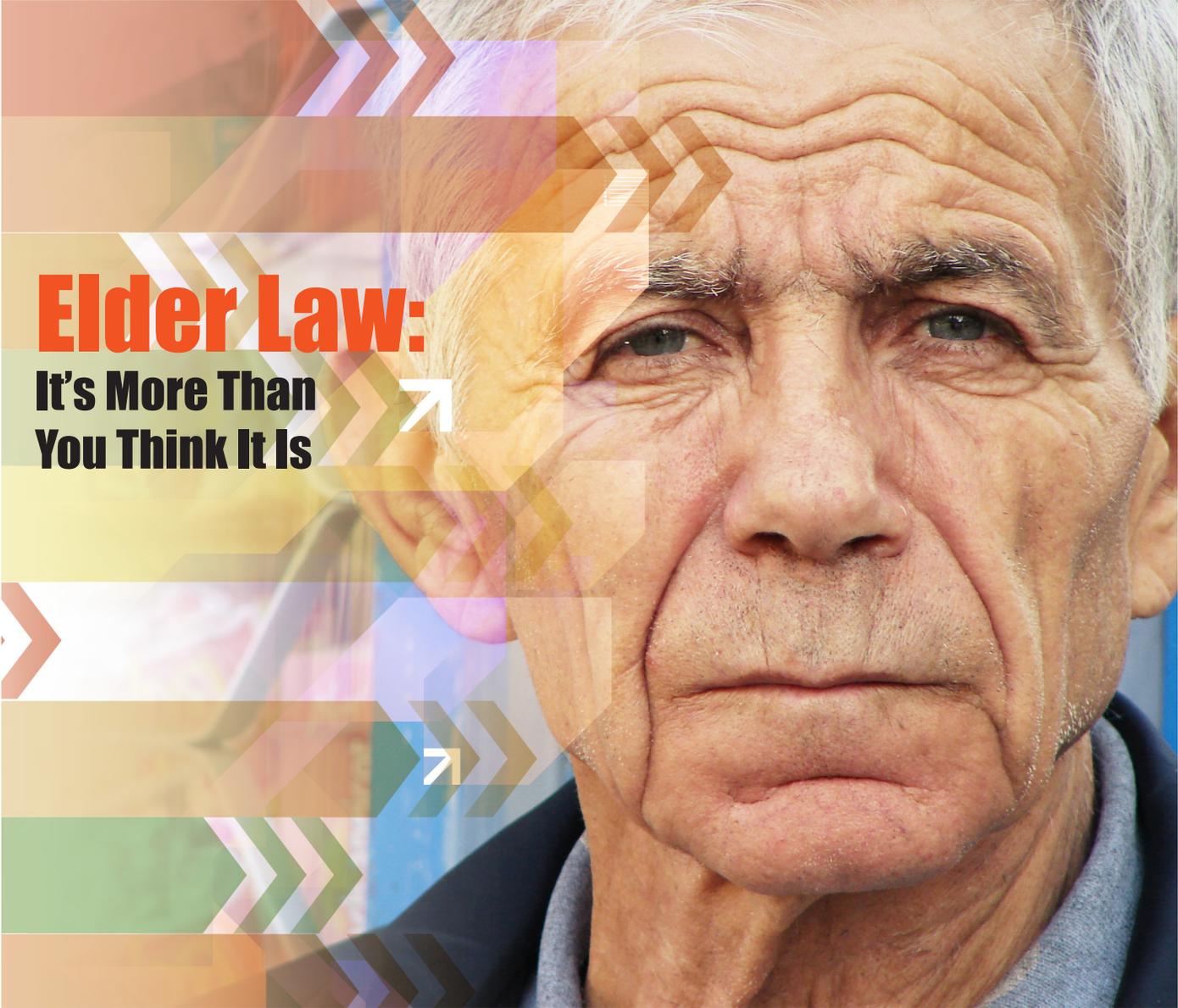


# NEW MEXICO Lawyer

August 2014 Volume 9, No. 3

[www.nmbar.org](http://www.nmbar.org)



## Elder Law: It's More Than You Think It Is

The State Bar Elder Law Section's edition of the *New Mexico Lawyer* focuses on how technology and social changes are affecting the elder law practice.



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# What is

# Elder Law?

By Laurie A. Hedrich and Johanna Pickel

If you are an attorney practicing in personal injury, family law or criminal defense, you likely do not need to explain the ins-and-outs of your practice. As an elder law attorney, the particulars of one's practice are not readily understood with just calling yourself an elder law attorney. Many mistakenly believe that an elder law attorney must practice in Medicaid planning or poverty law.<sup>1</sup> Although some elder law attorneys do provide those services, the practice of elder law has evolved into a broad term defined more by the client served than the exact type of law practiced<sup>2</sup>. As stated by the National Academy of Elder Law Attorneys (NAELA):

Rather than being defined by technical legal distinctions, elder law is defined by the client to be served. In other words, the lawyers who practices elder law may handle a range of issues but have a specific type of clients—seniors.

The most common legal areas that elder law attorneys focus on include long-term care planning, guardianship and conservatorship, advance medical directives, probate, and trust and estate planning.<sup>3</sup> Some elder law attorneys focus on Medicare and other government benefits, elder abuse and neglect and age discrimination.<sup>4</sup> Although there is not one specific area of focus, the key connection among elder law practitioners is the age of their clients.<sup>5</sup>

## History of Elder Law

Most trace the evolution of elder law to the passage of the Older Americans Act, which was signed into law by President Johnson in 1965.<sup>6</sup> The National Senior Citizens Law Center and the American Bar Association Commission on Law and Aging helped develop the practice of elder law.<sup>7</sup> In 1988, NAELA developed from a group of practitioners that met from various states focusing on elder law issues.<sup>8</sup>

In 1994 the National Elder Law Foundation began a national certifying program for elder law attorneys. The National Elder Law Foundation defined elder law as:

... the legal practice of counseling and representing older persons and their representatives about the legal aspects of health and long-term care planning, public benefits, surrogate decision-making, older persons' legal capacity, the conservation, disposition and administration of older persons' estates and the implementation of their decisions concerning such matters, giving due consideration to the applicable tax consequences of the action, or the need for more sophisticated tax expertise.

Throughout the development of the practice of elder law, many have attempted to define elder law practitioners as experts in the law of Medicaid.<sup>9</sup> Although many elder law attorneys do focus on Medicaid eligibility and planning, many other elder law attorneys have defined their practice in other areas of "late life planning" or late life issues that do not include Medicaid planning.<sup>10</sup>

## Future of Elder Law

As the practice of elder law continues to grow and evolve, the definition of an elder law attorney will continue to change.<sup>11</sup> ■

### Endnotes

<sup>1</sup> Frolik, L. A. (2003). The Developing Field of Elder Law Redux: Ten Years After. *The Elder Law Journal*, 1-14

<sup>2</sup> Fleming, R. B., & Davis, L. N. (2012 Supplement). *Elder Law Answer Book*. Aspen Publishers.

<sup>3</sup> Begley, Jr., T. D., & Jeffreys, J.-A. H.



(2012-1 Supplement). *Representing the Elderly Client*. Aspen Publishers.

<sup>4</sup> Fleming, R. B., & Davis, L. N. (2012 Supplement). *Elder Law Answer Book*. Aspen Publishers.

<sup>5</sup> Fleming, R. B., & Davis, L. N. (2012 Supplement). *Elder Law Answer Book*. Aspen Publishers.

<sup>6</sup> Sabatino, C. (2012, August). The Longevity of Elder Law. *BiFocal*, p. Vol. 33.

<sup>7</sup> Sabatino, C. (2012, August). The Longevity of Elder Law. *BiFocal*, p. Vol. 33.

<sup>8</sup> Sabatino, C. (2012, August). The Longevity of Elder Law. *BiFocal*, p. Vol. 33.

<sup>9</sup> Sabatino, C. (2012, August). The Longevity of Elder Law. *BiFocal*, p. Vol. 33.

<sup>10</sup> Frolik, L. A. (2003). The Developing Field of Elder Law Redux: Ten Years After. *The Elder Law Journal*, 1-14

<sup>11</sup> Sabatino, C. (2012, August). The Longevity of Elder Law. *BiFocal*, p. Vol. 33.

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# End of Life Care— The Ever-changing Landscape

By Laurie A. Hedrich and Johanna Pickel

Public interest in the right of seriously ill patients to make their own choices about whether they receive life-sustaining treatment has been fueled by discussions about how healthcare is provided in the United States. A few well-publicized cases, involving the withdrawal of life-sustaining treatments from individuals who had lost decision-making capacity, have driven those discussions including Karen Quinlan<sup>1</sup> in the 1970s, Nancy Cruzan in the 1980s<sup>2</sup> and most recently the much publicized case of Theresa Schiavo.<sup>3</sup>

Quinlan's family petitioned and was allowed to remove her from a respirator in 1976 after a ruling by the New Jersey Supreme Court. In 1983, Cruzan was injured in a car accident, which left her in a persistent vegetative state. Her parents sought to remove her feeding tube. The case ultimately was decided by the U.S. Supreme Court and supports that patients have a fundamental right to refuse life-sustaining treatments. States, however, may regulate the circumstances under which life-sustaining treatments may be withdrawn when the patient cannot speak on his or her own behalf.

Schiavo was in a persistent vegetative state for 15 years before artificial hydration and nutrition were withdrawn and she died in 2005. The Schiavo case differed from the *Quinlan* and *Cruzan* cases by challenging notions of what was thought to be settled law rather than breaking new legal ground on the right-to-die issue. The five-year battle between Schiavo's husband and her parents about whether to maintain life support played out in the media, turning a very private family decision into a very public debate. Eventually, the court found in favor of Schiavo's husband and allowed life support to end.

As a result of the *Quinlan* and *Cruzan* cases, states began to enact legislation to provide for decision makers and, in most cases, for an individual to make end-of-life decisions (i.e., living wills). There was no uniformity of statutes from state to state and it was unclear if a document that was prepared in one jurisdiction

would be honored in another. In 1993, the Uniform Law Commissioners approved the Uniform Health-Care Decisions Act (UHCDA) to unify the various state laws. New Mexico<sup>4</sup> and five other states adopted the UHCDA.<sup>5</sup> The overall objective of the UHCDA is to encourage the making and enforcement of advance health care directives and to provide a means for making health care decisions for those who have failed to plan. The New Mexico statutory form advance health care directive is intended to assist individuals regarding treatment preferences when they would otherwise be unable to make such decisions.

In New Mexico, a group of medical and other professionals is developing a Medical Orders for Scope of Treatment (MOST), to be used for providing treatment under the authority of New Mexico's UHCDA.

Although public cases about ending life-sustaining treatments<sup>6</sup> cause quite uproar in the media, most individuals still do not complete advance care directives.

The Patient Self-Determination Act<sup>7</sup> (the Act) was enacted by Congress in 1990 to encourage competent adults to complete advance directives. Compliance with the Act requires all health care facilities receiving Medicare or Medicaid reimbursement to ask patients whether they have advance directives, to provide information about advance directives and to incorporate advance directives into the individual's medical record. In the late 1990s, state legislation focused on the issue of unwanted resuscitation of terminally ill patients at home or in hospice settings with development of explicit do-not-resuscitate (DNR) instructions for use outside the hospital. Advance directives are not DNRs and do not prevent unwanted resuscitations, intubations or readmission of individuals to the emergency department.

As a result of the Act, changes in how health care is delivered and the low number of people who completed advance care directives, many states are now enacting legislation to legalize Physician Orders for Life-Sustaining Treatment (POLST).

A POLST is put in place after medical personnel have a conversation with individuals who are terminally ill or have a serious illness, to create an order on the exact care the patient desires as his or her end of life approaches. "POLST differs from an advance directive (living will or health care power of attorney) in that it is an actionable medical order dealing with the here-and-now needs of patients—it can build on an advance directive but can be created for patients without advance directives."<sup>8</sup>

In New Mexico, a group of medical and other professionals is developing a Medical Orders for Scope of Treatment (MOST)<sup>9</sup>, to be used for providing treatment under the authority of New Mexico's UHCDA. MOST is designed to be a statewide mechanism for an individual to communicate his or her wishes about a range of life-sustaining and resuscitative measures, including the use of CPR, ventilators, administration of antibiotics, choices regarding curative treatments or comfort care measures. MOST can be used as a means of transferring the known wishes of an individual from one care setting to another. It is intended to be honored across all treatment settings, including home, hospital, rehabilitation, skilled nursing or assisted living facility. MOST is an advance directive document designed to help healthcare providers honor the treatment wishes of their patients with serious advanced illness.

While there is considerable merit in any advance care planning that allows individuals and their families the ability to have a voice in the type of treatment they receive or do not receive, New Mexico's form of MOST has a number of areas of concern that should be addressed:



and/or POLST, MOST, MOLST registries or other electronic solutions for document completion, storage and access for health care professionals. However, determining which agency or health care system will be responsible for the registry, whether reporting will be mandatory, obtaining funding to get a registry up and running and for operations is vital to long-term success. Currently, there are no plans for a New Mexico registry. ■

#### Endnotes

<sup>1</sup> *In Re Quinlan*, 355 A.2d 647 (NJ. 1976)

<sup>2</sup> *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

<sup>3</sup> *Schindler v. Schiavo (In re Schiavo)*, 780 So. 2d 176, 180 (Fla. Dist. Ct. App. 2001) (affirming the trial court’s decision to withdraw feeding and hydration from Theresa Schiavo).

<sup>4</sup> NMSA 1978, §§ 24-7A-1 to -18 (1995, as amended through 2009).

<sup>5</sup> The Uniform Law Commission also lists Alaska, Hawaii, Maine, and Mississippi and Wyoming. In addition, Alabama, California, Delaware and Tennessee have adopted substantially similar legislation.

<sup>6</sup> “In one way, the cases are polar opposites: the parents of Jahi McMath in Oakland, Calif., have fought to keep their daughter connected to a ventilator, while the parents and husband of Marlise Muñoz in Fort Worth, Tex., want desperately to turn the machine off.” *At Issue in 2 Wrenching Cases: What to Do After the Brain Dies*, By BENEDICT CAREY and DENISE GRADY, JAN. 9, 2014, <http://nyti.ms/1bWrmNR>

<sup>7</sup> Omnibus Budget Reconciliation Act. Title IV, section 4206. Congressional Record, October 26, 1990.

<sup>8</sup> Charles P. Sabatino and Naomi Karp, *Improving Advanced Illness Care: The Evolution of State POLST Programs*, 2011–01 AARP, April 2011, at V.

<sup>9</sup> POST, MOST, and MOLST are all variants of the term POLST.

<sup>10</sup> Schmidt TA, Hickman SE, Tolle SW and Brooks HS (2004). The Physician Orders for Life-Sustaining Treatment Program: Oregon Emergency Medical Technicians’ Practical Experiences and Attitudes. *Journal of the American Geriatrics Society*, 52: 1430–1434.

<sup>11</sup> Weinick RM, Wilcox SR, Park ER, Griffey RT, Weissman JS. Use of Advance Directives for Nursing Home Residents in the Emergency Department. *Am J Hosp Palliat Care*. 2008 Jun-Jul;25(3):179-83. Epub 2008 Apr 10.

- The form should specifically identify if there is an existing advance health care directive and, to the extent that an individual wishes to change agents, the individual should be required to acknowledge that the MOST revokes the advance health care directive agents. Absent such clarification, it is impossible to know if the person filling out the form is simply listing the names of family without due consideration of the individual’s prior express preferences in naming agents to make health care decisions.
- An individual should be aware that by completing the MOST, he or she is revoking his or her prior advance health care directive, and the MOST does not provide an agent as guardian. Therefore, even if there is not a conflict with the prior advance health care directive, by executing the MOST and revoking the prior advance health care directive, an individual may be vulnerable to a future guardianship hearing.
- A New Mexico MOST must be signed by a physician, but it should be made clear that the physician must meet with the individual to discuss treatment options to help the individual understand his or her medical condition and options for treatment/care and to determine and clarify the individual’s wishes.
- New Mexico’s MOST labels an individual’s healthcare agent as

the “healthcare decision maker.” Although only a minor variation, the New Mexico UHCDA uses the language “my agent to make health care decisions.” The language should be consistent so it does not create any confusion.

Finally, an identified barrier to the effectiveness of both advance directives and MOST is inaccessibility of the documents intended to guide care. A 2004 survey of Oregon EMTs indicated that the POLST form can be difficult to locate in an emergency—with 25 percent of respondents indicating the last time they expected to find a POLST form, they were unable to do so in a timely way.<sup>10</sup>

An identified barrier to the effectiveness of both advance directives and MOST is inaccessibility of the documents intended to guide care.

A 2008 study of nursing home patients 65 years of age or older who were transferred to a hospital’s emergency department found that many patients arrived without their advance directive; and, when the advance directive was sent, it did not always agree with other information in the record, thereby limiting its use.<sup>11</sup>

Many states have developed or are considering developing advance directives

# Cover Your Digital Assets: You May Not Own Everything

By Kate Fitz Gibbon

Most Americans today rely on the Internet for social communications, information storage and for performing a range of financial activities from investments to consumer purchases. The Internet is also a repository for a significant percentage of U.S. assets: in a 2011 survey, Americans valued their Internet assets on average at \$55,000.<sup>1</sup>

A digital asset is any content—textual, sound or visual—owned by an individual that is stored in digital form. In the law, the term can refer to any information created, generated, sent, communicated, received or stored by electronic means on a device or system. Examples include email accounts, websites, domain names and blogs as well as computers, tablets and other portable devices on which digital information is accessed. Digital information assets may include items of significant value such as online gaming items, intellectual property including photographs, client lists and other business assets.

Management of digital assets may require not only access to an account and ownership of its digital contents, but also its ongoing use to generate income for heirs or estates. Entire businesses are increasingly located online: Between 2011 and 2012, the number of electronic shopping establishments grew 27.4 percent to 30,185 online businesses employing 365,508 people. During the same period, 77,000 brick-and-mortar businesses in the U.S. grew only 1.1 percent.<sup>2</sup>

A Harris Poll from March 2013 found that “93 percent of Americans who have digital assets were unaware of or misinformed about what would happen to their digital assets should they die.” Certainly, estate planners and other advisors should be prepared to counsel clients regarding these increasingly important assets.



Practitioners need to make dealing with digital assets a standard element of estate-planning to address clients’ concerns over privacy, transferability, management and distribution of digital assets. As a practical matter, this could include:

- Client instructions for account passwords, access and regular updates
- Information on Internet contacts to be notified in the event of death or disability.
- Instructions for continuing or closing sites on death.
- Plans to realize value for digital assets.
- Completing beneficiary designations for digital assets in wills or trusts.

Managing digital assets can be a challenging task for fiduciaries, whether acting as agent under a power of attorney for an incapacitated person or as a trustee or personal representative on death. Online accounts are usually created by signing a “click-wrap” contract of adhesion to accept a “terms of service agreement” (hereafter TOSA). TOSA often provide for non-transferability or termination of accounts on death, despite the prevailing legal principle that a decedent’s rights under a contract may be assigned to an executor by operation of law. For example, social media and photo storage accounts

may not allow the contracting individual’s heirs to transfer content—or may give the Internet service provider extraordinary rights to the content carried over the Internet even after death.

Without adequate planning when setting up an Internet business, an heir may be unable to discover passwords<sup>3</sup> or find that the business website account is tied to the deceased individual who contracted for it rather than the business entity. A new fiduciary or trustee for a nonprofit organization may be hampered in operating the entity.

State laws largely fail to address whether an online account or its contents pass via will, intestacy or non-probate transfer. State and federal laws like the Electronic Computer Privacy Act and Stored Communications Act penalize unauthorized access to digital accounts and prevent the access necessary to fiduciaries. These conflicts exacerbate an already difficult situation. A few states have tried to address post-mortem digital management<sup>4</sup> and others are considering legislation. (As of this writing, New Mexico has not considered any such legislation.) Existing legislation differs with respect to the types of digital assets

covered, the rights of the fiduciary and whether the principal's death or incapacity is covered.

Some state laws require email providers and/or other custodians of private communications to turn over copies of electronically stored information to the estate administrator; others grant administrators the right to take control of, continue or terminate any accounts. In some respects, state digital access laws appear to assume that a digital account is the property of the person who creates and uses it, despite what the TOSA might say. However, courts have not yet interpreted these laws and the statutes do not grant fiduciaries any new powers not already conferred by the contract terms.

A major change to U.S. laws governing digital assets is likely to take place in the near future. In 2012, the National Conference of Commissioners on Uniform State Laws formed a drafting committee to prepare a Uniform Fiduciary Access to Digital Assets Act (UFADAA), now in its final reading stage.<sup>5</sup> The UFADAA covers not only personal representatives and trustees, but also conservators and agents under a power of attorney for the incapacitated. The results will impact the Uniform Probate Code, Uniform Trust Code, Uniform Guardianship and Protective Proceedings Act, and Uniform Power of Attorney Act. If adopted by New Mexico, the UFADAA will guarantee access by fiduciaries to digital assets and void some of the most burdensome aspects of Internet service providers' TOSA.

The UFADAA authorizes fiduciary access to digital property. It governs *access* to digital assets and not *ownership*, leaving existing law of contract, copyright, banking, securities, agency, employment, privacy and trusts in place. The fiduciary or acting agent is presumed to have all access not subject to protection under other laws and equal to that of the account holder under a TOSA. A fiduciary may not sell or transfer rights that the original owner could not. An account holder who wishes to retain privacy after death is required to make an election in the TOSA. It also grants immunity from civil liability to fiduciaries who act in compliance with the UFADAA.

The draft UFADAA does not address the ability to transfer the actual digital assets to beneficiaries. If a digital asset cannot be transferred to another individual under the TOSA, but could be transformed into

tangible goods or services, then additional guidance regarding authority to transform certain digital assets into tangible ones could be useful.

While it is generally accepted that heirs have an inheritable interest in the *contents* of an online account, transferring a user's private account login information to a successor through a digital estate planning service or by giving a list to a personal representative appears to grant the recipient *full use* of the account, which may be a violation of the contract signed when setting up an account. Because estate planning is for the long term and the services' legal authority to manage digital assets is uncertain, a client may not be able to count on these services being available— or lawful—10, 20 or 30 years from now.

Social media and photo storage accounts may not allow the contracting individual's heirs to transfer content—or may give the Internet service provider extraordinary rights to the content carried over the Internet even after death.

The UFADAA does not address whether the ability to use online accounts and Internet-based businesses could be particularly vulnerable to losses when the TOSA does not provide for transfer of use. There are other possibilities for addressing this issue. Provisions for non-probate transfer on death in instruments deemed "effective as a contract" have been recognized under the Uniform Probate Code in the past. Legislation to expand the concept of Transfer on Death provisions under state laws regulating bank accounts to other online assets as an added form of non-probate transfer is one possible solution.

Amendments to click-wrap contracts by digital providers could create an efficient, built-in means of transferring authority over an account on death. Some email providers including Google have already created mechanisms for transfer of access on death through an opt-in in the account settings. In contrast, Facebook announced in February 2014 that it will maintain client's Facebook pages "as is" instead of restricting access to deceased users' "frozen"

or, in Facebook parlance, "memorialized" pages to friends only.<sup>6</sup> While the new policy claims to honor users' "wishes in life," it does not allow changes after death, regardless of the users' wishes, and allows Facebook to utilize the content of its 1.23 billion users' public pages in perpetuity.

Internet service providers need efficient mechanisms to deal with death and incapacity of clients. The legal community in New Mexico has an interest in seeing clients' individual and property rights protected as well. A vigorous public debate concerning adoption and amendment of the UFADAA in New Mexico may provide that opportunity. ■

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#### Endnotes

<sup>1</sup> Kelly Greene, Passing Down Digital Assets, WALL STREET JOURNAL (Aug. 31, 2012), <http://goo.gl/7KAaOm>.

<sup>2</sup> Online Shopping and Mail Order Businesses Jump 27 Percent, Census Bureau Reports, 5-29-2014, [http://www.census.gov/newsroom/releases/archives/county\\_business\\_patterns/cb14-102.html](http://www.census.gov/newsroom/releases/archives/county_business_patterns/cb14-102.html)

<sup>3</sup> A Microsoft study of password usage found that 8+ passwords were typed per day, on average, and that 4.28% of Yahoo users forgot their passwords over a three month period. Dinei Florencio and Cormac Herley, A Large-Scale Study of Web Password Habits, <http://research.microsoft.com/pubs/74164/www2007.pdf>.

<sup>4</sup> These include Connecticut, Idaho, Indiana, Oklahoma and Rhode Island, Nevada, and Virginia.

<sup>5</sup> The most recent iteration dates to June 6, 2014. Draft for Approval, Uniform Fiduciary Access to Digital Assets Act, National Conference of Commissioners on Uniform State Laws, [http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014am\\_ufadaa\\_draft.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014am_ufadaa_draft.pdf).

<sup>6</sup> Remembering Our Loved Ones, Chris Price and Alex DiSclafani, Facebook Community Operations, February 21, 2014, <http://newsroom.fb.com/news/2014/02/remembering-our-loved-ones/>

*Kate Fitz Gibbon is a Santa Fe attorney, advising art collectors, foundations, galleries and museums as well as other clients. She writes and lectures on law and cultural policy, and is a founding member of New Mexico Lawyers for the Arts. Fitz Gibbon serves on the boards of the Committee for Cultural Policy, the ABA Art & Cultural Heritage Law Committee and the Santa Fe Estate Planning Council.*

# Is the Tortfeasor Off the Hook?

## A Look at the Changing Allocations to Interested Parties in a Personal Injury Case

By Jeanine R. Steffy

### What is a Secondary Payer? The Medicare Example.

A while back an elderly couple came into my office looking for some help with their “estate planning,” a term I quickly learned may not mean the same to clients as it does to me. They told me they had received a small settlement for a car accident after the husband and the insurance company went back and forth for a year on the numbers. I did a double take, “You made the claim and argued it with insurance . . . without an attorney?”

The zinger came when the couple showed me a letter from the Centers for Medicare and Medicaid Services (CMS). It went something like this: “We heard you received some money in a settlement. Give it to us.” We were looking at a \$100,000 settlement, but Medicare had already paid out \$160,000 in medical bills related to the injuries from the car accident.

That is not all. Medicare has a right of subrogation to past medical payments but, given the right case, it may also expect the recipient to set aside funds for future medical bills that will arise as a result of the injuries that are the subject of a settlement or judgment. The Medicare Secondary Payer Act (MSPA) requires Worker’s Compensation and other primary sources to pay before Medicare is allowed to cover bills.<sup>1</sup> If an award is pending, the best that Medicare can do is to make a “conditional payment” and seek reimbursement after the case ends.<sup>2</sup> The thought is that it is better for the tortfeasor to pay than to put the burden upon taxpayers who fund Medicare. Notably, Medicare covers not only the elderly, but also the disabled, meaning that a personal injury lawsuit may very well implicate Medicare, even when the plaintiff is not elderly.



For an attorney, failure to account for Medicare’s interest can result in double damages in addition to malpractice.

To handle the matter of future medical needs, lawyers have grown accustomed to setting up a Medicare Set-Aside Arrangement (MSA) during the lawsuit or settlement, a process well outlined in the context of Worker’s Compensation cases in guidance, or “Memos”, put out by CMS.<sup>3</sup> The arrangement sets aside amounts received now to pay medical bills that will arise. Personal injury awards or Liability Medicare Set-Aside Arrangements (LMSAs) are part of Medicare’s focus as well, although a 2011 Memo specifically exempted cases in which the treating physician certifies there will be no future medical needs.<sup>4</sup> Other than this exemption, CMS has issued very little guidance in liability cases, unlike in Workers Compensation cases. Personal injury attorneys are left with the obvious warning that Medicare may be looming, and use their own discretion in consulting with special needs attorneys regarding Medicare’s interests. For an attorney, failure to account for Medicare’s interest can result in double damages in addition to malpractice.<sup>5</sup>

The couple who came to see me about the auto accident settlement had handled their personal injury matter *pro se*. Not only did they not have assistance in building a case against the driver of the other car in the accident nor negotiating with the insurance company, but they did not have an attorney to

advise them about Medicare’s interests. Now there is an amount outstanding which, to some limited extent, can be mitigated within the administrative process. Unfortunately in this case, the result is still garnishment of a meager Social Security retirement check.

### Now Add Medicaid: the Poor and Those in Need of Long-term Care

Medicaid also has a right to subrogation.<sup>6</sup> In fact, the federal government mandates that states as the administrators of Medicaid recoup their payments from third parties who are liable for medical expenses. Historically, the states’ right has been limited to the amounts allocated to medical in the judgment or settlement.<sup>7</sup>

This is about to change. Effective October 2014, the Bipartisan Budget Act of 2013 will expand the reimbursement right to *any* money that comes in from a third party who is liable to make a payment for assistance provided by the state.<sup>8</sup>

The state is required to ramp up its efforts to collect in light of the amended federal statutes.<sup>9</sup> Soon it will be of little or no importance to the state just how much the settlement or judgment itself allocates to medical expenses. This opens up drastically the pool of opportunity, at least for now.

*continued on page 10*

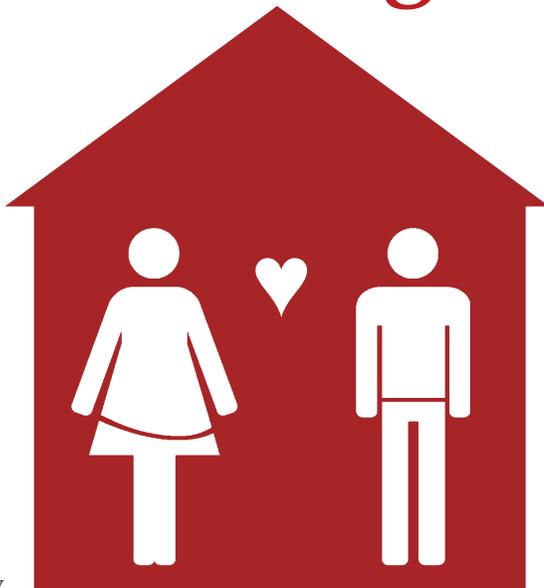
# Matt and Miss Kitty Living in Sin?

By Tom Dunlap

It used to be against the law to cohabit in New Mexico. Some lawyer made it his personal crusade to get that law repealed after a young man got killed in Ruidoso in the 1970s. Some lady's daddy knew the law up there and had his daughter's boyfriend arrested and hauled off to jail for cohabitation. While they were unloading the young man at the jail, the young man freaked and ran, kinda like Tom Robinson in *To Kill a Mockingbird*. Deputy missed his aim and killed the young man. Anyway, 20-30 years ago, the state Legislature repealed the law, opening the way for "Marshal Dillon and Miss Kitty" to cohabit lawfully if they lived here today. For youngins, I'm not talkin' about that pretty boy Matt Dillon chasing down Cameron Diaz in the 1998 film *There's Something About Mary*, but rather the no-nonsense, law-and-order marshal of Dodge City from the TV classic western "*Guns, Smoke,*" which ran for 20 years on CBS. Google it, watch it on cable or ask your daddy.

Now I don't want to pick a fight with church people and I'm not pushing cohabitation by seniors in lieu of marriage—living in sin and such late in life—when you might have two sets of kids, two sets of assets, etc. Rather, I just want you to be aware of some of the consequences and some of the alternatives.

For instance, sometimes those two sets of kids come on like gangbusters worrying about their inheritance. None of the kids' business, in my opinion, but by avoiding the marriage, one might circumvent some family grief. Naturally, by sidestepping the marriage you avoid the prospect of divorce. Those who do marry should probably have prenuptials or postnuptials (yes, you can do this after the marriage, although somebody might have lost his/her leverage) and should consider revising wills to eliminate the automatic allowance of \$45,000 in personal and cash property provided for a surviving spouse in New Mexico. One might also skip late-in-life marriage for the purpose of avoiding liability for the spouse's debts, credit card bills, auto accidents and, most important as we get older, medical and nursing home



expenses that can quickly eat up a nest egg that took a lifetime to build with a prior spouse.

So, to avoid all this secular grief, maybe you should just live in sin because the state doesn't care. Some of my clients begin to perspire from the heat when we discuss the sin part. Others may not think it's a sin, but they worry about the example they may be setting for the grandkids who are just studying for their First Communion. Could be more complicated than it was for Matt and Miss Kitty because they only had Chester, Festus and Doc Adams looking over their shoulders and they could all be bribed with a free beer.

Hence, many people these days are considering commitment ceremonies. Several of my older clients have used this approach. A number of preachers are performing commitment ceremonies. You commit before the eyes of God, exchange vows and get a certificate of commitment to have on the wall for the little ones to see when they visit. BUT, there's one critical difference: no marriage license, and that means in the eyes of the state, no marriage. Instead of divorce, the one who owns the house can just say "Git outta here!" Instead of bankruptcy, the one who is not in financial trouble or is not a chronic gambler or didn't get in the car wreck, can fake the deepest sympathy for

the poor other partner, help as is prudent, but hold onto his or her savings. You know, when you are in your 70s and 80s, it's too late to build another nest egg. Each estate plan (wills, trusts and stuff like that) remains intact and separate from the other person's estate plan. Kids are more relaxed about their inheritance unless they are upset about cohabitation to begin with and again, I say it's none of their business.

Sometimes people who cohabit late in life worry about the surviving partner or significant other who doesn't own the home being tossed out in the street by the kids in the event of the death of the homeowner. It can happen, but this can be remedied by the homeowner providing a life estate in the will for the non-homeowner in the event the homeowner dies first. Doing this in the will is safer than in a deed. The non-homeowner never really owns anything, can't mortgage the place and his or her creditors can't really attach anything, but he or she can stay in the home after the death of the owner, rent free, exclusively; it's usually provided in the will that the occupant must maintain the place, pay the taxes and utilities, keep it insured, etc. It's a pretty nifty way to help out your partner. When the surviving partner dies, the home automatically passes to the kids of the homeowner or as the owner's will provides.

Partners should probably not put both names on a car title as that can make them both liable for a car wreck. However, a small joint banking account or an operating account for groceries is not a problem, and passes to the surviving joint tenant automatically. Keep the account small because if you put all the kids' inheritance in it, they could come at you again in their childish role as gangbusters. This is just a concept of which I want you to be aware. If it is a sin, hey, don't blame me. ■

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## Is the Tortfeasor Off the Hook?

continued from page 8

### Anyone Else Struggling To Be the Last Payer in Line?

In *E.J. v. Mont. Contractors' Ass'n Health Care Trust*<sup>10</sup>, a child injured at birth received a settlement due to those injuries. Afterward, the father sought to enroll his child on his healthcare plan at work, an ERISA plan. ERISA refused to cover the child without information on the settlement and a Third Party Reimbursement Agreement. The trial court interpreted the plan documents and found that the settlement funds constituted an "other plan" and would need to be used first for any future medical expenses related to the settlement. The denial of benefits to the child was found on appeal not to be an abuse of discretion. However, the case is ongoing.

ERISA plans generally have a right of subrogation, but what is interesting is that in the *E.J.* case, the plan document made way for a sort of a private insurance set-aside from which future medical expenses had to be paid before the plan would pay.

Obviously, the Affordable Care Act (ACA) now affects much of what occurs in health insurance cases, and is affecting lawsuits in its own right. With set copays and consistent coverage and deductibles for all, the options are to shift a case's burden of medical expense to healthcare insurers under the ACA or to the plaintiff by requiring a set-aside for private insurers.<sup>11</sup> This conclusion is based on the premise that the total award in a given case will not change.<sup>12</sup>



Medicare has a right of subrogation to past medical payments but, given the right case, it may also expect the recipient to set aside funds for future medical bills that will arise as a result of the injuries that are the subject of a settlement or judgment.

Lawsuits are complicated. Healthcare is too, and changes in the federal system of healthcare and associated costs affect lawsuits. A change is coming and it will mean a reallocation of settlement and judgment awards and possibly fewer plaintiffs. ■

#### Endnotes

<sup>1</sup> 42 USC §1395y(b).

<sup>2</sup> 42 USC §1395y(b)(2)(B).

<sup>3</sup> See CMS WCMSA Memorandum "WCMSA FAQ's" (July 11, 2005); CMS WCMSA Memorandum "WCMSA

and Part D" (December 30, 2005); CMS WCMSA Memorandum "WCMSA Low Dollar Threshold" (April 25, 2006); and CMS WCMSA Memorandum "Use of CDC Table 1 in the WCMSA review process" (May 20, 2008).

<sup>4</sup> CMS Medicare Memorandum "LMSA Amounts and Future Medicals" (September 30, 2011).

<sup>5</sup> 42 USC §1395y(b)(2)(B)(iii).

<sup>6</sup> 42 USC §1396a(a)(25).

<sup>7</sup> *Arkansas Dept. of Health and Human Servs. v. Ahlborn*, 547 US 268, 126 S. Ct. 1752 (2006).

<sup>8</sup> BBA 2013 Section 202(b)(2) as it amends 42USC 1396a(a)(25)(H). See also Jason A. Frank, CELA, CAP and Jack K. Beckett, *Is this the Death of Ahlborn? The Self-Defeating Expansion of States' Authority to Seek Reimbursement Under the Medicaid Secondary Payer Act*, NAELA News February/March 2014, available at: [http://www.naela.org/Public/Library/Publications/Publications\\_Main/NAELA\\_News\\_Archive/NAELA\\_News\\_2014/FebMarch/Pub\\_Policy.aspx](http://www.naela.org/Public/Library/Publications/Publications_Main/NAELA_News_Archive/NAELA_News_2014/FebMarch/Pub_Policy.aspx)

<sup>9</sup> 42 USC §1396a and 42 USC §1396k were both amended. The first outlines the type of funds from which states can collect, the second affects how the states are assigned rights to these funds.

<sup>10</sup> US Dist. LEXIS 101588 (D. Mont., Sept. 27 2010).

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