The Connecticut Chapter of the
National Academy of Elder Law Attorneys

CT NAELA Practice Update

December 2010 Volume 1, Issue 1

IN THIS ISSUE:

New Legislation Increases Community Spouse Protected Amount and More!

Identifying Issues that are Appropriate for Federal Court Litigation: The Use of a Spousal Immediate Annuity in *Lopes v. Starkowski*

Report From The NAELA 2010 Advanced Fall Institute

Calendar of Events

*BOARD MEMBERS:*

**President:**
Joseph A. Cipparone
*Kepple, Cole-Chu, Cipparone, Avena & Zaccaro, PC*

**Past President**
Amy E. Todisco
*Braunstein and Todisco, P.C.*

**President Elect:**
F. William O'Connor
*The Law Office of F. William O'Connor, LLC*

**Vice President:**
Brendan F. Daly
*Czepiga Daly Dillman, LLC*

**Secretary:**
Elizabeth N Byrne
*Farrell, Guarino, Boccalette, P.C.*

**Treasurer:**
Linnea J. Levine
*Law Offices of Linnea J. Levine, P.C.*

**Members:**
Debra A. Brown
*Law Office of Debra A. Brown*
Franklin Drazen
*Law Offices of Franklin A. Drazen, LLC*
Kevin C. Kelly
*Bishop, Jackson & Kelly, LLC*
David Slepian
*Garson & Slepian*
Marialta Sparagna
*Melanson & Sparagna, LLC*
Henry C. Weatherby
*Weatherby & Associates, P.C.*

# President's Message

By Joseph A. Cipparone

Welcome to the inaugural edition of CT-NAELA Practice Update! This quarterly newsletter will give you timely, practical insights on elder law. Please let us know if you have an article to contribute to this new periodical.

We are have an exciting year at CT-NAELA. Visit our new website at www.ctnaela.org. Eight attorneys agreed to serve as mentors for newer elder law attorneys. If you would like a mentor, let us know. In 2011, we will propose legislation in the Connecticut General Assembly to exclude retirement accounts in periodic payment status from counting as assets for Medicaid eligibility. Only the required minimum distributions would count for eligibility purposes. SSI and our Food Stamp program exclude retirement accounts in pay status from the asset calculation. Why not Medicaid? We also hope to build an elder law forms bank on our website that CT-NAELA members can tap. On April 29, 2011, Victoria Collier is coming to the Farmington Club for a day-long seminar on Veterans Benefits. Become an accredited Veterans Benefits attorney by attending this seminar. Watch for the brochure early next year.

Our goal is simple – to provide the best support we can to Connecticut elder law attorneys. Get involved in the Chapter's publications, public policy, litigation, or programs. It will build your expertise and enhance your elder law practice.

# New Legislation Increases Community Spouse Protected Amount and More!

By Amy E. Todisco

On May 27, 2010, Governor Rell signed into law Public Act 10-73, An Act Concerning Medicaid Long-Term Care Coverage For Married Couples. The Connecticut chapter of the National Academy of Elder Law Attorneys ("CT NAELA") was the proponent of raised bill S.B. 370, which passed the legislature and became P.A. 10-73.

P.A. 10-73 contains two sections, the first of which increases the Community Spouse Protected Amount to that provided under federal law, and the second of which allows proceeds from the equity in a home to be excluded from being counted as assets.

The intent of The Medicare Catastrophic Coverage Act of 1988 ("MCCA") was to prevent the impoverishment of the Community Spouse. MCCA prescribed the amount of assets and minimum income a Community Spouse could retain. Under 42 U.S.C. Section 1396r-5(f)(2), the maximum amount of assets which a Community Spouse may retain in 2010 and 2011 is $109,560.00. Prior to the passage of P.A. 10-73, Connecticut's regulation under U.P.M. Section 4022.05 (B) provided that a Community Spouse could keep the home residence plus the lesser of fifty (50%) per cent of the couple's remaining assets, or $109,560 (in 2010); however, in no event would the Community Spouse keep less than $21,912.00 (as of January 1, 2010). U.P.M. Section 4022.05 (B) was stricter than what federal law prescribed, and arguably violated MCCA by requiring a spend-down of assets, thus impoverishing a Community Spouse.

Section (1) of Public Act 10-73 allows the Community Spouse to keep all of the couple's non-exempt assets up to $109,560.00 in 2010, and the institutionalized spouse is immediately eligible for Medicaid. If the couple has non-exempt assets in excess of $109,560.00, those assets in excess of $109,560.00 will have to be spent-down in order for the institutionalized spouse to be eligible for Medicaid. Under the former U.P.M. Section 4022.05 (B), if a couple had $80,000.00 in non-exempt assets, the Community Spouse could only keep $40,000.00 (one-half of $80,000.00), and the remaining $40,000.00 had to be spent-down before the institutionalized spouse would be eligible for Medicaid. Under P.A. 10-73, the Community Spouse can keep all of the couple's non-exempt assets, up to $109,560.00 in 2010, and not have to spend-down anything, and the institutionalized spouse will be immediately eligible for Medicaid.

Section (2) of P.A. 10-73 effectively reinstates a paragraph that had been D.S.S. policy but which D.S.S. eliminated when it promulgated its proposed regulations under the Deficit Reduction Act of 2005 (the "D.R.A."). Under former U.P.M. Section 4030.40 B., "Loans as Excluded Assets. A loan which has been excluded as income, as described in Section 5050, is also excluded as an asset if it is kept separate from the non-excluded assets." The proceeds of a reverse mortgage or home equity loan were not counted as assets or income under the prior regulation. In April 2007, the Department of Social Services promulgated its regulations under the DRA. The DRA proposed regulations deleted paragraph B. of Section 4030.40, thereby resulting in segregated accounts holding home equity loan proceeds to be countable as assets and income. The rationale given by DSS for this change in policy was that D.S.S. could not justify its prior treatment of segregated loan proceeds as being founded in or sanctioned under federal law. Section (2) of P.A. 10-73 in effect reinstates the former paragraph B. of Section 4030.40 and allows an individual or a couple to take out a reverse mortgage loan, home equity loan or other loan financing arrangement, deposit those loan proceeds into a separate account and not have that separate account counted as assets or income for an individual applying for home or community based long term care services under a Medicaid waiver.

As of the date this article is being written, Governor Rell is in the process of preparing an annual budget to present to the new governor and his administration. Under Connecticut law, the sitting governor is required to present a balanced budget to the legislature in January. Governor Rell has directed agencies to reduce their expenses by 10-15% which will be reflected in the proposed budget to the Office of Policy and Management ("OPM"). D.S.S. has submitted its annual budget options to OPM. Option #34 of D.S.S.' submission states as follows: "rescind use of maximum Community Spouse Protected Amount and revert to prior treatment of spousal assets." OPM and Governor Rell's administration will draft a final proposed budget to the new governor using all of the submissions received from the agencies. The new governor will in turn use that proposed budget to submit to the General Assembly. The budget is translated into legislation, and if adopted could repeal, change or add to P.A. 10-73. Many speculate that since this is only the first draft of D.S.S.' submission to OPM, that it might change. However, all agree that it is something to watch and be ready in the future.

# Identifying Issues that are Appropriate for Federal Court Litigation: The Use of a Spousal Immediate Annuity in *Lopes v. Starkowski*

By Brendan F. Daly

## A. Introduction

When I first met Mrs. Lopes in early 2009, her husband had recently been admitted to a convalescent home. Mr. Lopes had a long term care insurance policy with a Connecticut Partnership policy benefit that would pay for an additional year. The couple's assets well exceeded the Community Spouse Protected Amount, (CSPA), so she launched forth on a spend-down while the long-term care insurance paid, and she covered the difference with her excess funds.

A year later Mrs. Lopes had spent all that she could on her home, leaving her with about $341,000 of investments. Since her husband's Connecticut Partnership long term care insurance policy paid $71,175, this sum was exempt for him. In addition to the $109,560 maximum CSPA, therefore, Mrs. Lopes' protected assets totaled about $181,000, leaving $160,000 at risk.

Although Connecticut's regulation requires the Department of Social Services (DSS) to treat income from an annuity as an asset,[i] Mrs. Lopes was amenable to the idea of challenging the State's position in federal court. With the support of the CT NAELA Chapter, we decided to move forward with a lawsuit in federal district court for a preliminary injunction.

## B. Selecting the issue

### 1. Likelihood of success

Given the combative environment elder law attorneys have encountered with DSS in recent years, we expected a vigorous defense of the challenge to Connecticut's annuity regulation. DSS has embraced continued retrenchment of benefits, none more so than the regulations it promulgated as part of the DRA implementation[ii], several of which are likely more restrictive than federal law. Its annuity regulation, however, is so egregious, especially in the light of the numerous cases supporting the use of immediate annuities, that we felt very confident in our chances for success. This consideration in selecting the issue to litigate—the statewide impact to practitioners—was an extremely important factor in deciding on litigation.

### 2. A sympathetic fact pattern

Mr. and Mrs. Lopes are the quintessential blue-collar, depression-era couple, who lived well beneath their means and amassed a considerable nest egg. Mrs. Lopes spent her career raising her children and managing a sandwich shop at Hartford Hospital (where, she proudly told me, she "knew every doctor in the hospital."), and Mr. Lopes worked at Pratt and Whitney. They became concerned with protecting their savings years before Mr. Lopes became ill, and they purchased their State Partnership-approved long term care insurance policies as a means to preserve their assets. We knew that had we litigated with a very wealthy community spouse, we would play into the State's hands with its public policy argument. Mr. and Mrs. Lopes, with their long term care insurance partnership policy purchases and modest lifestyle, presented an ideal and sympathetic fact pattern.

## C. The Lawsuit

On February 5, 2010, Mrs. Lopes purchased a single premium immediate annuity with $166,000, reducing her resources to slightly less than the CSPA. Her annuity complied in all respects with the requirements of federal Medicaid law for the purchase of an annuity not to be considered a disqualifying transfer of assets, see, 42 U.S.C. §§ 1396p(c)(1)(F) and (G), i.e., the State is named as the remainder beneficiary in the first position for at least the total amount of Medicaid paid on behalf of Mr. Lopes, the annuity is irrevocable and non assignable, it is actuarially sound (the payment period of 72 months is less than Mrs. Lopes' life expectancy of 7.87 years for an 82-year old woman under the actuarial publications of the Social Security Administration), and it provides for payment in equal amounts during the term with no deferral and no balloon payments.

The annuity term concerned me. Although Mrs. Lopes was in very good health at the time of the purchase, she was still age 82, and six years is a longer term than what I had hoped for. The historically low interest rates precluded a shorter payout; the annuity would not have been actuarially sound had we done so. Although the longer annuity term increased the risk that Connecticut would receive a remainder interest, we launched forth nonetheless. With the annuity purchase completed, we filed our Medicaid application and Complaint immediately thereafter.

We filed our suit in federal district court requesting a preliminary injunction to enjoin the State from enforcing UPM § 4030.47 arguing that the regulation: (1) violated the Medicaid comparability doctrine—that it is more restrictive than the SSI program's treatment of annuities;[iii] and (2) contravened the Medicaid spousal income rules in counting as an asset income that is exempt for a community spouse. [iv]DSS requested that we withdraw our motion for preliminary injunction and in return they agreed that if we were successful on the merits they would grant the Medicaid application effective February 2010. Since DSS's offer addressed our Eleventh Amendment issue, we agreed, provided that they make a decision on the application within one month.

**1. The secondary market issue**

DSS contacted Peachtree Financial and obtained paperwork for Mrs. Lopes to assign her income stream in exchange for a lump sum of about $98,000. DSS then requested that we complete the Peachtree Financial paperwork and attempt to assign the income stream; they further stated they considered this a factor of eligibility and that they would deny the application for refusing to comply. In anticipation of the Department's actions, I had obtained a letter from The Hartford, the company that issued the annuity, in which it stated that no part of the annuity contract—including periodic payments—was assignable. Furthermore, The Hartford indicated that it would not honor any attempt by Mrs. Lopes to assign the income stream. We provided this letter to DSS before they requested that we cooperate in attempting to sell the income stream to Peachtree, and we relied on The Hartford's letter as part of our justification for refusing to comply with DSS's request. Consequently, DSS denied the application—not because of UPM § 4030.47—but because of our refusal to cooperate in pursuing what it considered a potentially available asset. We then filed a motion for Summary Judgment, which the court granted on August 12, 2010, and DSS has appealed.

**2. The State's arguments**

**a. <u>Standing</u>**

DSS argued that because it denied Mr. Lopes' Medicaid application for failure to cooperate in pursing what it considered a potentially available resource, and not in application of UPM § 4030.47, we lacked standing. We responded that: (1) the "resource" that we purportedly failed to pursue was the stream of annuity payments, which cannot be characterized as a resource at all, but rather income belonging solely to Mrs. Lopes; (2) DSS could not have denied the Medicaid application on this basis without relying on UPM §4030.47 for the legal justification of doing so; and (3) that the underlying issue, therefore, was whether Mrs. Lopes' annuity payments were a stream of income which Medicaid could not count or whether they were a resource as set forth in the underlying policy of § 4030.47. The Court agreed: "Plaintiff has standing to challenge the DSS's treatment of Mrs. Lopes' annuity as an 'asset' in connection with DSS's conclusion that Mrs. Lopes failed to cooperate in collecting an 'asset'." *Lopes v. Starkowski*, No. 3:10-cv-3072010, 2010 U.S. Dist. LEXIS 81829, at *3 (D. Conn. August 11, 2010).

**b. <u>The DSS policy is not more restrictive than the policy set forth in the SSI program</u>**

In its Memorandum, DSS concluded, without providing any supporting authority, that in defining as an asset fixed annuity income, UPM §4030.47 was not more restrictive than SSI.[v] DSS 1) ignored the fact that Mrs. Lopes had no right, authority or power to liquidate her annuity, 2) ignored the distinction between income and resources, and 3) ignored the decisions in *James v. Richman*, 547 F.3d 214, 218 (3d Cir. 2008), and *Weatherbee v. Richman*, 595 F. Supp. 2d 607 (W.D. Pa. 2009), holding that an irrevocable annuity in payment status could not be counted as an available resource under SSI based on that regulation and policy, and that therefore the Medicaid program could not do so either since 42 U.S.C. § 1396a(a)(10)(C)(i)(III) prohibits Medicaid from using a more restrictive methodology for evaluating resources than the SSI program uses.

The court rejected DSS's conclusion: "Defendant fails to point to a single case supporting his position, and this court was unable to locate any." Lopes at *4 Instead, the court followed the reasoning set forth in *James and J.P. v. Mo. State Family Support Div*., No. WD 70994, 2010 WL 1539870 (Mo. Ct. App. Apr. 20, 2010): "UPM section 4030.47 violates federal law, as applied to Mr. and Mrs. Lopes, by treating Mrs. Lopes' income stream as an asset, a characterization which is more restrictive (admits less applicants) than would be applied to a similarly situated individual under the methodology utilized by SSI." *Lopes* at *4. The court tracked the James decision further in finding that because 20 C.F.R. § 416.1201(a)(1) and § SI 01110.115 of the POMS require that only if Mrs. Lopes had a legal right to liquidate (convert the income stream to a lump sum) the income stream could it possibly be considered an available asset; and since in doing so, she would have breached the contract with The Hartford by assigning her income, DSS's policy was more restrictive.

In support of its holding that UPM § 4030.47 is more restrictive than SSI, the court relied on the letter we obtained from The Hartford, in which the company stated that Mrs. Lopes could not assign her monthly payments, and that it would not honor any attempt by her to do so. Although the annuity Rider provides that no "the rights, title and interest in the contract may not be transferred…." (which rights, title and interest would include the right to transfer the income stream), the court placed a great deal of weight on the letter, especially because DSS did not contest it: "The uncontested letter from The Hartford makes clear that no such change [to the payee] would be accepted (or even permitted) under the terms of the annuity." Lopes at *4.

**c. <u>The Deficit Reduction Act (DRA) permits States to treat annuity income as an asset</u>**

DSS made the same argument that the Pennsylvania Department of Public Welfare made in *Weatherbee*: that the enactment of 42 U.S.C. § 1396p(e) under the DRA made it possible for States to treat annuity income as an asset.[vi] The court applied the same statutory construction as the *Weatherbee* court, concluding that subsection (4) was limited to subsection (e). *Lopes*, at *5. Subsection (e) requires that Medicaid applicants disclose any interest in an annuity, and the court noted that the purpose of subsection (e) is to permit States to determine whether an annuity meets all other statutory requirements. *Id*. As in *Weatherbee,* the court also found

it illogical that Congress would have permitted States to deny Medicaid eligibility by treating annuity income stream as an asset after setting forth the criteria[vii] by which an applicant may avoid a transfer penalty. *Id*. The court concluded: "If Congress had intended to 'ring the death knell' for otherwise compliant annuities, it would have said so. It did not." *Id.*, quoting *Weatherbee*, 595 F. Supp. 2d at 617.

**d. CMS memorandums justify DSS's treatment of annuity income as an asset**

DSS cited three CMS memorandums[viii] in support of its position that the DRA permits States to treat annuity income as an asset. The July 2006 memorandum states that even though an annuity may not be subject to a transfer of assets penalty "this does not mean that it is excluded as income or resource." But the memorandum did not clarify anything: clearly the income from Mrs. Lopes' annuity is not excluded as income-- DSS would be entitled to count Mrs. Lope's annuity income in determining whether to allocate any of her income to her as a Community Spouse Allowance. As we noted in our reply brief, what the CMS memorandum does NOT say is that States may treat annuity income as an asset. The court agreed and in comparing the memorandum to 42 U.S.C. 1399p(4), concluded that the CMS memorandum "…does not clarify how any given annuity is to be analyzed, only that it can be considered either 'income' or 'resources.'" *Id.*, at *6.

The July and August 2007 CMS memorandums clarified instances in which an annuity is assignable, and further that if such an annuity is assignable a State may count it as an asset in determining eligibility. The court concluded that these memorandums are not applicable because "[Mrs. Lopes] established that all aspects of [her] annuity are unassignable, including her right to receive payments on it." *Id*. However, the court went on to suggest that "[i]f the income stream of Mrs. Lopes' annuity were found to be assignable, the court notes that the statements by CMS may very well suggest a different outcome." *Id*. But, the court then pointed out that the July and August 2007 CMS memorandums' conclusion that an annuity is assignable and, therefore, a countable asset "if the payee may be changed," lacked statutory authority and, therefore, the court was not required to grant deference to CMS's interpretation. *Id*. Specifically, the court stated that 42 U.S.C. § 1396p(e)(4), which did "not support the finding of a complete alteration to Title XIX's treatment of annuities as income or assets."

## D. Conclusion: Where do we go from here?

The State has appealed the *Lopes* decision, but since it did not move for a stay of the judgment, the court's holding that § 4030.47 is more restrictive than federal law should apply to similarly situated married couples. Despite this, DSS has taken the position that the decision was limited to plaintiff and has no precedential value on anyone else.

Moving forward with the purchase of a non-qualified immediate annuity, therefore, is likely to be met with a DSS request that the client attempt to assign the income stream. One could challenge the State by requesting injunctive relief in federal court based on the *Lopes* decision. Another option is to actually go through the motions of attempting to sell the income stream. If you choose to do so, arm yourself with a letter from the insurance company in advance that the company would not consent to any attempt to assign the contract. Otherwise, stay tuned and wait for the outcome of the appeal.

---

[i] CT Uniform Policy Manual (UPM) §4030.47 provides that "Any payments from an annuity are considered income. Additionally, the right to receive income from an annuity is regarded as an available asset, whether or not the annuity is assignable."

[ii] Although the Connecticut Legislative Review Committee rejected DSS' proposed regulations that it submitted in April 2007, it continues to operate under them nonetheless.

[iii] See 42 U.S.C. §§ 1396(a)(10)(C)(i)(III) and 1396a(r)(2).

[iv] See 42 U.S.C. § 1396r-5(b)(1).

[v] See 20 C.F.R. § 416.1201(a)(1): "If an individual has the right, authority or power to liquidate the property, or his or her share of the property, it is considered a resource." § SI 01110.115 of the POMS defines this further as a legal right.

[vi] Subsection (4) of 42 U.S.C. § 1396 provides that: "Nothing in this subsection shall be construed as preventing a State from denying eligibility for medical assistance for an individual based on the income or resources derived from an annuity described in paragraph (1)."

[vii] See 42 U.S.C. §§ 1396p(c)(1)(F) and (G).

[viii] See CMS bulletins dated July 27, 2006, July 23, 2007 and August 6, 2007.

# Report From The NAELA 2010 Advanced Fall Institute

By Joseph A. Cipparone

As President of the Connecticut Chapter of NAELA, I attended the NAELA 2010 **Advanced Fall Institute and Introduction To Elder And Special Needs Law** in San Diego, CA. NAELA held the seminar from November 4th to November 6th. This Report summarizes the sessions that I attended. Of course, the conference had many more sessions than those summarized here but this article gives a flavor of the educational presentations. Jonathan Blattmachr and Stephen Silverberg discussed the future of the practice of law. Technological changes will continue to have a huge effect on our law practices. Blattmachr and Silverberg traced the history of technological changes from the time they began practicing law to the present. Blattmachr recommended that we rent less office space and work more on the go or at home because the need for a law library and in person meetings with clients will greatly diminish. Ordering legal research from India instead of hiring associates locally will become a trend because of the tremendous cost savings and reliable legal analysis. Virtual meetings through Skype will become as commonplace as e-mail. Only lawyers who provide valuable services at fixed, annual prices for a large number of clients will survive. Many areas of estate planning practice will become standardized and less remunerative. Tech-savvy clients will compare lawyers in ways they never compared them in the past. Clients will use their negotiation skills and ability to compare fee estimates to reduce costs. Web sites will completely change from bragging about expertise to engaging clients with interactive features. NAELA seminars will all become webinars; to save time and money, attorneys will prefer the virtual format.

Doris Hawk of the California Bar discussed Advanced Health Care Planning. She discussed that most people fail to do Living Wills because they are hard to understand and providers do not use them in emergencies. Instead, Advanced Health Care Directives (AHCD) and Physician Orders for Life Sustaining Treatment (POLST) are growing in popularity. Our Connecticut law provides for Health Care Instructions (CGS§19a-575), but I had never heard of a POLST. A POLST outlines a plan of care reflecting the patient's wishes concerning care at the end of life. It complements the AHCD, streamlines transfer of patient records between facilities, clarifies treatment intentions and minimizes confusion about patient preferences. A POLST covers whether to provide CPR, what level of medical interventions (comfort measures only, limited additional interventions, or full treatment), whether to provide artificial nutrition by tube, and who will discuss the decision with the doctor. The one-page, pink form is signed by the patient and doctor and becomes part of the patient's medical chart. Twenty-three states have adopted it and Connecticut is considering it.

John Preston gave an entertaining talk on Three Principles in Marketing: (1) leverage and control; (2) eliminating risk for the client; and (3) eliminating the competition. To get more clients, focus on getting others to recommend you especially clients and financial advisors. Gather contact information on prospective clients so that you can control the message. Deemphasize building name recognition because it does not give you control. A prospective client will never hire you unless you eliminate the client's risk. A client wants to know how much it will cost, that you care about them, and you will accomplish his or her goals. Prospective clients do not care or understand credentials like CELA, LLM or ACTEC fellow. A client must be comfortable with you, not the documents you can produce. Instead of turning away work beyond your skill set, Preston advised hiring more expert attorneys to draft sophisticated documents while you maintain contact with the client. Finally, to get more clients you must eliminate the competition. How do you eliminate the competition? Not by cutting your legal fees. According to John Preston, you eliminate your competition by providing a much higher level of service for a price that clients can afford. He contacts his clients 9 times each year, invites them to seminars at fancy restaurants, charges $395 per year to keep their estate planning documents and beneficiary designations current, sends them DVDs of presentations, and personally contacts them when they miss an appointment or a presentation he invited them to attend. No other firm provides as much service as he does so he "eliminates the competition." Mr. Preston practices in California and has a booming law practice in this recession.

Eric Carlson of the National Senior Citizens Law Center and Patricia Nemour of the Center for Medicare Advocacy spoke on the delivery of Medicare and Medicaid under the new Patient Protection and Affordable Care Act (PPACA). Public Law 111-148. Carlson no longer wants to be known as the "nursing home guru." The nation is moving towards home and community based services

(HCBS) through the State Balancing Incentives Payment Programs and the Community First Choice Option. The former gives states that have more than 50% of their long-term care population in nursing homes (like Connecticut) 5% greater reimbursement from the federal government for the HCBS they provide from 2011 to 2015. The latter seeks to eliminate waiting lists for HCBS for applicants with incomes that are less than 300% of the SSI rate. Family members can receive payment for services under the Community First Choice Option. Carlson emphasized that the limitation of all of the HCBS programs including Money Follows the Persons is that they only cover services, not housing costs. PPACA also expands the spousal impoverishment provision of the federal law to HCBS but for some odd reasons limits this expansion to the period 2014 to 2018. Nemour covered the Medicare Advantage Special Needs Plans for clients who are eligible for Medicare and Medicaid. She emphasized the need to ask for the SNP's Model of Care document and benefit package to determine whether it provides anything special that you could not get from regular Medicare Advantage plans.

Robert Anderson of the Michigan Bar and Sharon Kovacs Gruer of the New York Bar held a breakout session on the Taxation of Special Needs Trusts and MIDGTs (Medicaid Intentionally Defective Grantor Trusts). An attorney must decide when drafting a trust who will bear the income tax generated by trust investments. Should the grantor, the beneficiary or the trust bear the income tax? When the beneficiary receives public benefits, attorneys must also consider how the tax provisions will affect the beneficiary's eligibility for public benefits. For instance, giving the beneficiary of Special Needs Trust a lifetime general power of appointment would make the beneficiary liable for the income taxes under the grantor trust rules. If the beneficiary is in a low tax bracket, the general power of appointment helps lower taxes. Yet, a general power of appointment would render the beneficiary ineligible for Title 19. Anderson and Gruer discussed Revenue Ruling 83-25. The IRS ruled that the beneficiary of a Special Needs Trust will be considered the grantor of the trust for income tax purposes. However, under that Ruling and the grantor trust rules (IRC §673 to 678), the settlor must be a non-adverse party like a parent or an attorney acting as conservator. If you want the beneficiary to bear the income taxes, you cannot have a sibling serve as conservator because a sibling could be considered an adverse party. The sibling may be a remainder beneficiary after the state is paid back for medical assistance provided. Anderson discussed qualified disability trusts. Under IRC §642(b), a qualified disability trust can claim a $3,650 income tax exemption instead of the $100 income tax exemption for complex trusts. A qualified disability trust must be for the sole benefit of a disabled beneficiary who is under 65.The qualified disability trust minimizes income taxes by allowing the use of the trust's personal exemption ($3,650 in 2010) and the disabled beneficiary's personal exemption (also $3,650 in 2010). The trust's exemption amount remains in the trust federal income tax free. This exemption allows assets to remain in the trust for future use. Anderson and Gruer briefly discussed allocation of basis. The IRS finally came out with the form to allocate basis for people who die in 2010 with a gross estate exceeding $1.3 million. It is Form 8939 and can be found at www.irs.gov. NAELA has sought clarification from the IRS as to whether an Executor can allocate basis in assets held in a Special Needs Trust but NAELA has not received a reply. Anderson then covered naming a Special Needs Trust as beneficiary of an IRA. To allow IRA distributions over the life expectancy of the beneficiary, some commentators recommend a conduit trust. A conduit trust requires that the Trustee distribute the required minimum distribution to the trust beneficiary. With a Special Needs Trust, however, distributing the required minimum distribution to the beneficiary would render the beneficiary ineligible for Title 19. Instead, distributions should go to a trust without conduit language that allows accumulation of income and has other individuals as remainder beneficiaries.The age of the oldest beneficiary will determine the size of the distributions but the acceleration of income tax is worth the preservation of public benefits.

Patricia Dudek and Sanford Mall of the Michigan Bar gave a presentation on the implication of the new Health Care Reform Law on Special Needs Trusts. Coordination of benefits for clients eligible for both Medicare and Medicaid (dual eligibles) will require additional diligence. Providers just want to get paid and insurance companies just want to deny claims; neither wants to coordinate a client's care. Elder law attorneys advocating for their clients will assure coordination of care. This is the age of advocacy and litigation, instead of planning! Children under 26 can now obtain coverage under their parents health plan. Dudek and Mall encouraged us to seek refunds for premiums paid in advance for children under 26 who have a Special Needs Trust. Access the high risk pool for those who have been uninsured for at least 6 months. Reinsurance for early retirees (over 55) could cover the 2 year wait for Medicare when a person receives SSDI. Mall expressed concern that health insurers will raise their premiums in the wake of health care reform. PPACA provides expanded coverage for mental health issues. This improvement should help Trustees coping with substance abuse by beneficiaries. For most health insurance plans, the new law mandates coverage of essential benefits such as ambulatory patient services, emergency care, substance abuse, rehabilitative services and devices, mental health, preventive and wellness services, chronic disease management, hospitalization, prescription drugs, and others. For those with disabilities, the inclusion of rehabilitative services and devices and mental health and substance abuse assistance in the definition of essential benefits will make a huge difference. The elimination of lifetime caps by 2014 will also greatly benefit special needs clients. Beginning in 2014, the new health care law requires states to provide

Medicaid coverage for individuals within 133% of the federal poverty level who are over 65, pregnant, not covered by Medicare Part A or B, or not eligible for Medicaid under any other category. This expansion of Medicaid could greatly benefit staff or family members of special needs clients as well as beneficiaries of discretionary trusts. Expanding Medicaid may bust already overburdened state Medicaid agencies, however.

Michael Gilfix of the California Bar and his son, Mark Gilfix, a law school student, gave a fascinating talk on Multigenerational Estate, Tax and Long-Term Care Planning. When representing multiple generations, consult the ACTEC Commentary on the Rules of Professional Conduct and the NAELA Aspirational Standards. The Aspirational Standards are written for elder law attorneys and assume that more people will be involved in the representation due to the declining capacity of the elder. Compare the ACTEC commentary on Model Rules 1.6 and 1.7 with the NAELA Aspirational Standards on Confidentiality and Conflicts of Interest. The key is to get consent in writing from both generations clarifying whether you are engaged in joint representation or separate representation. The materials include a sample client letter covering multigenerational representation. Michael and Mark discussed how the values of each generation differ. Our clients (ages 70 to 90+) are frugal, aghast at attorneys fees, and shocked at the spending habits of their children and the country. Baby Boomers (ages 40 to 70) are sensitive to the vagaries of life and the need to seize the moment, feel a greater need to protect their children, and welcome family meetings. The younger generation (age 20 to 40) sees the nation's debt exploding and believe Social Security will not exist by the time they reach retirement. Mark's generation (age 20 to 40) does not like to think about elder law issues but are open to understanding them. Michael and Mark thought that law firm web sites ought to serve all 3 generations, focusing more on stories and needs rather than legal concepts. Michael Gilfix recommended the use of a stand-alone Family Protection Trust (a dynasty GST-exempt trust) to avoid the problems of divorce, lawsuits, and coming estate tax increases. The trust could have multiple donors. He recommended that wealthy children consider a Special Needs Trust for a parent or buying long-term care insurance for parents. We ought to host more family meetings and ask about estate plans for not only our clients but their siblings, their children, and their grandchildren. Consider adding a client's children to your mailing list and invite them to seminars.

Morris Klein's talk on the Community Living Assistance Services & Supports (CLASS) Act continued the conference emphasis on the new health care reform law. The CLASS Act (42 USC §300ll) creates a voluntary long-term care insurance program run by the federal government. Only the self-employed and active employees can participate in a CLASS plan; spouses cannot participate. Employees have to opt-out of the plan to avoid coverage. The amount of premiums an employee must pay depends on the employee's age but cannot increase if the employee is over 65 and has paid premiums for 20 years. The CLASS Board of Trustees will manage the funds. The plan will have an enrollment period each year like Medicare Part D. To receive a benefit from the plan, the employee must contribute to the plan for 5 years. The employee must work 3 of those 5 years. The lack of a lifetime limit on the amount of benefits paid distinguishes this program from private long-term care insurance. Benefits will begin once the employee needs substantial assistance with 2 or 3 activities of daily living (eating, bathing, toileting, dressing, transferring & continence). This program should particularly benefit the working disabled. The benefits received cannot affect Medicaid or Veterans Benefits; employees on Medicaid can keep 50% of the CLASS benefit if receiving care at home. The CLASS Act leaves many questions unanswered that only regulations can clarify. For example, what are the initial premiums? The Secretary of Health & Human Services (HHS) was to set the premiums by October 12, 2010; it did not happen. Do premiums stop once you start receiving the benefits? The amount of $75 per month is the benefit cap but how much will be paid for each level of care? Financial viability also remains a concern regarding this new program. The program is meant to be self-sustaining without funding federal tax revenues. Given the voluntary nature of the program, how can the plan sustain itself when the population least likely to need benefits -- younger workers -- will have little incentive to participate. Long-term care insurance companies will surely oppose the program because it cuts into the market for private insurance. The CLASS Act may become one of those seldom used government benefit programs like Education IRAs. The Act by law becomes effective January 1, 2011. Yet, the Secretary of HHS has until January, 2012, to set the eligibility assessment and until October, 2012, to create a benefit plan.

Karen McIntyre, gave a talk on Avoiding the Pitfalls of the VA Non-Service Connected Pension Claims Process. Ms. McIntyre is a registered nurse in Tampa, Florida and is the Co-Creator of VisPro, the software program for preparing Veterans Benefit forms. The non-service connected pension is different from Aid and Attendance. The former provides a monthly pension for low-income veterans who are over 65 or 100% disabled. The latter requires a showing that the veteran needs substantial assistance with activities of daily living. A veteran over 65 can be in great health and still get a pension. A veteran can have both taxable military retirement pay and a non-taxable VA pension. A veteran can receive a pension of up to $985 per month if single or $1,291 per month if married. If the veteran has died, the veteran's surviving spouse can receive up to $661 per month. To qualify, the veteran must have served 90 days of consecutive active duty with one of those days occurring during war time.

For acceptable war times, see 38 CFR §3.3. For acceptable service, see 38 CFR §3.7. A spouse of a veteran must have been married to the veteran for at least 1 year or had a child by the veteran. There is no asset limit for the VA pension but if a veteran has more than $50,000 in countable assets the veteran should complete Form 21-8049. VA pays the difference between family

countable income (gross income less unreimbursed medical expenses (UME)) and the yearly income limit. For example, if a single veteran has gross income exceeding UME of $1,000 and the yearly income limit for a single veteran is $11,830, the veteran will receive $902.50 per month, calculated as follows: 11,830 – 1,000 / 12 = $902.50. McIntyre advised seeking an informal award date to preserve the retroactive payment date to the first day of the month following the informal claim. It gives the veteran 1 year to get together the documents to support a claim.

The older Form 21-526 (application for compensation and/or pension) does not require disclosure of transfers of assets; the new Form 21-526 issued June, 2010 requests information on transfers. Some offices may still accept the older form. McIntyre talked to VA representatives who said that they want the transfer information to determine if the applicant has relinquished control of the assets transferred. VA will not deny pensions merely because of transfers of assets. We reviewed the Medical Expense Report Form 21-8416. If the veteran lives in an assisted living facility, McIntyre does not advise breaking out the facility charges between housing and care if the veteran is also applying for Aid and Attendance benefits. Only recurring medical expenses can be deducted from gross income. Thus, a one-time purchase of medication will not reduce gross income. She advises having the veteran's doctor write a prescription for every recurring medication the veteran takes or skipping prescriptions all together if the veteran qualifies without deducting the prescriptions. If the veteran lives in an assisted living facility and still owns a home, McIntyre advised against declaring the home as an asset because it is exempt. If the home is rented out, list the rent as income but state that the veteran retains full rights of ownership and keep some of the veteran's personal belongings in storage on the property. If a family member lives in the home, have the family member sign a caretakers agreement to assure that the veteran can return home and preserve the home as an exempt asset.

The 2010 Fall Institute included many other sessions not included in this report. To get the listing of each session, visit the NAELA web site (www.naela.org) under Meetings and Events. You can purchase a recording of each session and its materials online or by podcast at the Online Education Library under "Archived Seminars" on the NAELA web site.

---

# Calendar of Events

## JANUARY 2011

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| | | | | | | 1 |
| 2 | 3 Connecticut Bar Association Estates & Probate Executive Committee meeting | 4 | 5 | 6 | 7 | 8 |
| 9 | 10 | 11 CT-NAELA Board Meeting | 12 | 13 | 14 | 15 |
| 16 | 17 | 18 Connecticut Bar Association Elder Law Section Meeting | 19 | 20 NAELA Unprogram | 21 NAELA Unprogram | 22 NAELA Unprogram |
| 23 NAELA Unprogram | 24 | 25 | 26 | 27 NAELA Chapter Presidents Meeting | 28 | 29 |
| 30 | 31 | | | | | |

## FEBRUARY 2011

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| | | 1 | 2 Connecticut Bar Association Estates & Probate Section meeting | 3 | 4 | 5 |
| 6 | 7 | 8 CT-NAELA Board Meeting | 9 | 10 | 11 | 12 |
| 13 | 14 | 15 Connecticut Bar Association Elder Law Section Meeting | 16 | 17 | 18 | 19 |
| 20 | 21 | 22 | 23 | 24 NAELA Chapter Presidents Meeting | 25 | 26 |
| 27 | 28 | | | | | |
| | | | | | | |

## MARCH 2011

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| | | 1 | 2 | 3 | 4 | 5 |
| 6 | 7 Connecticut Bar Association Estates & Probate Executive Committee meeting | 8 | 9 | 10 | 11 | 12 |
| 13 | 14 | 15 Connecticut Bar Association Elder Law Section Meeting | 16 | 17 | 18 | 19 |
| 20 | 21 | 22 | 23 | 24 NAELA Chapter Presidents Meeting | 25 | 26 |
| 27 | 28 | 29 | 30 | 31 | | |
| | | | | | | |

## APRIL 2011

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| | | | | | 1 | 2 |
| 3 | 4 Connecticut Bar Association Estates & Probate Section meeting | 5 | 6 | 7 | 8 | 9 |
| 10 | 11 | 12 Connecticut Bar Association Elder Law Section Meeting | 13 | 14 | 15 | 16 |
| 17 | 18 | 19 | 20 | 21 | 22 | 23 |
| 24 | 25 | 26 | 27 | 28 NAELA Chapter Presidents Meeting | 29 CT-NAELA Spring Seminar | 30 |
| | | | | | | |

## MAY 2011

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| 1 | 2 Connecticut Bar Association Estates & Probate Executive Committee meeting | 3 | 4 | 5 | 6 | 7 |
| 8 | 9 | 10 CT-NAELA Board Meeting | 11 NAELA Elder & Special Needs Law Annual Meeting | 12 NAELA Elder & Special Needs Law Annual Meeting | 13 NAELA Elder & Special Needs Law Annual Meeting | 14 NAELA Elder & Special Needs Law Annual Meeting |
| 15 NAELA Elder & Special Needs Law Annual Meeting | 16 | 17 Connecticut Bar Association Elder Law Section Meeting | 18 | 19 | 20 | 21 |
| 22 | 23 | 24 | 25 | 26 NAELA Chapter Presidents Meeting | 27 | 28 |
| 29 | 30 | 31 | | | | |
| | | | | | | |

***Look for our next issue in March 2011**. Highlights will include: Victoria Collier's VA seminar, which CT NAELA will host in April and Linnea Levine's article on a proposal for Connecticut to exempt retirement accounts in determining Medicaid eligibility.