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Elder Law Attorney

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

Chair to Chair

Ami S. Longstreet
Outgoing Chair

It is hard to believe that my term as Chair of the Elder Law Section has ended. While so much has transpired within our Section over the past year, it has been a privilege as well as a pleasure to work with my fellow officers, **Tim Casserly**, Chair, **Mike Amoruso**, Chair-Elect, **Sharon Gruer**, Vice-Chair, **Dave Stapleton**, Secretary and **Ellen Makofsky**, immediate past Chair. I do not think I could have made it through the year without their gracious assistance and support. I also want to thank each and every member of the Executive Committee: **Mike Amoruso, Dave Stapleton, Joan Robert, Pauline Yeung-Ha, Tim Casserly, Sharon Kovacs Gruer, Ellen Makofsky, Alfreida Kenny, Amy O'Connor, Deborah Slezak, Donald Mustico, Gayle Eagan, Richard Weinblatt, Batya Levin, Steven Stern, Anne Ruffer, Marcia Boyd, Mickey Haggerty, Howard Angione, Ben Levine, Edward Wilcenski, Cora**

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Timothy E. Casserly
Incoming Chair

In the summer of 1991 when the Elder Law Section was just completing its first year as an official Section of the NYSBA, I went to Cooperstown to attend my first Elder Law Section meeting. Seeing that I was getting more and more involved with issues affecting the elderly and not having many resources available for comprehensive answers, the Summer Meeting seemed to be a good opportunity to gain more experience and information from the state's leading experts. I went to the meeting not really knowing anyone, but had the good fortune of meeting a few other guys who were in similar situations in that they were still developing their law practices and, in doing so, handling more and more elder law matters. Over the course of the many hours spent together in those two days in Cooperstown, we heard about and witnessed the

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I am genuinely in awe of the generosity of so many of you in sharing your time and talents to make our Section, in my opinion, the most active and innovative of the entire New York State Bar Association.

A special thanks also goes out to **Lisa Bataille**, our NYSBA staff liaison, and **Kathy Heider**, who made sure all our meetings went off without a hitch.

What has been accomplished over the past year?

1. **Programming**. Our meetings just keep getting better, the most recent one at the time of the writing of this message having been held at Embassy Suites in Syracuse, the second annual Unprogram, co-sponsored by the New York Chapter of NAELA, and co-chaired by **Howard Krooks** and **Steve Silverberg**, with the able assistance of **Mike Amoruso**. For those of you unfortunate enough to have been unable to attend, the Unprogram is an innovative style of programming wherein attendees are able to get specific questions answered through numerous different discussion groups involving all areas of our practice, substantive as well as administrative; practice management issues are also addressed in depth. At the Spring Unprogram, discussions continued at the internationally famous Dinosaur Barbeque.

2. **Proposed Legislation**

   A. **Qualified Spousal SNT. Sharon Kovacs Gruer** and **Steve Silverberg**, as Co-Chairs of the Estate and Tax Planning Committee, have been working on proposed legislation to amend the right of election statute to permit the use of supplemental needs trusts to satisfy the right of election under certain circumstances. The Executive Committee of our Section unanimously approved the draft of the proposed legislation, and Sharon and Steve are working with the Trusts and Estates Section to obtain their input regarding this important proposed legislation.

   B. **Annuity Legislation. Tim Casserly**, Chair of our Section, has been busy drafting proposed legislation to curb the abuse taking place in the sale of annuities. A revised Bill has the support of a Senator and the Bill is also being presented to the Assembly.

   C. **Response to Assembly Power of Attorney Bill. Mike Amoruso**, as Chair of our Section's Legislative Committee, working with **Ira Salzmen, Robert Freedman, Richard Weinblatt, Robert Kurre, Tammy Lawlor, Amy O'Connor** and **Pauline Yeung-Ha**, is working with Ron Kennedy of the New York State Bar Association to issue comments from our Section regarding this Bill.

   D. **Compact for Long Term Care.** This initiative, on which numerous volunteers from our Section have been working for a few years now, has been steadily gaining steam statewide and nationally, thanks to the tireless efforts of the Compact Working Group. The ABA has unanimously approved a resolution to support legislation such as the Compact.

3. **Pro Bono Initiative.** This initiative, the brainchild of past chair **Ellen Makofsky**, continues to be successful. Pro Bono clinics are being held at least twice a year in virtually every District of the state, thanks to **Dave Stapleton**, who heads up the initiative, and all of the **District Delegates**, who arrange for the clinics in each of their respective districts.

4. **Committees. Sharon Kovacs Gruer** chairs a newly created committee, the Mental Health Committee, which will be a great addition to all of our existing standing committees. All of our committees remain active, and I thank all of the chairs, vice chairs and members of all of the committees of the Section, for volunteering their time and talents to advance the important initiatives of our Section.

As my term as Chair ends, the Section is very lucky to have the very capable and hard working **Tim Casserly** as our Chair, along with the other officers, **Mike Amoruso**, Chair-Elect, **Sharon Kovacs Gruer**, Vice Chair, **Dave Stapleton,** Secretary and **Anthony Enea**, Treasurer.

It has been an honor to serve as Chair of the Elder Law Section, and I thank all of you for the opportunity to have served.

See you all in Baltimore!

Ami Setright Longstreet

exhaustive efforts being put forth by the Section's leadership on Section duties, speaking and writing for continuing education sessions and attending numerous conference calls and meetings with legislators, Bar representatives and Section members across the state. At the final night's dinner, the Past Chair, **Mort Goodstein**, and the new Chair, **Muriel Kessler**, addressed the attendees with a lengthy summary of the efforts of the Section's leaders and the various accomplishments, projects and countless volunteer hours being put forth by them. While the list was very impressive, it also caused one member of our group to remark that, "These people must be crazy. How can they dedicate so much time and energy to the Section and still be able to concentrate on any client work?" To which another member of our newly formed alliance remarked, "Let's agree to keep getting together at these meetings, but to avoid any real responsibility within the Section itself." To that, we toasted. Now, as I become the Chair of the Section, I can probably categorize our promise as one of the worst-kept promises made. But I do not feel too badly because the other parties to that deal were **Bernie Krooks, Howie Krooks** and **Ira Miller**, who have each preceded me as officers of the Section, two have served as Chair and, collectively, have provided hundreds of hours of service to the Bar and the Elder Law Section.

The point of the story is not to highlight our lack of foresight, but to illustrate the attraction, value and benefits our Section has to offer. Within a very short time of that initial meeting, the energy, enthusiasm and breadth of knowledge of Section members made it attractive and welcoming to easily get involved and share ideas and information. Consequently, it also became easier to work on client matters with so many new and available resources.

Since that Cooperstown meeting, I continue to get together with those guys and have had the good fortune to meet many others who have since become not only good friends, but resources to turn to for expertise, advice and, occasionally, legal forms. As evidenced by their leadership roles, I know that each of the members of my initial group quickly realized the same benefits of Section participation as I have. So it is with great appreciation and thanks that I begin my term as Chair and I hope to continue to foster the experiences of inclusiveness, sharing, participation and camaraderie that our Section has offered me since getting involved. As such, I would summarize my broader goals as wanting to essentially continue what our prior leadership has consistently provided. Namely, these goals are to provide cutting-edge conferences, publications and resources for our members; to advocate on behalf of our members and clients in Albany and, if necessary, Washington, D.C.; and to continue to develop the community that our Section has become for elder law attorneys to share ideas, resources and information.

Fortunately, these goals should be easier to maintain as I have the benefit of following our past Chair, Ami Longstreet, who has been terrific in not only fulfilling these same objectives, but in keeping my role to a minimum. I also have the benefit of a strong slate of officers behind me—**Michael Amoruso**, Chair-Elect; Sharon Kovacs Gruer, as Vice-Chair; **T. David Stapleton, Jr.**, Secretary; **Anthony J. Enea**, Treasurer and the continuing help of **Ami Longstreet** as the Past Chair.

Meetings

Hopefully by the time you are reading this, you have already registered for our Summer Meeting which is being chaired by Howie Krooks and will be held in Baltimore, Maryland. The dates for this meeting are August 14th through the 17th. I think every Section member is aware of the successful track record Howie has had in putting on programs in the past and this one is up to his usual high standards. The meetings will be held at the Renaissance Harbor Place Hotel. This location is literally across the street from Baltimore's Inner Harbor, which offers a large variety of waterfront activities, an aquarium, the *USS Constellation*, a science museum, restaurants and shopping. Our keynote speaker will be **Barbara J. Collins, Esq**., from Centers for Medicare and Medicaid Services (CMS), discussing the policies of CMS and the implementation of the DRA. Other presenters include **Charles Sabatino, Esq**., Director of the ABA's Commission on Law and Aging in Washington, D.C.; **Gene Coffey, Esq**., of the National Senior Citizens Law Center in Washington, D.C.; **William Conway, Esq.**, principal of WealthCouncil, LLC; **Thomas Forrest, CPA,** President of Charles Schwab Trust Company of Wilmington, Delaware; and Maryland attorneys **Jason A. Frank** and **Morris Klein** will be presenting a session on Medicaid waivers. Also, Section members **Lou Pierro** and **Rose Mary Bailly, Anthony Enea** and **Ira Miller** will be covering topics ranging from an Elder Law update to power of attorney issues to guardianships and Medicaid planning under the DRA. In addition to the 12 CLE credit hours that you obtain at this meeting, there is plenty of opportunity for socializing and networking, as we will have our committee breakfasts and cocktail reception, and naturally, since we are in Baltimore, a crab feast on Friday night. Also, we will have at least ten exhibitors to speak with about products and services relevant to our practices. (Thank you **Anthony Enea**, our Sponsor Chair, **Judie Grimaldi** and **Lisa DeKenipp** for making these arrangements.) Again, I hope you have already

registered, but for more details and the registration materials, the full brochure is available online through the Bar's website at www.nysba.org/ELDSummer08.

Our annual Fall Meeting will be held on October 23rd and 24th at the Otesaga Hotel in Cooperstown. **Cora Alsante** is chairing this program, and is well underway assembling an impressive group of speakers and activities for this two-day conference including our first Section softball game. Also, as we have done in prior years, we will have the Advanced Institute immediately follow the Fall Meeting at the Otesaga. This program will be Co-chaired by **Robert Kurre** and **Amy O'Connor**. As any past attendees of this program will tell you, this is a great opportunity to interact with some of our leading elder law experts on planning issues and topics ranging from guardianship to Medicaid to estate planning to practice management.

Further into the calendar, the 2009 Annual Meeting will, as always, take place in New York City and be Chaired by **Ellyn Kravitz**. While the program itself will have some variations from prior Annual meetings, we hope to replicate the success of the past two years by having a panel of DSS attorneys to express their views on the implementation and interpretation of the DRA (and any other legislation we might see.) Mark your calendars for January 27, 2009 and count on a great program, and, hopefully, in a bigger room.

Consumer Initiatives

In addition to the programs that we will be offering for CLE, there are a couple of other projects in process geared towards consumers. Some of these will be a continuation of programs already in place such as the statewide Pro Bono Senior Clinic Project which was initiated by **Ellen Makofsky** and is now being Chaired by **Dave Stapleton** and implemented by our **District Delegates**. We are also planning to hold a series of seminars for seniors which will be done in collaboration with the Financial Planning Association (FPA), which is the largest professional national association of Certified Financial Planners. **Laurie Menzies** and **Walter Burke** are currently working with the New York State Chapters of the FPA to coordinate and present the program to seniors throughout the state with local FPA Chapter leaders.

Another consumer-related project will be an update of the NYSBA *Senior Citizen Handbook*. This handbook, a resource guide for New York's older citizens, has been compiled and updated by the Young Lawyers Section through five editions with the last update being 1999. Many of our Committees will collaborate with the Young Lawyers Section and, in particular, the volunteers assembled by **Crystal Doolity** and **James Barnes** from their Section to update the *Handbook* and make it available in both print and online, free of charge to seniors.

Legislation

Our legislative efforts will continue with promoting the Compact for Long Term Care. As previously reported, the ABA's House of Delegates has already voted on and approved the Compact as ABA policy in its meeting last February. With the continuing and tireless efforts of **Michael Amoruso, Howard Angione, Howard Krooks, Ellen Makofsky, Lou Pierro** and **Vincent Russo**, we will continue to lobby for New York State to adopt this planning alternative for seniors.

We will continue to seek whatever final approvals may be needed to move forward on the Qualified Spousal SNT legislation that **Sharon Kovacs Gruer** and **Steve Silverberg** have redrafted to everyone's satisfaction several times.

We will also continue to support the current bill broadening disclosure requirements in the sales of annuities to seniors. Many of us have seen our clients withdraw CDs or savings in order to purchase single premium deferred annuities. However, it is often only after the fact that they understand what they purchased is not exactly what was described to them initially. Currently, there is a bill introduced in both the Assembly (by Assemblywomen and Section Member **Ann-Margaret Carrozza**) and in the Senate (by **Senator Frank Padavan**) which would mandate broader disclosures of the terms, conditions and withdrawal penalties of these investments in the hopes of curtailing abusive sales of these products and/or, at the very least, allowing for more informed decisions before investing.

Besides specific legislative activity, we are also looking to broaden the dialogue with NYS Department of Health and Department of Social Services in New York which has already been initiated through the panels conducted at our annual New York City meetings the past two years. The purpose of these discussions would be to understand or at least hear, the State's interpretation of relevant legislation (and where we differ, to explain ours). Consequently, these discussions might allow us to plan with more certainty and less litigation.

Fiscal Planning

Currently, our Section has a budget surplus from the successful programs that we have held over the course of our existence. Naturally, we are not looking to squander the surplus we have grown over the years, but we are also examining how some of these funds could be used to enhance Section benefits and further the mission of the Bar. In terms of monitoring not only

our surplus but our overall Section budget as well, **Martin Finn** has been elected as our Fiscal Officer. As you may recall, **David Pfalzgraf** had been our Fiscal Officer for a number of years until having to rotate out of that position several years ago. Since that time the Treasurer has handled the duties of the annual budget for the Section, so we have had a new person doing this each year for the past four years. Now, it will be Marty's job to work with the Treasurer to review and formulate the Section's budget with the staff of the Bar Association each year. This continuity of oversight and analysis should help us maintain the financial success that we have had as a Section.

In terms of using a portion of our surplus, a Committee of past Section Chairs has been formed to examine what other Sections have done with their surplus and what programs might be appropriate and unique to our Section to support and benefit our membership. While we await those recommendations, there are two immediate uses of some of the funds planned. One will be an allocation of funds to encourage members of the Young Lawyers Section to join our Section and attend our meetings. Our first effort in this regard will actually serve two purposes—one is that members of the Young Lawyers Section will be entitled to a $100 discount on their registration to this summer's meeting. Secondly, to memorialize the passing of **Ken Grabie**, a longtime Section and Executive Committee member, we will term this benefit in his honor as a "Ken Grabie Scholarship."

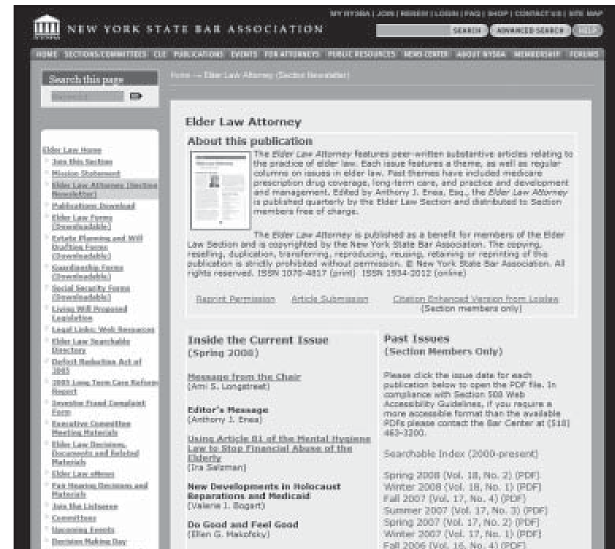
A second use of surplus funds will be a gift approved by the Executive Committee of $10,000 to be donated to the New York Bar Foundation to establish a restricted fund that would provide scholarship funds to law students demonstrating an interest in the field of elder law. We will continue to work with the Foundation to formulate the exact qualifications and terms of the scholarship grants, but I hope to have everything in place in the very near future.

In closing, let me again express my thanks to the Section, its members and its past officers and Executive Committee members who have made it enjoyable and worthwhile personally and professionally to be a member of this Section. And to anyone that has yet to become a part of this community, I suggest looking on pages 34 and 35 in this issue, where you will find a listing of committees and the respective chairs to find an area in which you are particularly interested. Please call any Committee Chair or myself to discuss how you would like to be involved. Failing that, just simply come to one of our meetings and see what happens.

Hope to see you in Baltimore in August.

Timothy E. Casserly

The *Elder Law Attorney* is also available online!



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- Past Issues (2000-present) of the *Elder Law Attorney**
- *Elder Law Attorney* Searchable Index (2000-present)
- Searchable articles from the *Elder Law Attorney* that include links to cites and statutes. This service is provided by Loislaw and is an exclusive Section member benefit*

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Editor's Message

This edition of the *Elder Law Attorney* contains an interesting and eclectic array of submissions. The first article is a submission by Laurie Menzies, Esq. entitled "What's Wrong with Most Estate Plans." Ms. Menzies in great detail describes many of the most important issues that the estate planner should investigate and analyze prior to putting pen to paper. We also have an interesting and timely submission from Ann-Margaret Carrozza, Esq. and Howard M. Esterces, Esq., entitled "Tax Deferred Annuities: New Rules will Protect Investors," discussing the new rules enacted by the NASD regulating the sale of tax deferred annuities, which became effective on May 5, 2008. Robert Kruger, Esq. and Lisa Friedman, Esq. have collaborated on a touching piece entitled "In Praise of a Smart Social Worker," which I encourage all of you to read as it illustrates the good that can be accomplished with a little hard work, effort and caring.

We also have a must-read submission from Ronald A. Fatoullah, Esq. and Stacey Meshnick, Esq. entitled "Practice Tip: Planning with Joint Accounts," which discusses joint accounts in regards to Medicaid eligibility. We also have included a Fair Hearing Decision submitted by Ronald C. Mayer, Esq. regarding the "Scope of Transfer Penalty Exemption for Transfers Made Exclusively for a Purpose Other Than to Qualify for Medicaid." Valerie J. Bogart, Esq. has also submitted an article entitled "Alert on Threatened Elimination of Spousal Impoverishment Protections in Medicaid Waiver Programs."

Additionally, Salvatore M. Di Costanzo, Esq. has submitted his semi-annual piece alerting us to interesting tax issues regarding "Alternative Filing Requirements for a Grantor Trust."

Last but not least we have our excellent regular contributions from Ellen G. Makofsky, Esq. and Judith B. Raskin, Esq.

I am confident that this edition of the *Elder Law Attorney* will be read at numerous beaches, swimming pools, patios and decks throughout the Northeast this summer.

Finally, I want to congratulate our outgoing Chair Ami Setright Longstreet on a job well done, and congratulate our new Chair Timothy Casserly and wish him the best of luck in the upcoming year.

Anthony J. Enea

Request for Articles

If you have written an article you would like considered for publication, or have an idea for one, please contact Elder Law Attorney Editor:

Anthony J. Enea, Esq.
Enea, Scanlan & Sirignano LLP
245 Main Street, 3rd Floor
White Plains, NY 10601
aenea@aol.com

Articles should be submitted in electronic document format (pdfs are NOT acceptable) and include biographical information.

www.nysba.org/ElderLawAttorney

What's Wrong with Most Estate Plans?

By Laurie Menzies

Every day clients present themselves at the conference table to "plan their estate." Depending on the client and depending on the advisor, the scenario could look very different and produce completely different results. What differentiates a successful plan from one that fails to accomplish the client's goals can be the result of many factors. Most likely the cause relates to the fact that developing a good estate plan takes more time than most people are willing to devote to it.

As estate planning attorneys who also concentrate in elder law, it is not uncommon to have many clients who are confused about what they are asking us to do. They want lifetime planning to remove assets from exposure to the costs of long-term care, while at the same time they want to avoid probate and eliminate estate taxes. It may not be possible to implement a plan that can accomplish all of our clients' goals at the same time. A plan to remove assets from probate, for example, may not be necessary if all of the client's assets are spent before death, paying for skilled nursing services. Twelve thousand dollar annual exclusion gifts still have to be reported to the Department of Social Services, even if the IRS gives them a pass.

So, the first thing we have to do is **EDUCATE THE CLIENT**.

Clients present themselves to us with varying degrees of sophistication regarding estate planning and asset protection. Many have old documents that need to be reviewed and almost all have discussed various techniques with friends at the senior center or have attended seminars on the subject. I find it helpful to explain the current state of their affairs and how assets would either be spent or transferred in the event of illness or death. Using a chart that displays ownership allows clients to see that assets are treated differently based on the type of investment and how it is titled. It is almost inevitable that no one has explained to them which of their assets will actually pass via the terms of their Last Will and Testament. Clients need to understand that the purchase of an annuity, instead of renewing a certificate of deposit, will change the flow of their estate plan. Therefore, it is imperative that the estate planning attorney thoroughly review each client's assets, including beneficiary designations, in order to develop any type of plan.

The process of determining what assets are owned by the client and how they are titled can be time-consuming and difficult, but it is imperative that this be done before advice is given about planning. If the client or their representative are unable or unwilling to provide this information, the plan is destined to fail. Generalizations can be given, as an educational exercise, but specific planning cannot be done without a valid basis from which to start. Our firm requires the client to complete a detailed intake questionnaire to obtain the relevant information.

"Clients present themselves to us with varying degrees of sophistication regarding estate planning and asset protection . . . and almost all have discussed various techniques with friends at the senior center or have attended seminars on the subject."

Unfortunately, clients invariably misrepresent the type or title of certain assets. To avoid unexpected results later on, supporting documentation should be obtained for each asset. Many people have done some "simple" planning of their own, such as adding another individual on the title of their bank account or bond. Transfer on Death accounts can now be established at banks and brokerage houses for assets that previously passed through probate in New York. Failure to uncover the true nature of each asset will result in frustration of the client's overall plan.

Therefore, every successful estate planner must first **OBTAIN UPDATED AND ACCURATE ASSET INFORMATION** from the client.

The next step should logically be to **DEFINE THE CLIENT'S OBJECTIVES AND EXPECTATIONS**.

"I want to put the house in my kids' names."

"I want to avoid probate."

"I don't want the government to take all my money if I go into a nursing home."

Clearly, clients arrive with certain ideas about the plan that they want you to implement. It is the job of a professional to determine the most appropriate plan to achieve the client's planning goals. Individuals should expect an "estate examination" before a diagnosis can be made. I ask my clients if they would respect a doctor who puts a cast on a leg because he or she thinks it is broken, without taking an X-ray.

The only way to determine clients' objectives regarding their estate and long-term care plan is to listen to their story and to get to know them, both of which take time. It will most likely take two meetings to review the client's current state of affairs and

discuss possible plans. Clients may not reveal certain important information, not only because they do not feel comfortable, but also because the attorney has not discussed enough about the plan for the client to realize what information is significant. Both of these impediments to complete disclosure can be eliminated by developing better communication with the client.

The client may say that they want a simple will and at the same time they don't want their assets to have to go through probate. Obviously, these clients need more education about asset transfers. There is also the client who wants to protect all of his or her assets but never wants to spend them or give them away. These kinds of misunderstandings on the part of clients can launch a very important area of discussion. The client may have never developed a vision of what their money should or can do for them or those they care about. It is short sighted to simply want to "hide" money for its own sake. Asking the right questions will help develop a picture of the client's real attitude and expectations about what they're asking for in an estate plan. The attorney should assist the client to develop a clear understanding of his objectives before proceeding with the plan.

In order to complete an effective estate plan, the attorney must **WORK WITH THE CLIENT'S FINANCIAL CONSULTANT**.

Estate planning attorneys have to review their clients' assets to create a plan. Some clients have been very active in their financial planning and may have a trusted advisor who helps them in this endeavor. However, many times clients have been "sold" a variety of investments and may not have a coordinated plan. For an estate or long-term care plan, the attorney needs to understand how the assets will transfer at death or how they will be treated by government agencies in a Medicaid application process. To truly benefit the client, it is important to understand the underlying investment objectives and tax implications of altering an asset structure. For this, a sophisticated investment advisor should be consulted.

Developing relationships with qualified investment professionals is key to creating successful estate plans for our clients. If the client has a trusted advisor, this is a good opportunity to develop a new relationship or networking opportunity. In any event, it should not be left up to the client to coordinate the information between the investment advisor and attorney. First, clients may not fully understand what we need them to do and, second, they should not be required to complete "our" work.

The more estate planning that attorneys engage in, the more familiar they become with asset types and investment scenarios. Although we do not offer investment advice, the attorney should be able to recognize problems within the asset structure of an estate. It is imperative that an attorney concentrating in this area be educated about financial planning and investments. We are retained to preserve and transfer the product of a lifetime of hard work and accumulation. Every client has a different pot of assets. That is part of what makes our job so interesting and difficult at the same time. By joining a professional financial planning organization, an attorney can continue to be educated in current investment planning techniques and at the same time develop professional relationships with local advisors.

A frequent defect in any estate plan is the failure to **COMPLETE AND FUND THE PLAN**.

Clients bring in beautifully bound, three-ring binders containing "everything" in their estate plans. Invariably, their assets have not been transferred to correctly fund the plan they thought they had. Here is where the clients' lack of education in the rules of asset transfer and title becomes apparent. They may have re-titled their real property into the trust and then proceeded to purchase annuities and other investments outside of the terms of the original plan. Clients don't necessarily need to understand asset transfer rules if their advisor takes it upon him or herself to ensure that assets are correctly structured to fit the plan documents. The client or financial advisor must be advised to maintain contact with the estate planning attorney as investments change.

THERE HAS TO BE A PROFESSIONAL HERE SOMEWHERE.

Remember, the client is paying an attorney for professional advice. Years of experience with the planning issues described gives an estate planning attorney a better perspective and the ability to avoid or eliminate potential problems. The children of our clients will be experiencing the ramifications of the plan we implement today. The best way to generate goodwill and expand a planning practice is through good "generation planning." Explain to the clients the possible problems that can result when antagonistic siblings jointly own real property. Tell them why there are practical complications of appointing three co-attorneys-in-fact. Beyond having the technical expertise to implement the correct legal requirements for a plan, a good attorney will have asked the right questions and have enough information to personalize the plan in light of the specific client situation. Remember, this creative involvement with the client is the reason we chose our profession. Challenge the client to explain his or her "money goals" and open-up the dialogue. If an attorney becomes more interested in the outcome of a client's plan, it is more likely to be implemented correctly.

Tax Deferred Annuities: New Rules Will Protect Investors

By Ann-Margaret Carrozza and Howard M. Esterces

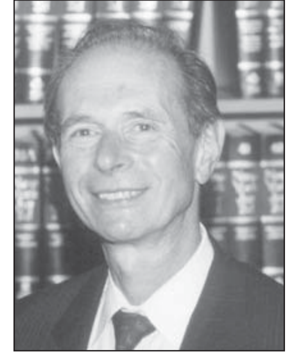
On September 7, 2007, the Securities and Exchange Commission ("SEC") approved new NASD Rule 2821 regulating the sale of tax deferred variable annuities.[1] The new rule seeks to protect investors from purchasing annuities that may not be beneficial for them. The rule went into effect May 5, 2008 and requires, among other things, that registered representatives who sell tax deferred variable annuities have a reasonable basis in believing that the customer is informed of the material features of the product and will benefit by the investment. In addition, a principal of the broker-dealer employing the registered representative must approve of the sale. Both the basis for the approval and the registered representative's belief as to the appropriateness of the sale must be documented.

Description of Contracts

Tax deferred variable annuities ("contracts") are contracts between an investor and an insurance company. Investments are made in various funds selected by the investor in consultation with a financial advisor, and held in "subaccounts." The funds are similar to, but not the same as, mutual funds purchased independently.

The subaccounts holding the various funds are segregated investments and are not subject to general liabilities of the insurance company ("company"). The company may also offer investments at fixed interest rates from its general assets, which are subject to the company's general liabilities.

The tax deferred variable annuity must in each instance be registered with the SEC as a unit investment trust under the Investment Company Act of 1940 (the "1940 Act"). A prospectus must be filed with the Securities and Exchange Commission and be delivered to the customer, along with a prospectus for each of the funds offered before an investment is made.[2] Broker-dealers and registered representatives employed by broker-dealers are subject to regulation and supervision by the SEC and by the Financial Industry Regulatory Authority (which was created on July 30, 2007 and comprises the former National Association of Securities Dealers, Inc. (NASD) and regulatory functions of the New York Stock Exchange). In addition, both insurance companies and their contracts are subject to regulation by the Insurance Departments of the states in which contracts are sold.



The tax deferred variable annuity contract may be suitable for retirement planning, since income and gains accumulate income tax free until withdrawn by the investor. This can dramatically increase the value of an investment, since money otherwise used to pay income tax can be reinvested and grow. Withdrawals may be made generally at any time, albeit usually with a withdrawal charge. If the owner dies before the contract is "annuitized" (i.e., before payments begin in the form of an annuity), there is a death benefit which varies with each company and contract. For an extra charge the investor's net investment, and sometimes the contract's highest account value, will be paid as a death benefit. The investor may also change investments among the various funds offered under a contract without recognition of taxable gain, and without a sales charge.

For an additional cost, contracts often allow an investor to continue to profit from investment in the various funds offered, and to make lifetime withdrawals (typically limited to 5% to 7% of account values), while guaranteeing return of the investor's net investment. Sometimes return of highest account values is guaranteed. Numerous complex variations of optional death and lifetime withdrawal benefits are offered under various names under different contracts of the same insurance company, and by different companies.

Once a contract is "annuitized," the withdrawal options and death benefits described above no longer apply. Various forms of annuity arrangements may be elected. For example, an annuity for life will provide monthly payments for the annuitant's lifetime with no death benefit. Under another form of annuity (an annuity for life with 10 years certain), payments will be made for the annuitant's lifetime; but if the annuitant dies within 10 years from the time payments begin, the same payments will be made to a beneficiary for the balance of the 10-year term. All of these benefits come with a cost.

Table 1				
	Mortality and Expense	**Administration**	**Distribution**	**Total**
Fidelity[3]	0.20%	0.05%	—%	0.25%
Sun Life Financial Masters[4]	1.40	0.15	0.15	1.70
AXA Equitable Accumulator[5]	0.75	0.30	0.20	1.25
American Legacy[6]	0.55	0.10	—	0.65
Hartford Leaders Edge[7]	0.65	0.20	—	0.85

Fees and Expenses

Fees and expenses of an investment in a tax deferred variable annuity contract can be significant, and vary with each company and within each contract, often depending upon highly complex optional features offered.

All of the prospectuses examined imposed annual charges for the basic contract (typically as a percentage of account values), for "mortality and expense," "administration," and sometimes for "distribution" charges. It is difficult to make an accurate comparison, because some contracts include as standard benefits those which are optional benefits under other contracts. A sampling is shown above inTable 1.

Some contracts impose a sales charge on purchases as a percentage of premium payments. For example, the Hartford Leaders Edge "A" share annuity contract imposes an initial sales charge of 5.5% on investments up to $49,999 declining to 1.0% on investments of $1,000,000 or more, but withdrawals may thereafter be made without penalty. Others impose a contingent deferred sales or withdrawal charge on amounts invested but withdrawn before expiration of a stated period.[8] For example, the Sun Life Financial Masters annuity contract imposes an 8% withdrawal charge on amounts withdrawn during the first two years, declining to 3% on amounts withdrawn which are invested between 6 and 7 years. The AXA Accumulator contract imposes charges for similar periods ranging from 7% down to 1%.

All of the funds in which investments are made impose still more annual charges for management and expenses which are paid from the fund itself. In the case of the prospectuses examined, these ranged from 0.10% to as high as 2.77%. This is in addition to expenses paid to the insurance company for the contract.

For optional lifetime and death benefits, charges can add as much as another 1.5%.

Prospectuses frequently show total charges based on a $10,000 investment, and assume the most expensive options are elected. The total expenses might be based on surrender, failure to surrender, or annuitizing the contract after 1, 3, 5 and 10 years.

NASD Rule 2821

As can be seen from the foregoing, making a knowledgeable investment in a tax deferred variable annuity can be daunting. Understanding the standard and optional benefits offered and the concomitant computation of charges is extraordinarily complex. No two contracts are exactly the same. Prospectuses seem more geared toward protecting insurance companies from liability for failure to make adequate disclosure, than offering an understandable explanation to investors. It took one of the writers of this article over two days to carefully read a typical prospectus, and even then there were many unanswered questions.

As a result, investors must rely on a knowledgeable registered representative in making an investment in a contract. Registered representatives, however, have a strong potential conflict of interest in view of substantial commissions, which can be 7% of purchase payments, and are typically 0.25% annually of account values. These commissions are paid from the insurance company's own funds and are not charged directly against the contract.

Because of the potential conflicts of interest and the complexity of tax deferred variable annuities, Rule 2821 was adopted effective May 5, 2008. Under the rule a registered representative "must have a reasonable basis to believe that the customer has been informed in general terms, of the material features of a deferred variable annuity, such as potential surrender period and surrender charge, potential tax penalty,[9] mortality and expense fees, charges for and features of enhanced riders, insurance and investment components and market risk."[10]

The rule also requires that the registered representative "have a reasonable [and documented] basis to believe that the customer would benefit from certain features of deferred variable annuities, such as tax-deferred growth, annuitization or a death or living benefit."[11]

If an exchange of one variable annuity for another is involved, the registered representative must have a reasonable basis to believe that the transaction is suitable after considering surrender charges, whether the

customer would be subject to the beginning of a new surrender period, or would lose existing benefits or be subject to fees or charges. The registered representative must also consider whether the customer would benefit from product enhancements and improvements and whether another variable annuity of the customer had been exchanged within the preceding 36 months.

The registered representative who recommends the purchase or exchange of a deferred variable annuity must document and sign the determinations above.

A registered "principal" of the broker-dealer (as defined in the rule) must review the registered representative's determination prior to submission of the customer's application to the issuing insurance company for processing, but no later than seven business days after the customer signs the application. The registered principal's determination must also be documented and signed.

Proposed New York Legislation

The new NASD Rule 2821 should go a long way toward protecting investors. There is, however, still room for improvement. Assembly bill 10002, authored by one of the writers, seeks to give New York consumers additional information.

For example, few companies questioned as part of the research for this article would provide the following information: that is, what monthly annuity amount the company will pay as of the date of the prospectus to an individual who wished to annuitize the contract. This information would be extremely useful as a basis for comparing contracts and deciding which one to invest in.

Moreover, senior consumers should be advised of the impact of the Deficit Reduction Act of 2005 on the purchase of annuity contracts. Namely, that the state must generally be named as a death beneficiary to the extent that the contract owner incurs Medicaid covered expenses during his or her life. This applies to all new annuities purchased after February 8, 2006 as well as "rollovers" that trigger a new contract date.

Conclusion

Tax deferred variable annuities can be a powerful investment tool in the right circumstances. However, benefits are costly. The products offered are extremely complicated, require reliance on the integrity of a registered representative selling the contracts and are prone to abuses. Many past abuses are expected to be corrected by new NASD rule 2821. Assembly bill 10002 would build upon the worthy aims of NASD Rule 2821 by providing consumers with these vital pieces of information with which they may make meaningful investment decisions.

Endnotes

1. Securities Exchange Act Release No. 56375 (Sept. 7, 2007), 72 FR52403 (Sept. 13, 2007) (SR-NASD-2004-183); SEC Corrective Order, Securities Exchange Act Release No. 56375A (Sept. 14, 2007), 72 FR53612 (Sept. 19, 2007) CSR-NASD-2004-183, correcting the rules effective date).
2. Sales material must also be filed with the SEC The SEC does not approve the prospectus, but requires that adequate disclosure be made before the prospectus becomes effective.
3. Prospectus dated 4/30/07.
4. Prospectus dated 5/1/07.
5. Based on sales literature since a prospectus was not provided.
6. American Legacy Shareholders' Advantage Variable Annuity (New York) prospectus dated 5/1/07.
7. Prospectus dated 5/1/07.
8. Withdrawals of limited amounts specified under the contract (usually 10% of account values per year) are exempt from withdrawal charges.
9. There is a 10% tax penalty for withdrawals prior to age 59½.
10. Executive Summary of FINRA to Rule 2821.
11. *Id.*

Ann-Margaret Carrozza maintains law offices in Bayside and Port Jefferson and is a New York State Assemblywoman.

Howard M. Esterces is a partner at Meltzer, Lippe, Goldstein & Breitstone, LLP in Mineola, NY.

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In Praise of a Smart Social Worker

By Robert Kruger and Lisa K. Friedman

Prelude

Usually, parents of an adult child with a disability are appointed as guardians and, as they have historically done, continue to act as advocates for the child, as they did through their school years. At times however, parents do not apply for guardianship because the special education system and the adult system for people with disabilities recognize parents as decision makers. If the child is high functioning with parental supervision, no application for guardianship may appear necessary, leaving siblings or other family members to address the lack of a guardian after the death of both parents.

In the subject case, a sibling and his wife established a guardianship for his brother, who was disabled. Jonathan had never had a guardian, but he had a wonderful mother who was his advocate and who managed his daily life. Her disabled son married Sarah, who was also disabled and who did not have a guardian. Sarah was a bit more high functioning than her husband. They had been married for over 20 years, having first met in their special education program. Sarah's family was disengaged, leaving Jonathan and Sarah's supervision to Jonathan's mother.

They lived in the city and each had jobs where their fellow employees supported them. Jonathan's supervisor modified his responsibilities to his level of competence and had reasonable expectations for him. Thus, mom oversaw his home life and his co-workers oversaw his work life.

Jonathan's mother died first and his father, who had never before managed his day-to-day activities, "took over." But he moved to Florida, so he was "managing" from afar. Sarah's family remained disengaged. Jonathan's sibling was preoccupied with his own, very busy, career, so he too, could not step into mom's shoes.

As Jonathan's father declined, Jonathan's sister-in-law (the sibling's wife) began to help informally, attempting to assist in money management and to make sure things were being addressed or to follow instructions from her father-in-law.

As time had passed, unfortunately Jonathan's workplace became less supportive; job descriptions changed and staff and supervisors were less sensitive to his abilities and disabilities. The work environment became stressful as demands upon Jonathan increased. He started drinking and missed work to the point that he was about to be fired. His mother was not there to "catch" the signs that he was tanking. He was not capable of telling anyone how he felt or what was going on at work, because he was not capable of articulating what was happening to him at work. No one else knew him well enough or had the time to support him.

As Jonathan deteriorated, conditions at home also deteriorated between Jonathan and Sarah. Sarah wasn't capable of communicating what was happening at home either. Bills were not paid, the rent was terribly overdue, the phone was turned off, etc. Informal attempts by his sister-in-law to manage finances and get Jonathan back to work failed. He was about to be fired. He was trying to cover up his failures and he was drinking more.

It was this confluence of disasters, actual and potential, that generated the filing of a petition seeking the appointment of Jonathan's sister-in-law, Beth, as guardian and his brother as standby guardian. With this appointment, the bills were straightened out. Jonathan was put on a budget. He returned to work and functioned acceptably. A social worker was hired for a while to help Jonathan and his wife find activities that they would enjoy together, such as joining a gym. For close to ten years, the situation was manageable.

Unexpectedly and unfortunately, the guardian became ill and could no longer provide regular oversight. Without the oversight, Jonathan deteriorated to the point where he was fired. He did not report this, so by the time his discharge surfaced, advocacy could not save his job or his pension. He was drinking more. Sarah was not well, having been diagnosed with Parkinson's disease, and did not communicate with the guardian well.

At the point where the guardian became ill, Jonathan was fired and Sarah was developing Parkinson's disease, Sarah's sister, Sally, finally took the stage. Sally's appearance provides the point of this article, and the drama. Sarah's sister was unsuitable on several levels: she had no real understanding of Sarah's needs, much less Jonathan's. Sally was inordinately interested in monetary/budgetary issues and really not in the least interested in the needs of either Jonathan or Sarah.

With the resignation of Beth and the professional responsibilities of Jonathan's brother precluding his service as guardian, and with Sally being so obviously unsuitable, the family sought a professional guardian. Thus, the co-author was nominated by the family to serve as Successor Guardian, a nomination accepted by the presiding judge.

Enter the Social Worker

By the time of the appointment of the Successor Guardian, he had learned of the following:

1. Jonathan, who was mildly retarded, had been employed at Bellevue Hospital as an orderly and had been fired after 30 years employment. An attorney skilled in employment law successfully reversed his discharge, which enabled him to retire with a pension, all of which was finalized prior to my appointment.

2. Shortly after the appointment of a successor, his SSD was approved. Now, with SSD and a pension, his income was more than adequate for his limited needs and wants.

3. Sarah's sister, Sally, who is probably skimming a portion of Sarah's paycheck, took over management of Sarah's share of the family's expenses, preaching a mantra of economy that would have, if fully implemented, severely constricted Jonathan's already limited lifestyle.

4. As a consequence, Jonathan's prior guardian, Beth, and Sally were locked in a conflict that harmed both Jonathan and Sarah. There were now two power centers in the household—Beth for Jonathan and Sally for Sarah. There was also considerable resentment, because Sally, a newcomer, and a self-interested one at that, was disruptive—creating conflicts between Jonathan and Sarah over the only issue that Sally apparently cared about, money.

When I took over, after reviewing the family budget, I found Jonathan unemployed, at loose ends; with a drinking problem and in conflict with a Sally-inspired Sarah. It was clear that a change in the dynamics here was critical and it would not be achieved through judicial intervention. Jonathan's guardian has no jurisdiction over Sarah or Sally. My only judicial weapon, a petition to appoint an Article 81 Guardian for Sarah, might result in the appointment of Sally, or a dismissal of the petition, since Sally has Sarah's Power of Attorney and Healthcare Proxy.

Instead, I retained the services of a highly skilled geriatric care manager for Jonathan. Sally would not pay for this service for Sarah, which was just as well, since the care manager might be in a conflicted position servicing the masters.

The care manager, among other things, straightened out Jonathan's medical insurance and drug coverage, got Jonathan into some volunteer work (to give a purpose to his days) and bonded with Jonathan. This bonding is more significant than it might appear, because it enables me to override Sally's veto when, for example, we purchased new furniture to replace old, decrepit furniture. She brought in Fresh Direct to improve their diet and purchase food both Jonathan and Sarah liked and had been forbidden to buy under Sally's stringent economies. She brought in a first-rate companion for cooking and cleaning. She performed wonders, in taking a deteriorating situation and making it workable.

There is much more. Sarah has Parkinson's Disease and will not be able to continue working beyond the next year or two. Jonathan is not altogether reliable and his volunteer work is an off-and-on thing. His drinking is much reduced, but it remains a concern. Looking to the future, their ability to remain in their rent-stabilized apartment may depend on the progress of Sarah's Parkinson's Disease. Getting appropriate care for Sarah will be a problem so long as Sally controls Sarah and is unwilling to spend Sarah's money for services for Sarah.

CODA

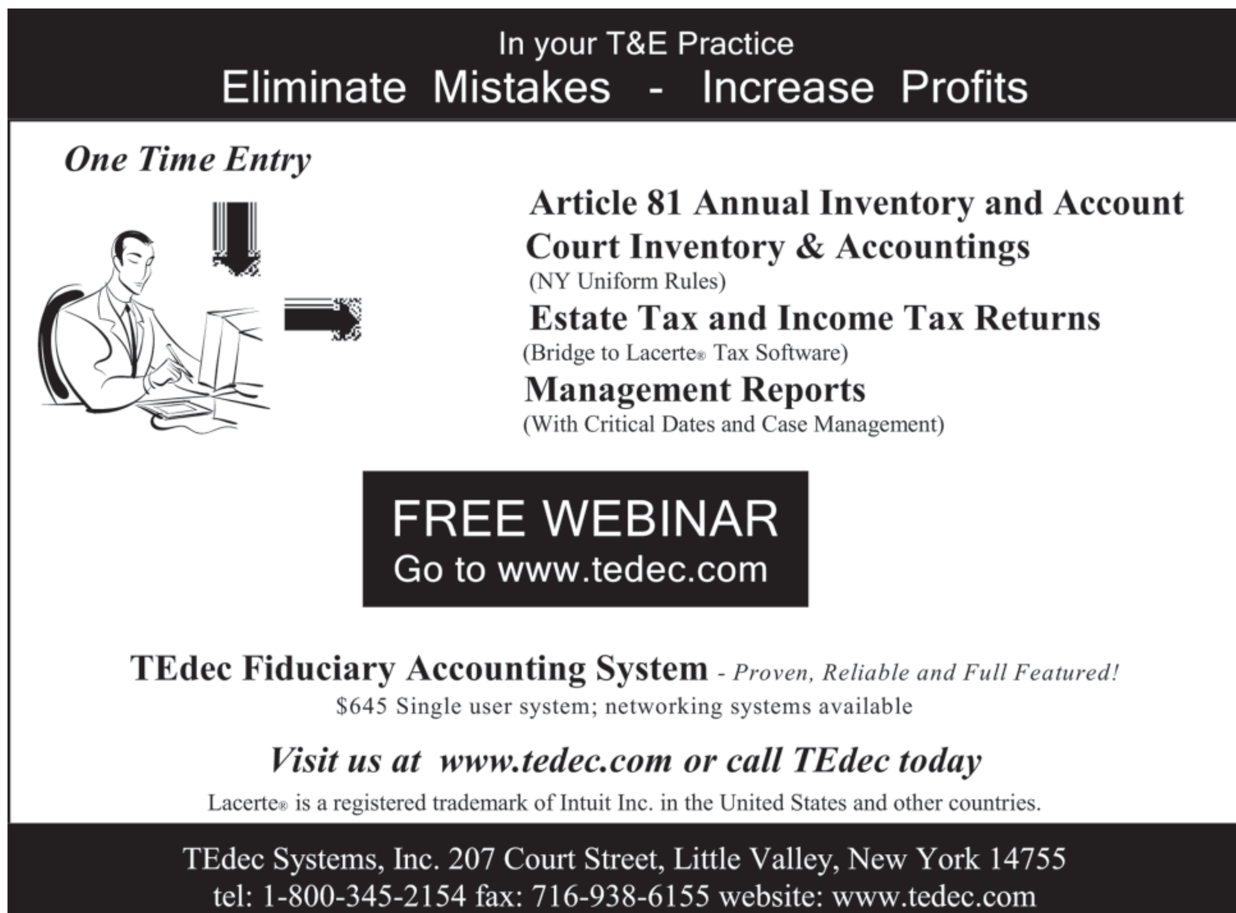
Still, with these problems looming, conflicts over money have subsided for now, and the guardianship is presently stable. One may fairly ask: How many lawyers functioning as guardian, with presumed expertise in financial issues, could constructively function, *without* social work assistance, as a personal-needs guardian in family-conflict cases such as Jonathan's? Would you have the patience, or time, as did this care manager, to take Jonathan and Sarah out to dinner—not once, but repeatedly; to go out shopping for a sofa; to insist that they did not need Sally's OK to purchase the sofa; to take Jonathan to a Local 1199 benefits office to straighten out his medical coverage; to find and locate volunteer work for Jonathan, to take him there and introduce him to the agency where he would volunteer and to see him consistently, not sporadically? How many of us can find the skill to communicate with an impaired individual and make a personal connection? How many of us here have the interest in doing this? How many of us have the latitude in our practice to carve out an entire afternoon to spend on our ward? Weekly or bi-weekly? How many of us can afford to donate this amount of time? If you say that you can, I wonder how you pay your rent or pay your staff.

The qualified care manager is, in many ways, a surrogate mother or sister. The assumption that family is capable of functioning in the role of personal needs guardian is tested in this matter, where there are two competing power centers for one couple. An attorney, serving as personal needs guardian, would do well to recognize his or her limitations and reach out for help because we are kidding ourselves if we think we are fit to perform the job.

The professional guardian cannot become the parent. Rather, a social worker can provide the day-to-day management of a developmentally disabled person living in the community, particularly one who is not accessing services from agencies. The services they provide replace what would be the "extraordinary services" of a parent (or actively involved family member). In order to get appropriate social work services, the social worker must be reasonably paid.

If a guardian suddenly cannot fulfill his or her responsibilities, how can an orderly transition from parent/guardian be assured? Siblings are not always the right individuals to succeed as guardian. If the individual is high functioning, and his retirement or disability coverage allows him to live in the community, agency services are not likely to be available. If the individual is not receiving agency services, there are no eyes and ears to pick up the signs that something is not quite right. A social worker can bridge transitions from parent as guardian to sibling or professional guardian before succession begins due to death or disability of the parent. That is where a social worker can also prove indisposable, to fill in the many roles of the parent as guardian and/or advocate.

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



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Practice Tip: Planning with Joint Accounts

By Ronald A. Fatoullah and Stacey Meshnick

If assets of a potential Medicaid applicant are jointly held in a non-financial institution account(s), such accounts may be considered unavailable for purposes of determining Medicaid eligibility. It is important to know whether the joint owner is willing to participate in liquidating the accounts.

Sections 360-4.1 and 360-4.8(b) of 18 N.Y.C.R.R. both address the process of determining financial eligibility and the effect of excess income and resources on eligibility. All income and resources of the A/R (Medicaid Applicant/Recipient) are to be identified when determining eligibility.

Section 360-4.4 of 18 N.Y.C.R.R. defines resources as "property of all kinds, including real and personal property." It includes all resources *in the control* of an applicant or recipient. Once it is established what resources are within the control of the applicant, the next step is to examine the individual accounts.

When considering assets available to the A/R, it is important for the attorney to look at the type of accounts held by the A/R as well as whether the account is joint or individual. 96-ADM-8 memorialized OBRA '93 and the state's treatment of jointly held assets. Joint property is generally considered available to the extent of a Medicaid applicant's interest. It is presumed that joint owners possess equal shares, with the exception of "financial institution accounts."

The Medicaid Reference Guide (MRG), p. 252, describes financial institution accounts as including savings, checking and time deposits or certificates of deposit. The MRG specifically excludes stocks, bonds and mutual funds. If a Medicaid applicant is designated as the sole owner of a financial institution account and can withdraw funds, the account is presumed available to the A/R and such presumption may not be rebutted.

If the A/R will be penalized for early withdrawal from an account, the available value is the amount after the penalty deduction, but income taxes due as a result of withdrawal are not deductible. If the A/R is the joint owner of a financial institution account, it is presumed that *all funds belong to the A/R*. However, the presumption in such a case may be rebutted with evidence to the contrary. For example, you can rebut this presumption if you can prove that the A/R contributed only 25% to the account, and the A/R's son contributed the remaining 75%.

In the absence of contrary evidence, an A/R with joint *non*-financial institution accounts owns one-half (50%) of the account. An important consideration, however, is how the Medicaid program treats a joint non-financial institution account in a situation where the joint owner refuses to liquidate the account.

The situation is analogous to that addressed by 03-OMM/ADM-1, which deals with the elimination of conditional eligibility and changes in the treatment of the homestead. The directive provides that "all non-exempt resources are considered available and applied against the appropriate resource standard, unless there is a legal impediment that precludes the liquidation of the resource. A legal impediment exists when an A/R is legally prohibited from, or lacks the authority to, liquidate the asset."

In a letter responding to the author's query regarding liquidation of joint non-financial institution accounts, The New York State Department of Health responded that if the A/R cannot withdraw the funds in a joint non-financial institution account because the joint owner refuses to liquidate, the accounts would not be treated as countable resources. Of course, if the A/R's ownership interest in the account(s) was transferred to the joint owner during the look-back period, a penalty would be imposed as to the assets transferred for less than fair-market value.

Example 1: A/R has a jointly held Smith Barney account worth $450,000. It is a "non-financial institution" account that requires one signature in order to withdraw funds. It is presumed that only one-half of the account, or $225,000, is available to the A/R.

Example 2: A/R has a Smith Barney account held jointly with his son worth $450,000. The account requires two signatures in order to withdraw funds. The A/R's son refuses to sign a withdrawal slip or check, so the A/R cannot liquidate the account. The entire account is unavailable.

Ronald Fatoullah, Esq. is the principal of Ronald Fatoullah and Associates, elder law and estate planning attorneys with offices in Great Neck, Forest Hills, Brooklyn, Manhattan, and Cedarhurst. Stacey Meshnick, Esq. is the senior staff attorney at the firm and supervises its Medicaid Department.

Scope of Transfer Penalty Exemption for Transfers Made Exclusively for a Purpose Other Than to Qualify for Medicaid—Favorable Fair Hearing Decision

By Ronald C. Mayer

Individuals applying for institutional Medicaid will be subject to a so-called transfer penalty if an uncompensated transfer was made during the specified look-back period.[1] Certain transfers are exempt from this rule, e.g., a transfer to a spouse or to a blind or a disabled child. A perhaps less frequently used exemption is contained in 42 U.S.C. § 1496p(c)(ii)[2] which exempts transfers if "the assets were transferred exclusively for a purpose other than to qualify for medical assistance."

An earlier version of this exemption was interpreted in 96-ADM-8,[3] which states:

> Factual circumstances supporting a contention that assets were transferred for a purpose other than to qualify for MA include, but are not limited to . . .
>
> 1. the sudden, unexpected onset of a serious medical condition after the transfer;
> 2. the *unexpected* loss, after the transfer, of income or resources which would have been sufficient to pay for nursing facility services; or
> 3. a court order specifically requires transfer of a certain amount of assets.

This 1996 ADM further states:

> All of the circumstances of the transfer will be considered as well as factors such as your age, health and financial situation at the time the transfer was made. It is important to note that you have the burden of providing this agency with complete information regarding all assets and any other relevant factors which may affect your ineligibility.

A recent fair hearing decision by the New York State Department of Health,[4] reversing a determination by the Albany County Department of Social Services, suggests that the scope of the statutory exemption may in some circumstances be interpreted more broadly than the 1996 ADM would suggest.

The facts of the matter are worth summarizing in some detail. Applicant, who died in December 2007 at the age of 83, had been admitted to a skilled nursing facility in January 2007. The applicant's wife stated that an August 2006 $10,000 gift to their 18-year-old granddaughter was made for a reason other than exclusively to qualify for Medicaid. The gift was made approximately five months prior to her husband's admission to a nursing home and after he had been diagnosed with early-stage Alzheimer's disease. The applicant's wife documented that she and her husband had been making gifts to their granddaughter three or four times a year since her birth and that the August 2006 gift was made in anticipation of her entering college in the fall of 2008. The hearing decision listed prior gifts aggregating approximately $8,400 over the granddaughter's lifetime. The applicant's wife, a registered nurse, testified that her husband was playing golf and using a computer at the time of the gift, and she had anticipated that she could continue to care for him at home for many years. She maintained that an unanticipated deterioration in his condition required his admission to a nursing home. The Department of Health's decision held that the gift to the granddaughter was made exclusively for a purpose other than to qualify for Medicaid.

Obviously any determination regarding the purposes of a transfer and the availability of the exemption will depend heavily on the facts and circumstances of the matter and the credibility of witnesses. However, at the very least this decision seems to provide a strong basis for invoking this exemption even if a transfer is made after the onset of a debilitating disease, if such disease is still in an early stage and does not at that time seem to require the individual to be institutionalized. Also, a consistent pattern of gift giving can be used to justify a transfer even if the gift in question is substantially larger than earlier gifts and if the stated purpose of the gift is not for an imminent deed (in this case the gift to the granddaughter was made two years prior to her anticipated matriculation to college).

Endnotes

1. *See* 42 U.S.C. § 1496p(c); 06-OMM/ADM-5, dated July 20, 2006, "Deficit Reduction Act of 2005—Long Term Care Medicaid Eligibility Changes," http://www.health.state.ny.us/health_care/medicaid/publications/pub2006adm.htm.
2. This exemption was implemented by New York State in Section 366.5(e)(4)(iii)(B) of the Social Services Law.
3. 96-ADM-8, dated March 29, 1996, "OBRA '93 Provisions on Transfers and Trusts."
4. FH No. 4898029L, dated March 14, 2008, Albany County, Anne Reynolds Copps, appellant's representative (available in fair hearing database on wnylc.net online resource center—free registration required).

Alert on Threatened Elimination of Spousal Impoverishment Protections in Medicaid Waiver Programs

By Valerie J. Bogart

Since 1988, federal law has afforded protections against impoverishment for "community spouses" (CS) of "institutionalized spouses" (IS) who receive institutional services under Medicaid. The community spouse is entitled to sufficient income from the IS that would supplement the income of the CS up to the minimum monthly maintenance needs allowance (MMMNA).[1] In the last two years, this 20-year-old provision has been re-interpreted by the federal Center for Medicaid & Medicare Services (CMS) in a way that sharply limits which spouses are entitled to these protections against impoverishment. These limitations are beginning to be applied to the popular waiver programs in New York State, including the Lombardi program,[2] the Traumatic Brain Injury program,[3] and the new Nursing Home Transition and Diversion waiver[4] programs. This article explains the background and status of these changes.

The core of the new CMS interpretation is the definition of the federal statutory term "institutionalized spouse" for purposes of the spousal protections. Section 1924 of the Social Security Act enacted in 1988 defines this term as follows:

> (h)(1) The term "institutionalized spouse" means an individual who—
>
> > (A) is in a medical institution or nursing facility or who (at the option of the State) is described in section 1902(a)(10)(A)(ii)(VI)[5]
> >
> > (B) is married to a spouse who is not in a medical institution or nursing facility . . .

42 U.S.C. § 1396r-5(h)(1)(A). The first phrase in subparagraph (h)(1)(A) shows that any spouse in a nursing facility (nursing home) is an "institutionalized spouse," so that their community spouses *must* be afforded these protections. The second phrase of this subparagraph provides that states have the *option* of defining "institutionalized spouse" to include an individual who "is described in section 1902(a)(10)(A)(ii)(VI)."

The cross-reference in subparagraph 1396r-5(h)(1)(A) is to a provision that has, for 18 years, been interpreted to mean simply that states have the option of extending spousal protections to the home and community based services (HCBS) waiver programs, including 1915(c) waivers, such as Lombardi, TBI and New York's other waiver programs. More specifically, this cross-referenced provision obscurely identifies HCBS enrollees as follows:

> [Individuals] who would be eligible under the State plan under this subchapter if they were in a medical institution, with respect to whom there has been a determination that but for the provision of home and community-based services described in subsection (c), (d) or (e) of section 1396n of this title they would require the level of care provided in a . . . nursing facility . . . the cost of which could be reimbursed under the State plan, and who will receive home or community-based services pursuant to a waiver granted . . . under [42 U.S.C. § 1396p].

Social Security Act § 1902(a)(10)(A)(ii)(VI); 42 U.S.C.S. § 1396a(a)(10)(A)(ii)(VI).

The New York State Department of Health and, formerly, CMS, has always interpreted this provision as defining eligibility for waiver programs to require *medical* eligibility for nursing home placement. But for the provision of waiver services, they would require the level of care provided in a nursing home.

New York State has always exercised what has long been interpreted as the federal option to apply the spousal impoverishment protections to 1915(c) waivers. New York Social Services Law § 366-c, enacted in 1989, codifies state law on "Treatment of income and resources of institutionalized persons." Section 366-c(2)(a) defines "institutionalized spouse" to include a person who "is receiving care, services and supplies pursuant to a waiver pursuant to subsection (c) of section nineteen hundred fifteen of the federal social security act. . . ." This protection is one of the attractive features of the Lombardi program, which serves 27,000 people at any time.

In 2006, CMS completely revised its interpretation of the above-quoted cross-referenced provision, Social Security Act § 1902(a)(10)(A)(ii)(VI). Instead of meaning that the individual must be *medically* or functionally eligible to be in a nursing facility, CMS now says the provision requires that the individual would be *financially* "eligible . . . if they were in a medical institution." Thus CMS believes this provision is limited to individuals whose income is within the nursing facility/HCBS income limit set by the state.[6]

> As CMS sees it, if an HCBS enrollee has $900 in monthly income in a state where the nursing facility/HCBS monthly income limit is $1,000, this person would definitely be eligible if s/he were in an institution, and his or her spouse could therefore be protected by the spousal impoverishment provisions. But if this same HCBS enrollee with $900 in monthly income lives in a state with a nursing facility/HCBS monthly income limit of $800, then it is not certain, according to CMS, that this person would be eligible if in an institution. His or her spouse may therefore not enjoy the spousal impoverishment protections.[7]

Of course, since New York State has a medically needy program, the individual in the above example with $100 income over the $800 income limit would clearly be eligible, since care in a nursing facility of course costs at least $100 per month. The individual would meet her spend-down. In discussions, CMS has steadfastly resisted allowing anyone with a "spend down" to qualify under this subparagraph. Their interpretation allows only individuals with NO spend down to be defined as an "institutionalized spouse," whose spouses are entitled to spousal impoverishment protections. Of course, this interpretation is absurd, since anyone with no spend-down would not have any excess income to give his or her spouse as a "community spouse monthly income allowance" (CSMIA).[8]

How CMS' New Interpretation Will Impact New York State

The Nursing Home Transition & Diversion Waiver

CMS' new interpretation came to light when New York State submitted a request for a new waiver in 2006. The Nursing Home Transition and Diversion Waiver was submitted pursuant to Social Services Law § 366(6-a), enacted in October 2004. This home and community-based services waiver is for nursing home-eligible persons over age 18, regardless of the type of their disability (as distinguished from certain waivers that are only for people who have a traumatic brain injury, developmental disability, etc.). Unlike the Traumatic Brain Injury (TBI) waiver, it does not include generous housing subsidies. This waiver uses the Money Follows the Person Act, wherein the federal government will pay 100 percent of the first year of Medicaid costs for individuals who transition out of nursing homes.[9] The waiver will have 5,000 slots.

Federal approval was not granted until 2007. The delay resulted from CMS' refusal to approve the waiver unless the state eliminated spousal impoverishment protections. As described above, it is undisputed that federal law gives states the option whether to afford these protections to waivers. In the state budget enacted in July 2007, the state capitulated and amended Social Services Law § 366-c to eliminate spousal protections from this waiver. Since the State Department of Health disagrees with the federal interpretation, the state was careful to phrase the amendment to apply only "to the extent required by federal law." Thus, if federal law was amended to clarify that CMS' interpretation is wrong, or if CMS changes its interpretation (perhaps after a change in administration), or if a court declared waiver participants entitled to spousal protections, then these protections would automatically be reinstated in New York, without the need for another statutory amendment. As of April 2008, the waiver still has not been implemented because of logistical issues. It will reportedly first be implemented upstate, not in New York City.

Lombardi, TBI and Other Waivers

The waivers for the Lombardi, TBI and other programs are approved by CMS for periods of five or more years. The waivers now in effect do include spousal impoverishment protections, which were previously approved by CMS. Thus people in these programs continue to have the benefit of the spousal protections. However, the waivers are now up for renewal in 2008.

TBI Waiver—The TBI waiver expired March 1, 2008, and the state obtained an extension to allow the state to amend its law to eliminate spousal impoverishment protections in the 2008 state budget just enacted. This amendment was in fact made in April 2008.[10] Based on this amendment, the state will submit its request to renew the TBI waiver without spousal protections, and when this is granted, it will begin reassessing current waiver participants and re-budgeting them to eliminate their spousal protections.

Lombardi Waiver—The Lombardi waiver expires on December 31, 2008. The state is preparing its renewal application. Presumably, unless the state eliminates spousal protections, CMS will refuse to grant the renewal. The state did not eliminate spousal protec-

tions for this waiver in the 2008 budget enacted in April 2008, given the hope that some change could be achieved in the next few months—whether from Congress, from within CMS, or through litigation. About 27,000 individuals receive Lombardi services throughout the state. The State Department of Health estimates that 3,500 of these would be affected if spousal protections are eliminated, but there is no central database to compile this figure.

Advocacy Strategies—Various efforts have been and are being made. First, while the Nursing Home Transition & Diversion waiver was still pending in 2006, Section members Rene Reixach, Tony Szczygiel, and Valerie Bogart joined with disability rights advocates as well as with the State Department of Health in trying to persuade CMS to grant the waiver with spousal protections. These efforts were unsuccessful. Second, led by the National Senior Citizens Law Center, efforts to amend the federal Medicaid law with a technical amendment were attempted during the enactment of the federal budget in 2007 and as part of the CHAMP or S-CHIP legislation in 2007, which extended the Children's Health Insurance Program. This was also unsuccessful. Third, litigation is being contemplated that would challenge the federal interpretation. Plaintiffs would be people in the TBI and Nursing Home Transition & Diversion Waivers who will be affected by the elimination of spousal impoverishment in these waivers later in 2008. If efforts are not successful, then the state will be in the difficult position of having to choose between having the waiver denied by CMS in its entirety, because it includes spousal protections, or of continuing the waiver but eliminating spousal impoverishment protections for those participants who now use it.

Action Alert—If you know married participants of the TBI waiver program who are now utilizing spousal impoverishment protections or prospective applicants for the TBI or Nursing Home Transition & Diversion Waiver programs who are married and would benefit from spousal protections, please call or e-mail Valerie J. Bogart, Selfhelp Community Services, Inc. 212.971.7693 vbogart@selfhelp.net.

Endnotes

1. 42 U.S.C. § 1396r-5. The allowance from the IS is called the "community spouse monthly income allowance" (CSMIA). 42 U.S.C. § 1396r-5(d)(2).
2. NY Social Services Law § 366(6), 367-c; Long Term Home Health Care Program (LTHHCP) Reference Manual (June 2006, 219 pp.), available at http://www.health.state.ny.us/health_care/medicaid/reference/lthhcp.
3. N.Y. Pub Health §§ 2740 *et seq.*, 95 LCM-70, 96 INF-21; (HCBS/TBI) Program Manual (June 2006, 123 pp.), available at http://www.health.state.ny.us/health_care/medicaid/reference/tbi/docs/tbiprovidermanual.pdf.
4. Social Services Law § 366(6-a).
5. 42 U.S.C.S. § 1396a(a)(10)(A)(ii)(VI).
6. States may set as their income limit for nursing facility and HCBS services an amount up to 300% of the S.S.I. benefit rate, which is $1,869 for 2007. 42 U.S.C. § 1396b(f)(4)(C).
7. Gene Coffey, Statement of the National Senior Citizens Law Center Regarding CMS' Position on Spousal Impoverishment Protections in HCBS Waiver Programs, 2007, on file with Selfhelp Community Services, Inc. (hereinafter "NSCLC Memo.") (may be posted on www.nsclc.org by the time this article is published).
8. For a complete analysis of the defective reasoning, see the NSCLC Memo, n. 7, *supra.*
9. Section 6071 of the Deficit Reduction Act, see Gene Coffey, *Money Follows the Person 101*, *available at* NSCLC website (may need to register first) http://nsclc.org/areas/medicaid/article.2008-01-23.2399931224/at_download/attachment.
10. *See* http://assembly.state.ny.us/leg/?bn=A09808&sh=t, Sec. 51 and 52, amending Social Services Law § 366-c, subd. 4.

Valerie J. Bogart is Director of the Evelyn Frank Legal Resources Program Selfhelp Community Services Inc. in New York City. She received her J.D. from the New York University School of Law.

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Alternative Filing Requirements for a Grantor Trust

By Salvatore M. Di Costanzo

Since the enactment of the Deficit Reduction Act, most of us have turned to the Income Only Trust as a preferential advanced planning technique to protect our clients' assets. Often, the trust is prepared to protect the homestead or other real estate of the client. At times, it may also be prudent to transfer liquid assets to the trust such as cash, money markets or other types of marketable securities. In doing so, the trust may generate income, giving rise to certain tax filing requirements. However, it may not always be necessary to file a tax return if the trustee takes certain actions.

A properly drafted Income Only Trust is usually designed to be a grantor trust for income tax purposes. Having the creator of the trust retain sufficient control over the income and principal of the trust does this. If the trust is a grantor trust, the creator is treated as the owner of the income and/or principal of the trust and consequently, those items of income—deduction, credit, etc., attributable to income and/or principal—are taxable to the creator at the individual level.[1] For instance, if the creator reserves the power to reacquire trust property by substituting other property of equivalent value, the creator will be treated as the owner of all the trust property (e.g., income and principal) and consequently, all the income of the trust will be taxed to the creator.[2] If husband and wife jointly create an Income Only Trust structured as a grantor trust, they will both be considered owners of the trust in proportion to their contributions. [3]

Generally, the trustee of a grantor trust must file Form 1041 by the 15th day of the fourth month following the close of its taxable year if the trust (i) generates any taxable income for the year, (ii) has gross income for the year of $600 or more or (iii) has a non-resident alien beneficiary.[4] Since the trust is considered owned by the creator for income tax purposes, Form 1041 is merely an informational tax return (also referred to as a skeleton return). Procedurally, a statement detailing the items of income, deduction, and credit that are taxable to the creator accompanies Form 1041. Form 1041 contains no information other than identifying information of the creator and the trust. The front page of Form 1041 usually includes the following statement, "Under the terms of the trust instrument, this is a grantor trust. All income is taxed to the grantor under IRC § 671-678. A statement of income, deductions and credits is attached." A sample Form 1041, page 1 (Appendix A) appears on page 23 and a grantor letter (Appendix B) appears on pp. 24-25.

After January 1, 1996, where a trust is treated as being owned by one creator, the trustee is afforded two alternative reporting methods prescribed by the Treasury Regulations ("Regulations") as simplified alternatives to filing a tax return.[5] A husband and wife who file a joint tax return are treated as one grantor for tax purposes. If the trustee follows the procedures outlined in the Regulations for one of the following optional reporting methods, the trustee is not required to file Form 1041. The two alternative options are discussed below.

Option One[6]

The trustee must furnish the name and taxpayer identification number of the person treated as the owner of the trust and the address of the trust to all payors of income. The trustee obtains the creator's information by having the creator complete Form W-9. When each payor files its respective Form 1099s with the Internal Revenue Service, such information will be reported under the creator's social security number, not the tax identification number of the trust. Unless the creator is also a trustee, when the trustee receives each Form 1099 from the payors, the trustee is required to deliver these forms to the creator together with a statement that (i) identifies the payor, (ii) shows all items of income, deduction, and credits attributable to the creator, (iii) provides the creator with information necessary to compute the return and (iv) informs the creator that all items of income, deduction, and credits shown on the statement must be reported by the creator on the creator's tax return.

Option Two[7]

The trustee must furnish the trust's name, tax identification number, and address to all payors of income. When the trustee receives Forms 1099, the trustee must file its own Form 1099 with the Internal Revenue Service to report such amounts being received by the trust and paid to the creator from the trust. The trustee then prepares and delivers the same statement as described in Option One (except for (i)) to the creator so the creator can prepare its tax return.

The statement required in both of the above options can be prepared in similar format to the grantor letter and its accompanying statements that appear on pp. 24-25.

The Regulations allow the trustee to switch between filing Form 1041 and electing one of the optional reporting methods.[8] If this is done, the trustee must file a final Form 1041.

Getting a client to understand the tax complexities of an Income Only Trust can sometimes be a daunting task. However, if you can effectively communicate the tax filing requirements to your clients and or their accountant and then offer one of the alternative options, you will most likely save the clients money on an annual basis and avoid unnecessary penalties and interest for clients who undoubtedly are less than diligent in filing tax returns. Initially, it may be difficult for the trustee to understand and implement. However, once an option is chosen and identification numbers are provided to the payors, a template grantor letter can be creator and utilized each year.

In my opinion, providing the payors with the creator's social security number and delivering a grantor letter to the creator each year is the easiest option for the trustee. Regardless of the option chosen, since the trustee of an Income Only Trust is usually a child of the creator, carrying out the procedures of one of the alternative options should not be too difficult of a task, or is it?

Endnotes

1. Treasury Regulation § 1.671-4(a).
2. I.R.C. § 674(4)(c).
3. Treasury Regulation § 1.671-4(b)(8).
4. I.R.C. § 641.
5. Treasury Regulation § 1.671-4(b)(2).
6. Treasury Regulation § 1.671-4(b)(2)(i)(A).
7. Treasury Regulation § 1.671-4(b)(2)(i)(B).
8. 1.67104(g).

Salvatore M. Di Costanzo is a partner with the firm of McMillan, Constabile, Maker & Perone, LLP. Mr. Di Costanzo is an attorney and accountant whose main areas of practice include Trusts and Estates, Tax Law and Elder Law. Prior to being a partner with McMillan, Constabile, Maker & Perone, LLP, Mr. Di Costanzo was an attorney with Ernst & Young, LLP in its estate and business succession planning group, where he provided estate planning and income tax services for individuals, corporate executives, and closely held business owners, as well as estate and trust taxation and administration services. Prior to practicing law, Mr. Di Costanzo was an auditor with Deloitte & Touche, LLP in Stamford, CT. He earned a B.B.A. in accounting from Siena College and a J.D. from Pace University School of Law. Mr. Di Costanzo is a member of the National Academy of Elder Law Attorneys and is active in the Real Property, Elder Law and Tax Sections of the New York State Bar Association. He is also the current co-chair of the Elder Law Committee of the Westchester County Bar Association. He is licensed to practice law in New York, Connecticut, the United States District Court for the Southern District of New York and the United States Tax Court. Mr. Di Costanzo is a regular contributing author for the *Elder Law Attorney* on various tax matters affecting the practice of elder law. He can be reached at (914) 834-3500 or via e-mail at smd@mcmillanconstabile.com.

Department of the Treasury — Internal Revenue Service

Form **1041** **U.S. Income Tax Return for Estates and Trusts** **2007** OMB No. 1545-0092

A Type of entity (see instr): For calendar year 2007 or fiscal year beginning , 2007 and ending

- [ ] Decedent's estate
- [ ] Simple trust
- [ ] Complex trust
- [ ] Qualified disability trust
- [ ] ESBT (S portion only)
- [X] Grantor type trust
- [ ] Bankruptcy estate — Chapter 7
- [ ] Bankruptcy estate — Chapter 11
- [ ] Pooled income fund

The Sally Jones Income Only Trust
Julie Stevens
Trustee
2180 Boston Post Road
Larchmont, NY 10538

C Employer identification number: 26-3872910

D Date entity created: 4/15/2007

E Nonexempt charitable and split-interest trusts, check applicable boxes (see instr):
- [ ] Described in section 4947(a)(1)
- [ ] Not a private foundation
- [ ] Described in section 4947(a)(2)

B Number of Schs K-1 attached (see instructions)... ►

F Check applicable boxes: [X] Initial return [ ] Final return [ ] Amended return [ ] Change in trust's name [ ] Change in fiduciary [ ] Change in fiduciary's name [ ] Change in fiduciary's address

G Check here if the estate or filing trust made a section 645 election..... ► [ ]

Income

1 Interest income — 1
2a Total ordinary dividends — 2a
b Qualified dividends allocable to: (1) Beneficiaries (2) Estate/trust
3 Business income or (loss). Attach Schedule C or C-EZ (Form 1040) — 3
4 Capital gain or (loss). Attach Schedule D (Form 1041) — 4
5 Rents, royalties, partnerships, other estates and trusts, etc. Attach Schedule E (Form 1040) — 5
6 Farm income or (loss). Attach Schedule F (Form 1040) — 6
7 Ordinary gain or (loss). Attach Form 4797 — 7
8 Other income. List type and amount — 8
9 **Total income.** Combine lines 1, 2a, and 3 through 8 ► 9

Under the terms of the trust instrument, this is a grantor trust. All income is taxable to the grantor as set forth under sections 671 - 678 I.R.C. A statement of income, deductions, and credits is attached.

Deductions

10 Interest. Check if Form 4952 is attached ► [ ] — 10
11 Taxes — 11
12 Fiduciary fees — 12
13 Charitable deduction (from Schedule A, line 7) — 13
14 Attorney, accountant, and return preparer fees — 14
15a Other deductions **not** subject to the 2% floor (attach schedule) — 15a
b Allowable miscellaneous itemized deductions subject to the 2% floor — 15b
16 Add lines 10 through 15b ► 16
17 Adjusted total income or (loss). Subtract line 16 from line 9 — 17
18 Income distribution deduction (from Schedule B, line 15). Attach Schedules K-1 (Form 1041) — 18
19 Estate tax deduction including certain generation-skipping taxes (attach computation) — 19
20 Exemption — 20
21 Add lines 18 through 20 ► 21

Tax and Payments

22 Taxable income. Subtract line 21 from line 17. If a loss, see instructions — 22
23 **Total tax** (from Schedule G, line 7) — 23
24 Payments: a 2007 estimated tax payments and amount applied from 2006 return — 24a
b Estimated tax payments allocated to beneficiaries (from Form 1041-T) — 24b
c Subtract line 24b from line 24a — 24c
d Tax paid with Form 7004 (see instructions) — 24d
e Federal income tax withheld. If any is from Form(s) 1099, check ► [ ] — 24e
Other payments: f Form 2439 ____; g Form 4136 ____; Total ► 24h
25 **Total payments.** Add lines 24c through 24e, and 24h ► 25
26 Estimated tax penalty (see instructions) — 26
27 **Tax due.** If line 25 is smaller than the total of lines 23 and 26, enter amount owed — 27
28 **Overpayment.** If line 25 is larger than the total of lines 23 and 26, enter amount overpaid — 28
29 Amount of line 28 to be: **a Credited to 2008 estimated tax** ► ; **b Refunded** ► 29

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

► Signature of fiduciary or officer representing fiduciary — Date — ► EIN of fiduciary if a financial institution

May the IRS discuss this return with the preparer shown below (see instrs)? [X] Yes [ ] No

Paid Preparer's Use Only

Preparer's signature ► Salvatore M. DiCostanzo, Esq. — Date — Check if self-employed ► [X] — Preparer's SSN or PTIN: P00078485

Firm's name (or yours if self-employed), address, and ZIP code ► MCMILLAN, CONSTABILE, MAKER & PERONE, LLP, 2180 BOSTON POST RD, LARCHMONT, NY 10538-3616 — EIN 13-3751918 — Phone number (914) 834-3500

BAA For Privacy Act and Paperwork Reduction Act Notice, see separate instructions. FIFA0105L 10/15/07 Form **1041** (2007)

Grantor 1
Page 1

2007 Federal Grantor Information

The Sally Jones Income Only Trust
Julie Stevens
2180 Boston Post Road
Larchmont, NY 10538

Grantor Name and Address	Trust Tax ID:	26-3872910
Sally Jones 2180 Boston Post Road Larchmont, NY 10538	Grantor ID/SSN:	976-54-5348
	% Ordinary Income:	100.000000
	% Capital Gain/Loss:	100.000000

The following income, deductions and credits are to be reported on the income tax return of the above named grantor.

Income

Ordinary Dividends (Enter on Line 9a, Form 1040)	(See Statement 1)	875.
Qualified Dividends (Enter on Line 9b, Form 1040)	(See Statement 2)	654.
Capital Gain Distributions (Enter on Line 13f, Schedule D, Form 1040)	(See Statement 3)	7,436.
Interest (Enter on Line 1, Schedule B, Form 1040)	(See Statement 4)	6,875.

FIFL0213L 07/15/03

2007	Federal Statements	Page 1
Client 6007	The Sally Jones Income Only Trust	26-3872910
5/02/08		04:01PM

Statement 1
Income
Ordinary Dividends

Merrill Lynch	$	875.
Total	$	875.

Statement 2
Income
Qualified Dividends

Merrill Lynch	$	654.
Total	$	654.

Statement 3
Income
Capital Gain Distributions

Merrill Lynch	$	7,436.
Total	$	7,436.

Statement 4
Income
Interest

Wachovia	$	6,875.
Total	$	6,875.

Advance Directive News: Proposed Living Will Legislation

By Ellen G. Makofsky

New York authorizes surrogate medical decision-making through the Health Care Proxy, which allows for the appointment of an agent to make medical decisions for an incapacitated person.[1] Currently New York does not have a statutory Living Will but does recognize the Living Will by case law.[2] In 2007 the Elder Law Section and the Trusts and Estates Section jointly proposed new legislation to amend Public Health Law Article 29-C by including a Living Will provision in the Health Care Proxy Law.[3] This proposed legislation was envisioned as a way to provide New Yorkers with another forum to express their health care wishes.[4] The aim of the legislation is to codify existing case law and make certain changes to the Health Care Proxy form.

Following an endorsement by the House of Delegates of the NYSBA, the Bar Association actively sought passage of the legislation. On April 25, 2007 a bill reflecting the proposed legislation was introduced in the New York Senate by Senator De Francisco.[5] It was then referred to the Senate's Health Committee, where it remains. Similarly in June 2007, Assemblywoman Weinstein introduced the legislation in the Assembly[6] and the Bill was subsequently referred to the Assembly's Health Committee. One year later, the NYSBA stands firmly behind the proposal and plans are currently underway to advocate for the legislation with legislators De Francisco and Weinstein during the Elder Law Section's Lobby Day.

The proposed legislation defines a Living Will as a written statement of health care wishes[7] and does not limit the statement of an individual's wishes to issues of death and dying. For example, an individual with diabetes can include a statement in his or her Living Will refusing amputation under any circumstances. The proposal does not mandate use of a specific form. One reason is that no one form would be appropriate for everyone as an individual's wishes are influenced by personal experience as well as moral, ethical and religious beliefs. Another reason is that individuals might feel compelled to execute a statutory form that did not reflect his or her actual wishes.

Pursuant to the proposed legislation, if an individual has designated a health care agent in a Health Care Proxy, the agent's directions are the "gold standard." Accordingly, where both a Health Care Proxy and a Living Will are in existence and present some conflict, the directions of the health care agent will be honored unless the Living Will specifically says otherwise. This rationale is based on the idea that health care wishes change as one ages or as health deteriorates. The Living Will can only reflect the thoughts of the individual at the time the document was executed. In contrast, the health care agent has the ability to learn of changes in regard to health care wishes through ongoing discussions with the principal. The legislation promotes the idea that the Living Will is not the exclusive means of expressing wishes but rather constitutes evidence of what a person would have wanted. Of course where no Health Care Proxy exists or the designated agent is unavailable, under the proposed legislation, the Living Will would control.

The proposal makes two modifications to the current Health Care Proxy form. One allows the individual to indicate on the Health Care Proxy whether or not the individual wishes to be an organ or tissue donor.[8] The other is the inclusion of HIPAA language on the form so there is no confusion or doubt that the health care agent is entitled to access to the principal's medical records.

We can only wait and see if New York will adopt the proposed Living Will legislation.

Endnotes

1. The form of a Health Care Proxy is codified in Article 29-C of the N.Y. Public Health Law.
2. *In re O'Connor,* 72 N.Y.2d 517, 528(1988).
3. Amy O'Connor, a member of the Executive Board of the Elder Law Section, was instrumental in drafting the proposed legislation.
4. New York is one of only three states that does not have a Living Will Statute (Massachusetts and Michigan are the other two states.)
5. SB5270.
6. A8995.
7. In proposing a statutorily recognized Living Will the proponents did not want to create additional barriers to having the Living Will recognized as evidence of a person's wishes regarding health care. With this in mind, the legislation only requires that the Living Will be a writing, and there are no particular execution requirements which must be followed in order to have the document recognized as a valid one.
8. Article 29-C of the N.Y. Public Health Law as amended already provides that a Health Care Proxy can include instructions regarding organ and tissue donation. However, the Health Care Proxy form contained within the statute was not changed to include these optional provisions.

Ellen G. Makofsky is a *cum laude* graduate of Brooklyn Law School. She is a partner in the law firm of Raskin & Makofsky with offices in Garden City, NY.

Recent New York Cases

By Judith B. Raskin

Fiduciary Not Liable to Nursing Home

Plaintiff nursing home sought payment of deceased resident's outstanding bill from the transferee of the resident's real property. Dismissed. *Ruby Weston Manor v. Vidal*, N.Y.L.J, p. 19, col. 3 (Sup. Ct., Kings County, January 11, 2008).

Defendant transferred her aunt's real property to herself by power of attorney approximately 6 weeks prior to her aunt's entry into the plaintiff's nursing facility in 2002. Defendant sold the property while her aunt was still in the facility and dispersed the proceeds. Plaintiff's nursing home provided care for about a year. Following the resident's death in 2004, the facility sued the defendant for payment of its unpaid fees plus interest totaling over $110,000. The defendant moved for summary judgment.

The court granted summary judgment to the defendant, finding that: 1) the plaintiff had no contractual relationship with the defendant; 2) the defendant's fiduciary duty under the power of attorney was to the decedent, not the facility; 3) the plaintiff cannot claim unjust enrichment as against the defendant; 4) there was no outstanding debt to the plaintiff at the time of the conveyance; 5) there was insufficient evidence to show that the resident was rendered insolvent as a result of the transfer; 6) the plaintiff failed to submit evidence of a debt owing to it from the resident such as a contract, accounting, statement or invoice; 7) the plaintiff failed to join the resident's estate; and 8) the plaintiff failed to get a monetary judgment prior to commencing the action.

Nursing Home Entitled to Interest

The Public Administrator paid a nursing home the decedent's unpaid NAMI plus interest. The Public Administrator then sought return of the interest paid. Denied. *Estate of Mayo*, 2008 NY Slip Op. 50153U, 18 Misc. 3d 1121A, 2008 N.Y. Misc. LEXIS 211 (Surr. Ct., Bronx County, January 28, 2008).

The decedent resided in a nursing home prior to her death. Medicaid paid for her care less her net available monthly income (NAMI). Decedent failed to pay $49,935.56 of her NAMI due the facility. When the resident died, the Public Administrator paid the nursing home the back payments due plus interest of $33,091.17 as requested by the nursing home. In this proceeding to judicially settle the Public Administrator's account, the Public Administrator sought return of the interest it had paid. The nursing home argued it was entitled to the interest.

The court held that the decedent breached her contract with the nursing home. The nursing home was entitled to the same 9% interest the decedent would have had to pay.

Exoneration Provision in Power Held Void

The administrator of an estate sought turnover of assets taken by the attorney-in-fact who defended his actions by citing an exoneration provision in the document. Summary judgment granted to administrator. *Estate of Francis*, N.Y.L.J., p. 27, col. 1 (Surr. Ct., Westchester County, April 1, 2008).

Respondent rented an apartment with his mother in the two-family house owned by the decedent, who lived upstairs. Decedent's nephew was her sole distributee and the beneficiary under a will she had executed in 1987.

When the decedent was 98 years old in 2001, the respondent drafted a power of attorney that the decedent signed. The document included added language which read in part: "full authority to make gifts in any amounts and at any time to any person, including my attorney-in-fact himself." and "My attorney-in-fact shall not incur any liability to me, my estate, my heirs, successors or assigns or to anyone else for acting or refraining from acting under this document."

The day after the decedent executed the document, the respondent converted $240,000 of the decedent's accounts for his benefit. Three months later he prepared and executed on behalf of decedent a lifetime tenancy for himself, his mother and one other person jointly with right of survivorship.

Petitioner moved for summary judgment ordering the respondent to turn over decedent's assets or assets of equal value, to set aside the tenancy agreement and to compel respondent to account. Respondent argued that the exoneration clause in the power of attorney absolved him of any wrongdoing, that he was authorized by the document to take the actions he did and that the statute of limitations on conversion had run.

The court granted summary judgment to the petitioner. The action was one for breach of fiduciary duty which has a statute of limitations of six years. The provision exonerating the agent is void and against public policy. The agent has a fiduciary duty to the principal that cannot be waived and there was no evidence that any of the agent's actions benefited the decedent in any way.

Trust Conversion to SNT Approved

Trustee petitioned to convert a trust created under his father's will for his disabled sister to a supplemental needs trust. Granted. *In re Estate of Newman*, 2008 N.Y. Slip Op. 50127(U) (Surr. Ct., Bronx County, January 22, 2008).

A father's will provided a trust for his disabled daughter for her lifetime, remainder to his sons. Several years after his father's death, the only surviving son, as Trustee, sought to convert the $500,000 trust to a supplemental needs trust. The guardian *ad litem* objected because the petitioner son stood to benefit from the preservation of trust assets.

The court granted the conversion to a supplemental needs trust. The change reflected the testator's intent. He wished to protect his daughter and provide for her during her lifetime. By naming his sons as trustees he obviously was comfortable that his sons would properly provide for their sister.

Payments to Legal Aliens

Legal aliens no longer eligible for SSI and ASP sought increased payments from New York State to compensate them for their loss of those benefits. Granted. *Khrapunskiy et al. v. Doar*, 2008 NY Slip Op. 351, 2008 N.Y. App. Div. LEXIS 316 (App. Div. 1st Dep't, January 17, 2008).

Legal aliens who failed to become American citizens in seven years became ineligible for SSI and additional state payments (ASP). New York residents who lost those benefits brought this class action to require New York State to compensate them for the loss of SSI and ASP. They wanted the state to increase their grants for safety net assistance under Social Services Law § 131-a(2) to the much greater monthly standard of need set by the Legislature in Social Services Law § 209(2).

The Supreme Court, New York County, held that the state must provide adequate assistance to this class by compensating the members of the class for their loss of SSI and ASP. The state appealed.

The Appellate Division affirmed. States were given the option of providing financial support in addition to SSI. New York State did provide, in Social Services Law § 209(2), for additional payments for qualifying residents with a determined monthly standard of need. The legal aliens who lost their SSI and ASP were denied adequate assistance even though their need had not changed. New York must continue to provide assistance based on the level of monthly need established by the Legislature.

Judith B. Raskin is a member of the law firm of Raskin & Makofsky. She is a Certified Elder Law Attorney (CELA) and maintains memberships in the National Academy of Elder Law Attorneys, Inc., the Estate Planning Council of Nassau County, Inc., and NYS and Nassau County Bar Associations. She is the current chair of the Legal Advisory Committee of the Alzheimer's Association, Long Island Chapter.

NEW YORK STATE BAR ASSOCIATION

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The Renaissance, *(pictured left),* is located on the Inner Harbour, adjoins the Gallery Mall, and is connected to the Harbour Place Pavilions and waterfront.

NYSBA

Elder Law Section
Summer Meeting

Renaissance Harborplace Hotel
Baltimore, MD
August 14-17, 2008

Co-sponsored by the Maryland State Bar Association Elder Law Section

The New York State Bar Association's Meetings Department has been certified by the NYS Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York.

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PLEASE SEE SEPARATE SCHEDULE ON P. 33 FOR SOCIAL EVENTS BEING HELD IN CONJUNCTION WITH THE MCLE MEETING.

Thursday, August 14

8:30 a.m. - 5:30 p.m. **REGISTRATION**

9:00 a.m. - 10:00 a.m. **EXECUTIVE OFFICERS' MEETING**

10:15 a.m. - 1:30 p.m. **EXECUTIVE COMMITTEE MEETING AND LUNCHEON**

1:45 p.m. - 5:35 p.m. **GENERAL SESSION**

1:45 p.m. - 1:55 p.m. **WELCOMING REMARKS**

ELDER LAW SECTION CHAIR
TIMOTHY E. CASSERLY, ESQ.
Burke & Casserly, PC
Albany

ELDER LAW SECTION PROGRAM CHAIR
HOWARD S. KROOKS, ESQ.
Elder Law Associates PA
Boca Raton, FL

2:00 p.m. - 2:50 p.m. **KEYNOTE SPEAKER – IMPLEMENTING THE DEFICIT REDUCTION ACT OF 2005: MEDICAID POLICIES AFFECTING THE ELDERLY AND INDIVIDUALS WITH DISABILITIES**

Since passage of the DRA, the Centers for Medicare and Medicaid Services (CMS) has issued numerous regulations, State Medicaid Director letters and other policy guidance. This summary will focus on key provisions of the law and the CMS policy, including: rules on transfers of assets, annuities, home equity limits; new options for states to provide services to individuals in the community; provisions giving individuals more autonomy and control over their own care; and initiatives to ensure continuous quality improvement in home and community-based service.

BARBARA J. COLLINS, ESQ.
Office of the General Counsel, CMS Division
US Department of Health and Human Services
Baltimore, MD

2:50 p.m. - 3:40 p.m. **ELDER LAW UPDATE – THE HOTTEST AND MOST UP-TO-DATE ISSUES IN ELDER LAW**

LOUIS W. PIERRO, ESQ.
The Pierro Law Group, LLC
Albany

3:40 p.m. - 3:50 p.m. Refreshment Break

3:50 p.m. - 4:40 p.m. **HEALTH CARE ADVANCE DIRECTIVES PLANNING: CHANGING A TRANSACTIONAL APPROACH TO A COMMUNICATIONS APPROACH**

Since the mid-1970s, health care advance directives have become the central legal tool to make sure one's health care wishes are known in a formal way and, it is hoped, followed. However, whether advance directives laws can achieve that goal is very much an open question. This presentation provides a national overview of the evolving legal landscape of end-of-life decision making generally, and advance directives specifically, and describes fundamental policy and practice shift from a legal transactional approach to a communications approach for advance care planning.

CHARLES A. SABATINO, ESQ.
Director, ABA Commission on Law and Aging
Washington, D.C.

4:40 p.m. - 5:35 p.m. **"REBALANCING" MEDICAID'S COVERAGE OF LONG-TERM CARE**

The controversial changes the DRA made to Medicaid's LTC eligibility rules received, not surprisingly, a great deal of attention. But capturing less attention while being of almost equal importance were the methods the DRA offered states to "rebalance" their Medicaid LTC programs from a reliance on facility care to community-based care. For example, the DRA allocated $1.7 billion for the "Money Follows the Person" program to help Medicaid-enrolled nursing facility residents move back to the community (New York was awarded $82 million), and the law also created a new home and community-based care services benefit and opportunities for beneficiaries to "self-direct" their personal care. These DRA products run parallel with other federal and state efforts to drastically reduce Medicaid's reliance on nursing facilities for delivery of LTC through "diversion" and other "transition" programs. This workshop will present an overview of the national efforts to rebalance LTC, identify New York's particular rebalancing plans and discuss the financial eligibility issues relevant to these programs.

GENE COFFEY, ESQ.
National Senior Citizens Law Center
Washington, D.C.

Friday, August 15

7:30 a.m. - 12:30 p.m. **REGISTRATION**

7:15 a.m. - 8:20 a.m. **COMMITTEE BREAKFAST MEETINGS**

8:30 a.m. - 12:10 p.m. **GENERAL SESSION**

8:30 a.m. - 8:40 a.m. **NYSBA WELCOME**
BERNICE K. LEBER, ESQ.
President, New York State Bar Association
Arent Fox PLLC
New York City

8:40 a.m. - 9:30 a.m. **CLASS ACTION MEDICAID LITIGATION FROM A TRIAL LAWYER'S PERSPECTIVE**
- What Kinds Of Medicaid Issues Are Worth Presenting In A Class Proceeding, and Why
- What The Plaintiff's Bar Can Learn From Elder Law Attorneys – and Vice-Versa
- State Plans, State Law and Section 1983

WILLIAM K. MEYER, ESQ.
Zuckerman Spaeder LLP
Baltimore, MD

9:30 a.m. - 10:20 a.m. **DRAFTING THE PERFECT TRUST**
- Trust Protectors – Pros and Cons
- Have You Taken A Look At Your Boilerplate Provisions Lately? (What Provisions Are Worth Including In Your Trusts)
- Trustee Removal/Succession Issues
- Planning With IRAs (Including Income In Respect Of A Decedent)

WILLIAM A. CONWAY, ESQ.
Principal, WealthCounsel LLC
Law Offices of William A. Conway, P.C.
McLean, VA

10:20 a.m. - 10:30 a.m. Refreshment Break

10:30 a.m. - 11:20 a.m. **PLANNING WITH TRUSTS – NON-MEDICAID ISSUES**
- Why Are So Many Trusts Leaving NY?
- Why A Corporate Trustee?
- Asset Protection Trusts
- Dynasty Trusts

THOMAS M. FORREST, CPA
President, Charles Schwab Bank, Personal Trust Services Division
Wilmington, DE

WILLIAM A. CONWAY, ESQ.
Principal, WealthCounsel LLC
Law Offices of William A. Conway, P.C.
McLean, VA

11:20 a.m. - 12:10 p.m. **IS MEDICAID AND ESTATE PLANING IN A GUARDIANSHIP STILL POSSIBLE POST DRA?**
- Update On Guardianship Practice, Decisions Of Interest And Proposed Legislation
  IRA K. MILLER, ESQ.
  Brooklyn
- Is Medicaid And Estate Planning In A Guardianship Still Possible Post DRA?
  ANTHONY J. ENEA, ESQ.
  Enea, Scanlan & Sirignano LLP
  White Plains

Saturday, August 16

8:00 a.m. - 12:00 p.m. **REGISTRATION**

8:30 a.m. - 12:00 p.m. **GENERAL SESSION**

8:30 a.m. - 9:20 a.m. **MEDICAID WAIVERS AND MEDICAL LEVELS OF CARE**
States facing budgetary pressures may be tempted to tighten the eligibility rules for Medicaid. One possible way to restrict eligibility is to make it more difficult for applicants to be determined to be medically in need for long-term care. Learn about how Maryland has established medical level of care standards and how the elder law bar has responded, particularly regarding home and community based waiver programs.

JASON A. FRANK, ESQ.
FRANK, FRANK & SCHERR, LLC
LUTHERVILLE, MD

MORRIS KLEIN, ESQ.
BETHESDA, MD

Saturday, August 16 (Continued)

9:20 a.m. - 10:10 a.m. **LONG-TERM CARE INSURANCE**

JULIE GELBWAKS, CLTC
Gelbwaks Insurance Services Inc.
Plantation, FL

ABRAHAM I. GRUENWALD, CLU
65 Plus - The Health Care Safety Net
Suffern

LOUIS W. PIERRO, ESQ.
The Pierro Law Group, LLC
Albany

10:10 a.m. - 10:20 a.m. Refreshment Break

10:20 a.m. - 11:10 a.m. **CUTTING EDGE POLICY ISSUES IN POWERS OF ATTORNEY**

Compare the latest proposals to amend the New York Power of Attorney Law with the Uniform Power of Attorney Act (drafted by the National Conference of Commissioners on Uniform State Laws) which has been introduced in the Maryland Legislature this year.

ROSE MARY K. BAILLY, ESQ.
NYS Law Review Commission
Albany

MICHAEL W. DAVIS, ESQ.
Davis, Agnor, Rapaport & Skainy, L.L.C.
Columbia, MD

11:10 a.m. - 12:00 p.m. **INVESTING IN 2008 - ARE YOU SMARTER THAN A FIFTH GRADER?**

- Mutual Funds – "A" Shares, "B" Shares, "C" Shares – Does It Matter?
- Closed End Funds – You Mean They're Not The Same As Mutual Funds?
- Annuities – Will Your Clients Ever Understand Them?
- Subprime Exposure – Do Your Clients Have It?
- Ethics and Famous Lawyers

DAVID A. WEINTRAUB, ESQ.
Law Office of David A. Weintraub, PA
Ft. Lauderdale, FL

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SPECIAL DISCOUNTS: The Elder Law Section has approved a policy which allows for a 50% discount on the registration fees for all Elder Law Section members who practice in government, public sector or as Court personnel. **This discount is not automatic and must be requested in writing as stated above under Discounts and Scholarships. Where applicable, members of the Judiciary may also register as a guest and pay the reduced guest registration fee.**

BALTIMORE

Baltimore is renowned for its bustling Inner Harbor and many waterfront attractions, but the city today actually offers a great deal more. Baltimore's rich cultural heritage is rooted firmly in its diverse neighborhoods, with a variety of arts, theater, history and culture appealing to a wide range of visitors. Whether you travel by water taxi, bus, car – or even on foot – you'll find Baltimore an easy city to enjoy.

The family-oriented attractions and sporting events around the Inner Harbor include the distinguished collections of the city's fine museums, a wide array of live theatrical performances and numerous sites of historical interest.

Beyond the Inner Harbor, charming neighborhoods beckon, each with its own proud ethnic heritage and culinary traditions. From the cultural mecca of Mt. Vernon to the kitchens of Greektown and Little Italy, and from the cobblestone streets of Fell's Point to the view atop Federal Hill, Baltimore offers many unique and unforgettable experiences.

Thursday, August 14

6:00 p.m. - 7:00 p.m. **COCKTAIL RECEPTION – RENAISSANCE COURTYARD**
DINNER ON YOUR OWN

Friday, August 15

2:00 p.m. **NATIONAL AQUARIUM –** A limited number of tickets have been purchased for a discounted admission to the aquarium and for the dolphin show. The aquarium is a very popular tourist attraction. These tickets enable you to enter at an appointed time (2:15 p.m.), without having to go and reserve times for another day and/or time. Be sure to walk over in time for the special 2:15 p.m. admission. Cost is $22.95 per adult; $13.95 for ages 12-1 and $11.95 for ages 3-11.

6:30 p.m. **CRAB FEAST – PHILLIPS HARBORPLACE RESTAURANT**
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Saturday, August 16

2:00 p.m **TOUR OF CAMDEN YARDS** – Meet in the lobby and join others for the walk over to Camden Yards for a tour that includes the Orioles dugout, the Press Level, the Scoreboard/JumboTron control room, and the exclusive Suite Level. Fans are also treated to a historical perspective of the Camden Yards area, including the B & O Railroad, Baltimore's Famous Inner Harbor and Babe Ruth's home. Cost is $5.00 per person.

NATIONAL AQUARIUM – A limited number of tickets have been purchased for a discounted admission to the aquarium and for the dolphin show. The aquarium is a very popular tourist attraction. These tickets enable you to enter at an appointed time (2:15 p.m.), without having to go and reserve times for another day and/or time. Be sure to walk over in time for the special 2:15 p.m. admission. Cost is $22.95 per adult; $13.95 for ages 12-1 and $11.95 for ages 3-11.

7:00 p.m. Join us for dinner, or following your dinner out, to meet up with fellow attendees at the **ESPN Zone** (601 East Pratt Street) for a final gathering of friends and colleagues.

For more information, go to www.nysba.org/ElderSummer08
or call (518) 463-3200

Section Committees and Chairs

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

Client and Consumer Issues
Frances Pantaleo
Walsh & Amicucci LLP
2900 Westchester Avenue, Suite 205
Purchase, NY 10577
FMP@walsh-amicucci.com

Communications
Howard S. Krooks
Elder Law Associates, PA
7000 W. Palmetto Park Road,
Suite 205
Boca Raton, FL 33433
hkrooks@elderlawassociates.com

Michael J. Amoruso
Amoruso & Amoruso, LLP
800 Westchester Avenue, Suite S-320
Rye Brook, NY 10573
michael@amorusolaw.com

Compact Legislation
Vincent J. Russo
Vincent J. Russo & Associates, PC
1600 Stewart Avenue, Suite 300
Westbury, NY 11590
vincent@vjrussolaw.com

Howard S. Krooks
Elder Law Associates, PA
7000 W. Palmetto Park Road,
Suite 205
Boca Raton, FL 33433
hkrooks@elderlawassociates.com

Elder Law Practice
David Goldfarb
Goldfarb Abrandt Salzman &
Kutzin LLP
350 Fifth Avenue, Suite 1100
New York, NY 10118-1100
goldfarb@seniorlaw.com

Robert J. Kurre
Robert J. Kurre & Associates, PC
1010 Northern Blvd, Suite 232
Great Neck, NY 11021
rkurre@kurrelaw.com

Estate and Tax Planning
Sharon Kovacs Gruer
Sharon Kovacs Gruer, PC
1010 Northern Boulevard, Suite 302
Great Neck, NY 11021
skglaw@optonline.net

Stephen J. Silverberg
Certilman Balin Adler Hyman LLP
90 Merrick Avenue, 8th Floor
East Meadow, NY 11554
ssilverberg@certilmanbalin.com

Family Law Issues
Marcia J. Boyd
Law Office of Marcia J. Boyd
290 Linden Oaks Office Park
Rochester, NY 14625
mjboyd@aol.com

Financial Planning and Investments
Walter T. Burke
Burke & Casserly, PC
255 Washington Ave. Ext.
Albany, NY 12205-5504
wburke@burkecasserly.com

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

Guardianships and Fiduciaries
Ira K. Miller
26 Court Street, Suite 400
Brooklyn, NY 11242-0103
ikmesq2@aol.com

Anthony J. Enea
Enea, Scanlan & Sirignano LLP
245 Main Street, 3rd Floor
White Plains, NY 10601
aenea@aol.com

Health Care Issues
Judith D. Grimaldi
Grimaldi & Yeung, LLP
9201 Fourth Avenue, 5th Floor
Brooklyn, NY 11209
jgrimaldi@ffglaw.com

Leadership Task Force
Sharon Kovacs Gruer
Sharon Kovacs Gruer, PC
1010 Northern Boulevard, Suite 302
Great Neck, NY 11021
skglaw@optonline.net

Michael J. Amoruso
Amoruso & Amoruso, LLP
800 Westchester Avenue,
Suite S-320
Rye Brook, NY 10573
michael@amorusolaw.com

Legal Education
Ellen G. Makofsky
Raskin & Makofsky
600 Old Country Road, Suite 444
Garden City, NY 11530-2009
EllenGM@aol.com

Marie Elena Rosaria Puma
Vincent J. Russo & Associates, PC
3740 Expressway Drive South
Hauppauge, NY 11749
mepuma@vjrussolaw.com

Legislation and Liaison to Public Agency
Michael J. Amoruso
Amoruso & Amoruso, LLP
800 Westchester Avenue,
Suite S-320
Rye Brook, NY 10573
michael@amorusolaw.com

Liaison to Legal Services & Nonprofit Organizations
Ellen P. Rosenzweig
Independence Care System
257 Park Avenue South, 2nd Floor
New York, NY 10010
rosenzweig@icsny.org

Liaison to the Judiciary
Colleen Lundwall
Supreme Court of State of N.Y.
140 Grand Street
White Plains, NY 10601-4834
clundwal@courts.state.ny.us

Liaison to the Legislature
Hon. Ann Carrozza
NYS Assembly
LOB 656
Albany, NY 12248
anncarrozza@aol.com

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

Long Term Care Insurance
Louis W. Pierro
The Pierro Law Group, LLC
20 Corporate Woods Boulevard,
3rd Floor
Albany, NY 12211
lpierro@pierrolaw.com

Long-Range Planning
Michael J. Amoruso
Amoruso & Amoruso, LLP
800 Westchester Avenue, Suite S-320
Rye Brook, NY 10573
michael@amorusolaw.com

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

Medicaid
Valerie J. Bogart
Selfhelp Community Services Inc.
520 Eighth Avenue, 5th Floor
New York, NY 10018
valbogart2@aol.com

Ira Salzman
Goldfarb Abrandt Salzman &
Kutzin LLP
350 Fifth Avenue, Suite 1100
New York, NY 10118
salzlaw@aol.com

Membership Services
Ellyn S. Kravitz
Littman Krooks LLP
655 Third Avenue, 20th Floor
New York, NY 10017
ekravitz@littmankrooks.com

Mental Health
Sharon Kovacs Gruer
Sharon Kovacs Gruer, PC
1010 Northern Boulevard, Suite 302
Great Neck, NY 11021
skglaw@optonline.net

Persons Under Disability
Lisa K. Friedman
Law Office of Lisa K. Friedman
232 Madison Avenue, Suite 909
New York, NY 10016
lkleef@aol.com

Real Estate and Housing
T. David Stapleton Jr.
Karpinski Stapleton Galbato &
Tehan
110 Genesee Street, Suite 200
Auburn, NY 13021
david@ksgtlaw.com

Technology
Patricia J. Shevy
The Shevy Law Firm, LLC
7 Executive Centre Drive, Suite 504
Albany, NY 12203
patriciashevy@shevylaw.com

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NEW YORK STATE BAR ASSOCIATION
LAWYER ASSISTANCE PROGRAM

ELDER LAW ATTORNEY

Section Officers

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

Chair-Elect
Michael J. Amoruso
Amoruso & Amoruso, LLP
800 Westchester Avenue, Suite S-320
Rye Brook, NY 10573
michael@amorusolaw.com

Vice-Chair
Sharon Kovacs Gruer
Sharon Kovacs Gruer, P.C.
1010 Northern Boulevard, Suite 302
Great Neck, NY 11021
skglaw@optonline.net

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

Treasurer
Anthony J. Enea
Enea, Scanlan & Sirignano LLP
245 Main Street, 3rd Floor
White Plains, NY 10601
aenea@aol.com

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Editor-in-Chief

Anthony J. Enea
Enea, Scanlan & Sirignano LLP
245 Main Street, 3rd Floor
White Plains, NY 10601
aenea@aol.com

Board of Editors

Lee A. Hoffman, Jr.
Hoffman, Wachtell, Koster & Maier
399 Knollwood Road
White Plains, NY 10603
lhoffman@hwkmlaw.com

Andrea Lowenthal
Law Offices of Andrea Lowenthal PLLC
541 Warren Street
Hudson, NY 12534
andrea@lowenthallaw.com

Vincent Mancino
Littman Krooks LLP
399 Knollwood Road, Suite 114
White Plains, NY 10603
vmancino@littmankrooks.com

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

Brian Andrew Tully
Law Office of Brian A. Tully
444 New York Avenue
Huntington, NY 11743
bat@estateplanning-elderlaw.com

ADDRESS SERVICE REQUESTED

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