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NAVIGATING THE UNIFORM POWER OF ATTORNEY ACT

Linda S. Whitton, J.D.*

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The Uniform Power of Attorney Act (the “Act”) was approved by the Uniform Law Commission in July 2006 and is currently under review for enactment in a number of states. This article provides an introduction to the Act as well as practice pointers for drafting a power of attorney under the Act. Part II describes the study process that identified a need for the Act, Part III gives an overview of the Act’s structure and significant innovations, and Part IV analyzes the default provisions and drafting options that should be considered when tailoring a power of attorney to fit individual client needs and objectives. The Act and Comments should be consulted for further detail and explanation regarding topics reviewed by this article.

II. NEED FOR A NEW ACT

In 2002, at the request of the Joint Editorial Board for Uniform Trusts and Estates Acts, Professor Susan Gary and I co-chaired an advisory committee whose task was to analyze how much uniformity existed among state power of attorney statutes and to

1. The Uniform Law Commission was formerly known as the National Conference of Commissioners on Uniform State Laws.
identify those areas about which states had adopted divergent provisions. Professors Karen Boxx and Rebecca Morgan assisted with the data analysis. Although a majority of states adopted the original Uniform Durable Power of Attorney Act, we found that state statutes were no longer uniform as a result of subsequent legislative modifications to address specific issues about which the Uniform Durable Power of Attorney Act is silent.

Areas of legislative divergence included, for example, the default rules governing multiple agents, the authority of later-appointed fiduciaries, gift-making authority, and agent fiduciary duties. There were also a number of areas where states had supplemented the basic provisions of the Uniform Durable Power of Attorney Act, but not necessarily in a divergent manner. These included execution requirements, portability provisions, and the recognition of liability for unreasonable refusals of powers of attorney by third persons. Based on this information, the advisory committee conducted a national survey (hereinafter the “JEB survey”), which was distributed to all state bar probate and elder law sections, the NAELA membership, the leaders of the ABA Section of Real Property, Probate and Trust law, ACTEC fellows, as well as electronic mailing lists for elder advocates. The purpose of the survey was to ascertain whether divergence in state power of attorney legislation reflected substantive differences of opinion about power of attorney issues or merely the lack of a uniform legislative model. Among the 371 survey respondents, over 70 percent agreed that legislation was needed to address the following issues:

- Provision should be made for a confirming affidavit to activate springing powers,
- Gift-making authority should be expressly stated rather than implied,
- Agent fiduciary duties should be specified,
- A principal should be permitted to alter agent fiduciary standards,
- Notice should be required for agent resignation,
- Remedies should be provided for unreasonable refusal of a power of attorney,
- Third person reliance on a power of attorney should be protected by a statutory presumption of validity,
- An action for marital dissolution or annulment should revoke a spouse-agent’s authority,
- Portability provisions should address powers created under other law, and
- Remedies and safeguards should address financial abuse by agents.

5. Id.
Based on the results of the advisory committee’s study and survey, the Uniform Law Commission constituted a committee to draft the new Uniform Power of Attorney Act.

III. OVERVIEW OF THE ACT

The Act consists of four articles. Article 1 contains general provisions for the creation and use of a power of attorney, including provisions for the protection of the principal, the agent, and third persons who deal with agents. Article 2 provides default definitions for various types of authority as well as rules pertaining to certain grants of authority. Article 3 consists of an optional statutory form power of attorney and a sample agent certification form. Article 4 contains miscellaneous provisions concerning the relationship of the Act to other law and pre-existing powers of attorney. The following is a general overview of the Act.

A. General Provisions

Article 1 provides the basic framework for the creation and use of a power of attorney as well as rules for interaction between the principal, agent and third persons who are asked to accept the agent’s authority. Default provisions in the Act are signaled by the phrases, “unless the power of attorney otherwise provides,” or “except as otherwise provided in the power of attorney.” A principal is free to modify these provisions by express language in the power of attorney.

The Act departs from the Uniform Durable Power of Attorney Act in two significant ways. First, a power of attorney created under the Act is durable unless the power of attorney expressly provides that it is terminated by the principal’s incapacity. Second, an agent’s authority continues even after the later court appointment of a fiduciary, such as a guardian, unless the court chooses to limit, suspend or terminate that authority. Establishing durability as the default rule reflects the premise that most principals prefer a power of attorney to be durable even if it is for a limited purpose, such as closing a real estate transaction. Reserving to the court, rather than to a later-appointed fiduciary, the power to terminate the agent’s authority reflects a public policy favoring a principal’s choice of agent unless there is evidence that the agent should be removed from that role.

1. Exclusions, Definitions, and Relation to Other Law

The Act supersedes the Uniform Durable Power of Attorney Act, the Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code. It applies to all powers of attorney except powers coupled with an interest in

8. Id. at § 104.
9. Id. at § 108.
10. Id. at § 104 cmt.
11. Id. at § 108 cmt.
12. Id. at § 404.
the subject matter of the power, health-care powers, proxies or delegations to exercise voting or entity management rights, and powers created on a governmental form for a governmental purpose.\textsuperscript{13} The foregoing powers are excluded from the operation of the Act either because the authority for the power emanates from other law and the power is for a limited purpose or because the agent is not intended to act as the principal’s fiduciary.\textsuperscript{14}

A few terms and definitions in the Act bear particular mention. The term “incapacity”\textsuperscript{15} replaces the term “disability,” which was used in the Uniform Durable Power of Attorney Act, in recognition that a disability does not necessarily render a person incapable of property management. As explained in the Comments, “[t]he definition of incapacity stresses the operative consequences of the individual’s impairment— inability to manage property and business affairs—rather than the impairment itself.”\textsuperscript{16} Another terminology departure from the Uniform Durable Power of Attorney Act is use of the term “agent”\textsuperscript{17} in place of “attorney in fact.” This change was made to address confusion in the lay public about the difference between an attorney in fact and an attorney at law.\textsuperscript{18}

The term “presently exercisable general power of appointment”\textsuperscript{19} also bears special mention. It appears in two places in the Act. The first is in the section defining authority with respect to “Estates, Trusts, and Other Beneficial Interests” where the context is the authority to exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal.\textsuperscript{20} The second is in the section defining authority with respect to “Gifts” where the context is exercise of the power for the benefit of someone other than the principal.\textsuperscript{21} The term is defined to clarify that in these contexts it does not include a power exercisable by the principal in a fiduciary capacity or exercisable only by will.\textsuperscript{22} If a principal wants to delegate authority over a power that the principal holds in a fiduciary capacity, the Act requires that the power of attorney contain an express grant of that authority.\textsuperscript{23} Delegation of a power held in a fiduciary capacity is also limited by whatever constraints exist under the terms of the power of appointment on the principal’s authority to delegate or exercise that power.

With respect to the operation of other law, the Act is supplemented by the principles of law and equity, including the common law of agency, except where
provisions of the Act displace such principles.  Likewise, the remedies under the Act are not exclusive and do not abrogate any other right or remedy a party may have with respect to a power of attorney.  For example, an agent who violates the Act will be subject to liability as provided by the Act, but may also be subject to liability under other laws that deal specifically with financial exploitation or fraud.  Lastly, the Act addresses concerns expressed by the banking and financial industries that the regulations that govern their businesses might conflict with provisions of the Act. The Act provides that it “does not supersede any other law applicable to financial institutions or other entities, and the other law controls if inconsistent.”

2. Creation, Validity and Effect

The execution requirements under the Act are simple. A power of attorney must be signed by the principal or in the principal’s conscious presence by someone whom the principal has directed to sign the principal’s name on the power of attorney. While acknowledgement of the signature is not mandatory under the Act, only acknowledged signatures carry a statutory presumption of genuineness, and under the Act, third persons have no obligation to accept unacknowledged powers of attorney.

The Act encourages the portability of powers of attorney by recognizing the validity of pre-existing powers executed under the prior law of an enacting jurisdiction, powers validly created under the law of another jurisdiction, and military powers of attorney. Unless presentation of the original power of attorney is required by another law of the jurisdiction, e.g., for recording purposes in connection with a real estate transaction, the Act provides that a photocopy or electronically transmitted copy of a power of attorney has the same effect as the original.

The Act also addresses how to determine the meaning and effect of a power of attorney when the default rules of the jurisdiction where the power of attorney was created differ from the default rules under the Act. The advisory committee’s study revealed a number of areas in which default provisions differ, including those setting the scope of gift-making authority and those specifying the decision-making requirements for co-agents. To address this problem, the Act provides that “[t]he meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, 

24. Id. at § 121.
25. Id. at § 123.
26. See id. at § 117 cmt.
27. Id. at § 122.
28. Id. at § 105.
29. Id.
30. See id. at § 120 (liability provisions apply only to refusal of an acknowledged power of attorney (Alternative A) or an acknowledged statutory form power of attorney (Alternative B)).
31. Id. at § 106.
32. Id. at § 106(d) & cmt.
33. See id. at prefatory note.
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by the law of the jurisdiction in which the power of attorney was executed.” The purpose of this provision is to prevent a principal’s grant of authority from being enlarged or narrowed simply by virtue of the agent using the power in a different jurisdiction.

3. Provisions Applicable to the Agent

One of the important advancements of the Act is articulation of mandatory and default rules for matters related to the agent. Professor Karen Boxx has noted the long-standing problem of inadequate guidance for agents, observing that as compared to a trustee who is guided by the terms of a trust or a guardian who takes direction from the court, the agent of an incapacitated principal is “uniquely directionless.” The absence of clear fiduciary guideposts not only exposes a vulnerable principal to greater risk, but uncertainty about potential liability may discourage prospective agents from accepting appointment under a power of attorney.

The Act meets the foregoing concerns by specifically addressing the following issues:

- an agent’s acceptance of appointment,
- default rules for co-agents and successor agents,
- default rules for agent reimbursement and compensation,
- mandatory and default agent duties,
- exoneration of the agent,
- judicial review of the agent’s conduct,
- agent liability, and
- a default method for agent resignation.

The default rules and drafting options with respect to agent duties are discussed in greater detail in Section IV(B) of this article.

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34. Id. at § 107.
35. See id. at § 107 cmt. For a discussion of the issues that can arise with inter-jurisdictional use of powers of attorney, see Linda S. Whitton, Crossing State Lines with Durable Powers, Prob. & Prop. 28 (Sept./Oct. 2003).
37. See id. at 61.
39. Id. at § 111.
40. Id. at § 112.
41. Id. at § 114.
42. Id. at § 115.
43. Id. at § 116.
44. Id. at § 117.
45. Id. at § 118.
4. Provisions Applicable to Third Persons

Perhaps, the most important problem tackled by the Act is the deterrence of unreasonable refusals of valid powers of attorney. No matter how carefully a power of attorney is drafted, it will be useless as a hedge against guardianship if third persons refuse to accept the agent’s authority. The seriousness of this problem was confirmed by respondents to the JEB survey as well as by a myriad of anecdotal stories shared at various professional meetings where the Act was discussed during the three-year drafting process.

The Act has a three-prong approach to the problem of arbitrary refusals of powers of attorney. First, the Act provides broad protection for good faith acceptance of any purportedly acknowledged power of attorney without imposing a corresponding duty to independently verify that the power of attorney is valid. When an entity conducts activities through employees, it is considered to be without knowledge of a fact related to a power of attorney if the employee conducting the transaction is without actual knowledge of the fact. Second, the Act sets out clear safe harbors for legitimate refusals of a power of attorney. And third, if a refusal does not meet one of the safe harbors, the person refusing the power is subject to a court order mandating acceptance and to liability for attorney’s fees and costs associated with any proceeding to confirm the validity of the power of attorney or to mandate its acceptance. Currently, ten states recognize statutory liability for unreasonable refusal of a power of attorney.

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46. Whitton, supra n. 6, at 10.
48. Id. at § 119(f).
49. Refusals may be made on the following bases:
   (1) the person is not otherwise required to engage in a transaction with the principal in the same circumstances;
   (2) engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;
   (3) the person has actual knowledge of the termination of the agent’s authority or of the power of attorney before exercise of the power;
   (4) a request for a certification, a translation, or an opinion of counsel under Section 119(d) is refused;
   (5) the person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel under Section 119(d) has been requested or provided; or
   (6) the person makes, or has actual knowledge that another person has made, a report to the [local adult protective service office] stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent. 
Id. at §§ 120(b), Alternative A, 120(c), Alternative B.
50. Id. at §§ 120(c), Alternative A; 120(d), Alternative B.
B. Authority

Of equal importance to the concern that a power of attorney will be unreasonably refused is the concern that the power of attorney will be abused. The primary innovation of the Act aimed at preventing abuse is the requirement that the power of attorney contain express language to specifically authorize certain actions that have significant potential for dissipating the principal’s property or altering the principal’s estate plan. The following provides an overview of the actions that require a specific grant of authority as well as those that may be delegated or inferred from a general grant.

1. Authority Requiring a Specific Grant

In response to rising concern over power of attorney abuse, a growing number of states now require express authority for an agent to make gifts; create, amend, or revoke trusts; or use other non-probate estate planning vehicles such as survivorship interests and beneficiary designations. This approach forecloses arguments that a broad grant of general authority from the principal was intended to include these potentially damaging powers. Following this trend, the Act requires an express grant of authority in order for an agent to:

- create, amend, revoke, or terminate an inter vivos trust;
- make a gift;
- create or change rights of survivorship;
- create or change a beneficiary designation;
- authorize another person to exercise authority granted to the agent;
- waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;
- exercise fiduciary powers that the principal has authority to delegate; and
- disclaim or refuse an interest in property, including a power of appointment.

In addition to requiring express authority for the foregoing actions, the Act precludes an agent who is not an ancestor, spouse, or descendant of the principal from exercising delegated authority for the agent’s benefit unless the power of attorney

contains express authority to do so.\textsuperscript{56} Even with respect to close family-member agents, the exercise of authority is still subject to constraint by the agent’s fiduciary duties.\textsuperscript{57} While it is possible under the Act for an agent to legitimately exercise authority for the primary benefit of the agent, there must be both the authority to engage in the particular transaction \textit{and} a clear indication of the principal’s expectation that the agent is to exercise the authority for the agent’s benefit.\textsuperscript{58}

2. General Authority

With the exception of actions that must be authorized with an express grant of authority, authority with respect to other subject areas defined in Article 2 may be delegated through a general grant.\textsuperscript{59} Based in part on the predecessor Uniform Statutory Form Power of Attorney Act (1988), the Act provides default statutory definitions of authority with respect to real property,\textsuperscript{60} tangible personal property,\textsuperscript{61} stocks and bonds,\textsuperscript{62} commodities and options,\textsuperscript{63} banks and other financial institutions,\textsuperscript{64} operation of an entity or business,\textsuperscript{65} insurance and annuities,\textsuperscript{66} estates, trusts, and other beneficial interests,\textsuperscript{67} claims and litigation,\textsuperscript{68} personal and family maintenance,\textsuperscript{69} benefits from governmental programs or civil or military service,\textsuperscript{70} retirement plans,\textsuperscript{71} and taxes.\textsuperscript{72} Although most of the statutory definition language comes directly from the Uniform Statutory Form Power of Attorney Act, it has been revised to comport with modern custom and practice.

These statutory definitions for authority over various subject areas may be incorporated by reference by using the optional statutory form provided in Article 3 or by referring to the descriptive term or section number for the subject.\textsuperscript{74} The Act also provides that if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has authority with respect to all of the enumerated subject

\textsuperscript{56} Id. at § 201(b).
\textsuperscript{57} See id. at § 201 cmt.
\textsuperscript{58} See id. at § 114 cmt.
\textsuperscript{59} See id. at § 201(c).
\textsuperscript{60} Id. at § 204.
\textsuperscript{61} Id. at § 205.
\textsuperscript{62} Id. at § 206.
\textsuperscript{63} Id. at § 207.
\textsuperscript{64} Id. at § 208.
\textsuperscript{65} Id. at § 209.
\textsuperscript{66} Id. at § 210.
\textsuperscript{67} Id. at § 211.
\textsuperscript{68} Id. at § 212.
\textsuperscript{69} Id. at § 213.
\textsuperscript{70} Id. at § 214.
\textsuperscript{71} Id. at § 215.
\textsuperscript{72} Id. at § 216.
\textsuperscript{73} Id. at § 301.
\textsuperscript{74} Id. at § 202.
areas in Article 2 that do not require an express grant of authority. A principal may modify any authority incorporated by reference. (Section IV(C) of this article outlines factors to consider in modifying grants of specific or general authority.)

C. Statutory Forms

Article 3 provides both an optional statutory form power of attorney and an optional agent certification form. Although opinions are mixed about the prudence of states offering a statutory form, the reality is that a proliferation of forms is available to the public through the internet and office supply stores. The drafting committee for the Act chose to include an optional statutory form on the premise that the public would be better served by a form which minimizes traps for the unwary. The form uses layperson-friendly language to explain options to the principal and to provide important information to the agent about duties and potential liability.

The experiences of states like Illinois and New York, where for many years both lawyers and laypersons have used state-sanctioned statutory forms, suggest that over time a statutory form promotes uniformity in power of attorney practice and facilitates acceptance of powers of attorney by third persons. The following provides a basic overview of the optional statutory form power of attorney and agent certification form.

1. Optional Statutory Form Power of Attorney

The statutory form power of attorney (Appendix) is designed to be understandable to laypersons while still providing attorneys a foundation upon which any drafting option under the Act can be implemented. Certain commonly exercised options appear on the face of the form (e.g., designation of a successor agent or agents and nomination of a conservator or guardian) and others, such as naming co-agents or creating a springing power of attorney, may be exercised using the Special Instructions section of the form. The Important Information section identifies the Special Instructions as the place for exercising other options and making modifications.

The most significant feature of the form is the separation of the Grant of General Authority section from the Grant of Specific Authority section. In the Grant of General Authority section, if the principal wishes to grant authority with respect to less than all of the subjects listed, the principal is instructed to initial only those subjects. If the principal wishes to grant authority over all of the subjects in this section, the principal may simply initial the “All Preceding Subjects” line.

The Grant of Specific Authority section (marked “optional”) lists all of the acts that require a specific express grant of authority. A warning to the principal about the possible negative consequences of granting authority to perform the listed acts

75. Id. at § 202(c).
76. Id. at § 202(c).
77. Id. at § 301.
78. Id. at § 302.
79. Id. at Art. 3 cmt.
80. See id. at § 201(a).
Of the acts listed in the Grant of Specific Authority section, only the authority to make a gift has a default definition in Article 2. Of the acts listed in the Grant of Specific Authority section, only the authority to make a gift has a default definition in Article 2.81 The authority to make a gift is limited by this definition unless modified in the Special Instructions. Likewise, any further specification desired with respect to any of the other acts listed in the Grant of Specific Authority section must be included in the Special Instructions.

2. Optional Agent Certification Form

Under the Act, anyone asked to accept a power of attorney may request from the agent a “certification under penalty of perjury of any factual matter concerning the principal, agent, or power of attorney.”82 While third persons are not required to investigate factual matters concerning a power of attorney, they are entitled to rely upon any certification provided.83 The optional form contains the statements of fact about which persons commonly request certification, but an agent may add other factual statements to the form as needed to satisfy a certification request.84

IV. DRAFTING PRACTICE POINTERS

Drafting an effective power of attorney requires a clear understanding of the client’s objectives and preferences, a thorough knowledge of the default rules under which the power of attorney will be created, and anticipation of how the power of attorney will be used. For example, if the power of attorney will be used in more than one jurisdiction, knowledge of the portability and default provisions in those jurisdictions is advisable to ensure that the power of attorney and scope of authority will be understood and honored.85

The following provides a template for drafting a power of attorney under the Uniform Power of Attorney Act, but the principles of good drafting practice are transferable to any power of attorney statute. The drafting checklist is divided into three areas: general parameters, agent duties, and agent authority. The default provisions and drafting options are reviewed for each area. Default provisions apply to the power of attorney unless express language in the power of attorney limits or overrides them. Drafting options are choices that a principal may elect to exercise by including additional language in the power of attorney. An analysis is provided for what factors may support altering default rules and exercising certain drafting options.

A. General Parameters

The Uniform Power of Attorney Act is primarily a default statute that supplies a framework upon which to build a customized power of attorney. The following are the

81. See id. at § 217.
82. Id. at § 119(d).
83. Id.
84. See id. at § 302.
85. See Whitton, supra n. 35.
default provisions and drafting options that comprise the basic parameters for a power of attorney.

1. Default Provisions

   Unless otherwise provided in the power of attorney, the Act establishes that a power of attorney is:
   
   • durable,\textsuperscript{86}
   • effective when executed,\textsuperscript{87} and
   • unaffected by the lapse of time.\textsuperscript{88}

   Likewise, unless otherwise provided, an agent is entitled to:
   
   • reimbursement of expenses reasonably incurred,\textsuperscript{89} and
   • compensation that is reasonable under the circumstances.\textsuperscript{90}

   While the foregoing basic default parameters reflect what principals commonly desire in a power of attorney arrangement, individual client circumstances may dictate the need for alterations. It is difficult to contemplate, however, a scenario in which a principal would not want a power of attorney to be durable. Even for isolated transactions, such as a real estate closing, a durable power of attorney would spare the principal the necessity of a guardianship proceeding in the event of intervening incapacity. Opinions about whether a power of attorney should be immediately effective or “springing” (\textit{i.e.}, contingent on a future date or event) are more divided.

   Lawyers were asked in the JEB survey whether their clients prefer immediately effective or springing powers of attorney.\textsuperscript{91} Sixty-one percent of the respondents stated a client preference for immediately effective powers, 23 percent reported a preference for springing powers, and 16 percent saw no trend.\textsuperscript{92} Despite the majority preference for immediately effective powers, 89 percent of the same respondents indicated that a power of attorney statute should permit springing powers.\textsuperscript{93}

   The advantages of an immediately effective power of attorney are many. There is the convenience benefit of having a surrogate who can act when it is logistically difficult for the principal to do so, such as during a period of temporary absence or incapacity. Furthermore, a principal who still has capacity can “test drive” the agency relationship to determine whether the agent is trustworthy and possesses the skills and judgment necessary to carry out the principal’s objectives. Use of an immediately effective power of attorney also provides an opportunity for the principal to communicate expectations to the agent and to share decision-making responsibility when it is still possible to monitor and critique the agent’s actions. Finally, an immediately effective power of attorney avoids the stigma of a triggering event, such

\textsuperscript{86} Unif. Power of Atty. Act, supra n. 2, at § 104.

\textsuperscript{87} Id. at § 109.

\textsuperscript{88} Id. at § 110(c).

\textsuperscript{89} Id. at § 112.

\textsuperscript{90} Id.

\textsuperscript{91} Whitton, supra n. 6, at 6.

\textsuperscript{92} Id.

\textsuperscript{93} Id. at 7.
as incapacity, and the need to delineate how the occurrence of the triggering event will be verified.

Despite the benefits of an immediately effective power of attorney, probably the strongest justification for the springing power option is the self-determination and privacy interests of the principal. Arguably, a principal should not have to give up sole present control in order to provide for future surrogate decision making in the event of later incapacity. Ultimately, the client’s preference dictates whether the power of attorney should be immediately effective or springing, but the lawyer’s guidance plays a significant role in how well the principal and agent understand the consequences of the type of power chosen.

Once an agent’s authority is activated, the Act provides that it continues “notwithstanding a lapse of time since execution of the power of attorney” unless the power of attorney stipulates otherwise. This default provision protects agents and principals from third party rejection of a power of attorney on the basis that it is “stale.” Like the default provision that establishes the durability of a power of attorney, the provision that makes passage of time irrelevant to validity reflects the preference of most principals. A drafting attorney should consider, however, whether exigent circumstances, such as a limited transaction or a finite absence, make a time-limited power of attorney advisable. This decision generally depends on whether the principal’s objective is to delegate authority for a limited purpose or to create surrogate authority as a hedge against later incapacity.

The default provision that establishes that an agent is “entitled to reimbursement of expenses reasonably incurred” and to “compensation that is reasonable under the circumstances” also reflects a common statutory approach. Nonetheless, there may be circumstances that justify further specification in the power of attorney. For example, a principal may be concerned that an agent will incur expenses that are more extravagant than the principal would have chosen to incur or, at the other extreme, that family members may contest eccentric expenditures that were actually within the principal’s expectations. In either case, further specification in the power of attorney regarding the type or amount of permissible expenses is warranted.

Similar to the subjective nature of expenses, appropriate agent remuneration may vary depending on the extent and type of services expected. Specifying the parameters for agent compensation rather than relying on a reasonableness standard may best serve the principal and the agent. For example, many family members who are agents serve without compensation, but remunerating the agent may be advantageous to a principal who must spend down income or resources to qualify for public benefits.

2. Drafting Options

In addition to the general default provisions in the Act, there are also a number of drafting options to consider. While most of these options relate to delegation of

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95. *Id.* at § 112.
96. *Id.*
authority and will be discussed in Section IV(C) of this article, the Act does contain several general options:

- the principal’s signature may be acknowledged;\textsuperscript{97}
- the principal may choose to nominate a conservator or guardian for consideration by the court if one is later needed;\textsuperscript{98} and
- if the principal has chosen to execute a springing power of attorney, the principal may authorize one or more persons to make a written determination that the triggering event has occurred.\textsuperscript{99}

Although acknowledgment of the principal’s signature is not mandatory under the Act, there is no advantage to an unacknowledged power of attorney and several important disadvantages. Under the Act, only an acknowledged signature carries the statutory presumption of validity,\textsuperscript{100} and third persons may rely on this presumption in the absence of actual knowledge to the contrary.\textsuperscript{101} Third persons have little incentive to accept an unacknowledged power of attorney because the Act’s liability provisions apply only to unreasonable refusals of acknowledged powers.\textsuperscript{102} In addition, acknowledgment may be required if the power of attorney will be recorded in conjunction with the execution of real estate documents.\textsuperscript{103}

Another option, nomination of a person to serve as conservator or guardian, is advisable if the principal fears that a family power struggle may ensue after loss of capacity. High profile family feuds using guardianship proceedings have been labeled “will contests” while the person is still alive.\textsuperscript{104} In theory, naming the agent as the preferred nominee to serve as conservator or guardian should make it more difficult for the control seeker to make an end-run around a valid power of attorney. The Act further protects the principal’s choice of agent by providing that if there is a later court appointment of a fiduciary, the agent’s authority continues “unless limited, suspended, or terminated by the court.”\textsuperscript{105}

The last drafting option in the foregoing list applies only to springing powers of attorney. It provides that the principal may authorize someone to verify that the triggering event has occurred. While the Act also provides a default mechanism for determining incapacity,\textsuperscript{106} designating one or more persons to make such a

\textsuperscript{97} Id. at § 105.
\textsuperscript{98} Id. at § 108(a).
\textsuperscript{99} Id. at § 109(b).
\textsuperscript{100} Id. at § 105.
\textsuperscript{101} Id. at § 119(b)
\textsuperscript{102} See id. at § 120.
\textsuperscript{103} See id. at § 105 cmt.
\textsuperscript{105} Unif. Power of Atty. Act, supra n. 2, at § 108(b).
\textsuperscript{106} See id. at § 109(c)
determination better protects the principal’s privacy and facilitates acceptance of springing powers by third persons.

B. Agent Duties

Clearly articulating the duties of the agent protects both the principal and the agent. The Act requires all agents to act in good faith, within the scope of authority granted, and according to the principal’s expectations if known or in the principal’s best interest if unknown.\footnote{Id. at § 114(a).} With the exception of these mandatory duties, the remaining duties outlined in the Act are default rules that may be modified or omitted by the principal. The principal is also permitted to alter certain agent liability standards. The following outlines these default rules and drafting options and analyzes their implications for customizing a power of attorney.

1. Default Provisions

Unless otherwise provided in a power of attorney, an agent must:

- act loyally for the principal’s benefit;\footnote{Id. at § 114(b)(1).}
- avoid creating a conflict of interest that impairs the ability to act impartially in the principal’s best interest;\footnote{Id. at § 114(b)(2).}
- act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;\footnote{Id. at § 114(b)(3).}
- keep records;\footnote{Id. at § 114(b)(4).}
- cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal’s reasonable expectations if known, and if unknown, to act in the principal’s best interest;\footnote{Id. at § 114(b)(5).}
- attempt to preserve the principal’s estate plan to the extent the plan is known to the agent and preservation is consistent with the principal’s best interest;\footnote{Id. at § 114(b)(6).}
- account only if requested by the principal, a fiduciary appointed for the principal, a governmental agency having authority to protect the principal’s welfare, or the personal representative or successor in interest of the principal’s estate, or if ordered by a court.\footnote{Id. at § 114(h).}

Further clarifying the agent’s duties, the Act states that “[a]n agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.”\footnote{Id. at § 114(d).} Unlike the common law
fiduciary duty standard, which required an agent to act “solely” for the benefit of the principal, the Act recognizes that loyalty to the principal is not necessarily mutually exclusive with an action that also benefits the agent. This pragmatic approach reflects the reality that many agents are family members who have inherent conflicts of interest with the principal as a result of common property ownership or inheritance expectations.

This statutory qualification of the common law duty of loyalty is not adequate, however, to cover situations where a principal fully intends the agent’s actions to benefit the agent to the exclusion of the principal. In other words, if a principal wants the agent to engage in donative activities that will benefit the agent or someone to whom the agent owes a duty of support, it is advisable to alter the default duties. The Comments to the Act give as an example a principal who wants a family-member agent to invest the principal’s property in the agent’s business in order to improve the economic position of the agent or the agent’s family.

An agent’s mandatory duty to act “in accordance with the principal’s reasonable expectations to the extent actually known by the agent and, otherwise, in the principal’s best interest” contemplates that a principal’s expectations may not always meet an objective “best interest” test. Not only might actions that benefit the agent fall into this category, but so might other activities such as high risk investments or disproportionately large gifts to charity. The drafter of the power of attorney should consider carefully whether a principal’s expectations require alteration of the statutory default duties and whether those expectations should be memorialized either in the power of attorney or in some other admissible form.

The default duties requiring cooperation with the principal’s health-care agent and preservation of the principal’s estate plan should also be reviewed to determine whether further communication to the agent or specification in the power of attorney is warranted. For example, a seriously ill principal may have definite preferences about how and where treatment and care are to take place. These expectations need not be communicated in the power of attorney, but they should be provided in an admissible form to the health-care agent as well as to the agent named in the power of attorney. Many health-care-related decisions cannot be effectuated without the cooperation of the person holding the purse strings. Likewise, if the principal wants specific priorities followed with respect to use and disposal of property covered by the principal’s estate plan, these priorities should be communicated to the agent and, if necessary, the default duty to preserve the estate plan should be altered.

With respect to an agent’s duty to account for transactions conducted on behalf of the principal, the Act provides that there is no duty to disclose such information unless a request is made by one of a narrow list of persons enumerated by the statute or

116. See Restatement (Second) of Agency § 387 (1958).
117. Several other states have statutory provisions which recognize that an agent who has conflicting interests in relation to the property, care, or affairs of the principal can still act with due care for the benefit of the principal. See e.g. Cal. Prob. Code § 4232(b) (West Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/2-7 (West 1992); Ind. Code Ann. § 30-5-9-2 (West 1994 & Supp. 2005).
Disclosure is ordered by a court.\(^{119}\) This approach is designed to protect the principal’s privacy and minimize agent compliance costs. However, a principal who wants a greater check-and-balance on the agent’s activities may modify this default rule by authorizing additional persons to request information from the agent or by creating an affirmative agent duty to make periodic reports.

2. Drafting Options

In addition to modification of an agent’s default duties, two other drafting options under the Act relate to agent standards of conduct:

- exoneration of the agent,\(^ {120}\) and
- designation of a specific method for agent resignation.\(^ {121}\)

In a world in which financial exploitation of vulnerable persons appears to be on the rise,\(^ {122}\) the use of an exoneration provision to protect an agent may seem ill advised. Such a provision may nonetheless be warranted if the principal is concerned that the agent’s conduct will be attacked by others seeking to gain control over the principal or the principal’s assets once the principal is incapacitated. The Act provides that an exoneration provision will be binding upon the principal and the principal’s successors in interest except to the extent it:

1) relieves the agent of liability for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or

2) was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.\(^ {123}\)

As explained in the Comment to this provision, the effect is to permit exoneration of an agent whose actions, at a minimum, meet a standard of good faith.\(^ {124}\)

Given the advent of increased civil and criminal penalties under state law for financial abuse, and given that many agents are layperson family members, the parameters for agent conduct should be clear and the liability standards reasonable. A statutory and drafting tension exists between the need to balance accountability for agent abuse on the one hand and reasonable protection of good faith conduct on the other hand.

Both for the protection of the principal and the agent, the agent should have a method of resigning if the agent is no longer able or willing to serve. The Act’s default method for giving notice of resignation is available to an agent unless the

\(^{119}\) Id. at § 114(b).

\(^{120}\) Id. at § 115.

\(^{121}\) See id. at § 118.


\(^{123}\) *Unif. Power of Atty. Act, supra* n. 2, at § 115.

\(^{124}\) Id. at § 115 cmt.
power of attorney provides a different method.\textsuperscript{1} Under the Act, an agent who wants to resign need only notify the principal, provided the principal still has capacity.\textsuperscript{125} If the principal is incapacitated, the agent must also give notice to a conservator or guardian, if one has been appointed, and to a co-agent or successor agent, if any.\textsuperscript{126} If there is no fiduciary, co-agent, or successor agent for an incapacitated principal, the agent may give notice to any of the following: the principal’s caregiver, a person reasonably believed by the agent to have sufficient interest in the principal’s welfare, or a governmental agency that has authority to protect the principal’s welfare.\textsuperscript{127}

The Act addresses two important concerns with this default resignation provision. First, an incapacitated principal should not be left unrepresented without notice to an interested person. Second, an agent should have an inexpensive means of ending the agency relationship. A principal who wants notice given to a specific person or persons may identify those persons in the power of attorney, but the drafter may still want to reference the Act’s resignation provision as a default mechanism in the event the designated persons are unavailable.

C. Agent Authority

Once a principal has answered key questions about who should serve as agent and the terms and conditions of the agent’s service, the drafter’s most important task is helping the client determine the appropriate scope of authority. Article 2 of the Act is the primary resource for this task. It provides default limitations on agent authority as well as definitions for certain subject areas of authority. Article 2 also differentiates between acts that require a specific express grant of authority and those subjects for which authority may be inferred from a general grant.\textsuperscript{128} The following outlines the default provisions and drafting options that are relevant to delineation of the agent’s scope of authority.

1. Default Provisions

For purposes of this discussion, the default provisions relevant to delineation of an agent’s authority are divided into two categories—default rules that relate to the agent’s exercise of authority and default rules that define the authority itself.

\textit{a. Default Provisions for the Agent’s Exercise of Authority}

Following are the default provisions for the agent’s exercise of authority:

- A successor agent has the same authority as that granted to the original agent.\textsuperscript{129}

\begin{flushleft}
\textsuperscript{125} Id.  \\
\textsuperscript{126} Id. at § 118.  \\
\textsuperscript{127} Id.  \\
\textsuperscript{128} See id. at § 201.  \\
\textsuperscript{129} Id. at § 111(b)(1). 
\end{flushleft}
A successor agent may not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.\textsuperscript{130}

Each co-agent may exercise authority independently of the other co-agents.\textsuperscript{131}

A spouse-agent’s authority terminates upon the filing of an action for dissolution or annulment of the marriage to the principal or their legal separation.\textsuperscript{132}

An agent who is not an ancestor, spouse, or descendant of the principal may not exercise authority to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal’s property.\textsuperscript{133}

The default rules with respect to successor agents are intended to provide for orderly and consistent coverage of the principal’s decision-making needs if the original agent is no longer willing or able to act. Generally, an agent’s scope of authority is chosen based on the principal’s anticipated future needs rather than on the individual characteristics of the agent. There may be circumstances, however, when the principal might want a different scope of authority for a successor agent than the original agent. Consider the principal who conveys to a spouse-agent broad authority to make gifts and to create or change beneficiary designations and survivorship rights. The principal may not be as comfortable giving such broad authority to the adult child who is selected among several adult children to serve as the successor agent. In such a circumstance, additional language would be needed in the power of attorney to alter the default rule.

Although a successor agent typically serves when the predecessor is no longer willing or able to serve, there may be situations when the client wants a “successor” agent to fill in from time to time in advance of a need to permanently replace the predecessor. The successor agent would, in effect, act as an alternate agent until such time as the predecessor could no longer serve. The advantage, of course, to the default rule that provides for a straight linear succession is that it avoids third-person confusion about who has authority to act for the principal. However, the drafter can easily clarify in the power of attorney that a successor has the authority to act at any time the predecessor is unavailable. The Act permits third persons to request and rely upon an agent certification as to any fact concerning the power of attorney.\textsuperscript{134} Thus, the temporary unavailability of the predecessor agent could be certified at the request of third persons.

With respect to the authority of co-agents, the Act provides as a default rule that co-agents may exercise authority independently of one another.\textsuperscript{135} The drafting

\textsuperscript{130} Id. at § 201(b).
\textsuperscript{131} Footnote goes here.
\textsuperscript{132} Id. at § 111(b)(2).
\textsuperscript{133} Id. at § 111(a).
\textsuperscript{134} Id. at § 110(b)(3).
\textsuperscript{135} Id. at § 201(b).
committee favored this approach because it reduces third-person uncertainty about accepting a power of attorney and because it avoids the problem of impasse if co-agents disagree. For better or worse, some principals name all of their adult children as co-agents because they fear hurting their children’s feelings if they pick and choose among them. Nonetheless, the practice of naming co-agents is not one that the Act encourages. Whether co-agents exercise their authority independently or by consensus decision making, the arrangement is problematic. Independent authority is potentially dangerous because co-agents may take inconsistent actions with the principal’s property; consensus decision-making is risky because the principal’s need for surrogate property management may be undermined by disagreements among co-agents. The drafting solution to this dilemma inevitably must be made on a client-by-client basis.

Most would agree that a spouse-agent’s authority should terminate at the commencement of an action for the annulment or dissolution of the principal and agent’s marriage or their legal separation, but even the rationale for this default rule has exceptions. There may be reasons other than disharmony for marital dissolution, such as the preservation of assets for one spouse when the other has a condition that will likely require long-term institutional care. In such a situation, the ex-spouse may be the best person to continue acting for the principal. This is permissible under the Act by specifically drafting around the default rule.

The last default rule in the foregoing list (that an agent who is not the principal’s ancestor, spouse, or descendant may not exercise authority to create for the agent an interest in the principal’s property) is an important safeguard for vulnerable principals and one that should rarely be modified in a power of attorney. The most likely scenario for removing this limitation is when the principal’s agent is a collateral relative, such as a sibling, niece or nephew. If the drafter is satisfied that the principal’s donative objectives for the agent have been formed freely, and not under duress or undue influence, then express language is needed in the power of attorney to remove the prohibitions of this default rule.

b. Default Provisions That Define Authority

For a power of attorney to be effective as a hedge against the need for guardianship, an agent’s authority must be broad enough to cover all of the principal’s property management needs. Article 2 of the Act sets out the subject areas over which the principal may convey authority. Most of the default statutory descriptions are a modernized version of the definitions in the Uniform Statutory Form Power of Attorney Act (1988).136 Sections 204-217 of the Act provide default provisions for authority with respect to:

- Real Property;
- Tangible Personal Property;
- Stocks and Bonds;
- Commodities and Options;

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136. See id. at Art. 2 cmt.
- Banks and Other Financial Institutions;
- Operation of an Entity or Business;
- Insurance and Annuities;
- Estates, Trusts, and Other Beneficial Interests;
- Claims and Litigation;
- Personal and Family Maintenance;
- Benefits from Governmental Programs or Civil or Military Service;
- Retirement Plans;
- Taxes; and
- Gifts.

These default definitions may be incorporated by reference and further expanded or limited in the power of attorney. Article 2 also contains a general construction section that supplements the default definitions for each subject area. This section authorizes ancillary actions that are often necessary for the exercise or implementation of authority granted over specific subjects. For example, the agent is authorized to seek the assistance of a court or governmental agency, to engage and compensate other professionals, to contract with other persons to accomplish a purpose authorized by the power of attorney, and to access communications intended for the principal.

Authority to make a gift is the only defined subject area in the Act not included in the Uniform Statutory Form Power of Attorney Act. The authority to make a gift is one of the specific actions enumerated in the Act for which an express grant of authority must be given. It is the only act of those enumerated for which default limitations are provided, the rationale being that it is one of the most commonly granted extraordinary powers and one easily abused.

Unless gift-making authority is otherwise modified in the power of attorney, gifts are limited to the per donee amount permitted under the annual federal gift tax exclusion. The default definition clarifies that a gift includes outright gifts as well as gifts for the benefit of a person. The definition for gift-making authority also reiterates the requirement for all agent actions that the gift must be “consistent with the principal’s objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal’s best interest based on all relevant factors. . .”

In general, Comments to the Act indicate where significant changes were made to the default definitions taken from the Uniform Statutory Form Power of Attorney Act. Worth special mention are several additions to the Personal and Family Maintenance

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137. Id. at § 202.
138. Id. at § 203.
139. Id.
140. Id. at § 201(a)(2).
141. See id. at § 217.
142. Id. at § 217(b).
143. Id. at § 217(a) & (b).
144. Id. at § 217(c).
Language in that section now authorizes the agent to act as the principal’s personal representative pursuant to the Health Insurance Portability and Accountability Act for the purpose of making health-care related payments. A new provision also states that family maintenance payments may extend to “individuals whom the principal has customarily supported or indicated the intent to support,” thus making it possible for the agent to continue support payments to individuals such as the principal’s parents, adult children, or grandchildren. Another new subsection clarifies that although family maintenance payments may be subject to gift tax treatment, authority with respect to personal and family maintenance is “neither dependent upon, nor limited by, authority that an agent may or may not have with respect to gifts.”

Even though the Act provides that a grant of authority “to do all acts that a principal could do” gives the agent general authority with respect to all defined subject areas in the Act, except for gift-making authority, there are advantages to listing the individual subject areas in the power of attorney. Such a listing makes clearer to the principal, the agent, and the person to whom the power of attorney is presented just what authority the principal intends the agent to have. The drafter of the power should be familiar with all of the default definitions in order to assess when individual client circumstances warrant omitting subject areas or modifying the authority with respect to certain subjects.

2. Drafting Options

The drafting options relevant to delineation of an agent’s authority can be divided into two categories: drafting options that relate to the agent’s exercise of authority and drafting options that define the authority itself.

a. Drafting Options for the Agent’s Exercise of Authority

Drafting options for the agent’s exercise of authority include:

- One or more persons may be designated as successor agents.
- Authority may be granted to an agent or other person to designate one or more successor agents.
- One or more persons may be designated as co-agents.

To maximize the effectiveness of a power of attorney as a hedge against the need for guardianship, careful consideration should be given to how surrogate decision making will continue if the principal becomes incapacitated and the original agent can no longer serve. The most common solution to this problem is to name one or more successor agents in the power of attorney. If, at the time the power of attorney is

145. Id. at § 213.
146. Id. at § 213(a)(6).
147. Id. at § 213(a)(1).
148. Id. at § 213(b).
149. Id. at § 201(c).
150. Id. at § 111(b).
151. Id.
152. Id. at § 111(a).
drafted, the principal cannot identify an appropriate person to serve as a successor agent, the Act permits the principal to authorize the agent or another person to name successor agents at a later time. An alternate solution is to name co-agents who, under the default provisions of the Act, may act with independent authority, and thus may continue to act even after another co-agent can no longer serve. The drafter should counsel a client about the problematic aspects of co-agency if the client is considering opting for co-agency rather than naming successor agents.

b. Drafting Options to Define Authority

Drafting options to define authority include:

- modification of authority incorporated by reference;153 and
- inclusion of authority for acts that must be delegated by a specific express grant of authority (See Section III(B) of this article).154

A principal may give the agent authority over any or all of the subject areas defined in the Act by incorporation by reference of the Act’s descriptive definitions for those subjects. The principal may also choose to enlarge or limit these definitions by express terms in the power of attorney. In addition to discussing with the principal whether the defined subject matters should be included in the power of attorney, the drafter should discuss whether to authorize any of the acts that require a specific express grant of authority. While these acts have been segregated for special consideration because of their propensity for dissipating the principal’s property and altering the principal’s estate plan, they may be critical to fully take advantage of the principal’s estate and long-term-care planning options.155

Other than the authority to make a gift, acts that require an express grant of authority are not further defined in the Act. The primary reason authority for these acts is not defined is because the circumstances in which such authority may be used vary too much for a generalized default definition. A principal who wants the agent to have authority with respect to any of these acts should consider carefully whether the authority requires further specification. For example, a principal who wants to give the agent authority with respect to beneficiary or survivorship designations should state whether that authority extends to designations already made or only to designations for new policies of insurance and property interests. Likewise, if authority is to be granted with respect to inter vivos trusts, does the principal want the agent to have unlimited authority or authority only with respect to specified trusts?

The drafter should always carefully consider whether any of the acts that require an express grant of authority might be needed to fully implement general authority granted with respect to other subject areas. For example, an agent who has general authority with respect to insurance and annuities156 does not have the authority to create or change a beneficiary designation unless the principal includes an express

153. Id. at § 202(c).
154. Id. at § 201(a).
grant of that authority in the power of attorney. Likewise, an agent who has general authority with respect to banks and financial institutions would not be able to create a survivorship interest on an account without the additional express authority. In each instance where a grant of express authority is considered, the property management benefits should be balanced against the potential for abuse.

V. CONCLUSION

The Uniform Power of Attorney Act contains many innovations that enhance the use of a power of attorney as an inexpensive and flexible tool for surrogate property management. Clear articulation of agent duties provides guidance for the agent and protection for the principal. Protection of good faith acceptances and refusals of powers of attorney, as well as recognition of liability for unreasonable refusals, reduces the likelihood that a power of attorney will be arbitrarily refused. A combination of default rules and drafting options for the delegation of authority make it possible to specifically tailor a power of attorney to a principal’s individual needs and objectives. While the Act provides a solid framework upon which to customize a power of attorney, a lawyer’s evaluation of the client’s needs and advice concerning the risks and benefits of various drafting options is essential to maximizing the effectiveness of a power of attorney.

157. See id. at § 208.
APPENDIX

[INSERT NAME OF JURISDICTION]
STATUTORY FORM POWER OF ATTORNEY
IMPORTANT INFORMATION

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the Uniform Power of Attorney Act [insert citation].

This power of attorney does not authorize the agent to make health-care decisions for you.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent’s authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you.

Your agent is entitled to reasonable compensation unless you state otherwise in the Special Instructions.

This form provides for designation of one agent. If you wish to name more than one agent you may name a coagent in the Special Instructions. Coagents are not required to act together unless you include that requirement in the Special Instructions.

If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.

This power of attorney becomes effective immediately unless you state otherwise in the Special Instructions.

If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.

DESIGNATION OF AGENT

I ________________________________________________ name the following (Name of Principal) person as my agent:

Name of Agent: ____________________________________________________________

Agent’s Address: ___________________________________________________________

Agent’s Telephone Number: ________________________________________________
DESIGNATION OF SUCCESSOR AGENT(S) (OPTIONAL)

If my agent is unable or unwilling to act for me, I name as my successor agent:

Name of Successor Agent:____________________________________________
Successor Agent’s Address:___________________________________________
Successor Agent’s Telephone Number: _________________________________

If my successor agent is unable or unwilling to act for me, I name as my second successor agent:
Name of Second Successor Agent: _____________________________________
Second Successor Agent’s Address: ____________________________________
Second Successor Agent’s Telephone Number: ___________________________

GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the Uniform Power of Attorney Act [insert citation]:

(INITIAL each subject you want to include in the agent’s general authority. If you wish to grant general authority over all of the subjects you may initial “All Preceding Subjects” instead of initialing each subject.)

(____) Real Property
(____) Tangible Personal Property
(____) Stocks and Bonds
(____) Commodities and Options
(____) Banks and Other Financial Institutions
(____) Operation of Entity or Business
(____) Insurance and Annuities
(____) Estates, Trusts, and Other Beneficial Interests
(____) Claims and Litigation
(____) Personal and Family Maintenance
(____) Benefits from Governmental Programs or Civil or Military Service
(____) Retirement Plans
(____) Taxes
(____) All Preceding Subjects
GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent.)

(___) Create, amend, revoke, or terminate an inter vivos trust
(___) Make a gift, subject to the limitations of the Uniform Power of Attorney Act [insert citation to Section 217 of the act] and any special instructions in this power of attorney
(___) Create or change rights of survivorship
(___) Create or change a beneficiary designation
(___) Authorize another person to exercise the authority granted under this power of attorney
(___) Waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
(___) Exercise fiduciary powers that the principal has authority to delegate
[(___) Disclaim or refuse an interest in property, including a power of appointment]

LIMITATION ON AGENT’S AUTHORITY

An agent that is not my ancestor, spouse, or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the Special Instructions.

SPECIAL INSTRUCTIONS (OPTIONAL)

You may give special instructions on the following lines:

______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
EFFECTIVE DATE

This power of attorney is effective immediately unless I have stated otherwise in the Special Instructions.

NOMINATION OF [CONSERVATOR OR GUARDIAN] (OPTIONAL)

If it becomes necessary for a court to appoint a [conservator or guardian] of my estate or [guardian] of my person, I nominate the following person(s) for appointment:

Name of Nominee for [conservator or guardian] of my estate:

_________________________________________________________________
Nominee’s Address: ________________________________________________
Nominee’s Telephone Number:_______________________________________

Name of Nominee for [guardian] of my person:

_________________________________________________________________
Nominee’s Address: ________________________________________________
Nominee’s Telephone Number:_______________________________________

RELIANCE ON THIS POWER OF ATTORNEY

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person knows it has terminated or is invalid.

SIGNATURE AND ACKNOWLEDGMENT

_________________________________________________________________
Your Signature Date ________________________________________________
Your Name Printed _________________________________________________
Your Address _____________________________________________________
Your Telephone Number ____________________________________________
State of ____________________________
[County] of ______________________

This document was acknowledged before me on ____________________, (Date)

By _____________________________________________. (Name of Principal)

____________________________________________ (Seal, if any)

Signature of Notary_________________________________________________

My commission expires: ______________________________

[This document prepared by: _________________________________________
_________________________________________________________________
_________________________________________________________________
_________________________________________________________________
_________________________________________________________________
_________________________________________________________________

IMPORTANT INFORMATION FOR AGENT

Agent’s Duties

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

- do what you know the principal reasonably expects you to do with the principal’s property or, if you do not know the principal’s expectations, act in the principal’s best interest;
- act in good faith;
- do nothing beyond the authority granted in this power of attorney; and
- disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as “agent” in the following manner:

  (Principal’s Name) by (Your Signature) as Agent

Unless the Special Instructions in this power of attorney state otherwise, you must also:

- (1) act loyally for the principal’s benefit;
- (2) avoid conflicts that would impair your ability to act in the principal’s best interest;
- (3) act with care, competence, and diligence;
- (4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal; cooperate with any person that has authority to make health-care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal’s expectations, to act in the principal’s best interest; and attempt to preserve the principal’s estate plan if you know the plan and preserving the plan is consistent with the principal’s best interest.
**Termination of Agent’s Authority**

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

- death of the principal;
- the principal’s revocation of the power of attorney or your authority;
- the occurrence of a termination event stated in the power of attorney;
- the purpose of the power of attorney is fully accomplished; or
- if you are married to the principal, a legal action is filed with a court to end your marriage, or for your legal separation, unless the Special Instructions in this power of attorney state that such an action will not terminate your authority.

**Liability of Agent**

The meaning of the authority granted to you is defined in the Uniform Power of Attorney Act [insert citation]. If you violate the Uniform Power of Attorney Act [insert citation] or act outside the authority granted, you may be liable for any damages caused by your violation.

**If there is anything about this document or your duties that you do not understand, you should seek legal advice.**
POST-ELIGIBILITY TRANSFERS

Michael J. Millonig, CELA*

I. INTRODUCTION AND CMS POSITION

The Center for Medicare and Medicaid Services (CMS) has indicated that transfers by a community spouse (CS) after a determination of eligibility for the institutional spouse (IS) may be treated as a transfer causing ineligibility for the IS. (See Letter to Michael J. Millonig dated September 13, 2004, attached as Appendix 1) This letter states a change of policy that was expressed in a prior letter of CMS. This based upon anecdotal reports from some NAELA members, some states have adopted this policy. As pressures mount to collect more in estate recovery programs, we may

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1. A prior CMS letter, dated April 26, 2004, expressed the same opinion more briefly as follows:

You object to a provision of the State’s regulations that restricts transfers by the community spouse after eligibility has been determined for the institutionalized spouse. You believe that the federal statute contains no such restrictions. This is incorrect. Section 1917(c)(1)(A) specifically requires that a State plan must provide a period of ineligibility if an institutionalized individual or the spouse of such an individual disposes of assets for less than fair market value on or after the look-back date. (emphasis added by CMS in letter).


3. CMS letter to Brian Barreira (Nov. 8, 1999).

see this policy becoming more prevalent. Such post-eligibility transfers are often motivated by a desire to avoid estate recovery in the estate of the CS.

The issue is as follows: Is a post-eligibility transfer by the CS upon his/her death to beneficiaries other than the IS a transfer for less than fair market value under 42 U.S.C. §1396p(e) (2006) [herein “transfer statute” or “the statute”] causing ineligibility for the IS? Does the language of the statute define the look-back period to extend beyond the date of the application for Medicaid indefinitely into the future even after a determination of eligibility?

This client situation will present itself in your office after the determination of eligibility for the IS. There is still much more planning for the CS at this point. For example, the estate plan of the CS may need to be changed to omit the IS as a beneficiary if this is possible under your state law. Planning to avoid the certain state estate recovery claim should be addressed with your client. The post-eligibility transfer problem also occurs if the CS changes his/her Will, funds a Revocable Living Trust or creates other non-probate beneficiary designations naming children or beneficiaries other than the IS. Upon the death of the CS, these alleged transfers could affect the eligibility of the IS. A post-eligibility transfer by the CS during his/her lifetime may also cause ineligibility for the IS. Of course, there is no question that such a transfer will affect the future Medicaid eligibility of the CS, but that is not the issue here. It is the continuing eligibility of the IS that is at issue.

In some states, a surviving spouse has no right or only limited rights to a forced inheritance from the estate of their spouse. For example, Ohio provides a right to inherit some portion of the “probate estate” but no right to inherit anything from non-probate property such as trusts, life insurance, IRA’s or other nonprobate assets. Consequently, the IS has no legal right to demand property from the estate of the CS. Of course, other states may provide for expanded statutory rights for a surviving spouse, with a result that some or all of the probate and non-probate estate of the pre-deceasing CS must pass to the IS. In such states, the post-eligibility transfer issue will only be presented to the extent some property may not have passed to the IS or if the CS makes lifetime transfers to others.

The CMS letter does state that there are two permissible interpretations of the statute with respect to this issue. Under one interpretation, states may permit post-eligibility transfers by a CS based upon the deemed available language of 42 U.S.C. §1396r-5 (2006). The argument is that because no resources of the CS shall be deemed available to the IS after eligibility, there can be no transfer penalty imposed on the IS with respect to a transfer of assets by the CS. This article will not discuss this interpretation.

The other permissible interpretation is that the states may impose a transfer penalty for post-eligibility transfers by a CS. The phrase “on or after the look-back date” in the statute is the key phrase supporting this interpretation. CMS interprets this to mean that the period extends beyond the date of the application and even after eligibility has been granted to the IS. The relevant text from the statute is as follows:

4. O.R.C. § 2106.01 et seq.
Post-Eligibility Transfers

[I]f an institutionalized individual or the spouse . . . disposes of assets . . . on or after the look-back date . . .

(i) The look-back date . . . is a date that is 36 months ( . . . or in the case of any other disposal of assets made on or after the date of the enactment of the Deficit Reduction Act of 2005, 60 months) before the date specified in clause (ii).

(ii) The date specified in this clause . . . is the first date . . . has applied for medical assistance . . . “5 (emphasis added).

The determination of the look-back date generally starts on the date of application and goes back to a point that is 36 or 60 months prior to such date. The look-back date is the farthest date back at the beginning of the 36-60 month period. The CMS interpretation states that we then look forward from such date and that this period continues indefinitely into the future and does not close or stop on the date of application or determination of eligibility. The look-back is not really just looking back. Instead, CMS asserts we go back 36-60 months and look forward indefinitely.

The CMS argument clearly relies on the attribution of transfers between spouses. This is a correct interpretation of the statute with respect to the effect of transfers prior to the determination of eligibility. However, post-eligibility transfers by a spouse are a different matter.

CMS also presents a confusing explanation of this issue in the SMM, § 3258.4(D), twice acknowledging that the look-back period ends with the baseline date, but then concluding with the statement that: “However, it is important to note that transfers which occur after the baseline date are also subject to penalty if they are made for less than fair market value.” This simple statement does not address all the arguments discussed herein and is inconsistent with the other section of the SMM, § 3258.10(C)(2), discussed later in this article.

This CMS interpretation of the transfer statute is unsupported in the legislative history of the transfer statute and is incorrect for the following three reasons:

1) The look-back period does not extend beyond the date of the application for Medicaid into the future indefinitely. This time period starts on the date of application and goes back, not forward, in time for a fixed 3 or 5-year period.

2) The transfer statute does not apply to the transfer of non-countable resources. The CS is generally free to sell or transfer the residence or any other property remaining after spend down and a determination of eligibility of the IS.

3) One of the exceptions to the presumption of a transfer for less than fair market value is that the transfer was not made for the purpose of qualifying for Medicaid. A post-eligibility transfer is clearly not done for this purpose since the IS has already been determined to be eligible.

II. FEDERAL SUPREMACY

All the relevant federal Medicaid statutes, regulations, standards, promulgations and issuances of the Center for Medicare and Medicaid Services are mandated by

federal law and all states are required to be in compliance with federal Medicaid law as a condition of approval of the state plan by CMS. Compliance with federal Medicaid law is required in order for states to receive matching federal funds. Each state’s Medicaid plan must ensure compliance with the “official issuances” (i.e., the CMS State Medicaid Manual) of the CMS. The first page of the introduction to the CMS SMM explains this binding nature of the Medicaid Manual on the states. (“Instructions are official interpretations of the law and regulations, and, as such, are binding on Medicaid State agencies.”). State Medicaid Manual, Foreword, p. 1. Informal letters from CMS, although not rising to the level of a regulation or SMM, are given deference by the courts. Thus, the states are required by law to follow the federal transfer statute and CMS SMM provisions.

Thirteen states have exercised an option not to use SSI criteria for the resource rule eligibility requirements, but instead have chosen to retain their existing Medicaid standards that were in effect upon the inception of the federal Medicaid program on January 1, 1972. Such states are known as “209(b) states,” named after this section of the federal law allowing this state option. As a result, any new state regulations must be consistent with the federal statute or CMS SMM and such states cannot enact a provision that is more restrictive than state standards in effect on January 1, 1972. In addition to the above general federal authority, the federal transfer statute specifically states that all states must follow the federal transfer statute.

(4) A State (including a State which has elected treatment under section 1902(f) [42 USCS §§ 1396a(f)] (2006)) may not provide for any period of ineligibility for an individual due to transfer of resources for less than fair market value except in accordance with this subsection.

This provision applies both to SSI states and to 209(b) states. The clear import of this provision is that states may not enact any rules governing the effect of transfers on Medicaid eligibility except those that are specifically provided for in the federal statute. If there is some open question of interpretation not clearly provided for in the federal statute, the result must be that a period of ineligibility is not imposed.

III. THE LOOK-BACK PERIOD

The look-back period does not extend beyond the date of application for Medicaid as stated in the CMS letter. The period closes on the date of application. One obvious argument supporting this is simply by relying on an interpretation of the term “look-back.” The statute does not say to look forward. The focus is only on

6. 42 U.S.C. § 1396a(a)(17) (2006) (“A State plan for medical assistance must . . . include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this title . . . in accordance with standards prescribed by the Secretary.”).
looking back prior to the application date and a determination of eligibility. This is the plain meaning of the language.12

The legislative history of the statute reveals the Congressional intent to penalize transfers of resources that should be used to pay medical expenses in the spend-down process. Prior to the enactment of the transfer statute, there was no prohibition in the federal law for such transfers. The initial enactment of this statute in 1980 was in response to this problem.13 The original transfer statute applied to resources transferred 24 months before the application, “for the purpose of establishing eligibility for benefits or assistance under this Act.”14 This provision was subsequently changed by the Medicare Catastrophic Coverage Act of 1988 to read, “... at any time during the 30-month period immediately before the individual’s application for medical assistance under the State plan, disposed of resources for less than fair market value.”15 The latter was in the initial enactment of MCCA on July 1, 1988. MCCA was eventually repealed in 1989 because of the controversy surrounding the Medicare surtax, although the Medicaid provisions were left intact.16 Thus, up to this time of enactment of MCCA, the statutory language clearly indicated an intent to apply only to transfers prior to the application date.

However, some changes to the statute labeled as technical corrections to MCCA were passed in October of 1988.17 The words “or after” were inserted into the statute, which then read as follows: “at any time during or after the 30-month period.” The legislative history of this Act does not contain anything that would shed some light on the reason for this technical correction. If this change is truly a technical correction to MCCA, there should be something in the MCCA legislative history to indicate why this change is being made under this subsequent act. There is nothing in such history to indicate any intention to apply the transfer statute to transfers after the 30-month period. The MCCA Conference Report repeatedly refers to the period as the “24 months prior to the application.”18

The language was changed in OBRA ‘9319 to read: “on or after the look-back date.” This Act was a much more comprehensive revision of the Medicaid provision than the prior October 1988 technical corrections. The legislative history of the OBRA ‘93 Amendment, however, does not contain any expression of legislative intent that the Medicaid transfer provisions would apply to a post-eligibility transfer.

Congress appeared to understand that the focus was on the time period prior to the date of application:

Under current law, individuals residing in nursing facilities who dispose (or whose spouses dispose) of resources for less than fair market value during the 30-month period prior to application for Medicaid are subject to a delay in eligibility for nursing facility care (and home and community based services) . . . Under the Committee bill, individuals who, during the period 36 months prior to the first day of application for Medicaid benefits as an institutionalized individual, have transferred assets for less than fair market value will be subject to a denial of eligibility for Medicaid coverage for nursing facility (and home and community based waiver services). The penalties for different transfers occurring within the 36-month “look back” period will run consecutively . . . . (emphasis added). H.R. Rep. No. 103-111, at 206—07 (1993); no Senate Report was given.

The above language indicates that Congress intended the look-back period to be a fixed 36-month period that ends on the date of application, not an indefinite period that extends past the date of application. The “look back” terminology was added to the statute in OBRA ‘93 and shows an intent that the focus should be on the time period prior to the application looking backward in time and not forward after the 36-month period.

The Conference Report describes the bill as providing, “a delay in Medicaid eligibility for institutionalized individuals (or their spouses) who dispose of assets for less than fair market value on or after a specified look-back date (36 months prior to either the date of application for benefits or the date of institutionalization, whichever is later).”20 The Conference Report then goes on to describe other aspects of the bill that closed loopholes allowing assets to be transferred before application for benefits to Medicaid.21 While the Conference Report makes a point to note that the look-back period is now 36 months, it does not state or even imply that it extends beyond the date of application. The legislative history of the OBRA ‘93 amendment contains no statements, explanations or other indications of legislative intent that support the CMS assertion that the look-back period can extend beyond the date of application. The House Report specifically gives a side-by-side comparison of how the pre-1993 Amendment and post-1993 Amendment transfer provisions would work. Neither provision extends the look-back date beyond the date of application. During Committee Hearings no one testified that the look-back provision would extend beyond the application date. To the contrary, Chairman Waxman and witnesses’ expectations were that the look-back provision would apply only to pre-application transfers.22

All the above supports the conclusion that the legislative intent of OBRA ‘93 confirms the original purpose of the transfer statute to apply only to time periods prior to the date of application, thus, negating any possible contrary implication from the

21. Id.
1988 technical corrections. The Deficit Reduction Act of 2005 (DRA) made substantial changes to the transfer statute. The language pertaining to the issue presented herein was not changed, however, and thus the DRA has no impact on this issue. Case law interpreting transfers supports the interpretation of the statute as applying only to transfers occurring prior to the date of the application.23

There is one circumstance that might reconcile the CMS interpretation and congressional intent. If a Medicaid recipient receives some new resource by inheritance or otherwise that puts him/her over the resource limit, a subsequent transfer should appropriately be the subject of a new ineligibility period. This is perhaps the circumstance contemplated by Congress in looking at this post-eligibility period and would be consistent with the purposes of the transfer statute. Such an interpretation would give us a harmonious reading of the different parts of the Medicaid statute discussed herein.

The overwhelming weight of the legislative history of the transfer statute clearly indicates a congressional intent to apply only to a look-back period prior to the date of application. The odd insertion in the second 1988 technical corrections appears to be an anomaly not supported by congressional intent before or after this enactment. It is also inconsistent with the other parts of the transfer statute providing that there is no ineligibility period for transfer of non-countable resources or the purpose exception as discussed below. A well established rule of statutory construction is that a statute should be interpreted such that each part or section is construed in connection with every other part or section so as to produce a harmonious whole.24 This principle demands an interpretation that the Medicaid transfer statute does not apply to post-eligibility transfers by a CS.

In conclusion, the plain language of the transfer statute, its interpretation consistent with other Medicaid provisions, the legislative history and case law, all support an interpretation of the transfer statute that prohibits the imposition of an ineligibility period for post-eligibility transfers by a CS.

IV. TRANSFER OF NON-COUNTABLE RESOURCES

The Medicaid transfer statute focuses on the transfer of “assets.” If something is not within the definition of an asset, then there is no penalty period under the statute. The statute defines assets to include all resources, and resources that are defined with

23. *Mertz v. Houston*, 155 F. Supp. 2d 415, 421 (E.D. Pa. 2001) (“requires states to establish periods of ineligibility for transfers of assets made for less than fair market value during a certain time period up to the application for Medicaid assistance, known as the ‘look back period.’”); *Dempsey v. Dep’t of Pub. Welfare*, 756 A.2d 90 (Pa. Cmwlth. 2000) (“Other regulations provide that transfers of assets by the applicant or his or her spouse made within the prescribed look-back period.”); *New York State Bar Ass’n v. Reno*, 999 F. Supp. 710, 712 (N.D. N.Y. 1998) (“certain transfers of assets up to 36 months prior to an application for Medicaid benefits and certain transfers to trusts up to 60 months prior to application.”).

reference to the Social Security definition of countable resources. Therefore, a non-countable resource is not subject to the asset transfer penalty since it is not within this definition of an asset. This reference specifically states, however, that this cross-reference does not include the SSI exclusion for the home. In other words, the home is an exception to the exception and is included in the definition of resources for purposes of the transfer provision.

After a single or married person has spent down to eligibility limits, any remaining assets must necessarily be within this definition of non-countable resources. Thus, a post-eligibility transfer of any remaining asset should not be subject to any transfer penalty since it is not an “asset.” If the CMS argument were accepted in the post-eligibility context, then a post-eligibility transfer by an unmarried individual of a $2,000 bank account or an exempt automobile would also cause ineligibility.

The transfer statute has a special exception for transfer of the home. A transfer is permitted to the CS and for other special situations. As stated above, the home is an exception to the exception in the transfer statute asset definition but this exception for a home should apply only to an “institutionalized individual.” This section by its specific language applies only to a transfer by an “institutionalized individual” and does not apply when there is a transfer of a home by the community spouse. Consequently, a post-eligibility transfer of a home by a CS should not cause a period of ineligibility for the IS.

This argument can only be understood by reference to the SSI provisions relating to the home. Under these provisions, the home is only exempt if the person moves out with the intent to return. If a person is institutionalized, the provision of 42 U.S.C. § 1396p(c)(5) (2006) recognizes the intent to return home test, and thus the home should not be considered an exempt resource for purposes of the transfer statute. If it did qualify as exempt for a limited time period after institutionalization, then a transfer made during that time would escape any penalty even though at some later point in time it would be counted as a resource. For example, one month after institutionalization, let’s assume that an IS has met the intent to return home requirement. The IS then transfers the home to a child. There is no penalty since the home was determined to be exempt at that time. After six months in the nursing facility, it is established that the IS does not intend to return home. The home would then be countable except for the fact that the IS no longer owns it. This IS has managed to transfer a home without any transfer penalty. It is this circumstance to which this statutory language is intended to apply.

However, the CS, who is entitled to keep the home as an exempt resource after a determination of eligibility of the IS, is clearly entitled to this home exemption. The SSI regulation specifically recognizes this by stating that the home is exempt if the CS

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continues to live there. Thus, the transfer exception to the exception, by its specific language, is intended to apply only to an “institutionalized individual” and does not apply when there is a transfer by the CS. A post-eligibility transfer of a home by a CS should not cause a period of ineligibility for the IS since it is not an “asset” for purposes of the transfer statute definition.

V. PURPOSE EXCEPTION

The transfer statute excepts transfers of the assets for a purpose other than to qualify for Medicaid. That exception should clearly apply when the IS has already been determined to be eligible. The CS cannot be said to be making such a transfer for the purpose of qualifying for Medicaid. It is axiomatic that the circumstances of this exception should always be satisfied after a determination of eligibility. How could there possibly be any purpose related to Medicaid eligibility at that point? It is simply impossible to make any rational assertion that a CS has made a transfer for the purpose of qualifying the IS for Medicaid when the IS has already been determined to be eligible. However, some documentary evidence should still be provided to the caseworker to support this exception. The federal statute appears to require the states to do so (“a satisfactory showing is made to the State”), and most state plans will require some proof upon application or appeal. The CMS letter also defers to the state’s standards and procedures in this determination of purpose. (See Appendix.)

The CMS State Medicaid Manual (SMM) addresses this post-eligibility transfer issue but unfortunately does not give a specific answer:

In some instances, the individual may argue that the asset was not transferred to obtain Medicaid because the individual is already eligible for Medicaid. This may, in fact, be a valid argument. However, the validity of the argument must be determined on a case-by-case basis, based on the individual’s specific circumstances. For example, while the individual may now be eligible for Medicaid, the asset in question (e.g., home) might be counted as a resource in the future, thus compromising the individual’s future eligibility. In such a situation, the argument that the individual was already eligible for Medicaid does not suffice. CMS SMM § 3258.10(C)(2).

The above does recognize that this argument may be valid and perhaps implies that in most cases it will be valid. The reference to the home is recognition of the SSI intent to return home provision discussed above. The statute and related SMM provisions require a satisfactory showing of evidence to support this exception to the transfer penalty. The reluctance of the above provision to state a clear guidance for post-eligibility transfers is merely recognition of this requirement.

32. Of course, such a transfer could affect the eligibility of the CS at a later time if the CS applies for Medicaid.
VI. ADVOCACY

This article has presented arguments based primarily on federal law relevant to the issue. On a day-to-day basis, it is more important for practicing Elder Law attorneys to prevail on this issue at the caseworker or fair hearing level. Citations to the congressional record will be of little help at the state administrative level. Some practical suggestions for dealing with this issue are as follows:

1) Document the purpose of all post-eligibility transfers by supporting a purpose not related to Medicaid eligibility in order to qualify for the purpose exception to the transfer rule.\textsuperscript{34} The documentation should reflect the circumstances accurately and honestly and include statements concerning the following: affirmative statement of the assignor’s purpose (e.g., avoid probate), status of IS Medicaid eligibility, health condition of assignor, reason for chosen beneficiaries and reason for omitting the IS as a beneficiary. Proof contemporaneous to the date of transfer is best but, if there is none, such proof should be presented to the caseworker or at the fair hearing on appeal. The transfer rule exception has always been very difficult to prevail on with a caseworker, on appeal, or in court. However, in the context of a post-eligibility transfer, you will have a better chance to prevail if you have good documentation of purpose for the transfer and persuasive legal arguments based on the applicable state rules.

2) Citations to your state rule providing that the transfer of an exempt resource does not cause ineligibility as argued above might be successful with the caseworker or on appeal.

3) One planning option for a CS to avoid a post-eligibility transfer penalty is to obtain a divorce after the IS becomes eligible for Medicaid with all remaining property being awarded to the CS in the divorce settlement. A transfer by the CS would then not be attributed to the IS since the CS is no longer a spouse at the time of transfer.\textsuperscript{35} Of course, most clients will not wish to pursue this option for religious, moral or personal reasons, but you should consider your professional obligations to advise your clients of this legal planning option.

VII. CONCLUSION

When confronting this issue in your state, you should first assert the “deemed available” argument, which according to CMS is a permissible interpretation. The other arguments above may be successful in your advocacy for your clients. More important, you should incorporate into all your post-eligibility transfers some documentation of the purpose of the transfer.

\textsuperscript{34} 42 U.S.C. § 1396p(c)(2)(C) (2006).

\textsuperscript{35} A post-eligibility divorce may also avoid an estate recovery claim in the estate of the CS since he/she will no longer be a spouse under the language of the statute and recovery can only be made against the individual (i.e., Medicaid recipient). 42 U.S.C. § 1396p(b) (2006).
APPENDIX

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop 52-26-12
Baltimore, Maryland 21244-1850

Center for Medicaid and State Operations

SEP 13 2004

Michael J. Millonig
Michael Millonig Law Group, LLC
7601 Paragon Road, Suite 103
Dayton, Ohio 45459-4062

Dear Mr. Millonig:

This is in response to your letter regarding Ohio’s Medicaid policies citing various concerns that you believe we did not address in our previous April 26, 2004 or July 28, 2003 replies to your earlier correspondence. While we have attempted to respond in full to your questions, we note that your queries were presented in a format that requires scrutiny of scores of pages of photocopied state regulations with your accompanying annotations. CMS Central Office does not have the resources to undertake a review of the entire State regulatory code to determine whether each and every provision complies with federal Medicaid law and policy. However, we will attempt to clarify federal law and policy in response to your additional points, as we understand them.

First, you state that Ohio has not amended its annuity rule since it passed the current rule in November 2002. We stated in our April 2004 letter our belief that the State had changed portions of its regulations, including provisions limiting purchases of annuities for the community spouse. However, it appears that the regulatory changes by the State did not in fact include amendments to the annuity provisions. If you believe that the State is not in compliance with federal Medicaid laws or policies, the Regional Office of CMS has the authority and discretion to take measures to address that issue. You may wish to contact the Regional Office at: Centers for Medicare & Medicaid Services (CMS), Region V, 233 North Michigan Avenue, Suite 600 Chicago, IL 60601.

Second, you object to the language in Ohio’s regulations regarding presumed asset transfers. The federal statute, section 1917 (e)(1)(A) of the Social Security Act (the Act), defines improper asset transfers. However, the statute is silent as to burden of proof regarding the threshold issue of whether an asset transfer that could result in a period of ineligibility took place. The State, by setting forth a series of presumptions in its regulations, may merely be putting into place procedures for determining if an asset was transferred for less than fair market value. The existence of the presumptions would not in and of itself determine if a period of ineligibility would be imposed on an applicant.
Page -2- Michael J. Millonig

In the situation where an applicant is trying to establish that a transfer of assets within the look-back period should not be penalized because it falls within one of the exceptions listed in Section 1917 (c)(2) of the Act, the federal statute leaves to the states considerable discretion in establishing standards and procedures. This flexibility includes the State’s authority to make determinations regarding transfers exclusively for a purpose other than to qualify for Medicaid, referred to in paragraph four of your most recent letter.

You appear to be requesting that we provide additional analysis of State regulations that you believe improperly permit the State to penalize transfers by the community spouse. We previously advised you that the State can, consistent with the provisions of federal law, impose such penalties. Again, without commenting specifically on a particular State policy or regulation, we will explain the basis for the federal policy.

The decision of the United States Supreme Court in Wisconsin v. Blumer, No. 00-952 WL 236700 (February 20, 2002) established that the Secretary of the U. S. Department of Health and Human Services (DHHS) may leave to the states the interpretation of a provision of the Medicaid statute, when the statute does not clearly or unambiguously require a particular reading of the provision in question. Section 1924 (c)(4) of the Social Security Act states that, during the continuous period in which an institutionalized individual is in an institution and after the month in which he or she is determined to be eligible, no resources of the community spouse “shall be deemed available” to the institutionalized spouse. However, the statute does not specify what “deemed available” means in this context.

We believe that states may choose between two supportable interpretations of the “deemed available” language in light of the statutory ambiguity. States may determine, with respect to post-eligibility transfers by community spouses, that penalizing such transfers of resources would have the effect of treating those resources as being constructively available to the institutionalized spouse and violate the requirement of section 1924 that the community spouse’s resources are not “deemed available” to the institutionalized spouse once eligibility has been determined. States may therefore permit the community spouse to transfer those resources to a third party without a transfer penalty being incurred by the spouse in the institution.

Alternatively, states could interpret section 1924 (c)(4) as addressing the availability of resources as part of the redetermination process after the institutionalized spouse’s initial eligibility determination. In other words, “deemed available” could be read as meaning the Supplemental Security Income (SSI) process of deeming resources from an ineligible spouse to an eligible spouse. Under this interpretation, a state would be basing the imposition of a penalty for a post-eligibility transfer by a community spouse on the requirements of section 1917 (c)(1) of the Act. This section requires states to impose a penalty if an institutionalized individual or the individual’s spouse transfers assets for less than fair market value. Under section 1917 (c)(1), “assets” include all resources.
Page 3- Michael J. Millonig

... belonging to the individual or the individual's spouse. Thus, a community spouse's transfer of resources, whether the resources belong to the spouse or the institutionalized individual, can be imputed to the institutionalized individual, and can be subject to penalty. In the context of a post-eligibility transfer by a community spouse, these provisions taken together would allow a state to impose a penalty without making a determination that the transferred resources were actually "available" to the spouse in the institution. Rather, imposition of a transfer penalty would be based on section 1917 (e) (1) language requiring states to impose a penalty when assets, as defined in section 1917 (e)(1), are transferred by the individual or the individual’s spouse. In summary, we believe that by adopting the latter interpretation of "deemed available", the State may impose a penalty for post-eligibility transfers of resources by a community spouse.

Finally, you stated that you do not believe that our prior correspondence addressed the issue of transfers of exempt resources, or transfers for a purpose other than to qualify for Medicaid. Transfers of exempt resources are covered by Section 1917 (c)(5), which defines the term "resources" as having the same meaning that it would have in the Supplemental Security Income (SSI) program, with the exception that assets excluded under Section 1613 (a)(1) of the Act are not excluded as resources for the purpose of applying the Medicaid transfer of assets rules. This exception refers to the home. We have already addressed the exception in 1917 (c)(2)(C) for transfers of assets made exclusively for a purpose other than to qualify for Medicaid in the third paragraph of this letter.

Sincerely,

[Signature]

Gale P. Arden
Director
Disabled and Elderly Health Programs Group

cc: Regional Administrator
    Region V, Chicago
    Attn: Associate Regional Administrator
    Division of Medicaid and State Operations

Ohio Department of Job & Family Services
Ohio Health Plans
Attention: Mary Mynatt
30 East Broad Street
31st Floor
Columbus, OH 43215-3414
ISOLATION AS A DOMESTIC VIOLENCE TACTIC IN LATER LIFE CASES: 
WHAT ATTORNEYS NEED TO KNOW

Betsy Abramson, J.D.*  
Bonnie Brandl, M.S.W.**  
Tess Meuer, J.D.***  
Jane Raymond, M.S.****

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I. INTRODUCTION

Many older adults lead active lives and have frequent interactions with friends, neighbors and family. However, some older adults who lack a strong social network become isolated. Of course, not all isolation results from aging issues. Older individuals can become isolated because they live far from neighbors or are non-English speaking immigrants in this country. But for many elderly, increased isolation is directly related to aging—through the loss of friends and family or due to poor health or mobility limitations.

Isolation is also a standard tactic used by perpetrators of domestic violence. Abusers use their power and control to isolate victims and, by so doing, make it easier to engage in physical, emotional and sexual abuse and financial exploitation. Abusers isolate their victims for essentially two reasons. First, they want the victim to be focused entirely on the abuser’s needs. Other social contacts allow victims less time for their abusers, which is a right of victims that abusers do not accept. Second, abusers do not want their victims to develop sources of strength that could contribute to their independence or make them desirable to others. Most abusers are aware that a victim’s social contacts can bring her strength and support that could ultimately enable her to escape the abuser’s control. Consequently, abusers commonly attempt to keep their victims completely dependent on them to increase their power. Depictions of the different tactics that abusers use in situations of domestic violence in later life can be found in the Appendix.

This article will explore isolation tactics used in abuse in later life and potential interventions to promote victim safety through the provision of services as well as use of legal remedies. Abuse in later life for the purposes of this article is defined as abuse, neglect and exploitation of a person age 50 or older by someone the person knows, trusts or loves and with whom she has an ongoing relationship. Abusers are generally spouse/partners, adult children or other family members, and caregivers. This article will not discuss self-neglect or harm by strangers.

In cases of abuse in later life, generally an abuser uses a pattern of coercive tactics to gain and maintain power and control in the relationship or financial resources. For example, a husband may feel entitled to tell his wife when dinner is served, where she can go, and whom she can talk to on the telephone. He may put her

1. Since most victims are female, this article will focus on older abused women; however, some material may be relevant to older men who are victims of family violence.
3. Id.
on an allowance to control her spending and check the odometer to be sure she does not go anywhere without his permission. If the victim does not comply with his wishes, he may threaten her or be emotionally abusive to her or he may physically assault her. Adult children may feel that because they are younger and healthier, they can also use power and control tactics to their financial benefit. They may use intimidation, psychological manipulation and physical violence so their mother will turn over her Social Security check or change her will to reflect that child as the sole beneficiary.

For coercive tactics to be successful, isolating the older victim is crucial. Abusers recognize that victims who have access to information may not believe their lies and manipulation. Therefore, abusers often limit or do not allow victims access to their mail or the media, because victims could learn about abuse and services from these venues. In addition, abusers often restrict or limit access to family, friends or neighbors who may question the abuser’s tactics and motives and offer to help the victim.

II. ISOLATION TACTICS IN CASES OF DOMESTIC VIOLENCE GROWN OLD

The following case examples,4 gathered by the National Clearinghouse on Abuse in Later Life, a project of the Wisconsin Coalition Against Domestic Violence,5 demonstrate the use of isolation as a method for maintaining power and control.

A. Isolation for Purposes of Power and Control

The husband of Laura (age 67) insisted they move to Montana, largely to get Laura away from her family in Wisconsin. Once there, he destroyed photos of her family and told her she “didn’t need anyone but me.” Often when she tried to go out with a woman friend he went to the car to disable it (e.g., disconnect the starter) so that she could not leave. Then, when the time for her to leave had passed, he would correct the problem, pretending that nothing was ever wrong with the car and ask her why she had not left.

The husband of Andrea (age 81) moved her from the Midwest to Arizona for one year to try to limit her contact with her mother. He would not let her have a phone in the home so that she had to walk to the corner store to contact anyone from the outside. He never let her learn to drive and always selected apartments far away from public transportation lines to make it more difficult for her to go anywhere except work.

The husband of Angie (age 67) mocked her faith and prohibited her from attending church so that she was not in contact with many of her friends.

4. All names are pseudonyms. Some of the ages are approximate.
5. See: www.wcadv.org and www.ncall.us for additional background and resources. Wisconsin Coalition Against Domestic Violence, 307 S. Paterson St., Suite 1, Madison, WI 53703, (608) 255-0539; E-mail: ncall@wcadv.org.
The husband of Pam (age 85) did not let her have any friends and would not let her go out. He totally alienated their son so that Pam did not see him or his family (including her grandchildren) for years at a time. When she was hospitalized after surgery for a life-threatening illness, he blocked all visitors, including her son.

The husband of Louise (age 83) unplugged the phone and took it with him every time he left the home so that she could not contact the outside world. A friend of hers from church gave her a small phone that she plugged in and used when he was gone, being very careful to remove it before he returned each day.

In all of the above cases, domestic violence continued as the parties grew older. This is known as “domestic violence grown old.” The victims said that throughout their decades of marriage, their husbands did not allow them to have any friends. Most of the husbands also limited their access to money by putting them on an “allowance,” or not permitting them to handle money at all. This made it nearly impossible for them to go out or spend time with anyone else because they had no money for transportation, dining at a restaurant or other social activity. As a result, they said that they never had friends over to the house, never went anywhere with friends and never socialized with other individuals or couples. Thus, they had no one with whom to discuss their situation or from whom they could seek support or assistance.

Domestic violence in later life occurs not only between intimate partners, but also in other relationships. And as some of the following examples demonstrate, isolation is one of the first tactics abusers use. It does not take much time to isolate a victim; an abuser can swiftly and effectively isolate an older victim from sources of assistance and support.

B. Other Isolation Tactics More Unique to Domestic Violence in Later Life

Jackie (age 67) permitted Linda, his unemployed, divorced 40-year-old daughter to move in with her and live in her home without paying rent. The daughter became very physically, financially and emotionally abusive. Jackie’s health declined, and she had a stroke. Jackie had significant medical needs and communication disabilities (receptive and expressive aphasia), which Linda neglected and mocked. Linda later gave birth to a child to whom Jackie became extremely attached. Linda made it clear to her mother that if she contacted law enforcement about the abuse she would make sure Jackie never saw any family members (i.e., she would further isolate her), including her baby granddaughter. Despite the threats, Jackie did seek a restraining order against Linda, who then made good on her threat—she stayed away and isolated Jackie from her granddaughter and other family members.

The husband of Katy (age 83) forced her into a van to ride from the Midwest to Florida, despite a recent hip surgery and stroke. He did this because he wanted her to be away from their adult children, from whom she could have received assistance during her recuperation. He did not want any attention taken from him. Once in Florida, he also refused to hire any caregivers or get any other assistance for her, insisting that she was “fine” and just “faking it.” He prohibited anyone from coming into their Florida residence.
In a case involving reverse caregiving roles from Katy, above, the husband of Marjorie (age 79) had extensive long-term care needs but would not permit any paid or volunteer caregivers into the home. He insisted that only his wife was to provide for his care, isolating her from the outside world and exhausting her in the process. Despite his declining physical ability, he continues to abuse her.

Alice (age 76) lived with her abusive husband for years. After several decades of emotional abuse and later physical abuse, she left and started planning her divorce. Her husband then suddenly developed an “illness,” and, according to Alice, pressured their daughter to let him move in with her daughter and her daughter’s husband. He then convinced their daughter that his alleged illnesses needed a great deal of her attention and that their daughter should be on “his side,” convincing her to cut off all contact with her mother, thereby further isolating Alice.

Carl, a caregiver/attendant, would not assist Rose (age 82), an elderly woman, to the bathroom until she agreed to sign over one of her benefit checks. The caregiver/attendant would also leave Rose on the toilet all night—sometimes for up to 10 hours—if she did not do what Carl wanted. This caregiver preyed on the built-in isolation that resulted from Rose’s disabilities to further abuse and exploit her.

Bill and John, lawn-care workers, worked their way into the life and home of Muriel (age 85). Using classic predator/grooming tactics, they soon became Muriel’s personal caregivers. They isolated her from her adult daughter 100 miles away by answering every phone call and telling her daughter that her mother was sleeping, did not feel well, or just did not want to talk to her. When Muriel told the “caregivers” that she could not understand why her daughter was no longer calling, they told Muriel that her daughter obviously did not care about her and had abandoned her. They talked Muriel into completing new powers of attorney, appointing them as agents in place of her daughter; and they insisted that the doctor had instructed them to have Muriel take her medications with alcohol. They then blocked access to Muriel by the local elder abuse agency, which had to file a guardianship to revoke the powers of attorney.

The adult son of Beverly (age 78) isolated her from the rest of her family and stopped her from attending many social events because of his constant harassment of her for money. Afraid to talk to her other adult children anymore, she ultimately gave her son her entire life’s savings before securing a restraining order against him, thus enabling her to again go out in public and be with other members of her family without fear of his harassment.

The above examples demonstrate both classic domestic violence isolation techniques as well as isolation tactics that are more uniquely used against older people. They also demonstrate the inter-relationship of isolation and other tactics. Abusers use power and control tactics against older individuals to increase their isolation, leading to further diminution of any support or other connections.

Physical abuse particularly isolates the victim. When the victim is physically harmed, it may be harder for her to leave the home; or the perpetrator may keep her at home to avoid having her bruises seen in public. Or, the bruised victim may isolate herself for the same reasons that a victim does not report abuse:
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- fear of further retaliation,
- embarrassment,
- shame of having “let” herself be abused,
- shame of having a family member who abuses her,
- fear that by disclosing the abuse it will cause the family member to “get in trouble,” or
- fear she may be forced to move to a nursing home.

Financial exploitation isolates an elder by reducing her ability to engage in community activities, including shopping, attending cultural events or participating in church services (embarrassment over the inability to make a financial contribution). Isolation is also a key ingredient in undue influence cases involving financial exploitation. Exploiters use undue influence to manipulate an older person to agree to turn over financial assets to them. The judgment of the victim is supplanted by the desires of the exploiter. To succeed, the exploiter isolates the victim from information and caring individuals while creating an environment of fear and dependency. Often the tactics that are used are similar to those used by cult leaders or hostage takers.

Similarly, abusers who ridicule their victims’ spiritual beliefs or their victims’ direct involvement in religious-based activities cause their victims to stop attending their house of worship for fear of further harassment and ridicule by the abuser. For many elders, religion is a major source of comfort as well as a social connection. Discontinuation of their involvement in religious activities often breaks connections to a very important circle of long-time friends and support.

Emotional abuse, including “crazy-making,” also isolates victims. Many victims of domestic violence report that physical violence was preceded by emotional abuse, and that they consider the emotional abuse more difficult to heal from than the physical. Abusers’ emotional abuse of their victims systematically destroys their self-esteem and belief that they have any options or personal skills to make themselves safer. The emotional abuse of constant yelling, screaming, belittling, mocking of disabilities and harassing so wears victims down that it is incredibly difficult to live from day-to-day, and makes it seem impossible to seek out a support group, see a

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8. Supra n. 6, at 55. E-mail conversation with Rev. Dr. Marie M. Fortune, Founder and Senior Analyst, Faith Trust Institute, www.faithtrustinstitute.org.
9. Id.
counselor, consider options other than remaining with the abuser, or develop and implement a safety plan.

Abusers use “crazy-making” tactics against older victims to cause them to question their competence. For example, “Laura’s” husband (see above case example) regularly disabled her car when she had plans to go out with a friend. She would go out to the car and find it would not start, so she would give up her plans. But a few hours later, when it was too late for her to pursue her planned outing, her husband would reassemble the car, start it up, come back into the house, ask her why she did not go out and mock her for not being able to start the “perfectly working” car. Other abusers move furniture, medication, kitchen equipment, pictures and other home objects, and then deny having done so, to confuse victims into thinking that they are “losing it.” Many intercept mail or phone calls (or send strange letters or phone calls) also resulting in victims’ questioning whether they have impaired hearing or vision, whether they are “hearing voices,” or losing their memories and minds. The constant barrage of insults and “crazy-making” chips away at a victim’s confidence to manage her life and decisions and handle her affairs, often leading to depression and self-isolation. In addition, the perpetrator’s wild temper and nastiness often causes a victim such embarrassment and discomfort that she discontinues having guests (if she ever had them), including her own family members, into her own home. The victim does not want her family or friends to experience the same discomfort she does around the abuser or observe her being a target. Even if the victim attempts to maintain contact, family members and friends typically drift away or stay away for the same reasons.

C. Impact of Isolation Can Be Both Worse and Different for Older Victims

Isolation is a potent tactic used against victims of all ages, but it can be particularly devastating to older victims. An older victim, who has been systematically and purposefully isolated for decades, finds that the sheer length of time that she has been without contact with others makes it that much harder for her to find assistance. Decades of isolation destroy the victim’s natural support system of friends and family from childhood or early adulthood. Over the years, all of the victim’s contacts, friendships and support have been lost. Being alone with the abuser for years with no outside contacts makes the abuser’s mind games both easier to conduct and that much more effective. Family and friends, even if not prevented by the abuser from seeing the victim, often do not want to spend any time with her as they find it stressful to be around the omnipresent abuser and the situation tremendously uncomfortable and unpleasant. The older the victim is, the harder it is to make any

new friends, particularly if the victim is experiencing depression, grief or health issues that make it difficult to reach out to others.

Isolation compounds itself and has numerous negative ripple effects. The longer the victim is isolated, the more her self-esteem is damaged, so that seeking safety is much more difficult. Unmitigated isolation prevents the victim from knowing that there is any assistance available from individuals, organizations or government entities, so she does not even consider reaching out. At the same time, the outside world often does not offer assistance to the victim. Well meaning friends and family, as well as professionals, can misinterpret a victim’s lack of involvement in activities as being due to mild depression, illness or “just getting older.” They do not consider the possibility that the victim is not seeking help or even socializing because of a well-honed pattern of isolation by the abuser. Rather than continuing to invite the victim out or ask the victim if she needs any assistance, they “mind their own business,” “just give her time” and “leave her alone.” Thus, she is alone . . . with the abuser.13

When either the victim or perpetrator has long-term care needs, isolation can be even more insidious and dangerous. As the “Marjorie” case, above, demonstrates, if the abuser has care needs, but refuses to let anyone else in the home, insisting that only his long-time spouse can care for him, the victim often wears herself out as caregiver. After years of isolation and other power and control tactics, the abuser makes it clear that no one else is permitted in the home and that it continues to be her responsibility to attend to all of his needs. He often berates her for not attending to his needs “fast enough” and minimizes what his needs are to others who may be willing to assist (e.g., adult children), insisting that his needs are minor and perfectly manageable by his victim. The victim, who is accustomed to not having others in the home and who has a destroyed sense of self-esteem, compounded by constantly being told that she is “lazy” or self-absorbed, believes it is her own inadequacy that makes caregiving a challenge. She continues to try to create peace in the home and perform her responsibilities, as demanded by the abuser.14

In the converse caregiving situation, e.g., “Katy” or “Jackie,” above, in which the victim needs care, the long-time isolating abuser will rarely permit any outside assistance, including even adult children. As the “Katy” situation demonstrates, abusers will go so far as to moving ill, fragile victims out-of-state, rather than permitting family or others into the home to assist. They minimize their victims’ needs and refuse offers of assistance. Abusers mock their victims’ needs and disabilities and simultaneously berate their victims by telling them that they are “faking it” or just being lazy while insisting that their victims continue to be responsible for other ongoing household tasks such as cleaning and cooking, despite the victims’ illness, disability or care needs.


14. Id.
III. INTERVENTIONS

Elderly victims of abuse require assistance if they are to break down their isolation. They need personal and emotional support and even legal assistance. At some point, they may need accessible emergency and transitional housing. During a transition period, older victims need safe homes or motel rooms, and transportation to attend support groups and take care of other business. They also need adequate time (generally more than younger women) to sort out their affairs and rebuild their lives, to break through the isolation, to learn how to remake friends and to get assistance with financial planning, to apply for public benefits and insurances and, in many cases, to obtain permanent housing.15

A. Social Services and Community Resources

To break down isolation, older victims need a variety of supportive social services. Some activities that may be attractive to older women are purely social in nature, such as sewing groups, book clubs, card games and cooking groups. Other activities may be a “back door” way to encourage older victims to participate in a support group for older victims of domestic violence. “Angie,” described above, now is a regular attendee at her local senior center where she joyfully visits, eats meals and plays cards with new friends. She has discovered that several of the other women there are, like herself, survivors of long-term domestic violence and while they do not have a per se support group, “Angie” reports taking great comfort in being with women she knows “have been through the same thing I have.”

For some older victims, finding employment can both break the isolation and provide additional funds that give her more options. Groups such as Displaced Homemakers, or employment agencies specifically designed for older people, can assist in finding jobs. In addition, for low-income women, the Title V worker program16 can be an excellent [re-]entry into the work world. For example, “Louise,” described above, works at the Boys & Girls Club in her community. She loves being around young people, feels of value and appreciates the income. “Pam,” see above, works in a craft store helping customers select materials for creative projects. She enjoys the interactions and relies on the income.

For others, volunteer work provides a safe opportunity to leave the home, increase contacts with other individuals and build self-esteem through the development of skills and an appreciation of their efforts by others. Almost every community has organizations that help match potential volunteers with appropriate and interesting volunteer opportunities, whether for one afternoon or on an ongoing basis. Possibilities include the United Way, a local Community Chest or Retired Senior Volunteer Programs.

15. Jane A. Raymond, Housing and the Older Battered Woman, 2 Victimization of the Elderly and Disabled 65-67 (no. 5, Jan./Feb. 2000). These findings are in significant contrast to the documented primary needs (i.e., child care and job training) of younger women.

16. The Senior Community Service Employment Program (SCSEP) was established under Title V of the Older Americans Act, as amended, 42 U.S.C. 3056, Section 501.
Many elderly continue to have a close connection with a religious community. Faith communities provide plentiful opportunities for socialization through weekly services, activities, educational programs and various service projects. In addition, congregations are increasingly recognizing the need to reach out and provide assistance to victims of domestic violence.17 Some communities have parish nurses, who check in on homebound individuals and help break the isolation for both self-neglecting elders and those being abused by others. For example, “Angie’s” husband, described above, totally cut her off from her religious community. Had the congregation reached out to her, providing rides to church events and checking in with her, she would not have been as isolated and may have discovered that there were additional support and safety resources for her.

Some services are valuable simply because it brings another individual into the home setting. These may include books on tape delivered by a library volunteer, a cleaning service, a hair stylist who will come to an individual’s home, a volunteer reader, or a volunteer who brings movies, groceries or meals-on-wheels.

B. Home Care

For victims with care needs, or whose abusers have care needs, home care assistance can begin to break down the isolation as well as provide much-needed help. For example, “Marjorie,” “Kathleen” and “Jackie,” described above, would all benefit from home care assistance. “Marjorie,” whose abusive husband has high care needs and insists that she be the only one to provide them, seriously risks her own health from the burden of around-the-clock caregiving responsibilities to her unappreciative and demanding spouse. Home care programs that assist with meals and housekeeping would provide “Marjorie” with respite so that she could leave the home and spend time with other family or friends, would help break her isolation and maintain her own health.

“Katy’s” health was significantly endangered by her husband’s refusal to permit any outside caregivers to provide assistance to her in the Florida home to which he had dragged her, while she was recuperating from surgery. Her abusive husband did not have caregiving skills, minimized her needs and increased his emotional abuse (“you’re just making up phony excuses” . . . “stop being so lazy and get up and make me dinner.”) Despite her need for an extensive range of home health nursing and social services, her husband permitted none. Only when an old friend from out-of-state stopped by for a visit did the isolation stop. That friend called “Katy’s” children, who immediately flew to Florida. They helped their mother relocate to the Midwest where, now divorced, she lives in her own apartment and receives support from local aging and health care programs.

“Jackie’s” daughter lived with her both before and after Jackie’s stroke. The daughter denied her needed care and mocked Jackie’s stroke-related disabilities. A

17. See, e.g., Faith Trust Inst.
home care agency could have assisted Jackie with various therapies (e.g., speech, occupational, physical) and assisted in the homemaking chores that her daughter neglected and that Jackie was not capable of performing.

Home care programs therefore serve two very important functions in situations of domestic violence in later life when either the abuser or the victim has care needs. First, by bringing in outside individuals, such services break down the isolation of the victim. Second, the provision of care service reduces the caregiving responsibilities and provides time and space apart.

C. Advocacy and Housing (Emergency and Transitional)

Many older victims can benefit from advocacy services. Given the power differential between the abuser and victim, most advocacy organizations use an empowerment model of service delivery. Advocates listen to the victim’s needs and assist by providing information and referrals, support and services. The approach is victim centered. The advocate works with the victim to identify needs and help the older person choose an appropriate remedy.

Domestic violence and sexual assault programs that use this empowerment model can provide many useful services for isolated older victims. A 24-hour help line offers victims an opportunity to reach out for help at any hour of the day or night. Support groups provide women time to meet with other victims with similar experiences where they offer each other help, encouragement and strategies. Legal advocacy programs provide victims with information about mandatory arrest, restraining or protection orders, divorce and legal separation and other potential legal options available to the victim. Safety planning is another critical tool for victims.

Most domestic violence and sexual assault programs offer services to adults of any age. Few programs across the country offer services tailored to meet the needs of older victims. While many older women have benefited from services offered by domestic violence or sexual assault programs, some older women may not be comfortable exploring this option. In addition, some programs may have only limited experience working with older individuals and so need to collaborate with other professionals to provide effective services.

For victims who want to leave the abuser, either temporarily or permanently, where to stay is often an issue. For older women, even during a life-threatening crisis, it is emotionally difficult to leave home and its familiar surroundings and to consider living alone when they have never previously done so. In many communities, domestic violence programs have emergency shelters or can make arrangements for temporary housing of a victim of abuse. Adult protective services may also be able to assist victims locate shelter.

Recognizing that traditional domestic violence shelters may not meet the needs of later-life victims of domestic violence, advocates around the country are developing innovative methods of meeting older victims’ emergency housing needs. Some examples include traditional domestic violence shelters with accommodations for older people, elder shelters as part of a multi-service programming for elders, and use of
donated assisted living or nursing home beds for emergency housing followed by assistance with transitional housing.

Support groups for older victims of domestic violence can be very valuable, but how they are titled can be important. Many communities have reported little success when advertising support groups for “older battered women” or “elder domestic violence victims.” Older victims in the community often state that they do not identify themselves as victims of domestic violence. In other situations, the victims believe it would be dangerous for them to attend, e.g., they do not drive and the abuser is the only source of transportation and controls all of their activities. Many communities have found much greater success in organizing groups of older women with more innocuous, ambiguous or appealing titles such as: “Self-Help for the Elderly,” “Safe Options for Seniors,” “Healthy Women Over 55,” and “Golden Circle.” They also often hold the support group at a location other than a domestic violence shelter, such as at a hospital or clinic, senior center or library, both to reduce stigma and make it safer for victims to attend.

D. Adult Protective Services (APS)\(^{18}\)

Each state has created its own Adult Protective Services (APS) system to respond to cases of elder abuse or abuse against vulnerable adults, although definitions and statutes vary from state to state. In most states, in addition to responding to elder abuse, APS programs also serve vulnerable adults, age 18 to 59, who are reported to be victims of abuse, exploitation, neglect and self-neglect. In some states, APS workers investigate abuse that occurs in regulated facilities (such as nursing homes and assisted living centers) in addition to the investigations conducted by regulatory agencies.

1. APS Guiding Ethical Principles

A competent older adult has the right to refuse services that have been offered or recommended. An APS worker can only use an intervention, such as the legal system, to protect the older adult if efforts for voluntary cooperation have failed, and the older adult remains at risk of substantial physical, sexual, emotional or financial harm. Because adults are presumed to be competent, they have the right to make their own decisions about their safety and living conditions. Any effort to provide services against the older adult’s wishes must be based on the belief that the situation is so hazardous or harmful to the adult or others that it overrides the person’s right to live life as she chooses. Although this may be frustrating, it is important to respect competent older adults’ right to make their own decisions. APS workers also operate on the ethical belief that older persons who are victims of abuse, exploitation or neglect should be treated with honesty, care and respect.\(^{19}\)

\(^{18}\) The following section first appeared in, and is adapted with permission from Bonnie Brandl, Mandatory Reporting of Elder Abuse: Implications for Domestic Violence Advocates (Wisc. Coalition Against Domestic Violence’s Natl. Clearinghouse on Abuse in Later Life, APS).

\(^{19}\) Natl. APS Assn. (NAPSA) Ethical Principles and Best Practice Guidelines (2003).
2. APS Reports and Case Management

APS programs receive reports of alleged elder abuse from victims, neighbors, professionals and interested others. Most APS programs receive reports; conduct investigations; evaluate client risk and capacity to make informed decisions; develop and implement a case plan; and offer services. APS is designed to work primarily with crisis situations, providing case management by identifying needs and working with victims to link them with needed services.

In general, APS workers conduct investigations by visiting alleged victims in their homes or other place of residence (e.g., long-term care facility). Investigations generally are opened within 24 hours in emergency situations and within 72 hours (depending on state statutes) for non-emergencies. The worker typically goes alone to the home, although in some situations APS may send two workers or the worker may request law enforcement accompaniment. The worker will meet with the victim to assess the situation, determine if the allegation of abuse can be substantiated and decide if there is an immediate risk of further harm to the victim. APS evaluates the older individual’s living environment, ability to function and perform daily living tasks and process and understand information. Generally interviewers conduct these interviews in private, away from the suspected perpetrator. Depending on the case allegations, the worker may also interview the suspected offender and conduct other collateral interviews with friends, family, physicians and neighbors. In some areas, if the worker makes several visits and does not find the victim home, the worker may send a letter with information about abuse and services to the victim.

3. Services Available from APS

Once a case has been investigated, APS can offer a number of services, which a competent victim may accept or reject. In some communities, if criminal activity is suspected, the APS worker may file a report with law enforcement. In a few states, workers are required to notify the perpetrator of the outcome of the investigation.

If an allegation of abuse is substantiated and the victim is capable of giving informed consent, APS can arrange for a wide variety of services including, but not limited to, medical, social, economic, legal, housing, home health, protective, and other emergency or supportive services. In most communities, victims who have the capacity to give informed consent may refuse any or all of these services. If the victim lacks the capacity to consent, APS may seek the appointment of a temporary guardian who can agree to the services and oversee their provision. Depending on state laws and regulations, APS will monitor these services once they have been put in place and provide counseling or casework services until the victim’s risk has been reduced or eliminated. Victims who lack the capacity to give informed consent and who are in imminent danger may have emergency services ordered by a court. If the court determines a victim is not competent, the court may appoint a guardian or APS to make decisions on behalf of the victim, including removing the person from the home.
E. Legal Remedies - Civil

There are numerous legal remedies for later life victims of domestic violence, including those that help break the isolation. Civil remedies may be pursued by elder abuse or APS agencies, domestic violence programs, legal services program lawyers or private practice Elder Law attorneys.

1. Denial of Access

Many victims of later life domestic violence endure isolation that endangers both their psychological and physical safety. In many cases, abusers reject any offers of assistance or social connection and deny access to their victims by government authorities or other family members. Recognizing the problem of an abuser turning away adult protective service workers at the door, some states have responded with legislation that empowers elder abuse and adult protective service workers with intervention authority. Wisconsin, for example, permits adult-at-risk (APS) workers, upon receiving a report of alleged abuse, neglect, financial exploitation or self-neglect, to gain access to the victim notwithstanding an abuser’s (or anyone else’s) refusal. In addition to workers being permitted to seek law enforcement assistance in gaining access, the workers have authority to interview alleged victims alone, with or without the consent of a guardian or agent under a power of attorney for health care. They also have authority to transport the alleged victim to a facility for a medical examination, again without the consent of a guardian or agent under a health care power if that individual is the suspected perpetrator or under a court order.

In addition, in Wisconsin any interested person (including government adult-at-risk (APS) workers) may, when appropriate, initiate an action for mental commitment of an abuser with mental health issues or guardianship or protective services for the victim or abuser. For example, in the “Muriel” case above, the local elder abuse agency filed a petition for guardianship because the agents under her power of attorney were her abusers and were clearly not looking out for her best interests, especially by their tactic of deliberately isolating her. The victim herself, as well as any interested person, can seek a restraining order when an abuser is engaging in tactics, including isolation, that are endangering the individual. For example, in the situations described above, “Beverly” sought a restraining order against her financially exploitive son and “Jackie” sought a restraining order against her daughter. “Muriel” would have greatly benefited from an interested party filing a restraining order on her behalf to prohibit her financial exploiters from continuing their tactics, including isolation.

20. Wis. Stats. Sec. 46.90(5)(br).

21. Wis. Stats. Sec. 46.90(5)(b).

22. In Wisconsin, individuals other than the victim may seek the restraining order on the victim’s behalf. In such a situation, the court must appoint a guardian ad litem to investigate and report to the court whether the restraining order would be in the victim’s best interests, and the petitioner must provide notice to the victim of the filing of the petition. Wis. Stats. Sec. 813.123.
2007] Isolation as a Domestic Violence Tactic

2. Physical Abuse

While generally only criminal remedies are appropriate in situations of physical abuse (see next section), civil remedies including restraining orders are available. Court orders for protective services may be used to provide needed services for a victim whose competence is in question when the perpetrator denies access to services. Protective services may also be of assistance to involuntarily place a mentally incapacitated abuser for whom residential placement is appropriate. Similarly, a mental commitment may be an appropriate remedy for an abuser with a mental illness or disability.

3. Confinement

When the level of isolation constitutes confinement, the available civil remedies include restraining orders to keep the abuser away and tort actions for damages of intentional infliction of harm, negligent infliction of harm or false imprisonment. Depending on the facts, a guardianship petition might also help provide the victim with needed assistance.

4. Emotional Abuse

In cases of emotional abuse, when the victim is incompetent, restraining orders as well as guardianship may help break the isolation and stop other abusive behaviors. Alternatively, if the abuser has an active mental illness, a mental commitment would remove the abuser from the scene.

5. Neglect

In many cases, isolation contributes to serious neglect of the victim’s needs. For example, “Jackie’s” daughter isolated her from other family members and refused to seek assistance needed to help her recover from her stroke. “Katy’s” husband moved her to Florida, so that he could further isolate her from caring relatives and deny access by any outside caregivers and in doing so neglect her need for rehabilitative services. “Muriel” paid individuals to assist with her care needs, but instead of honoring their commitment, they isolated and seriously neglected her. Such abuse could be addressed through civil actions for misrepresentation (a reliance on a claim to take care of the person), a suit for the violation of the duty to provide care under a power of attorney, or a suit for the violation of the duty to exercise the fiduciary responsibility by the guardian.

6. Financial Exploitation

As indicated, rarely does isolation occur without other additional forms of abuse. Financial exploitation often occurs when the abuser isolates the elder from other individuals. “Beverly’s” son, described above, isolated her from the rest of her family to more easily intimidate her into giving him all of her life savings. “Jackie’s” daughter, already living in her home without contributing financially to the household, exploited additional funds from her. “Muriel’s” caregivers isolated her, neglected her
medical condition and then pressured her to execute a new durable power of attorney that put them in charge of her funds, which they immediately began to steal.23

Possible civil actions in these cases include conversion, misrepresentation, fraud, breach of contract, and an action for accounting. Possible solutions include guardianship, conservatorship, executing a new durable power of attorney, filing a petition to review the agent’s performance, seeking a restraining order, and filing for a legal separation or divorce.

F. Criminal Law Violations

Turning to the criminal side, Elder Law attorneys and other advocates for victims of domestic violence in later life should help to educate and encourage prosecutors to pursue criminal charges in appropriate cases. Criminal laws differ in every state. The following is a list of examples based on Wisconsin’s criminal code:26

- **Physical Abuse**—Battery; aggravated battery; reckless injury; harassment; recklessly endangering safety; abuse of vulnerable adult; injury by negligent handling of dangerous weapon, explosives or fire.
- **Denial of Access**—Resisting or obstructing an officer, refusing to aid law enforcement officer.
- **Confinement**—False imprisonment, taking a hostage, kidnapping, intimidation of a victim or attempt to intimidate, criminal trespass to dwelling, abuse of vulnerable adult, disorderly conduct, damage or threat to property of witness.
- **Emotional Abuse**—Recklessly endangering safety, reckless injury, threats to injure or accuse of crime.
- **Neglect**—Abuse of vulnerable adult, reckless injury, recklessly endangering safety, administering dangerous or stupefying drugs, tampering with household products.
- **Financial Exploitation**—Theft or attempted theft, embezzlement, theft by fraud, computer crimes, fraudulent writings, forgery, failure to report income, securities fraud, threats to injure or accuse of a crime, robbery, misappropriation of personal identifying information or documents, identity theft.

23. This was a classic case of “undue influence.” See Bonnie Brandl et al., The Parallels Between Undue Influence, Domestic Violence, Stalking and Sexual Assault (ABA Commn. on Law and Aging). For an excellent curriculum on undue influence, see “UNDUE INFLUENCE: The Criminal Just. Response,” www.ywcaomaha.org, created with a grant from the Off. on Violence Against Women, Off. of Just. Programs, U.S. Dept. of Just..

24. Terminology differs in states. For example, in Wisconsin, a conservator is a voluntary request to the court for appointment of a specifically named individual to assist the petitioner with financial matters. No finding of incompetency is required. Court accountability is mandatory. “Guardianship” in Wisconsin is similar to the term “conservator” in California.

25. See e.g Wis. Stat s. Sec. 243.07(6m).

26. The below-cited crimes and their statutory references are all from Wisconsin Statutes chs. 939-961.
IV. THE ROLE OF AN ELDER LAW ATTORNEY

First and foremost, as in all areas of practice, an attorney should provide the client with accurate information about legal options—both civil remedies as well as potential crimes. Clients need to know about (1) legal options to break the isolation and promote safety (including emergency and transitional housing); (2) how to increase their income by accessing public benefits or pension benefits; and (3) if necessary, how to file for an order of support, legal separation or divorce.

Elder Law attorneys should also have a comprehensive referral and resource directory with listings of community options in domestic violence (emergency housing, transitional housing, counseling, support groups and safety planning). These referral listings should identify various social service interventions including social activities, employment and volunteer opportunities and various home care programs.

It is worth the attorneys’ time to conduct universal screening of all clients, to determine whether there are concerns about any elder abuse, including isolation or other domestic violence dynamics in later life occurring in the client’s lives.27 There are many helpful tools available for attorneys, both listings of “red flags” and “indicators,” as well as standard screening questions to pose.28 Informing clients that the attorney engages in universal screening removes a stigma or concern by clients that their status as a victim of domestic violence is somehow “showing.” Victims of domestic violence often will not voluntarily disclose their situation, but will do so if sensitively and privately asked. To put the client at ease, the attorney can begin with a prefatory, “I always ask all of my clients these questions because I have found I cannot identify elder abuse on my own . . .” or “I want all of my clients to know that I care and can help.” It also helps clients understand that even if they are not ready to take action at this moment, their attorney will be available later.

Attorneys must hone their listening skills to make sure they understand what older victims of isolation and other forms of elder abuse are expressing. Many clients who have endured isolation and other domestic violence tactics for years have “never told a soul.” It is especially important, therefore, that they experience sensitive and careful listening when they do choose to share their situation. Attorneys must learn to be one of the “anchor(s) in the storm”29 to understand what barriers the victim faces and how they might best assist their clients in accessing resources. Attorneys should be mindful that, as in domestic violence situations of victims of all ages, they are often planting seeds. A victim may not be ready to take action at this time but she will be greatly assisted by knowing that a sensitive, caring attorney, with access to resources and legal skills is available if she later chooses to take action.

27. See e.g., Tool for Attorneys to Screen for Domestic Violence, (ABA Commn on Domestic Violence (ISBN # 10590310597-9, 2005). See also, Lori A. Stiegel, Financial Abuse of the Elderly: Risk Factors, Screening Techniques, and Remedies, 23 ABA Commn. on Law and Aging Newsletter, formerly Legal Problems of the Elderly (no. 4, Summer 2002).
28. Id.
29. Supra n. 13.
V. CONCLUSION

Isolation is an extremely potent tactic in an abuser’s arsenal of power and control strategies. For many elderly, the isolation has been going on for decades. For others, it may begin as they age. Situations in which the client or the abuser has long-term care or other special needs may make the isolation even more dangerous. Sensitive attorneys, well versed in the many legal and non-legal interventions available, recognize that breaking the isolation is a process, and they can assist their clients to break down the isolation, work towards safety and ultimately find an engaged and happier life.
APPENDIX:

Power and Control Wheel

Family Violence in Later Life

Wisconsin Coalition Against Domestic Violence
307 S. Paterson St., Suite 1, Madison, WI 53703
(608) 255-0539 / FAX: (608) 255-3580

This diagram is based on the Power and Control Equality wheels developed by the Domestic Abuse Intervention Project,
202 East Superior Street, Duluth, MN 55802 (218) 722-2781  www.duluth-model.org
TACTICS USED BY ABUSIVE FAMILY MEMBERS

PHYSICAL ABUSE
- Slaps, hits, punches
- Throws things
- Burns
- Chokes
- Breaks bones

SEXUAL ABUSE
- Makes demeaning remarks about intimate body parts
- Is rough with intimate body parts during caregiving
- Takes advantage of physical or mental illness to engage in sex
- Forces you to perform sex acts that make your feel uncomfortable or against your wishes
- Forces you to watch pornographic movies

ABUSING DEPENDENCIES/NEGLECT
- Takes walker, wheelchair, glasses, dentures
- Takes advantage of confusion
- Denies or creates long waits for food, heat, care or medication
- Does not report medical problems
- Understands but fails to follow medical, therapy or safety recommendations
- Makes you miss medical appointments

THREATS/INTIMIDATION
- Threatens to leave, divorce, commit suicide or institutionalize
- Abuses or kills pets or prized livestock
- Destroys property
- Displays or threatens with weapons

RIDICULING VALUES/SPIRITUALITY
- Denies access to church or clergy
- Makes fun of personal values
- Ignores or ridicules religious/cultural traditions

EMOTIONAL ABUSE
- Humiliates, demeans, ridicules
- Yells, insults, calls names
- Degrades, blames
- Withholds affection
- Engages in crazy-making behavior
- Uses silence or profanity

USING FAMILY MEMBERS
- Magnifies disagreements
- Misleads members about extent and nature of illnesses/conditions
- Excludes or denies access to family
- Forces family to keep secrets

ISOLATION
- Controls what you do, who you see, and where you go
- Limits time with friends and family
- Denies access to phone or mail

USING PRIVILEGE
- Treats you like a servant
- Makes all major decisions

FINANCIAL EXPLOITATION
- Steals money, titles, or possessions
- Takes over accounts and bills and spending without permission
- Abuses a power of attorney
FAMILY AGING AND THE PRACTICE OF ELDER LAW:

A FINANCIAL GERONTOLOGY PERSPECTIVE

Janice I. Wassel, PhD, RFG*
Neal E. Cutler, PhD**

I. INTRODUCTION: THE MULTIPLE PROCESSES OF AGE AND AGING

Financial Gerontology is an emerging field that brings applied social gerontological education to financial services professionals. These practitioners are already well educated in their primary fields, but are seeking to add aging and gerontology to their knowledge to better understand and serve a mature or “aging” clientele. Thus, Financial Gerontology parallels the legal specialization of Elder Law. Practitioners first receive education and accreditation in the fundamentals, and then go further to acquire specialized knowledge and training. It is in this context that several propositions from applied research and education in Financial Gerontology are likely to be of value to Elder Law specialists.

The central proposition that introduces the first day of all Financial Gerontology classes—from undergraduate lectures to graduate seminars—is the following: Gerontology is not the study of old people, but is the study of the multiple processes of

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aging. Of course, the conceptual and descriptive analysis of older people is part of gerontology, but so are considerations of the family dimensions of aging and the historical-generational context in which maturation and socialization take place. Further, students are quickly reminded that the middle-aged are just as critical a part of gerontology as are older people and the process of aging.

The corollary to the central proposition (that gerontology is not the study of old people) is that there are four lenses through which the multiple processes of aging may be viewed:

- Individual Aging
- Population Aging
- Family Aging
- Generational Aging.

Individual Aging is the gerontological phrase akin to the everyday use of the word “aging.” In scientific terms, Individual Aging refers to maturation and development, with a strong sense of an individual’s growth and change over time.

Financial and legal professionals (and health professionals too) should be especially aware that not all attributes of an older client are solely the consequences of Individual Aging. To jump to such a conclusion is very likely to produce errors of both omission and commission.

Population Aging is the demographic accounting and analysis of the number or percentage of people of different ages in the population, as these numbers change over time, and the concomitant study of the factors and dynamics that produce historical and future projected numbers, changes, and trends. The graying of America is occurring because longevity is increasing (Individual Aging) and there are more people who are getting older (Population Aging).

Family Aging analyzes changes in the age structure of families—changes that are the consequence of the other multiple processes of aging. Population Aging is characterized by a growing number of middle-aged families who have a variety of legal and financial concerns. Increasing life expectancy (Individual Aging) produces a greater number of middle-aged people who have surviving elderly parents with health, financial, and legal challenges: that is, Family Aging.

Generational Aging suggests that a person’s chronological age “measures” more than just the consequences of individual maturation and development. A woman who celebrates her 87th birthday this year was born in 1920 and spent her teenage and young adult years in the aftermath of the Great Depression. Her current concerns about finances may reflect the fact that she is in her ninth decade of life, but it is just as logical to assume that there is a generational component to her attitudes, values, worries, and financial behavior. Consequently, both Financial Gerontology and Elder Law practitioners must be aware of this important generational component of the multiple processes of aging. In a word, “age” does not always mean “aging” – and “aging” signals more processes than maturational Individual Aging.

The present article focuses on Family Aging in which we present the concept of the Senior Sandwich Generation, and a new planning tool, the Filial Fraction. In a subsequent article we will explore how understanding of Generational Aging offers a view of chronological age that is different from, and often in conflict with, age seen simply as Individual Aging.

II. THE NEW CONCEPT OF FAMILY AGING

The dynamics of increasing life expectancy have yielded unforeseen consequences. While adult children fortunate to have parents living longer enjoy longer relationships, Financial Gerontology and Elder Law practitioners need accurate information on the consequences and complexities of the interaction between family, financial and legal decisions, and changing family dynamics resulting from longevity. To fully appreciate the intricacies of family aging, professionals and practitioners must be aware of how gerontological and demographic dynamics interact to reshape the financial and legal responsibilities of family members, as both the (middle aged) children and (elderly) parents are living many more years than previously experienced.

Improvement in life expectancy has added more than years to life; it has added years to a person’s responsibilities in a family role as son, daughter, (daughter-in-law, son-in-law), parent, spouse, and grandparent. This longevity factor alone has had profound consequences for family aging. Recent changes in other demographic factors—such as the timing of marriage, divorce, and fertility—are simultaneously altering the number of years spent in family roles, thereby changing the demands on families and family members and their resources. Financial Gerontology and Elder Law practitioners need to consider these factors when advising middle-aged or older clients and their families.

Current literature and media discussions frequently focus on the family aging concerns of the “sandwich generation,” presenting a female family portrait of a harried 40-something mother juggling the demands of young children while providing physical care to an ill or disabled elderly parent. While the intensity of such a dual care-giving experience may be great, it is not the experience of the majority. Fewer than 14 percent of women aged 45–49 are providing parental care at any given time. Although nearly half of all daughters will provide care to a parent at some point over their lives, it will most likely be after the daughter’s 60th birthday. Nowadays, with aging parents living longer, the emergence of second families, and extended “young-adulthood,” the risk of being sandwiched is more likely to be felt by women

2. Elaine Brody, “Women in the Middle and Family Help to Older People,” The Gerontologist (October 1981). Brody was the first to illustrate the squeeze women in their 40s faced who were pressured or “sandwiched” between competing time demands of aging parents and young children (elementary-aged or younger children). While the term has become common in the literature when discussing family caregiving issues, it does not address middle-aged men and women facing competing financial demands between aged parents and young and young-adult children.


4. Id.
(and increasingly by men\textsuperscript{5}) in their late 50s, 60s, and even 70s—which is why we have introduced the concept of the “Senior Sandwich Generation.”\textsuperscript{6}

The historical context of the traditionally defined Sandwich Generation (that of caring for young children while simultaneously providing care to aging parents) initially was driven by the demographics of the 1960s and 1970s. Today’s family structure is different. Societal changes such as later marriage, later childbearing, later divorce, and remarriage has raised the age at which men and women enter these important family roles. Increasingly, young adults are returning home to live before launching into self-sufficient adulthood.\textsuperscript{7} Thus, the “children” being cared for by today’s middle-agers range from infancy to mid-twenties, with the middle-ager’s own parents being in their 80s and 90s. In this contemporary scenario of family aging, members of the sandwich generation are most likely to be in their 60s and 70s, with the more appropriate designation, Senior Sandwich Generation.

Financial Gerontologists and Elder Law practitioners need to appreciate the changing demographics that “cause” the Senior Sandwich Generation. Longer-lived parents have implications for the responsibilities and behavior of their middle-aged kids. One study of the demographic history of American families examined the proportion of time women spent in various family roles. This study found that from 1900 to 1980, the amount of adult lifetime lived with at least one parent age 65+ increased from 15 percent to 29 percent, doubling the time adult children are “at risk” for caring for an aging parent.\textsuperscript{8} Building on this research and looking ahead to the boomer experience, this suggests that the portion of a boomer’s adult life with at least one parent aged 65 or older is likely to increase from the current one-third to almost two-thirds of the boomer’s adult life or nearly 40 years.

Parental longer life expectancy is only part of the emerging caregiving story. An analysis of decennial U.S. census data from 1900 to 1990 reveals that the number of middle-age children with one surviving parent was 80 percent in 1990, compared to only 39 percent in 1900.\textsuperscript{9} Furthermore, 27 percent of middle-age children had two surviving parents in 1990, compared to 4 percent in 1900 and only 8 percent as recently as 1940. Crucial to the concept of the Senior Sandwich Generation is the dramatic pattern found for “60-year-old kids.” The percentage of “60-year-old kids”

\textsuperscript{5} Lenard W. Kaye and Jeffrey S. Applegate, Men as Caregivers to the Elderly (Lexington Books 1990).
\textsuperscript{7} Many young adult children who see living with parents as a cost savings strategy make little, if any, financial contribution to the household. Comparisons of the 1990 and 2000 U.S. Censuses found that the “baby boomerangs” (age 18-24) living with parents increased from 25 percent to 56 percent for young adult sons and 25 percent to 47 percent of young adult daughters. Jason Fields and Lynne Casper, America’s Families and Living Arrangements 2000: Population Characteristics, U.S. Census Bureau pp. 20-537 (June 2001).
\textsuperscript{9} Peter Uhlenberg, “Mortality Decline in the Twentieth Century and Supply of Kin Over the Life Course,” The Gerontologist, (October 1996).
who had at least one surviving parent increased from 7 percent in 1900, to 13 percent in 1940, and to 44 percent by 1990.

Greater longevity for both the adult children and their parents increases the need for complex legal and financial planning. The combination of having more and older surviving parents means that, while they are legally and financially planning for their own retirement, many adult children will be helping their parents with caregiving and even financial support. Consequently, given the current political and financial realities, many Elder Law attorneys must provide an increasing number of older and middle-aged clients with advice about sophisticated asset preservation that goes beyond traditional estate planning.

Family Aging arises from longevity, but also from the age of persons at the time of first marriage, childbirth, divorce(s), and remarriage(s). The growing incidence of later marriage inexorably leads to later childbirth, divorce, remarriage, and second families, all contributing to the aging of the family structure, i.e., Family Aging. Remarriage and later life childbirth are more common today than in the past. Currently, it is not unusual for men in their late 40s, 50s, and even 60s to become new fathers. Many more women delay childbirth until after age 35. At age 60, the 40-something new parents may find saving for retirement, child tuition costs and parental care more overwhelming than anticipated.

Research studies show that during the past decade young adult children have become increasingly dependent on their parents. Returning home to live with Dad and Mom increasingly has become an accepted (and in many cases, anticipated) experience with little social stigma attached to it. Few parents will turn out their children even if that places a financial burden on them. From the perspective of Financial Gerontology, for the middle-aged the cost of such “large ticket items” as their kids’ college tuition and the strains of children returning home occurs just when their responsibilities to their own elderly parents are growing, thus exacerbating their

10. Rose M. Kreider and Tavia Simmons, Marital Status 2000: Census 2000 Brief, U.S. Bureau of the Census, available at http://www.census.gov/prod/2003pubs/c2kbr-30.pdf (October 2003). The trend in later marriage began with the early boomers delaying marriage an average of 2 years compared to their parents (who married at age 22.8 for men and age 20.3 for women in the 1950s) with boomer men marrying on average at age 24.7 and women at 22.0 years old. The later boomers (born 1956-1964) delayed marriage even further—an average of 4 years later than their parents (men, 26.1 and women 23.4 years old).
13. Id. The 2005 study found that 57 percent of boomers were their children’s primary financial support regardless of the children’s ages (under and over age 18). Another 18 percent of boomers partially financially supported their young adult children (aged 18+). Less than 20 percent of boomers with children reported that they gave no financial help to their children over the previous year.
role as the supportive half of the senior sandwich—a role that can continue for a substantial number of years.

III. THE SENIOR SANDWICH GENERATION: A 21ST CENTURY UPDATE OF A WELL-ESTABLISHED IDEA

While the traditional sandwich generation family continues to be an important part of the sociology of the American family, our gerontological and demographic research indicates that financial and legal professionals alike increasingly will be called upon to serve a growing number of families characterized as the Senior Sandwich Generation. Table 1 provides results from our recent study of the Senior Sandwich. We found that nearly half of those age 50-59 had a living parent, and slightly less than half (46 percent) had children age 24 or under living at home or to whom they were providing financial support. The Senior Sandwich Generation are those who are simultaneously in both categories. As seen in Table 1, even 20 years ago, 25 percent of persons age 50-59 were Senior Sandwiched. Not unexpectedly, there were fewer 60-somethings who had both living parents and children at home. Nonetheless, 3 percent were still “60-year-old kids” who are potentially caught between two dependent generations. Today, in 2007, the percentage of those “sandwiched” is undoubtedly higher.

<table>
<thead>
<tr>
<th>Middle-age (kids)</th>
<th>Parent(s) Living (%)</th>
<th>Children (%)</th>
<th>Senior Sandwiched (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age 50 to 59</td>
<td>49%</td>
<td>46%</td>
<td>25%</td>
</tr>
<tr>
<td>Age 60 to 69</td>
<td>19%</td>
<td>21%</td>
<td>3%</td>
</tr>
</tbody>
</table>

*Data from The National Survey of Families and Household (NSFH), 1987*

Family Aging and boomers who are “senior sandwiched” are of concern to both Elder Law and Financial Gerontology professionals. Middle-aged adult children are providing financial help to multiple generations—40 percent to parents and 80 percent to children. Being a member of the Senior Sandwich Generation can have dramatic consequences for the accumulation of wealth for retirement, health costs, long-term care, and for the expenditure stage of the Wealth Span. Those “sandwiched” may be forced to defer their own retirement in order to meet simultaneous financial obligations to children and parents. Furthermore, Family Aging challenges are arising just as retirement security is decreasing because of potential and actual changes in Social

14. The data are from the 1987 National Survey of Families and Households (NSFH), a nationally representative sample of 13,007 men and women age 18 and over. Personal interviews collected detailed information on all family children living in the family household and elsewhere, on the respondent’s parents, and on financial and social attributes of the family.

Security, defined benefit versus defined contribution pension plans, and the financing of health care.\textsuperscript{16}

Family decisions arise against the complex backdrop of existing family structures, current and perceived future needs, and competing demands placed on limited resources and family members. Increasing longevity pushes parental caregiving to older and older ages, and creates a need for decisions and demands to be made by older and older “adult kids.” These extended-caregiving demands, legally, financially, and physically burden middle-agers who are preparing for their own retirement. Changing family demographics produces greater complexity for the 50- and 60-year-old as both child and parent, precipitating new challenges with push-and-pull pressures on limited resources of time and money. Financial Gerontology and Elder Law practitioners must understand and respond to these complexities affecting family dynamics, financial and legal decisions and family aging if they are to effectively serve their middle-aged and older clients.

\textbf{IV. The Filial Fraction: A New Planning Tool for Legal Professionals}

Saving for one’s own old age, including retirement income, health, and long-term care costs during working years for an extended retirement, is essential. Since the role of Financial Gerontology and Elder Law practitioners is to prepare clients for both expected and unexpected future situations, it is critical to anticipate the additional potential impact of elderly parents on legal and financial planning. To help middle-aged clients more fully appreciate the magnitude of child-parent relationships and potential responsibilities in this age of extended longevity, we have developed a new planning tool based on the Senior Sandwich Generation research, referred to simply as the “Filial Fraction.”\textsuperscript{17}

The Filial Fraction is defined as the percentage of a person’s adult life during which an elderly parent is also alive. This numerical tool provides legal and financial practitioners with a method to demonstrate in quantitative terms the client’s potential risks of providing assistance (financial, legal, health, residential, and caregiving) to an aging parent. The Filial Fraction is not a pronouncement that aging parents by definition are a burden. Rather, it is a planning device to visualize or even to dramatize the client’s increasing potential responsibilities in the context of Family Aging, in general, and the Senior Sandwich concept in particular.

The Denominator of the Filial Fraction is the number of years the middle-aged child has been an adult—which we define as 20 years old. For a 60-year-old child the

\textsuperscript{16} Cutler, \textit{supra} n. 2. Chapter 5 provides an in-depth discussion of the historical changes in balance between the accumulation and expenditure stages. The age intervals for the accumulation stage have moved from about age 20 through age 67 in the 1930s to age 30 through age 70 in 2000. Meanwhile, the expenditure stage at old age lengthened nearly 10+ years. The Senior Sandwiched will need to adjust their accumulation stage to meet financial obligations of family while planning for retirement.

numerator is 40.\textsuperscript{18} The Numerator is the number of years the elder parent has been age 75 or older. For an older parent who is 90 years old the Numerator is 15. The son or daughter is appropriately in the Denominator, as the potential burden is on his or her shoulders.

<table>
<thead>
<tr>
<th>Table 2. The Filial Fraction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Numerator = number of years parent is “old” (age 75 or older)</td>
</tr>
<tr>
<td>Denominator = number of years child is “an adult” (age 20 or older)</td>
</tr>
</tbody>
</table>

**Case I: 2007**

<table>
<thead>
<tr>
<th>Agnes, Age = 90</th>
<th>David, Age = 60</th>
</tr>
</thead>
<tbody>
<tr>
<td>Years &gt; 75 = 15 years</td>
<td>Years as adult = 40 years</td>
</tr>
</tbody>
</table>

David & Agnes’ Filial Fraction in 2007: $15/40 = 38\%$

**Case II: 2017**

<table>
<thead>
<tr>
<th>Agnes, Age = 100</th>
<th>David, Age = 70</th>
</tr>
</thead>
<tbody>
<tr>
<td>Years &gt; 75 = 25 years</td>
<td>Years as adult = 50 years</td>
</tr>
</tbody>
</table>

David & Agnes’ Filial Fraction in 2017: $25/50 = 50\%$

Table 2 offers two Case Examples to illustrate the calculation of the Filial Fraction. Case I, for the year 2007, describes David, the 60-year-old son of Agnes, his 90-year-old mother. The Numerator is 15 (90-75=15); the Denominator is 40 (60-20=40), resulting in a Filial Fraction of 38 percent (15/40=38\%). Although David may not have current concerns about his mother’s legal, financial, or health status, the potential does exist. The Filial Fraction as a planning tool provides a quantitative method and alerts both the advisor and the client to potential responsibilities.

Fast forward to the year 2017 (Case II). David is now 70 and his mother has survived to 100 years old. The Numerator (Agnes) is now 25 (100-75=25) and the Denominator is 50 (70-20=50). David’s Filial Fraction is 50 percent (25/50=50\%). In other words, by 2017 David will have spent half of his own adult life with an older parent during which time he has been anticipating, planning, and saving for his own later years. The usefulness of the Filial Fraction is that it provides an instrument to help clients perceive and estimate their potential responsibilities for an aging parent, given the contexts of Family Aging and the emergence of the Senior Sandwich Generation dynamic. It provides the Financial Gerontologist and the Elder Law attorney with a research-based tool for explaining to and discussing with the client (and client’s family) the complexities of family aging, and how to best prepare them for the future.

\textsuperscript{18} For a colorful discussion of the “60-year-old kid” phenomenon in financial and legal terms, see Lee Eisenberg, *The Number: A Completely Different Way to Think About the Rest of Your Life* (Free Press 2006), Chapter 9.
V. EPILOGUE: THE TENSIONS OF DIMINISHING FINANCIAL BALANCE

As experienced Elder Law practitioners know all too well, families caught in the Senior Sandwich dilemma need advice about asset preservation and long-term care advice, and how best to use their income and savings. All counsel must be framed within the context of “who is the client.” Ethics requires the lawyers to provide counsel directed to those to whom their loyalties have been established. The National Academy of Elder Law Attorneys has confronted potential tensions between family members and the client by publishing aspirational standards for its members, which place a high duty of responsibility on the Elder Law Attorney.

First, the attorney must maintain confidentiality and honor conflicts of interest. The Academy’s aspirational standards go further and direct attorneys to first identify who is the client: the family or the elderly individual. The attorney must next meet privately with the older adult to confirm competency and to reduce the potential of undue influence. Of frequent concern is the financial status of the elderly person, because sometimes the family contacting an attorney is the result of the elder person’s children desiring financial control of their parent’s assets. Understanding the factors driving Family Aging helps to perceive and plan for such eventualities.

Consider the dutiful daughter, Joy. Living near her mother, she has been driving her mother to the doctor, grocery store and hairdresser, and providing increasing assistance as her mother grows feebler. Now, her mother needs a higher level of care as her memory declines, and the demands on Joy have increased. As a result, Joy has been forced to take sick days from work to care for her mother. At the same time, Joy’s daughter is entering college and the stress of the competing demands—financial and time constraints—have increased. She has limited choices: reduce work hours to care for her mother, tap into her own savings and retirement to care for her mother, increase student loan amounts for her daughter’s education, or tap into her mother’s resources. How to advise Joy, as well as protecting her mother, is the duty of the Financial Gerontologist and the Elder Law attorney. Understanding the sources of Joy’s stress is the first step towards resolving her problems.

Advanced planning, in concert with a Financial Gerontologist and an Elder Law Attorney using the filial fraction tool to alter potential competing demands of the aging

19. Any effective multidisciplinary intervention involving law and aging involves the creative engagement of both the researchers and the practitioners. In this context the authors are grateful to A. Frank Johna for this Epilogue illustrating application of Financial Gerontology to Elder Law practice. Mr. Johna is no stranger to either Elder Law or the practice considerations of Financial Gerontology, being a former President of NAELA and a current faculty member of the American Institute of Financial Gerontology.


23. See NAELA Aspirational Standards, supra n. 22, at 8.
family, could have saved both Joy and her mother stress and resources. Working within the guidelines of The Academy’s aspirational standards with an understanding of the four lenses of aging will result in less family and financial tensions through the aging process.
ANNUITY POLICY:
CONSUMER PROTECTION ISSUES AND PUBLIC POLICY
RECOMMENDATIONS

A WHITE PAPER PREPARED BY THE NAELA ANNUITY TASK FORCE:

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EXECUTIVE SUMMARY

1. INTRODUCTION

Annuities have become one of the most popular investment choices of America’s senior population, but also tend to be misunderstood by those who purchase them and even by those who sell them. Seniors have flocked to annuities out of a sense of security stemming from fears of market risk or concerns about low interest rates. The broad use of annuities in investing leads to certain consumer protection issues that uniquely affect seniors in the financial service marketplace.

Annuities are highly regulated by state insurance departments and are given financially advantageous tax status by the Internal Revenue Code. Certain annuities are exempted as a countable resource under the federal Medicaid rules. However, the use of these annuities can range from appropriate to abusive depending on the type of annuity and personal situation of the owner.

Elder law attorneys need to understand better the positive and negative issues surrounding annuities to be better advocates for their clients. Public policy makers should understand both the vital role of annuities in the lives of seniors planning their retirements and the exposure many seniors have to abusive marketing of a financial service that could potentially be a disservice to the consumer. Finally, seniors who purchase annuities must understand how to balance the needs of the healthy spouse with the needs of a spouse requiring long-term care.

2. PURPOSE

The purpose of this White Paper is to:

a) help the reader understand the mechanics of what annuities actually are, their wide variety, their benefits, and their pitfalls;
b) provide the unique perspective of the elder law community in both the
use and abuse of annuities as they relate to retirement planning and long-
term care planning; and

c) present recommendations to address Medicaid and consumer protection
issues that involve the marketing, sale and use of annuities by seniors.

3. ELEMENTS OF THE WHITE PAPER

The White Paper is divided into three sections:

a) Understanding Annuities: This section enables the reader to sift through
the various types of annuities and provides insight into the nuances of
different annuity contracts, the design of the annuities, the use of the
different annuities, and the common misunderstandings surrounding
annuities.

b) Medicaid Planning with Annuities: In 1993, federal rules were adopted
that significantly impact the use and treatment of certain types of
annuities under the Medicaid program. This section explains the
common usage and treatment of these annuities, including their important
role for many seniors who rely on them to preserve income when a
spouse enters a nursing home. The scope of the impact of the Deficit
Reduction Act of 2005 on the use of annuities in relation to Medicaid
eligibility is also explored and contrasted with prior law.

c) Consumer Protection Issues: Annuities have strong selling points, but
oftentimes the details are not understood by the unsuspecting or
unsophisticated consumer. This section helps the reader learn the or learn
about the inappropriate marketing techniques used to sell annuities to
seniors, the positive and negative features of annuities, and the confusion
that many seniors have when using annuities as an investment. The
section makes several key public policy recommendations that, if
adopted, will provide significant consumer protections for seniors.

WHITE PAPER

1. UNDERSTANDING ANNUITIES

1.1. What is an Annuity?

Before it can be readily understood what role commercial annuities play in
retirement and estate planning, it is beneficial to have a thorough understanding of
what exactly is an annuity. Because the term “annuity” is a generic term referring to a
wide variety of investments, knowing the differences will assist in understanding the
multiple uses of the investments by seniors and by elder law attorneys.

Generally speaking, an annuity, which comes from the root word “annual,” refers
to a type of investment that pays the investor a set amount of money each year for a
number of years. Typically annuity investments paid the investor at regular intervals
(i.e., annually or monthly). This traditional concept of an annuity is quite outmoded
because the concept has been significantly expanded by those companies selling annuity investments. These investments are extremely popular with retired people. The reason for this lies in the inherent characteristics of annuities and how they are perceived as satisfying the investment needs of seniors.

Any investment must be evaluated on the basis of difficulty of realizing the return, risk of loss, and the waiting period. If Abner wants to borrow a dollar from Ben, he has to give Ben an incentive to make the loan. For example, Abner says, “If you loan me a dollar today, I will pay you back $1.10 tomorrow.” Depending on what Ben knows about Abner, that might be a good investment. If Abner is a good risk, time is the major factor and 3650 percent annual interest is a good rate. However, if Abner says, “If you loan me a dollar now, there are two dollars on my kitchen table that you can have when you come to my house.” Ben has to decide whether it is worth the effort to go collect the return on his investment. As an example of how the issues of return, risk of loss, and the waiting period come together, assume that Abner says, “If you loan me a dollar, I will pay you back $1,000 at noon on the observation deck of the Empire State Building, ten years from today.” In the next paragraphs these investment characteristics of annuities are analyzed.

For instance, let’s take a look at the difficulty of realizing a return. Annuities can be purchased at most insurance offices, banks, or investment houses, merely by filling out an application and signing a check. A simple form is signed and mailed to effect a return of the principal and accumulated interest. In this respect, annuities are easier than U.S. Savings Bonds to own and liquidate.

Fixed annuities are also low on risk when compared to typical equity investments. Risk is the probability that an investor may suffer a loss of principal or anticipated interest if a particular investment fails to perform as expected. Everyone knows stocks go up and go down. Over the past ten years or so, it has become a truism that, given enough time, stocks always go up. With the tremendous amount of market volatility, seniors have sought to be less reliant on equities because of the risk that they will not be able to wait out market recovery.

Without factoring in the surrender charges/penalties for early withdrawal, fixed annuities are comparatively low risk compared to similar type investments because insurance companies issuing annuities have higher reserve requirements protecting their instruments than banks do for CDs. Therefore, even though bank deposits have FDIC protection, a reasonably solid insurance company is as safe a repository for one’s funds as a bank.

Many annuity concepts stem from the payment style of a pension. A pension annuity pays the pensioner a monthly annuity payment for the pensioner’s lifetime, and in an advanced hybrid, the payment stream, or a reduced amount, is paid to the pensioner’s spouse at the death of the pensioner. These pensions are often funded by monies in a general pension fund that are contributed by the pensioner’s employer or by the government. Commercial annuities are rooted in this style of pension, with the pensioner contributing the funds that generate the annuity payment. However, the unifying characteristic of this type of annuity is that the payment stream ends on the death of the annuitant.
When using the generic term “annuity” in the practice of elder law, most clients generally tend to hearken back to the early form of the annuity based upon the pension concept. With healthy trepidation, many fear or dislike even the term annuity as it refers to such a style of investment, because they believe the annuity to operate under these traditional terms: funds are given to the annuity company (i.e., a licensed life insurance company) and the annuity company pays the funds back to the annuity owner for life, and base the monthly amount on a payout that would repay the total investment with interest over the annuity owner’s actuarially determined life expectancy.

Under these terms, the annuity owner “wins” if he or she outlives her life expectancy because the annuity company will be forced by contract to give the annuity owner more money back than the company had planned when it based the payout on life expectancy. However, the annuity company “wins” if the annuity owner dies before his or her life expectancy, with the annuity company keeping the remainder of the funds that would have been used to fund the promised payments. These unfavorable terms, coupled with a general dislike of insurance companies and/or a general distrust of large companies or organizations, led to a generally negative view of the traditional annuity because of the fear of not getting back the funds that were used to fund the income stream.

There have been significant advancements in annuities. Many modern annuities never actually make a regular payment. Because of the explosion in the use of annuities and the sophistication of the annuity products which are sold, coupled with the traditional understanding of the concept of annuity, there is often a great deal of confusion about what exactly is an annuity.

Seniors are not alone in their lack of understanding of the multiple styles and functions of the modern annuities. Even many of the annuity salespeople (also known as “life insurance agents,” “financial advisors,” “senior planners,” and other terms commonly used to soften the concept that the annuities are being sold and are a life insurance product) struggle to understand the products they sell. Most elder law attorneys are at a disadvantage, having never been licensed to sell annuities and never having direct involvement with the investments.

1.2. Immediate v. Deferred Annuities

The first subdivision of annuities is the “immediate” annuity and the “deferred” annuity. Every annuity can be generally categorized as one or the other. The immediate annuity distributes a payment according to a plan that is initiated immediately upon the purchase of the annuity. A deferred annuity is one that has not been “annuitized.” Since taxation is deferred to the time when funds are withdrawn from the annuity, or death, which is essentially a forced withdrawal/payout, these investment accounts are referred to as “deferred” annuities.

Immediate annuities can pay in many ways. The traditional annuity is an immediate annuity. However, to ensure that the annuitant or the annuitant’s estate will recoup most or all of the benefits, many immediate annuity contracts guarantee repayment of principal with interest over a term certain, or over life with a guaranteed
minimum number of years. For example, a “term certain” immediate annuity would be one where the investor placed a lump sum into the annuity and chose a term certain (i.e., 5 years or 10 years) for the annuity company to repay the principal. During that timeframe for repayment, if the annuitant dies, the remaining payments due by the company are paid to the beneficiary listed in the contract.

It is important to understand that annuities which are “actuarially sound” under OBRA ‘93’s legendary clarification in HCFA Transmittal 64 are immediate annuities. Under the guidelines laid down in Transmittal 64, an annuity that pays out during the life expectancy is excluded from the assets considered available to pay for care in a nursing home under Medicaid rules. These rules, discussed in greater detail below, are complex and widely misunderstood. This creates an opportunity for sales agents to misrepresent their products as Medicaid shelters, even where there is no Medicaid advantage in the annuity at issue.

Immediate annuities (lifetime, fixed term, and minimum term) are useful to supplement income and quite often settlements in lawsuits are annuitized, or “structured.” Immediate annuities are also a great way to force an installment payout to an heir or beneficiary without the maintenance and paperwork associated with a discretionary trust or other interlocking device to provide ongoing fiscal protection of the potentially spendthrift heir.

Immediate annuities can pay annually as well as monthly, and annuities do not have to pay in equal payments. They can pay out with an increasing benefit (i.e., monthly payment or annual payment steadily increases or increases once a year for the term of the annuity payout period). Another style, which is popular in some states for Medicaid planning, pays the annuitant a minimum amount on a monthly basis with one large “balloon” payment or lump sum payment in the last month of the term. For example, a classic balloon annuity will pay out for the annuitant’s life expectancy of five years and makes small principal payments of $10 plus interest for 59 months, then a final payment of the remaining principal in month 60.

Apart from their Medicaid uses, these annuities are unpopular because they are irrevocable and usually pay low interest, compared to deferred annuities. Even when used for Medicaid planning, the owner could be at a disadvantage if he or she leaves the nursing home and the funds are needed. The immediate annuity also lacks any tax advantages that characterize the deferred annuity.

1.3. Variable v. Fixed Annuities

The two general types of tax-deferred annuities are “variable” and “fixed.” Variable annuities have separate accounts within them that buy shares of equity investments, similar to mutual funds, and have the ability to rise in value with the stock market and fall in a bear market. Variable annuities are rated by the percent of participation. A 60 percent variable has three-fifths of its value in equity investments and the rest in interest-bearing funds. Some variable annuities have protection against loss from year to year. Even if the market tanks, the annuity cannot end the year with a lower value than it had at the end of the previous year, or with less than a specified percentage of growth.
Fixed annuities tend to be safer by nature in that they earn guaranteed interest, and the interest accrues without the generation of a Form 1099 until the funds are withdrawn or the annuitant dies. The tax deferral generally allows for the excess earning of interest on funds that would have typically gone to satisfy the taxation requirements of a similar taxable account, such as a certificate of deposit or money market account.

The variable annuity is all or partially stock-based and allows the annuity owner to change investments within the annuity similar to the buying and selling of direct equities or mutual funds through a broker. Because of the close similarity to the sale of equities, the annuity agent must not only be licensed to sell life insurance through a state regulatory agency, but must also be licensed and registered with the National Association of Security Dealers (“NASD”). This entails additional burdens and safeguards on conduct, product representation, marketing, and correspondence with the consumer.

Variable annuities are different from the direct purchase of an equity investment in that they incorporate a life insurance provision within the policy that typically pays the “high water” value of the contract at the death of the annuitant, less any withdrawals. For example, if you invest $50,000 and the account value decreases from a stock market decline to $25,000, the annuity owner would only have the $25,000 available and may be unable to declare a loss on the investment. However, if that same annuitant dies, assuming no lifetime withdrawals, the beneficiaries will receive $50,000 because of the death benefit associated with the highest value of the account during the annuitant’s lifetime. This is a subtlety that commonly presents a trap for the unsuspecting investor. Transferring the account balance to some other investment type would protect the remaining principal against market loss and reduce or eliminate the fees charged on the annuity, but would cause the surrendered variable contract to lose its death benefit.

Another reason why variable annuities rank as unpopular is the fees that are associated with the contracts. Most variable annuities have fees which are paid to the annuity company on a regular interval (i.e., monthly, quarterly, or annually). The mortality charges for the death benefit in the annuity are also associated with the fee structure in the contract. Oftentimes it adds insult to injury for an investor to lose a great deal of fund value in the account due to market loss and still have additional loss during the same timeframe from the annuity because of the fees which are deducted from the account. In addition to these fees, variable annuities have additional fees, similar to those found in fixed annuities, which are referred to as “surrender charges.” Surrender charges are generally charged as a percentage of the overall account and charged against the full or partial surrender of the policy.

Fixed interest deferred annuities, in their simplest form, generally pay a declared interest rate which is credited to the account on a regular interval. The interest rate paid can be a static figure paid for a guaranteed certain number of years, or can be tied to some marker, such as the prime rate, and can go up or down depending on moves the Federal Reserve makes during the calendar year. However, with the growing complexity and sophistication of these types of accounts, many have come up with
much more clever and/or complicated ways of declaring earned interest on a fixed annuity.

1.4. Equity Index Annuities

One of the most popular types of fixed annuity is the “equity index annuity” or “EIA,” because it boasts the ability to protect principal, yet still potentially earn a double-digit return. The interest rate is, in some way, connected to a stock market index, such as the Dow Jones Industrial Average, S&P 500, or the Russell 2000. These investments can be a very effective tool for the investor who likes safety but does not want to trade that safety for low returns. However, the numerous types of contracts that are available can be confusing. These contracts often have caps on how much interest can be earned in a year or a month, participation rates which limit the interest rate paid on the contract as a percentage of the growth of the equity index, and/or a reduction in the total interest rate as a fee that reduces the total amount credited to the account. The principal in these accounts is not subject to stock market declines and generally has a stated minimum rate of return, which makes these accounts extremely popular.

These accounts generally have very high surrender fees and longer surrender terms, which may prevent an unhappy investor from removing the funds from the annuity if they are unsatisfied with the product. Most typical fixed annuities have standard surrender periods with decreasing fees usually for a period of five to ten years, on average. For example, an annuity may have a surrender charge in year one of the contract of 10 percent, which decreases every year by one percent until after year ten, when there would be no surrender charges. For more complicated equity index contracts, the surrender charges could be as stiff as 25 percent and the investment term could extend out to 15 years or more. However, most contracts have some liquidity provisions that anticipate the need of the investor to make a withdrawal of principal and/or interest on a regular basis or in an emergency situation. Most accounts will allow for 10 percent withdrawals of account balance per year without a penalty, while some allow for lower percentages and put a cap on total withdrawal during the lifetime of the contract.

Annuities also pay healthy commissions to the salespersons who sell the annuities; however, commissions for sales of deferred annuities are generally much higher than those of immediate annuities, including OBRA ‘93 annuities, and are not much higher than traditional commissions on other investments or consumer goods sold to seniors that are also unavailable resources during a Medicaid spend down (i.e., pre-paid funerals, vehicles, appliances, etc.). Annuity commissions for immediate annuities depend upon the length of the term of the income stream. Since the income stream is based on life expectancy, those utilizing the OBRA ‘93 annuities are generally older having shorter life expectancies. With the lower life expectancies requiring the contract term to be relatively short, these type of annuities generate a lower commission than the deferred annuities.

While the nature of these deferred annuity investments seem quite distant from what the traditional concept of what an annuity was, the deferred annuities generally
have additional liquidity provisions that allow for the annuitization (creation of an income flow to the annuitant), from the accumulated cash value of the annuity. An investor can purchase a deferred annuity with a lump sum investment and several years into the contract, after interest has accrued over time, choose to annuitize the funds in the same way an immediate annuity is designed to distribute income to the annuitant. Most deferred annuities are never annuitized because the liquidity provisions within them generally allow for sufficient access to the funds in the investment and the irrevocable nature of the resulting immediate annuity stream generally gives the annuitant a reduced sense of security in retirement because they lose access to lumps sums of cash for emergencies or unanticipated needs.

Deferred annuities have been a relatively popular investment, of late, because of the waning interest rates that other typically safe investments, such as certificates of deposit or money market funds, are paying investors and because of the additional advantage of tax-deferred growth on the investment. This presented a severe problem to banking institutions which saw investors cashing out their CDs and putting the funds in annuities. Banks successfully lobbied regulators to allow for the sales of annuities right in the banking institution by bank tellers or “investment advisors” conveniently positioned in the bank lobby. Banks have even begun posting interest rates paid on fixed annuities similar to the postings on the wall that indicate the going interest rates on CDs and other accounts. Because the bank is endorsing and selling the annuity there is often confusion about the fact that the annuity is not insured by the FDIC.

Annuities, like other tax-deferred investments, such as savings bonds, can have a positive tax benefit on seniors collecting social security. When a retiree receives social security, taxation on social security is affected by the income reported in any taxable year. If the senior is single and has more than $25,000 in income, including interest income, 50 percent of the social security benefit is considered taxable income; if the senior is single and has $34,000 or more in income, including interest income, 85 percent of the social security benefit is considered taxable income. The higher the income is, the more the taxation on social security benefits. Shifting income-producing assets to a tax-deferred investment like a fixed annuity can reduce the annual income reported on the tax returns and possibly, in turn, reduce the taxation of social security benefits.

1.5. Obra ‘93 Annuities

Annuities factor prominently in the practice of elder law due to the passage of OBRA ‘93. The Act specifies the availability of certain annuities when qualifying for Medicaid benefits. The allowance of certain types of annuities was enacted for four

1. On November 12, 1999, the 106th U.S. Congress passed and the President signed into law Public Law 106-102. Its title was the Gramm-Leach-Bliley Act (also known as the Financial Modernization Act of 1999).

2. In August of 1993, Congress passed the Omnibus Budget Reconciliation Act (referred to as OBRA ‘93) which changed the Medicaid rules pertaining to the transfer of assets.
main reasons. First, as a matter of public policy to discourage the use of divorce in Medicaid planning, the government decided to allow for certain assets to be annuitized for the financial security of the community spouse. Second, the tidal shift from defined benefit plans (i.e., pensions) to defined contribution plans (i.e., 401(k), 457, 403(b), etc.) shifted the retirement resources from unavailable to available under the antiquated Medicaid rules. The ability to take those funds in the defined contribution plan and create a private pension by the annuitization of those funds allows a community spouse to rectify this problem if a nursing home stay is required. Third, the government generally tends to encourage private contracts and therefore is generally respectful in its planning of private contracts between annuitants and annuity companies which irrevocably make annuity premiums unavailable when an immediate annuity is purchased. And finally, the lengths to which the Medicaid agency would have to go to get access to clearly unavailable funds used to fund such immediate annuities would not be cost effective.

HCFA Transmittal 64,\(^3\) which clarified OBRA ‘93, defines which annuities are unavailable as a resource when paying for long-term care expenses. The basic premise of the annuity is that it must pay the annuitant back over the annuitant’s life expectancy, as defined by the Transmittal. Annuity payments made after the annuitant’s life expectancy appear, on their face, as a payment meant to be made to the beneficiary of the annuity, which the law was not necessarily meant to protect. An annuity which is paid out during the annuitant’s declared life expectancy is referred to as being “actuarially sound.” Additional requirements must exist, such that the annuity must be irrevocable, meaning the annuitant cannot have any access to the principal. The annuity must be non-commutable and unassignable, meaning that you cannot sell the annuity for a lump sum and cannot assign either the ownership of the annuity or the income stream, otherwise it would be available to be pledged towards the cost of care at the nursing home. Before the passage of DRA, some states additionally require that the annuity pay the annuitant in substantially equal amounts, while others require that the annuity pay the annuitant monthly only.

The Deficit Reduction Act of 2005 (“DRA”), signed by President Bush on February 8, 2006, added several requirements. When a person applies for Medicaid or when Medicaid is being redetermined, the application must disclose any annuity in which the person or the person’s community spouse has an interest, regardless of whether the annuity is irrevocable or is treated as an asset. The state’s application or redetermination form must “include a statement that . . . the State becomes a remainder beneficiary under such an annuity or similar financial instrument by virtue of the provision of such medical assistance.” The state must then “notify the issuer of the annuity of the right of the State under such subsection as a preferred remainder beneficiary in the annuity for medical assistance furnished to the individual.” The state may also require the issuer to notify the State when there is a change in the amount of

\(^3\) Transmittal 64 is no longer in existence. The rules on annuities embodied by the Transmittal have been incorporated into Part 3, Section 3257 of the State Medicaid Manual. This can be found on the Centers for Medicare and Medicaid Services website, at http://www.cms.hhs.gov/manuals/45_smm/sm_03_3_3257_to_3259.8.asp#_toc490734962.
income or principal being withdrawn. The state is directed to take the annuities into account in determining the person’s eligibility for Medicaid.

The DRA also requires annuities to name the state as the beneficiary to the extent that the state has expended Medicaid funds for the annuitant’s benefit. Otherwise, the purchase is treated as if it were a gift. While it is uncertain if the term “annuitant” was used intentionally in the legislative drafting of the DRA, typically the owner and annuitant of the annuity is the community spouse, who would, theoretically, not have any Medicaid expenditures on his or her behalf.

An Individual Retirement Account or Roth annuity under IRC § 408 or § 408A, or an annuity purchased with the proceeds of an IRA or a Roth IRA is explicitly permitted for Medicaid applicants and recipients. Otherwise, an annuity must a) be irrevocable and nonassignable, b) be actuarially sound, and c) provide for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments.

The new rules seem to permit a Medicaid recipient in long-term care, or the community spouse of such a Medicaid recipient, to have an annuity of unlimited value, as long it meets the three criteria in the preceding paragraph and the state is named as the first beneficiary after the community spouse for the amount of Medicaid expenditures. However, state regulations promulgating the DRA into practical form have not been issued yet by the various state agencies and it will be rather difficult to determine the way these regulations are enacted at the state level or if the states will act with the lack of uniformity that followed OBRA ‘93.

Misunderstanding of the annuities fosters misconceptions about what is and is not available to the nursing home during a Medicaid spend down when it comes to annuities. Annuity salespersons tend to make overbroad statements about the ‘safety’ of deferred annuity investment and quite often cross the line of unauthorized practice of law by making claims about the annuities as it affects the investor’s Medicaid eligibility. Deferred annuities are not qualified under OBRA ‘93 as an unavailable resource, but are often sold to the investor as though they were. Many deferred annuities are not designed to be annuitized in such a way that complies with Transmittal 64, which requires that they be surrendered and exchanged for immediate annuities with proper contractual language if the investor desires to utilize the annuity for allowances provided for under OBRA ‘93.

Medicaid departments complain that the use of annuities places an unfair burden on the states’ Medicaid budgets because they shelter assets from the Medicaid spend down requirements. However, the rules set forth in the Social Security Act and Transmittal 64 explicitly permit the use of these excludable annuities. Some states have tried to limit the use of annuities to protect additional assets for community spouses by defining the purchase of an annuity with excess funds as a gift that lacks fair consideration, or divestment. The new rules enacted in the Deficit Reduction Act of 2005 should make it clear that the purchase of an annuity to protect funds for the community spouse is permitted, provided the annuity is irrevocable, actuarially sound, has no cash value, and appoints the state as the beneficiary after the death of the annuitant in the manner called for by the statute.
This shows Congress’s intention that sound public policy is served by allowing the community spouse to keep more assets, making it less likely that he or she will need public benefits later or would have to resort to divorce to protect more than the resource allowance. Since a significant portion of long-term care is provided by unpaid family members, a case can also be made that residual payments to family beneficiaries are often repayments for extended in-home care provided by the family members before the parent went into the nursing home or for other expenses, such as the ongoing payments of taxes, insurance, or utilities for the residence that the patient was unable to afford during her or his stay in the nursing home.

2. Medicaid Planning with Annuities

2.1. Medicaid Overview

Medicaid (or MediCal if you live in California) is a federal program authorized in 1965 by Title XIX of the Social Security Act. This federal program provides federal resources to the states as a state/federal co-partnership towards providing medical services to the poor and nursing home patients. The program requires the individual states to organize, manage, and distribute resources, with various limitations and with some degree of latitude.

The federal rules allow for a general framework that each state must operate within. Certain areas or items are left individually to the states for clarification or legislation; therefore, while some of the principles of Medicaid planning are generally applicable throughout most of the country, each state has different, sometimes completely separate rules that apply. Given that the senior population tends to be more transitory, it would be advisable that any serious reform of the Medicaid rules also includes a standardization of rules that apply to annuities on a state-by-state basis. A person can easily purchase an annuity in one state and assume that it will be counted in a particular fashion, but enter a nursing home in another state to be closer to children or other loved ones that can look in on them, only to find that their annuity is treated completely differently in the different state.

2.2. Medicaid Eligibility

Medicaid rules generally require that certain types of assets held by a patient, a patient’s spouse or jointly with non-spouses, be considered when determining whether or not a patient is eligible for Medicaid assistance. These assets are considered “resources,” which, if they are determined to be “available” to the patient, are generally considered to be available for what must be spent prior to becoming eligible for Medicaid assistance. The federal rules give some guidelines on the types of assets considered as resources and amount of resources that can be retained while still making a person eligible; however, there is wide discrepancy between the states as to the specific figures and how these numbers are applied.

Generally, a person who is single (i.e., unmarried, widowed, or divorced) has a maximum amount of available resources, which is generally very low (i.e., $1,500 or $2,000 by way of example). This amount is known or referred to as the “Resource
Allowance.” Medicaid rules apply to married couples differently than if they were single, recognizing the need to keep the “at-home” or “healthy” spouse (known more formally as the “community spouse”) from going completely broke. Under the “Spousal Impoverishment” law, which was actually enacted to avoid the impoverishment of a community spouse, a formula is established to determine how many of the available resources must be spent before a person can be considered eligible. The use of an annuity is sometimes considered as one of the possible ways for a person in need of assistance under Medicaid to restructure an asset (in order to preserve the asset as income) for the community spouse.

2.3 Annuities in Medicaid Planning

Annuities have a favored status under the Medicaid laws that were passed in 1993 and continue to enjoy a more limited favored status under the 2005 DRA. The term “Medicaid Annuity” has been coined by those in the insurance business for those immediate annuities which meet the Federal requirements under OBRA ’93 and the subsequent HCFA Transmittal No. 64, dated November 1994, and the Deficit Reduction Act of 2005, which has yet to be reduced to a directive or regulation.

2.4. The “Actuarially Sound” Annuity

The money used to purchase the immediate annuity is converted from an available resource to an unavailable resource with an income stream. Using an income annuity this way may be beneficial if it is structured properly. The annuity income stream must begin prior to applying for Medicaid. According to HCFA 64, the annuity must be “actuarially sound.” In order to be considered actuarially sound an annuity must have life expectancy payout rates that are in accord with the mortality tables set forth in HCFA 64 §3258.9B. Many insurance companies do not naturally structure the annuity payouts of their immediate annuities in compliance with this rule. A payment period longer than the actuarial life expectancy may cause the annuity to be rejected as an unavailable resource or the excess payments that occur after the actuarial life expectancy may be considered to be divested at the time of the annuitization of the contract and create a divestment penalty.

Immediate Medicaid Annuities must be irrevocable contracts. Once the annuity has been purchased, the owner does not have the right to revoke the contract and obtain a refund. It is generally advisable to waive rights to any “free-look” period where the policyholder, by law, would have a right to reject the contract. Many states also require the annuity to be un-assignable, non-transferable and non-commutable. In other words, you cannot change the owner, the payee, the beneficiary, sell the policy, or change the benefit period. Once again, few insurance companies offer policies that carry these terms as a standard feature on their annuity contracts.

The DRA requires the first federally mandated payback provision by requiring the state to be named as a beneficiary.\(^5\) The purchase of an annuity is to be treated as the disposal of an asset for less than fair market value unless the state is named as the remainder beneficiary. If the Medicaid applicant has a community spouse or a minor or disabled child, then the state is to be named as a contingent beneficiary – read in the law as “beneficiary in the second position.” The law is quite specific that state is to be named as the remainder beneficiary for “at least the total amount of medical assistance paid on behalf of the annuitant” by Medicaid. If the community spouse is also the annuitant, it would follow that the annuity must include the state as a beneficiary in order to not be considered a transfer for less than fair market value and even though the state is named as a remainder beneficiary, since there was no medical assistance paid on behalf of the community spouse/annuitant, then no payback would be required at the death of the institutional spouse.

2.5. Annuities as Income

There are three types of payouts that usually tend to qualify as non-countable under the Medicaid rules, depending on the state regulation: level monthly payment, level annual payment, and a “balloon” payment. For many states, prior to enactment of the DRA a Medicaid Annuity must also pay out in substantially equal payments. This requirement is now universal under the DRA. The level monthly payout or the level annual payout fit the requirements by making payments that are equal for the length of time as determined by the life expectancy chart. For annual payouts, the life expectancy is generally rounded down to the nearest whole number and equal payments are made for that number of years. Annual payments are utilized in states where the policyholder would not want to add the monthly payment to the monthly income of the patient or the spouse thereby increasing the monthly patient liability.

Balloon payments were one of the reasons that Congress felt it necessary to address annuities with the DRA. Balloon payments came under fire and considerable scrutiny because they are effectively for single individuals where the primary purpose of the annuity is to transfer the wealth to the heirs/beneficiaries at the end of the life of the nursing home resident. These generally paid interest and a small portion of principal (usually $10) on a monthly basis and paid the remaining portion of the principal in the last month of the patient’s actuarial life expectancy. Many states have restricted the use of the balloon payment before the enactment of DRA as they saw it depriving the state of resources that should be used as part of the co-payment. The new Federal rules concerning annuities have indicated a desire at the policy level to restrict the use of the types of annuities that are purposefully designed to transfer wealth to the single patient’s beneficiaries that could be used to pay for that patient’s care, while not completely abandoning the valuable use that annuities provide.

\(^5\) 42 U.S.C. 1396p(c)(1)
2.6. “Noncommutable” and “Nonassignable” Annuities

An actuarially sound annuity must also be “noncommutable” and “nonassignable” in order to be unavailable as a resource. To be “noncommutable” means that a person cannot trade the income source for a lump sum payout from the annuity holder at any time during the lifetime of the annuitant. To be “nonassignable” or “unassignable” the annuity ownership or income stream must not be able to be assigned to anyone, but must remain the ownership and income of the original purchaser.

States have attempted to access irrevocable annuities that are both noncommutable and nonassignable by arguing that there is a valid secondary market where the annuity could be sold. States have likened the annuities to land contracts, which have a secondary market where a finance company will purchase the income from the land contract for a lump sum. Theoretically, if there were a secondary market for these annuities, the annuity would have a value on the secondary market that would be available if the annuity were sold on that market.

States have split over whether or not to consider this as a valid reason for including the annuity as an available resource. Gross v. North Dakota DHS (687 N.W. 2d 460 (N.D. 2004)) ruled against a community spouse who had not made a “good faith” effort to prove that her annuitized annuity was not sellable on a secondary market, thus counting the annuity as an available resource; however, in Estate of F.K. v. Division of Medical Assistance and Health Services, (374 N.J. Super. 126; 863 A.2d 1065 (App. Div. 2005)), the state Medicaid agency contended that there was a secondary market for the payment stream and that the possibility of liquidation was not adequately rebutted by the applicant. The appellate court held that the burden of proof of a secondary market is on the state agency, not the applicant, and the proofs submitted by state agency of a secondary market (i.e., internet websites advertising sales of structured settlements and lottery winnings) did not meet the burden of proof.

2.7. Annuity Payback

Prior to the passage of the DRA, separate moves by New Jersey, Minnesota, Louisiana, Michigan, and Washington had attempted to include annuities as assets that are recoverable by the state after the death of the patient or the death of the community spouse. The federal case of Johnson v. Guhl (91 F. Supp 2d 754 D.N.J. 2000) and New Jersey Appellate Division case of A.B. v. Division of Medical Assistance and Health Service, (374 N.J. Super. 460, 865 A.2d 701 (App. Div. 2005)), along with subsequent and consistent communication from the Centers for Medicare and Medicaid Services (“CMS”) all indicated that the state Medicaid agency cannot require that the state or the Medicaid agency be paid back, thus requiring Congress to incorporate a payback provision in the DRA. The court in A.B. v. DMAHS also agreed with prior decisions that an actuarially sound annuity in payout status is income, not a resource, and thus is not included as an asset that can be recoverable against. The DRA did not go so far as to recover against annuity income streams, but required a payback as part of a beneficiary designation in exchange for the annuity not to be considered a purchase of an asset for less than fair market value. One concern is that this will potentially force community spouses to accelerate the payment of annuity
proceeds so there would be no income or death benefit left available to pay the state back at the death of the annuitant or at the death of the community spouse if he or she is not the annuitant. Since qualified annuities appear to be exempt from this requirement in the DRA, fears are allayed that the DRA would force the healthy spouse unnecessarily to pay higher taxes because of the increased annual income bumping them up into a higher income tax bracket.

Because most annuities do not allow for a commuted value at the death of the annuitant, it is reasonable to conclude from the language in the DRA that the state would become an income beneficiary of the remaining payments, only up to the amount of money that the state has paid on behalf of the annuitant’s medical expenses. Since states generally prefer to have their money sooner rather than later, it may be possible to negotiate a settlement with the state for a fraction of the amount owed in a manner similar to the negotiation and settlement of a Medicare lien, thus saving the heirs of the Medicaid recipient a substantial loss.

2.8. Federal Case Law on Annuities

Johnson v. Guhl, mentioned above, and Mertz v. Houston (155 F. Supp 2d 415 D.PA. 2001) have both addressed commercial annuities at the federal court level. Each decision extensively cites MCCA and OBRA ‘93 and grant deference as a matter of case law to HCFA 64 as the effective rules pertaining to the countability and availability of the commercial annuities when determining Medicaid eligibility. In Mertz v. Houston the purpose behind the purchase of an annuity for Medicaid planning was scrutinized. The State of Pennsylvania had rejected an applicant’s Medicaid application on the grounds that the sole purpose was to achieve Medicaid eligibility. The Court ruled that because the purchase was for “fair market value” and “for the benefit of” the community spouse, both allowed under the federal rules, then the state could not impose a secondary test to scrutinize the intent of the transaction. Notably, the court in Mertz found that where a state adopts a conforming state Medicaid plan but then follows an unpublished eligibility requirement policy which conflicts with federal law, then the approved plan is subject to challenge.

It is reasonable to expect that if the DRA passes the numerous court challenges that seek to halt its enactment, then the lack of specificity and existence of ambiguity will lead to numerous issues that will require court interpretation or action to clarify the Medicaid applicant’s rights concerning the protection of their annuity policies.

2.9. State Law on Annuities

Thirty-five states have statutes or regulations dealing with annuities in reference to Medicaid eligibility. State court decisions in Ohio, Delaware, Louisiana, California, Wisconsin, Pennsylvania, and Iowa have all upheld actuarially sound annuities as non-countable resources. The vast difference between the states make it difficult for seniors that move from state to state. The following is an overview of each state’s policy on annuities at the time of passage of the DRA:

2.1.1. MEDICAID ANNUITIES NON-COUNTABLE AS A RESOURCE

Kentucky, Michigan, New Hampshire, New York, North Carolina, South
Carolina, Tennessee, Vermont, Virginia, and Wisconsin.

2.1.2. MEDICAID ANNUITIES NOT COUNTABLE WITH CONDITIONS
Arizona, Idaho, Indiana, Maine, Montana, Rhode Island, Nevada, North Dakota, Ohio, and New Jersey.

2.1.3. MEDICAID ANNUITIES NON-COUNTABLE IF IRREVOCABLE AND ANNUITIZED
Arkansas, California, Colorado, Florida, Maryland, and Alabama.

2.1.4. FOLLOWS EXISTING HCFA 64 GUIDELINES

2.1.5. MEDICAID ANNUITIES CASE BY CASE REVIEW
Connecticut, Kansas, Montana, Pennsylvania, and Vermont

2.1.6. MEDICAID ANNUITIES COUNTABLE AS A RESOURCE
Georgia, Iowa, South Dakota, Massachusetts, and Oklahoma.

2.1.7. MEDICAID ANNUITIES REQUIRE STATE PAYBACK
Louisiana, Texas, and Washington.

2.10. Recent Studies Concerning Annuities and Transfers

An October 2003 report entitled “The Role of Annuities in Medicaid Financial Planning: A Survey of State Medicaid Agencies” was published and disseminated by the National Association of State Medicaid Directors (“NASMD”). This opinion survey of State Medicaid Directors claimed that Medicaid funding was being depleted at a substantially faster rate because of the volume of applicants who were taking advantage of annuities. The report went so far as to recommend that annuities should be considered a countable resource for eligibility purposes.

By contrast, an independent study conducted by the Georgetown University Long-Term Care Financing Project seems to directly dispute the findings in the NASMD report. The Georgetown May 2005 report entitled “Medicaid: Asset shelter or safety net?” concludes that: “The argument that something needs to be done about abuses of Medicaid eligibility rules is not supported by the facts.” Although not focusing exclusively on annuities, the report also finds that while some Medicaid planning does occur, asset transfers are not widespread, and the planning is generally used to protect modest assets for future needs.

A third report was issued by the CNA Corporation under a federal contract from the Centers for Medicare and Medicaid Services (“CMS”) entitled “Analysis of the Use of Annuities to Shelter Assets in State Medicaid Programs” dated January, 2005. The report attempted to quantify the use and/or over use of annuities as a tool for Medicaid planning. While coming to a conclusion that the financial impact is far less than was reported in the NASMD report, the report demonstrated both the need for the presence of annuities in the Medicaid planning and some extreme cases considered to be abusive. Additionally, the report cites numerous consumer protection issues in the marketing of annuities that are similar to those issues discussed below. Finally, even

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though extensive interviews were conducted of state and local Medicaid agencies and caseworkers in the subject states of the study, the conclusions were: “Although most of those interviewed offered at least one recommendation for addressing the use of annuities by Medicaid applicants to avoid asset spend down, there were a few interviewees who were reluctant to suggest that annuities were such a large problem that changes to Medicaid policy were needed.”

3. CONSUMER PROTECTION ISSUES

3.1 Why are Annuities Well Liked by Seniors?

If annuities are the type of investments that continue to generate outcries from the press and advocates alike, why are they so popular with seniors – the very audience the press and the advocates want to protect? The answer lies in the inherent characteristics of annuities and how they are perceived as satisfying the investment needs of seniors. As explained in Section 1, annuities are easy to purchase and liquidate and most have a very low risk of loss.

3.1.1. The Risk Factor

Seniors are well aware of the inherent risks of equity investing, shaped from the losses that resulted in the crash of the stock market in 1929, the years of doldrums through the late sixties, into the early eighties just to get even from stock investments. Seniors know that stocks always have and always will involve risk. And most seniors do not want to accept significant risk when it comes to their savings. In fact, over and over, in focus groups across America, the same themes for seniors appear: they are concerned about being able to stay in their homes late in life; they never want to outlive their retirement savings; and they do not want to be a burden on their families. As a result, seniors tend to avoid equity investments.

Seniors are used to the “long view” of investing. Ten years is not perceived as a long time when you are in your seventies or eighties. Therefore, they are willing to accept longer penalty periods and tie their money up for greater lengths of time, discounting the risk of needing that money for their care. In addition, widespread anecdotal evidence in the practice of elder law indicates that when they have the facts fully disclosed to them, seniors are not interested in bonds or bond mutual funds, either. Bonds, or bond mutual funds, of course, are very susceptible to risk and fluctuations based upon interest rate market movements.

Real estate is not considered viable for most seniors, usually, beyond the home in which they reside, due to the costs and the requirements for active management. Very few seniors want to involve themselves in the complexities of precious metals or commodity investments, and they tend to look to strong financial institutions as safe routes to retirement security and financial independence.

That leaves fixed income investments, usually associated with some kind of guarantee of principal. The most obvious choices are certificates of deposit (“CDs”), contracts with banks, that are usually FDIC insured.
CDs offer relatively low rates of interest, restrictive terms and little or no access to funds while invested but the FDIC, an agency of the federal government, guarantees them. They entail little if any risk, aside from early withdrawal penalties. CDs are very easy to maintain; are readily available in the branch of the local bank; usually provide instant reinvesting by automatic ‘rolling-over’ upon maturity, eliminating any further decision-making; and in a pinch, the investor can walk into the bank and get her or his money, less penalties, of course, but access is easy and reassuring.

Very short term federal securities, notes and bills, are an alternative, but they tend to be complicated to purchase and are much more acceptable to the more sophisticated investor. In addition, they require action upon the part of the investor to participate and track them, requiring close monitoring when the instruments come due. Also, as interest rates begin to grow, these assets can lose value because they are not as marketable as other instruments of the same variety that pay higher interest rates.

3.1.2. Advantages of Fixed Annuities

Annuities are popular with seniors throughout the United States. The average amount invested is $44,000 and has been holding steady for many years. A contract that permits tax-favored accumulation of interest, eventually affording a choice of being converted into a stream on income, the annuity has become an investment with which seniors are comfortable. In spite of the fixed annuity being an investment designed to eventually provide a stream of income to its owner, in reality, about 95 percent of all annuities sold in the United States never become annuitized, instead being treated as savings accounts by owners.

The primary driver for the comfort of senior investors with annuities is the guaranteed aspect of the investment. Although there are no government agencies that guarantee annuity contracts, the financial strength of the insurance carriers themselves provides the risk-aversion needed by seniors to be comfortable. Additionally, some states require the insurance companies to pay into a state guarantee association which provides a reserve to protect life insurance and annuity policyholders against a company becoming insolvent. The insurance companies rely on the continued strength and endurance of the industry to weather financial storms for many years, coupled with ratings of companies indicating their relative financial strength and ability to meet the obligations to policy holders. It is the aversion to risk that lays the foundation of the seniors’ comfort with the fixed annuity, so long as they are willing to tie up their money and survive the surrender charges.

Another aspect of the fixed annuity that appeals to seniors is the fact that interest is paid into the account and remainsuntaxed, both at the federal and state income tax level, while the funds are held in the account. As a result, the return a senior may realize from an annuity investment offers the added advantage, when compared to another investment like a CD, of being tax deferred while held in the account. Compound interest is accumulated on funds that would otherwise be used to pay income tax liabilities on the accrued interest.

The rates paid on deferred fixed annuities are usually higher than rates available on other investment vehicles. Certainly, the products are priced to compete favorably with CDs and almost always generate higher rates of return than available from banks, even banks that are offering CDs in the five to seven year maturity range. Insurance companies generally have larger reserves than banks and lower overhead, so they are uniquely poised to be competitive with the bank investments.

The ability to annuitize the contract is a feature that appeals to many seniors while they are considering the purchase of an annuity. Although industry statistics indicate that the option is rarely used, the ability to convert the cash value in the account into a stream is comforting and attractive to seniors. There are various options available, one of which is the option to have an income for life, no matter how long the senior lives. Seniors worry about whether or not they will outlive their assets. With life expectancies extending further and further, the knowledge that the option exists to insure they will not outlive their money is enough to attract some senior investors.

3.1.3. Disadvantages of Annuities

Each of the annuity models have at least one disadvantage associated with it, as should be expected by any intelligent investor. For instance, the interest that is accumulated in the contract is, indeed, tax-deferred and fully credited to account. Upon the death of the annuity holder, and distribution to the beneficiaries, the income that has accumulated will be distributed directly to the beneficiary, creating what could be a sizeable current income tax liability.

In addition to the deferred income coming due being seen as a disadvantage, there has always been an argument presented that a comparable investment in mutual funds, equity mutual funds presumably, will escape much of the income tax liability for the beneficiaries because the income has been taxed ‘along the way’ and paid by the senior, along with capital gains distributions. Further, the ownership of equities will receive a stepped-up cost basis upon death of the owner (i.e., the date of death value of the equities will become the cost basis when the heirs liquidate the equities), saving the beneficiaries from the payment of capital gains taxes.

One of the dilemmas for advocates attempting to protect seniors from investments that could be counterproductive to their needs is trying to develop an alternative to the fixed annuity that satisfies the seniors regarding these matters. There are many counter arguments to overstated claims made by sales presentations that simply fail to generate a viable alternative for a senior starved, either expressly or emotionally, for a higher rate of return on their investments. Additionally, it is often pointed out that fixed income annuities afford no protection from inflation during the period they are held by a senior. This, of course, is true of all fixed income investments.

Finally, an aspect of fixed annuities that greatly appeals to seniors is how fees are assessed for the purchase of the annuity. Typically, every dollar invested in an annuity is credited to the owner’s account, no reduction for sales charges or commissions assessed at that point. To the senior, they are in the position of having every dollar

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8. Internal Revenue Code § 1014.
invested working from day one. The sales charges are accounted for, of course, through the assessment of a surrender charge that may be charged against the account for many years, often 7 years but many times as long as 15 years from the date of purchase.

Seniors often compare an annuity to a CD for investment purposes: they both offer guarantees of principal; they both eliminate risk; they are both fixed; they both have penalties for taking the funds out of the account before mutually agreed timeframe. The major difference is that the CDs create income tax liability in the year the interest is earned, while annuities do not currently get taxed. The senior can get access to the CD relatively easily, at the local branch, whereas the annuity company sometimes takes a few days and rarely issues funds from the annuity at the agent’s office, but instead issues the funds from a home office. The access to funds in an annuity is usually limited to no more than 10 percent of the value of the account annually to avoid fees. Seniors often compare these surrender charges to the early withdrawals penalties they face with a CD. Unlike a CD, annuities offer the choice of being converted into a stream of income for life.

As a result of comparing the features of guaranteed investments, seniors often conclude annuities offer more advantages and overcome the disadvantages inherent in them when compared to CDs. When seeking a safe harbor for their savings, there really are few choices and the higher yields often provide enough of an incentive to choose an annuity, even for seniors that are age 80 and above. Generally, a senior is not limited to one investment or the other. They typically will put a certain amount of money into the bank in the form of a CD, a money market account, or both to be readily available for emergencies; then the senior will invest the additional funds into the fixed annuity to take advantage of the benefits the annuity has to offer.

It is primarily because of the popularity of the basic elements of the annuity in the older generations, the complexity of the various annuity products that are around, and the incentives provided to financial advisors for selling the products that lead us to be concerned about some of the consumer protection issues involving annuities. Specifically, the practices used for selling the annuities, the appropriateness of the types of annuities that are sold to seniors, and the abuse or application of the term “Medicaid friendly” or “Medicaid safe” when annuities are marketed by non-lawyers are issues that need to be addressed by the conscientious elder law practitioner.

3.2. Consumer Protection Needs for Annuity Buyers

3.2.1. The Cost of Investing

Every investment has some costs associated with acquiring the investment or liquidating it when the time to sell has arrived. As a result, it is important to understand these costs, in terms of the investment itself and in terms of alternatives available.

Fees are called many things by various institutions but they all act the same as far as the consumer is concerned. The fees may be known as commissions, early withdrawal penalties, marketing costs, maintenance fees which are all the same to a
consumer: a charge against the investment or the income produced by the investment purchased by the consumer.

When a consumer decides to purchase a mutual fund, there will be a cost associated with that acquisition. The cost will be ‘billed’ one of three ways, a fee up front, usually in the 4-5 percent range, a fee at the end, when the mutual fund shares are sold, or higher annual fees along the way, potentially generating the highest rate of fees of all. The fee is deducted from the investment immediately and reduces the amount of money actually going to work. $10,000 invested with a 5 percent fee means that $9,500 is actually in the account.

The purchase of stock in a company will generate a fee, to buy and to sell. The purchase of a bond will also generate a fee, directly quoted to the client as a commission or ‘built-in’ to the price, unstated but certainly charged. Instead of buying the bond, for instance, at the price of $950, the bond is sold to the client at the price of $1,000 with no fee quoted. The result is the same: a fee, commission, or sales charge is assessed to the investment.

A certificate of deposit has a pricing scheme that is different, but just as effective for the institution selling it, typically a bank. By reducing the rate of return on the CD, the bank is reducing the amount of interest paid to the consumer and boosting its own profits. When a CD pays 1 percent or 2 percent less than other investments, then the 1 percent or 2 percent has the same effect as a fee to the consumer. In addition, the CDs all have penalties for early withdrawal. These fees are usually 3 to 6 months interest, earned or not, for CDs ranging from 3 months to two years or so, usually 12 months interest on CDs that are 3 or 5 years in duration. In other words, if a consumer has a CD paying 4 percent and needs or opts to cash out of the arrangement early or before the due date agreed upon, the bank will charge a fee of 4 percent in the form of an early withdrawal penalty. While most banks typically limit fees to a reduction only in the amount of interest the CD has earned, some banks apply the fees to the CD principal as well.

3.2.2. Annuity Surrender Charges

Annuities are ‘shaded’ a bit differently and have developed a method of charging fees that appeal to consumers that have not explored the terms carefully. Annuities generally state the amount invested will be credited to the consumers account immediately, earning full interest. A $10,000 investment will begin earning interest on the entire $10,000 from day one. This is described as an advantage over mutual funds, as they will either reduce the amount invested to pay for the sales charge immediately or will be charged with ongoing fees from day one.

Annuities are contracts whose terms are designed by insurance carriers, reviewed and approved for sale in each of the 50 states by individual departments of insurance or some regulator charged with the duty of protecting consumers. What insurance carriers will do, however, that is often seen as contrary to protecting consumers, is place very high surrender charges on their contracts. This has the effect of keeping the sales charge or fees in place for a very long time and having the consumer at risk for fees that are higher, proportionately, than other forms of investments. Having a 10
percent surrender charge for 10 years, means an investor will be faced with having to pay 10 percent penalty fees, like the CD, for a withdrawal over the first 10 years the contract is in place. Some, not all, annuity contracts allow for a certain percentage to be withdrawn (i.e., 5 percent or 10 percent) annually as a “penalty-free” withdrawal to allow for some of the liquidity requirements of the annuity owner.

Typically, the surrender charges decline over time, a simple example being a 10 percent surrender charge over 10 years declines at the rate of one percent per year, the penalty being 9 percent in year two, 8 percent in year three, and so on, until it is one percent in year 10 and then disappears completely in year 11. Since the penalty is typically assessed on the total account value, the penalty generally tends to be a penalty against interest and principal, not just principal in all but the last few years of the annuity contract.

Every investment has a cost. Mutual funds will generally have a fee of 5 percent, direct investing in stocks and bonds will have a fee generally around 5 percent, the CDs will have a fee of 4 percent-6 percent, and the annuities will have a fee, many times, from 8 percent-12 percent, which is higher than other investments. The annuity only has this fee if the annuity owner withdraws more than the liquidity provisions of the contract allow during the surrender term of the contract.

The question then becomes if comparing a mutual fund, either equities or bonds, a CD or just about any other kind of investment, why are the fees on annuities so much higher? The answer is in the fact that annuities pay much higher commissions to sales agents. As a result, the fees, specifically the surrender charges, are held at higher levels to cover paying the commissions. The insurance carriers continue to sell annuity contracts and pay out disproportionately high commissions because it is worth it to them to do so. Additionally, insurance companies can pay higher interest rates to clients when they are guaranteed control over the funds for a longer period of time. The surrender charges discourage early withdrawal of the funds in the annuity and provide the insurance company with more protection to invest in longer-term investments to cover their guarantees.

3.2.3. The Need to Cap Surrender Charges and Other Protections

Insurance carriers will argue that they cannot reduce surrender charges because they cannot be expected to keep the risk of paying a commission that they cannot recoup if a consumer opts out of the contract. Consumer advocates should, logically, be asking regulators to place that risk squarely where it belongs: in the hands of the insurance companies not on the back of the consumer.

Seniors need to be protected by a cap on surrender charges. If surrender charges were capped by regulation, from the various state agencies that are empowered to so, the surrender charges could be brought into line with other fixed income investments, the 4 percent-6 percent range. With a more equitable surrender charge, the controversy surrounding annuities and senior consumers will disappear.

Additional protections could easily be put in place to protect senior consumers that are more susceptible to misleading or high-pressure sales pitches. For instance, regulators could limit insurance companies from selling to consumers age 75 to 80 any
annuity that carries a surrender charge in excess of 6 percent or six years and to consumers age 80 and over any annuity contract that has a surrender charge in excess of 3 percent or three years. If an annuity owner is age 75 years or older, they should be permitted to annuitize the contract within three years or sooner. Contracts sold to consumers over age 75 should not require annuitization of the contract to withdraw the full-accumulated value of the annuity when the surrender period is over. Some states have attempted to rein in these surrender charges and surrender periods, including regulations issued in Utah in 2002\(^9\) controlling and limiting surrender charges for seniors to age 70 or 10 years, whichever is longer. This approach has the following advantages: consumers are protected because they can get their money back and the terms of annuities are set by insurance company, not agents.

Any serious attempts to address these issues can easily be done at the company level, while they may require some regulatory urging if they are not voluntarily adopted. All annuity contracts are submitted to the home office of the insurance company before the contract is issued. This puts the companies in the position to take simple steps internally to regulate them further. Many times the salesperson oversells the annuity by using language that is not accurate and misrepresents the product being sold. An example is calling an annuity “Medicaid Friendly” when the annuity is not designed to be acceptable to Medicaid. The insurance company would need to revise their literature adequately explaining the meaning of the provisions in clear, understandable, unambiguous, and large typeface. The senior purchaser would be required to sign a document that they have read the description and they acknowledge that the annuity will not do certain things, such as assist them with Medicaid eligibility, allow the person over the age stated in the contract to be eligible for the nursing home penalty waiver rider, and that the surrender charges directly correlate to the commission that is being paid the salesperson. Nursing home penalty waiver riders allow the owner to make penalty-free withdrawals from the annuity if the owner or the spouse of the owner is confined in the nursing home. These riders should not require a time delay (i.e., 60 days of confinement) before the withdrawals are allowed and should not limit the amount of the withdrawal. This signed document would have to be provided to the insurance company before any commission, similar to the “free look” provisions currently provided for in the annuity contracts.

3.2.4. Simplify Annuity Contracts

In response to a move to cap surrender penalties, insurance companies could argue with some justification that the market should determine permissible levels. Annuity contracts are sold to willing buyers and surrender penalties are generally proportionate to rates of return. If the consumer wants a high rate of return, he or she must be willing to leave the funds in the annuity or accept a penalty. Assuming that this is true, there is still room for reform. The conditions under which the penalties are

\(^9\) Utah Code, Chapter 22, Part 4 of Title 31A and Utah Insurance Administration Rule 590-230: Senior Protection in Annuity Transactions.
assessed should be clearly and unambiguously spelled out in the application and the contract.

People (not just seniors) frequently have difficulty reading long and complex annuity contracts. Often they rely on the salesperson’s representations or interpretation of the contract because it is so difficult to read and/or understand the fine print. This leaves the senior consumer squarely reliant on the salesperson, who should be held to a higher standard when working with a senior consumer than a savvy and knowledgeable investor. It is for this reason that our society has often chosen to enact extra requirements to protect this age group because of their natural vulnerabilities.

These problems are illustrated in the following example with a typical annuity sold by a large insurance company through a large national bank. John, age 86 and Mary, age 84, purchase an annuity at their local bank. They invest $50,000, most of their liquid cash. It is a fixed annuity with a 10 percent, 10-year surrender period. The salesman briefly mentions to them that it includes a rider that allows surrender if either end up in a nursing home. He points to the rider while he is explaining other parts of the contract, but neither John nor Mary read more than the heading “long-term care.” At the end of that paragraph in fine print it says that the rider is void if either annuitant is older than 85 years old. It further says that this rider can only be used if an annuitant is in a nursing home for six months of time without leaving the nursing home.

Mary has a major stroke six months after signing this contract. She is first hospitalized and then she is sent to a nursing home where she is not doing well. John tries to withdraw the $50,000. The insurance company says that the rider was void because they were too old. Mary is sent back to the hospital after two months. Even if the age limited rider were not enforced by the insurance company, Mary will now have to start over again to be eligible for the six months non-cumulative time in a nursing home. If John removes funds from the annuity he will lose $5,000 of his original investment plus any interest. If he leaves it with the company, he cannot pay for Mary’s care during the six-month period. Neither John nor Mary had any idea that this would happen if one of them had a catastrophic illness.

The ambiguous and misleading information about surrender penalties included in annuity brochures, applications, and contracts is as great a problem as the size of the penalties. Reform is badly needed in this regard and should raise no legitimate objection from the insurance lobby. Making the language understandable would be nearly cost-free and would not deprive the annuity company of any legitimate advantage. The only effect would be to curb questionable sales and oppressive contracts.

Some annuities do not allow a lump-sum payout. Remembering the importance of the time factor, an annuity that allows a lump-sum liquidation at the end of the penalty period has a higher present value than one that does not. This distinction is important, but is often not disclosed or properly explained at the point of sale. Oftentimes with these annuity contracts, the annuitant must annuitize the contract in order to receive the accumulated interest in the contract or must take the payments out over a specified minimum period of time (i.e., five years) in order to receive the full value of the account.
3.2.5. Require Full Disclosure

One indication of the profitability of the annuity for the issuer—and the relative
difficulty of cashing out the investment—is the commission paid to the agent. There is
no legal or administrative prohibition on disclosing commissions, but there is strong
reticence to do so. The fact that the annuity recommended by the agent carries an 8
percent commission, while the annuity not recommended pays 4 percent, is relevant
information that might be very helpful to the consumer in deciding which to purchase.
Reform in this area would be important in leveling the playing field between agents
and consumers and between scrupulous and unscrupulous issuers and agents. To that
end, a reform that would cost little, but that would greatly assist consumers would be
to require annuities to carry a standardized disclosure card, like the MSRP stickers on
new car, which allows for ‘apples to apples’ comparison of annuities and full
disclosure of all relevant facts concerning the annuity purchase.

The answer to quality consumer protections in the area of annuities lies in the fair
and equitable treatment of consumers by the insurance carriers and the terms of the
contracts offered to the public. Measures to address these inequities by controlling the
conduct of agents have been cumbersome, confused and very ineffective. Having the
terms of the contracts under greater scrutiny and developed with an eye to reasonable
consumer protections is healthy and beneficial to all parties concerned.

3.3. Unprotected Seniors: The Risk of Trust Mills to Sell Annuities

3.3.1. What is a Trust Mill?

“Trust mill” is a term used to describe an organization that markets “estate
planning” services, primarily to seniors, through the use of seminars conducted by
non-lawyers. The services that most trust mills are trying to sell are usually estate
planning documents and annuities.

3.3.2. How Does a Trust Mill Market Annuities?

The use of seminar selling has become a very powerful and effective marketing
strategy. Although certainly not limited to seniors, the seminar has become one of the
primary tools of any organization seeking to market financial services, especially,
seeking to market those services to seniors. NAELA members are encouraged to
participate in public seminars and workshops so that a knowledgeable source can be
readily available in the public to answer questions that are otherwise misrepresented
by non-lawyer salespersons who typically conduct these trust mill seminars.

The trust mill seminar presentation will center on the disadvantages of the probate
process with an emphasis of the expense and the legal fees. The attendees will be
encouraged to make appointments with the representatives of the trust mill in their
homes. At the appointment, the seniors are helped to prepare an information sheet that
will contain a wide variety of information for the process of creating an “estate plan.”
The initial appointment is conducted by a non-lawyer who gathers intimate financial
data on the consumer and has no attorney-client privilege for the information received
from the consumer. The information that is always pertinent and particularly valuable
to the trust mill representative is the listing of the financial assets, which is used by the
trust mill salesperson to sell the consumer an annuity or other financial service
products.

Once the basic information has been obtained, the representative gets a check for
the production of the documents that will provide the protection the seniors are
seeking. These fees are generally very modest, ranging from $350-$395 for wills, a
trust and durable powers of attorney and is typically a loss leader – a product
undervalued to provide access to future sales for the more lucrative products. The low
fees are a very strong lure for many seniors. The documents are generalized, usually
developed from the statutorily created documents or forms. In addition, there may or
may not be a promise, or an implication, that an attorney will review the documents;
however, even if an attorney reviews the documents, the product is already sold to the
senior and there is no independent attorney review of what the most appropriate estate
planning is necessary for the senior’s situation. Elder law attorneys should strive to
discourage or prohibit attorney involvement in this type of “hit and run” estate
planning.

The person coming back to the senior’s home is usually different from the person
that originally met with the senior. This new person is typically a notary and a
licensed insurance agent. At this second meeting, the person delivering the documents
will not only notarize the documents for the seniors but will also ‘suggest’ they move a
portion, sometimes all of their savings into another “probate-proof” account – the
annuity – for safekeeping. Some even go so far as to say that certain assets can only be
put into the trust by using an annuity. An aggressive sales pitch can, and often does
drift into other areas preying on the fears of the senior, purporting the deferred annuity
to be “Medicaid Friendly,” meaning that the annuity will shield the funds in the event
of catastrophic illness requiring a nursing home stay even though it is uncertain if the
annuity will actually do so, if the customer will actually need to use an annuity in such
a manner, and even if such an annuity is appropriate for the personal circumstances of
the customer.

3.3.3. The Need to Curb Trust Mills

In the final analysis, it is the annuity sales commissions that sustain the trust mill
operator. The sale of estate planning documents, especially those that are priced at
very low rates, are nothing more than an opportunity to offset the expenses of doing
business: The costs of full-page ads in major newspapers to generate an audience at the
seminars; the expense of renting facilities for the seminars, sometimes for providing
complimentary meals for the attendees; the expense of often having professional
presenters that conduct the seminars; and, of course, the sales agents to conduct sales
presentations in the homes of the seniors. This puts the consumer at risk because they
are shortchanged the valuable advice they truly seek about what is an appropriate way
to plan their estate and they are not provided with a sales-free environment to
contemplate important estate distribution issues. Failure to take adequate steps to
procure legitimate estate planning can often end up more costly than doing nothing at
all if the lack of proper procedure (i.e., competency evaluation, proper witnessing of documents, etc.) results in contested estate issues at the death of the senior.

There appears to be no viable solution to the proposition that consumers have the right to obtain “estate planning” documents from whatever source they choose. It could be from a stationery store, a book touting estate planning without having to pay legal fees, internet sources of downloadable documents, often sold without regard to state jurisdictions. There is also the reality in the marketplace that consumers have come to regard estate planning documents generally are produced in a ‘boiler plate’ fashion and there is no need to pay a premium for the services of an attorney.

Abusive marketing in the annuity arena was exposed in a 2002 Wall Street Journal article. In the article, a training session of “Annuity University,” the marketing “educator” lectured participants about selling annuities to seniors. The quotes in the Wall Street Journal article include:

• “Treat them like they’re blind 12-year-olds . . . .”;
• “You’re there to solve their problems, but you have to create those problems first. No problems, no sale.”;
• “Tell them you can protect their life savings from nursing-home and Medicaid seizure. They don’t know what it is, but it sounds scary”;
• and
• “It’s about putting a pitchfork in their chest.”

It is doubtful that these comments are typical of the average annuity salesperson; but the methodology behind these comments shows why elder law attorneys must be vigilant to discern between the appropriate and inappropriate uses of annuities. These unethical sales and marketing practices are leading to an increased amount of litigation against insurance companies and trust mill operators.

By reducing surrender charges based upon the age of the purchaser of the annuity contract, insurance companies will compensate by reducing the commissions paid to agents selling to seniors. This may reduce the incentive for trust mill operators to engage in their deceptive practices. Additionally, state attorneys general and state bar associations should increase their prosecution for the unlicensed practice of law that is ostensibly going on when non-lawyers in trust mills purport to be “estate planners” and function as an attorney in the advice and application of probate and trust laws to a senior’s factual circumstances.

Additionally, the non-lawyer should be held accountable for misleading the seniors about the protections afforded the annuity under the Medicaid rules. It is quite common in these seminar situations for annuity salespersons to refer to annuities as “Medicaid safe” or “Medicaid friendly” alluding to OBRA ‘93 annuities; however, the annuities that are typically sold through these trust mill operations are deferred annuities which do not meet the guidelines as an unavailable asset and are fully countable assets – which the unsuspecting consumer only comes to realize at a much later date when they enter a nursing home.

4. CONCLUSION

The use of annuities by seniors is a widespread investing phenomena that, by the nature of the aged population of the average investor requires close scrutiny and greater understanding by both the consumer and the elder law advisor. As annuities will continue to be used as a risk-avoidance method by the conservative senior investor and Medicaid planning by the uninsured senior despite the passage of Medicaid reforms, more emphasis on the proper and suitable use of annuities as an investment vehicle is required from the regulatory level down to the sales level. Better understanding by all involved with the uses of these investments will provide greater safety and security to our society’s most vulnerable members, while providing the natural advantages that the proper use of annuity investing can offer.