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of the New York State Bar Association

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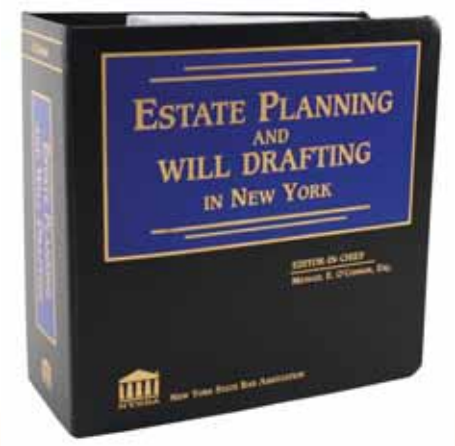

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Message from the Chair

Happy Birthday! 2016 brings with it two exciting birthday celebrations—all those folks with a February 29th birthday get to celebrate (or mourn?) aging on their actual birthday this leap year, and the Elder Law and Special Needs Section turns 25. Happy Birthday to all!!

The end of 2015 gives us the chance to thank those who have helped make the year so memorable, and to look forward to a challenging and exciting new year. Our Section has seen some exciting changes, all designed to enable us to move expeditiously to address the needs and concerns of our Section members and our clients. We have also been focused on the committee work that keeps us moving forward, and have enjoyed ourselves along the way.

Our Fall meeting was held October 23-24, 2015 at the Gideon Putnam Resort in Saratoga Springs. Co-Chairs Felicia Pasculli and Bill Pfeiffer put together a terrific two day program, attended by over 100 attorneys. Our reception and dinner at the Saratoga Thoroughbred Racing Hall of Fame was a wonderful opportunity for attendees, guests, sponsors and exhibitors to continue the dialogue and debate that our CLE presentations started. Our program was a success due in large part to our sponsors and exhibitors. While we had many of our faithful supporters with us, we were fortunate to have some new sponsors and exhibitors with us. Check out the photographs on our Section's webpage at www.nysba.org/Elderlaw and click on "Photo Gallery" on the left side.

In the midst of all, we have been hard at work. Rene Reixach, Valerie Bogart, Deep Mukerji and I met in early October with some representatives from the New York State Department of Health to discuss several issues that have been percolating for a while. Joined by Kevin Kerwin of NYSBA's Governmental Relations Department, our discussion included the inconsistent treatment of retirement accounts across the state, the exemption of federal income tax refunds, the delay in commencement of payment to homecare agencies for persons approved for Medicaid but not yet enrolled in Managed Long Term Care programs, and the challenges in budgeting where both spouses need Medicaid, but with one in the community and the other in a nursing home. The group was dynamic and well versed in presenting our Section's thoughts. We are always grateful for the time and courtesy that the Department of Health extends to our Section, and believe that our members, the clients we serve, and the public at large benefit from collaborative dialogue.

Our committees have similarly been hard at work. The **Veteran's Benefits** Committee has finished a wonderful pamphlet available on our Section's website outlining the benefits available through the Veterans Benefits Administration called "Benefits for Veterans and Their Families." It is a tool for practitioners and veterans and their families alike! www.nysba.org/Sections/Elder/Section_Pamphlets/Elder_Law_Section_Pamphlets.html.

The **Legal Education Committee** worked with NYSBA's Continuing Legal Education Department to prepare the Continuing Legal Education seminar on the "Basics of Elder Law." Richard Weinblatt and Fran Pantaleo, our two most recent past Chairs, collaborated with the staff at NYSBA to present this CLE in five locations across the state: Westchester on November 5; Long Island on November 19; Rochester and New York City on December 1; and Albany on December 8. This Basics class is always popular, and this year was no exception. I also send a heartfelt THANK YOU to Fran and Richard, all the local site chairs, and the entire team of faculty, authors, and presenters who were able to make this CLE so wonderful.

I would be remiss if I did not extend our Section's thanks to Mr. Jean Nelson, who assisted us in getting this CLE together. Jean decided that the time had come for him to retire and spend more time with his wife, and so, after ensuring our Section was well situated for this five-part CLE, he retired from the CLE Department of NYSBA on October 30. On the off chance he's spending his retirement reading NYSBA Section journals, THANK YOU Jean for your years of service to the Association and our Section!

Our **Legislation Committee** has also been hard at work. With over ten agenda items for continued attention, this is an active committee always in need of assistance. This Committee had previously advocated for a modification to the Right of Election Statute to permit a surviving spouse's share to be placed in a supplemental needs trust and still satisfy the elective share. We had received the support of NYSBA, and, this year, have placed this item on the top of our legislative priority agenda. Small group meetings with legislators have taken place to advance this issue, with the hope that we can secure a change to the law to permit a surviving spouse's Elective Share to be paid into a supplemental needs trust. This Committee has also advanced a new

proposal on the Elective Share—permitting a waiver of the Elective Share after the death of the first spouse. This issue has been approved by the NYSBA Executive Committee and we hope that we will be able to move forward with this important issue as well.

Our **Membership Services Committee** has launched a four-prong approach to growing the membership of our Section. Focusing on newly admitted attorneys, attorneys transitioning into this area from other areas of law, attorneys in the public sector, and attorneys of diverse ethnic and geographical backgrounds will help our Section remain vibrant and relevant. Please do not hesitate to step up and volunteer!

And, of course, we must send a big thank you to our **Publications Committee** chairs, the Co-Editors, Tara Anne Pleat and Judy Nolfo McKenna, for their tireless work on the *Journal*. Keep an eye out for the Spring edition of the *Journal*, where some of our past Chairs will be contributing pieces commemorating the Section's 25th Anniversary.

As our Section prepares for another budget season and the continuation of the legislative session, we remain as committed as ever to being the voice for our members and the clients we serve. I would encourage you to join us on our Legislation Committee conference calls on the second Tuesday of each month to become involved.

I look forward to seeing you this spring at the Un-Program in Poughkeepsie or working with you on one of our committees. And, as always, please let me know if there is anything I can do as Chair of the Section to bring more member benefits to you!

JulieAnn Calareso

Message from the Co-Editors in Chief


Judith Nolfo McKenna

Dear Colleagues:

As we write our second message as Co-Editors in Chief, please let us express our gratitude to all the members who have submitted articles, columns and photographs. Our Fall Meeting at the historic Gideon Putnam Hotel in Saratoga Springs was the perfect autumn respite as we ready ourselves for another predictably unpredictable New York winter.

Our Section is as diverse in practice area and focus as our state in its geography and demographics; not to mention diverse in snow accumulation totals…

We are excited to bring you our Winter *Journal* that truly highlights the diverse issues our Section's members address each day. We are pleased to print a submission from former Surrogate Kristin Booth Glen, which discusses repurposing the role of a Trust Protector in Supplemental Needs Trusts in an effort to create more efficient and effective administration of these Trusts. As our members are well aware, the administration of Supplemental Needs Trusts is a developing area, and Judge Glen's insightful article provides concepts and ideas that should be strongly considered by attorneys drafting these Trusts.

Joanne Fanizza's article "Should They Go or Should They Stay?" summarizes common questions our snowbird clients face when considering a move from New York to Florida. In this issue, we will shine our Committee Spotlight on the Legislation Committee, Co-Chaired by Deep Mukerji and Matt Nolfo. The Committee Spotlight is part of our Section's efforts to share information about particular committees and attract new members to our Section's plentiful and diverse committees. In addition to the "Spotlight," the Legislation Committee's Deep Mukerji has provided a summary of the new Social Services Law Section 133 regarding Immediate Need Medicaid.

George Gray explains the ideal circumstances under which a Third Party Supplemental Needs Trust should be integrated into an estate plan involving charitable remainder trusts in his article "Naming a Supplemental Needs Trust as a Beneficiary of a Charitable Remainder Trust." Anthony Enea's submission, "Separated but Not Divorced" highlights the perils that separated (but not divorced) couples can face in the context of a Medicaid application.


Tara Anne Pleat

We welcome Elder Abuse Committee's article on the sexual rights of older adults and those with dementia, in "Putting the Sex in Sexagenarian" authored by Malya Levin and Deirdre Lok. Bob Mascali's column, the "New York NAELA Niche" returns this winter and provides an update on the Special Needs Trust Fairness Act as well as a summary of a recent decision regarding the impact of Supplemental Needs Trust administration on federal housing benefits.

Keri Mahoney discusses the new ABLE Act and challenges readers to identify the circumstances where the ABLE Act can serve as a meaningful tool for our clients in "Which Clients Can Benefit from ABLE Accounts?" Stephen Donaldson provides insight to attorneys who are new to the appointment as Court Evaluator in an Article 81 proceeding by writing a concise summary of recommendations in "Building a Better Court Evaluator Report."

The Technology Committee's submission invites our membership to learn more about and engage in the Section's communities and the Ethics Committee returns with its 12th poll of our membership. In this most recent poll, the Committee explains the scenario where our clients wish to execute documents that they have not read and may not fully understand. We are grateful to both the Technology Committee and the Ethics Committee for their submissions, which provide a value added to our members in the areas of accessing technology that can better our practices and the muddy waters we often face in the ethical realm that allow us to better ourselves in the counsel we provide.

We round off this edition of the *Journal* with an introduction to our Section's liaison with NYSBA, Lisa Bataille, a woman all of our members should know and should thank for keeping the Section members and leaders both organized and informed.

We sincerely hope you find this edition of the *Journal* insightful and useful in your practices whether you have been in practice for 30 years or 30 days. We continue to strive to provide our members with relevant and useful articles that will keep the membership informed and enhance the practices of our members. We are hopeful that our members will continue to submit articles that share their expertise, ideas and experiences, as we all benefit in receiving them.

Tara & Judy

Protecting the Vulnerable Beneficiaries of Special Needs Trusts and Other Trusts: Re-Purposing the "Trust Protector"

By Kristin Booth Glen

Parents or other relatives of persons with disabilities often worry about what will happen to their loved ones when they are no longer around, or able to provide care. Where funds are,[1] or may become available,[2] their concerns center around ensuring that monies will be invested prudently and spent wisely to give their loved ones their best possible lives. When consulting professionals, the most frequent advice is to create a trust, whether a discretionary support trust or a Supplemental Needs Trust (SNT),[3] and many do so.

A well-regarded treatise suggests language for a discretionary trust with just such a purpose:

> The primary purpose of the Trust is to assist the Beneficiary to achieve his maximum potential and lead as full, independent and normal life as possible. To that end, it is the Settlor's desire that the Trustees view themselves not only as Trustees in the traditional sense, but also as advocates and protectors of the beneficiary, and the Trustees shall expend the income and principal of the trust in ways that shall best further these goals. While the Trustees shall administer the Trust in a prudent manner to protect the long—as well as the short—range interest of the Beneficiary, it is the Settlor's intent that the quality of life of the Beneficiary, not merely cost factors or considerations of the impact on the value of the trust, shall determine the expenditure of income and principal from the Trust.[4]

However, despite such laudable goals, and even with clear, albeit precatory instructions, it is possible that the settlor's intent will be thwarted by an inattentive, uncaring or incompetent trustee. Consider the following examples:

1) Marie and Mark[5]

Marie was a widow in her 60s when she adopted Mark, subsequently diagnosed as autistic. She spent significant funds and efforts obtaining the best possible treatment; he was living at home, making progress and attending school at the time that, sadly, she was diagnosed with terminal cancer. With only a limited time to live, Marie located an apparently appropriate placement for Mark at the Anderson School, a facility in Staatsburg, New York. After attending a lecture by an attorney specializing in estate planning for families with special needs children, she engaged the attorney to write her will, and to create a trust to provide for Mark after her death. She named the lawyer and a bank as successor trustees to her sister, who unfortunately passed away soon thereafter.

For more than three years after Marie's death, and despite a trust corpus of more than $3 million, neither the lawyer nor anyone from the bank visited Mark, or made any effort to ascertain his needs. The trustees spent not a single penny for Mark's benefit, though both took commissions and, in the lawyer's case, legal fees. When the lawyer applied to become Mark's 17-A guardian, court papers indicated that Mark was at, or had regressed to, the functional level of a six-month-old, with the communication skills of an 18-month-old. He was described as suffering from seizures and self-harming behavior.

With court intervention, a care manager was hired, visited Mark and assessed his needs. She learned many sad and painful facts: over the prior four years, no one had ever visited Mark; alone among patients of the facility, he had never left the grounds. She was advised that Mark's seizure medication came in two forms: single dose and extended action. The former, covered by Medicaid, produced aggressive behavior which frequently required Mark to be restrained. The latter had no such side effects, but because Mark was a Medicaid patient, and Anderson had no knowledge of the trust, only the single dose was available to him, causing him entirely unnecessary distress.

Over the next several years, the care manager's active participation dramatically improved Mark's quality of life and his underlying conditions. She used trust funds to purchase assistive communication devices, computers and exercise equipment, as well as services, like independent medical and pharmaceutical consultations and personal assistants who took Mark to restaurants, recreational facilities and other off-campus activities. He now lives in a pleasant group home where he participates in all activities, dresses and feeds himself, chooses his own favorite foods, goes to restaurants and movies, makes purchases, and even, most recently, participated in a local Special Olympics competition.

2) Miriam, Fred and Cynthia[6]

Miriam and Fred were middle-class Long Islanders with modest savings, and a house that had significantly appreciated over the 25 years since its purchase. Their daughter, Cynthia, had adolescent-onset schizophrenia

which manifested as inability to hold a job, periods of paranoia, and grandiosity, including spendthrift activities. Cynthia often lived on her own, but had periods in which she returned to her parents' care. As Miriam and Fred grew older, they became concerned about what would happen to Cynthia when they passed. In particular, they worried about how their relatively modest estate might best be used to help support her, but avoid being dissipated by misuse or extravagant spending. They consulted a lawyer who advised and prepared a will and discretionary testamentary trust. There was, however, a problem about who might be the trustee. Miriam and Fred's other child, a son, lived across the country and declined to serve. They had neighbors who had known Cynthia since her childhood, but who felt they lacked the skills or energy to take on the responsibility of the trust. Seeing no alternative, Miriam and Fred named a bank as sole trustee upon both of their deaths.

The parents passed away within months of each other, leaving a net estate, including the proceeds of their house, of approximately $600,000. As trustee, the bank purchased a condominium apartment in the town where Cynthia was living, and thereafter paid the common charges and taxes on a regular basis. Also, apparently without review or comment, the bank paid all the bills Cynthia sent it, including credit card bills exceeding $80,000 per year. At the end of three years, the bank sought court permission to sell the apartment to satisfy its commission and fees because the corpus of the trust was exhausted. Terrified, and facing eviction, Cynthia sought assistance from the local legal services office. The lawyers there believed the bank had violated its fiduciary obligation, making it subject to surcharge, but explained that they lacked the resources to prosecute a proceeding which might result in relief. Cynthia's brother belatedly learned of the situation and frantically began seeking legal assistance from across the country. Before he was able to obtain counsel, Cynthia unexpectedly passed away.

Lessons from the Stories

If we look back to the moment when Marie created the trust for Mark, or where Cynthia's parents attempted to provide for her future needs from their life savings, we might ask: what were their hopes and expectations, and what would it have taken to meet them? Marie wanted her money to be well invested, but, of equal importance, the trustees to attend to Mark's needs and use those funds to give him his best possible life. Cynthia's parents wanted a fiduciary who would steward their hard-earned estate, use their funds to supplement Cynthia's government benefits and sporadic earnings, and help her live a middle class life. At the same time, they wanted a fiduciary who would carefully dispense funds to protect against the very spendthrift behavior that prevented them from making an outright bequest.

In some ways, these parents wanted what all trust settlors want: that their trustees will invest well, demonstrate loyalty and a duty of care, and utilize trust funds to provide for their beneficiaries in the way described by the trust. But, as commentators have cautioned, "how do we assure that the trustee provides the care and loyalty the settlor and beneficiaries expect?"[7]

Generally speaking, trust law looks to beneficiaries to protect their own interests, but such reliance is not always realistic or effective; Langbein notes the "difficulty of beneficiary monitoring underscor[ing] the importance of the duty of loyalty."[8] This difficulty is, of course, magnified exponentially when beneficiaries have significant disabilities, especially intellectual or psychosocial disabilities.

What Mark and Cynthia's parents wanted was good, competent, knowledgeable, caring trustees. And for cases like theirs (although, unfortunately, not for them), there are such trustees, both individual and institutional. Many trustees, however, simply lack the knowledge and training to effectively carry out such settlor's wishes. They are not necessarily bad, or uncaring; the job they have been given simply exceeds their skill sets.

To be sure, there are financial institutions that add expertise with in-house social workers, or which contract out to care managers who have extensive experience with persons with disabilities. Some specialized attorneys have developed the relevant expertise and capacity to assess and meet special needs with available resources. But even in these best case scenarios, the "good" bank can be acquired by another and lose its social service resources, or the expert lawyer can retire, or die, leaving a successor trustee without the same commitment and skills.

Settlors of trusts for vulnerable persons need individuals who are connected to those persons, who know their strengths and weaknesses, and how best to meet their needs. But the very people who might do so, siblings, neighbors and peers, are least likely to have, or believe they have, skills to invest and account for substantial sums of money. Nor are they willing to take on a legal obligation far outside their comfort zone. As well, there is an economy of scale in administering multiple trusts, as opposed to a sole individual's responsibility for investment decisions, tax returns, annual reports, and the other duties of a competent trustee.

Ideally, a knowledgeable and caring individual might serve as a watchdog or advisor to a trustee, rather than as trustee herself. Many families could identify someone to assume this role. It might be a person who knows the beneficiary intimately, like a sibling, friend or "supporter"[9] who will visit, and who can advise, but who is not able to undertake the other responsibilities

of the trustee. It might be a neighbor who has watched the beneficiary grow up, who knows the settlor's hopes and dreams, and who is willing to be involved, but only up to a point. What, if any, devices exist in the law of trusts that might make such person's engagement possible and beneficial?

Re-Purposing the Trust Protector

Decades ago, creative lawyers developed the concept of "trust protectors" or "trust advisors" for a very different purpose: to "enable settlers of offshore asset protection trusts to maximize their control over assets transferred into such trusts while still immunizing them from the reach of creditors."[10] As a leading commentator has noted, over time "lawyers have recognized the potential of the office and are using it as a device that adds flexibility to long term trusts and that increases the settlor's ability to control trustee behavior long after the time when the settlor has died or has otherwise become unable to direct the trustee."[11] This broad description and the very term, trust protector, suggests relevance and potential solution to issues confronting people like Marie, Miriam and Fred, and others who hope to use their assets after their deaths or incapacity to care for loved ones with significant disabilities.

For such parents and others like them, the question is whether the concept of trust protector can be re-purposed, not to give the settlor greater control, or evade fiduciary disclosure requirements,[12] or permit subsequent alteration to benefit from changes in tax laws, but to ensure that settlors' wishes to protect vulnerable beneficiaries are carried out. Answering this question requires some knowledge of the current state of the law relating to trust protectors, and consideration of the appropriate powers and obligations that might be conferred. Thinking about alternative uses for trust protectors may also raise issues outside the usual scope of trust and estate law.

The Current Status of Trust Protectors

The increased use of trust protectors in domestic trust governance has spawned a significant volume of commentary, but a relative paucity of legislative response, with a striking lack of consistency in such laws as do exist.[13] Commentators have focused on two main issues: is the trust protector a fiduciary, with the obligations and potential liabilities that status imposes[14] and does the use of a trust protector increase, rather than decrease, "agency costs"[15] associated with a trust.[16] Statutes passed over the last two decades provide varying approaches to the first, with no empirical evidence as to the second.

The first statute explicitly authorizing or defining trust protectors was enacted in South Dakota in 1997;[17] since then, 14 additional states have enacted legislation "that expressly or impliedly authorize settlors to appoint trust protectors."[18] A significant influence on a number of those statutes has been the Uniform Trust Code which, although nowhere using the term trust protector,[19] provides for a "person [with] power to direct certain actions by a trustee" "under the specific term of a trust." Under the UTC, such person is presumptively a fiduciary, and the trustee is required to follow her directions

> unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.[20]

Perhaps as a result of the Section 808's lack of specificity,[21] several states have passed statutes that list, albeit not necessarily exclusively, powers that a trust protector may exercise.[22] While noting that "[o]ften only one or two…powers may be included" by a settlor in a particular trust, Bove lists eleven possible powers:

> (1) Remove, add, and replace trustees; (2) Veto or direct trust distributions; (3) Add or delete beneficiaries; (4) Change the situs and governing law of the trust; (5) Veto or direct investment decisions; (6) Consent to the exercise of a power of appointment; (7) Determine whether an event of duress has occurred; (8) Amend the trust as to administrative provisions; (9) Amend the trust as to dispositive provisions; (10) Approve trustee accounts; and/or (11) Terminate the trust. Bove, *supra* n. 14.

Current statutes are divided as to whether to follow Section 808's rule that a trust protector is presumptively a fiduciary unless otherwise provided in the instrument.[23] In South Dakota, for example, a trust protector "may not be considered to be acting in a fiduciary capacity except to the extent the governing instrument provides otherwise."[24] Several other states have chosen the presumptive *non*-fiduciary route.[25] Statutes purporting to deal with the issue can themselves create ambiguity, as in Missouri, whose statute provides that while a trust protector acts in a fiduciary capacity, the trust protector is not a trustee, and is not liable or accountable when performing or declining to perform the express powers given in the instrument.[26]

There is virtually no case law guidance on a trust protector's powers in the absence of specific statutory authorization or explicit language in the instrument, nor on when, and to what extent, a trust protector may be liable when her action or inaction causes damage to the beneficiary. Only one appellate case has even pur-

ported to address these issues[27] and did so in a fashion so limited by the procedural constraints of the case[28] that it is of little or no assistance and probably lacks precedential value.

New York[29]

At present, New York has neither statutory or case law guidance,[30] and any possible future adoption of the UTC could lead to the ambiguities already noted. With or without adoption of Section 808, any prospective use of trust protectors must fit into an existing regime of trust administration and litigation with its own set of requirements and challenges. For example, consider the question of standing. If a trust protector wanted to compel an accounting by a trustee, or sought to remove a trustee, she would confront an indeterminate statutory standard[31] which, unless and until appellate authority exists, could be utilized inconsistently by different surrogates to permit *or* deny standing regardless of the terms of the trust instrument.[32]

While existing law creates challenges, there are also provisions in non-trust New York law that provide possible solutions[33] or good analogies. An example of the latter is creation of a "monitor" for powers of attorney.

In 2009, New York adopted a new power of attorney law, Gen'l Obligations L., Title 15,[34] which created a new office, that of a "monitor"[35] which, according to the Practice Commentaries

> allows the principal to arrange for informal oversight of an agent, particularly when the agent's authority to act on behalf of the principal continues after the principal has become incapacitated and no longer capable of directing the agent.[36]

An agent acting under a power of attorney has an obligation

> to keep a record of all receipts, disbursements and transactions entered into on behalf of the principal and ... shall make such record…available within fifteen days of a written request by…(1) a monitor.[37]

If the agent fails or refuses to make the record available, the monitor is empowered to bring a special proceeding under §5-1510. Significantly, the Law Revision Commentaries refer to the monitor as "akin to a trust protector."[38]

The GOL "monitor" has two possible implications for thinking—or legislating—about trust protectors. First, it permits the agent to keep and provide relatively informal financial records "as modest as a check book, bank book or account, and receipts from credit cards."[39] A settlor, seeking to avoid the expense of a full accounting, might give a trust protector access to these more informal "records" in order to perform the oversight of the trustee's action.[40]

Second, as the GOL monitor is concerned only with financial transactions, and has no fiduciary duty or power to direct or remove the agent,[41] the monitor's limited role may provide "a model where a friend or family member is unwilling to undertake a role which has even a remote chance of imposing liability.

Preliminary Observations for Re-Purposing

Absent a statute or significant case law exegesis, how should the drafter of a discretionary support trust or SNT for a settlor of relatively modest means provide for a "re-purposed trust protector"? The two issues most commonly identified by commentators with regard to such trusts, "agency costs" and fiduciary status, are also relevant where protection of vulnerable beneficiaries is the goal.

First, any prospective expense connected to the use of a trust protector will be important to all but the wealthiest settlors. For people like Miriam and Fred, the corpus of their trust will be barely adequate to provide for Cynthia over the expected course of her life; diminishing it by administrative expenses is obviously to be avoided to the extent possible. The assumption in such cases must be that the prospective trust protector will be a family member or friend who is willing to serve without fee. Even this does not entirely avoid potential expense, as the trust protector, in the exercise of her duties, may be required to retain legal counsel and will almost certainly look to the trust for payment. In thinking through the powers that might be granted to the trust protector, the potential for litigation and associated costs must be considered.

Dependence on unpaid family members, friends or neighbors implicates whether the trust protector should be considered a fiduciary in the exercise of any or all of the power she is given, and, if so, under what standard her actions or inaction are to be judged. The prospective unpaid "volunteer" trust protector is likely to be relatively unsophisticated and risk-averse. She would need to understand and accept the possibility, however unlikely, of liability were she to breach a fiduciary obligation imposed by the instrument, by statute, or case law. Avoiding the imposition of fiduciary obligation may, therefore, prove critical in obtaining the consent of a person otherwise willing and appropriate to protect the interests of a vulnerable beneficiary.

The fiduciary issue leads to one final preliminary consideration. The process of drafting a trust with a "re-purposed trust protector" is likely to involve substantial and thoughtful interaction with the proposed trust protector. The drafter must not only determine what powers are appropriate to best protect the benefi-

ciary, but also assess the proposed protector's capabilities and limitations, and to fully explore and resolve her concerns. Although there should never be a "one size fits all" approach to drafting, the need for closely individualized attention is especially great given both the personal relationships involved and the uncertainty of the law.

What Are the Goals of Using a Trust Protector?

In the previous scenarios, to protect a vulnerable beneficiary, a trust protector would need to know and understand the beneficiary's current situation, monitor the actions (or inactions) of the trustee, and have the capacity to take action against the trustee if necessary. The latter two goals involve choices among the kinds of powers which might be given to a trust protector, while the former implicates legal issues unrelated to the trusts and estates context. What are the powers that families of persons with disabilities might want the trust protector to have, and what would be necessary to ensure that they are both legally *and* practically exercisable?

1) Monitoring the Beneficiary

To ensure that trust assets are utilized to optimize the beneficiary's well-being, the trust protector will need to keep abreast of her whereabouts and situation/condition. Here, state and federal laws about the privacy of medical records[42] become important. The trust protector needs not only to be someone whom the grantor trusts, but someone who has the trust of the beneficiary.[43] To the extent that the trust protector needs access to medical records, a trusting and cooperative beneficiary can give consent that avoids the problem of HIPAA.[44] In a situation where a third party health care provider refuses to accept the beneficiary's consent, or where it is not possible to obtain it, the trust protector might consider employing the "one-shot" or "single transaction" provision of Art. 81, MHL 81.16(b), by which a court could authorize access to medical records without imposing a guardian or any additional deprivation on the beneficiary's liberty rights.

2) Monitoring the Trustee

This is clearly the first, and driving criteria for a trust protector, and obviously requires that the trust protector have access to relevant information about trust finances and the expenditures the trustee is—or is not—making. The former includes the Cynthia problem, spending too much unnecessarily and exhausting the corpus, when something as simple as placing a limit on the beneficiary's credit card could alleviate or solve the problem. A trustee might also be spending excessively for legal and/or accounting services, or to reimburse herself for providing such services. Catching such over-spending early is far preferable to attempting to remedy it through surcharge when little or nothing is left in the trust. The latter, or "not spending," as in Mark's case, involves a combination of awareness of the beneficiary's needs (precisely why someone who knows and cares about him should be appointed), and knowledge of how much is being expended relative to available funds.

a) Obtaining Necessary Information

An important initial question is how the trust protector can obtain the necessary information in a way that is not unduly burdensome and which does not impose additional and unnecessary costs on the trust. Clearly, requiring a formal accounting on a yearly basis would fail the cost criteria. One possibility is to require the trustee to furnish the trust protector with the more informal records permissible for an agent under a power of attorney, *supra* at page 10, or in the case of a testamentary trustee, an SCPA 2310 statement required for her to take commissions.[45]

Where a trustee is unreasonably recalcitrant, or it appears there may be some wrongdoing or failure to advance the grantor's wishes, the trust protector must have the power to compel an accounting. This raises the issue of standing, with no certainty that a court would find the trust protector a party with an "interest," even if the trust instrument so provided.[46] One possibility is to name the trust protector as a remote contingent beneficiary in the event all other bequests should fail, which would give the trust protector a *financial* interest recognized by the IRS[47] and thus almost certainly by New York courts under SCPA 2101(1)(a). Note, however, the possibility that such status might create a potential conflict of interest because of the protector's status as a beneficiary.

b) "Directing" or "Advising" the Trustee

More traditional use of trust protectors routinely provides the power to direct the trustee, often with regard to investment decisions. The power to direct might be usefully re-purposed to involve expenditures the trust protector believes would help the beneficiary, like purchasing assistive technology items, or services like a care manager or physical or occupational therapist. Similarly, a trust protector could direct the trustee to place limits on the spending of a beneficiary like Cynthia.

The power to direct may be useful not only in enhancing the beneficiary's life, but also in providing a partial safe haven for trustees. Even in the absence of a statutory provision (such as that contained in UTC §808(d)), a drafter could include (and reasonably assume a court would enforce) a provision that a trustee shall not be liable for any action directed by the trust protector.[48] Trustees may welcome the appointment of trust protectors with such power as it may assist them in fulfilling the settlor's intent and remove risk from actions they take in support of the beneficiary. Given what has been asserted as some reluctance of potential

trustees, especially institutional trustees,[49] the power to direct, however limited or defined, may provide this additional benefit.

There is, however, a major caveat. It is likely that giving a trust protector the right to direct may make her a fiduciary as a matter of law. As such, she would have, and could not be exonerated from, liability, at least for failure to exercise reasonable care, diligence and prudence, EPTL (11-1.7(a)(1)). This may deter lay family members or friends; presumably, however, the power to request or suggest, as opposed to giving a binding "direction" to a trustee, would not generate fiduciary status.

Accordingly, the settlor might choose to give the protector the more limited power to "advise or recommend" to the trustee. Coupled with the powers to compel an accounting and to bring a removal proceeding (with provision for payment of expenses by the trust) this—plus language stating clearly that the protector is not to be deemed a fiduciary—could serve to insulate the protector from fear of liability[50] while still giving her meaningful input.

3) Taking Action Against a Deficient Trustee

Optimally, a trust protector would be able to spot deficiencies (over or under-spending; failure to protect resources, etc.) at an early stage, bring the problem to the trustee's attention and change the deleterious behavior. Beside the trust protector's own care and tact (the "carrot" of doing the right thing) the trust protector needs a corresponding "stick," or believable threat to incentivize the trustee. A grantor might give the trust protector outright power to remove the trustee; if the grantor has a designated successor trustee, or if one is obvious, this would avoid the cost and delay of removal litigation. The power to remove and/or replace may, however, trigger fiduciary status in the absence of a statute to the contrary, even if the trust provides for no such liability. This is obviously a serious consideration, depending on the prospective trust protector's wishes.

The lay trust protector also may not feel comfortable with making such a decision unilaterally, or may have no idea of who (or what institution) to appoint in place of the defaulting trustee, and might rather have a court decide. In the latter case, the drafter must not only grant the power to bring a removal proceeding but also provide for payment of the trust protector's legal fees in doing so.[51] It is likely that this more limited power would avoid imputation of fiduciary status.

Even where the trust protector is given the power to remove and replace, it may be necessary to compel an accounting in order to impose a surcharge for losses incurred by the trust, so the trust protector's powers should include bringing a proceeding under SCPA 2101 or 2005 or otherwise.

4) Interpreting Trust Language/Mediating Disputes

Discussion of the benefits—and relevant powers—of trust protectors in more traditional asset protection trusts suggests two other possible powers. Where there may be ambiguity in trust language, the instrument may grant the trust protector the power to resolve that ambiguity, or to otherwise clarify trust terms, avoiding costly and often unpredictable court reformation proceedings.[52] For example, the "re-purposed" trust protector could determine what are "educational" expenses or "necessary" rehabilitative services as an adjunct to advising the trustee more generally. To accomplish this, a provision that such determination (if made in good faith) would be binding on the trustee should be included in the instrument.

Commentators have also noted the potential for a trust protector to mediate among beneficiaries or between beneficiary(ies) and trustee.[53] Whether to include such a power for the repurposed trust protector requires careful consideration. Where the beneficiary is argumentative or oppositional, a power or obligation to mediate may constitute an excessive imposition on the trust protector; in other situations—where, for example, the beneficiary has communicative disabilities—it might appropriately allow a trust protector who knows and understands the beneficiary to interpret and convey her wishes to the trustee, and resolve any lack of understanding on either party's part.

5) Removal and/or Replacement of the Trust Protector

As with the holder of any other office created by a trust, there is always the possibility that the trust protector may resign, become incapacitated or die before the beneficiary's death. Because of the personal relationship and commitment required of the trust protector and the special characteristics that led to her appointment (and willingness to serve) in the first instance, it may be difficult or impossible to identify or provide for a successor.[54] In the case of resignation (because of advanced years, relocation or other reasons) the trust might provide the trust protector with the power to name a successor. This might be especially appropriate where the trust protector is part of a "circle of support,"[55] and some other member of that circle is willing and able to serve. Incapacity to serve would presumably be treated similarly to incapacity of a trustee, but thought would have to be given to who might determine that trigger for removal. The trustee would be inappropriate for obvious reasons, and if there were no obvious candidate, the settlor might simply wish to take the risk of leaving the instrument silent on the issue. Again, because of the close personal relationships involved, this should be the subject of a thoughtful conversation with both settlor and prospective trust protector.

Conclusion

Attorneys drafting trusts for settlors who want to provide for vulnerable persons with disabilities should strongly consider incorporating a trust protector in their plans. The trust protector should be someone who knows and cares about the prospective beneficiary—a sibling, supporter, friend or neighbor—who is willing to stay involved and to monitor both the beneficiary and the trustee. Ideally, for settlors of limited means, the trust protector will agree to serve without fee.

The relationship between the trust protector and beneficiary should make it possible for the trust protector to informally obtain information about the beneficiary's needs, including medical needs, as well as his hopes and dreams for his life, and that information should be communicated to the trustee. Where health care providers are unwilling to release information on the beneficiary's consent, or where such consent cannot be obtained, the "one shot" provision of MHL 81.16 could be utilized without unduly burdening the beneficiary's autonomy.

Drafting a discretionary support trust, or an SNT, the attorney will need to carefully consider the powers given to the trust protector. These include the power to obtain necessary information from the trustee, with a corresponding duty on the trustee's part to provide (and, if necessary, create) that information. At the simplest level, this could mirror the provision for a "monitor" in the General Obligations Law; at the farther end of the spectrum (if the trust is large enough to bear the expense) an annual accounting might be required.

The trust protector's primary obligation and role is to ensure the beneficiary's well-being. As such, she must be knowledgeable about the beneficiary and willing and able to communicate with the trustee. Her power may be no more than "advising," or as great as "directing," with, in the latter case, a corresponding obligation on the trustee to obey her directions. In the less formal "advising" role, the trustee may be incentivized because she wishes to carry out the settlor's wishes, but lacks the expertise or intimate knowledge of the beneficiary to do so, and so would welcome the advice of someone designated by the settlor who possesses that knowledge. Where the trust protector has the power to direct, the trustee could be benefited by a clause exonerating her from actions taken in response to the trust protector's directions.

In the event that the hoped-for collaborative relationship between the trust protector and trustee breaks down, or where some wrongdoing occurs, the trust protector must, at the least, have the power to compel an accounting and/or bring a removal proceeding, so issues of standing must be considered. The trust protector can also be given greater powers—to remove and replace the trustee without court involvement—though such power would almost certainly result in fiduciary status and corresponding obligations for the trust protector. This highlights the drafter's obligations to give careful consideration to the trust protector's status and potential liability, both where a statute provides a default position and where the imposition of fiduciary status may depend on provisions in the trust instrument.

Wherever the trust protector might need to resort to litigation in order to protect the beneficiary, the trust instrument must also provide for payment of legal fees and any other appropriate and related costs.[56]

Creating a trust that combines a capable trustee to manage the corpus and disburse funds, and a trust protector who is attuned to the needs of the beneficiary, should provide parents and similar settlors with confidence that the trust will, hopefully,

> assist the beneficiary to achieve his maximum potential and lead as full, independent and normal life as possible.[57]

Endnotes

1. Sometimes funds become available as the result of a verdict or settlement in a personal injury or wrongful death action (usually of a person's parent). In those cases, the court itself often "settles" the trust, *see*, *e.g.*, *Matter of A.C.*, 2007 N.Y. Slip Op. 51478 (U) (S.Ct. Bronx Co. 2007) (involving trust created by court order in an infant compromise proceeding). In a number of counties, judges provide for annual monitoring of such trusts by court referees or court examiners. (Personal communication with Jay Sangerman, Esq.). Without expressing an opinion as to whether such oversight, intended or actual, protects the beneficiaries, this article deals only with "private" trusts which would ordinarily involve no surveillance, whether by a court or otherwise.
2. Many trusts for the benefit of persons with disabilities are testamentary trusts, funded by the estate or a portion of the estate of a family member whose assets do not become available until her/his death.
3. As authorities on such trusts note: "Planners increasingly have been turning away from pure discretionary trusts and support trusts in favor of special needs trusts (SNT). Such trusts give broad discretion to the trustee but do not mandate any distributions. Instead, the trust limits distributions in such a way that "[they]…do not result in the beneficiary losing eligibility for public benefits." Frolik & Brown, *Advising the Elderly & Disabled Client*, Second Edition ¶17.08(6) (2014). New York's SNT statute is E.P.T.L. 7-1.12.
4. Frolik & Brown, *supra* n. 3 ¶17.08(3)(b).
5. The facts here are drawn from a published opinion, *Matter of Morgan Stanley, Chase Manhattan* (Marie H.), 38 Misc.3d 363 (Surr. Ct. N.Y. Co. 2012) and an article written about the case, Katia Savchuk, *The Ruling That Could Change Everything for Disabled People with Million-Dollar Trusts*, Village Voice, July 10, 2013, available at www.villagevoice.com/news/the-ruling-that-could-change-everything-for-disabled-people-with-million-dollar-trusts-6438890.
6. The facts here are drawn from an inquiry and request for assistance made to me after my retirement from the bench. I have changed the names and slightly altered the facts to protect the privacy of the family.

7. Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 Cardozo L. Rev. 2761 (2006) ("Sterk").

8. John H. Langbein, *Questioning the Trust Law Duty of Loyalty*, 114 Yale L.J. 929, 957 (2005).

9. This is a relatively new term, describing a person (or persons) who assists a person with an intellectual disability in making various kinds of decisions, derived from the movement for supported decision making. The phenomenon is gaining traction nationally. *See e.g.*, Statement of Commissioner, Agency for Community Living, U.S.H.H.S., www.acl.gov/newsroom/blog /2015_01_23.aspx, and extensive materials collection at the National Resonance Center for Supported Decision-Making, www.supporteddecisionmaking.org and Kristin Booth Glen, *Supported Decision-Making and the Human Right of Legal Capacity*, 3 Inclusion, 2 (2015) and in New York, *see* Disability Rights New York, Protection and Advocacy for Individuals With Intellectual & Developmental Disability, PADD Priorities for Fiscal Year 2015, Priority VI(2) ("Foster the supported decision making model in New York through education, direct advocacy, and/or coalition building"), www.disabilityrightsny.org/p-a-for-people-with-id.dd.padd.html.

10. Sterk, *supra* n. 7 at 2763.

11. Gregory S. Alexander, *Trust Protectors: Who Will Watch the Watchmen?*, 27 Cardozo L. Rev. 2807 (2006).

12. *See*, *e.g.*, Lauren Z. Curry, Note: Agents in Secrecy. *The Use of Information Surrogates in Trust Administration*, 64 Vand. L. Rev. 925 (2011) (describing the use of a trust protector-like surrogate to avoid the general requirement of disclosure to qualified beneficiaries); Jonathan J. Rikoon and Louise Bing Yang, *Quiet Trusts and Great Expectations*, N.Y.L.J., Sept. 17, 2012.

13. For a discussion of how "inconsistent and contradictory" state statutes discourage practitioners from utilizing the trust protector device, *see* Alexander A. Bove, *The Case Against the Trust Protector*, 37 ACTEC L.J. 88 (2011).

14. *See, e.g.*, Sterk, *supra* n. 7; Phillip J. Ruce, *The Trustee and the Trust Protector: A Question of Fiduciary Power*, 59 Drake L. Rev. 67 (2010).

15. See Robert H. Sitikoff, *An Agency Theory of Trust Law*, 89 Cornell L. Rev. 621 (2004).

16. For example, Sterk argues that trust protectors are effective in reducing agency costs while Alexander suggests that trying to ameliorate the agency costs in the relationships Sitikoff and others have identified "will create its own set of agency costs problems." Alexander, *supra* n. 11 at 280.8. In the "re-purposing" I propose, costs, whether preceded by the term "agency," or simply understood as quasi-administrative expenditures that reduce the trustee's corpus—and thus its ability to provide for the vulnerable beneficiary—are clearly to be avoided where possible.

17. 1997 S.D. Sess. Laws 280 §1 (codified as amended at S.D. Codified Laws §§55-18-5 (2005). *See* Alexander A. Bove, Jr., *The Trust Protector: Trust(y) Watchdog or Expensive, Exotic Pet*?, 30 Estate Planning 390 (2003) (Bove).

18. Richard S. Ausness, *The Role of Trust Protectors in American Law*, 45 Real Prop. Tr. & Est. L.J. 319, 324 (2010). As of 2014, two states basically adopted the Uniform Trust Code provision, *infra*, with no specific reference to, or provisions for, trust protectors, ALA. Code §19-3B-808 (2006); ARK. CODE ANN. §2873-808 (Repl. 2012). Sixteen other states have enacted statutory provisions setting forth powers, duties and/or liabilities attributable to trust protectors.

    ALASKA STAT. §13.36.370 (Repl. 2003); ARIZ. REV. STAT. ANN. §14-10818 (2008) (amended 2009); DEL. CODE ANN. Tit. 12, §3313 (1986 & Supp. 2011); HAW. REV. STAT. §§554G-4, 4.5 (Supp. 2011); IDA CODE ANN. §15-7-501 (1999 & Supp. 2007); ILL. COMP. STATS. ANN & CHAP. 760, Act 5816.3 (2013); MICH. COMP. LAWS ANN. §§700-7103, -7809 (1998 & Supp. 2010); NEV. REV. STAT. ANN. §§163.5547, -5549, -5553, -5555 (LEXIS Supp. 2009); N.H. REV. STAT. ANN §§564B:12-1201 to 1206 (2006 & Supp. 2008); R.I. GEN. LAWS §18-9.2-2 (1999 & Supp. 2007); S. CAR. CODE ANN §62-7-1005A (2014); S.D. CODIFIED LAWS §§55-1B-1 (1997 & amended 2011), -6 (1997 & Supp. 2009); TENN. CODE ANN. §35-16-108 (Supp. 207), 35-15-303(7) (2004 & Supp. 2010); UTAH CODE ANN. §75-7-906 (West 2004); VT. STAT. ANN. Tit. 14A, §§1101 to 1105 (Supp. 2009); WYO. STAT. ANN. §4-10-710 (Repl. 2003 & Supp. 2007).

19. The term is, however, utilized in the Comment, Uniform Trust Code §808 (2005), which states that it applies to both trust advisors and trust protectors. The comment goes on to distinguish between these two roles, noting that trust advisors "have long been used for certain trustee functions, such as the power to direct investments or manage a closely-held business" while trust protectors are often granted greater powers, "sometimes including the power to amend or terminate the trust." *Id*. 808 Cmt. at 142-43.

20. *Id*. at 808(b). That is, as Sterk notes, "UTC does not provide trustees with absolute immunity for following the directions of the trust protector" and "requires that the trustee exercise 'minimal oversight responsibility' before following the protector's directions." Sterk, *supra*, n. 7 at 2769 and n.48.

21. Section 808 has been criticized as "ha[ving] acquired a well-known reputation for ineffectuality as it relates to trust protectors," J. Andy Marshall, *Note: Trusts & Estates Law… Trust Protectors…Increasing Trust Flexibility and Security While Decreasing Uncertainty of Liabilities for Doing So*, 35 U. Ark. Little Rock 1137, 1144 (2013).

22. For example, Idaho Code Ann §15-7-501 (6) states that the powers and discretions of a trust protector may include the following:

    > a) To modify or amend the trust instrument to achieve favorable tax status or because of changes in the Internal Revenue Code, state law, or the rulings and regulations thereunder; (b) To increase or decrease the interests of any beneficiaries to the trust; (c) To modify the terms of any power of appointment granted by the trust… (d) To terminate the Trust; (e) To veto or direct trust distributions; (f) To change situs or governing law of the trust, or both; (g) To appoint a successor trust protector; (h) To interpret terms of the trust instrument at the request of the trustee; (i) To advise the trustee on matters concerning a beneficiary; and (j) To amend or modify the trust instrument to take advantage of laws governing restraints on alienation, distribution of trust property, or the administration of the trust.

23. These are Delaware, New Hampshire, Illinois, Michigan, Wyoming, all *supra* n. 18, and the aforementioned Missouri, *infra*.

24. S.D. Codified Laws §55-1B-1 (2011).

25. They are: Alaska, Arizona, and Idaho, *supra* n. 18.

26. Mo. Rev. Stat. §456.8-808 (6)(1) (2012).

27. *Robert T. McLean Irrevocable Trust v. Davis*, 283 S.W.3d 786 (Mo. Ct. Appeals, S.D. 2009). The question presented was whether the trust protector was liable for failing to prevent depletion of the assets of an SNT, where the trust instrument granted him three powers: to remove trustees; appoint trustees; and resign and appoint a successor trust protector. The instrument also provided that his authority was "conferred in a fiduciary capacity" but that the trust protector would "not be liable for any action taken in good faith." *Id.* at 790.

28. The cited decision, from a three judge panel with two separate concurrences, arose out of the trial court's grant of summary judgment, and so was largely dependent on the law relating to summary judgment rather than the merits. After reversal, and a trial below, the appeals court again failed to definitively address the questions initially presented, leaving open whether the trust

protector was a fiduciary, "what the nature of his duties to the Trust might be, and whether these fiduciary duties, if any, were inherent in the office of trust protector or whether they arose solely from the trust instrument," or whether the trust protector "had a duty to actively oversee or supervise the activities of the trustee." Richard C. Ausness, *When Is the Trust Protector a Fiduciary?*, 27 Quinn. Prob. Law. Jour. 277,301 (2014) (Ausness II). The actual holdings and complicated procedural steps in the *McLean* case are of no real assistance in the task at hand and so are not discussed further here; Professor Ausness describes them in detail, *id.* at 295-301.

29. Although this article deals with trusts created by persons other than the vulnerable beneficiary, it should be noted that, at present, New York Medicaid offices do not permit the use of trust protectors in first party SNTs.

30. Several cases mention trust protectors in passing, *e.g.*, *In re Lorie Dehimer Irrevocable Trust*, 2012 N.Y. Misc. LEXIS 5450, 2012 N.Y. Slip Op. 52214(U) (Surr. Ct. Oneida Co. 2012), modified 122 A.D.3d 1352 (4th Dept. 2014) but no substantive discussion of the term or concept has been found.

31. Proceedings for relief against a fiduciary under SCPA 2102 may be commenced by "a fiduciary, creditor or person interested." SCPA 2101(1)(a). Would the ability to bring such a proceeding depend on whether the trust instrument describes the trust protector as a fiduciary, or might a court utilize the more traditional categories, ignoring the grantor's explication? And, even in the face of a power to compel an accounting, could a court read the "person interested" language in the statute only in the context of one with *financial* interest? For a suggested solution *see infra* at n. 47 and accompanying text.

32. SCPA 2101(1)(b) permits a surrogate to compel an accounting *sua sponte*; query whether a sympathetic surrogate would use this power to grant a trust protector's petition.

33. These include the "one shot" provision of Mental Hygiene Law Art. 81, *see infra*.

34. L. 2008, C.644, eff. Sept. 1, 2009.

35. "A principal may appoint a monitor or monitors in the power of attorney who shall have the authority to request, receive and compel the agent to provide a record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal, to request and receive such records held by third parties, and to request and receive a copy of the power of attorney…." GOL 5-1509.

36. Rose Mary Bailly and Barbara S. Hancock, Practice Commentaries, Appointment of a Monitor, McKinneys Consol. Gen. Obligations L. §5-1509.

37. GOL §5-1505(3)(1). Others entitled to such record include (ii) a co-agent or successor agent operating under a power of attorney; (iv) an Article 81 court evaluator; (v) a guardian ad litem appointed under SCPA 1754; (vi) a guardian or conservator if not already provided to the court evaluator or GAL; and (vii) the personal representative of a deceased principal if not already provided to (vi) above.

38. Practice Commentaries, GOL §5-1509 (2010) citing Law Revision Commentaries, available at www.lawrevision.state.ny.US/reports/reversed_final_commentary_2008.pdf.

39. New York State Law Revision Commission, Recommendations on the Proposed Revisions to the General Obligations Law Powers of Attorney, V(C)(5) at p.34.

40. GOL 5-1509 provides: "Nothing in this title shall be construed to impose a fiduciary duty on the monitor."

41. Significantly, because the monitor's power to bring a special proceeding pursuant to the statute does not trigger fiduciary status, it could be argued that the power to compel an accounting or bring a removal proceeding also does not impose the possible liability faced by a fiduciary.

42. Such privacy is covered by both state and federal law. Under state law, the only persons who are "qualified" to authorize access to an individual's records, other than the individual herself, are Article 81 guardians, parents or guardians of "an infant," the distributee of a deceased patient's estate if no executor or administrator has been appointed, or an attorney holding a power of attorney from such "qualified person." N.Y. Pub. Health Law 818. Federal HIPAA law Health Insurance Portability and Accountability Act of 1996, Public Law 104-191. HIPPA's "Privacy Policy" limits access to a person's medical and billing records to the person and her "personal representative." 45 C.F.R. §164.502(g)(2).

43. Here, a person already designated a "supporter" by the beneficiary, *supra* n. 10, would be ideal.

44. Even where the beneficiary's disability is an intellectual disability, she is presumptively capable of giving consent, *see* MHL 81.29(a) (person retains all rights not specifically granted to an Art. 81 guardian). Although not yet ratified by the U.S., the U.N. Convention on the Rights of Persons with Disabilities (CRPD) provides that all persons have legal capacity to make their own choices, to have the supports necessary to do so, and the right to have those choices recognized at law. *See* Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship and Beyond*, 44 Col. Human Rts L.Rev. 95 (2012).

45. This would require a provision in the trust that the trustee make such application on an annual basis.

46. *See* discussion *supra* n. 32.

47. *See Estate of Maria Cristofani v. Commissioner*, 97 T.C. 74 (1991) acq. in result only, 1996-2 CB.

48. An extremely cautious drafter could, of course, also include the proviso "unless such direction is, in the judgment of the trustee, a violation of the terms of the trust or made in bad faith". Given the relationship of trust that presumably precedes and informs the identity of the trust protector, such language might be unnecessary—or unnecessarily provocative.

49. *See*, *e.g.*, Presentation of Edward V. Wilcenski, Esq. at NYSBA Annual Meeting of Disability Rights Committee, 2015, paper entitled *State Court Case Puts Trustees on Notice*, 41 Estate Planning 3 (2014).

50. In the particular area of trusts for persons with disabilities discussed here, it is reasonable to assume that the individual selected by the Settlor to serve as trust protector will have, and willingly accept, a duty of loyalty to the beneficiary.

51. It is likely that, in most cases, as a condition of taking on the responsibility of oversight of the beneficiary's care, the lay friend or relative trust protector will be unwilling or unable to finance that litigation—and appropriately so.

52. Richard C. Ausness, *When Is a Trust Protector a Fiduciary*?, 27 Quinn. Prob. Law Jour. 277, 309 (2014) (Ausness II).

53. *Id*. at 308.

54. This potential problem provides one of many reasons that families of persons with intellectual disabilities should begin early to identify and encourage a number of people, including especially supporters or potential supports who are the beneficiary's age or younger.

55. "Circles of Support" are groups of persons chosen by a person with intellectual disabilities to support her in making and actualizing a variety of decisions. *See, e.g.*, Foundation for People with Learning Disabilities, Circles of Support, www.learningdisabilities.org.uk.

56. Ausness II, *supra* n. 52 at 314.

57. Frolik & Brown, *supra* n. 3.

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Should They Go or Should They Stay? Issue-Spotting for the New York Lawyer Whose Clients May Be Considering a Change in Domicile to Florida

By Joanne Fanizza

With all that warm weather, sunshine and lack of state income tax, Florida has become one of the prime destinations for New Yorkers who are looking to retire to another state that will be less of a drain on their fixed incomes. There certainly are benefits to making that move, most notably the tax system (or lack thereof), but those benefits come with trade-offs, like a paltry Medicaid system. Florida cannot afford to provide New York-style Medicaid benefits when it collects a fraction of New York's tax receipts (despite almost equal populations), due to its Constitutionally limited ability to raise funds and balanced-budget requirement.[1]

The differences between New York and Florida are considerable, and unless you are both admitted to practice in Florida and routinely practice there, you should consider consulting with Florida counsel to ensure you are giving your clients the best and most accurate advice possible. Meanwhile, if one of your clients advises you that he or she is considering a change in domicile to Florida, keep in mind the issues below. They may make or break the client's decision:

☺	☹
No state income tax, Article VII, Section 5, Florida Constitution	You get what you pay for (see Medicaid section)
No state estate tax, Article VII, Section 5, Florida Constitution	You get what you pay for (see Medicaid section)
Sun!	Hurricanes!
Homestead protections (3): Article X § 4 and Article VII § 6, Florida Constitution; Fla. Stat. § 732.401-.4015	Restrictions on devise of homestead, Fla. Stat. § 732.401-.4015
Bar on creditors' claims 2 years after death Fla. Stat. § 733.710	Smart creditors file caveats and force estates open within 2 years of death
Legal process is simpler and faster	(I don't see any downside to this)

Homestead

Florida's unusual homestead laws are perhaps the most difficult to understand, and the area in which many attorneys commit malpractice—*both* those admitted to The Florida Bar and those not but who nevertheless insist on advising clients on Florida legal issues. Keep in mind that Florida is considered a debtor's state that will not allow your home to be taken away—so long as you pay the mortgage, taxes and association maintenance fees.[2] If you do, then you and certain of your heirs will enjoy the benefits of that property, even if you don't want them to.

"Florida's unusual homestead laws are perhaps the most difficult to understand…"

There are three types of homestead protections in Florida, one of which affects estate planning. The others affect taxation of homesteaded property (off-the-top exemption of $25,000 value from real property taxes, plus some additional exemptions, if qualified)[3] and valuation of homesteaded property (annual caps on increases in valuation).

The most important homestead protection for estate planning purposes is found in Article X, § 4 of the Florida Constitution, which gives homeowners

who declare homestead (you must apply!) protection from the claims of creditors, including from forced sale, Medicaid liens and all other creditors except the lender who financed the loan to purchase the property, taxing authorities, and materialmen.

Article X, § 4 states as follows:

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement, or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located with a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;

(2) personal property to the value of $1,000.

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

In essence, this means that a homestead passes to a *spouse or lineal descendant* free from the claims of creditors. But it also states that a homesteader is restricted from devising that property upon death if the homesteader is survived by a spouse and/or minor child. In other words, Florida does not allow a testator to leave a spouse or minor child without a roof over their head. For example, if a decedent owned the homestead in his or her name only, upon death was married and/or had a minor child, yet attempted to devise their homestead in his or her will to a third party (e.g., a paramour), that devise is modified under the law: The spouse and/or minor child receives a life estate in the property, with the remainder to go to the ultimate devisee.

If a decedent has creditors, no spouse or children but other lineal descendants, the homestead will still pass free from creditors' claims to a more remote descendant. But if the decedent wishes to devise that homestead to some other third party (i.e., someone who is not a lineal descendant), that can be done if there is no spouse or minor child, but the property will not pass free from the claims of creditors. The idea is to protect those who relied upon the decedent for support.

"Florida does not allow a testator to leave a spouse or minor child without a roof over their head."

There is similar protection for "exempt property" as defined in Fla. Stat. § 732.402, but only to a spouse or child, not all lineal descendants. Exempt property generally consists of household furnishings up to $20,000 in value, two motor vehicles, qualified 529 plans, and certain teacher benefits.

Practice point: If you are drafting a will for a New York domiciliary who may be moving to Florida in the near future, do NOT call for the homestead to be sold upon death. That destroys the homestead protection and frees the assets for creditors' claims.[4] Also, if your New York domiciliary is survived by a spouse and/or minor child, any testamentary clause that attempts to force a sale of the property, or devise it to someone else, will be modified by the Florida courts. Attorneys admitted in New York but not admitted in Florida should not draft wills that they know are intended to be effective in Florida. Clients should be advised to see a Florida-admitted attorney at this time or after the move to Florida.

Estate Planning and Administration

In many ways, Florida is more protective of its seniors than other states, which protections are reflected in the Florida Probate Code.

Florida recognizes and allows for the probate of a will executed under another state's laws so long as it meets that state's laws at the time of execution.[5] It does *not* recognize holographic (handwritten or self-made) or nuncupative (oral) wills. *Id.* But it also does not consider a self-made will to fall under the ban **if** it is prepared with the formalities of execution required by Florida law.

Some additional differences:

☺	☹
More options to avoid probate by proper homestead planning, etc.	You must file will, notice of trust and death certificate upon death if no probate, Fla. Stat. §§ 732.901, 736.05055
In terrorem clauses are unenforceable, Fla. Stat. § 732.517 (and for trusts, too, Fla. Stat. § 736.1108)	Full-blown will contests allowed (because litigation is streamlined, cases move)
Separate writings allowed to dispose of personal property, Fla. Stat. § 732.515	Possible problems with fraud or forgery? (I've never seen that happen)
Not stuck on staples and "dog and pony show" formalities of execution	Proper drafting is paramount, with proper page breaks and initials and dates on every page
Advanced directives can be merged for simplification (e.g., health care proxy, living will and medical power of attorney), Chapter 765, Parts I, II and III; however, DNRs require very specific execution, including color of paper	No downside to the advanced directives; DNRs are usually not adhered to by EMTs, for example (thought is, if someone called for emergency medical help, the individual no longer wanted to adhere to a DNR)
Durable powers of attorney are not as complicated as NY's, Chapter 709; no more springing POAs as of October 1, 2011, Fla. Stat. § 709.2108(2)	New requirements make them more complicated than in years past, adding some NY-like clauses, such as gifting, Chapter 709, Fla. Stat. §§ 709.2201, 709.2202
Legal process is simpler and faster (including Guardianship)	You generally must complete probate within 12 months of issuance of letters

To explain some of the items in the chart above:

Homestead planning, revocable living trusts, joint titling of property (real or otherwise) will allow your client to avoid probate (which is the only term used; it includes testate and intestate estates and the petitions are for administration). Even if your client can avoid probate, original wills and death certificates must be filed upon death, and Notices of Trust must be filed, too.[6] The purpose of these formalities is to give creditors an opportunity to find the estate or trust assets in order to make valid claims.

Florida does *not* enforce *in terrorem* clauses in wills or trusts, even if valid in the state in which the will was drafted.[7] The thinking behind such a policy is that the state does not want to penalize anyone with a legitimate claim. If it turns out the challenge to the will is frivolous, the court will punish the objecting party in another way, such as assessing attorneys fees.[8]

Florida favors separate writings for personal property, giving testators the opportunity to change their mind over time without having to constantly rewrite their wills.[9]

Florida's attitude toward "Do Not Resuscitate" documents is more stringent, erring on the side of life. The form itself must be on bright lemon-yellow paper and signed by a doctor, and any failure to execute it properly will consider it void.[10] If emergency personnel are called to a location where the victim has a DNR, they will still attempt to revive the victim, on the thinking that the victim likely changed his/her mind by calling for help.

If a Florida resident fails to prepare certain advanced directives and loses competency, the *Guardianship procedure* is vastly more streamlined and efficient than New York's procedure under Article 81 of the Mental Hygiene Law.[11] You can have a guardianship in place within a matter of weeks. It is also carefully scrutinized on an annual basis, leaving little room for subterfuge by Guardians who would take advantage of their Wards.[12]

Practice point: It is easy to commit malpractice in Florida regarding will drafting and probate if you are not familiar with the intricacies of Florida law. If you are foolish enough to try to probate an estate in Florida, be advised that judges are proactive and *will* file a complaint with proper authorities against an offend-

ing attorney. The unlicensed practice of law has been criminalized in Florida. The courts also will not hesitate to sanction an attorney who does not meet the time and substantive filing requirements.

Real Estate

Florida has very clear requirements for the proper execution of deeds that are much different from New York. They are designed to avoid fraud, and they succeed greatly in doing so. (Requirements of witnesses, color of ink, pagination, etc.) Recording clerks are required to take your papers and record them, so long as they meet basic requisites (color of ink and notarization, except for promissory notes); they do NOT pass judgment on whether your documents meet any legal tests. They leave that to the malpractice carriers. So if you prepared a deed for a Florida property that was accepted and recorded by a clerk, do not think that you did the job right. I cannot tell you how many times I have found completely invalid deeds recorded by New York lawyers who simply committed malpractice. Those problems rear their ugly heads later on, when the chain of title is broken and their clients have difficulty conveying the property.[13]

Practice point: If you are a New York lawyer who prepares a Florida deed, watch out! You have likely committed malpractice. Worse, you have committed a third degree felony by practicing Florida law without a license.[14] Why take a chance on such a small fee? Please retain Florida-licensed counsel!

Medicaid

Florida's Medicaid budget is paltry compared to New York's due to limitations on Florida's revenue-raising constraints. The Florida Constitution bars a state income tax and estate tax,[15] and Florida has ended state corporate income taxation and taxes on securities and other similar intangible property. Florida's Constitution also requires the state budget to be balanced every year, so there is never any government borrowing to make ends meet.[16]

Political will also dictates the expansiveness—or lack thereof—of entitlement programs. Florida is one of the states that opted out of Medicaid expansion, and it refuses to set up health insurance exchanges. That type of mentality, combined with limited revenues, severely hampers the provision of social services and entitlement programs.

Perhaps the easiest way to capture the differences between Florida's Medicaid program and New York's is by using a comparison chart. These are the figures for 2015:

Florida	New York
Asset limit = $2,000	Luxury accounts! $14,850
Income cap = $2,199/month	Income level = $825/month
Monthly personal allowance: Was $35, rose to $105.00 as of July 1, 2014	Monthly personal allowance: $50
CSRA = $119,220	CSRA = $119,220
MMMNA = $2,931	MMMNA = $2,980.50
No Community Medicaid! At-home and ALF waiver programs have lengthy waiting lists of 10,000 or more; at home, 4 years wait; ALF, 2+ years wait; if lucky enough to qualify, services are limited	Ambitious Community Medicaid program
Look-back period started late due to legislative confusion: Full 5-year look-back began in December 2014	Look-back period is 5 years with onset of DRA 2006 on Feb. 6, 2006
Penalty divisor = $7,995 statewide	Penalty divisor = from $8,768 central to $12,390 LI
More willing acceptance of Personal Services Contracts, although they are undergoing state agency review; accepts promissory note planning	Hates Personal Services Contracts; accepts promissory note planning
Can shelter excess income into a Qualified Income Trust or Miller Trust	Can shelter excess income into a pooled trust

If you are counseling clients about a potential move to Florida, you should consider discussing the following issues:

1. If they became ill in Florida, would they stay? Or would they move back to New York to be closer to their children or extended family? This will affect how the homestead might be handled and the calculation of penalties for transfer purposes.
2. What is their monthly income? How does that affect their ability to private pay for a nursing home in Florida versus returning to New York and having to go on Medicaid?
3. Which state's planning tools are more helpful, e.g., Florida's personal services contract? New York's community Medicaid program? Which state's penalty divisors are more helpful?

These are a few ideas, and there are likely many others. But at least you now know how to spot the issues for your clients who are considering a move to Florida.

Endnotes

1. Art. VII, §1(d), Florida Constitution.
2. Article X § 4, Florida Constitution; *see also,* Chapter 222, Florida Statutes.
3. Article VII § 6, Florida Constitution.
4. *Estate of Price v. West Florida Hospital,* 513 So.2d 767 (Fla. 1st DCA 1987).
5. Fla. Stat. § 732.502(2).
6. Fla. Stat. §§ 732.901, 736.05055.
7. Fla. Stat. §§ 732.517 and 736.1108.
8. E.g., Fla. Stat. § 57.105.
9. Fla. Stat. § 732.515.
10. Do Not Rescuscitate Orders are executed under the "informed consent" provision of the Health Care Advance Directives Section of the Civil Rights Law, Fla. Stat. § 765.101(9), and may be executed by health care proxies or agents pursuant to a power of attorney.
11. *See, e.g.,* Chapter 744, Florida Statutes; Part III, Florida Probate Code.
12. *See,* Fla. Stat. §§744.3675, 744.3678, 744.368, 744.3685 and 744.369.
13. For the requisites of Florida deeds, see Chapter 689, Florida Statutes.
14. Fla. Stat. § 454.23.
15. Art. VII § 5, Florida Constitution.
16. See note 1, supra.

Update on Immediate Needs Medicaid: New Section Added to Social Services Law

By Deepankar Mukerji

In his presentation at the Elder Law and Special Needs Section's Annual Meeting on February 9, 2015, Section Vice Chair David Goldfarb discussed the issue of "Immediate Needs" Medicaid and illustrated the convoluted process to obtain home care Medicaid under the current system, aptly using a Rube Goldberg schematic drawing. The home care process, which involves a financial eligibility determination for Medicaid, two nursing assessments, enrollment in a Managed Long Term Care plan, selection of a home care agency and aides to provide services, entry and acceptance of the case into the statewide computer system, and most particularly the EMEDNY subsystem—the payment mechanism for all Medicaid providers—before any services can be rendered. Given that this process takes several months at best, emergent needs are not addressed by the Medicaid program, in violation of the New York State Constitution.

The issue of whether people with an immediate need for home care services could receive such care was addressed by the New York Courts in *Konstantinov v Daines*.[1] In that case, the Appellate Division found that, pursuant to New York Social Services Law § 133, which provides for emergency assistance, applicants for personal care services under Medicaid and who are in immediate need are entitled to temporary personal care services while their applications are pending.[2] In response to the Court's decision, the State passed laws limiting all home health care to be granted prior to an eligibility determination to a provision called presumptive eligibility, which allows certain hospitalized individuals to receive home health services prior to a determination of eligibility upon discharge, and claimed that the emergency assistance provisions of § 133 did not apply.[3] This was rejected by the New York State Supreme Court in a subsequent order, which also found that temporary personal care services are required under the New York State Constitution. The Court ordered the Department of Health to promulgate regulations to provide assistance to people with immediate needs.[4]

In response to this ruling, the State proposed new legislation, which was published in the 2015-16 New York State Executive Budget for Health and Mental Hygiene, amending Social Services Law § 133 to provide that Medicaid, personal care, and home care were to be eliminated from consideration as emergency assistance and amending § 364-i of Social Services Law to limit provision of Medicaid services in advance of an eligibility determination to a limited category of persons and instances. The legislation appeared to be designed to essentially undo the Appellate Division's ruling in *Konstantinov v. Daines*.

On February 26, 2015, representatives from the Elder Law and Special Needs Section focused their annual Lobby Day on two proposed legislative proposals: 1) the Governor's annual effort to eliminate spousal refusal for community Medicaid; and 2) the proposal to strictly limit any home care provided to persons with immediate needs. The Section's lobbying effort was joined by The New York Legal Assistance Group, Empire Justice Center, the Legal Aid Society and other consumer advocates, who argued that this protracted approval process created dangerous and unsafe conditions for frail seniors and people with disabilities who are seeking Medicaid home care services and violates Article XVII of the State Constitution and the Americans with Disabilities Act (ADA) as interpreted in *Olmstead*.

While the spousal refusal proposal was successfully eliminated from the State's budget bill, the resulting legislation on immediate needs Medicaid can only be considered a partial victory. A new section, signed into law on April 15, 2015 (Chapter 57), has at least partially addressed the issue of immediate needs. The new provisions removed any medical assistance coverage from § 133 of Social Services Law and added the following relevant sections:

> § 36–b. Section 364–j of the social services law is amended by adding a new subdivision 31 to read as follows:
>
> NY SOC SERV § 364–j
>
> 31. (a) The commissioner shall require managed care providers under this section, managed long-term care plans under section forty-four hundred three-f the public health law and other appropriate long-term service programs to adopt expedited procedures for approving personal care services for a medical assistance recipient who requires immediate personal care or consumer directed personal assistance services pursuant to paragraph (e) of subdivision two of section three hundred sixty-five-a of this title or section three hundred sixty-five-f of this title, respectively, or other long-term care,

and provide such care or services as appropriate, pending approval by such provider or program.

§ 36–c. Section 366–a of the social services law is amended by adding a new subdivision 12 to read as follows:

12. The commissioner shall develop expedited procedures for determining medical assistance eligibility for any medical assistance applicant with an immediate need for personal care or consumer directed personal assistance services pursuant to paragraph (e) of subdivision two of section three hundred sixty-five-a of this title or section three hundred sixty-five-f of this title, respectively. Such procedures shall require that a final eligibility determination be made within seven days of the date of a complete medical assistance application.

The first provision requires Managed Care Long Term Care (MLTC) providers to "adopt" expedited procedures to approve home care services for people with immediate needs after Medicaid eligibility has been determined. Since there are no time frames, no regulations, or ability for the MLTC to change the process established by the Department of Health, the provision seems too vague to be of much use and it may likely become unenforceable. The second provision, which provides for the Department of Health to establish procedures for a determination of Medicaid eligibility within seven days of a complete application, is somewhat encouraging. Certainly, the State has made an attempt to improve on the dysfunctional system it has created; however, the procedures themselves have not yet been published in the form of regulations or policy directives, so it remains to be seen if real progress has been made. Meanwhile, arguments on the appeal of the *Konstantinov v. Daines* are adjourned until fall of this year. The Section's Legislation Committee will continue to monitor this issue closely and will keep membership apprised of any developments.

Endnotes

1. 101 A.D.3d 520, 956 N.Y.S.2d 38 (1st Dep't 2012).
2. *Id.* at 522.
3. Chapter 60 of the Law of 2014.
4. *Konstantinov v. Daines*, 2014 NY Slip Op. 30657(U), 2014 N.Y. Misc. LEXIS 1137 (N.Y. Sup. Ct. Mar. 12, 2014).

Legislation Committee

The Legislation Committee's mission is to monitor legislative activity, to develop legislative proposals and to advocate for or against legislation affecting our members and our clients. The Committee regularly reports to the Section's Executive Committee regarding its findings and recommendations for action by the Section or the Bar Association as a whole. Once a position on a legislative proposal has been taken by the Section, the Committee drafts the appropriate memoranda and works with NYSBA lobbyists to advance the Section's positions.

The Committee's activities include:

- Presenting legislation and materials for distribution at Executive Committee meetings and Section meetings when appropriate.
- Drafting memoranda in support or in opposition to specific legislation.
- Drafting legislation or legislative provisions which reflect the Section's positions.
- Following legislation through the appropriate committee or house to monitor and report progress, and to track any amendments made to such legislation.
- Conferring and corresponding with lobbyists to introduce new legislation or to oppose proposed legislation.
- Meeting with legislators and legislative staff to advocate for the Section's positions.

The Committee holds monthly calls for members to track current issues and to discuss new proposals.

Since its founding, the Legislation Committee has prepared many memos to our Section regarding proposed legislation, regulations and newly approved statutes. Perennially, the Committee is asked to oppose the proposed the elimination of the right of spousal refusal for Medicaid cases, which it has successfully blocked to date. In the past, we have successfully been able to repeal Medicaid recoveries from non-probate estates, and support the passage of the Uniform Guardianship Act, among numerous other issues important to the Section.

The Committee has currently focused on legislation related to allowing the statutory elective share available to a surviving spouse to be satisfied by a testamentary supplemental needs trust for the spouse's benefit; technical amendments to Article 83 of Mental Hygiene Law, the Uniform Guardianship Act, legislation allowing a waiver of the elective share after the death of the spouse, and new legislation creating expedited Medicaid approval. In addition, we continue to work with the Power of Attorney Task Force created by NYSBA.

The Committee is comprised of Section members who are committed to effective advocacy within the legislative process. We are always eager to welcome new members interested in actively advancing the mission of the Committee. For more information, please contact either of the Co-Chairs, Matt Nolfo at mnolfo@estateandelderlaw.net and Deepankar Mukerji at dmukerji@kblaw.com.

Naming a Supplemental Needs Trust as a Beneficiary of a Charitable Remainder Trust

By George H. Gray

Under the proper circumstances, an effective and attractive planning strategy is to name a third party supplemental needs trust (a "SNT") as an income beneficiary of an charitable remainder trust (a "CRT"). The proper circumstances arise if the grantor:

a) has a loved one with a disability and who is receiving means tested government benefits, such as Supplemental Security Income ("SSI") or Medicaid; and

b) has charitable intentions and a charity which he/she wishes to benefit as part of his/her estate plan; and *either*

c) during his/her lifetime has appreciated property which the grantor wishes to sell and to shelter the gain on the sale; *or*

d) upon his/her death wishes to use a qualified retirement account to fund the SNT, while at the same time benefitting a tax-exempt organization.

A CRT[1] is a "split-interest" charitable trust which is irrevocable and in which the economic and beneficial rights under the trust are split between non-charitable individuals or entities and one or more tax exempt organization.[2] A CRT consists of two distinct components: (i) a private interest in the form of a right to a stream of payments to a non-charitable beneficiary each year; and (ii) a charitable interest in the assets remaining in the trust. Properly structured and administered, a CRT is exempt from income tax and affords the grantor a charitable gift or estate tax deduction for the property contributed to the CRT.

There are two types of CRTs: a charitable remainder annuity trust (a "CRAT") and a charitable remainder unitrust (a "CRUT"). A CRT is a creature of the Internal Revenue Code and an exception to the general rule that a taxpayer cannot receive a charitable deduction for a "split-gift" to a charity. Because a CRT is a creature of statute, there are specific characteristics which must be present in each.[3]

A CRAT must have the following characteristics:[4]

a) The CRAT pays a sum certain:

(i) which is not less than 5% nor more than 50% of the initial net fair market value of all property placed in trust (expressed as either as a fraction or a percentage of the net fair market value);

(ii) not less often than annually;

(iii) to one or more persons (at least one of which is not a tax-exempt organization); and

(iv) for a term of years (not in excess of 20 years) or for the life or lives of such individual beneficiar(ies).

b) At the termination of the payments described in subparagraph "a" above, the remainder interest in the trust will be transferred to, or for the use of, a tax-exempt organization.

c) The value of the charitable remainder interest must be at least 10% of the initial net fair market value of all property placed in the trust.

A CRUT must have the following characteristics:[5]

a) The CRUT pays an amount:

(i) which is fixed percentage not less than 5% nor more than 50% of the net fair market value of the trust assets as valued annually (expressed as either as a fraction or a percentage of the net fair market value);

(ii) not less often than annually;

(iii) to one or more persons (at least one of which is not a tax-exempt organization); and

(iv) for a term of years (not in excess of 20 years) or for the life or lives of individual beneficiar(ies).

b) At the termination of the payments described in subparagraph "a" above, the remainder interest in the trust will be transferred to, or for the use of, an tax-exempt organization.

c) With respect to each contribution of property to the trust, the value of the charitable remainder interest in such property is at least 10% of the net fair market value of such property as of the date such property is contributed to the trust.

The grantor's charitable deduction for contributions to a CRT is equal to the remainder of: (i) the value of the property contributed to the CRT; minus (ii) the net present value of the unitrust or annuity payments made during the term of the CRT. The value of the charitable remainder interest is determined using the §7520 interest rate for the month of the transfer to the CRT. However, the grantor may elect to use the §7520 interest rate for either of the two months proceeding the month of transfer. All other things being equal, the higher the §7520 interest rate, the larger the charitable deduction. In the present low interest rate environment, the strategy of using a CRT to fund an SNT is of limited value to a grantor who seeks to maximize the charitable deduction.

A CRUT may receive additions to the trust assets by transfers of property made during the grantor's life or at his/her death. No additions can be made to a CRAT once it is funded.

The payout of a CRAT does not vary and it doesn't matter how much income is earned by the trust during the year. If assets held by the CRAT are producing substantial gains, the non-charitable beneficiary won't benefit. If income is insufficient to support the payout the difference is made up from the principal of the CRAT. Because the annuity is fixed, the non-charitable recipient receives no benefit from any appreciation in trust assets from year to year. On the other hand, the unitrust amount paid to the income beneficiary of a CRUT does vary with the performance of the underlying trust property. If the CRUT does well in its investments, it will increase in value and the unitrust amount will, in turn, increase. If the CRUT's investments do poorly in a year, the unitrust amount for the next year will correspondingly decrease.

The non-charitable interest of a CRT is payable to a "person." The definition of "person" includes a trust, estate, partnership, association, company, or corporation.[6] Thus, an SNT is a permissible income beneficiary of a CRT, although the term of the CRT is limited to 20-years or less.

A contribution of appreciated property to the CRT is an efficient way to shelter the gain on a subsequent sale by the CRT. Further, the Grantor of an *inter vivos* CRT receives an immediate income tax charitable deduction for the contribution made to the CRT, while the contribution of assets to a testamentary CRT would generate an estate tax charitable deduction.[7] Likewise, if a CRT is named the beneficiary of a qualified retirement account, the "required minimum distributions" to the CRT are not subject to an income tax and the entire retirement account balance is available to be invested tax free until the unitrust or annuity amounts are distributed to the income beneficiaries of the CRT.

A properly created and maintained SNT will not jeopardize a disabled beneficiary's[8] eligibility for "means tested" government benefits. The use and purpose of a SNT is to provide funds for the use and benefit of a disabled beneficiary to pay for items which supplement but do not supplant, impair or diminish any benefits, assistance or payment of any governmental entity. Most importantly, the property and assets in the SNT are disregarded as a resource for purposes of determining the disabled beneficiary's eligibility for Medicaid and SSI benefits. One of the main benefits of the SNT is to enhance the beneficiary's quality of life by providing for the purchase of additional support, services, therapies and other items that are not covered by or provided adequately for by available government programs.

A "third-party" SNT is funded with property or assets contributed by any person *other than* the person with a disability, such as a parent, grandparent or other interested person or relative. The SNT can accept contributions from "third parties" even after its initial funding.

There is one other defining feature of a Third Party SNT worthy of note. The money and property remaining in the SNT at the beneficiary's death *need not* be used to "pay back" the State for Medicaid benefits paid on the beneficiary's behalf. In other words, the grantor may direct the money remaining in the SNT to any persons or entities he/she desires. Many time in the deliberation of how much should be used to fund the SNT the grantor may worry "how much is too much"? That worry is mitigated and the decision is made easier by the realization by the grantor that he/she can name family members as residuary beneficiaries of the SNT.

Third party supplemental needs trusts are referenced in section 7-1.12 of the Estates Powers and Trusts Law[9] (the "EPTL"). That section of New York law describes an SNT as a discretionary trust. As such, it makes sense that the grantor can do with his/her property what he/she wishes, including disinheriting a disabled beneficiary altogether. To the extent that the grantor wishes to create a trust which explicitly limits or restricts the availability of trust funds so that the beneficiary can maintain his/her eligibility for "means tested" government benefits, the grantor should be free to do so and to determine the ultimate disposition of the trust corpus at the death of the disabled beneficiary.

If the SNT is named as the income beneficiary of a CRT, it will receive a mandatory unitrust or annuity amount each year. That being the case, the SNT trustee must engage in intentional income tax planning for these amounts which will be received, but may not always be needed.

The character of the distributions from the CRT to the SNT during the tax year is determined using a

four-tier system.[10] This system divides the unitrust or annuity amount received during the tax year into four categories: (i) ordinary income; (ii) capital gains; (iii) other income; and (iv) return of trust corpus. A distribution is first treated as ordinary income to the extent of the sum of the CRT's current-year or accumulated ordinary income. When the current-year and accumulated ordinary income is exhausted, the ordering proceeds to the second category (capital gains). When capital gains are exhausted, the ordering proceeds to the third category (other income). Finally when all income is exhausted, the distribution is considered a return of corpus. Thus, the annual distributions from the CRT are guaranteed to be characterized (at least in part) as income to the SNT.

Like all trusts, the income tax brackets for an SNT are greatly compressed. An SNT is taxed at the 39.6% tax bracket on income above $12,300; whereas, a single taxpayer would have to earn in excess of $413,200 to attain the same high tax bracket. The CRT is mandated to make a distribution each year, and each distribution carries with it income tax consequences to the SNT. There are a number of strategies which can be engaged to manage the income tax bite to the SNT.

a) The most straight forward technique to minimize tax is for the SNT to make distributions for the benefit of the disabled beneficiary which will afford the SNT a distribution deduction;[11] and, in turn "pass-thru" the income to the beneficiary to be taxed at his/her lower bracket. But…there are limits on this technique because it is based upon the needs of the beneficiary which may not match the level of the optimal distributions from the SNT. That being said, it is a useful technique when the disabled beneficiary has high medical expenses which are not covered by Medicaid. In that instance, the SNT beneficiary can deduct the medical expenses in excess of 10% of his/her adjusted gross income and thereby shelter the distributions from the CRT which "pass through" the SNT to the beneficiary.

b) Because the third party SNT is generally neither a "simple trust"[12] nor a "grantor trust,"[13] it classified for tax purposes as a "complex trust."[14] As such, it is required to report income on a Form 1041 and to pay a tax on the amount earned with only a $100 personal exemption. However, an SNT can qualify as a "qualified disability trust,"[15] and if it does it is it is entitled to a $4,000 personal exemption.[16] This personal exemption can be used by the trustee of the SNT to shelter the income which may be accumulated in the SNT and not distributed to the beneficiary. A qualified disability trust is one which (i) is a "complex trust"; (ii) is established for a disabled beneficiary under the age of 65; and (iii) the income beneficiary is eligible to receive SSI or SSDI benefits.

c) The $4,000 personal exemption available to a "qualified disability trust" is *in addition* to the personal exemption and standard deduction available to the disabled beneficiary on amounts distributed to him/her. Thus, in the simplest of scenarios, a $14,300 unitrust or annuity amount distributed by the CRT would be fully sheltered from tax if: (i) the SNT retained $4,000 (sheltered by its personal exemption amount); and (ii) it distributed $10,300 to the beneficiary (sheltered by the beneficiary's $4,000 personal exemption and $6,300 standard deduction). This scenario does not account for the deductions otherwise available to the SNT[17] which would further reduce or eliminate the Income Tax.

d) A CRT is not restricted to one recipient of the unitrust or annuity amount; there may be multiple income beneficiaries. A charity may be the recipient of part of the annuity or unitrust amount so long as there is at least part of the amount going to a non-charitable beneficiary each year. Further, the CRT can be designed to give the trustee the power to allocate or "sprinkle" the unitrust or annuity amount between or among income recipients. Thus, if the SNT could not make full use of the entire unitrust or annuity amount required to be distributed in a year, the trustee of the CRT could allocate the unneeded portion to another income beneficiary of the CRT. However, in order to avoid treatment as a grantor trust, a CRT trustee that is granted sprinkling powers must be "independent."[18] Generally speaking, to be "independent" the trustee may not be a person who has a beneficial interest in the trust; a contributor to the trust; a beneficiary of the trust; a spouse; former spouse; ancestor; descendant; sibling or employee of a contributor or beneficiary.

The strategy proposed by this article is best demonstrated by the following examples.

Example 1:

Strategy—If the grantor is faced with a significant capital gains tax bill upon the imminent sale of a greatly appreciated asset, grantor could create a CRUT and contribute the appreciated asset to the CRUT prior to sale. The CRUT would name an SNT established for the benefit of a loved one with a disability as the recipient of the unitrust amount during the 20-year term of the CRUT. The grantor would name the not-for-profit social services organization providing services to the disabled beneficiary as the recipient of the charitable remainder interest of the CRUT.

Economic Outcome—Assume the grantor contributes $300,000 in August, 2015 to the CRUT, which is designed to provide an annual unitrust amount of 5%. Assume further that the CRUT has a 4% return on its investments.

a) The amount of the charitable deduction available to the grantor in 2015 is $109,093;

b) the unitrust amount ranges between $15,000 in the first year and $12,215 in the 20th year;

c) the total estimated unitrust payments to the SNT over the 20-year term is $271,251; and

d) the estimated payment of the charitable remainder interest to the favored charity in August 2035 is $241,680.

Example 2:

Strategy—If the grantor is faced with a significant capital gains tax bill upon the imminent sale of a greatly appreciated asset, the grantor could create a CRAT and contribute the appreciated asset to the CRAT prior to sale. The CRAT would name an SNT established for the benefit of a loved one with a disability as the recipient of the annuity amount during the 20-year term of the CRAT. The grantor would name the not-for-profit social services organization providing services to the disabled beneficiary as the recipient of the charitable remainder interest of the CRAT.

Economic Outcome—Assume the grantor contributes $300,000 in August, 2015 to the CRAT which is designed to provide an annual annuity amount of 5%. Assume further that the CRAT has a 4% return on its investments.

a) The amount of the charitable deduction available to the grantor in 2015 is $57,424;

b) the annuity amount payable to the SNT in each of the 20 years is $15,000;

c) the total annuity payments to the SNT over the 20-year term is $300,000; and

d) the estimated payment of the charitable remainder interest to the favored charity in August 2035 is $203,965.

Analysis of Examples 1 and 2—The contribution of the appreciated asset generates an immediate income tax charitable deduction for the grantor. Because the CRT itself is tax-exempt, any gain on subsequent sale of the appreciated asset out of the CRT is sheltered from any capital gains tax. There is, however, an income tax to be paid, but by the SNT and only on the dollars distributed to the SNT as the annuity or unitrust amount. However, the Income Tax impact can be eliminated using: (i) the personal exemption of the SNT and the beneficiary; (ii) other deductions available to the SNT; and (iii) the beneficiary's standard or itemized deductions. Further, because they are undiminished by the payment of the capital gains tax, the entire $300,000 of proceeds are available for investment by the CRT and can grow tax free until distributions are made from the CRT.

The SNT is created using the model language contained in EPTL 7-1.12, together with the draftsperson's other trust language governing the administration of the SNT. It is designed to be a "qualified disability trust" to take advantage of the $4,000 personal exemption. Because it is a "third party" supplemental needs trust, the grantor can name any person or entity (including the favored charity) as the remainder beneficiary of the SNT.

Example 3:

The grantor names a CRUT as beneficiary to receive his/her IRA or qualified retirement account balance at the death of the grantor. The CRUT would name an SNT established for the benefit of a loved one with a disability as the recipient of the annuity amount during the 20-year term of the CRUT. The grantor would name the not-for-profit social services organization providing services to the disabled beneficiary as the recipient of the charitable remainder interest of the CRUT.

Economic Outcome—Assume the amount in the grantor's IRA at death is $300,000. Assume that the CRUT is funded in August, 2015 with an RMD of the entire $300,000 IRA balance. The CRUT is designed to pay an annual unitrust amount of 12.75%. Assume further that the CRUT has a 4% return on investments.

a) The amount of the Estate Tax charitable deduction is $30,006;

b) the unitrust amount will range between $33,072 in the first year to $8,013 in the 20th year;

c) the total estimated unitrust payments to the SNT over the 20-year term is $356,564; and

d) the estimated payment of the charitable remainder interest is $67,464.

Example 4:

The grantor names a CRAT as beneficiary to receive his/her IRA or qualified retirement account balance at the death of the grantor. The CRAT would name an SNT established for the benefit of a loved one with a disability as the recipient of the annuity amount during the 20-year term of the CRAT. The grantor would name the not-for-profit social services organization providing services to the disabled beneficiary as the recipient of the charitable remainder interest of the CRAT.

Economic Outcome—Assume the amount of a grantor's IRA at death is $300,000. Assume that the CRAT is funded in August, 2015 with an RMD of the entire $300,000 IRA balance. The CRAT is designed to pay an annual unitrust amount of 5.56%. Assume further that the CRAT has a 4% return on investments.

a) The amount of the Estate Tax charitable deduction is $30,255;

b) the annuity amount paid in each year is $16,800;

c) the total estimated unitrust payments to the SNT over the 20-year term is $333,600; and

d) the estimated payment of the charitable remainder interest is $153,188.

Analysis of Examples 3 and 4—If a grantor names a trust which also benefits both an individual and a non-individual (*e.g.*, a charity) as the beneficiary of his or her IRA, the trust is generally required to take the entire amount of the IRA balance as an RMD within five years of the date of the grantor's death.[19] This will result in the loss of the opportunity to "stretch" payments from the IRA over a period measured by the life expectancy of the oldest individual beneficiary of the trust and thereby defer the income tax due.

The contribution of the IRA account balance to the CRT generates an immediate estate tax charitable deduction for the grantor's estate. Because the CRT itself is tax-exempt, the immediate distribution of the entire $300,000 RMD is sheltered and there is no concern to "stretch" distributions from the IRA.

There is, however, an income tax to be paid, but by the SNT and only on the dollars distributed as the annuity or unitrust amount. However, the income tax impact can be mitigated using: (i) the personal exemption of the SNT and the beneficiary; (ii) other deductions of the SNT; and (iii) the beneficiary's standard or itemized deductions. Alternatively, the grantor could name an additional tax exempt organization and/or "person" as an income beneficiary of the CRT. An "independent" trustee selected by the grantor can be given the power to "spray" distributions between or among some or all the several income beneficiaries. This would divert unwanted or unneeded unitrust or annuity amounts away from the SNT to effectively reduce or eliminate the income tax consequence to the distribution.

Further, because they are undiminished by the payment of an Income Tax, the entire $300,000 RMD are available for investment by the CRT and can grow tax free until distributions are made from the CRT.

The SNT is created using the model language contained in EPTL 7-1.12, together with the draftsperson's other trust language governing the administration of the SNT. It is designed to be a "qualified disability trust" to take advantage of the $4,000 personal exemption. Because it is a "third party" supplemental needs trust, the grantor can name any person or entity (including the favored charity) as the remainder beneficiary of the SNT.[20]

Endnotes

1. Section 664 of the Internal Revenue Code of 1986, as amended (the "Code") defines the characteristics and restrictions of a charitable remainder trust.
2. I am using the term "tax-exempt" organization or "charity" to refer to an organization described in Code §170(c)which includes only a

   > corporation, trust, or community chest, fund, or foundation: (a) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals; (b) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and (c) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and (d) which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

3. The IRS published sample trust instrument provisions that, if followed, would meet IRC 508(e) requirements. A series of revenue procedures were issued in 2003 that presented approved sample trust documents covering the various scenarios that a CRAT would typically involve. Rev. Proc. 2003-53 through Rev. Proc. 2003-60. In 2005, a series of revenue procedures were issued that provided sample trust instruments for various scenarios involving CRUTs. Rev. Proc. 2005-52 through Rev. Proc. 2005-59.
4. Code §664(d)(1).
5. Code §664(d)(2).
6. Code §7701(a)(1) contains the definition of a "person."
7. In the case of a testamentary CRT, the exemption from the capital gains tax and the availability of an estate tax charitable deduction play a greatly diminished role in current estate planning. First, the step-up in basis of an appreciated asset at the death of the grantor will result in zero or very little tax imposed upon a subsequent sale. Further, the Federal Unified Credit Amount (currently $5.430 million) shelters all but a very small percentage of estate from the Estate Tax. In New York, the Unified Credit Amount is now $3.125 million and will soon increase to an amount equal the Federal Unified Credit Amount, thereby making an estate tax charitable deduction of value to a limited number of estates.
8. While I typically use "person first language" ("PFL") and refer to a "person with a disability," sometimes it is grammatically awkward to use that linguistic convention. There are articles published by a number of individuals with a disability which push back against PFL. One author expressed it this way:

   > as with almost any major activism movement, PFL sparked a counter-movement, known as identity-first. IFL is a linguistic concept embraced and actually preferred by countless people within the disability community. In the ideology of identity-first, "disabled" is a perfectly acceptable way for a person to identify. Instead of going out of your way to say "person with a disability,"

when using IFL you would instead say "disabled person." This is how I personally choose to identify myself. I am a disabled person. *Why Person First Language Doesn't Always Put the Person First*, Emily Ladau, *Think Inclusive* (July 20, 2015), http://www.thinkinclusive.us.

For simplicity of syntax, I have chosen to use IFL on several occasions in this article.

9. EPTL 7-1.12 was enacted in 1993 to provide model language for a "third party" supplemental needs trust. It was subsequently amended to include "first party" supplemental needs trusts, and the model language applies to both types of trusts.
10. Code §§664(b); *see* also Treas Regs §1.664-1(d).
11. Code §661(a).
12. Code §651.
13. *See*: Code §§671-679.
14. The IRS Manual on on Charitable Trusts defines a complex trust as "…is any trust that doesn't meet the requirements for a simple trust. Complex trusts may accumulate income, distribute amounts other than current income and, make deductible payments for charitable purposes under IRC 642(c)." IRS Manual §4.76.5.2.7 *Exempt Organization Examination Guidelines, Charitable Trusts (IRC 4947(a)(1) and 4947(a)(2))*, (4/13/2015).
15. Code §642(b)(2)(C).
16. The personal exemption for a qualified disability trust is equal to the personal exemption for an individual tax payer; and, thereby is increased year over year. In 2015 the personal exemption amount is $4,000.
17. The disabled beneficiary would either take the standard deduction; or if he/she had tax deductions in excess of $6,300, the sum of the itemized deductions.
18. Treas Reg. §1.674(c)-1 describes an "independent" trustee.
19. The rules regarding naming a trust as a beneficiary of a qualified retirement plan account are complex and often confusing. Likewise are the rules governing "required minimum distributions." ("RMD") An explanation of the subtle nuances of these rules is beyond the scope of this article and will render the example, intended to present the simplest of facts, unnecessarily complex.
20. *See also* IRS Rev.Rul. 2002-20 wherein the IRS confirms the utility of naming a First Party Supplemental Needs Trust as the beneficiary of both CRUTs and CRATs.

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Separated but Not Divorced: The Long Term Care Planning Implications

By Anthony J. Enea

I recently read an article about Katherine Hepburn's illustrious acting career and life. The article described her longtime romance with fellow actor, Spencer Tracy. It was reported that Mr. Tracy was a devout Catholic who, in spite of his romance with Ms. Hepburn, refused to divorce his wife, an arrangement for which, I am willing to venture, Mrs. Tracy was handsomely compensated.

The following is an overview of the Medicaid and estate issues affecting those who are separated but not divorced. I suspect that there are thousands of people in New York who may one day suffer detrimental financial consequences because they have not legally finalized their divorce and have not adequately addressed Right of Election and Medicaid eligibility issues.

For purposes of Medicaid eligibility and pursuant to 18 N.Y.C.R.R. §360-4.3(f), the income and resources of "legally responsible relatives" are considered in determining the eligibility of the applicant for Medicaid. 18 N.Y.C.R.R. §360-1.4(h) defines the only "legally responsible relatives" to be:

(a) A spouse for the other spouse;

(b) A parent for a child under the age of twenty-one (21) years; or

(c) A step-parent for a step-child under the age of twenty-one (21).

Thus, a spouse that is separated but not divorced is included as a "legally responsible relative" whose income and resources are considered for Medicaid eligibility purposes. Although the separated spouse has the ability to execute a "spousal refusal" pursuant to §366(3)(a) of the Social Services Law, the "spousal refusal" will not relieve the spouse of the liability for the medical care paid for by the Medicaid program, and local department of social services can pursue recovery against a refusing spouse for the actual expenses paid to the Medicaid recipient to the extent of the resources in excess of the Community Spouse's Resource Allowance ($74,820 to $119,200 on a sliding scale for 2015).[1]

Medicaid can pursue recovery of assets against a separated spouse even if the spouse were separated from and living apart from the applicant prior to the applicant's institutionalization, although the separated spouse's refusal to divulge income and asset information will not affect the applicant's eligibility. In New York State, Medicaid's decision to pursue, or not pursue recovery against separated spouses, just like with married non-separated couples, often depends on how aggressive a particular County is in pursuing recovery.

Imagine, however, the surprise and shock separated spouses may experience when they learn that they may have financial responsibility for the medical care of spouses from whom they have been separated. It is not a situation one should ever allow him or herself to be placed.

Pursuant to the New York Estates, Powers and Trust Law ("EPTL") Section 5-1.1, the surviving spouse of a New York domiciliary who died on or after September 1, 1992, is entitled to a statutory elective share equal to the greater of $50,000 or one-third of the net estate (being the probate estate less certain debts and expenses) plus one-third of the testamentary substitutes, e.g.: joint accounts, certain trust accounts, retirement benefits, etc. EPTL 5-1.1-A provides a comprehensive description of the types of assets considered to be a "testamentary substitute" for the purposes of calculating a spouse's right of election.

It is clear that the right to an elective share may affect one's future eligibility for Medicaid, irrespective of the existence of a waiver of the right of election in a separation agreement, where one is separated, but not divorced from, their spouse.

Unless one is divorced at the time of the death of the first spouse, Medicaid will consider the surviving spouse to be entitled to an elective share for Medicaid eligibility purposes. Additionally, if one were to execute a Waiver of a Right of Election, it is treated by Medicaid as a non-exempt transfer of assets which creates a period of ineligibility for Medicaid. Further, the period of ineligibility is calculated not from the date the waiver was executed, but from the date of death of the spouse.[2]

For purposes of Medicaid eligibility an "available asset" includes any income or resources to which an individual is entitled but, because of any action or inaction on his or her part, does not receive.[3] Thus, for example, if a surviving spouse is already a Medicaid

recipient, and he or she fails to exercise the Right of Election, Medicaid can discontinue his or her benefits. Procedurally, Medicaid must only send the recipient a notice requesting that the person exercise the Right of Election.[4] If the Medicaid recipient fails to do so, Medicaid will deem the person to have refused to accept an "available asset" and either discontinue or deny benefits.[5]

As can be seen from the above, there are some significant financial issues that those separated, but not divorced, will encounter. While this author is not advocating that every separated individual obtain a divorce, it may be critical for those who have separated to take the steps necessary to formalize a divorce if they wish to avoid the potential problems that may arise with respect to Medicaid eligibility and the Right of Election.

Endnotes

1. NY SSL 366(a).
2. See NYS Department of Health 96 ADM 8 (1996).
3. *Id.*
4. *Id.*
5. *Id.*

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Putting the "Sex" in Sexagenarian: Older Adults, Dementia and the Case of Henry Rayhons

By Malya Levin, Joy Solomon and Deirdre Lok

This article is part of an ongoing series brought to you by the Elder Law and Special Needs Section's Elder Abuse Committee. For more information or to join the Committee, please contact joy.solomon@hebrewhome.org. For a list of statewide elder abuse resources, please visit nysba.org/ElderAbuseResourceGuide/.

Consent to Sex

Malya Levin

Deirdre Lok

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The legal standard for consent to sexual activity is a much-discussed topic across the country, and New York State is no exception. On July 7, 2015, the Governor signed a bill into law which requires students on all New York State college campuses to use an "affirmative consent" standard when engaging in sexual activity.[1] This heightened standard has gained popularity against a national background of high profile cases and alarming statistics, with one in five women sexually assaulted while in college.[2] New York may be one of the first states to usher in a national trend.[3] The American Law Institute is currently revising Article 213 of the Model Penal Code which governs sexual assault and has not been updated since the early 1960s. The current proposed draft would adopt the affirmative consent standard more generally, criminalizing all sexual activity undertaken without express consent by both parties.[4]

Our society's movement towards a legal standard that views express communication as the hallmark of consent provides an important opportunity to consider the sexual rights and vulnerabilities of those who may not be capable of meeting this standard, such as older adults with some degree of cognitive impairment. Last year's Iowa case of *People v. Rayhons* is illustrative, casting a national spotlight on the complex intersection of aging, sexuality and dementia.

The *Rayhons* Case

In April 2015, Henry Rayhons, 78, a nine-time state legislator, was acquitted of third-degree felony sexual abuse. Rayhons was accused of having sex with his wife, Donna, who suffered from Alzheimer's disease and lived in a long-term care facility. The relationship was a second marriage for both, who met through their church choir in 2007. The State's case was not based on any evidence of Donna Rayhons having resisted or refused sexual activity with her husband. In fact, witnesses testified that she always responded positively to his visits and acted affectionately towards him.[5] The prosecution's contention, however, was that facility personnel determined that Donna Rayhons' dementia rendered her incapable of consenting to sex, and further, that Henry Rayhons was informed of this conclusion. The prosecution alleged that a criminal act occurred when Henry Rayhons had sex with his wife in her room at the facility, subsequent to being informed that she was not capable of consenting to sexual activity. At trial, Henry Rayhons testified that he had engaged in sexual activity with his wife while she lived in the nursing home, though not on the date alleged by the prosecution, when he claimed they held hands, kissed and prayed together. Rayhons said that his wife would sometimes initiate sexual contact, which she clearly enjoyed, when he came to visit her in the nursing home. Rayhons became tearful on the stand, referring to Donna, who passed away shortly after charges were filed, as "my queen."[6]

The jury also heard a recording of the care plan meeting at Donna Rayhons' facility, attended by Henry Rayhons and two of his stepdaughters, during which Henry Rayhons was allegedly informed that his wife had been deemed incapable of consenting to sexual activity. The audio revealed that the issue of sexual activity was discussed for approximately one minute, and the word "sex" was never uttered. Rather, Henry Rayhons was referred to a printed list of staff recommendations for Donna Rayhons' care, which included a

doctor's statement that she could not consent to sexual activity given her cognitive state. Nobody explained what the sentence meant, but Henry Rayhons could be heard on the tape saying, "That's not a problem."[7]

Sexuality and Older Adults: Myths and Facts

This complex and emotionally charged case provides a microcosm through which to view issues of older adult sexuality. First, it highlights the degree to which older adult sexuality is so often viewed through a cloud of ageism, which pigeonholes both sexual expression and, by extension, sexual abuse, as the province of the young, with no meaningful connection to the lives and health of older adults. Research has shown that the opposite is true. In a 2007 study, most of the over three thousand older adults surveyed remained sexually active, though the frequency of the activity decreased with age, and continued to view sex as an important part of life. Among respondents aged 75 to 85, 54% of those who reported being sexually active had sex two to three times a month, and 23% had sex once a week or more. Additionally, the study found a dramatic positive correlation between older adults' health and sexual activity.[8] Relatedly, a study of 1,292 people aged 60 and older found that, while the percentage of people having sex at least once a month decreased with age, the percentage of those who were "very happy" with the sexual activity they were engaged in rose as people aged.[9] It seems that not only are many older adults engaged in sexual activity throughout their lives, but the positive impact that sexual activity has on a person's life actually increases as that person ages.

Unfortunately, mistaken attitudes towards the role of sexuality in the lives of older adults seem to be prevalent even among the professionals who work with them. In the same 2007 study referenced above, only 38% of men and 20% of women reported having discussed sex with a physician since the age of 50.[10] Age-related medical issues that may prevent older adults from leading sexually satisfying lives, and which might be mitigated with help from a physician, thus go unresolved, and the stereotype that older adults are not having sex becomes a self-fulfilling one. Conversely, reticence to discuss sexuality may keep professionals from uncovering signs of abuse. The Rayhons were no exception to this trend, as evidenced by the apparent lack of importance accorded to their sexual relationship during Donna Rayhons' care plan meeting, and the general squeamishness demonstrated by the staff towards even uttering the word "sex" in the context of a relationship between two older adults, one with apparent cognitive impairment, even within the context of a marital relationship.

Legal Standard for Capacity to Consent to Sexual Activity

Cognitive impairment introduces another layer of complexity to the issue of older adult sexuality. What is the legal standard for capacity to consent to sexual activity, and how can that standard be applied in cases of dementia, where a person's capacity is far from static, but may change based on time of day, surroundings, medical conditions and other external stressors? Our legal system must strike a balance between the fundamental right of all citizens, regardless of age, to private sexual activity, enshrined by the Supreme Court in *Griswold v. Connecticut* and *Lawrence v. Texas*,[11] with the *parens patriae* obligation of the state to protect individuals unable to protect themselves.

In New York, the standard for capacity to consent to sexual activity is defined in the context of criminal law, which includes lack of consent as an element of any sexual offense. Lack of consent may result from "incapacity to consent"[12] due to "mental disability"[13] which is defined as "a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct."[14] Courts have elaborated on this standard noting that "understanding the 'nature' of one's sexual conduct implicates a range of human responses, only a part of which is intellectual."[15] Like other standards of capacity, this determination is a functional assessment, and the mere presence of a particular diagnosis, such as dementia, is not sufficient to establish incapacity.[16] Factors implicated in capacity to consent to sexual activity include knowledge of the physical activities in question, an understanding of their physical consequences and effects, and the ability to make a voluntary decision.[17] New York courts have also considered whether an individual is capable of understanding morals or values that exist around sexuality, though not the adherence to a particular set of values.[18] However, there are no generally accepted approaches or criteria for the assessment of these factors in the psychological community.[19] Furthermore, courts seem to have created this standard in the context of evaluating younger individuals with cognitive disabilities, not older adults with dementia or age-related cognitive impairments.

Nuanced Evaluation

Given the uniquely complex and subtle factors at play in decision-making regarding sexual activity, it is critical that attorneys encourage and help facilitate, where appropriate, a nuanced evaluation specifically geared towards a task specific assessment of an older adult's ability to consent to sexual activity, rather than relying on a more general assessment of the older adult's cognitive capacity. Such an assessment should track the specific factors courts look to in analyzing the legal standard. In Donna Rayhons' case, no evidence

was presented of such a specific assessment having been conducted. Rather, her doctor at the long-term care facility testified that his assessment was based on standard cognitive tests that ask simple questions about the day of the week and ask participants to repeat short lists of simple words.[20]

The Hebrew Home at Riverdale, the long-term care facility that houses the Harry and Jeanette Weinberg Center for Elder Abuse Prevention, has long championed the rights of its residents to engage in sexual activity, developing a Sexual Expression Policy in 1995. The Hebrew Home and the Weinberg Center also developed a tool for professionals to use in assessing consent to sexual activity. The tool is geared towards assessing:

(a) An individual's ability to express choices/consent, by asking questions such as:

   a. What are your wishes about this relationship?

   b. Does your sexual partner make you happy?

   c. Do you enjoy sexual contact?

(b) An individual's ability to appreciate sexual activity, by asking questions such as:

   a. Do you know what it means to have sex?

   b. What does it mean to you/your partner? What would you do if you wanted the sexual activity to stop?

   c. How would you respond if your partner wanted the sexual activity to stop?

(c) An individual's current personal quality of choices, by asking questions such as:

   a. Was and is physical intimacy important in your life?

   b. What are your social and companionship wishes?

   c. What brings happiness or fulfillment to your day?

All of the above questions should be formulated in a way that will make it easiest for the older adult to meaningfully respond. Consider using short and simple words and sentences, using examples based on the older adult's particular circumstances and breaking the conversation into several shorter pieces. It is critical to note that individuals suffering from dementia may be capable of formulating preferences and choices even if they are no longer able to verbally express those decisions.[21] Therefore, an individual's non-verbal cues (facial expressions, body language, shifts in emotions and mood when coming into contact with the potential sexual partner) may be just as critical, if not more so, than the questions themselves. It is also important that the evaluation consider the individual's relationships and values, both before the onset of the cognitive impairment as well as currently.

Sexual Abuse

Very few statistics are available about the prevalence of sexual abuse among older adults, due, at least in part, to the high level of stigma surrounding the issue. According to one study, over 60,000 rapes of women over 50 years old are reported annually.[22] Many more may actually occur, given that both sexual assault and elder abuse are dramatically underreported crimes.[23] Moreover, sexual abuse, like other forms of abuse, is more likely to cause severe or long-lasting injuries when the victim is an older adult. In two separate studies, a significantly higher percentage of post-menopausal sexual assault victims had genital trauma, as compared with younger victims.[24] According to a 2008 study, older adults with dementia exhibit the same post-sexual abuse behavior symptoms of distress as cognitively intact individuals in the same age demographic.[25] It is critical that attorneys be mindful of the prevalence of sexual abuse and the extent of its medical and emotional consequences, particularly among cognitively impaired individuals whose ability to communicate verbally may be limited.

Family Discord: An Attorney's Role

Another issue illuminated by the Rayhons case is the role that internal family discord can play in situations where a cognitively impaired older adult is engaging in sexual activity. Henry and Donna Rayhons both had children from previous marriages, and Donna Rayhons' daughters seemed to have repeatedly disagreed with Henry over various issues involving Donna's care, such as the frequency of her trips outside of the long-term care facility.[26] While one of Donna's daughters, who testified against Henry, denied playing any role in initiating the criminal case, it seems likely that children, grandchildren or other family members may oppose the sexual activity of a loved one with dementia if the relationship is a new one or one that challenges their personal values or sense of family obligation. If the older adult in question is living in a long-term care facility, staff may be incentivized to follow the preferences of family members, since they are the likely source of liability. An older adult with cognitive impairment is unlikely to be able to assert his rights by taking legal action against a facility, whereas an outraged family member may well threaten suit.[27] Given their knowledge of the typical interests at play, attorneys should encourage clients to think through the implications of their particular family dynamics as part of holistic legal planning. Particular family dynamics around issues like sexuality may bear directly on a cli-

ent's advance and estate planning choices, and should be part of the conversation an attorney has with a client before executing such documents.

Conclusion

Older adult sexuality is a complex topic, particularly as our youth-oriented society moves towards a model of consent, which, by definition, excludes many older or disabled adults. As the Rayhons case demonstrates, older adults, particularly those with some form of cognitive impairment, are vulnerable both to sexual abuse, which, when it occurs, is so difficult to identify and to prove beyond a reasonable doubt, and to having their rights to sexual expression curtailed, with devastating physical and emotional consequences. Elder law attorneys are aptly positioned to assist clients in navigating this issue by: combating stereotypes regarding older adult sexuality, encouraging frank discussion of a client's wishes for their sexual life as part of the legal planning process, including the ways in which family dynamics may prove relevant, and encouraging or arranging for appropriately nuanced evaluations of an older adult's capacity to consent to sexual activity, in accordance with New York State law. Attorneys should also be aware of the reality of elder sexual abuse and be prepared to identify it and to alert law enforcement where appropriate. Integrating these services and skills into an elder law practice is an important boon for clients and a step towards fewer cases like *People v. Rayhons*.

Endnotes

1. NY EDN. LAW §6432-a.
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27. *See* Tenenbaum, *supra* note 21 at 705.

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New York NAELA Niche

By Robert P. Mascali

The New York Chapter of the National Academy of Elder Law Attorneys is pleased to present an update on current issues of national import for the members of the Elder Law and Special Needs Section of the New York State Bar Association. While in many instances the Chapter's interests overlap with those of the Section, as does much of our membership, the Chapter feels that it can assist all of our colleagues through these national updates, as well as our ability to effectively advocate and lobby on a range of topics that are of interest to us all.

1. The Special Needs Fairness Act

Current federal law found at *42 U.S.C.1396p (d) (4) (A)* provides that a self-settled special needs trust can be established for a disabled person by a parent, grandparent, court or guardian. Noticeably absent from this list is the disabled beneficiary who, if legally competent, does have the right to establish a pooled special needs trust under the provisions of *42 U.S.C.1396p (d) (4) (C*). The reason for this distinction, if any, remains elusive to this day. Whether intentional or merely a drafting error, the result has been years of needless delay, expense and hardship for many disabled beneficiaries who, if they don't have a parent or grandparent available, have had to go to court in order to establish such a trust. Many situations required the needless appointment of a single transaction guardian.

In an effort to rectify what many see as a discriminatory intent against certain disabled persons who are competent, the National Academy of Elder Law Attorneys, along with many other advocacy groups, has been at the forefront in the support of the Special Needs Trust Fairness Act. This Act provides a very simple change to the current wording of the statute naming the individual as a party able to establish the trust and would therefore allow people with disabilities to establish their own special needs trust without having to rely on others in order to do so. This legislation has recently been passed by the United States Senate and a companion bill is now working its way through the Energy and Commerce Committee and its Health subcommittee in the House of Representatives. The belief among many advocacy groups is that without additional support the bill may not make it out of committee to the full House. The New York Chapter encourages all attorneys with an interest in the rights of individuals with disabilities to contact their congressional representative to urge him or her to support this important bill. For contact information for representatives go to http://www.house.gov/representatives/find/.

2. *DeCambre v. Brookline Housing Authority* (D. Mass., No 14-13425-WGY, 3/25/2015)

Practitioners are constantly reminded of the complexities in representing individuals with disabilities and their family members, especially in the area of public benefit compliance. The *DeCambre* case is illustrative of this complexity and the constant need for care when making distributions from a special needs trust.

Ms. DeCambre was the recipient of a personal injury settlement and the proceeds of $330,000.00 were placed in a court-established special needs trust as she was receiving Supplemental Security Income (SSI) and Medicaid due to numerous medical conditions. Significantly, she was also receiving a Section 8 housing voucher and it was at the point that the trouble came about. While the trustee was careful in the administration of the trust and made payments for various expenses such as for a car, phone, Internet and travel in accordance with the requirements for SSI and Medicaid, the trustee unknowingly violated of the rules for a Section 8 beneficiary. As a result, the Brookline Housing Authority took the position that the payments from the trust were considered to be "income" rather than distributions from the trust, thereby causing Mrs. DeCambre to be over income for the voucher program. Ms. DeCambre filed suit in state court alleging a number of civil rights and due process violations. The case was removed to the federal district court and the U.S. District Court for the District Court of Massachusetts, while sympathetic to the plight of special needs trust beneficiaries who have difficulty in retaining Section 8 benefits, held in favor of the housing authority, in effect confirming that these regular types of distributions can be considered income for Section 8 eligibility. An appeal to the federal first circuit court of appeals

has been filed. The Public Policy Committee of NAELA is continuing to monitor this and similar cases and future advocacy is probable.

3. ***Home Care Association of America v. Weil*** **(U.S. Court of Appeals, District of Columbia Case No.15-5018 D.D.C)**

Since the early 1970s individuals employed as in home companions, including those employed directly by a family or household as well as those employed by agencies, were exempt from the minimum wage and overtime provisions of the federal Fair Labor Standards Act (FSLA) [29 U.S.C. Section 201 et. seq.] provided they met certain criteria dealing with caregiving and live-in conditions. However, in 2014, the United States Department of Labor proposed regulations that were slated to go into effect on January 1, 2015 that drastically curtailed the number of individuals that would qualify under that companionship and live-in exemption and which would result in considerable increased costs of care for the elderly and disabled who were living in their own homes. The Home Care Association commenced a lawsuit challenging these regulations under the Administrative Procedure Act, alleging that the Department exceeded its authority in the promulgation of these regulations. The District Court for the District of Columbia agreed and vacated the regulations (14-cv-967; WL 7272406). An appeal ensued and on August 21, 2015 the District of Columbia Court of Appeals reversed the district court in a unanimous decision and reinstated the regulations. The regulations were effective on October 13, 2015 and the Department has stated on its website (www.dol.gov) that enforcement will commenced on November 12, 2015. A request for an injunction from the United States Supreme Court was recently denied, although there is still a possibility that a full review from the Court may be allowed.

Robert P. Mascali is an attorney in Albany, New York and is the president-elect of the New York Chapter of the National Academy of Elder Law Attorneys and is co-vice chair of the Special Needs Planning and Legislation committees of the Elder Law and Special Needs Section of the New York State Bar Association. Mr. Mascali is a Senior Settlement Consultant for The Center for Special Needs Trust Administration, Inc. a national non profit organization based in Clearwater, Florida. The views expressed in this article are Mr. Mascali's and do not necessarily reflect the views or opinions of that organization.

Third Annual *Elder and Special Needs Law Journal* Writing Competition

The Elder Law and Special Needs Section of the New York State Bar Association continues to strive to achieve a diverse membership body, in hopes of fostering a rich environment within which ideas are cultivated.

We are pleased to announce, the "Third Annual *Elder and Special Needs Law Journal* Writing Competition."

Topic: Any law or legal issue affecting seniors and/or persons with disabilities, with a specific focus on historically underserved populations. Examples include, but are not limited to, access to education, health care and housing.

Eligibility: All students attending an accredited ABA law school within New York State and recent law graduates seeking employment.

Awards: The winners of the "Third Annual *Elder and Special Needs Law Journal* Writing Competition" will be guaranteed publication within the New York State Bar Association's *Elder and Special Needs Law Journal* (*ESNLJ*). In addition, there will be two $500 prizes and a complimentary one-year membership in the NYSBA Elder Law and Special Needs Section for the winners.

Format: Submit the article in the form of a Word document. Please do not use Word Perfect or .docx. The article should contain endnotes in Arabic numerals, and all sources should be attributed in *Bluebook* format. Contact the Co-Production Editor for further details or your Office of Student Life or its equivalent.

Judging: The articles will be judged by the *ESNLJ* Editorial Board. Even if one of your students' articles is not chosen as a winner, we may choose to publish it in the *ESNLJ*.

To Enter: Please send all submissions to the following email addresses:

TPleat@WPLawNY.com
and
judy@mckennalawny.com

Deadline: March 15, 2016 and no extensions will be granted.

Which Clients Can Benefit from ABLE Accounts?

By Keri Mahoney

What Is the ABLE Act?

The Achieving a Better Life Experience Act of 2014 ("ABLE Act') is a federal bill that was signed into law on December 9, 2014 as part of the Tax Extenders Package.[1] The law is codified as part of the Internal Revenue Code and allows disabled children and young adults to create a special type of tax exempt savings account that is akin to the 529 savings plans used for educational purposes.[2] Ostensibly, the law provides important tax benefits savings accounts for children and young adults with disabilities.[3]

However, in addition to the tax benefits associated with the new ABLE accounts, such accounts can also be used in order to allow persons with disabilities to preserve assets without losing access to government benefits and entitlements such as SSI and Medicaid.[4] In fact, the stated purpose of the ABLE Act is to "encourage and assist individuals and families in saving private funds for the purpose of supporting individuals with disabilities to maintain health, independence and quality of life," and "[t]o provide secure funding for disability related expenses on behalf of designated beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, the Medicaid program…the supplemental security income program…the beneficiary's employment, and other sources."[5] Thus, these accounts bear many similarities to supplemental needs trusts, and will likely become an important part of planning for children and young adults with disabilities.

When Will ABLE Accounts be Available in New York?

Although Federal Legislation creates the ABLE accounts, each state must adopt the program (or contract with another state that has adopted the program) in order to allow the state's residents to take advantage of these accounts.[6] In New York, a bill to enact the ABLE Act was introduced on March 23, 2015 and was recently signed into law by Governor Cuomo.[7]

"[I]n addition to the tax benefits associated with the new ABLE accounts, such accounts can also be used in order to allow persons with disabilities to preserve assets without losing access to government benefits and entitlements such as SSI and Medicaid."

What Are the Differences Between an ABLE Account and a Supplemental Needs Trust?

ABLE accounts and supplemental needs trusts are both viable planning tools for children and young adults with special needs who need a mechanism to save money without jeopardizing means-tested government entitlements. For attorneys practicing in planning for individuals with special needs, it is important to understand the finer distinctions between an ABLE accounts and a supplemental needs trust in order to determine which tool is best suited for any given client. Following is a table outlining some of the distinctions between the two devices.

(continued on page 40)

	ABLE Account	First-Party Supplemental Needs Trust	Third-Party Supplemental Needs Trust
Main Governing Statute	26 U.S.C. §529A (federal statute, state statute pending).	N.Y. EPTL 7-1.12 and 42 U.S.C. § 1396p.	
Payback Provision	Yes. State named as creditor (rather than beneficiary) of account and entitled to repayment to the extent of total amount paid for medical assistance for the beneficiary and amount of insurance premiums paid by Medicaid.[8]	Yes (to the state if individual trust, to state and/or non-profit agency administering trust if pooled trust).[9]	No.
Beneficiary Eligibility	Individual entitled to Social Security Benefits based on blindness or disability that started before age 26.[10]	**Individual Trust**: Under age 65 and disabled (as defined by Social Security Administration).[11] **Pooled Trust:** Disabled.[12]	Disabled.
Grantor/Settlor	Any person.	**Individual Trust**: Parent, grandparent, or legal guardian of disabled beneficiary, or a court.[13] **Pooled Trust:** Same as individual trust, but in addition, may also be established by the disabled beneficiary.[14]	Any person other than beneficiary, the beneficiary's spouse, or a person with a legal obligation to support the disabled beneficiary.
Countable Resource?	**SSI Eligibility:** $100,000 must be disregarded (but each state may allow for higher disregard).[15] **Medicaid Eligibility**: No suspension of Medicaid for excessive balance.[16]	Disregarded.	
Maximum Contribution	Cannot contribute more than the annual gift tax exclusion (currently $14,000) annually.[17]	No limit.	
Tax on Trust/ Account Income	Exempt.[18]	Grantor pays tax on trust income.	
Treatment of Distributions	**Taxation**: Distributions for items other than qualified disability expenses (education, employment, housing, education, health care, and many other items) are included in gross income and are taxable.[19] **Benefit Eligibility**: Generally, distributions for qualified expenses are disregarded; however, distributions for housing may reduce SSI.[20]	**Taxation**: N/A—no distributions directly to beneficiary. **Benefit Eligibility**: Trustee should not make distributions which would impair government benefits, unless the trustee determines it is in the beneficiary's best interest to do so. In that event, distributions for food, shelter, or health care may have adverse effect on government benefit eligibility.[21]	
Limit on Number of Accounts	1 per beneficiary.[22]	None.	
Other Restrictions	Funds must be cash.[23] Beneficiary can only direct investment of contributions twice annually.[24] May not use ABLE Account as security for loan.[25]	Controlled by trustee who cannot distribute assets in any manner which will "supplant, impair or diminish government benefits or assistance."[26]	

Overall Conclusions

ABLE accounts are another tool for practitioners to consider when helping to plan for the financial security of a disabled child or young adult. The table above highlights some of the important differences between such accounts and supplemental needs trusts. The decision of which tool to use will likely vary depending on the preferences of the disabled person and his or her family.

At the outset, the most important distinction is that ABLE accounts are not available to person(s) who were not deemed disabled before the age of 26. Thus, as part of the initial screening, it is important to determine the age at which the beneficiary became disabled. If the person was certified as disabled after the age of 26, an ABLE account is not an option.

Assuming a client is eligible for an ABLE account, the preferences of the disabled individual and the specific circumstances of that client will guide the decision as to whether to use an ABLE account, a supplemental needs trust, or both. If the client is capable of managing his own funds and prefers to maintain control, then an ABLE account might be preferable because the funds are not managed by a trustee. If the client desires to pay out of pocket for some medical expenses while maintaining eligibility for Medicaid, an ABLE account might be preferable because it may allow this flexibility. If the facts lend themselves to creation of a third-party supplemental needs trust, then the ability to avoid Medicaid payback provision through the use of a third-party supplemental needs trust might weigh against using an ABLE account. For a client of low or modest means, the tax benefits of the ABLE account might prove to be important. Additionally, clients may benefit from having both an ABLE account and a supplemental needs trust, particularly if the client wants an ABLE account, but has income in excess of the maximum amount which can be contributed to an ABLE account in any given year.

Endnotes

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2. *See* 26 U.S.C. § 529 (tax exempt savings for education) *and* 26 U.S.C. § 529A (tax exempt savings for disabled persons).
3. *See* 26 U.S.C. § 529A(a) ("A qualified ABLE program shall be exempt from taxation under this subtitle.").
4. ABLE Act of 2014, H.R. 647, 113th Cong. (2014) (enacted).
5. *Id.* at § 101.
6. Ann Carrns, *Law Creates Special Savings Accounts for Disabled People*, N.Y. Times, Jan. 30, 2015, http://www.nytimes.com/2015/01/28/business/special-savings-accounts-for-disabled-people.html?_&_r=0.
7. *See* S. 04472A, 2015-2016 Reg. Sess. (N.Y. 2015). Kathy Reakes, *Carlucci Hails Signing of ABLE Act into Law*, Clarkstown Daily Voice, Jan. 5, 2016, http://clarkstown.dailyvoice.com/news/carlucci-hails-signing-of-able-act-into-law/614071/.
8. 26 U.S.C. § 529A(f).
9. 42 U.S.C. § 1396p(d)(4)(A)(ii) and (C)(iv).
10. 26 U.S.C. § 529A(e)(1).
11. 42 U.S.C. § 1396p(d)(4)(A).
12. 42 U.S.C. § 1396p(d)(4)(C).
13. 42 U.S.C. § 1396p(d)(4)(A).
14. 42 U.S.C. § 1396p(d)(4)(C).
15. ABLE Act of 2014, H.R. 647 § 103, 113th Cong. (2014) (Enacted); *see also House Passes H.R. 647, Achieving a Better Life Experience Act of 2014 (ABLE Act), Social Security* (Dec. 5, 2014), http://www.ssa.gov/legislation/legis_bulletin_120514.html [hereinafter *House Passes H.R. 647].*
16. *Id.*
17. 26 U.S.C. § 529A(b)(2).
18. *Id.* at § 529A(a).
19. 26 USC § 529a (c)(1) and (e)(5).
20. *House Passes H.R. 647, sup*ra note 15.
21. N.Y. Est. Powers & Trusts Law 7-1.12(a)(5)(ii).
22. 26 U.S.C. § 529A(b)(1)(B).
23. *Id.* at 529A(b)(2).
24. *Id.* at 529A(b)(4).
25. *Id.* at 529A(b)(5).
26. N.Y. Est. Powers & Trusts Law 7-1.12(a)(5)(ii).

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Building a Better Court Evaluator Report

By Stephen Donaldson

During the course of my legal career I have had the privilege of serving as court evaluator in a significant number of Mental Hygiene Law Article 81 proceedings. With this article, I hope to provide some practical tips to attorneys who are new to the role of court evaluator. If you've been serving as a court evaluator since Article 81 was enacted, it's probably safe to say you can go ahead and skip this article, but if you're just getting started, the following pointers may hold some value for you.

The legal standard is your be all and end all

Above all else, keep in mind the legal standard. When making phone calls, meeting people, and drafting your report, try to keep in mind the standard that Article 81 imposes upon the court: whether "the appointment is necessary to provide for the personal needs…and financial affairs of" the alleged incapacitated person (AIP) *and* that the AIP either consents to the appointment of a guardian or "that the person is incapacitated" according to Article 81.[1] Because that's the most important question the court has to answer, it's also the most important question the court wants you to answer in your report.

A report does not need to be limited to a single recommendation

When making a recommendation based on your analysis as evaluator, I don't think you have to limit your report to a single recommendation. As a matter of fact, I think you're performing a better service as evaluator if you provide your primary recommendation in addition to at least one alternative for the court to consider. This should very likely tell the court that you intend to go above and beyond the bare reporting minimum and have given the matter the thought it deserves.

Write in the first person

I've seen some reports where drafters write "Your Evaluator" rather than "I." That always struck me as unnecessary legalese. Why write, "When Your Evaluator met with Jane Doe" when you can make the report easier to read by writing, "When I met with Jane Doe"? We don't speak like that so why write like that? The best writing in the world is the writing that is well received by readers and I don't think clerks and judges are any exception.

Submit your report at least two business days before the hearing

This should give the court ample time to review and, hopefully, approve your report. Upon approval, some judges permit the evaluator to share the report before the hearing. Some judges only permit the report to be shared at the hearing. Either way, promptness affords the court a significant courtesy and, depending on the judge, it may also afford the same courtesy to the parties involved.

Consider including a one-page report summary

Courts are busy. Attorneys are busy. Clients are busy. We're all busy in the twenty-first century, so not long after I started serving as a court evaluator, I began including a one-page report summary with every report as an exhibit. This allows the reader to quickly identify the index number, the hearing date and time, the AIP's name, names of interested parties, who I interviewed as evaluator, whether the AIP consents to the appointment, whether the people I interviewed agree with the appointment of a guardian (most of this is done by way of a table I insert into the Word document), and my final recommendation using the legal standard language I noted above. I think it's a very useful tool based on the feedback I've received.

Answer all of the questions set forth in § 81.09(c)(5)

As much as I'd like to take credit for this idea, I can't. When I recently received an Order to Show Cause appointing me court evaluator, the court expressly requested that the report include answers to the seventeen questions set forth in § 81.09(c)(5)(i-xvii). To do so, I included a second exhibit that separately spelled out answers to each question. I think doing as much insures that the evidence Article 81 requires is satisfied by way of your report because, if your report answers all of those questions and your report is admitted into evidence during the hearing, then it's on the record.

Overall, all of those things mentioned above should push your court evaluator reports to a higher level, not to mention your recommendations.

Endnote

1. N.Y. MHL Article 81 § 81.02(a).

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Technology Committee Update—More About the Communities

It has been some time since the new NYSBA website along with the Communities debuted. For the technologically savvy, it was an easy transition, but for others, such as myself, it took some time and practice to adjust. Communities took the place of the listserv. This is the place to interact with fellow attorneys, post documents or have discussions. If you belong to a section or community, you are automatically enrolled in Communities. One of the neat things about Communities is that you can edit your settings to choose the way in which you receive e-mails about posts on your Communities. For those who want to receive an e-mail each time there is a new post, you would select "Real Time." For those who would prefer to receive just one e-mail with that day's posts, "Daily Digest" is the choice for you. The "Legacy" is a good option for those who are nostalgic for the old listserv and of course you can select "no E-mail." Now you may be thinking that all this sounds great but if you do not know how to access or use the new website, it is useless. Fear not fellow attorneys! The great staff at NYSBA has created a tutorial to help guide you through the website. You can watch the video by going to http://communities.nysba.org/home, clicking on "Community Help" and then select the video titled "How Do I Use the Community Sites." So if you are still hesitant about the new website, I encourage you to watch the tutorial provided on the website and spend some time exploring the website.

Monica P. Ruela, Co-Chair

Ethics Poll #12 Results

Scenario

Jeorgina Jeorgenson, a 72-year-old widow, came to your office for Medicaid planning. After she told you about her situation, you recommended an irrevocable Medicaid trust. You described, in broad outline, how trusts function. She requested that you prepare one for her and gave you the names of her appointees and beneficiaries. When you sent her the finished draft, you included a cover letter instructing her to call for another appointment, to review important details of the trust and assure her understanding of how to implement it properly for Medicaid elibility.

When she called, she said she would not have time to read or discuss the trust before her trip to Florida. She told you that her son had read it, and said it was "fine." She just wanted to stop on her way to the airport to sign it.

Question

Under these circumstances, does the RPC permit you to oversee the execution of the trust?

A. Yes

B. No

C. I don't know

Results and Commentary

Response	Count	Percent
A. Yes	33	20%
B. No	119	73%
C. I don't know	11	7%

Answer

B. No. But, the Rules do not prohibit you to oversee the execution either.

Analysis

The Rules of Professional Conduct (RPC) leave us on our own in some situations. This impasse between you and your client is one of them.

Client autonomy and attorney professionalism are two basic principles underlying the RPC. Here these principles collide head on, and the RPC urges opposing courses of conduct. Do you permit the client to execute the document because it's her right to do so, or do you insist upon informing the client before supervising the execution? A basis is found for arguments pro and con. Ultimately, it will have to be your call.

Arguments Pro

The Rules address respectively: a) informing the client (R.1.4); b) details to be given (R. 1.4(b)), and 3) allocation of authority between lawyer and client (R. 1.2).[1] Further, Rule 1.16(c) permits an attorney to withdraw when:

> (4) the lawyer fundamentally disagrees with the course insisted on by the client…or, (7) the client's uncooperativeness renders the representation unreasonably difficult…"

Each of these rules supports your authority and permits you to decline to supervise the execution of the trust when your client is running off, uninformed, to the airport.

Arguments Con

Limitations on these Rules provide, however, that "[a] lawyer shall not intentionally prejudice or damage the client"(R. 1.1(c)(2)) and that a lawyer may only withdraw when it can be accomplished "without material adverse effects on the client's interest."(Comment to Rule 1.16). Here, both prejudice and adverse effects are almost inevitable, regardless of which course you take. In both cases, your client remains uninformed and probably unable to obtain the results she needs for successful Medicaid planning.

The pertinent Rules offer no resolution. But neither does the Preamble to the Rules which, at first blush, looks like it will help:

> …within the framework of the Rules, many difficult issues of professional discretion can arise. The lawyer must resolve such issues through the exercise of sensitive professional and moral judgment, guided by the basic principles underlying the Rules.

No Help from the Preamble

Here we have come full circle to the "basic principles underlying the Rules." We are stuck here with solely the exercise of sensitive professional and moral judgment.

Ask yourself, will you refuse the execution of the trust in the rush to the airport, or will you oblige? To answer this question, you will have to weight the Rule's basic principles, and any others that seem pertinent, in accordance with your personal values. You will undoubtedly look for creative inspiration to meet what you consider to be your obligations in the matter. Maybe you'll make an appointment for when your client returns, or maybe you'll provide her with written instructions. At the end of the day, it's up to you.

The postscript to this must be, of course, that it's also up to you to provide for any matter that may terminate prior to execution in your retainer agreement.

Endnote

1. Rule 1.4(b) provides, "A lawyer shall explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the representation."

   Under the definition of "informed consent," a person is informed, "after the lawyer has communicated information adequate for the person to make an informed decision and after the lawyer has adequately explained the material risks…and reasonable alternatives."

   Rule 1.2(a)— discussing the allocation of authority between client and lawyer—reiterates the need for a consultation "as required by R. 1.4" ("to the extent reasonably necessary to permit a client to make informed decisions regarding the representation"), saying:

   > [A] lawyer shall abide by a client's decisions concerning the objects of representation and, as required by 1.4, shall consult with the client as to the means by which they are to be pursued.

Liaison Spotlight: Lisa Bataille

Interview by Katy Carpenter

Q Where are you from?

A I was born in Manhattan and my family moved up to the Albany area when I was young. I went to college in Oneonta and moved to Vermont for a little while after school, then back to the Capital District.

Q What brought you back to the Capital District?

A I wanted to be close to family and there were more job possibilities here after college. I was kind of living like a nomad for a few years, traveling all over.

Q Where did you travel?

A I did a loop all over the country. I went from the Northeast to California and down the coast, then across the southern states, stayed in Florida and then back up the East coast.

Q I've heard you are the "front line" and very busy at work, how did you get involved with the NYSBA?

A After college I worked for the New York State United Teachers for eight years. I then saw and applied for a blind ad and went on the interview…and I will have been with the NYSBA for 25 years next June.

Wow, that's impressive!

Q What's your favorite part of your job?

A The people, the Members I work with and the Section Meetings (wherever they may be!). I work with five sections and I love the different personalities of each Section.

Q How is it working with attorneys?

A It's challenging sometimes, fun sometimes and they keep me on my toes.

Q What did you want to be when you were 13?

A A rock and roll star! I did not achieve my goal.

Q What was your instrument?

A Guitar!

Q Then I'm sure you enjoyed concerts while you were traveling; where is your favorite place that you've traveled to?

A In 1985 I won tickets to Live Aid in London. It was at Wembley Stadium! I went with my friend and we hitchhiked for a few weeks around London and Ireland to visit her relatives.

Q That must have been **q**uite a memorable experience!

A Oh, it was.

Q If money were no object, where would you travel?

A There are a number of places: the Canadian Rockies (Lake Moraine), Vancouver, Australia and New Zealand…I studied abroad in England in college and I love the British Isles…Antarctica and Bora Bora.

Q So you definitely don't mind the cold!

A I like the idea of traveling somewhere warm in the winter but I love the four seasons—summer and fall are my favorite.

Q If your personality was embodied in a musician, who would that be?

A Bruce Springsteen. He writes songs about the common man and struggles with daily life—he's relatable. I also like that he's a gritty musician, not polished and he's an awesome guitarist.

Q What are a few words you would choose to describe yourself?

A Fun loving, a people pleaser (usually), I enjoy traveling and adventures and, at this stage of life, I enjoy spending time with my grandbabies.

Q What do you look forward to on the weekends?

A Spending time with family and my grandbabies and taking day trips. We like to go to Massachusetts, Williamstown, the Catskills and the Adirondacks.

Really we are boat people—when we had our boat, we'd spend time on Lake Champlain and Lake George. Hopefully we'll have another boat soon.

Q What is the best gift you have ever received?

A Not to sound sappy but the best gifts I've ever received are my grandchildren.

Katy Carpenter is a paralegal with Wilcenski & Pleat PLLC in Clifton Park. Katy has been working as a paralegal since her graduation from Marist College in 2010 where she graduated *cum laude* earning a B.A. in Political Science as well as completing the Paralegal Certificate program. Currently, Katy is pursuing her law degree at Albany Law School with an anticipated graduation date in May of 2016. While at Albany Law School, Katy has expanded her commitment to community service through her roles as Project Director for the Albany Law School's Tax Law Pro Bono Society, which is an extension of the IRS's Volunteer Income Tax Assistance program (V.I.T.A.); President for the National Academy of Elder law Attorneys' student chapter, and as a presenter for the Elder Law Pro Bono Society. At Wilcenski & Pleat, Katy devotes her career to the areas of special needs and traditional estate planning and administration, trust administration and elder law.

Elder Law and Special Needs Section Fall Meeting

By Tara Anne Pleat and Judy Nolfo McKenna

The Elder Law and Special Needs Section Fall Meeting was held on October 22nd and 23rd at the historic Gideon Putnam Hotel in Saratoga Springs, New York. The meeting was co-chaired by Felicia Pasculli and William D. Pfeiffer and included diverse programming touching on many areas of practice for those in attendance. The Sponsorship Committee, manned by Elizabeth Briand, Jeantte Grabie and Lauren Sharkey, should be commended for an outstanding job securing sponsors and exhibitors for the Fall Meeting. The vestibule outside of the general meeting rooms was brimming with information from the sponsors and exhibitors that will assuredly enhance our practices. We are sincerely grateful to the sponsors of the meeting, NYSARC Services, Inc., AETNA, The Centers for Special Needs Trust Administration, the Elder Law and Special Needs Practice of Felicia Pasculli, Esq., the KTS Pooled Trust, the McGuire Group, and Premier Health Care Services. We also thank the exhibitors who included Eddy & Schein In-Home Administrators for Seniors, ElderCounsel, Findlaw, Thomson Reuters, First Bank, RDM Financial Group, SmartAdvocate Case Management Software, Stay at Home Solutions, Inc., Summit Home Health Care, Trustco Financial Services, The Wesley Community, and York Health Care.

After a lively Executive Committee Meeting, the general session was kicked off by the two Taras, Tara Anne Pleat of Wilcenski & Pleat PLLC and Tara Moffett of Girvin & Ferlazzo, PC, who together presented

on "Considerations for the Special Needs Family" wherein they provided an overview and the mechanics of the early intervention and special education systems. In addition to the nuts and bolts of the law, Tara and Tara discussed practical issues many families face in navigating the often emotionally charged special education system. Joan Lensky Robert of Kassoff, Robert & Lerner Law followed with a great presentation on the "Mechanics of Protecting Assets for the Special Needs Child." Joan took the audience through a settlement conference for a hypothetical client explaining the considerations and interplay between Article 17, 17-A and 81 Guardianships, Infant Compromise Orders, and litigation settlements. Joan highlighted the pitfalls of overlooking the child's benefit structure, which are sometimes not at top of mind for those settling personal injury and medical malpractice lawsuits.

Following this, a panel consisting of Nina M. Daratsos of Niskayuna, New York; Paul E. Store of the New York State Division of Veterans' Affairs and Benjamin P. Pomerance of the New York State Division of Veterans' Affairs, discussed what we need to know about the VA's health care system and benefits available to veterans and their families. Thursday's general session was concluded by a presentation from Cora Alsante of Hancock Estabrook and Susan L. King of Miller King where attendees were challenged to think outside the box in considering asset preservation strategies that also have beneficial income and estate tax results. Among other tools, Susan and Cora discussed the benefits of family

limited partnerships, limited liability companies, and irrevocable life insurance trusts, in the context of traditional asset protection planning.

Thursday evening, participants and guests were invited to enjoy a cocktail reception at the National Racing Museum Hall of Fame, which is situated directly across Union Avenue from the historic Saratoga Race Course in the heart of Saratoga Springs. Many attendees enjoyed an "interesting" bus ride from the Gideon to the museum where they were welcomed into a gallery of sculptures and silks commemorating the beauty, majesty and history of equine racing. At the close of the cocktail hour, guests were invited to the Hall Fame Gallery to enjoy a movie on the history of racing and a wonderful dinner sponsored by NYSARC, Inc. Trust Services, which was paired with choice of red and white wine sponsored by the The Centers for Special Needs Trust Administration (special thanks to Bob Mascali!).

Friday morning began with robust committee meetings. Eleven substantive committees (Elder Abuse, Estates, Trusts and Tax Issues, Ethics, Guardianship, Health Care Issues, Mediation, Medicaid, Mental Health Law, Special Education, Special Needs Planning and Technology) met for breakfast to discuss the issues facing our Section and projects that are under way for this 2015-2016 year. In addition, as there were 25 first time attendees to our Fall Meeting, the Membership Committee led by Sal DiCostanzo, held a special breakfast meeting to welcome these first-timers to the Section and to provide a non-intimidating forum to ask questions and learn about the Section, its committees and its benefits.

The General Session began after breakfast with Immediate Past Chair Richard A. Weinblatt of Haley Weinblatt & Calcagni, LLP educating the attendees about covering all contingencies when drafting the New York Statutory Durable Power of Attorney. Specifically, Richard spoke of necessary modifications to the Power of Attorney and the Statutory Gifts Rider, acceptance issues with both private and government entites and agencies, as well as the fine line between asset protection and financial abuse. Following Richard was Judith Nolfo McKenna of the Law Office of Judith Nolfo McKenna, who gave a comprehensive and humorous presentation on the taxation issues we face each day in our elder and special needs law practices. Judy covered basis considerations and fiduciary income tax basics, among others.

Jeanette Grabie of Grabie & Grabie, LLP was the next presenter, and she gave a very informative discussion of how to optimize Medicaid benefits in an effort to keep clients living in the community. Jeanette spoke about the interplay between Community Medicaid benefits and the utility of pooled trusts, the impact managed care is having on the administration of Medicaid in the community and how to use Community Medicaid in certain assisted living facilities. Following Jeanette were Jeffrey Rheinhardt of Radley & Rheinhardt, PC and Scott M. Sokoloff of Sokoloff Legal PA, who provided a comparison of the Medicaid service delivery system between New York and Florida. Jeff and Scott provided attendees with an informal and practical approach to advising clients about the system and rules in both states that clients need to consider when they are contemplating both planning for their long-term care needs and a move to a warmer climate.

After lunch, Rachel A. Kabb-Effron of the Kabb Law Firm in Beachwood, Ohio, spoke about a holistic approach to estate and long-term care planning. Specifically, Rachel suggested including adding nurses and social workers to traditional law firm staff to address the changing needs of the population of clients we serve and assist us in creating a bridge in our clients'

legal and care needs proactively as opposed to managing the health care crises our clients and their families often face. Rachel was followed by program co-chair, Felicia Pasculli, Esq. who covered the use of Trusts in the realm of Veterans' Benefits. Felicia addressed the use of Trusts for obtaining VA benefits eligibility as well as Medicaid eligibility and whether one trust or two makes sense in the context of spousal VA benefits.

The program closed with a panel of program Co-chair William D. Pfeiffer of the The Pfeiffer Law Firm, PLLC, Richard Marchese, Jr. of Woods Oviatt Gilman LLP, and Robert Swidler, V.P. for Legal Services at St. Peter's Health Partners and Member of the New York State Task Force on Life and the Law. The panel discussed the limitations of Advance Directives in situations where patients have diminished capacity. Topics covered ranged from the capacity to execute advance directives, to visitation rights, to ethics committee disputes. The ethics segment was highlighted by real life stories from both the panelists and the audience and their personal and legal experiences. It was truly a wonderful way to close out a very informative and diverse Section meeting.

The Fall Meeting was extremely well attended and exceeded expectations in every facet. The location was beautiful, historic and comfortable. The program was diverse and insightful. The opportunities to connect with existing colleagues and make new ones were plentiful. We are looking forward to the Annual Meeting in January where we will once again come together to learn from and connect with our colleagues and friends. Accolades again to our Section leader, JulieAnn Calareso, and our program Co-chairs Bill and Felicia for a successful, informative and fun Fall Meeting.

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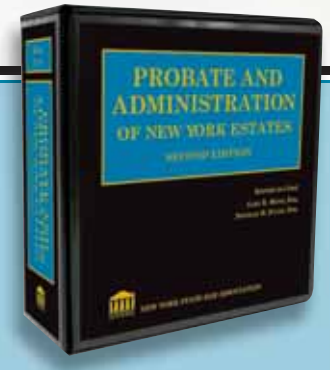

Probate and Administration of New York Estates,
Second Edition

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