Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

December 2010 | www.nassaubar.org | Vol. 60, No. 4

Follow us on facebook

OF NOTE

NCBA Member Benefit – I.D. Card Photo
Obtain your photo for court identification cards at NCBA Tech Center. Cost $10.
January 11, 12, & 13 • 9 a.m.-4 p.m.

EVENTS

Bridge-the-Gap Weekend
Jan. 22 & 23, 2011 at Domus
See insert

Suddenly Solo-What do I need?
Information Service Fair
Feb. 1, 2011

WE CARE Children's Holiday Party
Feb. 23, 2011 at Domus
See insert

Moot Court Competition
March 22 & 23 at Domus

Law Day
Thursday Evening, April 28, 2011
at Domus

WHAT'S INSIDE

Alexandr Otchaynov (second from l.), the Vice Consul, Chief of Legal Affairs Bureau for the Consulate General of Russia, is among the international dignitaries welcomed to Domus last month. Greeting him in the Great Hall are NCBA President Marc Gann, BOLD Task Force member Olga Ruh, and BOLD Co-Chairs Howard Brill and Linda Nanos. (Photos by Hector Herrera)

From Around the World to Domus –

Foreign Dignitaries Connect with NCBA

By Valerie Zurblis

For the first time, Domus opened its doors to the world and the world came – or so it seemed – when high level dignitaries from countries around the globe arrived for a special luncheon and CLE seminar on November 18. Consuls general, vice consuls and other dignitaries from China, India, Russia, Ukraine, The Philippines, Haiti, Jamaica and Mexico were introduced to NCBA's attorneys and judges as a first step to building a relationship, and to educate the foreign consuls about the legal resources available to them and to their nationals at the Nassau County Bar Association. The goal of the CLE program was also to educate NCBA members about responsibilities when representing clients who are not U.S. citizens.

The intense excitement was created through the hard work of the BOLD Task Force. "All the consuls commented on the extraordinary warmth and camaraderie of members and said thank you, thank you so much for putting this event together," reported BOLD Co-Chair Howard Brill. "I found that all the consuls I spoke with, in particular the Philippines and Mexico, want to participate in and build a solid relationship with NCBA."

Andrij Szul, who spearheaded the Foreign Consulate Project as part of the

See FOREIGN CONSULATE, Page 2

M. Yvette Pacheco, Director of the Nassau County Homeownership Center and BOLD Task Force member, talked about housing and mortgage foreclosures on Long Island with Hon. Miguel Medrano, Chief of Criminal Affairs, Protective Services, Consulate General of Mexico. "He was so impressed with our Mortgage Foreclosure Legal Consultation clinics, and said he would like to come and see it in action," she noted.

Consul Hon. Wang Bangfu, Consulate General of China made a new friend with BOLD guide Yuh Tyng Tsuei.

UPCOMING PUBLICATIONS COMMITTEE MEETINGS

Jan. 13, 2011 • Thurs., Feb. 10, 2011 – 12:45 at Domus

The Lawyer Assistance Program provides confidential help to lawyers and judges for alcoholism, drug abuse and mental health problems. Call 1-888-408-6222. Calls are completely confidential.

Courtside Election Results

Hon. Daniel Palmieri and
Hon. Norman Janowitz
were elected to the Supreme Court.

Hon. Edward McCarty was elected Surrogate.

Hon. Merik Aaron was elected to Family Court.

Hon. David W. McAndrews and
Hon. Margaret C. Reilly
were re-elected to District Court.

Helen Voutsinas was elected to District Court.

The Nassau County Bar Association would like to offer congratulations to all!

The Judicial induction ceremony will take place as follows:

Supreme and Surrogate's Court
January 10, 2011 at 2:00 p.m.

Family and District Court
January 11, 2011 at 2:00 p.m.

Nassau County Supreme Court
Central Jury Courtroom
100 Supreme Court Drive
Mineola, NY 11501

For further questions about the induction ceremonies contact:

Dan Bagnuola, Director of Community Relations
Nassau County Courts
100 Supreme Court Drive. Mineola, NY 11501
516-571-1478

FOREIGN CONSULATE ...

Continued From Page 1

BOLD Initiative, agreed. "All the consulates felt welcomed," he said. "In my 25 years of working with consuls, this is the first time I know of that a local bar association has reached out to foreign dignitaries like we did today."

Deputy Consul General Hon. Dr. Ajay Gondane, Consulate General of India, is greeted by BOLD's Hon. Elizabeth Pessala and Jasleen Kaur Anand.

"The program's success far exceeded anyone's expectations," noted NCBA President Marc Gann. "This groundbreaking event not only was an educational experience for the dignitaries but, equally as important, also afforded them an opportunity to meet their counterparts face to face, exchange information and make plans for future collaborations. Likewise, NCBA members had a rare opportunity to speak directly with foreign officials about specific legal issues and mutual interests."

Mindful of the intricacies of diplomacy and the need for politically correct protocol, a special committee was convened to review the myriad details necessary for this program's success. How to address the dignitaries, what type of food to serve, where to seat them, and security measures all had to be considered. Members of the BOLD Task Force with appropriate background or language competence were enlisted to serve each consul general as personal guides during the visit.

Each dignitary was greeted in the lobby of Domus by the BOLD co-chairs and the assigned guide. Photos were taken of the officials with the NCBA President before going to a private reception area. About 100 NCBA members and a dozen jurists representing Supreme, County, District and village courts in Nassau County, were in attendance at the seminar. "The best thing about this program was having the opportunity to talk about Nassau County to the consuls," noted NCBA Secretary Hon. John Kase.

The Nassau Academy of Law presented an informative Dean's Hour program on "Requirements of Foreign Consulate Notification Upon Arrest/Detention of a Foreign National." The foreign dignitaries were extremely grateful and appreciative for the information, many taking copious notes on the information presented by

BOLD's Haitian Creole-speaking Carrie Solages (c.), who was a key player in BOLD's earlier seminars on Temporary Protected Status (TPS) for the Haitian community, welcomes Vice Consul Hon. Myriam Alexis and Consul General Hon. Felix Augustin, Consulate General, Republic of Haiti. "We learned the most important information here today," Augustin commented. "I will be happy to help get the word out about what the Nassau Bar offers for the Haitian community, where the people are usually hesitant to do anything that involves government officials, such as filling out forms."

Catherine May Co (r.), the only NCBA member fluent in Tagalog, was thrilled to be asked to escort two consuls from the Consulate General of The Philippines. BOLD Co-Chair Howard Brill (second from r.) and Co greeted Consuls Hon. Zaldy Patron and Leandro Lachica, Esq. "It was a terrific opportunity to reach out to my country a little more, and made me feel proud," Co said.

Peter Tomao, Paul Delle and Andrij Szul. They were impressed with the Nassau County Bar Association's dedication to helping the public, and indicated their desire to work with the Bar. The Haiti dignitaries agreed to help promote the December 6 Mortgage Foreclosure Clinic, in which BOLD is reaching out to the Haitian Creole community. The Philippines, Indian and Mexican officials also commented that they wanted to continue the relationship with NCBA, to exchange information and help each other.

"A program like this pulls everyone together," remarked Chandra Ortiz, who attended because she was interested in the topic, "and demonstrates that we're all a part of one another. We're not so far apart from each other."

NCBA launched the BOLD (Bridge Over Language Divides) Task Force last year in an effort to incorporate a variety of foreign languages into the NCBA's community outreach to serve more effectively an increasingly diverse public whose primary language is other than English. The Foreign Consulate Project is but one of several projects that BOLD is advancing.

NCBA President Marc Gann, who greeted every consular dignitary personally, here poses for a photo with NCBA Executive Director Dr. Deena Ehrlich, Hon. Tracey Blackwood, Deputy Consul General, Consulate General of Jamaica with her BOLD guide David Gabor.

"The BOLD Initiative created an awareness of the untapped resources here at the Bar and underscored all the Bar offers for our members and the community," said BOLD Co-Chair Linda Nanos. "Through BOLD, the NCBA is strengthening its reputation as a place where all residents of Nassau County, regardless of their national origin, can gain an understanding of legal issues that are often complicated but that affect their lives – and in their native tongue."

The work involved in reaching out to the various consulates, tracking down names and phone numbers, sending letters and emails and making phone calls, all ensured a strong turnout for the event. In addition to the BOLD Task Force members, special thanks go to Executive Director Deena Ehrlich, Community Relations and Public Education Director Caryle Katz, Nassau Academy of Law Director Barbara Kraut, Director of Marketing and Public Relations Valerie Zurblis, and House Manager and Photographer Hector Herrera. Any member interested in joining the BOLD Task Force may contact Caryle Katz, 516-747-4070 x211 or ckatz@nassaubar.org.

Vice Consul Hon. Constantine Vorone, Consulate General of Ukraine, is greeted by BOLD Task Force member Susan Katz Richman, NCBA President-Elect and NCBA President Marc Gann.

Thanking Jurors For Their Service

NCBA President Marc Gann addressed jurors in Central Jury on November 15 about the importance of their service to the legal system of justice as part of the annual Juror Appreciation Week at the Nassau Courts. Afterwards jurors were treated to coffee and pastries in the lobby of Supreme Court, courtesy of the Nassau County Bar Association. (Photos by Hector Herrera)

NCBA New Members

We welcome the following new members

Attorneys

Rachael E. Dioguardi
Emmet Donnelly
John Edmund Lavelle
Stacey Lipitz Marder
Thomas A. O'Rourke
Gabrielle Beth Ruda
Luigi Vigliotti
Edward Wiener

Students

Jacqueline Lilliana Aguilar
Emily Bennett
Matthew J. Crawford
Johanna C. David
Brionna L. Denby
Leor Oved Edo
Adam D Kahn
Ross S Kaplan
Meghan Nichole LaFronz-Emberger
Lauren E. Manning
Douglas Marquez
Stephanie Reilly
William R. Reinken
Andrew Klay Sonpon Jr.
Alison M. Zwiren

Trusts & Estates/Elder Law/Health & Hospital Law Focus

Family Health Care Decisions Act

A surrogate decision-making framework

New York State recently passed a new public health law regarding health care decisions for individuals who lack capacity to make their own decisions and who have not appointed a health care agent to act on their behalf. The Family Health Care Decisions Act ("FHCDA"), codified under Article 29-CC of the Public Health Law and effective as of June 1, 2010, establishes a decision-making process in which a surrogate[1] is selected and authorized to make health care decisions for such a patient. This article highlights critical aspects of the new law.[2]

Jennifer B. Cona

Priority of Decision

A Health Care Agent appointed under a Health Care Proxy has decision-making priority under existing law before looking to the new Family Health Care Decisions Act ("FHCDA"). Health care providers are required to make reasonable efforts to determine if there is an appointed health care agent and to contact that agent before looking to the FHCDA and relying on a decision made by a surrogate.

Determination of Incapacity

A determination that an adult patient lacks decision-making capacity must be made by an attending physician. The physician must determine, to a reasonable degree of certainty, that: 1) the patient lacks decision-making capacity; 2) the cause and extent of the incapacity; and 3) the likelihood that the patient will regain decision-making capacity.

If the patient is in a Residential Health Care Facility ("RHCF"), in addition to the attending physician's determination, a health or social services practitioner must also independently determine whether the patient lacks decision-making capacity. If the patient is in a hospital, in addition to the attending physician's determination, a health or social services practitioner must independently determine whether the patient lacks decision-making capacity only if the surrogate's decision concerns the withdrawal or withholding of life-sustaining treatment. In either case, if there is a disagreement between the attending physician and the independent determination of incapacity, the matter must be referred to the Ethics Review Committee if it cannot be resolved.

Under the FHCDA, notice that a surrogate will make a health care decision must be promptly given to the patient and at least one person on the surrogate priority list, (which is described below) in the highest order of priority.

A determination of incapacity under the FHCDA is for health care decision/surrogate appointment purposes only under this law. Such determination is not to be construed as a finding that the patient lacks capacity for any other purpose.

A patient's own expressed wishes will continue to have priority. A patient can object: 1) to the determination that s/he lacks decision-making capacity; 2) to the choice of surrogate; or 3) to the health care decision made by the surrogate. The patient's objection will prevail unless a court has determined that the patient lacks decision-making capacity or the patient has been adjudicated incompetent.

The determination of a lack of decision-making capacity is intended to govern only that one health care decision. A continued lack of decision-making capacity must be confirmed by an attending physician for any subsequent medical issues and/or decisions. Further, an independent determination of a continued lack of decision-making capacity must be made if subsequent decisions concern the withholding or withdrawal of life-sustaining treatment.

Priority of Surrogate Decision Makers

The FHCDA sets forth a priority order of decision-makers as follows:

1. A Legal Guardian appointed under Article 81 of the Mental Hygiene Law.

2. A person 18 years or older designated orally by the patient if made in the presence of two adult witnesses (which may be employees of or affiliated with the facility at which the patient is receiving treatment but who cannot be designated as the surrogate) and those witnesses affirm that the patient reasonably appeared to have decision-making capacity to make such a designation. The orally designated person can be further down on the priority list provided a higher-priority person does not object.

3. A person 18 years or older designated by a person of higher priority on the list provided no other person in a higher priority position objects.

4. A spouse[3] or domestic partner

5. A son or daughter over the age of 18

6. A parent

7. A brother or sister over the age of 18

8. A close relative or close friend

Restrictions on Who May Be a Surrogate

An operator, administrator or employee of a hospital/RHCF or a physician who has privileges at the hospital or a health care provider under contract with the hospital may not serve as the surrogate for a patient at such hospital unless such individual is related to the patient by blood, marriage, adoption or is a close friend whose friendship preceded the patient's admission to the facility. If a physician serves as the surrogate, he/she may no longer act as that patient's attending physician.

Scope of Authority

The surrogate will have authority to make any and all health care decisions that the patient could make. However, health care providers are not obligated to seek the consent of the surrogate if the patient has already made a decision about the proposed health care, either orally or

See FHCDA, Page 18

Testamentary substitutes and the right of election

New York Estates Powers and Trust Law ("EPTL") Section 5-1.1-A provides a right of election for the surviving spouse to take a share of his or her spouse's estate, no matter what the will provides. The current law pertaining to the right of election states that the elective share of the surviving spouse is the greater of one-third of the net estate, as augmented by the statute, or Fifty Thousand Dollars ($50,000). However, if the estate is less than Fifty Thousand Dollars ($50,000), the elective share is the value of the net estate.[1] In computing the net estate, debts, administration expenses and reasonable funeral expenses are deducted, but all estate taxes are disregarded.[2]

The amount to which the spouse is entitled under the elective share is, of course, reduced by any interest which passes outright to the spouse, whether by the decedent's will, testamentary substitute or intestacy.[3]

If a spouse exercises her right of election under the will, the election negates any interest which would have passed to the spouse by any means other than outright or absolutely, as though the surviving spouse had died on the same day as the decedent but prior to the decedent.[4] For example, if the decedent's will created a trust for the surviving spouse and the spouse exercised her right of election, the trust would be interpreted as though the surviving spouse died before the decedent.[5]

Sharon Kovacs Gruer

The right of election applies to probate assets and to other assets deemed "testamentary substitutes."[6] Testamentary substitutes include gifts causa mortis, gifts made in the year prior to the decedent's death, Totten trust accounts, joint bank accounts, property held jointly or payable to another upon death, assets transferred by the decedent in which she retained the right to income for life, retirement accounts, assets in which the decedent held a general power of appointment and transfer-on-death (T/O/D) or payable-on-death (P/O/D) accounts or securities. These testamentary substitutes are added back into the net estate for purposes of calculating right of election of the surviving spouse.

1. Gifts *causa mortis*

Gifts made by the decedent in contemplation of death are considered testamentary substitutes.[7]

2. Gifts Within One Year of Death

Transfers of property made within one year of the death of the decedent to the extent that the decedent did not receive adequate and full consideration for the gift are considered testamentary substitutes.[8]

3. Totten Trust Accounts

Funds deposited, together with dividend and interest, in a bank account in the name of the decedent in trust for another person which remain on deposit as of the date of the decedent's death are considered testamentary substitutes.[9]

4. Joint Bank Accounts

Money deposited after August 31, 1966, with a bank or savings and loan association, together with dividends and interest, in the name of the decedent and another person and payable on death to the survivor, which remain on deposit as of the date of the decedent's death, are considered testamentary substitutes to the extend of the decedent's contribution.[10]

5. Property Held Jointly Or Payable To Another On Death

Any disposition of property made after August 31, 1966, by the decedent and held at the decedent's date of death by the decedent and another person as joint tenants with a right of survivorship or as tenants by the entirety, or property held by the decedent which is payable on the decedent's date of death to a person other than the decedent or his or her estate, to the extent of the consideration furnished by the decedent.[11]

EPTL §5-1.1-A(b)(3) provides that United States Savings bonds and other United States obligations held jointly or payable upon death are included in the

See RIGHT OF ELECTION, Page 14

‘Uncle Sam (Deena that is)’ Wants You! … And Wants to Help You!

From the President

Marc C. Gann

During the first six months of my term as President of the Nassau County Bar Association, I have come to see first hand the extraordinary efforts of our staff and members in providing assistance to the public and the bar. Whether it be the WE CARE Fund, the Mortgage Foreclosure Clinic, the Senior Citizens Clinic or our various mentor programs, our members and staff must be commended in this holiday season for all that they do. But there is always a need for more…and so many of you have answered the call.

Most specifically, I have been struck by the effect that the “Great Recession” has had on the legal community. At every event that I have attended, I have encountered members of our profession who have lost their jobs and who are out of work. In addition, the numbers of recently graduated law students who are unemployed has increased exponentially. At Domus, we will continue to address these issues by creating additional networking programs and opportunities. I am convinced that this is the best avenue to create opportunity whether through a committee meeting, our career center, mentoring program, Young Lawyers activities or CLE events.

One such event that has gotten off to a running start is the “Legal Leaders – Creating Opportunities for Success” program. This is a series of free programs that we are sponsoring in conjunction with the Long Island Council of Bar Leaders aimed at networking between those who are unemployed and various members of the local legal community. I want to thank the Hon. Kathleen Rice, Lois Schlissel, Joe Ortego, Vernadette Horne, Michael Ende, Christina Sittner, Christopher Clarke, Marian Rice, John McEntee, Helen Voutsinas, Rick Ostrove, Peter Mancuso and Milagros Ocasio for making the first program, “Getting a Job – What do you want from me?”, such a huge success. We were able to provide one free CLE credit and have a distinguished panel discuss how they obtained their positions, followed by discussion groups which provided great networking opportunities.

The subsequent programs will be “Suddenly Solo” and “Rainmakers”. In “Suddenly Solo”, we will be providing an array of services necessary to open a law practice as well as discussion and networking with local practitioners who have successfully started their own practices. “Rainmakers” will highlight attorneys who are successful businessmen and women describing the various ways in which one can enhance one’s practice and suggest networking opportunities. Again, these are free programs offering CLE and superb networking with attorneys from all types of practice areas. Keep your eye out for these events.

I am convinced that the more time you spend at Domus, the greater your chances for success. Out wonderful staff led by “Uncle Deena” are always ready to help. In addition, the success stories of those members who use Domus as a resource is remarkable. Please take advantage of all we have to offer.

I wish everyone a happy and healthy holiday season.

The Bar Welcomes the Supreme Bench

Each year, member attorneys have the unique opportunity to meet with Nassau County’s top judiciary outside the courtroom at the Nassau County Bar Association’s Annual “Lunch with the Supremes.”

On November 16, 26 judges from Nassau County’s Supreme Court made the annual trip to Domus to informally socialize with and enjoy the warm hospitality of NCBA members. (Photos by Hector Herrera.)

Lawyer Assistance Program

Free Confidential Help Exclusively for Attorneys Call the 24-Hour Hotline 888.408.6222

Nassau Lawyer

The Official Publication of the Nassau County Bar Association
15th & West Streets
Mineola, N.Y. 11501
Phone: (516) 747-4070
Fax: (516) 747-4147
www.nassaubar.org
E-mail: info@nassaubar.org

Published by Long Island Business News
(631) 737-1700; Fax: (631) 737-1890
Publisher
John L. Kominicki
Associate Publisher
Kathleen Gobos
Graphic Artist
Nancy Wright

Nassau Lawyer (USPS No. 007-505) is published monthly, except combined issue of July and August, by Long Island Commercial Review, 2150 Smithtown Ave., Suite 7, Ronkonkoma, NY 11779-7348, under the auspices of the Nassau County Bar Association. Periodicals postage paid at Mineola, NY 11501 and at additional entries. Postmaster: Send address changes to the Nassau County Bar Association, 15th and West Streets, Mineola, NY 11501.

Trusts & Estates/Elder Law/Health & Hospital Law Focus

The New York State Physician Profile: A practitioner's guide

After some highly publicized cases involving "bad outcomes" by physicians with prior disciplinary histories which were otherwise unknown to the public, in particular the Lisa Smart matter of 1997, the New York State Legislature passed and Governor George Pataki signed into law, the New York Patient Health Information and Quality Improvement Act of 2000 (the "Act"), creating what we now know as the New York State Physician Profile ("the Profile").[1]

David A. Zarett

The Act can be found at New York Public Health Law § 2995 *et seq*. ("the Profile Statute") and its regulations can be found at Title 10 N.Y.C.R.R. 1000 *et seq*. (hereinafter, the "Profile Regulations"). In general the Profile is a publically available online database which contains a wealth of information about every physician licensed in New York State, including background on a physician's medical education and training, board certification, medical staff privileging, and legal actions taken against the physician such as medical malpractice awards or settlements.[2] In February 2002, some two years after the Act was signed, the Profile went live.[3] The stated purpose of the Profile is to provide patients with information about health care providers and thereby improve the quality of health care in New York State.[4]

Data Collected-Initial Data and Updating Requirements

The data collected in the Profile spans from "required data," such as education and board certification, to "optional data" such as publications and a statement by the physician. Significantly, New York Public Health Law § 2995-a (7) states that a physician who provides materially inaccurate information to the Profile is guilty of professional misconduct. One explanation for this particular provision is that the information maintained by the Profile is based on the information reported by the physicians in their initial profile submission upon licensure (10 N.Y.C.R.R. 1000.4) and pursuant to the physician's self-updating requirements (10 N.Y.C.R.R. 1000.5).

The initial Profile information is collected in accordance with 10 N.Y.C.R.R. 1000.4, which states that the Department of Health will send an initial profile survey to every newly licensed physician in the State of New York. This initial profile survey was also sent to all currently licensed physicians when the Act became law in 2000. For many physicians, this initial Profile survey is the only time that they provide information to the Profile, however, the Profile Regulations provide for more frequent updating. Pursuant to 10 N.Y.C.R.R.1000.5, physicians licensed in the State of New York are required to notify the Profile of any change in their "non-optional" information within 30-days. Any change in "optional information" must be reported to the profile within 365 days.[5] Finally, as a condition of license renewal, physicians are required to update their Profile information within six months prior to the expiration date of their registration period.[6]

Joshua A. Boxer

Physicians can update their Profile information by contacting the Profile customer service center and obtaining a Physician Survey Form. The Physician Survey Form is a ten-page form which lists all the information a physician will find in their Profile and allows for modifications which are then submitted to the Profile for updating.[7] There is also an online updating option which requires that the physician obtain a username and password from New York State.[8]

How is the Profile Utilized?

The Profile is utilized by patients, insurance payors, hospitals and physician rating/review websites (such as healthygrades.com and vitals.com), amongst others. The Profile has vastly increased the amount of data available to the public regarding physicians licensed in the State of New York. While many utilize the Profile, the information on the Profile is primarily based on self-reported data.[9] Failure of physicians to timely self-report to the Profile has an obvious negative effect on the ability of patients to make informed decisions regarding their choice in practitioner and puts into question the accuracy of the information presented by physician ratings websites. It also puts physicians at risk for not following the Profile updating requirements. Attorneys representing physicians would be wise to remind their physician clients to confirm the accuracy of their profiles and to timely update their profiles. But that is easier said than done due to the lack of regulatory guidance about Profile updating.

Practical Guidance

There is confusion about what information needs to be updated to the Profile and when such updating responsibilities are triggered. One such area of confusion which we have encountered in our practice relates to New York Public Health Law § 2995-a(1)(d), the reporting of hospital privileges restrictions. Any restriction or loss of a physician's hospital privileges constitutes non-optional information which requires updating to the Profile within 30 days.[10] Recognizing physicians' due process rights to challenge a disciplinary action taken against their privileges by a hospital, New York Public Health Law § 2995-

See PROFILE, Page 15

Join us on Saturday, May 7, 2011 at our Annual 112th Dinner Dance.
On the occasion of the 112th Dinner Dance of the Association, we take pride in honoring eighty-nine members who are celebrating the 50, 60 & 70 year anniversary of their admission to the Bar.
Please join us in celebrating with them on Saturday, May 7, 2011.

50 YEAR RECIPIENTS

Robert A. Akeson
Richard H. Bakalor
Lionel G. Batley Jr.
Walter Black
Edward C. Bond
Aaron Britvan
Donald T. Brudie
Hon. Gregory W. Carman
Joseph R. Carrieri
Walter J. Carroll
Lloyd K. Chanin
W. Shelby Coates Jr.
Thomas Dell Aquila
Anthony P. DeRiggi
Thomas P. Dougherty
Stephen V. Dubin
Saul Edelstein
Lawrence E. Elovich
Ronald A. Friedman
Francis J. Heneghan
Lawrence M. Lally
William F. Levine
Stanley C. Lipton
Sue K. Luskin
Paul W. Lynch
David C. Marx
Donal F. McCarthy
Peter J. Merani
Richard M. Naness
Marvin Natiss
Hon. Donald D. Olman
Robert M. Orens
Benedict J. Pollio
Hon. John P. Reali
H. Regenstreif
Michael J. Ricigliano
Edward T. Robinson III
John Kenneth Rode
Peter D. Rubinton
William T. Ryan
J. Leonard Samansky
Elliot D. Samuelson
Salvatore Spano
Robert R. Spina
Timothy W. Sullivan
Nathaniel M. Swergold
M. David Tell
Frederick S. Tomasone
Benjamin Vinar
Matthew Jay Warmund
Marcel Weber
Leonard Weinstock

60 YEAR RECIPIENTS

Leon Applewhaite
Marvin V. Ausubel
Theodore D. Bennett
Donald M. Booxbaum
Jack I. Bornstein
Edward P. Bracken Jr.
Morris J. DeNardo
Hon. Andrew J. DiPaola
Hon. Dorothy D.T. Eisenberg
Raymond J. Ellmer
Hon. Marilyn R. Friedenberg
Theodore Gilberg
Lawrence I. Hammer
Hon. Raymond Harrington
Julius B. Kamhi
Bernard C. Kass
Shirley Kellner Kay
George W. Kelly
Robert Kornbluth
Robert Lewis
Julius L. Mintz
Lawrence J. Mittenthal
Hon. James F. Niehoff
Erwin Popkin
Melvin S. Popper
Joshua A. Rednor
Irvin H. Rosenthal
Marvin Ross
George R. Ruditz
Edward P. Schroeder
Harold L. Sokoloff
Herbert Stone
Marshall D. Sweetbaum
Robert Tesori
David J. Tubridy

70 YEAR RECIPIENTS

Hon. Aaron B. Cohen
Thomas D. Conway

CALL FOR NOMINATIONS

The Nominating Committee welcomes applications for nominations to the following Nassau County Bar Association offices for the 2011-2012 year:

❑ President-Elect
❑ First Vice-President
❑ Second Vice-President
❑ Treasurer
❑ Secretary

Applications are welcome for nominations to serve on the Nassau County Bar Association Board of Directors. There are eight available seats, each for a three year term and one seat for a one year term.

The Nominating Committee invites applications for nomination to the following offices of the Nassau Academy of Law for the year 2011-2012:

❑ Dean
❑ Secretary
❑ Associate Dean
❑ Treasurer
❑ Assistant Dean (3)
❑ Counsel

NCBA members interested in applying for any of the above nominations, or in submitting suggestions for such nominations, are invited to submit such information to Emily F. Franchina, Chair Nominating Committee, at NCBA, 15th & West Streets, Mineola, NY 11501 or email: spagano@nassaubar.org.

Deadline for all nominations is January 14, 2011.

l-r: Tamar Khulordava (Facilitator), Judge Lali Bestavashvili, Judge Luiza Todua, Pres. Gann, Judge Areshidze, Judge Nikoloz Marsagishvili, Judge Giorgi Ebanoidze.

Republic of Georgia judges get a taste of Domus hospitality

Nassau County Bar Association President Marc Gann was on hand to formally welcome five judges from the Republic of Georgia, who visited Domus last month to experience the camaraderie of our professional association as part of the Open World Program. During their stay in the United States, the Georgian officials examined the United States legal system by meeting with judges, attorneys, faculty, and law students.

President Gann remarked that, apparently due to recent political upheaval and changes in the court personnel in Georgia, he was surprised to find that these judges were relatively young, the oldest at 32 years. "They appeared to be wiser than their ages, and they were most appreciative of our efforts to teach them our system of justice," he noted.

BOLD (Bridge Over Language Divides) Task Force Members Olga Ruh and Hofstra Law student Anna Demidchik, who are both fluent in Russian, were called in to help translate.

The Open World program enables emerging Eurasian political and civic leaders to work with their U.S. counterparts and experience American-style democracy at the local level. This group trip was organized by NCBA member Jeffrey Dodge of Hofstra Law School, and was hosted by Hofstra along with Judge Joanna Seybert of the Eastern District of New York.

Five County Bars unite efforts

Two dozen officers, executive directors and board members from county bar associations including Nassau, Suffolk, Queens, Brooklyn and Richmond (Staten Island) were invited to meet here at the Nassau County Bar Association last month for a special dinner to explore how best these groups could collaborate and work together on topics of common interest. NCBA President Marc Gann indicated that the coalition of the "5 Bars" will be an important resource to address regional issues and concerns and all agreed to meet annually. (Photo by Hector Herrera)

Trusts & Estates/Elder Law/Health & Hospital Law Focus

Estate of Schneider v. Finmann

A direct breach of the front lines of privity? No – more of a flanking action.

"Fortress Privity," which had protected estate planning attorneys and others against malpractice suits brought by injured parties after the client's death, relied on the rock-solid foundation set forth in Estate of *Spivey v. Pulley*, 138 A.D.2d 563, 564 (1988). Set in concrete was the rule in *Spivey*, which proclaimed that "absent fraud, collusion, malicious acts or other special circumstances," an attorney is not liable to third parties, not in privity with the attorney, for harm caused by professional negligence. [*See also*, *Deeb v. Johnson*, 170 A.D.2d 865 (1991).]

Donald J. Farinacci

Nevertheless, stout-hearted fiduciaries and beneficiaries of estates, having suffered many rebuffs, did not retreat. For decades, their battalions gallantly mounted one direct assault after another against the well-entrenched battlements of the impenetrable wall of privity.

In venues far and wide, plaintiffs had tested and probed the formidable defenses of "Fortress Privity," searching for weaknesses. Then, suddenly, their hopes were buoyed by a defendant-attorney who apparently counseled his client to transfer a one million dollar life insurance policy back into the client's name alone. The client then died, sorely accursed by the dreaded affliction known as "incidents of ownership." So grievously wounded was the estate by deep lacerations of additional estate taxes, that the executor, seized by the punctilio of an honor most sensitive, did file his lawsuit against said attorney.

Privity's line of defense held firm and repelled the estate's attack in the initial foray in Nassau County Supreme Court. Plaintiff was not in privity with defendant, announced the court, and added that none of the *Spivey* exceptions were present either. Nor could the estate avail itself of a viable cause of action held by decedent for legal malpractice, for the alleged damage was an increase in estate taxes, which meant the cause of action accrued only after decedent's death. The estate's forces, having regrouped to again assail the barrier of privity in the Appellate Division, were once again repelled. The action could only have been brought while decedent was alive, decreed the court, and may not be maintained under EPTL 11-3.2(b). *Estate of Schneider v. Finmann*, 60 A.D.3d 892, 876 N.Y.S.2d 121 (2nd Dept., 2009).

But, then came the decisive battle in the Court of Appeals, wherein the Appellants eschewed a direct assault upon the defenses of privity in favor of a flanking action. The top court reaffirmed the continuing necessity for privity, while stating, in *Estate of Schneider*, that there was privity between attorney and client because the client had been damaged during his lifetime, citing such things as the cost to the client of retaining another attorney to correct the problem and legal fees already paid to the allegedly negligent attorney. The Court of Appeals held that the cause of action had accrued, therefore, during the decedent's lifetime, giving his personal representative the derivative power to sue on behalf of his estate.

The court, however, extended no open invitation to every variety of plaintiffs to pursue "malpracticing" attorneys. Privity stands unbowed, blocking the way of third parties, such as beneficiaries of the estate. Only personal representatives of a decedent's estate may circumvent the wall of privity by suing as decedent's representatives for causes of actions accruing during his lifetime. That class of plaintiffs achieved victory, not by directly smashing through the wall of privity, but rather by outflanking it. *Estate of Schneider v. Finmann*, ... N.Y.3d ..., N.Y.S.2d ...., 2010, NY Slip Op 05281 (June 17, 2010). The rule of "strict privity" remains in effect.

Donald J. Farinacci is the Estates and Trusts Partner at the Mineola law firm of Bee Ready Fishbein Hatter & Donovan, LLP, in Mineola. He is also a fellow of the American College of Trust and Estate Counsel.

New York State Family Health Care Decisions Act

The New York State Family Health Care Decisions Act may impact unsuspecting clients of attorneys and accountants. It is the result of a history of conflicts between hospitals and families of patients without an executed health care proxy.

Stephanie M. Reilly Keating

It applies to health care provided in a public hospital to a patient lacking health care decision-making capacity.[1] Under certain conditions, a private hospital and individual health care providers are not required to follow this statute.

Prior to relying upon a surrogate, health care providers makes reasonable efforts to determine whether a health care agent has been appointed.[2] If they cannot locate a health care agent, they will rely upon the surrogate.[3] The surrogate is selected to make health care decisions on behalf of a patient. They notify the physician of their decision orally or in writing.[4] If it is later determined the decision-making is regained by the patient, then the authority of the surrogate ends immediately.[5]

Generally, every adult is presumed to have decision-making capacity.[6] An initial determination is made by the physician to a reasonable degree of medical certainty.[7] This includes an assessment of the cause and extent of the patient's incapacity, and the likelihood they will regain capacity.[8] The initial determination sometimes is subject to a concurring determination.[9] Next, notice is given to the patient; to a person on the surrogate list highest in priority; and if transferred from a mental hygiene facility, to that director of the facility.[10] Generally, unless a court determined the patient lacks capacity, if the patient objects to the determination of incapacity, or choice of a surrogate or to health care decision made by the surrogate, the patient's objection or decision prevail.[11]

Pursuant to the New York State Family Health Care Decisions Act, the surrogate chosen to act on behalf of the patient is selected from a list. The first available person listed highest in priority is named surrogate. This statutory list is the following: 1) guardian under Article 81 of NYS Mental Hygiene Law; 2) spouse, if not legally separated, or domestic partner; 3) son or daughter, age 18 or older; 4) parent; 5) brother/sister, age 18 or older; or 6) close friend.[12] A close friend is "any person, age 18 or older, is a close friend or a relative of the patient (other than spouse, adult child, parent, brother/sister), who maintained regular contact with patient and is familiar with patient's activities, health, religious or moral beliefs, and presents such a signed statement."[13]

If the general hospital physician does not agree with the surrogate's decision, there are additional confidential

See SURROGATE, Page 14

IN BRIEF

Member Activities

Christopher T. McGrath, a partner in the firm of Sullivan Papain Block McGrath & Cannavo P.C., was recently selected in the 2011 edition of The Best Lawyers in America. Mr. McGrath was also recently named to the 2010 issue of the New York Super Lawyers which is awarded to the top five percent of attorneys in the state who have attained a high degree of peer recognition and professional achievement. He has also been featured in the New York Times Long Island's Ten Leader's in Civil Trial Law. Mr. McGrath is a past president of the Bar Association, past chair of the Medical-Legal, Supreme Court and Judiciary Committee and is a member of the Character and Fitness Committee for the Second, Tenth and Eleventh Judicial Districts. He is also a special professor of law teaching New York Civil Practice and Advanced Torts at Hofstra University School of Law.

Hon. Stephen L. Ukeiley

Stephen P. Scaring, senior partner in the Garden City-based firm of Scaring & Brissenden PLLC, has again been named in the 2010 Super Lawyers – Metro Edition's top list of attorneys practicing in the area of Criminal Defense Law in New York State.

Carol M. Hoffman, Arbitrator and Mediator in Syosset, recently completed training for the Federal Mediation and Conciliation Services Labor Arbitrator Panel. Ms. Hoffman, a former chair of the Education and Lawyers Assistance Committees of the Bar Association, is a member of the Adjunct Faculty at Molloy College where she teaches Human Resources Management in the Division of Business. She will be moderating a workshop on Executive Sessions at the 2010 School Law Conference in early December 2010. Ms. Hoffman is also a volunteer mediator at the Community Mediation Center in Jamaica, Queens.

Catalano, Gallardo & Petropoulos partners **Ralph Catalano**, **Dom Gallardo** and **Matt Flanagan** were listed among the top rated Professional Liability attorneys on Long Island in the September edition of Long Island Pulse Magazine.

Joel M. Greenberg, a senior partner at Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP, was a featured guest speaker at the annual meeting of the National CPA Health Care Advisers Association in Orlando, Florida. Mr. Greenberg spoke about physician issues and the changing healthcare environment.

Guercio & Guercio, LLP partners **Gregory J. Guercio**, **Richard J. Guercio**, **Gary L. Steffanetta**, **John P. Sheahan** and **Randy Glasser** recently presented at the 2010 Annual School Law Conference presented by the Nassau and Suffolk Bar Associations Education Law Committees. Richard J. Guercio, John P. Sheahan, Randy Glasser and partner **Barbara P. Aloe** will be presenting at Hofstra University, A Legal Clinic: A Survey of Educational law topics on January 12, 2011. Richard J. Guercio also recently presented on behalf of the National Council for School Attorneys; Eastern Suffolk BOCES; and on behalf of

See IN BRIEF, Page 17

COMMITTEE REPORTS

Alternative Dispute Resolution

Meeting Date: 10/15/10

Marilyn K. Genoa, Chair

The committee discussed its focus for the upcoming year: (1) regarding the alternate dispute resolution tribunal presently in place at the NCBA; and (2) how the committee can assist in the implementation of the new commercial rules for alternate dispute resolution/mediation in Nassau County. Members then discussed the various programs which presently exist within the ADR tribunal, the need to fully understand the original intent and goals when the tribunal was established, how to further breakdown the services offered by the tribunal to better service the bar and the community, and outreach to the bench and bar. Various subcommittees will be established to work with OCA and the Nassau County court system to determine why the mediation panels currently in place are not being utilized, what additional type of specialized panels can be made available through the ADR tribunal, and how the committee can work with the court to begin the requisite mediation training for certification.

Animal Law

Meeting Date: 10/19/10

Michele R. Olsen & Elinor Molbegott, Co-Chairs

The committee intends to put a brochure together which will highlight animal protection issues to be a resource for the community. Upcoming CLE programs to be held on March 3, 2011, and May 5, 2011.

Hospital & Health Law

Meeting Date: 11/4/10

Michael J. Langer

Edmond D. Farrell & Ron Lebow, Co-Chairs

Members of the committee discussed self-disclosure obligations under the new False Claims Act provisions following a private insurance carrier audit, referrals to immediate family members under the Stark Law, and topics for a future CLE ethics program.

Strategic Planning

Meeting Date: 11/9/10

Hon. Ira B. Warshawsky, Chair

The committee held a discussion about the overall goal of presenting a 3-5 year plan to the Executive Committee for improving communication by the NCBA internally and externally. Use of Facebook by committees was considered, not only for public consumption but also internally. The current official preclusion against committee chairs from contacting their membership was discussed, with past presidents providing the history of the rule and the committee's consensus the rule is outdated and largely unneeded. President Marc Gann added to the discussion, and the committee had a dialogue about the possibility that

See COMMITTEE REPORTS, Page 14

Trusts & Estates/Elder Law/Health & Hospital Law Focus

Beware: Bequests to non-U.S. citizen spouses may not qualify for the Estate Tax Marital Deduction

Generally, for purposes of computing the Federal estate tax (as well as the New York estate tax), bequests to a surviving spouse qualify for the marital deduction under Internal Revenue Code ("Code") Section 2056. The result of this, of course, is that assets passing to the surviving spouse are excluded from the deceased spouse's taxable estate, thus deferring any potential estate tax until the surviving spouse's death. However, unless certain conditions are met, Code Section 2056(d) disallows the marital deduction where the surviving spouse is not a United States citizen. The United States Government's obvious concern here is that a non-citizen spouse will inherit a sizeable estate from his or her spouse, and then return to their homeland without paying any estate taxes. Unfortunately, the imposition of a costly federal estate tax upon a surviving spouse's inheritance, especially in light of the minimal $1,000,000 federal unified credit amount for 2011, may be financially devastating in some cases.

Patricia C. Marcin

In order to address the government's tax policy concerns, while avoiding the imposition of estate tax under these circumstances, the Code requires that such property either pass into a qualified domestic trust (a "QDOT") under Code Section 2056A or, alternatively, the surviving spouse must become a citizen of the United States before the estate tax return is filed (assuming the surviving spouse was a resident of the United States at all times after the death of the decedent and before becoming a citizen). Unfortunately, even if a surviving spouse anticipates applying for U.S. citizenship, such process can take many years to accomplish.

If the deceased spouse was mindful of the estate tax treatment of non-citizen spouses, the QDOT will already have been provided for in an intervivos or testamentary instrument executed by the deceased spouse. In the absence of forethought and careful estate planning, the Code provides that under certain circumstances, a trust created for the spouse which does not meet all of the QDOT requirements may be reformed in order to qualify as a QDOT. If no trusts for the benefit of the non-citizen spouse exist, all is not lost. A QDOT may also be created after the first spouse's death by the surviving non-citizen spouse or the executor of the decedent's estate, and the non-citizen spouse must thereafter irrevocably assign his or her inheritance thereto (Treas. Reg. §20.2056A-2(b)(2)).

Code Section 2056A sets forth the requirements of a valid qualified domestic trust. Generally, a QDOT is similar to a qualified terminable interest property trust (a "QTIP" trust) in that all income must be paid to the surviving spouse and no person other than the surviving spouse may have an interest in the trust during the surviving spouse's lifetime. The income may be paid to the spouse without the imposition of estate tax. However, any distributions of principal from the QDOT will require concurrent payment of estate tax by the QDOT trustees. An exception to this rule is when distributions of principal are made to the non-citizen spouse on account of a "hardship." A "hardship" is defined under the regulations to the Code as a distribution "made to the spouse from the QDOT in response to an immediate need relating to the spouse's health, maintenance, education or support, or the health, maintenance, education or support of any person that the surviving spouse is legally obligated to support." If the spouse has other resources reasonably available to meet these expenses, the distribution will not qualify as having been made on account of "hardship." Any such distribution must be reported on a Form 706-QDT. Treas. Regs. §20.2056A-5(c)(1).

To make certain that estate taxes will be paid upon the death of the non-citizen spouse, or when principal distributions are made during the lifetime of the non-citizen spouse, the QDOT must have at least one trustee who is an individual citizen of the United States or a domestic U.S. corporation. Code §2056(a)(1)(A). When creating a QDOT, it is extremely important to follow the rules under Code Section 2056A and the regulations thereunder to ensure that the trust continues to qualify as a QDOT in order to continue to enjoy deferral of the estate tax.

Additional rules apply to QDOT's containing assets in excess of two million dollars ($2,000,000). The terms of the trust must require the trustee to adhere to certain security requirements in order to further ensure the payment of estate tax. Treas. Reg. 20.2056A-2(d). The security options consist of either having a banking institution serve as a co-trustee, or furnishing a surety bond or bank letter of credit in favor of the IRS in an amount equal to sixty five percent (65%) of the fair market value of the trust assets. If the value of the QDOT does not exceed two million dollars ($2,000,000), these requirements do not apply.

Jordan S. Linn

For purposes of calculating the QDOT's value to determine whether the security provisions above will apply, the executor of the estate may exclude up to six hundred thousand dollars ($600,000) in value attributable to real property (and related furnishings) which is used by the non-citizen spouse as a principal residence. If at any point in the future this real property is no longer used as a residence, the exclusion would no longer apply and the U.S. Trustee must file a written statement with the IRS reporting this event. Treas. Regs. §20.2056A-2(d)(l)(iv).

After the creation of a QDOT, if the surviving spouse attains U.S. citizenship, the assets in the trust can be distributed to the surviving spouse without the imposition of estate tax. Thus, there appears to be no downside to the post-mortem creation of a QDOT where the surviving spouse is a non-U.S. citizen. In fact, even if the amount passing to the surviving spouse is questionable, such as where the estate is involved in a bona fide will contest, it is prudent for the executor of the decedent's estate to make a protective QDOT election. Treas. Regs. §20.2056A-3(c). The executor's filing of the protective QDOT election assumes that the surviving spouse will concurrently assign, or make a protective assignment of, his or her right to all property passing to him or her, or which may pass to him or her, from the decedent's estate to the QDOT. The time for filing the QDOT election is limited to one year after the due date of the Federal estate tax return, including extensions. This election, once made, is irrevocable. Treas. Regs. §20.2056A-3(a).

As an aside, it is important to note that the rules propagated under IRC §2040(b) with respect to includibility of joint interests of spouses will not apply in cases where the surviving spouse is a non-citizen. Treas.

See BEQUESTS, Page 14

Nassau Academy of Law

PREPARING FOR TRIAL:
AN EXPERT'S POINT OF VIEW

Wednesday, December 15, 2010
5:30 - 8:30 p.m. *Light Supper*

Attendees will hear from a panel of experts on what is necessary to prepare an expert for trial. These well-qualified experts will offer practical advice, tips and strategies as to what it takes to win your case.

OUR PANEL

Roy Lubit, M.D., Ph. D., Forensic Psychologist, NY

Nicholas Belizzi
Accident Reconstruction/Traffic Engineer/Civil Engineer, Holmdel, NJ

Richard Obedian, M.D., Orthopedic Surgeon Island Spine and Sports, Hicksville

Moderator
Deanne M. Caputo, Esq.
Sullivan Papain Block McGrath & Cannavo P.C., Mineola
3.0 Credits: .5 ethics & professionalism and 2.5 areas of professional practice.

DEAN'S HOUR

DIVORCE & THE MILITARY CLIENT

Tuesday, January 18, 2011
12:30 - 2 p.m. *Lunch & Discussion*

This program will explore the problems and pitfalls of representing service members and spouses

- the ins and outs of the military pay system
- child support and the military
- military retired pay and equitable distribution

... and more!

Guest Speaker
Gary Port, Esq.,
Port & Sava, Garden City

Moderator: TBA

1.0 Credits in the areas of professional practice

LEGAL WRITING CHECK-UP:
A WRITING WORKSHOP

Monday, February 7, 2011
Time: 5:30 - 7:30 p.m.

Are your briefs anemic and lacking pep? Does drafting a contract raise your blood pressure? This workshop, aimed at lawyers in all practice areas, is designed to resuscitate your writing skills. The session will include useful tips for drafting, editing and revising your written work product. Tips on crafting effective e-mails will also be included.

The workshop will be taught by Amy Stein, a Professor of Legal Writing at Hofstra Law School for over a decade.

Please join us for an enjoyable event which should also add new health and vigor to your writing!

****NOTE: Participants are asked to e-mail a short selection of their own writing (three pages maximum) to Barbara Kraut: bkraut@nassaubar.org at the Nassau Academy of Law at least one week prior to the event. The instructor will review the samples ahead of time and comment on a few illustrative ones (anonymously!) during the program.**

Speaker
Amy R. Stein
Professor of Legal Writing and Program Coordinator; Assistant Dean for Adjunct Instruction
Hofstra Law School

2.0 Credits in skills or areas of professional practice.

NCBA Tech Center

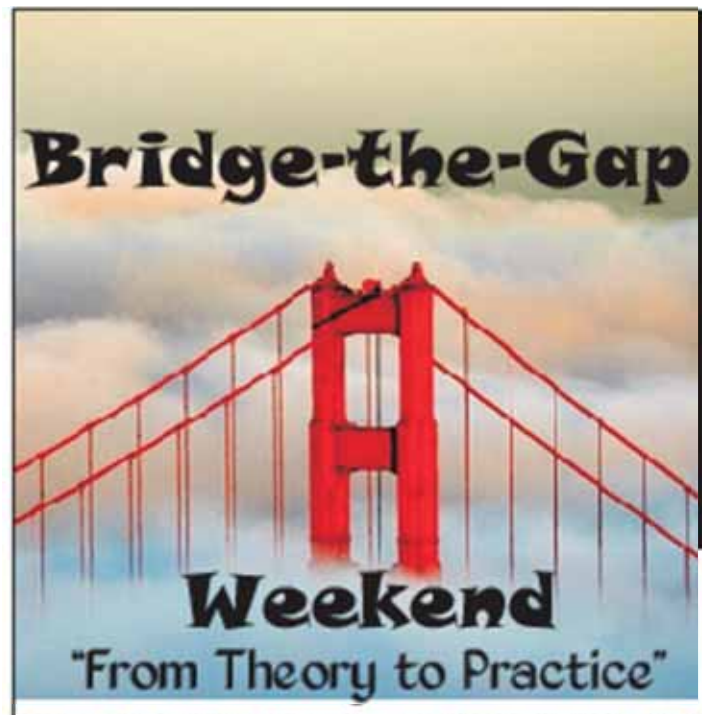
Westlaw Seminars
Never a charge! All seminars 1 CLE Credit
Jan. 12, 2011, 10 a.m.

Tech Center Seminars
Still $45 per session /1.5 CLE Credit Each
Dec. 14 Intro to Time Slips 8:30 AM
Dec. 16 Intro to Time Matters 8:30 AM

At NCBA Headquarters, 15th & West Streets, Mineola, NY

Please register in advance or classes may be cancelled.

To register call 516-747-4464 x228



Saturday & Sunday, January 22 & 23, 2011

Saturday — 8:30 a.m. to 5 p.m.
Sunday — 8:30 a.m. to 3 p.m.

- Practicing Law in the Commercial Division
- Administrative Hearings • Real Estate ABC's
- Matrimonial Law • Ethics • Elder Law
- Arbitration & Mediation • Criminal Law
- Persuasive Writing • Depositions • View From the Bench

Bridge-the-Gap Re

Name _____ Sing
Address _____ 1 cr 2 cr
_____ Amo
Phone _____ ☐ Vi
Email _____ Acct
Law School/Graduation Date _____ Exp.
_____ Billi

Tuition *(includes breakfast & lunch):* Make
Recent law school graduates, attorneys admitted less than 2 years, law students..... $245
NCBA members admitted over 2 years..... $375
Non-members admitted over 2 years..... $485

Save the Date!

Fabulous Friday February Fourth!

All-day Litigation Seminar

ecember 2010 - February 2011

Materials Now Online!
All course materials must be downloaded and brought to the program.
www.nassaubar.org

Nassau Academy of Law

...Because law school ®
was just the beginning

t the Nassau Academy of Law
your guide as you cross the
dge from the theory of law to the
alities of everyday practice

ctical information & advice from
owledgeable attorneys will help you become
nore confident advocate

rn your required 16 MCLE credits: 3 ethics,
kills, 7 professional practice

ration Form

ession

NCBA member $40/non-member $65
- NCBA member $75/non-member $100

Enclosed $ _____

□ MC □ AMEX

_____

e _____ Security Code _____

dress _____

ck payable to: NAL, 15th & West Streets, Mineola, NY 11501
Fax: 516-747-4147
Email: www.nassaubar.org

ncial Hardship Guidelines/Arrangements: 516-747-4464

2010 Florida Bar CDs Available
Members only!
Call to reserve: 516-747-4464

End of Year CD/DVD Sale!

15% OFF all Fall Semester CDs and DVDs

Order Now!

Nassau Academy of Law ORDER FORM

TO REGISTER OR ORDER: Circle your selections in the correct columns and total amount due.
- **By Check:** Make checks payable to NAL and mail with form to NAL, 15th and West Streets, Mineola, NY 11501
- **By Credit Card:** FAX completed form with credit card information to 516-747-4147
- **Order Online:** www.nassaubar.org >MCLE>Calendar, Reservations

Seminar Reservation Form

Date	Seminar Name	P	E	TOTAL Credits	Member	Non-Mem	5 Session Ticket	18b
Dec. 15	Preparing for Trial: An Expert's Point of View	2.5	0.5	3.0	$110	$145	Yes	
Jan. 18	DH - Divorce and the Military Client	1.0		1.0	$38	$55	No	
Feb. 7	Legal Writing Check-Up: A Writing Workshop	2.0		2.0	$65	$100	Yes	
	Seminar Reservations Total:							

FALL 2010 CD and DVD Order Form

15% off!

Area of Law	Seminar Name	P	E	TOTAL Credits	CD/DVD Member	CD/DVD Non-Member	Seminar Code
Business/Corp	DH-Annual Securities Arbitration Update	1.0		1.0	35 /40	50 /60	DH112210
Civil Litigation	Annual CPLR Update-w/ Profs. Alexander & Simons	2.5	0.5	3.0	105/150	120/160	0CPLR118
	Preparing for Trial: An Expert's Point of View	2.5	0.5	3.0	105/150	120/160	OPREP1215
	DH-Your "First" Car Accident Case	1.0		1.0	35 /40	50 /60	DH101210
Criminal Law	Annual Criminal Law Update 18B	2.5	0.5	3.0	105/150	120/160	0CLU1029
	DH-Animal Cruelty Law & Enforcement	1.0		1.0	35 /40	50 /60	DH101310
Estate/Elder Law	DH- 2006 Pension Protection Act	1.0		1.0	35 /40	50 /60	DH111010
	DH- Estate Planning Malpractice		1.0	1.0	35 /40	50 /60	DH93010
	Health Care Decision Making	2.5	0.5	3.0	105/150	120/160	0ADV1006
Environmental	DH-Building Green on LI: Development & Transactional Issues	1.0		1.0	35 /40	50 /60	DH111210
Family Law/Mat	DH - Divorce and the Military Client	1.0		1.0	35 /40	50 /60	DH011811
	Forensic E valuations & Mental Health in Family Court Matters	2.5	0.5	3.0	105/150	120/160	0BNKTBL1115
	"New" Matrimonial Rules - It's Happening in NY!	2.0		2.0	70 /80	100 /120	0NEWMAT1004
	DH-Representing Parents & Children in Article 10 Proceedings	1.0		1.0	35 /40	50 /60	DH120110
General	DH- Your "First" Landlord/Tenant Case	1.0		1.0	35 /40	50 /60	DH110410
	Guardian Ad Litem	2.5	0.5	3.0	105/150	120/160	0GAL0920
	Improving The Performance Of Your Law Firm	2.0		2.0	70 /80	100 /120	0FIRM0927
	Practicing Law in a Fragile Economy	2.5	0.5	3.0	105/150	120/160	0FRAG1028

CD/DVD Order Total (Shipping & Handling Included)	
Less 15% Discount	
Subtotal:	
Plus Seminar Reservations Total:	
Subtotal:	
ADD SALES TAX: 8.625%	
Allow 3 weeks for delivery. **TOTAL:**	

TOTAL CHECK ☐

Name: _____
Address: _____
City/State/Zip: _____
Phone: _____
Credit Card Acct. #: _____
Security Code: _____ Exp. Date: _____
Signature:

Email Address: _____

For Financial Aid Guidelines or Arrangements Call 516-747-4464.

YOU MAY ALSO ORDER ONLINE: www.nassaubar.org.

Mental Illness and Termination of Parental Rights Proceedings

By Hon. Edmund M. Dane

The wide range of issues addressed on a daily basis in Family Court are challenging and demanding. Every type of matter impacts deeply upon a keystone of our society: the family. This article will focus on proceedings under Article 10 of the Family Court Act alleging familial child abuse or neglect. Most of my caseload at Nassau County Family Court involves these difficult but important cases, a task I share with my able colleagues Family Court Judges Ellen Greenberg and Robin Kent. I will focus this discussion to the most serious possible ramification of a court finding of neglect or abuse, the termination of parental rights ("TPR"), because the potential of a TPR is of utmost concern to any parent facing a neglect or abuse petition.

TPR proceedings generally do not take place unless a child has been previously removed from the care of a parent or other legally responsible person ("the parent") and the child has been placed in foster care. If the child is suspected to have been the subject of abuse or neglect and needs to be taken out of the parent's care to avoid imminent danger, a removal may take place with the parent's consent (FCA § 1021) or without that consent following a hearing regarding the need for removal and the efforts of County social workers to remedy the situation (FCA § 1022).

Once a child has been removed and has remained in foster care for fifteen of the most recent twenty-two months, or a court has determined the child to have been abandoned, or the parent has been convicted of an act culminating in the child being deemed "severely abused," the Department of Social Services ("DSS") is required to file a petition seeking the TPR. See SSL § 384-b (1) (i), (8). There are some limited exemptions to the 'mandatory' statutory requirement that DSS file the TPR petition. See SSL § 384-b (3) (i), (ii).

There is one other special category of cases that creates a steady flow of TPR proceedings in this County. Under SSL § 384-b (4), if a parent is presently and for the foreseeable future unable, by reason of mental illness or mental retardation, to provide proper and adequate care for a child, that parent's rights may be terminated after the child has been in foster care for at least a year. The statute requires that a forensic expert examine the parent and testify regarding the parent's mental illness and ability to care for the child for the foreseeable future.

It should be obvious that a TPR order is a drastic measure that irreparably changes the family. Though the legislative intent of SSL § 384-b admirably expresses the preference that a child live or visit with the birth parent whenever possible, it nevertheless also requires that a permanent alternative home be found when reunification cannot be accomplished reasonably soon. The legislature has provided procedures assuring the rights of birth parents. Yet, when a positive, nurturing parent/child relationship no longer exists, and is not likely to resume in the near future, the law is clear that courts must act to further the best interest and permanency needs of the child by terminating parental rights and freeing the child for adoption.

Without question, parents alleged to suffer from mental illnesses are entitled to zealous advocacy by their attorneys and an impartial determination by the Court. The parents in these proceedings are among the most vulnerable in our society. Often, they have an impaired understanding of their own best interests and may be difficult legal clients. Almost without exception, these parents do not have adequate funds to pay for their own attorneys, so they rely upon the service of the Family Court 18-B panel, a dedicated and experienced group of practitioners. From the inception of the case and continuing through the fact-finding hearing, advocating for such a parent requires competent and thorough preparation. The subject of forensic evaluations and trial techniques in these cases was the subject of a recent CLE at the Bar Association, which I moderated, entitled "Forensic Evaluations and Mental Health in Family Court Matters." Fellow panelists included Dr. Julie Low, Carolyn Reinach Wolf, Esq., and Douglas Stern, Esq. Recordings of their comments should be available in the near future through the Nassau Academy of Law.

To put it mildly, I find the usual trial procedure unsettling. Think about it for a moment. DSS maintains and pays its forensic expert to interview and test the parent, review records, recommend programs and write a report.

Procedurally, after arraignment, counsel is assigned to represent the parent and the matter is referred to Best Practice conferences, during which time necessary services and evaluations are discussed, together with attendant issues such as visitation and possible reunification. Understanding the nature, extent and gravity of the mental illness is imperative in order to shape the most effective course of treatment and/or therapy for a parent. These pre-fact finding discussions are intended to gauge the parent's compliance with proffered services as well as to re-evaluate the effectiveness of same on an ongoing basis. This process requires all counsel, including the court attorney, to be objective as possible and to consider alternative services.

Absent an agreement to return the subject child to the parent, or a parent voluntarily choosing to surrender their parental rights, the matter will proceed to a fact finding hearing. If there is a voluntary surrender so the child can be adopted, the parent can negotiate for continued contact with the child, whether with pictures and correspondence or even visits on a regular basis. Under current law, however, if the parent asks for a trial, such an "open" adoption cannot be ordered by the Court and a total termination of rights is a very real possibility.

Typically, DSS will call its forensic expert to testify regarding the evaluation at the fact-finding hearing as well as the caseworker. In the average case, the only other witnesses are the parent in question, on his or her own case, and a possible in camera meeting with the child. In some cases, the County's evidence is quite strong, with a parent who has demonstrated serious deficits in their care of the child or older siblings, one who has made little effort to improve their parenting potential. There are others, however, in which the parent has worked as diligently as possible in treatment and has shown some progress, making the Court's determination a more difficult task.

To put it mildly, I find the usual trial procedure unsettling. Think about it for a moment. DSS maintains and pays its forensic expert to interview and test the parent, review records, recommend programs and write a report. That expert then testifies regarding the mental capacity and future potential of the parent. Generally, the only expert testimony heard by the court is from an individual selected and paid for by the petitioning party, DSS. That expert is usually an individual that is retained by the County on many such matters, and the County work may constitute a substantial aspect of his or her practice.

Attorneys representing parents and children would obtain multiple benefits by asking the Court for an order permitting an 18-B appointment of an additional expert or exploring the possible use of experts on the list maintained by the office admin-

See VIEW FROM THE BENCH, Page 17

Trusts & Estates/Elder Law/Health & Hospital Law Focus

The carry-over basis dilemma

The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) repealed the estate tax for 2010. Along with the repeal, EGTRRA changed the way an estate's beneficiary computes his or her income tax basis for property that is inherited. Prior to 2010, the beneficiary's basis for property inherited from an estate was its "estate tax value." Estate tax value is, generally, the fair market value of the property on the date of the decedent's death.

Robert Katz

Section 1022 of the Internal Revenue Code of 1986 ("IRC") provides that the income tax basis for assets inherited from an individual who died in 2010 is the lesser of the decedent's adjusted basis for the property or its fair market value. One of the major problems with this change is the determination of the decedent's basis. For assets acquired many years prior to death the determination of cost basis requires records that may no longer be available. The Internal Revenue Code very clearly provides a zero adjusted income tax basis for property for which a taxpayer cannot establish his or her cost basis.

However, the Code contains the following two increases to carry-over basis that can be made by the decedent's executor:

1. The basis of assets inherited by a spouse, either directly or through a Qualified Terminable Interest Property (QTIP) trust can be increased by up to $3 million.

2. The basis of assets inherited by anyone can be increased by up to $1.3 million.

It should be noted that these adjustments cannot increase an asset's basis above its fair market value.

Neil D. Katz

Example: A child inherits property worth $2.5 million with an income tax basis of $1 million. The executor can increase the basis of the property to $2.3 million. However, if the basis of the property was $1.5 million the executor could only increase the basis of the property by $1 million to its fair market value of $2.5 million.

With the recent decline in values of real estate and marketable securities, the beneficiary may face a "step-down" in basis.

Example: Decedent purchased real estate for $3.6 million. On the date of the decedent's death the property was worth $3 million. The beneficiary's basis will be stepped down to $3 million, the lesser of the decedent's basis or the property's fair market value.

The executor that makes the basis increase election must notify the IRS of the increases on a form (presently being developed) by April 15, 2011. The form is to be attached to the decedent's final individual income tax return. Section 6018(c) of the IRC requires that the following information must be included with the form:

1. The name and the taxpayer identification number of the recipient of the property.

2. An accurate description of the property.

3. The decedent's adjusted basis for the property and its fair market value.

4. The decedent's holding period for the property.

5. Information to determine if the gain on the sale of the property or any portion thereof would be taxed as ordinary income.

6. The amount of the aggregate or spousal increase in the basis of the property.

7. Such other information as may be required by Treasury Regulations.

A $10,000 penalty is imposed on an executor who fails to file this form timely. In addition, the executor is also required to furnish this information to the respective beneficiaries who are affected by this increase.

In addition to the issues set forth above, the carry-over basis regime is further complicated by the language contained in Section 901(b) of EGTRRA. Section 901(b), if read literally, says that in 2011 and later years the estate and gift tax rules shall be applied and administered as if the changes made by EGTRRA "had never been enacted."

Does this mean that if an individual died in 2010 and the beneficiary or the estate does not sell any of the assets of the estate until 2011, the basis of those assets are estate tax value (fair market value on date of death)?

Example: An individual died in 2010 owing real estate worth $3 million with an adjusted basis of $1 million. Assume that no basis adjustment was made to this asset and it was sold in 2010 by the executor for its value. The estate would have a taxable gain of $2 million. If the literal reading of Section 901(b) is correct and the executor held on to the asset and sold it in 2011, for its value, no taxable gain would be realized.

Is that what Congress intended? There has been no indication as to how this is ultimately going to be interpreted. In addition, if the executor interprets this provision literally and intentionally holds off selling assets to get the higher income tax basis, what if the asset's value drops considerably? Has the executor subjected himself/herself to a lawsuit from a beneficiary? Any executor would be well advised to discuss the issue with the beneficiary and get his or her approval before taking this delaying action.

Other Issues:

1. Some commentators have suggested that since there is no estate tax for 2010 there is no need to have the decedent's assets appraised. However, if the executor is going to elect to increase the basis of assets an appraisal is needed to show that the new increased basis is not in excess of the asset's fair market value. Even where no basis adjustment is to be made, Section 1022 of the IRC provides that the beneficiary's basis is the lower of the decedent's adjusted basis or the asset's fair market value. Additionally, as previously stated, where a basis adjustment is made the executor must file a form with the IRS. Until that form and instructions are issued it is unclear as to what additional attachments (*i.e.* appraisals) might be required. Finally,if the decedent is a New York State resident or a non-resident who has real or tangible personal property with a situs in New York (and meets other

See TAX, Page 19

You've Got Mail
(and it's not SPAM)

In our continued effort to be greener, much of our "snail" mail will now be email. Most of what we need to communicate will be included in our weekly "e-bulletin" which is sent to the entire membership toward the end of each week. However, there are other emails you may receive, including:

- committee notices
- letters from the President and/or Executive Director
- notices about upcoming events and/or seminars
- communications from individual NCBA staff members

In order for this to work, we need your assistance:

1. Make sure we have your current email address on file (*send inquiries or updates to membership@nassaubar.org*).

2. Add news@nassaubar.org to your address book.

3. If you do not want to receive our informative emails, just let us know (*send opt-out to webmaster@nassaubar.org*).
Please **DO NOT MARK OUR EMAIL AS SPAM**. When you do, it impacts the entire membership. DON'T click the spam button!

4. If you are not receiving our emails, and we have your proper email address on file, you need to contact your Internet Service Provider and request that they unblock our domain name (nassaubar.org).

5. If you have any comments, suggestions or questions, we are happy to hear from you! (*contact dsunger@nassaubar.org*)

RIGHT OF ELECTION ...

Continued From Page 3

definition of testamentary substitutes. However, apparently mindful of the fact that such inclusion may conflict with federal regulations and may present constitutional issues, the legislature provided in EPTL §5-1.1-A(b)(7) that if any part of the section is preempted by federal law with respect to an item of property included in the net estate, any person who received that item is obligated to return it to the surviving spouse and is personally liable to the surviving spouse for the value of that item.

6. Property In Which Decedent Retained A Life Estate

Any disposition of property or contractual arrangement made by the decedent, in trust or otherwise, to the extent that after August 31, 1992 the decedent retained for her life the possession or enjoyment of or the right to income for life, or at the date of her death retained a right to revoke the disposition or power to consume, invade or dispose of the principal. However, this does not apply to any right which vested on or before August 31, 1992.[12]

Although a literal reading of EPTL § 5-1.1-A(b)(1)(F) would make it appear that life insurance is a testamentary substitute, in *Estate of Boyd*, the Nassau County Surrogate's Court held that life insurance is not a testamentary substitute: "the Court feels constrained to construe the new statute, EPTL 5-1.1-A(b)(1)(F), such that life insurance contracts are to be considered excluded from the list of testamentary substitutes." (*See, Estate of Boyd*, 161 Misc. 2d 191, 613 N.Y.S.2d 330 (Surr. Ct. Nassau Co. 1994). In *Matter of Zupa*, 48 A.D.3d 1036, 850 N.Y.S.2d 311 (4th Dept. 2008), the Court held that annuities are not insurance and would be considered testamentary substitutes.

7. Retirement Accounts

Any money, securities, or other property payable under a thrift, savings, retirement, pension, deferred compensation, death benefit, stock bonus or profit sharing plan, account, arrangement, system or trust. This section does not apply if the decedent designated the beneficiary of the plan benefits on or before September 1, 1992 and did not change the beneficiary designation thereafter. Also, certain plans are only included at half of their value.[13]

8. Property In Which Decedent Held A General Power Of Appointment

Any interest in property to the extent that the decedent held a general power of appointment in such property immediately before her death or which she released within one year of her death, or exercised in favor of any persons other than herself or her estate.[14]

9. Transfers of Securities

Transfers of securities by means of a "transfer-on-death" registration.

Waiver of Right of Election

One may waive one's statutory right of election in writing, acknowledged or proved in the manner required for the recording of a deed. *See, EPTL* §5-1.1-A(e)(2). For example, this could be done in a pre-nuptial or post-nuptial agreement.

Some recent cases have invalidated a surviving spouse's right of election where the marriage was posthumous revoked ab initio because the decedent had lacked the capacity to enter into the marriage. *See, Matter of Kaminester v. Foldes*, 26 Misc. 3d 227, 888 N.Y.S.2d 385 (Surr. Ct. N.Y. Co. 2009). *See, also, Campbell v. Thomas*, 36 A.D.3d 576, 828 N.Y.S.2d 178 (2d Dept. 2007), *after remand*, 73 A.D.3d 103, 897 N.Y.S.2d 460 (2d Dept. 2010). In *Matter of Berk*, 71 A.D.3d 883, 897 N.Y.S.2d 475 (2d Dept. 2010), the court held that a triable issue of fact exists as to whether a surviving spouse who married a mentally incapacitated person who was incapable of consenting to the marriage would be determined to have forfeited the statutory right of election, so as to prevent her unjust enrichment.

When representing a surviving spouse, one should consider obtaining information as to the testamentary substitutes in order to make a determination as to whether the exercise of the right of election is warranted.

Sharon Kovacs Gruer, Esq., Great Neck, New York, chair of the Elder Law Section of the New York State Bar Association, Board of Director for the National Academy of Elder Law Attorneys and past chair for NCBA Taxation Law Committee.

1. *See*, EPTL § 5-1.1-A(a)(2)
2. *See*, EPTL §5-1.1-A(a)(2)
3. *See*, EPTL §5-1.1-A(a)(4)
4. *See*, EPTL §5-1.1-(a)(4)(A)
5. *See*, EPTL §5-1.1-A-(a)(4)(A)
6. *See*, EPTL §5-1.1A-(a)(5)(b)(1)
7. EPTL §5-1.1-A(b)(1)(A)
8. EPTL §5-1.1-(A)(b)(1)(B)
9. EPTL §5-1.1-A(b)(1)(C)
10. EPTL §5-1.1-A(b)(1)(D) and (b)(2)
11. EPTL §5-1.1-A(b)(1)(E) and (b)(2)
12. EPTL §5-1.1-A(b)(1)(F)
13. EPTL §5-1.1-A(b)(1)(G). However, a plan under Internal Revenue Code §401(a)(11) or a defined contribution plan to which such subsection does not apply pursuant to paragraph 401(b)(iii), which are, generally, plans for which ERISA rules protect the spouse's right to a joint or survivor annuity, are considered testamentary substitutes only to the extent of one-half of each.
14. EPTL §5-1.1-A(b)(1)(H)

COMMITTEE REPORTS ...

Continued From Page 8

membership is being bombarded with too much material, as was a discussion about eliminating email attachments.

Women in the Law

Meeting Date: 11/16/10

Patricia M. Latzman & Mary Ann Aiello, Co-Chairs

An insightful dialogue was held with various judges discussing their accomplishments in both careers and the judiciary over the years. Justices Marie Santagata and Marilyn Friedenberg shared their experiences of attending Brooklyn Law School and being in the judiciary in earlier days, and Justice Iannacci and Judge Bennett discussed their present experiences, as well as being thankful for their ability to benefit from their trailblazing women jurist counterparts. All of the judges discussed the importance of professionalism and formality in the courtroom setting; noted were the major increase in women judges, court officers, court reporters and attorneys over the last 40 years.

Intellectual Property

Meeting Date: 11/17/10

Aimee L. Kaplan, Chair

Alexander Arato, Esq., Vice President and Associate General Counsel of Computer Associates, Inc., delivered a lecture to the committee from the perspective of an intellectual property licensor. Mr. Arato is responsible for managing relationships with outside counsel, assisting the general counsel in formulating and implementing internal policies and strategies, and is primary counsel to two Computer Associates business units and has managed various M&A transactions. Mr. Arato also manages aspects of the company's trade secret, contract, employment and tort litigation in federal, state and bankruptcy courts. Mr. Arato has a Bachelor of Arts degree in economics from the University of California at Berkeley and a Juris Doctor (magna cum laude) from the Benjamin N. Cardozo School of Law, where he was a member of the Law Review.

Military Law

Meeting Date: 11/18/10

Daniel T. Campbell, Chair

Upcoming Dean's Hour program has been set up with the Matrimonial Law Committee for January 18, 2011, at 12:30 p.m. titled "Divorce and Military Clients." The committee is also working on a Dean's Hour with the Labor & Employment Law committee. The committee is attempting to have an outreach program for veterans.

Appellate Practice

Meeting Date: 11/30/10

Lauren Bristol, Chair

Discussion was held about plans to have an Appellate Division justice as guest speaker to the committee for a future meeting. Member Charles Holster was thanked for his article on the recent change in the Clerk of the Court of the Appellate Division, Second Department. Talks were held about a possible upcoming CLE for Spring 2011, potentially to be held as a joint CLE with another committee.

Michael J. Langer, an associate in the Law Offices of Kenneth J. Weinstein, is a former law clerk in the United States Court of Appeals for the Second Circuit, and a former Deputy County Attorney in the Office of the Nassau County Attorney. Mr. Langer's practice focuses on matrimonial and family law, criminal defense and general civil litigation.

SURROGATE ...

Continued From Page 7

procedures employed.[14] If the matter escalates, the courts intervene.[15]

With a minor patient, the parent acts as surrogate, subject to limitations.[16] When the physician believes the minor patient has a parent or guardian not informed of a decision to withhold life-sustaining decisions, the physician should make reasonable efforts to determine if that parent/guardian has maintained "substantial and continuous contact" with the minor, and if yes, make diligent efforts to notify that parent/guardian before following those instructions.[17]

When an adult patient does not have a surrogate, and lacks capacity, where possible, the hospital looks to the medical record to ascertain the patient's wishes.[18] The physician makes decisions for the patient for routine medical treatment, and major medical treatment under certain circumstances.[19]

Decisions concerning withdrawal of life-sustaining treatment are made by the physician with concurrence of an independent physician in a reasonable degree of certainty that no medical benefit would be gained by the patient because they face imminent death, or not providing such treatment would violate medical standards.[20]

This new legislation should relieve a majority of the conflicts. It's important to keep current on these changes so we, as attorneys and CPAs, can advise our clients knowledgeably.

Stephanie M. Reilly Keating, Esq., CPA of Schwartz & Fang, P.C., with offices in Lake Success and New York.

1. P.H.L. § 2994-n(2).
2. Chapter 45 of the New York Consolidated Laws – Public Health Law, Article 29-CC Family Heath Care Decision Act, § 2994-b(2).
3. P.H.L. § 2994-b(2).
4. P.H.L. § 2994-d(5(e).
5. P.H.L. §2994-d(3)(b).
6. P.H.L. § 2994-c(1).
7. P.H.L. § 2994-c(2).
8. P.H.L. § 2994-c(2).
9. P.H.L. § 2994-c(3).
10. P.H.L. § 2994-c(4).
11. P.H.L. § 2994-c(6).
12. P.H.L. § 2994-d(1).
13. P.H.L. § 2994-a(4).
14. P.H.L. § 2994-d(5)(c).
15. P.H.L. § 2994-r.
16. P.H.L. § 2994-e(1).
17. P.H.L. § 2994-e(3).
18. P.H.L. § 2994-g(1).
19. P.H.L. § 2994-g(4).
20. P.H.L. § 2994-g(5).

BEQUESTS ...

Continued From Page 9

Regs. §20.2056A-8. This means that the full value of joint property will be included in the deceased spouse's estate under Treas. Regs. §20.2040-1(a)(2) unless the executor can prove otherwise. Obviously, this can further exacerbate the issues described herein where a QDOT election has not been made.

Based upon the above, and the significant tax consequences for failure to do so, where property is to be, or may be, distributed to a non-citizen spouse, it is imperative that the decedent's executor (or trustee of the decedent's revocable trust) consider the formation of a QDOT and making the QDOT election, or a protective QDOT election, on the decedent's estate tax return.

Patricia C. Marcin is an attorney at Farrell Fritz, P.C. concentrating in estate planning and estate administration.

Jordan S. Linn is an estate planning and estate administration associate at Farrell Fritz, P.C.

PROFILE ...

Continued From Page 5

a(1)(d) states that a physician must submit to the Profile "a statement of any loss or involuntary restriction of hospital privileges or a failure to renew professional privileges at hospitals within the last ten years, for reasons related to the quality of patient care delivered or to be delivered by the physician where procedural due process has been afforded, exhausted, or waived, or the resignation from or removal of medical staff membership or restriction of privileges at a hospital taken in lieu of a pending disciplinary case related to the quality of patient care delivered or to be delivered by the physician ..." (emphasis).

In our practice we have faced this issue when representing physicians who have their hospital privileges summarily suspended, sought appeal of the suspension via the hospital due process hearing rights, and were successful in reversing the suspension through the intra-hospital hearing process. Upon review of the Profile Statute and Regulations, along with consultation with representatives at the Profile, we advised our clients that an update was not necessary even though they had been suspended from clinical practice at their respective hospitals for an extended period of time during the pendency of the internal due process hearing process. From a tactical standpoint, the ability to delay the updating or potentially avoid the updating of a hospital privileging adverse action can be very beneficial when representing a physician who is facing such a predicament. As a result of the paucity of regulatory guidance on the specifics of Profile updating in nuanced situations such as these, we have found it necessary to request two opinions from the Profile to determine whether a physician-client's Profile updating obligations had been triggered. Requesting an opinion from the Profile on reporting obligations for your physician clients is a worthwhile avenue for attorneys to evaluate a physician's updating obligations especially when an update would have the potential to damage a practitioner's reputation. We have also found it helpful at times to call the Profile and speak to one of their knowledgeable staff members on specific client related issues.

Finally, on multiple occasions we have assisted physicians who received notice from the Profile of a posting of a malpractice award, with an appeal pursuant to 10 N.Y.C.R.R. 1000.3, requesting reversal of the decision to publish the award.[11] This written appeals process permits the physician to submit factual clinical information to the

Department of Health, which reviews the submission under the standard of whether the settlement/award is "relevant to patient decisionmaking."[12] In our practice, we represented a physician who had a substantial money damages verdict against him. Though it was his first settlement/award the Profile sought to post the award pursuant to 10 N.Y.C.R.R. 1000.3(b)(2)(i) as the plaintiff had suffered a permanent injury. We successfully appealed the decision to post the award to the Profile. While the jury found our client liable, the Profile (through the panel set up to review Profile appeals pursuant to 10 N.Y.C.R.R. 1000.3(b)(2)(ii)(a)) agreed that, "...despite the awarding of payment to a complaining party, appropriate provision of patient care was provided."[13] It is important to note the 30-day time limit by which the appeal must be submitted is based on the date of the Profile notice, not the date of receipt of the notice.[14]

Conclusion

If you are an attorney who represents physicians it is important for you to consider Profile related issues when representing your client in a wide array of matters. From the benign situation of a physician resigning privileges at one hospital in order to take a new position at another institution, to the more serious and career-threatening situation of a physician facing criminal charges, each may trigger a Profile update obligation.

For those attorneys who represent physicians before the Office of Professional Medical Conduct ("OPMC"), one of the first things mentioned at the physician's Interview by the OPMC investigator is the physician's need to update their Profile. Ideally as a result of your counsel, your client will be able to inform OPMC that they are in full compliance with their Profile updating obligations. Furthermore, as explained, it is also critical that the physician's Profile information be accurate as misleading information to the Profile constitutes professional misconduct.[15] A relatively simple way to verify your client's accurate reporting to the Profile is to assist them with the completion of their Physician Survey Form. Finally, if your client is faced with the obligation to update a negative change to their Profile (such as a criminal conviction) you may want to consider submitting an optional statement in which the physician can explain the conviction and potentially limit the reputational damage that can understandably result from such an update.

David A. Zarett, Esq. and Joshua A. Boxer, Esq., Weiss & Zarett, P.C. New Hyde Park, New York, representing physicians in "Profile" issues and related proceedings.

1. *See* Buettner and Sherman, New York Daily News, March 8, 2000, "Fight For Law To Open Malpractice Records."
2. *See* Public Health Law § 2995-a, which lists the information collected by the New York State Physician Profile.
3. The New York State Profile is located at www.nydoctorprofile.com.
4. New York Public Health Law § 2995(1).
5. The non-optional information that a physician must update to the Profile within thirty days of any such change includes education and certification, board certification, teaching appointments, hospital privileges, participation in state or federal health insurance programs, translation services offered at their office, malpractice award payments, license actions, hospital privileging limitations, and criminal convictions. The optional information that a physician must update within 365-days of any such change includes practice office location, publications, professional community service activities, health plan contracts or other affiliations, and the physician concise statement which is an optional statement a physician can include on their Profile.
6. New York Public Health Law § 2995-a (4).
7. The Profile Customer Service Center can be reached at (888) 338-6999.
8. To obtain e-access for Profile updating online contact the New York State Health Provider Network at (866) 529-1890 to apply for an HPN account.
9. Physicians are required to report malpractice judgments and/or settlements pursuant to 10 NYCRR 1000.3, and those judgments or settlements are also separately reported by professional liability carriers pursuant to N.Y. Ins. Law § 315.
10. N.Y.C.R.R. 1000.5(a).
11. A physician is able to appeal a malpractice settlement/award posting to the Profile if they have two or fewer awards/settlements within the most recent 10 years. 10 N.Y.C.R.R. 1000.3(b)(1).
12. 10 N.Y.C.R.R. 1000.3(b)(2)(ii)(a).
13. 10 N.Y.C.R.R. 1000.3(b)(2)(ii)(a).
14. 10 N.Y.C.R.R. 1000.3(b)(2)(ii)(b).
15. *See* New York Public Health Law § 2995-a (7).

We Acknowledge, with Thanks, Contributions to the WE CARE Fund

Donors

Deena Ehrlich

Hon. Sandra Feuerstein
Hon. Sandra Feuerstein

Elaine Leventhal
Michelle A. Mantone
Philip Milone
Philip Milone
Hon. Andrea Phoenix

Hon. Andrea Phoenix

Susan Katz Richman
Andy & Eileen Simons

In Honor Of

Christopher Clarke, son of Carol & Lance Clarke passing the Bar

Judge Marano's Recognition by the Jewish Lawyers'
Induction of Hon.Loretta Lynch as US Attorney for the Eastern District of New York

Christopher Clarke passing the Bar
Michael Masri
Hon. Daniel Palmieri's election to the Supreme Court
Hon. Andrew Crecca's election to the Supreme Court
Irene V. Villacci Distinguished Alumni Award from Molloy College

Franklin Perrell's receipt of the Roslyn High School Martin Luther King Scholarship Fund Award

Irene V. Villacci, Esq. Recipient, Molloy College's Distinguished Alumni Award
Joy Watson COBANC'S Woman of the Year Award
Judge & Mrs. Joseph W. Bellacosa's 50th Wedding Anniversary

Donors

Joanne & Hon. Frank Gulotta Jr.
Elaine Leventhal
Hon. Andrea Phoenix
Joan & Stephen Schlissel

Speedy Recovery

Helen Phillips
Troy Stone
Troy Stone
Helen Phillips

Donors

Columbian Lawyers' Assoc. of Nassau County
Columbian Lawyers' Assoc. of Nassau County
Alice & Frank Finnerty
Marilyn K. Genoa
Kantor & Kopman
Kantor & Kopman
Law Dept. & Referees of Nassau County Family Court
Grace D. Moran
Grace D. Moran
Nassau County Magistrates Association Inc.
Ed, Lynn & Robbie Robinson
Ellen Rosen
Ellen Rosen
Sabino & Sabino
Joan & Steve Schlissel
Hon. Denise Sher

In Memory Of

Claire Diodato, sister of Cleona Spano

Frances Cucarese, sister of Salvatore Spano

Nancy Deegan, wife of Donald Deegan
Don Forchelli
Stephen Posner
Susan Dworkin Levering
Hon. Richard S. Lawrence

Hon. Stanley Harwood
Nancy Deegan
Hon. Charles Rattoballi

Nancy Deegan
Gerald Tohn
Guenther Michaelis
Mary Jane C. Sabino, Esq.
Susan Levering
Thomas Cunniff, father of Hon. Joanna Seybert

In Memory Of Ruth Lieberman, Mother Of David Lieberman & Mother-In-Law Of Susan Katz Richman

Hon. Sandra Feuerstein
Elena Karabatos & Steve Schlissel
Hon. Susan T. Kluewer
Kenneth L. Marten

In Memory Of George C. Trovato, Jr.

Hon. Sandra Feuerstein
Hon. Sondra Pardes
Hon. Denise Sher
Turley, Redmond, Rosasco & Rosasco, LLP

In Memory Of Paul Barbara, Brother Of Dominic Barbara

Florence Fass
Joanne & Hon. Frank Gulotta Jr.
Grace Moran
Joan & Steve Schlissel

In Memory Of Arline Besunder, Wife Of Harvey Besunder

Hon. Sandra Feuerstein
Grace D. Moran
Joan & Steve Schlissel

General

Laurie S. Hershey
Robert Kalimian

Contributions may be sent to: NCBA, Attn: ***WE CARE,*** 15th & West Streets, Mineola, NY 11501 or at: **www.nassaubar.org**

WE CARE grants the wishes of Freeport Little League Inc.

Freeport Little League Inc. is an organization comprised of volunteers who act as league officials, managers, coaches and as mentors to children enrolled in their baseball and softball programs. Little League International, who charters and governs this organization, mandates that a child cannot be refused the opportunity to register for a league even if he or she is unable to pay. In adopting this mandate, Freeport Little League granted over 30 scholarships to families who applied for financial assistance last year, which totaled over $ 3000.

Deanne M. Caputo

The children who are afforded the wonderful opportunity of being a part of this organization are not only taught baseball and softball skills, but the volunteers also work to instill values of discipline, teamwork, sportsmanship and cultural diversity. This League had over 550 kids register for the Spring season of this year, ranging in ages 5 through 16. In an effort to help kids, ages 13 through 18, who are at risk for drug use, and gang violence, Freeport Little League sponsors travel teams with a mission to keep as many kids as possible "off the streets and in cleats," from April to November. Last year, Freeport Little League was able to form 5 travel teams for this age group and were even able to send one of the teams to Delaware, a first time trip outside the state of New York for many of the kids.

WE CARE is proud to announce that in supporting the mission of this organization, it has assisted in financing the travel team program and has contributed to raising money to purchase a batting cage for the children. On behalf of WE CARE, we commend Freeport Little League and all its volunteers for helping keep our children safe. It is because of you that so many children are able to recognize their potential and develop confidence.

Deanne M. Caputo is an associate at the law firm of Sullivan Papain Block McGrath & Cannavo P.C., concentrating her practice in personal injury law.

It's Heartfelt to support WE CARE

NCBA's 23rd Annual Children's Festival
hosted by the WE CARE Fund and the
Community Relations & Public Education Committee

Wednesday, February 23, 2011
at Domus • 12 - 2 p.m.

This spectacular event, made possible by your contributions to WE CARE treats deserving and challenged youngsters to a fun-filled afternoon including hot dogs, popcorn, ice-cream, clowns, gifts and other entertainment!

Please open your hearts and wallets for WE CARE:

Gold Heart - $200 Silver Heart - $100 Caring Heart - $50
(suggested minimum donation)

WE CARE Hearts

_____
Name

_____
Address

_____
City, State, Zip

_____
Phone

Mail to Nassau County Bar Association
Att: Elaine Leventhal
15th & West Streets
Mineola, NY 11501

Amount of Donation $ _____

IN BRIEF ...

Continued From Page 8

Stony Brook University, for the Wallace Fellows Foundation regarding "Law for Beginning Administrators." **Kathy A. Ahearn**, also a partner in the firm, spoke at the Long Island Association for Supervision and Curriculum Development's Annual Conference and the New York Council for School Superintendents Fall Conference regarding newly implemented legal requirements for teacher and principal evaluations. Gregory J. Guercio also presented at the Nassau and the Suffolk County Superintendent's Associations Meeting and the Pre-Convention sponsored by the New York State School Boards Association and the New York State Association of School Attorneys.

Michael L. Pfeifer, a principal in the Law Offices of Michael L. Pfeifer, P.C., serves as a trustee for Life's WORC Supplemental Needs Pooled Trust. Life's WORC is a private, not-for-profit organization providing comprehensive support for individuals with development disabilities. Founded in 1971, Life's WORC serves over 1,200 individuals and families and maintains 36 homes and 12 non-residential homes throughout Nassau, Queens and Suffolk counties.

Claudia Hinrichsen, a partner at the Lake Success-based firm of Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP, recently published an article in the Nassau County Medical Society's bulletin on recent changes in the rules and regulations of the Health Insurance Portability and Accountability Act. In addition, **Ron Lebow**, a senior associate at the firm, has been appointed Co-Chair of the Bar Association's Hospital and Health Law Committee. Mr. Lebow, who concentrates his practice in Health Business Law, has also been elected Chair of the Sub-Committee on Accountable Care Organizations and Medical Homes, a sub-committee to the New York City Bar Association's Health Law Committee.

Carolyn R. Wolf of Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP, recently spoke at Cornell University on the sudden rise in campus suicides and various other mental health issues. Ms. Wolf concentrates her practice exclusively in Mental Health Law.

Paul Hyl, senior associate of the Melville-based elder law and estate planning firm Genser Dubow Genser & Cona, has been appointed to the Board of Directors of Dowling College Center for Intergenerational Policy and Practice in Oakdale. The Center's mission is to raise public awareness of the inter-relatedness of all generational groups through advocacy, education and special programs. Mr. Hyl practices exclusively in the field of Trusts and Estates and Elder Law, and supervises the firm's Estate Planning and Estate Administration divisions. He received his Juris Doctor from St. John's University School of Law and has been featured in multiple media outlets.

The firm of Pegalis & Erickson, LLC was recently listed in the Tier 1 Category of the U.S. News Media Group and Best Lawyers 2010 Best Law Firms rankings. The publication ranks law firms nationally in 81 practice areas.

New Partners, Of Counsel and Associates

Deborah L. Rubin has joined Valli Kane & Vagnini, LLP, a Garden City-based law firm specializing in cases of discrimination, harassment and civil rights violations in the workplace, as an associate. Ms. Rubin, who earned her Juris Doctor from CUNY School of Law, served as the Staff Editor of the New York City Law Review and Co-President of the Domestic Violence Coalition.

The In Brief section is compiled by the Honorable Stephen L. Ukeiley, Suffolk County District Court Judge. Judge Ukeiley is also an adjunct professor at the New York Institute of Technology and an Officer of the Suffolk County Bar Association's Academy of Law.

PLEASE E-MAIL YOUR SUBMISSIONS TO Nassau Lawyer: nassaulawyer@nassaubar.org with subject line: IN BRIEF

VIEW FROM THE BENCH ...

Continued From Page 12

istering the Attorneys for Children program. This expert could help at the very beginning of the process in assessing the parent's prior diagnosis and services offered by the caseworkers. The expert could also help with trial preparation by reviewing the curriculum vitae of the opposing expert, educating the attorney about terminology, explaining the medications recommended and challenging the analysis and conclusions of the DSS forensic expert. Of course, if appropriate, the expert might be a witness for the parent or the child at trial. Let me make no bones about it. This Court is not looking to prolong hearings unnecessarily, especially given the press of Family Court's overburdened calendar. However, preserving and protecting the rights of all litigants should trump those concerns, particularly in these most "final" of Family Court proceedings. This is especially true in cases involving clients struggling with mental illness or developmental disabilities, who rely utterly on their attorneys to make the best possible case on their behalves.

I truly and deeply respect all counsel who dedicate their hearts, skills and careers to representing parents in such great need. I nevertheless challenge those attorneys to "up" their game and re-dedicate their efforts to preserve and protect the family of origin, ultimately helping the Court to render a decision giving children in foster care the permanency they so richly deserve, while giving their parents the fairest hearings possible of their cases.

Judge Edmund M. Dane is a Judge of the Nassau County Family Court.

FHCDA ...

Continued From Page 3

in writing, including decisions regarding withdrawing or withholding life-sustaining treatment.

If an attending physician relies on a patient's prior decision, the physician must record that prior decision in the patient's medical record. If a surrogate has already been designated to make decisions, the attending physician will make reasonable efforts to notify the surrogate prior to implementing the decision.

Commencement of the Surrogate's Authority

The authority of a surrogate commences upon the determination that the patient lacks decision-making capacity. If a patient regains decision-making capacity (as determined by a physician), the authority of the surrogate will cease.

Right to Be Informed

The surrogate has the right to receive medical information and medical records necessary to make informed decisions about the patient's health care. Health care providers are to provide to the surrogate information necessary to make an informed decision, including information regarding the patient's diagnosis, prognosis, the nature and consequences of the proposed health care, the benefits and risks of and alternatives to the proposed health care.

Life Sustaining Treatment

Decisions to withhold or withdraw life-sustaining treatment can only be made by the surrogate if it is determined that treatment would be an extraordinary burden to the patient and an attending physician determines, with the concurrence of another physician, that, to a reasonable degree of certainty, the patient has an illness or injury which can be expected to cause death within 6 months (whether or not the treatment is provided) OR the patient is permanently unconscious OR the provision of treatment would involve such pain or suffering that it would be reasonably deemed inhumane or extraordinarily burdensome AND the patient has an irreversible or incurable condition, as determined by the attending physician with the concurrence of another physician to a reasonable degree of medical certainty.

In a Residential Health Care Facility, a surrogate will have authority to refuse life-sustaining treatment only if the Ethics Review Committee reviews and approves the decision. This does not include the decision to withhold CPR. Further, providing nutrition and hydration orally, without reliance on medical treatment, is not "health care" under this law. It should be noted that specific rules govern life-sustaining treatment decisions for minor patients and patients with mental retardation.

Obligations of Attending Physician Regarding Life Sustaining Treatment

In the event a decision is made to withdraw or withhold life-sustaining treatment, an attending physician must:

1. Record the decision in the patient's medical record
2. Review the medical basis for the decision and either:

a) implement the decision OR

b) promptly make an objection known to the decision-maker and either arrange for the transfer of the patient to another physician or refer the matter to the Ethics Review Committee.

If an attending physician has actual notice of the following objections or disagreements, he/she must promptly refer the matter to the Ethics Review Committee if the objection or disagreement cannot be resolved:

1. An independent practitioner disagrees with the attending physician that the patient lacks decision-making capacity.
2. Any person on the surrogate list objects to the designation of the surrogate.
3. Any person on the surrogate list objects to a surrogate's decision.
4. A parent or guardian of a minor objects to the decision of another parent or guardian of the minor.
5. A minor patient refuses life-sustaining treatment and the parent or guardian wishes the treatment to be provided or the minor patient objects to the attending physician's determination regarding his/her decision-making capacity or recommendation regarding life-sustaining treatment.

If a surrogate directs the provision of life-sustaining treatment and a hospital or health care provider does not wish to provide such treatment, the hospital or health care provider must nonetheless comply with the surrogate's decision pending transfer to another hospital or health care provider or judicial review.

Decisions for Patients Without Surrogates

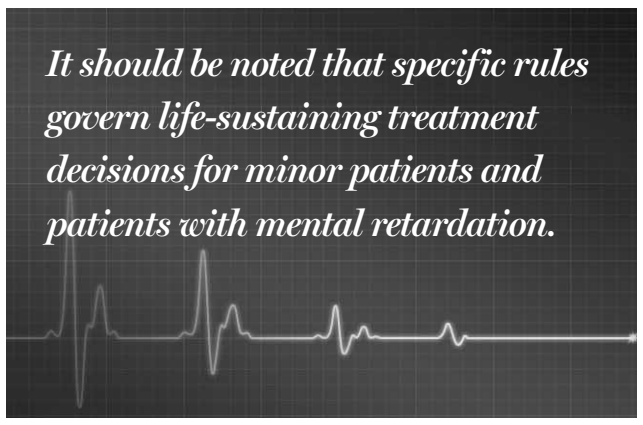
A hospital/RHCF has a duty, within a reasonable time after admission, to determine if the patient has a Health Care Agent or if at least one individual is available to serve as a surrogate in the event the patient loses decision-making capacity. If no such potential surrogate is identified, the hospital/RHCF must identify, to the extent reasonably possible, the patient's wishes and preferences, including religious and moral beliefs, regarding the pending health care decisions, and record such findings in the patient's medical record.

Routine Medical Treatment

An attending physician is authorized to make decisions regarding routine medical treatment in the absence of a surrogate. "Routine Medical Treatment" is defined to include treatment, services or procedures to diagnose or treat a physical or mental condition, such as administration of medication, extraction of bodily fluids for analysis and dental care performed with a local anesthetic. Routine medical treatment does NOT include ventilator support or nasogastric tubes unless such treatment is provided as part of post-operative care or in response to an acute illness and recovery is reasonably expected within one month or less.

Major Medical Treatment

An attending physician is authorized to make a recommendation regarding major medical treatment in the absence of a surrogate upon consultation with hospital/RHCF staff. "Major medical treatment" is defined to include treatment, services or procedures to diagnose or treat a physical or mental condition in which a general anesthetic is used, OR which involves significant risk, OR which involves significant invasion of bodily integrity requiring an incision, producing substantial pain, discomfort, debilitation or having a significant recovery



period, OR which involves the use of physical restraints (except in an emergency), OR which involves the use of psychoactive medications, except as provided as part of post-operative care or in response to an acute illness and treatment is reasonably expected to be administered for 48-hours or less or when provided in an emergency.

In a hospital setting, in addition to the attending physician, one other independent physician recommendation is required for major medical treatment decisions. In a residential health care facility, in addition to the attending physician, an independent determination by the medical director (or a physician designated by the medical director) that the recommendation is appropriate is required for major medical treatment decisions. If the medical director is the patient's attending physician, a different physician designated by the RHCF must make the independent determination. A health or social services practitioner may provide a second opinion regarding the use of restraints.

Withholding or Withdrawal of Life Sustaining Treatment in the Absence of a Surrogate

In the case in which the patient does not have an agent or a surrogate under the new law and a decision must be made as to the withholding or withdrawal of life sustaining treatment, a guardianship proceeding may still be required as a court of competent jurisdiction continues to be empowered to make such determinations. The FHCDA provides that such decision can also be made by an attending physician, along with the independent concurrence of a second physician designated by the hospital/RHCF, upon a determination to a reasonable degree of certainty that life-sustaining treatment offers no medical benefit because the patient will die imminently, whether or not the treatment is provided and the provision of life-sustaining treatment would violate accepted medical standards. However, this will not apply to treatment necessary to alleviate pain or discomfort.

If a physician consulted for a concurring opinion or a member of the hospital/RHCF staff objects to the attending physician's determination or recommendation regarding major medical treatment, the matter must be referred to the Ethics Review Committee if it cannot be resolved.

DNRs

A "Do Not Resuscitate" ("DNR") order must be written in the patient's medical record. Under the FHCDA, consent to a DNR will not constitute consent to withhold or withdraw treatment other than CPR.

Revocation of Consent

A patient, surrogate, or parent/guardian of a minor may at any time revoke consent to withhold or withdraw life-sustaining treatment by informing an attending physician or a member of the medical or nursing staff. An attending physician informed of a revocation must: 1) record the revocation in the patient's medical record; 2) cancel any orders to withdraw or withhold treatment; and 3) notify the hospital staff directly responsible for the patient's care of the revocation. Any member of the medical or nursing staff informed of a revocation must immediately notify the attending physician.

Implementation and Review of Decisions

Hospitals/RHCFs are directed to adopt written policies requiring implementation and regular review of decisions to withhold or withdraw life-sustaining treatment. Hospitals/RHCFs must also develop policies regarding documentation of clinical determinations and decisions made by surrogates.

Interinstitutional Transfers

If a patient with an order to withhold or withdraw life-sustaining treatment is transferred from a mental hygiene facility or from one hospital/RHCF to another, the order will remain effective until an attending physician examines the patient and either issues orders to continue the prior plan OR cancel the order if the attending physician determines that the order is no longer appropriate or authorized. The physician must make reasonable efforts to notify the person who made the decision to withdraw or withhold treatment prior to cancelling the order.

Ethics Review Committee

Every hospital must establish at least one Ethics Review Committee or participate in an Ethics Review Committee that serves more than one hospital/RHCF and must adopt a written policy governing the committee's functions, composition and procedures.

The Ethics Review Committee may provide advice on the ethical aspects of proposed health care, make recommendations as to proposed care and resolve disputes regarding proposed care. Ethics Review Committee members and consultants will have access to medical information and medical records necessary to perform their functions.

Limitation on Private Hospitals and RHCFs

A private hospital/RHCF cannot be required to honor a health care decision if the decision is contrary to the formally adopted religious beliefs or moral convictions central to the facility's operating principles provided the facility has informed the patient, family or surrogate of such policy prior to or upon admission, if reasonably possible, and the patient is transferred promptly to another facility. Similarly, an individual health care provider cannot be required to honor a health care decision if the decision is contrary to the individual's religious beliefs or moral convictions provided the individual health care provider promptly informs the person who made the decision and the facility of his/her refusal to honor the decision. The facility must then transfer responsibility for the patient to another individual health care provider willing to honor the decision.

While the FHCDA is intended to fill the gap regarding patients who lack decision-making capacity but have not appointed an agent to make health care decisions on their behalf, the new law is quite complex and burdensome. Individuals, families and health care facilities will each be far better served if the populace has properly executed Health Care Proxies and Living Wills in place.

Jennifer B. Cona, Esq. is the managing partner of the Melville Elder Law firm Genser Dubow Genser & Cona, LLP and heads the firm's Health Care Facility Representation practice group.

1. "Surrogate" is the term used under the FHCDA to refer to the person selected to make health care decisions on behalf of a patient.
2. This article is not intended to be exhaustive and does not cover all aspects of the new law.
3. Provided the couple is not legally separated.

TAX ...

Continued From Page 13

criteria), a New York State estate tax may be due and an appraisal of the assets would be a necessity.

2. Some estate planners anticipated a year in which there would be no estate tax and included in their wills provisions relating to the election to increase the basis. For example, where there were multiple executors the duty to assign the asset basis increase was given to one of them. Where there were family member executors and non-family member executors, the duty to assign the asset basis increase was given, generally, to the non-family member executor to avoid any potential conflicts. Unfortunately, few estate planners believed that Congress would allow for the one-year repeal of the estate tax. Therefore, many of the wills of 2010 decedents are silent in this regard. Therefore, there are potential conflicts that can arise in who will make the ultimate decision. If the decedent named one of the children to be an executor there are potential conflicts between the executor and his/her siblings over the basis increase allocations. Some commentators have suggested that there may be potential gift tax consequences arising from these allocations.

3. Prior to 2010 any inherited property was considered to be long-term for income tax purposes. Therefore, if a decedent acquired and asset on December 1, 2009 and died on December 15, 2009, the asset was considered a long-term asset in the hands of the beneficiary and qualified for long-term capital gain benefits when sold. For 2010, this rule no longer applies. The holding period of the assets will include the decedent's holding period if the beneficiary uses the decedent's adjusted basis.

Example: An individual dies on March 1, 2010. One of the assets owned by the decedent was a parcel of land acquired six months earlier for $1 million. On the date of the decedent's death the property was worth $1.2 million. Assuming no increase was elected for this property, the estate's income tax basis is $1 million with a 6-month holding period. If on the date of the decedent's death the property was worth $950,000, the estate's tax basis for the property would be $950,000 and the decedent's holding period would not be used.

The carry-over basis rules, while simple on their face, have created complications far greater than tracing the cost basis of the decedent's assets. Estate planners, estate administration attorneys, accountants preparing estate and income tax returns and executors must be cognizant of these rules and the dilemmas that have been created. They must take steps to closely follow future developments and interpretations.

Robert Katz is the Senior Partner of the law firm Katz, Bernstein and Katz, LLP, located in Syosset, New York. He is also the Chaykin Distinguished Teaching Professor of Accounting and Taxation at Hofstra University.

Neil D. Katz is the Managing Partner of the law firm Katz, Bernstein and Katz, LLP.

BUSINESS CARD DIRECTORY

OFFICE SPACE

LAWYER TO LAWYER

COMMERCIAL ARBITRATION AND MEDIATION

ENVIRONMENTAL LAW AND LITIGATION

PERSONAL INJURY

DEFENSE ATTORNEYS

LEGAL WRITING/ APPELLATE PRINTING

TRADEMARK ATTORNEY

DIVORCE MEDIATION

PER DIEM ATTORNEY

Lawyer to Lawyer Rates
(Includes photo)

1 time	$110	2nd category	$30
3 times	$90	3rd category	$20
6 times	$85		

For additional information call
Joe Parrino at the office of
Long Island Business News
(631) 913-4253

Have you taken advantage of all NCBA has to offer?

Great New Member Benefit!

Looking for a New Job?

OR

Looking for Legal Help?

Try Our New Online

NCBA Career Center

Job Seekers Can:

- Post an Anonymous Resume.
- Set a Personal Job Alert.
- View jobs.
- Create a Jobseeker Account.

Exclusively for NCBA Members

√*Members see all newly posted jobs for 14 days before they can be viewed by the general public.*

√*Member resumes are listed first in employer searches.*

Employers Can:

- Browse Resumes for FREE.
- Post a job.
- Create a Profile.
- Email Broadcasts.

Long Island's First Online Job Board For The Entire Legal Profession

Get Started Today!

www.nassaubar.org

Are you feeling

Overwhelmed?

The NCBA Lawyer Assistance Program can help.

We understand the competition, constant stress and high expectations you face as a lawyer, judge or law student. Sometimes the most difficult trials happen outside the court. Unmanaged stress can lead to problems such as substance abuse and depression.

The LAP Committee provides referral services, professional and peer support, and assistance with law firm closings. All services are completely free, strictly confidential and protected under Section 499 of the Judiciary Law.

Call the Confidential 24-Hour Hotline:

888.408.6222

LAP Lawyer Assistance Program

Lawyer Assistance Program
Sponsored by
NYS Lawyer Assistance Trust
Nassau County Bar Association

Looking to Build Your Client Bast This Year?

Then Take a Look at Joining NCBA's Lawyer Referral Information Service

NCBA receives 250 calls a week from people seeking all sorts of legal help.

All callers are personally evaluated and referred to appropriate NCBA member attorneys on the LRIS panel, who agree to charge no more than $50 for the first half hour consultation. Fee arrangements are then between the attorney and the client.

Join LRIS today!

LRIS annual membership remains at the low starting fee of just $250.

Apply online at www.nassaubar.org, or contact Pat Carbonaro, 516-747-4070 x219.

LRIS

Lawyer Referral Information Service

We encourage you to contact our Corporate Partners* for special Members-Only offers

CBS Coverage Group, Inc.
(516-394-7562)

NORTH PARK CONSULTANTS
INCORPORATED
INSURANCE & FINANCIAL SERVICES
(800-250-2283)

CHAMPION OFFICE SUITES
(516-873-8880)

RealtimeReportingInc.
(516-938-4000) *National Court Reporting Services*

CAPITAL PAYMENTS
(631-719-8657)

Paragon Group, LLC
CORPORATE REAL ESTATE & TENANT REPRESENTATION
(516-336-5440 x18)

***Corporate Partnership** represents the highest level of sponsorship, which helps to offset expenses for Bar Association programs and services*

For more information about these benefits or Corporate Partnership contact Dede Unger at 516-747-4070 x226 or dsunger@nassaubar.org