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NEW YORK STATE BAR ASSOCIATION

Journal

Are You Prepared for the Elder Years?

A special issue for attorneys, their loved ones and their clients

Robert Abrams, Editor

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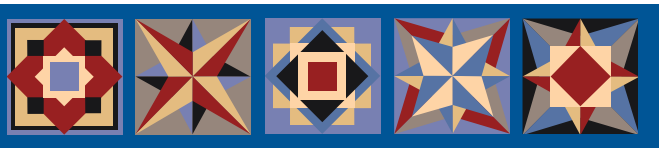
NEW YORK STATE BAR ASSOCIATION
Journal

CONTENTS



JULY/AUGUST 2011

ARE YOU PREPARED FOR THE ELDER YEARS?

A special issue for attorneys, their loved ones and their clients

DEPARTMENTS

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. Copyright © 2011 by the New York State Bar Association. The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $30. Library subscription rate is $200 annually. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

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VINCENT E. DOYLE III

The Importance of Planning – For Our Clients and Ourselves

Whether you are a newly admitted young lawyer or you have been practicing for decades, you are probably familiar with at least some of the legal and financial considerations involved with aging. Some of us have seen how careful planning can, in some small way, ease the suffering that results from a serious illness or untimely death, allowing loved ones to focus on healing rather than complex legal details. Unfortunately, some of us have also seen how the failure to plan can complicate an already painful and difficult situation.

It is important for us to be aware of these issues, not only for the sake of our clients but because of the impact they can have on our own lives. The long list of factors to consider – everything from long-term care to advance directives to retirement planning – can be daunting. And, of course, it is unpleasant to spend time away from our work or our personal lives to consider the inevitable end of life and the possibility of illness, incapacity or an untimely death. But it is so important to our practices and our loved ones that we do just that, and it is never too early to start.

That is why I am so honored to contribute to this special *Journal* issue exploring the many different concerns facing attorneys and our clients as we age. The contributing writers have experienced these concerns either in their own lives or in the lives of their colleagues or their clients. They share numerous stories and examples of how the tragedy surrounding a catastrophic event or serious illness can be exacerbated by complications that could have been prevented through proper planning. They also address unique concerns, such as those facing seniors providing for adult children in need of special care, and the considerations present when older adults divorce or re-marry.

Medical advances allow us to live longer lives and remain healthy and active well into our senior years. Many of us, however, will spend some portion of our lives in need of long-term care or assisted living. Although it is uncomfortable to think about experiencing an extended illness or serious injury, enough of us have supported our own parents and loved ones through difficult times to know that it is a possibility we must consider. And it is important to impart that to our clients as well.

But planning for the future involves more than imagining a parade of horribles awaiting us as we age. We must also plan for life's more pleasant journeys, such as retirement. Many attorneys have helped clients plan for retirement, considering the professional and personal factors involved and closely tailoring their advice to each client's unique needs and aspirations. As attorneys, we must also prepare for the end of our own careers, and consider all of the issues involved in that process. Many of us have spent so much time and energy on our practices and our profession that we self-identify as "an attorney" first and foremost. It is important to consider how retirement will affect us and prepare for it practically and psychologically as we age.

And those of us preparing for a comfortable retirement should not forget how fortunate we are to be in that position. As Valerie J. Bogart discusses in her article, many impoverished senior citizens require extensive legal assistance just to maintain the most basic necessities such as housing and subsistence income. As we plan for tomorrow, we must remember the importance of legal services for people whose basic needs are in jeopardy today. And I hope we will all contribute in whatever way we can.

These are just a handful of the many important topics addressed in this issue. As you read these moving and informative articles, I encourage you to use this as an opportunity to evaluate your own plans for the future and all of the unexpected joys and challenges life may bring. And as we hope those unfortunate potentialities never come to pass, I believe we will enjoy our happy, healthy years more completely, taking comfort in having planned for ourselves and our loved ones in the event that they do. ■

Vincent E. Doyle III can be reached at vdoyle@nysba.org.

Are You a Planner or a Gambler?

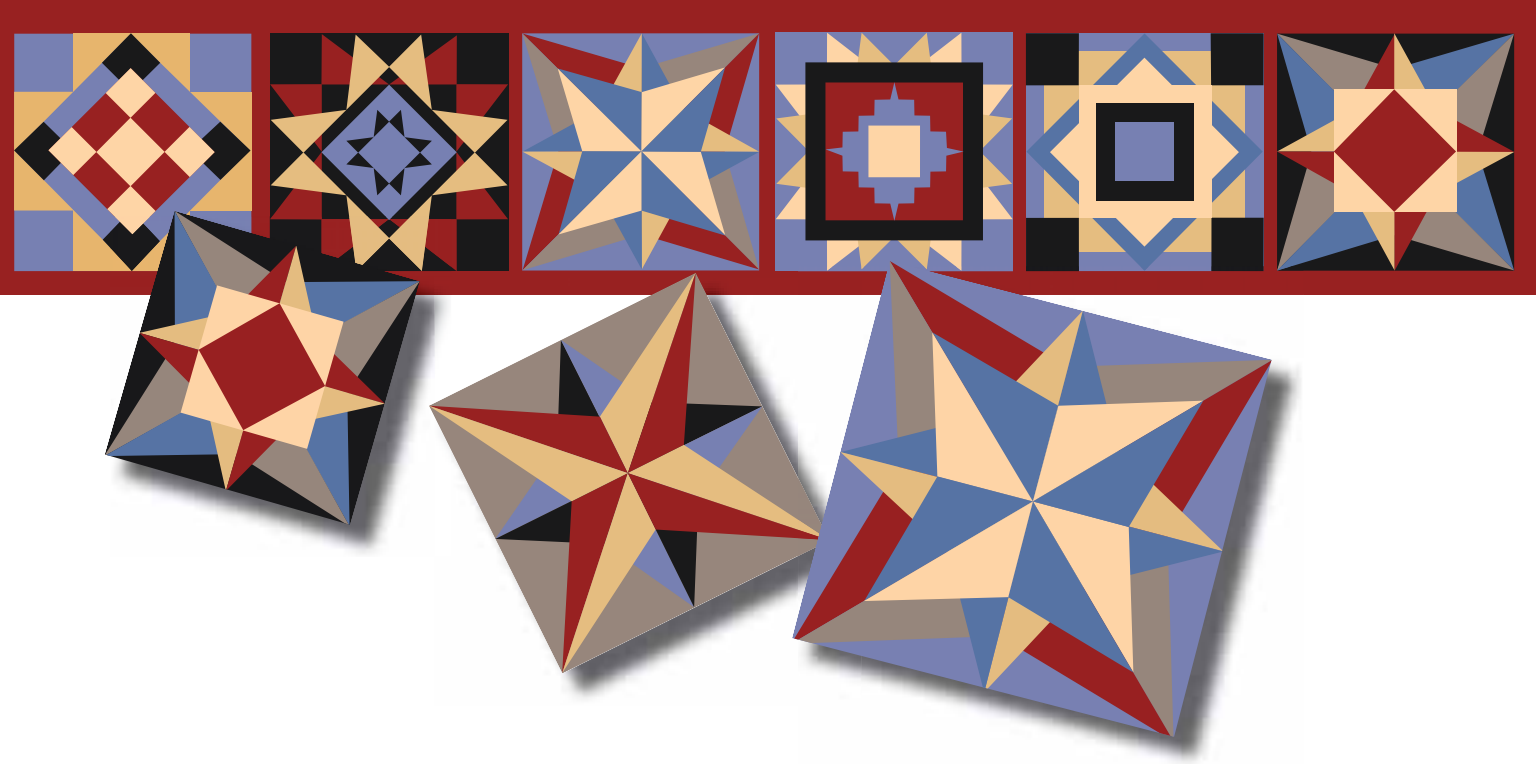
By Robert Abrams, Editor

I have just celebrated my 55th birthday; I have become or soon will be an elder. Despite the irony that I've been an elder lawyer for more than 20 years, I decided it was time to prepare myself (and the rest of America) for the elder years.

As a lawyer and author, I logically began this endeavor by conducting research. Here's a small sampling of what I learned:

- In 2010, approximately 70 million Americans were 50 years of age or older, 40 million of whom were at least 65 years old.
- By the year 2030, one out of every five Americans will be at least 65 years of age.
- The life expectancy for Americans increases with age; individuals who are 65 years old can project that they will live into their late 70s or early 80s. Some will live well into their 90s and a few will become centenarians.
- Millions of Americans have or will suffer from temporary and/or permanent mental incapacity.
- More than five million Americans suffer from Alzheimer's disease and this number is expected to dramatically increase over the next three decades.
- Notwithstanding the prevalence of incapacity, millions of Americans do not have advance directives such as a power of attorney or health care proxy, or they possess documents which are outdated or were executed incorrectly.
- Due to the lack of advance directives and/or available resources, many Americans, notably some lawyers and judges, become the subject of expensive and contested guardianship proceedings.
- While the U.S. Centers for Disease Control and Prevention asserts that there is not necessarily a direct link between aging and poor health, there is no question that the prevalence of chronic health conditions and diseases as well as reliance on prescription and over-the-counter medications increases with age.
- Throughout the country, certainly in New York, millions of Americans have either failed to develop an estate plan and/or have an estate plan that is either incomplete and/or will not be implemented in accordance with their wishes due to non-compliance with and/or a lack of familiarity with the "operation of law."
- Family, and the complexities that result from familial relationships, are the centerpiece of American life. Many older Americans have been married two or more times. Many have concerns about other family members including adult children with special needs and their parents – *yes* their parents!

Robert Abrams (BAbrams10@gmail.com) is a founding member and of counsel to Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato, & Einiger, LLP. A former Chair of both the Elder and Health Law Sections of the New York State Bar Association, he has edited and/or written numerous books and articles for NYSBA including the treatise *Guardianship Practice in New York State; The Legal Manual for New York Physicians*; and the *New York State Public Heath Legal Manual*. He is the author of *Watered-Down Truth: A Flood of Lies More Deadly Than Hurricane Katrina* and *Be a Planner, Not a Gambler: What You Need to Know and Do to Prepare for the Elder Years*, which will be released later this year. His first novel, *Murder by Suicide*, will be published in 2012. In 1995, he created Health Decision Making Day (renamed Mitchell Rabino National Healthcare Decision Day), which has successfully informed tens of thousands of people throughout New York and the United States about the importance of advance directives.



While I could continue to document the impact of what some refer to as the "silver tsunami," suffice to say the exploding elder demographic will forever change the American way of life. Or, as Bob Dylan, who recently turned 70, said, "The times they are a-changing."

My research also revealed that when it comes to preparing for the elder years there are three kinds of people: Geriatric Gamblers; Planning Procrastinators; and Pragmatic Planners.

Geriatric Gamblers: These are risk takers who opt not to plan for the elder years even though they know such inaction increases the likelihood that they and their loved ones will needlessly suffer adverse consequences when they encounter one or more of life's contingencies.

Planning Procrastinators: They recognize the importance of planning; they just believe that there's no reason to plan for the elder years today. Preparation for the elder years can wait till tomorrow – assuming, of course, there is a tomorrow. Unfortunately, some planning procrastinators have discovered that inertia can have adverse ramifications.

Pragmatic Planners: Although they cannot fully predict or control the future, they recognize that at least they can prepare for those issues they are likely to confront. The pragmatic planner's primary objective is to minimize the trauma to themselves and their family members when difficult challenges do arise.

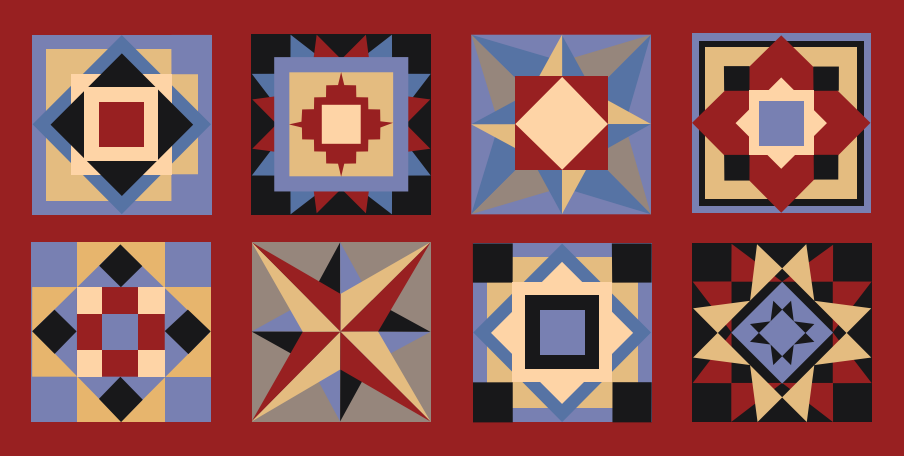
Clearly, from both a personal and professional perspective, our loved ones and our clients, as well as ourselves, will best be served if we all become pragmatic planners. Hence, educating New Yorkers and our fellow citizens throughout the United States is of paramount importance.

Who better to encourage New Yorkers, and all Americans, to plan ahead than lawyers and judges? The Honorable A. Gail Prudenti, the presiding Justice of New York's Appellate Division, Second Department, with unequivocal candor and elegance, makes the following call to action in her article "Lawyer Plan for Thyself and the People You Love":

> As members of the legal profession, we bear a special responsibility to our clients, to our colleagues, and to ourselves, to consider and implement those planning tools which will ease the burden on those who will care for us in our later years and those who will survive us.

Simple math illustrates that, if the legal community responds to Justice Prudenti's challenge, we can spark a national movement. There are approximately 150,000 attorneys in New York. Collectively, we touch the lives of millions of people each day both personally and professionally. Think of the power we have to encourage our families, clients, colleagues and communities to prepare for the elder years. We welcome and urge you to join us in this important endeavor to implement a national movement of planners – for the sake of our family, friends and society.

Before closing, I'd like to thank the current and past leaders of NYSBA who have provided me with the opportunity to participate in various projects, like this special *Journal* issue, which have touched and, hopefully, improved the quality of life for hundreds of thousands of people in New York and throughout the United States. I must also acknowledge David Wilkes, editor in chief of the *Journal*, Dan McMahon, director of CLE Publications, Joan Fucillo, assistant editor of the *Journal*, and Erin Corcoran, designer, for their guidance, support and collegiality. I also extend my gratitude, appreciation and respect to the dedicated authors who have contributed their expertise to this historic issue of the *Journal*. Finally, I thank my wife, Linda, and my daughters Dana and Tracey, who motivate me to live a long, productive and meaningful life. ■



Hon. A. Gail Prudenti is the Presiding Justice, Appellate Division, Second Judicial Department.

Lawyer, Plan for Thyself and the People You Love

By A. Gail Prudenti

It is never easy to confront the issues surrounding one's own mortality. Ideally, we are all too busy with our day-to-day responsibilities and enjoying our lives to consider such unpleasant thoughts. As Woody Allen aptly remarked, "I am not afraid of death, I just don't want to be there when it happens." Most of us feel the same way.

It is no wonder then why so many people either delay end of life planning or fail to do it altogether. As members of the legal profession, we bear a special responsibility to our clients, to our colleagues, and to ourselves, to consider and implement those planning tools which will ease the burden on those who will care for us in our later years and those who will survive us.

Throughout my career, as a partner in an estate and trusts firm, a Surrogate, and a Supreme Court Justice who presided over a dedicated Guardianship Part, and now as the Presiding Justice, I have witnessed how the failure to plan for life's unexpected tragedies has caused undue hardship, both financial and emotional, to countless families. All too common, unfortunately, are the difficulties encountered by the families of those individuals who failed to engage in proper planning and who were rendered incapacitated by a traumatic injury or who died an untimely death. These family members are often faced with potentially expensive court proceedings for the appointment of a guardian for their loved one or protracted litigation over who should be the fiduciary of the estate. Their frustrations are exacerbated by the fact that a good deal of the expense and anguish could have been avoided through the proper use of even the simplest advance planning tools.

As members of the legal profession, what can we do to minimize those instances where a failure to plan may result in unnecessary hardship? To begin, we ought to make sure that our own personal planning is in proper order. We are all familiar with the old adage pertaining to our colleagues in the medical profession: "Physician, heal thyself." We ought to adapt a similar edict for the legal profession: "Lawyer, plan for thyself!"

Regrettably, and despite my constant encouragement to do so, I am aware of more than a few of my friends who are lawyers that have neglected to prepare even the simplest of wills, powers of attorney or health care proxies. Continuing to pester our friends, whether they be lawyers or not, to execute the proper documents, as I do on a regular basis, is not only a demonstration of our friendship and caring but perhaps our obligation as colleagues.

When considered on a professional and business level, attorneys in general, and solo practitioners in particular, are advised to consider what will happen to their law practice in the event of their incapacity or death. In the Second Judicial Department, we have noted an unfortunate increase in the number of instances where the appointment of an inventory attorney is required to supervise the winding down of a law practice where the deceased attorney had neglected to plan otherwise. The appointment of an inventory attorney is not only an additional expense to the deceased attorney's estate but

is often not the ideal solution for the clients or the family of the deceased attorney.

Those attorneys among us who have established an expertise in either trusts and estates or guardianship are well versed in and are well aware of the need for proper planning. Attorneys who specialize in other disciplines are well advised to counsel their clients on the need to consider the issues which are associated with end-of-life planning. Alerting clients to the options available to them and reminding them of the need to update their planning on a regular basis ought to be part of every consultation. It is only by making this type of dialogue a priority for ourselves, our colleagues and our clients that we will do our best to serve the public.

No advice could be more valuable than to suggest a consultation with an attorney who has developed an expertise in the area of preparing for one's elder years. At such a consultation, the client's particular needs can be measured against the available options to determine what tools are necessary and which are best suited to the client's situation.

Some of the matters which ought to be discussed in such a consultation are the following:

- Executing a last will and testament
- Granting a power of attorney for financial decision-making that survives incapacity
- Executing health care proxies, living wills and/or other advance directives
- Evaluating the cost of and the need for long-term disability insurance as well as long-term care insurance
- Maintaining sufficient life insurance, if appropriate for your particular situation
- Consulting with a certified financial planner
- Establishing convenience accounts
- Considering organ and tissue donation
- Making funeral arrangements
- Considering reverse mortgages
- Organizing important documents
- Exploring residential care and alternative living arrangements, as needed
- Obtaining property tax relief
- Making the home safe
- Exploring emergency preparedness and disaster planning options
- Becoming familiar with applicable government programs and benefits

This list is not intended to be exhaustive, but may serve as a guide in preparing for the elder years. Consultation with experienced professionals will undoubtedly lead to additional issues which will require resolution. By not delaying proper planning, we may have our best chance not only to enjoy our elder years but also to relieve our friends and family from needless turmoil in the future. ■

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A Prayer, a Hug and a Martini

Dealing With the Realities of Aging

By Charles Fahey

The process of aging and being aged pose challenges for all persons in both their personal and professional lives. While this part of the human experience is as old as humanity, we are to some extent in terra incognita because of rapid changes in demography, family relations and public policy, based on an explosion of knowledge and technology and their application to the human condition. Social structures are having difficulty keeping pace with these rapid changes, particularly as they affect the process of aging. As individuals and practitioners, personally and professionally, lawyers are deeply enmeshed in the experience.

Essentially, law involves interactions and exchanges among individuals and groups. As one advances in age, relationships continue to be vital though the capacity of some elders may be compromised, thus requiring the assistance of advocates – whether informal or formal. Lawyers may need to be more conscious of relationships in the aging process not only for clients but for loved ones and even for themselves.

The Stages of Aging

A brief overview of the aging process across the life span might help clarify the challenge facing individuals and society, the legal profession and its practitioners.

The underpinning of the human journey is biology – from cells and molecules, to the fully functioning organism we characterize as a human being. From the first moment of conception until death, this human being ages.

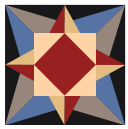
In the first age, our biological makeup matures over time, until physical maturity, the capacity to participate in reproduction, and the ability to satisfy basic urges for physical, emotional and even spiritual intimacy usher in the second age. Historically this was the period of maximum physical capacity to perform the basic tasks necessary for personal and species survival; only in the last 100 years has a third age become "normal." Heretofore, relatively few people survived past the second age. However, as a result of our growth in knowledge and its application to the human condition we have, to a large degree, eliminated many causes of premature death – primarily through immunizations and various medical interventions.

And, we have dramatically increased life expectancy and, at least, raised the question of extending the life span itself. But now we have the challenge of "managing our miracles" both as individuals and as a society.

The Third Age

During this relatively new third age, a period necessary neither for reproduction nor for persons with physical strength, we experience changes in the power structures of and our needs in both personal and societal relationships. Basic biological realities come into play. Where in the first two ages there is consistent, orderly, balanced degradation and repair functions occurring at the cellular level,[1] in the third age the balance is disrupted; the repair function cannot keep pace with cellular failure, resulting in progressive intermittent frailty (often referred to as PIF).

There is a third age phenotype, evident across the entire older population, with changes in hair, hearing, teeth, skin, eyes, organ reserve and energy. For women, menopause is particularly dramatic marker.



In medicine there is a growing recognition of physical frailty as a syndrome, a collection of symptoms or markers, primarily due to the aging-related loss and dysfunction of skeletal muscle and bone, that place (mostly) older adults at increased risk of adverse events such as death, disability, and institutionalization.

Frailty as used here, however, has a broader meaning. Frailty is both physical and social in its etiology. It tends to be progressive, ultimately ending in death, but manifests itself both differently from individual to individual and expresses itself in an uneven course with each person with periods of relative exacerbation and remission. It encompasses the disequilibrium between an individual's personal capacity and external demands. Any number of relational factors, including physical and social environmental factors, will intensify or remediate this disequilibrium.

The presence of willing supportive others, ideally with instrumental, emotional and even financial (in-kind, too) help is critical at all stages of frailty, especially the most acute. Its absence makes it ever more difficult to deal with frailty. Unfortunately the loss of dear ones is difficult, if not devastating, to older persons.

Resources and the Third Age

The third age is a period of consumption of economic resources rather than their production and accumulation. A fortunate few have been able to accumulate assets they can rely on to help moderate their frailty by securing various aids – both human and mechanical/technological. As income and assets are becoming ever more bifurcated in the United States, the financial viability of many in the third age and the baby boomers entering this period is becoming more problematic. Potential modifications of Social Security, Medicare and Medicaid may exacerbate the problems for many. For half of persons in the third age, Social Security is their primary source of income.

Health expenditures are problematic in the private and public sectors for individuals, businesses and governments at every level. Despite our huge investments in health services our outcomes, as compared to those of other countries, indicate that our efforts, while costly, are not very efficient.

In addition to lowering premature death throughout the life span and thus increasing life expectancy, medical interventions, rehabilitation activities, management of chronic illnesses, pharmacological agents and prosthetic devices all lessen frailty but have personal and societal costs.

Health Care Decision Making

Health care decision making has for some time been front and center in the public agenda. There are many questions that will not go away: Who should make decisions and on what basis? Will decisions be "evidenced based" and include quality of life considerations? Should ability to pay be the rationing tool? Both private and public sectors effectively "ration" by what they will reimburse. Should government instrumentalities be the determiners? Can and should the matter be left to individuals and their physicians or other health care providers?

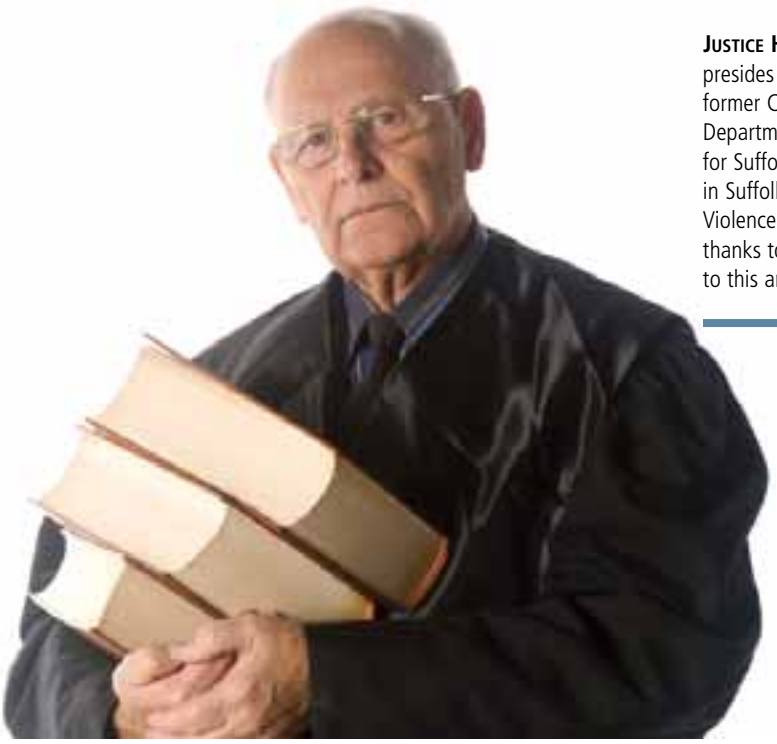
Whatever direction public policy takes, all individuals will need and want health services. They will require trusted advisers to help them understand what is possible and to advocate for what is their due. And lawyers have an increasingly important role to play. Advance directives are a first step. They can be utilized in the event a person does not have the capacity at a given moment or over time to make important health care decisions. Virtually all states have developed statutes in this regard.

In general, an advance directive is one of two general types; either the person enumerates explicitly and in detail what he or she wishes or does not wish to be done in particular circumstances; or the person appoints a health care proxy, essentially a durable power of attorney approach, where a person is delegated to be the decision maker. Often the state statutes cover elements of both types. In most jurisdictions attorneys need not be involved, but often they are.

From my perspective the health care proxy approach is preferable as long as it is drawn and executed appropriately. The proxy should be agreeable to assuming the responsibility and have a thorough understanding of what it entails. The proxy should understand the person's wishes and have the ability to negotiate with health professionals in what may be difficult circumstances and be ready to be supportive to all involved.

A brief vignette may be helpful. My health care proxy is my niece Sharon, an attorney who is a board member of a hospital and the former chair of a long-term care system. I said to her, "Sharon you know this is like an engagement, an indication of our love and respect for one another. We have known one another since you were a little girl. I want you there not only if I am incapable of making a decision but whenever I might be in trouble. Even while technically capable I may have diminished decisional acuity and would need your intellectual, moral and emotional support. Oh yes, in the event I am in extremis, I will not burden you with what you should be doing with regard to technical interventions, but I will ask you to honor these three simple requests: Can I say another prayer? Can I give or get another hug? Can I enjoy another martini?" ■

1. Leonard Hayflick, *Aging Is No Longer an Unsolved Problem in* Biogerontology: Mechanisms and Interventions, Annals N.Y. Acad. Sci., vol. 1100, pp. 1–13 (Apr. 2007). "It is the cornerstone of modern biology that a purposeful genetic program drives all biological processes that occur from conception to reproductive maturation."



Justice H. Patrick Leis III of the New York State Supreme Court currently presides over the Model Guardianship Part in Suffolk County. He is the former Co-Chair of the Guardianship Task Force for the Second Judicial Department. Justice Leis has served as the District Administrative Judge for Suffolk County, the Supervising Judge of the Matrimonial Courts in Suffolk County and the Presiding Justice of the Integrated Domestic Violence Court of Suffolk County. Justice Leis would like to give special thanks to Athena Voorhees, his Principal Law Clerk, for her contributions to this article.

From ESQ to IP

Attorneys and Judges Need to Prepare for the Possibility of Incapacity

By H. Patrick Leis III

Approximately one out of every eight Americans who is 65 years of age or older will have periods of mental incapacity. This increases to one out of every four persons over the age of 75. Over five million people currently suffer from Alzheimer's disease alone.[1]

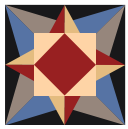
In the last 15 years, this writer has had the opportunity to preside over hundreds of guardianship proceedings, and what is most striking is the number of attorneys and judges who become the respondent in such matters. It is very difficult to witness a colleague's public ordeal as assets become subject to court inspection and his or her capacity is litigated.

Being the subject of a guardianship proceeding can be upsetting, but it is especially disconcerting for judges and lawyers as we are accustomed to being in control of our legal environment. While every effort is made to treat each individual with dignity and respect, a guardianship proceeding, by its very nature and regardless of one's professional background, can result in the alleged incapacitated person (AIP) experiencing embarrassment, hurt and feelings of indignity as well as the loss of power and control over his or her person or property. Further, the cost of an Article 81 proceeding, especially if contested, can be substantial for the alleged incapacitated person who will be statutorily required to pay for most, if not all, of the attorney fees and costs if a guardian is appointed.

The Guardianship Process

The filing of a guardianship proceeding alleging that a person is unable to care for his or her own personal or property management needs is a major intrusion into an already vulnerable person's life. Allegations of incapacity, no matter how well-intentioned, can be hurtful and are often resented by the alleged incapacitated person. The mere act of petitioning for a guardian can erode a lifelong relationship between the AIP and the petitioner and often results in irreparable family disharmony.

Pursuant to N.Y. Mental Hygiene Law Article 81, the commencement of a guardianship proceeding generally requires the appointment of a court evaluator who must personally meet with the AIP, and, in many instances, the appointment or retention of an attorney to represent the AIP. In addition, there are situations in which a court will appoint a temporary guardian and/or grant provisional relief prior to any hearing if it is alleged that the AIP is in need of immediate assistance. In such instances, although counsel is required to be appointed for the AIP, counsel's first opportunity to be heard on behalf of the client generally will have to wait until the hearing. Meanwhile,



the AIP's assets, depending on the powers conferred, could be marshaled by the temporary guardian prior to a determination of incapacity being made by the court.

A hearing is required whether or not the AIP opposes the guardianship or family members can agree on the selection of a particular guardian.[2] At this hearing, if it is contested and depending upon the court, the AIP may be required to testify and subjected to cross examination. This can be extremely taxing for individuals suffering from Alzheimer's disease or dementia. At the hearing, AIPs will ordinarily be in attendance unless, for example, they have been found by the court to be unable to meaningfully participate in the proceeding and their presence has been excused.[3]

Being the subject of a guardianship proceeding is especially disconcerting for judges and lawyers as we are accustomed to being in control of our legal environment.

Often individuals alleged to be in need of a guardian have physical infirmities, are in pain and/or are in a wheelchair. Almost always they feel frightened and humiliated by the process. Indeed, listening to family members and strangers explain in minute detail indicia of one's incapacity can be extremely stressful and embarrassing. If no suitable family member is available to serve as a guardian or if family disharmony prevents a family member from being selected, an independent guardian will be appointed by the court. The guardian generally will be compensated yearly from the AIP's funds. Moreover, as mentioned above, contested hearings can be prolonged and deplete large amounts of the AIP's estate.

The Antidote for an Article 81 Proceeding: Advance Directives

A failure to execute advance directives can result in a guardianship proceeding in which the alleged incapacitated person's most private and personal matters are aired in a courtroom wherein family members, neighbors and others battle for control of the AIP's person or property. By contrast, executing advance directives such as a power of attorney, health care proxy and/or living will when an individual's capacity is not an issue can help avoid a guardianship action. If, however, one waits to prepare these documents until capacity has become an issue, the advance directives could be modified, amended or even revoked by a court, rendering them valueless.[4]

Furthermore, were a family member to take an AIP to an attorney and cause the AIP to create subsequent advance directives at a time when his or her capacity is in question, the presence of the prior advance directives made when there was no issue of incapacity could dictate a finding by the court that the new documents are void. This determination would result in a dismissal of any guardianship proceeding in favor of the prior advance directives.

Selecting a responsible and trustworthy individual to serve as an agent pursuant to a power of attorney or health care proxy is just as important as assuring that the documents are executed during a period of time when capacity is not an issue. If one chooses as an agent an individual who acts in a manner inconsistent with his or her fiduciary duties and responsibilities, the court in a guardianship proceeding can set aside the advance directive.[5] In fact, guardianship proceedings seeking to set aside advance directives on the basis of allegations that the agent has breached his or her fiduciary duties and responsibilities have become more common as attorneys increasingly use allegations of a breach of fiduciary duty to pierce the sanctity of properly drafted and executed advance directives.[6]

In the Brooke Astor guardianship proceeding,[7] for example, an application was made to declare void the powers of attorney and health care proxy given by Mrs. Astor to her son, based on allegations that the son had enriched himself from the his mother's assets while neglecting and mistreating her. The proceeding was ultimately settled, but not before the court was presented with numerous fee applications encompassing the services of 56 lawyers, 65 legal assistants, six accountants, five bankers, six doctors, a law school professor and two public relations firms. When the fees requested by the temporary guardian of Mrs. Astor's person and the temporary guardian of her property are included, the total fees requested were over $3 million.[8]

By not executing advance directives, an individual can lose the ability to choose who will make decisions if his or her physical or mental capabilities become compromised. While the alleged incapacitated person's opinion concerning who will become his or her guardian will be considered at a guardianship hearing if the court determines that the AIP has the capacity to make a reasoned choice, the final decision will rest with the judge.

Thus, where an advance directive is made when capacity is not an issue, a responsible agent is appointed, and the directive is sufficient to meet the AIP's needs, a guardianship petition challenging the advance directive will be denied.[9] Also, when a petition is dismissed under these circumstances, the cost of the guardianship proceeding can be charged to the petitioner rather than the assets of AIP.[10]

Family Health Care Decisions Act or Article 81

In a laudable attempt to help families without advance directives avoid confusion, possible turmoil and even judicial intervention, New York State in 2010 enacted the Family Health Care Decisions Act (FHCDA).[11] The FHCDA allows family members to become qualified surrogates and to make health care decisions where there is no advance directive. This would include decisions concerning the withholding or withdrawing of life-sustaining treatment. The person in need of the surrogate, however, must be either in a hospital or a residential care facility for the surrogate to be able to act pursuant to this law. Also, the individual who becomes the surrogate is selected not by the person in need but by the statute based upon a boilerplate priority list. Who makes the decision regarding a do-not-resuscitate order or the decision to withhold life-sustaining treatments in cases of terminal illness and prolonged suffering, is far too important and personal a decision to be made by a statutory priority list. Another problem inherent in the FHCDA list is that it allows for the concurrent appointment of several family members to act as surrogate when the person in need has more than one sibling or child. This can result in an inability to act when all cannot agree on a course of action.

In addition, making decisions concerning end-of-life care can be very difficult for spouses, children and siblings who are not provided with clear guidance as to the individual's wishes. Although the FHCDA provides authority to act during a health care emergency, it is no substitute for the expressed specific guidance contained in advance directives. Endeavoring to discern what mom, dad, sister or brother would want by attempting to reconstruct conversations in which such matters were discussed should be avoided if possible – especially when making end-of-life decisions. In fact, the ensuing confusion experienced by the family, the result of not knowing the exact wishes of the loved one who is facing the medical crisis, can cause great consternation. *Thus, it is an act of consideration and compassion to predetermine these matters in advance directives.*

Conclusion

A properly executed power of attorney, health care proxy and living will, if drafted when there is no issue as to capacity, can go a long way in preserving an individual's assets, dignity, desires, privacy and even family harmony. ■

1. *Be a Planner, Not a Gambler: What You Need to Know and Do to Prepare for the Elder Years*, Robert Abrams (2011).
2. MHL § 81.11.
3. MHL § 81.11(c).
4. MHL § 81.29(d).
5. *Id.*
6. *In re Daniel TT*, 39 A.D.3d 94 (3d Dep't 2007).
7. *In re Marshall*, 14 Misc. 3d 1201(A) (Sup. Ct., N.Y. Co. 2006).
8. *Id.*
9. *E.g., In re Maher*, 207 A.D.2d 133, 140 (2d Dep't 1994).
10. MHL §§ 81.09(f), 81.10(g); cf. MHL § 81.16(f); *see In re Kurt T.*, 64 A.D.3d 819, 822–23 (3d Dep't 2009); *Schneider v. Engelmayer*, 49 A.D.3d 348, 348 (1st Dep't 2008); *In re Lukia QQ.*, 27 A.D.3d 1021, 1023 (3d Dep't 2006); *In re Ida Q.*, 11 A.D.3d 785, 786 (3d Dep't 2004); *In re Albert S.*, 300 A.D.2d 311, 311 (2d Dep't 2002), *lv. denied*, 99 N.Y.2d 511 (2003); *In re Lyles*, 250 A.D.2d 488, 489 (1st Dep't 1998); *In re Geer*, 234 A.D.2d 939, 939 (2d Dep't 1996).
11. 2010 N.Y. Laws ch. 8, § 2.

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You Never Know What Life Will Bring

By Lisa K. Friedman

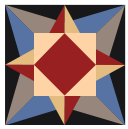
Last fall, shortly after having been diagnosed with Amyotrophic Lateral Sclerosis (ALS), often referred to as Lou Gehrig's Disease, my husband, an attorney, died. Through this difficult experience, my family and I learned that the worst time to address one's health care planning and estate planning is when one is facing certain death or when one is facing a serious illness. All of us have friends and relatives who have not planned at all or who have not updated or completed any planning. We should not wait to make difficult choices until we are in crisis. In memory of my husband, I urge you all to plan now for life's contingencies. You never know what life will bring.

As attorneys we advise our clients with regard to myriad issues. Ironically, many of us who do any kind of life or estate planning often have not planned properly for ourselves, in spite of planning for our clients and in blind disregard of our knowledge and experience. We do not take our own advice. When was the last time you reviewed your will, health care proxy or power of attorney? Planning in a crisis when you have been given a dire diagnosis of a potentially fatal illness is certainly less than optimal; having no plan if there is a sudden catastrophic medical event is even worse.

We lawyers (and our loved ones) are not immune to the challenges life brings. I urge you to engage in a moment of meaningful and honest reflection and consider the following issues.

Health Care

How many of us have health care proxies in place and other advance directives with regard to our health needs? Have you thought about what you want done medically if you are given a dire diagnosis? Have you communicated your specific wishes to your agent? Does your health care agent know what your wishes and preferences are? Have you had that discussion with the agent as to what you want under various scenarios? Have you named the right person? Have you just named someone – a child, another



family member, a friend – as your health care agent and not taken the time to discuss what your wishes are with the agent, so he or she can make a meaningful decision? While we can discuss decisions regarding our health care when we are capable, our agent needs to know what we want done when we cannot specify what we want. What measures do you want taken if you temporarily or permanently cannot communicate what you want? Have you even considered the risks and benefits of various forms of care and treatment in the case of emergency or urgent care? Who is going to be your health care advocate when you cannot deal with the issues? If you have a medical issue when you go to the doctor, should you take someone with you to be your eyes and ears, to act as your memory of the conversations you are having with medical professionals? Does that person help you ask meaningful questions?

When a crisis occurs you may not be able to communicate what you want, much less execute a health care proxy. If family members disagree or are likely to disagree regarding your health care, avoid a family feud by properly executing advance medical directives now. Why leave the family members to fight over your care? How many times have you visited someone in the hospital and seen a blank health care proxy form on the bedside table?

Why risk the appointment of a guardian of the person, possibly a family member or stranger, who will be empowered to make decisions for you? The guardian may be limited in terms of what he or she can do if there is no health care proxy or other advance directives. The cost and delay in getting appropriate care can be great and potentially have adverse consequences for you and your family.

Money Management

The same applies to money management issues. If you are facing serious medical issues, you cannot devote your time or limited energy to addressing money management issues. Similarly, it is difficult to get your financial house in order when facing major health issues. As with the execution of a health care proxy, a power of attorney is essential to carry on matters during the lifetime of the attorney. The decision making with regards to executing powers of attorney is time consuming and takes energy, which the ill attorney does not have.

Your Estate Plan

When your mind is on life and death matters or you are immersed in medical care due to a terminal or serious illness, you will not have the luxury of carefully thinking out what you (and your spouse) want to do with reference to your estate plan. For example, who has all the life insurance and retirement plans with current beneficiary information and change of beneficiary forms necessary to review and make necessary modifications? It can easily be dealt with when you have your health but when you don't, the emotions and trauma can interfere.

Your Children

If you are alive but become incapacitated, have you thought about who will care for your minor children? What legal authority will be needed to ensure that person has the authority to act? Will the person you appoint as your health care proxy communicate and connect with your minor and/or adult children in a meaningful and respectful manner?

Upon your demise, have you made provisions to assure that your children have an appropriate guardian if they have not yet reached maturity? Have you spoken with and secured the consent of the proposed guardian? Do you have an alternative? If you have created testamentary trusts for your children, did you appoint and secure the consent of the nominated trustee? Asking someone to serve at a time of pressure, or through a testamentary instrument, can backfire later. Do you have a plan in place for your minor children? Will there be sufficient funds available to provide for their care?

> Planning in a crisis when you have been given a dire diagnosis is certainly less than optimal; having no plan if there is a sudden catastrophic medical event is even worse.

Does your proposed trustee or guardian *want* to be a trustee or guardian? Do they understand the time commitment? An individual may be a good personal needs guardian for a child but not a good trustee. Should you be naming two people rather than one?

For those of you who have a disabled adult child, have you selected a person(s) or agency that will serve as your child's lifetime advocate? Have you applied to a court for guardianship for the disabled child before he or she reaches 18? Have you named capable and willing successors? Have you determined where your child will live? Have you taken steps to ensure your child will receive the health care, financial and/or mental health services as well as day-to-day services he or she will require?

As Bob Abrams cautions us in *Be a Planner, Not a Gambler: What You Need to Know and Do to Prepare for the Elder Years,* do not become a victim of "elder denial." We owe it to ourselves and our loved ones to create, implement and constantly update a plan that addresses life's contingencies. ■

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There's a Reason It's the POWER of Attorney

By Rose Mary Bailly, Michael E. O'Connor and Jennifer N. Santaniello

The power of attorney is a powerful life estate planning document; as attorneys, we should treat it as such, both in the drafting, and in the counseling of our clients on its use. All clients should be advised as to the types of powers of attorney that may be employed, the powers they may delegate, the selection of an agent, and the legal and fiduciary obligations of the agent to the client. This will allow our clients to consider the various issues and decisions that must be addressed through the artful drafting of a power of attorney.

The Importance of the Power of Attorney

First, the attorney must thoroughly explain the importance of the power of attorney.[1] The client should understand that a power of attorney will allow the agent to act on the client's behalf in regard to the client's personal and financial affairs; that the client is, in essence, providing the agent with a blank check. Clients should also understand that, without such a document in place, a family member may not be able to assist them and will have no other choice but to file for guardianship. This is a costly, time-consuming and administratively burdensome process where the court, as opposed to the client, determines who will have power over the client's affairs in the event the client becomes incompetent.

It is the duty of the attorney to inform the client of the importance of a power of attorney in planning for the future. It is also the duty of the attorney to inform the client that the document could potentially be used as a means of financial exploitation and to address with the client how that potential misuse may be mitigated. As many members of the New York State Bar Association are aware, the complexity of the current statutory power of attorney is, for the most part, attributable to the desire of New York State to discourage and decrease such incidences of fraud.[2]

Selecting an Agent

The careful selection of the agent is perhaps the most effective means of reducing the client's vulnerability to the potential misuse of a power of attorney. The attorney should advise the client to select only those persons in whom the client has the utmost faith, confidence and trust. This selection requires the client and attorney to anticipate how such persons would behave under certain circumstances. The attorney should be cognizant of the fact that a client's first inclination may not always be appropriate – for example, is a second spouse necessarily an appropriate choice, if there are adult children from a prior marriage? Should the power be granted to an individual with financial or personal problems that may impair their judgment?

In certain situations it may be appropriate to recommend that the client appoint more than one agent and require that such agents act together, as opposed to permitting each of the agents to act separately. The appointment of two agents who must act together provides an extra layer of protection to the client as each agent may act as a check on the other, so as to assure that no self-dealing takes place.

Preventing Misuse

Pursuant to the recent modification of New York's power of attorney statute, the client should also be counseled

on the potential use of a monitor under the new form.[3] The use of a monitor, armed with the power to demand and compel an accounting from the agent, is a potentially powerful tool that may be employed to protect a client from financial exploitation and should not be overlooked. However, before most attorneys and clients become comfortable with the selection of a monitor, certain practical obstacles must be addressed. For example, as the law imposes no fiduciary duties on or protection for the monitor, the attorney and the client should consider utilizing the modifications section of the power of attorney to address some of the potential issues that may dissuade a monitor from exercising his or her powers. One option is for the client to provide the monitor with reasonable compensation and reimbursement of costs and expenses with the understanding that the exercise of such a power could be time consuming and may result in litigation. Moreover, the monitor should be indemnified and/or held harmless from any alleged losses to the client and/or his or her beneficiaries as long as the monitor has acted in good faith.

Another potentially effective means of preventing misuse that should be considered, is limiting the agent's access to the power of attorney after it is executed. A common method has been for the drafting attorney to hold the power until advised that the client is under a disability. In determining whether this method is to be utilized, consider the obligation of the attorney to the client in verifying the client's purported disability prior to the release of the document.

The use of a springing power may also be presented to the client as an alternative to limiting the agent's access to the power of attorney. A springing power typically provides that an agent's authority to act exists only if a client's physician verifies the client's incapacity. Springing powers, however, are not looked on favorably by financial institutions. Notwithstanding the requirement that a valid power of attorney be honored, the lack of a sanction makes it doubtful that the springing power will be any more agreeable to financial institutions in the future than it has been in the past. The privacy rules of the Health Insurance Portability and Accountability Act (HIPAA) further compound the problems faced by an agent in establishing authority under a springing power.

As some of the most damaging transgressions occur under the gift-giving authority, determining whether the agent should be provided with such power, and to what extent, is an issue that also requires the careful attention of the attorney and client. Providing this power to the agent may be important, as it is commonly used in estate planning to reduce prospective transfer taxes and in Medicaid planning to protect assets from impending long-term health care costs. The potential need for such planning should be evaluated in determining if the gifting power is appropriate and if so, how it should be structured. For example, if the client has an estate of significant value, it may be appropriate to limit gifting to the annual exclusion amount as the potential for Medicaid planning and hence, unlimited gifting would be unlikely. In contrast, if a client is elderly and has limited assets, a broad gifting power may be necessary as this client may need to engage in Medicaid planning.

To ensure that the client does not unknowingly provide the agent with the power to make gifts inconsistent with the client's wishes, the client and attorney should consider placing some limitations on the agent's gift-giving powers. For example, the power of attorney may provide that if a gift is to be made to one of the client's descendants, then every member of the particular class to which that descendant belongs must also be provided with a gift of equal value. Another option may be to provide that gifts may only be made if they conform to the disposition of the client's property as provided in the client's last will and testament (or other testamentary substitute).

The client should also understand the fiduciary obligations of the agent to the client and the remedies available to the client should these obligations be breached. New York's guardianship courts, for example, have seen numerous cases where the alleged improper actions of an attorney-in-fact were at issue.[4]

Conclusion

The power of attorney has been, and continues to be a key element of a client's estate plan. It should be discussed fully with the client, drafted carefully, and reviewed periodically to be sure that this powerful document accurately reflects the client's current objectives. The client should understand its importance and not decide hastily on the details. Clearly, the attorney should proactively seek to protect the client from any potential misdeeds and fully counsel the client on the benefits and risks attendant upon its design and use. As Milton Friedman once said, "[t]he power to do good is also the power to do harm." ■

1. *See, e.g.*, David Goldfarb, *New York State Power of Attorney Law and Proposed Amendments*, NYSBA Elder Law Attorney (Summer 2010), p. 7; Rose Mary Bailly & Barbara S. Hancock, *Changes for Powers of Attorney in New York*, N.Y. St. B.J. (Mar./Apr. 2009). p. 41; Michael M. Mariani, *Planning Ahead – Power of Attorney: An Important Estate Planning Document*, N.Y. St. B.J. (Oct. 2008). p. 47; Anthony J. Enea, *Have You DRA Proofed Your Power of Attorney?*, NYSBA Elder Law Attorney (Fall 2007), p. 30.

2. *See* N.Y. General Obligations Law §§ 5-1501–5-1514 (GOL). On March 1, 2009, New York adopted comprehensive amendments to New York's power of attorney statute. On August 13, 2010, additional amendments were made to address technical issues and to clarify the ambiguities of the 2009 amendments.

3. GOL § 5-1509.

4. *See* N.Y. Mental Hygiene Law § 81.29(d); *M.R v. H.R*, N.Y.L.J. (2008); *In re Guardian & Prop. of Sally A.M.*, 19 Misc. 3d 1124(A) (Sup. Ct., Rensselaer Co. 2008); *In re Wingate*, 169 Misc. 2d 701 (Sup. Ct., Queens Co. 1996); *In re Rochester Hosp. (Levin)*, 158 Misc. 2d 522 (Sup. Ct., Monroe Co. 1993).

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Take Your Own Advice – Please

Advance Planning for Health Care Decisions

By Robert N. Swidler

While I have no footnote for this assertion, I suspect that lawyers are far better at advising clients than they are at advising themselves. When we counsel clients, we are impartial and dispassionate, and we draw upon those skills of reasoning and logic that we have practiced since law school. We can think ahead two or three moves and plan for them accordingly. We use the right side of our brains. In contrast, when we address our own affairs (or when we avoid addressing our own affairs) we use more of our left brain. We are more emotional and less logical. And we procrastinate.

Planning for health care decisions is a case in point. One does not have to be an elder lawyer, a trusts and estates lawyer or a health care lawyer to recognize the importance of advance planning for health care decisions. It should be self-evident: If you take some basic steps now to appoint a health care agent and make your health care wishes known, you will greatly increase the likelihood that your wishes will be honored if and when you are unable to make decisions personally. If you care at all about who you would want to make health care decisions for your future self, or whether you would want aggressive treatment until the end of life or a focus on comfort care, your inner lawyer should be shaking a finger at you and saying: *plan now*.

Why then do most New Yorkers, and presumably most New York lawyers, not take those steps?[1] For one thing, planning for the prospect of one's future illness and inability to make health care decisions is distressing. Indeed, it can cause more anxiety than planning for the distribution of one's estate. Each of us knows that we will pass away one day, and there is something about the inevitable yet abstract nature of death that makes it possible to work on a will without undue emotion, at least in our culture. But health care planning forces one to contemplate scenarios of suffering, loss of control and indignity that are less inevitable and more disturbing than the notion of eventually passing away. Effective advance planning also requires discussions with family members or others – a step that can both increase and transmit that discomfort.

Also, the use of health care advance directives, unlike the use of wills, is still a recent phenomenon. When living wills first appeared in the 1960s, the legality of the documents was uncertain, and the people who completed them were considered a bit idiosyncratic. To be sure, our culture has changed dramatically since

then, and such documents are now familiar and legally accepted. Even so, there is still something a bit avant garde about this approach to health care decision making; evidently it is not considered as essential a planning document as a will.

Moreover, health care decision making scenarios are more varied and complex than the unitary event that triggers an estate: How does one plan for unknown future treatment decisions for unknown future conditions? What if you just don't know what your future incapable self would want? So even lawyers who support advance health care planning in principle may see no contradiction in urging their clients to plan while declining to commit themselves to future treatment decisions.

Finally, there is inertia – a factor that should never be underestimated. Some lawyers who fully appreciate the value of an advance directive and intend to complete one "just haven't gotten to it yet."

This article is a gentle effort to snap those lawyers out of their complacency. If you were advising a client, your advice would be to complete an appropriate advance directive as soon as possible. You should give yourself that advice – and then follow it.

To help you get started, this article will (1) briefly summarize the law on health care decision making in New York; (2) explain why it is essential for New Yorkers to have an advance directive, even though New York now has a default surrogate decision making law, i.e., the Family Health Care Decisions Act; and (3) identify key options for advance care planning in New York.

Health Care Decision Making

The law for health care decision making in New York can be organized under three broad principles.

1. Adult Patients With Decisional Capacity Can Decide What Treatments to Accept or Decline

Decisional capacity is generally defined as the ability to understand and appreciate the nature and consequences of proposed health care, including the benefits, risks and alternatives to a health care decision, and to reach an informed decision.[2] As long as you have decisional capacity, you have the right to decide whether to consent to or decline a proposed treatment. There are exceptions to this principle, but they are rare. For instance, a patient with capacity could be compelled to accept treatment for a communicable disease.[3] And notably this principle, which is based on the more general right not to be touched without permission, does not encompass a right to compel the provision of any particular treatment. The principle applies in full force to life-sustaining treatments: a capable adult patient can accept or decline life-sustaining treatment, without regard to diagnosis or prognosis, the invasiveness of the treatment, or the patient's motivation.

2. If a Patient Lacks Decisional Capacity, Providers Can and Should Follow the Patient's Previously Expressed Directions

This is a simple extension of the first principle. If you consent to a particular treatment and then lose capacity, your consent generally will remain valid. Conversely if you make known your wish to decline a treatment and later lose capacity – and there is no reason to believe that you would decide differently under the new circumstances – your refusal remains valid and must be respected. New York courts have consistently applied this principle many times since the Court of Appeals, in *Eichner v. Dilon*, invoked it to give effect to a permanently unconscious patient's previously expressed wish to forgo ventilation.[4]

Notably, a few years after *Eichner*, the Court in *In re O'Connor* noted that "the ideal situation is one in which the patient's wishes were expressed in some form of a writing, perhaps a 'living will,' while he or she was still competent."[5] New York does not have a living will law, and in the view of many lawyers, it does not need one: case law, regulations[6] and experience all support the legality and enforceability of living wills.

3. If a Patient Lacks Decisional Capacity But Did Not Previously Give Clear Directions, a Surrogate Decision Maker Will Be Authorized to Make Health Care Decisions for the Patient

On June 1, 2010, New York's comprehensive surrogate decision making law – the Family Health Care Decisions Act (FHCDA), became effective.[7] The FHCDA establishes the authority of a patient's family member or close friend to make health care decisions for the patient in cases where the patient is in a hospital or nursing home, lacks decisional capacity and did not leave prior instructions or appoint a health care agent. The "surrogate" decision maker is directed to make decisions based on the patient's wishes, if reasonably known, or else based on the patient's best interests. The surrogate has the authority to direct the withdrawal of life-sustaining treatment in cases that meet specific clinical and non-clinical criteria.

The Continued Need for Advance Directives

The FHCDA operates something like an intestacy statute – it prescribes a default decision maker for persons who failed to identify a decision maker in advance, and it prompts that decision maker to honor the patient's known wishes. The FHCDA is proving enormously helpful in practice by clarifying who has decision making authority and in facilitating appropriate decisions for incapable patients.

But even its strongest supporters (including this author) recognize that the FHCDA is no substitute for advance planning. Put simply, if you care about who will make decisions for you in the event you lose capacity,

and if you care about the treatment decisions that will be made for you, then you would be remiss to rely upon the FHCDA. Appointing a health care agent, and giving that person oral or written instructions, remains far more advantageous. Taking those steps will help ensure that

- the person of your choice will be the health care decision maker for you;
- your decision maker will not be subject to the same clinical constraints that apply to surrogates;
- your decision maker will have greater ethical authority by virtue of your appointment than they would have as a surrogate, and be more able to command respect and deference from other family members and health care professionals; and
- your decision maker will be prepared to make decisions that reflect your wishes, and more confident in the decisions that he or she makes.

If you have specific wishes about treatment but do not wish to appoint a health care agent, it becomes even more important to document your wishes. Significantly, the FHCDA expressly provides that there is no need to seek a surrogate decision about life-sustaining treatment when a patient previously made the decision personally, either in writing or orally before witnesses during hospitalization.[8]

The most important and effective step you can take to plan for health care decisions is to appoint a health care agent by completing a health care proxy form.

Health Care Decisions Planning Options

Health Care Proxy

In this author's view, the most important and effective step you can take to plan for health care decisions is to appoint a health care agent by completing a health care proxy form. An agent can interact with health care professionals, seek the same information you would have sought, and apply your wishes and values to unpredictable and changing circumstances. But make sure to have a conversation with your agent to ensure that he or she understands and will honor your wishes. A model proxy form is on the New York State Department of Health website, and it is easy to complete.[9]

Living Will

Individuals who have specific concerns about limiting or insisting upon life-sustaining treatment in various circumstances should consider completing a living will – preferably along with a health care proxy. The instructions in your living will may never be applicable to the specific clinical situations that arise in your care, but if they are, then the document will stand as an authoritative statement of your wishes. As such, it generally will be legally and ethically binding on both your agent (if you have one) and on health care professionals. The NYSBA distributes a simple, useful living will form. The "Five Wishes" advance directive is another example that is less legalistic, and that guides one to convey their personal, spiritual and emotional views.[10] Also religious groups may offer living wills that reflect their values and moral teachings.[11]

Note that there are no required execution formalities in this state for a living will. However, taking basic steps like signing and dating the document before one or two witnesses will enhance its effectiveness by giving others confidence in both its authenticity and the seriousness of your commitment to your instructions. Note also that if the form includes the appointment of a health care agent, then there are basic formalities that must be followed for the appointment to be valid.[12]

You should of course customize the document to reflect your individual wishes. But lawyers: please exercise some self-restraint and do not present health care professionals with a complex, unfamiliar, lengthy and legalistic living will form. Such a document is more likely to subvert your wishes than no document at all.

Medical Orders for Life-Sustaining Treatment (MOLST)

MOLST is New York's version of a standard process and form to promote health care decision planning through a dialogue between an individual and his or her physician, with the result being specific orders recorded on a portable, easily identified form.[13] The MOLST approach offers several advantages over simply creating a living will: (1) the resulting document is not merely a statement of your directions, it is an actual physician's order – and will be recognized as such by health care professionals; (2) because your physician is involved in the issuance of the order, he or she will ordinarily be committed to ensuring the decisions are implemented; (3) the document addresses the specific clinical decisions that health care professionals actually confront with dying patients (e.g., "no antibiotics"), avoiding the sometimes vague language in living wills (e.g., "no extraordinary measures"); (4) the form is portable – it will be effective at any facility to which the patient is brought; and (5) MOLST is a standard, easily recognizable, bright red form.

The trade-off for these advantages is that the MOLST process and form is more difficult to complete than a health care proxy or living will, and it requires far more detailed decisions than many people are prepared to make. But it is particularly valuable for individuals who face a specific and pressing need for end-of-life decision planning.

Structured Conversation

Whether you create a proxy, living will, MOLST or some combinations thereof, your planning is incomplete unless you make sure that your close family members know your wishes. Various sources are available to help promote and guide that invaluable conversation.[14]

There are a variety of other health care decision planning approaches, as a simple Internet search will demonstrate. The main advice here is that you appoint someone you trust to make decisions for you; talk with that person, to make sure he or she knows your wishes and values; and supplement that appointment by recording any specific decisions that you care deeply about. Give yourself this advice, and then take it. ■

1. In a 2008 survey of upstate New Yorkers, 42% of respondents indicated they designated a health care agent, and 26% indicated that they completed a living will. Excellus, End-of-Life Care Survey of Upstate New Yorkers: Advance Care Planning Values and Actions. https://www.excellusbcbs.com/wps/wcm/connect/e62a7d804e8ee6ff9077bfe420b83c88/End+of+Life+survey-EX.pdf?MOD=AJPERES.

2. *See, e.g.*, N.Y. Public Health Law §§ 2980(3), 2994-a(5) (PHL).

3. *See* PHL § 2100.2(a). *See generally*, New York State Public Health Legal Manual: A Guide for Judges, Attorneys and Public Health Professionals 28–33 (NYSBA 2011).

4. *In re Storar* and *Eichner v Dillon*, 52 N.Y.2d 363 (1981).

5. *In re Westchester Cnty. Med. Ctr.*, 72 N.Y.2d 517 (1988).

6. 10 N.Y.C.R.R. § 400.21 "Advance Directives."

7. 2010 N.Y. Laws ch. 8, enacting N.Y. Public Health Law Article 29-CC. *See* Robert N. Swidler. *New York's Family Health Care Decisions Act: The Legal and Political Background, Key Provisions and Emerging Issues*, 82 N.Y. St. B.J. (June 2010), p. 18.

8. PHL § 2994-d(3)(a)(ii).

9. Health Care Proxy: Appointing Your Agent in New York State, http://www.health.state.ny.us/forms/doh-1430.pdf.

10. Aging with Dignity, Five Wishes, http://www.agingwithdignity.org/five-wishes.php.

11. *See, e.g.*, Now and at the Hour of Our Death: A Catholic Guide to End-of-Life Decision making, http://www.nyscatholic.org/admin/news/document/952_End%20of%20Life%20booklet%20final.pdf.

12. PHL § 2981.

13. Karen Lipson & Jonathan Karmel, *Honoring Patient Preference at the End of Life: The MOLST Process and the Family Health Care Decisions Act*, 16 NYSBA Health L.J. 34 (Spring 2011).

14. *E.g.*, http://patients.about.com/od/endoflifedecisions/a/endlifeconver.htm.

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Your Money and Your Life

Who Do You Trust?

By Ira Salzman

From the point of view of a client there is, in most cases, no part of an estate plan that is more important than the selection of an agent for a power of attorney and/or health care proxy. The rest of a typical estate plan has no immediate effect on the client. Generally, it will only come into effect when the client is deceased. The health care proxy and/or power of attorney is utilized while the client is still alive, normally at a time when the client is most vulnerable to abuse. Helping a client decide which person to name as an agent for a health care proxy or power of attorney is therefore one of the most important functions of an attorney.

Making a decision about which person to name as an agent for a power of attorney or health care proxy requires the client to make a character assessment of the proposed agent and an assessment of family dynamics. It may require the client to confront his or her successes or failures as a parent or spouse. With regard to children, it may require the client to select a "favorite" at the risk of offending other children. With regard to the power of attorney it may require assessing whether to have multiple agents who are required to act together, whether there should be a monitor, or whether a power of attorney is completely inappropriate and a revocable trust should be used.

Because the selection process requires the client to be brutally honest with the attorney and with himself or herself with regard to feelings about family members, it is absolutely critical that the attorney meet with the client privately. The burden of insisting on a private meeting should not be placed upon the client. The attorney should insist on a private meeting. The attorney should explain to family members that the attorney does this in all cases as a precaution and no family member should be personally offended.

Factors to Consider When Selecting an Agent for a Health Care Proxy

The New York Health Care Proxy Statute does not permit two agents to act together when making a decision. This means that there is no effective way to have an agent on a health care proxy "second guessed" other than by specifically limiting the power of the agent in the document. Limiting the power of the agent can create some often-insurmountable drafting problems because it is impossible to predict the exact circumstances under which the health care agent will be required to act. This of course makes it even more important that the client think carefully about who should be appointed as agent. Here are some factors that a client should consider.

First, given this reality, the principal must be sure that an agent's financial situation will not compromise the agent's ability to make appropriate health care decisions.

Second, the health care agent needs to be sophisticated enough to navigate the health care system. The usual job

of the health care agent is to make sure that the client receives proper care and treatment from hospitals and other health care institutions. Health care institutions are often large bureaucracies. It sometimes takes significant time and effort to make sure that the right level of care is being provided to a patient.

Third, the health care agent needs to have the strength of character to make difficult decisions. Sometimes deciding what form of health care to provide to a person is not easy. The agent needs to be able to coolly assess the risks and benefits. In addition, not everyone has the ability to tell a physician to stop providing care to a loved one even if he or she knows with certainty that termination of life support is what the loved one would want.

Fourth, the health care agent needs to have the persistence to obtain accurate information. This is important for making sure that the client receives the care and treatment that is needed in order to stay well. It is also important with regard to end-of-life decisions. Two main assumptions underlie a decision to terminate life support. The first is that the prognosis of the physician is correct. The second is that it is appropriate to forgo possible advances in medical technology that, at least theoretically, could occur in the near future. The health care agent needs to be able to evaluate information provided by health care professionals and obtain second opinions when necessary.

Fifth, if possible, the client should choose a health care agent that lives relatively nearby. That way, the agent can meet with health care professionals if necessary.

Factors to Consider When Selecting an Agent to Act Under a Power of Attorney

Obviously, an agent selected to act under a power of attorney has to have an appropriate level of financial sophistication. But, in many ways, the character issues are more important. In Act I of Oscar Wilde's play *Lady Windermere's Fan*, one of the characters famously says, "I can resist everything except temptation." The key question to ask, in picking an agent to act under a power of attorney is: To what extent will the proposed agent be able to resist the temptation that having access to the client's money creates? One does not have to be practicing elder law for any significant period of time before one becomes involved in a guardianship proceeding that has been commenced because of allegations of misuse of a power of attorney. Here are some basic factors that the client should consider in assessing whether or not a person is appropriate to serve as an agent under a power of attorney.

First, is the proposed agent honest? In this context, honest means more than having integrity. It also means having the strength of character to resist the blandishments of family members or others who argue, for example, that the client "does not need the money and no one will ever know" if money is used for other than its intended purpose.

Second, is the proposed agent financially stable? If the proposed agent has a significant number of creditors then there could be a temptation to utilize the client's funds to pay the agent's debts.

Third, are there future risks to the financial stability of the proposed agent? Significant factors include the stability of the marriage of the proposed agent and any unusual business ventures in which the proposed agent is involved.

The process of selecting an agent to act under a power of attorney can be further complicated if the power of attorney authorizes the agent to make gifts to himself or herself. Clients will sometimes grant agents this authority with the understanding that while a gift is a complete legal transaction, the agent will have a moral (not legal) obligation upon receiving the gift to utilize the funds for the benefit of some other person (perhaps a disabled family member) or perhaps, under appropriate circumstances, for the benefit of the client. Under these circumstances, the client needs to assess whether the moral obligation will always follow the money. What happens if the agent predeceases the client? What happens if the agent becomes disabled and as a result no one can gain access to the money? In addition, if the agent has self-gifting powers, his or her financial stability becomes an even more critical issue because any asset gifted to the agent becomes subject to the claims of the agent's creditors.

> Helping a client decide which person to name as an agent for a health care proxy or a power of attorney is one of the most important functions of an attorney.

Conclusion

A discussion with a client with regard to who should serve as agent on a power of attorney or health care proxy can be difficult and time consuming. However, it is important for the lawyer to realize that the client may not be able to discuss these issues frankly with anyone else. A carefully structured discussion of these issues is the best way to help keep the client out of guardianship court. ■

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Gray Divorce and Remarriage

By Willard H. DaSilva and Steven J. Eisman

As the first wave of baby boomers approaches age 65, their divorce rate is rising. Boomers, born between 1946 and 1964, already have a divorce rate triple that of their parents. Now they are pioneering a new trend in matrimonial law – the "gray divorce," the phenomenon of couples divorcing after the age of 50. While divorce rates overall have declined slightly nationwide, from a peak of 5.3 per 1,000 people in 1981 to 3.5 today, the rate of "gray divorce" has doubled in the last 20 years. This growth in the divorce rate among older adults translates into a larger share of all divorces being experienced by middle-aged and older adults. In 1990, only 8% of all persons who divorced were more than 50 years of age;[1] over the last several years that number has increased to over 25%.[2]

According to recent U.S. Census data, there was a 20% drop in married couples (those wed between 1955 and 1984) who reached their 20th anniversary.[3] Coinciding with an increased divorce rate among adults above the age of 50 is an increased rate of remarriage later in life. And, as remarriages become a larger share of marriages for the baby boomer generation, the portion of marriages at a higher risk for divorce likewise increases.

Several cultural changes have contributed to the baby boomers generating high rates of late-life divorce. In the past 20 years, gender roles have shifted significantly, and women have become increasingly less financially dependent on men. According to a recent survey by the American Association for Retired Persons (AARP), women over 50 now initiate two-thirds of divorce proceedings. There has also been a growing acceptance of divorce in society, and more states have moved to make divorce easier, as evidenced by the passage of no-fault divorce laws in all states.[4] Furthermore, boomers entering their retirement years are healthier than any previous generation and are projected to have longer life expectancies. As such, experts have observed a growing desire for fulfillment in the later years, as well as an inclination to leave a dispassionate marriage. Additionally, as the children of boomers enter adulthood, parents are less concerned about the impact of divorce on their offspring and are more likely to exit the marriage without worries about custody, child support and the effects of divorce on young children.

People who divorce later in life have had more time to accumulate assets and debts, which can be significant in

a remarriage and subsequent divorce. Access to pensions, retirement account balances and Social Security benefits must be considered. Moreover, it is crucial during the separation process to revise existing wills. Issues such as estate planning, survivor annuities and the protection of bequests to children must be contemplated and addressed. Additionally, as couples grow older and face increasing health issues, health care decision making and the execution and/or revocation of advanced life directives become increasingly important in the context of a remarriage and/or a divorce.

When a marriage occurs later in life, each partner has his or her own life-long experience which raises distinct issues. Each party has assets and liabilities, developed separately from the new marital partner. In many cases, each partner has a family (children, grandchildren and others) separate from the new marital partner. When contemplating remarriage, the partners inevitably consider what impact the new marriage will have on their separately developed economic and personal lives. Questions may arise concerning the protection of separately developed assets and to ensure that they pass to children rather than to the new spouse and/or the new spouse's children or other heirs. These questions can be resolved by a well-drafted, written agreement made in contemplation of marriage and signed by both parties.[5] This prenuptial agreement permits a party to protect separate assets through provisions that allow a party to have an exclusive right to manage, re-invest and otherwise completely control all separate assets and ensure that separate real estate, accounts or retirement assets of the party are to remain the separate property of its owner.[6] In the absence of fraud, coercion and/or misrepresentations, prenuptial agreements are generally deemed valid by courts. The party alleging defects has the burden of proof to establish their invalidity.[7]

Financial Considerations and Implications

Marriages and divorces later in life come with their fair share of financial ramifications. Later-in-life divorces can be problematic because individuals' future earning potentials are typically limited. When combined with the possibility of costly health problems, individuals may be unable to maintain the status quo of the lifestyle they enjoyed as married couples, and older couples may have a harder time adjusting their personal habits and money management styles. Furthermore, in cases where adult children are financially dependent on their parents, this can create a particularly precarious situation. This is especially true when one spouse refuses to contribute anything toward the continued support of the adult children, knowing that the other spouse will ultimately bear this burden out of separate resources.

New York is an equitable distribution state; accordingly, the marital assets and liabilities ("marital property") are divided in an equitable fashion, meaning that the marital property will be divided in such a way that fairly represents the parties' respective contributions to the marriage. In the context of negotiating a settlement agreement, it is important to consider all the assets that are subject to distribution. Parties may decide to trade off passive assets or negotiate percentages of various active assets, such as a business or professional practice, and courts typically look to indirect contributions – for example, from a homemaker spouse – in order to determine the proper percentages.[8] Later in life divorces provide parties with less time to pay off debt, another critical aspect in the negotiation of a settlement agreement between spouses. In addition to being fully aware of all debts involved (even previously undisclosed debt or credit cards), parties can take certain security measures to better protect themselves, including, but not limited to, adjustments in the asset allocation process or the placement of money into an escrow account to be released to the indebted party upon full satisfaction of a certain obligation. As for credit cards post-divorce, each party should remember to remove the former spouse from any credit card account held in his or her name to prevent the former spouse from incurring additional debt.

Financial transparency allows couples to be honest and realistic about their finances, including assets and liabilities, as well as their long-term financial goals for the preservation of their estates. Open lines of communication about financial desires, before marrying or remarrying later in life, will help avoid problems down the road. Reconciling and finalizing all tax-related issues from a previous marriage are key components to an easy transition to a second or third marriage.

As with any potentially life-altering decision, one should factor in the current economic, stock and real estate market conditions. It is strongly recommended that individuals contemplating a marriage, separation or divorce later in life consult with an attorney and an accountant.

Spousal Support

An important consideration in the contemplation of a divorce is spousal support or maintenance.[9] The amount of maintenance, if any, is generally determined by balancing the payor spouse's ability to pay with the payee spouse's reasonable needs. Additionally, it is imperative to secure any financial obligation. While life insurance may be cost prohibitive depending upon age and health, it is possible to secure payments through mortgages, confessions of judgment and other security devices. Some considerations include obtaining a significant down payment on any financial obligation or securing a life insurance policy on a former spouse's life.

There is a growing concern as to how courts address maintenance awards as one party approaches retirement. Generally, long-term marriages go hand in hand with

long-term support. If, however, a court provides a party with a long-term maintenance award, this could effectively force one spouse to continue working well past his or her planned retirement age, posing a potential problem for later-in-life divorces as well as those already divorced who are seeking to modify support payments later in life. In the 2008 decision *J.S. v. J.S.*,[10] Justice Anthony J. Falanga of the Nassau County Supreme Court held that as a matter of first impression, in considering a non-durational award of spousal maintenance, courts should consider prospective financial circumstances and work-life expectancy of the payor spouse.[11]

Marital Residence

For many older couples in their retirement years, income is limited, so asset division can be problematic. In today's troubled real estate market, the marital residence may not have retained its prior value and may remain unsold for a long period of time. Dividing the remaining equity (net proceeds) may not provide the husband or wife with enough financial wherewithal to obtain adequate separate housing. Since the marital residence is frequently a married couple's largest asset, decisions and negotiations regarding the disposition of the home are often protracted and emotional. While the equity in the marital residence is typically divided equally between spouses, other issues can arise including the timing of the sale and the payment of carrying charges pending the sale. In the case of minor children, courts may defer the sale of the house until some defined event – such as the emancipation of the youngest child (e.g., high school or college graduation).

When deciding whether to retain the marital residence, it is important to analyze the costs associated with maintaining the home – taking into account taxes and inflation.[12] Will there be sufficient cash flow to pay the carrying charges of the home (e.g., real estate taxes and mortgage costs) together with other necessary expenses? The pros and cons of keeping the home must be compared to the cost/benefit of trading off other assets (e.g., liquid assets and retirement plans). There are other aspects relating to the value of a residence that cannot be overlooked, such as exemptions from property tax increases at specific ages, the potential income through reverse mortgages, special treatment for people qualifying for public benefits if the house is a primary residence, rental income, tax deductions for mortgage interest, and taxes and exclusions from gains upon sale.

Pension, Retirement Accounts and Stock

Pensions and retirement plans are considered marital assets; typically, the amount that was earned during the marriage will be subject to equitable distribution pursuant to New York's Domestic Relations Law (DRL).[13] Monies that were set aside for retirement prior to marriage must be separately valued to determine the contributing spouse's separate property interest. A married person may change the beneficiary of his or her retirement plans to someone other than a spouse – in limited circumstances. For example, if the retirement plan is an ERISA qualified plan, such as a 401(k), 403(b) or other employer-sponsored plan, the law requires the non-participating spouse to be the primary beneficiary, unless otherwise waived in writing. Waivers make sense, particularly in second and third marriages when a spouse is financially independent.

Additionally, if the plan is an individual retirement account (IRA) and the IRA was funded using marital funds, the non-participating spouse commonly has the right to one-half of its value, unless consent is given for distribution to a non-spousal beneficiary; otherwise anyone can be named the beneficiary of an IRA. A 2009 U.S. Supreme Court decision illustrates the importance of keeping up-to-date beneficiary designations. In *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*,[14] the Supreme Court of the United States ruled that a plan administrator properly distributed benefits under an ERISA pension plan to a deceased participant's former spouse because she was the only designated beneficiary in the records of the plan administrator – even though she had waived her interest in plan benefits in the parties' divorce settlement agreement and in the divorce decree.

It is important to obtain an accurate determination of the value of pension plans, IRAs and stock holdings, together with their concomitant tax ramifications. Taxes on retirement funds must be considered when determining the true value of those accounts.[15] In many circumstances, one party will trade away rights to a spouse's pension to keep the house for sentimental reasons, even if he or she cannot afford to maintain said residence. If the parties involved own equities jointly, sometimes it is beneficial to negotiate for some of the "poor performers" to gain a benefit from a taxable loss when sold. Pension payouts, a more streamlined process to receive payments directly from the spouse's pension plan, can be achieved with the use of a qualified domestic relations order (QDRO), which identifies (1) how the pension payments are divided; (2) whether direct payments will be made to the non-employee former spouse; (3) what type of survivor benefits are in place; and (4) who will receive cost-of-living adjustments, among other things. IRAs and 401(k)s are easier to value and divide since they are based on the current market value. Dividing these types of defined contribution retirement plans by percentages (and not by dollar value) provides an additional security measure by spreading the risk and tax implications. Other plans, such as defined benefit plans, will require the assistance of an actuary to determine their value.

Continued on Page 30

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Continued from Page 28

Social Security

For a couple getting divorced later in life, monthly income from Social Security can play an important part in divorce negotiations, particularly in the consideration of division of property and maintenance payments. After at least 10 years of marriage, a former spouse is entitled to one-half of the benefits of the other (without affecting the benefits of the other) after he or she has attained 62 years of age. Once an individual is over the age of 62 and has been divorced for at least two years, there will be an entitlement to benefits through the former spouse as long as the former spouse is eligible, even if the former spouse has not yet filed for benefits.

For couples who marry after full retirement age, the less-monied spouse generally cannot collect benefits on the former spouse's record unless the later marriage ends either by death or divorce. Widows' or widowers' benefits, which are 100% of the former spouse's Social Security benefit, will be waived by a widowed spouse who remarries before age 60. If marriage occurs after full retirement age and one spouse's Social Security benefit is less than half that of the new spouse, that spouse can receive his or her own Social Security benefit plus an additional amount to bring the distribution up to half of the new spouse's Social Security benefit. This will generally occur one year into the marriage.

Couples contemplating remarriage later in life should consider prenuptial agreements to address issues such as waiver of rights to retirement benefits, obligations to children of prior marriages, tax considerations, and rights to assets brought to the marriage.

Separation, Annulments and Common Law Marriage

There are alternatives to obtaining a divorce, such as a legal separation or annulment. In certain circumstances, choosing to live apart may be less costly than an actual divorce. Crafting a binding agreement addressing the division of financial assets is a crucial element of a successful separation. Maintaining the marriage, while living apart and settling financial matters, may allow an uninsured spouse to receive continued medical coverage under the other spouse's plan, keep the marital status intact until a spouse becomes eligible for Medicare, meet the 10-year eligibility requirement for Social Security benefits or otherwise maintain the marriage for personal or religious beliefs. Separation has the same legal effect of a divorce in the sense that it may by agreement provide for distribution of assets as well as support. The main distinction between a separation and a divorce is that a separation does not provide either party with the right to remarry.

Obtaining an annulment or having a marriage declared void is an additional option, even for the aging population, as length of the union is not a determining factor in whether an annulment will be granted. Annulments can be obtained where the marriage never existed because it was not a legally valid union. It is usually considered invalid from the date of the "marriage," as if it had never taken place, although in some states the union is void from the date of the annulment. People may choose an annulment over a divorce for various reasons, including religious and financial. Generally speaking, an annulment may provide for a division of property and/or support payments. Annulments can be obtained on various grounds, including lack of consent, fraud, and inability to consummate the marriage.

Although many people believe that living with someone for a specified period of time constitutes a common law marriage, this is not the case. In fact, the few states in the United States that do recognize common law marriage impose a requirement that the couple hold themselves out to the community as married (with affirmative conduct and declarations).[16] If a party plans to reside in a state where common law marriages are recognized without the intention of entering into a common law marriage, it is recommended that the parties execute a written agreement stating their intentions to cohabitate as unmarried persons. Nevertheless, states, including those that have abolished common law marriage, recognize common law marriages lawfully contracted in those jurisdictions that permit them. As such, it is important to keep in mind that a common law marriage provides each spouse with the same rights and privileges as those provided to spouses in non-common law marriage jurisdictions.[17]

Wills, Trusts and Estates

One of the most important areas to consider in later-in-life divorces and remarriages is estate planning. During the divorce process, it is critical to evaluate the beneficiaries that parties have selected in wills and retirement plans, as well as agent designations in medical directives or powers of attorney, to ensure that the documents reflect their current circumstances and desires. Under § 5-1.1-A of New York's Estates, Powers and Trusts Law (EPTL), surviving spouses have a personal right of election to a minimum basic inheritance of the deceased spouse's estate. The elective share is the greater of $50,000 or one-third of the net estate regardless of what the will provides for the spouse. The net estate consists of the net probate assets as well as testamentary substitutes, such as joint bank accounts, jointly owned property and pension plans. This entitlement can be circumvented by a signed contract between spouses.

In most states, such as New York, the entry of a final judgment of divorce automatically revokes all prior provisions or bequests in a will to a former spouse.[18] However, the period of time between the execution of a final divorce settlement and the receipt of a signed judgment of divorce may be lengthy. Therefore, parties should be protected by a provision in the divorce settlement agreement stating that each party has waived his or her right of election and other rights under the EPTL.

During the pendency of the divorce, individuals should also consider changing beneficiary designations on certain types of property which can pass outside of the probate estate by operation of law, such as most retirement accounts, life insurance policies, annuities, property owned as joint tenants with rights of survivorship, and property owned in a trust. If beneficiary designations are not changed, this property may pass directly to the former designated beneficiary upon death. Keep in mind, however, that a spouse may not be unilaterally removed as a beneficiary from an ERISA-protected retirement account. Furthermore, if an action has been commenced, the automatic restraining orders that accompany the filing of the summons will protect against any change in insurance policies.[19] In a separation or divorce agreement, ownership of life insurance policies, including cash value, if any, and beneficiary designations should be addressed. If one spouse dies without having removed the other spouse as a beneficiary on a life insurance policy, the insurance proceeds will pass to the named beneficiary.

In the estate-planning process, couples contemplating remarriage later in life should consider prenuptial agreements in order to address legal issues such as waiver of rights to retirement benefits, obligations to children of prior marriages, tax considerations, and rights to assets brought to the marriage – including the appreciation thereof. These issues can be addressed by a carefully drafted prenuptial agreement which can help determine what assets will retain their separate nature. A well-drafted and properly executed prenuptial agreement may also prevent a current spouse from challenging a will or any existing trusts. Whether a trust will be affected by remarriage may depend on the nature of the trust (i.e., revocable or irrevocable), as well as the designated beneficiaries.

Some trusts, such as a qualified terminable interest property trust (QTIP), can offer protections to children from a former marriage. Upon death, a QTIP trust gives the surviving spouse limited access to a party's assets during his or her lifetime while ensuring that the remaining assets in the trust are distributed to children from a prior marriage upon the spouse's death. Property passing to a QTIP trust is eligible for the marital deduction, so the property is not taxed at the death of the deceased spouse, leaving the entire amount available for the surviving spouse's support. Such a trust can generate income for the benefit of the surviving spouse during his or her lifetime. At the death of the surviving spouse, those assets would then be distributed among the parties' mutual and/or prior children pursuant to the wishes of the settlor of the trust.

Health Care Decision Making

As baby boomers reach retirement age and face growing health care problems and risks, they must carefully consider medical decision making in the event of legal incapacity. This becomes increasingly important in the framework of a later-in-life divorce or remarriage. A frequent source of conflict in the law is the dilemma posed by adults without current decision making ability who have either not expressed their intent in the past or have provided conflicting or unclear directions.

This difficulty can be obviated in many circumstances by adherence to statutes that permit competent individuals to execute advance life directives, such as a living will or a health care proxy. A living will is a document that expresses the type of life-sustaining treatment a patient does or does not want performed in the event the patient loses capacity to make decisions regarding his or her own health. A health care proxy is an instrument in which a patient appoints an agent to make health care decisions in circumstances when the patient is incapable of making such decisions. Advance life directives bestow upon a chosen individual the right to make a medically related decision regarding the health of the patient in the event the patient is unable to do so.

Chronic illnesses, such as Alzheimer's or dementia, can have a profound impact on the health and quality of life of elder adults and their spouses. The divorce rate among the chronically ill is high. The creation of no-fault divorce laws of the 1970s and 1980s, and the recent passage of no-fault divorce in New York, opened the door to the concept of divorce without the need to prove a cognizable offense.[20] With the passage of no-fault, it is conceivable that spouses of chronically ill or mentally incapacitated individuals could more easily initiate divorce proceedings.

Spouses of chronically ill individuals often feel unable to handle the enhanced care-giving role and deal with the financial burdens that are associated with long-term illnesses. In such situations, individuals may try to initiate guardianship proceedings against a chronically ill spouse in order to gain an advantage in divorce proceedings. Planning and the execution of advance life directives may make it less likely that an individual will be declared by a court to be unable to manage his or her personal and/or financial affairs, and therefore obviate the necessity of the appointment of a guardian.

For aging couples getting divorced, considerations regarding medical decisions and the execution of advanced life directives will be significant, to ensure that the

person or persons of their choosing are able to carry out their treatment wishes. Unmarried seniors living with significant others should consider a cohabitation agreement supplemented with durable power of attorney and health care proxy documents, allowing partners to make medical decisions for one another when and if needed.

New York's Family Health Care Decision Making Act (FHCDA), signed into law in March 2010, has the potential to improve the legal situation for patients residing in hospitals and nursing homes. The act not only simplifies and facilitates the execution of advance directives but also provides for default procedures if advance directives have not been completed where there is no "clear and convincing" evidence of prior expressed wishes. Prior to the enactment of the FHCDA, there was a protracted process which included filing petitions to a court, even in circumstances where the family was in fact available to make decisions.

The FHCDA establishes a clear hierarchy for health care decision making, authorizing decision makers beginning with a spouse and proceeding to additional family members (adult children, parents, siblings) or other persons close to the patient. These can include the withholding or withdrawal of life-sustaining treatment on behalf of patients who lose their ability to make such decisions (i.e., incapacitated persons). If, however, the patient has executed an advance life directive, then the previously designated agent will be authorized to make decisions.

Spousal Obligation to Pay Health Care Costs

Generally, a married person is obligated to support his or her spouse. If possessed of sufficient means or the ability to earn such means, a party may be required to pay a fair and reasonable sum for the support of his or her spouse, as the court may determine, having due regard to the circumstances of the respective parties. The court may include in an order for support a provision for necessary shelter, food, clothing, care, medical attention, expenses of confinement, the expense of education, payment of funeral expenses, and other proper and reasonable expenses.[21] Except as otherwise provided in DRL § 236, a husband and wife cannot contract to alter or dissolve the marriage or to relieve either of his or her liability to support the other in such a manner that he or she will become incapable of self-support and, therefore, likely to become a public charge.[22] This spousal support obligation may create tension between adult children and a parent who decides to remarry later in life, especially in circumstances where the parent's new spouse becomes ill or incapacitated and requires spousal support at the parent's expense, having the net effect of reducing the value of the parent's estate.

Another growing trend in the practice of elder law – relating to both matrimonial law and health care planning – is the use of so-called "Medicaid divorces." In

Resources

Books

11 N.Y. Practice, New York Law of Domestic Relations § 5:12.

45 N.Y. Jurisprudence 2d, Domestic Relations § 89.

Deirdre Bair, Calling It Quits: Late-Life Divorce and Starting Over (2007).

Janice Green, Divorce After 50: Your Guide to the Unique Legal & Financial Challenges (2010).

Periodicals

Emily Brandon, "How Divorce Affects Retirement Benefits," *U.S. News and World Report* (April 23, 2010), http://money.usnews.com/money/blogs/planning-to-retire/2010/04/23/how-divorce-affects-retirement-benefits.

Wendy N. Davis, "Till Death Do Us Pay? As Retired Boomers Head to the Golf Course, Courts Look at Limits on Alimony," *American Bar Association Journal*, September 2008, at 18.

Michael Farley, "When 'I Do' Becomes 'I Don't': Eliminating the Divorce Loophole to Medicaid Eligibility," 9 *Elder Law Journal* 27 (2001).

Janice Green, "5 More Tips About Late-Life Divorce and Your Money: Estate Planning, Divorce Costs, and Other Financials Issues," *AARP* (January 4, 2011), http://www.aarp.org/money/budgeting-saving/info-01-2011/more-tips-on-late-life-divorce-and-your-money.html.

Catey Hill, "Divorce Over 50, 3 Mistakes to Avoid," *Wall Street Journal* (March 23, 2011), http://www.smartmoney.com/personal-finance/marriage-&-divorce/divorce-over-50-mistakes-to-avoid-1300832383830/.

Ellen W. Kessler, "The Financial Impact of Divorces for Older Clients," *Experience*, Winter 2002, at 24.

Diane Snow Mills, Comment, "'But I Love What's-His-Name': Inherent Dangers in the Changing Role of the Guardian in Divorce Actions on Behalf of Incompetents," 16 *Journal of the American Academy of Matrimonial Lawyers* 527 (2000).

Xenia P. Montenegro, "The Divorce Experience, A Study of Divorce at Midlife and Beyond," *AARP* (2004), http://assets.aarp.org/rgcenter/general/divorce.pdf.

Sy Moskowitz, "Still Part of the Clan: Representing Elders in the Family Law Practice," 38 *Family Law Quarterly* 213 (2004).

Lisa Scherzer, "Marriage Later in Life Tricky for Estate Planning," *Wall Street Journal* (May 17, 2007), http://www.smartmoney.com/personal-finance/estate-planning/marriage-later-in-life-tricky-for-estate-planning-21281/.

Carolyn R. Wolf, Eric Broutman and Douglas K. Stern, "Planning Ahead for Difficult Health Care Decisions," *The Mental Health Lawyer*, Spring 2011, at 26.

Other Resources

"Can this Marriage be Annulled?," LexisNexis, http://family-law.com/divorce/Can-This-Marriage-be-Annulled.html?p=1/.

Kay Harvey, "Saying 'I Don't'; Gray Divorce," Eldr.com (May 17, 2007), http://www.eldr.com/article/family/saying-i-dont-gray-divorce.

National Center for Health Statistics 2009 (data on marriage and divorce), available at http://www.cdc.gov/nchs/nvss.htm.

Jeanne Sahadi, "Divorcing Late in Life: Breaking up is Hard – and Pricey – to do, Especially for Elderly Women" CNN Money (Feb. 1, 2000), http://money.cnn.com/2000/02/01/life/q_retire_divorce/.

U.S. Census, 2010.

fact, the use of Medicaid gifting and Medicaid planning received judicial sanction from New York's highest court in 2000 in *In re Shah*.[23] In this type of divorce, the "spouse in the community" (the spouse who is not institutionalized or the healthy spouse), stands to lose a lifetime's worth of savings unless a health care plan is devised that provides care for the ill or incapacitated spouse and simultaneously protects the assets of the spouse in the community so that both spouses do not end up impoverished wards of the state. A prenuptial agreement alone will not defeat a claim by Medicaid.

In circumstances where there is an incapacitated spouse, the spouse in the community will petition the court under Article 81 of the Mental Hygiene Law to ensure that the best interests of the incapacitated party can be addressed. The healthy spouse has two options: first, do no planning and privately pay for the ill or incapacitated spouse's health care, be it at home or in an inpatient health care facility, such as a nursing home, until the community spouse depletes virtually all personal liquid assets, which would then render the ill or incapacitated spouse Medicaid eligible; or second, what is referred to as a "spousal refusal."[24] This is the process wherein excess assets are shifted into the name of the community spouse who then executes a document, later filed with the Department of Social Services, indicating that he or she refuses to contribute income and assets to the care of the ill or incapacitated spouse. This was a right granted to New Yorkers in 1998. Spousal refusal may result in a Medicaid divorce, which immediately renders the ill or incapacitated spouse Medicaid eligible – a plan that the Court of Appeals declared sound policy in the aforementioned case of *Shah*. This type of plan allows the community spouse to retain the marital residence and enough money to maintain a decent quality of life.[25]

Conclusion

As this article illustrates, a variety of considerations related to matrimonial and elder law decisions affect members of the ever-growing aging population. Many of the problems and pitfalls that may be associated with later-in-life marriages can be addressed with a well crafted prenuptial agreement. The decision to marry, separate or obtain a divorce, especially later in life, involves critical decisions with potentially far-reaching ramifications for the individuals and families involved, their financial circumstances and even their health. Decisions of this nature require considerable thought and analysis. Most important, individuals contemplating marriage, separation or divorce, especially in their later years, should consult an experienced attorney who can address their particular circumstances, needs and goals. ■

1. National Center for Health Statistics 2009 (data on marriage and divorce), *available at* http://www.cdc.gov/nchs/nvss.htm.

2. *Id.*

3. U.S. Census, 2010.

4. New York was the last state to enact no-fault divorce, effective in October of 2010.

5. *See* DRL § 236B(3).

6. Couples should be sure to consult a knowledgeable attorney in the drafting of their prenuptial agreement in order to ensure that their interests are fully protected and the individual circumstances of both parties are covered in the final agreement.

7. *See In re Phillips' Estate*, 293 N.Y. 483 (1944).

8. *See McSparron v. McSparron*, 87 N.Y.2d 275 (1995) ("In attempting to select a suitable valuation date, some courts have drawn a distinction between 'active' assets [i.e., those whose value depends on the labor of a spouse] and 'passive assets' [i.e., those whose value depends only on market conditions]. These courts have concluded that 'active' assets should be valued only as of the date of the commencement of the action, while the valuation date for 'passive' assets may be determined more flexibly. *See also Smerling v. Smerling*, 177 A.D.2d 429; *Heine v. Heine*, 176 A.D.2d 77; *Zelnik v Zelnik*, 169 A.D.2d 317; *Kallins v. Kallins*, 170 A.D.2d 436; *Greenwald v. Greenwald*, 164 A.D.2d 706]. Such formulations, however, may prove too rigid to be useful in particular cases. Thus, they should be regarded only as helpful guideposts and not as immutable rules of law [citation omitted].").

9. As part of New York's No-Fault Divorce legislation package, DRL § 236B(6-a) directs the New York State Law Revision Commission to study and assess the economic consequences of divorce and to carefully review the spousal maintenance laws of the state in order to effectuate the state's policy goals of ensuring that the economic consequences of divorce are "fairly and equitably shared by the divorcing couple."

10. 19 Misc. 3d 634 (Sup. Ct., Nassau Co. 2008).

11. Justice Falanga's decision in *J.S.*, 19 Misc. 3d 634, was cited by *P.D. v. L.D.*, 28 Misc. 3d 1232(A) (Sup. Ct., Westchester Co. 2010), and *B.M. v. D.M.*, 31 Misc. 3d 1211(A) (Sup. Ct., Richmond Co. 2011). These later cases held that courts should determine awards of non-durational maintenance by considering the payor's ability to provide support through factors such as health and long-term work expectancy, rather than based solely on existing financial circumstances.

12. If the marital home is transferred to a spouse or former spouse incident to a divorce, there is no gain or loss. Furthermore, if the residence is sold incident to a divorce, there is a $250,000 exclusion of capital gain per spouse ($500,000 per couple) on a principal residence, subject to certain provisions (e.g., satisfaction of the ownership and use test).

13. *See Majauskas v. Majauskas*, 61 N.Y.2d 481 (1984).

14. 555 U.S. 285 (2009).

15. Where a pension or retirement plan is subject to the protections under ERISA, special exceptions exist providing that retirement funds are exempt from certain taxes and penalties when transferred directly to a non-employee spouse's retirement account incident to a divorce.

16. New York does not recognize common law marriage, unless they were contracted in a state that does permit them.

17. The Social Security Administration (SSA) will only recognize common law marriage if the state in which the couple resides recognizes common law marriage. In order to be eligible for survivor benefits, couples must go to the SSA office to provide supporting evidence of a common law marriage, such as joint tax returns and a statement from two blood relatives.

18. N.Y. Estates, Powers & Trusts Law 5-1.4.

19. *See* DRL § 236B(2).

20. There is some debate in New York over whether a defense is permitted to the new no-fault provision under DRL § 170(7). However, since the statute was signed in October of 2010, most courts have held that there is no defense to no-fault. *See A.C. v. D.R.*, 31 Misc. 3d 517 (Sup. Ct., Nassau Co. 2011). DRL § 170(7) permits a party to obtain a divorce by swearing under oath that the marital relationship has been irretrievably broken for a period of at least six months.

21. *See* N.Y. Family Court Act §§ 412, 416.

22. *See* N.Y. General Obligations Law § 5-311.

23. 95 N.Y.2d 148 (2000).

24. It should be noted that the community spouse is entitled to a Community Spouse Resource Allowance (CSRA) of no more than $109,560. Furthermore, the community spouse is allowed to retain a community spouse monthly income allowance of $2,739.

25. The state may seek recovery of the cost of Medical Assistance benefits from the community spouse. The local Medicaid agency must commence a proceeding against a financially qualified spouse for the Medical Assistance benefits granted after Medicaid benefits are paid, instead of at the initial calculation stage which might limit the amount of Medicaid benefits to be provided.

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Estate Planning and the Nonmarital Child

By John M. Czygier, Jr. and Barbara Howe

A frequently overlooked and emotionally charged estate planning issue is that of the nonmarital child. The term "nonmarital" is now used to define the parent-child relationship that results when a child is born to parents who are not married to each other at the time of the birth. This current term is socially and historically significant, and it reflects an evolution in the law and by our society away from traditional views which identify a child's mother by birth and the father primarily on the basis of his marriage (or not) to the mother.

Why is the nonmarital child significant in estate planning? Practitioners and courts alike are familiar with will provisions which leave "all the rest, residue and remainder" of a testator's estate to "my children" or to "my issue." In *In re Best*,[1] the Court of Appeals, discussing inheritance by nonmarital children, noted that the

> [u]se of the term issue in a dispositive instrument has always been viewed as ambiguous. . . . Contemporary social mores and constitutional doctrine governing the rights of children born out of wedlock suggest that drafters now view the unmodified term issue to refer to children born both in and out of wedlock . . . and we now hold this to be a rebuttable term of construction.[2]

Additionally, in *In re Uhl*,[3] the Appellate Division, Fourth Department pointed out that the last 50 years or so had "been marked by a gradual liberalization of the laws governing the rights of nonmarital children to inherit. The Legislature's 'successive efforts at liberalizing the rights of nonmarital children to inherit from their fathers' were undertaken with a view toward eliminating the disparity between marital and nonmarital children."[4]

The issue of nonmarital children can be intergenerational. In *In re Springer*,[5] the decedent was survived by a son and a daughter. When the son, who had resided in California and was the father of eight children, both marital and nonmarital, died, Kings County Surrogate Judge Lopez Torres had to apply California law to determine whether the son's nonmarital children were his distributees. California's Probate Code merely required the father to have "openly held out" a child as his own, and evidence established that the decedent's son had acknowledged all eight children as his own. Thus, half of the decedent's estate was distributed in equal shares to each of her post-deceased son's eight children.

Historical Views of the Nonmarital Child

Under English common law, a nonmarital child was considered the child of no one and, hence, could inherit from no one.[6] This common law approach was followed in the United States until the early 1900s, after which a nonmarital child was permitted to inherit through intestacy, but only from his or her mother. Most states refused to recognize the nonmarital child's right to inherit from a father by intestate succession.[7]

Gradually, the intestacy rights of nonmarital children increased under the trusts and estates laws. In 1966, N.Y. Estates, Powers and Trusts Law 3-3.3 (EPTL) was amended and "illegitimate" children were deemed issue for the purposes of the "anti-lapse" statute (but they still had to meet the requirements of EPTL 4-1.2). EPTL 5-4.5 was amended in 1975 to allow "illegitimate" children to participate in a wrongful death recovery as a paternal distributee. In 1990, EPTL 2-1.3 was amended to include "illegitimate" children within a class disposition under a will. Case law protected nonmarital children born after the execution of the father's will by including them within the provisions of EPTL 5-3.2.[8] In 2007 the Legislature codified such case law, once again, however, adding the requirement that to come within EPTL 5-3.2 paternity must be "established pursuant to section 4-1.2."

These changes were undoubtedly influenced by the evolution in the social attitudes toward nonmarital children as evidenced by changes in nomenclature: the word "bastard" was replaced by "illegitimate," which, in turn, was replaced by "nonmarital."

The Statutory Framework

In New York, EPTL 4-1.2 governs the inheritance rights of nonmarital children. Under EPTL 4-1.2(a)(1), a "nonmarital child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred." However, a nonmarital child may inherit from his or her father only in specified circumstances.

EPTL 4-1.2(a)(2)(A) and (B) provide for establishing paternity by documentary proof, such as an order of filiation or a filed acknowledgment of paternity by the mother and father pursuant to Public Health Law § 4135-b,[9] or an acknowledgment of paternity by the father filed with the putative father registry.[10]

Recently, the statute has been amended to reflect society's evolving view of nonmarital children and to embrace advances in technology commonly used to establish paternity, such as DNA testing. Until 2010, EPTL 4-1.2(a)(2)(C) and (D) each provided a two-pronged test for a nonmarital child to establish the right to inherit from his or her father's estate. Under EPTL 4-1.2(a)(2)(C), there had to be clear and convincing evidence of paternity, and there had to be a showing of "open and notorious acknowledgment" by the father that the child was his. Under EPTL 4-1.2(a)(2)(D), the nonmarital child could inherit from his or her father where a blood genetic marker test had been administered to the father which, together with other evidence, established paternity by clear and convincing evidence.

Some courts concluded that the scientific reliability of DNA testing met the standard for clear and convincing proof of posthumous paternity evidence under subdivision (C), but there was disagreement among the appellate courts as to whether such testing was permissible unless the open and notorious prong had first been established.[11]

Effective April 28, 2010, EPTL 4-1.2(a)(2)(D) was repealed. At the same time, EPTL 4-1.2(1)(2)(C) was amended to allow paternity to be established by the use of "evidence derived from a genetic marker test" *or* by evidence that the father "openly and notoriously" acknowledged the child as his own. The amendment made clear that the burden of proof for either method is by clear and convincing evidence, and it also made clear that any other type of proof could be utilized by a claimant.

Issues for the Practitioner

From the standpoint of estate planning, a frank and open discussion with a prospective testator at the time of drafting is essential in order to avoid later difficulties. As one treatise has put it, "[a]mbiguous dispositive provisions can only lead to prolonged litigation."[12] Therefore, the attorney and his or her client should strive for accuracy and clarity in the dispositive provisions of a will; and that accuracy and clarity may sometimes only be arrived at by a painful discussion between attorney and client. It also may require a painful discussion between a husband and wife about their past and possibly raise an attorney conflict issue between the spouses.

Another important issue during estate planning is to ensure that, when it comes time to probate the will, notice is given to all those who might have a cognizable interest in the estate. Even if excluded by a will, a nonmarital child is generally entitled to be heard; but, unless given notice of the proceeding, that child may later have the right to have the probate proceeding reopened and potentially set aside.

In the Internet age, where access to information travels the globe at warp speed, family secrets are rapidly unearthed. Estate planners need to impress this fact of modern life on their clients so that the lawyer and surviving family members do not confront unpleasant realities for the first time after the testator's death.

The practical problem of nondisclosure about nonmarital children is illustrated in the judicial response to the claims of an alleged nonmarital child interposed after a will has been admitted to probate. In *In re Iengo*,[13] after the decedent's will had been admitted to probate, the fiduciary advised the court that she had failed to include in her petition an alleged nonmarital son of the decedent's. The court vacated the probate decree for lack of jurisdiction over all necessary parties, and the fiduciary was directed to recommence the probate proceeding.[14]

The lesson from these cases is that after death the deepest of personal and family secrets sometimes are revealed, and when they are, protracted, embarrassing, and costly litigation can result. Even when a nonmarital child does not prevail, the emotional and financial costs for all involved can be extremely high. The better alternative is thorough – albeit sometimes painful – estate planning. ■

1. 66 N.Y.2d 151 (1985).
2. *Id.* at 154–55. By way of contrast, a will which makes a disposition to a testator's "lawful issue" has generally been held to exclude nonmarital children in the bequest (*see, e.g.*, *In re Dwight*, N.Y.L.J., Apr. 22, 2011, p. 26, col. 4; *In re Kane*, 130 Misc. 2d 282 (Sur. Ct., Nassau Co. 1985)).
3. 33 A.D.3d 181 (4th Dep't 2006).
4. *Id.* at 183.
5. N.Y.L.J., Apr. 15, 2011, p. 25, col. 3.
6. *See In re Hoffman*, 53 A.D.2d 55, 57 (1st Dep't 1976).
7. Charles Nelson Le Ray, Note, *Implications of DNA Technology on Posthumous Paternity Determination: Deciding the Facts When Daddy Can't Give His Opinion*, B.C. L. Rev., 35 BCLR 747 (1994).
8. *See In re Wilkins*, 180 Misc. 2d 568 (Sur. Ct., N.Y. Co. 1999).
9. EPTL 4-1.2(a)(2)(A).
10. EPTL 4-1.2(a)(2)(B).
11. *See In re Morningstar*, 17A.D.3d 1060 (4th Dep't 2005); *In re Davis*, 27 A.D.3d 124 (2d Dep't 2006), *rev'd in part by In re Poldrugovaz*, 50 A.D.3d 117 (2d Dep't 2008); *In re Betz*, 74 A.D.3d 1459 (3d Dep't 2010).
12. Frederick K. Hoops et al., 1 Family Estate Planning Guide, § 17.17, at 17-41 (4th ed.).
13. N.Y.L.J., Apr. 22, 2010, p. 35, col. 3.
14. *See also In re Duncan*, N.Y.L.J., May 28, 1992, p. 23, col. 1; but contrast, *In re Gentile*, N.Y.L.J., Mar. 1, 2001, p. 21, col. 3.

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Who Will Stand in My Shoes?

When Adult Children Need Lifelong Support and Supervision

By Ellyn S. Kravitz and Carolyn Reinach Wolf

You are in a diner, and at the next table is an elderly man feeding his middle-aged son, who is in a wheelchair. A neighbor, spry into her 80s, puts her 50-year-old daughter on a bus every morning, to travel to an adult day care. The woman upstairs has taken to sitting in the building lobby, asking questions of tenants as they go in and out; clearly she has stopped bathing. Her parents come by every day to try to coax her back upstairs.

As the population ages, concerns mount regarding the future of adult children with serious mental illness and/or other related incapacities, who will continue to require financial oversight and medical/mental health interventions and planning. Parents of adult children who require lifelong support come from all socio-economic levels and professional practice and cultural backgrounds, including fellow attorneys and judges.

According to a recent study published by MetLife, over 44 million Americans, an estimated 21% of all U.S. households, provide care for an adult family member or friend age 18 or older; 79% of these family caregivers provide care to someone over the age of 50.[1] Many caregivers are aging themselves; and many have been the primary caregivers of their adult children for the entirety or greater portion of their own adulthood. Few, if any, have the training and experience to address the mental health care needs of their now-adult children.

With severe budget cuts looming and the shortfall of appropriate clinical outpatient programs, residential housing, vocational programs and support services, many aging and elderly parents care for their dependent adult children at home without the necessary financial and emotional support. The thought of planning for the future is overwhelming; rather than plan, some parents hope that someone or some agency will miraculously take over in a seamless and efficient manner.

For these aging parents the main issue is who will direct medical and mental health care and the financial oversight of their child when they are incapacitated or gone. Concerns include, but are not limited to, the following: (1) Who will care for my child when I am gone? (2) Where will my child live? (3) Who will make certain that my child receives proper medical/mental

health treatment? (4) Who will manage my child's care? (5) Will there be enough money to provide for a good quality of life for my child?

The Case Consultation

Consultations with these clients involve an in-depth discussion of the history and up-to-date details of the loved one's living, clinical and legal situations and the current status of any provisions made for the adult child's care. These aging parents fear the loss of control and that as a result their adult child will be left alone, homeless, untreated and uncared for once they are incapacitated or gone. It is a significant balancing act to address and then execute a plan that satisfies all their fears and concerns. Sometimes these issues can be addressed by the legal system, sometimes not; often it takes a great deal of creativity to formulate a workable plan. In every situation, a team of individuals must be assembled and involved to effectuate such a plan. The team should include family members, clinical experts, future care/advocacy organizations, a financial planner or an insurance agent, attorneys with the appropriate mental health or elder law expertise, accountants and, quite often, the adult child.

Over 44 million Americans, an estimated 21% of all U.S. households, provide care for an adult family member or friend age 18 or older; 79% of these family caregivers provide care to someone over the age of 50.

Who Can Legally Stand in the Shoes of the Aging Parent(s) When the Time Comes?

While it may be impossible to identify someone who has the same level of commitment as a parent, the law does provide several avenues by which others can make appropriate medical and mental health-related decisions for the adult child with a mental illness or developmental disability. Individuals with a mental illness or developmental disability who are over 18 and have the mental capacity can sign a health care proxy and appoint a health care agent for themselves. First, the attorney advising the family should evaluate specifically the adult child's capacity to execute such a document. It is important to explain the purpose of this document and to impress upon the adult child the importance of making his or her wishes known to the person who is appointed as agent and the successor agent, if there is one. Knowing that someone will be ready, willing and able to act in their stead should the adult child be unable to decide about medical or mental health issues, may bring comfort to the parents.

In the event an individual with a mental illness or developmental disability lacks the capacity to appoint a health care agent, the newly enacted Family Health Care Decisions Act (FHCDA)[2] allows for a surrogate decision maker to decide on a proposed treatment or to withhold or withdraw treatment under specific circumstances and when the patient is in a hospital or residential health care facility. The law creates a hierarchy of decision makers, including a spouse or domestic partner, a son or daughter over the age of 18, a parent, a sibling over the age of 18 or a close friend. The FHCDA fills in the gap between those who have not appointed a health care agent and where "clear and convincing evidence" of a person's wishes are unknown or could never have been known. Living wills and do not resuscitate orders are also legal alternatives available to individuals when end-of-life decisions are required to be made, in the absence of a health care proxy.

When discussing mental health decision-making alternatives with an aging parent-client, it is important to point out that neither a health care agent nor a surrogate under the FHCDA may involuntarily commit a person or override the person's objection to treatment on an inpatient psychiatric unit. The New York State Mental Hygiene Law and its concomitant regulations, however, provide for these decisions to be made for the incapacitated individual in this situation.

When addressing the financial management and oversight of an adult child with a mental illness or developmental disability, an aging parent may want to consider offering the adult child, if he or she has the requisite capacity, the opportunity to execute a power of attorney. Unlike a health care proxy, which goes into effect only when the person loses capacity to make health care decisions, a power of attorney authorizes the agent, previously called the "attorney-in-fact," to make financial decisions either while the person has capacity but chooses not to act or loses capacity to make financial decisions. A power of attorney can be as broad or narrow as the individual would like, authorizing the agent to make all or only specific financial decisions. When advising an aging parent, it is essential to carefully explain the benefits and drawbacks of a power of attorney, such as the individual's ability to revoke it at any time. The parent must understand that this document can be withdrawn at the whim or misunderstanding of their adult child.

Another option, which is vitally important in protecting access to government benefits, is the creation of a supplemental needs trust (SNT). If properly drafted, any assets placed in this type of trust should not affect

an individual's eligibility for Medicaid or other public benefits such as Supplemental Security Income (SSI) so long as the money is used solely for the benefit of the person for whom the trust is created and is used to "supplement" not "supplant" or replace government benefits. This type of trust can be created for anyone who has a severe and long-term disability even if the individual is not presently receiving government benefits. The advisor should evaluate as soon as possible whether the family could and should set up an SNT, taking into account life-time care needs going forward and extending into the period of the aging parent's incapacity or death.

Depending upon the situation at hand, a variety of supplemental needs trusts are available to protect government benefits: e.g., pooled trusts,[3] self funded trusts[4] and third party funded trusts.[5] Such trusts may be used as part of a well-drafted estate plan. Aging parents of adult children with special needs or limitations should consider these options. Additionally, those parents with sizable assets may consider the variety of irrevocable trust options available.

Many aging parents of an adult child with a mental illness or developmental disability do not realize that every young person, regardless of the disability, becomes an emancipated adult at age 18 in the State of New York, so another legally available option to consider is guardianship. Deciding whether an individual requires the appointment of a guardian, and who will serve in that capacity, is an important part of life planning for children with disabilities. Aging parents in this situation need to consider who will be best suited to act as a guardian. New York State has two types of guardianships that parents can seek for an adult child with a mental illness or developmental disability. Article 81 of the Mental Hygiene Law allows for a tailored guardianship and is the least restrictive alternative. Article 17-A of the Surrogate's Court Procedure Act is usually a plenary guardianship and most suitable for adult children with developmental disabilities or mental retardation. A guardian can be empowered to make both health care and financial management decisions for an individual deemed to lack decisional capacity, whether due to a developmental disability, mental illness, serious substance abuse diagnosis or related psychological disorders. Petitioning for guardianship allows families, particularly parents, to choose exactly whom they believe will make the best decisions for their loved one, act in the adult child's best interest and have the protection of a court-overseen process to avoid anyone taking advantage of the adult child. The guardianship can be court ordered to include a successor guardian as well which can make aging parents feel confident that their adult child will have continuity of care. It is important to note, however, that a guardian under New York law cannot involuntarily commit an individual to a psychiatric hospital nor can the guardian override a refusal of treatment when the individual is on an inpatient psychiatric unit of a hospital.

It Is *Always* Better to Plan Ahead

Many of the clients who seek advice about their adult child come in "crisis mode." They have not planned, and now they face a situation which requires immediate legal and/or clinical interventions. Among the alternatives – and they are very limited in scope – is the mental health warrant,[6] involuntary inpatient hospital commitment[7] and, when appropriate, assisted outpatient treatment (Kendra's Law).[8] Professional support services may also include psychiatric case managers, care coaches, geriatric care managers, intensive care managers or ACT Teams. There are generally a finite range of legal options, but a myriad of clinical options, which need to be consolidated and coordinated.

Although crisis mode can be managed it is always better to plan ahead. A proactive rather than reactive approach allows for thoughtful consideration and time to act as well as to try different alternatives. If one approach does not work, switch to another; if that fails, try again. Dealing with mental illness, developmental disabilities, mental retardation and/or serious substance abuse is not an exact science and often changes on a weekly, sometimes daily basis. Just as people age so do the issues inherent in these conditions.

Multiple areas of law may need to be addressed and coordinated: criminal law, landlord-tenant law, employment law, family law, matrimonial law and trusts and estates law. For example, an adult child has decompensated, broken a law and has been arrested. Criminal charges and penalties loom, and the parents must deal with the criminal justice system. Or, the aging parents have set up the adult child with housing and services, which they pay for and oversee. Through a decompensation or a sudden triggering of symptoms, the adult child's behavior changes; the coop or condo board becomes concerned about the living arrangements and challenges this legally. The parents must now address landlord-tenant and real estate legal issues with which they may be extremely unfamiliar.

Safety and Security

In addition to the medical-legal systems involved in caring for an adult loved one with mental illness, developmental disabilities, mental retardation and related health issues, are safety and security concerns, whether that of the person with the disability, the adult caring for that person, or both. Sometimes this involves bringing in safety and security experts, investigators, former law enforcement specially trained personnel and the like, to ensure the dependent child does not harm himself or herself and/or others.

Other Considerations and Options

The use of a psychiatric case manager or geriatric care manager is another option. These professionals are generally nurses or social workers who are specially trained to assist on a daily basis, 24/7, with the logistics of overseeing the care, interventions or management of an individual with mental illness or developmental disabilities. They are often the most efficient and effective means of monitoring and making active the proposed medical/mental health care plan. They also keep a close eye on the financial management plan to ensure it is in the best interest of the individual and look out for potential financial abuse – and intervene in a timely and appropriate manner. Many organizations as well can assist families with putting in place a long-term care plan to eliminate some of the stress of caring for an adult child with disabilities.

Families of children with disabilities often face decisions regarding appropriate housing for their adult children, post-secondary education, employment, health care and guardianship. Parents can aid in planning for children with disabilities by helping the children learn to self advocate to the greatest extent their ability. The Individuals with Disabilities Education Improvement Act (IDEIA)[9] protects students with disabilities until the child graduates from high school or reaches the age of 21. After high school, Section 504 of the Rehabilitation Act[10] and the Americans with Disabilities Act[11] protect students with disabilities from discrimination. Parents need to be aware of the protections afforded their children and educate future caregivers of the same.

Parents should remember that students with disabilities are entering college and other post-secondary educational programs in greater and greater numbers. Families may work with a mental health attorney and an educational consultant who can explore higher education options and advise them on appropriate choices for an adult child with special needs. When available, parents should explore educational and vocational options as early as possible to provide these adult children with access to programs and assistance so that they become as self sufficient as possible.

Where Aging Parents Go From Here

Probably one of the most daunting questions for aging parents is, "Where will my child live after we are gone?" Depending upon the needs of the adult child, parents may consider home placement with care supports, assisted living and group home placement. Parents need to plan early and carefully so that a child with disabilities will be able to access appropriate housing options. In many cases, families will have to take steps to ensure that their adult child is eligible for Supplemental Security Income and Medicaid in order to qualify for housing options, although families may pay privately if significant resources are available. Even when a family can pay for an adult child's long-term residential placement, however, many programs require that the individual be eligible for SSI and Medicaid to ensure a long-term payment stream. Families may use the tools discussed above to protect their adult child's access to governmental benefits or private resources and in turn allow them to take advantage of the different housing options available.

Conclusion

Parents of children with disabilities need to plan early to ensure that the care of these adult children is without gaps. Families have more planning choices than ever before. First and foremost, however, aging parents should try to assess their adult child's long-term needs and seek appropriate advice and counsel to address them. Parents should put together a team to develop a plan which provides oversight and direction for both medical/mental health and financial concerns. Again, whenever possible, it is important to include the adult child in the conversation and planning. Some may be capable of handling their medical/mental health and/or financial needs, others cannot. Helpful as well for aging parents is seeking out appropriate advocacy organizations and other professionals who are well versed in the nature of the individual's specific disability. There truly is safety in numbers, and support groups can be of great help and comfort for families experiencing these difficulties and issues. It is also helpful to get referrals to professionals from those who have had a positive experience with them.

Parents of a loved one with disabilities may be consumed with worry about the future of their adult child with special needs, but with proper planning families can help an adult child to develop to full potential while enjoying the quality of life all parents want for their child. ■

1. National Alliance for Caregiving & AARP, Caregiving in the U.S. 6, 9 (Apr. 2004).
2. (PHL §§ 2994-a–2994-u.
3. 42 U.S.C. § 1396p(d)(4)(c); 18 N.Y.C.R.R. § 360-4.5(b)(5)(b).
4. 42 U.S.C. § 1396p (d)(4)(a).
5. N.Y. Estates, Powers & Trusts Law 7-1.12.
6. MHL § 9.43.
7. MHL § 9.27.
8. MHL § 9.60.
9. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647.
10. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.
11. Americans with Disabilities Act, 42 U.S.C. § 12101.

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Give a Gift

And Get Personal Satisfaction and Tax Relief

By Stanley E. Bulua and A. Mitchell Greene

Gifting Strategies in 2011 and 2012

As people accumulate wealth and advance in age, a well-planned gifting program to children and grandchildren can help achieve family objectives as well as minimize estate taxes that would otherwise be due on death. In determining whether to make gifts to children and grandchildren, it is important to determine if the donor has adequate resources after making the gift to meet his or her continuing financial and lifestyle requirements. Once the financial situation of the donor is determined, a gifting program can be implemented to transfer "surplus" wealth using a variety of gifting strategies described below.

Annual Exclusion Gifts

Each person can gift annually $13,000 (indexed to inflation) in value of assets per recipient. There is no limitation on the number of recipients (donees) but the gift must be one of a present interest. Gifts that qualify for the annual exclusion remove assets from the donor's estate for estate tax purposes and, over the course of many years, can result in significant tax savings. For example, assume four donees receive annual exclusion gifts for a period of 15 years and therefore the aggregate value of the gifts is $780,000. Assuming a combined federal and state estate tax rate of 45%, and without regard to future appreciation of the assets, the estate tax savings would be $351,000. If both husband and wife make equivalent gifts or split gifts, the tax savings would be doubled. Gift splitting allows either a husband or wife to treat one-half of any gift made by one of them to a third party as if made one-half by each. The only disadvantage to gifting is that the donee generally takes the donor's basis in the gifted assets, whereas if the asset is left in the donor's estate, it will generally receive a new stepped-up basis upon death so that any appreciation during lifetime is eliminated from capital gains taxation. Since the tax rate on capital gains is lower than the estate tax rate and since a tax on sale is only imposed when a sale occurs, the loss of the stepped-up basis is typically outweighed by the estate tax advantages.

Gifts for Medical and Educational Expenses

Payments that are made directly to a medical provider or an educational institution for the benefit of family members are not treated as gifts and don't use up the payor's annual exclusion or lifetime exemption. These payments can be made on behalf of children, grandchildren or any other family members.

Section 529 plans are also available to fund expenses for higher education. Contributions under these plans use the donor's annual exclusions and can be used to front-load five years' worth of annual exclusion gifts with a gift of $65,000 (or $130,000, if husband and wife split gifts).

If this is done, then no additional annual exclusion gifts can be made over the five-year period to the recipient commencing with the year in which the Section 529 plan is funded. With 529 plans, no income tax is imposed on earnings within the plan and distributions from the plan are not subject to income tax, as long as the proceeds are used for higher education expenses. Furthermore, many states provide for state income tax benefits with respect to funds contributed to a 529 plan maintained and sponsored by that state.

Lifetime Exemption Gifts

The lifetime exemption is an amount that an individual can gift during lifetime or leave to his or her heirs upon death that is not subject to federal gift or estate tax. As a result of the changes to the gift and estate tax law made by the 2010 Tax Act, the federal lifetime exemption has been increased to $5 million per person, thereby permitting a husband and wife to collectively gift up to $10 million during their lifetimes without the imposition of a gift tax. The 2010 Tax Act will sunset on December 31, 2012, and there is no assurance that the $5 million lifetime exemption for gifts and estates will continue beyond that date. The benefits of making large gifts now for individuals who have large estates are as follows:

1. Gifting appreciating assets freezes the value at which the asset will be taxed in an individual's estate. For example, if stock currently valued at $2 million is gifted and has appreciated to $3 million when the donor dies, then the $1 million in appreciation and the income earned thereon during the interim (if not spent) will be removed from the donor's estate. Assuming a 45% combined federal and state estate tax rate, estate tax savings of $450,000 will have been achieved.
2. New York does not have a gift tax although it does have an estate tax. Making gifts during lifetime removes assets from the New York taxable estate which is taxed at rates ranging from 6% to 16%.
3. Gifts of interests in entities – i.e., corporations, partnerships and LLCs – can be discounted due to the lack of control and lack of liquidity that are inherent in such interests. For example, a gift of a 20% interest in a limited liability company that holds real estate worth $10 million might be entitled to a discount ranging between 20% and 35%. Assuming a discount of 35%, the amount of the reportable gift would be $1.3 million. Congress has previously considered restricting the availability of such discounts and there is no assurance that discounted gifts will continue into the future.
4. Many gifting strategies (beyond the purview of this article) involve leveraging interest rates by outperforming the prescribed IRS interest rate assumptions, which are published on a monthly basis. Although today's low-interest rate environment is conducive to such strategies, there is no guarantee that the current low-interest rate environment will continue indefinitely.
5. Gifts to grantor trusts, that is trusts in which the creator of the trust is taxed on all of the income generated by the trust investments, are disregarded for income tax purposes. Accordingly, the grantor is permitted to pay the income taxes while the trust is permitted to grow in value without being burdened by income taxes. The funding of such a trust followed by the donor's payment of the income tax on the trust investments, which is equivalent to a tax-free gift, has been approved by the IRS.
6. Gifts to spousal access trusts can be used to achieve many of the benefits described above in situations where the donor has a stable marriage and is concerned about his or her ability to access the funds in the event of an unexpected financial need. In this situation, the donor makes a taxable gift to a trust in which the spouse is a discretionary beneficiary, with principal passing to the children or grandchildren upon the death of the spouse. For donors who are not comfortable with complete lack of access to the gifted assets, these gifts provide a viable alternative.

Assuming you have the discretionary funds, a gift can provide needed support to your loved ones while reducing your tax liability. ■

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Retirement: The End or the Beginning?

By Walter T. Burke and Timothy E. Casserly

"Few men of action have been able to make a graceful exit at the appropriate time."
– Malcolm Muggeridge

Few aspects of an attorney's life engender such yearning and such fear as the prospect of retirement. Does retirement mean doing whatever you want to do – having unlimited choices – or does it condemn you to being just another nameless, faceless, universally ignored person standing in the coffee line at Starbucks?

What would life be like without the dark suit that projects our image, identifies us in the social structure, and provides our income? Can I afford (financially) to take off the suit? The following article reviews some items that every attorney should review when contemplating retirement, be it a near or a distant event.

Financial Aspects

"You can be young without money but you can't be old without it." – Tennessee Williams

The almost universal question clients have when planning for their retirement is, How much money do I need to have in order to retire? The better approach for planning is to determine what a realistic budget is for yourself and your family and then from that determine the number that you need. Due to lifestyle and geographic variations, coming up with an absolute number for the amount needed for retirement is a futile effort. However, if it is determined that a particular client realistically needs X thousand dollars per month for the balance of life, that becomes a number that can be worked on, projected, and a goal established. Some clients are very happy with a modest amount of money coming in every month – which more than satisfies their needs. Others find that a net after-tax income of $600,000 or more is inadequate. Where you fall in this spectrum is very subjective, but it does determine how much money you need to retire. Unfortunately, there is no short cut or magic to it, and picking numbers out of the air – such as $1 million or $5 million – does not in any way aid in any relevant retirement planning. Yes, more is better, but more is not better if you have to spend more years doing something you do not like. This is especially the case when you could have had many more years of happiness and satisfaction doing something for reasons other than generating needless income.

The Roman philosopher Seneca once remarked, "Our plans miscarry because they have no aim. When a man does not know what harbor he is making for, no wind is the right wind." A successful retirement plan requires

just that – a plan. Putting it off, delaying it, ignoring it, jumping into it, any one or all of the above can lead to a retirement disaster. Most lawyers do not wake up one morning and decide that they are going to go out and buy a house. If you have a child, you do not wait until the child is age 18 to consider that you may need money to pay for the child's college education. Why would you not spend time and effort planning something that will affect you for the balance of your life? Yes, there are many variables, and yes it is difficult. But that's no reason not to do it. Once you have a plan that suits your individual needs and an intelligent estimate of the financial assets that you will require to meet those needs, then you can address some of the issues of retirement planning such as: Do I take early retirement? Do I work an extra two years? When should I elect to take Social Security? Do I work part-time? Or: Should my spouse continue to work? You may not necessarily like what you see in the plan, but at least you'll have a plan.

> "Our plans miscarry because they have no aim. When a man does not know what harbor he is making for, no wind is the right wind."

For many attorneys, the retirement years offer additional options for tax planning, particularly in how and when to withdraw and/or liquidate certain assets for cashflow needs. When you work, all of your income is taxable in one form or another. However, in retirement you often have multiple sources of income with varying tax consequences, including pension, Social Security, drawing down of after-tax savings, partial distributions from various tax-sheltered annuities, appreciated assets, IRAs, and deferred compensation.

Income taxation is not an area where experimentation and self-help is very profitable. If during your career you successfully managed taxes, understood them and enjoyed doing them, then fine. For the vast majority of attorneys who do not participate in that strange exercise, they should retain a very good CPA or Certified Financial Planner because retirement planning is a dynamic process. Meet with your advisor not only before you retire, but several months after you retire, and subsequently in the fall of every year as well. It is at these points that you can modify the plan, make whatever adjustments may be necessary, and understand where your tax exposure may be. Meeting with your accountant only in April is simply an exercise in memorializing your mistakes.

Wall Street and You

Just as there is no magic dollar amount for a successful financial retirement, there is no universal investment mix that works perfectly for every retiree. What is clear is that extremes – extremely conservative or all risk – do not work well. The balance of investment products that you select will be based on multiple factors including your knowledge of investments, your comfort level, your tolerance of risk, and your need for growth to protect against inflation and provide longevity for your accounts. The last time CDs were a rock-solid retirement investment was when Jimmy Carter was president – six-month CDs were paying 14% and money markets were paying 8%.

Despite the Great Depression, the tech stock boom and bust, the real estate crash, and the 2008 debacle, a diversified portfolio of stocks and bonds has proven to be the most reliable method of retirement investing. If you are not familiar with this type of investment, now would be a good time to talk to friends and colleagues and get some professional help. Being a good attorney does not make you a good investor.

Taxes

Many attorneys have acquired a variety of assets in different retirement plans over the years: IRAs, Keoghs, Simple Plans, 401(k)s and quite possibly a defined contribution plan from an employer. These plans all have one thing in common: Beginning at age 70½, there are required minimum distributions and all proceeds taken out are taxed as ordinary income regardless of their source. This is based on life expectancy; in the first several years of required minimum distributions, the distributions relative to the principal are relatively modest. However, as one gets older, the minimum distribution requirement increases regardless of whether you are using the money. Therefore, you should look to balance the required minimum distributions and, quite possibly, take out additional moneys even though not immediately needed to avoid being forced to take out disproportionally larger amounts later in life, therefore paying additional taxes.

You should also balance the types of investments you have in your retirement plan with what you have in your after-tax savings. Capital gains tax at 15% from your equities is attractive in your taxable savings, however, capital gains in your retirement plan simply come out as ordinary income. For the same reason, you should never have tax-free income in a retirement plan.

Retirement Projections

One of the biggest causes of anxiety and frustration about retirement planning is the use of retirement projection calculators, which are offered on multiple websites. Depending upon the assumptions made for rate of return, as well as the inflation factor, these projections can take the same amount of money and predict that you will be

wealthy beyond your dreams or destined to live in abject poverty. While these projections can be very helpful, they can also lead to a badly skewed prediction of your future financial health.

Look at the rate of return in terms of your own portfolio, that is how your assets are allocated, and to some extent use a historical perspective on how those assets have performed over time. While history is no guarantee, it can be somewhat representative of what is likely to happen over a period of 20-plus years.

With regard to inflation, while all of us are paying $4 a gallon for gas (as opposed to the $1.25 we all remember), many attorneys close to retirement have either satisfied their mortgage or have locked in favorably low permanent rates, have already paid for their children's education, and are not buried in credit card debt. These are the three greatest sources of the huge debt that inflation exacerbates. If you are not burdened by them, then the danger of inflation is greatly diminished. With regard to the $4 per gallon for gas, think about investing in the oil companies.

Resources

Books of Interest

Sarina Butler and Richard Paszkiet, The Lawyer's Guide to Buying, Selling, Merging, and Closing a Law Practice (ABA 2007).

David D. Corbett and Richard Higgins, Portfolio Life: The New Path to Work, Purpose, and Passion After 50 (2006).

Marc Freedman, Prime Time: How Baby Boomers Will Revolutionize Retirement and Transform America (2002).

Herminia Ibarra, Working Identity: Unconventional Strategies for Reinventing Your Career (2003).

Pamela D. Blair, The Next Fifty Years: A Guide for Women at Mid-Life and Beyond (2005).

William Sadler and James Krefft, Changing Course: Navigating Life After Fifty (2007).

Web Sites of Interest

www.go60.com
www.retirement-cafe.com
www.retiredbrains.com
www.retirementlifestyle.com

Volunteerism

volunteerattorneys@nycourts.gov
www.americorps.org
www.globalvolunteers.org
http://apps.americanbar.org/lpm/lpt/articles/fin09101.shtml
www.legalservicesnyc.org

Health

www.mayoclinic.com
www.ehealthsites.com
www.webmd.com/healthy-aging

Wealth

www.money.cnn.com/retirement/guide
www.personal.fidelity.com/planning/retirement
www.personal.vanguard.com/us/planningeducation/retirement
www.troweprice.com

Of Particular Interest to Women

www.thetransitionnetwork.org

The Psychology of Retirement

"[Lawyers] intoxicate themselves with work so that they won't see how they really are." – Aldous Huxley

"Habit is habit, and not to be flung out the window by any man, but coaxed downstairs a step at a time." – Mark Twain

The idea of retirement is attractive to some but dreaded or feared by others. Sometimes it is postponed not for financial but for psychological reasons. For many attorneys not retiring is a cloak and a shield from the world to say that they are not changing, not aging and have lost none of their skills.

Yet, we have all seen the sad picture of lawyers who tried to hang on too long. They miss deadlines, are confused at meetings, forget basic elements of a case or argue irrelevant points. Nobody wants to be that person and yet we have all seen that person. If it is not finances, then what drives people to become the shell of their former professional self? For some it is ego, attorneys who have defined themselves not as people but as attorneys; therefore, to give up the trappings of the office is to give up themselves. For others it is the fear of a challenge late in life. Dr. William Russell has told us, "Leisure is the most challenging responsibility a man can be offered." While leisure can be attractive for a weekend or a week, the prospect of a lifetime of leisure forces us to new and different challenges and a new variety of choices. For those who have spent 30 or 40 or more years doing the same, often satisfying work, the prospect of something so new and open-ended is frightening. Couple that fear with the definition of yourself as your profession, and one can easily see why attorneys hang on too long to their briefcases. That is also why during the working years it is so critical for attorneys to cultivate strong family ties and social connections as well as to seek out enjoyable hobbies and meaningful work that is not tied to revenue or necessarily the profession. This is not something that is done overnight or within two months of a planned retirement date.

For some attorneys the road is simple: You keep on working because if you don't you will get sick and you will die. While we all know individuals who have taken that path, that does not make it a forced march for the rest of us. Often this simplistic view of life post retirement is used to mask the real fear, that of a long-term illness and a protracted stay in a nursing home.

Yet despite these fears often attorneys will studiously ignore basic medical advice and/or the specific direction of their physicians. Rather than giving the appearance of a slight loss of independence, they will drive when it is no longer appropriate for them to drive, maintain the large expensive house when only one or two people live there, and struggle to maintain a house with multiple levels when single-level housing is the most appropriate. These are the exact activities that tend to guarantee that loss of independence and cause the long-term illness. But change is something that they refuse to accept.

In addition to the fear of the debilitating aspects of long-term care, whether it be physical or mental, there is also the fear of its crippling cost. Depending on where you live in New York State, monthly costs of nursing home care can range from a low of $7,000 per month to a high exceeding $16,000 per month. These costs are not covered by Medicare or almost any typical health insurance policy. While long-term care insurance is available, most attorneys do not have it. So whether you are concerned about the physical, mental or the financial aspects of long-term illness, remember two things: (1) there are steps that can be done to minimize the dangers and risks associated with long-term care, and (2) a successful retirement plan will deal with but not dwell on this aspect of retirement.

The End of the Game

As much as we hate to admit it, death comes to all of us. As attorneys we know or should know the importance of estate planning documents. If your individual estate is worth less than $5 million, then you are free from (at least for now) concerns about federal estate tax. If your spouse has similar holdings, then with a modicum of planning $10 million can be passed to the next generation free of federal tax. Please note that New York State is still holding at a $1 million credit line after which state estate tax will be due.

New York State also has a new power of attorney form, which is dramatically different from the prior forms. While the old forms continue to be in effect, as the years go on, third parties such as banks and other financial institutions may no longer accept them so readily.

Your health care proxy (yes, you should have one) should be updated both in terms of your current medical condition as well as the appropriate agents that you have named. Finally, you should have a checklist of important contacts and a list of where vital documents are located. You do not want your legacy to be your loved ones plowing through all of your back records and documents looking for missing investment accounts or an insurance policy. You want your last official act as a lawyer to be smooth, efficient and professional. ■

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Should They Stay or Should They Go?

A Primer for New York Attorneys Advising Their Florida Snowbird Clients

By Howard S. Krooks

Although the numbers fluctuate from year to year, Florida remains a popular destination for Northeasterners to vacation and in many cases to own a second home. This is particularly true for New Yorkers, who have claimed Southeast Florida as the "6th Borough." The so-called New York-Florida connection raises a variety of legal issues that can be complex for the New York practitioner advising the Florida snowbird. I have practiced in New York since 1990 and in Florida since 2005, so these issues arise frequently in my New York- and Florida-based elder law and special needs planning practices. This article will inform the New York attorney about some of the most important aspects of Florida law that must be considered when counseling clients with a nexus to Florida. Understanding these rules will help New York practitioners counsel Florida snowbird clients who are deciding whether to remain a New York resident or become a Florida resident, and to identify when it is appropriate to bring a Florida attorney into the planning process.

Advance Directives

Your client already has advance directives in New York and wants to know if she needs to execute the same documents in Florida. While it is tempting to hang your hat on the full faith and credit doctrine, and the fact that both New York and Florida have statutes which acknowledge that an out-of-state document is to be honored in-state as long as it was validly executed in the other state, there are practical reasons for advising your clients to have advance directives signed in both states. The foremost reason is that an out-of-state document gives health care providers and financial institutions a "reason" to decline to honor the advance directives, notwithstanding full faith and credit. We've all been there; ready to take the gloves off because we know the law, but our clients aren't much interested in litigating against a bank or a health care provider in order to have their legal documents honored. This is one of those cases where it is simply more practical, and far less expensive, to have advance directives in both states signed, so that

when your client is in Florida, her agents can present the Florida documents that will be easily recognized and are more likely to be honored by third parties.

The power of attorney executed by the New York client may present a number of issues if it is to be used in a Florida transaction. While New York's power of attorney statute was modified as of September 1, 2009, to require two witnesses, bringing this in line with Florida law requiring the same, many pre-September 1, 2009, powers of attorney will not satisfy this two-witness requirement, precluding the use of the power of attorney for real estate transactions, possibly the most common reason the power of attorney is used – to buy or sell Florida real estate. Further, many New York practitioners may be unaware that to convey real property in Florida, the county property appraisers' offices require the original power of attorney to accompany the deed for recording purposes. A copy of the power of attorney will not suffice. This is a fact that will not become apparent until the property appraiser returns the deed as unrecordable due to the lack of the original power of attorney. If the grantor is incapacitated when the deed is prepared, and there is no original power of attorney, the only alternative will be to advise your client to bring a guardianship petition, even if the sole purpose in doing so is to accomplish the deed transfer.

The Last Will and Testament

We attorneys are often asked whether a last will and testament signed in one jurisdiction will be honored if the testator dies in and requires probate in another jurisdiction. Generally, if the will is valid in the jurisdiction in which it was signed it will be honored in the foreign jurisdiction to which the decedent relocated prior to his death. What if a New York attorney prepares a will for a client while he is in New York but the client owns a home or spends a great deal of time in Florida? Or, suppose you have represented a client for many years, and now he is relocating to Florida. He has a longstanding relationship with you and doesn't really know any attorneys in Florida, so he asks you to prepare his will. Should you? This can be a thorny question since you may feel compelled to help your longstanding client, but unless you are also admitted in Florida, you have an unauthorized practice of law (UPL) issue to deal with. In addition to the UPL issue, there is the potential for malpractice claims any time the New York practitioner drafts a will for a Florida resident. Here are a couple of things the New York practitioner may not be aware of.

Limited Persons May Serve as Personal Representative Under Florida Law

Florida has special requirements for a person to serve as personal representative (Florida's term for the executor of the will). In order for an estate to go through the probate process in Florida, the personal representative must meet stringent requirements. Failure to do so will result in that individual being disqualified from serving as personal representative of the estate, in some cases giving rise to extensive and costly litigation.

Consider a woman who resided in Westchester County, who owned a home in Florida, and who died in Florida in 2004. "Jane Doe" had a multimillion-dollar estate, and she had her New York attorney prepare her will pursuant to which she attempted to appoint four individuals to serve as her personal representatives. In her will she named her son, her accountant (a Florida resident) and two of her friends, both of whom were New York residents. When the estate was admitted to probate in Florida, the probate court appointed the son and the accountant as co-personal representatives, but refused to appoint the two friends from New York as personal representatives, notwithstanding the express wishes of the decedent that all four individuals serve.

Why? Because under Florida Statutes, only the following individuals may serve as personal representatives: "Any person who is sui juris and is a resident of Florida at the time of death of the person whose estate is to be administered is qualified to act as personal representative in Florida."[1]

Furthermore, a person who is not domiciled in the state of Florida cannot qualify as personal representative unless the person is:

- a legally adopted child or adoptive parent of the decedent;
- related by lineal consanguinity to the decedent;
- a spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent, or someone related by lineal consanguinity to any such person; or
- the spouse of a person otherwise qualified under this section.[2]

In addition to the foregoing, certain trust companies and other corporations may serve as personal representative of an estate being administered in Florida.[3]

What happened to the estate of the Westchester woman who died in Florida? For more than two years after her death, the estate was mired in litigation over, among other things, who should properly serve as personal representatives of the estate. Therefore, New York practitioners need to be aware of the requirements for serving as personal representative in Florida and make efforts to be sure anyone appointed in a will to serve as such satisfies Florida's requirements.

Long-Term Care Planning for Spouses

In Florida, one can satisfy the elective share by creating in his or her last will and testament a qualifying supplemental needs trust (SNT) for the benefit of the surviving spouse. Florida's elective share is an amount equal to 30% of the elective estate.[4] Since 1999, the property that is included in the elective estate is augmented for elective

share purposes in Florida, as set forth in Florida Statute § 732.2035. The augmented elective estate includes, among other things, assets in the decedent's probate estate, the decedent's ownership interest in "transfer on death," "payable on death" and "in trust for" accounts or accounts co-owned with rights of survivorship. The elective share is in addition to the homestead, exempt property and the family allowance.[5]

Under Florida law, the income and principal of the qualifying supplemental needs trust must be distributable to or for the benefit of the spouse for life in the discretion of one or more trustees less than half of whom are "ineligible" family trustees. Ineligible family trustees include the decedent's grandparents and any descendants of the decedent's grandparents who are not also descendants of the surviving spouse.[6] Thus, this would include the decedent's parents and brothers and sisters, nieces and nephews, etc.

Florida law also requires court approval for the creation of such a qualifying supplemental needs trust in satisfaction of the elective share if the aggregate value of all property in the trust is $100,000 or more. While this will require some additional legal fees and probate fees that might have otherwise been avoided through the use of a non-SNT trust, the benefits far outweigh these additional costs.

A "reverse pour-over supplemental needs elective share trust" may sound like a mouthful of legalese but this advanced Florida planning strategy provides the client with the benefits of a revocable trust along with the benefits of elective share preservation. The trust typically owns all of the couple's assets. The trust includes a provision for the calculation of the elective share amount and directs that the elective share amount shall pass to the decedent's estate. The decedent's last will and testament would then create the supplemental needs elective share trust. Because the supplemental needs trust is created under the will, the client avoids potential Medicaid transfer penalties. Because the couple's assets are owned by the trust, all of the other assets pass outside of the estate and are not subject to a Florida probate proceeding. The "reverse pour-over supplemental needs elective share trust" provides clients with the best of both worlds, avoiding the delay and expense of probate with respect to the bulk of estate assets while allowing for the elective share to be made available to the surviving spouse free of Medicaid penalties.

Imagine a married couple whose estate is valued at $400,000. Whether utilizing the reverse pour-over concept or simply having all of the assets pass through probate, if the spouses execute wills creating a qualifying supplemental needs trust for each other's benefit when they die, then $120,000 would go into a supplemental needs trust upon the death of the first spouse for the benefit of the surviving spouse. Rather than being forced to spend down these funds on long-term care costs, these funds would remain available to supplement those costs to the extent not covered by a government program such as Medicaid. In New York, which does not presently allow the satisfaction of the elective share by creating an elective share trust, the surviving spouse would either have to spend down the elective share amount or could engage in Medicaid planning to protect a portion of that amount. However, the surviving spouse's ability to engage in Medicaid planning is severely restricted due to the provisions of the Deficit Reduction Act of 2005.

The Elder Law Section of the New York State Bar Association is currently spearheading an effort to pass legislation that would codify the approach available in Florida. It is an approach that makes sense because it preserves the surviving spouse's right to the elective share amount while also permitting the spouses to engage in some type of planning designed to achieve asset protection in the face of exorbitant long-term care costs. While New York practitioners often draft supplemental needs trusts into their wills, there is no provision of New York law that will allow for the elective share law to be satisfied in this way. Instead, New York's elective share law requires an outright distribution of the elective share amount (33-1/3%). Thus, a couple considering long-term care issues may choose to declare Florida residency in order to take advantage of the above provisions.

Many New York practitioners may be unaware that to convey real property in Florida, the county property appraisers' offices require the original power of attorney to accompany the deed for recording purposes – a copy will not suffice.

Long-Term Care Planning Issues

Helping clients decide where to receive and how to finance long-term care services is one of the most important services elder law attorneys provide. It is a lot easier to render this advice when a client is deciding between two counties located in New York State, where the Medicaid eligibility rules are statewide, even though there are some local variances. Many complex issues arise when a client is deciding to receive long term care either in New York or Florida. Here are some tips that will help

New York practitioners help their clients decide where to receive long term care services:

1. New York has a home care program that in certain cases will allow a person to remain in his or her home and receive 24/7 care. Florida's home care program is limited to about two hours per day, five days per week, and is currently not funded.

2. Although more beds have become available in recent years, New York's Assisted Living Program is limited in scope, with half of New York counties not offering any ALP beds. Most assisted living facilities in New York remain a private pay only proposition, unless one is fortunate enough to locate an ALP bed. In Florida, the Medicaid Diversion program covers the medical cost of an assisted living facility when the program is funded. Funding is at the discretion of the legislature and can result in long wait lists for individuals seeking such assistance.

3. Nursing home care is a mandatory service under the Medicaid program, so one can access this level of care in either New York or Florida without funding issues, as is the case at the assisted living and home care levels. However, there are significant differences between the two states from a long-term care planning perspective.

- Personal care contracts are more widely used in Florida than New York. Florida is more liberal than New York in that it permits the use of such contracts in the nursing home context and also permits the use of lump-sum contracts.
- Partial return of funds is permitted in Florida after an asset transfer has been made in order to reduce the applicable penalty period. While some New York counties permit the use of the partial return approach, many do not, resulting in the need to engage in some type of promissory note planning.
- New York is a spenddown state while Florida is an income cap state. This means that while a New York resident can spend down his or her income, regardless of amount, and when the income is fully spent he or she can qualify for Medicaid, a Florida resident cannot have more than $2,022 per month in income. If he or she does, then a qualified income trust must be established in order to receive the excess income each month, which is then used towards the cost of long-term care.
- Both states honor spousal refusal in the nursing home context.
- New York's Medicaid resource allowance is currently $13,800, while Florida's remains at $2,000.
- New York has fully implemented a 60-month lookback period for all transfers, while Florida is still at 36 months for non-trust transfers; Florida's phase-in period starts January 2013 and goes through December 2014.

What Are the Advantages of Establishing Florida Residency?

For clients considering establishing Florida residency, there are many advantages to doing so:

- Florida has no state income tax, whereas New York has a state income tax equal to about 8% for an individual in the highest tax bracket. Even considering individuals in retirement with lesser earnings, New York State taxes income over $20,000 at about 7%.
- One planning strategy to consider would be to advise a client to declare Florida residency before taking major withdrawals from traditional IRAs or participating in a Roth conversion to avoid the state income tax component of such a transaction.
- Florida has no estate tax, whereas New York imposes a state estate tax beginning with estates valued over $1 million.
- The Florida Intangibles Tax has been *eliminated* as of January 1, 2007. Previously, Florida imposed a tax at the rate of $.50 for every $1,000 worth of intangible assets owned (less an exemption amount of $250,000 per person or $500,000 per couple) on intangible property (stocks, bonds, mutual funds, etc.).
- The homestead is constitutionally and statutorily protected from creditors, regardless of amount.

How to Establish Florida Residency

An individual can have several residences, but only one domicile. Domicile refers to one's principal place of residence and, once established, domicile will continue until changed. To change a domicile, one must move to another location with the intention to make the new location the place of domicile. The best proof of a person's domicile is where he or she says it is. However, courts and taxing authorities often look at objective factors in analyzing proof of intent. I strongly recommend that my clients who desire to establish a new domicile in Florida take as many of the following actions as possible:

1. Execute a Declaration of Domicile and file it in the records office in the county where the client's Florida residence is located.
2. Register to vote in the state of Florida.
3. Change the owner's registration for automobiles and/or boats to Florida.
4. Obtain a Florida driver's license.
5. File for Florida Homestead Exemption on the client's principal residence.
6. File income (and gift) tax returns with the Internal Revenue Service Center in Atlanta, Georgia.
7. Use the Florida address in all documents and records.

Continued on Page 55

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Happy 65th Birthday: What Now?

By Peter J. Strauss

Individuals age 65 or older are eligible to apply for and receive Medicare benefits.[1] To understand how Medicare will affect you, you need to understand the various components of the Medicare program.

Medicare Part A is hospital insurance; it helps cover inpatient care in hospitals and skilled nursing facilities, hospice and home health care.

Medicare Part B is medical insurance. It helps cover doctors' services, hospital outpatient care and home health care, as well as some preventive services to help maintain health and keep certain illnesses from getting worse.

Medicare Advantage Plans are health plans run by Medicare-approved private insurance companies. Also known as "Medicare Part C," these plans are similar to health maintenance and preferred provider organizations (HMOs and PPOs). They include Part A, Part B coverage, and usually other coverage like Medicare prescription drug coverage (Part D), sometimes for an extra cost.

Medicare Part D is the prescription drug option run by Medicare-approved private insurance companies. It helps cover the cost of prescription drugs and may help lower prescription drug costs and help protect against higher costs in the future.

So what does the working senior do when he or she turns 65? Should he or she maintain private health insurance or switch to Medicare? The decision is not an easy one, particularly for persons who are enrolled in PPO plans because their doctors are not "in network." The decision is further complicated by many factors, including analysis and comparison of the following costs:

Employer Plan:

- Employee premium cost
- Policy annual deductible
- Insurance company reasonable charge
- Co-insurance
  (Reimbursement is typically 80% of reasonable charge but to keep costs down some employer plans now only allow 70% or 60%)

Medicare:

- Part B (physicians) and D (prescription drug) premium cost
- Medicare Part A, B & D annual deductibles and the "gap" for Part D
- Medicare reasonable charge
- Co-insurance (Medicare reimbursement is 80% of reasonable charge)
- Medigap policy premiums

Basic Health Care

At the time of this writing, Congress is debating the 2012 U.S. budget, including a Republican proposal to drop the current "fee for service" system of Medicare and give beneficiaries a voucher to pay for private insurance. Based on history, the value of the proposed voucher is not likely to cover the actual premium cost, thus placing beneficiaries and providers in an untenable position. These proposals are unlikely to be enacted; but Medicare will change.[1]

The 2010 Affordable Care Act (ACA)[2] has several provisions that will affect Medicare and the benefits available to Medicare beneficiaries. Among these are the following, which emphasize preventive care, innovation and cost controls.

For example, certain preventive services will be available without the annual Part B deductible or 20% co-insurance. The free "Welcome to Medicare" examinations will continue, and Medicare will soon offer all beneficiaries free annual wellness exams and personalized prevention plans.

Medicare Advantage plans that implement new programs in areas such as care management, patient education and self-management, medication management, patient safety, and health information and technology will be eligible for bonuses. Among new projects being developed are the Medicare Independence at Home demonstration project – the idea is to pay physicians and nurse practitioners to provide primary care in patients' homes. The Center for Medicare and Medicaid Innovations at CMS is working on better care delivery models; one such models is the patient centered medical home, where the primary care providers, along with interdisciplinary care teams, are charged with coordinating and overseeing a broad range of services for chronically ill persons.

New physicians and nurses, particularly in the area of primary care, will be needed to meet the needs of the growing senior population. As incentives, providers will receive a 10% bonus for *primary care services* to Medicare beneficiaries during 2011–2015; primary care physicians will receive the same pay for Medicaid patients as they do for Medicare patients; medical schools that train more primary care physicians will be allowed to request additional residency slots; and residency programs will be allowed to count training in non-hospital settings towards training completion. Medicare funding for graduate nursing education was increased; rural physician and nurse practitioner training grants were enacted; and National Health Care Service Corps scholarship and loan repayment programs were established for students who commit to service in community health centers for two to four years.

The ACA includes per capita spending targets. If, starting in 2014, the spending exceeds certain targets, an Independent Payment Advisory Board will recommend ways to reduce Medicare spending. The Secretary of Health and Human Services is required to adopt the board's recommendations unless Congress adopts alternative means to achieve the same savings, with the caveat that the recommendations cannot "ration" or modify benefits, eligibility, premiums or taxes.

Seniors will be – and have already been – affected by financial provisions. Medicare Part B premiums increased for many beneficiaries over the past several years and will probably continue to do so. Medicare Part B premiums are already significant for beneficiaries with higher incomes.

- In 2013, the Medicare payroll tax for workers will increase for individuals earning more than $200,000 or married couples earning more than $250,000 from 1.45% to 2.35% (a 62% increase).
- In 2013, "high income" taxpayers will pay a tax on unearned income, such as interest income, dividends, annuities, royalties, rent and capital gains.[3]
- In addition, the current medical expense deduction "floor," now 7.5%, will increase to 10% starting in 2013, but this increase is postponed for taxpayers 65 or older until 2017.

Medicare beneficiaries also should be aware that premiums for Medicare Supplemental Insurance policies are increasing. Since Medicare has deductibles and co-insurance, a "Medigap" policy is necessary. A meaningful plan (one that covers more than the basic Medicare deductibles) can cost $250 a month or more. Seniors should consider a policy that will pay more than the Medicare reasonable charge when the beneficiary's physician does not "accept assignment."[4] Keep in mind that under federal Medicare law a physician may not bill more that 115% of the Medicare reasonable charge and New York law limits the allowable "excess" charge to 105% of the reasonable charge.[5]

While changes in Medicare are inevitable – the Medicare Trust Fund is reported to be in danger of running out of funds by 2024 – the basic Medicare structure is not likely to change. According to an August 2010 assessment by the trustees of the Medicare Trust Fund, the ACA will result in cost savings which, together with the new funding mechanisms contained in the act, will stabilize the system.[6]

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1. *The New York Times* reported on May 6, 2011 that "House Republicans signaled Thursday that they were backing away from the centerpiece of their budget plan – a proposal to overhaul Medicare – in a decision that underscored both the difficulties and political perils of addressing the nation's long-term fiscal problems."

2. Patient Protection and Affordable Care Act of 2010 as amended by the Health Care and Education Reconciliation Act of 2010 (2010 Health Reform), 42 U.S.C. §§ 300gg *et seq.* Public Laws 111-148 and 111-152, 111th Congress.

3. For a discussion of the new tax, see CRS Report R41413, *The 3.8% Medicare Contribution Tax on Unearned Income, Including Real Estate Transactions*, by Mark Keightley, 111th Cong., Oct. 7, 2010.

4. By accepting assignment the physician agrees to accept the reasonable determined by Medicare charge for his or her services.

5. N.Y. Public Health Law § 19(1)(a); *Med. Soc'y of the State of N.Y. v. Dep't of Health*, 83 N.Y.2d 447 (1994).

6. CMS fact sheet on the Medicare Trustees Report can be found at http://www.cms.gov/apps/media/press/factsheet.asp?Counter=3823. *Also see* HHS and CMS report found at http://www.cms.gov/apps/docs/ACA-Update-Implementing-Medicare-Costs-Savings.pdf. These reports indicated that the Medicare Trust Fund would be exhausted in 2029, but in a report issued on May 13, 2011, the trustees reported that because of the weak economy and lower payroll tax revenues the Trust Fund would run out in 2024.

Another important factor in the "Medicare or not" decision is whether the senior's physicians participate in the Medicare program. If they choose not to participate – which is their right – no payments to the physician by the patient may be submitted to Medicare for reimbursement, and the fees will not be covered by a Medicare Supplement policy. The patient must absorb the entire cost. And seniors also need to look at the "reasonable charge" problem. Medicare and health insurance plans reimburse a participant for a percentage of the reasonable charge for a physician's services as determined by Medicare or the insurance company, as the case may be.

More and more physicians are electing to drop out of the Medicare program. The primary reason is because physicians feel the Medicare reasonable charges are prohibitively low and then they are subject to the "limiting charge" rules. Under federal Medicare law, a physician may not bill more that 115% of the Medicare reasonable charge; New York law limits the allowable "excess" charge to 105% of the reasonable charge.[2] The same problem exists with respect to the reasonable charges used by insurance companies in paying employee claims for reimbursement when the employee goes "out of network" under a PPO plan.

Most health insurance companies determined their reasonable charges by purchasing data from Ingenix, a subsidiary of United Health Group. In 2009, then Attorney General Andrew Cuomo took action against United Health Group, alleging that the data used to reimburse insureds who went "out of network" was flawed and increased insurance company profits at the expense of patients and physicians. United Health Group agreed to settle the charges and paid $50 million to fund creation of a not-for-profit organization which would develop new "reasonable charge" data for insurance companies operating in New York. Many other carriers signed on to the new approach and agreed to make contributions, which have reached a total of $100 million. This entity, FAIR Health, has developed new data which is intended to be free of conflicts of interest – that is, neutral and fair.[3]

Here's another option for retirees. Employees over the age of 65 who decide to retire may chose to remain on the law firm's health insurance plan under COBRA. If the lawyer's firm has more than 20 employees, federal law allows the retiree to elect COBRA coverage for 18 months.[4] The COBRA election is lost if the employee is "entitled" to Medicare. "Entitlement" means enrollment in Medicare, not just that the employee is "eligible" for Medicare by being over 65. Further, if the Medicare enrollment was prior to a COBRA election, COBRA benefits may not be discontinued.[5]

There are also New York State COBRA protections for employees of firms that employ fewer than 20 persons.[6] The New York "Mini COBRA" law extends the federal rights to employees of these firms; in 2009 the New York law extended the COBRA period to 36 months, not just for employees of firms employing fewer than 20 persons but also for employees of larger firms who have used up their 18 months under federal law.

The budget debates in Washington and the focus on what to do about Social Security and Medicare will affect all current seniors and the baby boomers who will soon be "seniors." How issues about benefits (including benefits at the end of life), payments to physicians and hospitals, the future of the prescription drug program (Part D) and beneficiary costs are resolved will affect all of us. Whether these decisions will be for better or worse only time will tell. ■

1. Persons under 65 who suffer from end stage renal disease or who have received Social Security disability benefits for 24 months are also eligible for Medicare benefits. It should be further noted that persons are automatically enrolled in Medicare Part A when they apply for Social Security benefits.

2. N.Y. Public Health Law § 19(1)(a); *Med. Soc'y of the State of N.Y. v. Dep't of Health*, 83 N.Y.2d 447 (1994).

3. FAIR Health promises that consumers will be able to check the new reasonable charges for medical procedures by August, 2011, on its website, FH Consumer Cost Lookup www.fairhealthconsumer.org.

4. In some limited cases the period can be longer.

5. FAQs For Employees, U.S. Department of Labor, http://www.dol.gov/ebsa/pdf/faq_consumer_cobra.pdf. *See also* Treas. Reg. § 54.49808-7, Q/A-3(b). This protects a person's eligibility when the person is automatically enrolled in Medicare Part A at the time he or she applies for Social Security benefits at age 65.

6. N.Y. Insurance Law § 3221(m).

Continued from Page 51

8. When traveling, use the Florida address as the residence when registering at hotels, motels, etc.
9. Change the homeowner's insurance policy to show the Florida residence as the client's principal address.
10. Most or all of the client's bank accounts and safe deposit box(es) should be relocated to Florida.
11. All bills should be sent to the Florida address.
12. To the extent possible, resign from local clubs and organizations or obtain non-resident membership, and join Florida clubs and organizations.
13. To the extent possible, transact business from Florida.
14. Execute a last will and testament declaring Florida as the client's residence.
15. Spend as much time as possible in Florida.

There are many considerations when advising the Florida snowbird client regarding estate and long-term care planning. The items discussed here are only a handful of the issues that can arise in this situation. The best course of action for New York practitioners with Florida snowbird clients would be to consult with or co-counsel with a Florida elder law attorney to address these issues on their clients' behalf.

1. Fla. Stat. § 733.302.
2. Fla. Stat. § 733.304.
3. Fla. Stat. § 733.305.
4. Fla. Stat. § 732.2065.
5. Exempt property includes, among other things, household furniture, furnishings, and appliances in the decedent's usual place of abode up to a net value of $10,000 as of the date of death and all automobiles held in the decedent's name and regularly used by the decedent or members of the decedent's immediate family as their personal automobiles. Fla. Stat. § 732.402.
6. Fla. Stat. § 732.2025(8)(a).

Valerie J. Bogart is Director of the Evelyn Frank Legal Resources Program at Selfhelp Community Services, Inc., a nonprofit organization in New York City that provides free legal services to Holocaust survivors and other vulnerable seniors, trains advocates on Medicaid and Medicare, and launched the advocacy website http://NYHealthAccess.org with partners Empire Justice Center and the Legal Aid Society. She received her law degree from the New York University School of Law. She received the President's Award from the National Academy of Elder Law Attorneys and the Access to Justice Award of Project FAIR in 2010.

Just the Basics

The Neediest Elderly Need Legal Services to Protect Housing and Subsistence Income, Not Retirement Planning

By Valerie J. Bogart

Planning for retirement usually involves saving enough to afford a comfortable lifestyle, with enough to spare to pass on to our loved ones. Investment strategies, trusts, tax and estate planning are the tools of the trade for realizing one's retirement goals. But, for a large sector of the older population, tax and estate planning have no relevance. More than 11.8% of people over age 65 in New York State live below the poverty level[1] – this means that over 303,000 New Yorkers over age 65 have monthly incomes below $908 (singles) and $1226 (couples).[2] Of these, nearly half – 131,589 people – age 65+ receive SSI,[3] which is only 83% of the federal poverty level. Many more seniors have incomes above the federal poverty level but that are still low. Nationally, 42.3% of all households with someone age 65+ whose annual income is below $25,000.[4]

The aged with few financial resources may not need lawyers to do estate or tax planning, but they need representation for myriad complex legal problems – to prevent eviction or foreclosure, to access Medicaid and other subsistence benefits, to fight consumer fraud. This article will discuss the need for funding to support free legal services to meet this demand. First, we will look at some examples of the complex problems faced by low-income seniors.

Medicaid and Food Stamps

Dollie, age 87, and her sister-in-law, Rosie, age 89, live with Dollie's daughter, Alice, in her apartment in Manhattan. Rosie has advanced dementia, and both women are totally dependent on personal assistance because of cardiac disease, arthritis, and incontinence. Alice, in her 60s, took care of the two older women for 10 years – depleting her own savings – before seeking help from Medicaid in late 2009. In June 2010, Selfhelp Community Services' legal advocate won a fair hearing to increase their home care hours from the 12 hours initially approved to 24 hours/day, based on their frequent round-the-clock needs. In September, 2010, Selfhelp resolved a second fair hearing when one sister's Medicaid was discontinued without notice. Now, Selfhelp is contesting an error in authorizing food stamps for only one and not both sisters. The sisters' combined income is $1,534/month, after their Medicare and Medigap premiums are paid. They could not afford to pay legal fees.

Supplemental Security Income (SSI)

A 69-year-old widow, who has received SSI since 2005 to supplement a small Social Security benefit, found her income reduced by 13% when her Medicare Part B premium of $96.40/month was withheld from her Social Security check. Her legal advocate at Selfhelp rectified the error – unfortunately, not uncommon – so that Medicaid payment of the premium was restored, with no deductions from her check. In addition, her representative successfully contested an alleged overpayment of SSI benefits, due to an error beyond her control.

Threatened Loss of Affordable Housing

Margarita C, age 64, who lives alone on SSI and food stamps, moved to New York City from Puerto Rico in 1969 and is not fluent in English. A survivor of three strokes and stomach cancer, she suffers from anxiety and depression. She moved into her rent-stabilized apartment in a largely Hispanic Brooklyn neighborhood 10 years ago. The rent is affordable because she obtained Section 8, administered by the New York City Housing Authority (NYCHA). Each year Ms. C successfully completed the annual recertification process to retain Section 8 until September 2009, when she learned that her landlord had not received Section 8 subsidy payments from NYCHA for the prior three months. Ms. C had neither received the recertification packet nor any of the three predicate notices required to terminate her subsidy. The Legal Aid Society Brooklyn Office for the Aging attorney obtained her NYCHA file, which revealed an error in how her apartment number was listed. Though the error was slight – "R5I" instead of "R5" – the convoluted apartment numbering system for this 165-unit, 13-building apartment complex, and the fact that many tenants have common Hispanic surnames, like Ms. C's, made it likely that any notices to her were not delivered. When NYCHA refused her attorney's request to reinstate Ms. C's subsidy, the Legal Aid attorney prepared and filed an Article 78 petition in state Supreme Court, and simultaneously defended Ms. C when her landlord lost patience and brought an eviction proceeding against her in Housing Court. The cases were settled, with the Section 8 subsidy reinstated retroactively and Ms. C's eviction prevented.

Consumer Fraud

Mrs. Alice J, a 74-year-old widowed homeowner contacted the Legal Aid Society Brooklyn Office for the Aging in September 2009 after her bank account – which solely contained her Social Security benefits – was frozen due to a default judgment for $11,000 that had been entered against her in a debtor-creditor action. Mrs. J secured a credit report which confirmed that that she never incurred a debt in the alleged amount with any credit card company and never even had a credit card with the specific credit card company who had sold its debt to the plaintiff debt-buyer. Further, she never received the summons and complaint. The Legal Aid attorney's motion to vacate the default judgment was granted. Discovery requests followed to obtain the documentation of the alleged debt, and the debt-buyer finally produced documentation of a debt for someone with the same name as Mrs. J, but who lived in Delaware and had a different social security number. The court granted Mrs. J's motion to dismiss the case in July 2010, lifting the threat of a lien being placed on her home.

Crisis in Funding for Legal Services

In May 2010, Chief Judge Jonathan Lippman launched a statewide, multi-faceted initiative to provide adequate legal assistance for low-income New Yorkers in civil legal matters that involve fundamental human needs.

> No issue is more fundamental to our constitutional mandate of providing equal justice under law than ensuring adequate legal representation. . . . [T]o meet our constitutional and ethical mandates, the Judiciary of this State is determined to bring us closer to the ideal of equal access to civil justice. . . . [I]t is my fervent hope, first, that it will be an obvious truth *to all* that those litigants faced with losing the roof over their heads, suffering the breakup of their families, or having their very livelihood threatened cannot meaningfully pursue their rights in the courts of New York *without legal counsel* – and second, that it will be equally obvious that we together will have taken major steps forward in providing such representation to those who need it most, *making equal justice for all not just an ideal, but truly a reality in our great State.*[5]

The Chief Judge convened the Task Force to Expand Access to Civil Legal Services in New York, which was charged with organizing the first ever judiciary hearings in all four Judicial Departments to evaluate the unmet need for civil legal assistance. The Report to the Chief Judge, issued on November 23, 2010,[6] found:

> Each year, more than 2.3 million New Yorkers try to navigate the State's complex civil justice system without a lawyer. The current statistics are staggering, to cite a few:
>
> - 99 percent of tenants are unrepresented in eviction cases in New York City, and 98 percent are unrepresented outside of the City.
> - 99 percent of borrowers are unrepresented in hundreds of thousands of consumer credit cases filed each year in New York City . . . and . . .
> - 44 percent of homeowners are unrepresented in foreclosure cases throughout our State.
> - 70 percent of civil matters in New York State courts involve family law, consumer credit, landlord-tenant and foreclosure cases.

The Task Force's legal needs survey "found that senior citizens, in particular, had significant legal needs."

> Consider, for example, the hearing testimony of . . . a senior citizen faced with the loss of his home through foreclosure after a lifetime of work and whose wife suffered from the challenges of a bi-polar condition and dementia could not have coped with these overwhelming legal problems without expert civil legal assistance that unraveled and solved these complicated matters. He testified that "[w]e had nowhere else to go and [legal services] found a path for us in many directions."[7]

Funding for civil legal service programs in New York State comes from Interest on Lawyer Account (IOLA), the federal Legal Services Corporation, state and local governments, private foundations and individual donors, and NYSBA New York Bar Foundation and local bar associations. All of the funding from these sources has been reduced because of the recession. IOLA funding has been crucial for 26 years, but with plunging interest rates that funding dropped from $32 million in 2008 to $6.5 million in 2010.[8] Pledging to expand the funding for legal services, the Chief Judge recommended that a new appropriation of $25 million be included in this year's state budget for legal services, but only half of this amount was approved. The Task Force found that pro bono assistance cannot fill the gap in access to counsel.

How You Can Help

Give to the New York Bar Foundation or your local legal services program, which you can find on http://lawhelp.org/NY/. ■

1. U.S. Census Bureau, Table M1703. Percent of People 65 Years and Over Below Poverty Level in the Past 12 Months, SOURCE: 2005–2009 American Community Survey 5-Year Estimates, *posted at* http://tinyurl.com/CensusNYS65.
2. *Id.* at Table M0103. Percent of the Total Population Who Are 65 Years and Over, *posted at* http://tinyurl.com/censusNYS65-All.
3. N.Y. State Office of Temporary & Disability Assistance, January 2011, *posted at* http://otda.ny.gov/resources/caseload/2011/2011-01-stats.pdf.
4. U.S. Census Bureau, The Older Population in the United States: 2009, Table 20: Total Money Income of Households by Type and Age of Householder 55 Years and Over: 2008, *posted at* http://www.census.gov/population/www/socdemo/age/older_2009.html.
5. Chief Judge Jonathan Lippman, Law Day, May 3, 2010, at 3, 7 (emphasis in the original).
6. *Report of the Task Force to Expand Access to Civil Legal Services in New York* ("the Report") issued November 23, 2010, *posted at* http://www.courts.state.ny.us/ip/access-civil-legal-services/.
7. *See id.* at p. 30, and n.67 (citing the Chief Judge's Hearing on Civil Legal Services, Second Dep't, Oct. 7, 2010 (testimony of William Schneider, client of Nassau/Suffolk Legal Services, at 86:20-21)).
8. The Report at p. 34.

Be a Resource

For 20 years, members of the Elder Law Section of the New York State Bar Association, individually and as a group, have provided pro bono services and information to older New Yorkers. These efforts can be easily replicated by Bar Associations and attorney groups throughout the country.

Here is a sampling of some of the Section's regular activities and services for seniors and the special needs community:

Hosting pro bono clinics for seniors throughout New York State on a quarterly basis.

Organizing the annual Mitchell Rabbino National Healthcare Decisions Day: Volunteer lawyers give free presentations explaining legal procedures and documents to help attendees make better, more informed health care and financial decisions. The topics for this year's program included an overview of legal documents important in the life of every New Yorker.

Publishing the Section's pamphlet "17 Benefits for Older New Yorkers," which provides information on the following programs:

- Social Security
- Medicare
- Medicare Buy-In
- Medicaid
- SSI (Supplemental Security Income)
- Temporary Assistance
- Veterans Benefits
- EPIC Pharmaceutical Insurance Coverage
- Food Stamps
- Home Energy Assistance Program (HEAP)
- Weatherization Referral and Packaging Program (WRAP)
- Senior Citizen Rent Increase (SCRIE)
- Senior Citizen Homeowners Exemption (SCHE)
- Real Property Tax Credit
- New York State School Tax Relief Program (STAR)
- Life Line Telephone Service

The pamphlet may be accessed online at: http://www.nysba.org/AM/Template.cfm?Section=Elder_Law_Home&ContentID=49992&Template=/CM/ContentDisplay.cfm

Making available health care proxy forms in English, Chinese, Russian and Spanish.

Creating a database of attorneys who speak languages other than just English.

Proposing legislation such as The Compact,[1] an alternative to Medicaid financing, which has been adopted by New York State as a pilot program.

As a Section, we are constantly striving to explore new and creative ways to serve our constituency.

T. David Stapleton, Jr.
Mr. Stapleton is current Chair of the Elder Law Section.

1. The Compact for Long-Term Care is described in detail on page 68.

You're a New York State Bar Association member.

You recognize the value and relevance of NYSBA membership.

For that, we say **thank you**.

The NYSBA leadership and staff extend thanks to you and our more than 77,000 members — from every state in our nation and 113 countries — for your membership support in 2011.

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.

Vincent E. Doyle III
President

Patricia K. Bucklin
Executive Director

NYSBA

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The Devil Is in the Details

How the Legal Title of Assets Can Sabotage One's Inter Vivos and Testamentary Estate Plans

By Anthony J. Enea

In spite of the facts, clients believe that upon their death their last will and testament will control the disposition of jointly held assets and their revocable living trust will control assets not legally titled in the name of the trust. I am not exactly sure when it occurred, but it has become very common for married couples and seniors to title many of their assets jointly with their spouses, and if not married, then jointly with their children or other loved ones. Perhaps they believe that doing is evidence of the strength of their marriage or the depth of their love.

All frivolity aside, there are many logical and legitimate reasons for real and personal property to be jointly titled or to have accounts titled "in trust for" or "transfer on death." For example, the jointly held real and/or personal property may have been purchased or created with assets the parties equally contributed or, in the case of married couples, they may be assets purchased during the marriage. With respect to jointly held bank accounts, said accounts allow the account holders to have full and unfettered access to the accounts during their lifetime. This is of particular advantage upon the death, disability or incapacity of the joint account holder. Jointly held real and personal assets are also commonly recognized as effective wealth transfer vehicles, permitting the transfer of assets from one party to another upon death without necessitating the probate of a will or the creation of a trust. Significant problems arise, however, when clients and, unfortunately, some attorneys, do not recognize and fully understand the unintended consequences of assets passing by "operation of law," and the estate, gift and income tax consequences resulting from real and personal property being jointly titled or titled in a manner that the property passes by operation of law. In this article I will highlight the significant pitfalls resulting from how the legal title of real and personal property is held, while also providing you with the statutory guidance with respect thereto.

Common Law Rules of Ownership of Property and Their Codification

The joint ownership of both real and personal property has been recognized for centuries as a valid legal doctrine. At common law three forms of joint ownership were recognized:

1. tenancy in common (individuals own an indivisible fractional share with no right of survivorship in the other joint tenant's interest;

2. tenancy by the entirety (applicable to husbands and wives and ownership of real property only each owns an undivided interest with a right of survivorship but without the right to unilaterally sever or partition their interest); and
3. joint tenancy (the joint tenants have an undivided interest which can be unilaterally severed or destroyed; the tenants have a right of survivorship).

These three common law forms of ownership have been codified and recognized in § 6-2.2 of the New York Estates, Powers and Trusts Law (EPTL). With respect to the authorization of conveyances of an interest in real property by one or more persons, the relevant statutory provisions are found in § 240-b of the New York Real Property Law (RPL). As to the severance of an interest(s) in jointly held real property, the relevant statutory authority is found in RPL § 240-c.

Relevant Statutory Provisions for Jointly Titled Bank and Brokerage Accounts

The right to receive by operation of law the assets in a joint account upon the death of the joint tenant does not apply to a joint account that is created and held "for the convenience" of the depositor. Accounts "for the convenience" are regulated by § 678 of the New York Banking Law. Section 678 provides that accounts held "for the convenience" shall not affect the title to such deposit or shares. The depositor is not considered to have made a gift of one-half the deposit or of any additions or accruals thereon to the other person, and on the death of the depositor, the other person shall have no right of survivorship in the account.[1]

In order for the provision of Banking Law § 678 to apply, the words "for the convenience" or similarly "for convenience only" must appear on the title of the account.[2] If the aforesaid words do not appear, the presumptions created by Banking Law § 675 will apply.

Section 675 of the Banking Law provides that the making of a deposit in the name of the depositor and another person, to be paid to either or to the survivor, is prima facie evidence that the depositor intended to create a joint tenancy, and that where such a deposit is made, the burden of proof is on the one challenging the presumption of joint tenancy. Under § 675 three rebuttable presumptions are created: (1) as long as both joint tenants are living, each has a present unconditional property interest in an undivided one-half of the money deposited; (2) that there has been a irrevocable gift of one-half of the funds in the account by the depositor to the other joint tenant; and (3) that the joint tenant has a right of survivorship in said entire joint account upon the death of the other joint tenant.[3]

Section 675(b) of the Banking Law provides that the burden of proof is upon the one challenging the presumption of joint tenancy.

With respect to securities accounts or brokerage accounts in joint names, the Transfer-on-Death Security Registration Act and EPTL 13-4.1–13-4.12 permit joint securities and brokerage account holders to have the rights and choices that joint bank account holders have. The Transfer-on-Death Security Registration Act was enacted on July 26, 2005; it amended EPTL by enacting a new part four to Article 13; and it is essentially codified in EPTL 13-4.1–13-4.12. Under EPTL 13-4.2 a "transfer on death" or "payable on death" securities or brokerage account can only be established by sole owners or multiple owners having a right of survivorship in the account. The owners of a securities or brokerage account held as tenants-in-common are expressly prohibited from creating a "transfer on death" account. Although the creation of a "transfer on death" or "payable on death" securities or brokerage account does not require that any specific language be utilized to create the account, evidence of its creation is in the usage of the phrases "transfer on death" and "payable on death" or their abbreviations "TOD" or "POD."[4] However, under EPTL 13-4.4, evidence of the establishment of the account is the opening documentation that indicates that the beneficiary is to take ownership at the death of the other owner(s).

The Pitfalls of Jointly Titled "In Trust For" or Other Property Passing by Operation of Law

The manner in which one holds title to property at the time of demise will have a critical and significant impact upon the estate plan and the disposition of the estate's assets. With the exception of property (real and/or personal) held jointly as tenants in common, all other jointly held property, "in trust for" accounts, "transfer on death" accounts, IRAs, 401(k)s and life insurance policies which have a named beneficiary (other than one's estate) are accounts that by operation of law are non-probate assets. Thus, they are assets that are not controlled by one's last will and testament. While for many individuals (those with relatively small estates), jointly titled property or having property passing by operation of law may be advisable, for many others it can have disastrous and unforeseen consequences. The most expertly crafted wills, trusts and other documents of a testamentary nature may be rendered useless by the legal title of one's assets. The following is a summary of how many plans are sabotaged and the unintended consequences resulting from jointly held assets.

Property Jointly Titled and/or Passing by Operation of Law to One's Spouse

Estate Tax Impact

Property jointly held with one's spouse or which names one's spouse as a beneficiary with the exception of property held with a spouse as a tenant in common,

will pass by operation of law to said spouse. Thus, it is property eligible for the "unlimited marital deduction" on the death of the first to die and will pass free of any estate taxes to the surviving spouse who is a U.S. citizen.[5] However, on the death of the second to die all of the surviving spouse's assets, including those received by the first to die, will be includable and taxable in his or her estate. Pursuant to the provisions of the recently enacted "Tax Relief, Unemployment Insurance Authorization and Job Creation Act of 2010," also known as "TRA 2010," the surviving spouse (unless the estate's representative can utilize the portability provisions of TRA 2010), upon his or her death, would have only a $5 million federal estate tax credit available upon his or her demise during the years 2011 and 2012, with a 35% estate tax upon all amounts in excess of $5 million.[6]

Thus, for example, a husband and wife with a $10 million gross estate would lack the ability to shelter $5 million from federal estate taxes if their assets were jointly held or passed by operation of law from one spouse to the other upon the death of the first to die. This would occur even if the husband and wife had well-crafted last wills or inter vivos trust agreements that contained "credit shelter" or "disclaimer trust" provisions. Said last wills and/or trusts would be of no import upon the jointly titled or other assets passing by operation of law. Similarly, for New York estate tax purposes, the $1 million estate tax credit of the first spouse to die would also be squandered with respect to the jointly held and/or other property passing by operation of law to the surviving spouse, thus, also resulting in the potential for New York estate taxes upon the death of the second spouse to die.[7]

Impact Upon the Children of a Prior Marriage

As the rate of divorce has skyrocketed, more often than not the decision of the remarried parent to title his or her assets jointly with or to pass by operation of law to the new spouse can have devastating consequences upon the children of a prior marriage. It is not unusual for clients in a second marriage to have assets titled jointly with or having their new spouse as a beneficiary. This is particularly common with respect to their IRAs, 401(k)s, and other retirement assets. Most often they have been told by their financial advisor that naming their spouse will continue the income tax deferral upon their death as the surviving spouse will be able to do an IRA rollover. Again, these IRA, 401(k) and other retirement assets will pass to the decedent's spouse irrespective of any provisions for the children of the prior marriage in any last will or trust.

Property Held Jointly With Children and/or Others

Potential Exposure to the Claims of the Creditors of Joint Owners

As parents age, it is not unusual for them to title assets jointly with one or more children. Often, the child selected is the one who lives closest to the parent and/or provides assistance to the parent with his or her financial affairs (payment of bills, etc.). One unintended consequence of doing so is that parent has now exposed these assets to the claims of the potential creditors of the child. It is not unusual for the jointly held asset to become embroiled in either a bankruptcy, divorce or other litigation involving the child.

> The manner in which one holds title to property at the time of demise will have a critical and significant impact upon the estate plan and the disposition of the estate's assets.

Potential Gift and Estate Tax Consequences

When one transfers an interest in any real or personal property to a child or any non-spouse third party, he or she may have made a taxable gift that requires filing a federal gift tax return (if more than $13,000 per person in any calendar year) and which can result in utilization of part or all of one's lifetime gift and estate tax credit ($5 million unified gift and estate tax credit for the years 2011 and 2012).[8] The reduction of one's lifetime gift and estate credit as a result of gifts made may result in a significantly smaller credit being available to the other heirs of one's estate.

Potential Disinheritance of Other Children

If a parent places one child's name jointly on his or her assets or accounts because the child is the "responsible" child that he or she trusts to "do the right thing," the parent's wishes that his or her assets be equally divided among all the children may never be fulfilled, irrespective of the parent's stated wishes in a last will or trust. Unless the joint account is a "for convenience only" account under § 678 of the Banking Law, the child is under no legal obligations to share the joint account with his or her siblings upon the death of the parent.[9] Additionally, if the child upon the parent's demise does decide to do the right thing and share the joint assets with siblings, he or she may be subjected to gift taxes. The Surrogate's Court's dockets are filled with cases involving disputes as to whether other assets jointly held with a child should be part of the parent's estate.

Potential Capital Gains Tax Consequences

A serious and often adverse consequence created by the transfer of real and/or personal property is the capital gains tax consequence upon the eventual sale of the jointly held property by the surviving joint tenant.[10]

When a parent re-titles his or her residence (or other real property) and other assets (securities) into joint title with a child, the child, unless the parent has reserved a life estate in the premises or the right to income from the asset transferred, will receive his or her interest in the asset transferred at the parent's original "cost basis" in the property (purchase price plus any capital improvements). Thus, upon the death of the parent, the surviving joint owner's cost basis in the property is the parent's original cost basis. He or she will not receive a stepped up cost basis (date of death value) of the property.[11]

Failure to Fund Irrevocable or Revocable Trusts

One of the most common problems associated with the creation of trusts is the failure of the client to comprehend that the trust (revocable and/or irrevocable) will be of no consequence if the client and/or his or her attorney has not funded the trust with the client's assets. The trust agreement is an agreement of a contractual nature which only controls assets that have been conveyed (titled) in the name of the trust during one's life or upon the one's demise. A trust can be the named beneficiary that receives specified assets upon one's demise or the occurrence of a specified event. For example, a trust can be the beneficiary of one's account(s), IRA, 401(k), life insurance, etc.

Most recently I had a consultation with clients who presented to me a very large leather-bound binder that contained their revocable living trusts and last wills. Unfortunately and to the client's dismay, neither their home nor any of their assets had been titled in the name of the trust. All of their assets were jointly owned or named each other as beneficiaries. Thus, their very expensive trust and last wills had no control over their assets.

Conclusion

When preparing last wills and trusts for clients, the clients need to understand which assets will be controlled by the terms of their last wills and/or trusts and all of the consequences resulting from their ownership of jointly held property and/or property that will pass by operation of law upon their demise. Additionally, the attorney should document for the client which assets, if any, the attorney will be responsible for changing title of and that which will be the responsibility of the client. The failure to do so can have serious consequences. ■

1. Banking Law § 678.
2. *Id.*
3. Banking Law § 675.
4. EPTL 3-4.2; *see* EPTL 13-4.5.
5. IRC § 2056(a).
6. TRA 2010 § 302(a)(1).
7. N.Y. Tax Law § 952.
8. TRA 2010 §§ 301(b), (302)(b)(1), 2505(a)(1).
9. Banking Law § 678.
10. IRC § 1222.
11. IRC § 1014.

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Tax Tips When Planning for Long-Term Care

By Michael J. Amoruso and Allan Povol

Long-term care is expensive, and if you count yourself among those who have carefully planned for the future, you are way ahead in terms of costs and worry. Often, however, in the throes of an emergency that triggers the need for long-term care or even in the planning stage, people overlook the very real and important tax-saving strategies that can be used to lower costs and increase monthly cash flow. Below we discuss several strategies and issues that seniors and their loved ones should explore.

Income Tax – Utilize the Medical Expense Deduction

Save those receipts! Qualifying medical expenses that exceed 7.5% of your adjusted gross income can be used as a tax deduction against annual income. This deduction can be a significant cash flow savings for individuals who are forced to take withdrawals from their retirement accounts or offset other income sources to cover the cost of their care. These costs may include nursing home, home care or other qualifying related health care expenses. Significantly, the Internal Revenue Code permits a medical expense deduction for certain qualifying long-term care insurance policy premiums. New York, however, offers a 20% credit, instead of a deduction, for premiums paid for a qualifying long-term care insurance policy.

Income Tax – Preserve the Section 121 Capital Gains Exclusion for Sale of the Home

If a person has resided in a residence for two of the last five years, and sells that principal residence then the individual can deduct $250,000 of capital gain if single or $500,000 of capital gain if married. A qualifying stay in a nursing home will count towards the two-year requirement. Often, in long-term care planning, an individual will transfer the home into an irrevocable trust to protect the home from creditors. However, homes purchased years ago may have substantial built-in capital gains, and an irrevocable trust that sells such a home will not qualify for the individual grantor's capital gains exclusion unless the trust is drafted as a wholly owned "grantor trust." Simply stated, a "grantor trust" under the Internal Revenue Code is one in which the grantor is treated as the owner of trust assets for income tax purposes only; thus, asset protection may still be achieved. Thus, the grantor's capital gain exclusion can be used to offset gain if the residency requirements are met.

Property Tax – Preserve Property Tax Exemptions

Seniors living on a fixed income need to keep expenses in check, and many seniors rely on property tax exemptions (i.e., enhanced STAR and veterans' exemptions) to reduce their annual expenditures. A trap for the unwary, however, is when the senior either transfers the home outright or into an irrevocable trust in an attempt to protect the home for the senior's descendants. Unfortunately, such a transfer will eliminate their property tax exemptions and cause a dramatic increase in their tax bill. (Another reason an irrevocable trust may not be the best option.) Proper drafting and planning can avoid this unintended consequence. In many cases, the reservation of a "life estate" on the deed or the reservation of the exclusive right to "use and possess" the property in a trust may be

Taxability of Social Security Benefits

Is Social Security income taxable? It depends.

About one-third of beneficiaries pay federal income tax on their Social Security. Many states do not tax Social Security benefit income (SS). Some states follow some measure of the federal government's rules.

Whether your income from Social Security is taxable depends on your total provisional income (PI).[1] Figure your PI by adding your taxable income items, your tax-exempt interest income, and any other amounts excluded from income (i.e., series EE bonds, etc.). Then subtract any student loan interest and qualified tuition-related expenses, as well as certain other specific items, such as domestic production deductions. Then add in 50% of your Social Security income. That is your PI.

If you are single, the head of household, a qualifying widow, or are married filing separately (and living separately) and your PI is not greater than $25,000, then none of your Social Security income is taxable. Your Social Security income is not taxable if you are married, filing a joint return, and your combined PI is not greater than $32,000; or if you are married, filing a separate return and living with spouse at any time during the year, and your PI is zero.

Up to 50% of your Social Security income is taxable when your PI exceeds the $25,000/single-$32,000/married levels but is less than the following:

- $34,000 for a single, head of household, qualifying widow, or married but filing a separate return taxpayer and the taxpayer did not live with spouse at any time during the year;
- $44,000, if married filing a joint return;
- Zero, if married but filing a separate return and the taxpayer lived with spouse at any time during the year.

Up to 85% of Social Security benefits are taxable if PI exceeds the levels above. Any lump-sum Social Security income (i.e., retroactive benefits) is taxable in the year received and would be subject to the outline of potential taxability thresholds listed above, although lump-sum Social Security death benefits are not taxable.

If any Social Security income is received prior to full retirement age (pre-1960 = 65 to 66 and 10 months depending on year of birth; post 1960 = 67), the Social Security income received while continuing to earn income is subject to certain limitations, which can reduce the benefits received, and in certain cases can require that benefits be repaid to the Social Security system.

The best advice? Consult with your tax advisor.

1. *See* Paula Span, "Are Social Security Benefits Taxable?" Sept. 13, 2010 at http://newoldage.blogs.nytimes.com/2010/09/13/paying-taxes-on-social-security-benefits/?pagemode=print.

enough to maintain the exemptions. A word of caution: New York State's recent budget, effective on April 1, 2011, gives Medicaid a right of recovery against life estates and certain trusts for benefits paid during lifetime. Thus, it is important to balance the current cash flow requirements against a Medicaid right of recovery, if any.

Income Tax – Caregiver Agreement With a Family Member

Many seniors want to remain at home and receive care as they age. One can hire a home care agency to render care, but many pay a loved one to render the care pursuant to a caregiver agreement. Income tax issues must be considered, however. First, the loved one rendering the care will be considered an employee by the Internal Revenue Service, which subjects the senior to quarterly and annual tax filing requirements (i.e., W-2, Medicare, Social Security). Given the time-sensitive deadlines and complexities with the tax filings, it is often more appropriate to hire a payroll service to handle the filings and payment to the caregiver. For the caregiver, any money received to render the care will be considered income, which must be reported on the caregiver's personal tax return.

Estate and Gift Tax

Effective January 1, 2011, Congress increased the federal estate tax exemption (that was scheduled to return to $1 million) to $5 million, likewise increasing the federal gift tax exemption to $5 million. In a state, such as New York, that does not have a gift tax but has an estate tax exemption of only $1 million, a significant opportunity exists for the next two years to transfer wealth to successor generations through solid planning (outright or through trusts) with little or no tax effect.

Gift Tax – Limited Power of Appointment

With the 2011 change in the federal gift tax exemption, it may be very attractive to transfer wealth through lifetime transfers. However, what if the asset being transferred is highly appreciated and has a low cost basis for tax purposes? Seniors should consider the use of a limited special power of appointment as a means to obtain a step up in tax basis for the asset to the fair market value at the time of the grantor's death. This benefit is obtained since the reservation of such a power will not be deemed a taxable transfer during life, so the asset is includable in the grantor's estate for tax purposes at death.

Income Tax – Claiming Parent as a Dependent

Frequently, given the high cost of living and care, many parents have no choice but to move into the home of a child. If the child provides more than one half of support for the parent for the year, and the parent's income does not exceed $3,650, then the child may claim the parent as a dependent on the child's tax return. ■

Paying for Long-Term Care

By Moriah Adamo, Randy Breidbart, Sharon Kovacs Gruer, Felicia Pasculli, Joan Lensky Robert and Fred S. Sganga

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Introduction

The national debate over health insurance that resulted in the enactment of the Affordable Care Act[1] did not, in large part, address the long-term care needs of seniors and persons with disabilities. At least 70% of people over age 65 will require long-term care services at some point in their lives, whether it is support services for the activities of daily living or nursing home care.[2] People who reach age 65 will face a 40% chance of entering a nursing home.[3] The cost of nursing home care may exceed $150,000 a year.[4] Paying for long-term health care costs is a challenge facing not only seniors and those with disabilities but our society at large. This article presents a

brief overview of the government entitlements and long-term care insurance options, followed by a discussion of the legislative proposals that address the financing of long-term care.

Medicare[5]

Medicare provides only limited coverage of extended care.[6] Medicare is an entitlement program available to those over the age of 65 or those under the age of 65 who have been receiving Social Security Disability benefits for two years.[7] Generally, Medicare pays only for skilled care either at home or in a skilled nursing facility.[8] In either case, the normal prerequisite is a qualifying hospital visit.[9] Additionally, in order to receive care at home, a physician must certify that the individual is homebound and needs only intermittent skilled care.[10] Should the individual require a higher level of care, then Medicare will cover in full the cost of the first 20 days of a stay at a skilled nursing facility.[11] Days 21 through 100 will be covered, subject to a co-payment, assuming the individual continues to benefit from restorative treatment, such as physical or occupational therapy.[12]

Pressure to reduce the federal Medicare budget has resulted in privatization of a significant portion of the administration of the Medicare program.[13] Medicare Advantage allows private insurance companies to offer traditional insurance products like HMOs and PPOs to Medicare enrollees, as a means to shift the cost of the program.[14] The Medicare Part "D" drug program is also administered by private companies; it offers limited coverage of certain prescription drugs.[15] Each company compiles its own unique formulary, outlining the specific drugs that it will cover. Inherent in the program is a coverage gap, referred as the "donut hole," which requires full payment of the costs of prescriptions after the threshold coverage is exhausted.[16]

Given Medicare's limitations, many beneficiaries will require alternative payment sources to finance their long-term care needs.

Medicaid[17]

While Medicare provides limited coverage for long-term care, Medicaid pays for custodial or skilled care in the community or in a skilled nursing facility. Medicaid, however, is means-tested. In 2011, to be eligible for Medicaid, the recipient may have no more than $13,800 in countable assets. Medicaid also imposes income limitations upon a recipient. When in a nursing home, the Medicaid recipient retains only $50/month in income; in the community, the recipient retains $767/month.[18]

If a Medicaid applicant has transferred assets for less than fair market value to those not protected by statute, the government imposes an ineligibility period before it will provide Medicaid coverage in a skilled nursing facility.[19] Not all transfers of assets create ineligibility. The home may be transferred to certain individuals[20] without penalty and, in New York, all assets may be transferred to a spouse[21] without the applicant's incurring any waiting period for Medicaid benefits. However, although the transfer of assets between spouses does not create ineligibility for Medicaid services, the community spouse with resources above $74,820–$109,560 and/or income above $2,739/month[22] remains vulnerable to paying for the cost of care, even if he or she has "refused" to make such assets available for the medical support of the institutionalized spouse.[23]

When a spouse in the community needs Medicaid services at home, the financial rules may be even more limiting.[24] At this time, New York does not impose an ineligibility period for the transfer of assets for Medicaid services in the community.[25] Spousal refusal permits the well spouses of some Medicaid recipients to stay in the community by enabling them to retain sufficient assets to live in dignity. Without spousal refusal, the escalating costs of institutional and/or home care could devour a couple's income and assets and impair the ability of both spouses to continue living in the community.

Veterans' Benefits

Veterans and their spouses have access to an array of services that can be an essential component of long-term health care planning. New York alone is home to more than one million living veterans.[26]

The United States Department of Veterans Affairs or "VA" has two major functions: providing health care (VHA) and paying benefits (VBA). Veterans should be encouraged to "enroll"[27] at their local VA medical centers, where in addition to acute care services, they can receive low-cost prescription drugs (creditable coverage under Part D), geriatric evaluations, home-based primary care, skilled home health care, homemaker and home health aide services, adult day health care, respite care, hospice and palliative care.[28]

When a veteran has a service-connected disability, he or she is paid "compensation"[29] and given priority in terms of services.[30] If the service-connected disability is rated at 70% or more, the VA is responsible for the veteran's long-term care costs.[31]

The VA also offers pension programs that can financially assist veterans or the spouses of deceased veterans, who are low income or whose incomes are being depleted by health care expenses. The applicant does not have to have a service-connected disability, but the veteran must have served active duty during a period of war, have an honorable discharge, be age 65 or older *or* permanently and totally disabled.[32] Pension enhancements are available for those who are housebound or require aid and attendance (A & A) with activities of daily living.[33] These benefits are monetary and range from a basic pension of $11,830 annually for a

The Compact for Long-Term Care

By Louis Pierro

Long-term care is a broad phrase, encompassesing an array of goods and services required by people with chronic illnesses, disabilities or advanced age. The cost of long-term care has become unaffordable for most New Yorkers, with bills for nursing homes and home care topping $15,000 per month in some parts of the state. The passage of Medicare and Medicaid in 1965 addressed the problems of health care for seniors and the poor, respectively. Now, more than 45 years later, the demographics of New York State and the nation are so changed that those programs are unsustainable. Yet we cling to the same two programs that are bankrupting our government, while providing health care services that are inadequate and disproportionately expensive when compared to services offered in other countries, which spend far less. More important, due to cuts enacted to keep Medicare and Medicaid solvent, individual health care and long-term care costs are rising, forcing more people into poverty. Over the next 50 years, these costs could do more to destroy America's middle class than any other single factor.

In 1991, the Elder Law Section of the New York State Bar Association was formed in response to the growing needs of seniors and people with disabilities. Ten years later, the Section formed a Task Force on Long-Term Care Reform, to address the problems of health care and long-term care for seniors and people with disabilities.

In response to the current budget crisis, Gov. Andrew Cuomo appointed a Medicaid redesign team and tasked it with proposing cuts to the Medicaid budget of $2.8 billion. The proposals encompassed ideas intended to make the existing Medicaid system more efficient, but the external factors that have impacted Medicaid, including the erosion of Medicare benefits and the explosion in the number of seniors and people with disabilities who require government-funded health care and long-term care services, have already resulted in significant cuts to programs and services. The complex problems inherent in long-term care reform mandate that the safety net provided by Medicaid for the "current poor" be preserved. It is also necessary to recognize that certain individuals of substantial means, the "current wealthy," can absorb the devastating costs of long-term care without becoming poor themselves. It is the middle class that is left at risk, facing impoverishment in their "golden years" due to the staggering costs of long-term care services. Having studied the problem from the perspectives of the government, providers, insurers and consumers, the Elder Law Section developed, and the NYSBA has proposed, the "Compact for Long-Term Care."

The Compact will not solve all the public and private long-term care financing problems in the current system, but it is the first multi-source health care financing program truly aimed at New York's middle class. It offers middle class New Yorkers a way to pay for care without threat of impoverishment and allows them to preserve the assets and income necessary to remain at home, in their communities and neighborhoods. Another important benefit of the Compact is that it lowers governmental costs. The actuary engaged to examine the program concluded that under reasonable scenarios, the Compact saves public funds and provides significant benefits to participants who have sufficient financial resources to meet the thresholds needed for sustainability in the program. The Compact does not replace other programs – resource-poor individuals will still need to use the state's publicly financed care systems, and the rich will use their own money for care as they always have – but for the majority of middle-class individuals who need long-term care, the Compact offers benefits in the form of retained wealth and control over health care.

The Compact for Long-Term Care would also facilitate the development of a provider network that could offer comprehensive solutions to individual consumers in their own neighborhoods, financed with private-pay dollars with an increased level of reimbursement supplemented by the consumer once public funds become available. In addition, the sale of private long-term care insurance, which has failed to penetrate a shrinking marketplace, would be enhanced by capping the risk which an individual policy holder would have to insure, thereby allowing a reduction in the premiums that have put the purchase of such policies out of the reach of middle-class consumers.

The Compact was first drafted into legislation in 2006, and a later version of the Compact was enacted into law in N.Y. Social Services Law § 366-I, part of Gov. David Paterson's 2010 budget. Unfortunately, however, due to the current state budget crisis, and the focus on immediate budget cuts, the Compact program has not been funded, nor has staff been allocated to implement the pilot program which the legislation calls for.

Middle-class America deserves a chance to avoid becoming impoverished by the ravaging costs of long-term care. Likewise, the taxpayers of New York deserve a budget that is not threatened by a bloated Medicaid system. The innovation offered by the Compact can strike that balance, and the Elder Law Section will continue to advocate for its implementation.

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single veteran with no dependents to $19,736, if A & A is required.[34]

Veterans may also be eligible for admission to New York State-run veterans homes which offer care at a reduced cost when compared with privately run homes.[35] Veterans in these homes who are receiving pensions may retain their entire pension benefit, while receiving Medicaid chronic care coverage. However, those veterans on Medicaid who are in private nursing homes will have their pension benefit reduced to $90, which is disregarded by Medicaid.[36]

Dependent and/or disabled children of veterans who are rated 100% disabled, are also eligible for health care coverage from the VA.[37]

Attorneys must be accredited by the VA before they may assist claimants in the preparation, presentation, and prosecution of claims for VA benefits.[38]

Long-Term Care Insurance

Long-term care insurance provides an alternative to private pay or government entitlements. Long-term care insurance provides a pool of funds to pay for long-term care at home, in an assisted living facility or in a skilled nursing facility. People with long-term care insurance often have more options in securing care, particularly in the community, and will preserve their assets if they do not enroll in the Medicaid program. Long-term care policies contain many variables, including elimination periods, policy caps, daily benefit caps, spousal benefits, etc. In choosing long-term care insurance, one must choose the duration of the policy and decide whether to include an inflation rider. Navigating the changing tides of long-term care policies requires a great deal of expertise.

The three major categories of long-term care policies are reimbursement plans,[39] indemnity plans[40] and cash plans.[41] In addition, New York State offers the Partnership plan, a type of reimbursement plan that provides a long-term care policy to cover long-term care costs and Medicaid eligibility when policy benefits are depleted.[42] A new type is called a hybrid plan,[43] because it provides both a death benefit and a long-term care benefit. The premiums are guaranteed not to increase, and long-term care benefits are paid out as reimbursements; the unused portion is paid as a death benefit to the insured's beneficiary. These policies address two concerns of policyholders: the potential increase in policy premiums and paying for a long-term care policy that is never used.

All New York state residents who purchase a qualified long-term care insurance policy receive a tax credit on their state tax income tax return for 20% of the costs of the policy in each year.[44] Additionally, sole proprietors, S corps, and LLCs can deduct a certain portion of premium as a health insurance expense. C corporations can deduct the entire premium.

Given continuous political and economic pressure to cut government need-based and entitlement programs, private long-term care insurance is an increasingly useful tool to finance long-term care. So why doesn't everyone purchase a long-term care policy? First, the long-term care policies are medically underwritten, meaning that not everyone will qualify. Second, the premiums are expensive, and would-be purchasers must evaluate their finances to ascertain that they will be able to pay the premiums once they are retired and have a lower income but are more likely to need care. The younger and healthier the individual, the more affordable the policy. Those who are insurable and have sufficient means to pay for these policies should consider long-term care insurance as part of an estate plan.

> Without spousal refusal, the escalating costs of institutional and/or home care could devour a couple's income and assets and impair the ability of both spouses to continue living in the community.

The CLASS Act[45]

The CLASS Act, which is tentatively effective in October 2012, establishes a national, voluntary insurance program for purchasing community living assistance services and supports. The act represents an attempt to establish a hybrid public benefits and long-term care insurance program. Individuals who enroll in the program and pay the requisite premiums are eligible to receive modest cash payments for their long-term care needs. Although a "public" program, Congress explicitly mandated that the CLASS Act be voluntary, not involve public dollars and be solvent for 75 years.[46] Many experts question the willingness and ability of younger individuals to make voluntary payments toward a future medical need. Further, even supporters of the CLASS Act recognize that contributions may be insufficient to cover the promised benefit of a minimum of $50 per day for a lifetime. Although an admirable attempt to address the problems of financing long-term health care, the CLASS Act has significant limitations and falls far short of providing a comprehensive solution.

The Compact for Long-Term Care[47]

An alternative long-term care financing demonstration program, known as "the Compact," is discussed in the sidebar to this article.

Conclusion

Attorneys should be familiar with all the government, veterans and long-term care insurance options when preparing a plan for clients. But, certainly, we need creative solutions and fresh approaches that do not come at the expense of those who are elderly or disabled or impoverish their spouses. It is up to our legislators to open the debate about long-term care, and to seek long-term solutions that will allow our elderly and disabled to live in dignity. ■

1. Patient Protection and Affordable Care Act, Public Law 111-148 (2010).

2. *National Clearinghouse for Long-Term Care Information*, U.S. Dep't of Health and Human Servs (Jan. 31, 2011), http://www.longtermcare.gov/LTC/Main_Site/index.aspx.

3. Brian O. Burwell & Beth Jackson, *The Disabled Elderly and Their Use of Long-Term Care*, U.S. Dep't of Health and Human Servs (July 1994), http://aspe.hhs.gov/daltcp/reports/diseldes.htm (discussing the future of our elderly population).

4. The New York State Department of Health lists the average monthly cost of a nursing home in New York City for 2011 as $10,579/month, and on Long Island as $11,445. GIS 11 MA 001, www.health.state.ny.us. *See also The Genworth 2010 Cost of Care Survey (2010)* (www.genworth.com) assessing the average annual cost for skilled nursing care in New York City at $159,000/year.

5. 42 U.S.C. §§ 1395 *et seq*.

6. Part A provides coverage for hospitalizations and skilled nursing facilities.

7. 42 C.F.R. § 406.5. Those with End Stage Renal Disease, *see* 42 U.S.C. § 1395c, and ALS ("Lou Gehrig's Disease"), *see* 42 U.S.C. § 426(h), may receive Medicare the first month in which they receive their disability benefits.

8. *Medicare Coversage of Skilled Nursing Facility Care*, Centers for Medicare & Medicaid Services, *available at* http://www.medicare.gov/publications/pubs/pdf/10153.pdf.

9. 42 U.S.C. § 1395d(a)(3).

10. 42 U.S.C. §§ 1395f(a)(8); 1395n(a)(2)(A). If a Medicare beneficiary is receiving a skilled service at home, such as a nurse or therapy, a home health aide may be provided for up to 20 hours per week. Medicare generally does not pay for custodial care, which is the assistance with the activities of daily living such as eating, bathing, dressing, transferring and toileting. 42 C.F.R. § 409.40.

11. 42 C.F.R. § 409. Medicare will cover up to 100 days per spell of illness in a skilled nursing facility. 42 C.F.R. § 400.3(e). One must enter a nursing home within 30 days of a three-day hospital stay. 42 C.F.R. § 409.30.

12. 42 C.F.R. § 409.

13. 42 C.F.R. §§ 423 *et seq*. *See* definitions of the Medicare parts on Peter Strauss's article "Happy 65th Birthday," on page 52.

14. *Id*.

15. 42 C.F.R. §§ 423 *et seq*.

16. 42 U.S.C. § 1395w-102(b).

17. 42 U.S.C. §§ 1396 *et seq*.

18. GIS 10 MA 026, www.health.state.ny.us.

19. The government looks at transactions made within 60 months of applying for benefits in a skilled nursing facility. 42 U.S.C. § 1396p(c)(1)(D); Soc. Serv. Law § 366(5)(e)(5). The cumulative value of transfers made during this "look-back period" is divided by the average cost of a nursing home in the region to determine the number of months of ineligibility caused by the gifts. This transfer penalty period will commence when an individual is receiving nursing home care AND has no excess resources AND has unmet medical needs that exceed his/her income AND files an application for Medicaid, which should be approved but for the transfer penalty. If, for example, one transfers $114,450 while in a nursing home on Long Island, there will be a 10-month ineligibility for Medicaid services in a skilled nursing facility.

20. To a spouse, 42 U.S.C. § 1396p(c)(2)(A)(i), Soc. Serv. Law § 366(5)(e)(4)(i)(A), or to a sibling with an equity interest in the home who has been residing in the home for at least one year immediately before the Medicaid applicant became institutionalized, 42 U.S.C. § 1396p(c)(2)(A)(iii), Soc. Serv. Law § 366(5)(e)(4)(i)(C), or to a care-giving child, i.e., one who has resided in the home for at least two years immediately before the Medicaid applicant became institutionalized and who provided care to him/her so that s/he did not require institutionalization 42 U.S.C. § 1396p(c)(2)(A)(iv), Soc. Serv. Law § 366(5)(e)(4)(i)(D), or to a child who is blind or disabled 42 U.S.C. § 1396p(c)(2)(A)(ii)(II), Soc. Serv. Law § 366(5)(e)(4)(i)(B), or who is a under the age of 21, 42 U.S.C. § 1396p(c)(2)(A)(ii)(I), Soc. Serv. Law § 366(5)(e)(4)(i)(B). All assets may also be transferred or to a disabled child or to a trust for the sole benefit of a disabled child, or to a trust for the sole benefit of any disabled individual under the age of 65.

21. 42 U.S.C. § 1396p(c)(2)(B)(i),(ii); Soc. Serv. Law § 366(5)(e)(4)(ii)(A), (B). All assets may also be transferred to a child with a disability or to a trust for the sole benefit of a child with a disability, 42 U.S.C. § 1396p(c)(2)(B)(iii), Soc. Serv. Law § 366(5)(e)(4)(ii)(C), or to a trust for the sole benefit of any individual with a disability under the age of 65. 42 U.S.C. § 1396p(c)(2)(B)(iv), Soc. Serv. Law § 366(5)(e)(4)(ii)(D).

22. GIS 10 MA 026, www.health.state.ny.us.

23. Federal and NYS law provide that the institutionalized spouse shall not be determined ineligible for Medicaid even if the community spouse has greater resources than the resource allowance of $74,820–$109,550 so long as the community spouse refuses to make these assets and income available to the medical support of the institutionalized spouse. 42 U.S.C. § 1396r-5. 18 N.Y.C.R.R. § 460-10(c)(4). *See also In re Shah*, 711 N.Y.S.2d 824 (2000). The counties may, however, pursue a contribution from the institutionalized spouse. By regulation, a community spouse with excess income may make a voluntary contribution of 25% of the amount his/her income exceeds the minimum monthly maintenance needs allowance, $2,739. 18 N.Y.C.R.R. § 360-4.10(5)

24. The couple on community Medicaid may retain only $20,100 and $1,137/month in income.GIS 10 MA 026, www.health.state.ny.us. The Long Term Home Health Care Program budgets couples as if they were in a nursing home but the hours of care provided are limited.

25. *See* Soc. Serv. Law§ 366(5)(e)(1)(vi) (assessing a look-back period only to institutionalized individuals). *See also* GIS 07 MA/018, www.health.state.ny.us.

26. Table 508, www.census.gov.

27. Pub. L. No. 104-262, 110 Stat. 3177 (1996).

28. The Veterans Millennium Health Care and Benefits Act of 1999.

29. 38 U.S.C. §§ 1110, 1131; 38 C.

30. 38 U.S.C. § 1710; N.Y. Public Health Law § 2632.

31. The Veterans Millennium Health Care and Benefits Act of 1999.

32. 38 U.S.C. § 1521; 38 C.F.R. § 3.3(A)(3); 10 U.S.C. § 101(33).

33. 38 C.F.R. § 3.352.

34. 38 C.F.R. § 3.351.

35. 38 U.S.C. § 1745.

36. 38 U.S.C. § 5503(a)(1)(D); 18 N.Y.C.R.R. § 360-4.6(a).

37. 38 C.F.R. §§ 17.270–17.278; *see also* 38 C.F.R. § 3.356.

38. 38 C.F.R. § 14.627(a).

39. These policies provide a pool of money paid from the insurance carrier who reimburses the aide or facility based on the daily or monthly benefits allowed in the policy. If the cost of care is less than the daily or monthly benefit allowed by the policy, the funds will remain in the account and serve to extend the policy benefit.

40. Care must usually be provided by a certified aide or therapist. The insurance carrier will pay the insured the entire daily or monthly benefit regardless of the daily cost incurred by the insured.

41. These plans allow care provided by anyone of the insured's choosing including family members and friends. The entire monthly benefits are paid to the insured regardless of expenses incurred.

42. The insured must be residing in New York State at the time their care is being paid by Medicaid, and the customary Medicaid income rules remain in force. New York State will not enact estate recovery against a Medicaid recipient's assets who has had a partnership long-term care insurance policy. See GIS 07 MA 0007 and GIS 07 MA 020, www.health.state.ny.us, for the interrelationship between these plans and Medicaid eligibility rules.

43. *See, e.g.*, Julian Land, *New Hybrid Long-Term Care Insurance Programs are Better Solutions for Seniors*, www.plan-retirement.org/new-hybrid-long-term-care-insurance-programs-are-better-solutions-for-seniors.

44. N.Y. Tax Law § 606(aa). A qualified plan is one that is approved by the New York State Superintendent of Insurance under N.Y. Insurance Law § 1117(g) and is a qualified long-term care insurance contract under IRC § 7702B or is a group contract delivered or issued for delivery outside New York State and the group contract is a qualified long-term care insurance contract under IRC § 7702B. A qualified long-term care insurance contract under IRC § 7702B must be guaranteed renewable, not provide for cash surrender value or other money that can be paid, assigned, pledged or borrowed, provide that refunds, other than refunds on the death of the insured or surrender or cancellation of the contract, and dividends, must be used only to reduce future premiums or increase future benefits and generally will not pay for services that would be covered under Medicare. These tax incentives do not apply to hybrid plans.

45. The Community Living Assistance Services and Supports Act (the CLASS Act), Title VII of the Affordable Care Act, Public Law 111-148 (2010). Persons at least 18 years of age who are actively employed may enroll by having premiums withheld from their payroll checks. The Secretary of Health and Human Services will determine premiums by October 1, 2012. Once one has paid premiums for 60 months, one will be vested and entitled to receive benefits if certified by a licensed health care practitioner that one cannot perform at least two or three activities of daily living without substantial assistance or requires substantial supervision to protect from threats to health and safety due to substantial cognitive impairment or has a level of functional limitations similar to the first two criteria. Once so certified, the CLASS Act will provide a benefit of at least $50/day to the enrollee for his or her lifetime. *Id*.

46. *Id*.

47. Soc. Serv. Law § 366-i.

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Counseling Seniors and Caregivers on Medication Safety

By Bryan A. Liang and Timothy Mackey

Introduction

Attorneys counsel their clients in a wide array of legal areas. The need for estate planning and concerns regarding appropriate protection of their assets and options, to ensure that they can live quality lives, can raise related, important issues as clients enter or plan for their golden years. So, as they age clients often look to attorneys for guidance in other key subject areas, including health care.

Health care represents a large and growing cost associated with aging. As critical issues regarding quality and safety have taken center stage in recent government initiatives, including the federal health care reform law, seniors in particular are concerned about the stubborn persistence of errors in and injuries from the health care delivery system. Avoiding errors can maintain health and quality of life while preserving increasingly strained senior assets.

For seniors, a major aspect of patient safety is medication safety. Medication errors impact the senior population disproportionately, with almost half of the fatal medication errors occurring in patients over 60 years of age. Aging is correlated with increasing prescription medication use, the combining of medications, and a greater vulnerability to the effects of medications. Medication errors represent a significant potential source of harm. However, there are some basic principles that counselors may provide to seniors to limit risks of medication-based mistakes and injury.

Current and New Medications

Current Medications

To help seniors preserve their assets by avoiding medication errors, seniors and/or their caregivers should take an active role in their medication management. The

key to effective management is maintaining a current list of prescription *and* nonprescription drugs being taken, and the reasons for taking each.

At least annually, seniors should visit with their primary care physician to review all the drugs they are currently taking and the clinical indications/reasons for each. Usually, this occurs in what is called a "brown bag review." Patients pack all the medications they use daily in a brown bag and bring the bag to their physician for assessment and reassessment. This visit should include dating the event and creating a list for patient/caregiver and physician/provider use. The senior should bring this list to specialists and all other relevant physicians when new treatments are being considered, particularly if the new physicians do not have access to current patient records.

New Medications

Seniors should be counseled to ask and record the answers to four questions when any *new* medications are prescribed (as well as on the first brown bag review).

1. What is the "brand" and generic version (if any) drug names of each of their medications, and what do the "brand" and generic versions of the drugs look like?
2. How, at what time(s) each day, and for how many days should the drug be taken (using a scheduling chart, calendar, and/or pill organizer to illustrate)?
3. What precautions does the patient need to take (e.g., no driving; food restrictions; other drug interactions, etc.)?
4. And, what are the side effects to watch out for and what should be done if they occur?

Patients should also always seek to clarify any answers they do not understood and always follow up with questions if additional information is needed. Seniors need to be counseled that they must take control of the discussion, to ensure that all their concerns are addressed because they ultimately bear the burden of any misunderstandings and errors regarding drugs they are taking. This includes when they are in the outpatient/office setting as well as in the inpatient/hospital setting. In the latter situation, seniors may need the assistance of a caregiver/family member to advocate for them if they are not able to ask and have answered each question of interest. As well in the inpatient setting, close attention must be paid to the schedule of drugs to be provided by the hospital. This is necessary to ensure that drug doses are provided appropriately and on time. Caregiver/family member support in this endeavor should also be a priority where the patients are not in a position to monitor this themselves. Seniors and their caregivers can obtain more information on patient experience, including key communications scores that impact safety, on the federal Hospital Compare database. As of 2012, under the new health care reform law, physicians will also be scored and results reported.

Additional Resources

Hospital Compare Database.
www.hospitalcompare.hhs.gov.

Institute for Safe Medication Practices.
www.ismp.org.

National Association of Boards of Pharmacy.
www.nabp.net.

National Patient Safety Foundation.
www.npsf.org.

Partnership for Safe Medicines.
www.safemedicines.org.

Verified Internet Pharmacy Practice Site Accreditation.
http://www.nabp.net/programs/accreditation/vipps/find-a-vipps-online-pharmacy.

The Pharmacy Setting

When obtaining drugs from the pharmacy, seniors should also be counseled to take precautions at the point of dispensing. First, the list of both prescription and nonprescription drugs being taken should be provided to the patient's pharmacist. If the pharmacist has records of patient medications, ensuring the list is complete (including medications from other providers) will allow for appropriate and effective medication therapy management by the pharmacist to help promote patient safety.

The pharmacy also represents an important safety check on newly prescribed drugs. Seniors can have the pharmacist recheck the name of the drug, reconfirm the directions for appropriate drug use including assessing the medication chart created by the patient and physician, as well as ensure that potential side effects are explained and drug-drug, drug-food, and other known interactions are identified. Because the pharmacist often has more interaction with the patient, a more in-depth conversation about the prescribed drug, its use, and its potential side effects can be more effective in the pharmacy setting, and seniors and/or their caregivers should take full advantage of this.

Internet Purchasing

The Internet has become a driver of sales of everything from toys to toothpaste to pet food to pharmaceuticals. However, there are significant risks of buying drugs online. Much of the online drug trade is illicit, with 90% or more of online drug sellers violating state and/or

federal laws through illegal drug procurement and sales, according to the National Association of Boards of Pharmacy (NABP). The risks associated with online drug purchasing are financial, including payment for substandard or fake products that are not eligible for reimbursement from federal health care programs, as well as identity theft. But more important, they cheat the patient of treatment that could improve quality of life and, indeed, potentially be life saving.

Seniors considering purchases of drugs online should be counseled to avoid websites that do not require prescriptions, do not have listed physical addresses, are located overseas, and/or do not list states in which the pharmacy and pharmacist are licensed. Instead, patients should either obtain their drugs from brick-and-mortar local pharmacies or only order drugs online from NABP Verified Internet Pharmacy Practice Sites (VIPPS) accredited pharmacies. The VIPPS program is the only rigorous, legitimate online pharmacy accreditation program in the United States, and pharmacies accredited are subjected to periodic verification of licensure, location, and other quality and safety system reviews. VIPPS-accredited pharmacies are listed on the NABP VIPPS webpage, and are consistently updated for consumer use.

Conclusion

Often, attorneys are the only professionals that seniors reach out to for advice on all aspects of their lives. Since a key area of interest to seniors is health care and in particular the medications they take, attorneys as counselors are presented with important opportunities to educate their clients in medication safety and other areas that promote their clients' quality of life while preserving their assets. Attorneys should embrace these opportunities and the role of counselor by providing this education so that they may better assist their clients. ■

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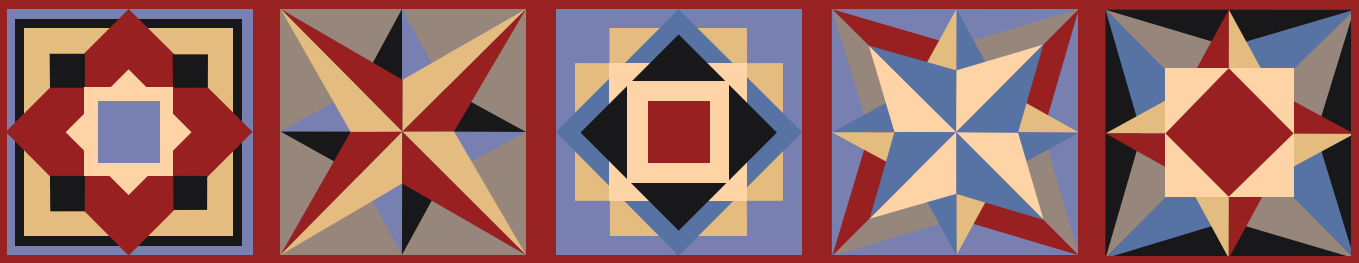

A Collegial Tapestry

Each of Us Can Make a Meaningful Difference

By Robert Abrams

Robert Abrams is editor of this issue of the *Journal*.

This special issue of the *Journal* is part of a statewide initiative to encourage members of the New York legal community to plan for themselves, their loved ones and their clients. Judges, lawyers, court personnel and many other colleagues have made the commitment to participate in this historic movement. Together we form a collegial tapestry that will help all New Yorkers prepare for the elder years.

Three members of this group are worthy of special mention: Kathryn Grant Madigan, Vincent Russo and Scott Singer. Scott inspires us by his courage and determination; Vincent motivates us with his innovation and leadership; and Kate is a visionary who provides us with guidance and encouragement to become the type of community we believe ourselves to be. Kate, Scott and Vince are wonderful people who through their efforts and willingness to meet life head on bring our collegial tapestry to life. Their lives are proof that each one of us can make a material difference.

Kathryn Grant Madigan

In her President's message in the November/December 2007 issue of the Journal, Kate provided us with her vision for the future:

"We need a new paradigm that rejects the notion of old age as a time of inevitable decline, chronic disease and diminished capacity, and that embraces the wisdom, serenity, balanced judgment and self-knowledge that represent the fruit of long life experience.

"We also need to provide opportunities for our aging population – including older lawyers – to harvest the wisdom of their years and transmit a legacy to future generations, in whatever form is most meaningful to them – community service, pro bono work, mentoring, coaching, a work of art or literature, a song or a poem that fills the heart.

"Whether you are approaching retirement or transitioning your practice, already retired, or a Gen X or Y for whom that is a distant possibility, I encourage you to approach aging consciously, creatively, and as a new beginning. Seize every opportunity to share your wisdom and experience leaving your legacy with the next generation."

This Journal *provides proof to Kate that we have listened and learned.*

Vincent Russo

Some people talk about making a difference; others do.

We have much to be grateful for in life. For us elder law attorneys, we have been given the gift of making a difference in the lives of those in need.

It was not long ago that a small group of attorneys had the vision, energy and foresight to look at our aging population and realize that seniors and people with disabilities faced challenges and that we could be part of the solution. The field of "Elder Law" was created and now hundreds of thousands of seniors benefit from our services every year.

On a personal level, it has been quite a journey. From the start, my professional career focused on serving the needs of seniors as part of a small boutique law firm in New York City. In 1985, I started my own practice, and soon thereafter my third child, Theresa, was born severely brain damaged. My life would never be the same as she crystallized for me what life is all about. We were blessed to have her for five and half years. Since that time, I have been on a mission. My focus has been on three levels: (1) serving clients, (2) educating and assisting attorneys in the practice of elder law and special needs and (3) advocating for the rights of seniors and people with special needs.

None are so old as those who have outlived enthusiasm.
Henry David Thoreau

As part of my mission, I co-founded the National Academy of Elder Law Attorneys (NAELA), the Elder Law Section of the New York State Bar Association, the Academy of Special Needs Planners and Elder Counsel. All of these attorney-member organizations have one focus – Doing Well by Doing Good. I am privileged to have co-authored the *New York Elder Law and Special Needs Practice* treatise, which is a handbook for the practicing attorneys in New York.

Through the support of my colleagues, family and friends, my daughter's legacy continues in our Theresa Foundation. We support music, dance, art and recreation programs locally, and around the country. Recently, we formed The Theresa Academy of Performing Arts for Children with Special Needs; the Foundation now has its own "Theresa Pooled Trust."

We can stand tall as we reflect on what we have done as elder law attorneys but we must also continue to lead as the challenges seniors face today adversely impact on their quality of life. Many thanks to the elder law attorneys who have taken the time to help seniors and people with special needs.

Vincent is one of several New York attorneys who have helped improve the quality of life for millions of older persons and individuals with special needs throughout the country.

Scott Singer

A doctor once told me we are all TAs – temporarily ambulatory. I think of this comment often – Scott lives it every day.

My name is Scott Singer. I am the Clerk-in-Charge of the Guardianship and Fiduciary Support Office in the New York State Supreme Court, New York County. In 1990, when I was 34, I was diagnosed with Multiple Sclerosis (MS). MS is an auto-immune disease of the central nervous system (CNS), the exact cause of which is unknown. In persons with MS, the body's immune system attacks the fatty insulation surrounding nerve fibers. These attacks lead to damage to the nerve's capacity to carry impulses through the CNS. The course of MS is unpredictable and its symptoms vary between persons.

In 1990, my symptoms, mostly numbness and tingling in my hands, were mild and invisible. Today, some 21 years later, I have a secondary progressive form of MS. My symptoms include leg and arm weakness, foot drop, spasticity, fatigue and thermosensitivity. I began regularly using a cane six years ago, then a scooter two years ago and crutches about a year ago.

As I became increasingly mobility impaired, I became more acutely aware of the challenges that faced me in my everyday world.

Although many barriers have been lifted due to the passage of the Americans with Disabilities Act, there are still many obstacles to accessibility. I will provide some examples of the challenges I encounter.

My family and I formerly lived on the first floor of a pre-war cooperative, but that apartment was not handicap accessible, as the building's primary entrance and lobby had stairs. Knowing that I needed a scooter, I called the New York City Commission on Human Rights Equal Access program. I met with an Equal Access staff person who conducted an evaluation. I was advised that accommodations for entry to the first floor were neither practical nor economically feasible. Fortunately, an apartment on an upper floor in the same building became available, and we purchased it. I can now enter the building on my scooter through a service ramp via the basement and take the elevator to the floor on which I live. Within a year after I moved, the co-op board, on its own initiative, installed an automatic basement door, not only making it easier for me to enter and exit the building, but also making it easier for other residents bringing grocery carts and bicycles in and out of the building.

Another challenge became going to the supermarket. My local supermarket has a cart corral that limits my access into and out of the store. I can call a manager to open the corral to give me access, but once inside, I have a hard time navigating the narrow aisles cluttered with boxes of merchandise waiting to be shelved.

I live by a wonderful neighborhood theatre showcasing foreign and art cinema. Several of their screens are on the second and third floor. I typically will drive to the theatre, park, and then very cautiously and deliberately climb one or two flights of stairs. It is usually worth the effort.

Street parking can be a problem if I do not have enough room to take my scooter out of the back of my car. Vacationing can often be a challenge. Restaurants and small stores in small towns in upstate New York and New England are not very accessible to the disabled.

Although challenged, persons with MS can certainly lead productive, vibrant and fulfilling lives. It is important for me to keep showing up even though I face many challenges.

I have always derived great satisfaction from work. My job has taken on a greater importance for me. I will continue to work as long I can remain productive and readily fulfill my responsibilities

Scott's life demonstrates that we are all susceptible to challenging chronic conditions that could forever change our lives and the lives of the people we love. Some may be the result of aging; some may be related to particular health issues. The point is, these conditions can challenge us, but they don't have to devastate us.

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BY ELLIOTT WILCOX

Elliott Wilcox is a professional speaker and a member of the National Speakers Association. He has served as the lead trial attorney in over 140 jury trials, and teaches trial advocacy skills to hundreds of trial lawyers each year. He also publishes *Trial Tips*, the weekly trial advocacy tips newsletter <www.trialtheater.com>.

Story Time: Reading to Your Audience

Have you ever heard an attorney stumbling or stammering while reading depositions to the jury? Ever felt sorry for someone attempting (but unable) to effectively read a passage to the congregation at your place of worship? Or have you ever read something aloud to a group and then thought to yourself, "They must think I'm an idiot – that sounded awful."

Reading aloud requires different skills and preparation than that required to speak to an audience or read quietly to yourself. Regardless of whether you're reading stipulations to a jury, quoting from a favorite text, or delivering a prepared statement to the press corps, these tips will improve your presentation the next time you read aloud to an audience.

Read the script in advance. No matter how great your command of the English language, and no matter how well you read, you should read the document aloud *before* you read it to your audience. Words that you've read silently dozens of times before can become troublesome when spoken aloud. You don't want to stammer or trip over words in public. Find a quiet place and read the document. Not silently – read it aloud. There are several reasons why you should read the document in advance:

First, you want to ensure that the script is complete. We've all had the experience of reading through a contract or a fax, only to realize partway through that you're missing a critical page. It's better to discover the missing page in your office, rather than onstage or in the courtroom.

Second, you want to make sure that you can pronounce the words and capture the flow of the language. Think about reading any of Shakespeare's works aloud – you wouldn't want to pick up the text and just "wing it." Reading the document in advance, you will discover words you can't quite wrap your mouth around. Rather than fumbling your way around the word in public, you can practice pronouncing the word until it flows from your tongue with ease.

Third, you will discover that words written for the eye differ from words written for the ear. Things that made sense on the page aren't as clear when spoken aloud. Your job as the narrator will be to convey the writer's meaning to your audience. The audience won't be able to see the commas, parentheses, brackets, ellipses, colons, and other grammatical tools that the writer uses to promote understanding. Reading the document in advance will highlight the sections that require you to pause, change your pace, or vary your vocal inflection.

Mark up your text. As you read through the material, use pens and highlighters to add staging comments. These comments will help prevent you from speaking in a monotone voice. Highlight or underline the key words that you will want to emphasize (the words that will carry the sentence). Add dividing lines or slashes ("//") between sentences to indicate extended pauses. Add directional lines over phrases to indicate when you should raise or lower your pitch. Write phonetic (foh-net-tick) spellings of difficult words or names so you don't mispronounce them. Add staging comments like "whisper," "slow down," or "look at the CEO" to the margins. No one else needs to read your script, so feel free to scribble all over it, adding anything that helps you get the message across.

Blow it up. Make your text large enough to read. Words that were easy to read in your office (under perfect lighting and without any performance pressure) may be more difficult to read onstage or in court. If you are printing your own script, use 18 point font size or larger. If you will be reading a passage from a book, enlarge the text on your photocopier and tape it into the book. Make the script easy on your eyes, so that you will be free to concentrate on your delivery and connecting with the audience.

Maintain eye contact. Many lawyers make the mistake of talking to the script that they're reading from. They keep their eyes on the paper the entire time and ignore their audience. Don't talk to your script. You're presenting to an audience – connect with them through eye contact. This is a fourth reason to read the material in advance. If you are familiar enough with the material, you can let your eyes wander from the page and connect with your audience. Use your finger to keep track of your place in the document, but maintain eye contact with your audience. A good rule of thumb is to look

at your audience at least half the time. The best presenters can maintain eye contact with the audience over 75% of the time while reading from a script or document.

Remember, the reason that you're reading aloud is to communicate an idea, belief, or image to your audience. If you apply these tips the next time you read from prepared notes or from a document, you will help your audience pay attention to what you're saying and your presentation will be a success. ■

BY DAVID PAUL HOROWITZ

David Paul Horowitz (david@newyorkpractice.org) practices as a plaintiff's personal injury lawyer in New York and is the author of *New York Civil Disclosure* (LexisNexis), the 2008 Supplement to *Fisch on New York Evidence* (Lond Publications), and the *Syracuse Law Review* annual surveys on Disclosure and Evidence. Mr. Horowitz teaches New York Practice, Evidence, and Electronic Evidence & Discovery at Brooklyn, New York and St. John's law schools. A member of the Office of Court Administration's CPLR Advisory Committee, he is a frequent lecturer and writer on these subjects.

May I Please Say Something?

Introduction

Last issue's column discussed a recent Fourth Department case, *Thompson v. Mather*,[1] where the appellate court held:

> We agree with plaintiff that counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pre-trial deposition. CPLR 3113(c) provides that the examination and cross-examination of deposition witnesses "shall proceed as permitted in the trial of actions in open court."[2]

Thompson has sparked a lively debate among practitioners and commentators, and the time seems ripe to engage in the further analysis alluded to in June's column.

Thompson's Issues

Thompson raises two critical issues, one a subset of the other.

The first, broader issue is the role of attorneys representing non-party witnesses at deposition. *Thompson* holds that attorneys for non-party witnesses have no role whatsoever. This represents a sharp break from day-to-day deposition practice, pre-*Thompson*, where attorneys representing non-party witnesses traditionally exercised all of the rights available to party attorneys.

The second, narrower issue, requires accepting, for the moment, that *Thompson* is correct in differentiating between attorneys representing parties and those representing non-parties insofar as participating at a deposition is concerned. If counsel for a non-party witness does not have the full panoply of rights available to counsel for a party at the deposition, what ability, if any, does an attorney representing a non-party witness at a deposition have to intercede when questions are posed to the witness that invade a privilege or other area where an absolute or conditional right to withhold disclosure exists? *Thompson* clearly holds that attorneys for non-party witnesses may not intercede and participate even in this limited area.

Attorney's Role Critical in Representing a Non-Party at a Deposition

One immediate dichotomy in representing non-party witnesses at deposition was flagged in the conclusion to June's column, *to wit*, that *Thompson* does not place any restrictions on the ability of an attorney representing a party to the action to represent a non-party at the deposition and to participate fully in that deposition. Thus, it is the hat worn by the attorney, rather than that worn by the witness, that controls the ability of the attorney to participate in a non-party deposition.

To illustrate, if the sibling of a plaintiff I represent is served with a non-party subpoena, and has personal counsel to represent her at the deposition, that attorney, under *Thompson*, has no right to participate. If, however, the personal counsel of the non-party is a transactional lawyer, who has never participated in a deposition, and that attorney contacts me, asks me to represent the non-party witness at the deposition (assuming there is no conflict), and I agree, under *Thompson* I should be able to exercise all of the rights in defending the deposition of the non-party witness as I would on behalf of the plaintiff to the action: objecting to form, invoking privilege and directing the witness not to answer questions violative of the privilege, and conferring with the witness as permitted by Part 221.

Can the *Thompson* dichotomy be squared with generally accepted concepts of fairness to witnesses, litigants, and the judicial system?

Thompson's Reasoning

The *Thompson* court cited no case law in support of its holding, grounding it instead upon CPLR 3113(c) and Uniform Rule § 202.15(g)(1), (2).

CPLR 3113(c) provides:

> R 3113. Conduct of the examination
>
> * * *
>
> (c) Examination and cross-examination. Examination and cross-examination of deponents shall proceed as permitted in the trial of actions in open court. When the deposition of a party is taken at the instance of an adverse party, the deponent may be cross-examined by his own attorney. Cross-examination need not be limited to the subject matter of the examination in chief.

The *Thompson* court took the "shall proceed as permitted in the trial of actions in open court" language to control all aspects of a deposition. This literal reading takes CPLR 3113(c) to mean that counsel for a non-party, who is not permitted to examine or

cross-examine a witness at trial, may not participate in a pretrial deposition.

However, numerous cases over the years addressing issues arising at depositions of non-parties have noted, without comment or criticism, the active participation of counsel for the non-party at the deposition.

In a leading case on deposition practice, the Second Department discussed the merits of objections made at the deposition of a non-party witness by the "witness's counsel":

> This action is premised on damages allegedly sustained by the infant plaintiff while in utero. The nonparty witness, a partner of the defendant physicians at the time the infant plaintiff's mother was their patient, is entitled to refuse to answer questions which seek testimony in the nature of opinion evidence. However, rather than rule on the propriety of the questions and lines of questioning to which the witness's counsel objected, the Supreme Court, in determining that branch of the plaintiffs' formal motion which was to compel the witness to answer questions, prospectively limited the scope of the plaintiffs' inquiry by providing that the witness "is compelled to answer only questions regarding *his* treatment on his patient Maureen Horowitz * * * [plaintiff's] counsel is directed to make every effort to avoid questions concerning treatment of other patients specifically or in general, treatment by his former partners, his present opinions or practices and knowledge, or opinions of the pharmaceutical promotional practices and representations." We reverse and remit the matter to the Supreme Court to make the rulings to which the parties are entitled.[3]

The motion underlying the appeal was made by the plaintiff's counsel in response to objections lodged by counsel for the non-party, and the relief fashioned, by the trial court and as modified by the appellate court, was favorable to the objections raised by counsel for the non-party at the deposition. The Second Department evinced no problem with the participation of counsel for the non-party at the deposition, thereby, at the very least, impliedly countenancing the practice.

The questioning of witnesses at deposition differs in other critical respects. As the *Horowitz* court[4] explained:

> It is well settled that the scope of examination permissible at deposition is broader than the scope of examination permissible at trial. Moreover, the witness, in his capacity as a physician, may possess knowledge of discoverable facts which goes beyond that which is derived from his direct contact with the infant plaintiff's mother. The Supreme Court therefore improvidently exercised its discretion when it, in effect, prospectively limited the scope of examination to the witness's treatment of the infant plaintiff's mother.[5]

Thus, the scope of questioning does not mirror that which occurs at trial.

Other differences abound. Counsel on a trial may not agree among themselves to adjourn the proceedings, whether for a bathroom break, lunch, or for the day, without the permission of the judge. Yet custom and practice and the deposition rules permit this.[6] Counsel whose witness is on the stand at trial testifying may not unilaterally decide to confer with the witness to determine whether to exercise a privilege, and take the witness outside the courtroom to do so. The deposition rules explicitly permit this.[7] Nor may counsel at trial direct a witness on the stand not to answer a question posed by opposing counsel, yet the depositions rules explicitly permit this practice, in limited circumstances.[8]

In addition to CPLR 3113(c), the *Thompson* court relied upon subsection (g) of Uniform Rule 202.15, concerning the videotaping of depositions:

> We note in addition that 22 NYCRR 202.15, which concerns videotaped recordings of civil depositions, refers only to objections by the parties during the course of the deposition in the subdivision entitled "Filing and objections." We thus conclude that plaintiff is entitled to take the videotaped depositions of the physicians and that counsel for those physicians is precluded from objecting during or otherwise participating in the videotaped depositions.[9]

Uniform Rule 202.15(g)(1), (2) provides:

> Videotape recording of civil depositions
>
> * * *
>
> (g) Filing and objections. (1) If no objections have been made by any of the parties during the course of the deposition, the videotape deposition may be filed by the proponent with the clerk of the trial court and shall be filed upon the request of any party.
>
> (2) If objections have been made by any of the parties during the course of the deposition, the videotape deposition, with the certification, shall be submitted to the court upon the request of any of the parties within 10 days after its recording, or within such other period as the parties may stipulate, or as soon thereafter as the objections may be heard by the court, for the purpose of obtaining rulings on the objections. An audio copy of the sound track may be submitted in lieu of the videotape for this purpose, as the court may prefer. The court may view such portions of the videotape recording as it deems pertinent to the objections made, or may listen to an audiotape recording. The court, in its discretion, may also require submission of a stenographic transcript of the portion of the deposition to which objection is made, and may read such transcript in lieu of reviewing the videotape or audio copy.[10]

The Fourth Department reads the reference to "parties" in the rule to support its interpretation of CPLR 3113(c) barring participation by counsel for non-parties. Yet this may not have been the intent of the drafters.

Subsection (a) relates to the ministerial act of filing the transcript with the court "by the proponent," something that, by definition, would only be done by a party to the action.

Subsection (b) relates to the procedure for the parties to obtain a ruling by the court on objections made at the deposition, in preparation for use of the videotaped deposition at the trial. This too is something that, by definition, would only be done by a party to the action.

To extrapolate from the use of the word "parties" in these two subsections to the proposition that only counsel for parties may interpose objections, as opposed to seeking rulings on the objections for use at trial, does not appear to be consistent with the purpose and function of the two subsections.

A Role for a Non-Party's Counsel at Trial

The Fourth Department recognized, long before the enactment of Part 221 of the Uniform Rules, the "Deposition Rules," in 2006, that

> "[u]nless a question is clearly violative of a witness'[s] constitutional rights, or of some privilege recognized in law, or is palpably irrelevant, questions [at an examination before trial] should be freely permitted and answered, since all objections other than those as to form are preserved for the trial and may be raised at that time."[11]

Thus, certain questions posed at a deposition, including those "clearly violative of a witness'[s] constitutional rights," did not and do not have to be answered by the witness. *Thompson* does not eschew this holding but adds the caveat that a non-party witness represented by her own, as opposed to a party's attorney, must undertake the determination whether to answer such a question, or not, on her own and without the benefit of counsel's advice while testifying.

However, the corollary practice at trial does not apply, as there is authority in the Fourth Department that a non-party witness at a trial may confer with counsel during the course of questioning where the question(s) might be "violative of [the] witnesses'[s] constitutional rights."

In *In re James J. O'Neal*,[12] an Article 78 proceeding to review a trial judge's finding of criminal contempt against a non-party witness, the witness, throughout his testimony, was represented by his own counsel, who advised the witness during his testimony:

> The alleged contempt occurred during the trial of one William Graham upon charges not disclosed in the record before us. Immediately after petitioner was called as a prosecution witness, a conference in chambers was held at the instance of the attorneys for defendant Graham. At that conference petitioner was represented by separate counsel. In the colloquy that ensued, the prosecutor took the position that petitioner could receive immunity only on a piecemeal, question-by-question basis and not by a single immunity grant. Graham's attorneys contended that the law did not require immunity to be granted on such a "piece by piece" basis, and that the procedure recommended by the prosecutor would cause petitioner to invoke the Fifth Amendment, perhaps repeatedly, in front of the jury, to the prejudice of Graham. They threatened to move for a mistrial if that should occur. The prosecutor eventually suggested a procedure whereby petitioner, in the absence of the jury, would be sworn and instructed as to the scope and extent of immunity allowed him, after which it would be ascertained whether he was willing to answer questions. The prosecutor expressed willingness to accord petitioner immunity to the full extent allowed by law, to encompass even perjury which petitioner may have committed in prior testimony before the Grand Jury. The court agreed to "grant that immunity pursuant to the District Attorney's request," but intimated some doubt whether a grant of immunity from Grand Jury perjury was legally possible and stated positively that petitioner could not be given immunity from perjury committed during the trial. The court stated that if petitioner "invokes the Fifth Amendment before this jury, I will summarily punish him for contempt and he will leave this courtroom in custody to the jail."
>
> Petitioner's attorney, however, stated that he would still advise petitioner to invoke his privilege because the proferred immunity would not be broad enough to protect him from prosecution for perjury. He first expressed doubt that a grant of immunity for Grand Jury perjury could validly be given, and noted that even if it could, there would certainly be no immunity for perjury upon the trial. Secondly, he contended, in order to convict petitioner of perjury it would be necessary to show only that he made two inconsistent statements under oath, but not necessary to show which was true and which was false. Hence, he concluded that petitioner still ran the risk of "being charged with committing perjury here for a truthful statement made here inconsistent with his grand jury testimony," so that "the immunity being granted is not fully coextensive with his privilege against self-incrimination."
>
> After the court reiterated its position that petitioner "is not getting any immunity from perjury in

Can the *Thompson* dichotomy be squared with generally accepted concepts of fairness to witnesses, litigants, and the judicial system?

this trial," petitioner was sworn in open court, in the jury's absence. He gave his name to the crier, but invoked his privilege when asked his address. The prosecutor then told petitioner that he intended to question him "relative to any knowledge that you may have with respect to the arrest and subsequent prosecution of Henry Ralph Anderson," and asked if petitioner would "respond to any questions that I may ask of you." Petitioner replied, "I refuse to answer on the grounds it may incriminate me." He gave the same response when asked if he had been called before the grand jury and granted immunity.

The prosecutor then explained the immunity he was prepared to request the court to grant petitioner, as follows: "Q. I state to you, Mr. O'Neil, that any questions that I may ask of you during the course of this proceeding, that you have full transactional immunity which encompasses, I will define immunity for you. A person who has been a witness in a legal proceeding and who cannot, except as otherwise provided in this subdivision be convicted of any offense or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he gave evidence, therein possesses immunity from such conviction, penalty or forfeiture. A person who possesses such immunity may nevertheless be convicted of perjury as a result of having given false testimony in such legal proceeding, and may be convicted of or adjudged in contempt as a result of having contumaciously refused to give evidence therein. I state to you, Mr. O'Neil, in the presence of the Court that any question during the course of this proceeding that the Court deems a relevant and material question, whether on direct examination or on cross examination, I am prepared to recommend to the Court, to have the Court direct you to answer that question, and in answering it, sir, I advise you that the law of the State of New York will convey to you complete immunity with respect to your response, during this proceeding, with the exception of perjury during this proceeding. That encompasses any perjury that would have -- or, that encompasses any perjury that may have been committed before the grand jury upon your appearance on November 4, 1975. With that understanding of the immunity grant that I am prepared to direct the Court to direct you to answer any question relevant to this proceeding, both on direct examination and on cross examination. Will you respond to the questions that I may ask of you, or Mr. Condon will ask of you?"

Petitioner responded "I refuse to answer on the grounds it may incriminate me." At that point, petitioner's counsel reiterated his reason for advising petitioner to invoke his privilege, which was that the proferred immunity "is not coextensive with his privilege against self-incrimination."

Then the following occurred:

"THE COURT: All right. Mr. Witness you have heard the statement of your attorney, Mr. Gary Forsyth. You have heard the statement of the District Attorney, Mr. Joseph McCarthy who specifically read to you the extent of the immunity that he is requesting this Court to grant to you pursuant to Sections 50.10, Section 50.20 and Section 50.30 of the Criminal Procedure Law. And, I, as a competent authority to grant such immunity pursuant to Section 50.20, subdivision 2A and B, hereby state to you, that I hereby give you full transactional immunity as stated by the District Attorney, with the exception of any perjury, as a result of having given false testimony in this legal proceeding. *If you still insist on asserting your Fifth Amendment privilege, I will punish you immediately, in contempt of this Court, and I shall sentence you to thirty days in the Erie County Penitentiary, forthwith*. If you testify to the extent of the transactional immunity granted -- requested by the District Attorney, and which I hereby grant you, no such sanctions will be applied. Have you heard my statement? (emphasis supplied)

"THE WITNESS: Yes, sir.

"THE COURT: All right. I hereby grant you full transactional immunity concerning your testimony in this case. You will testify?

"THE WITNESS: No, Your Honor.

"THE COURT: You will not? You will assert your privilege?

"THE WITNESS: I plead the Fifth.

"THE COURT: You plead the Fifth. All right. The Court hereby sentences you to thirty days in the Erie County Penitentiary."[13]

The Fourth Department unanimously dismissed the petition.

Conclusion

It would appear that the role of counsel for a non-party witness at a deposition must be more than what *Thompson*, on its face, permits. *Thompson* would appear to bar a non-party's attorney from objecting to the use of a clearly incompetent interpreter, the improper administration of the oath to the witness, or "errors of any kind which might be obviated or removed if objection were promptly presented."[14]

In September's column, some suggestions for ameliorating the consequences, perhaps unintended, of *Thompson*.

Have a wonderful summer! ■

1. 70 A.D.3d 1436 (4th Dep't 2010).
2. *Id.* at 1438.
3. *Horowitz v. Upjohn*, 149 A.D.2d 467, 467 (2d Dep't 1989) (citations omitted).
4. I must confess I like the sound of "*Horowitz* court," but am constrained to point out it is the case name, not a court over which I preside.
5. *Horowitz*, 149 A.D.2d at 467 (citations omitted).
6. *See, e.g.*, 22 N.Y.C.R.R. § 221.3.
7. *Id.*
8. 22 N.Y.C.R.R. § 221.2.
9. *Thompson*, 70 A.D.3d at 1438 (citation omitted).
10. 22 N.Y.C.R.R. § 202.15(g)(1), (2).
11. *Dibble v. Conrail*, 181 A.D.2d 1040, 1040 (4th Dep't 1992) (citations omitted).
12. 53 A.D.2d 310 (4th Dep't 1976).
13. *Id.* at 311–14.
14. CPLR 3115(b).

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- **Standing.** You must plead as an affirmative defense a plaintiff's lack of standing to assert a claim. You'll waive the defense unless you raise it in your answer or in a pre-answer motion.[14]

Mislabeling a defense an "affirmative defense" isn't as fatal as never asserting the defense.

- **Other Pending Action**. You waive this defense if you don't assert it in your answer or pre-answer motion.[15] Use this defense when another action involving the same parties and the same claims is pending in another court.
- **Res Judicata.** Under res judicata, also called claim preclusion, a party is precluded from relitigating a claim between the same parties.[16] You waive the defense if you don't raise it in your answer or in a pre-answer motion. If you raise the defense too late, a court may deny your request to amend your answer.[17] *Example:* "The legal principle of res judicata bars plaintiff's claims."
- **Collateral Estoppel.** Under collateral estoppel, also called issue preclusion, a party is precluded from raising the same issues litigated in an earlier action or proceeding if those issues were litigated and determined earlier. You waive this defense if you don't raise it in your answer or in your pre-answer motion.[18] *Example:* "Collateral estoppel bars plaintiff's claims."
- **Arbitration and Award.** You may assert that the action or proceeding is barred by a prior arbitration and award. You waive the defense if you don't assert it in your answer or pre-answer motion. Assert this defense only when a prior arbitration award exists, not when a contract contains an arbitration clause and you're seeking to arbitrate the matter.
- **Release.** A release will "discharge[e] an existing obligation or cause of action."[19] For example, a release is given in exchange for settling a cause of action or pre-existing claim of right.[20] You waive the defense if you don't assert it as an affirmative defense in your answer or in a pre-answer motion.
- **Defendant's Infancy or Disability.** When the defendant is under 18 years old or legally incompetent, raise that affirmative defense in your answer or pre-answer motion. Otherwise, you'll waive it.
- **Failure to Mitigate Damages.** Assert as an affirmative defense that the plaintiff failed to minimize the damages for which you, the defendant, are allegedly liable. Otherwise, you waive the defense.[21] When you raise this defense, state precisely that you're not admitting liability for the damages or that the damages exist, if that's true. *Example:* "Plaintiff has failed to mitigate its alleged damages."
- **Statute of Frauds.** Under CPLR 3018(b), you're required to plead this as an affirmative defense.[22] Statute of frauds "requires that certain agreements, promises, and undertakings be in writing to be enforceable, [including an agreement that won't be completed within] one year from the date of agreement; . . . a promise to answer for the debt of another; . . . [or] a promise to pay a debt after the debt was discharged in bankruptcy."[23] *Example:* "The Statute of Frauds bars plaintiff's claims."
- **Mistake.** If a contract shouldn't be enforced because the contract, or one of its terms, was based on the parties' mistake, affirmatively plead this in your answer. A mistake doesn't have to be mutual.[24]
- **Illegality.** If a contract is void because its purpose was illegal under state or common law, raise illegality as an affirmative defense.[25]
- **Discharge in Bankruptcy.** If a debt was discharged in a bankruptcy proceeding, affirmatively plead that defense in your answer or pre-answer motion. The defense is otherwise waived.[26]
- **Failure to State Cause of Action.** Many defense lawyers will allege, as an affirmative defense, that the complaint failed to state a cause of action. *Example:* "Plaintiff's complaint fails to state a cause of action." This isn't a true affirmative defense. This defense belongs in a motion to dismiss under CPLR 3211(a)(7). All the Departments of the Appellate Division allow you to plead this defense as an affirmative defense; it won't prejudice you to include it as an affirmative defense. The First and Third Departments have acknowledged, however, that the defense is surplusage; it needn't be included in your answer.[27] It's up to you to decide whether to move to dismiss or to include as a defense in your answer that the plaintiff failed to state a cause of action. Even if you include the defense in your answer and the court strikes the defense, the merits of your defense won't be resolved until you move to dismiss under CPLR 3211(a)(7) for failure to state a cause of action.

By no means is the above an all-inclusive list of your affirmative defenses. More defenses exist. In culling through all the affirmative defenses available to you, consider the particular facts of your case and possible cutting-edge issues.[28]

Reservation of Rights

You may include at the end of your affirmative defenses a paragraph titled Reservation of Rights in which you state that you're reserving your right to make additional allegations to your answer. *Example:*

> Defendant hereby gives notice to plaintiff, as stated in its answer, that defendant lacks sufficient knowledge or information upon

> which to form a belief as to the truth of certain allegations contained in the complaint, or specific knowledge of actions on plaintiff's part or other persons that contributed to or caused plaintiff's alleged damages. Until defendant avails itself of its rights of disclosure, plaintiff cannot determine whether the above affirmative defenses will be asserted at trial. Defendant asserts these defenses in its answer to preserve defendant's right to assert theses affirmative defenses at trial, to give plaintiff notice of defendant's intention to assert these defenses, and to avoid waiving any of these defenses.
>
> Defendant reserves its right to add additional affirmative defenses as may become known to defendant during disclosure.[29]

A reservation of rights is neither required nor forbidden under the CPLR. It's your choice whether to include it. But because you can't reserve your right to assert additional affirmative defenses unless you amend your answer, a reservation has no legal effect. To amend your answer, you must comply with CPLR 3025.

Failing to Plead an Affirmative Defense

Failing to plead an affirmative defense in your answer might result in your waiving the defense. If you fail to plead an affirmative defense, you'll be precluded from presenting evidence at trial about that defense. To avoid a court's precluding you from presenting evidence at trial, file a timely amended complaint.[30] If you comply with CPLR 3025(a), you won't need to seek leave from a court to amend your answer. Ask your adversary, the plaintiff, to stipulate to amend your answer. If your amended answer is untimely and your adversary won't cooperate with you, move for leave to amend your answer. A court may deny your motion if amending the answer will prejudice or surprise the plaintiff, if the defense lacks merit, or if you've failed to provide an excuse for your delay.[31]

Be thorough when asserting your affirmative defenses. Raise all the affirmative defenses applicable to your client.[32] But don't use the kitchen-sink approach. Asserting frivolous affirmative defenses might subject the defendant and you, the attorney, to sanctions.[33] Making false statements in your pleading might also result in treble damages.[34]

Failing to plead an affirmative defense in your answer might result in your waiving the defense.

Mislabeling

Lawyers fear mislabeling a defense an "affirmative defense." Lawyers believe that doing so in the answer will cause the burden of proof to shift to the defendant to prove the defense even if the plaintiff has that burden.[35] Because of this fear, some lawyers label the section containing affirmative defenses "Affirmative and Other Defenses" or "First Defense," "Second Defense," and so forth. This leaves the issue of burden of proof unadmitted. As a practical matter, the plaintiff might still have the burden of proof even if you've gratuitously labeled your defense an "affirmative defense."[36] Mislabeling a defense an "affirmative defense" isn't as fatal as never asserting the defense.

The Plaintiff's Reply

Under CPLR 3011, a plaintiff may not reply to a defendant's affirmative defenses. Thus, a plaintiff is deemed to deny all the allegations in the answer, even the affirmative defenses.[37] *Exception:* A plaintiff may reply to an affirmative defense if a court orders a reply[38] or if the answer includes a counterclaim labeled as a counterclaim.

Pleading Requirements

CPLR 3014 tells you how to plead affirmative defenses. Separately number and state each defense. State each defense plainly and concisely. If practicable, state each fact allegation in a separate paragraph. Affirmative defenses must be sufficiently particular to give the court and the parties notice of the elements you intend to prove and the material elements of each defense.[39] Plead the defense's elements, not just the supporting facts.[40] For some affirmative defenses, a single sentence allegation will do.[41] *Example:* "The Statute of Frauds bars plaintiff's claims."[42] *Example:* "The applicable statute of limitations bars plaintiff's claims in whole or in part."[43]

Under CPLR 3014, affirmative defenses may be pleaded affirmatively or hypothetically. *Example:* "Plaintiff has failed to mitigate damages, if any."

The next issue of the *Legal Writer* continues with the answer, specifically counterclaims and cross-claims. ■

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1. David D. Siegel, New York Practice § 223, at 368 (4th ed. 2005).

2. Michael P. Graff, *The Art of Pleading — New York State Courts*, N.Y. City Bar Ctr. for CLE 1, 22 (Dec. 8, 2008); J. Joseph Wilder & Laura A. Linneball, *Pleadings and Motions Directed to Their Faults*, N.Y. St. B. Ass'n 17, 68 (Cont'g Legal Educ. Prog., May 25, 2011).

3. *See generally* 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 15:600, at 15-62, 15-69 (2006; Dec. 2009 Supp.).

4. CPLR 3211(e).

5. *Paladino v. Time Warner Cable of New York City*, 16 A.D.3d 646, 647, 793 N.Y.S.2d 63, 64 (2d Dep't 2005) ("The plaintiff is correct in asserting that the Supreme Court should not have considered, sua sponte, the expiration of the applicable statute of limitations. The statute of limitations is an affirmative defense which must be pleaded and proved by the party invoking it." (citation omitted)).

6. *Immediate v. St. John's Queens Hosp.*, 48 N.Y.2d 671, 673, 397 N.E.2d 385, 386, 421 N.Y.S.2d 875, 876 (1979) ("It was sufficient under CPLR 3013 that respondent pleaded the 'statute of limitations' as a defense; it was not required to identify the statutory section relied on or to specify the applicable period of limitations."), *reargument denied*, 48 N.Y.2d 975, 401

Continued on Page 90

N.E.2d 433, 425 N.Y.S.2d 1029 (1979); *see also Youssef v. Triborough Bridge and Tunnel Auth.*, 24 A.D.3d 661, 662, 808 N.Y.S.2d 362, 363 (2d Dep't 2005) ("Under the mis-cited statute, Public Authorities Law § 1212 (2), the period of limitations is one year and 90 days. Even if the plaintiffs were mislead into believing that the timeliness of the action was to be measured by that standard, it was nevertheless time-barred."); *DeSanctis v. Laudeman*, 169 A.D.2d 1026, 1027, 565 N.Y.S.2d 303, 304 (3d Dep't 1991) ("In our view, defendant correctly argues that he did not waive the defense of the Statute of Limitations in his responsive pleading despite the fact that he did not invoke the specific statutory provision he was relying on."); *Rabinowitz v. Am. Tire Works*, 146 A.D.2d 760, 761, 537 N.Y.S.2d 244, 245 (2d Dep't 1989).

7. *Cohen v. Krantz*, 227 A.D.2d 581, 583 643 N.Y.S.2d 612, 614 (2d Dep't 1996).

8. CPLR 3211(e); *IBM v. Murphy & O'Connell*, 172 A.D.2d 157, 158, 567 N.Y.S.2d 706, 707 (1st Dep't 1991) ("The failure to raise the defense of lack of personal jurisdiction in a responsive pleading constitutes a waiver of the defense . . . "); *Interlink Metals & Chems., Inc. v. Kasdan*, 222 A.D.2d 55, 58, 644 N.Y.S.2d 704, 706 (1st Dep't 1996).

9. CPLR 3025; *Iacovangelo v. Shepherd*, 5 N.Y.3d 184, 187, 833 N.E.2d 259, 261, 800 N.Y.S.2d 116, 118 (2005).

10. *Leon v. Montano*, 119 A.D.2d 553, 553–54, 500 N.Y.S.2d 555, 556 (2d Dep't 1986) ("The appellant knew or should have known of the existence of the defense from the outset of the action, yet neglected to include the defense either in its original answer or in the answer amended as of right, but waited until discovery had been completed and the case was ready for trial.").

11. *Intellect Art Multimedia, Inc. v. Milewski*, 24 Misc. 3d 1248(A), 2009 N.Y. Slip Op. 51912(U), *5, 889 N.Y.S.2d 60, 2009 WL 2915273, at *5 (Sup. Ct. N.Y. County 2009) ("Where a defendant moves to dismiss the complaint asserting that the court lacks personal jurisdiction over them, the plaintiff bears the burden of proof.").

12. *Morrison v. Budget Rent a Car Sys., Inc.*, 230 A.D.2d 253, 260, 657 N.Y.S.2d 721, 726 (2d Dep't 1997).

13. *Commonwealth Elec. Inspection Servs., Inc. v. Town of Clarence*, 6 A.D.3d 1185, 1186, 776 N.Y.S.2d 687, 688 (4th Dep't 2004) ("Although the issue was not raised by the litigants or addressed by the court, we address the exclusively federal nature of the claim sua sponte inasmuch as it goes to the subject matter jurisdiction of the court.") (citing *In re Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 718, 680 N.E.2d 578, 580, 658 N.Y.S.2d 205, 207 (1997)).

14. CPLR 3211(e); *Muchnick v. Alcamo Supply & Contracting Corp.*, 169 A.D.2d 711, 711, 564 N.Y.S.2d 198, 198 (2d Dep't 1991).

15. CPLR 3211(e); *Mannari v. Trinity 21 Corp.*, 73 A.D.2d 911, 911, 423 N.Y.S.2d 256, 257 (2d Dep't 1980).

16. *Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481, 485, 386 N.E.2d 1328, 1331, 414 N.Y.S.2d 308, 311 (1979); *Newton Garment Carriers, Inc. v. Consolidated Carriers Corp.*, 250 A.D.2d 482, 482-83, 673 N.Y.S.2d 631, 632 (1st Dep't 1998).

17. *Branch v. Abraham and Strauss Dep't Store*, 220 A.D.2d 474, 475 632 N.Y.S.2d 168, 169 (2d Dep't 1995) (denying motion to amend answer three years after defendant filed original answer).

18. CPLR 3211(e); *see Mayers v. D'Agostino*, 58 N.Y.2d 696, 698, 458 N.Y.S.2d 904, 904 (1982) (denying defendant's mid-trial request to amend answer to assert collateral estoppel).

19. Barr *et al.*, *supra* note 3, at § 15:609, at 15-64.

20. *Colton v. New York Hosp.*, 98 Misc. 2d 957, 965, 414 N.Y.S.2d 866, 873 (Sup. Ct. N.Y. County 1979).

21. *Loomis v. City of Binghamton*, 43 A.D.2d 764, 765, 350 N.Y.S.2d 213, 216 (3d Dep't 1973), *appeal dismissed*, 34 N.Y.2d 537, 309 N.E.2d 871, 354 N.Y.S.2d 101 (1974) (denying leave to add mitigation-of-damage defense mid-way through trial); *Bernstein v. Freudman*, 180 A.D.2d 420, 421, 580 N.Y.S.2d 861, 861 (1st Dep't 1992).

22. Defendant might be able to raise the defense for the first time on a summary-judgment motion if the defense doesn't surprise the plaintiff and the plaintiff has a fair opportunity to defeat the defense on its merits. *Rogoff v. San Juan Racing Ass'n*, 77 A.D.2d 831, 832, 431 N.Y.S.2d 16, 18 (1st Dept 1980), *aff'd*, 54 N.Y.2d 883, 429 N.E.2d 418, 444 N.Y.S.2d 911 (1981).

23. Barr *et al.*, *supra* note 3, at § 15:630, at 15-66 (citing N.Y. Gen. Oblig. L. § 5-701).

24. *305 E. 24th Owners Corp. v. Parman*, 122 A.D.2d 684, 689, 505 N.Y.S.2d 999, 1004 (1st Dep't 1986), *rev'd on other grounds*, 69 N.Y.2d 991, 510 N.E.2d 794, 517 N.Y.S.2d 710 (1987) (exercising the court's equity jurisdiction to correct one party's error: "fraud or inequitable conduct and mistake").

25. CPLR 3018(b); *see Tagliaferro v. Tagliaferro*, 116 A.D.2d 570, 571, 497 N.Y.S.2d 426, 427 (2d Dep't 1986) (finding that employment agreement was scheme to evade taxes); *but see Carlson v. Travelers Ins. Co.*, 35 A.D.2d 351, 353, 316 N.Y.S.2d 398, 401 (2d Dep't 1970) (finding that despite having failed to plead defense of illegality, defendant was not necessarily precluded from raising the defense because plaintiffs were aware of the facts that defendant's illegality defense was based).

26. *Corsale v. Pantry Pride Supermarket, Inc.*, 197 A.D.2d 659, 660, 602 N.Y.S.2d 887, 887–88 (2d Dep't 1993) ("[T]he court did not improvidently exercise its discretion by granting the defendant's motion for leave to serve an amended answer interposing an affirmative defense of discharge in bankruptcy.").

27. *Pump v. Anchor Motor Freight, Inc.*, 138 A.D.2d 849, 851, 525 N.Y.S.2d 959, 961 (3d Dep't 1988); *Riland v. Frederick S. Todman & Co.*, 56 A.D.2d 350, 352, 993 N.Y.S.2d 4, 5 (1st Dep't 1977). The Second Department has not held that the defense is surplusage, but in one case it noted that "a party who asserts the defense of failure to state a cause of action in a pleading will not achieve the intended purpose of dismissal, unless and until he or she makes an appropriate motion." *Butler v. Catinella*, 58 A.D.3d 145, 151, 868 N.Y.S.2d 101, 106 (2d Dep't 2008).

28. Wilder & Linneball, *supra* note 2, at 71.

29. Adapted from Graff, *supra* note 2, at 48.

30. CPLR 3025.

31. *D'Agostino*, 58 N.Y.2d at 698, 458 N.Y.S.2d at 904, 444 N.E.2d at 1323 (holding that trial court did not abuse its discretion when it denied defendant's mid-trial request to amend collateral-estoppel defense); *Charles Offset Co. v. Hobart-McIntosh Paper Co.*, 192 A.D.2d 419, 419, 596 N.Y.S.2d 68, 68 (1st Dep't 1993) (holding that defendant waived standing defense after waiting six years to assert it); *Muchnick*, 169 A.D.2d at 711, 564 N.Y.S.2d at 198 (holding that defendant waived incapacity defense because defendant waited until trial to assert defense); *contra Roberts v. Alexander's Inc.*, 224 A.D.2d 677, 678, 639 N.Y.S.2d 60, 61 (2d Dept 1996) (holding that trial court erred in denying leave to amend answer to assert additional affirmative defenses of discharge in bankruptcy and res judicata); *Seda v. New York City Hous. Auth.*, 181 A.D.2d 469, 470, 581 N.Y.S.2d 20, 21 (1st Dep't) (permitting defendant to raise statute of limitations defense in amended answer three years after plaintiff commenced case because parties had conducted little disclosure), *lv. denied*, 80 N.Y.2d 759, 602 N.E.2d 1125, 589 N.Y.S.2d 309 (1992).

32. In automobile tort cases, for example, you'll need to plead separately a plaintiff's failure to wear a seat belt, if true. *Costanza v. City of N.Y.*, 147 Misc. 2d 94, 98, 553 N.Y.S.2d 616, 619 (Civ. Ct. Queens County 1990) ("[T]his court holds that under VTL § 1229-c defendant herein is precluded from introducing any evidence with respect to plaintiff's alleged nonuse of the seat belt because it did not specifically plead such 'non-compliance,' and relied solely on its defense of culpable conduct.").

33. *Warner v. Levinson*, 188 A.D.2d 268, 268, 590 N.Y.S.2d 459, 460 (1st Dep't 1992) ("Sanctions were properly imposed on defendants' counsel's frivolous conduct in bringing nineteen affirmative defenses . . . that clearly lacked merit.").

34. *Amalfitano v. Rosenberg*, 12 NY3d 8, 15, 903 N.E.2d 265, 269, 874 N.Y.S.2d 868, 871 (2009) (holding that defendant attorney may be sued for treble damages under N.Y. Jud. Law § 487 based on defendant's attempted but unsuccessful deceit upon a court in the pleading).

35. *Beece v. Guardian Life Ins. Co. of Am.*, 110 A.D.2d 865, 866, 488 N.Y.S.2d 422, 424 (2d Dep't 1985) (holding that plaintiff's burden of proving cause of death did not shift when insurer pleaded, as an affirmative defense, that death resulted from disease).

36. *Id.*, 488 N.Y.S.2d at 424.

37. CPLR 3018(a).

38. *Mogilevich v. Grayzel*, 228 A.D. 821, 822, 240 N.Y.S. 540, 541 (2d Dep't 1930); *Barker v. O'Grady*, 98 Misc. 42, 43, 162 N.Y.S 262, 262 (Sup. Ct. Monroe County 1916) (entitling plaintiff to reply when defendant's answer contained statute of frauds defense and plaintiff had to state whether contract was oral).

39. CPLR 3013.

40. *See, e.g.*, *Brickner v. Linden City Realty, Inc.*, 23 A.D.2d 560, 560, 256 N.Y.S.2d 533, 534 (2d Dep't 1965) (dismissing fraud complaint when defendant failed to plead reliance).

41. Graff, *supra* note 2, at 23 (citing *Youssef*, 24 A.D.3d at 662, 808 N.Y.S.2d at 363; *Hatch v. Tran*, 170 A.D.2d 649, 649, 567 N.Y.S.2d 72, 74 (2d Dep't 1991) (holding personal-jurisdiction affirmative defense waived because defendants failed to plead it in answer; defendants pleaded in answer only that plaintiff "defective[ly] serv[ed]" the complaint on defendants); *St. John's Queens Hosp.*, 48 N.Y.2d at 671, 421 N.Y.S.2d at 875; *Linton v. Unexcelled Fireworks Co.*, 124 N.Y. 533, 538 (1891)).

42. Graff, *supra* note 2, at 47.

43. *Id.*

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: What is the difference between *advisor* and *adviser*? And how about the pairs *a lot* versus *alot* and *after all* instead of *afterall*?

Answer: The first pair, *advisor* and *adviser* are synonyms, both being broadly defined as "a person who offers advice." Both imply that the offered advice is official or professional, not the avuncular (often unrequested) type received from family members.

With regard to the words *a lot* and *alot*, the latter is not listed in most dictionaries. The single non-word *alot* seems to be a misspelling of *a lot.* Wikipedia lists it as an error and admonishes readers to remember that, like the misspelling "alittle," there is no single word "a lot."

The same can be said of *afterall*, which is not listed by dictionaries. I've never seen it as a single word. But the phrase *after all* is well-accepted in usage, and *all* is especially recognizable as a noun in the context of "after all is said and done." The phrase *after all* is also an idiom, meaning "all things considered" or "ultimately."

Another phrase containing *all* is "all together," The phrase refers to either people or things, gathered in a group. It is not a synonym of *altogether,* an adverb indicating totality. *Altogether* is an idiom meaning "completely": "She was altogether wrong." *All ready* and *already* also contrast. The two-word phrase containing the pronoun *all* plus *ready* ("prepared") means "All of us are ready." The adverb *already* means "now or a specified time": "We are late already." It can also mean "so soon?" as in, "Is it already 6:00 o'clock?"

The two adverbs *purposely* and *purposefully* are similar in meaning, but differ in intensity. The word *purposely* ("intentionally") descends from the Latin verb *proponere* ("to put forth"); it has a long history, having come into Old English from Old French before 1066. The word *purposefully* indicates a stronger sense of intent. The phrases *some time* and *sometime* indicate a difference in intent: "I'll see you sometime" conveys a lack of any meaning; "I'll see you some time," is less vague, at least indicating an un-stated future time.

The pair *born/borne* look almost alike, but differ in meaning. *Born* is an adjective meaning "having a quality or characteristic from birth" ("a born teacher"). Less common is *borne,* past participle of the verb to *bear* ("to accept, suffer, carry, or put up with"); "His angry reply, borne of frustration."

Another pair, *blatant* and *flagrant* are often confused, although they do not look alike. The chairman of a recent congressional hearing used the adjective *blatant* to describe Elizabeth Warren's testimony as a witness, saying he was shocked by her "blatant sense of entitlement" accusing her of giving "misleading testimony" and of having "made up facts." The choice of the adjective *blatant* drew a shocked gasp from the audience – and a demand for apology by another member of the committee.

The two adjectives are not synonyms, though some lawyers think they are. The adjective *flagrant* (derived from the Latin root *flagrans:* "burning") carries the sense of evil "intentionally glaring" or "notorious." It is commonly used in the phrase "flagrant conduct" to describe "outrageous or egregious behavior." The best that can be said of the chairman's choice of the word *blatant* may be that it was "grammatically," though not "factually," correct.

The adjectives *single* and *singular* are sometimes treated as synonyms both by lawyers and the general public, but they are far different in meaning. The adjective *single* means "sole" and is the antonym of *plural* ("more than one"). The adjective *singular* is much more colorful, often meaning "far from the norm." A recent soldier was awarded the Presidential Medal of Honor for his "singular act of courage" during war. *Singular* can also reflect behavior at the other end of the gamut: "His *singular* conduct may indicate that the man who recently shot Representative Giffords was insane."

The adjectives *full* and *fulsome* are far from synonymous. Saying that someone deserves "full praise" is flattering, but *fulsome praise* describes the praise as insincere and even offensive. Dictionaries note, however, that both words are mistakenly assumed to be flattering. In fact, in Old English the adjective *fulsome* did mean "abundant," but it began to downgrade in Middle English and now always carries a pejorative sense.

The adverb *presently* lends itself to ambiguity. Sometimes it means "now": "I am presently a lawyer." But it can also mean "not now, but soon." "Presently, I will go to New York to see the fall fashion show." The word *soon* itself came into English with the meaning of "immediately," but it now indicates future action.

During the same period of Old English and Middle English *anon* changed its meaning from "immediately" to "soon." Shakespeare used this change to create humor in his plays. When a servant responded "anon" to his masters' command, the audience knew that the command would be carried out "later," if at all.

Things are no different today. When the person you're talking to on the phone says, "Hold on, I'll be back in a second," do you take him literally?

Potpourri

What was said and what was heard: A kindergartner, humming a song he had been taught, told his mother the song was about "a juicy vegetable." On checking, the mother learned it was about "a Jewish festival." Another kindergartner told his mother that the teacher had called him "the trunk of an elephant." It turned out that because he talked too much, he had been told he was "a disruptive element." ■

Gertrude Block is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association). Her most recent book is *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co., 2004).

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BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part VIII — The Answer

The *Legal Writer* continues with drafting the answer. This column focuses on the essential aspects of affirmative defenses.

Affirmative Defenses

A party must plead all affirmative defenses. CPLR 3018(b) defines affirmative defenses as "all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading."

Affirmative defenses are defenses that a defendant has the burden to raise in the defendant's answer and prove at trial.[1] Affirmative defenses attack a plaintiff's legal right to bring a cause of action.[2]

Here's a list of some common affirmative defenses: (1) statute of limitations; (2) laches; (3) personal jurisdiction; (4) subject-matter jurisdiction; (5) standing; (6) other pending action; (7) res judicata; (8) collateral estoppel; (9) arbitration and award; (10) release; (11) the defendant's infancy or disability; (12) preemption by federal law; (13) failure to mitigate damages; (14) collateral source of recovery; (15) the defendant's acting as agent; (16) ultra vires act; (17) estoppel; (18) statute of frauds; (19) unconscionable contract term; (20) mistake; (21) duress; (22) illegality; (23) payment; (24) accord and satisfaction; (25) discharge in bankruptcy; (26) insurance policy exclusions; (27) usurious interest rate; (28) plaintiff's culpable conduct; (29) release of joint-tortfeasors; (30) pre-injury liability disclaimer; (31) workers' compensation exclusive remedy; (32) truth of defamatory statement; (33) absolute defamation privilege; (34) qualified defamation privilege; (35) adverse possession; (36) assumption of risk; and (37) waiver.[3] Some of these common affirmative defenses are discussed below.

- **Statute of Limitations.** As the defendant, you must affirmatively plead in your answer or in your pre-answer motion (a motion to dismiss the case before you file your answer) that the plaintiff failed to commence the lawsuit within the applicable statute of limitations. You waive this defense if you don't assert it.[4] A court may not take judicial notice on its own that a statute of limitation applies.[5] You may cure omitting this defense in your answer and avoid waiving it by raising it in an amended answer. You needn't specify the applicable statute or its limitation period in your answer.[6] *Example:* "The applicable statute of limitations bars plaintiff's claims in whole or in part."
- **Laches.** Laches applies to actions of equity, not actions at law. To establish laches, a defendant must show (1) the defendant's conduct giving rise to the situation complained of; (2) the plaintiff's delay in asserting a claim for relief despite the opportunity to do so; (3) the defendant's lack of knowledge or notice that plaintiff would assert its claim for relief; and (4) in the event that relief is accorded the plaintiff, the defendant will be injured or prejudiced.[7] *Example:* "The legal principle of laches bars plaintiff's claims." *Or:* "To the extent plaintiff seeks equitable relief, the legal principle of laches bars plaintiff's claims."
- **Personal Jurisdiction.** The court's personal jurisdiction over a defendant is an affirmative defense that is waived unless the defendant pleads it in the answer or raises it in a pre-answer motion.[8] If you've omitted the personal-jurisdiction defense from your answer and you want to assert it, you won't waive the defense if you amend your answer quickly.[9] If you wait until a court grants you leave to amend the answer, a court may deny your request if the amendment will prejudice the plaintiff.[10] As the defendant, you may raise personal jurisdiction as an affirmative defense, but the plaintiff must prove personal jurisdiction.[11] *Example:* "Plaintiff did not properly serve defendant. This Court has no personal jurisdiction over defendant."
- **Subject-Matter Jurisdiction.** Assert subject-matter jurisdiction as an affirmative defense when the court cannot hear and determine the subject matter of the dispute. This defense may be raised at any point in the case: The defense is never waived. The parties may not agree to confer subject matter jurisdiction on a court.[12] A court may bring up and determine sua sponte the issue of subject-matter jurisdiction.[13] *Example:* "This Court lacks subject matter jurisdiction over this matter."

CONTINUED ON PAGE 88

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