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Including Special Needs Planning

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Estate Planning after the 2017 Tax Act

By Glenn A. Henkel, Esq.

For federal estate and gift tax planners, the headline of the 2017 Tax Act is the dramatic increase in the federal estate, generation skipping, and gift tax exemptions from $5,600,000 per person to $11.18 million per person (with inflation adjustments). The effect of such a dramatic increase is to render federal estate and transfer taxes a complete non-factor for nearly all Americans. However, of particular concern to more affluent clients is the lack of permanency in these changes. Should the estate planning professional consider or ignore potential estate taxes?

Change of focus. The dramatic rise in exemption will bring an increased focus on income tax "basis" planning. While traditional planning had centered on maintaining estate tax "exclusion" of assets, the new construct will seek estate tax "inclusion." IRC § 1014 allows a "step up" in income tax basis for assets that are held at death and generally included in the estate tax base of a decedent. Thus, in some scenarios, planning may center on suggesting that elderly clients retain assets in order to achieve an income tax benefit. Some situations may require seeking to force assets into "taxable" estates. Remember however, that the new rules expire on December 31, 2025. Thus, unless the client is expected to pass before the rules expire, caution will be needed, especially given the possibility that the estate tax benefit is a "tax break for the wealthy" and likely to be reduced for political reasons in the foreseeable future.

Advice based on current age. Given the current state of the estate tax and its return to prior levels in 2026, the advice being given may differ for young, intermediate, and elderly clients. For young clients, maybe there should be no consideration given to this temporary doubling of the exemption. No one knows what the rules will be in the year 2040, 2050, or 2060. For elderly clients expected not to survive until 2026, perhaps the estate tax concerns could be disregarded, assuming they do not think it will be reversed after 2020. Finally, for intermediate age clients, all options need to be addressed, with consideration of gifting. Estate planners must provide the information needed to craft an appropriate plan. For those of you who remember the 2010 "repeal" of the estate tax created by the 2001 "Bush tax cuts" most, if not all, practitioners thought there would be an intermediate "fix" instead of the repeal/sunset scenario that actually played out. (In 2010, the federal estate tax was phased out to disappear for a period of one year, after which the federal estate tax returned in 2011 with a much higher federal estate tax exemption.) Boy, were we wrong!

Spousal estates. One difficult aspect for planners is the question of how to plan for spousal estates. Traditionally, each spouse would leave assets in a trust for the survivor (or for the survivor and other family members) with the thought that the trust

assets would both (i) be excluded from the estate of the survivor and (ii) be sheltered by the estate tax exemption of the predeceasing spouse. In other words, the goal has always been to transfer to a surviving spouse an amount permitted to defer any tax until the death of the surviving spouse/surviving parent. This share could be outright or in a trust (sometimes called "Marital Trust") for the surviving spouse. The balance would pass into another trust, sometimes called a "credit shelter" trust with the same terms, similar terms, or different terms depending on the situation. The credit shelter trust (also known as the "bypass trust" or "family trust" or "residuary trust") is excluded from the estate tax base of the surviving spouse. Prior to 1998 a "unified credit" was permitted to reduce taxes but now modern language uses the term "applicable exemption amount" or "basic exclusion amount." In light of the current higher estate tax exemption threshold, the testamentary plan in many of our client's testamentary documents would place virtually all their assets in the trust sheltered from estate tax.

Further, it may preclude the opportunity to receive a "step up" in income tax basis brought about by IRC § 1014 at the passing of the surviving spouse.

Due to increased BEA, wills containing hard "formula-driven" allocation provisions that are based on prior tax law provisions need to be reviewed in planning. Twenty years ago, it was common place for a testamentary spousal estate plan to include a provision that dedicated a certain sum to a spouse under a "marital deduction" formula. These planning instruments may no longer fit the client's intentions and may not matter for limiting estate taxes. Simply stated, estate planning is the process of arranging one's affairs to avoid aggravation and stress at the death of a loved one. Thus, when a formula-driven will does not achieve its intended goal, the unnecessary stress can wreak havoc for family planning.

While it is usual to consider the estate and gift tax formulas contained in many of our documents, some documents are driven by references to the federal generation skipping transfer tax. Thus, estate and tax practitioners must be mindful that some documents may need to be reconsidered, not only for the estate and gift tax provisions but also for the federal generation skipping transfer tax rules.

Another change in focus. A second important change in focus for estate practitioners brought about by the high exemption thresholds relates to timing of the decisions being made. It used to be that planning was performed when counseling clients on the structure of the will, trust, and other parts of the testamentary plan.

A plan was created and, at the passing of the testator, the estate administration process was merely designed to implement the decisions that had been reached earlier. Today, the situation is reversed and there is an emphasis on post-mortem planning at the death of the first spouse. Ensuring flexibility has become (and must be) the most important part of a planners' overall job.

Estate planning meetings have gradually gotten longer over the last decade. What was thought to be simplification has, in fact, caused estate planners to spend more time with their clients explaining the context of the changing tax laws. In 2008, estate planners explained how the estate tax was expected to be reformed before it expired in 2010. In 2010, planners explained the new rules without estate tax, but also without step up in income tax basis of IRC § 1014. In 2011, planners explained the temporary fix and, in 2013, addressed the "permanent" change made by the American Taxpayers Relief Act of 2012. Since then, the changes have been even more dramatic and now planners have to explain how portability of the estate tax exemption could be used as a mechanism to avoid the creation of the credit shelter trust described above. The 2012 tax Act solidified IRC § 2010(c)(4), which allows a surviving spouse to claim or "port" the tax exemption of a deceased spouse to the survivor. To make matters more confusing, portability applies for estate tax planning, but not for generation skipping planning.

More concerns. Placing significant emphasis on flexibility at death results in two more concerns. First, clients

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Technological Innovations Can Help Seniors

New technologies are increasingly being used to help seniors remain at home longer and to facilitate their care in institutional settings. Some of these innovations may have the potential to complement the care provided by home health care workers, of which there is a growing shortage.

Laurie Orlov, a tech industry veteran and elder care advocate who writes the "Aging in Place Technology Watch" blog, highlighted the upcoming Silicon Valley Boomer Venture Summit, in June 2018, and also spotlighted TheoraCare Solutions' Theora Connect, a monitoring and communication device worn like a wrist-watch, which can facilitate two-way communication between the caregiver and the wearer. [*See* Orlov, L., Blog, "Five Technology Offerings for Older Adults – April 2018," available online at *https://www.ageinplacetech.com/blog/five-technology-offerings-older-adults-april-2018*].

Mobile therapeutic robots are increasingly being considered for use in senior care. Applications include telemedicine delivery, medication reminders, and fall detection and reporting. [Sumiya, T., Matsubara, Y., Nakano, M., Sugaya, M., "A Mobile Robot for Fall Detection for Elderly-Care," Procedia Computer Science, Volume 60, pp. 870-880 (2015)]. Medical robots are currently being used in the Duke University School of Nursing program to provide realistic clinical simulations used to help train nursing students in pediatric care under the guidance of a more experienced clinician who is available remotely. [*See https://nursing.duke.edu/news/duke-university-school-nursing-uses-robots-nursing-education*].

On a lighter note, the PARO robot delivers "pet therapy" with a consistently well-behaved virtual pet. The device encases sensors and artificial intelligence technology in a fluffy, cuddly exterior resembling a toy seal. The PARO can respond to speech and movement with pet-like behaviors and sounds. Developed in Japan, the PARO was used in a single-site dementia unit in Sussex, Great Britain, with noted increases in social engagement of seniors living with dementia, as well increases in mood and reduction in agitation. Critics cited concerns regarding infection prevention and control, due to the difficulty of cleaning the PAROs. A recent study conducted in the Sussex dementia ward suggested that the PARO technology can be used safely under controlled conditions. [*See* Dodds, P, Martyn K, Brown M, "Infection prevention and control challenges of using a therapeutic robot," Nursing Older People 30(3): 34-40 (Mar. 2018)].

and their advisors need to be mindful that when a spouse passes away, there may be important decisions to be considered to implement a plan. Clients are often unlikely to act quickly due to emotion, confusion about the plan, and procrastination. Moreover, if the plan had not been considered for a period time, there may be post mortem steps to modify or reform documents to correct or clarify the decedent's original plan. In states like New Jersey, the "doctrine of probable intent" is firmly embedded in the law. Thus, for a decedent who took the guidance of counsel to incorporate a tax planning mechanism, it can be used as a justification for modification of irrevocable documents because they effectuate the probable (often likely) intent of the testator. Second, estate lawyers need to be much clearer in discussions of possible representations of a family after the death of a loved one. Sometimes, clients will procrastinate on hiring counsel or they will be vague on their intentions for representation. If deadlines are missed, a client may blame the attorney. Thus, it is important to be proactive in the circumstances of possible representation that deadlines be considered.

In planning for a spousal testamentary estate plan structure, two predominant themes have emerged over the past several years. We'll refer to the two plans as the "Disclaimer Trust" plan and the "QTIP Trust" plan. This presupposes that the planning is being done for tax reasons only. For circumstances involving a second marriage when asset protection is a concern or when long-term management and control of assets are needed, other considerations are warranted. While the main focus is usually on *federal* rules, we also need to be mindful that the state of residence of a client at death may be a factor. Some states, like New Jersey, have had estate taxes that have lapsed, but could current financial shortfalls in state budgets create a need to reenact estate taxes in the future? For example, there has been talk that California may reenact an estate tax.

Disclaimer trust structure. One structure, the Disclaimer Trust plan, allows a spouse to be the sole beneficiary of the

CMS Clarifies Medicaid Penalty Period Start Date for § 1915(c) Home and Community Based Medicaid Waiver Applicants

On April 17, 2018, the Department of Health and Human Services, Centers for Medicare and Medicaid Services issued State Medicaid Director Letter # 18-004. This guidance clarifies that the start date of the Medicaid penalty period for individuals applying for Home and Community Based Medicaid waiver services under section 1915(c) is no later than the point at which the applicant would otherwise be receiving HCBS waiver coverage based on an approved application for such care, but for the application of the Medicaid transfer penalty.

A Medicaid penalty period is the period during which Medicaid denies payment for care, based on the value of an uncompensated gift. States are required to impose Medicaid penalty periods for gifts for less than fair market value that are made during the five-year Medicaid look-back period corresponding to the Medicaid application in question.

The new agency directive clarifies that the Medicaid penalty period will generally begin to run on an application for section 1915(c) waiver services once the state has determined that the Medicaid applicant meets all the requirements (financial and other) for Medicaid eligibility, including the clinical eligibility/level of care criteria. In order for the Medicaid penalty period to begin to run, the state must also have clinically assessed the applicant, have developed a person-centered service plan, and have identified an available waiver slot for the applicant. The guidance notes that in the case of section 1915(c) waiver services, the five-year Medicaid look back period runs retroactively for the 60- month period beginning on the date that the state has confirmed that all the requirements for HCBS coverage are met.

The new State Medicaid Director letter also notes that the definition of an "institutionalized individual" encompasses individuals who are eligible for Medicaid waiver services to avert institutional placement. The guidance rejects the "never ending penalty period" approach which was rejected by a federal district court in New Jersey in 2010. [*See Frugard v. Velez* (D.N.J. No. 08-5119 (GEB) April 8, 2010)]. *For a copy of SMD Letter # 18-004 go to: http://business.cch.com/elr/smd18004_0518.pdf*]

decedent's estate and the testamentary document incorporates a mechanism for "disclaiming" assets into a trust for the benefit of the surviving spouse. Under IRC § 2518, a spouse can be a sole beneficiary of assets under a testamentary document (will, trust, or beneficiary designation) and if, within nine months, the surviving spouse disclaims assets pursuant to state law, the assets can pass into a trust in which the spouse remains the beneficiary. This creates the Disclaimer Trust because it is activated by a disclaimer under state law. The spouse can have significant power and control over the Disclaimer Trust including the ability to serve as trustee, receive all income, and hold the right to receive principal pursuant to an ascertainable standard under IRC § 2041. An "ascertainable standard" includes the ability to receive principal distributions for the "health, maintenance, and support in reasonable comfort" of the beneficiary, which is the surviving spouse in this scenario. If there is a tax advantage to be gained by having assets pass to a trust, the Disclaimer Trust provides flexibility to achieve that goal.

QTIP Trust. An alternate structure would be to rely on a QTIP-type trust. Under IRC § 2056(b)(7), assets passing into a trust in which the surviving spouse receives a "qualified income interest for life" can qualify for a marital deduction should the family choose to do so. A qualified income interest for life merely means that the surviving spouse must receive all income from the assets in the trust fund but, of course, the surviving spouse can have broader withdrawal rights including the power to withdrawal principal for medical care, maintenance, and support. One power that a surviving spouse can be given in a trust that is eligible to qualify as a QTIP Trust, (*e.g.*, a "Qtippable" trust) is the power to reallocate funds at his or her passing under a power known as a "limited" or "special" power of appointment. The power is usually limited to a special class that includes only family members. Providing a limited power of appointment can often be useful in the long-term management of family wealth. Such a power cannot be included in a Disclaimer Trust. Thus, the use of a QTIP Trust structure can provide maximum flexibility to decide, at the passing of the first spouse, whether estate tax inclusion or not is important. Unlike opting for the portability of estate tax exemption, the use of this type of trust can also preserve the generation skipping exemption, an attribute that would not apply if portability is elected. (For example, if a survivor

disclaimed assets into a Disclaimer Trust, generation skipping exemption could be allocated on a timely filed return.)

Finally, another non-tax benefit of the use of the QTIP Trust is that the funds in the trust will be preserved for known descendants to a deceased spouse. With the potential that a surviving spouse may remarry, some clients, even younger clients when the survivor may live for an extended period of time, may feel that the QTIP Trust provides more clarity in the plan.

Default? Some practitioners suggest that the Disclaimer Trust option should be the default plan for many clients because of the likelihood that the surviving spouse will not need to utilize the credit shelter mechanism due to the high exemptions rendering the further tax planning unnecessary. Even if the federal estate tax exemption reverts to the $5,000,000 threshold (indexed for inflation) under the 2012 American Taxpayer Relief Act, some clients will need not concern themselves with the administration of a trust being created solely for tax reasons.

Moreover, by accepting the assets upon the death of the first parent, the family can assure a "step up" in income tax basis under IRC § 1014 when the surviving parent passes away. Thus, an important goal in estate planning is to minimize future income taxes to the beneficiaries on the transfer of inherited, highly appreciated assets. Leaving the assets in the decedent's estate until death (rather than lifetime gifting of those assets), capital gain can be avoided or minimized due to the step up in basis. If the Disclaimer Trust is not used, the spouse can accept the funds in the estate and opt for portability of estate tax exemption under IRC § 2010.

While the use of the Disclaimer Trust plan is an important and useful approach, planners must be mindful that many clients will not act within the requisite timeframe. Some clients simply don't act on the disclaimer plan, no matter how beneficial it may be. Making complicated decisions about tax planning within nine months of the loss of a spouse can often be a hard and emotional decision. This is especially true if a client did not fully understand the implications when the plan was originally put in place.

Clarity. The use of a QTIP Trust form provides greater clarity in planning estates. Assets passing to the trust can be assured to both (i) be available for the surviving spouse, (ii) ensure that the balance of the trust will pass to the intended beneficiaries, and (iii) protect the situation when there is a later desire to remove assets from the estate tax base of the survivor. This may occur if the estate tax rules return to the pre-2017 thresholds.

Another tax benefit to a QTIP Trust was clarified by the IRS in Rev. Proc. 2016-49. In that ruling, the IRS made clear that the choice of electing "QTIP" treatment and simultaneously electing portability of estate tax exemption is an available and useful alternative in post mortem planning.

A choice can be made at the death of the predeceasing spouse. First, the family can opt for portability of the estate tax exemption and receive a step-up in income tax basis by making a QTIP election over the QTIP Trust. Alternatively, they could refrain from making the QTIP election and removing the growth in the value of the trust from the estate of the surviving spouse. Moreover, a surviving spouse always has the option of making a gift of the trust to the heirs at some point during his or her lifetime as a gift pursuant to IRC § 2519. In that scenario, the survivor would apply the deceased spouse's unused exemption to shelter the gift. Thus, the use of a "Qtippable" trust preserves options for an affluent family.

Qualified retirement accounts. In the course of planning for an estate, planners should be mindful that the typical trust assets used for funding would *exclude* qualified retirement accounts, such as IRAs and the like. With respect to items of deferred income, the *income* tax to be imposed on the retirement fund adds a layer of complexity that warrants additional care. If a deceased spouse names his or her surviving spouse as the direct heir of a retirement fund, he or she can rollover the funds thereby achieving a significant income tax deferral. Moreover, when a surviving spouse eventually leaves the funds to the next generation, the time for forced distributions as a "Inherited IRA" will begin at a later date. This is called the "stretch IRA" technique. Thus, opting for the rollover/stretch planning technique means that for many couples the retirement plan cannot be used as a part of the overall trust plan, whether for the Disclaimer Trust or the QTIP Trust.

Clayton QTIP Trust. Another variation in the structure of an estate plan would be the use of a so called "Clayton QTIP Trust" [*Estate of Clayton v. C.I.R.*, 976 F.2d 1486 (5th Cir.1992)], which is authorized now by T.R. § 20.2056(b)-7. With a Clayton QTIP, a third-party executor for this purpose can decide how much of the trust under the decedent's will is to become a Qtippable trust and how much will pass in an alternate direction, presumably to a broader-based trust without the strict requirements of a QTIP where the spouse *must* receive all income. Prudent planners will avoid allowing the spouse, as sole executor, to make the election about how the assets are divided between each of the separate shares. If allowed, some are concerned that the spouse would be making a gift to the beneficiaries of the share in which others have an interest. However, in the right circumstance (*i.e.*, where a family wants to limit forced distributions of income to the surviving spouse) the use of a

Clayton QTIP trust can be an appropriate mechanism to provide greater flexibility.

New opportunities. In addition to the changing landscape described above, the increased exemptions have also created a host of new, broader opportunities for the wealthier client families. The additional generation skipping exemption may be used to allocate newly created GST exemption to shelter prior gifts. Other families may choose to make inter-family gifts "upstream" (from a younger person to an elderly person) as a mechanism to achieve additional step up in income tax basis. An older generation family who holds assets at death can pass assets back to other family members with a new or higher tax benefit if received before one year of death. [*See* IRC § 1014(e)] Some of our wealthiest clients may even choose to consume the entirety of their newfound gift tax exemption with the hope that the possible reductions coming in 2026 will not be subject to clawback of the previously granted benefit. Some spouses will create irrevocable gifts in trust (called a Spousal Lifetime Access Trust or "SLAT") for the benefit of a spouse to secure some tax benefit which may be lost assuming the sunset of the 2017 tax benefits in 2026, or earlier.

In sum, while the new opportunities have changed the tax planning landscape, some of the previously tried and tested techniques of utilizing trusts for a spouse, such as the Disclaimer Trust and the QTIP Trust will be remain a staple of an estate planner's toolbox.

KEEPING CURRENT

Unpaid Loans Were Made to Facilitate Medicaid Eligibility

Wellner v. Jablonka, No. 525385, --- N.Y.S.3d ----, 2018 N.Y. Slip Op. 02701, (N.Y. S.Ct., A.D. 3d. Dep't., Apr. 19, 2018). In this case, the petitioner challenges the imposition of a Medicaid penalty period, contending that the transfers to her son were exclusively for another purpose under *Matter of Collins v. Zucker* [144 A.D.3d 1441 (2016)]. The New York Supreme Court, Appellate Division, however, sustains the Medicaid penalty period for funds loaned to the petitioner's son pursuant to promissory note and a mortgage.

Unlike the petitioner in *Matter of Collins,* who, though advanced in age, had only relatively minor health complaints when the transfers were made, the petitioner here was diagnosed with progressive neurological disorder years prior to the 2010 loan in exchange for a promissory note and the 2013 loan in exchange for a mortgage. pursuant to a mortgage. Neither the promissory note nor the mortgage was fully repaid.

The 2010 loan pursuant to the promissory note called for five annual payments, of which only two were made prior to December 2015. The 2010 loan was made to the couple's son, who was a self-employed attorney allegedly unable to qualify for a bank loan.

Even though the 2010 promissory note remained unpaid, in February 2013, the petitioner's spouse made another loan to their son, this time in exchange for a30-year mortgage secured by the son's New Jersey home. When the mortgage was made, the petitioner was aged 76 with an actuarial value life expectancy of less than 30 years (the term of the mortgage) and was receiving round the clock in home care from her husband and home health aides.

In approximately October 2014, the petitioner entered a nursing home and applied for Medicaid effective January 1, 2015. The petitioner was determined eligible for Medicaid and a Medicaid penalty period for the net aggregated transfers pursuant to the promissory note and the mortgage was imposed.

For the full text of this decision, go to: http://business.cch.com/elr/2018NYSlipOp02701_0518.pdf

Alaska Must Provide Therapy to Medicaid Eligible Children with Autism Spectrum Disorder

Disability Law Center of Alaska v. Davidson, No. 3:16-cv-0277-HRH (D. Ala., Mar. 28, 2018). The federal district court grants partial summary judgment to the plaintiff/Disability Law Center of Alaska (DLC), concluding that the Centers for Medicare and Medicaid (CMS) cannot authorize the defendant, Alaska Department of Health and Social Services (ADHSS), to deny providing ABA therapy under the state's early and periodic screening, diagnostic, and treatment service (EPSDT) program for Medicaid recipients.

ABA therapy is an intensive behavior therapy that may help autistic children with cognitive function, language skills, and adaptive behaviors. Alaska's state Medicaid plan includes an EPSDT program. Defendant, ADHSS, administers two section 1915(c) Medicaid waivers through which 16 children receive Intensive Active Treatment (IAT) Services.

Defendant/ADHSS did not indicate clearly whether any of those 16 children receive ABA therapy as an IAT service.

In July 2014, CMS issued a bulletin noting that all Medicaid enrollees who are children, including those with autism spectrum disorder, must receive EPSDT services. In September 2014, CMS published answers to questions from the states in response to the July 2014 bulletin. CMS' published answers stated that it did not mandate ABA services for children under age 21 with autism spectrum disorder (ASD), adding that ABA is one treatment modality for ASD.

In its section 1915(c) waiver renewal requests, defendant proposed removing IAT services from its waiver programs by January 1, 2017. CMS asked defendants to submit the amendments to the waivers and the State Medicaid Plan at the same time.

Plaintiff/DLC filed a section 1983 action, alleging that defendant AHDSS, violated the Medicaid Act by failing to provide ABA therapy under the EPSDT program with reasonable promptness. Only 16 children were receiving IAT waiver services, while there were 368 autistic children on the waivers' waiting lists, none of whom were receiving ABA services as of May 2017.

Even though CMS requested the simultaneous submission of the waiver amendments and the state Medicaid plan, given that CMS also directed the defendants, along with other states, to begin providing ABA therapy under the EPSDT program as quickly as possible, the defendants could possibly be viewed as violating the reasonable promptness provision of 42 C.F.R. 435.930(a) and the court denies the parties' cross motions for summary judgment on the reasonable promptness provision.

For the full text of this decision, go to: http://business.cch.com/elr/DisabilityLawCenterofAL_0518.pdf

Mental Health Parity Act Requires Coverage of Residential Mental Health Services

Munnelly v. Fordham University Faculty and Administration HMO Insurance Plan, No. 16-Civ-5632 (PGG) (S.D.N.Y., Mar. 30, 2018). The federal district court grants summary judgment on the plaintiff's motion, finding that the blanket denial of coverage for residential mental health treatment services in the plan document violated the Mental Health Parity Act.

The plaintiff is employed by Fordham University and was covered for mental health services under his employer's ERISA plan. The plan provided for a blanket exclusion of any mental health residential treatment services from coverage. The plaintiff's 17-year-old son had a history of mental illness and received residential mental health treatment, for which health insurance benefits were claimed.

Because the residential treatment services are only provided to treat mental health conditions, and the plan contains no corresponding limitation on analogous treatment for medical/surgical conditions, the plan's residential treatment services exclusion runs afoul of the express requirements of the Mental Health Parity Act. However, the insurer did not waive its arguments regarding the plan's precertification requirements and its exclusion for out of network inpatient mental health care.

For the full text of this decision, go to: http://business.cch.com/elr/10_31_46_1_16_cv_05632_PGG_78_0518.pdf

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Mr. Vanarelli cautions that elder law is a complex area, so it is also important that the elder mediator have a solid understanding of Medicaid, Veteran's Benefits Aid and Attendance, Supplemental Security Income and Social Security Disability Income, and other public benefit programs such as SNAP and Section 8 housing. The elder mediator should also be well-versed in handling capacity issues (including undue influence) and fiduciary duty matters.

Mr. Vanarelli trained in mediation through Elder Decisions, a group of mediators based in Boston, Massachusetts. Certification as an elder mediator is also available through other sources, including live webinars and on demand video training through the Elder Mediation International Network, the Good Shepherd Mediation Program presented in Philadelphia, Pennsylvania, and the Eldercare Essentials Mediation Training in Highlands Ranch, Colorado. In Arizona, Althea P. Halchuck EJD, Ct., provides 21 hours of elder and adult family mediation training. Additional training may be available through books and continuing legal educational seminars.

Incorporating Elder and Estate Mediation Into Your Practice

By Donald D. Vanarelli, Esq. and Jane M. Fearn-Zimmer, Esq., LLM.

By 2030, the elderly will outnumber the young in the United States population. With the increased number of elderly and disabled individuals being cared for by family members will come an increase in disputes elder mediation can successfully resolve elder-related disputes and estate mediation can successfully resolve elder-related disputes, while preserving family harmony and allowing all the participating family members, particularly the elderly or disabled individual, to have some input into the solution. [*See* Sadick, "Battling it out when it comes to aging parent's care? Elder mediation might help, Chicago Tribune, December 13, 2017, available online at *http://www.chicagotribune.com/lifestyles/sc-fam-elder-mediation-0102-story.html*].

Donald Vanarelli, Esq. is an Accredited Professional Mediator, and a co-founder of the Elder Mediation Center of New Jersey, a collaborative alliance of independent mediators, attorneys, geriatric care managers, and other elder care professionals. Mr. Vanarelli recommends elder mediation as a neutral decision-making framework that allows the parties to control the outcome and develop unique solutions that would not be available to a judge in a court proceeding. He observes that mediation can be less costly, both financially and emotionally, than litigation in resolving ongoing family dynamics and care-related disputes.

Elder mediation is well-suited to resolve the typical issues arising in an adult, incapacitated guardianship, from questions of capacity, medical, and asset preservation issues to who will serve as the guardian or co-guardians. When there is ongoing behind-the-scenes alienation of an individual with diminished capacity, the mediation process can provide a more transparent and effective framework to protect the alleged incapacitated person due to the ongoing nature of the mediation process. By contrast, alienation is less likely to be detected in a guardianship because the incapacitated person and his or her family members are more likely to be observed at a single point in time.

Mediation can also be used in the special needs planning area to resolve disputes such as the amount to fund a special needs trust. Trigger points or bench marks can be negotiated into a mediated settlement to resolve the timeframe for a parent's institutionalization or for empowering an adult disabled child with additional responsibilities and decision-making authority in lieu of guardianship. Security agreements to guarantee a divorcing parent's future financial obligations can also be incorporated into a mediation agreement, with an enforcement mechanism.

Mr. Vanarelli delineates the steps in the elder mediation process as follows. First, contact the parties and gather background information and facts needed to conduct the mediation sessions. When an agent is used, the power of attorney must be reviewed to ensure that it is broadly worded to allow the agent to enter into mediation contracts. The next step is to build credibility for the mediation process in general, and for the mediator, and to establish rapport with the disputants. The mediator's introduction sets the tone of the mediation, so take time to draft an opening statement (or at least an outline) that reflects your personal style but also touches on key points. Next comes additional fact gathering, issue identification, brainstorming, devising and, hopefully, agreeing on options to resolve the conflict. The mediator will write up the mediation agreement, which is then executed by the participants.

The effective elder mediator must hear the concerns of the elder, the caregivers, and the family; must develop a plan that will address those concerns in a positive and practical way; and must facilitate and support the family members in creating workable and mutually acceptable solutions to disputes and in developing new communication strategies for the future.

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