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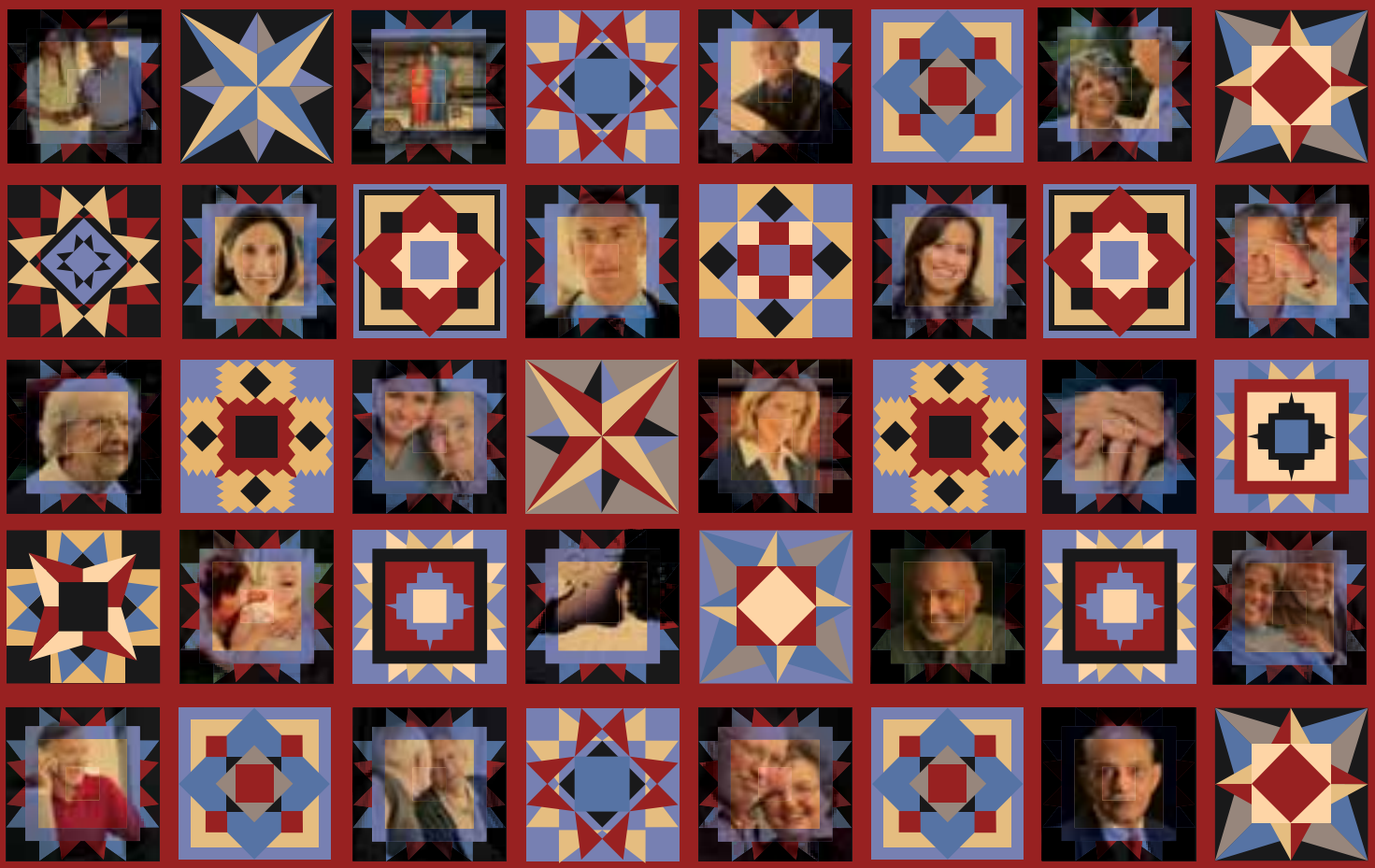

Are You Prepared for the Elder Years?

A special issue for attorneys, their loved ones and their clients

Robert Abrams, Editor

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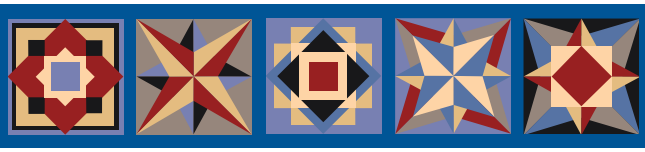

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VINCENT E. DOYLE III

The Importance of Planning – For Our Clients and Ourselves

Whether you are a newly admitted young lawyer or you have been practicing for decades, you are probably familiar with at least some of the legal and financial considerations involved with aging. Some of us have seen how careful planning can, in some small way, ease the suffering that results from a serious illness or untimely death, allowing loved ones to focus on healing rather than complex legal details. Unfortunately, some of us have also seen how the failure to plan can complicate an already painful and difficult situation.

It is important for us to be aware of these issues, not only for the sake of our clients but because of the impact they can have on our own lives. The long list of factors to consider – everything from long-term care to advance directives to retirement planning – can be daunting. And, of course, it is unpleasant to spend time away from our work or our personal lives to consider the inevitable end of life and the possibility of illness, incapacity or an untimely death. But it is so important to our practices and our loved ones that we do just that, and it is never too early to start.

That is why I am so honored to contribute to this special *Journal* issue exploring the many different concerns facing attorneys and our clients as we age. The contributing writers have experienced these concerns either in their own lives or in the lives of their colleagues or their clients. They share numerous stories and examples of how the tragedy surrounding a catastrophic event or serious illness can be exacerbated by complications that could have been prevented through proper planning. They also address unique concerns, such as those facing seniors providing for adult children in need of special care, and the considerations present when older adults divorce or re-marry.

Medical advances allow us to live longer lives and remain healthy and active well into our senior years. Many of us, however, will spend some portion of our lives in need of long-term care or assisted living. Although it is uncomfortable to think about experiencing an extended illness or serious injury, enough of us have supported our own parents and loved ones through difficult times to know that it is a possibility we must consider. And it is important to impart that to our clients as well.

But planning for the future involves more than imagining a parade of horribles awaiting us as we age. We must also plan for life's more pleasant journeys, such as retirement. Many attorneys have helped clients plan for retirement, considering the professional and personal factors involved and closely tailoring their advice to each client's unique needs and aspirations. As attorneys, we must also prepare for the end of our own careers, and consider all of the issues involved in that process. Many of us have spent so much time and energy on our practices and our profession that we self-identify as "an attorney" first and foremost. It is important to consider how retirement will affect us and prepare for it practically and psychologically as we age.

And those of us preparing for a comfortable retirement should not forget how fortunate we are to be in that position. As Valerie J. Bogart discusses in her article, many impoverished senior citizens require extensive legal assistance just to maintain the most basic necessities such as housing and subsistence income. As we plan for tomorrow, we must remember the importance of legal services for people whose basic needs are in jeopardy today. And I hope we will all contribute in whatever way we can.

These are just a handful of the many important topics addressed in this issue. As you read these moving and informative articles, I encourage you to use this as an opportunity to evaluate your own plans for the future and all of the unexpected joys and challenges life may bring. And as we hope those unfortunate potentialities never come to pass, I believe we will enjoy our happy, healthy years more completely, taking comfort in having planned for ourselves and our loved ones in the event that they do. ■

Vincent E. Doyle III can be reached at vdoyle@nysba.org.

Valerie J. Bogart is Director of the Evelyn Frank Legal Resources Program at Selfhelp Community Services, Inc., a nonprofit organization in New York City that provides free legal services to Holocaust survivors and other vulnerable seniors, trains advocates on Medicaid and Medicare, and launched the advocacy website http://NYHealthAccess.org with partners Empire Justice Center and the Legal Aid Society. She received her law degree from the New York University School of Law. She received the President's Award from the National Academy of Elder Law Attorneys and the Access to Justice Award of Project FAIR in 2010.

Just the Basics

The Neediest Elderly Need Legal Services to Protect Housing and Subsistence Income, Not Retirement Planning

By Valerie J. Bogart

Planning for retirement usually involves saving enough to afford a comfortable lifestyle, with enough to spare to pass on to our loved ones. Investment strategies, trusts, tax and estate planning are the tools of the trade for realizing one's retirement goals. But, for a large sector of the older population, tax and estate planning have no relevance. More than 11.8% of people over age 65 in New York State live below the poverty level[1] – this means that over 303,000 New Yorkers over age 65 have monthly incomes below $908 (singles) and $1226 (couples).[2] Of these, nearly half – 131,589 people – age 65+ receive SSI,[3] which is only 83% of the federal poverty level. Many more seniors have incomes above the federal poverty level but that are still low. Nationally, 42.3% of all households with someone age 65+ whose annual income is below $25,000.[4]

The aged with few financial resources may not need lawyers to do estate or tax planning, but they need representation for myriad complex legal problems – to prevent eviction or foreclosure, to access Medicaid and other subsistence benefits, to fight consumer fraud. This article will discuss the need for funding to support free legal services to meet this demand. First, we will look at some examples of the complex problems faced by low-income seniors.

Medicaid and Food Stamps

Dollie, age 87, and her sister-in-law, Rosie, age 89, live with Dollie's daughter, Alice, in her apartment in Manhattan. Rosie has advanced dementia, and both women are totally dependent on personal assistance because of cardiac disease, arthritis, and incontinence. Alice, in her 60s, took care of the two older women for 10 years – depleting her own savings – before seeking help from Medicaid in late 2009. In June 2010, Selfhelp Community Services' legal advocate won a fair hearing to increase their home care hours from the 12 hours initially approved to 24 hours/day, based on their frequent round-the-clock needs. In September, 2010, Selfhelp resolved a second fair hearing when one sister's Medicaid was discontinued without notice. Now, Selfhelp is contesting an error in authorizing food stamps for only one and not both sisters. The sisters' combined income is $1,534/month, after their Medicare and Medigap premiums are paid. They could not afford to pay legal fees.

Supplemental Security Income (SSI)

A 69-year-old widow, who has received SSI since 2005 to supplement a small Social Security benefit, found her income reduced by 13% when her Medicare Part B premium of $96.40/month was withheld from her Social Security check. Her legal advocate at Selfhelp rectified the error – unfortunately, not uncommon – so that Medicaid payment of the premium was restored, with no deductions from her check. In addition, her representative successfully contested an alleged overpayment of SSI benefits, due to an error beyond her control.

Threatened Loss of Affordable Housing

Margarita C, age 64, who lives alone on SSI and food stamps, moved to New York City from Puerto Rico in 1969 and is not fluent in English. A survivor of three strokes and stomach cancer, she suffers from anxiety and depression. She moved into her rent-stabilized apartment in a largely Hispanic Brooklyn neighborhood 10 years ago. The rent is affordable because she obtained Section 8, administered by the New York City Housing Authority (NYCHA). Each year Ms. C successfully completed the annual recertification process to retain Section 8 until September 2009, when she learned that her landlord had not received Section 8 subsidy payments from NYCHA for the prior three months. Ms. C had neither received the recertification packet nor any of the three predicate notices required to terminate her subsidy. The Legal Aid Society Brooklyn Office for the Aging attorney obtained her NYCHA file, which revealed an error in how her apartment number was listed. Though the error was slight – "R5I" instead of "R5" – the convoluted apartment numbering system for this 165-unit, 13-building apartment complex, and the fact that many tenants have common Hispanic surnames, like Ms. C's, made it likely that any notices to her were not delivered. When NYCHA refused her attorney's request to reinstate Ms. C's subsidy, the Legal Aid attorney prepared and filed an Article 78 petition in state Supreme Court, and simultaneously defended Ms. C when her landlord lost patience and brought an eviction proceeding against her in Housing Court. The cases were settled, with the Section 8 subsidy reinstated retroactively and Ms. C's eviction prevented.

Consumer Fraud

Mrs. Alice J, a 74-year-old widowed homeowner contacted the Legal Aid Society Brooklyn Office for the Aging in September 2009 after her bank account – which solely contained her Social Security benefits – was frozen due to a default judgment for $11,000 that had been entered against her in a debtor-creditor action. Mrs. J secured a credit report which confirmed that that she never incurred a debt in the alleged amount with any credit card company and never even had a credit card with the specific credit card company who had sold its debt to the plaintiff debt-buyer. Further, she never received the summons and complaint. The Legal Aid attorney's motion to vacate the default judgment was granted. Discovery requests followed to obtain the documentation of the alleged debt, and the debt-buyer finally produced documentation of a debt for someone with the same name as Mrs. J, but who lived in Delaware and had a different social security number. The court granted Mrs. J's motion to dismiss the case in July 2010, lifting the threat of a lien being placed on her home.

Crisis in Funding for Legal Services

In May 2010, Chief Judge Jonathan Lippman launched a statewide, multi-faceted initiative to provide adequate legal assistance for low-income New Yorkers in civil legal matters that involve fundamental human needs.

> No issue is more fundamental to our constitutional mandate of providing equal justice under law than ensuring adequate legal representation. . . . [T]o meet our constitutional and ethical mandates, the Judiciary of this State is determined to bring us closer to the ideal of equal access to civil justice. . . . [I]t is my fervent hope, first, that it will be an obvious truth *to all* that those litigants faced with losing the roof over their heads, suffering the breakup of their families, or having their very livelihood threatened cannot meaningfully pursue their rights in the courts of New York *without legal counsel* – and second, that it will be equally obvious that we together will have taken major steps forward in providing such representation to those who need it most, *making equal justice for all not just an ideal, but truly a reality in our great State.*[5]

The Chief Judge convened the Task Force to Expand Access to Civil Legal Services in New York, which was charged with organizing the first ever judiciary hearings in all four Judicial Departments to evaluate the unmet need for civil legal assistance. The Report to the Chief Judge, issued on November 23, 2010,[6] found:

> Each year, more than 2.3 million New Yorkers try to navigate the State's complex civil justice system without a lawyer. The current statistics are staggering, to cite a few:
>
> - 99 percent of tenants are unrepresented in eviction cases in New York City, and 98 percent are unrepresented outside of the City.
> - 99 percent of borrowers are unrepresented in hundreds of thousands of consumer credit cases filed each year in New York City . . . and . . .
> - 44 percent of homeowners are unrepresented in foreclosure cases throughout our State.
> - 70 percent of civil matters in New York State courts involve family law, consumer credit, landlord-tenant and foreclosure cases.

The Task Force's legal needs survey "found that senior citizens, in particular, had significant legal needs."

> Consider, for example, the hearing testimony of . . . a senior citizen faced with the loss of his home through foreclosure after a lifetime of work and whose wife suffered from the challenges of a bi-polar condition and dementia could not have coped with these overwhelming legal problems without expert civil legal assistance that unraveled and solved these complicated matters. He testified that "[w]e had nowhere else to go and [legal services] found a path for us in many directions."[7]

Funding for civil legal service programs in New York State comes from Interest on Lawyer Account (IOLA), the federal Legal Services Corporation, state and local governments, private foundations and individual donors, and NYSBA New York Bar Foundation and local bar associations. All of the funding from these sources has been reduced because of the recession. IOLA funding has been crucial for 26 years, but with plunging interest rates that funding dropped from $32 million in 2008 to $6.5 million in 2010.[8] Pledging to expand the funding for legal services, the Chief Judge recommended that a new appropriation of $25 million be included in this year's state budget for legal services, but only half of this amount was approved. The Task Force found that pro bono assistance cannot fill the gap in access to counsel.

How You Can Help

Give to the New York Bar Foundation or your local legal services program, which you can find on http://lawhelp.org/NY/. ■

1. U.S. Census Bureau, Table M1703. Percent of People 65 Years and Over Below Poverty Level in the Past 12 Months, SOURCE: 2005–2009 American Community Survey 5-Year Estimates, *posted at* http://tinyurl.com/CensusNYS65.
2. *Id.* at Table M0103. Percent of the Total Population Who Are 65 Years and Over, *posted at* http://tinyurl.com/censusNYS65-All.
3. N.Y. State Office of Temporary & Disability Assistance, January 2011, *posted at* http://otda.ny.gov/resources/caseload/2011/2011-01-stats.pdf.
4. U.S. Census Bureau, The Older Population in the United States: 2009, Table 20: Total Money Income of Households by Type and Age of Householder 55 Years and Over: 2008, *posted at* http://www.census.gov/population/www/socdemo/age/older_2009.html.
5. Chief Judge Jonathan Lippman, Law Day, May 3, 2010, at 3, 7 (emphasis in the original).
6. *Report of the Task Force to Expand Access to Civil Legal Services in New York* ("the Report") issued November 23, 2010, *posted at* http://www.courts.state.ny.us/ip/access-civil-legal-services/.
7. *See id.* at p. 30, and n.67 (citing the Chief Judge's Hearing on Civil Legal Services, Second Dep't, Oct. 7, 2010 (testimony of William Schneider, client of Nassau/Suffolk Legal Services, at 86:20-21)).
8. The Report at p. 34.

Be a Resource

For 20 years, members of the Elder Law Section of the New York State Bar Association, individually and as a group, have provided pro bono services and information to older New Yorkers. These efforts can be easily replicated by Bar Associations and attorney groups throughout the country.

Here is a sampling of some of the Section's regular activities and services for seniors and the special needs community:

Hosting pro bono clinics for seniors throughout New York State on a quarterly basis.

Organizing the annual Mitchell Rabbino National Healthcare Decisions Day: Volunteer lawyers give free presentations explaining legal procedures and documents to help attendees make better, more informed health care and financial decisions. The topics for this year's program included an overview of legal documents important in the life of every New Yorker.

Publishing the Section's pamphlet "17 Benefits for Older New Yorkers," which provides information on the following programs:

- Social Security
- Medicare
- Medicare Buy-In
- Medicaid
- SSI (Supplemental Security Income)
- Temporary Assistance
- Veterans Benefits
- EPIC Pharmaceutical Insurance Coverage
- Food Stamps
- Home Energy Assistance Program (HEAP)
- Weatherization Referral and Packaging Program (WRAP)
- Senior Citizen Rent Increase (SCRIE)
- Senior Citizen Homeowners Exemption (SCHE)
- Real Property Tax Credit
- New York State School Tax Relief Program (STAR)
- Life Line Telephone Service

The pamphlet may be accessed online at: http://www.nysba.org/AM/Template.cfm?Section=Elder_Law_Home&ContentID=49992&Template=/CM/ContentDisplay.cfm

Making available health care proxy forms in English, Chinese, Russian and Spanish.

Creating a database of attorneys who speak languages other than just English.

Proposing legislation such as The Compact,[1] an alternative to Medicaid financing, which has been adopted by New York State as a pilot program.

As a Section, we are constantly striving to explore new and creative ways to serve our constituency.

T. David Stapleton, Jr.
Mr. Stapleton is current Chair of the Elder Law Section.

1. The Compact for Long-Term Care is described in detail on page 68.