



# the Sidebar

## A Primer on Medicaid Asset Protection Trusts

*By Morris Sabbagh, Esq.*

Seniors are turning to elder law attorneys in greater numbers to help protect their homes and hard-earned savings from the rising costs of long term care. Due to the five year "look back period" under current Medicaid law, older adults need to start planning early. Transfers made within five years prior to applying for Medicaid will disqualify seniors from receiving nursing home care paid by Medicaid, and in some states, personal home care entitlements, during the resulting penalty period. One of the most common methods utilized in advanced Medicaid planning is the Medicaid Asset Protection Trust.



*Morris Sabbagh, Esq.*

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# Chances are your case won't go to trial. So why does it take so long to settle cases?

By Avrohom Gefen, Esq.



Avrohom Gefen Esq.

A U.S. government study found that 97% of cases are settled or dismissed without trial. Although a portion of cases don't go to trial because they are dismissed, an estimated 85-92% of cases don't go to trial because they are settled. Additionally, a study published in 2008 found that most plaintiffs who decided to pass up a settlement offer and went to trial ended up getting less money than if they had taken that offer.

With these statistics it seems logical that lawsuits should be settled, not only often but also early. Yet most people who have been involved in litigation will agree that it usually takes a long time, sometimes years, from the time a lawsuit is filed until it is resolved.

## Reasons:

Although each case is different, there are some common reasons why it takes a long time and a lot of legal work to settle a case.

### 1. "Principle"/Emotion

Litigants often feel passionate about what they perceive as their rightful position. Most clients think they are

completely right and litigating attorneys often hear from their clients, "I would rather pay you then pay a dime to my opponent (if they are the defendant), or "I want to make my opponent pay, even if I have to pay you a lot money to make that happen" (if they are the plaintiff). When this happens, litigants are not making rational business decisions and a lawyer has to be able to tell clients that a judge or jury might see things differently. Although litigants who take a principled or emotional position will sometimes still insist on going to trial, most often, after experiencing the angst, agitation and financial and emotional cost of litigation, these litigants will eventually settle. In addition, inexperienced litigants may not appreciate the emotional cost of litigation. In these cases, it takes time for the litigants to become emotionally/mentally prepared to settle.

### 2. Lack of information

Some cases do not settle early on because one or both parties are lacking information. For example, a plaintiff may believe he or she was discriminated against when terminated from his or her job, not knowing that the employer was suffering financially and that there were other employees who were terminated as well. Another example is a defendant who does not know that there are records or witnesses clearly supporting the plaintiff's case. In these instances, the case may not settle until there is at least some discovery, which involves the laborious process of searching for and exchanging documents and other evidence and identifying and deposing witnesses.

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## Preparing Your Business for Your Exit

**By John P. Gordon, Esq.**

Business owners put a great deal of time, money and energy into their businesses to ensure its success. However, by focusing exclusively on the everyday aspects of the business, some owners neglect to protect it from loss in value due to an unexpected owner exit. In addition, many owners fail to plan far enough in advance for a voluntary exit and miss out on important value-building strategies which can take time to implement.

For example, Dan Daily is a sole business owner. He personally manages everything about his business. He deals with all the customers and handles all the sales. No employees know the strategic direction or inner workings of the business. Dan has children, but they do not work in the business, and are not interested in taking over after he is gone. The result of Dan keeping all this to himself, if he dies or becomes incapacitated, the business might fall apart or be sold for substantially less than it should be.

On the other hand, Max Valuemaker owns a similar small business. He employs a salesperson who knows the customers, a bookkeeper who knows the finances, and a manager who deals with the employees. Max sometimes takes long vacations, but has set the business up so that it can run on its own. If Max dies or becomes disabled, his business can survive and would be marketable to a third-party buyer. It can even be sold to one or more key employees who have already been taking part in managing it.

If Max decides to sell his business or take in a partner, he would be able to demonstrate the value of the business. Dan would have a more difficult time showing how much his business is worth without him. In effect, Dan is the business.

Business owners can implement different strategies to address problems like this. In addition to the strategies which Max has put in place, a sole owner can take in a partner and enter into a buy-sell agreement. This can provide certainty in case of an unexpected owner exit. The partner can be an outside partner who injects cash into the business or buys a portion of the owner's equity. It also can be a successor from within the business who takes on a small ownership stake and the growth incentives that go along with it.

If adding an owner is not practicable, a business owner should, at the very least, set forth a detailed plan for what should happen: Who should manage daily operations in the short-term? Should the business be sold? To whom? For how much? Purchasing insurance to keep the business going after death or disability also can help prevent a loss in value.

Exit planning might seem premature for a business owner who does not plan on leaving the business in the near future. However, implementing a few key strategies during any stage of a business can help to preserve and even build value for years to come. **M**



*John P. Gordon Esq.*

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## A Primer on Medicaid Asset Protection Trusts

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Medicaid Asset Protection Trusts are unique in that they can protect a senior's home and other assets from the costs of long term care and "estate recovery" (Medicaid's right to recover the costs of care from the estates of senior Medicaid recipients after death), while allowing a senior to retain certain personal and tax benefits including:

- the continued right to receive income from trust assets;
- the continued right to reside in the family home;
- the ability for the trustees to sell the home and to purchase a replacement home;
- the right to receive the capital gains tax exclusion on the sale of the home;

- the continuation of property tax exemptions, including STAR and Veteran's exemptions;
- the preservation of the senior's lower income tax rate for trust income;
- the ability to control who will receive trust assets after the senior's death; and
- the step-up in basis which will allow the senior's beneficiaries to sell the home and other trust assets without paying capital gains taxes following the senior's death.

Medicaid Asset Protection Trusts are irrevocable, which means that they cannot be changed without the consent of the trust beneficiaries. In addition, once contributed, the creator of the trust no longer has access to trust principal.

The benefits listed here apply specifically to a trust created by New York State residents who continue to reside in New York. The ability to use Medicaid Asset Protection Trusts may vary from state to state. The proper design and funding for these trusts also may vary depending upon each individual's circumstances, and may not be appropriate for some people. An experienced Elder Law attorney can help seniors determine whether a Medicaid Asset Protection Trust is appropriate for them. **M**

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## Chances are your case won't go to trial. So why does it take so long to settle cases?

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### 3. Attorneys

Attorneys may suggest to their clients that their position is so strong that there is no reason to settle. This can be because an attorney is inexperienced and fails to recognize the inherent risk in litigation, or because an attorney is unscrupulous and is prolonging a case to "milk" fees. In these cases, it is often a client telling the attorney that he or she has had enough, or a judge pointing out the risks and costs of litigation before a settlement is reached.

### 4. Overcrowded courts

Judges often can have a significant influence in getting a case to settlement. A judge who meets with the parties, listens to their issues and then tries to forge a settlement is often successful. The litigants have an opportunity to be heard by a judge outside of a trial and they hear a neutral, experienced individual suggest a settlement. However, in many cases there is no opportunity for a settlement conference until the litigation is well underway and sometimes not until right before trial (after much time and money are spent). This is because many judges, especially in state court, have

hundreds of cases on their docket and cannot dedicate substantial time to early settlement conferences. Fortunately, there is some anecdotal evidence that more judges are willing to schedule early settlement conferences or to refer cases to mediation with a neutral mediator.

### Conclusion

Obviously, both parties must have an interest in settlement for it to work. However, attorneys are sometimes the key factor in whether or not a case settles before it takes a heavy financial and emotional toll on the parties. It is the attorneys who can mentally prepare their clients to settle, facilitate the quick exchange of important information and request an early settlement conference or mediation. Attorneys who properly advise and guide their clients regarding settlement will often achieve a better result than attorneys who lead their clients to trial. **M**

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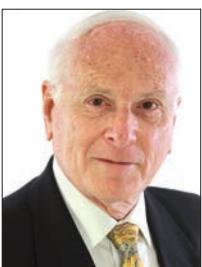
# news & Events



Pictured above: Top row, left to right: Bernard McGovern, James Seegert, Mike Vella, Liudmila De La Rosa, Joseph Milizio, Joseph Trotti, Dennis Lyons, James Burdi and Jordan Freundlich. Bottom row, left to right: Kenneth Renov, Bernard Vishnick, Lois DeNardo, Rosemary Vella, Colleen Morici, Meredith Chesler and Catherine Burdi.

## BOARD APPOINTMENTS ...

Senior Partner **Bernard Vishnick** has been reelected a vice



Bernard Vishnick



Andrew A. Kimler

president on the executive board of the Brandeis Association, a Queens County Bar Association of Jewish legal professionals. Partner **Andrew A. Kimler** has been elected corresponding secretary, also on the executive board

of the organization. Additionally, Mr. Vishnick has been elected secretary on the executive board of the Holocaust Memorial and Tolerance Center of Nassau County, where he recently was responsible for updating the organization's bylaws.

## CHARITABLE ACTIVITIES ...

Team Captain **Meredith Chesler**, along with VMM colleagues and family members, participated in the 17th Annual Ellen Gordon CPAs 4(a) Cause 5K Run/Walk to End Hunger to benefit Island Harvest. Held on the evening of July 12 at Eisenhower Park in East Meadow, the team proudly wore custom t-shirts that read "VMM Supports Island Harvest."



# news & Events

## CHARITABLE ACTIVITIES *continued...*



*Joseph G. Milizio*



HUMAN  
RIGHTS  
CAMPAIGN®

VMM served as the luncheon sponsor for the HRC (Human Rights Campaign) 15th Annual Greater NY Tee Off for Equality golf outing held at the Harbor Links Golf Course in Port Washington on July 30. Managing Partner **Joseph G. Milizio**

is a longtime member of the New York Steering Committee of the organization.

The VMM Family Institute, headed by Partner **Joseph Trotti**, is a sponsor of an upcoming event being held on September 25 at Tesoro's Ristorante in Westbury to benefit The Children's Center at Nassau County Family Court, which provides care and early learning to more than 1,400 children annually while parents and guardians are in court.



Once again, VMM Partner **Bernard McGovern** and Counsel **Michael Humphrey** participated in The Pat Cairo Family Foundation, Inc. Annual Golf Outing, held on July 24 at the Middle Bay Golf Course in Oceanside. The foundation helps those struggling with cancer and has donated more than \$4.5 million since its inception in 1995.

VMM was the Cocktail Hour Sponsor at the Great South Bay YMCA Send a Kid to Camp Golf Classic, held on July 23 at the Southward Ho Country Club in Bay Shore. This annual event supports YMCA Camp scholarships for deserving youngsters, providing an opportunity for positive, lasting memories.



## RECENT RESULTS ...

In a case that began in 2011, VMM's client was sued by a family member for breach of fiduciary duty and conversion of millions of dollars. In 2016, the New York State Supreme Court granted VMM's motion for summary judgment and dismissed the complaint against VMM's client. The plaintiff appealed to the Appellate Division. In July 2018, the Appellate Division confirmed the summary judgment dismissing the complaint. The case involved numerous motions and appeals, all of which were won by VMM.

A group of tenants backed by a tenants' rights organization brought an Article 7a petition in housing court to have a receiver appointed to take control of VMM's client's building. During the trial, VMM successfully negotiated a settlement that allowed our client to retain control of the building.

VMM's client, a small business, was audited by the U.S. Department of Labor. As a result of the audit, the DOL demanded more than \$250,000 in unpaid wages and penalties. VMM negotiated a settlement on behalf of its client for a fraction of that amount, saving the business from catastrophe.

Clients were represented by Avrohom Gefen, Esq.





## VMM ACADEMY ...

VMM partnered with the Estate Planning Institute, Long Island Chapter, to kick off the group's new monthly workshop series. Presented by EPI-LI Vice President/VMM Managing Partner **Joseph G. Milizio** and VMM Counsel **John P. Gordon** on July 25, 2018, the program, entitled "Is Your Business Prepared for Your Exit?" covered basic criteria which must be met for a business owner's exit to be successful.

**MAKE YOUR RESERVATION FOR OUR FIRST PROGRAM  
OF THE VMM ACADEMY FALL 2018 SEMESTER NOW!**

### **"IS YOUR ESTATE PLAN TRUST-WORTHY?"**

*Revocable, Irrevocable, Testamentary, Charitable, Special Needs, to name a few...*

A trust can be an important part of an estate plan. Learn whether trusts are right for you and your family.

**PRESENTERS: JAMES F. BURDI, ESQ. & CONSTANTINA S. PAPAGEORGIOU, ESQ.**

**DATE:** Wednesday, September 26, 2018

**TIME:** 5:45 – 7:30 PM

**PLACE:** Vishnick McGovern Milizio LLP, 3000 Marcus Avenue,  
Suite 1E9, Lake Success, NY 11042

**RSVP:** Mindy Wolfle, [mwolfle@vmmlegal.com](mailto:mwolfle@vmmlegal.com) / 516.390.3027

**LIGHT REFRESHMENTS WILL BE SERVED. THERE IS NO FEE TO ATTEND  
VMM ACADEMY, BUT RESERVATIONS ARE A MUST!**

Please provide full contact information for all registrants.

You are welcome to share this invitation with friends, family, colleagues and others.

*As always, attendees can expect expert commentary from our speakers, addressing the legal perspectives of pertinent topics that span our practice groups. VMM Academy schedules are posted on our website with registration instructions.*



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