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The "Hospital Observation Stay Crisis": A Senate Special Committee on Aging Hearing

by Hillary Anderson

On May 21, the U.S. Senate Special Committee on Aging held a hearing on the "Hospital Observation Stay Crisis." As a summer law intern with the ABA Commission on Law and Aging, I had an opportunity to attend. Here is my up-close report.

The Committee heard from two different panels of witnesses on issues regarding the current issue of Medicare patients who are in hospitals on "observation" status rather than being formally admitted to the facilities. For Medicare patients, the practical difference between being admitted and being kept under observation appears virtually non-existent—the patient experience is the same. In fact, during the hearing several witnesses and the Senators concurred that, absent some affirmative act of notification on the hospital's part, any given patient has no way of knowing on what basis he or she is in the hospital.

While the care is the same, however, the financial impact for those in the hospital under observation status can be enormous. Medicare coverage for observation status patients is far more limited, as the patient is not considered an inpatient under Medicare Part A. Moreover, in order for Medicare to cover a beneficiary in the context of a skilled nursing facility (SNF) after a hospital stay, that beneficiary must have been officially admitted to the hospital for a minimum of three days.

The hearing's first focus was on the Centers for Medicare and Medicaid Services (CMS) and on the Recovery Audit Contractors (RACs) that seek to identify improper Medicare payments. The witnesses suggested that Congress pass legislation requiring that, for patients who have been in the hospital for over twenty-four hours, hospitals provide affirmative notification of admission status and the potential financial ramifications. Ranking Member Claire McCaskill strongly expressed her preference that patients be unequivocally notified of their stay statuses upfront and be sufficiently educated on the financial consequences.

Senator Susan Collins was also concerned with communication of stay status to hospital patients. She remarked about the length of time it can take new legislation to pass and encouraged CMS to use the agency's implicit regulatory power to implement the changes administratively rather than waiting for the legislation. While legislation has passed through the House requiring stay status notification to patients who have been in the hospital over twenty-four hours, Senator Collins is concerned there will be a delay in the legislation's becoming law and would like CMS to step in now. She also stated that she had some concerns that notifying a patient of observation status may result in that patient's prematurely leaving the hospital despite being in need of care, but she nonetheless advocated for notification. Additionally, Senator Collins also encouraged CMS to use the agency's audit procedures to identify providers who need further education about this issue.

Senator Elizabeth Warren called for a study on the impact of the "two-midnight rule," which provides guidelines for when a patient should be given inpatient status. Under the rule, if a doctor expects the patient will need to stay in the hospital over at least two midnights and admits the patient based on that expectation, the patient's stay should be covered by Medicare Part A benefits. Senator Warren would like to see data on the impact the rule has had on beneficiaries and noted that Congress needs those numbers before the legislators can move forward in the law-making process. She expressed willingness to work with her colleagues to achieve legislative

reform, but said, "CMS needs to step up here with its regulatory authority."

The second panel was more focused on the role of skilled nursing facilities in this status dichotomy. Current law states that, in order to receive Medicare coverage for a stay at a skilled nursing facility, a patient must first have stayed at a hospital with inpatient status for a minimum of seventy-two hours (three days). A doctor on the panel set forth the premise that the *only* difference between observation and inpatient status is financial. Ms. Tori Gaetani of Beacon Health in Maine testified about a pilot program Beacon Health has conducted for the past year through which the group issues waivers of the three-day minimum hospital stay rule for Medicare patients seeking skilled nursing care.

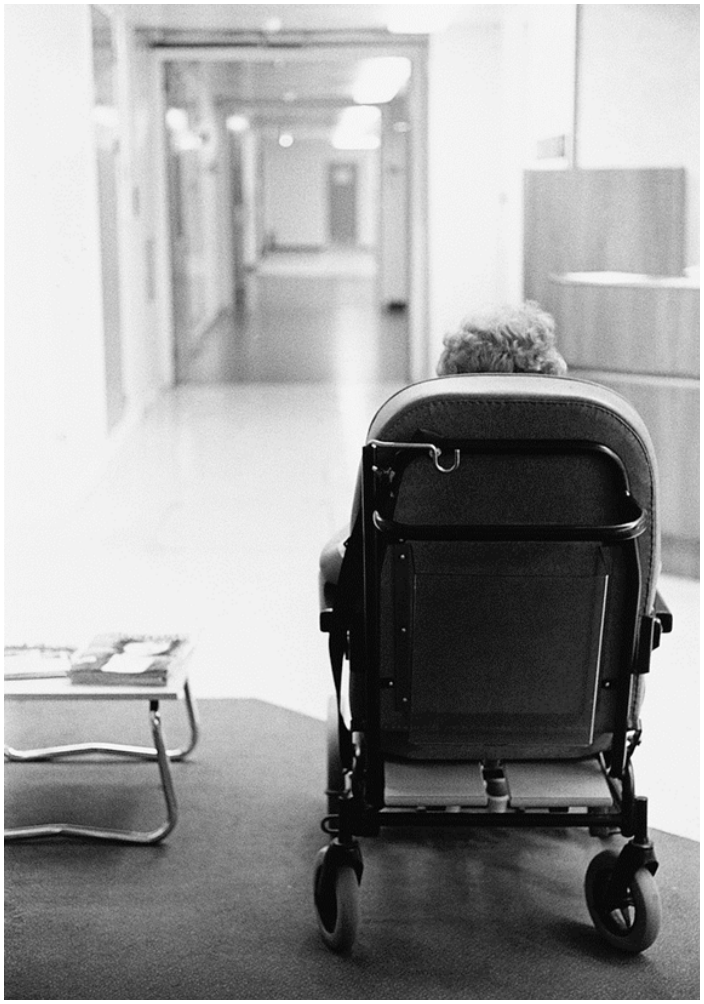
Ranking Member Claire McCaskill noted the immense complexity of this area of the law given the "arbitrary" rules and acronyms. In her frustration she asked, "Shouldn't we, like, make this a little simpler?" Senator McCaskill asked the panelists who, exactly, decides whether to admit a patient or to keep him or her only for observation. The panelists responded that a utilization manager, who has access to the patient's financial information and knows whether the patient is covered by Medicare, makes the ultimate decision.

Senator Susan Collins focused on the positive results Ms. Gaetani has found with the pilot program in Maine. The program gives waivers to the three-day minimum stay rule and has produced better patient outcomes and great savings for Maine's healthcare system. Senator Collins and Ms. Gaetani noted that Beacon Health maintains some basic medical requirements for its program so the use of the waivers is not an "opening of the floodgates." Senator Collins commended the program and noted she would like to see the revocation of the three-day minimum stay rule in national Medicare legislation.

Senator Sheldon Whitehouse asked the panel whether doctors are sufficiently aware of the three-day minimum stay rule such that they will keep patients in the hospital longer than necessary so as to open access for those patients to skilled nursing facility care. The panelists said that the practice has been known to happen. Senator Whitehouse shook his head and turned to Ms. Gaetani to commend her work with the waivers, then told the others, "[The waiver program] seems like the right way to go." Senator Whitehouse encouraged other states to implement similar programs.

As Senator Collins said during the hearing, legislation in this area has been and will continue to be slow-going. The Senators, however, seemed to agree that patient notification should be at the forefront of reform and that the two-midnight and three-day minimum rules most likely should be reformed in kind. While Congress strives to achieve a more efficient healthcare system for Medicare beneficiaries, regulatory agencies and state healthcare systems are urged to take action within their spheres of authority.

Hillary Anderson is a rising 2nd year law student at Syracuse University College of Law in Syracuse, NY. In 2014, Ms. Anderson graduated with honors from Ursinus College in Collegeville, PA, where she received a B.A. in Business and Economics. Ms. Anderson is a Summer 2015 intern with the ABA Commission on Law and Aging. ■



Supported Decision-Making: Protecting Rights, Ensuring Choices

by Jonathan G. Martinis[1]

Introduction

How would you feel if you had no say in where you live or work, on what you can spend money, or with whom you can spend time? The denial of such fundamental freedoms—the building blocks of Life, Liberty and the pursuit of Happiness—without extraordinarily compelling reasons violates our bedrock moral and legal codes. To safeguard liberty, for example, we pledge that "it is better that ten guilty persons escape than that one innocent suffer"[2] and provide evaluations and treatment for those thought to be incompetent to stand trial.

And yet, for over 2,000 years people with challenges in decision-making have been placed under guardianship, resulting in another person having "substantial and often complete authority over [their] lives,"[3] frequently including control of their finances, living conditions, social freedoms, and medical care.[4] Despite efforts to reform guardianship laws and proceedings, and a national trend toward increasing the autonomy of those affected, the number of adults under guardianship appears to have risen substantially in the last twenty years.[5]

This article introduces Supported Decision-Making, an alternative to guardianship where people make their own decisions, without a guardian, while receiving the help they need and want to do so.

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[1] This project was supported, in part by grant number HHS-2014-ACL-AIDD-DM-0084, from the U.S. Administration for Community Living, Department of Health and Human Services, Washington, DC. Grantees undertaking projects under government sponsorship are encouraged to express freely their findings and conclusions. Points of view or opinions do not, therefore, necessarily represent official Administration for Community Living policy.

Address for Correspondence: Jonathan G. Martinis, Legal Director, Quality Trust for Individuals with Disabilities, Project Director, National Resource Center for Supported Decision-Making, 4301 Connecticut Avenue NW, Suite 310, Washington DC, 20008. Tel. 202.459.4007; Fax 202.458.1451. Email JMartinis@DCQualityTrust.Org. This article was adapted from the amicus brief co-written by Mr. Martinis in *In Re: Ryan Keith Tonner*. See *infra* note 8.

[2] William Blackstone, 2 Bl. Com. c. 27, margin page 358, *ad finem,* cited in, *Coffin v. United States,* 156 U.S. 432, 456 (1895).

[3] Judge David Hardy, *Who Is Guarding the Guardians? A Localized Call for Improved Guardianship Systems and Monitoring*, 4 NAELA J. 1, 7 (2008).

[4] *See,* e.g., Sens. Gordon H. Smith & Herb Kohl, S. Spec. Comm. on Aging, *Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors with Reduced Capacity* 7 (2007) ("[W] hen full guardianships are imposed, all of one's fundamental rights are transferred to the guardian."); *Guardianships: Little Progress in Ensuring Protection for Incapacitated Elderly People: Hearing Before the S. Spec. Comm. on Aging*, 109th Cong. 3-4 (2006) (statement of Barbara D. Bovbjerg, Dir. Of Education, Workforce, and Income Security Issues) (discussing possible loss of rights).

[5] *See,* Winsor C. Schmidt, *Guardianship: Court of Last Resort for the Elderly and Disabled*. Durham, NC: Carolina Academic Press (1995); Sandra L. Reynolds, *Guardianship Primavera: A First Look at Factors Associated with Having a Legal Guardian Using a Nationally Representative Sample of Community-Dwelling Adults*. 6 Aging and Ment. Health, 109-120 (2002); Brenda K. Uekert, Richard Van Duizend, R., *Adult Guardianships: A "Best Guess" National Estimate and the Momentum for Reform*. In Future Trends in State Courts 2011: Special Focus on Access to Justice (2011). Retrieved from http://www.guardianshipcert.org/files/publicpolicy/Uekert_Van_Duizend_Adult_Guardianships.pdf (last visited June 3, 2015).

Supported Decision-Making protects and enhances the "principal prerogative all people have to make their own decisions and direct their own lives to the maximum of their abilities" and can improve life outcomes like health, independence, safety, and employment.[6]

Supported Decision-Making as an Alternative to Overbroad or Undue Guardianship

On September 25, 1987, a House Select Committee held hearings titled *Abuses in Guardianship of the Elderly and Infirm: A National Disgrace.* Summarizing the Committee's findings, Chairman Claude Pepper famously stated:

> *The typical ward has fewer rights than the typical convicted felon . . . . By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception . . . of the death penalty.*[7]

Decades of research performed before and after Representative Pepper's pronouncement has shown that people subjected to overbroad or undue guardianship—guardianships imposed on those who can use less-restrictive alternatives to make their own decisions[8]—can suffer negative life outcomes.[9] This is because guardianship decreases self-determination by taking away a person's legal right to make decisions. Self-determination "describe[s] actions that enhance the possibilities for people to control their lives."[10] People exercise self-determination by making life choices—decisions "casual and critical that determine where, how, and with whom they live life."[11]

When people are denied self-determination, their performance across-the-board can suffer, leading them to "feel helpless, hopeless, and self-critical."[12] Thus, it is easy to understand how overbroad or undue guardianship can cause a "significant negative impact on . . . physical and mental health, longevity, ability to function, and reports of subjective well-being."[13] In short, once a Judge

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[6] Jonathan Martinis, *'The Right to Make Choices': How Vocational Rehabilitation Can Help Young Adults With Disabilities Increase Self-Determination and Avoid Guardianship*, 42 J. Voc. Rehab., 221, 222 (2015); Peter Blanck & Jonathan Martinis, *'The Right to Make Choices': The National Resource Center for Supported Decision Making,* 3 Inclusion 24-33 (2015).

[7] H.R. Rep. No. 100-641, at 1 (1987).

[8] *See*, Jonathan Martinis, Peter Blanck, and Iris Gonzalez, Brief for Amici in *In Re: Guardianship of the Person and Estate of Ryan Keith Tonner, an Incapacitated Person*. Case No. 14-0490 (Tx, 2015); Margaret "Jenny" Hatch, Samantha Crane, and Jonathan Martinis, *Unjustified Isolation is Discrimination: The Olmstead Case Against Overbroad and Undue Organizational and Public Guardianship*, 3(2) Inclusion 65, 67 (2015).

[9] *See, e.g.*, Leslie Salzman, *Guardianship for Persons with Mental Illness – A Legal and Appropriate Alternative?*, 4 St. Louis U. J. Health L. & Pol'y 279, 289-93 (2011); Jennifer L. Wright, *Guardianship for Your Own Good: Improving the Well-Being of Respondents and Wards in the USA*, 33 Int'l J.L. & Psychiatry 350, 354 (2010); Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, Supported Decision-Making*: A Viable Alternative to Guardianship?*, 117 Penn St. L. Rev. 1111, 1119 (2013) [hereinafter "Kohn et al."].

[10] Michael L. Wehmeyer, *Self-Determination and Individuals with Severe Disabilities: Re-examining Meanings and* Misinterpretations, 30 Res. & Prac. for Persons with Severe Disabilities 113, 119 (2005) (internal quotations omitted).

[11] Martinis, Blanck, & Gonzalez, *supra* note 8 at 10.

[12] Edward Deci, Intrinsic Motivation 208 (1975).

[13] Wright, *supra* note 9, at 354.

Despite efforts to reform guardianship laws and proceedings, and a national trend toward increasing the autonomy of those affected, the number of adults under guardianship appears to have risen substantially in the last twenty years.

appoints someone to make their life choices, "[w]hy . . . should they attempt a task that they have been told they are incompetent to perform?"[14]

Consequently, policymakers, scholars, and some courts have recognized that "even when it is functioning as intended [guardianship] evokes a kind of 'civil death' for the individual, who is no longer permitted to participate in society without mediation through the actions of another if at all."[15] Consistent with the Americans with Disabilities Act and other law and policy mandating independence and community integration,[16] legislatures, courts, and policymakers have acknowledged the need to identify and implement less-restrictive alternatives to guardianship that protect and advance the self-determination of older adults, people with disabilities, and others with challenges in decision-making.[17]

Supported Decision-Making has recently emerged as "an alternative to and an evolution from guardianship"[18] with the potential to protect fundamental rights, increase self-determination, and improve life outcomes. While there is no one-size-fits-all model of Supported Decision-Making, it occurs when people choose trusted friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions.[19] In this way, it mirrors "what happens for most adults when they make decisions such as whether to get car repairs, sign legal documents and consent to medical procedures: they seek advice, input and information from friends, family or professionals who are knowledgeable about those issues, so they can make their own well-informed choices."[20]

Supported Decision-Making relationships can be "of more or less formality and intensity," including informal support by people who "speak with, rather than for, the individual with a disability,"[21] formal "micro-board[s] . . . and circles of support"[22] and other relationships offering varying types of support for various types of decisions. However, all Supported Decision-Making relationships share three common elements:

1. The recognition that the person has the right to make his or her own decisions;
2. The acknowledgment that the person can enter into a decision-making process or relationship without surrendering his or her right to make decisions; and

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[14] Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 Psychol., Pub. Pol'y & L. 6, 18 (1995).

[15] Robert Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to* Supported Decision-Making, 19 Hum. Rts. Brief 8, 9 (2012).

[16] *See,* e.g., Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.* (2006); *Olmstead v. L.C., ex rel. Zimring*, 527 U.S. 581 (1999).

[17] *See, e.g.*, Kohn et al., *supra* note 9, at 1115-1120.

[18] *See* Admin. for Cmty Living. U.S. Dep't of Health & Human Servs., Funding Opportunity HHS-2014-ACL-AIDD-DM-0084, *Supported Decision Making*, *available at* http://www.grants.gov/web/grants/view-opportunity.html?oppId=256168 (last visited June 3, 2015).

[19] Blanck & Martinis, *supra* note 5.

[20] Quality Trust for Individuals with Disabilities, Supported Decision-Making*: An Agenda for Action* (2014), *available at* http://jennyhatchjusticeproject.org/node/264 (last visited June 3, 2015).

[21] Dinerstein, *supra* note 15, at 10.

[22] Kohn et al., *supra* note 9, at 1123.

Supported Decision-Making protects and enhances the "principal prerogative all people have to make their own decisions and direct their own lives to the maximum of their abilities" and can improve life outcomes like health, independence, safety, and employment.

3. The understanding that the person may need assistance in making or communicating decisions "through such means as interpreter assistance, facilitated communication, assistive technologies and plain language."[23]

Through these relationships, people may "receive support to understand relevant information, issues, and available choices, to focus attention in making decisions, to help weigh options, to ensure that decisions are based on [their] own preferences, and . . . to interpret and/or communicate [their] decisions to other parties."[24]

Conclusion

Supported Decision-Making is increasingly being encouraged and adopted by courts,[25] legislatures,[26] and policymakers[27] as a less-restrictive alternative to guardianship. In contrast to overbroad or undue guardianship, Supported Decision-Making can increase self-determination by ensuring that the person retains life control to the maximum extent possible. Thus, instead of "divest[ing] the individual of the ability to make crucial self-defining decisions,"[28] Supported Decision-Making "retains the individual as the primary decision maker, while recognizing that the individual may need some assistance . . . in making and communicating a decision."[29] By doing so, it empowers people to be "causal agents"[30] in their lives, able and authorized to make their own life choices, with access to the improved life outcomes research has correlated with greater self-determination, such as increased and enhanced independence, employment, community integration, and safety.[31]

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[23] Dinerstein, *supra* note 15, at 10-11.

[24] Salzman, *supra* note 9, at 306.

[25] *See*, *In re Peery*, *727 A.2d 539, 540 (Pa. 1999) (guardianship terminated because the person had a "circle of support to assist her in making rational decisions"); In re Dameris L.*, 956 N.Y.S.2d 848, 856 (N.Y. Sur. Ct. 2012) (guardianship terminated because person was "able to engage in supported decision-making"); *Ross v. Hatch*, No. CWF120000426P-03, slip op. at 7 (Va. Cir. Ct. Aug. 2, 2013), *available at* http://jennyhatchjusticeproject.org/docs/justice_for_jenny_trial/ (petition for permanent guardianship denied in favor of Supported Decision-Making relationship the person had developed).

[26] *See,* e.g., Volunteer-Supported Decision-Making Advocate Pilot Program, Tex. Gov't Code Ann. § 531.02446 (2009) (expired on Sept. 1, 2013); H.B. 39 (Tx. 2015) (amending Texas Estate Code to recognize Supported Decision-Making as a less-restrictive alternative to guardianship; require that Courts find that less-restrictive alternatives are not feasible before imposing a guardianship; and authorizing Supported Decision-Making agreements); H.J.Res. 190, Reg. Sess. (Va. 2014).

[27] *See* Admin. for Cmty Living. U.S. Dep't of Health & Human Servs., Funding Opportunity HHS-2014-ACL-AIDD-DM-0084, *Supported Decision Making*, *available at* http://www.grants.gov/web/grants/view-opportunity.html?oppId=256168 (last visited June 3, 2015).

[28] Salzman, *supra* note 9, at 291.

[29] Dinerstein, *supra* note 15, at 10.

[30] Wehmeyer, *supra,* note 10, at 115.

[31] *See,* e.g., Karrie A. Shogren et al., *Relationships Between Self-Determination and Postschool Outcomes for Youth with Disabilities*, 4 J. Special Educ. 256 (2015); Laurie Powers et al., *My Life: Effects of a Longitudinal, Randomized Study of Self-Determination Enhancement on the Transition Outcomes of Youth in Foster Care and Special Education*, 34 Child. & Youth Services Rev. 2179 (2012); Janette McDougall et al., *The Importance of Self-Determination to Perceived Quality of Life for Youth and Young Adults with Chronic Conditions and Disabilities*, 31 Remedial & Special Educ. 252 (2010); Ishita Khemka et al., *Evaluation of a Decision-Making Curriculum Designed to Empower Women with Mental Retardation to Resist Abuse*, 110 Am. J. Mental Retardation 193 (2005).

New Grant Awarded by Huguette Clark Family Fund for Protection of Elders

Project will develop model civil statutes to combat elder financial exploitation

The Huguette Clark Family Fund for Protection of Elders announced on June 15, 2015, that it has awarded a $50,000 grant to develop model civil statutes to address elder financial exploitation.

Commenting on the grant, Ian Clark Devine, advisor to the Fund, said: "Civil courts can be an effective way for victims of financial exploitation to seek justice, recover assets and rebuild their lives. The Clark Family believes that developing model civil statutes is the fastest way to help the greatest number of elderly victims."

The project will be managed by the National Center for Victims of Crime under the guidance of Executive Director Mai Fernandez. Lori Stiegel of the American Bar Association Commission on Law and Aging will serve as a consultant on the project. Ms. Stiegel, a senior attorney, joined the ABA Commission in 1989 and has developed and directed its work on elder abuse.

"Creating a template of civil statutory provisions for elder financial exploitation is a short- term, innovative project that can have a lasting impact," Ms. Fernandez said. "It can give attorneys an effective tool for pursuing civil cases and provide victims with the greatest chance to recover stolen assets. We welcome the support of the Huguette Clark Family Fund for Protection of Elders on this important project."

The announcement of the grant took place at the World Elder Abuse Awareness Day Global Summit in Washington, DC, on June 15. The summit brought together for the first time leaders from 31 organizations around the world to discuss strategies for combating elder abuse. The event was convened by the National Adult Protective Services Association, the National Center for Victims of Crime, and the International Network for the Prevention of Elder Abuse and was sponsored by AARP and the Western Union Global Consumer Protection Program.

About the Huguette Clark Family Fund for Protection of Elders

Established in 2013, the Huguette Clark Family Fund for Protection of Elders is a donor advised fund created by members of the Clark Family to honor their late aunt, Huguette Clark, who was victimized by her caregivers for more than two decades. The Fund supports innovative organizations and programs that seek new strategies to fight the financial abuse of elders, which frequently includes emotional and psychological manipulation by the professionals and institutions entrusted with their care.

The Clark Family seeks to make grants to organizations that address immediate needs overlooked by traditional programs, or develop effective models to fight elder abuse that can be replicated nationwide. To date, the Fund's first three grants provided financial support for programs to train Adult Protective Service workers, to help banks implement federal guidelines for sharing customer information with investigatory agencies in cases of suspected financial exploitation of the elderly, and convened a roundtable of national specialists to formulate specific proposals to prevent elder abuse.

This article was prepared by the Huguette Clark Family Fund for Protection of Elders. ■

Ian Clark Devine, advisor to the Huguette Clark Family Fund for Protection of Elders, speaks on June 15, 2015, at the First Global Summit Commemorating the 10th Anniversary of the Launch of World Elder Abuse Awareness Day (WEAAD), at the Securities and Exchange building in Washington, D.C.

The Americas Becomes First Region in the World to Have an Instrument for the Promotion and Protection of the Rights of Older Persons

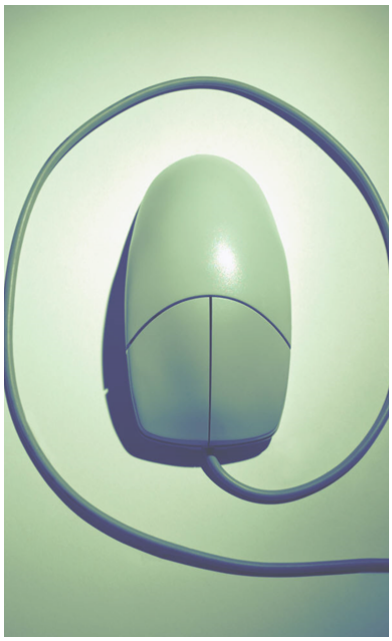
On June 15, 2015, the member states of the Organization of American States (OAS) approved the Inter-American Convention on Protecting the Human Rights of Older Persons during the General Assembly of the institution, which was immediately signed by the governments of Argentina, Brazil, Chile, Costa Rica and Uruguay at OAS headquarters in Washington, DC.

The purpose of the Convention—the first regional instrument of its kind in the world—is to promote, protect and ensure the recognition and the full enjoyment and exercise, on an equal basis, of all human rights and fundamental freedoms of older persons, in order to contribute to their full inclusion, integration and participation in society. The starting point of the Convention is the recognition that all existing human rights and fundamental freedoms apply to older people, and that they should fully enjoy them on an equal basis with other segments of the population.

"This is a very important step for everyone. Our slogan of 'More rights for more people' is fully in the logic of the Convention, which reaffirms the hemispheric dimension of our work, in this case the commitment to ensure the full enjoyment of the rights of older people, taking into account their needs and specific requirements," said Secretary General Luis Almagro during the signing of the document, which urges States to adopt "legislative or other measures" that are necessary to give effect to the rights and freedoms of older adults, including awareness campaigns.

At present, people aged 60 or older in the Americas represent 14% of the hemisphere's population (over 135 million). By 2030, nearly two in five people will be 60 or older, and in total there will be more than 215 million older people in the Americas. The Convention will strengthen the legal obligations to respect, promote and ensure the human rights of older persons. Its ratification will carry the obligation of States parties to adopt measures to guarantee a differentiated and preferential treatment to older persons in all spheres.

For the Convention to enter into force it is necessary that at least two signatory countries have ratified it. ■



Upcoming Commission Webinar

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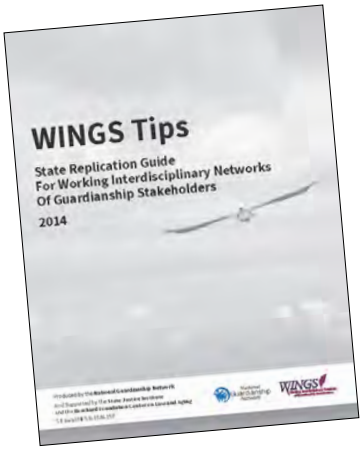
- This webinar will cover eligibility of veterans and their dependents for VA pension.

Panelists will discuss how to get the best results for a client looking to obtain a VA pension. Practical pointers on obtaining the highest amount for pension will be discussed, as well as how a client can keep that amount each year. Practice tips on dealing with a VA debt—due to an overpayment issue related to a VA pension—will also be provided. This presentation will give practitioners an understanding of the law and provide practical tips on how to work within the confines of the VA. ■

Bring the WINGS of Change to your State



The National Guardianship Network (NGN) has developed a new video introduction, "What is WINGS" by District of Columbia Chief Judge Eric Washington, former Chair of the Conference of Chief Justices, to improve state adult guardianship practices through collaborative court-community partnerships.

The five-minute video is a lead-in to the NGN Replication Guide for WINGS (Working Interdisciplinary Networks of Guardianship Stakeholders). Both the video and a link to the Replication Guide can be found at http://bit.ly/1TbbM6f.

The National Guardianship Network, established in 2002, consists of 11 national organizations dedicated to effective adult guardianship law and practice, including AARP; the American Bar Association Commission on Law and Aging; the ABA Section of Real Property, Trust and Estate Law; the Alzheimer's Association; the American College of Trust and Estate Counsel; the Center for Guardianship Certification; the National Academy of Elder Law Attorneys; the National Center for State Courts; the National College of Probate Judges; the National Disability Rights Network; and the National Guardianship Association. ■

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- *Collaborate*, a discussion list on aging, disability, and dispute resolution.

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Media Requests

The Commission provides background to the media on a range of issues relating to law and aging, including:

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- Health care decision-making and advance directives
- Medicare, Medicaid, and long-term care
- Elder Law and the delivery of legal assistance to older persons

Contact the Division for Media Relations and Communication Services for expert contacts at abanews@americanbar.org or (202) 662-1090.

Working Together to Prevent Senior Financial Exploitation

New Initiative Led by the North American Securities Administrators Association Aims to Protect Seniors Through Model Legislation, Best Practices, and Education

by Lynne Egan and Patricia Struck

Americans are turning 65 at the rate of 10,000 people per day. Within 10 years, nearly 20% of this nation's population will be over 65. State securities regulators realize that this growing demographic also is a growing target for fraudsters. Each state has a securities regulator whose primary goal is to protect the investing public by overseeing the offer and sale of securities within their jurisdiction. State securities regulators work together to encourage investing and to protect the integrity of the securities industry throughout the country. Currently, state securities regulators report that at least one-third of their enforcement actions involve senior investors. This percentage will rise as this population, which holds the bulk of this country's savings according to Georgia State University's Center for Mature Consumer Studies, continues to age. Clearly, investors are an important category in our aging population and financial exploitation against a senior investor can have devastating consequences.

Case Study

The following example involves a uniformed law enforcement officer who opened an account at a well-known securities firm for his almost 80-year-old grandmother-in-law. The officer presented a notarized financial power of attorney form, told the broker at the securities firm that his grandmother-in-law owned a large farm, and said he would be transacting business and making withdrawals from the account on his grandmother-in-law's behalf to help get the farm ready to sell.

The account was opened, investments valued at nearly $500,000 were transferred into the new account from the grandmother-in-law's previous brokerage firm, and the new broker began taking instructions from the grandson-in-law pursuant to the power of attorney form he had presented. The investment portfolio, which originally consisted primarily of fixed income investments such as certificates of deposit, with a small portion in mutual funds and dividend paying blue chip stocks, appeared appropriate for the elderly woman. Almost immediately upon opening the account, however, the officer began withdrawing funds from the account, precipitating the need for the liquidation of the account's holdings to cover the continuous withdrawing of funds from the account.

Over the course of the next 18 months, the grandson-in-law withdrew nearly 95% of the account for his own personal use, using margin loans. Unlike her previous account where she only had a "cash account," a "margin account" allowed her grandson-in-law to borrow money from her

account using her holdings as collateral for the money borrowed. In addition to margin privileges, the grandmother-in-law's account also included check-writing privileges.

The grandson-in-law told the broker that his grandmother-in-law was in frail health at the time the account was opened. While her health was actually stable, she had been formally diagnosed with dementia. She has since died.

The law enforcement officer's scheme ended after one of the victim's children (not the officer's spouse) discovered what was happening and notified the state securities regulator. Investigators determined that in addition to withdrawing nearly all of the money from the account, the law enforcement officer had also forged the grandmother-in-law's signature on the power of attorney form.

The Red Flags

There were a lot of red flags in this case—things the salesperson should have questioned. Among the red flags:

- The salesperson was in a perfect position to look into the health and capacity of the grandmother-in-law. Had he taken the time to assess the relationship between the law enforcement officer and his grandmother-in-law, he might have been able to ask her about her investment objectives. Instead, he never met her.
- Knowing the authority that comes with a power of attorney and that it can be easily used for improper purposes (coupled with the fact that abuse commonly occurs at the hands of family members), the salesperson could have explored the availability of other family members to verify his observations about the law enforcement officer and the victim.
- The salesperson could have asked why the investor suddenly was motivated to move her assets from income generating securities to a margin loan and ultimate liquidation of most of the portfolio, which was such a departure from her previous investment behavior.
- The salesperson could have escalated any resulting concerns to his supervisor.

The Action Plan

Over the past decade, state securities regulators have focused on addressing financial abuse against older investors through the efforts of the North American Securities Administrators Association (NASAA), the oldest international organization devoted to investor protection. NASAA is a voluntary association whose membership consists of 67 state, provincial, and territorial securities administrators in the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Canada, and Mexico.

The NASAA Board of Directors formed the Senior Issues and Diminished Capacity Committee (the Committee) in July 2014. It immediately established an Advisory Council comprised of representatives from the securities industry, the insurance industry, law enforcement, regulators, consumer groups, legal professionals, service organizations, and medical professionals. With input from the Advisory Council, the Committee is currently working in three areas in regards to senior protection with plans to broaden its focus in the future.

Model Legislation Working Group

The Model Legislation Working Group of the Committee is drafting model legislation to address issues faced by firms when there are senior and diminished capacity issues. As an example, the state of Washington adopted the Abuse of Vulnerable Adults Act (RCW 74.34), which permits financial services professionals to report their concerns when there is reason to believe a vulnerable adult is being or has been abandoned, abused, financially exploited or neglected, to state or local authorities; permits the sharing of records with the Washington Department of Human Services, law enforcement and prosecutors when there are such concerns; freezes assets of suspected exploiters or victims; requires training on elder and vulnerable adult financial exploitation for employees of financial institutions; and allows financial firms and employees to avoid civil liability when acting in good faith.

Best Practices Working Group

The Best Practices Working Group of the Committee is holding discussions with securities and other industry groups to identify best

practices for broker-dealer and investment adviser firms to prevent and detect the exploitation of seniors and individuals with diminished capacity. The Best Practices Working Group is currently looking closely at best practices involving the use of power of attorney forms, financial directives being put in place by an account holder when an account is opened, and methodologies to identify suspicious or unusual patterns of activity in senior accounts.

Outreach Working Group

The Outreach Working Group is building on existing NASAA resources to educate investors through a public outreach campaign called ServeOurSeniors. As part of the outreach campaign, NASAA is developing a resource-rich website for seniors, caregivers, regulators and securities industry professionals, a training program for regulators on issues related to diminished capacity, and an outreach program to help front-line financial workers detect the red flags of elder financial exploitation and where to report suspicions of fraud.

Conclusion

The goal is to stop people like the uniformed law enforcement officer from exploiting a senior. With the right combination of laws, best practices, and education, NASAA and the securities industry hopes to help protect your parents, your siblings, your neighbors, even you, from senior financial exploitation.

Lynne Egan is Deputy Securities Commissioner for the Montana State Auditor's Office and Chair of the NASAA Senior Issues and Diminished Capacity Committee. Patricia Struck is Securities Division Administrator for the Wisconsin Department of Financial Institutions and Vice-Chair for the NASAA Senior Issues and Diminished Capacity Committee. She is also a Commissioner of the ABA Commission on Law and Aging. ■

ABA Applauds Bipartisan Passage of Older Americans Act in Senate

WASHINGTON, July 20, 2015 — The American Bar Association commends the bipartisan reauthorization of the Older Americans Act (OAA), which was introduced by Sen. Lamar Alexander, R-Tenn., with Senators Richard Burr, R-N.C., Patty Murray, D-Wash., and Bernie Sanders, I-Vt. This week marks the 50th anniversary of the OAA.

For more than 30 years, the ABA has been a strong advocate on issues that help Americans age with dignity, security and quality of life. The OAA authorizes and oversees many vital programs and services, and it provides critical legal assistance to protect the rights of vulnerable seniors. Reauthorization of the OAA reaffirms and refines our country's commitment to a safe, secure and dignified life for all older Americans, and the ABA urges the House to pass this legislation swiftly.

The legislation reflects more than three years of bipartisan work reflected in a balanced, pragmatic approach to helping older Americans live longer with independence and dignity in their homes and communities.

Since it was enacted into law in 1965, millions of our most vulnerable older Americans have relied on the services provided by the OAA for their health and economic security. These services include:

- Supporting nutrition programs, including Meals-on-Wheels;
- Providing home and community-based services, including preventive health services and transportation assistance;
- Assisting family caregivers with information and referral, counseling and respite care;
- Preventing and detecting elder abuse; and
- Providing part-time community service employment and training. ■

New Commission Research and Resources

Summary of Health Care Decision Statutes Enacted in 2013-2014

http://ambar.org/healthdecisions

This new chart highlights the legislation states adopted from 2013 to 2014, on creating, modifying, and amending rights and procedures affecting health care decision-making. The statutes affect advance directives, default surrogate laws, Physician Orders for Life-Sustaining Treatment (POLST), and registries.

Relationship Between Adult and Minor Guardianship Statutes

http://www.ambar.org/guardianship

This chart provides a fifty-state examination of the statutory relationship between adult and minor guardianship provisions. By illustrating the statutory outline and the numerical range of the provisions, this chart ultimately clarifies whether the adult and minor guardianship provisions of a given state are integrated, associated, or separated. ■

Summer Interns

Dara Valanejad is a rising second-year law student at American University Washington College of Law in Washington, DC.

Mr. Valanejad is currently a junior staff member of the American University Law Review and will be a Writing Fellow with the school's Legal Rhetoric program this coming year.

Prior to attending law school, Mr. Valanejad was an undergraduate at San Francisco State University, where he graduated cum laude with a B.A. in Philosophy and B.A. in History.

This summer, Mr. Valanejad will be working under the supervision of Assistant Director Erica Wood on several guardianship-related projects.

Hillary Anderson is a rising second-year year law student at Syracuse University College of Law (SUCOL) in Syracuse, NY. Ms. Anderson graduated with honors from Ursinus College in Collegeville, PA, in 2014, where she majored in Business and Economics and minored in Politics.

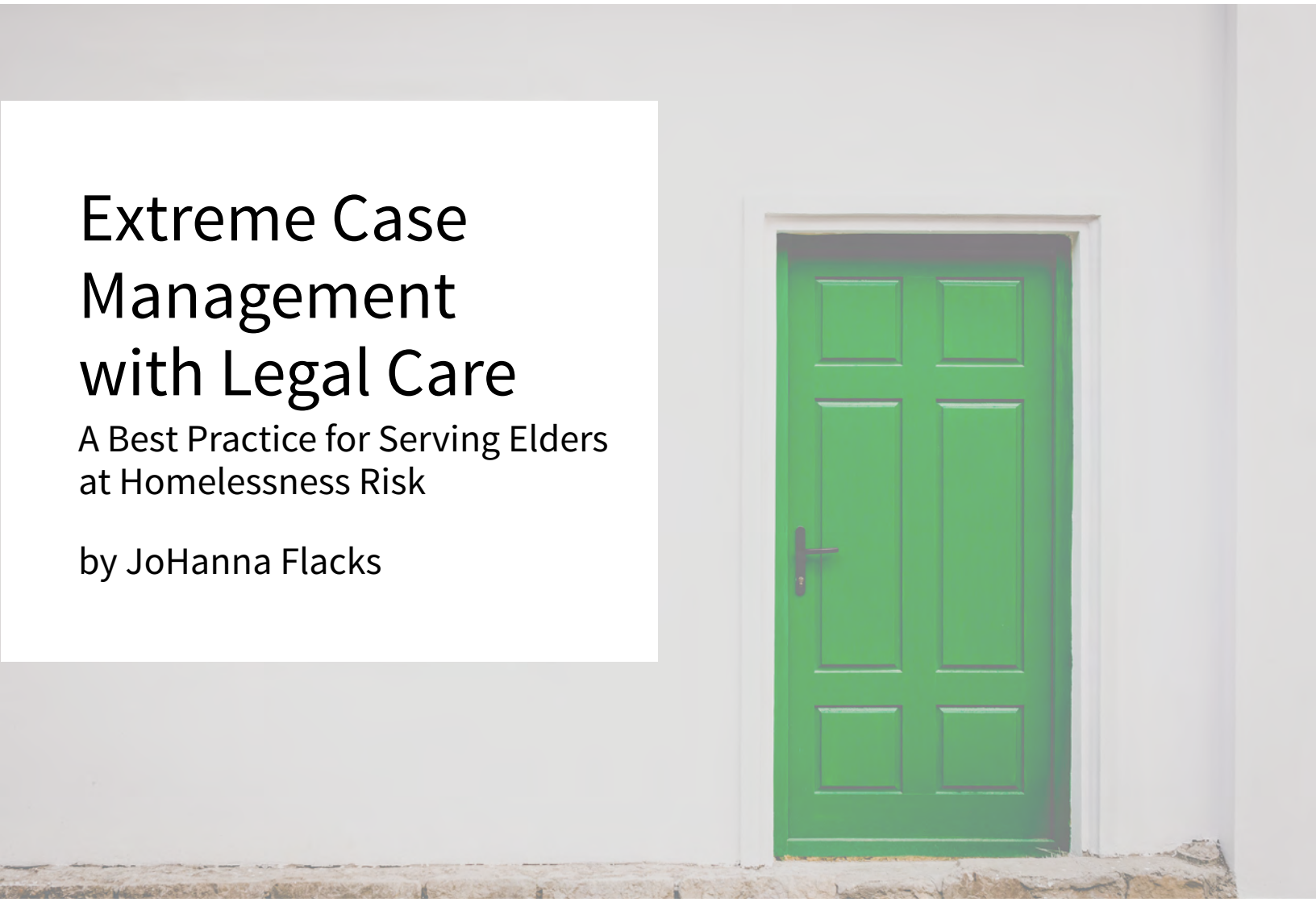
This spring at SUCOL, Ms. Anderson won the Hancock Estabrook 1L Oral Advocacy competition and was chosen as a member of the College's 2015-2016 ABA National Appellate Team. Ms. Anderson will also be participating in the Children's Rights and Family Law Clinic upon her return to Syracuse this fall.

Ms. Anderson has begun her summer with the Commission working with Director Charlie Sabatino on a project to record state statutory updates in the field of advance directives. ■

Extreme Case Management with Legal Care

A Best Practice for Serving Elders at Homelessness Risk

by JoHanna Flacks



Aging in Boston

Boston, Massachusetts, and its surrounding inner-urban areas are home to a diverse group of elders. Some of its neighborhoods are described as NORCs (Naturally Occurring Retirement Communities) because so many Bostonians have roots going back generations, and have chosen to grow old in the same homes in which their grandparents were born. Some of these homes are the ubiquitous triple-deckers that have housed multi-generational families in Boston since the 19th century, while others are public housing apartments that generations of very low-income families have also called home.

This article focuses on the population of Boston elders whose life story leads them to enter old age un-befriended, under-resourced, and at risk of homelessness—either because they have been homeless before and are at greater risk due to aging challenges, or because aging challenges like dementia have worn away their last buffers against homelessness.

Extreme Case Management (ECM)

Elders at risk of homelessness stand to benefit from models recently discussed in this publication, such as a dementia-ready community.[1] However, they often require a level of service that exceeds these empowering supports. In other words, what works for Ms. Smith who owns her home and has developed dementia without a backdrop of other vulnerabilities, may not work for an elder whose dementia is layered atop other defeating life experiences. This is where

[1] http://www.americanbar.org/publications/bifocal/vol_36/issue_3_february2015/dementia_friendly.html

Extreme Case Management (ECM) can help reach some of a community's most isolated older adults—those who have aged on the margins of society due to poverty, trauma history, mental illness, and addiction, among other risk factors.

ECM—an approach to elder homelessness prevention and advocacy developed by the Elders Living at Home Program (ELAHP)[2] based at Boston Medical Center (BMC)[3]—describes a "high-touch" method of case management. It emphasizes not only meeting clients where they are in the figurative sense, but in the literal sense, by visiting them where they live and engaging with them actively in the process of averting threats to their housing stability. This may mean, for example,

- Knocking on the door for a full 30 minutes because it will take Mr. Anwar that long to muster the focus to work with his ELAHP case manager;
- Scheduling to visit Senora Lopez at midnight for a hoarding intervention because that is when she returns home on rubbish collection nights in her neighborhood;
- Visiting Mr. Andre with barber shears in hand, so he has the dignity and advantage of a neat appearance on status conference days in housing court; or
- Arranging for a male lawyer to visit Mr. Jones at his home to discuss hygiene/housekeeping challenges threatening his tenancy.

Thanks to funding from the London-based Oak Foundation[4] and other generous funders, Medical-Legal Partnership | Boston (MLP | Boston)[5] has had the privilege of partnering with ELAHP and its extreme case managers for the past 24 months on a project called *Aging Right in the Community*. This pilot project integrates a legal advocate into ELAHP's case management team so that social services and legal services can be planned and delivered in a highly coordinated fashion. This experience has taught the MLP | Boston team a great deal as lawyers and as human beings committed to the program's mission: to equip healthcare, public health, and human services teams with legal problem-solving strategies that promote health equity for vulnerable people. Since undertaking this collaboration with ELAHP, it is difficult to imagine attempting legal advocacy for this complex population without partners who practice ECM.

ECM's Role in Elder Homelessness Prevention

From a housing advocacy perspective, ECM provides advantages for older tenants negotiating with landlords at their wits' end. It makes it possible to break the problem down into approachable pieces, including (1) arranging home-based health care, (2) engaging housekeeping services, and (3) assuring that the tenants are not alone in their struggle to remain housed, frequently in the only community they have ever known.

Exercising patience and persistence until a client answers the door is sometimes the first step in the process of tackling the herd of elephants in the room: including, for example, elephant-sized piles of miscellany that completely filled Senora Lopez's bathroom floor to ceiling. Other elephant-sized health conditions, like PTSD, alcoholism, and progressive dementia often underlie the symptom of hoarding, and can interfere, tragically, with otherwise avoidable institutionalization.

Many ELAHP clients seem more aged than their years. This is not surprising when at least one research study cited by the CDC estimates the average life expectancy for homeless people is 45.[6] ELAHP clients with a history of homelessness who reach eligibility age (ELAHP serves people over 50) very often need intensive help both to get housing and to keep it.

Protecting existing tenancies is a core ECM focus side-by-side with ELAHP's policy advocacy to increase appropriate emergency shelter options and permanent, deeply subsidized housing stock that meets elders' needs. While there is encouraging movement toward a right to housing, (See the D.C. Right to Housing Initiative[7] and the National Law Center on Homelessness and Poverty's[8] work), currently the existing stock of deeply subsidized housing meets at best only half the need for it. And, the statistics

[2] http://www.bmc.org/eldersathome.htm

[3] http://www.bmc.org/

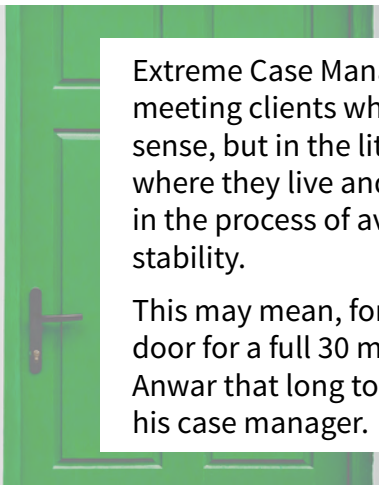
[4] http://www.oakfnd.org/

[5] http://www.mlpboston.org/

[6] http://www.cdc.gov/features/homelessness/

[7] http://www.legalclinic.org/dc-right-to-housing-initiative/

[8] http://www.americanbar.org/content/dam/aba/events/homelessness_poverty/2013_Midyear_Meeting_Right_To_Housing/housing_as_a_right_fact_sheet.pdf



Extreme Case Management emphasizes not only meeting clients where they are in the figurative sense, but in the literal sense, by visiting them where they live and engaging with them actively in the process of averting threats to their housing stability.

This may mean, for example, knocking on the door for a full 30 minutes because it will take Mr. Anwar that long to muster the focus to work with his case manager.

are worse for people with disabilities that require accessibility features. This is an urgent health equity issue. Against this backdrop, helping tenants hold tight to the affordable housing they have is critical. Often, Extreme Case Management just begins with the dismissal of an eviction action. The door to the office shared by ELAHP's Case Managers and stabilization workers is always open. When new and long-time ELAHP clients are worried about something (usually directly or indirectly related to their housing), they easily can (and often do) visit ELAHP's modest offices tucked in the back of BMC's Massachusetts Avenue overpass. From the East-facing windows, you can see the line queue up outside the Woods Mullen shelter in the afternoon—a line in which many ELAHP clients have a history of waiting, a fear of waiting again, and a high risk of yet again waiting were it not for their relationship with ELAHP.

A Supports-Based Approach

Notably, ELAHP's ECM practice does not adhere strictly to a strengths-based empowerment approach, through which an advocate typically focuses on helping a client identify her strengths and address her own needs with the ultimate goal of self-advocacy and independence. That approach squares with an important point often emphasized by Elmer Freeman,[9] MSW, Director of the Office of Urban Health Programs and Policy at Northeastern University's Bouvé College of Health Sciences: most of the problems confronted by disempowered people are not "in their heads." Instead, most of the time the problems disempowered people confront have a logical public policy solution: a unit of subsidized housing, for example, for a family living on minimum wage in a high-rent district or an elder living on a similarly insufficient fixed income for the housing market where she lives. Empowering these renters to identify, apply for, and navigate the subsidized housing bureaucracy (however limited we know it to be) may be the beginning and the end of these renters' advocacy needs.

At the same time, ELAHP serves particularly vulnerable older adults who need hands-on support and who likely are on a trajectory to need more support, not less. While an empowerment model in a vacuum will not work for most ELAHP clients, this does not necessarily mean the client is incapable of active engagement with advocacy; and elders are not the only members of the community who may benefit from the foundation established by an ECM approach prior to an empowerment approach.

For example, evidence shows that younger adults and parents with clinical depression often get stuck in a cycle of needing public benefits in order to engage with clinical care, and needing clinical care in order to access public benefits—and getting neither because what they really may need as a condition precedent to a strengths-based empowerment approach is the active support of an Extreme Case Manager knocking at their door, and knocking again. Once that person is enrolled in a health insurance program, has applied for Supplemental Security Income (SSI) with the benefit of well-developed medical evidence, and has learned to manage his depression, an empowerment approach to advocacy may succeed.

In this way, ECM can set a foundation that helps prevent expensive and inhumane cycles of hospitalization and homelessness: the success of the *Aging Right in the Community* pilot (>90% rate

[9] http://www.northeastern.edu/bouve/directory/elmer-freeman/

of averting homelessness and shelter placement in each year of our two-year collaboration with ELAHP) promises downstream benefits that flow from its upstream investment in a low client-to-advocate ratio compared with other models. This is because homelessness is not only costly in its own right but also is associated with increased healthcare utilization that can be prevented by stable housing—a true win-win.

The Future

Based in no small part on our collaboration with ELAHP and exposure to ECM, Medical-Legal Partnership | Boston increasingly seeks to include ECM principles in our approach to legal advocacy for people at high risk of homelessness for complex reasons—elders and younger families alike.

For MLP | Boston, ECM is embodied in the quietly heroic work of ELAHP's case managers who stabilize tenancies for older adults with multiple complicated health conditions, day in and day out. In other communities throughout the country, ECM may be practiced by case managers, care coordinators, resource social workers, navigators, or community health workers. By whatever name, ECM practitioners armed with support from legal advocates will be important people in the neighborhood if a community is to welcome and support all older adults.

JoHanna Flacks is Legal Director at Medical-Legal Partnership | Boston. ■

Centers for Medicare and Medicaid Services May Finally Pay for Advance Care Planning

On July 8, 2015, Centers for Medicare and Medicaid Services (CMS) announced its proposed physician fee schedule for next year. Two new Advance Care Planning codes that had been recommended by the American Medical Association are included and are funded. Both codes apply to a physician or other qualified health professional providing advance care planning services. If included in the final rule, this will be the first time advance care planning counseling will be expressly reimbursable by Medicare (other than as part of the Welcome to Medicare exam).

The comment period on the rule runs till September 8, 2015. When coverage of advance care planning was proposed as part of the Affordable Care Act, it triggered a hyperbolic "death panel" backlash. The proposed rule will need overwhelming support to survive, so supportive comments from as many groups as possible is extremely important.

The pre-publication copy of the rule is at: https://federalregister.gov/a/2015-16875. Instructions on filing comments are included. The advance care planning language in the rule is on pp. 246-247.

The ABA has strong policy in favor of advance care planning. Health care providers can't know and honor patient's values and wishes unless these care

planning conversations take place. All the incentives in Medicare right now work against focusing time on meaningful care planning discussions. These proposed codes are long overdue and will have the effect of acknowledging the importance of those conversations and providing at least a modicum of incentive to engage in them.

Related Commission-supported policy is online at: http://www.americanbar.org/groups/law_aging/policy.html

Advanced Care, February 2015, 100
Urges federal, state, local, territorial, and tribal governments to enact legislation and regulation that will promote six enumerated components in the provision of care to persons with advanced illness.

Medical Decision-Making, August 2012, 106A
Amendments to the Patient Self Determination Act, calling for strengthening advance care planning rights and procedures for health care decisions. ■

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