

Elder and Special Needs Law Journal



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



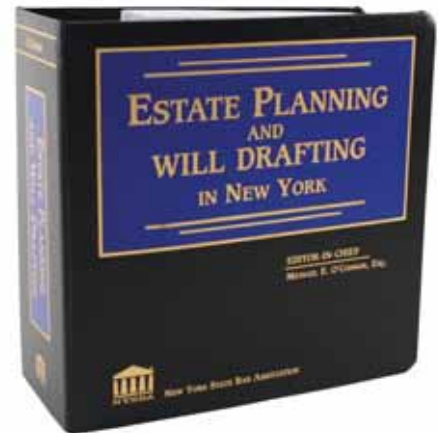
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- Supplemental Needs Trusts: What Is Income?
- Health Care Proxies
- How the DOL Fiduciary Rule Will Protect Seniors
- New York's Proposed Aid-in-Dying Bill
- Powers of Attorney: Who Is Your Client?
- Digital Assets in the Real World

Estate Planning and Will Drafting in New York

Editor-in-Chief

Michael E. O'Connor, Esq.
Costello, Cooney & Fearon, PLLC
Syracuse, NY



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- Estate Planning with Life Insurance
- Lifetime Gifts and Trusts for Minors
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Message from Outgoing Chair

By the time you are reading this, David Goldfarb is the Chair of our Section. My term as Chair of the Elder Law and Special Needs Section ended, without fanfare, thankfully, on May 31, 2016. David is at the helm, and steering our ship, for these next twelve months and I am already enjoying my new role as Immediate Past Chair.



Immediate Past Chair brings with it the opportunity to work with the current Chair and other officers for another year to ensure continuing momentum on the many important priorities we as a Section have identified. I also get to help plan our Continuing Legal Education agenda for this year. But, what I am enjoying the most is having more free time to continue meeting Section members who share my passion for the practice areas we have in common. Oh, and reading and responding to the Community posts on a more regular basis is certainly a perk of being Immediate Past Chair!

As I started my tenure as Chair, I pledged to do as General Patton suggested: “Don’t tell people how to do things. Tell them what to do and be surprised with their results.” As anyone who has sat in on an Executive Committee meeting can tell you. I sure did tell people what to do! And while I wasn’t exactly surprised with the results, I certainly was impressed and incredibly grateful. I knew our amazing Section members and Executive Committee members would rise to the challenges presented to them this year, and they delivered—big time!

Throughout my year, I have been impressed by the dedication that our Section members have exhibited in advocating for their clients. I have met some wonderful new Section members, and have continued to rely upon the veteran members who remain committed and dedicated to us.

This year, we have successfully navigated another NYS budget session. Spousal Refusal remains an option for Community Medicaid benefits. The CSRA floor remains at \$74,820 and MLTC continues to evolve. We have also successfully advocated to have two legislative priorities approved by NYSBA, and will be advocating to have these two priorities become law. We believe that a person should have the right to waive his or her elective share after the death of his or her spouse, and we

believe that a spousal elective share should be permitted to be placed in a supplemental needs trust. We will advocate to make these proposals law in New York.

We have also, through the dedicated efforts of our Sponsorship Committee, enabled our Section surplus to grow. Our Sponsorship Committee of Elizabeth Briand, Jeannette Grabie, and Lauren Sharkey diligently stacked our meetings with exhibitors and sponsors, providing both educational opportunities and funds for our Section. I now leave David Goldfarb with the unenviable position of being able to spend that surplus for the benefit of our Section.

I am extremely appreciative to those who helped make our Summer 2015 meeting in Newport so successful, and those who helped our Fall 2015 meeting in Saratoga Springs to exceed our goals. Our Annual Meeting 2016 was another stellar gathering of members, and we closed my year with the 2016 UnProgram, which brought together a large group of first time attendees to participate in free flowing discussion on a wide range of topics.

As I count my blessings and express my gratitude, I must acknowledge Kathy Heider and the amazing meetings department staff at NYSBA for helping through it all. Kathy retired before our summer 2016 meeting, but her years of dedication and service to our Section have been invaluable. Plus, she’s been a lot of fun to be with as we’ve adventured throughout the state and northeast at our meetings!

A grateful nod to Lisa Bataille at NYSBA, and to Kathy Plog, our Section’s staff who have helped keep our Section running smoothly.

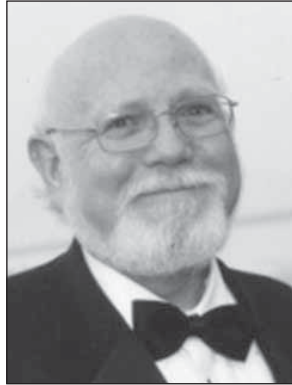
I turn the reins over to David Goldfarb, and encourage all of you to rely upon his leadership, his knowledge, and his vision for our Section. He has his 2016-2017 agenda set, and needs all of us to carry it out. When I started as Chair, I set my goal to be engaging Section members and expanding the reach of our committees. I am so pleased to have seen membership remain steady and to have seen our committees remain vibrant and engaged.

Thank you to all of you who have given of your time and talents this past year. And, thanks in advance for what I am confident you will do in the years to come.

JulieAnn Calareso

Message from the Incoming Chair

I am honored to have the opportunity to serve as Chair of the Elder Law and Special Needs Section for the 2016-2017 term. I am in the process as I write this message of appointing and reappointing chairs and vice chairs of our twenty-three committees. I am impressed by the dedication of the hundred plus people on our executive committee and the service they provide to our Section. The combination of the wealth of knowledge that is brought to our Section by all of its members and the willingness of the members to provide time and effort is indeed impressive. Of course, this is not the first time I am becoming acquainted with the service of our members. I have been involved with Section activities for approximately 25 years.



During many of those years I have served as chair of the Section's Technology Committee and been involved with the creation of our very successful listserve and later the transition to the new NYSBA communities. I have consistently believed that an attorney cannot competently practice elder law in the state of New York without being a member of our Section and taking advantage of its many benefits. Indeed we are in a field where the mere reading of the statutes and regulations and even the case law is not enough. A practitioner must know the practices and policies of the various local and state agencies we deal with. And this information can be found nowhere except on our listserve, at our conferences and at the Section-sponsored CLEs. Dealing with our website and listserve, I look forward to working with **Moira Laidlaw** and **Monica Ruela** as co-chairs of Technology Committee and **Fran Pantaleo** and **Scott Silverberg** as vice-chairs.

I have also been a member of our Legislation Committee and gone to Albany as part of our lobbying team for approximately twenty years. The accomplishments of our Section have been nothing short of amazing. We have stopped every governor's proposal to end Medicaid "spousal refusal" for community-based care. We spearheaded the fight to repeal the state's ill-conceived expanded Medicaid estate recovery, and we won that unprecedented repeal. And we have simultaneously achieved changes in many other of the budget proposals that would have harmed our clients. But we have not stopped there. We have drafted memoranda and met with state agencies regarding numerous state regulations. During many of those years I have acted as a "reporter" for our committees and drafted many of our reports. But I am most proud of the fact that I don't do this

anymore. We have a corps of practitioners, many of them newer to the field than I am, who have stepped up to the task and are doing a magnificent job. For years **Amy O'Connor**, **Ira Salzman**, **Matthew Nolfo** and **Deepankar Mukerji** have done an incredible job of leading that committee. Joining on our lobbying efforts recently have been **Robert Mascali** and **Stephen Silverberg**. And consistently our Section Chairs and past Chairs, most recently **Richard Weinblatt**, **JulieAnn Calareso**, **David Stapleton** and **Anthony Enea**, have joined in the lobbying efforts. And I am confident they will all continue along with new co-chair **Jeffery Asher** and new vice-chair **Britt Burner**. In the lobbying efforts with both the legislature and the Department of Health we have been joined by the co-chairs of our Medicaid Committee **Valerie Bogart** and **Rene Reixach**. Their knowledge in this field is legendary and has always lent great credence to our efforts.

I also co-chaired our Annual Meeting program in 2011 and I know what hard work the co-chairs of our various meetings put in. I want to thank **Britt Burner** and **David Kronenberg** for chairing the Summer 2016 program, which I am sure will be a spectacular success; and **Moira Laidlaw** and **Chris Brey** for co-chairing our Fall Meeting which as of now is just being put together, and **Sal DiCostanzo** and **James Barnes** for agreeing to co-chair the Annual Meeting program. And I assure Sal that I will soon have a co-chair for him to work with. And of course our conferences could not have been a success without the incredible work of our Sponsorship Committee, including most recently **Jeanette Grabie**, **Elizabeth Briand** and **Lauren Sharkey**.

There are too many committees and chairs and vice-chairs to mention in one article like this. But I have been proud to work with many of them and always impressed by the quality of their work. I hope to highlight the work of our various committees in my future chair messages.

I would be remiss if I did not thank my predecessor **JulieAnn Calareso** who has brought an unprecedented degree of dedication and organization to the job of Section Chair. I just hope that with her help I can live up to her standard. By reforming our By-Laws and Executive Committee Rules she has brought an incredible measure of organization to our Section. I look forward to serving with a dedicated group of officers including **Marty Hersh**, as Chair-elect; **Judith Grimaldi**, as Vice-Chair; **Tara Anne Pleat** as Secretary; **Matthew Nolfo** as Treasurer; and **Marty Finn**, in his capacity as our Financial Officer. Each of these people on the way to his or her job as a Section officer has outstandingly served the Section in multiple capacities. I look forward to serving with them as the 26th Chair of this incredible Section.

David Goldfarb

Message from the Co-Editors in Chief

Tara and I are pleased to present to you the Summer 2016 edition of the *Elder and Special Needs Law Journal*.

First, we say a most grateful “thank you” to JulieAnn Calareso, our outgoing Chair, for her outstanding leadership and direction. Her contributions and dedication to this Section continue even after she departs to the Immediate Past Chair role.



Judith Nolfo McKenna

We also enthusiastically welcome our new Section Chair, David Goldfarb. We look forward to a year filled with his wisdom and experience. We also welcome all the new Chairs, Co-Chairs and Vice-Chairs of our Section committees.

In this edition, our Member Spotlight shines on our new Vice-Chair, Judie Grimaldi, and our Committee Spotlight highlights the work of the Financial Planning and Investments Committee.

We also have a wonderful array of talented authors contributing articles to the Summer edition to take along to the beach, the sailboat or just under a shade tree. Anthony Enea has graced us with not one, but two, excellent articles. The first discusses New York’s proposed Aid-in-Dying legislation. Anthony’s second submission, “Is a Trust for My Pet a Viable Option?” addresses a topic important to many of our clients with canine or feline family members.

We also are pleased to include the next in a series of articles from the Elder Abuse Committee. This sub-

mission is entitled, “Powers of Attorney; Who Is Your Client?” Robert Swidler’s submission, “Health Care Proxies—Ten Difficult Issues,” outlines questions and issues with this document that all our members will appreciate.

In our world of devices and social media, we include Linda Meltzer’s submission, “Digital Assets in the Real World.” George Gray provides an excellent and comprehensive piece surveying operational issues of Supplemental Needs Trusts. We are grateful for the reliability of our routine contributors, Robert Mascali with the “NY NAELA Niche,” and Robert Kruger for his always practical and enlightening “Guardianship News.”

We welcome your submissions and ideas for articles; please feel free to contact us with any questions or ideas that you might have. The deadline for the *Winter Journal* is October 1st.

Lastly, we are in need of photographs at each of the Section meetings. If you take pictures of your colleagues at the dinner table, or while on the podium, or at any one of our Section events please feel free to forward them to us for inclusion in the *Journal*.

We wish you all a wonderful summer, and look forward to seeing everyone at the Fall Meeting in Hamburg, New Jersey.



Tara Anne Pleat

Judy and Tara

Looking for Past Issues
of the
***Elder and Special Needs
Law Journal?***

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A Survey of Operational Issues Affecting Supplemental Needs Trusts: What Is Income?

By George H. Gray

A supplemental needs trust (“SNT”) is a trust established for the benefit of a person with a disability which provides a source of funds to enhance and enrich the quality of life without affecting eligibility for means-tested government benefits, such as Medicaid and Supplemental Security Income (“SSI”). There are two types of SNTs with individual trustee(s) distinguished by the source of the property used to fund them.



A “first-party” SNT¹ is one which is funded by the beneficiary’s own funds, such as a personal injury award, an award of back SSDI benefits or an inheritance vesting directly in the person with a disability. First-party SNT’s are, by definition, *inter vivos* trusts established during the lifetime of the person with a disability since it is that person’s own property which is used to fund the trust. A first-party SNT must be established before the beneficiary has attained age 65. It is a particularity of Federal law that a first party SNT can only be established by a parent, grandparent, Guardian or the Court for the benefit of the disabled beneficiary.² The “*Special Needs Trust Fairness Act*”³ (currently pending in the U.S. Congress) would insert language into the Social Security Act to give individuals with a disability the same right to create a first party SNT as a parent, grandparent, guardian, or the Court. The two sentence bill makes no other changes to the Social Security Administration’s treatment of trusts and it does not alter the requirement that first-party SNTs contain payback provisions allowing the States to recoup the cost of Medicaid benefits paid on behalf of the beneficiary from a trust corpus after the beneficiary’s death.

A “third-party” SNT⁴ is one which is established and funded by property contributed by any person *other than* the person with a disability, such as a parent, grandparent or other interested person or relative. However, a third-party SNT may not be established by a parent of a minor child, nor may one spouse establish an *inter vivos* SNT for the other spouse.⁵ Third-party SNTs can be created during the lifetime of the grantor as an “*inter vivos*” SNT or as a testamentary SNT at the death of the grantor by his or her Will. A third party SNT may provide for payment to any person or entity

of the amounts which remain in the SNT at the death of the beneficiary. This feature, which allows the flexibility to name any person or entity as the remainder beneficiary of a third-party SNT, distinguishes it from a first-party SNT.

Means-tested government benefits require that an applicant be truly “poor” to qualify. In 2016 in New York, Medicaid denies benefits to individuals who have income in excess of \$825 per month or resources in excess of \$14,850. For SSI, an individual may not have resources in excess of \$2,000. In addition, there is a dollar-for-dollar reduction of SSI benefits for unearned income in excess of \$20 per month.

The advantage of an SNT is that assets and resources contained in the SNT are disregarded for purposes of most means-tested government benefits. Thus, a person with a disability may be the beneficiary of an SNT holding any amount and still be eligible for Medicaid and SSI.

In my experience, there are several maxims which govern the operation of first-party and third-party SNTs. This and the subsequent article will discuss these maxims.

1. There are different definitions of “income”—“Income” is a concept which has different definitions depending upon the context of its use.

A. Section 61 of the Internal Revenue Code of 1986, as amended (the “Code”) defines “gross income” as all income *from whatever source* derived, unless excluded by law. The Supreme Court has interpreted Code §61 to intend that Congress has expressed its full power to tax incomes to the extent that such taxation is permitted under the U.S. Constitution.⁶ Some items of value received by an individual are not subject to the Federal income tax (*e.g.*, interest on state and local bonds); but this is only so because the Code specifically excludes them from the definition of taxable “income.” Thus, while the Code has painted seemingly bright lines to define taxable “income,” the application of Code to ordinary life is exceedingly complicated. In our exploration of the maxims affecting the operations of SNT’s, we will see many examples of an item being subject to the Federal income tax, but not considered “income” for other purposes.

B. Each means-tested government benefit has its own (and somewhat different) rules regarding “income” for eligibility purposes.

i. **SSI**—"Income" is generally defined as anything a person receives in cash or in-kind that can be used to meet the person's needs for food or shelter.⁷ The SSI rules categorize income into "earned" and "unearned" income. Earned income is wages and salary before deductions and the net amount of earnings from self-employment. Unearned income is all income that is not earned, including annuities, pensions, alimony, support, dividends, life insurance proceeds, prizes, gifts, and inheritances. Unearned income also includes Social Security Disability Insurance ("SSDI"), unemployment payments and cash distributions from an SNT.

The first \$20 of unearned income received in a month is not counted to determine the amount of a SSI benefit payment. However; there is a dollar for dollar reduction in SSI benefits for any unearned income received in a month in excess of the \$20 disregard. Earned income is treated more generously. The first \$65 of earned income is not counted when determining the amount of a SSI benefit payment. Income earned in a month in excess of the \$65 disregard will result in a \$1 reduction in SSI benefit payments for every \$2 earned.

For example, assume a person with a disability receives a \$100 cash distribution from his/her SNT (*e.g.*, has unearned income) and he earns an additional \$165 during a given month from a part time job. His SSI benefit payment will be reduced by \$130 computed as follows: (i) \$80 reduction for the unearned income (\$100 unearned income less the \$20 disregard); and (ii) \$50 reduction for the earned income (\$165 in earned income less the \$65 disregard and 50% of the \$100 excess amount). A better result is attained if the SNT would spend \$100 on non-food items from a vendor and give the purchases to the person with a disability. In this way, the individual's SSI benefit would be reduced by only \$40 (\$165 of earned income less: (i) \$20 disregard still available (ii) the \$65 disregard for earned income; and (iii) 50% of the excess [(\$165-(\$20+\$65) x .50 = \$40].

ii. **Medicaid**—To be eligible for Medicaid, an applicant must be needy! In 2016, the Medicaid limits for an individual are: (i) \$825/month of "income" and \$14,850 of countable resources.⁸ "Income" is any payment received by a Medicaid applicant or recipient (an "A/R") from any source. Income may be "recurring," a onetime payment, "earned" or "unearned."⁹ Amounts earned are considered "income" for eligibility purposes in the month in which it is received. Any amounts retained beyond the month of receipt are considered a "resource." Unearned income is income which is paid to an A/R because of a legal or moral obligation rather than for current services performed. It includes pensions, government benefits, dividends, interest, insurance compensation and other types of payments; including SSDI benefits.

While a distribution from an SNT may be categorized as "taxable income" for Federal income tax purposes,

whether it is "income" for Medicaid purposes depends upon to whom it is paid and the purpose of the distribution.

For Example.—A payment directly to a beneficiary of an SNT to pay the cable bill is "income" for both Federal income tax and Medicaid purposes. If that same distribution is paid directly to the cable company; it is still "income" for Federal income tax purposes but it is not considered income for Medicaid purposes

Because an individual with a disability will often receive SSDI benefits, he or she will have "income" in excess of the Medicaid income limit of \$825/month. In this instance, the person with a disability will arrange to have a first-party SNT established by a parent, grandparent, guardian or the Court to receive the monthly income in excess of the Medicaid limit to maintain his/her eligibility for Medicaid.

2. Trusts are subject to compressed income tax brackets.—The Code provides distinct disincentives to retaining income in a trust. For example, in 2016, a trust will be taxed at the 39.6% tax bracket on income earned in excess of \$12,400.00; while an individual taxpayer would have to earn in excess of \$415,050.00 to suffer the same high tax bracket.¹⁰ Further, in 2016 the Code allows a complex trust a personal exemption of only \$100.00 and a simple trust (*i.e.*, a trust which, under its governing instrument, is required to distribute all of its income currently) a personal exemption of \$300.00.¹¹ On the other hand, the Code allows an individual taxpayer a \$4,050.00 personal exemption¹² and a \$6,300.00 standard deduction.¹³

3. Some relief is afforded Qualified Disability Trusts.—A SNT which is classified as a "complex" trust may be eligible for the advantageous tax treatment afforded a "qualified disability trust" defined in Code §642(c). A complex trust is one which is not required to pay out all income currently and which may make distributions of principal to the beneficiary. Complex trusts have a personal exemption of only \$100.00, thus subjecting more of the income "trapped" in the trust to the compressed income tax brackets affecting trusts in general.

A "qualified disability trust" ("QDisT") is one which is: (i) established solely for the benefit of an individual under 65 years of age who is disabled; and (ii) all of the beneficiaries of the trust as of the close of the taxable year are determined by the Commissioner of Social Security to have been disabled (within the meaning of section 1614(a)(3) of the Social Security Act, 42 U.S.C. §1382c(a)(3)) for some portion of such year. In other words, the qualified disability trust provision should apply to most third party SNTs established for the benefit of a disabled individual receiving SSI or SSDI benefits. In that instance, a QDisT is allowed the same personal exemption amount allowed to an

individual. In 2016, the personal exemption amount allowed to a QDisT is \$4,050.

A trust will not fail the definition of a “qualified disability trust” merely because the corpus of the trust may be paid to a person who is not disabled after the trust ceases to have any beneficiary who has a disabling condition. Typically, the disabled individual is a beneficiary of an SNT for life, but that does not appear to be a strict requirement for QDisT status. For example, the SNT could provide benefits for a disabled child for a term of years, and then permit distributions for all of the grantor’s children. Unlike the “sole benefit” requirement in the public benefits provision, which requires that the disabled beneficiary’s interest terminate only at death, the QDisT provision permits reversion after the trust ceases to have any disabled beneficiary.

4. It is generally advisable for the SNT Trustee to push taxable income out to the beneficiary.—Because of the stingy personal exemption amount and the compressed tax rate brackets affecting trusts, the “art” of the SNT Trustee’s management of the trust is to push out “taxable income” to the beneficiary in a way that is not considered “income” for purposes of eligibility for means-tested government benefits.

The Trustee gets an income tax deduction for amounts properly paid or credited or required to be distributed in a taxable year.¹⁴ As a consequence, the trust can reduce the amount of its taxable income by distributing that income to the beneficiary. Since a beneficiary of an SNT is, by definition “poor,” the income realized by the distribution to the beneficiary is taxed at a much lower income tax bracket than if it were “trapped” in the SNT.

For example, assume the simplest of facts that neither the SNT nor its beneficiary has any itemized deduction and each relies solely on its personal exemption. In the first scenario the SNT has \$20,000.00 of taxable income which it distributes to the beneficiary. The SNT will not have any taxable income to report after the distribution of \$20,000.00 to the beneficiary and the beneficiary will report that income on his/her individual income tax return. The Federal income tax on the \$9,650.00 of taxable income reported by the beneficiary (after application of the \$4,050.00 personal exemption and the \$6,300.00 standard deduction) is \$984.00 (an effective tax rate of 5%). Then, assume that the SNT hadn’t distributed the \$20,000.00 to the beneficiary. The tax on the \$19,900.00 of taxable income to the SNT (after application of the \$100.00 personal exemption amount) is \$5,859 (an effective tax rate of 29%). Since no income was distributed to the beneficiary, he/she has no income to report and, consequently, no tax to pay.

5. Someone has to report the income generated by the SNT.—It is axiomatic that some person or entity

must report and pay the tax on the income realized by the SNT. Trusts are a hybrid entity for income tax purposes. That is, a trust is considered a separate tax paying entity for some purposes and as an aggregate of its beneficiaries for other purposes. Generally, the Code treats a trust as a taxable entity, responsible to report and pay the tax on income generated. However, in certain circumstances the Code allows the pass-thru of tax attributes to the beneficiaries, who, in turn, report these items of income, deductions and credits on their individual income tax return. The rules of taxation of trusts generally attempt to assign the burdens of taxation equitably to those who enjoy the benefit of the income of the trust.

Among the various characterizations of trusts, the two which have the most direct impact on who reports and pays the tax on income is the difference between a “grantor” and “non-grantor” trust. The distinction is understood best by defining a “grantor” trust and characterizing any other trust as a “non-grantor” trust.

A “grantor” trust is one in which the grantor retains a level of control or an interest in the trust income or principal which causes him/her to be considered the owner of the trust property for income tax purposes.¹⁵ These powers are drafted into the SNT Agreement at the time the trust is established. Among the most frequently powers retained by a grantor to secure “grantor” trust status are: (i) the power to allow income of the trust to be distributed currently or held or accumulated for future distribution; (ii) the power to allow the grantor to reacquire the trust corpus by substituting other property of an equivalent value; and (iii) the power to remove, substitute, or add trustees. The first power will most often be present with a first-party SNT, as the Trustee has complete discretion to distribute or withhold trust income to the disabled beneficiary. The second and third powers are generally reserved to the parent or grandparent establishing a third-party SNT when it is planned that the income of the SNT be taxed at their level and not to the trust itself.

Except when steps are taken in the drafting of the Trust Agreement to qualify a third-party SNT as a grantor trust, the Trustee of a third-party SNT will always secure a tax identification number (an “EIN”) and always prepare a Fiduciary income tax return (a Form 1041). A Form 1041 generally must be filed by the Trustee of a non-grantor trust if either of the following circumstances is applicable: (i) the trust has any taxable income for the tax year; or (ii) the trust has gross income of \$600 or more (regardless of taxable income). The Trustee prepares and sends to each beneficiary of the SNT a Schedule K-1 to report the beneficiary’s share of the trust’s income, deductions and credits.

Through an elaborate set of rules, many unique to the taxation of trusts, the Trustee computes the income

and deductions and applies the credits to determine the amount of the trust's taxable income and the income tax on that amount. In its simplest format, gross income of a non-grantor trust is similar to that of an individual (*i.e.*, ordinary income, capital gains, and business and rental income). Generally, deductions allowed to individuals are also allowed a Trustee of a non-grantor trust. An important deduction available to a non-grantor trust is the "income distribution" deduction which allows the Trustee to deduct from the computation of the SNT's taxable income the amounts paid out to the disabled beneficiary. This generally results in the income distributed by the trust to the beneficiary being taxed at a much lower tax bracket than if the income were "trapped" in the trust.

A grantor trust may also secure a tax identification number and file a Form 1041. As a result, when the time comes for financial institutions to report how much income the trust has earned, a Form 1099 will be issued to the trust reflecting the trust's separate EIN. Items of income, deduction, and credit attributable to a grantor trust are not reported by the trust on an IRS Form 1041, but, rather, are shown on a separate statement which is attached to the Form 1041. The Trustee will check the box on an informational Form 1041 indicating that the trust is a "grantor trust" and will provide some general information about the SNT (name, address, tax identification number, and the date the trust was established). The income reporting is completed on an attachment to the Form 1041 which is often referred to as a "grantor trust information letter." The Trustee must give the grantor of the trust (*i.e.*, the beneficiary of a first-party SNT or the parent or grandparent who establishes a third-party SNT) a copy of the grantor trust information letter. The income taxable to the grantor and the deductions and credits that apply to that income must be reported by grantor on his/her own Form 1040.

There is another option available to a grantor trust which is considered to be owned by only one grantor. A first-party SNT may use this optional method because the disabled beneficiary is the sole income beneficiary; and, thus, the SNT is considered to be owned by only one grantor. The Trustee may choose this optional method as the trust's method of reporting *instead of* filing an informational Form 1041.¹⁶ The Trustee must give all payers of income to the trust during the tax year: (i) the name and social security number of the grantor (*i.e.*, the disabled beneficiary); and (ii) the address of the trust. This optional method may be used only if the grantor provides the Trustee with a signed IRS Form W-9. In addition, the Trustee must give the grantor an annual statement which reports the items of income, deductions and credits and explains how the disabled beneficiary takes those items into account when figuring his/her taxable income or tax. SNTs that

have not applied for an EIN and are going to file under this optional method do not need an EIN for the trust as long as the Trustee continues to report under this method.

6. Take care when selecting a Trustee—A parent of a person with a disability is a logical choice to serve as a Trustee of a first-party SNT. After all, who knows better than a parent what will enhance and enrich the life circumstances of the SNT beneficiary! However, if by design or default the parent can inherit the remainder interest in the SNT, then the SNT's status as a grantor trust may be jeopardized.

A first party SNT is treated as a grantor trust because, without the approval or consent of an "adverse party," the income of the trust and principal can be distributed to the grantor (*i.e.*, the disabled Beneficiary) or will be held or accumulated for future distribution to the beneficiary.¹⁷ Securing and sustaining grantor trust status for a first-party SNT is generally deemed desirable, since the income realized by the first-party SNT is then taxed at the disabled beneficiary's lower tax bracket.

The Trustee of a first party SNT must be a "non-adverse" party for the trust to attain grantor trust status. The Trustee of the first party SNT is a "non-adverse" party if the answer to one or both of the following questions is "no": (i) does the Trustee have a "substantial beneficial" interest in the trust; or (ii) will the exercise or non-exercise of Trustee's duties adversely affect his/her substantial beneficial interest?¹⁸

A party's interest in a trust is a "substantial interest" if the total value of the party's interest in the trust in relation to the total value of the property subject to the power is not "insignificant." This is largely a factual question that must be determined on a case-by-case basis, as some interests in a trust may be so contingent or remote that they are insignificant and thereby cause the interest holder to be "non-adverse."

Generally, what remains in the first-party SNT passes: *first* to the State to pay it back for the Medicaid provided to the disabled Beneficiary during his/her lifetime; and *second* to the disabled Beneficiary's Estate. It could be argued that the State's Medicaid lien is potentially so large as to consume the entire remainder of the first-party SNT, thereby rendering the interest of any person taking after the satisfaction of the Medicaid lien as "insignificant." This would allow the disabled Beneficiary's parents or siblings to be eligible to serve as Trustee and still maintain the first-party SNT's status as a grantor trust. This argument will be won; however, on the facts and circumstances of each particular case.

A partial answer and some relief is afforded the disabled Beneficiary and his/her immediate family un-

der the Treas. Regs §1.672(a)-1(d) which provides that a remainder beneficiary's interest in a trust would not be adversely affected by the exercise of any power over the income of the trust, but it would be adversely affected by the exercise of a power over any principal of the trust. Again this treasury regulation does not provide a compelling answer to the question of "grantor trust" status, as the Trustee of a first-party SNT will have discretion to distribute or withhold both income *and* principal, thus making the exercise of the Trustee's discretion over principal adverse to the parent/remainder beneficiary.

Certainty can be achieved by either: (i) appointing a corporate Trustee, who has no interest in the first-party SNT except the payment of Trustee fees; or (ii) providing in the trust document that the remainder interest passes to someone other than to the named Trustee.

This concludes the first of two articles discussing the practical aspects of the operation of a SNT. Here the emphasis was upon the Federal income tax aspects of a SNT and how they impact the management of distributions from the trust. In the next article we will explore in greater detail the impact of *to whom* and *why* a distribution is made from a SNT with an emphasis on how it intersects with the rules of eligibility for means-tested government benefits.

Endnotes

1. First-party supplemental needs trusts are expressly sanctioned under 42 USC §1396(d)(4) and New York Social Services law §366(2)(b)(2)(iii) and section 7-1.12 of the New York Estates Powers & Trusts Law (the "EPTL").
2. While not in keeping with "people first language" which references a "person with a disability," the author will sometimes use the term "disabled person" or "disabled beneficiary" as a grammatically simpler reference to the person is the beneficiary of an SNT who has a disability.
3. S 349 114th Congress 2015-2016.
4. Third-party supplemental needs trusts are expressly sanctioned by EPTL 7-1.12.
5. EPTL 7-1.12(c)(1).
6. The Sixteenth Amendment to the United States Constitution (adopted in 1913) gives Congress the power "to lay and collect taxes on incomes, from *whatever source derived*, without apportionment among the several states and without regard to any census or enumeration." In *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955) the Supreme Court noted in its decision that "[t]his Court has frequently stated that this language was used by Congress to exert in this field "the full measure of its taxing power."
7. The Program Operations Manual System ("POMS") is a body of written regulations which is used by the field agents of the Social Security Administration to determine eligibility for and the amount of SSI paid to an individual with a disability. "Income" is defined in POMS SSI 00810.005.

8. New York General Information Systems Messages, GIS 15 MA/021 (January 01, 2106). The purpose of this General Information System (GIS) message is to advise local departments of social services of the income levels and figures used in determining Medicaid eligibility, effective January 1, 2016.
9. 18 NYCRR §360-4.3.
10. Section 1 of the Internal Revenue Code of 1986 (the "Code").
11. Code §642.
12. Code §151.
13. Code §63.
14. Code §661.
15. The powers and interests which cause a trust to be characterized as a "grantor" trust are found in Code §§673-677.
16. Treas Regs §26-1.671-4.
17. Code §677(a).
18. Code §672(a).

Mr. Gray is a partner in the law firm of Gray & Feldman LLP, in Rochester, New York, whose practice includes estate planning and administration, special needs planning, tax planning, business law and commercial transactions. He has a strong background in federal and New York State tax law, which he uses to assist clients to prepare wills and trusts, and to structure business succession plans. He is on the Board of Directors of Starbridge (formerly LDA Life & Learning Services) and counsel to two start-up not-for-profits. Mr. Gray has developed an expertise in meeting the legal needs of individuals with disabilities and their families, including the preparation and operation of Supplemental Needs Trusts and appointment of Article 17-A guardianships. Mr. Gray is a member of the Monroe County and New York State bar associations; serving on the Executive Council of the Trusts & Estates Section of the Monroe County Bar Association. He is active in the Tax, Estate Planning and Elder Law sections of each professional association. He is also an active member of the Estate Planning Council of Rochester and the National Academy of Elder Law Attorneys. Mr. Gray has lectured on a variety of tax and estate planning topics throughout western New York. He has authored two books: *ESTATE PLANNING AND ADMINISTRATION: A Simple Guide for New Yorkers* (re-released in January, 2015) and *SPECIAL NEEDS PLANNING: A Guide for Families in New York with a Loved One with a Disability* (released in October, 2014). Mr. Gray earned his Bachelor of Arts degree from Hamilton College, Clinton, New York, and his *Juris Doctor* from Albany Law School of Union University, Albany, New York.

Health Care Proxies—Ten Difficult Issues

By Robert N. Swidler

Health care proxies have proven valuable and popular among New Yorkers because they enable a person to appoint a trusted family member or friend to make health care decisions for the person if he or she loses the capacity to make those decisions personally.¹ Health care providers like proxies as well, because they clarify who has the legal authority to act for an incapable patient,² and often provide guidance about the patient's wishes regarding end of life care. Each day, in hospitals, nursing homes and other care settings across New York State, providers seek and accept decisions from health care agents on behalf of incapable patients, with few or no problems.

But difficult problems and questions can still arise. This article addresses 10 difficult issues in connection with the creation and use of health care proxies, through FAQs and brief answers. Elder Law attorneys may find it useful to consider these issues and anticipate these problems. Again, these are difficult issues, and not all attorneys will agree with the conclusions below.

1. Can a Person Who Lacks Health Care Decision-Making Capacity Still Create a Health Care Proxy?

Yes, as long as the person is "competent." More specifically, the health care proxy statute ("the proxy statute") provides in Public Health Law § 2981.1 (PHL) that:

- (a) A competent adult may appoint a health care agent in accordance with the terms of this article.
- (b) For the purposes of this section, every adult shall be presumed competent to appoint a health care agent unless such person has been adjudged incompetent or otherwise adjudged not competent to appoint a health care agent, or unless a committee or guardian of the person has been appointed for the adult pursuant to article seventy-eight of the mental hygiene law³ or article seventeen-A of the surrogate's court procedure act.⁴

In contrast, "capacity to make health care decisions" means "the ability to understand and appreciate the nature and consequences of health care decisions, including the benefits and risks of and alternatives to any proposed health care, and to reach an informed decision."⁵ A determination under the statute that a

patient lacks capacity to make health care decisions triggers the authority of the agent.⁶

The difference in these standards is significant. It means that in some instances an adult who would be found to lack capacity to make health care decisions nonetheless is still competent, and therefore can still lawfully appoint a health care agent.⁷

This opportunity to allow a person who lacks health care decision-making capacity to create a health care proxy can be quite valuable in appropriate cases. For example, a patient with dementia or a developmental disability who needs surgery may not be able to make a complex health care decision, but may be able to understand that he or she is appointing a family member to make the decision for him or her. It is helpful, lawful, and ethical for such a patient to execute a health care proxy.

However, the practitioner must recognize that a determination of incapacity to make health care decisions, made at or about the time of the execution of the proxy, could be proffered to rebut the presumption of competence.⁸ Accordingly, before allowing a person who lacks health care decision-making capacity to execute a proxy, it would be important to secure an evaluation by a qualified professional who can document that the person is competent to create the proxy, even though incapable to make the pending health care decision.

And obviously no one should coax a person into signing a proxy when the person does not understand what he or she is doing. That is neither helpful (because the presumption of competence would be rebutted) or ethical, and could be fraudulent.

2. Can an Adult With an MHL Article 81 Guardian Still Appoint a Health Care Agent?

Sometimes. A person who has a guardian is no longer presumed competent to create a health care proxy.⁹ But, as noted above, in some cases an incapacitated person will still have the ability to understand what it means to appoint someone to make health care decisions for them. The MHL Article 81 guardianship statute directs the court and the guardian to take into account the incapacitated person's wishes and preferences, and to impose the least restrictive form of intervention.¹⁰ In an appropriate instance, a person with a guardian may be able and permitted to appoint a health care agent. But a practitioner would need to carefully review the guardianship order and secure a qualified professional's evaluation and documentation of the person's ability to understand what they are

signing. If the guardian supports the appointment, that documentation should be sufficient. If the guardian opposes the appointment, a judicial determination should be sought.

3. Where There Is Both an MHL Article 81 Guardian and a Health Care Agent, Who Makes Health Care Decisions?

In general, a health care agent has priority over a guardian. The proxy statute states very clearly:

Health care decisions by an agent on a principal's behalf pursuant to this article shall have priority over decisions by any other person, except as otherwise provided in the health care proxy or in subdivision five of section two thousand nine hundred eighty-three of this article.¹¹

Moreover, the guardianship statute includes a consistent provision that provides that

No guardian may... 2. Revoke any appointment or delegation made by the incapacitated person pursuant to...[the proxy statute].¹²

However, a guardian could always commence a proceeding to try to invalidate the proxy, or remove the agent, or override an agent's decision based on specified findings.¹³

4. Can a Person Appoint Co-Agents and Provide for Decisions by Agreement or by Majority Vote of Co-Agents?

No. The statute authorizes an adult to appoint "a health care agent" and "an alternate agent" to serve if the agent is not reasonably available, willing and competent, or is disqualified, or under conditions described in the proxy.¹⁴ This rather clearly contemplates the appointment of only a single agent.

This was intentional. While some individuals might prefer to have decisions made by co-agents, or by a majority vote of a group, those procedures can impose enormous burdens and risks on health care providers who may need a prompt, clear, authoritative decision. In any case, the adult can always direct the agent to consult with others before making a decision.

5. Does a Health Care Agent Have Any Authority While the Patient Still Has Capacity?

No. The statute is very clear that the agent's authority commences only upon a determination that the principal lacks capacity to make health care decisions.¹⁵

Despite that clarity, in health care settings it is very common for a family member or friend to try to make decisions for a patient who has not been found to lack

capacity "because I'm my Mom's health care proxy." And indeed, in many instances health care providers accept decisions from such a person on behalf of the patient. There is no support in the statute for this practice.

To be sure, sometimes this practice causes little harm because the patient clearly lacks capacity and the absence of a determination is just a procedural defect that can be remedied. But in other instances, the participants are contravening a fundamental ethical principle: when a patient has capacity, providers must seek a decision from the patient, not someone else.

6. Does a Health Care Agent Need a HIPAA Authorization to Get Access to Medical Records?

No. First of all, the Health Care Proxy Law itself gives the agent a limited right "to receive medical information and medical and clinical records necessary to make informed decisions regarding the principal's health care."¹⁶ Based on that provision an agent can access records relating to pending decisions, and according to one court, records useful for ongoing care decisions.¹⁷

But the HIPAA privacy rule extends the agent's authority even further: it gives an individual the right to access his or her own medical record,¹⁸ and further provides that when an individual lacks capacity, his or her HIPAA privacy rights may be exercised by a "personal representative." It defines the personal representative as a person who under applicable law has "the authority to act on behalf of an individual who is an adult or an emancipated minor in making decisions related to health care."¹⁹ That person is the health care agent.

Accordingly, a health care agent can access some medical records pursuant to the health care proxy law, and a broader range of medical records by virtue of being the patient's legal representative under HIPAA.

7. Can the Agent Override a Decision Previously Expressed by the Patient?

In general, no. While the law empowers the agent to make "any and all [health care] decisions on the principal's behalf that the principal could make,"²⁰ it goes on to provide as follows:

2. Decision-making standard...the agent shall make health care decisions: (a) in accordance with the principal's wishes, including the principal's religious and moral beliefs; or (b) if the principal's wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with the principal's best interests....

If, for example, a patient directly tells staff, or leaves a written instruction, that he or she consents to a do-not-resuscitate (DNR) order, and then loses capacity, the agent is obligated to honor those instructions.²¹ Conversely, if a patient expresses a wish for aggressive care, the agent is obligated to honor that wish.

To be sure, the agent may sometimes have a valid reason to override the patient's prior decision. For instance, in the DNR case described above, the agent might have information that the patient never actually agreed to the DNR order, or was pressured or coerced. The agent might have proof that the patient did not understand what he or she was agreeing to, or that the patient subsequently changed his or her mind.²² The agent might contend that the clinical circumstances are different now and the patient would no longer want the DNR order. More generally, an agent has broad latitude to interpret the patient's wishes and apply them to actual decisions, when there is room for such interpretation.

But what the agent does not have the authority to do is to interpose his or her own wishes and values as a basis to override the prior expressed wishes of a capable patient. That would defeat a key purpose of the statute: to ensure that such wishes would be respected in the event of a loss of capacity. Put differently, the agent cannot simply say, "I don't care what mom told you, I'm telling you this."

Conflicts such as this also raise procedural issues: can a provider simply disregard the instructions of an agent who appears to be acting contrary the patient's wishes? For one thing, in the example above where the agent opposes a DNR order, the practitioner needs to consider the applicability of PHL § 2984.5, which provides:

5. Notwithstanding the provisions of this section or subdivision two of section twenty-nine hundred eighty-nine of this article, if an agent directs the provision of life-sustaining treatment, the denial of which in reasonable medical judgment would be likely to result in the death of the patient, a hospital or individual health care provider that does not wish to provide such treatment shall nonetheless comply with the agent's decision pending either transfer of the patient to a willing hospital or individual health care provider, or judicial review in accordance with section twenty-nine hundred ninety-two of this article.

But this provision rather specifically applies to a disagreement between the agent and the provider: it

refers to "a hospital or individual health care provider that does not wish to provide such treatment." In contrast, this FAQ and the example above posits a conflict between the agent and the patient's clearly expressed prior wishes. For that reason, in this author's view, PHL § 2984.5 is inapplicable.

No published court decision has addressed this issue. Until it is resolved, a provider and its attorney understandably will be wary about withdrawing or withholding life-sustaining treatment in defiance of an agent's instructions, and may be inclined to seek a court ruling before proceeding. But if the patient's decision is very clear, and the clinical decision cannot wait for judicial review, legal and ethical principles support honoring the patient's decision.

8. Can a Health Care Agent Exercise Other Personal Rights on Behalf of the Patient, Such as Deciding Who Can Visit?

No. The health care proxy law gives the agent only the authority "to make health care decisions,"²³ which it defines as "any decision to consent or to refuse to consent to health care."²⁴ It further defines health care as any "treatment, service or procedure to diagnose or treat an individual's physical or mental condition."²⁵

In practice, providers tend to interpret "health care" broadly enough to encompass decisions closely linked to treatment, like discharge planning. But a health care proxy does not give an agent authority akin to that of a guardian of the person, such as who can visit or call, or whether the patient can sign documents, etc.

However, the person who is the health care agent may have much broader authority based on other instruments (like a power of attorney) or sources (such as the Department of Health regulations regarding the "designated representative" of a nursing home resident).²⁶

9. Can a Health Care Agent Remove a Patient From a Hospital Against Medical Advice (AMA)?

Yes—provided the decision is consistent with the patient's reasonably known wishes.

A discharge "Against Medical Advice," or AMA, occurs when a patient leaves the hospital before it is safe to leave, and despite being warned that leaving could jeopardize the patient's health or life.

Capable patients can and sometimes do leave the hospital AMA. As noted previously, the agent can make "any and all decisions on the principal's behalf that the principal could make."²⁷ As also noted previously, discharge decisions are generally regarded as health care decisions within the meaning of the statute.

So it follows that a health care agent could remove an incapable patient AMA.

But the statute's decision-making standard provides for a reality check on such a decision:

2. Decision-making standard....the agent shall make health care decisions: (a) in accordance with the principal's wishes, including the principal's religious and moral beliefs; or (b) if the principal's wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with the principal's best interests....

Accordingly, before a hospital allows an agent to remove a patient against medical advice, it should and usually will probe the agent's rationale carefully to determine whether it is based on the patient's reasonably known wishes—because by definition it will not be in the patient's best interests.

10. Can a Health Care Agent Complete a MOLST for an Adult?

Yes, if the patient has been determined to lack capacity. A Medical Order for Life Sustaining Treatment (MOLST) is a medical order (a physician's directive to staff) regarding end-of-life decisions that includes the necessary patient, agent or surrogate consents, and that is portable—it will remain valid if the patient is transferred from one setting to another. New York state law specifically recognizes the MOLST's validity as a DNR order.²⁸ But if completed by a competent patient, or by a duly authorized agent or surrogate acting under the Family Health Care Decisions Act, it is valid for other end-of-life decisions as well.

And indeed, the DOH-approved MOLST form includes a signature line for the "Decision-Maker," asks below that line "Who made the decision?" and provides optional answers—including "Health Care Agent."

Endnotes

1. N.Y. Public Health Law (PHL) Article 29-C, Health Care Agents and Proxies, 1990 N.Y. Laws, c. 752.
2. This article uses the term "patient" to describe the person for whom a health care agent is making decisions because it conveys a sense of the clinical context better than the statutory term "principal" does.
3. N.Y. Mental Hygiene Law Article 78, which was repealed in 1981, provided for a "Committee of the Incompetent or Patient" to care for the person and property of an incompetent person. It was replaced in 1981 by the current guardianship statute, Surrogate's Court Procedure Act (SCPA) Article 17-A.

References to MHL Article 78 are now deemed to refer to SCPA Article 17-A. Bills that would correct this reference along with other minor corrections to surrogate decision-making laws have been introduced repeatedly since 2011, but have not been passed. E.g., S.4791 (Hannon) (2015), A.6936 (Clark) (2015).

4. This article creates a guardianship for developmentally disabled persons.
5. PHL § 2980.3.
6. PHL § 2981.4.
7. See, e.g., *In re Mildred M.J.*, 43 A.D.3d 1391 (4th Dep't 2007).
8. See, e.g., *In re Rose S.*, 293 A.D.2d 619 (2d Dep't 2002); *In re Camoia*, 48 Misc. 3d 1221 (Sup. Ct., Kings Co. 2015) (Reported in Westlaw); *In re Cox*, 47 Misc. 3d 1211(A) (Sup. Ct., Kings Co. 2015) (Reported in Westlaw).
9. PHL § 2981.1.
10. SCPA art. 17-A or MHL § 81.22(a).
11. PHL § 2982. The exception, PHL § 2983.5, relates to decisions by the patient himself or herself.
12. MHL § 81.22(b).2.
13. PHL § 2992. See e.g., *In re Walter K.H.*, 31 Misc. 3d 1233 (Sup. Ct., Erie Co. 2011).
14. PHL § 2981.6.
15. PHL § 2981.4.
16. PHL § 2982.3.
17. *Mougiannis v. N. Shore – Long Isl. Jewish Health Sys., Inc.*, 25 A.D.3d 230 (2d Dep't 2005).
18. 45 CFR § 164.524.
19. 45 CFR § 164.502(g)(2).
20. PHL § 2982.1.
21. In fact, where the patient previously, when capable, provided clear consent to treatment or the withdrawal of treatment, there generally is no legal requirement to secure a redundant consent from an agent or surrogate at all. The Family Health Care Decisions Act is more explicit than the Proxy Law this regard. PHL § 2994-d(3)(a)(ii). But even in such cases, for a variety of legal, ethical, risk management and professional reasons, providers often will seek a decision from the agent or surrogate as well.
22. E.g., *Univ. Hosp. of the State of N.Y. Upstate Med. Ctr.*, 194 Misc. 2d 372 (Sup. Ct., Onondaga Co. 2002).
23. PHL § 2982.
24. PHL § 2980.6.
25. PHL § 2980.4.
26. 10 N.Y.C.R.R. §§ 415.2(f); 415.3.
27. PHL § 2982.1.
28. PHL § 2994-dd; 10 N.Y.C.R.R. § 400.21(e). See https://www.health.ny.gov/professionals/patients/patient_rights/molst/.

Robert N. Swidler is VP Legal Services for St. Peter's Health Partners. Previously, as Staff Counsel to the NYS Task Force on Life and the Law (1985-90), Mr. Swidler helped draft the Task Force's proposed Health Care Proxy Law. As Assistant Counsel to Governor Mario M. Cuomo (1990-92), Mr. Swidler participated in the legislative/executive negotiations that led to enactment of the Health Care Proxy Law in 1990.

How the DOL Fiduciary Rule Will Protect Seniors

By Ronald Fatoullah

The Financial Planning and Investments Committee of the Elder Law and Special Needs Section has been closely monitoring the new fiduciary rule issued by the Department of Labor ('DOL') since its proposal about a year and a half ago. The final rule was issued in April, 2016 and we have kept the Executive Committee of our Section informed of the progress of the then proposed rule since it was introduced.



The Rule is a boon to anyone saving for retirement. The DOL has estimated that there are \$1.7 trillion of IRA assets invested in products in which there are conflicts between the broker and the client. Additionally, the Council of Economic Advisors conservatively estimates that conflicted retirement advice costs Americans \$17 billion every year.

The Rule requires brokers and advisors overseeing tax-advantaged retirement accounts to act under a fiduciary standard and to put their clients' interests ahead of their own. This may sound like a "no brainer," but the Rule was vigorously fought by many in the financial services industry. The current rule requires brokers to only provide their clients with "suitable investments," i.e., the so-called suitability standard. This means that a broker can advise a client to invest in one investment product that will produce a higher commission for him/her as opposed to another, as long as they both are suitable and meets a client's risk tolerance, time horizon, etc.

The DOL held over 100 meetings, hosted four days of public hearings and reviewed almost 400,000 comments. The final rule consists of 1,023 pages. Many

of the more onerous provisions of the proposed law have been eliminated or streamlined. For example, the proposed rule originally required advisors to have their clients sign a contract before they were even hired, but the final rule allows for these contracts to be completed when a client fills out the paperwork needed to set up an account.

The Rule will be phased in to give advisors/brokers time to comply. Firms will have one year to abide by the basic definition of acting as a fiduciary. The Rule does permit brokers to recommend proprietary products to their clients if they obtain a Best Interest Contract Exemption (BICE). The BICE allows brokers to receive commissions on financial products such as REITs and variable annuities as long as the advisor agrees to put the clients' interest first. Brokers are also required to charge "reasonable compensation" and avoid misleading their clients about conflicts and fees. Some have argued that the Best Interest Contract Exemption waters down the fiduciary standard by allowing certain conflicts of interest to occur within retirement accounts.

It is important to remember that the new Rule only pertains to tax-advantaged retirement accounts. As attorneys, I believe that we have an obligation to advise our clients to make sure that the brokers/advisors they use with regard to all of their accounts will act as fiduciaries and will put their clients' interests ahead of their own.

Ronald Fatoullah is the Chair of the Financial Planning and Investments Committee of the Elder Law and Special Needs Section of the NYSBA. Mr. Fatoullah is the principal of Ronald Fatoullah & Associates, a law firm that concentrates in elder law, estate planning and special needs. Ronald Fatoullah is also President of J.R. Wealth Advisors LLC, a wealth management firm with offices in Long Island, NYC and Los Angeles, CA.

New York's Proposed Aid-in-Dying Bill: What You Should Know

By Anthony J. Enea

Every year thousands of Americans grapple with excruciatingly painful terminal illnesses. For many of these individuals, the thought of their lives being unnecessarily prolonged is abhorrent. While the issue of euthanasia and/or physician assisted suicide has been front and center in the American psyche since the days of Dr. Kevorkian and Karen Ann Quinlan, the controversial nature of this issue is still as strong today as it was forty to fifty years ago.



While euthanasia is illegal in most states and has been found morally unethical by many organized religions, there are now four (4) states (Washington, Oregon, Vermont and Montana) where physician assisted dying (PAD) is permitted. Additionally, it is also permitted in Bernalillo County, New Mexico.

The major distinction between euthanasia and PAD is who administers the lethal dose. With euthanasia, the physician or other third party administers the lethal dose, whereas with PAD, the lethal dose is self-administered by the patient and the patient determines whether and when to administer it.

New York State Assemblywoman, Amy Paulin, D-Scarsdale, has sponsored the Aid-in-Dying bill in the Assembly, while Senator John Bonacic, R-Mt. Hope (Orange County), has sponsored the bill in the Senate. The proposed legislation was first introduced in February 2015, and a new push for its enactment has occurred this February.

Under the proposed legislation, the Public Health Law of New York would be amended to include a new Article 28-F "Aid in Dying" provision. The proposed legislation would permit a terminally ill adult (age 21 years or older and expected to live six months or less because of terminal illness or condition) who has the capacity (ability) to understand and appreciate the nature and consequences of health care decisions (including risks and benefits), and who is able to reach and communicate an informed decision to a physician licensed to practice in New York State, to decide to end his or her life.

The proposed legislation allows the attending physician (one who has primary responsibility for the care and treatment of a patient's terminal illness) to prescribe a lethal dose of medication to the terminally ill patient that he or she can self administer. The medication has to be capable of ending life and can include any other ancillary

medication(s) intended to minimize the discomfort to the patient.

The request for this medication must be made in a writing which is signed and dated by the patient and witnessed by at least two (2) individuals who, in the presence of the patient, attest that to the best of their knowledge and belief, the patient has capacity, is acting voluntarily, and is not being coerced to sign the request. One of the witnesses cannot be a relative of the patient (by blood or by marriage). Additionally, the witnesses can neither be individuals who would be entitled to inherit upon the death of the patient, the attending physician, nor the owner or operator of a health care facility where the patient is residing or receiving treatment.

One of the issues that will surely arise when a decision is made by a terminally ill patient to end his or her life is whether the patient has the requisite capacity to make the decision. The proposed legislation provides that if, in the opinion of the attending physician, the patient is suffering from a psychiatric or psychological disorder or depression causing impaired judgment, the attending physician shall refer the patient for counseling.

The proposed legislation further provides that no medication to end a patient's life shall be prescribed, dispensed or ordered until the person performing the counseling determines that the patient is not suffering from a psychiatric or psychological disorder or depression causing impaired judgment, and that the patient has the requisite capacity.

Although the proposed legislation has bi-partisan support, it is not without controversy and opposition in the NYS Assembly and Senate. Only time will tell whether the legislation is enacted. However, irrespective of where one's opinion falls on this issue, it is safe to say that whenever any legislation is proposed that allows one to end his or her own life, it should be approached carefully and with a great deal of caution and deliberation.

Anthony Enea, Esq. is a member of Enea, Scanlan & Sirignano, LLP with offices in White Plains and Somers, New York. He is a past chair of the Elder Law Section of NYSBA and Past President and Founding Member of the New York Chapter of NAELA. His telephone number is (914) 948-1500.

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Powers of Attorney: Who Is Your Client?

By Sarah Duval and Malya Levin

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

Introduction

A power of attorney is both one of the most important planning documents and one of the most misunderstood by the general public. While in an ideal world, clients would approach attorneys to draft a Power of Attorney well in advance of any age-related illness or cognitive issues, this seldom occurs. Many people wait until they, or others around them, feel there is an immediate need to execute a Power of Attorney. Therefore, it is essential for attorneys facing these situations on a regular basis to be well informed on the ethics of who their client is, and the standard of capacity for executing a Power of Attorney. At the 2016 Elder Law and Special Needs Section Meeting at the NYSBA Annual Meeting this past January, the ethics portion of the presentation spent significant time on the issue of ascertaining the identity of the client, demonstrating just what an important topic this has become. This two-part series will delve into the issues surrounding Powers of Attorney. It is relevant to note that the attorneys authoring this article represent clients who have been victims of elder exploitation, that is, representing clients whose planning documents have been used to exploit rather than assist them.



Sarah Duval



Malya Levin

client-lawyer relationship with respect to a matter."¹ While the agent may be a prospective client because he or she has called you seeking assistance in executing a power of attorney for a third party, he or she is not necessarily a client because a client-lawyer relationship has not been formed. To ensure that such a relationship is not formed, it essential that attorneys explain at the outset that to draft the Power of Attorney it will be necessary to speak with the principal and the attorney's obligation is to them, and them alone. Attorneys must always clearly define who is the potential client in order to answer questions such as whether the potential client has the capacity to be represented,² whether a potential conflict of interest exists,³ and whether attorney-client confidentiality has been properly established.⁴ Once an attorney-client relationship has commenced, the attorney must make sure the professional duties owed to the new client are fulfilled. This includes duties of loyalty,⁵ diligence,⁶ and competence.⁷ While an older client may want family members or other advisors, including potential agents, to participate in a particular decision-making process, particularly if there are moments when the client's lucidity lapses, it is critical that an attorney retain a central focus on duties to the client and the best method for achieving the client's goals, not those of other participants. Rule 5.4(c) of the New York Rules of Professional Conduct expressly prohibits a lawyer from allowing a third party, particularly one who recommends, employs or pays a lawyer, to "direct or regulate the lawyer's professional judgment."⁸

I. Establishing the Attorney-Client Relationship

Often, it is not the potential principal who contacts an attorney inquiring about executing a Power of Attorney but rather the potential agent, who is often a family member or informal caregiver to the principal. This creates a situation in which, from the outset, there is the potential for conflict. Therefore, before establishing an attorney-client relationship, it is critical that an attorney clearly establish the identity of the client.

Simply by calling and initiating contact with the attorney, an agent is not automatically the client. Rule 1.18(b) of the New York Rules of Professional Conduct governs a lawyer's duties with respect to information provided by prospective clients. Specifically, it states that "A person becomes a prospective client by consulting with a lawyer about the possibility of forming [a]

II. The Risks of Simultaneous Representation

An attorney executing a Power of Attorney may wish to represent both the principal and the agent, particularly in a case where the agent is a former client. The primary concern in such a case is a potential conflict of interest. Rule 1.7(a)(1) of the New York Rules of Professional Conduct prohibits an attorney from representing a client if "the representation will involve the lawyer in representing differing interests." Although the agent may present himself as being entirely allied

with the principal, a well-crafted planning document will anticipate a variety of future scenarios, successfully protecting a client's interests in a multitude of circumstances, including those in which the respective interests of the agent and principal no longer align. Powers of attorney, which assign significant financial access and control to a third party inherently contain the potential for conflict. Moreover, if an attorney's goal is to create a long-lasting document, there is an increased potential for circumstances and allegiances to change over time, resulting in a reordering of interests. When family dynamics and the stresses of aging are added to the mix, the potential for conflict becomes even more pronounced. The ability to nominate a third party monitor⁹, to commence a special proceeding to determine if a power of attorney was obtained via fraud or duress or if the agent has violated fiduciary duties¹⁰ and the principal's ability to promptly revoke a Power of Attorney at any time¹¹ are all evidence that potential conflict was contemplated as a universal aspect of a Power of Attorney from the mechanism's inception. Therefore, it is the opinion of these authors that attorneys ought to represent the principal only, and to make the nature of their representation clear at the outset. If an agent has questions regarding rights and responsibilities under the Power of Attorney, that person should be advised to seek outside counsel and possibly referred to a trusted colleague. As Rule 1.7 goes on to state, there are exceptions to the conflict, including:

- (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.

To determine whether representing the principal when the nominated agent is a former client falls into one of the aforementioned exceptions, the attorney should first meet alone with the principal. It is only based on a thorough private meeting with the principal that an attorney ought to contemplate simultaneous representation of the agent.

III. Issues for Discussion During an Initial Private Meeting

Attorneys should exercise caution when the potential agent, not the principal, has called the attorney's office to set up an appointment. While this does not automatically mean the principal did not want the appointment, the attorney in this situation should take extra care to speak with the principal alone to determine what the principal's goals are, and whether those goals necessitate attorney involvement generally, and more specifically, preparation of a Power of Attorney appointing the caller as agent.

Physical disabilities such as difficulty walking and the need for assistance in sitting are often associated with aging. While they do not correlate with mental capacity, it is worth noting that, when an elderly client exhibits these signs, they are likely dependent on someone else for care. A common scenario in elder exploitation cases is a victim who is dependent on an abuser for care or companionship, and an abuser who is dependent on a victim, either financially, emotionally or both. If the attorney notes significant physical impairments, finding out who is assisting the principal in their daily life and what the principal's perception is of that arrangement could inform your understanding of the situation and the advice you provide, especially if further interactions lead you to suspect elder abuse.

Look for agents doing most of the talking, not giving space for the principal to express his or her wishes. An agent's hesitation or objection at the suggestion of a meeting alone with the principal should raise red flags for the attorney. A Power of Attorney gives significant authority to the agent. An attorney should therefore ascertain that a client understands the powers granted to the agent and would like to appoint a specific person as agent.

It is critical to provide a client with the opportunity to disclose information or opinions outside the presence of family members and/or caregivers. To facilitate this, ask an open-ended question such as, "Is there anything you want to say outside the presence of your family?" or "Do you have any concerns you want me to know about?" Always make sure the older adult has your contact information, so you can be contacted should the individual need or want to do so at a later time.

It is prudent to incorporate some general screening for elder exploitation into the standard initial conversation an attorney conducts with every client. Non-threatening language can be used in order to be sensitive to clients while simultaneously providing them with the opportunity to disclose abuse or other safety issues. The Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale has created two different elder abuse screening tools, one

crafted specifically for lawyers. To receive a copy of the screens, contact joy.solomon@hebrewhome.org.

IV. Resources

Based on a thorough conversation with the principal, the attorney should be able to determine how to best assist him or her. The principal may need civil legal assistance, but may also need other forms of help. According to Rule 2.1 of the New York Rules of Professional Conduct, an attorney is an advisor, and may refer to "moral, economic, social, psychological, and political factors that may be relevant to the client's situation." A lawyer should therefore also be prepared to refer a client to experts in these diverse fields who may be able to assist the client. An attorney can provide the client with the information, or assist the client in contacting the third party professional. If the client is dealing with a capacity or other medical issue, this might include local geriatricians, psychiatrists or geriatric care managers. If an attorney determines the client is being abused or is at risk of abuse, an attorney should offer to assist the client with referrals to local resources such as police, the District Attorney or Attorney General, Adult Protective Services, local domestic violence or social service agencies and local elder abuse shelters. An attorney might also consult with one of these professionals about a particular case without revealing the client's identity. A list of elder abuse resources throughout New York State can be found at http://www.nysba.org/Sections/Elder/NYS_Elder_Abuse_Resources_Guide.html.

Also, look for a statewide Elder Justice Guide on the OCA website, tentatively scheduled for Spring 2016 and created as part of the work of the New York State Judicial Committee on Elder Justice under the direction of the Honorable Deborah Kaplan.

Elder law attorneys should strive to build professional networks of individuals knowledgeable about local elder abuse options, who can be consulted as issues arise. The NYSBA's Elder Law and Special Needs Section's Elder Abuse Committee's goal is to build such a community for attorneys throughout New York

State. For more information, or to join the Committee, email joy.solomon@hebrewhome.org.

Endnotes

1. N.Y. RULES OF PROF'L CONDUCT, R. 1.18 cmt. 2 (2013).
2. 22 NYCRR Part 1200 §1.14.
3. *Id.* at §1.7.
4. *Id.* at §1.6.
5. *Id.* at §1.7, Comment 1.
6. *Id.* at §1.3.
7. *Id.* at §1.1.
8. *Id.* at §5.4(c), Comment 2; see also *Id.* at §1.8(f).
9. NY General Obligations Law §5-1509.
10. *Id.* at §5-1510 (c) and (f).
11. *Id.* at §5-1511.

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

Malya Kurzweil Levin, Esq. is the Staff Attorney for the Harry and Jeanette Weinberg Center for Elder Abuse Prevention. In this capacity, she responds to the legal needs of clients facing acute elder abuse, and speaks on the topic to a variety of professional and community audiences, including the Elder Law Section of the New York State Bar Association. Malya was the Weinberg Center's inaugural BLS and David Berg Law and Aging Post-Graduate Fellow prior to joining the staff. Malya received her JD cum laude from Brooklyn Law School, and is a certified Reiki energy healer. She is a co-author of *Changing of the Guardians: A Criticism and Analysis of the New York Guardianship Statute's Impact on Elder Abuse Victims*, published by the National Academy of Elder Law Attorneys (NAELA) Journal. For more information, contact her at malya.levin@hebrewhome.org.

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Tara Anne Pleat, Esq.
Wilcenski & Pleat PLLC
5 Emma Lane
Clifton Park, NY 12065
TPleat@WPLawNY.com

Judith Nolfo McKenna, Esq.
Law Office of Judith Nolfo McKenna
1659 Central Avenue, Suite 208
Albany, NY 12205-4039
judy@mckennalawny.com

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

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NY NAELA Niche

By Robert P. Mascali

On behalf of the members of the New York Chapter of the National Academy of Elder Law Attorneys, I would like to take this opportunity to congratulate our colleagues in the Elder Law and Special Needs Section of the New York State Bar Association on its Twenty-fifth Anniversary. We at NY NAELA, many of whom are also proud members of the Section, appreciate this opportunity to contribute to the education of all of our members on matters of federal law and policy.

Military Retirees Can Now Properly Plan for a Child with a Disability

Prior to 2014, military members and retirees who were parents of a child with a disability were unable to properly plan for their child's future because federal law did not permit them to direct their retirement benefit under the Survivor Benefit Plan (SBP) to a *special needs trust* (sometimes referred to as a supplemental needs trust) ("SNT") upon the retiree's death. As this option was not available, the member or retiree would have two choices, neither of which were good for the disabled child. They could choose to not have the benefit paid to that child, thereby disregarding the child completely and hoping others would care for the child, or else have the survivor benefit paid outright to the child, thereby often causing the child with a disability to possibly be ineligible for much needed public benefits. On December 19, 2014, President Obama signed the Disabled Military Child Protection Act (10 U.S. Code 1450) which provides in relevant part:



...a monthly annuity...shall be paid to the person's beneficiaries under the [Survivor Benefit Plan], as follows:

(4) Special needs trusts for sole benefit of certain dependent children—

...a supplemental or special needs trust established under subparagraph or (C) of section 1917(d)(4) of the Social Security Act [42 U.S.C 1396p(d) (4)] for the sole benefit of a dependent child considered disabled under section 1614(a)(3) of that Act (42 U.S.C. 1382c(a)(3) who is incapable of self-support because of mental or physical incapacity.

Thereafter on December 31, 2015, the United States Department of Defense issued guidance to implement this law so that now a military parent may

plan so that a survivor benefit can be paid to an SNT for that child's benefit in accordance with the guidance provided in the directive.

Many individuals with disabilities are eligible for what are referred to as "means tested or needs-based" programs which limit the amount of monthly income and resources they are allowed to keep. It is always important to recognize the differences between "entitlement" programs such as Social Security and its various programs and Medicare, which **are not dependent** on the financial needs of a person but are programs to which a person is entitled because contributions have been made over a period of time, and the *means-tested or needs-based programs*, such as Supplemental Security Income ("SSI") and traditional Medicaid and Medicaid waiver programs which **are dependent** upon one's financial condition. Prior to the change in the law, oftentimes the recipients of the survivor benefit would cause those individuals on such programs to lose these important benefits, either partially or completely, but now there is a solution.

The Disabled Military Child Protection Act now permits military parents an election to have the survivor benefit for a disabled child assigned to an SNT. While there are limitations as to the manner in which these trust funds can be used and distributed, the effect of such an assignment is that the individual with a disability can have an enhanced quality of life because the trust can be used to purchase goods and services that will benefit these individuals and at the same time they can remain eligible for public benefits which are essential for their continued well-being.

The law requires that in order to qualify, the SNT must be established under certain provisions of existing federal law that govern what are referred to as first party self-settled or pooled supplemental needs trusts, which are trusts that are administered by charitable organizations. The self-settled first party trust will need to be properly drafted and contain provisions that require a payback at the time the trust is terminated (usually upon the death of the individual with a disability) to the Medicaid program for benefits paid out to the individual with a disability during his or her lifetime. The pooled trust may be a simpler option as it does not require a trust to be prepared as there is

a master trust into which participants are able to join and the remainder upon termination can be retained by the charitable organization to further its mission and to benefit other disabled individuals.

The guidance issued by the Defense Department lays out the procedure to be followed in order to have the benefit properly assigned to a SNT in two separate situations, specifically (a) during the lifetime of the member or retiree; and (b) upon or after the death of the member or retiree.

During their lifetime, members or retirees can submit a statement to irrevocably elect to have the benefit paid to an SNT (either individually settled or a pooled trust) along with the name and tax identification number for the SNT and a separate statement using a pre-approved template from an actively licensed attorney certifying that the SNT is in compliance with applicable law and regulations or a certification from the Social Security Administration that the SNT qualifies under federal law (the template can be found at the end of this article).

Upon or after the death of a member or retiree, there are three different possibilities covered by the guidance

- (a) *Upon the death of a retiree*—provided the retiree has previously elected that the benefit would be payable to a dependent child, then that child's surviving parent, grandparent or court appointed guardian may irrevocably make the election to have the annuity benefit paid to a SNT established by the deceased member or by the surviving parent, grandparent or guardian;
- (c) *Upon the death of a member on Active Duty in the line of duty*—In those instances where the Secretary of Defense has made the election to cover a dependent child due to the death of the Active Duty member in the line of duty, the surviving parent, grandparent or court appointed guardian may irrevocably elect to have the SBP annuity paid to a SNT established by the deceased parent or by the surviving parent, grandparent or guardian;

- (c) *Upon the death of a member during inactive duty training*—Where a member dies during inactive duty leaving no spouse and the benefit is payable to dependent children the disabled child's benefit can be irrevocably assigned to a SNT by the surviving parent, grandparent or guardian or the benefit can be assigned to a SNT established by a parent, grandparent or guardian.

In all three of these situations the surviving parent, grandparent or guardian would need to submit the same form of statement or certification as mentioned above where the election is made during the lifetime of the member.

It is readily apparent to those familiar with planning for individuals with disabilities or their family members that the inability of a competent individual with a disability to make the election and/or to set up the SNT or pooled trust is a significant omission in the statute and guidance. According to Kelly A. Thompson, Esq., an attorney in Arlington, Virginia and a member of the New York Bar who was instrumental in obtaining passage of the statute, discussions are ongoing with the Department of Defense in an attempt to rectify this omission.

As in all matters dealing with planning for an individual with a disability, strict adherence to the procedures outlined above is critical.

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

Template for Special Needs Trust Certification (for Attorneys)

I certify that I, _____ (attorney's full name) prepared a Special Needs Trust ("Trust") on behalf of _____ (dependent child's full name), who currently resides at _____ (physical address), *and that the Trust complies with all applicable state and federal laws.* _____ (dependent child's full name) is the dependent child of _____ (name of military member or retiree).

I understand that if the child named above has previously applied for, or in the future applies for, Supplemental Security Income (SSI) or other benefits, the Social Security Administration may need to review the SNT and ensure that it is compliant with all applicable state and federal laws.

Name of practicing attorney _____

State licensed to practice _____

State bar number _____

Signature of attorney _____

State of (STATE) ss. _____

County of (COUNTY) _____

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me on _____ (DATE), by

Notary Public

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Guardianship News

By Robert Kruger

This article differs from the articles I usually write. It does not, for example, involve a particular case. It expresses a point of view and not, I suspect, a point of view widely shared by fellow members of the Bar.

The impetus for writing this article started with a call from a prominent trust and estates litigator, who was representing one side in a guardianship custody fight over an elderly relative. The purpose of the call was to obtain litigation advice.

In that call, I kept bringing the discussion back to the needs of the alleged incapacitated person (“AIP”) rather than ways to attack the adversary. As my involvement in other nasty guardianship proceedings occurred, I became increasingly sensitive to the tendency to marginalize the AIP, as the combatants focused on attacking each other. The AIP sits in the eye of the storm and it is often quiet there.

We owe a duty of loyalty to our clients. We cannot always restrain the worst impulses of our clients but, too often, I have met attorneys who do not try. Attorneys who approach contested proceedings constructively can make a resolution possible. I offer suggestions about how contested guardianships can be compromised, knowing full well that these suggestions are mine, and mine alone.

I believe that a forcefully engaged presiding judge, either individually or through the law secretary, is the best instrument in this endeavor. There is, always, an inclination to please the court. Counsel knows that the court wants a resolution and the court can offer support and encouragement to explore compromise. The practice of the late Justice Frank Rossetti of Nassau County is also worth considering. At a certain point in a contested guardianship, he would have heard enough. At that point, he told counsel that, from that moment forward, they would not be paid on the AIP’s dime. Apparently, the loss of subsidy often worked wonders on the parties.

Another potentially constructive instrument is the appointment of counsel for the AIP. While appointed counsel is often oppositional at the outset, appointed counsel will usually help craft a resolution if counsel believes it accommodates the needs (and demands) of an impaired AIP. The solvent that makes a compromise work is good faith and trust. One must exercise patience with an adversary because, until counsel form a basic level of trust with each other, negotiating a resolution



may be premature. If the AIP is oppositional, counsel has to build a relationship with the AIP as well before counsel can be heard by his/her client. The AIP may have limited ability to give meaningful direction to counsel, and may respond only to a sense of counsel’s good faith. It takes time and patience to change the dynamic from opposition to alliance.

When the fight is between siblings, the emotional baggage is much heavier. It is harder to reason with the litigants, and the notion that mediation might help strikes me as unrealistic. What might help is a forceful, mature, appointed counsel for the AIP. His/her opinions carry great weight and counsel for the parties, after immersion in the childhood rivalries of the parties, should be willing to become constructive negotiating partners. You also have a dose of reality to convey to your client.

Otherwise the presiding judge spends many hours listening to the airing of a family’s dirty laundry.¹ Where is the IP in this picture? The IP may be the reason why children behave so bitterly towards each other, but that is beside the point now. The AIP needs help and the conflict misses the point. You cannot halt or reverse cognitive decline, or reintroduce genuine tranquility, but you should be able to craft an uneasy cease fire. And that is better than the converse.

So, in conclusion, my message is that counsel often needs skills in client management and family dynamics more than litigation skills. There is nothing easy about a contested guardianship. Your client must feel that you are on his/her side and must trust you to achieve an acceptable result without losing sight of the needs of the AIP. Constructive engagement by mature court appointees and the court can help achieve a sensible resolution. I hope that this article, while stating some obvious truths, is not overly simplistic because, in a discussion about negotiated resolutions, one size most decidedly does not fit all.

I can be reached at rk@robertkrugerlaw.com or (212) 732-5556.

Endnote

1. I think that the court’s ability to appoint an independent in these cases could be exercised sooner.

Robert Kruger is an author of the chapter on guardianship judgments in *Guardianship Practice in New York State* (NYSBA 1997, Supp. 2004). He has experience as a guardian, court evaluator, and court-appointed attorney in guardianship proceedings. He graduated from the University of Pennsylvania Law School in 1963 and the University of Pennsylvania (Wharton School of Finance (B.S. 1960)).

Is a Trust for My Pet a Viable Option?

By Anthony J. Enea

One only needs to observe life's daily interactions to conclude that pets have become an integral part of the lives of many. It is virtually impossible to go to a mall or an airport without encountering someone who has a pet or two in tow. In Westchester County, the importance of pets has been readily apparent for over a century. For almost 120 years, Hartsdale has been the home of what is now recognized as the oldest pet cemetery in the nation. Thus, the question most pet owners face is what steps they can undertake to ensure that their pet [or other domestic animal] is properly provided for in the event of their demise.



Historically, one could always provide for his or her pet(s) in a Last Will and Testament. One's pet could be left as a bequest to another with the hope that said person would properly provide for the pet, or one's Last Will and Testament could specifically allocate a portion of his or her estate for the care and maintenance of the pet(s). However, the problem with providing for one's pet(s) in one's Last Will is that the Last Will can be contested for a reason unrelated to the pet, and there can also be a significant lapse of time between one's death and the appointment of the executor of said Last Will. These roadblocks can essentially leave the pet in a state of limbo. Because of these impediments, the wishes of pet owners have in many instances been thwarted by the use of a Last Will to provide for their pets.

In 1996, New York was one of the first states to enact a Pet Trust Statute. Section 7-8.1 of the New York Estates, Powers and Trusts Law (EPTL) permits the creation of a trust for the care and maintenance of a pet(s). The pet trust can be created and funded during the life of the grantor/creator as an "inter vivos trust" or it can be a testamentary trust, created in one's Last Will. As with any other trust document, a trustee(s) is appointed to oversee the implementation of the trust terms. Originally, EPTL 7-8.1 provided that the income and principal of the trust were to be used for the benefit of the designated pet(s) until the death of the pet or at the end of a twenty-one (21) year period, whichever occurs earlier. This was done to comply with the well-established "Rule against Perpetuities," where all interests in property must vest, if at all, no

later than twenty-one (21) years after the measuring life passes. However, in 2010, the statute was amended to recognize the fact that some animals may have a longer life expectancy than twenty-one (21) years. Thus, the statute now permits the trust to continue for the entire life span of the pet or animal.

At the end of the life of the pet or animal, the trust will terminate and the balance of the income and principal of the trust will be distributed per the wishes of the grantor/creator of the trust. It is important to note that EPTL 7-8.1(b) specifically provides: "(b) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of all covered animals."

EPTL 7-8.1(d) provides a court with the authority to reduce the amount of property transferred to the pet trust if it determines that it substantially exceeds the amount required for the intended use. The amount of the reduction, if any, will pass to beneficiaries named to receive upon the death of the pet or animal. The most well-known pet trust is the one created by Leona Helmsley for her beloved white maltese named Trouble. Trouble's Trust was originally funded with twelve million dollars. The Manhattan Surrogate's Court reduced the size of the trust to two million dollars, determining that the trust was overfunded for the implementation of the decedent's wishes. (Stephanie Strom, *Helmsley Left Dogs Billions in Her Will*, <http://www.nytimes.com/2008/07/02/us/02gift.html> [accessed February 4, 2016]; further discussed in *In Re Copland*, 44 Misc. 3d 485, 988 N.Y.S.2d 458 (2014), N.Y. Slip Op. 24172.)

In conclusion, if one wishes to ensure that one's pets or animals are adequately protected upon one's demise, a pet trust, even though it, too, may be contested, especially if it is overfunded, may be the best and most viable option of ensuring that one's wishes are implemented.

Anthony J. Enea, Esq. is the managing member of Enea, Scanlan & Sirignano, LLP with offices in White Plains and Somers, NY. Mr. Enea is a past chair of the New York State Bar Association's Elder Law Section. He was named Best Lawyers' 2016 Elder Law "Lawyer of the Year" in White Plains and Westchester County's Leading Elder Care Attorney at the Above the Bar Awards. Mr. Enea can be reached at 914-948-1500 or A.Enea@esslawfirm.com.

Digital Assets in the Real World: Challenges and Opportunities

By Linda Meltzer

Introduction

Increasingly, our lives and those of our clients are becoming digitized. More than 50% of adults over 65 use the Internet.¹ The typical person has 25 digital accounts ranging from email to social media to online banking accounts, according to a 2007 Microsoft study, yet few wills and other estate planning documents are fully addressing these assets.²



The existence of these digital assets poses challenges and opportunities for elder law and estate planning attorneys. A national survey finds that only 44% of adults report they have wills, even though 60% believe all adults should have estate plans.³ Most wills are largely silent with regard to how digital assets should be accessed, managed or distributed by fiduciaries to loved ones in the event of incapacity or death. The ease and benefits of going paperless in paying our bills, sharing photos or banking online can become overly complex for families and fiduciaries when the person is incapacitated or has died.

There has been progress, albeit slow, on the legal front through the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA—the “Act”) which, after revision, was approved in July 2015 and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws. The “Act” is designed to provide a framework for states to adopt rules to give fiduciaries the authority to manage digital assets and to appease privacy concerns raised by third party providers of electronic communications while respecting the user’s wishes and intent. Conflicts with third party vendor agreements formed between users and custodians, notably Internet service and social media providers, will remain a tough barrier for the foreseeable future. As attorneys, we have a role and a responsibility to mitigate those conflicts through proper estate planning with our clients.

Legal Background

Certain federal laws were enacted in 1986 that restrict fiduciaries and third party providers from accessing computers and electronic records. The RUFADAA defines these third party providers as custodians that carry, maintain, receive and store digital assets. The

custodians of digital assets, at their sole discretion, have choices for disclosing those assets to fiduciaries. A custodian may determine the level of control, by granting fiduciaries full or partial access to the user’s digital account. A custodian could simply choose to send a copy of all the user’s digital assets to the fiduciary. The Computer Fraud and Abuse Act (CFAA), specifically 18 U.S.C. § 1030(e) (2), makes it a criminal offense to access computers or records of the U.S. Government or financial institutions.⁴ It essentially criminalizes computer hacking, raising concerns for fiduciaries wishing to access the bank records of the deceased or incapacitated. The Electronic Communications Privacy Act (ECPA) and its accompanying Title 2, the Stored Communications Act (SCA) “prohibit public providers of electronic communications and remote computing from knowingly divulging to any person or entity the contents of any communication which is carried or maintained on that service”⁵ § 2702 (a) (2).

The federal laws predate the explosion of Internet use and development of internet service providers and social media networks such as Facebook and Google. The laws require users to agree to “Terms of Service” agreements (TOS). Many users simply click their agreement without consideration of the terms and its consequences. Some providers, notably Facebook and Google, have updated their TOS agreements to allow users some control over their account when they die or become incapacitated. The user may designate a family member or friend to take control of the account, if the user wanted a so-called “legacy account,” or close down the account altogether. It is unclear how many users opt in for this control over their account. Most TOS agreements do not provide for access to the digital assets after a user is deceased or incapacitated. Hence the need for updating the laws. The New York State legislature has been slowly moving to amend the Estates, Powers and Trusts (EPTL) law in relation to fiduciaries’ powers to control digital account and assets. The proposed A7869/S5775 bills seek to amend fiduciary control over digital assets and are likely to be modeled after RUFADAA. The Health Insurance Portability and Accountability Act (HIPAA) passed in 1996, and its Privacy Rule added in 2003, have served as a guideline for restricting access of “covered entities,” generally health care clearinghouses, employee sponsored health plans, health insurers and medical service providers. The Privacy Rule protects individually identifiable health information about a decedent for 50 years following the date of death of the individual. The health information balances privacy interests of surviv-

ing relatives and other individuals with a relationship to decedent with the needs of archivists and historians.⁶

The RUFADAA defines the term “digital asset” as an electronic record in which a person has a right or interest but does not include an underlying asset or liability unless the asset or liability is itself an electronic record.⁷ We note these records currently exist in both traditional or non-electronic and electronic forms and anticipate that in the future we may only have electronic records, such as a bank account online. Digital assets refer to any assets which exist in digital form. It will also likely refer in the future to technology we can’t imagine today. Digital assets may be messages, photos, music, video, recordings, domain names, blogs, documents, files, online gaming and gaming credits, loyalty awards, financial and bank accounts. The assets may be stored in many locations such as on our mobile devices, computers, cloud based storage systems (e.g., Dropbox), for business, personal, or a combination of uses. We pay our bills online, we bank online, we share our documents online, we play games online, and ultimately information about our lives is increasingly online.

However, when we become incapacitated or die, access to these accounts may be subject to TOS agreements with third-party providers (such as Facebook, Google, Amazon, Delta Airlines) and access becomes restricted or eliminated for our entrusted fiduciaries. Users of these websites, when initiating their accounts, agree to varying TOS agreements without considering the implications of their accounts and whether they terminate upon their death. Recently a widow, Peggy Bush, whose husband, David, passed away in August 2015, needed a court order in addition to her husband’s death certificate to access an Apple card game app on the couple’s iPad device so she could continue playing. Ms. Bush knew the password for the iPad device itself, but not her husband’s Apple ID.⁸ This is one of the many examples where barriers confound families and fiduciaries with time-consuming and costly detours. Instead, a will with clear authority for the fiduciary to handle such digital assets may have helped Ms. Bush. Among the goals of the legislative efforts by RUFADAA and in New York, is to enable digital assets to be treated like other assets, that is, create “asset neutrality” so fiduciaries can have the same authority as they do for traditional assets.

What Should Elder Law Attorneys Do to Help Their Clients?

Given the unsettled legal landscape in New York, attorneys can guide their clients through traditional estate planning documents and supportive documents to incorporate digital assets that have meaningful monetary or sentimental value. A survey by McAfee put an average value of digital assets at about \$35,000.⁹ Determination will need to be made as to what digital assets

are of importance to the clients, whether the assets are owned and belong to the clients, or are assets that are under the control of third party contracts that would require access to be granted to fiduciaries. By making arrangements in advance, clients can proactively protect their assets to the greatest extent possible.

An astounding \$41.7 billion of assets are currently held by states, according to the National Association of Unclaimed Property Administrators, including \$14 billion in New York State alone.¹⁰ Unclaimed property that escheats to state treasury accounts will likely rise further with the rapid increase in digital assets. Notably, electronic only bank accounts may escheat if digital account ownership can’t be easily identified. Not only can these valuable assets remain hidden, but personal debts may rise for the estate as bills, previously paid online by the decedent go unpaid, causing creditors to slap late financing fees on top of owed amounts if they are unaware of the holder’s death or incapacity. Dormant bank accounts are particularly vulnerable to identity theft, if untended to. According to the Bureau of Justice Statistics, an estimated 17.6 million persons, or about 7% of the U.S. residents ages 16 years or older, were victims of identity theft in 2014.¹¹

Increasingly, clients are spending more time online on personal computers, work computers, and smartphones. They have numerous usernames and passwords for many accounts. To prevent potential fraud and identity theft, attorneys need to discuss how to best safeguard the myriad of user names and passwords that accompany these accounts for the potential task of marshaling and disposing of digital assets to beneficiaries by personal representatives, guardians, executors, agents, and trustees.

Digital accounts with sentimental value may be even more difficult to access but may be just as important for family members who wish to understand an unexpected death by viewing a loved one’s emails or postings on a social media site such as Facebook. Many third party sites and TOS agreements (due to the requirements of federal law) have their own procedures and policies for purposes of privacy and safety concerns. Many of these providers make it very difficult or even impossible for family members to gain access to social media accounts. In the case of *In re Estate of Ellsworth*,¹² the parents of Justin Ellsworth, a U.S. Marine who had died in Iraq in 2004, struggled with Yahoo! to gain access to their son’s email account which he had used while on tour of duty. Yahoo! disallowed access due to its terms of service and to protect their son’s privacy. Ultimately the Michigan probate court directed Yahoo! to provide the family with the emails. Many other struggles like that of the Ellsworths reflect the complexity of digital property, privacy and contracts with email and social media platforms.

The case of *Ajemian v. Yahoo!*¹³ reveals the difficulties families face when requesting access to emails owing to restrictions imposed by TOS. Siblings were appointed administrators of the estate of their brother, John Ajemian, who had died tragically in 2006. Using privacy concerns covered by the Stored Communications Act, Yahoo! refused to give the family access to their brother's personal email account. Initially, the siblings wanted to find information to invite friends for a memorial service for their brother. Later, as administrators, they sought access to the emails as a means of finding their brother's assets. What followed were lengthy negotiations with Yahoo! and lengthy court battles. With a court order, the siblings were offered basic email header information by Yahoo! but not the contents of the emails. Yahoo! raised a forum selection clause issue in their TOS (to require the suit to move to California from Massachusetts) to dismiss the case. The court refused to do so, remanding the case to the probate court for determination as to whether decedent John Ajemian's digital assets are part of his estate. The court's decision questioned Yahoo!'s TOS and reflected on the lack of reasonable construction and clarity on the some terms in the contract. As these controversies have risen, Facebook and Google have updated their policies. Both companies have added options for Legacy Accounts allowing users to decide ahead of time to determine what do with their social media accounts, and have provided online tools so that users could set privacy controls for their accounts during their lifetime.

Suggested "best practices" for TOS agreements of online accounts are:

- (1) clearly authorize a duly appointed fiduciary to access to a user's online account during lifetime or after death for purposes of exemption from state and federal criminal laws including the Computer Fraud and Abuse Act;
- (2) clearly confirm that the user is providing "lawful consent" within the meaning of the federal SCA to divulge the user's online account contents to a duly appointed fiduciary; and
- (3) clearly state what happens to the user's account itself and the user's account contents after death.¹⁴

As digital accounts proliferate, elder law attorneys need to adapt their standard procedures to address the digital estate in all key draft documents and inventory gathering. At the same time, attorneys can address the client's need to provide direction of their intentions regarding access, transfer and disposition of key digital assets in absence of clear laws and mitigate the potential for conflicts down the road for clients and their proposed fiduciaries and beneficiaries.

A Practical Approach

Elder law attorneys should:

- work to raise client awareness of the need to identify and to add digital assets to estate plans;
- consider designating an executor that has the digital expertise to gain access to digital accounts and/or specifically authorizing a fiduciary (trustee, executor, agent under power of attorney) to retain a person or entity with digital expertise;
- develop an exhaustive digital asset inventory list, and incorporate the authority to handle digital assets in documents, notably, powers of attorney, wills, and trusts.

Attorneys should understand their clients and their backgrounds and learn what digital accounts they use in their personal lives. Clients should be apprised of the risks of online accounts on computers and smartphones owned by their employers that may be less accessible by a fiduciary. Attorneys need to understand their client's profiles to the extent they have digital assets that have monetary value, such as fledging small businesses that involve their own websites, with client lists, domain names, blogging, YouTube accounts, online auctions, frequent flyer accounts, stock or currency trading accounts or even speculation in bitcoins. I recommend that attorneys incorporate language in planning documents to encourage their clients to identify their wishes and help fiduciaries carry out those intentions. We, as attorneys, also need to counsel our clients of the current uncertain state of the law.

Attorneys may suggest to their clients that they consider appointing more than one agent as power of attorney that can either act separately or together. The second agent or co-agent can be authorized to take on the responsibility for access to digital accounts, such as bank records, a separate person as co-agent to handle the digital assets (digital agent), separate from traditional assets, and that these individuals be technologically more knowledgeable with online accounts, TOS, and websites. It should be stressed that no passwords or security questions should ever be noted in any planning documents but rather kept separately whether in a safe deposit box or another secure place.

Estate planning documents should always be reviewed periodically every few years and when there are lifechanging events. If these documents are largely silent with respect to digital assets, clients should update their planning documents and create a digital inventory by key categories which can have passwords. Also the client can have sensitive information on this list but take care to be stored carefully or shared with a trustworthy person.

A suggested practical approach for elder law attorneys could entail the following list to better work with their clients:

1. explore their wishes and intentions with respect to their digital profile;
2. discuss the need to develop a detailed digital inventory list including digital assets of meaningful financial and sentimental value, with passwords, access codes and security questions stored securely;
3. suggest options to update power of attorney, will, trusts to address digital property, decide whether there will be a separate digital fiduciary, notably, digital agent or digital trustee;
4. emphasize the importance of indicating their wishes as to access, distribution or deletion of these digital accounts;
5. create a clear authorization to fiduciaries to access respective hardware devices, such as smartphones, tablets, computers, storage devices, data and cloud accounts;
6. grant specific authority to fiduciaries to reset passwords if needed; and
7. authorize fiduciaries to obtain court orders if required by third party providers to gain contents of any and all electronic communications.

Powers of Attorney

In the N.Y. S. Statutory Short Form Power of Attorney, attorneys can use “(g) Modifications” to make additional provisions.¹⁵ This optional section can include language to limit or supplement authority granted to the agent spelling out the agent’s power to use, manage, terminate, transfer or have full access to digital accounts, name the type of accounts including email accounts, digital music, video, photos, software licenses, e-commerce accounts and bank /financial accounts, whether access includes passwords, access controls. Digital assets should detail what is included and whether there are any limits. Also, the POA should name whether the agent is specifically a digital agent.

Wills

Typically, wills designate an individual to serve as executor who will have the authority to manage property. Attorneys can add language to enable the executor to have authority to manage, handle, access, use, distribute, control and dispose of digital property, including and not limited to all named digital assets, digital accounts, social media accounts and include obtaining digital files from any and all Internet service

providers. It should be noted that New York State does not allow for a separate “digital executor” at this time. The will should never contain any passwords or sensitive information because of the risk of the will becoming part of the public record once the will is admitted to probate. Attorneys should consider referencing an external list of digital assets with relevant usernames, access codes, security questions and passwords in a separate document. The following sample language serves as an example:

I have prepared a memorandum with instructions concerning my digital assets and their access, handling, distribution and disposition. I direct my executor and beneficiaries to follow my instructions concerning my digital assets.¹⁶

The will should include the specific powers to handle digital assets and provide an all-encompassing definition of digital assets. The will should identify what devices files may be stored on, refer to current and advancing technologies and include all types of digital accounts which reflect the client’s usage currently and in the future. Attorneys can be guided in part by the client’s digital inventory list but need to consider less active accounts as well as future usage not currently envisioned.

Trusts

Trusts can stand on their own, by highlighting digital assets, and can set forth the authority granted to the trustee to handle the digital assets. If digital assets are of significant value a Digital Asset Trust can be created. The information in the trust does not become part of the public record as in the case of a will if admitted to probate. Alternatively, a testamentary trust can be folded into a will and contain only the digital assets. Similar to an executor, the trustee can be granted authority to manage, access, use and take control of digital assets.

Digital Asset Inventory

Clients should be encouraged to create an inventory of all of their assets. Traditionally, assets would be listed according to real property (e.g., primary and second homes) and personal property, including valuables such as art, antiques, rare books, jewelry and such). Clients should be organizing their digital property as well. Some digital assets have monetary value or point values while other digital assets are sentimental in value. A list of all digital assets and accounts should be categorized and referenced in a document. Everplan’s *Digital Cheat Sheet*¹⁷ provides an outline and can be customized for each client in the following categories:

1. **Devices.** Computer hardware, such as computers, external hard drives, flash drives, tablets, smartphones, digital music players, e-readers, home security systems, smart television, digital cameras and other digital devices;
2. **Online storage at home and work.** Any information or data that is stored electronically, whether stored online, in the cloud, or on a physical device;
3. **Any online accounts,** such as email and communications accounts, social media accounts, shopping accounts, photo and video sharing accounts, Instagram, video gaming accounts, and websites and blogs that you manage;
4. **Domain names** that exist personally and business;
5. **Intellectual property,** including copyrighted materials, trademarks and any code you may have written.

It is clear that in our digitally connected society, elder law attorneys can play an important role in helping our clients address all assets, including the digital assets in their estate plans. The value of these assets can be meaningful yet are often not reflected in planning documents. Digital assets are difficult to access and manage for families and fiduciaries when a loved one becomes incapacitated or dies. The retrieval of these assets can add costs and complexity to an already difficult time. With the legal landscape still unsettled for digital assets, we need to facilitate the wishes of our clients in their planning documents to the greatest extent. Clients need to understand the risks of failing to address their growing portfolio of digital assets properly and the difficulties families may face without clear direction. These challenges can provide opportunities for elder law attorneys in their practices.

Endnotes

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Linda Meltzer, Esq. is an Associate Professor at CUNY-Queensborough Community College (QCC) in Bayside, New York where she has taught Business Law and Principles of Finance for the past eight years. Additionally, Ms. Meltzer is an attorney duly admitted to practice law in the State of New York at www.themeltzerlawfirm.com. Ms. Meltzer concentrates on elder law and trust and estate issues. She holds an MBA in Accounting from Baruch College. In a prior life, she was a Managing Director in equity research at UBS.

Member Spotlight: Judith D. Grimaldi

Interview by Katy Carpenter

Q Where are you from?

A Brooklyn, always! I grew up in Brooklyn. Was born on 79th Street and now live on 79th Street. I know this is unusual but I have family here and I believe in a strong sense of community.

I am committed to my community of Bay Ridge, Brooklyn. As I am a senior citizen now and part of the “silver tsunami,” my latest community project is “Making Bay Ridge Age Friendly” and I am currently planning the Senior Sidewalk Social which will take place on Bay Ridge central Commercial Street, 3rd Avenue. The focus is to invite the community out to meet with local store owners and companies who have taken steps to make their establishment more age-friendly. For example, banks have created a curb-side service taking deposits from a customer when parking is an issue. The bankers have placed seats and better lighting at the customer deposit desks. These little thoughtful conveniences, such as large print deposit slips, are little or no cost fixes that help our elder residents as they age. Churches are taking steps with headphones if someone can’t hear due to the acoustics and are working on making the churches wheelchair accessible. Restaurants are changing lighting and font size on menus. The sidewalk event, called “Welcome to the 60s” will feature fun events from food tastings, music, fashion shows and even a 60s vintage car show!

Q Are these the reasons that have kept you in Brooklyn?

A It’s a great place to live, why would I leave?

Q Where have you traveled?

A I love to travel and enjoy Europe and our own U.S. national parks. As part of NAELA, I traveled to China as part of their Aging Delegation. My son studied abroad in South Africa, so I went to visit him in Capetown and went on a safari, but Italy is my favorite place. I am an avid horseback rider (while it’s not something you would think I would be natural at, growing up in Brooklyn). I try to ride horses whenever and wherever I can! I ride western style—I find riding English style to be too fussy. I’ve been horseback riding in New Mexico, Wyoming, Colorado, Venezuela and Tuscany but, ironically, one of the best places has been



in Florida! I am going to a cattle range this August to try my hand at roping and barrel racing.

Q Where is your favorite destination?

A My heart is in Italy.

Q Now back to you career, how did you become interested in elder law?

A I spent 10 years in the fashion industry promoting and doing public relations and I taught at the PRATT Institute. I was fascinated by color and design. I remember organizing my last fashion show for the couturier Hubert de Givenchy while being pregnant. Givenchy kept saying to me, “Sit down, Madame”!

During my early child care years, when I was home I would bring my baby son to visit with elders in my community as a parish volunteer. It was a tribute to my own grandparents. It was then that I fell in love with the elderly and began to understand the issues which affect them. I continued to work in the fashion industry but the attraction was over. And I decided to return to school at night to earn my undergraduate degree in Gerontology. I was committed to the services for the aged. I soon learned that an undergraduate degree in Gerontology was not very useful. I was told that I needed a Master’s or Doctorate to do anything in the field of Gerontology. I was challenged to discover how I could use the persuasive sale skills I had learned through the fashion industry and apply them to “selling” the needs of older adults. I was directed to become a social worker. I enrolled in a graduate program in social work at Hunter College and earned my MSW while working and raising my two sons. I worked in the field of aging as a social worker for 10 years, operating a licensed home care agency for a local Brooklyn hospital, running the Foster Grandparent Program for the NYC Department for Aging, and teaching Gerontology at Marymount Manhattan College.

My two boys were now entering their teens, and I was wondering how I was going to send them to college on a social worker’s salary. I was working in a hospital when a retired judge, now the hospital administrator, encouraged me to attend law school. I attended Brooklyn Law School at night while working in the hospital and then as a paralegal. I entered law school with the specific focus of becoming an elder law attorney, a very new field of law. My first paralegal job was with elder

law practitioner Ellice Fatoullah, who advocated for in the first spousal refusal case, which was the basis of our current Medicaid spousal impoverishment rules. It was then that I was introduced to two exceptional elder law attorneys, David Goldfarb and Jeffrey Abrandt, from whom I developed a strong foundation in elder law. My working relationship continues with them to the present as I am a member of their study group.

Q What's your favorite part about your job?

A That I can still be a Social Worker with a law degree! The profession provides a "hands-on approach" with my clients and I like that. There is the autonomy in running my own practice which allows me flexibility to do community work as well as the opportunity to do other worthwhile work. Our firm motto is "in legal matters, people matter." And the elder law practice allows me to practice with that philosophy.

Q Do you have a project or accomplishment that you consider to be significant in your career?

A My life accomplishments are my sons; I have raised feminist men! Now that is an accomplishment! Second, I also wrote a book titled "5@55: The Five Essential Legal Documents You Need by Age 55" which compiles stories of my clients and discusses the 5 essential legal documents everyone should have in place by the time they are age 55. Society establishes ages for when one's health must be in checked, or other life milestones, but our legal issues are often left undone. The book addresses the dangers of procrastination in lifetime planning and lays out a plan for getting one's legal affairs in order.

Q You are also an adjunct professor at Brooklyn Law School. What do you enjoy about teaching?

A Spreading the message to younger attorneys to prepare for aging and their later years.

Q Have you had any turning points in your career or life that are notable?

A I believe if you understand your core skills (whether it be people skills, ability to persuade or identify policies you want to change), you can use these life skills in many different professions. I have learned to adapt to life's changes as long as I keep true to my core.

Q Have you ever been given career or life advice that you remember?

A I have a picture of my first boss at Abraham & Straus Department Store's Special Events Department on my desk today to remind me of the life lessons Jane Miller taught me in 1969. She was a fighter and a feminist. She taught me to be confident and sure. I also have a picture of Rosemarie O'Keefe on my desk; she

was the NYC City Commissioner of Consumer Affairs and led the family services unit after 9/11. She died of cancer, probably from the aftereffects of her work in the 9/11 area, but her generosity is something I admired and try to emulate. I like to surround myself with people who have dedicated themselves to the community.

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

A When I grew up, there were 3 choices for women: be a teacher, a nurse or stay at home mother. I broke the rules and went into fashion when I won a scholarship to a fashion school.

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

A My grandchildren! I have 5 grandchildren, with one on the way! I also love Italian cooking—I'm a real Italian Mama when it comes to food. I'm looking forward to a family wedding in New Orleans with all of my brothers and sisters this year. When my mother died—she was 95—we were all together to celebrate and there were 19 grandchildren and 23 great-grandchildren. We also get together every year for Christmas—sometimes the room feels as crowded as a subway but with great food. Family celebrations are important to me.

Q Where do you see yourself in 5 years?

A Semi-retired, but I can't wrap my head around that just now! I would like to be involved with the firm in a gentler way but I see myself remaining active in the community.

Q Do you have any words used to describe yourself?

A Energetic!

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

A I'm really a Brooklyn girl.

Katy Carpenter is a paralegal with Wilcenski & Pleat PLLC in Clifton Park. Katy has been working as a paralegal since her graduation from Marist College in 2010 where she graduated Cum Laude earning a B.A. in Political Science as well as completing the Paralegal Certificate program. Currently, Katy is pursuing her law degree at Albany Law School with an anticipated graduation date in May of 2016. At Wilcenski & Pleat, Katy devotes her career to the areas of special needs and traditional estate planning and administration, trust administration and elder law.

The 2016 Enhanced UnProgram

On Monday, April 18th, I was at work by 7 a.m. bursting with energy and ideas. I can only attribute this newfound *joie de travail* to the UnProgram held the preceding week. I have attended many of the eight UnPrograms offered by our Section, and each time leave with a new attitude. My first experience with the UnProgram was shortly after I returned to work full-time as a sole practitioner. I called my brother Matt on an almost daily basis to ask him questions about practice and procedure. I had no network, no posse to call on should I become lost. The UnProgram was the beginning of my journey into the hearth and home of our Section. It gave me the confidence to reach out to others, and to help those in return.

Shari Hubner, Antony Eminowicz and I were honored to serve as Co-Chairs of the program. There were many familiar friends and loads of fresh faces. This year the Section offered three hours of CLE in addition to the traditional format of the program, in response to many suggestions during our “wrap-up” session of the 2014 program.

This amazing program would not have been possible without the leadership and direction of our outgoing Chair, JulieAnn Calareso. JulieAnn participated in all aspects of planning, and encouraged us at every turn. We are also so grateful to our facilitators, who guided the topic discussions and answered questions. Without the benefit of these facilitators, we would not have a program.

This year, the program was enhanced with three credits of CLE, including one coveted ethics credit. Ron Fatoullah and Judie Grimaldi inspired us all to have a paperless office. Jeff Asher offered an excellent ethics hour, and led a spirited Q and A after the presentation. We also were honored to have a very distinguished panel discuss elder abuse, including Dutchess County Surrogate James D. Pagones.

During the last “break-out” session on Friday, we had a “wrap-up” session to discuss the likes and dislikes from the participants’ view. After reviewing the comments, most responders were very happy with the program and would definitely return. Looking forward to Spring of 2018!

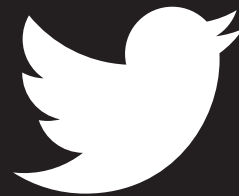
Judith Nolfo McKenna

Service and Leadership Award



Service and Leadership Award presented to JulieAnn Calareso, Immediate Past Chair of our Section, at the Executive Committee Meeting on April 13, 2016.

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Section Committees and Chairs

Client and Consumer Issues

Melinda Bellus
Legal Services of the Hudson Valley
30 South Broadway, 6th Floor
Yonkers, NY 10701
mbellus@lshv.org

Diversity

Veronica Escobar
The Law Offices of Veronica Escobar
153-01 Jamaica Avenue, Suite 201
Jamaica, NY 11432
vescobar@veronicaescobarlaw.com

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

Elder Abuse

Julie Stoil Fernandez
Finkel & Fernandez LLP
16 Court Street, Suite 1007
Brooklyn, NY 11241-1010
jstoilfernandez@ffelderlaw.com

Deborah S. Ball
Law Offices of Deborah S. Ball
880 Third Avenue, 13th Floor
New York, NY 10022
dball@ballnyelderlaw.com

Estates, Trusts and Tax Issues

Patricia J. Shevy
The Shevy Law Firm, LLC
7 Executive Centre Drive
Albany, NY 12203
patriciashevy@shevylaw.com

Judith Nolfo McKenna
Law Office of Judith Nolfo McKenna
1659 Central Avenue, Suite 208
Albany, NY 12205-4039
judy@mckennalawny.com

Ethics

Phillip M. Tribble
Tribble Law
3 Tallow Wood Drive; Suite H-1
PO Box 1411
Clifton Park, NY 12065
ptribble@ptribblelaw.com

Natalie J. Kaplan
Elder Law on Wheels
477 Madison Avenue, Suite 530
New York, NY 10022
nkaplan@elderlawoffices.com

Financial Planning and Investments

Ronald A. Fatoullah
Ronald Fatoullah & Associates
60 Cutter Mill Road, Suite 507
Great Neck, NY 11021
rfatoullah@fatoullahlaw.com

William D. Pfeiffer
The Pfeiffer Law Firm PLLC
20 Corporate Woods Blvd
Albany, NY 12211
wpfeiffer@albanyelderlaw.com

Guardianship

Patricia A. Bave
Kommer Bave & Ollman LLP
145 Huguenot Street, Suite 402
New Rochelle, NY 10801
pbave@kboattorneys.com

Fern J. Finkel
Finkel & Fernandez LLP
16 Court Street, Suite 1007
Brooklyn, NY 11241
ffinkel@aol.com

Health Care Issues

Tammy Rose Lawlor
Miller & Milone, P.C.
100 Quentin Roosevelt Boulevard,
Suite 205
Garden City, NY 11530
TLawlor@millermilone.com

Legal Education

JulieAnn Calareso
Burke & Casserly, P.C.
255 Washington Avenue Extension,
Suite 104
Albany, NY 12205
jcalareso@burkecasserly.com

Richard A. Weinblatt
Haley Weinblatt & Calcagni, LLP
One Suffolk Square
1601 Veterans Memorial Hwy, Suite
425
Islandia, NY 11749
raw@hwclaw.com

Legislation

Deepankar Mukerji
Keane & Beane, PC
445 Hamilton Ave., 15th Floor
White Plains, NY 10601
dmukerji@kblaw.com

Jeffrey A. Asher
Law Offices of Jeffrey A. Asher,
PLLC
43 West 43rd Street, Suite 72
New York, NY 10036
jasher@asherlawfirm.com

Liaison to Law Schools

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

Peter J. Strauss
Drinker Biddle & Reath LLP
1177 Avenue of the Americas
New York, NY 10036
advocator66@gmail.com

Marianne Artusio
Touro College Jacob D Fuchsberg
Law Center
225 Eastview Drive
Central Islip, NY 11722
MarianneA@tourolaw.edu

Mediation

Beth Polner Abrahams
Polner Abrahams Law Firm
350 Old Country Road, Suite 101
Garden City, NY 11530
Beth@bpabrahamslaw.com

Antonia J. Martinez
Antonia J. Martinez, LLC
P.O. Box 883
Croton On Hudson, NY 10520
elderlawtimes@yahoo.com

Medicaid

Rene H. Reixach Jr.
Woods Oviatt Gilman LLP
2 State Street
Suite 700^1Rochester, NY 14614
rreixach@woodsoviatt.com

Valerie J. Bogart
New York Legal Assistance Group
Evelyn Frank Legal Resources
Program
7 Hanover Square, 18th Floor
New York, NY 10004
vbogart@nylag.org

Membership Services

Salvatore M. DiCostanzo
Maker, Fragale & Di Costanzo, LLP
350 Theodore Fremd Avenue
Rye, NY 10580
smd@mfd-law.com

Pauline Yeung-Ha
Grimaldi & Yeung LLP
9201 Fourth Avenue, 6th Floor
Brooklyn, NY 11209
pyeung@gylawny.com

Mental Health Law

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

Martin Petroff

Martin Petroff & Assoc. Attorneys
At Law
1725 York Avenue
New York, NY 10128
mbpetroff@petroffelderlaw.com

Mentoring

Anne E. Dello-Iacono
The Dello-Iacono Law Group, P.C.
105 Maxess Road, Suite 205
Melville, NY 11747
anne@dellolaw.com

Practice Management

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

Publications

Tara Anne Pleat
Wilcenski & Pleat PLLC
5 Emma Lane
Clifton Park, NY 12065
TPleat@WPLawNY.com

Publications

Judith Nolfo McKenna
Law Office of Judith Nolfo
McKenna
1659 Central Avenue, Suite 208
Albany, NY 12205-4039
judy@mckennalawny.com

Real Estate and Housing

Jeffrey G. Abrandt
Goldfarb Abrandt Salzman &
Kutzin LLP
350 5th Avenue, Suite 4310
New York, NY 10118-1190
abrandt@seniorlaw.com

Special Ed

Adrienne J. Arkontaky
The Cuddy Law Firm
50 Main Street, Suite 1280
White Plains, NY 10606
aarkontaky@cuddylawfirm.com

Special Needs Planning

Lisa K. Friedman
Law Office of Lisa K. Friedman
880 Third Avenue, Thirteenth Floor
New York, NY 10022
lf@lisafriedmanlaw.com

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Elizabeth Briand
Bleakley Platt & Schmidt LLP
One North Lexington Avenue
White Plains, NY 10601
ebriand@bpslaw.com

Technology

Moira Schneider Laidlaw
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55 Smith Avenue
Mount Kisco, NY 10549-2813
mlaidlaw@smhal.com

Monica P. Ruela

Makofsky & Associates, P.C.
600 Old Country Road, Suite 444
Garden City, NY 11514
monica@makofskylaw.com

Veteran's Benefits

Edward F. Cunningham
Law Offices of Edward F.
Cunningham
62 Cambridge Avenue
Garden City, NY 11530
ed@edcunninghamlaw.com

Sarah Amy Steckler

Keane & Beane, PC
445 Hamilton Ave., 15th Fl.
White Plains, NY 10601
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New York, NY 10118
goldfarb@seniorlaw.com

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Law Offices of Martin Hersh, Esq.
PO Box 567
Liberty, NY 12754
elder.law@verizon.net

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Judith D. Grimaldi
Grimaldi & Yeung, LLP
9201 Fourth Avenue, 6th Floor
Brooklyn, NY 11209
jgrimaldi@gylawny.com

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Wilcenski & Pleat PLLC
5 Emma Lane
Clifton Park, NY 12065
tpleat@wplawny.com

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mnolfo@estateandelderlaw.net

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Martin S. Finn
Lavelle & Finn, LLP
29 British American Boulevard
Latham, NY 12110-1405
marty@lavelleandfinn.com

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Elder and Special Needs Law Journal

Co-Editors in Chief

Tara Anne Pleat
Wilcenski & Pleat PLLC
5 Emma Lane
Clifton Park, NY 12065
tpleat@wplawny.com

Judith Nolfo McKenna
Law Office of Judith Nolfo McKenna
1659 Central Avenue, Suite 208
Albany, NY 12205-4039
judy@mckennalawny.com

Board of Editors

Lee A. Hoffman, Jr.
Hoffman & Keating
82 Maple Avenue
New City, NY 10956
lhoffman@hkelderlaw.com

Sara Meyers
Enea Scanlan & Sirignano LLP
245 Main Street, 5th Floor
White Plains, NY 10601
s.meyers@esslawfirm.com

Aaron E. Connor
Pierro Schaeffer & Connor LLC
43 British American Blvd
Latham, NY 12110
aconnor@pierrolaw.com

Patricia J. Shevy
The Shevy Law Firm, LLC
7 Executive Centre Drive
Albany, NY 12203
patriciashevy@shevylaw.com

George R. Tilschner
Law Office of George R. Tilschner, PC
7 High Street, Ste. 302
Huntington, NY 11743
gtilschner@preservemyestate.net

Lauren I. Mechaly
Schiff Harden LLP
666 Fifth Avenue, Suite 1700
New York, NY 10103
lmechaly@schiffhardin.com

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Britt Burner
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