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The Senior Lawyer

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of the New York State Bar Association

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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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Cover image:
***Erie Canal* by Debra Millet**

A Message from the Section Chair

I hope that by the time you read this that signs of Spring will be appearing in your neighborhood. The winter blast which occurred during NYSBA's Annual Meeting week caused the cancellation of our Section's Annual Meeting program, "Issues in Planning for Children Within the Autism Spectrum and Diagnosed With Other Disabilities." The program, which had been scheduled for January 27th, was rescheduled for February 9th, but weather conditions continued to impact the area. The change in date and the weather clearly prevented some people from attending this very timely and interesting program but, fortunately, we had arranged to have the program videotaped. The video is available at no charge to members of our Section at www.nysba.org/SLSVideoAM2015 as are the written materials. Complementing those materials are articles by most of our speakers included in this issue of *The Senior Lawyer.*

Consistent with our mission to provide articles relevant to the diverse interests of our Section members, this issue of *The Senior Lawyer* also includes articles on a wide variety of topics, including the work of the NYSBA Bar Foundation and the IOLA Fund, the provision of legal services to the elderly in New York, and special needs planning and education and school issues affecting diabled children. The editors welcome suggestions for articles and the submission of original articles for their consideration.

Planning will soon begin for our 2015 Fall CLE program. Last year the program was "Update 2014" and covered wills, trusts, and estates; elder law; CPLR; real property; retirement planning; systematizing a law practice; and social security. As with articles in *The Senior Lawyer*, our intent is to create programs which recognize the diversity of our Section members and their interests. Suggestions for program topics and speakers should be directed to Anthony J. Enea, Chair of our Program and CLE Committee.

As reported in my last Chair's Message, we have undertaken a Mentors Pilot Project with CUNY School of Law. Members of our Section will be linked with graduates of CUNY who are in, or are planning to create, a solo or small firm community-based law practice. The focus of the mentoring relationship is law practice management, and the goal is to utilize the expertise of the Section membership for the benefit of attorneys with 0-5 years of experience who need support in creating a sustainable practice. The first group of eligible CUNY graduates has been chosen, and the process of creating the mentoring relationship is in progress. We welcome your interest in this project and your comments.

Please also consider participating in one or more of our Section's Committees. A list of our Committees, with a description of their focus and the names of the Chairs, can be found on our website, www.nysba.org/sls. Your years of experience can contribute significantly to the goals of our Section and, in return, I believe you will find participation on a Committee to be intellectually, professionally and personally rewarding.

Carole A. Burns

The IOLA Fund of New York: Helping New Yorkers to Access Justice

By Mary Rothwell Davis

Civil Legal Services: Making Rights Real

> I could not imagine a criminal justice system that did not afford an accused individual legal representation at every stage of the process. After all, each criminal case implicates liberty interests, however nominal those interests may be in a given case. However, individuals seeking access to our courts of civil jurisdiction often have interests at stake nearly as dear as liberty or even life itself. Think of a family facing foreclosure or eviction, or a parent threatened with the loss of custody of a child, or the loss of access to health services or reasonable accommodations for a disability.
>
> —New York City Corporation Counsel Zachary Carter[1]

Equal justice under law is a stirring ideal for most lawyers, but for New Yorkers who cannot afford counsel, they seem empty words. For those without legal counsel, or skilled guidance in pro se matters, the justice system is a confusing and inaccessible institution. Rights that cannot be enforced are of no utility, and civil legal service organizations give life to the rights of New Yorkers. They are the backbone of our judicial system.

Since 1983, the Interest on Lawyers' Accounts (IOLA) Fund of New York has served as an important source of funding for civil legal services organizations in the state. IOLA supports non-profit organizations that provide legal assistance to low-income people and improve the administration of justice for groups underserved by legal services. For the 2013 year, over a half million New Yorkers received direct representation from legal services groups that IOLA funds.

As a trustee of the IOLA Fund of New York, I have been privileged to learn about the many dozens of legal service providers and thousands of dedicated attorneys who work tirelessly to improve the lives of disadvantaged New Yorkers. Each case represents a home saved, child support secured, SSI benefits accessed, a domestic violence victim finding safety, educational services ordered, a trafficking victim freed from a pimp, and other fundamental benefits and savings that change the lives of these clients for the better. The IOLA Fund plays a unique role in our state in overseeing and contributing to the health and vitality of these groups, for in addition to providing monetary support the Fund is the only institution that closely watches the complete landscape of civil legal service needs in our state, and connects with each provider.

The IOLTA Model

Recognizing the desperate need for access to civil legal services, a dedicated group of lawyers in Canada and the United States, borrowing from an Australian model, devised the Interest on Lawyers' Trust Accounts (IOLTA) fund. These funds serve as a means of raising money for charitable purposes, primarily the provision of civil legal services to indigent persons.[2] The establishment of IOLTA in the United States followed changes to federal banking laws passed by Congress in 1980, which allowed some checking accounts to bear interest. The interest on lawyer's escrow accounts generate funds that are too small or held too briefly to justify being held in a separate account for the client's benefit. The money earned through interest is deposited into a common fund, and directed toward civil legal services through the oversight of an IOLTA program. IOLTA programs currently operate in 50 states, the District of Columbia, and the U.S. Virgin Islands.[3] Currently, 36 jurisdictions require lawyers to participate, 14 others allow opt outs, and the remaining two have voluntary rather than mandatory programs.

New York IOLA Fund's Administration

New York's Interest on Lawyer Accounts program began in 1983, in response to Reagan Administration cuts to U.S. Department of Justice funding. With the pioneering leadership of Lorna Blake, who served as Executive Director from the Fund's inception until her retirement over 25 years later, New York's IOLA Fund has long held prominence in the national IOLTA community. Christopher O'Malley, the Fund's second Executive Director in its 32-year history, has continued to play a very active role in the evolving statewide examination of delivery of civil legal services. He has served on the Chief Judge's Task Force to Expand Access to Civil Legal Services since its inception in 2010,[4] an initiative IOLA supports with all its institutional heart.[5]

The Fund is a public body, established by the Legislature and the New York State Bar Association, and governed by an independent board of trustees. Its members are appointed by the governor, legislative leaders, and the Chief Judge of the State of New York, and come

from all over the state.[6] The offices of the Fund are based in New York City. The Board meets quarterly, with an additional meeting to consider grant applications, and usually holds at least one meeting at a site outside New York City. In recent years, these meetings have been held in Buffalo, Rochester, Albany, Ithaca and on Long Island. These meetings give the Board an opportunity to hear from providers in regions other than New York City; the regional expertise of Board members is also an important contribution to the effectiveness of the Fund.

How the Fund Functions

Initially New York created a voluntary IOLA program; after the IRS ruled that interest paid on these accounts would not expose the attorney or client to taxation, the Legislature made participation mandatory as of 1989. There are now more than 50,000 IOLA accounts in the state, held at more than 200 banking institutions.

The amount available for distribution to legal services groups fluctuates, depending in great part on the interest rate. As of 2007, banks were required to offer IOLA account holders "the highest yield available…to its best customers…on similarly-sized accounts maintained at that institution." The infusion of funds that this new "comparability" rule brought to IOLA was short-lived, however. In December 2008 the Fund made grants totaling $31 million over 18 months; in December 2009, the disbursements dropped to $6.5 million. Because of the lowering of interest rates that accompanied the financial crisis of 2008, the Fund's income decreased nearly 80%.

Attorneys and their firms have the opportunity to increase the Fund's interest income by placing their IOLA accounts at banks that have higher interest rates than others, or waive the account fees that are charged against IOLA accounts, or both. The IOLA website provides such information at *Where You Bank Makes a Difference*.[7]

In response to this crisis in funding stream and in recognition of the fundamental role that properly funded civil legal services group play in the administration of justice in this state, the Judiciary allocated an emergency infusion of $15 million for IOLA grants in the 2010-11 Judiciary budget. Lack of legal representation creates serious operational obstacles for the judicial system.[8] Accordingly, this contribution has continued, so that in a two-year grant cycle running from 2013 to 2015, IOLA was able to make grants totaling $33,060,000 for civil legal services and an additional $10, 940,000 for "Administration of Justice" grants. IOLA remains an essential funding source of many of the state's busiest and most effective legal services providers. For the coming 2015-2017 cycle, the Fund anticipates allocation of grants totaling $46 million.

In the more than 30 years since IOLA first distributed funds in 1984, IOLA has provided over $ 377 million to civil legal service providers throughout New York. In the most recent grant cycle alone, $44 million was disbursed; dollar benefits and savings won for clients surpassed a half billion dollars. Thus, the benefit far surpasses the outlay, and in human terms, the benefits are incalculable.

IOLA's Grant-Making Process

The staff of the Fund performs the task each grant cycle of reviewing all applications and preparing reports and recommendations for the Board of Trustees. The staff also makes every effort to visit sites all around the state, frequently accompanied by a board member. These visits supplement the impressions from the grant application with introductions to staff and directors of the programs. The opportunity to see first-hand the work of the groups IOLA funds adds tremendously to the assessment process. Groups are often invited to present to the board, as well, particularly when the board meets in areas outside New York City.

Under its rules and regulations, there are two essential areas that the IOLA Fund supports:

1. **Civil Legal Services (CLS) providers:** An entity which operates within New York State and provides direct civil legal services without charge to poor persons within a geographical area in New York State.

   These include large legal services providers such as the Legal Aid Society, Empire Justice Center, and Legal Assistance of Western New York. CLS grants consume the greater part of the IOLA Fund. By statute, the Fund must award seventy-five percent of the available money to regionally identified providers of civil legal services. The percentage each provider is allocated is tied to geographic distribution of those living at the federal poverty line as measured by the federal government.[9] Thus, for example, the Rural Law Center based in Plattsburgh, New York received a grant of $400,000 while the Legal Aid Society in New York City received $6,620,000.[10]

2. Administration of justice (AOJ) providers: These receive most of the balance of the Fund's income. They are generally smaller organizations than the CLS providers, and provide specific services for discrete populations. The Fund's regulations mandate that these applicants fit into one of four subcategories:

   (i) enhance civil legal services to the poor through innovative and cost-effective means;

   (ii) provide direct civil legal services either to groups of clients currently underserved by legal services, such as

the elderly or the disabled, or in an area of representation, whether substantive or geographical, that cannot be or is not effectively served by individual qualified legal services providers;

(iii) provide legal, management or operational training, or legal, management, support service, or technical assistance, or direct legal assistance, informational advocacy or litigation support to qualified legal services providers; or

(iv) which otherwise promote the improvement of the administration of justice.[11]

A typical AOJ grantee might serve immigrants, migrant workers, the elderly, the disabled, victims of domestic violence, or another special population. Factors considered by the Board in deciding among the many excellent applications include:

- Affiliation with bar groups, volunteer legal programs and other providers;
- Community demographics and need for legal services;
- Organizational structure, corporate documents, affirmative action programs, other sources of funding, and client or community input and support;
- Community outreach, staffing, procedures for the provision of legal services, quality control, supervision and training;
- Program budget specifying proposed use of funds, program timetable and a self-assessment plan to monitor implementation.

Grants are voted upon by the Board of Trustees. Each applicant, using an online form available through the New York State Grants Gateway,[12] submits a demanding set of documents. Applicants answer questions about the group's clients, mission, administration, board governance, finances, goals, attorney staffing, technological effectiveness, questions aimed at determining whether IOLA funding would be put to good use.

Not every grantee follows a "law firm" model with full time staff attorneys. Because there are not enough legal service providers to meet the needs of New York's poor, *pro se* assistance remains a critical resource. IOLA supports several groups that, in turn, foster effective *pro se* representation within the bar. Such groups are both independent, and affiliated with bar associations. The Queens Volunteer Lawyers Project, for example, conducts the CLARO-Queens Consumer Debt Clinic, in partnership with St. John's University School of Law. LawHelp NY maintains a website that provides visitors with plain language guides in ten languages, along with information and tools needed to help themselves. There are Disaster Relief and Recovery materials, including interactive FEMA materials. The site has four interactive models (two English, two Spanish) that help applicants for public benefits advocate for themselves at Fair Hearings. These materials alone were accessed more than 5,500 times in the last reporting period.

Maximizing the impact of each dollar spent on legal services is also a priority, and technological advances continually provide more opportunities for achieving economy of scale and cooperation among providers. IOLA has long encouraged collaboration in order to maximize effectiveness for clients. Technology can provide an effective, cost-efficient and increasingly central means of achieving those goals. LawHelpNY created materials in conjunction with Legal Services-NYC, for example. As technology expands in the justice system and in office management, wide-reaching partnerships become very achievable. When LawHelpNY has the technology and expertise to build an outstanding legal resource for indigent, *pro se* New Yorkers, it makes sense for other providers to add their substantive knowledge to the common platform rather than have each office build out an independent technological system.

IOLA for this reason provides, from time to time, special funding to encourage technical growth and innovation among the grantees. As finances permit, IOLA sets up special trainings, or disburses funds for investment in software and hardware.

Each grant cycle brings far more requests from qualified recipients than IOLA can fund. IOLA's rules and regulations require, however, that priority be given to maintaining a stable funding stream for existing grantees.[13] At the same time, IOLA funding is not meant to be the primary funding source for any group; in order to be deemed a "qualified recipient," a group must show that it has a fairly broad base of financial support.[14] Thus during lean years, when interest rates were low and IOLA Funds ebbing, the Board had to decline many worthy new applicants in the interest of maintaining our commitment to existing grantees.

As the Legislature responds to IOLA's own need for a stable funding stream with generous allocations, through the Judiciary, the Fund is better able to respond to statewide needs, of which it has a broad understanding. IOLA's experience over the past 35 years has shown that its role in the New York State justice system goes much deeper than overseeing a creative device for disbursing income. IOLA has created a framework that connects and sustains civil legal service providers throughout the state, and provides eyes, ears and a voice for their common needs and interests.

Endnotes

1. From Mr. Carter's remarks before the 2014 Report of the Task Force to Expand Access to Civil Legal Services in New York, p. 13, available at http://www.nycourts.gov/ip/access-civil-legal-services/.
2. For a short video presentation on the history of the IOLTA movement in Canada and the United States, visit the New York IOLA Fund website at http://iola.org/About/HistoryofIOLTA.html (accessed February 5, 2015).
3. *See* Sen. Ruth Hassell Thompson, IOLA & Civil Legal Services Task Force, http://www.nysenate.gov/report/fractured-history-civil-legal-services-new-york (accessed February 5, 2015).
4. *See* http://www.nycourts.gov/ip/access-civil-legal-services.
5. The goals of the CLS Task Force are: (1) to prioritize civil legal assistance in the core "essentials of life"—housing, family matters, access to health care and education, and subsistence income; (2) to focus on preventive legal assistance that can avert or reduce the need for litigation; (3) to target assistance for New Yorkers living at or below 200 percent of the federal poverty level in all counties of the State; (4) to recognize the need for a seasoned, well trained civil legal services staff able to provide comprehensive service in often complex, interrelated legal matters; (5) to distribute funds according to the number of low-income New Yorkers in each county; and (6) to award funds through a competitive-bidding Request for Proposals (RFP) process under the oversight of a JCLS Oversight Board consisting of Chief Administrative Judge A. Gail Prudenti, the Task Force's Chair, Helaine M. Barnett, and the Chair of the IOLA Board. *See 2014 CLS Task Force Report to the Chief Judge*, *supra,* at p. 3.
6. The governing statute is set forth at Judiciary Law § 497. The Funds rules and regulations are codified at 21 NYCRR §§ 7000.1 et seq.
7. http://iola.org/banks/index.html.
8. Report to the Chief Judge, The Task Force to Expand Access to Civil Legal Services in New York, November 2014 at page 18, available at http://www.nycourts.gov/ip/access-civil-legal-services.
9. The federal poverty level and 200 percent of that level for 2013 are calculated as follows:

Family Size	100%	200%
1	$11,490	$22,980
2	$15,510	$31,020
3	$19,530	$39,060
4	$23,550	$47,100

10. A full description of the CLS grants for the 2013-2015 grant cycle is available in the Fund's 2013 Annual Report at http://iola.org/about.html.
11. 22 NYCRR §7000.12(a).
12. The 2015-2017 grants application can be accessed at: https://www.grantsgateway.ny.gov/Intelligrants_NYSGG/module/nysgg/goportal.aspx?NavItem1=2.
13. 22 NYCRR § 7000.12(2)(c)(3).
14. *Id.* at (2)(c)(2).

Mary Rothwell Davis, Acting Chair of the New York State IOLA Fund, was appointed a trustee of the fund by then-Chief Judge Judith S. Kaye in 1999 and reappointed by Chief Judge Jonathan Lippman. She is the editor of the *Lawyer's Manual on Domestic Violence, 6th Edition* and volunteer counsel at the Sanctuary for Families' Center for Battered Women's Legal Services. She is a member of the American Bar Association Domestic Violence Appeals Group and Sanctuary for Families' Legal Advisory Committee. Previously, she was Court Attorney at the Bronx County Integrated Domestic Violence Court, Instructor at Brooklyn Law School and Principal Court Attorney to Chief Judge Judith S. Kaye. She has authored appellate briefs and argued appeals in dozens of criminal law cases, primarily in the Appellate Divisions, First and Second Departments, as well as five appeals in the New York State Court of Appeals, one in the Second Circuit, and a petition for certiorari in the United States Supreme Court.

Special Needs Trusts: A Primer

By Anthony J. Enea

It has been well documented that millions of "baby boomers" are coming of age, and that their aging will have a significant impact upon our medical and long-term care infrastructure. However, the one aspect of the aging of the baby boomers that is overlooked is that the baby boomers are the parents and caregivers for millions of non-elderly disabled children, and the impact their aging will have on the care and well-being of said children.

Little has been done to educate the aging baby boomers as to what steps they should take to provide for the future care and well-being of their non-elderly disabled children.

Special Needs Trusts, a/k/a Supplemental Needs Trusts, play an important role in the planning for a disabled child. They are generally considered the legal centerpiece of a plan for a disabled person.

I. Three Basic Types of Supplemental Needs Trusts

A. "Third Party SNT"

A Third Party SNT is a Trust created and funded by someone other than the disabled beneficiary. It is generally created by a parent, grandparent or sibling. The source of funds used to fund a Third Party SNT is not from the disabled person. A disabled beneficiary's funds should never be used to fund a Third Party SNT. Any individual can fund this type of trust for a disabled beneficiary without affecting the beneficiary's entitlement to government benefits.

It is important to note that the SNT can be "Inter-Vivos" or "Testamentary." The spouse of a disabled beneficiary or the parent of a minor disabled beneficiary cannot create and fund an "inter-vivos" SNT and get the protections under EPTL 7-1.12 for government benefits. However, the spouse or parent can fund and create a "testamentary" trust for the disabled beneficiary.

All too often we tend to think of SNTs as inter vivos trusts. However, their use in Testamentary documents such as a Last Will should be given consideration.

EPTL 7-1.12 codifies *Matter of Escher.*[1] In *Escher*, the Bronx County Surrogate's Court held that a testamentary trust established by parents of a disabled daughter which provided that principal was to be used only for the "necessary support and maintenance of daughter" was protected from the claim of the State for reimbursement of the amount it had paid on behalf of the daughter. The Court found that the Testator had intended principal be used for daughter during her lifetime.

It should also be noted that the funding of a Third Party SNT has Medicaid planning benefits for the Grantor of the Trust. The transfer is considered an exempt transfer. Thus no period of ineligibility is created.[2]

B. "Self-Settled SNT or First Party SNT"

Self-Settled Trusts are authorized by the Omnibus Budget Reconciliation Act of 1993 ("OBRA93"). These are SNTs funded with a disabled beneficiary's own funds, or funds to which he or she is entitled such as personal injury award or inheritance. In order for the disabled beneficiary to establish and fund a Self-Settled SNT, he or she must establish the following:

(a) Must be disabled (proof of SSI or SSD generally sufficient);

(b) Must be under the age of 65 to establish it (as of the date the assets are transferred to the Trust);

(c) Must be established for the benefit of the disabled beneficiary, by a parent, grandparent, guardian or court. Once established it may be funded by the disabled beneficiary. If the disabled beneficiary has no parent or grandparent, it will be necessary to obtain a Court order, pursuant to Article 81 of Mental Hygiene Law or SCPA 2101 and 202;

The transfer of the disabled beneficiary's funds to the Self-Settled SNT creates no look back period or ineligibility period for Medicaid nursing home benefits, so long as the disabled beneficiary is under the age of 65 at the time the gift to the Trust is made;

(d) Must have a "Payback Provision." Upon the death of the disabled beneficiary all remaining trust principal and accumulated income must be paid back to Medicaid to reimburse Medicaid for all benefits paid to the disabled beneficiary during his or her lifetime. Any funds left over may be paid to the named beneficiary of the Trust.

C. "Pooled Self-Settled SNT"

A Pooled Self-Settled SNT is one that must be managed by a non-profit association. For example, the United Jewish Appeal ("UJA") and the New York State Association of Retarded Citizens ("NYSARC") sponsor such Pooled Trusts for disabled persons.

The funds transferred to the trust are pooled in the Trust, but a separate account is established for each individual beneficiary. The beneficiary can be under or over the age of 65. However, if the beneficiary is over the age of 65 there is a penalty period for assets transferred to the Pooled Trust for Medicaid nursing home benefits. These Trusts are usually utilized when there is no family member to act as a trustee or when the beneficiary is over age 65.

Depending on the terms of the Pooled Trust, the disabled person may be able to provide how the remaining balance of his or her account is to be distributed upon his or her death; however, this would be subject to a payback to Medicaid. If the balance on death is retained by the Pooled Trust, then Medicaid is not entitled to a payback of the benefits paid.

Pooled Trusts play an important role when the disabled beneficiary has fixed income that exceeds the monthly amount permitted by the Medicaid home care program. For example, if a Medicaid home care applicant has income in excess of the permitted $767 per month for the year 2010, he or she is allowed to contribute said excess income to a Pooled Trust. The Trust will then pay the disabled beneficiary's household expenses such as mortgage, rent and taxes which he or she would not be allowed by Medicaid to pay. The Pooled Trust in many cases allows the beneficiary to remain at home, and still be eligible for Medicaid Home Care.

D. When Is a Court Order Required to Create and Fund a Self-Settled SNT?

If the disabled beneficiary is competent, and has a parent or grandparent willing to be the creator, a Court Order is not required. If the disabled beneficiary is mentally incapacitated, then regardless of the existence of a parent or grandparent, a Court Order is required for the assets or income of the beneficiary to be transferred to the SNT. If the disabled person is competent, and has no parent or grandparent, a Court Order is required.

Court Orders are normally obtained within an Article 81 Guardianship (can be a single transaction guardianship), or if the matter involves an inheritance, or if funds are received by a developmentally disabled or mentally retarded person, then within a 17A Proceeding in the Surrogate's Court.

II. General Drafting Considerations for SNTs

The following are some provisions to consider including in an SNT:

(a) Make specific reference to *Matter of Escher* within the body of the Trust, and that the trust is intended to comply with *Escher.*

(b) Make specific reference *to* EPTL 7-1.12 within the body of the Trust, and that the Trust is intended to comply with its provisions.

(c) Utilize the requisite provision that the trust corpus is to be used on behalf of the disabled individual to "supplement" and "not supplant" government benefits such as Medicaid and SSI, and that the funds are not to be used for basic needs such as food, clothing and shelter. However, despite the aforestated provision it is still important to give the Trustee the power to make distributions to meet the beneficiary's basic needs (food, clothing and shelter), even if it will diminish or impair the beneficiary's receipt of government benefits. This is commonly referred to as the "Notwithstanding Consequent Effect" provision of an SNT.

Third Party Trusts should also provide that the Trustee has the full and absolute discretion to pay out principal and income. However, the use of an ascertainable standard such as "for health, education, maintenance or support" should be avoided.

III. Drafting Considerations for an SNT to Be Approved by Court

When requesting that the Court approve an SNT, the Petition to the Court seeking said approval should articulate the following:

(a) The disabled beneficiary's life expectancy and life care plans;

(b) Projected growth of funds;

(c) Project how long the funds will last.

With respect to Court Ordered SNTs, the Courts have required different drafting requirements.[3] In *Morales*, the Court offered a model SNT to be used in New York City. The Department of Social Services must be notified when a Court Ordered Self-Settled SNT is being requested.

In drafting an SNT it is important to be familiar with the specific disability the beneficiary of the Trust is afflicted with. For example, the needs of a competent physically disabled non-elderly beneficiary will be different from those of someone who is mentally incapacitated and physically disabled. The competent physically disabled beneficiary can be actively involved in the decisions concerning the drafting and implementation of a Self-Settled SNT and his or her future care plan. For example, he or she can be made a member of an Advisory Committee to the Trustees.

It is also important to know what government benefits program or programs will support the beneficiary. Will it be institutional or non-institutional? This will provide the attorney draftsman an idea as to how trust assets can be used, and the specific terms to be contained in the Trust, as well as for the preparation of an additional memo to Trustees about their use.

For example, a severely developmentally disabled individual residing in a group home may have more pre-

dictable needs than an individual suffering from a psychiatric illness who resides in federally subsidized housing and is receiving outpatient mental health services.

The individual suffering from a psychiatric illness who resides in the federally subsidized housing will most likely be receiving SSI, and any distributions for food or shelter by the Trustee of the SNT will impact the SSI coverage.

Conversely, the individual in the group home may be receiving basic community Medicaid without SSI, so the Trustee may be free to use trust funds to support a reasonable housing arrangement and provide other necessities that will enhance the beneficiary's ability to reside in the community.

It is important to consider the functional level of the beneficiary, and his or her ability in an advisory capacity to participate in decisions regarding trust expenditures and management.

IV. Sole Benefits Trust ("SBT")

Finally, I thought it would be important to describe a relatively new special type of SNT that has been gaining increased popularity. Generally, a Sole Benefits Trust ("SBT") is a special type of Third Party Trust. It will not be counted as an available resource to the trust beneficiary for purposes of determining his or her Medicaid and SSI eligibility so long as it is set up as a Third Party SNT. The Third party funding an SBT may do so without incurring a transfer penalty for purposes of his or her own eligibility for Medicaid and SSI.

A Sole Benefits Trust is often used when a Plaintiff settling a claim or suit will want to set aside funds from the settlement to provide for a disabled friend, child or grandchild while still preserving his or her own eligibility for Medicaid or SSI.

A Sole Benefits Trust must meet all of the Third Party SNT requirements. It must provide that the beneficiary is the only person who will benefit from the funds in the trust, presently and at any time in the future. The trust must also provide that the assets in the trust will be spent or distributed in a manner that is "actuarially sound." Assets are to be distributed each year in an amount that is calculated to deplete the trust within the beneficiary's remaining life expectancy.

A Sole Benefits Trust does not have to meet the "actuarially sound" requirement if it is an exempt SNT or Pooled Trust under OBRA93 and the Foster Care Independence Act of 1999 (FICA). However, it would then lose its primary advantage over an OBRA93 and FICA-exempt trust in that it does not need to be created by a Court, parent, grandparent or legal guardian of the beneficiary, and is not required to contain a State payback provision. It is recommended that an SBT be actuarially sound in order to maintain the flexibility it has. It only needs to provide a minimum amount to be paid to the beneficiary that will deplete the trust over his or her life expectancy.

An SBT can be funded with a lump sum or annuity. However, it must be fully funded before the beneficiary reaches the age of 21. It is administered the same as a Third Party SNT to preserve beneficiary's eligibility for Medicaid or SSI. Any Third Party can transfer funds to a Sole Benefits Trust.

In the situation where the beneficiary's ability to qualify for Medicaid or SSI is not a concern, the SBT can be administered to provide for the beneficiary's general health, education, welfare, support, maintenance and comfort, so long as the trust is created for the Grantor's blind disabled or minor child, or for any other disabled individual under age 65, and the trust meets the SBT requirements. The Grantor's transfer of assets to fund the trust will not subject the Grantor to a transfer penalty for Medicaid.

Where there is a concern about Medicaid or SSI eligibility for the Plaintiff and the beneficiary, neither the Plaintiff, the beneficiary, the spouse of the Plaintiff or beneficiary may act as a Trustee. Otherwise, the assets in the trust would be considered an available resource, and adversely affect their Medicaid and SSI eligibility. If beneficiary's eligibility for Medicaid and SSI is not an issue, the beneficiary and his or her spouse could act as Trustee.

V. Effect of Medicaid Lien on Funding of an SNT

The U.S. Supreme Courts' decision in *Arkansas HHS v. Ahlborn*[4] dramatically impacted the law on Medicaid liens and the funding of Supplemental Needs Trusts.

Under *Ahlborn*, when a Medicaid recipient receives a personal injury settlement following the payment by Medicaid of medical costs, the Medicaid lien amount is limited to the amount of proceeds meant to compensate the recipient for medical costs, and not for damages for pain and suffering, lost wages and loss of future earnings. This rule also applies to the personal injury settlement or award of a minor.

In *Ahlborn*, there was an agreement apportioning the settlement between medical costs and other damages, but the Court held the result would be the same for a Judge-allocated settlement or a jury award which establishes liability for both medical care and other kinds of damage.

Prior to *Ahlborn*, the rule in New York was that a valid Medicaid lien may be enforced against the entire amount of a personal injury settlement, award or verdict before the proceeds are transferred into a Supplemental Needs Trust.[5]

VI. Conclusion

The use of a properly drafted Special Needs Trust will help give the parents of a non-elderly disabled child a level of comfort in knowing that they have taken a significant step in assuring the future care and well-being of their child. It is truly the cornerstone of any planning for a disabled person.

Endnotes

1. 94 Misc. 2d 952, *aff'd*, 75 A.D. 2d 531, 426 NYS 2d 1008.
2. *See* 42 U.S.C. § 1382 c(a)(3).
3. *See Matter of DiGennaro*, 202 A.D. 2d 259 (2d Dept. 1994), *Matter of Goldblatt*, 162 A.D. 2d 888 and *Matter of Morales*, NYLJ 7/28/95 (Supreme Court, Kings Co.).
4. 547 U.S. 268, 126 S. Court 1752 (2006).
5. *Cricchio v. Pennisi* and *Link v. Town of Smithtown*, 90 NY 2d 296, 683 NE 2d 301.

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Avoiding Consequential Liabilities for Trustees of Trust-Owned Life Insurance

By Henry Montag, CFP

The following is an update to an article which appeared in the Spring 2014 edition of *The Senior Lawyer*.

Low interest rates over recent years, combined with neglect on the part of the private owners and trustees, have resulted in an increasing number of non-guaranteed life insurance policies expiring prematurely. The majority of these policies were purchased from the mid-1980s to 2003. The primary reason can be traced back to the early 1980s when prevailing interest rates were 18% to 19% and there were only two types of life insurance policies available:

- Term Life Insurance, in which a specific dollar amount of life insurance was guaranteed to remain in force for a specific period of time and at a specific guaranteed premium, and
- Whole Life Insurance, which was guaranteed to remain in force for the life of the insured as long as he or she paid the stated premium on time. These Whole Life policies contained a tax-deferred accumulation account known as Cash Value, which earned 3% annually.

Universal Life Insurance Policies

With high interest rates in the early 1980s, buyers of life insurance who wanted permanent coverage chose to buy Term Life and invest the difference in other guaranteed investments, as an alternative to Whole Life policies that were only paying 3%.

In 1982, E.F. Hutton Life was the first insurer to combine the two elements, term insurance and an investment component, into a single policy originally called "Total Life," then "Complete Life." By 1983, nearly every major life insurance company offered a "Universal Life" policy. While the product was designed to pay a competitive interest rate similar to bank accounts and certificates of deposit, its largest drawback was that, unlike its predecessors, a Universal Life policy was *not guaranteed* to last for the rest of one's life. Instead, policy owners assumed 100% of the responsibility for policy performance. It was up to them to make certain that the policy was adequately funded so that it would remain in force for the rest of their lives.

The Problem

As a result of sustained low interest rates and unintended neglect on the part of owners who owned a policy outright rather than through a trust, or the sons and daughters who acted as accommodation trustees for their parents irrevocable life insurance trusts, as well as the trusted friend or professional adviser acting as a trustee, Universal Life policies are expiring seven to nine years earlier than originally anticipated. It's now apparent that neither many of these owners, nor the Insured, nor the accommodation trustees were aware that they were solely responsible for the performance of their non-guaranteed policies and did not know that they should have increased premium payments to make up for the lower than anticipated earnings caused by reduced interest rates. They treated their policies as Buy and Hold, rather than as Buy and Manage assets.

Solutions

Many grantors, trustees and their advisors mistakenly believe that the life insurance agent or broker is watching over their policy to make certain that it does not lapse. Others believe that the insurance company itself will make sure that premiums are collected so that the policy does not lapse.

However, it is an agent's or broker's role to market and distribute the policy. It is the company's role to administer bills and issue an annual report indicating where the policy stands. It is exclusively the trustees' or private owners' duty to manage the policy to make certain they are not paying more in expenses than they should and that a sufficient premium is paid to keep the policy in force, up to and beyond the insured's normal life expectancy.

When the policy has not been appropriately managed by the private owner or trustee, corrective action involving these options is available to them:

- Increase the premium to maintain the death benefit to a desired age,
- Reduce the death benefit to achieve same results,
- Attempt to exchange to a more competitive policy,
- Consider a "life settlement," a sale at a higher valuation than the cash value (explanation of life settlement on next page),
- A combination of all or some of the above.

Considering these options, what's the best way for an insured or trustee to proceed?

As a first step, they have to inform themselves of the facts and discover whether the policy is in fact a non-guaranteed policy that may be in danger of expiring prematurely. If it is, intervention is needed and the logical source for assistance is a tax or legal advisor, working in conjunction with an experienced Independent life insurance consultant, who would conduct an independent performance evaluation of the policy. To avoid fixing a problem by creating another problem, a request for proposal process should be used to assure that an objective, unbiased consultant is engaged and credible policy evaluation is provided.

The next step is to develop a risk management plan as follows:

1. Formalize a "Trust Owned Life Insurance Investment Policy Statement" that:
    - Updates the trustees'/beneficiaries' current death benefit requirement.
    - Summarizes the trust's parties and their respective responsibilities.
    - Sets out trustee risk management criteria for carrier and product suitability.
    - Identifies the life insurance product and policy evaluation duties.
    - Establishes vendor due screening requirements for delegated life insurance.
    - Affirms annual beneficiary communication requirements.
2. Obtain an actuarially certified life expectancy evaluation that includes:
    - A percentage probability that the payment of currently scheduled premiums will sustain coverage to the insured's life expectancy and the policy's maturity.
    - The earliest predicted lapse age for the insured's policy.
    - A corrected premium amount that would sustain the death benefit to the insured's life expectancy
3. Verify that the trust file contains:
    - A signed copy of the trust agreement.
    - A policy contract and signed copy of the "as sold" delivery illustration.
    - A current Trust Investment Policy Statement.
    - A Grantor Guidance Letter providing guidance at time of policy issue concerning policy purpose and long-term performance expectations.
    - Product suitability evaluation signed by writing agent when purchased.
    - Copy of annual performance monitoring reports.
    - Copy of annual beneficiary communication.

Based upon this information, a risk mitigation plan can be initiated that provides for appropriate delegation of expertise functions and determinations to insure that a policy lapse can be avoided.

Additional Considerations

Trustee Hold Harmless Clauses

Every trust warrants review to determine if what was important to the grantor then, is still relevant and accurate today—in particular if it contains a trustee hold harmless provision, and to make certain its existence has been clearly explained to the grantor and trustee.

Since the trustee has the sole responsibility for managing the trust asset, if the trust has a hold harmless provision and the trustee lacks life insurance evaluation expertise, how will suitability of the carrier, product and policy be addressed and managed? And, if the policy unnecessarily lapses, what is the trustee's liability?

The Court of Appeals reminded trustees of their exposure to personal liability in the recent case of *Penman v. Penman*[1] when it dismissed the appeal of a trustee who was found liable for not making inquiries as to the performance of her co-trustee. Because she had abdicated her duties as a co-trustee, she could not avail herself of the protection afforded trustees by statute or the exculpatory clause in the trust instrument and the court found that she did not act reasonably.

In another recent decision regarding the subject of a hold harmless provision, co-authors Steve Leimberg and Howard Zaritsky of *Tax Planning with Life Insurance* comment on a recent Nebraska Supreme Court case *Rafert v. Meyer*[2] stating that:

> …a trustee has a non–waivable duty to keep beneficiaries informed about the status of life insurance policies held in trust, and a non-waivable duty to act in good faith and in the best interest of the beneficiaries. Among the trustee's duties is the responsibility to inform the beneficiaries fully of all material facts so the beneficiaries can protect their own interests where necessary.

* * *

> …furthermore, as demonstrated in Rafert v Meyer, such a clause may not even protect the trustee from liability for failing to maintain the trusts insurance policies. The better approach for all parties is to require that the trustee treat a life Insurance policy as it would any other trust asset, that the trustee evaluate it and determine its appropriateness on a continuing basis, and that the trustee be paid for these services. Sometimes, penny wise really is pound foolish—for both the payor and payee.
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> * * *
>
> …relieving a trustee of various duties may result in lower trustee's fees, but it also leaves the trust without anyone to assure that the policy in question remains in effect, and that it is the correct policy for the trust, and that full advantage is being taken of its options.

In *Rafert v. Meyer*,[3] we see that a trustee has the responsibility to inform the beneficiaries that their trust assets are in danger of being lost. "Meyer the trustee contends that the lapses of the policies occurred prior to the time such reports were due. But annual reporting was a minimum requirement in the ordinary administration of the trust. A reasonable person acting in good faith and in the interests of the beneficiaries would not wait until such annual report was due before informing the beneficiaries that the trust assets were in danger of being lost."

Regardless of whether a violation by a trustee of a duty required by law was willful, fraudulent, or resulted from neglect, it's a breach of trust, and the trustee is liable for any damages caused. A trustee is responsible to administer the trust in good faith, and in accordance with its terms and the interests of the beneficiaries, and Code. § 30-3866.[4]

Life Settlements

Just as an individual can sell a car or home, so too can an owner of a life insurance policy sell his or her policy. A life settlement is the process in which an owner of a life insurance policy sells his or her policy to another individual or group of individuals, i.e., a hedge fund, in what's called the secondary market, rather than surrendering it to the Insurer for the cash surrender value. It has been a common practice for insurance companies that use agents rather than brokers to discourage their agents from discussing a life settlement as an option with a client faced with lapsing or surrendering a life policy because a life settlement would reduce profitability for the insurers as they count on a percentage of their policies lapsing and being surrendered. This practice is now changing as a result of *Grill v. Lincoln National Life Insurance Company*, a 2014 federal court case the significance of which one commentator described as follows:

> In the Grill case, the plaintiff's attorney asserts that Lincoln's agent did in fact have a fiduciary duty to review all potential options when the policy no longer became affordable.… With respect to life settlement disclosure, an inherent conflict exists between insurance companies and their agents. An advisor's duty to exercise the reasonable care standard is hindered by carrier directives to conceal the life settlement option. Until this issue is resolved, lawsuits like the one filed in Riverside County may become more common.[5]

Chronic Care and Long Term Care Riders

In addition to regularly evaluating a life insurance policy, one should also consider alternatives such as Chronic Care and Long Term Care riders which first became available at the end of 2011. Either of these allow an Insured to withdraw up to $120,000 tax free in 2015 (adjusted annually for inflation), directly from the death benefit of a policy, to pay for qualifying long-term care expenses. Care, however, must be taken to distinguish between the two as there is an additional upfront cost for a Long Term Care rider, while that's not the case for a Chronic Care rider. There are also many planning opportunities to remove the asset from the estate while yet allowing the Insured to have direct access to the funds in the event they were needed to pay for long term care costs.

Conclusion

While it is important to be aware of the potential problems involving non-guaranteed life insurance, particular attention needs to be paid to the attorney or accountant who acts as a trustee, yet does not have, nor retains an expert with, the requisite skills necessary to evaluate the performance of a life Insurance policy.

A trustee can be sued by a beneficiary if the life insurance coverage prematurely expires and the beneficiary is not made aware that a shortfall could have been corrected—or if the trustee does not examine policy expenses, since beneficiaries can claim the trustee was overcharged and the policy could otherwise have provided a greater death benefit.

The earlier a trustee learns of a potential problem, the easier and less costly it will be to fix it, especially in those situations where the replacement of a policy is called for, since an insured's health may deteriorate with age making it more difficult and costly to obtain a better performing policy.

Endnotes

1. 2014 ONCA 83 (CanLII) [*Penman*].
2. Steve Leimberg and Harold Zaritsky, *Tax Planning with Life Insurance*, March 2014.
3. __ N.W.2d __ (Neb. 2015).
4. *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).
5. *Larry Grill et al. v. Lincoln National Life Insurance Company*, 5:2014cv00051, U.S. District Court, California Central District (case not yet adjudicated).

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Representing Students in Special Education Matters

By Adrienne J. Arkontaky

Introduction

Many families today face the challenge of raising a child with some type of disability. Many children with disabilities need assistance in school to access education. The Individuals with Disabilities Education Improvement Act (IDEA) is the most recent amendment to the federal statute addressing the rights of students with disabilities to a free appropriate public education (FAPE).[1]

Over the years, an increasing number of attorneys have become interested in representing students in special education matters. For those readers who have no interest in representing students, I am confident that at some point in your practice, you will come across a family that is facing the challenge of raising a child with disabilities and my hope is that this overview will at least provide you with a general understanding of the relevant statutes and allow you to perhaps guide families in the right direction.

Researching a Special Education Case

When researching a special education legal issue, it is important to study all relevant statutes including both federal and state law. Many states (including New York) offer additional protections so it is important for a practitioner handling a special education matter to be well-versed in both.

It is important to study the U.S. Code,[2] and the Code of Federal Regulations pertaining to the provision of special education to students.[3] It is also important to look at the appropriate state regulations. In New York State, the governing body of law is embodied in Part 200 and 201 of the Regulations of the Commissioner of Education and Article 89 of the Education Laws of New York State.[4] In addition, a practitioner should look at the United States Department of Education's Analysis, Commentary and relevant case law.

Approximately eleven states operate on a two tier system that requires both families and school districts to exhaust administrative remedies (a due process hearing[5] and an appeal to an office of state review[6]) before pursuing a claim in either federal or state court. Practitioners should review the administrative decisions in their respective states on a regular basis to ensure they keep current on trends.

Other Federal Statutes Protecting Students with Disabilities

In addition to the special protections under the IDEA and Parts 200 and 201 of the Regulations of the Commissioner of Education of the State of New York, there are several other statutes that offer protections to children (and adults) with disabilities. Section 504 of the Rehabilitation Act of 1973[7] is an anti-discrimination civil rights statute. The statute prohibits discrimination based upon disability and requires that the needs of students with disabilities be met as adequately as the needs of their non-disabled peers. Section 504 provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.[8]

A Section 504 claim is often referred to as a 1983 claim. Students who receive special education services in New York State automatically receive protection under Section 504 of the Rehabilitation Act.

The Americans with Disabilities Act of 1990[9] (ADA) prohibits discrimination on the basis of disability in employment, state and local government, public accommodations, commercial facilities, transportation, and telecommunications. Under the ADA, an individual with a disability is one who (1) has a physical or mental impairment that substantially limits one or more life activity; or (2) has a record of such an impairment; or (3) is regarded as having such an impairment.[10]

Basic Rights and Responsibilities of Parents and School Districts under the IDEA

To receive federal funds, states must provide assurance to the United States Department of Education that they have policies and procedures in place to ensure that all children who are in need of special education receive a free appropriate public education. The right to a FAPE applies to students in need of special education services from age three to twenty-one years of age.[11] The right to a FAPE extends to children with disabilities who have been suspended from school.[12]

"Child Find" requires school districts to identify, locate and evaluate all children with disabilities, including children who are home-schooled, homeless, wards of the

state and children who attend private schools, and determine which children are and are not receiving special education and related services.[13]

Parents and school district staff may request an initial evaluation of a student to determine whether a student needs special education services.[14] The evaluation and eligibility determination must be completed within sixty calendar days of receipt of parental consent[15] unless a state has regulations that allow longer time frames.

The school district must obtain parental consent for initial evaluations.[16] If a parent does not consent to initial evaluations, the school district may initiate a request for due process against the parent to evaluate the student.[17] Once a student is identified as a student in need of special education services, the school district is required to develop an Individualized Education Program (IEP).[18] The parents or person in parental relationship to the student must be part of the Committee on Special Education.[19] The IEP must be reviewed at least once a year and more frequently if necessary.[20]

Key Terms

It is important for practitioners to be able to recognize a few key terms including the following: (1) Committee on Special Education (CSE); (2) Individualized Education Program (IEP); (3) Least Restrictive Environment (LRE)[21]; (4) Independent Educational Evaluations (IEE)[22] and Prior Written Notice (PWN).[23]

LRE means that to the maximum extent appropriate, students with disabilities, including students in public and private institutions or other care facilities, must be educated with students who are not disabled. Removal of students with disabilities occurs only when the nature or severity of the disability of a student is such that education in regular classes with the use of supplementary aids and services cannot be achieved.

If parents disagree with the evaluations conducted by a school district, they have a right to seek approval of IEEs from the school district. Finally, if a school district proposes to change or refuses to change the identification, evaluation, or educational placement of a student with a disability, the school district must provide a parent with written notice regarding the proposed change.

Seminal Special Education Cases

It is important for practitioners to be familiar with a few seminal cases that paved the way or further explained the rights of parents and students and responsibilities of school districts in providing services to students in need of special education services. The following are a few of the seminal cases:

Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982), held that a free appropriate public education should be reasonably calculated to confer educational benefits and the state does not need to maximize each child's potential.

Burlington Sch. Committee v. Mass. Bd. of Ed., 471 U.S. 359 (1985), held that when a school district fails to offer a FAPE to a student with a disability, the parents may place the student in an appropriate private school and seek reimbursement for the cost of tuition.

Honig v. Doe, 484 U.S. 305 (1988), held that school districts may not unilaterally exclude a child with a disability for more than ten school days. School districts were enjoined from indefinitely suspending students or altering their current placements until they were properly evaluated for an appropriate academic setting.

Florence Co. Sch. Dist. Four v. Shannon Carter, 510 U.S. 7, (1993), held that, if the public school fails to provide an appropriate education and the child receives an appropriate education in a private placement, the parents are entitled to be reimbursed for the child's education, even if the private school does not comply with state standards.

Schaffer v. Weast, 546 U.S. 49 (2005), held that the burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. The Court declined to rule on whether states may require school districts to bear the burden of proving FAPE was provided. In New York, school districts bear the burden of proving FAPE was provided under N.Y. Educ. Law § 4404(1)(c). The Court also held that parents are entitled to IEEs to "balance out" the school district's "natural advantage" in these proceedings.

Arlington Central School District Board of Education v. Murphy, 548 U.S. 291 (2006), held that the IDEA does not authorize the payment of the experts' fees of the prevailing parents.

Winkelman v. Parma City School District, 550 U.S. 516 (2007), held that parents may represent their children's interests in special education cases, and are not required to hire a lawyer before going to court.

Forest Grove School District v. T. A., 557 U.S. 230 (2009), held that the IDEA allows reimbursement for private special education services, even when the child did not previously receive special education services from the public school.

The Components of an IEP

The IEP is the "roadmap" or "contract" between the school district and the parent that should detail the program and services identified by the CSE that are tailored to the unique needs of the student.[24] Generally

the IEP should include the following: (1) a description of the student's present levels of functioning; (2) goals and objectives which must be measurable and meaningful; and (3) related services that are necessary. These services supplement the activities provided in the classroom. They include but are not limited to assistive technology, parent training and counseling, physical, occupational or speech therapy, transportation and nursing services.[25]

Procedural Safeguards

Parents and school districts generally work together to resolve disagreements regarding the provisions of special education services to students. However, parents must be aware of their rights if a disagreement arises that cannot be resolved at the CSE level. The IDEA Section 1415 and Part 200.5 of the Regulations of the Commissioner outline the procedural safeguards available to both school districts and families.[26]

Parents and school districts may request an impartial hearing relating to the identification, evaluation, or educational placement of a child or related to the provision of FAPE to a student.[27] An impartial hearing is a formal proceeding in which disagreements between parents and school districts are decided by an Impartial Hearing Officer or Administrative Law Judge. There must be a resolution session held by the school district within fifteen days of the school district receiving a parent's request for due process and prior to moving forward with an impartial hearing.[28] If the school district has not resolved the issues raised in the due process request to the satisfaction of the parent within thirty days of the receipt of the due process request, the parties must move forward with a hearing.[29]

A waiver of the resolution session is available if both parties agree.[30] The timeline for requesting a hearing is within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint.[31] Any party to a hearing has the right to be accompanied and advised by counsel.[32] The parties have the right to present evidence and confront, cross-examine, and compel the attendance of witnesses.[33] The parties must disclose all evidence five business days prior to the hearing to the opposing party.[34] The parties have the right to open hearings and there is a right to appeal any decision to the Office of State Review and ultimately to federal court.[35]

The Right to Attorney Fees

In an effort to afford all parents, regardless of economic status the opportunity to secure legal representation, the IDEA provides for parents to recoup attorney fees if they prevail in a special education action.[36] A school district also has a right to attempt to recoup attorney fees from a parent who files a due process complaint that is determined to be frivolous, unreasonable or without merit.[37] The right of school districts to recoup fees is rarely used but practitioners should be aware of this provision.

The Student's Status During Due Process Hearings and Subsequent Appeals

Because it is imperative that a student's placement be maintained during these legal proceedings, the IDEA provides for "pendency," or the right to "stay put," during a due process or subsequent appeal in some situations. Generally, during the pendency of any administrative or judicial proceeding, unless the school district and parent agree otherwise, the student involved in the dispute must remain in his current educational placement as defined in the last agreed upon IEP.[38]

I have tried to provide the reader with a brief overview of the relevant provisions that I feel are crucial in the IDEA. I encourage you to explore this area of the law further. Some additional resources are the Council of Parent Attorneys and Advocates (COPAA)[39] and Wrightslaw.com. I also invite you to visit our website at www.cuddylawfirm.com. I would like to thank Samantha Pownell, Esq., an Associate Attorney with the Cuddy Law Firm, P.C., for her contributions to this article.

Endnotes

1. 20 U.S.C. § 1412(a)(1)(A).
2. *Id.* at § 1400.
3. 34 C.F.R. pt. 300.
4. N.Y. Comp. Codes R. & Regs. tit. 8 § 200, 201; N.Y. Educ. Law § 4401 et seq.
5. 8 N.Y.C.R.R. § 200.5; N.Y. Educ. Law § 4404(1)(a).
6. 8 N.Y.C.R.R. § 200.5 (k); N.Y. Educ. Law § 4404(2).
7. 29 U.S.C. § 794 et seq.
8. *Id.* at 794(a); 34 C.F.R. § 104.4(a).
9. Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990).
10. 42 U.S.C. § 12102.
11. 8 N.Y.C.R.R. § 200.1 (zz); 20 U.S.C. § 1412(a)(1)(A).
12. 20 U.S.C. § 1412(a)(1)(A).
13. 20 U.S.C. § 1412(a)(3).
14. *Id.* at 1414(a)(1)(B).
15. *Id.* at 1414(a)(1)(C).
16. 34 C.F.R. § 300.300(a).
17. *Id.* at § 300.300 (a)(3).
18. 8 N.Y.C.R.R. § 200.4 (e).
19. *Id.* at § 200.3 (a)(1).
20. *Id.* at § 200.4 (f).
21. 20 U.S.C. § 1412(a)(5).
22. *Id.* at 1415 (b)(1).
23. *Id.* at 1415 (b)(3).
24. 8 N.Y.C.R.R. 200.1(ww).
25. *Id.* at 200.4 (d)(2).
26. 20 U.S.C. § 1415; 8 N.Y.C.R.R. § 200.5.
27. 8 N.Y.C.R.R. § 200.5 (i).

28. *Id.* at 200.5(j)(2)(i).
29. *Id.* at 200.5 (j)(2)(v).
30. *Id.* at 200.5 (j)(2)(iii).
31. *Id.* at 200.5 (j)(1)(i).
32. *Id.* at 200.5 (j)(3)(vii).
33. *Id.* at 200.5 (j)(3)(xii).
34. *Id.*
35. *Id.* at 200.5(J)(3)(x); 200.5(5)(v).
36. 34 C.F.R. pt. 300.517 (a)(1)(i).
37. *Id.* at 300.517 (a)(1)(ii).
38. 34 C.F.R. pt. 300.518.
39. www.copaa.org.

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New York's Aging Population—A Growing Impact on the Need, Market, and Framework for Legal Assistance

By Vera Prosper

New York's 3.7 million older adults (aged 60 and older) are among three populations that are the focus of the state's Legal Services Initiative. The Initiative's aim is to address gaps in the availability, affordability, and accessibility of legal assistance in civil matters.

The state's mounting number of older adults has largely gained attention in the provision of health and long-term care. However, for both the legal community and policymakers, the impact of aging demographics strongly underscores the expanding need for trained, expert legal assistance for this growing population.

Several important change-drivers are transforming the characteristics of New York's communities and setting the stage to re-shape law school curricula and training, court room environments, the practice framework for legal-service professionals, and the role of legal assistance in residents' lives:

- The aging of the "baby boomers" and several "baby boomlets,"[1,2] as well as increasing longevity among all population groups (including those with frailties, chronic illness, and disabilities), will continue a significant growth in the older adult population throughout this century.
- The characteristics defining the older population have changed, including their increased participation in the work force and in educational pursuits; their significantly greater cultural and ethnic diversity; their increasing classification by a variety of non-traditional household types, including growing responsibility for their grandchildren and aging adult children with disabilities; and their greater acceptance and use of technology in conducting their daily lives.
- Public policies have shifted the delivery of health and long-term care from institutional facilities to in-home and community-based services, resulting in the greater majority of individuals living most or all of their lives in conventional housing, regardless of age or ability, and often alone.
- The over two million informal caregivers (family and friends), who currently provide the majority of all types of assistance and care for the state's older residents, will increase in tandem with the aging population. As older individuals live into very old age in conventional homes, the responsibilities of caregivers grow in number, type, and complexity.

The impact of these four trends can be viewed as two sides of the same coin: (1) for New York's older adults and their caregivers, the trends foretell an expanding need for both basic and more sophisticated legal assistance to resolve increasing challenges of daily life; and (2) for the legal community, the trends represent a growing *market* for legal assistance—both in the numbers and variety of clients and in the diversity and complexity of issues presented.

New York State Legal Services Initiative

http://www.aging.ny.gov/livableny/Legal Services/index.cfm

Initiative's Focus

- Civil legal matters
- Older adults (aged 60 & older)
- People of all ages with all types of disabilities
- Caregivers of these two groups

Initiative's Goal

Advance "equal access to justice" for the three population groups.

Initiative's Partnership

- NY State Office for the Aging
- NY State Office of Court Administration
- NY State Bar Association
- NY State Office for People With Developmental Disabilities
- Facilitation assistance by Robert (Bob) Abrams, Esq.
- Consultation assistance by a 100-member Think Group

NY State has the 4th largest number of individuals aged 60 and older in the U.S.[3]

Demographics of Aging Population Projections: NY State*Number of Older Adults

Age Group	2010	2025	2040
Aged 60–74	2,426,862	3,143,802	2,704,445
Aged 75–84	866,467	1,078,124	1,320,294
Aged 85 & Older	390,874	389,062	543,452
Aged 60 & Older	3.7M	4.61M	4.57M

*Program on Applied Demographics (September 8, 2011), New York State Projections Data by County. Ithaca, NY: Cornell University. http://pad.human.cornell.edu/counties/projections.cfm

Reflecting these impacts, the impetus for the Legal Services Initiative's activities stems from ongoing comments that limitations and gaps exist in the ability of many residents to readily find and effectively use affordable legal assistance. The Initiative's study project[4] (six statewide surveys) and the work of the Initiative's consultative 100-member Think Group describe the status of legal assistance in the state, highlighting aspects that have a strong effect on access to legal assistance by the Initia-

tive's three population groups. This article focuses on findings related to various facets of accessibility for older adults.

Access to and use of legal assistance: The Initiative's "Statewide Survey of Residents Aged 18 and Older" showed that, within a three- to five-year period, 51%[5] of New York's general adult population experienced one or more issues that "required more than ordinary action and was serious enough that they needed or wished they had professional assistance." Among the older adult population, 44%[6] felt that need (45% of those aged 18-24 and 57% of those aged 25-59). Among the 44% of older respondents, between 47%-67%[7] across the survey's five issue categories[8] used legal assistance to help resolve serious issues (between 32%-61% of respondents aged 18-59 used legal assistance).

Causes of limited or complete lack of accessibility are many, including: lack of transportation; mobility problems, due to disabilities, frailties, home-bound; lack of available legal services within a reasonable travel distance, or lack of nearby attorneys who have expertise in the consumer's problem area; language or other communication issues inhibiting effective communication; the consumer's educational, mental health, or cognitive limitations; the inability of many members of the legal and judiciary communities to interact effectively with the consumer because they lack an understanding of the traits, characteristics, norms, and circumstances of elderly, frail, or impaired consumers; and other reasons.

However, as became apparent through the Initiative's study, as well as the Think Group's discussions, several additional factors strongly influence the extent to which consumers access legal services. For respondents of all ages in the "Survey of Residents Aged 18 and Older" (24% are aged 60 and older), their primary reasons for not using legal assistance were:[9]

- They are not knowledgeable or aware of their legal rights.
- They do not think the presenting problem is a legal issue—they are not aware that a legal framework underlies many problems and issues they encounter and, thus, do not even consider seeking legal guidance for unresolved situations.
- They do not know where or how to find legal help.
- They cannot, or fear that they cannot, afford legal help.
- For a variety of reasons, they believe they can handle problems themselves…or they *choose* to handle them themselves or represent themselves in court; for example, they do not trust the legal community; they have had a negative experience with a legal service provider in the past; they do not realize they have insufficient knowledge of the legal aspects of an issue; they do not realize that they have insufficient understanding of courtroom procedures, the legal process, how to present testimony, how to defend their position, etc.; they believe the judge has discretion to provide whatever help they need in the courtroom; or they are convinced they can do a better job than the legal service provider.

The Initiative's "Survey of Attorneys Staffing the New York State Mental Hygiene Legal Service" (MHLS)—23% of whose clients are aged 60 and older—showed similar reasons why New Yorkers do not use the MHLS program,[10] and comparable reasons why MHLS-eligible individuals and their families do not use alternative community-based legal assistance.[11] Respondents in the Initiative's "Survey of Judges and Justices in New York State's Unified Court System" reported similar reasons why civil litigants appear in court or hearing proceedings without the benefit of legal counsel (*pro se*).[12] The judges and justices also reported a substantial number of adverse and negative impacts on both the quality of judicial proceedings involving *pro se* litigants and the outcomes of those cases.[13]

To address the many accessibility issues, the Legal Services Initiative's partners, together with members of the Think Group, law schools, the legal and judiciary communities, and many interested community aging, disability, and caregiver organizations, will draw upon the *Blueprint for Action*[14] developed by the Think Group to implement a variety of strategies, actions, and training activities.

Client-oriented versus topic-oriented legal practice: Anecdotal comments from various sources, including members of the legal community, suggest that the topic-oriented practice area of "elder law" (concentrating on wills, advance directives, health care proxies, powers of attorney, guardianship, and estate planning) does not reflect the reality of issues faced by older adults and does not adequately reveal the extent to which, among the overall legal field, improvement is needed in communication and interaction between older adult clients and the general legal profession. The Initiative's various studies[15] show that the challenges and serious issues facing older adults are many and extremely diverse, including:

- Retirement and estate planning.
- Debt issues, including credit cards, bill collectors, bankruptcy.
- Consumer contracts, small claims, and consumer protection.
- Family issues, including divorce, marriage, permanency planning, foster care, custody, adoption, visitation rights, spousal and child support, paternity, orders of protection, name change, family offenses and disputes, child's finances and debts, and others.

- Public benefits.
- Housing (rental and homeownership), including landlord/tenant issues, eviction, foreclosure, discrimination, harassment, fees/charges, housing conditions, utilities, mortgages, liens, purchase/sales, zoning, repairmen, deed adjustments, property transfers, trouble with neighbors, safety, co-op conversions, and others.
- Long-term care, including issues related to all types of in-home services and care, adult homes, assisted living, nursing homes, caregiving issues.
- Guardianships, diminished mental capacity.
- Insurance and taxes, including health, life, long-term care, income, business, property, and other types of insurance, taxes, and fees.
- Abuse and neglect, including financial, mental, emotional, and physical.
- Fraud and scams, including public benefits, contractors, identity theft, home repair, telephone/mail/computer scams, and others.
- Employment issues, including pensions, wages, benefits, discrimination, harassment.
- Business ownership issues, including sale of business, breach of fiduciary duty, business succession, business theft.
- Immigration issues.
- Traffic tickets, arrests, criminal activity, personal injury.

In addition, study findings[16] show that members of the legal and judicial communities are not sufficiently knowledgeable about the traits and characteristics of older people, the aging process, and caregiving. Eighty-six per cent of respondents in the survey of practicing attorneys reported receiving "no training" in law school about the aging process or older adults, and 91% received "no training" regarding Alzheimer's Disease or other dementia; 54% reported that, during their entire legal career, they engaged in "no" professional learning activities related to older adults, and 67% engaged in none related to Alzheimer's Disease or dementia. In the survey of judges and justices, the opinion of respondents is that 75% of judges and 81% of non-judicial attorneys are less than "very knowledgeable" about older adults, and that 87% of judges and 89% of non-judicial attorneys are less than "very knowledgeable" about the caregivers of people who are frail, impaired, incapacitated, or elderly.

In response to these findings—and in light of the state's demographic and policy trends—the Legal Services Initiative will:

- Launch discussions with the state's law schools and members of the legal and judiciary communities to develop strategies for transforming how consumers, law students, and legal professionals think about the provision of legal assistance to older adults and their caregivers—evolving from "function-based" (focusing on several specific items or topics) to "client-based" (focusing on effectively understanding and serving an older adult client group, regardless of the problem presented or the professional's area of practice).
- Promote training activities for members of the legal and judicial communities on the traits, characteristics, norms, values, situations, and circumstances of older adults and caregivers.

Aging network's Legal Assistance Program (LAP): Across the Initiative's six study surveys, "affordability" rose as an issue affecting the availability and accessibility of legal assistance. A number of organizations, programs, and individuals across the state provide *pro bono*, free, discounted, and other types of affordable legal assistance; nevertheless, a demand for low-cost and no-cost legal help continues, as many of these programs and individuals cannot, for various reasons, meet all requests for assistance. The Legal Services Initiative surveyed the administrators of the Legal Assistance Program, a statewide aging services program providing legal assistance for older adults, targeting those with greatest economic and/or social need.

In the U.S., services and programs for people aged 60 and older are provided through a three-tiered structure, which includes the Administration on Aging in the Department of Health and Human Services at the federal level, a state unit on aging in each state, and a local network of approximately 620 area agencies on aging (AAA) across the country that coordinate the delivery of services to older adults. Such services include meals, transportation, in-home support and care, caregiver programs, counseling, advocacy, and others. The Older Americans Act (OAA) is the federal enabling legislation that established the three-tiered structure and authorizes the expenditure of federal funds for aging programs.

Among the services provided by AAAs to individuals aged 60 and older, three are mandated by the Older Americans Act. One mandated service is the provision of legal assistance in civil matters, as well as the designation of a Legal Assistance Developer in each state. In New York, 59 county-based AAAs each administer a Legal Assistance Program, and each contracts with various types of community-based legal assistance Providers to deliver the Program's services. Contracted Providers include sole proprietor attorneys, law firms, Legal Aid Society, and community-based service organizations.

The Legal Assistance Program is predominantly supported with federal funds under Title III-B of the OAA,[17] and 26 AAAs in New York supplement the program with county government funds.[18] The state's total LAP program is modest, with a total program budget for the 12-month survey period of $4.47M.[19] Across the state, the program varies greatly in size, with a median program budget of $13,556 among the 59 AAAs. Legal service Providers contract with the AAAs at negotiated rates, and cost per unit of service varies widely, with some of the highest rates in rural areas of the state.[20]

Reflecting the state's growing numbers of older adults and caregivers, 42%[21] of AAAs reported that LAP's Title III-B funds were exhausted prior to the end of the program year and 35%[22] reported that LAP's county government funds were exhausted.

AAAs and their contracted Providers collaborate effectively to provide the program, sharing program tasks[23] and developing strategies for stretching program resources. While some Providers stop delivering services when program resources are exhausted, others use a variety of means to supplement and extend the program throughout the program year, including modifying the type and amount of legal help provided to each client (for example, not providing costly client representation in court); pacing the number of requests per month throughout the program year; moving non-emergency requests to the following contract year; re-allocating funds from the AAA's or the Provider's other programs to supplement LAP; using AAA staff for tasks that do not require an attorney; and searching for additional supplemental funds. In addition, when program funds are exhausted, some Providers will continue services on a *pro bono* basis, and some solicit *pro bono* services from their legal colleagues in the community.

Initiative's next steps: In 2015, the Initiative's Partnership will join with members of the Initiative's Think Group and interested individuals and organizations to begin implementing strategies, activities, and steps outlined in the Think Group's *Blueprint for Action: Strategies for Achieving the Legal Services Initiative's Goals.* The public can follow the progress of these activities on the Legal Services Initiative web site.

Endnotes

1. Sharon Jayson, with contributions by Anthony DeBarros, *Is This the Next Baby Boom*, including *Live U.S. Births By Year* providing annual live births in the U.S. from 1909-2006 from the National Center for Health Statistics, USA Today, (Updated July 17, 2008), available at http://usatoday30.usatoday.com/news/nation/2008-07-16-baby-boomlet_N.htm.
2. Centers for Disease Control and Prevention, U.S. Department of Health and Human Services, *National Vital Statistics Reports*, Volumes 58–63 (2007–2013). During the Baby Boom years (1946-1964), live births in the U.S. topped 4M annually for the first time, peaking at 4.3M in 1957. From 1989-1993, U.S. live births were again over 4M annually, and again surpassed 4M annually from 2000–2009, peaking at 4.3M in 2007. Live births in the U.S. began declining below 4M in 2010.
3. American FactFinder, U.S. Census Bureau, *Population 60 Years and Over in the U.S. 2009-2013* Table S0102, American Community Survey 5-Year Estimates, (Retrieved Feb. 15, 2015).
4. Vera Prosper, *Report of Findings: Six Statewide Surveys*, (2014) available at http://www.aging.ny.gov/livableny/LegalServices/. The six groups surveyed include: New York residents aged 18 and older, attorneys practicing in New York State, Area Agency on Aging directors—regarding the aging network's Legal Assistance Program, legal services providers—regarding the aging network's Legal Assistance Program, attorneys staffing the New York State Mental Hygiene Legal Service, and judges and justices in New York State's Unified Court System.
5. *Id*. at 35 Chart 17.
6. *Id*. at 37 Chart 19a. The Initiative's "Survey of Residents Aged 18 and Older" is a telephone survey conducted by the Siena College Research Institute. The 44% is likely a conservative finding as a telephone survey does not include older persons who cannot adequately participate in a telephone interview; for example, those: with cognitive impairments, are too ill, with no access to a private telephone (financial reasons, in hospitals or other facilities, are homeless or in homeless shelters, in prison, etc.), with hearing loss, have language or other communication issues, use only cell phones with out-of-state area codes, or other reasons.
7. *Id*. at 51 Chart 34.
8. The five issue categories for the "Survey of Residents Aged 18 and Older" are: Housing, Family Interactions/Relations, Money, Life Planning, and Dealing with Others.
9. *Supra* at 64, *Report of Findings: Six Statewide Surveys* Chart 52.
10. *Id*. at 200 Table 10.
11. *Id*. at 202 Table 11.
12. *Id*. at 244 Table 9.
13. *Id*. at 248 Table 11.
14. Vera Prosper, *Blueprint for Action: Strategies for Achieving the Legal Services Initiative's Goals*, (2015) available at http://www.aging.ny.gov/livableny/LegalServices/.
15. *Supra Report of Findings: Six Statewide Surveys*, at 91 Table 8, at 124 Table 14, at 170 Table 22, at 246 Table 10.
16. *Id*. at 96 Tables 15 and 16, at 258 Table 16.
17. *Id*. at 114 Chart 1.
18. *Id*. at 116 Chart 2.
19. *Id*. at 118 Table 6.
20. *Id*. at 119 Table 7.
21. *Id*. at 131 Chart 13.
22. *Id*. at 131 Chart 14.
23. *Id*. at 155 Table 8.

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Cruise Ship Accidents: What Are the Rights of the Passenger? An Update

By John H. (Jack) Hickey

Last year, I wrote an article for the Senior Lawyer entitled "Cruise Ship Accidents: What Are the Rights of the Passenger?" This is a brief supplement to that article. This supplement will discuss some of the case law which has been decided in the last 1½ years.

The original article discussed the basic foundation of the cruise lines' duties to its passengers under the general maritime law, the venue selection clause in the ticket, and the one year statute of limitations in each passenger ticket. This supplement is limited to recent cases in the areas of (a) medical malpractice on cruise ships; (b) slip and falls on cruise ships; (c) personal jurisdiction and venue issues in cases against excursion operators; and (d) the Death on the High Seas Act.

MEDICAL MALPRACTICE ON BOARD CRUISE SHIPS; IT'S A WHOLE NEW WORLD OUT THERE. Last year's article described the confusing state of the law in the Southern District of Florida, where most cruise line cases have to be filed, and elsewhere. The case from 1988 followed by many courts held that a cruise line cannot be vicariously liable for the medical malpractice of its physicians on board. That case, *Barbetta v. S/S Bermuda*, 848 F.2d 1364 (5th Cir. 1988), effectively has been overruled at least in the 11th Circuit by *Franza v. Royal Caribbean Cruises Ltd.*, 772 F.3d 1225 (11th Cir. 2014).

In *Barbetta*, the Court said that a ship owner could not be held liable under *respondeat superior* for the negligence of its shipboard doctor. The Court based that conclusion on the belief that the cruise line was not in the business of providing medical care, but provided a doctor merely for the convenience of the passenger.[1] And *Barbetta* is based on the belief that the cruise passenger has alternatives when selecting a medical provider on board the ship.

The 11th Circuit in *Franza* made clear that the cruise lines can be vicariously liable for the negligence of their medical doctors and personnel. The 11th Circuit in *Franza* reversed the dismissal of a complaint which pled medical negligence against the cruise line under two theories: actual agency (also called *respondeat superior*) and apparent agency. The 11th Circuit now says that both of these causes of action are viable for the medical negligence of the shipboard doctor.

The *Franza* opinion describes the basis of the court's ability to mold the general maritime law and the basis for vicarious liability in general. According to *Franza:* "Federal admiralty jurisdiction flows from the Constitution itself, see U.S. Const. Amend. III, Section 2 ("The judicial power shall extend… to all cases of admiralty and maritime jurisdiction…"), "With admiralty jurisdiction comes the application of substantive admiralty law."[2] *Franza*, 772 F.3d at 1231. The opinion reviews a series of United States Supreme Court cases which demonstrate that the federal courts have adopted new theories of tort liability in maritime law, introduced new causes of action in maritime law, and promulgated new remedial rules in maritime law such as adopting the proportionate fault rule for calculation of non-settling maritime tort defendants' compensatory liability.[3] The Court in *Franza* also reviewed cases in which the 11th Circuit has "regularly permitted passengers to invoke *respondeat superior* in maritime negligence suits."[4]

AGENCY. *Franza* reviewed the three requirements for an agency relationship. Those requirements are "(1) the principal to acknowledge that the agent will act for it"; (2) the agent to manifest an acceptance of the undertaking; and (3) control by the principal over the actions of the agent."[5]

Any lawyer interviewing a prospective client about such a claim should inquire about which cruise line medical personnel provided care, whether that person is a physician or a nurse, and the similarities between the uniform of that personnel and the other personnel on board the ship. Specifically, did the medical personnel uniform bear the logo and name of the cruise line and otherwise appear to be an officer of the ship?

In *Franza*, the court cited to the following considerations which are "probative of control in the maritime context: "(1) direct evidence of the principle's right to actual exercise of control; (2) the method of payment for an agency's services, whether by time or by the job; (3) whether or not the equipment necessary to perform the work is furnished by the principal; and (4) whether the principal had the right to fire the agent."[6] The specific allegations in the *Franza* complaint were that the medical personnel on board the ship were employed by the cruise line, were hired to work in a facility which the cruise line "owned and operated," the medical personnel were paid directly by the cruise line, the medical personnel were considered to be members of the ship's crew, the cruise line required its medical personnel to wear uniforms furnished by the cruise line, and the ship's physician and

nurse were under the command of the ship's superior officers.

As a practical matter, cruise ship medical personnel not only are under the command of the master of the vessel but also of the cruise lines' medical department and onshore physicians who are on call to the ships' medical staff. Further, the Textbook of Maritime Medicine, found online at textbook.ncmm.no in section 9.5 under the heading of "Some Special Conditions/Special Considerations" written by, among others, a Royal Caribbean Cruises shipboard physician provides:

> Before the doctor recommends a helicopter evacuation or a deviation of the ship's normal itinerary for purposes of medical evacuations of ill or injured passengers or crew, he is advised to first consult with the company's medical department ashore.

The cruise line in *Franza* argued, as they always do, that "the physicians on board are independent contractors." The 11th Circuit was not fazed by the label of independent contractor in the passenger contract ticket, however. Status of these personnel as independent contractor or employee of course depends upon the circumstances and the actual dealings of the parties.[7]

The 5th Circuit in the *Barbetta* case based its opinion, at least in part, on concepts from 19th century steamships.[8] The 11th Circuit in *Franza* said: "We now confront state-of-the-art cruise ships that house thousands of people and operate as floating cities, complete with well-stocked modern infirmaries and urgent care centers. In place of truly independent doctors and nurses, we must now acknowledge that medical professionals routinely work for corporate masters."[9]

The opinion addresses the argument that vicarious liability cannot attach to the doctor-patient relationship by its very nature. The 11th Circuit reviewed opinions which stand for the proposition that "wholesale immunity [of employers of medical professionals] has never been the rule."[10] The Court reviewed opinions which allow for vicarious liability for the errors of professionals such as airline pilots, locomotive engineers, and chemists.[11] And, given the current state of the healthcare industry, "as the Florida Supreme Court has remarked, the thought of visiting a private and independent office of a totally independent physician may now be one more of history and cultural conditioning than current reality."[12] *Franza* also reviews decisions from all across the country for vicarious liability for the negligence of corporate medical providers.[13]

The other basis of *Barbetta* was that the doctor-patient relationship is "under the control of the passengers themselves."[14] However, as I said last year in my article "nothing could be further from the truth." In fact, the cruise passenger "may have literally nowhere else to go."[15] And "afflicted persons may reasonably be reluctant to seek treatment from an unknown doctor or medical facility in a foreign land."[16]

The 11th Circuit in *Franza* also reviewed the advantages to the carrier providing "medical infrastructure and hiring skilled medical employees." The *Franza* Court recognized that cruise ships avoid the potentially high cost of providing reasonable care in more expensive ways such as changing course for the benefit of the ailing passenger.[17] And, the cruise ship infirmary, which charges for its services, can be a profit center for the cruise line.[18]

APPARENT AGENCY. The plaintiff in *Franza* alleged that the cruise line represented the medical staff as being employees of the cruise line through brochures, internet advertising, and on board the vessel; the cruise line publicly described the medical centers in proprietary language, "the cruise line billed passengers directly for onboard medical services, the cruise line required its doctors and nurses to wear uniforms bearing the cruise line's name and logo, and the cruise line held out the Dr. and nurse as 'members of the ship's crew'" not only to passengers but also to immigration authorities. Also, the cruise line introduced the doctor to the ship's passengers as one of the ship's Officers.[19]

STANDARD OF CARE. The 11th Circuit in *Franza* referred to the often cited Standard of Care under the General Maritime Law as "ordinary reasonable care under the circumstances."[20] The Court said: "Implicit in this variable standard is the notion the cruise lines not always be held to the same standard of care that will guide treatment on shore." Interestingly, the 11th Circuit defined standard of care in medical malpractice actions in light of all relevant surrounding circumstances."[21]

The surrounding circumstances on board cruise ships is that most of the passengers are from the United States and are accustomed to medical care at the level found in the United States. The cruise lines market principally within the United States for these passengers. The cruise lines are taking these passengers, some of whom are older or infirm, to the waters of third world countries on board a ship, a confined, isolated environment. Taking these circumstances into account, the standard of medical care on board cruise ships should be somewhat elevated.

SLIP AND FALLS/TRIP AND FALLS ON BOARD CRUISE SHIPS. Slip and falls and trip and falls are the most common accidents on cruise ships. Generally, these accidents are caused either by a transitory foreign substance like water or caused by a fixed object like a broken stair step or a collapsing chair. In every such case, the cruise lines raise the somewhat inconsistent defenses of "open and obvious," that is, that the condition was open and obvious to the passenger and "lack of notice" that is that the cruise line did not have notice of the dangerous condition. The Plaintiff must show that the cruise line had

notice, actual or constructive, of the dangerous condition or that notice was not required because, for example, the cruise line created the dangerous condition.[22]

Most of the cruise line slip and fall cases decided in the last year involve issues of either the defenses of lack of notice or the defense of open and obvious. In *Long v. Celebrity Cruises, Inc.*, the Court denied summary judgment in a case where the passenger tripped and fell on the step with a broken flashing and light. The first defense was that there was no dangerous condition. The Court held that the fact that the nosing of the step had pieces of the plastic light strip protruding out of it was in and of itself evidence of a dangerous condition.[23] The Plaintiff's expert provided an opinion that the attempted repair fell below the minimum safety standards and created a tripping hazard. This is a prototypical case where the cruise line creates the dangerous condition and then pleads that it had no notice that the dangerous condition existed.

The Court in *Long* observed that the Plaintiff in maritime law is not required to prove notice if the cruise line created the dangerous condition, and cited to numerous cases in support. The Court denied summary judgment.[24]

In *Bonilla v. Seven Seas Cruises*, the passenger tripped on a 3-inch raised metal threshold and fell. The defendant moved for summary judgment and argued that the Plaintiff cannot prove that the Defendant had notice of a dangerous condition where there were no prior accidents at that location. The Defendant also argued that the fixture was open and obvious. Further, the Defendant argued that the Plaintiff did not produce an expert who could testify that the threshold was unreasonably dangerous.

The Court held that a 3-inch metal threshold was small enough not to be open and obvious but large enough to be dangerous.[25] The fact that the cruise line operated the ship since 2008 with that same raised metal threshold was evidence in and of itself that a Jury could find that Defendant had actual or constructive knowledge of the dangerous condition.[26]

In *Merideth v. Carnival Corporation*, a passenger slipped and fell in condensation or some other liquid on the floor. The Court held that the presence of warning cones, among other things, provides evidence of notice of the dangerous condition. This is yet another in a long line of cases which hold that the warning sign itself provides evidence that the defendant had notice.[27] *Cohen v. Carnival Corp.*, 945 F. Supp. 1351, 1355 (S. D. Fla. 2013) (finding a lack of warning sign or cone to be critical of the issue of notice); see also *Harnesk v. Carnival Cruise Lines Inc.*, 1990 1WL329584, at 3 (S. D. Fla. December 27, 1991) (noting that defendant had actual notice of the dangerous condition when it installed the "watch your step" signs);[28] *Mabrey v. Carnival Cruise Lines, Inc.*, 438 So. 2d 937, 938 (Fla. 3d DCA 1983) (noting that "defendant did have knowledge that the deck was dangerous, since it had posted at the entrance to the deck a sign warning "slippery when wet").

In holding that condensation on an interior floor is not necessarily open and obvious, the Court in *Meredith v. Carnival Corporation* cited the case of *Magazine v. Royal Caribbean Cruises, Ltd*, 2014 W. WL1274130, at 6 (S. D. Fla. March 27, 2014) for the proposition that "an anomalous condition in otherwise safe areas, such as a slippery substance on a walkway, generally are not open and obvious." This is to be contrasted with the case of *Frasca v. NCL (Bahamas) Ltd.*, where the court found the fact that it was rainy or misty outside provided adequate warning that the exterior deck would be wet and slick because it is obvious to the reasonable person.[29]

Finally, the Southern District of Florida denied the cruise lines' motion for summary judgment in a case where the Plaintiff alleged inadequate crowd control. In *Lancaster v. Carnival Corporation*, the Plaintiff tripped and fell over a piece of luggage in a crowded hallway.[30] The Court in L*ancaster* recognized the duty of the defendant "not to unreasonably create or allow a crowd to form in the corridor such that the crowding causes injuries to passengers. This duty is discharged not by warnings, but rather by implementing and exercising the due level of debarking safety procedures intended to prevent crowding. This would include an adequate level of: signage; safety videos; debarking videos, announcements, and instructions; defendants own debarking protocols; and debarking crowd—management personnel." In *Lancaster*, the plaintiff established through testimony that: (1) no crowd control personnel were stationed in the hallway; (2) if crowd control personnel had been present in the hallway they would have dispersed the crowd; and (3) the defendant could have had crowd control personnel in the hallway.

EXCURSION ACCIDENTS; PERSONAL JURISDICTION OVER THE EXCURSION OPERATOR. One of the issues in any accident which occurs on a cruise excursion is whether to bring suit against the excursion operator in the United States. In the usual case, the cruise passenger brings suit against the cruise line in the forum required in the cruise line ticket. The question is whether the Plaintiff can obtain personal jurisdiction over the excursion operator. Typically, the excursion operator is based in the Caribbean or in a country other than the United States. In the recent United States Supreme Court decision in *Daimler AG v. Bauman* the court overruled and reversed a 9th Circuit opinion which allowed personal jurisdiction to exist against *Daimler AG*, a publicly held company headquartered in Stuttgart, Germany.[31] The United States Supreme Court characterizes the case as one which "concerns the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States."[32] This case is based on allegations that Daimler's Argentinian

subsidiary, Mercedes-Benz Argentina, collaborated with state security forces to kidnap, detain, torture, and kill certain Mercedes-Benz Argentina workers including persons closely related to the plaintiffs. This occurred in Argentina during Argentina's 1976–1983 "dirty war." The Court in *Daimler v. Bauman* analyzed the seminal case on personal jurisdiction, *International Shoe Co. v. Washington*.[33] The Court in *International Shoe* described two categories of personal jurisdiction: general and specific. General jurisdiction is where the "continuous corporate operations within the state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."[34] Specific jurisdiction, however, is where the suit arises out of or relates to the defendant's contacts within the forum.

Even though subsequent cases involving excursions and foreign resorts have cited to *Daimler v. Bauman*, the *Daimler* case is limited. In *Daimler*, the court observed that "plaintiffs have never attempted to fit this case into the *specific* jurisdiction category. Nor did plaintiffs challenge on appeal the District Court's holding that Daimler's own contacts with California were, by themselves, too sporadic to justify the exercise of general jurisdiction." Apparently, the plaintiffs in *Daimler* sought to impute Mercedes-Benz USA's California contacts to Daimler on an agency theory.

Some courts have interpreted Daimler as changing the formula somewhat for personal jurisdiction. In *Barriere v. Cap Juluca Leading Hotels of the World, Ltd.* the plaintiff slipped and fell on wet tiles as she was descending a stairway to the beach in the defendant's resort in Anguilla.[35] The Court in *Barriere* said that there is a two-step analysis for personal jurisdiction. First, the court must determine whether the exercise of personal jurisdiction is appropriate under Florida's long arm statute and second whether personal jurisdiction over the defendant violates the due process clause of the 14th Amendment. The Court said that prior to *Daimler*, the defendant would have been subject to general jurisdiction in the forum. The Court in *Barriere* said that allegations that the defendant maintained a sales office in Florida, that defendant's assets are managed by its Florida-based agent, that the Defendant utilized the reservation system of another entity which was also a Defendant and which did not contest jurisdiction in Florida, that the other Defendant provided standards to maintain association with the Defendant parent and regularly inspected its properties that is the properties of the defendant was sufficient to find that the defendant had minimum contacts with Florida to be considered "at home." The Court said "a contrary result would effectively permit foreign corporations to freely solicit and accept business from Americans in the United States and at the same time be completely shielded from any liability in U.S. Courts from any injury that may arise as a result."[36]

In another case arising out of the Southern District of Florida, *Aronson v. Celebrity Cruises Inc.*, 2014 U.S. DIST. Lexis 98071 (S.D. Fla 2014), the Court granted in part Defendant's motion to dismiss for lack of personal jurisdiction. In *Aronson*, the plaintiff cruise passenger sustained a fall from a rope bridge in Dominica while on a shore excursion arranged for passengers traveling on a Celebrity cruise ship. The Court observed that "where the plaintiff and defendant have submitted conflicting evidence, the court must construe all reasonable inferences in favor of the plaintiff."[37] For specific jurisdiction, the plaintiff failed to show any facts that the excursion operator is a business operating in Florida or that it has an office or agency in Florida as required by the Florida long-arm jurisdictional statute § 48.193 (1). But the Plaintiff in *Aronson* did not show under *Daimler v. Bauman* that the activities were so continuous and systematic as to render the defendant essentially at home in the forum state.

Finally, in August 2014, the Southern District of Florida decided *Twinstar Partners, LLC v. Diamond Aircraft Industries Inc.*[38] This case granted "defendant Diamond Aircraft Industries GMbH motion to dismiss. In *Twinstar Partners*, the plaintiff brought an action in the Southern District of Florida for the loss of warranties on turboprop engines of aircraft which were manufactured in Germany (by a company which went bankrupt in Germany). The Court held that the activities of a subsidiary of a corporation do not establish that the principal parent Corporation had affiliations with the state which were so continuous and systematic as to render them essentially at home in the forum state.

DEATH ON THE HIGH SEAS ACT (DOHSA). Congress passed DOHSA in 1920 to fill the void of the absence of any federal remedy for death on the high seas and to effect uniformity in the maritime law across state jurisdictions. See, e.g., *Moragne v. States Marine Lines, Inc.*, 398 U.S. at 398, 401. DOHSA, 46 U.S.C. § 30302 provides:

> When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond three nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.

Section 30303 makes clear that the recovery is limited to "pecuniary" damages. That section provides:

> The recovery in an action under this chapter shall be a fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action has brought. The court shall apportion

the recovery among those individuals in proportion to the loss each has sustained.

CAUSES OF ACTION UNDER DOHSA OF NON-DECEDENTS JOINED WITH ACTIONS BY SURVIVORS OF DECEDENTS. Any one catastrophe can give rise to a death as well as non- fatal injuries. The maritime law allows joinder in one action of causes of action for non- fatal injuries along with an action for wrongful death. DOHSA, according to the Supreme Court "did not address the availability of other causes of action." *Dooley v. Korean Air Lines Company, Ltd.*, 524 U.S. 116, 122-23 (1998) as cited in *Smith v. Carnival Corporation*, 584 F.Supp.2d 1343 (S.D. Fla. 2008).

The Southern District of Florida has held that an action for negligent infliction of emotional distress was not precluded by DOHSA. In *Smith v. Carnival Corporation*, 584 F.Supp.2d 1343 (S.D. Fla. 2008), the Court was faced with a Second Amended Complaint which stated that the daughters of the decedent "were present at the drowning of their mother and saw their mother die as a direct and proximate result of the [conduct] of [the cruise line] and [the excursion operator] as described herein." 584 F.Supp.2d at 1349. This was the claim not of the decedent's estate because of the death itself but for the others who witnessed the death. However, in determining whether the plaintiff stated a cause of action, the court held that "admiralty law allows recovery only for those passing the zone of danger test." *Smith*, 584 F.Supp.2d at 1349. After discussing the zone of danger test, the court dismissed the second amended complaint for negligent infliction of emotional distress under U.S. general maritime law because the plaintiffs had "not alleged any facts indicating that [the decedent's] daughters were in the zone of danger." *Smith*, 584 F.Supp.2d at 1350.

The Southern District of Florida reached a somewhat different result in regard to a claim for intentional infliction of emotional distress after a death on the high seas. In *Markham v. Carnival Corporation*, case number 1:12-CV-23270-CMA (S.D. Fla. Order dated December 3, 2012), the Court held that plaintiffs may state an intentional infliction of emotional distress claim in the maritime context citing *McAllister v. Royal Caribbean Cruises, Ltd.*, No. Civ. A. 02-CV-2393, 2003 WL 23192102, at 4 (E.D. Pa. September 30, 2003); and *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 841 (9th Cir. 2002). The Court in *Markham* relied on Florida law to determine whether the allegations of the intentional infliction of emotional distress claim were sufficient. See, *Garcia v. Carnival Corporation*, 838 F.Supp.2d 1334, 1339 (S.D. Fla. 2012). In *Markham*, the plaintiff alleged that the cruise line allowed unlimited amount of liquor on one of its excursions to Cozumel, Mexico. A cruise line passenger, apparently inebriated, came back to the ship, fell over the railing of the ship, and hit the surface of the ocean and died on impact. To make matters much worse, the cruise made "no immediate response despite the fact that this incident occurred in daylight and the ship was directly off of Cozumel, Mexico in relatively calm seas." Then, in another aggravation of the situation, a cruise line representative contacted the decedent's mother and told her that the decedent, her only son, had committed suicide. To make matters even worse, if that is possible, the cruise line "then caused the same misinformation to be disseminated to the local media."

The plaintiff in *Markham* brought a two count complaint, one for intentional infliction of emotional distress and another for negligence, and sought punitive damages. The Court in its order denying Defendant's motion to dismiss said that "Florida common law demands an 'extremely high standard' of outrageousness to sustain an IIED claim" but "Florida courts have nonetheless shown a particular solicitude for the emotional vulnerability of survivors regarding improper behavior toward the dead body of a loved one" citing *Williams v. City of Minneola*, 575 So.2d 683, 691 (Fla. 5th DCA 1991). The Southern District of Florida in *Markham* also declined to strike the claim for punitive damages. The Court held that even under DOHSA "punitive damages are available in those rare situations of intentional wrong doing" citing *In Re Amtrak Sunset Ltd. Train Crash In Bayou Canot, ALA. on September 22, 1993*, 121 F.3d 1421, 1429 (11th Cir. 1997).

In *Coriam v. Magical Cruise Company, Limited*, case number 6:14 – CV – 0398 – ACC – DAB in an order [DE 33] filed November 24, 2014, the Middle District of Florida held that Death on the High Seas Act does not preempt a claim which is based on independent, separable acts of the defendant who may also have caused the death. Here, a woman named Rebecca was a Seaman employed on the M/V Disney Wonder. Rebecca was found missing from her place of work on board the ship. The discovery was made at 9:00 a.m. The cruise company started searching for the seaman at about 10:30 a.m. The defendant announced that the crew member was missing at about 11:50 a.m. The defendant later reviewed the closed-circuit video and noticed that around 5:45 a.m. Rebecca was speaking with another crew member on the telephone and she appeared to be in a state of distress and turmoil. The defendant notified its shore-side office that Rebecca was missing at about 12:10 p.m. and made an announcement on board the ship at about 12:45 p.m. However, the defendant did not contact the United States Coast Guard or the Coast Guard of the waters in which the ship was sailing, Mexico, until about 1:20 p.m. and 1:50 p.m. that day. The defendant did not report the incident to the FBI until 4:00 p.m. The defendant did not contact the parents (plaintiffs) of the crew member until about 10:45 p.m.

The cruise line, according to the plaintiff in *Coriam*, failed to turn the vessel around and search the area where the missing crew member likely went overboard. The Plaintiff alleges that the defendants violated every emergency protocol and man overboard rule and regulation

in the maritime industry by continuing to sail on. The Plaintiffs, the family of the disappeared seaman, brought an action against the defendant for Jones Act negligence, unseaworthiness, DOHSA, fraudulent misrepresentation, intentional infliction of emotional distress, and spoliation of evidence.

The opinion in *Coriam* is also significant because the Court held that even though some of the line item allegations of negligence may very well not in and of themselves state a cause of action, other allegations do, citing *Caldwell v. Carnival Corporation*, 944 F. Supp.2d 1219, 1224 (S.D. Fla. 2013). In *Caldwell*, the Court said that "even though certain of the alleged breaches of Carnival's duty of reasonable care may not adequately state a negligence claim, the Court will not strike the alleged breaches in line-item fashion as Carnival requests."

Corium also held that DOHSA does not preclude a claim for unseaworthiness, citing James E Rooks, Jr., Recovery for Wrongful Death, Sec. 1:8 (4th Ed. 2014) and *Bodden v. American Offshore Inc.*, 681 F.2d 319, 333 (5th Cir. 1982). Certainly, DOHSA preempts state wrongful death remedies under *Dooley v. Korean Air Lines Co., Ltd.*, 524 U. S. 116, 124 (1998). However, a claim under DOHSA does not prevent a claim for fraudulent misrepresentation according to *Coriam* which cites to *Ostrowiecki v. Aggressor Fleet Ltd.*, No. CIV.A. 07 – 6598, 2008 WL 3874609, at *6 (E. D. La. Aug. 15, 2008) (finding that emotional distress claims asserted by representatives of the estate were not preempted by DOHSA). The Court in *Coriam* said:

> The causes of action barred by the Supreme Court in cases such as *Dooley* involve state law claims which "provide remedies for injuries flowing from the death itself," not claims that are independent from the decedent's death. *Ostrowiecki*, 2008 WL 3874609, at *6. Put simply, **DOHSA does not prevent a plaintiff from recovering for injuries suffered as result of independent, separable acts of a defendant, who may have also caused the death of the decedent.**

(Emphasis added). *Coriam*, __ F. Supp.2d __ 8. The Court in *Coriam* said that "the plaintiff's claim for fraudulent misrepresentation arises from conduct that is independent and separate from Rebecca's death." This is significant because DOHSA limits recovery to economic or pecuniary damages only.

Further, intentional infliction of emotional distress claims are not preempted by DOHSA. The Plaintiffs were not seeking recovery for the decedent's death but for the emotional distress that resulted from a separate and independent injury to the plaintiffs. *Coriam*, __ F. Supp.2d __ 9, Ostrowiecki, 2008 WL 3874609 at *1 and *Smith v. Carnival Corporation*, 584 F. Supp. 2d 1343, 1353 (S.D. Fla. 2008). **Therefore, these two causes of action, fraudulent misrepresentation and intentional infliction of emotional distress, are not preempted or governed by the damage limitations in DOHSA.**

CONCLUSION. The cruise lines, just as other enterprises, can now be held vicariously liable for the negligence of their medical staff. In actions for slip and falls which occur on board ships, the defenses of lack of notice and open and obvious can be defeated. The test for personal jurisdiction over excursion operators—and other foreign-based entities—has been clarified. And there are causes of action which allow non-economic damages in a death on the high seas.

Endnotes

1. *Barbetta v. S/S Bermuda*, 848 F.2d 1364.
2. *East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864, 106 S.Ct. 2295, 2298–99 (1986).
3. *Franza*, 772 F.3d at 1232.
4. *Franza*, 772 F.3d at 1234.
5. *Whetstone Candy Co. v. Kraft Foods, Inc.*, 351 F. 3d 1067, 1077 (11th Cir. 2003).
6. *Langfitt v. Fed. Marine Terminals, Inc.*, 647 F.3d 1116, 1121 (11th Cir. 2011).
7. These parties ___ Franza 772 F3d. 1225, citing *Cantor v. Cochran*, 184 So.2d 173, 174 (Fla. 1966).
8. In *Barbetta*, for example, the 5th Circuit cited *Opryland v. Coast Guard S. Us.* Code 28 NE. 266, 267 (Massachusetts 1891).
9. *Franza*, 772 F3d. at 1239.
10. *Franza*, 772 F3d. at 1240.
11. *Franza*, 772 F3d at 1240.
12. *Franza* 772 F3d 1225, citing *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 854 (Fla. 2003).
13. *Franza*, 772 F.3d at 1241.
14. *Barbetta*, 848 F.2d 1369 (quoting Brian, 28 and. E. At 267).
15. *Franza*, 772 F3d. at 1242, citing *Fairley v. Royal Cruise Line, Ltd.*, 1993 A.M.C. 1633 (S.D. Fla. 1993), 1990 3A. M. C. 1633, 1638 (S. D. FLA. 1993).
16. Franza, 772 F3d. at 1242.
17. Citing the Iroquois, 194 U.S. 240, 243 (1904) and yet this and i.e. TES, 188 F. Supp. at 221.
18. *Franza*, 772 F.3d at 1247.
19. See, *Franza*, 772 F.3d at 1252.
20. *Franza*, 772 F.3d at 1253.
21. § 766.102 Fla. Stat. (2013).
22. See, *Weiner v. Carnival Cruise Lines*, 2012 WL 5199604 (S.D. Fla. 2012).
23. *Long v. Celebrity Cruises, Inc.*, case number 12 – 22807 – CV – TORRES, __ F. Supp.3d __ (S.D. Fla 2013) (order on defendants motion for summary judgment, DE85 August 1, 2013).
24. *Bonilla v. Seven Seas Cruises S. DE R.L., LLC*, no 1:13 – CV – 23866 – 80 (S. D. Fla. 2013) (the order on motion for summary judgment DE 46 August 14, 2014).
25. See also, *Harnesk v. Carnival Cruise Lines Inc.*, 1991 WL 329584, at 4 (S. D. Fla., Dec. 17, 1991) (citing *Luby v. Carnival Cruise Lines Inc.*, 633F. Supp. 40, 41 (S.D. Fla. 1986).
26. *Bonilla*, __ F. Supp.3d __ 5.

27. *Meredith v. Carnival Corporation*, __ F. Supp.3d __, case number 1:13 – CV – 23931 – BB (order on defendants motion for summary judgment DE155, August 18, 2014).
28. *Mabrey v. Carnival Cruise Lines, Inc.*, 438 So. 2d 937, 938 (Fla. 3d DCA 1983).
29. *Fracsa v. NCL Ltd.*, 2014 WL1385806 (S. D. FLA. April 9, 2014).
30. *Lancaster v. Carnival Corporation*, __ F. Supp.2nd __, case number 1:14 – CV – 20332 – K M [DE101] Order on Defendants Motion for Summary Judgment, February 9, 2015).
31. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).
32. 134 S. Ct. 750.
33. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945).
34. 326 U.S. 318.
35. *Barriere v. Cap Juluca Leading Hotels of the World, Ltd.* case number 12 – 23510 – CIV – Moreno (order denying defendants motion to quash and motion to dismiss, February 19, 2014).
36. *Barriere*, __ F. Supp.2d __ 5.
37. Citing *Meier v. .Sun Int'l Hotels, Ltd.*, 288 F.3d 1264, 1271 (11th Cir. 2002).
38. *Twinstar Partners, LLC v. Diamond Aircraft Industries Inc.*, case number 11 – 61684 – CIV – Moreno (S.D. Fla. August 15, 2014).

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Defective Hip Implant Litigation Global Update

By Hadley L. Matarazzo

A lot has happened in the world of the defective hip litigation in the year since I wrote the last article on this topic. In my prior article, I focused on metal-on-metal hip implant Multidistrict Litigations.[1] Briefly, Multidistrict Litigation ("MDL") is created when a special federal legal procedure is used to centralize cases pending in federal district courts throughout the country involving one or more common questions of fact before one federal district court judge to handle all general pre-trial proceedings and discovery. As discussed below specific to New Jersey, a number of states have a similar centralization procedure. As of April 2014, there were five pending metal-on-metal hip implants MDLs based on manufacturer and model. This article focuses on the trend of global settlement in centralized hip implant litigation and discusses three of those five pending metal on metal hip implant MDLs as well as other centralized hip implant litigations involving dual modular hips.

MDL 2197: *In re DePuy Orthopaedics, Inc. ASR Hip Implant Products Liability Litigation*

As of February 17, 2015, the Judicial Panel on Multidistrict Litigation (the "Panel") reported a total of 9,362 filed cases with 7,116 cases then pending in the Northern District of Ohio.[2] On November 19, 2013, within weeks following the postponement of the bellwether or lead trial case in this MDL, a global settlement was announced. DePuy Orthopaedics, Inc. ("DePuy") agreed to pay nearly $2.5 billion to compensate all individuals who were implanted with an ASR hip that was removed by August 31, 2013, subject to certain exceptions.[3] The Master Settlement Agreement was published to the public via the ASR hip settlement website maintained by the claims administrator.[4]

On February 3, 2015, a jury in Tulsa County, Oklahoma awarded $2.5 million to a woman who was implanted with ASR hips on both sides of her body in 2006 and 2007. Both ASR hips were revised within six years of implantation due to significantly elevated metal ions in her bloodstream. The jury found that the ASR hip was defectively designed, but found for DePuy on the negligence and failure to warn claims. The jury did not award punitive damages.

On February 20, 2015, the parties filed a Joint Status Report with the MDL court stating they "are pleased to announce to the Court an agreement which would effectively extend the existing U.S. Settlement Program to U.S. citizens/residents with ASR™ hips, who had revision surgery on or before January 31, 2014, subject to the terms and conditions of the Program."[5] According to the report, detailed information regarding this second settlement program was to be available on the claims administrators' website in late March 2015.

MDL 2244: *In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Products Liability Litigation*

As of February 17, 2015, the Panel reported a total of 7,133 filed cases with 7,045 cases then pending in the Northern District of Texas involving DePuy's Pinnacle metal on metal hip implant. The Panel issued the MDL transfer order on May 24, 2011.[6] On September 10, 2013, the court began the discussion with counsel of selection of bellwether or lead cases for trial in the MDL.[7] Shortly thereafter, the court issued an Order staying all cases pending bellwether trials.[8]

On September 2, 2014, a jury was selected for one of the bellwether cases, *Herlihy-Paoli v. DePuy Orthopaedics, Inc*, and opening statement commenced on September 3, 2014.[9] Prior to trial, the judge denied all of DePuy's motions to dismiss and for summary judgment and motions to exclude expert testimony.[10] After many weeks of trial and little more than a day of deliberations, the jury returned a defense verdict.[11]

On February 18, 2015, the court issued an order selecting 10 additional bellwether cases to be prepared for trial.[12] As of the writing of this article, no trial dates had been set for these 10 cases. The stay remained in place for all of the other cases in the MDL.[13]

MDL 2391: *In re Biomet M2a Magnum Hip Implant Products Liability Litigation*

As of February 17, 2015, the Panel reported a total of 2,451 filed cases with 1,963 cases pending in the Northern District of Indiana involving Biomet's metal-on-metal hip implant.[14] The Panel began the transfer of cases from federal district courts throughout the country to this MDL on October 2, 2012.[15] In a little more than two years, the parties reached an agreement on a global settlement.[16] Unlike the ASR settlement discussed above, the terms of the Biomet settlement are confidential.

MCL Docket No. BER-L-936-13: *In re Stryker Rejuvenate Hip Stem and ABG II Modular Hip Stem Litigation*

As of January 13, 2015, the New Jersey Multicounty Litigation (MCL) Center reported a total of 2,185 filed cases involving Stryker Rejuvenate and ABG II dual modular hip implants.[17] The New Jersey Supreme Court ordered centralization of these cases on January 15, 2013.[18] Within the federal court system, the Panel established a MDL approximately six months after New Jersey established its MCL.[19] Unlike the metal-on-metal hip implants discussed above, these hip implants were voluntarily recalled by Stryker in June 2012 "due to the potential for fretting and corrosion at the modular-neck junction that may result in ALTR (adverse local tissue reactions), as well as possible pain and/or swelling at or around the hip."[20]

The New Jersey court adopted a novel bellwether approach and instead of setting bellwether trials at the outset, Hon. Brian R. Martinotti, along with counsel for the parties, established a bellwether mediation process with bellwether trials to follow if the mediations were not successful. On April 2, 2013, the court entered an Initial Mediation Consent Order directing the parties to choose six mediators and to identify eligible plaintiffs who intended to participate in the mediation process.[21] The mediation proceeded in three phases. As of October 8, 2014, all Phase I cases settled, 20 out of 21 Phase II cases settled and 10 Phase III cases were selected for mediation.[22]

Shortly after the Phase II mediation concluded on November 3, 2014, the parties entered into a Settlement Agreement pertaining to all plaintiffs and claimants who had a Stryker Rejuvenate or ABGII implanted in the United States that was revised prior to November 3, 2014.[23] In this case, it was clear that the bellwether mediation process was a more cost effective and faster way of bringing about global resolution of the cases. It will be interesting to see if this approach is adopted by other MCL and MDL courts in the future.

Endnotes

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Government Entitlements for Children with Developmental Delays

By Joan Lensky Robert

I. Introduction

Special Needs Planning is often entitlement driven—what plan must be implemented to preserve government benefits for those with disabilities when they may have their own assets or work history or wealthy parents? The following is an overview of the government entitlements available to children and adults with disabilities, with an emphasis on SSI, SSDI and Medicaid. When coupled with planning options such as special needs trusts, the person with a disability may live an enriched life while remaining eligible for government benefits based upon need.

II. SSI: The Federal Entitlement Program for Those with Disabilities Unable to Work

A. Introduction to Supplemental Security Income

The Supplemental Security Income (SSI) program[1] was signed into law in 1972 by President Nixon in order that the "worthy poor" receive a standard monthly income paid by the federal government and administered by the Social Security Administration. The SSI program is a needs-based program. The federal program provides a monthly cash stipend to the aged, blind and disabled whose available resources and income do not exceed the maximum income and resources standards of the program. A person with a disability is someone whose inability to perform substantial gainful employment is expected to last for 12 months.[2]

The statute addressed gaps in federal benefit coverage for the aged, blind, and disabled who had not been able to work sufficiently to be currently insured so as to receive disability benefits that existed under the Social Security Act and who were poor.[3] Prior to the enactment of the SSI program, only state welfare programs were available to provide cash income to this population. New York State provides an Optional State Supplement of $87/month to the federal benefit amount, which is $733 in 2015.

B. Children's Benefits

Until a child reaches 18, the financial eligibility of a child for SSI depends upon the economic situation of the parents. The parents' assets and income are deemed available to the child when computing eligibility for SSI for the disabled child through the month of his/her 18th birthday. The parents may have no more than $3,000 in countable assets and income at the poverty level.

After 18, however, the parents' assets and income will not be counted when an application is made for the "adult" child's own SSI benefits. Only his or her own assets and income will count. Many clients consult counsel in preparation for the child's application for SSI and to review existing assets and documentation to prepare for the future of their son or daughter.

"When coupled with planning options such as special needs trusts, the person with a disability may live an enriched life while remaining eligible for government benefits based upon need."

C. Transfer of Resource Rules for SSI

An SSI recipient may have no more than $2,000 in countable assets. In general, the uncompensated transfer of resources will result in a period of ineligibility for SSI. The wait is calculated by dividing the amount of resources transferred by the monthly SSI benefit. There is a 36-month look-back.[4] If $820/month is the monthly benefit, and $8,200 is transferred, there will be a 10-month ineligibility for SSI. If $82,000 is transferred, there will be a 36 month ineligibility. No ineligibility period will be assessed to transfers into a trust by someone under the age of 65, which provides a payback to the state for the lifetime of Medicaid provided[5] or to a pooled income trust.[6] There is no payback for SSI benefits.[7] So, when the child has savings bonds or a custodial account, or Gerber's Life Insurance, what to do?

1. A Special Needs Trust may be established for bonds.
2. UTMA Accounts: These become vested in the child upon his reaching the age of 21.[8]

D. Applying for SSI upon the Child Reaching the Age of 18

1. Definition of Household

The SSI program pays a higher amount to those who live in their own household than those who live with others or in another's household. An SSI recipient is residing in his/her own household if he or she has an "ownership interest or a life estate interest in the home,"[9] or pays the

shelter costs in a business arrangement,[10] or pays "at least a pro rata share of household and operating expenses."[11] In the context of a family, when the SSI applicant cannot pay a pro rata share of household and operating expenses, then Social Security Administration considers a rental subsidy provided by the parents as income that will reduce the SSI monthly payment by 1/3.

2. Effect of Pro Rata Share Rule

The pro rata share standard in determining household living arrangements thus results in a *reduction* in SSI benefits for the 18-year-old child whose SSI is not sufficient to pay his pro rata share of the monthly household expenses. Assuming a middle class home with two parents and one 18-year-old son, with a mortgage and taxes of $2,800/month and utilities of $500/month and food of $600/month, the total household expenditures are $3,900/month. The son's pro rata share of the household expenses would be $1,300/month. However, the SSI maximum payment is $820/month. The SSA will impute the discount given by the parents to their son's portion of household expenses as income to him.

The SSI payment will be reduced to reflect the household living subsidy, called in-kind support and maintenance, provided by the parents who are not (cannot) charge their child his/her pro rata share of the household expenses.

3. But Not in the Second Circuit: *Ruppert v. Bowen* and the Actual Economic Benefit Rule

In the Second Circuit, pursuant to *Ruppert v. Bowen*,[12] the *Ruppert Acquiescence Ruling*,[13] no in-kind support and maintenance is being provided to an SSI recipient whose parent is charging at least 1/3 of the federal benefit monthly payment plus $20 as a flat fee for room and board. So long as the parent charges at least one-third of $721/month plus $20 for room and board, or $265/month, there should be no reduction in the monthly SSI benefit amount.

4. Loans Are Not Income for SSI Purposes

Proceeds of a loan are not considered income for SSI purposes.[14] Food and shelter provided as a loan do not count as in-kind income reducing the SSI benefit.[15] Thus, during the period of time when the application is pending, the parent providing food and shelter to his child without being paid monthly for the room and board is not providing in-kind support and maintenance to reduce the SSI benefit, so long as the parent intends to be reimbursed from the retroactive SSI.

5. Tips to the Parents Applying for SSI for Their 18-Year-Old Son/Daughter

1. The Social Security Administration should NOT ask the parent about household expenses on the application. Answer: Not Applicable.
2. Parents MUST charge and collect the room and board in order to comply with the rules: "Cash must pass hands."
3. The contract/lease may be written but may also be an implied contract for necessities.[16]
4. The parents will charge a flat fee for room and board.
5. When asked to list everyone in the applicant's household, list only the applicant. For household living arrangements, the child is living alone, i.e., in his own fiscal household.
6. When asked how the child is paying for the room and board while the application is pending, the parent will be making a loan of the food and shelter.
7. When the child receives the SSI payment, s/he must pay back the parent for the outstanding loan of the room and board from the first SSI payment, which will be retroactive to the application date.

III. Social Security Disability Insurance

A. Overview

The Social Security Act provides for Disability Insurance Benefits (SSDI)[17] which is a benefit program for workers who become disabled and are unable to work. The program provides a monthly income during a period of disability, while the individual is unable to perform substantial gainful activity.[18] Substantial gainful activity is work that involves doing significant and productive physical or mental duties, and is done (or intended) for pay or profit.[19] However, the applicant must have insured status to qualify for eligibility under the Disability Insurance Program.[20] The wage-earner with a disability must have paid into the Social Security system through a deduction from earned income pursuant to FICA (Federal Insurance Contributions Act),[21] the federal income tax withholding paid to the Social Security system.

To be "currently insured,"[22] for a period of disability and Disability Insurance Benefits, one must have sufficient quarters of coverage ("Social Security Credits"). For each calendar year, an individual can earn a maximum of four (4) credits of employment and social security taxation. An individual gains one quarter for each $1,220.00 of social security taxed employment earnings. Hence, if the individual earns $4,800.00 in social security taxed employment earnings for a calendar year, with a minimum of $1,220 in each quarter, that individual has secured four (4) quarters of coverage or social security credits.

In general, the individual must have paid taxes into (FICA) for a period of twenty (20) quarters out of the prior forty (40) quarters, i.e., five (5) years out of the ten (10) years prior to the disability and the application for Social

Security Disability Insurance Benefits.[23] Those under the age of thirty-one (31) require fewer quarters of coverage, but never fewer than six (6) quarters for those under the age of twenty-four (24).[24]

After a two year waiting period, a recipient of Social Security Disability benefits is eligible to receive Medicare,[25] even though that individual has not yet attained 65 years of age, which is the standard eligibility age requirement.

If the individual does not have the requisite "insured status," then the Supplemental Security Income (SSI) program[26] might be available for that individual. The SSI program is an appropriate benefit program for non-workers, workers who do not have insured status or workers who have insured status, but have limited earnings that would generate a nominal social security monthly income benefit. Unlike the SSI program, there is no asset or income eligibility threshold for SSDI.

In some instances, individuals who qualify for Social Security Disability Insurance benefits might also be eligible for Supplemental Security Income if the amount of their monthly Social Security Disability Insurance benefit is less than the monthly benefit of SSI. If, for example, the SSDI monthly payment based on the recipient's earnings record is $600/month, then the SSI program will pay $220/month in 2015 to supplement the SSDI to bring the total amount up to the maximum SSI benefit of $820/month. If, however, the SSDI will pay $1,000/month, the there is no SSI supplement. And, of course, to receive SSI, one must meet the asset and income tests of the SSI program.

B. The Medical Criteria for Disability Pursuant to the Social Security Act

One must be totally and permanently disabled in order to receive Social Security benefits.[27] Permanently disabled refers to one who is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve (12) months.[28] One is totally disabled if his/her physical or mental impairment or impairments are of such severity that he/she is not only unable to do previous work but cannot, after considering the individual's age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy.[29]

IV. Other Benefits

A. Childhood Disability Benefits (Adult Child Benefits)[30]

When the disabled child is over the age of 18 and his parent is retired, disabled or deceased, the adult child may be eligible to receive Social Security benefits based upon the parent's earnings.

1. Requirements:

a. The child must not be performing substantial gainful activity ($1,070/month earnings);

b. must be unmarried at the time of the application;

c. must be disabled prior to age 22;

d. must be dependent upon the parent.

2. Medicare Entitlement

After 2 years, the adult child will receive Medicare benefits.

3. Interrelation with SSI

An adult child will receive the highest amount of either benefit, but the monthly benefits will not be added together to result in double monthly benefits. If the child's own SSI is $808/month, and the Childhood Disability benefit on the parent's earnings is $860/month, the client will LOSE SSI but receive the Social Security benefit. If the Social Security benefit is $500/month, then the SSI will be added to the Social Security benefit to result in $308/month of SSI and $500/month Social Security.

B. Medicare

Individuals 65 years of age or older who are entitled to receive Social Security, widows or Railroad Retirement benefits are eligible for Medicare,[31] as are individuals with a disability who have received Social Security Disability benefits for 25 months,[32] or those with Adult Disabled child benefits.

Medicare pays for hospitals, doctors, rehabilitation, and prescription drugs. It does not, in general, pay for home attendants or room and board in a group home or custodial care. Medicare eligibility is not determined by assets and income. Hence, an SNT is not needed to protect Medicare eligibility. However, SNTs are often used to shelter assets for those who are dually eligible for both Medicare and Medicaid.

C. Office of Mental Health Benefits

In New York, those under the age of 21 and over the age of 65 in a state psychiatric hospital eligible for Medicaid will have their stays paid for by Medicaid. Those between the ages of 21 and 65 unable to pay will have their stays paid for by the State of New York. This is a means-tested program.

New York State law[33] specifically directs that SNTs apply to all New York State entitlements for persons with disabilities, not just Medicaid. Hence, an SNT is available to preserve assets for those who enter a state facility while continuing ongoing eligibility for OMH state benefits.

V. Medicaid

A. Parental Obligation of Support for Medicaid

In 1965, the Medicaid program was enacted "to furnish medical assistance to aged, blind or permanently and totally disabled individuals and families with dependent children, whose income and resources are insufficient to meet the costs of necessary medical services… to help such individuals and families attain or retain capability for independence or self-care."[34] Initially, these "dependent children" included not only parents' minor children but also their adult children over the age of 21 who had disabilities.[35] At its inception, the Medicaid program directed that parents were legally responsible for the medical support of adult children with disabilities.

B. Waivered Programs for Children

When the SSI program was enacted in 1972, parents were no longer financially responsible for the child with a disability over the age of 18 for government entitlement purposes. However, parents remained financially responsible for their minor children, and middle class children with catastrophic disabilities were excluded from Medicaid coverage due to their parents' assets and income.

In an effort to meet the needs of these families, programs were developed that waived the requirement that parents have poverty level assets and income in order for their children to receive Medicaid coverage. These include the Care at Home Waivers for children with complex medical needs and/or severe disabilities and the Home and Community Based Services Waiver for children with mental illness. This program is open to those between the ages of 5 and 21, but the child must have enrolled by the time s/he is 18 in order to continue after age 18.

Advice to our clients: Certain waivered programs stop at age 18. Find the program suitable for your son or daughter.

C. Continuing the Services: Waivers for Those 18 and Older

Certain waivered programs are open to both children (under 18) and adults (over 18). Others provide services only for those over the age of 18. The waivered programs of interest to those with 18-year-old sons and daughters with disabilities are:

1. **The OPWDD (Office of Persons with Developmental Disabilities) Home and Community Based Services Program:** For children and adults with developmental disability or MR living at home or in an Individualized Residential Alternative, Community Residence or Family Care Home who would meet the level of care provided in an Intermediate Care Facility. Services provided include residential and day habilitation, supported employment, respite, adaptive devices, a care plan and support services.
2. **TBI (Traumatic Brain Injury) Waiver:** For those 18-64 with traumatic brain injury. Injury must have occurred *after* the age of 18. Provides supportive services, life skills training, housing accommodations, day programs and transportation for those who would meet the level of care provided in a skilled nursing facility.

Advice to Parents: The adult child receiving a waivered Medicaid program or a buy-in must qualify for Medicaid. Hence, third party Supplemental Needs Trusts are an important planning tool. Flexibility may be built into these trusts to have a termination prior to the death of the beneficiary if the child is working or otherwise loses eligibility for government benefits based on need.

D. "Traditional" Medicaid

Medicaid is a means-tested health insurance program financed by the federal government and by the states.[36] A Medicaid recipient in New York State in 2015 may have no more than $14,850 in countable assets. If s/he has income above $825/month s/he may spend that excess income on medical needs. Medicaid is available for those over the age of 65 and those under the age of 65 with a disability. Families with very low income and resources and minor children also may qualify for Medicaid. Medicaid covers room and board in group homes and many other nonmedical services for those with disabilities as well as hospitalization, skilled nursing homes, physicians, therapies, home health aides, prescription drugs, and habilitation services.

If one has assets in excess of the resource level, there is no transfer penalty for Medicaid services provided in the community. For chronic care coverage in a nursing home the government looks at the financial transactions made by the applicant within 5 years of applying for benefits.[37] In general, an ineligibility period will apply for those who transfer assets to reach the resource level. However, the transfer of the home to a child who is blind or disabled,[38] or who is under the age of 21,[39] incurs no penalty for Medicaid eligibility. In addition, all assets transferred to a child with a disability or to a trust for the sole benefit of a child with a disability,[40] or to a trust for the sole benefit of any disabled individual under the age of 65,[41] incur no ineligibility period for Medicaid benefits.

These exemptions to the Medicaid transfer rules present planning options when a parent or grandparent is entering a nursing home and is seeking eligibility for Medicaid benefits for him/her by creating a trust for the sole benefit of a child with a disability or for any relative with a disability.

A Medicaid recipient with a disability is eligible for Medicaid once he or she has no more than the resource level of countable assets and the waiting period, if any, caused by the transfer of resources has ended. However, there is no ineligibility period for Medicaid or SSI when the Medicaid or SSI applicant under the age of 65 transfers assets into a trust that will provide a payback to the state for Medicaid provided to the individual upon his/her demise.

E. MAGI (Modified Adjusted Gross Income) Medicaid

The new category of Medicaid eligibility is based solely on one's income. If one's Modified Adjusted Gross Income is at or below 138% of the federal poverty level, the individual or the household will qualify for Medicaid. Many people did not realize that before this Medicaid expansion Medicaid coverage was not available, in general, to individuals who had low income but no disability or young children. This MAGI Medicaid method of calculating income and assets is not available to those who receive Medicare unless they are parents or relatives caring for children under the age of 18.

For MAGI Medicaid, only one's income is counted. If a single person's income is at or below 138% of the Federal Poverty Level, one will qualify for Medicaid even if one does not have a disability. This MAGI Medicaid is available only to those UNDER THE AGE OF 65 and to those WHO DO NOT RECEIVE MEDICARE, whether they are under or over 65.

To be eligible for MAGI Medicaid, one's household must meet the income criteria. **Modified Adjusted Gross Income** includes wages, taxable interest and dividends, unemployment pensions, IRA distributions, alimony and income from self-employment. Tax exempt interest is counted. Profit or loss from self-employment is counted after expenses. Net income from rental income is counted. All Social Security income is counted, even the part that is not taxable. Child support, VA benefits, gifts or inheritances, workers' comp and certain scholarships are NOT counted as income. An important planning option presents itself because periodic payments from structured settlements are not income for MAGI Medicaid.

1. Income Level

Although the individual without a disability under the age of 65 will have his/her income computed at 138% of the Federal Poverty Level, certain categories of individuals have higher income levels. Children ages 1-18 are fixed at 154% of FPL, and 19-20-year-olds living with parents are at 155% of FPL. The taxpayers' income as well as the income of dependents obligated to file tax returns are counted as income for the household.

2. MAGI Medicaid and Estate Recovery

Medicaid is not without its financial consequences. In particular, the Medicaid program may seek recovery from the estate of a Medicaid recipient over the age of 55 who dies with assets. A concern was raised whether Medicaid would seek estate recovery from individuals who had assets and simply obtained financial assistance in paying for the new health insurance premiums under the Affordable Care Act. On February 21, 2014 the Center for Medicare and Medicaid Services issued a policy statement directing that MAGI Medicaid recipients would be subject to estate recovery only if they received long-term health care services (nursing home, home care, and related prescription drug and hospital services) and only for services provided after they reached the age of 55.[42]

3. Choosing MAGI or NON MAGI Medicaid

Those under the age of 65 with disabilities who do not receive Medicare may choose either MAGI or NON MAGI Medicaid, as may those who are parent/caretaker relatives even if they receive Medicare. Counsel may be needed to help analyze each case to best advise clients which program will meet their needs best.

VI. Conclusion

The Social Security Act provides a safety net for adult children to remain in the community and work to the extent possible without requiring that parents remain responsible to pay for their health care or supportive services. Through SSI, Medicaid, Social Security Disability and Medicare the entitlement programs provide services and support so that family members with disabilities need not be prematurely institutionalized. Attorneys knowledgeable about special needs can counsel families about government entitlements, supplemental needs trusts, services available in the community and guardianship so as to maximize the quality of life for these individuals.

Endnotes

1. 42 U.S.C. § 1381 et seq.
2. 20 C.F.R. § 416.905.
3. 42 U.S.C. § 1381.
4. 42 U.S.C. § 1382b(c)(1)(A).
5. 42 U.S.C. § 1396p(d)(4)(A).
6. 42 U.S.C. § 1396p(d)(4)(C).
7. 42 U.S.C. § 1382b(e)(5).
8. In the New York Region, an opinion letter issued by SSA Regional Office advised that parents holding UTMA and UGMA accounts may establish an SNT with UTMA and UGMA funds. This advisory letter referenced Section 12b of UTMA Act, which has fewer limitations on investments than do other statutes concerning fiduciaries, and Section 13a, which gives the custodian all of the rights that an unmarried adult would have as to those assets. This will be a first party SNT.

9. 20 CFR § 416.1132(c)(1).
10. *Id*. at (c)(3).
11. *Id*. at (c)(4).
12. 871 F.2d 1172 (2d Cir. 1989).
13. AR 90-2(2), at www.ssa.gov.
14. 20 C.F.R. § 416.1103(f).
15. *Hickman v. Bowen*, 803 F. 2d 1377 (5th Cir. 1986). SSR 92-8p.
16. *Ruppert v. Bowen*, 871 F. 2d 1172 (2d Cir. 1989).
17. 42 U.S.C. § 423.
18. 42 U.S.C. §§ 423(d), (e).
19. 20 C.F.R. § 404.1510.
20. 42 U.S.C. § 423 (c); 20 C.F.R. § 404.101 et seq.
21. 42 U.S.C. § 409.
22. 42 U.S.C. § 423 (c)(1); 20 C.F.R. § 404.120.
23. 42 U.S.C. § 423 (c)(1)(B)(i); 20 C.F.R. § 404.130.
24. 20 C.F.R. § 404.130 (c).
25. 20 C.F.R. § 406.12.
26. 42. U.S.C. § 1381.
27. 42 U.S.C. §§ 423 (d)(1)(A), 416 (i)(1).
28. *Id*.
29. 42 U.S.C. § 423(d)(2)(A).
30. 42 U.S.C. § 202(d).
31. 42 C.F.R. § 406.5.
32. 42 C.F.R. § 406.12.
33. EPTL 7-1.12.
34. 1965 U.S.Code Cong. & Adm. News, 1943, p. 2144.
35. 1965 U.S.Code Cong. & Adm. News, 1943, p. 2018.
36. 42 U.S.C. § 1396.
37. 42 U.S.C. § 1396p(c)(i)(B)(i), N.Y. Soc. Serv. L. § 366(5)(e)(1)(v).
38. 42 U.S.C. § 1396p(c)(2)(A)(ii)(II), N.Y. Soc. Serv. L. § 366(5)(e)(4)(i)(B).
39. 42 U.S.C. § 1396p(c)(2)(A)(ii)(I), N.Y. Soc. Serv. L. § 366(5)(e)(4)(i)(B).
40. 42 U.S.C. § 1396p(c)(2)(B)(iii), N.Y. Soc. Serv. L. § 366(5)(e)(4)(ii)(C).
41. 42 U.S.C. § 1396p(c)(2)(B)(iv), N.Y. Soc. Serv. L. § 366(5)(e)(4)(ii)(C).
42. *Applications of Liens, Adjustments and Recovery, Transfers of Asset Rules and Post Eligibility Income Rules to MAGI Individuals*; www.ssa.gov.

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Utilizing SCPA Article 17-A (Surrogate's Court Procedure Act 17-A) and MHL Article 81 (Mental Hygiene Law 81) Guardianships for Disabled Children

By Sara Meyers

"SCPA 17-A is 'a simple guardianship device, based upon principles of in loco parentis' by which a court can appoint a guardian for an individual based on a diagnosis of mental retardation, developmental disabilities, or traumatic head injury. In contrast, MHL 81 'the most modern form of guardianship…' is a more complex statute. Under MHL 81, the court appoints a guardian with authority tailored to the needs and functional limitations of the incapacitated person, rather than basing its decision on the individual's particular diagnosis."[1]

SCPA 17-A Background

The need for and appointment of a Guardian under SCPA 17-A is diagnosis driven. A person must be diagnosed as being mentally retarded or developmentally disabled, while MHL Article 81 requires a finding of functional incapacity due to diminished capacity.[2]

SCPA 17-A was enacted in 1969 as a means for parents of adult children diagnosed with Mental Retardation[3] to seek Guardianship in an inexpensive manner. SCPA 17-A is based on the principle of "in loco parentis."[4] It was seen as a way for parents to continue as the legal care-givers and decision-makers of their mentally retarded children once the child reached the age of legal maturity, 18 years old.[5] In 1989, SCPA 17-A was amended and expanded to include Developmental Disability and Traumatic Brain Injury.[6] The term Developmental Disability also encompasses autism and autism spectrum disorders, and neurological impairments.[7]

Procedure for filing a SCPA 17-A Proceeding

The diagnosis of mental retardation or developmental disability must be certified by a licensed physician and a licensed psychologist; or by two physicians.[8] The doctors and/or psychologist must complete an Affidavit (a standard SCPA form is used in all counties[9]). The Affidavits are then reviewed by the Surrogate's Court in the county in which the individual needing a Guardian resides. Upon the Court's approval of the Affidavits, the Article 17-A Petition is filed with the Court.[10]

The Petition for Guardianship may be filed by a parent, an interested person, the individual him or herself, or a not-for-profit or corporate entity.[11] The Petition must set forth who is the Petitioner and her relationship to the disabled individual; the identity of the disabled individual and his or her diagnosis.

The standard for appointment, for a person needing a SCPA 17-A Guardian, is "best interest of the individual."[12] The SCPA does not establish a burden of proof or standard of proof required for said appointment; rather, as the person has been diagnosed with mental retardation or developmental disability, she requires the appointment of a Guardian to manage his or her personal/medical and/or financial affairs.

Upon the filing of the SCPA 17-A Petition, the Court appoints a Guardian ad Litem, who can serve without a fee, to investigate the allegations set forth in the Petition, meet with the disabled individual and report findings to the Court.[13] Unless requested, the Court will waive a hearing, subject to the GAL's Report. The Court will then issue a Decree appointing the Guardian(s). The Guardianship is not tailored to the individual, and does not tailor the Guardian's powers specific to her ward. The Guardianship is also of indefinite duration.[14]

Once appointed Guardian, the SCPA does not set forth standards that should govern the Guardian's conduct. Nor does SCPA 17-A require the Guardian to attend a Guardianship training nor file an annual report with the Court (unless she is the Guardian of the Property); though, SCPA 17-A, as discussed above, is seen as a continuation of the parent's legal authority over her child.

While SCPA 17-A has been called a "simple approach to Guardianship," MHL Art. 81 has "emerged as a nuanced one."[15]

MHL Article 81 Background

MHL Article 81 was enacted in 1992.[16] Article 81 takes a broader approach to Guardianships, and allows for greater flexibility relevant to the Guardianship.

MHL 81 is not "diagnosis" driven, and a determination for the need for a Guardian is not made based on a person's medical condition and/or diagnosis. Article 81 provides for a functional assessment of the actual abilities of the alleged incapacitated person ("AIP") for both property and personal management.[17]

Procedures for Filing MHL Article 81 Proceeding

An Article 81 Petition can be brought by a family member or other interested party, such as the nursing home where the AIP resides.[18] The Petition must set forth the AIP's functional limitations and demonstrate why the appointment of a Guardian is necessary, The proceeding is commenced by filing[19] an Order to Show Cause and Petition in the Supreme Court in the county where the AIP resides, though if the AIP is in a nursing home, the Petition is brought in the county where the nursing home is located.[20]

Upon the Court's signing the Order to Show Cause and setting a date for the Hearing, the Court may appoint an attorney[21] to represent the AIP and/or a Court Evaluator, to investigate the allegations set forth in the Petition and prepare a report[22] for the Court regarding same.

At the Guardianship Hearing, which is usually held within twenty-eight days[23] from the Court's signing of the Order to Show Cause, the Petitioner must prove by clear and convincing evidence that the AIP has functional limitations necessitating the need for a Guardian.[24] If said burden is met by the Petitioner, the Court will grant the Petition and appoint a Guardian for the AIP.

The Guardianship Judgment must specifically define the authority of the Guardian,[25] and said Judgment can be tailored to the specific needs of the AIP. For example, if the AIP has a health care proxy, the Court may not necessarily appoint a Guardian of the Person. If the AIP has a Power of Attorney (POA), but said POA limits or does not permit gifting, the Court may authorize the gifting of the AIP's assets for Medicaid or estate planning purposes.[26] Also, the Judgment must set forth the duration of the Guardianship.

Once appointed Guardian, the Guardian is required to take a Guardianship class.[27] The Guardian is also required to file an Initial Report[28] within ninety days of appointment, setting forth what she has done on behalf of her ward since appointed. Each calendar year, she is also required to file an Annual Report[29] with the Court.

MHL Article 81 can allow for the Incapacitated Person (IP) to retain some autonomy even with the appointment of a Guardian. The statute provides for flexibility and independence. In planning for a disabled child, the key is flexibility and MHL Article 81 can allow for more flexibility and a more tailored Guardianship that meets the exact needs of the individual. However, some individuals are constrained by the type of proceeding that can be brought based on the disabled individual's diagnosis and functional capacity.

Endnotes

1. *Should we be Talking? Beginning a Dialogue on Guardianship for the Developmentally Disabled in New York*, Rose Mary Bailly and Charis B. Nick-Torok, 75 Alb. L. Rev.807, 808.
2. N.Y. Mental Hyg. Law §81.01 (McKinney 2014).
3. SCPA 17-A defines a Mentally Retarded person as someone who is "incapable to manage him or herself and/or his or her affairs by reason of mental retardation and that such condition is permanent in nature and likely to continue indefinitely." SCPA 1750.
4. Bailly, at 808.
5. *Id.* at 818.
6. *See generally*, SCPA 1750.
7. *Id.*
8. SCPA 1750 and SCPA 1750-a.
9. SCPA 17-A forms can found on HotDocs or on line, at http://www.nycourts.gov/forms/surrogates/guardianship.shtml.
10. A $20 filing fee is charged by the Surrogate's Court.
11. SCPA 1751.
12. SCPA 1750.
13. SCPA 1754.
14. SCPA 1759.
15. Bailly, at 816.
16. N.Y. Mental Hygiene Law §81.
17. *Id.* at §81.15.
18. *Id.* at §81.06.
19. The filing fee is $305.00.
20. *Id.* at §81.05.
21. *Id.* at §81.10.
22. *Id.* at §81.09.
23. *Id.* at §81.07.
24. *Id.* at §81.12.
25. *Id.* §§81.21 and 22.
26. *See generally* §81.21, Powers of the Guardian, property management.
27. *See generally* §81.20, Duties of the Guardian.
28. *Id.* at §81.30.
29. *Id.* at §81.31.

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Aging in the Digital Age: How Seniors Can Use Technology to Access Needed Government Benefits and How Government Can Play an Important Role in Helping to Bridge the Technology Gap for Older Adults

By Christine Julien

Today, post-recession, everyone is looking for ways to maximize resources and cut cost. One solution that is being looked to is technology. Technology is being embraced by businesses and government entities to streamline processes and develop more efficient ways to do business and reduce waste. The phrase "doing more with less" has become the permanent way of life. Particularly in government, technology is playing an increasing role in the delivery of benefits and services to the public. Arguments for incorporating technology in the service delivery model in government include better and greater access to benefits, reaching potentially a wider group of eligible individuals, streamlined processes and lower cost, which also promotes more transparency and accountability in the use of taxpayers' funds. Efficiency in the delivery of government benefits and services, especially in current fragile economic climate, is a goal recognized by the highest level of government to the lowest. For example, in April 27, 2011, Executive Order 13571 (Streamlining Service Delivery and Improving Customer Service),[1] issued by President Barack Obama, outlined the need for the Federal government to streamline and make more efficient its service delivery to better serve the public. Executive Order 13571 states in relevant part that:

> …with advances in technology and service delivery systems in other sectors, the public's expectation of the Government have continued to rise.… Government managers must learn from what is working in the private sector and apply these best practices to deliver services better, faster, and at a lower cost. Such best practices include increasingly popular lower-cost, self-service options accessed by the Internet or mobile phone and improved processes that deliver services faster and more responsively, reducing the overall need for customer inquiries and complaints. The Federal Government has a responsibility to streamline and make more efficient its service delivery to better serve the public.[2]

Thus, it is not surprising that in many areas of state and local government throughout the country technology is being used to promote efficiency in the delivery of services to the public in order to streamline processes, maximize resources and reduce cost. These technological innovations include more self-service options accessed by the Internet which is changing how government interacts with the public. While younger people generally welcome new technologies and are quick to adopt it in their daily lives, some older people are a little more reluctant and are not yet comfortable with using technology. Particularly, there are many reasons why the elderly (age 60 and older) are reluctant to embrace new technologies, and it is important for government to identify and understand those concerns and develop solutions that can help bridge the technology gap among that population and get everyone onboard.

Some of the more common reasons given for why the elderly avoid new technologies include lack of knowledge, usability, inability to see the benefits of using the technology, and privacy concerns. I submit that each of these concerns, if properly addressed, can help ease the discomfort that the elderly experience with technology.

Let us explore those concerns in greater detail. First, the idea that many older people avoid technology because they do not know how to access or use the technology and don't actually think that they can learn is quite true. You often hear older people say "I can't learn this at my age" or "I am too old to get it," and while none of this may actually be true, this lack of confidence can translate into fear and, consequently, avoidance of the technology altogether. However, for some older adults the difficulty with technology is not due to lack of knowledge, but the fact that the design itself does not take into account age-related motor and cognitive abilities which are so essential to accessibility. According to an article entitled *Designing a Familiar Technology For Elderly People*, the idea that age-related "technophobia" is the main obstacle to elders' technology usage is progressively disappearing. "On the contrary, one of the main reasons for elderly users being neglected by technology is that hardware and software design, and in particular interfaces, have simply not been

conceived to suit them."[3] The article further elaborated that "designing technologies for older adults means, first of all, to carefully take modifications in perceptual, motor and cognitive capabilities into account."[4] Thus, when adopting new technology, government should not only incorporate education and training to help older adults willing to learn take full advantage of the benefits of the technology, but in designing new technology should also bear in mind the limitations of the elderly and disabled.

Research has also shown that the reluctance of older adults to adopt new technologies is also due to their inability to see the benefit of the technology and its perceived relevance to day-to-day life.[5] In general, most people will not devote the energy to learn something new if they cannot see the benefit or relevance to day-to-day life. Yet, for some it may simply be resistance to change and the preference of sticking to what is familiar. For instance, I know many people who prefer receiving paper checks rather than sign up for electronic direct deposits despite the advantages and convenience and others still can't see the benefits and relevance of using a smart phone and continue to prefer the land line. Government may never be able to get that group of people to abandon their old ways of doing things and replace it with new technology. However, for older adults willing to adopt new technology, government can play an important role by encouraging its usage through education on how to use the technology, designing technology that suits their needs, and helping them to recognize the benefits, especially in the areas that can actually impact their lives such as accessing government benefits.

As to privacy concerns being a reason for why older people avoid technology, those concerns are very real and should not be ignored. Rightfully, privacy should be in the back of everyone's mind when entering personally identifiable information online (i.e., name, date of birth, social security number). In some ways, it is a Catch-22 because in order to take advantage of the convenience of applying for or purchasing an item on the electronic commerce market, you are required to provide certain personal information to either verify identity, assess eligibility, or to process payment, etc.; however, there is a real potential threat of unauthorized access and use of this personal data. For example, the Federal Trade Commission (FTC) estimates that as many as 9 million people living in the United States have their identities stolen each year.[6] Particularly, studies have shown that older people are more likely to be targeted in identity theft and fraud schemes and are more susceptible to victimization, fraud and scams on the Internet. Therefore, it is important for seniors to be able to authenticate whether a particular government website or communication is secure and legitimate. Government, on the other hand, has an obligation to implement data protection safeguards and ensure that private information collected is secured and being used for its intended purpose. For the elderly, confidence that their privacy and security is protected online will contribute to more participation in government programs and acceptance of new technologies.

As we move toward a more digital age, many state and local government agencies have embarked on comprehensive overhaul of their service delivery model by incorporating more technology to streamline government processes. The goal is to emphasize more self-service options accessed by the Internet or mobile phone and improved processes that deliver services faster, cheaper and more responsively to the public. Thus, it is important for the elderly to develop some level of comfort using new technology. For example, in New York State, individuals are able to determine eligibility for and apply for certain government benefits online such as Unemployment Insurance benefits, Social Security benefits and some Social Services benefits and work supports. The myBenefits site[7] is a website launched by the New York State Office of Temporary and Disability Assistance (OTDA) which allows New Yorkers to go online and find out if they qualifiy for work support and other programs designed to help low-income working families and individuals make ends meet. According to a press release at the launching of the myBenefits website, "accelerating the use of state e-government services like myBenefits is one of the primary goals of the New York State universal broadband access initiative designed to close the digital divide gaps throughout our state. Greater access to online government resources like myBenefits enables individuals and communities to participate more fully in society and the digital economy."[8] I submit that in order to truly achieve this goal and get older people to also participate more fully and close the digital divide gap among that population, some of the concerns and discomfort that they experience with technology must be addressed.

Additionally, NYC residents can visit the ACCESS NYC website[9] to find out if they may qualify for over 30 city, state and federal benefit programs such as Medicaid and Supplemental Nutrition Assistance Program (SNAP) formerly Food Stamp. Further, a perfect example of how technology has been incorporated in the delivery of government benefits is the use of the Electronic Benefit Transfer (EBT) in the SNAP program.[10] SNAP benefits are provided through an electronic benefit card, similar to a debit or credit card. Once an individual is determined eligible and an EBT card is issued, an account will automatically be set up for the individual, and every month the benefits will automatically be deposited on the card.

Technology is also revolutionizing the United States Health Care system. For example, as part of the Patient Protection and Affordable Care Act[11] (Affordable Care Act) and the Health Care and Education Reconciliation Act,[12] which together make up the federal health care reform legislation, major changes are occurring in the delivery of health services in the United States. For instance, in New York under the Affordable Care Act (ACA), individuals are able to shop for and purchase health insur-

ance online through what is known as an "Exchange." The exchange is supposed to provide more people with access to affordable health insurance coverage and set up mechanisms for consumers to shop knowledgeably for insurance.[13] The Federal government is operating an exchange in the States which have opted not to set up their own exchange under the ACA. Unfortunately, the federal government's launch of the federal health insurance marketplace has received a lot of criticism for its many technical glitches. Reportedly, the site Healthcare.gov[14] is performing slowly and users have experienced countless glitches such as difficulty logging in, the site displaying incorrect plan information and users receiving erroneous reports. The troubled rollout has prevented many people from viewing available coverage options and enrolling in a health insurance plan. Some in the media have compared the Obama administration's troubled rollout of the health care exchanges to those of the Medicare Prescription Drug benefit rollout in 2005 and 2006 under President Bush's administration. Rather than point fingers and draw comparisons as to which administration's rollout was more smooth, I think what the rollout of both Medicare Part D and the Affordable Care Act truly demonstrates is the fact that technology is not perfect. The Medicare Part D system was an online prescription drug plan finder which allowed seniors to browse through coverage options and enroll in the program. I would imagine that designing such complex systems to accommodate so much information and activities will experience some glitches and have many flaws to be worked out in the early stages. Perhaps some of those glitches and issues could have been predicted and resolved prior to the official launch. However, no matter how imperfect technology is, the reality is that technology is still a good thing and government must continue to improve and find better, faster, and cheaper ways to do things using technology. I have incredible faith that once those glitches and problems have been resolved, the ACA online infrastructure will function as it should and the benefits will have outweighed the setbacks.

Worthy of mention is how technology is also changing the way health care providers deliver services and interact with patients through the use of Electronic Health Record (EHR), sometimes referred to as Electronic Medical Record (EMR) systems. EHRs are defined as a "digital collection of electronic patient health information generated by one or more encounters in any care delivery setting," and typically include patient demographics, progress notes, problems, medications, vital signs, past medical history, immunizations, laboratory data and radiology reports.[15] EHRs have essentially transformed the health care system from a mostly paper-based industry to a more computerized system. Particularly, the Health Information Technology for Economic and Clinical Health (HITECH) Act of 2009 ("the Act"), signed into law as part of the American Recovery and Reinvestment Act (ARRA) of 2009, more commonly referred to as a "stimulus package," encourages the use of EHR technology in ways that can positively improve patient care. The Act provides financial incentives to eligible professionals (including eligible Medicare and Medicaid health care providers), eligible hospitals and critical access hospitals (CAHs)[16] to adopt, implement, upgrade and demonstrate "meaningful" use of EHR technology.[17] Some of the benefits cited for adopting EHR systems include improvement in the quality of patient care, reduction in medical errors and reduced costs such as those associated with supplies needed to maintain paper files and reduction in billing errors.[18]

Physicians are not necessarily best known for having the most legible handwriting and sometimes an illegible handwriting can result in serious consequences for the patient such as delay in treatment and lead to unnecessary tests and inappropriate medication doses.[19] Therefore, EHRs seem to be a great solution for resolving some of these issues and that alone suggests that EHRs are here to stay. One governmental agency that has developed and has begun using an EHR system is the U.S. Department of Veterans Affairs (VA). The VA has adopted an online personal health record (PHR) system known as My Health*e*Vet.[20] My Health*e*Vet enables veterans to "create and maintain a PHR that includes access to health education information, personal health journals, copies of key portions of VA patients' electronic health records and electronic services such as online VA prescription refill request, Secure Messaging and more."[21] This is a great benefit to veterans by helping them to manage and make informed decisions about their health care needs and promotes better coordination of care among multiple service providers.

The Elder Law Section of the New York State Bar Association (NYSBA) recently published a pamphlet entitled "17 Benefits for Older New Yorkers,"[22] which highlights some of the major benefits available to older New Yorkers, and not surprising most of these benefits are accessible online. The seventeen major benefits discussed in the pamphlet are: (1) Social Security, (2) Medicare, (3) Medicare Buy-In, (4) Medicaid, (5) Supplemental Security Income (SSI), (6) Temporary Assistance, (7) Veterans Benefits, (8) Elder Pharmaceutical Insurance Coverage (EPIC), (9) Food Stamps, (10) Home Energy Assistance Program (HEAP), (11) Weatherization Referral and Packaging Program (WRAP), (12) Senior Citizen Rent Increase (SCRIE), (13) Senior Citizen Homeowners Exemption (SCHE), (14) Real Property Tax Credit, (15) Reduced Fare, (16) New York State School Tax Relief Program (STAR) and (17) Live Line Telephone Service.

Even if an individual is unable to apply directly for some of these benefits online due to state and federal program rules and guidelines, he or she may still be able to obtain valuable information such as reviewing eligibility criteria and downloading the application online, avoiding multiple trips to the local government office. Given

that mobility often deters older people from seeking or applying for benefits to which they may be entitled, the convenience of applying from one's own home is a huge benefit worth exploring. For more detailed information on these 17 benefits for older New Yorkers, please refer to the NYSBA pamphlet; however, below is a brief summary and information on how to access and obtain valuable information on these benefits by telephone or online:

Social Security—provides income for insured workers, certain spouses, divorced spouses, children, grandchildren and surviving parents. To apply call (800) 772-1213 to find your local office, or visit the website: www.ssa.gov. Further, the Social Security Administration offers individuals the ability to apply for Social Security retirement online from the convenience of their own home or any computer. Their slogan is "Retire Online—It's So Easy!"[23]

Supplemental Security Income (SSI)—provides monthly payments to limited income individuals who are aged (65 or older), blind or disabled, in addition to other income they may be receiving such as Social Security. To apply, contact the Social Security Administration (800) 772-1213 or visit www.ssa.gov.

Temporary Assistance—provides cash benefits for limited-income persons for essential food, clothing, shelter and one-shot deals. To apply, contact your local Department of Social Services which information is available at: (800) 342-3009. In NYC, residents can contact the Human Resources Administration at (877) 472-8411 for information and an application. For additional information, see also www.otda.ny.gov/programs/temporary-assistance.

Medicaid—to apply for Medicaid, you can use the "Fill and Print" ACCESS NY Health Care application at: (https://apps.health.ny.gov/doh2/applinks/accessny/). Fill out the application on your screen and print the completed form from the convenience of your home. Once printed, you can either mail or bring the application to your local DSS/HRA office.

Medicare—to apply, contact the Social Security Administration/Medicare: (800) 772-1213 or visit www.medicare.gov.

Medicare Savings Program—information may be obtained by searching for "Medicare Savings Program" through the NYS Department of Health (DOH) website: http://www.health.state.ny.us/. You can also search through: www.medicare.gov.

Elder Pharmaceutical Insurance Coverage Program (EPIC)—covers more than one-half the cost of most prescription drugs after income-eligible beneficiary pays Medicare Part D premium or deductible. For more information, call (800) 332-3742/ (518) 862-9936, or visit the website: www.health.ny.gov/health_care/epic.

SNAP/Food Stamp—provides food support to low-income New Yorkers including working families, the elderly and the disabled to increase their ability to purchase food. SNAP Centers are located in all five boroughs and you can go online to locate a SNAP Center near you.[24] Alternatively, you can take advantage of the option to apply for SNAP online including recertification and phone interviews options by filing an electronic application using the ACCESS NYC or myBenefits websites.

Home Energy Assistance Program—a federally funded program that assists eligible households with cash or credit for heating costs and heat-related emergency grants. Questions regarding the HEAP program should be directed to your local Department of Social Services Office, the NYS HEAP Hotline at (800) 342-3009 or visit website: www.otda.ny.gov/programs/heap.

Transportation—The Reduced-Fare MetroCard program subsidizes subway or bus fare for seniors (65 years of age or older) and individuals with qualifying disabilities. Fare is half the base fare. For more info contact the New York State Office of the Aging: http://www.aging.ny.gov/ResourceGuide/Transportation.cfm.

To apply by mail, you may also download the application online: http://www.mta.info/nyct/fare/rfindex.htm., and mail completed application with a 2"x2 ½" photograph, and photocopy of acceptable proof of age such as Driver's License, Medicare Card or Birth Certificate, or proof of qualifying disability to:

MTA New York City Transit
Attn: Reduced Fare Program
130 Livingston Street
Brooklyn, New York

Veterans Benefits—The U.S. Department of Veterans Affairs administers benefits to veterans such as pensions for low income and disabled veterans, health care, education and training, life insurance, and burial and memorial benefits. Dependents and survivor benefits may also be available for certain benefits. To apply contact the NYS Division of Veterans Affairs at (888) 838-7697; U.S. Department of Veterans Affairs (800) 827-1000; or visit: http://www.va.gov; www.veterans.ny.gov. Additionally, as mentioned earlier veterans may also manage their health care needs by accessing the VA's My Health**e**Vet, https://myhealth.va.gov, personal health record (PHR) website.

Weatherization Assistance Program (WAP)—assists income-eligible families and individuals by reducing their heating/cooling costs and improving safety of their homes through energy efficiency measures. According to the NYSBA manual on 17 benefits for older New Yorkers, funds are limited but applications by the elderly and disabled receive a priority. To apply, contact your local Office for Aging, the New York State Division of Housing & Community Renewal or New York City HRA for more information.

Internet Websites:

New York State Division of Housing & Community Renewal: http://www.dhcr.state.ny.us/programs/weatherizationassistance/.

New York City HRA: http://www.nyc.gov/html/hra/html/directory/heap.shtml.

Senior Citizen Rent Increase Exemption (SCRIE)—exempts rent-controlled/rent stabilized, Division of Housing and Community Renewal (DHCR) housing and rent-regulated hotel tenants from certain rent increases. To apply, in NYC contact the Department of Finance (DOF) and outside NYC, contact the New York State Division of Housing and Community Renewal (DHCR).

Internet Websites:

http://www.dhcr.state.ny.us/Rent/about.htm#seniors.

New York City Department of Finance: http://www.nyc.gov/html/dof/html/property/property_tax_reduc_drie_sc_te.shtml.

Senior Citizen Homeowners Exemption (SCHE)—provides partial tax exemption up to 50% on real property owned by qualified senior citizens. For more info visit New York State Exemption Applications website: http://www.tax.ny.gov/pit/property/exemption/seniorexempt.htm.

NYC Tax Reductions for Residential Property: http://www.nyc.gov/html/dof/html/property/property_tax_reduc_individual.shtml#sche.

Real Property Tax Credit (IT 214)—provides tax credit or cash payment for part of rent or property taxes paid during the year. Apply by submitting Form IT-214 with tax return, or, if no return, anytime during the year. For assistance from New York State Department of Taxation and Finance call (800) 225-5829.

Internet Websites:

New York State Department of Taxation and Finance: http://www.tax.ny.gov/pit/credits/real_property_tax_credit.htm.

New York State IT-214 Form: http://www.tax.ny.gov/pdf/current_forms/it/it214_fill_in.pdf.

New York State School Tax Relief Program (STAR)—provides an exemption from the school portion of property taxes for owner-occupied primary residences. All New Yorkers who own their own one- two- or three-family homes, condominiums, or cooperative apartments, mobile homes or farms are eligible for the STAR tax exemption. Apply by contacting local assessor's office or by accessing the necessary STAR Reimbursement Application Form available online at http://www.orps.state.ny.us/ref/forms/index.htm.

New York City residents should call the New York City Department of Finance at 311 or (212) 504-4080 or the website at: http://www.nyc.gov/html/dof/html/property/property_tax_reduc_individual.shtml.

Life Line Telephone Service—reduces the cost of basic telephone service and connection charges for limited-income persons. To apply, contact your local telephone company business office.

Internet Websites:

New York State Public Service Commission: www.askpsc.com/. From that homepage, follow the links for Telephone to the "Life-Line Discounted Telephone Services" or call for information at (888) Ask-PSC1 (888) 275-7721.

National Association of State Utility Consumer Advocates: Lifeline Across America: http://www.lifeline.gov/lifeline_Consumers.html.

Conclusion

We know that government benefits are extremely important to improving the health and well-being of the elderly, and we also know that the elderly are least likely to know for which benefits they qualify or how to apply. For example, according to the Food Research and Action Center, older Americans who are eligible for SNAP are significantly less likely to participate in the program than other demographic groups. Reportedly, factors contributing to this low participation rate range from barriers related to mobility, technology and stigma, to widespread myths about how the program works and who can qualify.[25] Technology has the potential to improve the lives of older adults by providing greater access to needed government benefits; therefore, encouraging the use of technology among older people to learn about programs to which they may be entitled and how to apply online for such benefits is a good opportunity to increase enrollment rates so that the elderly can maximize their benefits. With the rapid growth of the Internet and the increasing role of technology in our daily lives includ-

ing in the delivery of government benefits and services, it's important not to leave the elderly population behind. Government should incorporate training to help the elderly take full advantage of the benefits and convenience of technology. While also bearing in mind that for some, due to physical limitations or cognitive impairments, reasonable accommodations must be provided including accommodations in the design of new technologies, so as not to discriminate against those individuals and comply with the requirements of the Americans with Disabilities Act. Government should encourage older people to take advantage of technology to access these very important benefits which can make a huge difference in healthy aging and longevity.

Endnotes

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7. www.myBenefits.ny.gov.
8. *Struggling to Get By? New Website Helps Determine If You May Qualify for Supports. State Unveils myBenefits.ny.gov, a Quick, Easy, Interactive Tool,* available at http://www.labor.state.ny.us/agencyinfo/mybenefits.htm.
9. https://a858-ihss.nyc.gov/ihss1/en_US/IHSS_homePage.do.
10. Pub. L. 104-193, the Personal Responsibility and Work Opportunity Reconciliation Act of August 22, 1996 "mandated that States implement EBT systems before October 1, 2002, unless USDA waived the requirement because a State faced unusual barriers to implementation." At the time, legislative history for implementing the EBT system indicated that it was intended eliminate "the cumbersome processes required by the paper food stamp system. By eliminating paper coupons which could be lost, sold or stolen, EBT may help cut back on food stamp fraud. EBT creates an electronic record of each food stamp transaction, making it easier to identify and document instances where food benefits are exchanged for cash, drugs, or other illegal goods." *See A Short History of SNAP*, available at http://origin.www.fns.usda.gov/snap/rules/Legislation/about.htm.
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23. www.socialsecurity.gov.
24. Visit http://www.nyc.gov/html/hra/html/directory/food_stamp_centers.shtml.
25. Food Research and Action Center, SNAP/Food Stamp Challenges, SENIORS AND SNAP/FOOD STAMPS, http://frac.org/initiatives/addressing-senior-hunger/seniors-and-snapfood-stamps/.

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The Boneyard

By Robert Cioffi

Basements typically do not invoke feelings of warmth or comfort—at least mine does not. It is dark, dingy and simply begging for a makeover. For the time being it is performing exceptionally well in its relegated role as a time capsule for the unwanted and forgotten relics of our lives. Boxes, furniture and assorted unknown objects are stacked together like a Rube Goldberg contraption gone horribly wrong. The creepy-crawlies, however, find refuge among this subterranean bramble despite the best stalking efforts of our two cats who remain futility fixed to flush them out.

"A business has its proverbial basement too. The 'boneyard,' as I like to call it, is usually that spare office or closet where the carcasses of old computers, machines and electronics are exiled. Their useful years are wholly spent yet there is no true finality for them. They are banished to a life (or is it a death?) in perpetual purgatory."

In recent years, though, my wife and I had grown progressively uneasy with the micro urban sprawl growing in our cellar. Thus began the herculean effort to dismantle the mess while suppressing any emotion about the once-forgotten and now recently remembered things of the past. The cats, however, did not forget about their multi-legged tormentors and quickly seized the opportunity to exact justice for being teased for so long. But before they had time to lick their chops we had moved most everything to the driveway for the most spectacular extravaganza of the year: the mighty garage sale! That's right; it became our goal to get others to part with their cash for our old junk.

A business has its proverbial basement too. The "boneyard," as I like to call it, is usually that spare office or closet where the carcasses of old computers, machines and electronics are exiled. Their useful years are wholly spent yet there is no true finality for them. They are banished to a life (or is it a death?) in perpetual purgatory. Some people will visit this graveyard periodically to ponder a potentially different fate. Is there not some use to this stuff? Is there no one who would want or care for these neglected gadgets? Although most homeowners find success at unloading their surplus sundries, a business may not find it as easy to dispense with its derelict devices. Furthermore, what lays buried inside the electronic waste may be forgotten, but it should be remembered with tremendous gravity. The data these items contain could harm your business in a multitude of ways.

The natural instinct of most office managers is to task their computer guy with the mission to tackle this problem. They will know what to do with all that stuff, right? In many cases the answer is no, or the net result is plainly not worth their time and effort. In fact, the job is quite a burdensome chore very low on the priority list and riddled with problems. Let's examine them.

The first issue is environmental. We cannot (or should not) cram the dumpster with old computers, monitors and printers. They end up in landfills or are incinerated. Electronics are chock full of caustic and dangerous chemicals including arsenic, mercury, lead and cadmium, to name a few. When burned, the PVC plastic found in most computers emits a harmful compound known as dioxin. All of these hazards are known to cause cancer, respiratory illnesses and reproductive problems. They are particularly dangerous because of their ability to traverse great distances through air and water systems, and are toxic even in small amounts. According to The Gartner Group, by 2008 over 2 billion PCs were sold since the first IBM PC rolled off production lines in the 80s, and over 1 billion are still in use today. So, what happened to the other billion? By 2013, the International Data Corporation ("IDC") estimated there were 1.8 billion cell phones in use and project there will be a total of 2.3 billion by 2017. Eventually all those devices will be considered trash. Countries like the United States, Japan and the European Union all have laws and systems to regulate and control the proper disposal of eWaste. But export systems are overwhelmed by the sheer volume of waste, and laws are mostly ignored. Furthermore, countries in Southeast Asia, such as China and India, do little to prevent the illegal import of eWaste because of the lucrative business opportunity. Aside from the dangerous elements, eWaste contains quite a number of valuable ones such as: gold, silver, copper, steel, zinc, aluminum, brass, plastics and other precious elements in rare-earth magnets.

The second problem eWaste represents is the potential for data leakage. Every business needs to be concerned about corporate or personal data falling into the wrong hands. Your old computer and electronics are likely to contain very important or sensitive files on storage systems like hard drives. Most business executives and IT managers are focused on the day-to-day compliance for regulations such as those concerning HIPAA/HITECH and Payment Card Industry matters. However, that tunnel vision can blind you from taking prudent steps once systems get powered off and disconnected. The data remaining behind still poses a threat. In addition to breaking the

law, a sloppy error could mean the loss of business goodwill or reputation. For example, the recent hacker activity at Target and Home Depot has left some feeling nervous about continuing to transact with them.

If you are disposing of, or donating old equipment, you should take great care in making sure the data is either properly removed or destroyed before it leaves the building. This includes items like hard drives, flash drives, cell phones, backup tapes, copiers, printers, etc. Components such as these should be mechanically shredded to physically and permanently destroy the data. Just because the device is placed curbside does not mean a curious mind won't find it before the maw of the garbage truck does. If a device is donated, make sure your gift does not include more than you anticipated.

The third issue is an extension of the second. Most people I meet are genuinely willing to help others less fortunate. Although their heart is in the right place, sometimes their head is not. The reason most electronics end up in the boneyard is because they rightfully belong there. Nine out of ten times, their utility is gone. For decades the world of technology has been laser focused on manufacturing new electronic devices, yet no one has paid any attention to completing the circle of life. One obvious solution appears to be charity. But think about that notion for a moment. Here is an old PC that our office shoved into the bottom of a closet because it was super slow and was a few generations behind in terms of operating system and software. Perhaps even a few components were beginning to fail. Now I want to give this away to a church, a non-profit, an employee, a school, or some underprivileged kid. Are you really doing them a favor? Unfortunately, in order to participate in the globally interconnected digital society, you must have a vehicle that can at least keep up. The information superhighway has no speed limits but does impose minimum speed requirements. Standing still is hardly productive.

Is there hope? Indeed, hope is eternal. In my travels (and mainly because I am that computer guy tasked to do something about the boneyard), I have found a few outlets that can help.

First, there are commercial operations that will recycle your old equipment. The reputable ones achieve and maintain certifications such as e-Stewards or R2. Both are very similar and provide the consumer both assurance and peace-of-mind that eWaste is being disposed of in accordance with any applicable laws, and that items potentially containing data are physically destroyed. These organizations also likely confirm to the protocols and procedures outlined by the NIST 800-88 standard, and will offer Certificates of Data Destruction if requested. Ultimately, every business should perform its own due diligence to properly vet their vendors. The right certifications are a good starting point.

Second, although there is a wealth of online information, it is critical to trust your sources. The Basel Convention (www.basel.int) and the Basel Action Network (www.ban.org) are two related organizations at the forefront of eWaste disposal issues.

Third, a few years back I happened upon an impressive organization known as Per Scholas. Located in the South Bronx, its mission started in 1995 to put technology in the hands of disadvantaged students in low income areas. It has since grown into a local recycling powerhouse with designs on national expansion. It too will recycle systems in both manners: physical and responsible disposal, as well as refurbishing reusable equipment for training purposes, and as very low cost alternatives for students. It is certified at data destruction services and count major Wall Street firms among its clients. For a nominal fee you can bring your old computers to this organization, or for larger quantities you can arrange to have pickup at your office.

Finally, there are plenty of organizations that will accept your old CDs, DVDs and other magnetic media for recycling. Many will freely accept as much as you can ship them. The plastics are recycled and end up being reused in things like car parts. A quick Google search will yield a ton of these outfits.

Despite how well we fared at our garage sale, the concept is powerful win-win-win. The seller gets to free himself from unessential items, and the buyer is likely to find herself a great bargain. But the subtlest and biggest winner is the landfill. Hopefully you now realize that dissolving your office boneyard is no longer a challenging or impossible job. Like the garage sale, everybody wins.

Robert Cioffi graduated Iona College in 1990 with a BS in Computer Information Science. After working at GE Capital for several years, he pursued an entrepreneurial calling and founded Progressive Computing with co-owner and college buddy, Ugo Chiulli. In his career at Progressive Computing, he has worked diligently to build the solid foundations on which his company stands: prompt, reliable, professional and expert service. Clients regard him as their Virtual Chief Technology Officer (vCTO) trusting in his 20+ years of business technology experience and pragmatic, decisive and creative personality. He is also widely known to be an expert public speaker on small business technology topics, an official advisor to vendors such as Microsoft, CCD Instructor and Lector for his local church, and serves on the Leadership Council of the Yonkers Strive Partnership.

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The New York Bar Foundation—Lawyers Caring, Lawyers Sharing

By Deborah Auspelmyer

What began as an organization with 12 board members incorporated in 1950 and a balance of $8,349.03 in fiscal year 1955 has grown to the nonprofit, philanthropic organization of the New York State Bar Association we know and love today.

An excerpt from the Foundation's 50th anniversary newsletter notes that, "The idea for the Foundation emanated from a report of the Association's Committee on Ways and Means that recommended creation of an affiliated not-for-profit organization as a way to pursue and support [of] projects in service to the public. By unanimous vote, the Executive Committee authorized this new venture. With $20 donations from 34 members, the Foundation began it mission of altruism on behalf of the profession working to ensure access to, improvement of, professional competence in, and understanding of the justice system."[1]

Through visionary leadership and a passion to help those in need of legal services, four distinct Grant Committees were developed in 1980 to assist in accomplishing the Foundation's grant work. Those committees merged into the guiding pillars of the grant program that serves those across New York State today:

- Service to the public
- Improvements in the administration of justice
- Legal research and education
- High standards of professional ethics
- Public understanding of legal heritage (the law)

The Foundation continues to build on its rich history of charitable giving and educational endeavors. It continues to present grants to support law-related programs of legal services organizations, nonprofits, bar associations and other organizations across New York State. The Foundation's grant program has grown significantly from its early financial program support of $1,071.80. Through the years the established grant program, inclusive of cy pres funds, has presented between $413,259 to over $1,500,000 annually to organizations across New York.

Fellows Established

In 1970, the Board of Directors pursued "new means of involving the profession and enhancing its resources to better address current concerns and new challenges [of the Foundation]."[2] Thus the Fellows program was developed. 19 Fellows were elected at the annual dinner, beginning a collaboration of thousands of members of the bench and bar whose personal and financial contributions have enabled the Foundation to grow steadily.

Fellows are members of the bench and bar who are recognized for outstanding professional achievement, dedication to the legal profession, and commitment to the organized bar. Each Fellow makes a commitment to financially support the goals and objectives of the Foundation through charitable contributions.

Nomination to Be a Fellow

An individual is generally nominated to become a Fellow by a Director on the Board of the Foundation or by a member of the Fellows and is elected by the full board. As ambassadors they exemplify the spirit of caring and sharing by demonstrating their belief that the practice of law is a helping profession. Fellows are instrumental to the growth and success of the Foundation, and it is an honor to be nominated as such. To date, there are 1,098 Fellows and five Circles of Giving that are instrumental to the success of the Foundation.

The Needs Continue to Grow

The 2015 grant cycle saw a 25% increase in grant applications from organizations that provide legal assistance with front page issues such as poverty, homelessness, elder abuse, domestic violence, human trafficking, housing, and workforce issues. Our communities continue to see a need for fair legal representation and access to legal services while the gap of those who can afford these services continues to grow.

Continued support of the Fellows and the contributions received from donors to further expand the grant program make the Foundation's work relevant. Although the board and staff of the organization are passionate about the efforts and impact of the Foundation, it is the grantees and their clients that tell the real story.

Meet One Grant Recipient—Start Small Think Big

As guest speakers for the Foundation at the January House of Delegates meeting, Erica Coleman, Legal Programs Director of Start Small Think Big, and jewelry designer, Izaskun Zabala, shared their stories of how the organization was assisted via a grant from the Foundation.

Start Small Think Big is a small, relatively new non-profit organization founded in 2010. Its mission is to help low-income individuals build thriving businesses to increase personal financial security and stimulate economic activity in underserved New York City communities. It does this by providing free legal and financial services to low-income owners of small businesses, and low-income entrepreneurs that would not otherwise be able to access or afford the kind of specialized professional expertise needed to start a successful business.

Foundation Board President Cristine Cioffi (center) introduces Izaskun Zabala and Erica Coleman to the NYSBA House of Delegates.

The organization's legal program is operated by two people who reach over 1,000 low-income small business owners and entrepreneurs each year. They provide one-on-one legal assistance to approximately 250-300 individuals annually; on average the legal team provides 25-30 hours of free legal assistance, valued at approximately $17,000 per client.

"For a small organization like ours, a grant of $10,000 is absolutely something to jump up and down and be incredibly excited about," noted Ms. Coleman during the remarks. "We are incredibly grateful to the Foundation for the grant."

Clients of Start Small Think Big include corner stores, nail salons, and beauty supply stores in Harlem, the Bronx, Queens and Brooklyn. They are young immigrants who have designed new mobile apps or clothing brands that they would like to bring to market. Their clients are "…the most ambitious dedicated, hard-working, and optimistic group of people that it is a pleasure to work with," according to Coleman. "Our goal is to help them develop a sound legal infrastructure. We believe that is important as a first step in a prerequisite to accessing opportunities to grow their businesses and to move toward a place of financial stability."

The organization helps small business owners understand their obligation as employers while helping them protect their intellectual property. It was noted that in many cases those efforts are directly related to new income-generating opportunities.

Izaskun's Story

Start Small Think Big began working with Izaskun in the fall/winter of 2013. At the time, she had been receiving unemployment insurance and was previously operating her new hand-made jewelry business out of the bedroom in her apartment.

A talented designer who grew up in Basque Country (Spain), she moved to Dublin, Ireland at 19, where she learned English and enrolled in a course where she worked in the Fine Arts. Arriving in New York City at 23, she continued to learn about jewelry.

Within the first month of launching her company, Izaskun was noticed by Ann Taylor and invited to design for its new company called Lou and Grey. She is one of its core jewelers, manufacturing everything in New York City. Izaskun explains:

> I needed help; they [Ann Taylor] sent me information and third party vendor agreements. Everything was overwhelming to me. I didn't have the money to look for a lawyer for help. I reached out to Start Small Think Big where right away they helped me within a couple of days. They have continued helping me to the point where just recently my trademark and the copyright of my logo were registered. They are still willing to help me with anything else that comes up.
>
> My business is expected to grow because I had the legal help I needed. As everybody knows, without legal help you cannot have a company. I appreciate it, thank you so, so much.

Over the last year Start Small and two teams of pro bono attorneys have helped Izaskun negotiate a non-disclosure agreement received from an interested buyer and assist with various entity formation and intellectual property matters.

Through a grant from the Foundation, Start Small Think Big was able to impact the life of someone by helping her to start her own business.

A Successful Outcome

Legal Services for the Elderly, Disabled or Disadvantaged of Western New York applied for a grant from the Foundation to begin an innovative type of collaborative effort to assist victims of elder abuse. According to the application, thousands of the elderly are abused each year and often in cases of elder abuse the abuser is also

the caregiver which makes the victim dependent upon the abuser. At the time, there was no option for the abuse victim to seek immediate care outside of an often unnecessary admission to a hospital emergency room. These admissions further burden the healthcare system and leave the victims without a safe, secure place to get the treatment and care they need. An elder shelter network of nursing homes will give victims a place to stay while a team of service providers work to find a permanent, safe residence for the victim.

The Elder Domestic Violence Shelter Network of Erie County (EDVSN) opened its doors on June 13th, 2014. The purpose of the EDVSN is to provide shelter for elderly victims of domestic violence through temporary placement at local nursing facilities while a team comprised of attorneys, social workers, health care providers and other community members work together to seek permanent, safe placement. This process can involve filing for an order of protection, completing Medicaid applications, working to contact family members and putting in place the safeguards necessary so the victim can live a life free from abuse. In addition, by training hospitals and community providers to identify elder abuse and reach out to EDVSN, it is able to get involved and put safeguards in place to prevent readmissions and additional abuse. The more cases of elder abuse which are identified through referrals to EDVSN, the safer the community as a whole is for seniors.

Meet "Samuel"

One example of EDVSN at work is a recent admission to the shelter network. The victim "Samuel" (the person's name has been changed to protect his identity) was an elderly male; the abuser his wife. He was admitted to a local hospital, one of the network's training sites. The hospital workers identified the presence of elder abuse and reached out to EDVSN, submitting an application through the service website.

"Working collaboratively, we were able to ensure that an order of protection was in place removing the abuser from his home, that home health care services were reinstated, and had the victim desired placement at a facility, that placement was available," states Sarah Duval, Staff Attorney with LSED. The victim partnered with an advocate from crisis services who worked with him to ensure that he was safe in the home, that his bills were paid, and that with reinstated home health care he could stay physically well in his home.

"Samuel" is now a part of the shelter network, and instead of being alone in a home with an abuser he has access to legal, social and health care assistance.

"This comprehensive approach to elder domestic violence is the goal of the EDVSN and, thanks to the support of The New York State Bar Foundation, we are making our community a safe place for our seniors," states Kathy Kanaley, President of the Erie County Council on Elder Abuse.

You Make the Difference

The past year has been marked by change for the Foundation, developing and implementing a new strategic plan, receiving a historic increase in grant applications, and establishing a culture sharply focused on the growth of the Foundation through a purposeful approach.

Recognizing that more must be done to close the justice gap, the Foundation's board has been diligently working to achieve its goal of doubling the Foundation's grant-making over the next three years.

Efforts to increase funds include:

- Growing the numbers and contributions of Fellows of the Foundation;
- Working toward securing major gifts and bequests;
- Increasing awareness of giving opportunities through dues check-off and special gifts to the Foundation; and
- Requesting cy pres allocations of remaindered funds where appropriate in class action settlements.

Supporting the Foundation supports the grant program and helps us close the gap in the need for legal services. If you are a Fellow, we hope you will consider moving into the next Circle of Giving this year. Donors can also consider becoming a member of the Foundation's Legacy Society and making a gift in memory of someone or to honor a colleague or family member's celebration.

All of these efforts collectively support the Foundation's mission and make it possible to help Izaskun, "Samuel," and other people in need of life-changing legal services across New York. For more information on the Foundation, visit the website at www.tnybf.org/donation or call the Foundation at (518) 487-5650.

Endnotes

1. *The New York Bar Foundation Annual Report* 2000, at 1.

2. *Id.* at 15

Deborah Auspelmyer is the Director of Development and Administration for The New York Bar Foundation. She is a member of the National Conference of Bar Foundations, Women in Development of Northeastern New York, and the Association of Fundraising Professionals. She holds her B.S. in Business, Management and Economics, and is a graduate of The Institute of Organizational Management program at Villanova University.

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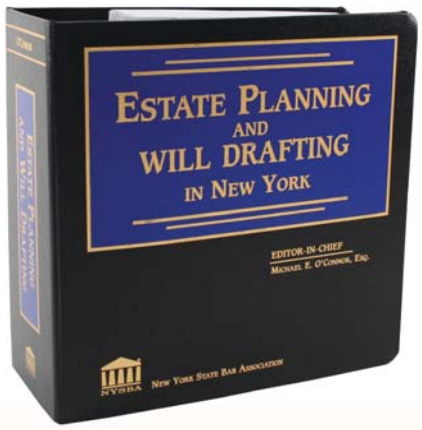

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