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Manning the Minefield of Long-Term Care Regulations

How attorneys can help families ensure the safety of their loved ones

By David Cohen

Estate and elder law attorneys stand at the forefront of the fight to protect the rights of the elderly and infirm in New Jersey and throughout the country. Very often such attorneys are in the best position to help families plan, appreciate and understand the impact of New Jersey's complex regulatory scheme upon residential institutional health-care facilities, and the best way to ensure the safety of individuals who usually cannot speak for themselves.

During the estate planning process, families very frequently reach out to Medicaid attorneys on issues of spending down personal assets, qualifying for Medicaid, establishing trusts and the like. Equally important in this regard is an appreciation of the frequently changing landscape of long-term care residential facilities along with the concomitant influx of big business upon the placement of institutional residents.

One of the most notable trends impacting this big-money marketplace is the intrusion of assisted living facilities (ALFs) upon the more traditional nursing home market. These facilities are much less aggressively regulated than traditional nursing homes, which are highly regulated and frequently inspected. ALFs represent a significant opportunity for big business — in particular, real estate investment trusts (REITs).

The challenge facing attorneys in giving good recommendations to their clients is that, much like the business itself, the needs and acuity level of residents are a moving target. ALFs typically now include what are known as "dementia wings," which in essence are small sections of their facilities, established in a lockdown-type fashion to allow themselves to market services that had historically been limited to nursing homes. (See N.J.A.C. 8:36-19.1 et seq.) The look and feel of ALFs provide visual solace to concerned family members about the home where their loved one is being sent to live out his or her remaining years.

New Jersey has established a regulatory scheme that impacts upon assisted living facilities under N.J.A.C. 8:36-1 et seq. The only means by which an assisted living facility can accept a resident is to have a physician, advanced practice nurse or physician's assistant sign off on that admission. N.J.A.C. 8:36-7.2 notes: "(a) Within 30 days prior to admission to the assisted living residence, compre-

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hensive personal care home, or assisted living program, a physician, advanced practice nurse or physician's assistant shall specify in writing that the resident is appropriate for this level of care." More often than not, it is the physician who completes this documentation.

Attorneys need to advise families that the primary care physician or internist assigned with this difficult task generally do not have an appreciation for the interrelationship between the services provided by two notably varying types of facilities (i.e., nursing homes versus ALFs). The documents reviewed by physicians are generally quite brief, and the physicians will nearly always advise during the course of discovery depositions that they rely almost exclusively on both the nursing assessment provided by the ALF and the facility itself to ensure that the services needed are in fact delivered. Additionally complicating matters is the fact that ALFs differ tremendously regarding levels of services provided to their resident populations. Thus, physicians are frequently in the least advantageous position to help a family decide between facilities.

Additionally, the regulations set up an interesting position for the moving-target resident wherein an ALF is permitted to discharge a resident when his or her acuity level exceeds the services that are provided by assisted living, but place very little administrative pressure on these facilities to do so. They also require ALFs to provide a skilled nursing (nursing home) level of care for those residents who need it. As defined in N.J.A.C. 8:36-1.3:

> "Nursing home-level care" means that an individual requires "nursing facility services" as defined at N.J.A.C. 8:85-2.1. Nursing home-level care is provided to individuals who have chronic medical condition(s) resulting in moderate to severe impairments in physical, behavioral, cognitive, and/or psychosocial functioning. The need for nursing home-level care and services is determined by a registered professional nurse and identified in a plan of care.

The challenge facing attorneys in giving good recommendations to their clients is that, much like the business itself, the needs and acuity level of residents are a moving target.

This sets up scenarios wherein ALFs are in direct competition with nursing homes for the same profile of residents.

Unfortunately, what is seen on the ground is that there are recurring problems with ALFs:

1. They frequently accept residents whose admission is inappropriate for the services provided; and
2. They frequently retain long-term residents whose acuity levels are simply beyond the services that they are capable of providing.

Under both circumstances, the stage is set for significant injuries to be suffered by the ALF population. These manifest themselves in the development of pressure ulcers, unnecessary falls, elopements, abuse and malnutrition/dehydration, and a host of others.

Unlike ALFs, nursing homes are the subject of a much more detailed set of regulations, both on the federal and state levels. New Jersey's regulatory scheme is set forth in N.J.A.C. 8:39-1 et seq. Additionally, the federal regulations, which largely mirror those of New Jersey (and yet are distinct in a number of regards), are contained within 42 C.F.R. 483-1 et seq., also called OBRA (Omnibus Budget Reconciliation Act of 1987).

Both ALFs and nursing homes are subjected to routine surveys and complaint inspections by the New Jersey Department of Health and Senior Services, which is charged with enforcement of all of these regulations. As noted, however, the degree of intensity of such surveys and complaint investigations is much lighter with regard to ALFs, again setting the stage for significant injury. These regulatory schemes, along with established residents bills of right (N.J.S.A. 30:13-1 et seq. for nursing homes, and N.J.A.C. 8:36-1.1 et seq. for ALFs), are largely alike in their composition.

Understanding the complex regulatory schemes that govern these facilities is only one piece of the puzzle. Attorneys need to advise their clients that under any circumstance in which their rights are violated, New Jersey provides a right of recovery, either through common law or statute. In this regard, N.J.S.A. 30:13-8 provides fee- and cost-shifting in the event that any rights of a nursing home resident are violated. Additionally, there is a complex interrelationship between the regulatory and statutory schemes which govern assisted living facilities and nursing homes.

Addressing this vexing issue, primarily centering on the issue of arbitrations, was the recent case *Ruszala v. Brookdale Living Communities*, 1 A.3d 806 (2010). Interesting in the analysis of the *Ruszala* court was that the defendant facility involved in that matter was uncontestedly that of a licensed ALF, and one which obviously was governed by the ALF regulations. In this opinion, the Appellate Division nonetheless noted and took as a given that the fee- and cost-shifting provisions of N.J.S.A. 30:13-8 apply to ALFs.

Beyond this reference in *Ruszala*, New Jersey courts have yet to address the issue of this potential application. However, an Ohio court on a different tack a number of years ago has settled this problem. Namely, in the matter of *Peskin v. Seasons Health Care*, 141 Ohio App. 3d 436., the court under a similar statutory scheme, noted that Ohio's nursing home statute would apply to ALFs when and if such facilities were acting more as a nursing home than as an ALF. Based upon New Jersey's current business climate of ALFs accepting residents whose profiles are more that of a traditional nursing home resident, it appears that the interrelationship between these two cases may set the stage for New Jersey's fee- and cost-shifting nursing home statute to apply in many or all situations involving assisted living.

A third category of long-term care residential health care regulations is that of group homes. These are yet another step down the scale from a purely acute care setting and generally involve adults who are much younger in age, but who nonetheless require long-term care residential placement because of varying difficulties from cognitive and physical points of view. The regulations are governed and administered by the Department of Community Affairs, rather than the Department of Health and Senior Services. Group homes are also the subject of routine inspections.

Making these cases even more interesting is that the regulatory scheme appears to recognize that these facilities are not so much health-care facilities, as facilities governing people with significant needs requiring a much lower quotient of nursing and medical care. Nonetheless, New Jersey has likewise established a statutory scheme that is specifically designed to protect the rights of these individuals when they are the subject of injury, abuse and other rights violations. The language nearly mirrors that of NJSA 30:30-8:

> 55:13B-21. Violation of rights; action for damages; costs and attorney's fees. Any person or resident whose rights as defined herein are violated shall have a cause of action against any person committing such violation. The action may be brought in any court of competent jurisdiction to enforce such rights and to recover actual and punitive damages for their violation. Any plaintiff who prevails in any such action shall be entitled to recover reasonable attorney's fees and costs of the action.

Because elder law attorneys and estate attorneys frequently have the very first contact with families attempting to place their loved ones in an institutional health-care setting, the ability to advise families on the multiple levels of acuity, and health-care institutions and the regulations that govern them, empower these attorneys to provide the best services for their clients and hopefully ensure the highest level of safety for their loved ones. These attorneys also frequently have the last contact with these families, when catastrophic injuries occur. Having a familiarity with the panoply of rights that New Jersey offers residents (and their estates) can help in identifying cognizable claims that can be handled by litigation attorneys who concentrate in this area. ■

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ALSO INSIDE...

Past the Cliff: The Future of State Estate Tax Planning

Do not proceed without a credit shelter trust

By Jeff Vandrew Jr.

Despite permanent spousal portability in the federal estate tax after resolution of the "fiscal cliff," credit shelter trust planning in New Jersey will likely remain popular due to the lack of portability in the state estate tax. While little publicized, both the recent American Taxpayer Relief Act (ATRA) and the Affordable Care Act (ACA) greatly increased the taxes on all trusts taxed under Internal Revenue Code (IRC) Subchapter J. ATRA increased the trust tax rate for income above an inflation-adjusted $11,950 threshold to 39.6 percent for ordinary income, and 20 percent for capital gains and qualified dividends. The ACA implemented IRC 1411, which imposes a 3.8 percent surtax on trust investment income above the same threshold. Both of these provisions increase the income tax cost of credit shelter trust planning.

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Fortunately, there are two ways to reduce the tax bite of these new ACA/ATRA taxes in New Jersey credit shelter trusts. The first involves applying IRC 678, and the second involves modifying trust Distributable Net Income (DNI).

IRC 678

IRC 678 is a little known (and poorly understood) code section that allows a trust beneficiary to be the "tax owner" of trust income and deductions, removing the trust from punitive Subchapter J tax rates. It reads:

> A person other than the grantor shall be treated as the owner of any portion of a trust with respect to which:
>
> (1) such person has a power exercisable solely by himself to vest the corpus or the income therefrom in himself, or
>
> (2) such person has previously partially released or otherwise modified such a power and after the release or modification retains such control as would, within the principles of sections 671 to 677, inclusive, subject a grantor of a trust to treatment as the owner thereof.

Under IRC 2041 and 2514, a surviving spouse obviously cannot retain the right to vest all corpus in herself, in a credit shelter trust. The alternative is to get into IRC 678 by giving the spouse the right to vest in herself the income generated from corpus. Due to varying definitions of the word "income," requiring a surviving spouse trustee to distribute all trust income to herself annually will not suffice. Under the terms of a credit shelter trust instrument, "income" generally means accounting income under the Uniform Principal and Income Act (UPIA). "Income" in IRC 678(a)(1), on the other hand, means taxable income. Taxable income includes capital gains income, which under the UPIA is accounting corpus. As a result, a mandatory income interest doesn't give the spouse the right to vest all of the *taxable income* in herself. The trust then has only a "partial" IRC 678 status, where capital gains and deductions paid from accounting corpus are taxed within Subchapter J, and all other taxable income and deductions paid from accounting income are taxed under IRC 678. See, e.g., *Goldsby v. Commissioner*, T.C. Memo 2006-274.

If the trust were instead drafted to override the UPIA and include capital gains in the definition of accounting "income," "full" IRC 678 status would be achieved, but the surviving spouse would be left with an undesirable general power of appointment over trust corpus under IRC 2041 and 2514.

What if a surviving spouse trustee was given the right to vest in herself all corpus, subject however to an ascertainable standard such as "health, education, maintenance and support" (HEMS)? This would solve the aforementioned IRC 2041 and 2514 problems, as both sections explicitly exclude powers subject to an ascertainable standard. However, while authorities differ, it appears that ascertainable standards also exclude such a power from IRC 678.

In *U.S. v. De Bonchamps,* 278 F.2d 127 (9th Cir. 1960), a life tenant had the right to vest in herself the corpus of the estate in question for her "needs, maintenance and comfort." The court held that IRC 678 did not apply because her power to invade corpus was too limited. *De Bonchamps*, however, involved a life tenant and not a trustee/beneficiary. The court noted that a life tenant does not have the power to deprive a remainderman of an asset except by using it to exhaustion. A surviving spouse trustee/beneficiary, on the other hand, does have the right to distribute to herself an asset to the exclusion of remainder beneficiaries without exhausting said asset. It's unclear if this distinction matters under IRC 678.

Complicating things further, in Private Letter Ruling (PLR) 8211057, a beneficiary acting as sole trustee had the power to distribute assets to himself for his "support, welfare and maintenance." With very little explanation, the PLR held that the beneficiary was treated as the tax owner of the trust under IRC 678. With regard to this PLR, many commentators have argued that the addition of "welfare" to the ascertainable standards of "support" and "maintenance" converted the otherwise ascertainable standard to being unascertainable. See, e.g., *A Beneficiary as Trust Owner: Decoding Section 678,* 35 ACTEC Journal 106. Under this reasoning, IRC 678 would not have applied to a pure HEMS standard.

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April Fool's Day in January for Estate Planners

Clients who took action in December are unlikely to have donor's remorse

By Rebecca Rosenberger Smolen and Amy Neifeld Shkedy

January 2 felt like a mix between the *Twilight Zone* and April Fool's Day for us, and we suspect for most of our fellow estate planners (as well as for many of our clients). During prior years in our careers, we've had a few time-sensitive year-end matters to manage for clients, but the end of 2012 was far busier than any prior year in our combined 30 years of practice (we were coordinating with clients up until about 4 p.m. on New Year's Eve). After inquiring with our colleagues, and as we recently learned from other estate planners at an annual estate planning conference we attended in Orlando, Fla., many have had similar experiences, recounting stories of coordinating with clients and their financial advisers on the very last day of the year.

We were extremely busy working with clients from right around Election Day until December 31 — helping many assess whether to and how to capture the $5.12 million exemption from the federal gift, estate and generation-skipping transfer taxes for the benefit of their families before it was potentially reduced to $1 million on January 1 under the law as it then existed. And then, when we heard the news January 2 that Congress had increased the exemption to $5.25 million, we learned that all of the effort and stress for us and our clients was for no apparent immediate gain.

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So, it now appears that those clients who chose to not let the tax tail wag the dog have no reason for regrets, and we'll learn over the coming months whether those who chose to act wish they had also stayed on the sidelines. To date, we've not heard of any "donor's remorse" among our clients, but perhaps that's because they remain in shock for the time being.

As a matter of fact, for several reasons, we don't expect that our clients who took action in December will have donor's remorse. First of all, although technically the exemption is now "permanently" set at $5 million, as indexed for inflation (whereas, previously, ever since the 1997 Tax Act under President Bill Clinton, it had been a moving target, and set to revert to $1 million this year), there's no guarantee that Congress will not reduce the exemption in the future. After all, in 1997, the exemption was only $600,000, and we have not had nearly enough inflation for it to reach $5.25 million (on an economic basis) over the last 15 years. So, in the event the exemption will be reduced down the road, clients who took action last year will not likely need to rush around again to develop and implement a plan to lock in the exemption before it expires.

Another reason not to have donor's remorse is that it is generally always good planning to transfer assets sooner rather than later for transfer tax planning purposes. By doing so, the appreciation is transferred out of a taxpayer's taxable estate. While it's true that appreciated assets will not benefit from the basis step-up at death for capital gains tax purposes, for the time being, the federal estate tax rate remains significantly higher than the capital gains tax rate, even with the new Medicare tax, so, it can be a good arbitrage to opt to potentially pay more capital gains tax in order to save estate tax. Also, for the time being, there are a number of planning techniques available using grantor trusts that allow taxpayers to have their cake and eat it too — if monitored successfully, grantors will be able to, prior to death, swap appreciated assets in such trusts for higher basis assets and thus secure a basis step-up while still avoiding estate taxation on the appreciation in the assets.

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In some cases, the effort to put planning in place last year was a welcome opportunity for procrastinating clients to develop a long-term (and likely permanent) estate plan.

For taxpayers who live in Pennsylvania and New Jersey, a significant advantage to making multimillion-dollar gifts last year (or any year) is the ability to save state inheritance and estate taxes at death. For a typical Pennsylvania resident who lives more than a year after the transfer, the savings on a $5.12 million gift will be, at least, $230,000. For a New Jersey resident, the savings could be at least $405,000. Although that's far less than the savings of more than $2 million that could have been realized if the federal exemption from estate tax had dropped to $1 million, it is still a pretty good return on investment for the cost and effort of implementing the planning.

In some cases, the effort to put planning in place last year was a welcome opportunity for procrastinating clients to develop their long-term (and likely permanent) estate plan that they wanted to address in the first place. It gave them a deadline to help them focus (a deadline which, in retrospect, was much more pleasant than a terminal illness often provides for our clients). Those clients have the satisfaction of knowing that they have now checked this project off of their list and they can now spend their time and efforts on more pleasant matters, like planning for their next series of vacations instead of their deaths. Also, in the long term, they have very likely saved significant costs and hassle for their progeny in administering their estates since they have gotten their affairs in better order and already taken the step of moving assets from their names to the names of their children or a trust. That step would have otherwise ultimately needed to be addressed at their deaths through the probate and estate administration process.

A final benefit that has inured to our clients who took action last year is the opportunity to have the pleasure of observing their children enjoy part of their inheritance during their lifetimes. There are few greater pleasures in life than the act of giving. Most of our clients elect to defer giving significant gifts to their children during their lifetimes, both because they are concerned that they may need the resources to meet their retirement needs and because they do not want to spoil their children and obviate the need for them to work hard to accomplish their own successes in life. By accelerating the timing of these gifts that would have ultimately been bestowed anyway, at a somewhat random time in the future triggered by their deaths, these proactive donors have the satisfaction of observing their children's receipt of part of their inheritance, as well as the opportunity to help steward their decision-making in how to incorporate such additional wealth into their lifestyles. For parents easing into their retirement years with time on their hands, the opportunity to reconnect with their children through this meaningful parenting act may be the best benefit of all. ■

Overuse of Antipsychotic Medications in Nursing Homes

Taking measures to reduce and eliminate this longstanding practice

By Shayna Slater

The misuse of antipsychotic drugs within the nursing home population is, unfortunately, a common and longstanding practice that puts elderly residents at increased risk of death. Fortunately, this practice has come to the forefront and numerous organizations are implementing policies in order to reduce and/or eliminate it. Reduction in the use of antipsychotic medications within our nursing home populations can not only dramatically reduce costs, but it will also result in better quality of care for patients.

In June 2012, the Centers for Medicare and Medicaid Services (CMS) announced an initiative to decrease the inappropriate use of antipsychotic drugs. While many antipsychotics have been approved for schizophrenia and bipolar disorder, they also bear black-box warnings against use in dementia patients. However, dementia patients make up a large majority of the nursing home patients currently receiving these medications. In fact, CMS indicated that in 2010, more than 17 percent of nursing home patients had daily doses of antipsychotic medications, an amount that exceeded the daily recommended levels. Additionally, CMS noted that almost 40 percent of nursing home patients with signs of dementia were receiving antipsychotic drugs in the same year. Therefore, almost 40 percent of nursing home patients were potentially receiving antipsychotic medications in direct contravention of a black-box warning.

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In May 2011, the Department of Health and Human Services issued a report indicating:

- Between January 1 and June 30, 2007, 304,983 elderly nursing home residents (14 percent) received atypical antipsychotic drugs at a cost of hundreds of millions of dollars for the six-month period; and
- Eighty-three percent of the claims were for off-label conditions, including 88 percent for conditions specified in the black-box warning given to antipsychotic drugs by the FDA.

While many antipsychotics have been approved for schizophrenia and bipolar disorder, they also bear black-box warnings against use in dementia patients.

Surprisingly, these numbers may actually be an underestimate. According to CMS, in the third quarter of 2010, there were 26.2 percent of residents who had received antipsychotic drugs within a seven-day period. The law prohibits this type of antipsychotic drug use. According to the federal Nursing Home Reform Law:

> Psychopharmacologic drugs may be administered only on the orders of a physician and only as part of a plan ... designed to eliminate or modify the symptoms for which the drugs are prescribed and only if, at least annually, an independent, external consultant reviews the appropriateness of the drug plan of each resident receiving such drugs.

The regulation goes even further by expressly limiting the use of antipsychotic medications:

> (2) Antipsychotic drugs. Based on a comprehensive assessment of a resident, the facility must ensure that:
>
> (i) Residents who have not used antipsychotic drugs are not given these drugs unless antipsychotic drug therapy is necessary to treat a specific condition as diagnosed and documented in the clinical record; and
>
> (ii) Residents who use antipsychotic drugs receive gradual dose reductions, and behavioral interventions, unless clinically contraindicated, in an effort to discontinue these drugs.

Additionally, the federal regulations require oversight of each resident's medication chart. The regulations state:

> (c) Drug regimen review.
>
> (1) The drug regimen of each resident must be reviewed at least once a month by a licensed pharmacist.
>
> (2) The pharmacist must report

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Descending Into Perpetuity

Refreshing our memories of the dreaded RAP

By Julian M. Wise, Daniel Martin and Justin C. Elliott

The Rule Against Perpetuities used to give us heartburn. It used to turn our stomachs. It made us edgy and nauseated when we were in law school and studying for the bar exam, as if we had way too many shots of espresso, so we did what most attorneys do when they enter the practice of law: We banished all but the most cursory recollections of the Rule Against Perpetuities from our minds, and hoped (and prayed) that we would never see or hear about it again.

It wasn›t until one of us watched the 2011 film *The Descendants* that the Rule Against Perpetuities reappeared in our lives.

For those of you who have not yet seen the film, it stars George Clooney, playing the role of Matt King, the sole trustee and decision maker for a family trust (the King Trust) that had generated millions of dollars for its beneficiaries through a series of leases and land sales in Hawaii. In the film, the King Trust solicited bids for the contemplated sale of 25 pristine acres of oceanfront property in Kauai. Driving the film's plot is the ambiguously lamentable notion that the property must be sold, and the King Trust dissolved, within seven years, to avoid running afoul of the Rule Against Perpetuities.

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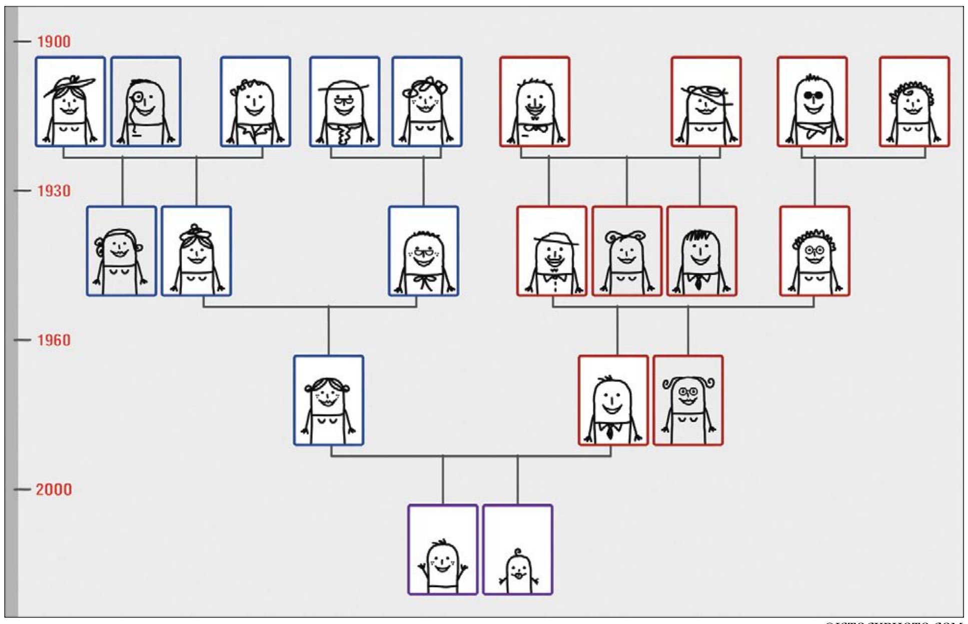
New York Rule

In New York, unlike most other states, the Rule Against Perpetuities is based on the English common-law rule, which, in turn, is rooted in the notion that property should not remain inalienable (i.e., nontransferable) for an unreasonably long period. In 1830, the Rule Against Perpetuities was codified in New York statutes. In 1958 and again in 1960, the Rule Against Perpetuities was the subject of major changes. These changes were incorporated into the provisions of the present Estates, Powers and Trusts Law, effective Sept. 1, 1967, which adhered closely to the common-law rule. In its current form in New York, the Rule Against Perpetuities (the New York rule) requires that all conveyances and transfers of present, contingent or future interests in real property vest within a discernible period. Each interest must vest within 21 years after the death of a person who was alive at the time of such transfer, or at the time the interest was created; this person, who is known as a "measuring life," can also be an unborn child who was conceived prior to the conveyance or transfer, or at the time the interest was created. The "measuring life" does not need to be named in the conveyance or transfer instrument.

In order to better grasp how the New York rule works, it is helpful to look at two examples:



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Example 1: Justin is an elderly gentleman with no family other than his much younger sister, Chloe, who has no children and is not pregnant. Justin's will states that his 25 pristine acres of undeveloped wilderness on Staten Island should be given to Chloe's first child to reach the age of 18, and if she has no children who turn 18, then it should be given to the Central Park Zoo. Using Chloe as the "measuring life" for purposes of this example, the New York rule requires that, within 21 years of her death, we know with certainty which (if any) of Chloe's children first reached the age of 18. Because we know with certainty that if Chloe has any children, all of them will turn 18 years of age within 21 years after Chloe's death, this bequest does not violate the New York rule.

Example 2: Slightly altering the fact pattern set forth above, Justin's will states that his Staten Island property should be given to Chloe's first child to watch *The Descendants*, and if she has no children who watch *The Descendants*, it should then be given to the Central Park Zoo. Using Chloe as the "measuring life" for purposes of this example, the New York rule requires that, within 21 years after her death, we know with certainty which, if any, of Chloe's children first watched *The Descendants*. Because it is possible that none of Chloe's children ever watches *The Descendants*, or that none of them does so within 21 years after Chloe's death, this bequest violates the New York rule.

When a conveyance or transfer of an interest in real property violates the New York rule, that conveyance or transfer is generally void ab initio, or treated as a legal nullity.

Uniform Rule

The Rule Against Perpetuities in Hawaii, in contrast, is based on the Uniform Statutory Rule Against Perpetuities (the Uniform Rule). While the New York rule examines the possibility of remote vesting at the time of creation, and can void a transfer or conveyance of a present, contingent or future interest in real property at any time after it is made, the Uniform Rule employs a less rigid "wait-and-see approach." Under the Uniform Rule, these interests are not automatically voided — instead, they are deemed to satisfy the Uniform Rule if they (1) must vest or terminate within 21 years after the death of the "measuring life," or (2) do in fact vest or terminate within 90 years of the creation of the interest. They are voided only if they fail to vest or terminate within 21 years after the death of the measuring life and fail to vest or terminate within 90 years.

Under Example 2, above, Justin's bequest (if governed by the Uniform Rule) would only be voided if none of Chloe's children watched *The Descendants* within 90 years after Justin died (as opposed to void ab initio, as under the New York rule) or if she did not have any children.

In *The Descendants*, there was certainly no explanation of how the Rule Against Perpetuities affected the King Trust, and none of the characters questioned precisely why the King Trust had to be dissolved, or why the property it owned had to be sold. Because Hawaii follows the Uniform Rule, the King Trust presumably had to dissolve and sell its real property because all future or contingent interests in the real property it owned did not vest within 21 years after the death of the measuring life, and could not vest within 90 years after the interests were created or conveyed to the King Trust, thus running afoul of the Uniform Rule's restrictions.

Legislation and Application

Hawaii is not alone in adopting the Uniform Rule; it has been adopted by 30 states (including California), and several other states have passed their own versions of a modified Rule Against Perpetuities that are even more liberal than the Uniform Rule, or abolished it altogether. Assemblyman Keith Wright of Assembly District 70 in Harlem sponsored a bill last year in the New York State Assembly, attempting to implement the Uniform Rule in New York. This bill was referred to the legislature's Judiciary Committee on Jan. 4 and is awaiting further action. The status of this bill should be followed closely by real estate and other attorneys whose practice could be impacted by changes to the New York rule. New York real estate attorneys should be aware that the New York rule has recently been reviewed by the courts with respect to lease renewal provisions, purchase options and purchase and sale agreements.

Although leases are subject to the New York rule, they are rarely voided as a result of the New York rule. This notion was recently clarified by the court of appeals in *Bleecker St. Tenants v. Bleeker Jones*. In *Bleecker St.*, the tenant entered into a 14-year lease with nine consecutive 10-year renewal options. Under the lease, if a renewal option was not exercised by the tenant, the lease would become a month-to-month lease, although the tenant would

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retain its right to renew the lease for a 10-year period at any time. The landlord argued that because the renewal option extended beyond the term of the lease, it should be invalidated because it violated the New York rule. The Court of Appeals disagreed, holding that so long as the tenant's possession was continuous, the tenant's right to renew remained "appurtenant" to the lease and therefore did not violate the New York rule.

Notwithstanding this ruling, attorneys should be careful to avoid drafting renewal options that may, even theoretically, be exercised after the expiration of the lease term (e.g., after the tenant vacates the leased premises). As Judge Susan Read noted in her concurrence in *Bleecker St.*, New York law does not provide a "blanket exemption" from the New York rule for all lease renewals. Instead, in order to comply with the New York rule, lease renewal options must be explicitly stated in the lease, and occupancy must be "continuous," leaving the tenant no option or right to renew the lease after their lawful possession ends.

The Court of Appeals has unequivocally established that the New York rule applies to options to purchase real property that do not derive from a pre-existing lease. Accordingly, attorneys should ensure that in drafting purchase options, particularly those with built-in contingencies, the options clearly vest within 21 years of the death of a measuring life. A recent New York case held that a purchase option agreement containing no definitive expiration date nonetheless satisfied the New York rule, given that the purchase option was to be exercised after a number of contingencies, each of which must have been completed within a few years. Real estate attorneys drafting purchase option agreements with contingent expiration or exercise dates should therefore be careful to outline concrete deadlines to ensure compliance with the New York rule.

Purchase agreements that do not include a definitive closing date have been challenged by parties wishing to void the proposed transaction, by claiming they violated the New York rule, but these challenges have rarely been successful. In *Kaiser-Haidri v. Battery Place Green*, the appellate division rejected a buyer's attempt to rescind a condominium purchase agreement by asserting that it violated the New York rule. The court held that the contract's failure to include a definite closing date was permissible, because time was "of the essence" and the closing was to take place concurrently with or shortly after certain specified events. Real estate attorneys should note that indefinite closing dates may be susceptible to legal challenge under the New York rule, in particular where closing mechanics and timing are not adequately addressed in the purchase contract.

Conclusion

Although the Rule Against Perpetuities magically disappears from the minds of many otherwise diligent lawyers immediately following the bar exam (or sooner), it is important for real estate, trust and probate attorneys to stay abreast of developing legislation and case law in this area. Even if your clients aren't impressed with your legal acumen, at least the person sitting next to you at an Academy Award-winning movie might be captivated by your analysis. ■

Past the Cliff: The Future of State Estate Tax Planning

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The PLR itself never discusses whether an ascertainable standard affects IRC 678 at all, let alone whether "welfare" is an ascertainable standard. Unfortunately, due to the renewed interest after ACA/ATRA, the IRS recently added IRC 678 to the list of topics for which it will not issue any more private letter rulings.

If IRC 678 is to be invoked while avoiding estate inclusion, the "partial" IRC 678 status referenced above is likely the best that can be done. This partial status carries the significant drawbacks of capital gains income remaining taxed under Subchapter J, and all trust income being distributed back into the surviving spouse's taxable estate each year, even if unneeded for her support.

Modifying DNI

For those practitioners unwilling to wade into IRC 678, there is another option. Even if a credit shelter trust remains taxed under Subchapter J, it can still avoid punitive tax rates on income other than capital gains by distributing such income as DNI to the surviving spouse to the extent it exceeds the inflation-adjusted $11,950 ACA/ATRA threshold.

Dealing with capital gains income is more complex. By default, capital gains income is not part of DNI under Treas. Reg. 1.643(a)-3(a), and is therefore taxed to the trust even if distributed. Under Treas. Reg. 1.643(a)-3(b)(2), however, if under the governing trust instrument capital gains are *consistently* treated as part of a beneficiary's distribution on the trust's "books, records and tax returns," they can be included in DNI. As evidence of the required consistency, practitioners should consider drafting corpus distribution ordering rules within the trust instrument. The exact "order" chosen may vary dependent upon the estimated taxable income of the beneficiaries, but an example of one such set of ordering rules is as follows: 1) from net short-term capital gain which is IRC 1411(c) "net investment income"; 2) from any other taxable income (other than long-term capital gain) allocated to corpus which is IRC 1411(c) "net investment income"; 3) from any net short-term capital gain which is not IRC 1411(c) "net investment income"; 4) from net long-term capital gain which is IRC 1411(c) "net investment income"; 5) from net long-term capital gain which is not IRC 1411(c) "net investment income"; 6) from any taxable income allocated to corpus not previously listed; and 7) from amounts of corpus not considered to be taxable income. The exact order chosen often won't matter much, so long as accounting corpus that is taxable income is always distributed before accounting corpus that is not taxable income.

In addition to corpus ordering rules, practitioners should consider drafting a direction to an independent trustee to distribute DNI if, in his sole discretion, it creates beneficial tax mitigation. The drafter may wish to absolve a trustee from any liability for exercise or non-exercise of this tax-driven distribution power.

However, in a typical credit shelter trust, where the surviving spouse rather than an independent party is trustee, such a tax-driven distribution power could create a problem under IRC 2041, 2514 and possibly Treas. Reg. 25.2518-2(e)(2), unless the surviving spouse's power to distribute to herself is either mandatory or limited to HEMS.

A mandatory withdrawal over all taxable income would make this DNI discussion moot, as it brings us back into IRC 678 as discussed earlier.

Practitioners should consider drafting a direction to an independent trustee to distribute DNI if, in his sole discretion, it creates beneficial tax mitigation.

This distribution power, then, must be restricted by HEMS when held by a surviving spouse as trustee. It may be the case that in most years, the amount of taxable income after the distribution deduction for HEMS will be less than the $11,950 inflation-indexed ACA/ATRA threshold. To plan for other years where the amount of taxable income after the distribution deduction for HEMS does exceed the ACA/ATRA threshold, the trust could grant the surviving spouse the power to hire and fire a special co-trustee to assist her. Said special co-trustee could be a CPA, attorney, friend or family member who is not "related or subordinate" to her within the meaning of IRC 672(c).

In the event the surviving spouse needs to distribute more taxable income than HEMS allows, she could appoint the special co-trustee to make the remainder of the tax-driven distribution on a fully discretionary basis unbound by HEMS. To avoid estate inclusion, the surviving spouse cannot have any control or input over the independent co-trustee's distributions. However, she can be granted indirect control through a power to hire and fire the independent co-trustee at will. Under the reasoning of Rev. Rul. 95-58, most practitioners believe the independent co-trustee's discretionary powers should not be attributed to her despite this hire/fire power, so long as the independent co-trustee is required to be outside of the "related and subordinate" definition.

While neither distributing DNI nor relying on IRC 678 is optimal, choosing one is certainly preferable than the alternative of proceeding without a credit shelter trust and wasting the first spouse's $675,000 New Jersey Estate Tax exemption. ■

Estate Planning and Administration in the Digital Age

What will happen to your electronic assets when you die?

By Laura E. Stegossi

From our financial accounts and tax records to our music and photograph libraries, more and more of our assets are finding homes online. When we die, however, our online accounts and passwords do not necessarily die with us.

Digital Assets

The term "digital assets" refers to assets and information stored or accessed online or as a file on a computer or mobile device. Some digital assets have monetary value, while others have personal or sentimental value. The digital asset realm includes not just bank and brokerage accounts, but also email accounts; blogs; Facebook pages; Tumblr accounts; photograph, book and music libraries — the list goes on, with new additions all the time.

We spend a significant amount of time using the Internet to manage and enhance our lives. We rely on computers and mobile devices to keep us organized and connected. However, many of us give little thought to what happens to our digital assets upon our incapacity or death. In this digital age, making provisions for the protection and administration of those assets is an integral part of a complete estate plan.

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Few Laws Address Digital Assets

States have been slow to enact laws addressing the issues associated with the administration of digital assets. A few states, namely Connecticut, Idaho, Indiana, Oklahoma and Rhode Island, have passed laws granting an individual's representative the right to access and manage certain digital accounts. Such laws vary widely in scope.

Digital assets that have sentimental or personal value may need to be specifically addressed in a will or separate writing.

Pennsylvania does not currently have laws specifically addressing the management of digital assets when an individual becomes incapacitated or dies. In 2012, state Representative Tim Briggs, D-Montgomery, introduced *HB 2580*, which would amend Title 20 (Decedents, Estates and Fiduciaries) of the Pennsylvania Consolidated Statutes by granting the personal representative of a decedent's estate the power to take control of, conduct, continue or terminate the decedent's account with a social networking website, microblogging or short message service website or email service website. The bill was referred to the judiciary committee in August 2012, and may be reintroduced in the 2013-14 legislative session.

Other efforts are in the works as well. For example, in 2012, the Uniform Law Commission appointed a Fiduciary Access to Digital Assets Committee charged with the task of drafting a uniform law that addresses a fiduciary's right to access, maintain, control and dispose of an individual or decedent's digital assets.

Suggestions

Until there is further guidance, there are a number of steps to take with respect to online accounts and assets:

1. Make an inventory.

When creating or updating an estate plan, it is common to write a list of tangible and intangible assets so that the executor has the information necessary to administer the estate. A similar list should be created for digital assets. Account information, website addresses, log-in names, passwords and answers to secret questions will assist the personal representative in marshaling these assets.

The digital asset inventory should, of course, be maintained in a safe place. Entrusting the inventory to a friend or family member for safe keeping may initially sound like a good idea. However, passwords and other confidential information may fall into the wrong hands or be misused. It may be best to keep the list in a safe deposit box or other secure place that is readily accessible, because the list will need to be updated periodically as passwords change and new accounts are added.

2. Choose the individual to have access and control of digital assets.

In a will, the individual responsible for collecting the assets of a decedent's estate is known as the executor or personal representative. The executor or personal representative should be trustworthy and reliable, and if dealing with digital assets, technologically savvy.

The relative or friend who may be an appropriate choice for dealing with the financial and tangible assets in an estate may nevertheless have little computer experience and not appreciate the significance of continuing a website's operations or the importance of maintaining certain computer files intact. For this reason, it may be necessary to name a separate individual as the "digital executor" in a will for an estate containing significant digital assets. Again, because many states have no laws in place for dealing with digital assets upon an individual's death, specific directions in testamentary documents may provide the guidance or authority for accessing and managing those assets.

In preparing for the possibility of incapacity, an individual may execute a power of attorney authorizing one or more individuals to act on the individual's behalf during his or her lifetime with respect to his or her financial, property and legal affairs. Should the agent acting on the individual's behalf in the power-of-attorney instrument be granted powers to deal with the individual's digital assets? Most states' power-of-attorney statutes have not addressed this issue. In addition, it may not be clear at this time whether provisions authorizing an agent to deal with digital assets will be recognized by the various online service providers. A review of the terms-of-service contract for an online provider may provide some guidance, but such guidance will only apply to the specific online account in question.

3. Create a plan for passing digital assets and terminating or continuing online accounts.

Certain digital assets pass through a decedent's estate while others do not. It is important to consult with an estate planning attorney to determine which rules apply. Digital assets that have sentimental or personal value may need to be specifically addressed in a will or separate writing. For example, an individual may want his or her online photo-sharing account continued and managed by a family member as a memorial. Alternatively, that individual may want the site closed and the digital images disseminated to friends and family members.

An estate planning attorney with experience in this area will advise on the best way to communicate an individual's wishes for the distribution of digital assets and the continuance of online accounts.

The importance of making provisions for the access, management and dissemination of digital assets in the context of estate planning cannot be ignored. Perhaps, as we deal with these issues more frequently in the digital age, it will be second nature to make a plan for our digital assets as we do for traditional ones. ■

Exploring and Accommodating End-of-Life Wishes

Tailoring living wills to your clients' specific needs and beliefs

By Jennifer B. Cona and Lynn Kay

As more and more people seek out advance directives as part of their estate plan, practitioners need to expand their ability to service this clientele. When it comes to end-of-life decisions, there is no "one size fits all," and attorneys must be cognizant of the ways in which living wills can be tailored to clients' specific needs and beliefs.

Growing out of the common-law rule that a person has the right to decline medical treatment and even life-sustaining treatment, living wills have long been recognized under common law in New York State. As living wills are currently not governed by statute in New York, they can vary widely to reflect the specific wishes of the individual. This article will focus on drafting techniques, specific issues to discuss with clients, and how to draft to accommodate special circumstances such as the giving of last rites, Orthodox Jewish specifications and provisions for survival of a pregnant woman versus a fetus.

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By way of background, in order to withdraw life-sustaining treatment from an incapacitated person, New York State requires clear and convincing evidence that the individual would have directed the termination of artificial life support if he or she were competent and able to communicate. In *Matter of Westchester County Medical Center on Behalf of O'Connor*, 72 N.Y.2d 517 (1988), the court, while recognizing the variety of possible scenarios and the resultant inability to set rigid guidelines, set forth basic principles to be used in determining "whether the proof 'clearly and convincingly' evinces an intention by the patient to reject life prolonged artificially by medical means."

The court further stated that:

> The ideal situation is one in which the patient's wishes were expressed in some form of writing, perhaps a "living will," while he or she was still competent. The existence of a writing suggests the author's seriousness of purpose and ensures that the court is not being asked to make a life-or-death decision based upon casual remarks.

Some 10 years later, in *Matter of May v. The Wartburg Health Care Center*, the Westchester County Supreme Court ratified a living will by finding that it established "clear and convincing evidence" that the patient would not wish to receive any form of life-sustaining medical treatment in her present medical condition.

As a common-law construct with no governing statute, there are no formal execution requirements for a living will. However, as a practical matter, a living will is typically executed concurrently with a health-care proxy and it is therefore good practice and procedure to follow the same execution requirements as set forth in the Public Health Law governing the execution of a health-care proxy, that is, signed and dated in the presence of two adult witnesses who also sign the document. New York Public Health Law §2981(2)(a).

For example, many clients do not wish to receive life-sustaining measures indefinitely but would like to receive artificial feeding and nutrition for some length of time.

Just as there are no standard execution requirements, there is no required language that must be included within the living will itself. Typically, a living will includes some form of the following language options indicating that a client either does or does not wish to receive life-sustaining treatment when suffering from a terminal condition:

> I declare that after thoughtful consideration, I have decided that I wish to forgo all life-sustaining treatment if I shall in the future sustain substantial and irreversible loss of mental capacity and I am unable to eat or drink without assistance and tube(s) or other artificial means are required to feed me and it is highly unlikely that I will ever be able to eat and drink without artificial feeding or I have an incurable or irreversible condition that is likely to cause my death within a relatively short time.

Or the living will may contain the alternative directive, as follows:

> I declare that after thoughtful consideration, I have decided that I wish to have all life-sustaining treatment administered to me even if I shall in the future sustain substantial and irreversible loss of mental capacity and even if I shall have an incurable or irreversible condition that is likely to cause my death within a relatively short time.

It is impossible to provide for and accommodate every possible scenario or permutation in a living will and therefore any general instructions given within

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Exploring and Accommodating End-of-Life Wishes

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the document will inevitably need to be interpreted by those charged with making treatment decisions. On the other hand, because the living will has no formal drafting requirements, it is possible to include instructions regarding events the client has specifically considered.

For example, the attorney may draft a living will to include instructions that end-of-life care adhere to a particular religious teaching, to provide that last rites be administered before treatment is terminated, to supply instructions in the event of pregnancy at the time such treatment decisions are made, to dictate a specific length of time the incapacitated individual wishes to receive a particular treatment before having it terminated, and even to request that an individual receive visits from a pet in the event he or she is suffering from a terminal illness and unable to make that request for themselves.

Religious Considerations

Practitioners are called upon to have difficult conversations with clients on these subjects. It can be very challenging to unearth this sensitive information, particularly if the client has not been prompted to think through such decisions before meeting with the attorney. To complicate matters more, attorneys are often uncomfortable inquiring as to religious beliefs that may affect end-of-life decisions. However, to shy away from such subjects is to do a disservice to the client.

Consider, for example, a Catholic client. As part of the living will conversation, attorneys should discuss whether a Catholic client wishes to specify in their living will the ministration of last rites, which may include the Anointing of the Sick, Penance and the Eucharist. Such last rites vary by differing Catholic traditions, but each can be accommodated in a well-crafted living will. Such a living will may include the following language:

> I direct that my family, all physicians, hospitals and other health-care providers and any court or judge honor my decision to have a Catholic priest present to administer the sacrament of anointing of the sick. If it is determined that I have an incurable or irreversible condition that is likely to cause my death within a relatively short time, I direct that a Catholic priest be present to administer my last rites.

Similarly, practitioners are wise to inquire of and educate Jewish clients as to the option to specify that Jewish Law govern health-care decisions and thereby create a Halachic living will. In such a case, not only is the client naming an agent and alternate agent to communicate health-care wishes under the living will but also specifying a rabbi and an alternate rabbi or Jewish organization to provide consultation and guidance as to the end-of-life requirements of Jewish law and custom. The following language can be added to the living will to instruct health-care providers that the client wishes to observe Jewish Law at the end of their life:

> Upon the occurrence of a triggering event, all life-sustaining treatment shall be withheld or withdrawn from me in a manner consistent with Jewish Law and tradition and in consultation with a rabbi competent in Jewish Law and the field of Jewish medical ethics to be chosen by my health-care agent authorized to communicate as named herein. It is my wish that Jewish Law and custom should dictate such matters as the administration of cardiopulmonary resuscitation, the initiation or discontinuance of life-support, including tube-delivered nutrition and hydration, and the method and timing of the determination of death.

In addition, a Halachic living will may specify a client's desire that the handling and disposition of their body be made pursuant to Jewish Law and custom, including any exceptions to the general prohibition against the performance of an autopsy or organ donation.

Accounting for Pregnancy

Female clients of child-bearing age can be faced with the possibility of a pregnancy concurrent with incapacity and life-threatening injury or illness. Again, an attorney would be remiss not to discuss relevant treatment decisions in this scenario, no matter how difficult the subject. When discussing this issue, practitioners must evince such decisions as whether the client wishes to save her own life over her unborn child's life, keep herself alive until a fetus is viable outside of the womb or save the unborn fetus at all costs, including the loss of her life. Possible language to include in the living will can be as follows:

> In the event I am not in the stages of a terminal condition and I am pregnant, and life-sustaining measures can possibly allow a recovery, but such measures might result in the death of my unborn baby, I wish to have my

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Overuse of Antipsychotic Medications in Nursing Homes

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any irregularities to the attending physician and the director of nursing, and these reports must be acted upon.

With the above regulations, in conjunction with a black-box warning on these medications, the logical question is why would a nursing home give a patient either with a dementia diagnosis or showing signs of dementia such a drug? One theory is that antipsychotics are now being used as chemical restraints. These medications are being administered to control agitation and combative behavior. However, these drugs are powerful sedatives that can increase numerous adverse side effects, including but not limited to, falls, dizziness, seizures, infections, cardiovascular complications, sudden drop in blood pressure and abnormal heart rhythms.

Although a large amount of nursing home patients have some type of mental health issue that would include dementia or Alzheimer's, there are generally few staff members that have specialized training in dealing with these patients. Therefore, unfortunately, antipsychotic medications are often used as a first line of treatment, which is often not only dangerous but ineffective. Additionally, in nursing homes that are understaffed, employees are often stretched thin and it is far easier for them to administer an antipsychotic than spend the necessary time with the patient to determine what other type of interventional approach may be more effective. According to a *Boston Globe* investigative report in April 2012:

> There is a clear link between the rate of antipsychotic use in the nursing home and its staffing level. Homes that most often used these drugs for conditions not recommended by regulators had fewer registered nurses, who direct care, and nurses' aides, who provide most of the hands-on care. Nursing home specialists say it can be more time-consuming for staff to keep dementia patients calm without using drugs.

Adequate staffing within a nursing home is extremely important to the proper care of its residents. Without appropriate staffing, nonpharmacologic approaches may not be considered or properly implemented.

The overreaching recommendation is that nursing homes and staff try nonpharmacologic approaches first. For instance, agitation in a dementia patient may be a sign of pain that the dementia patient is unable to communicate to the medical staff. If this agitation is simply met with a prescription for an antipsychotic, the patient may become less agitated but their pain has not been treated or assessed. Often times, nursing home patients are unable to communicate their feelings, pain and needs. Therefore, alternatives to antipsychotic medications may simply include trying to increase exercise, using consistent staffing so the patients are comfortable with the person providing their care, taking them outside, pain management, increased socialization and activities or other environmental modifications. If this intervention is unsuccessful, then a pharmacologic strategy can be considered in conjunction with the above.

One theory is that antipsychotics are now being used as chemical restraints; they are administered to control agitation and combative behavior.

However, this should be discussed and properly explained with the patient or his or her legal representative prior to initiation.

There are, without a doubt, situations in which it is appropriate to prescribe these antipsychotic medications even without a diagnosis of schizophrenia or bipolar disorder, especially in emergency situations. However, the existence of this type of situation does not account for the prevalent practice that is currently occurring. In order to accomplish the goal of reducing the number of inappropriate antipsychotic prescriptions, a multitiered approach will be required. Not only will prescribers need to become more vigilant and only prescribe these medications where absolutely necessary, but nondrug alternatives as well as proper staffing levels will all need to be addressed. Additionally, the imposition of stronger sanctions may be necessary in order to truly reduce the inappropriate use of these medications.

Family members and loved ones of nursing home patients can take steps to prevent the unnecessary use of antipsychotic medication. First, look for signs. If your loved one is suddenly lethargic, disoriented or has a change in mental status, ask if medications have changed or if new medications have been added. Second, do not be afraid to ask questions. If you have concerns regarding your loved one, those concerns should be expressed and addressed. Third, personalize your loved one to staff. I think it is important to tell the staff about your loved one and the things he or she enjoyed prior to the stay in the nursing home. I would also make the staff aware of the things that generally relax or upset your loved one. This may enable staff to create a more personalized care plan for your loved one that does not include antipsychotic medications as a first line of treatment. ■

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> life preserved over that of my unborn baby.

A living will can be drafted to allow for the mother's life to be preserved until such time as a viable fetus can be removed by including such language as follows:

> If, upon the occurrence of a triggering event, I am pregnant, and life-sustaining measures can possibly preserve the life of my baby, I would like to receive life-sustaining treatment until the baby can be removed. Once the baby is removed, I do not want to receive life-sustaining treatment if a triggering event has occurred.

Again, as a legal document governed by common law, it is not only possible but preferable to customize end-of-life treatment decisions in a way that provides comfort and peace of mind for the client. For example, many clients do not wish to receive life-sustaining measures indefinitely but would like to receive artificial feeding and nutrition for some length of time. In such a case, the practitioner should consider adding the following language:

> If I shall in the future sustain substantial and irreversible loss of mental capacity and I am unable to eat or drink without assistance, and tube(s) or other artificial means are required to feed me, and it is highly unlikely that I will ever be able to eat and drink without artificial feeding, then I wish all life-sustaining treatment be administered to me for a period not to exceed two (2) months, after which, if I still am unable to eat or drink without assistance, and tubes or other artificial means still are required to feed me, and it remains highly unlikely that I will ever be able to eat and drink without artificial feeding, then I wish to be removed from all life-sustaining treatment.

Conclusion

Practitioners in the fields of elder law and estate planning know that nothing is more important than honoring a person's last wishes. Appreciating that one size does not fit all in end-of-life decisions is critical to good lawyering. Accommodating all the varieties and permutations of end-of-life decision-making is possible with awareness of the issues and options, open and honest conversation, and sensitive drafting. As the court stated in *Matter of Westchester County Medical Center on Behalf of O'Connor*, "[n]othing less than unequivocal proof will suffice when the decision to terminate life support is at issue." As a writing that provides clear and convincing evidence of a person's wishes, it is critical that the attorney-draftsperson bring forth and examine clients' specific wishes and beliefs and tailor living wills to accommodate and reflect such directives. ■