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Estate Planning and Will Drafting in New York

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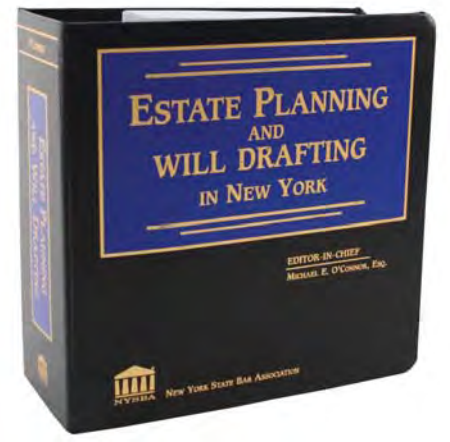

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NYSBA

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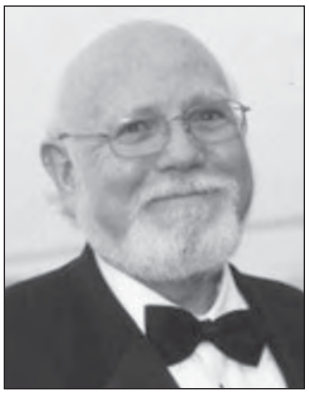
Message from the Chair

With a new presidential administration in Washington, we can anticipate changes not only to the Affordable Care Act, but also to Medicare and Medicaid. We will need to be vigilant in protecting our clients both on the federal and state level and to see to it that the many benefits that have come from these laws are not reduced or abolished. I think we have a great team in our Section with a great deal of knowledge and expertise in these crucial areas. I look forward to working with all of you in 2017.



David Goldfarb

Here are some of the highlights from our educational and legislative efforts from the fall of 2016:

The Section's Fall Meeting at the Grand Cascades in New Jersey was a spectacular success. I would like to thank the co-chairs **Moira Laidlaw** and **Chris Bray** for all their hard work on this event. **Jeffrey Asher** presented the Elder Law and Special Needs update highlighting local, state and national trends. **Professor Roberta Flowers** came from Stetson University College of Law in Florida to give an enlightening as well as entertaining ethics presentation regarding spouses. **Angelo Grasso** gave an informative and detailed presentation on discovery proceedings in Surrogate's Court**. Martin Hersh** our Chair-elect, presented an informative talk on Medicaid liens and estate recovery covering practices both upstate and downstate as well as new developments. **Robert Kurre** gave an excellent and detailed presentation on Medicaid Asset Protection trusts that had valuable information for both new and experienced practitioners. **Sara Meyers** gave presentation that enlightened us all on aspects of using Article 17A and Article 81 guardianship proceedings for disabled children. **David Kronenberg** moderated a panel that covered aspects of home care authorizations under the MLTC program. Panelists **Kimberly Bliss**, **Jeanette Grabie**, and **Peter Travitsky** gave information on how the program works in various parts of the state. **Kevin Cohen** gave a presentation on estate tax planning in light of the federal and New York state differences. **Britt Burner** talked about closing a guardianship proceeding. **Lou Pierro** and **Robert McDermott** spoke about the intersection of elder law and matrimonial law. Many thanks to Lou and Robert for filling in with an excellent presentation on short notice. And finally, **Glenn Witecki** gave a presentation that covered all aspects of "Aid in Dying," including what was happening in various states and the latest on the pending New York proposal. Thanks to all of these speakers the program was able to illustrate the broad range of topics that impact the practice of Elder Law and Special Needs Planning.

I would like to give a special thanks to **Liz Briand** as Chair and **Lauren Sharkey** as Vice-Chair of our Sponsorship Committee for helping to make our fall program a success and for their continuing work on our upcoming programs.

In November, our Section sponsored the NYSBA CLE on Intermediate Elder Law. Thanks to past chair **JulieAnn Calareso** for being the Overall Planning Chair and a local Chair for this program. Also thanks to the local Chairs **Fern Finkel**, **Fran Pantaleo**, **Kameron Brooks** and **Richard Weinblatt**. And thanks to the many Section members who contributed materials and spoke at the various sessions.

At this time Co-chairs **Sal DiCostanzo** and **James Barnes** are working on the Section's program for the Annual Meeting on January 24, 2017. It is sure to be a "not to be missed" event, with updates on Medicaid, Guardianship and Tax as well as sessions on annuities and retirement plans. Our reception, thanks to sponsorships by CaringKind and RDM Financial Group, will be at the Warwick Hotel (across the street from the Hilton) after the CLE program.

The Section's Legislation Committee under the leadership of **Deep Mukerji** and **Jeffrey Asher** has been busy getting ready for the 2017 legislative session. The New York State Bar Association has made the proposed amendments to the Power of Attorney law one of its legislative priorities. We will be working closely with **Ellen Makofsky**, who headed the NYSBA Task Force on the Power of Attorney, and the NYSBA legislative staff to get this important piece of legislation passed. Our Executive Committee in July passed a resolution on Aid in Dying brought to us by our Health Care Issues Committee and we will be working through NYSBA and its legislative staff to see if we can get some of our input incorporated in that legislation. Thanks to **Glenn Witecki** and **Tammy Lawlor** for working on this.

In November we held a Section Cabinet meeting to approve a response to a Proposal to Amend Part 36 of the Rules of the Chief Judge. Thanks to the co-chairs **Patty Bave** and **Fern Finkel** of our Guardianship Committee for working on this. And thanks for input from our Elder Abuse Committee and for the effort by our Section Delegates and Officers for participating in the Cabinet meeting to get this approved in a timely fashion.

In 2017, NYSBA has a special membership initiative to reach out to new members and to retain existing members. Our Section will be participating through a number of initiatives from our Membership Services Committee and our Diversity Committee. I would like to thank our Membership Co-Chairs **Sal DiCostanzo** and **Pauline Yeung-Ha** and our Diversity Co-Chairs **Veronica Escobar** and **Liz Valentin** for their efforts on this initiative.

As I said at the beginning of this message, we can anticipate a number of changes coming from the federal government that will impact our clients. I look forward to working with our Section committees and our Section members to protect the rights of our clients.

David Goldfarb

Message from the Co-Editors in Chief

Judith Nolfo McKenna

With the coming of a new year, we are excited to celebrate our Winter Edition of the *Elder and Special Needs Law Journal*. As always, we are very grateful to our Chair, David Goldfarb, for his unwavering support. We would also like to take a moment and thank the staff at NYSBA who partner with us for these publications, including Simone Smith, Lisa Bataille and Kathy Plog. They are always available to assist and support our efforts. This *Journal* could not be completed without their participation.

We are eager to host the 4th Annual *Elder and Special Needs Law Journal* Writing Competition, and hope to receive many creative and meaningful entries. Please encourage any law students to enter the competition, as well as recent law graduates seeking employment. We have sent correspondence and flyers to all the New York State law schools, and this year our Section is generously offering two $1,000.00 prizes to the top two entries, as well as publication within the *Journal*. If you are an adjunct professor at one of our law schools, please encourage students in your class to participate. This competition hopes to attract articles covering legal issues affecting seniors and persons with disabilities or special needs, with a specific focus on historically underserved populations. The deadline for entries is March 15, 2017. Please feel free to contact Tara or myself with any questions. A copy of the brochure is included in this issue.

In this issue, Christopher Bray has summarized the exceptional Fall Section Meeting at the Grand Cascades Lodge in New Jersey this past October. Moira Schneider Laidlaw and Chris were the co-chairs of this meeting, and it was clear to all the meeting was a success. Our thanks to Moira and Chris. Elizabeth Briand is featured in the new member spotlight, and Salvatore M. Di Costanzo is the "senior" member spotlight. Sal is the co-chair of our Membership Services Committee, the spotlight committee of this issue. Thanks to Elizabeth and Sal for their interesting interviews, and to Katy Carpenter for conducting our member interviews.

Tara Anne Pleat

Regina Kiperman and Naomi Levin offer an insightful article, "Factors to Consider When Converting Excess Resources Into an Income Stream for Purposes of the Institutional Medicaid 'Snapshot'." Once again, our reliable Elder Abuse Committee has submitted a new article addressing the issue of our veterans and "Don't Ask, Don't Tell." We thank Malya Levin, Deirdre Lok, Aaron Kurtzer and Jordan Lipschik for the thorough examination of this issue. Richard Marchese has shared his experience as an Elder Law attorney placing his parent in a nursing home. This is one of the most honest, heart-wrenching decision any child can make for a parent, and we know many of you will identify with Rick and his family.

Happy New Year to all our members. Please keep these great articles coming!

Judy and Tara

Save the Dates!

Elder and Special Needs Section Meets During NYSBA Annual Meeting
Tuesday, January 24, 2017 | 1:30 p.m. – 5:45 p.m.

Elder and Special Needs Section Summer Meeting
July 13 – 15, 2017 | High Peaks Resort in Lake Placid

For registration and more information on the above events, please visit www.nysba.org/ElderLaw

An Elder Law Attorney's Experience in Placing a Parent in a Nursing Home

By Rick Marchese

The call came in on Monday evening around 8:00 p.m. from my brother Steve. My mother had fallen at her home (for the fifth time in three months) and could not get up off of the floor. My brother was frantic because Mom was crying and yelling and he could not calm her down at all. For the last three years my Mom had slowly been going downhill cognitively, with significant short-term memory deficits and very erratic emotional swings. Interactions that occurred ten minutes ago were quickly forgotten, and her inability to remember conversations, meetings, really anything at all was getting dangerous. Also, the glass or two of wine she used to have every day had turned into four or five glasses, not because she wanted to drink a lot, but because she continually forgot that her glass had previously been full, and wanted another glass assuming that it was her first. My brother, who works full-time and lived with my mother, was increasingly becoming very stressed out, and worried about her erratic behavior. As a family, my brothers and my sister all felt we were actors in a play that would not end well.

Mom was in a very ornery and ugly mood when my sister and I arrived. She would not get off the floor and would not let any of us touch or help her at all, telling us to "get out of my house and leave me alone!" We told her we were not leaving, and pleaded with her to let us assist her, all to no avail. We called for an ambulance. Try as they might, the EMTs also could not get her to move. She started yelling and fighting with the ambulance personnel who in turn called the police. Great, I thought, the more the merrier! Two incredibly patient police officers spoke for ten minutes without any success. She would not move and refused all assistance. Finally, the officers lifted my Mom onto a stretcher (she was actually kicking at one of the officers who chuckled about my 89-year-old mother resisting arrest) and then moved her into the ambulance. My sister, who is very close to my mother, was crying, and I just looked at my brother and we sort of knew that this was it. My journey as an elder law attorney going through the nursing home placement process for my mother, something that I had feared for many months, was about to begin.

As my Mom arrived at the hospital I huddled with my siblings and we all came to the same conclusion. It was unsafe for mom to live at home any longer. Nursing home placement, unfortunately, was the only remaining choice for her care. She was well past assisted living, and in any event could never afford it on her very limited income. This was a very difficult and emotional decision for all of us. I think as elder law practitioners we sometimes, in counseling clients, forget about the emotional catharsis that spouses and/or children go through when the decision is made to place a loved one in a nursing home. As legal practitioners, we are rightfully thinking about planning and preservation of assets and making sure legal documents are in order, creating trusts, etc., but I can assure you that none of that was on my mind at all when my siblings and I came to the decision that this was it. We are a very close family, and at the heart of it, we all felt (I know I did) that we had let Mom down. That feeling has persisted to this day. Intellectually you know that a nursing home is the safest and only option, but emotionally it is a hard pill to swallow.

Rick Marchese

Mom was medically checked at the hospital. No broken bones, but significant bruises, and the attending doctor indicated that she would be kept for a day or two to make sure that she was fine, and that he was fully supportive of the decision that she could not safely be discharged home. Of course, he added as an aside to me, we are not admitting her; she will be held in observation. Now I know the importance of the distinction between observation and admission for Medicare reimbursement purposes, but I can tell you how powerless one feels when a doctor is telling you "that's how it will be." Who am I to argue with the doctor, especially when I believe that he was probably correct in that an admission was not warranted? I just basically went along and said "fine." Afterward, I thought about all of the times I have counseled my clients to be proactive and to vigorously advocate for an admission with the doctors and the social workers, and here I was just meekly assenting to their decision. Again, when you are caught up in the moment, your mind as a family member is not on money or legalities but just on facing forward and deciding what is best for your loved one. I was frankly relieved that the doctor was not going to allow her to go home, and that he was supportive of the decision to send Mom to a skilled nursing facility.

We now moved on to the skilled nursing facility placement merry-go-round. Mom actually had little, if any, assets. She was basically Medicaid eligible from day one. How to get her into a good nursing home? The discharge planner at the hospital dutifully produced a list of twenty area nursing homes and told us to "pick five," and she would start making calls to these facilities. My family naturally looked to me for guidance. I knew that as a straight Medicaid patient all of the good facilities on the list would decline the admission, and my head was spinning with the prospect of sending her to one of the "problematic homes" that we often talk about at the firm.

Here, my experience as an elder law attorney actually paid off, not as an attorney, but as an individual acting as an attorney who had made a lot of contacts with geriatric care managers during the course of my work. Now was the time for me to call in some favors. Miraculously, one of my contacts was able to get my mother placed in a fine nursing home in the area, which normally would never have occurred for a client in a similar financial position. Again, a sigh of relief.

I thought about the fact, as most of us who practice elder law do, that money really dictates the opportunity for, and quality of, care for our clients. I always think that there has to be a better way. This transition process from hospital to nursing home is fraught with tension as home after home gets crossed off of the "list," which leaves anxious family members wringing their hands. How can we allow our elderly clients and their supportive family members to be subjected to a process that encapsulates all of their efforts to keep mom or dad at home, and avoid nursing home placement, to this dreaded "list"? I think we owe it as practitioners to put our heads together to see if we can advocate for a better solution in this transition process.

My mother was transported to the nursing home and informally admitted until I signed all of the paperwork (I am her authorized agent, her Power of Attorney). After the admission, I knew enough to ask for a care plan meeting, which my entire family attended, and which was very helpful in getting us to feel more assured that this was the right place for my mother. After the meeting I went to the admissions office to sign the application for my mother. At that point, I was just so happy and relieved that my Mom had ended up in a safe place, and very thankful for my friend's efforts, and thankful for the nursing home accepting her, that I frankly just signed everything that was put in front of me. I had to stop myself and say, "Wait a minute, I should be reading this, this is what I tell my clients to do, **read the paperwork and sign everything as Power of Attorney!!"** I made a mental note to myself to be more understanding of my clients who go ahead and sign admission paperwork after I have told them to let me review it first, or to be very careful and sign "Power of Attorney" after their name. A lot of families find themselves in the situation that I did, where you feel relieved, and that you're nearing the end of your emotional rollercoaster. You will sign anything to make sure things go smoothly at the nursing home. It's funny how your role as an attorney slips away when you are acting as a son, daughter, spouse, or significant other of a loved one facing a health care crisis. At least that is how it happened (with me).

My Mom has now been at the nursing home a little over three months. Her mood swings continue but she is in a safe place. Her forgetfulness is increasing and her memory deficits are significant. Still, she enjoys our visits (and I enjoy visiting her) and things are so much better for everyone now that she is settled. My mom thinks the home is a hospital (or an apartment building depending on which day you talk to her). Do we tell her it's a nursing home? Do we tell her that she can't go home, and that the home in which all of us grew up has to be sold? These were questions that were left unanswered, actually for several months, while my Mom adjusted to her new setting.

My Mom is a staunch Roman Catholic. She stopped attending Mass at home, despite our offers to take her to church, and had not taken communion in years. The nursing home does have Mass every Sunday and I thought, "Hey, this is great; my Mom will finally be able to go to church again." Two weeks after her admission I visited my mother on a Sunday morning around 11:00 a.m. I found her in her room watching television. She seemed content, and we spent some good quality time reminiscing about events that had happened forty or fifty years ago—her long-term memory remaines fairly good. I then asked her if she had gone to Mass that morning. She looked at me and said, "Oh Rick, I knew that Mass was this morning and that I could take communion, but I heard that the Pope was here, and I didn't want to see the Pope." She looked at me and squeezed my hand and said "Rick, was that all right"? I told her, "Mom, that's totally fine; you know, I didn't want to see the Pope either."

I believe what my experience has taught me is to be more compassionate and understanding of my clients who are facing long-term care placement decisions for their loved ones. Of course, I go through all of the legal and financial planning with clients, draw up the appropriate documents, get them on the right path, and do what I do to help them navigate through the system. I think that often clients who are in the position I was facing are also looking for somebody to listen to their concerns, understand how they have reached this critical points in their lives, and be supportive of their decisions. If we can all remember to do those three things, and advocate as much as possible for a humane, safe, and dignified transition process to a nursing home, we will all be better attorneys for it.

Richard A. Marchese of Woods Oviatt Gilman LLP, Rochester, is a Partner in the firm's Elder Law and Health Care Practice Group responsible for handling all elder law and health care issues. He concentrates his practice in Medicaid and Estate planning, Social Security, Medicare and Medicaid eligibility and recovery matters, asset protection, issues of spousal support, and the use of trusts in Medicaid planning. Mr. Marchese also provides counsel to health care providers in matters of compliance with federal and state regulations, defense of government audits and investigations, voluntary self-disclosures, corporate compliance and professional licensure issues.

Prior to joining the firm, Mr. Marchese served for over fifteen years as Chief Counsel to the Monroe County, N.Y. Department of Social Services, advising the Chronic Care, Home Care and Adult Protective units at that agency. He was the director of the Monroe County Provider Fund, Waste and Abuse Demonstration Project, and he now represents Medicaid providers in matters of compliance with government regulations and defense against government audits.

Vulnerable Veterans Left in the Lurch: The Continued Harm of "Don't Ask, Don't Tell"

By Aaron Kurtzer and Jordan Lipschik with Professor Deirdre Lok and Malya Levin

Prof. Deirdre M.W. Lok

Malya Kurzweil Levin

No Photo Available

Aaron Kurtzer

No Photo Available

Jordan Lipschik

I. Introduction

The U.S. military has historically had, at best, a weak relationship with the concept of equality. One of the clearest examples from modern history is the military's implementation and repeal of "Don't Ask, Don't Tell". Despite the military's current, more progressive, stance on this issue, elder veterans are still fighting to receive well deserved benefits denied to them as a result of "Don't Ask, Don't Tell".

This article will begin by introducing "Don't Ask, Don't Tell" and examining its historical origins. Part II will explore the history of "Don't Ask, Don't Tell" and examine the history of discrimination against the LGBT community in the American military. Part III will look at the legal challenges waged against "Don't Ask, Don't Tell" and its eventual repeal. Part IV will talk about legislation which has been introduced, both in New York and federally, to restore benefits to those who may have been stripped of them due to dismissal from the military under the "Don't Ask, Don't Tell" regime, and will describe the particularly deleterious impact these policies have on older adult veterans. Finally, Part V will sum up this article and explain how more still needs to be done to correct our prior mistakes.

II. Clinton and the History of "Don't Ask, Don't Tell"

Seven months into his first term as President of the United States, Bill Clinton ascended the stage at Washington D.C.'s National Defense University. He stood on the stage and began a speech extolling the service of the United States Armed Forces, commending the military as one of the country's "finest accomplishments and greatest assets."[1]

He described the plan he was announcing as a "sensible balance between the rights of the individual and the needs of our military to remain the world's number one fighting force."[2] He reminded the public of alleged reports that the Department of Defense spent $500 million in the 1980s to separate and replace an approximated 17,000 homosexual people from military service. He invoked studies that showed that homosexual service members performed no less admirably or honorably than their heterosexual peers.[3]

Yet minutes after President Clinton's apparent condemnation of the military's policy of discrimination against homosexuals, he announced his new policy of how to best address the issue of homosexual individuals in the military:

> One, servicemen and women will be judged based on their conduct, not their sexual orientation.
>
> Two, therefore, the practice, now six months old, of not asking about sexual orientation in the enlistment procedure will continue.
>
> Three, an open statement by a service member that he or she is a homosexual will create a rebuttable presumption that he or she intends to engage in prohibited conduct, but the service member will be given an opportunity to refute that presumption; in other words, to demonstrate that he or she intends to live by the rules of conduct that apply in the military service.

> And four, all provisions of the Uniform Code of Military Justice will be enforced in an even-handed manner as regards both heterosexuals and homosexuals. And, thanks to the policy provisions agreed by the Joint Chiefs, there will be a decent regard to the legitimate privacy and associational rights of all service members.[4]

And with that speech, the policy that would become known as "Don't Ask, Don't Tell, Don't Pursue"—the policy termed a "compromise" by the *New York Times*[5]—became the official policy of the United States government. Being openly homosexual now carried a presumption that you were a rule-breaker—that you were less admirable than your peers. It carried the presumption that, in spite of the oath that a soldier swears when he or she first enlisted with the army to defend the Constitution and to obey the President, the immutable characteristic of his or her sexual orientation allows the government to presume him or her guilty of misconduct.

It was a "federal law that required the entire military establishment to discriminate," according to Aaron Tax, the Director of Federal Government Relations for the Services & Advocacy for Gay, Lesbian, Bisexual & Transgender Elders (SAGE).[6] SAGE has spent a significant amount of time assisting older veterans and their families who were deprived of military benefits due to the destructive "Don't Ask, Don't Tell".[7] Mr. Tax has also spent a large part of his career fighting against "Don't Ask, Don't Tell", in part by providing counsel to those who were impacted by the policy.[8]

Perhaps at the time, some progressives felt this policy was a good stopgap measure—a way to reverse over two centuries of outright refusal to tolerate homosexuality in the military that began with the dishonorable discharge of Lt. Frederick Gotthold Enslin in 1778.[9]

And perhaps this was a step forward. It had been 43 years since President Truman signed the Uniform Code of Military Justice, which set up discharge rules for homosexual service members, and only 11 years since President Reagan made his now famous defense directive that "homosexuality is incompatible with military service."[10]

Many Americans may have shared President Reagan's sentiments. Many may have shared the sentiment of President Clinton, who claimed to disagree with the policy he put forward, but, nonetheless, put it forward as a compromise. Yet many Americans—some say as many as 13,000—found themselves at the mercy of this program. An estimated 114,000 United States service members have been discharged less than honorably due to their sexual orientation since 1942.[11]

"Don't Ask, Don't Tell targeted three types of things that were considered 'homosexual conduct'," according to Mr. Tax. "The first one is touching, so touching anybody of the same sex for sexual gratification, that can include dancing, handholding, kissing, or everything else. Number two would be saying to anybody in your life, ever, that you're gay, or words to that effect. So that can be coming out to your parents when you're ten years old, coming out to your boyfriend or girlfriend, coming out on Facebook. If any of those people told the military, or the military found out about it, or if anyone showed the information…that could mean they could kick you out. And [three], marriage, or attempted marriage to the same sex."[12]

According to Mr. Tax, the first prong could result in expulsion from the military for anybody who may have romantically experimented with somebody of the same sex in college. A soldier could also deny having a consensual sexual tryst with a member of the same sex, accusing the other person of sexually assaulting him or her in order to avoid expulsion from the military.[13]

While people were under no duty to report homosexual activities, homosexual soldiers faced the constant threat of being exposed by their peers or their commanding officers. At any point in a long military career, someone from the past, such as a previous commanding officer, could emerge to report a soldier's prior actions. This could lead to an investigation and, ultimately, a discharge because of "Don't Ask, Don't Tell".

III. Challenges to "Don't Ask, Don't Tell", Its Consequences, and Repeal

The policy faced numerous court challenges, and, on September 9, 2010, Judge Virginia Phillips of the Ninth Circuit Court of Appeals gave opponents of "Don't Ask, Don't Tell" a huge victory. In *Log Cabin Republicans v. United States*[14] she issued a decision permanently enjoining the United States "from enforcing or applying the 'Don't Ask, Don't Tell' Act and implementing regulations, against any person under their jurisdiction or command."[15]

The nonprofit group of Republicans who support gay rights had mounted an attack on the "Don't Ask, Don't Tell" policy as facially unconstitutional by violating the Due Process and Equal Protection Clauses of the Fifth Amendment and the First Amendment right to freedom of speech. At the heart of their petition was a simple argument: "Don't Ask, Don't Tell" caused 13,000 service members to be deprived of benefits that had been guaranteed to them by the U.S. government.

Many of those veterans received "Other Than Honorable" discharges, prohibiting them from receiving federal military benefits. The paperwork of some gay veterans who were discharged honorably still may include narrative notes such as "homosexual conduct," which could affect the veteran's chance for obtaining benefits. Additionally, they may receive a negative re-enlistment code, which could bar them from being able to re-enlist. In New York alone, this meant that there was a possible deprivation of "over 50 state programs, benefits, and tax breaks for military veterans that are directly contingent upon the veteran's discharge status."[16]

Judge Phillips' ruling tracked the shifting political views at the time. In 1993, only 44 percent of Americans approved of service by openly homosexual service members; by 2008, the percentage had risen to 75 percent. Conversely, support for "Don't Ask, Don't Tell" fell from nearly 40 percent approval in 1993, to 22 percent by 2008.[17]

Furthermore, according to a Gallup poll taken in early December 2010, the repeal of "Don't Ask, Don't Tell" had bipartisan support from most average Americans. Americans who identified as Liberal Democrats (86% for repeal, 11% against); Conservative/Moderate Democrats (79% for repeal, 11% against); and Moderate/Liberal Republicans (69% for repeal, 11% against) all favored repeal. The only group not in favor of repeal were Conservative Republicans (39% for repeal, 57% against).[18]

Decades of public support combined with a negative court ruling is sometimes the perfect formula to spur Congress into action, and shortly after Judge Phillips' ruling, Congress committed to the ""Don't Ask, Don't Tell" Repeal of 2010," which was fully implemented by 2011. Unfortunately, this implementation did little to address the status of service members who had previously been discharged—they needed to individually apply to the Department of Defense if they wanted to attempt to have their discharge status changed to "honorable."

Unfortunately for these veterans, the government continues to address the status of such wronged service members via a gradual piecemeal process, partly because "Don't Ask, Don't Tell" was just part of the larger conservative legislative effort of the day to promote "family values." Shortly after "Don't Ask, Don't Tell" was implemented, service members were prevented from receiving certain benefits under a different law, the Defense of Marriage Act (DOMA), which was passed one Congressional session after "Don't Ask, Don't Tell".[19]

Among other things, DOMA limited the definition marriage to the union of one man and one woman for purposes of federal law and for federal benefits. This affected certain dependent-related benefits for same-sex service members including, but not limited to, Basic Allowance for Housing (BAH), medical benefits through the Military Health Care System (TRICARE), and family separation allowances.[20]

DOMA came before the Supreme Court in 2013. Writing for a 5-4 majority, Justice Anthony Kennedy described the section legitimizing only heterosexual marriage in the eyes of the law as an unconstitutional deprivation of the liberties guaranteed by the Fifth Amendment, and that it served no compelling state interest.[21]

For the moment, the Supreme Court appears to have adopted the view of lower courts and of the public, that the benefits granted to a veteran service member or his family should not be conditioned on his conformity to a specific sexual orientation. It appears that such restrictions would simply not survive a Supreme Court challenge on due process grounds.

IV. Legislation to Revive Benefits for Those Stripped of Them Through "Don't Ask, Don't Tell" Discharges

Even with the repeal of these federal laws, many states have laws that condition the receipt of state benefits on the discharge status of a retired service member, and getting that discharge status changed can be difficult. "Dozens of state benefits are directly related to discharge status, and aside from petitioning the U.S. Department of Defense to change a discharge status—there's not much else to be done," explains New York State Senator Brad Hoylman (D-NY).[22]

"On Memorial Day this year, I released a report titled *Restoration of Honor: Expanding LGBT Veterans' Access to State Veterans' Benefits*. The report identified at least 53 New York State benefits for veterans that are directly contingent upon the discharge status of the veteran," Sen. Hoylman explained.[23]

Some of the 53 benefits that Senator Hoylman spoke about are: general eligibility for local programs and services offered by state and local veterans agencies; health screening services for those veterans who may be experiencing health problems; eligibility to gain status as a service-disabled veteran owned business; lower barriers to obtaining street vending licenses; eligibility to benefit from provisions of the Veterans Employment Act; additional points on civil service exams; job protections if their civil services position is abolished; access to SUNY scholarships; the ability to get a high school diploma, if they do not already have one; pension and retirement benefits; eligibility for $2,500 toward burial costs reimbursed through New York State Veteran Burial Fund; eligibility for burial in a veterans cemetery or in

the veterans section of a regular cemetery; identification of veteran status on driver's licenses; distinctive license plates commemorating service in war; eligibility for various tax exemptions; various appointment opportunities; entitlement to an annuity paid to veterans; eligibility to apply for the issuance or renewal of a gun license; exemption from age restriction for the issuance of a gun license; eligibility to receive the Conspicuous Service Cross award from the Governor; paid leave for public employees on holidays commemorating their service.[24]

"The laws we identified touch virtually every aspect of veterans' lives, from scholarships to job opportunities to health screenings to reimbursement for burial costs," the Senator said.[25]

When the amount of all of these various benefits are combined, individuals who were discharged as a result of "Don't Ask, Don't Tell" could easily be stripped of benefits totaling hundreds of thousands of dollars, and the older the veteran, the greater the chance that he or she has benefited from one of these programs or relies on one of them.

However, organizations such as SAGE note that some people were discharged from the military because they were not good soldiers, not because of their sexual orientation. "You can be kicked out, despite "Don't Ask, Don't Tell", legitimately," noted Mr. Tax, "not because of "Don't Ask, Don't Tell", but because you are a lousy service member. Step A is that they are discharging you. Step B is what discharge characterization are they giving you."[26]

That's why Senator Hoylman introduced the Restoration of Honor Act on Veterans Day in 2011. He lamented the fact that the 2010 repeal of "Don't Ask, Don't Tell" did not include language to retroactively support the 14,000 service members who lost benefits under the law. Senator Hoylman's Act would

> make clear that LGBT veterans are not to be considered ineligible to access state programs, services, or benefits due to a less than honorable discharge based solely on their sexual orientation or gender identity. It would establish a streamlined certification process within the State Division of Veterans' Affairs for LGBT veterans to clarify their discharge status for the purposes of accessing state programs, services, or benefits. Finally, it would place the burden on the state to prove that a veteran who has been discharged from the military because of their sexual orientation or gender identity is not otherwise eligible to receive state programs, services, or benefits... . The experience of LGBT service members in the United States military was one of repression, deception, and fear for over two centuries. For the vast majority of our nation's history, men and women willing to risk their lives in service of their country faced unceremonious discharges or even criminal penalties solely due to their sexual orientation or gender identity.[27]

Senator Hoylman's legislation tracks the federal "Restore Honor to Service Members Act," introduced in the United States House of Representatives in July 2013 by Charles Rangel of New York and Mark Pocan of Wisconsin and in the Senate by Kirsten Gillibrand of New York and Brian Schatz of Hawaii.

The four Congress people wrote in an op-ed published in November 2015:

> The Department of Defense has already begun working to give service members who were discharged solely because of their sexual orientation the chance to restore their records to reflect their honorable military service. However, that process remains onerous for many service members, often requiring them to retain legal counsel to navigate red tape and produce paperwork that they may not have. Moreover, there is no legal requirement that the appeals process always remain available to gay, lesbian and bisexual veterans seeking corrective action.
>
> Our bill…would simplify the paperwork requirement necessary for service members to initiate a review, making it clear that the lack of documentation cannot be used as the basis for denying a review. Finally, it would require the historians of each military service to review cases where service members were discharged for their sexual orientation before the repeal of "Don't Ask, Don't Tell." This would improve the historical record that the Defense Department can use to help gay, lesbian and bisexual veterans correct their records.[28]

The Restore Honor to Service Members Act is crucial for the many former servicemen and women living in poverty. It is estimated that 1.4 million veterans live below the poverty line and that over 57,000 veterans are

homeless on any given night. Elder veterans have higher poverty rates compared to any class of veteran younger than them.[29] Furthermore, over 900,000 veterans live in households which receive food stamps and another 3.5 million veterans receive disability benefits. Additionally, more than 350,000 survivors of veterans receive death benefits.[30]

However, veterans who were discharged less than honorably could potentially have trouble receiving these benefits, which could total up to about $17,000 per year based on a multitude of eligibility factors such as: income, marital status, spouse's veteran status, whether the veteran has any children, and number of children, among many other factors.[31]

Furthermore, many of these policies will have a particularly acute effect on older adult veterans. Furthermore, as these veterans age, and are less likely to be able to work, this potential income becomes more and more critical.

Across the country, many municipalities allow veterans to apply the time they spent in the military toward their pension, to varying degrees. However, an "Other Than Honorable" discharge mandated by "Don't Ask, Don't Tell" prevents many veterans from being able to apply their service time toward their pensions. While this would affect anybody who received "Other Than Honorable" discharges, it would disproportionately affect older veterans who are nearing retirement age. It would especially affect those who may be suffering the long-term physical effects which commonly manifest themselves in older veterans who served tours of duty.

Furthermore, these restoration laws are also necessary for older veterans who were discharged because of "Don't Ask, Don't Tell" because they may not receive the same death benefits that many of the heterosexual people they served alongside will surely receive, such as burial cost reimbursement.[32] Given the prevalence of poverty in the veteran community, especially the older adult veteran community, this category of benefit goes a long way towards ensuring that people received the honorable burial which they have earned by putting their life on the line for the United States of America.[33]

While the passage of the Restore Honor to Service Members Act is far from guaranteed, it does not appear that current service members who identify as part of the LGBT community will be effectively pushed back into the closet due to any new federal enactments prohibiting them from serving in the military. Mr. Tax agrees that:

> it would be hard to put the genie back into the bottle. Even logistically, if you think about how hard it would be if they wanted to go back to *"Don't Ask, Don't Tell"*…what would you do with everybody who came out? Would you kick every gay person out? And then in Congress, if they thought that they could get them to pass a law like that, administratively, they would be hard pressed to come up with the regime that would pass constitutional law…could they try? Well yeah. But I don't think that it would get very far.[34]

V. Conclusion

The political landscape has shifted significantly for LGBT service members over the last 20 years. While the big victories in Congress and the courts are hugely significant, there are still many obstacles facing LGBT veterans. New York is in the minority of states with this type of legislation pending, and federal legislation has stalled in Congress.

While Congress and the courts have announced that veterans discharged under "Don't Ask, Don't Tell" will have their records restored, the process is slow. The Uniform Code of Military Justice still prohibits and criminalizes sodomy.

Younger veterans are more easily able to supplement their income with other work as they wait for their "Other Than Honorable" discharges to be reversed, but many older veterans do not have the same options or the same timeframe. These people who struggled on the battlefield in service to their country are still struggling to convince their government that they deserve equal veteran benefits.

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Senior Member Spotlight: Salvatore M. Di Costanzo

Interview by Katy Carpenter

Q Where are you from?

A I was born in the Bronx and raised in Rockland County. To be exact, in Monsey, which is close to Suffern and more familiar to people from a logistical perspective. I moved to Westchester County 16 years ago and my primary office is within a mile from my home.

Q What do you like about the area and community you serve?

A There is an intangible benefit in not having to get on a train every day and commute to New York City. As my practice grows, I enjoy being recognized by individuals in the County and local communities as a leading elder law attorney who can benefit the common family. It is nice to walk into a store or attend a family function and have people express their gratitude for my service. When I worked in New York City for a larger firm, I did not experience this.

Q Where is your favorite place you've traveled to?

A Without much aforethought—the Exumas. The Exumas are an archipelago of 365 small cays and islands in the Bahamas. They are secluded and off the beaten path—almost deserted. If you cannot disconnect, don't even think about it. The water is crystal clear and the views are serene, even surreal at nighttime. I love going fly-fishing, snorkeling and eating fresh fish three times a day.

Q What's your favorite part about your job?

A The process of gaining trust through dispelling myths and skepticism. There are some people who don't believe the area of elder law exists and usually begin the process with reluctance since there is no much misinformation out there. The truth is that most families need this area of law, and for some, it becomes a necessity. Generally, if all goes well, I am able to save them money, provide needed care to loved ones and calm their anxieties. This relationship forms an inseparable trust and a bond. When all is said and done, it is rewarding to be able to look someone in the eye and say "I told you so."

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

A There's no one particular thing. I've been published and received many awards and accolades but I don't have that one win or a big case or anything like that. What I do have are a lot of small success stories.

Q Have you had any turning points in your life?

A The turning point in my life was when I decided to leave my career at Ernst & Young in New City and start my own practice in 2004. Looking back, it was risky, and some would say downright crazy. I was in Times Square on a Friday and then come Monday I was in my own office in a small community of Westchester County. I never looked back.

Q Where do you see yourself in five years?

A I like to see me doing my thing. I'd like to grow my practice but I don't want it to be a big firm. Quite frankly, I enjoy the work/life balance. I believe that you should work as hard as you play—don't tip the scale in either direction! Sustainability is the key.

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

A A firefighter—every kid loves fire trucks.

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

A I'm an outdoors person. I like the country, outdoor activities and working around the house. I enjoy fly fishing and I just started beekeeping last year! I've always wanted my own honey and I am fascinated with the workings of a honeybee, so last year I became a beekeeper. I keep the bees on my property. I also have a farm in Columbia County that I enjoy spending time at.

Q Have you ever been given advice that you remember?

A Someone once told me in college to always try to work for yourself—you might lose a client here or there, but you can never be fired! It's funny how people think working for a company is a stable career and that working for yourself is risky. Admittedly, there are no guarantees when you work for yourself, but I will argue that the greater risk is not knowing when you are going to get a pink slip from your employer.

Q Do you have any words used to describe yourself?

A I tell it the way it is; you get what you see.

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

A No.

Factors to Consider When Converting Excess Resources Into an Income Stream for Purposes of the Institutional Medicaid "Snapshot"

By Regina Kiperman and Naomi Levin

Jack and Alice are married. Jack is 80 years old. He is sick, requires institutional care, and is about to enter a nursing home. (Jack is the "Institutionalized Spouse.") Alice is 75 years old. (Alice is the "Community Spouse.") Jack and Alice have a house, free and clear of mortgage and $750,000 worth of investable assets, generating de minimis annual income in the form of dividends (estimated at $4,000 a year). Each spouse also has their own separate IRA in payout status. The Institutional Spouse's required minimum distribution is $750 a month. The Community Spouse's required minimum distribution is $200 a month. The Institutional Spouse receives $2,000 a month from Social Security while the Community Spouse receives $510 a month from Social Security.

Jack and Alice come to you for Medicaid planning. You know that transfers between spouses are exempt.[1] If Jack transfers all of his assets to Alice, Jack can thereafter apply and be eligible for Medicaid. You also know that the Community Spouse may execute a "Spousal Refusal" advising the Local Department of Social Services ("DSS") that the community spouse refuses to fulfill his/her obligations, as the legally responsible relative, to support the institutionalized spouse.[2] DSS will provide the necessary medical assistance to the institutionalized spouse, notwithstanding the community spouse's refusal to contribute to the cost of the institutionalized spouse's care. However, the filing of the "spouse refusal" may create an implied contract with DSS, authorizing DSS to commence a claim for spousal contribution from the community spouse for the cost of care paid by DSS for the benefit of the institutionalized spouse.[3] [4] When initiating a claim for spousal contribution, DSS will look to the community spouse's income and/or resources in excess of applicable limits.

Current laws permit the Community Spouse to retain monthly income up to the amount of the minimum monthly maintenance needs allowance ("MMMNA"), and resources up to the amount of the community spouse resource allowance ("CSRA").[5] The MMMNA[6] and CSRA[7] are exempt from recovery by DSS and are adjusted annually to account for increases in cost of living.[8] Income and resources above the MMMNA and CSRA may be subject to a contribution claim from DSS. Currently, New York State limits its claims for spousal income contribution to twenty-five percent (25%) of the Community Spouse's income in excess of the MMMNA.[9] (The amount sought for contribution may be reduced if the Community Spouse can demonstrate a need for an increased income allowance, and therefore an increase in the MMMNA.)[10]

You know that the Community Spouse can have a Federal CSRA of $119,220 (and an MMMNA of $2,980.50) in 2016.[11] Thus, if Jack keeps $14,000 in his own name and transfers the balance to Alice, the first $119,220 in 2016 can be held free and clear of any contribution claims. Unlike the contribution claims for income, however, there is no limit on how much DSS can request for contribution of excess resources over and above the CSRA. Therefore, you are left wondering what can you do to protect your client's excess resources? Put another way, should you convert the excess resources into income so that you can mitigate the amount of money subject to contribution to just 25% of the income over the MMMNA?

You have heard suggestions regarding converting the excess resources over the CSRA into an income stream by using either a Promissory Note[12] or Medicaid Compliant Annuity[13] before filing the Medicaid application.[14] The goal of this approach is to provide a snapshot that minimizes, if not completely eliminates, the excess resources. Instead, the result of the conversion of the excess resource into an income stream will be that the snapshot will show a higher income stream (which is exposed to a maximum contribution claim of 25%). Should you employ this technique, you wonder?

This tool may not always be the optimal approach for your clients. Therefore, before you engage this method, you should conduct a cost/benefit analysis and consider the following.

1. Effect of the conversion on potential spousal impoverishment budgeting

When a community spouse earns less than the MMMNA, once Medicaid eligibility has been established for the institutional spouse, the community spouse can request spousal impoverishment budgeting wherein the institutional spouse's income is allocated to the community spouse such that the community spouse's income is brought up to the MMMNA.[15] The amount of income allocated is referred to as the Community Spouse Monthly Income Allowance ("CSMIA").

In our example, Alice's total monthly income (from Social Security, dividends, and her IRA distribution) does not equal or exceed the 2016 MMMNA of $2,980.50. Therefore, after Jack is determined eligible for institutional Medicaid, Alice may request that a portion of Jack's income be allocated to Alice. (In this instance, Jack can have almost $2,000 allocated to herself from Jack's income). However, if Alice converts all of her excess resources (approximately $650,000) into an income stream, it is very likely that the additional income will push her total monthly income over the MMMNA, and she will no longer be eligible to receive a CSMIA from Jack's income. Instead, Jack's income may be paid to the nursing home. Furthermore, the DSS may bring a contribution claim, requesting a contribution of 25% of Alice's income in excess of the MMMNA.

It may make sense to ask yourself the following questions: Is the Community Spouse eligible for minimum monthly maintenance needs allowance ("MMMNA") from the Institutionalized Spouse? If so, will the creation of the promissory note completely eliminate the amount of the MMMNA? Will it reduce the amount of the MMMNA? Is the Community Spouse better off receiving the MMMNA from the Institutional Spouse and possibly using some of the MMMNA as a negotiation tactic with DSS?

2. What is your client's risk tolerance?

A client who prefers certainty may find limiting potential liability to 25% of their income in excess of the MMMNA quite appealing. Indeed, risk-averse clients may prefer to have a calculation of their exact liability and may even want to make a voluntary contribution,[16] rather than waiting for Medicaid to file the claim.

Clients who are more risk tolerant may want to take their chances. In our example, Alice, who will ultimately seek spousal budgeting, may be better off not converting her excess resources on the theory that DSS may see her relatively lower income and overlook her excess resources. Alice, if she is more risk tolerant, may choose to wait to see what, if any steps, DSS takes.

3. What is the term of the note?

A non-qualified annuity or promissory note must be actuarially sound as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration.[17] The longer the term of the note, the lower the income. At the end of the day you are tying up your client's funds. The question is—for how long?

Factors to consider include:

- What are the actuarial life expectancies of the spouses?
- What are the realistic life expectancies of the spouses (based on the health/medical conditions of your specific clients)?[18]

For example, if the institutional spouse is terminal and has less than six months to live, perhaps the community spouse may not want to enter into an irrevocable agreement restricting access to resources for a period of time greater than six months. In situations such as these, it may be important to speak with the institutional spouse's care-team, as well as to check the actuarial life expectancy tables to understand the term of the note.

Reverting back to Jack and Alice, Alice's life expectancy (at age 75) is 12.76 while Jack's is 9.58. A note for the term of Alice's life expectancy would be "actuarially sound," but might result in income payments beyond Jack's life (and need for Medicaid benefits). Would Alice prefer to have her assets returned to her more quickly? Does the existence of the note and income stream create future problems for Alice's own future Medicaid eligibility and planning, or for her estate?

4. How much of the community spouse's resources should be converted into an income stream?

Should the community spouse convert all of her excess resources into an income stream? Should she convert more than her excess? Or perhaps she should only convert some of the excess.

Consider your client's needs and wishes. Does the community spouse need access to large amounts of money in the near future, or can she meet all of her needs with an income stream? Consider both anticipated and unanticipated needs that might arise, including things like vacations, home improvements, education for grandchildren, and medical emergencies.

5. Is there a correlation in your region between a lower "excess resource" amount and the chance that your local DSS will pursue a contribution claim?

Speak to your colleagues, the local DSS, and review any fair hearings. Perhaps there is a trend in Suffolk County such that Suffolk County pursues everything. Alternatively, perhaps there is a trend in Rockland County that DSS does not pursue anything.

If the chances of contribution pursuit are low, then it may not be worth converting.

6. How much over the CSRA is the community spouse going to be?

(This question also ties into risk tolerance and knowledge of your local DSS.) If the community spouse will only be $50,000 over the CSRA, perhaps there is a significantly smaller likelihood that the DSS may request a con-

tribution. If so, perhaps converting the excess resource into an income stream is not the ideal solution.

7. What are the transaction costs involved in converting the excess resources into an income stream?

In addition to increased legal fees and possible accountant costs for allocating the income and interest earned on the income, do you have to pay for the creation of the note or the annuity?

8. What types of investments are being exchanged/liquidated to get the fixed income?

Will the community spouse face capital gains taxes on the liquidation of the resources in order to convert it into an income stream? If so, are the taxes due larger or smaller than a possible contribution claim?

If the assets to be sold/liquidated are all stocks with a low basis, then it may not be worth converting. If the assets are just cash sitting in a bank account and the client is looking for something to do with the funds anyway, then this may be a different conversation to have.

In sum, although the concept of converting excess resources into an income stream is an excellent yet complex tool, it is important to consider the above factors prior to utilizing this tool as in some cases, this may not be the ideal tool to accomplish all of the client's goals.

Endnotes

1. *See* New York Social Services Law ("NY SSL") §366.5(e)(4)(ii)(A).
2. *See* NY SSL §366.3(a).
3. The implied contract is only created if the spouse has sufficient income and resources at the time that Medicaid is provided. *See Commissioner of the Dep't of Soc. Servs. v. Spellman*, 672 N.Y.S.2d 298 (1st Dept. 1998).
4. *See* NY SSL §366.3(a).
5. *See* Medicaid Reference Guide at p. 277.
6. *See* NY SSL §366-c.2(h); 18 NYCRR 360-4.10(a)(8).
7. *See* NY SSL §366-c.2(d); 18 NYCRR 360-4.10(a)(4)(ii).
8. *Commr. of the Dept. of Social Servs. of the City of N.Y. v Scola*, 2011 NY Slip Op. 33019[U] [Sup Ct., NY County 2011].
9. 18 NYCRR 360-4.10(b)(5).
10. NY Social Services law 366-c.8(b) and NY Social Services Law 366-c.8(c); 18 NYCRR 360-4.10(b)(6) and 18 NYCRR 360-4.10(c)(7).
11. GIS 15 MA/21.
12. NY Social Services Law 366.5(e)(3)(iii); 06 OMM/ADM-5, GIS 06 MA/016 and Medicaid Reference Guide Page 334 (updated June 2010).
13. 18 NYCRR 366.5(e)(3)(i); *see also* 06 OMM/ADM-5, GIS 06 MA/016, and Medicaid Reference Guide pages 452-54 (updated January 2011).
14. 1-7 Bender's New York Elder Law § 7.03(2) (2015).
15. 18 NYCRR 360-4.10(b)(4); Medicaid Reference Guide page 276 (updated November 2007).
16. Medicaid Reference Guide at 277 (November 2007).
17. NY SSL 366.5(e)(3)(iii); 06 OMM/ADM-5, GIS 06 MA/016 and Medicaid Reference Guide, Page 334 (updated June 2010).
18. The longer the term of the note, the lower the income. At the end of the day you are tying up your client's funds. The question is—for how long?

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The Fall Conference Debrief

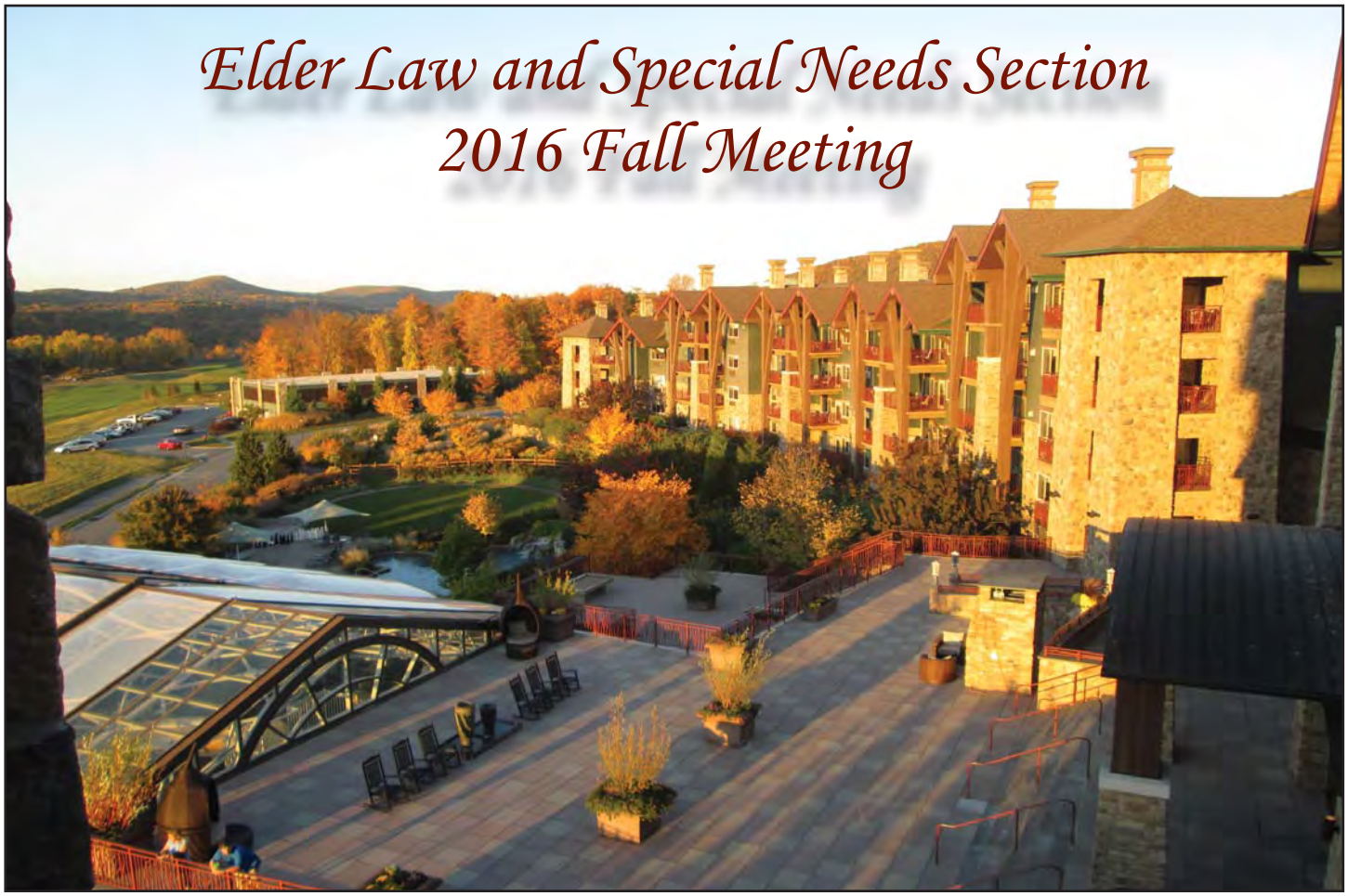
By Moira S. Laidlaw and Christopher Bray

The Elder Law and Special Needs Section's 2016 Fall Meeting was held on October 20th and 21st at the beautiful Grand Cascades Lodge in Hamburg, New Jersey. The colorful autumn trees against the Hamburg Mountains provided a serene venue for all. Many thanks to all those who worked tirelessly to make this meeting such a success. Moira and I received many positive comments about our presenters and topics. The cocktail reception and dinner provided a well-deserved evening of conversation and culinary delights.

The fall program introduced some new speakers and topics, including **Professor Roberta Flowers**' engaging and interactive lecture on the ethics of joint representation and the potential conflicts of interest between current and former clients which was extremely well received. We especially loved the technology permitting the attendees to vote on each ethical question. Our many thanks to **Lou Pierro** and **Bob McDermott** for saving the day and speaking without much notice. Their presentation provided an interesting comparison between tried and true spousal Medicaid planning strategies and the idea of utilizing divorce for the purpose of qualifying for Medicaid, including an overview of basic matrimonial law. This was an original and relevant presentation, and we are so grateful Lou and Bob were able to present.

David Kronenberg served as moderator of a distinguished panel of home care experts, including **Kimberly Bliss**, **Jeanette Grabie** and **Peter Travitsky**. This interactive discussion addressed many concerns and questions about home care issues in our practices.

We are so grateful to **Jeff Asher**, **Angelo Grasso**, **Marty Hersh**, **Bob Kurre**, **Kevin Cohen**, **Sara Meyers**, **Britt Burner** and **Glenn Witecki** for their excellent presentations.



Elder Law and Special Needs Section 201

16 Fall Meeting in Hamburg, New Jersey

Thank you to the beautiful Grand Cascades Lodge in Hamburg, New Jersey.

Loan Programs for Properties in Irrevocable Trust? How to Navigate Through Trust Lending Options

By Britt Burner and Frank Melia

All too often we have clients asking if they can get a reverse mortgage or line of credit even if their home has been placed into an irrevocable grantor trust for Medicaid protection purposes. Their home may be the only asset that they have equity in, especially if they have outlived their savings. Frank Melia, CMPS of Quontic Bank, sat down with me to explain options for clients that need to access the equity in their homes.

Q When a trust owns the home can a client get the same type of loan as when he or she owns the home outright in his or her sole name?

A No. Conventional mortgage financing guidelines ask for ownership to be in an individual(s) name. Any other type of ownership has historically not qualified for conforming/conventional mortgage financing. When an individual purchases or refinances a home we usually receive a Fannie Mae or Freddie Mac guideline-driven mortgage. Once you transfer ownership to an LLC, corporation, or trust you no longer qualify for conventional financing. Loans to these types of entities are known as "portfolio loans."

Q How do you determine what lending options are available to potential borrowers?

A Our bank guidelines include looking at occupants/grantors, beneficiaries, and trustees as potential guarantors. Property type, location of property, and valuation also determine what type of lending options we can offer. We prefer to look at the occupants/grantors as our loan program guarantors. With different lending options available we can recommend the proper lending terms for the individual situation and family needs.

Q What are some creative solutions you have come up with to access the equity an individual has in his or her home?

A We have offered mortgage financing with 5/1 ARM Terms for trustees of an irrevocable trust who were looking to purchase more four-family investment properties. We also have offered financing with Home Equity Conversion Mortgage ("HECM") line of credit terms to provide funds for private pay home care providers. Quontic

Britt Burner

Frank Melia

Bank can approve a reverse mortgage for a property transferred into an irrevocable trust and the line of credit option works well with most Medicaid planning strategies. I personally review the trusts for our bank and I find most trusts do receive approval.

A majority of the loans families have decided to use to satisfy their needs include a Home Equity Conversion Mortgage Line of Credit ("HECM LOC") so there is liquidity to the beneficiaries of trust assets. There are less stringent income and credit guidelines to get approval with a reverse mortgage. A reverse mortgage is also a non-recourse loan so no credit reporting is necessary and heirs of the estate will never owe more than the property's value once the borrower passes.

Q What can we do as attorneys to protect our clients' ability to access these types of loans?

A When a family sits down with their attorney to discuss the family's legacy and their need to protect what they have worked so long for, it makes sense to include verbiage in your trust document to ensure as many future lending options as possible. In order for us to approve lending for a property held in trust we need certain language in the trust including that the grantor is a lifetime income beneficiary. Our bank offers a review of any revocable and irrevocable trusts and will recommend additions or special language needed to ensure lending option approvals.

Q What if only a small amount of equity is needed from the property?

A A good example of this is the homeowner who needs a small amount of money to address a home improvement. Usually it is an amount no greater than $20,000 and it is a typical home improvement project including a new roof, kitchen or bathroom, or a new boiler or heating system. Lending programs have costs with closing and when the amount needed is relatively small in comparison to the home's value we can recommend quicker options including credit card financing, personal loans, or other bank products.

Q What are some of the worst case scenarios you have seen regarding lending to homes owned by a trust?

A We have spoken with families who have had an irrevocable trust for over 10 years who were told they must transfer title back into their individual names in order to get financing because their bank would not lend to trust-owned properties. We even had a family go to a different bank that recommended the transfer to their individual names, and then the bank denied the financing anyway. A consultation with us and a simple review of your trust document can save a lot of headaches and money for many families.

In most cases the family home is the largest asset. As our clients are living longer they may find themselves running out of liquid assets. It is useful for attorneys to be aware of ways to access the equity in the home.

Britt Burner manages the Manhattan office of Nancy Burner & Associates, P.C. Britt is a member of the Executive Committee of the New York State Bar Association Elder Law and Special Needs Planning Section as a Vice-Chair of the Legislative Committee and previously as a Vice-Chair of the Medicaid Committee.

Frank Melia entered the financial services industry in 1990 and worked as a financial advisor until the year 2000. Residential & Commercial Lending have been Frank's focus for the past 16 years. Frank regularly appears on the AM970 Radio show *Ask the Lawyer with Mike Connors* as a reverse mortgage expert. Frank works with some of the most respected and highly regarded professionals in their respective fields which include, Estate/Elder Care planning attorneys and law firms, financial planners, bankers and CPA/accounting Firms. Frank received his Certified Mortgage Planning Specialist designation in 2007 and offers mortgage planning services including purchase and refinance loans, reverse mortgages, commercial financing and construction loans. Frank can be reached at fmelia@quonticbank.com.

New Member Spotlight: Elizabeth Briand

Interview by Katy Carpenter

Q Where are you from?

A Massachusetts, originally—the greater Boston area. I went to college in Westchester and stayed in New York for law school. I've lived all over the New York area since college and came back to Westchester for work when I was hired at my current firm, Bleakley Platt & Schmidt, LLP in 2014.

Q What do you like about the area of Elder Law?

A There is a lot that I love about this area of the law. I love that Elder Law is intellectually challenging and never boring—things are always changing in this area. I also love that as an Elder Law attorney, I really feel like I've done some good at the end of the day.

Q Where is your favorite place you've traveled to?

A I just got back from Japan last month! It's at the top of my list, especially Kyoto which was spectacular! Another favorite is Glacier National Park in Montana.

Q What's your favorite part about your job?

A On a day-to-day basis, I love working with clients—it's what drives me. I believe you must like working with people to work in this practice area.

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

A It's hard to pick one particular thing. Every time we obtain a positive result for our clients it feels important. If I'm able to get a successful result for my client, on a Medicaid application for example, that feels significant to me.

Q Have you had any turning points in your life?

A I would say my second year of law school was a turning point. Prior to that year, I had been considering going into Elder Law. During my second year I participated in New York Law School's Elder Law Clinic, took an Elder Law course with Peter Strauss, and became involved in the Elder Law and Special Needs Section. After that year, I knew I wanted to pursue Elder Law as my career after law school.

Q Where do you see yourself in five years?

A I hope to still be practicing in the Elder Law and Special Needs area. At that time I hope I am able to devote some time to doing some pro bono work. I also plan to continue my involvement in the Section.

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

A A musician. I sang and played the piano, although I've been off track in that regard since law school. Singing was my strength—I sang mostly classical music. I think what pulled me away from pursuing music professionally was my desire to help people in some capacity.

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

A I love cooking—I'm not an expert, but I enjoy it. I also love yoga and reading. My husband is a library director and I enjoy volunteering at events at his library from time to time.

Q Have you ever been given advice that you remember?

A I've been told on multiple occasions that Elder Law attorneys do not only function as attorneys—we also play the role of therapist and social worker at times. Our clients are often going through stressful, painful life events and we need to approach our practice with this in mind.

Q Do you have any words used to describe yourself?

A Empathetic, which I believe helps me in my practice. Determined, which I believe you need as an attorney regardless of your practice area.

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

A Some people reading this may not know I'm the Chair of our Section's Sponsorship Committee. If you know of businesses that may be interested in sponsoring one of our events, please send them my way!

Overview of the NYSBA Elder Law and Special Needs Section Membership Services Committee

By Salvatore M. Di Costanzo

The Membership Services Committee is a standing committee of the Elder Law and Special Needs Section whose mission is to attract new members and retain existing members of the Section. For attorneys, the committee acts as a liaison between other Section committees and other sections of the NYSBA to cross pollinate among existing attorneys who are members of the Bar. This is accomplished through networking events, new member initiatives and CLE programs. The committee also recognizes that cost is a primary concern of many members, especially newly admitted attorneys, thus a significant effort is put forth to reduce membership related costs where feasible.

From an outreach perspective, the committee works in tandem with the NYSBA to educate law students and attract them to the profession. This is largely accomplished through coordinated law school presenta-tions and other events focused on introducing upcoming attorneys to the Section. Opportunities are created for law students to attend Section related events as an introduc-tion to the Section and its related activities. The Section also monitors members who have resigned from the Sec-tion, with the expectation of gathering useful information to renew their interest and prevent further withdrawals.

The Section, through the NYSBA, offers valuable resources for its members. One of the goals of the Section is to create awareness of these resources so that members of the Section can reap the benefi ts of their investment in the Section.

For more information about this committee or to become involved, please contact Pauline Yeung-Ha at pyeung@gylawny.com or Salvatore M. Di Costanzo at smd@mfd-law.com.

New York NAELA Niche

By Robert P. Mascali

Some Very Important Wins Leading Into an Uncertain 2017

The past year has seen a number of significant national developments in the areas of elder law and special needs planning and the National Academy of Elder Law Attorneys (NAELA) with the New York Chapter has been involved in many of them.

Robert P. Mascali

Special Needs Trust Fairness Act

On December 7, 2016 the United States Senate approved the 21st Century Cures Act (H.R.34) by an overwhelming majority and President Obama signed it into law on December 13th resulting in the elimination of the discriminatory provision that prevented a competent individual with disabilities from being able to establish his/her own Special Needs Trust (SNT) under 42 U.S.C. 1396p(d)(4)(A). The insertion of the two words "the individual" in addition to parent, grandparent, guardian or a court, as to who is able to establish such a trust, has ended years of delay and frustration for individuals with disabilities and those representing and advocating for them and their families.

The discussion as to whether the original statute that prevented the individual from establishing this type of trust while permitting it for pooled trusts under 1396p(d)(4)(C) was a drafting oversight, the result of personal beliefs or a vestige of the culture at the time is now happily confined to the archives. The important consequence of this statutory change is that beneficiaries with mental capacity can now establish and fund their own SNT without any undue difficulty or delay. The movement for this change has been supported by NAELA from the very beginning and in a statement NAELA President Catherine Anne Seal called the passage "a monumental moment for NAELA advocacy", while at the same time calling out for special recognition a number of NAELA members including Michael Amoruso and Howie Krooks, two past presidents of NY NAELA, and the NYSBA Elder Law and Special Needs Section.

ABLE Act

While the federal law (Achieving a Better Life Experience Act) was enacted at the end of 2014 it required the individual states to take the steps necessary to implement the law within their own state. Currently, ten states have implemented ABLE—Alabama, Florida, Ohio, Nebraska, Tennessee, Michigan, Oregon, Kentucky, Rhode Island and Virginia, and all of these states except for Florida permit accounts to be opened by non-residents (see www.ablenrc.org for updates on state implementation of ABLE). The effort to enact and implement ABLE in New York was stalled due to bureaucratic and legislative inertia but finally this past legislative session, due in part through the persistence of NY NAELA, the legislature passed and Governor Cuomo signed the bill so that implementation in New York may be only a short time away…hopefully in 2017.

Medicare Observation Status

This past year the issue of "obervation status" and Medicare came to a head. As a result, and beginning August 6, 2016, the Notice of Observation Treatment and Implication for Care Eligibility Act (NOTICE Act) required hospitals to provide written and oral notice, within 36 hours, to patients who are in observation or other outpatient status for more than 24 hours. The notice must explain the reason that the patient is an outpatient (and not an admitted inpatient) and describe the implications of that status both for cost-sharing in the hospital and for subsequent "eligibility for coverage" in a skilled nursing facility (SNF). The Center for Medicare Advocacy (Center) has written extensively about patients in hospitals who receive medically necessary care, tests, treatment, and medications ordered by their physicians but are in observation status or are otherwise called outpatients, rather than admitted inpatients.

The consequences for these patients are generally not medical. CMS confirmed that physicians can order whatever care their patients need, regardless of whether they are labeled inpatients or outpatients. A primary consequence for patients of the inpatient/outpatient Medicare billing distinction is financial: Medicare will not pay for post-hospital care in a SNF unless a patient is classified as an inpatient for at least three consecutive days, not counting the day of discharge. Observation status and outpatient status are not inpatient and they do not qualify a patient for Medicare Part A coverage of SNF care. After the completion of the regulatory process and considerable delay, CMS has issued the final form of the required notice. It is referred to as The MOON (Medicare Outpatient Observation Notice) and it is a standardized notice to inform beneficiaries

(including Medicare health plan enrollees) that they are an outpatient receiving observation services and are not an inpatient of the hospital or (CAH). Medicare Outpatient Observation Notice (MOON) and accompanying form instructions are available online at the CMS website (see https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2016-Fact-sheets-items/2016-12-08-3.html for the fact sheet and at https://www.cms.gov/Medicare/Medicare-General-Information/BNI/index.html?redirect=/bni for the forms. Manual instructions are to be made available in early 2017. All hospitals and critical access hospitals (CAHs) are required to provide the MOON beginning no later than March 8, 2017.

While we can savor these victories from 2016, there is considerable concern for the prospects for the elderly and individuals with disabilities as 2017 arrives. Both National NAELA and the NY Chapter will keep our colleagues advised as to developments on the national stage. There was a special webinar on January 10, 2017 at 1:00PM ET-NAELA "Strategy for the New Congress."

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

A Memorial to the Life and Death of Sharon Kovacs Gruer, Esq.

By T. David Stapleton

I would like to take this opportunity to share my feelings regarding Sharon's life and death and the loss of her as a colleague and friend. I had the good fortune of being one tier behind her as we climbed the Section ladder of command. Being able to observe Sharon's skills and approach, and to discuss the role of serving in each office position was very important to my growth in Section leadership.

Sharon was very intelligent and determined to do the best she could in guiding the Section through its many issues and challenges. This was particularly apparent to me as I served as her Chair Elect. She interacted with her other officers, members of the Executive Committee, and her colleagues with her usual pleasant and engaging personality, which induced us all to accommodate her requests. There were times when I recall Sharon had to be more assertive to obtain her objective, but it was always in the best interests of our Section. Observing all this up close and personal, just once again confirmed for me what I've learned in maturity, and that is to "never step between a woman and her objective."

I was so grateful watching Sharon diligently resolve all the pending issues during her term as Chair, so that I could assume my role with a clean schedule, which didn't last long.

Sharon was determined not just in her professional roles, but also in her personal ones. Later in her year as Chair Sharon began to experience her health issues, which took its toll on her strength and comfort, but she never let it interfere, as she soldiered on through her responsibilities without complaint.

Even after she completed her term as Chair, Sharon was always willing to be available to assist me in my role.

After I completed my term as Chair and as Sharon became less able to attend Section meetings, I tried to stay in touch with her by phone on a regular basis. During this time I grew to admire Sharon even more, in the way she conducted her life, while dealing with the hardships imposed by her pancreatic cancer. From its onset in 2010 and well into 2016 she managed her law office and continued her legal career. In our conversations, she was very restrained about her condition and never complained. Her primary concern was for protecting her children who were quite young at the time of her onset. As they matured, she felt grateful that she was able to "mother" them through most of their formative years.

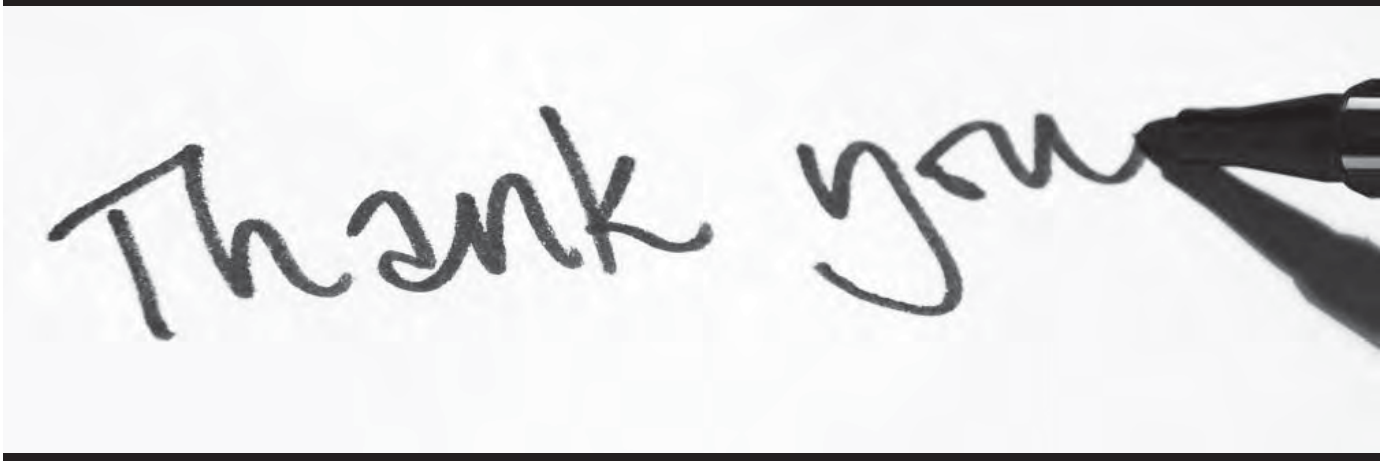
I had one conversation that might be of interest, and that was on my trip down Route 17 to Poughkeepsie for an UnProgram. I thought it was an ideal time to catch up with Sharon. As we talked, I looked at my gas gauge and advised her that I would soon have to pull off at an exit to fill the tank. I then became engrossed in our conversation until she reminded me of my needs, just as my car started to sputter and I had to pull to the side of the road—out of gas. I explained my predicament and hung up. Thereafter, in most of our calls she would razz me by asking if I was driving or if I had run out of gas lately. I loved it.

Sharon and I would occasionally talk about religion and she shared a story that confirmed for me that she was destined for an exceptional life. While in college she spent a semester in Israel with other students, and on one day she and a friend had agreed to meet for a meal at a certain restaurant. As Sharon walked to meet her friend, she passed all these other restaurants advertising Kosher meals. When Sharon arrived at the agreed-upon destination, she noticed they didn't serve Kosher, so she convinced her awaiting friend that they should eat like the local Jews and move to a Kosher restaurant. They walked to one down the street, and while eating they heard a large explosion. They eventually determined that their original agreed-upon meeting place had been the victim of a terrorist attack. As Sharon explained, from that point on she always tried to eat Kosher.

I thought of this story often during her struggle with health, and prayed for another Providential intercession. Those of us who knew her well loved her, and will miss her dearly.

Composed with love, affection and admiration by T. David Stapleton, Esq., a/k/a The Antique Chair.

NEW YORK STATE BAR ASSOCIATION



As a New York State Bar Association member you recognize the value and relevance of NYSBA membership.

For that, we say thank you.

Your commitment as members has made NYSBA the largest voluntary state bar association in the country. You keep us vibrant and help make us a strong, effective voice for the profession.

Claire P. Gutekunst
President

NYSBA

NEW YORK STATE BAR ASSOCIATION

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The Elder Law and Special Needs Section Welcomes New Members *(October 2016 – December 2016)*

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Lovetts Joyner
Karolina Maryniak
Mary Jane McPherson
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Michelle Yeung
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Aaron Carbone
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Gillian A. Hirsch
Bonnie McGuire Jones
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Emily Elizabeth Page
Keri Vanderwarker
John F. Von Ahn

Fifth District
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Scott A. Lickstein
Danielle M. Martell
James M. Nicholson

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Melissa Anne Krause

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Yolanda Rios
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Kristin M. Small
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Lindsay V. Heckler
Michael Klima
Mary Cosgrove Moran
Maryanna Moskal

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Josanna Berkow
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Rachel Sigel Simons
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Gregory H. Cayne
Sarah Anne Chussler
Timothy W. Clare
Patricia Craig
David P. Fallon
Paul S. Hyl
Jessica Leigh Karoutsos
Thomas J. Keegan, Jr.
Diana Lattanzio
Thomas E. Lavery
Cheryl A. Lein-Taubenfeld
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Fourth Annual *Elder and Special Needs Law Journal* Writing Competition

The Elder and Special Needs Section of the New York State Bar Association continues to strive to achieve a diverse membership body, in hopes of fostering a rich environment within which ideas are cultivated.

Topic: Any law or legal issue affecting seniors and/or persons with disabilities or special needs, with a specific focus on historically underserved populations. Examples include, but are not limited to, access to services and quality of life issues, healthcare and housing.

Eligibility: All students attending an accredited ABA law school within New York State and recent law graduates seeking employment.

Awards: The winners of the "Fourth Annual Elder and Special Needs Law Journal Writing Competition" will be guaranteed publication within the New York State Bar Association's *Elder and Special Needs Law Journal* (ESNLJ). In addition, there will be two $1,000 prizes.

Format: Submit the article in the form of a word document. Please do not use Word Perfect or .docx. The article should contain endnotes in Arabic numerals, and all sources should be attributed in *Bluebook* format. Contact the Production Editor for further details or your Office of Student Life. Production Editor is Katy Carpenter, Juris Doctor 2016, KCarpenter@WPLawNY.com.

To Enter: Please send all submissions to the following email addresses:

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Deadline: March 15, 2017 and no extensions will be granted.

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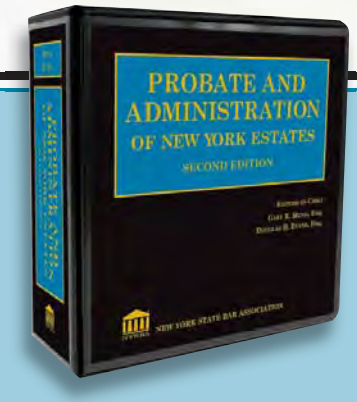

Probate and Administration of New York Estates, Second Edition

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