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Elder and Special Needs Law Journal

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

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Elder law is one of the most challenging and rewarding practice areas. With the aging of the baby boomers, and the rapid growth of the number of senior citizens, elder law practitioners have stepped in to fill the gaps in the more traditional practice areas. This text provides an introduction to the scope and practice of elder law in New York State. It covers areas such as Medicaid, long-term care insurance, powers of attorney and health care proxies, and provides an estate and gift tax overview.

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Message from the Chair

I am honored and privileged to have the opportunity to serve as Chair of the Elder Law and Special Needs Section for the 2014-2015 term. I am proud to be a member of our Section and to call you my colleagues. Our members are special people. We are dedicated to advocating for the most vulnerable members of our society, the elderly and those with special needs. We are also unique in our collegiality. We are always willing to help each other by sharing information, presenting educational programs and mentoring those new to the practice of Elder Law and Special Needs. Through our District Delegates, we also provide our communities with pro bono services. The elderly and those with special needs benefit from our efforts by receiving high-quality legal services.

During my time as an officer of this Section, I have had the opportunity to work with and appreciate the excellent leadership skills of past Chairs, **Sharon Kovacs Gruer**, **David Stapleton**, **Anthony Enea** and our immediate Past Chair, **Fran Pantaleo**. All of these individuals have served as excellent leaders of our Section and I have learned a lot from them.

On behalf of our Section, I would like to thank **Fran Pantaleo** and commend her for an outstanding job as Chair. Serving as Chair Elect to Fran Pantaleo last year was inspiring. Fran is a strong leader, who is dedicated to enhancing the quality of legal services provided to our clients. Fran recognized that our members provide legal services not only to the elderly but also to those with special needs. She set a goal of re-examining the name and mission of our Section and created a task force to examine this issue. It is as a result of her efforts that the name of our Section was changed from the Elder Law Section to the Elder Law and Special Needs Section. Fran is also a compassionate person, concerned about the personal well-being of our members. Recognizing that stress faced by attorneys has contributed to alcohol and substance abuse, she included a meeting of the Friends of Bill W at each of our Section meetings. This is a tradition that I intend to continue during my term.

As I begin my term as Section Chair and prepare to meet the challenges that lie ahead, I am fortunate to have **JulieAnn Calareso**, **David Goldfarb**, **Martin Hersh** and **Judith Grimaldi** to serve with me as officers. I am also pleased that **Martin Finn** will continue to serve as the Section's financial officer. I could not ask for a finer group of talented and dedicated individuals to serve with me and I know that I can count on them for guidance and support.

By the time this message goes to press, I will have appointed Chairs and Vice-Chairs for all of our committees as well as Section Liaisons. I would like to thank each of you for accepting your appointment. I look forward to working with you and appreciate your support.

One of my goals as Chair is in the area of elder abuse. While none of my clients has been a victim of physical abuse, in the last few years several of my clients have been victims of financial abuse. This trend of increased financial abuse of the elderly is of great concern to me. The documents that we draft in an effort to access government benefits for our clients and to protect their assets may be used by unscrupulous persons to take advantage of the very persons we seek to protect. Our members need to be aware of the risks associated with the documents that we prepare and be sensitive and alert to situations where abuse may occur. My goal is to heighten our members' awareness of this issue. I have strengthened our Elder Abuse Committee and look forward to working with them to provide our members with the information that they need to address this issue in their practices.

At the request of some of our members, I have added a special committee for those interested in the practice of representing persons with regard to special education. I have appointed **Adrienne Arkontaky** as Chair of this special committee. Anyone with an interest in serving on this committee should contact her.

There have been a number of initiatives launched by my predecessors that I intend to continue. These initiatives include membership, study groups, diversity of our members, mentorship of new attorneys and enhancing our website.

We have seen a recent decline in our membership. This decline is not unique to our Section but is being experienced by the entire NYSBA as well as other bar associations. Although we cannot point to any one reason for this decline, the economy may be one contributing factor. In addition, our members are aging, and we need to focus on attracting newly admitted attorneys to our Section. We need to come up with creative ideas to attract new members and encourage our existing members to continue their membership. We need to provide services to our members that will directly benefit them in their day-to-day practices. I have strengthened our Membership Committee and am confident that by working together we can identify creative ways to increase our membership.

A continuing goal of the NYSBA as well as our Section is to improve the diversity of our membership. Although some progress has been made, more remains to be done. This is one area in which our Diversity Committee and our Membership Committee can work closely together.

Our Study Group initiative identifies attorneys throughout the state who wish to participate in a study group and match those attorneys with an experienced practitioner. Study groups provide our members with the opportunity to discuss issues of importance to their practices with the entire group. These shared experiences, assistance with legal analysis and guidance with day-to-day issues that come up in one's practice are of tremendous value to our members.

Similarly, our Mentorship initiative pairs newly admitted or attorneys new to the practice of Elder Law and Special Needs with experienced practitioners. This service to the novice practitioner is invaluable.

As all of you are aware by now, the NYSBA website has been revamped and our Listserv has been converted to a Community. We will undoubtedly go through some growing pains as we switch to the new website. **Fran Pantaleo** has agreed to chair our Technology Committee. Anyone interested in assisting Fran on this committee should contact her. I am sure that she would welcome the assistance.

We will continue to monitor legislative developments. Our Legislation Committee is one of our most active and hardest-working committees. This past year, the committee was chaired by **Amy O'Connor** and **Ira Salzman**. Because of term limits, **Amy O'Connor** cannot serve as a Chair this year but has agreed to serve as a Vice-Chair. Under the leadership of Amy and Ira, the budget proposal to eliminate spousal refusal for certain individuals receiving community Medicaid was again defeated. I would like to thank the members of our Legislation Committee who contributed a significant amount of time and effort to legislation matters this year. I would like to give a special thanks to **David Goldfarb** and **Valerie Bogart** for their extraordinary effort in responding to the spousal refusal budget proposal. I have appointed **Matthew Nolfo** to join Ira Salzman as Co-Chair of the Legislation Committee for this year.

We will continue to provide the high quality continuing legal education programs that our members have come to expect. In addition to regularly scheduled programs, we will continue to use webinars as well as the new NYSBA website to provide timely information on new developments.

Our summer meeting in Hershey, Pennsylvania, from August 7-9, will be chaired by **Joseph Greenman** and **Sara Meyers** and has something to offer for both the new practitioner as well as the more experienced practitioner. Both basic- and advanced-level breakout sessions will be offered on Medicaid and guardianship issues. Transitional CLE credits will be offered for the basic level sessions. In addition, there will be an entertaining movie matinee on Saturday for which two ethics credits will be earned.

I hope that you will bring your family to our summer meeting. There will be plenty of activities for the whole family and, for those of you who bring your children, I am sure that they will enjoy Hershey Park. We are also offering reduced registration fees for attorneys admitted five years or less.

We are in the planning stages for our fall meeting. The meeting will be held in Tarrytown, New York, October 30-31 and will be chaired by **Jeffrey Asher** and **Judith Nolfo-McKenna**. I am confident that you will benefit from attending the program.

The success of our Section is dependent upon the involvement of our members. There is a proverb that counsels that "it takes a whole village to raise a child." So, too, it takes all of us working together to accomplish our common goals and objectives.

I urge all of you who have not been actively involved in our Section to become involved. For those of you who are already involved and realize the benefits of that involvement, I urge you to encourage your colleagues to become more involved. Sometimes all it takes is that little push to get someone to attend the first meeting that makes all the difference.

I remember the first Section meeting that I attended. I was reluctant to attend but was urged to attend by a friend and colleague, **Ken Grabie**. He promised that it would be worthwhile, and he was right. I returned from the meeting energized and excited about my practice. I had picked up a few practice tips and some planning ideas that I had never before considered. Involvement in the Section has helped me become a more successful Elder Law and Special Needs attorney. I have also made a number of friends whom I can call upon when I need assistance in my practice.

Just as I was encouraged by Ken Grabie, I now urge you to become more involved in our Section. I promise you that it will be worthwhile. If you are interested in becoming more involved, please contact me, my fellow officers or any of the Committee Chairs or Vice-Chairs. We always welcome new ideas and the participation of new members.

I look forward to an exciting and challenging year and welcome your involvement. I can be reached at (631) 582-5151 or raw@hwclaw.com.

Richard A. Weinblatt

Message from the Co-Editors in Chief

Dear Colleagues:

Summer is officially upon us. For many of us, the season is one of relaxing vacations and time spent with family and friends. Many of us use this time to catch up on our reading. Although the *Journal* may not be a suspense thriller or a great romantic novel, we are sure you will find the articles of great interest and worthy of adding to your summer reading list!

As special needs and elder law practitioners, we recognize the tragedy of elder abuse and discrimination and crimes against those with developmental disabilities. Our new Chair, Richard A. Weinblatt, sets a landscape for his term as Chair of the Section in noting his commitment to reducing financial abuse of the elderly. Richard's message is one that discusses innovative ways to strengthen our Section and draw in new members. We are fortunate to have such a great leader and look forward to the coming year. This edition of the *Journal* includes several articles on the topic of elder abuse, and so Richard's message is very timely.

Robert Kruger discusses the challenges of being an appointed guardian. It is interesting that as Richard mentions how important the issue of financial elder abuse is in today's society, Robert discusses how difficult it may be when making financial decisions on behalf of an incapacitated person.

Anne P. Meyer provides an interesting perspective on the concept of "Ableism" as we search for ways to provide individuals with intellectual disabilities more freedom to self-determine the outcome of their lives. In addition, we strive to abolish discrimination and prejudice against individuals with disabilities.

Joy Solomon and Malya Levin provide the first of an ongoing series of articles that will be published by the Elder Abuse Committee. The article points out the "staggering financial impact" of financial elder abuse. We look forward to the series in coming issues.

We also have two important articles on the use of trusts in elder law and special needs planning.

Henry Montag provides important information on trusts and whether the trust you may be drafting is really accomplishing the objectives that your client is striving for.

Stephen Donaldson provides a very interesting perspective on the use of pooled trusts and the potential of a conflict of interest. In contrast, we invited Theresa Wells, Trust Counsel for NYSARC, to provide her perspective on the issue. We consider this a very novel and interesting way to evaluate two views. Of course, we recognize the importance and value of pooled trusts and the fact that for many individuals, pooled trusts have been a lifeline to protect and ensure access to government benefits.

We thank all of our regular columnists for their contributions: Jeffrey N. Rheinhardt provides an update on Medicare's "improvement standard" and "observation status." David R. Okrent provides us with "Recent Tax Bits and Pieces" and, of course, Judith B. Raskin's column on recent New York decisions keeps us well informed of recent decisions that may effect how we practice and the guidance we provide to our clients.

Finally, we include a letter written by Jota Borgmann from MFY Legal Services and a coatition of advocates, which was sent to Governor Cuomo, the New York State Department of Health and Centers for Medicare and Medicaid Services offering proposals related to Medicaid Managed Long Term Care implementation. We continue to believe it is important for our readers to appreciate the incredible work these advocates are doing on behalf of all of our clients.

We look forward to seeing everyone at the Summer Meeting in Hershey Park in August. Richard has indicated that one of the challenges for all sections has been sustaining and increasing membership. We invite you to join your colleagues in Hershey and invite someone new to the meeting. As we all know, the Elder Law and Special Needs Section is an outstanding one, and we urge each of you to brag to your colleagues about the work we do and encourage fellow practitioners to join us.

So, we both wish you all a restful and relaxing summer. Happy reading and writing!

Sincerely,

Adrienne and David

“Ableism” in the Legal Sphere: An Analysis of MHL Article 81 Adult Guardianship of Persons with Intellectual Disabilities

By Anne P. Meyer

A. Introduction

On October 22, 2012, following the Presidential Debate, conservative pundit Ann Coulter took to Twitter to applaud Mitt Romney for taking it easy on that “retard,” President Obama.[1] She wrote this to much applause and when some confronted her about her use of that term, she not only refused to apologize for its use, she defended it.[2] Of those who spoke out against Coulter’s Tweet, one voice went viral: John Franklin Stephens, Global Messenger for the Special Olympics. Stephens wrote, “I’m a 30 year old man with Down Syndrome who has struggled with the public’s perception that an intellectual disability means that I am dumb and shallow. I am not either of those things, but I do process information more slowly than the rest of you. In fact it has taken me all day to figure out how to respond to your use of the R-word last night.”[3] Coulter responded that Stephens’ message to her was “unnecessary” since she never meant the word in connection with or in reference to “someone with an actual mental handicap,”[4] but Stephens did not buy her argument. He responded, saying, “The word ‘retard’ is offensive and I should not be a symbol for someone who is dumb and shallow. If they wanted to use me as a symbol, use me as a symbol for someone who fights adversity.”[5]

This is only one, well-publicized incidence of the intolerance and exclusion of those deemed “disabled” by our society’s standards of “normalcy.” Otherwise well-meaning people use the R-word flippantly and casually every day. They usually don’t understand that what they are doing derides and alienates a whole portion of the population. When confronted, they often respond like Ann Coulter: defending their use, citing the evolution of language, and telling their “critics” that they are wrong and/or unfoundedly attacking the person who used the word.[6] The uncaring use of this term is only one part of the problem at hand. There is a far greater oppression at work and the R-word is only one visible symptom of it.

While there has been amazing headway made over the years by the Disability Rights Movement, there is still a deeply rooted, systematic oppression and exclusion of people with disabilities in our society. “Ableism” is defined in the dictionary as “discrimination or prejudice against individuals with disabilities.”[7] Disability Rights activists and scholars define ableism in a more comprehensive way, as “the power structure that renders disabled people inferior to and dominated by non-disabled people, thereby serving as a justification for the discrimination and exclusion of disabled people [from society].”[8] This belief that one group is superior and the other is inferior is pervasive. It does not just exist independently in a non-overlapping social sphere. Our society, after all, contains academic, business, healthcare, political, and legal spheres, all of which are touched and molded by our general “ableist” principles. This paper explores “ableist” behavior in the legal sphere by examining the nature of “capacity” and guardianship law in New York State.

Part B of this paper provides a more in depth exploration of the medical, social, and legal constructs of what it means to be “disabled” in the United States and the “ableism” that results from those constructs.

Part C looks at adult guardianship under Mental Hygiene Law Article 81 (“Article 81”) in light of the previous two adult guardianship statutes (Mental Hygiene Law Articles 77 and 78) with a focus on Article 81’s definition and understanding of capacity versus incapacity.

Part D examines the social, medical, and legal constructs of “disability” and “capacity” and examines them at work in the legal system in a hypothetical guardianship case involving a person labeled as “mentally retarded” and “developmentally disabled.”[9]

B. A Brief History of “Abelism” in the United States: the Social, Medical, and Legal Constructs of “Disability”

The concept of “disability” is not new. The idea of the “lame” man or the “cripple” is said to have existed since biblical times, where a person with a disability was considered someone in need of a miracle cure.[10] As early as 1290, English law provided a framework for the guardianship of “idiots” and “lunatics” in order to preserve property owned by persons with disabilities.[11] However, it wasn’t until the 1800s when the formulation of the person with a disability as “the other” really developed in the United States.[12] That is when what current Disability Studies refers to as “The Medical Model” of disability really emerged.[13] While this model replaces the “miracle cure” from earlier times with the “medical cure,” it still bears great resemblance to the past treatment of persons with disabilities: it views the person with a disability as someone who is "sick and in need of treatment, rehabilitation, a cure, or charity… [locating] the 'problem' within the individual."[14] This Medical Model resulted in the erection of "large institutions to protect and exclude people with disabilities from society."[15] These homes and institutions were said to exist to "protect" individuals with disabilities from a society they were deemed ill-equipped to exist in, but the institutions were really just a means for a frightened "able-bodied" population to "protect" themselves from those they considered different.

This medical model of disability prevailed as the only model of disability well into the 1900s. In fact, one of the United States's most infamous institutions wasn't erected until the late 1930s: Willowbrook State School in Staten Island, NY.[16] Here, thousands of "mentally retarded" children were sent to live in filthy, subpar conditions:

> For decades, Willowbrook State School on Staten Island was a barren warehouse for more than 5,000 mentally retarded people, a place where children lay naked and untended on the floors of locked wards, where the air stank of urine and echoed with the moans and cries of residents.
>
> Willie Mae Goodman's 4-year-old daughter was in Building 14. "She wasn't clean," Mrs. Goodman recalled this week. "You could smell her. Her little toes would be so chafed I had to pull them apart. I had to cut her hair short it was so matted."[17]

This neglect and abuse was only one facet of the mistreatment of persons with disabilities in the 1900s. The twentieth century also saw the passage of "compulsory sterilization laws"[18] in thirty-two states, and restrictive marriage laws in thirty-nine states.[19]

Guardianship law changed at this time. While the 1290 notion of *parens patriae* was still the rationale behind guardianship in the United States, the medical model of disability left its mark on the revised laws in New York.[20] The year 1969 saw the enactment of the Surrogate Court Procedure Act ("SCPA") Article 17-A, titled "Guardians of Mentally Retarded and Developmentally Disabled Persons."[21] This law was based on the doctrine of *in loco parentis*, which allows the court to "appoint a guardian for an individual based on a diagnosis of mental retardation, developmental disabilities, or traumatic head injury."[22] The year 1972 saw the enactment of Mental Hygiene Law Articles 77 and 78. Article 77 allowed the court to find a person with a disability "incompetent" and appoint a committee to oversee the person's care. Article 78 was slightly less restrictive in that it allowed for the court to avoid a finding of "incompetence," but it still allowed the court to appoint a conservator to oversee the individual's life and run it with the individual's "best interest" in mind without actual input from the person placed under guardianship.[23] All three statutes were another means of depriving people with disabilities of their civil rights because society deemed them "abnormal" and in need of able-bodied intervention.

It would not be until the late 1970s and well into the 1980s that the need for reform of the medical model was realized on a large scale.[24] As Geraldo Rivera would say in his 1972 expose, *Willowbrook: The Last Disgrace*, "What we need is a new approach. We have to change the way we care for our mentally retarded. We ask for change; we demand change.… It just doesn't have to be this way."[25] The Willowbrook scandal and subsequent Consent Decree helped begin the shift from a medical approach to a "minority group" approach to Disability Rights.

The "Minority Group Model" of disability changed the focus from the flaws of the individual to the oppression of the minority group. Under this model, "people with disabilities are [considered] victims of indignities, discrimination, and exclusion from society in much the same way as are other marginalized groups of people based on race, gender, or sexual orientation."[26] This model is rights based, meaning it focuses on the rights denied to persons with disabilities, as a marginalized population, and it fights to gain back those denied rights. The rights denied to persons with disabilities have most notably included the right to vote and the right to choose where the person will live and with whom.[27] The historic denial of these rights served the purpose of obliterating the autonomy of persons with disabilities. Once again, "ableism" was at work, though this time fueled less by medical reasoning and more by the resulting social stigma. Not only were people being denied their fundamental right to live as a member of the greater human race, but they were also being forced into this category of "less than human." It was this category that society used to justify the denial of their rights.

While the "minority group model" resulted in a number of important pieces of legislation getting passed to protect the rights of persons with disabilities (most notably, the Rehabilitation Act of 1973 [Section 504],[28] the Education for All Handicapped Children Act of 1975[29] [later named the Individuals with Disabilities Education Act ("IDEA") in 1990],[30] finally culminating in the passage of Americans with Disabilities Act ["ADA"] in 1990[31]), critics considered the model flawed for focusing "on power politics and identity politics, while not necessarily problematising disability itself."[32] They argued that the minority model still situated the "disability" within the individual, like the medical model, instead of placing the responsibility on society.

The “Social Model” of disability, then, was proposed as an expansion of the “Minority Model.” This model proposes that disability is a social construct,[33] placing the responsibility on society to adapt, not the individual, by changing society’s attitude and by removing barriers in place to put an end to the systematic “othering” of persons with disabilities.[34] This model puts the onus on society to examine the ways in which it oppresses. Society is responsible for creating access for those people with disabilities whom society has segregated from those deemed “normal,” not just physically, but emotionally as well.

Language comes into play in very important ways under this model. For example, by recognizing terms that have been used to subject persons with disabilities (slurs like “retard,” “cripple,” “gimp,” “idiot,” “moron,” “Sped,”[35] etc.) and recognizing the ways human beings have been reduced to caricatures of their disability instead of human beings who happen to have a “disability” (“disabled person” versus “person with a disability”), it becomes apparent that society needs to change. There is a casual violence and oppression to the language thrown about in our society that is rarely noticed, let alone addressed.[36] The social model recognizes these microaggressions[37] are what need to be changed, not the individual with the disability. Society, with its construct of “normal” (an abstract concept that does not actually exist), is what needs to be changed.

C. Progressive Legal Reform: The Current Definitions of “Capacity” and Adult Guardianship Under MHL Article 81

While the law was changing to recognize the gross mistreatment of persons with disabilities prior to the 1980s and the demands of the newly formed Disability Rights Movement, it was not until the 1990s that adult guardianship was reformed. In 1992, Mental Hygiene Law Article 81 (“MHL 81” or “Article 81”) replaced Articles 77 and 78 in New York. The New York Legislature outlined their intent in section one of the statute:

> The legislature hereby finds that the needs of persons with incapacities are as diverse and complex as they are unique to the individual. The current system of conservatorship and committee does not provide the necessary flexibility to meet these needs.…The legislature finds that it is desirable for and beneficial to persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable.[38]

This new model of guardianship calls for “the least restrictive form of intervention”[39] in an effort to preserve as much autonomy for a person deemed in need of a guardian, while still providing the person assistance with “activities of daily living”[40] and/or property management. This provided far more flexibility than the prior two statutes. Where Articles 77 and 78 allowed the court to grant complete guardianship, or no guardianship at all, Article 81 takes a step back and not only allows but also requires the court to specifically tailor guardianship in each individual case.[41] Even if the court determines that someone is in need of assistance, if that person already has less restrictive means of managing his/her person and/or property in place, then the court will likely rule that a guardian is not necessary.[42]

This new “least restrictive” model of guardianship is functionally based.[43] Where Articles 77 and 78 relied on a medical diagnosis to prove a need for a guardian, Article 81 looks at an individual’s functional ability. It requires a court to find that a guardian is necessary and that either the person alleged to need a guardian agrees to the appointment of a guardian, or that person has been found “incapacitated” by the court.[44] If a person agrees to the appointment of a guardian, the person is termed a “person in need of a guardian” (a “PING”).[45] If the person is not consenting to a guardian and the court will be ruling on the person’s “incapacity,” then the person is termed an “alleged incapacitated person” (an “AIP”).[46]

A finding of “incapacity” is considered far less restrictive than the former required finding of “incompetence.” Incapacity is “based on clear and convincing evidence and shall consist of a determination that a person is likely to suffer harm because: 1. the person is unable to provide for personal needs and/or property management; and 2. the person cannot adequately understand and appreciate the nature and consequences of such inability.” [47] A finding of incapacity is said to “[reflect] an understanding that there is a continuum of capacity and a guardianship should be limited in scope.”[48] While a finding of “incompetence” formerly stripped persons with disabilities of all autonomy, a finding of “incapacity” recognizes functional limitations, however extensive or limited they may be, without taking all rights from an individual just because that individual needs assistance.

Article 81 also provides a number of procedural safeguards that the prior two MHL statutes were lacking. There are due process protections in place: before guardianship can be granted, a hearing must be held to determine whether a guardian should be appointed;[49] anyone alleged to need a guardian is required to be present at the hearing, unless the person is out of state or cannot meaningfully participate in the hearing;[50] if the person cannot physically be present, because the person is bed-bound, a bedside hearing can be held;[51]

and the person over whom guardianship is being sought has the right to have an attorney to represent the person's wishes at the hearing.[52] Additionally, a court-appointed independent party known as a "court evaluator" is tasked with meeting with the person over whom guardianship is being sought in order to observe the person's circumstances (including the person's functional capabilities and limitations), determine whether the person wants a guardian (if possible), the extent of the person's property and personal needs (and the person's level of awareness of those needs), and whether those needs are being met (with or without assistance).[53] The court evaluator compiles all the observed information into a report to the court either recommending or not recommending that a guardian be appointed.[54]

These statutory changes under Article 81 signified a major shift from the medical-based model of disability evidenced under Articles 77 and 78. The legal sphere, and guardianship law in particular, finally began to catch up with the rest of society by moving onto a more social model of disability. However, the current state of adult guardianship law has not progressed so far from the medical model of disability as one might believe. While Article 81 provides all the above safeguards, it still allows for the use of medical records,[55] diagnoses, and expert medical witnesses[56] as evidence of incapacity. Furthermore, the SCPA Article 17-A guardianship, introduced prior to MHL Articles 77 and 78, remains in effect. Article 17-A provides for the guardianship of persons specifically "based on a diagnosis of mental retardation, developmental disabilities, or traumatic head injury," a purely medical model law.[57] While many judges have interpreted Article 17-A as requiring the procedural safeguards detailed in Article 81,[58] the outdated, offensive statute has not been repealed or edited since its issuance in 1969.[59]

There is currently a global push to shift the Disability Rights paradigm even further. In 2006, the United Nations drafted and adopted the Convention on the Rights of Persons with Disabilities ("the CRPD").[60] This treaty outlines the most comprehensive and progressive Disability Rights reform to date. Article 12 of the CRPD specifically addresses the issue of capacity in relation to persons with disabilities. It says: "State Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life."[61] It has spurred quite a discussion among legal scholars about its potential ramifications on adult guardianship across the globe.[62] Though the treaty has neither been ratified by the United States,[63] nor been granted any kind of force of law over the United States, this language shift likely will have enormous impact on guardianship law in the United States, and in New York in particular in the years to come.

D. "Ableism" at Play in the Legal Sphere—An Article 81 Guardianship Case Study

It is one thing to acknowledge these ableist behaviors throughout our social, medical, and legal histories, especially when they are presented as changing and resolving as social consciousness evolves. It is another thing entirely to acknowledge that these ableist constructs and concepts are still at play in our current legal process in many ways, especially in a proceeding governed by a statute as "progressive" as New York's Mental Hygiene Law Article 81. The following case of Jane Doe will illustrate the ableism at play in the current legal sphere.

Jane Doe is a young woman in her early twenties who is described as having "mental retardation" and "learning disabilities."[64] According to the petition, Jane is the plaintiff in a personal injury suit that was commenced when Jane was a minor. A settlement has been offered since Jane has reached the age of majority and her personal injury attorney, Lawyer X, believes Jane cannot accept the settlement herself due to her disabilities. The only way the case can be settled, in Lawyer X's opinion, is if a guardian is given the power to settle the case on Jane's behalf. Lawyer X contacted Lawyer Y to handle the guardianship matter.

The guardianship petition states that Jane's mother, Mrs. Doe, is seeking indefinite guardianship of both Jane's person and property. The petition alleges that, in addition to being unable to settle her personal injury lawsuit, Jane has neither the capacity to care for her person or for her property without the help of a guardian. As is required under Article 81, a court evaluator is assigned to the case.[65]

The court evaluator makes a number of calls to learn more about the case at hand. She first calls to schedule a meeting with Mrs. Doe and Jane. Next, she speaks to Lawyer Y about the guardianship petition. Lawyer Y offers the court evaluator a "heads up" that Mrs. Doe is "not the most sophisticated person" and that she doesn't understand the legal process very well. He suggests that it might be fairly frustrating speaking with Mrs. Doe and Jane. He mentions this a number of times during the phone conversation with the court evaluator. Finally, the court evaluator calls and speaks to Lawyer X about the personal injury case and proposed settlement. While on the phone, Lawyer X keeps stressing that he wants to get the case settled and that it cannot be settled without a guardian. When the court evaluator asks him why he believes that is the case, he explains to her that the mother has no legal authority to settle the case on Jane's behalf. When the court evaluator then asks why Jane cannot settle the case herself, he responds that she doesn't have the capacity to do so.

When the court evaluator meets with Mrs. Doe and Jane, she can detect no lack of understanding or "sophistication," whatever that may mean. Mrs. Doe is a Latina woman in her late forties. Jane is also Latina and, as stated above, she is in her early twenties. Both Mrs. Doe and Jane acknowledge the court evaluator during this meeting. Mrs. Doe remains engaged and inquisitive. Jane does not seem very interested in what is being discussed, she focuses mainly on the television in the room, however she does respond when addressed. Her answers are generally short and she comes across as shy. They both explain their daily lives to the court evaluator.

When the conversation turns to the topic of Lawyers X and Y, Mrs. Doe gets mildly agitated. She just wants everything with the court to be finished so they can "move on with their lives." The court evaluator explains to her that if she gets guardianship, she will be required to report back to the court yearly.[66] She appears confused, so the court evaluator then explains to her what guardianship of the person and property entails under MHLArticle 81. Upon explanation, Mrs. Doe very vehemently states that she doesn't want guardianship. She is happy with the way things are with her and Jane and the arrangement they have in place. Jane and her mother take care of one another. Jane cooks for them and cleans the apartment. Jane does not work, but she does receive Supplemental Security Income (SSI) monthly, which her mother controls as Jane's representative payee. They have everything under control, they just want to be finished with the personal injury case and move on with their lives. The court evaluator then informs Mrs. Doe that a limited guardianship is available so someone can just be appointed to settle the case with Jane. Mrs. Doe thinks that sounds much more desirable. The court evaluator asks Jane if she would mind if someone helped her settle the open personal injury case and she shrugs, noncommittally.

The court evaluator meets with Mrs. Doe and Jane a second time a few weeks later where she speaks with Jane alone. It becomes clear to the court evaluator that Jane does need some assistance with settling the case and setting up a trust for the settlement funds. Jane acknowledges that she has some trouble with math and reading. She also expresses a desire to have someone help her settle the case and set up the settlement money into a trust. However, she believes the situation she has with her mom now is good the way it is and nothing more restrictive is necessary. The court evaluator agrees.

Based on the meetings with Jane and her mother, the court evaluator believes that a personal needs guardian is not necessary at all. There are less restrictive means of support in place already and nothing beyond that is necessary. The court evaluator also believes that a general property management guardian is not necessary. Again, there are already less restrictive means of management in place. The court evaluator does believe that the support of a limited guardian could be helpful to settle the case. However, the court evaluator does not believe Jane is lacking capacity and, instead, believes Jane should be considered a person in need of a guardian under the statute because she is consenting to the limited guardian. The court evaluator stresses these beliefs in her official recommendation to the court.

Lawyer Y does not agree with this assessment in the slightest. He is preoccupied with the idea that one day Jane might need a guardian of person and property management, indefinitely, and even if she does not need it now, it is best to get it in place now. On the morning of court, the court evaluator once again explains her position to Lawyer Y, stressing that his client does not agree with the petition he has drafted. When Mrs. Doe and Jane show up, he takes them aside and, after many minutes of discussion, relents and agrees that a limited guardian with the powers to settle the case would be a better solution and he will tell the judge he is changing his petition. The judge, taking into account the testimony of the court evaluator, the petitioner, and the person in need of a guardian, sides with the court evaluator's recommendation and disregards the requests and allegations in a large portion of the original petition as far too restrictive.

In the above scenario, it may not be clear that both Lawyer X and Lawyer Y have done anything wrong, let alone that they have expressed ableist views throughout the course of the case. Both lawyers appear to truly believe they are helping this family to the best of their abilities. However, their treatment of Jane Doe is not only harmful to her and her case, but it is harmful to the progress our country has made concerning Disability Rights. Lawyer X is adamant in his concern that Jane cannot possibly have capacity because she has a "developmental disability." Lawyer Y is likewise in agreement with Lawyer X, based on his argument in the petition that Jane is so severely limited by her disabilities that she cannot possibly care for her person and property without a guardian. This presumption of incapacity is exactly the kind of mentality that led to forced institutionalization and sterilization in the early 20th century. This paternalistic reaction to persons with disabilities during guardianship proceedings sets back the entire Disability Rights movement. Furthermore, it is in direct conflict with the current shifting paradigm of Disability Rights towards the presumptive guarantee of capacity to all persons with disabilities.[67]

While it is true that Jane does need assistance in managing her person and property, there is no evidence presented that even suggests that she has zero ability to care for herself and her property. She recognizes her limitations and she has a system in place that helps her to combat those limitations.[68] Article 81 specifically requires that the "least restrictive" means be put into place to help support an individual's autonomy, in lieu of a restrictive plenary guardianship.[69] With a system already in place, the guardianship hearing would have been superfluous had she not been party to a personal injury lawsuit with a pending settlement. Had a guardian been appointed, Jane and Mrs. Doe would have been subjected to indefinite court oversight of Jane's care and well-being. This would have resulted all because a pair of lawyers believed Jane lacked capacity and that the system she had in place was not adequate enough to care for Jane's needs, even though Jane's disabilities clearly only presented marginal functional limitations and she has had a perfectly adequate support system in place to compensate for those limitations for the majority of her life.

The lawyers' proposed misguided guardianship restrictions were ultimately prevented because the court evaluator was aware of the ableist beliefs bleeding into the legal discourse. The situation was also ultimately rectified because the judge was sympathetic to Mrs. Doe and Jane, and the judge did not prescribe to the ableist views the lawyers did. However, had the court evaluator and/or the judge been on the same page as Lawyers X and Y, this hearing could have gone very differently. This hearing, under those circumstances, could have lead to a very distressing situation for the Doe family and for Disability Rights. This situation could have become yet another moment of triumphant ableism in our country's legal and social history.

E. Conclusion

There have been a number of paradigm shifts throughout United States history regarding society's treatment of persons with disabilities. While the trend has been a good one, a push toward personal autonomy, dignity, and respect for persons with disabilities, there are still deeply rooted ableist beliefs held by a number of people within our society. Those beliefs are bleeding into the legal sphere. Mental Hygiene Law Article 81 has made great strides in helping to ensure that persons with disabilities are treated with the dignity they deserve. The law creates a presumption of capacity which must be disproven via court hearing in order for someone to be declared incapacitated and in need of a guardian. The law declares that a guardian is a last-resort appointment, allowing for the most autonomy any guardianship statute has ever afforded in The United States.

However, despite the progressive nature of Article 81, ableism is still at work in the legal system. The idea that some people are inherently more capable than others, and the idea that there is a "norm" that dictates how people should process information and live their lives, undermines all progressive aspects of Article 81. After all, a law can only be as progressive as the minds of the people creating and interpreting it. It falls on the shoulders of the legal actors, then, to consider the ways their personal beliefs affect their legal actions. There are many minds that must be opened, many people who must be made aware of their ingrained ableism, before that ableism can be eradicated from the legal sphere.

Endnotes

1. "I highly approve of Romney's decision to be kind and gentle to the retard." Ann Coulter (October 22, 2012), https://twitter.com/AnnCoulter/status/260581147493412865.
2. Michael Walsh, *'Screw them!' Ann Coulter refuses to apologize to the 'word police' for using the 'R word' in tweeted Obama insult*, New York Daily News (October 27, 2012), http://www.nydailynews.com/news/national/ann-coulter-refuses-apologize-word-article-1.1193843.
3. John Franklin Stephens, *An Open Letter to Ann Coulter*, The World of Special Olympics (October 23, 2012), http://specialolympicsblog.wordpress.com/2012/10/23/an-open-letter-to-ann-coulter/. (Stephens goes on in his response to poignantly state:

   > I thought first of asking whether you meant to describe the President as someone who was bullied as a child by people like you, but rose above it to find a way to succeed in life as many of my fellow Special Olympians have.
   >
   > Then I wondered if you meant to describe him as someone who has to struggle to be thoughtful about everything he says, as everyone else races from one snarkey sound bite to the next.
   >
   > Finally, I wondered if you meant to degrade him as someone who is likely to receive bad health care, live in low grade housing with very little income and still manages to see life as a wonderful gift.

   Because, Ms. Coulter, that is who we are—and much, much more."
4. *See* Walsh, *supra*, note 2.
5. *Id*.
6. *Id*.
7. *Ableism*, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/ableism.
8. Sagit Mor, *Disability and the Persistence of Poverty: Reconstructing Disability Allowances*, 6 Nw. J. L. & Soc. Pol'y 178, 180 n.4 (Winter 2011) (LexisNexis).
9. Article 81 struck the term "retarded" from guardianship law in New York in favor of the terms "developmentally disabled" and "intellectually disabled." *See* N.Y. Mental Hyg. Law 81; The term "mentally retarded" has also since been stricken from federal law via Rosa's Law. *See Why Pledge?: Rosa's Law and Legislative Challenges*, R-Word: Spread the Word to End the Word, http://www.r-word.org/r-word-why-pledge.aspx#.UWJNv2kS7pg, (*last accessed* May 3, 2013). However, under Article 17-A, the term "retarded" is still used.
10. *31 Verses About Disabled People*, OpenBible.info, http://www.openbible.info/topics/disabled_people (*last accessed* May 3, 2013).
11. Kristin Booth Glen, *Changing Paradigms: Capacity, Legal Capacity, Guardianship, and Beyond*, 44 Colum. Human Rights L. Rev. 93, 101 (Fall 2012).
12. *A Brief History of the Disability Rights Movement*, The Anti-Defamation League Archive (2005), http://archive.adl.org/education/curriculum_connections/fall_2005/fall_2005_lesson5_history.asp.
13. Arlene S. Kanter, *The Law: What's Disability Studies Got to Do With It or An Introduction to Disability Legal Studies*, 44 Colum. Human Rights L. Rev. 403, 419-421 (Winter 2011).
14. *See* Kanter, *supra*, note 13, at 419-21.

15. *Id*. at 420.
16. Celia W. Dugger, *Big Day for Ex-Residents of Center for the Retarded*, The New York Times Archives (March 12, 1993), http://www.nytimes.com/1993/03/12/nyregion/big-day-for-ex-residents-of-center-for-the-retarded.html?src=pm.
17. *Id*. at 2.
18. *See* Glen, *supra*, note 13, at 104, n.47 (*citing to* Buck v. Bell, 272 U.S. 200 [1927].
19. *Id*. at 104, n.46.
20. *Id*. at 105.
21. Rose Mary Bailly and Charis B. Nick-Torok, *Should We Be Talking? – Beginning a Dialogue on Guardianship for the Developmentally Disabled in New York*, 75 Alb. L. Rev. 807, 807-808 (2011/2012).
22. *Id*. at 808.
23. *See* Glen, *supra,* note 13, at 105, n.57.; *See also*, David Goldfarb and Joseph A. Rosenberg, *New York Elder Law* (LexisNexis/Matthew Bender 2012), § 10.02 [2] at 10-10.
24. *See* Dugger, *supra,* note 18.; *See also Willowbrook: The Last Disgrace Preview*, Youtube, http://youtu.be/k_sYn8DnlH4 (*last accessed* May 3, 2013) (hereinafter *"Willowbrook"*).
25. *See "*Willowbrook", *supra*, note 28; *See also* Consent Decree, Shneps, et al., v. Governor Carey, et al. (April 30, 1975), *available at* http://www.library.csi.cuny.edu/archives/pdfs/consent%20decree.pdf.
26. *See* Kanter, *supra*, note 15, at 422. It should not be forgotten or overlooked that this model also acknowledges that disability is only one category of marginalization that may be affecting an individual. There is intersectionality to marginalization and stigma. Oppressive systems overlap and it would be remiss to not address that fact. A person can have stigma associated with race, class, gender, sexual orientation, and disability all working against them at once, or in any combination, as they try to operate in a privileged society.
27. *Id.* at 422-423.
28. *See* The Anti-Defamation League, *supra,* note 14, at paragraph 11.
29. *Id*. at paragraph 12.
30. *Id*. at paragraph 13.
31. *Id*. at paragraph 15.
32. *See* Kanter, *supra,* note 15, at 426 (*citing to* Tom Shakespeare, *Disability, Identity, and Difference,* Exploring the Divide 94, 97 [Colin Barnes & Geof Mercer eds., 1996], *available at* http://disability-studies.leeds.ac.uk/files/library/Shakespeare-Chap6.pdf).
33. *Id.* at 428.
34. *Id*. at 427-28.
35. *See "sped,"* UrbanDictionary, http://www.urbandictionary.com/define.php?term=sped (*last accessed* May 3, 2013).
36. *See* Kanter, *supra,* note 15, at 433-39.
37. *Frequently Asked Questions*, The Microaggression Project, http://www.microaggressions.com/frequently-asked-questions/ (*last accessed* April 24, 2013).
38. N.Y. Mental Hyg. Law § 81.01.
39. N.Y. Mental Hyg. Law § 81.03(d).
40. N.Y. Mental Hyg. Law § 81.03(h).
41. *See* MHL § 81.01, *supra,* note 42.
42. *See* New York Elder Law, *supra* note 26, § 10.02 [5] at 10-13, n.19.
43. N.Y. Mental Hyg. Law § 81.02(c); *See also* N.Y. Mental Hyg. Law § 81.03(b); *See also* N.Y. Mental Hyg. Law § 81.03(c).
44. N.Y. Mental Hyg. Law § 81.02(a).
45. N.Y. Mental Hyg. Law § 81.16(c)(1).
46. N.Y. Mental Hyg. Law § 81.07(b)(3).
47. N.Y. Mental Hyg. Law § 81.02(b).
48. *See* New York Elder Law, *supra,* note 23, § 10.02 [3] at 10-11.
49. N.Y. Mental Hyg. Law § 81.11(a).
50. N.Y. Mental Hyg. Law § 81.11(c).
51. *See* New York Elder Law, *supra,* note 23, § 10.05 [6][b] at 10-51.
52. N.Y. Mental Hyg. Law § 81.10.
53. N.Y. Mental Hyg. Law § 81.09(a).
54. The court can also find that a special guardian, or that a "protective arrangement" is necessary and they can rule that one of those two alternatives to guardianship occur. *See* MHL § 81.16.
55. *See* New York Elder Law, *supra,* note 23, § 10.05 [5][a] at 10-49; *See also* Joseph A. Rosenberg, *Routine Violations of Medical Privacy in Article 81 Guardianship Cases: So What or Now What?*, 85-JAN N.Y. St. B.J. 34 (January 2013).
56. *See* New York Elder Law, *supra,* note 23, § 10.05 [6][f] at 10-53.
57. *See* Bailly and Nick-Torok, *supra,* note 21, at 808.
58. *See* Glen, *supra*, note 11, at 119.
59. *See also* Rosa's Law, *supra*, note 9.
60. *Convention on the Rights of Persons with Disabilities*, United Nations Enable, http://www.un.org/disabilities/default.asp?navid=14&pid=150.
61. *Article 12 – Equal recognition before the law*, United Nations Enable, http://www.un.org/disabilities/default.asp?id=272 (hereinafter *CRPD Article 12*).
62. Amita Dhanda, *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?*, 34 Syracuse J. Int'l L. & Com. 429, 438-450 (Spring 2007).
63. Steve Benen, *Senate GOP kills disabilities treaty*, The Maddow Blog (Dec. 4, 2012), http://maddowblog.msnbc.com/_news/2012/12/04/15675104-senate-gop-kills-disabilities-treaty?lite.
64. These two terms are both used interchangeably throughout the petition.
65. *See* MHL § 81.09(a), *supra,* note 53.
66. N.Y. Mental Hyg. Law § 81.31.
67. *See* CRPD Article 12, *supra*, note 61; *See also* Dhanda, *supra*, note 62.
68. *See* MHL § 81.02(b), *supra*, note 47.
69. *See* MHL § 81.01, *supra,* note 38.

Anne P. Meyer graduated from CUNY School of Law in May of 2013 and was admitted to the New York State Bar in May of 2014. Anne is currently working part time as a Staff Attorney with the Elder Law Clinic at Main Street Legal Services, Inc., for the summer, and she is looking for full-time employment in the area of elder law, particularly MHL 81 Guardianship Law. Going forward, she hopes to continue working to eradicate the above detailed "ableism" in the field of elder law.

Spotlight on Elder Abuse: Looking Up from the Law

By Joy Solomon and Malya Levin

This article will be the first in an ongoing series brought to you by the Elder Law and Special Needs Section's Elder Abuse Committee.

Joy Solomon

The consequences of elder abuse can include declining functional abilities, worsening psychological decline, dementia and a three times greater risk of death.[1] Beyond its impact on the lives of individual victims, elder abuse has a staggering nationwide financial impact, with a national annual financial loss to victims estimated at $2.9 billion.[2] Given that over a quarter of a million New York State residents over 60 are victims of elder abuse each year,[3] it is likely that many of the people experiencing these devastating effects are some of our clients or potential clients. Moreover, only one in twenty-four of these elder abuse cases are reported to law enforcement or social services agencies.[4] Therefore, it is likely that the client who is being abused is suffering alone and in silence. As attorneys, we are effectively positioned to serve as watchdogs in identifying, addressing and remedying incidents of elder abuse. Too often, however, attorneys lack the resources and multi-system support that is often required to adequately address this complex problem.

In response to this rampant and growing issue, the NYSBA's Elder Law and Special Needs Section has a newly formed Elder Abuse Committee, whose mission is to increase legal practitioners' proactive and informed responses to elder abuse through substantive educational programming, resource creation and distribution, and community building. The Committee took an important first step towards these goals by presenting at the recent Annual Meeting of the Elder Law and Special Needs Section.

The Elder Abuse Committee's co-chair, Joy Solomon, spoke about recent scientific research that indicates that the aging brain is neurologically less capable of both picking up on facial cues that indicate a lack of trustworthiness as well as spotting suspicious language in false or misleading advertisements.[5] These brain changes, which exemplify the growing medical, cognitive and psychological fragility that people exhibit as they age, help explain why elder abuse is difficult to both identify and address. Telltale signs of elder abuse can often be dismissed as the "natural" results of aging. Diminished capacity can prevent a victim from effectively disclosing the abuse and can often make it difficult for even seasoned professionals to evaluate such disclosure. Older adults who are in danger as a result of abuse often have complex medical, psychological and other needs that prevent them from accessing the services that are available to younger victims. Indeed, the rapid deterioration that often accompanies elder abuse, coupled with the isolation that is its hallmark, makes elder abuse more difficult to identify and remedy the more serious it becomes. Seeing these interlocking phenomenon play out repeatedly in her own work as an attorney led Solomon to co-found the Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale, the nation's first emergency elder abuse shelter located within a long-term care facility. The shelter was created specifically to address the unique and multifaceted needs of this population, and its catchment area includes all of New York City as well as Westchester County.

Malya Levin

Many of the medical, psychological and cognitive factors that are unique to this older demographic further highlight the need for a multidisciplinary response to elder abuse, and Solomon spoke about the proliferation of multi-disciplinary teams (MDTs), groups of professionals including doctors, nurses, law enforcement officers, prosecutors and adult protective service workers who meet regularly, pooling resources and expertise to address complex elder abuse cases. Civil attorneys can also bring cases to these teams, which now exist in Brooklyn, Manhattan and Westchester, and are in formation elsewhere in the state. Audrey Stone, Chief of the Westchester County District Attorney's Special Prosecutions Division, and a member of the Westchester County MDT, was also one of the presenters at the Annual Meeting. Stone spoke about the tremendous increase in elder abuse cases that her office has seen in recent years, and stressed the critical role of banks and other financial professionals in identifying abuse, given that financial abuse is a rapidly growing form of elder abuse, with a 12% increase nationwide between 2008 and 2011.[6] This point is especially salient given the interagency guidelines on privacy and elder financial abuse recently issued by eight federal financial regulatory agencies, which indicate that there is no conflict between federal privacy laws and banks disclosing suspicions of elder abuse to third-party law enforcement or social service agencies.[7] Attorneys should not hesitate to interface directly with banks in such circumstances. Stone also encouraged attorneys who suspect abuse to assist clients in making reports to local district attorneys' offices.

Adult Protective Services (APS), a state-mandated case management agency, is often effectively positioned to respond to cases of suspected elder abuse. Art Mason of Lifespan Rochester, a longtime board member of the National Adult Protective Services Organization, spoke to Annual Meeting participants about the basic criterion for receiving APS assistance. These services are available to individuals 18 and older who: (1) are mentally or physically impaired (2) are unable to manage their own resources and daily activities or protect themselves from risk due to that impairment and (3) have no one to assist them responsibly. APS can be a valuable community partner for an attorney looking for resources to help a client at risk.

Mason stressed that, since family members perpetrate 90% of elder abuse,[8] older adults are often extremely reticent to disclose. Attorneys, who occupy a position of trust and respect for many older adults, may well be the first people an older adult confides in, provided that the professional takes care to speak with the client alone and to listen carefully and thoroughly, reading between the lines when a client alludes to being "disrespected" or "mistreated," and asking gentle but direct questions.

The Elder Abuse Committee views this CLE as the first in a series of educational events that will educate and inform the legal community about various aspects of elder abuse. The Committee hopes to continue to convene professionals from a variety of disciplines to grow attorneys' toolkits in the fight against elder abuse.

For questions or to join the Elder Abuse Committee, please contact joy.solomon@hebrewhome.org.

Endnotes

1. Lachs MS, Williams CS, O'Brien S, Pillemer KA, Charlson ME. The Mortality of Elder Mistreatment. *JAMA*. 1998;2 80(5):428-432.
2. Metlife Mature Market Institute, *The Metlife Study of Elder Financial Abuse*, June (2011) *at* https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf, pg. 2.
3. Lifespan of Greater Rochester, Inc., Weill Cornell Medical Center of Cornell University, New York City Department for the Aging, *Under the Radar: New York State Elder Abuse Prevalence Study*, May (2011) *at* http://www.ocfs.state.ny.us/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf, pg. 2.
4. *Id*.
5. Proceedings of the National Academy of Sciences of the United States of America, Neural and behavior bases of age differences in perceptions of trust, October 2012; National Center on Elder Abuse, Research Translation, A Neuropsychological Test of Belief and Doubt: Damage to Ventromedial Prefrontal Cortex Increases Credulity, July 2012.
6. Metlife Mature Market Institute, *The Metlife Study of Elder Financial Abuse*, June (2011) *at* https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf, pg. 2.
7. Intergency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults, 2013 *at* http://files.consumerfinance.gov/f/201309_cfpb_elder-abuse-guidance.pdf.
8. National Center on Elder Abuse [NCEA]. National Elder Abuse Incidence Study, (1998) *at* http://www.aoa.gov/AoARoot/AoA_Programs/Elder_Rights/Elder_Abuse/docs/ABuseReport_Full.pdf.

Joy Solomon is the Director and Managing Attorney of The Harry and Jeanette Weinberg Center for Elder Abuse Prevention, the nation's first emergency shelter for elder abuse victims. Joy co-founded The Weinberg Center in 2004. She was previously Director of Elder Abuse Services at the Pace Women's Justice Center, a non-profit legal advocacy and training center based at Pace University Law School. Prior to joining the Women's Justice Center in 1999, Joy investigated and prosecuted a variety of crimes including child abuse, fraud, and elder abuse as an Assistant District Attorney in Manhattan, where she served for eight years. Joy is a frequent speaker on the issue of elder abuse, including to the United States Senate, Special Commission on Aging.

Joy is a board member of NCPEA, on the Executive Committee of the Elder Law and Special Needs Section of the New York State Bar Association, where she is Chair of the Elder Abuse Committee and on the Advisory Board of the New York City Elder Abuse Center, of which she was a founder. In 2010 Joy received The New York State Bar Association Award for Excellence in Public Service.

Malya Kurzweil Levin 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. 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. 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*, to be published by the National Academy of Elder Law Attorneys (NAELA) Journal in fall 2014.

Is Your Client's Trust Accomplishing Its Objectives?

By Henry Montag CFP

Clients establish trusts for many different reasons. Some for the management aspects to make sure their assets will be properly invested and not squandered away by a spendthrift child or spouse. Others establish trusts to make sure that if sued, their assets are protected from the claims of a creditor, or for tax purposes. A careful parent or grandparent may establish a trust to provide an inheritance earmarked for the next generation and even to make certain that their child's assets are protected in the event of a divorce. Trusts can also be set up to provide for the welfare of a child, to provide for their educational fund or to send a birthday, graduation or wedding gift even after the grantor has passed away. A Trust is also an excellent way to make a charitable bequest to assure your Legacy will always be remembered.

Some individuals with sufficient assets that choose to leave their IRA principal intact for a grandchild might choose to set up a stretch IRA trust. Doing so would allow the assets in the IRA to continue to grow tax deferred and accumulate for many years without having to take a distribution, a very smart and effective way to defer taxes on assets and even gives one an opportunity to skip a generation of taxes. Creditor protection for a beneficiary may also be another significant reason for a grantor to set up an IRA trust especially if the beneficiary might be sued because of their occupation, or spendthrift personality. Most recently the Supreme Court in its decision regarding inherited IRAs (*Clark v. Rameker*, 134 S.Ct. 678) provided us with another reason as to why a trust could be a very useful tool to protect a beneficiary in cases of bankruptcy.

Prior to the recent 2014 estate tax exclusion increase to $5,340,000 many attorneys advised their clients to use marital A B Trusts to reduce the size of the assets in their taxable estate to escape the federal estate and state inheritance taxes. Many advisors also suggested that clients place their primary homes in a Qualified Personal Residence Trust (QPRT'S), to avoid having their value included in their taxable estate for estate tax purposes. While there are many reasons for an individual or family to consider the benefits of establishing a trust, it is equally important that individuals review their trusts to make certain they are still operating in their best interest today. For example many individuals that placed their homes in QPRT'S, may wind up passing the ownership of the home from a parent to child while the owner is still alive. However, in doing so they give up the stepped up basis at death unnecessarily, as estate taxes may no longer apply for them today as a result of the new higher tax exclusions.

Many young families with children that have special needs, set up a Special Needs Trusts (SNT) to enable their child to receive whatever public assistance they may qualify for, and in addition provide them with other assets when parents are no longer alive. While it's always important to choose a trustee wisely, never is it more important than when it comes to providing guidance to the parent to advocate for the best outcome in providing management for the needs of a special needs child for the rest of his or her life. Just as much thought should go into the selection of a trustee, as a trustee should carefully consider the duties and responsibilities he/she is assuming by agreeing to act as a trustee for the family of a close friend.

Many times people will appoint or accept the title as Trustee but don't fully understand the ramifications, the fiduciary liability, nor the moral responsibility they assume when they become personally liable to preserve the assets in that trust. This commonly occurs when a life insurance contract was purchased in order to exclude the death benefit from an Individual's taxable estate. The attorney or accountant advised their client to select an individual to act as trustee for their trust owned life insurance (T.O.L.I). Often times an oldest son or daughter or good friend or trusted relative was chosen, but they probably didn't have the understanding of how a life Insurance contract works nor did they realize that they assumed 100% of the performance risk for a contract they didn't know wasn't guaranteed, and didn't know required active management, just like any other asset class. This can place the unskilled private trustee in a position where their lack of specialized knowledge concerning their duties as a trustee makes them vulnerable to a lawsuit by other family members, or can place them and their advisers in the center of an uncomfortable, otherwise preventable situation, which more often than not can turn into an un necessary lawsuit and a loss of reputation.

This most often occurs when a client in their mid to late 80's receives notification from their Life Insurance Company stating that their life Insurance contract, based on the current premiums will expire without value in another 1-2 years, unless a higher premium is paid. How can that be asks the client? I've paid all of my premiums on time and I never borrowed any of my cash value. What they don't understand nor did their sons and daughters acting as private trustees is that 85% of the life Insurance contract's they and others purchased over the last 25 years was a Flexible Premium life Insurance contract meaning that it wasn't guaranteed to last a life time. Instead 100% of the performance risk of that contract was transferred to the Insured/trustee. And any shortfalls in Interest rates should have been made up by the trustee each and every year. Unfortunately most trustees nor their advisers realized that if that shortfall which amounted to approximately 2.5% over the last 10 years wasn't made up, the end result would cause their life Insurance contracts to expire years earlier than originally anticipated.

An adviser should familiarize themselves and advise their clients and those individuals acting as private trustees, that owning a flexible premium life insurance contract requires active management. Once a performance evaluation is completed a trustee will find that they have several options available to them. The trustee can pay the additional premium, or they can reduce the death benefit maintaining the existing premium. They can replace the contract with a new contract if the grantor's health permits and it makes economic sense to do so, or the grantor can sell their policy on the secondary market as a Life Settlement. Point is that the message needs to be aired that it's no longer acceptable for a client to call their stock broker/wealth manager several times a week or month to go over the performance of their $500,000 Investment portfolio, but not even think of evaluating the performance of their $1-$2 Million life Insurance portfolio. In addition a performance evaluation allows a trustee to consider and perhaps take advantage of any new features and benefits that may have only recently been made available, i.e.: Pension Protection Act, Chronic Care Riders, which allow a grantor to withdraw up to $119,000 of tax free proceeds from a Life Insurance contract to pay for various qualifying long term care expenses. Consideration should also be given to protecting the assets of the trust from being depleted in the event a protracted long term illness by considering the purchase of 1 or 2 long term care Insurance policies. Once a contract's performance is initially evaluated, it should be reviewed every 2-3 years to allow an individual to make sure they're still getting maximum value and compare what they have to what may be available.

A useful tool I use in my practice to record all of the available options, is a Letter Of Intent Statement, (LOIS) that has the Grantor meet with the Trustee to discuss in plain simple language, the grantors intent under various circumstances which I then turn into an informal letter given to the trustee by the grantor. This letter should periodically be updated to keep current with a grantor's wishes as to beneficiaries, duties and percentages of desired proceeds

To summarize a typical client with an ILIT needs to make certain that their crummy administration letters are sent out annually, and that their gift tax returns are completed and properly allocated as to the GST. Someone must make certain that their Life Insurance company is still healthy and more importantly that their individual life Insurance contract will be there beyond an Insured's life expectancy. In short someone needs to advocate for the grantor's beneficiaries and coordinate all of the above to make certain that the next generation's future inheritance and well-being is not endangered as a result of neglect. There is perhaps no better way to initiate a conversation with the children of your clients than to let them know that you're interested in discussing the best way to protect and preserve those assets earmarked for them and their children. Especially since No one else is advocating for them.

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Pooled Supplemental Needs Trusts: A Conflict of Interest?

By Stephen Donaldson

Twelve years ago, Renee Lovelace published *The Dark Side of Pooled Trusts*[1] that outlined how pooled trusts "hold the promise of serving as an amazing technique to promote respectful quality of care and independent living options for persons with disabilities of all ages." However, Ms. Lovelace also identified equally "dark" aspects of pooled special needs trusts (hereinafter PSNT), one of which is the conflict of interest associated with nonprofit organizations taking title to the subaccount balances upon each beneficiary's death.

Express Trust Provisions

Stated in law school Property course language, the typical PSNT structure looks like this:

_ Nonprofit organization settles PSNT with nonprofit board member(s) as trustee(s).[2]

_ Contributing Sponsor to trust for the benefit of disabled beneficiary for life.

_ Remainder to nonprofit organization.

Ms. Lovelace's thesis is that a conflict of interest arises due to the PSNT structure: the settlor, trustee, and remainderman are essentially the same party. Moreover, this structure also appears to be contrary to a trustee's duty of impartiality[3] to manage the trust assets for the benefit of all of the beneficiaries as well as a trustee's duty of loyalty prohibiting self-dealing.

In her Article, Ms. Lovelace proposes "disclosure" to overcome these conflicts in part because it would help ensure that parties who stand to realize financial gain from interaction with the trust are made known to sponsors and beneficiaries.[4] As the author points out, "The best defense against conflicts of interest playing an exploitive role appears to be clearly, consistently, and continually updating complete disclosures."[5]

After investigating as many New York-situated PSNT master trust and joinder agreements as possible,[6] it appears safe to conclude that most, if not all, PSNT trust and joinder agreements include broad conflict of interest waivers to shield trustees and the nonprofit settlors from self-dealing claims. For example, the Life's WORC self-settled trust agreement includes the following waiver:

> There may be a potential conflict of interest in the administration of the Trust since (a) the Trustee may make disbursements on behalf of a Designated Beneficiary for the costs of Services and benefits provided directly or indirectly by Life's WORC or an affiliated enterprise and (b) the Trust shall retain those funds remaining in the Trust at the time of death of the Designated Beneficiary. The Sponsors executing the Sponsor Agreements are aware of the potential conflicts of interest that exist in the Trustees' administration of the Trust. *Any Sponsor executing a Sponsor Agreement to this Trust hereby waives any and all claims against the Trustees on account of self-dealing, conflict of interest or any other act. The Trustees shall not be liable to the Sponsor or to any party for any act of self-dealing or conflict of interest resulting from their affiliations with Life's WORC, Inc.* (emphasis added) or with any related entities or a Designated Beneficiary.

In re Smergut

In addition to the express language included in PSNT master and joinder agreements, the Nassau County New York Supreme Court recently addressed the conflict of interest issue in *In re Smergut (LD)*.[7] The issue in *Smergut* revolved around a $102,000 retroactive SSA payment to LD, a 46-year-old disabled person who had spent eighteen years living in a Life's WORC, Inc., facility where she received 24-hour care.[8] Upon discovery of the $102,000 payment, Life's WORC petitioned the Court to appoint LD's sister as a special guardianship with property manager powers. To avoid interrupting LD's government benefits, Life's WORC recommended transferring the $102,000 to its pooled community trust (PSNT) for LD's continued care and support.[9]

The New York State Office for People with Developmental Disabilities (OPWDD) and the New York Civil Liberties Union (NYCLU) challenged the petition on several grounds, including the conflict of interest the trust created by its remainder interest and the trustee's absolute discretion.[10] LD's interests would be better served, OPWDD and NYCLU argued, by transferring LD's funds into a Medicaid payback trust because of the lack of a conflict of interest.[11] NYCLU also argued that should the Court find in favor of establishing a PSNT, LD's funds should be transferred to a pooled trust handled by a "neutral and disinterested fiduciary"[12]

In its analysis, the Court relied on an earlier case, *In re Application of Robert Cannatella*.[13] In reference to the conflict of interest that arises when the state, which takes a remainder interest in a self-settled Medicaid payback trust, advocates that a beneficiary's assets should be placed into a payback trust. Justice Luft held, "[T]he purported conflict identified by the state would exist in any case in which there is a choice to be made between a pooled trust and a payback trust."[14]

Following Justice Luft's reasoning, the *Smergut* Court held in favor of transferring LD's assets into the pooled trust because the absence of any statutory prohibitions meant that the state legislature, in enacting the relevant Estates, Powers and Trusts Law (EPTL) and Social Services provisions, "saw fit to allow the use of the same" without any preference for payback trusts over pooled trusts.[15]

Trustee Discretion

Despite the holding from *Matter of Smergut*, additional provisions in the trust agreements appear to further insulate nonprofit organizations by granting trustees sole and absolute discretion over distributions. Some examples include:

> This Trust is intended to provide, *in the sole and absolute discretion of the Trustees* (emphasis added), extra and supplemental items for the care, support, comfort, education, rehabilitation and training of the Designated Beneficiaries…[16]
>
> The Trustee shall have full power and authority in its *absolute discretion* (emphasis added), without recourse to any court or any notice whatsoever, to do all acts and things necessary to accomplish the purpose of this Trust, and to perform the Trustee's duties as such and to…[17]

Per these provisions, PSNTs appear legally stacked in favor of the trust: the nonprofit organization appoints the trustees to the pooled trust, contributions are irrevocable, the trust agreement shields the trustees from any self-dealing claims, and the trust retains either some or all rights to money remaining in a beneficiary's subaccount upon death. To casual observer A, establishing a PSNT may sound as appealing as giving $10,000[18] to her friend B, asking B to spend the $10,000 for A's benefit, yet explaining that it's up to B whether she spends any of the $10,000 and, if she doesn't spend it, then B can keep the money.

However, PSNT agreements also include provisions that, on their face, appear to address the conflict of interest concerns a sponsor or beneficiary may harbor. One of the most important provisions that appears in master agreements includes the trust's purpose: "This Trust is intended to provide, in the sole and absolute discretion of the Trustees, extra and supplemental items for the care, support, comfort, education, rehabilitation and training of the Designated Beneficiaries in addition to and over and above benefits they already receive, are entitled to receive or may receive in the future as a result of their mental retardation or physical, psychological or developmental disabilities from any federal, state or local government program, agency or department."[19]

The significance of this provision is self-evident: without it, a beneficiary's contributions to a PSNT would fail to fit within the statutory boundaries that exclude a beneficiary's assets from what Social Service law considers "available resources" and would likely interrupt receipt of government benefits. Further, it specifically outlines how funds must be used.

PSNT agreements also include language that obligates a trustee to hold remainder interests subordinate to that of the beneficiaries. "Each Trust Account shall be held for the exclusive benefit of the Designated Beneficiary of that Trust Account during his lifetime. No Remainderman shall have a present interest in the Trust Account until the death of the Designated Beneficiary. The *Trustee shall consider the interests of a Remainderman to be subordinate to those of the Designated Beneficiary during his lifetime* (emphasis added). No Remainderman need be cited in an accounting proceeding during the Designated Beneficiary's lifetime."[20]

Together, these two provisions obligate a PSNT trustee to (a) forego managing and distributing the trust assets in any manner that would benefit the nonprofit remainderman in favor of using the trust funds exclusively for the disabled beneficiary during his or her lifetime, and (b) use the funds for specific purposes, only when those purposes will not interrupt entitlement to government benefits.

A significant wrinkle still remains, however, contained in a trust provision that grants a PSNT trustee sole and absolute discretion over trust distributions—a right that appears to overpower the trust's purpose and the obligation to use trust assets for the disabled beneficiary's benefit exclusively. This issue of trustee accountability, or an apparent lack thereof, appears broader than the conflict of interest that arises with a nonprofit's remainder interest in self-sponsored PSNTs, precisely because trustees have sole and absolute discretion over both self-sponsored and third-party PSNTs.

New York court decisions have addressed this wrinkle since the early part of the nineteenth century. As mentioned earlier, in *Matter of Smergut (LD)*,[21] the New York Supreme Court addressed one manner in which a trustee's management may be kept in check: through the use of annual accountings provided to a beneficiary's guardian and then filed with the court.

Sponsors may also review the annual accountings. Even though contributions to a PSNT are irrevocable, the lines of communications between a beneficiary, the beneficiary's family members, and either the trustee or the nonprofit service provider are open. Hence, in the unlikely event that a trustee denies reimbursement for a beneficiary's expenses that fall within the purpose of the trust, the beneficiary or sponsor can elevate the issue to the nonprofit organization's board that ultimately holds the power to remove a trustee with or without cause.[22]

Further, while *In re JP Morgan Chase Bank N.A. (Marie H.)*[23] did not specifically involve a PSNT, the case identifies precise authority that speaks to all trustees' fiduciary obligations, and how, even in the face of express provisions that grant absolute discretion, failing to administer a trust to fulfill its purpose may constitute an abuse of discretion.

In *In re JP Morgan Chase Bank N.A. (Marie H.)*, a deceased mother had previously established an irrevocable trust for the benefit of her adopted son, Mark, whom a physician described as "[p]rofound[ly] mentally retarded [and] suffering from autism."[24]

The irrevocable trust identified the drafting attorney and Chase Bank as successor trustees.[25] Article 2.1(iii) of the trust stated that the purpose of the trust was to provide for Mark's "support, maintenance, care and comfort…or for necessary medical expenses as determined by the *Trustees, in their sole and absolute discretion* (emphasis added). Further, the trust language made clear that its purpose was to benefit Mark as a disabled person: "Before expending any amounts from the net income and/or principal of this trust, the Trustees may wish to consider the availability of any benefits from government or private assistance programs for which the Grantor [sic] may be eligible and that where appropriate and to the extent possible, the Trustees may endeavor to maximize the collection of such benefits and to facilitate the distribution of such benefits for the benefit of the beneficiary."[26]

When the attorney co-trustee petitioned the Court to be appointed Guardian of Mark, the Court learned that the attorney had neither seen nor visited Mark since he was six years old, and that neither the attorney nor Chase Bank had spent any of the millions of dollars of trust assets for Mark's benefit.[27] Having directed the trustees to begin administering the trust for Mark's benefit, the Surrogate Court reinforced the importance of a trustee's fiduciary duties. Justice Kristen Booth Glen concluded, "Both case law and basic principles of trust administration and fiduciary obligation require the trustees to take appropriate steps to keep abreast of [a disabled beneficiary's] condition, needs, and quality of life, *and to utilize trust assets for his actual benefit* (emphasis added)."[28] Moreover, "the words 'absolute discretion' do not insulate the trustees…from liability."[29] In reaching her conclusion, Justice Glen relied on ample authority that was not only on point for the facts before her, but are also precisely relevant to the issue discussed here: the absolute discretion PSNT master agreements afford their trustees.

Relying upon Judge Cardozo's definition from *Meinhard v. Salmon*,[30] the Court noted that a fiduciary assumes "a punctilio of honor the most sensitive." As fiduciaries, all trustees have "unwavering [duties] of complete loyalty to the beneficiary of the trust to the exclusion of the interests of all other parties."[31] The Restatement 3d of Trusts, § 50 Enforcement and Construction of Discretionary Interests, also speaks to the matter:

> [A] court will intervene where the exercise of a power is left to the judgment of a trustee who improperly fails to exercise that judgment. Thus, even where a trustee has discretion whether or not to make any payments to a particular beneficiary, the court will interpose if the trustee, arbitrarily or without knowledge of or inquiry into relevant circumstances, fails to exercise the discretion.[32]

Finally, Justice Glen quoted *In re Van Zandt's Will*,[33] where the Appellate Division held,

> Where a trustee has been given freedom to act according to his own judgment in matters pertaining to another, and he fails…to exercise such discretion, he may be compelled to do that which the trust fairly requires him to do.

The above-quoted authorities should help to put to rest a sponsor or disabled beneficiary's concerns when reviewing trustee indemnification provisions in PSNT trust agreements. As noted by the above decisions, not only are trustees accountable and obligated to satisfy the purpose of the trust, but also the laws of the State of New York appear to mirror the notion that language in a trust attempting to waive a trustee's fiduciary obligations will fail if challenged in the face of abuse or neglect.

Moreover, anecdotal evidence supports the conclusion that PSNT trustees exercise their sole and absolute discretion only in the face of questionable distributions. For example, Caitlin Govoni, secretary for the Theresa Foundation Pooled Trust, expressed, "A request for a 70" TV for a blind beneficiary would generally not be approved. However, before making a final decision, we would first request additional information and potentially a care manager report or physician letter."[34]

Notwithstanding the above authority, concerned sponsors can further address the issue with ordinary due diligence. For example, sponsors would do well to inquire with different PSNTs regarding expectations. Making inquiries before executing a PSNT joinder agreement would serve as an effective way for beneficiaries and their family members to express their expectations regarding how they would like trust funds to be used. Doing so would also provide insight to nonprofit members, and even trustees to address those expectations, and avoid possible misunderstandings post-execution.

A situation may arise where there is no third-party sponsor or guardian. Who then stands to hold a PSNT accountable when a mentally disabled beneficiary has no one to review how a PSNT is distributing trust funds?

John Signorelli, a trustee with Life's WORC, Inc., identified four layers of protection applicable to PSNTs.[35]

First, many nonprofits execute independent audits of their pooled trust administration.[36] Standing alone, however, an independent audit may not appear to suffice as an adequately sufficient safeguard for vulnerable disabled beneficiaries who are at the hands of a trustee's abuse of discretion.

Second, because only a nonprofit organization can settle a PSNT, every PSNT in New York falls under the supervision of the New York State Attorney General who has the authority to audit and enforce charitable nonprofit organizations and, hence, a PSNT's provisions.[37]

Third, many PSNTs in New York hire outside co-trustees, one reason for which is to objectively audit PSNT trustees. For example, Life's WORC, Inc., employs Santa Fe Trust[38] to act as co-trustee over their PSNTs. The issue this type of measure raises concerns potential bias: when group A *pays* group B to audit group A's operations, is group B's audit truly independent and unbiased? In other words, if group B's audit detects unfavorable or questionable operations, will group B bite the hand that feeds it?

Fourth, because remainder funds the nonprofit does not retain from a self-sponsored account must be allocated to Medicaid payback,[39] and because the New York State Department of Health has authority to maintain and promulgate regulations concerning Medicaid, PSNT administration also falls under their purview.[40]

The question may be asked as to whether these layers of protection are sufficient. Executive enforcement from either the New York State Attorney General or the Department of Health seems likely to occur only as a reactive measure after a PSNT trustee has failed to render services according to the terms of the sponsor agreements and thereby placing disabled beneficiaries in harm's way. The same could be said of the trust audits: are they sufficient for disabled beneficiaries who have no one else to rely upon to ensure trustees are distributing funds for their benefit?

Reasonable minds could disagree. However, the New York Civil Liberties Union offered one solution in *In re Smergut* when they advocated that the disabled person's funds should transfer to a pooled trust managed by a "neutral and disinterested fiduciary."[41]

Ms. Lovelace offered a similar solution in her article quoted above.[42] This author is of the mind that adding a proactive yet disinterested layer of review and audit would make significant inroads in managing the inherent conflicts of interest that PSNTs create and ensuring that disabled beneficiaries' funds are put to their proper use.

That said, the proposed solution raises a series of questions around costs, competency, and compulsion, or CCC.

CCC: Costs

Typically, the addition of a third-party external audit of an organization's operations will increase costs. The same would hold true for a PSNT and its trustee distributions.

However, not all beneficiaries who participate in a PSNT would require outside, independent review of their distributions. Rather, only those disabled beneficiaries who do not have anyone else on whom they can rely, e.g., when there is no other family member or close friend who can ensure the beneficiary's trust funds are being used according to the purpose of the trust, would need independent review services. This, in turn, would lessen not only the amount of time required of an independent review entity, but it would also lessen any costs associated with the reviews.

Moreover, considering current legal supply exceeds demand (evidenced by innumerable media sources that incessantly highlight the unfavorable state of hiring in the legal industry), leveraging the supply of legal services to further mitigate costs that could arise from independently reviewing PSNT trustee actions would be unlikely to pose a significant hurdle.

CCC: Competency

A concern that could arise with the idea of leveraging the current oversupply of legal talent is competency. In other words, if mitigating costs result in relying on inexperienced legal talent with infrequent or inconsistent senior oversight from seasoned attorneys offering their services pro bono, does keeping an eye toward cost-consciousness leave disabled beneficiaries in a position better off than they were without the independent review?

Once again, reasonable minds could disagree. While it is unlikely that this author can offer a design that would constitute a turnkey solution, concerns over competency should not serve to inhibit the continued exercise of finding an independent fiduciary solution that (a) mitigates additional costs and (b) offers disabled beneficiaries participating in PSNTs the same level of competency they would expect from hiring a seasoned attorney or accountant.

As an example, there is little doubt that quality of life for severely disabled persons is an issue that touches most hearts. Accordingly, finding the right people willing to donate time to independently review PSNT distributions would likely not represent a major challenge, especially since the higher a person's education, the more likely a person is to volunteer.[43] Applying these figures to the current economic environment, finding recently graduated or junior attorneys, in addition to accountants, who would be willing to volunteer would very likely mitigate the costs associated with independent reviews.

Competency would still remain at issue, however. One possible solution to ensuring a sufficient level of competency could involve state-sponsored training. Because the state not only realizes income through taxes levied on PSNTs situated in New York, but also has the authority under the Attorney General to regulate charitable nonprofits, the state might be in the best position to create, train, and oversee independent review entities for PSNT purposes.

CCC: Compulsion

The final concern is compulsion, meaning there is currently a lack of authority in New York that compels a PSNT to make its beneficiary distributions available to individuals who don't contribute to the trust. Hence, the issue raises what is likely the most important CCC element: if a PSNT does not have to offer the distributions it has made for its beneficiaries, will it do so upon request?

The answer to that inquiry could likely constitute an entirely separate research expedition. However, because transparency typically leads to improved trust between persons and parties, it seems safe to conclude that PSNTs would voluntarily participate, if certain safeguards are set in place, i.e. state-sponsored training, etc.. Moreover, improved trust with the PSNT as a planning vehicle could then attract more sponsors and beneficiaries who would collectively grow the size of the trust. In turn, the growth of the total trust corpus could lead to better service and cost-savings for all of the PSNT beneficiaries by way of increasing the trustees negotiating leverage when working with service providers. By way of basic illustration, if only two beneficiaries require new computers, the trustees' leverage in negotiating the costs is negligible at best. If fifteen beneficiaries would like new computers, the chances that the trustee can strike a better price per computer increase significantly.

Another benefit that voluntary participation creates for PSNTs is the value associated with reputational evidence and word of mouth. This is especially true among groups that share special interests, e.g., parents with disabled children, because they often face challenges unique to their circumstances. Over the past fifteen (15) years, the Internet has vastly amplified how these consumers share information via word of mouth.

Therefore, considering the importance of reputational evidence and the ease of which the evidence spreads across special interest groups like persons with disabilities, in addition to their family and friends, it would likely behoove PSNTs to voluntarily engage with an independent review process.

Conclusion

A pooled special needs trust represents an effective life and estate planning tool for disabled persons. This is especially true for disabled persons over the age of 65 when they are in a position to receive some money—enough money to put them over the available resource ceiling so they would lose much-needed government benefits.

Unlike an individual special needs trust, however, the pooled trust structure does create a conflict of interest by its very nature when the settlor, trustee, and remainderman is essentially the same party. The pooled trust agreements that grant trustees sole and absolute discretion over how funds are used further compound the issue.

A trustee or pro-PSNT practitioner might argue, however, that (a) the trust agreements obligate trustees to use the funds for the disabled beneficiary's care, (b) the remainder interest is subordinate to the disabled beneficiary, and (c) recent New York case law has put the PSNT conflict of interest issue to bed.

The question remains, do express trust provisions, case law, and the Restatement 3d of Trusts help protect a severely disabled beneficiary's well-being when participating in a PSNT? Will the New York Attorney General's office detect a PSNT trustee abusing discretion when a disabled beneficiary has no one else to rely upon other than the nonprofit and its trustee board member? When the isolated 85-year-old severely disabled woman's trust money is not used for her benefit, who raises a red flag for her concern?

Understandably, no system is perfect. The same holds true of trust administration. However, the legal community can no doubt construct valid solutions, especially considering the current environment across the legal industry. Based on the above analysis, creating a layer of review could be a simple yet effective step to help fill the holes that PSNT structure and administration seem to create.

Endnotes

1. Lovelace, Renee, *The Dark Side of Pooled Trusts*, 14 NAELA Qrtly 6.
2. Not all PSNT trustees are also members of the nonprofit boards of directors.
3. Uniform Trust Code § 803 IMPARTIALITY. If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.
4. Lovelace, Renee, *The Dark Side of Pooled Trusts*, 14 NAELA Qrtly 6.
5. *Id.*
6. Most nonprofit organizations that offer PSNTs make their trust agreements available on their websites.
7. *Matter of Smergut (LD)*, 31 Misc. 3d 875 (2011).
8. *Id.* at 877.
9. *Id.* at 876.
10. *Id.* at 878.
11. *Id.*
12. *Id.* at 880.
13. *In re Application of Robert Cannatella*, Sup Ct, Suffolk County, Martha L. Luft, J., Index No. 8353/10.
14. *Id.*
15. *In re Smergut (LD)*, 31 Misc. 3d at 883.
16. Life's WORC, Inc., Self-Settled Pooled Trust Master Agreement.
17. NYSARC, Inc., Community Trust I.
18. Some PSNTs require a sponsor to commit to an average $10,000 minimum contribution.
19. Life's WORC, Inc., Self-Settled Pooled Trust (A Trust Funded By People With Disabilities), Master Agreement, Section 1.3.
20. Life's WORC, Inc., Self-Settled Pooled Trust (A Trust Funded By People With Disabilities), Master Agreement, Section 5.1.
21. *Matter of Smergut (LD)* 31 Misc. 3d 875 (2011).
22. For example, section 8.5 of the Life's WORC, Inc., Self-Settled Pooled Trust Master Agreement states that that the "…Board of Directors shall have sole and absolute authority to replace a Trustee, for any reason, with or without cause, by a majority vote."
23. *Matter of JP Morgan Chase Bank N.A. (Marie H.)*, 38 Misc. 3d 363 (2012).
24. *Id.* at 369.
25. *Id.* at 366.
26. *Id.*
27. *Id.* at 369-70.
28. *Id.* at 379.
29. *Id.* at 377.
30. *Meinhard v. Salmon*, 249 NY 458 (1928).
31. 106 NY Jur Trusts § 247.
32. Restat 3d of Trusts, § 50 Comment b.
33. *In re Van Zandt's Will*, 247 N.Y.S. 441 (4th Dept 1931).
34. Interview with Caitlin Govoni, Theresa Foundation Pooled Trust trustee secretary (October 31, 2013).
35. Phone interview with John Signorelli, Life's WORC Pooled Trust trustee (November 13, 2013).
36. *Id.*
37. NY CLS Exec Article 7-A Solicitation and Collection of Funds for Charitable Purposes; see § 175(2)(e)(i) "…the attorney general may bring an action or special proceeding in the supreme court, in the name and in behalf of the people of the state of New York, against a charitable organization and any other persons acting for it or in its behalf…"; see also NY CLS EPTL § 8-1.4 Supervision of trustees for charitable purposes.
38. http://www.santafetrust.com/.
39. 42 USC § 1396p(d)(4)(C)(iv).
40. NY CLS Pub Health § 201(1)(v); *see also* NY CLS Soc Serv § 363-a.
41. *In re Smergut (LD)*, 31 Misc. 3d at 880 (2011).
42. Lovelace, Renee, *The Dark Side of Pooled Trusts*, 14 NAELA Qrtly 6.
43. U.S. Bureau of Labor Statistics September 2012. "Individuals with higher levels of education engaged in volunteer activities at higher rates than did those with less education. Among persons age 25 and over, 42.2 percent of college graduates volunteered, compared with 17.3 percent of high school graduates and 8.8 percent of those with less than a high school diploma."

Having decided to pursue a career in law after almost twenty years in the digital advertising and strategy industry, Stephen Donaldson recently graduated from Brooklyn Law School. As of the time of this publication, he is likely taking a deep breath after the July bar exam by relaxing in a lounge chair in his backyard and watching his four-year-old daughter play on her swing set. Thereafter, he plans on pursuing opportunities in several areas, possibly elder law, trusts & estates, litigation, and bankruptcy, yet whether he ends up as an employee at a firm, hanging his own shingle, or purchasing a practice from another attorney, all of that remains to be seen. He can be reached at steve@stevenyc.com.

A Pool of Trust: The Community Option

By Theresa Wells

Both federal and New York State law have authorized the establishment of supplemental needs trusts, sometimes referred to as SNTs, as a way for people with various disabilities to set aside assets to enhance their life, without risking their eligibility for government benefits such as Medicaid and Supplemental Security Income (SSI).[1] For a disabled person, Medicaid benefits, and often SSI, are vitally necessary resources that assist with the cost of care and cost of living expenses.[2] While some individuals may choose to establish their own supplemental needs trust, many people choose to have their SNT set up as part of a not-for-profit's pooled trust.[3] An individual's pooled trust account may be funded with assets, such as a lump sum or structured payments, a lawsuit award or retroactive Social Security award.[4]

In New York, a pooled trust may also be funded with an individual's excess/surplus income (sometimes referred to as Net Available Monthly Income (NAMI) and have that income disregarded for Medicaid eligibility purposes.[5] This type of trust allows people to protect their excess monthly income by depositing the excess sum in their pooled trust sub-account, which would otherwise have to be spent down on the individual's medical needs.

While at first glance there may be some debate with regard to management of pooled supplemental needs trusts by a not-for-profit organization, which in essence receives the account remainder, the benefits of the pooled community trust options far outweigh any suspected concern about a conflict of interest. Disclosures are certainly advisable, and often mandated, with any kind of financial organization.[6] When working with trust beneficiaries, comprehensive disclosures regarding a trustee's role and compensation are essential to a fiduciary relationship.[7] Furthermore, many not-for-profits are clear with disclosure of potential conflicts of interest.[8]

In the case of self-settled (d4a) payback trusts, as further checks and balances on a trustee's role and fiduciary responsibilities, New York State has also promulgated regulations which address the supervision over supplemental needs trust administration.[9] The New York State Department of Health has issued regulations assuring that the fiduciary obligations of the trustee of an exempt payback (d4a) trust be met. Accordingly, a trustee must notify the social services district of the creation or funding of the trust as well as notify the social services district of the death of the beneficiary.[10] The trustee must also notify the social services district in advance of any transactions tending to substantially deplete the principal of the trust and notify the Social Services district in advance of any transactions involving transfers of principal for less than fair market value.[11] A trustee must also provide the social services district with proof of bonding when required.[12]

Finally, the statute and the regulations provide that Social Services may commence an action or proceeding under Executive Law § 63 to assure the trustee's compliance and protect the state's remainder interest in the trust.[13]

With a pooled trust, the not-for-profit trustee's discretion enables the beneficiaries to maintain their government benefits, while using the existing money in the account exclusively for that individual's sole benefit. Although the not-for-profit trustee has discretion over distributions, the primary goal remains the same for all pooled trust beneficiaries, which is for the individual beneficiaries to fully utilize the money in their existing accounts for those needs that are not otherwise covered by government programs. Each distribution is reviewed, and generally honored, as long as the distribution is for the sole benefit of the beneficiary, and in their best interest while keeping within statutory law. The trustee may, at its discretion, distribute trust income or principal to purchase property or services for each beneficiary, which are made according to the interests and location of each beneficiary.[14] Furthermore, distributions are generally paid to third parties that provide goods and services to the beneficiary, which the beneficiary may have gone without if not for the trust account.

As a general practice, not-for-profit pooled trust employees, such as NYSARC, Inc. service representatives, regularly reach out to beneficiaries, or their families or advocates, to determine whether there are any goods or services the beneficiary may be in need of to supplement their quality of life. Oftentimes, the not-for-profit organization is already in close contact with those caring for the beneficiary, whether that be a spouse, child, friend or guardian authorized to act on the beneficiary's behalf. If the individual beneficiary or caregiver has questions, service representatives help to navigate the request process and provide guidance on how to best use the trust account. Thus neither the beneficiary nor the designated contacts are alone to figure out the Medicaid system or left in the dark about the process. Beneficiaries are encouraged to, and frequently do, ask questions about their distribution requests or review their documents with a trust representative.

There are also numerous safeguards in place to ensure the beneficiary's accounts are properly managed.[15] Many not-for-profit pooled trusts, such as NYSARC, Inc. Trust Services, engage in annual audits by an independent accounting firm. A Management Board provides oversight and regulates the trusts' distributions. The Board also frequently provides feedback and input on unique distributions as additional guidance on the Trusts' operations.[16]

While it is true that the balance remaining in a deceased beneficiary's pooled SNT subaccount may remain with the trust, the vast majority of the remaining funds actually benefit other disabled individuals. For example, NYSARC, Inc. Community Trust remainder funds are distributed in the form of grants to NYSARC chapters to provide services otherwise not funded by Medicaid.[17] The NYSARC organization is the pioneer and a driving force in advocating for people with intellectual and developmental disabilities and assisting disabled individuals achieve their potential. Certainly a beneficiary can appreciate that any remaining balance would benefit other individuals in similar circumstances.

Besides offering a certain level of privacy and independence, not-for-profit pooled supplemental needs trusts, such as the NYSARC, Inc. Community Trust, helps to integrate people with disabilities into their communities, while assisting with quality of life expenses that improve their living situations. When one truly recognizes the alternative, such as exhausting all of an individual's financial resources by paying out of pocket for medical expenses, the option of a pooled SNT account is an impressive alternative, especially for those Medicaid-eligible disabled individuals who wish to enhance their quality of life, or in the case of an aged person, to help them remain in their home for as long as possible.

Pooled trusts also allow beneficiaries to increase their autonomy and maximize their decisionmaking by placing their assets in trust and allowing them input into how the funds are used. Furthermore, a not-for-profit pooled trust account may also be a wise option for those individuals who are age 65 or over, and in fact may be the only first-party trust option.[18] For an aged individual in the community, beneficiaries can use a pooled trust to protect both resources and income, since a not-for-profit pooled trust is an exception to Medicaid income rules.[19]

Another benefit is that not-for-profit pooled trust accounts may also be established by the individual him or herself, which is not an option under a payback (d4a) trust.[20] Not only do many community pooled trust beneficiaries establish their trust account themselves, they frequently are able to make their own distribution requests. Other beneficiaries may have a trusted individual, of their own choosing, to assist with making the requests. These individuals have been clearly identified as an authorized contact for the beneficiary's account and can make inquiries and/or request distributions.[21] These roles allow a beneficiary's account to have an appropriate amount of additional oversight and review.

In a not-for-profit managed pooled trust, accounts are pooled for investment and management purposes, allowing small amounts to be part of a pooled investment. Importantly, since the funds are pooled together, and a trust document is already in place, there is a low cost to establish a community trust account. While a community trust may be funded with small amounts, many banks may require minimum deposits or high balances on hand. Not-for-profit community trusts may also tend to be more personally managed than a traditional corporate or bank trustee, which may only offer an automated system to communicate with a beneficiary.

Management of a supplemental needs trust can be complicated and the undertaking can often be stressful for a disabled individual's family member to manage. Paperwork, tax filings and other fiduciary responsibilities can be overwhelming, and sometimes beneficiaries can be demanding on family members. The pooled NYSARC, Inc. Community Trust can provide a trustee in cases where no one else can, or wants to, serve as trustee.

Besides organization, a trusted reputation is another key factor to successful administration and management of a pooled trust. The reputation of the trustee is a critical factor to consider when choosing a trust, regardless of whether it is an individual trust or a not-for-profit pooled trust. NYSARC, Inc. is also recognized as a benchmark in America as the largest non-profit organization supporting individuals with intellectual and developmental disabilities, operating since 1949. With the history, reputation and experience behind it, the pooled NYSARC, Inc. Community Trusts offers service that is unparalleled.

Not-for-profit organizations, such as NYSARC, Inc., are in a unique position of providing these valuable pooled trust services for beneficiaries, while also recognizing the critical importance of assisting and providing access to services for disabled individuals. Not-for-profits have a vested interest in helping our beneficiaries, and improving their quality of life, while also providing a critical service to help them maintain their life in the community and staying in their home.

Endnotes

1. 42 U.S.C. §1396p (d)(2)(A); 42 U.S.C. §1396p(d)(2)(C); N.Y. EPTL 7-1.12(b)(3).
2. POMS §SI 01 01120.200. Transmittal No. 33, SSA Pub. No. 68-0501120, March 1994.
3. *See* Soc. Serv. Law §366 subd. 2(b)(2)(iii)(A). OBRA 93 provides exceptions for income trusts in income cap states and pooled trusts managed by non-profit associations. 42 U.S.C. §1396p(d)(4)(B) and (C). New York Law contains the exception for pooled trusts. Soc. Serv. Law §366 subd.2 (b)(2)(iii)(B). New York is a spend-down state for Medicaid purposes.
4. Health Care Financing Administration, State Medicaid Manual, Part 3 – Eligibility, §3259.7 at page 3-3-109.31 (Transmittal No. 64, November 1994).
5. *See generally* NYSARC, Inc. Community Trust II *at* http://www.nysarc.org/trust-services/our-trusts/community-trusts/trust-ii.
6. Restatement (Third) of Trusts § 2.
7. Lovelace, Renee, The Dark Side of Pooled Trusts, 14 NAELA Qrtly 6.
8. *See generally*, NYSARC, Inc. Community Trust II Master Trust, Article Nine.
9. *See* New York Consolidated Laws Chapter 170 of the Laws of 1994.
10. Soc. Serv. Law §366 subd.2(b)(2)(iv); *see also* 18 NYCRR §360-4.5(b)(5)(iii).
11. *Id*.
12. *Id*.
13. Soc. Serv. Law §366 subd. 2(b)(iv); 18 NYCRR §360-4.5(b)(5)(iv).
14. *See generally* NYSARC, Inc. Community Trust II Master Trust *at* http://www.nysarc.org/trust-services.
15. *See generally* NYSARC, Inc. Community Trust II Master Trust at http://www.nysarc.org/trust-services. The Trustee maintains records for each Trust sub-account in the name of, and showing the property contributed for, each beneficiary. At least annual accountings are sent to each beneficiary, and/or the appropriate designated representatives, showing the additions to and disbursements from the funds held on account in Trust for that beneficiary during the preceding calendar year. Furthermore, the Trustee files the accounting with the appropriate court having jurisdiction over the beneficiary as required.
16. *See generally* NYSARC, Inc. Community Trust II Master Trust *at* http://www.nysarc.org/trust-services.
17. *See* NYSARC, Inc. Trust Services website located at http://www.nysarc.org/trust-services.
18. 42 U.S.C. §1396p(d)(4)(C) and Soc. Serv. Law §366 subd.2 (b)(2)(iii)(B).
19. *See* New York State Office of Temporary & Disability Assistance Administrative Memo 96-ADM 8.
20. *Id*.
21. *See generally* NYSARC, Inc. Community Trust II Joinder Agreement *at* http://www.nysarc.org/trust-services.

Theresa Wells joined NYSARC, Inc., as Trust Counsel for the Trust Services division in 2013. Prior to NYSARC, she was employed in the legal and financial industries for the past nine years and has worked extensively on issues such as financial management and estate planning for the disabled and elderly. Ms. Wells attended Russell Sage College for her undergraduate studies and The College of Saint Rose for her Master's in Business Administration degree, where she is also serving on the Alumni Board of Directors for the 2014–2018 term years. A graduate of Albany Law School, Wells is dedicated to addressing the needs of individuals with disabilities through the use of supplemental needs trusts.

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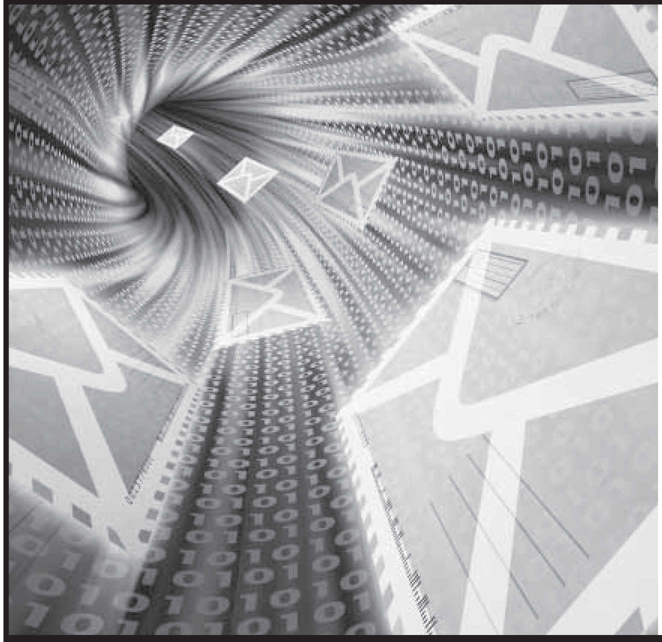

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The New York NAELA Niche—Update on "Improvement Standard" and "Observation Status"

By Jeffrey N. Rheinhardt

With SNF rates in New York averaging between $284 (Central Region) and $398 (Long Island) per day,[1] denial of eligibility for some or all of the one hundred day Medicare Part A benefit can result in thousands of dollars of uncovered costs. The potentially large financial burden is why the "improvement standard" and "observation status," which in their application limit and/or eliminate Part A eligibility for SNF care, have reached prominent places of infamy with patients and providers alike. Advocates for both of these stakeholders have responded with legal and political action. The results of their advocacy have been promising, but it is too early to tell to what extent the promises will be fulfilled. Part A eligibility may ultimately escape the jaws of the "improvement standard" and "observation status" only to encounter some equally onerous denizens of the eligibility rules that prey on coverage days.

"Improvement Standard"

For the sake of review, the "improvement standard" stood for the proposition that a SNF patient whose progress in restorative therapy had stopped or reached a "plateau" no longer qualified for Part A coverage. That standard, dubbed by CMS a "rule of thumb," was never the law.[2] It was adopted by SNFs who are charged in the first instance with assessing Part A eligibility against the standards set forth in the Medicare Benefit Policy Manual.[3] From the perspective of the SNF, the consequences of misreading the rules to deny coverage at most might be an angry patient. Conversely, find eligibility where it does not lie and upon review the Medicare intermediary coverage, and hence payment for services, will be denied. Find it too frequently and the SNF may face investigation for abuse and fraud against Medicare.

If the "improvement standard" was born from an overzealous or precautionary reading of the Medicare Benefit Policy Manual, it died with the *Jimmo* settlement approved on January 24, 2013.[4] It took CMS until December 2013 to write its obituary. On December 13, 2013 (Transmittal 176),[5] and again on January 14, 2014 (Transmittal 179, which made a correction to an error in the earlier iteration),[6] CMS amended the Medicare Benefit Policy Manual to incorporate the terms of the settlement. Although it amended the manual, CMS made clear that it was not amending the rules. It was merely providing "manual clarifications," the "significant aspects" of which are:

- the "improvement standard" is no longer to be used to assess eligibility for maintenance claims that require skilled care
- there must be "appropriate documentation" to support a claim
- *Jimmo* did not change eligibility requirements[7]

Initial reaction following the *Jimmo* settlement was to anticipate that many more SNF patients would receive many more Medicare coverage days. The theory was that even where rehabilitation therapy leaves a patient short of full restoration, in most of those cases skilled therapy would "prevent or slow deterioration in a patient's condition."[8] Since the standard including less ambitious therapy goals is the correct one, there ought to be a significant number of days after a patient reaches the "plateau" where she would be eligible for continuing Part A covered services.

The manual amendments contained in Transmittal 179 may not support such an optimistic expectation. A careful reading or reading between the "red" lines of Transmittal 179 suggests there may be less than meets the eye with regard to expanded coverage, and that what CMS taketh away—the "improvement standard"—it giveth back in some different but equally problematic form. Significant areas for continued or new concern include:

- The basic eligibility rules have not changed. The four prong test[9] must still be met, which means, for example, that the frail elder who cannot keep up with "daily" therapy will not qualify for Part A. Nor will the patient whose general needs can be met by an aide, even if her stay "might include *some* skilled services."[10]
- The so-called "enhanced guidance on appropriate documentation"[11] reads more like "appropriate guidance on enhanced documentation." It is useful to read Transmittal 179, which is replete with references to documenting claims, and particularly new Section 30.2.2.1 *Documentation to Support Skilled Care Determination*,[12] from the

perspective of a SNF. The sheer number of references, and language like "(a)lthough the presence of appropriate documentation is not, in and of itself, an element of the definition of 'skilled' service, such documentation serves as a means by which a provider would be able to establish and a contractor would be able to confirm that skilled care is, in fact, needed and received in a given case"[13] can only have a chilling effect on the SNF finding that a patient needs skilled therapy services.

- The SNF must do a kind of "cost–benefit" analysis to assess appropriateness of the prescribed therapy measured against a sort of "law of diminishing returns." "Physical therapy services are not reasonable and necessary and would not be covered if the expected results are insignificant in relation to the extent and duration of physical therapy services that would be required to achieve those results."[14] The "improvement standard" may have been chimerical, but "insignificant in relation" is not, and may accomplish much the same thing *vis-á-vis* Part A coverage.
- Even though not primarily intended as such, the Medicare Benefit Policy Manual is a set of instructions to providers on when they will be paid for their services. They will be paid when, upon intermediary review, their documentation supports Part A eligibility, and not otherwise. When CMS emphasizes post-*Jimmo* that there is really nothing new regarding Part A eligibility, the SNF would be well advised to read Transmittal 179 as a "suggestion" that any potential floodgate against coverage days opened by the settlement have been dammed up by the "clarifications" and "enhancements" in the transmittal.

Whatever the overall impact *Jimmo* may have in increasing Part A coverage days, it will certainly be relevant and a benefit to some of our clients. Clients can request re-review of "improvement standard" denials made on and after January 18, 2011, by filing a *Request for Review of Medicare Claims Related to the Settlement Agreement*.[15] New notices of termination should be scrutinized for reference to the old "rule of thumb," and challenged accordingly, while others should be compared against Transmittal 179. The examples in the transmittal can be useful in developing and arguing cases.

"Observation Status"

An "observation status" designation means that regardless of how long a person is actually in a hospital, the time there does not count toward the "three-day inpatient" requirement for Part A coverage of skilled nursing services. When that person is "discharged" to a SNF for restorative therapy, as frequently occurs, he is self-pay for his entire stay. So, whereas the "improvement standard" prematurely terminates Part A coverage, "observation status" preemptively eliminates it. Furthermore, since many termination cases involve patients who will transition to long-term care and Medicaid eligibility, the financial implications are mitigated. "Observation status" designees, i.e., outpatients, generally are not the sickest and often with restorative therapy are able to return to the community, where they soon receive a bill for the time they spent in the nursing home. The "improvement standard" is a piker compared with "observation status."

To admit or to observe, that is the question for the hospital. It matters to the hospital because it matters to Medicare. Medicare pays on average nearly three times more for a short inpatient stay then for an observation stay.[16] Since Medicare wants to be sure that it does not pay more than it should, it retains Recovery Audit Contractors to review hospital determinations for errors in areas like the inpatient-outpatient designation. Recovery Audit Contractors are paid on a contingent basis from refunds of overpayments from providers. Therefore, unlike "if it walks like a duck and quacks like a duck…," if she presents like an inpatient, and is treated like an inpatient, there is every chance that she is an outpatient in "observation status." If the hospital decides on "observation status," at least it gets paid under Medicare Part B, even if the poor patient is left with a large nursing home bill. If the Recovery Audit Contractor reverses an inpatient determination (with a percentage of the recovery on the line), the hospital must refund the payment. The hospital suffers a total loss.[17]

As with the "improvement standard," advocates for patients and providers have pursued legal and political action to address the "observation status" problem with a rather wide range of success and promise.

- A federal suit brought by Center for Medicare Advocacy (cite or case name—you refer to the case name below) on behalf of seven plaintiffs, was dismissed on September 23, 2013. The suit sought to end the denial of Part A coverage by use of "observation status" and to require notice and appeal rights to patients placed in that status. An appeal has been filed on the notice and appeal issue.[18]
- In New York, effective January 19, 2014, Public Health Law Section 2805-w requires hospitals to notify patients or their representatives within 24 hours of being placed on observation status and to explain that there may be Medicare, Medicaid and/or insurance consequences regarding medications and skilled nursing care.[19]

- The Improving Access to Medicare Coverage Act of 2013 was introduced in the House of Representatives and Senate on March 14, 2013, and has been referred to committee. It would make “observation status” days count toward the three-day hospitalization requirement for subsequent skilled nursing care.[20] The proposed federal legislation would resolve the “observation status” problem altogether. However, while it apparently enjoys relatively broad support, it could well languish and die.[21]
- CMS has adopted new rules (enforcement has been delayed until September 30, 2014), including a time-based presumption, known as the “two midnight rule”[22] and allowing the hospital to rebill under Part B if Part A is denied on review.[23]

Regardless of the outcome of the *Bagnall* appeal, New York has adopted legislatively a notice and explanation requirement regarding “observation status.” Provided the patient takes that notification seriously, and understands the consequences, there is an opportunity to advocate for reconsideration and change in status. Since a difference in symptoms is often not dispositive,[24] in many instances, successful advocacy would likely have to be nuanced and supported by the patient’s primary or other treating physician. If the hospital is not persuaded to change status, then appeals must be made through Medicare and would include contesting the notice of Part B (instead of Part A) coverage for the hospital stay, and the denial of coverage for the nursing home stay.

The new CMS rules create a time-based presumption for separating outpatients from inpatients. The rule directs Recovery Audit Contractors to presume that a hospital inpatient admission is Part A eligible if the stay passes two midnights. In such cases contractors should not scrutinize the admission for medical propriety absent systematic abuses by the provider. Of course, the inpatient decision must still be reasonable and supported in the medical record.[25] The presumption does not solve the underlying problem that long-term outpatients and short-term inpatients almost by definition must share indistinguishable diagnoses and needs. Ultimately whether or not the new rules will result in a reduction in “observation status” will depend on how the contractors interpret and apply them.

Conclusion

Legal and political advocacy regarding the “improvement standard” and “observation status” have been fruitful. The inappropriateness of the “improvement standard” has been recognized formally, but new emphasis in the Medicare Benefit Policy Manual on documentation and “cost-benefit” analysis may not result in a significant increase in the number of patients who receive more covered days. New York’s new notice and explanation requirement regarding “observation status” presents an opportunity to advocate for a change in status, although the window of opportunity may be narrow. While the pending federal legislation would solve the problem altogether, passage is by no means certain. The new CMS “two midnight” rule may result in a reapportionment in favor of inpatient versus outpatient designations, but it still leaves those branded “observation status” without Part A coverage.

As is often the case in the area of public benefits advocacy, a well-deserved victory lap must also be a training run for further efforts to represent stakeholders and clients whose health care and financial well-being depend on them. The New York Chapter of the National Academy of Elder Law Attorneys (NYNAELA) applauds the efforts of advocates like the Center for Medicare Advocacy who brought the *Jimmo* and *Bagnall* cases. It reminds us of the niche NYNAELA occupies in New York, and the responsibility we have and welcome to use our unique resources and flexibility to further the interests of our elder and special needs clients and constituents.

Endnotes

1. New York State Department of Health *Estimated Average New York State Nursing Home Rates* revised January, 2014. http://www.health.ny.gov/facilities/nursing/estimated_average_rates.htm (last visited April 17, 2014).
2. CMS Transmittal 179 dated January 4, 2014, pg. 1 http://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/Downloads/R179BP.pdf (last visited April 17, 2014).
3. CMS Manuel System Pub 100-02 Medicare Benefit Policy http://cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs-Items/CMS012673.html (last visited April 17, 2014).
4. *Jimmo vs. Sebelius*, Civil No. 5:11-CV-17 (D.VT. 1/18/2011.
5. CMS Transmittal 176 dated December 13, 2013 http://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/Downloads/R176BP.pdf (last visited April 17, 2014).
6. Transmittal 179 *supra.*
7. *Id.* at 1.
8. *Id.*
9. *Id.* at 49. (Required services must be “skilled,” therapy must be received on a “daily” basis, a SNF must be the most economical and efficient setting for the skilled services; and services must be reasonable and necessary as to treatment, duration and quantity.)
10. *Id.* (emphasis in original text).
11. *Id.* at 1.
12. *Id.* at 52-54.
13. *Id.* at 52.
14. *Id.* at 62.
15. Original Medicare (fee-for-service) Appeals—Important News for Beneficiaries: Jimmo Re-Review Information. http://www.cms.gov/Medicare/Appeals-and-Grievances/OrgMedFFSAppeals/index.html (last visited April 17, 2014).

16. OIG. *Hospitals' Use of Observation Stays and Short Inpatient Stays for Medicare Beneficiaries*, OEI-02-12-00040, page 12 (July 29, 2013) http://oig.hhs.gov/oei/reports/oei-02-12-00040.pdf (last visited April 17, 2014).
17. As if the risk of non-payment were not enough pressure on hospitals to err on the side of "observation status," re-admission penalties under the *Medicare Hospitals Readmission Reduction Program* incentivize hospitals to avoid an inpatient designation against the possibility that the patient might re-present with a similar diagnosis.
18. *Bagnall v. Sebelius*, No. 3:11 cv 1703, 2013 WL 5346659 (D. Conn.).
19. NYS Public Health Law Section 2805-w.
20. H.R. 1179 and S. 569, *Improving Access to Medicare Coverage Act of 2013*.
21. The prognosis of govtrack.us is that is has 0% chance of passage. htpps://www.govtrack.us/congress/bills/113/hr179.
22. 78 Fed. Reg., 50946 and 50949.
23. 42 C.F.R. Section 414.5(c).
24. The Office of Inspector General found that of the ten most common reasons for observations status, six were also among the ten most common reasons for admission. *Supra* note 16.
25. 78 Fed. Reg. 50944.

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Guardianship News: Unpleasant People

By Robert Kruger

I have been writing recently about the reality of being a guardian. As I contemplate what case or what family to put under the microscope, I consider the outliers, the cases where the families are outrageous. These cases make for good stories, the kind where you might say that…"you can't make this stuff up." These stories must await another column.

For the present, I am struck by the constant undercurrent of low level hostility that some families manifest toward me in my interactions with them. I understand resentment at the inception of the guardianship. Even if I am a nominee and not a Part 36 appointee, I am a stranger put in charge of the ongoing financial life of the IP and, often, the IP's family members. In many cases, there may well be a racial subtext that, at its inception, causes suspicion and mistrust.

What is distressing is the continuation of suspicion and mistrust for years and years. The families know that no stranger can care for their loved one more than they. In that, they are correct. What they cannot understand are the constraints that Courts impose on disbursements, such as a request for an increased stipend. As an example, one year after increasing a mother's stipend to $3,000.00 per month, I incurred the mother's ire for refusing to pay for the rental of a Lamborghini, at a cost of $1,500.00, for the IP's senior prom.

In another matter, despite my suggestion (which the Court endorsed) that the IP's mother receive the same salary a companion had received until the mother retired and assumed those duties, the mother was deeply offended that I did not replace her (working) salary, which would have represented an increase triple to what the companion received. The fact that she received an increase at all was due to my suggestion to the Court.

On most occasions, when I receive a request for a disbursement, I will immediately ask (if it is not apparent), "What is the benefit to the IP?," Lamborghini aside. Requests to beautify homes often fail before that question. If you want to beautify the home, pay for it yourself. Or get a part-time job. The IP's recovery is not "family" money.

As always, it all comes down to money, or control over money. I am dealing now with a demand from the mother and the 18-year-old IP over money. Once the guardianship is terminated, as it probably will be someday, mother and son will burn through his recovery. Therefore, I put their requests under a microscope. As I write, I know the mother schemes. If I see her name on an e-mail, and I have received several, I know that I must be careful about the substance of the request, but also the tone of my response, so as to avoid triggering more nastiness. Just one example: a request to fund a trip to Disney World required funding for hotel, rental auto, meals, tickets and extras. For whom? Mother and son, yes. Sister, I don't think so. Godmother, definitely not. The rental car was the product of my refusal to pay for repairs and insurance for a vehicle owned by the mother, not my ward. This request was made the day before the auto insurance was to be canceled. On one occasion, I was reprimanded for responding to an emergency (I refer to my articles on my surcharge and successful appeal). I interpreted these requests as blatant manipulation and immediately refused the request. Given time, I might have sought judicial approval; more likely, I would have sought permission to purchase a new car. When I suggested to the mother and son that they consider purchasing a new car, I suggested a sedan. They wanted an SUV.

In some matters, the guardian can actually enhance the life of the IP. I am moved to remark that not every family causes misery. Some families actually like me, and I them. But the impetus for this and my most recent previous article is the perceived lack of interest about the administration of guardianships by the rule makers. Guardians may deal in dollars, but we deal with people, people who are dependent on us but without an understanding of the legal constraints under which we operate. We do family counseling. We mediate with dysfunctional and self-interested people. We often have to say "no," and we certainly win no friends by doing so.

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

Recent Tax Bits and Pieces

By David R. Okrent

Estate of Shirley C. Giovacchini et al. v. Commissioner, T.C. Memo. 2013-27, No. 20122-05 Tax Court Determines Value of Estate for Tax Purposes

The Tax Court concluded that the decedent's estate undervalued the decedent's property for estate and gift tax purposes, but the Court also concluded that the IRS overvalued it; the Court declined to uphold accuracy-related penalties, finding that the estate acted with reasonable cause and in good faith regarding the underpayments.

PLR 201303003 (22 October 2012) Division of Marital Trust Won't Affect QTIP Status

The IRS concluded that the division of a marital trust into Trust 1 and Trust 2 did not disqualify Marital Trust, Trust 1, or Trust 2 as QTIP Trusts, and that Spouse's renunciation of her interest in Trust 1 did not cause Trust 2 to fail to be qualified as a QTIP trust.

PLR 201303004 (16 October 2012) Executor for Decedent Who Died in 2010 Granted Extension to Make Carryover Basis Election

The IRS concluded that the personal representative of decedent's estate was entitled to an extension of time pursuant to § 301.9100-3 to file the Form 8939 to make the Section 1022 Election and to allocate basis provided by section 1022 to eligible property transferred as a result of decedent's death.

PLR 201303006 (16 October 2012) Estates of Spouses Granted Extensions to Allocate GSTT Exemptions

Results in Private Letter Ruling 201303006, the IRS concluded that the estates of both husband and wife are entitled to extensions to allocate the decedents' available generation-skipping transfer tax exemptions to their respective transfers to three trusts.

PLR 201304003 (15 October 2012) Tax Consequences of Trust-Owned Life Insurance Policy Exchange

The IRS concluded that a new trust does not have to recognize any gain or loss from the assignment of an old life insurance policy in exchange for a new policy because the transaction is described by section 1035.

Estate of Harvey Evenchik et al. v. Commissioner, T.C. Memo. 2013-34, No. 17245-10 Court Denies Charitable Deduction for Lack of Qualified Appraisal

The Tax Court concluded that the estate was not entitled to a charitable deduction because the property appraisals didn't include essential information, such as the state, the date, or expected date of the contribution or the fair market value on those dates, didn't provide a statement that the appraisal was prepared for income-tax purposes.

Edward R. Zampella v. Commissioner, T.C. Memo. 2012-359, No. 2488-11 No Homebuyer Credit for Estate Beneficiary

The Tax Court concluded that the taxpayer is not entitled to the first-time homebuyer credit on the house conveyed to him through his mother's estate because he did not "purchase" the single-family home as that term is defined by I.R.C. sec. 36(c)(3)(A)(i).

In re Fisher, N.J. App. Div., Docket No. A-1889-11T1 (Feb. 15, 2013) Court Applies Doctrine of Probable Intent to Bequest

In re the Estate of E. Warren Fisher, the New Jersey Appellate Division applied the doctrine of probable intent to treat a pecuniary formula bequest as a fractional share.

Estate of James A. Elkins Jr. et al. v. Commissioner, 140 T.C. No. 5, No. 16597-10 Tax Court Values Artwork for Estate Tax Purposes

Results in *Estate of Elkins*, the Tax Court determined the value of the decedent's fractional interests in an art collection that consisted of 64 works of art, which included pieces by a number of famous artists. Code IRC Sections 2031, 2703

In re Woodworth, 2013 WL 486669 (Bk.E.D.Va., Feb. 6, 2013) Bankruptcy Court Addresses Fraudulent Transfer

In this case a parent transfers to child (the debtor in this case) the parent's life savings. Some eight years later, the child engages in complicated, but ill-fated, asset protection planning with a non-attorney planner using the money received from her parent. The debtor admitted to the Court she made a fraudulent transfer but argued the funds transferred were not hers and not part of the bankruptcy estate. The debtor's parent testified she never intended to make a gift to child and at the same time stated she gave the money to her daughter to render herself eligible for Medicaid. Predictably, the Court held for the bankruptcy trustee and against the transferee.

United States v. Joseph J. Melone et al., No. 1:11-cv-11548 Individual Is Trust's Nominee

The U.S. District Court for the District of Massachusetts concluded that the trust was nothing more than a legal fiction created by Mr. Melone to evade tax, and other, liabilities. Further, Mr. Melone has raised no genuine issues that require resolution by a fact finder, citing only a vague "dispute over the character of the Trust." Therefore, the Court found as a matter of law that the trust was Mr. Melone's nominee and finds that the 1997-99 income tax liabilities and the civil penalties for filing frivolous returns for 1991-97 attach to the Pleasant Street Property.

PLR 201308019 (23 August 2012) Exchange of Life Insurance Policies of Interest in LLC Is Tax Free

The IRS concluded that there is no recognition of gain or loss under section 721 when two banks transfer life insurance policies to a limited liability company in exchange for percentage interests in the LLC.

Estate of Antonio J. Palumbo et al. v. United States, No. 2:10-cv-00760 Estate Allowed Deduction for Settlement Payment to a Charitable Trust

The U.S. District Court for the Western District of Pennsylvania concluded that decedent's estate is entitled to a charitable deduction for the amount paid to trust to settle a dispute between the trust and the decedent's son over the residuary estate.

Frank Sawyer Trust of May 1992 et al. v. Commissioner, No. 12-1586 Court Addresses Trust's Transferee Tax Liability

The First Circuit Court of Appeals reversed the Tax Court's holding that a trust wasn't liable as a transferee for four corporations' unpaid taxes and remanded the case to the Tax Court to consider whether a fraudulent transfer occurred and whether the trust is liable as a transferee because of an unreasonable exchange value of the transferred assets.

PLR 201313001 (6 December 2012) Modification to Stock Purchase Agreement Won't Affect Estate Tax Valuation

The IRS concluded that an amendment to a stock purchase agreement to extend the payment period for a son's purchase of his deceased parent's shares of a company doesn't constitute a substantial modification of the agreement and, therefore, won't trigger IRC Section 2703.

Estate of John F. Koons III et al. v. Commissioner, T.C. Memo. 2013-94, Nos. 19771-09, 19772-09 Estate Cannot Deduct Expenses on Loan to Revocable Trust

The Tax Court concluded that an estate cannot deduct interest expenses incurred on a loan to a revocable trust and, further, the Court agreed with the IRS expert on the fair market value of the trust's interest in an LLC on the decedent's date of death.

Goodman v. Goodman, FL 3rd Circuit Court of Appeals, No. 3D12-1339 & 3D12-1510 Court Addresses Adoption of Adult Girlfriend as Estate Planning Tool

The Court in this case vacated, for lack of notice to the relevant parties, an adoption of Husband's forty-two-year-old girlfriend, which would have given her access to a trust fund created by the husband and his for spouse for their "children."

Michael P. Schwab et ux. v. Commissioner, No. 11-71957 Ninth Circuit Rules on Valuation of Taxpayers' Life Insurance

The Ninth Circuit Court of Appeals affirmed the decision of the Tax Court holding that the fair market value of insurance policies on the date of distribution from an employee benefit plan must be included in a couple's income. The panel affirmed the tax court's partial grant of a petition by taxpayers challenging the Commissioner of Internal Revenue's determination of a deficiency in their federal income tax. Taxpayers each purchased a variable universal life insurance policy that was subject to surrender charges (fees that taxpayers would incur if the policies were terminated prior to a contractually specified date). The distribution of taxpayers' policies to them was a taxable event, for which the Commissioner contended that the full stated policy values must be treated as income, even though the net cash surrender values were negative. The panel held that the "amount actually distributed" when taxpayers received ownership of the life insurance policies was "the fair market value of what was actually distributed," and that surrender charges associated with a variable universal life insurance policy may be considered as part of the general inquiry into a policy's fair market value.

PLR 201316004 (9 January 2013) IRS Addresses Tax Implications on Settlement of Will Contest

The IRS concluded that amounts distributed pursuant to the settlement over an incompetent decedent's will are not subject to the generation-skipping transfer (GST) tax, and the estate will receive a charitable deduction under § 2055(a) for amounts distributed to charity pursuant to the settlement. The Decedent's will provided for property to be distributed to her surviving spouse, children, grandchildren, and charity. Shortly after she executed the will, Decedent was adjudged incompetent by a Court. After Decedent's death, each beneficiary advocated for his or her own interpretation of Decedent's will and State law, insofar as the beneficiaries did not agree on the amount each beneficiary was to receive under the terms of the will. As a result, Decedent's estate petitioned the Court for construction and reformation of Decedent's will, to resolve the issue as to the amount each beneficiary was to receive under Decedent's will. Estate and the beneficiaries were represented by separate counsel; the charitable beneficiaries were represented by the Attorney General of the State in which the decedent's will was probated. The estate and the beneficiaries agreed that each beneficiary's proposed resolution of the issue has merit. Moreover, they seek to avoid the expense, uncertainty, and delay that would result if they should continue to litigate this issue. Accordingly, before the Court ruled on the substantive issue, Estate and the beneficiaries entered into a settlement agreement (Settlement). The Court approved the Settlement. The IRS determined that The Settlement is the product of arm's-length negotiations. The Settlement resolves the issue as to the amount each beneficiary is to receive in a manner consistent with applicable State law. The Settlement represents a compromise between the beneficiaries and reflects the parties' assessments of the relative strengths of their positions. Further, the Settlement is within the range of reasonable outcomes under the will and applicable State law.

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

Recent New York Cases

By Judith B. Raskin

Nursing Home Seeks Payment From Transferees

Grace Diogo gave Annette Louis and her sister $24,000 each in February 2009 and subsequently entered plaintiff's nursing home. When she made the gifts, Ms. Diogo was living in Portugal and had a $139,000 bank account. Annette Louis, Ms. Diogo's power of attorney, signed a contract with plaintiff nursing home agreeing to use Ms. Diogo's assets for her care and file a Medicaid application on her behalf, both of which she did. The period of ineligibility assessed for the transfers resulted in an unpaid nursing home bill of $62,344.71.

Plaintiff moved for summary judgment against Ms. Diogo and Annette Louis for its unpaid bill on four causes of action: breach of contract, account stated, unjust enrichment and fraudulent conveyance. The Supreme Court denied the summary judgment motion on all causes of action.

On appeal, the court agreed the defendants raised issues of fact to defeat the motion except for breach of contract and account stated against Ms. Diogo.

***Aaron Manor Rehabilitation and Nursing Center, LLC v. Diogo and Louis*, 2014 N.Y. App. Div. LEXIS 1060; 2014 NY Slip Op 1060 (App. Div., 4th Dept., February 14, 2014.)**

Unsafe Discharge From Hospital

When plaintiff entered defendant hospital his wife informed the hospital of his fragile mental state due to alcoholism and other medical issues and her concern that he would leave under unsafe circumstances. Plaintiff's wife was assured by hospital staff that she would be notified if her husband attempted to leave. When plaintiff left the hospital against medical advice, the hospital failed to notify his wife. He was found several hours later, disoriented and with severely frostbitten fingers. Plaintiff sued the hospital. The hospital moved for summary judgment on plaintiff's claim that the hospital was negligent in not seeing to his safe return home. The Supreme Court denied the motion. The hospital appealed.

The Appellate Division reversed, granting summary judgment on the negligence claim. Citing prior case law, the hospital did not have a duty to keep plaintiff from leaving or to see to his safe return home. Two judges argued in dissent that given the facts of this case, including plaintiff's condition and his wife's request, the claim of negligence should not be dismissed.

***Inguitti v. Rochester General Hospital*, 2014 N.Y. App. Div. LEXIS 1068, 2014 NY Slip Op 1088 (App. Div., 4th Dept., February 14, 2014.)**

Do You Have n Interesting Case to Share?

Have you participated in or become aware of an interesting, unreported and recent New York case on elder law issues ? I would love to share a summary of these cases with our Section membership. You can send a copy of the decision to Judy Raskin by email: jbr@raskinmakofsky.com or fax: 516-228-6525.

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

Jota Borgmann is a Senior Staff Attorney in the Disability and Aging Rights Project at MFY Legal Services, Inc. When the *New York Times* published its May 8th article about the serious problems with MLTC enrollment and denial of needed homecare services, advocates immediately put their heads together about the best next steps to achieve real change for their clients. The result was this letter offering concrete policy proposals, including several that had been raised previously in different forums. This coalition of advocates continues to work together to identify systematic problems in MLTC implementation and propose solutions to the State.

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May 20, 2014

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Re: Time for Change in New York’s Managed Long-Term Care

Dear Governor Cuomo, Ms. Mann, Dr. Zucker, and Mr. Helgerson:

We write to urge you to address the serious problems with Managed Long-Term Care (MLTC) in New York State. Many of our organizations have been warning government officials about these problems for years. As a matter of sound public policy, these problems can no longer be ignored.

A May 8, 2014 *New York Times* article (attached) highlights the human and financial costs of the key problem—MLTC plans are denying services to people who need them while aggressively recruiting clients who do not. The article juxtaposes the delay, disruption, and denial of community-based long-term care services to vulnerable New Yorkers who desperately need services with the MLTC plans’ illegal marketing practices and enrollment of people who do not need those services.

The article illuminates the problematic financial incentives for MLTC plans and the providers associated with those plans: **“the more enrollees, and the less spent on services, the more money the**

companies can keep." These incentives encourage the provision of services to those who do not need them and reward plans that deny services to those who need them most.

The article also highlights the life-and-death consequences of these incentives. For example, cuts in certified home health agency reimbursement led to massive dumping of people like Ena Johnson, whose 24-hour care was immediately dropped and not restored until it was too late. **"By the time lawyers won her return home with 24-hour aides, she had a bone-deep 13-inch bedsore . . ."** Advocates have reported the same types of abuses by MLTC plans. Just last week New York Legal Assistance Group filed a complaint about an 85-year-old Bronx resident who needed 24-hour care due to a stroke, vascular impairments, diabetes, and other complex needs. Her care, previously stable for seven years, was reduced to 7 hours per day after her transition into MLTC from the personal care program. As has been all too common, the MLTC plan gave no written notice, no notice of appeal rights, and as a result, no right to "aid continuing."[1]

Once MLTC fully expands to include nursing homes, another vulnerable population will be at risk. Ignoring these problems will lead to bad public policy that will be harmful to seniors, people with disabilities, and their families for years to come. Policymakers can no longer tout the claimed budgetary successes of this new program without acknowledging the undeniable human costs.

New York State will fail to meet the goals of MLTC—to reduce waste and improve patient outcomes—unless these problems are addressed now. We call for the following changes to the MLTC program immediately:

- **Implement conflict-free assessments and coverage decisions.** The current MLTC program allows financially motivated MLTC plans to conduct the clinical assessments that determine who is eligible to receive services and who is not, thus placing the highest-need and potentially costly beneficiaries at extreme risk. Enrollment should be suspended or greater oversight implemented until conflict-free assessments are fully implemented.

- **Require arms-length contracting.** New York law allows the same organizations to own and operate both the MLTC plans and the long term care facilities and home care agencies funded by those organizations. This blatant conflict of interest is structurally poisonous to the entire system of care.

- **Ensure real due process protections for consumers.** MLTC services should not be reduced or terminated without procedures that meet due process standards of notice, aid continuing, and fair hearing rights. So far, New York State has failed to ensure continued provision of services and MLTC plans have cut services illegally. Standardized notices must be developed with

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[1] The attached case example, described on page 3, further illustrates this problem.

consumer input. Providers found to have cut services without providing due process should be fiscally sanctioned and required to submit plans of correction to ensure future compliance.

- **End mandatory exhaustion of the internal appeal process.** The requirement that consumers "exhaust" internal appeals before requesting a fair hearing should be eliminated, because consumers are not notified of their appeal rights at all, let alone the obligation to request an internal appeal. Recourse to a fair hearing is essential. The attached case example shows how a consumer's services were cut from 12 to 8 hours per day for over five months until legal advocacy restored them last week. In the meantime, the 96-year-old man fell three times, requiring two hospitalizations. No notice was given, let alone notice of the requirement to request an internal appeal or the right to "aid continuing." *See* case example, attached.

- **Employ robust and effective surveillance.** Oversight of MLTC plans and providers is woefully inadequate and MLTC complaints, whether made through the MLTC complaint line or via other channels, are not adequately investigated and resolved. The State must invest more resources in surveillance. This could include:
  - expeditious implementation of the managed care ombudsman program with safeguards to ensure its independence from State and industry interference;
  - increased funding of the LTC Ombudsman Program, which will inevitably be a "first responder" on issues, particularly for consumers in residential care settings;
  - requiring an annual Office of Medicaid Inspector General audit of the MLTC program (including assessments of plans and providers);
  - using "secret shoppers" to look out for marketing fraud and monitor responsiveness of plan call centers;
  - training staff to identify fraudulent practices;
  - suspending enrollment for longer periods when plans engage in improper marketing and enrollment practices as well as other illegal practices such as due process violations; and
  - involving consumer advocates to identify best practices.

- **Weed out deficient MLTC plans.** The State should end its policy of letting any willing plan join the MLTC program and engage in an active procurement process. It should remove MLTC plans that violate the law or consistently fail to improve patient outcomes. The plans should be required to prove that complaints represent "one-off" incidents, by demonstrating actual compliance with adequate working systems and procedures. The State should periodically halt MLTC enrollment to assess plan performance with input from consumer advocates.

- **Ensure greater transparency and accountability**. There is no public information currently available on MLTC complaint and appeal rates.

Medicare beneficiaries can access information, through the star ratings system, about plan performance in dealing with complaints and appeals. The State Department of Financial Services' annual report on commercial insurers includes statistics on complaints and appeals. MLTC enrollees deserve at least the same level of transparency and accountability. The formal evaluation of MLTC plans must begin incorporating complaint and appeal information and such data must be made publicly available. Additionally, the State's MLTC reports must include plan-specific data on medical loss ratios, care management ratios, and the extent of provision of community-based services. The recent 2013 report presents only a partial picture of plan performance, much of it not plan-specific.

- **Protect nursing home residents in the enrollment process.** As the State rolls out expansion of MLTC to include nursing home care and residents, these vulnerable individuals must be protected. While existing residents will not be required to enroll in plans, they will be allowed to enroll in plans, and as such, will be vulnerable to marketing pressures. An enforceable informed consent requirement should be established, where plans must provide accurate and complete information about eligibility and choice and be able to document a consumer's consent to enrollment – or the consent of their designated representative for those who lack capacity. This is particularly important as the MLTC program begins taking on nursing home patients who are then passively enrolled into Fully Integrated Duals Advantage Plans. Additionally, DOH oversight of nursing homes must be more rigorous.[2]

- **Delay expansion of mandatory MLTC to new upstate counties and to the nursing home population** until the protections requested above are in place. In many upstate counties there are just one or two MLTC plans with only a handful of enrollees. No recipient of stable community-based services should be required to transition to these plans until their capacity is assured and the protections proposed above are incorporated.

With the deficiencies in the State's MLTC program clearly exposed, we ask you to take action so that the most vulnerable New Yorkers do not continue to suffer. We would welcome the opportunity to meet with you to discuss our proposals. Please contact Jota Borgmann at (212) 417-3717 or jborgmann@mfy.org if you would like to request a meeting with our group.

Sincerely,

Jota Borgmann, Senior Staff Attorney
MFY Legal Services, Inc.

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[2] Other concerns regarding expansion of MLTC and mainstream managed care to include nursing home population are stated in a letter to CMS and DOH dated March 14, 2014, posted at http://www.wnylc.com/health/news/58.

On behalf of:

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cc (via email):

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Hon. Kemp Hannon, Chair, New York State Senate Health Committee

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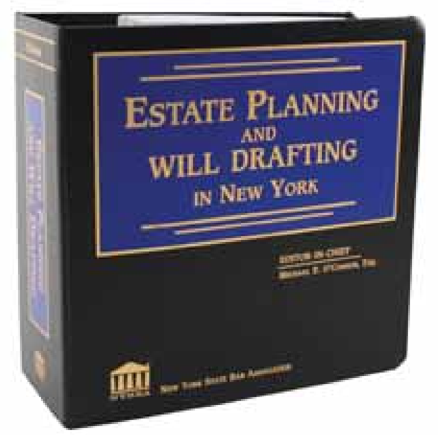

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