the power to remove and replace the Investment Trustee and the Independent Trustee, and (iv) any successor Independent Trustee cannot be related or subordinate to the primary beneficiary within the meaning of § 672(c) of the Internal Revenue Code.

The Independent Trustee proposes to add an individual distribution trustee (Distribution Trustee) for the purpose of making distribution decisions. Each trust would be modified to allow either the Distribution Trustee or the Independent Trustee to make the distribution decisions. The Distribution Trustee cannot be related or subordinate, or if related, no closer in relation than cousin to the current beneficiary, within the meaning of § 672(c). If the Distribution Trustee resigns or is replaced, the successor Distribution Trustee cannot be related or subordinate, or if related, no closer in relation than cousin to the current beneficiary, within the meaning of § 672(c). A cousin cannot serve as a Distribution Trustee for a trust if the beneficiary is serving as the Distribution Trustee for the cousin's trust. The primary beneficiary, or if the primary beneficiary is deceased, a majority of the issue of the primary beneficiary, may replace any trustee. Any successor Independent Trustee must be a national banking association that has trust powers and aggregate capital and surplus of at least $20 million. No child, issue or spouse may ever serve as his own trustee or co-trustee of the trust created for his benefit. The provisions regarding the Investment Trustee are not modified.

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

Recent New York Cases

By Judith B. Raskin

Presence of AIP at Article 81 Hearing

Father successfully petitioned to be appointed article 81 guardian for his daughter. Daughter appealed, arguing that the hearing was improperly held in her absence.

The Appellate Division reversed and remitted the matter to the Supreme Court, Kings County for a new hearing and the appointment of counsel for the appellant. The court neglected to explain in its Order and Judgment why it held the hearing without appellant present and failed to appoint an attorney to represent her.

***Matter of Gulizar N.O. (Anonymous)*, 2013 N.Y. App. Div. LEXIS 7444 (App. Div. 2d Dept., November 13, 2013)**

Medicaid Penalty Period for Purchase of a Life Estate

Petitioner purchased the life estate in her daughter's house while living in her own house in the same town. Thirteen months after the purchase, petitioner entered an assisted living facility. A year later she sold her house. Shortly thereafter she entered a nursing home after a fall, paid privately for several months and then filed a Medicaid application. Medicaid assessed a period of ineligibility based on the purchase price of the life estate. A fair hearing decision affirmed the agency determination. Petitioner appealed.

Petitioner claimed she resided in her daughter's home for a year after her purchase. She presented an undated letter sent to her at her daughter's address and an undated statement of intent to return home to her daughter's address. Other evidence included her tax returns indicating the address of her own house as her residence, her driver's license with the address of her own house, and her unchanged registration with the Board of Elections.

The court affirmed the fair hearing decision, holding that the petitioner did not reside in her daughter's house for a year after her purchase of the life estate interest. Social Services Law Sec. 366(5)(e)(ii) states: "… the purchase of a life estate interest in another person's home shall be treated as the disposal of an asset for less than fair market value unless the purchaser resided in such home for a period of at least one year after the date of purchase."

***Albino v. Shah et al.*, 2013 N.Y. App. Div. LEXIS 7311, 2013 NY Slip Op. 7375 (App. Div., 4th Dept., November 8, 2013)**

Medicaid Denial for Lack of Timely Documentation

Medicaid denied the decedent's Medicaid application for failure to present documentation timely. The denial was affirmed at a fair hearing. The executor of decedent's estate appealed, arguing that the Westchester County Dept. of Social Services was required to conduct a collateral investigation.

The court found the agency had substantial evidence for the denial. The evidence did not show good cause for the failure to submit the documentation timely and the agency did not have an obligation to do a collateral investigation.

***Bosco v. McGuire, et al.*, 2013 N.Y. App. Div. LEXIS 7899 (App. Div. 2d Dept., November 27, 2013)**

Naming of Account Beneficiary by Agent

In 2007, decedent opened an individual account and a retirement account with defendant Morgan Stanley Smith Barney (MSSB). The accounts were in decedent's sole name with no beneficiary or joint owner. In 2011, in poor health, she signed a statutory power of attorney with no gift rider appointing the plaintiff, her neighbor and good friend, as her agent.

Plaintiff directed MSSB to make her joint owner of the individual account and beneficiary of the retirement account. MSSB refused. Plaintiff presented notes to MSSB signed by decedent expressing her wish to make the neighbor a joint owner of the individual account. MSSB did not make the change. Decedent died a few days later.

Plaintiff brought suit against defendants for negligence and breach of contract. Defendants were granted summary judgment.

On appeal, plaintiff made several arguments. She claimed 1) defendants owed a duty to her as agent; 2) in addition to her authority as agent, she was acting as intermediary for decedent; and 3) she was third-party beneficiary of decedent's contracts with MSSB. Defendants contended that summary judgment was properly granted.

The Appellate Division, Third Department, affirmed the ranting of the summary judgment motion. The power of attorney did not include a gift rider and the contract signed with MSSB in 2007 made no mention of an interest in anyone other than decedent.

***Jacobs v. Mazzei, Jr., et. al.*, 2013 N.Y. App. Div. LEXIS 8262; 2013 Slip Op. 8320 (App. Div., 3d Dept., December 12, 2013)**

Stepparent Entitled to Payments Under Consumer Directed Personal Assistance Program

Petitioner's mother hired her husband, who was not her disabled son's father, as her son's caregiver under Medicaid's Consumer Directed Personal Assistance Program. Suffolk County DSS denied payments on the basis that a stepparent was ineligible to serve under the program. (At the time this determination was made, the regulation prohibited payments to a parent.)

A fair hearing decision affirmed the Agency's decision. An Article 78 proceeding was commenced and the Supreme Court transferred the proceeding to the Appellate Division, as an article 78 based on the involvement of substantial evidence. However, although the court deemed this a matter of law and not substantial evidence, the court retained jurisdiction.

The court held for appellant. The term parent in 18 NYCRR 505.14(h)(2) was clear and did not include a stepparent.

***Calenzo v. Shah*, 2013 NY Slip Op. 08242 (App. Div. 2d Dept., December 11, 2013)**

Assignable Income to Guardian

J.T. was incapacitated and unable to provide the documentation for the nursing home to file a Medicaid application on his behalf. The nursing home successfully petitioned for an article 81 guardian to allow the application to proceed. J.T.'s daughters were appointed guardian of the person and the Bronx Community Guardianship Network ("BCGN") as property guardian. BCGN was directed to deduct $450 from J.T.'s monthly income as its fee for acting as property guardian.

The NYC Human Resources Administration moved to vacate the $450 payment. Its policy was that no deduction may be taken from the Net Available Monthly Income (NAMI) when the income is assignable to the nursing home.

The court gave deference to the HRA policy and vacated the payment.

***Matter of J.T.*, 2013 NY Slip Op. 52171(U) (Sup. Ct., Bronx County, December 16, 2013)**

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 also contributed the Recent New York Cases column since 1995.

Elder Law and Special Needs Section Ethics Committee Poll #9

By Judith B. Raskin and Natalie J. Kaplan

Scenario

Judith B. Raskin

In 2009, you jointly represented Lilly and Billy, a married couple. You prepared wills for them, leaving their estates to each other. Last week, Lilly came in and asked you to revise her will, without telling Billy. She wanted to reduce the share to him in favor of their children. She explained that their relationship was in turmoil and that she can no longer trust him with financial matters.

Question

Do the New York Rules of Professional Conduct ("RPC") permit you to revise Lilly's will?

Responses from Section members:

Yes	**91**	**32.6%**
No	**170**	**60.9%**
Don't know	**18**	**6.5%**

Answer

No. The authority for this answer appears in RPC, 1.9(a).

Analysis and Comment

Rule 1.9(a) states:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same of a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Billy is a former client. Lilly's proposed will revisions pertain to a matter substantially related to your former joint representation of them. The revision would also be materially adverse to Billy and he has not given written consent. Rule 1.9(a), therefore, prevents you from representing Lilly in revising her will. You will probably have to refer her to other counsel.

But the situation is not always so clear. Suppose you represented another couple, Millie and Willie, jointly in 2005. Like Lilly and Billy, Millie and Willie executed wills leaving everything to each other. Suppose Willie became too debilitated to manage his finances and needed home care? If Millie wanted you to change her will to leave the share to Willie in a supplemental needs trust, would this change be materially adverse to Willie?

Natalie J. Kaplan

Argue it one way, and Willie's beneficial rights are diminished by the proposed trust, so the action would be "materially adverse." Argue it another way, and he would be receiving benefits both from the trust and Medicaid, maybe not "materially adverse." Then there's the question of "who makes the decision?"

For guidance, we turned to Professor Simon's *New York Rules of Professional Conduct Annotated* (2014 edition). For the threshold question of "who makes the decision," Simon leaves it to the attorney. But how to decide materiality and adversity is an altogether different matter.

Simon comments that the question of whether adversity is "material" depends on the setting and all of the facts and circumstances (p. 556). He admits that his tests of adversity are for the "obvious" cases only. He considers plaintiffs and defendants in litigation. For transactional matters, he looks to see whether the former client figuratively "sits on the opposite side of the table." No consideration is given to the kinds of conditions we encounter. The above description of the supplemental needs trust—as alternately adverse and beneficial—provides a striking example of a conundrum of the sort we can face. Each attorney may well be left to make the decision alone.

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 by the National Elder Law Foundation.

Natalie J. Kaplan is an elder law attorney in New York City and Westchester County, practicing as "Elder Law on Wheels." She is a Fellow and founding member of the National Academy of Elder Law Attorneys and former Adjunct Professor of Elder Law at New York Law School.

Section Committees and Chairs

Client and Consumer Issues
Michel P. Haggerty
Law Office of Michel P. Haggerty
37 West Market Street
Rhinebeck, NY 12572-1417
haggerty@haggertylawoffices.com

Shari S.L. Hubner
Van DeWater and Van DeWater, LLP
P.O. Box 112
85 Civic Center Plaza, STE 101
Poughkeepsie, NY 12602
shubner@vandewaterlaw.com

Diversity
Deepankar Mukerji
Keane & Beane, PC
445 Hamilton Ave., 15th Floor
White Plains, NY 10601
dmukerji@kblaw.com

Pauline Yeung-Ha
Grimaldi & Yeung LLP
9201 Fourth Avenue, 6th Floor
Brooklyn, NY 11209
pyeung@gylawny.com

Elder Abuse
Joy S. Solomon
The Hebrew Home at Riverdale
Administration Office
5901 Palisade Avenue
Riverdale, NY 10471
jsolomon@hebrewhome.org

Estates, Trusts and Tax Issues
Salvatore M. DiCostanzo
McMillan, Constabile, Maker
& Perone, LLP
2180 Boston Post Road
Larchmont, NY 10538
smd@mcmplaw.com

Robert J. Kurre
Kurre Levy Schneps LLP
1615 Northern Blvd., Suite 103
Manhasset, NY 11030
rkurre@klsllp.com

Ethics
Judith B. Raskin
Raskin & Makofsky
600 Old Country Road, Suite 444
Garden City, NY 11530-2009
jbr@raskinmakofsky.com

Financial Planning and Investments
William D. Pfeiffer
Girvin & Ferlazzo, PC
20 Corporate Woods Blvd
Albany, NY 12211
wdp@girvinlaw.com

Donna Stefans
Stefans Law Group P.C.
137 Woodbury Road
Woodbury, NY 11797
dstefans@sa-tax.com

Guardianship
Ellyn S. Kravitz
Abrams, Fensterman, Fensterman,
Eisman, Formato, Ferrara
& Einiger, LLP
630 Third Avenuem, 5th Floor
New York, NY 10017
ekravitz@abramslaw.com

Robert Kruger
Law Office of Robert Kruger
232 Madison Avenue, Suite 909
New York, NY 10016
rk@robertkrugerlaw.com

Health Care Issues
Miles P. Zatkowsky
Dutcher & Zatkowsky
1399 Monroe Avenue
Rochester, NY 14618
miles@dutcher-zatkowsky.com

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

Legal Education
T. David Stapleton Jr.
Karpinski Stapleton & Tehan, PC
110 Genesee Street, Suite 200
Auburn, NY 13021
tdavids@kst-law.com

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

Legislation
Ira Salzman
Goldfarb Abrandt Salzman
& Kutzin LLP
350 Fifth Avenue, Suite 4310
New York, NY 10118
salzlaw@aol.com

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

Liaison to Law Schools
Margaret M. Flint
John Jay Legal Services
Pace Law School
80 North Broadway
White Plains, NY 10603-3711
gflint@law.pace.edu

Peter J. Strauss
Epstein Becker & Green, P.C.
250 Park Avenue, Suite 1200
New York, NY 10177-0077
advocator66@gmail.com

Marianne Artusio
Touro College
Jacob D Fuchsberg Law Center
225 Eastview Drive
Central Islip, NY 10803
MarianneA@tourolaw.edu

Mediation
Judith D. Grimaldi
Grimaldi & Yeung, LLP
9201 Fourth Avenue, 6th Floor
Brooklyn, NY 11209
Jgrimaldi@gylawny.com

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

Medicaid
Melinda Bellus
Legal Services of the
Hudson Valley
90 Maple Avenue
White Plains, NY 10601
mbellus@lshv.org

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

Matthew Nolfo
Matthew J. Nolfo & Associates
275 Madison Avenue, Suite 1714
New York, NY 10016
mnolfo@estateandelderlaw.net

Mental Health Law
Julie Stoil Fernandez
21 Webster Place
Brooklyn, NY 11215
jsfesqlaw@gmail.com

Mentoring
Timothy E. Casserly
Burke & Casserly, P.C.
255 Washington Ave. Ext.
Albany, NY 12205
tcasserly@burkecasserly.com

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

Practice Management and Technology
Robert J. Kurre
Kurre Levy Schneps LLP
1615 Northern Blvd., Suite 103
Manhasset, NY 11030
rkurre@klsllp.com

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

Publications
David Ian Kronenberg
Goldfarb Abrandt Salzman
& Kutzin, LLP
350 Fifth Avenue, Suite 4310
New York, NY 10118-1190
kronenberg@seniorlaw.com

Adrienne J. Arkontaky
The Cuddy Law Firm
50 Main Street, Suite 1280
White Plains, NY 10606
aarkontaky@cuddylawfirm.com

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

Special Needs Planning
Robert P. Mascali
The Pierro Law Group, LLC
43 British American Blvd.
Latham, NY 12110
RMascali@Pierrolaw.com

Joseph A. Greenman
Bond, Schoeneck & King, PLLC
1 Lincoln Center
Syracuse, NY 13202
jgreenman@bsk.com

Task Force on Unauthorized Practice of Law
Anthony J. Enea
Enea, Scanlan & Sirignano LLP
245 Main Street, 3rd Floor
White Plains, NY 10601
aenea@aol.com

Technology
David Goldfarb
Goldfarb Abrandt Salzman
& Kutzin LLP
350 Fifth Avenue, Suite 4310
New York, NY 10118-1100
goldfarb@seniorlaw.com

Veteran's Benefits
Antonia J. Martinez
Antonia J. Martinez, LLC
P.O. Box 883
Croton on Hudson, NY 10520
elderlawtimes@yahoo.com

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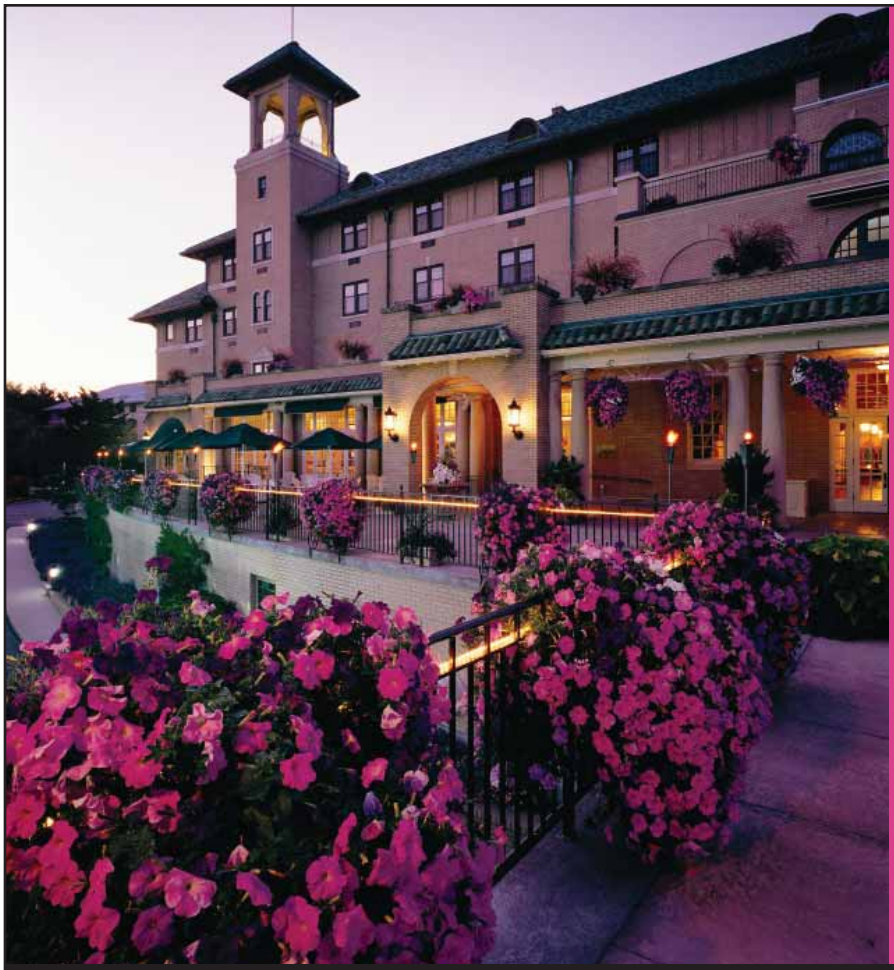

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