

## The Supplemental/Special Needs Trust:

By Gerald R. Tarutis, Esq.

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### An Effective Estate Planning and Living Trust Tool to Benefit People with Mental Illnesses Receiving Medicaid or Supplemental Security Income or Both

#### Introduction

For many people with severe and persistent mental illnesses, full-time employment is not a viable option. As a result, many of these individuals rely on the two main Social Security programs, Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI). In most states, an individual receiving SSI will automatically also receive Medicaid. Medicaid is a healthcare insurance program that covers the cost of medications and treatment. Without Medicaid, the cost of medications or treatment or both for most people with severe mental illnesses would be far beyond their means.

Both SSI and Medicaid are “needs based” programs, meaning that, to qualify, individuals must show that they have limited income, resources, or savings. An individual with more than \$2,000 savings during any one month would not be eligible for coverage in either program. Consequently, it is extremely important that Medicaid recipients not possess or receive large sums of money. How can family and friends provide financial support to their loved ones without adversely affecting their eligibility for either Medicaid or SSI? The answer is creating a supplemental or

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We invite your questions or comments!

We also welcome any articles or story ideas. Contact us at NAMI, Attention: Maria Carrasco, 2107 Wilson Blvd., Suite 300, Arlington, VA 22201 or at maria@nami.org or ronh@nami.org

Dear Friends and Colleagues:

NAMI is a grassroots organization of families, consumers, and others dedicated to self-help, support, education and advocacy to improve the lives of people with severe mental illnesses. Our membership is made up of more than 220,000 members and 1,200 state offices and local affiliates nationwide.

We are pleased to share with you information about some of our Legal Center's projects. They are designed to better serve the legal needs of NAMI members and to provide valuable resources and support to lawyers and others. We continually seek opportunities to improve the unfortunate discriminatory policies, laws, and court decisions that all too often create hardship for people with serious mental illnesses.

#### NAMI's Lawyer Referral Panels

Our Legal Center operates two lawyer referral panels for NAMI members and others across the country interested in obtaining legal representation. Our general lawyer referral panel attempts to link people seeking legal representation on a variety of issues with lawyers on our referral panel, which currently has about 200 lawyers who specialize in civil and criminal law. We also recently created a second panel for elder law and estate planning lawyer referrals.

**NEW - Elder Law and Estate Planning Lawyer Referral Panel:** The NAMI Legal Center receives many requests from NAMI members and others for information about estate planning for their loved ones with severe mental illnesses. Often families request a referral to a lawyer to represent them as they create a will or special needs trust (SNT). We consequently developed a specialized elder law and estate planning lawyer referral panel.

In January 2001, we announced our lawyer referral panels in the legal section of the NAMI Web site. We also announced the panels in the spring 2001 issue of the *NAMI Advocate*, which is sent to all NAMI members, mental health professionals, and other interested parties nationally. Those announcements generated an incredible number of requests for lawyer referrals from our members and others. Based on this demand, we intend to significantly expand our lawyer referral panels. Lawyers interested in serving on our elder law and estate planning or general lawyer-referral panels or both should visit the NAMI Web site at [www.nami.org](http://www.nami.org) for further information. Select the “Advocacy” category and click on “Legal” when the cascade menu appears.

Also, lawyers interested in NAMI and its grassroots advocacy and programs designed to improve the lives of people with severe mental illnesses should consider a professional membership in NAMI by joining as a **NAMI Legal Partner**. Please visit the NAMI Web site and click on “Join NAMI” for more information.

#### New Web-site design for the NAMI Legal Center

In January 2001, NAMI unveiled a new design for its award-winning Web site. At the same time, our Legal Center launched a new design and updated content for the legal section to better serve lawyers, our members, and the public. Please visit the legal section of the NAMI Web site to learn more about our projects.

#### New Publication on Legal Rights and Advocacy Strategies in Managed Care Systems

The NAMI Legal Center has just published *Legal Protections and Advocacy Strategies for People with Severe Mental Illnesses in Managed Care Systems*, which provides an overview of legal issues in public- and private-sector managed care systems. A copy of the publication will be mailed to lawyers participating on NAMI's lawyer referral panel, and it is available to others on the NAMI Web site [www.nami.org](http://www.nami.org). (Select the “Advocacy” category and click on “Legal” when the cascade menu appears.)

#### NAMI's Law & Science Center

NAMI recently created a Law & Science Center to advocate for unrestricted access to medications for people with severe mental illnesses. The center provides technical assistance with clinical, legal, and health economics issues to lawyers representing people with mental illnesses or their families in pertinent cases and focuses on linking lawyers with information, materials, and experts needed to advance their cases and consumers' access to medications. Please contact us at [legal@nami.org](mailto:legal@nami.org) if you are interested in the technical assistance provided by our center. Please include “Law and Science Center” in the subject line of your email message. You may also call the NAMI Legal Center at 703-524-7600.

As always, we invite your comments or questions. Send them to the attention of Maria Carrasco, NAMI Legal Center, 2107 Wilson Blvd., Suite 300, Arlington VA 22201. You may also call 703/524-7600 or email [legal@nami.org](mailto:legal@nami.org).

We also welcome articles or ideas for articles for the NAMI Legal Letter and extend a special thank-you to the lawyers who contributed articles to this issue, – Gerry Tarutis, Marcia Boyd, Suzanne Schwartz, and Stephen Rosenfeld.

Sincerely,  
Darcy Gruttadaro, NAMI Senior Attorney  
Editor

# On the Basis of Unwarranted Assumptions: Mistreatment of Individuals with Mental Illnesses in Massachusetts

By Suzanne L. Schwartz, Esq., and S. Stephen Rosenfeld, Esq.

*Editor's note: The majority of the federal appeals courts have issued decisions upholding the legality of long-term disability and other types of insurance plans that single out policyholders with mental illnesses for discriminatory treatment. Those courts have held that discriminatory coverage in long-term disability plans for individuals with mental illnesses does not violate the Americans with Disabilities Act (ADA) because the ADA was intended to target differential treatment of people with disabilities and those without a disability. In light of those unfavorable decisions, the lawyers who wrote this article filed lawsuits in state and federal courts challenging long-term disability policies on behalf of individuals with mental illnesses with legal theories that have not previously been tested. This article summarizes their successes to date.*

## Introduction

“You have to come forward with some basis, some rational basis, don't you?” a federal judge recently asked an attorney for the Commonwealth of Massachusetts. She was defending a state policy that provides continuous disability benefits to state employees who have a mental disability and are institutionalized, while cutting off benefits to non-institutionalized employees with a mental disability after one year. Long after that oral argument, which led the court to deny the state's motion to dismiss, this deceptively simple question continues to be the fundamental touchstone of the case being developed by lawyers for Valjeanne Currie, the plaintiff whose schizophrenia is keeping her from the state position she held for fourteen years. There are two cases going forward on Ms. Currie's behalf. The first filed in federal district court raises federal constitutional and statutory issues. The other filed in state superior court raises the cognate state issues. Inevitably, in 2001 the judges hearing these two cases will decide, perhaps for the first time in this country, whether it is rational to provide disability benefits to employees with a mental disability who are hospitalized while denying benefits to employees with a mental disability who are in all respects the same, except that they live outside the walls of a hospital.

Long-term disability benefits provide essential income to individuals who cannot work because of their disability. For most employees in this country, long-term

disability insurance is an important supplement to Social Security Disability Income (SSDI) when disability occurs. For Massachusetts state employees, long-term disability insurance sold through the state is the only source of disability income because the commonwealth as employer has chosen to opt out of the Social Security system. When the state chooses to leave a class of persons with disabilities out of the benefits picture, it is delivering a serious blow, which should require a focused and rational basis for the decision. Unfortunately, the decision in Massachusetts to cut off disability benefits to non-institutionalized state employees with a mental disability has been an offhand one, made without any serious analysis and on the basis of unwarranted assumptions that have long been discredited in the treatment of people with mental illnesses.

As advocates and consumers know and the Surgeon General's Report on Mental Illness, published this year, confirms, the most effective treatment for people with mental illnesses takes place as close to their home environment as possible. If they are placed in institutions, regression is virtually inevitable.<sup>1</sup> Valjeanne Currie is attempting to show that the state has put her in a catch-22 situation: she is struggling to live within her community to increase the likelihood of improving her health, but she can only do so

if her disability benefits continue. If the benefits are cut off, she will be forced into an institution and will likely suffer great harm. Ironically, under Massachusetts policy as devised by the state's Group Insurance Commission (GIC), her disability benefits will resume and continue only as long as she remains in an institution. The policy of the GIC to provide disability benefits only when an individual with a mental illness is institutionalized does little to help the people it is designed to benefit. This is the situation that prompted the federal judge to query the Commonwealth of Massachusetts on its ability to come forward with a rational basis for that policy.

Cases in which people with mental illnesses have argued that it is discriminatory and a violation of the Americans with Disabilities Act (ADA) to provide long-term disability benefits for mental illnesses for a short duration (usually 18 to 24 months) while providing long-term disability benefits for other physical illnesses until age 65 have by-and-large failed. Courts have nearly uniformly decided in favor of employers and insurers and held that the ADA was intended to target differential treatment of people with a disability and those without a disability. Distinctions among disability categories (individuals with mental illnesses vs. individuals with other physical illnesses) have

<sup>1</sup> See *Mental Health: A Report of the Surgeon General*. Rockville, MD: U.S. Department of Health and Human Services 3,6-7,18,22,79-80,99,275,283-294,341, 343,370-374, 455 (1999).

# Supreme Court Limits Rights Under ADA

By Ron Honberg, J.D., NAMI Deputy Executive Director for Legal Services

On February 21, 2001, the U.S. Supreme Court, by a five-to-four majority, ruled that the 11th Amendment of the U.S. Constitution bars private individuals from filing employment discrimination lawsuits seeking monetary damages from states under the Americans with Disabilities Act (ADA). The court's decision in *Board of Trustees of the University of Alabama v. Garrett*<sup>1</sup> is the latest in a series of decisions by the court striking down federal statutes or portions of federal statutes as violating states' rights. While limited only to Title I of the ADA, the court's decision in *Garrett* gives rise to questions about whether the court will rule similarly when faced with a case addressing the rights of individuals to sue states under Title II of the ADA.

The Eleventh Amendment of the U.S. Constitution limits the ability of Congress to enact laws giving individuals the right to sue states. "*The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State, without the State's consent.*" On its face, the Eleventh Amendment immunity appears to apply only to lawsuits filed against a state by citizens of a foreign state. However, it is well settled in law that Eleventh Amendment immunity applies as well to lawsuits filed against a state by one of its own citizens.<sup>2</sup>

The sovereign immunity of states created by the 11th Amendment is not absolute, however. It has long been recognized that the U.S. Congress has the power to enact laws abrogating this immunity. Nevertheless, the Supreme Court in recent years has issued a series of decisions that have sharply cut back

on the power of Congress to enact laws abrogating Eleventh Amendment immunity.<sup>3</sup> The decision in *Garrett* is the latest in this line of decisions.

## The Facts in *Garrett*

Plaintiff/respondent Patricia Garrett was employed as director of nursing for the University of Alabama hospital in Birmingham. In 1994, she was diagnosed with breast cancer and underwent treatment, including chemotherapy and radiation. During her treatment, she was compelled to take substantial leave from her job. When she returned from leave, she was told that she could no longer be director of nursing, and she subsequently transferred to a lower-level position.

Plaintiff/respondent Milton Ash was employed as a security officer for the Alabama Department of Youth Services. Diagnosed with chronic asthma and sleep apnea, Ash requested certain modifications to his duty to avoid exposure to carbon monoxide and cigarette smoke. He also requested transfer to a daytime shift. None of these requests were granted. Both Garrett and Ash filed lawsuits seeking monetary damages under the ADA. The District Court granted the state's motion for summary judgement, holding that Congress did not validly abrogate the Eleventh Amendment sovereign immunity of states in enacting the ADA.<sup>4</sup> The U.S. Court of Appeals for the 11th Circuit reversed.<sup>5</sup> The Supreme Court granted *certiorari* to resolve a split among the Federal Circuits on this issue.

## The Decision in *Garrett*

The Supreme Court has recognized that Congress may enact laws abrogating the sovereign immunity of states under the Eleventh Amendment when it does so pursuant to its authority to enforce the due process and equal protection guarantees set forth in the Fourteenth Amendment.<sup>6</sup> But the court has stated that it is the province of the court, not Congress, to determine whether congressional legislation falls within the limits of Section 5 of the 14th Amendment. Proponents of the legislation must show that there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>7</sup>

In *Garrett*, the majority applied a two-step "congruence and proportionality" analysis.<sup>8</sup> First, it analyzed the scope of the constitutional right at issue. In so doing, it turned to its 1985 decision in *Cleburne v. Cleburne Living Center*.<sup>9</sup> The *Cleburne* case involved an equal protection challenge to a restrictive zoning ordinance applied to group homes for persons with mental retardation. The *Cleburne* court rejected the Court of Appeal's classification of persons with mental retardation as a "quasi-suspect" class, and held that the appropriate standard for reviewing equal protection challenges by persons with disabilities was the minimum "rational basis" review generally applicable to "social and economic legislation."<sup>10</sup> Under rational basis review, an allegedly discriminatory policy or practice does not rise to the level of a violation of the equal protection clause "if there is a rational

<sup>1</sup> 121 S. Ct. 955 (2001).

<sup>2</sup> *Hans v. Louisiana*, 134 U.S. 1 (1890).

<sup>3</sup> See, e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (Congress does not have the power under Article I of the Constitution to abrogate the 11th Amendment immunity of States; *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down Religious Freedom Restoration Act as not appropriate legislation not appropriate legislation within the meaning of Section 5 of the 14th Amendment); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 2219 (1999) (holding that Patent and Plant Variety Protection Clarification Act is not a proper exercise of Congress' powers under Section 5); and *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000) (holding that the Age Discrimination in Employment Act does not validly abrogate the sovereign immunity of states under the 11th Amendment).

<sup>4</sup> *Garrett v. Board of Trustees of the University of Alabama*, 989 F. Supp. 1409,1410 (ND Ala. 1998).

<sup>5</sup> *Garrett v. Board of Trustees of the University of Alabama*, 193 F. 3d 1214 (11th Cir. 1999).

<sup>6</sup> This authority is set forth in Section 5 of the 14th Amendment, which states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

<sup>7</sup> *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

<sup>8</sup> The decision of the five Justice majority was authored by Chief Justice Rehnquist and joined by Justices Kennedy, O'Connor, Scalia and Thomas.

<sup>9</sup> 473 U.S. 432 (1985).

<sup>10</sup> *Id.* at 446. The Court in *Cleburne* appeared to be concerned that if it applied a "quasi-suspect" status to persons with mental retardation, it would have to do the same for all people with disabilities. "If the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . , it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others . . . . One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm." *Id.* at 445-446. (Emphasis added).

relationship between the disparity of treatment and some legitimate governmental purposes.”<sup>11</sup> In effect, the court in *Cleburne* was saying that people with disabilities are no more susceptible to discrimination than anyone else and therefore not in need of heightened protections under the equal protection clause.

The second step in the court’s analysis was to evaluate whether the legislative record of the ADA demonstrated a “history and pattern of unconstitutional employment discrimination by the States against the disabled.”<sup>12</sup> Presumably, the court viewed the burden on the plaintiffs/respondents to demonstrate such a pattern as high because of the standard established in *Cleburne*. The court concluded that this burden was not met here and explained that the legislative history of the ADA “simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.”<sup>13</sup> The court therefore reversed the decision of the Eleventh Circuit Court of Appeals, holding that Congress did not validly abrogate the Eleventh Amendment immunity of states to employment discrimination lawsuits filed by individuals seeking money damages for violations of the ADA.

Justice Breyer, joined by Justices Ginsburg, Souter, and Stevens, wrote a dissenting opinion. The dissent argued that the majority had imposed a greater burden on Congress to justify the application of specific provisions of the ADA to states than had been applied in previous cases considering the applicability of civil rights statutes to the states. “In reviewing § 5 legislation, we have never required the sort of extensive investigation of each piece of evidence that the Court appears to contemplate.”<sup>14</sup> For

example, in *Katzenbach v. Morgan*, the Supreme Court upheld a federal statute abolishing literacy tests as a qualification for voting and held that evidence of discrimination against Puerto Ricans in non-voting areas supported the application of this statute to the states.<sup>15</sup> Similarly extensive evidence of generalized and unnecessary disability-based discrimination by state and local governments collected by a congressionally appointed taskforce immediately prior to the enactment of the ADA justifies the application of the employment-discrimination provisions of that law to the states.<sup>16</sup>

The dissent also took the majority to task for placing the burden of proof on Congress to justify application of the ADA to the states. The dissent emphasized that Congress is far better positioned to engage in fact-finding than the courts. Thus, the courts should grant deference to legislative choices made by Congress pursuant to such fact-finding efforts. “Unlike the Courts, Congress can easily gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy.”<sup>17</sup>

### Analysis and Conclusion

It is important to recognize that the decision in *Garrett* applies only to lawsuits filed by individuals seeking monetary damages against states for violating the employment-discrimination provisions of Title I of the ADA. The decision does not apply to lawsuits filed against states under Title II of the ADA.<sup>18</sup> Additionally, the *Garrett* decision does not preclude the United States, acting in its enforcement capacity, from seeking monetary damages from states for violations of Title I of the ADA. Finally, *Garrett* does not bar private individuals from pursuing injunctive relief against states for violations of Title I under *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908).<sup>19</sup>

However, the court’s decision in *Garrett*, when coupled with previous decisions it has issued in Eleventh Amendment cases, raises concerns that it may rule similarly if presented with a Title II case. If such a case is docketed, advocates for persons with disabilities will have their work cut out for them to demonstrate a sufficiently pervasive pattern of state-sponsored discrimination in the non-employment context to justify abrogation of Eleventh Amendment sovereign immunity. The lengthy and well-documented history of state practices such as bars on voting for certain people with mental disabilities, unnecessary segregation of people with disabilities in institutional environments, mandatory sterilization of people with mental retardation, and other similar practices may provide stronger justification for the need for abrogation of sovereign immunity in the non-employment context. Indeed, the Supreme Court recently acknowledged the historical pattern of unnecessarily segregating people with mental disabilities in institutional environments in *Olmstead v. L.C.*, a case decided under Title II.<sup>20</sup> Time will tell if this history meets the Supreme Court’s criteria for abrogation of Eleventh Amendment sovereign immunity.

<sup>15</sup> 384 U.S. 641, 654 (1966)

<sup>16</sup> “From ADA to Empowerment”, Task Force on the Rights and Empowerment of Americans with Disabilities” (Oct. 12, 1990). An extensive list of examples of discrimination by state governments compiled by the Task Force was affixed as an Appendix to the dissent.

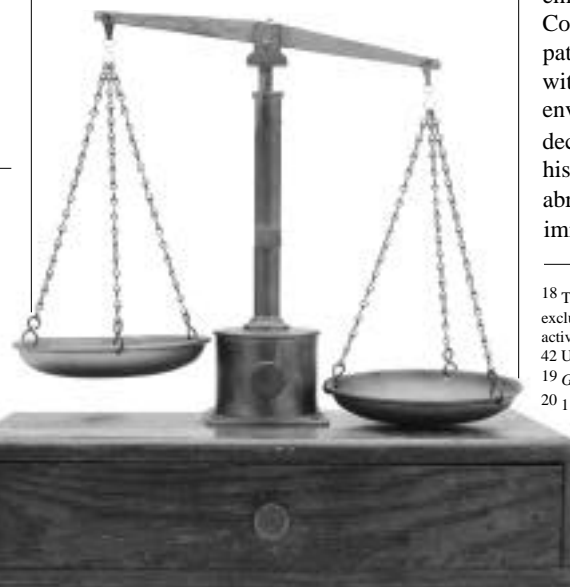
<sup>17</sup> *Garrett*, *Id.* at 292.

<sup>11</sup> *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citing *Nordlinger v. Hahn*, 505 U.S. 1 (1992); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*)).

<sup>12</sup> *Garrett*, *Id.* at 964.

<sup>13</sup> *Id.* at 965.

<sup>14</sup> *Id.* 971.



<sup>18</sup> Title II(A) of the ADA bars State or local governments from excluding or denying the benefits of the services, programs or activities of a public entity to qualified individuals with disabilities. 42 USC § 12132.

<sup>19</sup> *Garrett*, *Id.* at 968, Ft. Nt. 9.

<sup>20</sup> 119 S. Ct. 2176 (1999)

therefore not been held to be actionable under the ADA in nearly all of the federal circuit courts to date.<sup>2</sup>

The arguments presented in previously decided cases challenging discriminatory long-term disability policies have omitted reference either to the feature of long-term policies that favor institutionalization over community living in the payment of benefits or to the important purpose of the ADA to end the isolation of people with disabilities from the community mainstream. Our approach in the Currie case focuses entirely on these two features and, in so doing, suggests that prior cases that turn on the distinction between persons with mental disabilities and those with other disabilities miss the subtler defect that exposes the irrationality of state and private long-term disability policies.

Almost every long-term disability policy offered in the public and private sectors includes a structural bias in favor of segregating people with serious mental illnesses. This bias takes the form of a policy provision that continues disability benefits for individuals with mental illnesses who reside in an institution while terminating benefits for individuals who often suffer equally from a mental illness, but do not reside in an institution. There is no rational basis for this distinction. Certainly, favoring those who reside in an institution while cutting off the benefits of those who do not does not further the disability program's policy of returning employees to work as soon as possible. State and private employer claims of potentially spiraling costs if the hospitalization restriction were removed have not been supported with any empirical documentation. Ultimately, the outcome of Ms. Currie's case will turn on whether the courts applying state and federal law are willing to treat her claims as *tabula rasa*, untainted by the very different claims (challenging the gross disparity in long-term benefit policies for mental illnesses vs. other physical illnesses by claiming an ADA violation) that have failed to win relief. If they are, there is hope that the end is in sight for the lengthy and unjustified mistreatment of individuals who suffer from mental illnesses, but reside outside an institution.

<sup>2</sup> See *EEOC v. Staten Island Sav. Bank and Guardian Life Insurance Company* and *EEOC v. Chase Manhattan Bank and UNUM Life Insurance Co.*, 207 F.3d 144, 148 (2nd Cir. 2000); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1116-18 (9th Cir. 2000); *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1101-02 (10th Cir. 1999); *Lewis v. Kmart Corp.*, 180 F.3d 166, 170 (4th Cir. 1999), cert. denied, 120 S. Ct. 978 (2000); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 608-10 (3d Cir. 1998), cert. denied, 119 S. Ct. 850 (1999); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1015-19 (6th Cir. 1997) (en banc), cert. denied, 522 U.S. 1084 (1998); *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039, 1044-45 (7th Cir. 1996).

### The Two Currie Cases

Because Ms. Currie has sued a state agency — the GIC — thereby raising both state and federal constitutional and statutory issues, she is forced by the *Pennhurst* decision to bring her claims in two courts.<sup>3</sup> The federal court is considering constitutional claims under the equal protection and due process clauses of the Fourteenth Amendment and a statutory claim under Title II of the ADA. In state court, Ms. Currie has alleged violation of the equal protection and due process clauses, Articles of Amendment CVI and CXIV of the Massachusetts Constitution, Articles I, X and XII of the Declaration of Rights, as a violation of chapter 151B, the state's anti-discrimination statute. Ms. Currie has brought her case on behalf of a class that comprises "former, current and future employees of the Commonwealth of Massachusetts ('Commonwealth'), who are disabled and prohibited by the GIC from receiving Long Term Disability ('LTD') benefits solely because (a) their disability has been classified as mental and (b) they are not confined in a hospital or institution."

Ms. Currie personifies how an irrational policy can have devastating human results. She suffers from schizophrenia, a severe mental illness. Nonetheless, she is fighting for the opportunity to go back to work. She receives daily intensive outpatient treatment for her mental illness and is able to live independently in the community thanks entirely to her disability payments. However, the GIC decreed that she was not entitled to continue receiving LTD payments beyond one year. If her LTD payments had ended as scheduled, in June 2000, she would have faced the imminent threat of losing her home, and she most likely would have been hospitalized.

Finding that Ms. Currie was likely to succeed on her claim, a superior court judge on the eve of cutoff ordered her benefits to be continued.<sup>4</sup> The court found that Ms. Currie is likely to prove there is no rational basis for the distinction made in the LTD plan. The decision builds on the United States Supreme Court's landmark decision in *Olmstead*, which held that "unnecessary institutionalization and segregation from the community at large is 'properly regarded as discrimination based on disability.'"<sup>5</sup>

<sup>3</sup> *Pennhurst v. Haldeman*, 451 U.S. 1 (1981) (which held that the Eleventh Amendment prohibits federal courts from hearing state claims against a state or its agencies absent its consent).

<sup>4</sup> *Currie v. The Hartford Life and Accident Insurance Company, et al.*, C.A. No. 00-1831-H.

### Unwarranted, continued from page 2

The Court's use of the *Olmstead* decision provides a framework for how others bringing actions challenging discriminatory long-term disability policies may wish to proceed. The following is an excerpt from the Superior Court decision applying *Olmstead* to Ms. Currie's case:

Discrimination may be measured by the way an individual is treated. It is not necessary always to compare that treatment against the treatment of another, especially in the area of disability discrimination. Unnecessary institutionalization and segregation from the community at large is "properly regarded as discrimination based on disability." *Olmstead v. L.C.*, 119 S.Ct. 2176, 2185 (1999): In *Olmstead*, mentally disabled patients brought suit against the State of Georgia, challenging their confinement in a segregated environment. Justice Ginsburg, delivering the opinion of the Court, made clear that the plain language of the ADA condemns isolation of the disabled. Id. at 2178, 2186. The Court noted that "the identification of unjustified segregation as discrimination reflects two evident judgments: institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. . . ; and institutional confinement severely diminishes individuals' everyday life activities." *Olmstead v. L.C.*, 119 S. Ct. 2178.

The capping of LTD benefits of non-institutionalized mentally disabled individuals which forces them to become institutionalized may likewise offend Chapter 151B. Under the current LTD Plan, in order to receive needed medical services, non-institutionalized individuals with mental disabilities must, if those disabilities extend beyond one year, relinquish participation in community life they could enjoy if they were given reasonable accommodations.

Here, the GIC and Hartford argue that the LTD Plan discriminates between people with different disabilities, i.e., mental, physical, and they may do that. *Traynor v. Turnage*, 485 U.S. 535 (1988). Currie asserts

<sup>5</sup> *Olmstead v. L.C.*, 119 S.Ct. 2176, 2185 (1999).

that the LTD Plan discriminates against persons with mental disabilities in violation of Chapter 151B because it provides benefits for such persons for only one year unless they are hospitalized. Ultimately, Currie complains that the LTD Plan discriminates between mentally disabled individuals who need institutionalization and mentally disabled individuals who do not, after one year. Forcing people who do not need such a placement to become institutionalized is, under *Olmstead*, illegal discrimination. Id. at 2178.

The Superior Court also found merit in the plaintiff's equal protection attack, and in so doing suggested that the discrimination in this case may offend both the state and federal constitutions' equal protection guarantees. If so, relief will not be limited to Massachusetts state employees. The following is the court's analysis of the equal protection claim:

Generally, analysis of the Massachusetts equal protection guarantee is identical to the Federal equal protection guarantee. *McNeil v. Commissioner of Correction*, 417 Mass. 818 (1994). The equal protection clause safeguards not merely against such classifications due to race, gender and religion, but any arbitrary classification of persons that carries with it unfavorable government treatment. *Murphy v. Commissioner of the Dept. of Industrial Accidents*, 415 Mass. 218, 228 (1993). Thus, the means chosen to effectuate a goal must be the product of reason. If a particular means, although related to a fiscal goal in the sense that it may in a tenuous way save money, is nonetheless lacking in reason, it fails. Id. at 233. "Where the plaintiff demonstrates that a challenged classification lacks any rational basis to a legitimate State interest, we must declare such classification unconstitutional." Id. . . .

In *City of Cleburne v. Cleburne Living Center*, 473 U. S. 432, 446 (1985), the Supreme Court articulated the relevant equal protection standard, pointing out that "even under the lowest standard of court review, the State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." See also *Murphy v. Commissioner of Dept. of Industrial Accidents*, 415 Mass. at

233. Although the Supreme Court ultimately decided that disabled people do not constitute a suspect class in *Cleburne*, it stated clearly that the Equal Protection Clause prohibits irrational discrimination against them. *City of Cleburne v. Cleburne Living Center*, 473 U. S. at 446. Justice Marshall, concurring in the judgment in part, stated that a "more searching inquiry, be it called heightened scrutiny or "second order" rational-basis review, is a method of approaching certain classifications skeptically, with judgment suspended until the facts are in and the evidence considered. The government must establish that the classification is substantially related to important and legitimate objections. . . so that valid and sufficiently weighty policies actually justify the departure from equality." Id. at 472. . . It may be rational, then, as an abstract proposition, for the State to determine that denying LTD benefits to certain classes of people will lower the expense and thereby avoid premium increases. However, creating a policy that encourages institutionalization contemplates an irrational means to that end, in that it is at best attenuated in its relation to the goal, is just as likely to increase costs as to decrease them, and within the context of an LTD policy, undermines the very purpose of the program by making a disabled employee's return to work less likely.

Ultimately, Currie may be able to prove that there is no rational basis for the distinction made in the LTD Plan. It may be that discrimination is embedded in the assumptions that were the basis for the response to the RFP based on industry standards. *City of Cleburne v. Cleburne Living Center*, 473 U. S. at 446; *Rosenberg v. Merrill Lynch Pierce Fenner & Smith*, 995 F. Supp. 190, 197 (1998). An industry standard, in and of itself, does not justify application of a rational basis level of scrutiny simply because an industry continues such practice. *Rosenberg v. Merrill Lynch. Pierce Fenner & Smith*, 995 F. Supp. 190,197 (D. Mass. 1998); *LaChance v. Northeast Publishing Inc.*, 965 F Supp. 177, 186 (D. Mass. 1997).

### Future Litigation

If the reasoning of the Superior Court holds up, the insurance industry's standard practice of excluding long-term disability benefit coverage for individuals with a mental disability who do not reside in institutions after an arbitrary period may see its days numbered. *Currie* offers a new way of showing that built into the fabric of the "industry standard" policy is an archaic, stereotypical belief — prevalent at the time the mental disability limitation was originally imposed — that is antithetical to the principles of equal protection and the ADA.

Decades ago, people with severe mental illnesses were considered truly incapacitated only if they were confined to a mental institution. There was some suspicion that people claiming a mental disability who were able to live in their community were more likely than not either exaggerating their illnesses or they were the good-faith victims of a subjective condition. In such a climate, institutionalization served as a rough guarantor of objectivity in assessment of mental disability. Today, it is well established that such a basis for judgment is irrational. The determinants of whether a person with a mental illness will be institutionalized have nothing to do with whether the person is disabled and therefore unable to work, but are related to such factors as finances, network of family and friends available to provide support, and the availability of outpatient services sufficient to meet their treatment needs.

In future litigation on behalf of people with mental illnesses, it will be essential to use the principles underlying the *Olmstead* decision to prevail, rather than the distinction between a mental and physical disability. As in *Olmstead*, policies and practices that unlawfully premise receipt of benefits on the unnecessary isolation of people with mental illnesses in institutions violate the ADA. The standard insurance-industry provision that requires people with mental disabilities to be institutionalized to receive disability benefits beyond 24 months is just such a policy.

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special needs trust (SNT).

A supplemental or special needs trust is an estate planning and living trust tool for persons with disabilities. The SNT provides funds for goods and services not otherwise available under Medicaid or SSI. A major advantage of a SNT is that it encourages friends and family to provide financial support to a loved one with a disability while it also protects the trust beneficiaries from losing their right to benefits from government programs because of the increased funds. In creating SNTs, the focus should be on protecting assets available to persons with severe mental illnesses while ensuring that they do not jeopardize eligibility for government programs. Consider the specific trust provisions rather than the name of the trust instrument, which may vary from state to state and among estate lawyers.

If a person with a disability does not or will not need Medicaid or SSI, the SNT should not be used. However, because the course of severe and persistent mental illnesses is often difficult to predict, it is sometimes wise to use SNT provisions in a trust as a protective measure. It is helpful to have a frank discussion with the interested parties to ensure that the purpose of the trust creator or grantor is clear. If a person is receiving SSDI or Medicare and is not expected to receive SSI or Medicaid, then a SNT should not be used.

In general, the SNT is an irrevocable trust, usually established by a third party on behalf of a person with a disability under the age of 65. (A limited exception to the "age 65" rule is noted below.) The trust may be funded with gifts from a third party (*a third-party funded trust*) or with the beneficiary's own funds (*a self-settled trust*). Benefits received from the SNT and transfers of assets into the SNT are not considered "available resources" when determining eligibility for Medicaid or Supplemental Security Income. Upon the death of the trust beneficiary, the funds in a self-settled trust are first used to reimburse the government for Medicaid benefits paid during the lifetime of the recipient. Funds in a third-party funded trust and the funds remaining in the self-settled trust (after reimbursement for government benefits) paid to the person are distributed as provided by the trust. The SNT pays for goods and services for the beneficiary that would not otherwise be covered by government programs (such as funds for dental care or education).

The supplemental or special needs trust

(SNT) is authorized by federal law.<sup>1</sup> In addition, some states have enacted legislation that compliments the federal statute<sup>2</sup>. If the language of the trust meets the statutory criteria, the beneficiary who is eligible for Medicaid or SSI can receive payments from the SNT in addition to receiving Medicaid or SSI. It is important to draft the SNT to ensure its funds are used only for goods and services not covered by the government benefits. And most important: any payments from the SNT in excess of \$50 per month **must be made to third parties on behalf of** a Medicaid enrollee/trust beneficiary and **not directly to** the enrollee/beneficiary. A supplemental or special needs trust may make payments to third-party providers on behalf of the trust beneficiary for all goods and services **except** food, shelter, clothing, and medical care covered by Medicaid.

### How To Use Supplemental/Special Needs Trusts

#### Adults under Age 65.

Adults under the age of 65 with severe and persistent mental illnesses, who are unable to work, may use their savings and income to fund a SNT. An individual with a disability may have significant savings or resources or both. However, hospitalization that will not be covered by insurance could quickly exhaust these resources. By transferring assets into a SNT, people with mental illnesses will likely qualify for Medicaid (and possibly SSI) to provide for basic care as they receive additional goods and services paid for by the trust. Simply put, the SNT preserves the individual's assets and provides funds for goods and services not covered by Medicaid or SSI.

The SNT supplements the strictly defined benefits of Medicaid and SSI. The law requires a third party—typically a parent, grandparent, guardian or the court—to set up an SNT. In many states, legislation or court practice permits the court-appointed guardian to establish the SNT. A self-settled trust (funded by the beneficiary) is subject to the payback rule at the death of the beneficiary. The payback rule requires funds that remain in the trust at the death of the beneficiary to be used to reimburse the government for benefits paid during the beneficiary's lifetime. If the SNT is funded by a third party, such as parents or grandparents, then the payback rule does not apply.

<sup>1</sup> 42 U.S.C §1396p(d)(4)(A) and (C)

<sup>2</sup> See E.G. New York EPTL 7-1.12; NY Soc Serv L §360-4.5(b)(5); NY Soc Serv L § 366(2)(b)(2)(iii); and 18 NYCRR §360-4.5(b)(4).

#### Trustees

The SNT trustee can be a social service agency, an individual, or a financial institution. It is sometimes difficult to locate a trustee if family members are unable to assume that role. Social service agencies may be unwilling to serve as a trustee in cases involving individuals with mental illnesses. Also, financial institutions often require a high-minimum trust amount before they will serve as the trustee of a SNT.

#### Gifts by Will

Parents, grandparents, other relatives or friends often wish to make provision in their wills for loved ones with severe mental illnesses who either currently receive, or may later receive, SSI or Medicaid or both. They can create a will that includes a "testamentary SNT" that will be funded when the donor dies. If the person with a mental illness were to receive the bequest or inherited gift outright, he or she would most likely no longer qualify for SSI or Medicaid and be forced to spend the inheritance before being able to reapply for the benefit programs. The inheritance could not then, of course, pay for future needs for goods and services not otherwise covered by the government benefits.

The testamentary SNT is an excellent estate-planning tool to benefit persons with severe mental illnesses. By directing an individual's inheritance in a SNT, that individual can receive supplemental assistance from the trust for goods and services not covered by the government programs, yet also receive the Medicaid or SSI benefits. As a third-party trust, the testamentary SNT is not subject to the payback rule. Consequently, the SNT can also stipulate to whom the remainder funds are distributed at the death of the SNT beneficiary. Increasingly, individuals include trust provisions that donate remainder funds to NAMI.

#### Individuals over Age 65.

Social Security applicants of any age, including those over 65, can benefit from SNTs. When applying for Social Security, the application and appeal processes often take a long time. Applicants for Social Security Disability Income, Supplemental Security Income, or Social Security retirement benefits generally receive a lump-sum payment for benefits accumulated during the application and appeal processes, which is often a substantial award. The law permits Social Security beneficiaries to establish and

fund their own SNTs with the lump-sum award.

The self-funded Social Security SNT may be funded by people of any age, not only those under 65, and it is not necessary for the SNT to be set up by another person. The beneficiary can establish her or his own trust. With a Social Security SNT in some states, benefits must first be used to repay the government benefits provided while an individual waits for an eligibility determination, but benefits received after eligibility are not subject to the payback rule. In other states, there is no requirement that a beneficiary reimburse the government for benefits paid after eligibility<sup>3</sup>.

**The Pooled Supplemental/Special Needs Trust.**

A pooled supplemental/special needs trust can be managed by a not-for-profit organization that combines the contributions of many families into one pooled trust for multiple beneficiaries, thus providing common-investment and management advantages. The pooled trust is an attractive option for families who only have a modest amount to put into a trust for their family member. The not-for-profit organization also benefits by being able to pay for its services in administering the trust from the trust and by receiving some or all of the remainder of the pooled SNT.

A pooled trust allows parents or others to provide for the future needs of someone with a mental illness, even when they do not have enough money to establish a separate trust. They pool their donation with funds held in trust for others in the pooled trust. Funds remaining at the death of trust beneficiaries may be given to the administering organization, and these funds are not subject to payback rules unless they come from a self-funded trust. If they come from a self-funded trust, part of the remainder may be owed to Medicaid before the rest can be paid to remainder-persons, including the organization that administered the pooled trust. However, if all of the remainder funds go to the administering organization, then the pay-back rule does not apply. If any portion of the remainder is paid to a third party, other than the administering organization, then the funds are subject to payback for Medicaid benefits provided to the beneficiary.

Another advantage of the pooled trust is that it can be self-funded by a person of any age with a disability. However, if the self-settlor is over age 65, she or he is subject to

Medicaid’s five-year “look back” period for transfers to trusts and may have to comply with the payback rule.

Pooled trusts are underused. They can be highly beneficial for people with mental illnesses and as a long-term funding option for not-for-profit organizations. NAMI works with members and others to explore the creation of a pooled trust.

**How To Fund the Supplemental/Special Needs Trust**

In general, supplemental/special needs trusts are funded from one of two sources the beneficiary’s funds (self-settled SNTs) or a gift from someone other than the beneficiary (third-party SNTs). An individual can be the beneficiary of both a self-settled trust and one or more third-party-funded trusts.

**Third-party SNTs**

The third-party *inter vivos* (living) and testamentary (trust provided in a will) SNTs are governed by state law<sup>4</sup>. Federal law only governs income and resource-eligibility rules for qualifying for government-benefit programs. Some states, like New York, hold that income and resources in third-party SNTs are not “available” in determining eligibility for government programs, and the federal benefit programs honor that exclusion. In other states, a more informal practice has developed. In either case, it is important to know the applicable state law and any local practices that apply to SNTs.

The language required to draft SNTs varies considerably from jurisdiction to jurisdiction. In some states, there is a statute that includes recommended language for a SNT.<sup>5</sup> It is always best to use model statutory language where it exists. The statutory presumption of donor intent and the language of the SNT become the bases for excluding the trust assets and income when determining Medicaid or SSI eligibility. The New York statute is an example:

The grantor intends that the trust assets be used to supplement, not supplant, impair or diminish, any benefits or assistance of any federal, state, county, city, or other governmental entity for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving.... [EPTL 7-1.12(e)(1)].

Even when there is no model SNT statutory language, the language provided in

other state statutes (like the NY model language) is a helpful starting point.

Under the New York statutory scheme, the beneficiary of the SNT is not required to use or maintain eligibility for government benefits. It is within the discretion of the trustee to decide to use the trust funds instead of government benefits if the “beneficiary’s needs will be better met” and it is in the “beneficiary’s best interests” to do so.<sup>6</sup> In other jurisdictions, this language may be too broad and may run afoul of local practice without statutory guidance. In general, broad trustee discretion is essential to a SNT. Where there is a nonspecific statutory scheme, the person drafting the SNT should rely on local drafting formats.

**Self-settled SNTs**

Both federal and state laws permit self-settled SNTs. New York state law was amended in April 1994 to permit self-settled SNTs<sup>7</sup>. Eligibility for Medicaid and SSI are governed by federal and state law, so applicable state law SNT language must meet both federal and state requirements. In some states<sup>8</sup>, the statutes and regulations incorporate by reference the applicable federal requirements<sup>9</sup>. In other states, there is no specific statutory scheme and it may be wise for the drafter to incorporate the federal statutory provisions by reference.

The Omnibus Budget Reconciliation Act of 1993 (OBRA) specifies the limited circumstances under which transferring one’s own funds into a SNT does not preclude or limit Medicaid eligibility. The three OBRA exceptions are those for adults under age 65 with disabilities, Social Security lump-sum awards funding, and funding pooled trusts.<sup>10</sup> The Medicaid “transfer rules” do not apply, and SNT funds are treated as an “exempt resource.” Income from the SNT need not be used or may be used completely neither will affect eligibility for government-benefit programs. The only caveat is that the trust income and principal must be used for permitted purposes only and not given directly to the beneficiary.

In general, the Medicaid “transfer rules” require transfers of assets by a Medicaid applicant for less than full value within a “look back” period of 36 months (or five years for trusts), to be counted when determining the

<sup>3</sup> New York: EPTL 7-1.12(a)(5)(v).

<sup>4</sup> See E.g.: New York - EPTL 7-1.12.

<sup>5</sup> New York: EPTL 7-1.12(e)(1) and (e)(1) and (2).

<sup>6</sup> New York: EPTL 7-1.12(a)(5)(iii) and (e)(2)(i).

<sup>7</sup> New York: EPTL 7-1.12

<sup>8</sup> NY Social Services Law §366(2)(b)(2); Regulation citation: 18 NYCRR §360-4.5.

<sup>9</sup> 42 USC §1396p(d)(4)(A)

<sup>10</sup> 42 USC §1396p(d)(4)(A).

“penalty period,” which is the period of ineligibility. The length of the penalty period depends on the amount of the gift. However, the Medicaid applicant can transfer funds into the SNT without having the transfer rules apply. There is no penalty period for transfers into a SNT.

In addition to resources, a person’s income must be counted when determining Medicaid or SSI eligibility. SNT earnings are not considered a beneficiary’s income when determining eligibility, and benefits from the SNT income or principal are exempt for eligibility purposes when used as permitted.

The federal statute provides that to qualify as an SNT, the recipient’s parents, legal guardian, or a court must establish the trust; however, the trust can be funded by the beneficiary’s funds or by third-party gifts. Transferring the recipient’s money to the SNT is not considered a transfer for eligibility purposes. Instead, the funds become an exempt asset meaning that they don’t count in the eligibility determination. Transfers into an SNT by a parent or other donor for the benefit of a third party such as a grandchild with a disability under age 65 also do not count as transfers when determining the Medicaid eligibility of the donor. For example, in some states a grandparent can set up a SNT for a grandchild without the money provided for the SNT affecting the grandparent’s eligibility for Medicaid because it is an exempt transfer.

To benefit from the self-settled SNT, the beneficiary must meet the federal disability criteria as follows:

The inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or can be expected to last for a continuous period of not less than 12 months... [42 USC §1382c(a)(3); 20 CFR §§ 404.1505(a)].

**How to Administer the SNT**

The trust beneficiary qualifies for SSI or Medicaid or both by meeting the medical and financial criteria of those government programs. Some individuals qualify for Medicaid, but not SSI. An SSI recipient automatically receives Medicaid. Establishing the SNT does not make someone eligible for SSI/Medicaid. In general, the SNT is used only for people already eligible for these benefits or to financially qualify a person with a disability. If excess assets and income are correctly transferred into the SNT, a person with a disability may then meet the financial criteria for eligibility for these

needs-based government programs.

Establishing and funding an SNT provides additional funds for a person receiving government benefits. Preserving assets for the next generation is not usually practical, given the payback requirements of self-settled trusts.

An SNT can have a tremendous impact on the quality of life of a beneficiary. For example, a supplemental/special needs trust proved extremely beneficial to a middle-aged man with a mental illness who had been hospitalized for most of his adult life. After beginning a new medication, he left the hospital and began working. The SNT provided him with funds to help him set up an apartment, buy special work aids, and secure special services. In another case, an SNT allowed a woman with mental illness to take her first vacation.

Properly established and administered, the SNT allows the trust beneficiary to receive government benefits while providing funds for other items not covered by those benefit programs.

Unlike specifications of Medicaid-eligibility rules, neither SNT income nor principal may be used to benefit other parties, except to pay court-ordered support obligations to a spouse or child. This specification should not be confused with the requirement that payments from the SNT be paid to a provider of goods or services on behalf of the beneficiary.

**Medicaid Rules**

SNT benefits may be used to pay only for items not covered by Medicaid: supplies, services, extra care, equipment, computers, and the like. It is very important that the SNT trustee does not give money directly to the beneficiary. The third-party provider of goods and services must be paid directly from the trust.

Payments may be made from either income or principal to sustain Medicaid eligibility. Consistent with general Medicaid rules, cash payments directly to the beneficiary of no more than \$50 per month are permitted if the total cash received, including the SNT distribution, does not exceed \$50 per month.

**SSI Rules**

Rules governing the use of SNT funds for SSI recipients are more restrictive. The SSI grant is intended to provide “food, clothing and shelter” for the recipient. If these “necessities” are provided by funds

other than the SSI benefit, the benefit may be reduced by one-third<sup>11</sup>. But trust funds may be used for items *other than* food, clothing, and shelter.

In certain cases, a SNT can pay for a beneficiary’s rent and it will not result in a one-third reduction in his or her SSI benefit.

The recipient of Social Security Disability Insurance (SSDI) benefits, does not usually need to create a SNT because there are no financial prerequisites for SSDI eligibility. The only requirement for SSDI eligibility is meeting the standard for disability as defined by federal law and regulations.

Although there are no financial requirements for SSDI eligibility, many SSDI recipients also receive SSI. Because Medicare does not provide coverage for prescription medication and has limited coverage for psychiatric services, the SNT becomes a crucial element for the SSDI recipient to qualify for Medicaid.

**Conclusion**

If assets or income is used to fund the SNT, it becomes an important estate-planning and living trust tool to benefit persons with severe and persistent mental illnesses, especially those under age 65 who are eligible for Medicaid or SSI or both. With proper planning, the SNT can be incorporated into a will or used as part of a living trust to improve the quality of life for people with disabilities without adversely effecting their government benefits.

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<sup>11</sup> 20 CFR §416.1103(g)

## CASENOTES

By Stuart Broad, J.D.  
and  
Darcy Gruttadaro, J.D.

### Arkansas Court of Appeals Reverses and Remands Summary Judgment Decision in Favor of Insurer in Long-term Disability Case

The plaintiff received long-term disability benefits for his bipolar disorder from the First Unum Insurance Company (“Unum”). Those benefits were terminated after 24 months because of a mental illness limitation in the policy. The plaintiff filed a lawsuit against Unum and subsequently filed a motion for summary judgment, arguing that the mental illness limitation did not apply to him because his bipolar disorder was biological in origin. Unum filed a cross motion for summary judgment, arguing that the policy unambiguously excluded benefits for disability due to bipolar disorder beyond 24 months.

The plaintiff included affidavits from two physicians. The first stated that bipolar disorder is a biological condition with a hereditary predisposition in which abnormalities in brain chemistry cause mood disturbances and altered thought processes. The second stated that “there is no longer any reasonable doubt among informed members of the medical community that Bipolar Affective Disorder has a biological origin....” Unum responded with excerpts of deposition testimony from one of the plaintiff’s medical experts and an additional medical expert to show that bipolar disorder is widely viewed as a mental illness with a diagnosis based on behaviors and treatment by psychiatrists. The affidavit also stated that therapy is used to treat the disorder and there are no specific diagnostic markers for mental disorders.

The trial court held that the term *mental illness* was not ambiguous in the policy because the common, ordinary and lay understanding of that term as used in the policy included bipolar disorder. The court granted summary judgment for Unum and upheld the 24-month, long-term disability limitation.

The plaintiff appealed. The issue before the court of appeals was whether or not the mental illness coverage limitation in Unum’s policy (24 months for mental illnesses and until age 65 for physical illnesses) was ambiguous. The court struggled with how to determine whether a disorder should be

classified as a mental or physical illness as a matter of law. The court cited the approaches taken by courts in other jurisdictions in determining whether an ambiguity existed in the policy at issue. Some courts view the cause of the illness as critical in deciding whether the illness is mental or physical. In those cases, policy language that fails to specifically define *mental illness* is considered inherently ambiguous. In other cases, courts have held that when a layperson would view symptoms as indicating the presence of a mental illness, then the coverage limitation is unambiguous. Still other courts have decided that the treatment provided to the insured dictates whether an illness should be viewed as mental or physical.

The court also referenced scientific and medical developments in treating and diagnosing mental illnesses and the difficulty of neatly fitting illnesses into either a mental or physical category. The court ultimately held that the term *mental illness* as defined in the policy is ambiguous because it is susceptible to more than one interpretation. The court remanded the case to allow the trial court to determine whether the plaintiff’s disorder is a mental illness within the meaning of the policy.

*Elam v. First Unum Life Insurance Company, CA 00-316 (Arkansas Court of Appeals, December 6, 2000)*

*Editor’s Note:* NAMI thanks Robert J. Donovan, attorney for the plaintiff/appellant, for sending us a copy of the Arkansas Court of Appeals’ decision. (Mr. Donovan is a principal with the law firm of Daggett, Donovan, Perry & Flowers in Marianna, Arkansas.)

### Massachusetts Supreme Judicial Court Dispenses with Requirement that Mother with Mental Illness Provide Parental Consent for Adoption of Daughter.

The trial court granted the Commonwealth of Massachusetts Department of Social Services (DSS) petition to dispense with a mother’s parental consent to the adoption of her daughter. Her daughter had lived with a foster mother since she was six days old.

The biological mother appealed the decision, arguing that aspects of the finding of unfitness were improperly related to her decision not to take antipsychotic medication for schizophrenia. The Supreme Judicial Court (SJC) transferred the case from the appeals court on its own motion to decide the appeal.

The SJC affirmed the trial court decision to dispense with parental consent to the adoption of the child and vacated the order that allowed post-adoption visitation because of insufficient evidence of a significant bond between the mother and child and the lack of a finding that it was in the child’s best interests.

The mother argued that she faced a “Hobson’s choice” because the DSS service plans required her to take antipsychotic medication—without prior judicial authorization in violation of state laws and the U.S. Constitution—or face the possibility of termination of her parental rights. The SJC agreed that there would potentially be serious concerns with a DSS requirement that she take antipsychotic medication as a condition of her service plans that would ultimately have a bearing on whether her parental rights were terminated. The SJC found that the DSS and lower court determinations of parental unfitness were based on other factors in addition to the mother’s failure to take antipsychotic medications and that the combination amounted to an appropriate finding of the best interests of the child. According to the SJC, the lower court relied on several factors in finding unfitness including the mother’s refusal to comply with

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her treatment plans (including the failure to take her medication); her psychiatric hospitalizations; her rejection of an offer of a supportive-living arrangement; her inability to understand and prioritize her daughter’s emotional needs; and her inability to bond with the girl. On the basis of these multiple factors, the SJC affirmed the lower court’s decision to dispense with the mother’s parental consent to adoption.

*Adoption of Greta*, 729 N.E.2d 273 (Mass.Sup.Jud.Ct. 2000).

**Connecticut State Court Denies Defense’s Motion for Summary Judgment in Duty-to-warn Case.**

Joseph Schlegel murdered his mother within 24 hours of being released to her care by physicians at New Milford Hospital in Connecticut. The mother’s estate sued the hospital and physicians, contending that they had negligently released Schlegel and failed to warn his mother of the danger he posed to her. The physicians and hospital moved for summary judgment. The court denied the motion on the ground that it was reasonably foreseeable that a psychotic and irrational Schlegel might attack his mother because he had fought with and attacked friends and caregivers over the 24-hours preceding his release.

In Connecticut, psychotherapists have a duty to control a client or patient to prevent injury to a third person if the psychotherapist knows or has reason to know that the client or patient will cause harm to a specifically identified victim or a member of a specifically identified class of persons or individuals within the zone of risk of an identifiable victim.

The Court cited two facts in the case that, if proven at trial, could establish the hospital’s or physicians’ duty to control Schlegel to protect his mother from harm. First, the hospital or physicians knew that Schlegel had a very recent history of violent behavior. The night before he came to the hospital, he attempted to choke his

housemate. He struggled violently with the ambulance attendants when they attempted to transport him to the hospital and then with the hospital staff who tried to care for him. Second, he directed his violence toward a narrow class of persons, those who attempted to help him in his psychotic state. His mother belonged to this class of persons. On those grounds, the court denied the hospital’s and physicians’ motion for summary judgment.

*Schlegel v. New Milford Hospital*, 2000 WL 670103 (Conn.Super.Ct. May 9, 2000).

**Court Finds School Board Violated IDEA by Failing to Provide Student with Autism with Free Appropriate Public Education.**

The case involves an eight-year-old student who has autism. Because his communication skills were severely impaired, his parents started a home-based program for him using the Lovaas methodology, a therapy program that assists in the development of children with autism. The parents paid for the program.

The school district developed several individual education plans (IEPs) for the student, none of which included the home-based Lovaas program. The parents challenged the school district’s decision to exclude the program in the IEPs. They also sought reimbursement from the school board for the Lovaas program on the ground that it was necessary for the student’s free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA).

The parents prevailed at the due process hearing. The hearing officer found the school board’s IEPs inadequate and ordered the board to reimburse the student’s parents for the costs of the home-based program.

The school board challenged that decision in federal district court. The court first addressed the issue of which party bears the burden of proving that the IEP is or is not reasonably calculated to provide some

educational benefit. The circuits that have addressed the issue are split. The fourth circuit has not decided the issue. The second, third, eighth, and ninth circuits place the burden on the school district. The fifth, sixth, and tenth circuits place the burden of proof on the party seeking to change the IEP (citations omitted). This court found that the burden of proof rests with the school district.

The school board argued that the student had achieved success in previous school years and that it would be nearly impossible to determine whether the success was attributable to the IEP or the home-based program. The court commented that the school district inappropriately focused on the success of the student. The court provided that the issue of whether the child had or had not made progress was not critical. Instead, the statutory mandate requires the school district to prove that the IEP, when it was created, was reasonably created to provide some educational benefit. The focus of the inquiry must be on the time that the IEP was created. The court ultimately held that the school board failed to meet its burden of proving that the student’s IEPs were reasonably calculated to provide him with a free appropriate public education and consequently had violated its obligations under IDEA.

The court determined that the parents would be entitled to reimbursement for the home-based services if they could prove that the home-based program was reasonably calculated to provide their son with a free appropriate education and directed the parties to submit briefs on that issue.

*The Board of Education of the County of Kanawha v. Michael M.*, 95 F.Supp.2d 600 (S.D.W.Va. 2000).

### **Helpful Legal Web Sites**

**NAMI Legal Center:** [www.nami.org](http://www.nami.org)  
Click on “Advocacy,” then click on “Legal”

**Health Privacy Project:** [www.healthprivacy.org](http://www.healthprivacy.org)  
Current information about federal health privacy regulations

**Social Security Administration:** [www.ssa.gov](http://www.ssa.gov)

**U.S. Supreme Court:** [www.supremecourtus.gov](http://www.supremecourtus.gov)

**Index of ADA settlement agreements and court documents  
organized by state:** [www.usdoj.gov/crt/foia/settlement.htm](http://www.usdoj.gov/crt/foia/settlement.htm)

**Bureau of Justice Assistance:** [www.ojp.usdoj.gov/BJA/](http://www.ojp.usdoj.gov/BJA/)  
Information about criminal justice systems and communities

**Disability.gov:** [www.disability.gov](http://www.disability.gov)

## **The NAMI Legal Department Is Expanding Lawyer Referral Panels**

We receive many requests from our members and others for lawyer referrals. We operate two lawyer referral panels. We first established a general panel and we recently created a second, specialized elder law and estate planning panel.

If you have not already done so, please consider joining one or both of our lawyer referral panels. Visit the NAMI Web site at [www.nami.org](http://www.nami.org) for information. Select the “Advocacy” category, then click on “Legal.” You may also contact our legal department at 703/524-7600.

We welcome your suggestions of other lawyers we should contact to join our lawyer referral panels.