BarNews

ALBANY COUNTY BAR ASSOCIATION NEWSLETTER

JULY/AUG 2023

A Publication of the **Albany County Bar Association**

President's Message

Ryan Donovan, ACBA President 2023

Over the past 10 years our society has experienced changes, but it is safe to say that even more significant change has occurred specifically within the last four years. Unfortunately, part of this change has resulted in a country that has never been more divided. As President of the ACBA I am careful not express an opinion that might ostracize members, because I see my role as one to bring people together. For the first time this year, however, I am ready to stick my neck out with what could be considered a divisive position. Ready for it? ……. I don't think working remotely is a long-term win. There I said it. Before coming to a conclusion about my own perspective on working remotely, I hope that you at least keep an open mind and consider my thoughts on why.

Working from home has become the norm as a result of the pandemic. Before the pandemic though, working from home was not so much the norm. Occasionally, working from home might happen depending on the circumstances of your job, but when the shutdown came in March of 2020, we all had to catch up with technology including the legal community. The shutdown itself resulted in an accelerated development of software and catapulted the use of Zoom and other technology so that society could continue working and going to school, essentially overnight. This raises interesting questions: what if technology was not ready to allow people to work remotely, what would have been the ultimate effect on business? Would there have been more layoffs? Would the economic devastation have been even worse? While I don't have the expertise to answer these questions, it certainly invites an interesting discussion.

Like almost everything in this world, nothing is totally good or totally bad. There are both positive and negative aspects and benefits to working from home, the question is what model best supports you? Based on a preliminary 10-minute Google search, there are studies that support in-person models and remote work models. Personally, I favor an in-person working model, especially for attorneys.

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Working remotely has many benefits, which cannot be ignored especially in light of the pandemic and ongoing health concerns. Working from home creates flexibility for families, promotes activities such as exercise, cuts down on the time and costs of commuting, and overall provides for better work-life balance. Obviously, a work from home model provides opportunities to individuals who may not be able to work based on disability, family commitments, geographical obstacles, etc.

However, there is something to be said about the benefits remote workers are missing out on by not physically

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PRESIDENT'S MESSAGE *(continued from p.1)*

working in the office. One major thing that comes to mind is the opportunity to learn – not only about the practice of law, but everything that comes with working in a law office or agency. The type of work that we all do can be tedious, stressful, or even boring at times. Having a community to learn from, to lean on, collaborate, and to socialize with makes the most difficult of tasks more bearable. I have learned more than I can quantify from my partners, staff, and co-workers throughout the years. By working in person, I have been able to observe different strategies of preparing for a trial, how to approach a large writing assignment, how to navigate communications with a difficult client, how to utilize a professional network outside of the office, how to organize a business, and different approaches generally to the practice of law. Understandably, not every office environment can offer a positive social or working experience.

I hope this column encourages our ACBA members to take stock of their approach to working remotely as I believe it may be time to reassess the advantages and disadvantages of doing so. In-person work is still very important, and I believe that could transfer over to the ACBA to help us all continue to boost morale, build networks, and encourage collaboration in the community.

RYAN DONOVAN

Conway, Donovan & Manley, PLLC
RDonovan@lawcdm.com

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BENCH & BAR IN THE NEWS

An update to date Bench and Bar News can be found on our website – albanycountybar.com

The Towne Law Firm Partner, DOUGLAS GOLDMAN, ESQ., has been elected Chair of the Upstate New York Chapter of the American Immigration Lawyers Association.

JOHN E. AHEARN III, ESQ., has been promoted to partner at Couch White, LLP in the Environmental and Renewable Energy Transactions practice areas. John appears before municipal land use development boards regarding the land use entitlement process, advises clients on real estate development and provides advice regarding New York's State Environmental Quality Act Review and other state and local laws regarding development. John also is experienced in providing due diligence of renewable energy projects, including wind, battery energy storage, and solar.

After four years of work, Confidential Law Clerk at Montgomery County Supreme Court NORINA A. MELITA, ESQ.'s article on attorney wellbeing has been published in the Emotional Regulation and Processing Section of the peer reviewed international journal Frontiers in Behavioral Neuroscience. The article contains a very timely interdisciplinary discussion of attorney wellbeing seen through the lens of affective neuroscience and discusses the attorney as emotional laborer, emotional labor's effects on attorney wellbeing, and strategies to combat them.

LISA TABER, ESQ., partner at Sciocchetti Taber PLLC, was named to the Albany Business Review Power 50 in July 2023.

Job Bank
See the Job Bank on the ACBA website - https://albanycountybar.org/?pg=jobBank or see website footer and look under "Attorney Resources."

MISSION STATEMENT

THE PURPOSE OF THE ALBANY COUNTY BAR ASSOCIATION is to promote professional collegiality among the bench and bar; facilitate public service and access to justice for all; and offer programs, benefits and services to enhance the skills of its members.

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Committee and Committee Leadership
Want the most from your membership? Committee work is a great way to get and stay connected, as well as gain exposure within the legal field and beyond. Let us know your interest in a particular committee acba@albanycountybar.com. Please visit us online albanycountybar.org to learn more about committees and how to get involved. Please note that some committees are by Presidential appointment only.

Are you ready to join an organization steeped in rich legal history and tradition? For more than 120 years, the Albany County Bar Association has represented the interests of attorneys and judges practicing or living here in Albany County. Our mission is to promote collegiality among the bench and bar, facilitate public service and access to justice for all and to offer programs, benefits and services which enhance the skills of our members.

Please visit us online **albanycountybar.org** to join today.

Ariel E. Solomon, Esq. • Solomon Law Firm PLLC • asolomon@fedemploylaw.com

Telework: Not Our State Not Our Laws

The New York City Human Rights Law (NYCHRL) and New York State Human Rights Law (NYSHRL) are, respectively, New York City and New York State's anti-discrimination laws. The laws provide some of the strongest anti-harassment and anti-discrimination laws in the country, providing employees with protections that go well beyond federal mandate and those of neighboring jurisdictions. The Administrative Code's legislative history "contemplates that the New York City Human Rights Law be liberally and independently construed with the aim of making it the most progressive in the nation. Thus, the case law that has developed in interpreting both the state Human Rights Law and title VII of the Civil Rights Act of 1964 should merely serve as a base for the New York City Human Rights Law, not its ceiling." *Jordan v. Bates Adv. Holdings*, 11 Misc. 3d 764 (N.Y. Sup. Ct. 2006) (See, Local Law No. 85 [2005] of City of New York § 1 [Local Civil Rights Restoration Act of 2005]; Council Report of Governmental Affairs Div, Comm on General Welfare, Aug. 17, 2005.). In a recent decision, the United States District Court for the Southern District of New York held that employees who telework outside of New York State cannot avail themselves of the expansive protections under the NYSHRL and NYCHRL, even if the teleworking employee is assigned to work in a New York City office and is only working remotely because of the COVID-19 pandemic.

In *Shiber v. Centerview Partner, LLC,* the Court held that an employer who had offices in New York City; made employment decisions in New York City; and ("allegedly") discriminated in New York State, cannot be sued by its employee under the NYSHRL and NYCHRL, if the employee exclusively teleworked outside of New York State. The Shiber Court held that because the "impact" of the discrimination did not occur in New York State, out of state employees cannot avail themselves of the protections under the NYSHRL and NYCHRL. The fact that the employee was assigned to the New York City office and was only teleworking because of COVID-19 did not sway the Court's opinion. The claims of discrimination brought under federal statute and New Jersey state laws, were permitted to go forward.

When teleworking plaintiffs elect to commence a lawsuit in a favorable forum like NYC the "impact" theory may preclude any cause of action under the NYSHRL and NYCHRL. Claims may proceed under the federal statutes and, under pendent jurisdiction, the home-State anti-discrimination statutes. However, damages and burden of proof requirements will likely be less favorable than those of an employee who worked, at least part of the time, in New York State.

Depending on the home-State jurisdiction, the NYCHRL and NYSHRL likely provide better recovery for the harm sustained from intentional discrimination, including uncapped compensatory damages, personal liability, and a more favorable burden of proof with lower bars for establishing hostile working environment. Although the COVID-19 pandemic no longer requires telework, there is little dispute that the broader use of telework remains for the foreseeable future. An increasing number of employees are hired remotely and may never set foot in an office where employers are actively engaging in an intentional act of discrimination. As a result, an increasing number of employees hired by companies in New York State may not avail themselves of the NYSHRL and NYCHRL.

In *Shiber*, the Employee was a New Jersey resident who was hired by Centerview Partners, LLC, an investment bank and advisory firm with offices in New York City. In 2019 Centerview offered Shiber a position in the company's three-year analyst program in its New York City office. Shiber started work remotely in June 2020 due to the COVID-19 pandemic. Like most employees in 2020, Shiber worked out of her home, which was in New Jersey. When the New York City office reopened, all parties understood that Shiber would physically resume work in the New York City Office. Ultimately, Centerview terminated Shiber's employment before the New York City office reopened.

Following her termination, Shiber brought an action against Centerview alleging disability discrimination under the NYCHRL and NYSHRL. Causes of action were also brought under the Americans with Disabilities Act and the New Jersey Human Rights Law. Centerview filed a motion to dismiss the NYCHRL and NYSHRL claims on the grounds that Shiber was a non-resident of New York, who worked exclusively in New Jersey during her tenure with Centerview Partners, LLC. The Company argued that the NYCHRL and NYSHRL did not apply because there was no "impact" from the alleged discrimination in New York. The Court agreed and dismissed the Case under Rule 12(b)(1). Generally, such dismissals are appropriate where a plaintiff attempts to plead a statutory claim but lacks standing to invoke that law. See, *Pedroza v. Ralph Lauren Corp.*, 2020 WL 4273988, at *1–4 (S.D.N.Y. July 24, 2020).

The New York Court of Appeals has held similarly. See Hoffman v. Parade Publications, 15 N.Y.3d 285, 290-291 (2010) (holding the impact requirement is appropriate where a nonresident plaintiff invokes the protection of the NYCHRL, plaintiff must plead and prove the discriminatory conduct had an impact in New York). Contrary to much speculation, no departure from the "impact" test was made in light of COVID-19. When an employee is a new hire and never stepped foot in New York during the entire tenure of employment, the "impact" test will not be met, regardless of the reason for the remote work.

For purposes of the NYCHRL and NYSHRL, a plaintiff suffers an "impact" in New York City - or State - if the plaintiff lived or worked in the City or State—a more tenuous connection will not do. See *Wolf v. Imus,* 170 A.D.3d 563, 564 (N.Y. App. Div. 1st Dept. 2009) (Supreme Court properly dismissed plaintiff's age discrimination claims brought under the NYCHRL and NYSHRL because the impact on plaintiff from the termination of his employment occurred in Florida, where he lived and worked); *Benham v. eCommission Solutions*, LLC, 118 A.D.3d 605, 606 (N.Y. App. Div. 1st Dept. 2014) (dismissing NYCHRL and NYSHRL claims for lack of subject-matter jurisdiction where "the alleged conduct occurred while plaintiff was physically situated outside of New York").

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IMMIGRATION LAW UPDATE

David W. Meyers, Esq. *Meyers and Meyers, LLP dmeyers@meyersandmeyers.com*

The Aftermath of This Year's H-1B Lottery

I know I write a lot about the H-1B visa program. Probably too much. But this month's missive must be written. In today's globalized world, the United States continues to be one of the most sought-after destinations for skilled immigrants (even despite all the remote work opportunities that have presented themselves as a result of the Covid-19 pandemic). The H-1B visa program, designed for non-immigrant workers in specialty occupations, plays a crucial role in attracting and retaining talented professionals from around the world.

And yet the process to be able to participate in this program (especially if you're not a "cap exempt" employer),[1] as well as other "lottery based" nonimmigrant visa programs (e.g., the H-2B program), is a joke. The current cap for H-1B visas is only 65,000, with an additional 20,000 available for individuals with U.S. master's degrees or higher.

I get calls literally every day asking how I can get this computer programmer or that software engineer an H-1B visa. Arguably worse than that, this time of year, I speak with my clients in hospitality (or other seasonal businesses with seasonal peakload labor needs), many of them now in their busiest time of the year, and they cannot fill critical roles (e.g., front and back of the house restaurant positions, landscapers, etc.) where some actually have to close one or two days a week when they should be open each and every day of the week!

Yet, as I've written before, unless you're a "cap exempt" employer, participation in the H-1B visa program involves a lottery process (due to the program's popularity), and this year's lottery registration process involved so much abuse I cringe just thinking about it.

The government's Fiscal Year 2024 visa registration and lottery process closed on March 17, 2023, and on April 28, 2023, USCIS released data indicating that there was a ***sixty one percent (61%) increase*** in the number of H-1B registrations submitted compared to the prior year. More concerning, however, was that the data revealed a ***one hundred forty-seven percent (147%) increase*** in the number of registrations that were for individuals who had multiple registrations.

According to the WALL STREET JOURNAL, approximately 96,000 individuals were responsible for more than 408,000 registrations. Although the regulations do allow different employers to file registrations (and petitions) for the same foreign national, the significant increase raises concern. Multiple registrations involving the same foreign national accounted for over fifty percent (50%) of all the lottery registrations. That is concerning and suggests that unscrupulous employers are trying to unfairly (and perhaps unlawfully) game the system.

How does this play out in real terms? Several ways. Here are a couple. First, it potentially results in some H-1B visas from not being used because some individuals may be counted more than once if more than one employer had their registration selected for the same individual. This affects other companies who filed registrations for foreign nationals who were not selected.

In addition, many foreign students (who are in the United States on F-1 visas and working for U.S. employers pursuant to Optional Practical Training, or OPT) may be required to depart the United States if they are at the end of their OPT availability and are not selected in the H-1B lottery.

Something needs to change. According to USCIS, in FY23, there were 483,927 H-1B registrations. This number increased in FY24 to more than 780,000 total registrations. Of course, some of this increase is legitimate, but clearly not all of it. And even if you just look at the legitimate increase in demand, and accept as true all the anecdotal evidence from clients like mine or people you may even know in your everyday lives complaining about the difficulties in attracting and retaining talent into the workforce, if the H-1B lottery registration process is not changed, than it's U.S. employers, and our economy, that will suffer.

With unemployment rates at historic lows, and demand for labor so high, the status quo will no doubt negatively impact economic growth. While the Department of Homeland Security ("DHS") has indicated that it will refer for prosecution those that are unlawfully gaming the system, the issues are far more systemic, and Congress must get its act together to finally implement meaningful immigration reform. •

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[1] *Some employers are eligible to file what are called "cap-exempt" H-1B nonimmigrant petitions if they are an institution of higher education, a non-profit entity which is "related to" or "affiliated with" an institution of higher education, a non-profit research organization, or a government research organization.*

LABOR & EMPLOYMENT PRACTICE *(continued from p.4)*

However, the holding in Shiber is not a likely outcome for employees who telework on a hybrid basis, physically working in New York State, a percentage of the time. Moreover, if Shiber worked in the New York City Office prior to teleworking, the motion to dismiss may have been denied. In that situation, depending on the circumstances, Shiber would likely be able to allege a discriminatory "impact" in New York.

To avoid a - not our state, not our laws- dismissal, examples of discrimination that physically occurred in New York State should be plead with specificity; emphasizing acts of discrimination that occurred while working, or even receiving training, in New York State. •

I Put My House In A Medicaid Trust. Now What?

by Patricia J. Shevy, Esq. • The Shevy Law Firm LLC • tricia@shevylaw.com

Seniors throughout the Capital District have transferred title to their homes in a variety of ways in an effort to protect their equity from potential long term care expenses. While your client may understand the process at the time of the transfer, many may not recall the implications when it comes time for a nursing home admission or sale of the home.

Frequent calls to our office include:

- "I know I put my house in a trust, but now I need a home equity line."
- "I want to sell my house that you put into a trust. Why can't I get the proceeds?"
- "Another lawyer put my kids on my deed, why can't I sell it?"
- "The assessor says I am losing my STAR exemption."
- "But I thought my mother's house was an exempt asset. What do you mean there is a lien?"

"We're closing on my mother's house on Friday; and need to know how much she gets from the sale proceeds."

If you have assisted clients with this type of planning, be prepared for similar follow-up questions, sometimes 10 or more years later.

Homestead

A "homestead" is an exempt resource for Medicaid nursing home benefit eligibility purposes. The "homestead" is the primary residence occupied by the Medicaid applicant/recipient and/or certain members of the applicant/recipient's family, including the applicant/recipient's spouse, minor children, certified blind or disabled children and other dependent relatives. An exempt homestead may be a one, two or three family home, a condominium, a cooperative or a mobile home. The homestead includes the home, the land and integral parts on the property including garages and outbuildings. Contiguous property (land adjoining the homestead on a separate deed) is considered part of the homestead and is exempt.

The homestead is exempt as long as it is the primary residence of the applicant/recipient or a family member; but exempt status remains only during a period of temporary absence. The homestead is not countable as long as the applicant/recipient indicates an intent to return home (even if not actually able to return home). However, a lien for Medicaid services provided may be imposed on a permanently institutionalized individual's homestead. A person will be in permanent absent status upon entering a nursing home, or upon remaining in an acute care hospital, for more than 6 months; or if, after admission to acute care in a hospital, is transferred to an alternate level of care, pending placement in a nursing home.

By placing a person in permanent absent status, Medicaid is presuming that the person will not return home. At this time, if a home owner enters a nursing home leaving no spouse or minor or disabled child in the home, Medicaid will determine the individual to be in permanent absent status and deny Medicaid on the basis of excess resources. If the applicant/recipient indicates an intent to return home in the Medicaid application, the applicant/recipient will be determined Medicaid eligible, but once "permanently absent" a Medicaid lien will be placed on the homestead, to be ultimately satisfied at closing when the house is sold.

There are times when one spouse is being admitted to the nursing home, leaving the other spouse (called a community spouse for Medicaid eligibility purposes) in the home. At that time, with a properly drafted power of attorney that includes gift-giving powers, the spouse entering the nursing home can be removed from the deed with only the name of the community spouse remaining. The transfer is between spouses, and therefore exempt from penalty. A well-drafted power of attorney with gift giving power will be key to assisting clients with this transfer.

Life Estate Deed

Pre-2006, life estate deeds were commonplace. The reason being that before 2006, for Medicaid eligibility purposes, trusts had a look back period of 5 years and non-trust transfers had a look back period of 3 years. The difference made life estate deeds significantly more attractive. The Deficit Reduction Act changed the Medicaid eligibility rules, and imposed a 5-year look back on all transfers regardless of whether a trust is used.

A life estate deed is a deed whereby the grantor transfers a remainder interest in the property, and retains the right to the exclusive use and occupancy of the property during the grantor's lifetime. Some deeds simply state, "The Grantor retains a life estate in the premises." Other deeds are a bit more complicated, with the grantor retaining the ability to change the remainder beneficiaries by filing a new deed during the grantor's lifetime (called a limited power of appointment).

When transferring the property by way of a deed with retained life use and limited power of appointment, the residence may be protected from potential long term care expenses. The retained life use means that the grantor gets to live in the residence as long as the grantor is living. The limited power of appointment means that the grantor can change how the residence passes after death among a limited class, typically the grantor's descendants. The grantor cannot take the property back for the grantor, but the grantor can take the property away from one child and give it to another child (or whomever else is a permissible remainder beneficiary as specified in the deed).

The advantages of transferring the house in this way include the following: (1) The grantor has the right to live in the house for as long as the grantor is living; (2) Upon the grantor's death, the house will pass automatically to the remainder beneficiaries designated in the deed; (3) A tax advantage known as a "step-up in basis" (for income tax purposes, cost equal to the value of the residence as of the grantor's date of death) is preserved for the remainder beneficiaries; (4) The grantor retains the enhanced Senior STAR and Veterans' real property tax exemptions; and (5) No gift tax is due at the time of the transfer.

The disadvantages of this method include the following: (1) A period of ineligibility

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or "penalty period" for Medicaid eligibility purposes will accrue based upon the grantor's age and the fair market value of the house. Under the post-2006 Medicaid eligibility rules, if the grantor applies for Medicaid within 5 years of the transfer, the penalty period will not begin until the grantor has spent down the grantor's other assets to $30,180, applies for Medicaid, and is admitted to a nursing home (which means that if the transfer did not occur at least 5 years prior to nursing home admission, the grantor needs to find another source to pay for care); (2) Should the grantor decide to sell the house, the remainder beneficiaries will be required to sign the deed and they will be entitled to a portion of the sale proceeds; (3) Should the grantor decide to sell the house, the portion of the sale proceeds allocated to the remainder beneficiaries is subject to capital gains tax; (4) Should the grantor begin receiving Medicaid nursing home benefits and the house is sold before the grantor dies, a portion of the sale proceeds may reimburse Medicaid for the expenses covered by Medicaid; (5) Should the grantor begin receiving Medicaid nursing home benefits, someone will need to pay the real property taxes and maintain the residence for the balance of the grantor's life (however, the house can be rented to alleviate the tax burden and maintenance expenses). If rented, the net rent will be considered income for Medicaid eligibility purposes.

When a property subject to a life estate is sold during the grantor's lifetime, both the grantor and the remainder beneficiary signatures will be required to transfer title. A portion of the proceeds will be allocated to the grantor, with the balance allocated to the remainder beneficiaries.

To calculate the value of the life estate, the first step is to determine the IRS Section 7520 rate for the month of closing. The 7520 rate can be obtained on the IRS website. The next step is to find Table S, also on the IRS website. Scroll through the Age, Annuity, Life Estate, Remainder headings to match the applicable 7520 rate with the age of the grantor. Use the Life Estate factor to determine the value of the life estate, and the Remainder factor to determine the value of the remainder interest. For example, the 7520 rate in July 2023 is 4.6%. At age 90, the life estate value is 17.31% and the remainder interest value is 82.69%. If the net closing proceeds are $300,000, the amount attributed to the grantor is $51,930. The remainder beneficiaries will receive $248,080.

The grantor's portion of the sale proceeds will receive the capital gains exemption (presuming that the grantor resided in the home for 2 of the 5 years prior); but may be subject to recovery for Medicaid services received. The portion allocated to the remainder beneficiaries will be subject to capital gains tax.

While some attorneys continue to recommend life estate deeds because of their simplicity,

post-2006 the Medicaid Trust offers better advantages and should be considered.

Medicaid Trust

A Medicaid Trust is a trust that the grantor establishes that requires that all income (interest and dividends earned by the underlying trust assets) be paid to the grantor while preserving the principal (the underlying trust assets) for the remainder beneficiaries. Assets transferred to a Medicaid Trust more than 5 years before a person requires nursing home Medicaid benefits are protected from long term care expenses.

The advantages of transferring the house to a Medicaid Trust include the following: (1) The grantor has the right to live in the house for as long as the grantor lives; (2) If the house is sold during the grantor's lifetime, the proceeds can be reinvested in the Trust to maintain protection from the grantor's long term care expenses; (3) Upon the grantor's death, the house will pass automatically to the remainder beneficiaries; (4) A tax advantage known as a "step-up in basis" is preserved for the remainder beneficiaries; (5) The grantor retains the enhanced Senior STAR and Veteran's real property tax exemptions; and (6) No gift tax is due at the time of the transfer.

The disadvantages are: (1) A penalty period for Medicaid eligibility purposes will accrue based upon the grantor's age and the fair market value of the house. Recall that if the grantor applies for Medicaid within 5 years of the transfer, the penalty period will not begin until the grantor spends down the grantor's other assets, applies for Medicaid, and is admitted to a nursing home requiring the grantor to find another way to pay for care (or un-do the trust, and proceed with crisis planning); (2) The grantor will not easily be able to re-finance any existing mortgage or home equity line or obtain new financing once the property is transferred to the trust; (3) Should the grantor decide to sell the house, the Trustee will be required to sign the deed and other closing documents (and, typically the grantor will only receive the net income from the trust thereafter).

When the house is sold from the trust, the Trustee must sign all of the paperwork- the listing agreement, the contract and all of the closing documents. Once the house is sold, the proceeds must then be deposited into a trust account with the Trustee as the signatory on the account. Presuming that the trust is drafted properly, Internal Revenue Code Section 121 will apply so that the grantor is considered the owner for income tax purposes. This means that if the grantor resided in the home for at least 2 of the 5 years prior to the sale, the grantor will receive a $250,000 capital gains exemption ($500,000 for a married couple).

If the Trustee did not establish a trust bank account prior to the real estate closing, the Trustee should open a trust bank account before the closing. Once the funds are deposited into the trust account, under most conventionally prepared Medicaid Trusts, the Trustee must then distribute the trust income (interest and dividends) to the grantor at least annually. The grantor cannot access the trust principal (the underlying trust assets and capital gains) without the prior written consent of the beneficiaries under EPTL 7-1.9.

EPTL 7-1.9 allows an irrevocable trust to be partially or wholly revoked by the creator of the trust (the grantor) and the presumptive remainder beneficiaries of the trust as those "persons beneficially interested." If there may be a need for a partial or full revocation, careful drafting should be considered as EPTL 7-1.9 only applies if all "persons beneficially interested" are competent adults. If there are minor beneficiaries or beneficiaries without mental capacity, EPTL 7-1.9 may not be available.

STAR and Senior STAR Exemptions/ Credits

The STAR ("School Tax Relief") program provides a benefit to real estate owners who are eligible and enrolled. The basic STAR exemption (only if you have been receiving the STAR exemption since 2015) is available to the owner of a primary residence with an annual income of $250,000 or less. For homes purchased after 2015, the STAR exemption is no longer available, but the STAR credit is. The

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Waters of the United States: the Ebbs and Flows of Federal Clean Water Act Jurisdiction

By Alita Giuda and Hilana Said • Couch White, LLP • agiuda@couchwhite.com

While definitions are the very foundation of statutory interpretation, one definition in the Clean Water Act, that of "Water of the United States" is particularly notorious. This definition has been embroiled in litigation since its drafting. 2023 is no different: multiple lawsuits have been filed, and a U.S. Supreme Court decision was issued relating to the scope of regulated "Waters of the United States."

A Brief History of the "WOTUS" Statute:

"Waters of the United States" is the term that defines which waters are subject to federal jurisdiction pursuant to the Clean Water Act. It includes waters ranging from the Atlantic Ocean to the smallest ditches bordering a farmer's field, and the wetlands near those ditches. However, the scope of the covered waters has vacillated significantly over time.

The question of what is considered a "Water of the United States" first became a subject of contention in *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 123 (1985), where the Supreme Court held that the current definition of "Waters of the United States," having been drafted to include "navigable waters," was too narrow to meet the statute's goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). This resulted in an the Court finding that the waters covered by the Clean Water Act include "tributaries of such waters, interstate waters and their tributaries, and non-navigable intrastate waters whose use or misuse could affect interstate commerce." *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. at 123.

Over the next twenty years, the Agencies charged with overseeing and enforcing the Clean Water Act[1] attempted to define the scope of regulated "Waters of the United States." For example, in 1986 the Agencies added the Migratory Bird Rule to the reach of "Waters of the United States." This rule brought wetlands and waters that served environmental importance to migratory or endangered birds into the Agencies' jurisdiction as a "Water of the United States." Shortly after this addition, the Supreme Court in *Solid Waste Agency of Northern Cook County v United States Army Corps of Engrs.* rejected this addition as beyond the authority of the statute as it included waters that were isolated and thus, non-navigable. 531 U.S. 159, 174 (2001).

Since that time, this definition has been consistently shifting between being narrowed and expanded based on two main schools of thought. In *Rapanos v. United States*, the Supreme Court again reviewed the scope of "Waters of the United States" and in particular, the scope of "wetlands adjacent to non-navigable tributaries of traditional navigable waters." While the plurality and concurrence were in agreement that the term "navigable" did not, plainly, encompass all the applicable waters that may fall under the agencies' jurisdiction; where the two opinions differed was exactly how to decide which waters were subject to federal jurisdiction. *See generally Rapanos v. United States*, 573 U.S. 715 (2006).

While the Scalia-authored plurality defined "waters of the United States' [as] . . . only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features'" and wetlands "with a continuous surface connection" to bodies of water already under the jurisdiction of the statute as jurisdictional waters, the Kennedy-authored concurrence that formed the plurality instead stated that waters, and in particular, wetlands, need only have a "significant nexus" to navigable waters to fall under the Agencies' jurisdiction. *Rapanos*, 573 U.S. at 739; id. at 759 (Kennedy, J., Concurring). As the lack of majority opinion allows the Federal courts and the Agneices to adopt either the Scalia or Kennedy opinion, much uncertainty has remained. The lack of one definitive standard, as well as the President overseeing the issue, has left the scope of Waters of the United States on shaky ground and subjected it to rapid and extreme changes. Certainly, as the waters ebb and flow, seemingly so does their jurisdictional status.

The Current Rule:

Over the preceding two administrations, there have been largely different approaches to the WOTUS jurisdictional analysis. In 2015, the Obama administration passed its version of the rule named the Clean Water Rule which largely looked to the 'significant nexus' test, as well as concepts in the *Rapanos* dissent, and as a result greatly broadened the Agencies' reach. In contrast, the Trump administration passed the Navigable Waters Protection Rule ("NWPR") which more heavily relied on the plurality's 'relatively permanent' test and subsequently greatly narrowed the Agencies' jurisdiction. (Much litigation ensued as a result of both enactments.)

The current administration rescinded the NWPR to put into place a rule closer to the Obama rule. The promulgation recited that this version of "Waters of the United States" was drafted with the goal of finding a middle ground among the past standards that were promulgated. The Agencies noted in the Executive Summary that the current definition of "Waters of the United States" was drafted by consolidating past forms of the law, Supreme Court case law, and scientific evidence and guidance. 88 Fed. Reg. 3004, 3005 (2023).

As a result, the rule continues to codify both the 'relatively permanent' and the 'significant nexus' tests. It is important to note however, the definition of "significant nexus" provided by the rule also comes with a sub-definition for "significantly affects."[2] This sub-definition provides a list of factors and considerations that landowners and agencies are to consider when determining whether wetlands are subject to the Agencies' jurisdiction. However, such an extensive list of factors to consider in case-by-case analyses may fail to provide the clarity the current rule boasts.[3] In addition, the current rule largely limits the NWPR Rule's list of exclusions and provides that certain categories long thought to be out of the jurisdiction of the Agencies are now back under federal jurisdiction.[4]

continues on p.9 »

GIUDA AND SAID ARTICLE *(continued from p.8)*

What is left is a new rule with which landowners, project-managers, and environmental attorneys must yet again adopt and familiarize themselves. But even this has been thrown into further uncertainty, as the United States Supreme Court issued a decision on May 25, 2023, *Sackett v. United States Environmental Protection Agency,* No. 21-454, that significantly curtails the waters subject to federal jurisdiction. In Sackett, the petitioners argued that the "significant nexus" test, as applied to wetlands, exceeded the authority granted to the Agencies pursuant to the Clean Water Act. The Agencies required individual permits for properties that contained wetlands which were alleged to have a "significant nexus" with other wetlands located a significant distance away, which were then connected to other waters by ditches or small streams. The basis for federal jurisdiction relied upon a chain of smaller waters, significant physical distance (including at least one intervening road), and the alleged "significant nexus" between the onsite wetland and that chain of features.

The Supreme Court rejected this, finding that the Clean Water Act contemplated only wetlands that were "adjacent" to other jurisdictional waters as subject to the Agencies' authority. The Court found that "adjacent" meant that the wetland was so close or connected to a traditionally navigable water, such as a river or ocean, that you could not tell where the wetland ended and the water began. Jurisdictional wetlands are those that have a physical connection to a relatively permanent surface water, such as a ditch, stream or river, those wetlands that do not have that level of connection are not subject to the Clean Water Act. As of the time of writing this article, the Agencies have not issued any updated guidance on this issue, so existing projects potentially subject to federal Clean Water Act jurisdiction, or that have not yet sought a jurisdictional determination, should consult with their wetland biologists and counsel regarding the implications of this decision. All told, this means that the WOTUS rule is at two extremes. For wetlands, the Agencies' jurisdiction is substantially decreased (absent a Congressional Act in response to *Sackett*). For all other waters, the expansive WOTUS rule remains in place, but is subject to ongoing litigation. The regulated community will need to stay tuned on this. •

[1] The United States Environmental Protection Agency and the United States Army Corps of Engineers (the "Agencies").

[2] The Agencies define waters as meeting the 'significant nexus' test if "they alone, or in combination with other similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of the waters identified in paragraph (a)(1) of th[e] rule." 88 Fed. Reg. 3004, 3119 (2023).

[3] To date, multiple cases have been filed seeking an injunction of the law, most notably, in American Farm Bureau Federation vs. U.S. EPA, which granted an injunction of the current rule in two states, Plaintiffs complain that the new law "asserts improperly vague and malleable jurisdiction over features that "alone or in combination with similarly situated waters in the region" "significantly affect" navigable waters, interstate waters, or tributaries, determined by multiple indeterminate factors that provide no practical guidance to the regulated community." Civ. Act. No. 3:23-cv-20 at 3 (S.D.TX. 2023).

[4] For example, under the 2020 'NWPR' (the previous "WOTUS" rule) storm water control features and wastewater recycling structures were excluded, this exclusion has been removed from the current rule.

SHEVY ARTICLE *(continued from p.7)*

STAR credit is available for a primary residence where there is combined annual income of the owner and owner's spouse is less than $500,000. The credit is paid by check in lieu of a reduction in school taxes (like the STAR exemption).

The enhanced STAR is available for the owner of a primary residence where at least one owner is age 65 or older (as long as the owners are a married couple or siblings). If non-married, non-sibling joint owners, all owners must be age 65 or older. For 2023, annual income for all owners (residents and non-residents, together with any resident spouse) is limited to $93,200 or less ($98,700 in 2024).

Corporations, partnerships and LLCs are not eligible unless the property is a farm dwelling. For STAR purposes, where the primary residence is held in a life estate deed, the life tenant is deemed to own the property (remainder beneficiaries are not deemed owners), and STAR eligibility is based on the life tenant's qualifications. When a primary residence is held in a revocable trust or an irrevocable Medicaid trust, the trust beneficiary (the grantor, when properly drafted) is treated as the owner for STAR eligibility.

Remember the Fine Print

As our population continues to age, we will need to remain knowledgeable of the Medicaid eligibility rules so that we can answer the questions, even if the client calls more than 10 years later. Clients will "forget" that the primary downside of a Medicaid Trust is the inability to access equity in the home. Some will "forget" to name the Medicaid Trust as an additional insured on the homeowners' insurance policy. Other may "forget" that when the house is sold the proceeds remain in the Medicaid Trust. When assisting clients with this type of planning, be sure to tell them the pros and cons, provide them with the next steps and consequences in writing, and follow up with them to ensure that the deed is properly transferred. When that call comes through with what has been forgotten, you have the letter to serve as a reminder to the client of all your advice. You can also then assist the client with the next steps to continue protecting the home from potential nursing home costs. •

Gerald P. Leary, Esq. • Balzer & Leary P.C. • GLeary@balzerleary.com

EQUITABLE DISTRIBUTION SUPPORT AND ATTORNEY FEES

In *McGovern v. McGovern*, Westlaw 534258 (3d Dept. July 27, 2023), the wife appealed from a Judgment of Divorce deciding various issues relating to the equitable distribution of the parties' marital property, classification of separate property and tracing of the same, issues of proof, attorneys fees and support, upon a decision of Supreme Court.

The husband was the owner of three entities, to wit: two real estate holding companies and a law firm operated as a sole proprietorship. The primary business of the real estate holding companies was the purchase and rental of multiple residential apartment buildings. The sole proprietorship law firm primarily provided legal services on behalf of one of the two real estate holding companies known as McGovern Enterprises, LLC. The entity known as 970 Broadway, LLC, is a component of a self-directed individual retirement account for the benefit of the husband.

The fair market value of the numerous rental properties owned and rented by McGovern Enterprises, LLC, were appraised at approximately $2 million by a real estate appraiser jointly retained by the parties'. The rental properties had no mortgage liens. In establishing proof of the fair market value of McGovern Enterprises, LLC, the wife relied solely upon the appraised values of the rental properties owned by the LLC, appraised by a jointly retained real estate appraiser, which appraisal reports were stipulated into evidence. No business valuation expert was called by the wife to opine as to the value of McGovern Enterprises. Based upon a report and testimony of a tax expert called by the husband, the trial court determined that the value of McGovern Enterprises, LLC, to be approximate $1.3 million, finding that the value of the total gross value of rental properties alone did not equate to the value of McGovern Enterprises, LLC, as a whole. The wife presented no evidence to rebut or challenge the husband's tax expert and her opinion as to the after-tax value of McGovern Enterprises, LLC. The Appellate Division noted that: [T]here is no uniform rule for fixing the value of a going business for equitable distribution purposes. Indeed, valuation is an exercise properly within the fact-finding power of the trial courts, guided by expert testimony citing *Burns v. Burns*, 84 NY2d 369, 375 [1994].

The trial court found that the tax expert's calculation which accounted for both the appraised value of the rental properties owned by McGovern Enterprises, LLC, and the costs associated with liquidating these assets, *e.g.*, built in capital gain taxes and other tax issues associated with the various rental properties, painted a more complete picture of the business's value then did the mere appraised values of the LLC's properties. The Appellate Division determined that wife presented no expert testimony that would support a different valuation amount and the trial court credited the husband's expert witness's report and testimony finding that the wife failed to prove that McGovern Enterprises was worth more than the approximately $1.3 million dollar amount opined to by the husband's expert witness. The wife was awarded 45% of McGovern Enterprises as distributive award, which award was challenged by the husband, as the wife admitted on cross-examination at trial that she had absolutely no role in the business. The husband's argument was not considered by the Appellate Division, however, due to the husband's failure to file a notice of appeal on that issue.

The wife next appealed the classification of the husband's self-directed Individual Retirement Account, a primary component of which was 970 Broadway, LLC, as the husband's separate property. The Appellate Division noted the well settled law that there is a presumption that all property acquired during the marriage is marital property. The burden then rests with the party asserting the separate property claim to rebut the presumption. The trial court credited the testimony of the husband and the husband's bookkeeper which showed, by a preponderance of the evidence, to wit: testimony and records, that the husband's self-directed IRA was established using funds transferred from an account owned by the husband, prior to the marriage. The trial court further found that the evidence in the record demonstrated that the husband made no contributions to his self-directed IRA during the marriage although the husband did purchase rental properties with cash from his self-directed IRA during the marriage. No marital monies, however, were utilized for the purchase of rental properties owned by 970 Broadway, LLC. Accordingly, the Appellate Division concurred with the Supreme Court's determination that the husband's self-directed IRA, which included the real properties owned by 970 Broadway, was the husband's separate property as the husband proved that the properties owned by 970 Broadway, LLC, were acquired with pre-marital assets.

On appeal, the wife also challenged the issue of the trial court denying her request to impute income of $300,000.00 to the husband for the purpose of maintenance, child support and an award of attorneys fees. In a *pendente lite* motion the trial court had imputed income of $300,000.00 to the husband and ordered the husband to pay monthly maintenance and child support payments based upon that level of income, in addition to an award of counsel fees and an award for the retention of a forensic accountant the wife was intending to call as a witness to opine as the husband's income. On appeal the wife argued that the trial court should have imputed the same level of income, to wit $300,000.00, annually, to the husband, which the trial court did agree to do, and imputed income to the Husband at $85,000.00, annually.

The Appellate Division found that the wife's claim that the husband was hiding money in his complicated business network in support of her request to impute $300,000.00 in income to the husband was not proven at trial. The wife introduced several banker boxes of the husband's bank records into evidence, however, the Appellate Division noted the wife's failure to call a forensic accountant was critical as there was no testimony proffered concerning the voluminous boxes of bank records received into evidence. A court is permitted to impute income to a party based on the parties' earning capacity, as long as the court articulates the basis for imputation the record evidence supports the calculations citing *Yezzi v. Small,* 206 AD3d 1472, 1474 [3d Dept 2022]. The Appellate Division

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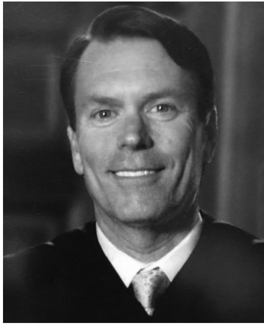
The Practice Page

Hon. Mark C. Dillon
Justice of the Appellate Division, Second Department
Adjunct Professor of New York Practice, Fordham Law School
Author of the CPLR Practice Commentaries in McKinney's
MDillon@nycourts.gov

LAW CLARIFIED ON PROXIMATE CAUSE OF NEGLIGENT SECURITY



Judicial departments within the state differed on a salient point of law regarding proximate cause in negligent security cases. Recently, the Court of Appeals resolved these differences in *Scurry v. NYCHA and Estate of Murray v NYCHA,* __ NY3d __ , 2023 WL 3588692, jointly decided on May 23, 2023. Both cases were similar, as they involved mortal crimes in NYCHA buildings where there were alleged defective door locks permitting intruders' with criminal intent easy access into the premises. One was the death of a plaintiff's decedent by flammable immolation. The other was by a gang-related shooting. The stakes in these cases are understandably high. Negligent security cases against landowners are not uncommon, rendering the *Scurry/Murphy* holdings noteworthy for the bar.

As a general matter, property owners have a duty to take at least minimal precautions to protect tenants from foreseeable harm, including harm that may arise from the criminal conduct of third persons (*Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 548). Negligence includes the separate concepts of duty and foreseeability – once a duty is found to exist, foreseeability determines the scope of the efforts that must reasonably be undertaken to fulfill the duty (*Maheshwari v City of New York*, 2 NY3d 288, 294). A tension naturally exists when criminal conduct occurs within a premises – it might arguably be an intervening cause severing the nexus between an occurrence and an injury, or alternatively, be criminal conduct that is foreseeable as to expose the landowner to potential liability *(Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 520). Liability may exist where intervening acts are a natural and foreseeable consequence of circumstances created by the defendant, but not where the acts are not foreseeable *(Derdiarian v Felix Constr. Corp.*, 51 NY2d 308, 315).

That all said, the First Department has had a long line of cases distinguishing between "targeted" criminal acts against a particular victim within a premises, versus opportunistic crimes at a premises against random victims. If a crime is targeted against a specific person such as murder, the First Department held that the proximate cause between an occurrence and an injury is essentially broken by the intervening criminal event, on the theory that no amount of building security can foreseeably prevent a planned and targeted crime (*Estate of Murphy v NYCHA,* 193 AD3d 503 [1st Dep't. 2021]; see also *Roldan v. New York City Hous. Auth.*, 171 AD3d 418, 419; *Estate of Faughey v New* 56-79 IG Assoc., L.P., 149 AD3d 418, 418; *Flynn v Esplanade Gardens, Inc.*, 76 AD3d 490, 492; *Cynthia B. v 3156 Hull Ave. Equities, Inc.*, 38 AD3d 360; *Flores v Dearborne Mgt., Inc.*, 24 AD3d 101, 101-02; *Buckeridge v Broadie,* 5 AD3d 298-300; Cerda 2962 Decatur Ave. Owners Corp., 306 AD2d 169, 169-70; *Rivera v New York City Hous. Auth.*, 239 AD2d 114, 115; *Harris v New York City Hous. Auth.*, 211 AD2d 616, 616-17). Under many of those cases the defendant landlords were entitled to summary judgment. By contrast, where the criminal act was perpetrated in the First Department in a "random" manner, the causal nexus between the plaintiff's injury and the landowner's duty of care raised triable issues of fact about the adequacy of the building security (*Gonzalez v Riverbay Corp.*, 150 AD3d 535, 536 [sexual assault by perpetrator who entered building by "piggybacking" a tenant who entered at the door using a key]; *Gonzalez v 231 Ocean Assoc.*, 131 AD3d 871, 871-72 [random intruder in defendant's building]; *Foreman v B&L Props. Co.*, 261 AD2d 301 [random sexual assault in elevator with evidence of broken front door lock]).

The Second Department took an entirely different approach to the issue in *Scurry v NYSHA,* 193 AD3d 1 (2nd Dep't. 2021). The Second Department specifically rejected the distinction between "targeted" and "random" attacks at a premises for legally defining issues of foreseeability and the reasonable security measures that should be undertaken by landlords. This is particularly true, said the court, as there may be more than one proximate cause of an occurrence such as, in Scurry, the criminal intent of the perpetrator and the premises' broken door lock facilitating the crime. Therefore, in the Second Department, a landlord could not receive summary judgment in its favor by merely establishing that a crime at a premises was "targeted," but rather, had to prove prima facie that any alleged security deficiencies were not a proximate concurrent cause of the occurrence (*Scurry v NYCHA,* 193 AD3d at 10).

The Third and Fourth Departments do not appear to have directly addressed the dichotomy between "targeted" and "random" crimes, if any such dichotomy should even be recognized. Of particular interest to the members of the Albany County Bar, the closest any Third Department case came to the issue was in *Haire v Bonelli*, 107 AD3d 1204 (2013). There, the plaintiff was a victim of a 2005 mass shooting by an individual at a shopping mall using a semiautomatic weapon. The Third Department held that such an event was not reasonably predictable or foreseeable. As such, the reasonableness of the shopping mall's security measures did not need to be reached given the difference between duty and foreseeability.

The Court of Appeals joined the appeals of Murphy from the First Department decided in 2021 with Scurry from the Second Department, also decided in 2021, for oral argument and a joint opinion. In a 6-0 opinion authored by Chief Judge Rowan Wilson (Judge Halligan not taking part), the Court of Appeals resolved the differences between the two departments in favor of the approach of the Second Department. The Court of Appeals held that the First Department's conclusion in Murphy, that the broken condition of the door lock at the premises would not have prevented a targeted attack, mistakes a factual determination for a legal one. In other words, the question of whether a targeted attacker's intent qualifies as a superseding cause of an occurrence is a matter of proximate cause and foreseeability that belongs to a trier of fact, rather than being a question of law for the court on summary judgment. This is now the law statewide.

For the record: There is no intramural competition between the judicial departments. The justices of each department render

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THE PRACTICE PAGE *(continued from p.11)*

opinions that they each sincerely deem correct, and in the event of differences of opinion, genuflect to the ultimate determinations of the Court of Appeals that set forth statewide standards. The *Scurry/Murphy* opinion from the Court of Appeals is an example of how the statewide system "works" in practice, providing the bench and bar from Montauk to Buffalo with a uniform legal standard that will guide similar issues in the future. That role is clearly recognized by the Court of Appeals, as evidenced by that court's joinder of the *Murphy* and *Scurry* appeals and the publication of a joint opinion resolving the differences between the judicial departments on the issue presented. Well done. •

MATRIMONIAL LAW UPDATE *(continued from p.10)*

further noted that: The trial court is afforded considerable discretion in determining whether to impute income to a party and the court's credibility determinations will be accorded deference on appeal citing *Harris v. Schreibman*, 200 AD3d 1117, 1121 [3d Dept 2021]. Mentioning that the missing witness rule was not constrained to criminal cases, the Appellate Division noted the trial court did not apply the witnessing person rule, however, did express its dissatisfaction with the wife' decision not to call a forensic accountant at trial to explain the husband's finances. •

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