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WHO IS GUARDING THE GUARDIANS? A LOCALIZED CALL FOR IMPROVED GUARDIANSHIP SYSTEMS AND MONITORING

*Judge David Hardy, CELA**

Our independence cost too much to have our liberty and property wrested from us, and we put under guardianship without even the form of a trial. Should we sanction these proceedings, no one in the evening of life could dwell secure, but would tremble at the approach of any one that entered his door, lest he was then to be called to surrender all that would render life desirable.¹

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1. *Shumway v. Shumway*, 2 Vt. 339, 1829 WL 1106 (1829); see also Joseph A. Reinert, Esq., *Guardianship Reform in Vermont*, 32-SUM Vt. B.J. 40, 40 (2006).

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I. AUTHOR'S NOTE

Self-examination is difficult and often risky. Nonetheless, it is essential for reasoned progress. A recent national survey commissioned by the American Bar Association (ABA) Commission on Law and Aging notes that basic guardianship data is unavailable, “offering courts, policymakers, and practitioners little guidance for

improving the system.”² Policymakers are “unable to make informed policy and practice decisions without an adequate knowledge base of what exists and what trends are evident.”³ This article focuses on the author's own judicial district to identify areas in which institutional improvement may be warranted. Other states and jurisdictions may constructively use the information within this article to consider institutional changes.

II. INTRODUCTION

We may be judged by the way we treat our weaker and more vulnerable citizens.⁴ We therefore devote considerable resources to protect children who may be harmed by the intentional or neglectful conduct of others. Some of our elderly citizens are as weak and vulnerable as children, yet we may be judged harshly for our imperfect attempts to assist them in the last season of their lives. Indeed, it has been said that “the manner in which a society behaves with its old people unequivocally reveals the truth—often carefully masked—of its principles and its ends.”⁵

Guardianship intervention is inevitable for some elderly citizens, and the number of local guardianships will proliferate as the elderly population increases and *pro se* access to the court is expanded.⁶ Guardianship is “a complicated, little-known corner of the law in which courts can grant strangers tremendous power over vulnerable family members.”⁷ Guardianship has been described as:

...a legal mechanism for substitute decision making which comes in the guise of benevolence, as it was originally intended to protect the disabled individual and his property from abuse, dissipation of resources, and the effects of designing persons. It is an exercise of the state's role as *parens patriae* for the mentally and physically disabled. Yet, guardianship, in reality, reduces the disabled person to the status of a child.⁸

Despite the severity of state intervention, guardianship orders are issued by judges, “without full information, often interpreting statutes not examined by appellate courts,

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2. Erica F. Wood, *State-Level Adult Guardianship Data: An Exploratory Survey*, NCEA, 5 (Washington, D.C. Aug. 2006).
 3. *Id.* at 8.
 4. Hon. H. Patrick Leis, III, *Judicial Perspectives 2004, Guardianship Practice in New York State* s-xxix (Robert Abrams ed., 2004), reprinted in H. Patrick Leis, III, *The Model Guardianship Part: A Novel Approach*, 78 N.Y. St. B.J. 10 (2006) (writing, “It is after all, the way a society treats its weakest and most vulnerable members that it ultimately will be judged.”).
 5. Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 U. Tol. L. Rev. 189, 213 (1994).
 6. On December 22, 2006, the Nevada Supreme Court adopted standardized guardianship forms for *pro se* litigants. See *In the Matter of Adoption of Standardized Guardianship Forms*, ADKT No. 402 (Nev. 2007).
 7. Cheryl Phillips et al., *Secrecy Hides Cozy Ties In Guardianship Cases*, Seattle Times, 1(Mar. 15, 2007, at 1.).
 8. *In the Matter of the Guardianship of Hedin v. Gonzales*, 528 N.W.2d 567, 572 (Iowa 1995) (citing Sheryl Dicker, *Guardianship: Overcoming the Last Hurdle to Civil Rights for Mentally Disabled*, 4 U. Ark. Little Rock L. Rev. 485, 485-86 (1981)).

all without adequate staff to implement safeguards both before and after guardianship is established.”⁹

Guardianship involves the inverse concepts of state intervention and personal liberty.¹⁰ In social science terms, any guardianship system will yield false negatives (failure to appoint a guardian when needed, otherwise known as a Type 1 error) or false positives (approval of guardianship when not necessary, otherwise known as a Type 2 error).¹¹ Though judges control the means by which neither error subsumes the other and equilibrium is maintained, judicial control cannot be exercised in isolation. It must be predicated upon accurate pre-guardianship information and effective monitoring systems. Guardianship is most efficacious through judicial oversight and structured monitoring. As stated more than a decade ago:

Guardianship law and practice, while varying from state to state, has generally been criticized as “procedurally inadequate, substantively archaic, demeaning to the elderly, and operating in a manner that permits widespread abuse.” The practices following a guardian’s initial appointment are of particular concern. A significant number of jurisdictions do not have an established system to monitor the guardianship, and most do little to provide any systematic oversight of the guardian’s actions. A call for reform has gone out. Many states have responded with legislative action in the form of statutory reform of existing guardianship laws. However, court implementation of effective guardianship monitoring practices has been lacking.¹²

What is generally described above is found to be specifically accurate in Washoe County, Nevada. A statistical analysis of local guardianships demonstrates that Washoe County guardianships do not compare well to “exemplary” courts in which best practices exist. Well over a majority (64 %) of all Washoe County guardianships begin as temporary guardianships in which an order is entered before the proposed ward is given notice of the action and an opportunity to respond. The judges granted 99 % of the *ex parte* petitions for temporary guardianship. Few proposed wards are represented by counsel or guardians *ad litem*. Only seven percent of the petitions sought limited authority in recognition of the proposed wards’ situational capacity. Inventories, personal status reports, and financial accountings were late or missing in alarming numbers. There were also recurring substantive problems relating to the content of petitions and medical evidence, sufficiency of notice, consistency of orders and financial accountings, statutory noncompliance with inventory requirements, widely divergent administrative expenses, and post-death property disposition orders. Finally, judges have no county resources with which to investigate the propriety of

9. Mary Joy Quinn, *Guardianships of Adults: Achieving Justice, Autonomy, and Safety* 3 (Helvi Gold & Brian Black eds., Springer Pub. Co. 2005).

10. Lawrence A. Frolik, *Plenary Guardianship: An Analysis, A Critique and a Proposal for Reform*, 23 Ariz. L. Rev. 599, 605 (1981).

11. Lawrence A. Frolik, *Guardianship Reform: When the Best is the Enemy of the Good*, 9 Stan. L. & Pol’y Rev. 347, 350 (1998). See also John Monahan & Laurens Walker, *Social Science in Law* 89-90 (6th ed., West 2006).

12. Fell, *supra* note 6, at 189.

guardianship or monitor the performance of their guardians.¹³ This author is of the opinion that Washoe County and other jurisdictions across the United States can improve their guardianship systems by implementing the "best practices" reforms identified in this article.

Most reform proposals are predicated upon adequate funding. In this era of financial constraints, the question is why the judiciary and its funding agencies should devote scarce resources to guardianship systems and monitoring. The answer has best been stated as follows:

First, historically, courts have had a *parens patriae* duty to protect those unable to care for themselves. *Parens patriae* is the fundamental basis for guardianship and the primary justification for curtailing civil rights. The court appoints a guardian to carry out this duty and the guardian is a fiduciary bound to the highest standards. In reality, observed one judge, "the court is the guardian; an individual who is given that title is merely an agent or arm of that tribunal in carrying out its sacred responsibility." Second, unlike with decedent's estates, the incapacitated person is a living being whose needs may change over time. This argues for more active court oversight. Third, monitoring can be good for the guardian by offering guidance and support in the undertaking of a daunting role. Fourth, monitoring can be good for the court by providing a means of tracking guardianship cases and gauging the effect of court orders. Finally, monitoring will boost the court's image and inspire public confidence.¹⁴

III. THE SHIFTING DEMOGRAPHICS OF AGE

Individual Americans are living longer, and a greater proportion of Americans within the aggregate population are growing elderly.¹⁵ The age-related statistics are staggering. Seventy-eight million "baby boomers" were born between 1946 and 1964.¹⁶ Approximately 8,000 Americans reach their 60th birthday every day.¹⁷ The U.S. Department of Health and Human Services, Administration on Aging, reports there were 3.1 million Americans over the age of 65 in 1900, 33.2 million in 1994, and 36.3 million in 2004. The number of Americans over the age of 65 will almost double to 71.5 million by 2030.¹⁸

The average life expectancy for older Americans is also increasing. While there were 4.2 million Americans over the age of 85 in 2000, there will be 8.9 million Americans over the age of 85 in 2030. The real growth in this population will occur as the baby boomers age; the cumulative growth in this population is expected to exceed

13. Documentation available from author upon request.

14. Quinn, *supra* note 10, at 163.

15. Dep't of Health and Human Servs., *A Profile of Older Americans: 2005*, Admin. Onon Aging (AOA), May 8, 2006, at 1, available at <http://www.aoa.gov/PROF/Statistics/profile/2005/4.asp?pf=true>, at 1 (May 8, 2006).

16. Lenita Powers, *Baby Boomers Changing the Way We Look at Growing Old*, Reno Gazette-Journal, 1 (Apr. 4, 2006, at 1.).

17. *Id.*

18. Wood, *supra* note 3, at 10. See also Dep't of Health and Human Servs., *supra* note 16.

400% between 1995 and 2050. Elderly Americans typically own a home and investment accounts, with an aggregate value in excess of \$15 trillion.¹⁹ It is estimated that people over the age of 50 control at least 70% of household net worth.²⁰

An estimated six percent of Americans aged 65 or older have Alzheimer's disease, a degenerative condition that leads to dementia. Other causes of dementia include strokes, brain tumors, and a variety of endocrine, metabolic and nutritional disorders.²¹ The U.S. Census Bureau estimates that approximately 25% of people over the age of 85 suffer from Alzheimer's disease.²² Medical and social attempts to extend life have been successful, but our elderly citizens require a disproportionately larger share of services and public support.²³ Accordingly, "[t]he number of people requiring a guardian is expected to increase considerably in the years ahead."²⁴

IV. LEGAL CONSEQUENCES OF AGING

A. Incapacity

The law presumes all adults enjoy mental capacity, "meaning they are capable of making rational decisions and so are best situated to make decisions on their own behalf."²⁵ The law does not presume rational people will always make rational decisions.²⁶ However, some people, through no fault of their own, become incapable of managing their personal and financial affairs as they travel through the last season of their lives.²⁷ Incapacity is not a label with definite meaning as the elderly experience age-related effects differently. Each elderly person faces a unique set of challenges, "each maintaining a varying degree of ability to function that may fluctuate with time and circumstances."²⁸

19. Quinn, *supra* note 10, at 9; *see also* *Briefing: Finances*, Time, 18 (July 23, 2007, at 18.).

20. *Id.*; *see also* Dep't of Health and Human Servs., *Snapshot: A Statistical Profile of Older Americans Aged 65+*, Admin. on Aging (AOA), Mar. 1, 2006, at 1, *available at* <http://www.aoa.gov>, at 1 (Mar. 1, 2006).

21. Guardianships: Collaboration Needed to Protect Incapacitated Elderly People, Report from GAO to the Chairman of the Special Comm. on Aging, U.S. Senate (July 13, 2004), in 04-655 GAO Highlights, at 4 n.3 (July 2006, at 4 n.3) [hereinafter GAO Highlights].

22. GAO Highlights, *supra* note 22, at 1.

23. Dep't of Health and Human Servs., *Statistics: Aging into the 21st Century*, Admin. on Aging (AOA), Dec. 7, 2006, at 1, *available at* http://www.aoa.gov/prof/Statistics/future_growth/aging21/summary.asp, at 1 (Dec. 7, 2006).

24. GAO Highlights, *supra* note 22, at 1.

25. Lawrence A. Frolik, *Legal Implications of Mental Incapacity: Guardianship & Conservatorship* (ALI-ABA Course of Study, Elder Law Issues, Answers and Opportunities, Scottsdale, Ariz.), (Feb. 23-24, 2006).

26. *Id.*

27. GAO Highlights, *supra* note 22, at 1.

28. Fell, *supra* note 6, at 192.

B. Vulnerability

Aging has been described as the process of loss: “As we grow older, we lose acuteness of hearing, sight and memory. Our stature, vigor, agility and mobility are diminished. Our skin loses elasticity, our bones lose calcium and weaken, and our muscles lose size and strength. As we age, the occurrence of chronic illness and disabling conditions increases.”²⁹ Aged citizens also lose their ability to defend themselves; they become vulnerable to the improper actions of others, which include abuse, neglect, exploitation and isolation. The National Center on Elder Abuse estimates that between 1 and 2 million Americans age 65 or older have been injured, exploited, or otherwise mistreated by someone on whom they depended for care or protection.³⁰ Many caregivers are family members, and family dynamics are “almost impossible for the court to try to unravel.”³¹ The frequency of elder abuse and neglect will undoubtedly increase as the population ages.

V. GUARDIANSHIP AS THE STATE’S RESPONSE

A. Guardianship Generally Defined

The western concept of guardianship can be traced to the Greek, Roman and British Empires.³² Guardianship also existed in Colonial America. The legal and philosophical basis is *parens patriae*, which “obligates the state to care for the vulnerable and less fortunate.”³³ Guardianship is the legal proceeding in which a person is divested of legal autonomy and subjugated to the control of another person or entity. It is critical for at-risk elderly citizens, but it is also a drastic intervention in which the guardian is given substantial and often complete authority over the lives of vulnerable wards.³⁴ Guardianship has been described as “the most inclusive method of substituted decision making for individuals for whom it has been judicially determined that they cannot act for themselves.”³⁵

B. Legal and Emotional Consequences of Guardianship upon the Ward

Guardianship is “protective yet oppressive, an instrument of beneficence that can at the same time bring a dire loss of rights.”³⁶ A guardianship ward typically loses basic rights, such as the right to vote, sign contracts, buy or sell real estate, manage

29. *Id.* at 191 (citations omitted).

30. Wood, *supra* note 3, at 11.

31. Quinn, *supra* note 10, at 29 (citing S. Butterwick & P. Hommel, Mediation: A Tool for Resolution of Adult Guardianship Cases, NAELA Quarterly. (Fall, 2001)).

32. Quinn, *supra* note 10, at 18 (citing A. Frank Johns, *Ten Years After: Where is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?*, 7 Elder L.J. 33 (1999)).

33. *Guardianship of Hedin*, 528 N.W.2d at 571.

34. Wood, *supra* note 3, at 5.

35. *Guardianship of Hedin*, 528 N.W.2d at 572.

36. Quinn, *supra* note 10, at 17.

finances, marry or divorce, decide where to live, and make decisions about medical procedures.³⁷ As described by one court, “[a]lthough the determination of incompetency is in no way a criminal proceeding, the result in terms of the defendant’s liberty interests may be very similar. [The elderly ward] may be deprived of control over his residence, his associations, his property, his diet, and his ability to go where he wishes.”³⁸ Guardianship can also have devastating personal and emotional effects upon wards, which when coupled with an intimidating legal environment, can affect confidence, well-being, and morale. The imposition of guardianship may also cause confusion, alienation, and loss of control.³⁹ In sum, the guardianship process can exacerbate the very frailties that made guardianship necessary.

C. Guardians’ Responsibilities Generally Defined

A guardianship is a trust relationship in which the guardian acts in a fiduciary capacity and is charged with the duty of unbending loyalty.⁴⁰ Being a guardian is not easy, and a person should cautiously assume the responsibilities of guardianship without training or experience. Indeed, being a guardian is “one of society’s most serious and demanding roles.”⁴¹ The duties of a guardian are broad, complex, and potentially confusing.⁴² They have been described as follows:

[A] good guardian [must] be knowledgeable about housing and long-term care options, community resources, protection and preservation of the estate, accounting, medical and psychological treatment, public benefits and communication with elderly and disabled individuals. A guardian should develop advocacy skills; assume case management functions, monitor the ward’s living situation, make decisions that are, to the greatest extent possible, in accord with the ward’s values; avoid any conflict of interest; and regularly report to the court.⁴³

37. Wood, *supra* note 3, at 9; Fell, *supra* note 6, at 190.

38. *Guardianship of Hedin*, 528 N.W.2d 567, at 573.

39. Linda S. Ershov-Levenberg, *Guardianship Actions Against Individuals Who Have Selected an Agent as Power of Attorney: When Should the Courts Say No?*, 7 Marq. Elder’s Advisor 83 (2005). See also *Estate of Bechtold*, 376 A.2d 211, 213 (Ch. Div. 1977); *Lommason v. Washington Trust Co.*, 53 A.2d 175 (N.J. 1947).

40. *In re Barnes*, 317 B.R. 187, 191 (Bankr. M.D. Ga., 2004) (citing *In re Armfield*, 439 S.E.2d 216, 220 (N.C. 1994); see also *Doe v. Harbor Schools, Inc.*, 826 N.E.2d 228 (Mass. Ct. App. 2005)).

41. Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 Stetson L. Rev. 867, 872 (2002).

42. Fell, *supra* note 6, at 205.

43. Hurme & Wood, *supra* note 42, at 872 (citing American Bar Association Comm’n on the Mentally Disabled & Comm’n on Legal Problems of the Elderly, *Guardianship: An Agenda for Reform—Recommendations of the National Guardianship Symposium and Policy of the American Bar Association* (1989)).

D. Guardian Process Generally Defined

Although each state has its own unique guardianship statute,⁴⁴ in general, guardianship proceedings are susceptible to a two-part analysis. The “front end” of a guardianship involves the procedural and substantive requirements for establishing the guardianship, whereas the “back end” involves judicial oversight of the guardian’s conduct and the ward’s welfare through effective monitoring systems.⁴⁵

The front-end requirements generally include an initial petition for guardianship supported by medical or similar evidence demonstrating the proposed ward’s incapacity. The guardianship petitioner may seek emergency, temporary authority or permanent authority. Temporary authority may be granted without notice, whereas permanent authority is predicated upon notice and the opportunity to be heard. Guardians may be appointed over the ward’s person or the ward’s estate. Many guardians are appointed over both the ward’s person and estate. Individual statutes will establish who may petition to be guardian, the priority among competing petitioners, the nature of incapacity evidence, notice provisions, the appointment of investigators, attorneys or *ad litem* advocates, and the relevant standards of proof. In many states the level of guardianship authority may be commensurate with the ward’s functional needs. In other words, some guardians are given plenary authority, whereas other guardians are given specifically enumerated limited authority.

The back-end requirements generally include the posting of a financial bond, the filing of an initial inventory, periodic reports of person, and periodic financial accountings. Some states, such as Nevada, require the guardian to petition for instructions before performing certain acts on behalf of their wards. The procedures for guardianship termination may also be included within the back-end analysis. The technical back-end requirements are essentially tools to help the court monitor the ward’s health and welfare after the guardianship order is entered.

VI. INADEQUACY OF GUARDIANSHIP DATA

The ABA Commission on Law and Aging and the National Center on Elder Abuse recently published the results from their survey of adult guardianship data collected from state court administrators.⁴⁶ The survey found that state court administrators do not receive adequate information about trial court guardianships. Too few states collect information about guardians of person and estate as distinct case types. Administrative offices do not receive guardianship information beyond the number of filings and dispositions. Only five states report elder abuse as a distinct case type, and almost 50% of administrative offices are interested in compiling additional data.⁴⁷ The survey authors concluded there is a profound need for uniform, consistent guardianship data, which will become ever more important as demographic trends

44. An examination of competing state statutes exceeds the scope of this article.

45. *Id.* at 867.

46. Wood, *supra* note 3, at 5.

47. *Id.* at 6.

increase the number of guardianships in the future.⁴⁸ This article is a contribution toward providing better guardianship data.

VII. NEWSPAPER CRITICISMS

In 1986, the Associated Press published a six-part investigative series entitled *Guardians of the Elderly: An Ailing System*. The series involved 57 reporters, 50 states, and more than 2,000 randomly selected guardianships. The series is oft-quoted for its conclusion that “the nation’s guardianship system, a crucial last line of protection for the ailing elderly, is failing many of those it is designed to protect.”⁴⁹ The series also denounced “a dangerously burdened and troubled system that regularly puts elderly lives in the hands of others with little or no evidence of necessity, then fails to guard against abuse, theft and neglect.”⁵⁰ The following recurring problems were identified in the Associated Press series:

- There was no unified system of guardianship laws. The differing laws led to procedures that were vague and incomprehensible.
- Guardianships were often granted without meaningful review. Due process was frequently violated in proceedings that divested elderly citizens of fundamental rights and relegated them to the status of children.
- Guardianships were rarely terminated except upon the ward’s death.
- Courts were overburdened and lacked resources to monitor the guardians.
- Incapacity assessments were based upon ill-defined criteria.⁵¹

Several other newspapers have published critical stories about guardianships during the past few years.⁵² In 2005, the *Los Angeles Times* published a three-part

48. *Id.* at 10.

49. Erica F. Wood, *Guardianship Reform at the Crossroads*, 15 WTR Experience 12, 13 (2005).

50. *Id.*

51. Wood, *supra* note 3, at 11.

52. Phillips, *supra* note 8, at 1. See also Wendy Wendland-Bowyer, *Who’s Watching the Guardians*, Detroit Free Press, (May 24-26, 2000) (“Too often, there’s evidence that guardians . . . aren’t caring for anyone’s interests but their own. Some professional guardians oversee more than 500 people whom they rarely visit or never meet.” Guardianship is “a growth business with no safeguards.”); see also Quinn, *supra* note 10, at 42 (citing Wendland-Bowyer, (2000); Paul Rubin, *Checks and Imbalances: How the States Leading Fiduciary Helped Herself to the Fund of the Helpless*, Phoenix New Times, (June 7, 2000); Quinn, *supra* note 10, at 42 (citing Rubin, (2000)); Lou Kilzer & Sue Lindsay, *The Probate Pit*, Rocky Mountain News, (Apr. 7, 2001) (series) (conflicts of interest abound as judges appoint members of a close-knit, for-profit industry to control the lives and bank accounts of vulnerable Coloradans with scant government oversight); Quinn, *supra* note 10, at 42 (citing Kilzer & Lindsay, (2001); Diane G. Armstrong, Ph.D., *The Retirement Nightmare: How to Save Yourself from Your Heirs and Protectors*, (Prometheus Books 2000) (future guardianship will be driven by transfer of wealth, some 11 trillion dollars. This transfer “will surely inspire a rising tide of involuntary conservatorship/guardianship litigation as alienated or envious heir-petitioners seek to direct this massive flow of accumulated wealth to themselves before it vanishes.”); Carol D. Leonnig et al., *Under Court, Vulnerable Became Victims*, Washington Post, A01 (June 15, 2003, at A01), and Leonnig, *Rights and Funds Can Evaporate Quickly*, Washington

series entitled *Guardians for Profit*, with the subparts: *When a Family Matter Turns into a Business*; *Justice Sleeps While Seniors Suffer*; and *Missing Money, Unpaid Bills and Forgotten Clients*. The *Los Angeles Times* reviewed more than 2,400 adult guardianships in Southern California, including every guardianship in which a private, for-profit guardian was appointed between 1997 and 2003. The reports are troubling, and may be summarized by one quoted attorney's lament: "This is what we'll have to look forward to—that we'll be disposable when we no longer have a voice."⁵³ The *Los Angeles Times* identified the following recurring problems:

- Procedural safeguards were too often ignored in emergency guardianships.
- Guardians' misuse of "their near-parental power over fragile adults, ignoring their needs and isolating them from loved ones."
- Excessive guardian fees depleted the wards' estates.
- Guardians misunderstood or overlooked their fiduciary duties to their wards.
- Guardianships were difficult to terminate.
- Guardians ignored their wards' wishes, particularly for placements, communications, and social interactions.
- Guardians lacked certification and training.
- Guardianship judges abdicated their oversight responsibilities by failing to enforce reporting and accounting requirements. "Judges are supposed to monitor the guardians' conduct, scrutinize their financial reports, and sanction those who misuse their authority. Yet courts have failed dismally in this vital role. Judges frequently overlooked incompetence, neglect and outright theft."

The *Los Angeles Times* series illustrates that many of the problems identified during the past 20 years still exist today. The local survey results set forth in Section XI of this article reveals the existence of these problems within the author's own jurisdiction. The suggested reforms in Section XII are offered in response to the general problems above and the specifically identified problems in Washoe County, Nevada.

VIII. POLICYMAKER INTEREST, LEGAL ASSOCIATION STUDIES, AND REFORMS

Public policy should not be driven by press accounts, which may be inspired by both legitimate concerns and commercial realities. As noted by one commentator, "[m]uch of the criticism of guardianship proceedings stems from a few highly publicized, notorious, and particularly heinous examples of guardians' abuse and neglect of wards. Whether these examples constitute the exceptions or the rule of how

Post A01 (June 15, 2003) (the Washington Post published two front-page stories, the same day); Barry Yeoman, *Stolen Lives*, AARP Magazine, (Nov. 19, 2003).

53. Robin Fields et al., *When a Family Matter Turns Into a Business*, L.A. Times, 2 (Nov. 13, 2005, at 2.).

guardianships actually function [is] unknown.”⁵⁴ Nonetheless, press accounts have led to greater policymaker interest, bar association studies, and even substantial reforms.

A. Policymaker Interest

The U.S. Senate and House of Representatives have both expressed concerns about guardianships and considered versions of bills calling for an Elder Justice Act, which would establish an advisory board on elder abuse, neglect, and exploitation.⁵⁵ A few examples are included to demonstrate why local jurisdictions should be proactive now, as opposed to waiting until they are placed under the uncomfortable lens of a public microscope.

The U.S. House Subcommittee on Aging convened a hearing just five days after the first Associated Press article was published.⁵⁶ Chairman Claude Pepper summarized his concerns as follows:

The typical ward has fewer rights than the typical felon.... By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception, of course, of the death penalty.... Guardianship proceedings are often highly adversarial, pitting children against parents, spouses against stepchildren, and siblings against each other. Guardianship proceedings are often commenced for the convenience of state case workers or long-term care facilities, or to relieve adult children of the ongoing need to worry about the risks run by an aging parent attempting to remain independent.... The issues at stake in an adult guardianship often pose difficult conflicts among highly personal values and priorities, without a clear or objective “right” answer.⁵⁷

The U.S. Senate Special Committee on Aging conducted a hearing in 2003, partly because of the high profile guardianship of an elderly, federal retiree in the Washington, DC area.⁵⁸ The hearing was entitled *Guardianship over the Elderly: Security Provided or Freedom Denied*. The chair noted, “When used correctly in very extreme cases, guardianships can be an important tool in securing the physical and financial safety of an incapacitated elderly person. At the same time, guardianship can divest an elderly person of all the rights and freedoms we consider important as

54. Wood, *supra* note 3, at 9 (citing Paula L. Hannaford & Thomas L. Hafemeister, *The National Probate Court Standards: The Role of the Courts in Guardianship and Conservatorship Proceedings*, 2 Elder L.J. 147, 150 (1994)); *see also* Frolik, *supra* note 11, at 350-352.

55. Barbara D. Bovbjerg, *Guardianships: Little Progress in Ensuring Protection for Incapacitated Elderly People, Testimony Before the S. Special Comm. on Aging* (Sept. 7, 2006), in 06-1086T GAO Highlights, at 11 (Sept. 2006 at 11.).

56. Wood, *supra* note 50, at 13.

57. Jennifer L. Wright, *Protecting Who From What, and Why, and How?: A Proposal For an Integrative Approach to Adult Protective Proceedings*, 12 Elder L.J. 53, 60 (2004).

58. *In re Millie Orshansky*, 804 A.2d 1077 (D.C. App. 2002).

citizens.”⁵⁹ The Senate Special Committee concluded its hearing by directing the U.S. General Accounting Office (GAO) to study problems associated with guardianships.

As noted later in this article, the *Los Angeles Times* series led directly to legislative interest and the enactment of the 2006 California Omnibus Conservatorship and Guardianship Reform Act. The U.S. Senate Special Committee on Aging conducted a hearing in September, 2007, entitled *Exploitation of Seniors: America’s Ailing Guardianship System*.⁶⁰ The hearing was conducted partly in response to a high-profile family dispute in New York City involving philanthropist Brooke Astor.⁶¹

B. Government Accounting Office Reports

As noted above, the U.S. Senate Special Committee on Aging directed the GAO to study guardianships and prepare a report of its findings. The GAO was specifically instructed to examine: 1) what state courts do to ensure that guardians fulfill their responsibilities, 2) what guardianship programs recognized as exemplary do to ensure guardians fulfill their responsibilities, and 3) how state courts and federal agencies work together to protect incapacitated elderly people.⁶² The report, entitled *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*, was released on July 13, 2004. The GAO identified several problems with guardianships. For example, court procedures for implementing guardianships were inconsistent among the states. Some states did not recognize guardianships established in other states, and few states had adopted procedures for accepting transfers of guardianships from other states. Most states did not track the number of active guardianships, and only a few could provide the number of guardianships involving elderly wards.⁶³ The GAO noted an inherent problem in guardianships and then recognized four “exemplary” courts as follows:

Guardians... do not always act in the best interest of the people they are appointed to protect. Some have conflicts of interest that pose risks to incapacitated people. While many people appointed as guardians... serve compassionately, often without any compensation, some will act in their own interest rather than in the interest of the incapacitated person. Oversight of... guardians... is intended to prevent abuse by the people designated to protect the incapacitated people.⁶⁴

....

Judges for four courts widely recognized as having exemplary guardianship programs devote staff to the management of guardianships, allowing the courts to

59. *Guardianship Over the Elderly: Security Provided or Freedom Denied*, Hearing Before S. Special Comm. on Aging (Wash. 2003) (statement of Chairman Larry E. Craig).

60. *Legislation Update 2006: Signed into Law*, Current Long-Term Care Legis., California Advocates for Nursing Home Reform, 2 (San Francisco, Cal. Nov. 6, 2006).

61. *Senate Special Comm. on Aging Hearing Examines Guardianship Abuses*, 8 Nat’l. Ctr. on Elder Abuse Newsl., at 1 (Sept. 2006, at 1.)

62. GAO Highlights, *supra* note 22, at 2.

63. *Id.* at 3.

64. *Id.* at 8.

specialize and develop programs for guardianship training and oversight. For example, the court we visited in Florida provided comprehensive reference materials for guardians to supplement training. The other three courts offered training to guardians even though state law does not require it. Three of the exemplary courts have programs in which volunteers or student interns visit people under guardianship and report on their condition to the court. For example, the court in New Hampshire recruits volunteers, primarily retired senior citizens, to visit incapacitated people, their guardians, and care providers at least annually, and submit a report of their findings to court officials. Exemplary courts in Florida and California also have permanent staff to investigate allegations of fraud, abuse, or exploitation or cases in which guardians have failed to submit required reports.⁶⁵

The Senate Special Committee on Aging directed the GAO to revisit its 2004 report. The GAO delivered its second report, *Guardianships: Little Progress in Ensuring Protection for Incapacitated Elderly People*, on September 7, 2006. The GAO noted little progress had been made, and oversight remained a crucial component “to prevent abuse by the people designated to protect the incapacitated people.”⁶⁶

C. Legal Association Response

The ABA Commission on the Mentally Disabled and Legal Problems of the Elderly convened a national guardianship symposium in July, 1988, partly in response to the Associated Press series. The conference is now known as Wingspread. The attendees were hand-picked experts representing a variety of disciplines.⁶⁷ The symposium resulted in several recommendations, which were set forth in *Guardianship: An Agenda for Reform*.⁶⁸ Among other substantive areas, the conference attendees noted the need for improved judicial practices and monitoring. With respect to monitoring, the attendees made six recommendations that were later endorsed by the ABA House of Delegates.⁶⁹ As part of their conclusions, the attendees noted, “[g]iven the serious loss of liberty and vulnerability of the incapacitated ward, it is essential that the court regularly receives and reviews basic information about the ward’s well-being, utilization of funds, and guardians’ actions.” The attendees also recognized the burden on court resources and suggested that “volunteers, review boards and investigators [be used] to verify the contents of the report and the circumstances of the ward.”⁷⁰

65. *Id.* at 3.

66. Bovbjerg, *supra* note 56, at 5.

67. John Parry, *Selected Recommendations from the National Guardianship Symposium at Wingspread*, 12 *Mental & Physical Disability L. Rep.* 398, 398 (1988). *See also* Hurme & Wood, *supra* note 42, at 869.

68. American Bar Association Comm’n on the Mentally Disabled & Comm’n on Legal Problems of the Elderly, *Guardianship: An Agenda for Reform—Recommendations of the National Guardianship Symposium and Policy of the American Bar Association* (1989).

69. Hurme & Wood, *supra* note 42, at 869.

70. American Bar Association, *supra* note 69. *See also* Fell, *supra* note 6, at 203-211 (discussion of Wingspread monitoring recommendations).

Wingspread led to an ABA national survey of monitoring practices, which was supported by the State Justice Institute and completed in 1991.⁷¹ The survey identified ten recommended “monitoring steps.” At about this same time, the State Justice Institute also funded an AARP monitoring project featuring trained volunteers to serve as court visitors, auditors, and records researchers.⁷² In 1993, the National Probate Court Standards recommended procedures for guardianship monitoring, and in 1997, the Uniform Guardianship and Protective Proceedings Act was revised to include a section on guardianship monitoring.⁷³

In November, 2001, more than 80 national experts convened to revisit the issues first raised at Wingspread. This second conference is now known as Wingspan.⁷⁴ The conference resulted in 68 recommendations, some of which are summarized as follows.⁷⁵

- There should be mandatory education for all judges hearing guardianship cases.
- There should be adequate funding for investigations at the inception of the guardianship and for oversight for the duration of the guardianship.
- Reports and accountings should be frequently audited.
- Effective monitoring requires: (a) a functional assessment of the abilities and limitations of the person with diminished capacity; (b) an order appropriate to meet the needs of the person with diminished capacity (with preference given to as limited a guardianship as possible); (c) an annual plan based on the assessment and an annual report, appropriately updated, based on the plan; and (d) inclusion of any other mandated reports that are the guardian’s responsibility, such as reports to the Social Security Administration or the Department of Veterans Affairs.
- Courts should maintain adequate data systems to assure that required plans and reports are timely filed.
- Courts should be primarily responsible for monitoring.
- Monitoring should be enforced regardless of who is serving as guardian.
- Guardianship cases should be delegated to judges who have special training and experience in guardianship matters.⁷⁶

In November, 2004, the National Academy of Elder Law Attorneys, National Guardianship Association, and National College of Probate Judges convened a

71. Hurme & Wood, *supra* note 42, at 869.

72. *Id.* at 869-870.

73. *Id.* at 870.

74. Symposium, *Wingspan—The Second National Guardianship Conference, Recommendations*, 31 Stetson L. Rev. 595 (Sponsored by National Academy of Elder Law Attorneys, the Borchart Foundation Center on Law and Aging, the Stetson University College of Law, the American Bar Association Comm’n on Law and Aging, the American Bar Association Section on Real Property, Probate and Trust Law, the American College of Trust and Estate Counsel, the National College of Probate Judges, the National Guardianship Association, and others).

75. *Id.* (six papers with accompanying issue briefs). *See also* Quinn, *supra* note 10, at 30.

76. *Id.* at 597, 603, 605-606 (at recommendations 10, 40, 51, 52, 53, 55, and 56).

Wingspan Implementation Session at their joint conference.⁷⁷ The participants identified specific action steps for 19 of the 68 Wingspan recommendations, which are referred to in *Action Steps on Adult Guardianship Progress*.⁷⁸ Relevant action steps are identified as follows:

- Action Step 56-1: States should consider the creation of specialized courts to handle guardianship matters.
- Action Step 56-2: The Supreme Court in each state should mandate training of judges to achieve core competency in guardianship matters prior to judges assuming responsibility for those cases.
- Action Step 56-3: The Supreme Court in each state should mandate training of court staff to achieve core competency in guardianship matters prior to the court/support staff assuming responsibility for those cases.
- Action Step 56-4: The funding entity of the court should allocate funds for the initial and continuing education of court staff in guardianship matters.
- Action Step 56-5: The National College of Probate Judges and/or the National Judicial College should develop and promote a judicial education module for judges and court staff in guardianship matters.

Reformation of judicial processes can be slow and indiscernible, and constant reform can be counterproductive.⁷⁹ But improving guardianship monitoring systems now is essential, particularly as age-related demographics shift and existing problems have been identified. The Wingspread recommendations and subsequent action steps suggest the need for judicial education and leadership. With such education and leadership, incremental improvements can be made. Judges will require greater accountability and demand increased or creative funding solutions once they become acquainted with the systematic and social problems identified by national commentators. The likelihood of success will be stagnated until judges lead the reform efforts.

D. Recent Reforms

More than 30 states, including Nevada, have substantially reformed their guardianship statutes in the last 20 years.⁸⁰ Examples of reform legislation include the

77. National Guardianship Network Members: NAELA, NGA & NCPJ, *Action Steps on Adult Guardianship Progress*, Natl. Wingspan Implementation Session, at 1 (2004). (Members of these three organizations were joined by representatives designated by state Chief Justices, and individuals from the American Bar Association Comm'n on Law and Aging, the American Bar Association Section on Real Property, Probate and Trust Law, and the American College of Trust and Estate Counsel). See also Bovbjerg, *supra* note 56, at 10 n.9 (regarding other representatives who attended).

78. Bovbjerg, *supra* note 56, at 10. See also National Guardianship Assoc., *Standards of Practice* 9 (3d ed. 2007).

79. See generally Frolik, *supra* note 11.

80. See generally A. Frank Johns, *Ten Years After: Where is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?*, 7 Elder L.J. 33 (1999). See also Erica

right to counsel, the right to effective notice, standardized forms and petition requirements, the right to be present at hearings, the right to cross-examination, the development of least restrictive alternatives, and the requirement of proof by clear and convincing evidence.⁸¹ The trend in guardianship reform is statutorily mandated greater autonomy for the ward.⁸² Some legislation is traceable to press criticisms. For example, in response to the *Los Angeles Times* series, California recently enacted the 2006 California Omnibus Conservatorship and Guardianship Reform Act, which requires increased court investigations, licensing, and oversight of guardian sale transactions.⁸³ Guardianship reform remains an ongoing effort across the country. The GAO identified several states that had recently modified their guardianship statutes. As other examples, Nevada amended its statute to require additional certification and training for private professional guardians in 2005. The Wisconsin legislature passed a major guardianship reform bill in 2006, after 12 years of study and consideration.⁸⁴ Vermont also made changes during its 2005-06 legislative session.⁸⁵ The Texas legislature recently created a Guardianship Certification Board, which is comprised of 15 members appointed by the judicial and executive branches.⁸⁶

A good example of reform legislation is the emphasis upon limited guardianships, known in Nevada as special guardianships.⁸⁷ The limited guardianship is touted as the most significant of all reforms.⁸⁸ Historically, guardianship authority was evenly imposed upon all wards, even though incapacity is situational. The contemporary view is that general guardianships are overused because “the abilities of mentally disabled persons to manage their personal and financial affairs are diverse and amenable to growth and development.”⁸⁹ Therefore, in limited guardianships, the court fashions the order “to meet the particular needs of the incapacitated person. The ward is relieved of specified decision making authority, and the guardian is assigned only those duties and

F. Wood, *Guardianship Reform at the Crossroad*, 15-WTR Experience 12 at 14; Quinn, *supra* note 10, at 31.

81. Wright, *supra* note 60, at 61.

82. Patricia C. McManus, *A Therapeutic Jurisprudential Approach to Guardianship of Persons with Mild Cognitive Impairment*, 36 Seton Hall L. Rev. 591, 604 (2006) (comment by McManus).

83. *Governor Sign Bills on Handling of Conservatorship Cases*, In the News (Nat'l Guardianship Found.: The Guardian Gazette, Harrisburg, PA), at 6 (Winter 2007, at 6.). See also *Governor Signs Legislation to Improve Probate Conservatorship Cases*, News Release, Jud. Council of Cal., 1 (San Francisco, Cal., Sept. 27, 2006).

84. Betsy Abramson, *Wisconsin Legislature Passes Major Guardianship Reform Bill*, Bifocal, at 80 (Aug. 2006, at 80.).

85. Reinert, *supra* note 2, at 40.

86. Don D. Ford, *The Guardianship Certification Board: A Legislative Attempt to Protect the Elderly*, 43-JUN Hous. Law. 69, 69 (2006).

87. McManus, *supra* note 83, at 604.

88. Frolik, *supra* note 11, at 354.

89. *Guardianship of Hedin*, 528 N.W.2d at 573 (citing Sheryl Dicker, *Guardianship, Overcoming the Last Hurdle to Civil Rights for Mentally Disabled*, 4 U. Ark. Little Rock L. Rev. 485, 485-86 (1981)).

powers the ward is incapable of exercising.”⁹⁰ Limited guardianships remain an important ideal that has been integrated into many state statutes, but actual use of limited guardianships remains rare.⁹¹ One appellate court was so concerned about the impropriety of a “one-size-fits-all” approach to guardianship, and the potential underuse of limited guardianships, that it directed all trial courts within its jurisdiction to “make a determination in all cases...whether limited guardianship... is appropriate.”⁹²

Not all commentators agree that continuing reforms are necessary. For example, one leading scholar contends that the best way to effectuate the goals of reformation is through judicial education and embracement,⁹³ legislative reform is only as good as the judges who preside over guardianship cases. “Only when judges become acculturated to the existing reforms, and only when they internalize the values embedded in those reforms, will guardianship truly change.”⁹⁴ New York Court of Appeals Chief Judge Judith Kaye exemplified judicial leadership when she announced in her 2005 State of the Judiciary address the establishment of a model guardianship program in Suffolk County, New York. The model program employed a holistic approach to guardianships that included judicial specialization, training for family members, mediation, judicial promptness in responding to problems, the use of volunteers to monitor the wards’ status after a guardian was appointed, and the creation of a court examiner specialist who would oversee volunteers and ensure guardian compliance with report and accounting requirements.⁹⁵ In so doing, the New York court hoped to “provide a more humane, empathetic, and cohesive treatment of its elderly citizens.”⁹⁶

IX. THE CALL FOR EFFECTIVE MONITORING SYSTEMS

The call for “more consistent, effective monitoring and accountability relating to the duties and fiduciary responsibilities of guardians” is not new.⁹⁷ Guardianship wards are not in a position to “effect personal preferences, oversee the guardian’s activities or assert changed conditions.”⁹⁸ Guardianship reports and accountings are typically self-reported and “[m]istakes, conflicts of interest, and abuses of power may go unnoticed unless the guardian or a person interested in the welfare of the ward brings it to the court’s attention.”⁹⁹ Monitoring of individual guardianships provides the best

90. *Guardianship of Hedin*, 528 N.W.2d at 572.

91. Frolik, *supra* note 11, at 354

92. *Guardianship of Hedin*, 528 N.W.2d at 582.

93. Frolik, *supra* note 11, at 354

94. *Id.* at 355.

95. H. Patrick Leis, III, *The Model Guardianship Part: A Novel Approach*, 78 N.Y. St. B.J. 10 (2006).

96. Chief Judge Judith S. Kaye, State of the Judiciary Address (Feb. 26, 2007). *See also* Leis, *supra* note 96, at 11.

97. Johns, *supra* note 81, at 36. *See also* Erica Wood, Guardianship at the Crossroads, National Aging and Law Conference (April, 2006) (noting that monitoring reform has been discussed for 20 years; acknowledging John Regan).

98. Fell, *supra* note 6, at 196.

99. Reinert, *supra* note 2, at 43.

mechanism for balancing state intervention with personal autonomy, and active judicial oversight is necessary to ensure protection is available and autonomy is preserved. As stated by a court in Maryland:

[Unlike] an ordinary type of lawsuit in which the court's role is merely that of fact-finder and adjudicator... [the court] has a much deeper involvement—a much more significant function—in a guardianship proceeding. “Lest sight be lost of the fact, we remind all concerned that a court of equity assumes jurisdiction in guardianship matters to protect those who, because of illness or other disability, are unable to care for themselves. In reality the court is the guardian; an individual who is given that title is merely an agent or arm of that tribunal in carrying out its sacred responsibility.”¹⁰⁰

Another commentator aptly described the need for guardianship monitoring as follows:

Legal intervention, to properly protect the elderly person experiencing functional incapacity, must take into account the particular characteristics of the individual and must play an ongoing role. Because the circumstances of each guardianship ward are unique and subject to change, the court, in each case, must consider the personal assistance and treatment options being made available, implement appropriate strategies for treatment and recovery, and monitor outcomes for functional change and revision of interventive [sic] measures.¹⁰¹

For these reasons, a court should “scrupulously oversee the handling of the affairs of incompetent persons under its jurisdiction and err on the side of over-supervising rather than indifference.”¹⁰² Unfortunately, the recurring calls for improved monitoring systems have not been followed by actual implementation of such systems in many states.

A. Monitoring Best Practices

Two leading guardianship scholars published an article in 2002 in which they identified eight elements of guardianship accountability and monitoring.¹⁰³ These elements are summarized as follows:

- **Orientation and Training.** “[T]he issue is not whether guardians need training, but rather, whether the training should be mandatory or voluntary,” and “how the training should be developed[, delivered,] and financed.”¹⁰⁴ Leading states have developed handbooks, videos, and flowcharts to help guardians understand their responsibilities. Other states require that guardians attend training seminars within a certain amount of time after their appointments.

100. Fell, *supra* note 6, at 197 (citing *Law v. John Hanson Sav. & Loan*, 400 A.2d 1154, 1158 (Md. 1979)).

101. Fell, *supra* note 6, at 192.

102. *Sun Bank & Trust Co. v. Jones*, 645 So.2d 1008, 1017 (Fla. Dist. Ct. App. 1994).

103. Hurme & Wood, *supra* note 42, at 872.

104. *Id.* at 877 (citing Sally Balch Hurme, *Steps to Enhance Guardianship Monitoring*, ABA, 27-28 (1991)).

- Standards, Licensing, and Certification. Many states, including Nevada, now require that professional guardians be licensed and certified. The National Guardianship Association has developed uniform standards of practice. Other states require that guardians be registered.
- Guardianship Plans. The concept of a forward-looking guardianship plan has been included in every set of guardianship recommendations since 1979.¹⁰⁵ The concept is best summarized by the National Guardianship Association's standards of practice: "The guardian should develop and monitor a written plan setting forth short and long-term goals for the ward's personal care, including residential and all medical and psychiatric concerns. Short-term goals should reflect the first year of guardianship and long-term goals should be beyond the first year. The guardianship plan should be updated no less often than annually."¹⁰⁶
- Guardian Reports. Many states, including Nevada, require guardians to file personal status reports and financial accountings.
- Court Review. The reports and accountings may be superfluous if they are not reviewed or used to monitor the case. Thus, "[i]f an annual guardian report is merely going to be placed in a file, unread or at most given a cursory review, it is nothing but a palliative that squanders the guardian's time and energy."¹⁰⁷ The Wingspread attendees found review "lacking, qualitatively as well as quantitatively."¹⁰⁸ A former President of the National Academy of Elder Law Attorneys wrote, "[m]ost states provide little or no oversight of the guardians' actions, reviewing only accountings and reacting to petitions or other accusations. Most states offer no proactive oversight that determines whether the quality of the lives of wards or conservatees are maintained, let alone enhanced."¹⁰⁹
- Role of Judges. "The key to the quality of the guardianship monitoring is the judge."¹¹⁰ The 1991 ABA monitoring study recommended that courts "designate certain judges to be responsible for guardianship hearing and review procedures." The "continuity in the monitoring process can be gained by... having specific judges and other personnel responsible for monitoring activities."
- Funding. Good monitoring requires sufficient resources. Courts must have funds available for staff, computers, software, training, and

105. Hurme & Wood, *supra* note 42, at 893.

106. National Guardianship Assoc., Standards of Practice 9 (3d ed. 2007). *See also* Fell, *supra* note 6, at 206.

107. Hurme & Wood, *supra* note 42, at 901-902 (citing ABA Comm'n on the Mentally Disabled & Comm'n on Leg. Problems of the Elderly, *Guardianship: An Agenda for Reform—Recommendations of the National Guardianship Symposium and Policy of the American Bar Association*, ABA (1989) (recommendation V-B Commentary)).

108. Hurme & Wood, *supra* note 42, at 904.

109. Johns, *supra* note 81, at 93 n.477. *See also* Hurme & Wood, *supra* note 42, at 904-905.

110. Hurme & Wood, *supra* note 42, at 914-915.

materials. “If the rights of wards are going to be adequately protected, financing is going to be a key component of any successful effort.”¹¹¹

B. National Monitoring Data

The AARP Public Policy Institute and ABA Commission on Law and Aging have examined national monitoring practices in some detail. In June, 2006, they published the first phase of their study, which is entitled *Guardianship Monitoring: A National Survey of Court Practices*.¹¹² The data was collected through a national internet-based survey in which 43 states participated. The findings are summarized as follows:¹¹³

- Guardian Reporting and Accounting Requirements. Seventy-four percent of respondents stated their court requires annual personal status reports. Eighty-three percent reported their court requires annual accountings of the ward’s finances, but only about a third reported their court requires guardians to file forward-looking plans.
- Court Assistance to Guardians. Although the most common available resource for guardians is court-provided written instructions or manuals, more than 20% of respondents reported that no guardian training resources are available in their jurisdiction; only 20% reported the court routinely sends reporting and accounting forms to guardians; and 40 % reported that no samples of prepared reports and accountings were available to guardians.
- Enforcing Reporting Requirements. Two-thirds of respondents reported the court has an effective notification system in place to alert guardians of report due dates, while the most common sanction for failure to file reports and accountings is to send the guardian a notice of delinquency, followed by a show-cause order.
- Procedures for Review. Seventy percent of respondents reported that financial accountings are reviewed by court staff, and one-third reported that a judge performs the review. One-third of respondents reported that a court investigator or other court staff has the primary task of regularly reviewing personal status reports, and another 30% stated that it was performed by the judge who entered the order.
- Verification, Investigation, and Sanctions. Over one-third of respondents reported no one is designated to verify the information in reports and accountings; only 16% reported that someone verifies every report. Over 40% of respondents reported no one is assigned to visit individuals under guardianship, whereas 25% reported that someone visits the ward regularly.

111. *Id.* at 922.

112. Naomi Karp & Erica Wood, *Guardianship Monitoring: A National Survey of Court Practices* (2006-14 AARP Pub. Pol’y Inst., Washington, D.C.) June, 2006 at v.), at v (June 2006). Also cited as PPI Report #2006-14 at, <http://www.aarp.org/research/legal/guardianships/2006-14-guardianship.html> (accessed April 15, 2008).

113. Naomi Karp & Erica Wood, *National Survey of Guardianship Monitoring Practices Shows Courts Lack Verification of Appropriate Care*, *Bifocal*, at 77 (Aug. 2006, at 77.).

The most common sanction for guardian malfeasance, used by two-thirds of respondents, is the removal of the guardian.

- Funding for Monitoring. Forty-three percent of respondents reported that funding for monitoring is unavailable or insufficient and another 30% reported their court has no specific funding for monitoring.
- Role of Attorneys. The role of the attorney for the incapacitated individual in monitoring the person's well-being after a guardian is appointed varies greatly. Thirty percent of respondents reported the court dismisses the attorney after the appointment and has no further role. Only eight percent reported the attorney remains the attorney of record and routinely stays actively involved throughout the case.
- Use of Technology. One-fifth of respondents reported their court does not use computer technology in monitoring. Only four percent of respondents reported their court e-mails guardians about reporting status, and less than one-third reported the court has a computerized data system to track the adult guardianship filings and dispositions.

C. Identification of Monitoring Practices by Exemplary Courts

In December, 2007, the AARP Public Policy Institute and ABA Commission on Law and Aging released the second phase of their study, entitled *Guarding the Guardians: Promising Practices for Court Monitoring*.¹¹⁴ The survey authors developed information from site visits, interviews, document reviews, and an invitational symposium with interdisciplinary experts.¹¹⁵ The courts in Maricopa County, Arizona; Ada County, Idaho; Suffolk County, New York; and Tarrant County, Texas were identified for implementing exemplary monitoring practices. The more promising practices were divided into monitoring categories such as “reports, accounts, and plans;” “court actions to facilitate reporting;” “practices to protect assets;” “court review of reports and accounts;” “investigation, verification, and sanctions;” “computerized database and other technology;” “court links with community groups and other entities;” “guardian training and assistance;” and “funding for monitoring.” The compilation of these promising practices can be invaluable to jurisdictions seeking to improve their guardianship systems. Judges must assert leadership in this regard as the common thread throughout most promising practices is judicial awareness and activism.

X. WASHOE COUNTY GUARDIANSHIPS

A. Comparison between National Monitoring Data and Washoe County Guardianships

Washoe County adult guardianships are randomly assigned to four different district judges. The guardianship cases represent a small part of the judge's

114. Naomi Karp & Erica Wood, *Guarding the Guardians: Promising Practices for Court Monitoring*, AARP Public Policy Institute (December, 2007).

115. *Id.*

adjudicatory responsibilities. The judges each read their files and prepare for hearings with their own patterns and perspectives. In general, however, like most courts surveyed by the GAO, Washoe County judges “spend little of their time on guardianship cases [and] tend to focus on each case as it comes up on their calendar and find it difficult to devote the time and resources needed to develop an effective guardianship program.”¹¹⁶ The court does not have the benefit of common guardianship staff or any staff member who is specially trained or dedicated to guardianship cases. The court does not have the benefit of front-end investigators or back-end compliance officers. Specific comparisons are as follows:

- Guardian Reporting and Accounting Requirements. Nevada requires annual reports of personal and financial accountings, but does not require forward-looking guardianship plans.
- Court Assistance to Guardians. Washoe County does not provide any guardian training, instructions or manuals. It does not send reporting and accounting forms to guardians. It does have guardianship forms available through the internet and self-help center, but it does not offer any legal advice regarding these forms. Washoe County does not provide samples of appropriately prepared reports and accountings to guardians.
- Enforcing Reporting Requirements. Washoe County does not have an effective notification system to alert guardians of required due dates for reports and accountings. Some judicial department clerks review guardianship files for missing or late reports and accountings. Some judges issue orders directing guardians to file late or missing reports and accountings.
- Procedures for Review. Washoe County does not have a formal mechanism for judicial review of personal status reports that are filed with the court and not transmitted to judicial chambers for review. There is no court staff with the primary responsibility for ensuring reports and accountings are filed, nor is there any staff to audit or verify financial accountings.
- Verification, Investigation, and Sanctions. Nevada, unlike some other jurisdictions, has no requirement that an independent party or court personnel determine the accuracy of personal status reports and accountings.¹¹⁷ Washoe County does not have any judicial staff resources to verify the information contained in petitions, reports and accountings.
- Funding for Monitoring. Washoe County does not have any funding for monitoring efforts, nor does it have any judicial staff resources to visit the wards.
- Role of Attorneys. Nevada does not have clear and complete ethical guidelines for attorneys appearing in guardianship cases. Legal aid attorneys are available for appointment on a case-by-case basis through

116. GAO Highlights, *supra* note 22, at 16.

117. *Id.* at 11.

the Washoe County Senior Law Project. The duration of attorney involvement depends on the facts of each case.

- Court-Community Interaction. Washoe County does not have any collaborative relationships with community groups to provide training for guardians.
- Use of Technology. Washoe County does not use computer technology for monitoring purposes. Washoe County does not communicate through e-mail regarding reports and accountings. Washoe County does not use guardianship case management software.

B. Special Advocates for Elders

Washoe County benefits from a non-county organization entitled Special Advocates for Elders (SAFE), identified as one of 12 promising practice ideas by the State Court Partnerships with the Aging Network.¹¹⁸ SAFE is patterned after the Court Appointed Special Advocate (CASA) model in which volunteer visitors provide reports to the court. SAFE was conceptualized in 1998 by several local guardianship stakeholders, including a judge, a legal services attorney, a professor who oversaw age-related studies at the local university, the Nevada Chief of Elder Rights, the County CASA Director, private professional guardians, and private guardianship attorneys.

Initially funded by two small grants, the first cadre of SAFE volunteers graduated from their training program in 2000. SAFE is currently funded by the Nevada Division for Aging Services and a private charitable foundation, but funding is nominal and the program lacks financial stability because it has no permanent funding source.

SAFE volunteers are involved with 75-80 cases at any time and have participated in over 200 cases since its inception. SAFE volunteers are typically appointed when the court perceives the ward's need for an advocate because of apparent conflicts between guardianship petitioners. SAFE has therefore grown from a visitor role into an advocacy role because most Washoe County wards are not represented by counsel or guardians *ad litem*.

Similar programs have been used in other jurisdictions, but with lesser emphasis upon advocacy. For example, the AARP Legal Counsel for the Elderly initiated a monitoring project featuring the use of trained volunteers to be the "eyes and ears" of the court and serving as court visitors, auditors, and records researchers. Volunteers can help the court verify information in reports and accountings, and identify problems or other concerns. "To be successful, a volunteer program needs program organization and development; procedures for volunteer recruiting, screening, and doing

118. State Court Partnerships with the Aging Networks, *Good Guardianship: Promising Practice Ideas on Court Links for Agencies on Aging, Adult Protective Services, and Long-term Care Ombudsman* (unpublished report, on file with the author).

background checks; written mission skills and knowledge about the subject matter; and support and commitment to the program by the supervising agency.”¹¹⁹

C. Previously Identified Problems with Washoe County Guardianships

Washoe County commissioned a report on public guardianships in 2006. The *Report on the Washoe County Guardianship System and Community Satisfaction Regarding the Washoe County Public Guardian’s Office* was prepared by private attorney Terry Hammond, who is also the Executive Director of the National Guardianship Association. Mr. Hammond offered the following conclusions regarding all guardianships in Washoe County:

- [L]ocal judges have turned to SAFE and the Senior Law Project because the Nevada statutory scheme does not mandate the appointment of a guardian *ad litem* on every guardianship case (as in many jurisdictions around the country), nor does the statutory scheme mandate a court monitoring system to ensure that guardians are being properly managed. The guardianship community clearly would welcome a formal system that mandates legal representation in every guardianship case as well as a refined court monitoring system.
- The Nevada statute should be modified to require a formal court monitoring system for jurisdictions in metropolitan areas.
- The Nevada statute should be modified to require an attorney *ad litem* in every guardianship case.
- The use of temporary guardianships should be monitored and minimized.¹²⁰

D. Local Stakeholder Concerns and Recommendations

In April, 2007, Washoe County convened a two-day guardianship conference entitled *A Bridge to the Future*. More than 100 local stakeholders, such as judges, private and public guardians, private and public attorneys, private and public social workers, physicians, geriatric care managers, academicians, and care facility representatives, attended the conference. The attendees prioritized several specific recommendations for change, which were separated into categories of “courts, community, and rights of wards.” Most of the recommendations follow Wingspan recommendations and action steps, and are generally set forth in Section XIII of this article. The conference ended with the creation of 14 committee working groups to continue the momentum for change.

119. Hurme & Wood, *supra* note 42, at 908 (quoting Spokane County Superior Court, *Volunteer Guardianship Monitoring Program: Feasibility Study* 8 (2000)).

120. Terry W. Hammond, *Report on the Washoe County Guardianship System and Community Satisfaction Regarding the Washoe County Public Guardian’s Office* 8, 10 (2006) (unpublished report, on file with the author).

XI. SURVEY OF WASHOE COUNTY GUARDIANSHIPS¹²¹*A. Survey Trends*

There is no system-wide information about Washoe County guardianships, other than the number of cases opened and closed. Between January 1, 2000, and June 30, 2006, there were 1,404 adult guardianships filed in Washoe County. As of January 6, 2007, there were 1,039 open adult guardianships in Washoe County. The author collected data from 351 randomly selected guardianship files, which constitute 25% of the guardianships filed between January 1, 2000, and June 30, 2006. The only method to selecting guardianship files for review was that an equal number of files were reviewed for each of the representative years. The preliminary findings are summarized in Appendix A below.

B. Additional Problems Identified

The survey identified additional problems, including that several files had no activity since the letters of guardianship were issued, some financial accountings were never heard by the court, and some temporary guardianships were terminated without an accounting. There was no continuity of orders and papers. For example, accountings ranged from mere copies of bank statements (sometimes inches thick) and copies of check registers without explanations, to comprehensive reports prepared by certified public accountants. There were few summary statements associated with the accountings. There were no orders referencing or requesting invoices or receipts. Inventories were also inconsistently prepared and almost always noncompliant. Clerk

121. The author intended to present a descriptive study of guardianships in Washoe County. Unfortunately, some of the results set forth in this article are not yet statistically verifiable. The author discovered several problems that must be corrected before any declarative statement can be made about Washoe County guardianships. For example, the data collection instrument was too narrowly drawn. The data does not capture the timeliness of reports and accountings for cases involving multiple years. The data is limited to the first time a report or accounting was due. The data does not capture the continuum of punctuality. Thus, reports that were only days late are classified in the same manner as reports that were late by several years. Additionally, there was no mechanism to account for some 2005 and all 2006 guardianships for which the reporting and accounting requirements had not yet matured. Another deficiency within the survey involves property inventories. There were many cases in which the ward was divested of all resources in the appointment order for Medicaid eligibility purposes. The guardianship statute is silent as to whether an inventory is required in this circumstance. The missing inventories in these types of cases were counted, even though the guardian may have been compliant. As another example, the data collected does not distinguish cases in which summary guardianship was warranted but not ordered. Thus, a number of guardianships in which the estate had a value less than \$5,000.00 were counted as deficient for having no accounting, even though the accounting requirement should have been eliminated by court order. The absence of intercoder reliability, such as within- or between-observer reliability checks, must be noted. Finally, this survey would be more meaningful if the present information were statistically extrapolated into projected trends consistent with future growth of the elderly population in Washoe County. In the final analysis, however, the survey results are included to demonstrate preliminary trends that may remain accurate if the survey is refined.

staff minutes were inconsistent and often unhelpful in understanding what occurred at hearings. A significant percentage of medical evidence appeared rote and unrelated to the ward's functionality. The costs of guardianship are troubling, particularly when such costs impair the ward's ability to subsist in the least restrictive environment. There was no consistency in the imposition of bonds and bond amounts. Finally, Washoe County judges may approve too many temporary guardianship petitions, which are frequently entered without notice, appearance or representation.

XII. SUGGESTED REFORMS

Washoe County courts are committed to serving the elderly population with substantive compliance, consistency, predictability, and judicial efficiency. The following reforms are suggested for further review, discussion and implementation.

A. Judicial Specialization

Washoe County has a dedicated probate department with a full-time commissioner, specialized probate assistant, and support staff. A similar model exists for probates and guardianships in Clark County, Nevada (Las Vegas). There are no comparable resources for the administration of guardianship cases in Washoe County. According to one commentator, the distinction between a vibrant living person and the administration of that person's affairs upon death is important to make:

Probate estate administration deals primarily with the orderly movement of property. Continuous close court oversight may be neither necessary nor desirable. Guardianship, on the other hand, is about people, not property. It's about removing or limiting a person's right of self-determination. The court uses its power to give one person the ability and the responsibility to make complex life-choice decisions concerning the personal, social and legal rights of another person.¹²²

As noted earlier, the key to guardianship monitoring is the judge. Judicial specialization is beneficial because "of the specialized nature of cases involving incapacitated persons," and the judge's "need to be familiar with the complexities of case management and surrogate decision-making for individuals with complicated mental and medical problems."¹²³ As described by two commentators:

The judge often has wide latitude in shaping court practices in guardian oversight. The judge may determine how frequently reports are filed in jurisdictions that allow discretion, what the reports should look like, what assistance guardians will have in preparation of the report, how the reports will be tracked and reviewed, whether investigators will follow up on "red flag" items, whether sanctions will be imposed, how the complaint process will be handled, and whether funds will be sought for resources monitoring.¹²⁴

122. Fell, *supra* note 6, at 196.

123. Hurme & Wood, *supra* note 42, at 917.

124. McManus, *supra* note 83, at 619 (citing Hurme & Wood, *supra* note 42).

The family division within the Second Judicial District Court already recognizes judicial specialization in many subject areas. It is suggested that a single judge in Washoe County be given responsibility for the administration of adult guardianships.

B. Staff Specialization

As noted, there are four district judges currently adjudicating adult guardianships. There are also eight different court clerks who assist the judges during guardianship hearings. The level of staff assistance varies among judicial departments, yet there is no staff member with primary responsibility for adult guardianships. There is no specific guardianship training available to the clerk staff. Judicial specialization should also include judicial staff specialization and training.

C. Creation of a Para-Professional Guardianship Specialist Position

While overall administration of guardianships is a judicial function, the specific management of guardianships may be delegated to a highly trained and experienced guardianship specialist, who could assist in both front- and back-end matters in collaboration with the guardianship judge. The guardian specialist could be particularly helpful in training guardians and coordinating with the SAFE program.

D. Front-End Investigations; Pre-Review of Petitions and Orders; Dissemination of Pre-Hearing Status

The sequential methodology for determining capacity is set forth in the book *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings*.¹²⁵ In sum, the judge must screen the case, gather additional information as available, and conduct a hearing to determine capacity. As part of the process, the court should examine the proposed ward's medical condition, cognition, functionality, values and preferences, risks and level of supervision, and means to enhance capacity. The court should also develop a plan for overseeing the guardian. These tasks simply cannot be performed within the existing system in which judges review their case files the day before or the day of the initial hearing and proposed orders are given to the judge at the hearing in open court. Additionally, it is difficult for judges to meaningfully analyze the adequacy of notice requirements. The AARP recommends that an investigator be appointed in every temporary guardianship case, either before the hearing or within 48 hours after the appointment of a temporary guardian.¹²⁶ Investigators can also inform wards of the impending action, the right to oppose the action, the right to attend the hearing, and the right to be represented by counsel. Investigators can make recommendations to the judge

125. American Bar Association Comm'n on Law and Aging-American Psychological Association, *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings* (2006). *See also* American Bar Association Comm'n on Law and Aging, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005).

126. Testimony of Naomi Karp, AARP Public Policy Institute, Judicial Council of California Probate Conservatorship Task Force (Mar. 24, 2006) (noting the important distinction between temporary guardianships and emergency guardianships).

regarding the propriety or impropriety of guardianship intervention. Much of this work can be done by a guardianship specialist in collaboration with SAFE volunteers who have been used as investigators with great success.

The Washoe County Probate Commissioner and the Clark County Probate and Guardianship Commissioners preview all petitions, papers, and proposed orders to determine statutory compliance. The Commissioners have developed a notice system to petitioners through the internet of approved and deficient matters. It is suggested that a similar model be developed for Washoe County guardianships. By so doing, judicial resources will be made more efficient, while consistency and compliance are enhanced.

E. Development of Training and Reference Materials

Guardians must understand what is expected of them before they can be accountable to the court. For example, guardians should know how to access and possess the ward's financial accounts, segregate the ward's financial accounts from the guardian's accounts, perfect control of real property, and protect personal property. Guardians should also know their back-end reporting, accounting, and petitioning responsibilities, and have an information source when post-appointment issues arise. As but one example of many, the parties at the hearing could be immediately referred to a compliance conference with the guardianship specialist or a SAFE volunteer. For these reasons, Washoe County should develop specific training and reference materials for guardians.

F. Development of Model Orders, Inventories, Reports, and Accountings

As noted elsewhere in this report, there is virtually no consistency with inventories, reports, and accountings. The inconsistencies create judicial inefficiencies and increase the risks of error. A model appointment order could include the dates by which the inventory, reports and accountings are due. The order could also include the date for the hearing on the next annual accounting.

G. Development of Forward-Looking Plans

The use of forward-looking plans is helpful when monitoring the adequacy of guardianship intervention. These plans are essential for wards with limited capacity, because capacity is situational. These plans also help guardians understand the important nature of their work and the standards by which they will be reviewed.

H. Back-End Monitoring

“To adequately protect the ward, the court must conduct more than just a paper review of the guardian's report of the circumstances. [The court] must investigate the validity of the report and determine whether activities of the guardian reflect the purposes of the guardianship. The only sure way to accomplish this is for a non-involved person, such as a court-appointed visitor, to get out of the courthouse and into ‘the field’ to investigate. Such a visitor could talk to the ward, interview caregivers,

inspect living arrangements and prepare a report to the court.”¹²⁷ Accountings should be “accurate, complete, and verifiable,” yet Washoe County does not have a satisfactory system for reviewing reports or accountings.¹²⁸ The court should develop a protocol for auditing select financial accountings, to include periodically requesting invoices and receipts. The SAFE program could be a remarkable, cost-efficient resource for these monitoring tasks.

I. Respond to the Potential Overuse of Temporary Guardianships

Temporary guardianships should be the exception rather than the rule, and as noted, temporary guardianship should not become an “automatic doorway” to permanent guardianship that bypasses procedural safeguards.¹²⁹ A collaborative system-wide analysis of temporary guardianships appears warranted.

J. Develop Standards for Identifying, Appointing, and Supporting Special Guardianships

Too often standard medical labels are relied upon to the detriment of accurate functional assessments. As a result, the special guardianship mechanism appears to be underused in Washoe County. A collaborative system-wide analysis of special guardianships appears warranted.

K. Development of Mediation Alternatives

Washoe County judges who preside over family disputes are statutorily required to pursue nontraditional methods of dispute resolution.¹³⁰ Guardianships also often involve complex family dynamics. Just as Washoe County provides mediation for dissolution actions and state-initiated terminations of parental rights, so should it adopt a mediation model for contested guardianships.

L. Identify Additional Funding Sources

The specialist judge should be assigned the responsibility of identifying nontraditional and creative revenue sources to assist with the substantial reforms suggested in this report.

M. Development of Computerized Guardianship Case Management

Washoe County could improve its monitoring efforts through specialized technology. Washoe County could also track the details of its guardianships through specialized technology.

127. Fell, *supra* note 6, at 206.

128. *In re Guardianship of Saylor*, 121 P.3d 532 (Mt. 2005). See also *Matter of Estate of Clark*, 772 P.2d 299, 302 (Mont. 1989).

129. American Bar Association Comm’n on Law and Aging-American Psychological Association, *supra* note 126, at Section 1C. See also Judicial Council of California Probate Conservatorship Task Force, *supra* note 127.

130. NRS 3.225 (2005).

N. Analysis of Guardianship Costs Borne by the Ward, and Development of Cost-Efficient Models using Public Guardians, Private Guardians, Public Attorneys, and Private Attorneys

The aggregate costs of guardianship are generally paid from the ward's estate. Consequently, some wards suffer total depletion of their resources during the guardianship, which alters the ways in which they live out their lives. Resource protection should be an important, but not dispositive consideration, in every guardianship. A collaborative system-wide analysis of administrative expenses appears warranted.

O. Development and Strengthening of SAFE Program

The benefits of a well-trained cadre of volunteers, such as SAFE, are recommended by virtually all national guardianship experts. SAFE is an essential component of a successful Washoe County guardianship system. While adjustments to the current program may be necessary, SAFE provides trained, compassionate volunteers who are willing to help the judges assist elderly guardianship wards. It is suggested that the SAFE Director and necessary staff be assimilated into Washoe County as a permanent feature of guardianship administration.

XIII. CONCLUSION

The Latin question *Quis Custodiet Ipsos Custodias?* has been translated to mean Who shall oversee the overseer?; Who is guarding the guardian?; and Who will watch the watcher?¹³¹ Regardless of the question's ancient origins, its contemporary meaning remains clear: those with responsibilities for others must, themselves, be responsible. This article examines the general concern that judges abdicate their responsibilities when they fail to monitor guardians and fail to demand guardianship accountability. The article further assesses how guardianship wards suffer the necessary indignity of state intervention. It comes to the conclusion that judges can ameliorate that indignity by ensuring guardianship appointments only when necessary, imposing limitations when possible, and appropriately sanctioning guardians' malfeasance. Clearly, these actions cannot occur without an improved guardianship system and effective monitoring of guardians. There is a tsunami of Americans approaching their "golden years." Courts must do better now, and prepare better for the future as the wave of elderly citizens is observable on the horizon.

131. Plato, *The Republic* (Benjamin Jowett trans., Hackett 360 B.C.E). See also Juvenal, *Satire VI: Death is Better Than Marriage*, in *Satires Book 2*, 6.346-348 (n.d.); E.O. Winstedt, *A Bodleian MS of Juvenal*, *Classical Review* 13:201-205 (1899).

APPENDIX A

- 75 percent of the wards were between the ages of 60 and 99, and the average age within this group was 75.
- 12 percent of the wards were between the ages of 40 and 59.
- 13 percent of the wards were between the ages of 18 and 39.
- 64 percent of the guardianships began with the appointment of a temporary guardian.
- 30 percent of the petitions sought a permanent guardian only.
- 3 percent of the petitions sought temporary authority only.
- 2 percent of the files were “empty,” meaning there was nothing filed after the initial petition.
- 1 percent of the petitions were withdrawn before an order was entered.
- 1 percent of the petitions for temporary guardianship were either set for hearing or denied. The balance of petitions for temporary guardianship was granted.
- 85 percent of the petitions sought authority over the person and estate.
- 8 percent of the petitions sought authority over the person only.
- 3 percent of the petitions sought authority over the estate only.
- 4 percent of the petitions did not state the authority sought.
- 88 percent of the petitions sought general authority.
- 7 percent of the petitions sought special authority.
- 5 percent of the petitions did not state whether general or special authority was sought.
 - 76 percent of the petitions seeking special authority by caption requested specific, limited authority, whereas 24 percent of the petitions seeking special authority by caption actually requested general, non-specified authority.
 - 1 percent of the petitions seeking special authority included a functional assessment.
- 5 percent of all guardianship files contained misfiled documents from other guardianship files.
- 52 percent of the appointment orders were not compliant because they were missing residency statements or the names and addresses of relatives within the second degree of consanguinity.
- 42 percent of the files were missing notices of entry of order.
- 12 percent of the guardians did not have letters of guardianship issued.
- A guardian *ad litem* was appointed in 1 percent of the cases.
- 12 percent of the wards were represented by attorneys.
- An investigator was appointed in 1 case.
- A SAFE volunteer was appointed in 10 percent of the cases.
- 39 percent of the wards attended the first hearing.

- 28 percent of the estate cases were granted summary administration status.
- 48 percent of the files were missing inventories.
 - Of the inventories filed, 44 percent were filed late.
- 30 percent of the files were missing reports of person.
- 62 percent of the reports of person were filed late.
- 18 percent of the files were missing financial accountings.
- 59 percent of the financial accountings were filed late.
- The average length of time between the ward's death and the petition to terminate the guardianship was 9.4 months.

MANEUVERING THE LABYRINTH OF LONG-TERM CARE ADMISSIONS CONTRACTS

*Amy Parise DeLaney, CELA**

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Until recently, the phrase “*caveat emptor*” has not been considered applicable to consumer transactions involving health care. As a society, we are conditioned to trust our healthcare providers and accept their directives. We ingest prescribed medications, undergo recommended surgeries, engage in suggested therapies, and sign documents at the direction of our health-care provider. Our confidence in the health-care industry plummets, however, when we are faced with headlines of Medicare fraud, botched surgeries, kickbacks, nursing home neglect, and the trend towards profit-maximization in health care.¹ Now, more than ever before, consumers must invoke a “buyer beware”

1. Ewing, Bradley T., Kruse Ewing, et al., *Linkages within the Health Care Industry*, Texas Tech University Department of Economics (October 2002).

mentality, especially at the commencement of the relationship with a long-term-care facility.

Contracts between seniors needing care and facilities providing care are often presented at difficult and inopportune times, fraught with significant emotion, stress, and often, guilt. An independent senior who suffers a fall likely will be subjected to a whirlwind of experiences—rushing to the hospital emergency room, waiting to be admitted to the hospital, undergoing surgery, entering the intensive-care unit, recuperating in a hospital bed, and rehabilitating with physical and occupational therapy. Then, after several exhausting days of this rollercoaster ride, the senior is discharged from the hospital with very little, if any, notice and subsequently admitted to a never before seen nursing facility for further rehabilitation and care. In the face of this frenzied activity, many seniors and their families undoubtedly feel rushed and confused and are in no position to negotiate through the long-term-care admissions process. Familiarity with the rules governing long-term-care admissions agreements has become especially important to attorneys who provide legal counsel to the elders who require long-term care or their fiduciaries.

Skilled and intermediate care nursing facilities are what one would typically consider to be “nursing homes.” The laws pertaining to skilled and intermediate care facilities are the most detailed and expansive. Public policy necessitates widespread control, since skilled and intermediate care nursing facilities generally service the infirm, chronically ill, and most vulnerable members of our society. For these reasons, the scope of this article will focus mainly upon the background and analysis of contracts with skilled nursing facilities, hereinafter referred to as “nursing homes” or “facilities.” Other types of facilities will be briefly reviewed at the end of this article, as some aspects of resident’s rights and facility responsibilities discussed may not apply to other facility types. Therefore, it is incumbent upon the practitioner to ascertain the facility license and certification prior to rendering advice and counseling regarding the admissions process.

In general, nursing home residents’ rights are defined and protected under federal and state law while the admissions agreement is carefully designed to benefit and protect the nursing home. More often than not, individuals entering nursing homes have had no need to know their rights under federal and state law prior to the crisis that necessitated their admission to the nursing home and are neither familiar with their rights nor cognizant of the surrender of their rights delineated under the terms of the contract. The facilities, on the other hand, have daily experience with the rights of residents and obligations of the facilities, as it is their business. As in most consumer contracts, long-term care agreements give the business the upper hand, and the consumer is left with limited bargaining power, resulting in catastrophic situations not only for the residents, but also their spouses, children and other family members. Therefore, preventing such predicaments has become a necessary feat of the practitioner.

I. MEDICARE AND MEDICAID CERTIFICATION CREATES STATUTORY RIGHTS

Prior to the enactment of the “modern” Medicaid and Medicare programs in the 1960s, most nursing homes were government owned and operated. Currently, most nursing homes are privately owned and operated, but they are publicly subsidized.² “On average, 67% of nursing home residents have their care paid for through the Medicaid program. While 9% are covered by Medicare, and 24% are covered by private insurance or pay for the care themselves.”³ The federal Medicare program, also known as Title XVIII of the Social Security Act, provides up to 100 days of skilled nursing care and rehabilitative services in nursing homes, but it does so only after a hospitalization of at least three days and then only if the level of care received is considered “skilled” or “rehabilitative” rather than “custodial.”⁴ The few residents who pay privately for care quickly discover their insurance or personal nest eggs will become rapidly exhausted due to the extraordinarily high cost of this absolutely necessary care. As a result, most nursing home residents eventually look to the Medicaid program, or Title XIX of the Social Security Act, to fund their care.⁵

Most nursing homes are under financial pressure to increase their census of Medicare qualifying residents while simultaneously decreasing their census of Medicaid recipients. This is due, in large part, to Medicare providing skilled nursing facilities with higher payment through a prospective payment system, as opposed to the much lower (and more delayed) state-contracted Medicaid per diem reimbursement rate.⁶ Failure to properly review, amend, and negotiate an admissions contract may place a Medicaid qualifying client on the receiving end of a discharge hearing, when the facility claims not to have any available Medicaid beds. Once a resident becomes impoverished enough to receive Medicaid, he or she typically lacks available resources to enforce his or her rights.

Medicare and Medicaid certifications are conditioned upon compliance with federal statutes and regulations.⁷ For this reason, facilities are not only bound by state law, regulations, and departmental policies, but also by federal statutes and regulations.⁸ Whether or not your client is, or may become, a Medicaid or Medicare

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2. K.R. Kaffenberger, *Nursing Home Ownership: An Historical Analysis*, 12-1 *Journal of Aging & Social Policy*, Page 38, Volume 12, Issue 1 (March 7, 2001).
 3. U.S. General Accounting Offices, *Nursing Home Expenditures and Quality*, GAO-02-431R, <http://www.gao.gov/new.items/d02431r.pdf> (Washington, DC: June 2002).
 4. 42 U.S.C. § 1395; <http://www.medicare.gov/LongTermCare/Static/Home.asp> (last visited (2006), <http://www.medicare.gov/LongTermCare/Static/Home.asp> (accessed October 23, 2007).
 5. 42 U.S.C. § 1396 (2006).
 6. Nancy A. Peterman, Nancy A. and Collin B. Williams, Collin B., *Intensive Care – Skilled Nursing Home Facilities: The Challenges of the 21st Century*, 24-2 *American Bankruptcy Institute Journal*, Page 31, Volume 24, Issue 2 (March 2005); see also Medpac’s “Report to the Congress: Promoting Greater Efficiency in Medicare,” http://www.medpac.gov/documents/Jun07_EntireReport.pdf, at 18 (June 2007, p. 187).
 7. Linas J. Grikis, *Understanding a Long-Term Care Contract*, Advising Elderly Clients and Their Families (Illinois Institute of Continuing Legal Education, 2006).
 8. The Secretary of the U.S. Department of Health and Human Services (DHHS) and its underlying agency, the Centers for Medicare and Medicaid Services (CMS), have authority under the

beneficiary is somewhat irrelevant. A long-term-care facility is bound by relevant federal laws for all of its residents if it is certified to receive public subsidies under the federal Medicare or Medicaid programs. Additionally, if federal law is more protective than state law, federal law controls.⁹ However, federal law generally should not preempt stricter state standards for the protection of long-term-care residents.¹⁰

In 2000, the Census Bureau determined that less than 3% of nursing homes (2% of beds) opted not to obtain federal certification. Therefore, nearly all nursing homes in the United States are Medicare and/or Medicaid certified.¹¹ This may not continue to be the case, as the industry trend appears to be toward privately funded facilities.¹² To ascertain whether a nursing home is publicly funded, the State of Illinois, like many others, offers cost reports on the web at www.hgs.illinois.gov/assetscr. Additional information may be obtained at Medicare's Nursing Home Compare site at www.medicare.gov/NHCompare, or by submission of a Freedom of Information Act request to the Centers for Medicare and Medicaid Services (CMS) or the state regulatory agency. In Illinois, the Department of Public Health licenses and regulates such facilities.¹³

II. THE ADMISSIONS PROCESS AND TIMING OF THE NURSING HOME CONTRACT

The law generally contemplates that a facility will present a contract to a potential resident prior to or at the time of admission. The Illinois Nursing Home Care Act states, in part:

*Before a person is admitted to a facility, or at the expiration of the period of previous contract, or when the source of payment for the resident's care changes from private to public funds or from public to private funds, a written contract shall be executed between a licensee and a resident.*¹⁴

Federal law requires the nursing facility to provide a written agreement and statement of rights at the time of a resident's admission.¹⁵ In reading the federal and

Administrative Procedure Act, 5 U.S.C. § 551, et seq., to issue regulations governing Title XIX, in the Federal Register, which are codified at Title 42 of the Code of Federal Regulations, Part 430, et seq.

9. Federal law (42 U.S.C. §§ 1395i-3 and 42 USCS §§ 1395i-31396r and 1396r) (2006) preempts local regulations regarding facilities eligible for Medicare and/or Medicaid benefits that are based on level of care distinctions; thus, District of Columbia's regulations, which provide for two-tiered system for licensing and regulating nursing facilities that are eligible for reimbursement under Medicare and/or Medicaid, violate federal law and are preempted. Newman v. Kelly, 848 F. Supp. 228 (D.D.C. Dist. Col., 1994).
10. 42 USCS § 1396r(c)(2)(5)(B)(i) (2006).
11. Shi, Leiyu Shi and Douglas Singh, Douglas, Essentials of the US Health Care System, 239 (Jones and Bartlett Publishers (2004) at p. 239.).
12. Peterman and Williams, *supra*, note 1.
13. The form for the submission of a Freedom of Information Act request from the Illinois regulatory agency is available online at www.idph.state.il.us/pdf/foi.pdf.
14. 210 ILCS § 45/2-202(a) (West 1996).
15. 42 CFR § 483.10(a)(6) (2002); 42 U.S.C.S. § 1396r(c)(1)(B)(i) (2006).

state laws together, although a facility must present a contract, it appears that there is no express requirement under federal law for a resident to sign a contract.

For facilities with a limited number of Medicaid beds (known as “distinct part” facilities), there exists a mandatory disclosure to the resident of the possibility of discharge due to lack of an available Medicaid bed. In Illinois, this requirement must be made early on, presumably to allow a resident with limited means to secure the services of a facility that will not discharge upon qualification for Medicaid. A facility’s failure to disclose the possibility of discharge *prior to* admission may become a valid defense for a resident faced with an involuntary discharge proceeding. It is therefore crucial to document the timing of the admissions agreement and any additional disclosures, which may be backdated by the facility. Unfortunately, backdating admissions agreements and required disclosures tends to be a typical practice of some nursing facilities in Illinois. Many unwitting residents inadvertently accept and execute such documents without understanding the implications.

Unfortunately, it is unlikely that a nursing home will provide a prospective resident with a contract and the required disclosures prior to admission. Most nursing home admissions occur within a very short time, if not immediately, upon discharge from a hospital. Usually, a contract is presented to a family member in conjunction with the frantic admission of the resident, along with high pressure to sign on the spot or instructions to sign and return it right away. This can happen even well after the original admission of the resident.¹⁶ It is a rare occurrence for a nursing home representative to visit a prospective resident in the hospital to present and explain the contract.

Neither Federal nor Illinois laws provide penalties against a nursing home resident for refusal to sign a contract. However, if a resident is not yet residing in the nursing home at the time the contract is presented, the facility may choose to deny admission to a resident who refuses to sign, perhaps because the resident appears difficult or non-conforming to the admissions director. Whether a denial of admission on this basis is appropriate and legal will depend upon the language of the contract, which may be construed as being in violation of statutory law or public policy. In general, a nursing home’s main exercise of power against a resident is an involuntary discharge proceeding, but involuntary discharge should not be granted if the sole reason for the discharge is a resident’s failure to sign an admissions agreement.¹⁷

III. NURSING HOME CHARGES

Privately paying nursing home residents are generally required to pay whatever the market will bear, so long as the resident is notified of the charges.¹⁸ For residents

16. Recently, a client appeared at my office and asked me to review with an admissions agreement thatfor my review which was backdated 17seventeen months.

17. See also the section of this publication, entitled “Termination of Contract.”

18. See *See Keup v. Wis. Dep’t of Health & Family Servs.*, 2004 WI 16, P32 (Wis. 2004), wherein it states) (stating, “medical assistance providers may charge private pay patients any rate they deem appropriate, provided that the patient has notice as to the amount of the charge.”).

receiving Medicare or Medicaid benefits, most nursing home charges are restricted by the Medicaid and Medicare rules.

If a resident qualifies, or may qualify in the future, for governmental programs to pay for long-term care, a facility contract cannot require the resident to waive the right to these governmental subsidies.¹⁹ Also, a facility is strictly forbidden from requiring or accepting a voluntary donation from a resident at the time of admission.²⁰

A nursing home contract must set forth the nursing home's daily rate, what is included in the daily rate, and what additional fees the facility will charge for supplemental services.²¹ If an additional fee for supplemental services or items is required, Illinois law requires the charge to be delineated in the contract; and if the exact fee may be calculated with specificity, the additional cost must be stated.²²

The facility may not impose a charge for any item or service for which payment is made under the Medicaid or Medicare programs, except for that which is considered to be a required co-payment.²³ Furthermore, there is an express prohibition against the supplementation of charges for most goods and services to a Medicaid resident; a facility must accept Medicaid as payment in full.²⁴ Fees may be imposed upon non-medically related luxury items, which are enumerated in the federal regulations. These include: telephones, televisions for personal use, smoking materials and confections, personal clothing, flowers and plants, privately hired nurses or aides, and private rooms if not required for isolation purposes.²⁵

Nursing homes are precluded from charging for the following services and items: nursing services, dietary services, activities, room and bed maintenance services, routine personal hygiene items, and medically-related social services.²⁶ "Nursing services" are broadly defined to include not only generalized nursing care, but also "related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident."²⁷ The Federal Nursing Home Reform Act

19. 42 C.F.R. § 483.12(d)(1.) (2006).

20. 305 ILCS § 5/8A-11(a)(2)(i) (West 1996); 42 USCS §.S.C. § 1396r(c)(2)(5)(A)(iii) (2008); 42 C.F.R. § 483.12(d)(3) (2006).

21. 210 ILCS 45/2-202(g)(2) (West 1996), 45/2-202(g)(3); 77 Ill. Admin. Code § 300.630(m) (2008); 42 USCS §.S.C. § 1396r (c)(1)(B)(iii) (2008); 42 C.F.R. § 483.10(b) (2006).

22. 210 ILCS § 45/2-202(g); 77 Ill. Admin. Code § 300.630(m.) (2008).

23. 42 C.F.R. § 483.10(b)(8) (2006); 42 C.F.R. § 447.15; See (2006); *see also* 114.6 of Handbook for Providers of Medical Services at www.hfs.illinois.gov/assets, 114.6, www.hfs.illinois.gov/assets.021103.chap100.pdf (last visited 10/28/07), and the, 2007); CMS State Operations Manual although generally available online at www.cms.hhs.gov while normally available, was under construction (last visited 10/29/, www.cms.hhs.gov (accessed October 28, 2007).

24. *Lawrie v. Dept. of Pub. Aid*, 72 Ill. 2d 335 (1978); *see also* 42 C.F.R. § 483.10(b)(8) (2006); 42 C.F.R. § 447.15 (2006); 305 ILCS § 5/8A-11 (West 1996).

25. 42 C.F.R. § 483.10(c)(8)(ii) (2006).

26. 42 C.F.R. § 483.10(c)(8)(i) (2006).

27. 42 C.F.R. § 483.30 (2006).

also requires a nursing home to provide emergency dental services, pharmaceutical services, and mental health treatment.²⁸

If a state plan does not define certain items or services as “nursing facility services,” but the resident has requested and received these services, the facility may charge the resident.²⁹ However, a facility must not charge a resident for any item or service not previously requested, nor may a facility require a resident to request a chargeable item or service.³⁰ Even when supplemental services or items are requested, the provider is limited to the charge imposed. Federal regulations state that the provider may charge only the differential between (1) the provider’s customary charges for the services furnished and (2) the provider’s customary charges for the kinds and amounts of services that are reimbursed by the government.³¹

This premise was applied in a recent Wisconsin case in which a Mr. Keup, a Medicaid applicant and nursing home resident, sought a refund of his monthly nursing home payment after being retroactively approved for Medicaid benefits. The court held that Mr. Keup did not have a federally protected right to be refunded the entire payment. The court ruled Mr. Keup was only entitled to reimbursement for the amount originally paid by him which exceeded the medical assistance reimbursement figure.³² Under this analysis, if a resident provides a nursing home payment of \$6,000 in October, and receives approval for Medicaid commencing in October, but the facility’s Medicaid reimbursement rate is \$3,000 per month, the resident would only receive a refund of \$3,000.

A. Deposits

The contract must specify the amount of any deposit paid.³³ Under federal law, it appears that deposits may be required only of privately paying residents. Title XIX provides that the facility cannot require any payment as a condition of admission or continued stay in a facility.³⁴ Illinois law explicitly prohibits a nursing home from requiring Medicaid recipients to pay a deposit.³⁵ Furthermore, Title XVIII forbids a facility from requiring residents to deposit their personal funds with the facility.³⁶ Whether this technically prohibits a deposit in all cases is debatable.

Regardless, depositing funds with a nursing home is generally not recommended. As in the *Keup* case, a consequence of an unnecessary payment may be a partial, rather than a full, refund.³⁷ Illinois law requires any deposit made by a resident who becomes

28. 42 U.S.C.S. § 1396r(b)(C)(4)(A). (2008).

29. 42 USC.S.C. § 1396r(c)(2)(5)(B)(i). (2008); *see also* Handbook for Long Term Care Providers of Medical Services at, www.state.il.us/dpa/ (accessed April 18, 2008).

30. 42 C.F.R. § 483.10(c)(8)(ii) (2006).

31. 42 U.S.C.S. 1395i(c)(1)(B) (2008); 42 C.F.R. § 489.32. (2006).

32. See *Keup v. Wis. Dep’t of Health & Family Servs.*, 2004 WI 16, P32 (Wis. 2004).

33. 210 ILCS § 45/2-202(g)(4) (2008).

34. 42 USC §1396r(c)(2)(5)(A)(iii). (2008).

35. 210 ILCS 45/2-202(j) (2008); 77 Ill. Admin. Code § 300.630(u).) (2008).

36. 42 USC § 1395i-3(c)(6) (2008).

37. *Keup*, 2004 WI 16, at 32.

eligible for Medicaid to be “returned to the resident within thirty (30) days, unless the deposit is encumbered as an eligibility requirement.”³⁸ However, if encumbered as an eligibility requirement, the resident would be forced to spend down the entire amount of the payment, less an allowable asset disregard, which may result in a lesser refund to the resident than in *Keup*.

The facility may be penalized for double charging if it accepts a deposit and also receives Medicaid payments. This is considered a business offense, and it would subject the facility to fines and more serious penalties, even a loss of certification, for egregious or continued conduct.³⁹

If a deposit is made to the nursing home and the resident dies, obtaining the refunded deposit is not a simple process. Federal law provides that the deposit shall be paid to the estate administrator;⁴⁰ however, the small nursing home deposit certainly would not warrant the court costs and legal expenses associated with the appointment of an estate administrator through the opening of a probate estate.⁴¹ Arguably, a small estate affidavit may be utilized in Illinois for estates not exceeding \$100,000; however, a small estate affidavit is not permissible if an unpaid known claimant exists. If the resident received Medicaid payments, the Department of Public Aid is a known creditor, thereby precluding the provision for small estates.⁴² Ensuring the deposit is coupled with a beneficiary designation may alleviate potential difficulties; however, nursing homes certainly do not use beneficiary designations as a standard practice.

B. Change in Payment Source

Illinois law states a new resident contract shall be executed when certain circumstances arise, such as, when a resident’s payment source changes.⁴³ This may occur when either the resident’s Medicare eligibility terminates or when a resident qualifies for Medicaid benefits. However, the Illinois Nursing Home Care Act states the written contract shall be executed prior to admission or at the expiration of the period of previous contract or when the payment source changes. Thus, if a prior contract was previously executed and the resident chooses not to execute a new contract, another contract execution does not appear to be required.⁴⁴

IV. NOTICE OF RIGHTS

The nursing home contract must contain a statement of the nursing home resident’s rights. If a contract is not signed by the resident at the time of admission, the facility must provide oral and written notification to the resident, or legal

38. 210 ILCS 45/2-202(j)(4) (West 1996); 77 Ill. Admin. Code § 300.630(u)(4). (2008). See also, Grikas, *Understanding a Long-Term Care Contract*, *supra* note 9.

39. 210 ILCS 45/2-202(k); 77 Ill.39.210 ILCS 45/2-202(k) (West 1996); 77 Ill. Admin. Code § 300.630(v) (2008).

40. 42 USC § 1395i-3(c) (2008).

41. Illinois Jurisprudence, Probate § 35:01.

42. 755 ILCS § 5/25-1. (West 1996).

43. 210 ILCS § 45/2-202(a) (West 1996); 77 Ill. Admin. Code § 300.630(a)(1).) (2008).

44. 210 ILCS 45/2-202(a).

representative, of the resident's right to participate in a plan of care, and the requirements and procedures necessary to establish Medicaid eligibility.⁴⁵

Illinois law allows a more generous time period than federal law for the notification of the resident's rights. Illinois law requires notification at the time of admission, or as soon thereafter as possible but no later than 48 hours after admission. While Illinois law does not require verbal notification, the Nursing Home Care Act mandates a written explanation of federal and state rights, and it specifically requires the use of the notice published by the Office of the State Long-Term Care Ombudsman. This written notice must continue to be provided at least annually thereafter.⁴⁶ The following residents' rights are codified in the Illinois Nursing Home Care Act and/or the Federal Nursing Home Reform Act and the promulgated regulations by the underlying agencies. While all of the below rights are not identical from state to state, or between Illinois and federal statutes and regulations, federal law does not preempt stricter state standards for the protection of long-term-care residents.⁴⁷

A. No Deprivation of Rights

No resident shall be deprived of any rights, benefits, or privileges guaranteed by law, including but not limited to Title XVII and Title XIX of the Social Security Act, the Constitution of the State of Illinois, or the Constitution of the United States solely on account of his or her status as a resident of a facility.⁴⁸ Federal regulations similarly state, "The resident has the right to exercise his or her rights as a resident of the facility and as a citizen or resident of the United States."⁴⁹

B. Spousal Impoverishment Rights

All new residents and their spouses shall be informed upon admission of their spousal impoverishment rights as defined in Section 5-4 of the Illinois Public Aid Code.⁵⁰ Under the federal law, it is incumbent on the facility to furnish a written description of the requirements and procedures for establishing Medicaid eligibility, including the right to "request an assessment to determine the extent of a couple's non-exempt resources" at the time of admission and "that amount which cannot be considered available for payment toward the cost of... medical care."⁵¹ The federal regulations also require information to be prominently displayed regarding how to apply for and use Medicare and Medicaid benefits, and how to receive refunds for previous payments covered by such benefits.⁵²

45. 42 USC § 1396r(c)(1)(B) (2008); 42 USCS.S.C. 1395i-3(c)(A). (2008).

46. 46.210 ILCS § 45/2-211. (West 1996).

47. 42 USC § 1396r(c)(2)(5)(B)(i.). (2008).

48. 210 ILCS § 45/2-101 (West 1996).

49. 42 C.F.R. § 483.10(a)(1). (2006).

50. 210 ILCS § 45/2-101.1 (West 1996).

51. 42 C.F.R. § 483.10(b)(7) (2006).

52. 42 C.F.R. § 483 (b)(10) (2006).

C. Management of Financial Affairs

A resident shall be permitted to manage his or her own financial affairs unless a court-appointed guardian authorizes in a written statement that the administrator of the facility may manage such resident's financial affairs.⁵³ Similar provisions to allow the resident to manage his or her own finances are found in the federal regulations. In addition, should a resident choose to place funds with the nursing home for safekeeping, the nursing home must be bonded, pay interest on funds in excess of \$50, maintain accounting procedures, and never commingle residents' funds with those of the nursing home.⁵⁴

D. Disposition of Personal Property

A resident shall be permitted to retain and use or wear his or her personal property in his or her immediate living quarters, unless deemed medically inappropriate by a physician and so documented in the resident's clinical record. The facility is required to provide adequate storage space for the personal property of the resident, a means of safeguarding small items of value in the facility, and daily access to such valuables.

To minimize theft or loss, the facility is required to make reasonable efforts to safeguard a resident's property, including training and monitoring staff, labeling property, and maintaining property inventories. The facility is also required to develop procedures for investigating complaints concerning theft of residents' property and to promptly investigate all such complaints.⁵⁵

E. Personal Physician; Medical Treatment

The rights concerning medical treatment are outlined in the Nursing Home Care Act and provide that a resident is able to retain his or her own personal physician, obtain medical and nursing home records, and actively participate in a plan of care.⁵⁶ These rights are nearly identical to those in the federal law, although the federal law requires a speedier response to a records request. Under the federal law, records are to be provided to a resident within 24 hours of a request, excluding weekends or holidays.⁵⁷

The Illinois Act also addresses a prohibition on experimental research or treatment without prior informed consent; and the conduct of any experimental research or treatment must be regulated. The resident expressly retains the right to refuse medical treatment, unless such refusal would be harmful to the health and safety of others and such harm is documented by a physician in the resident's clinical record. The resident's refusal will eliminate the facility's obligation to provide the treatment.⁵⁸

53. 210 ILCS 45/2-102 (West 1996).

54. 42 C.F.R. § 483.10(c.) (2006).

55. 210 ILCS § 45/2-103. (West 1996).

56. *Id.*

57. 42 USC § 1396r(c)(1)(A) (2008).

58. 210 ILCS § 45/2-103. (West 1996).

The federal regulations also reiterate a resident's right to complete disclosure of information and free choice⁵⁹ and require a notification of change in condition or accident to the resident's legal representative or interested family member.⁶⁰

F. Private Facility; Transfer of Ownership

Within 30 days after ownership of a private facility is transferred to another private owner, the new owner may be required to evaluate the condition and needs of each resident as if each resident were being newly admitted to the facility.⁶¹ This particular provision is not addressed in the federal regulatory enumeration of rights in the Code of Federal Regulations at 42 CFR 483.10.

G. Do-Not-Resuscitate Orders

Every facility licensed under the Illinois Act shall establish a policy for the implementation of physician orders limiting resuscitation, commonly referred to as "Do-Not-Resuscitate" orders. This policy may only prescribe the format, method of documentation and duration of any physician orders limiting resuscitation. Any orders under this policy shall be honored by the facility.⁶²

H. Confidentiality

A resident shall be permitted respect and privacy in his or her medical and personal care program. Every resident's case discussion, consultation, examination and treatment shall be confidential and shall be conducted discreetly; and those persons not directly involved in the resident's care must have the resident's permission to be present.⁶³ Confidentiality is similarly mandated under the federal regulatory rights, and also under HIPAA regulations.⁶⁴

I. Physical Restraint and Confinement

Illinois law states, "Neither chemical nor physical restraints nor confinements shall be employed for the purpose of punishment or for the convenience of any facility personnel. No restraints or confinements shall be employed except as ordered by a physician who documents the need for such restraints or confinements in the resident's clinical record."⁶⁵

A physical restraint is defined as "any manual method or physical or mechanical device, material, or equipment attached or adjacent to a resident's body that the resident cannot remove easily and restricts freedom of movement or normal access to one's body. Devices used for positioning, including but not limited to bed rails, gait

59. 42 C.F.R. § 483.10(d.) (2006).

60. 42 C.F.R. § 483.10(b.) (2006).

61. 210 ILCS § 45/2-104.1. (West 1996).

62. 210 ILCS § 45/2-104.2 (West 1996).

63. 210 ILCS § 45/2-105 (West 1996).

64. 42 USC § 1320a-7c. (2008).

65. 210 ILCS § 45/2-106(b) (West 1996).

belts, and cushions, shall not be considered restraints.”⁶⁶ A chemical restraint is any drug used for discipline or convenience and not required to treat medical symptoms.⁶⁷

Restraints may only be used with the informed consent of the resident, the resident’s guardian, or other authorized representative, and only after consultation with a healthcare professional and only after a trial with lesser restrictive means.⁶⁸ If a restraint is determined necessary, it may be used only for specific periods, and only if it is the least restrictive means necessary to attain and maintain the resident’s highest practicable physical, mental or psychosocial well-being.⁶⁹

J. Drug Treatment

Residents shall not be given unnecessary drugs. An unnecessary drug is any drug used in an excessive dose, including in duplicative therapy; for excessive duration; without adequate monitoring; without adequate indications for its use; or in the presence of adverse consequences that indicate the drugs should be reduced or discontinued.⁷⁰

Psychotropic medication shall not be prescribed without the informed consent of the resident, the resident’s guardian, or other authorized representative. Psychotropic medication means medication that is used for or listed as used as an antipsychotic, antidepressant, anti-manic, or anti-anxiety, or for behavior modification or behavior management.⁷¹

K. Resident Identification Wristlet

No identification wristlets shall be employed except as ordered by a physician who documents the need for such mandatory identification in the resident’s clinical record. When identification bracelets are required, they must identify the resident’s name, and the name and address of the facility issuing the identification wristlet.⁷² Similar provisions regarding wristlets do not appear to be addressed in the federal regulatory recitation of rights.

L. Abuse or Neglect

An owner, licensee, administrator, employee or agent of a facility shall not abuse or neglect a resident. It is the duty of any facility employee or agent who becomes aware of such abuse or neglect to report it as provided in “The Abused and Neglected

66. 210 ILCS § 45/2-106.

67. *Id.*

68. 210 ILCS § 45/2-106(c) (West 1996).

69. *Id.*

70. 210 ILCS § 45/2-106.1(a) (West 1996).

71. 210 ILCS § 45/2-106.1(b).) (West 1996).

72. 210 ILCS § 45/2-106a (West 1996).

Long-term Care Facility Residents Reporting Act”⁷³ The federal act also prohibits physical or mental abuse, corporal punishment, and involuntary seclusion.⁷⁴

M. Communications

Unless restricted by a physician to protect a resident, every resident shall be permitted unimpeded, private and uncensored communication of mail, public telephone calls or visitation. This includes the timely receipt of mail, accessibility of telephones, private visiting areas, and requires facility personnel to knock, except in an emergency, before entering any resident’s room. Any restrictions of communication shall not apply to letters addressed to or sent from the Governor, members of the General Assembly, Attorney General, judges, state’s attorneys, officers of the Department, or licensed attorneys at law.

With respect to married couples residing in the same facility, federal regulations explicitly state, “the resident has the right to share a room with his or her spouse when... both spouses consent to the arrangement.”⁷⁵ State law contemplates pragmatic difficulties in accommodating such a request, and permits a denial when “there is no room available in the facility or it is deemed medically inadvisable by the residents’ attending physician and is so documented in the residents’ medical records.”⁷⁶

N. Free Exercise of Religion

A resident shall be permitted the free exercise of religion. Upon a resident’s request, and if necessary, at his or her expense, the administrator shall make arrangements for a resident’s attendance at religious services of the resident’s choice. However, no religious beliefs or practices, or attendance at religious services, may be imposed upon any resident.⁷⁷ While this is not specifically stated in the federal regulatory statement of rights, it may be inferred in the general statement at the commencement of the regulation, which states, “The resident has the right to exercise his or her rights as a resident of the facility and as a citizen or resident of the United States.”⁷⁸

O. Access to Residents

The rules governing access to residents are included in the Illinois Nursing Home Act.⁷⁹

Any individual shall be permitted access at reasonable hours to any individual resident of any facility, but only if there is neither a commercial purpose nor effect to such access, and if the purpose is to do any of the following:

73. 210 ILCS 30/1 *et seq.* 210 ILCS 45/2-107.

74. 42 USC § 1396r(c)(A)(ii) (2008).

75. 42 C.F.R. § 483.10(m.) (2006).

76. 210 ILCS § 45/2-108. (West 1996).

77. 210 ILCS § 45/2-109. (West 1996).

78. 42 C.F.R. § 483.10(a)(1.) (2006).

79. 210 ILCS § 45/2-110. (West 1996).

- 1) Visit, talk with and make personal, social and legal services available to all residents;
- 2) Inform residents of their rights and entitlements and their corresponding obligations, under federal and state laws, by means of educational materials and discussions in groups and with individual residents;
- 3) Assist residents in asserting their legal rights regarding claims for public assistance, medical assistance and Social Security benefits, as well as in all other matters in which residents are aggrieved (assistance may include counseling and litigation); or
- 4) Engage in other methods of asserting, advising and representing residents that extends to them full enjoyment of their rights.

All persons entering a facility under these access rights shall promptly notify appropriate facility personnel of their presence. They shall, upon request, produce identification to establish their identity. No such persons shall enter the immediate living area of any resident without first identifying themselves and then receiving permission from the resident to enter. The rights of other residents present in the room shall be respected. A resident may terminate a visit by a person having access to the resident's living area at any time.

Any person who has been refused access to a facility may, within ten days, request a hearing under 210 ILCS §3-703. In that proceeding, the burden of proof is on the facility to prove its right to refuse access.

The federal regulations contemplate "reasonable" access to a resident by any healthcare provider, governmental agent, and family member, subject to the resident's consent.⁸⁰

P. Grievances

A resident shall be permitted to present grievances on behalf of himself/herself or others to the administrator, the Long-Term Care Facility Advisory Board, the residents' advisory counsel, state governmental agencies or other persons without threat of discharge or reprisal in any form or manner, whatsoever. The administrator shall provide all residents or their representatives with the name, address, and telephone number of the appropriate state governmental office to which complaints may be lodged.⁸¹

The federal law also requires the posting of "State client advocacy groups such as the State survey and certification agency, the State licensure office, the State ombudsman program, the protection and advocacy network and the Medicaid fraud unit; and a statement that the resident may file a complaint."⁸²

80. 42 C.F.R. § 483.10(j). (2006).

81. 210 ILCS § 45/2-112. (West 1996).

82. *Id.*

Q. Labor

A resident may refuse to perform labor for a facility.⁸³ The federal regulations contemplate the potential for a resident to choose to work for a facility if it is part of a plan of care wherein there is a documented need or desire for work by the resident.⁸⁴

R. Private Right of Action

The Illinois Nursing Home Care Act provides all residents with a private right of action for a violation of their enumerated rights. Any resident whose rights are violated shall be paid actual damages, costs, and attorneys' fees by the nursing home.⁸⁵ No private right of action is expressly afforded under the federal regulations of the Nursing Home Reform Act, as these are generally considered to be facility certification requirement, and, thus, a contractual agreement between the facility and CMS.⁸⁶

V. ADDITIONAL RIGHTS AND PROTECTIONS UNDER FEDERAL LAW

While all of the above Illinois rights are not specifically contained in federal statutes and regulations, federal law does not preempt stricter state standards for the protection of long-term-care residents.⁸⁷ It is important for lawyers representing nursing home applicants and residents to be familiar with the rights under both state and federal law. For example, additional rights, provided under federal law, are also applicable to Illinois nursing homes, since the more protective federal laws are controlling.⁸⁸

A. Room Rights

Federal law provides for additional protections for nursing home residents with respect to their room locations and roommates. Under Title XVIII, a nursing home resident is to receive notice before the room or roommate of the resident in the facility is changed.⁸⁹ Furthermore, a resident is granted the right to refuse a transfer to another room within the facility if the purpose of the transfer is to relocate the resident from a portion of the facility that is a skilled nursing facility to a portion of the facility that is not a skilled nursing facility,⁹⁰ presuming skilled nursing, not custodial care, is

83. 210 ILCS 45/2-113. (West 1996).

84. 42 C.F.R. § 483.10(h.) (2006).

85. 210 ILCS § 45/3-602. (West 1996).

86. Robert Rabrikant, Robert and Glenn E. Solomon, Glenn E., "Application of the Federal False Claims Act to Regulatory Compliance Issues in the Health Care Industry," 51 Ala. L. Rev. 105, 140 (1999).

87. 42 USC § 1396r(c)(2)(5)(B)(i.) (2008).

88. Federal law (42 U.S.C. §§ 1395i-3 and 42 USCS §§ 1395i-31396r and 1396r)(2008)) preempts local regulations.; see also *Newman v. Kelly*, 848 F. Supp. 228 (D.D.C. Dist. Col., 1994).

89. 42 USC § 1395i(c)(1)(A)(v)(II.) (2008).

90. 42 USC § 1395i(c)(1)(B); 42 USCS 1396r(c)(1)(x.) (2008).

required as a component of the care plan. A resident's exercise of the right to refuse transfer shall not affect the resident's eligibility under Medicare or Medicaid.⁹¹

B. Restraints

The prohibition of restraints under federal law is more expansive, and it also mandates the right to be free from physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline (as well as those for purposes of convenience, as stated in the Illinois act).⁹²

C. The Care Plan

A care plan is not specifically required by the Illinois Nursing Home Care Act, but is required under federal law. In 1987, Title XVIII of the Social Security Act was amended to include the requirements of assessment and a plan of care pursuant to the Federal Nursing Home Reform Act (also known as OBRA '87). The goal of the assessment and care plan is to provide services to "attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, in accordance with a written plan of care."⁹³

The care plan must be conducted no later than 14 days after the date of admission, or promptly after a significant change in the resident's physical or mental condition. In no case may this be accomplished less than once per year.⁹⁴ The facility must examine each resident at least every three months, and it is to revise the care plan to assure the assessment is accurate.⁹⁵

The resident assessment process gathers information about the health and physical condition of a resident and how well a resident can take care of himself or herself. This includes assessing help needed to perform activities of daily living (ADLs), such as walking, dressing, toileting, eating, bathing and functional abilities such as seeing, hearing, communicating, understanding and remembering. These abilities and needs are based upon a uniform minimum data set (MDS). This process is required to be completed in any certified facility for each resident upon admission.⁹⁶

The care plan is a development of the services to be provided to the resident to assist with ADLs and functional abilities, and includes a plan involving all medical and non-medical issues, including: activities, therapies, personal schedule, medical and nursing care, and emotional needs. The plan of care is prepared and periodically reviewed by the resident or representative, and the resident's attending physician and nurse. It should describe the needs of the resident and how such needs will be met.⁹⁷

91. 42 USC § 1396r(c)(1)(x.) (2008).

92. 42 USC § 1395i(c)(1)(A)(ii.) (2008).

93. 42 USC § 1395i-3(b)(2); although (2008). Although this language is utilized in the Illinois Nursing Home Care act, it is not utilized in this context.

94. 42 USC § 1395i-3(b)(2)(C.) (2008).

95. *Id.*

96. 42 C.F.R. § 483.10. (2008).

97. *Id.*

In essence, the care plan becomes a component of the nursing home contract. Therefore, if the care plan is not being met, this may be construed as a breach of contract, not only between the facility and the government, but also as a breach of contract between the facility and the resident.⁹⁸

VI. INVOLUNTARY DISCHARGE OR CONTRACT TERMINATION

A. Legal Justifications for Discharge

A resident may be discharged from a facility after providing the administrator, a physician, or a nurse of the facility written notice of his or her desire to be discharged. If a guardian has been appointed for a resident, the resident shall be discharged upon written consent of his or her guardian, unless there is a court order to the contrary. In such cases, the facility is relieved from any responsibility for the resident's care, safety or well-being after discharge.⁹⁹

Without a request for discharge by the resident or guardian, there are only three reasons under Illinois law (discussed below) why a facility may discharge a resident without the resident's consent. It is not unusual, however, for a nursing home to present a voluntary transfer agreement and verbally explain that the transfer is necessary, or even mandatory, for some particular reason not enumerated under state or federal law.

Under the Illinois Nursing Home Care Act, the only circumstances permitting involuntary discharge are: (1) nonpayment; (2) medical reasons; and (3) the resident's *physical* safety or the *physical* safety of other residents.¹⁰⁰ Furthermore, the federal statute specifically states:

A nursing facility must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility unless:

- (i) the transfer or discharge is necessary to meet the resident's welfare and the resident's welfare cannot be met in the facility;
- (ii) the transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
- (iii) the safety of individuals in the facility is endangered;
- (iv) the health of individuals in the facility would otherwise be endangered;
- (v) the resident has failed, after reasonable and appropriate notice, to pay or to have paid under Medicare or Medicaid programs for a stay at the facility; or

98. *United States v. Chester Care Ctr.*, 1998 U.S. Dist. LEXIS 4836 (D. Pa. 1998).

99. 210 ILCS § 45/2-111.

100. 210 ILCS § 45/3-401, (West 1996) (emphasis added. Note:) The state statute is more protective to the resident presented with a discharge notice than the Federal statute, and requires a threat of *physical* safety, whereas the Federal statute requires only an endangerment of the general safety, which does not require evidence of physical risk.

(vi) the facility ceases to operate.¹⁰¹

In general, discharges for the convenience of the nursing home or to provide the bed to a patient with a higher payment source are not permissible.¹⁰²

If a state permits an involuntary discharge to occur when the above facts do not exist, the state may also be liable under 42 USC §1983 for violations of certain nursing home resident's rights. To the extent that federal laws require the state to protect a resident's rights conferred by the Medicaid Act, a nursing home resident may have a private cause of action under §1983, if the state does not provide an adequate procedure by which residents can seek redress for violations of those rights.

For instance, suppose a facility admits a resident and one week later asks the resident to sign an admissions agreement. After the resident refuses to sign the agreement, the facility seeks to discharge the resident pursuant to 210 ILCS 45/2-202(a). As delineated in this article, there are very limited circumstances that permit a facility to transfer or discharge a resident against the resident's will, and the failure to sign an admissions agreement is not among them.¹⁰³

Moreover, the Federal Nursing Home Reform Act mandates that "The state, for transfers and discharges from nursing facilities effected on or after October 1, 1989, must provide for a fair mechanism, meeting the guidelines established under subsection (f)(3), for hearing appeals on transfers of residents of such facilities."¹⁰⁴ In Illinois, these hearings are conducted by the Illinois Department of Public Health, under rules promulgated with authority of the Illinois Administrative Procedure Act.¹⁰⁵

The state appeals process for transfers and discharges must meet federal guidelines as determined by the secretary.¹⁰⁶ If the resident appeals the discharge for failure to sign an admissions agreement, and the state appeals process allows the discharge to proceed on the basis of that Illinois statute, this could give rise to a claim by the resident under §1983, for depriving the resident, under color of state law, of the rights, privileges, or immunities secured by 42 USC 1396r(c)(2).¹⁰⁷

Under *Blessing v. Freestone*,¹⁰⁸ the court ruled that in determining whether a federal statute gives rise to a private cause of action under §1983, one must apply a three-factor test: "First, Congress must have intended that the provision in question

101. 42 U.S.C. § 1396r(c)(2)(a) (2008).

102. 42 C.F.R. § 448.115. (2006).

103. See 42 USC § 1396r(c)(2) (2008). Note that this analysis addresses the question of whether a nursing home can require a resident to sign a contract *after* admission, as 42 USC § 1396r(c)(2) (2008) only speaks to residents rights regarding transfer or discharge, *not* admission.

104. See 42 USC § 1396r(e)(3). (2008).

105. 5 ILCS § 100/5-10(a)(i) (West 1996); For rules on discharge hearings, see 77 Ill. Admin. Code Pt. 100. (West 1996).

106. See 42 USC § 1396r(f)(3). (2008).

107. See *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 432 (U.S. 1987), (wherein the Supreme Court ruled a violation of the Housing Act gave rise to private cause of action under §1983, and the state deprived residents of Federally conferred rights under that statute, even though the statute did not provide a private cause of action).

108. 520 U.S. 329 (1997).

benefit the plaintiff.¹⁰⁹ Second, the plaintiff must demonstrate that the right assuredly protected by the statute is not so “vague and amorphous” that its enforcement would strain judicial competence.¹¹⁰ Third, the statute must unambiguously impose a binding obligation on the states. In other words, the provision giving rise to the asserted right must be couched in mandatory rather than predatory terms.”¹¹¹

The *Blessing* test has been applied in the context of Title XIX, and the Third Circuit has concluded that at least several sections of the Social Security Act clearly meet the Blessing test in “terms that could not be clearer.”¹¹² Under this same analysis, the state’s obligation to provide an appeal process to vindicate the resident’s transfer and discharge rights specifically enumerated by that statute would also give rise to liability under §1983.

B. Distinct Part Facilities

Distinct part certification has been defined by the Department of Health and Human Services as a certified unit of a health care facility (other than a facility that provides only intermediate care), which is a separate unit distinguishable from non-certified units and independently operated to provide intermediate-level health care solely to Medicaid recipients.¹¹³ Under a distinct part certification, the provider of a skilled nursing facility may certify a specific physical part of a facility (e.g., a wing, one side of a corridor, a floor) for Medicaid participation.

In general, a facility participating in the Medicaid program is prohibited from failing or refusing to retain as a resident any person because he or she is a recipient of or an applicant for the Medicaid program.¹¹⁴ Discharges for the convenience of the nursing home or to provide the bed to a patient with a higher payment source are impermissible.¹¹⁵

However, a facility in which only a distinct part is certified to participate in the Medicaid program may refuse to retain as a resident any person who resides in a part of the facility that does not participate in the Medicaid program and who is unable to pay for his or her care without Medicaid assistance only if: (1) the facility, prior to admission, provides an explanation in writing that the facility may discharge the resident if the resident is no longer able to pay for his or her care in the facility without Medicaid; and (2) the resident, the resident’s representative, and the person making payment on behalf of the resident for the resident’s stay, acknowledge in writing that they have received the written explanation.¹¹⁶ This protection is also stated in the federal regulations, wherein it provides that a facility that is a composite distinct part

109. *Id.*, at 430.

110. *Id.*, at 431-432.

111. *Blessing v. Freestone*, 520 U.S. 329, 340 (U.S. 1997), citing *Wright*, 479 U.S. 418, at 430; *see also Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 509, 110 L. Ed. 2d 455, 110 S. Ct. 2510 (1990).

112. *Sabree v. Richman*, 367 F.3d 180, 190 (3d Cir. 2004).

113. HCFA Medicare/Medicaid State Operations Manual §2110.

114. 210 ILCS § 45/3-401.1. (West 1996).

115. 42 C.F.R. § 448.115. (2006).

116. 210 ILCS § 45/3-401.1. (West 1996).

must disclose in its admission agreement its physical configuration, including the various locations that comprise the composite distinct part, and must specify the policies that apply to room changes between its different locations.¹¹⁷

A facility is not permitted to randomly create Medicaid and non-Medicaid beds within a facility. In the *Linton* case, the Sixth Circuit declared the use of spot certified beds in distinct part facilities to be a violation of the Medicaid Act.¹¹⁸ In this case, the Tennessee Department of Health and Environment violated federal law by allowing a facility to certify and de-certify a bed for Medicaid, at will, based upon demand and the facility's desire for patients who could pay privately for care.¹¹⁹

Furthermore, a nursing facility must establish and maintain identical policies and practices regarding transfer, discharge, and the provision of services required under the state plan for all individuals, regardless of the source of payment.¹²⁰

VII. WHO SIGNS THE CONTRACT?

Under Illinois and federal law, an adult person is presumed to have the capacity to contract for admission to a long-term-care facility, unless he or she has been adjudicated a "disabled person" within the meaning of the Probate Act of 1975,¹²¹ or unless a petition for such an adjudication is pending.¹²²

In general, it is neither required nor recommended that nonresidents sign a contract that contains responsible party or guarantor language. While a nursing home contract cannot legally require a third party guarantee of payment as a condition of admission, expedited admission, or continued stay in the facility, third party guarantor language often exists, and individuals sign without realizing the ramifications.¹²³ Whether third party guarantor provisions are enforceable depends upon the specific facts and circumstances of each case.

A. Legal Representative without Actual Access to Funds

In a Minnesota case, *Extend Care Health Services, Inc. v. Henderson*, a son of a nursing home resident signed the nursing home contract as a "responsible party" agreeing to pay from the resident's funds, but he did not sign the contract as a guarantor. Upon the death of the resident, there was an unpaid balance to the facility. A probate estate was opened, but the facility never filed a claim against the estate. The facility's subsequent attempt to collect against the son, individually, was unsuccessful due to the fact that this son did not in actuality have legal access to the mother's assets and income during her lifetime.¹²⁴

117. 42 C.F.R. § 483.5(c), 483.12(a)(8). (2006).

118. *Linton by Arnold v. Comm'r of Health and Environment*, Tenn. 65 F. 3d 508 (6th Cir. 1990).

119. *Id.*

120. 42 USC § 1396r (c)(4)(A). (2008).

121. 755 ILCS § 5/11a-2 (West 1996).

122. 42 USC § 1396r. (2008).

123. 42 USC § 1396r(c)(2)(5)(A)(ii) (2008), 42 C.F.R. pt..F.R. § 483.12. 9 (2006).

124. *Extendicare Health Serv., Inc. v. Henderson*, 735 N.W. 2d 706 (Minn. Ct. App. April 3, 2007). (unpublished).

B. Agent and Responsible Part

An earlier Minnesota case, *Northfield Care Center, Inc. v. Anderson*, allowed a facility to recover against a son who signed an admission agreement as his mother's attorney-in-fact and responsible party. Although the mother received state assistance for payment of the fees, the son failed to pay all of the co-payments, totaling almost \$4,000. Because the son voluntarily signed as the responsible party, the court held he could be personally liable for the debt. However, a state statute only allowed recovery for monies that the son "misapplied," an issue the lower court failed to address. The appeals court also held that the son could be personally liable for the nursing home's legal fees even though they were over three times more than the debt owed, if the son, as the attorney-in-fact, acted in bad faith. The appeals court remanded the case for the lower court to consider the issue of bad faith and determine whether the funds were misapplied.¹²⁵

C. Breach of Contract Claim against Agent but not a Responsible Party

In *Sunrise v. Azarigian*, the resident's daughter, Vicki Azarigian, was an agent appointed under a durable power-of-attorney for property. Azarigian signed the contract agreeing to use her mother's assets and income to pay for care at the facility, but she did not sign as a guarantor. While her mother was in the nursing home, Azarigian made some gifts from her mother's funds and paid for a private caregiver. When her mother's funds were depleted, Azarigian applied for Medicaid, but was denied due to a penalty period associated with the gifts. The facility successfully proceeded against Azarigian, receiving a judgment of \$78,779 at the trial court on the basis of breach of contract. The lower court's decision was upheld on appeal.¹²⁶

D. Son-In-Law Signed as Guarantor

In the Illinois *Carroll* case, a law firm, on behalf of a nursing home, attempted collection against a personal guarantor through garnishment of his wages. The personal guarantor sued both the attorney and the nursing home, successfully arguing that the nursing home's attorney's collection activities violated the Fair Debt Collection Practices Act by collecting against an illegal guarantee.¹²⁷ However, because the Medicaid Act did not provide a private right of action against the facility, the plaintiff's complaint alleging violation of the Illinois Consumer Fraud Act did not prevail against the nursing home. More importantly, the issue of the enforceability of the personal guarantee was left unresolved, because the court declared this issue moot based upon the defendants' promise not to seek enforcement.

VIII. BED-HOLD AGREEMENTS

A bed-hold agreement is a separate agreement, or portion of the admissions contract, that requires a resident to pay the per diem rate (or a portion thereof) even

125. *Northfield Care Ctr., Inc. v. Anderson*, 707 N.W. 2d 731 (Minn. Ct. App., Jan. 17, 2006).

126. *Sunrise Healthcare Corp. v. Azarigian*, 522 N.W. 2d 432 (Conn. Ct. App. Ct. May 20, 2003).

127. See *Carroll v. Butterfield Health Care Inc.* (2003 U.S. Dist. LEXIS 19287).

though the resident may be hospitalized, visiting family, or at home for a long weekend. For privately paying or Medicare residents, the signing of a bed-hold agreement may be necessary to preserve the resident's bed at the facility.

However, under the Illinois Nursing Home Care Act, a Medicaid recipient or applicant for Medicaid shall be considered a resident in the facility during any hospital stay totaling ten days or less following a hospital admission.¹²⁸ Recognizing that facilities may attempt to involuntarily discharge a resident absent the required notice and opportunity to be heard, a facility may not only be fined but also subjected to the costs of hospitalization if unnecessary hospital bills were incurred.¹²⁹

IX. ARBITRATION CLAUSES

Nursing home admissions contracts increasingly include provisions requiring mandatory arbitration of any disputes between the resident and the facility. Unfortunately, many residents and their families do not understand the implications of these agreements until it is too late. Over the past several years, the enforceability, validity and propriety of mandatory arbitration in nursing home admissions agreements has been litigated across the country. Although proponents of the arbitration process chiefly point to the relative cost savings of arbitration as opposed to litigation, the volume of hard fought cases devoted to defending a nursing home's right not to litigate claims against it suggests that there may be substantive advantages for the nursing home in the requested alternative forums. Furthermore, the lack of publicity associated with arbitrated cases, while an incentive to nursing homes, is certainly not a public benefit.

A. CMS Takes a Stand

An official policy memorandum from the CMS Director of the Survey Group, Mr. Steven A. Pelovitz, was effectuated on January 9, 2003. This memorandum addressed CMS's position regarding binding arbitration in nursing homes by stating that "CMS believes that its primary focus should be on the quality of care actually received by nursing home residents that may be compromised by such agreements, for the reasons set out below. Under Medicare, whether to have a binding arbitration agreement is an issue between the resident and the nursing home. Under Medicaid, we will defer to state law as to whether or not such binding arbitration agreements are permitted subject to the concerns we have where Federal regulations may be implicated. Under both programs, however, there may be consequences for the facility where facilities attempt to enforce these agreements in a way that violates federal requirements."¹³⁰

128. 210 ILCS § 45/3-401.1. (West 1996).

129. 210 ILCS § 45/3-401.1(a-10), (b.) (West 1996).

130. <http://healthblawg.typepad.com/healthblawg/files/scletter03101.pdf> (last visited February 17, 2008). 130. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), *Memorandum from Director, Survey and Certification Group*, <http://healthblawg.typepad.com/healthblawg/files/scletter03101.pdf> (January 9, 2003).

The memorandum further states:

1. If a nursing home discharges a resident or retaliates due to an existing resident's failure to sign or comply with a binding arbitration agreement, the State and Region may initiate an enforcement action based on a violation of the rules governing resident discharge and transfer. A current resident is not obligated to sign a new admission agreement that contains binding arbitration. Federal regulations, at 42 C.F.R. §483.12(a)(2) limit the circumstances under which a facility may discharge or transfer a resident. None of the conditions specified in the regulation permit a facility to discharge or transfer a resident based on his or her failure to comply with the terms of a binding arbitration agreement. Additionally, a facility that retaliates against a resident who fails to sign or comply with the agreement is subject to an enforcement response based upon its failure to comply with the obligation to furnish an abuse-free environment under 42 C.F.R. §483.13(b) or other requirements bearing upon the facility's obligation to provide quality care to all residents. The existence of a binding arbitration agreement does not in any way affect the ability of the state survey agency or CMS to assess citations for violations of certain regulatory requirements, including those for quality of care.

2. The Medicaid appeal procedures at 42 C.F.R. §431.200 et seq. apply to discharges or disputes of eligibility between the resident and the state Medicaid agency and are not affected by a binding arbitration agreement.¹³¹

Such a threat by CMS revealed itself to be largely empty since no follow-up was pursued against the facilities. Arguably, the issue of the right to use arbitration clauses in nursing home contracts was left to the court system to weed out the acceptable and unacceptable arbitration provisions. Regardless, if CMS took any steps against nursing homes that use arbitration clauses, it generated little attention. Indeed, anecdotally, arbitration clauses seem to be the norm in nursing home and most commercial/consumer contracts.¹³²

CMS guidelines authorize the American Health Care Lawyers Association (AHLA) Alternative Dispute Resolution Service to be the designated arbitrators of disputes arising between nursing homes and residents. However, the AHLA will not accept a "consumer health care liability claim" unless the arbitration agreement was signed after the injury occurred, or if a court orders them to arbitrate.¹³³

B. Illinois Law on Nursing Home Arbitration Agreements

The Illinois Nursing Home Care Act prohibits the use of arbitration provisions in nursing home admissions agreements. The Illinois Act states that any party to an action brought under the Nursing Home Care Act "shall be entitled to a trial by jury and any waiver of the right to a trial by jury, whether oral or in writing, prior to the

131. Id. at p.2.

132. Hopkins, Christopher, "Can a State Prohibit a Nursing Home from Using an Arbitration Clause?" <http://floridarbitrationlaw.com/blogs/index.php?blog=5&m=200712> (last visited February 18, 2008).

133. American Health Lawyers Association, Alternative Dispute Resolution Service - Rules of Procedure for Arbitration Rule 1.01 Applicability of Rules (Revised October 2007).

commencement of an action, shall be null and void, and without legal force or effect.”¹³⁴ For causes of Action not arising under the Illinois Nursing Home Care Act, the Health Care Arbitration Act applies¹³⁵ and thereby governs all agreements to arbitrate claims arising out of the providing of health care services.¹³⁶

Every health care arbitration agreement shall be subject to the following conditions:

- a) The agreement is not a condition to the rendering of health care services by any party and the agreement has been executed by the recipient of health care services at the inception of or during the term of provision of services for a specific cause by either a health care provider or a hospital; and
- b) The agreement is a separate instrument complete in itself and not a part of any other contract or instrument; and
- c) The agreement may not limit, impair, or waive any substantive rights or defenses of any party, including the statute of limitations; and
- d) The agreement shall not limit, impair, or waive the procedural rights to be heard, to present material evidence, to cross-examine witnesses, and to be represented by an attorney, or other procedural rights of due process of any party.
- e) As a part of the discharge planning process, the patient or, if appropriate, members of his or her family, must be given a copy of the health care arbitration agreement previously executed by or for the patient and shall re-affirm it. Failure to comply with this provision during the discharge planning process shall void the health care arbitration agreement.¹³⁷

The Illinois Act allows for cancellation of the arbitration agreement within 60 days of the date of execution. The arbitration agreement may not continue beyond two years from the date of execution.¹³⁸

Furthermore, every health care arbitration agreement is required to contain certain language, immediately above the signature lines, in upper case type in printed letters of at least 3/16 inch height, a caption and paragraphs as follows:¹³⁹

AGREEMENT TO ARBITRATE HEALTH CARE NEGLIGENCE CLAIMS

NOTICE TO PATIENT YOU CANNOT BE REQUIRED TO SIGN THIS AGREEMENT IN ORDER TO RECEIVE TREATMENT. BY SIGNING THIS AGREEMENT, YOUR RIGHT TO TRIAL BY A JURY OR A JUDGE IN A COURT WILL BE BARRED AS TO ANY DISPUTE RELATING TO INJURIES

134. 210 ILCS § 45/3-607. (West 1996).

135. 710 ILCS 15/1, *et seq.*

136. 710 ILCS § 15/5 (West 1996) (emphasis added).

137. 710 ILCS § 15/8. (West 1996).

138. 710 ILCS § 15/9. (West 1996).

139. 710 ILCS 15/9(d).

THAT MAY RESULT FROM NEGLIGENCE DURING YOUR TREATMENT OR CARE, AND WILL BE REPLACED BY AN ARBITRATION PROCEDURE.

THIS AGREEMENT MAY BE CANCELLED WITHIN 60 DAYS OF SIGNING OR 60 DAYS AFTER YOUR HOSPITAL DISCHARGE OR 60 DAYS AFTER YOUR LAST MEDICAL TREATMENT IN RELATION TO HEALTH CARE SERVICES NOT RENDERED DURING HOSPITALIZATION.

THIS AGREEMENT PROVIDES THAT ANY CLAIMS WHICH MAY ARISE OUT OF YOUR HEALTH CARE WILL BE SUBMITTED TO A PANEL OF ARBITRATORS, RATHER THAN TO A COURT FOR DETERMINATION. THIS AGREEMENT REQUIRES ALL PARTIES SIGNING IT TO ABIDE BY THE DECISION OF THE ARBITRATION PANEL.

C. Arguments Used against Binding Arbitration Clauses

1. Unconscionability

If an agreement is signed by the resident, and the nursing home followed all procedural requirements in obtaining a signature, courts are reluctant to find the agreement unenforceable. While an argument can be made that an arbitration agreement is unconscionable, courts seldom agree. For an agreement to be found unconscionable, it must be both procedurally and substantively unconscionable, and finding both prongs is very rare.

For example, in *Bland v. Healthcare Retirement Corporation*, a Florida appeals court found that a woman's limited education did not create procedural unconscionability when the arbitration agreement was signed four days after her mother had been admitted to the hospital.¹⁴⁰ The court noted that the woman never questioned the agreement and had three days to revoke it after signing it. Because the court found the agreement was procedurally conscionable, it did not address substantive unconscionability, but it noted the remedial provisions in the agreement were not substantively unconscionable.

On the other hand, in a 2007 Ohio case, Ms. Manley signed an arbitration agreement as she was being admitted to a nursing home directly from a hospital without a family member or friend's help. In addition, she had no legal expertise, a mild cognitive impairment, and some confusion. An Ohio appeals court found that this arbitration agreement was procedurally unconscionable because the woman lacked bargaining power.¹⁴¹ However, the agreement was still considered valid because it was not substantively unconscionable. The court noted that it was a stand-alone agreement and included a statement in bold that admission was not contingent upon signing the agreement. It also included a warning that signing the agreement meant the resident

140. *Bland v. Health Care Retirement Corporation* (Fla. Ct. App., 2nd Dist., No. 2D05-3107, May 10 (Fla. 2d DCA, 2006).

141. *Manley v. Personacare*, No. 2005-L-174, 2007 WL 210583 (Ohio Ct. App. Ct., 2007-Ohio-343, Jan. 26, 2007).

was giving up her right to a jury trial and gave the resident 30 days to reject the agreement.

The court is more likely to be skeptical of an arbitration agreement that is not separate from the admission agreement. Contrast *Manley* with another case from Ohio in which a different Ohio appeals court found an admission agreement unconscionable. In *Small*, a woman signed an arbitration agreement while admitting her husband to the nursing home. According to the court, the agreement was substantively unconscionable because it was not separate from the admission agreement, so it appeared that the arbitration provision was a condition for admission to the nursing home. The court also did not appear to appreciate the terms of the contract which contained language entitling the prevailing party to attorney fees. In addition, it was procedurally unconscionable because the woman signed the agreement while under “considerable stress.”¹⁴²

Arbitration agreements that contain a cap on damages or make it difficult to prove negligence are also more likely to be found unenforceable.¹⁴³

2. Incapacity; Lack of Authority

A more successful attack on existing arbitration agreements has been made by arguing that the person who signed the agreement was not authorized to agree to arbitration on behalf of the nursing home resident. States differ as to what is necessary to grant authority for arbitration, but, in general, if the individual who signs the arbitration agreement is not the legal representative of the nursing home resident, there is a strong argument that the arbitration agreement is not enforceable. For example, in *Flores*, a California Court of Appeals found that a husband who did not have a power of attorney to act for his wife at the time he signed an arbitration agreement on her behalf lacked the authority to bind his wife to arbitration. The court held that the spousal relationship does not create agency status by itself.¹⁴⁴

A recent Mississippi high court struck down a decision by the trial court to enforce a nursing home arbitration agreement signed by the resident’s daughter when a purported power of attorney for healthcare was said to exist but evidence of the document was not made part of the trial court record.¹⁴⁵ Furthermore, the Mississippi Supreme Court rejected the healthcare provider’s argument that, as a healthcare surrogate, the daughter could bind the resident to the arbitration agreement.

In a separate case five days later, a Mississippi appellate court arrived at a completely different conclusion, holding an arbitration agreement enforceable against

142. *Small v. HCF of Perrysburg, Inc.* (., 159 Ohio Ct. App., 6th, No. 2004-Ohio-5757, 3d 66 (Oct. 29, 2004).

143. See *Blankfeld v. Richmond Health Care, Inc.* No. 2D05-3107 (Fla. Dist. Ct. App., 4th DCA, May 25, 2005) and; *see also Lacey v. Health Care Retirement Corp.* (Fla. App. Ct., 4th Dist., No. 4D04-4450 (Fla. 4th DCA, November 30, 2005).

144. *Flores v. Evergreen at San Diego, LLC.*, No. D048002 (Cal. Ct. App., 4th Div., No. D048002, Mar. 13, 2007).

145. *Mississippi Care Ctr. of Greenville, LLC v. Hinyub*, No. 2005-CA-01239-SCT (Miss., January 3, 2008).

a child who was not a legally-appointed agent, since the resident “received services from a contract that was executed for her benefit.”¹⁴⁶ Thus, the court reasoned, the resident’s “wrongful death beneficiaries are bound to the contract including arbitration.”¹⁴⁷ In light of the Mississippi Supreme Court case, the appellate decision is likely to be struck down if further appeal is sought.

The issues become more complicated if the agent has the actual authority to make only health care decisions. Courts in Florida, Kentucky and Texas have held that an individual with authority to make health care decisions on behalf of a resident does not have authority to bind the resident to arbitration, because arbitration is not a health care decision.¹⁴⁸ On the other hand, courts in Tennessee and California have found that an agent with a health care power-of-attorney is authorized to sign an arbitration agreement.¹⁴⁹

A few states have found an implied or apparent authority for a third-party to make decisions on behalf of the nursing home resident. In the *Ruesga* case, an Arizona appellate court found that a wife who had a history of making decisions for her husband was authorized to agree to arbitration on his behalf, even though she did not have a power-of-attorney to act on his behalf. The court cited the husband’s medical records, which showed that the wife had made several decisions on her husband’s behalf.¹⁵⁰ In addition, the Alabama Supreme Court found that a brother had apparent authority to agree to arbitration when he signed an arbitration agreement for his sister as “authorized representative,” and the sister did not object to her brother acting on her behalf.¹⁵¹

D. Statutory Restrictions on Arbitration Agreements in Other States

Some states, such as Ohio, have attempted measures to broaden the use of arbitration in claims against nursing homes. In 2005, Ohio Senate Bill 88 proposed a pilot program to require mandatory arbitration of all medical malpractice claims against health care professionals, hospitals and healthcare facilities. Although this bill passed in the Senate, it remained in a House Committee and was not apparently re-introduced in the next session of the General Assembly.¹⁵²

146. *Trinity Mission Health & Rehabilitation of Clinton v. Estate of Scott*, No. 2006-CA-010530COA (Miss. App. Ct., January 8, 2008).

147. *Id.*

148. *Blankfeld v. Richmond Health Care, Inc.*, Fla. Dist. Ct. App., No. 2D05-3107 (Fla. 4th DCA, May 25, 2005); *Texas Cityview Care v. Fryer*, Tex. App. Ct., 2nd Dist., No. 2-06-373-CV (Tex. App. Ct., 2d Dist., May 24, 2007); and *Kindred Hospitals Ltd. v. Luttrell*, Ky. App. Ct., No. 2006-CA-000221-MR (Ky. App. Ct., July 27, 2007).

149. *Hogan v. Country Villa Health Services* (Cal. Ct. App., 3rd Div., No. G036406, (Cal. Ct. App., 3d Div., Mar. 1, 2007) and); *Owens v. National Health Corp.* (Tenn. Ct. App., No. M2005-01272-COA-R3-CV (Tenn. Ct. App., June 30, 2006).

150. *Ruesga v. Kindred Nursing Centers West* (Ariz. Ct. App., 2nd Div., No. 2 CA-CV 2006-0114 (Ariz. Ct. App., 2d Div., July 18, 2007).

151. *Caraway v. Beverly Enterprises Alabama, Inc.* (Ala., No. 1051409 (Ala., July 20, 2007).

152. See <http://lsc.state.oh.us/coderev/sen126.nsf/Senate+Bill+Number/0088?OpenDocument> (last visited February 17, 2008); Benne, Christopher, et.152.See

Other states have also attempted to restrict arbitration agreements or waivers of rights. “California’s Health and Safety Code imposes certain requirements for arbitration clauses to be enforceable in health care contracts.”¹⁵³ Specifically, any health care service plan that includes terms that require binding arbitration to settle disputes shall include, in clear and understandable language, a disclosure that clearly states whether the agreement includes claims of medical malpractice and whether the agreement waives a right to a jury trial. Additionally, the disclosure must be present immediately above the signature line.¹⁵⁴

Oregon’s Legislative declaration of rights intended for nursing home residents, states that residents shall not be “required to sign a contract or waiver that waives the resident’s right to collect payment for lost or stolen articles.”¹⁵⁵

In 1980, Oklahoma passed its Nursing Home Care Act, which provides a private right of action for a nursing home’s breach of duty under the Act, but also states, “any waiver by a resident... of the right to commence an action under this section [of the Nursing Home Care Act], whether oral or in writing, shall be null and void, and without legal force or effect.”¹⁵⁶ Although this Act does not expressly prohibit arbitration, in 2006, the Oklahoma State Department of Health (OSDH) attempted to enforce this section of the Act by citing nursing homes that used arbitration provisions in their admissions agreements. As a plan of correction, the OSDH required nursing homes to eliminate the use of arbitration provisions in their contracts.

In Oklahoma, enforcement of arbitration restrictions by the state agency had been at first protected by the state courts, but later struck down by the federal courts under the Federal Arbitration Act (FAA). The central challenge to enforcement of states prohibiting arbitration clauses in nursing home contracts has been the Federal Arbitration Act (FAA), which favors arbitration in all interstate commerce contracts and preempts state law.

In a 2006 case, *Bruner v. Timberlane Manor*,¹⁵⁷ a nursing home was sued in a wrongful death action and sought to compel arbitration of the underlying action. The nursing home attempted to enforce its arbitration clause under the FAA, arguing that its admissions contract involved or affected state commerce because the nursing home: 1) received Medicare payments that originate outside the state, 2) complied with federal Medicare and Medicaid licensing rules and regulations, 3) purchased supplies from out-of-state vendors, and 4) used instruments of interstate commerce, such as telephone lines, internet, airlines and the federal postal service.¹⁵⁸ The court looked to the terms of the contract and relied upon the lower court’s factual findings that: 1) the

<http://lsc.state.oh.us/coderev/sen126.nsf/Senate+Bill+Number/0088?OpenDocument> (last visited February 17, 2008); Christopher Benne, et. al., *State Legislative Update*, 2005 J. Disp.Resol. 419, 437 (2005).

153. 28 W. St. U. L. Rev. 257 (2007).

154. Cal Health & Saf Code § 1363.1.154.Cal Health & Safety Code § 1363.1 (2007).

155. 441 ORS 605(15.) (2008).

156. 63 Okla. Stat. tit. 63 §1-1939(E.) (2006).

157. *Bruner v. Timberlane Manor*, 155 P.3d 16 (2006).

158. *Id.* at 30-36.

language of the contract did not invoke the FAA, but rather clearly indicated state law should apply; and 2) the nursing home care at issue did not involve interstate commerce.¹⁵⁹ Further, the court found that “Oklahoma’s Nursing Home Care Act governs over Oklahoma’s Uniform Arbitration Act in this case.”¹⁶⁰

The nursing homes then took the challenge to a different forum—the federal court. In *Sooner Geriatrics*, two nursing homes were cited with a deficiency because they had arbitration agreements with their nursing home admissions contracts. The State Department ordered the nursing homes to eliminate the contractual provisions and to re-execute new contracts with their residents that did not contain such language. The nursing homes sought federal court intervention to enjoin the Department’s enforcement of this corrective against them.¹⁶¹ The nursing homes argued that they had arbitration clauses within hundreds of contracts and that they would suffer irreparable harm, since many legal representatives resided out-of-state and many residents no longer had capacity to execute new contracts. The court agreed with the nursing home and enjoined the State from further action against the nursing homes, holding that the nursing homes were maintaining the status quo because they had been using arbitration clauses since 2003, but the State did not attempt to prohibit them from doing so until 2006.

More recently, on January 30, 2008, a federal district court enjoined the state from prohibiting arbitration clauses in nursing home admissions contracts.¹⁶² In the *Rainbow* case, the nursing home required its residents, as a condition of admission, to sign an admissions agreement containing a binding arbitration clause, but allowed an opt-out provision to be exercised within ten days of execution.¹⁶³ The court found that the nursing home agreement evidenced a transaction involving interstate commerce, because the nursing home obtained food, medicine, and durable medical supplies as a result of interstate transactions and often admitted residents from other states. Thus, the FAA applied to the contract.¹⁶⁴ The court further explained that Congress had not passed any laws withdrawing the nursing home admissions agreement from the FAA’s coverage. Therefore, the court concluded that the OSDH’s prohibition on arbitration agreements was preempted by the FAA, which favors enforcement of arbitration agreements in all contracts involving interstate commerce. The court looked to the nursing home’s contract, which stated, that the arbitration agreement was governed by the FAA.¹⁶⁵ The court distinguished this case from the Oklahoma Supreme Court case

159. *Id.* at 48.

160. *Id.*

161. *Sooner Geriatrics, LLC v. Crutcher*, No. CIV-07-244-M (W.D. Okla. October 3, 2007).

162. *Rainbow Health Care Ctr., Inc. v. Crutcher*, 2008 U.S. Dist. LEXIS 6705 (D. Okla. 2008).

163. *Id.*

164. *Id.* at 10, citing *Wickard v. Filburn*, 317 U.S. 111 (1942),); *Katzenbach v. McClung*, 379 U.S. 294 (1964),); and *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003).

165. The court distinguished this case from the Oklahoma’s Supreme Court decision in *Bruner*, in that the contract in *Bruner* stated the agreement was governed by Oklahoma law in at least eight different places, and therefore, application of Oklahoma law was the appropriate choice of law.

of *Bruner v. Timberlane Manor Limited Partnership*,¹⁶⁶ because the admissions agreement in *Bruner* did not specifically invoke the FAA, but rather stated that Oklahoma law applied.

The court ruled “The FAA provides that an arbitration provision in ‘a contract evidencing a transaction involving commerce’ shall be enforceable, except under such grounds that exist at law or in equity for the revocation of any contract.”¹⁶⁷ Although this would suggest that many of the arguments used in the state courts to request that an arbitration clause be held unenforceable should likewise be available in the federal courts, a cursory glance at the body of federal case law on the FAA reveals a strong inclination by the federal courts to uphold arbitration agreements. This is not inconsistent with the CMS position on arbitration agreements, in that they both view them as a contractual matter between the facility and the resident. Attempts by sympathetic state legislators to protect their nursing home resident constituents from oppressive arbitration clauses would likely be preempted by the FAA, and thus the law simply requires that nursing home residents simply be “better consumers.” Thus, it is incumbent on nursing home residents and their attorneys to carefully review admissions agreements and strike any provisions that require disputes to be resolved in arbitration.

X. LIABILITY FOR LOSS OF PERSONAL PROPERTY

Any provisions limiting liability for the loss of personal property should not be included in a nursing home contract. A statute that expressly creates a duty thereby creates a cause of action.¹⁶⁸ The Illinois Nursing Home Care Act places responsibility on the facility for residents’ personal property. For example, a facility must provide adequate storage space, a means to safeguard, and invoke reasonable efforts to prevent the loss and theft of personal property, including staff training and frequent inventories.¹⁶⁹

Although many facility contracts may state a waiver of liability for personal property, this provision should be stricken from the contract, since every Illinois facility has a statutory obligation and duty to protect its residents’ personal property. Even if such a provision remains in the contract, it is likely not enforceable.

XI. LIABILITY FOR NEGLIGENCE AND PERSONAL INJURY

A statute that expressly creates a duty thereby creates a cause of action.¹⁷⁰ Furthermore, a statutory duty may give rise to strict liability if a legislative intent, grounded in social policy, to impose such liability is found.¹⁷¹

166. *Bruner v. Timberlane Manor*, 155 P.3d 16 (2006).

167. *Id.*, citing the FAA 9 USC § 2 (2008).

168. 1 Callaghan’s Illinois Civil Practice Forms, Pleadings In General § 29.04.

169. 210 ILCS § 45/2-103. (West 1996).

170. 1 Callaghan’s Illinois Civil Practice Forms, Pleadings In General §29.04., *supra* n. 164.

171. *Abbasi v. Paraskevoulakos*, 187 Ill 2d 386 (1999).

Although both the federal and state laws preclude a facility from being held liable for the negligence of a resident's personal physician, neither federal nor state laws preclude a facility from liability for negligence and injuries resulting from the facility's own actions. In fact, both federal and state laws impose very specific duties on nursing homes, and any personal injury arising from the act or inaction of a facility, licensee, or agent that resulted from a breach of any statutory or common law duty would certainly give rise to a tort claim.

As such, waivers of liability for negligence and personal injury should be stricken from the contract. If these provisions remain in the contract, they are likely not enforceable.

XII. TYPES OF LONG-TERM-CARE FACILITIES

Laws pertaining to contractual requirements, discharge proceedings, governmental benefits and residents' rights differ depending upon the state licensing and federal certification of the long-term-care facility. Therefore, it is important for the practitioner to recognize and understand the client's facility type. The rights discussed above were for residents residing in facilities with Medicare or Medicaid certification.

A facility seeking Medicare and Medicaid reimbursement must first be licensed by the state, and then must be certified by the CMS. Thus, licensure and certification serve different purposes. A license allows a facility to operate. Certification allows a nursing home to admit patients who bring with them public funding.

There are three federal certification categories for nursing homes: 1) skilled nursing facilities, 2) nursing facilities, and 3) intermediate care facilities. Skilled nursing facilities are certified to receive Medicare; nursing facilities are certified to receive Medicaid; and intermediate care facilities (which generally service the developmentally disabled) receive Medicaid.¹⁷² There are also additional waiver programs, which vary from state to state, that provide Medicaid funding to non-nursing home facilities..

Illinois, like most states, has five types of long-term-care licenses: 1) supportive living facilities; 2) sheltered care facilities; 3) assisted living facilities; 4) intermediate care facilities; and 5) skilled care facilities. The regulatory requirements of each facility to safeguard residents' rights vary based upon the facility license.

A. Supportive Living Facilities

A supportive living facility is either a free-standing facility or a distinct physical part within another type of long-term-care facility.¹⁷³ In Illinois, supportive living facilities were developed as a result of a federal demonstration project or "waiver project," in which the enabling statute waives the general requirements for state Medicaid plans.¹⁷⁴ The facilities seek to prevent premature admission to a nursing facility when a senior requires some additional daily assistance, but cannot afford to

172. Shi, *supra* note 11.

173. 305 ILCS § 5/5-5.01a. (West 1996).

174. 42 USCS § 1315(e), (2008); 42 USCS.S.C. 1396(n)(b)(4) (2008).

pay privately for such care in his or her home.¹⁷⁵ Some SLFs also serve persons with non-developmental disabilities who are over the age of 22 years.¹⁷⁶ This reduces the excess Medicaid costs associated with skilled care, when skilled care is not actually needed by the resident.

A supportive living facility's structural and architectural requirements for Illinois State licensing are quite extensive. For example, each resident must be provided with an apartment, with at least 160 square feet of living space, which is equipped with: a door that locks from the inside; a full bathroom, emergency call system, heating and cooling controls, wiring for private telephone lines, access to cable television or antenna with at least ten channels; and a sink, microwave oven or stove, and refrigerator with a separate freezer compartment. As a result, these facilities tend to be newly constructed or rehabilitated facilities with a well-appointed hotel-like appearance.¹⁷⁷ A list of existing and planned supportive living facilities is available online at www.slfillinois.com.

Medicaid residents in SLFs must be screened and found to be otherwise in need of nursing facility level of care but that the SLF placement is appropriate to meet their needs.¹⁷⁸ SLFs are not permitted, however, to accept residents with pervasive mental health conditions or chronic healthcare conditions.

Thus, SLFs are subsidized by the Medicaid program, and receive a monthly reimbursement rate of approximately \$2,000 for each Medicaid resident, including a portion of the resident's income.¹⁷⁹ Additional services, such as physical, occupational, and speech therapy may also be provided to residents on-site, the costs of which are generally covered by private health insurance and Medicare.

However, unlike other Medicaid or Medicare certified facilities, SLFs are exempt from many of the requirements of the federal laws that protect facility residents. The Illinois statute explicitly states "Facilities or distinct parts of facilities which are selected as supportive living facilities and are in good standing with the Department's rules are exempt from the provisions of the Nursing Home Care Act and the Illinois Health Facilities Planning Act."¹⁸⁰ This exempts the facilities from safeguarding the residents' rights under the Illinois Nursing Home Care Act and the Federal Nursing Home Reform Act.¹⁸¹ The Illinois statutes governing SLFs is the Supportive Living

175. 305 ILCS § 5/5-5.01a. (West 1996).

176. Illinois Medicaid Assistance Program Provider Bulletin (March 1, 2005) at http://www.slfillinois.com/assets/030105_slfhandbook.pdfhttp://www.slfillinois.com/assets/030105_slfhandbook.pdf.

177. See 89 Ill. Admin. Code § 146.210. (2006).

178. Illinois Medicaid Assistance Program Provider Bulletin, *supra* n. 195.

179. *Id.* at 39.

180. *Id.*; 210 ILCS 45/1-101 et seq.; 20 ILCS 3960/1 et seq.

181. See 301 ILCS § 5/5-1, et seq.; 42 USCS §.S.C. § 1396r (2008). Arguably, however, if a SLF is located within a SNF and operated by the SNF, which receives federal funding, then the SLF may be subject to the Illinois and Federal laws pertaining to SNFs.

Facility Act,¹⁸² and the supporting regulations are codified in Title 89 of the Illinois Administrative Code.¹⁸³

B. Sheltered Care Facilities

Sheltered care facilities provide individual living units with private or shared bathrooms, maintenance, and personal care. “Maintenance” means food, shelter and laundry services.¹⁸⁴ “Personal care” means assistance with meals, dressing, movement, bathing, or other personal needs or maintenance, or general supervision and oversight of the physical and mental well-being of an individual, who may not otherwise live alone.¹⁸⁵

Newly licensed facilities are held to stricter structural standards, although a large number of older sheltered care facilities are in existence and are not required to comply with these standards. Many clients find these types of facilities to be akin to a college dormitory type of environment, with individual bedrooms, private lavatories, and community libraries and shared meeting and dining rooms. A list of Illinois sheltered care facilities is available online at www.idph.state.il.us/healthca/sheltered_care_list.htm.

Some sheltered care units are located within skilled nursing facilities; others are individual facilities. These facilities are eligible to receive Medicaid reimbursement. In Illinois, the reimbursement for shelter care is approximately 60% of the reimbursement rate for supportive living facilities.¹⁸⁶ Sheltered care facilities are subject to the Nursing Home Care act, and the Residents’ Rights enumerated in the Title XIX of the Social Security Act, if the sheltered care unit is located within a skilled nursing facility.¹⁸⁷

C. Assisted Living Facilities

Assisted living facilities are governed by the Assisted Living and Shared Housing Act,¹⁸⁸ which requires mandatory services to be provided to all residents, including: three meals per day, housekeeping services, personal laundry and linen services, 24 hour security services, an emergency communications response system, and personal assistance with activities of daily living as required by individual residents.¹⁸⁹ Regulations are codified in Title 77 of the Illinois Administrative Code.¹⁹⁰

Assisted living residents’ rights are enumerated in the Assisted Living and Shared Housing Act and are similar to those of the Illinois Nursing Home Care Act, although

182. 305 ILCS 5/5-5.01a. (West 1996)

183. 89 Ill. Admin. Code § 146.200. (2006).

184. 210 ILCS 45/1-116.

185. 210 ILCS § 45/1-120. (West 1996).

186. For the cost report site of various types of facilities, visit <http://www.hfs.illinois.gov/assetscr/> (last visited February 18, 2008).

187. See 301 ILCS § 5/1-1, *et seq.*, and; 42 USCS §.S.C. § 1396r (2008).

188. 210 ILCS § 9/1 *et seq.*

189. 210 ILCS § 9/10 (West 1996).

190. 77 Ill. Admin. Code § 330.110. (2006).

not as expansive.¹⁹¹ The Nursing Home Care Act and Title XIX of the Social Security Act do not apply to assisted living facilities.¹⁹² A list of assisted living facilities is available online at www.idph.state.il.us/healthca/assisted_living_list.htm.

D. Continuing Care Retirement Communities

Continuing Care Retirement Communities (CCRCs) are a conglomeration of varied sub-communities, located on the same campus, or in the same building, which provide various levels of care. CCRCs are governed by a combination of statutes as they relate to the state licensing and federal certification of the sub-communities contained within the CCRC.

The Federal Deficit Reduction Act of 2005 (DRA '05), which as of this writing has not yet been adopted in Illinois, requires a CCRC resident to apply any entrance fee upon admission toward the cost of skilled nursing care prior to qualifying for Medicaid.¹⁹³ In some communities, the entrance fee may be as low as \$90,000 or as high as \$1 million.¹⁹⁴ This requirement, if adopted in Illinois, may legally preclude otherwise permissible asset protection strategies, such as 'OBRA Trusts, spousal impoverishment exceptions, and distributions to minor children or children with disabilities.

XIII. CONCLUSION

Few nursing home residents and their family members recognize the horrendous implications that may arise from apparently innocuous, consumer-friendly language contained in long-term-care admissions contracts. It is terribly unfortunate, but not surprising, that nursing home residents continue to be faced with substandard care and poor living conditions. Contracts signed in the absence of good legal advice more often than not rob nursing home residents and their families of the ability to adequately challenge their circumstances and seek justice.

Now, more than ever, it is crucial for Elder Law practitioners to intervene, to educate, and to take a more active role to prevent the enforcement of unfair agreements against the most vulnerable members of our society and their unwitting families. This includes an obligation to communicate and address these issues not only with clients, but also with members of the public, community leaders, healthcare workers, state employees, and senior advocates who may have no idea of the pitfalls awaiting them in the long-term care.

191. 210 ILCS § 9/95. (West 1996).

192. 210 ILCS § 45/1-113, (West 1996); 42 USCS §.S.C. § 1396r (2008).

193. 42 USC § 1396p(g). (2008).

194. <http://www.theclareatwatertower.com> (last visited February 18, 2008). 194.The Clare at Water Tower, <http://www.theclareatwatertower.com> (last visited February 18, 2008).

THE TRANSFER-ON-DEATH DEED IN THE ELDER LAW SETTING

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The “transfer-on death-deed,” sometimes known as a “beneficiary deed,” is a relatively new estate planning and probate avoidance device that has rapidly gained acceptance in the last few years. So far, ten states have adopted this testamentary transfer device.¹ Additionally, the National Conference of Commissioners on Uniform State Laws (NCCUSL) has created a drafting committee to develop a model uniform law on this subject.² Other states, such as California, have begun preliminary consideration of such a law in their state legislatures, and a proposal effort is underway in the American Bar Association to adopt a position in support of such legislation in every state.³ While often seen as a probate avoidance device, the transfer-on-death deed has aspects that make it an especially useful tool in the Elder Law setting, regardless of the perceived need for probate avoidance.

I. INTRODUCTION

The concept of the transfer-on-death deed is directly comparable to the use of pay-on-death, or transfer-on-death, accounts at banks or with brokerage houses. Most state transfer-on-death statutes are based upon the Uniform Transfer on Death Security Registration Act, as developed by NCCUSL in 1989.⁴ Under such transfer-on-death deed laws, the owner of real property is permitted to designate, during the owner’s lifetime, a beneficiary recipient (usually known as a “grantee-beneficiary”) of the property upon the death of the current owner. Upon the current owner’s death, the real property passes to the grantee-beneficiary, without invocation of the probate process, and without the need to transfer the property to a revocable trust or similar ownership device during the lifetime of the current owner. Typically, by recording in the real property records a death certificate, and possibly an affidavit of heirship-type document, such property automatically becomes the property of the grantee-beneficiary named in the deed.⁵ If the property is currently owned by joint tenants with rights of survivorship, the property does not transfer to the grantee-beneficiary until the death of the last joint tenant owner. With regard to the possibility of multiple grantee-beneficiaries, or even contingent grantee-beneficiaries, most state’s statutes permit such joint interest ownership or multiple and contingent beneficiary grantees as are permitted by other real property laws within the state. However, transfer-on-death deed statutes are relatively new in all the states that have adopted such deeds. Thus, there is little, if any, case law concerning resolution of conflicts regarding ownership and beneficiary-grantee designation rights among joint owners after the death of one or more joint owners, or of resolution of conflicts between multiple grantee-beneficiaries or contingent grantee-beneficiaries.

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1. Arizona, Arkansas, Colorado, Kansas, Missouri, Nevada, New Mexico, Ohio and Wisconsin have adopted some form of beneficiary deed or transfer-on-death deed.
 2. The NCCUSL drafting effort is in preliminary stages. NCCUSL attempts to develop uniform laws in a two-year drafting cycle; although depending on the complexity of the issue this process can take considerably longer.
 3. Cal. Sen. 250, 63d Gen. Assembly, 1st Reg. Sess. (February 1, 2001).
 4. See *generally* Unif. TOD Sec. Registration Act, 8 U.L.A. 449 (1998).
 5. See *e.g.* Co. Rev. Stat. § 38-31-102 et seq. (2006).

The transfer-on-death deed grew out of the desire and perceived need to avoid probate proceedings. Use of the transfer-on-death deed holds significant advantages over many of the methods of non-probate transfers traditionally used by both estate planners and laymen alike. While many of the issues facing these traditional non-probate transfer techniques involve tax and litigation-related estate planning concerns, other incentives for adoption and use of the transfer-on-death deed exist, which are commonly found in the Elder Law setting regardless of the size of the individual's estate.

Historically, real property has been treated differently from personal property, whether such personal property is tangible or intangible. Such separate treatment has been present since the creation of the English common law system centuries ago.⁶ In all states, recording of deeds to real property and the recognition of the transfer of ownership from one individual to another at death is a basic part of common law and statutory law. This process, normally known as "probate," is relatively inexpensive and straight forward in states that have adopted the Uniform Probate Code; however, such simplicity is not necessarily universal.⁷ In many non Uniform Probate Code states, revocable living trusts are a common probate avoidance vehicle. But, when the only major asset of an estate is the real property, typically the family home, the cost of creating, funding and administering a revocable living trust may seem prohibitive. Use of a transfer-on-death deed presents the individual with limited assets, consisting mainly of the home, with a much less expensive and less cumbersome alternative.

II. TAX CONCERNS

A. Gift Tax

The estate planning attorney and the Elder Law Attorney will recognize that both sophisticated and unsophisticated clients will attempt to avoid the probate process through a variety of techniques. Among the most common of such techniques is the addition of an intended beneficiary to a deed during the lifetime of the current owner, and creation of a joint tenancy deed. This technique is especially effective for ownership by a husband and wife when the total size of the estate of each spouse is less than the federal estate tax exclusion amount (currently \$2 million).⁸ However, with the continuing aging of the population, attorneys practicing estate planning for elderly clients have seen a trend towards adding a child or children (or other

6. The authors recognize Louisiana law derives from a Napoleonic law tradition, although in both legal systems the unique nature of real property is recognized.

7. See generally Unif. Prob. Code (2004), as amended 2006.

8. The maximum size of an estate for federal estate tax purposes that is not subject to the federal estate tax is \$2 million, rising to \$3.5 million in 2009. In 2010, the federal estate tax is temporarily eliminated, returning in the year 2011 with a \$1 million exemption amount, assuming no prior taxable gifts. Numerous proposals have been introduced and considered, but as yet, no clear solution to the current problems with the federal estate tax have been found. The authors, therefore, do not attempt to consider the issue of the effect of any eventual changes to the federal estate tax on overall estates or upon the use of transfer-on-death deeds.

individuals) to deeds for real property owned by the aging parent as a probate avoidance technique, which, unfortunately, results in a negative impact on the tax basis and other unintended consequences.

In most states, execution of a new deed adding an adult child's name to the deed creates a completed gift, and in all states a completed gift is made at the time of recording of the deed in the appropriate real property records system. Such a completed gift may result in the imposition of federal gift taxation to the extent the gift exceeds the annual gift tax exclusion amount (currently \$12,000 per beneficiary per year).⁹ While the filing of gift tax returns is often honored more in the breach than in compliance, for the vast majority of individuals this is of little consequence.

Each individual, in addition to the annual \$12,000 gift tax exclusion amount per beneficiary, has a \$1 million lifetime exclusion amount from gift taxation.¹⁰ Because the penalty for non-compliance with gift tax statutes is based upon a multiplier of the amount of tax due, this \$1 million lifetime exemption effectively eliminates the tax and the need for filing of the gift tax return for most taxpayers.¹¹ However, when the individual has accumulated and transfers wealth over and above this amount, a gift tax is imposed and payable.

We tend to think of individuals wealthy enough to incur gift tax as also being able to pay the gift tax due. It is not uncommon, however, for elderly individuals to own property that has significantly increased in value over its original purchase price and to not have significant assets outside of the real property with which to pay the tax. Such a situation may be a result of having held ownership of the property over long periods of time, sometimes all of the owner's adult life, or simply because real property values have rapidly and significantly increased over the original purchase price. In either event, individuals adding the name of an adult child to a deed for the perceived convenience of avoiding probate may have inadvertently created a significant tax burden for which they may not have sufficient liquid assets to pay.

B. Capital Gains Tax

In addition to potentially creating unintended gift tax consequences, the lifetime transfer of assets by adding the name of an adult child to a deed creates significant consequences in the area of capital gains taxes. When an owner of real property makes a gift of real property during the owner's lifetime by placing another individual's name on the deed, the capital gains tax basis of the original owner is also transferred to the new individual. No step up in basis is achieved, as would be the case if the property were transferred at death. Should the individual to whom the property has been transferred (hereinafter "grantee") decide to sell the property at a later date, the capital gains tax will be determined based upon the original owner's tax basis in the property.

9. I.R.C. § 2503 (1998).

10. I.R.C. § 2505.

11. The authors are not advocating ignoring the federal tax law requirement to file a gift tax return for gifts over \$12,000 per year per beneficiary, but are simply recognizing that failure to file the return will not result in the incursion of penalties and interest.

C. Estate Tax

Additionally, if the property is gifted as a joint tenancy with right of survivorship to an adult child or any other individual who is a non-spouse, the entire value of the property will be included in the estate of the original owner of the property for estate tax purposes. While this has the effect of giving the grantee a full step up in basis in the property at death, it may increase the size of the decedent's estate to a level causing the imposition of federal estate taxes that the original owner, now decedent, thought had been avoided by the lifetime property interest transfer to the non-spouse joint owner. Estate tax inclusion of real property jointly held can be a double-edged sword. For individuals for whom the gross estate is below the federal estate tax threshold, no estate tax consequences exist and a full capital gains tax basis is achieved. However, for the individual facing a taxable estate, the tax due upon death is likely to be significantly higher than the tax owed by the beneficiary at sale, given the differences in the tax rates between the two taxes.

III. OTHER NEGATIVE CONSEQUENCES

Once transfer of ownership during lifetime has occurred, other negative consequences may ensue. In the case of divorce proceedings of the grantee who is a joint owner (hereinafter "grantee-joint owner"), the value of the grantee-joint owner's interest in the real property may be considered in the determination of the division of marital assets by the divorce court. In community property states, this may additionally result in the court considering the property to be a marital asset, resulting in the divorcing spouse having an undivided one-half interest in the grantee-joint owner's ownership interests in the property.

If damages are assessed against the grantee-joint owner who is a defendant in a civil suit by a third party, the property jointly owned is subject to attachment to pay the damage award. While many states exempt property that is the homestead of an individual from attachment, it is likely the interest of the grantee-joint owner in the property may not have such homestead protections, as it is the *grantor*-joint owner living in the property, not the grantee-joint owner. It is entirely possible that the innocent grantor of the property could find him or herself in a sale for division action by the third-party judgment holder, and possibly subject to loss of property due to such action. This same problem exists in a bankruptcy proceeding involving the grantee-joint owner of the property. Family members may think of the property as still belonging to the elderly grantor-joint owner, but, in fact, that is not its legal status.

Furthermore, if the adult child dies before the parent, this same situation may exist. The grantee-joint owner's interest in the real property could be subject to creditor's claims against his/her estate. Moreover, the property could be subject to distribution in accordance with the will of the deceased grantee-joint owner or the intestate laws of the state.¹²

12. This situation would depend on whether the deed transferring the interest to the grantee-joint owner created a survivorship right.

Even more disturbing is the case of the adult child whose name is added to the real property, and who, as the grantee-joint owner, then pledges the property as collateral against a debt. If the adult child fails to honor the debt, the creditor may attach the adult child's interest in the property to satisfy the debt. Additionally, should the parent who is the grantor-joint owner decide at a later date to use the property as collateral for his/her own purposes, he/she may be unable to do so because the property is already encumbered by the adult child who is the grantee-joint owner. For many elderly individuals, the home represents the largest and possibly the only substantial asset. The result is an elderly client who may be unable to meet his/her financial needs while continuing to own a significant, but overly encumbered, asset.

IV. CO-HABITATION

It is not just elderly clients and adult children who face this issue of placing the property into joint ownership. For economic reasons, some elderly, unmarried individuals may desire to continue to remain single, even though they become involved in a relationship with another person. By doing so, economic benefits such as Social Security and pension benefits, whether from one's own work efforts or in the form of survivor benefits, are unaffected. Couples may consider themselves as committed as any married couple, yet not want to face a financial penalty for remarriage. While they may not marry, many of these individuals do commingle their financial assets, including their real property.

Unfortunately, advanced age does not protect people from entering into relationships with others that do not last. However, if the property owner places the name of another onto a real property deed, a completed gift is created. If the relationship ends prior to the death of one of the individuals, the surviving co-owner of the real property commonly expects to be compensated for removing his/her name from the deed to real property, regardless of whether they gave any consideration for the addition of their name to the deed. As with any divorce situation, when the relationship of an unmarried couple dissolves, the same positive feelings that were present in the beginning of the relationship no longer exist, and the departing partner may demand significant consideration for removal of their name from the deed or may even fight the situation in court.

A. Medicaid

Even assuming the relationship remains positive and continues, as the couple grows older, health and long-term care decisions may arise that will impact the decision to place the name of another onto the deed. Under the Deficit Reduction Act of 2005 (hereinafter "DRA"), the rules for Medicaid qualification have changed drastically. Two major changes may impact an individual placing the name of a non-spouse partner onto a deed. The first of these is the extension of the so-called "look-back" period. Under the DRA, once application for Medicaid is made, the applying individual must report all uncompensated transfers that the individual made in the

preceding five years.¹³ As most of us are unable to predict five years in advance whether or not we will require Medicaid assistance for long-term care, it is quite likely that the innocent addition of another to a deed may result in a penalty being imposed for the uncompensated transfer of an interest in the real property. An individual who has made an uncompensated transfer and does not have sufficient liquid assets to wait out the penalty period imposed by Medicaid may find him or herself in a very difficult position. If the house is jointly owned by a spouse, it is normally exempt from inclusion in determining Medicaid eligibility.¹⁴ But, if the house is jointly owned by a non-spouse, such exemption does not exist to the extent of the Medicaid applicant's interest in the house.

The second major area impacted by the DRA is that of determination as to when the penalty period begins to run. While state rules varied somewhat under the pre-DRA laws, the penalty period generally began at the time the transfer was made. As a result, depending on the size of the transfer, it was entirely possible that the penalty period would have expired prior to application for Medicaid services. In fact, most Medicaid planning opportunities were based upon this penalty calculation methodology. But, under the DRA, the penalty period does not even begin to run until there is a Medicaid application and the applicant is otherwise eligible for Medicaid assistance.¹⁵

The result of these two major changes to Medicaid law is that the individual who adds the name of a non-spouse to a deed may find him or herself subject to a prolonged Medicaid ineligibility period for any transfer made within the five-year period immediately prior to the Medicaid application, and one which does not begin until the time when application for Medicaid benefits is made.

An additional issue concerning the use of transfer-on-death deeds has been considered in a number of states with regard to the use of such deeds as a Medicaid eligibility planning technique. To date, however, only Colorado has included a provision in its statute that prohibits the use of transfer-on-death deeds for individuals applying for Medicaid assistance.¹⁶ While Colorado is unique in prohibiting the use of transfer-on-death deeds in the Medicaid application process, other states have addressed the issue of avoidance of the Medicaid recovery process. Nevada, for example, addressed this issue by stating that the provisions of the beneficiary deed could not be used to limit the recovery of benefits paid on behalf of the grantor by Medicaid.¹⁷

V. RECORDING REQUIREMENTS AND OTHER PROTECTIONS

The result of all of these issues is the increasing interest in the concept of a transfer-on-death deed. While the specifics vary slightly from state to state, most

13. Pub. L. No. 109-171 (Feb. 8, 2006).

14. 42 U.S.C. § 1396p (2006).

15. *Id.*

16. Co. Rev. Stat. § 15-15-403 (2006).

17. Nev. Rev. Stat. § 111.109(9) (2005).

transfer-on-death deed provisions are held in common among the ten enacting states.¹⁸ In a typical transfer-on-death deed statute, an owner, or ever joint owners, of real property may execute a deed naming a successor owner of the property whose interest does not vest until the death of the original owner. At the time of death, as a matter of law, the property vests in the grantee-beneficiary. The documentation of transfer is normally accomplished by recording of a death certificate in the real property records, or such other requirements as are typical in the state for recordation of ownership for a joint tenancy with rights of survivorship deed when one owner dies. When there are joint owners of a transfer-on-death deed, the vesting of the interest of the grantee-beneficiary does not occur until the death of the surviving original joint owner.¹⁹

To avoid the issue of so-called “pocket deeds,” in which the individual executes a deed but does not record the deed, the typical transfer-on-death deed statute requires recording of the deed.²⁰ As further protection against pocket deeds or other questionable practices, many states require the deed to be recorded prior to the death of the grantor. This eliminates so-called “deathbed transfers.” Under these statutes, a deed not recorded prior to death is simply void.

The requirement for pre-death recording of the transfer-on-death deed also eliminates the prospect of dueling deeds made to multiple beneficiaries shortly before the death of the grantor. Unfortunately, it is not uncommon for an elderly individual to execute such multiple deeds to differing beneficiaries. This is often the case because the elderly individual fears abandonment by the adult children. To curry the attention of multiple adult children the parent may tell each child that he/she has determined to transfer the real property to that child. But, subject to undue influence, the elderly individual may execute transfer-on-death deeds to multiple individuals, often in a relatively short period of time, to gain the favor of each adult child. In more dysfunctional families, pressure may be exerted by adult children upon the elderly parent in an attempt to gain ownership of the real property. Under the typical transfer on death statute, the last deed recorded prior to death is the effective deed, regardless of the existence of later, but unrecorded, transfer-on-death deeds.

A. Right to Revoke or Amend Transfer-on-Death Deed

The transfer-on-death deeds in all states where such laws exist permit the grantor to revoke or amend the transfer-on-death deed without the need for the consent of the grantee-beneficiary. When devising the real property to a particular child is in recognition of the support such child provided to the grantor (physical or financial) during the lifetime of the grantor, the use of the transfer-on-death deed removes the property from the probate process. This permits the grantor to continue an estate plan that gives apparent equality of bequests to all of the children, while permitting the grantor to benefit a particular child outside of the will. Because the transfer-on-death deed is revocable without the consent of the grantee-beneficiary, should the grantee-

18. *Supra* n. 1.

19. *See e.g.* Co. Rev. Stat. § 15-15-408 (2006).

20. *See e.g.* Nev. Rev. Stat. § 111.109(6) (2007).

beneficiary cease to assist the elderly parent, the elderly parent is free to revoke the gift and later gift the property outside the will to a different grantee-beneficiary through the use of a new transfer-on-death deed. If the grantee-beneficiary's only, or primary, incentive in caring for the elderly parent, was anticipation of receipt of the real property, the support of the grantee-beneficiary is continued, less the grantor determine to revoke the deed.

B. Creditor's Rights

Because such outside-of-probate transfer techniques are sometimes used as creditor avoidance devices, most states have included protective provisions in their transfer-on-death deed statutes. Typically, these statutes include provisions that the property devised by a transfer-on-death deed is still subject to creditor claims the same way property passing through probate is subject to creditor claims. As is standard with other real property passing through probate proceedings, typical transfer-on-death deed statutes require that any outstanding mortgage upon the property runs with the transfer of the property.²¹

C. Divorce or Separation

As protection in divorce or legal separation proceedings, the typical transfer-on-death deed statute provides that the transfer-on-death deed benefitting the now-former spouse is void upon entry of judgment of divorce or legal separation.²²To prevent abuse or misunderstanding of the transfer-on-death deed, the typical statute also requires specific language to be prominently included in the deed indicating that the interest does not pass to the grantee-beneficiary until the death of the current owner, and notice that the deed may be revoked at any time by the grantor.²³

VI. CONCLUSION

As with many estate planning techniques, the transfer-on-death deed cannot be considered separate and apart from other aspects of an individual's estate plan. The estate planner must be sensitive to the reasons why the client wants to adopt a particular estate planning device, especially when the client comes into the estate planner's office with a preconceived notion of what estate planning techniques are appropriate. This is especially true for the estate planner dealing with elderly clients. Quite often, for example, the elderly client is brought to the Elder Law Attorney by an adult child or other individual who would also become the grantee-beneficiary under the transfer-on-death deed. Considering the potential for undue influence is not simply an academic exercise in this situation. While in hindsight this may seem a classic undue influence scenario, it may not initially present itself as such to the attorney. The attorney should make it a routine part of the estate planning interview to inquire as to the reasons behind a particular desire by the elderly client to achieve any particular

21. See e.g. Co. Rev. Stat. § 15-15-407 (2006).

22. See e.g. Mo. Rev. Stat. § 461.051 (2007).

23. See e.g. Co. Rev. Stat. § 15-15-407 (2006).

estate planning goal so as to ensure the client understands the consequences of the use of a transfer-on-death deed. Of course, it is important to remember that the attorney should always conduct the interview with the elderly client alone.

As Elder Law Attorneys, we should all be sensitive to our own propensity to exhibit ageism in our Elder Law practice. But, we must also consider the tendency of elderly individuals to be bombarded by professionals, relatives and well meaning friends, to “inform” the client about the “horrors of probate.” We must consider the possibility that the elderly client may desire a particular transfer device because he/she has heard their friends tell of having such transfer-on-death deeds, and touting of such deeds to the client. We must be aware of the distinct possibility that the client may be subject to the improper influence of the potential grantee-beneficiary who desires to have the elderly client execute a transfer-on-death deed for their own nefarious reasons.

While all states with transfer-on-death deed statutes permit the independent revocation of the transfer-on-death deed by the grantor, with elderly clients the potential exists that the grantor may suffer a physically or mentally catastrophic event that incapacitates the grantor and makes it impossible for him/her to execute a revocation of the transfer-on-death deed. It may be advisable when executing an estate plan for the elderly individual with a transfer-on-death deed to ensure that a durable power of attorney is also executed, which includes a provision permitting the agent under the power of attorney to revoke the transfer-on-death deed.²⁴ Inclusion of such a provision can eliminate the need for a court proceeding for revocation of the transfer-on-death deed, whether to permit qualification for Medicaid or for other estate planning reasons. Such a single purpose conservatorship proceeding is a part of virtually every state’s laws, but even so, it creates additional expense and is time consuming. However, providing for the ability of an attorney-in-fact or agent to revoke a transfer-on-death deed should be balanced against the potential risk for abuse, such as financial exploitation.

Transfer-on-death deeds are not a universal solution to all estate planning issues. But, they can be a highly effective tool for the Elder Law and estate planning attorney. When the individual’s real property is the only major asset of the estate, such a deed can avoid the need for a probate proceeding, or the more significant expense and administrative requirements of a revocable living trust. This can be financially advantageous even in states with “probate friendly” estate proceedings. While most states have a small estate transfer procedure to avoid full probate proceedings, the dollar limits on such proceedings vary widely. In Alabama, for example, the small estate proceedings limit is \$3,000, and in any event cannot be used for probate estates that contain real property.²⁵ By contrast, in California, the small estate procedures limit is \$100,000.²⁶ Beyond such limits, a full probate proceeding is required, and, with it, additional time and expense.

24. This is particularly important in Colorado and any other state that denies Medicaid eligibility for an individual who has executed and recorded a transfer on-death- deed.

25. Ala. Code § 43-2-692 (1975).

26. Cal. Prob. Code Ann. § 13100 (West 2006).

Even in estates that are not subject to estate taxation, joint tenancy may not be the appropriate method of ownership of real property. This is so when there is no intention to leave the property to the surviving spouse, such as in a second marriage, or when the spouse has independent tax, creditor or child support issues that might subject the real property to encumbrances by third parties if jointly titled. The transfer-on-death deed, possibly used as a joint ownership transfer-on-death deed, may be the proper solution.

Where the goal of the owner is to benefit a particular individual, typically one of a number of the children of the owner, the transfer-on-death deed permits this without subjecting the estate to otherwise unequal distributions. But, the parent may not want to reveal the unequal distributions during his/her lifetime through inclusion in the individual's will. The transfer-on-death deed permits the individual to ensure such disproportionate benefit to a favored child without being subject to attempted influence by other children who may well be aware of the contents of the individual's will.

Right or wrong, many individuals want to avoid the probate process, believing it an expensive and invasive vestige of an antiquated real property transfer system. The enactment of a transfer-on-death deed system provides an alternative to the probate process, as well as too many other issues facing elderly individuals owning real property. The trend is acceptance of such a non-probate real property transfer technique. As this trend grows, Elder Law attorneys should become aware of the advantages and disadvantages of such a real property transfer device for their elderly clients.

FAIR HEARING DECISIONS ON MEDICAID “HARDSHIP” AND “INTENT” CLAIMS

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I. INTRODUCTION

“Hardship” waivers are supposed to be granted to mitigate the harshness of the Deficit Reduction Act of 2005 (DRA) changes that took effect February 8, 2006, tightening Medicaid’s asset transfer rules.¹ Massachusetts’ regulations to implement the DRA took effect September 2006.² This article reviews Fair Hearing decisions³ issued by the Board of Hearings of MassHealth (the Massachusetts Medicaid program) from 2004 through the end of 2007, to determine which hardship claims, if any, are likely to be upheld. Our findings are distressing. Of 23 claims presented to Fair Hearings since 2004, none were wholly successful. The lack of an effective “hardship” remedy can be traced to the:

1. extremely restrictive definitions of “hardship,”

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1. Deficit Reduction Act of 2005, Pub.L. No. 109-171, § 6011, which has been codified in 42 U.S.C. 1396p(c)(1)(B)(i), (look-back lengthened to five years); and 1396p(c)(1)(1)(D) (delay of the running of the period of ineligibility).
2. See Eligibility Letter 147 dated July 1, 2006.
3. 42 CFR § 431.205 requires that each state participating in the Medicaid program maintain “a hearing system,” with due process standards as set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970) which provides aggrieved applicants with an opportunity to appeal decisions taken by caseworkers and that following a favorable Fair Hearing decision the agency must take corrective action, including payments retroactive to the date of the incorrect action under 42 CFR § 431.246.

2. complete discretion of Medicaid offices on whether to grant “hardship” waivers,⁴
3. imposition of harsh time standards, and
4. disregard of the impact on impoverished spouses.

Although the DRA recognized that its new transfer penalties were likely to trigger new and more severe hardships, necessitating a safety net to deal with such hardships,⁵ Massachusetts and other states simply reiterated outmoded rules on “hardship,” ignoring the impact that the DRA will have on innocent and foolish transfers.⁶ Examining cases turning on the DRA’s attack on transfers confirmed that hearing officers continue to apply unduly rigorous standards for “hardship”—refusing to mitigate serious hardships that have been presented since the DRA was implemented.

While this research is particularly relevant to Massachusetts practitioners, Medicaid applicants in all states are similarly affected by their state agency’s response to the DRA’s restrictions on transfers. A recent survey confirms this. In the fall of 2007, Elder Law Report polled Elder Law Attorneys in a variety of states about their experience with the new DRA. When asked about hardship claims, attorneys in nearly every state agreed that it was very difficult to get an exemption.⁷ Some commented that it was “rarely permitted;” that “it exists on paper, but has likely never been granted;” even that it “requires special dispensation from God.”⁸ A Maryland attorney stated that he has never known one to be granted except in a case of fraud or theft.⁹ In Colorado it may be even worse, as the state has added requirements that *all* legal

4. Significantly, the Massachusetts regulations begin: “The MassHealth agency *may* waive a period of ineligibility” 130 CMR 520.019(L)(1). (Emphasis added) This would appear to raise the standard for judicial review of Fair Hearing decisions to the virtually impossible “abuse of discretion” level.
5. “Each state shall provide for a hardship waiver process ... [defining] “undue hardship” [so that] application of the transfer of assets provision would [not] deprive [applicants] (A) of medical care [that would endanger the individual’s health or life] or food, clothing, shelter, or other necessities of life.” Section 6011(d)(2) further provides that the waiver process must provide for (A) notice to recipients that an undue hardship exception exists; (B) a timely process for determining whether an undue hardship waiver will be granted; and a process under which an adverse determination can be appealed.” The federal law is long on process but short on substance and, as a result, states have not generally amplified the definition of “hardship.”
6. See Maya Bazar, “The DRA Two Years On: How It Has Changed Practices,” XIX ELDERLAW REPORT (No. 7, February 2008). See also Center for Advanced Legal Studies (Suffolk University Law School), PRACTICAL TIPS FOR IMPLEMENTING DRA, October 12, 2007, at 53-56. Attorneys from Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont prepared responses to a number of questions concerning implementation of the DRA. Comments on whether “undue hardship” ameliorated difficult cases ranged from “illusory” (New Jersey) to the Massachusetts comment “none known” on whether any waivers had been granted. This research confirms that observation.
7. Maya Bazar, *op. cit.* at 2.
8. *Id.*
9. *Id.*

remedies must have been pursued to the fullest, including filing a *criminal* complaint to have property returned, before an exemption can be granted.¹⁰

As far as can be determined, all states that have complied with the DRA's requirement that they adopt standards for adjudicating "hardship" claims have simply adopted, as did Massachusetts, the broad and highly restrictive definitions of "hardship"—word for word—embodied in the DRA, itself. No hardship claim succeeded prior to the DRA. Although the number of hardship appeals rose precipitously after the DRA, they all met the same fate. On the other hand, those arguing "intent" rather than "hardship" met with some success. About 30% of applicants whose transfers were challenged, our research finds, were approved when they demonstrated that "resources were transferred *exclusively* for a purpose other than to qualify for [Medicaid]."¹¹ Thus, advocates at least have some chance for success if they contend that apparently disqualifying transfers were made "exclusively for a purpose other than to qualify for Medicaid."

While we set out to determine how best to represent clients in difficult cases, a significant goal emerged for publishing this study. We want to encourage the same type of research in states other than Massachusetts because, as we conclude, public advocacy at the state and national levels is essential to bring fairness to "hardship" Cases. During the time considered in this study (Jan. 2004-Dec. 2007), no judicial appeals of Fair Hearing decisions have been taken to the Massachusetts Superior Court on the two issues of this study, "hardship" or "intent."¹² Thus, while these Fair Hearing decisions are not precedents that can be relied on in later cases,¹³ they remain the only objective data for interpreting these basic regulations. We hope that by describing a method for conducting such studies, NAELA members in other states will conduct and share similar research so that, if our assumption is correct that the harshness of the DRA affects all states, this might lead to improved advocacy not only for individual clients, but also for overcoming a draconian law.

II. METHOD

Although our research was focused on more recent decisions, records of all MassHealth Fair Hearing decisions handed down since 1995 are available at the Board

10. *Id.* Apparently, the Medicaid agency in Colorado believes that all transfers within the look-back period are "criminal."

11. "Intent" is defined in MassHealth Regulations, 130 CMR 520.019 (F) (1), emphasis added. Another way to prove that the applicant did not "intend" that his or her gift was not to qualify for MassHealth" is to show that the applicant was cheated, i.e. that a transfer was intended to be for valuable consideration "equal to at least the fair-market value of the transferred resource." 130 CMR 520.019 (F)(2).

12. There is no central reporting of appeals to Superior Court under Mass. Gen. L, ch. 30A. This conclusion relies on the fact that, while information on appeals is freely exchanged through the Massachusetts Chapter of NAELA, no such case has yet been reported.

13. See Massachusetts Gen. L., ch. 30A, § 11.

of Hearings office in downtown Boston.¹⁴ Records are not available at any MassHealth regional office, nor are they currently available online.

The public can only access cases through a single standard PC computer terminal. The hearing decisions are saved on a drive connected to a server, so it is likely, but not certain, that employees or administrative law judges may access decisions on their own computers.

Decisions are saved as Word files by their individual appeal numbers,¹⁵ the first two digits of the appeal number representing the year in which the case was decided. Using the Windows file search function, one can select the whole drive (all the cases decided since 1995) or narrow the search to subfolders (2006 only), or search for specific text within the documents.¹⁶ Because these files are not contained in a database, there is no way to do complex searches using multiple qualifiers, such as “not” or “or.” Furthermore, as the Windows file search can be sluggish, it may actually take several minutes to complete a single search. Although that may not seem significant, those minutes quickly add up to a lot of waiting when one is performing multiple searches.

Once all the results are returned, the user can search within the document to clarify if the searched term appears in context relevant to the purpose of the research, e.g. many “hardship” cases do not involve long-term care benefits, our only interest, so non-long-term care cases were not printed for further analysis. Researchers may only take hard copies with them, since no electronic copying is permitted. The Board of Hearing sends invoices for the copies (\$0.10 per page) to the researcher via U.S. mail.

III. BACKGROUND: FOUR CHANGES BROUGHT ABOUT BY DRA

Medicaid did not impose penalties for transfers until the 1980s. Until then, nursing home residents could give their assets away one day and the next day apply successfully for Medicaid.¹⁷ Medicaid then ushered in the notion of a “look-back period”—which increased from 18 months to two years then to three years, and now five years—during which transfers that occurred would be penalized.¹⁸ The original notion of the “look-back” and the calculation of a penalty period (based on what the state decides is the “average cost of a nursing home stay”) continue under the DRA.

14. Other MassHealth Fair Hearing records may cover hearings on any of the following programs: MassHealth, Commonwealth Care, Commonwealth Choice, Health Safety Net (Free Care), Children's Medical Security Plan, Prescription Advantage, Special Health Care Programs.

15. To protect privacy, no case in the BOH database refers to the name of the applicant. A few, inadvertently, name the applicant's representative. Researchers, therefore, cannot find specific cases without knowing either the date of decision or the number of the case.

16. We defined our search by referring to specific Massachusetts regulations.

17. William J. Brisk, Margaret A. Hoag, Megan MacLaughlin-Barck, *Massachusetts Elder Law*, §13.1 (2006).

18. *Id.*

The DRA enacted four changes that dramatically changed the treatment of gifts.¹⁹ First, gifts made on or after February 8, 2006 (the date President George W. Bush signed the law), are subject to a five-year look-back. Second, the disqualification period does not begin to run until “the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional-level care... but for the application of the penalty period...”²⁰ Third, in the same section, the DRA requires “[e]ach state [to] provide for a hardship waiver process” governed by the following considerations:

1. [each state’s hardship provision must define “hardship” as] when application of the transfer of assets provision would deprive the individual
 - A. of medical care such that the individual’s health or life would be endangered; or
 - B. of food, clothing, shelter, or other necessities of life; and
2. which provides for —
 - A. notice to recipients that an undue hardship exception exists;
 - B. a timely process for determining whether an undue hardship waiver will be granted; and
 - C. a process under which an adverse determination can be appealed.

The fourth change allows nursing homes to file and pursue undue hardship waiver applications.²¹ At least two of the recent Massachusetts cases reviewed were brought by nursing homes. Given the hardship the DRA may cause to both nursing home residents and facilities, it would not be surprising if facilities increasingly bring such claims.²² Ironically, neither the DRA nor Massachusetts’ implementing regulations consider whether the requirement that an applicant seeking a waiver must be facing imminent eviction conflicts with the facility’s right to seek a waiver.

Prior to the adoption of the Massachusetts regulations implementing the DRA in the summer of 2006, practitioners hoped that our Medicaid office might expand the meaning of “hardship” to protect spouses and that our regulations might differ from previous hardship regulations given the draconian effect of the new law. Our hopes have been dashed.

IV. DEFINITIONS

“Hardship waivers” may be obtained against estate recovery when an applicant owns a home with equity that exceeds DRA’s new limitations, and when ineligibility is caused by untimely transfers. The DRA and Massachusetts’ implementing

19. The four changes, which has since been codified in the general Medicaid statute, appeared in DRA § 6011.

20. Pub. L. No. 109-171, § 6011, amending 42 U.S.C. § 1396p(c) (2) (D).

21. Subparagraph (e) of § 6011 of the DRA amending 42 U.S.C. 1396p (c) (2).

22. After the DRA, in at least two cases, nursing homes were granted standing to bring hardship claims, but were not successful. In one case, hardship was denied for retroactive benefits since the applicant had died, making the case 'moot' according to the hearing officer, leaving the nursing home with over \$170,000 in unpaid bills. Appeal No. 0704938, decided August 6, 2007, and Appeal No. 070755, decided August 10, 2007; See also Appeal No. 0705538, decided October 1, 2007.

regulations ignore completely any hardships befalling Community Spouses. At least some relief, however, may be available by meeting another test, i.e., whether questioned transfers may have been motivated solely for reasons other than accelerating Medicaid eligibility.

A. *What is Hardship?*

The MassHealth (MassHealth) regulations currently allow for eligibility waivers in three instances: estate recovery, excess value of a residence, and transfers. Although this article focuses on “hardship” waivers for penalized transfers, “hardship” waivers can be granted in two other two situations.

1. Hardship Waiver of Estate Recovery²³

MassHealth estate recovery liens can be waived against the estate of a former MassHealth recipient if an individual is still living in the house and:

- has lived there for at least one year before the deceased recipient became eligible for MassHealth,
- owns “an interest in the property,”
- is not being forced to sell property by other devisees or heirs, and
- receives gross annual income less than 133% of the applicable federal poverty level income standard for appropriate family size.

If these conditions are met for two consecutive years, the waiver will become permanent. If at anytime during the first two years these conditions are not met, the waiver can be revoked.

2. Hardship Waiver if a Residence is Worth more than \$750,000²⁴

Under circumstances outlined in the regulations, MassHealth will grant hardship waivers to prevent loss of housing for the applicant and/or certain individuals who live or have lived with him or her, and/or have a property interest in residences considered “countable” because they are worth more than \$750,000.²⁵

The equity ceiling does not apply if the applicant’s spouse or child (under the age of 21, blind, or permanently and totally disabled) resides in the home.²⁶ This hardship waiver apparently protects the applicant if no child or spouse resides in his former home, but only if: (1) he would be in serious medical danger or in serious deprivation of food, clothing, shelter; *and* (2) in imminent danger of being evicted; *and* (3) there is no less costly noninstitutional alternative available to meet the resident’s needs.²⁷ The regulation specifically states that mere ‘inconvenience’ is not deprivation.²⁸ We have

23. 130 CMR 515.011 (D)

24. 130 CMR 520.007 (G)(13) and 130 CMR 520.007 (G)(11).

25. That amount “will be adjusted annually, beginning in January 2011 ... based year-to-year on the percentage increase in the Consumer Price Index.” 130 CMR 520.007(G)(3).

26. 130 CMR 520.007(G)(3).

27. 130 CMR 520.007(G)(13).

28. *Id.*

yet to encounter any claim pressed at a Fair Hearing to delay imposition of the equity ceiling and, indeed, the simpler course is to allow time to mortgage or sell the property.

3. Waiver of the Period of Ineligibility Due to Undue Hardship Caused by Untimely Transfer²⁹

Although the DRA specifically required states to promulgate regulations defining “hardship,” the actual regulation adopted in Massachusetts as part of its compliance with the DRA is *identical to the pre-DRA language*. If, within 15 days of a denial of MassHealth eligibility, an applicant believes that the ruling creates a hardship, the same hearing officer will consider, expeditiously, whether it merits a waiver of ineligibility, according to the following guidelines:

- (a) The denial would deprive the nursing-facility resident of medical care such that his or her health or life would be endangered, or the nursing-facility resident would be deprived of food, shelter, clothing, or other necessities such that he or she would be at risk of serious deprivation.
- (b) All appropriate attempts to retrieve the transferred resource have been exhausted, and the recipient of the transfer is unable or unwilling to return the resource or to provide adequate compensation to the nursing-facility resident.
- (c) The institution has notified the nursing-facility resident of its intent to initiate a discharge of the resident because the resident has not paid for his or her institutionalization.
- (d) There is no less costly non-institutional alternative available to meet the nursing-facility resident’s needs.³⁰

Often quoted in decisions upholding denial of benefits is the phrase “undue hardship does not exist when imposition of the period of ineligibility would merely inconvenience or restrict the nursing-facility resident without putting the nursing-facility resident at risk of serious deprivation.”³¹

An example of what can happen under the DRA follows:

Ann and Richard, a healthy married couple in their early seventies, gift \$100,000 (an amount equal to 13 months disqualification) to their daughter, Robin, in November 2006 to enable her to buy a condominium. In November 2007, Ann has a severe stroke and enters a nursing home. The couple’s countable assets equal \$120,000.

Under the old system, the disqualifying gifts they made would create a 13-month disqualification that would end December 1, 2007. They might be able to spend down to the maximum allowable resources (currently \$104,400 for Richard and \$2,000 for Ann) about that time. Richard would have been able to keep most of the couple’s savings.

29. 130 CMR 520.019(L).

30. 130 CMR 520.019 (L) (1).

31. 130 CMR 520.019(L)(2).

Under the DRA, however, the penalty period of 13 months would not begin to run until they spend down their countable assets, say, in December 2007. The penalty period would last another 13 months, until January 2009, assuming that Robin could not (because of declining real estate values) add to her existing mortgage to “cure” the original gift. Richard would have to bear the \$10,000/month expense to maintain Ann in the nursing home, which would require spending all of the couple’s assets and also incurring himself, presumably to the nursing home, for at least \$20,000.

Is that a hardship? Not according to the regulations that are concerned solely with the *applicant’s* hardship. At best, Richard might persuade MassHealth, when he has spent *all* of the couple’s savings on Ann’s care, that then, and only then has the hardship occurred. Up to that point, in the language of the regulation, ineligibility is a mere inconvenience.

*B. What is Intent?*³²

The regulation states that:

In addition to the permissible transfers described in 130 CMR 520.019(D), the MassHealth agency *will not impose a period of ineligibility* for transferring resources at less than fair-market value if the nursing-facility resident or the spouse demonstrates to the MassHealth agency’s satisfaction that:

(1) The resources were transferred *exclusively for a purpose other than to qualify for MassHealth*; or

(2) The nursing-facility resident or spouse *intended to dispose of the resource at either fair-market value or for other valuable consideration*. Valuable consideration is a tangible benefit equal to at least the fair-market value of the transferred resource.³³

In most cases, applicants must prove that they did something exclusively for a specific purpose, under these new regulations, other than trying to accelerate their rights to Medicaid. They are, in effect, forced to prove a negative with certainty. This has meant in practice that applicants must demonstrate, through a thorough paper trail at best and credible testimony at worst, that questionable transfers they made were consistent with a pattern of like-transfers made year after year. Applicants who can demonstrate a pattern in their gift making that significantly predates their move to a nursing home are likely to be approved. One time lump-sum transfers, however, are especially difficult to get past caseworkers and hearing officers because there is little to demonstrate intent that is exclusive of qualifying for MassHealth.

32. 130 CMR 520.019(F).

33. *Id.* (Emphasis added).

V. ANALYSIS

A. The Numbers

Below we have tallied the results of our findings in two charts, one for “hardship” and the other for “intent.” For cases that were approved in part or denied in part, we used the term “mixed.” Because “mixed” results are often the most interesting, and “mixed” does not give a clear picture of what the hearing officer’s decision actually was, we describe those particular decisions.

1. Hardship Cases

The DRA took effect in February 2006 and was implemented by regulation that summer in Massachusetts. While the number of appellants pleading hardship in 2007 nearly tripled from the previous year, none were approved.

Case Result	2004	2005	2006	2007	Result Total
Approved	0	0	0	0	0
Mixed	0	1	1	2	4
Denied	1	3	4	11	19
Annual Total	1	4	5	13	23
Approval Rate	0%	0%	0%	0%	0%

Before the DRA, we discovered a single “mixed” case:

- A 53-year-old woman admitted to a nursing home because of multiple sclerosis paid privately for her care for over a year. Once she was informed she would need surgery that she could not afford, she filed an application for long-term benefits. The application was denied due to failure to provide information relating to joint bank accounts, as well as a trust in her name. She claimed the assets were unavailable, as they were property at issue in a pending divorce. She argued “hardship” because the necessary surgery would not be scheduled until she proved that she had a source of payment. The hearing officer granted more time for her to prove that the assets attributed to her were inaccessible.³⁴

After the DRA, three cases met our “mixed” category:

- Appellant had no funds; his accounts were closed. He had given his niece the proceeds from a sale of property to buy a home, which she then did. She could not obtain a mortgage to pay him back. He owed the nursing home \$46,000 in arrears, for which it transferred him to a hospital that was also in the process of seeking to transfer him (although at the time of the decision, no facility would take him). At the time of the appeal, the appellant had not properly filed a hardship request waiver and was asking

34. Appeal No. 0508354, decided August 31, 2005.

for a recalculation of his disqualifying period. The hearing officer denied the appellant's request for a recalculation of the disqualifying period under the present appeal, but he extended the time for filing a proper request for a hardship waiver.³⁵

- A new disqualifying period was approved when appellant provided evidence of a partial cure for a disqualifying transfer. Since the new disqualifying period start-date had passed, and the nursing home did not evict appellant during that period, despite her non-payment, she was not entitled to a hardship waiver.³⁶
- Appellant's wife refused to provide the verifications process, claiming she signed a pre-nuptial agreement that specifically limited access to each other's funds and assets, which she believed relieved her of any duty to participate in the process. The hearing officer agreed with MassHealth that the wife still has to participate in the verification process. He allowed 30 days for her to comply.³⁷

We did not discover any case in which it appeared that the hearing officer seriously entertained granting a hardship waiver. At best, hearing officers were willing to recalculate the disqualifying period based if there was a cure or if the applicant produced overwhelming evidence that gifted assets were inaccessible. While some hearing officers overlooked the fact when applicants failed to file a timely hardship waiver, they were still disinclined to consider the substance of their claims. Significantly, none of the decisions we reviewed recognize the ostensible purpose for a hardship waiver, to provide Medicaid to some people who unwittingly or through bad advice made gifts that rendered them technically ineligible for Medicaid.

2. Intent Cases

The safety valve for innocent or badly counseled applicants is in arguing "intent." The number of cases decided after the passage of the DRA in which appellants pleaded "intent" has more than doubled from previous years. The approval rate, however, has decreased from 42% before the DRA to only 25% in 2006 and, even worse, 21% in 2007.

Case Result	2004	2005	2006	2007	Result Total
Approved	3	5	3	6	17
Mixed	0	1	4	5	10
Denied	4	6	5	17	32
Annual Total	7	12	12	28	59
Approval Rate	42%	42%	25%	21%	29%

35. Appeal No. 0601671, decided April 27, 2006.

36. Appeal No. 0703184, decided April 2, 2007.

37. Appeal No. 0711322, decided October 9, 2007.

The one “mixed” result occurring before the DRA reduced, but did not eliminate, the penalty period because certain assets were recognized as jointly owned.³⁸

The nine post-DRA “intent” cases that had “mixed” results indicate how advocates and Fair Hearing officers—closed off from meaningful considerations of “hardship – are increasingly relying on “intent” to add some “equity” to the process:

- The appellant demonstrated that assets were jointly owned; her disqualifying period was reduced but not eliminated.³⁹
- Transfers to the appellant’s daughter were documented to have been used to pay for the appellant’s needs, but the hearing officer concluded that other transferred funds constituted a gift resulting in a disqualifying period.⁴⁰
- After the sale of appellant’s home, the caseworker noticed a \$400 refund to the buyers for a missing dryer. The hearing officer advanced the eligibility date by accepting two major deductions at the closing (a negotiated reduction of \$5,000 from the purchase price because the house “needed a lot of work,” as well as \$6,000 in legal fees paid to appellant’s attorney-in-fact), but considered the \$400 value of the missing dryer (“that the daughter may have taken”) a disqualifying transfer.⁴¹
- The applicant’s husband purchased three notes (October 2004, April 2005, and September 2005) in his son’s start-up venture capital company engaged in developing alternate energy sources. A caseworker denied an application submitted in October 2005, concluding that the cumulative investment of \$250,000 was a gift “because no income is being received from the notes.” The caseworker also considered the notes “non-allowable annuities” under 130 CMR 520.007(C)(4) because “the total present value of projected payments... is less than the value of the transferred asset [purchase price].”⁴² Appellant argued that the notes, rather than annuities, were convertible debentures, so that, if the company succeeded, the notes would be converted to stock in the company and, therefore, should be considered inaccessible assets until converted. The hearing officer, however, decided that the “intent” rule, 130 CMR 520.019(F) governs, stating “[N]o Medicaid rule... prohibits an applicant... from making speculative investments. Rather, the requirement is that assets not be given away, and if invested, it must be for fair market value.” The hearing officer decided that if there had been no disqualifying transfer then the notes had value rendering the applicant over-assets.⁴³ A re-hearing occurred after the company converted the

38. Appeal No. 0504727, decided July 13, 2005.

39. Appeal No. 0512863, decided April 5, 2006.

40. Appeal No. 0603799, decided June 16, 2006.

41. Appeal No. 0606363, decided July 26, 2006.

42. Caseworkers tend to focus on annuities because they are regulated in much greater detail than promissory notes.

43. Appeal No. 0603871, decided August 3, 2006.

notes into stock in the company. Ironically, the appellant's attorney now disputed that the converted stock was worth \$250,000 and presented an expert who so testified. The expert and the son both testified that the stock was negligible because it was worth only a fraction of the company's \$200,000 book value. The second decision observes that, "[w]hat is evident is that the appellant's son is trying to do everything he can to discount the father's investment in his company so that his mother can qualify for MassHealth," and concludes that if the son's estimate of the stock's value is correct there *was* a disqualifying transfer. Otherwise, the father would have to spend down the value of the stock.⁴⁴

- The hearing officer approved re-drafting of a promissory note to comport with MassHealth regulations, since life expectancy calculations for the note were based on the applicant's longevity table not the spouse's, who was the actual holder of the note.⁴⁵
- The hearing officer agreed with appellant that regular weekly payments (reflecting 30-60 hours of work per week at \$10 per hour) to his son were consistent with their contention that it was for care rendered (son quit job to care for father after mother died, demonstrating need to be paid) and not, as MassHealth contended, a gift. Other transfers, however, were still penalized.⁴⁶
- The hearing officer found that the caseworker improperly assumed that appellant had access to funds which were really part of an irrevocable trust he administered as trustee for his son, who was its beneficiary. The hearing officer ruled that appellant's transfer to his son was as the trustee, although it seemed to pass from his personal account. Other money he transferred from his personal account to his son, however, was not exempt.⁴⁷
- A caseworker imposed a one-day disqualifying period based on two checks written to family members totaling \$300.⁴⁸ One was marked "Happy Easter," the other was unmarked, but appellant testified it was a Christmas gift. Because appellant asked whether the caseworker's denial was consistent with MassHealth "policy," the opinion is especially worth

44. Before the second hearing, the notes were converted to 107,308 shares at \$2.50/share for, according to an expert who testified on behalf of the family, a total conversion price of more than \$250,000. The son, however, testified that, based on book value of \$200,000, with 2 million shares outstanding, the share price was only about \$0.02. This time, the hearing officer emphatically stated that either the stock had value, and therefore, the couple was over-assets or the transfer of the notes for stock in the company was a transfer for less than fair market value. Appeal No. 0607730, February 22, 2007.

45. Appeal No. 0703947, decided April 6, 2007.

46. Appeal No. 0704937, decided June 7, 2007.

47. Appeal No. 0705855, decided June 25, 2007.

48. Before the DRA, of course, the penalty period for such small gifts would have run well before a MassHealth application. Such disqualifications, since the DRA, may deprive applicants of months of benefits.

reading. MassHealth admitted that, while there is no fixed policy on penalizing small transfers, periodic staff meetings generated such a “plan.” The attorney representing the applicant then argued that she should be able to make such small gifts as long as her bank balances remained under \$1,700; she should not be penalized for \$300 gifts. The hearing officer agreed that the Easter check for \$100 was not a disqualifying transfer because it was clearly not written with intent to qualify sooner for MassHealth (it had been written five months before she entered a nursing home). But, since the “Christmas” check for \$200 was not written contemporaneously with the holiday, was issued some three months after she entered a nursing home, and, at the time it was written appellant was over assets, it was considered a disqualifying transfer.⁴⁹

- One mixed decision turned on the hearing officer’s recalculation of the disqualifying period after appellant’s daughter made a partial cure. She made the disqualifying transfers after attending a seminar that she claimed had informed her that such transfers were permissible.⁵⁰

B. Significant Decisions

1. Hardship

Not a single hardship waiver was issued in the years we reviewed, despite the new, harsher regulations. The Board of Hearings has interpreted the rules governing transfers very literally. Hearing officers have upheld denials in cases in which relatives refused to return or claimed that they were unable to return gifts.⁵¹

Hearing officers, before the DRA, held on several occasions that nursing homes did not have standing to bring hardship claims. When the appellant’s family refused to pay, cure, or even cooperate, the nursing home could not recover expenses through a hardship claim.⁵² In that sense, the DRA offered one needed change, not that it mattered much. After the DRA, in at least two cases, nursing homes were granted standing to bring hardship claims, but were not successful.⁵³ In another case, hardship was denied for retroactive benefits since the applicant had died, making the case ‘moot’ according to the hearing officer, leaving the nursing home with over \$170,000 in unpaid bills.⁵⁴ We did not find a single instance in which a nursing home brought a successful case.

Individuals did not fair any better. In one case, despite actual, current financial hardship, the hearing officer upheld a three-month denial of benefits because appellant

49. Appeal No. 0710108, decided September 12, 2007.

50. Appeal No. 0712186, decided November 2, 2007.

51. Appeal No. 0711322, decided October 9, 2007; Appeal No. 0601671, decided April 27, 2006.

52. Appeal No. 0707551, decided August 10, 2007; Appeal No. 0704938, decided August 6, 2007.

53. Appeal No. 0704938, decided August 6, 2007, and Appeal No. 070755, decided August 10, 2007.

54. Appeal No. 0705538, decided October 1, 2007.

had delayed reducing assets until after he requested benefits.⁵⁵ In another case, the appellant's current nursing home initiated her transfer to another facility because she could no longer pay.⁵⁶ The hearing officer held that, since there would be no break in the care she received, moving to another facility was merely an inconvenience and not a true hardship.⁵⁷ In another case, the hearing officer held that since the nursing home had not actually begun eviction proceedings, there was no actual hardship.⁵⁸ "Hardship" was also not available to a Rhode Island resident despite compelling medical reasons for his treatment in Massachusetts (two heart transplants at MassGeneral) because he was not a Massachusetts resident, even though he spent all of his time residing in Massachusetts hospitals.⁵⁹

Overall, the cases demonstrate that:

- Hardship is strictly interpreted, even on redeterminations.⁶⁰
- Failure to claim hardship within 15 days of denial is fatal.⁶¹
- While the hardship claim must be filed within 15 days of denial, evidence may be presented at the hearing, or even later, with approval of the hearing officer.⁶²
- Spousal refusal does not excuse lack of verifications,⁶³ although in an unreported 2006 case a caseworker approved our client's application despite the spouse's refusal to provide information.
- Pending appeals do not constitute grace periods for private payment of long-term-care services.⁶⁴

The most favorable outcome of recent cases is one that explicitly allowed for a "cure" after the hearing.⁶⁵

2. Intent

More "intent" appeals are brought before the Board of Hearing than "hardship" appeals. That trend appears to be increasing after the DRA.

Approvals turn almost exclusively on appellants' ability to demonstrate, through documents and credible testimony, that (1) their gifts and/or transfers were consistent with a regular pattern of behavior, or (2) the transfer was *contemporaneous* with and usual for an event for which one gives a gift, and the intent of the transfer was not to qualify for MassHealth. Two examples would be an appellant paying for a daughter's

55. Appeal No. 0409730, decided April 6, 2005.

56. Appeal No. 0603895, decided August 3, 2006.

57. *Id.*

58. Appeal No. 0705678, decided June 14, 2007.

59. Appeal No. 0507535, decided August 22, 2005.

60. Appeal No. 0507144, decided October 6, 2005.

61. Appeal No. 0510117, decided January 5, 2006, and Appeal No. 0511245, decided February 10, 2006.

62. Appeal No. 0507640, decided August 18, 2005.

63. Appeal No. 0402108, decided May 19, 2004.

64. Appeal No. 0409730, decided April 6, 2005.

65. Appeal No. 0707306, decided October 7, 2007.

wedding dress when the daughter was getting married, or showing that appellant consistently gave all of her grandchildren cash gifts on their bar/bat mitzvahs.

Denials have generally turned on three elements:

- Timing: when the transfers are made right before the MassHealth application and there is no pattern of like transfers, hearing officers deny intent appeals.
- Failure of a contractor to carry out obligations. Caseworkers check to see that contractors who are relatives paid to provide services (whether it is building an addition to a home or daily care) actually perform their duties.
- Lack of documentation: oral agreements without supporting documents or testimony were not generally successful. That is particularly true with caretaker agreements.

In post-DRA cases, “intent” has been used to justify caretaker contracts and other transfers that caseworkers challenged. In one case, a payment of \$20,000 to a daughter was appropriate because the daughter, a nurse, had given up a much more lucrative job.⁶⁶ In another case, the otherwise disqualifying transfer of a life estate, just before the applicant suffered a stroke, was justified as a way to allow the applicant’s son, to whom the applicant had 16 years earlier transferred the remainder interest, to take out an equity line of credit to help pay some of his daughter’s college expenses.⁶⁷

VI. CONCLUSION

Massachusetts did not broaden the concept of “hardship” to include cases in which individuals and couples may not be able to pay for nursing home care because of untimely transfers. Ironically, nursing homes, now that they have been given standing to bring hardship claims, must visit tremendous hardship on behalf of those for whom they are bringing the claim. Before nursing homes can bring a claim, they must begin eviction proceedings against the resident on whose behalf they are making the claim. Furthermore, hearing officers have affirmed caseworkers’ denials that ignored “hardship” which befalls spouses and nursing homes. And, finally, they have required significant evidence to prove both that transferees cannot reimburse the applicant and that the applicant has used *all* reasonable means to recover the gift.

Given the narrow interpretations offered at Fair Hearings, advocates may need to engage in public advocacy. These are issues in which the Elder Law bar and its clients have a common interest with nursing facilities. (Nursing facilities also lose if their residents are ineligible for MassHealth but have no funds to pay past bills.) Cases of “real hardship,” including a community spouses’ loss of savings, might help forge an alliance to induce Medicaid to reformulate “hardship” in Massachusetts and elsewhere. Until “hardship” is redefined, challenging “intent” at Fair Hearings will be more productive than arguing “hardship.” Indeed, most transfers after February 7, 2006, are either “innocent” (i.e., they could not have been made in order to accelerate

66. Appeal No. 0601673, decided May 11, 2006.

67. Appeal No. 0603676, decided August 10, 2006.

MassHealth eligibility) or misguided, satisfying either of the two requirements for “intent.”

We believe that research in other states will find, as we have in Massachusetts, that “hardship waivers” are nothing more than a fiction portrayed as a remedy. We began this research hoping to discover the “keys to successful hardship advocacy,” but, alas, the key seems to be to change regulations as well as the hearts of Fair Hearing officers by demonstrating how seriously “hardship” as defined in the DRA has failed to correct real problems. We, hope, therefore, that our analysis will encourage others to research similar issues not only to help further clients’ reasonable expectations and interests but also to contest the rules themselves.

THE USE OF QUALIFIED SETTLEMENTS FUNDS, QUALIFIED ASSIGNMENTS AND SPECIAL NEEDS TRUSTS IN PHYSICAL INJURY SETTLEMENTS

*John J. Campbell, CELA, MSCC**

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I. INTRODUCTION

Internal Revenue Code (I.R.C.) § 104(a)(2) provides that the proceeds (except for punitive damages) from the settlement of a claim involving physical injury or sickness are not included in the taxable income of the plaintiff who receives these proceeds.¹

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1. 26 U.S.C. § 104(a)(2) (2008) provides that gross income does not include “the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or periodic payments) on account of personal physical injuries or physical sickness.” 26 U.S.C. § 104(a)(1) (2008) excludes from gross income amounts received under workers’ compensation acts “for personal injuries or sickness.”

However, if the settlement of the claim is paid in the form of a lump sum,² any *income* earned by the recipient on the lump sum settlement is taxable.³ In addition to income tax concerns, there is an inherent risk that a lump sum settlement designed to provide for the plaintiff's lifetime medical and support needs may be dissipated prematurely. Unwise investments, poor money management or even the volatility of the economy can result in the exhaustion of the plaintiff's settlement funds, leaving the plaintiff with no means to provide for his or her care and support.⁴

II. PERIODIC PAYMENT ACT OF 1982

In 1982, Congress passed the Periodic Payment Act (PPA),⁵ amending the Internal Revenue Code to grant statutory certainty to the tax-favored use of periodic payments in physical injury (PI) settlements.⁶ The PPA amended I.R.C. § 104(a)(2) to add parenthetical language which indicated that amounts received would be excluded from gross income whether received as "lump sums or as periodic payments."⁷ Most notably the Act created I.R.C. § 130, which provides a means whereby a defendant can fulfill a settlement obligation to make periodic payments of settlement proceeds through a qualified assignment of his or her liability to a third-party assignee.⁸ The defendant pays the assignee a lump sum, and the assignee purchases an annuity contract that will fund payment of the defendant's obligation to the plaintiff in the form of periodic payments.⁹ Under I.R.C. § 130, the amount received by the assignee is not included in that assignee's gross income unless that amount exceeds the cost of the annuity.¹⁰

As a result, it is now common practice to structure all or part of a PI settlement with a qualified annuity and a qualified assignment under I.R.C. § 130. The advantages

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2. "Tort damages have traditionally been paid on a lump-sum basis." Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived*, 2002 Wisc. Law Rev. 859, 862 (2002).
 3. See Rev. Rul. 65-29, 1965-1 C.B. 59 (1965).
 4. These concerns are described by Senator Max Baucus, one of the original sponsors of the Periodic Payment Act, at 144 Cong. Rec. S11499-01, (available at 1998 WL 684078).
 5. Pub. L. No. 97-473, 96 Stat. 2605 (1982).
 6. "Despite several revenue rulings that indicate that the Internal Revenue Service considers that periodic payments as personal injury damages are excludable from the gross income of the recipient, the committee believes it would be helpful to taxpayers to provide statutory certainty in the area." S. Rep. 97-646, 97th Cong. 2d. Sess. 1982, 1982 U.S.C.C.A.N. 4580, 4583.
 7. Pub. L. No. 97-473, § 101, 96 Stat. 2605 (1982).
 8. 26 U.S.C. § 130 (1997). "Typically, the assignee is an affiliate of an insurance company, and its only business is to accept for a fee qualified assignments of liabilities to make periodic payments to tort claimants." *Letter from Skadden Arps lawyers to Pamela Olson, Assistant Secretary (Tax Policy)* (requesting I.R.S. clarification on whether an assignment by a qualified settlement fund is a "qualified assignment") (June 19, 2003), (available at 2003 WL 22662008) (I.R.S. Misc.) (hereinafter "Skadden Arps Letter").
 9. This annuity is referred to in I.R.C. § 130 as the "qualified funding asset." 26 U.S.C. § 130(d) (1997).
 10. *Id.*

to the settling plaintiff are clear: proceeds received as annuity payments are not subject to income tax and the plaintiff has the security of a future stream of income to provide necessary funds for the plaintiff's lifetime.

I.R.C. § 130 requires that a qualified assignment be made by a "party to the suit or agreement" having liability to the plaintiff.¹¹ In addition, if the plaintiff has actual or constructive receipt of the settlement funds, the ability to take advantage of the tax savings under I.R.C. § 130 is lost. Therefore, structured settlements under I.R.C. § 130 have traditionally been funded directly by the defendant or the defendant's insurance carrier.

Increasingly, settling plaintiffs and their attorneys have expressed serious dissatisfaction with the traditional arrangement in which the defendant has complete control over the purchase of the annuity that will fund the qualified assignment. Plaintiffs are forced to agree to a specified income stream rather than the lump sum amount with which the annuity will be funded. Defendants' insurance carriers often use "preferred" brokers who may be under an agreement to split commissions with the carrier. Fees, commissions and the actual commuted value of the annuity are seldom fully disclosed. Many times, the future payments the plaintiff will receive are less than what the plaintiff might have been able to obtain from another annuity issuer for the same premium payment. Plaintiffs may thus be deprived of the ability to enjoy the fullest benefit of the settlement and may even feel that they have been duped into settling for less than the agreed-upon amount. Further, there is at least a perceived conflict of interest involved where the plaintiff's financial settlement planning is in the hands of the opposing party.¹²

Finally, in the context of PI settlements involving seriously or catastrophically injured plaintiffs, a primary goal is to provide funds for the support and care of the plaintiff while preserving eligibility for all available and appropriate governmental benefit programs, including Supplemental Security Income (SSI) and Medicaid. Typically, Medicaid eligibility is the first consideration because the need to ensure adequate medical care is paramount. However, SSI is also an important benefit program that can provide much needed additional income, and sometimes more, to those who qualify.

For many years, Special Needs Trusts have been commonly used to preserve Medicaid eligibility for a settling plaintiff and have also been employed to preserve SSI eligibility since January 2000. Settling plaintiffs may require that the distribution of settlement proceeds be delayed to allow time to complete planning for SSI or Medicaid eligibility. At the same time, both the plaintiffs and defendants may wish to avoid delay in the execution and completion of the settlement itself. Plaintiffs in this situation will need a vehicle by which their settlements can be finalized without the proceeds being treated as available resources during the time necessary to create and fund an exempt Special Needs Trust.

11. 26 U.S.C. § 130(c)(1) (1997).

12. See generally Richard B. Risk, Jr., *A Case for the Urgent Need to Clarify Tax Treatment for a Qualified Settlement Fund Created for a Single Claimant*, 23 VA Tax Rev. 639, 642-44 (2004) (describing these concerns in detail).

As a result, many plaintiffs who are interested in receiving their settlements in the form of a structure are insisting on a different procedure that will allow them more control. Qualified Settlement Funds under I.R.C. § 468B and the corresponding IRS regulations provide an alternative to the traditional, defendant-directed structured settlement arrangement.

A. Qualified Settlement Funds under I.R.C. § 468B

In 1986, Congress enacted the Tax Reform Act,¹³ which added I.R.C. § 468B to allow a defendant to extinguish his or her liability by paying settlement proceeds into a “designated settlement fund” (DSF).¹⁴ Initially, DSFs were used in the settlement of large class action PI¹⁵ suits in which the individual shares of the settlement to the various class members had not yet been determined. However, I.R.C. § 468B contains no language that restricts the use of DSFs to the settlement of suits or claims involving multiple plaintiffs.

A DSF is defined as any fund:

(A) which is established pursuant to a court order and which extinguishes completely the tort liability [of the defendant or the defendant’s insurance carrier to the plaintiff],

(B) with respect to which no amounts may be transferred other than in the form of qualified payments,

(C) which is administered by persons a majority of whom are independent of the [defendant or the defendant’s insurance carrier],

(D) which is established for the principal purpose of resolving and satisfying present and future claims against the [defendant] (or any related person or formerly related person) arising out of personal injury, death, or property damage,

(E) under the terms of which the [defendant] (or any related person) may not hold any beneficial interest in the income or corpus of the fund, and

(F) with respect to which an election is made by the defendant.¹⁶

In 1992, the Secretary of the Treasury introduced regulations governing the treatment of DSFs.¹⁷ Under these regulations, the Secretary provided for the creation and use of “qualified settlement funds” (QSFs).¹⁸ Although QSFs are not specifically mentioned in I.R.C. § 468B, they are clearly intended to meet the definition of a DSF.

Under 26 C.F.R. § 1.468B-1, a fund, account or trust is a QSF if:

13. Pub. L. No. 99-514, 100 Stat. 2085 (1986).

14. 26 U.S.C. § 468B (2008).

15. DSFs may be used to settle PI claims, but may not be used to settle workers' compensation claims. 26 U.S.C. § 468B(e) (2008).

16. 26 U.S.C. § 468B(d)(2) (2008).

17. 26 C.F.R. §§ 1.468B-1-1.468B-5 (2008).

18. A QSF, like a DSF, may be used to settle a PI claim, but not a workers' compensation claim. 26 C.F.R. § 1.468B-1(g)(1) (2008).

- (1) It is established pursuant to an order of, or is approved by, the United States, any state (including the District of Columbia), territory, possession, or political subdivision thereof, or any agency or instrumentality (including a court of law) of any of the foregoing and is subject to the continuing jurisdiction of that governmental authority;
- (2) It is established to resolve or satisfy *one or more* contested or uncontested claims that have resulted or may result from an event (or related series of events) that has occurred and that has given rise to *at least one claim* asserting liability—
 - (i) Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (hereinafter referred to as CERCLA), as amended, 42 U.S.C. 9601 et seq.; or
 - (ii) Arising out of a tort, breach of contract, or violation of law; or
 - (iii) Designated by the Commissioner in a revenue ruling or revenue procedure; and
- (3) The fund, account, or trust is a trust under applicable state law, or its assets are otherwise segregated from other assets of the transferor (and related persons).¹⁹

Although the regulations define a QSF in broader terms than the statute's definition of a DSF, the regulations have been held to be valid.²⁰

The proceeds of a PI settlement used to fund a QSF continue to receive favorable tax treatment under I.R.C. § 104(a)(2), but income earned on the proceeds are taxable to the QSF for so long as the QSF continues to hold the funds.²¹ Under 26 C.F.R. § 1.468B-2, QSFs are taxed at the maximum rate applicable to trusts, but are otherwise treated as corporations under the I.R.C.²²

Like the governing statute, the regulations do not contain any language restricting the use of QSFs to settlement of suits or claims involving multiple plaintiffs. Moreover, the regulations state specifically that a QSF can be used to settle "one or more" claims.²³ There can be little serious doubt that the regulations permit QSFs to be used in the settlement of single-plaintiff PI claims.²⁴

B. Qualified Assignments and Qualified Funding Assets under I.R.C. § 130

As noted above, the PPA amended I.R.C. § 104(a)(2), clarifying that the income from an annuity which makes periodic payments as part of a settlement of a PI claim

19. 26 C.F.R. § 1.468B-1(c) (2008) (emphasis added).

20. *U. S. v. Brown*, 348 F.3d 1200, 1217 (10th Cir. 2003).

21. 26 U.S.C. § 468B(b) (2008) and 26 C.F.R. § 1.468B-2(a) (2008).

22. 26 C.F.R. § 1.468B-2(a) (2008).

23. 26 C.F.R. § 1.468B-1(c)(2) (2008).

24. However, the I.R.C. and the Treasury Secretary have as yet refused to clarify the validity of this use of QSFs. See Risk, *supra* n. 11 at 673-82. See also Skadden Arps Letter, *supra* n. 6.

for physical injury or sickness is not included in the gross income of the recipient.²⁵ In addition, under I.R.C. § 130, amounts received for agreeing to a qualified assignment are not counted as income.

The assignment of the obligation to make periodic payments constitutes a “qualified assignment” if the following requirements are met:

(1) if the assignee assumes such liability from a person who is a party to the suit or agreement..., and

(2) if—

(A) such periodic payments are fixed and determinable as to amount and time of payment,

(B) such periodic payments cannot be accelerated, deferred, increased, or decreased by the recipient of such payments,

(C) the assignee’s obligation on account of the personal injuries or sickness is no greater than the obligation of the person who assigned the liability, and

(D) the periodic payments must be excludable from the gross income of the recipient under I.R.C. §§ 104(a)(1) & (2).²⁶

Further, the periodic payments must be funded with a commercial annuity issued by a life insurance company, and the annuity payments cannot be more than the periodic payments under the qualified assignment. Finally, the annuity must be purchased with settlement proceeds within 60 days before or after the qualified assignment and must be designated specifically to payment of the qualified assignment.²⁷

Once there is a qualified assignment of an annuity funding a structured PI settlement, the plaintiff cannot change the terms of the annuity, including the payment amounts or the payee. The annuity must be purchased directly by a party to the PI suit with liability to the plaintiff to avoid constructive receipt of the settlement funds by the plaintiff.²⁸ The plaintiff will also be treated as having constructive receipt of the settlement funds if he or she has the option of receiving a lump sum in lieu of an annuity, or the ability to direct the use of the settlement proceeds to purchase an annuity.²⁹

As noted above, qualified assignments under I.R.C. § 130 are available in the settlement of both PI and workers’ compensation claims, but only with regard to settlement proceeds that are exempt from taxation under I.R.C. §§ 104(a)(1) & (2).

25. 26 U.S.C. § 130 (1997).

26. 26 U.S.C. § 130(a) (1997).

27. 26 U.S.C. § 130(d) (1997).

28. Rev. Rul. 79-313, 1979-2 C.B. 75 (1979).

29. Rev. Rul. 65-29, 1965-1 C.B. 59 (1965); Rev. Rul. 76-133, 1976-1 C.B. 34 (1976).

C. QSFs and Qualified Assignments in Single-Plaintiff PI Settlements

The question still remains whether a QSF holding funds from a PI settlement involving a single plaintiff can accomplish a qualified assignment under I.R.C. § 130. Many defendants, liability carriers and structured settlement professionals have argued for years that it cannot, based upon the common law doctrine of “economic benefit,” as defined in the landmark case of *Sproull v. Commissioner*.³⁰

In a nutshell, the *Sproull* case held that when a fund is placed irrevocably with a third party for the sole benefit of the taxpayer and the taxpayer has a vested, unconditional right to the fund, the taxpayer has received an economic benefit.³¹ This, the argument goes, is exactly what happens when a QSF is funded with the proceeds of a single-plaintiff PI settlement, since the amount to which the plaintiff’s vested interest applies is immediately determinable.

Under *Sproull*, if the taxpayer has received an economic benefit, the fund is immediately includable in the taxpayer’s gross income.³² Therefore, if the plaintiff has an economic benefit from PI settlement funds, the principal settlement amount is excludable under I.R.C. § 104(a)(2), but any *income* earned on the funds is includable in the plaintiff’s gross income. This would arguably prevent the QSF from being able to accomplish a valid I.R.C. § 130 qualified assignment, since *all* of the periodic payments from the qualified funding asset, including the income portion, must be excludable from the plaintiff’s gross income under I.R.C. § 104(a)(1) or (2).³³

Proponents of this argument often cite IRS Private Letter Ruling (P.L.R.) 200138006,³⁴ as authority for the application of the economic benefit doctrine to single-plaintiff QSFs. While that particular PLR did involve an analysis of a QSF under the economic benefit doctrine, the QSF discussed in P.L.R. 200138006 was not funded with the proceeds of a PI settlement.³⁵ Therefore, the case discussed in P.L.R. 200138006 did not involve the issue of whether a QSF holding funds from a single-plaintiff PI settlement could accomplish a valid I.R.C. § 130 qualified assignment.

The real issue is whether the economic benefit doctrine applies to bar a single-plaintiff QSF, funded with PI settlement proceeds, from making a qualified assignment under I.R.C. § 130. To rely solely upon P.L.R. 200138006 as authority for the application of the economic benefit doctrine in such cases is to ignore the content of I.R.C. § 130, the Congressional intent and legislative history behind I.R.C. § 130, and IRS Rev. Proc. 93-34.

When I.R.C. § 130 was originally enacted in 1982, the statute provided that the party making a qualified assignment could not assign payment rights “greater than

30. *Sproull v. Commr.*, 16 T.C. 244 (1950), *aff’d*, 194 F.2d 541 (6th Cir. 1952).

31. *Id.* at 247-248.

32. *Id.*

33. 26 U.S.C. § 130(c)(2)(D) (1997).

34. P.L.R. 200138006 (May 7, 2001).

35. The settlement discussed in this Private Letter Ruling was the settlement of a malpractice lawsuit against a law firm.

those of a general creditor.”³⁶The legislative history behind the original 1982 statute states Congress’ intent at the time that payments of damages from PI claims be “excludable from income only if the recipient taxpayer is not in constructive receipt of or *does not have the current economic benefit of* the sum required to produce the periodic payments.”³⁷

However, Congress amended I.R.C. § 130(c)(2)(C) in 1988³⁸ by removing the “greater than a general creditor” language, so that “[r]ecipients of periodic payments under structured settlement arrangements should not have their rights as creditors limited by provisions of the tax law.”³⁹ When Congress repealed I.R.C. § 130(c)(2)(C), it also added the following language to I.R.C. § 130(c):

The determination for purposes of this chapter of when the recipient is treated as having received any payment with respect to which there has been a qualified assignment shall be made *without regard to any provision of such assignment which grants the recipient rights as a creditor greater than those of a general creditor.*⁴⁰

The legislative history behind the 1988 revisions to I.R.C. § 130(c) states that “no amount is currently includable in the recipient’s income solely because the recipient is provided creditor’s rights that are greater than the rights of a general creditor.”⁴¹

A settling plaintiff with vested rights to a settlement fund has rights “greater than those of a general creditor” and would normally be considered to have an “economic benefit” under *Sproull*.⁴² Thus, the effect of the 1988 amendments to I.R.C. § 130(c) was to make the “economic benefit” doctrine inapplicable to qualified assignments in PI settlements.

Whenever the parties to a PI case reach an agreement to settle for a specified amount, the plaintiff obtains a vested right to the settlement proceeds. When the defendant or the defendant’s insurance carrier provides the funds through a qualified assignment for the purchase of a qualified annuity, the funds are irrevocably placed with a third party for the sole benefit of the plaintiff. In spite of this, qualified assignments are routinely and successfully employed in structured PI settlements for individual plaintiffs.⁴³

It seems clear that the economic benefit doctrine is no longer applicable to bar a qualified assignment under I.R.C. § 130 after the 1988 revisions to that section. Indeed, the IRS has interpreted the 1988 revisions as allowing qualified assignments of periodic payment liabilities without regard to whether a plaintiff has the current

36. 26 U.S.C. § 130(c)(2)(C) (1982).

37. S. Rep. No. 97-646; H.R. Rep. No. 97-832, 97th Cong., 2d Sess. 4 (1982) (emphasis added).

38. Pub. L. 100-647, 102 Stat. 3342, Title VII, § 6079(b)(1).

39. H.R. Rep. No. 100-795, at 541 (1988).

40. I.R.C. § 130(c) (emphasis added).

41. H.R. Conf. Rep. No. 1104, 100th Cong., 2d Sess. at II-171(1988).

42. 16 T.C. 244 (1950), *aff’d*, 194 F.2d 541 (6th Cir. 1952).

43. To prevent constructive receipt, the settlement terms will not permit the plaintiff the option to receive the settlement in a lump sum, and will provide that the assignment will be made directly by the defendant or the defendant’s insurance carrier.

economic benefit of the settlement proceeds or the qualified funding assets purchased with those settlement proceeds.⁴⁴ Assuming the requirements of I.R.C. § 130 are met, the plaintiff's economic benefit does not bar a successful qualified assignment.

Therefore, a party to the suit or agreement with liability to the plaintiff can accomplish a valid qualified assignment, regardless of whether the settlement proceeds are placed irrevocably with a third party in a separate fund, account or trust for the sole benefit of the plaintiff and the plaintiff has an unconditional, vested right in the fund, account or trust. So long as the plaintiff is not in constructive receipt of the settlement proceeds, a qualified assignment is still possible.

It is very important to note that I.R.C. § 130 requires only that the assignment be made by a "party to the suit or agreement" having liability to the plaintiff.⁴⁵ That section does *not* require that the assignment be made by the original defendant or its insurance carrier. Thus, *any* party with liability to the plaintiff can make a valid qualified assignment.

In 1993, the IRS issued Revenue Procedure (Rev. Proc.) 93-34.⁴⁶ This procedure "provides rules under which a designated settlement fund described in section 468B(d)(2) of the Internal Revenue Code or a qualified settlement fund described in section 1.468B-1 of the Income Tax Regulations will be considered 'a party to the suit or agreement' for purposes of section 130."⁴⁷

Specifically, Rev. Proc. 93-34 provides that:

... a qualified settlement fund will be treated as "a party to the suit or agreement" within the meaning of section 130(c)(1) of the Code if each of the following requirements is satisfied:

- (1) the claimant agrees in writing to the assignee's assumption of the... qualified settlement fund's obligation to make periodic payments to the claimant;
- (2) the assignment is made with respect to *a claim* on account of personal injury or sickness (in a case involving physical injury or physical sickness) that is...:
 - (b) *a claim* [under CERCLA ; or arising out of a tort, breach of contract, or violation of law; or designated by the Commissioner in a revenue ruling or revenue procedure];
- (3) each qualified funding asset purchased by the assignee in connection with the assignment by the designated or qualified settlement fund relates to a liability to a *single claimant* to make periodic payments for damages;
- (4) the assignee is not related to the transferor (or transferors) to the designated or qualified settlement fund within the meaning of sections 267(b) or 707(b)(1); and

44. P.L.R. 9703038 (Jan. 17, 1997).

45. 26 U.S.C. § 130(c) (1997).

46. Rev. Proc. 93-34, 1993-28 C.B. 49 (1993).

47. Rev. Proc. 93-34, § 1.

(5) the assignee is neither controlled by, nor controls, directly or indirectly, the designated or qualified settlement fund...⁴⁸

Rev. Proc. 93-34 does not contain any provisions that would restrict its application to settlements involving multiple plaintiffs. On the contrary, it speaks in terms of qualified assignments relating to “a claim” and “liability to a single claimant.”⁴⁹ This language, like the language of I.R.C. § 468B, itself, is consistent with situations involving either a single plaintiff or multiple plaintiffs.

The logical conclusion is that the provisions of I.R.C. §§ 130 and 468B, and Treas. Reg. §§ 1.468B-1 through 1.468B-5, as interpreted by the I.R.S., itself, permit QSFs in single-plaintiff PI settlements to make qualified assignments under I.R.C. § 130, so long as the QSF is made a “party to the suit or agreement” in compliance with Rev. Proc. 93-34.

III. STRATEGIES FOR USING QUALIFIED SETTLEMENT FUNDS

A. How Does a QSF Make a Valid Qualified Assignment?

It should not be difficult to comply with all of the applicable requirements of I.R.C. §§ 130 and 468B, I.R.S. Regulation §§ 1.468B-1 through 1.468B-5, and Rev. Proc. 93-34 when settling a PI claim. The parties could first petition the court with jurisdiction over the claim to create a QSF trust and appoint an independent trustee, with the court having continuing jurisdiction over the QSF trust until it terminates. The plaintiff would not have any rights to revoke or modify the terms of the QSF trust, or to compel any distributions from the QSF trust other than to fund a qualified assignment.

The parties could then enter into a “novation,”⁵⁰ in which the plaintiff, defendant, the defendant’s insurance carrier and the QSF trustee would all agree that the defendant’s liabilities to the plaintiff be assigned to and fully assumed by the QSF. As consideration, the defendant and/or the defendant’s insurance carrier would agree to pay the QSF an agreed upon lump sum, to be used only to fund a qualified assignment.

The QSF could then be substituted for the original defendant as a party to the case; the QSF could be funded by the defendant or the defendant’s insurance carrier; and the defendant and/or its carrier could be granted a full release by all parties. The QSF trustee, now a party standing in the shoes of the original defendant, could then enter into a full and final, court-approved settlement agreement with the plaintiff. The settlement would extinguish all liabilities assumed from the original defendant and require payment of the settlement proceeds through a qualified assignment. The

48. Rev. Proc. 93-34, § 4 (emphasis added).

49. *Id.*

50. A “novation” is a “mutual agreement among all parties concerned for the discharge of a valid existing obligation by the substitution of a new valid obligation on the part of the debtor or another, or a like agreement for the discharge of a debtor to its creditor by the substitution of a new creditor.” 58 Am. Jur. 2d *Novation*, § 1 (2008).

plaintiff would not have the option of receiving any portion of the settlement in a lump sum and the obligation to make and fund the qualified assignment would fall solely to the QSF.

The QSF, as a “party to the suit or agreement,” should then be able to accomplish an I.R.C. § 130 qualified assignment, giving the plaintiff favorable income tax treatment of all income earned on the qualified annuity. Since the QSF would be funded with an agreed lump sum, representing the commuted value of the qualified annuity, the plaintiff would be assured of receiving the full value of the settlement.

The plaintiff would also have the ability to choose the structured settlement broker, to request that the trustee purchase a qualified annuity which would provide the most valuable income stream, and to ensure that all fees and commissions are fully disclosed. At the same time, the settlement would be protected from premature depletion and the plaintiff would be assured a secure, future stream of income for life to meet his or her needs for support and medical care. In short, the plaintiff would be able to enjoy all of the advantages of a tax-free structured settlement without the negative aspects of the traditional, defendant-directed structured settlement arrangement.

B. QSFs and Special Needs Trusts

Use of a QSF may be particularly useful in situations in which the distribution of settlement proceeds needs to be delayed to allow planning for the plaintiff’s SSI or Medicaid eligibility. The QSF’s prohibition on distributions other than to fund a qualified assignment and its restrictions on the plaintiff’s authority to compel distributions of principal or income prevent the assets in the QSF from being treated as available resources or income to the plaintiff for purposes of SSI and Medicaid. The qualified assignment may be drafted to name an SSI/Medicaid exempt Special Needs Trust as the payee (so long as all payments are made before the plaintiff reaches age 65).⁵¹

The Omnibus Budget Reconciliation Act of 1993 (OBRA ‘93)⁵² established new Medicaid criteria for treatment of both revocable and irrevocable trusts created after August 10, 1993. Specifically, OBRA ‘93 permits the use of a Special Needs Trust, funded with the assets of a Medicaid beneficiary, if the trust meets the following criteria set forth in the statute:

(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in § 1382c(a)(3) of the Social Security Act) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual by the state;....⁵³

51. 42 U.S.C. § 1396p(d)(4)(A) (2008); 42 U.S.C. § 1382b(e)(5) (2008).

52. Pub. L. No. 103-66, 107 Stat. 312 (1993).

53. 42 U.S.C.A. § 1396p(d)(4)(A) (1984).

In December 1999, Congress passed the Foster Care Independence Act (FCIA),⁵⁴ which contained new anti-fraud provisions applicable to the SSI program. The FCIA specifically exempts OBRA '93 Special Needs Trusts from being considered available resources and provides that transfers to fund such trusts by individuals under age 65 will not incur a penalty period.⁵⁵ Thus, the FCIA provides that a trust will be exempt from the general rules regarding self-settled trusts if it complies with all of the criteria in 42 U.S.C.A. § 1396p(d)(4)(A) applicable to OBRA '93 Special Needs Trusts for Medicaid.

Even a trust that complies with all of the requirements of 42 U.S.C.A. § 1396p(d)(4)(A) might not be recognized as a valid exempt trust if it does not also comply with Social Security Administration policies, as set forth in the Program Operations Manual System (POMS) at POMS SI 01120.203. In particular, the trust must comply with all of the following key requirements:⁵⁶

1. The trust will be established with the assets of the beneficiary, who is under age 65;
2. The beneficiary is disabled as that term is defined in the Social Security Act;
3. The beneficiary is the sole beneficiary of the trust and the trust must not allow any Prohibited Expenses or Payments under POMS SI 01120.203.B.3);⁵⁷
4. The trust was established by the beneficiary's parent, grandparent, legal guardian or a court, if the beneficiary is a minor. If the beneficiary is not a minor, the trust was established by someone who has legal authority to act with regard to the beneficiary's assets,⁵⁸ which would mean that the trust must have been established by the beneficiary's legal guardian or a Court, or by the individual in the case of a pooled trust account;
5. The trust provides specific language providing that, upon the death of the beneficiary, the trust must first reimburse the State for medical assistance paid for the beneficiary;
6. The trust will be fully funded before the beneficiary reaches age 65;
7. The trust is irrevocable. (The trust must contain a specific provision making the trust irrevocable; and, in states which still follow the common law *doctrine of worthier title*, the trust must name specific individuals as contingent beneficiaries upon the beneficiary's death, after repayment to the State for medical assistance benefits paid).

54. Foster Care Indep. Act of 1999, Pub. L. 106-169, 113 Stat. 1822.

55. 42 U.S.C.A. § 1382b(e)(5) (1984).

56. Social Security Online, POMS SI 01120.203, <https://secure.ssa.gov/apps10/poms.nsf/lrx/0501120203!opendocument> (accessed Feb. 18, 2008).

57. Examples of Prohibited Expenses and Payments include: "Payments of debts owed to third parties; Funeral expenses; and Payments to residual beneficiaries." Social Security Online, POMS SI 01120.203.B.3(b), <https://secure.ssa.gov/apps10/poms.nsf/lrx/0501120203!opendocument> (accessed April 18, 2008).

58. *Id.* at POMS SI 01120.203.B.1(e).

Failure of the trust to comply both with OBRA '93 and the requirements in the POMS will result in trust assets being considered an available resource for SSI purposes or in transfers to fund the trust being considered transfers without fair consideration, resulting in an SSI penalty period. The question arises, then, as to when the more restrictive SSI requirements will apply to the creation of a Special Needs Trust.

In 1999, the United States District Court in Colorado was presented with the issues of: 1) whether, in an SSI state⁵⁹, a trust approved under the federal SSI eligibility criteria could nonetheless be considered invalid under state Medicaid law; and 2) whether a Medicaid beneficiary in an SSI state can be denied Medicaid benefits under state Medicaid regulations if the individual continues to qualify for SSI.⁶⁰ The court held that, in SSI states, Medicaid agencies cannot employ methodology or criteria more restrictive than that of SSI when evaluating trusts, because an SSI recipient automatically qualifies for Medicaid.⁶¹

The court's holding in *Ramey* governs any situation in which state Medicaid regulations in an SSI state might impose more restrictive criteria for eligibility than those imposed by federal regulations governing SSI. In an SSI state, an individual who is eligible for SSI under the federal Social Security regulations cannot be denied Medicaid benefits by the application of a more restrictive state Medicaid law or regulation.

In SSI states, a trust that is approved by the Social Security Administration for an SSI beneficiary cannot also be required to comply with any additional requirements under state Medicaid law; and an individual who qualifies for SSI cannot be denied Medicaid under any state Medicaid law that might impose eligibility requirements stricter than those imposed by SSI. Thus, for a person whose Medicaid eligibility is due to eligibility for SSI, that person's Special Needs Trust must comply with SSI criteria, regardless of what criteria may exist under state Medicaid law. Further, if such an individual qualifies for SSI, even after consideration of all cash income and in-kind support and maintenance, that individual cannot be denied Medicaid benefits, even if a

59. There are 39 SSI states, consisting of 32 "§1634 states": Alabama, Arizona, Arkansas, California, Colorado, Delaware, Georgia, Florida, Kentucky, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, Wyoming and Washington D.C.; and 7 "SSI criteria states": Alaska, Idaho, Kansas, Nebraska, Nevada, Oregon and Utah. The "§ 1634 states" have entered into an agreement, as authorized by §1634 of the Social Security Act, 42 U.S.C. § 1383c, that the Social Security Administration will determine Medicaid eligibility. The "SSI criteria states" make their own Medicaid determinations, using the SSI criteria. Social Security Online, POMS SI 01120.203.B.3(b), POMS SI 01715.010, <https://secure.ssa.gov/apps10/poms.nsf/lnx/0501715010!opendocument> (accessed Feb. 18, 2008). See generally John J. Campbell, *Basic Strategies for SSI Planning*, 1 NAELA Q. 311, 321 (Fall 2005).

60. *Ramey v. Rizzuto*, 72 F. Supp.2d 1202 (D.C. Colo. 1999), *aff'd*, *Ramey v. Reinertson*, 268 F.3d 955 (10th Cir. 2001).

61. 268 F.3d at 962, *citing Herwig v. Ray*, 455 U.S. 265, 268, 102 S.Ct. 1059, 1063 (1982).

calculation of the individual's cash income and in-kind support and maintenance under state Medicaid regulations might otherwise result in ineligibility.

IV. SPECIAL FUNDING ISSUES

A. Medicaid Annuities under the Deficit Reduction Act of 2005

In many PI settlements, the plaintiff's future medical expenses may be expected to "spike" in later years. For example, a plaintiff may anticipate the need for surgery or replacement of certain durable medical equipment many years after the settlement. In these instances, it is not unusual for the structured settlement to include an annuity that might pay out large payments in fixed amounts at 5 or 10 year intervals, specifically to provide extra funds in those years when unusually large medical costs are expected. By deferring payment for large and infrequent costs until needed, the defendant can reduce the costs of funding the settlement while still providing the plaintiff with sufficient settlement funds to meet his or her needs for future care.

The Deficit Reduction Act of 2005 (DRA)⁶² amended federal Medicaid law to provide that the purchase of an annuity from the assets of a Medicaid recipient (or the recipient's spouse) is a transfer without fair consideration, unless the annuity: (1) is irrevocable, non-assignable, actuarially sound, and provides for substantially equal payments over the life of the annuity *with no deferral or balloon payments*; or (2) names the state as death beneficiary up to the amount of Medicaid benefits paid on behalf of the annuitant.⁶³ However, the DRA does not provide for any further consequence in the treatment of deferred or balloon annuities. Thus, even a deferred or balloon annuity still should not be treated as a "resource" if it is annuitized, but rather, the payments should continue to be treated as income in the month received.

Under I.R.C. § 130, an annuity that funds a qualified assignment must be fixed as to the amount and time of periodic payments. However, those payments need not be made monthly or even annually. On the other hand, the DRA restrictions on annuities require that a Medicaid-exempt annuity must be actuarially sound and provide for substantially equal payments. The DRA specifically provides that the purchase of deferred annuities and balloon annuities by the Medicaid recipient or the recipient's spouse will result in a transfer penalty. Does this mean that only I.R.C. § 130 *immediate* annuities may be used in a structured settlement when the annuity will be used to fund a Medicaid Special Needs Trust for the plaintiff? Not necessarily.

As discussed above, a qualified annuity under I.R.C. § 130 must be purchased directly by a party to the case with liability to the plaintiff. The plaintiff cannot even have the *option* of receiving an annuity or a lump sum payment without having constructive receipt of the settlement funds and running afoul of I.R.C. § 130. In other words, any annuity that would be used to fund a Special Needs Trust in the context of

62. Pub. L. No. 109-171, 120 Stat. 4 (2005).

63. Pub. L. No. 109-171, § 6012(b) & (c), amending 42 U.S.C. § 1396p(c)(1)(F) & (G).

a PI settlement is purchased with assets of the party with liability to the plaintiff, and not with assets that could be considered “available” to the plaintiff/Medicaid recipient.

The DRA’s restrictions on the purchase of deferred or balloon annuities only apply to purchases of annuities with *assets of the Medicaid recipient* (or the recipient’s spouse). Further, the DRA does not apply to SSI. Therefore, the DRA annuity provisions should not affect the ability to fund Medicaid or SSI Special Needs Trusts with I.R.C. § 130 deferred or balloon annuities as part of a PI settlement. In fact, the DRA annuity provisions arguably would not be applicable to this situation at all; thus, it should not be necessary for the I.R.C. § 130 annuity funding a Special Needs Trust to be actuarially sound or to name the state as remainder beneficiary.

B. Use of Annuities to Fund SSI and Medicaid Special Needs Trusts

SSI and Medicaid do not prohibit the use of either deferred or balloon annuities to fund exempt Special Needs Trusts if the annuities comply with I.R.C. § 130. If the plaintiff expects to incur future medical expenses on a fairly regular basis, an immediate annuity can be used to provide the necessary funding over time. If large expenses are expected periodically in the future, a deferred or balloon annuity may be appropriate as well. However, all annuity payments into an exempt Special Needs Trust must be completed before the plaintiff reaches age 65.⁶⁴ Further, the Special Needs Trust should also be funded initially with a lump sum sufficient to provide immediate liquid funds for unexpected costs, the annuity payments should be large enough to ensure that funds in the trust will not be exhausted before the next payment date, and payments should be indexed to keep pace with inflation.

C. Naming the Trust as the Annuitant

Since both SSI and Medicaid eligibility are based partly upon the individual’s level of income, a structured annuity that makes periodic payments directly to the beneficiary could prevent the individual from qualifying for those benefits for the lifetime of the annuity. Further, if the annuity is the subject of a qualified assignment, the individual will not be able to amend the annuity at a later time to redirect payments into a Medicaid or SSI exempt trust.

Since there will virtually always be a qualified assignment of any annuities used to structure any PI settlement, careful planning is required to preserve the plaintiff’s ability to qualify for Medicaid or SSI. In these cases, the annuity generally should not be set up with the individual plaintiff as payee. Rather, the annuity should pay out to the exempt Special Needs Trust.

V. CONCLUSION

Defendants, liability carriers and their structured settlement brokers have historically argued that QSFs cannot be used in single-plaintiff PI structured settlements involving qualified assignment. This argument, based on the theory that the economic benefit doctrine somehow bars the plaintiff from taking advantage of the

64. 42 U.S.C. § 1396p(d)(4)(A) (2008).

favorable tax treatment in I.R.C. § 130, is not persuasive. It is based solely on a common law doctrine that has been superseded in this context by federal statutes and regulations; and upon a private letter ruling that is not on point.

An in-depth analysis of I.R.C. § 130 and its legislative history, I.R.C. § 468B and the corresponding IRS regulations, and Rev. Proc. 93-34 all support and lead to the opposite conclusion: the economic benefit doctrine is not applicable to the use of qualified assignments in PI settlements. The IRS' own interpretation of the law on this issue is in agreement.

The IRS has not said whether its stated position in this regard might somehow depend on the number of plaintiffs involved. Of course, it is possible that the IRS could draw a distinction and treat the economic benefit doctrine as a bar to use of qualified assignments by QSFs in single-plaintiff settlements only. However, this seems like a remote possibility at best.

There is simply no cogent basis in the Internal Revenue Code, the IRS regulations and procedures, or in the IRS' own previously stated interpretations of the law to support such a distinction. It is far more likely that the IRS will remain consistent and adopt the position that QSFs may successfully make qualified assignments in PI settlements regardless of the number of plaintiffs, so long as there is compliance with the requirements of I.R.C. § 130, I.R.C. § 468B; Treas. Reg. §§ 1.468B-1 through 1.468B-5; and Rev. Proc. 93-34.

Use of a QSF to purchase an I.R.C. § 130 qualified annuity to fund the exempt Special Needs Trust is a natural fit when a settling plaintiff seeks the most advantageous tax treatment of his or her settlement proceeds, needs to preserve SSI and/or Medicaid eligibility, and requires time to create an exempt Special Needs Trust without delaying the finalization of the settlement. This process provides the necessary flexibility, while allowing the plaintiff to receive the maximum benefit from the settlement. However, the rules here are complex and the interplay of the various applicable statutes and regulations requires special care and knowledge. Finally, the circumstances in every settlement are unique. Practitioners are cautioned never to use a form QSF or Special Needs Trust, but rather to prepare the necessary documentation in a manner that is specific to the individual needs of each plaintiff in the context of this or her own settlement.

THE PSYCHOLOGY OF MEDIATION

Barry Goldman, Esq.*

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Mediation works. We all know that, many of us from personal experience. As a result, many attorneys and judges turn to it as a method to resolve disputes and avoid litigation. But how does it work? What are the psychological levers that move the parties to come to agreement?

According to the social psychologist Robert Cialdini, there are six psychological “weapons of influence.” In his widely cited book, *Influence: The Psychology of Persuasion*,¹ Cialdini says the many ways salespeople, politicians, con-artists and other influence professionals get us to do their bidding all boil down to one or another of these six weapons: authority, reciprocity, scarcity, commitment and consistency, and social proof. This article will introduce each of Cialdini’s weapons and show how they are used in mediation.

I. LIKING

We tend to be influenced by people we like. Who do we like? We like people who are similar to ourselves. This is called the *similarity-attraction effect*, and it accounts for a well-known sales gimmick. The salesman from the copier company comes into your office and notices the sailing pictures on the wall. It turns out that he is a big sailor himself; sails all the time. Yes sir.

Later in the day he will be a big fisherman, football fan, golfer, or bowler. He also has always had a deep fascination with antique cuckoo clocks. Why is this?

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1. Robert B. Cialdini, *Influence: The Psychology of Persuasion* (William Morrow 1993).

This is a question we can answer from the perspective of evolutionary psychology. For human beings, as well as other social animals, enormous importance attaches to in-group and out-group membership. Within the group we share, outside the group we compete. Fights within the group are largely symbolic. Fights between groups are merciless.²

In the ancestral environment it made sense to fear the stranger. It was an adaptive strategy. When we lived in groups of 100 people, if you met someone you did not recognize you had good reason to be afraid. Jared Diamond put it this way: “Should you happen to meet an unfamiliar person in the forest, of course, you should try to kill him or else to run away; our modern custom of just saying hello and starting a friendly chat would be suicidal.”³

Either the stranger is friendly or he is dangerous. Either you trust him or you do not. That sets up a two-by-two matrix with the following outcomes.

Outcome of Trusting or Fearing a Stranger

Stranger proves to be		
	Friendly	Dangerous
Trust	Good	Terrible
Fear	Missed Opportunity	Escape Disaster

If the stranger is friendly and you trust him, something good can happen. You could learn something, trade goods or have sex. But if the stranger is dangerous and you trust him, something very bad can happen, e.g., he can kill you. If the stranger is dangerous and you fear him, you increase the chances that you will survive the encounter. If he is friendly and you fear him, you miss a chance to have a nice visit but no serious harm is done. What is a sensible *homo sapien* to do? In general, the strategy is to reduce the downside risk. Take the choice that offers the smallest chance of the worst outcome. If you fear all strangers you reduce the chance of getting the worst possible payoff. Evolution favors that choice, and it is the choice our ancestors took. We are not the descendants of people who trusted people they did not know.

The copier salesman’s gimmick is designed to tap into this primal psychological instinct. He is not a threatening stranger from the tribe of copier salesmen. He is a fellow sailor or fellow football fan—one of us.

The notion that we like people who are like us is also the foundation of a technique called *mirror and match*. The idea is that people who are in synch with each other will have similar posture, tone, vocabulary, and tempo in their conversation. If you train yourself to notice body language, you will often see that a group of friends talking will all be sitting in the same posture. Practitioners of the mirror and match

2. Frans de Waal, *Our Inner Ape* (Penguin Group 2005).

3. Michael Shermer, *The Science of Good and Evil: Why People Cheat, Gossip, Care, Share, and Follow the Golden Rule* 36 (Henry Holt 2004).

method will consciously adopt the posture, tone and delivery of their target. Proponents claim that in the hands of an expert the effect is hypnotic. The target gets more and more comfortable with the amazing closeness he feels toward the practitioner and allows himself to be led. The practitioner can be a therapist whose goal is to help, or it can be a salesman. The process is the same.

In addition to liking people who similar to us, we like people who like us. That is why salespeople are so friendly and why they use our first names so often. The principle is the same. People who are perceived to like us are perceived to be less likely to harm us. The true situation is complex. We do not have the time or mental energy to do a careful evaluation, so we depend on cues. Smiling and acting friendly are usually cues that signal an absence of danger. But once a cue like that is identified, it can be simulated, and the simulated cue will often work as well as the real one. It is best to take Lord Chesterfield's advice. "Distrust all those who love you extremely upon a very slight acquaintance and without any visible reason."

II. AUTHORITY

We tend to obey authority and do what we are told. If the person we are dealing with has sufficient authority, we tend to experience what we are told to experience. Consider:

[P]articipants in one experiment were told that a substance they would be asked to drink might induce vomiting. After drinking the liquid, nearly 80% of the participants actually vomited. When they received a placebo "antidote" to stop their vomiting, their condition improved almost immediately. As you may already have guessed, the antidote was the same inert substance but in a different color.⁴

Again, there is probably a good reason for our obedience to authority in terms of our evolutionary history. The people with authority, old people for example, were likely to have greater knowledge. They knew from experience that when the ocean suddenly receded it meant a big wave was coming. When they told you to get to high ground, you went. The people who did not go, did not survive to become our ancestors.

Sometimes, however, deference to authority can be a mistake. Flight recorders recovered after fatal crashes, for instance, provide plenty of examples of overly polite co-pilots deferring to their pilots.

Another problem, of course, is that authority can be faked. In the ancestral environment we knew who had authority because we knew everyone in the group. Today we identify people with authority by their badges and indicia. Medical authorities wear white coats. Judges wear black robes. Cops wear uniforms. Generals wear stars. The danger is that the badges and indicia work as a heuristic, so we trust them even when they are false. We follow the medical advice of actors dressed as doctors.

4. Gerald Zaltman, *How Customers Think: Essential Insights Into the Mind of the Market* 62 (Harvard Business School Press 2003).

III. RECIPROCITY

In most negotiations, once there are two opening offers on the table the negotiation proceeds by means of reciprocal concessions. And the subject of reciprocity takes us again to evolutionary psychology. Imagine two populations from the ancestral environment. Hunting is successful only intermittently, and refrigeration will not be invented for another few hundred thousand years. One population, we might imagine, is made up of individualists who eat what they kill, without sharing, and one is made up of cooperative sharers. It is easy to see that the sharers are more likely to survive food shortages and become our ancestors. This intuition turns out to be correct when the behavior of our closest relatives is studied. Not only do apes share food, but they share it preferentially with other individuals who have previously shared with them. They reciprocate. Furthermore, apes have been shown to retaliate against individuals who do not engage in reciprocal sharing.⁵

But in order for sharing to develop, our ancestors had to figure out a way to solve what the theorists call the first mover problem. Suppose I give you something or do something for you—I make the first move—and you simply accept what I give you and go away. If that is the anticipated response, I never do anything for you or for anybody else, and we all die. That is no good.

We needed a way to ensure that the first mover will be compensated. The reciprocity norm is that solution. If I do something for you, you do something for me. This fact is built into who we are at the biological level, and it is enforced by every culture around the world. If someone gives you something, you give them something back. If you fail to reciprocate, you can expect to be punished.

This can be easily shown by experiment. Go to your neighborhood bar and get in a conversation. When someone at the table buys a round of drinks, accept. When someone else buys a round, accept that too. Then when everyone has bought a round but you, announce that you have something else to do and leave. See how well you are received the next time you come back.

Not only will your companions resent your behavior but, more important for purposes of this discussion, you will feel uncomfortable about it too. Unless you are a lonely sociopath, you will not be proud of yourself for having put one over on the suckers at the bar. You will be ashamed—again far out of proportion to the cost of the beer—and you will seek out an opportunity to make it right. Baked into the ancient depths of your brain is the knowledge that without the reciprocity norm, we die.

As we have seen, wherever there is a strong natural response like this, someone is going to develop a way to exploit it. It is a jungle out there.

We can see this in the classic reciprocity norm experiment. The experimental subject is presented with some task or other that will take several hours. Say, rating the attractiveness of a pile of pictures. It does not matter. What matters is that seated next to him, doing the same task, is another person who appears to be an experimental subject but is really a confederate of the experimenters. After some time the confederate goes out and comes back with two Cokes. He says something like “I was

5. Frans de Waal, *Our Inner Ape* (Penguin Group 2005).

getting a Coke so I got one for you too.” More hours go by. Then during a break the confederate mentions that he is selling raffle tickets for charity and offers to sell some to the subject. Subjects who got the Coke bought twice as many raffle tickets on average as subjects who did not get the Coke.⁶

There are two important features to notice about this experiment. One is that Cokes have nothing to do with raffle tickets. The other is that the Coke was not requested. In other words, the reciprocity norm is so strong that it is possible to get people to give you things you want by giving them things they do not want and did not ask for.

The reciprocity norm manifests itself in negotiation in the form of the prohibition against consecutive unreciprocated concessions. Once I have made a concession, it is your turn. I will not move again until you do. Correspondingly, I do not expect you to make unreciprocated concessions. If you have made a concession, you are entitled to expect me to make the next one.

The reciprocity norm can thus explain a great deal of negotiation behavior. It explains, for example, the widespread practice among union negotiators of bringing a laundry list of demands to collective bargaining negotiations. Many of these demands will have been presented to the Union by individual members and have only minimal support. But they are not there on their merits. They are there so they can be conceded, and so that the concession can prompt a reciprocal concession from the employer on an issue that has real importance to the union.

It is psychologically powerful for a negotiator to say, “On point number one, we give up.... On point number two, we give up. On point number three... you should give up.”⁷ It triggers the deeply-seated urge to reciprocate. It is your turn. You feel the pressure of a million years of evolution telling you so.

IV. SCARCITY

We want what we cannot have. There is something irresistible about forbidden fruit. It is an old story. Adam and Eve come to mind.

Why is this so? One explanation is that our reaction is a form of loss aversion. If I tell you there is only one more *potrzebie*⁸ left and once it is gone you will never be able to get another one, you experience a threat of loss. Your freedom to be the owner of a *potrzebie* is about to disappear. We hate loss. So we buy the *potrzebie*.

Real estate sales people are famous for the phantom offer gimmick. “There is someone else coming to look at the house later today.” Some private sellers of used cars will put an ad in the paper, ask people to call for an appointment and then schedule all the appointments at the same time. If there are not enough real potential buyers to make a small crowd, such sellers may enlist friends or relatives to stand around in the driveway looking eager.

6. Robert B. Cialdini, *Influence: The Psychology of Persuasion* 20 (William Morrow 1993).

7. G. Richard Shell, *Bargaining for Advantage: Negotiation Strategies for Reasonable People* 231 (2d ed., Penguin Books 1999).

8. An object, never specifically described, subject of a long-running gag in *Mad Magazine*.

The scarcity weapon is what drives negotiation deadlines. Anyone who has engaged in settlement discussions has heard this thinly veiled threat. “At this point my client is prepared to settle for X. But if we have to engage in expensive discovery and retain an expert and all the rest of it, the settlement price is going to go up.” Sometimes this is accompanied by a time limit. “I’ll keep this offer open for 24 hours. After that the offer comes off the table and we start over.”

If you believe him, this may work. If you believe he would take \$20,000 today but the day after tomorrow he would refuse it, he may be able to get you to offer \$20,000. But why would that be so? What is the real difference between today and the day after tomorrow?

Once you begin to ask questions like this the scarcity weapon loses some of its effectiveness. Not long ago I saw a sign by the roadside that said,

Needed: 36 people to Make Money and lose 10 lbs in 14 days

Right. Better call now. If you are the 37th person he will turn you down.

The point is that a scarcity claim has to be credible. There has to be some actual reason for a deadline or for a claim of limited availability. Otherwise it is too obviously just bluster.

This is related to another piece of advice. People do not like to be threatened, but they do not mind so much being warned. There is a difference between saying, “If you don’t accept my offer today, I’m taking it off the table,” and saying, “Tomorrow is the end of the period when the company sets its reserves for outstanding lawsuits. If I can go back with a settlement today, the settlement will come out of the current period reservation fund. But after today, the reservation funds go into the retention account for previous lawsuits and the valuation is booked based on the retention amounts in the subsequent quarter. So after today the new formula will apply and that settlement amount won’t be available.”

This is gibberish, of course, but it is gibberish of a specific kind. It is expressed in terms of a warning rather than a threat. I am not telling you I am taking the offer off the table if you do not accept today. That is not credible. I am telling you that vast and mysterious forces beyond my control are taking the offer off the table. I am trying to help you out here. That is credible.

V. COMMITMENT AND CONSISTENCY

Thinking is expensive. It takes a lot of blood to run the brain and it takes a lot of calories to circulate the blood. Thinking takes time and attention away from activities that evolution thinks are more important, like finding food, fighting off predators and having sex. So we avoid thinking when we can. We prefer to use heuristics instead.

We can imagine that there are two piles of documents in the brain, one marked “Decisions I Need to Make,” the other marked “Decisions I Have Already Made.” Our preference is to move the documents from the first pile into the second with as little effort as possible and not to let any documents slip back into the undecided pile once they have been decided. We are busy with new decisions. If old decisions insist on being reconsidered the whole system will bog down. So we have a rule that says the way a decision was made the first time is the way it will be made henceforth. We agree

with Friedrich Nietzsche: “It is hard enough to remember my opinions, without also remembering my reasons for them!”

As a result, we tend to behave consistently with our earlier verbal commitments and consistently with our earlier behavior. This is the basis of the ancient sales technique called the foot-in-the-door. If I can get you to make one small purchase, you change from being a prospect to being a customer. It is easier to sell to a customer than to a prospect. And this is so because the customer has put this decision in the “Decisions I Already Made” pile and does not want to have to take it out.

Recent research has shown that car buyers loyal to one make of car pay more for their cars than first-time buyers of that make. Why? The reason is that first-time buyers have to be persuaded and price is one of the ways to persuade them. Much of the persuading of loyal buyers has already been done in advance. They do not need a cut in price to be convinced to continue buying the same make. They need only to look in the “Decisions Already Made” pile and see: “I drive Pontiacs. I do not have to revisit that decision every time I need a new car.”

The Commitment and Consistency principle is behind the willingness of Oriental rug merchants to let you take a rug home and look at it in your house. It is behind the ingenious 24-hour test drive recently introduced by Cadillac. Once the salesman’s foot is in the door, our cognitive parsimony is likely to let him get himself the rest of the way in. This is why Amazon.com suggests you put things in your shopping cart. You can always take them out later. Sure you can.

The commitment and consistency weapon can be used to make it easier to get people to agree to settlements. One technique, used often in domestic relations mediations, is to seek an early commitment to a guiding principle. John and Mary are getting a divorce. They hate each other and each seems motivated only by the desire to cause the other harm. On the table is the custody and visitation question with regard to little Emmylou. The mediator might start by talking to John about what a satisfactory settlement would look like. John says a satisfactory settlement would be one that keeps Emmylou away from Mary since she is a Satanist and a drunk. The mediator thanks John politely and turns to Mary. What does she think a satisfactory settlement would look like? Mary says it would be one that keeps Emmylou away from John since he is a dope fiend and a psychopath. The mediator thanks her politely and says, “While you certainly have your differences, that is to be expected under the circumstances. What pleases me is that you both agree the most important thing we are going to work to accomplish here is to reach the solution that is going to be the best for little Emmylou. Isn’t that right? That’s the most important thing? And we all agree?”

It is difficult for either John or Mary to disagree. Whatever they may be thinking in their treacherous and hate-filled hearts, publicly they are going to agree that all they want is what is best for Emmylou. This sets the tone of the negotiation. Whenever the session degenerates to the Hobbesian war of all-against-all, the mediator can gently remind the participants of what they agreed was the goal of the mediation.

A negotiator will have an easier time getting an opponent to agree to a position when it follows from a position to which the opponent is already committed.

VI. SOCIAL PROOF

When people do not know what to do, they look around to see what other people are doing and do that. This is called social proof. Once again, we can see how doing what the rest of the tribe is doing was an adaptive strategy in the ancestral environment. As a default position, doing what the rest of the tribe is doing is probably safe. If everyone is running that way as fast as they can, the odds are it is a good idea to do the same. It is probably not wise to stop to investigate and inquire or to adopt a contrary attitude and go the other way. Sometimes, perhaps, but not often enough to be worth the risk.

To some extent we have evolved as herd animals. If we see people running, we run. If we hear people laughing, we laugh. This is not because we consciously want to be like other people. It is because the sound of people laughing makes us think what is happening is funny. We consistently judge television shows with laugh tracks funnier than shows without them.

Back in the 1950s, the psychologist Solomon Asch did a famous experiment where he asked people which of three lines was the same length as a fourth line. Anyone could plainly see what the correct answer was, but a substantial number of subjects got it wrong. They got it wrong because before they answered they listened to the answers of a number of other “subjects” who got it wrong. The other subjects were, of course, confederates of the experimenter and the goal of the study was to measure social conformity. Some of the subjects reported that they went along with the majority even though they knew it was wrong because they did not want to stick out and be thought peculiar. Others reported that they really did perceive the wrong answer as right. New evidence from the infant science of neuro-economics supplies some surprising support for this latter explanation. Evidently, there are neurological changes in the brain that take place when we learn about the behavior of other members of our tribe. The brain changes not just the way we behave in order to conform; it changes the way we perceive.

This is why sales pitches emphasize that their brand is the most popular, largest selling, fastest growing. Your internal, instinctive decision-maker judges that it is in your interest to make the choice made by so many other members of the tribe and buy the same brand.

The same social proof weapon is at work when your lawyer tells you your severed leg is worth \$500,000 in Wayne County, Michigan. Other people in this jurisdiction have received awards clustering around \$500,000 for their severed legs. That is the going market price. You are selling yourself cheap if you accept substantially less and you are being greedy if you demand more. The right number is \$500,000.

Why is it the right number? Because lots of similarly situated people have determined that it is the number they are willing to take or pay. It is deemed to be sufficient to compensate you for your injury because it has been deemed to compensate others for theirs. That is all there is to it.

At that point the burden shifts to you to show that yours was a particularly excellent leg or that your relationship to it was particularly close. Some adjustment

may be appropriate in light of your peculiar circumstances, but the anchor price is the one set by the market. This is not unreasonable, and it is difficult to come up with a better approach. But it is important to see what is happening here and to be able to identify when social proof is being used.

VII. WHY MEDIATION WORKS

Mediation works because an experienced mediator uses all six of Cialdini's weapons. Let us see how.

Even before the litigant walks into the mediator's office he or she is prepared to be impressed with the mediator's authority. The whole idea is that this person has the ability to get people out of what they have so far found to be an intractable dispute. The mediator has the knowledge and the experience and the magical techniques—like a medical specialist or a witch doctor, someone who knows the mysteries. A litigant who walks into the office meets someone with the badges and indicia of authority. A secretary greets visitors, takes coats, and offers coffee. The litigant is kept waiting; not long, just enough to demonstrate that the Great Mediator is busy with important matters. He emerges: dark suit, white shirt, silk tie, shiny black shoes, and gray temples. Or she emerges: dark suit, white blouse, simple gold chain, shiny black pumps. The mediator takes the litigants to the room with the leather chairs, long table, thick books and dark paneling. This is the authority weapon at work.

The mediator, powerful and important and busy as he or she is, shakes hands and smiles warmly. The mediator makes sure the litigant has fresh coffee and makes friendly small talk about the weather or the traffic or the parking. Did you give your parking ticket to the secretary to have it validated? No? The mediator will do it for you. He or she takes your ticket and summons the secretary. The mediator asks you about yourself. Often it turns out you have something in common.

The mediator could sit behind the big desk but does not. He or she sits directly across from the litigant with nothing between them. Both feet on the floor, the mediator looks the litigant in the eye, leans forward and asks "How can I help?"

How can you not like this person? He or she cares, listens actively, paraphrases and validates. He or she mirrors. Busy and important and rich and powerful as the mediator obviously is, he or she understands and wants to help. This is the liking weapon.

Then the mediator gets the commitment; listens for it during all that time. The mediator asks, "It sounds to me like you are tired of this litigation and you would like to get past it and get on with your life. Is that right?" Or, "It sounds to me like you are concerned this litigation is having a negative effect on little Wanda June. Is that right? And you would like to get it settled so your lives can return to normal? We're not here to punish your opponent for being a crook or to teach your rotten ex-spouse a lesson, right? We're here because you want to get this matter behind you and get back to what's really important. Is that what I hear you saying?" That is the commitment and consistency weapon.

Then the negotiation enters the explicit bargaining phase. There are offers and counter-offers, back and forth. The reciprocity norm is the weapon used to extract them. The other side moved last, and now it is your turn.

So far the mediator has not said anything evaluative. He or she has been functioning mainly as a facilitator, helping the parties frame issues, helping them express interests and you look for outcomes that will maximize mutual gains. But there comes a time when the mediator will be asked to give some evaluative advice. What do you think, Mr. or Ms. Mediator? You have seen a lot of these cases. You know the judges in this jurisdiction. You're familiar with the jury awards. You know these lawyers. Is this a good deal or not?

There are mediation purists who will tell you a mediator should not answer that question. I am not one of them. I think a fair assessment of the market value of your case is one of the reasons to go to a mediator. I think a mediator has a duty to tell a party who asks, "In my experience cases like yours in this jurisdiction tend to settle in the range of \$x—y. That's not to say you won't get more, maybe you will. That's not to say you should settle for \$x. It's your decision and you should do what you think is best. But you should make that decision based on the best information you can get." This is the social proof weapon. Most people in your situation do S. If you do S, you won't be out there all alone.

Finally, the settlement offer on the table will be available for a limited time only. If your opponent has to go back and conduct more depositions and retain an expert and all the rest, his or her costs will go up and the settlement demand will go up. The mediator points out, "Right now we've got a proposed deal on the table and everyone has done the work necessary to get us there. We can agree and walk out of here with the deal closed and the case behind us. Or we can reject. It's up to you. But if we stop now it is very likely the deal will unravel, the good-will will go away and we will start back at the beginning, or worse." This is the scarcity weapon.

Put them all together and it is no wonder mediation is such an effective form of dispute resolution.