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PLANNING FOR AN ELDERLY RELATIVE:
DON'T WAIT TO GET HELP

By Austin F. DuBois, J.D.
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Over the past few months we have seen more and more families who are dealing with difficult situations related to an elderly relative.

The fact pattern is often something like this: a family member, usually a parent, is in need of some lower level of long-term care. One of the children moves the parent into his or her own home to more easily provide that care.

Over time, the parent's needs become more acute. As the parent's ability to handle their finances diminishes, the child often intervenes. Money is transferred from the parent's account into that of the child. A pattern forms, and more transfers are made on behalf of the parent or for the benefit of the child, who often suffers financially because of a reduced work schedule and/or additional expenses related to the care of the parent.

Records are typically not kept.

Then the day finally comes when the family member falls, suffers a significant health decline, or simply becomes too much for the non-medically trained family member to handle, resulting in the need for nursing home care. By this time, mom or dad has very little money left, with the bulk of it having been transferred to the child who has been helping out.

That's a problem when the average Hudson Valley nursing home costs between $10,000 and $14,000 per month.

"But Austin," I am frequently asked, "don't you always mention how Medicaid will cover long-term care, including nursing homes?"

Theoretically that's correct, but when you apply for Nursing Home Medicaid, the "5-year look back" period applies. The Department of Social Services (DSS, the county office that processes and approves Medicaid applications) will require that the applicant submit five years of financial records, including (but certainly not limited to) bank and brokerage statements, property deeds, life insurance, and retirement plans. DSS will see that withdrawals have been made. If you can't prove that those were all used for the applicant's care, DSS will impose a **Penalty Period, a time of non-Medicaid coverage, during which the applicant will be responsible to pay that monthly nursing home bill, regardless of whether they still have the money to do so.**

Any amounts transferred to the child with the benevolent intent of offsetting the child's decreased income will definitely count toward the Penalty Period.

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And if the nursing home (which, like it or not, is a business) has unpaid bills, the facility will almost certainly sue the person(s) responsible for the Medicaid applicant's financial shortfall. In most cases, the family is left unable to pay for a nursing home when it is most needed, without the benefit of Medicaid coverage, for a significant period of time.

There are two provisions of the law meant to help families in these situations, but they are extremely hard to take advantage of. If the family can prove to DSS that the withdrawals or transfers were done "solely for a purpose other than to qualify for Medicaid," then DSS, assuming they concur with the assertion that the transfers were made for a purpose other than to qualify for Medicaid, is supposed to refrain from penalizing those transfers.

Also, if you can prove that imposing a penalty will cause "undue hardship"—and there is not much to help us understand what that means in detail—then DSS is similarly supposed to refrain from penalizing you. But proving those two exceptions is typically unsuccessful at the DSS level; the agency will almost certainly deny your application (or approve it with a long penalty period). You will need to appeal that decision, which is often an expensive and frustrating process.

There are a number of options that would have helped the family take care of the parent, compensate family members providing care, maintain control over finances as needed, and gain financial protection in case the family is simply unable to continue providing care. For example: the family members could execute a **Family Caregiver Agreement, pursuant to which the ailing relative pays one or more family members to provide care.** Payments to family members are allowed, but you need to have a written contract and keep good records, among other technicalities.

A Medicaid Trust can perhaps be set up to qualify the family member for community Medicaid to provide some additional help from an agency.

The solutions vary, because each family's situation is different. Ideally, the parent will have addressed these issues by consulting an Elder Law attorney. However, since that often doesn't happen, it becomes the responsibility of the caregiver child not just to provide physical care, but to seek help for the planning necessary to ensure care will continue without crippling financial burden. We in the legal profession are not blind to the fact that many people are reluctant to contact attorneys for fear of expensive fees. **Any good attorney, especially in the field of Elder Law, is an investment. We should be saving you money many times over and above the cost of our services.** Don't wait until the nursing home is asking for an up-front deposit of $30,000, and $12,000 a month after that.

Glossary

Penalty Period: a time of non-Medicaid coverage, during which the applicant will be responsible to pay the monthly nursing home bill, regardless of whether they still have the money to do so

Family Caregiver Agreement: an agreement that outlines terms related to payments made from an ailing relative to one or more family members to provide care

THE LEGAL INS AND OUTS OF INSTALLING SOLAR PANELS AT YOUR HOME

By Gardiner S. Barone, J.D.
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While having solar panels installed on the roof of your home as part of a photovoltaic system (PVS) seems like a worthwhile and environmentally conscious investment, it is not a choice you should make without first considering the possible legal implications.

1. You need to ascertain what local zoning codes or building restrictions your PVS installation will need to comply with.
2. There may be private restrictive covenants that prohibit the installation and operation of a "commercial" power generating system on your property.
3. You need to decide whether it would be better to lease or purchase the equipment. The solar panels you install on your house may generate more than electricity.

The first issue to consider is whether a PVS is even permitted under your local zoning ordinances, and, if permitted, what restrictions the zoning codes impose on a residential PVS. While few zoning ordinances limit PVS installations altogether, more and more towns are imposing limitations on PVS installations in residential neighborhoods. For example, your local zoning code may prohibit a PVS from being installed in your front or side yards, and it may also limit the number of panels you can install on the roof of your home.

In addition to local zoning codes and ordinances, a PVS is governed by the National Electrical Code and Section 605.11 of the International Fire Code, both of which have particular, exacting requirements related to the design and installation of a PVS. **Before installing your PVS, you will need to submit design plans to your local Building Department and secure a building permit.** You will also need to have an approved electrical inspector examine your installation so you can get a certificate of compliance from your local Building Department. You should make it the responsibility of the contractor who installs your PVS to secure a building permit and arrange for the required inspections, and you should condition acceptance of their work on their obtaining a certificate of compliance from your local Building Department.

Second, even if the local zoning code allows you to install a PVS, you need to determine whether any restrictive covenants apply to your property and relate to a PVS. For example, in a recent case in Saratoga County, several homeowners sued their neighbor, claiming his installation of a ground-based PVS violated a restrictive covenant designed to preserve the aesthetics of their neighborhood.

Third, you need to research whether to lease or purchase a PVS. While leasing seems like an attractive option because it spreads the cost over 15 to 20 years, you need to consider whether a long-term lease will impair your ability to sell or maintain your house in the upcoming years. Indeed, it is becoming more and more frequent that potential sales of homes are falling through because the prospective purchaser is either reluctant to take over a long-term lease or does not have the credit standing to assume the lease. In addition, if it ever becomes necessary to perform roof-related repairs on your home, you need to consider the future additional costs of removing an installed rooftop PVS to perform work on your roof.

In addition to these considerations, you also need to make sure you are dealing with a reliable and insured contractor, and study the manufacturer's warranty that covers the products being installed.

In short, the concept of helping the environment while cutting your utility bills seems like a no-brainer, but you must first perform your due diligence before going forward with your PVS project.

DWI POST-ARREST PROCEDURES

By Marcello A. Cirigliano, J.D.
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You have been pulled over by a New York State Trooper, and you have already been asked to perform the field sobriety tests on the side of the road. Whether you chose to perform the tests, or you have refused to do so, the trooper, based on the totality of all of the evidence obtained through his or her investigation, must now decide whether he or she has "Reasonable Cause," also referred to as "Probable Cause," to place you under arrest for Driving While Intoxicated (DWI) or Driving While Ability Impaired by alcohol (DWAI).

Probable Cause to Arrest

An arrest of a driver for DWI is an arrest made by an officer without a warrant, and therefore the officer must have reasonable cause to believe that the driver has committed such crime, whether in the officer's presence or otherwise.

In People v. Shulman, 6 N.Y.3d 1, 25-26, 843 N.E.2d 125, 133 (2005), the Court of Appeals held:

> Probable cause "does not require proof sufficient to warrant a conviction beyond a reasonable doubt, but merely information sufficient to support a reasonable belief that an offense has been ... committed" by the person arrested (People v. Bigelow, 66 N.Y.2d 417, 423, 497 N.Y.S.2d 630, 488 N.E.2d 451 [1985]).

Therefore, the threshold of "Probable Cause" that must be determined by a police officer to place someone under arrest is substantially less than the burden on a prosecutor to prove that the person is guilty of the crime charged "Beyond a Reasonable Doubt."

Beyond a Reasonable Doubt

The term "Beyond a Reasonable Doubt" has been described as "a nebulous concept not susceptible of precise definition." 1 Charges to Jury & Requests to Charge in Crim. Case in N.Y. § 4:68.

Although it is the standard of proof required to convict any person charged with a criminal act in our country, it has been found to be constitutionally required pursuant to case law and not specifically stated in the Constitution. It wasn't until 1970 that the United States Supreme Court read this burden of proof into constitutional law in In re Winship, 397 U.S. 358, (1970).

Entire lectures, court opinions, and books have been devoted to this standard of proof; however for the purposes of this article, it is important to know how this standard is defined and applied under New York State law. The definition of reasonable doubt given to most criminal juries by the judges in our courts is as follows:

> A reasonable doubt is an honest doubt of the defendant's guilt for which a reason exists based upon the nature and quality of the evidence. It is an actual doubt, not an imaginary doubt. It is a doubt that a reasonable person, acting in a matter of this importance, would be likely to entertain because of the evidence that was presented or because of the lack of convincing evidence.
>
> Proof of guilt beyond a reasonable doubt is proof that leaves you so firmly convinced of the defendant's guilt that you have no reasonable doubt of the existence of any element of the crime or of the defendant's identity as the person who committed the crime.

1 Charges to Jury & Requests to Charge in Crim. Case in N.Y. § 4:67.10

It is axiomatic that a prosecutor must prove beyond a reasonable doubt **every element of the crime**, which is clearly a much higher burden than the probable cause required for an arrest. Accordingly, the District Attorney in New York State must prove to a jury each and every element of the charge of Driving While Intoxicated beyond a reasonable doubt to obtain a conviction.

Post Arrest Procedure

After a person is placed under arrest for Driving While Intoxicated, unless he or she requires immediate medical attention, he or she is traditionally transported by the police back to the police department or State Police barracks. In addition to processing the person on the charges (i.e., gathering personal information, fingerprints, mug shots), the police officer will ask the person to submit to a test to determine blood alcohol content (BAC).

Now that the driver is in the custody of the police, if the police intend to question, or interrogate, him or her further, the police must read Miranda Warnings, which advise those in custody of their rights (see "You Have A Right To Remain Silent", August 2014). **Any statements made by a person in custody in response to questions by law enforcement shall not be used against that person at trial unless he or she has been advised of his or her right to remain silent prior to the statements.** However, this does not apply to voluntary admissions by the defendant that are not in response to questions posed by law enforcement. Remember, you always have the right to remain silent.

Testing for Blood Alcohol Content

Alcohol is readily detected in any bodily fluid that contains water, including a person's breath. A person's BAC is the percentage of his or her blood that contains alcohol. The most common samples that law enforcement collect from an individual to try to determine his or her BAC is from breath, blood, or urine. The more alcohol in a person's blood, the higher the number of the BAC.

For the purposes of this article, we will focus on the test most commonly used by the police, which is the breath test. Several companies have developed breath test machines to test a person's BAC. There are three machines that are most commonly used in New York State: the Intoxilyzer (NYPD), the Draeger (NYSP), and the DataMaster (local police departments). The New York State Court deemed these machines to be "scientifically reliable" **as long as the prosecutors can prove at**

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trial that the machines were maintained and tested properly, and that the test was administered properly. All of these requirements have very specific procedures and guidelines that must be adhered to by law enforcement for the tests to be admissible, and a good DWI attorney should be able to identify any flaws.

The courts have determined that chemical tests are not testimonial, and therefore Miranda Warnings are not required to be given prior to the tests. Scmerber v. California, 384 U.S. 757 (1966). The test is not a statement or an admission being made by the defendant; it is a device being used to gather evidence.

In New York State, section 1192 of the Vehicle and Traffic Law provides the majority of the statutes under which a person can be charged with operating a motor vehicle with too much alcohol in his or her blood.

- VTL §1192.1: Driving While Ability Impaired by Alcohol: an individual's ability to operate a motor vehicle is "Impaired" when his or her BAC is 0.07 of one per centum or more, but less than 0.08.
- VTL §1192.2: Driving While Intoxicated; Per Se: A person is determined to be "Intoxicated" when his or her BAC is 0.08 or more.
- VTL §1192.2-a(a): Aggravated Driving While Intoxicated; Per Se: A person is determined to be "Intoxicated" when his or her BAC is 0.18 or more.

Right to Counsel

In addition to not being required to advise a defendant of his or her right to remain silent prior to submitting to a breath test, defendants do not have to be advised of the right to counsel. However, at that stage, a defendant has a "qualified right to counsel", and therefore if the defendant requests counsel, the police must make some effort to allow the defendant the opportunity to contact an attorney. The courts have been clear, however; consulting with an attorney should not extend or unnecessarily interfere with the procedures requiring a driver to submit to a chemical test. Accordingly, a defendant does not have the right to refuse the test until his or her attorney comes to the police station.

Can I Refuse the Test?

An operator of a motor vehicle does **NOT** have a constitutional right to refuse a chemical test once a police officer has properly requested that he or she submit to a test. The license to drive a car is considered a privilege, not a right.

If a person chooses to refuse to take the test, he or she must be read Refusal Warnings, which advise him or her that:

1. He or she is under arrest for DWI.
2. A refusal of the test will result in the immediate suspension and revocation of his or her license.
3. A refusal can be introduced at trial as evidence against him or her.

The warnings should be read from a form or card, and not from the officer's memory, so that the officer can guarantee that he or she used clear and unequivocal language.

What if I Refuse?

This is one of the only times in our criminal procedure where an individual's silence can be used against them.

VTL § 1194(2)(f) states that "evidence of a refusal to submit to such chemical test or any portion thereof shall be admissible in any trial, proceeding, or hearing…"

If a court determines that a person persistently refused a chemical test, the People can introduce the refusal as **"consciousness of guilt"** evidence, and therefore argue to the jury that the reason why he or she refused the test was because he or she knew he or she was intoxicated.

The penalties for a refusal are:

1. Immediate suspension of license
2. Likely 1-year revocation of license following a DMV Refusal Hearing
3. Fines from the Department of Motor Vehicles
4. Charges for violating DWI under VTL 1192.3 (a misdemeanor if 1st offense; felony if there is a prior misdemeanor/felony DWI in previous 10 years)
5. If convicted: Fines, revocation of license, possible probation and/or incarceration

What Should I Do?

There is never a clear answer to this question, because it depends on each individual situation. However, one thing that has been universal in my experience is that the less evidence the police officer is able to provide to the District Attorney, the more difficult it is for the District Attorney to prove a defendant's guilt beyond a reasonable doubt.

The best advice I can give is to **plan ahead**. If you are going out, and you intend on having an alcoholic drink with dinner, make sure you have a designated driver or take a car service. However, if you find yourself in the middle of a DWI investigation, remember that you always have **the right to remain silent**, and a right to call your attorney.

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