NYSBA

WINTER 2013 | VOL. 23 | NO. 1

Elder and Special Needs Law Journal

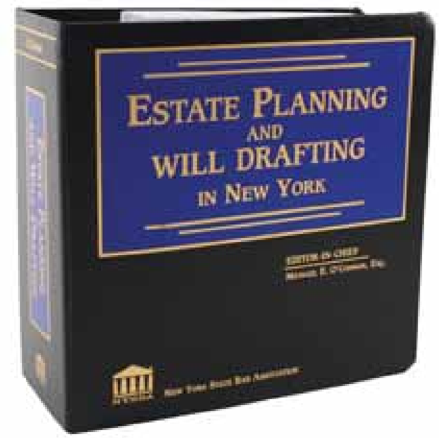
A publication of the Elder Law Section
of the New York State Bar Association

Inside

NEW YORK STATE BAR ASSOCIATION

Estate Planning and Will Drafting in New York

Section Members get 20% discount* with coupon code PUB1618N



Editor-in-Chief

Michael E. O'Connor, Esq.
DeLaney & O'Connor, LLP
Syracuse, NY

Key Benefits

- Marital Deduction / Credit Shelter Drafting
- Estate Planning with Life Insurance
- Lifetime Gifts and Trusts for Minors
- Planning for Client Incapacity

Product Description

This comprehensive text provides an excellent overview of the complex rules and considerations involved in estate planning in New York State. Whether your practice incorporates issues surrounding minors, marriage, the elderly, federal and state taxes, this text provides comprehensive guidance to attorneys. With useful practice comments, real-world examples and sample forms this text is also an invaluable practice guide for practitioners who are just entering this growing area.

Contents at a Glance

Estate Planning Overview
Federal Estate and Gift Taxation: An Overview
The New York Estate and Gift Tax
Fundamentals of Will Drafting
Marital Deduction/Credit Shelter Drafting
Revocable Trusts
Lifetime Gifts and Trusts for Minors
IRAs and Qualified Plans—Tax, Medicaid and Planning Issues
Estate Planning with Life Insurance
Dealing with Second or Troubled Marriages
Planning for Client Incapacity
Long-Term Care Insurance in New York
Practice Development and Ethical Issues

Book with Forms on CD Prices | PN: 4095C | 2006 (includes 2012 revision)
NYSBA Members $175 Non-Members $210

PN: 4095 (book only) | 2006 (includes 2012 revision) I 868 pages | loose-leaf
NYSBA Members $125 Non-Members $160

PN: 50959 (2012 revision for past purchasers) | loose-leaf
NYSBA Members $120 Non-Members $145

CD Prices | PN: 60952 | 2012
NYSBA Members $95 Non-Members $115

***Discount good until December 31, 2012.**

To order call **1.800.582.2452**
or visit us online at **www.nysba.org/pubs**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total. Prices do not include applicable sales tax.

Mention code: PUB1618N when ordering.

NYSBA

Table of Contents

Message from the Chair

As this edition of the *Elder and Special Needs Law Journal* goes to print, we have just completed a series of highly successful CLE Programs. On October 25 and 26, we had a highly informative and entertaining Fall Meeting at the Doubletree Hotel in Tarrytown, New York. With its spectacular fall foliage, the Hudson River Valley served as a magnificient backdrop for two days of excellent programs and presentations. We owe a debt of gratitude to **Tara Pleat** and **Matt Nolfo** for their hard work and efforts as program Co-Chairs, and to all of the presenters. I would also be remiss if I didn't thank **Lisa Bataille** and **Kathy Heider** and all the NYSBA staff for the fantastic job they did at the Fall Meeting. "What would we do without them?" is a refrain that has been uttered by many past Chairs.

Additionally, our co-sponsored statewide program with NYSBA entitled "Developing an Elder Law Practice" was hugely successful and extremely well attended. For years, our members have sought out more practice management programs; I am grateful and honored to have had the opportunity to help bring to fruition this statewide half-day CLE. I can assure you that organizing these programs was no small feat, and I wish to express my deep gratitude to **Bob Kurre** and **Ron Fatoullah**, the Programs Co-Chairs and to all of the local program Chairs, **Miles Zatkowsky**, **David R. Okrent**, **Tim Casserly** and **David Goldfarb**, for their efforts. As a result of the collective efforts of many, including the esteemed collection of presenters, I have been able to accomplish one of my goals as Section Chair of bringing more practice management programs to our members. I would also like to thank **Jean Nelson** of the State Bar CLE Department for his cooperation and assistance with this endeavor.

As we now begin working towards our Annual Meeting at the New York Hilton on January 23, 2013, I thought it would be an opportune time to provide you with an update of some of the many interesting matters and projects our various Committees are working on:

(a) **Mediation Committee—Judy Grimaldi** and **Laura Menzies**, the Committee Co-Chairs, have been working on a four-day basic training institute to train mediators for Elder Law and Trust and Estate issues to be scheduled for early 2013. The focus of the training programs will be to train elder law and trusts and estates attorneys to utilize mediation as part of their practice with a focus upon contested Guardianships, Estates and general family disputes concerning the elderly.

(b) **Diversity Committee**—Committee Chairs and Vice-Chairs **Elizabeth Valentin**, **Pauline Yeung-Ha** and **Deepankar Mukerji** have been working hard on a variety of projects. First and foremost they are working to help our Section meet the goals set by NYSBA President Seymour James in his Diversity Initiative. President James has asked that each Section "measure and quantify" our outreach to diverse communities of attorneys. Our participation in this Initiative is of great importance to our Section as we attempt to grow our membership and achieve diversity within the elder law bar. The committee is also working on fine-tuning its mission statement, increasing membership and publishing articles from attorneys who deal with clients from diverse cultural backgrounds.

If you have any interest in working with the Committee please contact any one of the chairs and vice chairs.

(c) **Mentorship Committee**—Committee Co-Chairs **Joan Robert** and **Tim Casserly** have done an excellent job in partnering less experienced elder law attorneys with seasoned practitioners. The Committee recently conducted a survey for all of the mentors and mentees that have participated in the program, and is looking for other experienced attorneys who wish to serve as mentors. Please contact Joan or Tim if you are interested in sharing your experience and talents with a less experienced elder law attorney.

The mentoring of younger and less experienced attorneys is an ethical obligation that we all have. I can personally tell you that mentoring a younger attorney and watching his or her career blossom is a truly fulfilling experience.

(d) **Membership Committee**—Committee Co-Chairs **Matt Nolfo** and **Ellen Makofsky** are busy working on a new initiative to encourage the creation of study groups throughout the state for our members. The Committee is in the process of preparing a questionnaire for our membership for the purpose of matching potential study group members based on their level of expertise, their practice areas within elder law and their geographical location.

If you are interested in formulating a Study group in your area and would like our assistance, please feel free to reach out to Matt or Ellen. The Committee is also launching a pilot plan to work with local bar associations to expand membership in the Elder Law Section. If you are active in a local bar association and would be interested in seeing more elder law programs and events, please reach out to Ellen or Matt.

(e) **Special Needs Planning Committee**—Committee Co-Chairs **Adrienne Arkontaky** and **Robert Mascali** have ambitious endeavors for their Committee for the years 2012-2013. They have been studiously assessing housing for the disabled, including reviewing the OPWDD "Home on your Own Program." They will be preparing a written summary of the program which will be posted on the Special Needs Planning page of the State Bar website. The Committee is also analyzing and evaluating the meaning of "sole benefit" and will be preparing a white paper highlighting recent cases, writings and actions taken by the Social Security Administration.

Additionally, they held several Special Needs Pro Bono clinics in the Spring of last year, and are working on future Special Needs Planning clinics. The Committee is also evaluating the proposal that Article 17-A should be amended to incorporate a personal needs accounting requirement. Clearly, they have taken on many challenges, which I am confident they will see through to fruition.

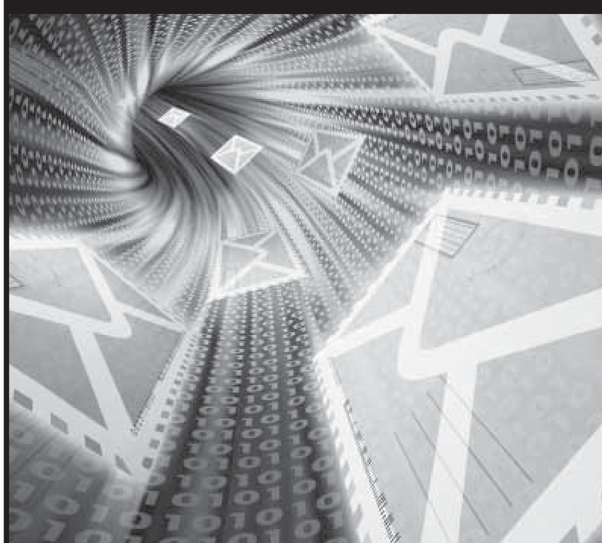
(f) **Legislation Committee**—Last but not least our Legislation Committee, masterfully co-chaired by **Amy O'Connor** and **Ira Salzman**, has prepared our list of legislative priorities for the upcoming year. After successfully spearheading our attempt to defeat the expansion of the definition of estate recovery, they have now turned their attention to amending the elective share statute to allow for the elective share to be held in a Qualifying Supplemental Needs Trust under certain circumstances.

Additionally, they are reviewing and analyzing the issue of the adoption of the Uniform Guardianship Protective Proceedings Jurisdiction Act (UAGPPJA) in the State o f New York and its potential impact upon Guardianship practice.

In conclusion, it is because of the ongoing hard work and efforts of all of our Committee that our Section has grown and thrived. Our Committees have helped make the Elder Law Section one of the most prominent and preeminent Sections within the New York State Bar Association. I urge you to actively participate in our Committees and our Section. I can assure you that it will be a professionally and personally rewarding experience.

Anthony J. Enea

Request for Articles



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

David Ian Kronenberg, Esq.
Goldfarb Abrandt Salzman & Kutzin, LLP
350 Fifth Avenue, Suite 4310
New York, NY 10118-1190
kronenberg@seniorlaw.com

Adrienne J. Arkontaky, Esq.
The Cuddy Law Firm
50 Main Street, Suite 1000
White Plains, NY 10606
aarkontaky@cuddylawfirm.com

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

www.nysba.org/ElderJournal

Message from the Co-Editors in Chief

With the coming of the new year, we celebrate our first year anniversary as Editors of the *Journal*. It has been an incredible experience thus far and we could not do this alone. As we begin 2013 we take this opportunity to acknowledge all of the authors who contributed to its success this past year. The articles covered a vast array of topics in elder law and special needs law and we continue to be impressed by the in-depth research and writing included in each submission. From the Editorial Board, the Production Editors and law student editors, the *Journal* has flourished as a result of your involvement, and we thank you.

We think of the *Journal* as the "town hall" of the Elder Law Section, and accordingly, we encourage *all* of our members to submit articles and let us know how you think we can improve the publication. This is ***your*** *Journal*. As you can see from the articles included in each issue, it is amazing what we all can learn from our colleagues. And, in addition, as authors ourselves, we can safely say that it is amazing what you can learn from writing an article. So, if you have an interesting case, practice management advice, a planning idea, or any topic that relates to elder law or special needs law, you may have the subject of a great article. Please reach out to us and contribute.

Moving forward! We have great ambitions for this coming year, such as: a write-on competition for New York law students to encourage the participation and enrollment of energetic and diverse section members; the inclusion of Committee Highlights to showcase the wonderful advocacy work they are engaged in and encourage more involvement; and to continuing to highlight and include remarkable examples of written advocacy produced by the elder and special needs law community of advocates. We will also continue to include our regular columns in the areas of Guardianships, Advance Directive News and Recent New York Cases and to add columns on topics such as tax and Medicare.

In addition, we intend to feature certain topics in upcoming issues. For example, our upcoming Spring issue of the *Journal* will focus on issues facing those with special needs, particularly special education and special needs planning. This summer, the *Journal* will concentrate on home care, investigating all of the recent changes, including an examination of the current status of the mandatory transition to Medicaid Managed Long Term Care and updates on the Medicare home care program.

Without further adieu, Season's greetings, and let's get to our Winter issue. Peter Aronson provides a detailed explanation of the NYS Partnership for Long-Term Care with case examples and planning options in his article *The New York State Partnership for Long-Term Care: An Underused Asset*. Each of us has been faced with a situation where we look to amend a trust with a Power of Attorney. Helen Galette and James Villani examine this process in light of *Perosi v. LiGreci*, in *Amending a Trust Instrument with a Power of Attorney after* Perosi v. LiGreci. Antonia Martinez and Robert Shaw write on the growing use of mediation within the fields of elder and family law, in their article *Mediation: It's Not Just When the Marriage Breaks Up*. Examining the Achieving a Better Life Experience Act (ABLE), Tara Pleat and Edward Wilcenski investigate its likely legislative impact with regards to current tax and estate planning tools in *The ABLE Act of 2011: Good Intentions, Questionable Results*. Kathryn Jerian provides the second part of a two-part article, the first of which was published in our Summer 2012 issue, focusing on the interests of the minor and his or her parent when settling a personal injury claim, in *Establishing the Chosen Settlement Vehicle*.

Our regular columnists continue to provide us with pertinent and insightful information and we thank Judith Raskin, Robert Kruger, and former editor David Okrent for the continued dedication to the *Journal*. Finally, we include another example of written advocacy regarding concerns about the mandatory transition to Managed Long-Term Care (MLTC). This letter was sent on August 29, 2012 from The Legal Aid Society, Empire Justice Center, NYLAG, CIDNY, and other consumer, disability rights and community-based organizations asking for further protections in rolling out MLTC. While the roll-out continues in full force, many of the issues and concerns raised in this letter continue in the new year. We commend these advocates for all of their hard work.

From all of us at the *Journal* we want to wish you a Happy New Year and we hope to hear from all of you soon!

David and Adrienne

The New York State Partnership for Long-Term Care: An Underused Asset

By Peter Aronson

The adult child of an elderly woman recently came to my office wanting to do long-term Medicaid planning for his mother. His mother had hoped to save more than $500,000 for her children, the child explained, possibly through an outright transfer or an irrevocable trust. If they did such planning, the child and mother were well aware that they could not apply for Medicaid nursing home coverage for at least five years because of the look-back period.

The child explained that his mom ("Client") had long-term care insurance to pay for care in the interim. I asked the child if the policy was part of New York State's Partnership for Long-Term Care. The child did not know, saying he had not heard of such a plan.

I reviewed the plan and it turned out it was part of New York State's Partnership for Long-Term Care ("NYS Partnership"), purchased by the client in 1998. The client selected the best option, the so-called total asset protection plan called 3/6/50. This is how her plan works: once she receives home care for six years, or nursing home care for three years, or a combination of the two that equals 1,095 days of care (calculated by receiving one day for each day of nursing home care and ½ day for each day of home care), the client will be eligible for *Medicaid Extended Coverage* with full asset protection.[1] This means she will receive Medicaid regardless of her assets. She will not have to do any Medicaid planning. She will not have to transfer any assets. After she uses up her allotted days under her long-term care policy, she will be eligible for full Medicaid coverage to pay for home care and/or nursing home care, should she need it. Her assets will be exempt.

However, Medicaid Extended Coverage does have income limitations. For a couple, the spousal impoverishment minimum monthly maintenance needs allowance ("MMMNA") applies, which in 2012 is $2,841. For community-based single individuals, like my client, they may keep half that amount, or $1,420.50 in 2012. If the individual is in a nursing home, they may keep only $50 a month. The amount of income exceeding those amounts must be paid to Medicaid as a spend-down.[2] But another advantage to participating in Medicaid Extended Coverage is that the Medicaid asset transfer rules *do not apply, thus my client can transfer assets away and not suffer a penalty period.* This means that she can transfer away certain income-producing assets (i.e., a brokerage account or income-producing real estate), thereby lowering her income and reducing the amount she will have to pay to Medicaid, should she need it. "In other words, as a Participating Consumer, you will not lose eligibility for Medicaid Extended Coverage because your income decreases after transferring an income-generating resource."[3]

The NYS Partnership is a terrific option for my client because her monthly income is moderate and it falls far below the cost of her monthly home care. And clearly this is a terrific option for many other New Yorkers, particularly those who are younger, because the younger the purchaser, the less expensive the cost of the policy. (The average age of a purchaser for a NYS Partnership plan is approximately 60.) However, for clients who have monthly income that exceeds the monthly cost of their home care or nursing home care, they are not eligible to receive the Medicaid Extended Coverage. Therefore, these individuals would not make good candidates for a NYS partnership plan. These individuals could explore other long-term care insurance options outside the NYS Partnership.

My client had the foresight to purchase the policy years ago and now has private long-term care insurance for up to six years. During this period, depending on the policy an individual purchases, the private reimbursement rate can range from $126.50 to $200 per day for home care or residential care (i.e. assisted living) or $253 to $400 per day for nursing home care.

Needless to say, in the case outlined above, my client and her children were extremely happy when told no asset transfers were necessary. This case raised the issue for me: Why don't more New Yorkers take advantage of the NYS Partnership? I practice in New York City, and I have found that most of my clients have never heard of the program. For clients who have substantial assets, but a fixed monthly income that will be less than the estimated cost of future care, and are under seventy years old, I believe the partnership plan is a viable option, one that certainly should be explored by many more individuals than now consider it. One thing that must be emphasized to clients is that the annual premium cost of a NYS Partnership plan, if the coverage is identical to a non-partnership plan, may actually cost less. So why shouldn't the client consider a partnership plan? Of course, each client's circumstances are different and the pros and cons must be weighed.

Recent changes to the NYS Partnership are designed to make the plans more attractive to consumers. The changes will be described below.

1. The Facts and Figures

As of June 30, 2011, there were 72,310 active policy holders in the NYS Partnership program.[4] (Approximately 1,000 additional policies are being sold in the state every quarter.) These numbers pale compared to the potential client pool in the state. According to the state's 2010 U.S. Census figures, there are 2,617,000 people over age 65 in New York State, and another 6,535,000 individuals age 40 to 64, for a total of 9,152,000 people age 40 and over in the state.[5] Yet less than one in 100 of those 9,152,000 individuals have a long-term care policy in the NYS Partnership plan.

Equally as surprising, the purchase of policies in counties throughout the state is not close to proportionate with the counties' population. The county with approximately 50 percent more policy holders than any other county in the state is Monroe County (Rochester area), population 744,000, with 9,306 policies. Erie County (Buffalo area), population 918,000, has the second most policyholders with 6,660. Compare Monroe and Erie counties with the five boroughs of New York City, population 8,184,000, with 7,982 policies, or with Nassau and Suffolk Counties, population 2,835,000, with 11,887 policy holders.[6 and 7]

A further look at the totals underlines the emphasis placed on the NYS Partnership in upstate counties: Onondaga County, with a population of 467,000, has 2,854 policyholders, the state's seventh highest total. Saratoga County, with a population of only 219,000, has 2,083 policy holders, the state's ninth highest total, and more than Queens County, with a population 10 times that of Saratoga, with only 2,057 policy holders. Kings County, the state's most populous county with 2,508,000 people, has only 1,472 policy holders.[8 and 9]

Clearly, elder care attorneys and long-term care specialists upstate focus more on the NYS Partnership then their downstate brethren.

According to NYS Partnership long-term care specialists like Sam DePaolo, a licensed broker with Genworth, based in Orange County, and Ira Weiss, a licensed broker based in Staten Island, a lot of brokers don't suggest the NYS Partnership because they simply don't understand the plans and they find it difficult to explain to clients. An excellent resource for brokers and attorneys is the NYS Partnership Website. (http://www.nyspltc.org/).

To find the insurance companies that sell policies in the NYS Partnership plan, go to: http://www.nyspltc.org/insurers.htm.

2. The Beginning and the Options

The NYS Partnership began in New York in 1993 and was among four states at the time to implement a partnership program.

> As an alternative means to fund long-term care, New York State was authorized to establish a partnership for Long-Term Care demonstration program. The program was designed to assist New York State residents in planning for the cost of long-term care and to promote personal responsibility. This program, funded in part by a grant from the Robert Wood Johnson Foundation, promoted the availability of New York State approved long-term care insurance policies issued by participating insurers to residents of New York State.
>
> The goal of the Partnership program is financial independence for consumers through shared responsibility. This means New York State will share with participating consumers in planning for their long-term care expense. If an individual/couple purchases a Partnership for Long-Term Care insurance policy and keeps it in effect, the State will protect them, if otherwise eligible, against the costs of extended care situations through the Medicaid program.[10]

There have been four insurance plan options over the years and a fifth option was just added, to be available in 2013, so there will now be three *total asset protection plans* and two *dollar-for-dollar* plans. The total asset protection plan, as described in my client's case above, means that once the private insurance benefit is exhausted, the individual is eligible for Medicaid coverage regardless of their assets. The dollar-for-dollar plan means that once the private insurance benefit is exhausted, the individual's assets equal to the amount expended under the private insurance benefit will be an exempt asset. In both cases, income rules previously described will apply.

a. Total Asset Protection Plan

The Total Asset Protection plan allows for the disregard of all of the consumer's assets in determining eligibility for Medicaid Extended Coverage. There are two old options for Total Asset Protection and the one new one:

1) Total Asset 50 policies, identified as 3/6/50 policies, provide a minimum benefit of:

   - Three years in a nursing home; or

- Six years of home care.

To be eligible for Medicaid, the policy holder must use benefits equal to *three* years of paid nursing home care or its equivalent, or six years of paid home care or a combination, with one day's credit for one day of nursing home care and a ½ day credit for one day of home care.[11]

2) Total Asset 100 policies, indentified as 4/4/100 policies, provide a minimum benefit of:

- Four years in a nursing home;
- Four years of home care; or
- Four years in a residential care facility, such as an assisted living program.

To be eligible for Medicaid, the policy holder must use benefits equal to *four* years of paid nursing home care or its equivalent. A combination of nursing home care, home care, or care in a residential facility may be used to satisfy this requirement.[12]

3) The *new* Total Asset protection plan, called 2/4/50, will provide a minimum benefit of:

- Two years in a nursing home;
- Four years of home care; or
- Four years of residential care, such as an assisted living program.

To be eligible for Medicaid, the policy holder must use benefits equal to *two* years of paid nursing home care or its equivalent, with a ½ day credit for every day of home care or residential care. A combination of nursing home care, home care, or care in a residential facility may be used to satisfy this requirement.[13]

This will be an attractive plan option for some clients because it is expected to be a less expensive policy than the other options.

b. Dollar-for-Dollar Asset Protection Plan

The Dollar-for-Dollar Asset Protection Plan allows for the disregard of the policy holder's assets up to the amount of benefits paid out by the long-term care plan on behalf of the consumer. There are two options under the Dollar-for-Dollar Asset Protection Plan.

1) Dollar-for-Dollar Asset 50, identified as 1.5/3/50, provides a minimum benefit of:

- 1½ years in a nursing home; or
- Three years of home care, where two days of home care equals one nursing home day.

To be eligible for Medicaid, the policy holder must use benefits equal to 1½ years of paid nursing home care, or, three years of home care, or a combination of the two, where one day of nursing home care counts as one day and one day of home care counts as a ½ of a day.[14]

2) Dollar-for-Dollar Asset 100, identified as 2/2/100, provides a minimum of:

- Two years in a nursing home; or
- Two years of home care; or
- Two years in a residential care facility, such as an assisted living program.

To be eligible for Medicaid, the policy holder must use benefits equal to two years of nursing home care, or a combination of nursing home care, home care and care in a residential care facility. A participating consumer may buy a partnership policy that exceeds the minimum required, but there are restrictions.[15]

Here's a summary of some key elements of the NYS Partnership plan:

- Insurance companies will notify policy holders approximately 90 days before they are eligible for Medicaid;
- There is no age restriction for participating in the NYS Partnership plan;
- In the Total Asset Protection Plan, if the policy holder is married, the spouse's resources are not counted when determining Medicaid eligibility for the policy holder;
- In the Total Asset Protection Plan, because a policy holder's total resources are exempt, the rules regarding resource transfers, the look-back period and penalty period do not apply;
- In the Total Asset Protection Plan, no lien or estate recovery may occur against a policy holder's property or estate;
- In the Total Asset Protection Plan, annuities purchased by the policy holder or their spouse are exempt;
- In the Total Asset Protection Plan and the Dollar-for-Dollar Plan, the $750,000 Home Equity Rule does not apply;
- Medicaid Extended Coverage imposes income limitations: for a couple, the spousal impoverishment minimum monthly maintenance needs allowance (MMMNA) applies, which in 2012 is $2,841. For community-based single individuals, the covered individual may keep half that amount, or $1,420.50 in 2012. If the individual is in a nursing home, they may keep only $50 a month. The amount of income exceeding those amounts must be paid to Medicaid as a spend-down. However, because Medicaid transfer rules

do not apply, the individual may transfer away certain income-producing assets to reduce his or her spenddown; and

- If an insurance company denies a claim due to failure to meet the insurer's disability standards, the policy holder may request that the NYS Partnership review the denial.[16]

3. 2012 Changes

In addition to adding the fifth plan option of 2/4/50, described above, there are three other important changes to the NYS Partnership.

1) New York State will now participate in reciprocity, although to a limited extent. The change will allow New Yorkers who have purchased a NYS Partnership Plan in New York to relocate to one of 40 other participating states and take advantage of asset protection and receive Medicaid in those states at a dollar-for-dollar level. Reciprocity will not apply for total asset protection. This means that even if an individual purchases a total asset protection plan in New York State and then moves to one of these 40 states, the individual will receive only dollar-for-dollar protection from that other state. Thus, the amount of assets protected will be only the amount expended under the individual's private long-term care plan. (It's important to keep in mind that virtually all the NYS Partnership plans purchased in New York State—98 percent, according to the NYS Partnership—are total asset plans, because consumers want full, not partial, protection for their assets, particularly when the cost of the two types of policies is not that much different).[17]

2) In the past, NYS Partnership policies required that the minimum daily benefit amount be increased annually by an inflation protection factor of 5 percent. The new rule will allow the consumer to choose an inflation protector of 3.5 percent or the 5 percent. The option of the lower inflation protector will lower the cost of the policy.[18]

3) The final change will allow insurance agents to become certified to sell NYS Partnership plans through an on-line training and certification program. For details, see: http://www.nyspltc.org/agents/index.htm.[19]

4. Factors to Consider

While I believe the NYS Partnership is not being fully utilized by New York consumers, clearly it is not a program for everyone. If individuals project a substantial monthly income in their later years when they might need care—in other words, if they believe their monthly income will more than pay for home care or nursing home care and they are unwilling or unable to transfer certain assets to reduce their income—then they would not be eligible for Medicaid coverage, so they would not want to purchase a NYS Partnership plan. The plan also might not make sense for our older clients. For example, a healthy 55-year old can purchase a 3/6/50 total asset protection plan, with $126.50 daily coverage for home care and $253 daily coverage for nursing home care, with 5 percent inflation protection, for approximately $2,600 a year. The cost for a 75-year-old would be approximately $12,000 a year. The older clients will have to evaluate whether it's cost effective for them to purchase a policy. We should emphasize to our younger clients that the NYS Partnership option, or any long-term care insurance option, is much less expensive when purchased at a younger age.

Insurance brokers reported to me in interviews that they have many clients with substantial assets (easily more than $1 million), who project a fixed, moderate income, who are purchasing partnership plans. Some individuals buy the plan for financial need, and some, the brokers say, for equal parts need and peace of mind. As elder care attorneys, we advise clients to be prepared for many scenarios, including catastrophic illness or events, even though these events for the average person are a remote possibility. An example is the all-encompassing durable power of attorney, with a few dozen modifications, to cover a plethora of scenarios, even though most scenarios are unlikely to arise for any particular individual. But we include these modifications just in case. Long-term care insurance falls into this same category. It is there *just in case*.

I believe strongly that as part of our regular client intake, whether our clients are 40 or 70, we should inquire whether the client has long-term care insurance and if not, then, if the client's finances warrant it, we should advise the client on NYS partnership options, as well as other long-term care insurance options. After all, we all have had or heard about the 50-something client who suffers a catastrophic event and needs (or will need) extensive care. Personally, I have had two cases—one client hit by a bicyclist and a second with early-onset Alzheimer's disease—who came to me after the fact. Neither had long-term care insurance and now it is too late to get it. That's why we advise clients on steps to take *just in case*. We should have a list of qualified and reputable long-term care insurance specialists available for referral. (A list of certified agents can be found at: http://www.nyspltc.org/certified_agents/.) We should advise the client that long-term care insurance is a safety net. A safety net that hopefully will never be needed, but one that will be there just in case. It is our job to advise the client on the options, so that the client can make an informed decision.

A NYS Partnership plan is not for everyone, but I believe it is a viable option for a far greater pool of New Yorkers than now consider and purchase a plan.

Endnotes

1. NYS Social Services Law, Article 5, Title 11, Section 367-f and 09 OHIP / ADM-3 (July 8, 2009).
2. GIS 10 MA / 016 (July 7, 2010), explaining Chapter 58 of the Laws of 2009, amending Section 367-f of the Social Services Law.
3. *See* New York State Partnership for Long-Term Care Consumer Participation Agreement, p. 4, found at http: / / www.nyspltc.org / publications.htm.
4. *See* www.nyspltc.org / policysales.htm.
5. 2010 U.S. Census.
6. *See* www.nyspltc.org / policysales.htm.
7. 2010 U.S. Census.
8. *See* www.nyspltc.org / policysales.htm.
9. 2010 U.S. Census.
10. *See* 09 OHIP / ADM-3 (July 8, 2009).
11. *Id.*
12. *Id.*
13. *See* Department of Financial Services, State of New York, Third Amendment to 11 NYCRR 39, Insurance Regulation 144, Minimum Standards for the New York State Partnership for Long-Term Care Program (April 26, 2012).
14. *See* 09 OHIP / ADM-3 (July 8, 2009).
15. *Id.*
16. *See* 09 OHIP / ADM-3 (July 8, 2009) and GIS 10 MA / 016 (July 7, 2010) (explaining Chapter 58 of the Laws of 2009, amending Section 367-f of the Social Services Law).
17. *See* Department of Financial Services, State of New York, Third Amendment to 11 NYCRR 39, Insurance Regulation 144, Minimum Standards for the New York State Partnership for Long-Term Care Program (April 26, 2012), available at: http: / / www.dfs.ny.gov / insurance / r_finala / 2012 / rf144a3t.pdf.
18. *Id.*
19. *Id.*

Peter Aronson operates The Law Office of Peter Aronson PLLC in Manhattan. A solo practitioner who formerly was an associate with Goldfarb Abrandt Salzman & Kutzin LLP, Mr. Aronson focuses on elder law, including Medicaid planning, asset protection, trusts and estates, probate administration, and guardianship work. He services clients throughout the New York metropolitan area. Mr. Aronson is a member of the New York State Bar Association's Elder Law and Trusts and Estates Law Sections. He also serves on the Board of Directors of LiLY (Lifeforce in Later Years), a non-profit organization on the Upper West Side of Manhattan that provides volunteer service to homebound seniors.

The author would like to thank the following individuals for their considerable input and review of this article: Ira Weiss, a licensed broker and long-term care specialist based in Staten Island; Sam DePaolo, a licensed broker and long-term care specialist based in Orange County; and Patrick Breen, a senior analyst with the NYS Partnership.

Amending a Trust Instrument with a Power of Attorney After *Perosi v. LiGreci*

By Helen Z. Galette and James M. Villani

Helen Z. Galette

In *Perosi v. LiGreci*,[1] the Supreme Court, Richmond County ruled that, absent express authority, an agent under a power of attorney could not amend a trust created prior to the execution of the power of attorney. Based on this decision, we were comfortable that the various riders we had drafted to supplement the durable statutory short-form power of attorney to account for the specific contingency, which arose in that case, were in place. While the Appellate Division, Second Department reversed the lower court's decision, and ruled that the agent had acted within her authority and could amend or revoke past estate planning devices, we still believe that we will best serve our clients if we remember to draft our powers of attorney with broad powers that encompass a variety of possible estate planning scenarios.

1. The Lower Court's Decision

In *Perosi v. LiGreci*, the settlor, Nicholas LiGreci, executed a trust in 1991 containing a provision that the trust was irrevocable and not subject to any alteration or amendment.[2] The settlor appointed his brother and accountant as trustees.[3] In April 2010, Mr. LiGreci executed a durable statutory short form power of attorney and a statutory major gifts rider, appointing his daughter as his agent. The power of attorney granted the agent "full authority to act on his behalf, as well as all the modifications listed one through eleven on the statutory form."[4] In May 2010, the agent under the power of attorney, along with all of the beneficiaries under the trust, executed an amendment to the trust removing the settlor's brother and accountant as trustees and naming the settlor's grandson as the trustee. Because the irrevocable trust was silent as to the right to amend the trust, the amendment was effectuated pursuant to EPTL § 7-1.9(a) with the agent under the power of attorney acting on Mr. LiGreci's behalf.[5]

Once the "amendment" was effectuated, the newly appointed trustee filed a petition in the Supreme Court, Richmond County seeking, among other things, an accounting from the former trustees. The former trustees cross-moved for an order setting aside and rescinding the amendment removing them as the original trustees.[6]

James M. Villani

While the lower court noted that the language contained in the trust did not permit the settlor to amend the trust, it nonetheless took cognizance of EPTL § 7-1.9(a) as the statutory mechanism by which a settlor and all beneficiaries under a trust can revoke or amend an irrevocable trust. However, the lower court questioned whether one of the beneficiaries of a trust, who was also the attorney-in-fact for the settlor, could utilize this statutory mechanism to remove a trustee. The lower court ruled that the amendment, executed by the attorney-in-fact, was ineffective. In doing so, the court focused on the fact that the statutory short form power of attorney and gift rider did not expressly grant the authority to amend or revoke "past estate planning devices, such as trusts."[7] The court opined that "furthermore, even construing the terms of the power of attorney at its broadest, the authority granted to the agent with regard to trust and estate instruments extends only to actions taken prospectively. The power of attorney executed by Nicholas LiGreci grants no authority to his agent to reform his estate planning."[8] Pursuant to this reasoning, the lower court denied the new trustee's petition, vacated the amendment, and granted the former trustees' cross-motion to have them reinstated as trustees.[9]

When reviewing this decision, we believed it to be reasoned, yet inflexible. If followed, it would create a significant onus on attorneys to draft broad provisions to deal with various scenarios that an agent may encounter under a power of attorney. While most trusts and estates lawyers would likely include language in a rider, providing an agent with unrestricted power to act with respect to trusts, including but not limited to, creating and funding, revoking or modifying, an existing or subsequently created trust, the general practitioner preparing a power of attorney for a client may not be so thorough.

2. The Appellate Division's Reversal

On July 11, 2012, the Appellate Division reversed the lower court's decision.[10] The Second Department framed the issue as follows: "On this appeal, we are asked to decide whether an irrevocable trust, which can be amended or revoked by the creator of such a trust with the written consent of the trust beneficiaries, can also be amended by the creator's attorney-in-fact."[11]

In her appeal, the petitioner argued that GOL §§ 5-1502G[12] (pertaining to estate transactions) and 5-1502N (pertaining to all other matters)[13] granted her the requisite authority to effectuate the amendment to the trust whereby the original trustees were removed. The Second Department, in reviewing the power of attorney in conjunction with GOL §§ 5-1502G and 5-1502N, determined that these provisions are limited to acts which a principal can do through an agent, stating, "Thus contrary to the petitioners' contention, neither the power of attorney nor article 15 of the General Obligations Law specifically authorizes the attorney-in-fact to amend the Trust."[14]

However, the Second Department's continued analysis into the transaction and case law pertaining to an agent's authority turned the tide in this matter. The Second Department, relying on its decision in *Zaubler v. Picone,*[15] described an attorney-in-fact as an "alter ego" of the principal. Quoting *Zaubler,* the Second Department stated, "An attorney-in-fact is essentially an alter ego of the principal and is authorized to act with respect to any and all matters on behalf of the principal with the exception of those acts, which by their nature, by public policy, or by contract require personal performance."[16]

There are only few exceptions to the powers that can be granted to an attorney-in-fact under these stated guidelines, namely, the power to execute a principal's Last Will and Testament; the power to execute a principal's affidavit upon personal knowledge; and the power to enter into the principal's marriage or divorce.[17]

Accordingly, the Second Department held that the amendment to the trust executed by the attorney-in-fact, pursuant to EPTL § 7-1.9, was permissible. The amendment was neither an act contrary to public policy nor a contractual requirement to be performed personally by the principal. The Second Department concluded that a "specific delegation" of authority was not necessary, because a presumption that a creator cannot act through his or her agent should be made by the Legislature, and not the courts.[18]

Questions arise if the decision's impact is to be considered by practitioners. Based on the Second Department's ruling, may we assume that there is a presumption that an agent can act on behalf of his or her principal based on the "alter ego" theory, as long as the exercised authority does not violate the aforementioned exceptions? Is it better not to add broad and various powers? What if a scenario is not foreseen in the power of attorney? Would agents be able to rely on the "alter ego" theory to essentially exercise broad authority on behalf of their principal, in which case a general statutory power of attorney without any modifications would be sufficient?

It is our opinion that notwithstanding the "alter ego" theory, we still believe that the prudent approach is to continue to draft broad riders / modifications to the power of attorney to encompass as many situations as possible, and as a fallback provision argue that the "alter ego" theory serves as a "catchall" to an agent's authority.

Endnotes

1. 31 Misc. 3d 594,918 N.Y.S.2d 294 (Sup. Ct., Richmond Co. 2011), rev. 948 N.Y.S.2d 629, 2012 N.Y. Slip Op. 05533 (2nd Dept. 2012).
2. 31 Misc. 3d at 595.
3. *Id.*
4. *Id.* at 596.
5. EPTL § 7-1.9(a) provides in relevant part, "(a) Upon the written consent, acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property, of all the persons beneficially interested in a trust of property, heretofore or hereafter created, the creator of such trust may revoke or amend the whole or any part thereof by an instrument in writing acknowledged or proved in like manner, and thereupon the estate of the trustee ceases with respect to any part of such trust property, the disposition of which has been revoked. If the conveyance or other instrument creating a trust of property was recorded in the office of the clerk or register of any county of this state, the instrument revoking or amending such trust, together with the consents thereto, shall be recorded in the same office of every county in which the conveyance or other instrument creating such trust was recorded." EPTL § 7-1.9(a) (McKinney 2012).
6. *Perosi v. LiGreci* at 594.
7. *Id.* at 599.
8. *Id.*
9. *Id.*
10. *Perosi v. LiGreci*, 31 Misc. 3d 594, 918 N.Y.S.2d 294 (Sup. Ct., Richmond Co. 2011), rev. 948 N.Y.S.2d 629, 2012 N.Y. Slip Op. 05533 (2nd Dept. 2012).
11. *Id.* at 3.
12. The Second Department scrutinized General Obligations Law § 5-1502G(2), which provides that with respect to estate transactions, "To the extent that an agent is permitted by law thus to act for a principal, to represent and to act for the principal in all ways and in all matters affecting any estate of a decedent, absentee, infant or incompetent, or any trust or other fund, out of which the principal is entitled, or claims to be entitled, to some share or payment, or with respect to which the principal is a fiduciary." *See*, *Perosi v. LiGreci*, 31 Misc. 3d 594, 918 N.Y.S.2d 294 (Sup. Ct., Richmond Co. 2011), rev. 948 N.Y.S.2d 629, 2012 N.Y. Slip Op. 05533, 3 (2nd Dept. 2012) (citing General Obligations Law § 5-1502G(2) (McKinney 2012)).

13. The Second Department also reviewed General Obligations Law § 5-1502N, entitled Construction—all other matters, which provides that "[i]n a statutory short form power of attorney, the language conferring general authority with respect to 'all other matters' must be construed to mean that the principal authorizes the agent to act as an alter ego of the principal with respect to any and all possible matters and affairs which are not enumerated in sections 5-1502A to 5-1502M, inclusive, of this title, and which the principal can do through an agent." *See Perosi v. LiGreci*, 31 Misc. 3d 594, 918 N.Y.S.2d 294 (Sup. Ct., Richmond Co. 2011), rev. 948 N.Y.S.2d 629, 2012 N.Y. Slip Op. 05533, 4 (2nd Dept. 2012) (citing General Obligations Law § 5-1502N (McKinney 2012)).

14. *Perosi v. LiGreci*, 31 Misc. 3d 594, 918 N.Y.S.2d 294 (Sup. Ct., Richmond Co. 2011), rev. 948 N.Y.S.2d 629, 2012 N.Y. Slip Op. 05533, 4 (2nd Dept. 2012).

15. *Zaubler v. Picone*, 100 A.D.2d 620, 473 N.Y.S.2d 580 (2nd Dept. 1984).

16. *Perosi v. LiGreci*, 31 Misc. 3d 594, 918 N.Y.S.2d 294 (Sup. Ct., Richmond Co. 2011), rev. 948 N.Y.S.2d 629, 2012 N.Y. Slip Op. 05533, 4 (2d Dept. 2012) (quoting *Zaubler v. Picone*, 100 A.D.2d 620, 473 N.Y.S.2d 580 (2d Dept. 1984); *see also*, *In re Arens v. Shainswit*, 37 A.D.2d 274, 324 N.Y.S.2d 32, *aff'd*, 29 N.Y.2d 663, 324 N.Y.S.2d 32 (1971); *Bismark v. Incorporated Vil. of Bayville*, 21 A.D.2d 797, 250 N.Y.S.2d 769 (2d Dept. 1964); *Mallory v. Mallory*, 113 Misc. 2d 912, 450 N.Y.S.2d 272 (Sup. Ct., Nassau Co. 1982).

17. *Perosi v. LiGreci*, 31 Misc. 3d 594, 918 N.Y.S.2d 294 (Sup. Ct., Richmond Co. 2011), rev. 948 N.Y.S.2d 629, 2012 N.Y. Slip Op. 05533, 5 (2nd Dept. 2012).

18. *Id.*

Helen Z. Galette and James M. Villani are longtime friends and colleagues who formed the firm of Villani & Galette, P.C., and practice in the areas of elder law, guardianships, and trusts and estates. Helen is the immediate past president of the Bay Ridge Lawyers Association and has served on the Elder Law and Grievance Committees for the Brooklyn Bar Association. James was on the Planned Giving Council of the American Cancer Society and has lectured extensively on Elder Law and Medicaid Planning matters and Charitable Giving.

Mediation: It's Not Just When the Marriage Breaks Up

By Antonia J. Martinez and Robert W. Shaw

Antonia J. Martinez

Individuals are familiar with the concept of mediation in divorce and child custody disputes as a cost-effective alternative to litigation. It can be an equally effective alternative to litigated guardianship proceedings, or to resolve heated disputes among feuding siblings with opposing views concerning where mom should reside, how much assistance dad really needs, or how money is being spent. The potential for mediation to resolve these sorts of disputes is only beginning to emerge and New York State still has a long way to go.

Mediation should be distinguished from arbitration, another form of alternative dispute resolution. Arbitration utilizes an independent fact-finder to make decisions for the parties based on the facts presented by all involved in the arbitration. The decision of the arbitrator is final and the parties to the conflict are bound to his or her decision. In mediation, the mediator does not make decisions for the parties. Instead, participants make their own decisions under the mediator's guidance.

A. Diverse Mediation Models

There are several different types of mediation and mediator styles. The *evaluative model* focuses on the law and legal questions pertinent to the matter at hand. That is, the legal issues presented will be the primary focus of the mediation. A second model in which law is not used as the means to resolve a dispute is the *transformative model*, where the mediator is there to help the parties reach agreement, but does not necessarily have a background in the subject matter of the dispute. A third and ideal model for the family conflict arena is the *facilitative model*. In the facilitative modality, the law is brought into the mediation not for the purpose of resolving the dispute, but rather to guide the parties in how the dispute will be settled in the courtroom if the parties are unable to reach an agreement. In a family dispute scenario, a mediator experienced in the field of Elder Law and Trusts and Estates Law is an asset to the resolution of the dispute.

Types of family disputes in which mediation should be considered include the following:

1. A parent is suffering from physical decline and/or early stage dementia. The children, residing in multiple states, are fighting amongst themselves or with the parent on what type of care plan should be initiated;

Robert W. Shaw

2. A now incompetent senior has a validly executed Power of Attorney appointing two separate agents who disagree on what actions will be taken. This is particularly critical where the document requires them to act jointly;
3. A parent recently died and two adult siblings are fighting over the terms and validity of the Will, resulting in delaying probate and appointment of the Estate's Executor. One of the adult children resides in the deceased parent's house and had lived with decedent until his death. The two argue over whether the house should be sold or a financial arrangement put in place allowing the adult child to continue residing in the home. The sibling who does not reside there wants to initiate a lawsuit to force a sale of the premises since the two cannot agree on the arrangement;
4. The continued effectiveness of a care plan already in existence for a senior is now in dispute. Is a home attendant sufficient or does the senior now need assisted living or nursing home care? The three adult children each have a different point of view and the senior's perspective has not been articulated during the heated arguments that have ensued among bickering siblings.

B. Underlying Interests

What is each dispute really about? Is it really about settling the estate, or is it about the resentment Susie bears towards Bill for all the years mom and dad favored Bill, and bought him expensive gifts, even though he was financially well established? Susie feels unappreciated for everything she did for her parents over the many years she was the one who lived close by, provided care, arranged medical appointments and gave of herself at the expense of her own family of three children and husband who grew resentful over her involvement. The dispute for her is not about the money in the estate but over the lack of recognition she received throughout her life.

In all of the above examples, there are multiple advantages to avoiding a courtroom as a forum for dispute resolution. Familial "issues" going back to childhood are often the real reasons behind hardened positions. These are relationship conflicts not only between parent and child, but between siblings. Mediation offers the opportunity to go beyond the surface issue and explore the family dynamics behind the problem. Mediation gives the parties an opportunity to vent, and when done successfully will go beneath the issues to uncover what the real needs are of each party, as opposed to their announced purported positions. Often, a family crisis and a stalemate preventing a resolution, stems from a failure to look at underlying needs and feelings of the parties. The courtroom is not an appropriate forum to address these underlying interests, whereas mediation gives the parties the room and time they need to hear one another's positions. An understanding of the other party's perspective can result in a shift of position once the mediation looks beyond the surface issues.

C. Efficiency of Mediation in the Elder Law and Probate Arenas

Mediation is an alternative to putting a case through the court system, where cases may be drawn out for several years, costing many thousands of dollars, and utilizing limited court resources. Time, in particular, is critical to senior citizens and the disabled. Mediation, as an alternative, offers a speedier resolution, allows the voice of the senior to be heard, and offers greater privacy as an alternative to litigation.

The benefits of family dispute mediation are both a reduction of stress to the individual parties and the chance for creative problem solving. A mediation can be conducted in a less formalized setting than a trial court, and with the help of the mediator, determine the topics of discussion, including what issues to raise and which ones can be limited. It is an opportunity for the parties to vent with greater flexibility of time than available on a court calendar.

D. Elder Law Attorneys and Mediation

Many elder law attorneys incorrectly perceive themselves as family mediators. They are not. The role of the elder law attorney is significantly different and is that of advocate who must represent his or her client with reasonable diligence.[1] It is rather the role of the mediator to facilitate a solution or set of solutions to parties ensnared in a dispute originating from competing interests that originate with family dynamics and resentments harbored over the course of many years, and sometimes decades. The elder law attorney will make recommendations to provide particular planning options, whereas the elder mediator offers a forum for each voice to be heard. The role of the elder law attorney is to bring the legal issues to resolution promptly and efficiently, whereas the mediator's role is to oversee a process that allows all parties to fully articulate their positions and exchange their personal views.

E. Elder and Probate Mediation: Is It in New York State's Future?

In New York State, given the current state of overloaded court calendars, the climate is ripe for mediation in guardianship proceedings and contested probate matters. Should New York State create a specific framework and methodology to establish criteria for mediation in certain probate proceedings? What is to be gained by such action? First, significant savings of legal expenses will inure to the benefit of the litigants. Second, mediation will conserve limited court resources. Even when mediation fails to resolve all aspects of a dispute, the issues remaining before the Court for resolution are more narrowly focused as a result. Third, the parties to the mediation, no longer constrained by the Rules of Evidence and eager to be heard, will have a forum to talk about the underlying issues that resulted in the conflict. Even in situations in which mediation fails, the litigants return to Court with a better understanding of the court process.

Mediation has been an important part of alternative dispute resolution in other states throughout the United States for many years. It is time to bring mediation to the forefront in New York for the many areas of conflict one encounters in Elder Law and in Trusts and Estates Law practice. Should New York follow other states that have initiated mediation programs such as Texas, Florida, California, Georgia, Hawaii, Arizona, Michigan, New Hampshire, Utah, and Washington? Given that New York was the very last state in our country to authorize no-fault divorce, one cannot be hopeful that such legislation will be forthcoming anytime soon. At a Symposium at Albany Law School in March 2012, New York's Chief Judge Jonathan Lippman noted the courts were contemplating strategies to reduce expenses, increase efficiency and lighten calendars.[2] The climate is ripe for the establishment of criteria in the area of trusts and estates and guardianship matters to permit litigious parties to resolve disputes with better long-term results through mediation. It is the responsibility of the bar to inform and educate the public about the opportunity and advantages afforded parties to a mediation.

Endnotes

1. N.Y. State Rules of Prof'l Conduct Rule 1.3 (2012).
2. Mark Mahoney, *Judges From Several States Seek Answers to Court Problems*, New York State Bar Association State Bar News, May/June 2012, at 28.

Antonia J. Martinez, Esq., devotes substantially all her professional time to Trusts and Estates and Elder Law matters. Ms. Martinez is Co-Chair of the Elder Law and Disabilities Committee of the New York Women's Bar Association and a member of the Executive Committee of the New York State Bar Association Elder Law Section and serves as Vice Chair of its Veteran's Benefits and Mediation Committees, and a member of the ADR in the Courts Committee of the Dispute Resolution Section of the New York State Bar Association. Ms. Martinez is a speaker at Continuing Legal Education programs as well as community programs. Her articles in *The Elder Law Times, Professional Planning for Wealth & Lifestyle Preservation* are distributed to the general public. She is a 1982 graduate of Harvard Law School.

Robert W. Shaw, Esq., is an attorney in White Plains, New York. He focuses his practice in the areas of elder law and estate planning. Mr. Shaw received his J.D. from the University of Toledo College of Law and his B.A. from Lycoming College. He is a member of the National Academy of Elder Law Attorneys (NAELA) and the Elder Law and Trusts & Estates Law Sections of the New York State and Westchester County Bar Associations. He is a member of the Mediation Committee of the NYSBA Elder Law Section.

The Achieving a Better Life Experience (ABLE) Act of 2011:[1] Good Intentions, Questionable Results

By Tara Anne Pleat and Edward V. Wilcenski

Tara Anne Pleat

On November 15, 2011, the second iteration of the ABLE Act was introduced as bill H.R. 3423 in the House of Representatives.[2] As of the writing of this article, the ABLE Act has not seen major progress and remains in Committee. Supporters of this Act describe it as a low-cost tool to help families save for future disability related expenses in a manner similar to that which is available to families planning for future educational expenditures through College Savings Plans. In the authors' opinion, while well intentioned, the ABLE Act falls short of this mark.

Introduction

Planning for clients who have children and other family members with special needs can be challenging. In many cases, these clients have the same tax and estate planning objectives as any family; however, the unique needs accompanying a disabled family member force planners to consider issues beyond traditional wills and trusts, taxation, investments and fiduciary management. With the special needs family, the focus is often on issues of guardianship, maintaining public benefits, and future access to community-based support services, issues with which most tax and estate planning professionals have limited experience. Should the ABLE Act become law, it will add yet another option for planners and family members alike.

A. Mirroring the Qualified Tuition Programs

The ABLE Act would result in an amendment to Section 529 of the Internal Revenue Code ("the Code"), which is the section of the Code governing the establishment, funding, and use of Qualified Tuition Programs (hereinafter referred to as"529 accounts").[3] There are several tax-related benefits afforded 529 accounts which would similarly apply to ABLE accounts.

First, in the context of estate and gift taxes, a contribution to a 529 account is treated as a gift to the named beneficiary of the account. Such gifts qualify for the federal gift tax annual exclusion.[4] In 2012, an individual could contribute $13,000 to a 529 account without having to file a federal gift tax return. For families who intend to use 529 accounts in connection with estate tax planning, a contribution between $13,000 and $65,000 can be made in a single year, and the donor can elect to treat the contribution as being made over a five calendar-year period for gift tax purposes.[5] This allows an individual to utilize as much as $65,000 in annual exclusions to shelter a larger contribution. Funds in the 529 account, including the future growth of the account, are removed from the donor's estate more quickly than if he or she made yearly contributions.

Edward V. Wilcenski

From an income tax standpoint, while contributions to a 529 account are not deductible for federal income tax purposes, the investments within the account are permitted to grow on an income-tax-deferred basis; as long as the withdrawals are for qualified higher education expenses, withdrawals or distributions can be made from the accounts on an income-tax-free basis.[6]

The ABLE Act would add a new provision to Section 529 stating that "ABLE programs" and "ABLE accounts" would be treated in the same manner as qualified tuition programs, whereby "qualified disability expenses" would be treated in the same manner as qualified higher education expenses.

The proposed legislation defines a Qualified ABLE Program as "a program established and maintained by a State or agency or instrumentality thereof under which a person may make contributions to an ABLE account which is established for the purpose of meeting qualified disability expenses of the designated beneficiary of the account…."[7]

B. Qualified Disability Expenses

Much like the Section 529 definition of qualified higher education expenses, the ABLE Act defines "qualified disability expenses" as "any expenses which are made for the benefit of the individual with the disability who is a designated beneficiary."[8]

The legislation goes on to itemize specific categories of expenses, namely, education, housing, transportation, employment support, health prevention and wellness, financial and legal expenses, and assistive technology expenses. The Secretary of the Treasury is required to issue regulations within six months of passage to further define these qualified disability expenses.

C. Who Is Eligible for an ABLE Act Account?

A 529 educational savings plan can be established for any individual with a social security number who is expected to incur educational expenses at some point in the future. ABLE accounts can only be established and maintained for someone who is determined to be an "Individual with a Disability." This determination must be made and / or certified on an annual basis.[9]

The ABLE Act provides that an individual of any age is considered an individual with a disability in a given year if the individual is blind or "has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[10] The ABLE Act goes on to provide that an individual shall not be treated as an individual with a disability unless the individual is (1) receiving or is qualified to receive Supplemental Security Income (hereinafter referred to as "SSI"); (2) receiving Social Security Disability benefits; or (3) files a disability certification with the Secretary of the Treasury each year.[11] Thus, if a person has not been determined eligible for SSI or Social Security Disability benefits, the disabled individual, or his or her parent or guardian, must annually provide a certification of disability, supported by the written diagnosis of a physician, to use the ABLE account.[12]

At first blush, this disability definition may seem reasonable and easily met. However, while many individuals with disabilities receive SSI or Social Security Disability income benefits, many advocates in the disability community are concerned that the ABLE Act definition will exclude individuals whose disabilities are more difficult to identify and define. For example, there is a fairly significant movement to modify how autism spectrum disorders are diagnosed and categorized.[13] Many advocates believe that this redefinition will make it harder for individuals who have an Autism Spectrum Disorder and unable to work to meet the definition of "disabled" under the SSI and Social Security Disability programs. These individuals would be forced to have their disability confirmed by a physician on an annual basis, something which a physician may be reluctant to do. The same concern exists for many individuals with mental illness, acquired head injuries, learning disabilities or are "high functioning" individuals with other disabilities. When combined with the risk of being caught by the "Payback Provision," the fear of losing disability status and the protections they afford may keep many individuals with disabilities and their families from establishing an ABLE account.

D. The Payback Provision

What is most frustrating about the commentary regarding ABLE accounts is that proponents have ignored the most costly and potentially damaging result of using the ABLE account as an alternative to the traditional Third Party Supplemental Needs Trust.

The ABLE Act contains a provision entitled "Transfer to State," which reads as follows:

> Subject to any outstanding payments due for qualified disability expenses, in the case that a designated beneficiary dies or ceases to be an individual with a disability, all amounts remaining in the qualified ABLE account, not in excess of the amount equal to the total medical assistance paid for the designated beneficiary after the establishment of the account… [must be repaid to the State Medicaid program].[14]

In other words, when a beneficiary of an ABLE account dies, the Medicaid program must be repaid from the remaining funds for the Medicaid benefits paid to the beneficiary during his or her life. This is in stark contrast to what happens upon the beneficiary's death when a traditional Third Party Supplemental Needs Trust is used to hold family assets for a family member with a disability. With the Third Party Supplemental Needs Trust, funds remaining after the beneficiary's death will go wherever the parents, or other person establishing the trust, choose—to other family members, to charity, etc. By choosing an ABLE account rather than a traditional Third Party Supplemental Needs Trust, families are unnecessarily subjecting their assets to voluntary repayment to the State.

Perhaps more alarming is the fact that this payback may be demanded by the state Medicaid program during the life of the beneficiary with the disability. The proposed legislation states that the claim can be made if he or she "ceases to become an individual with a disability." Since the determination of whether or a not a person is an "individual with a disability" is made on an annual basis, the ABLE account could be subject to claim by a state Medicaid program much earlier than the date of death. This could occur due to the termination of SSI benefits upon an individual's securing employment or a physician's refusal to recertify a beneficiary's disability in a particular year.

Explanation of this "Payback Provision" is suspiciously absent from much of the promotional materials being circulated by various national disability organizations which support the ABLE legislation. Whatever the motive for failing to publicize this confiscatory feature of the ABLE Act legislation, this omission represents a disservice to the disabled individuals and a substantial financial risk of which families should be aware.

E. Plan Limits and Impact on Means-Tested Government Benefit Programs

Section 529(b)(6) of the Internal Revenue Code requires state 529 programs to set maximum contribution limits so 529 plans do not become overfunded.[15] The same contribution limits will apply to ABLE accounts, and those limits will likely vary from state to state. In New York State that limit is currently $375,000.[16]

Section 4 of the ABLE Act provides that ABLE accounts should be disregarded when determining access to means-tested government benefit programs during any period in which the beneficiary is considered disabled.

There is one significant exception to this provision. If the disabled individual receives SSI, distributions from an ABLE account for housing expenses will not be ignored and will be considered "in kind support and maintenance" to the beneficiary. This characterization will have the effect of reducing the SSI benefit.[17] In addition, only the first $100,000 of an ABLE account is disregarded in determining financial eligibility for SSI Income beneficiaries. Thus, if an ABLE account exceeds $100,000, the monthly SSI benefit will be suspended and reinstated once the account dips below $100,000. Should the SSI beneficiary reside in a state where eligibility for SSI means automatic enrollment in the State Medicaid program, as is the case in New York State, the Act goes on to say that the suspension of SSI benefits due to a overfunded ABLE account is to have no impact on that beneficiary's Medicaid eligibility.[18] Nonetheless, the potential loss of monthly SSI benefits, which in 2012 can be up to $1,133.00 per month for disabled individuals residing in group residences, will substantially diminish the appeal of using the ABLE account for many families.

F. The Positive Aspects of the ABLE Act

As explained above, the ABLE account does not represent a viable estate planning alternative to a traditional Third Party Special Needs Trust. It subjects families to an unnecessary "Payback Provision" which is typically only seen in First Party Supplemental Needs Trusts.[19] For wealthy clients who can privately support disabled family members, SSI and Medicaid coverage may not be an issue. For such individuals, the "Payback Provision" may not be a concern. But for the overwhelming majority of families, Medicaid coverage is and will continue to be a critically important benefit, and as such, the "Payback Provision" of the ABLE account makes it a poor substitute for a Third Party Supplemental Needs Trust.

However, there is one particular subset of disabled individuals who may benefit from the use of the ABLE account: mentally competent but physically disabled individuals who have assets which exceed the SSI resource threshold of $2,000, but who do not expect to accumulate assets in excess of $100,000. Under current law, the only viable option for protecting assets without disrupting coverage is a First Party Supplemental Needs Trust,[20] which allows a Trustee to manage such funds during life, but subjects the funds to Medicaid repayment upon death. These individuals could establish ABLE accounts on their own, and could manage distributions from the accounts without the need for a Trustee. Funds in the accounts would grow on a tax-deferred basis, and distributions from the accounts would have the aforementioned tax and government benefits. The ABLE accounts would allow these individuals to retain custody and control of their own property, thereby promoting independence without sacrificing critically important services and support from government programs. As with the First Party Supplemental Needs Trust, repayment to Medicaid would typically occur at death.

It is important to remind readers that even for such individuals, the Payback Provision of the ABLE Act would still risk Medicaid repayment during life. But if the individual is willing to assume this risk in exchange for retaining control of his or her funds, the ABLE Account provides a viable alternative.

Conclusion

The ABLE Act has garnered a lot of support from Congress and disability organizations around the country. Many in the disability community believe that the ABLE Act has the momentum to pass in its current form. Should it pass, advocates and professionals should help educate families about both the benefits and the risks of ABLE accounts to enable *informed* decision making when incorporating ABLE accounts into a comprehensive Special Needs Estate Plan.

Endnotes

1. Achieving a Better Live Experience Act of 2011, H.R. 3423, 112th Cong. (2011).
2. Achieving a Better Life Experience Act of 2009 H.R. 1205, 111th Cong. (2009).
3. I.R.C. § 529 (2012).
4. I.R.C. § 2503(b) 2012).
5. I.R.C. § 529(c)(2)(B) (2012).
6. I.R.C. § 529(c)(3)(A)(i), (2012).
7. H.R. 3423 §3(a)(2), 112th Cong. (2011).
8. H.R. 3423 §(3)(a)(3), 112th Cong. (2011).

9. H.R. 3423 §3(a)(1)(C), 112th Cong. (2011).

10. *Id.*

11. *Id.*

12. H.R. 3423 §3(a)(1)(C)(iii), 112th Cong. (2011). The Disability Certification certified to the satisfaction of the Secretary of the Treasury that the beneficiary is disabled and must contain a copy of the physician's signed diagnosis. One can reasonably expect that this process will be defined in greater detail via Treasury Regulations if the legislation passes.

13. Benedict Carey, *New Definition of Autism Will Exclude Many, Study Suggests,* N.Y. Times, Jan. 19, 2012, http://www.nytimes.com/2012/01/20/health/research/new-autism-definition-would-exclude-many-study-suggests.html.

14. H.R. 3423 §3(a)(4), 112th Cong. (2011).

15. I.R.C. §529(b)(6).

16. *See* NY's 529 Savings Program, *Frequently Asked Questions,* (Sept. 6, 2012, 4:45 PM), https://uii.nysaves.s.upromise.com/content/faqs.html#11.

17. H.R. 3423 §4(a), 112th Cong (2011). Generally, whenever a third party pays for housing or food-related expenses, those payments are considered "in kind support and maintenance ("ISM")," a form of unearned income, and attributed to the SSI recipient. This results in a reduction in the individual's monthly SSI benefit. *See* POMS 00835.001.

18. H.R. 3423 § 4(b)(2), 112th Cong (2011).

19. The First Party Supplemental Needs Trust is in many ways a creature of the federal Medicaid statute, created by statutory provisions which were later incorporated into the SSI program. Congress allowed individuals with disabilities to put their own assets into a First Party Supplemental Needs Trust in order to maintain Medicaid and SSI program eligibility, but at a price. Upon the beneficiary's death, property remaining in the First Party Supplemental Needs Trust must be used to first "pay back" the state's Medicaid program for all medical assistance provided to the beneficiary during his or her life.

20. These trusts are also referred to as "self-settled" trusts, "payback" trusts, "OBRA '93" trusts, or "(d)(4)(A)" trusts (the latter two references being the common name and the relevant subsection, respectively, of the federal legislation that officially authorized their use). 42 U.S.C. § 1396p(d)(4)(A).

Tara Anne Pleat and Ed Wilcenski are founding partners of the Clifton Park law firm of Wilcenski & Pleat PLLC, a firm which concentrates in the areas of Special Needs Planning, Elder Law, and Estate Planning and Administration. Ed is past President of the Special Needs Alliance, www.specialneedsalliance.org, an invitation only, not-for-profit organization of leading disability attorneys who practice in the areas of special needs trusts, public benefits and related planning for individuals with disabilities and the professionals who serve them. Tara is a member of the Special Needs Alliance and co vice-chair of the Special Needs Planning Committee of the Elder Law Section of the New York State Bar Association.

Balancing the Interests of a Minor and a Parent Where the Minor Is the Injured Party in a Personal Injury Action Part Two: Establishing the Chosen Settlement Vehicle

By Kathryn E. Jerian

1. Introduction

Part I of this article reviewed the preliminary issues for attorneys to consider as they settle a personal injury claim for an infant. This article will provide further information for attorneys regarding the various processes involved after the court confirms an infant's settlement by order and the settlement funds either have been or are about to be distributed to the child by means of a bank deposit, supplemental needs trust ("SNT"), or annuity.[1]

As a general note, some clients may want to seek counsel of a financial advisor, depending on the complexity of the decisions involved with the settlement. Attorneys should not, of course, offer financial advice on anything more than the most basic financial decisions if they are not qualified to do so.

a. Supplemental Needs Trust

Should a supplemental needs trust be in your client's best interest, you will need to choose the trust company and should include some details of its administration fees and application materials in your motion to the Court. The attorney can suggest that the full settlement amount be deposited right away into the trust account or instead may want to have an annuity fund the trust over time. If the trust account will earn more interest than an annuity, for example, the attorney might advise the client or his or her representative accordingly. Since parents are generally required to continue to provide "necessaries, treatment and education" for their minor children,[2] despite the fact of any settlement monies, it may be advisable to keep a majority of the infant's funds in the highest interest rate vehicle until he or she reach the age of majority. Again, this may be a decision best made by a financial advisor.

Given the parents' continued obligation to support their child regardless of the infant's receipt of settlement funds,[3] the attorney should make it clear to the parents or legal representative that they should not count on many disbursements from the trust account prior to age 18. This conversation is worth having with the trust company as well so that your client is made fully aware even before the trust is established of the limitations on disbursements. If there are acceptable items the client or parents know they plan to request before the age of majority, you should discuss whether it makes sense to put those items in the proposed order. This approach gives the trustee more security in making those kinds of disbursements, which can include items like electronic equipment, vehicles, and the like.

Once the trust has been established, the client (or his or her representative) should be communicating directly with the trust company for disbursement requests.

b. Annuities

If your client has chosen an annuity, it is wise to request that the Court make the specifics of the chosen structure part of its order by means of providing the details in the body of the order as well as making the proposal an exhibit. Once the Court has ordered a structured settlement, the attorneys can finalize their previously quoted annuity and proceed with the remainder of the paperwork necessary to establish the annuity for their client.

Usually several months after the infant's representative has signed the agreements in connection with the annuity, the chosen company will forward the policy documents to the attorney or directly to the client. It is advisable for the attorney to review policy documents in the event there are any errors in the agreed-upon payout. When final policy documents are provided to the client, the attorney should advise the infant's representative that he or she should inform the annuity company of all future changes in address so that the payments will ultimately be mailed to the correct location when they are finally scheduled to begin. Depending on the age of your client at the time of settlement, if the payments will not begin until age 18, it can be many years before the first payment following settlement. Attorneys should also advise their clients to create a will after age 18, unless they want the state's intestacy laws to control who will receive remaining annuity payments in the event of the payee's premature death. At that point, the attorney's relationship with the client and the claim generally ceases.

At some point after the court's final order, an infant's parent or legal representative (or the infant client once he or she reaches the age of 18) may desire to "accelerate" the annuity payments—also called "factoring" a settlement, which is a process where the right to receive future payments is sold in exchange for a lump sum. Under New York's Structured Settlement Protection Act, an application for approval must be made to either a judge in the Supreme Court for the county where the payee resides or the court that originally approved the structure.[4] Among other things, the statute requires that the proposed transfer be "in the best interest of the payee…and whether the transaction, including the discount rate used to determine the gross advance amount and the fees and expenses used to determine the net advance amount, are fair and reasonable."[5] The Courts have generally employed a "totality of the circumstances" test to determine "best interest" absent more specific direction from the Legislature.[6] Some of the factors Courts will consider are previous factoring requests,[7] the discount rate,[8] impact on payee's long-term financial security,[9] and the welfare and support of the payee's dependents,[10] among other things.

Ultimately, this process can be administered without the attorney who achieved the personal injury settlement even being made aware of it. The factoring company can usually obtain all of the necessary documents directly from the annuity company and the infant's original attorney does not need to be notified of the proceeding. Also, and unfortunately, there is no prohibition against a parent or legal representative applying to the court for the factoring of an infant's funds prior to age 18. Although the payee's attendance is generally required at the hearing,[11] the Court is within its rights to order acceleration of the payments (or a portion thereof) if it finds that to be in the child's "best interest."

As Part I of this article briefly indicated, it is incumbent upon the attorney who settles the claim in the first instance to thoroughly inform their client of the relative finality of annuities and the problems that can arise should they attempt in the future to amend the structure.

c. Bank Deposit

CPLR Article 12 governs the requirements for the compromise of an infant, incompetent, or conservatee's claim. As indicated in Part I of this article, the Court may order that these funds be deposited into a restricted bank account, for example, with no withdrawals until further order of the Court. Specifically, CPLR § 1206(b)[12] provides that smaller settlements, those under $10,000, can simply be distributed to certain qualified individuals so long as the property is "held for the use and benefit of [the] infant, incompetent or conservatee." Otherwise, the Court has several options for approval including depositing the funds in a specified account at a bank or trust company, structuring the settlement, or investing in bonds,[13] to name a few. However, for any settlements involving infants' funds, expenditures of those funds are not to be authorized where the parents have the ability to financially support the child "and to provide for the infant's necessaries, treatment and education."[14]

If the Court orders a bank deposit, the attorney should handle establishing the account so that he or she can ensure that any restrictions placed upon the account are noted by the bank. Obviously, a copy of the Court's order should be provided to the bank with the initial paperwork. The attorney, in conjunction with the client, needs to decide who will receive statements and must also direct the client that he or she will be responsible for making future decisions regarding the maturation of certificates of deposit, for example. Although your clients will most likely have a preference of banking institution, it is recommended that the attorneys use, and have the Court order, a bank with whom they have a good business relationship so that they can ensure the account is properly administered on behalf of their clients.

2. Conclusion

Concluding the settlement of an infant's personal injury case is in many circumstances just as important as the primary litigation itself, and similarly contains important and significant decision making. As this article and its previous part demonstrate, attorneys for infants should be well-versed in the intricacies of the various settlement mechanisms, legal requirements, and available financial vehicles in order to assist their infant clients in making the best possible choices.

Endnotes

1. There are other options a Court may consider which are not discussed here, such as cash to the child's representative in certain situations or a guardianship account, for example.
2. Uniform Court Rules for the New York State Trial Courts § 202.67(g).
3. *See In the Matter of Marmol*, 168 Misc. 2d 845, 852 (Sup. Ct., New York Co.) (Feb. 16, 1996) (denying an application by a parent to use $125,000 of the infant's settlement funds for purchase of a family home holding that it would "impose upon the child the obligation of support of his parents and siblings").
4. N.Y. Gen. Ob. Law. § 5-1705.
5. N.Y. Gen. Ob. Law. § 5-1706.
6. *In the Matter of the Petition of 321 Henderson Receivables, L.P.*, 13 Misc. 3d 526 (Sup. Ct., Erie Co.) (Aug. 11, 2006).
7. *Id.*
8. *Settlement Funding of New York, L.L.C. v. Transamerica Annuity Service Corp.*, 11 Misc. 3d 1061(A) (Sup. Ct., Bronx Co.) (Feb. 6, 2006).
9. *In the Matter of the Petition of Settlement Capital Corp.*, 1 Misc. 3d 446. 455 (Sup. Ct., Queens Co.)(July 7, 2003).
10. *J.G. Wentworth Originations, L.L.C. v. Point Du Jour*, 35 Misc. 3d 1219(A) (Sup. Ct., Queens Co.)(Apr. 27, 2012).
11. N.Y. Gen. Ob. Law. § 5-1705(e).
12. *See also* Uniform Court Rules for the New York State Trial Courts § 202.67(g).
13. CPLR § 1206(c) and (d).
14. Uniform Court Rules for the New York State Trial Courts § 202.67(g).

Kathryn E. Jerian, Esq. is Assistant General Counsel for NYSARC, Inc. located in Delmar, New York. Ms. Jerian is a summa cum laude graduate of the University at Albany and a magna cum laude graduate of Albany Law School. Her article, “What’s a Legal System to Do? The Problem of Regulating Internet Pharmacies,” was published in the *Albany Law Journal of Science and Technology* in 2006. Ms. Jerian was also the 2006 recipient of the Judge Bernard S. Meyer Scholarship. She is an honorary member of the Justinian Society and is admitted to practice in all New York State Courts and the United States District Court for the Northern District of New York. She is a member of the New York State Bar Association.

Recent New York Cases

By Judith B. Raskin

A. Amendment of Irrevocable Trust by Attorney-In-Fact

Nicolas LiGreci created an irrevocable trust in 1991 naming his brother John as trustee. In 2010 he executed a durable statutory power of attorney appointing his daughter Linda as his attorney-in-fact. A month later Linda, as attorney-in-fact, executed an amendment to the trust removing the trustee and successor trustee and appointing Linda's son as trustee. All three named beneficiaries of the original trust signed the amendment. Mr. LiGreci died a few weeks later when the trust corpus consisted of a $1 million life insurance policy.

The attorney-in-fact and the new trustee filed a petition, *inter alia*, seeking from John a trust accounting and all trust assets and records. John moved to set aside the amendment, arguing that the trust was irrevocable and that he had acted properly. The Petitioners said the amendment was proper pursuant to EPTL 7-1.9.

The Supreme Court denied the petition and voided the amendment because the power of attorney only addressed matters that occurred subsequent to its execution. The court stated the power of attorney has "forward looking" powers only and that amending or revoking of an irrevocable trust is personal to the creator.

On appeal, the court held that the power of attorney provided powers sufficient to permit the amendment. The document included a gift rider and the authority to handle "all other matters." The court stated it would be up to the legislature to make the amendment of an estate plan personal to the creator.[1]

B. Court Evaluator Fees Charged to Petitioner

Simon petitioned for appointment of himself as Article 81guardian of his brother, Samuel, who was living with their sister, Helene. The petition was combined with a previous action Simon commenced for a writ of *habeas corpus*. Helene cross petitioned to be appointed guardian if a guardian was required.

Prior to the filing of the Article 81 petition, in 2004, Samuel appointed Helene as his attorney-in-fact and, in 2008, Samuel appointed Helene as his health care agent. Helene had been caring for Samuel in her home since 2007. Only one of the eight siblings agreed that Simon should be the guardian and that Samuel should be relocated.

The petition was dismissed and the power of attorney to Simon voided. In 2010, Simon arranged for Samuel to execute the power of attorney under false pretenses and the document was not properly notarized. Simon was directed, without a hearing, to personally pay the court evaluator's fee. Simon appealed.

The Appellate Division, Second Department, held that Simon failed to establish a *prima facie* case for the appointment of a guardian. Samuel was being well cared for in his sister's home. The lower court properly exercised its discretion in revoking the power of attorney and directing that Simon personally pay the fees. His motives "…were questionable, given his knowledge of the existence of the advance directives and the lack of any evidence that the AIP had suffered any manner of harm or loss…."

However, because fees were fixed without a hearing and an explanation, the issue of the fee amounts was remitted to the lower court for determination of fees and explanation of factors.[2]

C. Personal Services Agreement

Petitioner entered into a "Personal Services-Care Agreement" with her parents, Mr. and Mrs. Swartz, after moving into their home to care for them in October 2006. She was obligated under the agreement to keep contemporaneous records of her services. Her hourly rate of pay varied from $15.50 per hour to $17.00 per hour. In April 2007, Mr. Swartz entered a nursing home and applied for Medical Assistance. In February 2008, the parents sold their home and transferred $51,940.50 to Petitioner.

The Broome County Department of Social Services assessed a penalty period of 5.8 months for transfers during the look-back period including a portion of the $51,940.50. The agency said Petitioner did not have contemporaneous records of her services and her hourly rates were above the rate for a personal home health care aide in New York, which was $9.22 per hour. The Department of Health upheld the agency determination after a fair hearing.

The Appellate Division, Third Department, confirmed the decision and dismissed the appeal.[3]

D. Failure to Pay Court Evaluator Fee

Upon denying Petitioner's application for the appointment of a guardian, the court ordered Petitioner to pay the court evaluator's fee of $4,233. When payment had not been made, the court evaluator moved by order to show cause to compel payment to her. Subsequent to receiving the order to show cause, the Petitioner's attorney requested an extension of time to perfect an appeal of the decision that denied the appointment of a guardian and to delay the payment to the court evaluator pending the outcome of the appeal.

The court ordered the Petitioner to make payment within 20 days or be held in contempt. The attorney's request for the extension was deemed a further attempt to delay payment.[4]

Endnotes

1. *Perosi v. LiGreci*, 2012 N.Y. App. Div. LEXIS 5448; 2012 Slip Op. 5533 (App. Div., 2d Dep't., July 11, 2012).
2. *Matter of Samuel S.*, 2012 N.Y. App. Div. LEXIS 4954; 2012 Slip Op. 5010 (App. Div., 2d Dep't. June 20, 2012).
3. *Swartz v. NYS Dept. of Health*, 2012 NY Slip Op. 04809 (App. Div., 3d Dep't. June 14, 2012).
4. *Maria F. v. Alba P.*, 2012 NY Slip Op. 51085 (Sup. Ct. Bronx Co., June 12, 2012).

Judith B. Raskin is a partner in the firm of Raskin & Makofsky located in Garden City and practices in the areas of elder law and trusts and estates. She is a Certified Elder Law Attorney (CELA) by the National Elder Law Foundation. She maintains membership in the National Academy of Elder Law Attorneys, Inc., the Estate Planning Council of Nassau County, Inc., and the New York State and Nassau County Bar Associations. Ms. Raskin is a past Chair and current member of the Alzheimer's Association, Long Island Chapter Legal Committee. Ms. Raskin has been writing the Recent New York Cases column since 1995.

Discussion About Disbursements (Continued)

By Robert Kruger

On October 9, 2012, I argued the case of Jerrell F. before the Appellate Division, Second Department. This is the guardianship that prompted this and prior articles about disbursement issues. Since the decision will not be issued by publication date, I cannot do a victory lap or, conversely, appear in public in sackcloth and ashes.

This is a less self-justifying article than the reader might have anticipated. By this time, over two years after I was surcharged for certain disbursements made by me without judicial pre-approval, I have achieved a level of detachment that should enable me to view my own decisions critically.

The events at issue occurred in the fourth quarter of 2008. The then 6-year-old IP resided with his parents and six siblings, only one of whom was a "full" sibling in a rat-infested apartment in Brooklyn. Sometime around October 23, 2008, the father and sole breadwinner of the family, walked out on the family. The mother was not a good reporter on the date of this event; originally, she told me that the father walked out on November 23, 2012. Therefore, my ability to sequence events for the reader and for the Appellate Division is imperfect.

The mother's first calls crying destitution came in early October 2008 and involved her inability to pay auto insurance on a *non*-handicapped accessible van she purchased with her share of the medical malpractice settlement a year earlier.[1] Jerrell is wheelchair-bound and the NYC Board of Education refused to transport him to school because the wheelchair could not be safely secured. Therefore, the mother had to drive him and she needed auto insurance to do so in compliance with the law.

Predictably, the insurance issue and the position of the Board of Education were brought to my attention just days before the insurance expired. I do recall that I was uncomfortably aware that I might be rolled by the mother but I decided to pay the cost of insurance without asking the Court for pre-approval. I believed, in 2008, that I would not have been able to bring this to a judicial decision as quickly as I needed to. Both the guardianship court and the Appellate Division believe that I should have tried. Four years removed from these events, they don't recall how sluggish judicial responses were at that time. I do not believe that the pre-approval issue[2] will result in sustaining the surcharge, but fiduciaries should beware: asking first protects you and spares you the second-guessing that I have been dealing with for two years. Also, the uncertainty.

The auto insurance issue was roughly 50% of the surcharge amount—about $4,350.00. The other 50% of the disbursements requires a more convoluted explanation. These disbursements were made (largely) in November, 2008 and were predicated on my belief that the family was facing a genuine financial crisis, a belief I hold still. I do believe, however, that the guardianship court and the Appellate Division were a great deal more skeptical than I about this emergency. This surprised me because I "bought" the fact of the emergency and thought that the Appellate Division would as well.

To summarize, while I was dealing with skepticism and criticism, I was not having an easy time or enjoying the glow of the Court's embrace.

Returning to this point, the sequence was as follows. The hearing which resulted in the appointment of guardians (the mother and myself) was held in November 2007. The judgment of appointment was signed on February 8, 2008 and the commission was issued on June 4, 2008. When the calls crying poverty came in (largely November 2008) I did not want to send the mother a check payable to her order. Rather, I asked her to send me receipts for items that she paid for from her recovery, intending to reimburse her for items that the guardianship would have paid for if asked. Among the items presented for reimbursement were airfare to Disneyworld for mother and child, which mother paid for post-judgment and pre-commission, gasoline for the van, a game system and a few other items, all during this same time period.

Other bills, including reimbursement for food purchases, to avoid a National Grid turnoff notice, gasoline (again), clothes for Jerrell, reimbursed her for post-commission purchases.

No members of the Appellate Division panel were noticeably upset about this, nor were they noticeably thrilled.

Central to my thinking was the belief that a family facing a turnoff notice on December 1, 2008 was not fooling around…there was a genuine financial crisis at issue here. So I acted on the assumption that, with limited verifiable information about the financial condition of the family, a mistake in making these payments was the lesser evil than refusing to pay and forcing the family into the welfare system, with the uncertainty about response time from New York City. Actually, I felt that I was damned if I do and damned if I don't.

I (later) subpoenaed the bank records regarding the mother's recovery and could see that she dissipated her

$187,000.00 recovery in a year. She was essentially broke by August 2008 but I did not know that when I wrote the reimbursement checks in November 2008.

Please note that the payments and reimbursements made were not for the sole benefit of the IP, they benefited the IP and his family. I called these “mixed disbursements” in my Appellant Division brief and had to answer skeptical questions from one of the Appellant Division judges why it was not the parent’s obligation to support the child rather than the child’s money being used to support the family. When I asked how the parents (the mother) could support her family without funds, I don’t think that particular judge was thrilled by my answer, particularly if that judge was not convinced there was a financial emergency. I was getting static over everything, which is not to assume that the panel will affirm the guardianship court.

That is because the issue is more complex than right or wrong. The issue is one of abuse of discretion and, should the court believe that I erred, that may not rise to the level of abuse of discretion. That was the core position of my two amicus briefs filed on my behalf, one by New York NAELA (Joan Robert as author) and the other by Harvey Greenberg on behalf of court examiners.

They argued that fiduciaries are appointed to exercise discretion and to require pre-approval by the court will result in fiduciaries bucking decisions up to the court rather than risk surcharge. The courts will be increasingly burdened as a result, just as the court examiners will be reluctant to pass on annual accounts. I don’t believe that the court examiners are exposed to surcharge; rather, they will be more self-protective and more inclined to raise questions about the disbursements made by guardians as reflected in their annual accountings.

The disbursements in Jerrell’s case involve the payment of “mixed” disbursements *in the context* of an emergency, and, thus, are arguably limited to instances where there are time constraints. What of modest mixed disbursements, such as a vacation for the IP with a parent along, or a repair to a home owned by the guardianship? Will the small, mixed disbursements be referred to the court? This is an issue that needs to be reconsidered as a policy matter because, given my experience, at least, we are moving in the direction of de facto “blocked” accounts as per Article 12, CPLR.

Of course, the propriety of such disbursements are informed by parental resources. Generalizations are dangerous but one lesson from Jerrell’s case is clear: when you can, seek pre-approval of any mixed disbursements if you have any doubt about the Court’s reception of that disbursement when it appears on an annual accounting.

Endnotes

1. Predating the abandonment, Jerrell’s father may have already abandoned the family financially, if not physically.
2. The judges were also far from thrilled that the mother had purchased a non-handicapped accessible van. Let us all agree that the mother was not a candidate for mother of the year. Still, the van was the only available vehicle so, good judgment or bad, that was the vehicle available to transport the child. Purchasing a handicapped accessible vehicle requires a motion taking months and was, in fact, accomplished in July 2010.

Robert Kruger is an author of the chapter on guardianship judgments in *Guardianship Practice in New York State* (NYSBA 1997, Supp. 2004) and Vice President (four years) and a member of the Board of Directors (ten years) for the New York City Alzheimer’s Association. He was the Coordinator of the Article 81 Guardianship training course from 1993 through 1997 at the Kings County Bar Association and has experience as a guardian, court evaluator, and court-appointed attorney in guardianship proceedings. Mr. Kruger is a member of the New York State Bar (1964) and the New Jersey Bar (1966). He graduated from the University of Pennsylvania Law School in 1963 and the University of Pennsylvania (Wharton School of Finance (B.S. 1960)).

Recent Tax Bits and Pieces

By David R. Okrent

***Thomas Lane Keller et al. v. United States*; No. 10-41311; *Keller v. United States*, No. 6:02-cv-00062 (S.D. Tex. 2011)—Delayed funding of FLIP can be cured with establishing Decedent's Intent.** A $115 million estate tax refund was allowed by the 5th Circuit Court of Appeals holding that bonds were successfully transferred to a family limited partnership before the death of an individual—resulting in a valuation discount to the estate. The Court also held the estate was entitled to an interest deduction for a transaction restructured as a loan from the FLP to pay estate taxes. Maude Williams passed away in May 2000, leaving behind both a substantial fortune and incomplete estate-planning documents. Originally believing this omission precluded transfer of the relevant estate property to a limited partnership, her Estate paid over $147 million in federal taxes. The Estate later discovered Texas state authorities supporting that Williams sufficiently capitalized the limited partnership, by establishing intent to fund the partnership before her death even though the assets were not actually retitled into the limited partnership, entitling the Estate to a substantial refund. In this refund suit, the Estate claimed a further substantial deduction for interest on the initial payment, which it retroactively characterized as a loan from the limited partnership to the Estate for payment of estate taxes. The district court upheld both of the Estate's contentions and the appellate court affirmed.

***Family Trust of Massachusetts Inc. v. United States*, No. 1:11-cv-00680—Special Needs Trust Not Exempt from Tax.** In *Family Trust of Massachusetts*, the U.S. District Court for the District of Columbia concluded that a pooled-asset special needs trust was not exempt from federal income tax, finding that the trust failed to demonstrate that it operated solely for exempt purposes and that it failed to show that its net earnings didn't provide a private benefit to its founder.

IRS issues Proposed Regulations on Portability of a Deceased Spousal Unused Exclusion Amount. In **REG-141832-11 (15 June 2012)** temporary regulations issued by IRS provide guidance on the estate and gift tax applicable exclusion amount, in general, as well as on the applicable requirements for electing portability of a deceased spousal unused exclusion (DSUE) amount to the surviving spouse and on the applicable rules for the surviving spouse's use of this DSUE amount. The text of the temporary regulations also serves as the text of the proposed regulations set forth in this notice of proposed rulemaking. This document also provides a notice of public hearing on these proposed regulations.

IRS Proposed Regulations Governing Practice Before the IRS (Circular 230). REG-138367-06 (14 September 2012) proposes modifications of the regulations governing practice before the Internal Revenue Service (IRS). These proposed regulations modify the standards governing written advice and update certain provisions as appropriate. This document also provides notice of a public hearing on the proposed regulations and withdraws the notice of proposed rulemaking published on December 20, 2004, setting forth standards for State or local bond opinions.

***Bruce A. Brown et ux. v. Commissioner*, T.C. Memo. 2011-83, No. 6825-08—Income From Cancellation of Life Insurance Policy Subject to Tax.** In this case the Seventh Circuit affirmed a memorandum opinion of the Tax Court, and held that a policy owner had taxable income when a policy against which there were outstanding loans was cancelled for nonpayment of premiums. *Brown* is merely the latest case to note that the surrender or cancellation of a policy that secures a loan in excess of the owner's basis results in a taxable gain. Practitioners should be careful.

PLR 201235006—Sale of a Life Insurance Policy Between Trusts. The IRS approved the income and estate tax treatment of a sale of a life insurance policy by one trust to another, where the acquiring trust is a grantor trust deemed owned by the insured. One of the key problems with a trust-to-trust transfer is determining the proper purchase price. The selling trustee has a fiduciary duty to obtain the highest possible price, and the buying trustee has a fiduciary duty to pay the lowest possible price. Unless there is a problem with the existing trust that might cause the proceeds to be included in the insured's gross estate, there is no estate or income tax advantage to any particular sales price above gift tax value. In both PLR 9413045 and PLR 201235006, the sale's price was the interpolated terminal reserve plus the unexpired portion of the most recent premium. In neither ruling did the IRS express any concerns or dissatisfaction. PLR 201235006 is, of course, a private ruling that cannot be cited as a precedent, and it does not discuss the impact of the transfer on either gift or GST taxes, but it still provides a good roadmap on how to effect a trust-to-trust transfer, without risking adverse income or estate tax consequences. In Private Letter Ruling 201235006, the IRS concluded that the proceeds of a life insurance policy transferred between two trusts wouldn't be includable in the purchasing trust's gross estate, that the grantor's power of substitution under that trust wouldn't be viewed as an incident of ownership in the policy, and that the trust corpus wouldn't be includable in the grantor's gross estate.

***Brenda Frances Bartlett v. Commissioner*, T.C. Memo. 2012-254, No. 22669-10—Use of Turbo Tax No Defense to Understatement of Tax.** In *Bartlett*, the Tax Court concluded that the taxpayer was liable for a tax deficiency and an accuracy-related penalty and stated that she could not use Turbo Tax as excuse for misreporting her income. Petitioner admits that her income was misreported and that her taxable income was underreported. She maintains that she reported all of her income and that the mistakes made were "honest mistakes" resulting from her lack of familiarity with the TurboTax program. Petitioner claims she used the audit portion of the TurboTax program, believing the audit portion would catch any mistakes she otherwise might make.

***Joseph Mohamed Sr. et ux. v. Commissioner*, T.C. Memo. 2012-152, Nos. 13947-07, 12882-08—Lack of Qualified Appraisal Results in Denial of Charitable Deduction**. In *Mohamed*, the Tax Court concluded that a couple was not entitled to a charitable contribution deduction for property they donated to a charitable remainder unitrust, finding that appraisals made by the husband, a real estate broker and appraiser, did not satisfy the regulatory requirement for a qualified appraisal.

***Estate of George H. Wimmer et al. v. Commissioner, T.C.* Memo. 2012-157, No. 26540-07—Gifts of Interest in Limited Partnership Qualify for Annual Gift Tax Exclusion.** The Tax Court concluded that gifts of limited partnership interests made in 1996, 1997, 1998, 1999, and 2000 qualify for the Federal gift tax annual exclusion under section 2503(b). The partnership agreement generally restricted the transfer of partnership interests and limits the instances in which a transferee may become a substitute limited partner. The transfer of limited partnership interests required, among other things, the prior written consent of the general partners and 70% in interest of the limited partners. Upon satisfaction of the transfer requirements, the transferee would not become a substitute limited partner unless the transferring limited partner has given the transferee that right and the transferee: (1) accepts and assumes all terms and provisions of the partnership agreement; (2) provides, in the case of an assignee who is a trustee, a complete copy of the applicable trust instrument authorizing the trustee to act as partner in a partnership; (3) executes such other documents as the general partners may reasonably require; and (4) is accepted as a substitute limited partner by unanimous written consent of the general partners and the limited partners. Notwithstanding the transfer restrictions and limitations on partnership admission, the partnership agreement creates an exception for transfers to related parties. The partnership agreement allowed the transfer of a partnership interest by gift or as a result of a partner's death without the prior written consent of the general partners if the transfer is to or for the benefit of an incumbent partner or any related party. Moreover, the partnership agreement allowed a transferee of a partnership interest to be admitted to the partnership without the prior written consent of the general partners if the transferee was an existing partner or a related party. A "related party" meant a partner's "descendants and ancestors, or an estate or trust the sole beneficiaries of which are one or more descendants or ancestors of a Partner, a QTIP trust under Code § 2056(b)(7) or similar irrevocable trust for a Partner's spouse, provided that the remainder beneficiaries of the trust consist exclusively of the Partner's descendants or ancestors. The Tax Court reviewed the requirements of the annual exclusion under 2503(b) noting that the term "future interest," which does not qualify for the annual exclusion as compared to a present interest, included "reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which were limited to commence in use, possession, or enjoyment at some future date or time." Sec. 25.2503-3(a), Gift Tax Regs. The Court went on to note that a present interest, however, is "An unrestricted right to immediate use, possession, or enjoyment of property or the income from property." Sec. 25.2503-3(b), Gift Tax Regs. The terms "use, possess or enjoy" connote the right to substantial present economic benefit, that is, meaningful economic, as opposed to paper rights. *Hackl v. Commissioner*, 118 T.C. at 291 (discussing *Fondren v. Commissioner*, 324 U.S. 18, 20-21 (1945)). Therefore, to qualify as a present interest, a gift must confer on the donee a substantial present economic benefit by reason of use, possession, or enjoyment (1) of property or (2) of income from the property. With respect to the limited partnership interests themselves, the primary source of the donees' rights and restrictions to the use, possession, or enjoyment of the property is the partnership agreement. The donees' rights, however, are limited. For example, although limited partners may transfer their partnership interests to other partners and related parties, as described above, all other transfers are restricted unless certain requirements are met. Therefore, the donees did not receive unrestricted and noncontingent rights to immediate use, possession, or enjoyment of the limited partnership interests themselves, and, instead, the Court considered whether the donees received such rights in the income. For the Court to ascertain whether rights to income satisfy the criteria for a present interest under section 2503(b), the estate must prove, on the basis of the surrounding circumstances, that: (1) the partnership would generate income, (2) some portion of that income would flow steadily to the donees, and (3) that portion of income could be readily ascertained. See *Calder v. Commissioner*, 85 T.C. 713, 727-728 (1985);

see also *Hackl v. Commissioner*, 118 T.C. at 298; *Price v. Commissioner*, T.C. Memo. 2010-2. In September 1996, before the partnership made gifts of limited partnership interests, the partnership held publicly traded and dividend-paying stock. The partnership received its first quarterly dividend in December 1996 and continued to receive dividends for each quarter thereafter. The partnership made gifts of limited partnership interests on November 23, 1996, January 9, 1997, November 21, 1997, March 13, 1998, January 15, 1999, and January 7, 2000. Therefore, the Court noted with respect to the first prong, the estate had proven that on each date the partnership made a gift of a limited partnership interest the partnership expected to generate income. With respect to the second prong, the fiduciary relationship between the general partners and the trustee of the Grandchildren Trust showed that on the date of each gift some portion of partnership income was expected to flow steadily to the limited partners. Finally, the Court held that, with respect to the third prong, that the portion of income flowing to the limited partners could be readily ascertained. The partnership held publicly traded, dividend-paying stock and was thus expected to earn dividend income each year at issue.

Private Letter Ruling 201229005—Effect of Son's Testamentary Power of Appointment. The IRS concluded that: (1) Son's testamentary power of appointment over the principal and accrued or undistributed income of the Trust does not constitute a general power of appointment within the meaning of § 2041(b)(1); and (2) The existence, exercise, failure to fully exercise, or partial or complete release of Son's power to appoint the principal and accrued or undistributed income of the Trust will not cause the value of the property in the Trust to be included in Son's gross estate under § 2041(a). On date, Settlors established an irrevocable trust for the benefit of their two children. Pursuant to the terms of the trust, immediately upon the trust's creation, the trustee was to divide the trust estate into two equal separate shares, one for daughter and one for Son (Trust). The separate share for the benefit of Son was the subject of this letter ruling. Under Article 2.2.1 of the Trust, until the death of the survivor of Settlors, a special trustee had discretion to distribute principal and income to Son, Son's spouse, Son's issue, and the spouses of Son's issue (collectively, Beneficiaries). Under Article 2.3, after the death of the survivor of Settlors, the trustee may distribute the principal and income of the Trust to Beneficiaries for their health, education, maintenance, and support. A special trustee also has discretion to distribute the principal and income of the Trust to Beneficiaries. Under Article 2.3.3 of the Trust, upon Son's death, the trustee was instructed to distribute the principal and any accrued or undistributed income of the Trust to one or more of the group consisting of the "Settlors' issue," and on such terms and conditions, either outright or in trust, as Son shall appoint by a written instrument delivered to the trustee during Son's lifetime. Any balance of the Trust remaining and not effectively appointed by Son upon Son's death was to continue to be held by the trustee pursuant to the other provisions of the Trust.

***Estate of Bernard Shapiro et al v. United States*, No. 08-17491—Ninth Circuit Allows Estate Tax Deduction for Palimony Claim.** The 9th Circuit Court of Appeals concluded that the decedent estate's claim was entitled to deduct the value of a palimony claim. Palimony is the division of financial assets and real property on the termination of a personal live-in relationship wherein the parties are not legally married. Bernard Shapiro and Cora Jane Chenchark lived together for twenty-two years, but they never married. Over those twenty-two years, Chenchark cooked, cleaned, and managed their household. When they broke up, she filed a palimony suit against him in state court. While the suit was pending, he died. In the context of this tax refund lawsuit filed by Shapiro's estate, the district court held that Chenchark's homemaking services did not, as a matter of law, provide sufficient consideration to support a cohabitation contract between Shapiro and Chenchark, and that, therefore, an estate tax deduction for the value of Chenchark's claim was properly disallowed. Because the district court's holding was premised upon a misconstruction of Nevada law regarding contracts between cohabitating individuals, it was reversed.

PLR 201231014 (9 May 2012)—Transfer of Trust Assets Is Not Self-Dealing. In Private Letter Ruling 201231014, the IRS concluded that the transfer of assets from a charitable lead unitrust (CLUT) to two successor trusts will not result in the imposition of private foundation termination tax and will not constitute self-dealing.

PLR 201228012 (27 March 2012)—Father's Transfer of Stock to Children Not Motivated by Tax Avoidance. In Private Letter Ruling 201228012, the IRS concluded that a father's proposed transaction to give some of his shares of his corporation's stock to his two children, followed by the corporation's redemption of his remaining shares, was not motivated by the avoidance of federal income tax under section 302(c)(2)(B).

***Edith Schlain Windsor v. United States*, No. 1:10-cv-08435—District Court Allows Estate Tax Refund to Same-Sex Surviving Spouse**. In Windsor, the U.S. District Court for the Southern District of New York concluded that the definition of marriage in the Defense of Marriage Act violates the equal protection clause and, as such, the surviving same-sex spouse of the decedent is entitled to a refund of estate taxes paid on her deceased spouse's estate that would not have been owed if she had been allowed to claim a marital deduction. DOMA was enacted and signed into law in 1996. The challenged provision, section 3, defines the terms "marriage" and "spouse" under federal law. It provides: In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

***United States v. Robert S. MacIntyre et al.*, No. 4:10-cv-02812—District Court Finds Executor & Trust Liable for Estate Taxes**. In *MacIntyre*, the U.S. District Court for Southern District of Texas concluded that both the trustee of a living trust and an estate's executor were individually liable for amounts they distributed without paying gift taxes on an indirect gift and jointly liable for trust funds set aside in violation of the government's priority status.

David R. Okrent, Esq., is a CPA and Managing Attorney of the Law Offices of David R. Okrent. David is currently serving as the Tenth District (Long Island) delegate of the Elder Law Section of the New York State Bar Association. He is also the immediate past Co-Editor-in-Chief of this publication and a past Vice Chairman of its Estate Tax and Planning Committee. He is a past Co-Chair of the Suffolk County Bar Association's Legislation Review Committee, Elder Law Committee, and Tax Committee and is an advisory member to its Academy of Law. He is a member of the National Academy of Elder Law Attorneys, was a past longtime Chairman of the Long Island Alzheimer's Foundation's Legal Advisory Board, and is a former IRS Agent.

Ad Hoc Coalition of Consumer Advocacy Organizations in New York State

VIA ELECTRONIC MAIL

August 28, 2012

Cindy Mann, Deputy Administrator & Director (Cynthia.mann@cms.hhs.gov)
Barbara Edwards (barbara.edwards@cms.hhs.gov)
Suzanne Bosstick (Suzanne.bosstick@cms.hhs.gov)
Jessica Schubel (Jessica.schubel@cms.hhs.gov)
Centers for Medicare & Medicaid Services
Center For Medicaid & CHIP Services
7500 Security Boulevard, MS S2-01-16
Baltimore, Maryland 21244-1850

Dear Ms. Mann et al,

We are writing on behalf of a coalition of disability rights and seniors' rights advocates and community-based organizations in New York State regarding New York's application for expansion of its 1115 Medicaid Waiver to include mandatory enrollment of Dual Eligibles who receive community-based long-term care services into Managed Long-Term Care (MLTC) plans. We have been working with the State to meet the laudable goals of this program and it is in this spirit that we write to you now.

We urge CMS to ensure that there is appropriate time to educate consumers and their advocates, implement consumer protections (some of which we detail below and others we communicated in our December letter to CMS, which is attached hereto) and ensure plan compliance with all program requirements before this program is implemented. Below we suggest that the program only include new applicants in its first year. If it does include current service recipients, at a minimum, we believe that a six-month transition period, rather than the proposed 30-day period, is critical to protect the most vulnerable high-need consumers when they shift into this new system.

This ambitious program imposes massive changes to an already complex system used by tens of thousands of consumers and their families and advocates. Now, individuals who depend on personal care services they have received for years are receiving notices that they must select an entirely new method of receiving services within 60 days or they will be auto-assigned -- some as soon as September 6th. Needless to say, they are confused, upset and do not understand what is happening. The packet of information being sent with the notice provides a summary description of the different models and lists of individual plans to choose from. Not only are individuals daunted by the distinctions between the "partially capitated" plans and "fully capitated" PACE/Medicaid Advantage Plus models that they don't understand, there is no concrete advice on choosing between individual plans within the models. Although the packet includes the telephone number of New York Medicaid Choice, this is insufficient to meet the needs of 30,000 high-need enrollees.

In December 2011, we submitted extensive comments to CMS regarding our concerns that the State had not provided sufficient safeguards to ensure that enrollees receive needed services in the community and avoid institutionalization.[1] We write again to ask that critical protections be expanded before implementation of the waiver program, in light of serious continuing concerns about consumer protections and lack of readiness to ensure a smooth transition.

- **The implementation should begin only with new applicants**, in order to publicize and test the new procedures and systems before shifting over 30,000 current stable personal care recipients to this new and untested program in the next few months, and another 50,000 next year.

- **Alternatively, the transition period should be expanded to a six-month safe harbor**, at least for those vulnerable individuals currently receiving 12 or more hours per day five or more days per week. The 30-day transition period in the State's proposal is not enough. As proposed, the plan is only required to continue the previous plan of care for someone currently receiving personal care services until they reassess the consumer's needs, which they must do in 30 days. Thus an individual who has received 24-hour/day care for ten years could be reassessed within a week of being assigned to an MLTC plan, and could have services sharply reduced immediately. While there are appeal rights, this is an entirely new system, and as stated below, the appeal rights are reduced from those which have existed. Providing a six-month safe harbor would allow time for the confusion of the initial months of mandatory enrollment to calm down, for consumers, their advocates. It would also allow time for plans to learn and adapt to the new systems, and ensure that vital services are not interrupted resulting in unnecessary institutionalization.

- **Fair hearing procedures must comply with due process rights guaranteed by the Fourteenth Amendment of the Constitution**, as interpreted in *Goldberg v. Kelly,* 397 U.S. 254 (1970). This must include the right to continue receiving long-term care services unchanged while a fair hearing is pending regarding the MLTC plan's proposed reduction or termination of these services, and timely and adequate notice of the proposed action. Many consumers transitioning to MLTC have received stable personal care services for years and even decades, because their chronic conditions have not changed. As proposed, an MLTC plan may reduce or even terminate these long-term services, and need not continue them while a hearing is held and decided, simply because an arbitrary "authorization period" for these services happened to expire. The right to a pre-termination hearing is the most fundamental requirement of due process as interpreted by the United States Supreme Court. See letter of December 2011 attached.

---

[1] December 2011 Letter attached and posted at http://wnylc.com/health/download/296/ .

- **Advance public information explaining these changes is vital**, such as articles in newspapers, public meetings in various parts of the state on the changes, or clear, consumer-friendly online information. The State has said it will conduct such education once it receives approval from CMS. However, as you know, the State is moving ahead to enroll over 30,000 NYC personal care recipients into MLTC plans as early as September 6th and in the next few weeks and months. The State's only online information is generally inaccessible to the public. One must find this webpage and then know to scroll down to MRT Number 90 – http://www.health.ny.gov/health_care/medicaid/redesign/supplemental_info_mrt_proposals.htm. In this void, some consumer organizations have posted information online[2] and conducted training programs for dozens of community-based organizations whose staff help consumers. But these organizations lack the resources to educate the thousands of people who need this information – much of which is still undefined. The State only recently (on August 17th and 24th) posted its first "Q & A's" online, answering only some of the many questions posed over the last few months.

- **State oversight must be expanded**. Before reducing or terminating 24-hour/day home care services previously authorized, and before placing a member in a nursing home, in order to avoid the grave risk of harm, plans should be required to report these cases to the State and to a designated independent ombudsprogram or advocacy organization, and afford time for investigation and representation. The State proposal lacks sanctions on plans with high rates of nursing home, hospital or adult home placements or low amounts of home care.[3] Only if the consumer manages to file a complaint or grievance, which requires learning an entirely new system that has not been publicized, might the issue come to the State's attention.

Most of the concerns raised in our December 2011 letter remain – and new ones have emerged as the daunting complexity of this roll-out becomes more evident. The State's process has lacked sufficient stakeholder inclusion. The weekly or bi-weekly "stakeholder conference calls," during which the State gives updates to hundreds of people, are not a substitute for active ongoing workgroups on key topics, such as rate-setting, quality, oversight, consumer rights, network adequacy, and contracts. Although the State has indicated that it will be creating some workgroups in the future, this should have been done before the roll-out. We do acknowledge having input on the language of the notices being sent to consumers[4] and individual discussions with policy makers, but

---

2 See http://wnylc.com/health/news/37/ and http://www.ltccc.org/MandatoryManagedCare.shtml .

3 As an example of inadequate oversight, the State has not addressed warning signs that some plans may not be authorizing sufficient hours of home care, evident from quarterly cost reports filed by the plans, which were obtained through freedom of information requests. See, e.g. Home Health Care and Personal Care Services Hours Provided by MLTC and PACE Plans in NYS (2010), compiled from MLTC Cost Report Data for CY 2010, posted at http://wnylc.com/health/afile/169/324/. See also http://wnylc.com/health/afile/169/325/.

4 The notices and brochures fail to explain all consumer options and exemptions from mandatory enrollment, such as that consumers may still enroll in the Lombardi (long term home health care) 1915(c)

more input is needed to ensure success of the program. In some key areas, such as "continuity of care" requirements to ensure that plan contracts with home care agencies to ensure that consumers keep their long-time home care aides, there is still ambiguity and confusion.

We are also particularly concerned about the need for financial incentives, contractual requirements and oversight to offset the inherent incentive in the capitation model for plans to avoid giving costly services. We submitted concrete proposals to the State in March 2012 to incentivize community-based care and prevent diversion of high-need members to nursing homes. See http://wnylc.com/health/download/304/. These proposals are vital to enforce *Olmstead's* mandate to provide services in the most integrated setting. Although the State met with us once to discuss our proposals, they have not made any significant changes.

Those most at risk are the approximately 5000-7000 people who, because of chronic health conditions, have been receiving 12-24-hour/day personal care services through the existing Medicaid prior authorization system in New York City. Many of them have received these services for years and even decades. Incentives and safeguards are needed to ensure that plans continue to provide the services needed to prevent nursing home placement. As stated above, the right to appeal a plan's decision to reduce or terminate long-term services is rendered meaningless if the consumer has no right to continue to receive these services unchanged pending a State hearing, *and* if the consumer must exhaust the plan's internal appeals before seeking a State fair hearing.

***Olmstead* is implicated not only in the lack of monitoring and safeguards, and in curtailed appeal rights, but in the inadequate ADA compliance plans** submitted by the plans that show a serious lack of compliance with the ADA. One of the undersigned organizations, the Center for Independence of the Disabled/NY, has analyzed these compliance plans. Among its findings are that MLTCs are not providing adequate notice of the right to reasonable accommodations, examples of those accommodations, and the right to appeal failure to provide accommodations. Plans are not all providing training to staff regarding member rights under the ADA. The plans cite agencies that no longer exist (and haven't for years) as providing assistance with accommodations. They confuse the provision of Medicaid services required by contract with provision of accommodations. Some of the plans omit mention of accommodations to some groups altogether. They do not provide information on their procedures. The information on provider compliance with the ADA is scant.

Support for Community First Choice Option & Ombuds program – While there are clearly grave concerns about the expedited implementation on mandatory MLTC, the State is simultaneously pursuing positive reforms that will have a direct impact on MLTC and the consumers enrolled in MLTC. We commend the State for pursuing the Community First Choice Option, 1915(k), to expand personal assistance services and streamline the service delivery system to support people regardless of age or diagnosis in

---

waiver program, instead of an MLTC program. Nor do they explain that people in consumer-directed personal assistance programs are not yet required to enroll.

the community. We are also pleased that the State recognizes the need for an independent, statewide ombudsman program for people with disabilities and multiple chronic illnesses as these populations get mandatorily folded into managed care.[5] However, we are concerned that the State does not see the ultimate connection to advancing these initiatives that support people's rights, and the potential problems with MLTC that could prove to violate the Olmstead decision.

Please let us know if there are any other ways that we can help to ensure that the State's MLTC initiative is a success for all stakeholders.

Sincerely,

Susan Dooha, Esq., Director
Center for Independence of the Disabled, NY
841 Broadway
New York, NY 10003
(212) 674-2300
sdooha@cidny.org

Roberta Mueller, Esq.
Co-Director, Disability Justice Program
New York Lawyers for the Public Interest
151 West 30th, 11th Floor
New York, NY 10001
(212) 336-9312
Rmueller@nylpi.org

Liliana Vaamonde, Esq.
Director, Health Law Unit
The Legal Aid Society
199 Water St. 3rd Fl.
New York, NY 10038
(212) 577-3394
lkvaamonde@legal-aid.org

Toby Golick, Esq.
Clinical Professor of Law & Director
Cardozo Bet Tzedek Legal Services Clinic
Cardozo Law School
55 Fifth Ave.
New York, NY 10003
(212) 790-0240
Tgolick@yu.edu

Benjamin Taylor, Esq.
Senior Staff Attorney
New York Legal Assistance Group
7 Hanover Square, 18th Floor
New York, NY 10004
(212) 613-5069
btaylor@nylag.org

Trilby de Jung, Esq.
Empire Justice Center
One West Main Street #200
Rochester, NY 14614
(585) 295-5722
tdejung@empirejustice.org

---

[5] New York State 1115 Medicaid waiver proposal submitted August 6, 2012, "Ombudsperson Program – Supporting Choice," page 68.

On behalf of the following organizations:

504 Democratic Club
Alzheimer's Association, New York City Chapter
Bronx Independent Living Services
Brooklyn Center for Independence of the Disabled
Cardozo Bet Tzedek Legal Services
Center for Disability Advocacy Rights
Center for Disability Rights
Center for Independence of the Disabled, NY (CIDNY)
Commission on the Public's Health System
Disabled In Action
Empire Justice Center
JASA/Legal Services for the Elderly in Queens
The Legal Aid Society
Legal Services NYC - Bronx
Legal Services NYC, Brooklyn Branch
Lenox Hill Neighborhood House
Long Term Care Community Coalition
Medicaid Matters NY
Medicare Rights Center
Metropolitan Council on Jewish Poverty
MFY Legal Services, Inc.
New York Legal Assistance Croup
New York Lawyers for the Public Interest
United Spinal Association

cc: Jason Helgerson, New York State Medicaid Director, jah23@health.state.ny.us
Mark Kissinger, New York State Dep't. of Health, mlk15@health.state.ny.us
MLTC Implementation Workgroup, mltcworkgroup@health.state.ny.us
Henry Claypool, HHS Administration on Community Living

Enclosure: Letter from Legal Aid Society, NYLPI, and Cardozo Bet Tzedek Legal Services to Victoria Wachino at CMS (December 27, 2011)

Section Committees and Chairs

Client and Consumer Issues
Michel P. Haggerty
Law Office of Michel P. Haggerty
37 West Market Street
Rhinebeck, NY 12572-1417
haggerty@haggertylawoffices.com

Shari S.L. Hubner
Van DeWater and Van DeWater, LLP
85 Civic Center Plaza, Ste. 101
P.O. Box 112
Poughkeepsie, NY 12602
hubnerlaw@verizon.net

Diversity
Elizabeth Valentin
Littman Krooks LLP
399 Knollwood Road, Ste. 115
White Plains, NY 10603-1900
evalentin@littmankrooks.com

Tanya M. Hobson-Williams
Law Office of Tanya Hobson-Williams
253-15 80th Avenue, Ste. 211
Floral Park, NY 11004
hobson666@aol.com

Estate Administration
Laurie L. Menzies
Pfalzgraf Beinhauer & Menzies LLP
455 Cayuga Road, Ste. 600
Buffalo, NY 14225
lmenzies@pbmlawyers.com

Salvatore M. DiCostanzo
McMillan, Constabile, Maker
& Perone, LLP
2180 Boston Post Road
Larchmont, NY 10538
smd@mcmplaw.com

Estate and Tax Planning
Robert J. Kurre
Kurre Levy Schneps LLP
1010 Northern Boulevard, Ste. 232
Great Neck, NY 11021
rkurre@klsllp.com

Salvatore M. DiCostanzo
McMillan, Constabile, Maker
& Perone, LLP
2180 Boston Post Road
Larchmont, NY 10538
smd@mcmplaw.com

Ethics
Richard A. Marchese Jr.
Woods Oviatt & Gilman LLP
700 Crossroads Building
2 State Street
Rochester, NY 14614
rmarchese@woodsoviatt.com

Judith B. Raskin
Raskin & Makofsky
600 Old Country Road, Ste. 444
Garden City, NY 11530-2009
jbr@raskinmakofsky.com

Financial Planning and Investments
Donna Stefans
Stefans Law Group P.C.
137 Woodbury Road
Woodbury, NY 11797
dstefans@sa-tax.com

William D. Pfeiffer
Girvin & Ferlazzo, PC
20 Corporate Woods Blvd
Albany, NY 12211
wdp@girvinlaw.com

Guardianship
Anthony J. Lamberti
435 77th Street
Brooklyn, NY 11209
ajlesq@alamberti.com

Robert Kruger
Law Office of Robert Kruger
232 Madison Avenue, Ste. 909
New York, NY 10016
rk@robertkrugerlaw.com

Health Care Issues
Judith D. Grimaldi
Grimaldi & Yeung, LLP
9201 Fourth Avenue, 6th Fl.
Brooklyn, NY 11209
Jgrimaldi@gylawny.com

Miles P. Zatkowsky
Dutcher & Zatkowsky
1399 Monroe Avenue
Rochester, NY 14618
miles@dutcher-zatkowsky.com

Legal Education
Sharon Kovacs Gruer
Sharon Kovacs Gruer, PC
1010 Northern Boulevard, Ste. 302
Great Neck, NY 11021
skglaw@optonline.net

T. David Stapleton Jr.
Karpinski Stapleton Galbato
& Tehan, PC
110 Genesee Street, Ste. 200
Auburn, NY 13021
david@ksgtlaw.com

Legislation
Ira Salzman
Goldfarb Abrandt Salzman
& Kutzin LLP
350 Fifth Avenue, Ste. 4310
New York, NY 10118
salzman@seniorlaw.com

Amy S. O'Connor
McNamee, Lochner, Titus
& Williams, P.C.
P.O. Box 459
Albany, NY 12201-0459
oconnor@mltw.com

Liaison to Law Schools
Margaret M. Flint
John Jay Legal Services
Pace Law School
80 North Broadway
White Plains, NY 10603-3711
gflint@law.pace.edu

Peter J. Strauss
Epstein Becker & Green, P.C.
250 Park Avenue, Ste. 1200
New York, NY 10177-0077
advocator66@gmail.com

Mediation
Judith D. Grimaldi
Grimaldi & Yeung, LLP
9201 Fourth Avenue, 6th Fl.
Brooklyn, NY 11209
Jgrimaldi@gylawny.com

Laurie L. Menzies
Pfalzgraf Beinhauer & Menzies LLP
455 Cayuga Road, Ste. 600
Buffalo, NY 14225
lmenzies@pbmlawyers.com

Medicaid Benefits
Rene H. Reixach Jr.
Woods Oviatt Gilman LLP
2 State Street, Ste. 700
Rochester, NY 14614
rreixach@woodsoviatt.com

Valerie J. Bogart
Selfhelp Community Services Inc.
520 Eighth Avenue, 5th Fl.
New York, NY 10018
vbogart@selfhelp.net

Medicaid Litigation and Fair Hearings
Melinda Bellus
Legal Services of the Hudson Valley
90 Maple Avenue
White Plains, NY 10601
mbellus@lshv.org

Beth Polner Abrahams
Law Office of Beth Polner Abrahams
One Old Country Road, Ste. 235
Carle Place, NY 11514
bpabrahamslaw@gmail.com

Membership Services
Matthew Nolfo
Matthew J. Nolfo & Associates
275 Madison Avenue, Ste. 1714
New York, NY 10016
mnolfo@estateandelderlaw.net

Ellen G. Makofsky
Raskin & Makofsky
600 Old Country Road, Ste. 444
Garden City, NY 11530-2009
ellengm@aol.com

Mental Health Law
Suanne L. Chiacchiaro
45 Wintercress Lane
East Northport, NY 11731
slc4law@optonline.net

Martin Petroff
Martin Petroff & Assoc.
270 Madison Avenue
New York, NY 10016
mbpetroff@aol.com

Mentoring
Timothy E. Casserly
Burke & Casserly, P.C.
255 Washington Ave. Ext.
Albany, NY 12205
tcasserly@burkecasserly.com

Joan L. Robert
Kassoff, Robert & Lerner Law
100 Merrick Road, Ste. 508W
Rockville Centre, NY 11570
joanlenrob@aol.com

Practice Management and Technology
Ronald A. Fatoullah
Ronald Fatoullah & Associates
60 Cutter Mill Road, Ste. 507
Great Neck, NY 11021
rfatoullah@fatoullahlaw.com

Robert J. Kurre
Kurre Levy Schneps LLP
1010 Northern Boulevard, Ste. 232
Great Neck, NY 11021
rkurre@klsllp.com

Publications
Adrienne J. Arkontaky
The Cuddy Law Firm
50 Main Street, Ste. 1000
White Plains, NY 10606
aarkontaky@cuddylawfirm.com

David Ian Kronenberg
Goldfarb Abrandt Salzman
& Kutzin, LLP
350 Fifth Avenue, Ste. 4310
New York, NY 10118-1190
kronenberg@seniorlaw.com

Real Estate and Housing
Jeanette Grabie
Grabie & Grabie, LLP
162 Terry Rd.
Smithtown, NY 11787
jeanettegrabie@
elderlawlongisland.com

Neil T. Rimsky
Cuddy & Feder LLP
445 Hamilton Avenue, 14th Fl.
White Plains, NY 10601-5105
nrimsky@cuddyfeder.com

Social Security, Disability and SSI
Steven P. Lerner
Kassoff, Robert & Lerner, LLP
West Bldg. Ste. 508
100 Merrick Rd.
Rockville Centre, NY 11570-4801
steveler@aol.com

Arlene Kane
Law Office of Arlene Kane, Esq.
61 Bryant Avenue, Ste. 202
Roslyn, NY 11576
adkesq@aol.com

Special Needs Planning
Adrienne J. Arkontaky
The Cuddy Law Firm
50 Main Street, Ste. 1000
White Plains, NY 10606
aarkontaky@cuddylawfirm.com

Robert P. Mascali
13 Columbia Circle
Albany, NY 12203
rmascali@rwgmlaw.com

Sponsorship
Jeanette Grabie
Grabie & Grabie, LLP
162 Terry Rd.
Smithtown, NY 11787
jeanettegrabie@
elderlawlongisland.com

Veteran's Benefits
Felicia Pasculli
Felicia Pasculli, PC
One East Main St., Ste. 1
Bay Shore, NY 11706
felicia@pascullilaw.com

Elder and Special Needs Law Journal is published by the Elder Law Section of the New York State Bar Association. Members of the Section receive a subscription to the publication without a charge.

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

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

Elder and Special Needs Law Journal

NEW YORK STATE BAR ASSOCIATION

From the NYSBA Book Store >

Guardianship Forms—Powered by HotDocs®

When you're preparing legal documents, could you use an extra hand? What if you didn't have to tie up your time in retyping, cutting, pasting, and proofing for errors? Now there's a quick and easy way to produce accurate guardianship documents, with New York State Bar Association's Guardianship Forms. This invaluable package contains 135 forms covering virtually every aspect of guardianship practice under Article 81 of the Mental Hygiene Law, ranging from the petition for guardianship to forms for annual and final accountings.

- New York State Office of Court Administration Forms
- Forms Recommended by the NYS Office of Guardianship Services
- Initial Interview Form and Checklists
- Petition for Guardianship
- Court Evaluator Forms
- Appointment of Guardian
- Initial Reports and Accounts
- Annual Reports and Accounts
- Final Reports and Accounts
- Institutional Commitment Forms
- Sale of Real Property (by Guardian)
- IRS Forms

PRODUCT INFO AND PRICES

CD Prices*

PN: 6120

NYSBA Members	$553
Non-Members	$648

Prices include 1 year subscription for updates

Members
1 compact disc (single-user, annual subscription)
PN: 6120 • Annual Renewal $295

Non-Members
1 compact disc (single-user, annual subscription)
PN: 6120 • Annual Renewal $328

Multi-user pricing is available. Please call for details.

Prices subject to change without notice.

Free shipping and handling within the continental U.S. The cost for shipping and handling outside the continental U.S. will be added to your order. Prices do not include applicable sales tax.

Get the Information Edge

1.800.582.2452 www.nysba.org/pubs

Mention Code: PUB1624

NYSBA

NEW YORK STATE BAR ASSOCIATION
ELDER LAW SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

Elder Law Section Meeting

Tuesday
January 22, 2013

NYSBA

Annual Meeting

The Hilton
1335 Avenue of the Americas
New York City
January 21-26, 2013