Journal of Life Care Planning, Vol. 8, No. 3, (125-134)

Life Care Planning in Bankruptcy Court A Case Study

Tracy Albee, BSN, RN, PHN, LNCC, CLCP, FIALCP

Abstract

This author had the unique experience of testifying in Federal Bankruptcy Court to defend an injured woman against her creditors during a proceeding whereby the bank trustees were attempting to obtain the moneys provided to the injured woman specifically ear-marked for her life care planning needs during the settlement of her prior personal injury litigation. As this author was the plaintiff's retained life care planning expert in the earlier personal injury case, it was a natural progression to then switch roles in order to defend the injured woman's rights to keep the settlement money for the use of her future medical care needs, rather than to have to use it for paying off debts that had been incurred directly due to the personal injury incident itself. A review of the literature could not locate any such published circumstances whereby a life care planner was allowed to testify to opinions in the course of a bankruptcy hearing being heard in Federal Court.

Introduction

While life care planning is widely accepted in courts across the country that are hearing and ruling upon claims of personal injury and medical malpractice, it appears to be absent in the area of bankruptcy law. In the matter of *Gina M. Johnson, Debtor (2008)*, The Honorable Whitney Rimel, in the US Bankruptcy Court, Eastern Division of CA, allowed in the testimony of life care planners and a forensic economist, when considering the issues of this case.

Ms. Johnson's injuries occurred on June 3, 2004, when she was at a local drug store shopping for a greeting card, at which time a box of wood fell from a high shelf, striking her on her back and neck. At the time of the impact, Ms. Johnson was squatting over and bending down. An incident report was completed on site but Ms. Johnson did not seek the care of a physician until 13 days later, at which time she reported that she hurt all over. The physician's exam noted Ms. Johnson to have pain down her right leg to the back of her knee with decreased range of motion in her back and decreased sensation over the right lateral upper arm. The diagnoses following examination were documented as paracervical spasm and associated right radiculopathy and paralumbar spasm and sciatica of the right lower extremity. On 10/29/04, when the pain was not resolving, Ms. Johnson was provided an MRI whereby she was then diagnosed with a herniated nuclear pulposus at L4-5 and L5-S1. Following multiple other physician examinations, and after failing conservative therapy, Dr. D., a neurosurgeon, proceeded with a partial laminectomy at the right L4-5 and L5-S1 level with decompression of L4-5 and L5-S1 on 11/16/04; microscopic discectomy at L4-5 and L5-S1 level on the right side; and removal of a disc herniation at the right L5-S1 level. Ms. Johnson continued to have pain, especially in the right lower extremity, and did not recover after the November 2004 surgery. By July 2005, Dr. D. reported that Ms. Johnson had not done well and had experienced further deterioration. The doctor noted that Ms. Johnson had a recurrent disc herniation at L4-L5 along with the findings of positive straight leg raising and a touch of weakness and decreased sensation primarily in the L5 distribution of the right leg. At that point, the doctor recommended an artificial disc replacement at L4-L5 and L5-S1 with complete discectomy. From August 2005 to October 2006, Ms. Johnson attempted further conservative treatment, as well as ongoing pain management work with Dr. O., an anesthesiologist / pain management

specialist. Care with Dr. O. included epidural injections and lumbar blocks. By 10/06, Ms. Johnson proceeded with the recommended artificial disc replacement under the care of Dr. D. Following recovery from this surgery, Ms. Johnson continued to have chronic pain and other residual physical / psychological symptoms.

The Personal Injury Case

On 01/17/07, Ms. Johnson's personal injury attorney contacted this author to request a life care plan for Ms. Johnson's case. Extensive medical records, as well as three volumes of Ms. Johnson's deposition, were initially reviewed. The only pre-existing health conditions prior to the date of injury were mild asthma, Lasik surgery in 1996, and occasional chiropractic visits for "stiffness" in the distant past.

A life care planning evaluation was performed at Ms. Johnson's home on 02/22/07. At that time, Ms. Johnson's primary complaint was restless leg syndrome [RLS] that occurred daily in both of her legs and her arms. Stress and "just sitting" reportedly brought on the RLS. Ms. Johnson had been prescribed Requip and sometimes this medication was helpful and other times it was not. Ms. Johnson reported that massage was very effective but her insurance would not cover the sessions so she discontinued this modality. The second complaint was described as pain in the right leg from the low back down the hip and into the back of her thigh and calf. She understood this pain to be sciatica in nature. The pain traveled down the left sciatic nerve at times as well, but less often than the right side, which was daily. There had been some improvement since the October 2006 surgery but the pain was still an average of 2/10, even at rest. Ms. Johnson's third complaint was depression. She was taking prescribed Zoloft, for which the dose had been recently increased. There were many days when she just did not want to get out of bed. She recognized that she needed to return to counseling, which had been on hold after her most recent surgery. Another complaint was a new onset of urinary incontinence, whereby Ms. Johnson reported daily leaking and loss of sensitivity. She also was experiencing complete incontinence during sexual intercourse. She had not yet seen an urologist for this new issue. The last physical issue reported was constipation from the ongoing medication side effects and her limited mobility. The constipation was requiring multiple medications to move her bowels, at which time she would often become incontinent of feces once the medications were effective.

For some further background, it was noted that Ms. Johnson had been previously married and that she and her former husband owned a business together providing after-market automobile accessories and customization. At some time prior to the date of injury, Mr. Johnson had left Ms. Johnson and their two children, moving out of the immediate area, and providing no physical, emotional, or significant financial support. This resulted in the dissolution of the marriage and Ms. Johnson becoming a full-time single mother and a full-time business owner. After the date of injury, Ms. Johnson attempted to keep the business profitable; however, with her physical problems, chronic pain, and depression, she lost some control of running the business to her employees, who then took advantage of the situation, leaving her with even more financial complications. Ms. Johnson eventually lost her business and was then unemployed. A Vocational Rehabilitation Expert was retained by Ms. Johnson's attorney to address this loss of wages issue. Ms. Johnson downsized her home; she removed her children from private school and the many recreational and sporting activities that they had become accustomed to; she lived on what she considered to be a very tight budget; and she borrowed money from family. Despite all the attempts at a drastic lifestyle change, she incurred significant credit card debt during this four year period of time that the personal

injury [PI] litigation continued.

The life care plan [LCP] for the PI case was completed in collaboration with the treating neurosurgeon and pain management physician, as well as a retained physiatrist and retained neuropsychologist. The future medical care being recommended included lifetime physician visits for pain management; short-term psychiatric / psychological support; periodic care by medical specialists related to the urinary and bowel issues; intermittent physical and massage therapy for pain management modalities; a motorized scooter for long distance community ambulation; some minimal durable medical equipment; diagnostic testing over lifetime, mostly related to urinary problems; ongoing medication use; the treating neurosurgeon's recommendation for a fusion at an additional lumbar level and the use of nerve blocks; and minimal home care support in the way of housekeeping and gardening. The costs in Year 1 of the LCP were just over $50,000.00 and the ongoing annual costs as of Year 2, and throughout life, were outlined in the LCP as about $28,500.00 per year. There were also One Time Only Costs, related to the future diagnostic testing and the inclusion of the future surgery, in the amount of $375,700.00. Based on life expectancy, as opined normal by all physicians that were consulted, the total of the LCP without present value determination, was approximately $1,500,000.00. The LCP was submitted to the defendants by the plaintiff's attorney as an inclusion to his mediation brief. An economist was also used to provide the present day calculations of the LCP, as well as the lifetime value of the combined claimed damages in this case.

In July 2007, this author's deposition and the treating neurosurgeon's deposition were taken in the personal injury case and seven days later the case was settled in the amount of $1,750,000.00, before attorney's fees. The settlement was for damages, including personal injury, loss of future earnings, and anticipated future medical expenses.

The Bankruptcy Case

On 01/28/08, this author was contacted by Ms. Johnson's bankruptcy attorney. He explained that following the settlement of the PI case, Ms. Johnson filed for Chapter 7 Bankruptcy. One definition of Chapter 7 bankruptcy describes the process as:

> "Individuals who reside, have a place of business, or own property in the United States may file for bankruptcy in a federal court under Chapter 7 ("straight bankruptcy", or liquidation). In a Chapter 7 bankruptcy, the individual is allowed to keep certain exempt property. Most liens, however (such as real estate mortgages and security interests for car loans), survive. The value of property that can be claimed as exempt varies from state to state. Other assets, if any, are sold (liquidated) by the interim trustee to repay creditors. Many types of unsecured debt are legally discharged by the bankruptcy proceeding, but there are various types of debt that are not discharged in a Chapter 7. Common exceptions to discharge include child support, income taxes less than 3 years old and property taxes, student loans (unless Ms. Johnson prevails in a difficult-to-win adversary proceeding brought to determine the dischargeability of the student loan), and fines and restitution imposed by a court for any crimes committed by the debtor. Spousal support is likewise not covered by a bankruptcy filing nor are property settlements through divorce. Despite their potential non-dischargeability, all debts must be listed on bankruptcy schedules."
> (http://en.wikipedia.org/wiki/Chapter_7,_Title_11,_United_States_Code)

After Ms. Johnson filed her Chapter 7 documentation, two of several of Ms. Johnson's bank trustees were fighting the claim based on the fact that they should be entitled to a share of the settlement money. The bankruptcy attorney asked for a declaration that summarized this author's qualifications and life care planning expertise, what had been done in order to prepare the LCP in the PI case, and what were the final opinions in terms of future medical care costs that had been previously rendered. This declaration was provided upon request and it was filed on Ms. Johnson's behalf as an "Objection to Claim of Exemption".

In preparation for this new role of providing testimony in a bankruptcy matter, Ms. Johnson was reassessed in April 2008. It was learned that Ms. Johnson, who had bought into a COBRA [Consolidated Omnibus Budget Reconciliation Act] health plan following the closure of her business, could no longer keep that health care policy, nor could she obtain health insurance on the open market for herself. The various life care planning recommendations were reviewed and most treatment had all come to a halt due to a lack of funding for the ongoing and needed medical services. The pain management physician had continued to treat Ms. Johnson with little-to-no cost, due to this physician being sensitive to her financial circumstances. It was noted that many of the medications had been adjusted to lower cost generics. It was clearly noted by the physician that these medication changes were found to be less effective for successful pain management. After this re-evaluation of Ms. Johnson, it was determined that no changes or adjustments needed to be made to the LCP since the latest publication date of 05/16/07.

In early May, a deposition was requested by the bank trustee's counsel, in order to further explore the life care planning opinions. However, the same day this deposition was scheduled, it was then cancelled without explanation. A subpoena then arrived ordering an appearance during the bankruptcy trial. A week later, a report entitled, "Selective Life Care Plan Comparison" was provided for review. This report was authored by an opposing life care planner, who was offering up analysis and criticism of the LCP that had been done during the PI case. This opposing expert noted in the report that only the "major cost components" were being evaluated. Nine out of forty components were selected for review and included physical therapy, massage therapy, lab work including urinalysis / cultures, three of the fourteen medications, the fusion, and the nerve blocks. This report reflected opinions of slightly lowered cost estimates for some of the above recommendations.

On 05/22/08, this author's testimony was provided during the Johnson bankruptcy trial. Though this was a bench trial, the proceedings were similar to that of traditional litigation. One noted difference was that each individual was sworn in at a seat at the counsel's table and there was no request to move to a witness chair. There was a direct examination, followed by a cross examination, followed by a re-direct. When the bank trustee's counsel rested without a re-cross, the judge took the opportunity to ask her own questions and to clarify some of the evidence before her within the body of the LCP report.

It was noted that prior to the life care planning testimony, the treating physician had testified. Following this author's life care planning testimony on behalf of Ms. Johnson, the opposing life care planner and the opposing forensic economist also testified. The evidentiary hearing took place over three days. Following the filing of post-trial closing briefs, the court took the matter under submission on 06/20/08. On 09/16/08, the Honorable Whitney Rimel, provided her "Findings of Fact and Conclusions of Law". This published finding totaled thirty-five pages in length, and according to the certified court reporter who was on this case, this finding was the longest published ruling on record by this particular judge.

The Judge's Decision

In her reading of the decision, Judge Rimel complimented all of the attorneys involved in this matter as having done an outstanding job of presenting the evidence, arguing their points, and writing their briefs. The reading of the decision included the background information involving the prior PI case and the injuries involved. It was noted that the plaintiff's attorney's fees had to be deducted from the original settlement amount of $1,750,000.00. It was also noted that of the remaining amount, $650,000.00, was used to purchase an annuity from which Ms. Johnson was now receiving $3,315.00 per month. The balance then remaining, which was currently being held in a trust for Ms. Johnson pending resolution of the Chapter 7 matter, totaled only $389,236.00. The two bank trustees argued that all but $52,000.00 of this $389,236.00 should be turned over to the trustees for the debt repayment.

In her findings, Judge Rimel stated that California Code of Civil Procedure Section 704.140(b) provides that "an award of damages or a settlement arising out of personal injury is exempt to the extent necessary for the support of the judgment debtor and spouse and the dependents of the judgment debtor". She furthermore stated that Federal Rule of Bankruptcy Procedure 4003(c) provides: "Burden of proof: In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objection". The judge opined that the legal issues to be decided are two. First, what does the phrase "necessary for the support of the judgment debtor" in California Code of Civil Procedure Section 704.140(b) mean? And, second, does Federal Rule of Bankruptcy Procedure 4003(c) correctly allocate the burden of proof? The question of fact to be determined is to what extent the $389,236.00 that was being held in a trust resulting from the settlement, also considered the "net proceeds", was necessary for the debtor's support and that of her children.

After a lengthy discussion of prior case law, Judge Rimel noted that one needed to look at the debtor's income and expenses. In analyzing to what extent the cash proceeds are necessary for the debtor's support and that of her dependents, the Court began with Schedules I and J (Exhibits to the Bankruptcy Petition). Ms. Johnson filed her initial Schedules I and J when she filed her petition on 09/25/07. On 11/09/07, she filed an amended Schedule I and an amended Schedule J. As to the income portion, the parties stipulated in court that Ms. Johnson's income as of the date of the evidentiary hearing was as follows, monthly: The annuity was $3,315.00; SSI/disability for the daughter was $666.00; SSI/disability for the son was $666.00; child support received was $1,000.00; SSI/disability for Ms. Johnson was $1,851.00; for a total monthly income of $7,498.00. In four years, it was noted that the debtor's daughter will turn eighteen and at that time, the debtor's monthly income will be reduced to $5,732.00. In five years, her son will turn eighteen, at which time the debtor's monthly income will be reduced to $5,130.00. The annuity is guaranteed to remain at $3,315.00 for twenty years.

As of the date of the hearing, Ms. Johnson had no medical insurance. However, there was testimony by the opposing Life Care Planner that Ms. Johnson would become eligible for Medicare benefits twenty-four months after her SSI disability began. As Ms. Johnson had testified that she has been receiving SSI disability benefits for about a year before the hearing, it appeared likely she would begin receiving Medicare benefits by mid-2009. Ms. Johnson's original Schedule J shows average monthly expenses of $4,952.00 per month. Amended Schedule J showed average monthly expenses of $7,487.00 per month. Based on her current income of $7,498.00 per month, Ms. Johnson was able to afford to pay the expenses set forth on amended Schedule J.

The trustees argued that the expenses set forth in amended Schedule J are unreasonable. The trustees also argued that The Court should consider the original Schedule J. The trustees were correct that the original Schedule J executed under penalty of perjury has significant evidentiary weight and that a debtor may not simply amend bankruptcy schedules in a cavalier fashion. Nonetheless, The Judge expressed that household expenses are a moving target, particularly in circumstances like those of Ms. Johnson where she is attempting to determine the amounts necessary for the support of herself and her children in the context of a recent debilitating, life-changing accident and the necessity for ongoing medical care. The court cannot find that Schedule J here was amended in a "cavalier manner".

The trustees also argued that The Court should utilize the IRS National Standards for Allowable Living Expenses. The trustees' argument was based on the incorporation of those IRS National Standards into the Bankruptcy Code for purposes of determining whether a Chapter 7 filing is an abuse of the provisions of Chapter 7, and of determining what kind and duration of a Chapter 13 plan will be required by a Chapter 13 debtor or of a Chapter 13 debtor. In making those determinations, the code, as amended in year 2005, describes that the debtor's monthly expenses and income are to be calculated in accordance with the IRS National Standards and certain local standards. The trustees' argument that the IRS National Standards should be utilized in order for the court to determine to what extent the net proceeds or the cash proceeds are necessary for Gina Johnson's support and that of her dependents were not well taken. The Court reviewed the expenses of Ms. Johnson in the context of the facts and evidence about her needs, not in the context of the IRS National Standards. In the context of this case, and based on the testimony of Gina Johnson, The Court was persuaded that her expenses for home maintenance, repairs, and upkeep of $400.00 per month and her expenses for food of $800.00 per month were reasonable.

A reminder was given that Ms. Johnson has two children and a house that is twenty years old. While she might not actually spend $400.00 each month on repairs and upkeep, over time, maintenance of a house requires significant expenditure, as a real estate appraiser testified. Over time, the house will need painting, new carpet, and substantial remodels to the kitchen and bathroom, as well as other improvements. Allocating $400.00 per month for this category was not unreasonable. On an average, $400.00 per month was appropriate, especially since that amount includes the housekeeper necessitated by Ms. Johnson's injury. The home maintenance expenses on Schedule J include expenses for a housekeeper and a gardener. The housekeeper was coming twice a week because of Ms. Johnson's injuries. At the time of the hearing, Ms. Johnson was current with all of her bills but continued to struggle with pain, stress, depression, and anxiety.

Ms. Johnson has two children, whose ages at the time the petition was filed, were thirteen and twelve. Thus, $800.00 per month for food expenses was, in The Court's view, reasonable. Also, there was evidence that Ms. Johnson's children have special dietary needs, making food more expensive. Further, The Court was mindful that Schedule J is an estimate. In one month, Ms. Johnson might spend less for food and more for clothing. She had allocated $100.00 per month for clothing, which, given two growing children, may not be sufficient.

In original Schedule J, Ms. Johnson allocated $550.00 per month for medical and dental expenses. In the amended Schedule J, she changed that to $1,500.00. Also in amended Schedule J, she allocated $75.00 per month for life insurance and $745.00 a month for health insurance, and she increased her auto insurance expense by $75.00. Although Ms. Johnson testified that she currently does not have health insurance, none of these expenses appeared unreasonable.

The trustees challenged the $370.00 per month in storage fees in the amended Schedule J as not necessary for Ms. Johnson's support. In this instance, the trustees had a point. Ms. Johnson testified that the items in storage are belongings from over four years ago when she moved, and also include personal property from her former business. There was no evidence that this amount is necessary for her support or that of her dependents. On the other hand, Ms. Johnson's health does not presently allow her to sort out and dispose of the items in the storage unit. If Schedule J shows expenses that are almost exactly, within $11.00, of the amount of the debtor's present income, then for what purpose could she need the cash proceeds?

First, Ms. Johnson's income will be reduced when her children turn eighteen. In five years, her income will be $5,130.00 per month. Her expenses will presumably be reduced at that time as well. After paying her mortgage, real estate taxes, and property insurance of $2,425.00 per month, she will have $2,705.00 per month left for all of her other expenses. At this point, she should have Medicare insurance. Absent extraordinary medical expenses, this amount should be sufficient for her needs. Therefore, the question at issue really comes down to the extent to which the cash proceeds are necessary for extraordinary medical expenses that Ms. Johnson will incur due to the injury at this drug store. In fact, this is the area on which most of the testimony focused.

In this regard, the Judge stated that testimony was heard from Tracy Albee, Ms. Johnson, and Dr. O., on behalf of Ms. Johnson. On behalf of the trustees, there was testimony by an orthopedic surgeon, an opposing life care planner and an economist.

The Judge summarized Ms. Johnson's testimony and opined that she was a very credible witness. Although Ms. Johnson may have made some choices that in retrospect were not prudent, in general she is doing the best she can with the life altering and painful results of the accident. Her standard of living is by no means extravagant. The twice weekly housekeeper is reasonable under the circumstances of her medical condition.

Dr. O. testified. She has treated Ms. Johnson since 2005 and was referred by Ms. Johnson's orthopedic surgeon for interventional approaches. Dr. O. has given Ms. Johnson various kinds of treatment, including nerve blocks and epidural injections and eventually Ms. Johnson had a total disc replacement. Since October 2006, when Ms. Johnson had the disc replacement, she has continued to see Dr. O. for pain management. The pain is accompanied by depression and anxiety, and the pain is chronic. According to Dr. O., there will continue to be limitations on what Ms. Johnson can do, and, in Dr. O's opinion, it is very likely that she'll need spinal fusion surgery. The uncertainty about her physical abilities, pain management, and her future causes Ms. Johnson's anxiety to be severe.

The trustees retained Dr. M., a retired board certified orthopedic surgeon. He reviewed the life care plan for Ms. Johnson that was generated by this author, herein referred to as "Albee's LCP". While Dr. M. did not disagree with the future invasive procedures being probable, he had opinions that the costs were much less than those projected in the Albee LCP. It was noted that Dr. M. had never examined Ms. Johnson. He looked at some of her medical records and at Albee's LCP. In order to obtain comparable costs he telephoned two hospitals. The court did not find this physician's testimony very credible due to his lack of familiarity with Ms. Johnson's situation and the limited investigation that he performed.

The trustees also retained a real estate appraiser to opine as to a value of Ms. Johnson's residence and to project the future value of the residence. A projection of the value of the residence in the future, ten to twenty years, was so speculative that The Court declined to consider it in connection with whether the cash proceeds were necessary for the support of Ms. Johnson and her children.

The primary focus of the hearing was on Albee's LCP which was performed in the scope of retainment and prepared in connection with the drug store litigation. Judge Rimel stated that she found this author to be a very credible witness. She commented that Albee's LCP was prepared after reviewing medical records and meeting with Ms. Johnson, as well as with two of Ms. Johnson's doctors. This author was noted to have performed cost research and to have prepared a life care plan that describes the medical expenses anticipated to be necessary for Gina Johnson throughout her life expectancy.

The opposing life care planner reviewed Albee's LCP and evaluated the reasonableness of the costs. Of the forty categories in Albee's LCP, he found fewer than twenty-five percent to be too high. In other words, he found nine categories to be in need of alteration. The economist retained by the trustees to prepare present value projections of the life care planning needs for Ms. Johnson were based both on the Albee and the opposing life care plan.

The Judge opined that the primary differences between the trustee's and Albee's LCP projections of future medical needs were whether allocation of funds for a possible future spinal fusion would be necessary for Ms. Johnson's support and, if so, what that cost would be. The other "big ticket" item that created the medical expense variation is whether Ms. Johnson would require nerve blocks, and if so, how many and at what cost.

Gina Johnson's health at the time of the hearing was precarious, according to Judge Rimel. Although she has had surgery to correct the back problems brought on by the accident, that surgery had not been, by any means, entirely successful. At the time of the hearing, Ms. Johnson testified, as did Dr. O., that she continued to incur a great deal of pain. Ms. Johnson's normal life activities had been severely interrupted by the pain and other physical symptoms resulting from the accident. The Judge felt that no one could say with any degree of certainty whether spinal fusion surgery will be necessary or recommended. Similarly, it was considered impossible to say with any degree of certainty what kind of medical insurance, if any, Ms. Johnson would have in the future. If she continued to be disabled so that she could not be employed, it was likely she would continue to receive SSI disability. In that event, it was likely that she would, after a year, qualify for Medicare insurance. It was unknown by The Court as to what extent Medicare insurance would cover possible or anticipated medical costs such as spinal fusion surgery. To a great extent, the same was true of the projected expenses for nerve blocks. The Court stated that it must evaluate the situation as it is at the time of the hearing and the evidence was that Ms. Johnson did not have medical insurance and was not yet eligible for Medicare.

Judge Rimel opined that even if the opposing life care planner's reduced expenses were utilized, the projected expenses of the life care plan were still significant. If Ms. Johnson had a maximum of $18,000.00 per year, based on Schedule J, to devote to her medical expenses, that would still not be enough to pay for the costs of the life care plan whether Albee's LCP numbers or the trustees' claimed numbers were used. It was certainly not enough to pay for the life care plan if she required spinal fusion surgery. And even if she does not, it would not be enough to pay for the life care plan if it includes nerve blocks. All the experts agreed that nerve blocks will be required. They differed only in the projected cost of the nerve blocks and the frequency that Ms. Johnson should have them.

Judge Rimel stated that the factors set forth by the Bankruptcy Appellate Panel in the Moffat case argue in favor of allowing the claim of exemption, especially after analyzing Ms. Johnson's present and anticipated living expenses and income. The major factor here was considered to be her anticipated or potential medical expenses as a result of the accident and her continuing pain and disability.

The age and health of Ms. Johnson argue in support of allowing the exemption. While she is relatively young at age forty-one, her health is severely damaged. In fact, it was the accident and the resulting physical and emotional trauma caused by the accident that resulted in the settlement, the proceeds of the settlement, and the bankruptcy.

While the age and health of her dependents is less of a factor, Ms. Johnson did introduce evidence, which the court found credible, that her children have health issues that require some expenditure of funds that is greater than usual. Her ability to work and earn a living is significantly impaired. The evidence is that at this point, Ms. Johnson is not able to work. If she is able to return to work, it will be at a clerical office job. Her training, job skills, and education do not qualify her to earn an income that will provide for the needs that she now has solely because of this accident, the injury, and all the resulting side-effects. Her other assets do not fill the gap. Her only significant asset is her house. This is not a particularly liquid asset. And second, The Court found the testimony and report about the likelihood of its appreciation over the next ten to thirty years to be speculative.

Under the circumstances, The Judge opined that Ms. Johnson has little, if any, ability to save for retirement. Her special needs were considerable. In fact, they were the reason for this whole proceeding. The Moffat factors argue in favor of allowing the exemption. Ms. Johnson is not a professional who earns a high income, who has filed bankruptcy and is seeking to exempt a retirement fund, like in some of the reported decisions about exemption claims. Rather, she is a woman who, through no fault of her own, suffered a severe accident that resulted in a debilitating and crippling injury. As a consequence of that accident, she suffers extreme pain and requires continuing medical care.

Under all the facts and circumstances of this case, Judge Rimel stated that the trustees had not met their burden of proof. The Court observed that even if Ms. Johnson had the burden of proof, as the trustee had argued, she should, in The Court's view, by the evidence presented at the hearing, she would have met that burden. The net proceeds were found to be necessary for the support of Ms. Johnson and her dependents.

Conclusion

This author's experience of participating as an expert in Federal Bankruptcy Court was interesting and educational. It afforded the first hand opportunity of accessing the Judge's written opinion for consideration and analysis. The process of working on this case and then taking the measures to publish on the proceedings offered the opportunity to understand the legal decision-making behind the ruling.

It was noted that Judge Rimel based some of her opinions on possibility rather than probability, for example, as to whether a future orthopedic surgery would occur. This consideration of possibilities is quite different than what is allowed in civil litigation. This author felt that the The Court would have benefited greatly by hearing testimony of the treating orthopedic surgeon, Dr. D., who clearly, during the PI case, testified to the future surgery being within medical probability. It was also significant that the issue of collateral sources, though brought up by the opposing life care planner, was not fully explored by either side, or the judge, in this case. As of July 2009, with Medicare-Set-Aside issues entering the civil litigation arena, the collateral source issues will be even more important in these types of hearings.

In conclusion, life care planning, as a tool to be applied during Bankruptcy Pleadings, is an opportunity for the profession to continue educating the courts on the methodology and process we undertake in order to evaluate the special damages. This particular Trier-of-fact was quite impressed with the credibility and level of expertise being brought into her courtroom by

the forensic experts and by the attorneys who had prepared their arguments with the help of their retained experts. It demonstrates another avenue in which life care planning has moved beyond the initial evaluation of a plaintiff's damages.

About the Author

Tracy Albee, RN, LNCC, CLCP, FIALCP, is owner of MediLegal, Inc. with expertise in life care planning, home health/hospice, elder abuse, and residential care, and clinical experience in the care of newborns, pediatrics, adults, and elderly. Having served on boards of AALNC, AALNCCB, GSAC-AALNC, and a local hospital board, Tracy is the AALNC 2010 Conference Chair. Published multiple times, she provides educational programs at local and national levels and works with plaintiff and defense firms nationally.