

# **PRACTICAL MEDICAID PLANNING**

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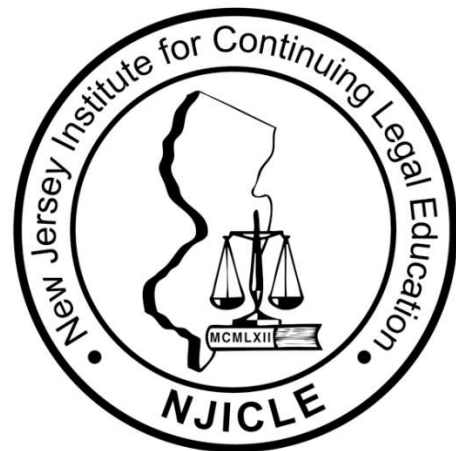
**2022 Seminar Material**

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# PRACTICAL MEDICAID PLANNING

## Speakers

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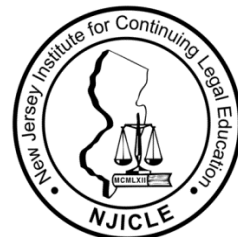
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M0699.22



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# **Practical Medicaid Planning**

## Long-Term Care Planning:

- Income and Asset Rules for Medicaid Eligibility
- Transfer Rules
- Medicaid Applications
- Estate Recovery

**Dana E. Bookbinder, Esq., CELA**

**Pamela A. Quattrone, Esq., MBA, CELA**



## What is the likelihood of needing long term care?

- 43% require Nursing Home Care
- 60% require Long Term Care
- \$4,000-5,000/mo. Home Care
- \$4,000-\$9,000/mo. ALF
- \$10,000-\$14,000/mo. SNF

## Funding Sources

- Private Pay
- Long Term Care Insurance
- VA
- Medicaid

## Why Plan?

- Best Quality Care
- Security for the community spouse
- Avoid Burden on Kids
- Preserve legacy for children
- Avoid Medicaid liens

## Considerations for Planning

- Income Requirements
- Resource Requirements
- Transfer Rules
- Taxes
- Beneficiary Designations
- Estate Recovery

## THE LAW

### FEDERAL

- Statutes
- Regulations
- HCFA/CMS
- SSA
- Federal case law

### STATE

- Statutes
- Regulations
- Communications
- Administrative decisions
- State case law
- County Boards of Social Services

## MLTSS

- Medicaid Managed Long Term Services and Supports
  - Uses managed care organizations to coordinate care
    - Aetna
    - Amerigroup
    - Horizon
    - UnitedHealthcare
    - WellCare
  - Covers home care, assisted living and nursing home, as well as health insurance, Rx, dental and vision

## MEDICAID ELIGIBILITY FOR LONG TERM CARE

- **Clinical Eligibility**
  - Pre-Admission Screening (“PAS”)
  
- **Financial Eligibility**
  - Income
  - Resources
  - Transfers

## CLINICAL ELIGIBILITY

- N.J.A.C. § 10:71-3
  - A person meets the qualifications for nursing home level of care, which means that the person requires assistance with activities of daily living such as bathing, toileting and mobility.



## PRE-ADMISSION SCREENING (PAS)

- N.J.A.C. 8:85-1.2 & 8:85-1.8
- Administered by Office of Community Choice Options (OCCO)
- Referral is made to OCCO by:
  - Hospital – Form LTC-4
  - Nursing Home – Form LTC-2
  - Assisted Living – AL-6
  - Community – Form PA-4
- OCCO sends nurse to evaluate clinical eligibility

## PAS & COVID-19

- Med-Comm 20-04:
  - Post eligibility clinical assessments permitted through the last day the COVID-19 emergency has officially ended.
    - When financial eligibility is complete, CWA may approve without verifying PAS.
  - Also bars all Medicaid terminations during the COVID-19 emergency.

## FINANCIAL ELIGIBILITY - INCOME

- N.J.A.C. § 10:71-5
- No longer income caps, however, if income is in excess of \$2,523 per month (2022), need to use QIT
- *Gross* income (not net)

## QUALIFIED INCOME TRUST (QIT)

- Income over \$2,523/mo must be deposited into QIT every month
  - Must deposit whole source of income (i.e. all of social security or all of pension)
- QIT must name Trustee (not Medicaid applicant)
- Set up account at bank
- Must be established and funded in month of anticipated eligibility

# QIT MEMO TO BANKS



**State of New Jersey**

DEPARTMENT OF HUMAN SERVICES  
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES  
PO Box 712  
TRENTON, NJ 08625-0712

PHILIP D. MURPHY  
Governor  
  
SHEILA Y. OLIVER  
Lt. Governor

CAROLE JOHNSON  
Acting Commissioner  
  
MEGHAN DAVEY  
Director

## Memo to New Jersey Banks Regarding Qualified Income Trusts

In December of 2014, New Jersey's Medicaid program, administered by the New Jersey Department of Human Services, Division of Medical Assistance and Health Services (Division) implemented a financial eligibility policy that allows higher income persons seeking long-term care services and supports, who cannot afford the private cost of such care, to place income that is above the allowable Medicaid income limit into a Qualified Income Trust (QIT). See 42 U.S.C. 1396p(d)(4)(B) (also known as a "Miller Trust" from the case *Miller v. Ibarra*, 746 F. Supp. 19 (D. Colo. 1990)). These QIT accounts are used in a number of states nationwide that allow this type of Medicaid eligibility where monthly income is first placed in the QIT and then paid toward care and other approved expenses. The income that is placed in the QIT will not be considered for the financial eligibility determination. The income deposited each month into the QIT must then be paid out each month for the Medicaid beneficiary's specified post-eligibility expenses, consistent with their eligibility determination (payment amounts are specified on each individual's Personal Responsibility form).

Additional information on QITs can be found on the State's website at: <http://www.state.nj.us/humanservices/dmahs/clients/mtrusts.html>.

Due to the nature of a QIT, generally almost all income deposited into the QIT every month will be depleted at the end of each month. An initial amount up to \$20 can be deposited to open a QIT bank account, if needed. After that, only income belonging to the QIT beneficiary can be deposited into the QIT bank account every month. Generally, an account with no minimum deposit and balance requirements and very limited monthly fees would best serve these individuals who require these accounts in order to be Medicaid eligible.

A QIT is established with the Trust beneficiary's Social Security Number. An EIN, which is required for some other trust types, is not required for a Qualified Income Trust. Banks can verify this information at: [http://www.irs.gov/irm/part21/irm\\_21-007-013r-cont02.html](http://www.irs.gov/irm/part21/irm_21-007-013r-cont02.html) where the below content is provided:

IF	THEN
The trust is a Miller type trust	Do not assign an EIN. Instead, inform the trustee that he/she must: <ul style="list-style-type: none"> <li>• Use the SSN of the beneficiary or trustee to report trust activities, and</li> <li>• Provide information such as the SSN, BOD, closing month of accounting year, principal activity, and the market to which they sell their product or services, if not already provided on Form SS-4 under Treasury Regulation 301.6109-1(d)(2).</li> </ul> Note: Miller Trusts are treated as grantor trusts under IRC § 671.

Rev 2/2015

The individual, their Power of Attorney, legal guardian or conservator can act on behalf of the individual, consistent with New Jersey law, to establish a QIT. If a Power of Attorney document grants general authority to handle the financial or health care affairs of an individual, this should be sufficient to allow the Power of Attorney to establish a QIT for that individual.

If the Trust beneficiary is residing in a nursing home or assisted living facility, it may be convenient for the trustee to be able to have certain monthly expenses paid electronically to that facility each month. The trustee can make these arrangements with the bank, depending on the circumstances.

### Important information for banks to ensure QIT account accuracy:

- 1) An initial amount up to \$20 can be deposited to open a Qualified Income Trust bank account, if needed. Monthly fees should always be less than \$20 per month.
- 2) The QIT bank account must be a checking account that allows the trustee to (1) make monthly income deposits to the account and (2) pay monthly expenses with the account funds. Due to the nature of the QIT almost all funds deposited into the QIT will be depleted at the end of each month.
- 3) An example of how to title a QIT bank account is: "The Jane Doe Irrevocable Qualified Income Trust Account, John Smith, Trustee".

**QIT Frequently Asked Questions** are located on the Division's website at: [http://www.state.nj.us/humanservices/dmahs/clients/QIT\\_FAQs.pdf](http://www.state.nj.us/humanservices/dmahs/clients/QIT_FAQs.pdf). Additional questions may be sent to [MAHS.QIT@dhs.state.nj.us](mailto:MAHS.QIT@dhs.state.nj.us) and responses will be added to a list of Frequently Asked Questions (FAQs) located on the Medicaid agency's website. Please be aware email is not a secure method of communication. Do not use email to send us confidential or sensitive information such as personally identifiable information, account numbers or social security numbers. If you need to provide this type of information, contact us by phone, fax or regular mail as set forth on the QIT website.

Rev 2/2015

## ESTABLISHING QIT?

- Who can establish?
  - Beneficiary
  - Guardian
  - Power of Attorney
- Uses Beneficiary's Soc. Sec. No. (not EIN)
- Treated as Grantor Trust
- Establish with deposit up to \$20

## QUALIFIED INCOME TRUST (QIT)

- Trust property can only be used for:
  - Personal Needs Allowance (PNA)
  - Minimum monthly maintenance allowance for non-Medicaid spouse (MMMNA)
  - Medicaid expenses
  - Patient cost share
- Payback to NJ upon death

## STATE TEMPLATE FOR QIT

- [http://www.state.nj.us/humanservices/dmahs/clients/Qualified\\_Income\\_Trust\\_Template.pdf](http://www.state.nj.us/humanservices/dmahs/clients/Qualified_Income_Trust_Template.pdf)



## RESOURCES

- N.J.A.C. § 10:71-4
- Resource Limits:
  - **Single** - less than \$2,000
  - **Married (1 spouse applying)-**
    - Medicaid spouse - \$2,000
    - Non-Medicaid spouse can keep half of all combined assets (“CSRA”)
      - Minimum \$27,480 (2022)
      - Maximum of \$137,400 (2022)
  - **Married (both spouses applying) - \$3,000**

## RESOURCES

- Excludable resources:
  - Personal effects, household goods under \$2,000
  - Cash value of life insurance if total face value of all policies is less than \$1,500
  - Income producing business property
  - Not accessible through “no fault of his/her own”
  - Burial plots of beneficiary/spouse
  - 1 car
  - House if occupied by applicant or spouse

## TRANSFERS

- N.J.A.C. § 10:71-4.10
  - 5-year look-back
  - Uncompensated transfer for less than FMV
    - Includes:
      - Gifts
      - Waiving right to receive inheritance (disclaimer) or elective share
      - Not accepting injury settlement
      - Refusal to take legal action for alimony

## TRANSFERS

- Transfer to friend or relative for care/services presumed gratuitous unless documented before commencement of services

## PENALTY FOR TRANSFERS

- Penalty divisor - \$361.21/day (effective 4/1/2021)
  - For every or about \$10,986 gifted = 1 mon ineligibility
- No limit on penalty period
- Penalty does not start to run until apply and otherwise eligible
- No partial abatement of penalty if some of gift returned

## **PENALTY BEGINNING DATE**

- 42 U.S.C.S. 1396p(c)
- Latter of:
  - Date of Transfer
  - Month after date of transfer
  - Date of Medicaid eligibility & would be receiving institutional level of care but for penalty period



## EXCEPTIONS TO TRANSFER RULES

- To spouse
- To child under 21 of institutionalized individual or blind/disabled child of any age
- Sibling who already has equity interest in home and was residing in it for 1 year
- 2 year caregiver child
- Sole benefit trust for disabled individual under 65
- Exclusively for purpose other than to qualify for Medicaid (NJAC 10:71-4.10(j) & (k))
- Transferred assets returned

## APPLICATION PROCESS

- **In-Person (\*not during COVID-19\*):** County Board of Social Services in county where care will be provided
  
- **Mail:** NJ FamilyCare Aged, Blind, Disabled Programs Application
  - [http://www.state.nj.us/humanservices/dmahs/clients/medicaid/abd/ABD\\_Application\\_Booklet.pdf](http://www.state.nj.us/humanservices/dmahs/clients/medicaid/abd/ABD_Application_Booklet.pdf)
  
- **Online:**
  - <http://www.state.nj.us/humanservices/dmahs/clients/medicaid/abd/>



## APPLICATION PROCESS

- Supporting documentation:
  - Clinical eligibility
  - Identifying information
  - Documentation of existing insurance
  - Proof of gross income & deductions
  - Proof of resources -
    - 60 months bank statements for every account
    - Life insurance cash value
    - Deed to real property
  - Proof of prepaid funeral
  - Tax returns (not usually requested, but can)

## ESTATE RECOVERY

- N.J.A.C. § 10:49-14.1
  - Payback to State of NJ out of deceased Medicaid beneficiary's estate for benefits provided under Medicaid program **after age 55, including** health insurance Medicaid (NJFamilyCare/ACA Medicaid)

## ESTATE RECOVERY

- Cannot lien:
  - Where benefits paid to before age 55
  - During lifetime of surviving spouse
  - During lifetime of surviving child under age 21 or permanently disabled child
  - Amount recoverable less than \$500
  - Gross estate under \$3,000

## ESTATE RECOVERY

- “Estate” defined broadly in NJ
  - Includes non-probate assets (i.e. joint assets)
  
- “Estate” does not include:
  - Life estates
  - Third-party SNT assets (testamentary or inter vivos)



## State of New Jersey

DEPARTMENT OF HUMAN SERVICES  
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

P.O. Box 712  
Trenton, NJ 08625-0712

CHRIS CHRISTIE  
*Governor*

JENNIFER VELEZ  
*Commissioner*

KIM GUADAGNO  
*Lt. Governor*

VALERIE HARR  
*Director*

### **Memo to New Jersey Banks Regarding Qualified Income Trusts**

New Jersey's Medicaid program, administered by the Division of Medical Assistance and Health Services, NJ Department of Human Services, is implementing a financial eligibility policy that will allow higher income persons seeking long-term care services and supports, who cannot afford the private cost of such care, to place income that is above the allowable Medicaid income limit into a Qualified Income Trust. See 42 U.S.C. 1396p(d)(4)(B) (also known as a "Miller Trust" from the case Miller v. Ibarra, 746 F. Supp. 19 (D. Colo. 1990)). The income that is placed in the Trust will not be considered for the financial eligibility determination. The income deposited each month into the Qualified Income Trust must then be paid out each month for the Medicaid beneficiary's specified post-eligibility expenses.

Additional information on Qualified Income Trusts can be found on the Medicaid agency's website at: <http://www.state.nj.us/humanservices/dmahs/clients/mtrusts.html>.

Due to the nature of a Qualified Income Trust, generally almost all income deposited into the Trust monthly will be depleted at the end of each month. An initial amount up to \$20 can be deposited to open a Qualified Income Trust bank account if needed. After that, only income belonging to the Trust beneficiary can be deposited into the Qualified Income Trust.

A Qualified Income Trust is established with the Trust beneficiary's Social Security Number. An EIN, which is required for some other trust types, is not required for a Qualified Income Trust. Banks can verify this information at: [http://www.irs.gov/irm/part21/irm\\_21-007-013r-cont02.html](http://www.irs.gov/irm/part21/irm_21-007-013r-cont02.html) where the below content is provided:

If	Then
The trust is a Miller type trust	<p data-bbox="565 321 1276 348">Do not assign an EIN. Instead, inform the trustee that he/she <i>must</i>:</p> <ul data-bbox="532 365 1425 506" style="list-style-type: none"> <li data-bbox="597 365 1357 392">• Use the SSN of the beneficiary or trustee to report trust activities, and</li> <li data-bbox="532 422 1425 506">• Provide information such as the SSN, BOD, closing month of accounting year, principal activity, and the market to which they sell their product or services, if not already provided on Form SS-4 under Treasury Regulation 301.6109-1(d)(2).</li> </ul> <p data-bbox="886 533 954 560" style="text-align: center;"><b>Note:</b></p> <p data-bbox="610 575 1230 602" style="text-align: center;">Miller Trusts are treated as grantor trusts under IRC § 671.</p>

The individual, their Power of Attorney, legal guardian or conservator can act on behalf of the individual, consistent with New Jersey law, to establish a Qualified Income Trust. If a Power of Attorney document grants general authority to handle the financial or health care affairs of an individual, this should be sufficient to allow the Power of Attorney to establish a Qualified Income Trust for that individual.

If the Trust beneficiary is residing in a nursing home or assisted living facility, it may be convenient for the trustee to be able to have certain monthly expenses paid electronically to that facility each month. The trustee can make these arrangements with the bank, depending on the circumstances.

Questions on Qualified Income Trusts can be sent to: [MAHS.QIT@dhs.state.nj.us](mailto:MAHS.QIT@dhs.state.nj.us) and responses will be added to a list of Frequently Asked Questions (FAQs) located on the Medicaid agency's website. In addition to the FAQs, a Qualified Income Trust template can also be found on the Medicaid agency's website listed above.

## **QUALIFIED INCOME TRUSTS**

### **A Qualified Income Trust can only be used for applications filed on or after 12/1/2014.**

The Division of Medical Assistance and Health Services (DMAHS) provides this information to assist prospective Medicaid applicants and their attorneys by describing basic information about the use of a qualified income trust (QIT) (sometimes referred to as a "Miller" Trust) to establish income eligibility for Managed Long Term Services and Supports (MLTSS). A model instrument is included at the end of this document to provide an example of a QIT that meets DMAHS requirements when properly completed. This form meets the basic DMAHS requirements for a QIT; however, it is not the only acceptable QIT form, and it may have consequences beyond eligibility for Medicaid that an applicant would want to consider.

**DMAHS attorneys are prohibited from giving legal advice to the public. DMAHS, county and State vendor eligibility workers, supervisors and other DMAHS employees are prohibited from advising anyone by recommending specific actions to become eligible for Medicaid as doing so may constitute the unauthorized practice of law.**

This information is not intended as legal or tax advice, and persons seeking information on the legal or tax consequences of these documents are encouraged to consult a lawyer or other professional of their choosing. DMAHS and eligibility determination agencies will only review trust documents in connection with the processing of a Medicaid application. The review by DMAHS or an eligibility determination agency is limited to whether the trust meets the requirements for a Medicaid QIT. Other actions by the applicant and/or trustee may impact Medicaid eligibility and have consequences, including but not limited to termination, imposition of a transfer penalty and/or recovery of incorrectly paid benefits.

Persons with low or limited income may be able to obtain legal counsel through their local Legal Aid office or local bar association.

#### Caution

A QIT should not be confused with other types of trusts that are commonly used in connection with the receipt of Medicaid or other public benefits. The information here does not address these other types of trusts, such as a "Special Needs" trust that may be created for a person with a disability under age 65 who wishes to shelter resources in order to become or remain eligible for Medicaid or other public benefits.

Income that is properly diverted through a QIT is not counted in determining the eligibility for Medicaid for Managed Long Term Services and Supports (MLTSS), but this income is not disregarded in the post-eligibility treatment of income or in determining eligibility for other Medicaid benefits. Such income also may not be disregarded in determining eligibility for non-Medicaid public benefits programs.

Although the use of a QIT can help when income that is above the special income limit for Medicaid eligibility, a QIT does not address other eligibility requirements for institutional and home and community-based waiver services, such as citizenship, residency, medical necessity and the applicant's countable resources. A person with more than \$2,000 in countable resources is not eligible for benefits, and this resource eligibility requirement is not affected by the use of a QIT.

This information is based in part on informal guidance by the federal Centers for Medicare & Medicaid Services (CMS). CMS has not adopted any federal regulations relating to QITs, and CMS' guidance and interpretations could therefore change without advance public notice or any opportunity for advance public comment.



**The \_\_\_\_\_ Irrevocable Qualified Income Trust**  
[full legal name of primary beneficiary]

Grantor, \_\_\_\_\_ [name of the person establishing the Trust], residing in \_\_\_\_\_ County, \_\_\_\_\_ [state], hereby creates a Trust, to be known as the \_\_\_\_\_ [name of primary beneficiary] Qualified Income Trust, (hereafter referred to as "the Trust"), created consistent with the requirements in 42 U.S.C. §1396p(d)(4)(B) and to be governed by the terms set out below:

Trust Purpose

The primary beneficiary of the Trust is \_\_\_\_\_, born on \_\_\_\_\_, residing in \_\_\_\_\_ County, New Jersey. The purpose of this Trust is to achieve income eligibility for the primary beneficiary for medical assistance under Title XIX of the federal Social Security Act (hereafter referred to as "Medicaid"). The primary beneficiary must meet the eligibility criteria under New Jersey Medicaid standards, including the standards applicable to Qualified Income Trusts. The Trustee must perform all acts necessary to maintain the primary beneficiary's eligibility for Medicaid and comply with New Jersey's standards for Qualified Income Trusts. This Trust must be presented to the Medicaid eligibility determining agency at time of application for benefits.

Trust Funding

The income to be placed in the Trust is the income received by [primary beneficiary] from the following sources:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

No property may be placed in the Trust other than income from the primary beneficiary's pensions, Social Security, or other income sources. The Trust may receive any or all of the primary beneficiary's income. The entire amount of the income allocated to the Trust shall be deposited directly in the trust account or deposited in the trust account in the same month the income is received by the primary beneficiary.

### Trust Disbursements

No expenditures shall be made from the Trust except in accordance with this paragraph. The Trustee shall make distributions from the trust in amounts and for the purposes necessary to maintain the income eligibility of the primary beneficiary for Medicaid. Consistent with the requirements of the Medicaid program that require all income including any income that is not placed in the Trust be used for post eligibility expenses, the Trustee shall make payments from the Trust in the following priority, no later than the last day of the calendar month in which the income is received by the Trust:

1. A monthly personal or maintenance needs allowance for the primary beneficiary;
2. A sum to the spouse of the primary beneficiary, sufficient to provide but not exceed the minimum monthly maintenance needs allowance for the spouse as determined by the eligibility determination agency, and, if applicable, the maintenance needs deduction for family dependents;
3. Incurred medical expenses of the primary beneficiary as determined by the New Jersey Medicaid program;
4. The cost of medical assistance provided to the primary beneficiary;

The Trustee may expend not more than \$20 a month for banking costs to administer the trust. After payment of all of the above expenses, the Trustee may claim a fee of up to 6% of the income paid to the trust that month as compensation. Fees not taken during the month cannot be taken in a subsequent month.

Any other payments from the Trust shall invalidate the Trust under 42 U.S.C. §1396p(d)(4)(B) and the income of the primary beneficiary placed in this Trust will be counted towards the Medicaid eligibility limit.

Trustee Appointment, Resignation or Removal

\_\_\_\_\_ [full legal name of initial trustee] shall serve as Trustee of the Trust. Trustee's contact information is:

Address \_\_\_\_\_

Phone number(s): \_\_\_\_\_

In the event the Trustee resigns, becomes legally incapacitated or dies while serving, \_\_\_\_\_ [name of successor trustee], whose current address is \_\_\_\_\_, shall serve as successor trustee. If there is no named Trustee eligible or willing to serve as Trustee, any interested person may apply to the primary beneficiary of the Trust in order to be appointed Trustee. The primary beneficiary may not serve as Trustee. If the primary beneficiary is incompetent and has no guardian or attorney-in-fact, then any interested person may petition the court for the appointment of a successor trustee. No bond shall be required for any Trustee. The Trustee shall have all powers given to a Trustee by New Jersey law.

No resignation by the Trustee shall be effective until he or she provides an informal accounting and a successor Trustee shall have accepted appointment and qualified to serve as Trustee. The eligibility determination agency must be notified by the resigning trustee of his resignation, and must immediately be provided with a final accounting and the contact information for the new trustee. The resigning trustee shall also provide this documentation and information to the remainder beneficiary, the Division of Medical Assistance and Health Services, Recovery Unit, Mail Code #6, PO 712, Trenton, NJ 08625-0712.

Accounting

The Trustee shall provide two copies of the accounting of the trust annually to the eligibility determination agency in conjunction with the redetermination of primary beneficiary's Medicaid eligibility. The informal accounting shall include a detailed listing (date, check number, amount, payee or payor) and explanation (as needed) of all trust receipts and trust disbursements, the balance remaining in the trust, and a copy of the bank statements for the trust.

The Trustee shall account in the same manner as described above whenever the primary beneficiary's Medicaid eligibility is reviewed due to a change in income, resources or other circumstances.

Irrevocability

This Trust is irrevocable. The Trust’s assets, income and distributions shall not be subject to anticipation, assignment, pledge, sale or transfer in any manner. The primary beneficiary shall not have the power to anticipate or encumber the Trust’s assets, income or distributions. The Trust’s assets, income and distributions shall not, while in the possession of the Trust, be liable for, or subject to the debts, contracts, obligations, liabilities or torts of the primary beneficiary.

Termination

The Trust shall terminate when the primary beneficiary ceases to receive Medicaid benefits provided by the State of New Jersey. Upon termination of the Trust, the Trustee shall notify the New Jersey Department of Human Services, Division of Medical Assistance and Health Services and shall distribute to the Division or its successor agency any remaining trust property up to an amount equal to the total Medicaid expenditures paid on behalf of the primary beneficiary by the Division, reduced by any previous recoveries made by the Division of such Medicaid expenditures. The Division shall not be required to take any action for this payment to be due and owing. Payment shall be made payable within 30 days of notification by the Division of the amount due, to “Treasurer, State of NJ” and mailed to:

Division of Revenue (NJDMAHS)  
Lockbox 656  
200 Woolverton Ave., Bldg 20  
Trenton, NJ 08646  
Attn: Processing Bureau.

No provisions in the trust shall permit the trustee to first repay other persons or creditors at the death of the beneficiary. The trust shall not pay for burial expenses after the death of the primary beneficiary. Only what remains in the trust after the distribution to the Division has been made shall be considered available for other trust expenses or beneficiaries of the estate. The Trust shall provide all bank statements from the creation of the trust or last redetermination, whichever is later, showing any activity up to the current date. After any payment to the Division as specified in this section, the Trustee shall distribute any remaining trust property to \_\_\_\_\_

\_\_\_\_\_.  
[name(s) of distributee(s)]

Note, if primary beneficiary is not competent at the time this trust is established, no contingent distributee can be named.

Signed the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_.

\_\_\_\_\_  
Grantor

\_\_\_\_\_  
Trustee

STATE OF NEW JERSEY  
COUNTY OF \_\_\_\_\_

STATE OF NEW JERSEY  
COUNTY OF \_\_\_\_\_

I CERTIFY that on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, \_\_\_\_\_ [Grantor], personally came before me and acknowledged under oath, to my satisfaction, that the person:

I CERTIFY that on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, \_\_\_\_\_ [Trustee], personally came before me and acknowledged under oath, to my satisfaction, that the person:

- (a) is named in and personally signed the attached document; and
- (b) signed, sealed and delivered this document as his act and deed.

- (a) is named in and personally signed the attached document; and
- (b) signed, sealed and delivered this document as his act and deed.

\_\_\_\_\_  
Notary

\_\_\_\_\_  
Notary

**SCHEDULE A**

Funds being deposited into Qualified Income Trust:

<b><u>Source</u></b>	<b><u>Amount</u></b>
Social Security	
Pension	
Other	
Total:	

**Location of Trust Bank Account:**

Bank: \_\_\_\_\_

Bank Routing Number: \_\_\_\_\_

Account No. \_\_\_\_\_

Account Title: \_\_\_\_\_

Initial Deposit Amount: \$ \_\_\_\_\_

Initial Deposit Dated: \_\_\_\_\_

Monthly Bank Fee: \_\_\_\_\_

Responsible Party \

Third Party Guarantee Litigation

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## The NHA - N.J.S.A. 30:13-3.1.

a. A nursing home shall not, with respect to an applicant for admission or a resident of the facility:

(2) require a third party guarantee of payment to the facility as a condition of admission or expedited admission to, or continued residence in, that facility; except that when an individual has legal access to a resident's income or resources available to pay for facility care pursuant to a durable power of attorney, order of guardianship or other valid document, the facility may require the individual to sign a contract to provide payment to the facility from the resident's income or resources without incurring personal financial liability.





## Responsible Party Claims

- ▶ Lawsuit grounded in breach of contract filed by a senior living facility for payment of a Resident's bill.
- ▶ Filed after Medicaid's assessment of an ineligibility period causes a shortfall for the senior living facility.



## Responsible Party Claims (cont.)

- ▶ Not filed against the Resident - does not seek the Resident's assets. (Why?)
- ▶ Filed against everyday "People" - does seek People's personal assets. (Who?)
- ▶ Drafted to function the same as a guarantee, while also trying to maintain an argument that the claim does not violate state and federal prohibition of third-party guarantees.



## Caveat – A Litigator’s Bias

- ▶ Admissions - There are many honorable senior living facilities in New Jersey.
- ▶ There are many honorable lawyers who represent senior living facilities in New Jersey.
- ▶ Most senior living facilities do not file lawsuits with contrived or illegal claims.
- ▶ Bias - I only litigate on behalf of Residents and their families; never on behalf of a senior living facility.



## Caveat (cont.)

- ▶ Reality - People do not call a litigator to tell them about a great experience that they had with a senior living facility.
- ▶ People do call a litigator when they get sued by a senior living facility.
- ▶ When I speak about these cases, sometimes my passions can get the best of me.



## Caveat (cont.)

- ▶ Pre-emptive apology - Any comments critical of the senior living industry, or tactics used by some of their law firms, are only meant to reference those facilities and firms that file lawsuits with contrived or illegal claims.
- ▶ Questions and opposing points of view are encouraged.



# Who signed the Admission Agreement?

## PEOPLE

### **Different types of People found in New Jersey caselaw:**

- ▶ Resident?
- ▶ Guardian
- ▶ Child POA in NJ
- ▶ Child POA out of state  
(who did not sign)
- ▶ Friend
- ▶ Child / Child's Spouse
- ▶ Verbal – just a vague claim to fill  
in the gaps?



## Typical Facts

- ▶ People are named as agent under a power of attorney, sometimes without their knowledge.
- ▶ People are asked to sign a lengthy Admission Agreement before a Resident is admitted to a senior living facility.
- ▶ People are made to feel as though they are required to sign the Admission Agreement immediately, often because it is late, and the Resident is already at the facility.



## Typical Facts (cont.)

- ▶ The Admission Agreement often contains clauses obligating People to perform certain duties without receipt of any consideration.
- ▶ The Admission Agreement also often contains clauses obligating People to certify to pre-printed representations about the Resident's finances.





## Typical Facts (cont.)

- ▶ People find themselves in a lawsuit that they cannot afford to defend.
- ▶ Conversely, People find themselves in a lawsuit that they cannot afford not to defend.
- ▶ All the while, People are asking why their siblings are not part of the lawsuit.



## Parties to the Admission Agreement

- ▶ Importance of Precision – Bankers and Litigators
- ▶ How are People identified in the Admission Agreement?
  - ▶ At the beginning?
    - ▶ Blanks?
  - ▶ At the end?
    - ▶ Pre-printed Designations?
- ▶ How did People sign the Admission Agreement?
  - ▶ Signature only / Agent / POA?
- ▶ Where did People sign the Admission Agreement? How many times?



## The Admission Package

- ▶ Admission Agreements \*plus\*
  - ▶ Vague and Seemingly Conflicting Provisions
  - ▶ Assumption of Pre-printed Obligations and Duties
    - ▶ Does applying for Medicaid equal a guarantee of eligibility?
    - ▶ Agreeing to collect and “return” transfers?
  - ▶ Financial Disclosures
    - ▶ Pre-printed Representations
    - ▶ What if People do not know the answer?
    - ▶ Problematic when related to Medicaid Eligibility



## The Admission Package (cont.)

- ▶ Signing Process
- ▶ Attorney Review
  - ▶ Request changes?
- ▶ Arbitration Agreements
- ▶ Address potential issues in the POA?



## Types of Transfers

- ▶ Shares in an LLC
  - ▶ Force a sale?
  - ▶ Value as of what date?
- ▶ Real Estate Transfers
- ▶ Gifts



## Issues Surrounding Transfers

- ▶ Issues
  - ▶ Control of the Funds
  - ▶ Timing of the Transfers
  - ▶ Competency of the Giftor
  - ▶ Intent – U.F.T.A.
    - ▶ Not all transfers are meant to defraud nursing homes
    - ▶ Resident's health
    - ▶ Resident's financial condition
- ▶ Validity of equitable claims that recipients should pay the money back?



## Manahawkin Convalescent v. O'Neill, 217 N.J. 99 (N.J. 2014)

- ▶ Seminal Responsible Party case decided by the New Jersey Supreme Court on March 11, 2014.
- ▶ Although ultimately siding with Manahawkin, the Supreme Court was critical of the collection methods utilized, and set forth a request to the senior living industry to be more transparent about each party's rights and remedies in the future.
- ▶ Has anything changed in almost 8 years?



## Manahawkin – The Parties

- ▶ Plaintiff - Manahawkin Convalescent Center
- ▶ Manahawkin's Representative - David Goldberg
- ▶ Resident - Elise Hopkins
- ▶ Resident's Daughter / Agent - Frances O'Neill





## Background

- ▶ Hopkins suffered from Alzheimer's Disease.
- ▶ O'Neill was Hopkins' agent under a durable power of attorney.
- ▶ Hopkins was receiving Medicaid benefits.
- ▶ O'Neill managed Hopkins' income and paid her bills.
- ▶ January 22, 2007 - Hopkins was admitted to Manahawkin.



## Admissions Package

- ▶ O'Neill signed the Responsible Party section of Manahawkin's Admission Agreement, which designated O'Neill as the Responsible Party for purposes of processing Hopkins' bills, and set forth remedies in case of a default of that obligation.
- ▶ O'Neill did not sign the Private Pay Guarantor section of Manahawkin's Admission Agreement, which required the Responsible Party to guarantee payment of Hopkins' bills.
- ▶ Manahawkin provided O'Neill with a Resident's Bill of Rights form, which stated that O'Neill was not required to guarantee payment from her own assets.



## Manahawkin's Collection Letter

- ▶ On March 26, 2009, David Goldberg, from Manahawkin's Collection Department, wrote a letter to O'Neill stating that Manahawkin had advised the Collection Department that O'Neill was “the responsible party for [Hopkins], which means that you have the obligation to pay any debts owed by this resident to the facility.”
- ▶ Manahawkin's Collection Letter advised O'Neill of the \$878.20 balance “owed to the facility on this resident[']s account,” and demanded a prompt response from O'Neill.



## Manahawkin's Collection Letter (cont.)

- ▶ Mr. Goldberg wrote that O'Neill's failure to contact Manahawkin to arrange payment “will leave us no choice but to proceed with legal action against you as the responsible party,” and that Manahawkin would sue O'Neill “for the monies due with [accrued] interest plus court costs and legal fees.”
- ▶ Mr. Goldberg added that O'Neill would be “reported to the credit rating agencies,” and that his letter was the only notice that she would receive “prior to the commencement of legal proceedings.”



## 8 Days Later ... Manahawkin Files Suit

- ▶ On April 3, 2009, Manahawkin's Complaint is filed in the Special Civil Part seeking \$878.20.
- ▶ Manahawkin's Complaint named O'Neill as the sole defendant.
- ▶ Manahawkin's Complaint did not assert a claim against Hopkins' estate.
- ▶ Manahawkin's Complaint was signed by Mr. Goldberg, who was referred to as Manahawkin's representative.



## O'Neill's Pleadings

- ▶ In her individual capacity, O'Neill denied Manahawkin's allegations, including the allegation of an outstanding balance on her mother's account, and contended that “[d]efendant does not personally guarantee the debts and liabilities of the resident.”
- ▶ O'Neill also filed a counterclaim and third party complaint in her fiduciary capacity as the executrix of Hopkins' estate asserting various statutory and common law claims, including claims that the Admission Agreement violated the NHA, the CFA and the TCCWNA.
- ▶ All of O'Neill's affirmative claims were tethered to the allegation that Manahawkin violated the NHA.



## Transfer to Law Division

- ▶ The matter was transferred to the Law Division.
- ▶ In September 2009, Manahawkin voluntarily dismissed its claims with prejudice.
- ▶ The Parties both filed motions for summary judgment related to O'Neill's affirmative claims.



## Manahawkin's Intention?

- ▶ O'Neill alleged that Manahawkin's Complaint was an effort to press O'Neill to personally pay the outstanding balance on Hopkins' account.
- ▶ Manahawkin contended that Manahawkin's Complaint was an effort to compel O'Neill to exercise her control over Hopkins' assets, including Hopkins' final Social Security payment, to pay off Hopkins' account balance.





## Manahawkin's Complaint

- ▶ Manahawkin's Complaint was captioned in less than an articulate fashion.
- ▶ Manahawkin's Complaint should have identified the defendant as the Estate of Elise Hopkins rather than as Ms. O'Neill.
- ▶ The fact that Manahawkin's Complaint did not identify the correct defendant was deemed by the trial court to be "a matter of semantics."



## Trial Court's Findings / Rulings

- ▶ The Responsible Party section of Manahawkin's Admission Agreement did not compel O'Neill, as Responsible Party, to assume personal liability for Hopkins' contractual obligation.
- ▶ O'Neill did not sign the Private Pay Guarantor portion of the Admission Agreement.
- ▶ O'Neill received the Resident's Bill of Rights form, which explicitly disclaimed any third-party guarantee.



## Trial Court's Findings / Rulings (cont.)

- ▶ The Collection Letter only sought to compel O'Neill to pay the balance from Hopkins' funds, not O'Neill's personal funds.
- ▶ Manahawkin's Complaint was poorly drafted.



## Trial Court's Findings / Rulings (cont.)

- ▶ Manahawkin was constrained by the NHA, and Manahawkin's Admission Agreement, from seeking to collect O'Neill's personal assets as payment for Hopkins' care.
- ▶ All parties understood that Manahawkin's Complaint sought to compel O'Neill to assist Manahawkin's effort to collect Hopkins' assets in payment of the amount allegedly owed to Manahawkin.
- ▶ Manahawkin did not violate the NHA because they did not seek to collect O'Neill's personal assets.



## Appellate Division's Findings / Rulings

- ▶ O'Neill appealed. The Appellate Division affirmed.
- ▶ Federal and state law barred Manahawkin from legally requiring O'Neill to use her personal assets to satisfy Hopkins' obligations.
- ▶ Concurred with trial court holding that Manahawkin did not expressly nor implicitly attempt to collect O'Neill's personal assets in payment of Hopkins' account.



## Appellate Division (cont.)

- ▶ Manahawkin did not violate the NHA because they were entitled to seek payment from O'Neill as the Responsible Party, and pursued such payment in a lawful manner.
- ▶ Since Manahawkin did not violate the NHA, O'Neill failed to prove unlawful conduct to satisfy the CFA's threshold requirement.



## Finally – The Supreme Court

- ▶ O’Neill appealed. The Supreme Court held dismissal of O’Neill’s claims was proper because Manahawkin’s Admission Agreement imposed no requirements on O’Neill that contravened the NHA.
- ▶ N.J.S.A. 30:13–3.1(a)(2) defines the scope of the agreement that a nursing home can require a “Responsible Party” with legal access to a resident's income or resources to execute as a condition of the resident's admission at or retention by a Medicaid or Medicare-certified nursing home.



## Amicus Curiae - Legal Services

- ▶ Amicus Curiae Legal Services of New Jersey (LSNJ) asserts that in an effort to circumvent the NHA, nursing homes routinely create third-party liability for costs incurred by residents covered by Medicaid and Medicare by designating “Responsible Parties” in admission agreements, and pursuing those parties personally for residents' unpaid bills.





## Alleged Violations of NHA

- ▶ O'Neill's NHA claim was premised on three alleged violations:
  - ▶ 1. Manahawkin's Admission Agreement required that O'Neill spend her personal funds to pay Hopkins' bills;
  - ▶ 2. Manahawkin's Collection Letter constituted an attempt to coerce O'Neill into using her own assets to pay the final bill, and
  - ▶ 3. Manahawkin's Complaint improperly sought a remedy against O'Neill in her individual capacity.



## Supreme Court's Findings / Rulings

- ▶ Manahawkin's Collection Letter was inartfully drafted and devoid of important details.
- ▶ Manahawkin's Collection Letter did not purport to assert rights on Manahawkin's behalf beyond those set forth in the Admission Agreement, and authorized by the NHA.



## Supreme Court's Findings / Rulings (cont.)

- ▶ Manahawkin's Complaint was an action to enforce the Admission Agreement.
- ▶ Manahawkin's Complaint was similarly imprecise and lacking in detail.
- ▶ Manahawkin's Complaint was improperly pled, and the cause of action was not defined in sufficient detail.
- ▶ Manahawkin's Complaint made no distinction between O'Neill's potential liability as a fiduciary, and her potential personal liability for Hopkins' bills.



## Supreme Court's Findings / Rulings (cont.)

- ▶ Manahawkin's Complaint included no allegation that the Admission Agreement required O'Neill to use her personal funds to pay Hopkins' bills.
- ▶ Manahawkin's Complaint should have made clear that its claim for Hopkins' account balance was either asserted against O'Neill in her fiduciary capacity as Executrix of Hopkins' estate, or against O'Neill individually based solely upon her contractual obligation to arrange for the payment of Hopkins' bills.



## Supreme Court's Findings / Rulings (cont.)

- ▶ Manahawkin's Admission Agreement's definition of "Responsible Party," does not suggest that the Responsible Party commits his or her personal assets to pay for the resident's care.
- ▶ Likewise, Manahawkin's Admission Agreement's provision addressing the Responsible Party's role in the payment of resident's obligations does not suggest that the Responsible Party commits his or her personal assets to pay for the resident's care.



## Supreme Court's Findings / Rulings (cont.)

- ▶ The Resident's Bill of Rights form confirms that neither party to the Admission Agreement intended that O'Neill's personal assets would be used to pay Hopkins' nursing home bills.
- ▶ O'Neill's suggestion that her assets were at risk by virtue of her execution of the Admission Agreement is belied by the Resident's Bill of Rights form.
- ▶ Manahawkin's Complaint did not improperly target O'Neill's personal funds, and dismissal of O'Neill's NHA claim was proper.



## Section V - Dicta

- ▶ Although Manahawkin did not violate the NHA, TCCWNA or CFA, Manahawkin's Admission Agreement, Collection Letter, and Special Civil Part complaint failed to adequately set forth the respective rights and duties of the parties.
- ▶ In the Admission Agreement, Manahawkin should have explained to O'Neill the specific obligations that may be imposed upon a Responsible Party, consistent with the NHA, and the remedies available to Manahawkin in the event of a default of those obligations.



## Section V - Dicta

- ▶ Manahawkin accurately summarized the relevant NHA provision in its Resident's Bill of Rights form, and should have incorporated similar language in the contract itself.
- ▶ Manahawkin's Admission Agreement would have better served both parties had it specifically addressed the status of a Responsible Party who acts on behalf of a resident in a Medicaid or Medicare-certified nursing home.





## Section V - Dicta

- ▶ Manahawkin's Collection Letter and Complaint failed to clearly articulate Manahawkin's legal rights.
- ▶ Manahawkin's Collection Letter provided only a partial explanation of Manahawkin's potential cause of action against O'Neill.
- ▶ Manahawkin did not explain to O'Neill what it later represented to the trial court: that Manahawkin intended to demand nothing more than that Hopkins' account balance be paid by O'Neill in her fiduciary capacity, using the assets of Hopkins' estate under her control.



## Section V - Dicta

- ▶ Manahawkin's Complaint was similarly sparse and unclear.
- ▶ Manahawkin's Complaint neither alleged O'Neill's control over Hopkins' assets nor pled a cause of action against O'Neill in her fiduciary capacity.
- ▶ Manahawkin's decision to utilize the services of a non-lawyer to draft its collection documents did not obviate the need for those documents to properly identify the defendant and to define the legal right that the nursing home sought to vindicate.



## Section V - Dicta

- ▶ “We urge counsel for this important industry, serving elderly and disabled residents and their families, to ensure that nursing home contracts are prepared—and collection practices conducted—in a manner that fosters a clear understanding of each party's rights and remedies as it complies with the law.”
- ▶ Has anything changed in the last 8 years?



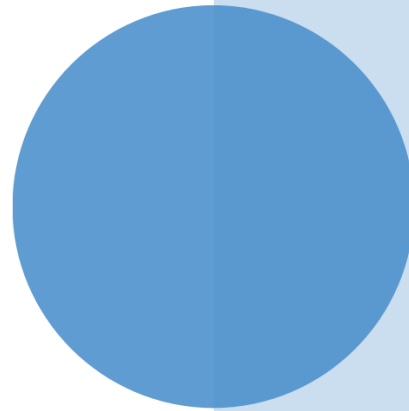
## “Help me, help you!”

- ▶ Facts help drive the outcomes of Responsible Party cases.
- ▶ I hope you learn something that helps one of your clients.
- ▶ Goal #1 - avoid litigation for your clients.
- ▶ Goal #2 - help your clients establish the best facts possible.



Thank you for the privilege of sharing your time with me. Please feel free to contact me if you have any questions. My contact information is below:

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## About the Panelists...

**Dana E. Bookbinder**, Certified as an Elder Law Attorney by the ABA-accredited National Elder Law Foundation, is the founder and Managing Attorney of Bookbinder Law, LLC in Marlton, New Jersey, where she helps clients protect their beneficiaries and finances through proactive planning for long-term care expenses as well as through legal tools including Wills, Living Wills, Powers of Attorney, Special Needs Trusts, and guardianship applications.

Admitted to practice in New Jersey and Pennsylvania, Ms. Bookbinder is Co-chair of the Camden County Elder and Disability Law Committee and Past Chair of the New Jersey State Bar Association's Elder and Disability Law Section and the Burlington County Real Estate and Probate Committee. She is a member of the National Academy of Elder Law Attorneys (NAELA) and its New Jersey Chapter. She previously served as a defense department researcher for the Pentagon's Office of the Chief Attorney and editor of the NJSBA Elder Law Section's newsletter.

Ms. Bookbinder has authored articles on asset, estate and tax planning, veterans benefit planning, and elder law activism in New Jersey in publications including the *New Jersey Law Journal* and *NAELA News*. Listed in *The National Registry of Who's Who*, she lectures to civic and retirement groups as well as financial and legal professionals, regularly serves as a panelist for ICLE programs and has discussed planning for seniors on radio and television.

Ms. Bookbinder received her B.A., with distinction, from Cornell University and her J.D. from the George Washington University Law School. She is also a former New Jersey Superior Court law clerk.

**Donald F. Browne, Jr.** practices with the Rothkoff Law Group in Cherry Hill, New Jersey. He is a litigator who focuses his practice primarily in estate litigation, abuse and neglect litigation against nursing homes, and the defense of collection actions filed against the families of nursing home residents.

Admitted to practice in New Jersey and Pennsylvania, Mr. Browne is a member of the New Jersey State and Camden County Bar Associations, and serves on the Elder and Disability Law Section of the former Association. He is also a member of the American Association for Justice (AAJ), the New Jersey Association for Justice (NJAJ), the National Academy of Elder Law Attorneys (NAELA), NAELA-NJ and the National Consumer Voice for Quality Long-Term Care. He has lectured on litigation issues for NAELA-NJ and the New Jersey State and Camden County Bar Associations.

Mr. Browne received his B.A. from Villanova University and his J.D. from Rutgers University School of Law-Camden.

**Pamela A. Quattrone, MBA**, Certified as an Elder Law Attorney by the ABA-accredited National Elder Law Foundation, is a Partner in Rice & Quattrone, P.C. with offices in Cherry Hill and Linwood, New Jersey. She concentrates her practice in estate, tax and long-term care planning; estate administration; guardianship; and litigation related to these areas. She has experience

drafting several estate planning instruments, including Wills, trusts, durable powers of attorney and advanced directives for health care.

Admitted to practice in New Jersey and Pennsylvania, and before the United States District Court for the District of New Jersey, Ms. Quattrone has been a member of the New Jersey State, Gloucester County and Camden County Bar Associations, and the National and New Jersey Academies of Elder Law Attorneys. She has been a contributor to FamilyAffaires.com, an online resource which provides expert content to families in transition, and is the author of “The Potential Pitfalls of Giving Away Your Assets” and “Time Share Headaches: What Happens to My Time Share When I Die?” She has lectured for community organizations.

Ms. Quattrone received her B.S. from Rowan University, her M.B.A. from the University of Denver Daniels College of Business and her J.D. from the University of Denver Sturm College of Law. During law school she was an editor of the *Transportation Law Journal* and an Honors Law Intern for the United States Securities and Exchange Commission’s Central Regional Office in Denver, Colorado.