FRIEDLANDER ON POSNER

DELAWARE LAWYER

A PUBLICATION OF DELAWARE BAR FOUNDATION
Volume 18 Number 1 $3.00 Spring 2000

DE SENECTUTE

CONTENTS

Cover photograph by Jane R. Wiggin
Top photograph courtsey of The Milton & Hattie Kutz Home, Inc.

In this the end of both the twentieth century and the second millennium we are completing the most extraordinary hundred years in human history, in which – among other wonders – the life expectancy of Americans has advanced from 47 to 77 years. Progress, yes. But progress begets problems. In October 1998, *Fortune Magazine* interviewed the distinguished economist and social thinker, Peter Drucker. Among his many refreshingly tart observations one in particular stands out and merits repetition: "If you go by what corresponds to age 65 when Social Security began in 1936, the proper retirement age now is 79, given current life expectancy."

The crabby old character on the facing page is no longer one of those fascinating rarities, exciting the curiosity of newspaper reporters. He is a member of a large and ever larger population segment with the pressing needs of geriatric frailty, many of them calling for the skills of our profession. (Hence this issue.) We take this opportunity to congratulate the Delaware State Bar Association's Committe on Law and the Elderly for its leadership in this branch of the law. And many thanks to our authors for the light they have cast on this increasingly important part of the legal system.

-WEW

"**Senior citizens.** Retirement and pension systems have suddenly confronted younger people with the discovery that the old are a large and increasingly numerous class — a sort of Fifth Estate with vested interests, votes not to be overlooked by the astute politician, debilities worth the attention of those who purvey patent medicines, and perhaps even feelings that should not be hurt. Thanks to the modern mania of political euphemism, a group of such numerical strength comes to be known by flattering names, or such as are thought flattering. Accordingly, we no longer have old men and women, the elderly, the aged, the superannuated, the retired, or the old fogies, but *senior citizens.* The phrase is generally preceded by *our.* Such a label for the old could only be a young person's invention. It shares the blight that overtakes every genteelism. There may be someone here and there who would rather be a senior citizen than an old man. But the phrase that delights the social psychologist and enriches the jargoneer's hoard is hard to imagine being used in the street. The old man accosted by a stranger will not hear himself addressed as 'Mr. Senior Citizen.' From some he will hear 'Sir'; from most others 'Mister'; from the rest 'Pop.'"

Contributors

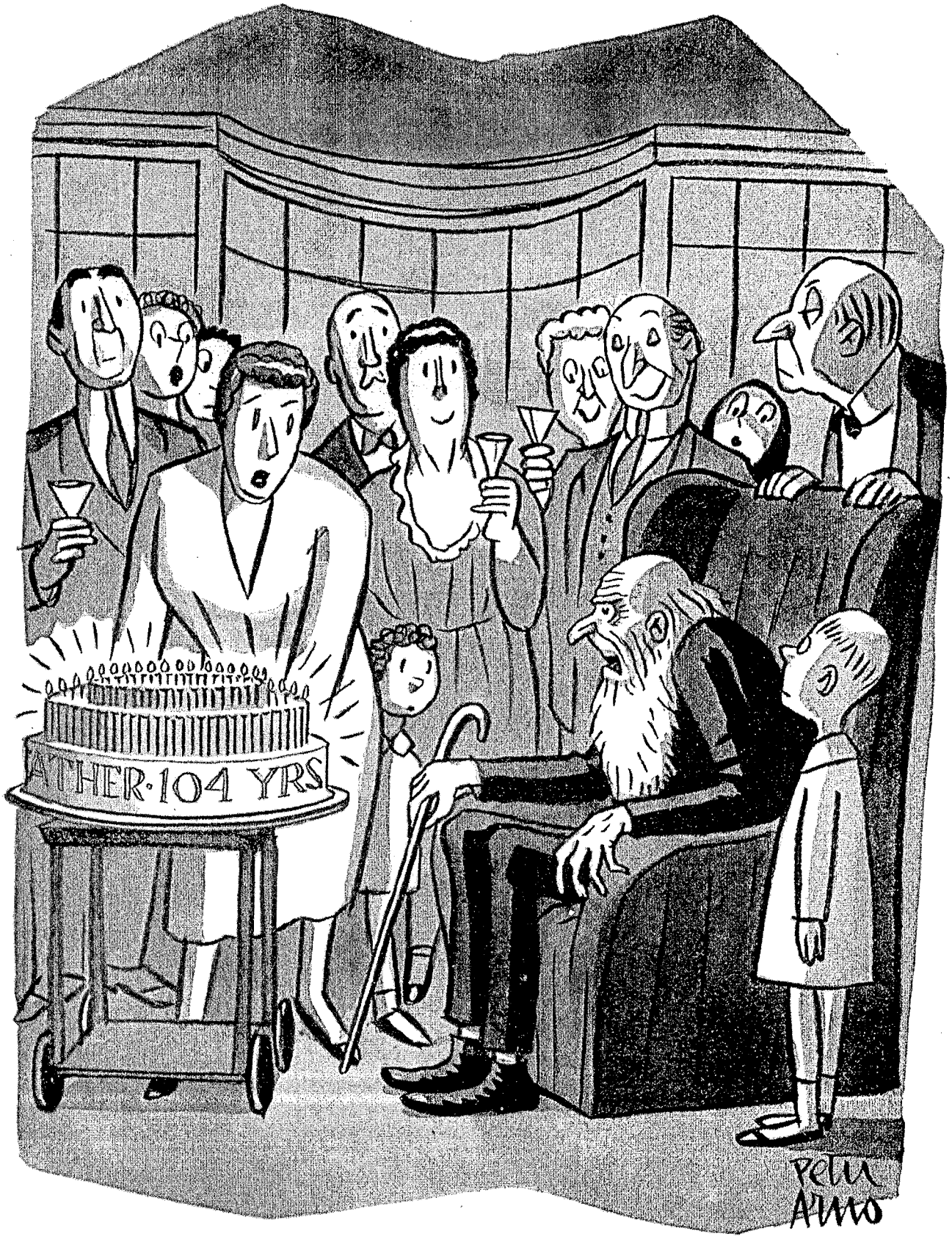
Timothy H. Barron has been a Deputy Attorney General since 1977. He received his B.A. and J.D. from the University of North Carolina in Chapel Hill. Although Mr. Barron is currently the Director of the Delaware Medicaid Fraud Control Unit, he has prosecuted many cases of financial exploitation of infirm adults. He has been a guest speaker at various locations across the country on the subject of financial exploitation of the elderly and was recently called upon to testify as an expert on that subject before the full U.S. Senate Committee on Commerce, Science and Transportation.

Sandra Kaufmann Battaglia is the Senior Vice President, General Counsel for Peninsula United Methodist Homes, Inc. located in Wilmington, Delaware. She previously served as the Director of Personnel and as County Attorney for New Castle County, Delaware. A graduate of Vassar College and Villanova University School of Law, Mrs. Battaglia is admitted to practice in Delaware and the District of Columbia. She has given presentations on legal issues affecting retirement living at seminars sponsored by the American Association of Homes and Services for the Aging, the Delaware Health Care Facilities Association, and the American Health Lawyers Association.

David J. Ferry, Jr. is a partner in the Wilmington law firm of Ferry & Joseph, P.A. where his areas of practice include matters involving guardianships, trusts and probate. He received a B.A. degree from St. Joseph's College and a J.D. degree from Delaware Law School of Widener University. He is a member of the Pennsylvania, Delaware and American Bar Associations. He has served as Chair of the Delaware State Bar Association Committee on the Law & the Elderly from 1997 to the present and is a frequent speaker on issues of elder law, guardianships, trust and probate matters.

Joel Friedlander is a partner with Bouchard Margules & Friedlander, where he practices corporate law litigation. He also serves on the Board of Editors of this magazine.

Carolee Burton Kunz left private practice in 1996 to become the Supervising Attorney for the Elder Law Program of Community Legal Aid Society, Inc. She is a graduate of the University of Delaware and Boston College Law School. She serves on the DSBA's Committee On Law and the Elderly and has been active in Delaware's nursing home reform process.



"Never mind the damned cake! Where are the reporters?"

DELAWARE LAWYER
A publication of Delaware Bar Foundation
Volume 18, Number 1
3301 Lancaster Pike, Suite 5-C
Wilmington, Delaware 19805

DELAWARE LAWYER
Attention: Chairman, Board of Editors
c/o Today Media, Inc.
Formerly Suburban Marketing Associates, Inc.
3301 Lancaster Pike
Suite 5-C
Wilmington, Delaware 19805

Address changes, subscription orders, requests for information about advertising should be directed to:

TODAY MEDIA, INC.

at the preceding address
Telephone inquiries to (302) 656-8440

Editorial inquiries should be directed to:
Megan M. F. Everhart, Associate Editor
(302) 656-8440

Delaware Lawyer is published by Delaware Bar Foundation as part of its commitment to publish and distribute addresses, reports, treatises, and other literary works on legal subjects of general interest to Delaware judges, lawyers, and the community at large. As it is one of the objectives of *Delaware Lawyer* to be a forum for the free expression and interchange of ideas, the opinions and positions stated in signed material are those of the authors and not, by the fact of publication, necessarily those of Delaware Bar Foundation or *Delaware Lawyer*. All manuscripts are carefully considered by the Board of Editors. Material accepted for publication becomes the property of Delaware Bar Foundation. Contributing authors are requested and expected to disclose any financial, economic, or professional interests or affiliations that may have influenced positions taken or advocated in the articles. That they have done so is an implied representation by each author.

FEATURE

Carolee Burton Kunz

CLASI: PROTECTING THE ELDERLY

Jerry Bright, a Delaware lawyer on his way to work, has a lot on his mind. He uses the notepad on the dashboard to remind himself: "1) Pay tuition bill; 2) Find roofer; 3) Reschedule civic association meeting; 4) Pick up dog food." Making the transition into work-mode, he considers how he can draft his interrogatory responses before the other side moves to compel... he wonders why his secretary scheduled two arbitrations for the same afternoon... he hopes the answering brief came in so he can draft the reply before the weekend. As he cruises into the parking garage, the caffeine kicks in and he prepares for a full-out assault on his in-box. He swings by the receptionist, grabs his messages, and as he hurries back to his office he glances down and reads, "Call the nursing home. Your mother's Medicare coverage has expired."

Most of us have fairly complicated lives on any given day. We juggle parental, spousal, professional, social, and civic obligations. For many people, the exhausting responsibility of caring for an aging family member must be added to the mix. Unlike Jerry, most people are not lawyers. They know their elderly relative has a problem, but they do not fully understand the issues involved. They are tired and upset with other family members who are not pulling their weight caring for the elderly person, and they are easily frustrated when a fair solution is not readily available. Sometimes they are angry with their loved one for failing to prevent the problem in the first place.

The Elder Law Program ("ELP") of Community Legal Aid Society, Inc. ("CLASI"), known prior to 1997 as the Senior Citizens Legal Assistance Program ("SCLAP"), assists Delawareans aged 60 and over with a wide variety of legal problems. The ELP's services are free. Although CLASI was founded in 1946, the seniors program was not created until 30 years later. In 1965, Congress passed the Older Americans Act, which was designed to meet the needs of the elderly. Title III of the Act pertained to social services. Several priorities, including legal services, were enumerated in the 1975 amendments to the Act, which also mandated that states spend a minimum portion of their Title III funds on these services. The creation of the Elder Law Program resulted from the Older Americans Act, and also from the realization that only 3% of CLASI's clientele was aged 60 and over, but statewide that age group comprised 20% of the low-income population. The program is partially funded by federal and state dollars received from the Division of Services for Aging and Adults With Physical Disabilities.

At its inception, the program had one attorney and three paralegals. Thereafter, staffing levels fluctuated in proportion to available funding. At its peak in 1987, the program had four full-time and three half-time positions. By 1993 staffing had decreased to a Project Director spending 71% of her time in the Elder Law Program, a full-time New Castle County paralegal, a half-time paralegal in each county, and a full-time staff attorney riding circuit between Kent and Sussex counties. Current funding limitations have reduced the program to one full-time attorney in New Castle County and a part-time paralegal in each county.

The Elder Law Program is still providing assistance to the same types of clients who received help in its early days. The Older Americans Act requires that services be available to all, with particular emphasis on low-income minority older persons. A means test is prohibited, and clients are encouraged to make financial contributions. The program will not deny service simply based on income level, although that may be considered in evaluating a case. The focus is on clients who are economically and/or "socially" needy. Socially needy clients include, for example, those who are frail, isolated or who have language barriers.

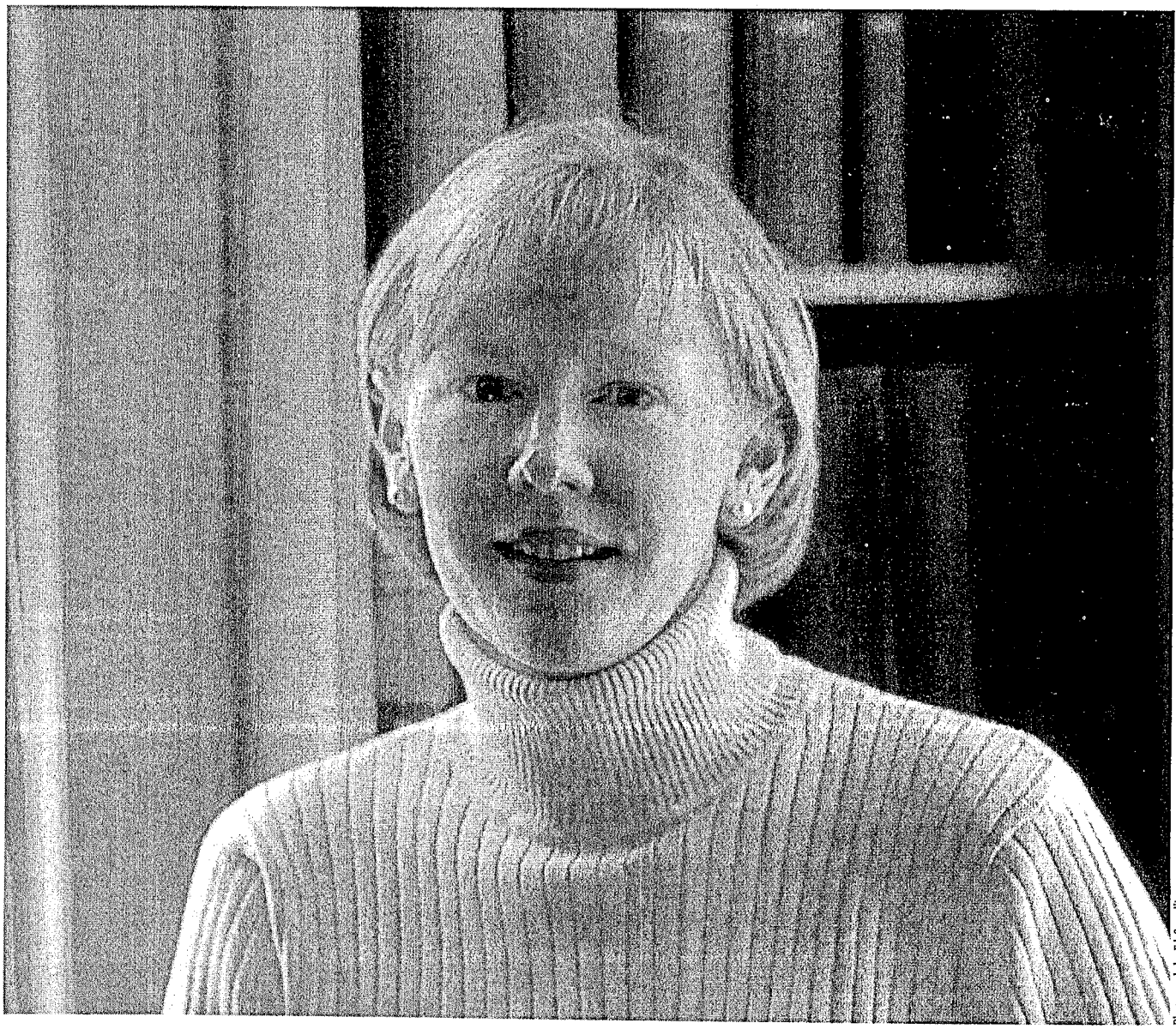
The caseload in the Elder Law Program has always been diverse and akin to that of a general practice. Clients are represented in housing, consumer, and income maintenance matters, and numerous powers of attorney and advance health care directives are drafted on their behalf. With so many people needing help, it has traditionally been difficult to limit intake. The current policy, with a few restrictions, is to make represen-

tation decisions case-by-case following investigation. Relatively recent Elder Law Program clients have included a couple who needed a bankruptcy to save their car and mobile home, a gentleman who faced foreclosure because his son had forged his name on a mortgage, and a woman who had a default judgment entered against her because of an illegal third-party guarantee in a nursing home contract. The latter case eventually led to passage of a law in Delaware prohibiting such guarantees.

The substantive issues addressed by CLASI's seniors program have evolved over the years. The initial press release for the Elder Law Program in early 1977 stated that public benefits, wills, and "other legal problems" would be addressed. Wills were a big part of the seniors program until 1988. The decision was made to curtail that work because private attorneys offered reasonable rates for simple wills and Delaware Volunteer Legal Services could place low-income clients with pro bono attorneys. In addition, Hercules, Inc. had a program that provided legal services, including wills, to elderly members of the community. The Elder Law Program still receives requests for estate planning documents, but there are no plans to resume that work. A will may provide a client with peace of mind, but it is usually the heirs who stand to benefit the most.

Other developments affected the seniors program at CLASI. The Adult Protective Services unit of the Division of Services for Aging and Adults With Physical Disabilities was formed in 1982. This agency provided another resource to which abused and exploited seniors living in the community could go for help. Also, a durable power of attorney statute was promulgated, which provided that a power of attorney could still be effective if the principal became incompetent. The statute allowed for "springing" powers of attorney, which meant that the documents would not become operative unless and until clients became unable to handle their own affairs. These developments contributed to a decrease in the Elder Law Program's involvement in guardianship actions.

In addition to casework, the program's staff has traditionally tried to keep abreast of statutory and regulatory changes and offer community education to various groups. The purpose of community education is three-fold: it publicizes the availability of free legal services, it trains people in how to address legal issues, and it helps prevent legal problems in the future. The latter is particularly important because it is far easier to educate people about the ramifications of co-signing loans, for example, than it



Photograph by Ed Camelli

is to stop a foreclosure. It has been a long-time goal of the program to regularly conduct community education at senior centers and other sites. As staffing has decreased, this aspect of the program has necessarily been scaled back. Community education will remain important, however, as the elderly population continues to grow.

Publications are a way to educate more people on a wider variety of topics. The Elder Law Program distributes a monthly "Help from ELP" bulletin addressing legal issues to senior centers throughout the state. Many people have also been assisted by the *Legal Handbook for Older Delawareans.* The *Handbook* was originally published in 1985 by the Delaware State Bar Association's Committee On Law and the Elderly. Judith Schuenemeyer, the attorney then directing CLASI's seniors program, chaired the subcommittee responsible for this project. In 1997, the Committee On Law and the Elderly formed another subcommittee, again chaired by an Elder Law Program attorney, to update the *Handbook.* With support from the Delaware Supreme Court, Wilmington Trust, and MBNA, over 11,000 copies of the 39-page booklet were distributed statewide. Recipients included libraries, senior centers, and homebound individuals via the Meals On Wheels program. The *Handbook* provided an overview of topics such as Medicare, Social Security, landlord-tenant problems, and consumer issues.

Even with education, finding a way to meet basic needs will remain a challenge for the elderly. This is certainly true of health care needs. Today an older person is fortunate to have a myriad of drugs available to help him maintain his lifestyle and remain active longer, but the downside may be prescription bills of several hundred dollars each month. A typical elderly person just over the poverty level who has Medicare coverage but no private insurance must pay for prescriptions out of pocket. He may also be responsible for deductibles and co-pays he cannot afford.

At the far end of the health care continuum lies institutionalized care. The likelihood of receiving care in a nursing home increases with age, and the oldest segment of the elderly population is growing. In 1997, the 85-and-older population was 31 times larger than in 1900.[1] Thus, a 72-year-old man may find himself caring for his 90-year-old mother who is in a nursing home. Or, perhaps his mother is still living in the community but his 74-year-old wife of 50 years needs nursing home care. If so, he may face a complicated Medicaid application process in which he is expected to understand terms like "snapshot," "look-back period," and "spend-down."

Problems caused by increased longevity are compounded by the fact that workers are retiring earlier. In the United States, the 1995 average retirement age for men dipped to 63.6 years, from 66.5 years in 1960.[2] Unfortunately, the average number of people contributing to public pension systems per retiree is also dropping. In 1995 the number was 4.2 contributors for each retiree, but by 2050 it is expected to decrease to 2.3, adding to the strain on programs such as Medicare and Social Security.[3]

One result of this is that government programs like Medicare, Medicaid, and Social Security are in a constant state of flux. Problems in these areas can be difficult for even a lawyer to dissect, so it is not surprising that many elderly people do not understand how these programs work. A client may be quite upset upon receipt of a form letter stating that her Social Security check — perhaps her only source of income — is being reduced because of an alleged overpayment resulting from Social Security Administration error. She can apply for a waiver, but only if she can figure out how to do it. She may call the Administration and be put on hold by an electronic operator, causing her to simply give up.

In 1995 the number was 4.2 contributors for each retiree, but by 2050 it is expected to decrease to 2.3.

For some, their Social Security check is so small that they qualify for Supplemental Security Income ("SSI"). The SSI level for 1999 was only $500.00 per month. There is also a $20.00 "disregard," so that an elderly person receiving $220.00 in Social Security income may receive a $300.00 monthly SSI benefit to supplement that income. The SSI level is not even as high as the federal poverty level. In 1997, one of every six elderly persons in the United States was living at or below 125% of the federal poverty level. For an individual, this means his income was less than $821.92 per month.

With a fixed income and steep health care bills, housing issues often add to the stress experienced by the elderly. Many older persons must use a large portion of their income to pay rent. Those fortunate to own their own homes generally try to remain there as long as possible, avoiding institutionalized care or transfer to an apartment. But older people often live in older houses. About 53% of homes owned by older persons in 1995 were built prior to 1960, necessitating that the elderly spend a high percentage of their income on maintenance and repairs.[4] For extensive work they may mortgage a home that has been paid off for years, or even obtain a reverse mortgage. Seniors who are not financially savvy are prime targets for predatory lenders and contractors. If the spouse who handled the family finances dies first, he may leave behind a widow with little experience in such matters.

According to the U.S. Census Bureau, between 1900 and 1997 the percentage of Americans aged 65 and older more than tripled.[5] By 2030, it is projected that 20% of the American population will be 65 or older, and one-quarter of those people will be minorities.[6] Delaware is experiencing a senior citizen growth rate that is higher than the national average.[7] There are now more than 100,000 Delawareans aged 60 and older and the available resources to assist them are stretched to the limit.[8]

Ideally, an elderly person should be able to sit down with a lawyer and discuss in detail the legal issues outlined in the *Legal Handbook for Older Delawareans.* The reality is that most people cannot afford to pay a lawyer to educate them before a problem occurs. When it happens, it is often up to the individual to identify the problem on his own and either resolve it himself or try to find help. He may not have transportation or be involved with a senior center, and he may not have heard about free legal help, especially if he lives in Kent or Sussex County. In 1998 the U.S. Census Bureau estimated that 39,157 people aged 65 and older were living in those counties.[9] Illiteracy or visual impairment

may also pose obstacles to his attempts to find help. He may not have telephone service. If he gets as far as contacting an attorney, he may be asked to produce a retainer beyond his means.

If he somehow learns about non-profit legal services providers, he may persevere. In the past, he would have called CLASI, Delaware Volunteer Legal Services, or the Legal Services Corporation of Delaware directly. These entities are now working together to provide a single point of access called the "Legal Help Link." Clients dial a toll-free number and are funneled to the appropriate provider. For an older person, particularly one who is frail or isolated, this single point of access to legal assistance can make the search for help much easier.

It may not be the elderly person who realizes there is a problem. The Elder Law Program receives many referrals from social workers, family members, nurses, and others. Sometimes help is requested for a person who is incompetent. The senior is always the client and concerned others, much to their frustration, are told that the elderly person's decisions drive the case and information will not be released despite their good intentions. To facilitate representation and eliminate family members as middle men, Elder Law Program staff members often travel to homes, senior centers, hospitals and nursing facilities.

Working with the elderly in a non-profit setting poses many challenges, but provides rewards as well. The work is stimulating and diverse, and the goal is usually to help the client preserve a basic necessity such as housing, income, or health care. For over 20 years the Elder Law Program has focused on providing free representation to older Delawareans who might otherwise lack access to legal assistance. ◆

FOOTNOTES

1. RESOURCE SERVICES GROUP, AMERICAN ASSOCIATION OF RETIRED PERSONS (AARP) & ADMINISTRATION ON AGING (AOA), U.S. DEPT. OF HEALTH AND HUMAN SERVICES, A PROFILE OF OLDER AMERICANS (1998).
2. Longman, *The World Turns Gray*, U.S. NEWS & WORLD REPORT, March 1, 1999, at 35.
3. *Id.*
4. AARP, *supra* note 1.
5. *Id.*
6. *Id.*
7. *Id.*
8. POPULATION ESTIMATES PROGRAM, POPULATION DIVISION, U.S. CENSUS BUREAU, www.census.gov.
9. *Id.*

FEATURE

David J. Ferry, Jr.

GUARDIANSHIP PRACTICE AND PROCEDURE

Delaware's Court of Chancery has jurisdiction over guardianship cases. The Court's jurisdiction is derived solely from the guardianship statute, 12 Del.C. §3901 et seq.[1] Prior to substantial revisions made to the law in this area effective July 8, 1993, the Court distinguished between guardianship of mentally infirm persons and mentally ill persons. This distinction was eliminated by the new law and all persons for whom a guardianship is sought are now referred to as "disabled persons." The Court can appoint a guardian for the person or property or both for any disabled person who is a resident of the State, a guardian of the property of one who is a non-resident disabled person, but who owns property located in the State, or for the person of a non-resident person who is brought into the State for care.

The great majority of guardianship cases concern adults. As to adults, a disabled person is anyone who, by reason of mental or physical incapacity is unable to properly manage or care for his person or property or both and, in consequence thereof, is in danger of dissipating or losing such property or becoming a victim of designing persons or, in the case where a guardian of the person is sought, such person is in danger of substantially endangering his health, or becoming subject to abuse by other persons, or becoming the victim of designing persons.[2]

The Court may appoint guardians of both person and property. The Court could appoint two or more persons as guardians of the disabled person, one or more to have care of the person of the disabled person and one or more to have possession and management of the property of the disabled person, with all of the rights, powers, and subject to all of the duties respecting the property of the disabled person, or the Court may appoint one person as guardian with all rights, powers, and subject to all the duties respecting both person and property of the disabled person.[3]

The Court of Chancery Rules regarding guardianships were also amended within the past several years. The rules regarding bonds, inventories, accountings, sale of real estate, commissions, and appointment and duties of successor guardians are set forth in Chancery Court Rules 109 through 133. The rules for petitions, hearings, involuntary sterilization proceedings, powers and duties and termination of guardianship are set forth in Rules 175 through 180.

A limited guardianship is one that is sought to obtain authority over a disabled person for a limited purpose. The most common example is a Petition to designate a guardian to obtain authorization to either approve or deny consent for medical treatment. In exercising its general supervision over guardians of disabled persons, the Court of Chancery may instruct the guardians in the exercise of their duties. Both the Court in its supervisory role and the guardian in his or her primary role are bound to advance the best interests of the ward.

A case of significance in this area is *In the Matter of Gordy*, Del. Ch., 658 A.2d 613 (1994). In that case, a child of a 96 year old resident of a State nursing facility petitioned to be appointed as guardian so that he might be legally enabled to deny consent to surgical insertion of a gastric feeding tube. Based upon a Living Will that Mrs. Gordy executed, and statements she made over the years, the petitioner believed that his mother would not want this procedure taken. The Court appointed an attorney to serve as guardian ad litem for Mrs. Gordy. The attorney recommended the relief sought by the petitioner. The Attorney General objected under the belief

that the disabled person was not competent to make this health care decision. The Attorney General believed that it was in the best interest of the disabled person to have the gastric feeding tube inserted.

The application raised two issues. The first was whether Mrs. Gordy was no longer competent to make decisions respecting her own health care. The second issue was whether a guardian may, consistent with the best interest of the ward and its legal obligations, refuse to authorize the insertion of a gastric feeding tube necessary to assure the ward's continued adequate nutrition. The Court carefully considered the opinions of several expert witnesses and decided that Mrs. Gordy was not presently suffering from mental incapacity that endangered her health and concluded that she had made a rational choice concerning her medical treatment, which deserved to be respected. The Court also determined that it was clear that at some point, perhaps very soon, Mrs. Gordy would no longer have the residuary mental capacity to make decisions and that an appropriate person to make those decisions was the petitioner. The Court specifically authorized the petitioner to follow his mother's expressed directions to decline insertion of the feeding tube and to make such other health care decisions as were, in his good faith judgment, in the best interests of the disabled person.

Another form of limited guardianship that is much less common is a Petition for Involuntary Sterilization pursuant to 16 Del.C. §5707. Although this is not truly a guardianship action, it has all the elements of a limited guardianship proceeding. A Petition is filed in the Court of Chancery. It may be filed by the chief executive officer of the institution where the person to be sterilized resides, the head of the agency responsible for such person if he or she is not a resident of an institution, the parent or guardian of such person, or any agency, which by virtue of the scope of its powers and jurisdiction has an interest in the sterilization of the person. 16 Del.C. §5705(a).

In the case of a person presumed incapable of informed consent, the contents of the petition are set forth in 16 Del.C. §5707. Unless a Physician's Affidavit indicates that it would be meaningless or detrimental to serve the respondent, service is made at least ten days before the hearing date. Certified or registered mail notice to next of kin is required. The Court appoints a guardian ad litem, attorney, or both for the respondent. A hearing is held in the Court of Chancery pursuant to 16 Del.C. §5710.

One of the few cases in this area was heard by the Court of Chancery in 1996. A carefully considered and well written report of Master Richard Kiger can be found in *In the Matter of Susan S.*, Del. Ch., C. M. No.7764, Kiger, Master (Feb. 1, 1996).

The guardianship of minor children is generally a more simple process. It is generally unnecessary to appoint an attorney ad litem in the case of a guardianship of a minor. However, the Court, in its discretion, may appoint an attorney ad litem to represent a minor disabled person under Rule 176(a).

Many of these cases are very difficult to litigate. The nature of the litigation and the posture of the litigants often try the patience of Court and counsel.

Petitions for minors are generally brought as a result of the minor receiving an inheritance or as the result of a tort claim brought on behalf of the minor child. A minor over the age of 14 years may choose his guardian, and the Court, if there is no just cause to the contrary, shall appoint the person chosen. 12 Del.C. §3902(c). The sole surviving parent of a minor child may, by written declaration or Last Will and Testament, name a guardian of the person or property, or both, for his child who shall be appointed if there is no just cause to the contrary. 12 Del.C. §3902(b). When a guardian is appointed for a minor under 14 years of age, unless such appointment is according to a written declaration or the Last Will of the sole surviving parent, if the minor, after arriving at the age of 14 years, chooses another person for his guardian, the Court shall appoint the person so chosen, if there is no just cause to the contrary and the preceding guardianship shall thereby be superseded. 12 Del.C. §3902(e).

The guardianship of a minor child terminates automatically when the minor attains the age of 18 years. The automatic termination of the guardianship of the property of the minor does not relieve the guardian of any duty to account. 12 Del.C. §3909. A Petition to terminate the guardianship, providing proof of the fact that the minor has attained the age of 18 years, should be filed promptly with the Court of Chancery after the child attains the age of 18 years.

The Court may also appoint a receiver for the property of a minor child if the minor has real or personal property and no guardian. 12 Del.C. §3910. The Court has control of money paid into the Court to the credit of any minor who cannot be located under 12 Del.C. §3971.

Family Court also has jurisdiction to appoint guardians for minor children. 10 Del.C. §925(16). A guardian of the person will be appointed by the Family Court where a child's dependence, neglect, or delinquency are not likely to be eliminated in the foreseeable future. Such an appointment contemplates an *in loco parentis* relationship that may be limited in time by the Court or may approach permanency. *Martin v. Sand*, Del. Fam., 444 A.2d 309 (1982).

The Superior Court is now also involved in minor's guardianships for the limited purpose of dealing with tort claim settlements. 12 Del.C. §3901(k). Under this procedure, a Petition to Settle Minor's Tort Claim is heard by a Judge of the Superior Court. The Superior Court Judge evaluates the merits and approves the settlement. If approved, the guardianship is established and administered by the Court of Chancery as in the case of all other guardianships.

The terms guardian ad litem and attorney ad litem are often used interchangeably. A guardian ad litem may be appointed by a court of law or equity to prosecute or defend a suit. Typically, in the case of a minor's tort claim, a person is appointed guardian ad litem by Superior Court for the limited purpose of pursuing the claim. When a claim is about to be settled, the guardian ad litem usually asks for his "official"

appointment as guardian to settle the tort claim and to hold the minor's settlement proceeds until the age of 18 years. Under 12 Del.C. §3902(a), no person has the right or authority as a guardian unless the person has been duly appointed by the Court of Chancery or is admitted by a court of law or equity to defend a suit as guardian ad litem, except in accordance with 10 Del.C. §925(15) and 12 Del.C. §3904. The latter statute deals with foreign guardians of non-residents.

The term attorney ad litem is now the preferred terminology for the appointment of an attorney for a disabled person upon the filing of a guardianship petition. See Chancery Court Rule 176(a). After a guardianship petition is filed, the Court appoints a member of the Delaware Bar to represent the adult person alleged to be disabled, if the person is not otherwise represented by counsel. The attorney ad litem is typically, though not always, suggested by the petitioner. The attorney ad litem receives notice on behalf of the disabled person and gives actual notice to the disabled person and explains, to the extent possible, his or her rights and the nature of the proceedings. The attorney ad litem represents the person alleged to be disabled as if engaged by the person. In the great majority of cases, the attorney ad litem agrees that a guardianship is necessary and writes a report to the Court confirming the need for the appointment of a guardian. In some cases, the attorney ad litem may take a position on who that guardian should be.

Temporary guardianships or emergency guardianships are provided for in 12 Del.C. §3901(d). If the Court finds the allegedly disabled person is in danger of incurring imminent serious physical harm or substantial loss or expense, the Court may, without notice and hearing, appoint a temporary guardian of person or property to serve for a period of up to thirty days. A hearing shall be held within thirty days of the appointment of a temporary guardian. The temporary guardian has all powers and duties granted to guardians.

If it is determined at a hearing that an individual is a disabled person, the Court will then make the guardianship appointment a full one.

There are cases where the Court of Chancery has appointed guardians pending the outcome of litigation. *In the Matter of Agnes D. Rick*, Del. Ch., C.M. No. 6920, the Court appointed the Public Guardian as guardian of the person pendente lite to make medical and health care decisions on behalf of the disabled person pending the conclusion of litigation. *Rick* was a hotly contested guardianship action in which the niece of an elderly person alleged that Mrs. Rick's neighbor had victimized her. One of the neighbors had power of attorney for Mrs. Rick. Her medical condition deteriorated rapidly and it was necessary for someone to have clear authority to make medical and health care decisions pending the outcome of the litigation. The Public Guardian was appointed and required to provide full information concerning the health care and medical status of the disabled person to the Court and counsel upon request.

It is becoming increasingly common for challenges and objections to be filed to guardianship applications thereby leading to a contested guardianship hearing. When interested parties are advised of the filing of a guardianship, they may, at any time before the scheduled hearing set by the Court, file objections to the guardianship petition. An objection can be a very simple statement of one's intent to challenge the petition. An objection can be made by appearing in Court at the time of the hearing or simply notifying the Court by a phone call, letter, or pleading indicating an objection. An objection can be made by any interested party which is defined as next-of-kin or one holding a power of attorney for the alleged disabled person, by the attorney ad litem appointed by the Court to represent the disabled person, or by the disabled person himself or herself. The objection usually states whether the objection is made to the need for a guardian or if it is simply an objection to a particular person or entity being appointed guardian.

After an objection has been filed, the guardianship case is assigned to a specific vice chancellor or to the Master in Chancery to be scheduled for a hearing. The parties can engage in any and all discovery that would be had in any civil action. Discovery can be brief or very involved. Hearings on contested guardianship cases can be simple or very complicated. Many of these cases involve pro se parties and are somewhat informal. Other cases are very formal and involve a great number of lay witnesses as well as expert witnesses. Many of the issues that arise in the context of will contest cases appear in contested guardianship matters. There are often issues regarding capacity and undue influence. Many of these cases are very difficult to litigate. Very strong emotions are brought before the Court. The nature of the litigation and the posture of the litigants often try the patience of Court and counsel.

There are alternatives to contested guardianship cases. Because of the expense and the time involved in these cases, it is highly recommended to consider settlement. Among the alternatives to a family battle over control of an alleged disabled person's person and property, it is often advisable to consider using a bank, the Public Guardian's Office, or a neutral guardianship agency to protect and care for a disabled person's person and property.

Another procedure to consider is mediation. Present Court Rule 174 provides a mechanism for mediation. At present, mediation is strictly voluntary and, because of the strong feelings of the litigants, it is often not utilized because one party or the other is not willing to mediate on a voluntary basis. Because it is becoming a frequent occurrence that there is a dispute regarding the need for a guardian of an elderly or disabled person, the Committee on Law and Elderly of the Delaware State Bar Association has proposed a guardianship mediation project. The Committee has arranged for the Center for Social Gerontology, Inc. of Ann Arbor, Michigan to provide guardianship mediation training to attorneys who are interested in acting as mediators. The hope is that this training will lead to a Court Rule change that will require that disputed guardianship cases be referred to mediation. Most of these matters cannot be satisfactorily resolved through the adversarial legal process of a contested guardianship hearing. In fact, family relationships are often ruined by the adversarial process and no one, including the disabled person, is benefitted by the process. It is hoped that trained mediators will provide a more satisfying resolution to guardianship disputes that will decrease the likelihood that there will be damage to family relationships and also conserve the resources of the litigants and the Court. ◆

FOOTNOTES

1. In re: Langmeier, Del. Ch., 466 A.2d 386 (1983)
2. 12 Del. C. §3901(a)(2)
3. 12 Del.C. §3903

FEATURE

Timothy H. Barron

FINANCIAL EXPLOITATION OF THE INFIRM ELDERLY:

A DELAWARE PERSPECTIVE

INTRODUCTION

In all cultures in the past, the elderly were revered for their acquired wisdom and treated with respect, dignity, and honor. Fortunately, that is still the case in many societies. Yet in the United States, one of the wealthiest and most technologically advanced nations in the history of the world, a disturbing trend can be discerned.

All too often now, the local newspaper has a story of an elderly person who was taken advantage of financially by a relative or other care giver. In the typical case of financial exploitation, the victim is usually elderly and often suffers from some infirmity. Infirmities, both mental and physical, are part of the aging process. Infirmities, such as short-term memory loss, in combination with age, make the elderly particularly vulnerable to financial exploitation. Sadly, the prognosis, legally speaking, will get worse as our aging population continues to grow. In fact, it has been estimated that the over-65 population in the United States will outnumber teenagers two to one by the year 2025[1]. Today there are approximately 2.3 million Americans aged 85 or older, more than four times the number in 1950. Such a trend will surely continue with the graying of the 76 million baby boomers.

Delaware Initiatives

In Delaware, financial exploitation of infirm adults has been a statutory offense since 1991. Until recently however, there was no specific unit within the Office of the Attorney General assigned the responsibility to investigate and prosecute such crimes. This often resulted in less than satisfactory dispositions, since the investigating police agency as well as the assigned prosecutor were not schooled in the dynamics of financial exploitation and viewed the prosecution for such crimes with less enthusiasm than, say, murder or robbery.

For those so schooled, however, it is hard to find a difference between a street robbery of an elderly victim at gun point and the Machiavellian efforts of a "caretaker" who accompanies an infirm elderly citizen to the bank in an attempt to induce the senior to withdraw and hand over $5,000. In fact, the latter scenario is indubitably worse because, in addition to the inherent vulnerability of the infirm senior, there is an egregious violation of trust. The solipsistic design of the so-called caretaker to do less caring and more taking is the common denominator in crimes of financial exploitation of the infirm elderly.

Realizing the extent of the problem and with the help of a federal grant, Delaware initiated its Elder Abuse and Exploitation Project in 1996. Delaware Attorney General M. Jane Brady, having realized the importance of initiatives supportive of securing better protection for the senior population of Delaware, hired Edward Hazewski, a retired Wilmington Police Department sergeant and a special investigator for the attorney general as elder abuse advocate to head the project. While Delaware's Adult Protection Services (APS) Program investigated over 200 cases of financial exploitation in 1993, the number of referrals for criminal prosecutions was negligible because of lack of police and prosecutorial resources. Additionally, many of those in law enforcement viewed the problem as something better handled in the civil arena.

By contrast, in the year 1997, 121 elder abuse cases were referred to the Elder Abuse and Exploitation Project, 84 percent of which represented allegations of financial exploitation. Augmented by the assignment of a full-time prosecutor, the project initiated prosecution in 25 cases, achieving an enviable

conviction rate of 100 percent. Even more telling is the fact that the great majority of those convicted were sentenced to jail terms despite sentencing guidelines suggesting probation.

Definitions — The Nitty Gritty

As used in this Section 3902 of Title 31 of the Delaware Code, and stripped of verbiage,

(1) 'Infirm adult' shall mean any person 18 years of age or over who, because of physical or mental disability, is substantially impaired in the ability to provide adequately for the person's own care and custody.

(2) 'Physical or mental disability' shall include any . . . mental or physical infirmity.

(3) 'Substantially impaired in the ability to provide adequately for the person's own care and custody' means the infirm person is unable to perform or obtain for himself or herself essential services.

(4) 'Essential services' shall refer to those . . . services necessary to safeguard the . . . resources of the infirm person. . . These services shall include . . . protection from . . . exploitation.

(5) 'Exploitation' means the illegal or improper use . . .of an . . . infirm person's resources. . . by another person, whether for profit or other advantage.

Thus, it becomes apparent that the following types of persons are covered by the statute:

1. An 18-year-old mentally retarded McDonald's floorsweeper;
2. An 89-year-old widow with short-term memory loss living independently;
3. A 30-year-old wheelchair bound female suffering from MS;
4. A 57-year-old chronic alcoholic.

While the list of those types of infirmities covered by the statute is inexhaustible, the determinant-task of the investigative team is to establish that the alleged victim is "infirm" as required by statute. For without an infirmity, one is free to dispose of one's assets as he or she chooses, regardless of the outcries from disgruntled potential heirs, agonizing over the diminution of "Uncle Norm's" estate.

In several cases I've prosecuted, the biggest hurdle has been establishing the infirmity. In one such case the victim was a 69-year-old widow with a hearing impairment. The defendant, a 25-year-old exotic dancer, "moonlighting" as a caretaker, had used the victim's credit cards and ATM card in part to finance her breast augmentation operation and to augment her wardrobe with various lingerie items purchased from Victoria's Secret. (While I don't profess to know Victoria, I would suggest that her secret is that her apparel is not designed for 69-year-old ladies.)

The medical evidence introduced at trial suggested that the victim was socially deprived, minimally educated with an academic skill disorder, had a language and speech disorder and a hearing deficit. While specifically finding no evidence of dementia or psychiatric problems, the medical expert's conclusions that the victim would have difficulty understanding bank statements, would be dependent on others, and could be taken advantage of in financial dealings were enough to carry the day.

While medical testimony may seem essential to establish the requisite infirmity, many elderly people avoid doctors like the plague. That a physician may not be available to testify is not a problem. An infirmity can be proven with testimony by neighbors, friends, family members or business representatives such as a bank teller or loan officer. In addition, APS utilizes a "Short Portable Mental Status Questionnaire" (SPMSQ) when interviewing a possible victim of financial exploitation. While not conclusive, the results of the test go to the weight of the evidence and are therefore admissible. In the case of the exotic dancer, the SPMSQ revealed that the victim did not know who the president of the United States was or who had preceded him. She also did not know her mother's maiden name and could not perform simple arithmetic functions. The medical evidence, coupled with the results of the SPMSQ, was sufficient to convince the jury that the victim was infirm, thus assuring the conviction that followed.

The Role of Adult Protective Serivces (APS)

The role of APS is more concerned with the safety and care of the victim than it is with the apprehension and punishment of the perpetrator, as can be gleaned from a reading of 11 Del.C. §3901:

"The General Assembly recognizes that many adult citizens of this State are subject to psychological or physical injury or exploitation because of physical or mental infirmity, disease or other causes which render them incapable of providing for their basic daily living needs. The General Assembly, therefore, intends through this chapter to establish a system of services for impaired adults designed to protect their health, safety and welfare. The intent is to authorize only the least possible restrictions on the exercise of personal and civil rights and such restrictions may be permitted only when consistent with proven need for services."

Their statutory duties notwithstanding, it is more often than not a diligent and concerned APS caseworker who brings a case of suspected financial exploitation to the attention of the Attorney General's Office for possible prosecution.

Some Observations

As one who has prosecuted many cases of financial exploitation of infirm adults, I feel that sharing some observations would be of value.

Financial exploitation cases can be as intriguing as a case of murder.

- An APS worker or a police officer or a prosecutor would be hard pressed to think of a case, any case, where one could expect a more sympathetic jury. Our cherished notions of American values become magnified in appeal and devotion when they are represented by an 89-year-old widow whose life savings have been stripped from her at the hands of a smooth-talking thief or relative in whom the widow had placed her complete trust.
- Just as one will find an escalation of sympathy for the victim, there is a concomitant visceral enmity by the jury toward the defendant whose protestations of innocence will be transparent.
- There is nothing that so readily evokes emotional response as the knowledge that one has so utterly and uncaringly taken advantage of somebody incapable of self-protection. This is as true in cases of adult financial exploitation as it is with cases of child molestation. In a nutshell, the trial begins with a decidedly emotional advantage in favor of the prosecution.

Despite beliefs to the contrary, financial exploitation cases can be (and should be) fairly easy to prosecute.

- Unlike most other crimes where the evidence may depend on human fallibility (eye-witness testimony, for example), cases of financial exploitation provide an arsenal in the way of documentary evidence: to wit, a paper trail leading inexorably to the exploiter.
- Canceled checks with forged signatures.
- Bank statements and records that indicate large or frequent withdrawals.
- Loan documentation that

indicates the elder signed for an unneeded or questionable loan.

- Bank surveillance photographs.
- ATM transactions when the elder is not ambulatory.

These are some of the more common means by which a good investigator can snare a target.

- Also, unlike the typical criminal case, anything a defendant chooses to tell an APS worker, a police officer, a special investigator, or, at trial, a jury, usually is as good as a full confession. There is nothing much a care giver can say when confronted with the documentary proof of his or her defalcations. For example:
- "It was a loan." (Great! Where is the promissory note?)
- "I had permission to use Mrs. Smith's MAC card." (To withdraw $500 on five successive days?)
- "But Mr. Smith wanted to marry me." (Mr. Smith is 88 years old, has Alzheimer's disease, and you're 35?)
- "I never used his MAC card. I don't know the PIN!" (You don't? Well, do you recognize yourself in this bank photograph?)
- "But I was doing a lot of work around her house." (Like charging $350 to cut her grass?)

The Defendant Profile

In point of fact, most defendants, when confronted with such evidence, quickly change their tune. In this regard a word about the typical defendant profile in cases of financial exploitation may be helpful. In my experience I have found striking similarities among those charged and convicted of financial exploitation of the elderly.

In the garden variety of financial crime—street mugging, car-jacking, armed robbery, shoplifting, smash and grab heist and burglary—the offender is usually young and impulsive with a severe dependency on drugs or alcohol. He is in search of the quick fix and is brazen in his efforts to make a fast score. He is also "street smart" and can probably recite the Miranda warnings from memory. He is usually anti-social and resents authority, especially authority represented by those in blue uniforms with badges. He is quick to deny accusations and to invoke the protections afforded him by the Fifth Amendment to the United States Constitution.

In contrast, those accused of financial exploitation of the elderly are usually middle class and, anomalously, middle aged. An anomaly because typically the common criminal makes a conscious decision to mend his ways by the time he reaches his thirties. Call it belated maturity or a simple recognition that crime doesn't pay. The typical financial exploiter, however, is just beginning to embark upon a new criminal career upon having reached the age when most other criminals are "retired." Why this is so can perhaps be explainable in terms of the relationship between the exploiter and the victim. If the victim is a relative, the exploiter can discern the deterioration over time of the victim's physical condition and/or mental faculties as the victim ages and becomes more vulnerable.

The typical victim often has physical or mental infirmities in varying degrees. She is, in short, isolated and lonely and is therefore highly vulnerable.

Like a predator stalking the weakest prey, the exploiter, if a daughter or niece of the victim, may herself be middle-aged before given the opportunity to pounce. Although not without problems of their own, exploiters are more likely than not to have had little, if any, prior involvement in the criminal justice system. Mostly female (in Delaware at least), these offenders, while certainly more intelligent than their street counterparts, are far less likely to invoke Miranda. Rather than a show of defiance typical to the street mugger, financial exploiters, when confronted with the evidence against them, sometimes break down in tears and are often quick to confess. A considerable aid in the investigative process is that financial exploiters usually possess a greater respect (and fear) toward law enforcement. They seem to steal without conscience and yet, ultimately, their conscience may be their greatest enemy.

This phenomenon might be explainable in terms of the crime itself. Financial exploitation is, after all, a crime that involves a gradual process of cultivating the victim's trust. Far from impulsive, the exploiter must attempt to display compassion and caring toward the intended victim so as to slowly gain the victim's confidence. Once trust is gained, the crime becomes a series of crimes over a period of time: credit card purchases, MAC card withdrawals, check writing and a host of other such financial transactions all inuring to the victim's financial detriment.

The phenomenon that occurs in the conscience-stricken serial murderer who subconsciously is hoping to get caught may be similar to that found in financial exploiters. Having presumably been raised to know right from wrong, they must know what they're doing is wrong; yet, they almost never stop until caught. With each successive act of theft against those who look upon them as their protectors, the exploiter can leave a trail. Finally faced with the evidence against them, they are far more likely to admit their wrongdoing than a veteran burglar.

In those cases where confessions are not forthcoming — the exception rather than the rule — the financial exploiters are not terribly convincing in asserting their innocence. One defendant, a middle- aged female, had emphatically denied using the victim's MAC card or even knowing the personal identification number. When shown bank photographs of herself making various ATM withdrawals with the victim's MAC card, she lamely offered to the police officer that she sometimes suffers from blackouts! Needless to say, her attorney convinced her that the acceptance of the State's plea offer to felony Exploitation was in her best interests and would obviate the inevitable verdict of guilty after trial. The point is clear; whether or not they confess, the very makeup of the typical financial exploiter inures to the benefit of the prosecution team.

The Victim Profile

Various studies have shown, and the experience in Delaware has demonstrated, that the typical victim of financial exploitation is an elderly widowed female who lives alone. She was, like many of

her contemporary "sisters," more likely than not dependent upon her husband for such things as transportation and may never have learned to drive a car. In addition, as was typical before the long-overdo days when women began gaining social, political and economic parity with men, her husband, as sole bread winner, may have assumed the responsibility for managing the checkbook and other financial affairs, leaving her to cope with such matters upon his death. Conjoined with her newly acquired responsibilities of home financial management the typical victim often has physical or mental infirmities in varying degrees. She is, in short, isolated and lonely and is therefore highly vulnerable and willing to put her trust in others.

The Tasks Ahead

With the above thumbnail sketch of key points in the investigation and prosecution of cases of adult financial exploitation, it should be stressed that much still needs to be done to help this vulnerable population. The state of Delaware is trying to stay ahead of the game.

Laws Need to be Strengthened.

•Until June 28, 1999, cases of financial exploitation of infirm adults were classified as misdemeanors if the loss was less than $500. Any loss in excess of $500 was classified as a class G felony, for which the presumptive sentence under Delaware's Truth in Sentencing guidelines was 12 months of probation. The Elder Abuse and Exploitation Project reviewed Delaware's files and statistics and concluded that approximately 50 percent of all Delaware cases of financial exploitation in 1997 involved losses by the victim exceeding $50,000. Surely a low-level probation does not fit the crime. In an attempt to rectify this anomaly, the author, with the Attorney General's imprimatur, and with the support of Delaware's General Assembly, offered legislative changes to increase the penalty provisions for financially exploiting infirm adults and residents of nursing homes, depending on the amount of loss suffered. For instance, under the newly adopted amendments, exploitation involving a loss in excess of $50,000 is classified as a C felony with the definite likelihood of exposure to incarceration for those found guilty.[2]

•If there is one complaint heard time and again from those charged with the responsibility of investigating crimes of financial exploitation of the elderly, it is that such cases are inherently more difficult because of the distinct possibility that the victim will be unable to testify at trial. After all, these cases are perpetrated against those who have various infirmities, none of which can reasonably be expected to improve over time. In fact, in most cases such infirmities are increasingly degenerative so that, by the time trial approaches, the victim may be unable to appear in court to testify. Recognizing the potential for such an occurrence, last year the Elder Abuse and Exploitation Project in Delaware offered a bill for legislative consideration, which creates a statutory hearsay exception for infirm adults and residents of nursing homes. Under the statute, passed by the Delaware General Assembly and signed into law by Governor Carper on June 29, 1998, an out-of-court statement material to the crime charged may be admissible in evidence if the infirm adult or nursing home resident is deceased, absent from the jurisdiction, has no memory of the event due to age or infirmity or would likely suffer medical or emotional trauma if called upon to testify.[3] Naturally there are certain technical parameters which would have to be observed prior to admission of such statements. Nevertheless, such a procedural aid, assuming it withstands constitutional scrutiny, will become a valuable tool in holding legally accountable those who would seek to take financial advantage of the elderly.

The *sine qua non* of society's efforts to expose and prosecute financial exploiters of the elderly has to be public awareness of the problem and the commitment to combat it. Worthwhile community projects such as TRIAD programs have already begun to have a salient effect in Delaware. The TRIAD Program is a combined effort of the American Association of Retired Persons, the International Association of Chiefs of Police and the National Sheriffs Association. The group consists of retired persons working with members of the criminal justice system to fight crime, including exploitation, targeted at elderly people. TRIAD programs in all three of Delaware's counties have been formed and plans to expand the programs are in progress.

There must be greater vigilance by the community at large to take a more active role in the daily lives of their elderly friends and neighbors. Simple telephone calls, letters, and visits help show elderly persons that a support system is in place, thereby decreasing the possibility that they will become vulnerable to the manipulations of exploiters.

Other Strategies

There are other strategies that have been implemented by the Delaware Attorney General's Office through the leadership of Attorney General M. Jane Brady.

The previously mentioned Elder Abuse and Exploitation Project coordinates efforts between the Division of Services for Aging and Adults with Physical Disabilities (DSAAPD) and the Attorney General's Office to provide services to victims of elder abuse and exploitation. Edward Hazewski, as the advocate and one of two special investigators for cases involving elderly victims, assists those victims in their efforts before and during the criminal process of a case. The advocate acts as liaison between the victim and the Attorney General's Office. This represents a holistic approach to serving elderly victims of abuse and exploitation. The goal of the Elder Abuse and Exploitation Project is the coordination of referrals and investigations relating to elder abuse in a domestic setting where there have been incidents of abuse, neglect or exploitation. The advocate:

- Helps to coordinate investigations for DSAAPD.
- Collects facts and makes recommendations.
- Has established a case referral incident and investigative tracking system in order to monitor progress of cases.
- Provides information to various groups on elder abuse, neglect and exploitation, as well as criminal and civil remedies that are available to counter them.
- Assists the specially-assigned prosecutor in the preparation and trial of the case.

Prosecution-Based Services for Elderly Victims, operated out of the Attorney General's Office, is a federally funded program of the Victims of Crime Act. A social worker provides prosecution-based assistance to elderly victims of crime in Delaware's Kent and Sussex counties. Services include:

- Court accompaniment.
- Crisis intervention.
- Information about, and referral to, appropriate victim/social services treatment.

- Assistance with victim impact statement preparation.
- Explanation for court appearances including courtroom tours.
- Liaison on behalf of victims with the prosecutor, police and other criminal justice system personnel and service providers.

Conclusion

On August 4, 1999, I was honored to have been one of four recognized experts on the subject of financial exploitation of the elderly to have been invited to testify before the full United States Senate Commerce Committee Hearing on "Fraud, Targeting America's Seniors."

The main thrust of my remarks was that the most difficult aspect of financial exploitation cases lies not in their prosecution but, rather, in the fact that they are often hard to uncover. Intervention may sometimes occur months — even years — after the exploitative process has been set in motion. In fact, the great majority of elderly victims of financial exploitation may not realize they are being victimized. When finally (if ever) confronted with the cold, hard facts by an Adult Protective Services caseworker, the victim will not usually want to admit to having been taken advantage of, especially by somebody whom the victim had trusted.

Often the knowledge that one has been exploited brings about a sense of worthlessness. In one such case, a trusted yardman took advantage of his knowledge that the elderly widow for whom he did occasional work suffered from short term memory loss. Over a period of about four months the exploiter was able to con the unsuspecting widow out of over $20,000. His modus operandi was as simple as it was sinister. He would knock on the widow's door, announce that her quarter-acre yard needed mowing, disappear for half an hour and return requesting payment for labor performed. The amounts requested were staggering – anywhere from $300 to $500 for what, if actually performed, would have ordinarily cost $20. On one particular summer day in 1996, the defendant appeared at the victim's home four times and received a total of $1,650 for four "mowings," having been paid each time by personal check, payable to his order. The dear, sweet old lady, because of her memory lapses, simply had no recollection of the defendant's prior appearances at her doorstep. When she was finally made to realize

that she had unwittingly paid the defendant so much money for work never performed she told me, "I can't believe I'm that stupid. You might as well take me out to a field and shoot me because if I'm that dumb, I don't deserve to live." How sad that she blamed herself for something her infirmity prevented her from recognizing: that she was a victim of financial exploitation.[4]

If the exploiter is a family member, the victim may not want to see a loved one prosecuted as a common criminal. The victim may also be dependent upon the offender and may fear the loss of a caretaker. The status quo is sometimes looked upon by the victim as a far better alternative to being declared incompetent or being confined to a nursing home. These are the difficult problems faced by those who are involved with seeking to protect this vulnerable segment of our society.

In September of 1998, the National Elder Abuse Incidence Study (NEAIS) was published by the National Center on Elder Abuse. The study confirmed the validity of the "iceberg" theory of elder abuse which has been tacitly accepted in the elder research community for the past twenty years or so.

According to this theory, official reporting sources, typically Adult Protective Services, receive reports about the most visible types of abuse and neglect while a large number of other incidents are unidentified and unreported.

NEAIS estimated that for every reported incident of elder abuse, there are over five (5) more separate incidents of Elder Abuse which go unreported. In the context used, elder abuse would encompass the myriad forms of abuse, including physical and sexual abuse, mistreatment and neglect as well as financial exploitation.

Yet victims of financial exploitation, unlike most victims of abuse and neglect, exhibit no physical manifestations of their victimization.

It is reasonable, therefore, to conclude that for every reported case of financial exploitation there are perhaps as many as ten to fifteen such unreported cases. The dilemma for successful investigation of crimes of financial exploitation of the elderly lies in the fact that such crimes are inherently imperceptible to law enforcement. Often committed under the guise of ostensibly legal mechanisms such as powers of attorney and guardianships, financial exploitation is a hidden crime, which

until detected, lies buried in bank account records and statements, canceled checks, accountings and the like.

The point to be made, however, is that, once uncovered and detected, the investigation of cases of financial exploitation of the elderly should be geared to the view that criminal prosecution is appropriate and, in fact, results in a far greater number of criminal convictions than perhaps thought possible.

The detection, investigation, arrest and prosecution of the predators within our midst who take, through fraud and deception, from those who gave us life is a noble endeavor of the highest calling. We must continue the struggle to protect one of our greatest national treasures, the elderly, and deracinate the scourge of financial exploitation. To do less will be to tarnish the character of this great nation. ◆

FOOTNOTES

1. Ken Dychtwald, Age Wave (Knapp: State Government News, 1991).

2. 31 Del.C. §3913(b). Any person who knowingly or recklessly exploits an infirm adult by using the infirm adult's resources shall be guilty of a Class A misdemeanor where the value of resources is less than $500 and a Class G felony when the value of the resources is $500 or more but less than $5,000. If the value of the resources is $5,000 or more but less than $10,000, the person shall be guilty of a Class E felony. If the value of the resource is $10,000 or more but less than $50,000, the person shall be guilty of a Class G felony and if the value of the resources is $50,000 or more the person shall be guilty of a Class D felony. Any subsequent conviction under this subsection shall be treated as a Class C felony regardless of the amount of resources exploited.

3. The full text is found as Appendix A.

4. Because of his status as a Habitual Offender under 11 Del.C.§4214(a), the defendant was sentenced by Hon. Henry duPont Ridgely to a well deserved twenty-five years incarceration.

Appendix A

Title 11 Del.C. Section 3516

Section 3516. Hearsay exception for infirm adult or patient/resident victim's out-of-court statement of abuse.

(a) An out-of-court statement made by an infirm adult, as defined in 31 Del.C Section 3902, or by a patient or resident of a state facility, as defined in 16 Del.C Section 1131, at the time of the proceeding concerning an act that is a material element of any of the following offenses:

(1) abuse, neglect, exploitation or mistreatment of an infirm adult or a patient/resident, as set forth in Section 3913 of Title 31 and Section 1136 of Title 16 respectively, or;

(2) any felony set forth in Title 11 which is defined as a violent felony pursuant to Section 4201 of Title 11; or

(3) any felony set forth in Subparts D, E, H or

I of Subchapter III of Chapter 5 of Title 11, that is not otherwise admissible in evidence, is admissible in any judicial proceeding if the requirements of subsections (b) through (f) of this section are met.

(b) An out-of-court statement may be admitted as provided in subsection (a) of this section if:

(1) the victim is present and the victim's testimony touches upon the event and is subject to cross-examination rendering such prior statement admissible under Section 3507 of this Title; or

(2)a. the victim is found by the court to be unavailable to testify on any of these grounds and there is corroborative evidence to support the out-of-court statement;

1. the victim's death;
2. the victim's absence from the jurisdiction;
3. the victim's total failure of memory due to age or other infirmity;
4. the victim's physical or mental disability including the inability to communicate about the offense because of fear or a similar reason; or
5. substantial likelihood that the victim would suffer severe medical or emotional trauma from testifying at the proceeding or by means of a videotaped deposition or closed-circuit television;

b. the victim's out-of court statement is shown to possess particularized guarantees of trustworthiness;

c. A finding of unavailability under subparagraph (b)(2)a.5. of this section must be supported by expert testimony;

d. The proponent of the statement must inform the adverse party of the proponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the adverse party with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered;

e. In determining whether a statement possesses particularized guarantees of trustworthiness under subparagraph (b)(2)b, of this section, the court may consider, but is not limited to, the following factors;

(1) The victim's personal knowledge of the event;

(2) The victim's communicative and cognitive abilities at the time the statement is made;

(3) Certainty that the statement was made, including the credibility of the person testifying about the statement;

(4) Any apparent motive the victim may have to falsify or distort the event, including bias, corruption or coercion, or a history of false reporting;

(5) The timing of the victim's statement;

(6) Whether more than one person heard the statement;

(7) Whether the victim was suffering pain or distress when making the statement;

(8) The nature and duration of any alleged abuse, neglect, exploitation, or mistreatment;

(9) Whether the statement has a "ring of verity," has internal consistency or coherence and uses terminology appropriate to the victim's mental abilities;

(10) Whether the statement is spontaneous or directly responsive to questions;

(11) Whether the statement is suggestive due to improperly leading questions;

(12) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the victim's statement.

(f) the court shall support with findings on

the record any rulings pertaining to the victim's availability and the trustworthiness of the out-of-court statement.

A major portion of this article is reprinted from "*The Prosecutor*", Vol.32/No.6, Nov/Dec 1998, published by the National District Attorneys Association.

LET US PREY!

Apropos Mr. Barron's disturbing account of the economic abuse of the elderly, there is the well documented and equally cautionary tale of Mr. James Scott and the Reverend Carl McIntire. As recounted in Tom Greer's excellent reportage in *The News Journal*, Mr. Scott consulted the prominent fundamentalist minister late in the 1970's. He then improvidently handed over the bulk of his estate (more than $100,000) in exchange for McIntire's promise to care for him for the rest of his life.

The promise was not fulfilled and litigation followed. The sanctimonious predator had the audacity to claim that the transfer was a gift, pure and simple. That obliging good shepherd had also drawn up a will for Mr. Scott, benefitting a McIntire charity, where he had also deposited the *inter vivos* assets he had extracted from the trusting Mr. Scott. Following spirited litigation he handed back Mr. Scott's assets, a more or less happy ending to a transaction that should never have occurred.

— WEW

FEATURE

Sandra Kaufmann Battaglia

MANAGED CARE OR MANAGED COST?

Managed care is pervasive in the country today. The latest statistics are that over 181 million persons or 75% of all Americans with health insurance have managed care provisions. While almost 90% of those enrolled in commercial types of health insurance have managed care provisions, only 26% of Americans covered by Medicare have managed care types of insurance.

Managed care has been around for many years; however, it was not until the mid-1980s that the number of consumers affected by managed care grew enormously. In 1984 nearly 88% of all Americans were covered under traditional fee for service type programs. By 1999 that percentage had changed dramatically so that over 75% of all consumers covered by health insurance were covered in a managed care environment.

What is managed care?

By definition, managed care is a method of providing care and services through financing mechanisms which coordinate care across time, place and provider, emphasizing prevention, risk/reward sharing and appropriate utilization of services based on consumer and community needs for an outcome of maximum health and well-being at lower overall costs.

Having read the technical definition, your eyes might glaze over. The bottom line for the consumer is that insurers and those who pay for insurance, particularly employers, have decided that payments for health insurance will be made to those health care systems where costs are controlled through certain cost savings methods. Some of these methods include the mandatory use of primary care physicians who serve as gatekeepers, limiting the ability of the patient to access specialist care unless such care is agreed to by the primary care physician and limiting the use of emergency rooms to only "true" emergency visits. Members of the health plan who fail to follow the rules established by the managed care company are penalized by having to pay for services either in a higher percentage than would be covered by the health plan or completely with the member's own funds as if the members were uninsured. In addition, the managed care plans often participate in the health care of the members by dictating which providers to use and even which protocols for treatment will be paid for. Preventive care is emphasized and routine physicals and routing screenings for cancer frequently are included as a covered benefit.

Payment to providers is made through contractual agreements between the managed care plan and those providers. One common method of payment to the providers is capitation where the provider receives a fixed amount of money per member assigned to that provider regardless of the number of services delivered to the member. Other types of payments include withholds where a portion of the provider payment is held back and only paid later if certain criteria are met and contract capitation. Contract capitation is a relatively new capitation methodology based on experience. Under this methodology the managed care organization pays the provider a capitated amount per qualifying patient with the payment structure based on the referral or a specific diagnosis.

By way of contrast, traditional health care allows consumers the freedom to choose — to choose doctors, specialists and even hospitals without incurring any added costs. The health plan is usually a passive participant, paying claims as presented but not engaging in any dialogue with the consumer over the use of specialists or type of treatments rendered. However, as managed care has become pervasive even plans that are primarily traditional plans have an element of

managed care. Many "traditional" plans while allowing freedom of choice in choosing providers also require second opinions before certain types of surgery or limit the number of physical therapy visits over the course of a year. While the management of care is not as pervasive in these "traditional" plans, there still is more control over costs and utilization than there was prior to managed care.

Types of managed care organizations.

Organizations that practice managed care take many forms. Health Maintenance Organizations (HMOs) are the most basic of managed care organizations. However, other types of organizations such as Preferred Provider Organizations (PPOs), Point of Service plans (POSs) and Medical Savings Accounts (MSAs), also are forms of managed care. Recent federal legislation has allowed the Medicare program through the Medicare+Choice options to offer many of these types of managed care programs to the Medicare population. As mentioned above, even the traditional plan, if it includes a requirement for second opinions or limitations of services, can be considered a managed care plan.

The history of managed care.

Managed care evolved from the traditional health care programs as a way of controlling costs. Under the traditional indemnity or fee for service plans, the patients paid for their health care services and then sought reimbursement for a portion, usually 80%, of that cost. The health plan paid the reimbursement but could not control the number of visits or the number of times the patient accessed the health care system. Providers were paid based on the reasonable and customary charges for their service area. Such "reasonable and customary" charges were developed based on what other providers were charging so if all providers raised their rates, the reasonable and customary charge would eventually get raised as well.

The initial HMOs were started in the 1940s by the Kaiser Health Care System in California with a clinic based model. In 1973 federal legislation paved the way for the growth of HMOs by requiring employers to consider HMOs as an alternative to the traditional health care providers. In the 1980s and 1990s, as health care costs grew enormously, employers increasing sought alternative forms of financing mechanisms for delivering health care. Employers also encouraged participation in HMOs by offering HMOs at an attractive price to employees as opposed to the traditional fee for service plans.

Soon it became clear to the employers and insurance companies that asking consumers to make a radical shift from traditional plans to clinic-based HMOs had only limited appeal. Employers, as the primary source for payment of health insurance premiums, began urging insurance companies and the provider community to find other alternative ways of controlling costs. The insurance and medical communities responded with the creation of PPOs and POS plans. In these types of plans the patient agrees to receive care within the network of contracted physicians and other health care providers and so long as the patient receives all of health services from providers in the network, the cost of the care will be covered. Should the patient need or want to receive care outside the network, particularly in POS plans, such care is available but at an additional cost.

Managed care came into existence to control costs while improving the quality of care and promoting preventive medicine for the long term health of the consumer.

With the increase in these different forms of managed care organizations, cost controls became more difficult to achieve. The gatekeeper approach and the strict controls over referral and use of emergency rooms is harder to maintain when patients are demanding more choice and are willing to pay additional costs. As a result, health care cost increases began to rise again.

In order to continue controlling costs, new forms of managed care organizations were developed. The most recent are the Medical Savings Accounts or MSAs that allow those enrolled in this type of program to use partially tax deductible savings accounts to pay high deductibles ($6000 in 1999 in the Medicare program), if necessary, on accompanying insurance policies to cover catastrophic expenses. The MSA provider contributes to the MSA to help pay for the insurance policy premium and to deposit money into the MSA for health care expenses. The participant uses the money to pay for and choose health care services and once the member has reached the deductible additional expenses are covered 100% by the insurance policy.

Medicare and managed care.

Until the 1990s, the traditional Medicare program was largely unaffected by the rise in managed care. Because the federal government largely funds the program, the issue of cost control was not addressed. However, when in 1994, studies began to show that the Medicare Part A Trust Funds could be "bankrupt" by 2002 and that the Part B Trust Fund would face a serious funding crisis by 2010, federal lawmakers began to look for ways to control costs and thus create solvency in the trust funds. Managed care was not seen as the panacea for cost control but as one means together with aggressive fraud and abuse control to control those costs. While there were some Medicare HMOs created in the mid-1990s, the shift to managed care intensified with the Balanced Budget Act of 1997 and the creation of the Medicare+Choice program to begin operations in January 1999. In 1999, 8.9 million persons were enrolled in Medicare managed care programs representing 25.7% of the Medicare beneficiaries. It is projected that by 2002, 33.3% of the Medicare beneficiaries are likely to be covered by Medicare managed care programs due to the increased use of Medicare+Choice programs. However that projection is not likely to be met.

Medicare+Choice programs.

Beginning in January 1999, providers were allowed to participate in Medicare+Choice programs. Those programs could take any form that the provider wished within certain parameters. The Medicare+Choice plan offered

by the provider could be an HMO, a Preferred Provider Organization (PPO), a Provider Sponsored Organization (PSO), a Point of Service (POS) plan or even a Medical Savings Account (MSA).

Every plan must provide certain protections for its members. First, the plan must be a guaranteed issue (the plan must enroll the applicant if the applicant resides in the plan's service area and the applicant has Part A and Part B Medicare coverage). Care must be available 24 hours a day, seven days a week. The plan must provide access to specialists. For members with complex or serious medical conditions, as identified by the plan, the plan must create a treatment plan for each member and if the treatment plan includes specialists, then the member must have direct access to the specialist without the need for a referral from the primary care physician. The plan must have a grievance and appeal process that must deal with appeals in a timely manner. For emergency room care, the plan must pay for such care under the prudent layperson standard (if a layperson would think that a symptom could be an emergency, then the plan must pay for emergency treatment). The plan cannot charge more than $50 copayment for visits to the emergency room.

Medicare+Choice plans are offered in particular service areas by local insurance companies and need to receive preapproval from the federal government. Those members enrolled in the Medicare+Choice program must have Part A and Part B coverage under Medicare and must pay the Part B premium along with the plan premium, deductibles and copayments. However, members of a Medicare+Choice plan often receive additional benefits not traditionally offered under the original Medicare plans such as prescription drug coverage or vision care.

As of January 1, 2000 HMOs are the only type of Medicare+Choice programs offered in Delaware and only one program is statewide and one other program is offered only in New Castle County. In the past there had been other Medicare HMOs offered but in 1998, three programs terminated their HMO contracts with Medicare effective in 1999 leaving those beneficiaries to return to the traditional Medicare program. Nationally the statistics are very similar. Despite the seeming attractiveness of the various Medicare+Choice options, insurance carriers offering Medicare products generally offer HMOs and are wary of the newer managed care products such as PPOs and POS plans.

The future of managed care.

Managed care in the commercial health insurance market is a fact of life and yet it is the subject of much media and even legislative attention as the consumer struggles against a system that the consumer often sees as being profit-driven and uncaring.

In the Medicare area the legislation creating the Medicare+Choice options addressed some of the concerns that consumers voiced with commercial managed care products but due to the financing schedules the insurance industry has been reluctant to offer these new products.

Traditional health care allows consumers the freedom to choose — to choose doctors, specialists and even hospitals without incurring any added costs.

Managed care came into existence as a means to control the health care costs while improving the quality of care and promoting preventive medicine as a method for the long term health and wellness of the consumer. Employers who were paying for the health insurance for their employees felt that costs were seemingly spiraling out of sight because under the fee for service programs there was no incentive to control costs. The employee and his dependents saw any doctor at any time for any condition and participated very little in paying the costs of those visits. The managed care plans sought to limit the availability of access to the expensive specialized care while monitoring the day to day health of the member by requiring every member to have a primary care physician who would serve as a gatekeeper and direct the member to the appropriate level of care. Emergency room care was permitted only in a life threatening emergency situation and required approval from the primary care physician before or within 48 hours of the care being provided. Preventive care was covered more readily than in the fee for service plans and members were encouraged to seek the advice of the primary care physician early in the process so that illnesses would be monitored and treated before the need for expensive hospital care. Use of certain tests and expensive testing equipment such as MRIs was closely monitored sometimes through payment schedules that made the primary care physicians responsible for the costs of such tests and sometimes through a pre-certification process. Use of experimental procedures for treatment of diseases such as cancer was not covered on the basis that such treatments were unproven. In addition, members were required to receive all types of health care services from those providers that had contracted with the managed care plan. Thus every time the consumer, willingly or unwilling, changed health care insurance there was always a risk that the consumer would have to find a new group of providers from a new physician to a new laboratory to a new physical therapist.

These managed care restrictions came into being because the purchasers of health care, primarily employers, were seeking ways to control costs. With the first wave of managed care, the employers did see a decrease in the double digit cost increases. Those employees who chose the managed care programs did so with an understanding of the general parameters even if they did not have any personal experience, either positive or negative. Particularly in the early years of managed care, consumers were not locked into the managed care program for any more than a year because the consumer had the ability to access a traditional fee for service programs along with the managed care programs. However, this option has become more limited as even the traditional programs became managed care programs and as many consumers have had personal experiences with the plan, the vocalized dissatisfaction with managed care has grown.

In a Newsweek/Discovery Health Channel poll reported in November

1999, 61% of those polled stated that they were "frustrated and angry about the state of the health care system in this country" and more than half said "fundamental changes" are needed. When asked what was the most important problem with the health care system 65% said that health care was not affordable and 70% indicated that the high cost of prescription drugs was a key reason for their dissatisfaction with the health care system.

Much of the dissatisfaction seems to be fostered by the fact that costs even in the managed care plans are rising and there is little perception that the quality of care has increased. Thus if the goal of managed care was to control costs while improving quality the public perception is that managed care has failed. Yet consumers feel frustrated because they have nowhere to turn — if they choose a different plan it is still a managed care plan — the traditional fee for service plan no longer exists. The result is a tinkering with the system to try to address the perceived injustices.

The tinkering takes many forms. Many plans have changed their definition of emergency care to that of the prudent layperson, which is the standard, required by the Medicare+Choice. Referrals to specialists are often easier to obtain and frequently can be handled through phone and fax rather than having to get a hard copy of the referral and carrying it to the specialist's office. Some plans have even allowed patients to see a specialist without a referral for certain defined conditions. United Health Care, one of the largest managed care organizations, announced in November 1999 that it would no longer require preapproval of treatment plans thus allowing physicians to have the last word in determining what services to recommend or provide to patients. While some commentators criticized the move as a move away from the very reason that managed care evolved, that is controlling costs by controlling access, United Health Care stated that it was already approving over 99% of the doctors' decisions. United asked that doctors continue to inform the plan of the utilization of services so that the plan can undertake what it terms "care coordination" which allows the United employees to follow the patient's progress and plan for appropriate continuum of care.

In the closing days of the 1999, the U.S. Congress weighed on the issue of

controlling costs through the passage of separate bills in the House of Representatives and the Senate. These bills will need to be reconciled and compromised in a conference committee before final passage. While most of the public discussion on these bills focused on the proposals to allow managed care organizations to be sued directly by members, there were many other consumer protections included in the bills. Which and how many of these protections will become law is still unknown. Even more uncertain are the effects the inclusion of these protections will have on the financial and economic health of the managed care plans. The Medicare+Choice program incorporates some of the changes that are included in the federal legislation yet insurance companies have been very reluctant to offer the programs presumably because the cost of running a Medicare+Choice program is not financially attractive from the insurance company's perspective.

State legislatures also have been active in the area of managing managed care. According to the National Conference of State Legislatures, states passed close to 400 laws in 1997 and 1998 regulating managed care. Issues such as the length of maternity stays and the payments for preventive care were addressed by state legislatures and laws passed mandating the types of coverage to be included in health insurance policies issued in those states. States also weighed in on the issue of members being able to directly sue that managed care organizations with California, Texas and Georgia all enacting laws allowing such suits.

With all these changes the issue still is one of controlling costs. The public argues that it wants high quality health care but at a price that is affordable. As insurance companies mandated restrictions in order to control costs, the public perceived that the restrictions were too onerous and needed to be loosened. Loosening the restrictions required higher costs and when asked to pay more, the employers and other payors balked at the suggestion and tried to pass the costs on to the consumers through higher deductibles and copayments leading to more consumer dissatisfaction. How the health care system gets off this merry-go-round is the key question that is yet to be resolved. The resolution will require a fundamental shift in the public's attitude in how health care is delivered. ◆

IN PURSUIT OF
Rewarding Senior Status

BOOK REVIEW

continued from page 32

judges ignore them, deciding their cases on other grounds.

Posner's alternative approach is what he calls pragmatism, by which he means "the methods of social science and common sense." Constitutional scholars should assist judges by analyzing "the social context of constitutional issues, their causes, their costs, and their consequences." Posner wants law schools to devote more resources "to the development and application of social scientific theories and to the collection of data about how the legal system actually operates and with what costs and other consequences."

The Posnerian ideal, following the sociologist Max Weber, is the professionalization or rationalization of the law. The following prediction of Weber may best describe and clarify the path that Posner advocates: "Inevitably the notion must expand that the law is a rational technical apparatus, which is continuously transformable in the light of expediential considerations and devoid of all sacredness of content."[2] At his most provocative, Posner advances the "supersession thesis," which he believes is implicit in "The Path of the Law": law will evolve into a scientific, policymaking apparatus that performs the function of law but is not a body of law in which new rules are derived from old. For prudential reasons, Posner believes that law will and should remain somewhat "entangle[d]" with morality, politics, tradition and rhetoric, but he thinks great strides should be taken on the path of professionalization.

Posner does not place his approach in the history of modern American jurisprudence, but he has precursors other than Holmes. In 1957, Justice Brennan made news by suggesting that lawyers and judges "turn their minds to the knowledge and experience of the other disciplines, and in particular to those disciplines that investigate and report on the functioning and nature of society."[3] Three years earlier, in *Brown v. Board of Education*,[4] the Court had inaugurated the explicit use of social science research in its decisions.

Justice Brennan and the Warren Court are not Posner's models. He writes that the judicial activism of the 1960s is "largely discredited." Nor does Posner promise that sociological inquiry will lead us to a future utopia. He does not believe in moral progress and his favored sociology is empirical and "refreshingly down to earth." Under Posner's taxonomy of legal thinking, his pragmatic approach opposes both left-liberal and conservative-religious academic moralists, who, he argues, want judges to remake America according to their favored theories of the just society.

This taxonomy obscures the sociological fact that Posner is aligned with those liberal law professors who seek to justify and build upon the departures of the Warren Court. They each belong to that modern tradition, discussed by Weber and advanced by Holmes, that seeks to sever positive law from its sacred antecedents, in the belief that the science of society should replace the commanding truths of religion as the foundation of law. That is the true fault-line in contemporary jurisprudence.

On the other side of the divide, there lies no academic movement seeking to impose some body of sacred law (such as Talmudic law, Islamic law or Catholic natural law) on the American public. The opponents of the modern sociological approach are those judges who resist the suggestion that a judicial decision should not be derived from an inherited legal rule and who interpret statutes and constitutional provisions in light of the dominant sentiments at the time of their enactment. Indirectly, this positivist approach tends to preserve the sacred element of law.

The historical connection between the common law and natural law may be illuminated by an influential book from the pre-dawn of academic moralism. In 1530, Christopher St German, a former barrister and informal advisor to Henry VIII, wrote *Doctor and Student*, which takes the form of dialogues between a doctor of divinity and a student of law concerning the grounding of the laws of England. The two discuss how the laws of England are valid unless they transgress the law of God or the law of reason. They also discuss the responsibility of the lord chancellor to decide whether a rule of law is violative of conscience, which requires both the ability to discern good and evil and to apply science or knowledge. Through the intercession of equity, the common law developed in a manner whereby it was tested by the standards of reason and revelation.[5]

Deference to statutes can also retain the sacred content of law, so long as Americans continue the practice of translating religious beliefs into legislation. In the colonial period, penal laws were sometimes taken directly from Biblical text.[6] In recent years and months, some of the most-publicized constitutional cases have taken the form of challenges to statutes or regulations consistent with Biblical prohibitions, such as long-standing proscriptions against abortion, homosexuality and obscenity, or more recent derivations, such as bans on "partial birth" abortions, the military's "don't ask don't tell" regulations, Colorado's Amendment 2, or New York's anti-pornography ordinances.

When these enactments are challenged, we see a struggle between culture classes. On one side is an opinion elite that mostly supports relief from the prohibition, often with the active assistance of law professors writing law review articles, op-ed pieces or amicus briefs. On the other side is a relatively inarticulate voter majority claiming religious sanction for the legislation. This cultural struggle, which is sometimes known by the German word *Kulturkampf*, may be the most salient sociological phenomenon of our time.[7] Yet Posner's sociology of law does not analyze the cultural struggle, or seek to inquire which side is better supported by constitutional text or history.

Posner's pragmatic approach aims to make the contested moral issue in a case "disappear" by bringing to bear empirical social science data and prudential reasoning. In its extreme form, this effort recasts legal disputes into a form that neither side in the *Kulturkampf* would recognize or accept as authoritative. The tools Posner favors can only illuminate the contested moral issue and supplement the legal analysis.

Posner discusses at length Romer v. Evans,[8] in which the Supreme Court struck down Colorado's Amendment 2, a voter initiative barring state and local governments from forbidding discrimination against homosexuals. The Court reasoned, with minimal analysis, that hostility toward homosexuality was an inadequate basis for treating homosexuals differently. Posner's analysis avoids the contested moral issue at the heart of the case. He begins by observing that "[m]any religious people believe that homosexual activity is morally wrong[,]" but then continues: "There is no way to assess the validity of this belief; and what weight if any such a belief should be given in a constitutional

case seems to me an equally indeterminate question."

The second clause does not follow from the first. Even granting Posner's metaethical position that there exists no means to evaluate the truth of a moral proposition, it is neither apparent nor is it explained by Posner why a judge cannot examine constitutional text, structure and history to determine whether state legislation founded upon a Biblical commandment is within the purview of the Tenth Amendment or whether the Equal Protection Clause requires equal treatment of homosexuals.

Instead of legal analysis, Posner engages in the magician's act of making the moral issue disappear. Citing polling data, he writes: "In any event, most Americans, whether religious or not, dislike homosexuality and in particular do no want their children to become homosexuals." This is a proposition the merits of which Posner dissects with relish. He writes that scientific evidence suggests that homosexual preference is not an acquired trait, meaning that parents need not fear that their children will become homosexual by imitation or seduction. Nevertheless, a parent's preference that his or her child not be homosexual is rational, given that homosexuals on average have more difficulty than do heterosexuals in forming family units. A repressive environment toward homosexuality will increase the number of homosexuals who marry and have children, although perhaps unhappily. And since allowing peaceable private discrimination is not an egregious form of repression, Posner suggests that Amendment 2 was a barely rational, if misdirected, measure. He chides the Supreme Court for not having engaged the social facts of homosexuality, concluding that "[t]he Achilles heel of constitutional law is the lack of an empirical footing, not the lack of a good constitutional theory."

Posner's empiricism may help explain why homosexuality is not a matter of public indifference, but it has little to do with Colorado's Amendment 2. Posner interprets his polling data as if the mass of Coloradans are motivated by a quasi-Darwinian drive to avoid AIDS and produce offspring who will form families and perpetuate the species. He ignores the social context of the actual debate over homosexual rights in Colorado, a state which contains a leading institution of the Christian Right, as well as affluent resort towns in which discrimination against homosexuals was out-

lawed. The passage of Amendment 2 was less an effort to repress homosexuals in Aspen than a cultural statement that civil rights must not be based on a moral wrong.

Posner's analysis also suggests that the Supreme Court was lacking "a good constitutional theory." What Posner thinks "most curious" about the *Romer* decision is that it can be "read to expel moral considerations from constitutional law." Posner expresses skepticism that the constitutional text supports such a reading. If *Romer* ends up standing for the proposition that Biblically-derived moral beliefs are an illegitimate basis for law, then its cultural significance is large. But that point holds little interest for Posner. Instead, he devotes five pages to explaining why ancient Greek views about homosexuality should not be imported into constitutional analysis.

Posner's analysis of affirmative action is no less idiosyncratic. After asserting that "[o]ne can get nowhere discussing the morality of affirmative action," he attempts to gain traction by examining opinion polls, which show that the American public does not like the use of racial classifications, but is also concerned about the danger posed by the disaffection of African Americans. Posner believes that affirmative action may contribute to this disaffection, but thinks its elimination "could not be 'sold' to blacks as the elimination of an unjust preference." Not wanting to embrace or discard affirmative action, he then writes: "[F]ortunately, neither extreme is compelled by clear constitutional or statutory texts or precedents." Having ducked the question whether the weight of legal authority falls on one side, he openly endorses a purely political approach, which is to let the decisions "turn on the values of the [judicial] decision-makers" except in extreme cases where an affirmative action program is either too burdensome on individual whites or is plainly necessary.

This is amateur sociology in the stead of legal analysis or moral principle. Today, Posner believes that social peace requires continued governmental favoritism for African Americans, but not for other groups. Tomorrow, some of those other groups, or even resentful whites, may clamor for favored treatment in a sufficiently threatening manner to justify a new rule of law. Maybe Posner would then decide that equal treatment for all is the most expedient rule for securing social peace, though

such a rule would itself be subject to change. Posner does not say whether empirical social science tells us that a perpetual balancing of competing racial groups is the best means to preserve social order.

Posner accepts "the inescapably political character of an important class of judicial decisions." He thinks it appropriate to trust appellate judges to resolve disputes "in a way that will produce the best results in the circumstances rather than resolving them purely on the basis of rules created by other organs of government or by their own previous decisions . . . ." Appellate judges deserve such latitude because they can be like "councils of wise elders" and "are generally picked from the upper tail of the population distribution in terms of age, education, intelligence, disinterest and sobriety."

But appellate judges are not representative of America's dueling culture classes. They are chosen from the legal elite, a social stratum that, I venture to guess, is relatively less inclined to religious observance, orthodoxy or fundamentalism. Elite legal education is almost wholly secular. Appellate judges are not likely to have studied the history of natural law theory. The fact that Supreme Court opinions tend not to discuss the moral issues raised in their controversial cases may reflect the pyschospiritual beliefs of the Justices. In 1960, a scholar reviewing the Supreme Court's treatment of constitutional challenges to obscenity laws noted: "I think it not unlikely that none of the justices takes the evils of obscenity very seriously."[9]

When the Supreme Court decided in *Roth v. United States*[10] that obscenity was not constitutionally protected, the majority opinion (written by Justice Brennan) relied upon the weight of precedent. The Court had previously assumed the same result over a period of several decades, obscenity was universally proscribed, and the original states and colonies had punished obscenity, as an offense related to profanity. The dissenters noted that new social science indicated that obscenity did not lead to juvenile delinquency. After 40 years of proliferating constitutional challenges and social science studies, the question raised in *Roth* remains — whether modern social science persuades us to abandon the commanding truths that historically anchored our legal system and our society.

Posner argues that a pragmatist judge would respect precedent, statutes and

constitutional text. His central criticism of Holmes is that he failed "to appreciate the risk of premature enthusiasm for scientific solutions to human problems." He criticizes the naive activism of the Warren Court and the present Court. Posner also notes that "the great failing of the German judges of the Nazi period was not their positivism, but their willingness to interpret the laws of the New Order flexibly in order to further the aims, the spirit, of those laws." Posner describes the dangers of a social-scientific approach to judging, but I think he understates them. A world in which judges alienated from our cultural past and from large segments of the cultural present deny the existence of moral truth, deny the ability to derive right answers from the application of legal text, and feel free to discover the best rule in the circumstances, with the help of opinion polls and emergent "methods of apprehending social behavior" is not one in which liberty under law is secure.

Posner closes his book with a sentence drawn from the title of Holmes's most famous essay. If we steer by the light of pragmatism, Posner writes, we will "keep on the path that leads to a true and healthy professionalization of law." A more apt phrase may be the one with which Holmes closed "The Path of the Law." Sociological theory and data, when combined with a due respect for positive law and its origins, can help us catch "a hint of the universal law." ◆

FOOTNOTES

1 Oliver Wendell Holmes, Jr., The Path of the Law, 10 *Harv. L. Rev.* 457 (1897).

2.2 Max Weber, Economy and Society 895 (G. Roth & C. Wittich eds. 1978).

3. *Brennan Backs Use of Non-Legal Data*, N.Y. Times, Nov. 26, 1957, at 17, quoted in Joel Friedlander, Constitution and Kulturkampf: A Reading of the Shadow Theology of Justice Brennan, 140 U. Pa. L. Rev. 1049, 1051 (1992).

4. 347 U.S. 483 (1954).

5. Equity does not easily fit into Holmes's effort to distinguish law from morals. In "The Path of the Law" Homes stipulated that his theory of contract did not encompass what he viewed as those exceptions to the rule, in which equity will grant an injunction. Holmes, *supra* note 1, at 176.

6. 1 Alexis de Tocqueville, Democracy in America 26-28 (Schocken 1964).

7. See generally Philip Rieff, The Newer Noises of War in the Second Culture Camp: Notes on Professor Burt's Legal Fictions 3 Yale J. Law & Human. 315 (1991).

8. 116 S. Ct. 1620 (1996).

9. Harry Kalven, Jr., The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Review 1, 45.

10. 354 U.S. 476 (1957).

BOOK REVIEW

THE IMPOVERISHED SOCIOLOGY OF JUDGE POSNER

Joel Friedlander

THE PROBLEMATICS OF MORAL AND LEGAL THEORY

Richard A. Posner

(Harvard University Press, 320 pp.)

In 1897, Oliver Wendell Holmes, Jr., then a Justice of the Supreme Judicial Court of Massachusetts, delivered an address in which he spoke of the danger of "confounding morality with law," exposed the fallacy of "the notion that the only force at work in the development of the law is logic," observed that judges "have failed adequately to recognize their duty of weighing considerations of social advantage," called for a "deliberate reconsideration of the worth of [legal] rules," looked forward "to a time when the part played by history in the explanation of dogma shall be very small," and prophesied that while "the black-letter man may be the man of the present, . . . the man of the future is the man of statistics and the master of economics."[1] That address, entitled "The Path of the Law," inaugurated the modern era of American jurisprudence. What common law rule has endured untouched?

One hundred years later, Richard A. Posner, the Chief Judge of the U.S. Court of Appeals for the Seventh Circuit, surveyed legal academia and judicial practice and came to the conclusion that Holmes's lessons need to be relearned, extended and only slightly modified. His *Problematics of Moral and Legal Theory*, published in 1999, grew out of a series of lectures given in 1997, and may be understood, he writes, "as an extended homage to Holmes's ideas about morality and law."

Posner proceeds from the premise that judging often requires recourse to sources of authority beyond legal text. The question is where judges should turn. Posner's target is what he calls "academic moralism," the tendency among elite law professors to seek answers to legal questions by engaging in moral philosophy, which he thinks is often political preferences cloaked as legal theory. This avenue, Posner argues, is useless, principally because nobody is persuaded by academic moral argument, and secondarily because there is no such thing as universal moral truth. Posner describes how opposing camps of professors debate the morality of euthanasia or homosexuality, while

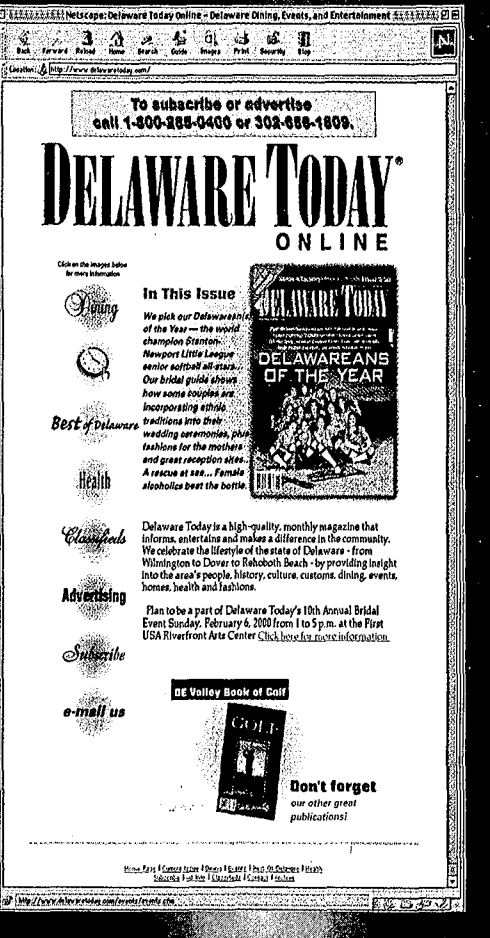
Continued on page 27

Read It. Live It. Hit It.

Visit Delaware Today Online at www.delawaretoday.com for the latest information on dining, events, and the "Best of Delaware."

Plus find out what's in the current issue of Delaware Today magazine.

For information on subscribing to or advertising in Delaware Today magazine call (800) 285-0400.



www.delawaretoday.com

YOUR PROTECTION IS OUR PROFESSION

Wilmington, Delaware
302.658.8000

London, England
171.962.2003

BUSINESS

PERSONAL

Disability

LIFE/

Professional Liability

Health

Malpractice

unusual Risks

We know all about protecting the things you value. Since 1940 Zutz has specialized in creating innovative insurance solutions for professionals. We are well known for covering unusual risks faced by firms of all sizes and descriptions.

Zutz professionals tailor complete insurance coverages to meet very specific needs, including comprehensive life and health coverage for you and your employees and personal insurance for your home and valuables.

Over the years, we have earned the endorsement of many professional organizations, including state bar associations, medical and dental societies. For quality insurance protection, contact Zutz, *the last word in insurance.*

www.zutz-pli.com

PLI
Professional Liability Insurance, Inc.

Sponsored administrators for professional liability insurance by the Delaware State Bar Association since 1979. Lawyers who value quality value Zutz.

ZUTZ
INSURANCE