2024 | VOL. 34 | NO. 3

NYSBA

Elder and Special Needs Law Journal

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

How To Put Your Best Foot Forward as Court Evaluator

Assisting Individuals in Need of Mental Health Services Through a Guardianship Lens

Domestic Violence Service Providers Need Help Addressing Older Adult Concerns

LIFE Pooled Trusts

PUT YOUR TRUST IN LIFE

Why Choose Us?

Medicaid-Certified Trust
Administered by a 501(c)(3) nonprofit agency with experienced attorneys and CPAs on staff.

Convenient Online Portal
Clients can easily access their account information anytime. Attorneys can generate Verification of Deposits (VODs) directly from the portal.

Quick Trust Setup
We establish all new trusts within 2 business days.

No Security Deposit Required
LIFE does not require a security deposit or escrow funds to be held in the trust account.

Dedicated Support
Our trust counselors are available Monday through Friday, 9 AM to 5 PM, via phone, email, or live chat on our website.

New Debit Card Coming Soon!
We're excited to introduce a new debit card option to simplify access to your funds.

Contact Us

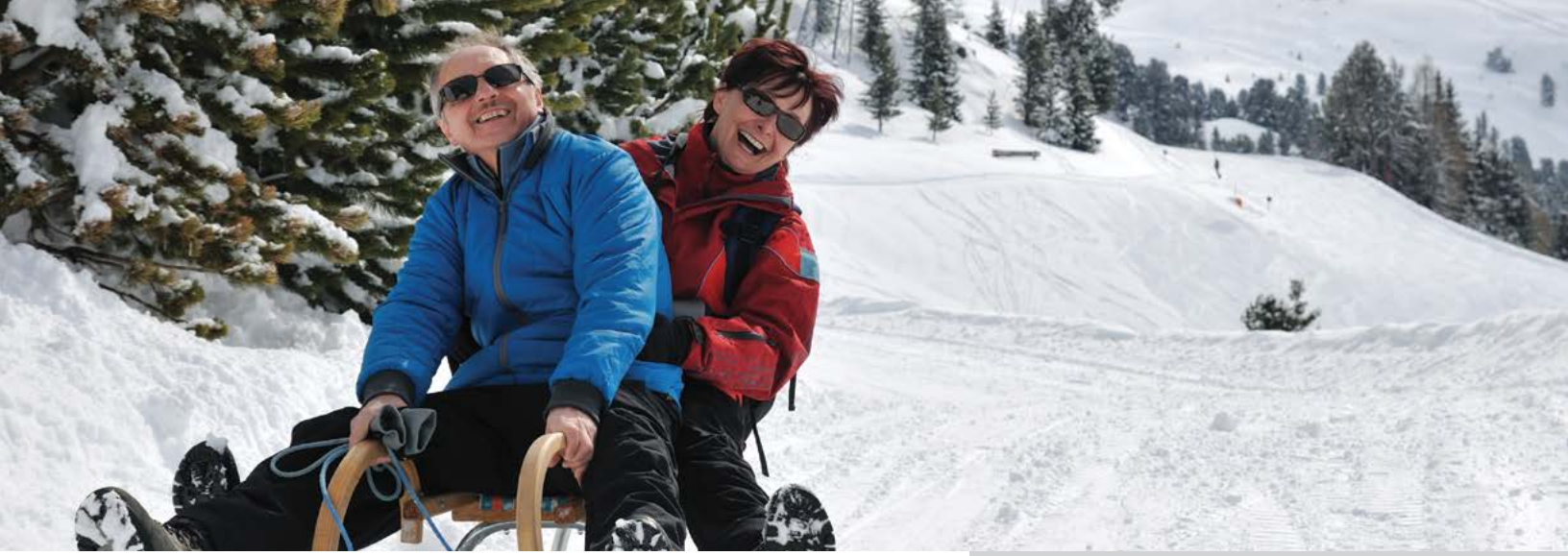
Call Our Phone
516-374-4564 ext. 3

Visit Our Website
www.lifetrusts.org

Jennifer Katz Esq.
jkatz@lifetrusts.org

Email Us:
bills@lifetrusts.org

(paid advertisement)



Contents

5 How To Put Your Best Foot Forward as Court Evaluator
Anne Littwin

8 Assisting Individuals in Need of Mental Health Services Through a Guardianship Lens
Sara Chussler and Carolyn Reinach Wolf

12 Overview of the Justice Center
Charlie Pensabene

17 Elder Law and Special Needs Section Fall Meeting Recap
Michael Dezik

21 Domestic Violence Service Providers Need Help Addressing Older Adult Concerns
Malya Kurzweil Levin

23 **NEW COLUMN: Special Education Law**
Welcome to the World of Special Education Law: Why It's Important to Elder Law and Special Needs Planners
Adrienne Arkontaky

24 Strategies for Estate Planners in Light of *Connelly v. United States*: Addressing Life Insurance and Stock Redemptions in Estate Tax Planning
Nancy Burner

28 State of Estates
Paul S. Forster

NYSBA

Elder and Special Needs Law Journal

2024 | Vol. 34 | No. 3

3 Message From the Section Chair
Britt Burner

4 Message From the Co-Editors
Lauren C. Enea and Katherine Carpenter

18 Photos: Fall Meeting 2024

31 Member Spotlights: Kristine Garcia-Elliott and Jeffrey Shapiro
Katherine Carpenter

33 Adventures in a Busy Elder Law/T&E Office
Antony Eminowicz

35 Section Committee Chairs and Vice Chairs

Publication Date: December 2024

ISSN 2161-5292 (print)
ISSN 2161-5306 (online)

Elder and Special Needs Law Journal

NYSBA.ORG/ELDER

Publication and Editorial Policy

This publication is a benefit of membership of the Elder Law and Special Needs Section of the New York State Bar Association. Persons interested in writing for this newsletter are welcomed and encouraged to submit their articles for consideration to Katherine Carpenter (kcarpenter@wplawny.com) and Lauren Enea (l.enea@esslawfirm.com).

Submitted work are subject to NYSBA's Copyright Policy in the event of publication. For more information please visit NYSBA.ORG/SEC-PUB-AUTHOR.

The articles in this publication represent the authors' viewpoints and research and not that of the editor, section or its officers, or the New York State Bar Association. The accuracy of the sources used and the cases cited in submissions is the responsibility of the authors.

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at 518-463-3200.

Message From the Section Chair

By Britt Burner

Dear Section Members:

The fall has been a productive time for the section. Our committees have been hard at work on various issues. The Medicaid Committee conducted a deep dive on the new law authorizing transfer on death deeds. The goal was to identify any potential areas of advocacy or a request for legislative change. At the fall Executive Committee meeting, the committee reported that they are recommending no formal action at this time but will continue to monitor the issue.

The Special Needs Planning Committee reviewed and submitted comments on the proposed supported decision making regulations. A second round of proposed regulations are expected, and the committee plans to review and comment on those as well. In August, the Guardianship Committee submitted comments to OCA supporting an increase in the cap for Part 36 compensation. The section has also supported a bill that shines a light on preventing bed sores for long term facility residents.

Back by popular demand is the Unauthorized Practice of Law Committee with David Cutner as chair. The goal of the committee is to limit the legal advice that is often provided to consumers by individuals who are not lawyers, specifically in the context of Medicaid applications. For applicants who require advice on transfer of monetary assets or real estate, or where spousal refusal and spousal contribution are an issue, proper legal advice is a must. We have seen many instances of harm to the consumer caused by the advice of non-lawyers.

I would also like to highlight the Client and Consumer Issues Committee, which has updated the NYSBA pamphlet entitled "17 Benefits for Older New Yorkers." Please take a look and consider using this tool in your practice as a resource to hand out to your clients and the community.

As you can see, the work of the committees is the life blood of the section. Beyond the committees that are proposing or commenting on legislation or rulemaking, many of our committees serve as topic-based study groups. I urge all Elder Law and Special Needs Section members to get involved with committees. Many meet on a monthly basis and *all section members* are welcome and encouraged to join.

The fall meeting at Canandaigua Lake, a joint meeting with the Trusts & Estates Section, was sold out and was a great success. Moriah Adamo and Mike Dezik served as co-chairs for Elder Law and they did a great job! More and more we see the intersection of issues between the two sections and many of us have practices that focus on both areas. A special thank you to Patricia Shevy, a member of ELSN and chair of the Trusts and Estates Law Section, and the T&E program chairs, Lisa Powers and Ross Katz.

The section has shown support to the Women in the Law Section with a financial donation and has also given a donation to the Lawyer's Assistance Program, which provides help to members of the practice struggling with addiction or mental health issues. The funds given will be used to support the 24/7 hotline staffed by licensed mental health professionals. This service offers immediate support and guidance, along with a referral to a therapist for up to four free sessions, providing a much-needed lifeline for lawyers in distress.

The section continues to prioritize our advocacy against financial exploitation of the elderly and the repeal of the 30-month lookback for community Medicaid. Leadership held a meeting in November with staff members of the Executive Chamber to stress the concern over these issues to the governor.

We look forward to another great meeting in January, when we come together in Manhattan for the Annual Meeting. For spring 2025 we will be bringing back the UnProgram! Please join us on April 24 and 25 in Albany at the Bar Center. If you have never attended the UnProgram, it is intended to give attorneys a forum to connect with leaders in elder law practice and discuss elder law issues/ideas/planning opportunities and more. Save the date and stay tuned for programming, including more information on the CLE credits that will be provided as part of the event.

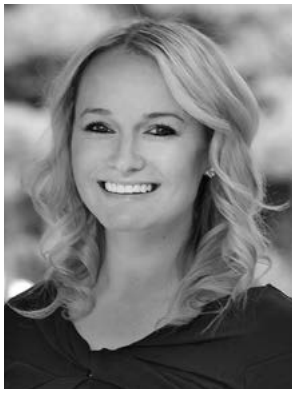
If you want to see your name in print . . . submit an article for an upcoming issue of the Elder Law and Special Needs Journal!

Happy New Year!

Britt

Message From the Co-Editors

Lauren C. Enea



Katherine Carpenter

At the time of this writing, the holiday season is in full swing and by the time you are reading this it may already be the year 2025! It is hard to believe that the COVID pandemic is almost five years ago. We have certainly seen quite a bit of change in the practice of law in the past five years: Zoom meetings, remote will signings, virtual conference and the implementation of AI, to name a few. Fortunately, your support and readership to our Elder Law and Special Needs Law Journal has not changed! We are grateful for your continued support and hope that you will continue to read and submit articles for publication.

This issue showcases six articles and a new "Special Education Law" column, which we are excited to introduce!

We start with a wonderful article regarding the role of a court evaluator by Anne Littwin, which includes helpful tips and best practices. Anne's article is especially helpful for court evaluators who are evaluating AIPs who may have less than clear diagnoses or characteristics indicative of incapacity.

Sara Chussler and Carolyn Reinach Wolf then provide us with an overview of the various mental health services available in the community and how use of these services may avoid the need of a MHL Article 81 guardian, or be used in combination with guardianship to the least restrictive path is followed.

Charlie Pensabene of the Justice Center for the Protection of People with Special Needs has prepared an excellent summary of the Justice Center's offerings. Th is is a mu st-read for all special needs practitioners. It often feels like the various offices that assist individuals with special needs are a "black hole" of information. Charlie's overview helps clarify not only the intake and case management process but also the processes and programs available for services to be commenced and appealed, when denied.

Malya Kurzweil Levin then turns our attention to the very important issue of domestic violence in older adults. As elder abuse cases continue to be on the rise, it is important for us as practitioners to not only know how to avoid elder abuse from occurring, but also how to best assist our clients if they unfortunately become a victim.

Next, we are pleased to introduce our new column, "Special Education Law With Adrienne Arkontaky." Adrienne is excited to start a dialogue with our readership and kicks off the column by educating us on special education law and why it is important to us as elder law and special needs planners.

Nancy Burner and Paul Forster round out this issue with two wonderful articles: First, Nancy Burner addresses strategies for estate planners in light of *Connelly v. United States*, a landmark case addressing critical issues concerning the estate tax implications of life insurance proceeds used in the redemption of stock in closely held corporations. Paul Forster then brings us an end of year "State of Estates," providing an excellent outline of interesting 2024 Surrogate's Court cases, all worthy of a read!

Our issue would not be complete without a recap of the 2024 Fall Meeting, our member spotlights of Kristine Garcia-Elliot and Jeffrey Shapiro, as well as our "Adventures in a Busy Elder Law / T&E Office" by Antony Eminowicz – always relatable and gives us a good laugh!

We hope you enjoy the journal and we, as always, urge you to submit articles you have written for publication.

Happy Reading!

Lauren & Katy

Correction

The article, "Understanding New York's Transfer on Death Deeds: A Guide for Lawyers To Understand the Medicaid Implications," which appeared in the previous issue (2024, v. 34, no. 2), was co-authored by Moriah Adamo with Judith Grimaldi. Moriah Adamo is a partner at Abrams Fensterman, LLP, where she manages the elder law and estate planning/administration department. The editors apologize for the error.

How To Put Your Best Foot Forward as Court Evaluator

By Anne Littwin

Most people who are involved in Article 81 guardianships will likely say that no two guardianship cases are the same. Most cases have their own nuances and hiccups along the way. It has become pretty rare to have a "plain vanilla," "run of the mill" guardianship proceeding. Even in cases where it is clear that the individual needs a guardian and even when there is no one contesting the appointment of a guardian, more times than not, there is some twist or some aspect that puts the some court evaluators on their toes.

The court evaluator is appointed pursuant to Mental Hygiene Law (MHL) § 81.09 and his or her role is to be impartial. The court evaluator should review the petition to get a general idea of the allegations, but should not always take them as fact until fully investigated. In some instances, the court evaluator needs to become creative.

When conducting the investigation, the court evaluator will reach out to many individuals to learn more about the alleged incapacitated person (AIP). In doing so, third parties may be reluctant to speak freely to the court evaluator because they may be concerned of being sued for what they say. However, in *55th Management Corp. v. Goldman*, NYLJ April 15, 2003 (Sup. Ct., N.Y. Co.) (Lebedeff, J.), the Court held that out of court statements made to a court evaluator in the course of judicial proceedings are protected by absolute privilege.

In *55th Management Corp*, *supra,* the Court used a three prong test ("(1) whether the speaker's remarks were of a character permitting the assertion of the privilege; (2) whether addressing such remarks to a court evaluator is a statement made in the course of a judicial proceeding; and (3) whether the speaker has standing to claim the privilege.") In *55th Management Corp,* the Court found that the remarks were pertinent to the guardianship proceeding; barring any public policy mandates to the contrary, a statement made to a court evaluator is a communication properly subject to the absolute privilege; and that this defendant had standing to claim the protection as a potential witness. As a result, the defamation action was dismissed.

The Court also noted the vital role a court evaluator plays in guardianship proceedings and did not want court evaluators to be hindered by third parties being concerned that if they speak with the court evaluator, they may become the subject of a defamation lawsuit. Within the case, the Court notably mentions that court evaluators are also protected by

the privileges afforded in judicial proceedings stating, "It takes no great astuteness to understand that the freedom to collect defamatory but pertinent information is necessary if a court evaluator is to perform a full investigation and report the evaluator's informed conclusions to the court." The Court uses as an example a case where there are allegations of financial abuse, and states that "the threat that a court evaluator might become the target of a defamation action, or even be drawn into a defamation action as a non-party witness, would clearly have a detrimental effect on the diligent collection and reporting of relevant information."

As you embark on the role as court evaluator, here are some tips with real case examples that I have implemented at times, which I have found to be helpful.

Don't Take the Facts in the Petition for Granted

In one instance, the petition portrayed the AIP as incapacitated and unable to understand that she was being evicted from her apartment. In this case, the AIP did have capacity. At the outset, the AIP called me and not only was able to communicate but was fully aware of her situation. It became clear how aware the AIP was because, in that case, the petitioner's counsel requested substituted service due to one unsuccessful attempt at service. I informed the petitioner's counsel that the AIP explained to me that she lives in a bad neighborhood and as such she does not answer her door if she is not expecting someone. She said she would answer the door if the process server called her before he came. However, when she did not answer her door, the process server "nailed" the guardianship papers on the front door of the building and NOT on her apartment door. She called me very distraught, to say the least, expressing how all the people in her building had read the papers and now were aware of the guardianship. This is a lesson to the petitioner's counsel and to court evaluators. Petitioner's counsel should make sure that their petition sets forth the AIP's capacity accurately. It is also a lesson to court evaluators to do their own investigation and not automatically take the details in the petition as fact.

Physical Incapacity Doesn't Always Mean Mental Incapacity

In another case, the AIP was physically incapacitated and bedbound but reportedly could understand what was going on. She was able to nod her head and say "yeah." We used a method of communicating consisting of a counting system and choice system. She was able to communicate her wishes and understood the proceeding. At times she tried to speak but it was very unclear. It was apparent that she understood and had mental capacity when I repeated back to her what I thought she said and she smiled. She was happy that she was understood.

Some Cases Require a Lot of Patience

The AIP suffered from psychiatric issues and was a selective mute. She would not speak. She did not want to write or draw. I wasn't sure how I would communicate with her. I knew I was in for a challenge. I ended up using a nodding system and a choice system. However, I wanted to ascertain the level of her cognition. I wanted to know whether she understood where she was, her personal information and about the guardianship. So, I asked her date of birth, the current date, her age, where she lived etc. by reciting the months one by one, days of the month one by one, counties, one by one, etc. and asked her to nod when I said the correct answer. This was a long meeting but was effective. By taking the time and having patience, I was able to ascertain that while she needed assistance and had psychiatric issues, she was aware of where she was, her family, and what a guardian was. This was helpful, because despite her need for assistance, she was able to communicate her wishes, which is always something that should be taken into account, even with and despite the appointment of a guardian.

Watch for Body Language

In another instance, it was important to watch the AIP's body language. The AIP's wife was the petitioner. It was an "easy" guardianship insofar as there was no other family involved and no one contesting. The AIP lacked capacity and that was clear just by speaking with him for a few minutes. He was not sensical in what he said and we could not have any sort of meaningful conversation. However, when his wife stroked his face and used nicknames and familiar words, he smiled. That indicated to me his recognition, even if on a subconscious level, that she was familiar and endeared to him.

Talk on the AIP's Level and Use Visual Cues

It is not always possible to ask all the questions on our "checklist" or to explain in our legalese way what a guardianship is and what the proceeding is about. I was the court evaluator for a young adult with special needs. She had down syndrome. She lived in a group setting. I met with her in her bedroom. When we started, she was very tense. While I knew that she could not understand the full extent of what a guardianship is, I could tell that she knew that our "meeting" did not seem part of her ordinary day. I could tell that she sensed something was off. I wanted to come up with a way to communicate with her to assess what her level of cognition was, what she knew about her family etc., but in a way that was comfortable for her and in a way that she could understand. Her father had recently died and I did not want to alarm her or trigger her in any way unnecessarily. I was able to use the things around us to get her more comfortable with me. For example, she was wearing a Disney shirt, so I asked her about the character on her shirt and was able to glean that she is a

Disney fan. We spoke about princesses. I also noticed her nail polish so we discussed that as well. This was on her level and made her comfortable. I was then able to have a conversation about her family and other pertinent topics, while keeping it on her level.

Don't Always Discount What the AIP Is Saying as Incorrect Just Because There Is a Petition Alleging Incapacity

Incapacity is not always permanent and may be due to a temporary medical condition. I once was appointed court evaluator for a woman who was hospitalized and the hospital was seeking to discharge her and petitioned for a guardian. The petition detailed her incapacity. When I went to meet with the AIP, I was expecting someone who was out of it. So, when the AIP told me that she has assets totaling around four million dollars my first instinct was to disregard what she was saying, assuming she was exaggerating and delusional. It happened to be that I met with the AIP with her court-appointed counsel present, and the AIP's apartment was in close proximity to the hospital, so we decided, with the AIP's permission, to go together to her building to check out her mail. The super had been collecting her mail. We looked through her mail and reviewed some financial statements. Turns out she was correct. So what was the issue? She had become dehydrated and that caused her to faint and upon admission to the hospital she showed signs of mental confusion. She was recovering and when we met with her she was much clearer. In the end, she had the means and could benefit from assistance, but she was not incapacitated. She just needed help taking care of herself and was receptive to that help.

Listen to the AIP

Just because an AIP lacks some capacity, cannot pay her own bills or manage her own affairs, she may still be able to communicate who it is she would want to assist her and to be her guardian. The AIP's wishes should be taken into account, even if she needs a guardian.

Stay Neutral and Obtain Court Orders for Financial Records

There are times when I receive a petition with allegations of financial exploitation and abuse. I then speak with the family or friend under scrutiny. Often, they have a different story they tell. In these situations, remember that you are a neutral party. Your role is to get as much information you can to assist the Court. To that end, if you are not sure who to believe, and you can ascertain the AIP's financial institutions, request a court order to obtain and review financial records in an attempt to determine whether or not the AIP is the subject of financial exploitation or alternatively whether there is just miscommunication or a breakdown in communication.

Review Prior Cases and Fact Patterns

Mental Hygiene Legal Service Second Judicial Department publishes an up-to-date publication with collected cases, which can be found at https://nycourts.gov/ip/gfs/pdfs/Article81-HandBook.pdf. Here you will find guardianship cases on a plethora of topics. When faced with a set of facts new to you, take a look at these cases. They may give you that step forward you need.

Good luck!

Anne Littwin has an office in River-dale, New York and is also of counsel to RK Law PC in Manhattan. Her practices consist of guardianship, es-tate planning, probate, and estate administration.

Assisting Individuals in Need of Mental Health Services Through a Guardianship Lens

By Sara Chussler and Carolyn Reinach Wolf

According to the New York State Department of Health, one in ten New Yorkers experience mental health challenges that impact their ability to function.[1] In certain situations, the appointment of a Mental Hygiene Law (MHL) Article 81 guardian may be appropriate. An individual's functional limitations may be primarily caused by a mental illness, or their mental illness may be a contributing factor. In either scenario, prior to seeking the appointment of a MHL Article 81 guardian, an assessment of mental health services available, which may constitute a less restrictive alternative to a guardianship appointment, is warranted.[2] This assessment should review services already in place, additional services for which an individual in need is eligible, and a consideration of each service's purpose and limitations for the individual on a case-by-case basis.

Examples of mental health services available in the community include therapists, counselors, psychiatrists, Assisted Outpatient Treatment, Assertive Community Treatment (ACT), Forensic Assertive Community Treatment, Intensive Case Management, Partial Hospitalization Programs, residential treatment, and case management. These services may provide a comprehensive level of care to assist an individual who is challenged by a mental health issue and allow them to live safely in the community. Even with mental health services in place, there are occasions where a MHL Article 81 guardian may become necessary. In those instances, a guardian can coordinate with the mental health clinical providers to obtain and maintain the best possible outcome for the individual in need.

Assisted Outpatient Treatment or AOT

Assisted Outpatient Treatment (AOT), also known as Kendra's Law, is a court-mandated mental health treatment program codified by MHL § 9.60. Each county outside of New York City is responsible for maintaining an AOT program and jurisdiction is determined by the individual's place or residence. The New York City AOT is operated by the city Department of Health and Mental Hygiene.[3] A petition for AOT under the statute may be initiated by a number of individuals or entities including hospitals, parents, siblings, adult children, roommates, or the director of community services or his or her designee.[4] Statistically, in most circumstances, hospitals who provide acute inpatient psychiatric will serve as the petitioner.

When an individual who is subject to an AOT order is non-compliant with treatment and suffers a psychiatric decompensation, they may be brought to a hospital for a clinical evaluation and possible involuntary admission. This is commonly referred to as "an AOT removal."[5] The components of an AOT plan often include court-mandated psychiatric medications, follow-up with a psychiatrist, and can include various categories of services such as group therapy, individual therapy, vocational training, housing assistance, and substance abuse counseling, as well as periodic alcohol and drug testing.[6] AOT treatment plans must include either Assertive Community Treatment (ACT) teams or case management services (ICM: Intensive Case Manager) for coordination of the recipient's mental health care services.[7] An active AOT order may be an available resource for an AIP to address some of their functional limitations, specifically those relating to mental health treatment, and may help to prevent further multiple inpatient psychiatric hospitalizations, referred to by some as a revolving door.

A court order for AOT is typically limited in duration and an initial AOT court order is usually only effective for either six months or one year. As such, the availability of AOT as a long-term resource for an AIP is arguable.[8] Furthermore, to qualify for AOT, several statutory criteria must be met – a mental health diagnosis, standing alone, will not qualify an individual for AOT. Most significantly, the petitioner must prove that an individual's non-compliance with mental health treatment has resulted in two hospitalizations in the preceding 36 months, or resulted in an act of serious violence or threats or attempts at serious physical harm to themselves or others within the preceding 48 months of the application to the court.[9] The availability of AOT as an alternate resource to guardianship is thus further constrained by the statutory eligibility requirements and a high level of evidentiary proof. Moreover, "as the coercive force of the [AOT] order lies solely in the compulsion generally felt by law-abiding citizens to comply with court directives,"[10] AOT might be considered an insufficient resource for an individual who is unwilling to abide by the court's order.

Assertive Community Treatment

The New York State Office of Mental Health regulates the ACT program, which "offers treatment, rehabilitation, and support services, using a person-centered, recovery-based ap-

proach, to individuals that have been diagnosed with serious mental illness (SMI)."[11] For an individual in the community, an ACT team can provide a variety of hands-on services including at home visits, assistance with medication adherence, counseling and support services, vocational training, and other daily activity support such as assistance with grocery shopping or accompanying an individual to the pharmacy to assist with obtaining medications. If an individual assigned to an ACT team is admitted to a mental health facility, the ACT team will participate in discharge planning "to ensure an optimal transition" when the individual is discharged back home to the community[12]

The process of being assigned to an ACT team begins with a referral or application to the Single Point of Access, known as (SPOA). SPOA processes referrals and matches an individual to an ACT team.[13] The referrals are typically made by hospitals, though family members and others in the community may apply. The assignment of an ACT team is based upon the individual's county of residence and enrollment availability. In practice, there can be a waiting period for the assignment of ACT services due to the high volume of individuals in need of these services. For example, according to data maintained by the Office of Mental Health, as of Sept. 11, 2024, there were 6,826 individuals enrolled across New York's 122 ACT teams.[14] Despite the addition of 14 new ACT teams since October of 2022, statewide there was an 86% enrollment capacity, and many programs are at or above maximum capacity[15]

The limitations of ACT team availability and the enrollment criteria may limit the ACT team as an alternative resource to a MHL Article 81 guardianship. Another potential limitation to ACT services is that participation and cooperation by the subject individual is volitional and the individual has the right to refuse to engage with their ACT team. That being said, statistically individuals who receive ACT services over a three-year period generally experience increased medication adherence and decreased psychiatric hospitalizations, and experience increases in enrollment in educational courses and employment, and decreases in homelessness over the same period.[16]

Forensic Assertive Community Treatment

When an individual with a mental illness is involved with the criminal justice system, a Forensic Assertive Community Treatment (FACT) team can be assigned to provide similar services described above for ACT teams. The FACT team can work with an individual to prevent further criminal behavior, monitor the individual's risk for relapse, prevent further incarceration or hospitalization, and serve as diversion to jail or prison time.[17] To that end, the FACT team will develop a treatment plan for each individual served including annual screens for risks of violence and the completion of a violence risk assessment to address dynamic risk factors, defined as "characteristics of individuals and their environments that are related to the likelihood of recidivism after discharge."[18]

The FACT team should have a heightened level of understanding of the interplay between the criminal justice system and clinical needs of the individuals they serve. To strengthen these services, FACT team staffing must include a clinician, a criminal justice specialist, a criminal justice liaison, a housing specialist, and a peer specialist.[19]

Partial Hospitalization Program or PHP

Another form of a heightened level of mental health care in the community is a Partial Hospitalization Program (PHP). PHP is a structured program of outpatient psychiatric services as an alternative to inpatient psychiatric care. A PHP provides intensive day treatment where an individual receives individual and group therapy services for a set number of hours per day, multiple days a week, for a prolonged duration. Enrollment in a PHP can last for weeks or months. Through PHP an individual receives therapeutic services and skills training to transition back into or to remain safely the community, with the daily meetings there is oversight into their mental health treatment compliance and clinical presentation.

Residential Treatment and Mental Health Case Management

Where public services are either insufficient or not available, and the individual has means, residential treatment or private mental health case managers should be considered and may constitute an alternative available resource to the use of MHL Article 81 guardianship or may be an appropriate resource to augment the guardian's services.[20]

Residential treatment programs provide therapeutic programming across the country for voluntary placement. While a residential treatment program is a less restrictive setting than traditional inpatient psychiatric care, individuals enrolled are provided with clinical supervision, therapeutic services, medication management, and trained staffing available around-the-clock to assist their needs. Ideally, an individual who agrees to enroll and participate in a residential treatment program will learn and develop the skills necessary to sustain an independent living arrangement in the community once they have graduated from the program.

Private mental health case managers can assist an individual to remain safe at home in the community. Mental health case management services are provided by individuals trained and experienced in the mental health field. These case managers meet frequently with individuals to build relationships of trust, support, and understanding. Mental health case managers will explore benefits and programs available to an individual in need, and the mental health case manager will coordinate the delivery of services through state and local agencies or private organizations. This includes an assessment of the individual's current ability and needs, the appropriateness of the current housing and alternative housing options available, and services currently in place. Additionally, mental health case managers can advocate for services and provide hands on assistance to an individual by accompanying the individual to medical appointments to ensure attendance, assisting the individual with errands and grocery shopping to ensure their basic needs are met, and importantly, by monitoring the individual's overall well-being. In this latter regard, a mental health case manager provides an invaluable service by enabling a guardian or family to take immediate action to respond to an individual's mental health and functioning decline in the community.

Article 81 Guardianship in Conjunction With Mental Health Services

Where a guardianship is appropriate, a MHL Article 81 guardian for an individual suffering from a SMI should be aware of the foregoing services and consider establishing such services for the individual in need. If mental health support services are in place, the guardian should be in touch with the providers to coordinate services and assist the subject individual. This is particularly important as mental health treatment is a distinct area of health care where a MHL Article 81 guardian's powers are restricted. An Article 81 guardian has the authority to consent to routine and major medical treatment, but psychiatric treatment is excluded from these categories of healthcare treatment.[21] Particular attention should be paid to how and when an individual may be treated with psychotropic medications over their objection. The authority to involuntarily medicate an individual is governed by the decision of the Court of Appeals in *Rivers v. Katz*.[22]

In essence, a guardian may not consent to the administration of psychotropic medication to their ward. That is not to say that an Article 81 guardian is powerless to assist a mentally ill Incapacitated Person in obtaining much needed medications. A guardian could assist by scheduling doctor and therapy appointments, by ensuring services discussed herein are in place, coordinating those services, and by encouraging the individual to engage in treatment and to accept same. For example, to encourage acceptance of mental health treatment, a guardian of an individual whose symptoms result in overspending may step in to stop the financial bleeding and create a budget in connection with the individual's acceptance of mental health services. Likewise, where an individual is facing an eviction, the guardian can coordinate with the mental health community service team to secure appropriate housing.

The appointment of a guardian may only be needed for a limited duration to address a specific issue such as housing, finances, or medical care which other potentially available resources are unable to address, or depending on the severity and longevity of an individual's mental health symptoms, a guardianship with broader powers and for an indefinite duration may be warranted. In every instance, the goal of seeking guardianship for an individual with a mental illness should be to help return an individual to a stable and functional lifestyle.

Conclusion

When an individual in the community is in need of mental health services, the use of AOT, ACT, FACT, PHP, residential placement, or mental health case management, as appropriate, may be sufficient and may constitute a less restrictive alternative to guardianship. Where these services are either not available or are insufficient to meet an individual's needs, a MHL Article 81 guardian may be appropriate to work in conjunction with the clinical providers. By utilizing and coordinating the mental health services available with a track record of success, individuals with mental health diagnoses can be equipped with the services and support needed to live independently in the community.

Sarah A. Chussler is a partner at Abrams Fensterman, LLP, where she handles Mental Hygiene Law Article 81 guardianship proceedings and Mental Hygiene Law Article 9 mental health proceedings. She also assists clients with the preparation of health care proxies and powers of attorneys. Ms. Chussler was designated as a "Rising Star" in New York Elder Law by "Super Lawyers" in 2019, 2020, and 2021, and has been selected as a "Best Lawyers Ones to Watch" for elder law and for health care law since 2021. She is a member of the NYSBA Elder Law and Special Needs Section, Guardianship and Elder Abuse committees, serves as vice co-chair of the Mental Health Law Committee, and is a member of the Health Law Section.

Carolyn Reinach Wolf is an executive partner in the law firm of Abrams Fensterman, LLP and director of the firm's mental health law practice. Supported by a team of expert clinicians, she specializes in navigating the complex landscape of legal issues utilizing her mental health toolkit including but not limited to, hospital admissions, mental hygiene warrants, case management, referrals to mental health out-patient services, Assisted Outpatient Treatment applications, and guardianship. She also represents institutions, mental health, healthcare, higher education and related professionals. Ms. Wolf is a regular contributor to Psychology Today, was profiled by The New York Times in a 2013 story entitled, "A Guide in the Darkness," which ran on the front page of the Sunday edition metro section, and she teaches law and psychiatry as an adjunct professor of law at Hofstra University School of Law. She is a member of the Elder Law and Special Needs Section's Guardianship Committee.

Endnotes

1. New York Department of Health, Priority Area: Mental Health/ Substance Abuse – Mental Health, published April 2022, found at https://www.health.ny.gov/prevention/prevention_agenda/mental_health_and_substance_abuse/mental_health.htm#data.
2. Mental Hyg. L. § 81.02(a).
3. Mental Hyg. L. § 9.60(b).
4. Mental Hyg. L. § 9.60(e).
5. Mental Hyg. L. § 9.60(n).
6. Mental Hyg. L. § 9.60(i).
7. *Id.*
8. Mental Hyg. L. § 9.60(j)(2).
9. Mental Hyg. L. § 9.60(c).
10. *In re K.L.*, 1 N.Y.3d 362, 369-70 (2004).
11. New York State Office of Mental Health, Assertive Community Treatment (ACT), found at https://omh.ny.gov/omhweb/act/.
12. Memorandum of the Office of Mental Health found at https://omh.ny.gov/omhweb/act/inpatient_setting_continuity_of_care_expectations_for_act_individuals.pdf.
13. New York State Office of Mental Health, Assertive Community Treatment (ACT), found at https://omh.ny.gov/omhweb/act/.
14. New York State Office of Mental Health, Tableau, Assertive Community Treatment (ACT), Location and Information for New York State ACT Teams, published September 11, 2024, found at https://omh.ny.gov/omhweb/tableau/act.html.
15. New York State Office of Mental Health, Tableau, Assertive Community Treatment (ACT), Location and Information for New York State ACT Teams, published Oct. 12, 2022, found at https://omh.ny.gov/omhweb/act/.
16. New York State Office of Mental Health, Assertive Community Treatment (ACT), Prevalence of Outcomes at Admission and Discharge for Individuals Discharged from ACT: Snapshot of New York State, published Sept. 11, 2024, available at https://omh.ny.gov/omhweb/tableau/act.html.
17. U.S. Department of Health & Human Services, Substance Abuse and Mental Health Services Administration, Forensic Assertive Community Treatment (FACT), found at https://store.samhsa.gov/sites/default/files/d7/priv/pep19-fact-br.pdf.
18. New York State Office of Mental Health, Forensic Assertive Community Treatment (FACT) Program Guidelines Addendum, found at https://omh.ny.gov/omhweb/act/forensic-act-program-addendum.Kristine Garcia-Elliot.pdf.
19. *Id.*
20. *In re Bonnie H.*, 53 Misc.3d 1218(A), 48 N.Y.S.3d 264 (Sup. Ct. Dutchess Cty, 2016).
21. *In re Rhodanna C.B.*, 36 A.D. 106, 823 N.Y.S.2d 497 (2d Dep't, 2006).
22. *Rivers v. Katz*, 67 N.Y.2d 485, 504 N.Y.S.2d 74 (1986).

Overview of the Justice Center

By Charlie Pensabene

The Protection of People with Special Needs Act[1] (PPSNA) stablished the Justice Center for the Protection of People With Special Needs as an executive agency responsible for protecting the safety and well-being of the approximately one million adults and children who, due to physical or cognitive disabilities, or the need for services or placement, are receiving care from certain facilities or provider agencies that are licensed, operated, or certified by six state agencies.

These agencies include:

- Office for People with Developmental Disabilities (OPWDD)
- Office of Mental Health (OMH)
- Office of Addiction Services and Supports (OASAS)
- Office of Children and Family Services (OCFS) (state-operated programs/facilities and certain residential programs)
- Department of Health (DOH) (summer camps and adult homes that meet certain criteria)
- State Education Department (SED) (certified residential schools and programs)

To achieve its mission, the Justice Center standardized the state's systems for incident reporting,[2] investigations,[3] disciplinary processes for state employees,[4] corrective and preventive actions,[5] and pre-employment background checks.[6]

The agency, which became operational on June 30, 2013, serves as the state's central repository[7] for all reports of allegations of abuse, neglect and significant incidents involving vulnerable individuals.[8] The Justice Center maintains a case management system that tracks all reported cases of abuse and neglect to resolution, ensures all allegations are fully investigated,[9] and makes final legal determinations on all allegations.[10]

The Justice Center works with county district attorneys to prosecute allegations that are criminal in nature.[11] The agency also provides guidance, information, and support to victims and their families throughout the investigative process.[12]

Through its oversight and monitoring activities, the Justice Center identifies durable corrective and preventive actions to address the conditions that cause or contribute to the occurrence of abuse and neglect.[13] In consultation with its Advisory Council, the Justice Center also works collaboratively with a broad array of stakeholders to promote prevention strategies and to develop guidance and tools to help provider agencies better protect people receiving services.[14]

More than one-third of the agency's 500-strong staff have a loved one with special needs. Also, staff have collectively accumulated decades of experience working with special populations at state and private provider agencies. These perspectives enhance the collective commitment of the Justice Center's workforce to the mission of the agency: protecting the health, safety, and dignity of all people with special needs and disabilities through advocacy of their civil rights, prevention of mistreatment, and investigation of allegations of abuse and neglect so that appropriate actions are taken and the dedicated people who provide services to these populations are sufficiently supported.

The Justice Center makes protecting the rights of the dedicated workers who provide direct care to vulnerable individuals a top priority. The agency also recognizes its responsibility in supporting victims in an investigation.

In addition to investigating and adjudicating allegations of abuse and neglect for vulnerable populations, a core element of the Justice Center's mission is to develop tools to help prevent mistreatment of individuals with special needs. There are several ways the agency works toward the prevention of abuse and neglect. Examples include pre-employment checks to ensure the safety of both individuals receiving services and the workforce, data analysis of trends, issuance of guidance on how to stop practices that might endanger vulnerable populations, and quality improvement reviews. The Justice Center's actions encourage provider agencies, stakeholders, and staff members to take a proactive approach to establishing safe, supportive, and abuse-free environments.

Case Management Process

Intake of Abuse/Neglect Allegations

Anyone, including a parent or guardian, advocate, or individual receiving services can make a report to the Vulnerable Persons Central Registry (VPCR) when they have knowledge or have reason to believe that a person receiving services has been abused, neglected, or mistreated.[15] Some "mandated reporters" are required by law to report to the VPCR, including provider agency staff and human services professionals who,

by nature of their job, must report allegations of abuse or neglect.[16]

Call center representatives are available 24 hours a day, seven days a week, 365 days a year.[17] The number to contact the toll-free hotline to make a report is 855-373-2122. A web-based reporting form and a mobile application are also available.

The call center representative will first assess whether an emergency responder offering immediate assistance is necessary or if the person receiving services is in danger. Where the person requires immediate assistance, the caller is instructed to hang up and call 9-1-1. The reporter should then call back once the emergency is over to file the report. If no emergency exists, the call center representative will collect information from the reporter and assign an incident number.[18]

Classification: Once the allegation is assigned an incident number, it is then classified into one of the following categories: abuse, neglect, death, significant incident, or non-NYJC.[19]

Criminal vs. Administrative Cases: Once a case is classified as abuse or neglect, that case is next characterized as either criminal or administrative.[20]

Criminal Cases: The Justice Center's special prosecutor works with county district attorneys to bring criminal charges in cases that allege that a crime has occurred against an individual receiving services by an employee of a facility or provider agency.[21] The Justice Center notifies district attorneys of all allegations of abuse and neglect.

Administrative Cases: The first step in the administrative investigation of allegations of abuse and neglect is appropriate classification and assignment for investigation. The Justice Center investigates allegations in state-operated programs as well as the most serious allegations in non-state operated settings.[22] Less serious allegations of abuse and neglect in non-state operated settings are delegated to the state agency for investigation, and such agency may in turn delegate to the provider. The Justice Center reviews all investigations, regardless of which delegate investigative agency conducts them and makes all final determinations regarding whether a case will be substantiated or unsubstantiated. Significant incidents are referred to the appropriate state agency for investigation.

The investigation process proceeds with examination of the evidence and interviews of witnesses, victims, and subjects.[23] Witnesses and subjects of Justice Center investigations can have legal counsel or a union representative present when being interviewed unless an applicable collective bargaining agreement provides differently. Individuals receiving services who are the victim of or witness to abuse and neglect may have a personal representative or an advocate from the Justice Center's Individual and Family Services Unit accompany them during an interview.

Determinations: Administrative cases conclude by either being substantiated or unsubstantiated.[24] The Justice Center makes the final determination regardless of which agency completed the investigation. The standard of proof for a Justice Center administrative case is a preponderance of the evidence, so Justice Center staff must demonstrate that the allegation of abuse or neglect was more likely than not to have occurred.[25]

The Justice Center makes several parties aware of the findings of an investigation. The victim or their personal representative will be issued a "letter of determination" (LOD), making them aware of the outcome of the allegations. An LOD is also issued to the director of the facility or program, the SOA that licenses or certifies the facility or program, and the subject of the investigation.

Appeals: An appeals process, known as a "request for amendment," is available to subjects of substantiated reports to ensure due process. Subjects have 30 days to challenge Justice Center findings. Upon receipt of an appeal request, the Justice Center reviews the investigative file, the substantiated report, the request for amendment and any additional in-

formation provided by the subject. A determination is then made as to whether there is a preponderance of evidence to support the substantiation as well as proper category assignment.

If the substantiated finding is upheld, subjects can proceed to a hearing before an administrative law judge. The judge considers all the evidence presented by both the Justice Center and the subject or their legal representative and makes a recommended decision that is reviewed by the Justice Center's executive director.[26]

One of the three outcomes is then possible:[27]

- The Executive Director finds the Justice Center met its burden to prove the allegation and the correct category level was assigned. The substantiated finding remains against the subject.
- The Executive Director finds the Justice Center met its burden to prove the allegation, but a lesser category level was inappropriate. The substantiated finding remains with a new category level.
- The Executive Director finds the Justice Center did not meet its burden to prove the allegation. The report is unsubstantiated, and the record is sealed.

Discipline: Disciplinary or other employment actions resulting from a substantiated finding are at the discretion of the employing provider agency in accordance with established rules and collective bargaining agreements. However, Category 1 findings result in placement on the Staff Exclusion List (SEL).[28] Therefore, in most of the cases, the Justice Center is not involved in any decisions regarding the discipline of a subject. The notable exception occurs with state employees, where Justice Center attorneys work collaboratively with the state agencies to achieve appropriate disciplinary outcomes.

Mortality Reviews

Executive Law § 557 requires the deaths of all individuals receiving services from a residential facility or program licensed, certified, or operated by OPWDD, OMH, OASAS or OCFS to be reported to the Justice Center. In addition, the death of any individual who received services from the above facilities in the 30 days prior to their death must also be reported. Any time a death is reported to the Justice Center where there is an allegation of abuse or neglect, the Justice Center sends a separate notification to both the district attorney and the medical examiner.

Prevention

Criminal Background Checks: The Justice Center reviews and evaluates the criminal history of all prospective employees or volunteers applying for jobs at provider agencies under its jurisdiction and advises about the individual's suitability for employment.[29] This comprehensive review provides a safety net for individuals receiving services while at the same time mitigates risk for service providers and the direct care workforce.

Staff Exclusion List (SEL):

All subjects substantiated for Category One conduct, which include serious or repeated acts of abuse or neglect, as defined in SSL section 493(4)(a), are placed on the Staff Exclusion List (SEL). Placement on the SEL bars an individual from working in all settings under the Justice Center's jurisdiction forever.[30]

Provider agencies under the Justice Center's jurisdiction, as well as other providers identified in statute, are required to check the SEL before hiring someone who will have regular and substantial contact with an individual with special needs.[31]

Since 2014, there have been 320 instances where an SEL check has resulted in a match and a provider has been notified that the applicant was on, or pending placement on, the SEL. This means individuals who have been substantiated for serious acts of abuse and neglect were stopped from being hired into settings where they would have regular and substantial contact with vulnerable people again.

Additional Programs

Individual and Family Support Unit (IFSU)

The Justice Center provides guidance and support to victims of abuse or neglect, their families, personal representatives, and guardians throughout the course of an investigation.[32] Nearly 21,500 individuals and family members have contacted advocates for assistance since 2013. In 2023, IFSU provided advocacy and support to over 3,600 individuals and family members.

Advocates provide information about the reporting and investigative process, case status updates, and records access. In 2023, IFSU aided individuals and families regarding records access over 1,100 times. The Justice Center's IFSU advocates can also help with questions or concerns involving state agencies.

The Justice Center has an ombudsman responsible for advising and responding to questions and concerns raised by more than 200 individuals receiving services at two OPWDD Developmental Centers in New York State: Sunmount DDSO and Valley Ridge. The ombudsman helps address systemic trends by supporting self-advocacy initiatives through participation in over one thousand committee and treatment team meetings annually. Through direct collaboration with

individuals receiving services, Mental Hygiene Legal Services, DOH, and OPWDD, the ombudsman advocates for improved conditions overall.

Surrogate Decision-Making Committee (SDMC): The Justice Center hosts the Surrogate Decision-Making Committee (SDMC).[33] This program, governed by Mental Hygiene Law Article 80, is an alternative to the court system and is authorized to provide consent for non-emergency major medical treatment and end-of-life care decisions for people who qualify. SDMC consists of volunteer panels that make the decision, providing for quicker, more accessible, cost-free, and personalized decision on behalf of individuals receiving services.

Specific medical decisions include medical, surgical, dental, or diagnostic interventions or procedures which involve:[34]

The use of a general anesthetic

- Any significant invasion of bodily integrity requiring an incision or producing substantial pain, discomfort, debilitation, or having a significant recovery period
- Significant risk (e.g., colonoscopies, endoscopies, MRIs, CT scans with contrast)
- Chemotherapy
- Hospice
- Withdrawal or withholding of life sustaining treatment for persons with an intellectual or developmental disability
- Any other treatment or procedure for which informed consent is required by law
- The law excludes the following care from the purview of SDMC:

  -Routine diagnosis or treatment including the administration of routine medications

  -Dental care performed under a local anesthetic

  - Emergency medical treatment

  - Electroconvulsive therapy (ECT)

  - Withdrawal or discontinuation of life-sustaining medical treatment, except as provided in the Health Care Decisions Act for persons with an intellectual or developmental disability

  - Sterilization

  - Termination of pregnancy[35]

Who Is Eligible?[36]

Major Medical: Individuals believed to be incapable of providing informed consent, have no surrogate authorized to act on their behalf, and:

- Currently reside or have formerly resided in a residential program operated, licensed, approved, or funded by the Office for People with Developmental Disabilities (OPWDD), the Office of Mental Health (OMH), or the Office of Addiction Services and Supports (OASAS); or
- Currently receives or previously received individual support, case management, family care or day programs approved or funded by OPWDD.

End of life care decisions: SDMC also possesses granted jurisdiction to provide end of life care decisions for individuals with intellectual or developmental disabilities, including orders to not resuscitate, orders to not intubate, withholdings of artificial hydration and nutrition.[37]

What Determinations Must the SDMC Panels Make?[38]

Panels will consider three decisions:

- Determination of the individual's ability to consent to or refuse the proposed major medical treatment decision.
- Determination of whether there is an authorized surrogate who is willing and available to consent to or refuse the proposed major medical procedure on behalf of the individual.
- Determination of whether the proposed major medical treatment decision is in the best interest of the patient.

The panel makes these decisions in this order to protect the individual's rights. In all cases, the individual will appear before the panel or one of its members before a decision is made.

When a person is considered to be incapable of providing consent: If an individual is unable to assess the risks, benefits, and alternatives to a proposed medical treatment, including the risks of non-treatment, they are therefore unable to make an informed decision to consent or refuse such treatment.[39]

Who Serves on SDMC Panels?[40]

A panel is made up of volunteers appointed by the Justice Center who serve their home communities throughout New York State. A hearing panel must consist of at least three, and no more than four members.

The panels are made up of one member from each of the following categories:

- New York State licensed health care professional (e.g., physician, nurse, clinical social worker)
- New York State attorney
- Former patients or family members of individuals with mental disabilities
- Advocate for persons with mental disabilities (e.g., persons with recognized expertise or demonstrated interest in the care and treatment or individuals with behavioral health or developmental disabilities)

What Is an SDMC Hearing Like?

The SDMC hearing is a quasi-judicial hearing, with procedures that are more informal than a court/judicial trial.

A rewarding opportunity: Attorneys who are interested in pro bono opportunities involving the intersection of bioethical considerations and contributing to the medical care of vulnerable populations are welcome to apply to be volunteer panelists.

TRAID Program

The Technology-Related Assistance for Individuals with Disabilities (TRAID) Program provides access to assistive technology to any New Yorker with a disability through Regional TRAID Centers. These centers provide device loans and hands-on training to people with disabilities. The Justice Center administers TRAID through grants from the U.S. Department of Health and Human Services Administration for Community Living, the New York State Department of Health, and ACCES-VR to 12 Regional TRAID Centers. TRAID centers loan a variety of devices for use in different settings such as at home, school, or work.

Conclusion

This article aims to build familiarity of the Justice Center within the New York legal community, specifically for practitioners who work with vulnerable populations and individuals with disabilities. The Justice Center holds the unique role of being the only state agency in the United States tasked with responsibility for centralized oversight over a diverse array of vulnerable populations.

Charlie Pensabene is diretor of intergovernmental affairs at the Justice Center. Previously, he worked as the governmental relations manager for a large-scale renewable energy developer and as associate counsel at SUNY System Adminitration.

Endnotes

1. Chapter 501 of the Laws of 2012.
2. Executive Law § 553(1).
3. Executive Law § 553(3).
4. Executive Law § 553(1)(c).
5. Executive Law § 553(3).
6. Executive Law § 553(5).
7. Executive Law § 553(2).
8. Social Services Law § 488(1) defines vulnerable individuals to be "a person who, due to physical or cognitive disabilities, or the need for services or placement, is receiving services from a facility or provider agency."
9. Executive Law § 553(1)(a).
10. Social Services Law § 493.
11. Executive Law § 552(2).
12. Executive Law § 553(11).
13. Executive Law § 553(3).
14. Executive Law § 561(6).
15. Social Services Law § 492.
16. Social Services Law § 491.
17. Social Services Law § 492(2)(b).
18. Social Services Law § 492(5)(a).
19. These terms are defined in Social Services Law § 488.
20. Social Services Law § 492(3)(b).
21. Executive Law § 552(2).
22. Social Services Law § 492(3)(c)(i).
23. *Id.*
24. Social Services Law § 493(1).
25. Social Services Law § 493(3).
26. Social Services Law § 494.
27. Social Services Law §§ 493(5)(a), 495.
28. Social Services Law §§ 493(5)(a), 495.
29. Executive Law § 553(5), 562.
30. Social Services Law §§ 493(5)(a), 495.
31. Social Services Law § 424-a.
32. Executive Law § 553(11).
33. Executive Law § 553(15).
34. Mental Hygiene Law § 80.03(a).
35. Mental Hygiene Law § 80.03(a).
36. Mental Hygiene Law § 80.03(b).
37. Mental Hygiene Law § 80.07(2).
38. Mental Hygiene Law § 80.07(2).
39. Mental Hygiene Law § 80.07(2).
40. Mental Hygiene Law § 80.05(c).

Elder Law and Special Needs Section Fall Meeting Recap

By Michael Dezik

The Elder Law and Special Needs Section's Fall Meeting took place as a joint meeting with the Trusts and Estates Law Section at Canandaigua Lake on September 26 and 27. The meeting was set in beautiful Canandaigua Lake in Western New York at the Hotel Canandaigua where attendees were greeted with some beautiful Western New York gall weather. The program was a sold-out success with over 190 attendees across both sections. Moriah Adamo and Mike Dezik represented the Elder Law and Special Needs Section as program co-chairs with Lisa Powers and Ross Katz co-chairing for the Trusts and Estates Law Section.

This year's joint program was titled "Meet at the Crossroads" to represent the relative approaches that each section takes to their practice of law. Often we can find ourselves in an elder law or trusts and estate bunker and it was the intent in planning the meeting to provide different vantage points on issues that we so frequently encounter in each of our sides of the fence.

The location of the program was nestled in the Finger Lakes in Western New York. The view from the hotel was worth the trip for even the most hesitant Long Islander. While it rained during the Executive Committee meeting, the weather ultimately cooperated and opened for some great sunset views across the Canandaigua Lake.

On Wednesday September 25, the Executive Committee met to conduct its regular business and discuss the issues that the committee will focus on for the coming year. Finances continue to be a concern but planning to make sure that we enjoy the level of programs and support are underway and in good hands.

Wednesday night brought a reception for those arriving early or for the Executive Committee meeting. With the rain holding off, the outdoor location was a perfect spot for catching up among colleagues and friends. Thank you to Webster Bank for sponsoring a wonderful evening.

Following breakfast and coffee provided by Arthur B. Levine Co., Surety and Bonds, the regular meeting got underway on September 26, providing a full day program including "Financial Abuse Education," presented by Tracey Siebert-Konopko and Monica R. O'Brien, "A View from the Banking Industry," presented by Jennifer N. Weidner, and "Planning for Psychiatric Issues," presented by Douglas K. Stern and Sarah A. Chussler.

After a lunch looking over the lake, the afternoon program featured "Navigating Guardianship in New York Issues Relating to Employing 17-A and Article 81," presented by Hon. Gail Prudenti and Laura M. Brancato, and a two-part presentation, "Planning for the Family Camp," presented by Elisa Shevlin Rizzo and Sal DiCostanzo. Finally, the Thursday program ended with a presentation on the ethical implications of utilizing artificial intelligence in our practice, presented by Frank T. Santoro.

After the meeting, we once again adjourned to the picturesque outdoor venue for cocktails, dinner and comradery. Once again, the sun cooperated and many enjoyed pictures among a near-perfect sun-soaked lake backdrop. Thank you to Empire Valuation Consultants and Harris Beach for sponsoring a wonderful evening.

On Friday, September 27, (the last day of the program) we received some very eye-opening information in "The State of Transfer on Death Deeds," presented by Moriah Adamo and Lisa Powers, followed by "Insights on SCPA 1404 Examination," presented by Ross Katz, Hon. John M. Czygier, Jr. and Hon. Frederick G. Reed. After a brief break, a Surrogate Court panel discussion, "Mediation in Surrogate Court Proceedings," presented by Hon. Christopher S. Ciacco, Hon. Hilary Gingold and Hon. Mary Leib Smith provided some much-appreciated guidance from the bench.

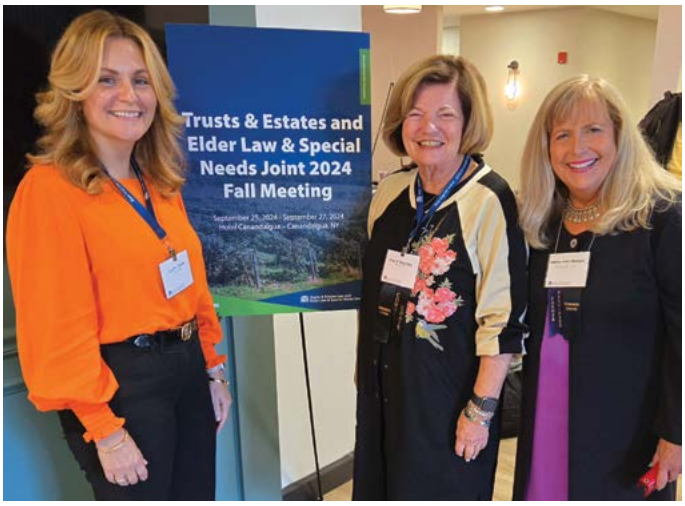
The program chairs wish to thank all of the speakers who lent their time to this program as well as the NYSBA staff members who worked tirelessly throughout the three days of events. If you were not able to attend (again, it was sold out!), please take a moment to review the materials.

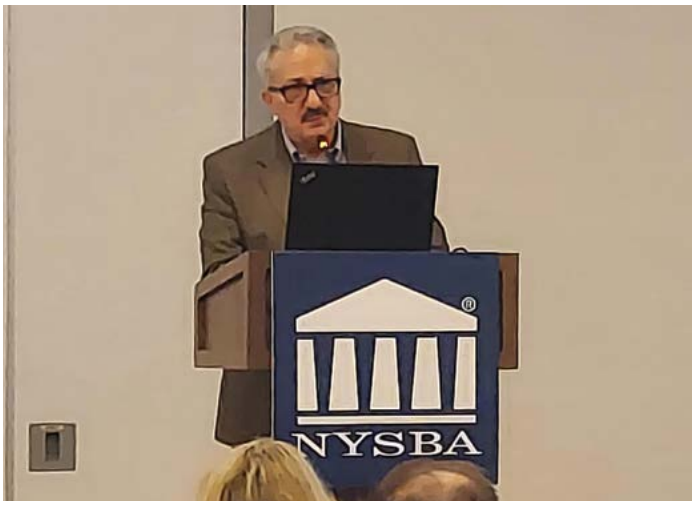
Special thanks to all of our sponsors and exhibitors who provided their support (often year after year) for this joint meeting. Other program sponsors included NYSARC Trust Services, MPI Business Valuation & Advisory, and Farrell Fritz Attorneys. Exhibitors included American Cancer Society, Anchor Health, Advocacy Trust, Community Care Home Health Services, Doyle Auctioneers and Appraisers, Lackner Group, Life Trusts, Midland Trust Company, New York Financials Organizers, Senior Living Consultants, Silver Solutions, Smokeball and Lifetime Care Foundation. Hightower RDM Financial and Contour Mortgage sponsored the wi-fi, which allowed everyone attending access to the course materials and occasionally a client. Without their support, this program could not exist. We appreciate them going above and beyond time after time.

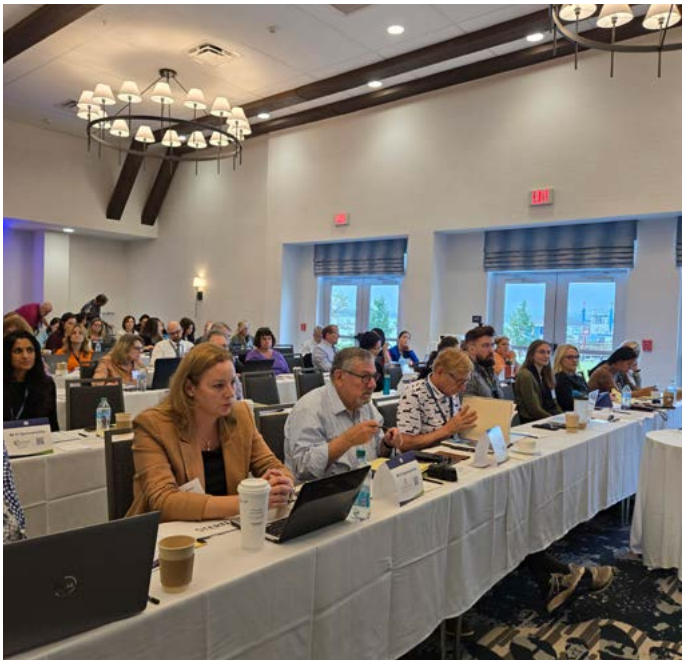
The next Elder Law and Special Needs Section meeting will take place in New York City during the Annual Meeting on January 15, 2025.

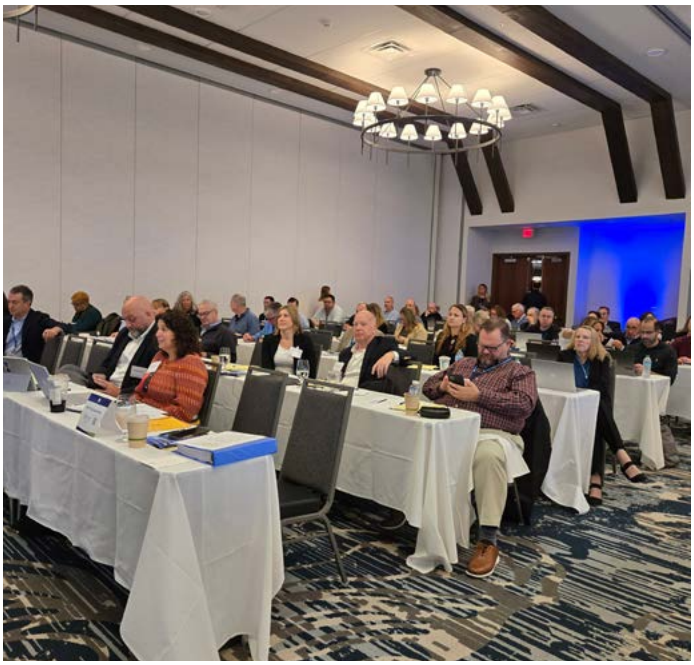
Michael Dezik is co-chair of the Fall Meeting.

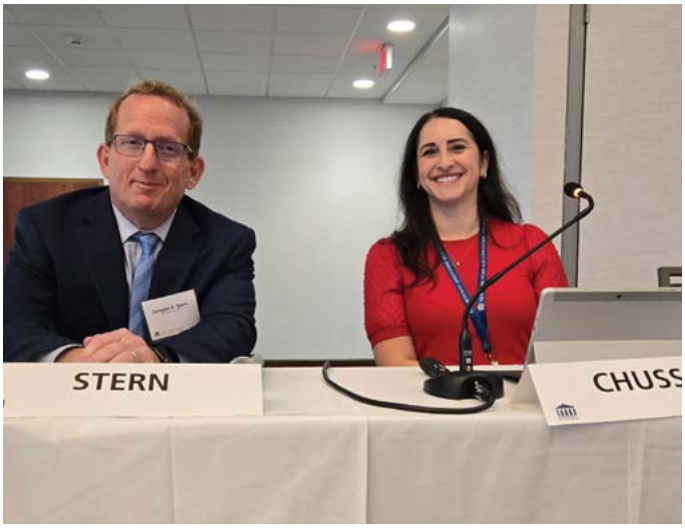
Fall Meeting

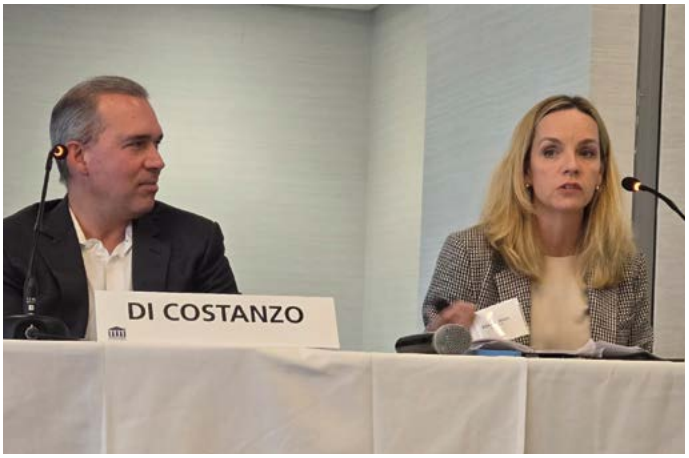


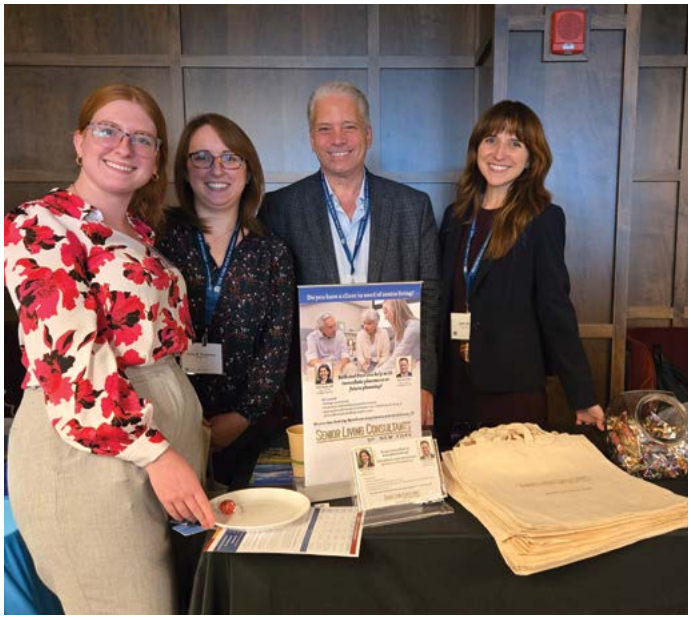


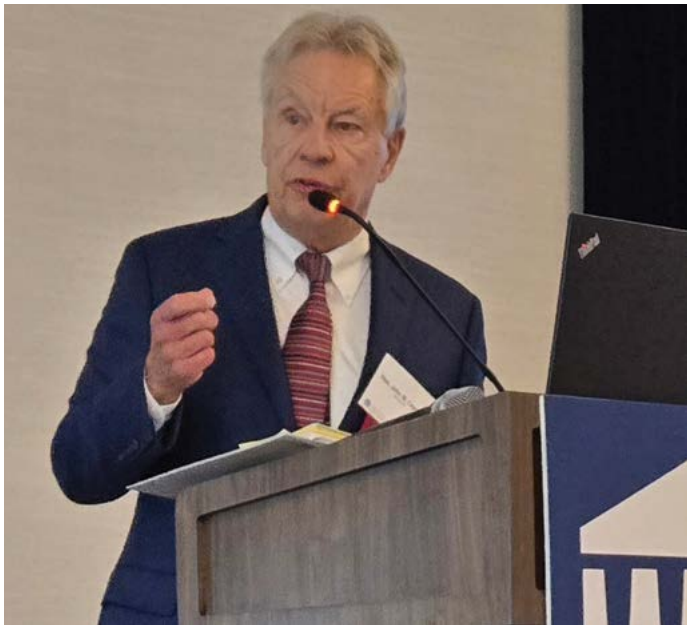


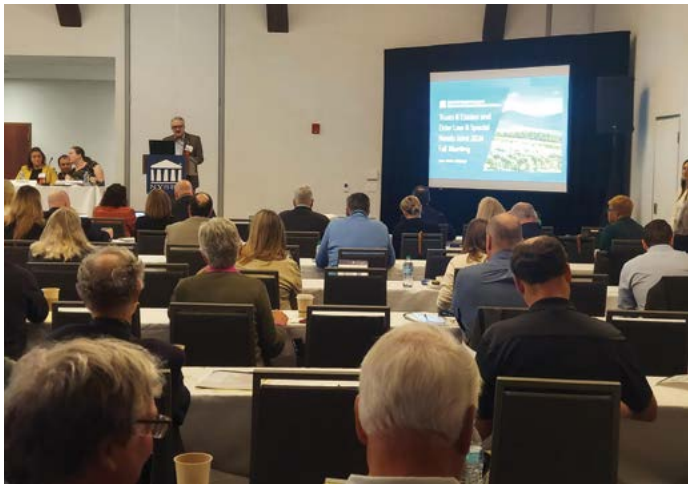


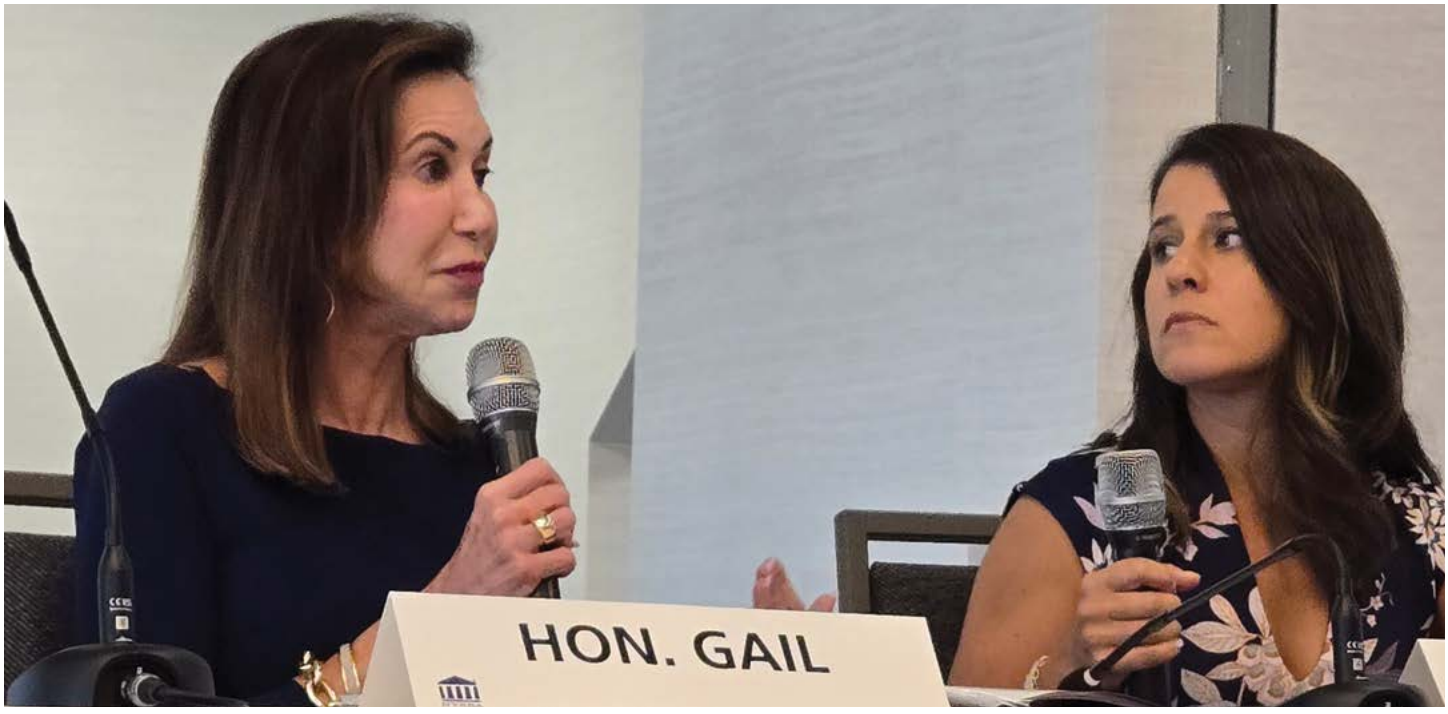



DI COSTANZO








HON. GAIL

CONTOUR MORTGAGE

HOME EQUITY CONVERSION

Mortgage Solutions

FOR HOMES IN IRREVOCABLE TRUSTS

TRADITIONAL MORTGAGE LOAN PROGRAMS FOR REAL PROPERTY IN A REVOCABLE TRUST

Call us today!

888-954-7463

Scan Here

FRANK MELIA, CMPS
DIVISION MANAGER
SENIOR LOAN OFFICER
NMLS ID#62591
516.879.7262
fmelia@contourmtg.com

MICHAEL BOCELLI, CMPS
DIVISION MANAGER
SENIOR LOAN OFFICER
NMLS ID#38416
516.980.1125
mbocelli@contourmtg.com

Domestic Violence Service Providers Need Help Addressing Older Adult Concerns

By Malya Kurzweil Levin

Rose, 74, was sexually assaulted and left on the ground for several days by her intimate partner and informal caregiver. Rose needed help advocating with law enforcement, securing benefits to ensure safe and accessible housing, intensive therapeutic support and new power of attorney and health care proxy documents, all while receiving medical care and rehabilitation.

Reuben, 82, lived with his adult daughter, who struggled with unmanaged mental illness. Reuben would often lock himself in his bedroom or walk the neighborhood for hours, avoiding his daughter's angry tirades and physical attacks. After cardiac bypass surgery, Reuben was fearful of returning home to heal, knowing that being in the apartment with his daughter while his mobility was so compromised would put him in danger. Rose and Reuben are experiencing what elder law attorneys would likely call elder abuse, but what is often also classified as domestic violence.

The prevalence of elder abuse is generally illustrated through studies that focus on it as an independent issue, such as the World Health Organization's research concluding that 1 in 6 older adults worldwide experience some form of abuse, or, in the U.S., the federal government's Elder Justice Roadmap, which states that 1 in 10 older adults in the U.S. experience abuse annually.

Elder abuse can also be measured as a type of domestic violence. For instance, in 2022, over 19,000 domestic incident reports taken by New York City police officers were for people over the age of 60 experiencing harm, according to data gathered by the city. The true numbers are likely much higher, as according to the New York State Elder Abuse Prevalence Study, only 1 in 24 people who experience elder abuse seek assistance from professionals.

Elder abuse may often be addressed as a form of domestic violence by front line service providers like law enforcement, hospital and other medical professionals and crime victim services. Domestic violence organizations often have more robust and well-established partnerships with these groups, and well understood protocols for how to refer to and access domestic violence services. Therefore, when referring older adults for follow-up services after an elder abuse related incident or disclosure, first responders may often connect older

adults with domestic violence professionals, rather than elder law or elder justice specific services.

However, domestic violence service providers, whether they are attorneys, clinicians or social workers, are generally more experienced working with younger clients, and may not be fluent in the unique services, resources and considerations required for an effective elder abuse response. The legal perspective is illustrative: elder abuse seldom confines itself to one area of law. An older adult who has experienced elder abuse will likely face an interconnected array of legal issues which will need to be addressed in tandem. These issues can be as varied as advocacy with law enforcement, orders of protection in family court, divorce or foreclosure proceedings in Supreme Court, advocacy in Article 81 guardianship proceedings, landlord/tenant proceedings in housing court as well as variety of transactional issues including advance directives, estate planning and tort claims. This list is non-exhaustive, and each case is a unique amalgam of needs and problems. Attorneys who work with survivors of domestic violence may not be able to evaluate and identify all these needs and issues.

To effectively serve this unique population, attorneys or other domestic violence service providers also often need to address or at least understand emergent medical issues, establishing and ideally maximizing a client's physical and cognitive baseline. Simultaneously, trained clinical providers must work alongside attorneys to help address trauma symptoms that might otherwise prove prohibitive to an effective attorney-client relationship, and can be particularly difficult to identify and can present differently as compared to younger people. Domestic violence service providers may not have the network required to access these connections.

The world of benefits and entitlements unique to older adults is, as elder law attorneys perhaps know better than anyone, both vast and worlds away from the landscape for younger people. Professionals need a sophisticated understanding of the qualifications and requirements for a number of interlocking programs, and how an older adult's financial and professional histories, and current medical needs, align with the programs and tools available. Ideally, they will also understand the relevance of benefits specific to different categories crime victims. Domestic violence service providers may struggle to integrate their familiarity with crime and domestic violence survivor specific benefits with an older adult's needs and circumstances.

To address this multifaceted and under recognized gap in service for older adults, the Weinberg Center for Elder Justice by River-Spring Living and the New York City Mayor's Office To End Domestic and Gender Based Violence (NYC ENDGBV) are launching a service provider consultation helpline (SPEACH) to connect domestic violence advocates with elder abuse experts to support their work with older adult clients. The helpline is currently being piloted at the Manhattan Family Justice Center, which provides walk-in multidisciplinary services to survivors of domestic violence. The goal is to ultimately expand the helpline to Family Justice Centers in all five boroughs.

At the time of this writing, it is currently October, Domestic Violence Awareness Month, and a great time for elder law attorneys to consider connecting and partnering with domestic violence service providers. Our knowledge is a critical piece of the puzzle in advocating for older adult survivors of abuse that is too often missing, to deleterious results. Likewise, these domestic violence service professionals, as well as other cross-disciplinary connections like medical providers, may also have resources and connections that will benefit us and our clients. For guidance on how to connect with the domestic violence response community, please reach out to me at malya.levin@theweinbergcenter.org.

Malya Kurzweil Levin is the assistant director and general counsel at the Weinberg Center for Elder Justice by River-Spring Living. She is also a vice chair of the Client and Consumer Issues Committee of the Elder Law and Special Needs Section at NYSBA.

Welcome to the World of Special Education Law: Why It's Important to Elder Law and Special Needs Planners

I am sure many of you reading this column are saying, "I have no interest at all in practicing special education law and what if any benefit does knowledge about this practice area have as I plan for my clients?"

I started my career as a special needs planner focusing on long-term planning for families of loved ones with disabilities. As I met with clients struggling to ensure that their children with special needs were taken care of, it became apparent there were also issues related to special education that affected the planning process and remained unattended to.

For example, the Individuals with Disabilities Education Act (IDEA) and the New York education laws require that school districts develop a transition plan for students with special education needs no later than age 16 (15 in New York (8 N.Y.C.R.R. § 200.4(d)(2)(ix)) or earlier if deemed appropriate by the school district. The statute requires that local educational agencies (LEA) develop transition goals and a set of activities that assist students in planning life after high school and in essence provide families with strategies on the processes and requirements (*See* 200.4(d)(2)(ix)(a)(5), 34 CFR 300.43).

Did you know that school districts must invite the Office of Persons With Developmental Disabilities (OPWDD) to participate in a Committee of Special Education (CSE) or Individualized Education Plan (IEP) meeting for the student by the individual's 18th birthday when the individual is in a residential school OR if the student is not in a residential school but "is likely to require adult residential services," and the school district must send a report to OPWDD to determine if the student is OPWDD-eligible if OPWDD requests it (Education Law 4402(1)(b)(5)) (see also 14 N.Y.C.R.R. § 630.2; 14 N.Y.C.R.R. § 630.4). This is crucial to planners in addressing future needs for individuals with disabilities and developing a comprehensive plan to ensure a good quality of life for loved ones with special needs.

Did you also know that some school districts want to use special needs trusts (SNTs) to fund special education settlements? It is important that the special education attorneys understand the complexities of both drafting and administering the SNTs but also it is imperative for planners to understand at least the fundamentals of these settlements to assist in planning for the future. Many of the families and special education attorneys are unaware of how to administer the SNTs once they are funded. There are many areas where special needs and elder law planners can work together to address the needs of mutual clients and develop comprehensive plans adding value to the cases and providing enormous benefits to the clients.

While some school districts certainly strive to fulfill their responsibilities under the law, after more than 20 years of practice, I realize many parents and caregivers are unaware of the school district's responsibilities and most important how to plan long term for individuals with disabilities. The crossover between special education law and planning is vast. Grandparents concerned with providing for a grandchild with special needs bring up the fact that the student is home without an appropriate school program while the parents are unaware of the special education laws.

The point is that planners who understand the fundamentals of special education law are able to offer guidance to families on planning while at the very least making a referral to a practitioner who may work with the family to address the failure of the school district to provide the student with the mandated services and resources, such as guidance on post-emancipation decision-making options, eligibility for government benefits such as Supplemental Security Income and Office of Persons With Developmental Disabilities. I believe that practitioners using this "holistic" model will add incredible value to cases by just asking the question, "Do you have a child with special needs and are they getting services through the school district?" This one question may also impact a child's entire life if there are special educational needs that are being unmet.

I hope in the coming months to share additional ideas on how special education attorneys and planners may work together to address the needs of loved ones with disabilities. Also, there is an extreme shortage of special education attorneys available to handle cases and I can only hope that perhaps it will spark some interest. I look forward to comments and suggestions for future columns.

Adrienne Arkontaky is the founder and owner of the Arkontaky Law Group. Adrienne has been advocating for persons with disabilities for over 30 years and practicing law for 20 years, focusing on her practice on representing individuals with disabilities in special education matters, assisting families plan for the future and securing eligibility for government benefits such as OPWDD and Medicaid eligibility. As the mother of adult daughters with significant disabilities, Adrienne understands both personally and professionally the challenges families face when caring for a loved one with disabilities.

Strategies for Estate Planners in Light of *Connelly v. United States*: Addressing Life Insurance and Stock Redemptions in Estate Tax Planning

By Nancy Burner

Introduction

In the landmark case of *Connelly v. United States*, the Supreme Court addressed critical issues concerning the estate tax implications of life insurance proceeds used in the redemption of stock in closely held corporations.[1] This article examines the Court's decision, its ramifications for estate planning, and proposes strategic approaches for estate planners in light of *Connelly v. United States*.

Case Background and Supreme Court's Decision

Connelly v. United States arose from a dispute over the federal estate tax treatment of life insurance proceeds utilized by closely held corporations to fulfill contractual redemption obligations between a corporation and a deceased shareholder.[2] The executor of the estate, Thomas Connelly, argued based on the "willing-buyer/willing-seller" standard as outlined in *United States v. Cartwright,* 411 U.S. 546 (1973), that such insurance proceeds paid to the corporation upon the death of the shareholder should not inflate the corporation's estate tax valuation. He argued that no reasonable buyer would consider life insurance proceeds received by the corporation that were then used to buy out the deceased shareholder's share to be part of the company's value because of their designated use for stock redemption.[3]

Contrarily, the Supreme Court held that life insurance proceeds payable to a corporation, even if designated for stock redemption, are part of the corporation's value for estate tax purposes, and therefore increase the value of the corporation's shares. The proceeds, as assets of the corporation, cannot be disregarded merely because they are earmarked for stock redemption. [4]

Legal Analysis

Judicial Reasoning and Implications

The stock of a closely held corporation is included in the gross estate of a deceased shareholder at its fair market value at the date of the decedent's death, in accordance with IRC 26 U.S.C. § § 2031(a) and 2033. The fair market value is determined by the net amount a willing purchaser – individual or corporation – would offer, assuming both parties have reasonable knowledge of relevant facts.[6]

This interpretation poses a significant challenge as the ruling indicates that life insurance proceeds designated for stock redemption are classified as corporate assets, thereby increasing the corporation's value for estate tax purposes.[7] The decision introduces inconsistences in estate tax valuations across various stock redemption scenarios, thereby complicating the estate planning process.[8]

Strategic Recommendations for Estate Planners

Cross-Purchase Agreements: In a Cross-Purchase Agreement, each shareholder purchases a life insurance policy on the other. Upon the death of one shareholder, the surviving shareholder(s) use the insurance proceeds to buy the deceased shareholder's interest directly from their estate.[9] This structure ensures that the proceeds bypass the corporation's assets and are instead used for the inter-shareholder transfer of ownership, minimizing the estate's exposure to tax liability.[10] However, this approach may be less practical in businesses with multiple shareholders due to the complexity and administrative burden of maintaining multiple policies. In such cases, an Entity-Purchase Agreement (or stock redemption agreement) might be preferable.

Stock Redemption Agreements: Under this structure, the corporation itself purchases life insurance policies on each shareholder and uses the proceeds to redeem the shares when a shareholder dies. While this arrangement simplifies the buyout process for businesses with multiple shareholders, it comes with a significant caveat in light of the *Connelly* decision: the life insurance proceeds now used in these agreements may be included in the corporation's value for estate tax purposes.[11] Estate planners must carefully weigh the administrative simplicity of Entity-Purchase Agreements against the potential for increased estate tax exposure. This strategy requires careful planning, particularly for estates nearing or exceeding the estate tax threshold, which is expected to decrease substantially in the coming years.[12]

Trust-Owned Life Insurance (TOLI): A strategic estate planning vehicle often employed is the establishment of an Irrevocable Life Insurance Trust (ILIT). Under this arrangement, the life insurance policy is held and owned by the trust rather than by the shareholder or the corporation.[13] Upon the insured's death, the insurance proceeds are paid directly to the trust, effectively separating the funds from the corporation's assets.[14] By ensuring that the proceeds do not flow through the corporation's balance sheets, this method prevents any inflation of the corporation's fair market value for estate tax purposes.[15] The ILIT further ensures that the life insurance proceeds are excluded from the decedent's gross estate under I.R.C. § 2042, provided that the decedent did not retain incidents of ownership in the policy.[16] This structure thereby minimizes estate tax exposure while simultaneously preserving liquidity to satisfy the estate's obligations or to benefit heirs.[17]

Lifetime Gifting and Bequeathments: Transferring shares during the shareholder's lifetime can be an effective tool for reducing the value of the decedent's taxable estate. This method removes appreciating assets from the estate, thereby lowering the potential estate tax burden. However, such transfers trigger potential gift tax implications under I.R.C. § § 2501 and 2503, as substantial lifetime transfers may count against the unified credit and require the filing of a federal gift tax return. A key consideration is the strategic timing of these transfers. Executing them too early may reduce the shareholder's control and influence over the business, while waiting too long could forfeit the opportunity to optimize tax savings. Additionally, the application of I.R.C. § 2035 requires caution, as any transfers made within three years of death may be pulled back into the gross estate for tax purposes. This emphasizes the need for aligning lifetime gifts with broader business and succession planning goals, ensuring the transfers support long-term objectives while complying with applicable tax laws.

Stock Redemption Funded by Non-Insurance Assets: In some cases, instead of relying on life insurance policies to fund stock redemptions, shareholders and corporations may opt to use non-insurance assets, such as cash reserves or other liquid assets, to ensure sufficient liquidity for a buyout. This approach can avoid the potential estate tax implications that arise when life insurance proceeds are included in the corporation's value for tax purposes.[18]

Review of Existing Agreements: When reviewing buy-sell agreements, estate planners must ensure that these contracts comply with I.R.C. § 2703(b) and the accompanying Treasury Regulation § 20.2031-2(h). These provisions are particularly significant in estate planning for closely held corporations, as they directly affect how buy-sell agreements are structured to avoid unjustly increasing estate tax liabilities.

I.R.C. § 2703(b) Overview

I.R.C. § 2703(a) provides that the value of property is generally determined without regard to any option, agreement, or restriction that limits the use or transfer of the property at less than its fair market value.[19] However, subsection (b) provides exceptions to this rule. To qualify for the exception, an option, agreement, right, or restriction must meet the following three requirements:

Be a Bona Fide Business Arrangement: The agreement must represent a legitimate business arrangement. This means that the agreement is operationally necessary and reflects a genuine business purpose rather than serving as a mere device to avoid estate taxes.

No Transfer for Less Than Full Consideration: The agreement must not serve as a mechanism to transfer the property to family members for less than full and adequate consideration. This ensures that the agreement isn't used to undervalue the decedent's interests for the benefit of heirs.

Arm's Length Comparability: The terms of the agreement must be comparable to those negotiated in arm's length transactions between unrelated parties. This ensures that the agreement reflects fair market conditions and is not designed to artificially lower the property's value for estate tax purposes.

Treasury Regulation § 20.2031-2(h)

Treasury Regulation § 20.2031-2(h) further addresses the valuation of closely held corporate stock for estate tax purposes in the context of buy-sell agreements. According to the regulation, the price stipulated by a buy-sell agreement is a strong indicator of the stock's value if the following conditions are met: the agreement is binding both during life and after death; it is not a device to transfer property for less than full and adequate consideration; and it requires that shares be sold at fair market value, determined by reasonable methods at the time of the agreement's execution.[20]

Application in Estate Planning

To ensure compliance with I.R.C. § 2703(b) and Treasury Regulation § 20.2031-2(h), estate planners must thoroughly review and potentially restructure existing buy-sell agreements.[21] This review involves evaluating whether the agreement serves legitimate business purposes without facilitating undervalued transfers, especially in family-owned businesses where IRS scrutiny is heightened.[22]

First, planners should assess whether the terms of the agreement reflect genuine economic and business motivations consistent with industry standards. This demonstrates that the agreement is driven by legitimate business needs, not merely by tax avoidance strategies. Second, planners must examine the execution of the agreement to confirm that it op-

erates as intended, rather than serving as a facade for transferring wealth under the guise of a business transaction.[23] Ensuring that the agreement is consistently followed and not merely a nominal document will help withstand IRS challenges. While not a deciding factor, it is important to note that the parties in *Connelly* did not abide by the agreement which required an outside appraiser. Respect and follow your own agreements. Finally, estate planners must meticulously document the business rationale behind any restrictions on share sales or redemptions. This documentation should clearly establish that such restrictions are designed to preserve business continuity and are not solely intended to reduce the estate's tax liability.[24] Proper documentation is crucial to demonstrating that the agreement meets the statutory and regulatory requirements.

Conclusion

The recent decision in *Connelly v. United States* reshapes the landscape for estate planning involving closely held corporations and life insurance-funded buyouts. In light of this ruling, estate planners must take a meticulous approach to structuring buy-sell agreements and managing life insurance proceeds to minimize potential estate tax liabilities. By ensuring compliance with I.R.C. § 2703(b) and Treasury Regulation § 20.2031-2(h), planners can help safeguard these agreements against IRS challenges while preserving the continuity and financial stability of closely held corporations.

Nancy Burner is founder and partner of Burner Prudenti Law, successor firm to Burner Law Group, a women-owned trust and estates and elder law firm. She's a founding member of Mediation Solutions of NY in Suffolk County and holds the designation of Certified Elder Law Attorney from the National Elder Law Foundation. She has been named one of the Top 50 Women Attorneys in New York and frequently lectures on legislative changes, financial implications, and governmentl benefits affecting the elderly and special needs populations.

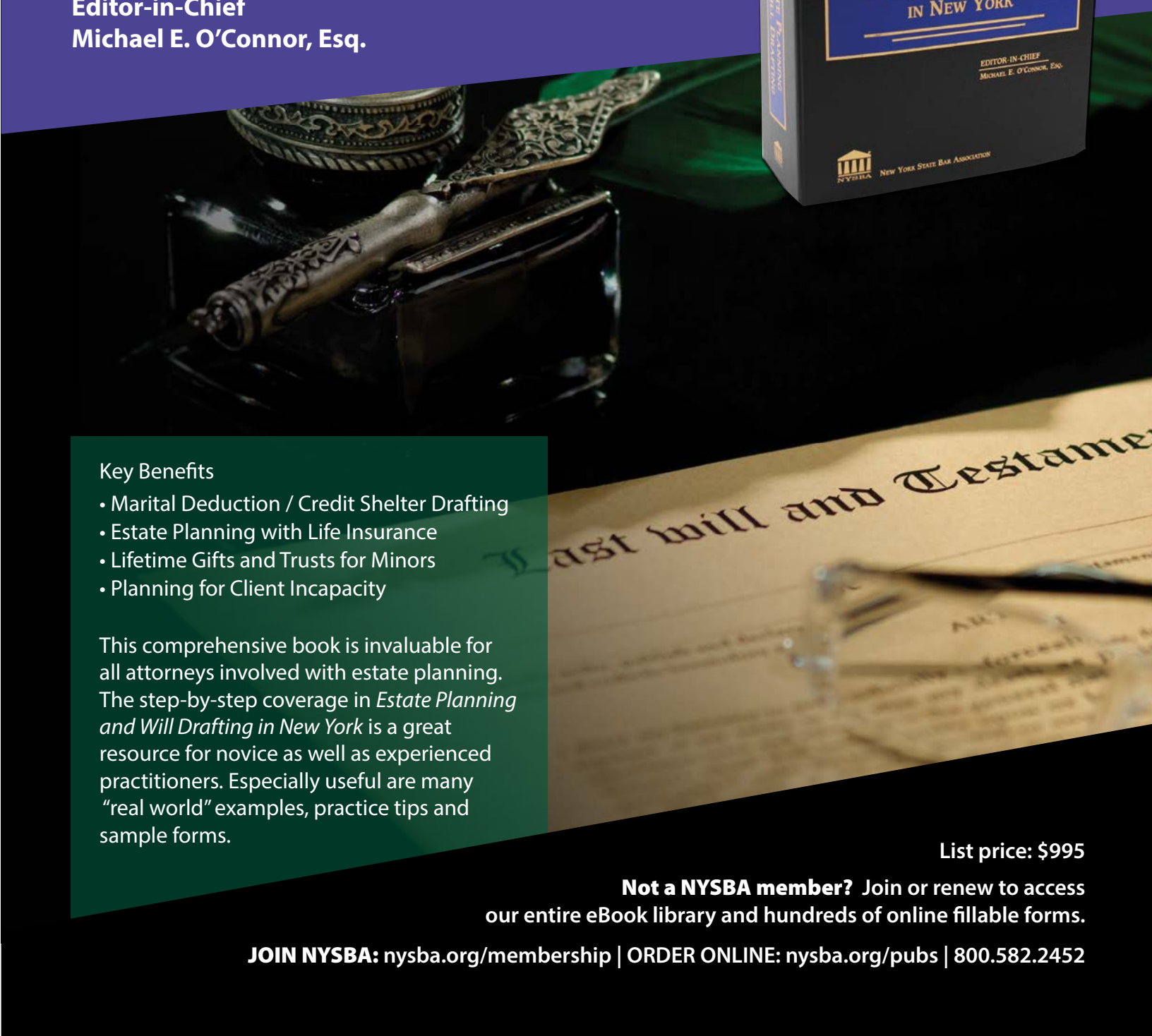
Endnotes

1. *Connelly v. United States*, No. 23-146, 602 U.S. ___ (2024).
2. *Id.*
3. Brief for Petitioner at 17, *Connelly v. United States*, No. 23-146, 602 U.S. ___ (Jan. 24, 2024) (citing *United States v. Cartwright*, 411 U.S. 546 (1973)).
4. *Connelly v. United States*, No. 23-146, 602 U.S. ___, slip op. at 6-8 (2024).
5. I.R.C. §§ 2031(a), 2033.
6. Treas. Reg, § 20.2031-1(b) (2021).
7. *Connelly v. United States*, 602 U.S. ___, slip op. at 6-7 (2024).
8. *Id.* at 7.
9. Michael Kitces, *Business Buy-Sell Agreements in the Wake of* Connelly v. IRS, Kitces.com (2024).
10. *Buy-Sell Agreements and Corporate Insurance*, Journal of Financial Planning (2024).
11. *Connelly v. IRS*, No. 23-146, 602 U.S. ___, slip op. at 5-9 (2024).
12. Michael Kitces, *Business Buy-Sell Agreements in the Wake of* Connelly v. IRS, Kitces.com (2024).
13. Brief for Petitioner at 3, *Connelly v. United States*, No. 23-146 Opinion of the Court at 4-5, 602 U.S. ___ (Jan. 2024).
14. *Connelly v. United States*, No. 23-146, 602 U.S. ___, slip op. at 4-5 (2024).
15. Amicus Brief of Adam Chodorow at 5, *Connelly v. United States*, No. 23-146 (2024).
16. 26 U.S.C. § 2042
17. *See Estate of Blount v. Comm'r*, 428 F.3d 1338, 1343-44 (11th Cir. 2005); I.R.C. § 2042.
18. Michael Kitces, *Business Buy-Sell Agreements in the Wake of* Connelly v. IRS (2024).
19. 26 U.S.C. § 2703.
20. Treas. Reg. § 20.2031-2(h) (as amended in 2003).
21. I.R.C. § 2703(b).
22. Treas. Reg. § 20.2031-2(h)
23. *See* I.R.C. § 2703(b).
24. I.R.C. § 2703(b); Treas. Reg. § 20.2031-2(h).

NYSBA PUBLICATIONS

Estate Planning and Will Drafting in New York

Editor-in-Chief
Michael E. O'Connor, Esq.



Key Benefits

- Marital Deduction / Credit Shelter Drafting
- Estate Planning with Life Insurance
- Lifetime Gifts and Trusts for Minors
- Planning for Client Incapacity

This comprehensive book is invaluable for all attorneys involved with estate planning. The step-by-step coverage in *Estate Planning and Will Drafting in New York* is a great resource for novice as well as experienced practitioners. Especially useful are many "real world" examples, practice tips and sample forms.

List price: $995

Not a NYSBA member? Join or renew to access our entire eBook library and hundreds of online fillable forms.

JOIN NYSBA: nysba.org/membership | ORDER ONLINE: nysba.org/pubs | 800.582.2452

State of Estates

by Paul S. Forster

After an extremely hot and humid summer, for some (but not all) the chilly winds of winter are a relief. To while away the time (or to provide kindling) herewith are some interesting cases involving the necessity of a guardian *ad litem* to perform personally the services for which fees are sought; the failure to list a claim as an asset in a bankruptcy, foreclosing its assertion in separate unrelated litigation; health care facilities' COVID immunity requiring satisfaction of statutory conditions to be effective; the statute of limitations for damage to embryos involved in in vitro fertilization getting the longer negligence standard, as opposed to the shorter medmal standard; substitution for a deceased defendant not denied after a long delay because opposing movant no longer authorized to act; Apple being directed to provide fiduciary access to a decedent's account; annulment of a marriage ab initio, and voiding of a prenuptial agreement *ab initio*, after death, affirmed; a fiduciary of a deceased fiduciary being required to account for the acts and doings of the deceased fiduciary not just for the property that has come into her hands; a property owner tracing title back to a conceded forged deed nonetheless getting clear title by virtue of adverse possession; an unsuccessful attempt by the trustee of a first-party supplemental needs trust to amend the trust after the death of the grantor-beneficiary; the court, *sua sponte* adjourning oral argument on a summary judgment motion by virtue of its view that the of counsel attorney was unprepared to represent the defendant's case; and a court having to extrapolate from other information on a document when a material fact is required to be redacted.

Guardian *Ad Litem* Must Perform Personally the Services for Which Fees Are Sought

In a probate proceeding, the GAL's application for fees was opposed by the petitioner/nominated executor. The petitioner argued that the GAL was inexperienced and billed for many hours which did not reflect the actual time required to complete the task. He noted that much of his communications with the GAL's office were with two of GAL's associates. The GAL responded, *inter alia*, that one of his associates had handled the primary bulk of the work before her departure, and that the other associate reviewed the file and ascertained details from notes in continuing to work on the case. The court found that there was no question that GAL's associates performed the bulk of the work in the assignment. Consequently, the court held that since it had appointed the GAL personally to protect his ward's interests, not his associates, and in any event the associates were not eligible to serve as guardians *ad litem* in New York County, the court only would award compensation for substantive legal services rendered by the GAL, personally. *Matter of Wolf*, N.Y.L.J. 7/26/24, p.17, c.1 (Surr. Ct., New York Co., Surr. Gingold).

Failure To List Claims as Assets in a Bankruptcy May Foreclose Their assertion in Separate Unrelated Litigation

In a personal injury case, defendants sought to amend their answer to assert the affirmative defense of judicial estoppel. The plaintiff had filed for bankruptcy prior to the events that formed the basis for the personal injury claim. The defendants alleged that plaintiff failed to disclose the personal injury action to the bankruptcy court or to the trustee in the still pending bankruptcy proceedings. The Supreme Court denied the motions to amend the answer, and the defendants appealed. The Appellate Division reversed. The court stated that the integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets, and that by failing to list causes of action on bankruptcy schedules of assets, the debtor represents that it has no such claims. The court held that the doctrine of judicial estoppel may bar a party from pursuing claims that were not listed in a previously instituted but still pending bankruptcy proceeding. *Cussick v. R.L. Baxter*, 228 A.D.3d 614 (2d Dep't 2024). Note: this doctrine applies as well to claims against estates by beneficiaries, devisees, distributees, and creditors, and may form the basis for dismissal of such claims in the proper case.]

Health Care Facilities' COVID Immunity Requires Satisfaction of Statutory Conditions To Be Effective

In a wrongful death case, defendants were granted a motion to dismiss the complaint on the grounds that they were immune from liability under the Emergency or Disaster Treatment Protection Act (Public Health Law former art 30-D, §§ 3080-3082, which was repealed in 2021). The act provided, with certain exceptions, that a health care facility "shall have immunity from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services" as long as three requirements were met: the services were arranged for or provided pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law, the act or omission was impacted by decisions or activities that were in response to or as a result of the COVID-19 outbreak and in support of the state's directives, and the services were arranged or provided in good faith. In op-

position, the plaintiff argued, among other things, that the repeal of the act in April 2021 was retroactive and, therefore, the defendant was not immune from liability. The Appellate Division rejected the plaintiff's argument that the repeal of the act was retroactive. However, it held that while the act "immunized healthcare facilities from civil liability for certain acts or omissions in the treatment of patients for COVID-19 during the period of the COVID-19 emergency declaration" the defendant's submissions had not established that the three requirements for immunity were satisfied. Consequently, it found that the Supreme Court should have denied the defendant's motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint. *Damon v. Clove Lakes Healthcare*, 228 A.D.3d 618 (2d Dep't 2024)

Statute of Limitations for Damage to Embryos Involved in In Vitro Fertilization May Get Longer Negligence Standard, as Opposed to Shorter Medmal Standard

This action involved failed in vitro fertilization. The suit was brought two years and ten months after the embryos were cryo-preserved. The Supreme Court granted defendants' motion to dismiss on statute of limitations grounds, using the medmal 2 1/2-year statute. The Appellate Division reversed in part. While affirming dismissal of the medmal claims on those grounds, the court held that the maintenance of the storage tanks containing the frozen embryos did not comprise acts of "medical science or art requiring special skills not ordinarily possessed by lay persons." The court added that where an act is more administrative than medical in nature, conduct is measured by ordinary negligence standards. The court ruled that while the cryopreservation storage tanks were checked at least twice weekly for leaks and the levels of liquid nitrogen, such acts were more administrative than medical in nature, and that thus, once the embryos entered cryopreservation, defendants merely owed a duty to plaintiffs to maintain the successful operability of the storage tanks. The court concluded that the alleged failure in fulfilling this different duty sounded in negligence, rather than medical malpractice, and thus a three-year negligence SL applied. *Bledsoe v. Center for Human Reproduction*, 228 A.D.3d 96 (1st Dep't, 2024).

Substitution for a Deceased Defendant Not Denied After a Long Delay Because Opposing Movant No Longer Authorized To Act

In a personal injury action, the defendant died. Plaintiff moved to substitute in the decedent's attorneys, but this was denied, with the court instructing the plaintiff to have an administrator appointed in the Surrogate's Court. The plaintiff failed to do so, and after a period of time (18 months) the decedent's former attorneys moved to dismiss for plaintiff's failure to obtain a substitution. Plaintiff cross moved to substitute the decedent's daughter. The Supreme Court granted the motion by defendant's former attorneys and denied the cross motion. The plaintiff appealed. The Appellate Division reversed. It held that since the motion pursuant to CPLR 1021 to dismiss the complaint was made by the former attorneys for the decedent purportedly on behalf of the decedent, who lacked the authority to act, the Supreme Court lacked jurisdiction to consider the motion. The AD added that the Supreme Court correctly denied the plaintiff's cross-motion but should have done so with leave to renew upon service on persons interested in the decedent's estate. *Fazilov v. Acosta*, 228 A.D.3d 910 (2d Dep't 2024).

Annulment of a Marriage *Ab Initio*, and the Voiding of a Prenuptial Agreement *Ab Initio*, After Death, Affirmed

In a guardianship, the Supreme Court annulled a marriage *ab initio* and voided a prenuptial agreement *ab initio*. The wrinkle was that the judgment was entered after the IP's death. Nonetheless, the Appellate Division affirmed. On the merits, the Appellate Division ruled that "[w]here there is medical evidence of mental illness or defect, the burden shifts to the opposing party to prove by clear and convincing evidence that the person entering the agreements in question possessed the requisite mental capacity." *Matter of V.L.*, 228 A.D.3d 549 (1st Dep't 2024).

Fiduciary of Deceased Fiduciary Can Be Required To Account for the Acts and Doings of the Deceased Fiduciary, Not Just for the Property That Has Come Into Her Hands

In a contested compulsory accounting proceeding, a beneficiary of the deceased estate sought to compel the fiduciary of the then-deceased fiduciary of the estate to account for the deceased fiduciary's activities as executor of the subject estate. The fiduciary of the deceased fiduciary opposed and asserted that she had been wholly uninvolved in the administration of decedent's estate, and that she had provided all documentation she possessed with respect to decedent's estate to the beneficiary. The beneficiary moved for summary judgment and the fiduciary of the deceased fiduciary cross-moved seeking to dismiss the beneficiary's petition. The surrogate held that the court may compel the fiduciary of a deceased fiduciary to account in the same manner as it can with respect to the deceased fiduciary, and that the fiduciary of a deceased fiduciary must account not only for estate property which has come into her hands but also for the acts and doings of the deceased fiduciary. The court added, however, that the fiduciary of a deceased fiduciary only is responsible to turn over estate property in her hands. *Matter of Hock*, 2024 N.Y. Slip Op. 50765 (Sur. Ct., Erie Co., Sur. Mosey, 6/17/24).

Apple Directed To Provide Fiduciary Access to a Decedent's Account

In an uncontested turnover proceeding, the administrator of the decedent's estate sought an order directing Apple (i) to recover decedent's personal data from decedent's Apple accounts and to provide such data to petitioner; (ii) to permit access to petitioner to any data contained within decedent's Apple ID, including decedent's Apple account; and (iii) to obtain and to release the personal data and records of decedent's Apple accounts to petitioner for his unfettered access and use. Petitioner stated in the petition that he wished to access decedent's personal information, held under her Apple user ID, which was stored on her iPhone and MacBook, including business records, design work, photographs, writings, and saved files. Apple did not file a responsive pleading and did not appear on the return date of the citation. Consequently, based upon the uncontested allegations in the petition, the court directed Apple to assist in the recovery of decedent's personal digital data, which might include third-party personally identifiable information/data from decedent's account. In particular, the court directed Apple to provide to petitioner (1) access to digital assets other than the content of electronic communications, including but not limited to, photographs, notes, and music; and (2) a catalogue of electronic communications sent or received by decedent's user ID. *Matter of Healy (Beaupere)*, N.Y.L.J. 8/22/24, p.17, c.1. (Sur. Ct., New York Co., Sur. Gingold).

Property Owner Tracing Title Back to a Conceded Forged Deed Nonetheless Gets Clear Title by Virtue of Adverse Possession

In an action to quiet title brought by heirs of a deceased former title holder, the issue was the legal validity and effect of a number of title and possession transfers to bona fide purchasers that occurred after a deed was forged in 1994. The court concluded that given the clarity of the law that such a forged deed is void ab initio, and that it is a document without legal capacity to have any effect on ownership rights or the right to encumber a property, the forged deed did not convey title to the subsequent buyers, nor did it convey the right to encumber the property with a mortgage. However, the court ruled that the defendant had demonstrated by clear and convincing evidence that it had acquired title to the property by adverse possession as set forth in statutory and common law and granted its motion to dismiss the complaint and for an order quieting title in its favor. *Montague v. Yezol, Inc.*, 2024 N.Y. Slip Op., 24067 (Sup. Ct., Bronx Co., Justice Hummel, 3/5/24).

Attempt by the Trustee of a First-Party Supplemental Needs Trust To Amend the Trust After the Death of the Grantor-Beneficiary Unsuccessful

The decedent was an incapacitated person for whom a first-party SNT had been established in 1997. After the IP's death in 2020, the trustee (the IP's mother) sought to set aside $50,000 for a "memorial fund" prior to turning over the remaining funds to DSS. DSS objected. The application was denied. The court stated that at the late juncture it no longer had any discretion or authority to amend the terms of the settled trust. *Matter of J.T.*, 2024 N.Y. Slip Op. 50846 (Sup. Ct., Kings Co., Justice Freier, 7/5/24).

Court, *Sua Sponte,* Adjourning Oral Argument on a Summary Judgment Motion by Virtue of Its View That the 'Of Counsel' Attorney Was Unprepared To Represent the Defendants' Case

In a contract case, plaintiff moved for summary judgment. According to the court, at oral argument, the attorney appearing for the defendants in an 'of counsel' capacity was flustered from the outset and began presenting arguments at variance with the defendants' submitted papers in opposition. After a brief colloquy, the court became quite concerned, and being of the view that the attorney was, at the very basic minimum, simply not prepared to represent the defendants, *sua sponte,* discontinued oral argument and adjourned the motion. The court thereupon directed that the attorney of record appear in person to represent the clients in future proceedings. *Matter of Adjournment of a Motion for Summary Judgment*, 2024 N.Y. Slip Op. 24039 (Sup. Ct., Kings Co., Justice Maslow, 2/14/24).

Court Has To Extrapolate From Other Information on a Document

The plaintiff sought a trial preference for the reason of being over 70 years of age. However, the copy of the birth certificate submitted in support of the application showed the plaintiff to have been born in a year 70 years prior, but it had the month and date redacted so the court could not ascertain if the plaintiff had reached 70 years of age as of the date of the motion. Nonetheless, the court was able to ascertain from other dates on the birth certificate that the plaintiff had satisfied the statute, in that the birth certificate showed that it had been filed more than 70 years earlier. *Derevensky v. World Market of N.Y.,* 2024 N.Y. Slip Op. 50932 (Sup. Ct., Kings Co., Justice Maslow, 7/19/24). (Note: this problem may arise where kinship is involved, if a date which is required to be redacted is a material fact.)

Paul S. Forster is a sole practitioner in Tuckahoe, New York. He is the co-chair of the Estate and Trust Administration Committee of the Trusts and Estates Law Section.

Member Spotlight: Kristine Garcia-Elliott

By Katherine Carpenter

Q: Where are you from?

A: Bronx, New York – born and raised.

Q: Where is your favorite place you have traveled to?

A: Puerto Rico – stunning beaches, delicious food, great music and culture.

Q: What led you to work in the field of elder law and special needs planning?

A: Initially my love for my grandparents. My first job as a teenager was at an adult day center playing cards and bingo. It was then that I began advocating for older adults when they would bring me notices to read or translate. Years later when Judge Charles J. Thomas suggested I join the Part 36 list, it was a no brainer.

Q: Did you have a turning point in your career?

A: The transition from nonprofit work to private practice. I don't think it was one moment but rather a series of events that have led to my best year yet.

Q: What is your favorite part about your job?

A: Being able to provide holistic representation to address multi-faceted issues. Whether it is a Medicaid approval, securing 24-hour split shift care or protecting the AIP in a guardianship proceeding. Giving clients the good news at the end of it all makes it all worth it.

Q: Tell me about an accomplishment that you consider to be the most significant in your career thus far.

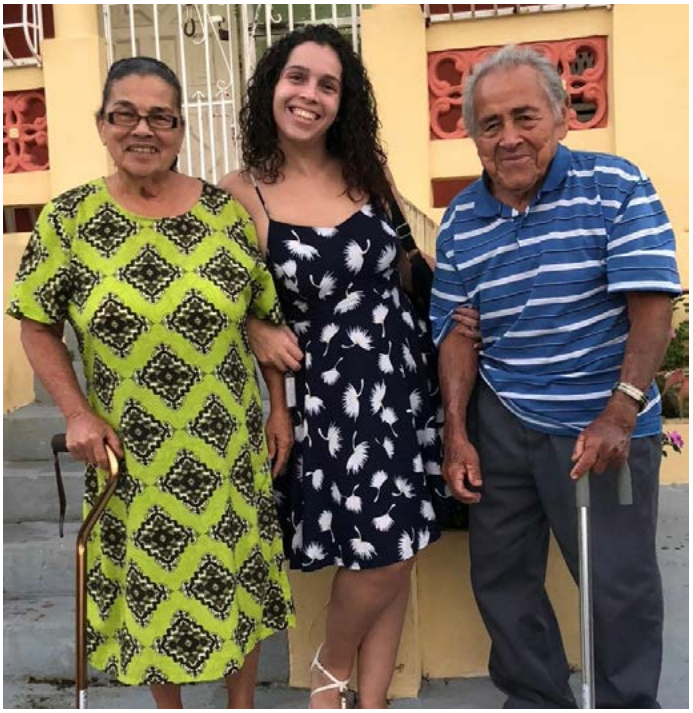
A: My time with the Evelyn Frank Legal Resources Program at NYLAG [New York Legal Assistance Group], under the direction of Valerie Bogart and Rebecca Wallach. It was an invaluable experience; I was part of an amazing team, who taught me how to be a better advocate.

Q: Where do you see yourself in five years?

A: Growing, learning, expanding on what I do now – still in elder law.

Q: What did you want to be when you were younger?

A: An attorney! At my law school graduation party my mother gave me a piece of art work I drew as a kid with a word bubble "I became a lawyer today." Truly a full circle moment.



Q: Tell me a little about your family.

A: I am married with two boys: 17 and 13. They are my inspiration.

Q: Are there hobbies you look forward to outside of work?

A: I should have more hobbies. I love cooking, live music and spending quality time with my family.

Q: Do you have any advice to give?

A: Be true to yourself. If you know what you want, go for it! If you have kids – save those pieces of artwork!

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

A: I speak Spanish, and I am happy to assist with language barriers and translating on behalf of clients.

Kristine Garcia-Elliott is an associate attorney at Vishnick McGovern Milizio, LLP, concentrating on elder law; trusts and estates; special needs planning, Medicaid planning and applications; and guardianship proceedings. She is a Diversity Committee co-chair of the Elder Law and Special Needs Section. She received a J.D. from the CUNY School of Law. She is admitted to practice law in New York. She can be contacted by email at: kgarciaelliott@vmmlegal.com.

Member Spotlight: Jeffrey Shapiro

By Katherine Carpenter

Q: Where are you from?

A: Coram, Long Island.

Q: Where is your favorite place you have traveled to?

A: Dominican Republic! I get to visit family.

Q: What led you to work in the field of elder law and special needs planning?

A: Both of my parents were special ed teachers, so I grew up with a real appreciation for this type of work. When in law school I was the Sandman Fellow, which is a fellowship in the area of aging, disability, and health law. The fellowship opened my eyes to how important our advocacy work is, and it reinforced my commitment to the field. I am grateful to have had Professor Rose Mary Bailly as a mentor during my fellowship.

Q: Did you have a turning point in your career?

A: Not really one single point, every day is a new challenge and opportunity to learn.

Q: What is your favorite part about your job?

A: Building strong client relationships and being there to advocate for them is what I value most.

Q: Tell me about an accomplishment that you consider to be the most significant in your career thus far.

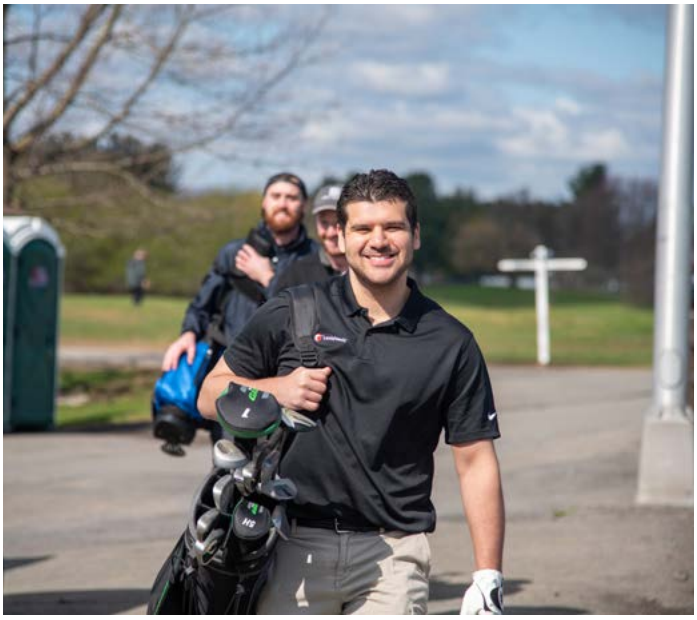
A: A significant accomplishment I'm proud of is committing to providing representation in Article 81 guardianship proceedings to meet a growing need. I believe my experience in litigation and estates gives me a unique perspective that enhances my ability to represent clients in these specialized proceedings.

Q: Where do you see yourself in five years?

A: Helping younger attorneys and students see that this field can be exciting and fulfilling, as I feel it's often undersold.

Q: What did you want to be when you were younger?

A: A professional football, baseball and basketball player all at the same time. Later, I found that mock trials in high school and college offered that same competitive outlet and pushed me to improve my skills. The rest is history.



Q: Tell me a little about your family.

A: My mom is from the Dominican Republic and my dad is from Long Island. They met outside of work, and it was a coincidence that they had the same profession as special ed teachers. I have an older brother and a younger brother.

Q: Are there hobbies you look forward to outside of work?

A: Playing sports like rugby and golf, and when I want to exercise my mind, I play chess.

Q: Do you have any advice to give?

A: Always make time for yourself, even taking moments throughout the day is important.

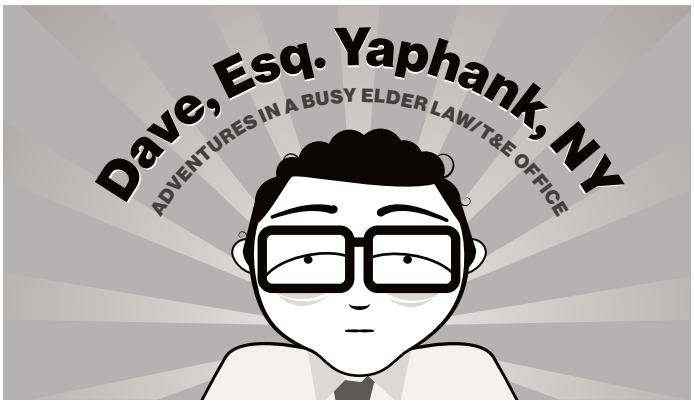
Q: Is there anything else you want people to know about you?

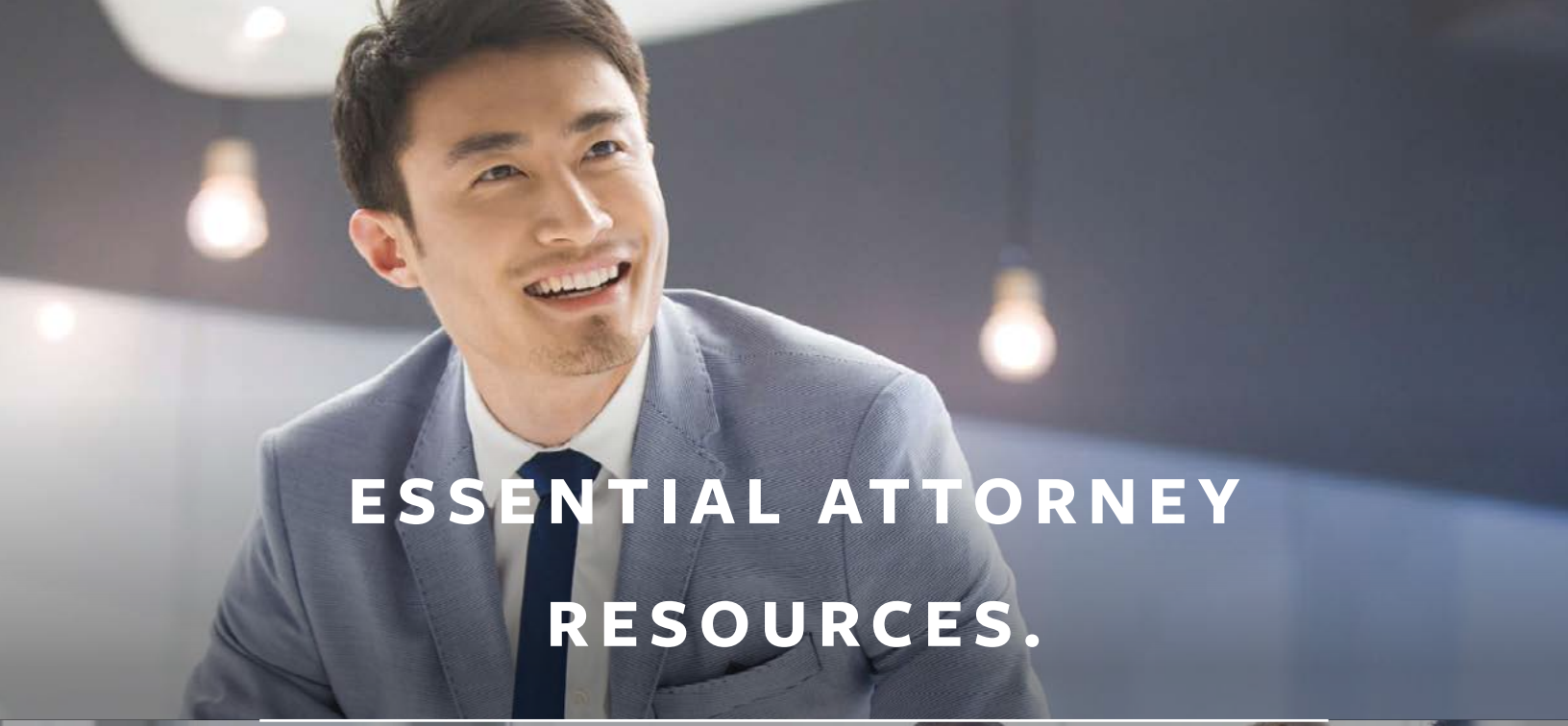
A: I'm passionate about my work, I'm genuinely fulfilled by what I do.

Jeffrey Shapiro is a senior associate at Bartlett, Pontiff, Stewart & Rhodes, where he focuses on estate planning, estate administration, and estate litigation. He is a volunteer with the University at Albany Mock Trial Team.

Adventures in a Busy Elder Law/T&E Office

A Comic Strip by Antony Eminowicz





ESSENTIAL ATTORNEY RESOURCES.

INCREDIBLE SAVINGS.

TAKE ADVANTAGE OF NYSBA'S BRAND-NEW MEMBERSHIP MODEL, FEATURING ALL OF THE FOLLOWING FOR A SINGLE MEMBERSHIP FEE:

Free registration to all live, virtual CLE programs

24/7 access to thousands of hours of on-demand CLE programming

Access to entire eBook library and hundreds of online, fillable forms.

Thousands of articles covering legal topics across all practice areas and NYSBA Sections.

Includes 2 Section Memberships (Choose from 28 Available)

RENEW YOUR MEMBERSHIP TODAY

to start benefitting from our new model at **NYSBA.ORG/MEMBERSHIP**

NYSBA

New York State Bar Association

Section Committe Chairs and Vice Chairs

Client and Consumer Issues
Rebecca Lebowitz
Cedarhurst, NY
rebeccalebowitzesq@gmail.com

Melinda Bellus
Legal Services of the Hudson Valley
White Plains, NY
mbellus@lshv.org

Malya Levin
Hebrew Home of Riverdale
Bronx, NY
Malya.Levine@
theweinbergcenter.org

Neil T. Rimsky
Cuddy Feder LLP
White Plains, NY
NRimsky@cuddyfedder.com

Diversity
Young Mee Jun
Grimaldi & Yeung LLP
Brooklyn, NY
ymkim@gylawny.com

Kristine Garcia-Elliott
Vishnick McGovern Milizio
New Hyde Park, NY
kgarciaelliott@vmmlegal.com

Elder Abuse
Iris T. Bikel
Iris Bikel Attorney at Law
New York, NY
iris@irisbikelattorney.com

Yolanda Rios
Dutcher & Zatkowsky
Rochester, NY
yolanda@rochesterelderlaw.com

Elizabeth Anne Adinolfi
Phillips Nizer LLP
New York, NY
eadinolfi@phillipsnizer.com

Antonia Martinez
Antonia J. Martinez, LLC
Croton on Hudson, NY
elderlawtimes@yahoo.com

Estates, Trusts and Tax Issues
Lorese Phillips
Attorney at Law
New York, NY
lp@loresephillipslaw.com

Tamara Stack
Law Offices of Stack & Associates PLLC
New York, NY
tstack@stack-law.com

David R. Okrent
The Law Offices Of David R. Okrent
Huntington Station, NY
dave@okrentlaw.com

Ethics
Patricia A. Powis
The Law Office of Patricia A. Powis
Garden City, NY
patricia@powislaw.com

Ira Salzman
IRA
New York, NY
Salzman@seniorlaw.com

Elizabeth Ingold
Ingold Law PLLC
Buffalo NY
ingold@ruppfalzgraf.com

Financial Planning and Investments
James R. Barnes
Burke & Casserly, P.C.
Albany, NY
jbarnes@burkecasserly.com

Donna Stefans
Stefans Law Group, P.C.
Woodbury, NY
dstefans@stefanslawgroup.com

William D. Pfeiffer
The Pfeiffer Law Firm PLLC
Albany, NY
wpfeiffer@albanyelderlaw.com

Guardianship
Linda A. Redlisky
Rafferty & Redlisky, LLP
Pelham, NY
redlisky@randrlegal.com

Jeffrey Abrandt
Brian Raphan, LLP
New York, NY
jabrandt@raphanlaw.com

Moriah Adamo
Abrams Fensterman LLP
New Hyde Park, NY
MAdamo@Abramslaw.com

Health Care Issues
Deborah A. Slezak
Cioffi Slezak Wildgrube PC
Schenectady, NY
dslezak@cswlawfirm.com

Jeffrey R. Neuman
Abrams Fensterman LLP
New Hyde Park, NY
JNeuman@abramslaw.com

Legal Education
Christopher R. Bray
Rheinhardt & Bray, PC
Ilion, NY
cbray@cnyelderlaw.com

Fern J. Finkel
Fern Finkel & Associates PLLC
Brooklyn, NY
ffinkel@ffelderlaw.com

Legislation
Deborah S. Ball
Law Offices Of Deborah S. Ball
New York, NY
dball@ballnyelderlaw.com

Jaime Dale Lewis
Birnbaum Lewis, PLLC
Garden City, NY
jaime@birnbaumlewis.com

Valerie J. Bogart
New York Legal Assistance Group
New York, NY
vbogart@nylag.org

Michael D. Dezik
Gold & Dezik
Niagara Falls, NY
mdezik@goldanddeziklaw.com

Liaison to Law Schools
Tara Anne Pleat
Wilcenski & Pleat PLLC
Clifton Park, NY
tpleat@wplawny.com

Peter Strauss
Pierro Connor & Associates, LLC
New York, NY
pstrauss@pierrolaw.com

Liaison to NY NAELA
JulieAnn Calareso
Gleason Dunn Walsh O'Shea
Albany, NY
Jacalareso@gdwo.net

Liaison to Trusts and Estates Law Section
Patricia J. Shevy
The Shevy Law Firm LLC
Albany, NY
tricia@shevylaw.com

Liaisons to Young Lawyers Section
Salvatore M. Di Costanza
Maker, Fragale & Di Costanza LLP
Rye, NY
smd@mfd-law.com

Nicholas Nisson Khayumov
Littman Krooks LLP
Great Neck, NY
nickkhayumov@gmail.com

Long-Term Care Facility Reform
Sara E. Meyers
Enea, Scanlan & Sirignano, LLP
White Plains, NY
s.meyers@esslawfirm.com

Giulia R. Marino
Marino & Marino P.C.
Great Neck, NY
grmesq@yahoo.com

Neil T. Rimsky
Cuddy & Feder LLP
White Plains, NY
NRimsky@cuddyfeder.com

Arthur John Conte
Law Office of Arthur J. Conte
Lindenhurst, NY
arthur@hylcontelaw.com

Mediation
Regina Kiperman
RL Law PC
New York, NY
rkiperman@rklawny.com

Judy Mock
The Law Offices of Judy S. Mock, PC
Brooklyn, NY
judy@judymocklaw.com

Continued on next page

Section Committees Chairs and Vice Chairs continued

Medicaid
Robin N. Goeman
Law Offices of Robin Goeman
Montpelier, VT
robin@goemanlaw.com

Nancy Brady
Brady & Bader LLP
Howard Beach, NY
nbrady@bradybaderlaw.com

Samantha Lyons
Falcon Rappaport & Berkman
Mount Kisco, NY
SLyons@frblaw.com

Member Services
Katherine Carpenter
Wilcenski & Pleat PLLC
Clifton Park, NY
kcarpenter@wplawny.com

Kristen Marie Casper
Law & Law PLLC
East Greenbush, NY
kristen@thelawfirmalbany.com

Mental Health Law
Lisa K. Friedman
Law Office Of Lisa K. Friedman
New York, NY
lf@lisafriedmanlaw.com

Nina Lowenstein
Disability Law Center, Inc.
Kinderhook, NY
nina.loewenstein1@gmail.com

Laura Marie Brancato
Brancato Law Group PLLC
Larchmont, NY
laura@lb-lg.com

Sarah A. Chussler
Abrams Fensterman LLP
New Hyde Park, NY
schussler@abramslaw.com

Mentoring
Timothy C. O'Rourke
O'Rourke Seaman LLP
Syosset, NY
timothy.orourke@
orourkeseaman.com

Miles P. Zatkowsky
Dutcher & Zatkowsky
Rochester, NY
miles@rochesterelderlaw.com

Pamela Ann-Marie Walker
The Walker Firm, PLLC
New York, NY
pamela@walkerfirmny.com

Practice Management & Technology
Pauline Yeung-Ha
Grimaldi Yeung Law Group LLP
Brooklyn, NY
pyeung@gylawny.com

Joanna C. Feldman
Maker Fragale & Di Costanzo LLP
Rye, NY
Jcf@mfd-law.com

Megan Harris-Pero
Harris-Pero Law Firm PLLC
Saratoga Springs, NY
Megan@saratogawills.com

Daniel Ross Miller
Miller & Miller Law Group PLLC
Brooklyn, NY
daniel@millermillerlawgroup.com

Publications
Katherine Carpenter
Wilcenski & Pleat PLLC
Clifton Park, NY
kcarpenter@wplawny.com

Lauren C. Enea
Enea, Scanlan & Sirignano, LLP
White Plains, NY
l.enea@esslawfirm.com

Real Estate and Housing
Deanna M. Eble
Russo Law Group, PC
Garden City, NY
dmeble@vjrussolaw.com

Ronald A. Fatoullah
Ronald A. Fatoullah & Associates
Great Neck, NY
rfatoullah@meltzerlippe.com

Patricia L. Angley
Equal Justice America Disability
Rights Clinic
White Plains, NY
pangley@law.pace.edu

Robert P. Mascali
The Pierro Law Group PLLC
Falmouth, MA
Rpmascaliesq@gmail.com

Special Education
Adrienne J. Arkontaky
Arkontaky Law Firm
Hawthorne, NY
aarkontaky@arkontakylaw.com
Irina Roller
Law Offices of Irina Roller PLLC
New York, NY
irina@nycspecialeducation.com

Special Needs Planning
Renee G. Schwartz
Goldman Schwartz LLC
Katonah, NY
renee@familytrustmatters.com

Lisa K. Friedman
Law Office of Lisa K. Friedman
New York, NY
lf@lisafriedmanlaw.com

Amy C. O'Hara
Littman Krooks LLP
New York, NY
aohara@littmankrooks.com

Ellyn S. Kravitz
Abrams Fensterman LLP
New York, NY
ekravitz@abramslaw.com

Sponsorship
Abby Carol Zampardi
Finkel & Fernandez LLP
Brooklyn, NY
azampardi@ffelderlaw.com

Sarah Amy Steckler
Warshaw Burstein LLP
New York, NY
ssteckler@wbny.com

Julia Lynn Santo
Abrams Fensterman LLP
Lake Success, NY
jsanto@abramslaw.com

Technology
Erica R. Berger-Hausthor
Finkel & Fernandez LLP
Brooklyn, NY
eberger@ffelderlaw.com

Moira Laidlaw
Falcon Rappaport& Berkman
Mount Kisco, NY
mlaidlaw@frblaw.com

Yana Feldman
Yana Feldman & Associates PLLC
New York, NY
yana@yanafeldmanlaw.com

Unauthorized Practice - Medicaid
David A. Cutner
Lamson & Cutner PC
New York, NY
dcutner@lamson-cutner.com

Veterans Benefits
Thomas J. Manzi
Thomas J Manzi P.C.
Central Islip, NY
tmanzi@thomasjmanzilaw.com

Looking for a Pooled Trust Partner?

KTS Pooled Trust will help you simplify the trust enrollment process for you and your clients

- Same day application processing and approval
- Competitive and flexible fees
- Expedited service – we handle special situations in a rapid and timely manner
- Same day disbursement processing and electronic bill payment
- 24/7 online and phone access to accounts for members and attorneys
- Automatic ACH deposits
- Reliable and responsive customer service – always a live representative available to answer calls and emails

---

4.9 ★★★★★ | We are extremely proud of all of our positive Google reviews

Our team takes extra steps to ensure you receive the care and attention you deserve. It's not by accident that KTS has a reputation for taking exceptional care of its members.

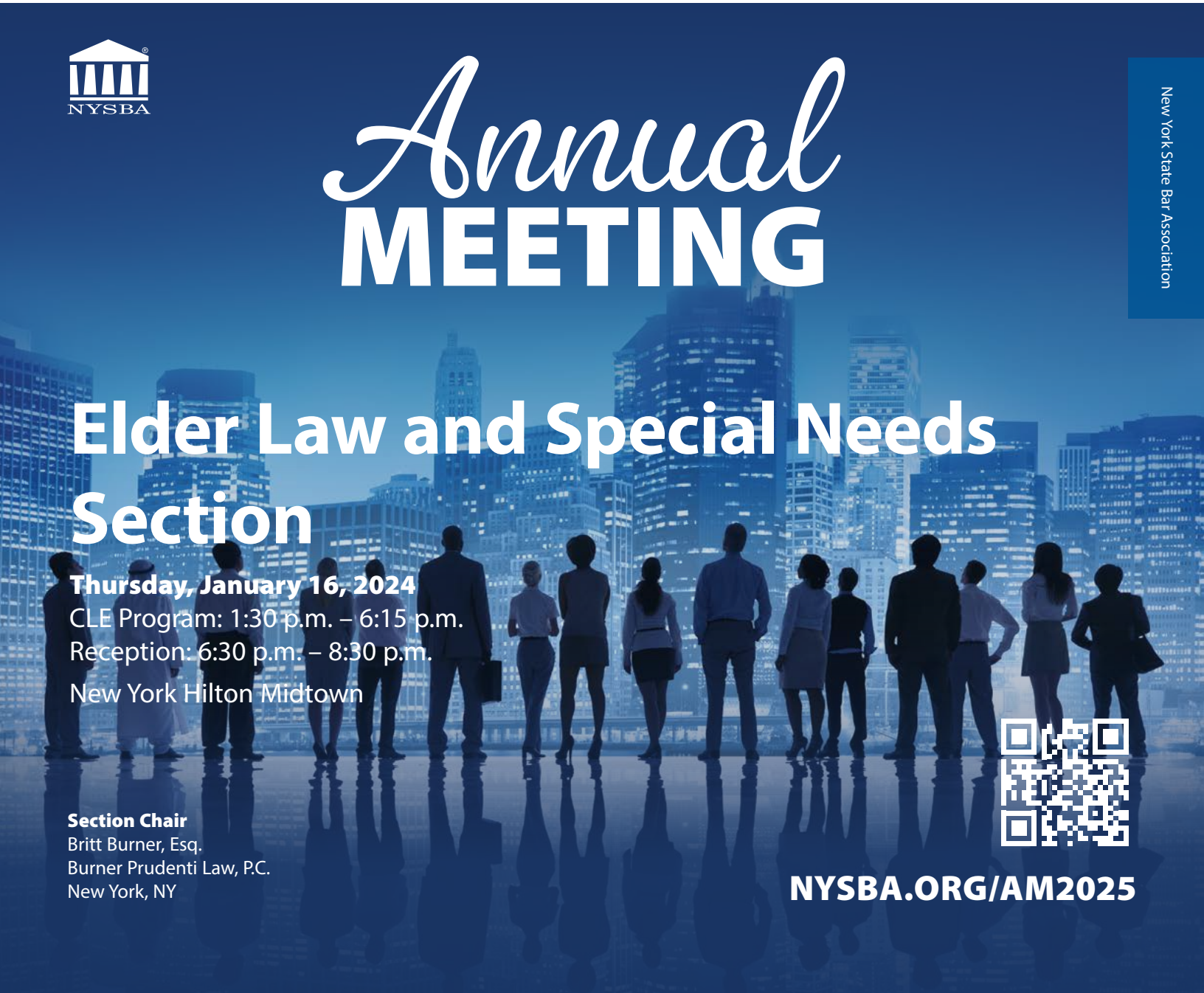
KEEP THEM SAFE POOLED TRUST kts

For inquiries contact us

718.475.5000 ext 6 • sam@ktstrust.org • ktstrust.org

(paid advertisement)

NEW YORK STATE BAR ASSOCIATION
ELDER LAW AND SPECIAL NEEDS SECTION
One Elk Street, Albany, New York 12207-1002



Annual MEETING

New York State Bar Association

Elder Law and Special Needs Section

Thursday, January 16, 2024
CLE Program: 1:30 p.m. – 6:15 p.m.
Reception: 6:30 p.m. – 8:30 p.m.
New York Hilton Midtown

Section Chair
Britt Burner, Esq.
Burner Prudenti Law, P.C.
New York, NY

NYSBA.ORG/AM2025