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The ElderLaw Report

Editors
Harry S. Margolis, Esq.
Kenneth M. Coughlin

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Protecting Nazi Restitution Funds

By Jeffrey A. Bloom

Knowing how to protect Nazi restitution funds can be an important part of an elder law practice, even if relatively few of our clients were victims of Nazi persecution. In 2011, it was estimated that there were still approximately 125,000 Holocaust survivors living in the U.S. (Findings of H.R. 2786: Holocaust Survivors Assistance Act of 2011.) Given the ages of those affected, this population is declining markedly each year. Nonetheless, there are significant legal protections for funds received by victims of the Nazis, so it is critical to be aware of these protections when such cases do arise.

Background

As early as 1952, West Germany passed an indemnification law to provide compensation to Holocaust survivors. Since then, Germany and other countries have passed new laws and created additional funds—too numerous to list here—for various populations of victims. (A good summary and set of Internet links can be found at www.claimscon.org.) Compensation can be either in the form of regular pensions or lump-sum payments. Eligible victims may have been in Germany or other countries throughout central and Eastern Europe.

Effect on Public Benefits Eligibility

All forms of Nazi restitution payments are non-countable for Medicaid, SSI, and federally subsidized housing programs. In 1994, Congress passed the Victims of Nazi Persecution Act of 1994, which states:

> "Payments made to individuals because of their status as victims of Nazi persecution shall be disregarded in determining eligibility for and the amount of benefits or services to be provided under any Federal or federally assisted program which provides benefits or services based, in whole or in part, on need." Victims of Nazi Persecution Act of 1994, Public Law 103-286 (108 Stat. 1450)

Even before this bill was passed, there was federal case law to support the position that payments made under the German Restitution Act could not be counted in Medicaid eligibility determinations. *See Grunfeder v. Heckler*, 748 F.2d 503 (1984). The federal law is now codified at 42 USC § 1437a, and can also be found at 20 CFR 416.1236(a)(18) and in the Social Security Administration's Program Operations Manual System (POMS) at POMS SI 01130.610. (Practice note about reference to POMS: The POMS include more instructive guidelines for situations concerning restitution payments than can be found in federal Medicaid rules and the Medicaid regulations in many states. Reference to the POMS should still be instructive in many Medicaid cases, however, because most states cannot have Medicaid rules that are more restrictive than the SSI rules. And for the states that don't follow that rule, reference to the POMS may still be helpful as guidance, even if it is not directly binding.)

Treatment of Assets and Segregation of Funds

Not only are the restitution payments non-countable as income in eligibility determinations, but the accumulated restitution funds are non-countable assets for all federally funded public benefits as well. POMS SI 01130.610, SI 00830.500(d). Recipients of these funds are not required to spend them down in order to maintain eligibility. Further, the accumulated restitution payments remaining at the death of the recipient should be exempt from estate recovery. *See* CMS State Medicaid Manual § 3810.

Certainly, a client who has always segregated Nazi restitution funds from other funds will have a much easier application for Medicaid or SSI, and will have a greater certainty of protecting such funds. But how many recipients have, or could have been expected to have, done this? Some started receiving payments before Medicaid or SSI was even enacted, and the rest were likely decades away from thinking about the convoluted eligibility rules for such programs or the future effect of the 1994 Victims of Nazi Persecution Act.

Fortunately, the law permits commingling of excluded and non-excluded funds as long as the excluded funds are "identifiable." *See* POMS SI 01130.700. "Identifiability does not require that excluded funds be kept physically apart from other funds (e.g., in a separate bank account)." POMS SI 01130.700(B)(1). Excluded funds may be identified by presenting documentation of both the nature of the (Nazi restitution) payments and the deposit history into one or more accounts. Because it would be impossible to unscramble the egg of commingled funds once withdrawals begin, the presumption is in favor of the applicant: where withdrawals are made from an account with commingled funds, there is an assumption that the non-excluded funds are withdrawn first. POMS SI 01130.700(B)(2). So, if you can simply prove the amount of Nazi restitution payments going into an account, that amount (or the full balance, if less is remaining) is excluded from countable assets.

But can you just calculate the total amount of restitution payments received during life and then simply exclude that amount of funds wherever and however they are held, without evidence that restitution funds were deposited into that specific account or asset? Some would argue "yes," and can cite individual cases where Medicaid accepted such an argument.

For example, in a Massachusetts Medicaid Administrative Appeal, the agency accepted the position that approximately $315,000 held in a restitution trust should be excluded from the asset-limit calculation after documentation was submitted that verified that the Medicaid applicant and his spouse had received approximately $385,000 in restitution payments to date. (MassHealth BOH Appeal No. 0402166, 8/14/04). There was no requirement to provide documentation that the $315,000 itself came from restitution funds. There is some logic to this position, because it can be impossible to trace where payments going back to 1952 were deposited and the clear presumption is that non-excluded funds were spent before excluded funds. POMS SI 01130.700 (B)(2). Therefore, showing that a remaining amount of assets (which is less than the total amount of payments) that was subsequently earmarked by the applicant as restitution funds could be enough to exclude them.

Favorable Decisions Where "Identifiability" Was Challenged

Little case law exists to help define what constitutes "identifiable" excluded restitution payments when there is not good documentation of where the funds went after receipt. However, the two following Medicaid administrative appeal decisions are good examples of reasonable interpretations (and favorable outcomes) in cases where "identifiability" cannot be well documented. In a New York decision, the applicant had documented a total of approximately $290,000 in restitution payments received. Less than a year before seeking coverage, he transferred two brokerage accounts totaling approximately $185,000 into an account held in the name of a restitution trust, and began depositing subsequent monthly restitution payments into the account. (NY Fair Hearing No. 4433606Z, 1/18/07). The hearing officer held that this was sufficient evidence that all of the newly created account constituted excluded restitution funds. The hearing officer was

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EDITORS
Harry S. Margolis
Kenneth M. Coughlin

Development Editor
Georgia D. Koutouzos

Editorial Director
Pamela Maloney

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Fiscal Cliff Notes

Small Change to Estate Tax . . .

As part of the tax compromise Congress approved to avoid tumbling down the "fiscal cliff," the amount that is exempted from estate taxes will remain the same as it has been for the past two years, although the maximum tax rate will rise by five percentage points.

The American Taxpayer Relief Act, permanently sets the estate tax exemption at $5 million for an individual (now $5.12 million due to inflation) and $10 million for a couple (now $10.24 million). (With new inflation adjustments, the exemptions are expected to rise to about $5.2 million and $10.24 million.)

But Congress did make one change to the prior rules: the tax rate on inheritances above these levels will increase from 35 percent to 40 percent.

The gift tax and generation-skipping transfer tax exemptions will also remain the same as last year, adjusting for inflation.

. . . But CLASS Act Is Casualty of Negotiations

The budget deal also repealed a long-term care insurance program that would have helped keep the elderly and disabled out of nursing homes and off the Medicaid rolls. In its place, the new law establishes a commission to come up with an alternative plan to make long-term care available to those who need it.

The Community Living Assistance Services and Supports (CLASS) Act, part of the health reform bill and Sen. Edward M. Kennedy's final legislative legacy, would have established a voluntary national long-term care insurance program offering basic help for the elderly and disabled. The Obama Administration suspended implementation of the CLASS Act in October 2011 over concerns that the program could not be self-supporting, but the Administration had resisted calls to repeal the law, hoping that changes could make it financially viable. (See *The ElderLaw Report*, December 2011, p. 6.)

The Administration's resistance ended during negotiations over legislation to avert higher tax rates for all Americans, however.

At the insistence of Sen. Jay Rockefeller (D-W.Va.), Congress replaced the CLASS Act with a 15-member Commission on Long-Term Care that is to recommend legislation in about six months. The Commission will be a bipartisan body consisting of members to be appointed by the President and congressional leaders within one month of the budget bill's January 2 enactment. Members will represent the interests of the elderly, consumers of long-term care services, family caregivers, private long-term care insurance providers, and employers, among others.

persuaded after the citation of two salient points regarding "identifiability" in the POMS: (1) the operating assumption is that non-excluded funds are spent before excluded funds; and (2) the agency should "accept the individual's allegation as to the date and amount of a deposit of excluded funds if it agrees with the evidence in file on receipt of the funds." POMS SI01130.700 (C)(2). Given that the applicant had identified the restitution funds by placing them in a separate trust account, and the amount in the restitution trust was less than the total amount of payments received, the hearing officer accepted the restitution trust account as excluded assets.

In an Ohio decision, the applicant documented that the she had received a total of $190,000 in restitution funds and had placed approximately $160,000 from various accounts into a restitution trust a month before seeking Medicaid eligibility. (Ohio State Hearing No. 1298841, 1/10/07) Although Ohio has an Administrative Code section which states that "identifiability" may be established by a written statement from the recipient declaring the resource as the accumulated funds from a restitution payment, the Ohio agency took the position that the applicant did not have the mental competency to submit a statement at the time of the hearing, so no evidence of "identifiability" existed. The hearing officer dismissed this position by noting that the creation of the restitution trust itself served as evidence that the applicant "viewed all her assets as emanating from the reparation payments, regardless of whether they had been distributed into various bank or other financial accounts." (Ohio State Hearing No. 1298841, 1/10/07, Page 5). The hearing officer went on to note that the applicant's legal representative could provide a written statement that declares what portion are the accumulated funds from restitution payments.

The consistent theme of the above decisions is that when the total amount of restitution payments received is more than the amount claimed as excludable, these agencies must be cognizant of the near impossibility of proper documentation and the legal presumption in favor of excluding the funds.

Practice Tips for Restitution Payments

1. Calculate Past Restitution Payments in Advance of Need for Benefits

Any client who has received restitution payments and is concerned about future eligibility for public benefits should calculate the amount of past payments received to date. Usually, one can work with the appropriate consulate or foreign governmental agency administering the fund(s). This can take considerable time and cannot always be accomplished in the normal time limits of an application for public benefits, so putting in the effort well before the need for an application is usually the best option. Further, doing a year-by-year, if not month-by-month, conversion of the foreign currency to U.S. dollars will result in the most accurate total and presumably will yield more credible results.

Where documentation is lacking, other evidence of payments, including an affidavit of the recipient or his/her representative can be helpful, as shown in the Ohio case discussed above.

2. Segregate and Spend Non-Excluded Funds First

Although segregation of the funds is not an absolute requirement, as a practical matter, it will make for a much simpler application for public benefits and a greater likelihood of success in protecting the funds.

3. Use a Trust

Using a trust for the purpose of segregating excluded restitution funds can be helpful. First, as shown in the New York case discussed above, the mere fact that the recipient placed the funds in a trust designated as a restitution trust can serve as evidence that the funds have been "identified" as restitution funds. Second, segregating the funds in a restitution trust will increase the likelihood that the client (or his/her representative) will keep the funds segregated and preserved as the funds are transferred to different investments or institutions from time to time.

Because the funds in the trust will be protected simply by virtue of the fact that the funds are "identifiable" as restitution funds, the trust itself need not be in a specific form for this purpose. The trustee may have full discretion to use the funds for the grantor and the grantor may be trustee for himself or herself. Usually, the trust will include a reference to restitution funds in both the title and the trust purpose to reflect the nature of the funds held therein, but the structure of the document will be dictated by other estate planning considerations and the client's specific situation.

Conclusion

Nazi restitution payments are granted considerable protection under federal law. To ensure that recipients of such funds fully realize this protection, they should calculate the amount of payments they have received to date and segregate those funds in a separate trust.

Jeffrey A. Bloom is a partner in the Boston-based elder law firm of Margolis & Bloom.

Estate Tax Case Is on High Court's Same-Sex Docket

The Supreme Court has announced that it will accept two same-sex marriage cases, and one of them, from New York, involves the surviving spouse of a lesbian couple who had to pay an estate tax because the federal Defense of Marriage Act defines "marriage" as a union between a man and a woman. (See *The ElderLaw Report*, Sept. 2012, p. 3.) The other case the Court will hear involves California's Proposition 8, which banned same-sex marriages in the state. Oral arguments on the estate tax case are scheduled for March 27.

KEEPING CURRENT

Resident's Wife Should Have Used Joint Assets to Pay for Care

Sunshine Care Corp. v. Warrick (N.Y. Sup. Ct., App. Div., 2nd Dept., No. 2011-02193, Nov. 28, 2012). A nursing home is entitled to summary judgment in a breach of contract claim against the wife of a nursing home resident where the wife had signed an admissions agreement requiring her to use her husband's funds to pay for his care, a New York appeals court rules.

Betty Warrick admitted her husband to a nursing home and signed an admission's agreement on his behalf. The agreement required that Mrs. Warrick pay the facility from her husband's resources to the extent she had access to those resources. The agreement also provided that she would be personally liable if her actions or omissions caused the nonpayment of the facility's fees.

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After Mr. Warrick died, the nursing home sued Mrs. Warrick for breach of contract, arguing that she had access to her husband's funds but did not pay the nursing home. Mrs. Warrick countered that most of the money in their joint account belonged to her. The trial court denied the nursing home's motion for summary judgment, and the nursing home appealed.

The New York Supreme Court, Appellate Division reverses, holding the nursing home is entitled to summary judgment. According to the court, the nursing home presented evidence that Mrs. Warrick had access to her husband's funds and knew her obligation to pay the nursing home and she admitted to spending the bulk of their joint assets while he was in the nursing home, so there was no triable issue of fact.

For the full text of this decision, go to: **http://tinyurl.com/elr-Sunshine**

Daughter's Transfer to Self Was to Qualify Mother for Medicaid

Absolut Care of Three Rivers v. Shah (N.Y. Sup. Ct., App. Div., 3rd Dept., No. 514581, Dec. 13, 2012). A New York appeals court holds that when a daughter of a Medicaid applicant transferred money out of a joint checking account, there was no evidence she was self-dealing, so there was no evidence that the transfers were made with a purpose other than to qualify for Medicaid.

Carolyn Bradian named her daughter as attorney-in-fact under a power of attorney and, four years later, her daughter opened a joint checking account with her mother. Ms. Bradian entered a nursing home, where she was found to have a poor short-term memory but was able to follow commands and understand questions. Ms. Bradian's daughter transferred money from the joint account into her own account. The nursing home applied for Medicaid benefits on Ms. Bradian's behalf, but the state issued a 13-month penalty period due to the transfer by the daughter.

The nursing home appealed, arguing that the transfers by the daughter were an improper gift to herself and exceeded her authority as Ms. Bradian's agent, so they were for a purpose other than to qualify for Medicaid. The state affirmed the decision after a hearing, and the nursing home appealed. (Ms. Bradian died during the first appeal.)

The New York Supreme Court, Appellate Division, affirms, holding that the nursing home did not present enough evidence to overcome the conclusion that the transfers were made for the purpose of qualifying for Medicaid. According to the court, the creation of the joint account was authorized under the power of attorney and the nursing home did not offer evidence of Ms. Bradian's mental state at the time of the creation of the joint account.

For the full text of this decision, go to: **http://tinyurl.com/elr-Absolut**

Reprimand for Offering Free Estate Consult and Then Charging for It

Cincinnati Bar Association v. Espohl (Ohio, No. 2012-0684, Dec. 3, 2012). Ohio's highest court publically reprimands two attorneys who advertised a free consultation on their law firm's Web site but then charged an estate planning client for the consultation after the client signed a fee agreement.

Kathleen Mezher and Frank Espohl practice together in a law firm that advertised free consultations on its Web site. Stephanie Mahaffey and her siblings met with Mr. Espohl to discuss their mother's estate and a trust that Ms. Mezher had prepared. During the consultation, the siblings agreed to hire the law firm and signed a fee agreement. Mr. Espohl reviewed the will and trust, and continued discussing the estate with the siblings. When the law firm sent the siblings a bill, it included a $250 charge for the attorney conference.

The Cincinnati Bar Association charged Ms. Mezher and Mr. Espohl with committing professional misconduct by violating rules requiring attorneys to communicate the basis for a fee and not make false or misleading statements about the lawyers' services.

The Ohio Supreme Court publically reprimands Ms. Mezher and Mr. Espohl. The court finds that the law firm's Web site was "misleading because it omitted a key piece of information—the free consultation ended (and the billing began) with the signing of the fee agreement." The court also finds that "an attorney must inform the client when the representation and chargeable events commence."

For the full text of this decision, go to: **http://tinyurl.com/elr-Espohl**

Niece Who Did Not Sign as Aunt's Responsible Party Is Not Liable

Sunny View Nursing Home, Inc. v. Gorman (R.I. Super. Ct., No. KC 11-0491, Dec. 4, 2012). A Rhode Island trial court holds that a niece who signed a nursing home admissions agreement on behalf of her aunt did not sign as a responsible party and, therefore, is not personally liable for her aunt's unpaid nursing home bill.

Susan Carr had a joint checking account with her aunt, Henrietta Gorman, and served as her attorney-in-fact. When Ms. Gorman entered a nursing home, Ms. Carr signed an admissions agreement on her behalf. The agreement had separate provisions for a "responsible party" and for a "representative." Ms. Carr paid for Ms. Gorman's nursing home care from the joint account until the funds

SSA Removes Controversial POMS Language, But Planners Remain in Limbo

In response to criticism from disability advocates and the special needs planning community, the Social Security Administration (SSA) has removed several controversial examples that it only recently added to its Program Operations Manual System (POMS). The examples, which caused a firestorm of protest when introduced, appeared to take the position that a first-party special needs trust could not contain a provision allowing a trustee to compensate a trust beneficiary's family members for travel expenses incurred when they visit the beneficiary or when they assist a beneficiary with travel because the reimbursement would violate the "sole benefit" language of the trust. (See *The ElderLaw Report*, July/Aug. 2012, p. 3.)

Sources close to the SSA indicate that the examples were removed at the request of SSA Commissioner Michael J. Astrue, who reportedly also had all of the other 2012 POMS changes taken down as well. New Jersey special needs attorney Thomas D. Begley, Jr., who has closely followed recent developments regarding the POMS, told *The ElderLaw Report* that the removal of the POMS examples "looks like it is temporary until SSA decides what to do."

The POMS changes were apparently on the agenda at a January 4 meeting between Commissioner Astrue and senior SSA staff members, but it is unclear at this point whether the SSA's restrictive reading of the "sole benefit" rule will remain in place or if the withdrawal of the recent POMS language signals a thawing of the SSA's approach to sole benefit questions, so attorneys remain in limbo until further clarification emerges from Washington.

were depleted. After Ms. Gorman's Medicaid application was denied, Ms. Gorman left the nursing home.

The nursing home sued Ms. Carr, arguing that she was personally liable for Ms. Gorman's unpaid bill. Ms. Carr testified that she signed the agreement as a representative, not as the responsible party. The nursing home claimed that anyone who signed the agreement was a responsible party.

The Rhode Island Superior Court enters judgment for Ms. Carr, holding that she is not liable for her aunt's nursing home care. The court finds that the agreement is ambiguous because the definition of "responsible party" and the capacity in which one is signing the agreement are not clear. According to the court, the evidence shows that Ms. Carr signed the agreement as a representative, not a responsible party, and the liability of a representative and a responsible party are not the same.

For the full text of this decision, go to: **http://tinyurl.com/elr-SunnyView**

Assets Transferred for Medicaid Are Not Recoverable by Executor

Matter of Rokeach (N.Y. Sup. Ct., App. Div., 2nd Dept., Nos. 128/07, 2010-09323, 2011-00110, 2010-09309, Dec. 19, 2012). The executor of the estate of a woman who transferred assets in order to qualify for Medicaid cannot recover those assets, a New York appeals court rules.

Elsie Rokeach transferred securities, cash, and her interest in real property to various people between 1996 and 2000. After Ms. Rokeach died, her executor petitioned the court to recover the property. The executor argued that the property was sold in violation of a written agreement executed in 1986 and that Ms. Rokeach had deeded her property with an understanding that the assets would be held in the trust for her so that she could qualify for Medicaid benefits.

The trial court granted summary judgment to the other parties, and Ms. Rokeach's executor appealed.

The New York Supreme Court, Appellate Division, affirms, holding the executor could not recover the property. According to the court, the evidence showed that the transfers were gifts, so Ms. Rokeach did not have an interest in the property at the time of her death. In addition, the court rules that the claim that the 1986 agreement was breached is barred by the statute of limitations.

For the full text of this decision, go to: **http://tinyurl.com/elr-Rokeach**

Court Overturns Minn. Medicaid Law That Pays Relatives Less

Healthstar Home Health, Inc. v. Jesson (Minn. Ct. App., No. A12-0591, Dec. 17, 2012). A Minnesota appeals court holds that a state law that reduces the pay of personal care attendants who are related to Medicaid recipients to 80 percent of the pay of non-relative care attendants creates an arbitrary distinction between similar individuals in violation of the state constitution's equal protection clause.

Under Minnesota Medicaid law, some recipients qualify to receive the services of a personal care attendant (PCA). The Minnesota legislature passed a law in 2011 reducing the pay of PCAs who are related to recipients to 80 percent of the pay of non-relative PCAs.

Several PCAs sued the state, arguing that the law violates the equal protection clause in the state constitution.

Bill to Explore 10-Year Look-Back Went Nowhere

A House bill introduced in August that, among other things, called for studies of the impact of extending the Medicaid look-back period to a decade and reducing the home equity exemption to as little as $50,000, went nowhere in the session of Congress that just ended.

"It appears that the publicity surrounding this bill has been created only by Stephen Moses, the President of the Center for Long-Term Care Reform and a noted opponent of Medicaid long-term care coverage," said National Academy of Elder Law Attorneys' Public Policy Committee Chair, H. Amos Goodall, CELA, in an e-mail message_to NAELA members.

The bill, the "Medicaid Long-Term Care Reform Act of 2012" (H.R. 6300), was introduced by Rep. Charles Boustany Jr. (R-La.). The measure had only four co-sponsors and no bipartisan support. It was not marked up and did not leave the committee after being introduced.

The bill may be reintroduced in the 113th Congress.

The state argued that the rational basis for the distinction is that relatives have a moral obligation to help family members and will still help even when their pay is cut. The trial court granted the state summary judgment, and the PCAs appealed.

The Minnesota Court of Appeals reverses, holding that the law violates the state's equal protection clause. The appeals court rules that the rationale for the distinction between relative and non-relative caregivers was based on assumptions, not on facts, so there was not a rational basis for the distinction. According to the court, the state "has not shown that any *facts* support the assumption that a significant number of relative PCAs will provide equal services for unequal pay based on an assumed moral obligation to do so." [emphasis in original]

For the full text of this decision, go to: **http://tinyurl.com/elr-Healthstar**

Estate Recovery Claim Not Barred By SOL Because No Notice Given

In re Estate of Crumley (Tenn. App. Ct., No. E2012-00030-COA-R3CV, Dec. 18, 2012). A Tennessee appeals court rules that the state's claim against the estate of a Medicaid recipient is not barred by the statute of limitations because the heirs failed to open the estate or provide notice to the state of the recipient's death.

Fred Crumley received Medicaid benefits before he died. After his death, his heirs did not attempt to administer his estate. A little more than a year later, the state filed a petition to open the estate as a creditor, and the court appointed an administrator.

The administrator filed a motion to dismiss, arguing that the state lacked standing as a creditor because the claim against the estate was barred by the statute of limitations. State law imposes a one-year statute of limitations on claims made by the state against an estate. State law also provides that an estate must provide the state with notice of a Medicaid recipient's death and a release evidencing that Medicaid benefits have been paid. The trial court dismissed the claim, holding that it was barred by the statute of limitations, and the state appealed.

The Tennessee Court of Appeals reverses, holding that the claim was not barred by the statute of limitations. The court rules that the fact that Mr. Crowley's heirs failed to provide notice to the state or get a release prevented the statute of limitations from running.

For the full text of this decision, go to: **http://tinyurl.com/elr-Crumley**

Intended Beneficiary Can Sue Attorney for Breach of Contract

Fortier v. Sullivan (Mass. Ct. App., No. 12-P-231, Dec. 11, 2012). A Massachusetts appeals court allows a testator's beneficiary to pursue a breach of contract claim against the testator's estate planning attorney.

Susan Pond hired attorney John Sullivan to draft her estate plan. Albert Fortier was the residual beneficiary of Ms. Pond's will. The will did not exercise Ms. Pond's general power of appointment over a trust that would have allowed funds in the trust to go to Mr. Fortier.

After Ms. Pond died, Mr. Fortier sued Mr. Sullivan for professional negligence and breach of contract. The trial court dismissed the claim, holding that the attorney for a testator does not owe a duty of care to the testator's beneficiaries and is not contractually liable to the testator's intended beneficiaries. Mr. Fortier appealed.

The Massachusetts Court of Appeal reverses in part, dismissing the professional negligence claim but allowing the breach of contract claim to proceed. According to the court, the absence of a written contract does not preclude the breach of contract claim. The court rules that because Mr. Fortier claimed he was supposed to be the intended beneficiary of the legal services provided to Ms. Pond and Mr. Sullivan corroborated this, there was enough information to proceed on the breach of contract claim.

For the full text of this decision, go to: **http://tinyurl.com/elr-Fortier1**

Rule Changes Affecting VA Beneficiaries

The end of 2012 brought several significant changes relating to Veterans Administration pension and health care benefits that are of interest to attorneys who work in this area.

What's Deductible from Income?

In a new policy clarification, the VA is limiting the unreimbursed medical expenses (UMEs) for the cost of room and board at a care facility that may be deducted from income. VA Fast-Letter 12-23 states that room and board is deductible only when a senior-care or independent living facility provides custodial care. (The Fast Letter does not apply to residents of nursing homes or assisted living facilities.)

The "VA considers a facility to provide custodial care if it assists an individual with two or more ADLs [activities of daily living]," the Letter states. VA will not deduct room and board paid to a facility if the facility does not provide the claimant with custodial care or if the claimant's physician does not state in writing that the claimant needs care in the facility from a third-party provider. But while the VA will not deduct room and board unless these conditions are met, the cost of medical or nursing services from a third-party provider would still be deductible. The agency notes that it does not consider emergency pull cords, 24-hour staffing, and locked exterior doors to be a medical or nursing service.

In addition, charges for instrumental activities of daily living (IADLs)—such as meal preparation—are not UMEs, according to the VA. However, there is a circumstance when the VA will consider help with IADLs deductible: when the individual is entitled to a pension at the Aid and Attendance or housebound rate, or a physician has certified that the claimant needs to be in a protected environment, *and* the facility provides medical services or assistance with ADLs to the individual.

The clarification applies only to original claims pending on or filed after the date of the Fast Letter, which is October 26, 2012. To read the Fast Letter, go to: **http://tinyurl.com/elr-UME**

Goodbye Annual EVR

In more welcome news, the VA announced on December 20 that it is cutting red tape for veterans by eliminating the need for them to complete an annual Eligibility Verification Report (EVR). Historically, beneficiaries have been required to complete an EVR each year in order to ensure that their pension benefits continued. Under the new initiative, VA will work with the Internal Revenue Service and the Social Security Administration to verify continued eligibility for pension benefits. Staff that had been responsible for processing the old form will instead focus on eliminating the compensation claims backlog.

Certain Diseases Automatically Linked to TBI

Finally, the VA is proposing new regulations to make it easier for veterans to receive health care and compensation for five diseases linked to traumatic brain injury (TBI): Parkinsonism, unprovoked seizures, certain dementias, depression, and hormone deficiency diseases related to the hypothalamus, pituitary or adrenal glands. If a veteran can demonstrate a service-connected TBI, the VA will accept that any of those diseases was caused by the brain injury. For some of the diseases to be accepted, however, the TBI must have been moderate or severe.

For the proposed regulations, go to: **http://tinyurl.com/elr-TBI**

Congratulate the Old-Fashioned Way

We culled the following Practice Tip from a recent issue of *Lawyers Weekly*: Send cards, as opposed to e-mails, to people congratulating them on moves to new firms, articles they wrote, following up on meeting them, etc. Cards are much more personal and are more likely to be noticed.

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