

Elder and Special Needs Law Journal



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



Inside

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- Improving Telecommunications Accessibility for Americans with Disabilities
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- Medicaid Recoveries, Liens and Strategies
- Some Problems Facing Guardians

Estate Planning and Will Drafting in New York

With 2013–2014
Supplement

Editor-in-Chief

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Message from the Chair

I am writing this message as the summer of 2014 sadly comes to a close and fall is upon us. I am happy to report that by all accounts, we had a successful Summer Meeting in Hershey, Pennsylvania. The meeting was attended by more than 150 attorneys. I understand that the meeting may also have set a record for the most number



of children in attendance. This is not surprising given its location just outside of Hershey Park. The meeting could not have been a success without the hard work and dedication of our program Co-Chairs, Joseph A. Greenman and Sara Meyers. Thanks to you both for an outstanding program. The meeting included informative CLE topics of interest to all of our members. The format included some basic and advanced presentations running concurrently. This provided timely and important information for members of all experience levels. It also included an informative update of current statutes and cases. Carrying on the tradition started by our immediate past Chair, Frances M. Pantaleo, the meeting provided Friends of Bill W meetings on both Friday morning and Saturday morning.

As a rule, life should not be all work and no play. Our Summer Meeting was certainly no exception to this rule. As in prior years, the program included a mix of education and recreation. Thursday evening started with a cocktail reception followed by dinner with music, dancing and entertainment for the children. A special buffet was provided for the children, and the DJ entertained them with balloons, dancing and games. There was also a photo booth that was in constant use throughout the evening that was enjoyed by all. After a full morning of committee meetings and CLE programs on Friday, the afternoon was dedicated to recreation. Some of our members enjoyed a mixed golf tournament at the Hotel Hershey led by Sal M. DiCostanzo as golf chair. For those who prefer tennis, Jeffrey G. Abrandt and Ellyn S. Kravitz co-chaired a tennis tournament. Friday afternoon also offered the children (and the adults) a chance to experience the many rides and attractions in Hershey Park. The day ended with a cocktail reception at the Antique Automobile Club of America Museum. For many of us this was a walk down memory lane.

I would like to express my appreciation to all of the excellent speakers who graciously devoted their time and offered their expertise in their presentations.

Our attendees certainly benefited from their efforts. I would also like to give a special thanks to Lisa Bataille, Kathy Heider and Adriana Favreau for all of their work in making the Summer Meeting a success. Although they work behind the scenes, their work is invaluable to the success of our programs. Additionally, thanks to our many sponsors and exhibitors for their financial support. If not for this financial support, the cost of our programs would be considerably higher. Special thanks to NYSARC Trust Services, Inc. (sponsor of the wireless internet service and the Antique Automobile Club Rental), RDM Financial Group (sponsor of the favors), LCG Community Trust (sponsor of the photo booth), as well as AMR Care Group and The Centers.

In my message as incoming Chair, I informed you that I had appointed a special committee for those interested in the practice of representing persons with regard to special education and that I appointed Adrienne Arkontaky as Chair. I am happy to report that our Executive Committee has voted to make this a permanent committee of our Section.

The NYSBA has launched a membership initiative entitled "Pathways to the Profession." This is an initiative to educate law school students about the NYSBA and to demonstrate the benefits of becoming part of this association as they enter the profession. Our Membership Committee, together with our Section's liaisons to law schools, have taken an active role in participating in this initiative on behalf of our Section. As part of this initiative, our Section will be making presentations at various law schools.

After the Summer Meeting, our Medicaid Committee analyzed GIS14MA/015, which was issued by the NYS Department of Health on August 5, 2014. This GIS set forth the Department of Health's policy regarding Medicaid post-eligibility budgeting rules for married persons enrolled in a managed long-term care program. Although this GIS mandated spousal impoverishment protections for the spouse of a person enrolled in a managed long-term care program, it prevented a married person enrolled in a managed long-term care program from contributing excess income into a pooled community trust. Our Section's analysis concluded that the GIS violated Federal law, and on behalf of our Section I requested clarification from the NYS Department of Health. On October 6, 2014, members of our Section were given the opportunity to meet with the NYS Department of Health. As a result of that meeting, the NYS Department of Health has requested clarification from CMS and has issued GIS 14 MA/025 which rescinds GIS 14 MA/015. Our Section owes a debt of gratitude to David Goldfarb, Rene Reixach, Valerie Bo-

gart, Aytan Bellin, Britt Burner and Matt Nolfo for their tremendous efforts on this project.

Our Fall Meeting took place at the Doubletree Hotel in Tarrytown, New York from October 30–31. Thanks to our program Co-Chairs, Jeffrey Asher and Judith Nolfo-McKenna, the program was a tremendous success. The program was sold out with 214 attorneys in attendance. We had a number of attorneys in attendance who were admitted five years or less. I was pleased to see so many new members joining our ranks. The program included presentations on the preparation, uses and abuses of powers of attorney and powers of attorney in the Guardianship Court. Other important topics that were covered included revising estate plans in light of NYS estate tax changes, decanting of trusts, retirement plans, planning with real property and advising the family on the hiring of private home health aides. The real estate portion of the program was conducted in the format of a concurrent break-out session for basic and advanced issues. Again, in keeping with our tradition, on Friday morning there was a Friends of Bill W meeting. The recreation portion of the program included a cocktail reception and an entertaining murder mystery dinner on Thursday evening.

I would like to thank all of the speakers for their excellent presentations. I would also like to thank Lisa Bataille, Kathy Heider and Adriana Favreau for a great

job in putting together the program. Unfortunately, Kathy Heider was not able to be present but she was missed. Thanks also to our sponsors and exhibitors for your continued financial support. A special thanks to NYSARC Trust Services, Inc. for sponsoring the Murder Mystery entertainers.

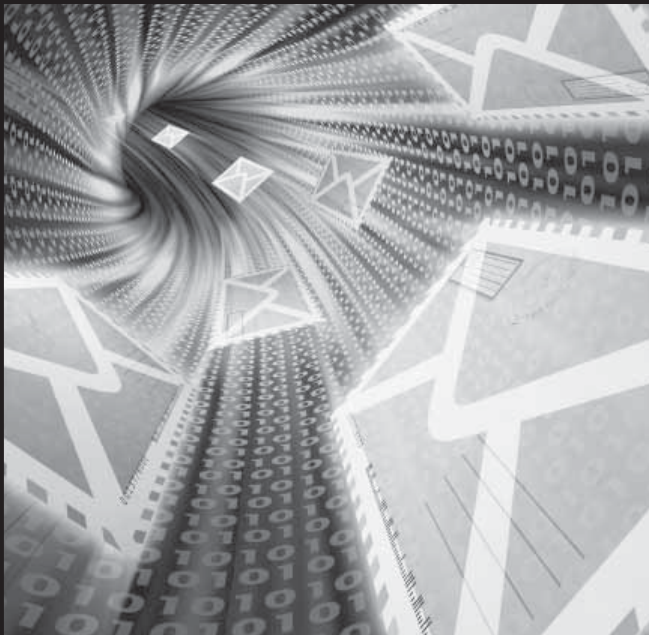
I have appointed Fern Finkel and David Okrent as program Co-Chairs for our Annual Meeting on January 27, 2015 at the New York Hilton Midtown in New York City. Fern and David are actively working on developing the program for that meeting.

After discussions at our Executive Committee Meeting, it was decided that we will run the UnProgram every other year instead of every year. Accordingly, we will not be running that program this spring.

The continued long-term success of our Section depends upon new members who will become our future leaders. I am delighted at the number of new members I had the pleasure to meet at our Summer Meeting. I am encouraged by their enthusiasm and look forward to their active participation in our Section. For those of you who may be reading this message but are sitting on the sidelines, I encourage you to become active participants, join our committees and attend our programs. We appreciate new ideas and welcome your involvement.

Richard A. Weinblatt

Request for Articles



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

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

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Message from the Co-Editors in Chief

Dear Colleagues and Friends:

We write this message as the leaves are beginning to turn colors and our membership is enjoying the incredible fall foliage along with the sights and sounds of the season. High school football games, pumpkins, bonfires and crisp morning air are only a few of the unique experiences that make autumn so special. After the “lazy” and thankfully not such “hazy” days of summer, autumn is a time of renewed spirit, and commitment to our professions. We hope that the articles in this edition of the *Journal* will spark interest and provide great fall reading for newcomers to the fields of elder law and special needs law and experienced practitioners.

We begin this issue with *Practical Consideration for Attorneys and Trustees; Trust Decanting After Matter of Kroll* by Elizabeth A. Candido. This is an especially useful piece to Special Needs Planning practitioners who are using the decanting statute to protect beneficiaries with disabilities; and a reminder (as noted in the article) for attorneys to draft *flexible* trust instruments. Next, Elana M. Simha and Mordecai Y. Simha provide sound planning advice in *Matrimonial Action and the Use of Supplemental Needs Trusts for Individuals with Disabilities*. Both articles address issues that planners are facing more and more on a regular basis.

Last year, we started a law student/recent law graduate writing competition for the *Journal*. We are honored to include the winners’ articles in this edition. This year’s winners both wrote their submissions while attending Benjamin A. Cardozo School of Law. We congratulate Michelle K. Chu on her contribution *Universal Service in the 21st Century: Improving Telecommunications Accessibility for Americans with Disabilities* and we also congratulate Shawna Benston on her submission—*Balancing Autonomy and Beneficence: The Legal, Sociopolitical, and Philosophical History of and Support for Legalizing Assisted Suicide*. We are thankful for their excellent articles and we look forward to their presence at our Fall Meeting. We encourage everyone to welcome them to our ever-growing circle of colleagues.

We continue to include informative submissions from the Elder Abuse Committee. As part of an ongoing series of articles we include a Legislative Update on



the Financial Exploitation of the Elderly by Elizabeth (Betsy) Klampert and Malya Levin. In addition, *Heeding the Call: Response to National Survey on Elder Law Education* by Joy Solomon and Meredith Feinman is thought-provoking and provides quite a number of dramatic statistics on elder abuse. The article highlights the need for elder law attorneys to be more educated and aware of the complex issues of elder abuse.



Reverse mortgages in many cases are a planning tool for our elder population. Jim Sarlis provides us with important information in *HUD’s New Regulations, Passed in the Wake of Bennett v. Donovan, Offer Protections for Non-Borrower Spouses in Reverse Mortgage Situations*.

Bob Kruger, one of our regular columnists, reminds us of the potential perils associated with guardianship appointments. Judith Raskin provides a summary of recent New York cases, including a decision that addresses the validity of pre-death transactions. This issue also includes an informative piece on *Medicaid Recoveries, Liens and Strategies* by Michael L. Pfeifer. The article provides a guidepost for those dealing with these issues and we believe it will be a very helpful resource for our members.

Finally, we thank Richard A. Weinblatt for his leadership and the entire Executive Committee for their support of this *Journal*. As many of our colleagues are aware, Richard and the Executive Committee recently established a new committee for those interested in special education law as it affects individuals with disabilities. We are hopeful that we will include articles from members of this committee in coming issues.

In closing, we realize that our term as Co-Editors is winding down in the coming months. We look forward to receiving submissions from those who have not done so previously during our tenure. This Section is so fortunate to have such talented and dedicated practitioners. Allow us to brag about you as we pass the torch!

Happy Reading and Writing!

Sincerely,
David and Adrienne

Practical Considerations for Attorneys and Trustees: Trust Decanting After *Matter of Kroll*

By Elizabeth A. Candido

The New York “trust decanting statute” (EPTL 10-6.6) was significantly revised in August 2011. Although commentary and analysis of the new statute appeared almost immediately from practitioners, it was not until late 2013 that the judiciary joined the conversation. In *Matter of Kroll*,¹ the Surrogate’s Court of Nassau County was faced with a challenge to a trustee’s exercise of appointing trust assets from a lifetime trust to a supplemental needs trust (SNT). The decision is noteworthy not only because it is the first to analyze the revised statute, but also because it serves as an important reminder for all trustees and attorneys to draft flexible trust instruments, to stay current with the needs of beneficiaries, and not to delay when changed circumstances necessitate a change to the trust.



A. Statutory Background

In 1992, New York was at the forefront of trust law when it enacted EPTL 10-6.6, which allowed trustees with unlimited discretion over distributions of principal to appoint trust assets to another trust. The statute was essentially unchanged for almost 20 years, during which time it became evident that the statute had limited applicability. The revised statute now permits all trustees, regardless of their scope of authority, to decant, but they must maintain certain provisions of the original trust in the new trust and cannot eliminate or reduce the interests of current beneficiaries.

B. The Decision

Matter of Kroll presented the Surrogate’s Court with two issues concerning EPTL 10-6.6: (1) the meaning of “authorized trustee,” and (2) when the decanting becomes effective.²

In *Kroll*, the beneficiary’s grandfather created a lifetime trust (the “invaded trust”) for his grandson shortly after his grandson was born. All distributions from the invaded trust were discretionary until the beneficiary attained age 21, at which time he would be entitled to receive income and the right to withdraw principal at any time. After the invaded trust was created, it was discovered that the beneficiary had special needs which made him eligible for Medicaid and

Supplemental Security Income (SSI) benefits. To ensure that the beneficiary’s rights in the trust which were to vest on his 21st birthday did not render him ineligible for the continued receipt of his government benefits, six days before the beneficiary’s 21st birthday, the trustees executed an instrument appointing all of the assets of the invaded trust to a newly created third-party SNT for the beneficiary (the “appointed trust”).

The Attorney General of the State of New York, on behalf of the State Department of Health (the department responsible for providing SSI and Medicaid benefits), objected to the decanting, arguing that it was ineffective because (1) the trustees were not “authorized trustees” within the meaning of EPTL 10.6-6(s) (2); and (2) the beneficiary’s rights in the invaded trust had vested before the decanting became effective and, consequently, the appointed trust was a first-party SNT and must contain a payback provision.³

The court appointed a guardian *ad litem* (GAL), whose report supported the decanting. The court agreed. It addressed two issues:

1. **Definition of “authorized trustee.”** The statute defines an authorized trustee of the invaded trust as “any trustee or trustees with the authority to pay trust principal to one or more current beneficiaries other than: (i) the creator, or (ii) a beneficiary to whom income or principal must be paid currently or in the future or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee (other than by the exercise of a power of appointment held in a non-fiduciary capacity).”⁴ The court held that it is not the *beneficiary* who is under scrutiny, but rather it is the *trustee* who cannot be the creator or a beneficiary to whom income or principal must be paid currently or in the future, or who is or will become eligible to receive a distribution from the trust in the trustee’s discretion. To hold otherwise, the court said, would mean that no trustee could ever be an “authorized trustee” under the statute.
2. **Effective date of exercise.** The court also rejected the AG’s argument that the beneficiary’s rights vested in the trust before the decanting became effective. The statute provides that the trustees’ exercise of appointment becomes effective 30 days after the instrument appointing the trust assets is served on the interested parties,

unless those persons sooner consent in writing.⁵ On May 1, 2012, the trustees executed an instrument evidencing the decanting and delivered it to the beneficiary's father. The trust provided that a parent or guardian of a disabled beneficiary could receive notice and have authority to act on such beneficiary's behalf. On May 2, the beneficiary's father executed an instrument consenting to the appointment of trust assets, to be effective immediately. Five days later, on May 7, the beneficiary turned age 21. The AG argued that the beneficiary's rights vested on his birthday, which occurred sooner than 30 days after the trustees executed the instrument, but the court disagreed. In light of the trust's explicit authority permitting a parent or guardian to act on behalf a disabled beneficiary, the consent given by the beneficiary's father was proper, and the trustees' exercise of appointment was deemed to be effective on May 2, before the beneficiary's rights in the invaded trust had vested. Thus, the beneficiary remained eligible for government benefits, and the court held that the appointed trust was a valid first-party SNT which was not required to contain a payback provision.

C. Conclusion

Matter of Kroll is important both because it is the first published decision in which a court has analyzed the recent amendments to EPTL 10-6.6, and also because it offers practical guidance to attorneys and trustees.

First, this case marks the first instance where a court has analyzed and interpreted the language of the revised decanting statute. Although its clarification of the term "authorized trustee" likely is not groundbreaking, it is nevertheless an example of the judiciary's role in creating the meaning of the words written by the legislature.

Second, the decanting in *Matter of Kroll* was, in essence, "saved" because the trust contained a provision allowing the parent of a disabled beneficiary to act on

his behalf. When the trust was drafted, the beneficiary was not disabled. This is often the case, regardless of how healthy a beneficiary may appear at the moment the trust is created: developmental disabilities often are not present at birth, and accidents can render persons of all ages disabled. Thus, to provide for the utmost flexibility, practitioners should always include in their instruments a provision like the one in *Kroll* which allows another person to act upon behalf of a disabled beneficiary.

Finally, the trustees could have avoided the timing issue entirely if they had executed the instrument appointing the assets from the invaded trust to the SNT earlier so that the appointment would have been effective under the statute's 30-day time frame regardless of the father's consent. Thus, *Matter of Kroll* serves as a reminder for trustees to become, and stay, acquainted with the beneficiaries and their lives as they pertain to the trust, as well as a reminder to trustees and attorneys that they should not wait until the last minute before implementing important changes.

Endnotes

1. *Matter of Kroll*, 41 Misc.3d 954, 971 N.Y.S.2d 863 (Sur. Ct. Nassau Co. 2013).
2. EPTL 10-6.6(j)(1) states that the trustees may, but need not, obtain court approval to exercise their powers to decant under the statute.
3. A "payback provision" would require that, upon the beneficiary's death, the trustee of the SNT must reimburse SSI and Medicaid for the medical benefits it provided to the beneficiary during his lifetime prior to making any other distributions from the trust. See Social Services Law §§ 366(2)(b)(2)(ii) & (iii).
4. EPTL 10-6.6(s)(2).
5. EPTL 10-6.6(j).

Elizabeth A. Candido is an associate in the Private Clients, Trusts and Estates practice group at Schiff Hardin LLP in New York, NY. She focuses her practice on estate administration, estate planning, and estate and trust taxation. She received her J.D. and LL.M. in Taxation from New York Law School.

Matrimonial Actions and the Use of Supplemental Needs Trusts for Individuals with Disabilities

By Elana M. Simha and Mordecai Y. Simha

In negotiating matrimonial settlements, it is essential that families of individuals with disabilities are aware of associated special needs planning issues.

Means-Tested Government Programs

Children and adults with disabilities often rely on means-tested Federal and State government programs for health and financial benefits. Means-tested government programs have limits on the income and resources that a qualifying individual can have. In New York, such programs include supplemental security income (SSI)¹ and Medicaid.

SSI provides a monthly stipend to an individual with disabilities who has limited countable resources and monthly income. The stipend is intended for use towards basic needs including food and shelter. A child under eighteen (18) will only qualify for SSI benefits if his or her parents' countable resources and monthly income are below the state's eligibility requirement.² Upon turning eighteen (18) a child with disabilities is viewed independently for SSI purposes. As a result, the amount of his or her SSI stipend will depend on individual factors, including the amount he or she needs for monthly rental and household expenses,³ the amount he or she earns from employment (if employed), and the amount of cash, gifts or other monthly income he or she receives.

Medicaid is a government program which provides medical assistance for persons who meet income guidelines and who have limited resources. Many individuals with disabilities rely on the Medicaid program to meet their basic health needs. Medicaid is also used by many Americans as they age in order to fund community based nursing care and/or nursing home care.

Classic Child Support Arrangements and Means-Tested Benefits Programs

Divorce settlements usually delineate specific financial responsibilities of each party towards the children's care and schooling, either through the age of majority and/or through college. Often, the non-custodial parent's responsibility takes the form of



a monthly child support payment. In many cases it is also advisable for the settlement to require that each party pay for a life insurance policy on the life of the other, to ensure that there will be enough money to support the children in the event of the untimely death of one of the parties. When the divorcing couple has a child with special needs, the divorce settlement often recognizes that the child will require support into adulthood and makes provisions for support beyond the typical age of majority.



According to Social Security regulations,⁴ two-thirds of child support payments for a child under eighteen are considered income to the child. Once a child with disabilities turns eighteen, one hundred percent of child support payments are considered countable income of the child. Therefore, child support payments from the non-custodial parent that are made directly to the custodial spouse are includable when calculating the child's income for purposes of SSI and Medicaid eligibility. Additionally, since the purpose of child support is for food, shelter and other basic needs of the child, and the purpose of SSI is for the same items, Social Security will reduce a child's SSI payments by the amount of child support dollar-for-dollar. In that way, child support payments may have the unintended consequence of denying or reducing the child with disabilities' access to means-tested benefits.

Consider the following two examples pertaining to a child with disabilities who is under the age of 18:

Ex. 1: O. is a 10-year-old with severe Autism. He lives at home with his father. O.'s father's income and resources are low enough to make O. eligible for SSI. O.'s mother does not provide any child support. O. receives \$744 in SSI monthly, currently the highest amount available to an individual living in the household of another in New York.

Ex. 2: Same facts as in Ex. 1, except here, O.'s mother pays \$300 of child support monthly. Two-thirds of that payment, or \$200, is countable for SSI purposes and

offsets the SSI payment dollar-for-dollar. As a result, instead of receiving a monthly SSI check for \$744, O.'s monthly payment is reduced to \$544.

The damage of outright child support payments is magnified when a child with disabilities turns 18.

Ex. 3: M. is 18 years old with developmental disabilities. She lives at home with her mother and attends a day habilitation program in the local community. There is a rental agreement so that M. contributes monthly towards household expenses. She has no income from employment, does not have reportable cash or gifts and her mother receives no child support. In this case, M.'s income and resources make her eligible for SSI and Medicaid. She receives \$744 in SSI monthly, currently the highest amount available to an individual living in the household of another in New York.

Ex. 4: Same facts as in Ex. 3 except here, M.'s father pays \$400 of child support monthly. As M. is over 18, the entire \$400 child support payment is countable for SSI purposes, and offsets the SSI payment dollar-for-dollar. As a result, instead of receiving a monthly SSI check for \$744, M.'s monthly stipend is reduced to \$344.

There are legal options available to avoid the above scenarios, and to ensure that child support payments do not jeopardize a disabled child's means-tested benefits. Attorneys representing such couples must be cognizant of the interplay between child support and means-tested benefits and the available options in order better advise their clients.

Supplemental Needs Trusts

A supplemental needs trust (SNT)⁵ is the most basic and crucial planning tool for families of individuals with disabilities. SNTs may be established for a loved one with chronic or severe disabilities. They allow family members or others to set aside money for a loved one with disabilities without jeopardizing government benefits. By law, SNT funds are available only to supplement (and not to supplant) government benefits, meaning funds can be used only for those items that cannot be paid for using government benefits.

There are two basic types of SNTs. *First party SNTs*, also known as self-settled or payback trusts, are funded with the disabled individual's own funds. In order to establish a first party SNT, a number of criteria must be met: (1) the individual must be under 65 years old, (2) the individual must be disabled as defined in the Social Security act, (3) the trust must be for the benefit of the

individual with disabilities, (4) the Grantor must be a parent, grandparent or legal guardian of the individual with disabilities (or a court), and (5) the trust must have a provision providing that state entities such as Medicaid that expend funds on the individual with disabilities during his or her lifetime must be repaid out of any funds that remain upon the individual's death. *Third party SNTs* are funded with the funds of someone other than the individual with disabilities. Grandparents, parents or friends who want to leave money for use by an individual with disabilities can utilize an *inter-vivos* third party SNT.

Divorcing parties may consider establishing an SNT to hold monthly child support payments. The use of an SNT is only recommended when a child would otherwise qualify for government benefits—if a child is under 18 and his or her parents' finances would prevent the child from receiving government benefits anyway, an SNT is not necessary and would place unnecessary restrictions on the money. However, for a child or adult with disabilities who would otherwise be eligible for government benefits, assigning child support payments to an SNT would allow for child support payments while still maintaining the child or adult's government benefit eligibility.⁶ The assignment must be irrevocable.⁷ For purposes of SSI, child support is viewed as the child's money. Therefore, if the child support will be assigned to an SNT, a first party SNT with payback provisions must be established. The assignment can be made through court order, or through a post-order agreement between the parties.

Third party SNTs may be utilized as part of divorce agreements as well. As discussed previously, parties sometimes agree to maintain life insurance on each others' lives, in order to ensure a surviving party will have necessary finances in the event of the untimely death of one of the parties. When a child with special needs is involved, the parties may want to consider naming an *inter-vivos* third party SNT as a beneficiary of the life insurance policy.

Other Issues Related to Children with Disabilities That Divorcing Couples Should Consider

Though outside the scope of this article, it is important to note a number of other areas pertaining to children with disabilities of which attorneys representing divorcing couples should be aware.

1. **Guardianship**—Parties should agree as to who will be appointed guardian and successor guardians when a child with special needs reaches the age of majority.
2. **Special Education Decision Making**—Parties should agree on which parent will have the

authority to make decisions pertaining to the education of the child with special needs.

3. **Estate Planning**—Parties may want to agree on certain estate planning provisions regarding the child with special needs. Depending on whether or not *inter-vivos* SNTs have been established, a testamentary SNT may be advisable.

SNTs and the Elderly or Disabled Ex-Spouse

According to a recent *New York Times* article, more Americans over the age of 50 are divorced than widowed.⁸ For attorneys advising older divorcing couples, it is important to realize that Medicaid is the largest payer for nursing home care and community based health care services in the country. The goal of preserving Medicaid eligibility should therefore inform the structure of the divorce agreement.

Under N.Y. Medicaid laws, alimony received by a Medicaid beneficiary, regardless of whether that person is disabled, will be viewed as income and will be taken into consideration when deciding whether he or she will remain eligible for Medicaid services. Moreover, for individuals applying for nursing home Medicaid, there is a five-year look-back period. Medicaid will look at any transfers made within the five year period preceding an individual's application and if non-exempt transfers above the Medicaid threshold were made, Medicaid will impose a penalty period commensurate to the amount of money transferred. During the penalty period, an individual will be denied Medicaid benefits and will be responsible to pay for nursing home care out of pocket.

Older divorcing couples who do not anticipate using Medicaid benefits within five years can agree to a lump sum payment in lieu of continuing monthly alimony/maintenance. The receiving party can conceivably quickly spend down the money on real or personal property purchases that are exempt from Medicaid's calculation of income or resources. The risk inherent in this approach is that if the transferor requires nursing home Medicaid within five years, Medicaid may attempt to impose a penalty period commensurate with

the value of the alimony paid. However, it could be argued that the transfer was made for a purpose other than qualifying for Medicaid.

Another option is to structure the divorce settlement so that alimony funds go directly to an SNT. Funds in the SNT will be available to provide for any need of the beneficiary that is not met by Medicaid or other government benefits. An SNT is beneficial with regard to SSI as well, as according to SSI rules any funds paid directly to a trust as a result of a court order are not considered income. While putting funds in an SNT does limit what the funds can be used for, for many older couples it may be the best route to preserving eligibility for crucial means-tested government benefits.

Endnotes

1. See 42 USC 1381 et seq.
2. In New York, the 2014 monthly limits are \$2000 for individuals and \$3000 for couples.
3. If a valid rental and household agreement is created, an adult with disabilities who lives at home may still be considered liable for rent and household expenses.
4. Program Operation Manual Systems (POMS) SI 00830.420 Child-Support Payments.
5. Estates Powers and Trusts Law (EPTL) 7-1.12.
6. POMS SI 01120.200 G.1.d.
7. *Id.*
8. Roberts, Sam, *Divorce After 50 Grow More Common*, September 20, 2013. URL: http://www.nytimes.com/2013/09/22/fashion/weddings/divorce-after-50-grows-more-common.html?_r=1&.

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Universal Service in the 21st Century: Improving Telecommunications Accessibility for Americans with Disabilities

By Michelle K. Chu

Introduction

High school football coach Kevin Bella credits advanced telecommunications and assistive technology¹ for his job.² Born deaf, Bella uses a new type of videophone similar to Skype that allows him to communicate with his players using Video Relay Service.³ Players are somewhere else on the phone with the interpreter and hear the interpreter translate Bella's signs. Sign language interpreters are not always available to meet directly with Bella. The interpreter dictates exactly what Bella would say if he spoke. All of this occurs in real-time through video and audio feeds. Bella reflects, "This allows me to work with hearing players, because there's a lot in my language that has to do with expressions. The meaning is lost if sign language is reduced to written text."⁴ Bella is among many individuals with disabilities who have been able to find gainful employment and increase their civic participation with the assistance of advanced telecommunications and assistive technology.



However, there are not enough individuals with disabilities who have benefited from the advantages of advanced telecommunications and assistive technology as Bella has. Economists may shudder at the concept of universal service, but it is in the best interests of the public good. Universal service promotes the principles of availability, affordability, and accessibility⁵ of telecommunications in order for as many individuals as possible to benefit. Although assistive technology furthers these principles of universal service by making telecommunications accessible to individuals with disabilities, the telecommunications industry has historically neglected the importance of accessibility in its products and services. While new telecommunications legislation and developments in disability case law in the 21st century place stronger obligations on the telecommunications industry, the industry cannot work alone to achieve universal service. Revisions to telecommunications and disability legislation, as well as a means of funding universal service, are required for the telecommunications industry to achieve universal service for individuals with disabilities.

Part I of this article provides general background of the changing perceptions of individuals with disabilities and the potential of telecommunications to improve their lives. Part II addresses the problems of the digital divide and the disability divide that individuals with disabilities face. Universal service for individuals with disabilities is difficult to achieve not only because of these divides, but also because the industry has little economic incentive to provide it. Furthermore, the way the concept of universal service was forced to develop within numerous regulations of the telecommunications industry also makes universal service for individuals with disabilities difficult to achieve. Part III explores disability legislation concerning telecommunications and telecommunications legislation concerning disability. Exploration of this legislation reveals a history of inadequate universal service for individuals with disabilities throughout the twentieth century. However, current legislation promises great changes in universal service in terms of accessibility for individuals with disabilities. Part IV proposes ways to carry out this legislation and considers counterarguments to these current legislative proposals.

I. The Importance of Equal Access to Telecommunications for Individuals with Disabilities

54.4 million Americans (18.7% of the total population) have a disability.⁶ Disability⁷ increases with age, as 13% of people ages 21 to 64 have a disability, but 53% of people over 75 have a disability.⁸ The number of individuals with disabilities is expected to rise even more with the aging of baby boomers.

In a society that relies so heavily on telecommunications, telecommunications policy regarding accessibility and universal service significantly affects not only everyday activities, but also essential aspects of life, such as income, employment, education, and access to health care.⁹ Information communication technologies ("ICTs"), which include telephony, television and broadcasting, computers, software applications, and Internet technologies, have great potential to improve the lives of individuals with disabilities.

A. Changing Perceptions of Disability

For many decades, American society relied on a medical model of disability, wherein disability was viewed as something inherently wrong with the body

and an unfortunate personal tragedy.¹⁰ The medical model promoted the eugenics movement throughout the late 19th and early 20th centuries. During this time, institutionalization and sterilization of individuals with disabilities were encouraged because of the idea that individuals with disabilities could not take care of themselves and were therefore a blight on society.¹¹ Individuals with disabilities were considered incapable of completely participating in society because of their own physical and psychological limitations. It was up to the individual to overcome his disability.

With the success of the civil rights movement for marginalized racial groups and the return of thousands of Vietnam War veterans who had developed disabilities overseas during the 1960s,¹² the model of disability shifted from a medical model to a social model. Under the social model of disability, disability is not viewed as something inherently wrong with the body, but is a result of “the interaction between his physical or mental characteristics and the social choices and attitudes that attach disadvantage to those characteristics.”¹³ Society started to recognize that physical differences only become disabilities because society fails to make modifications necessary to include the participation of individuals with disabilities.¹⁴

Despite the changing perceptions of individuals with disabilities for the better and the numerous disability laws that have been passed since the 1970s, individuals with disabilities are often forgotten. Many websites are inaccessible to the visually impaired because they are not compatible with screen reader software. Touchscreens are inaccessible to many of those who have mobile impairments. Individuals with disabilities are frequently an afterthought in many aspects of society, particularly in the development of telecommunications technologies, even though they have the potential to improve the lives of many.

B. Potential for Telecommunications to Improve the Lives of Individuals with Disabilities

In 2011, 61% of adults with disabilities had only a high school education or less, while only 40% of adults without disabilities had a similar level of education.¹⁵ In 2005, 32% of individuals with disabilities were employed, compared to 81% of individuals without disabilities.¹⁶ However, 75% of individuals with disabilities who are not employed want to work.¹⁷ 46% of adults with disabilities, compared to 26% of adults without disabilities, had household incomes of \$30,000 or less.¹⁸ There are clear disparities between adults with disabilities and adults without disabilities that seem too significant to repair.

Fortunately, access to broadband and ICTs have much potential to improve the education, employ-

ment, and income for individuals with disabilities.¹⁹ For example, while broadband is advantageous for all its users, it is particularly useful for individuals with visual, hearing, and ambulatory disabilities.²⁰ Their educational opportunities are improved by being able to obtain online educations.²¹ Better educational opportunities means better job opportunities, which individuals with disabilities can engage in through telecommuting and telework.²² Better job opportunities mean higher incomes. Most importantly, access to broadband and ICTs may mean the difference between working and not working at all.

Additionally, access to broadband and ICTs have great potential to improve health care access for individuals with disabilities.²³ Since broadband services are available 24/7, they allow for monitoring and other support services that allow individuals with disabilities to stay at home and be monitored, rather than remain in hospitals or other health care facilities.²⁴ This significantly reduces costs for those with disabilities, which is important because they need more access to health care than those without disabilities. Additionally, emergency systems can route calls to the nearest emergency service centers, even remotely.²⁵ While there is great potential for telecommunications to improve the lives of individuals of disabilities, this goal can be difficult to achieve.

II. Why Universal Service for Individuals with Disabilities Is Difficult to Achieve

The changing perceptions of disability have been the foundation of disability laws, but the accessibility problems that individuals with disabilities have with telecommunications can be traced back to other problems that have been developing alongside these changing perceptions.

A. Digital Divide

The high costs associated with telecommunications burdens the availability and affordability principles of universal service, contributing to the digital divide. The digital divide is an economic inequality among groups in the access of telecommunications because of demographic and socioeconomic variables such as income, geographic location, and race.²⁶ Because most individuals with disabilities meet these criteria, they constitute a large portion of the digital divide.

B. Disability Divide

Another problem that has hindered the progress of universal service is the lack of convergence between the development of telecommunications technologies in general and development of telecommunications technologies that keep individuals with disabilities in mind. This problem has contributed to the “disability

divide.” Take the smartphone revolution of the 21st century for example. Smartphones are superior to cellphones because of their mobile operating systems, a benefit for both individuals with disabilities and those without disabilities. However, as smartphone manufacturers respond to consumer wishes for sleekness and touchscreens, smartphones become smaller and thinner each year and keyboards have virtually disappeared. The features of smartphones make it very difficult for individuals who may have visual, auditory, or other types of physical impairments to take advantage of them. Consequently, individuals with disabilities are part of both the digital divide and the disability divide.

When manufacturers and providers do not consider individuals with disabilities in their initial design and implementation in products and services, they must either make sure they are compatible with assistive technologies or retrofit them to be accessible, as discussed in Part III.

C. No Economic Incentive

A third problem is that although individuals with disabilities comprise a significant portion of the American population, they are still a minority. None of the categories or groups of individuals with disabilities commands a large enough share of the market²⁷ that would economically incentivize manufacturers and providers to design their products and services with individuals with disabilities in mind. Furthermore, many individuals with disabilities have disabilities in multiple categories, making it even more difficult to design accessible products and services. In recent years, larger technology firms such as Facebook have created teams that focus on improving accessibility for clients who have disabilities.²⁸ However, most firms either do not have the resources of large companies like Facebook or feel that money is better spent on other areas. Historically, universal service has not been viewed as an obligation, which has led to legislation promoting universal service.

III. Current Legislation

Numerous disability laws have been enacted as a result of the great social changes of the 1960s and 70s. These laws include disability legislation that has specific provisions regarding accessibility for people with disabilities, such as the Rehabilitation Act of 1973 and Americans with Disabilities Act (“ADA”) of 1990.²⁹ They also include telecommunications legislation that has specific provisions regarding universal service, such as the Telecommunications Act of 1996. An overview of these laws demonstrates a history of inadequate universal service for individuals with disabilities throughout the 20th century, but a promising turn of events for the 21st century.

A. Disability Legislation Concerning Telecommunications

The Rehabilitation Act of 1973³⁰ was groundbreaking in that Section 502 of the Act finally established an Access Board to ensure federal agencies’ compliance with the Architectural Barriers Act for the removal of physical environmental barriers. In addition, Title IV of the ADA requires that telephone service providers provide relay systems for customers with speech or hearing impairments at no additional cost. Compliance with Title IV was viewed as widespread and successful by individuals with disabilities.³¹ However, in reality, compliance was high only because there were already readily available, inexpensive technologies that complied with the Act.³² Title IV also did not establish any new accessibility requirements for equipment³³ and only addressed the needs of individuals with hearing and speech impairments.³⁴

If disability legislation fails to adequately protect the accessibility of telecommunications for individuals with disabilities, it is unsurprising that telecommunications legislation concerning disability does not do any better.

B. Telecommunications Legislation Concerning Disability

Considering the fact that the United States has only used the social model of disability in the last few decades, disability law has made much progress. However, the history of how telecommunications legislation concerning disability is implemented demonstrates a pattern of how the telecommunications industry has been favored over disability groups. The legislation and case law covered below reflects the tendency of the Federal Communications Commission (“FCC”) throughout the 20th century to allow for non-compliance when the cost of accessibility is considered too expensive in order to protect the economic interests of telecommunications providers and manufacturers.³⁵

1. Telephony

Numerous types of telecommunications laws concerning telephony rights for individuals with disabilities were enacted in the 1980s. They all appeared to make great strides for individuals with disabilities who used telephones. The Telecommunications for the Disabled Act of 1982 requires uniform technical standards for telephone equipment to be compatible with hearing aids. The Hearing Aid Compatibility Act of 1988 requires all telephones made after 1989 to be compatible with hearing aids. The Telecommunications Accessibility Enhancement Act of 1988 requires federal telecommunications systems to be fully accessible to individuals with hearing and speech disabilities.

After the Telecommunications for the Disabled Act of 1982 was enacted, but before the Telecommunications Act of 1996 was enacted, the FCC required all companies to provide telephones compatible with hearing aids in accordance with the Hearing Aid Compatibility Act of 1988.³⁶ Although the FCC had planned to enforce the compatibility requirements by 1993, it suspended the rule as applied to certain places, such as non-common workplace areas, that same year.³⁷ The FCC cited undue economic burdens. Although places of public accommodations had at least five years of fair notice and the telephone was essential throughout the 20th century, the interests of individuals with disabilities were disregarded in favor of the telecommunications industry.

2. Television and Video Description

In 1976, the FCC approved commercial networks and broadcasters to use Line 21 technology, but adoption was voluntary. In *Gottfried v. FCC*,³⁸ although the D.C. Circuit recognized that TV licensees have a duty to provide those with hearing impairments with meaningful access to broadcasting, Section 504 of the Rehabilitation Act only imposes a legal obligation on recipients of financial aid. The interests of individuals with disabilities were not weighed, only the economic interests of networks and broadcasters.

Today, the Television Decoder Circuitry Act of 1990, the Telecommunications Act of 1996, Section 713, and the 21st Century Communications and Video Accessibility Act of 2010 ensure compliance with closed captioning. However, this compliance comes after decades of resistance from broadcasters. Part IV discusses the new accessibility problems associated with video programming broadcast over the Internet.

3. Telecommunications Act of 1996

The Telecommunications Act of 1996 was groundbreaking because it was not only the biggest comprehensive telecommunications act since the Telecommunications Act of 1934, but it was also the first comprehensive telecommunications act to address accessibility standards for individuals with disabilities. Universal service has developed in terms of affordability and availability throughout the 20th century. As the disability rights movement started in the middle of 20th century and only gained traction in the latest decades, universal service in terms of accessibility only developed as the social model of disability developed as well. Developments in disability law have changed the ways society views the abilities of individuals with disabilities. It society's lack of accessibility that prevents their full participation in society. The industry must now include accessibility as part of the determination of whether a product or service achieves universal service.

Under Section 255 of the Act, the FCC requires telecommunications equipment manufacturers³⁹ and service providers⁴⁰ to make their products and services accessible to individuals with disabilities, if such access is "readily achievable." If access is not readily achievable, manufacturers and providers must make their equipment and services compatible with assistive technologies and specialized customer premises equipment ("CPE"),⁴¹ but also only if such compatibility is readily achievable.⁴² In terms of equipment, Section 255 covers all hardware and software telephone network and CPE. Products should have accessible features such as adjustable fonts and elevated marks on keys.⁴³ In terms of services, Section 255 covers basic and special services, such as telephony and television. These rules of Section 255 were promulgated in order to achieve a set of lofty goals that the Act set.

Unfortunately, Section 255 was not written in a way that makes it feasible to achieve the Act's goals of accessibility. One goal of the Act was to establish "a single, comprehensive regulatory framework that will capture the benefits of competition while ensuring that the users and suppliers of a developing and diversified information industry will be protected."⁴⁴ This goal means that the needs and wishes of users should be balanced with the economic constraints of suppliers. However, since Section 255 only requires manufacturers and providers to comply only when access is readily achievable,⁴⁵ they are really only encouraged to achieve accessibility.⁴⁶

If compliance is too economically burdensome,⁴⁷ manufacturers and providers will not need to comply. More often than not, accessibility is determined not to be readily achievable because of how all the factors to be considered in making this accessibility assessment are stacked in the industry's favor. Such factors include the entity's overall financial resources, the number of people employed, and the type of operation.

Another goal of the Act was to "encourage the rapid deployment of new telecommunications technologies, including technologies to increase accessibility."⁴⁸ While idealistic, the faster the new technologies are deployed, the less time there is to design and develop them in order to make them accessible for individuals with disabilities.

In addition to the way Section 255 was written, the Act also fails to achieve accessibility for individuals with disabilities because of the way Section 254 was written and promulgated. Section 254 is the Act's only universal service provision and creates a Universal Service Fund ("USF")⁴⁹ that interstate telecommunications carriers must contribute to. However, it does not mention individuals with disabilities at all.⁵⁰ The exclusion of individuals with disabilities from the Act's only

universal service provision demonstrates that universal service is considered in terms of availability and affordability, not necessarily accessibility.

C. No Clear Definition of Universal Service

The Telecommunications Act of 1996 Section 254 formally defines universal service as a level of telecommunications services that considers the public interest and evolves alongside the developments of telecommunications.⁵¹ One issue that has made it difficult to achieve universal service in general, not just for individuals with disabilities, is how the concept of universal service has been forced to develop. Theodore Vail, the mastermind behind the Bell System and its monopoly over telephony, provided the country's first ideal of universal service for telecommunications in 1907: "one system, one policy, universal service." An analysis of how universal service was forced to develop alongside the telecommunications industry demonstrates the emptiness of Vail's ideal of "universal service."

As the industry began developing into a monopoly during the late 19th and early 20th centuries, Vail's concept of universal service did not have anything to do with the modern concept of universal service.⁵² The modern concept of universal service ensures the availability, affordability and accessibility of telecommunications products and services. Vail's concept of universal service ensured that networks were universally connected.⁵³ In fact, rural areas were not served initially because Bell did not see an economic benefit in serving them.

Subsequently, as the industry became a regulated monopoly in the middle of the 20th century, the concept of universal service was used as a pawn for why the industry should remain a regulated monopoly. The Telecommunications Act of 1934 attempted to promulgate to as many individuals a "rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."⁵⁴ However it failed to define "adequate facilities," and "reasonable charges."⁵⁵ An unclear definition of universal service continued.

After the Bell system was forced to divest in 1982, allowing for a competitive system, it was unclear what universal service even was. The industry was unsure of how the responsibility of universal service would be spread among competing firms. Consequently, it is also unclear who qualifies for USF and whether or not universal service incorporates accessibility, availability, affordability, or all of these considerations.

D. Recent Efforts

There have been major changes in telecommunications legislation that promote universal service for individuals with disabilities. The legislation that was enacted not only considers advanced telecommunica-

tions services of the 21st century, but universal service for individuals with disabilities.

1. National Broadband Plan

National broadband access has become such a priority for the United States that the American Recovery and Reinvestment Act of 2009 ("ARRA") required the FCC to create a national broadband plan. This became known as The National Broadband Plan: Connecting America ("Broadband Plan").⁵⁶ Broadband access creates numerous benefits, such as resources, services, and products for its users in education, health care, economic development, and many other areas, as discussed in Part I. By setting forth the Broadband Plan, the FCC finally recognized that broadband-enabled applications create enhanced opportunities for individuals with disabilities. In order for individuals with disabilities to experience the benefits of "broadband, hardware, software, services and digital content must be accessible and assistive technologies must be affordable."⁵⁷

In order for the FCC to achieve its goal of improving Internet access across the United States under the Plan, it plans to provide one hundred million households with access to 100 Mbit/s by 2020.⁵⁸ As broadband adoption increases over this decade, individuals with disabilities will still probably fall further behind in adoption, as they have already fallen behind in Internet usage, computer usage, and other areas of telecommunications, as discussed in Part I. In 2010, 65% of Americans used broadband at home, as opposed to 42% of Americans with disabilities.⁵⁹ As discussed in Part I, individuals with disabilities already fall behind those without disabilities in many essential aspects of life, such as income, employment, and education. Broadband has even more potential to improve the lives of individuals with disabilities than those without disabilities.

In order to maximize the potential of broadband for individuals with disabilities, the FCC makes many potentially beneficial recommendations. One recommendation would require the executive branch to convene a broadband accessibility working group to maximize broadband adoption by individuals with disabilities.⁶⁰ Another recommends that the FCC should establish an Accessibility and Innovation Forum.⁶¹ The last recommendation regarding individuals with disabilities encourages the FCC and Department of Justice ("DOJ") to work together to "modernize accessibility, laws, rules, and accessibility programs."⁶²

Many of the recommendations have already been carried out, but plans regarding funding do not specifically mention individuals with disabilities, even though they are a group that the Broadband Plan intends to benefit. USF contribution notices of proposed rulemaking and reform orders have been completed

and have only specifically mentioned groups such as schools, libraries, and rural areas.⁶³ On the other hand, the Accessibility and Innovation Forum has been established in order to improve accessibility in telecommunications for individuals with disabilities. However, as the ARRA did not give the FCC specific jurisdiction to implement these recommendations or to amend the universal service provisions of the Telecommunications Act of 1996, only time will tell if more of these recommendations are carried out.

2. 21st Century Communications and Video Accessibility Act

The 21st Century Communications and Video Accessibility Act of 2010 ("CVAA")⁶⁴ is one of the biggest reforms for telecommunications law concerning individuals with disabilities since the ADA and Telecommunications Act of 1996 were enacted. The CVAA was designed to ensure that the "accessibility laws enacted in the 1980s and 1990s are brought up to date with 21st century technologies, including new digital, broadband, and mobile innovations."⁶⁵ In passing the CVAA, Congress finally acknowledged shortcomings in communications and video laws. The lack of convergence between the outdated telephone and television laws regarding individuals with disabilities of the 1980s and 1990s and the fast-paced development of technologies was harming individuals with disabilities.

Under the CVAA, manufacturers of equipment used for advanced communication services⁶⁶ ("ACS") and providers of ACS must make their services and products accessible to individuals with disabilities, unless this is not "achievable."⁶⁷ The definitions of "achievable" and "readily achievable"⁶⁸ are very similar, but "achievable" considers the extent to which manufacturers and providers are already achieving accessibility. This definition of "achievable" will allow for fewer exemptions because "achievable" is a stricter standard than "readily achievable."

3. Internet and Websites

Unlike other areas of telecommunications, such as telephony and broadcast, the Internet is not as heavily regulated. The Clinton Administration recognized that the Internet should be regulated as little as possible in order to promote innovation, increase participation, and lower prices.⁶⁹ However, the Telecommunications Act of 1996 did not anticipate the Internet as the "ultimate form of convergence—broadband Internet service providers can support video programming, voice telephone calls, and a range of other services."⁷⁰ As discussed in Part I, broadband greatly improves quality of life in many ways, such as through online emergency services, health care, and education. Consistent with the self-regulation of the Internet, there is no legislation regarding the obligation of commercial websites to be accessible. This lack of legislation has led to an explo-

sion of case law on the accessibility of commercial websites at the start of the 21st century.

Title III⁷¹ of the ADA outlaws discrimination in commercial facilities and places of public accommodation.⁷² It requires that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods or services... of any place of public accommodation...."⁷³ Disability rights advocates have argued that commercial websites are a new kind of "place of public accommodation" because of the pervasiveness of the Internet today. Case law throughout the United States federal courts during this past decade points to the likelihood of a broad interpretation of "place of public accommodation," which should lead to a mandate of website accessibility.

In *Access Now, Inc. v. Southwest Airlines*, defendant Southwest Airlines was not required to make its website accessible to blind individuals using assistive technology devices because websites were not places of public accommodation.⁷⁴ "To fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure. To expand the ADA to cover 'virtual' spaces would be to create new rights without well-defined standards."⁷⁵ Title III was determined not to cover non-physical locations.

Subsequently, in *National Federation of the Blind v. Target Corp.*,⁷⁶ defendant Target was required to make its website accessible because it provided physical access to brick and mortar locations.⁷⁷ Plaintiffs did not have equal access to the enjoyment of goods and services to Target's website, so the Court determined that websites that were associated with physical locations fell under Title III.

Finally, cases such as *National Association for the Deaf v. Netflix*⁷⁸ have ruled that even websites that have no association with places of public accommodation must be made accessible to individuals with disabilities. The Court determined that Congress intended for the ADA to include new forms of technology. The Court also determined that Congress did not intend for the ADA to limit the determination of places of public accommodation to the list set forth in Title III.⁷⁹ *Netflix* also sheds light on how seriously the CVAA regulations are being taken after decades of inferior video accessibility for individuals with disabilities. Defendant Netflix was ordered to provide closed captioning for all of the shows that were broadcast with closed captioning that it redistributed online in accordance with the CVAA. Netflix argued that because Title III of the ADA did not cover redistribution of video content, the CVAA carved out an exception to Title III. However, just because earlier disability laws did not account for technological advances does not mean that they conflict with new laws that do. Case law has demonstrated

that websites may soon be considered places of accommodation under Title III.

IV. Proposed Responses and Counterarguments

Congress, the DOJ, and FCC have taken great measures in their recent reforms regarding universal service for individuals with disabilities. Now, measures that ensure compliance with the groundbreaking advanced telecommunications laws concerning individuals with disabilities, such as the National Broadband Plan and CVAA must be adopted. Additionally, a means of funding this compliance must be established.

A. Revision to Telecommunications Act of 1996, Section 254

In order for Section 254 of the Telecommunications Act of 1996 to be a true provision of universal service for all, individuals with disabilities must be included. Even if modern telecommunications laws such as the Broadband Plan and CVAA promote universal service, individuals with disabilities cannot be guaranteed universal service like the other groups that are already included in Section 254. Therefore, individuals with a disability as defined by the ADA should be included in Section 254.

B. Revision to Telecommunications Act of 1996, Section 255

Innovation and technological advancements accounting for individuals with disabilities will always be expensive and they cannot be made in a vacuum by just considering the burden on manufacturers and providers. By allowing exemptions when accessibility is not “readily achievable,” manufacturers and providers are given far too much latitude. The exemption from accessibility under Section 255 should match the exemption under the CVAA. This would help solve the problem of lack of convergence between telecommunications laws and the fast-paced development of technologies that makes universal service for individuals with disabilities difficult to achieve. Universal service for individuals with disabilities would no longer be a recommendation but an obligation.

The counterargument to the proposal on eliminating the long-standing standard of “readily achievable” in favor of “achievable” is largely economic. Manufacturers and providers will argue that if mandated to achieve accessibility, availability and affordability for other groups will inevitably be sacrificed. It is not that they do not want individuals with disabilities to become more integrated in society, but the ADA recognizes such a wide variety of disabilities that do not command a large enough market share.

However, the definition of “achievable” would not require manufacturers and providers to eliminate all

accessibility requirements, just insofar as they are able to. The ADA still only requires modifications that will neither “fundamentally alter the nature of the goods or services provided, nor result in an undue burden.”⁸⁰ The limitations of the ADA are still in place to further protect manufacturers and providers who truly do not have the resources to achieve accessibility.

C. Revision to Title III of the ADA

It is likely that the DOJ⁸¹ will soon issue regulations calling for commercial websites to be places of public accommodation under Title III of the ADA. In 2010 it issued an Advanced Notice of Proposed Rule-making⁸² “in order to solicit public comment on various issues relating to the potential application of” the ADA to the Internet. It has expressed that it believes Title III should reach commercial websites.⁸³ There is little merit to the counterargument that the text of Title III does not mention the Internet, leading to the conclusion that websites cannot be places of public accommodation. However, Congress could not have predicted the pervasiveness of the Internet today. In order for individuals with disabilities to enjoy the benefits of the goods and services that the Internet provides, universal service must ensure its accessibility.

D. Traditional and Non-Traditional Means of Universal Service Funding in Order to Serve Individuals with Disabilities

The Broadband Plan proposes several methods of universal service funding to increase accessibility for individuals with disabilities. These include suggestions that Congress authorize the FCC to use the USF to provide traditional forms of funding. If authorized, the FCC could provide up to \$10 million for assistive technology and up to \$10 million for competitive awards to be granted to firms for innovation.⁸⁴ However, thus far, progress for funding has only been made for the groups who are guaranteed universal service in the Telecommunications Act of 1996, such as schools and libraries.⁸⁵ Revisions to telecommunications and disability legislation would help ensure that progress in universal service is indeed made for individuals with disabilities. In the meantime, other means of funding should be considered to maximize universal service funding.

Similar to how the FCC auctions licenses for electromagnetic spectrum, the FCC should auction universal service funding in order to serve those with disabilities. This measure is needed because of the FCC’s history of weighing the economic interests of manufacturers and providers over the welfare of individuals with disabilities and interpreting “readily achievable” in favor of manufacturers and providers under the Telecommunications Act of 1996, as discussed in Part III. This would also ensure competitive neutrality for manufacturers and providers.⁸⁶ In fact, in 2012, the

FCC held its first Mobility Fund auction, where carriers bid for universal funding that totaled \$300 million, to extend 3G or 4G coverage to unserved areas with the goal of increasing opportunities such as employment, education, and health care.⁸⁷

In order to provide flexibility, it has been suggested that reverse auctions for universal service funding for general purposes incorporate tradable universal service obligations once the universal service funding is allocated.⁸⁸ The counterargument is that tradable obligations have the potential to lead to back room deals by firms to manipulate auctions in order to achieve the lowest possible price for funding. However, it may be worth taking the risk because of the unforeseen difficulties and costs in developing accessible technologies for individuals with disabilities.

Conclusion

Universal service, particularly for individuals with disabilities, is an important societal goal, but one that is often considered unachievable. The FCC and the telecommunications industry have come a long way from the inadequate provisions of universal service throughout the 20th century. Now, at the start of the 21st century, stronger obligations on the telecommunications industry through recent legislation will include accessibility as an important principle of universal service. However, without revisions to telecommunications and disability legislation, as well as a means of funding universal service, universal service for individuals with disabilities cannot be achieved. With the FCC, DOJ, Congress, manufacturers, providers, and disability rights advocates working together, the barriers of society that hinder universal service and the success of individuals with disabilities can be broken.

Endnotes

1. The Assistive Technology Act of 2004 defines assistive technology as “any item, piece of equipment, or product system, whether acquired commercially, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities.” 29 U.S.C. § 2202(2). It includes devices as commonplace as wheelchairs and hearing aids, but also includes many forms of advanced telecommunications, such as assistive touch for tablets and voice control to navigate cell phones.
2. See Martha Mendoza, *The Technology That’s Keeping Those With Disabilities Employed*, HUFFINGTON POST, June 23, 2013, http://www.huffingtonpost.com/2013/06/24/technology-disabilities_n_3486424.html.
3. Video Relay Service allows individuals with hearing disabilities who use American Sign Language to “communicate with voice telephone users through video equipment, rather than through typed text.” <http://www.fcc.gov/guides/video-relay-services>.
4. See Mendoza, *supra* note 2.
5. The Americans with Disabilities Act Glossary of Terms defines “accessible” as “refers to a site, facility, work environment, service, or program that is easy to approach, enter, operate, participate in, and/or use safely and with dignity by a person with a disability.” Throughout this article, accessibility will

refer to the ease with which individuals with disabilities can use a telecommunications product, device, or service.

6. American Community Survey (U.S. Census Bureau 2010).
7. The ADA’s definition of “disability” covers a wide range of impairments. It defines “disability” as “a physical or mental impairment that substantially limits one or more major life activities.” 42 U.S.C. § 12102(1).
8. Brian Wentz, Paul T. Jaeger, Jonathan Lazar, *Retrofitting accessibility: The legal inequality of after-the-fact online access for persons with disabilities in the United States* at 2, FIRST MONDAY: PEER REVIEW JOURNAL ON THE INTERNET.
9. Paul T. Jaeger, Telecommunications policy and individuals with disabilities: Issues of accessibility and social inclusion in the policy and research agenda, TELECOMMUNICATIONS POLICY at 113. (2006.)
10. Samuel R. Bagenstos, Disability Rights Law: Cases and Materials at 1.
11. *Id.*
12. See Bagenstos, *supra* note 10, at 4.
13. *Id.*
14. *Id.*
15. Wentz, *supra* note 8.
16. *Id.*
17. *Id.*
18. *Id.*
19. Krishna Jayakar, Chun Liu, Gary Madden, Eun-A Park, A Broadband Bridge For The Disability Divide: What Works And What Does Not, PTC Proceedings ‘13 at 6.
20. See *supra* note 19 at 7.
21. Wentz, *supra* note 8.
22. *Id.*
23. Jayakar, *supra* note 19 at 7.
24. Wentz, *supra* note 8.
25. *Id.*
26. U.S. Department of Commerce, National Telecommunications and Information Administration (NTIA) 1995, Falling through the net: A survey of the “have nots” in rural and urban America.
27. The ADA’s categories include hearing, vision, cognition, ambulation, self-care, and independent living.
28. See *supra* note 2.
29. ADA, 42 U.S.C.A. §§ 12101, et seq.
30. Rehabilitation Act of 1973, 20 U.S.C.A. §§ 701 et seq.
31. Jaeger, see *supra* note 9.
32. *Id.*
33. *Id.*
34. *Id.*
35. Tomoko Kanayama, Leaving It Up to the Industry: People With Disabilities and the Telecommunications Act of 1996, The Information Society (2003).
36. *Id.*
37. *Id.*
38. Gottfried v. FCC (D.C. Cir. 1981).
39. 47 U.S.C. § 255(b) Manufacturing: A manufacturer of telecommunications equipment or customer premises equipment shall ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable.

40. 47 U.S.C. § 255(c): Telecommunications services: A provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.
41. CPE is telecommunications equipment used in the home or office (get definition) and includes telephones, pagers, and answering machines.
42. 47 U.S.C. § 255(C) Access by persons with disabilities.
43. Jaeger (2006).
44. *Id.*
45. 42 U.S.C. § 12181(9)(A)-(D) The term “readily achievable” means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include:

- (1) The nature and cost of the action needed under this part;
- (2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
- (3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
- (4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities.

46. Jaeger (2006).
47. “Economically burdensome” is synonymous with “undue burden.” Undue burden means significant difficulty or expense, which is the test for “readily achievable.”
48. Jaeger (2006).
49. 47 U.S.C. § 254(d) Telecommunications carrier contribution.
50. 47 U.S.C. § 254(b) Universal service principles.

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

- (1) Quality and rates
Quality services should be available at just, reasonable, and affordable rates.
- (2) Access to advanced services
Access to advanced telecommunications and information services should be provided in all regions of the Nation.
- (3) Access in rural and high cost areas
Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.
- (4) Equitable and nondiscriminatory contributions
All providers of telecommunications services should make an equitable and nondiscriminatory

contribution to the preservation and advancement of universal service.

- (5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

- (6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h) of this section.

- (7) Additional principles

Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

51. 47 U.S.C. § 254(c) Definition of Universal Service:

- (1) In general

Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services—

- (A) are essential to education, public health, or public safety;

- (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

- (C) are being deployed in public telecommunications networks by telecommunications carriers; and

- (D) are consistent with the public interest, convenience, and necessity.

52. Mueller (1999).

53. *Id.*

54. 47 U.S.C. § 15—Purposes of chapter; Federal Communications Commission created.

55. Jayakar, see *supra* note 19.

56. http://www.recovery.gov/About/Pages/The_Act.aspx.

57. America’s Plan Chapter 9.

58. *Id.*

59. *Id.*

60. Recommendation 9.8, <http://www.broadband.gov/plan/9-adoption-and-utilization/>.

61. See *infra* note 63. Recommendation 9.9.

62. Recommendation 9.10.

63. <http://www.broadband.gov/plan/broadband-action-agenda-items.html?universal#wtb-usfmerger-order>.

64. Promulgated by 47 U.S.C. § 713.

65. FCC Consumer Facts.

66. ACS includes interconnected voice over Internet protocol (“VoIP”—added to the Telecommunications Act of 1996 in 2007) service, non-interconnected VoIP service, electronic messaging service; and interoperable video conferencing service. These

services include text messaging, e-mail, instant messaging, and video communications, among others.

67. CVAA § 716(g). Access to advanced communications services and equipment. Achievable Defined—For the purposes of this section and section 718, the term “achievable” means with reasonable effort or expense, as determined by the Commission. In determining whether the requirements of a provision are achievable, the Commission shall consider the following factors:

- (1) The nature and cost of the steps needed to meet the requirements of this section with respect to the specific equipment or service in question.
- (2) The technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies.
- (3) The type of operations of the manufacturer or provider.
- (4) The extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.

68. “Readily achievable” has been the determination of universal service throughout the various disability and telecommunications legislation.
69. A Framework For Global Electronic Commerce.
70. Stuart M. Benjain, Howard A. Shelanski, James B. Speta, Philip J. Weiser, *TELECOMMUNICATIONS LAW AND POLICY*, 3RD Edition (2012).
71. 42 U.S.C.A. §§ 12181-89.
72. *Id.* § 12181(7). A place is a “place of public accommodation” if it fits at least of the following categories:

- (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- (B) a restaurant, bar, or other establishment serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

73. 42 U.S.C. § 12182 (2006).
74. *Southwest Airlines*, 227 F. Supp. 2d.
75. *Id.* at 1318.
76. Nat’l Fed’n of the Blind v. Target Corp., 452 F. Supp. 2d 946 (N.D. Cal. 2006).
77. *Id.* at 954 (42 U.S.C. § 12182(a) (2000)).
78. *NAD v. Netflix* (2012 1st Cir.).
79. *Id.*
80. ADA § 12182(b)(2)(A).
81. The DOJ is responsible for issuing regulations pursuant to Title III of the ADA.
82. Advance Notice of Proposed Rulemaking: Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460, 43,460 (July 26, 2010).
83. ANPRM, *supra* note 82, at 465 (“The Department believes that Title III reaches the websites of entities that provide goods or services that fall within the 12 categories of ‘public accommodations,’ as defined by the statute and regulations. Because the Department is focused on the goods and services of public accommodations that operate exclusively or through some type of presence on the Web—whether hosting their own website or participating in a host’s website—the Department wishes to make clear the limited scope of its regulations.”).
84. Recommendation 9.10.
85. *See supra* 15-20, 24-26.
86. Jayakar (2004).
87. <http://www.fcc.gov/document/fcc-announces-winners-first-mobility-fund-auction>.
88. Peha (1999).

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Balancing Autonomy and Beneficence: The Legal, Sociopolitical, and Philosophical History of and Support for Legalizing Assisted Suicide

By Shawna Benston

A. Introduction

Assisted suicide, which “occurs when a physician provides a patient with the medical means and/or the medical knowledge to commit suicide,”¹ is a perpetually divisive, confusing, and agonizing issue within the intersecting realms of medical ethics, disability rights, and the law. It brings into stark opposition two of the four so-called Georgetown Principles of bioethics: individual autonomy and beneficence, with the latter presenting often as political paternalism.² Within the disability rights realm, these principles and the putative right to assisted suicide invite contesting applications of the most appropriate case law and philosophical argument in order to affirm either autonomy or potential vulnerability as the key consideration of this debate.



The vast majority of states in the United States prohibit assisted suicide,³ but both recent legal precedent and current sociopolitical discussion illustrate a slow, somewhat circuitous, yet genuine progression toward limiting government paternalism in favor of expanded autonomy recognition. Increasingly, American culture is grasping that the way to respect both autonomy and the protection of vulnerable groups is not to prohibit assisted suicide; instead, it is to legalize it with comprehensive built-in safeguards. This article will not discuss what those safeguards might entail,⁴ focusing instead on the historical, philosophical, and social foundations for the assertion that assisted suicide should be legalized in the remaining 46 states.

B. Case Law

Case law in the area of assisted suicide includes some of the fundamental cases in the overarching field of bioethics, thereby emblemizing how crucial this issue is for people with and without disabilities. While an individual naturally cannot contribute to the decision to be born, many people feel strongly that maintaining autonomy over how he or she will experience death and dying should be accepted and protected as a legal right. However, the federal government, and most state governments, fuse paternalism and ostensible beneficence in a nearly sweeping prevention of this puta-

tive right's recognition. The following cases—*Washington v. Glucksberg*, *Vacco v. Quill*, *Bouvia v. Superior Court*, and *Gonzales v. Oregon*—serve to illustrate the many integral concerns pervading the assisted-suicide debate, and provide a glimpse into the evolution (however labyrinthine) of American perspectives on this very sensitive matter.

1. *Washington v. Glucksberg*

An examination of our Nation's history, legal traditions, and practices demonstrates that Anglo-American common law has punished or otherwise disapproved of assisting suicide for over 700 years; that rendering such assistance is still a crime in almost every State; that such prohibitions have never contained exceptions for those who were near death; that the prohibitions have in recent years been reexamined and, for the most part, reaffirmed in a number of States; and that the President recently signed the Federal Assisted Suicide Funding Restriction Act of 1997, which prohibits the use of federal funds in support of physician-assisted suicide. In light of that history, this Court's decisions lead to the conclusion that respondents' asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.⁵

So began—in a rather sermonistic rhythm—the Supreme Court's tradition-based analysis that remained in agreement with previous decisions in finding no right to assisted suicide within the liberty protected by the Due Process Clause. The Court explicitly shied away from diverging from and reversing “centuries of legal doctrine...and policy choice of almost every State”⁶ and established tradition as their sole reason for rejecting a right to assisted suicide. The Court thereby provided an arguably weak, tautological basis—couched in “fundamental right” rhetoric—for its decision, given that when the Court does find reversal a compelling and necessary option, tradition as such cannot serve as the main reason to tip the balance in favor of the status quo.

However, the Court's repeated allusion to the nation's history seems to indicate that in this case, tradition did, in fact, primarily inspire the holding. Indeed, even when carefully referring to the "constitutionally protected right to refuse lifesaving hydration and nutrition that was discussed in [*Cruzan v. Director, Missouri Dept. of Health*],"⁸ the Court states that this right "was not simply deduced from abstract concepts of personal autonomy, but was instead grounded in the Nation's history and traditions, given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment."⁹

When confronted with the respondents' autonomy-based argument—namely, that in *Cruzan* "[the Court] acknowledged that competent, dying persons have the right to direct the removal of life-sustaining medical treatment and thus hasten death"¹⁰ and that "the constitutional principle behind recognizing the patient's liberty to direct the withdrawal of artificial life support applies at least as strongly to the choice to hasten impending death by consuming lethal medication"¹¹—the Court repeated its dismissal of a purely autonomy-oriented analysis, instead returning to its historical focus.¹²

The Court did include some substantive argument regarding the oft-debated issue of coercion, warning that vulnerable individuals might feel compelled—"by poverty, lack of access to good medical care, advanced age, or membership in a stigmatized social group"¹³—to avail themselves of assisted-suicide means if made legally available. While this concern is, of course, valid and worthy of exploration, its premise is that all members of such vulnerable groups somehow lack the personal autonomy required to make an informed decision. However, as this article will examine, at least some members of vulnerable groups—specifically, a subset of the disability rights sphere—remain cogent, rational individuals who believe that the decisions to seek out assisted suicide, or to refrain from doing so, should be theirs to make as they, not society, see fit.

2. *Vacco v. Quill*

Vacco v. Quill unsurprisingly makes direct reference to *Glucksberg* when confronting the issue of whether a state ban¹⁴ on assisted suicide was constitutional: "New York's statutes outlawing assisting suicide affect and address matters of profound significance to all New Yorkers alike. They neither infringe fundamental rights nor involve suspect classifications."¹⁵ *Vacco* extended *Glucksberg*'s determination that there is no right to assisted suicide, to the holding that there is no constitutionally protected right to die.

The Court went on to discuss the doctrine of double effect¹⁶ (without naming it as such), explain-

ing the "fundamental legal principles of causation and intent"¹⁷:

First, when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication.... The same is true when a doctor provides aggressive palliative care; in some cases, painkilling drugs may hasten a patient's death, but the physician's purpose and intent is, or may be, only to ease his patient's pain. A doctor who assists a suicide, however, "must, necessarily and indubitably, intend primarily that the patient be made dead." Similarly, a patient who commits suicide with a doctor's aid necessarily has the specific intent to end his or her own life, while a patient who refuses or discontinues treatment might not.¹⁸

The Court's emphasis on distinguishing between "killing" and "letting die" was fortified by a *Glucksberg*-like attachment to the historically validated view that individuals have a right to "bodily integrity and freedom from unwanted touching."¹⁹ However, the Court distinctly asserted that patients lack the "abstract 'right to hasten death,'"²⁰ and reiterated the public policy interest against vulnerable groups' exposure to the dangers of euthanasia.²¹

3. *Bouvia v. Superior Court*

*Bouvia*²² was a landmark case in the realm of patient autonomy and dignity, and the right to die. The patient, Elizabeth Bouvia, was, at the time of trial, a twenty-eight-year-old woman who, while mentally competent, was a quadriplegic with cerebral palsy. Having expressed a desire to die and attempted to accomplish death through self-starvation, Bouvia was denied the ability to do so by a California court, which issued a court order for Bouvia's hospital to force-feed her through a nasogastric tube.²³

While Bouvia's treatment providers believed this action was beneficent and in agreement with the state's interest in preserving life, the Court of Appeal highlighted an assertion by the Council on Ethical and Judicial Affairs of the American Medical Association that "[a]t all times, the dignity of the patient should be maintained."²⁴ After expressing support for the patient's right to self-determination, which includes refusal of unwanted medical intervention,²⁵ the court conducted a philosophical exploration centered on the distinction between quantity and quality of life:

Who shall say what the minimum amount of available life must be? Does it matter if it be 15 to 20 years, 15 to 20 months, or 15 to 20 days, if such life has been physically destroyed and its quality, dignity and purpose gone? As in all matters lines must be drawn at some point, somewhere, but that decision must ultimately belong to the one whose life is in issue. Here Elizabeth Bouvia's decision to forgo medical treatment or life-support through a mechanical means belongs to her. It is not a medical decision for her physicians to make. Neither is it a legal question whose soundness is to be resolved by lawyers or judges. It is not a conditional right subject to approval by ethics committees or courts of law. It is a moral and philosophical decision that, being a competent adult, is hers alone.... It is, therefore, immaterial that the removal of the nasogastric tube will hasten or cause Bouvia's eventual death. Being competent she has the right to live out the remainder of her natural life in dignity and peace.²⁶

Here, the court included the doctrine of double effect, but this time, unlike in *Vacco*, the doctrine was used in support of the patient's right to risk a fatal outcome when deciding to refuse medical treatment. While the tenor in *Bouvia* is more sympathetic to patients than the Supreme Court's would be in *Vacco* when discussing this doctrine, in fact the two cases do not diverge in their interpretation of it. Where they do diverge, however, is in their application: *Vacco*'s firm alignment with tradition left no door open to where patient autonomy might lead, while *Bouvia*'s emphasis on patient self-determination and dignity helped cultivate an evolution—side-stepped by *Glucksberg* and *Vacco*—in the legal and cultural understanding of competent patients' autonomy. Indeed, Associate Justice Compton's *Bouvia* concurrence states very explicitly,

The right to die is an integral part of our right to control our own destinies so long as the rights of others are not affected. That right should, in my opinion, include the ability to enlist assistance from others, including the medical profession, in making death as painless and quick as possible. That ability should not be hampered by the state's threat to impose penal sanctions on those who might be disposed to lend assistance.... The Hippocratic Oath reads in pertinent part: "...I will follow that method of treatment

which, according to my ability and judgment, I consider for the benefit of my patients...I will give no deadly medicine to anyone if asked...." Surely, adherence to that oath would yet admit of a reasonable balancing between the doctor's obligation to alleviate suffering and his obligation to preserve life, remembering that the term "life" has itself recently undergone substantial redefinition.²⁷

Although *Bouvia*'s openness to the right to die predated *Vacco*'s antipathy toward and denial of it, *Bouvia* has remained a deeply influential case in medical ethics, disability rights, and the law. The next case, *Gonzales v. Oregon*, likely could not have been decided as it was without *Bouvia*'s explicit recognition of a need for a constitutionally protected right to die. It is worth noting that although Elizabeth Bouvia was granted her right to die by means of removal of medical intervention, she opted instead to seek other treatment to avoid starvation.²⁸ As will be discussed,²⁹ merely having the option to elect help in ending one's life can provide people with disabilities substantial comfort in continuing life with—or, despite—their disabilities.

4. *Gonzales v. Oregon*

On October 27, 1997,³⁰ Oregon passed the landmark—and still controversial—Death with Dignity Act,³¹ which states: "(1) An adult who is capable, is a resident of Oregon, and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner in accordance with ORS 127.800 to 127.897." The Act provides a clause protecting vulnerable groups from coercion, one of the main foci of concern in the assisted-suicide debate. In saying "(2) No person shall qualify under the provisions of ORS 127.800 to 127.897 solely because of age or disability. [1995 c.3 s.2.01; 1999 c.423 s.2]," the Act appears to seek prevention of coercion or manipulation of elderly and/or disabled individuals lacking mental capacity or informed consent. Furthermore, a subsequent clause requires at least two witnesses to attest that "to the best of their knowledge and belief the patient is capable, acting voluntarily, and is not being coerced to sign the request."³²

Despite these codified precautionary measures, this Act stirred considerable controversy, culminating in the Supreme Court case *Gonzales v. Oregon*, in which the state of Oregon (with others) "brought action seeking declaratory and injunctive relief preventing federal enforcement or application of United States Attorney General's interpretive rule indicating that physicians who assist suicide of terminally ill patients

pursuant to Oregon Death With Dignity Act (ODWDA) would be violating the federal Controlled Substances Act (CSA).³³ The CSA, enacted in 1970, had “the main objectives of combating drug abuse and controlling legitimate and illegitimate traffic in controlled substances, criminalizes, *inter alia*, the unauthorized distribution and dispensation of substances classified in any of its five schedules.”³⁴ In 2001, Attorney General John Ashcroft issued an Interpretive Rule to assert that the Death with Dignity Act’s sanctioning of assisted suicide by means of controlled substances was “not a legitimate medical practice and that dispensing or prescribing them for this purpose is unlawful under the CSA.”³⁵

The Supreme Court affirmed the United States Court of Appeals for the Ninth Circuit’s holdings that the Death with Dignity Act is lawful within an area reserved for state authority, and that the Attorney General exceeded his own authority when issuing his directive under the CSA.³⁶ While the Supreme Court based its analysis mostly on federalism grounds,³⁷ the Ninth Circuit’s evaluation had hinted at voter (and, one might argue, by extension, patient) autonomy. For example, the court stated, “Here, Oregon voters have twice declared their support for the legalization of physician assisted suicide in their state. We disagree with the dissent’s suggestion that this court, rather than the Attorney General, is interfering with the democratic process. *See Glucksberg*, 735 (‘Our holding permits this debate [about] physician assisted suicide] to continue, as it should in a democratic society’).”³⁸ This statement, while derived from federalism concerns, appears to interpret voting as collective autonomy—indeed, voting itself is emblematic of individual autonomy within a democratic society. Thus, while the voting analysis was not explicitly couched in the medical context, it certainly can be read as supporting individual autonomy on both the political and medical levels, especially in light of the provocative and divisive nature of assisted suicide that pervades the two domains.

C. Philosophical, Psychological, and Social Reception of Assisted Suicide

1. Conflicting Views of Citizens and Advocacy Groups

Just as the general public includes both proponents of and opponents to the right to assisted suicide, so, too, does the disability rights contingent. The stance most commonly adopted by people with disabilities is that of resistance to this putative right’s recognition. The valid fear of coercion, the concern that their lives might be seen as less valuable than those of nondisabled people, the politically infused anxiety about a potential slippery slope to euthanasia—all of these considerations certainly lend support for argument against a right to assisted suicide.

Those individuals with disabilities who do support this right might seem to be in contradiction with their own interests. However, they, too, make compelling arguments in support of their position, as illustrated by Andrew I. Batavia in his article “The Relevance of Data on Physicians and Disability on the Rights to Assisted Suicide: Can Empirical Studies Resolve the Issue?”³⁹ Batavia makes the crucial point that the rejection by some people with disabilities of other disability rights activists’ condemnation of the right to assisted suicide “appears to be based fundamentally on differences in values, not empirical interpretations.”⁴⁰

One value that Batavia articulates on behalf of his fellow assisted-suicide supporters is the autonomous control of one’s own life trajectory, especially when one’s disability becomes overwhelmingly painful. Batavia voices the sense of relief he would feel upon knowing he had an available, legal “exit” plan:

[T]he mere concept that I would have a potential exit gave me the strength to continue when things were not going well. Since that time, I have learned from friends with disabilities that they shared this thought process. All were empowered by the notion of suicide, though they knew that assistance from their physicians was unlikely because the practice was illegal.⁴¹

This passage epitomizes the freedom that true autonomy brings: the tolerability of one’s own path that arises from the knowledge that one can determine it, including its end, if necessary. What suppresses this autonomy is, of course, the continued illegality of assisted suicide in most states.⁴² Furthermore, blocking the option of a peaceful, relatively predictable, and medically supervised process does not result in suffering individuals’ mere retreat into silent acceptance. Instead, many such individuals attempt suicide in much more violent and often-unsuccessful ways. As Batavia describes:

[M]y personal conviction in support of the right to die continued to grow as a result of the experience of three of my friends with disabilities who resorted to desperate acts of suicide using a gun, a knife, and drugs because of the lack of availability of assistance from their physicians or other knowledgeable individuals. All three were able to achieve their goals ultimately, though one achieved death only after two painful suicide attempts that increased his suffering dramatically.⁴³

In other words, in an attempt to reclaim their legally denied autonomy to make an informed assisted-sui-

cide decision, societally and legally abandoned people with disabilities can suffer further pain, emotional and physical, in their desperation to escape that of their disabilities.

While this danger continues to be addressed, the pervasive fear of coercion must not be dismissed. As the grassroots organization Not Dead Yet demonstrates, there is a strong contingent of disability rights activists dedicated to “oppos[ing] legalization of assisted suicide and euthanasia as deadly forms of discrimination against old, ill and disabled people... [and] demand[ing] the equal protection of the law for the targets of so called ‘mercy killing’ whose lives are seen as worth-less [sic].”⁴⁴ In at least partial opposition stands the organization Compassion & Choices, which cites as its goal to “help[] everyone have the best death possible,”⁴⁵ and as its qualifications both its thirty-year-plus record of “reduc[ing] people’s suffering and [giving] them some control in their final days—even when injury or illness takes their voice”⁴⁶—and its expertise in “what it takes to die well.”⁴⁷ Both organizations are, clearly, concerned with what they respectively consider the well-being of others.

Batavia certainly aligns his views and approach with those of Compassion & Choices, while advocating for a targeted approach: protecting those who actually need protection, while allowing others to exercise their autonomy in making informed decisions.⁴⁸ He carefully analyzes Not Dead Yet’s classification of the elderly and the disabled as predominantly, if not entirely, composed of vulnerable people requiring paternalistic protection. Instead, says Batavia, there is more nuance involved, and such a sweeping categorization is “objectionable to the majority of people with disabilities who are fully capable of autonomy and who do not wish to be protected from themselves.”⁴⁹

Indeed, in response to Not Dead Yet’s assertion that “physicians would not serve as adequate gatekeepers against abuse, and in the face of a health care system intent on containing costs, would in fact encourage or even coerce people with disabilities to end their lives,”⁵⁰ Batavia draws from his own experience as a person with a disability:

First, I thought that it was not my experience that my physicians or health plan would be eager to end my life, and that it was very distressing that other people with disabilities had this ominous perception of their physicians and the health care system. Second, I thought that, if in fact these allegations were true, we would need strong safeguards to avoid abuse. Never did I think that this argument could serve as a legitimate basis for denying suffering

individuals the right to end their suffering with assistance.⁵¹

Thus, it is clear that individuals like Batavia can support both their own putative right to assisted suicide when exercised knowingly and voluntarily, and vulnerable individuals’ right to protection from coercion. As one federal judge and scholar, Niel M. Gorsuch, astutely summarized, “there are ‘autonomy’ interests on both sides of the assisted suicide issue—the interest of those persons who wish to control the timing of their deaths and the interest of those vulnerable individuals whose lives may be taken without their consent due to acts of mistake or abuse.”⁵² Furthermore, the *Cruzan*-recognized right to “bodily integrity”⁵³—to be free of any physical intrusion without consent—and the related right to refuse treatment, including that necessary to sustain life, must ultimately and logically lead to the recognition of a “liberty interest in hastening one’s own death.”⁵⁴

These pivotal recognitions articulated in the case of *Compassion in Dying v. State of Washington* notwithstanding, Gorsuch reminds us that “[m]erely recognizing the existence of an ‘autonomy’ interest... does not end the analysis; it only raises the question of what autonomy means in this context”⁵⁵ and asks, “[i]f autonomy is a constitutional value, what kind of assisted suicide or euthanasia right follows?”⁵⁶ He then presents the definition of autonomy as analyzed by Israeli legal, moral, and political philosopher Joseph Raz, who explains that an autonomous person must satisfy three preconditions. First, “[i]f a person is to be a maker or author of his own life then he must have the mental abilities to form intentions of a sufficiently complex kind, and plan their execution. These include minimum rationality, the ability to comprehend the means required to realize his goals, the mental faculties to plan actions, etc.”⁵⁷ In other words, one must have the true capacity to make an informed decision. Next, Raz asserts that a person must have a sufficient number of options such that his choice among them is meaningful.⁵⁸ Finally, in order for a person to make a fully autonomous decision, he must be free from “coercion and manipulation.”⁵⁹ Raz’s preconditions for autonomous choice fully support Batavia’s articulation of how the right to assisted suicide, if legally recognized, can properly be exercised.

2. Philosophical Analyses of Citizen Autonomy and State Involvement

How a state might balance citizens’ autonomy with its own concern about potential coercion is, of course, central to the decision about whether to legalize assisted suicide. Gorsuch explains three modes of consideration within this debate: the neutrality principle, the harm principle, and the notion that life is a basic good.

The argument for state neutrality is that “respect for individual autonomy means that the state cannot promote any particular moral objective or end, but must leave individuals to choose their own values.”⁶⁰ Fueled by the Rawlsian notion that “in the original position, rationally self-interested persons would demand the freedom to define and pursue their own views of what constitutes a good life without state interference,”⁶¹ neutralists assert that “the state is left free to pursue only those policies and norms that evince equal respect for all competing conceptions of the good.”⁶² In the context of assisted suicide, because “[p]eople disagree about what kind of a death is meaningful for them,”⁶³ the state should allow for assisted suicide as an option equally valid among others.

Meanwhile, the harm principle “holds that each person must be afforded the right to exercise self-control ‘[o]ver himself, over his own body and mind,’ and that the ‘only purpose for which power can rightfully be exercised over any member of a [civilized] community, against his will, is to prevent harm to others.’”⁶⁴ In other words, an individual should be permitted to pursue his life in whatever way he wishes, until he is in danger of harming another person; at that point, and only at that point, should government step in. Ultimately, say adherents to the harm principle, rational adults must be granted both the right to die and the right to seek assistance in dying, because such rights can be part of one’s individualized pursuit of life without harming others.⁶⁵

Finally, the view that life is a basic good operates with the understanding that “[i]n claiming something as a basic good, one claims that an indefinite number of persons can participate in this inherent good in an indefinite number of valuable ways, many of which may be beyond what is presently imaginable.”⁶⁶ While human life is such a basic good, Gorsuch reminds us that this does not automatically entail choosing life over any other option.⁶⁷

D. Conclusion

The difficult and delicate balance of concern for individual autonomy and need for class protection exhibits a good-faith motivation for erring on the side of protection, not autonomy: fear of coercion, lack of fully informed consent,⁶⁸ and concern about a potential slippery slope toward euthanasia understandably impel states to prohibit assisted suicide. Furthermore, philosophical contemplation of life as an end in itself would forbid ever ending it prematurely.⁶⁹ However, a more universally respectful approach to the complicated prospect of a right to assisted suicide would be to legalize the right with extensive built-in protections for individuals and groups who are truly vulnerable.

By prohibiting assisted suicide, states do not succeed in protecting all individuals with disabilities.

Instead, while truly vulnerable groups are indeed protected, such protection comes at the expense of individuals both capable and desirous of making an informed decision to elect assistance in hastening death. As Batavia’s three friends tragically illustrate,⁷⁰ maintaining the illegality of assisted suicide will not only *not* protect individuals with disabilities who wish to die, but it will actually *harm* them. Although Not Dead Yet puts quotation marks around the term “mercy killing,”⁷¹ semantic tugs-of-war will not remove the very real torment and desperation that impel certain individuals with disabilities to seek out assisted suicide. It is the more humane approach to legalize this medical option for those who wish for an ending, and a peaceful one at that.

Endnotes

1. American Medical Association, Council on Ethical and Judicial Affairs Report 8-I-93. *Physician-Assisted Suicide*, available at <http://www.ama-assn.org/resources/doc/code-medical-ethics/2211b.pdf>.
2. Anthony Fisher, *Rethinking Principlism: Is Bioethics an American Plot?* BIOETHICS OUTLOOK, PLUNKETT CENTRE FOR ETHICS, June 2010, at 2 (the other two principles are non-maleficence and distributive justice).
3. See *State-by-State Guide to Physician-Assisted Suicide - Euthanasia*, PROCON.ORG, <http://euthanasia.procon.org/view.resource.php?resourceID=000132> (last visited Dec. 13, 2013).
4. With the exception of Oregon’s Death With Dignity Act, see *infra* Section B.4.
5. *Washington v. Glucksberg*, 521 U.S. 702, 702 (1997).
6. *Id.* at 703.
7. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).
8. *Glucksberg*, *supra* note 5, at 703.
9. *Id.* at 703.
10. *Glucksberg*, Brief for Respondents 23.
11. *Id.* at 26.
12. See *Glucksberg*, *supra* note 5 at 725–26.
13. *Id.* at 732 (quoting New York State Task Force on Life and the Law, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* 120 (May 1994)).
14. The state ban in *Glucksberg* was Washington’s Natural Death Act of 1979 (codified as Wash. Rev. Code § 70.122-070(1), which states: “The withholding or withdrawal of life-sustaining treatment from a qualified patient pursuant to the patient’s directive in accordance with the provisions of this chapter shall not, for any purpose, constitute a suicide or a homicide.” The state ban in *Vacco v. Quill* (citation in the next note) was New York Penal Law § 125.15(3), which states: “A person is guilty of manslaughter in the second degree when... (3) He intentionally causes or aids another person to commit suicide.”
15. *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (referring to *Washington v. Glucksberg* at 718–28).
16. The doctrine of double effect has been summarized nicely by the Stanford Encyclopedia of Philosophy: “The doctrine (or principle) of double effect is often invoked to explain the permissibility of an action that causes a serious harm, such as the death of a human being, as a side effect of promoting some good end. It is claimed that sometimes it is permissible to cause such a harm as a side effect (or “double effect”) of bringing

about a good result even though it would not be permissible to cause such a harm as a means to bringing about the same good end. This reasoning is summarized with the claim that sometimes it is permissible to bring about as a merely foreseen side effect a harmful event that it would be impermissible to bring about intentionally.” McIntyre, Alison, *Doctrine of Double Effect*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2011 ed.), available at <http://plato.stanford.edu/archives/fall2011/entries/double-effect/>.

17. *Vacco*, *supra* note 15, at 801.
18. *Id.* at 801–2 (quoting Assisted Suicide in the United States, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess., 367 (1996)).
19. *Id.* at 807 (referring to *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 278 (1990)).
20. *Id.* at 807 (quoting *Quill v. Vacco*, 80 F.3d 716, 727–28 (1996)).
21. *Id.* at 808–9.
22. *Bouvia v. Superior Court*, 179 Cal.App.3d 1127 (1986).
23. *Id.* at 1136.
24. *Id.* at 1141 (quoting the Council on Ethical and Judicial Affairs of the American Medical Association, *Withholding or Withdrawing Life Prolonging Medical Treatment* (Mar. 15, 1986)).
25. *See id.* at 1141.
26. *Id.* at 1143.
27. *Id.* at 1147.
28. *See* Bryan A. Liang and Laura Lin, *Bouvia v. Superior Court: Quality of Life Matters*, Virtual Mentor, Vol. 7, No. 2 (2005) (referring to *Los Angeles Times*, Sep 13, 1992:1), available at <http://virtualmentor.ama-assn.org/2005/02/hlaw1-0502.html>).
29. *See infra* Section C.
30. Oregon Health Authority, *Death with Dignity Act*, available at <http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/index.aspx>.
31. O.R.S. 127.800-995.
32. O.R.S. 127.810 s.2.02 (1).
33. *Gonzales v. Oregon*, 546 U.S. 243, Synopsis (2006).
34. *Id.* at 243.
35. *Id.*
36. *See generally* *Oregon v. Ashcroft*, 368 F.3d 1118 (2004).
37. *See, e.g.,* *Gonzales*, *supra* note 33, at 275.
38. *Ashcroft*, *supra* note 36, at 1124.
39. Andrew I. Batavia, *The Relevance of Data on Physicians and Disability on the Right to Assisted Suicide: Can Empirical Studies Resolve the Issue?*, 6 PSYCHOL. PUB. POL’Y & L. 546 (2000).
40. *Id.* at 546.
41. *Id.* at 547. *See also supra* Section B.4. (final sentence).
42. *See State-by-State Guide to Physician-Assisted Suicide—Euthanasia*, *supra* note 3.
43. Batavia, *supra* note 39, at 547.
44. *See* Not Dead Yet, *Who We Are*, <http://www.notdeadyet.org/about>.
45. *See* Compassion & Choices, *Who We Are – About*, <http://www.compassionandchoices.org/who-we-are/about/>.
46. *Id.*
47. *Id.*
48. Batavia, *supra* note 39, at 547.
49. *Id.* at 547.

50. *Id.* at 548.
51. *Id.*
52. Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 HARV. J.L. & PUB. POL’Y 599, 659–60 (2000).
53. *Cruzan*, *supra* note 7, at 269.
54. *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 816 (1996).
55. Gorsuch, *supra* note 52, at 661.
56. *Id.*
57. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 371 (1988).
58. *Id.* at 374.
59. *Id.* at 373.
60. Gorsuch, *supra* note 52, at 663.
61. *Id.* at 663 (referring to JOHN RAWLS, *A THEORY OF JUSTICE* 327–31 (1989)).
62. *Id.* at 663.
63. *Statement of Ronald Dworkin*, House of Lords, Report of the Select Committee on Medical Ethics, H.L. Paper No. 21-I, 23 (1993-1994) (quoted in Gorsuch, *supra* note 52, at 670).
64. Gorsuch, *supra* note 52, at 665–66 (quoting JOHN STUART MILL, *ON LIBERTY* 9 (E. Rappaport ed., 1978)).
65. *See id.* at 675.
66. *Id.* at 698–99.
67. *See id.* at 700.
68. *See, e.g.,* Kirk Cheyfitz, *Suicide Machine, Part 1: Kevorkian rushes to fulfill his clients’ desire to die*, DETROIT FREE PRESS (Mar. 3, 1997), available at <http://www.freep.com/article/20070527/NEWS05/70525061/SUICIDE-MACHINE-PART-1> (discussing Dr. Kevorkian’s first patient, Janet Adkins, who apparently had been chosen by Dr. Kevorkian without having previously met him and without the doctor’s having made any “real effort to discover whether [she] wished to end her life”).
69. *See* IMMANUEL KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS* 46 (1873): “He who contemplates suicide should ask himself whether his action can be consistent with the idea of humanity as an end in itself.”
70. *See supra*, Section C.1.
71. *See* Not Dead Yet, *Who We Are*, *supra* note 44.

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Financial Exploitation of the Elderly: Legislative Update

By Elizabeth Henry Klampert and Malya Levin

This article is part of an ongoing series brought to you by the Section's Elder Abuse Committee.

Financial abuse of the elderly is on the rise across the United States, as several recent studies have revealed.¹ In response, there has been a flurry of legislation introduced on the national and state levels.



Elizabeth Henry Klampert

In September 2013, Matthew Cartwright (D, PA) reintroduced the Elder Protection and Abuse Prevention Act, HR 3090. This bill would expand the definition of elder abuse, neglect and exploitation, as well as incorporate elder abuse prevention trainings, screenings, and reporting protocols into all senior service access points that receive federal funding under the bill. Although the bill now has 52 cosponsors (51 Democrats, 1 Republican) and is now in the House Education and the Workforce Committee, its chances of passing, according to Govtrak.us, are slim to none.

The future for bills like this is, however, brighter on the state front. In the past year, scores of bills dealing with financial elder abuse were introduced in a number of state legislatures, including the following: California, Colorado, Florida, Georgia, Hawaii, Iowa, Indiana, Mississippi, New Hampshire, New Jersey, New York, South Carolina, Tennessee, and West Virginia. Among the states that passed financial abuse legislation that was signed into law are:

- Colorado: SB 98, which establishes the new crime of criminal exploitation of an at-risk elder, was signed into law on April 7, 2014.
- Florida: HB 409, which, among other provisions, revises when an out-of-court statement by an elderly person or disabled adult is admissible in certain proceedings, was signed into law on June 20, 2014, to take effect on October 1, 2014.
- Iowa: Of the three bills introduced dealing with elder financial abuse, only SF 2239, which, among other provisions, creates new crimes related to elder abuse and providing penalties, was signed into law on May 23, 2014, effective July 1, 2014.
- New Hampshire: HB 1555, which protects the elderly and disabled residents from financial ex-

ploitation, was signed into law on June 19, 2014, effective January 1, 2015.

- West Virginia: SB 397, which expands the scope of activities considered financial exploitation of the elderly, was signed into law on March 18, 2014, effective June 6, 2014.



Malya Levin

New York

Both the New York Senate and Assembly introduced a number of bills in the 2013-14 sessions. While at least one has passed both houses (S.1788), none has yet been signed into law.

They include:

- **Senate Bill 143** (same as A4655-A): The purpose of this bill is to protect the elderly from financial exploitation through education. It proposes to do so by providing for a financial exploitation prevention outreach, education and training program, and by funding and authorizing the director of the Office of the Aging to award grants to qualified agencies to establish local elderly exploitation outreach, education and training programs, and outlines elements of such programs. The bill is currently in the Aging Committees of both houses.
- **Senate Bill 720** (same as A133-A): The purpose of this bill is to create the "Senior Anti-Violence and Enforcement Act (SAVE)," which will provide new protections for seniors, including mandatory reporting of crimes or abuse and the creation of a statewide abuse registry, establishment of new investigatory procedures, provision for research on senior violence, and establishment of new criminal penalties for crimes against seniors. The bill defines "a senior" as an individual 60 years of age or older. The bill is currently in the Senate's Codes Committee and the Assembly's Aging Committee.
- **Senate Bill 2323-A** (same as A591A): The purpose of this bill is to require the Office of Children and Family Services to track and report elder abuse. The bill passed the Senate on June 12, 2014,

and has been referred to the Assembly Codes Committee.

- **Senate Bill 2951** (same as A2781): This bill's purpose is to expand the definition of caregiver under the Penal Law to include a person who voluntarily, or otherwise under operation of law (e.g., appointed guardian or power of attorney), assumes responsibility of an elderly person so that they would be tried under the "endangering the welfare of a vulnerable elderly person" law. The bill passed the Senate on June 12, 2014, and was referred to the Assembly Codes Committee.
- **Senate Bill 6221** (no same as): The purpose of this bill is to authorize a banking organization, social services official, or law enforcement agency that reasonably believes that the financial exploitation of a vulnerable adult has occurred or may occur, to refuse to conduct any transaction that requires the dispersal of moneys in the account of a vulnerable adult or moneys held for the benefit of such adult. The legislation also authorizes a banking organization to provide access to or copies of historical records or recent transactions relevant to suspected financial exploitation of a vulnerable adult to law enforcement agencies and social service officials responsible for administering the provisions of this article. The term financial exploitation of an adult is as defined in Social Services Law section 473. The bill passed the Senate on June 12, 2014, and was referred to the Assembly Banks Committee.
- **Senate Bill 7177** (same as A8777-A): The purpose of this bill is to amend the Penal Law to state that, "it is no defense to a prosecution for larceny that the defendant obtained consent to take, withhold, or obtain property, where such consent was obtained from a person who the defendant knew or had reason to know was mentally disabled" and defines "mentally disabled." The bill passed the Senate on June 12, 2014, and was referred to the Assembly Codes Committee.
- **Senate Bill 7178** (same as A8779): This bill's purpose is to add elderly witnesses, age 75 years or older, to the category of witnesses who may be eligible to be examined conditionally, pursuant to Article 660 of the Criminal Procedure Law, in order that such testimony may be received into evidence at subsequent proceedings in or related to the action. The bill passed the Senate on June 10, 2014, and was referred to the Assembly Codes Committee.
- **Senate Bill 7179** (same as A8778): The purpose of this bill is to allow a prosecutor to obtain medical records, without a privilege waiver, with a subpoena, based upon a showing that the patient suffers from a medical disability, and that the patient

has been a victim of a crime of financial exploitation. The bill passed the Senate on June 12, 2014, and was referred to Assembly Codes Committee.

- **Senate Bill 7187** (same as A8781): This bill's purpose is to amend the Penal Law to explicitly state that in a prosecution for larceny by false promise, partial performance, by itself, does not prevent a reasonable jury from making such a finding from all the facts and circumstances. The bill passed the Senate on June 12, 2014, and was referred to the Assembly Codes Committee.
- **Senate Bill 7188** (same as A8780): This bill will provide that, with the consent of the prosecutor, a caregiver or social worker will be allowed to accompany a vulnerable elderly person who is testifying in front of a grand jury. The bill passed the Senate on June 10, 2014, and was passed by the Assembly and returned to the Senate on June 11, 2014.

The New York legislative session ended on June 19, 2014, but we expect that these bills will be revisited and the Elder Abuse Committee will keep an eye not only on them, but any new bills that are introduced in New York and other states.

Endnote

1. See, e.g., National Association of Professional Geriatric Care Managers (2014, March). *Financial abuse of elderly on the rise*. Available at <http://www.prweb.com/releases/2014/03/prweb11655452.htm>.

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Heeding the Call: Response to National Survey on Elder Law Education

By Joy Solomon and Meredith Feinman

The Elder Law Journal of the University of Illinois College of Law recently published an article entitled “A Call to Action on Elder Law Education: An Assessment and Recommendations Based On a National Survey” (“the Survey”).¹ The authors surveyed approximately 270 elder law attorneys to determine “how to prepare lawyers for elder law practice and how to ensure that those currently practicing in the field have the training they need to provide high-quality legal services to the clients.”² They concluded that “elder law is a growth field”; that “there is a need for elder-law specific education” in law schools and continuing legal education programs; and that all law schools should offer clinical and doctrinal elder law courses to J.D. students.³



Joy Solomon

The majority of the survey group indicated that their practices focused on what could be characterized as “practical” matters—advanced directives, Medicaid coverage, estate planning, Medicaid planning, guardianship and end-of-life issues. But, even though only slightly more than half the group dealt with elder abuse in their practices, elder abuse and ethics were the two subjects that practitioners most thought should be taught in CLE courses.⁴

It is this need for elder abuse training for prospective and current lawyers to which this article is addressed.

The statistics concerning elder abuse are terrifying: More than 1 in 10 Americans age 60 and above are the *known* victims of elder abuse, but the rate is much higher, as only 1 in 24 cases are reported.⁵ Elder abuse is defined as:

- Physical, sexual or psychological abuse, as well as neglect, abandonment and financial exploitation of an older person,
- That occurs in any setting (home, community or facility),
- Either in a relationship where there is an expectation of trust and/or when an older person is targeted based on age or disability.⁶

Its economic and personal tolls are dramatic. According to the Elder Justice Roadmap Project (the “Project”) which was funded by the U.S. Departments of Justice and Health & Human Services, elder abuse costs “many billions of dollars a year”; it triples the risk of premature death, and the medical costs incident to abuse are in the billions.⁷



Meredith Feinman

The highest priority cited by the Project as critical to understanding and reducing elder abuse is awareness; elder law courses that devote significant time to teaching law students about elder abuse, and how to identify signs of elder abuse, will enhance aspiring attorneys’ awareness of this ever-growing problem among an ever-growing population—a population that they may be representing some day in contexts that might not ordinarily be seen as providing a window into the problem; for instance, during the course of estate planning for an elderly client, a properly trained attorney can ask questions that might reveal undue influence and emotional abuse. The key, of course, is training and, while more law schools are offering “elder law” curricula, courses that purport to teach skills that are necessary to represent individual clients in handling the issues of their daily lives must also teach students how to interview and screen elderly clients for any hint of abuse.

There was a time when domestic violence and child abuse were not part of legal curricula. Now, law schools have entire concentration areas with seminars and clinics devoted to those issues. We need to do the same for elder abuse, a problem that will grow, not diminish, as our population lives longer and depends on caretaking by others. Students are galvanized around domestic violence and child abuse issues—they are drawn to the pertinent courses and clinics based on their desire to help innocent victims. The time has come, and the opportunity exists, for law schools to convey to students that large numbers of the elderly population are also innocent victims. Students who are drawn to family law, criminal law, domestic law, children’s law and other “human interest” areas of law will be equally drawn to elder law and elder abuse if law schools help them understand that “elder law” need not only be about topics like Medicaid, estate planning,

and guardianship—topics to which law students often cannot personally relate. Students need to be taught that elder law also includes the area of elder abuse, which can be quite personal—possibly affecting their own or their friends’ older family members.

One of the striking findings of the Survey was that “the ability to help people” was cited as the most satisfying aspect of elder law for practitioners in that field. Raising the awareness of law students to the tragedy of elder abuse may well stimulate those who see law as an opportunity to help people pursue opportunities to advocate for the elderly. Toward that end, law schools should be encouraged to partner with community organizations that provide legal and social assistance to the elderly. For instance, Brooklyn Law School launched an Elder Rights Clinic in 2013 in partnership with the Harry and Jeanette Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale and the South Brooklyn Legal Services Elderlaw Project. Students in the clinic manage a caseload directly representing older adults in housing court, and also complete a policy or advocacy related project addressing issues such as ethics, privacy rights, consent to sexual activity, or access to justice. Students also attend a weekly seminar that addresses foundational legal concepts in defending the rights of older adults across the spectrum of potential legal issues. By framing this clinic as an immersion in elder rights, there is a critical shift in the way students view and experience the field and their responsibilities and opportunities as future elder law practitioners.

At the same time that it is imperative for law schools to teach students about the facts of elder abuse, and how to interview older clients to screen for signs of abuse, there is also a need for CLE programmers to increase their elder law courses in general and to make the issue of abuse a component of such courses. The need for such continuing education was identified by respondents to the Survey who also called for pertinent ethics education because, as two respondents said “[e]thics are so lacking it is beyond belief” and “[t]he one thing that gives me the most concern is the lack of ethics and how many lawyers prey on the elderly.”⁸

The mission of the Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale is to provide emergency shelter for victims of elder abuse and to enhance public awareness and knowledge about elder abuse. The Center has devoted significant resources to identify and train many categories of persons who interact regularly with vulnerable seniors, so that they have the tools necessary to see and hear signs of physical and emotional abuse. It is critical that more law schools and CLE providers join this effort by incorporating such training into their elder law curricula.

Endnotes

1. Nina A. Kohn & Edward D. Spurgeon, *A Call To Action On Elder Law Education: As Assessment and Recommendations Based On A National Survey*, 21 U. Ill. Elder L.J., 345 (2014).
2. *Id.* at 347.
3. *Id.* at 363-367.
4. *Id.* at 361.
5. Lifespan of Greater Rochester, Inc., Weill Cornell Medical Center of Cornell University, New York City Department for the Aging, *Under the Radar: New York State Elder Abuse Prevalence Study*, 10 (2011).
6. U.S. Dept. of Justice, Elder Justice Roadmap Project Report, 39 (2014).
7. *Id.* at 3.
8. Kohn & Spurgeon, *supra* at 361.

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HUD's New Regulations, Passed in the Wake of *Bennett v. Donovan*, Offer Protections for Non-Borrower Spouses in Reverse Mortgage Situations

By Jim D. Sarlis

It's a sign of the times that even the man who once played the young rebel biker known as The Fonz now has gray hair and makes TV commercials hawking reverse mortgages.¹ Besides highlighting the fact that baby boomers are—let's face it—getting old, it is an indication of just how big the reverse mortgage business has become. After all, nearly a million reverse mortgages,² totaling \$140 billion,³ have been issued since the program began about fourteen years ago.



I. Reverse Mortgages: A Primer

Reverse mortgages were first introduced in the late 1980s as a way for seniors age 62 and older to access the equity in their homes.⁴ The loans are available for single family homes and owner-occupied two- to four-family homes, condominiums or Planned Unit Developments (PUDs). Significantly, coops, as well as mobile homes, are generally not eligible for reverse mortgages.

By far the most common type of reverse mortgage is the Home Equity Conversion Mortgage (HECM), accounting for some 90% of the reverse mortgages in the U.S.⁵ The money from these loans, which are available in all 50 states as well as the District of Columbia and Puerto Rico, can be used for any purpose. HECMs are written by private lenders and federally insured by the Department of Housing and Urban Development (HUD).⁶

Unlike a regular ("forward") mortgage, a reverse mortgage does not require a borrower to have good credit or a sufficient source of income to qualify; about the only requirement is that all borrowers must be at least 62 years old. Furthermore, there are no monthly mortgage payments on a reverse mortgage. The loan does not become due and payable until the loan's borrowers⁷ have died, moved out of the house, or sold it. Reverse mortgages are nonrecourse loans, meaning that no matter how large the loan balance becomes, neither the borrower nor his or her estate will ever owe more than the property is worth, and that the lender's only remedy is to foreclose and sell the property. Moreover, the proceeds of a reverse mortgage are, generally speaking, tax free and do not hinder government ben-

efit eligibility.⁸ This combination of features has made the reverse mortgage an important and popular elder law and estate planning tool. Indeed, given the right circumstances, a reverse mortgage can be a real life-saver for senior homeowners who are "house rich and cash poor," allowing them to stay in their homes and enjoy a better standard of living in their golden years.

Of course, no planning tool is right for every person or every situation, and reverse mortgages are not without their controversy and potential problems. For one thing, reverse mortgage closing costs are generally higher than those for forward mortgages. There is also the ongoing concern of potentially predatory lending practices, and of injudicious loans being taken out by borrowers who don't fully understand what they're getting themselves into, despite safeguards that include specialized training for those offering the loans and mandatory counseling for those thinking about getting the loans. One such latent disaster that had been lurking in the background of every reverse mortgage, which most seniors apparently did not realize, was how the loan's due-on-death clause affected non-borrower spouses living in the home.

In a reverse mortgage, upon the borrower's death, the lender can foreclose and recoup the unpaid principal and interest that has accumulated. But what happens in those situations where one spouse is the borrower, the other spouse is not, and the spouse listed on the mortgage has died? In the past, the surviving non-borrower spouse often was surprised to learn that he or she was being foreclosed upon and subject to eviction.

Of course, for this issue to even arise, one spouse would have to be left off the reverse mortgage. Why would that happen? In some cases, the house had always been in only one spouse's name. In others, one spouse was under age 62. In the vast majority of cases, however, the answer comes down to the three usual suspects: ignorance, short-sightedness, and (the most common culprit of all) greed. The amount that can be borrowed with a reverse mortgage depends on a number of factors, including the age of the youngest borrower. If one spouse is considerably younger than the other, less money could be borrowed if the younger spouse is included on the loan. Because of this, mortgage brokers often advised homeowners to quitclaim the property to the older spouse and leave the younger spouse off the mortgage in order to increase the amount of the loan. The younger spouses often had the mistaken belief that

they would be able to remain in the home after the borrower spouse died. Instead, once the borrower died, the surviving non-borrower spouse was often shocked to learn that if the loan was not then repaid immediately, the lender would foreclose on the property. This dire result was possible because, under the literal terms of these mortgages, the lender could demand immediate payment on the loan if a borrower dies and the property is not the principal residence of at least one surviving borrower.

II. The Landmark Case of *Bennett v. Donovan*

*Bennett et al. v. Donovan*⁹ addressed this issue. The case began in 2011 and went through a couple of rounds of preliminary litigation¹⁰ prior to coming before the U.S. District Court for the District of Columbia which, on September 30, 2013, rendered the landmark decision that is now in the process of affecting the reverse mortgage industry and the lives of thousands of reverse mortgage customers.

The lead plaintiff in the case, Robert Bennett, was a recent widower who lived in his home since 1975. Only a month after his wife took out a reverse mortgage, she died. This triggered the loan to become accelerated and, to his shock and surprise, he was facing foreclosure and, ultimately, eviction. He and the other plaintiffs were like so many others who got a reverse mortgage in the pre-*Bennett* lending environment where prospective borrower spouses with an age disparity were often advised to convey the property to the older spouse so that the maximum amount of financing could be obtained: they were not on title, they were not the borrowers, and they were not even mentioned on the mortgage documents. They were, in short, non-borrower spouses, and they were afforded no protection once their borrower spouses died.

The *Bennett* case changed all that, finding that it was a violation of federal law for the non-borrower spouse to face acceleration of the loan and foreclosure upon the borrower spouse's death. The key to the *Bennett* court's analysis was the specific wording of the relevant laws. Keep in mind that, to encourage lenders to lend money on reverse mortgages which involved some risk because of their non-recourse nature, HUD would insure the loans. But hand in hand with that directive was the concern, in the creation of the Home Equity Conversion Mortgage (HECM), to protect the elderly borrowers from foreclosure. This is reflected in the very name of the relevant federal statute, 12 U.S.C. § 1715z-20 (the "Federal Statute"), which is entitled "Safeguard to Prevent Displacement of Homeowner," and which goes on to state in plain language that HUD:

may not insure a home equity conversion mortgage...unless such mortgage

provides that the homeowner's obligation to satisfy the loan obligation is deferred until the *homeowner's* death [or] the sale of the home.... [T]he term "*homeowner*" includes the spouse of the homeowner.¹¹

Critical to the court's analysis was how the Federal Statute plainly uses the term "homeowner"—not a more restrictive term, such as "mortgagor" or "borrower"—and it expressly states that the word "homeowner" clearly and unequivocally includes the homeowner's spouse.

Yet, despite this plain language, HUD issued more narrowly worded regulations that failed to protect non-borrower spouses. The relevant regulation, 24 C.F.R. § 206.27 (the "Regulation"), requires an HECM mortgage to state that:

[the] mortgage balance will be due and payable in full if a mortgagor dies and the property is not the principal residence of *at least one surviving mortgagor*.¹²

In summary, the Regulation's use of the term "mortgagor" is impermissibly at odds with the more expansive term "homeowner" that appears in the Federal Statute.

The plaintiffs argued that they were not required to repay the loan upon the death of their spouses, and were protected from foreclosure. The court agreed, and determined that HUD violated the Federal Statute when it insured the reverse mortgages of the plaintiffs' spouses pursuant to the agency's Regulation, which permitted the loan obligations to come due upon the borrowers' death, even if the borrowers' spouses were still alive. The court also found, however, that it did not have the authority to require HUD to take any particular action to remedy its error, and sent the matter back to HUD to correct the problem. As the Court put it: "[T]his Court has no choice but to 'identify the legal error' and then 'remand to the agency.'"¹³

When the *Bennett* decision first came out, it was unclear how, exactly, HUD would remedy this. There was speculation, at the time, that the FHA could face huge losses as a result of the court's decision because younger spouses who weren't on the mortgages would be able to live in the homes and possibly even receive payments under the reverse mortgage. Now that the new regulations have come out, however, they provide three levels of clarification: They state the protections afforded the non-borrower spouse, they lay out the terms and conditions applicable to these protections, and they set forth guidelines for all future reverse mortgage loans.

III. The New HUD Rules

In response to the *Bennett* case, on April 25, 2014, HUD issued Mortgage Letter 2014-07,¹⁴ implementing new regulations that afford some protection for non-borrower spouses in reverse mortgage situations for loans originated on or after its effective date of August 4, 2014.¹⁵

Under these new rules, a non-borrower spouse who survives the borrower can now remain in the residence, subject to the reverse mortgage, and be eligible for a deferral of the mortgage's repayment and acceleration, so long as the following two-prong test is satisfied:

First, the non-borrower spouse must:

- a. Establish legal ownership or occupancy of the property within 90 days of the death of the borrower (by deed, court order, etc.), and
- b. Continue to fulfill obligations of the borrower (pay taxes, mortgage insurance premiums and hazard insurance) under the mortgage.

Second, the non-borrower spouse must satisfy all of the following conditions after the borrower's death:

- a. The non-borrower spouse was married to the borrower at the time the loan closed, and for the remainder of the borrower's life.
- b. The non-borrower spouse was disclosed to the lender as a non-borrower spouse.
- c. The non-borrower spouse has occupied and will continue to occupy the premises as his or her principal residence.

If the above criteria are met, the lender may not seek repayment in full of the loan until the end of the deferment period. The deferment period will continue so long as the non-borrower spouse is alive and continues to meet the above requirements. Note that the nonassumable nature of the HECM loan prevents the non-borrower spouse from receiving any unused portion of the mortgage. Furthermore, while in deferral, (1) the mortgage will continue to accrue interest; (2) mortgage insurance premiums will continue to be remitted; (3) servicing fees may be collected by the lender.

Not surprisingly, marital status has acquired a whole new prominence in the loan process. At inception, borrowers must now sign an affidavit certifying their marital status. During the life of the loan, they must now also submit such an affidavit annually. At closing, both the borrower and non-borrower spouse must not only certify their marital status, but also receive disclosures explaining how marital status relates to the loan. Similarly, the importance of marital status will be emphasized during the loan counseling that must be attended by both the borrower and non-borrower spouse as a prerequisite for loan approval.

IV. Conclusion

In summary, the following should be noted regarding the new HUD guidelines:

1. They apply prospectively only (i.e., as of the effective date of August 4, 2014), and thus have no effect upon HECM loans made before that date. The position taken by HUD is that, as to HECM loans closed prior to the effective date, the FHA has no authority to alter the existing contracts that govern such loans. This heightens the significance of the pending case of *Plunkett v. Donovan*,¹⁶ which is also in the U.S. District Court for the District of Columbia, and addresses such loans and the protections being sought for those non-borrower spouses as well.
2. They require the non-borrower spouse to, among other things, establish legal ownership or another ongoing legal right to remain in the home securing the HECM loan within 90 days of the death of the last surviving HECM borrower, and to undertake responsibility for meeting all of the obligations of the HECM described in the loan documents. Moreover, it permits servicers to declare the loan immediately due and payable (and thereby bring to an immediate end the deferral period and non-borrower spouse safeguards) if and when those and other specified requirements are not met.
3. They make it clear that HECM loans are not assumable during the deferral period and that, therefore, any otherwise available proceeds under the HECM loan will not be payable to the non-borrower spouse (even though the loan continues to accrue interest during the deferral period).
4. They establish new, as well as ongoing, certification requirements for both the HECM borrowers and their non-borrower spouses, and new counseling and servicer requirements. They also specify their content.

While major steps have been put into place, there is much more on the horizon. HUD will be submitting the new rules to the Federal Register, where they will be open for public comment. New model loan documentation must be created and refined to reflect these new rules. The rules are new and their implementation is just beginning. The *Plunkett* case, which addresses some unresolved related issues, is still pending. The pending foreclosures, and other lawsuits that can reasonably be anticipated, will lead to collateral rulings that could further shape the landscape here. This is, therefore, an issue that will very likely be evolving in the coming months.

Endnotes

1. The Fonz a/k/a Fonzie (full name: Arthur Fonzarelli) was, of course, the iconic cool, leather-jacket-wearing, motorcycle-riding character played by actor Henry Winkler on *Happy Days*, the popular television series set in the 1950s that ran from 1974 to 1984. Mr. Winkler now appears on One Reverse Mortgage TV ads.
2. National Reverse Mortgage Lenders Association industry statistics as of July 3, 2014 for fiscal years 1990-2014. See http://nrmloaonline.org/rms/statistics/default.aspx?article_id=601.
3. Total in outstanding FHA-insured reverse mortgage loans, as per the FHA's 2012 financial statement. Villarreal, Pamela, "The Ups and Downs of Reverse Mortgages," May 29, 2013, National Center for Policy Analysis. See <http://www.ncpa.org/pub/ib121>.
4. The Home Equity Conversion Mortgage (HECM) was authorized by Housing and Community Development Act of 1987, Sec. 417, Pub.L. 100242, 101 STAT. 1908, amending the National Housing Act, Pub.L. 73479, 48 STAT. 1246 (12 U.S.C. 1715z20), adding Sec. 255, authorizing elderly homeowners to borrow against the equity in their homes. The regulations for the HECM program were established as part 206 of title 24 of the Code of Federal Regulations (June 9, 1989, 54 FR 24833).
5. Initially, there were four types of reverse mortgages. Aside from the HECM, there was the Federal National Mortgage Association (FNMA or Fannie Mae) conventional reverse mortgage, which was discontinued several years ago, the public sector reverse mortgage, and the proprietary reverse mortgage; the latter three programs combined account for only a very small fraction of all reverse mortgages.
6. A good general discussion of reverse mortgages can be found at Somekh, Lori R., "Reverse Mortgages: Dispelling the Myths," *NYSBA Elder and Special Needs Law Journal*, Summer 2013, Vol. 23, No. 3, p. 29.
7. The use of the term "borrower"—referring, strictly speaking, to the mortgagor only—was literally true up until the events that are the subject of this article.
8. By the same token, the interest that is accumulating on the loan is not tax deductible on an ongoing basis, although it would be deductible when paid upon the loan's repayment at the end. Furthermore, although monthly payments received by a borrower do not count to disqualify him or her for government benefits, loan advances will be counted as "liquid assets" if the money is kept in an account (savings, checking, etc.) past the end of the calendar month in which it is received; the borrower could then lose eligibility for a particular public program if total liquid assets exceed what that government program allows. See, e.g., *Reverse Mortgages: A Lawyer's Guide*, American Bar Association, 1997.
9. 2013 WL 5442154 (D.D.C. Sept. 30, 2013).
10. The District Court had dismissed plaintiffs' case for lack of standing, see *Bennett v. Donovan*, 797 F. Supp. 2d 69 (D.D.C. 2011); the Court of Appeals reversed, see *Bennett v. Donovan*, 703 F.3d 582 (D.C. Cir. 2013). The parties then filed cross motions for summary judgment, whereupon plaintiffs' motion was granted while defendant's motion was denied. It was this Memorandum Decision rendered September 30, 2013 that is the subject of this article.
11. 12 U.S.C. § 1715z20(j) (emphasis added).
12. 24 C.F.R. § 206.27(c)(1) (emphasis added).
13. *Bennett, supra*, at p. 14 of Memorandum Decision dated September 30, 2013, Ellen Segal Huvelle, U.S. District Judge, citing *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012).
14. HUD's Mortgage Letter 2014-07 can be viewed at <http://portal.hud.gov/hudportal/documents/huddoc?id=1407ml.pdf>.
15. For loans dated prior to August 04, 2014, HUD takes the position that it is unable to alter existing contracts of law. That is the subject of a different case, *Plunkett v. Donovan*, currently pending before the U.S. District Court for the District of Columbia. See also note 16, below, and accompanying text.
16. Case Number 1:2014cv00326.

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Medicaid Recoveries, Liens and Strategies

By Michael L. Pfeifer

Since 1993, states have been required to seek recovery for Medicaid medical expenses where possible, and New York State seems to be becoming more aggressive in seeking such recovery. Many of our clients have received letters from the State of New York Office of the Medicaid Inspector General. It is important for us to understand what the rules are concerning recovery so that we can advise our clients properly.

The State is a preferred creditor when it provides medical services.¹ In general, that means that the State must be paid before any other creditors unless that creditor has a prior specific lien.²

The State may always recover incorrectly paid Medicaid. Incorrectly paid Medicaid may be recovered even where the agency made the mistake.³ However, in SSI related cases, the recovery is limited to the amount of the recipient's excess resources. Recovery cannot exceed the amount of medical expenses paid.⁴

A. Recovery Against the Medicaid Recipient's Estate

In 2011, New York State passed an expanded estate recovery statute, which would have allowed recovery against such things as life estates, revocable trusts, annuities and joint property. However, this controversial statute was repealed in 2012 and we have gone back to the traditional way in which New York has defined an estate, which is as follows:

...[T]he term "estate" means all real and personal property and other assets included within the individual's estate and passing under the terms of a valid will or by intestacy.⁵

Federal law still allows states to expand their definitions of an estate to include property and assets other than one's probate or intestate estate.⁶ Thus, it is possible that we could see expanded estate recovery again. However, for now, political and practical concerns seem to have made New York abandon its attempts at expansion of estate recovery.

As noted above, the State is a preferred creditor when it provides medical services. Executors would be well advised to make sure that the State is paid when Medicaid has been provided to the decedent. There is a statute that protects an executor from being personally liable for creditor claims seven (7) months from the date of the Letters Testamentary. However, the executor must have acted in good faith to pay the estate's creditors.⁷ Where the decedent has received Medicaid, the executor probably cannot argue that he was not aware

that the State had a claim for medical services provided and would not likely be successful in arguing "good faith" because of unawareness that such a claim existed.

The State can only recover from the estate of the Medicaid recipient for medical expenses paid for a person who is age 55 or older or permanently institutionalized.⁸

Recovery can be had from the Medicaid recipient's estate only if there is no surviving spouse or a child who is under the age of 21, certified blind or disabled.⁹ What if there are other beneficiaries of the estate who do not fit into the foregoing categories or what if there is a surviving disabled child but she is completely disinherited? Can the State recover from the estate or that part of the estate not going to a spouse or minor, blind or disabled child? For two opposing points of view, see *Matter of Burstein*¹⁰ and *Matter of Samuelson*.¹¹

Personal injury proceeds may be recovered against the estate even if there is a surviving spouse, minor, disabled or blind child.¹²

B. Recovery Against Spouse and the Estate of the Spouse of a Medicaid Recipient

A community spouse is liable for the Medicaid recipient spouse's support if said spouse has sufficient resources.¹³ Thus, if the community spouse has more assets than the Minimum Community Spouse Resource Allowance (CSRA) and signs a spousal refusal, the State may seek recovery from that spouse for the cost of the Medicaid recipient spouse's medical expenses. The spouse may transfer assets one month after the approval of Medicaid for the institutionalized spouse.¹⁴ However, this action may not insulate the community spouse from a lawsuit.¹⁵ You should also be mindful of the Debtor Creditor Law if a transfer by the community spouse is being contemplated.

To recover against the community spouse's estate, said spouse must have had sufficient resources to support the Medicaid recipient.¹⁶ A spouse is only liable for support (and only for medical services) provided before his death.¹⁷

The State must make a claim within six (6) years of a fiduciary being appointed.¹⁸ Furthermore, the State may only recover the cost of services provided within ten (10) years of the Medicaid recipient's death.¹⁹

C. Medicaid Liens

A lien cannot be placed upon the personal residence of an individual who is residing in that residence. Thus, no lien can be placed upon the personal residence of an

individual who is receiving home care. However, a lien may be placed upon the personal residence of a person who is permanently institutionalized, except if one of the following is lawfully living in the residence:

1. a spouse;
2. a child who is under 21 or who is certified as blind or permanently and totally disabled; or
3. a sibling who has an equity interest in the home and who resided in the home at least a year before the Medicaid recipient was institutionalized.

Note that the relevant statute and regulation do not prevent a lien on a home that a caretaker child is occupying.²⁰

A lien also cannot be placed on the personal residence of an institutionalized Medicaid recipient, if she has a "subjective" intent to return home.²¹ (However, if there is no reasonable expectation that the Medicaid recipient will actually return home, the Medicaid agency may commence a fair hearing in order to have a lien placed upon the home.)

No lien may be imposed for correctly paid Medicaid if the individual exhausted his benefits under a long term care insurance policy pursuant to the Partnership for Long Term Care up to the value of the benefits under the policy.²²

The State cannot enforce its lien as long as a spouse or minor, blind or disabled child is living in the residence.²³ It also cannot enforce its lien as long as a sibling with an equity interest or a caretaker child resides in the home.²⁴ A permanently institutionalized individual must be given a reasonable time to transfer the residence to an exempt individual.²⁵

With respect to personal injury and medical malpractice liens, the State has a lien to the extent that Medicaid services were provided for the injuries suffered.²⁶ However, no lien is permitted under the following circumstances:

1. The action is against a residential care facility for injuries sustained by a Medicaid recipient.²⁷
2. When Medicaid was provided for school based medical care to which a disabled child is entitled pursuant to the Federal Individuals with Disabilities Act.²⁸
3. For claims under the Workers' Compensation Law or the Volunteer Fireman's Benefit Law.²⁹

The local agency must serve a notice of lien that contains information about the parties, the accident and the nature of the lien. The notice must be served upon the plaintiff, defendant, their respective attorneys, the insurance carrier, the Medicaid recipient and his or her

attorney by registered mail.³⁰ The notice must also be filed with the relevant County Clerk.³¹

For now, the personal injury lien is limited to the amount of the proceeds that compensate the individual for medical costs and does not attach to damages for pain and suffering, lost wages or loss of future earnings.³² However, changes were made to the Social Security Act that were effective as of October 1, 2016. "[T]he legislation makes changes to sections 1902(a)(25), 1912 and 1917. The changes give states the ability to recover costs from the full amount of a beneficiary's liability settlement, instead of only the portion of the settlement designated for medical expenses, and it establishes an option for states to place liens against Medicaid beneficiaries' liability settlement."³³

The above limitations do not apply to a Medicaid recovery against an estate³⁴ or to public assistance funds in general.³⁵ There is an exception for wrongful death proceeds because the purpose of such a claim is to compensate decedent's distributees for their pecuniary injuries.³⁶

The personal injury lien must be satisfied prior to funding a Supplemental Needs Trust.³⁷

D. Other Considerations

If one has long-term care insurance under the partnership program, has met the minimum duration requirement of the policy and applies for Medicaid Extended Coverage (MEC), some or all of the Medicaid recipient's assets will be protected.³⁸

The State cannot recover reparations paid to special populations.³⁹

If a claim is made against a Medicaid recipient, she may be able to claim an undue hardship.⁴⁰ "Undue hardship is not considered to exist based on the inability of the beneficiaries to maintain a pre-existing lifestyle or when the alleged hardship is the result of Medicaid or estate planning methods involving divestiture of assets."⁴¹

E. Tips on Negotiating Medicaid Claims

In order to successfully negotiate claims due to the receipt of Medicaid, one must be thoroughly familiar with the law and the legal limitations on claims.

You should review the Claim Detail Report (NYC) or Assistance Statement & Claim (Nassau County). You should also consider whether undue hardship can be claimed. Are there any other circumstances that should be considered? For instance, if the non-institutional spouse is paying for an assisted living facility, recovery may deprive her of moneys she needs to stay in the assisted living facility and she may be forced into a nursing home. In the long run, the State may lose money by

making a recovery. There may be other equitable circumstances that the State will take into consideration.

In the right circumstances you might also request that the recovery be paid in installment payments. Or you might ask for deferral of payment, for instance in a case where a house would have to be sold in order to pay the recovery. Always obtain a release for your payment.

Conclusion

The prevention of recovery from the community spouse or the estates of the Medicaid recipient or the Medicaid recipient's spouse is an important part of Medicaid planning. Hopefully this article will be of help in assisting you to do such planning.

Endnotes

1. SSL § 104(1).
2. *Matter of Robinson*, 194 Misc. 2d 695, 754 N.Y.S.2d 525 (Surrogate's Court, Nassau County 2003).
3. *Oxenhorn v. Fleet Trust Co.*, 94 N.Y.2d 110 (1999).
4. Medicaid Reference Guide (MRG), page 678.
5. SSL § 369(6).
6. 42 U.S.C. 1396p (a)(4)(B).
7. SCPA § 1802.
8. 02 OMM/ADM-3, page 7.
9. SSL § 369 (2)(b)(ii); 18 NYCRR § 360-7.11(b)(2).
10. 160 Misc. 2d 900, 611 N.Y.S. 2d 739 (Sur. Ct., N.Y. County 1994).
11. 110 A.D.2d 187, 493 N.Y.S. 2d 784 (2d Dept. 1985).
12. SSL § 369(2)(c).
13. SSL § 101.
14. 96 ADM-11.
15. *Matter of Steele*, 85 A.D.3d 1375, 925 N.Y.S.2d 250 (3d Dept. 2011); and *Commissioner of the Dept. of Social Servs. of the City of N.Y. v. Scola*, 2011 N.Y. Misc. LEXIS 5509, 2011 NY Slip Op 33019U (N.Y. Sup. Ct. Nov. 15, 2011).
16. *Matter of Craig*, 82 NY 2d 388 (1993).
17. *Richardson v. Bryant*, 19 Misc. 3d 1129A, 866 N.Y.S.2d 95 (Sup. Court, Monroe County 2008), *aff'd*, 66 A.D.3d 1411, 885 N.Y.S.2d 848 (4th Dept. 2009); *Matter of Schneider*, 15 Misc. 3d 1146A, 841 N.Y.S.2d 823 (Sur. Court, Nassau County 2007).
18. SSL § 104; CPLR § 213; *Matter of Bustamente*, 256 A.D.2d 463, 682 N.Y.S.2d 102 (2d Dept. 1998).
19. SSL § 104.
20. SSL § 369(2)(a)(ii); 18 NYCRR § 360-7.11(a)(3)(ii); Medicaid Reference Guide (MRG), page 684.
21. SSL § 369(2)(a)(i); 18 NYCRR § 360-7.11(a)(1).
22. SSL § 367-f.
23. SSL § 366(2)(b)(ii).
24. SSL § 369(2)(a)(iii); 02 OMM/ADM-3, pages 7 & 8.
25. 02 OMM/ADM-3, page 7.
26. SSL § 104-b(1); 02 OMM/ADM-3, 14-17.
27. PHL § 2801-d(5); 02 OMM/ADM-3, 15.
28. 02 OMM/ADM-3, 15.
29. SSL § 04-b; 02 OMM/ADM-3, 15.
30. SSL § 104-b 02 OMM/ADM-3, 16.
31. SSL § 104-b(3); 02 OMM/ADM-3, 16.
32. *Arkansas HHS v. Ahlborn*, 547 U.S. 268 (2006); and *Wos v. E.M.A.*, 568 U.S. 2 __ (2013).
33. CMCS Informational Bulletin, dated December 27, 2013. The changes were originally supposed to go into effect on October 1, 2014; however, according to *Elderlawanswers.com* the changes were delayed until October 1, 2016. See <http://attorney.elderlawanswers.com/congress-delays-anti-ahlborn-medicaid-lien-amendment-14572>.
34. *Matter of Heard*, 79 A.D. 3d 74, 911 N.Y.S. 2d 534 (4th Dept. 2010).
35. *Corridan v. Public Adm'r*, N.Y.L.J., June 10, 2009, at 110.
36. *Matter of Paez*, 20 Misc. 3d 1102A, 867 N.Y.S. 2d 18 (Sur. Ct. Bronx County 2008).
37. *Crichio v. Pennisis and Link v. Town of Smithtown*, 90 NY 2d 296 (1997).
38. SSL § 367-f. See also <http://www.nyspltc.org>.
39. 02 OMM/ADM-3, 10.
40. 42 USC § 1396p(b)(3); SSL § 369(5); 02 OMM/ADM-3, 8; State Medicaid Manual, § 3810.
41. Medicaid Reference Guide, page 680.6.

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18 NYCRR 360-7.

02 OMM/ADM-3.

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Guardianship News: Some Problems Facing Guardians

By Robert Kruger

When accepting an appointment as guardian, we often don't know what we are getting into. I suppose it is not unlike courtship and marriage; while courting (we hope) one is on his or her best behavior, something that may not survive the wedding. As my wife says (referring to someone other than me), "When I married Mr. Right, I didn't realize his first name was Always."



Attempts at humor to one side, your willingness to accept an appointment may be predicated on a positive assessment of an IP, or his/her family. Even if it is a "big" case, you might reconsider if the family or the IP presents management problems. I have had several unpleasant surprises with incapacitated persons and their families. I also had one appointment where death threats were made, an even more unpleasant surprise.

One underlying theme of this article is to explore some (not all) typical problems that a guardian may face.

When I started this article, I had two recent cases in mind. As I dug into the article, a number of problematic cases resurfaced and those cases were, actually, far more difficult to handle than the first two. One pedagogical point here is case selection; if the case is problematic early, it will likely get worse, not better.

Another blinking red light is constant phone calls. Incessant, repetitive phone calls, followed by the "when" question. When will the judge sign the order... in one case, four calls a day. Or if the caller is the IP, as "Julia" was, repeating answers to her repetitive questions, until I found a way to say "good bye." Why did I take those assignments? Over confidence, or hubris certainly.

Another sign of trouble comes with the agendas of the families. If the case is a child case and is sizable enough, you can anticipate a request for a home, a car and a stipend for the mother. The court may approve all three, although not necessarily at once. But, if the home the family desires has six bedrooms and four baths it is surely a sign of grandiosity and as well a

sign of potential future conflict. I was always reluctant to reject an appointment, but at times the money is simply not worth the aggravation.

If a case is deeply problematic at the outset, consider rejecting that appointment, because failure is programmed into the DNA of the case. Yet why did I accept the appointment in "Joseph" where, besides death threats, one child is relentlessly litigious?

On a different track, I have found that many (trial) lawyers make promises to the families to induce the parents to sign a general release and they leave it to the guardianship attorney to redeem those promises. If the promises can't be redeemed, whom do you think the family blames...the attorney who obtained a seven (7) figure settlement or the guardianship attorney who can't deliver. In the first place, the family may resent the appointment of a professional co-guardian; it will only get worse if they fail to obtain what they want at the very beginning of the guardianship. Measuring the degree of hostility at that point is difficult; you don't know these people. The same is true for managing expectations. We bring a middle class mindset to families who have no experience making these decisions. Can the guardianship afford a top-of-the-line Lexus rather than a Camry? Will the judge balk? Will the family even understand that it is the child's money, not family money?

In fairness to the families of child tort victims, many have endured considerable hardship as a result of their child's disability. With a seriously disabled child, the parents are often in conflict over the mother's focus on the child. The mother becomes the rescuer, and the father resents being sidelined. It is not uncommon to see a divorce result, even if the "divorce" is simply the father walking away.

When the recovery arrives, the family, whatever its configuration, has endured financial hardship for years. There is a tremendous amount of pent up demand. In the case I call "Charles" promises were made to Charles's two sisters by Charles's mother that their ship would come in with Charles's recovery. It was a big case, and the monthly house-support was generous. The care manager and I actually did an audit of the receipts on cash purchases and there was a big discrepancy. One daughter admitted sending money to her

boyfriend, who was a guest of the state at Auburn State Prison on a manslaughter conviction.

The trial lawyers had represented the family as the “salt of the earth.” They may have been, but Charles’s mother, a very decent woman, never quite understood that Charles’s recovery was for Charles. It was not “family” money, yet she made these promises to her two daughters, intending no harm. Had I known what was coming, I would have been much tougher at the outset. My mistake was being too responsive in the beginning. It made it harder, later, when I toughened up.

* * *

I have, in my notes, another three (3) matters with management problems. Rather than recite anecdotes of family dysfunction, accompanied by a saccharine caveat.... Beware! I want to change focus to the Bench. Stories filter back to me about attorneys fending off families’ complaints in front of judges who treat them as strangers.¹ If the Bench lacks insight into the role of a guardian, the guardian is undefended when the family alleges guardian misconduct. And, if a judge is concerned (afraid?) of criticism by OCA, the guardian is even more vulnerable.

I remember the time...from 1985 or so to approximately 2001...when guardianship judges protected their appointees. If you do this work it is inevitable that a disgruntled family member is going to indulge his or her hostility at some point. During this period, there was one judge only sitting in the counties in the Second Department. Those judges had a practical understanding not only of the guardianship process, but of human nature as well. That is the culture that Judge Prudenti came from.

Before Judge Prudenti became Chief Administrative Judge, the regulators at OCA manifested little interest, much less understanding, about guardianship, perceiving guardianship as patronage. The “regulators” were invited to observe as court evaluators visited AIPs. Every one declined. They were ignorant and they were determined to remain so.

Many guardianship judges were all too aware that the regulators were ignorant and hostile. Judges often

became defensive because of concern about offending OCA. I heard judges say so. Consequently, the notion that a judge might protect his or her guardian was compromised.

I saw it personally when I was surcharged for responding to a crisis by releasing funds to buy food for the family. Although the surcharge was reversed by the Appellate Division, I felt that no judge from the preceding era would have done that. And yet judges complain about the difficulty in finding attorneys to accept appointments; allowing attorneys to be abused is no way to win friends.

I have avoided offering solutions, because solutions are facile; change in attitude evolves, it cannot be compelled. I have also avoided naming judges or designating counties where problems exist, to avoid over-personalizing the anecdotes or the examples. Nevertheless, the anecdotes are true. I merely changed (or avoided) names.

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Endnote

1. Of course, this remark assumes that such treatment is wrong. Since the guardian was trusted enough to be appointed, one would think that the complainant has the burden of proof. Not often enough.

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Recent New York Cases

By Judith B. Raskin

Validity of Pre-Death Transactions

Julius Gargani owned a cooperative apartment and bank accounts totaling approximately \$165,000, naming his children and ex-wife as beneficiaries in various amounts. His Will left the cooperative apartment to his 2 children and his ex-wife in equal shares, and his Residuary Estate, personal belongings and personal savings accounts to Joan Conklin, his named Executor.



Prior to the decedent's death, Joan Conklin and her daughter met with an attorney who discussed Medicaid planning involving the sale of the apartment. The attorney prepared a power of attorney naming Joan Conklin as attorney in fact. He brought the document to Mr. Gargani in the hospital for execution. Joan Conklin then sold the apartment, netting just over \$125,000, and closed all the bank accounts. She titled all the assets to an account in Mr. Gargani's sole name 2 weeks before Mr. Gargani died, including the accounts that were in trust for the children and ex-wife. As Executor she then distributed all the estate assets to herself as residuary beneficiary.

Joan Conklin sought summary judgment on the filing of her accountings as executor and attorney in fact. The children, the ex-wife and the decedent's sister (named successor executor and beneficiary in the will) filed objections to the accounting.

The Court denied summary judgment. The Executor's actions raised issues of fact as to whether she "either acted under the instruction of the decedent or whether the acts were in the best interest of the decedent."

***Accounting in re Estate of Gargani*, 2014 NY Slip Op 50577 (Surr. Ct., Nassau County, Mar. 31, 2014)**

Beatrice Juliano had 4 children. She executed a Will in 1995 leaving her estate to her children equally. By June, 2009, Ms. Juliano was in a nursing home recovering from a stroke when defendant son arranged for her to sign a power of attorney appointing himself as agent. He then prepared a deed which she signed transferring her home to him. He recorded the deed six years later. On hearing of the house transfer at their mother's

funeral, the three (3) other children brought this action seeking, inter alia, an order voiding the deed, requiring the defendant to account for actions as agent for the three years before his mother's death, requiring an accounting of the rent collected on the property and directing monetary sanctions.

At trial, it was established that two of the plaintiff children were disabled, living in the home and paying \$700 per month rent to defendant. He has also been receiving \$1,475 per month from other tenants. The defendant did not record the deed because he was going through a divorce. He attempted to remove his mother's brokerage account as agent but the brokerage firm did not allow it.

The Court held that: 1. the deed was null and void because the defendant did not accept the gift of the premises. He recorded the deed 6 years later when his mother was incapacitated; 2. The plaintiffs had no basis for an order directing the defendant to account. He had a fiduciary relationship with his mother, not his siblings; and 3. There was no basis for monetary sanctions.

***Ratner v. Juliano*, 2014 NY Slip Op 50205 (Sup. Ct., Kings County, Feb. 17, 2014)**

The Administrator d.b.n. of an Estate brought a discovery proceeding to determine the circumstances of certain financial transactions involving the decedent prior to his death. The Administrator alleged that the decedent sold certain real property while he was residing in a nursing home "with visible symptoms of diminished mental capacity" and that the sale of the real property and certain bank withdrawals were made against the interests of the decedent. The Court issued an order directing the purchaser, the purchaser's daughter to whom she gifted the property after purchase, the loan company and JPMorgan Chase to appear. Discovery was then stayed pending a respondent's motion to dismiss the proceeding. The respondent argued, inter alia, that the property was not a subject of the Estate proceeding as it was not owned by the decedent at the time of his death.

The Court denied respondent's motion to dismiss the discovery proceeding. The Administrator's allegations were sufficient justification for the discovery to proceed without a showing of undue influence, incapacity, or duress.

***In Re Estate of Lukele*, 2014 WL 3405712 (Surr. Ct., New York County, July 10, 2014)**

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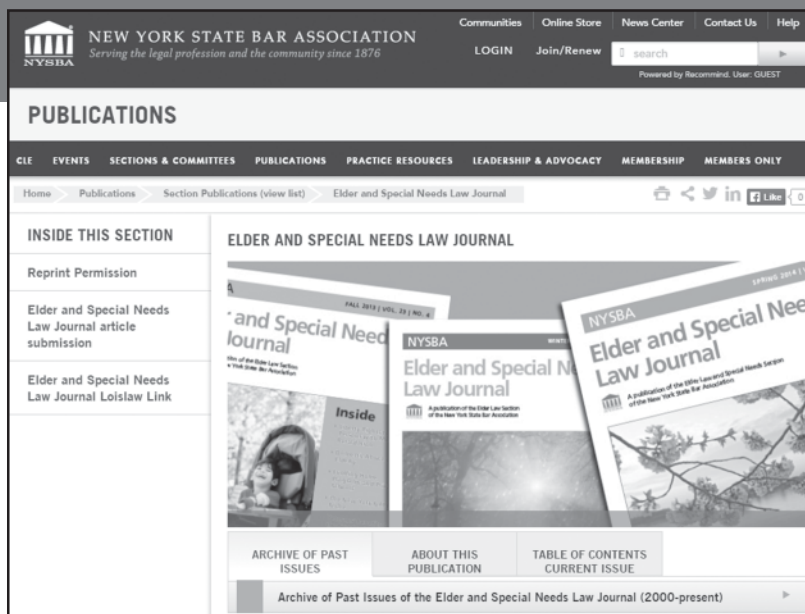
the Estate Planning Council of Nassau County, Inc., and the New York State and Nassau County Bar Associations. Judy is a past chair and current member of the Alzheimer's Association, Long Island Chapter Legal Committee. Judy has also contributed the Recent New York Cases column since 1995.

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