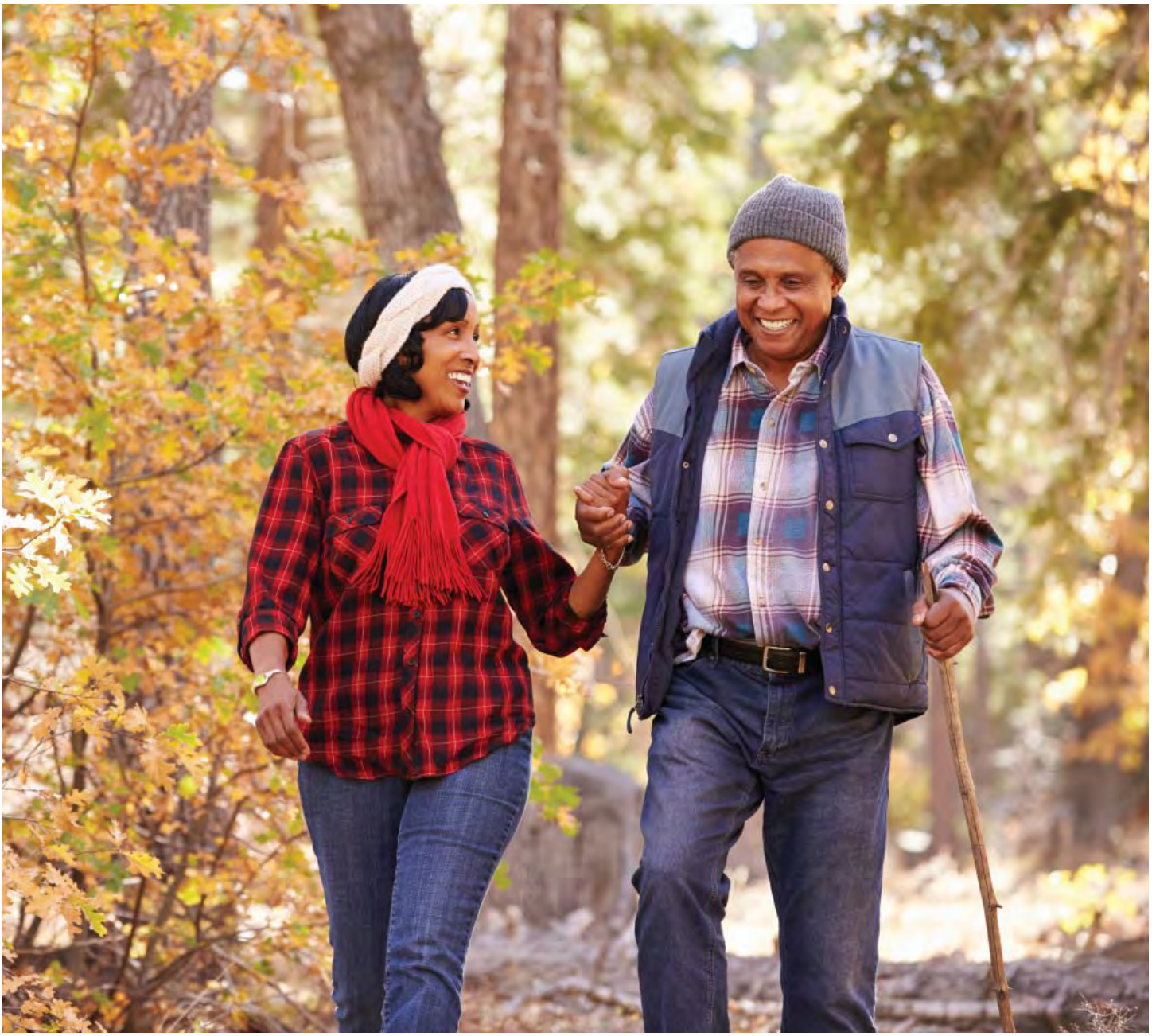
NYSBA FALL 2016 | VOL. 26 | NO. 4

Elder and Special Needs Law Journal

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



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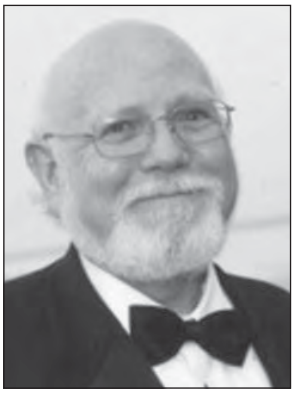
Message from the Chair



Our Summer Meeting in Philadelphia was a great success thanks to the efforts of our co-chairs **Britt Burner** and **David Kronenberg** and all of our speakers. I hope all of you that were able to attend found it as rewarding as I did. I was especially impressed that many of our Section Members stepped up to the plate as speakers: **Patricia Shevy** did the Elder Law update; **Ira Salzman** presented the Guardianship update; **Richard Haley** spoke on Advance Health Care Directives; **Kerry McGrath** gave a unique perspective on Using SNT's in Special Education Hearings; **Neil Rimsky** moderated a panel on Title Issues; **Valerie Bogart** presented an update on Community Medicaid; and **Matthew Nolfo** tackled the issue of the Return of Gifts. It is rewarding to know the breadth of knowledge and talent we have in the Section. Our "outside" speakers included **Even Gilder** and **Stephen Zweig** presenting on Employing a Home Care Worker; **Amelia Kelly**, **Glen Keene** and **Nicolas Ihnatolya** on our Title panel; **Kenneth Gartner** and **Jennifer Bergenfeld** spoke at the two sessions dealing with ethics—one on the role of Counsel for an incapacitated person and one on the Ethics of Social Media. Thanks again to all who helped make the meeting a success.

Our Fall Meeting at the Grand Cascades in New Jersey was also a success thanks to the leadership of **Moira Laidlaw** and **Chris Bray**. Once again we had presentations on topics that were of interest to all practitioners whether you concentrate in health care coverage, guardianship or estate planning and administration. Topics included Surrogate's Court Discovery Proceedings, Medicaid Estate Recovery, Medicaid Asset Protection trusts, Home Care Authorizations, Estate Tax Issues, Closing a Guardianship, and Aid in Dying Legislation. This just illustrates the broad range of topics that impact the practice of Elder Law and Special Needs Planning. Co-chairs **Sal DiCostanzo** and **James Barnes** are working on the Section's program for the Annual meeting in January 2017.

The Section's conferences, our Continuing Legal Education Programs, and our Community Listserv are among the tools we offer that help you to practice in a growingly complex field of law. There is always breaking news. At our Summer Meeting we announced a number of laws that the Governor had just signed that week including amendments to the New York ABLE Act. Our Executive Committee handled a number of recommendations including support for the SNT Fairness Act before Congress and the changes to Power of Attorney law being proposed by the New York State Bar Association. We are looking forward to continued advocacy from our Legislation Committee led by **Deepankar Mukerji** and **Jeffrey Asher**. On the regulation and administrative side there are recent final regulations dealing with Personal Care Services, the Consumer Directed Personal Assistance Program, and Immediate Need for Home Care Services. Our Medicaid Committee under **Valerie Bogart** and **Rene Reixach** have been advocating with the State Department of Health on these issues and a list of other issues that the Section has raised regarding the administration of the Medicaid Program in New York State.

The field of Elder Law and Special Needs Planning is rapidly changing. Managed Long Term Care is finally being implemented throughout the state; The Affordable Care Act's Expande Medicaid is presenting a number of opportunities and issues throughout the State; the New York Health Exchanged has also added in 2016 new health insurance plans for persons and families with low incomes. The alternatives presented to our clients by these myriad alternatives present a challenge for us a planners and advocates. It is essential when dealing with clients that we know the nuances of the various programs that are available. It is only through participating in the programs presented by our Section that you as a practitioner can stay on top of this rapidly changing field. **Sal DiCostanzo** and **Pauline Yeung-Ha** as co-chairs of our Membership Services Committee, along with vice-chairs **Amy Earing** and **James Barnes**, are working on ideas to better serve our members. We welcome your thoughts.

David Goldfarb

Save the Dates!

Elder and Special Needs Section Meets During NYSBA Annual Meeting
Tuesday, January 24, 2017 | 1:30 p.m. – 5:45 p.m.

Elder and Special Needs Section Summer Meeting
July 13 – 15, 2017 | High Peaks Resort in Lake Placid

For registration and more information on the above events, please visit www.nysba.org/ElderLaw

Message from the Co-Editors in Chief

Judith Nolfo McKenna

Welcome to the 2016 Fall Edition of the *Elder and Special Needs Law Journal*. Tara and I are now into our second year as Co-Editors in Chief. We are grateful for the invaluable leadership of David Goldfarb as our Chair. The summer meeting in Philadelphia was a smashing success, confirmed by the many compliments and the lively photo gallery and summary in this edition. Our fall meeting, scheduled for Crystal Springs, New Jersey, promises to be both enjoyable and educational.

In this issue, we are introduced to our brand new officer, Matthew Nolfo. As many of you know, Matt is my dearest brother. We are all so fortunate for the dedication and skill he will contribute as an officer of the Section. I hope you will join us in welcoming Matt to his new position.

Our new member spotlight is on another very special person, Antony Eminowicz. Antony has a thriving solo practice in Kingston, New York. Antony recently served as a Co-Chair of the 2016 UnProgram, and serves as a District Delegate. He is a shining example of a Section member who has demonstrated amazing dedication to any task at hand.

In this edition, our Legislative Committee has contributed a wonderful and timely update. The Committee is expertly chaired by Jeff Asher and Deep Mukerji, and has served as a beacon of information regarding upcoming changes to laws related to all of our practices. The members of this committee are in frequent contact with our state legislature and the Governor's office in order to make our voices heard. We are most grateful for their tireless efforts.

This is the third year our Section has sponsored a writing competition for law school students. This past academic year we had several excellent entries, and the winner of the competition, Irene Byhovsky, is a 2016 law graduate and is eager to begin her new clerkship at the Superior Court of New Jersey. Her entry, *Financial Crimes against the Elderly as a Hate Crime*, skillfully explored these deplorable crimes and we commend her for an excellent article. A very honorable mention to Katherine Carpenter for her entry, *Digital Assets, the new Reality*, as a timely and well-written piece on a topic of interest to all. We are so pleased to welcome Katy as our *Journal's* production editor. This academic year, we are increasing the award to $1,000, in the hopes of enticing even more applicants. If any of our Section members teach or participate in other ways at a local law school, please let us know, as it would assist our efforts to have contacts at each law school to assist with the competition publicity.

Tara Anne Pleat

Our feature articles in this edition include Mary Helen McNeal's original and excellent article, *Affordable and Accessible Hearing Health Care: Responding to a Public Health Concern*. This article discusses the aging public's dilemma with insurance coverage for hearing assistance devices.

Another article of interest is Anthony Enea's, *The Treatment and Marshalling of Joint Accounts in an Article 81 Guardianship Proceeding*. We are very grateful to Anthony for his consistent contributions to our journal.

The Elder Abuse Committee has again supplied the *Journal* with *Powers of Attorney; Ascertaining Capacity*. This issue is frequently discussed at meetings within our Section, and we are all so fortunate that the Elder Abuse Committee has consistently submitted excellent, relevant articles. We encourage every committee to contribute an article of interest, and of course, welcome all your ideas and entries.

Judy and Tara

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Financial Crimes Against the Elderly as a Hate Crime in New York State

By Irene Byhovsky

Introduction

In the last few decades, legislators have raised concerns regarding the increase of hate crimes within the nation. As a result, federal and state governments enacted a variety of statutes addressing this issue. Such legislation often creates new types of crime, enhances criminal penalties for crimes associated with hate, or mandates reporting hate crimes to the appropriate authority. Hate crimes are defined as crimes against a protected class, along the lines of race, ethnicity, religion, gender, sexual orientation, or age.[1]

This article addresses issues of financial crimes against the elderly on both federal and state levels, with a particular focus on New York State; describes types of hate crime statutes, and their application to financial crimes against the elderly; discusses the social impact of such crimes; and proposes prevention measures for this problem.

I. Federal Hate Crime Statutes

Over the last 40 years, the federal government enacted a number of statutes focusing on hate crimes. One of the first statutes addressing hate crimes is 18 U.S.C. § 245, which Congress incorporated in the Civil Rights Act of 1968. The statute prevents and punishes violent interference with an individual's exercise of specified civil rights[2] when the interference is motivated by the person's "race, color, religion, or national origin."[3] Further, in 1990, Congress passed the Hate Crime Statistic Act, which requires the "U.S. Attorney General to acquire and publish annual data about crimes that 'manifest evidence of prejudice based on race, gender and gender identity, religion, disability, sexual orientation, or ethnicity.'"[4] In 1994, Congress passed the Hate Crimes Sentencing Enhancement Act ("HCSEA").[5] The HCSEA increased the penalties for defendants who targeted their victims because of an identifiable characteristic, such as race, ethnicity, religion, gender, or sexual orientation.[6] Before 2009, critics argued that federal law is outdated because some statutes fail to incorporate crimes motivated by the victim's gender, sexual orientation, or disability.[7]

Numerous attempts "to expand the scope of federal hate crime legislation, including the Hate Crimes Prevention Act of 1997, the Hate Crimes Prevention Act of 1999, and the Local Law Enforcement Hate Crimes Prevention Act of 2007, were unsuccessful."[8] "Each of these federal hate crime bills died in committee."[9] In 2009, however, President Barack Obama signed into law the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act,[10] which expanded the categories of protected victims to include those targeted because of actual or perceived gender, sexual orientation, gender identity, and disability.[11] However, federal policymakers still fail to recognize that the rapidly expanding elderly population also deserves similar protections from hate crimes.[12] To date, none of the federal statutes include age.

II. State Hate Crime Statutes

At the present time, most of the states have enacted hate crime statutes.[13] Only Arizona, Georgia, Indiana, South Carolina, and Wyoming lack hate crime statutes.[14] All states that have enacted hate crime legislation address crimes motivated by the victim's race, religion, or ethnicity.[15] Thirty-one states have statutes that address sexual orientation; 31 states address disability; 27 address gender.[16] Only a few states include "age" as a protected category.[17] Among them are the District of Columbia, Florida, Iowa, Louisiana, Minnesota, Nebraska, Texas, Oregon, Vermont and New York.[18]

New York State Hate Crimes Act of 2000

In 2000, the New York Senate enacted the Hate Crimes Act that protects certain New Yorkers from crimes committed out of bias and hate. The Hate Crimes Act specifies that a hate crime is committed when the defendant commits an enumerated substantive offense and selects the victim based upon a belief or perception regarding such characteristics as race, color, national origin, ancestry, gender, religion, religious practice, **age**, disability or sexual orientation, regardless of whether the belief or perception is correct.[19]

Even after the passage of the Hate Crimes Act, hate crimes pose a serious threat to people. According to the FBI's recently released *2014 Hate Crime Statistics*, a report detailing bias-motivated incidents throughout the nation, 5,479 criminal incidents and 6,418 offenses motivated by bias toward race, gender, gender identity, religion, disability, sexual orientation, and ethnicity

were reported in 2014.[20] Although, hate crimes have declined nationally from 2010 when 6,628 criminal incidents were reported involving 7,699 offenses,[21] in New York State, the hate crimes rate has sporadically increased throughout the years. For example, in 2011, there were 556 hate crimes reported; this number increased by 31% in 2012.[22]

III. Types of Hate Crimes Statutes

In theory, hate crime laws protect against crimes motivated by enmity or animus against a protected class.[23] In reality, not every hate crime statute requires animus.[24] Both state hate crime laws and federal laws differ from statute to statute, "but they can be divided into two main categories"[25]: (1) animus-based, and (2) discriminatory-selection statutes. The animus-based statutes are those that define hate crimes as motivated substantially or in part by "animus" or "prejudice" against the victim because of the victim's group membership. A typical animus-based hate crime statute requires proof of "prejudice," "bigotry and bias," or "hostility" based on the victim's group identity. These statutes insist that the prosecutors prove that the defendant targeted the victim based on the victim's identity and that hatred or prejudice was a central motivating factor in the crime.[26] By contrast, discriminatory-selection statutes do not require proof of animus, only that the "defendant intentionally selected the victim because of the victim's [protected identity class]." [27] Under this type of statute, a crime may appear less like a hate crime and more like a "crime of opportunity."

Most statutes, including federal statutes, are non-animus based, and do not require that a defendant act with prejudice or bias toward the victim.[28] This type of statute requires only that the defendant deliberately select the victim based on the victim's identity class. Because the reasons behind the defendant's selection do not matter, this type of statute does not require prosecutors to prove that hatred or animus motivated the defendant's actions.[29] One of the states that does not require animus is New York.

IV. Financial Crimes as Hate Crimes

Discriminatory-selection type statutes may apply to financial crimes, such as larceny, theft, security fraud, mortgage or investment fraud and others. Defendants who have committed one of those crimes can additionally be charged with such crimes as a hate crime when they intentionally selected a victim "based on the perception that it was easier or more profitable to commit a crime against a member of a given group."[30] Even when they "did not manifest feelings of hostility or prejudice towards the victim or his group."[31] In such a case, the perpetrator is motivated by a desire to maximize his or her potential for success and the defendant using a person's group membership as a proxy for the relative likelihood of success.[32] Such defendants appear to select a victim "not because of any prejudice or animus toward them, but because of a "rational" assessment of the relative ease of defrauding victims of a particular group."[33]

For example, in New York, Queens District Attorney Richard A. Brown charged the members of an auto insurance fraud scheme under the hate statute, arguing that the defendants targeted Asian-Americans. "The district attorney's theory was that the defendants 'created' phony accidents by deliberately colliding with Asian drivers, selecting them based on the belief that the language barrier made them easy targets and that they were bad drivers and that they would be blamed by police and insurers for the accidents, instead of the culprits."[34] In New York State, the Hate Crimes Act of 2000 is a non-animus-based statute and is applicable to larceny committed against the protected class.

Generally, non-animus-based statutes support the extension of hate crime legislation to opportunistic crimes. However, it is sometimes difficult to charge a defendant who has been accused of a financial crime with hate crime under an animus-based statute, or to enhance sentencing under 18 U.S.C.S. Appx. § 3A1.1 Hate Crime Motivation or Vulnerable Victim for targeting certain groups.[35] Nevertheless, in *United States v. Medrano*, the United States Court of Appeals for the Ninth Circuit affirmed the lower court's decision enhancing sentencing pursuant to 18 U.S.C.S. Appx § 3A1.1 Hate Crime Motivation or Vulnerable Victim.[36] Ms. Medrano, a bank employee, pled guilty to 15 counts of embezzlement under 18 U.S.C. § 656 for stealing $219,615.78 from customers' accounts. "Medrano had targeted…Spanish-speaking migrant farm workers who had come to the United States from one of the poorest areas in Mexico, who were unsophisticated in American banking practices and many of whom were illiterate."[37] Ms. Medrano was not charged with a hate crime, but her sentencing was enhanced on the theory that her victims were vulnerable. The crime did not involve animus; however, the defendant's purposeful selection of her victims qualified for penalty enhancement.

Many states have enacted legislation allowing judges to impose sentencing enhancements for crimes that involve such targeting.[38] However, not every state has discriminatory-selection statutes. Moreover, not every jurisdiction applies the law in the same way. For example, in *United States v. Boylan*, the defendant, a municipal judge for Jersey City, pled guilty to wire fraud in connection with a scheme in which he propositioned dozens of women to have sex with him in exchange for taking care of their traffic tickets.[39] The

court held that "while Boylan may have generally chosen 'single, poor, Hispanic or light-skinned black females;' it does not appear beyond a reasonable doubt that the primary motivation for the offense was hatred of the [victims]."[40] Thus, because the former municipal judge was not convicted of a hate crime, "the sentencing adjustment under 18 U.S.C.S. Appx. § 3A1.1(a) for targeting a protected class did not apply."[41] But, the court applied a sentencing increase based on the victims' vulnerability under 18 U.S.C.S. Appx. § 3A1.1(b), alleging that victims were vulnerable.[42]

The Securities and Exchange Commission ("SEC"), though it does not charge hate crimes, investigates similar crimes when its examiners suspect financial abuse of a vulnerable client.[43] The SEC characterizes such fraud as affinity fraud. "Affinity fraud refers to investment scams that prey upon members of identifiable groups, such as religious or ethnic communities, the elderly, or professional groups."[44] The SEC has "investigated and taken quick action against affinity frauds targeting a wide spectrum of groups."[45]

For example, in 2012, in the Northern District of Georgia, the SEC indicted a ponzi scheme promoter who targeted African-American churchgoers and swindled over $11 million from them.[46] In 2013, "[t]he SEC obtained an emergency court order to halt a hedge fund investment scheme by a former Marine… who has been masquerading as a successful trader to defraud fellow veterans, current military, and other investors."[47] "Senior citizens also are not immune from such schemes."[48]

Hate crimes taking the form of financial crimes or crimes of opportunity deserve more systematic attention. "Studies indicate that such fraud is growing rapidly and has a significant impact on its immediate victims and society in general."[49] Perpetrators of such crimes are more blameworthy because they understand the harmful impact of bias-inspired crimes, and nevertheless commit the act.[50] "This kind of reckless disregard for the consequences of their actions" [51] provides additional support for increasing the punishment for such opportunistic actions under hate crime laws. Elderly people are specifically vulnerable to such crimes.

V. Age as a Characteristic Covered by the Hate Crime Act

Many elders are susceptible to exploitation for reasons associated with aging; however, not enough has been done to address the problem.[52] While states and the federal government have passed hundreds of laws protecting children, based on the assumption that they are vulnerable and unable to protect themselves, older at-risk adults have been comparatively ignored, even though they are vulnerable for some of the same reasons.[53] The Federal Elder Justice Act was enacted in 2010; however, it is not enough to fully protect elders. Given that at this time there are many baby boomers of or nearing retirement age, it is likely that courts will be seeing more cases concerning crimes against the elderly.

Elderly people are vulnerable to fraud and financial exploitation in large part because of the potential for mental and physical condition and memory loss. Elders are also often physically and socially isolated,[54] making them vulnerable to people who are otherwise untrustworthy. "Many live alone, having outlived their partners and friends."[55] Their isolation gives "perpetrators free rein to influence them and gain access to their private affairs without outside scrutiny."[56] Those same conditions contribute to under-reporting crimes against the elderly. For those reasons, law must protect the elderly from criminals who specifically target elders due to their vulnerability.

Currently, only a few states have hate crime laws that include age as a protected category. These states include the District of Columbia, Florida, Iowa, Minnesota, Nebraska, New York, Texas, and Vermont.[57] In 2000, New York State enacted the Hate Crimes Act to protect the elderly from crimes committed out of bias and hate. The first provision of Section 485.05 specifies that a hate crime is committed when the defendant commits an enumerated substantive offense and selects the victim based upon a belief or perception regarding such characteristics as "race, color, religion…**age** and disability."[58] The second provision specifies that a hate crime is committed when the defendant commits the enumerated substantive offense because of such a **belief**.[59] Put more simply, to be a hate crime, discriminatory selection may be behind either the choice of victim[60] or the decision to commit the crime.[61] Larceny against elders falls into the first provision.

The statute also includes definitions. The statute specifically defines two terms used in the list of characteristics: **age** ("sixty years old or more") and **disability** ("a physical or mental impairment that substantially limits a major life activity").[62] Clearly, based on the text of the statute, law drafters intended to give more protection to senior citizens[63] from crimes listed in the statute,[64] including **larceny** and **grand larceny**.

Hate crimes law intends to protect vulnerable individuals; as professor Hill argues, "it makes no sense to protect a frail individual from physical and psychological harm because the individual is a woman or African-American, or Jewish, but not to protect the frail individual who is uniquely vulnerable due to age."[65] In many cases, elderly people actually suffer greater injury[66] than younger victims of financial crimes;

therefore, the Hate Crimes Act includes protection for individuals based on age.

VI. Financial Crimes Against the Elderly Under the New York Hate Crimes Act

The New York Hate Crimes Act: (1) does not require a showing of animus for conviction on a hate crime charge; (2) includes age (defined as 60 years or older) as a protected category and (3) lists larceny as a crime that can be charged in conjunction with a hate crime.[67] The Hate Crimes Act contains both traditional hate crimes and crimes of opportunity. The application of the hate crime statute is clear as to offenses such as assault, manslaughter, harassment, and rape, but less clear as to larceny offenses. The text of New York Penal Law § 485.05 makes "no distinction between crimes of pure hate and crimes of opportunity."[68] In requiring simply that the victim be selected, or the crime be committed, because of a belief or perception regarding a person's race, age, or other characteristics, it embraces both traditional hate crimes and opportunistic bias crimes.

In order to understand the legislative intent and applicability of the law we need to examine the legislative history and applicable common law explaining the statute. The legislative materials relevant to the Hate Crimes Act of 2000[69] offer almost no indication that the bill's drafters or supporters envisioned the application of the law to extend to opportunistic hate crimes. A review of the legislative history suggests that crimes of pure hate "were the primary type of offense the legislature sought to punish."[70] Letters included in the Governor's bill jacket can provide additional insights into the law's purpose. Only one letter raised a concern related to crimes of opportunity. The letter from the Roman Catholic Bishops of New York State noted that the bill does "distinguish between an isolated offense and deep-seated bias."[71] This letter shows a weak support that the law drafter may have intended to include crimes of opportunity. But, it is not entirely clear whether or not the bill drafters had in mind to include crimes of opportunity.

The legislative history tells us that the crimes of hate/crimes of opportunity distinction was a nuance that almost escaped the bill's public debate and discussion.[72] In order to interpret the law we need to look at applicable case law. In such a situation, the appellate courts' interpretations can provide some of the best explanations as to the legislative intent of a statute and resolve doubts as to a statute's meaning. Unfortunately, the "New York appellate courts have had very little opportunity to consider the Hate Crimes Act."[73] The most relevant case is *People v. Fox*.[74]

In *Fox*, the defendants claimed that that their selection of the victim of their criminal scheme was "motivated by opportunistic calculation, not hatred of gays, and thus fell outside the statute."[75] The trial judge, Hon. Jill Konviser, rejected the claim. Judge Konviser noted that "[n]either the Legislative findings nor any other portion of the Legislative history alter the definition of a hate crime as set forth in Penal Law § 485.05(1)(a)."[76] "The Legislature…made an assessment that the intentional selection of a victim based on a protected characteristic is tantamount to a crime motivated by bias, prejudice or hatred, thereby justifying enhanced punishment."[77] Judge Konviser's opinion is especially important because she served as former Governor Pataki's Senior Assistant Counsel from 1997 to 2002, during the time when the Hate Crimes Act was enacted.[78] Unfortunately, Judge Konviser did not explain her ruling, but suggested that opportunistic bias crimes were of equivalent odiousness to crimes of pure hate and thus could be subsumed under a statute that mainly criminalized the latter.[79]

While an analysis of cases and legislative history demonstrates the difficulty of applying the statute to opportunistic crimes, the Queens District Attorney's office pursues hate crime charges that "show just how far the envelope might be pushed in construing hate."[80] In a 2006 press release, District Attorney Brown stated, "[u]nder New York state's Hate Crimes Act of 2000, enhanced charges can be filed when a defendant commits larceny and selects his or her victims because of their age which is defined as being 60 years of age or older."[81]

For example, Shirley Miller was an alleged scam artist accused of fleecing four older, lonely men out of hundreds of thousands of dollars by pretending to be their sweetheart. She was charged not only with grand larceny, but also grand larceny as a hate crime pursuant to New York Penal Law § 485.[82] While grand larceny is a C felony, hate crime charges elevate the charge to a B felony, the next higher level. [83] Therefore, she could have faced a maximum "sentence of up to 25 years in prison, but pled guilty in exchange for a short four-month sentence."[84] Other recent cases follow the similar pattern of choosing the elderly as victims of financial exploitation.[85]

The practice of charging larceny as a hate crime is not limited to the Queens District Attorney's Office. This practice "shows signs of becoming more widespread in the near future"[86] in New York. In Brooklyn, for example, "Sal Lauria and an accomplice were charged with grand larceny in the second degree as a hate crime for allegedly obtaining a reverse mortgage in the victim's name and then stealing $350,000 in

proceeds from a joint account they established."[87] The victim of the reverse mortgage[88] fraud scheme was an 81-year-old man.

Similarly, in September of 2015, Brooklyn District Attorney Ken Thompson charged a licensed insurance agent and financial planner, who "held himself out as a savvy investor and trusted advisor,"[89] with a "64-count indictment in which he was charged with grand larceny as a hate crime and other charges for allegedly targeting vulnerable, elderly victims and scamming them out of more than $2.5 million in hard-earned savings."[90] Just like Sherry Kastov, who "admitted that she preyed upon elderly because their age made them 'susceptible' and an 'easy target for theft,'"[91] "[t]his defendant allegedly took advantage of some of society's most vulnerable victims, whom he targeted because of their age."[92]

These cases show that the elderly are particularly susceptible to being victims of opportunistic crimes, and how the "**age**" category applies in the prosecution of opportunistic hate crimes. All of the defendants took advantage of the vulnerability of the elderly. An explanation for targeting elders, and the consequent necessity of protecting them under the hate statute is that older people are defenseless and "hold most of the household wealth in this country."[93]

"While exact statistics on how often financial crimes against the elderly occur are not available, it is widely believed to be underreported by the victims"[94] due to their medical and mental conditions. For all these reasons, it is essential that this growing class of vulnerable citizens be protected.

VII. Legislative Proposal

"According to the 2011 MetLife Mature Market Institute study,[95] financial exploitation of older Americans is a growing epidemic that cost seniors an estimated $2.9 billion in 2010."[96] In Maine alone, there are 14,000 new reports each year of senior abuse, which includes financial abuse.[97] The scope of the problem is hard to estimate because of the limited data on that topic.[98] According to the New York State Elder Abuse Prevalence Study, "only 1 in 44 cases is reported."[99] Many of these cases are never reported because the victim is "too ashamed to report financial exploitation."[100] "Perpetrators are constantly developing new ways to gain access to our seniors' life savings and have focused upon a generation that typically has been more trusting and less able or willing to self-report."[101] These crimes are more difficult to report when the victim is a family member, because "often a family member is legally appointed as the guardian of assets."[102] "A victim or those around them may suspect what is happening, but feel even more powerless or ashamed to report. Often, a victim will struggle with filing criminal charges against a child or other family member."[103]

Andrew Jay McClurg, the Herbert Herff Chair of Excellence in Law at University of Memphis Cecil C. Humphreys School of Law, in his article *Preying on the Graying: A Statutory Presumption to Prosecute Elder Financial Exploitation*, proposed a number of solutions to prevent and/or eliminate financial exploitation of the elderly. I strongly support his idea of enacting a local law requiring financial institutions to report reasonable suspicion of elder fraud to law enforcement.[104] In many states, the law already requires mandatory reporting of financial exploitation cases, but only to Adult Protective Services ("APS"), not to law enforcement.[105] APS often lacks the resources to properly investigate these cases. As a result, financial exploitation is rarely investigated.[106]

According to Professor McClurg, financial institutions are often in the best, most efficient position to detect and disrupt elder financial abuse because of their existing duties and safeguards to protect customers' assets, sophisticated technology for identifying patterns of fraud, and ability to train employees to spot exploitation. "Ideally, all fifty states would require mandatory reporting by financial institutions and, importantly, back up the duty with meaningful sanctions for failure to comply."[107]

I believe that these preventative measures would significantly increase the investigation of financial crimes against the elderly, and consequently would protect the most precious and vulnerable citizens. Every such victim could be someone's parent or grandparent, who supported and raised them. It is our duty to protect the elderly. Enacting a law requiring financial institutions to report suspicious activity such as unusual transferring or wiring large amounts of money by the elderly, will not eliminate the problem, but it can be a significant step in preventing the financial crimes against the elderly.

Conclusion

Generally, a hate crime is defined as "a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, age, gender, disability, or sexual orientation of any person."[108] Age is a category that is covered by the New York Hate Crime Act, and therefore, the elderly are a protected class. Elders are more vulnerable to financial crimes, or in other words, crimes of opportunity. Although the statute does not expressly cover crimes of opportu-

nity, courts may consider such crimes as if they were expressly covered by the statute.

"Hate crimes do more than just inflict incalculable physical and emotional damage on victims. Hate crimes also threaten the safety and **welfare of all citizens**, tearing at the very fabric of our society. These despicable acts intimidate and disrupt **entire communities**, and do damage to the civility that is crucial in a democracy."[109] In this regard, protection of the elderly is essential. While "not everyone falls into the category of being female, African American, Jewish, gay, transgender or disabled, anyone who is fortunate to live long enough will eventually fall into the category"[110] of being elderly. To protect this growing class of vulnerable citizens, courts in New York should freely apply the Hate Crimes statute to financial crimes against the elderly, and the legislature should take a "concrete step toward both providing justice for individual victims and deterring exploitation before it happens."[111]

Endnotes

1. The scope of protected classes differs from statute to statute.
2. Such exercises include "enrollment in public education, participation in state programs, obtaining private or state employment, participation in jury service, interstate travel, and use or enjoyment of public accommodations."18 U.S.C. § 245(b)(2) (2006).
3. 18 U.S.C. § 245(b)(2) (2006).
4. Helia Garrido Hull, *The Not-So-Golden Years: Why Hate Crime Legislation Is Failing a Vulnerable Aging Population*, 2009 Mich. St. L. Rev. 387, 415 (2009) (citing 28 U.S.C. § 534 (b)(1) (2006)).
5. The act was inspired by the U.S. Supreme Court decision in Wisconsin v. Mitchell, where the Court unanimously upheld that a Wisconsin statute, which enabled judges to increase the sentence of defendants found guilty of any crime if the defendant intentionally selected his or her victim on account of race or some other prohibited characteristic, was constitutional. *See* Wisconsin v. Mitchell, 508 U.S. 476 (1993).
6. *See* Lisa M. Fairfax, *The Thin Line Between Love and Hate: Why Affinity-Based Securities and Investment Fraud Constitutes a Hate Crime*, 36 U.C. Davis L. Rev. 1073, 1076-1077 (2003).
7. *See* Hull, *supra* note 4.
8. Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. Rev. 858, 867 (2014).
9. *Id.* (citing Isabelle Cutting, Hate Crimes Legislation, Now Riding on the DoD Bill, Open Congress Blog (July 17, 2009), http://www.opencongress.org/articles/view/1106-Hate-Crimes-Legislation-Now-Riding-onthe-DoD-Bill (last visited Dec. 1, 2015).
10. 18 U.S.C. § 249 (2009).
11. *See* Eisenberg, *supra* note 8; *see also* 18 U.S.C. § 249 (2009).
12. *See* Hull, *supra* note 4, at 407.
13. *See* Ala. Code § 13A-5-13 (LexisNexis 2009); Alaska Stat. § 12.55.155(22) (2012); Ariz. Rev. Stat. Ann. § 41-1750; Ariz. Rev. Stat. Ann. § 13-702 (2010); Ark. Code Ann. § 16-123-106 (2006); Cal. Penal Code § 422.55 (West 2010); Colo. Rev. Stat. § 18-9-121 (2012); Conn. Gen. Stat. Ann. § 46a-58 (West 2009); Conn. Gen. Stat. Ann. § 53a-181j (West 2012); Del. Code Ann. tit. 11, § 1304 (2007); D.C. Code § 22-3701 (LexisNexis 2012); Fla. Stat. Ann. § 775.085 (West 2010); Haw. Rev. Stat. Ann. § 706-662(6)(b) (LexisNexis 2007); Idaho Code Ann. § 18-7902 (2004); 720 Ill. Comp. Stat Ann. 5/12-7.1 (West 2002); Ind. Code Ann. § 10-13-3-1 (LexisNexis 2003); Iowa Code Ann. § 729A.2 (West 2013); Iowa Code Ann. § 712.9 (West 2003); Kan. Stat. Ann. § 21-6815 (2007); Ky. Rev. Stat. Ann. § 532.031 (LexisNexis 2008); La. Rev. Stat. Ann. § 14:107.2 (2004); Me. Rev. Stat. tit. 17-A, § 1151 (2006); Me. Rev. Stat. tit. 25, § 1544 (2007); Md. Code Ann., Crim. Law § 10-304 (LexisNexis 2012); Mass. Gen. Laws ch. 265, § 39 (LexisNexis 2010); Mich. Comp. Laws Ann. § 750.147b (West 2004); Minn. Stat. § 626.5531 (2003); Minn. Stat. § 609.749 (2003); Minn. Stat. § 609.2231 (2003); Miss. Code. Ann. § 99-19-301 (2007); Mo. Ann. Stat. § 557.035 (West 2012); Mont. Code Ann. § 45-5-222 (2012); Neb. Rev. Stat. § 28-111 (2008); Nev. Rev. Stat. Ann. § 193.1675 (LexisNexis 2012); N.H. Rev. Stat. Ann. § 651:6 (2007); N.J. Stat. Ann. § 2C:16-1 (West 2006); N.M. Stat. Ann. § 31-18B-3 (2013); N.Y. Penal Law § 485.05 (McKinney 2008); N.C. Gen. Stat. § 14-3 (2011); N.C. Gen. Stat. § 14-401.14 (2011); N.C. Gen. Stat. § 99D-1 (2011); N.C. Gen. Stat. § 15A-1340.16(d)(17) (2011); N.D. Cent. Code § 12.1-14-04 (2012); Ohio Rev. Code Ann. § 2927.12 (West 2006); Okla. Stat. tit. 21, § 850 (2002); Or. Rev. Stat. § 166.155 (2011); 18 Pa. Cons. Stat. Ann. § 2710 (West 2000); R.I. Gen. Laws § 12-19-38 (2002); S.D. Codified Laws § 22-19B-1 (2006); Tenn. Code Ann. § 40-35-114 (2010); Tex. Code Crim. Proc. Ann. art. 42.014 (West 2006); Tex. Penal Code Ann. § 12.47 (West 2011); Utah Code Ann. § 76-3-203.3, 203.4 (LexisNexis 2012); Vt. Stat. Ann. tit. 13, § 1455 (2002); Va. Code Ann. § 18.2-57 (2009); Wash. Rev. Code Ann. § 9A.36.080 (West 2009); W. Va. Code Ann. § 61-6-21 (LexisNexis 2000); Wis. Stat. § 939.645 (2011-12); Wyo. Stat. Ann. § 6-9-102 (2003).
14. *See* Hull, *supra* note 4, at 409.
15. *See id.*
16. *See* Anti-Defamation League, Anti-Defamation League State Hate Crime Statutory Provisions (Sept. 2014).
17. *See* District of Columbia (D.C. Code Ann. § 22-4001 (LexisNexis 2009) and D.C. Code Ann. § 22-4003 (LexisNexis 2009)), Florida (Fla. Stat. Ann. § 775.085 (LexisNexis 2009) and Fla. Stat. Ann. § 877.19 (LexisNexis 2009)), Iowa (Iowa Code Ann. § 729A.2 (West 2009)), Louisiana (La. Rev. Stat. Ann. § 15:1204.2B(4) (2009)), Minnesota (Minn. Stat. Ann. § 609.749 (West 2009)), Nebraska (Neb. Rev. Stat. Ann. § 28-111 (LexisNexis 2009)), New York (N.Y. Penal Law § 485.05 (McKinneys Consol. 2009)), Oregon (Or. Rev. Stat. Ann. § 181.550 (West 2009)); Texas (Tex. Penal Code Ann. § 12.47 (Vernon 2009) and Tex. Code Crim. Proc. Ann. § 42.014 (Vernon 2009)); Vermont (Vt. Stat. Ann. tit. 13, § 1455 (2009)).
18. Hawaii enacted a separate statute that enhances imprisonment when crime is committed against the elderly. Haw. Rev. Stat. Ann. § 706-662 (Lexis 2012).
19. *See* N.Y. Penal Law § 485.05(1)(a).
20. *See* Press Release, FBI 2014 Hate Crime Statistics (Nov. 16, 2015), https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2014-hate-crime-statistics (last visited Nov. 29, 2015).
21. In 2011, 6,222 criminal incidents and 7,240 offenses were reported. In 2012, 5,796 criminal incidents and 6,718 offenses were reported. In 2013, 5,928 criminal incidents and 6,933 offenses were reported. *See* FBI Uniform Crime Report, About Hate Crime Statistics, 2011, https://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011 (last visited Nov. 29, 2015); Press Releases, FBI 2012 Hate Crime Statistics (Nov. 25, 2013), https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2012-hate-crime-statistics (last visited Nov. 29, 2015); Press Releases FBI 2013 Hate Crime Statistics (Dec. 8, 2014), https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2013-hate-crime-statistics (last visited Nov. 29, 2015).
22. *See* Division of Criminal Justice Services, Hate Crime Incidents in New York by Reporting Agency, DCJS, Uniform Crime Reporting System (May 20, 2014) available at http://www.

criminaljustice.ny.gov/crimnet/ojsa/hatecrimeincidents2013.pdf (last visited Nov. 29, 2015); *see also* Mary Schmitt, Hate Crime in New York State 2013 Annual Report, Division of Criminal Justice Services, Office of Justice Research & Performance, (Oct. 2014), http://www.criminaljustice.ny.gov/crimnet/ojsa/hate-crime-in-nys-2013-annual-report.pdf (last visited Nov. 29, 2015).

23. *See* Hull, *supra* note 4, at 397.

24. The Hate Crimes Statistics Act defines hate crimes as: "crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity." Hull, *supra* note 4, at 397 (citing Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified at 28 U.S.C. § 534 (2006). "Under 18 U.S.C. § 245, the primary law under which federal prosecution of hate crimes is carried out, a victim is not expressly required to present evidence of the defendant's bias or animus").

25. Eisenberg, *supra* note 8, at 870-872.

26. *See id.*

27. *Id.*

28. Thirty-three states do not require defendants to exhibit any discriminatory motive beyond the discrimination involved in selecting a victim. *See supra* note 6, at 1102 (*citing see* Ala. Code § 13A-5-13 (2001); Alaska Stat. § 12.55.155 (Michie 2001); Cal. Penal Code § 422.75 (West 2001); Colo. Rev. State. Ann. § 18-9-121 (West 2002); Del. Code Ann. tit. 11, 1304 (2001); Idaho Code § 18-7092 (Michie 2000); 720 Ill. Comp. State. Ann. 5/12-7.1 (West 2001); Ind. Code. Ann. § 5-2-5-1 (West 2002); Iowa Code Ann. 729A.2 (West 2001); Kan. Stat. Ann. § 21-4716 (2001); Ky. Rev. Stat. Ann. 532.031 (Michie 2001); La. Rev. Stat. Ann. §14:107.2 (West 2002); Me. Rev. Stat. Ann. § 17-A, 1151 (West 2001);Md. Code Ann. § 27, 470A (2001); Mich. Comp. Laws Ann. § 750.147b (West 2001); Minnesota Sentencing Guidelines II, subd. D, Minn. Stat. Ann. ch. 244 app. (West 2001); Mo. Ann. Stat. 557.035 (West 2001); Mont. Code Ann. 45-5-222 (2001); Neb. Rev. Stat. 28-111 (2001); Nev. Rev. Stat. Ann. § 193.1675 (Michie 2001); N.J. Stat. Ann. § 2C:16-1 (West 2001); N.Y. Penal Law § 485.05 (McKinneys 2001); N.C. Gen. Stat. § 15A-1340.16 (2001); N.D. Cent. Code § 12.1-14-04 (2001); Okla. Stat. Ann. § 21, 850 (West 2001); Or. Rev. Stat. § 166.155, 166.165 (2001); S.D. Codified Laws 22-19B-1 (Michie 2001); Tenn. Code Ann. § 40-35-114 (2001); Utah Code Ann. § 76-3-203.3 (2001); Va. Code Ann. § 18.2-57 (Michie 2001); Wash. Rev. Code Ann. § 9A.36.080 (West 2001); W. Va. Code § 61-6-21(d) (2001); Wis. Stat. Ann. § 939.645 (West 2001). Only the statutory language of the District of Columbia and 14 states specifically require that some bias or animus toward the victim motivate the defendant's conduct. *See* Ariz. Rev. Stat. Ann. § 13-702 (West 2001) (malice); Ark. Code Ann. § 16-123-106 (Michie 2001) (defendant must be motivated by animosity); Conn. Gen. Stat. Ann. § 53a-181j, 53a-181k, 53a-181l (West 2001) (conduct based on bigotry or bias); D.C. Code Ann. § 22-3701 (2001) (defendant must demonstrate prejudice); Fla. Stat. Ann. § 775.085 (West 2001) (evidence of prejudice); Ga. Code Ann. 17-10-17 (2001) (bias or prejudice); Haw. Rev. Stat. Ann. § 706-662; 846-51 (Michie 2001) (hostility); Mass. Gen. Laws Ann. § 265 39 (West 2001) (conduct motivated by bigotry or bias); Miss. Code Ann. § 99-19-307 (2001) (malicious); N.H. Rev. Stat. Ann. § 651:6(I)(g) (2001) (hostility); Ohio Rev. Code Ann. § 2927.12 (West 2001) (prejudice); 18 Pa. Cons. Stat. Ann. § 2710 (West 2001) (malicious intent); R.I. Gen. Laws § 12-19-38 (2001) (hatred or animus); Tex. Penal Code Ann. § 12.47; Tex. Crim. Proc. Code Ann. § 42.014 (Vernon 2001) (bias or prejudice); Vt. Stat. Ann. § 13, 1455 (2001) (malicious motivation)).

29. *See* Fairfax, *supra* note 6, at 1105 (*citing* United States v. Woodlee, 136 F.3d 1399, 1413 (10th Cir. 1998) (finding that defendant's actions were "racially motivated" when he selected victim because of race); People v. McCall, No. D035520, 2001 Cal. App. Unpub. LEXIS 2639, at 11 (Oct. 16, 2001) (stating that hate or animus may or may not be component of defendant's actions); State v. Choppy, 539 S.E.2d 44, 51 (N.C. Ct. App. 2000) (noting that defendant must target victim because of race, animus not required); State v. Hatcher, 524 S.E.2d 815, 817 (N.C. Ct. App. 2000) (finding no need to prove that defendant harbors animosity toward race or ethnic group); In re Joshua H., 17 Cal. Rptr. 2d 291, 302 (Cal. Ct. App. 1993) (stating that selection of victim, not reason for selection, triggers additional punishment under hate crime statute); Oregon v. Plowman, 838 P.2d 558, 563 (Or. 1992) (noting that defendant "need not hate at all" to commit hate crime; defendant must hold no opinion other than his perception of victim's characteristic)).

30. Fairfax, *supra* note 6, at 1106-1107.

31. *Id.*

32. *See id.*

33. *Id.*

34. Alex Ginsberg, *Hate Is Enough: How New York's Bias Crimes Statute Has Exceeded Its Intended Scope*, 76 Brook. L. Rev. 1599, 1626-1627 (2011) (citing Maria Alvarez, *DA: Scammers Targeted Asians*, N.Y. Newsday (Oct. 31, 2008)).

35. In October 2004, 18 U.S.C.S. Appx. § 3A1.1 Hate Crime Motivation or Vulnerable Victim was held unconstitutional, leaving less protection for hate crime and vulnerable victims; *see* United States v. Detwiler, 338 F. Supp. 2d 1166 (D. Or. 2004).

36. *See* United States v. Medrano, 241 F.3d 740 (9th Cir. 2001). The case was overturned by United States v. Contreras, 593 F.3d 1135, 1136 (9th Cir. 2010) to the extent it conflicts with the court's interpretation of U.S.S.G. § 3B1.3 Abuse of Position of Trust or Use of Special Skill.

37. *Id*.

38. *See* Fairfax, *supra* note 6, at 1076-1077.

39. *See* United States v. Boylan, 5 F. Supp. 2d 274 (D. N.J. 1998); *see also* Metro News Briefs: *A Former Judge Admits Propositioning Women*, N.Y. Times, Jan 24, 1998.

40. *Id.* at 39.

41. *Id.*

42. *See id*.

43. *See* Richard Eisenberg, *Why Elder Financial Abuse Is Such A Slippery Crime*, Forbes, Feb. 13, 2015, http://www.forbes.com/sites/nextavenue/2015/02/13/why-elder-financial-abuse-is-such-a-slippery-crime/ (last visited Nov. 29, 2015).

44. *Affinity Fraud: How To Avoid Investment Scams That Target Groups,* SEC Investor Publications, Oct. 9, 2013, http://www.sec.gov/investor/pubs/affinity.htm (last visited Dec. 1, 2015).

45. *Id.*

46. The SEC's complaint alleges that defendants violated Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933, and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder. The complaint also alleges that defendants violated Section 15(a)(1) of the Exchange Act, and aided and abetted violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The complaint seeks disgorgement, financial penalties and permanent injunctive relief against all defendants, as well as officer and director bars against defendants. *See* Complaint SEC v. City Capital Corp, No. 1:12-cv-01249-WSD (Georgia filed Apr. 12, 2012).

47. Press Release, SEC Halts Ex-Marine's Hedge Fund Fraud Targeting Fellow Military (Aug. 6, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539753649 (last visited Dec. 1, 2015).

48. SEC, *supra* note 44.

49. Fairfax, *supra* note 4, at 1141-42.

50. *See id.*

51. *Id.* at 1107.

52. *See* Andrew Jay McClurg, *Preying on the Graying: A Statutory Presumption to Prosecute Elder Financial Exploitation*, 65 Hastings L.J. 1099, 1103-1104 (2014).

53. *See id.*

54. *See id.*

55. *Id. at* 1108.

56. *Id.* at 1108-1109.

57. Hull, *supra* note 4, at 415.

58. N.Y. Penal Law § 485.05(1)(a) (McKinney) (emphasis added).

59. *See id.* at (b) (emphasis added).

60. "A person is guilty of a hate crime when he or she commits a specified offense and intentionally selects the person against whom the offense is committed or intended to be committed in whole or in substantial part because of a belief or perception regarding specified attributes (race, color, national origin, ancestry, gender, religion, age, disability or sexual orientation) of a person, regardless of whether the belief or perception is correct." Memorandum, Governor's Program Bill No. 1RR, at 2 (2000); *see* Ginsberg, *supra* note 34, at 1609-10.

61. Legislative materials explain that the second subsection was included to cover crimes where the perpetrator clearly exhibits group animus, but where no particular victim is intentionally selected—such as firebombing a predominantly African-American church without knowing who, in particular, is inside. Memorandum, Governor's Program Bill No. 1RR, at 2 (2000); *see* Ginsberg, *supra* note 34, at 1609-10.

62. N.Y. Penal Law 485.05(4)(d) (McKinney).

63. Looking at the bill drafting process from a purely political perspective, "hate crime legislation offers many advantages to elected officials. In backing such legislation, it is easy to satisfy a given constituency by including it in the protected class. Making a crime against a member of that class—which is purely motivated by the victim's membership in that particular group—a more severely punished act suggests that the group as a whole is deserving of special protections. This, in turn, might make it easier for the group to gain special accommodations in other areas of the law." Brian S. MacNamara, *New York's Hate Crimes Act of 2000: Problematic and Redundant Legislation Aimed at Subjective motivation (Commentary)*, 66 Alb. L. Rev. 519, 529 (Winter 2002).

64. Nothing in legislative history relates to older people, except for the text of the statute.

65. Hull, *supra* note 4, at 416.

66. *See id*.

67. According to New York's hate crime statute, "A person commits a hate crime when he or she…intentionally selects the person against whom the offense is committed…because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person." N.Y. Penal Law § 485.05 (McKinney). For a critical discussion of New York's hate crime statute; *see* Brian S. MacNamara, *New York's Hate Crimes Act of 2000: Problematic and Redundant Legislation Aimed at Subjective Motivation*, 66 Alb. L. Rev. 519 (2003); Eisenberg, *supra* note 4, at 896.

68. *See* McClurg, *supra* note 52, at 1108-1109 (2014).

69. N.Y. Penal Law § 485.05 (McKinney).

70. The Governor's Memorandum in Support, in deconstructing section 485.05(2), states that this section, which establishes the evidentiary burden to be met, "is designed to ensure that only those who are truly motivated by invidious hatred are prosecuted for committing hate crimes." Memorandum, Governor's Program Bill No. 1RR, at 2 (2000); *see* Ginsberg, *supra* note 34.

71. Letter from the N.Y. State Catholic Conference to Members of the N.Y. Senate (Apr. 3, 2000), (part of legislative packet; attaching a 1999 statement of the Roman Catholic Bishops of N.Y. State).

72. *See* Ginsberg, *supra* note 34, at 1610-11 (2011).

73. Ginsberg *Supra*, note 34, at 1621.

74. People v. Fox, 844 N.Y.S.2d 627, 631 (N.Y. Sup. Ct. 2007).

75. *Id*.

76. *Id.* at 633.

77. *Id*.

78. *See* Jill Konviser, Ballotpedia. Encyclopedia of American Politics, http://ballotpedia.org/Jill_Konviser (last visited Oct. 26, 2015).

79. *See* Ginsberg, *supra* note 34, at 1621 (citing People v. Fox, 844 N.Y.S.2d 627, 633 (N.Y. Sup. Ct. 2007)).

80. *Id.* at 1626-27.

81. Press Release 60-2006, District Attorney Queens County, *Florida Woman Pleads Guilty to Hate Crime in Predatory Scheme to Defraud Elderly Men. Will be Ordered to Pay $100,000 Restitution and Serve Six Months in Jail* (Mar. 1, 2006).

82. *See* Scott Shifrel, *Call Elderly Scam a Qns. Hate Crime*, N.Y. Daily News (Oct. 9, 2004) (calling the tactic "a novel strategy" and quoting Queens District Attorney Richard Brown as saying, "[s]uch crimes of financial exploitation are commonly known as 'sweetheart scams' and are among the most devastating forms of elder abuse").

83. Eisenberg, *supra* note 8, at 896.

84. *See* Gersh Kuntzman, *Golden Oldie Bilk Gal: I Did It*, N.Y. Post (Oct. 15, 2005).

85. In Queens, the District Attorney prosecuted several more criminals like Miller, each time charging larceny as a hate crime. For example, two women, Gina L. Miller, 39, and Sylvia Johns, 23, of Flushing, were charged with grand larceny as a hate crime for stealing more than $31,000 from three elderly men they had befriended separately. Nancy Jace, 37, bilked five elderly men out of $250,000, pretending to romance them and persuading them to pay for fictitious family emergencies. Ms. Jace pleaded guilty and served just six months in jail. Sherry Kaslov, 30, pleaded guilty to similar charges; she served four months and was hit with 10 years of probation. Natasha Marks, 20, was convicted of swindling more than $1 million from an 86-year-old man as a hate crime, including taking out a $550,000 mortgage on his house; a fugitive, she faces two to six years. Wand Delmaro was sentenced to 10 years after pleading guilty to a hate crime: posing as a water-company employee and distracting elderly people while accomplices burglarized them. *See* Anne Barnard, *Queens Prosecutors Make Use of Broader Vision on Hate Crimes*, N.Y. Times (June 22, 2010).

86. King's County has charged grand larceny as a hate crime, and other jurisdictions in New York State have considered bringing similar charges. *See* Meredith Hoffman, *Accused Mortgage Scammer Charged With Hate Crime for Stealing $ 350K*, DNAinfo N.Y. (Mar. 7, 2012), http://www.dnainfo.com/new-york/20120307/prospect-heights-bed-stuy-crown-heights/accused-mortgage-scammer-charged-with-hate-crime-for-stealing-350k (last visited Oct. 29, 2015).

87. Elizabeth Ecker, *New York Reverse Mortgage Scam Charged as Hate Crime,* Reverse Mortgage Daily (Mar. 7, 2012), http://reversemortgagedaily.com/2012/03/07/new-york-reverse-mortgage-scam-charged-as-hate-crime/ (last visited Dec.1, 2015).

88. A "reverse mortgage" is a financial instrument available only to adults over age 62 that allows a person to take equity out of

a home he or she owns, which is repaid by the estate upon his or her death. *Financial Crimes Against the Elderly 2013 Legislation*, National Conferences on State Legislature, http://www.ncsl.org/research/financial-services-and-commerce/financial-crimes-against-the-elderly-2013-legis.aspx (last visited Dec. 1, 2015).

89. Christina Carrega-Woody, *Brooklyn Insurance Broker Cheated Elderly Residents out of $2.5M: District Attorney*, N.Y. Daily News (Sept. 9, 2015), http://www.nydailynews.com/new-york/nyc-crime/brooklyn-insurance-broker-scammed-residents-2-5m-da-article-1.2354503 (last visited Dec. 1, 2015).
90. Press Release, Kings' County District Attorney, Bay Ridge Insurance Agent Indicted On Hate Crime Charges, For Allegedly Targeting Elderly Victims in Financial Fraud, Defendant Allegedly Stole $2.5 Million in Retirement Plans and Life Savings From 12 Victims Ages 60s, 70s, 80s, and 90s (Sept. 9, 2015).
91. Press Release, Kings' County District Attorney, Florida Woman Pleads Guilty to Hate Crime in Predatory Scheme to Defraud Elderly Men. Will be Ordered to Pay $100,000 Restitution and Serve Six Months in Jail (March 1, 2006).
92. Kings County District Attorney, *supra* note 90.
93. *See* McClurg, *supra* note 52, at 1108-09.
94. *Financial Crimes Against the Elderly 2013 Legislation*, National Conferences on State Legislature, http://www.ncsl.org/research/financial-services-and-commerce/financial-crimes-against-the-elderly-2013-legis.aspx (last visited Dec. 1, 2015).
95. *See Senate Committee on Aging: Broken Trust: Combatting Financial Exploitation Targeting Vulnerable Seniors*, 114th Cong., Susan M. Collins, Senator, Opening Statement, *US Committee Chanel (*Feb. 4, 2015), http://www.aging.senate.gov/hearings/broken-trust_combating-financial-exploitation-of-vulnerable-seniors (last visited Dec. 1, 2015).
96. MetLife, *The MetLife Study of Elder Financial Abuse Crimes of Occasion, Desperation, and Predation Against America's Elders,* MetLife Mature Market Institute (June 2011), https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf (last visited Nov. 29, 2015).
97. *See* Collins, *supra* note 95.
98. *See* Richard Eisenberg, *Why Elder Financial Abuse Is Such A Slippery Crime*, Forbs (Feb. 13, 2015), http://www.forbes.com/sites/nextavenue/2015/02/13/why-elder-financial-abuse-is-such-a-slippery-crime/ (last visited Nov. 29, 2015).
99. *Id.* (citing Julie McEvoy, U.S. Deputy Associate Attorney General, Elder Justice webinar by the 2015 White House Conference on Aging).
100. Collins, *supra* note 95.
101. *Id*.
102. *Senate Committee on Aging: Broken Trust: Combatting Financial Exploitation Targeting Vulnerable Seniors*, 114th Cong., Claire McCaskill, Ranking Member, Opening Statement, *U.S. Committee Channel (*Feb. 4, 2015).
103. *Id.*
104. McClurg, *supra* note 52, at 1142-43.
105. *Senate Committee on Aging: Broken Trust: Combatting Financial Exploitation Targeting Vulnerable Seniors*, 114th Cong., Page Ulrey, Senior Deputy Prosecuting Attorney King County Prosecutor's Office, Seattle, Washington, Written Testimony, *US Committee Chanel* (Feb. 4, 2015).
106. *Id.*
107. McClurg, *supra* note 52, at 1141.
108. Hull, *supra* note 4, at 398 (citing Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 1796 (1994) (codified in part at 28 U.S.C. § 994 (2006)).
109. Memorandum, Governor's Program Bill No. 1RR, at 2 (2000) (emphasis added).
110. *See* Hull, *supra* note 4, at 416.
111. McClurg, *supra* note 52, at 1143.

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Uncover Potential Problems and Planning Concerns at Initial Meeting

By Lawrence A. Frolik and Bernard A. Krooks

Lawrence A. Frolik

Bernard A. Krooks

After the client has engaged an estate planning or elder law attorney, the gathering of information begins. For some, this process starts on initial contact by the prospective client. Understanding the client and the client's needs is critical; the client may be focused on an immediate need, but as the attorney learns more about the client, he's likely to uncover other problems and planning concerns. So, it's usually dangerous to answer that phone call when the client tells your assistant, "I just have a simple question." Better practice is to have an in-person meeting so you can learn more about the client's situation and get a better understanding of what his needs are.

Rather than merely conversing with the client, most attorneys prefer using a questionnaire, perhaps one that the client fills out at home or online. The questionnaire helps systematize the process and minimizes the chance that you might fail to obtain some necessary information. **Caveat:** Some clients will cancel their appointment if they feel like they have to do "homework" (filling out the questionnaire) prior to the meeting. Consider whether this is a client you would want to represent. Based on the client's responses, you'll be alerted to what additional information is needed.

The following topics should guide the client interview and questionnaire.

- **Personal data.** This includes information about the client, his spouse, descendants, parents (if living), previous spouses, siblings and significant others. Beyond names and addresses, the questionnaire or interview process should ask the client to flag individuals with health problems, disabilities, past and current mental health issues and any other relevant conditions or circumstances. For example, you would want to know if the client has a non-citizen spouse.
- **Marriage history (both present and prior)**. If the client has been divorced, focus on the property settlement and any agreements as to pension or retirement fund rights that were granted to the client or former spouse.
- **Occupation or work record.** Many clients will strongly identify with their current or past employment. Knowing what the client did before retirement can be helpful in understanding how to approach him when explaining planning options. For example, explaining end-of-life choices to a former nurse is different from explaining them to a former office administrator.
- **Retirement benefits**. Get information about pensions, 401(k) plans, individual retirement accounts and retiree and health care benefits. If the client is married, be sure to inquire about the retirement benefits, including health care benefits for both spouses, and how or whether each has rights that continue after the death of the other spouse. The beneficiary designations for IRAs may be different from those for qualified plans.
- **Social Security benefits**. Ascertain the dollar amounts of both spouses. If not yet claimed, have the client ascertain the projected benefits. This data will help in determining the appropriate time to file for benefits. It will also help in determining the client's projected income during retirement.
- **Client's health**. Find out about the client's current physical and mental health, prognosis of any developing or latent condition, relevant past medical history and client estimation of future health care needs, including personal care or need for medical assistance. This information may affect the viability of certain estate planning or elder law strategies.
- **Parental and sibling health history**. Because many chronic conditions appear to have a genetic component, family medical histories may be a guide to what may happen to the client. Even shared environmental or cultural backgrounds may be predictive.
- **Religious beliefs**. Such beliefs might play a role in planning for end-of-life health care and funerals and may need to be incorporated into advance directives. Housing choices can also be affected by religious beliefs. You need to know enough about the client's beliefs to see that the beliefs are honored in the event of a future incapacity.
- **Secular values.** Many clients don't have religious beliefs but, nevertheless, have strong opinions as

to what's moral, ethical or proper behavior, particularly when it comes to health care, end-of-life care and funerals.

- **Professional, community and social affiliations**. Having the client give a brief summation of affiliations can assist in understanding who the client "is" and to whom he might turn if he needs assistance and social support.
- **Relationship with children and their spouses**. The client will need to appoint agents under powers of attorney, surrogate health care decision makers and executors and trustees. He also needs to identify possible caregivers. You need to know who the client trusts, who's available to serve in those capacities and who has the knowledge and appropriate temperament to be effective. You should also understand other demands on children who might be chosen to serve as agents or surrogates—personal, family and financial.
- **Significant others and close friends.** Not every older client has a spouse. Some co-habit and others merely have close friends that they consider "family." Uncovering these relations requires careful questioning. You need to know if someone other than a spouse or family member has a special place of trust in the client's life.
- **Financial obligations**. Find out about legal and voluntary obligations to children, grandchildren, parents, siblings and even charitable pledges or moral obligations. Ask about the amount of support provided, whether the client wants it to continue and, if so, under what conditions and subject to what limitations.
- **Legal documents and agreements**. Obtain knowledge of and, if possible, get copies of any current will, power of attorney, health care proxy, living will, revocable and irrevocable trusts, joint property, powers of appointment, long-term care insurance, Medigap insurance, life insurance, annuities, beneficial interests in a trust, rental leases as tenant or landlord, royalty rights and mineral leases.
- **Client assets**. Get a complete list of all intangible assets including all bank accounts, bonds and securities in paper form, brokerage accounts, deferred annuities and insurance products. Also ask about all real estate and tangible assets including art, precious metals and collectibles and any household effects that have significant market value.
- **Passwords.** Get the client's passwords for the home computer, bank accounts and all other password-protected sites. Insist that the client have some mechanism for keeping track of all his passwords. This can be done via hand-written note, stored on a computer or on some online site designed to securely hold this type of information. Also, because this information is constantly changing, it's important to keep the password list up to date. It's also important that the password information is accessible by a trusted third party or the attorney because on death or incapacity it may be difficult for third parties to access this information.

A client who seeks out an estate planning or elder law attorney usually has a particular problem or concern, but in all likelihood the client's needs are much broader. Those needs in general can be grouped into several areas of concern.

1. Long-term care in light of current or projected physical and mental decline.
2. Financial security, including financial security for the community (well) or surviving spouse.
3. Property management during life and distribution of property at death.
4. Housing that's affordable and appropriate in light of the client's current and projected physical and mental condition.
5. Minimizing the client's overall tax burden.
6. Leaving a legacy to loved ones.

Clients often are focused on only one or two of these areas and usually fail to appreciate their interdependence. You, therefore, must ask questions that force the client to consider how to plan for the variety of contingencies that go well beyond the immediate concern that brought the client to your office.

With an understanding of what's important to the client, such as aging in place or not being a burden on their children, you can begin to outline choices and solutions that translate vague values and wishes into specific solutions.

Finally, keep in mind that a client's life isn't static. Information initially learned may no longer be accurate in the following years. Understanding the client's world, his values and aspirations and his fears is a process; one that requires continual updating by questioning, and, even more importantly, by listening.

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This article was originally published in the July 2016 issue of Trusts & Estates. *For subscription information, go to https://www.pubservice.com/TE/SubNew.aspx?PC=TE&PK=MN66G.*

NYSBA Elder Law and Special Needs Section Legislation Committee Fall 2016 Update

By Co-Chairs Deepankar Mukerji and Jeffrey Asher

Deepankar Mukerji

Jeffrey Asher

On July 21, 2016, Governor Andrew M. Cuomo signed "Peter Falk's Law" into legislation. "Peter Falk's Law"(Chapter 98, Laws of 2016), named after the late actor and "Columbo" star, amends the Mental Hygiene Law to provide for visitation rights and end-of-life notice requirements when a person who is the subject of a guardianship proceeding is hospitalized or dies. The Elder Law and Special Needs Section, through the Legislation Committee, presented comments to the NYS Legislature which significantly influenced the final version of the bill.

On July 21, 2016, Governor Cuomo also signed the New York Achieving a Better Life Experience (NY ABLE) Savings Account Act into legislation (Chapter 149, Laws of 2016). The NY *Able* Act allows individuals and families to set up tax-free 529A savings accounts for housing, education, transportation, medical, and other disability-related expenses. Similar to college savings accounts, assets in ABLE accounts will be exempt from a $2,000 cap on conventional savings accounts and, more importantly, will not be deemed available resources for purposes of Medicaid or SSI for accounts up to $100,000.

On the Horizon

Toward the end of the last state legislative cycle, NY Senate Bill 4642 and Assembly Bill 6510 proposed an amendment to Mental Hygiene Law § 81.06(7) preventing a nursing home or other health care facility from bringing a guardianship proceeding where the petition is brought primarily for purposes of bill collection or resolving a bill collection dispute. The ELSN Section, through the Legislation Committee, opposed the proposed legislation on several grounds; however, the state legislative session ended without any action on S4642 or A6510. The Legislation Committee will be looking out for the reintroduction of these bills, although many factors indicate that they will not be reintroduced.

Also on Our Horizon

1. Efforts by the ELSN Section to propose legislation to allow a surviving spouse to waive his or her elective share: Under current law, a surviving spouse has an absolute right to exercise the right of election until six months from the date of issuance of fiduciary letters by the surrogate's court but no more than two years after the death of the deceased spouse. However, the current law does not permit a surviving spouse to waive his or her right of election after the death of his or her spouse, which creates an unnecessary delay in the administration of an estate. In turn, the delay creates uncertainty in the surviving spouse's long-term care planning options. Allowing the surviving spouse to waive the right of election after the death of the deceased spouse could resolve many issues.

2. The ELSN Section's proposed legislation to allow for a testamentary supplemental needs trust to satisfy the elective share: Under current law, a surviving spouse is entitled to an elective share amount from his or her deceased spouse's estate. An individual under age 65 can fund a self-funded, pay-back supplemental needs trust with the elective share without affecting his or her eligibility for Medicaid. In contrast, someone who is age 65 or over does not have that same option; however, an individual can create a "sole benefit" trust for his or her spouse without penalty. The ELSN Section's proposed legislation would permit a testator to place a surviving spouse's elective share into a pay-back supplemental needs trust for the benefit of the surviving spouse, without affecting the surviving spouse's eligibility for Medicaid. The proposed amendment would not affect the surviving spouse's right to receive the elective share out-

right instead of it being placed into a qualifying SNT.

3. Power of Attorney—The ELSN Section petitioned the NYS Bar Association to make the proposed legislation to revise the POA law and form a legislative priority in the upcoming state legislative cycle. The ELSN Section will follow up with the NYS Bar Association's Executive Committee and the Legislation Committee will keep everyone informed of the Section's efforts.

4. Health Care Proxy Registry—Introduced to the Senate by Senator Kemp Hannon of the Sixth District as S6081/A6307, if such a bill is enacted, a person would be able to upload or deposit his or her own Health Care Proxy into a registry of Health Care Proxies maintained at the Department of Health. An attending physician or other health care provider, for example, would be able to contact the Registry to determine whether or not a patient had transmitted a Health Care Proxy to the Registry. If so, the Registry would deliver a copy of the Health Care Proxy to the doctor or health care provider, as the case may be. When introduced to the last state legislative cycle, the proposed legislation did not pass. The Legislation Committee will look for its reintroduction in the 2017-2018 session.

5. Aid in Dying legislation—The ELSN Section is, for the most part, in favor of the proposed "Aid in Dying" legislation—Proposed Bills S7579/A100598—but is concerned with the language of the bills that introduces an interpreter into the process. The ELSN Section is concerned that a physician's or witness's independent verification and corroboration of the patient's wishes could be adversely and critically impacted by the interpreter's interpretation of the patient's diagnosis, prognosis, capacity, and voluntariness, especially since the statute lacks any qualification requirements at all for the interpreter. The ELSN Section will be proposing qualifying language and the Legislation Committee will keep everyone informed of the Section's efforts.

Elder Law and Special Needs Section 2016 Summer Meeting

By Britt Burner and David Kronenberg

The Elder Law and Special Needs Section Summer Meeting took place July 21 through July 23 at the Logan Square Hotel in Philadelphia, Pennsylvania. The meeting was co-chaired by **David I. Kronenberg, Esq.** and **Britt Burner, Esq.** We were proud to include veteran speakers as well as first timers presenting on a wide array of topics for new and experienced practitioners. We were lucky to have a great group of sponsors and exhibitors. It is through the support of our sponsors and exhibitors that our programs are possible.

The meeting opened with welcome remarks by the 2016-2017 Elder Law and Special Needs Planning Section Chair **David Goldfarb, Esq.** We then dove right into our first speaker, **Patricia Shevy, Esq.**, who gave the Elder Law Update with a focus on Medicaid issues. Ms. Shevy was followed by **Ira Salzman, Esq.** of Goldfarb Abrandt Salzman & Kutzin LLP, who provided an update on recent cases and developments in the law of guardianship. This included an update on Mental Hygiene Law Articles 81 and 83, with an emphasis on how courts are implementing the law with regard to the registration of out of state guardianship orders.

Next, **Richard D. Haley, Esq.** of Haley Weinblatt & Calcagni, LLP, gave an in-depth case study intended to help attorneys properly advise clients about executing a health care proxy and living will. He discussed the delicate interplay between the health care proxy and the living will and how we view quality of life. Our final speaker on Thursday was **Kerry McGrath, Esq.** of Cuddy Law Firm, who spoke about utilizing first party supplemental needs trusts in the context of awards from special education hearings. Ms. McGrath explained that supplemental needs trust funds may be used for compensatory education relief as a result of a special education hearing. She expertly fielded questions about the outcome of specific hearings and sparked a lively debate in the room.

The first evening of our program topped off with a cocktail reception held on the lovely terrace at the Logan. For some of our families and baseball fans there was an evening trip to Citizens Bank Park for a Philadelphia Phillies vs. Miami Marlins ball game.

The first panel of the day on Friday discussed the possible issues clients may face in employing a home care worker. **Evan Gilder** of Redlig Financial Services and **Steven E. Zweig, Esq.** of Ford & Harrison LLP reviewed the current status of federal, New York State, and New York City employment laws. This panel was an informative discussion on the dos and don'ts of managing the risks associated with hiring a home care worker. They discussed the issues of joint employer status and the ever so common issue of paying employees "off the books" or supplementing an aide's wages.

The second panel on Friday included attorneys from three title companies including **Amy Kelly, Esq.** of Seaport Title Agency Ltd., **Glen E. Keene, Esq.** of Benchmark Title Agency, LLC, and **Nicolas M. Ihnatolya, Esq.** of Sneeringer Monahan Provost Redgrave Title Agency Inc. This panel covered a range of topics related to real property transfers and their connection with elder law, special needs planning, and estate administration. What is the proper type of deed to use when transferring to a trust? What issues arise in relation to powers of attorney or special powers of appointment? Our panel of title attorneys addressed these issues and more.

Our final speaker of the day, **Kenneth L. Gartner, Esq.** of Lynn, Gartner, Dunne & Covello, LLP, discussed the ethical issues surrounding the role of counsel in representing alleged incapacitated persons. The main question Kenneth's presentation focused on was: "Does protective action ever trump the individual's stated position?"

Once the programs ended for the day, our attendees and their guests had the opportunity to learn more about Philadelphia's vast history. They chose from a guided tour of Independence Hall National Park, exploring the Franklin Institute Museum, or taking an audio tour of the Barnes Museum. This eventful day concluded with a cocktail reception and dinner on the Moshulu, the world's oldest and largest square rigged sailing vessel still afloat and the only restaurant venue in the world on a Tall Ship. The views were spectacular!

The final day of events began with **Professor Jennifer Bergenfeld, J.D.** of NYU Stern School of Business, who spoke on an extremely relevant issue of today, social media and its effects and possible implications on legal practitioners as well as our clients. Professor Bergenfeld lectured on the proper ways to have an online presence and abide by the ethical rules regarding advertising that bind us as attorneys.

We were happy as always to hear from **Valerie J. Bogart, Esq.** of New York Legal Assistance Group who covered the new regulations on immediate need Medicaid and the current status of Managed Long-Term Care. Before the conclusion of our meeting, **Matthew J. Nolfo, Esq.** reviewed the implications of the *Weiss* case out of Suffolk County. This case held that payments to an assisted living facility were not a return of a gift to a Medicaid applicant. Mr. Nolfo discussed potential strategies for dealing with Institutional Medicaid applications that involve the transferring of gifts and assets and the subsequent return of those assets within the five-year look-back.

The Summer Meeting was an amazing opportunity to inform each other of the advancements in elder law, estate planning, and special needs planning law. The collaboration between speakers, sponsors, exhibitors and attendees is wonderful to see and we were honored to put the meeting agenda together to facilitate those relationships. We could not have pulled off this successful meeting without **Elizabeth Briand, Esq.** of the Sponsorship Committee. Finally, we owe a great debt of gratitude to **Lisa Bataille** and **Catheryn Teeter** of NYSBA.

Elder Law and Special Needs Section

2016 Summer Meeting in Philadelphia

The Treatment and Marshaling of Joint Accounts in an Article 81 Guardianship Proceeding

By Anthony J. Enea

Anthony J. Enea

The existence of joint bank or brokerage accounts has become ubiquitous in 21st century America. There are numerous legitimate and logical reasons for the creation of a joint account. However, when an Article 81 guardianship proceeding is commenced and the Alleged Incapacitated Person ("AIP") has accounts jointly owned with another person, it is imperative for the petitioner to determine the reason the joint account(s) was created, the benefits conferred to each joint owner, if any, and the impact the guardianship proceeding may have on the funds. This article will explore the different ways of holding joint assets and explain how to treat and marshal said joint assets for the purposes of a guardianship proceeding.

Joint Accounts

It is particularly common for married couples and seniors to have joint bank or brokerage accounts with their spouse, children, sibling(s) or other third parties. For example, the joint account may have been created because the parties to the joint account contributed the funds or assets comprising the account, or acquired said funds during their marriage. An owner may also decide he or she wants a joint owner to have full and unfettered access to the account during their lifetimes (especially helpful if there is a subsequent disability) or upon the death of the owner, irrespective of whether the joint owner made equal contributions to the account.

Joint accounts are also commonly utilized and recognized as an effective wealth transfer vehicle, which permits the transfer of assets from one party to another upon death without necessitating the probate of a Last Will & Testament or the creation of a trust. Joint accounts, as well as what are known as "Totten Trusts" or "Transfer on Death Accounts" for brokerage and security accounts, pass by operation of law to the surviving joint tenant(s) or the designated person. For a Totten Trust or Transfer on Death Account, usually only an original death certificate is required by the bank or financial institution as proof that the surviving joint tenant(s) is authorized to access the funds.

For Convenience Accounts

The right to receive by operation of law the joint account upon the death of a joint tenant does not apply to a joint account that is created and held "for the convenience" of the depositor. Accounts "for the convenience" are regulated by *Section 678 of the New York Banking Law*. *Section 678* provides that

> when a deposit of cash, securities or other property has been made, or shares shall be issued in or with any banking organization or foreign banking corporation transacting business in this state, in an account in the name of the depositor and another person, and in the form to be paid or delivered to either 'for the convenience' of the depositor, the making of such deposit or issuance of shares shall not affect the title to such deposit or shares and the depositor is not considered to have made a gift of one-half the deposit or of any additions or accruals thereon to the other person, and, on the death of the depositor, the other person shall have no right of survivorship in the account.[1]

Section 678 of the Banking Law specifically gives the depositor the ability to have two signatories on an account who can withdraw funds from the account, but where the "convenience" signatory is not permitted to make a gift of more than half of the funds in the account, and his or her access does not bestow any survivorship benefits upon the joint account title holder. In order for the provision of *678 of the Banking Law* to apply, the words "for the convenience" or similarly "for convenience only" must appear on the title of the account. If the aforesaid words do not appear, the presumptions created by *675 of the Banking Law* will be applied.

Section 675 provides that the making of a deposit in the name of the depositor and another to be paid to either the depositor or to the survivor is prima facie evidence that the depositor intended to create a joint tenancy, and that where such a deposit is made, the burden of proof is on the one challenging the presumption of joint tenancy. Under *675*, three rebuttable presumptions are created: (i) as long as both joint tenants are living, each has a present unconditional property interest in an undivided one-half of the money deposited; (ii) that there has been an irrevocable gift of one-half of the funds in the account by the depositor to the other joint tenant; and (iii) that the joint tenant has a right of survivorship in said entire joint account upon the death of the other joint tenant.

675(b) of the Banking Law provides that the burden of proof is upon the one challenging the presumption of joint tenancy. In *Matter of Camarda* 63[2] A.D. 2d 837 and *Matter of Coddington* 56 A.D. 2d 697[3], the Court held that the presumption of joint tenancy created by *675* may only be refuted by "direct proof or substantial circumstantial proof, clear and convincing and sufficient to support an inference that the joint account had been opened as a matter of convenience or by proving undue influence, fraud or lack of capacity." See *Matter of Kleinberg v. Heller* 38 N.Y. 2d 836,841[4].[5]

With respect to securities accounts or brokerage accounts in joint names, the Transfer on Death Security Registration Act and EPTL 13-4.1 through 13-4.12 permits joint securities and brokerage account holders to have the same rights and choices that joint bank account holders have. The Transfer-on-Death Security Registration Act was enacted on July 26, 2005 and it amended EPTL by enacting a new part four (4) to Article 13. It is essentially codified in EPTL 13-4.1 through 13-4.12. Under EPTL 13-4.2 a "transfer on death" or "payable on death" securities or brokerage account can only be established by sole owners or multiple owners having a right of survivorship in the account. The owners of a securities or brokerage account held as tenants-in-common are expressly prohibited from creating a "transfer on death" account. Although the creation of a "transfer on death" or "payable on death" securities or brokerage account does not require that any specific language be utilized to create the account, the usage of the phrases "transfer on death" and "payable on death" or their abbreviations "TOD" or "POD" should be used to evidence the creation of the future interest. (EPTL 13-4.5). However, under EPTL 13-4.4, evidence of the establishment of the account is the opening documentation that indicates that the beneficiary is to take ownership upon the death of the other owner(s).

The Potential Problems Caused by *Joint Accounts In A Guardianship*

In the past, some Courts in New York, when dealing with the existence of joint accounts in a Guardianship proceeding under *Article 81 of the Mental Hygiene Law ("MHL")*, did not fully analyze the ramifications of the use of a joint account(s) by the incapacitated person. For example, in the past, some Courts have in their proposed form for the Findings of Fact, Conclusions of Law and Judgement included an outright prohibition against the Guardian maintaining any joint accounts as part of the Guardianship estate. The taking of such a position by the Court requires the Attorney for the Petitioner to be cognizant of such a position, so that he or she may be able to take the appropriate measures, and seek the appropriate and necessary relief as to the joint account(s) in the Petition. If the Court maintains a policy that joint accounts cannot be maintained by the Guardian, it will be necessary for the Petitioner to assess how the joint tenant(s) one-half interest and rights of survivorship in said joint account(s) will be impacted by the appointment of a Guardian of the property, and whether or not the joint tenant will lose his or her rights to access the funds in the joint account, as well as his or her survivorship interest. In many instances where the Guardianship proceeding is being initiated by the spouse of the alleged incapacitated person and the spouse is requesting a transfer of all joint accounts and assets to himself or herself (Medicaid planning/estate planning purposes) then the issue of how to title the account in the Guardianship is often moot.

Additionally, it requires an assessment and review of how and why the joint account(s) was created, who is entitled to notice of the relief being sought and what is his or her right to be heard. Irrespective of what the Court's proposed form Judgment states, the survivorship rights of a joint tenants(s) cannot and should not be terminated or modified without the joint tenant being given notice of the proposed change and an opportunity to be heard. To accomplish this, it is necessary that the Petitioner undertake a thorough investigation of the account(s) in issue and specifically delineate in the Guardianship Petition what is being proposed with respect to the joint account(s).

Identifying the *Joint Accounts* In The Petition

81.08 of the MHL specifically provides for the disclosure of the approximate value of any property or assets held by the alleged incapacitated person in the Petition for the appointment of a Guardian. It is incumbent upon the Petitioner to undertake the necessary investigation to determine which bank or brokerage accounts the AIP has in his name alone or holds jointly with others or is the beneficiary of, and to disclose same in the Guardianship Petition.

In doing so with respect to any bank or brokerage accounts, the Petitioner should specifically identify any jointly held bank or brokerage account(s), and whether or not said joint account(s) are joint accounts entitled to the presumptions of *675 of the Banking Law*, or are "for the convenience" accounts under *678* or "transfer on death" accounts with respect to any brokerage account pursuant to the *Transfer on Death Security Registration Act and EPTL 13-4.1 through 13-4.12*. The Petition should specifically identify any person who has an interest in the account, the extent of his or her interest and whether or not he or she has a right of survivorship in the account.

In most cases this should not be problematic if the joint account holder is the spouse of the alleged incapacitated person ("AIP"), and he or she has a joint account with the AIP. However, if the joint account holder is a child of the AIP or a third party, the Petitioner should obtain copies of the account signature cards and any other bank or financial institution record which

may describe whether or not the account is a joint account with rights of survivorship that is entitled to the presumptions of *675* or is a "transfer on death" account under *EPTL 13-4.1 through 13-4.12* or merely a "for the convenience" account under *678*.

Specifically Delineate Your Proposal As To *Any Joint Account(s) In the Guardianship Petition*

The Guardianship Petition should contain a clear and concise description of the relief sought by the Petitioner with respect to any joint bank or brokerage account(s). If a transfer of the title of the joint account from the AIP to the other named joint account holder is being sought, it is necessary that same be specifically delineated in the Petition. The Petition should also specifically identify the account by its account number, name of Bank or brokerage firm as well as the existing title on said account. It should also specify the title of the account to be created once the account or any part thereof has been marshaled by the Guardian, or whether an apportionment of the account or outright transfer to the other named account holder is being sought. Additionally, it is critical to address the survivorship interest of each joint tenant in the Petition, and your proposal with respect thereto.

As briefly stated above, if the potential exists that the AIP may need Medicaid (either nursing home or home care and/or has estate tax issues) and a transfer of the assets in a joint bank or brokerage account is being sought to the spouse, blind or disabled child (exempt transfer(s) for Medicaid eligibility) it is more likely that the Guardianship Court, will approve a transfer of the AIP's interest in said account(s) to the other named title holder, without any apportionment to the AIP. This is also true if no objection to the proposed transfer is made by any other interested party to the Guardianship Proceeding; and the AIP's testamentary scheme as reflected in any Last Will and Testament or Trust is consistent with the proposed transfer.

Obviously, complications could arise when the proposed transfer is to a joint account holder who is not the spouse of the AIP. If for example the joint account holder is a child, family member or friend, there will be issues as to whether or not the child, family member or friend contributed any of the funds in the joint account(s), and whether or not the proposed transfer will create the five (5) year look back period and a period of ineligibility for nursing home Medicaid purposes (unless it qualifies as an exempt transfer to a spouse, blind or disabled child). There will also be the issue of whether or not the other interested parties to the Guardianship will consent to the transfer, and if the proceeds of the account are to be apportioned by and between the account holders, how will title to each apportioned account be held, and what impact will the apportionment have on the survivorship interest of each joint tenant. Whether it be in the new Guardianship account created or the other account, the protection of the survivorship interest of each joint account holder must be addressed.

For example, if apportionment is not sought and a complete transfer is made to the non-incapacitated account holder, will it be necessary that said account be titled "in trust for" the incapacitated person. This could be problematic if the incapacitated person is a potential candidate for Medicaid, and the prior death of the non-incapacitated person would result in the passage of the funds by operation of law in the account to the incapacitated person. This problem may be obviated if the incapacitated party can be the beneficiary of a Supplemental or Special Needs Trust ("SNT"). In that event it would be appropriate to title the account of the non-incapacitated party "tn trust for" the SNT of the incapacitated party.

Additionally, in order to protect the non-incapacitated account holder, it may be necessary to seek that the account marshaled by the Guardianship be titled "X, as Guardian of his or her property of Y, in trust for Z" so as to protect his or her survivorship interest.

Conclusion

There are a multitude of differing and complex scenarios that could arise then dealing with joint accounts within the context of a Guardianship proceeding. However, irrespective of the scenario it is necessary that the Petition address the issue of the joint account(s) head on and clearly articulate the relief sought and the basis for the position being taken.

Additionally, in an age where the cost of long term care is a significant issue for most seniors, it is imperative that all Medicaid eligibility issues be also properly addressed within the context of the Guardianship proceeding.

Endnotes

1. Section 678 of the NY Banking Law.
2. Matter of Camarda, 63 A.D. 2d 837.
3. Matter of Coddington, 56 A.D. 2d 697.
4. Matter of Kleinberg v. Heller, 38 N.Y. 2d 836, 841.

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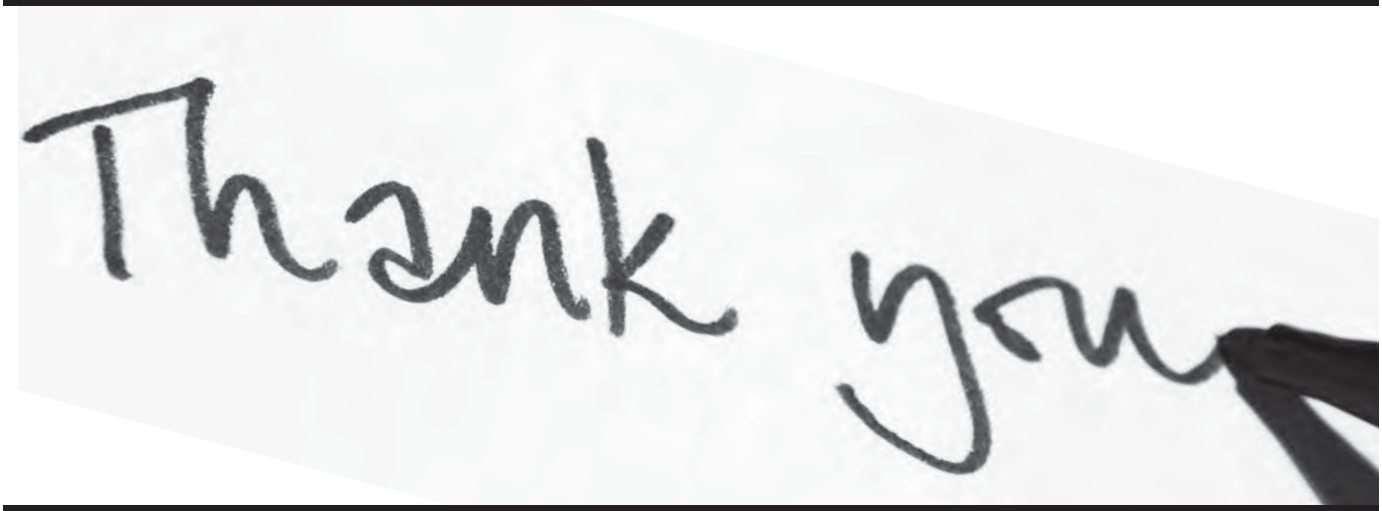
This article was originally published in the October 2016 edition of the New York State Bar Journal.

NEW YORK STATE BAR ASSOCIATION



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Powers of Attorney: Ascertaining Capacity?

By Sarah Duval and Malya Kurzweil Levin

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/.

Introduction

Sarah Duval

The Power of Attorney (POA) document is a cornerstone of even the most basic estate plan, and can often be critical in preserving an older adult's financial stability and independence. To function as a flexible and effective tool, the Power of Attorney provides a third party agent with wide-ranging powers over the principal's assets and income. While this can be (and often is) beneficial in allowing for substituted decision making without taking the more drastic step of an Article 81 Guardianship, it can also create vulnerability to financial exploitation. In our last article, we examined the importance of clearly establishing who the client is when a Power of Attorney is executed, and the ways in which taking time to establish an appropriate attorney-client relationship can minimize the possibility of a particular Power of Attorney becoming a tool of abuse. In this article, we will discuss the standard of capacity for executing a Power of Attorney, and the ways capacity can be addressed to maximize a client's safety.

1. Assessing Capacity—A Legal Perspective

Assessing client capacity is one of the many skills which attorneys are required to cultivate based on the realities of legal practice and ethical obligations to clients, despite their lack of formal education on the issue. While at first blush, mental capacity may seem to be the purview of a medical or psychiatric professional, determining that a potential client has the capacity to accept representation is an essential step in the formation of each and every attorney-client relationship. While capacity concerns are not unique to elderly clients, as a practical matter, an attorney is often called upon to assess whether a client or potential client has the requisite capacity to undertake a specific legal action. As opposed to a clinical setting, where capacity may be discussed in more general terms and associated with particular medical diagnoses, standards of legal capacity are task specific and based on the particular legal action contemplated. New York State's Rules of Professional Conduct indirectly acknowledge the critical role attorneys play in making capacity assessments, by stating that an attorney's ethical obligations to a client may change as a client's capacity becomes more compromised.[1] The implication is that a lawyer is obligated to make a judgment as to the capacity of the client and conduct the attorney client relationship accordingly, and as capacity fluctuates, this should be reflected in the attorney-client relationship and what, if any, direction an attorney is able to take from the client. This judgment should closely track the particular legal work in question.

Malya Levin

The specific standard for capacity to execute a Power of Attorney is described in the law's definitional section as "ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney."[2] This definition is discussed by the New York State Law Revision Commission Report on Powers of Attorney, which evaluates the extensive changes made to the POA law in 2009 and 2010. The report describes the capacity standard as "functional," citing to a leading treatise on the issue.[3] The treatise, Klipstein's Drafting New York Wills, elaborates on the nature of this functional capacity standard, stating that "it requires that the principal know what the principal is doing by creating (or revoking, amending, or modifying) a power of attorney...At the very least it seems to require that the principal understand at least in a general way the enormous range of the authority granted to the agent." Klipstein also states that this standard must be higher than the standard for testamentary capacity, since a will impacts the testator's finances only after death, whereas a Power of Attorney can significantly affect an individual's financial situation during that person's lifetime.[4] The report emphasizes that clients who cannot meet this standard are not able to execute a legally valid Power of Attorney. A closer look at legal capacity in general and the capacity standard for Powers of Attorney specifically therefore reveals that there is a somewhat rigorous and rather practical bar a client must pass in order to execute a valid POA document.

2. Client Capacity and Elder Abuse

Nationwide, older adults with diminished capacity suffer from staggering rates of mistreatment, with one

study finding that close to 50% of people with dementia have experienced elder abuse.[5] Financial abuse is cited by many studies as the most common form of abuse. According to a recent study by the New York State Office of Children and Family Services, the total monetary value of assets taken from older adults within the 12-month period may have ranged from a low of $352 million to a high of $1.5 billion, with this wide range due to the large percentage of financial exploitation incidents which go unreported.[6] Given these statistics, coupled with the extensive financial powers and discretion a Power of Attorney grants to an appointed agent, there is significant potential for abuse when a POA is executed where the principal's capacity is already in question. However, as capacity diminishes, a principal's need to grant POA to a trusted agent becomes even more acute, and attorneys are therefore likely to see clients who already have some degree of diminished capacity and are seeking to execute a POA. All too often it is only after the principal is experiencing some decline in their ability to manage their finances that a POA is sought. There is also a general misunderstanding within the community that POAs are only necessary after a significant cognitive decline, and they are not a tool for planning but rather a reactionary measure.

Managing the confluence of increased legal need and increased vulnerability created by diminished capacity issues so as to serve a client's best interests can be difficult. One telling illustration is the legislative history of the Statutory Gift Rider (SGR), a separate document granting an agent under a Power of Attorney the authority to make gifts on behalf of the principal in excess of $500 annually, including gifts to the agent. The SGR was created during the 2011 revision of the Power of Attorney law specifically to safeguard against potential financial abuse by the agent. However, the NYSBA's Working Group on Power of Attorney released a report recommending that the SGR be abolished and that the law revert back to a single simple document based on the fact that "the goal of heightened awareness has not been achieved by the new form whose increased verbosity only creates confusion for the principal."[7] It seems that the very same document created to protect clients in a vulnerable state is seen as lacking utility due to that same vulnerable state. While the ultimate fate of the SGR is still unknown the dilemma it highlights is clear. The challenge for an attorney who believes that a client requesting a POA has capacity deficits, is to strike a balance that fulfills a legal need while maintaining and even enhancing the client's safety.

3. POA and Diminished Capacity – Best Practices

When a lawyer assesses that a client is living with some degree of diminished capacity, the Rules of Professional Conduct require that the attorney "as far as reasonably possible, maintain a conventional relationship with the client."[8] Implied here is a duty for the attorney to maximize a client's capacity. Under the right circumstances and with appropriate assistance by counsel, "a client with diminished capacity often has the ability to understand, deliberate upon and reach conclusions about matters affecting the client's own well-being."[9] In a case where a client is seeking to name an agent under a Power of Attorney and diminished capacity is suspected, doing the utmost to maximize the client's capacity and screen the client for potential elder abuse will help the attorney to balance the utility and risk of the POA as an advance planning tool.

First and foremost, it is critical that an attorney meet with the client alone at the outset of the relationship, without family members, friends or caretakers. During this meeting, the attorney can explain the nature of the attorney-client relationship and the accompanying duties of loyalty,[10] diligence,[11] and competence.[12] The attorney can also generally explain the nature of the POA document, its purpose and potential pitfalls. There are a number of benefits to this practice. First, it will allow the attorney to gain a more thorough and accurate understanding of the client's functional capacity. If, in the attorney's professional judgment, a client is still capable of meeting the capacity standard for executing a POA despite some degree of capacity deficit, a private meeting is an opportunity to cultivate trust and confidence in the attorney-client relationship, a critical first step in maximizing client capacity. When an attorney takes the time to explain the legal transaction contemplated in a safe and comfortable environment, a client feels at ease and respected, allowing the client to participate in the transaction to the greatest extent possible.

An attorney can implement a number of other practices that accommodate for sensory deficits and play to cognitive strengths. Some examples are being mindful of lighting and acoustics, speaking slowly and clearly while positioned near the client without invading the client's personal space and ensuring that a client has all of the necessary assistive devices. Also, dehydration is common in older adults and can impact cognitive ability, so offer water or other hydrating beverages to your client. Interview techniques that can maximize cognitive capacity include scheduling multiple, shorter interviews, providing summaries of past discussions and scheduling appointments for the times of day most conducive to robust communication. The American Bar Association and American Psychiatric Association have co-authored a handbook, "Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers," which elaborates on these tactics at length.[13]

A private meeting also provides a good opportunity to discuss the vulnerability implicit in executing a Power of Attorney document. The attorney can provide the client with the space to disclose any concerns the client may have with regard to the trustworthiness of

potential agents or about executing a POA more generally. It is important when speaking alone with the client that an attorney gauges both the client's orientation to time and place as well as the client's general understanding of a Power of Attorney document, both at the outset, during the explanation of the document, and at the execution of the document. Common questions that can be used include:

1. What is today's date? (If unable to give exact date, ask for month/day of the week/year or season.)
2. Who is the current President?
3. Where do you live?
4. What is your date of birth?
5. Where are you now?
6. What brings you here today?
7. Do you know what a Power of Attorney is? If so, explain.
8. Why do you want one?

Asking these questions, especially those concerning the nature of a Power of Attorney, throughout the process, rather than just at the beginning or end of the execution, can go a long way in illuminating a client's capacity and is consistent with best practices when working with a client with diminished capacity. If, as a result of this conversation, an attorney believes that a potential agent is taking advantage of the client's cognitive deficits by pressuring the client to execute a Power of Attorney, the attorney can strategize with a client about other ways to effectuate legal goals or safeguards that might be put in place. If an attorney determines the client is being abused or is at risk of abuse, an attorney should provide the client with local resources such as police, the District Attorney or Attorney General, Adult Protective Services, local domestic violence or social service agencies and local elder abuse shelters. A list of elder abuse resources throughout New York State can be found at http://www.nysba.org/Sections/Elder/NYS_Elder_Abuse_Resources_Guide.html as well as on the website for the New York State Judicial Committee on Elder Justice at https://www.nycourts.gov/courts/family-violence/eji.shtml#comm.

Powers of Attorney are a critical part of the elder law attorney's toolkit and can provide significant benefits and peace of mind for clients. However, precisely because of their ubiquity and utility, it is critical that attorneys familiarize themselves with the appropriate capacity standard for executing a POA and be prepared to maximize a client's capacity and ensure a client's safety when that capacity is in question.

Endnotes

1. NY Rules of Professional Conduct, 1.14
2. N.Y. Gen. Oblig. Law § 5-1501(2)(c).
3. The New York State Law Revision Commission Report on Powers of Attorney, The New York State Law Revision Commission, January 1, 2012, pg. 28.
4. 2-19 Klipstein Drafting New York Wills 19.02.
5. A. Wiglesworth, A, Mosqueda, L, Mulnard, R, et al. (2010), Screening for Abuse and Neglect of People with Dementia. *Journal of the American Geriatrics Society*, Volume 58, Issue 3, 493-500.
6. New York State Office of Children and Family Services, The New York State Cost of Financial Exploitation Study, pg. 12, June 2016.
7. New York State Bar Association, Report and Recommendations of the Working Group on Power of Attorney, December 18, 2015, http://www.nysba.org/POAreport/ (last visited July 28, 2016.)
8. Id. At 1.14(a).
9. *Id*. Comment 1.
10. 22 NYCRR Part 1200 §1.7, Comment 1.
11. *Id*. at §1.3.
12. *Id*. at §1.1.
13. ABA Commn. on L. & Aging & Am. Psychological Assn., Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005).

Sarah J. Duval is a staff attorney with Legal Services for the Elderly, Disabled, or Disadvantaged of Western New York. Her focus is combatting and preventing elder abuse. For more information, please call (716) 853-3087 x.225 or e-mail sduval@lsed.org.

Malya Kurzweil Levin, Esq. is the Staff Attorney for the Harry and Jeanette Weinberg Center for Elder Abuse Prevention, the nation's first emergency elder abuse shelter. In this role, she represents clients who are victims of acute abuse and speaks about the legal facets and ramifications of elder abuse to a variety of audiences. Malya received her JD cum laude from Brooklyn Law School in 2012. She has written for a variety of legal publications including the NAELA Journal and the New York State Elder Law and Special Needs Journal. She is a certified Reiki energy healer.

New Member Spotlight: Antony Eminowicz

Interview by Katy Carpenter

Q Where are you from?

A I was born in London, England. I moved to Chelmsford, in a county called Essex (on the outskirts of London) when I was 14 years of age. Part London lad. Part Essex boy.

Q Where in London?

A Wembley, in northwest London. The area is renowned for its national stadium.

Q What brought you to Kingston?

A I was a practicing elder law attorney in England and I wanted to re-qualify in the U.S. Kingston was a good area in New York because this was where my wife's family was based. It was important we had a strong network of help on hand to help with our children while I went back to law school.

Q What do you like about the area and community you serve?

A It's wonderfully historic. Not a day goes by where I'm not amazed by its historical architecture, the Hudson River and the areas forests. My kids love the area, with its wildlife and numerous trees to climb! Autumn, in particular, is an incredibly beautiful time.

Q How many kids do you have?

A I have two boys: Casey and Tyler.

Q So besides London, Florida and New York, where have you traveled?

A In light of Brexit, I've travelled to much of mainland Europe…… and Britain!

Q Where is your favorite place?

A I was partial to Prague, in the Czech Republic. It was beautiful!

Q I see you run your own firm – is there special meaning behind the name of your firm "Murad"?

A It's actually my middle name. I believe it's a Persian male name. It was a choice between using my middle name or having clients continuously baffled by the spelling of my last name!

Q What does "Murad" mean?

A I believe it means "fulfillment of a vow vowed". I was flabbergasted when I found out that it had an appropriate meaning for what I try to do!

Q Tell me about your background and your work in Florida.

A I was a practicing solicitor in England. I practiced in elder law and trust and estates (in England, this line of work is called "Private Client"). My wife and I (and our 9 month old son – Tyler) moved to Florida in 2009 and I became a paralegal in an elder law office, in Sarasota, FL. Eventually, it was time to move on. I couldn't let the grass grow from under my feet - so we moved to NY and I went back to law school and try my hand at the Bar exam.

Q I understand you are the only hearing person in your family and that you are fluent in sign language - how has this helped you develop into the professional you are today?

A I advocated for the disabled long before I became an attorney. I suppose my background and upbringing was what put that "fire in my belly" about zealously representing those with special needs. As for sign lan-

guage, I am fluent in Sign Supported English. This is different to British Sign Language or American Sign Language English because SSE is signing in the order that the words are actually spoken.

Q What's your favorite part about your job?

A It's certainly fulfilling – it's nice to go home and know I've done my best to help someone in need.

Q Tell me about a project or accomplishment that you consider to be the most significant in your career.

A Being admitted to the New York Bar was a really big deal for me and my family. A lot of twists and turns took place when we moved to the U.S. right through to when I was admitted to the Bar. As for a current project, I currently serve as co-vice chair of the Special Education Committee. Attorneys in the field of elder law and special needs really should look to become a member of the committee as there is a wealth of information available that is relevant and can only help to enhance an attorney's own elder law/special needs practice.

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

A My Gran never let me forget that I wanted to be a policeman!

Q Are there hobbies you look forward to on the weekends?

A My wife is an ICU nurse at the local hospital and she works night shifts during the weekend, so it's my time with the kids. I try to take the kids somewhere different each weekend. Last Sunday we found ourselves in Bowdoin Park, in Poughkeepsie. Soccer also plays a big part in my weekend (both watching and playing).

KC – Oh, so you call it soccer?

AE – Yes, I have had to learn to adapt!

Q Have you ever been given advice that you remember?

A It's better to know what you don't know, than what you do…

Q Is there anything else you want people to know about you?

A I work of-counsel at the Cuddy Law firm on special education matters. I'm also likely the only attorney from England who actually lives and practices in special needs in New York… or at least the only one with an Essex accent!

New York NAELA Niche

By Robert P. Mascali

NY NAELA-Sponsored Report Uncovers Major Issues With Managed Long-Term Care In New York State

Elder law attorneys and advocates for the elderly and disabled have consistently voiced concerns for the past four years that "medicaid redesign" and the resulting system known as Managed Long Term Care had the potential to cause significant problems for those vulnerable individuals who are residing in the community but require some measure of assistance in order to be able to do so. The New York Chapter of the National Academy of Elder Law Attorneys, along with the advocacy organization, Medicaid Matters New York, co-sponsored a report that sheds light on the findings of an extensive study of fair hearing decisions on reductions of personal care and Consumer Directed Personal Assistance services hours by Managed Long Term Care (MLTC) plans.

The report identified every fair hearing decision posted in the New York State public online archive concerning reductions by MLTC plans, during the last six months of 2015. The more than 1000 decisions reveal a pattern of arbitrary and illegal reductions in hours of home care services. While most members win these hearings, the fear is that for every member who had the wherewithal to request, travel to, and present their case at a hearing, undoubtedly there were many who could not. The report calls on the State to restore services for these vulnerable New Yorkers, stop plans from engaging in these illegal reductions, and improve its oversight of these private plans spending public dollars.

Following is the Executive Summary from the Report and the full Report can be viewed at http://www.nytimes.com/interactive/2016/07/21/nyregion/document-Report-on-Medicaid-Home-Care-Reductions-in-New.html?_r=0

In 2015, elder lawyers and other advocates who represent consumers enrolled in Medicaid Managed Long Term Care (MLTC) plans in New York observed a sharp increase in the number of clients reporting that their MLTC plans had sought to reduce their home care services. This increase in cases raised concerns about whether these reductions violated the rights of plan members. Advocates undertook this study to examine the prevalence and extent of reductions by MLTC plans, and to assess plan compliance with procedural requirements for reducing hours of care.

This study was conducted by advocates who searched for all fair hearing decisions in the New York State Office of Temporary and Disability Assistance online Fair Hearing archive for which the issue was an MLTC plan's proposed reduction in hours of Medicaid home care services. For purposes of this report, "home care services" include both personal care services and Consumer Directed Personal Assistance (CDPA) services. Personal care services are performed by personal care aides employed by home care agencies that contract with MLTC plans. These services include housekeeping, meal preparation for special diets, and shopping, as well as assistance with activities of daily living such as bathing, dressing, grooming, toileting, walking, feeding, providing routine skin care, and assistance with administering medications. CDPA services are performed by personal care assistants hired directly by the consumer and paid by MLTC plans through a fiscal intermediary. CDPA services include all personal care services plus the performance of skilled tasks that normally would only be provided by a nurse.

Findings

The study found 1,042 decisions involving home care reductions by MLTC plans during the seven-month period, June 1, 2015 – December 31, 2015. The number of decisions issued each month increased six-4 fold from June to December 2015, with 98% of decisions involving MLTC members living in New York City.

Of the 1,042 hearing decisions, 87 percent involved proposed reductions by three MLTC plans. In order of prevalence, these plans are Senior Health Partners, VNSNY Choice, and CenterLight.

Had the proposed reductions taken effect in all 1,042 cases, the aggregate number of hours authorized in those cases would have decreased by 43 percent. Thirty-one percent of all hearings involved proposed reductions in hours between 40-49 percent.

MLTC plans prevailed in only 1.2% (13 out of 1,027) of hearings. See Figure 4, infra. MLTC members were able to thwart the plan's attempt to cut their services in 90% of all hearings, either by winning a favorable decision (26% of all hearings) or because the MLTC plan failed to appear at the hearing or withdrew its proposed reduction at the hearing (64% of all hearings). In another 8.7% of the decisions, the matter was settled by a "stipulation" in which the member—often in the absence of counsel—agreed to accept the MLTC plan's offer of a reduction in hours that was less than the plan originally proposed.

Concerns Raised by Data

A review of all of the hearings in which decisions were issued overturning the threatened reduction reveals a systemic pattern of reductions unjustified under Mayer v Wing, a federal court decision implemented by New York State regulations. This case, based on fundamental Constitutional principles of due process, prohibits a reduction in Medicaid home care services unless the agency establishes a change in medical condition or other circumstances that make the hours previously authorized unnecessary. In decision after decision, Administrative law judges found that the MLTC plans failed to

sustain their burden of proof to establish any such justification. One-fourth of the written decisions overturning the plan's determination to reduce services were based solely upon a finding that the plan failed to provide the required written notice of its proposed reduction to the 5 member. Such notice of action is the most basic due process requirement that explains the reasons for the reduction and the member's appeal rights including, in some instances, the right to continue services until a hearing decision is rendered.

Fair hearings are not an adequate remedy for this illegal pattern of reductions. MLTC members are, by definition, dependent on assistance with daily activities. For every member who had the wherewithal to request, travel to, and present their case at a hearing, undoubtedly there were many who could not. Worse yet, based on the decisions found in this study, many members never even received a notice of reduction from the plan informing them of the proposed action and their right to appeal. Instead, they were simply notified by telephone—or not at all—that the plan will be reducing their services as of a certain date. Many were likely not aware of their right to challenge the decision.

In 8.7% of all of the hearing decisions, the member accepted a partial reduction as a settlement. In one of those cases involving an unrepresented member, the final hearing decision rejected the settlement because the plan had so clearly failed to meet its burden of proof that the reduction was justified. One cannot help but wonder how many members accepted their plans' offer of only a partial reduction, fearful of losing more hours, when they could have fully prevailed on the grounds that the plan never provided notice, provided defective notice, or could not satisfy its burden of proof.

Recommendations

1. Monitoring and Public Accountability – The New York State Department of Health {DOH} should increase monitoring of plans by collecting and publishing detailed data:
   a) For the period of this report, DOH should identify how many more MLTC members than are tracked in this report faced reduc tions, assess whether the plans complied with legal requirements for the reductions, and continue to assess compliance going forward.
   b) DOH should analyze and publish data on the number of members authorized to re ceive various ranges of hours of home care, reported by all plans in the Quarterly Man aged Medicaid Cost and Operating Reports ("MMCOR"), with changes over time. This data is important to monitor whether plans are authorizing a continuum of services across a bell curve, meeting the needs of high-need consumers.
   c) DOH should annually publish plan-specific data on appeals and grievances with specific issues and outcomes.
2. DOH should take protective action to restore home care that was unlawfully reduced, including for members who agreed to accept a reduction, and ensure member rights are protected in the future. DOH should reopen cases settled by stipulation less than fully favorable to the member and review the legality of the original proposed reduction. Given the extremely high rate of instances where plans failed to provide members with basic due process rights, DOH should also audit MLTC plans to ensure that notices were provided each time a member's services were reduced or terminated, restoring benefits in any instance where such notice was not provided or was defective.
3. Hearings posted in the online Fair Hearing Archive should be redacted less so as to promote State oversight and public accountability. Key information, such as the name of the plan, the extent of the proposed reduction, and whether or not the member has legal representation should not be redacted. Decisions should also include clear information on aid continuing status and the type of plan involved (MLTC, mainstream managed care, etc.)

Since the publication of the Report, Medicaid Matters New York along with New York NAELA, has continued to pursue a strategy to advance the recommendations in the Report. Additionally, parallel litigation on the same issues—and possibly as a result of pressure from the Report—has led to some progress in the Department of Health which has issued two MLTC Policy directives that are both available at http://www.health.ny.gov/health_care/medicaid/redesign/mrt90/mltc_policies.htm

- MLTC Policy 16.07: Guidance on Task-based Assessment Tools for Personal Care Services and Consumer Directed Personal Assistance Services
- MLTC Policy 16.06: Guidance on Notices Proposing to Reduce or Discontinue Personal Care Services or Consum er Directed Personal Assistance Services

Both of these directives clarify that plans may not reduce services for arbitrary reasons and again clarify notice requirements. Policy 16.07 specifically prohibits some of the pretexts used by plans in the hearing decisions studied in the Report. The 16.07 directive clarifies that task-based assessment is not meant to be a rigid formula, but plans must take into account actual needs and availability of informal caregivers when determining the number of hours of care.

NY NAELA will continue to keep attorneys and advocates for the elderly and disabled in New York informed as progress is made in rectifying the abuses highlighted in the Report.

Robert P. Mascali is currently the president of the New York Chapter of NAELA. He is a senior consultant at the Center for Special Needs Trust Administration, Inc. which is a national nonprofit organization that administers supplemental needs trusts. Mr. Mascali is responsible for the New York and New England markets for The Center. Mr. Mascali is a member of the New York State Bar Association and its Elder Law and Special Needs and the Trusts and Estates sections. He serves on the Executive Committee and is Co-Vice Chair of the Special Needs Planning and the Legislation Committees of the Elder Law and Special Needs Section. He is also a member of Massachusetts NAELA.

Senior Member Spotlight: Matthew J. Nolfo

Interview by Katy Carpenter

Q Where are you from?

A I grew up in Kingston, New York. First capital of New York State for about 10 months until the Brits burned it to the ground. It was all downhill after that.

Q What brought you to NYC?

A College—I went to Fordham.

Q What do you like about the area and community you serve?

A Right now I work in New York City, Northern New Jersey and Westchester. The city is a vibrant business community and I enjoy the varied needs of my clients. I also enjoy my New Jersey clients.

Q Where is your favorite place you've traveled to?

A Everywhere! I love to travel with my family to the beach, whether it be in New England or down South. I also have nice family connections in Sicily established by my father. I've visited many times along with my wife. My cousin's daughter even came to stay with us last year for a month which was exciting for her and us—she loved the city! But I realized my Italian is atrocious.

Q How many kids do you have?

A We have three daughters: 14, 12 and 9. And a dog (male - but not very masculine).

Q What's your favorite part about your job?

A The interaction with clients is probably the best part. The work is interesting. I also enjoy dealing with my colleagues. There are good people in this field of law; generous, knowledgeable and caring.

Q Tell me about a project or accomplishment that you consider to be the most significant in your career.

A Hard to say—I enjoy working every day for our clients and spending time with my family.

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

A I wanted to be Larry Bird. Hands down!…but that did not work out for me, I stopped growing when I was 14! I was a little klutzy...

Q Are there hobbies you look forward to on the weekends?

A Spending time with my family. In the summer I like to garden and exercise and spend quality time with my family as well as with my parents and my sister's family and my wife's extensive family (she is the youngest of 7 children).

Q Have you ever been given advice that you remember?

A Lots of good advice. But I can't remember any of it.

Q Is there anything else you want people to know about you?

A Not really. I have a lot of interests but not a lot of time to pursue them.

Q Is there are particular comedy or comedian you enjoy the most?

A I love comedy—dry humor—like the movie "Office Space." I can also quote "Stripes" and "Caddyshack" in my sleep. My favorite comedian would have to be Bill Murray. I'm a lawyer, but if I had to go through life again I would try to be a comedy writer—something creative and comedic. I actually find that most of us have very good senses of humor.

DISABILITY RIGHTS NEW YORK

New York's Protection & Advocacy System and Client Assistance Program

FOR IMMEDIATE RELEASE

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Disability Rights New York Seeks Federal Injunction Declaring Article 17A Guardianship Unconstitutional

Albany, NY September 26, 2016 – Disability Rights New York (DRNY) filed suit in the United States District Court for the Southern District of New York, against New York State; the Unified Court System of The State of New York, Honorable Janet Difiore, as Chief Judge of the New York State Unified Court System; and Honorable Lawrence K. Marks, as Chief Administrative Justice of the New York State Unified Court System, seeking to enjoin the state from appointing guardianships pursuant to Article 17A of the Surrogate Court Procedure Act (Article 17A), because the statute violates the Fifth and Fourteenth Amendments to the United States Constitution, the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act of 1973 (Section 504).

Article 17A permits the termination of all decision making rights of only individuals with intellectual and developmental disabilities. These rights include, the right to vote, where to live, whom to associate with, what medical treatment to seek and receive, whether to marry and have children, whether to vote, and where to work. Article 17A allows for the imposition of a guardianship without ever having the person present at the hearing or with any regard to the wishes of the individual and does not provide the individual a right to be represented by counsel.

"This is an archaic law that is extremely harmful to individuals with intellectual and developmental disabilities," said Timothy A. Clune, Esq., Executive Director DRNY. "Article 17A as currently written needs to be removed from the books." DRNY is New York State's designated Protection and Advocacy System.

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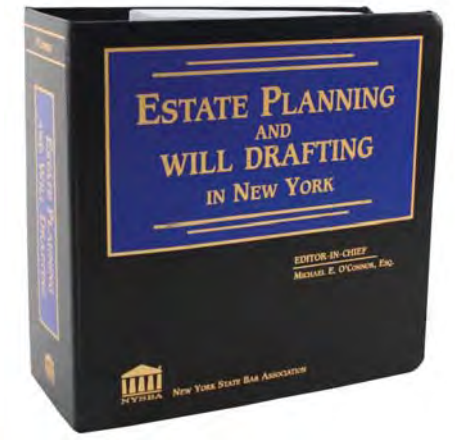
ISSN 2161-5292 (print) ISSN 2161-5306 (online)

Elder and Special Needs Law Journal

Estate Planning and Will Drafting in New York



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