NEW JERSEY LAWYER

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DEPARTMENTS

JERALYN L. LAWRENCE

6 Months in, Progress on Putting Lawyers First, Judicial Vacancies

WOW!

It is hard to believe, but six months have passed since my installation in May. Time has flown by. There is so much work underway and yet to be done, and it has been a pleasure and privilege to serve as your president. As we rocket ever forward to a new year and new adventures, please allow me to share a brief update of what I, and the Association, have been up to in our efforts to improve the profession.

The Putting Lawyers First Task Force has spent the summer and fall digging into issues that are major drivers of stress in the profession. It has been gathering information via surveys on issues including wellness and experiences with the ethics and fee arbitration systems. It has also been holding informational sessions with officials and lawyers from around the country, all with the goal of creating a comprehensive report that will be submitted to the NJSBA Board of Trustees this winter to consider. In a related development, the Association has added its voice to the Judiciary's committee examining the duration of disbarment, advocating strongly that we believe there should be a path for reinstatement following disbarment. We are working to ensure there is a potential pathway for attorneys to continue their livelihood following disbarment and rehabilitation.

The Association has been tireless in its efforts to urge all parties involved to address the judicial vacancy problem that is causing catastrophic issues for lawyers and their clients who want to resolve cases. We have had a two-pronged approach: We have been outspoken advocates in asking the governor and Legislature to fill these empty positions, and our Judicial and Prosecutorial Appointments Committee has been diligent in reviewing every candidate who has been sent our way. While some progress has been made—specifically we are pleased that Justice Rachel Wainer Apter and Justice Douglas Fasciale were confirmed to the state Supreme Court—there remains a staggering number of vacancies that need to be addressed to ensure the justice system is working to its fullest potential.

On the advocacy front, the NJSBA has been—and will continue to be—a national leader in the fight against the proliferation of non-lawyer legal service providers and non-lawyer-owned law firms. Unfortunately, some states have loosened restrictions on law firm ownership as an access to justice measure, potentially allowing for-profit businesses to compete to provide legal services in the U.S. We vow to be a voice opposing this, while also seeking ways to help clients who need representation and lawyers who want to help. Another national issue has been connecting with bar leaders around the country asking them to join us in supporting the federal version of Daniel's Law to protect our federal judges.

And in New Jersey, we are working closely with our colleagues in every county around the state to ask that lifesaving automated external defibrillators be accessible on each floor of every courthouse to protect everyone who visits these facilities. We continue to promote diversity and inclusion as well as monitor and educate our members on the latest regarding jury reform. We also are addressing mandatory pro bono assignments and are advocating for the abolishment of the *Madden* system as it is unfair to clients and to lawyers. While the goal of *Madden* is noble, it has led to disastrous consequences for clients when attorneys are compelled to represent them in practice areas for which they have no training, knowledge or expertise.

As we launch into the busy season of winter, holidays, the end of the mandatory continuing legal education reporting period, I am here to tell you that in the past six months I have seen the very best the legal community has to offer. Our members who selflessly volunteer their time and insights to do this important work and the sponsors that support our organization fill me with faith that we will accomplish so many great things together in the next six months!

Wishing you the happiest of holidays and an abundance of happiness today and throughout the year. ■

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FROM THE SPECIAL EDITORS

The Legal Practicalities of Aging

By Brian R. Lehrer and Lauren I. Mechaly

The reality of aging and mortality is something few, if anyone, want to face. Regardless of the deeper questions which affect all of us, there are practical considerations that everyone hopes they have the foresight to address.

This issue of *New Jersey Lawyer* addresses the legal considerations for aging adults and people with disabilities.

The articles authored by the lawyers who dedicated their time to this issue provide a road map for those seeking to provide legal advice concerning the issues which may arise with helping clients navigate the difficult and practical considerations that accompany old age.

The articles authored by the lawyers who dedicated their time to this issue provide a road map for those seeking to provide legal advice concerning the issues which may arise with helping clients navigate the difficult and practical considerations that accompany old age.

Shana Siegel and Michelle Scanlon open the issue with a discussion on protecting the home from long-term care costs and financial eligibility for Medicaid. Beth Barnhard discusses the considerations people with disabilities face with supported decision making.

Nursing homes and long-term nursing care may be unpalatable realties, but they must be addressed. Donald Browne discusses nursing homes and the issues of third-party guaranties, while Alexis Graziano, Kayla Moor and David Drake tackle the issues surrounding staffing shortages in the long-term care and skilled nursing industry.

In addition, this issue focuses on planning for individuals with disabilities. Crystal West Edwards and Ryann Siclari address the numerous services in New Jersey to support individuals with intellectual and developmental disabilities. Ben Menasha compares the use of Trusts and ABLE accounts in special needs planning.

Financial instruments are also something to be considered in elder law plan-

BRIAN R. LEHRER *is with the law firm of Brandon J. Broderick, LLC.*

LAUREN I. MECHALY *is with the law firm of Schenck, Price, Smith & King, LLP.*

ning. Lauren Marinaro addresses the use of Medicaid compliant annuities and the requirements of the Deficit Reduction Act of 2005. Regina Spielberg and Jordan Wassel discuss the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE) and the use of trusts in retirement planning. Shirley Whitenack addresses special needs settlement planning.

Finally, the issue wraps up with a contribution from a law student, Anthony Geremont, who addresses the issue of abuse of powers of attorney.

Everyone faces mortality differently and some age more gracefully than others. Those are often the result of individual choices to which everyone has a right. However, while self-help books and gurus may be swell in helping people face their life choices, many of the practical considerations of growing old are governed by legal doctrines and statutes. The articles in this issue of *New Jersey Lawyer* provide valuable and thoughtful guidance on the more concrete legal issues of aging. ■

WORKING WELL

Are You Fit for Law?

By Lori Ann Buza
NJSBA Lawyer Well-Being Committee Chair
KSBranigan Law

A fit lawyer is a more effective lawyer. Keeping active and staying fit will increase one's capacity to be productive and energized, and to cope better with the stresses of the practice of law. It takes endurance to run from meeting to meeting, make court appearances or the like. It takes stamina to endure the hours of research and preparation that goes into proficient lawyering. It takes clarity of mind and focus to ensure your competence and ethical decision-making as an attorney.

I am not surprised to see too many lawyers in an unhealthy physical state because of the pressures of the work and how making a time commitment to oneself is often the last thing on a busy lawyer's mind. I encourage you, however, to see that taking time for physical activity will enhance your cognitive abilities and make you a more efficient and competent attorney, not to mention a happier person. Indeed, a healthy lawyer will also promote a healthy work environment for others.

There are numerous studies which show that staying active and exercising is good for promoting clearer thought and the reduction of brain fog. When you exercise, your heart rate increases and breathing quickens; as a result, more oxygen is supplied in your blood stream and to your brain. Research explains that in so doing, brain plasticity occurs and hence, learning and memory is enhanced.

Moreover, when you exercise, dopamine and serotonin are secreted, occurrences which are linked to the reduction of depression and anxiety, while improving your mood. Why not get started and improve the quality of your life as well as heighten your abilities to provide better service to your clients? Let's get moving!

Make a Concrete Plan. Make an appointment with yourself each day to do something physically active. Prioritize yourself—you deserve to be healthy and feel good. Your health is the most important thing you possess; without it, nothing else can flow from you.

Start Small. Beginning an exercise plan can seem daunting for a newbie. Set a reasonable goal of exercise that you can achieve, and gradually increase your efforts. It can be something as small as 10 minutes a day until you can add more time. The important thing is to get moving!

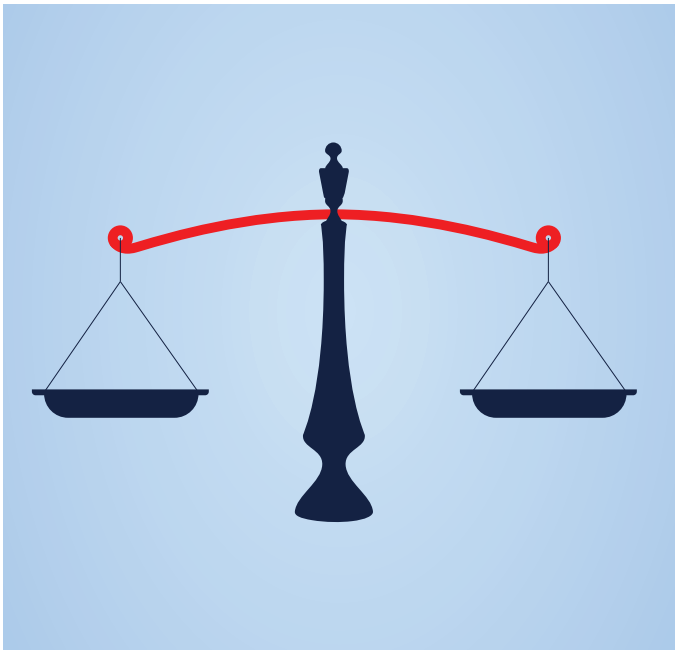
Monitor Your Goals. As your fitness level increases, challenge yourself with more exercise. For most healthy adults, ideally the long-term goal should be to move 60 minutes per day, 3 times a week, and 20–30 minutes per day, for the remaining days.

Ask a Friend. Perhaps a colleague would like to join you. Having a partner in an activity provides encouragement and it keeps you accountable. That being said, if your partner should bail on you, remember to not use that as an excuse, but to exercise on your own.

Mix it Up. It is great if you can make time to go to the gym or take a fitness class. But for most, that may not be possible. Instead, try taking a brisk walk and/or do calisthenics in the comfort of your own home. Tai Chi, yoga, golf or even pickleball, make it fun!

Stay Consistent. Consistency is the key to success in any fitness plan. You will be tempted to quit and/or to put other commitments above your own. Remind yourself that your health is surely worth more than any assignment. Trust that consistency will yield results. Stay focused and good luck!

**Remember to first consult with your doctor before beginning any exercise plan.* ■



ETHICS AND PROFESSIONAL RESPONSIBILITY

What are Motions for Reciprocal Discipline and Motions for Final Discipline?

By Bonnie Frost
Einhorn, Barbarito, Frost & Botwinick

It is important to ascertain how a respondent's ethical breach arose when one reads an ethics opinion to understand the discipline imposed by the New Jersey Supreme Court. Was the respondent also disciplined in another state? Or, by another tribunal such a federal trial court or circuit court? Was the respondent convicted of a crime? Or, did the respondent only breach New Jersey's ethics rules?

New Jersey Court Rules provide that any lawyer admitted in New Jersey, who may be practicing in another state, practicing before a specialty tribunal (U.S. Patent and Trademark Office, for example), or who are practicing before the federal Courts and who have been disciplined in another state or specialty tribunal, can be disciplined by the New Jersey Supreme Court for that same behavior. This process protects the public in New Jersey from a lawyer who has been disciplined in another jurisdiction and prevents that lawyer from moving to New Jersey to practice with a clean slate unbeknownst to the public who may hire them.

Every lawyer is obligated to advise the Office of Attorney Ethics (OAE) if they have been disciplined in another jurisdiction or specialty court [*Rule* 1:20-14(a)(5)]. New Jersey reviews the other jurisdiction's fact finding and looks to the level of discipline imposed to guide its decision making as to what discipline New Jersey will impose.

The OAE gives the lawyer 21 days to submit a brief to show why identical discipline in New Jersey is not warranted. The OAE then makes a motion directly to the Disciplinary Review Board (DRB) for reciprocal discipline. The DRB reviews the record from the other jurisdiction and submits its recommendation for discipline to the Supreme Court for an order.

Rule 1:20-14(a)(5) provides that a final adjudication of discipline of unethical conduct in another jurisdiction "establishes conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state."

New Jersey is not obligated to impose the same discipline another jurisdiction has imposed if that discipline is not within the parameters imposed by New Jersey ethics precedents for similar conduct. Thus, the OAE may argue the attorney should be disciplined more or less severely in New Jersey than they had been in the other jurisdiction. For example, in other states that may disbar a lawyer for a particular offense, New Jersey may not disbar a lawyer for that offense if it is not an offense which would result in disbarment in New Jersey. New Jersey may impose different discipline in circumstances where the behavior "warrants a substantially different discipline," [*Rule* 1:20-14(a)(4)(d) and *Rule* 1-20-14(a)(4)(e)]. In the case of *In re Mandell* [227 N.J. 111 (2016)], a Pennsylvania attorney was disbarred but New Jersey only suspended him for one year, reasoning that his ethical infractions warranted "substantially different discipline." In *In re Skripek* [156 N.J. 399 (1998)], a New York attorney was disbarred after he voluntarily resigned as a result of a judicial ruling finding him in contempt of a court order. New Jersey, however, imposed only a reprimand.

In the normal course, New Jersey will impose the same discipline imposed by another jurisdiction as this "promotes the imposition of consistent sanctions for the misconduct of an attorney admitted to practice in multiple states," [See *In re Sigman*, 220 N.J. 141, 154 (2014)].

New Jersey may also make readmission to the New Jersey bar contingent on readmission to another jurisdiction. In *In the Matter of Lankenau* [234 N.J. 261 (2018)], an attorney misused funds belonging to his law firm (in addition to other Rules of Professional Conduct violations). The State of Delaware suspended the attorney for two years, as did New Jersey. However, New Jersey required the suspension to be retroactive to the date of his suspension in Delaware and conditioned his reinstatement in New Jersey on being reinstated in Delaware.

The federal disciplinary process closely tracks that in New Jersey [Lite, *Current N.J. Federal Practice Rules* (GANN) Comment on L.Civ.R. 104.1. L.C.R. 104, 1(b)]. There is a presumption that the federal disciplinary system will impose the same discipline as the state courts to prevent the possibility that a New Jersey lawyer disciplined in the state court system may continue to practice in New Jersey's federal Courts. Nonetheless, it does "retain power to admit and discipline attorney "independently and separately from the state courts," [*In re Abrams*, 521 F. 2d. 1094 (3d. Cir.), cert. den. 4123 U.S. 1038 (1975)].

When a lawyer is indicted or pleads guilty to a crime, they must inform the OAE [*Rule* 1:20-13(a)(1)]. The OAE immediately applies to the Supreme Court for a temporary suspension, as the commission of a serious crime always results in discipline [*Rule* 1:20-(c)(1)]. The OAE then files a motion for final discipline with the DRB based on facts elicited from the criminal conviction or an admission of guilt. As a result of those proceedings, only the level of discipline is in dispute. *Rule* 1:20-13(c)(2) provides that an attorney's guilt will not be revisited in a disciplinary proceeding, but the DRB and the Court may review the "transcripts of the trial or plea and sentencing proceeding, the pre-sentence report, and other relevant documents in order to obtain the 'full picture,'" [*In re Spina*, 121 N.J. 378, 387 (1990)].

Certain crimes, more often than not, require a certain level of discipline. For example, commission of an act of domestic violence results in a three-month suspension [See *In re Magid*, 139 N.J. 449 (1995); *In re Margrabia*, 150 N.J. 198 (1997)); failure to file tax returns results in a suspension from 6 months (failure to file) to two years (purposeful evasion) (*In re Touhey*, 156 N.J.547(1999); *In re Rakov*, 155 N.J. 593 (1998)); conviction of the possession of cocaine results in a three-month suspension (*In re Foushee*, 156 N.J. 553 (1999)].

In all cases, the DRB reviews all underlying documents relating to an attorney's ethical infractions, including those presented in motions for reciprocal discipline and in motions for final discipline. The DRB presents its findings and recommendations for a "full" record to the Supreme Court to review. The Supreme Court, itself, then conducts an independent review of the record and determines whether the ethical behavior found by the DRB has been established by clear and convincing evidence when it recommended the quantum of discipline to impose. ■

Next:
When and Why Does the N.J. Supreme Court Order Disbarment?

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Protecting the Home from Medicaid

Transfer Options and Strategies

By Shana Siegel and Michelle Scanlon

For many New Jersey homeowners, their residence is by far their largest asset. This is especially true for older adults who have seen their homes appreciate exponentially over time and now have substantial equity in them. Therefore, when clients come to see an elder law attorney, generally their first questions revolve around how they can protect their home from long-term care costs. Fortunately, Medicaid (which is the primary payor for long-term care costs) treats an individual's primary residence as exempt. The home is not considered as a countable resource in determining financial eligibility for Medicaid as long as it is occupied as the principal residence by the Medicaid applicant or their spouse.[1] This simple rule is not absolute as there are a couple of complications surrounding when a home is considered the primary residence as well as a potential cap on the equity exemption. Therefore, it is important to understand these nuances which will be addressed in this article. In addition, there are many instances in which a home can be transferred to another person without incurring a Medicaid penalty as outlined in depth below.[2] Even where none of the exemptions apply, often elder law attorneys can assist clients in protecting their homes through other asset protection tools. The pros and cons of these approaches will be discussed.

The federal law states that a Medicaid applicant's home is excluded if the applicant intends to return home. New Jersey has added qualifying language stating that the exemption applies if the individual intends to return home and is reasonably expected to return.[3] The regulation further indicates that absence from the home for more than six months creates a presumption that the home no longer serves as the principal residence.[4] The county can treat a home as a primary residence when the applicant has been absent for more than six months only with approval from the state Medicaid agency.[5] As you can imagine, this is not likely to happen. However, as long as the spouse remains in the home, then the property is excluded.

With the Deficit Reduction Act of 2005, the federal government set an equity limit on the primary residence exemption if there is not a spouse, minor or child with disabilities in the home. Therefore, the equity limit only applies to single individuals receiving Medicaid MLTSS (managed long-term services and supports) services in their homes, resulting in it rarely becoming an issue. Since 2011 the equity threshold has been increased annually based on the Consumer Price index. The federal law sets a minimum and maximum equity limit allowing states to raise their equity limit based on higher property values. For 2022 the equity limit in New Jersey is $955,000 which is substantially higher than the federal minimum.[6]

While most of the time a primary residence jointly owned by a Medicaid applicant and spouse remaining in the home (referred to as the community spouse) is going to be a noncountable resource, it still is important to consider a transfer of the property to the community spouse. There are two primary reasons for this. First, if the primary residence is ever sold, or no longer is serving as primary residence for the spouse, then the property becomes countable. Secondly, Medicaid can place a lien on the assets of a Medicaid recipient and when a Medicaid recipient dies, their assets are subject to estate recovery. Although the Medicaid agency will delay collection while a spouse (or minor or child with disabilities) is in the home, they will enforce the lien after the death of the family member or upon sale of the property. Fortunately, transfer of a home to a spouse is one of several categories of homestead transfers which do not result in the application of a Medicaid penalty. This type of transfer is generally simple to accomplish and should be done prior to applying for Medicaid.

Medicaid has also carved out additional categories of exempt homestead transfers that may be beneficial when the applicant does not have a spouse or has a spouse who is also applying for and/or receiving Medicaid. Several of these exempt transfers center around the Medicaid applicant's child. In particular, Medicaid does not initiate a penalty when the home has been transferred to the child of the Medicaid applicant so long as certain conditions are met. For instance, a Medicaid applicant who has a child under the age of 21 may transfer the home to the child and it will not result in a transfer penalty.[7] This is commonly referred to as the Minor Child Exemption. However, most Medicaid applicants do not have children under the age of 21 during the applicable look-back period; thus this exemption rarely is a viable option. A more frequently used exemption allows a Medicaid applicant to transfer the home to a child of *any* age if the child is blind or has a total and permanent disability.[8] This is commonly referred to as the Disabled Child Exemption. In Medicaid's eyes, a child is deemed blind or disabled if they have a determination of disability from the Social Security Administration.[9] However, transfer to a child with disabilities should be done cautiously as the transfer may cause unintended consequences, such as the loss of benefits for the disabled child in certain circumstances or if not done appropriately.

In addition, children of Medicaid applicants often serve as a caregiver, supporting their parent(s) in order to keep them at home and avoid institutionalized care. This situation also creates an

SHANA SIEGEL *is chair of the Elder Law and Special Needs Group at Norris McLaughlin. Shana is a former President of the New Jersey chapter of the National Academy of Elder Law Attorneys and has been recognized by NAELA as a member of the Council of Advanced Practitioners. She has extensive experience in trust and estate administration, asset preservation, special needs trusts, planning for disability, guardianship and estate litigation, resident rights, health care decision-making, Medicare and Medicaid.*

MICHELLE SCANLON *is an associate in Norris McLaughlin's Estate Planning and Administration & Wealth Preservation Practice, and Elder Law & Special Needs groups. Michelle represents and advises her clients regarding estate planning, estate administration, trust administration, special needs planning, elder planning, and guardianships.*

opportunity for a Medicaid applicant to protect their home. This is commonly referred to as the Caregiver Child Exemption. In order to qualify for this exemption the following elements must be met: 1) the caregiver child is required to have resided in the Medicaid recipient's home for the two years prior; 2) the parent must have required an institutional level of care for that same two-year period; and 3) the parent's physical or mental condition must have required "special attention and care" which was "essential to the health and safety" of the Medicaid recipient.[10] The care provided cannot simply be driving the applicant to medical appointments and doing the shopping. Care must be "essential to the health and safety" of a Medicaid applicant, which includes providing assistance with activities of daily living (eating, bathing, dressing, toileting, transferring, and continence), preparing meals, and supervising medication.[11] Over the years, a major stumbling block to this qualification has been that the Medicaid agency's position required that the caregiver must either 1) provide full-time care or 2) pay for any other care provided from the child's own funds. These arguments have since been rejected by the Court.[12] Furthermore, the Court has determined that the question of who paid for additional caregivers is legally irrelevant.

The Caregiver Child Exemption can be a great resource for families, but it is important to know the requirements of the county in which you are applying. Most counties require a fully developed record of the applicant's condition and the care provided by the child. For example, you might need to provide an Affidavit or Certification from the applicant's physician stating that the level of care provided was essential to the health and safety of the applicant, medical records, or Affidavits/Certifications from the caregiver, friends, and family attesting to the applicant's condition and the nature of the care provided. The caregiver *must* establish that every element is met. If they cannot establish each element, the Medicaid Agency will assess a penalty for the transfer.

Medicaid also provides a transfer exemption for siblings, commonly referred to as the Sibling Equity Exemption. The Sibling Equity Exemption applies when a sibling of a Medicaid recipient *already* owned an equity interest in the Medicaid recipient's home prior to the transfer and has resided in the home for a period of one year before the Medicaid recipient became institutionalized.[13] It is important to note that Medicaid views an equity interest to be "on the face of the deed." Thus, if a sibling has only sweat equity, such as covering expenses or making improvements to the property but is not actually listed on the deed as a co-owner, then it does not rise to the level of equity required for a penalty free transfer. While it may appear that each of the above categories of exempt transfers are relatively straightforward, the state and county agencies are always looking for ways to avoid application of the exemptions. Therefore, it is essential to know the nuances of N.J.A.C 10:71-4.10(d) and recent case law to avoid an unnecessary transfer penalty. An experienced elder law attorney can be essential to correctly using these exempt transfers.

Clients who cannot make any of these exempt transfers still have many options for protecting their home, although the five-year lookback period means that they either have to plan early or use other sources to pay for care during the five-year period. Medicaid is a program for individuals with limited means. Therefore, when an applicant files for long-term care Medicaid, the agency requests five years of financial statements to ensure that the applicant has not given away their assets. Therefore, non-exempt transfers must be completed five years prior to applying for Medicaid. Fortunately, asset protection planning with one's home can generally be done early with little impact on day-to-day life.

When a client wants to transfer their home to children or other family members, they have three options: 1) outright transfer, 2) transfer with retained life estate interest, and 3) transfer to trust. Each option has advantages and disadvantages depending on the client's situation. An outright gift of the home is the most straightforward but is often not the best option because the donor does not retain any interest in the property. Many clients are uncomfortable with this proposition especially if they are continuing to live in the property.[14] Also, the donees often do not want legal responsibility for the expenses of the property. When this approach is chosen, we will often combine it with a rental agreement with the senior. The biggest downside to this approach comes from the fact that a lifetime transfer of interest results in a loss of step up in basis that would otherwise occur upon the senior owner's death. This is especially problematic where the recipient does not live in the home, so they could have a substantial capital gain tax when they sell the home.[15] Therefore, the transfer with retained life estate and transfer to trust are generally favored because they can provide the step-up in basis while still excluding the property for Medicaid purposes.

A homeowner can retain a lifetime interest in their home (known as a life estate) and transfer the remainder interest.[16] The life estate automatically terminates upon death. Because the homeowner retained the interest, regardless of whether they actually lived in the home, the property is treated under the tax code

as if it passed upon death.[17] This provides a step-up in cost basis for capital gains purposes to the date of death value. For clients who have owned their properties for decades, this can be an enormous tax savings for their heirs. In addition, life estates are specifically excluded from Medicaid estate recovery in New Jersey. One feature of a life estate can be more problematic. If the property is sold during lifetime, then both the tax and revenue repercussions can be less than ideal. Upon sale, the proceeds are legally split between the life estate owner and the remainderman. The percentage of proceeds to go to the life estate holder depends on their age at the time of sale. Medicaid uses life estate tables issued by the federal government.[18] As an example, an 85-year-old with a life estate would be entitled to 35% of the proceeds upon sale with the rest going to the remainderman.

This is generally undesirable, as the goal of the transfer was to preserve the property. However, in some situations it can be a real advantage. If the client is interested in protecting their home but has limited other assets, then a life estate may be the best way to proceed. If the individual remains home until death, perhaps receiving MLTSS services after five years, then the property was protected and there is no estate recovery. However, if the senior needs care sooner, or needs facility care, then the 35% of proceeds can be used to fund the needed care while ensuring that the remaining equity is protected. Two practical factors come into play here. First, most facilities require a private pay period – often two years. For individuals with limited liquid assets, the life estate option allows them to use their portion of the home proceeds for private pay, thereby expanding their facility options greatly. For individuals who want to stay in their home but do not have income or resources to pay for home care during the five-year period, a life estate may be their only option. Seniors can undertake a reverse mortgage with a life estate deed but cannot if the property has been placed in a Medicaid trust. Lastly, it is important to consider the capital gains consequences of the life estate option. As noted before, if the property is held until death then the remaindermen receive a step-up in basis. However, if the property is sold during lifetime, the remaindermen will be subject to capital gains on their portion of the proceeds (unless they reside in the home and then get the 121 exclusion).

For most clients, the disadvantages of outright transfer and life estate retention lead them to transfer their homes to an irrevocable trust. While a small minority of elder law attorneys favor non-grantor trusts, the majority use irrevocable grantor trusts for homes.[19] This allows us to remove the asset for Medicaid purposes while still having the property treated as belonging to the senior for tax purposes. In this way, their heirs receive a step-up in cost basis upon their death. This type of trust is drafted with certain retained powers and rights to preserve the step-up (as well as potentially the capital gains primary residence exclusion). Commonly, a limited power of appointment is the retained power so that the transfer to the trust is not treated as a completed gift to ensure estate inclusion.

The trust includes a use and occupancy provision stating that the senior homeowner retains the exclusive right to live in the home throughout their lifetime. The language must be carefully drafted so it does not convey a life estate ownership interest. We do so by providing that the individual retains the right to reside in the home and responsibility for mortgage, taxes and maintenance but cannot transfer or sell their occupancy rights. The other retained powers are chosen to qualify the trust as a grantor trust for estate tax purposes to ensure the step-up at death and often for income tax purposes as well. If the trust includes provisions to make it a grantor trust for income tax purposes then any income is taxed to the grantor. This is advantageous to avoid trust tax rates if the trust assets are expected to produce substantial income.[20] The bigger advantage of drafting as a grantor trust for income tax purposes is that in conjunction with the use and occupancy clause it guarantees the primary residence capital gains 121 exclusion. The powers that are commonly used for income tax inclusion are the power to substitute trustee and the power to substitute assets of equal value.[21]

The home is a central component for most Medicaid asset preservation plans. The way in which a family determines to keep or transfer a home can result in significant financial savings or loss. This article has discussed several options, including exempt transfers and transfer strategies, that are available to protect an individual's home. It is critical that Medicaid applicants and their families work with knowledgeable elder law attorneys who can provide them with a full understanding of the Medicaid rules and strategies discussed in this article. ■

Endnotes

1. *N.J.A.C.* 10:71-4.4(b); 20 *C.F.R.* 416.1212. The New Jersey regulation includes the home and "the land appertaining thereto."
2. As discussed in more detail below, an individual applying for Medicaid who has made transfers for less than fair market value within the prior five years is generally subject to a penalty which delays their eligibility for Medicaid. However, certain transfers are exempt and do not subject the applicant to a penalty.
3. *N.J.A.C.* 10:71-4.4(b)(1)(i)

4. *Id.*
5. *N.J.A.C.* 10:71-4.4(b)1.
6. *See* Medicaid Communication No. 22-02, dated February 25, 2022.
7. *N.J.A.C.* 10:71-4.10(d)(2).
8. *Id.*
9. If no such determination has been made, the child can be evaluated by the Disability Review Team of the Division of Medical Assistance and Health Services, in accordance with N.J.A.C. 10:71-3.3. See N.J.A.C. 10:71-4.10(d)(2).
10. *N.J.A.C.* 10:71-4.10(d)(4).
11. *A.M. v. Monmouth CBOSS,* A5105-18 (App. Div. March 2021).
12. *Id.*
13. *N.J.A.C.* 10:71-4.10(d)(3).
14. Concerns regarding creditors, divorce and college financial aid are often cited in addition to loss of control.
15. Individuals are entitled to a $250,000 exclusion of capital gain upon sale of their personal residence. 26 U.S.C . Sec. 121.
16. The focus of this discussion is on gifting and waiting the five-year lookback. Where waiting five years is not an option, family members could purchase a remainder interest as a fair market purchase, thereby getting the home at a reduced price based on remainder value under the actuarial tables.
17. 26 U.S.C. Sec. 2306.
18. Commonly referred to as HCFA transmittal 64 Life Estate and Remainder Tables, the tables actually derive from the tax code. 26 C.F.R. 20.2031-7.
19. These trusts are commonly referred to as MAPTs (Medicaid Asset Protection Trusts) or MIDGTs (Medicaid Intentionally Defective Trusts).
20. However, a minority of elder law attorneys choose not to use grantor trusts due to concern that the income will be reflected in the applicant's tax return and be a red flag for caseworkers.
21. The powers for income tax exclusion are listed in Section 671 through 679 of the Internal Revenue Code. However, several of these cannot be used in a Medicaid context. Power to substitute trustee is in Sec. 674. Power to substitute assets is in Sec. 675. The power to substitute property of equivalent value under Section 675 of the Code is considered a power over both income and principal which will preserve the Section 121 exclusion.

OVERPROTECTED

Can Supported Decision-Making Disrupt the Pipeline from Special Education into Guardianship?

By Beth L. Barnhard

BETH L. BARNHARD *is counsel at Harwood Lloyd and is certified to be an elder law attorney by the ABA-accredited National Elder Law Foundation. Beth concentrates her practice in Medicaid planning, Medicaid appeals, guardianships and capacity counseling, and probate and fiduciary litigation. Beth is a past Chair of the New Jersey State Bar Association's Elder & Disability Law Section, and a Past President of the New Jersey Chapter of the National Academy of Elder Law Attorneys (NJ NAELA). Beth is the President Elect of NJ NAELA.*

The most restrictive response to decision-making challenges faced by people with disabilities is the appointment of a guardian as surrogate decision-maker.[1] In New Jersey, a guardianship is a court proceeding in which a judge declares someone to be an "incapacitated individual"[2] and appoints a third party to make decisions on behalf of them. The appointed surrogate decision-maker is called the guardian. Although a guardian can be appointed for any individual deemed to be incapacitated, those most likely to find themselves the subjects of guardianships are people with intellectual disabilities (ID), individuals with developmental disabilities (DD), older adults with cognitive impairments, and those suffering from certain mental illnesses.

For the ID/DD population, there is a direct pipeline from their special education programs into plenary guardianships:[3] as part of an ID/DD student's Individualized Education Program (IEP) the school is required to give advance notice to the student and the family of the "transfer of rights" that will occur upon the student turning 18 years old, the age of majority, if guardianship is not obtained.[4] Accordingly, the school advises the family that it must communicate directly with the student for certain permissions, and certain aspects of the student's education moving forward. Whether intentional or unintentional, the disclosure and discussion of the transfer of rights creates a bias toward guardianship unless the school is aware of less restrictive alternatives and can apply the strengths of the individual student to those less restrictive alternatives.[5]

The pipeline to guardianship is disquieting considering what is at stake. The consequence of taking away constitutionally protected individual rights is viewed as "so severe" that courts must not permit its occurrence absent clear and convincing evidence of incapacity and a showing that no less restrictive alternative is available.[6] The guardianship system is supposed to be the avenue of last resort.[7] New Jersey has long acknowledged that a guardianship is a "drastic restraint on a person's liberty,"[8] and has encouraged limited guardianships[9] and other arrangements that promote personal autonomy for individuals with ID/DD.[10] Stripping a person with disabilities of their rights and substituting a third party as decision-maker is not intended to be perfunctory, yet the way the special education system is structured, guardianship has become almost a rite of passage of turning 18.

Guardianship has been described as the "civil death" of the person because even when functioning correctly, the guardianship, by its nature, requires the person to participate in society through a third-party intermediary, if at all.[11] On Sept. 25, 1987, a House Select Committee held hearings titled "Abuses in Guardianship of the Elderly and Infirm: A National Disgrace." In summarizing the Select Committee's findings, Chairman Claude Pepper famously stated:

> The typical ward has fewer rights than the typical convicted felon.... By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get, and in rare cases, when they will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen with the exception...of the death penalty.[12]

Unfortunately, the current system can make guardianship seem like a formality when the simple fact is that not every 18-year-old identified as ID/DD needs a guardian. The casualness of entering the guardianship for ease of education process belies the difficulty of extricating the individual from its confines. Once put in place, there is no easy "off ramp" for guardianship. Although the process for restoration of capacity is codified in New Jersey's statutes and court rules,[13] the burden of proof required for restoration of capacity is not and, as a result, it is left to the individual counties to decide how a restoration action will proceed.[14] Further, going to court, for any reason, is an expensive and time-consuming proposition.

Long before *Last Week Tonight with John Oliver* (HBO, 2018) and *I Care a Lot* (Netflix, 2020) made the dangers of financial abuse and exploitation associated with guardianship of older adults part of the national consciousness, critics were ringing the alarm and states were making efforts to enact monitoring programs. However, guardianship did not truly become a household word until 2021 when #FreeBritney dominated national news coverage as details of the alleged abuse pop star Britney Spears suffered under her 13-year conservatorship shocked the world. Now, with an educated and angry public demanding justice, conversations are happening from Capitol Hill to kitchens across the U.S. and the spotlight is now on younger individuals[15] trapped in unnecessary guardianships, and on the availability of less restrictive alternatives. Stakeholders have seized the opportunity and are seeking to: 1) break the pipeline from special

New Jersey has long acknowledged that a guardianship is a "drastic restraint on a person's liberty," and has encouraged limited guardianships and other arrangements that promote personal autonomy for individuals with ID/DD. Stripping a person with disabilities of their rights and substituting a third party as decision-maker is not intended to be perfunctory, yet the way the special education system is structured, guardianship has become almost a rite of passage of turning 18.

education to guardianship, and 2) promote less restrictive alternatives to guardianships including an increased focus on estate planning (*e.g.,* power of attorney, health care directive, trusts), representative payee arrangements, and Supported Decision-Making. Dominating the less restrictive alternative conversation is Supported Decision-Making.

What is Supported Decision-Making?

Supported Decision-Making (SDM) is a person-centered and person-directed[16] alternative to guardianship that allows an individual with a disability to retain their civil rights and autonomy while still receiving necessary assistance. The Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (2017)[17] defines SDM as:

> Assistance from one or more persons of an individual's choosing in understanding the nature and consequences of potential personal and financial decisions, which enables the individual to make the decisions, and in communicating a decision once made if consistent with the individual's wishes.

SDM is premised on the fact that *everyone* needs support or assistance with some of the choices they make; using friends, family members, and professionals as sounding boards as they analyze situations and determine how to react to the choices they face within those situations. Thus, SDM mirrors the real life of most adults. When confronted with choices and decisions, big or small, input and advice are sought from knowledgeable, trusted advisers so that well-informed choices can be made.[18] There is no single model of SDM.[19] Therefore, SDM relationships can be "of more or less formality and intensity"[20] ranging from informal arrangements between an individual and one trusted friend or family member to formalized "circles of support"[21] and "microboards."[22] Regardless of the structure, the SDM relationship allows the individual to receive the information needed to weigh options, make decisions based on their own preferences, and if necessary, communicate their decisions to third parties.[23]

To date, 11 states[24] and the District of Colombia have adopted statutes authorizing written SDM agreements and determining the circumstances under which supporters can access someone's confidential information. SDM has been endorsed by the American Bar Association,[25] the National Guardianship Association,[26] and the National Council on Disability.[27] There is evidence for judicial support for SDM dating back to 1999 when the Supreme Court of Pennsylvania interpreted Pennsylvania's guardianship statute[28] to mean that a person is not in need of guardianship services where the individual has a strong circle of support assisting with making decisions and meeting essential needs.[29] In a similar matter, New York terminated an existing guardianship finding that through a strong network of support in the community a young woman learned to make decisions and become a loving wife and mother.[30] New York continues to eschew guardianships in situations where people with disabilities can engage in SDM.[31] All of these decisions recognize more informal SDM arrangements.

Proponents of SDM note that its focus on self-determination and autonomy have psychological benefits for the individual, whereas guardianship is perceived as "anti-therapeutic."[32] The guardianship process itself is viewed as damaging to self-worth as it subjects the person to the knowledge that family, friends, medical providers, and other witnesses, do not believe they are capable of taking care of themselves in many areas of life.[33] The lack of self-determination in guardianship has been described as "constructive isolation."[34] For example, when a person is no longer allowed to make financial decisions, they "become gradually disengaged from the management of those finances as well as the interactions with others involved in that management."[35] The person who isn't going to the bank, isn't taking out money and spending it at shops and restaurants, and isn't interacting with sales people, waiters, other customers, friends, or family along the way.[36] Additionally, in a guardianship, the individual is told that they are not capable of doing certain things and because they are not capable, those things are taken away from them. That can be stigmatizing to the individual and affect self-worth. Conversely, SDM promotes social interaction and independence, which can help combat isolation and increase self-worth. Although scholars acknowledge that more studies need to be done on the outcomes of SDM for both the individual and the supporters,[37] existing studies have shown that people who exercised more self-determination were more likely to want to live independently, manage their own money, and be employed.[38]

Certainly, the same pitfalls that can occur in guardianship, such as abuse and exploitation, can occur in SDM relationships. Perhaps, of greater concern, would be that supporters would overstep their boundaries and unduly influence the individual during the decision-making process.

What is New Jersey Doing to Break the Pipeline?

Disability Rights New Jersey is New Jersey's designated Protection and Advocacy system under federal law.[39] Disability Rights NJ has focused significant resources on breaking the special education to guardianship pipeline; Disability Rights NJ sees disruption of this pipeline as the most effective way to advocate for self-determination for individuals with disabilities, according to Legal Director, Michael R. Brower.[40] Brower noted that Disability Rights NJ has partnered with

the New Jersey Council on Developmental Disabilities,[41] the Boggs Center for Developmental Disabilities,[42] and the New Jersey State Parent Advocacy Network,[43] and is also working with a small cohort of youth ambassadors with disabilities to accelerate and amplify the conversation that not everyone with a disability needs a guardian for their 18th birthday. Brower advised that the goals of his team will largely be driven by the youth ambassadors and are still in the development stage, but Brower hopes to see intervention strategies including: 1) educating stakeholders about alternatives to guardianship; 2) identifying legal, political, and practical barriers to implementing SDM in New Jersey; and 3) partnering with interested surrogates, judges, and practitioners to reduce unnecessary guardianships. Brower also spoke passionately of the importance of removing abusive guardians and freeing individuals from unnecessary guardianships on an individual basis but noted that many individuals with disabilities lack funds to hire private attorneys. Brower also noted that organizations like Disability Rights NJ only have the staff and resources to help a few individual clients in restoration matters every year.

New Jersey does not presently have a SDM statute on the books. However, the lack of infrastructure does not mean that there is a lack of recognition in New Jersey courts that SDM is an appropriate, less restrictive alternative to guardianship. To the contrary, the new model Report of Court Appointed Counsel for the Alleged Incapacitated Person expressly requires counsel to report if they have considered SDM as a less restrictive alternative to guardianship.[44] The concern with moving forward with SDM without statutory support would be the enforceability of any SDM agreement, the willingness of third parties to accept SDM agreements, termination of agreements, and the ability of supporters to obtain and review confidential information. All of these issues are addressed, in varying ways, in the statutes that have been enacted in other states.[45] This lack of infrastructure does not preclude the success of informal SDM agreements, nor does it preclude other less restrictive alternatives such as trusts, powers of attorney, health care directives, HIPAA authorizations, representative payee arrangements, and conservatorships, which the model Report of Court Appointed Counsel for the Alleged Incapacitated Person also requires court appointed counsel to consider.

While it is true that there will always be people with disabilities who, regardless of the supports in place for them, require a guardian, there can be no question that the pipeline is causing unnecessary guardianships to occur. It is incumbent upon attorneys practicing in this space to have a foundational knowledge in SDM. SDM and other less restrictive alternatives need to become a bigger part of the conversation; counseling clients about decision-making options is the only way they can make informed decisions about their case. The developing national conversation has come to New Jersey. It is time to prepare for the future. ■

Endnotes

1. Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN. ST. L. REV. 1111, 1115 (2013).
2. *N.J.S.A.* 3B:1-2 defines "Incapacitated individual" as an individual who is impaired by reason of mental illness or intellectual disability to the extent that the individual lacks sufficient capacity to govern himself and manage his affairs. The term can also designate an individual who is impaired by reason of physical illness or disability, chronic use of drugs, chronic alcoholism, or other cause (except minority) to the extent that the individual lacks sufficient capacity to govern himself and manage the individual's affairs.
3. Plenary guardianship is a guardianship of the person and the estate, in which the court makes a finding that the individual is incapacitated as defined in *N.J.S.A.* 3B:1-2, and thus is without capacity to make legal, medical, financial, educational, residential, and vocational decisions. The court will then appoint a general guardian to make decisions for the incapacitated in all areas. *N.J.S.A.* 3B:12-24.1a.
4. *N.J.A.C.* 6A:14-3.7(e)14.
5. National Council on Disability, *Turning Rights Into Reality: How Guardianship and Alternatives Impact the Autonomy of People with Intellectual and Developmental Disabilities* (2019) at 31: available at ncd.gov/sites/default/files/NCD_Turning-Rights-into-Reality_508_0.pdf.
6. *In re Keeter,* Docket No.: A-0553-10T4, 2011 *N.J. Super.* Unpub. LEXIS 1200 (App. Div. 2011) at *3,citing *In re M.R.,* 135 *N.J.* 155; *In re Conroy,* 98 *N.J.* 321 (1985).
7. Kohn, *et al.* at 1117.
8. *In re M.R.,* 135 *N.J.* 155, 171 citing *Lommason v. Washington Trust Co.*, 140 *N.J.Eq.* 207, 209 (E&A 974).
9. If the court finds that an individual is incapacitated pursuant to *N.J.S.A.* 3B:1-2, but only lacks capacity to do some, but all tasks to care for themselves, the court may appoint a limited guardian of the person, a limited guardian estate, or a limited guardian of the person and estate. In so doing, the court must make specific findings of fact as to which of the decision making areas (legal, medical, financial, educational, residential, vocational) the individual retains decision making capacity in. The Judgment of

Incapacity will specify accordingly. *N.J.S.A.* 3B:12-24.1b.

10. *M.R.,* 135 *N.J.* at 170-171.
11. Robert Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianships to Supported Decision-Making*, 19 Hum. Rts. Brief 8, 9 (2012).
12. H.R. Rep. No. 100-641, at 1 (1987).
13. *See, N.J.S.A.* 3B:12-28; *R.* 4:86-7(b)
14. The burden of proof issue is under review and is expected to be addressed.
15. David Goldfarb, *#FreeBritney Made Guardianship a National Issue, But Will Congress Act?* NAELA News, Oct/Nov/Dec 2021, 30.
16. "...meaning the values, priorities, and wishes of the individual drive the decision-making process. " Supporting Decision Making Across the Age Spectrum, A Report by The American Bar Association Commission on Law and Aging, March 2020.
17. §§301(a)(1)(A), 310(a)(1), not adopted in New Jersey.
18. Quality Trust for individuals with Disabilities, *Supported Decision-Making: An Agenda for Action (2014), hhtp://jennyhatchjusticeproject.org/node/264*
19. Leslie Salzman, *Guardianship for Persons with Mental Illness – A Legal & Appropriate Alternative?* 4 ST. LOUIS U. J HEALTH L. & POL'Y 279, 306 (2011).
20. Dinerstein, *supra*, note viii, at page 4.
21. Circles of Support are groups comprised of family and friends, who meet regularly with the individual with a disability to "help that person formulate and realize his or her hopes and desires." Kohn, *et. al. supra.* note i at 1123.
22. Microboards are similar to circles of support but are typically comprised of organizations that formed to support, and possibly provide services to the individual. Kohn, *et. al. supra.* note i at 1123.
23. Salzman, *supra*, note xiv at 306.
24. Alaska, Colorado, Delaware, Indiana, Louisiana, Nevada, North Dakota, Rhode Island, Texas, Washington, and Wisconsin.
25. American Bar Association ("ABA") House of Delegates Resolution (2017) available at americanbar.org/content/dam/aba/administrative/law_aging/2017_SDM_%20Resolution_Final.pdf; see also *Guardianship and Supported Decision-Making ABA,* available at americanbar.org/groups/law_aging/resources/guardianship_law_practice/
26. National Guardianship Association, *Position Statement on Guardianship, Surrogate Decision Making, and Supported Decision Making* (2017), available at: guardianship.org/wp-content/uploads/2017/07/SDM-Position-Statement-9-20-17.pdf
27. National Council on Disability, *Turning Rights Into Reality: How Guardianship and Alternatives Impact the Autonomy of People with Intellectual and Developmental Disabilities* (2019), *supra*, at 79-83.
28. 20 Pa.C.S.§ 5512.1.
29. *In re Peery,* 727 A. 2d 539 (Pa. 1999).
30. *In re Dameris L.,* 956 *N.Y.S.2d* 848 (N.Y.Sur. Ct. 2012).
31. *See, e.g., Matter of D.D.,* 50 *N.Y.Misc.* 3d 666 (N.Y. Surr. Ct. Kings County, Oct. 28, 2015); *Matter of Hytham M.G.,* 52 *N.Y.Misc.* 3d 1211(A) (N.Y. Surr. Ct. Kings County, July 27, 2016); *Matter of Eli T.* 89 *N.Y.S.3d* 844, 849 (N.Y. Surr. Ct. Kings County, 2018).
32. Jennifer Wright, *Guardianship for Your Own Good: Improving the Well-Being of Respondents and Wards in the USA,* 33 INT'L J.L. & Psychiatry 350 (2010).
33. *Id.* at 354.
34. Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act,* 81 U. COLO. L. REV. 157 (2010).
35. *Id.*
36. *Id.*
37. Kohn, *supra.*
38. Michael Wehmeyer & Susan Palmer, *Adult Outcomes for Students with Cognitive Disabilities Three-Years After High School: The Impact of Self-Determination,* 38 Educ. & Training Developmental Disabilities 131 (2003); Michael Wehmeyer & Michelle Schwartz, *Self-Determination and Positive Adult Outcomes: A Follow-Up Study of Youth*
39. Disabilityrightsnj.org.
40. Michael R. Brower, Esq., Legal Director, Disability Rights NJ interview with Beth L. Barnhard, Esq., CELA, August 19, 2022, follow up correspondence, August 23, 2022 to August 26, 2022. Beth L. Barnhard, Esq., CELA, is a member of the Board of Trustees of Disability Rights NJ.
41. Njcdd.org/about-the-njcdd/.
42. boggscenter.rwjms.rutgers.edu/.
43. spanadvocacy.org/about/.
44. *See,* Report of Court Appointed Counsel for the Alleged Incapacitated Person, Paragraph 25, Recommendations Concerning Suitability of Less Restrictive Alternatives/Areas of Decision-making That the Alleged Incapacitated Person May be Capable of Exercising, available at Njcourts.gov.
45. *See,* American Bar Association on Law and Aging, Access to Information Under Supported Decision-Making Statutes (Laws Current as of July 2022), available at: americanbar.org/aging.

Nursing Homes and Responsible Party Litigation—Subverting the Prohibition Against Requiring Third-Party Guarantees

Is it Time for the Legislature to Fix the Statute?

By Donald F. Browne Jr.

A nursing home is not required to accept every applicant. Whether to accept a new resident is an individual business decision. A resident without the financial resources to privately pay the nursing home will eventually need to apply for Medicaid. When the resident is approved, Medicaid sets a date of eligibility. The nursing home knows that if a resident owes them for three months or less when approved for Medicaid, the nursing home can still expect to be paid for all of the resident's care. Through retroactive eligibility, Medicaid will pay if the applicant is deemed otherwise eligible during the three-month period prior to the date of eligibility.[1] However, for the nursing home, accepting a resident that will need Medicaid includes an inherent risk that ultimately, Medicaid might not pay for all of the care provided to the resident.

Nursing Homes are Prohibited from Requiring a Third-Party Guarantee

Nursing homes in New Jersey are governed by the Federal Nursing Home Reform Act and New Jersey's Nursing Home Act (NHA).[2] The NHA was passed in 1976. In 1997, the Legislature added to the NHA by passing N.J.S.A. 30:13-3.1(a)(2) ("3PG Statute"). The 3PG Statute prohibits nursing homes from requiring that a resident's family member or friend guarantee payment.[3] The 3PG Statute is essentially a mirror image of the federal statute prohibiting third-party guarantees of payment.[4] Both statutes do contain an exception—if an agent has legal access to a resident's income or resources, the nursing home may require the agent to sign a contract agreeing to pay the facility from the resident's income or resources, without the agent incurring personal financial liability.[5]

Despite laws prohibiting third-party guarantees, a recent NPR article highlighted a disturbing trend where nursing homes were increasingly filing suit against the family and friends of its residents.[6] These lawsuits are known as responsible party cases. In a responsible party case, the nursing home alleges that the resident's family or friends are personally obligated to satisfy the bill that the resident is not able to pay. The author of the NPR article, Noam Levey, a senior correspondent for Kaiser Health News, contends that "the lawsuits illuminate a dark corner of America's larger medical debt crisis."[7]

Signing the Admission Agreement

Many nursing home residents have designated a family member or friend as their agent under a durable power of attorney. The process of finding a nursing home is often stressful and confusing for the agent. Admission to a nursing home often follows an unplanned hospitalization, usually after a fall or other serious medical event.

During their first visit to the nursing home, the agent is often asked to sign an array of complicated admission documents on behalf of the resident. The agent often describes feeling pressured by the nursing home staff to sign the documents at that time. The primary document setting forth the contract between the nursing home and resident is the admission agreement. Without thoroughly reviewing the admission agreement and speaking to a lawyer, most agents are not able to comprehend all of its terms. Regrettably, the agent usually just decides to sign the documents at that time. The agent often describes relying on the assumption that that they were only signing on behalf of the resident, and not in any type of individual capacity.

What is a Responsible Party?

If the agent assumes that they were only signing the admission agreement on behalf of the resident, it can later prove costly. The admission agreement will identify the resident and the nursing home as parties to the contract. The admission agreement will also contain a clause designating the resident's agent as the "responsible party." It will contain contractual terms and representations that only apply to the responsible party. The admission agreement will not provide for any type of legal consideration for the responsible party. If a lawsuit is ever filed against the responsible party, they are often dismayed to learn that assisting the resident by signing the admission agreement has become the basis for litigation seeking to recover their personal assets.

The admission agreement may contain preprinted representations about the resident's finances. One common representation is that the responsible party represents that the resident has not made any gifts in the last five years. The responsible party rarely possesses the

DONALD F. BROWNE JR. *is of counsel to DeNittis Osefchen Prince. Donnie has dedicated his litigation practice to assisting seniors and their families for over 20 years. His practice focuses on probate litigation. Donnie has also developed a niche representing seniors and their families in financial disputes with nursing homes and other types of senior care facilities.*

personal knowledge needed to confirm whether such a representation was accurate. Often, the responsible party does not even realize the significance of this type of representation in the admission agreement.

Whether the resident made any gifts is crucial because a Medicaid applicant is prohibited from gifting any assets during the five-year period before the date that their application is filed. Any gifting by the resident made during the five-year look back period will usually result in an ineligibility period. An ineligibility period is a penalty calculated by Medicaid that is expressed as a certain number of days. The ineligibility period starts on the first day of eligibility. Medicaid will not start paying for the resident's care until the ineligibility period is over. Imposition of an ineligibility period often means that the nursing home will not get paid for some of the care provided to the resident.

The admission agreement will also contain contractual obligations for the responsible party. One example is a requirement that the responsible party must claw back any gifts that the resident made during the look back period. Another example is a requirement that the responsible party apply for Medicaid on the resident's behalf. The Medicaid application process is difficult. It can take many months. It includes obtaining at least five years of financial records, as well as corresponding with a Medicaid caseworker. Many times, the caseworker will request that the responsible party provide explanations about some of the financial transactions made by the resident during the look back period. Often, the responsible party does not possess the personal knowledge to provide the explanations. An inability to explain legitimate transactions can also lead to an ineligibility period, and the situation where the nursing home might not get paid for all of the care provided to the resident.

Responsible Party Litigation

Some nursing homes treat the ability to file a responsible party case against the resident's agent as an insurance policy for the times when Medicaid imposes an ineligibility period. If the ineligibility period is because of past gifting by the resident, the responsible party case will allege breach of contract against the responsible party for falsely representing in the admission agreement that the resident had not made any gifts in the last five years. If the Medicaid application process takes longer than expected and resident's assets are exhausted before the process is complete, the responsible party case will allege negligence against the responsible party for their inability to get approval from Medicaid sooner.

In responsible party cases, the nursing homes calculate damages as the amount not paid by Medicaid. The remedy sought by the nursing homes is the same amount that they would claim if it was legal for them to require a third-party guarantee. Which begs the question, are responsible party cases just a veiled attempt to subvert the prohibition against nursing homes requiring third-party guarantees?

In responsible party cases, the nursing homes seek to obtain the personal assets of the responsible party. Their responsible party strategy is bolstered by the fact that that whether or not the claims have merit, a portion of responsible party cases will result in a default judgment against the responsible party. Which begs a similar question, are responsible party cases just a veiled attempt to subvert the prohibition against nursing homes seeking to recover from a responsible party's personal assets?

Manahawkin Convalescent v. O'Neill

In 25 years since its passage, only one published case in New Jersey addresses the 3PG Statute. In *Manahawkin Convalescent v. O'Neill*, the New Jersey Supreme Court considered whether a collection action filed by a nursing home against the daughter of one of its residents violated the 3PG Statute.[8]

Admission Agreement and Collection Action

In 2007, Elise Hopkins was admitted to Manahawkin Convalescent Center (Manahawkin). Hopkins' daughter Frances O'Neill was her agent under a durable power of attorney. O'Neill signed the admission agreement, which designated her as responsible party. O'Neill did not sign the private pay guarantor portion of the admission agreement. The admission documents also contained a Resident's Bill of Rights (RBR), which is relevant to this discussion because it includes language parroting the prohibitions contained in the 3PG Statute.

Following Hopkins' death in 2008, O'Neill was appointed executrix. In March 2009, O'Neill received a threatening letter from Manahawkin's collection department stating that she, as the responsible party, had "the obligation to pay any debts owed by [Hopkins] to the facility."[9] Manahawkin's collection letter warned O'Neill that her failure to contact Manahawkin to arrange payment "will leave us no choice but to proceed with legal action against you as the responsible party," and that Manahawkin would sue O'Neill "for the monies due with [accrued] interest plus court costs and legal fees."[10] The collection letter further added that O'Neill would be "reported to the credit rating agencies," and that the letter was the only notice that she would receive "prior to the commencement of legal proceedings."[11]

Eight days after mailing the collection letter, Manahawkin filed a responsible party case against O'Neill in the Special Civil Part of the Law Division. Manahawkin's complaint named O'Neill as the

sole defendant and sought payment of Hopkins' unpaid balance of $878.20. Despite what appeared to be attempts by Manahawkin to induce O'Neill to pay Hopkins' unpaid balance with her personal assets, Manahawkin argued that it only intended to demand that O'Neill use any assets of Hopkins' estate under her control to satisfy Hopkins' account balance.[12] This begs the question, if the debt was owed by Hopkins' estate, why was the estate was not named as the defendant?

Affirmative Claims Alleging Violation of the NHA

O'Neill filed a responsive pleading which contained counterclaims alleging Manahawkin violated two consumer statutes.[13] Both of O'Neill's counterclaims were tethered to her ability to establish that Manahawkin violated the NHA. O'Neill's claims were premised upon three alleged violations of the 3PG Statute. First, O'Neill contended Manahawkin tried to require her to spend her personal funds to pay her mother's bills in violation of the terms of the admission agreement. Second, O'Neill asserted that Manahawkin's collection letter constituted an attempt to coerce her into using her own assets to pay the facility's final bill. Third, O'Neill contended that Manahawkin's complaint sought a remedy against O'Neill in her individual capacity, rather than in her fiduciary role as executrix of Hopkins' estate.[14]

Law Division

The matter was transferred from Special Civil to the Law Division. In September 2009, Manahawkin voluntarily dismissed its complaint with prejudice. The court considered O'Neill's counterclaims which were tethered to her ability to establish that Manahawkin violated the NHA. The court concluded that Manahawkin did not violate the NHA and granted summary judgment dismissing O'Neill's claims. The appellate division affirmed. The New Jersey Supreme Court granted certiorari.[15]

Supreme Court

As far back as 2013, when *Manahawkin* was argued before the Court, it was well known that responsible party cases are often unfair to the defendant. Legal Services of New Jersey (LSNJ) highlighted this practice in an amicus curiae brief filed with the Court. LSNJ alleged that in an effort to circumvent the NHA, nursing homes routinely create third-party liability for costs incurred by residents covered by Medicaid by designating responsible parties in admission agreements, and pursuing those parties personally for residents' unpaid bills.[16]

O'Neill argued that by its plain language, the admission agreement violated the NHA. O'Neill cited a provision in the admission agreement that authorized Manahawkin to place a lien on the property of the resident and responsible party if the nursing home bill was unpaid.[17] The Court reviewed the admission agreement and noted that Manahawkin should have explained to O'Neill the specific obligations that may be imposed upon a responsible party, consistent with the NHA, and the remedies available to Manahawkin in the event of a default of those obligations.[18] The Court noted that the relevant NHA provision was summarized in the RBR, and Manahawkin should have incorporated similar language into the admission agreement.[19] The Court further noted that the admission agreement would have better served both parties had it specifically addressed the status of a responsible party who acts on behalf of a resident in a Medicaid certified nursing home.[20]

O'Neill also argued that Manahawkin's collection letter and lawsuit violated the 3PG Statute. The Court noted that Manahawkin's collection letter and complaint failed to clearly articulate the nursing home's legal rights.[21] The Court noted that the collection letter only provided a partial explanation of Manahawkin's potential cause of action against O'Neill.[22] The Court noted that Manahawkin did not explain to O'Neill that it only "intended to demand nothing more than that Hopkins' account balance be paid by O'Neill in her fiduciary capacity, using the assets of Hopkins' estate under her control."[23]

The Court was likewise critical of Manahawkin's complaint, which was prepared by a non-lawyer. The Court noted that Manahawkin's cause of action was not defined in sufficient detail in the complaint and was not properly pled.[24] The Court noted that Manahawkin's complaint should have made clear that its claim for Hopkins' account balance was either asserted against O'Neill in her fiduciary capacity as executrix, or against O'Neill individually based solely upon her contractual obligation to arrange for the payment of Hopkins' bills.[25] Instead, making no distinction between O'Neill's potential liability as a fiduciary and her potential personal liability for Hopkins' bills, Manahawkin named O'Neill as the defendant.[26] The Court reminded that Manahawkin's decision to use the services of a non-lawyer to draft its collection documents did not obviate the need for those documents to properly identify the defendant and to define the legal right that the nursing home sought to vindicate.[27]

Manahawkin claimed that its collection efforts were only intended to collect any assets of Hopkins' estate over which O'Neill exercised control.[28] This assertion conflicts with Manahawkin's threat to report O'Neill to the credit rating agencies. This assertion likewise conflicts with Manahawkin naming O'Neill as the

sole defendant in the complaint, without any designation that the claims were only against her in a fiduciary capacity. If Manahawkin's claim about its intent was true, Hopkins' estate would have been named as the defendant, and the executrix, O'Neill, would have been served with the complaint. O'Neill would have defended that lawsuit on behalf of the estate, without any basis to file a counterclaim against Manahawkin.

Contract Language v. Manahawkin's Actions—What Controls?

Instead of focusing on whether Manahawkin's collection related actions violated the 3PG Statute, the Court focused on the plain language of the admission agreement. The Court ruled that Manahawkin did not violate the NHA.[29] The Court concluded that the terms of the admission agreement did not require O'Neill to "commit[]…her personal assets to pay for the resident's care."[30] The Court noted that the RBR provided to O'Neill explained that a third party is only obligated to pay for care from the resident's assets.[31] Last, the Court repeated that Manahawkin had asserted that its collection efforts were limited only to Hopkins' assets over which O'Neill exercised control. The Court held that Manahawkin sought relief based on a contract that was expressly permitted by the 3PG Statute because the statute authorizes a nursing home to require a third party to agree to provide payment from the resident's personal funds without incurring personal liability.[32]

The Court never specifically addressed why its criticisms of Manahawkin's collection letter and complaint did not equate to an attempt to obtain O'Neill's personal assets in violation of the NHA. If O'Neill had not filed a responsive pleading, Manahawkin would have obtained a default judgment against her personal assets. It is likewise not clear why the filing of a lawsuit where O'Neill was the sole defendant did not violate of the 3PG Statute.

Time to Consider a Change?

Manahawkin ended with the following caveat, "[w]e urge counsel for this important industry, serving elderly and disabled residents and their families, to ensure that nursing home contracts are prepared—and collection practices conducted—in a manner that fosters a clear understanding of each party's rights and remedies as it complies with the law."[33] As highlighted in the NPR article, in the time since *Manahawkin* was decided, it appears that the nursing home industry has failed to adopt contracts and collection practices that foster a clear understanding of each party's rights and remedies. Conversely, some in the nursing home industry have refined a legal strategy designed to avoid the 3PG Statute, while still seeking to recover the personal assets of the resident's family member or friend.

When it was passed in 1997, the 3PG Statute appeared to be an attempt by the Legislature to protect the family and friends of nursing home residents from an unfair business practice. Today, the 3PG Statute does not protect these individuals. Without the ability to hold a nursing home accountable, a responsible party who successfully defends a responsible party case will still be required to spend significant time and money defending a claim that should be illegal. The time has come for the Legislature to take a second look at whether the 3PG Statute should be strengthened to provide additional protections for the family and friends of nursing home residents. ■

Endnotes

1. N.J.A.C. 10:71-2.16.
2. Federal Nursing Home Reform Act, 42 C.F.R. §§ 483.1-483.480; and New Jersey's Nursing Home Act, N.J.S.A. 30:13-1 to -17.
3. N.J.S.A. 30:13-3.1(a)(2).
4. Compare N.J.S.A. 30:13-3.1(a)(2) and 42 U.S.C. § 1395i-3(c)(5)(A)(ii).
5. *Id*.
6. Nursing homes are suing friends and family to collect on patients' bills, Noam Levey, July 28, 2022, npr.org/sections/health-shots/2022/07/28/1113134049/nursing-homes-are-suing-friends-and-family-to-collect-on-patients-bills.
7. *Id*.
8. *Manahawkin Convalescent v. O'Neill*, 217 N.J. 99 (2014).
9. *Id*. at 109.
10. *Id*.
11. *Id*.
12. *Id*. at 126.
13. Consumer Fraud Act, N.J.S.A. 56:8–1 to –20; and the Truth–in–Consumer Contract, Warranty, and Notice Act, N.J.S.A. 56:12–14 to –18.
14. *Manahawkin* at 117-118.
15. 212 N.J. 431 (2012).
16. Id. at 114.
17. *Id*. at 113.
18. *Id*. at 126.
19. *Id*.
20. *Id*.
21. *Id*.
22. *Id*.
23. *Id*.
24. *Id*. at 120.
25. *Id*.
26. *Id*.
27. *Id*. at 127.
28. *Id*. at 117-118.
29. *Id*. at 120.
30. *Id*. at 119.
31. *Id*.
32. *Id*. at 120.
33. *Id*. at 127.

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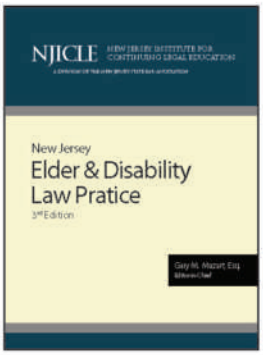

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Editor and Contributing Author: Gary Mazart, Esq.
Contributing Authors: Martin M. Shenkman, Esq., CPA, MBA; Shirley B. Whitenack, Esq.; Mary E. Wanderpolo, Esq.; Thomas D. Begley, Jr., Esq., CELA; Gary N. Skoloff, Esq.; Beatrice E. Kandell, Esq.; Paul W. Armstrong, Esq.; Marilyn Askin, Esq.; Dana E. Bookbinder, Esq., CELA; Grayson H. Heberley, III, Esq.; Peter A. Marra, Esq.; Brenda S. Mcelnea, Esq.; Robert S. Olick, Esq.; Nancy M. Rice, Esq., CELA; Todd M. Sahner, Esq.; Dana Shilling, Esq.; Maria A. Volarich, Esq.; Jonathan W. Wolfe, Esq.; William P. Isele, Esq.; Joyce S. Brown, Esq.; Kimber L. Gallo, Esq.

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Continued Resilience in the Face of Adversity

Exploring Staffing Shortages Facing the Long-Term Care and Skilled Nursing Industry

By Alexis A. Graziano, Kayla Moor and David Drake

Over two years after the COVID-19 outbreak upended life in the United States, pre-pandemic normalcy is returning. However, monumental challenges brought on by the pandemic remain.

The pandemic ushered in the most severe job crisis since the Great Depression.[1] Due to lockdowns, many businesses were forced to downsize or close. According to U.S. Bureau of Labor Statistics in May 2020—during the height of the pandemic—nearly 50 million people were unable to work due to business closures related to the pandemic.[2] Those effects continued one year later (June 2021) with 6.2 million people out of work due to the pandemic. It is estimated the pandemic resulted in the permanent closure of roughly 200,000 U.S. business.[3]

During this time, societal functioning was mainly in the hands of our essential workers.[4] Health care professionals in particular stood fearlessly on the front lines battling the pandemic. The health care industry was forced to grapple with new and evolving challenges brought on by the pandemic and existing challenges exacerbated by it. As the pandemic persisted, staffing shortages became one of the most crippling hurdles the industry faced.[5]

The long-term care space was particularly hard hit by both the pandemic and resulting staffing shortages. Workforce shortages have long plagued the long-term care industry, and the pandemic continued to fuel its intensity.[6] Now, more than two years after the pandemic's start, health care workplace shortages in the long-term sector continue and are expected to persist.[7]

This article will explore the ongoing staffing crisis, with a particular focus on the long-term care and skilled nursing industry. Despite these exceptional challenges, the long-term care industry continues to demonstrate remarkable resilience.

Current Labor Climate Across All Industries

While the United States continues to experience record-level labor shortages across most sectors, current economic indicators demonstrate a substantial improvement from the beginning of the pandemic. In April 2020, the unemployment rate spiked to 14.8%—the highest rate observed since data collection began in 1948.[8] Twenty-six months later, in July 2022, unemployment has fallen to 3.5%, matching a 50-year low reached just before the pandemic began in early 2020.[9] As of this past summer, the labor market had recovered all 22 million jobs lost in the pandemic, with U.S. employers adding 528,000 jobs to the labor market in July 2022 alone.[10]

With positive economic indicators and significant economic improvement from the height of the pandemic, the question remains: Why are labor shortages persisting? Many experts point to a decline in labor force participation. The current labor force participation rate is 62.1%, down from 63.3% in February 2020.[11] Although a 2.1 percentage point decline seems nominal at first blush, it translates to 3 million fewer workers today.[12] To put workforce realities further into perspective, there are more than 10 million job openings in the United States, but only 6 million unemployed workers, meaning there are over 1.5 job openings for every unemployed worker.[13]

The reasons behind the below-average labor participation rates are complex, with experts citing several possible factors including: early retirement, aging of the baby

ALEXIS GRAZIANO *is a shareholder at Buchanan Ingersoll and Rooney in the firm's Litigation Section. Since 2011, Alexis has represented health care providers in the long-term care and skilled nursing industries. Alexis lives in Haddon Township with her husband Charlie and daughters Anna and Grace.*

DAVID DRAKE *is an associate at Buchanan Ingersoll and Rooney in the firm's Litigation Section. He has represented health care providers since 2014, with a focus on long-term care and skilled nursing industries since joining Buchanan in 2019. David lives in Marlton with his family.*

KAYLA MOOR *is an associate at Buchanan Ingersoll and Rooney in the firm's Healthcare Litigation Section. Kayla concentrates her practice on representing health care providers in the long-term care and skilled nursing industries. Kayla lives in Rahway with her fiancé Kris.*

Current data and studies suggest staffing shortages are not only here to stay, but could worsen. In a recent study, the Association of American Medical Colleges (AAMC) predicted that by 2034, the demand for physicians will outpace the supply, resulting in a shortage of up to 124,000 physicians. The situation for nurses and other health care providers is equally dire.

boomer generation, child-care challenges, and COVID-related illness and deaths.[14]

Health Care Industry-Specific Staffing Challenges

The health care industry is among the sectors hit hardest by labor shortages.[15] During the first months of the pandemic, it is estimated that 1.5 million health care jobs were lost due to temporary closure of clinics and restrictions of non-emergency services. Although many of these jobs have returned, employment in the health care sector remains below pre-pandemic levels, with the number of workers down by 1.1%, or 176,000, compared to February 2020.[16] While employment increased in the health care industry as a whole from the start of the pandemic, there was immense variation by sector. For example, the ambulatory health care services sector experienced employee increases, while both hospitals and skilled nursing facilities experienced declines.[17]

Current data and studies suggest staffing shortages are not only here to stay, but could worsen. In a recent study, the Association of American Medical Colleges (AAMC) predicted that by 2034, the demand for physicians will outpace the supply, resulting in a shortage of up to 124,000 physicians.[18] The situation for nurses and other health care providers is equally dire. The U.S. Bureau of Labor Statistics projects 195,400 registered nurse vacancies per year through 2030, with employment projected to grow 6%.[19] Studies show that New Jersey will be among the hardest hit states of the nursing shortages. The U.S. Department of Health estimates that by 2030, New Jersey will have a shortfall of 11,400 nurses.[20] According to a 2018 survey conducted by consulting firm Mercer, by 2025, the U.S. will face a shortage of almost 30,000 registered nurses, 95,000 nursing assistants, over 98,000 lab technicians, and 446,000 home health aides.[21]

Staffing Challenges Faced by the Long-Term Care Industry

"Nursing homes have lost nearly 238,000 nursing home employees—amounting to 15 percent of its total workforce—since the start of the COVID-19 pandemic, Bureau of Labor Statistics data shows."[22] A 2022 study showed that skilled nursing facilities were among the providers with the largest declines in employment levels in 2020, with an 8.4% drop.[23] The study further found that while most health care sectors "rebounded to the pre-COVID levels" in 2021, skilled nursing facilities saw a 13.6% decline in employment, an even further decline from 2020.[24]

As described above, staffing shortages are predicted to affect all types of health care industry providers and staff, including certified nursing assistants (CNAs). CNAs provide close to 90% of direct care to nursing home residents.[25] Studies show that other essential long-term care worker shortages are on the horizon. A 2021 study by Mercer predicts the number of critical, but lower-wage health workers (e.g., medical assistants, home health aides, and nursing assistants), will drop substantially in the coming years.[26] Alarmingly, the Mercer study found that the need for these workers will grow over the next five years to around 10.7 million. If workforce trends continue, 6.5 million employees will leave with only 1.9 million filling these positions, leaving a 4.6 million-worker shortfall within five years.[27]

Those staffing realities are further exacerbated as the baby-boomer generation ages into the patient population most likely to require long-term care. "The number of individuals ages 65 and older is projected to increase from 54 million in 2019 to more than 80 million by 2040, according to the Department of Health and Human Services." [28]

Industry Solutions to Staffing Shortages

In response to the aforementioned shortage, the long-term care and skilled nursing sector have responded in unique and varying ways. Like many other sectors in the health care system, the long-term care industry has relied on staffing agencies to fill staffing vacancies. For most health sectors, use of agency staffing costs facilities 50% more than staffing with employees.[29] Despite increased agency utilization, the long-

term care industry remains wary of its use for reasons other than the increased cost.[30] Some in the industry believe agency use has a negative impact on staff morale, quality of care, and resident satisfaction—concluding that agency staff "don't know the policies, procedures, the residents."[31] However, states like New Jersey continue to experience high agency use since the implementation of its minimum staffing requirement to ensure compliance.[32]

Other unorthodox responses to the staffing shortages have originated from leaders within the industry. In response to the industry's concerns regarding staffing and influences from long-term care industry leader Dr. David Gifford, the chief medical officer at the American Health Care Association (AHCA), the Centers for Medicare & Medicaid Services (CMS) issued a blanket waiver for long-standing training and certification requirements for nursing assistants, creating temporary nurse aides (TNAs).[33] Specifically, at the beginning of the pandemic, CMS implemented Emergency Regulation 1135, which waived 42 CFR 483.35 9(d) of the OBRA ACT, allowing nurse aides to work for four months without completing a state-approved Nurse Aide Training and Competency Evaluation Program (NATCEP).[34] This waived NATCEP requirement includes a 75-hour training and passing the states' competency evaluation test. Many states, including New Jersey, created their own CNA waivers during the public health emergency.[35]

Quickly after the waiver was implemented, the American Health Care Association/National Center for Assisted Living (AHCA/NCAL) launched a free eight-hour online training course for temporary nurse aides.[36] To date, more than 300,000 individuals have completed the course.[37]

In April 2021, CMS advised that once the NATCEP waiver was lifted, aides using this program would have four months to complete their state's required training.[38] CMS also suggested that "states evaluate their NATCEP and consider allowing some of the time worked during the [pandemic] to count toward the 75-hour training requirement."[39] The waiver was lifted on June 6, 2022, and required TNAs hired during the pandemic to become CNAs by Oct. 6, 2022.[40] However, in August 2022, CMS issued new guidance allowing waivers of aide training requirements on a facility, county or state basis.[41] While the true impact of the federal waiver has yet to be fully examined, the waiver's expiration is expected to impact facility staffing.[42]

AHCA's Dr. Gifford has also advocated for the implementation of what he calls "hallway ambassadors."[43] He explains that "much of the burden of care in [long-term care facilities] can be removed from the shoulders of specialists and placed on those of other aides."[44] He envisions that these employees would address non-medical needs and requests by residents, their families or other nursing home staff—allowing nurses, certified staff, and specialists to focus on the medical, nursing, and other pressing needs of their residents.[45]

New Jersey Staffing Laws

Since the onset of the pandemic, New Jersey has passed several laws regulating staffing and pay in the long-term care industry. Most significantly, on Oct. 23, 2020, Gov. Phil Murphy signed into law P.L. 2020 c 112, codified at *N.J.S.A.* 30:13-18, establishing minimum staffing requirements for nursing homes. Particularly, the law requires a minimum of one certified nurse assistant for every eight residents on the day shift, one direct-care staff member (RN, LPN, or CNA) for every 10 residents on the evening shift, and one direct-care staff for every 14 residents on the night shift. The law also establishes the Special Task Force on Direct Care Workforce Retention and Recruitment.[46] These new minimum staffing requirements went into effect on Feb. 1, 2021.

New Jersey has also passed other laws regulating long-term care compensation and benefits. New Jersey passed a law requiring that long-term facility direct care staff members be paid $3 more than the prevailing minimum wage rate, making the current minimum wage for such staff $15 an hour as of January 2022.[47] Additional compensation-related measures include the passage of P.L.2020, c.90 in 2020, which increased Medicaid nursing facility reimbursement rates by 10% and required that additional revenue be placed toward wage increases and infection control.[48] The law requires nursing homes to use 60% of the funds to increase wages or supplement pay for CNAs.

In August 2022, Murphy signed into law Bill S315, which requires that any non-governmental health care entity that acquires nursing homes and other health care facilities in New Jersey preserve employee salaries and benefits for a minimum of four months.[49] It remains to be seen whether these new compensation laws will attract and retain employees, especially in light of a recent study showing declining staff in the face of rising wages.[50]

Proposed Federal Regulations

Joining the state and federal policymakers desiring to set minimum staffing standards, on Feb. 28, 2022, the Biden Administration announced its intention to reform nursing home care by working with and through the Department of Health and Human Services to implement measures aimed at setting higher standards for nursing homes.[51] The most notable reform being considered is the establishment of a federal staffing mini-

mum. The administration announcement indicated CMS would be conducting a research study to determine the level and type of staffing needed to ensure safe and quality care. The administration will issue proposed rules within one year.

This past August, CMS hosted its stakeholder call providing additional information regarding the study, which will include four parts: a literature review, nursing home site visits, quantitative analyses, and cost analyses.[52] CMS is on the "fast track" toward proposing new federal staffing minimum requirements for facilities by Spring 2023.[53] Industry input suggests that any federal staffing minimums required by CMS should consider the interdisciplinary team. Other industry officials urged CMS to consider geographical differences in costs and differences in hiring and retaining staff. [54]

An AHCA report estimates nursing homes will be required to spend $10 billion per year, and hire almost 188,000 nurses to comply with expected federal minimum staffing requirements.[55] The report warns that a federal minimum will likely have untended consequences. "If the Biden Administration establishes a Federal minimum staffing requirement, nursing homes will likely need to reduce the number of residents they care for to meet the standard. To comply with the 4.1 HPPD requirement, nursing homes would have to displace 18 percent of residents (205,400 residents)."[56]

Conclusion

As the varying industry state and federal responses show, there is no clear or single solution to the staffing shortage in the long-term care industry. Despite the current unknowns, the long-term care industry continues to remain resilient in the face of ever-present and evolving challenges. If there is anything the pandemic has shown, it is that our health care heroes will do anything but succumb to paramount trials and tribulations. The industry and providers have shown that they will adapt and do whatever is necessary to take care of the rest of us—keeping patient care their highest priority.

Endnotes

1. pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/
2. bls.gov/opub/ted/2021/6-2-million-unable-to-work-because-employer-closed-or-lost-business-due-to-the-pandemic-june-2021.htm
3. wsj.com/articles/covid-19s-toll-on-u-s-business-200-000-extra-closures-in-pandemics-first-year-11618580619
4. unitedwaynca.org/blog/us-states-with-the-most-essential-workers/
5. aha.org/fact-sheets/2021-05-26-fact-sheet-strengthening-health-care-workforce beckershospitalreview.com/workforce/healthcare-workforce-shortages-by-the-numbers.html
6. aarp.org/caregiving/health/info-2022/labor-shortage-nursing-homes.html#:~:text=The%20nation's%20nursing%20home%20industry,have%20also%20seen%20steep%20drops. usnews.com/news/health-news/articles/2022-06-29/staffing-shortages-have-u-s-nursing-homes-in-crisis#:~:text=Projections%20show%20that%20as%20many,the%20long%2Dterm%20care%20workforce.
7. aha.org/fact-sheets/2021-05-26-fact-sheet-strengthening-health-care-workforce beckershospitalreview.com/workforce/healthcare-workforce-shortages-by-the-numbers.html
8. sgp.fas.org/crs/misc/R46554.pdf
9. usatoday.com/story/money/2022/08/05/july-jobs-report-unemployment-rate-3-5-528-000-jobs-added/10243309002/
10. *Id.*
11. uschamber.com/workforce/understanding-americas-labor-shortage
12. heritage.org/jobs-and-labor/commentary/why-americas-labor-force-decline-matters-beyond-current-supply-shortages
13. uschamber.com/workforce/understanding-americas-labor-shortage
14. washingtonpost.com/business/2022/09/16/worker-shortage-strikes-economy/washingtonpost.com/politics/2022/01/07/economy-is-feeling-effects-fading-baby-boom/
15. uschamber.com/workforce/understanding-americas-labor-shortage-the-most-impacted-industries
16. usnews.com/news/health-news/articles/2022-07-28/staff-shortages-choking-u-s-health-care-system
17. aspe.hhs.gov/sites/default/files/documents/9cc72124abd9ea25d58a22c7692dccb6/aspe-covid-workforce-report.pdf (p.6).
18. aamc.org/media/54681/download?attachment (viii).
19. bls.gov/ooh/healthcare/registered-nurses.htm
20. bhw.hrsa.gov/sites/default/files/bureau-health-workforce/data-research/nchwa-hrsa-nursing-report.pdf (5).
21. lexisnexis.com/community/insights/legal/capitol-journal/b/state-net/posts/states-take-multiple-tacks-toward-easing-health-worker-shortage
22. skillednursingnews.com/2022/03/hiring-outside-the-industry-flexible-scheduling-are-key-to-clearing-skilled-nursings-staffing-hurdles/
23. jamanetwork.com/journals/jama-health-forum/fullarticle/2789521
24. *Id.*

25. ncbi.nlm.nih.gov/pmc/articles/PMC2715163/
26. mercer.us/content/dam/mercer/assets/content-images/north-america/united-states/us-healthcare-news/us-2021-healthcare-labor-market-whitepaper.pdf
27. *Id.*
28. usnews.com/news/health-news/articles/2022-07-28/staff-shortages-choking-u-s-health-care-system
29. skillednursingnews.com/2022/04/nursing-homes-pay-exorbitant-agency-costs-to-comply-with-staffing-minimums/fiercehealthcare.com/hospitals/pandemic-era-overtime-agency-staffing-costs-u-s-hospitals-extra-24b-per-year
30. skillednursingnews.com/2021/06/nursing-homes-use-of-staffing-agencies-soars-during-pandemic-as-workforce-crisis-deepens/
31. *Id.*
32. skillednursingnews.com/2022/04/nursing-homes-pay-exorbitant-agency-costs-to-comply-with-staffing-minimums/
33. providermagazine.com/Topics/Guest-Columns/Pages/2022/Creative-Solutions-for-the-Staffing-Crisis-in-Long-Term-Care.aspx
34. cms.gov/files/document/qso-21-17-nh.pdfmedicareadvocacy.org/cms-authorizes-new-waivers-of-nurse-aide-training-requirements-for-nursing-facilities/
35. cnaonline.com/wp-content/uploads/2022/05/TNA-and-CNA-Waiver-Presentation-by-NJDOH.pdf nj.gov/health/legal/covid19/4-29-20_WaiverRequirements_forNurseAideCertification.pdf
36. phinational.org/temporary-nurse-aides-need-job-stability-and-support/
37. ahcancal.org/Advocacy/IssueBriefs/TNA%20CNA_IB.pdf
38. medicareadvocacy.org/cms-authorizes-new-waivers-of-nurse-aide-training-requirements-for-nursing-facilities/
39. CMS, "Updates to Long-Term Care (LTC) Emergency Regulatory Waivers issued in response to COVID-19," QSO-21-17-NH (Apr. 8, 2021), cms.gov/files/document/qso-21-17-nh.pdf
40. leadingageny.org/topics/coronavirus/guidance/nursing-homes/cms-guidance/cms-provides-guidance-on-end-of-cna-certification-waiver-and-tna-to-cna-transition/#:~:text=Temporary%20nurse%20aides%20(TNAs)%20hired,waiver%20was%20due%20to%20expire.
41. leadingageny.org/home/assets/File/QSO-22-15-NH-NLTC-LSCv2.pdf
42. mcknights.com/news/providers-demand-federal-action-as-temporary-nurse-aide-waiver-ends/
43. providermagazine.com/Topics/Guest-Columns/Pages/2022/Creative-Solutions-for-the-Staffing-Crisis-in-Long-Term-Care.aspx
44. *Id.*
45. *Id.*
46. nj.gov/governor/news/news/562020/20201023a.shtml; https://www.lexology.com/library/detail.aspx?g=af559e50-4bbc-4ce7-8836-d18fb2341364; N.J. Stat. § 30:13-18
47. jdsupra.com/legalnews/new-jersey-increases-minimum-wage-for-4087621/
48. nj.gov/humanservices/library/slides/NF%20SFY2021%20Rate%20Increase%20FAQ.pdf nj.gov/humanservices/library/slides/NF%20Rate%20Presentation%202022-03-01.pdf https://www.nj.gov/humanservices/library/slides/Budget%20Newsletter%20FY%202022.pdf
49. https://skillednursingnews.com/2022/08/nj-law-offers-salary-benefit-protections-for-nursing-home-workers-during-ownership-changes/ https://www.nj.com/coronavirus/2022/08/nj-nursing-home-workers-getting-new-job-protections-under-law-murphy-just-signed.html
50. jamanetwork.com/journals/jama-health-forum/fullarticle/2789521
51. whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-protecting-seniors-and-people-with-disabilities-by-improving-safety-and-quality-of-care-in-the-nations-nursing-homes/
52. skillednursingnews.com/2022/08/providers-push-back-on-cmss-move-to-zero-in-on-nursing-roles-in-minimum-staffing-study/
53. skillednursingnews.com/2022/09/congresswoman-schakowsky-we-are-setting-the-stage-for-essential-nursing-home-ownership-disclosures/
54. skillednursingnews.com/2022/08/providers-push-back-on-cmss-move-to-zero-in-on-nursing-roles-in-minimum-staffing-study/
55. ahcancal.org/News-and-Communications/Fact-Sheets/FactSheets/CLA-Staffing-Mandate-Analysis.pdf
56. revcycleintelligence.com/news/minimum-staffing-requirements-could-cost-nursing-homes-10b-annually#:~:text=If%20the%20Biden%20Administration%20establishes,of%20residents%20(205%2C400%20residents).

From the Adult System to Long-Term Care

A Comparative Approach to Planning for Aging Adults With Intellectual and Developmental Disabilities

By Crystal West Edwards and Ryann M. Siclari

New Jersey provides numerous services to support individuals who are financially needy, medically needy, aging, blind or have disabilities. Both the New Jersey Division of Medical Assistance and Health Services (Medicaid) and the New Jersey Division of Developmental Disabilities (DDD) provide a suite of services, each having separate and distinct eligibility criteria. Individuals with Intellectual and Developmental Disabilities (I/DD) must coordinate services to assist with major activities of daily living. This is compounded by the typical aging processes including physical and/or cognitive decline. This article will discuss Medicaid and DDD services available to aging adults with I/DD and the unique challenges faced when selecting services.

Adults With I/DD

DDD provides services to adults with I/DD beginning at age 21. There are several requirements an individual must meet to qualify for services through the DDD. First, they must have a developmental disability as defined in *N.J.A.C.* 10:46-1.3. Second, they must be eligible for Medicaid under one of numerous paths to eligibility. Third, they must enroll in one of the two Medicaid waiver programs administered by the DDD: the Supports Program or the Community Care Program (CCP). Typically, an individual will be enrolled in the Supports Program once the other eligibility criteria are met.[1]

Developmental Disability

I/DD is more than "(i) an education classification of neurological impairment, (ii) attention deficit hyperactivity disorder, (iii) learning disorder, (iv) oppositional defiant disorder, [or] (v) conduct disorder.[2] Instead, I/DD is "a severe, chronic disability"... "which (i) is attributable to a mental [and/or] physical impairment ..., (ii) manifest[s] before age 22, (iii) is likely to continue indefinitely, (iv) results in substantial functional limitations in three or more...areas of major activities of daily living, and (v) reflects the need for a combination and sequence of special interdisciplinary or generic care, treatment, or other services, which are of lifelong or extended duration and are individually planned and coordinated."[3] Such areas of major activities of daily living include self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency.[4]

Medicaid Eligibility

By way of background, each state that participates in Medicaid is required to have a state plan which complies with the Medicaid Act.[5] The states are permitted to amend their state plan, with approval by the Centers for Medicare and Medicaid Services (CMS). One comprehensive amendment to the state plan is known as a Section 1115 Demonstration Waiver.[6] New Jersey elected to amend its state plan accordingly, which outlines numerous paths to Medicaid eligibility (1115 Waiver).[7] These paths include, but are not limited to, New Jersey Care, Workability, Supports Program, CCP, and Managed Long Term Services and Supports (MLTSS). Each of these programs provides a baseline of services, known as a Plan A package of services.[8] Additionally, certain waiver programs (i) provide additional services to the Plan A service package[9] and/or (ii) have eligibility criteria less restrictive than federal law.[10] However, federal law prohibits an individual from enrolling in two waiver programs simultaneously.[11]

CRYSTAL WEST EDWARDS *is a principal with Porzio, Bromberg & Newman in Morristown. She is a former member of the Board of Directors for the National Academy of Elder Law Attorneys (NAELA), a Past President of the New Jersey Chapter of NAELA, a Past President and Life Member of the Garden State Bar Association, and a member of the Elder and Disability Law Section of the New Jersey Bar Association. She is certified as an Elder Law Attorney by the ABA Accredited National Elder Law Foundation.*

RYANN M. SICLARI *is counsel with Porzio, Bromberg & Newman in Morristown. She is the Chair of the Elder and Disability Law Section of the New Jersey Bar Association, a member of the National Academy of Elder Law Attorneys (NAELA) and serves as the Legislative Committee Co-Chair of the New Jersey Chapter of NAELA. She is certified as an Elder Law Attorney by the ABA Accredited National Elder Law Foundation.*

The Plan A service package includes, but is not limited to, physician and advanced practice nurse services, including primary and specialty care, preventive health care, optometrist, optical appliances, emergency care, audiology and hearing aid services, inpatient hospital care, home health agency services, outpatient hospital care, hospice agency services, lab services, durable medical equipment, prescription drugs, organ transplants, rehabilitative care, dental services, prosthetics and orthotics, inpatient rehabilitation services, mental health/substance abuse services for clients of the DDD, medical day care, Personal Care Assistance (PCA) including the Personal Preference Program (PPP), and ambulance for medical emergency.[12]

Supports Program

The Supports Program provides employment support, day services and individual/family support services and is typically the first level of services offered to DDD recipients. Commonly, individuals live with family members or independently in unlicensed settings.

For individuals who require a nursing facility level of care but wish to remain in a community setting, there is an additional program called Supports Program + PDN. PDN stands for private duty nursing and is available to those who require skilled nursing facility level of care.[13] Supports Program + PDN includes assistive technology, behavioral supports, cognitive rehabilitation, community inclusion services, day habilitation, occupational therapy, prevocational training, support coordination, supported employment, and private duty nursing. Essentially, this program allows a DDD recipient to use their DDD Supports Program services (and underlying service delivery budget) while at the same time use a Medicaid service otherwise available under the MLTSS waiver program. Since federal law prohibits enrollment in two waiver programs (i.e., the Supports Program and MLTSS), the Supports Program + PDN is ideal for many medically needy adults with I/DD who reside in the community.

Community Care Program

The CCP provides residential placement (i.e. group home placement, supportive apartments, etc.) or in-home support services for DDD recipients who have greater support needs. There is a significant wait list for services under this program unless an emergency exists such that the recipient is at risk of imminent peril or homelessness.[14]

For an individual to receive services under the CCP, they must (i) meet all of the general eligibility criteria as the Supports Program, (ii) demonstrate the need for an Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/ID) clinical level of care, and (iii) reach the top of the waiting list.[15] The ICF/ID level of care requires an individual to have "substantial functional limitations which require care and/or treatment in an ICF/ID" or alternatively, in a community program under the DDD Community Care Program.[16]

An individual who qualifies for the CCP can choose to receive services in a residential setting or remain at home with their family. Depending on the individual's tier classification, 24/7 coverage may be provided in the home setting; however, this does not apply if PDN is needed. In other words, if someone requires private duty nursing, their service options are limited to Supports Program + PDN or an institutional setting. The CCP does not cover private duty nursing.[17]

Aging Adults

The Social Security Act, the Medicare and Medicaid Act, and the State of New Jersey all define ***aged*** as 65 years or older.[18] In fact, there is a 70% chance that an individual turning 65 will need some form of long-term care during their life.[19] Long-term care may be in the form of home and community based services, such as home health aide assistance or an assisted living facility, or it may be in a skilled nursing facility. Regardless of the care setting, the only government benefits program available when an aged person needs long-term care is MLTSS.

MLTSS covers long-term custodial care in a skilled nursing facility or a home and community based setting such as an assisted living facility or at home. Individuals who are enrolled in MLTSS at home receive the Plan A package of benefits (i.e. the benefits available under all Medicaid programs) and an additional package of benefits which includes home-delivered meals, medication dispensing devices, personal emergency response system, and private duty nursing, among others.[20]

One of the most common services needed by an aged person living at home is home health aide assistance, which is referred to as Personal Care Assistance (PCA).[21] PCA includes assistance with activities of daily living such as bathing, dressing, and ambulating, but it also includes instrumental activities of daily living such as house cleaning, grocery shopping, and medication monitoring. [22] Interestingly, PCA is a Plan A service which means it is available under MLTSS or any other Medicaid program.[23] PCA can be serviced in one of two forms: (1) through an agency that contracts with the Managed Care Organization or (2) through the Personal Preference Program which allows the Medicaid recipient to hire an employee who is paid by Medicaid.[24]

Applicants for the MLTSS program must be found eligible clinically and financially.[25] Clinical eligibility is defined as needing Nursing Facility Level of Care which is established if the individual "(i) requires limited assistance or greater with three or more activities of daily living; and/or (ii) exhibits problems with short-term memory and is minimally impaired or greater with decision making

ability and requires supervision or greater with three or more activities of daily living; or (iii) is minimally impaired or greater with decision making and, in making himself or herself understood, is often understood or greater and requires supervision or greater with three or more activities of daily living."[26] In order to be financially eligible, income and assets must be below the respective caps. Once an individual meets both the clinical and financial test, they will be deemed eligible for the MLTSS program.

Aging Adults With I/DD

What happens when someone is both aged and has a developmental disability? The intuitive answer would be to apply for benefits under both programs; however, that is not the case. An individual cannot be eligible for both MLTSS and the Supports Program or CPP.[27] Accordingly, they must pick the program based on level of care and the types of services needed.

The program an individual selects depends initially on level of care. As discussed above, both MLTSS and Supports Program + PDN require a nursing facility level of care. If an aged person with a developmental disability does not meet nursing facility level of care, the decision as to which program to be on is quite simple: they must receive services under the Supports Program. Conversely, an individual cannot enroll in the CCP if they require institutional level of care and "cannot be maintained safely in the community."[28] In the situation where someone requires institutional level of care due to a combination of age and disabilities, they should transition to the MLTSS program.

In conclusion, the Supports Program and CCP often provide more robust services in the community to younger individuals with I/DD. On the other hand, the MLTSS program often provides more robust services once someone needs nursing facility level of care in a skilled nursing or assisted living facility. Essentially, the physical and cognitive limitations that come with aging compound the pre-existing, lifelong need for support and often dictate when to transition to the MLTSS program. ■

Endnotes

1. See N.J.A.C. 10:46-1.2.
2. See N.J.A.C. 10:46-2.1(b)(2).
3. See N.J.A.C. 10:46-2.1(b)(1).
4. See N.J.A.C. 10:46-1.3.
5. 42 U.S.C. § 1396a.
6. See 42 U.S.C. § 1315.
7. See NJ FamilyCare Comprehensive Demonstration, available at medicaid.gov/medicaid/section-1115-demonstrations/downloads/nj-1115-request-ca1.pdf ("Waiver").
8. See 1115 Waiver, Table A at 12.
9. See 1115 Waiver, Table A at 12.
10. See 42 U.S.C. § 1396a(a)(10)(C)(i)(iii).
11. See 1115 Waiver, Special Term and Condition 32(C) at 27 and 34(D)(1) at 30.
12. See N.J.A.C. 10:49-5.2(a).
13. See 1115 Waiver, Special Term and Condition 32(D)(8) at 28.
14. See NJ Division of Developmental Disabilities Community Care Program Policies & Procedures Manual sec 5.1, page 23.
15. See NJ Division of Developmental Disabilities Community Care Program Policies & Procedures Manual sec 5.1, page 23 and see 1115 Waiver, Special Term and Condition 38.
16. See NJ Division of Developmental Disabilities Community Care Program Policies & Procedures Manual sec 5.1, page 23 and See 1115 Waiver, Special Term and Condition 38(F)(1) at 37.
17. See NJ Division of Developmental Disabilities Supports Program Policies & Procedures Manual sec. 4.1, page 23 found at nj.gov/humanservices/ddd/documents/supports-program-policy-manual.pdf
18. See 42 C.F.R. § 416.101, 42 C.F.R. § 435.520, and N.J.A.C. 10:72-3.4(a)(5).
19. See HHS Office of the Assistant Secretary for Planning and Evaluation, What is the Lifetime Risk of Needing and Receiving Long-Term Services and Supports?, April 2019 available at aspe.hhs.gov/sites/default/files/migrated_legacy_files//188046/LifetimeRisk.pdf.
20. See 1115 Waiver, Special Term and Condition 32(F) at 28 and Attachment D at 137.
21. See N.J.A.C. 10:60-3.3.
22. Id.
23. See 1115 Waiver, Special Term and Condition 27 at 26.
24. See generally N.J.A.C. 10:60 and N.J.A.C. 10:142, respectively.
25. See 1115 Waiver under Special Term and Condition 32
26. Id. at 26. See also N.J.A.C. 8:85-2.1 ("dependent in several activities of daily living (bathing, dressing, toilet use, transfer, locomotion, bed mobility, and eating).")
27. See 1115 Waiver, Special Term and Condition 32(C) at 27 and 34(D)(1) at 30.
28. See 1115 Waiver, Special Term and Condition 38(C)(2) at 37.

Elder Law and Annuities in New Jersey Post-DRA

The Only Game in Town

By Lauren S. Marinaro

I became an Elder Law attorney in 2006. This might have been a good thing for me because I didn't have to adjust my knowledge of Medicaid to anything that existed before the Deficit Reduction Act of 2005. Apparently, things were different in Elder Law and Medicaid planning before 2005. According to the federal Centers for Medicare & Medicaid Services,

> "Some individuals, with assistance from financial planners and attorneys, have developed methods of arranging assets in such a way that they are not countable when Medicaid eligibility is determined, and are thus preserved for the individual and/or family members. Various techniques are used to artificially impoverish Medicaid applicants, including gifting of assets to family members, *investing assets in financial instruments that are inaccessible,* and executing financial transactions for which fair market value are not actually received to get LTC coverage through Medicaid."[1]

LAUREN S. MARINARO *is a partner with the Clark firm of Fink Rosner Ershow-Levenberg Marinaro. She is a former Chair of the Elder Law Section of the NJSBA, past president of the New Jersey Chapter and a current member of the Board of Directors for the National Academy of Elder Law Attorneys (NAELA).*

This was news to me, new elder law attorney that I was. When the DRA, P.L. 109-171, passed in February 2006, Congress and the G.W. Bush Administration succeeded in profoundly changing Medicaid eligibility; in many ways making eligibility a more difficult process with more punitive outcomes, in response to this perception of out-of-control planning.

With no point of comparison, I could start from square one, never mourning the past planning options that are non-starters post-DRA. My job was to use what we had, both federally and in New Jersey, which in most respects provides the federal minimum asset and income standards for those who clinically qualify for long-term care (unlike, say, New York or California, which employ less restrictive eligibility methodology). And what we have are a very specific subset of annuity products that provide useful planning options for single and married individuals with few other options.[2]

Deviating from the statutory strictures of these instruments will cause a Medicaid transfer of assets penalty period, which under the 2005 DRA, commences from the point of being "otherwise eligible" or impoverished, rather than from when the transfer was made within the now five-year look back period (increased from three years), which is what had occurred before the DRA.

Basics of DRA Annuities

When using applicant or spouse's funds to spend down on a Medicaid-qualifying Single Premium Immediate Annuity (SPIA), the basic elements are the following: (1) the annuitant must be the applicant, spouse or applicant's child who has disabilities, (2) the annuity must be actuarially sound,(3) the annuity must be non-transferrable, irrevocable, and have no cash surrender value, (4) the state must be named as contingent beneficiary after the applicant, spouse and/or child with disabilities to the extent that benefits are paid for the applicant, and (5) the annuity must be paid back in equal installments with no balloon payments.[3]

SPIA products like these where the term can be limited to the needs of the applicant are relatively uncommon, but brokers have emerged to match clients with appropriate products. According to the federal State Medicaid Manual, Section 3258.9(b), "If the expected return on the annuity is commensurate with a reasonable estimate of the life expectancy of the beneficiary, the annuity can be deemed actuarially sound." The case of *Zahner ex rel. Zahner v. Secretary Pennsylvania Department of Human Services*,[4] confirmed that this meant annuities that otherwise met DRA requirements would not be a trust-like device and a resource even if the term was significantly shorter than the annuitant's life expectancy.

For a long time, the state wanted a further evaluation of whether irrevocable

SPIAs could be sold on the secondary market for cash or otherwise undone after they were purchased; that has eased in most cases now. While there are mandatory rescission periods where cancellation is possible, after the rescission period expires, an annuity with the appropriate language and/or rider that states it is irrevocable, non-transferrable and without cash surrender value should no longer be considered a resource. However, if an annuity which on its face contains contractual provisions that meet DRA requirements but is *de facto* canceled, amended or transferred, it will be considered a resource by Medicaid in New Jersey.[5]

Spousal Annuity Planning

When such a product is purchased with cash for a spouse, it can effectively spend down funds that would otherwise be countable resources, converting them to a spousal income stream that is exempt from income-counting rules under 42 USC 1396r-5.[6] One outstanding issue is whether the state, in the first beneficiary position after the community spouse, collects on past due benefits only or prospective ones as well. This is being litigated in Massachusetts.[7]

Medicaid-qualifying annuities can also be created from tax-qualified accounts of the applicant spouse to stretch out payment of the account to the applicant's actuarial life expectancy, naming the spouse is the first contingent position, and the state in the second contingent position if there is no child with disabilities to name first. When such an annuity is converted, the income is countable toward the cost-share of the applicant. New Jersey counts IRAs and retirement accounts if they can be accessed by the applicant or spouse without prior borrowing.[8]

New Jersey takes the position that the state must be named in the appropriate contingent position.[9] There is a split of authority on whether this is correct; the case of *Hughes v. McCarthy*[10] takes the position that if a tax-qualified annuity satisfies the provisions in 42 U.S.C. 1396p(c)(2)(B)(i), it need not meet the requirements of 42 U.S.C. 1396p(c)(1)(F)(i), while the 2012 case of *Hutcherson v. Arizona Health Care Cost Cont. Syst. Adm.*[11] (U.S. Dist. Ct., D. Ariz., No. CV 09-898-PHX-JAT, May 13, 2010) reached the opposite conclusion.

The irrevocability of DRA-compliant annuity products makes this kind of planning challenging. Attorneys must carefully consider whether locking up assets in such a product, which will collect minimal interest and could cause tax consequences for the applicant or spouse, is worth the benefit of Medicaid eligibility, especially when the applicant has significant income of their own which will go to the facility or state. Sometimes, the prognosis of the Medicaid applicant is the deciding factor.

Annuities in Planning for Single or Widowed Applicants

For single applicants, DRA-compliant annuities can be used for different reasons. An applicant may wish to convert resources into a Medicaid-qualifying annuity to increase income in a community-based setting to as close to 300% of Supplemental Security Income as possible, which is the Personal Needs Allowance for a community-based Medicaid under New Jersey Medicaid Managed Long Term Services and Supports.[12]

It might also be used to create additional monthly income in anticipation of a transfer penalty period where a facility will need to be paid. This could be due to past identified transfers within the look-back period or a new planned transfer of resources. This is where short-term products are most used post-*Zahner*. Practitioners will calculate the anticipated transfer penalty period based on that year's penalty divisor and then purchase an annuity that extends for the length of that period. Then the practitioner will apply for benefits on behalf of the client so that the Medicaid agency will make a finding of eligibility "but for" the transfers within the look-back period.

When annuities are used in this way, a Qualified Income Trust[13] will need to be set up for any regular annuity payment that exceeds 300% of SSI or would if in combination with other sources of monthly income. The total gross monthly income must not exceed the total cost of private monthly medical and remedial care expenses. At present, case law in New Jersey is mixed on whether assisted living expenses are characterized as medical and remedial care expenses so practitioners should proceed with caution in such a setting.

Impact of DRA-Compliant Annuities

The impact of these products on my clients has been and continues to be enormous as they face catastrophic long-term care costs. In the absence of annuity planning for spouses, the next best alternative for many would be divorce. Without these products for single individuals, there would be no way to deal with transfer penalty periods, and facilities would have more bad debt on their books. These annuities create income streams necessary for daily cost of living in non-institutional settings.

Annuities in Medicaid are also often under attack.[14] Such attacks have been beaten back to date but are always a concern. Despite the DRA being carefully written to create a minimally fair framework for states and individuals to both have household income while taking on a risk that Medicaid would be paid back at the annuitant's death for benefits paid to the Medicaid recipient, practitioners acting in good faith are consistently accused

of abusing the system and must be constantly vigilant to keep what is there and protect regular Americans from devastating long-term care expenses.

For me and many of my clients in New Jersey, DRA-compliant annuities are usually the only game in town. Therefore, it's best to know them inside and out. ■

Endnotes

1. See cms.gov/regulations-and-guidance/legislation/deficitreductionact/downloads/checklist1.pdf .
2. See generally 42 U.S.C. 1396p(c) et. seq.
3. The federal guidance on annuity parameters when purchased with tax-qualified or non-tax-qualified funds can be found at hhs.gov/guidance/sites/default/files/hhs-guidance-documents/2006.smdl%2520enclosures.dra%2520sections%25206011%2520and%25206016_65.pdf.
4. 802 F.3d 497 (2015)
5. See *M.M. v. Division of Medical Assistance and Health Services, OAL* Docket No. HMA 1057-2019, compared to *Cushing v. Jacobs,* 20-cv-130 (D.N.J. Mar. 25, 2020) and *C.L. v. Division of Medical Assistance and Health Services and Bergen County Board of Social Services,* Docket No. A-4284-19, October 17, 2022 (Approved for Publication), which confirmed that in the absence of any de facto action, the terms of the annuity contract control, even if there may have been a cancellation or modification of a similar product by a different customer.
6. See *James v. Richman,* 547 F.3d 214 (3d Cir. 2008), *Weatherbee v. Richman,* 351 F. App'x 786 (3d Cir. 2009).
7. See mass.gov/doc/standard-insurance-company-v-executive-office-of-health-and-human-services-et-al-dar-28415/download.
8. See Avery v. Union County Division of Social Services, A-2408-01T2 (May 15, 2003).
9. 42 U.S.C. 1396p(c)(1)(F)(i)
10. 734 F.3d 473 (6th Cir. 2013)
11. U.S. Dist. Ct., D. Ariz., No. CV 09-898-PHX-JAT, May 13, 2010
12. See state.nj.us/humanservices/dmahs/info/resources/medicaid/2022/22-01_Income_and_Resource_Standards_for_Medicaid_Only.pdf for the 2022 amounts.
13. 42 U.S.C. 1396p(d)(4)(B).
14. For example, see hearings in 2017 on further bills to restrict Medicaid-compliant annuities, govinfo.gov/content/pkg/CHRG-115hhrg24766/html/CHRG-115hhrg24766.htm, ("Representative Mullin has written the Close Annuity Loopholes in Medicaid Act to put a stop to this gaming of the system. His bill would make half of the income generated from an annuity purchased by a community spouse within the 60-month look-back period that would count toward the institutionalized spouse's financial eligibility.")

The Impact of the SECURE Act and the Applicable Multi-Beneficiary Trust

By Regina M. Spielberg and Jordan M. Wassel

The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), effective Jan. 1, 2020, substantially reformed retirement benefits and drastically changed estate and elder law planning around those benefits.

The notable changes include (i) increasing the age at which a plan owner's required minimum distributions (RMD) begin from the year in which the plan owner reaches age 70½ to age 72, (ii) eliminating the age 70½ cap restricting contributions to an IRA, (iii) permitting annuities in 401(k) plans, and (iv) permitting part-time workers with 500 hours of service in three consecutive years to participate in 401(k) plans.

The most heralded new provision, however, was the creation of the 10-year distribution rule. This rule impacts RMDs, whereby *most* beneficiaries inheriting IRA or 401(k) assets after 2019 are now required to completely withdraw all plan assets within 10 years of the plan owner's death. This was a stark departure from the RMD rules prior to the SECURE Act.

The Beneficiary of a Retirement Plan

The balance of the retirement plan may be left to a "designated beneficiary or a "non-designated beneficiary." A designated beneficiary may be an individual named by the plan owner or the beneficiary of a "see-through trust" named by the plan owner, which could be either a conduit or accumulation trust. A non-designated beneficiary is any other beneficiary and typically is either an estate or a charitable entity. These two categories dictated how RMDs were determined.

In a see-through trust, all of the beneficiaries are identifiable, meaning that they actually have a life expectancy (unlike an estate or a charity). The two types of see-through trusts are known as conduit trusts and accumulation trusts. A conduit trust is drafted to specifically require an annual distribution of withdrawals from plan assets out of the trust to the lifetime beneficiary. Conversely, an accumulation trust does not require an annual distribution and allows the withdrawals from the plan assets to accumulate inside of the trust year to year.

Pre-SECURE Act Treatment of Beneficiaries

Prior to the passage of the SECURE Act, at the death of a plan owner, if an individual (other than the plan owner's spouse) was a designated beneficiary, the plan assets would be paid over the life of the designated beneficiary. This is what is commonly referred to as the "stretch," meaning that the distribution of plan assets would be deferred, potentially over a long period of time. When the designated beneficiary was much younger than the plan owner (like a grandchild) a significant income tax benefit was realized by the long stretch, allowing for longer deferred income taxation on distributions and continued tax-deferred growth. If a conduit trust was the designated beneficiary (other than a conduit trust for the primary benefit of the plan owner's spouse), the plan assets would be paid over the life expectancy of the primary beneficiary of the conduit trust; if an accumulation trust was the designated beneficiary, the plan assets would be paid over the life of the oldest beneficiary of the trust (including remainder beneficiaries).

If the plan owner's spouse or a conduit trust for the primary benefit of the plan owner's spouse was a designated beneficiary, the spouse had the option to roll over the plan and treat it as if it was their own, or treat the plan as inherited, and the plan assets would be paid over the life expectancy of the spouse.

If the beneficiary inheriting the plan assets was a non-designated beneficiary and the plan owner died before reaching age 70½, the beneficiary would have to completely withdraw the plan assets within five years. If the beneficiary inheriting the

REGINA M. SPIELBERG *co-chairs the Estate, Gift and Charitable Planning Practice Group at Schenck Price Smith & King, assisting clients with the orderly and tax-efficient transfer of assets during life and after death. She is a Fellow of the American College of Trust and Estate Council and past Chair of the New Jersey State Bar Association's Real Property, Trust and Estate Law Section. Certified as an Elder Law Attorney by the ABA Accredited National Elder Law Foundation and as an Accredited Estate Planner by the National Association of Estate Planners & Councils, Regina assists seniors, people with disabilities and their families in connection with a variety of legal issues including elder care, special needs planning and planning for incapacity, with an emphasis on promoting the best quality of life for the individuals.*

JORDAN M. WASSEL *is an associate with Schenck, Price, Smith & King and a member of their Gift & Charitable Planning and Elder and Special Needs practice groups. He focuses his practice on estate planning and estate administration.*

plan assets was a non-designated beneficiary and the plan owner died after reaching age 70½, the plan assets would be paid over the life expectancy of the plan owner as if they had not died.

SECURE Act Implementation and Impact on Beneficiaries

The SECURE Act and the creation of the aforementioned 10-year distribution rule significantly altered these RMD rules. The SECURE Act retained the general concepts of the designated beneficiary and the non-designated beneficiary, and added a new category, the eligible designated beneficiary (EDB).

While the general rules remain the same for the non-designated beneficiary, any designated beneficiary, unless an EDB, must now completely withdraw the plan assets within 10 years of the plan owner's death; they can no longer stretch distributions over their life expectancy. The EDB categorization creates certain exempt individuals who retain the ability to stretch the distributions over their lifetimes.

There are five categories of EDBs: (i) the plan owner's surviving spouse, (ii) a minor child of the plan owner, (iii) a beneficiary with disabilities, (iv) a chronically ill individual, and (v) a beneficiary who is not more than 10 years younger than the plan owner.

A beneficiary with disabilities under the SECURE Act is defined consistent with IRC 72(m)(7). A beneficiary with disabilities must be "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration." This definition is the same as the definition of "disabled" for purposes of qualifying for Supplemental Security Income or Social Security Disability Insurance.

A chronically ill individual under the SECURE Act is defined consistent with IRC 7702B(c)(2). A chronically ill individual must be certified by a licensed health care practitioner to either (i) be unable to perform at least two of five activities of daily living for an indefinite period reasonably expected to be lengthy in nature due to a loss of functional capacity, (ii) have a level of disability similar to (i) above, or (iii) require substantial supervision to protect such individual from threats to health and safety due to severe cognitive impairment.

Impact of Trusts for EDBs under SECURE and the Applicable Multi-Beneficiary Trust

Both pre- and post-SECURE, trusts were able to qualify as designated beneficiaries so long as they were see-through trusts. The IRS treats the beneficiary of a conduit trust as the sole trust beneficiary and thus only their life expectancy is to be used to determine the payout. Conversely, with an accumulation trust, the IRS would historically look at the life expectancy of all of the beneficiaries, including the remainder beneficiaries, and use the life expectancy of the oldest beneficiary.

With the passage of the SECURE Act and the implementation of the EDB, only a trust in which the sole trust beneficiary was an EDB would be eligible for the "stretch." Accordingly, if the designated beneficiary is a trust for the benefit of an EDB, in order to receive the "stretch" the trust must be a conduit trust and cannot be an accumulation trust.

However, the SECURE Act created the notion of the applicable multi-beneficiary trust (AMBT) which could allow for a trust for someone with disabilities or chronic illness to be structured as an accumulation trust and still receive the "stretch." This is critical for third-party supplemental needs trusts because AMBTs allow an accumulation trust for the benefit of someone with disabilities or chronic illness to qualify for the "stretch."

An AMBT is defined under IRC 401(a)(9)(H)(v) as a trust that (i) has more than one beneficiary (ii) all of the beneficiaries of which are designated beneficiaries and (iii) at least one of the beneficiaries is someone with disabilities or chronic illness. There are two ways in which an AMBT could apply and allow the use of the "stretch."

First, if the AMBT is required by the terms of the document to be divided immediately upon the death of the plan owner into separate trusts for each beneficiary, the payout rules will apply separately to the separate trust created for someone with disabilities or chronic illness (sometimes referred to under the proposed regulations as a Type I Trust—see further discussion below). The separate share for someone with disabilities or chronic illness would qualify for the "stretch" and the separate share for someone who does not have disabilities or chronic illness would be subject to the 10-year rule.

Second, if under the trust terms only someone with disabilities or chronic illness has an interest in the plan benefits during their lifetime, then during such lifetime, the "stretch" will apply (sometimes referred to under the proposed regulations as a Type II Trust—see further discussion below).

In both cases, at the death of the individual who has disabilities or chronic illness, the 10-year rule will apply for the remainder beneficiaries.

Effect of Proposed Regulations and Proposed Legislation on AMBTs

On Feb. 23, 2022, the IRS issued proposed regulations to clarify and elaborate on the SECURE Act. These proposed regulations included regulations applying to AMBTs.

The proposed regulations create the terms "Type I" and "Type II" Trusts to apply to AMBTs. Specifically, they note that upon division of a Type I Trust, one

of the separate trusts could be a Type II Trust if only the person with disabilities or chronic illness had an interest in the plan benefits during their lifetime. The beneficiaries of a Type II Trust who do not have a disability or chronic illness (the remainder beneficiaries) are not considered when determining the life expectancy payout under the "stretch."

Because the SECURE Act is not clear as to whose age is used for determining the life expectancy payout under the "stretch" if there are multiple beneficiaries with disabilities or chronic illness of a single AMBT, the proposed regulations clarify that in this scenario the life expectancy of the oldest beneficiary with a disability or chronic illness will be used.

Finally, third-party supplemental benefits trusts often include provisions providing that the person with a disability would lose their interest in the trust in the event the interest would disqualify them from receiving government benefits. Currently it seems that this provision would not allow the trust to meet the definition of a Type II Trust, because it would provide an interest in the trust to someone other than the person with a disability during their lifetime. The proposed regulations specifically request comment regarding whether this provision can be included.

The Enhancing American Retirement Now (EARN) Act, introduced on the Senate floor on Sept. 8, 2022, proposes amendments to the SECURE Act, including permitting qualified charities to be treated as designated beneficiaries of AMBTs. This may have important impact in planning for beneficiaries with special needs since services for such beneficiaries may be provided by charities. As a result, clients may wish to name the charity as remainder beneficiary of the trust.

Conclusion

The SECURE Act has brought about substantial changes in retirement benefits. These changes, together with the newly-issued proposed regulations, mean that plan owners should consult with their estate, elder law and special needs planning attorney or wealth management professional to revisit and review their plans. This is important for those who have incorporated trusts into their plans as a beneficiary of a retirement account. ■

Special Needs Settlement Planning

Working With Personal Injury Attorneys

By Shirley Berger Whitenack

SHIRLEY B. WHITENACK *is a partner at Schenck, Price, Smith & King with offices in Florham Park, Paramus, and Sparta, and co-chairs the firm's Elder and Special Needs Law Practice Group and the Estates and Trusts Litigation Practice Group. She is a Past President of the National Academy of Elder Law Attorneys (NAELA), a NAELA Fellow, and a member of NAELA's Council of Advanced Practitioners (CAP), an invitation-only group of elder and special needs planning practitioners. Shirley has served as an adjunct professor of law in the J.D. and LL.M. in Elder Law Programs at Stetson University College of Law. Shirley is a member of the Special Needs Alliance (SNA), an invitation-only nationwide alliance of special needs planning attorneys.*

The Role of the Special Needs Attorney

Special needs settlement planning combines traditional government benefits planning with settlement-related issues as varied as identifying government benefits programs, determining and compromising Medicare, Medicaid and other liens, advising the personal injury attorney and the client regarding settlement vehicles in the context of disability planning, preparing special needs trusts (SNTs) and creating Medicare Set Aside Arrangements (MSAs).

The special needs attorney plays a distinctive role in personal injury settlement planning. While the personal injury attorney focuses on obtaining the best settlement for the plaintiff, the special needs attorney focuses on issues unique to individuals with disabilities. As a result, the earlier the special needs attorney enters a case, the greater the benefit to the plaintiff with disabilities. The personal injury attorney also benefits from early intervention by the special needs attorney since the services provided by the special needs attorney allow the personal injury attorney to concentrate on the litigation and settlement issues without the distraction of disability issues that are typically not their area of expertise.

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The failure of a personal injury attorney to involve the special needs attorney early in the case may cost the injured party a valuable planning opportunity. For example, the personal injury attorney may not appreciate the fact that a SNT cannot be established for individuals over the age of 65 or that some states do not allow people over the age of 65 to place assets in a first-party pooled trust. The earlier that a special needs attorney becomes involved, the better the chances that the injured party will receive the best possible advice.

Ascertain the Needs of the Plaintiff with Disabilities

As soon as an injury occurs, the injured person needs medical care. The person may lose their job and subsequently, group health insurance. A special needs attorney can assist in determining what government benefits programs are available to assist the person until the matter is ultimately settled and thereafter. There are a number of government benefits programs which must be considered in protecting a person with disabilities. While an in-depth examination of these programs is beyond the scope of this article, the plaintiff's eligibility for Supplemental Security Income (SSI), Medicaid, Social Security Disability (SSD), Medicare and federally-assisted housing should be considered. It may be appropriate to prepare a SNT to enable the injured party to qualify for means-tested government benefits

during the pendency of the lawsuit. The specifics of the various programs are outside the scope of this article, but should be discussed at length with the special needs attorney.

The special needs attorney should gather information about the injured party as soon as possible. Among other things, it is important to know the date and nature of the injuries, the long-term prognosis, the public benefits that the injured party already receives, costs advanced by family members, if any, and other creditors such as child or spousal support. Also significant are a description of the injured party's assets, the life care plan, estate planning documents, medical information and guardianship/conservatorship appointments.

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Engagement Letters

The special needs attorney must determine who is the client, which will inform the scope of the representation, the duty of loyalty, the source of payment for special needs attorney and the attorney-client privilege. Regardless of who the special needs attorney represents, the attorney should send an engagement letter to the client which sets forth the scope of the services that will be provided, the fee for the services and how that fee is calculated.[1] If the personal injury attorney will be responsible for negotiating and paying the various liens, the special needs attorney's engagement letter should exclude such services. Similarly, the letter may include or exclude services such as preparing a Medicare Set-Aside arrangement, preparing tax returns and submitting the SNT to the Social Security Administration and the Medicaid agency. The special needs attorney should be aware that regardless of the fee set forth in the engagement letter, that fee may require court approval.

Determine and Compromise Claims and Liens

The process of settling a personal injury case can take years from the time the injury occurs. During that time, if the injured party accesses benefits such as Medicaid, Medicare, or Employee Retirement Income Security Act (ERISA) medical insurance, there are liens that must be settled prior to settlement of the personal injury case.

The Medicare Lien

The Medicare Secondary Payer Program (MSP)[2] provides that Medicare is a secondary payer for any medical services for which payments have been made, or can reasonably be expected to be made, under workers' compensation or other insurance, including automobile, health or liability policies. MSP also creates a statutory lien for payments made under the Medicare Secondary Payer Act. The Medicare Prescription Drug, Improvement and Modernization Act of 2003[3] expanded Medicare's recovery authority, allowing the government double damages from parties who settle cases without first satisfying the Medicare lien. This provision places a great responsibility on attorneys to assure they are compliant. Medicare Part D and Medicare Advantage have a right of recovery that is separate from traditional Medicare.[4]

To the extent that Medicare makes a payment in a third-party liability case, the payment is conditional and must be repaid when the matter is settled. Medicare's right of recovery has priority over any subrogated right, and also has priority over Medicaid. Medicare is not bound by a settlement made between the beneficiary and the responsible party. Medicare may pursue its own claim against the liability insurer. If the liability insurer does not properly pay Medicare, Medicare has the right to take legal action against the insurer and to collect double damages.[5]

Determining the correct amount of the Medicare claim is an important part of the attorney's role. Centers for Medicare and Medicaid Services can provide a conditional payment summary on request. Medicare considers all monies recovered to be related to medical expenses, regardless of how they are characterized. Medicare will recognize allocation of liability payments for non-medical loss only when payment is based upon a court order specifically designating amounts that are not related to medicals, such as amounts for pain and suffering.

Medicare will recognize under a proportionate share of the necessary procurement costs incurred in obtaining a settlement.[6] Procurement costs are court costs and attorneys' fees. Medicare's payment from the beneficiary is reduced by the proportionate share of procurement costs.

Counsel for the beneficiary must noti-

fy Medicare as to any possible settlement prior to final settlement or adjudication of the case on its merits. Medicare will then stipulate to its claim, thus preventing subsequent charges from being added to its claim amount. A Medicare claim may be asserted even against the estate of a deceased beneficiary.

The amount of the Medicare lien may be appealed in writing by the Medicare beneficiary. The three levels of appeal are waiver, partial waiver and compromise. A waiver can be requested of a Medicare contractor after settlement is reached and Medicare has set a final claim amount based on financial hardship. Alternatively, only CMS has authority to compromise a Medicare lien. A request for compromise may be made prior to or after settlement. A partial waiver based on facts and circumstances may be granted against a specific entity. If the initial request for waiver, compromise or partial waiver is denied, an appeal for reconsideration may be made.[7]

The Medicaid Lien

Federal law requires each state Medicaid program to ascertain the legal liability of third parties to reimburse for medical assistance provided by the state and to recover from third parties the cost of medical assistance provided.[8] In most states the Attorney General is required to enforce rights against third parties for recovery of medical assistance payments. Many states require the Medicaid recipient, their guardian, executor, administrator or other appropriate representative who brings an action for damages against a third party to provide written notice to the appropriate Medicaid agency. As a condition of eligibility for medical assistance, a Medicaid recipient assigns to the state any rights to payment for medical care from a third party.[9]

In 2006, the United States Supreme Court held, in *Arkansas Dept. of Health and Human Servs., et al. v. Ahlborn* that federal laws requiring a Medicaid recipient to assign payments from third parties only extended to medical care and did not allow state Medicaid agencies to collect on amounts attributable to future expenses, permanent injury and lost earnings.[10] In *Gallardo v. Marstiller*, however, decided on June 6, 2022, the U.S. Supreme Court held, in a 7-2 opinion, that the Medicaid Act allows a state to seek reimbursement from settlement payments allocated for future medical care.[11]

As a practical matter, Medicaid may waive or compromise the enforcement of a lien in hardship situations. In some states, however, hardship waivers are not available. For example, a New Jersey appellate court found that states have a duty of repayment to the federal government of monies expended by the federal government even if they compromise a lien.[12]

Care should be taken to notify the appropriate agencies where a lien may exist. Failure to do so may result in the attorney's liability for satisfaction of the lien. For example, a New Jersey appellate court held an attorney liable for satisfaction of a lien where the attorney elected, rather than was required, to structure an entire settlement, other than attorneys' fees, thus failing to protect the plaintiff's lien. [13]

Medicare Set Aside Trusts

While resolving Medicare liens addresses medical expenses paid by Medicare prior to the settlement of a case, Medicare Set Asides address medical expenses that will be incurred after the settlement of a case. Recall that the Medicare Secondary Payer Program (MSP)[14] provides that Medicare is a secondary payer for any medical services for which payments have been made, or can reasonably be expected to be made. Payment of future medical expenses is covered under the MSP.

Workers' Compensation Cases

Workers' Compensation is a program that compensates workers for injuries sustained on the job. If an injured worker is eligible for Medicare, Medicare is a secondary payer of medical expenses to Workers' Compensation. Most state Workers' Compensation programs provide for final settlements to close a claim, ending the employer/insurer's financial obligation. Future medical expenses are often included in the final settlements. Once a final settlement is reached, the injured worker cannot look to the employer/insurer for payment of medical expenses associated with the injury.

Medicare has an interest in a lump-sum settlement to the extent that the funds are intended to pay future medical expenses. In order to prevent such a settlement from shifting responsibility for payment of future medical costs from the primary payer to Medicare, Medicare requires a portion of the settlement be set aside for payment of future medical benefits that Medicare would otherwise pay.[15] The amount of the set aside is determined on a case-by-case basis and should be reviewed by CMS. Once the CMS-determined set aside amount is exhausted and accurately accounted for to CMS, Medicare becomes the primary payer for future Medicare covered expenses.[16]

Workers' Compensation commutation cases are settlement awards intended to compensate individuals for future medical expenses resulting from a work-related injury as compared to compromise settlements which are deemed to be a workers' compensation payment for current or past medical expenses. Medicare Set Asides are only required in commutation cases.

Third-Party Liability Cases

As of July 1, 2009, all insurers, third-party health plans, self-insured plans and self-administered plans are required to identify situations where the plan is or has been a primary plan to Medicare. Failure to comply results in a penalty of $1,000 for each day of noncompliance for

each individual for which the information should have been submitted.[17] Medicare does not require set asides for third-party liability cases, mainly because CMS does not review liability settlements as it does Workers' Compensation settlements. Therefore, there is no mechanism in place to calculate a set aside amount to protect Medicare's interests.

Nevertheless, plaintiffs' attorneys may wish to calculate a set aside amount using the rules CMS imposes on Workers' Compensation cases. Alternatively, there are companies that specialize in determining the amount of Medicare Set Asides and establishing Medicare Set Aside Trusts.

Structured Settlement Planning

A structured settlement commonly involves the purchase, by the defendant's insurance carrier, of an annuity calculated to pay certain sums at regularly scheduled intervals in the future. Insurance carriers representing defendants in a personal injury case often favor structured settlements because they can settle the case for less money up front than the actual value of the case. Insurance companies, however, often are unwilling to disclose the amount that will be paid to purchase the annuity. This makes it difficult for the plaintiff's lawyer to evaluate the merits of the settlement offer.

Structured settlements are intended to provide a secure and fixed stream of recurring payments to a claimant over a long period of time. They avoid dissipation of lump sums by injured parties who may otherwise be left with no or few means of support. Strong public policy in favor of deterring claimants from squandering their settlements or awards has led to favorable tax rules for structured settlements.

Structured settlement proceeds are not subject to income tax. The proceeds, however, can be subject to federal estate tax if the settlement is structured with guaranteed payments so that the person with disabilities would receive payments for life and another person would receive payments upon the death of the person with disabilities. Under those circumstances the present value of the payments to be received by the other person would be included in the deceased person's estate.

Structured settlement annuities can be combined with lump sum payments to meet the specific needs of the injured individual. For example, lump sum payments can be used to pay medical bills, rehabilitation costs and debts of the injured party.

Settlements can be structured without the purchase of an annuity. The plaintiff can settle the matter for a lump sum and future payments and assign a certain amount of the settlement proceeds to a structured settlement trust. The trustee invests the proceeds to maximize asset growth and income and makes periodic payments to the injured party.

Structured Settlement Planning With Special Needs Trusts

Payments from a structured settlement can be made to a SNT. A SNT enables the individual with disabilities to retain existing means-tested public benefits such as SSI and Medicaid or to financially qualify for such benefits while having funds available to supplement the individual's needs that are not covered by government programs. The trust funds can be used for myriad purposes such as additional support services at home, vacations, companions, vehicles and a residence. If a SNT is created, the amount in the trust paid back to Medicaid will be deductible for federal estate tax purposes as a claim against the estate.

A structured settlement may be advantageous to the plaintiff because of the availability of large sums of money to the trustee of a SNT. Structured settlement payments often provide a fixed stream of income, and therefore, they usually will not be subject to unfavorable economic conditions such as recessions or inflation.

One of the disadvantages of structured settlements, however, is the inability of the injured party to change the amount received or the schedule of payments. When circumstances change and the injured party needs a lump sum of money (to purchase a house, for example) the injured party cannot simply give the annuity back to the life insurance company for a lump sum.

Similarly, the injured party is unable to unilaterally change the payee of the structured settlement. Yet often there is a need to do make such a change when it is subsequently determined that the payments should be deposited into a SNT so that the injured person can receive public benefits.

If structured settlement payments are going to be placed into a SNT, the defendant or their assignee should purchase the structured settlement to avoid constructive receipt by the plaintiff or the SNT and the loss of the benefit of tax-free interest.

The trustee of the SNT should be named as the recipient of the structured settlement payments. If the individual with disabilities is named as the recipient, the payments can disqualify the person with disabilities from receiving means-tested benefits such as SSI and Medicaid. A judgment involving both a structured settlement and a SNT should direct the periodic payments from a structured settlement to "pour over" into the SNT.

Qualified Settlement Funds

Section 468B of the Internal Revenue Code authorizes the establishment of qualified settlement funds. A qualified settlement fund (QSF) permits a plaintiff to set up a structured settlement without participation by the defendant so that the plaintiff can receive certain tax advantages of these settlements with provisions that best meet their needs.

QSFs typically are used to settle class action litigation, but they also can be used by plaintiffs with individual claims. QSFs provide defendants with an immediate tax deduction and as well as a full release.

After the settlement or trial proceeds have been deposited into the QSF, the funds can be turned over to the plaintiff, paid into a special needs or other trust, or used to buy a structured-settlement annuity that would provide the same tax advantages to the plaintiff as a structured settlement purchased by a defendant insurer.

Determining the Appropriate Fiduciaries

The special needs attorney's assistance can be invaluable in identifying an appropriate guardian (if necessary) and trustee. That attorney can recommend corporate fiduciaries, when appropriate, and counsel the injured party or family members with respect to the qualifications that should be considered in choosing fiduciaries.

A fiduciary must exercise a high degree of care when dealing with and managing the property of a ward or beneficiary. A fiduciary's interest cannot be in conflict with their duty of loyalty.[18] This high standard is quite rigid. A trustee is a fiduciary and, among other things, a trustee must follow the terms of the trust regarding how the trust should be managed.

Guardians and trustees must keep accurate records. The fiduciary may be required to act in accordance with the state's Prudent Investor Act or as a reasonably prudent investor pursuant to the common law of a state that has not enacted the Prudent Investor Act. Some states require trustees of third-party trusts to render accountings on a regular basis (such as once a year), and the trust itself may contain provisions regarding how often the trustee must provide such an accounting.

Administering Special Needs Trusts

State law may mandate additional responsibilities for SNT trustees. For example, New Jersey regulations require *inter alia* that a SNT provide for periodic formal or informal accountings of all expenditures and submission of that accounting to the appropriate public benefits agency. New Jersey regulations also provide that SNT trustees must give the state advance notice of any expenditure in excess of $5,000, and of any amount which would substantially deplete the principal of the trust, and additions to trust corpus must be reported to the appropriate public benefits agency.[19]

Resource and Income Limitations

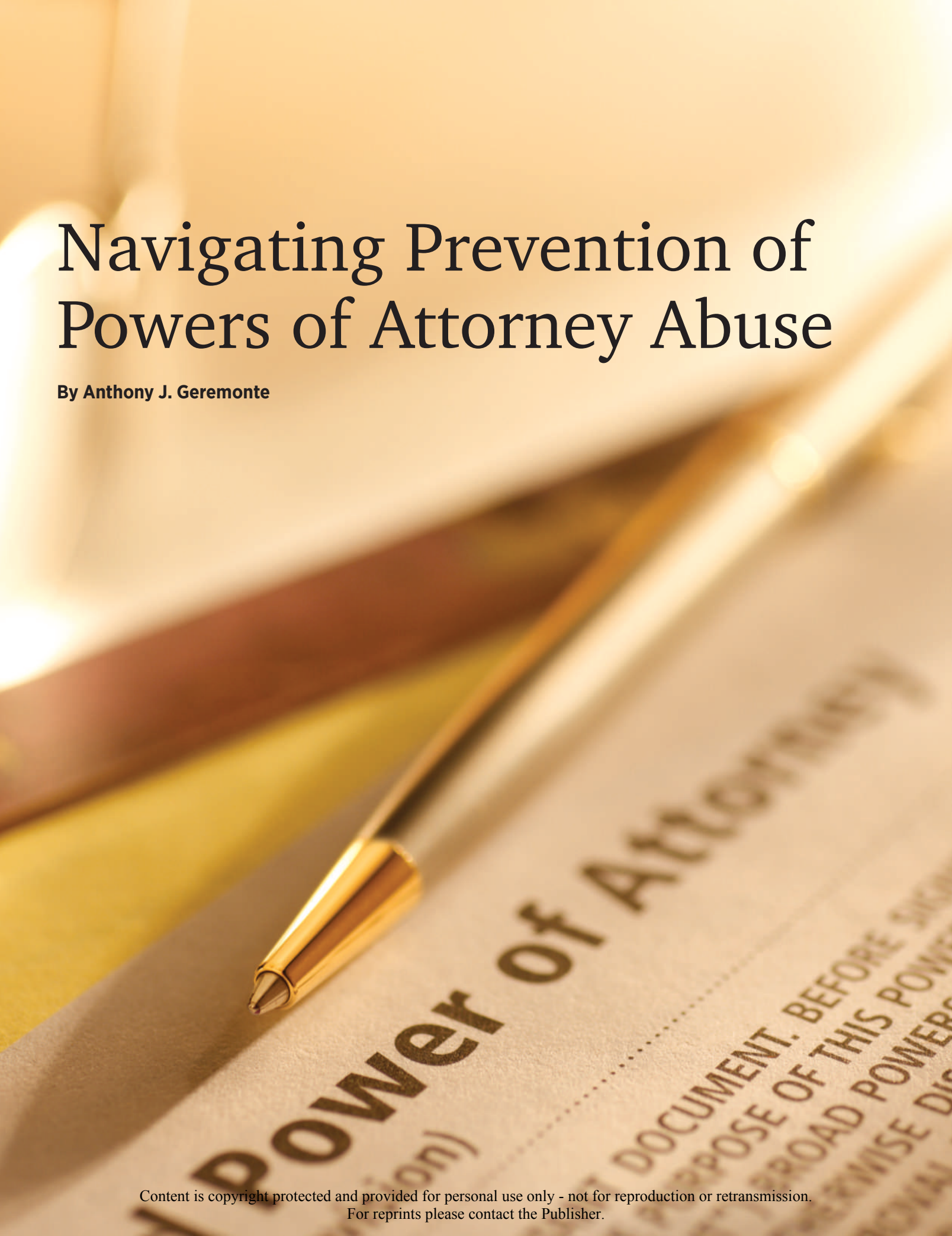
A trustee of a SNT must understand the public benefits programs that may be available to the beneficiary. A SNT is intended to preserve eligibility for means-tested government benefits programs such as SSI and Medicaid. Such programs limit the amount of resources that the beneficiary can own and the amount of income they can receive. The beneficiary's receipt of income or the provision by the trust funds of food or shelter can adversely affect eligibility for such programs. Accordingly, the trustee must administer a SNT with constant consideration of those resource and income limitations. ■

Endnotes

1. RPC 1.5(b).
2. 42 U.S.C. 1395y(b)(2).
3. Medicare Prescription Drug, Improvement and Modernization Act of 2003, P.L. 108-173 (Dec. 8, 2003).
4. Thomas D. Begley, Jr. and Angela E. Canellos, *Special Needs Trust Handbook*, 2013-1 Supplement, (Frederick, Maryland: Aspen Publishers, 2013), p. 14-36.6-5.
5. 42 C.F.R. § 411.24(c)(2).
6. 42 C.F.R. § 411.37(a).
7. Thomas D. Begley, Jr. and Angela E. Canellos, *Special Needs Trust Handbook*, 2013-1 Supplement, (Frederick, Maryland: Aspen Publishers, 2013) pp. 14-36.2
8. 42 U.S.C. § 1396a(a)(25)(A) and (B).
9. 42 U.S.C. § 1396k(a)(1)
10. *Arkansas Dept. of Health and Human Servs., et al. v. Ahlborn*, 126 S.Ct. 1752, 164 L.Ed. 2d 459 (2006).
11. 596 U.S. 142 S.Ct. 1751 (2022).
12. *Waldman v. Candia*, 317 N.J. Super. 464 (App. Div. 1999); *See also,* In re Keitur, 332 N.J. Super 18 (App. Div. 2000).
13. *Burlington County Board of Social Services v. Kaplan et al*., No. A-2203-01T2 (App. Div. Feb. 25, 2003) (unpublished opinion).
14. 42 U.S.C. § 1395y(b)(2).
15. 42 C.F.R. § 411.46
16. cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/WCMSA-Overview
17. 42 U.S.C. 1395y(b)(7).
18. *In re Carter's Estate,* 6 N.J. 426, 436, 78 A.2d 904, 909 (N.J. Sup. Ct. 1951); *Staats v. Bergen*, 17 N.J. Eq. 554 (N.J. 1867); *Estate of Shanley v. Fidelity Union Trust Co*., 108 N.J. Eq. 564, 565-566 (N.J. Ch. 1927). *Estate of Randeris v. Randeris*, 523 N.W.2d 600, 606 (Iowa Ct. App. 1994).
19. N.J.A.C. 10:71-4.11(g).

Navigating Prevention of Powers of Attorney Abuse

By Anthony J. Geremonte



According to a fact sheet issued by the National Center on Elder Abuse, powers of attorney abuse is the misuse by the agent of the authority granted by the principal.[1] It means making a decision or taking an action that is not in the principal's best interest. Since a power of attorney enables the agent to exercise complete control over the person's finances, the agent may steal or embezzle funds from the principal's account for personal use and portray it as being for the benefit of the individual. The agent also has full access to the individual's personal information. As a result, they may open bank accounts, credit cards, or purchase products in the individual's name. Such instances of misappropriating an older adult or person with disabilities funds for personal gain constitute a financial abuse of powers of attorney.

Illustrative Example[2]

Mary was 80 years old and physically unwell when she executed a power of attorney, naming her daughter Sue as her agent. Three weeks later, after discovering her wide breadth of power, Sue used this power of attorney to sell Mary's home, which Mary had lived in and took care of for over 60 years. Sue placed the proceeds from this sale into bank accounts that were in Mary's name. Within one year, Sue had used her authority under Mary's power of attorney to withdraw all the money from her mother's accounts. Now, Mary has unfortunately been left financially devastated.

Lack of Statistical Data and State Response

As tragic and devastating as a situation like this sounds, it can happen, has happened, and will continue to happen. Relatively few studies have been conducted to explore the prevalence of abuse among powers of attorney. Some believe an undetectable but probably high percentage of financial elder abuse is committed by agents in what are supposed to be protective measures for older adults.[3] In the wrong hands, a power of attorney can open a door to a whole myriad of problems with which no one should have to deal.

Thankfully, New Jersey has helped to curb powers of attorney abuse by placing various safeguards. Under New Jersey case law, the traditional rule was that a power of attorney should not be construed to allow the agent to give the principal's assets to themself or others without clear language in the power authorizing such gifts.[4] This was codified in a 2004 law which stated that a power of attorney shall not be construed to authorize the agent to gratuitously transfer property of the principal to the agent or anyone else except to the extent that the power of attorney expressly and specifically so authorizes.[5]

Further, if this were to happen, the Superior Court, upon application of any heir or other next friend of the principal, may require the agent to render an accounting if there is doubt or concern whether the agent has acted within the powers delegated by the power of attorney for the benefit of the principal.[6] In this circumstance, an accounting consists of a thorough explanation of when and for what reason the money was used.

Conclusion

In the end, an individual should ensure they find someone they trust and in whom they have complete confidence when selecting an agent. In the event someone is concerned about the extent of the power of attorney, they can consult an elder law attorney to draft the legal document to best suit their needs. An attorney can draft a limited power of attorney, meaning it is limited in scope or time. Alternatively, an attorney can draft a power of attorney that only takes effect upon disability. Disability can be defined by the client to ensure the power of attorney is truly only active in a specific circumstance. ■

Endnotes

1. Stiegel, Lori A., Durable Power of Attorney Abuse: It's a Crime Too, A National Center on Elder Abuse Fact Sheet for Criminal Justice Professionals, 2008. ncea.acl.gov/NCEA/media/docs/Durable-PofA-Abuse-FactSheet-Criminal-Justice-Professionals.pdf
2. Adapted from the example provided in the Durable Power of Attorney Abuse: It's a Crime Too, A National Center on Elder Abuse Fact Sheet for Criminal Justice Professionals, 2008
3. Shilling, Dana, Legal Issues of Dependent and Incapacitated People, 2007
4. *Manna v. Pirozzi*, 44 N.J. Super. 227, 130 A.2d 55 (App. Div. 1957).
5. *N.J.S.A. 46:2B-8.13a*.
6. *N.J.S.A. 46:2B-8.13(b).*

ANTHONY J. GEREMONTE *is a 3L at New York Law School. He is a New Jersey native and resides in Hudson County. He is incredibly passionate about elder law and aspires to practice in New Jersey.*

To ABLE or Not to ABLE—That is the Question

Understanding the Intersection of Trusts for the Benefit of People with Disabilities and ABLE Accounts

BEN MENASHA *is an elder and disability law attorney with over 20 years of experience serving New Jersey's elder and disabled population. He is a partner at Pisciotta & Menasha, LLC in North Brunswick. He is also a member of the National Academy of Elder Law Attorneys, and the New Jersey State Bar Association, where he was Chair of the Elder and Disability Law Section from 2019–2020.*

By Ben Menasha

For people living with disabilities, many turn to Supplemental Security Income (SSI) to provide basic income.[1] Once a person with disabilities has been deemed eligible, they must continue to meet the income, resource and medical requirements to maintain eligibility. This poses an issue when family members want to assist the person with disabilities by providing funds to pay for goods or services that means-tested public benefits programs will not provide.

Congress first addressed the issue as part of the Omnibus Reconciliation Act of 1993 and allowed for the creation of Pooled Trusts, Special Needs Trusts and Sole Benefit Trusts.[2] These trusts have proven to be beneficial to people with disabilities despite their complicated nature. Seeking to provide a simpler solution, Congress passed Public Law 113-295, The Stephen Beck Jr. Achieving a Better Life Experience Act (ABLE Act), enacted in 2014. This article will address how trusts for the benefit of the person with disabilities and ABLE Accounts intersect with one another.

SSI

SSI as a program is designed to provide low income aged and blind individuals and people with disabilities with money to meet basic needs like food and shelter.[3] Administered by the federal government,[4] people with disabilities must prove their disability and must qualify financially on a month-to-month basis based on income and resources. From a resource perspective a person with disabilities must qualify on the first day of each month. Each individual can have no more than $2,000 in assets or resources, or as a couple no more than $3,000 in combined assets or resources.[5] Should a person with disabilities have more than $2,000 in resources, they lose eligibility and are considered over-resourced. Applicants for SSI cannot give away resources to qualify. There is a 36-month look back from the application date, and a transfer penalty for transfers for less than fair market value may be imposed, affecting eligibility for no more than 36 months.[6]

Conversely, from an income perspective, there must be an accounting of any income received by the individual with disabilities earning income or income that qualifies as in-kind support and maintenance. Such income will reduce the monthly income amount of the person with disabilities. SSI determines their countable income amount and subtracts that amount from the maximum Federal Benefits Rate ($841 a month in 2022) which is supposed to cover food and shelter costs. The more income a person with disabilities earns per month, the more the monthly benefit is reduced. If the countable income for the month exceeds the monthly allowable limit, then they do not receive SSI benefits in that month.[7] SSI also addresses in-kind support and maintenance income, which is income that is not in the form of cash or negotiable instruments.[8] This also includes income that directly addresses food and shelter. Under the one-third reduction rule, an amount equal to one-third of the Federal Benefit Rate is the defacto value of the in-kind support and maintenance regardless of the market value of the amount received. The classic example of the application of the one-third reduction rule is a person with disablities receiving SSI benefits who lives in another person's household and receives both food and shelter within that household.[9] The presumed maximum value rules applies to any other situation. Here the reduction is calculated as one-third of the Federal Benefit Rate plus $20.[10]

It is this backdrop that guides our discussion. Trusts for the benefit of people with disabilities like First Party Special Needs Trusts (SNTs), Pooled Trusts and Third Party Supplemental Benefit Trusts (SBTs) are intended to preserve SSI eligibility for the person with disabilities while holding cash to supplement, but not supplant, their public benefits. Based in the same statutes and regulations as SSI and Medicaid, these trusts for people with disabilities are framed within the same contexts. In contrast, ABLE accounts are based in the tax code and can operate as a hybrid between public benefits rules and the tax code. Each has advantages and disadvantages.

Trusts

SNTs can be created by the parent, grandparent, legal guardian or the Court, or by the person with disabilities if they have capacity. These trusts are subject to the payback provision to the state of New Jersey. The Trust must be established and funded before the person with disabilities turns 65 years old. The person must have a disability and the state must be a first-named beneficiary to pay themselves back for the Medicaid services provided.

A Pooled Trust is similar to an SNT. The Pooled Trust is managed by a not-for-profit organization. Upon the death of the person with disabilities, the state and the pooled trust organization split the remaining funds.

SBTs are funded by third parties, not with the funds of the person with disabilities.

Because these trusts are not funded with monies from the person with disabilities, there is no payback provision requirement to the state. Further, the person with disabilities can be older than 65 years old when the trust is formed.

There are significant formation issues as well within these documents. SNTs must comply with the requirements of NJAC 10:71-4.11(g). Pooled trusts work off a general master trust while SBTs can name a beneficiary who is not the state of New Jersey. In any case the person with disabilities cannot be the Trustee and cannot compel distribution. All of these trusts are discretionary by nature.

Within these trusts is the issue of distributing monies. The person with disabilities cannot act as trustee, nor can they direct distributions. The distributions are based upon the discretion of the Trustee. Monies cannot be distributed to the person with disabilities directly, as it could affect income and resource rules. From an SSI perspective, monies used from the trusts to pay for food and shelter will be deemed in kind support and maintenance and will reduce the person's monthly SSI benefit.[11]

The trusts are subject to audit by the State Medicaid Agency and by the Social Security Administration. Where the governmental agency does not agree with the distributions, there will be complications for the person with disabilities affecting either SSI or Medicaid (or both).

For many families which have individuals with disabilities, trusts for the benefit of people with disabilities can be too complex due to the constant governmental scrutiny and the lack of knowl-

edge of family members of the various public benefits rules, regulations and accountings as they navigate distributions. Turning to a corporate trustee may be a better option; however, many (but not all) require sizeable amounts of corpus before getting involved and agreeing to serve as Trustee. Families were seeking an easier method to provide for a person with disabilities without putting their benefits in jeopardy.

ABLE Act

The Stephen Beck, Jr. Achieving a Better Life Experience act of 2014 (ABLE Act) was signed into law by President Barack Obama on Dec. 19, 2014, as part of the Tax Increase Prevention Act of 2014. The purpose was to "provide secure funding for disability related expenses on behalf of beneficiaries with disabilities that will supplement, but not supplant, benefit."[12] Codified in section 529A of the federal tax code, ABLE accounts are funded with after-tax dollars. All earnings in the account are tax deferred and all distributions which are considered "qualified disability expenses" (defined below) are not counted as income for the designated beneficiary. The goal is to have an alternative to the complex nature of trusts for people with disabilities and to allow them to be able to have control over some of their assets while still complying with the SSI and Medicaid rules for income and assets.

ABLE accounts can be created by a person with disabilities through an agent under a power of attorney, or by a parent or legal guardian.[13] To be able to qualify for the ABLE account, the designated beneficiary (also considered to be the owner) of the account must be the "eligible individual."[14] The eligible individual have a disability or be considered blind in conformance with the Social Security laws and must have suffered onset of the disability before their 26th birthday.[15]

Each eligible individual can only have one account and total annual contributions can be no more than the annual gift tax exclusion under IRC 2503(b).[16] Contributions may be made by any individual, trust, estate partnership, association company or corporation.[17] Third-party contributions are not considered to be income to the person with disabilities for SSI purposes. Further, balances of $100,000 and below are excluded from SSI and Medicaid as countable resources.[18] Balances above $100,000 are deemed available resources and may disqualify the person with disabilities when combined with other resources.[19] However, the maximum amount allowed in the ABLE account is the maximum amount allowed in the State 529 plan.[20]

The distributions from the account are limited to Qualified Disability Expenses.[21] Distributions made from an ABLE account are not considered to be income to the designated beneficiary. Rather it is seen as a conversion of a resource from one form to another.[22] Beware the distribution of funds to pay for housing expenses. Under the rules for the ABLE account, housing expenses are considered to be qualified disability expenses and are perfectly acceptable distributions. However, these same expenses could be considered in-kind support and maintenance and reduce the monthly income for the person with disabilities if they are paid by a trust for the benefit of the person.[23]

The ABLE program must limit the eligible individual to no more than two opportunities each calendar year to provide investment direction regarding the assets in their ABLE account. The ABLE account must require an accounting to the eligible person and to the IRS and the Social Security Administration.

Like SNTs and Pooled Trusts, ABLE accounts are subject to expanded estate recovery in New Jersey.[24] Within the federal statues are the provisions that allow for the state to file a claim against the designated beneficiary or the ABLE account itself to pay the state back for benefits paid to the beneficiary, upon their death, under the state's Medicaid plan from the time that the ABLE account was created.[25]

A Comparison

In light of the information above, does it make sense to use an ABLE account? The classic answer is "it depends." When comparing ABLE accounts to trusts for people with disabilities, skilled professionals like attorneys and accountants are not needed to open the accounts. The ABLE account allows for tax deferred growth of the account balances while the trusts pay income taxes. Monies from the ABLE account can be used to pay post death qualified disability expense distributions prior to Medicaid estate recovery while the trusts for people with disabilities do not allow for such payment.[26] The individual with disabilities has autonomy over their assets to some degree with an ABLE account but cannot compel distribution or serve as Trustee in a trust for people with disabilities.

ABLE accounts are not subject to review by the Social Security Administration and the state Medicaid program while trusts for people with disabilities are subject to audit. Distributions for food will not be considered in-kind support and maintenance from an ABLE account but will from trusts for people with disabilities, resulting in a reduction of the monthly SSI benefit. The ABLE Medicaid payback provisions are limited to costs incurred after the establishment of the ABLE account while SNT and Pooled Trusts are subject to all Medicaid dollars spent. Recall that SBTs have no payback provisions.

To create an ABLE account the person

with disabilities must have been found to be disabled before the age of 26. No such limitation exists for trusts for people with disabilities. The ABLE account can have no more than $100,000, otherwise the assets above that figure will be considered an available resource for the individual with disabilities and counted toward the $2,000 resource maximum. Trusts for people with disabilities do not have a cap on corpus but are subject to greater scrutiny by the Social Security Administration and the state Medicaid office. SBTs can be created by anyone while ABLE accounts must be created by the person (designated beneficiary), the parent, legal guardian or agent under a power of attorney. There is a cap on yearly contributions into an ABLE account but no such cap applies to a trust for a person with disabilities.

In the end, it is best to discuss these issues with the person with disabilities and their family to find the right tool for the client. ■

Endnotes

1. SSI is codified in 42 U.S.C. 1381 et. seq. SSI pays monthly cash benefits to people over the age of 65 and to people with disabilities who qualify under Title XVI of the Social Security Act. New Jersey participates in and automatically grants Medicaid eligibility to those who receive SSI benefits through Section 1634 of the Social Security Act. Both the SSI and Medicaid programs are means tested whereby the applicant must meet resource and income requirements, as well as medical/disability requirements. Under the resource rules, an individual cannot have more than $2,000 in non-exempt resources.
2. Codified in 42 U.S.C. 1396p(d)(4)(A), these trusts are known as First Party Trusts or Special Needs Trusts, where the assets of the person with disabilities are used to create the Trust, as opposed to Third Party Trusts or Supplemental Benefits Trusts which are created with funds that do not belong to the person with disabilities. Note that the 42 USC 1396p(d) does not mention the creation of third-party trusts.
3. See 20 CFR 416.110 to discuss the purposes of the SSI program.
4. SSI payments are made from the general treasury funds and not from Social Security retirement, or disability or Medicare trust funds.
5. See 20 CFR 416.1201 for the definition of resources and see also 20 CFR 416.1210 et. seq. and 42 USC 1382b(a) for exclusions to the resources. See also the POMS SI 01130.050.
6. POMS SI 01150.001D1 and C3 and SI 01150.110
7. See 20 CFR 416.100 et. seq. and POMS SI 00810.001 et. seq. See also 20 CFR 416.1103 and POMS SI 00815.001 to determine what is not countable income, 20 CFR 416.1112 for earned income exclusions, 20 CFR 416.1120 et. seq. for unearned income.
8. See 20 CFR 416.1130-1157.
9. See 20 CFR 416.1131
10. See 20 CFR 416.1140
11. See. 42 USC1396p(d)(4), See also, POMS SI 01120,200 for trusts established with assets of third parties and POMS SI 01120.201 for trusts established with assets of an individual on or after 1/1/2000.
12. Able Act Section 101(1) as discussed in 85 FR 74010, Final IRS regulations effective date 11/19/2000 at 74010.
13. 26 CFR 1.529A-2(c) and POMS SI 01130.740 B4
14. 26 USC 529A(e)(1)
15. Before the 26th birthday of the person with disabilities, the individual could also qualify if they qualified for disability insurance benefits (DIB), childhood disability benefits (CDB), or disabled widow's or widower's benefits (DWB). There is also a self-certification requirement where the individual with disabilities must be blind as defined by the Social Security Act, or has a medically determinable physical or mental impairment with marked severe function limitation that has lasted or is expected to last at least 12 continuous months or result in death. The individual must have a written disability-related diagnosis signed by a physician. Certification must be done annually.
16. This year the limitation is $16,000.
17. POMS SI 01130.740B2
18. POMS SI 01130.740C3
19. POMS SI 01130.740D1b.
20. In New Jersey, the max amount is $305,000 in 2022.
21. Some examples include education, health and wellness, housing, transportation, legal fees, financial management, employment training and support, personal support services, oversight and monitoring, and funeral and burial expenses. (POMS SI 01130.740 B8).
22. POMS SI 01130.740C4
23. POMS SI 01130.740B8 and POMS SI 01130.740B9 and POMS SI 00815.400 and POMS SI 01120.201
24. POMS SI 01130.740A2 and NJAC 10:49-14.1 and NJSA 30:4D-7.2 and NJSA 30:4D-7.2A.
25. IRS 529A(f) and POMS SI 01130.740A. It should be noted that the state is considered a creditor of an ABLE account and not a beneficiary. (IRC 529 A(f)).
26. See POMS SI 01120.203B3

NJSBA Celebrates Members by Providing Critical Advice Every Lawyer Should Have

The New Jersey State Bar Association's Member Celebration Days festivities this fall included a line-up of webinars, with information to help every attorney thrive in their professional lives.

From guidance on keeping trust accounts in ship-shape, to tips for improving legal research queries, to ways to keep client and personal matters safe online, a line-up of practical sessions offered takeaways that attorneys can put to work right away.

Member Celebration Days also included opportunities for members to talk with employers at a job fair; get free headshots to update their online presence; shred unwanted office documents; and connect and learn about the Association's sections and committees at an open house.

Read on for the kind of tips and guidance from the virtual informational sessions.

Nine Essential Tips for Attorney Trust Accounting

Jason Saunders, the First Assistant Ethics Counsel at the Office of Attorney Ethics, and Alison Picione, the OAE's Chief of Investigations, shared valuable information about attorney trust accounting basics.

1. On a regular basis, double back and look at the Rules of Professional Conduct, especially Rule 121-6.
2. Protect your client's money and know what is going on in your trust account. That means ensuring you have good recordkeeping, supervised staff and knowing how your bookkeeping software works. Keep good records that show what is happening in all accounts.

3. Use your trust account only for client funds. Don't comingle personal money, beyond what is allowed to cover bank fees. Don't use it as a personal bank account.
4. Treat each client's money as a mini account. Don't disburse more than you have for each client.
5. Wait for deposits to clear before disbursing funds. Individual banks can vary, depending on the type of transaction. Be aware of what is happening and when funds are available.
6. Maintain records and client files for seven years after a matter has closed.
7. Enter each transaction in three places: checkbook, client ledger card, receipts or disbursements journal. Be sure to add details and reconcile each month. Make a note if there are issues and correct any errors.
8. Negligent misappropriations happen. It is important to address it as soon as possible and restore good record-keeping practices. Knowing misappropriation is using client or escrow funds without authorization. Intent to steal is not required.
9. Where to get help: Invest in yourself and your practice: Take a trust accounting class. Read the Court Rules. Contact the Office of Attorney Ethics, your bar association or the New Jersey Lawyer's Assistance Program.

Four Ways to Power-Up Legal Research and Get the Most from Fastcase

NJSBA members have free access to the legal reseach tool, Fastcase. Here are four tips about how to improve research results and what Fastcase experts told our members during an informational session to help them get the most useful results from the platform.

1. Be sure to choose your jurisdiction at the right of the search bar prior to entering your search.
2. When considering your search, identify the keywords that would be found in the document you need and type those into the search bar. If you are getting too many results, try using a proximity indicator (w/15 for example) to limit how many words apart from each other your terms should be—like dog w/15 bite
3. The flag icon at the left of the case title will take you to Fastcase's Authority Check report—their negative treatment citator tool that identifies if the case is still good law, and provides a list of cases that have cited the opinion you are reviewing. A red/colored in flag indicates negative treatment, while a neutral/not colored in flag indicated no negative treatment.
4. Fastcase's search and document history are available by clicking the My Libraries icon, which appears as a clock, in the upper right section of the page.

How to Keep Personal and Client Data Safe Online: 4 Easy Tips

An ounce of prevention equals a pound of cure when it comes to cyber security. Did you know that having a modest cyber security plan can reduce the cost of a security breach by up to 92%?

1. If you are a lawyer who does work at home, consider having two Wi-Fi networks, one for work and one for everything else in life, like kids, streaming services.
2. Don't charge your devices using USB ports in public places like hotels and airports because cyberthieves can siphon off data from those sites. Instead, connect to an electrical outlet using your own charging cable.
3. If you receive an email asking you to log in to a site with a username and password, pick up the phone first to verify with the organization that it made the request.
4. Use a password manager to safely log in to sites. ■

WRAP IT UP

What you should be doing to close out your firm's fiscal year 2022

As the year closes, we go into holiday planning mode, making (tentative, perhaps) travel plans, gift buying, holiday parties (either small or vaxxed, or both), and hopefully we look at how we can volunteer our time giving back to our community during the season.

The reality is that the year is almost over for your business, too. Your law firm has end-of-year obligations that you should tend to, so that you are in the best position to start 2023. Here are some things you should be looking at.

Budgets

If you have a budget for 2022, how are you doing? If you don't have a budget for 2023, now is the time to get started on one. And don't just create a budget by looking at last year's expenses—plan for any personnel changes, equipment purchases, lease renewals or office moves, conference attendance, etc. Make sure your accounting system is properly configured to track expenses in a way that makes reporting easy and that can provide you with real insight as to where your money goes each month.

WIP

Review your aged Work in Progress (WIP, unbilled time). Your time and billing system should be able to report WIP by responsible attorney so that you can bill out any files that can be billed. If there are files with time that should be written off and closed, do that now. No sense carrying over WIP or balances you will never collect to the new year.

Accounts receivable

What does your 30-60-90 day aging report show you? Are there receivables older than 90 days? Is it truly uncollectable, and if so, why? Maybe you need to employ stronger collection efforts? Of particular importance here are the costs advanced that you may need to write off. And of course, consult with your CPA!

Stale bank items

Review any stale items on your bank reconciliations—no uncleared deposits and no stale uncashed checks greater than six months old. Review and balance your unallocated payments or credit balances. Make sure any money that should have been refunded or moved to trust has been appropriately handled.

Trust account

Review your trust account to be certain that you transferred any amounts to operating that you have rightfully earned and can transfer, and confirm there are no amounts due to be returned to a client. You should do this every month—but make sure you do it before the year's end.

Data entry

Finish any data entry for the year—make sure all client payments are posted, all bills are finalized, accounts payable are handled, and payroll is posted. Reconcile all of your bank accounts, including the three-way reconciliation for your trust accounts.

Tax forms

Review your list of vendors and send W-9s as needed. Review the requirements (basically anyone who is not incorporated should get a W-9). LLCs require 1099s unless filing as a corporation (if filing as partnership they are required to get them), so best to send W-9s to them too if uncertain. When in doubt, put the onus back on the vendor by sending them a W-9, or ask your CPA about the rules.

If you struggled to take care of the end-of-year items in 2022—make sure you start 2023 by putting the right people, process, and technology in place to make year-end preparation a holiday treat! And for a more-detailed information about preparing for year end, visit the Money section of the NJSBA's member-benefit PracticeHQ resource at njsba.com.

By PracticeHQ

NJSBA PRACTICE HQ

The New Jersey State Bar Association's Practice HQ is a free member resource designed to help you build and maintain a successful, thriving legal practice.

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Find information on topics such as:

OPENING OR CLOSING A LAW FIRM

There's a lot to know about opening or closing a law practice. Where do you start? The materials in this section start you down the right path and make sure vital considerations aren't overlooked.

CLIENT DEVELOPMENT

The success of your law practice relies on pleasing clients. But, before you can please clients, you have to obtain them. Learn how to find and retain satisfied clients.

DOCUMENTS

Learn how to effectively and securely draft, edit, share, and collaborate on electronic documents.

TECHNOLOGY

Review the fundamentals you should consider to figure out your organization's needs.

MONEY

Billing by the hour means that your supply of "product" is limited by the clock and calendar. Examine the resources provided to build a profitable practice.

MANAGEMENT

The best-run legal organizations embody a positive, growth-oriented culture, and entails fostering your organization's most valuable asset–your people.

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