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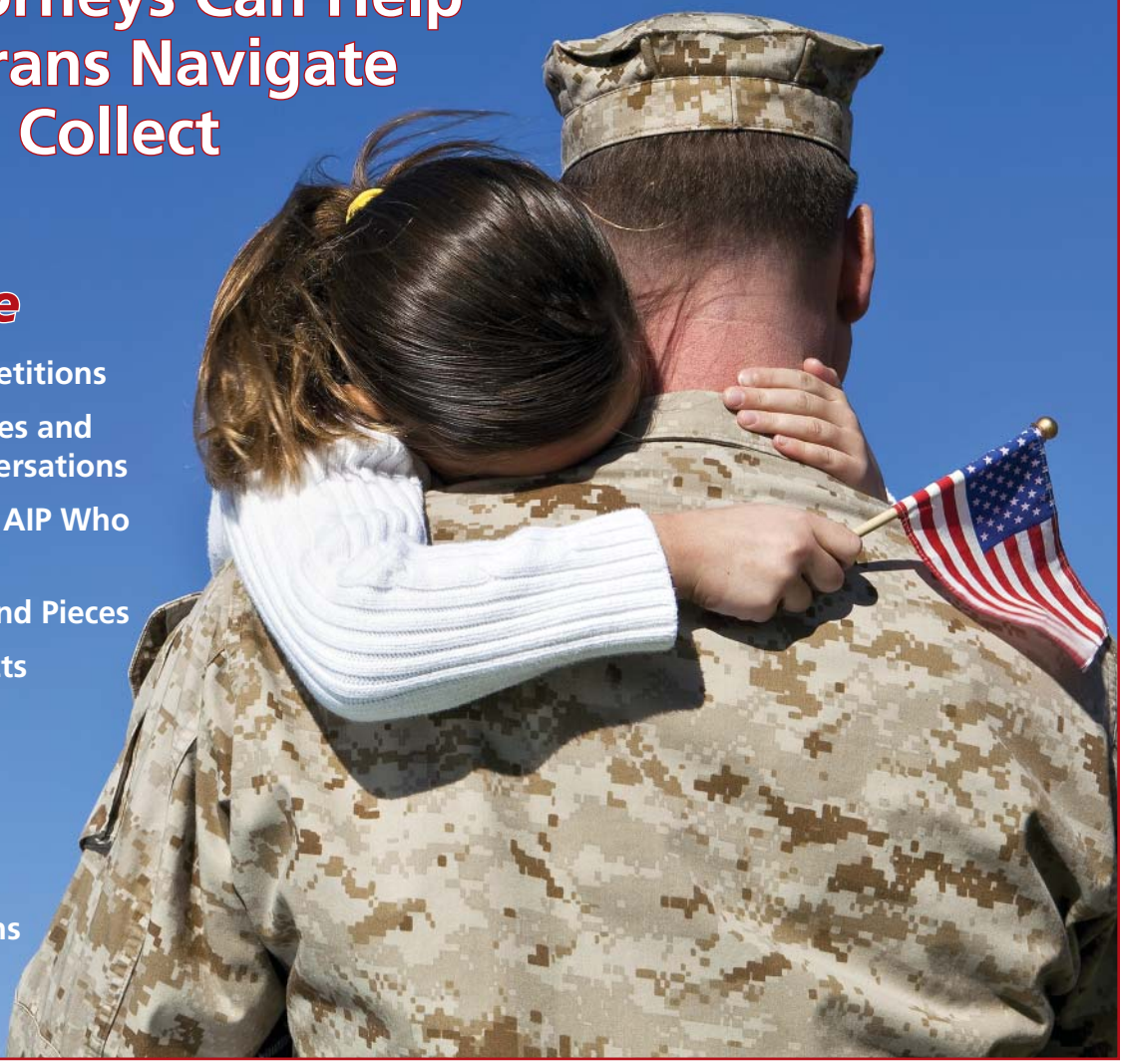
Elder and Special Needs Law Journal

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

How Attorneys Can Help Our Veterans Navigate the VA to Collect Benefits



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This practice guide is currently divided into two parts.

Part One, written by Bernard A. Krooks, Esq., examines the scope and practice of elder law in New York State, covering areas such as Medicaid, long-term care insurance, powers of attorney and health care proxies. Elder law cuts across many distinct fields including (1) benefits law, (2) trusts and estates, (3) personal injury, (4) family law, (5) real estate, (6) taxation, (7) guardianship law, (8) insurance law and (9) constitutional law.

Part Two, written by Jessica R. Amelar, Esq., gives the attorney a step-by-step overview of the drafting of a will, from the initial client interview to the will execution. This section provides a sample will, sample representation letters and numerous checklists, forms and exhibits.

The 2014-2015 release is current through the 2014 New York legislative session and is even more valuable with Forms on CD.

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Message from the Chair

The Annual Meeting at the New York Hilton Midtown on February 9, 2015 was a tremendous success. My thanks go out to Fern Finkel and David Okrent for the terrific job they did as program Co-Chairs.

During the business portion of the meeting, substituting for our Immediate Past Chair, Frances M. Pantaleo, I gave the report of the Nominating Committee which she chaired. Upon unanimous vote, the Section elected the following Officers and District Delegates:

Officers:

Chair—JulieAnn Calareso

Chair-Elect—David Goldfarb

Vice-Chair—Martin Hersh

Secretary—Judith D. Grimaldi

Treasurer—Tara Anne Pleat

District Delegates:

1st District—Elizabeth Valentin

2nd District—Fern Finkel

4th District—Judith Singer

5th District—Christopher R. Bray

8th District—Laurie Menzies

12th District—Joy S. Solomon

13th District—Anthony Lamberti

Congratulations to all of the elected Officers and District Delegates. I look forward to working with you in the upcoming year.

The Section honored Aytan Bellin for his work in litigation that has advanced the rights of the elderly and persons with disabilities. The Section also honored Judith Raskin for her work in furtherance of the rights of persons with disabilities and for her years of dedication to the Elder Law and Special Needs Section. In addition, Chelsea Breakstone, a student at City University of New York Law School, and Vanessa Cavallaro, a student at Touro Law School, were awarded the Hon. Joel K. Asarch Elder Law and Special Needs Section Scholarship. Congratulations to our honorees and award winners.

The CLE portion of the meeting included timely and important information for our Section members. Howard Krooks, a former Chair of our Section and the Immediate Past President of NAELA, kicked off the program with an up to the minute elder law update. Howard was followed by a presentation by Valerie J. Bogart of how Medicaid planning strategies impact eligibility for other means-based benefit programs. The program also included a presentation by David Goldfarb and David Silva on changes to Medicaid long-term care, including MLTC and FIDA issues, a presentation by Tammy Rose Lawlor on nursing home issues, and a presentation by Jeffery A. Asher and Elizabeth Sutherland on annuities.

I would like to thank all of the speakers. It takes a great deal of time and effort to prepare comprehensive materials and to speak at the meeting. Your efforts are much appreciated. All of the presentations were excellent and of great value to all in attendance.

The meeting was followed by a cocktail reception that provided a great networking opportunity for our members. It was rewarding to see a number of new faces at the meeting, and it is important for new members to have an opportunity to meet and network with more experienced practitioners.

As I reported in my last message, our Section will not be running the UnProgram this year. Accordingly, our spring meeting will be an Executive Committee meeting with no CLE component. The meeting will be held at the Empire State Building, 67th Floor Conference Room.

Our Legislation Committee, chaired by Matt Nolfo and Ira Salzman, has been very active. Some of the issues that the Committee has been addressing include:

- A proposal to amend EPTL 5-1.1A to allow for the satisfaction of the elective share by funding a testamentary Supplemental Needs Trust;
- A proposal to amend EPTL 5-1.1A to allow a surviving spouse to waive the right of election after the death of his or her spouse;
- A proposal to amend Section 83.39 of the Mental Hygiene Law with respect to the sale by a foreign guardian of real property located in New York;
- Commenting on the proposed legislation by the T&E Section with respect to digital assets; and
- Commenting on the proposed technical amendment to the power of attorney statute.

Additionally, the Legislation Committee is actively analyzing the 2015 New York State budget and preparing for our Section's annual lobbying efforts.

I would also like to thank Michael Amoruso, Chair of our Power of Attorney Task Force, Robert Freedman, our Section's Liaison to the Trusts and Estate's Section, and Task Force members, David Goldfarb and Jeffrey Asher, for their work on the proposed amendments to the power of attorney statute.

Our Membership Services Committee is also actively participating in the New York State Bar Association's "Pathways to the Profession" initiative. As part of this program, members of our Section are increasing our Section's presence at law school campuses and encouraging students to become active members of the New York State Bar Association and our Section. The committee is presently focusing on Brooklyn Law School and Pace Law School. The program will be extended to other schools in the future.

Our Diversity Committee continues to actively promote our Section and encourage people of diverse backgrounds to join our ranks. The committee participated in the 12th Annual "Celebrating Diversity in the Bar" reception that was held at the New York Hilton Midtown on January 26, 2015. At this reception, committee members had the opportunity to inform attendees of our Section's activities and of the benefits they would receive as Section members.

As I have stated in my prior messages, the continued long-term success of our Section depends upon new members who will become our future leaders. The efforts of our Membership Services Committee and Diversity Committee are crucial to attracting new members.

We have a number of other active committees that provide opportunities for new members. Once again, I encourage those of you who have not been actively involved in our committees to join in.

I am always available to you if you have any questions or concerns. I can be reached at raw@hwclaw.com or at (631) 582-5151.

Richard A. Weinblatt

Message from the Co-Editors in Chief

Dear Colleagues:

Winter weather is unpredictable. We prepare for the worst and hope for the best. Predicting weather is similar to the practice of law in many ways, don't you think? As elder and special needs planning lawyers, we constantly try to identify the hidden minefields, the facts that were not really gleaming at the beginning of the case, the ones that the client forgot to mention or the change of events that occur during the pendency of the case. These are our icy roads, snow drifts and freezing rain.

Alas, we plow through and make the best decisions based on the information we have (just like the weather forecasters). However, we have at least one advantage. We have our Section and our *Journal* contributors to provide us with the most up-to-date information available to assist us in providing recommendations to our clients. At the end of the day, the science of weather forecasting is far less foreseeable (as we can see from the recent "non-blizzard" Juno). We are thankful to our leadership, our authors and our editors for serving as our weather forecasters.

Our Winter *Journal* includes an article by William Doherty on how to assist our veterans to navigate the field safely. This area of practice is becoming increasingly technical. We are forever grateful to our veterans and we are grateful to be able to assist them in any way possible. Sarah Duval provides an overview of "Updates to the New York State Family Offense Petition

Provide New Protections from Financial Exploitation." Keri Mahoney provides an article on "How to Serve as Counsel for the AIP" and provide a voice to the individual who cannot advocate for his or her own needs. Patricia L. Angley's submission discusses "Resolving Conflicts Among Multiple Surrogates Under the Family Health Care Decisions Act." Ellen Makofsky provides a very insightful look at the Advance Directives and the interplay with requirements under the Affordable Health Care Act for physicians to have "advance care planning." David R. Okrent provides "Recent Tax Bits and Pieces" providing planners with up-to-the-minute (almost) information on recent tax decisions that are necessary to assist in planning for our clients. Judith Raskin monitors recent cases in "Recent New York Cases" and provides our membership with an overview of important decisions that may affect the way we practice. Finally, Robert Kruger discusses "Rarely Discussed Financial Concerns" in Guardianship News.

We are sure you will find the articles incredibly useful while you "weather the storms" of elder law and special needs planning. Once again, we encourage our membership to submit articles of interest. We can all be "weather forecasters."

Happy Reading!

David and Adrienne

Avoiding Minefields on the Homefront: The Veterans Administration, Veterans Benefits and How Attorneys Can Help Our Veterans Navigate the Field Safely

By William A. Doherty

I. Introduction

The notion of compensating veterans after active military service is nothing new. In the United States, this tradition of compensating veterans post-service goes back to at least 1636 when the Pilgrims in Plymouth, Massachusetts passed an ordinance aimed at compensating militia members who protected them.[1] During the Revolutionary War, the Continental Congress provided pensions for enlistees as an incentive for joining the fledgling army.[2]

The provision of benefits to veterans has not been without controversy. In 1924, the United States Congress passed (over President Coolidge's veto) a bill that would give service members $1.00 for every day of service stateside and $1.25 for each day of their service in a foreign land. This "bonus" would mature and be payable in 1945.[3] However, with the advent of the Great Depression, people, including these veterans, needed their money presently. Veterans demanded immediate payment. These bonus-eligible veterans, feeling that their bonuses should come earlier, petitioned Congress to this end with no success.[4] They then marched on Washington in order to call attention to their plight. The name "Bonus Army" comes from the fact that these veterans assembled as an "army" and "occupied" Washington, D.C. until being evicted by federal troops by direction of President Hoover in 1932.[5]

Present day controversies abound as well. Opening a newspaper or watching TV news on almost any day in the last two years brings stories about ineffectual assistance and even misfeasance at the hands of the U.S. Department of Veterans Affairs (the "VA"). The controversies reached all the way up the Executive chain of command and resulted in the recent resignation of General Eric Shinseki, USA (ret.), due to problems within the VA.

However, most of our nation's history regarding its veterans involves the government doing what it can to compensate those who through blood and sweat have served in uniform to protect our freedoms. Various programs such as the G.I. Bill, post-bellum veterans' homes, the Veterans Bureau and other vocational, health or rehabilitation programs have been the government's effort to pay back those who have served. Today, the Department of Veterans Affairs' Mission Statement is: "To fulfill President Lincoln's promise 'To care for him who shall have borne the battle, and for his widow, and his orphan' by serving and honoring the men and women who are America's veterans."[6]

This article will be a primer on the genesis of the current Department of Veterans Affairs, the various current programs and benefits that it offers, how veterans can seek and obtain benefits and what we as a profession can do to help these veterans. Several examples of veterans who sought veterans benefits, both successfully and unsuccessfully, will also be presented. This article is not meant to be an exhaustive manual for the attorney who wishes to undertake representation of a veteran seeking benefits. It is meant to be an overview that may point an attorney in the right direction. For more comprehensive presentations on veterans benefits, appeals, procedures and substantive law, readers would do well to consult the *Veterans Benefits Manual* and the VA website which are cited herein. Additionally, Vincent J. Russo and Marvin Rachlin's New York *Elder Law and Special Needs Practice*[7] treatise also contains a chapter on veterans' benefits.

II. A Brief History of the Veterans Administration

Throughout the centuries following the Revolution, the United States government has continued its efforts to provide for veterans after service. According to the Department of Veterans Affairs, its predecessor agency, the Veterans Administration, was born of Congress consolidating the Veterans Bureau, the Bureau of Pensions of the Interior Department and the National Home for Volunteer Soldiers in 1930. The Veterans Administration continued in that form until 1989 when the Veterans Administration was renamed the Department of Veterans Affairs and given presidential cabinet-level status.[8]

Prior to its ascension to cabinet rank, the VA provided disability compensation to veterans, established

nursing homes for veterans, and provided insurance programs and other beneficial programs. The VA also administered the National Cemetery System after having this responsibility transferred to it in 1973. The National Cemetery System administers all National Cemeteries in the United States. Veterans, their spouses and minor children have the right to be buried in these cemeteries.

The main responsibility of the VA has become its provision of healthcare to veterans. According to the VA, it started with 54 hospitals in 1930 to a present-day total of 152 hospitals, 800 community clinics, 126 nursing homes and 35 "domiciliaries."[9] Currently, there are three branches of the VA that administer the varied programs provided by the VA. These branches are the Veterans Health Administration, the National Cemetery Administration and the Veterans Benefits Administration.

III. How an Attorney Can Prepare to Assist a Veteran in Seeking Benefits

A. Attorneys Must Be Accredited by the Department of Veterans Affairs

Before an attorney may assist a veteran who wishes to apply for veterans benefits, prepare applications or prosecute claims before the VA, the attorney must be accredited by the VA.[10] Additionally, an accredited attorney may not charge a fee for the initial application for benefits. However, an accredited attorney may charge a reasonable fee after the veteran files a Notice of Disagreement (NOD) in the event that an application for benefits is denied. When an attorney agrees to represent an applicant veteran, a fee agreement must be prepared and forwarded to the VA. This fee agreement must conform to the requirements of 38 C.F.R. §14.636(g).

In addition to accredited attorneys, Veterans Service Organizations, such as the American Legion and Veterans of Foreign Wars, often assist veterans in making their applications. They often have representatives at local VA offices. The VA also has a process through which non-attorney Veterans Claims Agents can be accredited to assist veterans throughout the claims process. A searchable directory of all attorneys, agents and organizations that are accredited by the VA is available on the VA website at http://www.va.gov/ogc/apps/accreditation/index.asp. The VA will also entertain and investigate complaints against VA-accredited attorneys, agents and organizations.

B. The Attorney Accreditation Process

In order to become accredited by the VA, the attorney must fill out VA Form 21a, which is available on the VA website. Information such as pedigree, education, bar admission(s) and disciplinary history is collected on the form. The form is then submitted to the VA. An accreditation decision will be sent back to the applicant attorney, after which time a successfully accredited attorney will have his or her contact information posted in the VA's online searchable provider directory.[11] The attorney will then be able to represent an applicant veteran before the VA. An additional requirement is that newly accredited attorneys complete a qualifying 3 credit CLE course that covers certain statutorily required related topics within 12 months of accreditation.[12]

IV. Various Veterans Benefits Programs

A. Eligibility

The Department of Veterans Affairs defines what a veteran is based on federal law. According to the United States Code, a "veteran" is "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable."[13] This precludes someone who has received a dishonorable discharge from obtaining veterans benefits. It should be noted that the term "active" can have special consequences with regard to reserve and National Guard service members. National Guard members must have been activated for federal active duty by authority of Title 10 of the United States Code in order for them to be eligible for VA benefits.[14]

Additionally, active duty must often have been for other than training.[15] Interestingly, "active duty" for purposes of eligibility can include not only veterans of the Marine Corps, Coast Guard, Army, Air Force and Navy, but also full-time commissioned officers in the Public Health Service, National Oceanic and Atmospheric Administration or Environmental Science Services Administration, and cadets and midshipmen at our nation's service academies.[16] A veteran who is injured or dies as a result of injuries sustained while on active duty for training may be entitled benefits.[17]

When a veteran served is not always a controlling factor for determining eligibility for benefits. However, for VA pension benefits (discussed more below) the time periods of service are consequential. In order to be eligible to receive non-service connected disability pensions, veterans must have served in time of war.[18] As the case studies below will show, service that is not during these time periods considered "war time" will preclude the veteran from obtaining certain benefits. It should be noted that the United States has technically been "at war" since August 2, 1990 for purposes of veterans benefits designations.[19] A full description of the relative "war time" period for purposes of veterans benefits is available on the VA website.[20]

B. Various Benefits Programs

There are numerous benefits available to veterans from the VA. Some of them will be summarized here. For a complete treatment of all available benefits, see

the Department of Veterans Affairs website or the Veterans Benefits Manual cited herein. Generally speaking, the VA offers compensation programs to veterans for service-connected disabilities and pension programs for veterans with non-service-connected disabilities.[21]

1. Special Monthly Compensation for Serious Disabilities (SMC)

The SMC program is designed for veterans who have suffered the complete loss or loss of use of specific organs or extremities as a result of military service. SMC is paid in addition to payments made to disabled veterans based on the statutory rating schedule. The SMC rates in effect at the time that a veteran makes application for this benefit will vary based on rates payable then in effect. However, according to Stichman, et al., the basic SMC allowances for service-connected disabling conditions such as loss of one hand, one foot, one eye, voice and other examples is $99 per month for each anatomical loss.[22] The addition of SMC benefits will increase a veteran's benefits to a rate higher than a 100% disability rating when added together.[23]

2. Disability Compensation (DC)

The major difference between VA compensation benefits and VA pension benefits is that VA compensation benefits are for veterans who have injuries or disabilities that are service-connected. In order to be eligible for DC, the veteran must provide evidence that the veteran is, in fact, disabled, and evidence that a disease or injury occurred, or was aggravated, while the veteran was in-service. Additionally, the veteran must provide evidence "of a link or nexus" to the service connection or aggravation of that disease or injury and the current claimed disability.[24] It should be noted that being employed does not, necessarily, preclude receiving this benefit. In fact, under certain circumstances, veterans who have a disability rating and receive the statutory DC benefit may earn extra civil service points that can be used for appointment from eligible lists or promotions from a civil service promotion exam in New York State. These points can be used only once and the veteran must achieve a passing score in order to opt for these points.[25] Disability compensation is set by statute and varies depending on the veteran's specific disability rating and whether the veteran is married or has any children. For example, according to the VA, the current monthly benefit for a veteran with a 10% disability rating is $130.94. For a veteran with a 100% disability rating with a spouse and a child it is $3,134.32.

3. Pension for Veterans with Non-Service Connected Disabilities

Pension "is a needs-based program similar to supplemental social security income (SSI)."[26] A veteran seeking pension benefits "must have wartime service, low income, and total and permanent disability."[27] For this benefit, there is no requirement that the disability claimed be related to military service. In order to receive pension benefits, the applicant veteran must have been discharged under "other than dishonorable conditions."[28] Additionally veterans' periods of service also affect eligibility. There is a requirement that veterans have served at least 90 days of active duty, one day of which must have been during an enumerated period of wartime. For service after September 7, 1980, the applicant veteran must have served at least 24 months of active duty or the entirety of the period that the veteran was called for service.[29] The veteran's financial means will also be surveyed during the application process, as will the extent of the claimed disability. The applicant veteran can fill out VA Form 21-527EZ, which is downloadable from the VA website, and mail it or deliver it to a local VA office.

4. VA Benefits for Families

There are numerous financial and educational benefits that may be available for surviving spouses and dependent children of veterans. Three important programs are discussed below.

4a. Dependency and Indemnity Compensation (DIC)

The VA will provide eligible surviving family members with compensation in the event that a veteran dies from a service-connected injury or a disability that made the veteran totally disabled for an enumerated statutory period of time.[30] Moreover, if the veteran's death is determined to be due to negligent VA medical or rehabilitation treatment, eligible survivors may be entitled to the statutory benefit as though the death were service-connected.[31] DIC may be available to eligible surviving spouses, dependent children or, in some cases, surviving parents. Eligible survivors should download VA Form 21-534 from the VA website and fill it out in full. Eligible survivors may apply for this benefit at any time after the veteran's death. However, if the application is made within one year of the veteran's death, any benefits granted will be paid retroactively to the first day of the month after which the veteran died.[32] If not made within one year of the veteran's death, any benefits granted will be paid to the applicant retroactively to the first day of the month after which the application was received.[33]

If the veteran dies while in service the VA will generally provide benefits to eligible survivors without going through the process of issuing a formal rating decision in the absence of proof that the veteran committed suicide, the death occurred during the first six months of the veteran's service or in the absence of indications that the veteran's death was due to his or her own misconduct.[34]

4b. Children Diagnosed with Spina Bifida Born to Vietnam Veterans

Another important benefit paid to some veterans' families is that which is paid to individuals born with Spina Bifida. This benefit will be paid in addition to any other benefits for which the applicant is eligible. In order to be eligible, the applicant's parent must have served in Vietnam between January 9, 1962 and May 7, 1975. According to Stichman, et al., this presumption relates to veterans' exposure to the herbicide called "Agent Orange."

4c. Children Born to Female Vietnam Veterans

There is a presumption of service connection for certain birth defects that occur in children born to female veterans who served in Vietnam between February 28, 1961 and May 7, 1975. Conditions covered by this benefit include, but are not limited to, achondroplasia, hydrocephalus, neural tube defects, pyloric stenosis and Poland syndrome.[35]

5. VA Health Care

Possibly the most colossal benefit that is administered by the VA is its provision of health care to eligible veterans. A great deal of reporting has been done about VA health care in recent months. Most of the news reporting has centered on problems with VA health care such as long waiting lists, improper care and deaths while waiting for treatment. Journalists have attributed these problems to things such as a large and ineffectual VA bureaucracy, medical staffs that are understaffed and other administrative inefficiencies.[36]

However, in spite of the difficulties that the VA may be experiencing, veterans should be encouraged to apply for benefits that they may be entitled to and certainly deserve. Generally, VA health care is provided to "veterans with service connected disabilities, certain combat veterans and low income veterans."[37] The veteran's length of service will be a factor in determining eligibility. Enlisted veterans who joined the military after September 8, 1980 must have served for 24 months on active duty or for the entire duration of the period of time that they were called to active service; there is a similar requirement for officers.[38] Exceptions are made for veterans with service-connected disabilities.

Veterans' health care benefits are administered by the Veterans Health Administration (VHA). Veterans are allowed to choose which VA facility they will receive treatment in.[39] According to the VA, there are currently 150 VA medical centers nationwide, 1400 outpatient clinics, domiciliaries and community living centers and 53,000 practitioners assigned to the VA.[40] The VA describes itself as the largest comprehensive medical care system in the country, serving 8.3 million veterans annually.[41] Veterans must affirmatively enroll in the VA health system in order to receive care. Depending on their eligibility, disabilities and conditions, they will be assigned one of eight priority codes. A priority code of 1 is the highest priority, 8 is the lowest priority. Veterans in higher priority groups will be enrolled in VA health care before veterans in lower priority groups. A full explanation of these groups is available at http://www.va.gov/healthbenefits/resources/priority_groups.asp. Enrolling is done by filling out an application and submitting it to the VA. It can be submitted at any VA facility or mailed to the VA. VA Form 10-10EZ, the enrollment application, can be found on the VA website at http://www.va.gov/vaforms/medical/pdf/vha-1010EZ-fill.pdf. Veterans that fit certain statutorily enumerated descriptions, such as those with greater than 50% disability ratings and veterans who are catastrophically disabled are exempt from having to enroll.[42]

Veterans whose applications for VA health benefits enrollment are approved will be eligible for a host of VA health benefits that include outpatient surgical, prescription, inpatient hospitalization, home health services, maternity services, chiropractic care and many other services. Periodic medical exams, mental health treatment and substance abuse treatment are also made available. Some care is subject to a co-payment and some is not.

6. VA Burial

There are several burial benefits available to eligible veterans. Eligible veterans, their spouses, surviving parents and surviving dependents may be buried in one of the national cemeteries upon request. Eligibility is determined based upon the veteran's period of service and manner of discharge. Examples of veterans who are eligible for burial in a national cemetery include, but are not limited to, any veteran of the armed forces of the United States,[43] reserve or guard members that die while being treated for an injury or illness incurred while on active duty for training, inactive duty for training or while hospitalized at the expense of the United States,[44] ROTC members that die under certain statutorily enumerated circumstances,[45] United States citizens who served honorably in the military of foreign nations that were allied with the United States during period of war,[46] and other persons as authorized by statute.[47] This includes a veteran's parents if the veteran dies under certain enumerated circumstances. A veteran's dependent child may also be buried in a national cemetery if the child predeceases the veteran.[48] Additionally, veterans may be eligible for a burial allowance if they choose to be buried in a private cemetery or if their deaths are not service-connected. There is also a transportation allowance that may be paid to survivors to reimburse for the cost associated with transporting the veteran's remains.

In addition to the cost savings involved with this benefit, there is something else that is special about this benefit that many veterans hold dear and request of their loved ones. Survivors may not know that it is part of the interment process. Veterans buried in a national cemetery has their branch of service and an indication of service during a particular conflict inscribed on their headstone. Additionally, at their request, they can have a particular intra-branch unit inscription (such as "Force Recon Bat." for a Marine) and their personal decorations inscribed (such as "PH" for a Purple Heart recipient, "SS" for a Silver Star recipient or "BS" for a Bronze Star recipient) on their headstone.

7. VA Education

Some of the most well-known and ubiquitous of the VA benefits available to eligible veterans is in the arena of education. These benefits may also be available to eligible spouses and children as well. There are three major education benefits currently available to eligible veterans. These are the Post-Vietnam Era Veterans' Educational Assistance Program, the All-Volunteer Force Educational Assistance Program (better known as the Montgomery G.I. Bill) and the Post-9/11 Educational Assistance Program.[49] Veterans may not obtain benefits from more than one educational assistance program concurrently.[50]

The Post-Vietnam Era Veterans Educational Assistance Program provides educational assistance to veterans who served between December 31, 1976 and July 1, 1985; service must have been for at least 181 continuous days and the veteran must have been discharged under other than dishonorable circumstances.[51] The All Volunteer Force Education Benefits Program is available to veterans who entered active service subsequent to June 30, 1985. The required length of service varies and veterans may be entitled to as much as 36 months of tuition assistance.[52] The Post-9/11 Educational Assistance Program is available to eligible veterans with service that began on or after September 11, 2001 and lasted for at least 36 months. The veteran must have been discharged under other than dishonorable circumstances.[53] Eligible veterans may qualify for full tuition and fees as well as a housing stipend and an allowance for books and supplies.[54] This is an incredible benefit that all eligible veterans should be encouraged to apply for. For more complete eligibility requirements and information, the VA provides a dedicated portion of its website at www.gibill.va.gov.

8. VA Home Loans

The VA also has a program whereby it will guarantee home loans secured by eligible applicant veterans. These loans may be available for purchasing, refinancing or building a home. Favorable terms and lower rates are typically obtained because lenders are more apt to provide these terms for borrowers on a loan guaranteed by the VA.[55] There is no minimum length of service for applicant veterans who are discharged due to service-connected disability.[56] Veterans who apply for this benefit must have been discharged under other than dishonorable circumstances.

9. VA Life Insurance

This is a benefit that is brought to veterans by virtue of the VA's ability to procure favorable rates for eligible veterans due to the large pool of people paying premiums into the program. Another important aspect of this benefit is that it makes people who may not be easily insurable in the private insurance market able to become insured. Whether because of severe illness, disability or disease, insurance may not be affordable to them on the open market. They are able to secure insurance through the VA, however. Group life insurance, mortgage life insurance and insurance products geared specifically toward disabled veterans are among the products offered. For a full list of insurance products and their descriptions, the VA provides information at www.insurance.va.gov.

V. The Veterans Benefits Application Process

The Veterans Administration and its provision of benefits to our nation's veterans is a mammoth undertaking. There are approximately 22 million veterans in the United States, 9 million of whom are currently served by the VA.[57] Long waits, lost applications and even deaths while on waiting lists have been reported. However, it should be noted that many veterans are also satisfied with their experience with the VA. It either case, increasing the number of professionals able to provide services to veterans and employees to process applications may make the process more acceptable to applicants.

A. Application Process

There are differing forms promulgated by the VA that must be filled out depending on the benefit for which a veteran is applying. The various forms are easily available on the VA website. These forms are relatively easy to fill out and will require information about the veteran, dates of service, manner of separation or discharge, and supporting documentation such as a DD-214. A DD-214 is a veteran's service record and it serves as a veritable passport to applying for things such as veterans benefits. It is an invaluable personal record. Veterans and those who assist them would do well to secure this record as soon as possible and store it somewhere safe.

The applicant veteran submits the appropriate application for the benefit sought[58] to the VA's regional office (this information is available on the VA website and depends on where the veteran is located) from

where a decision on the application will be made. The decision will be formally sent to the veteran at which time the veteran can either begin receiving benefits or not, in the case of an application being denied.

If the application is denied, there is an appeals process. Additionally, if the veteran receives a rating lower than he or she feels is merited, that may be the subject of an appeal. While the appeals process for VA benefits would be the subject of its own article, readers should be aware that there is a substantive appeals process. Basically, a veteran (with or without counsel) files a Notice of Disagreement (NOD) with the Regional Office within one year of the denial. After filing the NOD, the veteran may request that a Decision Review Officer from that regional office review the application anew. When the regional office receives the NOD, it prepares a statement of the case (SOC). This is a detailed explanation of the factual and statutory reasoning for a decision. Assuming there is no change in the denial of the application, the regional office will send the SOC and a VA Form 9 to the veteran with instructions on how to initiate a substantive appeal. This Form 9 must be sent back to the regional office within 60 days of receiving the SOC or within 1 year of the rating decision to be timely. It is during this time that the veteran may also request a hearing. The next decision will be made by the Board of Veterans Appeals. In the event that the veteran wants to appeal after this decision, the next step would be to the United States Court of Appeals for Veterans Claims.

It is wise for veterans who wish to appeal a VA benefit application decision at any step in this process to consult with counsel. While these appeals may be initiated and pursued by the veteran alone, qualified accredited counsel can make the veteran's chance of success with the appeal much greater.

An important practice tip involves the actual submission of the application. It is imperative that anything sent to the VA be sent via certified mail, return receipt requested, or via FedEx. This will save the attorney and the applicant veteran a lot of trouble when timely applications or appeals are rejected because they are determined incorrectly to be untimely.

VI. Notable Presumptions of Disability

There are certain enumerated disabling conditions that are statutorily presumed to be related to military service and will qualify the applicant veteran to receive the appropriate level of benefits. These presumptions relate to when a veteran served, exposure to certain toxins or hazards and certain disabling conditions or diseases. They are codified in 38 C.F.R. §§ 3.307 and 3.309. When applying for benefits while suffering from a disease or condition covered by a presumption, the applicant veteran need not provide proof of service connection.

A. Agent Orange (AO): Vietnam Veterans Exposed to Herbicides

Certain applicant veterans who served in Vietnam between January 9, 1962 and May 7, 1975 are presumed to have been exposed to herbicides.[59] If these veterans exhibit certain diseases to the extent that the diseases are at least 10% disabling, these veterans will be eligible for benefits under this presumption. These diseases include, but are not limited to, certain forms of acne, soft-tissue carcinomas, Hodgkin's disease, prostate cancer, type-2 diabetes and chronic lymphocytic leukemia.[60] Because Vietnam-era veterans are quickly advancing into their late sixties and early seventies, it is critical that practitioners become aware of these presumptions so as to attempt to get these veterans benefits that they are entitled to during their lifetimes.

B. Certain Tropical Diseases

Additionally, suffering from certain tropical diseases will be presumptively deemed connected to a veteran's service in the military if the veteran served on or after January 1, 1947. The veteran must have served at least 90 days of active duty and the disease must have manifested itself to the level of at least a 10% disability. Examples of these diseases include, but are not limited to, dysentery, malaria, yellow fever and cholera.[61]

C. Former Prisoners of War

Former prisoners of war who have certain diseases that manifest themselves to a degree of at least 10% or more will be presumptively connected to an applicant veteran's service. These diseases include, but are not limited to, psychosis, anxiety disorders, maladies secondary to frostbite, heart disease and stroke. Veterans applying for benefits under this presumption can have been held captive for any period of time in order to be eligible.[62]

For veterans that were held captive as prisoners or war for at least 30 days, certain diseases will be covered by a presumption if manifested to at least a degree of 10% disabling. These diseases include, but are not limited to, chronic dysentery, malnutrition, irritable bowel syndrome, cirrhosis of the liver and peripheral neuropathy.[63]

D. Certain Veterans Exposed to Radiation

For certain veterans who have been exposed to radiation during their time in service[64] certain diseases and conditions will be presumptively deemed by the VA to be service-connected. Qualifying conditions and diseases are set by statute[65] and include, but are not limited to, all forms of leukemia, thyroid cancer, breast cancer, esophageal cancer, stomach cancer, lung cancer, ovarian cancer, multiple myeloma and certain lymphomas. Veterans eligible for this presumption include, but are not limited to, those who served in units that

participated in nuclear testing, were in Nagasaki or Hiroshima during or after the time the U.S. dropped atomic bombs there, service before February 1, 1992 at a diffusion plant in Paducah, KY, Portsmouth, OH or Oak Ridge, TN, or service before January 1, 1974 in Amchitka Island, AK.[66]

E. Gulf War Veterans with Undiagnosed Illnesses

For veteran applicants who served in the Southwest Asia Theater of Operations during the Gulf War, certain medically unexplained multiple symptom illnesses may be presumed to be related to these veterans' service. The disability must have reached at least 10% by December 31, 2016.[67] These diseases must have materialized in a cluster of unexplained illnesses and exist for six months or more. Such diseases include, but are not limited to, chronic fatigue syndrome, fibromyalgia and irritable bowel syndrome.[68] The VA has also extended this presumption to veterans of the Iraq and Afghanistan campaigns.[69]

F. Certain Chronic Diseases

Suffering from certain chronic diseases will be presumptively deemed connected to a veteran's service in the military if the veteran served on or after January 1, 1947. The veteran must have served at least 90 days of active duty and the disease must have manifested itself to the level of at least a 10% disability. Examples of these diseases include, but are not limited to, arthritis, anemia, hypertension, epilepsy and leukemia.[70]

VII. Pertinent Case Studies in Disability Benefits

Example number one involves a Marine Corps infantry veteran of the Vietnam War who served from 1965 to 1969. He was twice wounded in separate combat incidents in the Republic of Vietnam. One of the wounds required immediate evacuation and a month-long convalescence in the Navy Hospital in Okinawa, Japan. He had been hit by enemy shrapnel that lodged itself in the Marine's liver. Ultimately the Marine returned to Vietnam, completed one tour and two extensions in-country and was honorably discharged, having earned the Purple Heart (with gold star in lieu of a second award), the Combat Action Ribbon and various other service medals and ribbons. That shrapnel remained in his liver for the rest of his life, a complication that prevented him from ever being able to undergo magnetic resonance imaging (MRI) during his service-connected cancer treatments later in life.

This Marine was awarded a 10% disability rating from the Veterans Administration almost immediately upon returning home. At the time of the award in the very early 1970s, the benefit was approximately less than $20 per month. The Marine was also entitled to care at Veterans Administration facilities. The Marine went on to enter the New York City Police Department in 1973 and retired as a Police Captain in 2000. Sometime after his retirement, the Marine was diagnosed with cancer of the prostate. Several years into his treatment he learned of the herbicide presumption (i.e., the presumptive connection between exposure to "Agent Orange" in Vietnam and a diagnosis with prostate cancer). He applied for a service-connected designation and was deemed 100% disabled by the Veterans Administration. His disability allowance was raised to the then-statutory tax-free monthly amount. He continued to collect this benefit until he passed away from the cancer. Throughout his experience with the Veterans Administration he always remarked that his applications were processed timely and whenever he had to go to a VA facility (which was at least twice a year to be examined) he was serviced by kind and professional workers. His widow, with the help of counsel, applied to the Veterans Administration for Dependency and Indemnity Compensation (DIC) upon the Marine's death. She was awarded this benefit and receives the monthly statutory benefit.[71]

Another example of a veteran who successfully received benefits was that of the soldier who served in the Army from 1970 to 1972. He was trained as a paratrooper, Airborne qualified and also worked extensively in tanks. He served overseas in Germany but never in Vietnam and never in combat operations. Fast forward to the late 2000s and he began to develop hearing loss and tinnitus. Since his diagnosis, he has had to wear bi-lateral hearing aids. His audiologists and physicians all attributed this late-onset deafness to his service in the Army's tanks. With the help of counsel he applied for a service-connected disability rating. After several months he was awarded a 15% disability rating retroactive to the date of his application. He continues to receive the tax-free statutory monthly benefit. Initially he was uncomfortable applying at all because he felt that he was unworthy of the service-connected rating because he had not been in combat. The fact remains that his service was honorable and protected the rest of us and the laws governing veterans benefits rightly reflect that. Presently his hearing aids are provided to him by the VA.

Additionally, there is an example of the airman who served in the U.S. Air Force from 1994 to 1998. He served all over the world as a crew chief on C-17 cargo planes. His responsibilities included maintenance of the air frame and other important tasks. During his service he was exposed to toxic substances and loud noises. In his early twenties he became a police officer and continues to serve as one. As he got older, he developed what was diagnosed as tinnitus. He applied for veterans benefits and ultimately was awarded a 10% disability rating. He continues to receive the tax-free statutory monthly benefit. This veteran was also

fortunate enough to apply for a VA-guaranteed home mortgage loan when he bought his first home. Through this program, he was able to put down a lesser down payment than ordinarily required on the market and was also able to obtain a highly favorable interest rate on his mortgage loan.

An example of an unsuccessful application is that of the 75-year-old former airman who served from 1956 to 1958. Late in life he suffered a cerebral vascular accident (stroke) and other maladies which required care in a long-term care facility. His family applied for benefits from the VA, thinking he may be entitled to the pension benefit. Because he was not in service during wartime he does not fit the statutory criteria.[72] However, this veteran's service is no less honorable or worthy of accolade than the former.

An example of a dependent child being buried in a national cemetery is that of the author's first cousin who died in 1967 at the age of 3. The child predeceased his father, who was a U.S. Army veteran. The child was buried in a national cemetery where his father will, presumably, be buried upon his death.

The above examples show that there can be a large disparity in what veterans are entitled to based on their service. Neither of these veterans served any less honorably than the others but they were entitled to very different benefits. The important thing is to take note of the various benefits available and their conditions precedent. When in doubt, apply for benefits. The worst that can happen is that the VA can deny a claim.

VIII. Conclusion

The *Veterans Benefits Manual* authored by Stichman, et al. is an excellent resource for any accredited practitioner who wishes to represent veterans throughout the benefits process. It is also an excellent resource for attorneys who, although not accredited, find themselves looking for information so that they may properly refer a veteran client. Additionally, the Department of Veterans Affairs has a comprehensive website that provides information relative to the benefits that it offers.

It would be hard to deny that our government has a responsibility to help our service members after they hang up their uniforms. In his review of a book about the Bonus Army, Col. Thomas D. Arnhold, (USA) states that "veterans of war will struggle financially, socially and psychologically, and the U.S. government must take care of its military veterans."[73] Assisting veterans and their families with applications for veterans benefits is extremely rewarding. Helping those who have sacrificed their lives, their time and their families to keep us free from terrorism, despotism and all manner of other threats to our way of life, is an excellent way for our profession to give back.

Finally, it looks as though the new Secretary of Veterans Affairs, Robert McDonald, intends to fix the VA's problems and right the ship moving forward. His "Road to Veterans Day" initiative was recently announced and through it the Secretary intends to launch his three-point plan to rebuild veterans' trust, improve delivery of services to veterans and set a course for the VA's long term future.[74] Improvements such as hiring more professionals to provide services to veterans, ensuring that the VA Inspector General receives complaints and completes investigations, and streamlining the VA are already in progress. These are steps in the right direction.

Endnotes

1. U.S. Dept. of Veterans Affairs, *VA History in Brief*, at 3, *available at* http://www.va.gov/opa/publications /archives/docs/history_in_brief.pdf.
2. *Id.*
3. Col. Thomas Arnhold, *The Bonus Army—An American Epic*, 2005-Sep Army Lawyer 78 (2005) (book review).
4. *VA History, supra* note 1, at 9.
5. Arnhold, *supra* note 3, at 79. According to the *VA History in Brief*, these veterans were also called "Bonus Expeditionary Forces."
6. *See* http://www.va.gov/about_va/mission.asp.
7. Vincent J. Russo & Marvin Rachlin, *New York Elder Law and Special Needs Practice* (Thomson West Pub. 2014 ed.).
8. Department of Veterans Affairs Act, Pub. L. No. 100-527, 112 Stat. 2635 (1988).
9. *See* http://www.va.gov/about_va/vahistory.asp.
10. Sanford J. Mall, *The Future of Veterans Benefits*, 9 NAELA J. 167 (2013), *citing* 38 C.F.R. §14.629(b)(i),(ii).
11. It took the author approximately 8 months from application to receive a positive determination of accreditation.
12. 38 C.F.R. §14.629(b)(iii).
13. 38 U.S.C. §101(2).
14. Barton F. Stichman, et al., *Veterans Benefits Manual* 25 n.20 (Lexis Pub. 2012).
15. Barton F. Stichman, et al., *Veterans Benefits Manual* 25 (Lexis Pub. 2012).
16. *See* 38 U.S.C. §101(21) et seq.
17. Stichman, et al., *supra* note 15, at 26.
18. *Id.* at 36.
19. *Id. citing* 38 U.S.C. §§101(33), 1501(4).
20. *See* http://benefits.va.gov/pension/wartimeperiod.asp.
21. Stichman, et al., *supra* note 15, at 51.
22. *Id.* at 355, *citing* 38 U.S.C. §1114(k) and 38 C.F.R. §3.350(a)(1) *et seq.*
23. *Id. citing* 38 U.S.C.S. §1114 and 38 C.F.R. §3.350.
24. *Id.* at 59.
25. *See generally* N.Y. Civ. Serv. Law § 85.
26. Stichman, et al., *supra* note 15, at 52.
27. *Id.* at 53.
28. *Id.* at 460. There are several manners of discharge in the U.S. armed forces such as general discharge, administrative

separation, entry-level separation, honorable discharge and dishonorable discharge. the dishonorable discharge precludes benefits.

29. *See generally* http://www.benefits.va.gov/pension/ (last accessed September 1, 2014).
30. Stichman, et al., *supra* note 15, *citing* 38 U.S.C.S. §1318(b)(1) for veterans totally disabled for 10 years immediately preceding death; 38 U.S.C.S. §1318(b)(2) for veterans totally disabled for 5 years immediately upon release or discharge from service until death; 38 U.S.C.S. §1318(b)(3) for veterans who were former Prisoners of War and were totally disabled for 1 year immediately preceding death.
31. *Id.* at 549, *citing* 38 U.S.C.S. §1151.
32. *Id.* at 550, *citing* 38 U.S.C.S. §§5110(a),(d).
33. *Id.* at 550, *citing* 38 U.S.C.S. §5110(a).
34. *Id.* at 552.
35. *See generally* 38 C.F.R. §3.815 for a complete list of eligible birth defects.
36. *See* Sally Satel and B. Christopher Frueh, *The Other VA Scandal*, The National Review, August 24, 2014.
37. Stichman, et al., *supra* note 15, at 723.
38. *Id.*
39. U.S. Department of Veterans Affairs, V.H.A., Chief Business Office, *Health Care Benefits Overview* (2012), *available at* http://www.va.gov/healthbenefits/resources/publications/IB10-185-health_care_benefits_overview_2012_eng.pdf (last accessed September 4, 2014).
40. This information is available at http://www.va.gov/health/aboutvha.asp (last accessed September 1, 2014).
41. *Id.*
42. *See generally* 38 C.F.R. §17.37 for a complete statutory list.
43. 38 U.S.C. §2402(a)(1).
44. 38 U.S.C. §2402(a)(2).
45. 38 U.S.C. §2402(a)(3).
46. 38 U.S.C. §2402(a)(4).
47. 38 U.S.C. §2402(a)(5),(6),(7),(8),(9).
48. A personal example of this benefit is provided later in this article.
49. Stichman, et al., *supra* note 15, at 856-857.
50. *Id.* at 857.
51. *Id.* at 858.
52. *Id.* at 859.
53. *Id.* at 861.
54. *Id.*
55. *Id.* at 864.
56. *Id.* at 864 *citing* 38 U.S.C.S. §3702(a)(2)(B).
57. Sandhya Somashekhar, *Some of the Internal Problems that Led to the VA Health System Scandal*, Wash. Post, May 30, 2014.
58. These applications are available and explained online at http://www.benefits.va.gov/BENEFITS/Applying.asp and for health benefits at http://www.va.gov/healthbenefits/apply/.
59. 38 C.F.R. §3.307(a)(6)(iii).
60. 38 C.F.R. §3.309(e).
61. 38 C.F.R. §3.309(b).
62. *See* 38 C.F.R. §3.309(c)(1).
63. *See* 38 C.F.R. §3.309(c)(2).
64. *See* 38 C.F.R. §3.309(d)(3).
65. *See* 38 C.F.R. §3.309(d)(2).
66. Much of this information is available on the VA website as well at http://benefits.va.gov/BENEFITS/factsheets/serviceconnected/presumption.pdf (last accessed August 30, 2014).
67. 38 C.F.R. §3.317(a)(1)(i).
68. 38 C.F.R. §3.317(a)(2)(i). *See also* http://benefits.va.gov/BENEFITS/factsheets/serviceconnected/presumption.pdf (last accessed September 1, 2014).
69. Mall, *supra* note 10, at 174.
70. 38 C.F.R. §3.309(a).
71. This Marine was LCPL William A. Doherty, Sr., the author's father.
72. For purposes of this benefit the Korean War is said to have ended on January 31, 1955 and the Vietnam War did not officially begin until August 5, 1964.
73. Arnhold, *supra* note 3, at 80.
74. *See* Matthew Daly, *McDonald Vows Lessons from Phoenix Problems*, Marine Corps Times, September 9, 2014. *Available at* http://www.marinecorpstimes.com/article/20140909/NEWS05/309090056/McDonald-vows-lessons-from-Phoenix-problems (last accessed September 9, 2014).

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Updates to the New York State Family Offense Petition Provide New Protections from Financial Exploitation

By Sarah Duval

This article is part of an ongoing series brought to you by the Section's Elder Abuse Committee. For more information about the Committee, please contact joy.solomon@hebrewhome.org.

Reflecting the growing problem of elder abuse and the need to protect victims, older adults can now seek protection from financial exploitation in an unexpected venue: Family Court.[1] In December 2013 three new offenses were added to New York State family offense petitions.[2] These offenses, which include identity theft, coercion, and grand larceny in the 3rd or 4th degree, are designed to protect against financial crimes. Prior to these updates, offenses focused on physical and emotional crimes including assault, harassment, disorderly conduct, stalking, and reckless endangerment. Financial exploitation of an elderly person is often accompanied by other forms of abuse; it is also often the first step towards asserting control over the victim.

The inclusion of economic abuse into family offense petitions has significant potential in combating financial exploitation of the elderly and preventing further abuse.

Family Offense Petitions: What Are They, and Who Can File?

A family offense petition may only be filed against someone whose relationship with the petitioner qualifies as familial.[3] This includes a blood relation (parent and child, parent and grandchild, etc.), marriage, having a child in common, an intimate relationship that goes beyond simply a casual social or business acquaintance, or persons who currently live or have lived together. This would not include interactions associated with consumer scams, although these are also financial exploitation. The offenses listed are criminal offenses; however, unlike in criminal court where the burden of proof is beyond a reasonable doubt, the burden in family court is by a preponderance of the evidence.[4] A permanent order of protection under section 842 of the NYS Family Court Act may be in effect for up to two years; if aggravating circumstances are found it can be effective for up to five years.[5] Relief granted in the order generally falls into two categories. A level one order of protection is the more protective of the two, requiring the respondent to stay away from the petitioner both physically by not coming within a certain distance of a petitioner or to a petitioner's home and also by ceasing communication with the petitioner.[6] The level one order of protection also requires the respondent to refrain from "assault, stalking, harassment, aggravated harassment, menacing, reckless endangerment, strangulation, criminal obstruction of breathing or circulation, disorderly conduct, criminal mischief, sexual abuse, sexual misconduct, forcible touching, intimidation, threats, identity theft, grand larceny, coercion or any criminal offense against [specify protected person(s) and/or members of protected person's family or household, and/or person(s) with custody of child(ren)]."[7] A level two order allows the respondent to be in the presence of the petitioner; however, it requires that the respondent not commit any of the criminal offenses listed above. Both orders can be modified to the unique situations of the petitioner; for example, a level two order can be issued with a clause that the respondent stay away from the home of the petitioner, but is allowed to be around the petitioner outside of him or her home. This is helpful in situations where a petitioner seeks removal of a family member from him or her home but does not wish for the complete stay-away order.

These updates to the family offense petition are important to utilize when assisting an older adult dealing with exploitation. Filing a petition in family court does not prevent one from pursuing a criminal charge on the same incident; the courts have concurrent jurisdiction.[8] However, orders of protection in family court can be issued on an ex-parte basis the same day they are filed; that is, filing in family court can stop the exploitation sooner than simply filing a police report and waiting for an investigation to proceed.[9] Often in familial matters a victim may wish for an order of protection but decline to pursue criminal charges. Victims now have the option to get an order of protection for economic abuse without having to pursue criminal charges.[10] If a respondent violates an order of protection he or she is subject to criminal penalties.[11]

a. Identity Theft

Identity theft occurs when a person knowingly presents himself or herself as another person, either by acting as or (more commonly) using personal identify-

ing information of the other person to obtain some gain for himself or herself at the cost of financial loss to the victim.[12] This is increasingly common when family members or other caretakers use the personal information of an elderly person, including social security number, date of birth, and address to open credit cards in their names without their knowledge or consent. Also on the rise is the use ATM or debit cards without knowledge or consent. In addition to issuing an order of protection to stop the identity theft, the court is also authorized to order the respondent to return certain documents including credit and debit cards to the victim.[13]

b. Coercion

Coercion in the second degree is defined by New York Penal Law as compelling or inducing a person to do something that they have a legal right to abstain from.[14] This is often accompanied by threats, including threats of physical violence, property damage, blackmail, etc. The perpetrator usually stands to achieve some gain, either material such as money/access to finances or agency over the victim. The victim of coercion could be harmed materially with respect to his or her health, safety, business, calling, career, financial condition, reputation or personal relationships. An example of coercion includes an adult child demanding money from him or her parent(s) and threatening to put the parent(s) in a nursing home if they do not comply with the demand.

c. Grand Larceny

Grand larceny is when a person steals property. It is third degree if the property value is in excess of $3,000[15]; and fourth degree when the property stolen exceeds $1,000 in value or the property is a debit or credit card, public record, firearm, motor vehicle, etc. or any property obtained by extortion regardless of value.[16] This could be used in a situation where a family member is living with or frequently visiting an elderly person and, while not physically violent or harassing the person, he or she is taking money or possessions. An order of protection can provide the elderly person immediate protection from this theft.

Case Examples

To illustrate the effectiveness of this petition, I will describe two case examples; one prior to the updates and one after the updates. While these are based on actual cases, details have been changed to protect client identities. Financial abuse is often the precursor to physical abuse. Often, a victim's refusal to sign a check or give money to the abuser is met with physical intimidation. These updates may not only stop financial exploitation, they may also prevent physical abuse.

1. Mrs. W.

Mrs. W. first came to me in March of 2013, seeking protection against her granddaughter. Her granddaughter lived with her and, while she wasn't physically abusive or harassing, she was stealing money. Mrs. W. had contacted the police regarding the matter, and they were investigating the situation. She wanted her granddaughter out of her home. Because her granddaughter wasn't paying rent, and because the relationship was familial, seeking an order of protection in family court removing the granddaughter from the home was preferable to seeking an eviction in city court. However, because none of the actions of the granddaughter fit any of the offenses listed, we were unable to secure an order of protection. Mrs. W. came back to my office in January of 2014 after the abuse by her granddaughter had turned physical; we were then able to secure a permanent (two year) order of protection, and the granddaughter has been out of the home. Had we been able to pursue an order under the financial exploitation charges the additional abuse by physical assault may have been avoided.

2. Mrs. H.

Mrs. H. came to my office in April of 2014. She had been diagnosed with dementia and lived with her husband, who also had dementia. There was a conflict between her children over who would be best as Power of Attorney. Initially, both Mr. and Mrs. H had selected their daughter. However, one evening their son came to the home and requested Mrs. H and her husband sign documents appointing him Power of Attorney. Her husband signed; Mrs. H refused. However, her son continued to come to her home with the papers and refused to leave until she contacted the police. She came to my office seeking assistance; she was aware that her dementia was progressing and, while she was able to refuse to sign, as the disease progressed she was concerned she would be more susceptible to his influence. She felt he was attempting to convince her to do something that was not in her best interest for his own gain. She filed a family offense petition seeking a stay-away order listing coercion as the cause of action. We were granted an ex-parte order initially for a level two order of protection requiring non-offensive contact. "Offensive contact" included any attempt to have Mrs. H. sign the power of attorney document. Although a temporary order was granted over the course of a few months and a few court dates, the petition was dismissed for failure to state a claim. During this time my client's disease progressed to where she was not able to testify in court about her experiences. Although my position was that this was coercion, the court disagreed. The order was revoked. Despite our lack of permanent success, my client was protected from this coercion during those few crucial months and allowed

her family to take steps to ensure her wishes to have her daughter remain power of attorney were protected.

Conclusion

These new avenues to protect victims of elder abuse from additional harm are an important step in protecting the physical, financial, emotional, and mental health of our seniors. For more information, please visit www.lsed.org or www.councilonelderabuse.org, or feel free to contact me at (716) 853-3087 x.225 or by e-mail at sduval@lsed.org. For a list of local elder abuse resources throughout NYS, please visit www.nysba.org/ElderAbuseResourceGuide/.

Endnotes

1. NYS Family Court Act § 842 Order of Protection. NYS Assembly Bill A7400-2013; enacted December 18, 2013: Adds identity theft, larceny and coercion to those offenses which criminal and family courts have concurrent jurisdiction over when involving family or household members.
2. https://www.nycourts.gov/forms/familycourt/pdfs/8-2.pdf.
3. NYS Fam Ct. Act § 822.
4. Family offense must be established by fair preponderance of evidence through admission of competent, material and relevant evidence. McKinney's Family Court Act § 834. *Sharyn PP. v Richard QQ.*, 83 AD3d 1140 (3d Dept 2011).
5. NYS Family Court Act § 842 Order of Protection.
6. http://www.nycourts.gov/forms/familycourt/pdfs/gf-5a.pdf.
7. *Id*.
8. The family court has concurrent jurisdiction with the criminal court over all family offenses as defined in article eight of this act. NYS Family Court Act § 115.
9. Temporary order of protection; temporary order for child support, NYS Family Court Act § 828.
10. Powers on failure to obey order NYS Family Court Act § 846-a.
11. *Id*.
12. A person is guilty of identity theft in the first degree when he or she knowingly and with intent to defraud assumes the identity of another person by presenting himself or herself as that other person, or by acting as that other person or by using personal identifying information of that other person NYS Penal Law § 190.80.
13. NYS Assembly Bill A7400-2013; enacted December 18, 2013.
14. A person is guilty of coercion in the second degree when he or she compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he or she has a legal right to engage, or compels or induces a person to join a group, organization or criminal enterprise which such latter person has a right to abstain from joining, by means of instilling in him or her a fear that, if the demand is not complied with, the actor or another will: Penal Law § 135.60.
15. A person is guilty of grand larceny in the third degree when he or she steals property and:

    1. when the value of the property exceeds three thousand dollars, or

    2. the property is an automated teller machine or the contents of an automated teller machine.

    Grand larceny in the third degree is a class D felony. NYS Penal Law § 155.35.
16. A person is guilty of grand larceny in the fourth degree when he steals property and when:

    1. The value of the property exceeds one thousand dollars; or

    2. The property consists of a public record, writing or instrument kept, filed or deposited according to law with or in the keeping of any public office or public servant; or

    3. The property consists of secret scientific material; or

    4. The property consists of a credit card or debit card; or

    5. The property, regardless of its nature and value, is taken from the person of another; or

    6. The property, regardless of its nature and value, is obtained by extortion; or

    7. The property consists of one or more firearms, rifles or shotguns, as such terms are defined in section 265.00 of this chapter; or

    8. The value of the property exceeds one hundred dollars and the property consists of a motor vehicle, as defined in section one hundred twenty-five of the vehicle and traffic law, other than a motorcycle, as defined in section one hundred twenty-three of such law; or

    9. The property consists of a scroll, religious vestment, a vessel, an item comprising a display of religious symbols which forms a representative expression of faith, or other miscellaneous item of property which:

        (a) has a value of at least one hundred dollars; and

        (b) is kept for or used in connection with religious worship in any building, structure or upon the curtilage of such building or structure used as a place of religious worship by a religious corporation, as incorporated under the religious corporations law or the education law.

    10. The property consists of an access device which the person intends to use unlawfully to obtain telephone service.

    11. The property consists of anhydrous ammonia or liquified ammonia gas and the actor intends to use, or knows another person intends to use, such anhydrous ammonia or liquified ammonia gas to manufacture methamphetamine.

    Grand larceny in the fourth degree is a class E felony.

    Penal Law § 155.30

Advanced Directives: An Idea Whose Time Has Come

By Ellen G. Makofsky

In the midst of the Affordable Health Care Act debate five years ago, end-of-life decision-making became a political hot potato. What was proposed as a voluntary discussion with a health care provider about end-of-life choices became characterized by the political opposition as the creation of "death panels." The characterization had legs and led to the withdrawal of the idea of reimbursing physicians for discussions regarding end of life choices from the then-proposed Affordable Health Care Act.

Despite this setback, the idea that physicians should be encouraged to have end-of-life decision-making conversations with their patients is seeing a resurgence. The American Medical Association ["AMA"] recently proposed a new Medicare billing rate for physicians who provide counseling about advance directives. The idea is to provide patients and their families with information about the consequences of various medical choices. CMS is taking the proposal under advisement and a decision is expected shortly.[1] If Medicare adopts the change its decision will go a long way to setting the standard for private insurers encouraging more physicians to engage in these conversations.[2]

Two insurers in New York State already provide this type of coverage for patients with serious illness. Excellus Blue Cross Blue Shield initiated a reimbursement allowance for such coverage on November 9, 2009. In order to qualify for reimbursement, the participating physician must complete training in advance care planning and successfully complete both a pre-test and a post-test. MVP Health Care has a similar protocol for reimbursing physicians who provide advance care planning to patients with serious illness.[3] Reimbursement makes sense. Reimbursement to the physician encourages the dialogue with the patient. Although Americans are living longer, many live with illnesses and these patients are concerned with how they will spend their final days. A conversation with the physician can facilitate a patient's understanding of the implications of various medical choices. A patient's understanding leads to autonomy, allowing the patient a choice in determining what type of treatments to accept and how to spend his or her final days.

Although the AMA has recommended a billing code for end-of-life conversations, it is not a forgone conclusion that Medicare will accept the idea. Let's hope the recommendation is accepted. Reimbursement for dispensing essential information for making end-of-life decisions is sensible and is an idea whose time has come.

Endnotes

1. Modern Healthcare, *AMA proposes Medicare pay for end-of-life counseling*, http://www.modernhealthcare.com/article/20140831/NEWS/140839998.
2. Pam Belluck, *Coverage for End-of-Life Talks Gaining Ground*, N.Y. Times, Aug. 30, 2014, available at http://www.nytimes.com/2014/08/31/health/end-of-life-talks-may-finally-overcome-politics.html?_r=0.
3. Excellus BCBS endorses new IOM report on end-of-life, http://www.compassionandsupport.org/pdfs/news/91714IOMreportNewsRelease.pdf; *see also* Provider Training—Professionals, http://www.compassionandsupport.org/index.php/for_professionals/molst_training_center/provider_training.

Ellen G. Makofsky is managing attorney at Makofsky & Associates, P.C., the successor firm to Raskin & Makofsky LLP, with offices in Garden City, New York. The firm's practice concentrates in elder law, estate planning and estate administration. Ms. Makofsky serves as Secretary of the New York State Bar Association ("NYSBA"), is a past Chair of the Elder Law Section of NYSBA and served two terms as an At-Large Member of the Executive Committee of NYSBA. She is the current Co-Chair of NYSBA's Women in the Law Committee and Secretary of the Senior Lawyers Section. Ms. Makofsky is certified as an Elder Law Attorney by the National Elder Law Foundation and is the current President of the National Academy of Elder Law Attorneys, Inc. New York Chapter ("NAELA NY"). She is a Past President of the Estate Planning Council of Nassau County, Inc.

Speaking for the AIP Who Lacks a Voice: How to Serve as Counsel for the AIP

By Keri Mahoney

As a newly minted attorney, I recently had the opportunity to attend and observe a heated contested guardianship hearing. The hearing was apparently quite unique—the AIP was completely non-verbal and completely unable to communicate to the court evaluator, his court-appointed counsel, or any other person involved in his care. There were approximately a half dozen attorneys present, each representing a different facet of the case. The hearing proceeded straight through until 6:00 pm (despite the need to pay court employees overtime after 5:00 pm) at which point cross-examination of the cross-petitioner had to be interrupted and the remainder of the hearing scheduled for another day.

Before I continue, I should inform the readers that I wear two hats—I am a registered nurse as well as an attorney. As I was sitting in the courtroom listening to the testimony, my head screamed the thoughts of a lawyer while my heart screamed the thoughts of a nurse—simultaneously pondering the rules of evidence while worrying about the AIP's basic needs of eating and toileting while he was in court all day. As uncomfortable as the courtroom benches were for me, I could only imagine that the AIP's wheelchair was even more uncomfortable. As I watched the AIP gaze around the room, looking helpless and scared, I found myself wondering what he was thinking and wishing he could communicate his perspective of the events leading up to the hearing. Mostly, I hoped that he understood enough of what was going on to recognize that, despite the tension and formality of the courtroom, he was not in trouble and he did not need to feel afraid. "Don't worry," I wanted to say. "All of these intense-looking lawyers are here to help you." Whenever he looked in my general direction, I tried to send a re-assuring smile.

As I drove home following the hearing, I tried to imagine how I would have fulfilled each of the unique roles played by the attorneys throughout the day. I found myself completely stumped as to one attorney's role—that of the counsel for the AIP. This attorney's job was to speak for someone who *literally* did not have a voice. However, how could the attorney possibly advocate for the AIP's wishes when those wishes were unknowable?

My first instinct was that, in that situation, I would advocate for the AIP's best interests. Certainly the AIP would want what was in his best interest. However, the statute and its associated commentary indicate that the role of the attorney for the AIP is strictly to advocate for the wishes of the AIP;[1] the attorney charged with advocating for the AIP's best interests is the court evaluator.[2] The Rules of Professional Conduct are similarly lacking in guidance for this particular situation. The Rules indicate that the attorney should maintain a "conventional relationship" with the client with diminished capacity, and that the attorney should take "necessary protective action" including seeking a guardian if a client with diminished capacity is at risk of harm.[3] Thus, neither Article 81 nor the Rules of Professional Conduct provided any practical guidance as to the fulfilling the role of counsel for AIP when the AIP's wishes are unknowable. I could not find a single case or ethical opinion on point.

The conclusion I have reached is this: if I serve as counsel for an AIP whose wishes are unknown and unascertainable, I will serve that role by sitting by his side, supporting him, and reassuring him throughout the process. While I might not be able to know whether the AIP wants a guardian or who the AIP would select as guardian, I can know that the AIP wants to feel reassured and safe. I can know that he wants to feel cared about. I can know that he wants me to participate in the hearing to ensure that the process is fair and his rights are protected. Beyond that, the AIP and I will have to rest our faith in the hands of the court and hope that it reaches the right conclusion.

Endnotes

1. N.Y. Mental Hyg. Law § 81.10.
2. *Id.*; *see also* N.Y. Mental Hyg. Law § 81.09.
3. NY ST RPC Rule 1.14.

Keri Mahoney was the Valedictorian of Touro Law Center's Class of 2014. She is licensed as both a nurse and an attorney in the state of New York. She recently opened a solo practice and maintains her office as part of Touro Law Center's Community Justice Center. She intends to focus her practice primarily on elder law.

Recent Tax Bits and Pieces

By David R. Okrent

PLR 201244014 (30 May 2012) Gift Tax Consequences of Reformation of Deed. Code IRC Sections 2501, 2511, 2702

In this Private Letter Ruling 201244014, the IRS concluded that: The Grantor's erroneously naming Trust 2 as the grantee of the deed did not result in a completed gift; however, if the Court reforms the deed changing the reference in the deed from Trust 2 to Trust 1, then Grantor has made a completed gift to Trust 1 as of the date of the original transfer.

***Clark v. Rameker, Trustee, et al*., 573 U.S. (12 June 2014) Supreme Court Holds Inherited IRAs Are Not Protected from Bankruptcy. Code IRC Sections 301, 403, 408, 408A, 414, 457**

In *Clark*, the U.S. Supreme Court held that funds contained in an inherited individual retirement account are not retirement funds for purposes of the bankruptcy exemption and therefore not protected.

PLR 201423043 (15 February 2014) Decedent's Roth IRA Not Treated as Inherited IRA. Code IRC Sections 408, 408A

In Private Letter Ruling 201423043, the IRS concluded that: Two Roth IRAs would not be treated as inherited IRAs within the meaning of section 408(d) of the Code with respect to Taxpayer B and Taxpayer B is eligible to roll over or have transferred, by means of a trustee-to-trustee transfer, a distribution of the proceeds of the Roth IRAs into a Roth IRA set up and maintained in her own name, as long as the rollover of such distribution occurs no later than the 60th day from the date said distribution is made from the IRA.

***Whitehouse Hotel Ltd. Partnership et al. v. Commissioner*, No. 13-60131 Fifth Circuit Affirms Valuation of Easement for Charitable Purposes. Code IRC Sections 170, 6662, 6664**

In *Whitehouse Hotel Ltd. Partnership*, the Fifth Circuit Court of Appeals affirmed the ruling of the Tax Court disallowing a significant portion of a tax deduction claimed for a historic conservation easement.

***Morton Liftin et al. v. United States*, No. 2013-5103 Court Affirms Estate's Liability for Late Filing Penalty Reliance on Advice of Counsel Is Not Reasonable Cause. Code IRC Sections 6018, 6075, 6651**

In *Liftin*, the Federal Circuit Court of Appeals concluded that an estate is liable for a late-filing penalty, finding that the executor lacked reasonable cause under section 6651(a)(1) to rely on the advice of counsel.

T.D. 9668 (9 June 2014) IRS Issues Final Regs. Governing Practice Before the IRS. Code Various IRC Sections

This document contains final regulations revising the regulations governing practice before the Internal Revenue Service. These final regulations affect individuals who practice before the IRS. These final regulations modify the standards governing written advice and update other related provisions of the regulations.

PLR 201423009 (27 February 2014) Purchase of Life Insurance Policies from Grantor Trust Won't Affect Tax-Free Status of Proceeds. Code IRC Sections 101(a)(2), 1041

In Private Letter Ruling 201423009, the IRS concluded that a Trust's proposed purchase of the life insurance contracts between two Trusts was not a transfer for valuable consideration within the meaning of § 101(a)(2). Individual A and his spouse, Individual B, were the grantors of the AC Trust. The AC Trust, as amended, is represented to be a grantor trust for federal income tax purposes owned by Individual A and Individual B. The AC Trust, as amended, owns and is currently the beneficiary of Number Y life insurance contracts on the joint lives of Individual A and Indivi-dual B and the Number X policy on Individual B (collectively, the life insurance contracts which total Number Z policies). Individual A is the sole grantor of the AB Trust, which is represented to be a grantor trust for federal income tax purposes owned by Individual A.

***Estate of Franklin Z. Adell et al. v. Commissioner*, T.C. Memo. 2014-89, No. 24412-12L Estate Tax Payment Doesn't Trigger Gift Tax Refund. Code IRC Sections 6166, 6320, 6321, 6330, 6403**

In *Estate of Adell*, the Tax Court upheld the IRS's decision to proceed with collection of an estate's unpaid gift tax liability, finding that the estate's payment

of a portion of the estate tax didn't result in an overpayment against which the IRS could credit the gift tax liability because the estate hadn't paid all the estate tax due.

PLR 201425023 (25 March 2014) IRS Denies Request to Waive IRA Rollover Requirement. Code IRC Section 408

In Private Letter Ruling 201425023, the IRS concluded that the taxpayer is not entitled to waive the section 408(d)(3) 60-day rollover requirement for a distribution from an IRA. Prior to his death, Decedent maintained an IRA. After Decedent's death, the proceeds of IRA were distributed to its beneficiary, Trust C. More than 60 days after the distribution, Trust C made a distribution to Decedent's surviving spouse. On the assumption that she could roll over a distribution from the Trust to her own IRA, asks for a waiver asserting that her failure to deposit the distribution from Trust C in her own IRA within the 60-day period prescribed by section 408(d)(3) of the Code was due to financial institution error.

PLR 201426014 (24 February 2014) IRS Addresses Gift Taxes Issues Re Revocable Trust. Code IRC Sections 671, 673, 674, 675, 676, 677, 678, 2501, 2511, 2514

In Private Letter Ruling 201426014, the IRS concluded that the contribution of property to Trust by Settlor will not be a completed gift subject to federal gift tax, any distribution of property by the Distribution Committee from Trust to Settlor will not be a completed gift, subject to Federal gift tax, by any member of the Distribution Committee and any distribution of property by Distribution Committee from Trust to any beneficiary of Trust, other than Settlor, will not be a completed gift subject to federal gift tax, by any member of the Distribution Committee, other than Settlor.

PLR 201426016 (11 March 2014) IRS Addresses Estate & Gift Tax Consquences of Division of Marital Trust. Code IRC Sections 1015, 2056, 2207A, 2519, 2702

In Private Letter Ruling 201426016, the IRS concluded that after the division of a marital trust into three separate trusts, each separate trust will be a QTIP trust under § 2056(b)(7) and the termination will not cause Spouse to be deemed to have made a gift of the property.

PLR 201423009 (27 February 2014) Purchase of Life Insurance Policies from Grantor Trust Won't Affect Tax-Free Status of Proceeds. Code IRC Sections 101(a)(2), 1041

In PLR 201423009, the IRS ruled that a transfer of a second-to-die policy insuring a husband and wife to a grantor trust where only one of the spouses is a grantor is exempt from the Transfer for Value rule.

PLR 201427013 (24 February 2014) Power of Appointment Won't Trigger Inclusion in Beneficiary's Estate. Code IRC Sections 2001, 2041

In Private Letter Ruling 201427013, the IRS concluded that a beneficiary's testamentary power of appointment over trust property to appoint among said beneficiary's issue did not constitute a general power of appointment and that the beneficiary's power will not cause the value of the trust property to be included in the beneficiary's gross estate.

PLR 201409001 (10 July 2013) IRS Addresses Tax Treatment of Income Interest of U.S. Series I Savings Bonds (the "Bonds") Held in Trust. Code IRC Sections 454, 691

In Private Letter Ruling 201409001, the IRS concluded that with respect ot a joint trust with disclaimer provision and credit shelter trust contained therein that, if (1) Decedent's final tax return does not include the interest earned on the Decedent's share of the Bonds before Decedent's death; (2) qualified disclaimer is made pursuant to Trust with respect to Decedent's share of the Bonds; and (3) Decedent's share of the Bonds are transferred to an Account therein, the interest earned on the Bonds up to the date of Decedent's death is income in respect of the Decedent (IRD). In addition, if Decedent's Trust uses the cash method of accounting, and does not elect to report interest income on the Bonds annually, Decedent's Trust may defer reporting interest income on the Bonds until the bonds are disposed of, redeemed, or reach final maturity, whichever is earlier, and any interest that the Decedent's Trust reports and distributes currently to the beneficiaries of Decedent's Trust will have the same character in the hands of the beneficiaries as in the hands of the Decedent's Trust.

PLR 201429009 (18 March 2014) Joint Trust—Majority of Trust Assets Are Excluded from Decedent's Gross Estate. Code IRC Sections 2036, 2038, 2041

In Private Letter Ruling 201429009, the IRS concluded that the value of the assets of the Family Trust are not includible in the gross estate of the Decedent, with the exception of the value of the 5 or 5 Power held by Decedent at his death, under §§ 2036, 2038, and 2041. Decedent and Spouse created Trust, a joint revocable trust, Spouse predeceased Decedent on Date 3 and Decedent died on Date 4. Article Four Section 1 of Trust provides that during Decedent's and Spouse's joint lifetime, the trustee shall pay to or apply for the benefits of a trustor, all or such part of the income and principal of such trustor's separate share of the trust

estate as such trustor may direct. Under Article Four Section 3, when both Decedent and Spouse are alive, each held a power to revoke his or her separate share. After the first spouse dies, the surviving trustor had the power to amend any trust share over which the surviving trustor had a general non-lapsing power of appointment over principal, with the exception of retirement benefits. Article Two, Section 3 provided, in part, that unless clearly otherwise provided, as to property that is transferred to the trustee while Decedent and Spouse are both living, Decedent and Spouse shall hold the trust estate as tenants in common, each owning a separate share consisting of an undivided one-half beneficial interest. Decedent and Spouse entered into a property agreement, stating in part, as to all joint tenancy property transferred or to be transferred into the name of Trust, Decedent and Spouse agree that all trust property shall be characterized as tenants in common rather than joint tenancy. Under Article Seven, Section 1, upon the first of Decedent and Spouse to die, the trustee shall allocate and distribute the remaining trust estate into two separate shares to be identified as the Survivor's Share and the Family Share. The Survivor's Share shall consist of the surviving trustor's separate share. The Family Share is to consist of all assets of the deceased trustor's separate share not distributed to the Survivor's Share. Each of Survivor's Share and Family Share is to be administered as Survivor's Trust and Family Trust, respectively. Article Eight contains provisions governing the Survivor's Trust. Article Eight provides that trustee shall pay to or apply for the benefit of the surviving trustor, in monthly or other convenient installments but not less often than annually, so much of the net income of the Survivor's Trust as the surviving trustor directs. Any net income not distributed will be accumulated and added to principal. Trustee shall also pay to or apply for the benefit of the surviving trustor so much of the principal of the Survivor's Trust as the trustee deems proper for the surviving trustor's comfort, welfare and happiness. Trustee shall pay to the surviving trustor as much of the principal of the Survivor's Trust as the surviving trustor may from time to time demand in a signed writing delivered to the trustee. Upon the death of the surviving trustor, the trustee shall distribute all of the trust property, including the trust principal and accrued and undistributed income, to any person or entity, and upon any trust, terms and conditions, or to or in favor of the estate of the surviving trustor, as the surviving trustor may direct by his or her last will or living trust agreement. No exercise of this general power of appointment shall be effective unless it refers to this trust agreement and expressly indicates an intention to exercise this general power of appointment. Article Nine contained provisions governing the Family Trust. Article Nine provided that trustee shall pay to or apply for the benefit of the surviving trustor, in monthly or other convenient installments but not less often than annually, so much of the net income of the Family Trust as the trustee in its discretion deems proper for the surviving trustor's health, education, maintenance and support. Any net income not distributed will be accumulated and added to principal. The Decedent and Spouse recommended that the trustee first exhaust the principal from the Survivor's Trust before making discretionary payments of principal to the surviving trustor from the Family Trust. Trustee shall also pay to or apply for the benefit of the surviving trustor so much of the principal of the Family Trust as the trustee in its discretion deems proper for the surviving trustor's health, education, maintenance and support. Notwithstanding any other provision in Trust, each calendar year the surviving trustor had the power to withdraw principal from the Family Trust in an amount not to exceed the greater of five thousand dollars or five percent of the assets of the Family Trust, valued as of the end of the preceding calendar year. This power was noncumulative and to the extent it was not exercised by the end of January of each calendar year, it lapsed. This power shall exist each year until the death of the surviving trustor. On spouses death Decedent became the sole trustee and beneficiary of Survivor's Trust and Family Trust. Under the terms of Survivor's Trust, Decedent was eligible to withdraw income and principal as desired and possessed a testamentary general power of appointment over the Survivor's Trust. Under the terms of Family Trust, Decedent was eligible to receive distributions of income and principal limited to an ascertainable standard of health, education, maintenance and support. Decedent also held a lapsing right to annually withdraw the greater of five thousand dollars or five percent (5 or 5 Power) of the Family Trust's principal. Family Trust became irrevocable upon Spouse's death. Survivor's Trust remained a revocable trust.

PLR 201430029 (30 April 2014) IRA Is Not Treated as Inherited IRA. Code IRC Section 408

In Private Letter Ruling 201430029, the IRS concluded that a Decedent's IRA does not constitute an inherited IRA within the meaning of Code section 408(d)(3)(C) with respect to the Decedent's spouse and Spouse was eligible to roll over or transfer (by means of a trustee-to-trustee transfer) the funds in Decedent's IRA into an IRA established in spouse's own name. Decedent maintained an individual retirement account, IRA X. Decedent designated Trust T, a revocable trust established by Spouse, as the beneficiary of IRA X. Trust T provided that Spouse, as its settlor, has the right to withdraw all or any portion of its net income and/or its principal. Trust T also provided that Spouse has the right to modify, amend, or revoke such trust at any time during her lifetime. Spouse is its sole trustee.

***Terry L. Ellis et ux. v. Commissioner*, T.C. Memo. 2013-245, No. 12960-11 Prohibited Transaction Disqualifies IRA. Code IRC Sections 72(t), 402, 408, 4975, 6651, 6662**

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

***Deinlein v. U.S.*, 114 AFTR 2d 2014-5390 (DC KY), 07/23/2014; *Drye v. U.S.*, 528 US 49 (1999); *U.S. v. Craft*, 535 US 274 (2002); Code Section 6321—Disclaimer Does Not Defeat Federal Tax Lien**

Christopher Deinlein owed taxes to the IRS, and liens were filed against him. Chris' mother died, and Chris was a 1/3 beneficiary of her estate. Presumably to prevent the IRS from receiving the estate assets attributable to his 1/3 interest, Chris disclaimed his interest in the estate under Kentucky law. The IRS sought to seize his 1/3 interest, and the District Court held that the IRS' lien attached to the beneficial interest notwithstanding Chris' disclaimer.

New York State Issues Technical Memorandum TSB-M-14(6) M Estate Tax August 25, 2014

On March 31, 2014, the New York State legislature passed the Executive Budget for 2014-2015. The budget brought with it very substantial changes to New York law. On the estate tax front, for individuals dying on or after April 1, 2014, these ranged from increases in the estate tax exclusion amount, to an estate tax 'cliff,' to a gift add-back after death. On August 25, 2014, the New York State Department of Taxation and Finance issued a Technical Memorandum (TSB) regarding the sweeping changes made to New York's estate tax laws as a result of the Executive Budget's enactment. Although, for the most part, the TSB summarizes the changes in the law, it does provide some clarifications. It also includes examples illustrating the operation of the applicable credit allowed against the estate tax, and its phase-out. Note the basic exclusion amount for the period April 1, 2015 and before April 1, 2016 is $3,125,000.00.

***In re Castellano*, 2014 WL 3881338, Bk.N.D.Ill. (6 August 2014) Court Addresses Self-Settled Trusts and Spendthrift Provisions**

In *Castello*, a U.S. Bankruptcy Court held that a surviving beneficiary's interest in a Living Trust vested at the moment of the Grantor's death, such that the beneficiary's share of the trust assets would be part of the beneficiary's bankruptcy estate and subject to immediate collection by the Chapter 7 Trustee, despite the Living Trust having both an elaborate spendthrift clause and language that the beneficiary's interest would terminate if her share of the trust assets would go to creditors. The Bankruptcy Court also applied a very expansive interpretation of Bankruptcy Code 548(e) to defeat attempts by the Trustee to hold back the debtor-beneficiary's interests away from the Chapter 7 Trustee. Author's note: This is not a tax case but a very important case nonetheless.

***William Cavallaro et ux. v. Commissioner*, T.C. Memo. 2014-189, Nos. 3300-11, 3354-11 Couple Liable for Gift Tax Following Company Merger. Code IRC Sections 41, 2501, 2502, 2511, 2512, 6651, 6662, 6663, 6664, 7491**

In *Cavallaro*, the Tax Court concluded that a couple is liable for a gift taxes following the merger of their company with their son's company for less than full and adequate consideration. The couple was not liable for failure to file and accuracy-related penalties because they reasonably relied on professional advice.

***Estate of James A. Elkins Jr. et al. v. Commissioner*, No. 13-60472 Fifth Circuit Finds Errors in Tax Court's Valuation of Estate's Art Works. Code IRC Sections 2031, 2703**

In *Estate of Elkins*, the Fifth Circuit Court of Appeals affirmed the Tax Court's rejection of the Commissioner's insistence that no fractional-ownership discount may be applied in determining the taxable values of Decedent's undivided interests in the subject art work; affirmed the Tax Court's holding that the Estate is entitled to apply a fractional-ownership discount to the Decedent's ratable share of the stipulated FMV of each of the 64 works of art; reversed the Tax Court's holding that the appropriate fractional-ownership discount is a nominal 10 percent, uniformly applied to each work of art, regardless of distinguishing features; held that the correct quantums of the fractional-ownership discounts applicable to the Decedent's pro rata share of the stipulated FMVs of the various works of art are those determined by the Estate's experts and itemized on Exhibit B to the Tax Court's opinion; and rendered judgment in favor of the Estate for a refund of taxes overpaid in the amount of $14,359,508.21, plus statutory interest in a sum to be agreed on by the parties, based on the timing of the payment of that refund to the Estate, all as jointly stipulated to us by the parties.

PLR 201436006 (22 April 2014) Sale Won't Affect Trust's Status as ESBT. Code IRC Sections 1012, 1015, 1361

In Private Letter Ruling 201436006, the IRS concluded that sale of a trust's remainder interest to another trust would not affect the trust status as an electing small business trust (ESBT) because the sale is not a purchase within the meaning of section 1361(e).

***In re Cleveland*, 2014 WL 4809924 (D. Nev. Sept. 29, 2014) US District Court Allows Chapter 7 Bankruptcy Trustee to Sell Assets of Two Single-Member LLCs**

In *In re Cleveland*, the U.S. District Court for the District of Nevada has held that a Chapter 7 Bankruptcy Trustee has the power to take possession of and sell the assets of two LLCs which were solely owned by the Husband and Wife debtors, even though one of the LLCs provided "personal services" and was a state-licensed insurance agency, and that the Trustee was not restricted to the remedy of a Charging Order against the Debtors' interests in those LLCs. Numerous bankruptcy courts have held, and the Court agrees, that where a debtor has a membership interest in a single-member LLC and files a petition for bankruptcy under Chapter 7, the Chapter 7 trustee succeeds to all of the debtor's rights, including the right to control that entity, and a trustee need not take any further action to comply with state law before exercising such control. *See, e.g., In re First Protection, Inc*., 440 B.R. 821, 830 (B.A.P. 9th Cir. 2010*); In re B & M Land & Livestock, LLC*, 498 B.R. 262, 267 (Bankr. D. Nev. 2013); *In re Albright*, 291 B.R. 538, 541 (Bankr. D. Colo. 2003). Furthermore, the Court agrees that "[s]tate law does not control the administration of property interests that are part of the bankruptcy estate." *In re B & M*, 498 B.R. at 268. Accordingly, Appellant is not limited to a charging order under Nevada law, and succeeds to all of Appellees' rights in the LLCs, including the right to control those entities.

Rev. Proc. 2014-61, 2014-47 IRB 1 (30 October 2014) Inflation-Adjusted Tables for 2015. Code IRC Sections 23, 24, 25A, 32, 45R, 63, 132, 151, 911, 2503

In Revenue Procedure 2014-61 the IRS announces inflation-adjusted items for 2015, noting increases in some tax benefits.

***United States v. Fred K. Whisenhunt et al*., No. 3:12-cv-00614 District Court Holds Beneficiary Liable for Estate Tax. Code IRC Section 6324**

In *Whisenhunt*, the U.S. District Court for the Northern District of Texas concluded that the beneficiary was personally liable under section 6324(a)(2) for the estate's unpaid tax liabilities as the recipient of an IRA distribution—despite a recommendation from a magistrate judge that the government's claim against an estate beneficiary was barred by res judicata.

***Estate of Kathryn L. Menges v. Steven T. Miller*, No. 1:13-cv-01156 Court Denies First-Time Buyer Home Credit to Estate Beneficiary. Code IRC Sections 36, 267**

In *Estate of Menges*, the U.S. District Court for the Middle District of Pennsylvania concluded that Kathryn Menges is not entitled to the FTHBC because Kathryn, a beneficiary, did not "purchase" the subject property within the meaning of the statute but acquired it from a "related person," the executor of her grandmother's estate. Applying the doctrine of substance over form, the complicated series of legal actions at the heart of this matter were to effectuate a simple objective: the transfer of real property from the Estate of Betty L. Menges to Kathryn Menges, of which she was a beneficiary.

PLR 201444005 (14 July 2014) Grandchild's POA Is Not General Power; Won't Trigger Estate Tax Inclusion. Code IRC Section 2041

In Private Letter Ruling 201444005, the IRS concluded that: (1) Grandchild's testamentary power of appointment over the principal and accumulated or undistributed income of a testamentary trust does not constitute a general power of appointment within the meaning of § 2041(b)(1) and (2) the existence, exercise, failure to fully exercise, or partial or complete release of Grandchild's power to appoint the principal and accumulated or undistributed income of the trust will not cause the value of the property in the trust to be included in the Grandchild's gross estate under § 2041(a). The Grandchild was the beneficiary of a Trust with a testamentary power of appointment, "to such among [Settlor's] issue" as Grandchild shall validly appoint in Grandchild's last will. Because Grandchild's power of appointment was a testamentary power, Grandchild could not appoint any part of Trust to themselves or their creditors during Grandchild's life. In addition, based on the terms of Trust, the reference to "such among [Settlor's] issue" as a permissible class of appointees of Grandchild's testamentary power is properly viewed as not including Grandchild's estate or the creditors of Grandchild's estate after Grandchild's death.

PLR 201445017 (14 August 2014) Redemption of Decedent's Interest in Family Corporation Is Not Self-Dealing. Code IRC Sections 501(c)(3), 509, 4941

In Private Letter Ruling 201445017, the IRS concluded that the redemption by any Family Corporation of the interest in that Corporation held by a Decedent's Estate, the D Trust, the B/C Trust, or the E Trust will not constitute an act of indirect self-dealing and need not comply with § 53.4941(d)-1(b)(3) so long as the Corporation offers to redeem all interests held by every other person that are of the same class as that held (prior to the redemption) by the Estate or Trust on the same terms, the Estate or Trust receives the Redemption Price for its interest, and there is no extension of credit with respect to the redeemed interest between the Estate or such Trust and such Family Corporation on January 1 of the year following the year in which the redemption occurred.

Announcement 2014-32, 2014-48 IRB 1 Application of One-Per-Year Limit on IRA Rollovers. Code IRC Section 408

This announcement is a follow-up to Announcement 2014-15, 2014-16 I.R.B. 973, addressing the application to Individual Retirement Accounts and Individual Retirement Annuities (collectively, "IRAs") of the one-rollover-per-year limitation of § 408(d)(3)(B) of the Internal Revenue Code.

***United States v. Elaine T. Marshall et al.*, No. 12-20804 (10 November 2014) Fifth Circuit Affirms Gift Tax Liability. Code IRC Sections 2501, 6324, 6901**

In *U.S. v. Marshall*, the Fifth Circuit affirmed a District Court's finding that donees of an indirect gift of stock are liable for interest on gift tax liabilities under section 6324. It also concluded that an executor and trustee are liable for amounts they distributed and set aside without paying gift taxes.

***United States v. David Stiles et al*., No. 2:13-cv-00138. Executor Held Liable for Estate Tax After Depleting Estate. Code IRC Sections 6321, 6601, 6621, 6651, 6654, 6662**

In *U.S. v. Stiles*, the District Court for the Western District of Pennsylvania held two individuals liable for estate tax due because these individuals depleted the estate before paying the estate's tax liability.

***Sanchez v. Comm.*, TC Memo. 2014-223 (22 October 2014) Stamps.com Postage Date Is Not Proof of Mailing Date. Code IRC Section 301**

In *Sanchez*, a taxpayer attempted to use a Stamps.com record date of when postage was printed to prove timely mailing of a Tax Court petition. The Tax Court rejected the attempt, and instead relied on the U.S. Postal Service postmark for the date of mailing.

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Resolving Conflicts Among Multiple Surrogates Under the Family Health Care Decisions Act

By Patricia L. Angley

> The undiscovered country, from whose
> bourn
> No traveler returns, puzzles the will,
> And makes us rather bear those ills we have,
> Than to fly to others that we know not of?
>
> **—Hamlet, Act III, Sc. 1**

A. Introduction

In order to explore the "undiscovered country" of death and dying in the context of family and surrogate medical decision-making for patients at the end of life, it becomes necessary to first define patient decision-making authority and explore its genesis under the law. In the past one hundred years of legal and medical ethics, patient's rights have expanded to allow patients to meaningfully participate in individual health care decision-making. In contrast to a "doctor-knows-all" paternalistic framework, patient's rights of autonomy and self-determination now include the right to refuse medical treatment, including life-sustaining treatment. In 1914, Judge Benjamin Cardozo first expressed this right of patient self-determination in *Schloendorff v. The Society of the New York Hospital* by stating that "[e]very human being of adult years in sound mind has a right to determine what shall be done with his own body.…"[1] Judge Cardozo's "prescience notion of informed consent"[2] was not fully manifested until the socially turbulent decade of the 1960s and the genesis of the patient's rights movement and the birth of modern medical ethics.[3] The rise of institutionalized and specialized medicine and the fragmented style of the delivery of health care services combined with patients' increasingly diverse backgrounds and cultural beliefs created more "challenges when moral dilemmas arise in the practice of medicine."[4] The most challenging moral dilemmas have arisen in the context of patients' dying and death, the use of palliative care to alleviate pain and suffering and surrogate end–of–life decision-making for seriously ill, incapacitated patients.

> Because I could not stop for Death-
> He kindly stopped for me—
> The carriage held but just ourselves—
> And Immortality…
>
> **—Emily Dickinson**

The contrast between a benevolent, "kindly" personification of Death as opposed to a feared specter characterizes the inherent conflict in the human psyche when faced with mortality and the finality of death. Diverse values, religious beliefs, cultural traditions, community mores, family support or lack of support, level of education and language ability affect a patient

or surrogate's ability to comprehend and synthesize complex information regarding end-of–life medical treatment. When a patient loses decision-making capacity and surrogates assume the role of decision maker, these difficulties are exacerbated by the surrogate's sense of ultimate responsibility to the patient, perhaps a beloved parent or other relative. When multiple surrogates disagree, how are conflicts to be resolved? If death is considered a foe or enemy to be conquered by medical intervention at all costs, then a surrogate faced with a decision to withdraw or withhold life-sustaining treatment may feel the burden of defeat or surrender. We often read of a person's death after a valiant struggle or battle with a specific disease. If a surrogate must make the decisions that result in a patient's death, then is the battle thereby lost? The natural progression of the patient's rights movement has moved this discussion out of the culturally forbidden and morally repugnant areas of human discourse, to the forefront of health care policy, laws and ethics. Illness, vulnerability, weakness and dependence are anathema to the American values of independence, self-determination, and strength. As a society, even though we "strive to control every aspect of our lives, many of us abandon control of life's final passage."[5] Like the ancient Greeks, we fear the sharpened shears of Atropos, who ultimately cuts the thread of life for each of us.[6]

B. Expansion of Patient's Rights Through Court Decisions, Health Care Proxies and the Family Health Care Decisions Act in New York

Three landmark court decisions raised the American consciousness about a patient's right to die and the cessation of life-sustaining medical interventions. In 1976, Karen Ann Quinlan's parents successfully petitioned the New Jersey Supreme Court to be able to remove an artificial ventilator from their young daughter who was in a persistent vegetative state.[7] In its analysis, the court recommended a role for hospital ethics committees to resolve such ethical dilemmas.[8] Next, the important case of Nancy Beth Cruzan reached the United States Supreme Court in 1990.[9] Ms. Cruzan was also in a persistent vegetative state but was sustained by artificial feeding and hydration. The lower Missouri courts refused to

permit her family to remove the treatment unless there was clear and convincing evidence of Ms. Cruzan's actual wishes whether she would want such treatment before she became incapacitated. The justices of the U.S. Supreme Court held that while adult *competent* patients could refuse life-sustaining treatment, states could require that a criteria of standards be followed *before* surrogates could authorize the withdrawing or withholding of life-sustaining treatment for an incapacitated patient. The strictest criteria was that surrogates would have to prove by clear and convincing evidence the patient's actual wishes concerning life-sustaining treatment prior to incapacity. The next standard would permit the surrogate to use substituted judgment whereby the surrogate acts based upon what the surrogate believes the patient's decision might have been based upon the patient's values and life experiences. The least strict standard would permit surrogates to consider the best interests of the patient where "the issue is what sort of decision a reasonable person would make balancing the benefits and burdens" of treatment.[10] Ultimately, the *Cruzan* case was sent back down to the Missouri trial courts and the family successfully met Missouri's criteria of clear and convincing evidence of Ms. Cruzan's actual wishes against life-sustaining treatment and her feeding tube was removed, resulting in her death.

In the wake of the *Cruzan* case, a federal law was enacted to promote the use of advanced directives, such as health care proxies, to memorialize a person's wishes regarding life-sustaining medical treatment. This law, the Patient Self-Determination Act of 1990,[11] codified society's acceptance of patient's rights to decision-making regarding these end-of-life issues.[12] The third case that drew unprecedented national attention to this issue was the Florida case of Terri Schiavo in 2003.[13] Ms. Schiavo was thirty-nine years old and in a chronic vegetative state following anoxic brain injury.[14] This protracted, complicated conflict was between Ms. Schiavo's husband, who wanted to remove his wife's feeding tube in accordance with her prior wishes regarding life-sustaining treatment, and her parents, who wanted her artificial feeding to be sustained because of their hope for her recovery. Mr. Schiavo's authority to make the decision to remove his wife's feeding tube was upheld by the Florida lower courts and the U.S. Supreme Court refused to hear the appeal. Special state legislation was then passed authorizing the governor of Florida to order Ms. Schiavo's feeding tube reinserted. The Florida Supreme Court then decided that the governor's actions were unconstitutional and the Florida lower court judge ordered that the feeding tube be removed on March 18, 2005. Special federal legislation was then passed to authorize the reinsertion of the feeding tube but the reinsertion was denied by the federal district court and further appeals were denied. Ms. Schiavo died on March 31, 2005, thirteen days after the removal of the feeding tube. The rule of law applied in the *Schiavo* case had its genesis in the *Cruzan* case which "established that adult competent patients could refuse life-sustaining therapy and surrogates could make decisions on their behalf according to provisions set out in state law."[15] This value-neutral holding did not fully resolve the conflict between patient self-determination rights regarding end-of-life treatment and society's perception of the sanctity of life and the preservation of that life.

> Our very hopes belied our fears
> Our fears our hopes belied
> We thought her dying when she slept
> And sleeping when she died…
> **From "The Death Bed"—Thomas Hood**

In 1990, legislation was enacted in New York State permitting competent adults to appoint and authorize another adult to act as their health care agent or proxy. This agent could make decisions regarding medical treatment should the patient lose capacity as determined by the treating physician.[16] The agent could also make decisions about withdrawing or withholding life-sustaining treatment upon a second physician concurring that the patient had lost capacity. However, the agent may only decide to withhold or withdraw artificial nutrition and hydration if he or she has reasonable knowledge of the patient's wishes regarding such treatment, as written on the proxy form or as otherwise known to the agent. Proposed amendments to the law would also permit an agent to make decisions about withholding or withdrawing artificial nutrition and hydration based upon a patient's best interests.[17] This delegation of authority, and the empowerment of the patient to authorize a trusted individual to communicate the patient's end-of-life wishes to his or her health care provider even when the patient can no longer meaningfully communicate, has expanded patient's rights of self-determination and informed consent to a new level. It has also encouraged individuals to have the difficult conversation about death and the dying process with their loved ones and friends. Written directions in a health care proxy may also provide clear and convincing evidence of a patient's wishes should a conflict arise.[18] However, in contrast to a "living will,"[19] which specifies the use or prohibition of specific treatments under certain circumstances, the delegation of authority to the health care agent under a written proxy may ensure that the "evolutions of a patient's wishes during the course of their life-time"[20] are fully met. This authority may enable the agent to respond more appropriately during the trajectory of a patient's illness and dying process according to the patient's previously articulated or known wishes, values and beliefs. Unfortunately, for a variety of reasons including lack of information, reluctance to address difficult issues of death, illness and incapacity, cultural mores, or fear and distrust of the medical establishment, many adults have not named a health care agent through this mechanism.[21] Indeed, as noted *New*

York Times writer Jane Brody states, "most Americans regardless of age seem reluctant to contemplate the certainty that one day their lives will end, let alone discuss how they'd want to be treated when the end is near."[22]

Prior to the enactment of New York's landmark Family Health Care Decisions Act (FHCDA) in 2010,[23] family members and loved ones close to the patient were not authorized outside of a court order to withhold or withdraw life-sustaining treatment in the absence of clear and convincing evidence of the patient's prior wishes, a health care proxy or living will. The FHCDA empowers certain individuals with the authority to make treatment decisions as surrogates for incapacitated adults and children in the order of priority as follows: 1) a guardian authorized to make health care decisions pursuant to Article 81 of the Mental Hygiene Law; 2) the spouse, if not legally separated from the patient, or domestic partner; 3) a son or daughter 18 years of age or older; 4) a parent; 5) a brother or sister 18 years of age or older; or 6) a close friend.[24] However, there are no clear guidelines in the FHCDA to resolve disputes between surrogates regarding treatment decisions except to refer such disputes to Ethics Review Committees as established under the law.[25]

C. Recognizing and Resolving Conflicts in the Surrogate Decision-Making Process

> His soul had approached that region
> where dwell the vast hosts of the dead...
> His soul swooned slowly as he heard the
> snow falling faintly through the universe
> and faintly falling, like the descent of their
> last end, upon the living and the dead.
>
> **From "The Dead"—James Joyce**

Surrogate decision-making under the FHCDA thrusts individuals into, in most cases, making decisions of "life or death" for their family member or close friend. This mantle of responsibility may cause some individuals to "swoon" under this great weight, others may shoulder the burden stoically. In the frequent case of surrogate decision-making by an adult child for a dying parent, "the family experience of the aging and dying of a parent actually contains the history of the siblings and their relationship with each other and the parent."[26] As noted above, the FHCDA merely lists the hierarchy and priority of possible surrogates without specifying how, for example, two siblings with different views resolve conflicts about treatment decisions. The attending physician has the obligation with actual notice of any objection or disagreement to refer the conflict to the Ethics Review Committee *if the objection or disagreement cannot otherwise be resolved*.[27] Assuming that the dying parent's spouse has predeceased him or her or has deferred decision-making to the adult children and there is no court-appointed guardian, the mantle of decision-making authority next rests on "a son or daughter 18 years of age or older."[28] The law does not specify which adult child should become the surrogate. The decision to withhold or withdraw life-sustaining treatment may create an unbearable burden for the adult children. As Lory Alissa Skwerer writes, "…this situation will end in the parent's death. All care for an aging parent is given under that shadow, which means the end of the parent, of any hopes for resolution of conflict in the parent-child relationship and of the parent as a source of emotional and material support. All of these are losses on very basic psychological levels. It also means that the children have moved one generation closer to their own deaths."[29] Conflicts among adult children who become surrogates therefore carry great emotional weight. The resolution of these conflicts between surrogate decision-makers regarding treatment decisions for an incapacitated loved one must therefore first be attempted by the treating physician before referral to the institution's Ethics Review Committee. This attempt should recognize that the "working basis of conflict is confrontation, a clash of interests, an argument, perhaps an ongoing state of active and continuous dissatisfaction."[30]

Under New York law, treating physicians are also required to give seriously ill patients and their health care agents or surrogates information and counseling regarding palliative care and end-of-life options "including, but not limited to, the prognosis, risks and benefits of the various options, including hospice, as well as the patient's legal rights to comprehensive pain and symptom management at the end of life."[31] This requirement to give surrogates information on palliative care to relieve the pain and suffering of dying patients may help to resolve conflicts between surrogates deciding to withhold or withdraw life-sustaining treatments. Even when faced with conflicts, surrogates should desire the ultimate relief of pain and suffering of a dying patient by compassionate palliative care. Surrogates should have access to a patient's medical records and should be informed of the patient's diagnosis, prognosis, the nature and consequence of the treatment and the benefits and burdens of the treatment.[32] Surrogates should also be informed of the treating physician's recommendation, if any, within the context of the patient's goals of care, care plan and known preferences.[33] All health care professionals should aspire to achieve ethics competencies that promote sound outcomes, including learning "how disagreements arise in decision-making about life-sustaining treatment and in care near the end of life and how to prevent and resolve conflicts with patients, among loved ones and among professionals."[34] In describing these competencies, the authors of *The Hastings Center Guidelines For Decisions on Life-Sustaining Treatment and Care Near the End of Life* recommend that health care professionals know how "to initiate and participate in conflict resolution."[35] The authors further recognize the deep emotions and psychological dimensions of this decision-making process and its effect on dying

patients, their surrogates and the treating professionals. These emotions may include one or more of individual coping strategies, the belief in hope, the possibility of ambivalence or denial, the realities of grief, loss and existential suffering and the possibility of spiritual and religious conflict, including religious objections and moral distress.[36] Conflicts about treatments, especially withholding or withdrawing life-sustaining treatment, may arise when multiple surrogates cannot resolve these deep-seated and fundamentally human emotions. When attempting to resolve these conflicts, the treating physician, and hopefully, the palliative care team, should "[a]ddress fears, clarify priorities, and strengthen relationships with loved ones, all components of a good death."[37] It is clear that if the patient's preferences, beliefs and values are known prior to incapacity, then surrogates should follow those preferences first and foremost.[38] In the context of specifying those preferences, persons should identify and clarify "one's values based on evolving goals within the context of past experiences and individual definitions of quality of life.…"[39] In the absence of earlier identification and clarification, surrogates should make decisions in the best interests of the patient based upon an objective assessment of the relative benefits and burdens of available treatment options.[40]

Prior to referring conflicts among surrogates to the institutional Ethics Review Committee, a treating physician should make a best effort to resolve conflicts by first holding a family meeting. Physicians and the palliative care team should facilitate meaningful dialogue in comprehensible language, mindful of any special needs the surrogates may have (language barriers, cultural norms, distance barriers, religious or spiritual needs). This dialogue should include the diagnosis, prognosis and the benefits and burdens of the proposed treatment or withdrawal of treatment for the patient. Dr. Haider Javed Warraich describes that in such a meeting the "burden that family members feel when making medical decisions as proxies is immense."[41] The surrogates may benefit by the physician asking, "Tell me more about your [loved one]."[42] Assuming that multiple surrogates are able to participate in this dialogue, Dr. Warraich suggests that this conversation may "take them away from a place where they feel solely responsible for the trajectory of their relative's life to one where they simply communicate what the patient would want out of [their] life."[43] The physician should describe the standards for decision-making in the FHCDA: first, in accordance with the patient's wishes, including religious and moral beliefs; or if the patient's wishes are not known, then in accordance with the patient's best interests.[44] The physician should further expand upon the definition of a patient's best interests in accordance with the FHCDA: "the consideration of the dignity and uniqueness of every person; the possibility and the extent of preserving the patient's life; the preservation, improvement or restoration of the patient's health or functioning; the relief of suffering; and any medical conditions and such other concerns and values as a reasonable person in the patient's circumstance would wish to consider."[45]

If conflicts still persist, any person involved in the process can request an ethics consultation from the Ethics Review Committee whereby it "should help patients, families and clinicians with an analysis of the choices they face so that a better decision can be made."[46] If after meaningful, multiple attempts at conflict resolution fail, then the conflict is referred to the Ethics Review Committee for an advisory opinion or an ultimate resolution.[47] Knowledge, training and compassion among Ethics Review Committee members about interdisciplinary team practice, including palliative care, communication and good decision-making is imperative.[48] The FHCDA "establishes an authoritative function…by investing [the Ethics Review Committee] with legal authority to make binding decisions on certain matters."[49] These matters include the ability to make a binding decision when surrogates disagree about withholding or withdrawing life-sustaining treatment.[50] Therefore, in the context of this type of conflict among surrogates, the Ethics Review Committee has the power to ultimately resolve the issue by a consensus of its members.

> Mrs. Wilcox had taken the middle course, which only rarer natures can pursue…it is thus, if there is any rule, that we ought to die neither as victim or fanatic, but as the seafarer who can greet with an equal eye the deep that he is entering, and the shore that he must leave…
>
> **From *Howard's End*—E. M. Forster**

D. Conclusion

The expansion of patients' rights and self-determination has evolved tremendously over the past one hundred years. Our society has foresworn reliance on medical paternalism in the decision-making process and continues to expand upon a patient-centered process. Part of that expansion includes the right to name a health care agent to communicate one's wishes to a physician after the loss of capacity, especially wishes concerning life-sustaining treatment. In addition, patients facing serious illness have a right to receive information on palliative care to relieve suffering. Discussions about end-of-life issues have become more common and have emerged from the shadows of forbidden discourse. Numerous books and articles offer individuals advice on end-of-life planning and provide the mechanisms to initiate difficult discussions among family members and friends. The enactment of the FHCDA further expands patients' rights and empowers surrogates to make medical decisions for incapacitated patients, including decisions about withholding or withdrawing life-sustaining treatment. The FHCDA recognizes the possibilities for conflicts among multiple surrogates and provides the mechanism of referring such conflicts to the institutional

Ethics Review Committee. However, it is clear that the treating physician and medical team bear the responsibility to become competent in recognizing and resolving such conflicts first by sensitive and compassionate communication of the patient's condition in light of the patient's wishes, or in the patient's best interests. This communication may help multiple surrogates reach a consensus to help their loved one reach the deep that they are entering and bid farewell to the shores left behind.

Endnotes

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4. *Id*. at 25.
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8. *Id*. at 668, 669; see also Fins, J., *supra* at 33.
9. *Cruzan v. Director, Missouri Dept. of Health,* 110 S. Ct. 2841 (1990).
10. Fins, J.J., *supra* note 2, at 35.
11. 42 U.S.C. 1395 cc(a).
12. Fins, J.J., *supra* note 2, at 36.
13. *In re Schiavo,* 851 So.2d 182 (2003).
14. Fins, J.J., *supra* note 2, at 48 (citation omitted).
15. *Id*. at 50.
16. See N.Y. Pub. Health Law Art. 29-C (McKinney 1990 & Supp. 2011).
17. See Statement in Support of the Surrogate Decision-Making Improvement Act, NYSBA Health J., Spring/Summer 2013, Vol. 18, No. 2 p. 44. See also proposed Surrogate Decision-Making Improvement Act of 2014, making technical, minor and coordinating amendments regarding health care agents and proxies, decisions under the FHCDA and non-hospital orders not to resuscitate.
18. See N.Y.S. Dept. of Health, "The Health Care Proxy Law: A Guidebook for Health Care Professionals," www.health.state.ny.us.
19. See *In re Westchester County Medical Center*, 72 N.Y.2d 517 (1988) where the court established the need for "clear and convincing" evidence of a patient's wishes in some sort of writing, perhaps a "living will."
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22. Brody, J., "Keep Your Voice, Even at the End of Life," *The New York Times*, January 18, 2011, Science sec.
23. See N.Y. Pub. Health Law Art. 29-CC.
24. N.Y. Pub. Health Law § 2994-d.
25. N.Y. Pub. Health Law §§ 2994-f(2); 2994-m.
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29. Skewerer, L.A., s*upra* note 26, at 42.
30. Lawson M., *Dealing with Conflict*, Twenty-Third Publications, 1991, p. 7.
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48. Morrissey, M.B., "Educating Ethics Review Committees in a More Humanistic Approach to Rational Decision Making," NYSBA Health Law J., Spring 2011, Vol. 16, No. 1 p. 66.
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Recent New York Cases

By Judith B. Raskin

Court Evaluator Access to Medical Records

In this article 81 proceeding, the court granted the court evaluator the authority to review the medical and psychiatric records of the person in need of a guardian without her permission. Mental Hygiene Legal Services, as counsel to the respondent, sought to vacate the portion of the court order granting that authority. Respondent argued that this authority is in violation of the Physician-Patient Privilege and HIPAA unless the respondent has given permission or placed her medical or mental health condition in issue.

The court granted the authority to the court evaluator to review the medical and psychiatric records for the purpose of assisting the court evaluator in reporting on the alleged abuse to the respondent and other issues. The court cited Mental Hygiene Law 81.09(d,) stating that the court may grant this permission to examine medical records "…if the court determines that such records are likely to contain information which will assist the court evaluator in completing his or her report to the court." The court noted that the Second Department had not yet ruled on the granting of this authority where permission had not been granted and medical condition was not in issue but the First Department had done so in *Matter of Kufeld*, 51 AD 3rd 483, 859 N.Y.S.2d 119 (2008).

***Matter of Christine P.*, 2014 N.Y. Misc. LEXIS 3160; 2014 NY Slip Op 51084(U) (Nassau County Ct., July 15, 2014)**

Will Reformation to Create Supplemental Needs Trust

William Romanello died in 2013 leaving a will directing that his entire estate be held in trust for the benefit of a disabled daughter, one of his six children. She had lived with her parents until their deaths. Another daughter was appointed executrix and trustee of the trust. The executrix sought construction of her father's intent; and if the intent was to create a supplemental needs trust for her sister she requested reformation of the will to reflect that. The trust provisions allowed principal to be used for "maintenance, medical care and necessaries" and referred to the trust as a "special need trust fund." The court noted that EPTL 7-1.12 requires that supplemental needs trust language must clearly show the testator's intent to "supplement, not supplant, impair or diminish, government benefits."

The court set a hearing to determine the testator's intent. The words used were ambiguous, contrary to supplemental needs trust language and did not give the court a clear understanding of the testator's intent and thus the court would not reform the trust making it a statutory supplemental needs trust.

***In re Paradiso*, 2014 Misc. LEXIS 3204; 2014 NY Slip Op 31849(U) (Sup. Ct., New York County, July 17, 2014)**

Denial of Guardianship Petition

Carl R.P., Jr. sought appointment of a guardian for his mother who was living with a daughter, grandson and sister. The AIP had previously executed a power of attorney and Health Care Proxy appointing her daughter Claire C., a registered nurse, as her agent. Petitioner claimed his mother was spending large sums of money and his sister as agent was allowing this to occur. At the hearing the applicant testified she liked spending money for certain family members and herself which might be described as extravagant, that she understood what she was doing, and that she consulted with her agent daughter and her attorney before making these expenditures.

The court denied the petition. Although the court found some memory deficits that might have required a guardian if no advance directives were in place, she had executed these documents when she had full capacity.

***In re Carl R.P., Jr.*, 2014 N.Y. Misc. LEXIS 3484; 2014 NY Slip Op 51184(U) (Sup. Ct., Suffolk County, August 6, 2014)**

Appeal of Penalty Period

In this article 78 proceeding petitioner challenged the 18-month ineligibility period assessed when she applied for Medicaid institutional benefits. Petitioner and her husband had given gifts of $176,000 to family members. Evidence presented indicated she was not in good health for a few years prior to making the gifts. The agency decision was upheld at a fair hearing.

The court affirmed. The petitioner failed to produce evidence that she was in good health at the time of the gifts or that there was a history and pattern of gifting from the couple to the recipient family members.

***Corcoran v. Shah*, 2014 N.Y. App. Div. LEXIS 4549; 2014 NY Slip Op 4649 (App. Div. 4th Dept., June 20, 2014)**

Return of Gift

A Medicaid applicant brought this article 78 proceeding to appeal a fair hearing decision that the applicant incurred a period of ineligibility for Medicaid institutional benefits for gifting over $78,000 to her daughter. The applicant argued that her daughter paid over $41,000 of those funds for the applicant's assisted living costs prior to entering the nursing home and therefore returned a portion of the gift to reduce the penalty.

The Appellate Division affirmed the decision of the hearing officer. Penalties are reduced where all assets transferred for less than fair market value were returned or the funds were used to pay for a nursing home stay. The court dismissed petitioner's argument that payment for the assisted living facility was return of value to her.

***Weiss v. Suffolk County Dept. of Soc. Serv.*, 2014 N.Y. App. Div. LEXIS 6555; 2014 NY Slip Op 06594 (App. Div., 2d Dept., Oct. 1, 2014)**

Home Attendant Pay

Plaintiff non-resident home health attendants were required on premises for 24-hour shifts, including 12 on-duty hours, 8 hours for sleeping and 3 hours for taking meals. They were at all times on call to provide needed services. They were paid minimum wage for 12 hours and a small flat rate for the other 12 hours. Their overtime pay was calculated on 12 hours and not the 24 hours they were actually on call.

Plaintiffs moved for certification as a class to include non-resident home attendants who worked 24 hour shifts for defendants from June 22, 2008 to the date proper wages were not paid.

Plaintiffs argued that their pay was in violation of the Labor Law. They claimed entitlement to minimum wage for each hour of the 24-hour shift with overtime at 1.5 times the hourly rate for each hour over 40 hours per week and one hour for each hour over 10 hours in a day.

Defendants argued against the class certification and defended its position regarding its payment practices.

The court rejected "defendants' contention that, as a matter of law, sleep and meal hours must be excluded from the hourly wages of a home attendant who does not reside or live in the home of his or her client. As a non-residential employee, a putative class member is required by the defendant employer to be on the premises of the client for twenty-four hours, predominantly for the benefit of the employer and the client, and the amount of time the home attendant is actually able to spend sleeping or for meals is irrelevant. A case by case inquiry into the facts peculiar to each putative class member's shift is therefore not necessary to establish a claim. Class certification is therefor appropriate." The court authorized plaintiffs to give notice to individual class members.

***Andryeyeva v. New York Health Care, Inc.*, 2014 N.Y. Misc. LEXIS 4093, 2014 NY Slip Op 24269 (Sup. Ct., Kings County, Sept. 16, 2014)**

Intent to Return Home

Daughter of a nursing home resident signed a contract of sale for her mother's cooperative apartment on January 27, 2010. Closing was on March 10, 2010. Daughter submitted her mother's Medicaid application for coverage as of Dec. 1, 2010 with a statement of intent to return home dated Nov. 30, 2010. The Westchester DSS, affirmed by the Department of Health, denied petitioner's application for institutional Medicaid benefits from Dec. 1, 2010 to January 26, 2011. The NYSDOH decision stated that the intent to return home was not valid for three months prior to the requested pick up date.

On appeal, the applicant argued she was entitled to benefits from Dec. 1, 2010 until the date of the contract of sale on Jan. 27, 2011.

The court reversed and ordered reimbursement to petitioner for the period Dec. 1, 2010 to Jan. 26, 2011. Countable resources were to be assessed as of December 1, 2010, the first of the month in which benefits were sought. It was not until the contract was signed that the subjective intent was no longer effective and at that time the apartment was considered a countable resource.

***Inglese v. Shah*, 2014 N.Y. App. Div. LEXIS 6551, 2014 NY Slip Op 06586 (App. Div., 2d Dept., Oct. 1, 2014)**

Home Care Agency Claim for Payment

Defendants hired plaintiff home care agency to provide an aide for Daniel Lewis. His daughter assisted him in obtaining the services he needed. They signed a contract with plaintiff which stated HHA services would be provided. The agreement assessed a penalty to Mr. Lewis should he independently hire an aide that was introduced through plaintiff agency. It also had provisions for liquidated damages and high interest charges.

Two months after an aide, Ms. Parker, was assigned to Mr. Lewis, she resigned from the agency. Shortly thereafter she went to work for Mr. Lewis on

an independent basis. Plaintiff agency then filed a claim against Mr. Lewis and his daughter for payment pursuant to its contract. The defendants sought summary judgment.

Defendants argued that the agency delayed in providing a replacement so they had to reach out on their own to provide the needed services. They also argued that the plaintiff agency was not licensed to provide home health aides. Plaintiff agency argued it supplied companion services only, which was allowed without a license.

The court awarded summary judgment to defendants. The contract stated it was for a HHA which clearly meant home health aide and the plaintiff could not legally provide those services. The court also dismissed the claim for liquidated damages and interest.

***GTD Serv., Inc. v. Lewis*, 2014 N.Y. Misc. LEXIS 4073; 2014 NY Slip Op 51381(U) (Nassau County Dist. Ct., Sept. 15, 2014)**

Court Determines Health Care Proxy Invalid

Appellant with a diagnosis of moderate to severe mental retardation since birth executed a health care proxy in 2006. Following a hearing at the appellant's hospital bedside, the Supreme Court found that appellant failed to rebut the presumption that he lacked capacity to sign a health care proxy in 2006.

The Supreme Court granted the petition requesting the health care proxy to be declared invalid. The Supreme Court went on to appoint appellant's sister as guardian for purposes of making health care decisions to withhold or withdraw life-sustaining treatment pursuant to SCPA 1750-b. The court also appointed a surrogate decision-making committee to act as a standby guardian.

The Appellate Division, 2d Department, upheld the determination that the health care proxy was invalid. However, because the petition filed in this matter did not request the appointment of a guardian, the Appellate Division determined that the Supreme Court erred in appointing a guardian and in granting the guardian the authority to make decisions pursuant to SCPA 1750-b. Even if the petition had sought the appointment of a guardian, the Appellate Court found that there is no statutory authority for the appointment of a surrogate decision-making committee as a standby guardian in SCPA article 17-A.

***Matter of John T.*, 2014 N.Y. App. Div. LEXIS 5481; 2014 NY Slip Op 05547 (App. Div. 2d Dept., July 39, 2014)**

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Guardianship News: Rarely Discussed Financial Concerns

By Robert Kruger

My articles tend to focus on family conflict, including financial exploitation, and the way it plays in guardianships. So many guardianships are accompanied by attempted financial exploitation that the subject offers an unending source of anecdotal material.

Nor have I neglected conflicts between a guardian managing an incapacitated person's finances and the agenda of the families who want or need or crave access to the incapacitated person's money. However, in this article I intend to change tack.

Here, I focus on some basic responsibilities of a guardian managing the finances of an incapacitated person. For example, it has come to my attention that certain guardians simply do not invest the money that they control. Quite literally, the guardians leave the money in an account paying minimal interest. They appear to be content that the account does not lose money. This is potentially calamitous for the fiduciary (not to mention the IP) because the fiduciary has an obligation under the Prudent Investor Act to invest the beneficiaries/IP's funds and to accept a certain amount of risk in doing so.

If the IP is elderly and infirm, income and safety make perfect sense. Allowing the estate to lie fallow in a bank accounting earning a fraction of one percent does not. Conversely, to speculate with the guardianship estate to increase that estate is understandable when a primary motive is to avoid nursing home placement. However, if a guardian adopts a risk-free approach in a child case the account will not keep pace with inflation, and in terms of real dollars, the account will lose money. If the court examiner, in reviewing an annual accounting, focuses on this, in a rising market, there exists the possibility of a surcharge for the guardian.

Obviously, we do not control the market. In 2008, my accounts were savaged. I suffered significant portfolio losses of 25% or more on most of my accounts. These losses were not permanent losses because the market recovered, slowly and steadily, but recover it did. If the fiduciary was traumatized by that experience, and failed to invest as a consequence, the counter intuitive consequence of failing to invest is that the fiduciary could be criticized if not surcharged.

This article is not intended to be a disquisition on the Prudent Investor Act but the purpose behind the act was to free fiduciaries from the fear of losing money and being surcharged as a consequence. In the good old days, judges would advise the fiduciary to put the money in treasuries because the treasuries would not lose money. As a result, the account would be stagnant while other accounts would grow substantially over time. The investment philosophy in the Prudent Man Rule can be illustrated by an example: an account could have 20 securities, 19 of which would show gains and the 20th would show a loss, and the fiduciary could be surcharged for that one loss. To overcome this judicially enforced inertia, the Prudent Investor Act was adopted and the fiduciaries were encouraged to adopt a whole portfolio approach…to take risk in the context of the needs of the beneficiary because the account would benefit over the long term from a thoughtful acceptance of risk.

Yet, many fiduciaries, during the crash of 2008, panicked. They sold off at the bottom of the market and accepted substantial losses. They were, no doubt, afraid of a global depression and the sacrifice of an entire account. Therefore, they were willing to accept a huge loss to avoid the risk of a complete meltdown.

Such an approach, to my mind, is exceedingly unwise. We remain, despite the buffeting that the market has given investors in the past six years, the world's strongest economy. To sell off at the bottom of the market, and accept substantial losses without any prospect of recovery, is a panic-driven approach. While I hesitate to talk in terms of surcharge for panicked selling, I am not so sure that surcharge isn't warranted.

* * *

An entirely unrelated financial issue is the purchase of a house for the family and for the incapacitated person. In my salad days, I was much more enthusiastic about purchasing houses. However, I eventually learned that, unless the guardians or trust estate has sufficient funds to pay the inevitable costs of owning a house, the estate would eventually diminish, dangerously so. I think that, to maintain a house that has no mortgage, real estate taxes, fuel, insurance and particularly, repairs and improvements, require at least $2,000.00 a month or $24,000.00 a year. In this day of low interest rates, accounts are not consistently earning

four and five percent. It would take an account somewhat north of $2,000,000.00, to pay for carrying the house, commissions, attorney's fees, bond premiums, and any other disbursements that are absorbed by the guardianship. A guardian needs a lot of money to own a house and I regret purchasing houses for estates of $1,000,000.00 or less. They simply couldn't afford it, particularly if a guardianship or trust was supporting the entire family.

The time when a corporate bond would earn 4% to 5% *consistently* may return, but it has not yet arrived. It is still difficult to fully invest a large estate; my sizable accounts are far too heavy in cash, and the market, while improving, is by no means awash in the high yielding corporate bonds of reasonable term. To get a better rate of return, you might have to tie up the money for a very long time. Consequently, my appetite for debt instruments has diminished and I have invested more aggressively in common stock mutual funds because, at this time, they appreciate. One consequence is that many annual accountings reflect modest income; cash is generated by selling off principal to support the guardianship.

For the smaller estate, owning a house is a shaky edifice, made more so by the sheer number of families who are entirely supported by the guardianship or trust. These predominantly mother-led one-parent households can rarely be transformed into income-producing enterprises. The pressure on these guardianship accounts is constant, and I have no solution, although pushing the family to seek employment certainly helps my conscience, if not the bottom line.

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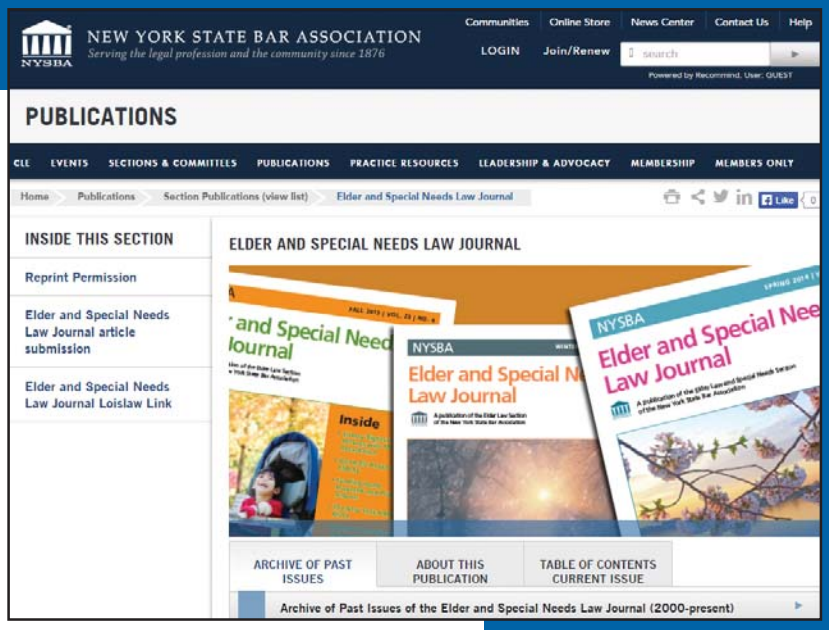

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