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# Elder and Special Needs Law Journal

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

## Inside



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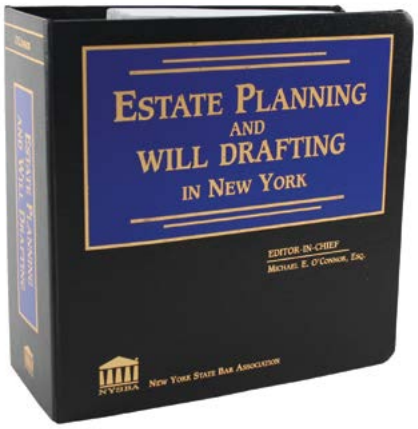
# Estate Planning and Will Drafting in New York

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**Product Description**

Estate planning is a diverse, challenging and sophisticated area of practice that requires the technical skills of a tax attorney; a strong understanding of business, real property and decedents' estate law; and the sensitivity and caring of a personal adviser. Estate planning is much more than will drafting - it is a well-recognized specialty that is a prominent part of the legal profession.

Written and edited by experienced practitioners, this comprehensive book is recognized as one of the leading references available to New York attorneys involved with estate planning. The step-by-step coverage in *Estate Planning and Will Drafting in New York* is a great resource for novice as well as experienced practitioners. Especially useful are many "real world" examples, practice tips and sample forms. **Includes Downloadable Forms.**

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NYSBA

# Table of Contents

# Message from the Chair

**Dear ELSN Members and Colleagues:**

**Judith D. Grimaldi**

As I enter the midway point of my tenure as the Chair of the NYSBA's Elder Law and Special Needs Section (ELSN), I reflect on the professionalism and energy in our Section. We are a strong force within our Bar Association and in the Aging Community. This can be seen in the activities of the ELSN Section's committees on behalf of the members.

## LEGISLATION COMMITTEE—Jeffrey Asher and Britt Burner, Chairs

On the day the Governor's 2019 Budget was released the Committee went to work identifying those budget items that we could support and ones we oppose and advocate for changes. The key legislative items selected were addressed by the lobbying team of our Section who traveled to Albany on Wednesday, February 27, 2019:

1. Opposing the change in eligibility for claiming Medicaid spousal budgeting and eliminating the spousal refusal option. The Section's position is to maintain the existing spousal eligibility rules and procedures.
2. Opposing the reduction in the number of Fiscal Intermediaries (FIs) approved by the State to serve the CDPAP program. It is believed this action will reduce accessibility to the CDPAP services, especially in rural and difficult to serve counties.
3. Opposing the reduction in reimbursement for Medical services covered by both Medicare and Medicaid. The budget provision requires that the reimbursement be limited to the Medicaid rate, which could result in medical providers refusing to serve the neediest of their patients because of the low Medicaid reimbursement rate.
4. Opposing the ability of the state's Managed Care Medicaid program to recover not only the cost of the service reimbursed by the state's Medicaid program but also the payments made by the managed care program as well. This would allow the state to recover a windfall beyond what the state had paid out.

Thanks to our NYSBA staffers Kevin Kerwin and Ron Kennedy, who directed the lobbying delegation consisting of the Section's officers Martin Hersh, Tara Anne Pleat, Matthew Nolfo, Deep Mukerji, Christopher Bray and me with Legislation Committee Members David Goldfarb, Tammy Lawlor, Moriah Adamo, Valerie Bogart and Committee Chairs Jeff Asher and Britt Burner.

## HOUSING COMMITTEE—Neil Rimsky and Joe Greenman

On March 5 , 2019 the Housing Committee convened a task force to explore the possibility of developing a New York model for housing for elders with cognitive impairment, using the tenets used at the famed "dementia village" in de Hogeweyk, Netherlands. The meeting was held at the law office of Bond, Schoeneck and King in Manhattan through the graciousness of Joe Greenman a retired partner in this firm, and was sponsored by the ELSN Housing Committee. The focus was to gather aging advocates and attorneys to discuss this model and work with housing developers and the aging services providers to integrate the Hogeweyk model into housing options offered in our city and state.

## ELDER ABUSE COMMITTEE—Deborah Hall and Julie Stoil Fernandez

This committee has ventured into the world of legislation and has drafted proposed legislation to prevent elder financial abuse occurring in banks and financial institutions while preserving the rights of the elderly. The legislation focuses on the need of the vulnerable elders to preserve their right to notice, due process and participation in their own financial affairs. This is and remains the challenge in creating legislation that provides the safety net while upholding individual rights to property in the financial institution. The Section has been working with members of the Business Law, Trusts and Estates Law Section and the Banking Committee to ensure the proposed law is practical and functional in the real world and will have the cooperation of the banking community. More to come on implementation in the community, and how we can educate the consumers and the banks on taking protective measures that help vulnerable seniors.

## CLIENT AND CONSUMER ISSUES COMMITTEE—Linda Redlisky and Patricia Angley

This committee has been working on the updating of our Section's consumer brochure pamphlets, which will be ready in the fall. They are also preparing for the Mitchel Rubbino Health Care Decision Making Day activities. All Section members are invited to participate

and present at the local aging outlets on the use of the Health Care Proxy, the Living Will, MOLST and other end-of-life directives.

### MEDICAID TASK FORCE AND THE UNAUTHORIZED PRACTICE OF LAW—Robert Kurre and Sal DiCostanzo

This Task Force continues to meet monthly. They have produced a survey that was distributed to the Section's Executive Committee to gather information on the non-attorney vendors in our state who are offering Medicaid planning and application services. These vendors may be veering into the unauthorized practice of law and/or providing substandard services that can put an elder at legal and financial risk.

The committee is addressing possible consumer abuse issues from a legal, legislative and consumer education perspective.

Please participate by completing the survey so we can move this important issue along and avoid future problems for our clients and our profession.

### Upcoming meetings and CLEs presented by the ELSN's Section

- Protecting Personal Injury Recoveries for Persons on Public Benefits—Live and Webcast—March 15, 2019 at Convene Conference Center in NYC, 9 a.m. to 4 p.m.
- Executive Committee Meeting—Friday, April 5, 2019, at the Poughkeepsie Grand Hotel in Poughkeepsie, N.Y.—10:30 a.m. to 1:30 p.m.
- The Summer Meeting—Boston from July 18 to 20 at the Marriott Long Wharf. The meeting agenda will have a special needs focus.
- Joint CLE sponsored by the ELSN Section's Health Issues Committee with the Health Law Section featuring updates on end-of-life issues and choices—Fall 2019.

Thanks to all the Section's committee members and NYSBA staff who make the work of the Elder Law and Special Needs Section so vibrant and meaningful. Look forward to working with all of you.

**Judith D. Grimaldi**

# Message from the Co-Editors

Katy Carpenter

Patricia Shevy

As we write the message for the Spring Journal, there is snow on the ground and we are looking at temperatures in the low 20s for the week. For some of us, Spring can't get here fast enough while others are enjoying all that Winter has to offer with skiing and snowshoeing. If we are having trouble with the Winter weather, just think of our clients and how it must feel when the weather prevents easy travel and the lack of daylight brings late morning and early afternoon darkness. Thankfully, the days are getting longer and, in no time, we'll all be together again in July for the Summer meeting.

A search of the OTDA fair hearings database for the month of February shows 255 nursing home decisions. We reviewed more than a few of them for reporting. In FH#7772583M (Suffolk), we are reminded that promissory notes must be contemporaneously made with the transferred funds in question. The Administrative Law Judge indicated that the contention that the loan does not have to be contemporaneous "belies the basis of a loan which is made at the time of the agreement," finding the appellant's argument unpersuasive as the transactions were unrelated in time.

FH #7864672J (MAP) provided a good summary of the Consumer Directed Personal Assistance Services program. In this case, an 84 year old appellant was authorized for Medical Assistance and enrolled in a managed long term care plan. The plan originally approved a total of 35 hours 7 hours per day 5 days per week; and then later denied services as "not medically necessary." Appellant provided evidence of his need for medical assistance with his medical history and medical records. The Administrative Law Judge found that the appellant met the requirements of the Consumer Directed Personal Assistance Program as the program intended.

Many times, we discuss the costs and difficulties of challenging the local Departments of Social Services when assisting clients with Medicaid applications. There are times when clients will concede to the local Department rather than continue the fight.

There are Departments that attempt to impose non-statutory requirements in proceedings involving supplemental needs trusts. Since our last *Journal*, and as highlighted under Awards on page 10, our very own Edward Wilcenski Esq. challenged the Department. *Matter of Tinsmon* was recently decided by the Appellate Division, Third Department. In this case, the Guardians (and parents) of an adult disabled woman (Jennifer) who were also Trustees of Jennifer's First Party Supplemental Needs Trust requested Court approval for distributions of trust funds related to the beneficiary's residence. The first component of relief was approval to distribute trust funds in order to purchase an interest in real property (which was jointly owned by Jennifer and her mother) as well as pay off the mortgage encumbering Jennifer's home. Thereafter, that title to the property be in Jennifer's individual name to be held by her Guardians.

A residence cannot be counted in determining eligibility for certain means-tested programs. 42 USC § 1382b[a][1]; 20 CFR 416.1212[a]; 18 NYCRR 360-1.4[f]; 360-4.7[a][1]. The local Department of Social Services argued that administrative interpretations of the applicable statutes require that Petitioners either hold title to the home as Trustees or provide security to the trust for its investment into the home. The Court noted that there is no statutory authority for Department of Social Service's position, even pointing out that the language of the Social Security Administration's Program Operations Manual System (POMS) contradicted the Department's argument, which provides that the individual/trust beneficiary (or the trust itself) must be shown as the owner of the item (e.g. a house). In addition to reaching this determination, the language of the decision emphasizes two important concepts: first, that the Trustee has sole and absolute discretion to utilize Trust funds for the benefit of the beneficiary. Second, that the Trustees are not obligated to consider the Department's interest in the remainder of the Trust, as it conflicts with their duty to act for the beneficiary's primary benefit.

Finally, there was a recent report we took interest in: a young Arkansas girl asked nursing home residents what three things they would like to receive—a wish list. The three big answers: an electric razor, new shoes, and Vienna sausage. Other really basic items were requested. What can we do to satisfy such simple requests? Perhaps, when we meet with clients in assisted living facilities and nursing homes, remember something simple to bring along to the meeting. While some resident clients have families and friends visiting with regularity, there are others who do not, and who are unable to get out to the store.

If you have an interesting case and would like to be included in our next Journal, please send us an article, or even just a copy of the decision and we'll prepare a summary. While our committees prepare many of our articles, it is always great to hear from our Section members. In the meantime, we look forward to seeing you at the Summer meeting.

**Katy and Tricia**

# 2019 Elder Law and Special Needs Section Annual Meeting Recap

By Christopher R. Bray and Joan L. Robert

On Tuesday afternoon, January 15, 2019, members of the Elder Law and Special Needs Section gathered at the New York Hilton Midtown to attend the annual business meeting for the section, awards presentation and MCLE program. Wi-fi access for the meeting was sponsored by KTS Pooled Trust. Section Chair Judith Grimaldi presided over the meeting.

The Nominating Committee is traditionally chaired by the immediate past chair of the Section, in this case Marty Hersh, who congratulated Chair-Elect Tara A. Pleat, who succeeds to the position of Section Chair beginning on June 1, 2019. Marty then presented the 2018-2019 slate of officers, as follows:

- Chair-elect: Matthew Nolfo, Esq.
- Vice Chair: Deepanker Mukerji, Esq.
- Secretary: Christopher R. Bray, Esq.
- Treasurer: Fern Finkel, Esq.

The members in attendance unanimously elected the entire slate of officers. Following the election, the meeting proceeded with the presentation of the Section awards. This year's recipient of the Section's most prestigious award was Frances M. Pantaleo. Fran was recognized for her actions and efforts in furtherance of the rights of the elderly and persons with disabilities. Edward V. Wilcenski, Esq. was recognized by the Section as a litigator who has advanced the rights of the elderly and persons with disabilities. The Hon. Richard N. Gottfried of the New York State Assembly, 75th District was presented with the coveted "Friend of the Section" Award. The Honorable Joel K. Asarch Elder Law and Special Needs Section Scholarship, awarded through the New York Bar Foundation, is given annually to a law student who demonstrates an interest in the legal rights of the elderly or


those with disabilities. This year's recipient was Fatema Jannat, a third-year law student at CUNY School of Law.

The Section also recognized two of its "founding fathers" who received awards presented on a larger stage. Peter J. Strauss was awarded the New York State Bar Association Award for Attorney Professionalism. The award honors professionalism, defined as a dedication to service to clients and a commitment to promoting respect for the legal system in pursuit of justice and the public good, characterized by exemplary ethical conduct, competence, good judgment, integrity, and civility. The National Academy of Elder Law Attorneys (NAELA) named Rene H. Reixach, Jr. as recipient of the 2018 Charles P. Sabatino Excellence in Public Policy Award for his outstanding achievement and dedication to litigation on behalf of older adults and persons with disabilities.

The MCLE program, offering attendees 5.0 CLE credits this year, was co-chaired by Christopher R. Bray and Joan L. Robert. The program began with the Annual Elder Law Update, presented this year by Louis W. Pierro. The Annual Meeting Update is always one of the most anticipated parts of the program. Attendees received information on important changes to Medicaid-related numbers for 2019, as well as recently passed laws and decided cases. Felicia Pasculli gave our membership important updates on changes to the eligibility rules for veteran's benefits. Next up was a lively discussion led by Domenique Camacho Moran, who presented on the "Lawyer as Employer," including topics on hiring and firing employees, paying overtime, and rules regarding hours and compensation. After a brief break, the membership reconvened for the incomparable Ira Salzman, who served as moderator for a diverse and experienced panel of Article 81 Guardianship judges including the Hon. Arthur M. Diamond, the Hon. David H. Guy, the Hon. Tanya R. Kennedy and the Hon. Bernice D. Siegel.

The final speaker for the day was Edward V. Wilcenski, who was able to keep everyone's attention through his thought-provoking presentation concerning ethical issues we all face in the Special Needs practice.

The program concluded at 6:30 sharp and many of the attendees walked across the street to a cocktail reception held at the Warwick New York Hotel.

The reception was generously sponsored by Orange Bank and Trust and TD Wealth Private Client Group.

**NOMINATIONS COMMITTEE REPORT**

# Nominees for 2019

By Martin Hersh

I wish to thank all members of the Nominating Committee of the Elder Law and Special Needs Section of the New York State Bar Association for their dedication and hard work in the months leading to our Annual Meeting. The Committee consisted of Ira Salzman, Ellen G. Makofsky, James R. Barnes, Veronica Escobar, Richard A. Marchese, Jr. and me. We were charged with nominating Officers and District Delegates for our Section for terms commencing June 1, 2019.

Several well-deserved Section members were nominated for Officer and Executive Committee positions for our Section, and three individuals were chosen to receive Section awards.

The following Section members were unanimously approved at our Annual Section Meeting, which was held at the New York Hilton Hotel on January 15, 2019. They will join Tara Anne Pleat, who will serve as Chair of the Section commencing June 1, 2019.

## Officers

**Chair-elect**

Matthew Nolfo

**Vice Chair**

Deepankar Mukerji

**Secretary**

Christopher Bray

**Treasurer**

Fern Finkel

## Judicial District Representatives

**1st District Delegate**

Elizabeth Valentin

**3rd District Delegate**

Antony M. Eminowicz

**7th District Delegate**

Yolanda Rios

**10th District Delegate**

Jeanette Grabie

**Member-at-Large**

Beth Polner Abrahams

Awards were given to the following:

## To an Individual Who Is Considered A "Friend to the Section"

### Richard N. Gottfried, New York State Assembly, 75th District, Manhattan

Richard N. Gottfried has represented the 75th District in the New York State Assembly for more than 40 years, making him the longest-serving member of that body. Mr. Gottfried currently serves as Chair of the Assembly Committee on Health and is also a member of the Committees on Higher Education, Rules, and the Asian Pacific American Task Force.

Some of Mr. Gottfried's pieces of legislation (bills enacted into law for which he has primary or secondary responsibility) include the creation of the Prenatal Care Assistance Program as well as the Child Health Plus and Family Health Plus programs. He is also the author of the Physician Profiling Law, which allows patients to access information about primary care physicians; the Family Health Care Decisions Act, which prioritizes who would make health care decisions for a person who does not have a health care proxy and is incapacitated; and the Health Care Proxy Law, which allows an individual to designate a secondary party to make critical health care decisions for the individual if he or she become incapacitated, as well as the HIV Testing and Confidentiality Law.

**Richard N. Gottfried**

As a leading advocate for patient autonomy, Mr. Gottfried has a major responsibility for New York's managed care reforms and continues to sponsor legislation for stronger protections for consumers and health care providers, work toward public support for universal access to quality, affordable health care, and establish end-of-life and pain management protocols. Mr. Gottfried's 1992 NY Health bill to establish universal, publicly funded health coverage was the first of its kind to pass a legislative body.

During his time as a member of the Assembly, Mr. Gottfried has served in various leadership capacities, including as Deputy Majority Leader, Assistant Major-

ity Leader, Chairman of the Assembly Committee on Codes, and Children and Families, as well as Chairman of the Assembly Task Force on the Homeless, Campaign Finance Reform and Crime Victims.

Mr. Gottfried's legislative advocacy had advanced the causes of the elderly and disabled in New York and greatly improved access to care and services. For his work on behalf of all New Yorkers in health care and equal rights, Assembly Member Richard N. Gottfried was nominated for, and received, an award as a Friend of the Elder Law and Special Needs Section.

## To an Individual Involved in Litigation (Including a Fair Hearing) Who Has Advanced the Rights of the Elderly and Persons with Disabilities

**Edward V. Wilcenski**

Ed has been quietly representing individuals with disabilities and their families as well as trustees of Supplemental Needs Trusts in contested matters throughout his career. In the last 18 months, through his advocacy and diligence, Ed has secured two published decisions in the areas of Supplemental Needs Trust Administration.

*Matter of Tinsmon (Lasher)*, 61 Misc. 3d 218 *; 79 N.Y.S.3d 854 **; 2018 N.Y. Misc. LEXIS 3215 ***; 2018 N.Y. Slip Op. 01471 (Feb. 22, 2018)

This Decision and Order highlights that trustees of a First Party Supplemental Needs Trust have the discretion to purchase real property, or an interest in real property, and determine whether the property should be titled to the beneficiary, in the name of the Guardians of the beneficiary, or in the name of the trust, while taking into consideration the impact of such titling on the trust beneficiary's eligibility for means-tested benefits. Court approval was sought by the trustee to use trust funds to purchase an interest in a residence and title it in the name of the beneficiary, and the local county Department of Social Services objected to the relief requested. The local county Department of Social Services filed an appeal shortly after the decision was issued. The case was argued before the Appellate Division, Third Department, the week after the Annual Meeting, and I am pleased to say that the Appellate Division agreed with Ed!

**Edward V. Wilcenski**

*Matter of KeyBank, N.A.*, 58 Misc. 3d 235 *; 67 N.Y.S.3d 407 **; 2017 N.Y. Misc. LEXIS 3800 ***; 2017 N.Y. Slip Op. 27321 ****.

This case analyzes the extent and limitations of the authority of a local Department of Social Services in an application to modify or reform a Supplemental Needs Trust. The written decision of the Surrogate confirms that the local Department of Social Services' role in the context of the establishment, reformation or other drafting of a Supplemental Needs Trust is limited. Specifically, that the state's role is twofold: first to determine the Supplemental Needs Trust beneficiary's continued eligibility for Medicaid by ensuring that the proposed Supplemental Needs Trust comports with existing federal and state Medicaid Law, and second by protecting the state's ultimate remainder interest. The decision goes on to hold that the local Department of Social Services has no authority to impose demands for specific language or provisions in the drafting or reformation of a First Party Supplemental Needs Trust that are neither mandated by statute and regulations nor in keeping with the grantor's intent.

These cases represent proactive pushback on the unfounded demands of local departments that so many other practitioners simply give in to when drafting Supplemental Needs Trusts and during trust administration. With his advocacy in these cases, appropriate light has been shown on the actual role of the local Departments of Social Services, and empowered practitioners to move forward feeling comfortable in the establishment and modification of these trusts for the benefit of individuals with disabilities, without feeling compelled to include provisions that restrict the utility of these trusts.

## To an Individual Whose Actions Are in Furtherance of the Rights of the Elderly and Persons with Disabilities

**Frances M. Pantaleo**

Fran has had an impact on the practice of elder law and the rights of the elderly and disabled starting with developing a premier elder law program at Cardozo Law School, and continuing her efforts to develop the study of elder law at Pace Law School, where she also helped develop an elder law course.

Fran's practice has always focused on elder law and special needs. She was at the center of the development of Article 81 and Article 17-A both in her local bar as well as in her role in the NYSBA's Elder Law Section. Under her tenure as the Chair of the Elder Law and Special Needs Section, she carefully shepherded the name change of the Section to include the Special Needs focus, giving it prominence in the Section title. Fran also was the first to integrate a diversity focus in our Section by appointing a Diversity Committee and funding their activities.

Fran is a past chair of the Elder Law and Special Needs Section of the New York State Bar Association and currently serves as Co-chair of the Committee on Elder

**Frances M. Pantaleo**

and Special Needs of the Trusts and Estates Law Section of the New York State Bar. She is a member of the National Academy of Elder Law Attorneys and has served as past chair of the Elder Law Committees of the Westchester Women's Bar Association and the Westchester County Bar Association. Fran was an Associate Clinical Professor and Supervising Attorney at the Benjamin N. Cardozo School of Law in the Bet Tzedek Litigation Clinic, which represented elderly and disabled individuals, and an Adjunct Professor at Pace Law School where she developed and taught a course on Elder Law. In 2007, Fran received a Partner in Justice Award in recognition of her outstanding pro bono assistance to Legal Services of the Hudson Valley. Fran serves on the Boards of Legal Services of the Hudson Valley and the Hudson Valley Justice Center. She is a former member of the Board of the Alzheimer's Association Mid-Hudson Chapter and the Westchester End of Life Coalition.

I, again, wish to thank the Officers, Executive Committee members, and members of our Section for all of your support last year during my term as Chair, and for your input and assistance in the selection process.

# Navigating the Rules of Professional Responsibility When Representing Trustees of Supplemental Needs Trusts

By Edward V. Wilcenski

## Introduction

Estate planning and elder law attorneys have long recognized that many of the rules of professional responsibility for lawyers are difficult to apply in our practice, which is typically collaborative and non-adversarial.

Consider the statement in Preamble to the New York Rules of Professional Conduct for attorneys in New York:

"The touchstone of the client-lawyer relationship is the lawyer's obligation to assert the client's position *under the rules of the adversary system*, to maintain the client's confidential information except in limited circumstances, and to act with loyalty during the period of the representation." (emphasis added).

The New York Rules of Professional Conduct provide little practical guidance for attorneys wrestling with issues of declining capacity and the involvement of family caregivers and other advocates in important financial and medical decisions. These challenges can be compounded in cases involving supplemental needs trusts, where counsel must consider how to manage communications with and decisions by a trustee who has independent fiduciary responsibilities of its own.

This article will focus on one fact pattern which is common to the special needs planning practice. It will introduce some of the rules that are implicated when undertaking representation, and will suggest some sources of commentary and analysis which may help the practitioner navigate this complicated area. While the fact pattern involves a first party supplemental needs trust, the analysis should also be helpful in cases involving third party supplemental needs trusts.

## Sources of authority

### 1. New York Rules of Professional Conduct

The New York Rules of Professional Conduct are found at 22 N.Y.C.R.R. § 1200 *et seq*. Throughout this article they will be referred to as the "NY Rule(s)." The New York Rules were developed using the ABA Model Rules of Professional Conduct ("MRPC") as a guide. The NY Rules with commentaries can be found at: https://www.nysba.org/DownloadAsset.aspx?id=50671 (last visited November 10, 2018) and are reproduced at the end of this article (without commentaries) for ease of reference.

The NY Rules highlighted in this article are:

1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

1.4 Communication

1.6 Confidentiality of Information

1.7 Conflict of Interest: Current Clients

1.16 Declining or Terminating Representation

1.18 Duties to Prospective Clients

4.1 Truthfulness in Statements to Others

4.3 Communicating with Unrepresented Persons

The NY Rules and accompanying commentaries serve as the governing authority in any disciplinary action in New York. However, the NAELA Aspirational Standards and the ACTEC Commentaries (discussed below) were written with elder law and estate planning attorneys in mind, and they address the same concepts found in the NY Rules with a focus on fiduciary representation and collaborative engagement. The NAELA Aspirational Standards and the ACTEC Commentaries will serve as the primary sources for analyses in this article, but practitioners are encouraged to refer back to the Commentaries to the NY Rules to compare how the insights and recommendations of the other two entities have been applied and interpreted in our State.

### 2. NAELA Aspirational Standards (Second Edition) with Commentaries

These are not "rules." Rather, they are what one would expect given the title: non-binding guidance developed by and for elder law attorneys who regularly provide representation in situations involving individuals with diminished capacity. Throughout this article they will be referred to as "Standards." The Standards with commentaries can be found on the NAELA website ( www.naela.org ).

NAELA's explanation of the challenges faced by elder and special needs planning attorneys and the difficulties faced by practitioners trying to reconcile the traditional rules of attorney conduct with this area of the law is insightful:

> The client-attorney relationship in elder law and special needs planning is not always as clear-cut and unambiguous as in other areas of law. Questions relating

**Edward V. Wilcenski, Esq.,** is a co-owner of the law firm of Wilcenski & Pleat PLLC, in Clifton Park, New York. He is a Member and Past President of the Special Needs Alliance, a Member of the National Academy of Elder Law Attorneys and the New York State Bar Association Elder and Special Needs Law Section, and has been a Trustee of the NYSARC Trusts since 2002.

> to end-of-life planning, self-determination, exploitation, abuse, long-term care planning, best interests, substituted judgment, and, fundamentally, "who is the client?" present issues not regularly faced by attorneys in other areas of law. https://www.naela.org/Web/About_Tab/History_and_Standards/History_and_Standards_Sub_landing/Aspirational_Standards.aspx (last visited November 10, 2018).

Nonetheless, the Standards introduce and reinforce some key concepts which are important to the special needs planning practitioner, including:

*"The Standards may be less helpful than the ACTEC Commentaries in developing practical approaches in those cases where the trustee is the client and the "protected individual" is the beneficiary."*

a. A "protected individual," which "refers to the individual whose personal and property interests are the subject of the representation." Comment to Standard B.1. The protected individual is not necessarily the client. See further discussion on this concept below.

b. The holistic approach to representation, including the use of non-legal professionals who are employed by an attorney or by a firm owned by the attorney and who help the attorney accomplish the objectives of the engagement with a client or protected individual. Comment to Standard A.1 and A.2.

c. The collaborative, non-judicial approach to conflict resolution among family members and others involved in the life of the 'protected individual.' Standard A.5.

The Standards acknowledge the broad and collaborative nature of the elder law and special needs practice, and practitioners can look to the Standards for significant discussion on issues relating to diminished capacity. However, the Standards may be less helpful than the ACTEC Commentaries in developing practical approaches in those cases where the trustee is the client and the "protected individual" is the beneficiary.

### 3. ACTEC Commentaries to the ABA Model Rules of Professional Conduct.

The ACTEC Commentaries are heavily focused on representation of fiduciaries (executors, administrators and trustees). While this article analyzes the ACTEC Commentaries from the perspective of the supplemental needs trustee, in most situations the discussion and analysis presented here would apply to any one of these fiduciary appointments. References will be to the ACTEC Commentaries, Fifth Edition 2016 located at https://www.actec.org/assets/1/6/ACTEC_Commentaries_5th_rev_06_29.pdf (last visited November 10, 2018).

The spirit and approach of the ACTEC Commentaries is reflected in the Reporter's Note to the First Edition:

> "The main themes of the Commentaries are: (1) the relative freedom that lawyers and clients have to write their own charter with respect to a representation in the trusts and estates field; (2) the generally non adversarial nature of the trusts and estates practice; (3) the utility and propriety, in this area of law, of representing multiple clients, whose interests may differ but are not necessarily adversarial; and (4) the opportunity, with full disclosure, to moderate or eliminate many problems that might otherwise arise under the [Model Rules of Professional Conduct]. The Commentaries additionally reflect the role that the trusts and estates lawyer has traditionally played as the lawyer for members of a family. In that role a trusts and estates lawyer frequently represents the fiduciary of a trust or estate and one or more of the beneficiaries. In drafting the Commentaries, we have attempted to express views that are consistent with the spirit of the MRPC as evidenced in the following passage: "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." ACTEC Commentaries at p. 1.

The ACTEC Commentaries highlight positions taken by courts and state bar associations in analyzing the roles and responsibilities of lawyers who represent fiduciaries. According to the ACTEC Commentaries, the majority view is "that a distinction should be drawn between the duties of a lawyer who represents a fiduciary in the fiduciary's representative capacity (a "general" representation") and the duties of a lawyer who represents the fiduciary individually (ie., not in a representative capacity)." ACTEC Commentaries at p. 1. This distinction is

critically important in the area of special needs planning, where the trust beneficiary often lacks cognitive capacity to review the trustee's actions and consent to the trustee's decisions.

The Editor's Note to the First Edition goes on to acknowledge the continuing challenges which arise in fiduciary representation, and the lack of a single and well established approach to guide practitioners in this area: "Unfortunately, the duties that the lawyer for a fiduciary owes to the beneficiaries of the fiduciary estate have not been adequately identified, defined, or discussed." ACTEC Commentaries at p. 2.

Yet the Commentaries are clear on one point. Lawyers who provide general representation to trustees have certain responsibilities to the beneficiaries: the requirement that the lawyer act in good faith and with fairness toward the beneficiaries, and to take affirmative steps to protect a beneficiary if the lawyer becomes aware that the fiduciary is engaged in acts of wrongdoing that would harm the beneficiaries. Here in New York, the general rule is that the lawyer for a fiduciary has the same level of responsibility to the beneficiaries as the trustee, and would be held liable to the beneficiaries if the lawyer places her own interests above the fiduciary responsibilities of the trustee. *In re Bond & Mortgage Guarantee Company*, 303 N.Y. 423 (1952).

While the ACTEC Commentaries provide a more practical analysis than the NAELA Aspirational Standards, both the Standards and the Commentaries—read together—provide an excellent framework for analyzing ethical questions that arise in this area of practice.

## Fact pattern

Adrian is a 7-year-old boy who sustained significant physical and cognitive injuries after being hit by a car while crossing the street. His parents hired an attorney to file a lawsuit on behalf of the boy, and the lawsuit includes a derivative claim by the boy's parents. The parents are not court appointed guardians.

As a result of his injuries, Adrian has been approved for the New York State Office of People With Developmental Disabilities (OPWDD) waiver, a Medicaid funded program which provides services and supports to children living with developmental and other cognitive disabilities.

The litigating attorney notifies you that the matter has settled for a significant sum, and he wants you to prepare a supplemental needs trust to protect the boy's eligibility for government benefits. The litigating attorney has a long-standing relationship with a trust company and has already discussed the appointment of that institution as trustee with the parents. The attorney asks you to attend a meeting to include him, the parents, and a trust officer from the trust company.

Prior to the meeting, and in order to provide credible and informed recommendations, you ask the litigating attorney for a copy of the Life Care Plan prepared for the litigation, and you ask the parents to complete a worksheet which provides information on the parents' financial assets and on any other household members who may be receiving government benefits.

## Answering *the* question

"Whom do you represent?"

The answer is typically: "I represent the disabled plaintiff." But do you? As you consider the question, keep in mind the comments to the NAELA Aspirational Standards on this very question: "*different attorneys with the same set of facts may identify different individuals as the client, and each result is equally appropriate.*" Comment to Standard B.1.

The Standards suggest that an attorney should—at the very first meeting—identify the client and make that identification known to all in attendance. This is easier said than done. Consider the issues that the special needs planning attorney may be called upon to address in an engagement of this nature, and consider who benefits from that advice.

1. You will discuss different options for management of settlement proceeds, and you will explain how first party supplemental needs trusts are used to protect government benefits. Who benefits? Clearly, the disabled plaintiff.

2. You will draft a first partly supplemental needs trust document. Once the trust is drafted and funded, most practitioners will submit the document to the Medicaid program representatives with proof of funding as required under 18 N.Y.C.R.R. § 360-4.5. Who benefits? Clearly the disabled plaintiff benefits, but isn't the proposed trustee of the trust relying on you to prepare a document which is compliant with federal and New York law, and when you submit the trust, aren't you taking a step which the regulations state is the trustee's responsibility?

3. The litigating attorney will append a copy of your trust to the compromise petition and represent to the Court that the establishment and funding of the trust is both consistent with the law and in the disabled plaintiff's best interest. Filing the application for court approval of the settlement is clearly the attorney's responsibility under his engagement agreement with the plaintiffs, and absent some written agreement to the contrary the plaintiff attorney would be liable to the disabled plaintiff if the trust he submitted to the court turned out to be defective and government benefits

were lost. Isn't the attorney relying on your advice to protect him as well as the disabled minor?

4. Assume the child is an SSI recipient because the parents have limited resources and income of their own. The litigating attorney asks for your opinion on whether the derivative payment to the parents will have an impact on the child's benefits, and if so, what options exist to minimize this impact. Who benefits? Clearly the disabled minor will benefit if your advice is designed to protect his benefits, but aren't you also making recommendations to the parents and to the litigating attorney regarding the allocation of settlement proceeds between the young boy and his parents? You might recommend allocating more to the parents so that they can purchase a home where the family can live, understanding that ownership of a home by the parents will not have an impact on the SSI entitlement. Who is benefitting from this advice?

5. The litigating attorney may ask you to review a claim by the Medicaid program for payment of its lien under section 104-b of New York's Social Services Law. In doing so, you see that the claim includes charges for school-based services, charges which must be backed out of the lien. In pointing this out to the attorney and, possibly, helping the attorney identify incorrect charges, who benefits from your advice? Clearly the disabled minor and the parents benefit because there will be more money left over for the plaintiffs, but aren't you also providing a service which directly benefits the professional who brought you into the engagement in the first place, possibly avoiding the possibility of a malpractice claim against the litigating attorney if the parents later learn that Medicaid was paid more than it was owed?

6. During the initial consultation with the plaintiff attorney and parents, you learn that the mother had to leave her job in order to provide care and oversight to her disabled son, and you discuss the possibility of using funds in the trust to compensate her on an ongoing basis for the extraordinary support she provides. After the trust is funded, can you prepare and file this petition with the Court, and if so, whom will you represent? The parent? The trustee? The disabled minor? All of them?

## Preliminary concepts:

In considering your answer to *the* question, some important concepts introduced and reinforced by the NY Rules, the Standards and the ACTEC Commentaries warrant attention:

1. "Protected Individual": someone who may not be your client, but someone whose interests you are engaged to protect and to whom you have an affirmative responsibility. Comment to Standard B.1.

2. "Prospective client": someone with whom you have communicated, with whom you have met, and/or from whom you have received information. You have not yet established an attorney-client relationship with this person, but you may have certain responsibilities to that individual under the Rules. NY Rule 1.18; ACTEC Commentaries at p. 178; Comment to Standard B.1.

3. Representation of a trustee in an "individual capacity" versus in a "representative (general) capacity". When representing a trustee in a representative (general) capacity, the attorney is also bound by the trustee's fiduciary responsibility to make decisions in the best interest of the beneficiary. This is contrasted with representing a trustee in an individual capacity, where the attorney is retained to advance the trustee's separate and individual interests. NY Rule 1.2; ACTEC Commentaries at p. 35.

4. Joint representation versus concurrent representation. Both involve representing two or more separate clients simultaneously, with the primary difference being the approach to the rules of confidentiality. Both models of representation presume that the interests of both (or all) clients are not adverse. NY Rule 1.7; Standard D.1; ACTEC Commentaries at p. 101.

## Seeking guidance in answering *the* question: "Who is the client?"

### New York Rules of Professional Conduct

Interestingly, the NY Rules do not define the term "client." NY Rule 1.0 ("Terminology") contains a number of definitions, but "client" is not one of them. They leave it up to the attorney to figure out the answer to the question. Once identified, the rules begin to ferret out the attorney's responsibilities.

*Conclusion: New York's Rules do not provide a definitive answer to the question.*

### NAELA Aspirational Standards

The Standards say that "usually, the client is the individual whose property and interests are to be protected," but they then go on to state that "alternatively, a family member, fiduciary, or other person seeking to protect or assist another person can be the client." Comment to Standard B.1.

The Comment introduces the idea of providing legal advice to a client in the client's representative capacity, similar to the concept of "general representation" discussed in the ACTEC Commentaries. The Standards' discussion of fiduciary representation seems much more focused on agents appointed under Powers of Attorney, and less on trustees with independent responsibilities as defined under the terms of varying trust instruments. Nonetheless, the Standards reinforce a concept which applies across all fiduciary appointments: the advice and counsel provided by the attorney derives from and must be consistent with the fiduciary's affirmative obligation to make decisions in the best interest of the "protected individual."

Does this concept provide any credible guidance in the scenario presented here, where the attorney is providing information and recommendations to the litigating attorney, the injured minor, the parents of the injured minor, and the proposed trustee of the supplemental needs trust? The Standards ask, " 'Who is seeking legal advice and services?' or 'For whom or for whose interests are legal services requested?'" Comment to Standard B.1.

In this scenario, all of the individuals at the initial meeting are "seeking legal advice" from the special needs planning attorney, and that advice may benefit more than one or all of them in differing degrees.

*Conclusion: NAELA's Aspirational Standards do not provide a definitive answer to the question.*

### ACTEC Commentaries

The ACTEC Commentaries focus on fiduciary representation and typically presume that the fiduciary is already a client. The Commentaries concentrate their analysis on how lawyers navigate conflicts between a fiduciary and a beneficiary, manage representation of more than one trustee, or manage simultaneous representation of both a trustee and a beneficiary. The Model Rules of Professional Conduct (which served as the basis for New York's Rule of Professional Conduct) do not define the term "client," and the ACTEC Commentaries are similarly silent.

*Conclusion: the ACTEC Commentaries to the MRPC do not provide a definitive answer to the question.*

## Considering alternative answers to *the* question

### 1. You represent the disabled minor.

The intuitive reaction of most attorneys is that the special needs planning attorney represents the disabled minor. Interestingly, while the NY Rules do not define the term "client," they do define the term "prospective client." "A person becomes a prospective client by consulting with a lawyer about the possibility of forming client-lawyer relationship with respect to a matter." NY Rule 1.18, Comment 2. Certain obligations—such as confidentiality of information provided during the consultation and preclusion from later representation in an adverse matter without written consent—will automatically apply. NY Rule 1.18(c). Clearly the disabled minor would be a prospective client.

The Standards' definition of a "protected individual" would also apply to the disabled minor, an "individual whose personal and property interests are the subject of the representation." Comment to Standard B.1. If the parents were the plaintiffs in an accident which didn't involve their disabled son, you wouldn't have been called in to the matter. You are consulted because the minor plaintiff is disabled.

The ACTEC Commentaries follow the analysis of NY Rule 1.18, Comment 2: "A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter." ACTEC Commentaries at p. 179.

Do these authorities conclusively determine that the disabled minor is your client? Not really. The Standards explain that the protected individual may not be the actual client: "Usually, the client is the individual whose property and interests are to be protected. *Alternatively, a family member, fiduciary, or other person seeking to protect or assist another person can be the client*." Standards Comment to B.1 (emphasis added).

There may also be some practical challenges in identifying the disabled minor as your client in this scenario. Under New York's Civil Practice Law and Rules (CPLR), an infant can appear by a parent unless a guardian ad litem has been appointed or unless there is a guardian of the property. This allows the parent to retain an attorney to represent the minor in an action. CPLR 1201, 1207.

Do these provisions authorize the parents to retain you to consult on how the proceeds of the litigation should be distributed for the minor's behalf? The parents in the fact pattern presented here are not court appointed property guardians, and as such they have no legal authority to direct the disposition of the minor's proceeds (in trust or otherwise). Nonetheless, these CPLR provisions are understood to allow you to appear in the underlying matter (perhaps at a settlement conference, or by reference in the moving papers to settle the suit) and recommend the establishment and funding of a supplemental need trust.

But what if the court appointed a guardian ad litem to represent the interests of the disabled minor? The court can do so if there is a conflict of interest, and many courts do so as a matter of practice. CPLR 1201. If the parents are also plaintiffs in the action and the proceeds will be divided between the parents and child, isn't there a prima facie conflict? If the plaintiff is a minor and you are recommending the use of a trust to hold litigation proceeds, aren't the parents considered intestate heirs with a poten-

tially conflicting interest in the trust that you will draft (as contingent remainder beneficiaries whose interests are adverse to the lifetime beneficiary)? Finally, if there is a conflict of interest and a guardian ad litem is appointed to appear for the disabled minor, then wouldn't the guardian ad litem have to hire you?

**2. You represent the parents.**

The personal injury attorney and the parents understand that you will be providing advice and recommendations for the benefit of the disabled minor. In order to make informed recommendations, you will ask the parents for information on household composition, financial condition, and household benefit eligibility. All will be relevant in determining how the settlement should be structured to protect the ongoing benefit eligibility for the disabled minor and to ensure that trust funds will be available to enhance the minor's quality of life. Once you receive this information from the parents, the parents will fit squarely into the definition of "prospective clients" under the provisions of the Standards and ACTEC Commentaries cited above. But are they also clients?

These consultations are typically wide ranging, and special needs planning attorneys often provide information and advice that would be considered specific to the parents: discussion of the tax implications of the parents' settlement, consideration of the impact of the settlement on means tested benefits being paid to the parents or family members other than the disabled minor, or recommendations for transfers by the parents to protect their windfall (which might be recommended when a parent's settlement will have an impact on the disabled minor's SSI payment, as the parent is considered a "deemor" under the SSI program rules) See POMS SI 01330.280 Examples—Parent-to-Child Deeming.

Recognizing that these discussions could be viewed as providing legal advice to the parents in addition to providing legal advice for the benefit of the disabled minor, you could refuse to answer any questions relating to parents' settlement, and insist they retain their own lawyer. Your recommendation may not be well received given that the family will now be paying another lawyer for her time, and the litigating attorney involved you because of your expertise in this area. Like it or not, the interests of the parents and the disabled minor are often inextricably linked in this type of representation.

You might relent and take the position that you represent both the disabled minor and the parents. This would be consistent with the broader objectives outlined in the ACTEC Commentaries which emphasize that estate and elder law planning is inherently non-adversarial and representation of multiple clients is often a cost-effective means of accomplishing a mutually beneficial result. Combined representation of parents and child with a disability is specifically addressed in the Comment to Standard E.4. discussing client confidentiality. The Standards also discuss a "holistic approach to legal problems" and the importance of recommending "harmony-enhancing measures consistent with the client's estate planning goals to minimize [potential] conflicts." Standards A.1 and A.4. Advice which is designed to help parents and child alike would be consistent with the spirit of both the ACTEC Commentaries and the Standards.

If you take the position that you represent the parents and the disabled minor, your engagement will be governed by the rules of joint or concurrent representation, and you will need to address issues relating to conflicts of interest and confidentiality of communication.

**Potential conflicts are different than actual, irreconcilable conflicts**

The Preamble to the NY Rules state that "the touchstone of the client-lawyer relationship is the lawyer's obligation to assert the client's position *under the rules of the adversary system…"* In other words, the NY Rules presume that separate individuals involved in a single matter are necessarily in opposition and an infrastructure must be constructed to protect each of them.

As a result of this presumption, "conflict" is a term that is often used in a knee jerk manner when one perceives the possibility of disagreement between two parties. The term works nicely for the litigation practice, but it is often overused and misapplied in estate planning, elder law and special needs planning.

Much of the special needs planning practice (like traditional estate planning) is inherently non-adversarial, and multiple clients will have common objectives. They may have disagreements on how to achieve those objectives and counsel may be called upon to help them resolve those disagreements, but the potential for disagreement (potential conflicts) should not preclude the engagement, and the rules governing clients in actual, irreconcilable conflict should not (yet) apply.

In the scenario presented here - where the special needs planning attorney takes the position that she represents both the disabled minor and the parents - NY Rule 1.7 governing conflicts of interest stands front and center:

> RULE 1.7:
>
> CONFLICT OF INTEREST: CURRENT CLIENTS
>
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
>
> (1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

**Is there a conflict which implicates 1.7?**

In the scenario presented here—an attorney consulting with both a disabled minor and the minor's parents in a personal injury settlement—NY Rule 1.7 may not even apply. After all, 1.7(a) precludes representation only if "(1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests."

One may argue that there are no differing interests - protection of the settlement for both the parents and the disabled minor benefits them equally. The fact that there may be some disagreement on the allocation of the settlement between the parents and the minor doesn't mean that their interests differ—they simply have differing opinions on how to achieve a common result—protection of the entire settlement without adverse impact on the household. Presuming that the lawyer has no personal interest in the matter under section (a)(2), one never gets to paragraph (b), and the attorney need not worry about a written consent for representation despite the conflict.

If one concedes a "differing interest" under (a)(1), then the clients would have to give informed consent in writing as outlined in 1.7(b). Substantively speaking, nothing in paragraph (b) would preclude the representation here: the attorney can provide competent advice, it would not be prohibited by law, and there will be no claim asserted against either client.

Rather, the challenge is a practical one. Who signs the informed written consent on behalf of the minor? There may not be a substantive conflict of interest to preclude the attorney's representation of both the parents and the disabled minor, but the parents may not have the right to waive the conflict on behalf of their minor child. You may be able to represent all of them under the NY Rules, but there may be a practical barrier to your accepting the engagement. At least one Ethics opinion in New York suggests that joint representation may be impossible if one client cannot consent in writing. NYS Bar Association Committee on Professional Ethics Opinion #836 (02/25/2010) (discussing the ability of an attorney to represent an AIP and a guardian in a petition to terminate the guardianship).

In sum, simultaneous representation of the parents and their minor child is an easy concept to grasp, but may be difficult to effectuate in a manner that is consistent with the NY Rules of Professional Conduct and the mechanics of representation under the CPLR. You would also need to determine whether you represent the parents and child jointly or concurrently, discussed below.

**3. You represent the attorney.**

Recall the NAELA Aspirational Standard's comment on client identification: "Alternatively, a family member, fiduciary, *or other person seeking to protect or assist another person can be the client."* (emphasis added).

Isn't the personal injury attorney "seeking to protect" the disabled minor, and asking for your assistance in doing so? Would that make the attorney your client, with the understanding that the advice you provide is "to assist another person" (the disabled minor)?

The Standards also say that when drafting a supplemental needs trust for an individual whose disability would preclude him from hiring the drafting attorney directly, the attorney "should only draft such a trust at the request of a fiduciary who has the authority to engage the attorney." Comment to Standard C.4.c.

The term 'fiduciary' as used in the Standards refers primarily to an agent under power of attorney or a court appointed guardian—someone who steps into the shoes of the individual with diminished capacity. Is the plaintiff attorney a "fiduciary" as that term is used in the Standards, such that he is hiring you to provide advice for the benefit of his client? He certainly has an obligation to act in the plaintiff's best interest, and hiring you is consistent with that obligation.

There may also be some support for this position in the ACTEC Commentaries to MRPC 1.18 where one lawyer (the consulting lawyer) contacts another lawyer to provide advice. ACTEC Commentaries at 180. The Commentaries approach the issue from the perspective of whether the lawyer being consulted has an obligation to the consulting lawyer's client, and whether the lawyer

being consulted would be precluded from representing another client in an adverse action against the consulting lawyer's client at some future point in time.

While the ACTEC Commentaries do not directly address the relationship between the two attorneys, consider the nature and purpose of the consultation when considering whether an attorney-client relationship exists between them. The litigating attorney expects the special needs planning attorney to offer advice and recommendations in a number of different areas, including:

a. charges which should be removed from a Medicaid lien;

b. the need for a Medicare set aside trust;

c. an allocation between lump sum and structure;

d. tax impact of the settlement on both the disabled minor and the parents; and

e. possible uses of funds in the supplemental needs trust once funded.

Clearly the disabled minor benefits from this advice. But in practice the litigating attorney seeks out the special needs planning attorney precisely because she will be able to offer advice and recommendations which cover a wide range of areas and which impact everyone at the table during the consultation, including the litigating attorney. Lawyers hire other lawyers all the time.

Finally, if you represent the litigating attorney in this scenario, consider whether your fee should be paid by the litigating attorney and not from the proceeds of settlement. ACTEC Commentaries at p. 79.

**4. You represent the proposed trustee.**

In this scenario, a trust officer from a local financial institution is invited to the meeting with the litigating attorney and the family to discuss the supplemental needs trust. The discussion with the proposed trustee may focus on the benefit programs in which the beneficiary participates, permissible uses of funds once the trust is funded, and the need to secure court approval for large expenditures. Once appointed, the trustee will be relying on the advice you provide when later conferring with the family. Does that reliance make you the trustee's attorney?

In practice, the trust will not be established until a court order so directs, and so it would be difficult to take the position that the future trustee is your client at this early stage. Rather, the trustee would likely be considered a "prospective client" to whom you owe those limited responsibilities under NY Rule 1.18 (maintaining confidentiality and precluding later adverse representation). ACTEC Commentaries at p. 83.

**5. You represent all of them.**

You have provided information and advice to or for the benefit of everyone at the table, albeit in differing degrees: the disabled minor, the parents, the litigating attorney and the proposed trustee. They rely or they will rely on the information and advice you provide. Perhaps you represent all of them.

If you come to this conclusion, then the analysis earlier in this article involving potential conflicts between parent and child would similarly apply here.

In addition, your representation agreement would need to address the confidentiality of information consistent with NY Rule 1.6, and you would need to decide whether you represent them *jointly* or *concurrently*. Both models of representation acknowledge that "a lawyer may represent more than one client with related, but not necessarily identical, interests... The fact that the goals of the clients are not entirely consistent does not necessarily constitute a conflict of interest that precludes the same lawyer from representing them." ACTEC Commentaries at p. 83.

*"In joint representation, an attorney can continue to represent multiple clients so long as their interests and objectives remain consistent, and information that one joint client provides cannot be withheld from another joint client."*

Both the ACTEC Commentaries and the NAELA Aspirational Standards discuss the representation of multiple parties, but the ACTEC Commentaries beginning at page 83 provide a much more comprehensive and practical analysis of the topic when one of the clients is a trustee with its own independent fiduciary obligations.

In *joint representation*, an attorney can continue to represent multiple clients so long as their interests and objectives remain consistent, and information that one joint client provides cannot be withheld from another joint client. ACTEC Commentaries at p. 102; Comment to Standard D.1. The most common example of joint representation in an estate planning practice is the representation of a husband and wife, where the engagement agreement makes clear that information shared by one spouse cannot be kept from the other. ACTEC Commentaries at p. 83; Comment to Standard E.2. Other examples include representing both trustee and beneficiary in an estate administration and business owners developing a part-

nership agreement. So long as their objectives are consistent, and despite the fact that disagreements on how to achieve those objectives may arise during the course of the engagement, a lawyer may represent multiple clients jointly.

In *concurrent representation,* an attorney represents two or more clients simultaneously, but communications between each client and the attorney remain confidential and do not need to be shared with the other clients represented in the concurrent representation. Comment to Standard D.1. The ACTEC Commentaries provide the example of an attorney who is working with a father and son on separate estate plans which have certain common objectives. If the attorney believes that she can maintain client confidentiality for each of them and still accomplish the common objectives of both, then concurrent representation is possible. ACTEC Commentaries at p. 103. Both the and ACTEC Commentaries and the Standards acknowledge that concurrent representation can be difficult to carry out in practice.

In the scenario presented here, all involved—the disabled minor, the parents, the litigating attorney and the proposed trustee—arguably share a common objective, and to the extent they have what NY Rule 1.7 calls "differing interests," all of them could consent to *joint representation* in writing. Information which is necessary for the special needs planning attorney to provide advice and counsel—information about the settlement, the injury and resulting disability, individual and household benefits, planning options, uses of trust funds—would be shared between and among all of them. That sharing arrangement would be clearly spelled out in the engagement agreement.

*Concurrent representation* would be difficult to carry out in this scenario, as the expertise that the special needs planning attorney brings to the engagement is her ability to synthesize information received from one client and advise on how that information may impact another. For example, if the special needs planning attorney learned that the parents were in the process of getting a divorce, that may impact the relative financial positions of the parents and the advice that the attorney might provide in the allocation of settlement proceeds between the parents and disabled minor. It would be difficult to provide competent representation to all clients while preserving this confidence at the request of the parents.

A special needs planning attorney may find comfort in the joint representation model in that it seems to dovetail nicely with the NY Rules given the non-adversarial nature of the engagement and the common objectives of the clients. In practice it may be difficult to pull off. For example, the litigating attorney may disagree with this reading of the NY Rules and refuse to acknowledge an attorney-client relationship as between the two attorneys. The proposed trustee might resist signing an engagement agreement when the trust document has not been executed and the institution has not yet been formally appointed as trustee.

Finally, the problem of who has the right to waive potential conflicts and consent to the sharing of confidential information on behalf of the minor (also discussed in paragraph 2 above) still exists.

**6. You represent none of them—they are all "prospective clients"—but you have an affirmative obligation to the "protected individual" (the disabled minor).**

This position is the most closely aligned with what actually occurs in engagements of this nature, and it allows for continuity throughout the initial engagement and into any subsequent representation. Adopting this position may require a more expansive interpretation of the NY Rules and the ideas expressed in the ACTEC Commentaries and NAELA Aspirational Standards. It would also require clear, written explanation at the outset of the engagement.

In the author's opinion, this model best represents the purposes for which the special needs planning attorney was first engaged. Litigation attorneys who work with experienced special needs planning counsel understand that the ability to draft a supplemental needs trust is one small part of the skill set. Special needs planning attorneys provide advice and guidance in a number of different areas: government benefits, guardianship issues, waiver program eligibility, Medicare and Medicaid lien resolution, Medicare set aside trusts, income and gift tax issues, just to name a few.

In many cases, the litigating attorney, the family of the disabled minor, and the trustee (once appointed) expect to draw on the special needs planning attorney's expertise after the trust is funded. Subsequent services might include Medicaid applications and recertifications, advocacy with service providers, preparation of detailed accountings of trust activity, petitions for court approval for significant trust expenditures, and preparation of fiduciary or personal income tax returns. A well drafted trust sets the stage for effective administration, but arguably the greater value is in the advice and assistance that will be needed after the case has settled and the trust is funded.

### Developing the written agreement for the initial engagement

This analysis—that the special needs planning attorney does not have a specifically identifiable client—would be based on the following:

a. all involved would be "prospective clients" pursuant to NY Rule 1.18; and

b. the disabled minor would be a "protected individual" as defined in the Comment to

Standard B.1., and advice provided throughout the engagement would be for the primary benefit of the disabled minor and not others involved in engagement;

This information would be included in an explanatory letter prepared at the outset of the engagement, directed to the litigating attorney, to be signed by parents of the minor, explaining that:

a. the litigating attorney has requested that you consult on issues arising from the settlement, and you expect to prepare a trust document for consideration by the court as part of your engagement;

b. the advice you provide and the document you draft will be based on your professional opinion of what is in the best interest of the disabled minor, a "protected individual," in a manner consistent with the law, rules and practice governing supplemental needs trust in New York;

c. information shared with you cannot be kept confidential from others involved in the settlement on behalf of the disabled minor (the plaintiff attorney, the parents, and any guardian ad litem appointed on behalf of the minor);

d. the parents waive the right to later argue that the existence of a potential conflict of interest—during the initial engagement or at some point in the future—precluded the representation (see the discussion of "prospective waivers" in the ACTEC Commentaries at p. 105);

e. you may later be retained by the trustee of the supplemental needs trust, but your obligation to render advice for the primary benefit of the disabled minor/beneficiary will continue; and

f. if during the course of the representation "differing interests" emerge (as that term is defined in NY Rule 1.18 regarding duties to prospective clients), you would inform the individual with the differing interest of the need for independent counsel, and you would need to secure the informed written consent of the prospective clients to continued representation. If the differing interest becomes an irreconcilable conflict, you would need to withdraw from representation in a manner consistent with NY Rule 1.16. This might occur if the parents argued for an allocation of the settlement proceeds in favor of their derivative claim which far exceeded any reasonable allocation under existing New York law and practice.

**Developing the written agreement with the trustee for ongoing representation**

If after the trust is funded the trustee chooses to retain you to provide ongoing representation in a manner consistent with the discussions during the settlement process, your engagement agreement with the trustee would identify the trustee as your client, but would also explain that you are being retained to provide general representation in a manner which is consistent with the trustee's affirmative obligation to the primary beneficiary of the trust (the "protected individual"). You will not offer advice or take steps which you believe to be adverse to the primary beneficiary's interests, even if those steps would be beneficial to the trustee (individually). In such a case, you would need to withdraw from representation and direct the trustee to retain counsel to provide representation in an individual (versus a general) capacity.

Your engagement agreement with the trustee should also address how you will handle ongoing communication between counsel, trustee and the family. The ACTEC Commentaries suggest that counsel for the fiduciary can maintain confidentiality of communication with its client (in this scenario, the trustee), but in communicating with individuals who are not actual clients (in this scenario, the disabled minor and the parents) the attorney has an obligation to speak candidly and in a forthright manner on issues which involve the administration of the trust. ACTEC Commentaries at pages 36-39 and 190-191:

"If a fiduciary is not subject to court supervision and is therefore not required to render an accounting to the court but renders an accounting to the beneficiaries, the lawyer for the fiduciary must exercise at least the same candor in statements made to the beneficiaries that the lawyer would be required to exercise toward any court having jurisdiction over the fiduciary accounting." ACTEC Commentaries at p. 191.

For example, if you consult with the trustee about whether payment of a utility bill for the household is appropriately made from the trust, your email communications with the trustee discussing the risks and benefits of doing so would be confidential and would not be shared with the parents of the beneficiary without the trustee's consent. If the trustee ultimately refuses to pay the utility bill because the payment of the bill would impact SSI benefits and the parents later call you to discuss the matter, you (as attorney for the trustee) would be obligated to explain the basis for the trustee's decision in an honest and forthright manner.

This communication protocol should be explained in writing to the trustee and to the parents at the time you undertake the representation of the trustee, and should make clear that:

a. you represent the trustee and not the primary beneficiary of the trust or the parents;

b. you represent the trustee for the purpose of assisting the trustee in carrying out its fiduciary obligations to the primary beneficiary, and your advice and services must be consistent with that responsibility to the primary beneficiary;

c. your communications with the trustee are confidential and protected, while your communications with the parents are not;

d. notwithstanding the confidentiality of communication between the attorney and trustee, the primary beneficiary and the primary beneficiary's legal representatives (here, the parents) are entitled to information on how trust funds are being used for the primary beneficiary's benefit, and you will communicate openly and honestly with them for that purpose; and

   [if you were involved in the initial representation during the course of the settlement such that the disabled minor and his parents are all "prospective clients" under NY Rule 1.18]:

e. you would be precluded under the rules of professional conduct from representing the trustee in an adversarial proceeding against the primary beneficiary or his parents, and you would be precluded under the rules of professional conduct from representing the primary beneficiary or his parents in an adversarial proceeding against the trustee.

## Conclusion

Every ethics presentation and publication seems to begin with *the* question: "Who is the client?" After reviewing the New York Rules of Professional Conduct and associated Commentaries, the NAELA Aspirational Standards, the ACTEC Commentaries, and select ethics opinions from the New York State Bar Association, one is left with a different question: "In the scenario presented in this article, must one identify a specific client in order to provide effective representation?" Or is it more important to determine how you will accomplish the broader objectives and protections which serve as the foundation of the Rules of Professional Conduct: the obligations of loyalty, confidentiality, and effective communication?

In considering the answer to this question, the passage from the Preamble to the Model Rules of Professional Conduct bears repeating: "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of the legal representation and of the law itself."

If the individual who will be the focus of the special needs planning attorney's efforts is clearly identified (the protected individual" in the language of the Standards), and if the rules of communication and confidentiality are clearly explained, understood, and consented to by all involved, wouldn't the engagement accomplish the objectives that the NY Rules are designed to promote?

# Aging in Place: Changes and Innovation

By Neil T. Rimsky

According to the Population Reference Bureau, the number of Americans ages 65 and older is projected to more than double from 46 million today to over 98 million by 2060. The 65-and-older age group's share of the total population will rise to nearly 24 percent from 15 percent. Of that group, the majority want to remain at their home.

This is the first in a series of article on aging in place. We will explore some of the more interesting and promising models. What we have seen is that creativity and cooperation among public, private and not-for-profit entities offer the best models for a long-term solution.

In this first installment, we will look at naturally occurring retirement communities followed by the Village Concept first developed in Beacon Hill.

Naturally occurring retirement communities (NORCs) are facilities that were not designed as senior communities but developed naturally into aging communities. The most famous and probably the first is Penn South in Chelsea, lower Manhattan. Originally, the International Garment Workers Union developed cooperative housing adding up to 2,820 apartments in 10 high rises. As the population aged out, social workers and staff at Penn South formed Penn South Program for Seniors. PSPS continues to function to this day with a combination of municipal and state agencies, as well as not for profit and private entities.

NORCs have developed across the country. New York first passed legislation to fund the NORC Supportive Services Programs in 1994. In 2002, Congress began to support the development and testing of NORC Supportive Services Programs

By definition, a NORC is not a planned community. The concepts behind NORCs can be transferred to other models, including planned communities. NORCs, a model of aging in place with shares services and community support, are an early example of how cooperation among government agencies and not for profit agencies can combine their talents and programs to provide a greater benefit than either government or private agencies could without coordinated help.

The Villages developed on the model of the Beacon Hill Village, which was formed in 2001. Each Village is a membership organization designed to assist and encourage persons to remain in the community. The Villages is a grassroots, member-driven organization.

According to their model, the Village community provides programs and services so that members can lead vibrant, active and healthy lives while living in their own homes and their own neighborhoods.

Annual fees are modest (under $1,000) and often scaled back where necessary. The Villages offer social activities, referrals for services at a discount, including home health services, as well as some services at no cost.

The Villages (unlike NORCs) does not contract directly with governmental or private agencies to provide services to its members. Instead, the Villages makes referrals to vetted providers, often at a discount. These services include handymen, caterers, computer technicians, companions, money managers, home health care providers and geriatric care managers. Some offer discounts at gyms to encourage a healthy lifestyle. Transportation is also available at reduced cost.

Villages can provide social and cultural programming, including trips to museums and shows. The Villages can also bring in outside speakers.

The Village to Village network (vtvnetwork.org) formed in 2010, helps villages form and grow. Today, there are over 200 villages nationwide in 45 states and the District of Columbia. Among the core principles encouraged by the Village to Village network are the practice and principle of reciprocity and the intentional exchange of ideas, approaches, learnings and shared wisdom

In the next article, we will explore Livable Communities.

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Mr. Rimsky regularly helps families with disabled children. This type of planning involves an in-depth knowledge of the services available in the community as well as legal issues, including private and institutional supplemental needs trusts.

# The Marriage of Trusts and Retirement Asset Planning in Modern Practice

By Anthony Santoro

A continuing trend of decreasing employer-sponsored pension plans has shifted a greater burden on individuals to amass retirement savings on their own. A recent Willis Towers Watson study revealed that only 16 percent of Fortune 500 companies offered a defined benefit plan to new employees, which is down from 59 percent in 1998.[1] Consequently, planning with retirement assets will have increasing significance for practitioners, both in terms of estate and income tax implications, as well as planning strategies.

As of September 30, 2018, U.S. retirement assets totaled $29.2 trillion.[2] In fact, retirement assets represent 33 percent of all household financial assets in the United States.[3] Of these retirement assets, 39 percent are owned by baby boomers, meaning these assets stand positioned for transfer to the next generation in the not too distant future.[4] Unlike most other inherited assets, which typically do not result in income tax to the inheritor, the majority of retirement assets that are held in qualified plans have not yet been taxed. As we plan in the current "high estate tax exemption" environment,[5] income tax planning has become even more of a focus than estate tax planning for most individuals and families.

In many scenarios it can be wise to name an individual as an outright beneficiary of these accounts; however, in certain cases, it can be more advantageous to designate a trust as a beneficiary. If the retirement account is inherited by a non-spouse, the IRS requires the account to be liquidated over five years, or over the lifetime of the beneficiary (referred to as a "stretch" and based upon life expectancy tables). Nevertheless, not all trusts accomplish the same goals. Simply naming a living trust, without further structuring subtrusts created upon death of the grantor, can have unintended income tax and creditor protection consequences. Instead, incorporating a Standalone Retirement Trust (SRT) can be a useful tool to protect the assets from creditors of the beneficiary, while maximizing tax-deferred growth. A SRT is an inter vivos trust that will typically remain unfunded during the grantor's life, and receive retirement plan assets upon the death of the grantor. This article will address the client objectives to weigh when choosing a trust instead of an individual as a beneficiary, as well as drafting considerations to customize the trust to those objectives. Generally speaking, many of the same motives for establishing a trust also apply to naming a SRT as a beneficiary of a retirement account. The two principal considerations are creditor protection and the separation of control over investment and tax planning.

## I. Protecting Assets from the Creditors of the Beneficiaries

Retirement accounts that qualify under the Employee Retirement Income Security Act (ERISA) enjoy broad protection from creditors, bankruptcy, and civil litigation.[6] In addition, rollovers from ERISA accounts (no dollar limit) and IRAs up to $1 million[7] (indexed for inflation) are also protected. However, these same protections do not necessarily apply to all types of IRAs, with inherited IRAs being specifically excluded. In 2014, the U.S. Supreme Court held in *Clark v. Rameker* that an inherited IRA for a non-spousal beneficiary was not protected under U.S. Bankruptcy Code.[8] In the court's unanimous decision, it stated that an inherited IRA should not be considered "retirement funds," since the account was not personally funded for the purposes of retirement by the new account owner, nor can they add any additional monies to the account.[9] Although New York State provides more extensive protections as it applies to individual retirement accounts (i.e., 401ks, IRAs, qualified profit-sharing plans),[10] inherited IRAs are similarly not covered by these protections.

In a recent 2018 U.S. Bankruptcy Court case from the Northern District of New York, the court found that an inherited IRA was not exempt from creditors[11]. Since the debtor in the case could not rely on Federal protection after the *Clark v. Rameker* decision, the debtor argued that her inherited IRA was protected under N.Y. CPLR 5205 (The NYS Bankruptcy "Exemption Statute"). The court did not accept her position, stating that the debtor had unfettered access to the account[12] and N.Y. CPLR 5205(c)(1) specifically requires the account be held in trust in order to be afforded protected status.[13] The court also noted the fact that other state legislatures (i.e., Florida) have amend-

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ed state exemption statutes to explicitly include inherited IRAs, which New York State has not done.[14]

In addition, another reason to not necessarily rely on state statutes is that beneficiaries may move from state to state, and it can be difficult to project where intended beneficiaries will one day reside, let alone predict the statutory landscape that may or may not exist at the time of inheritance. These issues may make it advisable for a client to consider other avenues to achieve any desired measure of asset protection, such as the use of a trust.

## II. Separate Control and Investment/Tax Decision Making from Beneficial Ownership

Retirement assets take years of deferred contributions and prudent financial planning to grow, and account owners aim to preserve these assets as long as possible, including for their beneficiaries. Trusts can provide control over multiple generations and be set aside for specific purposes or life events.

Individuals receiving inherited assets are frequently besieged with a myriad important decisions to make, and may not truly understand their options. A beneficiary choosing a payout option will typically result in an irrevocable election that could have undue tax implications. Furthermore, they might be novice investors and a trust can be designed to instill investment control over the assets. Investment professionals witness in practice that inherited assets are often significantly, or fully liquidated shortly after paying to a beneficiary. Consequently, decades of careful saving and investing may be squandered in a short period of time unless other controls are installed. With a SRT, the grantor can designate professional investment management and attempt to have the property thrive as long as possible.

In addition to the above, other planning considerations involved in evaluating the inclusion of a trust are protection for a spendthrift beneficiary, to ensure children from a prior marriage inherit at the death of a spouse, divorce protection for the intended beneficiary, and for planning with a special needs beneficiary.[15]

### Drafting Requirements for a Trust Beneficiary

Although a trust can be an effective tool to accomplish the above goals, it must first qualify as a designated beneficiary. A designated beneficiary can only be an individual(s) (those with a determinable life expectancy). Therefore, an estate or charitable organization would not be considered a designated beneficiary, since they do not have a life expectancy, and thus the option to utilize the "stretch" provision for electing minimum payouts over the course of the beneficiary's life would be forfeited. In order for a trust to be deemed a designated beneficiary, the following requirements must be met:

1. The trust is valid under state law;[16]
2. The trust is irrevocable upon death of owner;[17]
3. Beneficiaries of the trust are identifiable from the trust instrument;[18] and
4. Documentation provided to plan administrator/custodian within authorized timeline.[19]

If these requirements are successfully met, one will be able to look through the trust document to identify who the beneficiaries are for the applicable distribution period, and qualify as a "see-through trust." If there are multiple beneficiaries, the life expectancy of the oldest beneficiary is used to determine the payout period.[20] If the trust is not deemed to have a valid designated beneficiary, the account will be required to fully liquidate by December 31st of the fifth year following the year in which the account owner died, if the account owner passed away prior to their required beginning date (RBD) of taking distributions; or, if owner died after his/her RBD, the required minimum distribution (RMD) will be based upon the account owner's life expectancy.[21]

Although designated beneficiary requirements 1, 2 and 4 are often easily met, requirement 3 presents the most potential pitfalls. First, the beneficiary(s) must be identifiable by September 30th of the year following the year of the account owner's death, and be an individual(s) with an ascertainable life expectancy. Not only are primary beneficiaries considered, generally remainder and/or contingent beneficiaries may be factored in when determining designated beneficiary status.[22] One of the two exceptions to this rule is found in conduit trusts (see below), as the trust is required to distribute all RMDs to the beneficiary.[23] The second pitfall, which can be a bit trickier to determine, is in accumulation trusts (see below), whereby all contingent and successor beneficiaries are typically evaluated, unless the beneficiary is a "mere potential successor."[24]

### Conduit Trust

A conduit trust is a trust that requires the trustee to distribute the full amount of the RMD received to the beneficiary. The trust will not retain any of the distributions from the retirement account, but rather pass the full distribution of any distribution to the beneficiary. Since the trust requires the trustee to pay all amounts received, the IRS will disregard potential successor beneficiaries, therefore qualifying as a designated beneficiary.[25] This is also favorable from a "stretch-out" perspective, since the RMD can be calculated solely based off the income beneficiary's life expectancy. The potential to maximize tax-deferred growth can be greater in the case of a young child or grandchild beneficiary. A conduit trust can be incorporated in another instrument, such as a revocable living trust or testamentary trust, or drafted on its own as a SRT.

Since the RMD is paid out of the trust, the income will be subject to the beneficiary's applicable tax rate, versus the condensed trust tax brackets. The top tax bracket of 37 percent is not triggered for an individual beneficiary until taxable income exceeds $510,301/$612,351[26] (single/married filing jointly), while a trust will hit the 37 percent bracket after just $12,750.[27] Furthermore, an individual will not be subject to the 3.8% net investment income tax until $200,000/$250,000 (single/married filing jointly) compared to just $12,750 for a trust.[28]

In summary, advantages of conduit trusts generally include:

- Less complexity in drafting;
- More favorable income tax rates; and
- Easier to leave money to a charity as a contingent beneficiary, while retaining designated beneficiary status for primary beneficiaries.

Disadvantages of utilizing conduit trusts may include:

- Less control over distributions than an accumulation trust;
- Not maximizing asset protection; and
- Not favorable for a minor or special needs beneficiary, since the RMD will be forced out.

## Accumulation Trust

Unlike the conduit trust, as its name suggests, an accumulation trust is not forced to distribute its RMDs. Although in most cases the initial distribution will be subject to a higher marginal tax rate, the trust can control beneficiary distributions based on its terms. Discretionary control is especially attractive in the case of a spendthrift beneficiary. In addition, if a parent wishes to create a supplemental needs trust, but only has retirement assets to fund the trust, the accumulation trust can be an attractive option to preserve means-tested benefits.

In order to maintain discretionary control and qualify as a designated beneficiary, it is imperative to analyze all "countable" beneficiaries. As indicated above, the regulations state contingent beneficiaries must be accounted for, but a "mere potential successor" can be ignored; however, the IRS does not specifically define these terms.[29] It can be argued that in an example of a primary beneficiary who is only entitled to a portion of the trust income or principal, he or she will likely result in a remainder beneficiary eventually receiving a portion of the assets as well. Thus, the remainder beneficiary will become factored into deciding who is a potential beneficiary.[30] Many accumulation trusts will have discretionary language built in (such as for health, education, maintenance and support) and create a level of uncertainty between beneficial interests, since it is possible that the trust could potentially distribute the full amount prior to a contingent beneficiary receiving the remainder interest.[31]

Potential remedies to this issue include incorporating language that commands which beneficiaries will have been deemed as predeceasing other(s) at the account owner's death or establishing separate shares within the trust (discussed further below).

In summary, advantages of accumulation trusts generally include:

- Greater control over distributions;
- Asset protection for a spendthrift beneficiary;
- Protection of means-tested benefits for a special needs beneficiary; and
- Asset protection for a beneficiary involved in a litigious profession.

Disadvantages of utilizing accumulation trusts may include:

- Condensed tax brackets, resulting in higher income taxes due;
- Incurred administration costs—including filing 1041 returns, trustee/administration fees; and
- Greater drafting complexity.

The decision to choose a conduit trust or an accumulation trust requires the practitioner to balance the more favorable income tax treatment and potential for greater tax deferral (conduit) against the post-death control with greater asset protection (accumulation). Two significant planning techniques that can be utilized to offer further flexibility when contemplating the best path forward for a client are: (i) separate shares and (ii) trust protector provisions.

## The Case for Separate Shares

Generally, when multiple beneficiaries are listed on a retirement plan, so long as they are segregated by December 31st of the year following the death of the account owner, they can be isolated into separate shares with RMDs based on each beneficiary's life expectancy. With a trust, however, even if all elements of a designated beneficiary status are met, the trust will base the RMD on the oldest beneficiary's life expectancy. In PLR 200537044, the grantor established a conduit SRT with nine separate shares for the nine beneficiaries. The grantor named nine separate primary beneficiaries, with each beneficiary receiving a separate share, and each was specifically allocated his or her applicable percentage on the account beneficiary form. Upon the grantor's death, the account was divided into separate accounts prior to the December 31st deadline. The IRS ruled in favor of the decedent and allowed separate account treatment, with each subtrust

being able to calculate the respective RMD based on the beneficiary's life expectancy, driving home the significance to carefully draft the language on the designation form(s).[32] The beneficiary form should not just simply designate the name of the trust, but rather break out each separate share as a distinct primary beneficiary.

## 20/20 Hindsight—The "Toggle Switch"

As mentioned above, the decision to implement a conduit vs. accumulation trust should not be taken lightly by the client, or the practitioner. Gathering as much information as possible in advance and ascertaining the goals of your client, as well as the intended beneficiary, are paramount. Despite best efforts, this is not always possible. One fallback technique could be to install a trust protector. In PLR 200537044,[33] discussed above, each subtrust of the SRT had language allowing an independent third party to transform each subtrust to an accumulation trust based on the sole discretion of the trust protector. Based on the circumstances involving one beneficiary, the trust protector exercised its power and converted one subtrust to an accumulation trust. The ruling allowed this as a one-time action, requiring the exercise of the "toggle switch" within nine months of the account owner's death.[34]

The ruling opened the door for post-mortem flexibility that can help mitigate some of the challenges of predicating issues down the road, such as bankruptcy or divorce. For example, a grantor might initially establish an accumulation trust due to fears surrounding a spendthrift beneficiary. However, upon inheritance, if the beneficiary is deemed "financially mature," a trust protector may find it more advantageous to transform the trust to a conduit trust. Incorporating a trust protector provides the unique ability to treat each beneficiary differently on a case-by-case basis, and the flexibility to adjust to changes in the tax law or asset protection landscape down the road.

## Summary

In summary, it is critical to have knowledge of all the options available for retirement asset planning, especially as the assets become increasingly more significant in the financial portfolios of clients. Special attention is needed to ensure that these assets are protected, income taxes are minimized, and ultimately passed on according to the client's wishes. SRTs can be an extremely attractive option to accomplish these goals, since they offer the asset protection found in an accumulation trust, with the flexibility to toggle to a conduit trust, which is arguably difficult, if not impossible, to implement these same strategies in a will or revocable living trust. As clients consider their overall estate plan, SRTs can provide an important option to accomplish their goals, while giving due consideration to the special nature of retirement assets.

## Endnotes

1. Brendan McFarland, *Retirement Offerings In The Fortune 500: A Retrospective* (Feb. 26, 2018) https://www.towerswatson.com/en/Insights/Newsletters/Americas/Insider/2018/02/evolution-of-retirement-plans-in-fortune-500-companies.
2. Investment Company Institute, *Retirement Assets Total $29.2 Trillion in Third Quarter* (Dec. 20, 2018) https://www.ici.org/research/stats/retirement/ret_18_q3.
3. *Id*.
4. *Id*.
5. $11.8M per person in 2019; 26 CFR § 20.2010-1 (2015).
6. 29 U.S.C. § 1001 (1974).
7. This figure is indexed for inflation and is presently $1,238,025; The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C. § 109 (2005).
8. *Clark v. Rameker*, 573 U.S. 122 (2014).
9. *Id*. at 126.
10. New York Civil Practice Law & Rules § 5205 (2016).
11. *In re Todd*, No 15-11083 (Bankr. N.D.N.Y.2018).
12. *Id*. at 4.
13. *Id*. at 5.
14. *Id*. at 11.
15. To keep the focus of the article on the drafting mechanics, these considerations will be left out of the scope of the article.
16. 26 CFR §1.401(a)(9).
17. *Id*. (b)(2).
18. *Id*. 5(b)(3).
19. *Id*. (b)(4); Provide a copy of the trust by October 31st of the calendar year following year in which account owner dies, or a list of all the trust beneficiaries as of September 30th of the calendar year following the year in which the account owner dies.
20. *Id*.
21. *Id.*
22. *Id*. (a)(7)(3).
23. *Id*.
24. *Id*. (a)(9)(5), Q&A 7(b), 7(c).
25. *Id*.
26. I.R.S Pub No.17 (2019) https://www.irs.gov/pub/irs-pdf/p17.pdf.
27. *Id*.
28. I.R.S Pub No.559 (2019) https://www.irs.gov/taxtopics/tc559.
29. *Id*.
30. Keith A. Herman, *How to Draft Trusts to Own Retirement Benefits*, 39 Actec L.J. 112-134 (2014); *see also*: Natalie B. Choate, *Life and Death Planning for Retirement Benefits* (7th ed. 2011).
31. *Id*.
32. I.R.S. Priv. Ltr. Rul. 200537044 (May 20, 2005).
33. *Id*.
34. *Id*. In this case, since the subtrust was being transformed to an accumulation trust, contingent beneficiaries needed to be removed to allow the trust to continue as a designated beneficiary.

# Lobby Day at the State Capitol

By Jeffrey Asher and Britt Burner

On February 27, 2019 the Section held its Lobby Day at the State Capitol, focusing on issues in the Governor's budget that the Section believes, if enacted, would have an adverse impact on the clients we serve. Our Lobby Day team this year was composed of Legislation Committee Co-Chairs Jeff Asher and Britt Burner together with Section members Valerie Bogart, Marty Hersh, Tammy Lawlor, Moira Adamo, Deep Mukerji, Christopher Bray, Tara Anne Pleat and David Goldfarb.

The Section lobbied four positions this year. First, restrictions on the use of spousal refusal was included in the Governor's budget...again. Some version of restricting the use of or eliminating spousal refusal has been in the Executive Budget proposal every year for more than two decades, and it has yet to be made part of the law. The Elder Law and Special Needs Section lobbied in opposition to any changes to the use of spousal refusal in the state's Medicaid laws.

*"The Elder Law and Special Needs Section lobbied in opposition to any changes to the use of spousal refusal in the state's Medicaid laws."*

Second, in the part of the budget that related to the Office of the Medicaid Inspector General, there was a provision that purports to expand the definition of medical assistance to payments made by Managed Long Term Care programs to downstream providers. While the Section believed it to be an unintended consequence of expanding the auditing power of OMIG, the expansion of the definition of medical assistance could result in the state recovering more than it actually paid out via the Medicaid estate recovery provisions, against the remainder of a terminating First Party Supplemental Needs Trust, against a refusing spouse, or against a settlement in the satisfaction of a 104(b) lien. We opposed the provision in the budget and through our discussions believe that clarifying language will be added making it clear that the expansion of the definition of medical assistance would not extend to recoveries in the identified contexts. Remember, the state pays Managed Long Term Care programs a "capitated rate" (i.e., a fixed dollar amount) for each of its enrollees and the MLTC then pays providers to deliver care to their enrollees; sometimes they pay out more than the rate they get from the state and sometimes less. In the cases where the MLTCs pay out more in care costs than the capitated rate they receive, it would be an unfair windfall to the state (and a penalty against the families) should this expanded definition apply to recoveries.


Third, in the initial budget proposal there was a segment that purported to repeal and replace the current Consumer Directed Personal Assistance Program (known as CDPAP or CDPA) by limiting the number of fiscal intermediaries and changing the payment methodologies to those intermediaries. The Section opposed these provisions primarily on the basis that they fail to recognize the import of fiscal intermediaries in the support of consumers and their self-directed aides beyond the payroll service. We further argue that the consolidation of fiscal intermediaries would necessarily result in limited accessing of home care. The upstate practitioners on our teams attempted to make clear that in many less populated and rural areas the home care system simply does not function without meaningful access to the CDPAP program due to workforce shortages. Given the fiscal savings assigned to this measure by the Division of Budget, we expect that some modification will be made to CDPAP, but we are hopeful the consolidation of fiscal intermediaries is not a part of it.

Finally, the Section took a position against the proposal in the Governor's budget that would reduce the amount of cost-sharing assistance for seniors and

persons with disabilities who have Medicare, for services covered by Medicare Part B. These include physician's services, outpatient care including chemotherapy, ambulance costs and other outpatient services. Medicare beneficiaries with some means will purchase Medi-Gap policies to cover out-of-pocket costs, often with premiums of $250 a month or more; the lowest income Medicare beneficiaries cannot afford this and instead enroll in the Qualified Medicare Beneficiary Program (QMB) or Medicaid, the purpose of that program being to assure meaningful access to Medicare services by paying the Medicare deductibles and cost-sharing as well as Part B premiums. Access to Medicare services for this population is threatened due to these cuts, as there has been a slow erosion over the years in the benefits provided and this year is no different. These individuals need meaningful access to health care, and this proposal undermines and continues to erode that access.

While NYSBA has once again made the proposed Power of Attorney legislation a legislative priority and has been lobbying that issue all session, David Goldfarb was able to participate in meetings on February 27th to provide additional advocacy in support of the Power of Attorney legislation that passed the Assembly 151-0 during the 2017 legislative session. While it was never brought to a vote by the Senate, it was introduced in both the Assembly and Senate earlier this year.

Stay tuned for how it all shakes out, and if you are interested and want to get involved with advocacy efforts please consider joining our Legislation Committee. The Committee is filled with wonderful, knowledgeable, and generous practitioners. Please contact Lisa Bataille at NYSBA if you are interested.


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# Tales from the Trenches

By Christine Mooney and Linda Redlisky

Welcome to the second installment of *Tales from the Trenches*. It is our hope that other members of the Elder Law and Special Needs Section will begin to share their stories for this column. Our focus in this edition is on tips and tricks for serving as Court Evaluator in Article 81 proceedings. We have heard from several colleagues that serving as a court evaluator from one county to another can be complex.

**Christine Mooney**

**Linda Redlisky**

## Appointment as Court Evaluator

Appointment as a court evaluator carries several procedural responsibilities. It is important to ensure you are familiar with the procedures of the part and county in which you are appearing. First, ensure that you complete the necessary Office of Court Administration (OCA) electronic confirmation of your appointment. It is important that you closely verify and review the portions of the appointment that relates to "with compensation" and "without compensation." Compliance with the Part 36 rules is a condition of your appointment.

## Notice of Proceedings and Service

After certification of your appointment, it is imperative that you are served with the Order to Show Cause and accompanying petition. A newly appointed court evaluator should also review the Notice of Proceeding that is sent to the statutory parties. In a recent proceeding, the Notice of Proceeding prepared by petitioner's counsel and the Order to Show Cause signed by the court contained conflicting dates and times. It is imperative that you verify that the parties are notified of the correct day and time of the hearing. In this particular instance, the court held the court evaluator responsible for failing to review and report the discrepancy to petitioner's counsel.

Another important aspect of your role as a court evaluator service is to ensure that jurisdiction and personal service are effectuated for the Alleged Incapacitated Person (AIP). It is the duty of the court evaluator to request the requisite affidavits of service from petitioner's counsel to ensure that the AIP has been served.

## Attendance of the AIP at the Hearing

In another recent matter, petitioner's counsel requested that the presence of the AIP be waived at the guardianship hearing. The presence of the AIP is required at the hearing pursuant to Section § 81.11(c)[1] of the Mental Hygiene Law. If a court evaluator intends to request that the presence of the AIP be waived, that request should be made in compliance with the requirements of § 81.11(c)[2] which states,

> If the person alleged to be incapacitated physically cannot come or be brought to the courthouse, the hearing must be conducted where the person alleged to be incapacitated resides unless:
>
> 1. the person is not present in the state; or
> 2. all the information before the court clearly establishes that (i) the person alleged to be incapacitated is completely unable to participate in the hearing or (ii) no meaningful participation will result from the person's presence at the hearing.

## Investigation and Data Collection

The investigation of a court evaluator should begin with details and circumstances outlined in the petition.

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However, in a recent matter, the petition contained absolutely no information of use to the court evaluator. In your early attempts to conduct an investigation it is always best to be creative and dig deep to find information of use to the court. A good beginning source of information is always a search on white pages to determine any potential relatives and residences of the AIP. Another creative way to obtain familial information about an AIP is to conduct a quick search utilizing Ancestry.com. In several cases both of these databases have been useful in locating family of the AIP.

An assumption often made by court evaluators is that the sole source of information is the petition. This is not true. Oftentimes, the petition lacks details that you can find by conducting a thorough investigation. If the AIP is located in a facility, it is important to interview the case worker and look at the AIP's face sheet. This will include any information about contacts or family members that are relevant to the AIP. In a recent case, the petition denoted that the AIP did not have any living family members. However, after copying names and phone numbers from the face sheet, a daughter and son were located. A thorough and comprehensive investigation can yield important information for the court and the AIP's well-being. If the AIP resides in the community this presents a distinct challenge. However, it is possible to speak with neighbors and friends of the AIP to construct details about the AIP's life.

## Financial and Real Property Resources

Based upon our prior experience there are several things to keep in mind when reviewing the financial aspects of the petition. Court evaluators are responsible, pursuant to § 81.09(9)(e),[3] for preserving and safeguarding the assets of the AIP. The court evaluator's financial investigation should include an ACRIS search or search of the local property records if the property records are readily accessible, New York State Unclaimed Funds search, and a federal government unclaimed funds search for pension and other veteran's benefits at https://www.usa.gov/unclaimed-money.[4] These databases may provide information on the availability of funds for the care and maintenance of the AIP.

A court evaluator should be diligent in researching real property ownership of the AIP. Section § 81.24 requires petitioner's counsel to file a Notice of Lis Pendens if the AIP owns real property.[5] However, in several recent cases the court evaluator has been the one to discover the AIP's ownership interests. Therefore, if the real property belonging to the AIP is located, it is imperative that a lis pendens be placed on the property. The court evaluator should notify petitioning counsel and request that the lis pendens be filed to protect the AIP's interests in the property. Proof of said filing should be included with the court evaluator in the report to the court.

A petition may include information about bank or brokerage accounts belonging to the AIP. It is imperative that a court evaluator obtain the necessary financial information about the AIP's assets. Unfortunately, it is often difficult and challenging to obtain information from a financial institution. In several instances we have requested an additional court order directing the financial institution to provide the required information. The scope and depth of the court evaluator's investigation should ensure the protection and preservation of the AIP's assets as mandated by the statute.

## Visiting with the Alleged Incapacitated Person

Lastly, never underestimate what information you may obtain from visiting with and talking to the AIP. In a recent proceeding the petition reported that the AIP was unable to meaningfully communicate or participate in their health care or property management needs. Upon a visit to the facility, the AIP was eager to talk about ownership in a cooperative, a home health aide that had stolen funds and several large bank accounts at a number of financial institutions. The AIP had also apparently discussed this information with the social worker who had resigned the week before. As court evaluator, be thorough, be creative and most importantly, *be aware* of even the most minuscule details. Your AIP and the court are depending on you!

## Endnotes

1. New York State Mental Hygiene Law Article § 81.11( c).
2. *Id*.
3. New York State Mental Hygiene Law Article § 81.09( 9)e.
4. https://www.osc.state.ny.us/ouf/.
5. New York State Mental Hygiene Law Article § 81.24.

# Entering the Practice of Elder and Special Needs Law

By Kirsten Dunn


Elder and Special Needs Law sounds like a nice, innocuous area of law to dabble in. After all, what could be more noble or fulfilling than helping the vulnerable? Whether an attorney who recently graduated from law school, or a seasoned attorney with years of practice under your belt, Elder and Special Needs Law is full of surprises, requiring much more than a noble spirit and a willingness to help. Indeed, it requires much: great people skills; understanding of estate planning and the challenges Medicaid brings to the table; the ability to learn a new language (the acronyms in Medicaid planning are outrageous); negotiation skills—especially when dealing with a nursing home billing department or warring family members; knowledge of myriad miscellanea, from real estate transactions to types of physical lifts available for homes to tax complexities; and a sensitivity to all the parties involved, as well as a sense of humility that will admit "this crystal ball is out of order." Elder Law *does* deal with planning for the unknown, and no party to the transaction can pretend they have transcendent knowledge of the future. Thankfully, the practice of Elder and Special Needs Law is chockful of fabulous people, learning and struggling and teaching and sharing right along with the newbie. What follows is a non-exhaustive list of tips and tricks for attorneys involved in the practice of Elder and Special Needs Law.

**MINGLE:** Join NYSBA's Elder and Special Needs Law Section and sign up for the listservs. The listserv such as the Section "digests" are a fantastic resource for attorneys new and old, with all levels of experience advising on all types of issues. Involvement is a great way to widen horizons and learn about new strategies or techniques, or to find out that even seasoned veterans have cases with new issues arising in them. Asking questions often opens up the resource of a mentor in the practice, as many experienced attorneys are very willing to share their knowledge. For those of us who practice in a rural area, and who do not have daily or even weekly contact with other attorneys, this can be especially helpful and builds a sense of community among those in the field. Even for those involved in larger practices, many attorneys are not well versed in the newer Medicaid rules, or other areas of estate planning, which can be quite nuanced. Daily contact through the listservs keeps our minds fresh to the latest trends, latest vocabulary and latest problems. The Section offers other resources, as well, such as latest legal decision updates and articles on pertinent subjects relating to the elder law.

Join other things, too: County bar associations, women's or men's clubs, local associations, and Boards of organizations catering to elder or special needs are great places to get to know people involved in your area of planning, and also help keep the elder law practitioner abreast of current issues. Attending local fairs and public events creates an endless source of resources, whether clients or those invested in the same business. One benefit of becoming known in this way is that your personal strengths can be revealed in a natural setting, creating an easy comfort for new clients who may want to bring their elderly mother to you, or who wouldn't mind divulging their financial and personal secrets to you as their counselor. It can be a real challenge for a parent of a special needs child to locate a person they can confide in and trust with their child's future, and a simple meeting at an unplanned venue can be just what it takes for the trust to develop.

Part of being an Elder Law attorney is forming connections with other people relating to elder care of all sorts. These connections can be with the clerks of the court ("Do I file the waiver and consent *with* the petition or after it on the e-filing system?"), the clerks of the county ("Do you have a copy of the deed I filed? You placed it in the box for me? Oh, THANK YOU!"), the local Department of Social Services ("Would you hold onto that application until we meet and clear up that transaction? Thanks!"), and local law enforcement ("Is there any way to keep him off his tractor in the streets, since he is legally blind and should definitely NOT be driving, even though this is a right-to-farm community and tractors are not regulated the same way cars are, and one doesn't need a license to drive them?"). The connections can also be found at your child's school party, where you might find yourself rubbing shoulders with the local sheriff, the supreme court justice, the physician and the Liberty Community Services driver, all of whom have children in the same class and all who are potential valuable resources to the Elder Law practitioner—or the town meeting, where you meet all kinds, and they all talk a lot, with varying degrees of value to the law practice, but infinite value to the spice of life factor.

**ATTEND** live session CLEs offered by the Elder Law and Special Needs Section. While it seems easier to simply gain CLE credit through online courses, there is much missed when not attending CLEs live. People in this Section are NICE. Genuinely nice. For some reason, those

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who spend their time helping the elderly or those with special needs have themselves some very special qualities. Many are so friendly, so willing to help out clients and other attorneys, and are people who enjoy what they do and the people they do it for. The camaraderie in the Section is not something duplicated in other Sections, making the live CLEs, especially the longer weekend meetings, an anticipated treat. Attending live CLEs also allows for making friends with attorneys who are licensed in other states, creating a resource network around the nation. Other helpful resources are also made available during the live CLEs that are not existent during online courses: contacts with trust administration companies, pooled trust representatives, Offices for Aging representatives, and more.

**KEEP** an open mind. I met an attorney at a (live) CLE who wanted to transition his firm from military contracts to elder law. It is hard to imagine a more drastic change, but this man saw his source of referrals drying up (for whatever reason, the source was leaving the area), and he and his two partners were aging and wanted to transition into an area of law with which they thought they could grow and keep up. Two years later, the transition is complete, and while they are finishing off some unfinished former business they are now growing and thriving with Elder Law.

*"BUILD your reputation and keep it strong. Be known as a problem solver, not a problem attorney."*

Change scenes to a law school elder law course where students are taught about Medicaid redesign. Most students leave the room with a dazed look, swearing internally they will never, ever practice that area of law. It is confusing, frustrating, complicated, vast, and apparently unconquerable. But if it seems that way to students and practitioners of law, how much more so to those intimately affected by it? This is an area that needs practitioners. They are wanted, in demand, and generally well-liked. Given that the fastest-growing segment of society is now those over 65 thanks to the baby boomers growing up, this is also a growing area of need in the law. Adding Elder Law to an existing practice, or making the shift entirely to practicing only Elder Law can be a worthwhile experience.

**TRUSTS:** This word alone connotes a scary, nebulous netherworld of provisions that without help can be intimidating enough to keep practitioners away from the area of Elder and Special Needs Law. Intimidation can be immobilizing. Don't let intimidation prevent you from learning and filling in the gaps in your knowledge base! Ask questions: as previously stated, *most* Elder law attorneys are nice, and willing to answer your questions. When reading the listserv, it becomes obvious that we all share a lot of questions. Additional resources can be found through law schools, through the NYSBA Section leaders and the NYSBA mentorship program. CLEs on trust drafting are available. Take time to educate yourself in this area, and then dive in. During a trust-drafting CLE, an attorney shared his experience of his first trust, drafted for an older client who was needing crisis planning. Scared, he launched into the project and was almost finished when the client passed away. He hated to admit he was almost glad, because the "voices" had him worried that he just didn't know enough to practice in this area of law. But the next case came in, and he successfully created his first plan including a trust. Each new case added to his knowledge and, in turn, to his confidence. Yes, the practice of Elder and Special Needs Law does often include trust drafting. But it doesn't have to mean the death of you!

**BUILD** your reputation and keep it strong. Be known as a problem solver, not a problem attorney. Contrary to popular culture and media impressions, antagonistic attorneys are not helpful to anyone. As young (newer) attorneys, we may try to mask our lack of knowledge with bravado. It rarely helps solve matters, and almost always leads to a much less pleasant interaction with opposing counsel. Some of our problems are best solved through creative solutions and the attorney willing to consider these builds a reputation as a problem solver. Since the problems presented in Elder Law tend to be varied (a hairy real estate transaction involving a borderline dispute before the property can be transferred into trust, or an unscrupulous billing department at a skilled nursing facility trying to bully the client's family into paying what they don't owe), we have many opportunities to let our creative juices flow when it comes to finding solutions.

Proofreading is a huge skill to build a strong reputation. I have always been a stickler for proper English use, so maybe this is a personal problem. (What is wrong with the following: "Drive Careful!" or "Live Fearless!"? Please tell me you know!!!) Writing letters or emails or pleadings in the same manner with which you speak or text or message or snap is unprofessional. Casualness leads to misunderstandings. It shows a lack of decorum, respect and professionalism. One very obvious way to show you are skilled is through your professionalism with every communication. (And yes, the spell-check feature has created some embarrassments for me that I did not catch until too late! Should have proofread! Lesson learned.)

Lastly, your reputation as a quality person is important in the practice of Elder Law. Our clients tend to be very vulnerable and may be in a crisis situation, may be angry, or may be scared. Kindness, helpfulness, professionalism and humility go a long way in assisting these clients and building our reputations.

The need is real, and Elder and Special Needs Law attorneys can be and are great friends and assets to their clients, their firms, and their communities.

# The Statutory Power of Attorney and Its Use in Medicaid Planning

By Winston Spencer Waters


## Abstract

The use of the statutory "power of attorney" as a means of Medicaid and estate planning is often overlooked in practice. It is an important resource for attorneys practicing in the area of elder law. The general tendency in Medicaid planning is to at one point or another seek the appointment of a Guardian for the Person and Property of an incapacitated person, with a request for Medicaid planning to be sought in the same or separate application. However, the statutory "power of attorney" allows an effective means by which attorneys can engage in Medicaid and estate planning in the least restrictive way by circumventing judicial intervention through expensive and protracted guardianship proceedings. The current "power of attorney" in New York is designed to empower the principal to permit an agent to engage in financial and estate planning. This article seeks to review the more significant sections of agency law in New York via an effective use of a "power of attorney." This article examines: (1) durable versus non-durable powers; (2) springing powers; (3) HIPAA considerations; (4) format of the power of attorney; (5) agent's power to make gifts; and (6) standard of care. The article also reviews its enforceability by the courts as it relates to Medicaid planning.


## Introduction

The relationship between an attorney-in-fact and his principal has been characterized as an agent and principal relationship, with the attorney-in-fact under a duty to act with the utmost good faith toward the principal in accordance with the principles of morality, fidelity, loyalty and fair dealing. Consistent with that duty, traditionally, an agent could not make a gift to himself or a third party of money or property that was the subject of the agency relationship. Many cases examined whether the principal authorized the agent to make gifts from assets belonging to the principal.[1] If the specific gifting language was not present within parameters of the statute the gift was disallowed by the courts.

The law was amended in 1996 to allow agents to make gifts to a class of close relatives of the principal with a cap of $10,000 (which was the limit for annual exclusions at that time). Despite there being language permitting gifting authority, questions remained about the discretionary authority of the agent in such matters. In the event such a gift was made, a presumption of impropriety was created that could only be rebutted with a clear showing that the principal intended to make the gift.[2] This was particularly applicable when a power of attorney existed between relatives.[3] The use of a statutory short form power of attorney for major gifts and significant transfers created problems for the courts to determine: (1) whether the agent had authorization to make gifts;(2) what standard guided the making of gifts, and (3) whether the agent could make gifts to himself. Gifts by an agent to himself or others carried with them a presumption of impropriety and self-dealing, a presumption that could only be overcome with the clearest showing of intent on the part of the principal to make the gift.[4]

In 2006, the New York Court of Appeals in *In re Ferrara*[5] decided this issue. In *Ferrara*, *infra*, the decedent executed a will explicitly stating that he was not making any provision for any family members and that his entire estate was to go to the charity. After the decedent's health began to decline, the decedent signed a durable power of attorney making his brother and his nephew his attorneys-in-fact. The principal executed the statutory short form provided in N.Y. Gen. Oblig. Law § 5-1501(1). At that time, N.Y. Gen. Oblig. Law § 5-1501(1)(M) permitted an attorney-in-fact to give gifts to family members not to exceed the aggregate of $10,000 to each person in any year. The form executed by the decedent removed the $10,000 limitation. A nephew of the decedent subsequently transferred $820,000 of the decedent's assets to himself. The court held that where the statutory short form under N.Y. Gen. Oblig. Law § 5-1503 was augmented to remove the $10,000 limitation, an attorney-in-fact had to make gifts in the principal's best interest, which was interpreted by N.Y. Gen. Oblig. Law § 5-1502M as gifts to carry out the principal's financial, estate, or tax plans. It decided that the nephew did not make gifts to himself for such purposes and that he improperly impoverished the decedent whose will contradicted any desire to give his estate to the nephew. The New York Court of Appeals held that an agent acting under color of a statutory short form power of attorney that contains additional language augmenting the gift-giving authority must make gifts pursuant to these enhanced powers in the principal's best interest.[6] The Court stated that whether the gift-giving power in a


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statutory short form power of attorney is limited to the authority spelled out in the lettered subdivision, or augmented by additional language, the best interest requirement remains. The agent was only authorized to make gifts to himself insofar as these gifts were in the decedent's best interest … as gifts to carry out the principal's financial, estate or tax plans. Here, Dominick Ferarra clearly did not make gifts to himself for such purposes. Rather, he consistently testified that he made the self-gifts "[i]n furtherance of the [decedent's] wishes" to give him "all of his assets to do with as [Dominick] pleased." The term "best interest" does not include such unqualified generosity to the holder of a power of attorney, especially where the gift virtually impoverishes a donor whose estate plan, shown by a recent will, contradicts any desire to benefit the recipient of the gift.[7] Despite the issues resolved in *Ferrara*, problems still persisted.

Then, in 2009, the New York State legislature amended the New York General Obligations Law concerning statutory powers of attorney. The law made significant changes in the manner and procedures that must be followed in the preparation of the power of attorney document. The legislature revised the New York State General Obligations law to permit extensive estate planning to be structured through an agency relationship. A seasoned practitioner can accomplish this by the creative use of the new power of attorney document.

At the outset, it is important to note that the new power of attorney does not apply to all situations where a person seeks to appoint an agent. This new type of power of attorney does not apply to: (1) a power of attorney given primarily for a business or commercial purpose, including without limitation: (a) a power to the extent it is coupled with an interest in the subject of the power; (b) a power given to or for the benefit of a creditor in connection with a loan or other credit transaction; (c) a power given to facilitate transfer or disposition of one or more specific stocks, bonds or other assets, whether real, personal, tangible or intangible; (2) a proxy or other delegation to exercise voting rights or management rights with respect to an entity; (3) a power created on a form prescribed by a government or governmental subdivision, agency or instrumentality for a governmental purpose; (4) a power authorizing a third party to prepare, execute, deliver, submit and/or file a document or instrument with a government or governmental subdivision, agency or instrumentality or other third party; (5) a power authorizing a financial institution or employee of a financial institution to take action relating to an account in which the financial institution holds cash, securities, commodities or other financial assets on behalf of the person giving the power; (6) a power given by an individual who is or is seeking to become a director, officer, shareholder, employee, partner, limited partner, member, unit owner or manager of a corporation, partnership, limited liability company, condominium or other legal or commercial entity in his or her capacity as such; (7) a power contained in a partnership agreement, limited liability company operating agreement, declaration of trust, declaration of condominium, condominium bylaws, condominium offering plan or other agreement or instrument governing the internal affairs of an entity authorizing a director, officer, shareholder, employee, partner, limited partner, member, unit owner, manager or other person to take lawful action relating to such entity; (8) a power given to a condominium managing agent to take action in connection with the use, management and operation of a condominium unit; (9) a power given to a licensed real estate broker to take action in connection with a listing of real property, mortgage loan, lease or management agreement; (10) a power authorizing acceptance of service of process on behalf of the principal; and (11) a power created pursuant to authorization provided by a federal or state statute, other than this title, that specifically contemplates creation of the power, including without limitation a power to make health care decisions or decisions involving the disposition of remains.[8] An attorney can use a statutory short form power of attorney or a non-statutory power of attorney in connection with any of the transactions described above.[9]

## I. Durable vs. Non-Durable Power of Attorney

A principal can make an appointment of an agent while having the requisite mental capacity through a durable power of attorney and the agent can continue to act after the possible mental incapacity of the principal.[10] This approach is based on the assumption that most principals prefer that their powers of attorney remain in effect during any period of incapacity, thus avoiding the need for guardianship. The durable power has long been the preferred form for most purposes, while the nondurable form is often chosen for real property transactions.[11] At one time a specially labeled document had to be used containing a heading, "Durable Power of Attorney." Pursuant to recent amendments "a power of attorney is presumed to be durable unless the instrument expressly provides that it is terminated by the incapacity of the principal.[12] However, to convert the "power of attorney" form to a nondurable power of attorney (a power of attorney which will no longer be effective if the principal becomes incapacitated), the principal should include a statement to that effect in the section of the form labeled "modifications."[13]

## II. Springing Powers

Once there is an execution of the "power of attorney" by a principal with capacity, duly acknowledged in the presence of a notary,[14] the actual effective date of the power of attorney is the date of acknowledgement of the agent's signature.[15] If there is more than one agent designated then the power of attorney becomes effective on the date the last designated agent's signature is notarized.[16]There are instances when the principal seeks to delay the effective date of the power of attorney. A

power of attorney can "spring into effect" at a later point in time.[17] To convert the form to a power of attorney effective at a future time, also called a "springing" durable power of attorney, in the section labeled "modifications," the principal should include a statement describing the contingency that will trigger the document's effectiveness, or provide the date on which the document will become effective.[18] If the power of attorney states that it takes effect upon the occurrence of a date or a contingency specified in the document, then the power of attorney takes effect only when the date or contingency identified in the document has occurred, and the signature of the agent acting on behalf of the principal has been acknowledged.[19] If the trigger is anything but a date, the principal should also specify who is to certify that the contingency has taken place.[20] If the document requires that a person or persons named or otherwise identified therein declare, in writing, that the identified contingency has occurred, such a declaration satisfies the requirement of this paragraph without regard to whether the specified contingency has occurred.[21] If a person opts to wait without having a power of attorney, an expensive guardianship proceeding may be necessary to make financial decisions if incapacity follows.[22]

## III. Health Insurance Portability and Accountability Act of 1996 (HIPAA)

Practitioners should be aware that the Privacy Rule under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)[23]will be triggered if the principal wishes to create either a nondurable power or a springing power in which the contingency for effectiveness is the principal's incapacity.[24] The Privacy Rule protects individuals' medical information from disclosure to third parties without a valid HIPAA-compliant authorization.[25]

The new legislation permits an agent acting pursuant to a power of attorney to "examine, question, and pay medical bills in the event the principal intends to grant the agent power with respect to records, reports and statements, without fear that the HIPAA Privacy Rule [will] prevent the agent's access to the records."[26] However the amendment also clearly states that the agent's authority does not include the power to make medical or health care decisions for the principal.[27] This decision-making authority remains with the principal's health care proxy designated pursuant to New York Public Health Law section 2981.[28]

## IV. Format of the Power of Attorney

The format of the power of attorney is controlled by statute.[29] Among other requirements, it must be printed or typed and be signed by both the principal and agent.[30] The document must be signed and dated by a principal with capacity, with the signature of the principal duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property[31] and it must be signed and dated by any agent acting on behalf of the principal with the signature of the agent duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property.[32] Interestingly, the power of attorney does not have to be created or executed in the State of New York to be enforceable within New York State.[33] The power of attorney executed in another state in compliance with the law of that state or the law of New York State is valid in this state, regardless of whether the principal is a domiciliary of this state.[34]

## V. Agent's Power to Make Gifts

The key provision in the 2009 power of attorney is the ability to make gifts. There are two applicable statutes: N.Y. Gen. Oblig. Law § 5-1502(I)(McKinney 2018) and N.Y. Gen Oblig. Law § 5-1514 (McKinney 2018).

### N.Y. Gen. Oblig. Law §5-1502(I) (McKinney 2018)

The statute authorizes an agent to make gifts that the principal customarily made to individuals and charitable organizations prior to the creation of the agency, provided that in any one calendar year all such gifts shall not exceed five hundred dollars in the aggregate.[35]

### N.Y. Gen Oblig. Law § 5-1514 (McKinney 2018)

The major gifts rider section of the law reflects the evolution of the power of attorney into an instrument to accomplish complex financial and estate planning. In order to emphasize the significance of this usage, the 2009 law consolidates all of the permissible gifting and transfer powers that were scattered throughout the pre-2009 construction sections into section 5-1514. The various default self-gifting provisions that appeared in several construction sections are converted into affirmative choices. Section 5-1514 provides for an optional Major Gifts Rider to the statutory short form power of attorney by which the principal may authorize the agent to make major gifts and analogous transfers such as creating joint accounts and changing beneficiary designations. The principal must sign the Major Gifts Rider before two witnesses or acknowledge her signature before two witnesses, like the requirement for wills.[36] This execution requirement reflects the fact that by exercising the authority granted in the instrument, the agent can alter the principal's probate and non-probate assets. If the agent is granted such authority, the agent must exercise that authority in the best interest of the principal unless the principal has provided specific instructions about the exercise of the authority.[37] It is germane to note that if a principal grants gift giving authority to the agent, the specific power must be provided in the Statutory Major Gifts Rider only. It is not permissible to place such power in the the statutory short form power of attorney.

Specifically, the statute provides that the Statutory Gift Rider is a document by which the principal may supplement a statutory short form power of attorney to

authorize certain gift transactions[38] other than those permitted by subdivision fourteen of section 5-1502I.[39]

The power of attorney must meet the requirements of subdivision nine of section 5-1514 of the General Obligations Law,[40] and contain the exact wording of the form set forth in subdivision ten of section 5-1514.

A mistake in wording, such as in spelling, punctuation or formatting, or the use of bold or italic type, shall not prevent a statutory gifts rider from being deemed a statutory gifts rider, but the wording of the form set forth in subdivision ten of section 5-1514 governs.[41]

The use of the form set forth in subdivision 10 of section 5-1514 is lawful and when used, it shall be construed as a statutory gifts rider. A statutory gifts rider may contain modifications or additions as provided in section 5-1503 as such modifications or additions relate to *all* gift transactions. The statutory gifts rider must be executed in the manner provided in section 5-1514, simultaneously with the statutory short form power of attorney in which the authority (*SGR*) is initialed by the principal. A statutory gifts rider and the statutory short form power of attorney with its supplements must be read together as a single instrument.

*"The new legislation permits an agent acting pursuant to a power of attorney to 'examine, question, and pay medical bills in the event the principal intends to grant the agent power with respect to records, reports and statements, without fear that the HIPAA Privacy Rule [will] prevent the agent's access to the records.'"*

## Format

The statute authorizes the agent to make other types of gifts that were not allowed beyond those customarily made by the principal or those that exceeded the $500 threshold limit.[42] The principal must expressly grant such authority either in a statutory gifts rider[43]to a statutory short form power of attorney or in a non-statutory power of attorney executed pursuant to certain requirements.[44] To be valid, a statutory gifts rider to a statutory short form power of attorney must (a) be typed or printed using letters which are legible or of clear type no less than 12 point in size, or, if in writing, a reasonable equivalent thereof;[45] (b) be signed and dated by a principal with capacity, with the signature of the principal duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property, and witnessed by two persons who are not named in the instrument as permissible recipients of gifts, in the manner described in subparagraph two of paragraph (a) of section 3-2.1 of the Estates, Powers and Trusts law;[46] (c) be accompanied by a statutory short form power of attorney in which the authority (Statutory Gift Rider) is initialed by the principal;[47] (d) be executed simultaneously with the statutory short form power of attorney.[48]

## Statutorily Permissible Gifts

The statute permits the principal to authorize the agent to make gifts to two different classes of persons.

### Gifts to Family

The statute permits the principal to authorize the agent to make gifts to the principal's spouse, children and more remote descendants, and parents, not to exceed, for each donee, the annual federal gift tax exclusion amount pursuant to the Internal Revenue Code.[49] For gifts to the principal's children and more remote descendants, and parents, the maximum amount of the gift to each donee shall not exceed twice the gift tax exclusion amount, if the principal's spouse agrees to split gift treatment pursuant to the Internal Revenue Code.[50]

### General Gifts

The principal can authorize an agent to make gifts in unlimited amounts.

The principal may also authorize the agent to (a) make gifts up to a specified dollar amount, or unlimited in amount; (b) make gifts to any person or persons; (c) make gifts in any of the following ways: (1) opening, modifying or terminating a deposit account in the name of the principal and other joint tenants; (2) opening, modifying or terminating any other joint account in the name of the principal and other joint tenants; (3) opening, modifying or terminating a bank account in trust form as described in section 7-5.1 of the estates, powers and trusts law, and designate or change the beneficiary or beneficiaries of such account; (4) opening, modifying or terminating a transfer on death account as described in part four of article 13 of the Estates, Powers and Trusts Law, and designate or change the beneficiary or beneficiaries of such account; (5) changing the beneficiary or beneficiaries of any contract of insurance on the life of the principal or annuity contract for the benefit of the principal; (6) procuring new, different or additional contracts of insurance on the life of the principal or annuity contracts for the benefit of the principal and designate the benefi-

ciary or beneficiaries of any such contract; (7) designating or changing the beneficiary or beneficiaries of any type of retirement benefit or plan; (8) creating, amending, revoking or terminating an inter vivos trust; and (9) opening, modifying or terminating other property interests or rights of survivorship, and designate or change the beneficiary or beneficiaries therein.[51]

A gift to an individual authorized by this subdivision may be made outright, by exercise or release of a presently exercisable general or special power of appointment held by the principal, to a trust established or created for such individual, to a Uniform Transfers to Minors Act account for such individual (regardless of who is the custodian), or to a tuition savings account or prepaid tuition plan as defined under section 529 of the Internal Revenue Code for the benefit of such individual (without regard to who is the account owner or responsible individual for such account).[52]

Gifts to the agent must be authorized in the Statutory Gifts Rider.

## I. Standard of Care

In *Morrow v. Phelps*,[53] Johnnie Mae Phelps (hereinafter referred to as "the decedent") was a member of the Teacher Retirement System in New York City prior to her death, and owned a pension annuity valued at $46,434.48. Additionally, US Life Insurance insured the decedent for $100,000. The decedent died on January 15, 2012. In March, 2001, the decedent designated Tanya Phelps ("Phelps") and Dorothy Gordon ("Gordon") as her beneficiaries of the US Life Insurance policy and in June 2001, designated Gordon as the primary beneficiary on her pension account with TRS. In November, 2011, decedent had her Last Will and Testament prepared where she appointed Nancy P. Barbie as her Executrix and Gordon as alternate Executrix ("November Will").

On December 30, 2011, decedent hired her husband, T.J. Morrow, to draw a power of attorney ("Power of Attorney") and on January 9, 2012, T.J. Morrow drew decedent's Last Will and Testament ("January Will"). The January Will contained Riders, including plaintiff's power to select beneficiaries for decedent's life insurance and pension accounts, for which plaintiff's daughter was named as primary beneficiary. Further, the December Will included a No Contest Clause.

Gordon and Phelps contested the second will and plaintiff (Jacqueline Morrow) brought suit based on the "no contest" clause to recover 100 percent of the proceeds from the US Life Insurance policy and the TRS account. In support of her motion, plaintiff argued she had general authority to act as an alter ego of the principal (decedent) based on the Power of Attorney drawn by decedent. Further, decedent granted non-statutory powers to plaintiff through the January Will and the attached riders to change the beneficiary forms, where the January Will states, "My attorney in fact shall arrange my beneficiary documents accordingly. Rider B: Asset 1."

Allegedly decedent asked plaintiff to change her beneficiaries on January 11, 2012. Plaintiff argued she had the authority to do so and changed the beneficiaries on the US Life Insurance and TRS accounts on January 13, 2012, which plaintiff's attorney mailed on January 16, 2012. The change in beneficiaries was made in accordance with decedents intent (as defined in the Rider to the January Will). Plaintiff argued that even though the changes in beneficiary forms were not mailed until after decedent passed away, plaintiff did all that was humanly possible to adhere to decedent's wishes to change her beneficiaries and mailed them as soon as possible. As such, after defendants contested the will, plaintiff argued that she was entitled to 100 percent of the proceeds of the Life Insurance policy and the TRS pension, where defendants violated decedent's No Contest Clause.

In March, 2013, the court in denying the motion for summary judgment, held that *there were further issues of fact regarding whether plaintiff had a valid power of attorney to designate a change in beneficiaries, where the section on gift giving authority is blank and not signed/initialed by decedent* (emphasis supplied). The court also held that [t]he Designation of Beneficiary Form stated on Page 3, Instruction #5, "TRS must have your completed 'Designation of TDA Beneficiary Form' on file before your death." Decedent passed away on January 15, 2012 and plaintiff conceded the form was not mailed until January 16, 2012, one day after decedent's death. According to General Obligations Law 5-1514, "if the principal intends to authorize the agent to make gifts other than gifts authorized by subdivision fourteen of section 5-1502 of this title, the principal must expressly grant such authority either in a statutory gifts rider to a statutory short form power of attorney or in a non-statutory power of attorney" (N.Y. Gen. Oblig. Law § 5-1514 (McKinney). *An agent may not: (a) exercise any authority described in subdivision two or three of this section unless such authority is expressly granted in a statutory gifts rider to a statutory short form power of attorney or in a non-statutory power of attorney executed pursuant to the requirements of paragraph (b) of subdivision nine of this section."*

As such, there are issues of fact as to whether plaintiff had the authority to change beneficiaries and if she did, whether the change of beneficiaries was properly filed with TRS. Further, there are issues of fact regarding the proper beneficiaries of the US Life Insurance account as well for the same above-stated reasons[54] (emphasis supplied).

In addition, defendants Phelps and Gordon made a motion to disqualify T.J. Morrow, on the basis that he was a necessary and material witness regarding significant issues of fact and would likely be called at trial to testify to those issues. The court mentioned that the action involved plaintiff and plaintiff's counsel, and issues

concerning their involvement in having the decedent draw up a new Power of Attorney and Last Will and Testament just before decedent's death naming plaintiff and plaintiff's daughter as beneficiaries. Many of Gordon's and Phelp's counterclaims asserted claims against both plaintiff and plaintiff's attorney. They were in a dire financial situation, having problems with their mortgage until they eventually defaulted in 2008, upon which a foreclosure action is pending. Defendants argued these financial strains have created a fraudulent-looking cloud on their alleged relations with the decedent. Further, the genuineness of the documents, all of which were prepared by plaintiff's attorney, were at issue in the case. According to the court, the documents at issue included: the retainer agreement; the "new" power of attorney executed on December 30, 2011; the change of beneficiary forms for US Life Insurance and TRS, both allegedly executed on January 13, 2012; and the "new" will with riders allegedly executed on January 9, 2012. Each document requires testimony of plaintiff's attorney and after proper depositions and discovery. Based on such factual issues, the court denied the motion.

In *In re Conklin*,[55]on August 30, 2010 Julius Gargani died testate. He was survived by two children, Norman Gargani and Regina Demitrack. The decedent's Last Will and Testament dated December 9, 2003 was admitted to probate on February 10, 2011 and letters testamentary issued to Joan Conklin. Ms. Conklin was a cousin and "significant other" of the decedent. This case involved an accounting proceeding of the executor, Joan Conklin, who was also an attorney in fact. Her daughter, Lori Conklin, was co-agent under one power of attorney and a successor agent for the decedent under a second power of attorney. The decedent's will provided, in pertinent part, for all of his personal savings accounts, including his checking account as well as his personal belongings, to go to Joan Conklin. Article Fourth provided for the bequest of "all of the sales proceeds from the sale of my ownership interest in the cooperative apartment ... which is to be sold by the Executrix of my estate as soon as practicable upon my demise, and to be divided equally ... amongst my son, Norman Gargani, my daughter, Regina Demitrack and my ex-spouse Regina Gargani." The residue of the estate was bequeathed to Joan Conklin.

The first witness to testify was the attorney who drafted the power of attorney. The attorney testified that he was contacted by Lori Conklin, who said she needed a power of attorney for the decedent as well as Medicaid planning. The attorney scheduled a meeting with Lori Conklin and her mother, Joan Conklin. Lori Conklin subsequently testified that at almost every meeting with the attorney, present were her mother, her brother and her brother's wife. *The decedent was not present at any of these meetings* (emphasis supplied). The purpose of the meeting, according to the attorney, was to arrange for the drafting and execution of a new power of attorney and to provide Medicaid planning. The attorney testified that he sent a letter to Lori Conklin in which he outlined his plan for Mr. Gargani. The lawyer recommended that the decedent's cooperative apartment be sold and the net proceeds deposited into an account in the name of Julius Gargani. The lawyer advised Ms. Conklin in the letter that the account could be a joint account with Joan Conklin or Lori Conklin. With regard to the decedent's bank accounts, the attorney advised that the various accounts be consolidated and that "for the time being, when the new account is opened the designated beneficiary, 'in trust for person,' can remain the same." Further discussions regarding transfers for future Medicaid planning, according to the attorney, would be addressed at a later date. The attorney further testified that he reviewed an existing power of attorney and recommended that the decedent execute a new power of attorney as the other power of attorney did not contain a major gifts rider. The attorney testified that subsequent to the meeting, he believed that he had a telephone call with the decedent wherein they discussed the drafting of the power of attorney.

The attorney testified that he met the decedent for the first time on March 24, 2010 at a nursing home or a rehabilitation facility in which the decedent was residing. Also present at the meeting were the attorney's father, Lori Conklin, Joan Conklin and Ann Marie Conklin. The purpose of the meeting was to execute the second power of attorney. The attorney testified that he had a discussion with the decedent about liquidating the cooperative apartment and consolidating the accounts. The attorney thought that the entire meeting took approximately 30 minutes.

After the execution of the second power of attorney, the attorney testified that he had one additional conversation with the decedent on the date of the closing of the cooperative apartment, when the decedent was contacted to ensure that he was alive. The net proceeds from the sale of the cooperative apartment in the approximate amount of $125,500 were deposited into an account in the decedent's name. With regard to Medicaid planning, the attorney testified that he had further discussions with Joan Conklin and Lori Conklin regarding Medicaid planning. When asked whether the attorney advised the decedent about the proceeds from the sale of the cooperative apartment going to Joan Conklin, the attorney replied that he and the decedent talked about Medicaid planning, not about his testamentary plan. He stated that his firm was not retained to do estate planning and as such he never discussed with the decedent where his money should go. The attorney repeatedly stated that he was the attorney for the decedent despite the fact that his initial contact was with Lori Conklin, his subsequent meetings were with various members of the Conklin family and his only contact with the decedent was a 30-minute meeting and two phone calls.

The attorney testified that he told both Joan Conklin and Lori Conklin that they could charge a fee for acting as agents for the administration of Mr. Gargani's financial affairs. He did not recall if he told them what the amount of the fee should be. Lori Conklin testified that the decedent was her mother's cousin and her mother's "significant other" and that they had lived together for approximately 13 years. Ms. Conklin testified that she strongly disliked the decedent and resented the way he treated her mother. Ms. Conklin testified that at some point in January, 2010, the decedent was hospitalized. In February of 2010, a power of attorney was executed and according to Ms. Conklin, she and her mother were appointed agents by the decedent. Each was given the authority to act separately. Ms. Conklin testified that she arranged for the meetings with the attorney and that the decedent never discussed finances with her. With regard to the decedent's bank accounts, she testified that she found the bank books in the decedent's apartment, took possession of the bank books, closed some of the accounts and deposited the proceeds into an account in the decedent's name.

The issues at the hearing were whether the agent[s] appointed by the decedent in these powers of attorney acted appropriately when they closed out multiple Totten trust accounts; sold the decedent's specifically bequeathed cooperative apartment; paid $20,000 allegedly for the renovation of one of the agent's bathrooms; and paid themselves compensation as agents. As a result of the actions of the agents, the decedent's entire estate went to the accounting party, Joan Conklin, who was also an agent under both powers of attorney. Joan Conklin was not available to testify at the hearing as she is a resident of a nursing home.

The evidence and testimony adduced at the trial showed the following: on March 15, 2010, acting under the first power of attorney, Lori Conklin closed an account held in the decedent's name in trust for the decedent's daughter, Regina Demitrack, in the total amount of $10,001.04. On March 26, March 27, and April 23, 2010, acting under the second power of attorney, Lori Conklin closed bank accounts in the decedent's name in trust for Regina Gargani, Norman Gargani, Regina Demitrack and Joan Stucko. The combined total of the Totten trust accounts that were closed was $165,302.76.[56] The funds were deposited into an account in the decedent's name. With regard to the decedent's accounts that were in trust for her mother, Ms. Conklin testified that she left those alone. She also testified that she did not close some small Totten trust accounts for the Gargani family that amounted to approximately $40,000. Her mother's Totten trust accounts amounted to approximately $60,000. Ms. Conklin testified, incredibly, that the reason she did not liquidate the accounts in trust for her mother was because she wanted to start with the larger accounts and save the "little ones" for later.

With regard to the decedent's cooperative apartment, the apartment was sold on August 12, 2010. Ms. Conklin testified that the net proceeds in the approximate amount of $125,000 were deposited into an account in the decedent's name. Mr. Gargani died on August 30, 2010. Ms. Conklin testified that on September 8, 2010, nine days after the decedent died, she used the power of attorney to close out the decedent's account; she then used "90,000 to 99,000" to pay off her mother's home equity loan and the remaining $100,000 was "disbursed for Medicaid planning." The account statements offered into evidence at the hearing show that $100,000 was deposited into an account with Lori Conklin and Joan Conklin. She testified that she had never "read" the decedent's will, but that she had "heard" about it, which is why she knew that all the decedent's money could go to her mother. Lori Conklin further testified that her mother's home was transferred to her brother and her mother's other assets were transferred for Medicaid planning. She claimed, incredibly, to have no knowledge about where the $100,000 in the joint account she held with her mother (funded by the decedent's assets) had gone.

*The court held with regard to the appointment of Lori Conklin as an agent for the decedent, the instrument failed on its face. As set forth in the General Obligations Law § 5–1501B, to be valid, a statutory short form power of attorney must be signed and dated by any agent with the signature of the agent duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property (General Obligations Law § 5–1501B [1][c] ). The power of attorney in question has Lori Conklin's name handwritten into the document next to her mother's name. Joan Conklin's signature is properly acknowledged but the document is silent with regard to Lori Conklin. As such, the power of attorney was not valid with regard to her and she had no authority to close the account. Further, even if the power of attorney had been properly executed and acknowledged, as set forth more fully below, the power of attorney did not have the appropriate language to allow her to close the Totten trust account*[57](emphasis supplied).

In 2007, Helen Van Alst (hereinafter "decedent") opened an individual account and an individual retirement account (hereinafter IRA) at defendant Morgan Stanley Smith Barney, LLC (hereinafter MSSB). Decedent named no joint owners of the individual account and named her estate as the sole beneficiary of the IRA. Defendant Stephen J. Mazzei Jr. was later assigned as the financial advisor for these accounts. In January 2011, plaintiff (Jacobs), who was decedent's longtime friend and neighbor, took decedent—then 88 years old and suffering from lung cancer—to the hospital. Five days later, while still hospitalized, decedent executed a durable power of attorney—prepared by an attorney—that designated plaintiff as decedent's agent. Decedent initialed line (P) in the section headed "Grant of Authority," thus authorizing plaintiff to exercise all of the powers enumerated in that section, but neither initialed the section authorizing

plaintiff to make gifts pursuant to a statutory gifts rider, nor executed such a document (*see* General Obligations Law § 5–1513 [1] [Power of Attorney New York Statutory Short Form(f)(2); (h)]).[58]

Shortly thereafter, plaintiff presented the power of attorney to defendants and asked to be added to decedent's individual account as a joint owner and to be listed as the sole beneficiary of the IRA. Based upon decedent's failure to initial the statutory gifts rider section of the power of attorney, defendants declined to make the requested changes, and Mazzei allegedly advised plaintiff that personal confirmation from decedent was required.[59] Plaintiff later presented defendants with handwritten notes, allegedly signed by decedent, asking to have plaintiff added to the individual account as a joint owner. However, no changes were made, and decedent passed away several days later. The notes did not mention the IRA.[60]

Plaintiff commenced an action alleging negligence and breach of contract arising out of defendants' failure to make the requested account changes. Defendants answered, asserting lack of standing and other affirmative defenses. Morgan Stanley brought a counterclaim against plaintiff, as well as a third-party complaint for interpleader against, among others, decedent's sister. Shortly thereafter, defendants moved for summary judgment dismissing the complaint. Plaintiff opposed the motion and cross-moved for denial or a continuance on the ground that further discovery was required. Supreme Court granted defendants' motion, denied plaintiff's cross motion and dismissed the complaint. Plaintiff appealed. The Appellate Division held that defendants did not owe a duty to plaintiff to make the requested changes in decedent's accounts.

The supreme court held that whether a defendant owes a duty of care to a plaintiff is a threshold inquiry in a negligence action, as there can be no liability in the absence of such a duty (*see Lauer v. City of New York,* 95 N.Y.2d 95, 100, 711 N.Y.S.2d 112, 733 N.E.2d 184 [2000]; *Baker v. Buckpitt,* 99 A.D.3d 1097, 1098, 952 N.Y.S.2d 666 [2012] ). The Appellate Division agreed with the supreme court that defendants did not owe a duty to plaintiff to make the requested changes in decedent's accounts stating: A principal who wishes to authorize an agent to make gifts other than those authorized by General Obligations Law § 5–1502I(14), including gifts by the agent to himself or herself, "must expressly grant such authority ... in a statutory gifts rider." (General Obligations Law § 5– 1514 [1]; *see* General Obligations Law § 5–1501B [2][a]; *In re Curtis,* 83 A.D.3d 1182, 1183, 923 N.Y.S.2d 734 [2011]; *see also Marszal v. Anderson,* 9 A.D.3d 711, 712–713, 780 N.Y.S.2d 432 [2004]).[61] Further, in the absence of a statutory gift rider, an agent may not "add, delete or otherwise change the designation of beneficiaries in effect for any ... retirement benefit or plan" (General Obligations Law § 5–1502L [2]).[62] It is undisputed that decedent did not execute a statutory gifts rider or initial the pertinent section of the power of attorney.[63] Thus, plaintiff was without authority to make the requested changes in decedent's accounts (*see* General Obligations Law § 5– 1514[4][b]; *see also In re Marriott,* 86 A.D.3d 943, 945, 927 N.Y.S.2d 269 [2011], *lv. denied,* 17 N.Y.3d 717, 2011 WL 5829297 [2011]) and, as the power of attorney was not executed in accordance with the statutes applicable to plaintiff's requests, defendants owed her no duty to honor it (*see* General Obligations Law §5–1504[1]).[64]

Finally, plaintiff contended that she was acting as a liaison between defendants and decedent, rather than pursuant to the power of attorney. In this respect, she asserted that decedent's handwritten notes and the forms that decedent allegedly signed to add plaintiff as joint owner of the individual account and beneficiary of the IRA created issues of fact as to whether decedent intended to make the contested changes in her account, and whether defendants breached a duty to act according to her intent.[65] However, the court held that even assuming that plaintiff could act for decedent independently of the power of attorney in this fashion, any resulting duty of defendants would necessarily be owed to decedent, not to plaintiff. Moreover, plaintiff's authority to raise any related legal claims on decedent's behalf under the power of attorney terminated when decedent passed away (*see* General Obligations Law § 5–1502H [1]; 1511[1][a]), and in the absence of such authority, she lacks standing to raise decedent's legal rights (*see Society of Plastics Indus. v. County of Suffolk,* 77 N.Y.2d 761, 772–773, 570 N.Y.S.2d 778, 573 N.E.2d 1034 [1991] ). Thus, "plaintiff has wholly failed to demonstrate that defendant[s] breached any legally cognizable duty owed to her," and her negligence claims were properly dismissed (*Poole v. Susquehanna Motel Corp.,* 280 A.D.2d 764, 765, 720 N.Y.S.2d 592 [2001]).

These are just some examples of how the courts in New York are refusing to give credence to power of attorney if it was not executed in strict accordance with the statutory guidelines. It appears that the courts are taking special interest to determine whether or not the parties have strictly complied with the statutory guidelines on the statutory gifts rider.

## Summary

This article is a clear demonstration of the use of the statutory power of attorney if drafted and executed properly. This article further demonstrates the benefits it has in both financial and Medicaid planning. Finally, the cases reviewed show the strict scrutiny New York courts are applying in enforcement proceedings.

## Endnotes

1. *In re DeBelardino*, 352 N.Y.S.2d 858 (Surrogate Court, Monroe County 1974) (The decedent appointed the administrator as her attorney in fact. The administrator borrowed from a bank and the decedent signed as guarantor of the loans and pledged certain of her securities as collateral. The administrator also made a gift of more than half of decedent's estate to himself by executing a deed of gift. Seven days later, the decedent died intestate. Subsequently, a trial was held regarding the validity of the gift. The administrator defaulted in the payment of the loans and the bank executed against the securities. The court held that the gift was invalid and that the securities, which were the subject of the gift, were assets of the estate); *In re Colbert*, 101 N.Y.S.2d 666 (Surrogate Court, Westchester County 1950)(The court concluded money withdrawn from the decedent's bank satisfying the daughter and her husband's mortgages was an absolute gift, and the premature reimbursement of money to that daughter did not result in any damage to the estate. The court held funds transferred from the bank account by the daughter in Massachusetts who had a power of attorney into an account in her name only was not a valid inter vivos gift. The court found that under the power of attorney the daughter was permitted to withdraw such sums the decedent required, that the sums withdrawn were in excess of the decedent's needs, and that the transmittal of some of the funds occurred after the decedent's death, which was an unequivocal revocation of the daughter's agency); *In re Robertson*, 191 Misc. 956, 81 N.Y.S.2d 286 (Surrogate Court, Richmond County 1948) (The will of the decedent set up two trusts, one for her son, and one for her daughter, the executrix, with the provision that in the event of the death of either child without issue then the income of the trust fund of the deceased child was to be paid to the surviving child with remainder to the issue of the surviving child. It appeared from the petition that the son had three children while the executrix had none. The executrix failed to include in her account any of the stocks of the decedent, claiming that they were not assets of the estate. She relied on a power of attorney executed by the decedent and a transfer of stock or bill of sale to herself and her brother. The court held that the power of attorney did not give the executrix the right to make a gift of the stocks).
2. *Mantella v. Mantella*, 268 A.D.2d 852, 701 N.Y.S.2d 715 (3d Dep't 2000).
3. *Id.*
4. *Leonard Nursing Home, Inc. v. Kay*, 2003 WL 1571579, (Supreme Court. Saratoga County 2003).
5. *Ferrara v. Ferrara*, 7 N.Y 3d 244 (2006).
6. *Ferrara v. Ferrara*, 7 N.Y.3d 244, 247 (2006).
7. *Id.* at 7 N.Y.3d 254.
8. N.Y. Gen. Oblig. Law § 5-1501C (McKinney 2018).
9. *Id.*
10. N.Y. Gen. Oblig. Law § 5-1501A (McKinney 2018). The power of attorney is not affected by incapacity

    1. A power of attorney is durable unless it expressly provides that it is terminated by the incapacity of the principal.

    2. The subsequent incapacity of a principal shall not revoke or terminate the authority of an agent who acts under a durable power of attorney. All acts done during any period of the principal's incapacity by an agent pursuant to a durable power of attorney shall have the same effect and inure to the benefit of and bind a principal and his or her distributees, devisees, legatees and personal representatives as if such principal had capacity. If a guardian is thereafter appointed for such principal, such agent, during the continuance of the appointment, shall account to the guardian rather than to such principal.
11. See Rose Mary Bailly and Barbara S. Hancock, commentary to N.Y. Gen. Oblig. Law § 5-1501A (McKinney 2018) at 2.
12. N.Y. Gen. Oblig. Law § 5-1501A (McKinney 2018).
13. *Id.*
14. N.Y. Gen. Oblig. Law § 5-1501B(1)(b) (McKinney 2018).
15. N.Y. Gen. Oblig. Law § 5-1501B(3)(a) (McKinney 2018).
16. *Id.*
17. N.Y. Gen. Oblig. Law § 5-1501B(3)(b) (McKinney 2018).
18. *Id.*
19. *Id.*
20. *See* Rose Mary Bailly and Barbara S. Hancock, commentary to N.Y. Gen. Oblig. Law § 5-1501A (McKinney 2018) at 2.
21. N.Y. Gen. Oblig. Law § 5-1501B(3)(b)(McKinney 2018).
22. *See* New York Mental Hygiene Law Article 81.
23. The Health Insurance Portability and Accountability Act of 1996 makes it easier for people to protect the confidentiality and security of their health care information.
24. *See* Bailly and Hancock, *supra* note 20, at 2.
25. *See* 45 C.F.R. § 164.508(a)(1); Bailly and Hancock, *supra* note 20, at 2.
26. *See* N.Y. State Law Revision Comm'n, Memorandum in Support 1 (2007), available at www.lawrevision.state.ny.us/reports/07-memo-in-support.pdf; *see also* Rose Mary Bailly & Barbara S. Hancock, *Changes for Powers of Attorney in New York*, NYSBA Trusts and Estates Law Section Newsletter, Spring 2009, at 8.
27. Bailly and Hancock, *supra* note 20, at 8. *See also* N.Y. Gen. Oblig. Law § 5-1502K.
28. N.Y. Pub. Health Law § 2981 (McKinney 2018).
29. N.Y. Gen. Oblig. Law § 5-1501B (McKinney 2018).
30. N.Y. Gen. Oblig. Law § 5-1501B(1)(a) (McKinney 2018).
31. N.Y. Gen. Oblig. Law § 5-1501B(1)(b) (McKinney 2018).
32. N.Y. Gen. Oblig. Law § 5-1501B(1)(c) (McKinney 2018).
33. N.Y. Gen. Oblig. Law § 5-1512 (McKinney 2018).
34. *Id.*
35. N.Y. Gen. Oblig. Law § 5-1502(I)(14) (McKinney 2018).
36. *See* Estates, Powers and Trusts Law § 3-2.1.
37. *See In re Ferrara*, 7 N.Y.3d 244 (2006). *See also* Bailly and Hancock, *supra* note 20, at 15.
38. N.Y. Gen. Oblig. Law § 5-1501(2)(n) (McKinney 2018).
39. § 5-1502I. Construction—personal and *family maintenance*
    In a statutory short form power of attorney, the language conferring general authority with respect to "personal *and family maintenance*" must be construed to mean that the principal authorizes the agent:

    1. To do all acts necessary for maintaining the customary standard of living of the spouse and children, and other dependents of the principal, including by way of illustration and not by way of restriction, power to provide living quarters by purchase, lease or by other contract, or by payment of the operating costs, including interest, amortization payments, repairs and taxes, of premises owned by the principal and occupied by his family or dependents, to provide normal domestic help for the operation of the household, to provide usual vacations and usual travel expenses, to provide usual educational facilities, and to provide funds for all the current living costs of such spouse, children and other dependents, including, among other things, shelter, clothing, food and incidentals;

    2. To provide, whenever necessary, medical, dental and surgical care, hospitalization and custodial care for the spouse, children and other dependents of the principal;

3. To continue whatever provision has been made by the principal, prior to the creation of the agency or thereafter, for his spouse, children and other dependents, with respect to automobiles, or other means of transportation, including by way of illustration but not by way of restriction, power to license, to insure and to replace any automobiles owned by the principal and customarily used by the spouse, children or other dependents of the principal;

4. To continue whatever charge accounts have been operated by the principal prior to the creation of the agency or thereafter, for the convenience of his spouse, children or other dependents, to open such new accounts as the agent shall think to be desirable for the accomplishment of any of the purposes enumerated in this section, and to pay the items charged on such accounts by any person authorized or permitted by the principal to make such charges prior to the creation of the agency;

5. To continue the discharge of any services or duties assumed by the principal, prior to the creation of the agency or thereafter, to any parent, relative or friend of the principal;

6. To supervise and to enforce, to defend or to settle any claim by or against the principal arising out of property damages or personal injuries suffered by or caused by the principal, or under such circumstances that the loss resulting therefrom will, or may fall on the principal;

7. To continue payments incidental to the membership or affiliation of the principal in any church, club, society, order or other organization or to continue contributions thereto;

8. To demand, to receive, to obtain by action, proceeding or otherwise any money or other thing of value to which the principal is or may become or may claim to be entitled as salary, wages, commission or other remuneration for services performed, or as a dividend or distribution upon any stock, or as interest or principal upon any indebtedness, or any periodic distribution of profits from any partnership or business in which the principal has or claims an interest, and to endorse, collect or otherwise realize upon any instrument for the payment so received;

9. To prepare, to execute and to file all tax, social security, unemployment insurance and information returns required by the laws of the United States, or of any state or subdivision thereof, or of any foreign government, to prepare, to execute and to file all other papers and instruments which the agent shall think to be desirable or necessary for the safeguarding of the principal against excess or illegal taxation or against penalties imposed for claimed violation of any law or other governmental regulation, and to pay, to compromise, or to contest or to apply for refunds in connection with any taxes or assessments for which the principal is or may be liable;

10. To utilize any asset of the principal for the performance of the powers enumerated in this section, including by way of illustration and not by way of restriction, power to draw money by check or otherwise from any bank deposit of the principal, to sell any land, chattel, bond, share, commodity interest, chose in action or other asset of the principal, to borrow money and to pledge as security for such loan, any asset, including insurance, which belongs to the principal;

11. To execute, to acknowledge, to verify, to seal, to file and to deliver any application, consent, petition, notice, release, waiver, agreement or other instrument which the agent may think useful for the accomplishment of any of the purposes enumerated in this section;

12. To prosecute, to defend, to submit to *alternative dispute resolution*, to settle, and to propose or to accept a compromise with respect to, any claim existing in favor of, or against, the principal based on or involving any transaction enumerated in this section or to intervene in any action or proceeding relating thereto;

13. To hire, to discharge, and to compensate any attorney, accountant, expert witness or other assistant or assistants when the agent shall think such action to be desirable for the proper execution by him of any of the powers described in this section, and for the keeping of needed records thereof;

14. To continue gifts that the principal customarily made to individuals and charitable organizations prior to the creation of the agency, provided that in any one calendar year *all such gifts shall not* exceed five hundred dollars *in the aggregate*; and

15. In general, and in addition to all the specific acts in this section enumerated, to do any other act or acts, which the principal can do through an agent, for the welfare of the spouse, children or dependents of the principal or for the preservation and maintenance of the other personal relationships of the principal to parents, All powers described in this section 5-1502I of the general obligations law shall be exercisable equally whether the acts required for their execution shall relate to real or personal property owned by the principal at the giving of the power of attorney or thereafter acquired and whether such acts shall be performable in the state of New York or elsewhere.

40. N.Y. Gen. Oblig. Law §5-1514(9)(McKinney 2018) provides:

> To be valid, a statutory gifts rider to a statutory short form power of attorney must:
>
> (a) Be typed or printed using letters which are legible or of clear type no less than twelve point in size, or, if in writing, a reasonable equivalent thereof.
>
> (b) Be signed and dated by a principal with capacity, with the signature of the principal duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property, and witnessed by two persons who are not named in the instrument as permissible recipients of gifts, in the manner described *in subparagraph* two of *paragraph* (a) of section 3-2.1 of the estates, powers and trusts law. *The person who takes the acknowledgment, under this paragraph, may also serve as one of the witnesses.*
>
> (c) Be accompanied by a statutory short form power of attorney in which the authority *(SGR)* is initialed by the principal.
>
> (d) Be executed simultaneously with the statutory short form power of attorney and in the manner provided in this section.

41. N.Y. Gen. Oblig. Law § 5-1514(9)(McKinney 2018) provides:

> The use of the following shall be construed as the "Statutory Gifts Rider" for a statutory short form power of attorney: GIFTS RIDER FOR CERTAIN GIFT TRANSACTIONS "POWER OF ATTORNEY NEW YORK STATUTORY AUTHORIZATION
>
> CAUTION TO THE PRINCIPAL: This OPTIONAL rider allows you to authorize your agent to make gifts *in excess of an annual total of $500 for all gifts*

*described in (I) of the Grant of Authority section of the statutory short form Power of Attorney (under personal and family maintenance),* or *certain other gift transactions* during your lifetime. *You do not have to execute this rider if you only want your agent to make gifts described in (I) of the Grant of Authority section of the statutory short form Power of Attorney and you initialed "(I)" on that section of that form.* Granting any of the following authority to your agent gives your agent the authority to take actions which could significantly reduce your property or change how your property is distributed at your death. *"Certain gift transactions"* are described in section 5-1514 of the General Obligations Law. This Gifts Rider does not require your agent to exercise granted authority, but when he or she exercises this authority, he or she must act according to any instructions you provide, or otherwise in your best interest.

This Gifts Rider and the Power of Attorney it supplements must be read together as a single instrument.

Before signing this document authorizing your agent to make gifts, you should seek legal advice to ensure that your intentions are clearly and properly expressed.

(a) GRANT OF LIMITED AUTHORITY TO MAKE GIFTS
Granting gifting authority to your agent gives your agent the authority to take actions which could significantly reduce your property.
If you wish to allow your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.
To grant your agent the gifting authority provided below, initial the bracket to the left of the authority.
( ) I grant authority to my agent to make gifts to my spouse, children and more remote descendants, and parents, not to exceed, for each donee, the annual federal gift tax exclusion amount pursuant to the Internal Revenue Code. For gifts to my children and more remote descendants, and parents, the maximum amount of the gift to each donee shall not exceed twice the gift tax exclusion amount, if my spouse agrees to split gift treatment pursuant to the Internal Revenue Code.
This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(b) MODIFICATIONS:
Use this section if you wish to authorize gifts in *amounts smaller than the gift tax exclusion amount, in amounts in* excess of the *gift tax exclusion amount*, gifts to other beneficiaries, or other *gift transactions*. Granting such authority to your agent gives your agent the authority to take actions which could significantly reduce your property and/or change how your property is distributed at your death. If you wish to authorize your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.
( ) I grant the following authority to my agent to make gifts pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest*:*

(c) GRANT OF SPECIFIC AUTHORITY FOR AN AGENT TO MAKE GIFTS TO HIMSELF OR HERSELF: (OPTIONAL)

(d) ACCEPTANCE BY THIRD PARTIES: I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this *Statutory* Gifts Rider.

(e) SIGNATURE OF PRINCIPAL AND ACKNOWLEDGMENT:
In Witness Whereof I have hereunto signed my name on, 20.
PRINCIPAL signs here:
*(acknowledgment)*

(f) SIGNATURES OF WITNESSES:
By signing as a witness, I acknowledge that the principal signed the *Statutory* Gifts Rider in my presence and the presence of the other witness, or that the principal acknowledged to me that the principal's signature was affixed by him or her or at his or her direction. I also acknowledge that the principal has stated that this *Statutory* Gifts Rider reflects his or her wishes and that he or she has signed it voluntarily.
I am not named herein as a permissible recipient of gifts.

(g) This document prepared by:

42. N.Y. Gen. Oblig. Law § 5-1514(1) (McKinney 2018)[permits gifts other than gifts authorized by subdivision fourteen of section 51502(I)].
43. Effective September 12, 2010, the term "statutory gifts rider" is substituted for "statutory major gifts rider." *See* Practice Commentary to section 5-1501.
44. N.Y. Gen. Oblig. Law § 5-1514(1) (McKinney 2018).
45. N.Y. Gen. Oblig. Law § 5-1514(9) (a)(McKinney 2018).
46. N.Y. Gen. Oblig. Law § 5-1514(9) (b)(McKinney 2018).
47. N.Y. Gen. Oblig. Law § 5-1514(9) (c)(McKinney 2018).
48. N.Y. Gen. Oblig. Law § 5-1514(9) (d)(McKinney 2018).
49. N.Y. Gen. Oblig. Law § 5-1514 (2) (McKinney 2018).
50. *Id.*
51. N.Y. Gen. Oblig. Law § 5-1514 (3) (McKinney 2018).
52. *Id.*
53. 2013 WL 6857172 (New York Co., Supreme Court 2013).
54. *Morrow v. Phelps*, 2013 WL 6857172 (New York Co., Supreme Court 2013).
55. 2015 WL 1472826 (Surrogate's Court, Nassau Co. 2015).
56. TD Bank Acct. in trust for Regina Demitrack, balance of $10,001.04 closed 3/15/10; Ridgewood Savings Acct. in trust for Regina Gargani, balance of $4,009.34, closed 3/26/10; Ridgewood Savings Acct. in trust for Regina Gargani, balance of $35,178.70, closed 3/26/10; Ridgewood Savings Acct. in trust for Regina Gargani, balance of $11,025.70, closed 3/26/10; Ponce DeLeon Acct. in trust for Norman Gargani, balance of $50,043.81, closed 3/27/10; Ponce DeLeon Acct. in trust for Regina Demitrack, balance of $50,043.65; and Capital One Acct. in trust for Joan Stucko, balance of $5,000.52, closed April 23, 2010.

    The bank account at TD Bank in trust for Regina Demitrack was closed by Lori Conklin, who used a power of attorney dated February 13, 2010.
57. *In re Conklin*, 2015 WL 1472826 (Surrogate's Court, Nassau Co. 2015).
58. *Jacobs v. Mazzei*, 112 A.D.3d 1115, 977 N.Y.S.2d 123 (3d Dep't 2013).
59. *Id.*
60. *Id.*
61. *Jacobs v. Mazzei*, 112 A.D.3d 1115, 1117, 977 N.Y.S.2d 123 (3d Dep't 2013).
62. *Id.*
63. *Id.*
64. *Id.*, 112 A.D.3d at 1117.
65. *Id.*

# New Member Spotlight: Jamie A. Rosen

Interview by Katy Carpenter

**Q Where are you from?**

A I was born and raised on Long Island. While I did move away to attend the University of Maryland for college, I returned to New York every summer and then went to law school at Hofstra University. My husband and I just bought a home in Plainview so we are here to stay!

**Q What has kept you in the area?**

A Family and friends. I enjoy being near my parents and extended family. Also, most of my friends returned home to New York after college. It's nice to have a big support network nearby.

**Q Speaking of family, tell me a little about them.**

A I met my husband, Perry, at a University of Maryland football tailgate when I was 19 and we've been together ever since that night. We are expecting our first child, a baby boy, in February of 2019. My parents are my biggest supporters and I constantly look to them for advice on all things personal and professional. I have two younger siblings, Nicole and Jesse.

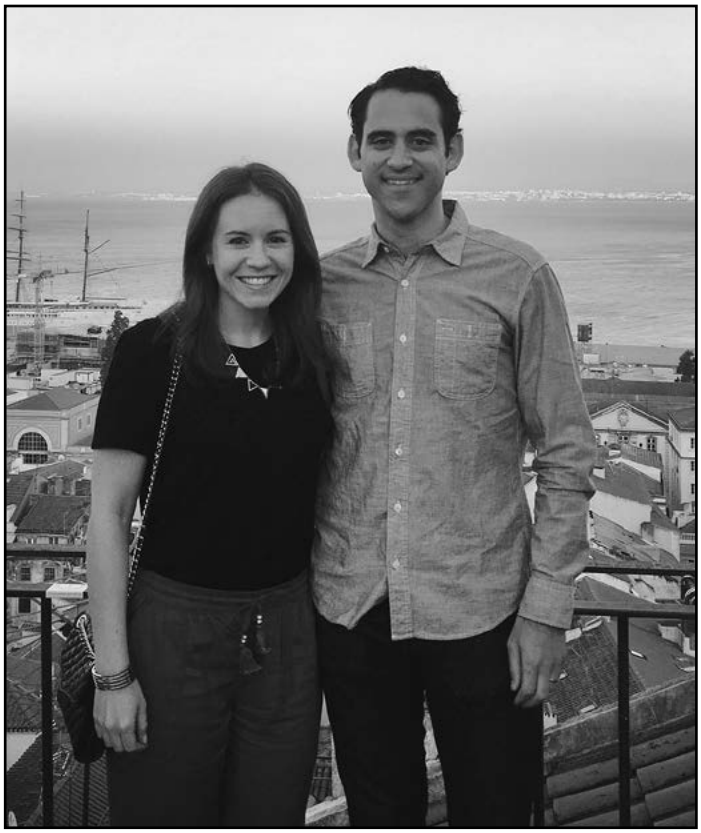
**Q Where have you traveled?**

A I was fortunate to have studied abroad in Rome, Italy in college and during that time I traveled all over Europe. My husband and I went on our honeymoon to Spain and we went to Portugal last year. I've also been to Israel on birthright.

My favorite place we've traveled was Hawaii. While on Maui we drove the Road to Hana, a winding mountain path. We stopped along the way to hike the rainforest and swim the waterfalls.

**Q Why did you choose to practice in the areas of mental health, health care and elder law?**

A I really fell in to this area of law. I was a Psychology major in college and I had a passion to pursue family law in law school. I enjoy working with families and helping them through difficult times in their lives. During my internship at my current firm (Abrams Fensterman LLP), a job opportunity arose in the mental health law practice and I have not looked back since. I am so lucky to be a part of the only family-focused mental health law practice in the country.



**Q What's your favorite part about your job?**

A I enjoy being in court and advocating for my clients. I value the relationships I have with the judges and fellow attorneys. I work very hard to build a community and develop my reputation.

**Q Tell me about an accomplishment that you consider to be the most significant in your career thus far.**

A What comes to mind immediately, especially as a younger lawyer, were the first few times I handled a full trial by myself. One was a family offense proceeding in Manhattan Family Court. Another was an Article 81 Guardianship hearing. I was guided by my mentors but doing the actual hearings by myself, including taking testimony and introducing documents into evidence, was extremely rewarding and boosted my confidence.

**Q Where do you see yourself in five years?**

A In this area of practice at this firm—hopefully as partner where I can have more responsibility and bring in more business. I value my department and my co-workers. I am also expecting a baby in four weeks so in five years I hope to have another child.

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

A I knew I liked to write. My mom is an accountant and I knew I didn't want to do that. I was also afraid of needles and blood so I knew I wouldn't pursue any medical degree. While I was described as stubborn, I viewed myself as determined and interested in making a better argument.

**Q Do you have any hobbies or special interests?**

A My favorite way to unwind on the weekends is with family and friends. Everyone is so busy these days, so I truly treasure getting together with friends, whether for a special occasion or a simple double date. I am lucky that my family lives very close by and I see them as often as I possibly can.

**Q Have you ever been given memorable advice or have advice to give?**

A When meeting law students or young attorneys, I always stress the importance of face time and networking with your peers. It is important to always be professional, polite and friendly to everyone, including court personnel and especially your adversaries. You can learn from everyone—what to do and what not to do. I take my reputation very seriously since I am only at the beginning of what I hope to be a very long and successful career.

# Member Spotlight: Christopher R. Bray

Interview by Katy Carpenter

**Q Where are you from?**

A I grew up in Mohawk, New York about 10 miles east of the City of Utica and only about a mile from where my office is located today.

**Q What kept you in the area?**

A Mostly family ties. I was raising my son, Jacob, and learning to be a dad at the same time I was studying for the bar exam. I was back and forth to Albany for law school. Student by day, dad by night.

**Q Tell me about your family.**

A I am engaged to the love of my life, Brandee, and rumors are starting to spread that the wedding may finally happen in 2019. I have four children: Jacob (20), Bailey (13), Maggie (11) and Leah (9) and I have two stepchildren: Dylan (15) and Juleighanna (12). I am not shy about bringing the whole gang along, usually to our summer meetings, and praying that they don't embarrass me too badly.

One of the perks of living "back home" is I get to stay close to my mom, Judy, who still lives in the house that I grew up in. Judy is the Village Clerk for the Village of Mohawk, a position she has held for over 30 years. I lost my dad last fall.

I'm the middle sibling; my older brother Andrew lives in Annapolis, Maryland and my younger brother Matt lives in Brooklyn.

**Q Where have you traveled?**

A I love to travel, although work and family commitments have definitely slowed me down. Right after I graduated high school I toured with a choir (yes, a choir) through parts of South America, including Peru, Ecuador and Bolivia. The highlight of that tour by far being the Incan ruins at Machu Picchu. I was able to travel to the countries of Sweden, Denmark and Norway where I took a boat tour of the fjords. I enjoyed visiting England and Wales and then again, while at Syracuse University, took another tour with the Hendricks Chapel Choir to Poland and the Czech Republic. This tour included visits to Warsaw, Krakow, Auschwitz, Czestochowa and finally Prague. One of my favorite trips was to Newport Beach, California a few years ago for the NAELA Annual Meeting.

**Q How you did come about to practicing in the area of Elder Law?**

A While at law school I was actually leaning towards practicing Criminal Law and even interned with the local county prosecutor's office. Just before entering my 3L year, I was looking for a part time job to help supplement the student loan income and by chance sent a resume to long-time Section member Jeff Rheinhardt. Most law firms in my area of the state are general practice but Jeff had an idea to focus his firm on Elder Law and move away from the general practice model.

He took a chance and brought me on part-time. I still remember getting up before the sun came up, driving to the office to work a few hours before heading out to Albany for school for the day. I worked as a legal assistant for the entire 3L year and even after graduation from law school handling most of the office estate administration. I found the work enjoyable and personally rewarding and before I knew it I realized I had been at the same office for the last 15 years and honestly can't imagine practicing in any other area.

**Q Have you had any turning points in your life?**

A Several—one was when I made the decision to commute to law school, because honestly it was more likely that after graduation I would have stayed working in Albany or even New York City and may not have even been introduced to the practice of Elder Law. As I sit here thinking about it, another turning point would have to have been when my partner Jeff Rheinhardt decided to take a chance on a local kid and trust him to get the work done all while he was still in school, with no guarantee that he would stick around. And most recently, when I shared a drink with David Goldfarb at the hotel bar at the summer meeting in Newport, R.I. Shortly after that drink Dave reached out and asked if I might be willing to chair a Section fall meeting. I feel like that opportunity has allowed me to become more active in the Section.

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

A Professionally, the case I take the most pride in was a fair hearing that happened right here in Herkimer County and, as far as I know, is one of the largest "transfers other than to qualify" cases in the state. I was able to convince the Administrative Law Judge that just over $200,000 in gifts made by a Medicaid applicant within five years of the application were made for a purpose other than to qualify for Medicaid and therefore should be disregarded. *In re A.S.*, FH#5515265P.

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

A An architect. I really enjoyed using computer programs to draw. I even interned at an architecture firm while I was an undergrad at Syracuse. While there, I worked my way up to project manager for several smaller school construction projects.

**Q Do you have any memorable advice for young attorneys?**

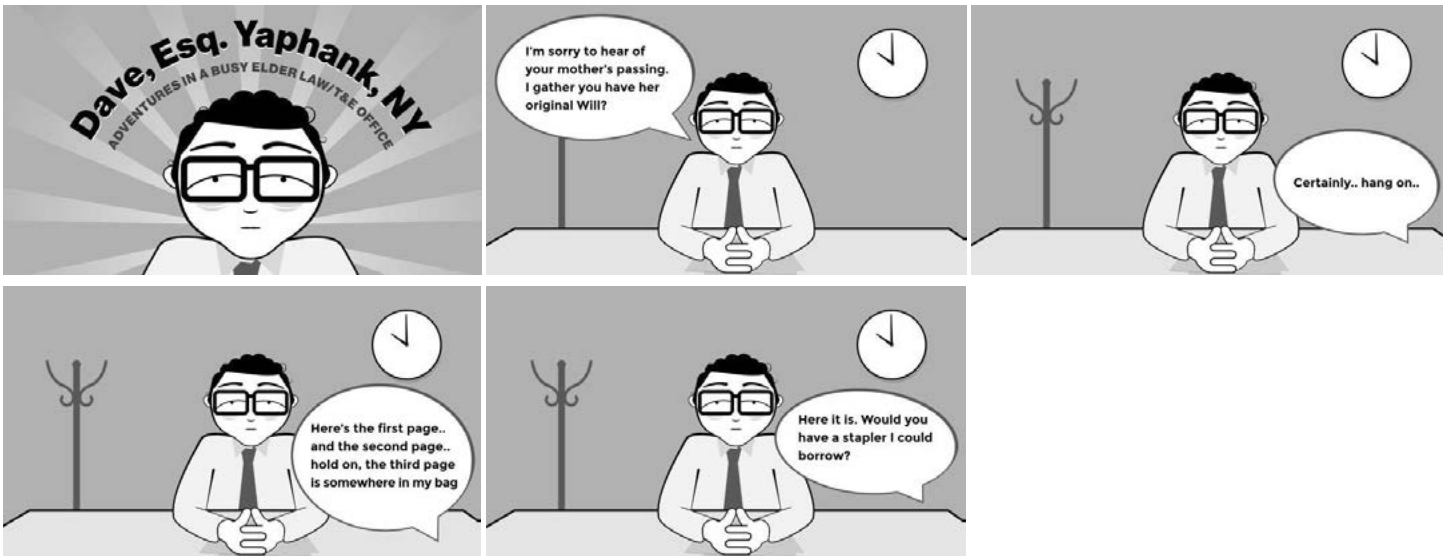
A I don't feel like I'm old enough to give advice! I would say that practicing law truly is a practice and it requires hard work. I think it's common to be overwhelmed, so I recommend to keep your head down and handle one thing at a time. And always, always, always make sure to make time for yourself, for your family, and for your children if you have any.

**Q What are your hobbies or special interests?**

A I am very active in my kids' lives and I coach everything! Currently I only have one indoor soccer team but come spring things will definitely pick up. Last year I was sending softball rosters to my assistant coaches via text messages from the summer meeting at Niagara on the Lake. I make sure that I take time away from the office to be there for my kids. I leave the office early to coach a practice, knowing that means I will have to be there early tomorrow. But you cannot get those moments back and I promised myself a long time ago that I would make sure I was there for them. I've coached soccer, softball, basketball and baseball—pretty much everything except ballet!

# Adventures in a Busy Elder Law/T&E Office

A Comic Strip by Antony Eminowicz




# Joel K. Asarch Scholarship

This year our Section was once again able to carry on our annual tradition of granting one deserving second- or third-year law student with a scholarship in memory of the Hon. Joel K. Asarch. The New York Bar Foundation awards this scholarship, established by the Foundation through a gift from the Elder Law and Special Needs Section of the New York State Bar Association. The $2,500 scholarship is awarded to a 2L or 3L who is enrolled in a law school in the State of New York and is actively participating in an Elder Law Clinic at the school during the 2018-2019 academic year, or evidences other substantial efforts that demonstrate interest in the legal rights of the elderly or the practice of elder law. A preference is given to a student who demonstrates a present and permanent physical or cognitive disability that substantially limits one or more major life activities of the individual, and to a student who demonstrates financial need.

This year, our recipient was Fatema Jannat. Ms. Jannat is a 3L at the City University of New York Law School and has done very well in her studies. She herself has a disability and embodies the qualities of an Asarch scholarship recipient. Through the Health Law Clinic, Fatema worked in a placement at Disability Rights New York where she worked on issues affecting individuals with serious mental illness. Fatema attended our Executive Committee Meeting and programming at the Annual Meeting and expects to begin actively participating in the Section's Mental Health Committee.

The award was established in memory of the late Joel K. Asarch, a Nassau County Supreme Court Justice who spent a significant amount of his time adjudicating guardianship cases and advocating for those who cannot help themselves. Judge Asarch was a frequent lecturer at our Section meetings, and his passing was a loss to all of us. Our Section and Judge Asarch's family were pleased to be able to establish this award in his honor with the assistance of the New York State Bar Foundation. If you know a deserving law student, keep your eyes open for the 2019-2020 award application later this year.

The 2019 Asarch Scholarship selection committee was comprised of James Barnes, Section member and Board Member of the New York Bar Foundation, Tara Anne Pleat and Matthew Nolfo, the Chair-elect and vice-chair respectively, of our Section.

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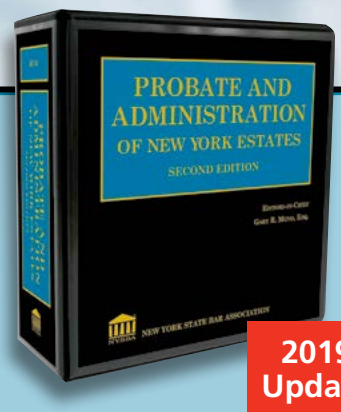


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