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IN THIS ISSUE:

Victoria Collier Details VA Benefits at CT NAELA Seminar

The Penalty for Staying Home: The DSS Asset Transfer Policy UPM § 3029.05E

Wrap Up From the Spring 2011 NAELA Seminar

CT-NAELA Launches Website

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President's Message

By Joseph A. Cipparone, Esq.

The wheel of change keeps turning in the elder law world. Despite the heroic efforts of the CT-NAELA Public Policy Committee and the CBA Elder Law Section Legislative Workgroup, the Connecticut General Assembly repealed Public Act 10-73 (CGS §17b-261k). Starting July 1, 2011, we will return to the bad old days of splitting a couples' assets into two equal shares and spending down the institutionalized spouse's half on exempt assets and expenses for clients with less than Community Spouse Protected Amount ($109,560).

Governor Malloy also succeeded in lowering the Connecticut estate and gift tax exemption from $3.5 million to $2 million commencing January 1, 2011. With a widening gap between the federal estate tax exemption ($5 million) and the Connecticut estate tax exemption ($2 million), we need to look for formulas in old estate planning documents that rely on the federal estate tax exemption. For couples with $2,000,000 to $10,000,000, an old formula based on the federal estate tax exemption could cause a lot of unwanted Connecticut estate tax at the death of the first spouse to die.

The charging of interest on probate court fees for late-filed Connecticut estate tax returns will commence soon. The Department of Revenue Services has produced a raft of new estate tax return forms for 2011. The new Form CT-706NT EXT allows an extension request for a non-taxable Connecticut estate tax return. Consider using this form to obtain 6 months of extra time to file the return and avoid payment of interest on the probate court fee.

Through this period of rapid change, the Connecticut Chapter of NAELA has stepped up its game to meet the challenge. The Chapter has a valuable web site that we will continue to improve with members' assistance. Get a summary of what you will find on our new web site through Marialta Sparagna's article in this edition. We continue to send Board members to NAELA conferences to bring the best ideas to Connecticut

elder law attorneys. See William O'Connor's article on the NAELA annual meeting in Las Vegas. We helped Connecticut lawyers integrate veterans benefits into their practice. See the article by Elizabeth Byrne summarizing Victoria Collier's April 29 veterans benefits seminar in Farmington. Finally, Brendan Daly alerts us to the Department of Social Services practice of delaying the start of the penalty period in home care cases even though the client is otherwise eligible for Title 19 on the application date. This column caps my year as President of your Chapter. William O'Connor will ably fill my seat at the end of June. As President, I learned a lot about the legislative process, federal litigation, seminar preparation, non-profit budgeting, starting a publication, and, of course, elder law. What I learned most, though, was the generosity of elder law attorneys like Amy Todisco, Elizabeth Byrne, Brendan Daly, Debra Brown, David Slepian, Linnea Levine and other Board members who have selflessly given extraordinary amounts of their time to build the Connecticut Chapter of NAELA. I am most grateful for all the help that I have received from Chapter members and elder law attorneys in this state. I look forward to continuing my involvement in the Chapter.

Victoria Collier Details VA Benefits at CT NAELA Seminar

By Attorney Elizabeth N. Byrne

Noted veterans benefits law specialist, Victoria L. Collier, addressed some fifty Connecticut elder law attorneys at the CT NAELA April 29th seminar regarding veterans benefits. Attorney Collier noted the general public's increasing interest in VA benefits, and the need for elder law attorneys to have an understanding of the VA benefit eligibility concepts. In a full day presentation satisfying the VA attorney accreditation requirements, Attorney Collier also advised the attendees on the benefits claims process, and the VA restrictions on attorney representation and billing.

Connecticut elder law attorneys apparently are recognizing the need to add VA benefits to their disability planning practice, as 144 attorneys statewide have now satisfied the accreditation requirements to provide such counsel to veterans and their families.

<u>Benefits Provided by the Veterans Benefits Administration</u>

Attorney Collier explained that there are different types of benefits available to veterans through the Veterans Benefits Administration (VBA) depending on whether the veteran suffered a service connected disability or non-service connected disability, the veteran's service record, the length of the service, the timing of the disability, and whether the veteran served during war time. (See the 4/29/11 Seminar outline entitled "Victoria Collier's In the Trenches: Integrate Veterans Benefits Into Your Elder Law Practice" at chapter V.) (hereinafter "Seminar Outline")

<u>Service Connected Disability</u>

A veteran who suffered an injury or disease while on active duty, and whose injury was the result of the service or was exacerbated by the military service, may be entitled to monthly income called "compensation" as long as the veteran was discharged other than dishonorably, and the disability was not a result of the veteran's own willful misconduct or abuse of drugs or alcohol. (38 USC 101 (13), 38 CFR 3.12, 3.3, 3.4). The amount of compensation is based upon the veteran's disability rating, and is not affected by the veteran's earned or unearned income or net worth.

In addition, dependent survivors of deceased veterans who suffered a service connected disability, including a surviving spouse, surviving child, and dependent surviving parents may make claims for Dependency and Indemnity Compensation (DIC) using VA form 21-534. Attorney Collier explained:

> Death Indemnity compensation is compensation paid to the survivor when the veteran was receiving disability compensation prior to his death. Accrued benefits are payments made to a claimant for a disability the veteran should have been paid for while the veteran was alive, but never received them. Pension is paid to low income claimants. (See Seminar Outline, V.A.2.)

Non-Service Connected Disability

Veterans and surviving spouses of deceased veterans may be entitled to a "Special Monthly Pension", specifically a Low Income Pension, Housebound Benefits, and Aid and Attendance benefits, to offset health care expenses. (See Seminar Outline, V.B.)

In order to qualify for the special monthly pension, (1) the veteran must have served at least 90 days of active duty service, one day of which must have been during a war time period, (2) the veteran must have received a discharge other than dishonorable, (3) the veteran must have limited income and assets available, (4) the veteran must have a permanent and total disability at the time of application (note that veterans aged 65 or older are presumed to be disabled), (5) the disability must not be the result of willful misconduct by the veteran, and (6) the veteran signs and submits an application for benefits.

According to Attorney Collier, permissible family income limits for the Low Income Pension in 2011, including all income sources other than SSI, are $11,830/year for a veteran with no dependents, $15,493/year for a veteran with one dependent, and $7,933/year for a surviving spouse with no dependents.

To obtain housebound benefits, a veteran must show that he has a single permanent (can be non-service connected) disability rating of 100% disabling and is confined to the home and satisfies the applicable income criteria, or has a 100% disabling disability along with a second 60% disability, whether or not confined to the home, and satisfies the applicable income criteria. For this program, Attorney Collier stated that the permissible family income limits are $14,457/year for the housebound veteran with no dependents, $18,120/year for the housebound veteran with one dependent, and $9,696/year for a housebound surviving spouse with no dependents.

The Aid and Attendance Program is the program that is most widely discussed these days. It is available to veterans and the spouses of deceased veterans who are blind, or living in a nursing home, or unable to dress/undress or keep himself clean and presentable, or unable to attend to the wants of nature, or has a physical or mental incapacity that requires assistance on a regular basis to protect the veteran from daily environmental hazards. According to Attorney Collier, the permissible family income limits for this program for 2011, including all income sources other than SSI, are $19,736/year for a veteran with no dependents, $23,396/year for a veteran with one dependent, and $12,681/year for a surviving spouse with no dependents. In ascertaining income, unreimbursed medical expenses (such as doctor's fees, dentist's fees, prescription glasses, Medicare premium deductions and co-payments, prescription medications, health insurance premiums, transportation to physician offices, therapy, and funeral expenses, home health care, assisted living facility expense, skilled nursing home charges) paid by the veteran, projected and annualized, may be used to reduce the veteran's countable income.

Attorney Collier explained that the VA also considers the net worth of the individual seeking benefits to determine whether the person has "sufficient means" to pay for his own care. In calculating assets, the VA excludes the value of the residence, furnishings, and car, but considers what cash assets (bank accounts, annuities and life insurance with cash values, business interests, and brokerage accounts) the veteran may have in comparison to age and presumptive financial need. Attorney Collier indicated that, due to the age (not life expectancy) analysis, a person who is 91 years of age who has $75,000 may not be eligible for the Aid and Attendance program, whereas a person who is 80 years of age and who has $75,000 may be considered eligible.

Attorney Collier reviewed some techniques for reducing income and assets so that a veteran may qualify for Aid and Attendance benefits. The lower the veteran's (net) income (after deduction for unreimbursed medical expenses), the greater amount of assistance available. One technique to reduce income is to use a family services contract with actual, verifiable payments to a non-spouse family member pursuant to the contract. Note that all of the medical expenses will have to be proved at time of application. One simple technique for reducing assets under VA regulations is to add owners to assets; for example, a $100,000 bank account re-titled in the name of the veteran and his child not living in the same household will serve to reduce the veteran's asset by one-half (1/2) to $50,000.00. Of course, the VA rules regarding assets transfers are much more relaxed than the Medicaid rules, so keep the Medicaid rules in mind when considering asset reduction options.

Benefits Provided by the Veterans Health Administration

Most of us are familiar with the superb medical benefits provided to veterans injured during their service to our country, but the Veterans Health Administration (VHA) provides a broad array of health benefits to veterans of all ages, such as inpatient and outpatient care, geriatric evaluations, nursing home care, and

home health, adult day, and residential/respite care. Many of our clients have declined to participate in this health care program, because they "don't want to see VA doctors." However, Attorney Collier explained that any veteran can enter the health care system and receive VHA benefits by completing and filing a VA form 10-10EZ and undergoing one physical examination with a VA physician for evaluation and ranking (in priority groups) purposes only. After that, the veteran may use his own physician but can qualify for VA prescription drugs or VHA-paid hearing aids, and the like.

To become eligible for health care benefits, Attorney Collier stated that the veteran simply needs to enter the armed services, serve in the armed services, receive a discharge other than dishonorable, and then leave the armed services. All veterans are then ranked into eight priority groups*, with the first priority group, composed of veterans who have suffered a 50% or greater service-connected disability or are unemployable due to the disability, receiving free medical care. The second priority group is composed of veterans who have suffered a 30% to 40% service connected disability. POWs, recipients of the Purple Heart, and medically discharged veterans are in the third priority group.

Recipients of the Aid and Attendance program and housebound veterans are in the fourth priority group. According to Attorney Collier, it is the fourth priority group, or higher priority groups, that receive the free hearing aids.

Attorney Collier stated that veterans who are in the VHA system can obtain their prescriptions from a VA clinic, whether the prescription was written by a VA or private physician. The co-payment for the prescription ranges from $0.00 to $9.00 per monthly dosage, with the co-pay based upon the veteran's annual household income.

The VHA also provides extended care services to veterans within the VHA system, including occupational, physical, and speech therapy, home-based primary care, adult day care, skilled and unskilled home care, home hospice care, and iv therapy. Co-payment for these services is based upon income and assets reported on the VA form 10-10EC, and may range between $0.00 and $97.00 per day. Attorney Collier mentioned that a non-spouse family member can become a registered caregiver to provide care to the veteran paid for by the VHA.

Benefits Provided through the National Cemetery System

According to Attorney Collier, there are burial benefits available through the National Cemetery System and the Private Cemetery System, depending on the veteran's eligibility. To confirm a veteran's eligibility for burial benefits, call (800) 827-1000.

Attorney Collier stated in her materials that, with regard to the National Cemetery System:

"burial benefits available include a gravesite [for casketed or cremated remains] in any of the 125 national cemeteries with available space, opening and closing of the grave, perpetual care, a Government headstone or marker, a burial flag, and a Presidential Memorial Certificate at no cost to the family. Some veterans may be eligible for burial allowances… Burial benefits available for spouses and dependents buried in a national cemetery include burial with the veteran, perpetual care, and the [inscription of the decedent's name and dates of birth and death] on the veteran's headstone, at no cost to the family. [Note that] eligible spouses and dependents may be buried [at the national cemetery] even if they predecease the veteran." (Seminar Outline, I.E.)

Not every state in the country has a VA national cemetery, and Connecticut and Rhode Island are two of those states. For our clients' information, there is a national cemetery located in Bourne, Massachusetts (telephone number 508-563-7113), and six national cemeteries in New York State (in Bath, Calverton, Cypress Hills, Long Island, Saratoga, and Woodlawn).

Connecticut has a "VA grant funded cemetery" at the Connecticut Veterans Cemetery on Bow Lane, in Middletown. According to the State of Connecticut, Department of Veterans Affairs:

"Veterans and their spouses may be buried free of charge in the State Veterans Cemetery. There is no charge for the plot, single or double depth, or cremation, for the opening or closing of the grave or the perpetual care of the grave. A white, upright marble headstone/marker is required and provided by the Federal government; [and] is installed by cemetery personnel at no cost. The vault that the casket is placed in is required and is the [financial] responsibility of the family. Veterans can arrange in advance to reserve a space [but not a specific space] in the cemetery… An eligible veteran's spouse may be buried in the cemetery before [or after] the veteran… To be eligible for burial at the cemetery, the decedent must be a veteran who served at least 90 days of active duty and was released from the Armed

Forces under honorable conditions; must have either entered the service as a Connecticut resident, died as a Connecticut resident, or must provide proof of one-time residency in Connecticut; must be the spouse of an eligible veteran; or [must have been] in the honorable service of the armed forces of any country allied with the United States." For more information, contact Cemetery and Memorial Services, Department of Veteran's Affairs (860) 616-3688."

According to Attorney Collier, there are also burial benefits available for veterans buried in a private cemetery. These benefits include a government headstone/marker, a burial flag, and Presidential Memorial Certificate, all at no cost to the family. Some veterans may also be eligible for burial allowances, but there are no similar burial benefits available to spouses and dependents of veterans interred in private cemeteries.

Attorney Accreditation, Fees, and Fee Agreements

In making application for VA benefits, a claimant can be represented by himself, a veteran service organization accredited through the VA such as the American Legion (38 CFR 14.628), an individual accredited by the VA after training and testing (38 CFR 14.630), a one-time power of attorney person (38 CFR 14.631), or an attorney who is a member in good standing with a State Bar and has been accredited by the VA (38 CFR 14.629). (Use VA form 21-22a to appoint a representative of the claimant).

To become accredited, a person (including an attorney) must complete and File VA Form 21a and fax, email, or mail it to the Office of General Counsel. This application resembles an application for admission to a State bar, but there is no application fee.

Once the Office of General Counsel (OGC) notifies the applicant that the application has been accepted, the attorney may assist claimants with the preparation, presentation, or prosecution of claims.

The OGC notification letter sets forth a minimum three-hour continuing legal education requirement to be fulfilled the first year of accreditation, and an additional minimum three-hour continuing legal education requirement to be fulfilled every two years after that. The accredited attorney must complete and submit verification of the CLE compliance to the OGC. (Note: Attorney Collier emphasized during her presentation that the OGC does not send reminders of the CLE requirements and deadlines, and suggested that all accredited attorneys diary the CLE requirement dates in Microsoft Outlook or like calendar system).

Attorney Collier referred the seminar attendees to the VA Office of General Counsel's website for specific questions and answers related to the requirement of accreditation and the regulation of attorney billing. She noted that it is OGC policy that, as a general rule, an attorney's practice of advising clients that they may be eligible for benefits and referring them to a recognized service organization to prepare the claim does not require accreditation. On the other hand, if an attorney works with a veteran, advises the veteran of eligibility requirements, and prepares an application for filing by the veteran, accreditation of the attorney is required because the advice provided is specific and not general. Likewise, if an attorney assists a veteran with the completion of the EVR (eligibility verification report) each year, the attorney must be accredited.

With regard to the charging of attorney fees, Attorney Collier stated:

"Veterans may obtain free assistance with filling out an application for benefits from accredited veterans service organizations. Only accredited agents and attorneys may receive fees from claimants or appellants for their services provided in connection with representation… Representation is defined as those acts associated with representing a claimant in a proceeding before the VA [after being duly appointed as a representative pursuant to Form 21-22a]. No organization or individual, including lawyers, can charge for the preparation, presentation, and prosecution of a claim (completing and filing applications). (See FR Vol. 73, No. 100, page 29866)…

If a claimant is denied or approved for fewer benefits than what is expected, the claimant or his representative can file a Notice of Disagreement [with the adverse decision, and, once that notice is filed, the attorney may then begin charging for the prosecution of the appeal of the adverse decision in accordance with a reasonable fee arrangement. The fee agreement] must include the name of the veteran, the name of the claimant, … name of any third party disinterested payer, applicable VA file number, specific terms under which the amount to be paid for services of the attorney will be determined, and must also clearly specify if the VA is to pay the attorney directly under past due benefits. (See 38 CFR 14.636(g).)

Attorney fees must be reasonable, but there is no limit. Fees can be based on flat fee arrangements, hourly, a percentage of benefits recovered, or a combination of these. (See 38 CFR 14.636(f)) If fees are limited by the agreement to 20% of the past due benefits, they are presumed to be reasonable and the VA will pay them without question. (See 38 CR 14.636(f)). If fees are for

more than 33 1/3% of the past due benefits, they are presumed to be unreasonable, which is a presumption that can be rebutted"… Attorney Collier recommended that Connecticut attorneys review their pro forma disability planning client engagement letters to delete any reference to billing for assistance with VA claims. She suggested that the attorney may wish to state specifically in the engagement letter something along these lines, "Any service I may provide regarding the preparation, presentation, or prosecution of a VA claim, I provide to you free of charge."

Other Benefit Matters

During the seminar, Attorney Collier also reviewed the laws, regulations, and opinions relating to VA practice. The applicable law can be found at Title 38 of the US Code and Section 38 of the CFR, along with various General Counsel opinions, and regulations.

Considerable time was devoted during the seminar to the application process and claim procedures. Attorney Collier emphasized that the VA applicant must personally sign the application form. The VA does not recognize a traditional power of attorney, no matter how specific it is and no matter how incompetent the principal may be. According to Attorney Collier, it does not matter to the VA whether the person is competent to sign the form or has any idea what the form is. Moreover, an application signed by someone other than the applicant himself will be delayed for months in a review/rejection process.

Attorney Collier recommended certain resources to assist the attorney practicing in the area of VA benefits, including Veterans Benefits Manual, published by LexisNexis, M21-1 and M21-1MR, Adjudication Manual, published by LexisNexis, and available online.

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*According to Attorney Collier, the veteran may move from a lower priority group to a higher priority group after the initial determination, based upon a change in the veteran's circumstances.

The Penalty for Staying Home: The DSS Asset Transfer Policy under UPM § 3029.05E

By: Brendan F. Daly, Esq.

A. Introduction

The Connecticut Department of Social Services (DSS) policy on when a penalty period begins for asset transfers does not track federal law (See 42 U.S.C. § 1396p(c)(1)(A)) under the Deficit Reduction Act of 2005 (DRA), P.L. 109-171 section 6011(b)(2). Consequently, the application of the DSS policy yields a result that is more restrictive than federal law for home care applicants. DSS requires eligibility for payment of services before a penalty period begins—a result that penalizes those applying for home care services due to the lack of retroactive payment. Moreover, the systemic problem in Connecticut of lengthy processing times for Medicaid applications creates a harsh result: those in need of home care assistance must pay out-of-pocket even longer while the application is pending with DSS.

B. Statutory construction: Breaking down the State and federal provisions

Under the Uniform Policy Manual (UPM), DSS begins a penalty period on:

> …the date on which the individual is eligible for Medicaid under Connecticut's State Plan and **would otherwise be eligible for Medicaid payment of the LTC** [long term care] **services** described in 3029.05B based on an approved application for such care but for the application of the penalty period, and which is not part of any other period of ineligibility caused by a transfer of assets. (Emphasis added.)

UPM § 3029.05E

But under the DRA, a penalty period begins:

> …the date on which the individual is eligible for Medical assistance under the State plan and **would otherwise be receiving institutional level care** based on an approved application for such care described in subparagraph (C) but for the application of a penalty period…and which does not occur during any other period of ineligibility under this subsection. (Emphasis added.)

42 U.S.C. § 1396p(c)(1)(D)(ii).

The first prong of the analysis between the two statutes is similar: an individual must be financially eligible (having no more than $1,600 in non-exempt asset) and categorically eligible (under age 65 and disabled or over age 65) for Medicaid. Analysis of the second prong results in a significant distinction between the UPM and the DRA. Although the UPM does not reference community-based services (the federal statute makes reference to "subparagraph (C)," which details the community-based waivers), DSS does permit a penalty period to begin in home care applications nonetheless—albeit in a manner that contravenes federal law. It is DSS's position that eligibility for "Medicaid payment" means that it cannot assess a penalty period until—in home care cases—the caseworker makes a decision on the application—as this is when the State would have begun paying for care had the applicant not made the gift:

> For individuals applying for home and community based services under a Medicaid waiver, the penalty will commence on the date that the Department **would have approved the payment** of the services under an approved application, but for the application of the penalty period. (Emphasis added.)

February 11, 2009 Memorandum of Michael P. Starkowski responding to individuals who commented on the DSS proposed regulations, at 3-4.

The language in the DRA provision, however, does not condition the penalty period start date on when the State would have approved payment; under the DRA, when an individual is financially eligible and "otherwise receiving institutional level care," a penalty begins. Consequently, in home care cases under the DRA, the penalty period start date is the month an individual: (1) is functionally and financially eligible; and (2) applies for Medicaid.

C. The Problem with Processing Delays in Home Care

Although DSS is required to process Medicaid applications within forty-five days, caseworkers virtually never meet this deadline. See UPM § 1505.35C.1.c.

The processing delays are pervasive and saddle the home care applicant with the cost of care while the case is pending. While Medicaid applicants in nursing homes receive retroactive benefits for up to three months prior to the month of financial eligibility (See UPM § 1560.10A), benefits do not begin in home care cases until DSS actually grants the application. A realistic processing time that this author has experienced in home care applications is six months or more. And although the processing delays may choke the nursing home, the resident's right to retroactive relief insulates them from the financial hardship.

The financial hardship that home care applicants already endure is exacerbated by the policy of postponing the penalty period start date. While DSS continues a shift in its course from providing for institutionalized care toward broadening home care benefits (with programs such as Money Follows the Person), its draconian policy regarding asset transfers in home care cases threatens to derail this objective. Consequently, the unfortunate result of the DSS asset transfer policy could be a reduction in the home care population.

D. *Frugard v. Velez*

When New Jersey promulgated its DRA implementation regulations, it removed the possibility of beginning a penalty period in home care cases, subjecting an applicant who transferred assets to a five-year penalty. Specifically, New Jersey did not permit a penalty period to begin until a home care applicant was actually receiving benefits—an impossibility for someone who transferred assets. In *Frugard v. Velez*, 2010 WL 1462944, (D.N.J. 2010), the plaintiffs—three home care applicants—argued that New Jersey's policy was more restrictive than the SSI methodology on asset eligibility. *Id.* at *2.

The State in *Frugard* relied on the CMS July 27, 2006 memorandum to State Medicaid directors:

> For transfers of assets made on or after February 8, 2006, the period of ineligibility will begin with the …date on which the individual is eligible for medical assistance under the State plan and is receiving institutional level of care services…that, were it not for the imposition of the penalty period, would be covered by Medicaid.

Id. at *4 (emphasis in original), quoting CMS bulletin dated July 27, 2006.

In rejecting the CMS interpretation, Judge Garrett Brown stated: "Clearly, this enclosure misquotes the statute and is not controlling in any way." *Id.* The court then provided a concise summary regarding the legislative history of the DRA provision; specifically, Judge Brown referenced the House bill, which initially included the phrase "is receiving institutionalized services" but later changed it to "would otherwise be receiving services." *Id*., quoting 151 Cong. Rec. H10571 (Nov. 17, 2005).

Lastly, the court applied statutory construction to reject any deference to the CMS memorandum, holding that the language in 42 U.S.C. § 1396p(c)(1)(D)(ii) was unambiguous and lacked the need for CMS interpretation. *Id.* at *5. The court concluded that "[t]he penalty period should have begun on the date the Plaintiffs were eligible for medical assistance under the State plan." *Id.* The court granted a permanent injunction, requiring New Jersey to begin penalty periods on the date that a home care applicant is financially eligible for Medicaid, and the State did not appeal the decision.

E. Conclusion

It is noteworthy that DSS relies on the July 2006 CMS memorandum to support its position that the penalty period begins when the State would have paid for assistance—as opposed to the date an individual is financially and functionally eligible:

> This interpretation [beginning the penalty period when an individual is eligible for payment of services] is supported by the Centers for Medicare and Medicaid Services ("CMS"), which describes the penalty as commencing on the date on which the individual is eligible for medical assistance under the State plan **and is receiving institutional level of care services.** (Emphasis added)
>
> February 11, 2009 Memorandum of Michael P. Starkowski, supra.

The State justifies their policy on the basis of the CMS interpretation—that home care applicants are not eligible for care until "receiving institutional level of care services," which is the month in which the State would have approved the application. The DSS reliance on the July 2006 memo is misplaced and the State should amend their policy to conform to the DRA. Assuming that litigation proceeds on this issue in Connecticut, the State will argue that it must grant deference to CMS guidance. But the court that decides the issue should follow Judge Brown's lead in *Frugard v. Velez* to prevent what may result in a chilling effect on applications for Connecticut's home care programs and a continuance of the institutional bias.

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Wrap Up From the Spring 2011 NAELA Seminar

By: William O'Connor, Esq.

As incoming president of the Connecticut Chapter of NAELA, I attended NAELA's annual meeting in Las Vegas, from May 19 to May 21, 2011. During the conference, I attended several seminars which I agreed to summarize for the benefit of our membership. This is the first part of a two part summary covering these seminars.

What Every Elder Law Attorney Should Know About Alzheimer's Disease

Dr. William J. Netzer from the Fisher Center for Alzheimer's Disease Research presented a seminar called "What Every Elder Law Attorney Should Know about Alzheimer's Disease." Dr. Netzer's research focuses upon attempting to elucidate the cellular and biochemical mechanisms that regulate production of beta-amyloid, believed to be the primary cause of Alzheimer's disease ("AD"). The goal of his research is to identify the molecules within brain cells that would act as therapeutic targets for drugs aimed at treating the disease.

Dr. Netzer began his talk with an overview of the impacts of Alzheimer's on our society. In the U.S. there are 5.3 million people diagnosed with AD which is now the fifth leading cause of death in people over the age of 65. It is estimated that in 2011 Alzheimer's will cost the nation's health care system more than $172 billion in health care, long-term care and hospice services. If the indirect costs such as lost wages and decreased productivity of people with Alzheimer's and their caregivers are taken into account, the costs rise astronomically, high enough to potentially bankrupt the nation's entire health care system.

Alzheimer's research focuses upon the "plaques and tangles" first discovered by the German doctor Alois Alzheimer more than 100 years ago. We now know that the plaques are composed of a potentially toxic substance called beta amyloid, a sticky group of proteins, originally erroneously thought to be starch. Beta-amyloid builds up in the brains of those with AD to a greater degree than those with normally aging brains. Scientists have also discovered that the tangles found in the brains of those with AD consist of a protein called "tau". In normal configuration, tau helps channel life-giving molecules through brain cells, keeping them healthy. But in those with AD, the tau goes haywire, forming twisted neurofibrillary tangles within the neuron. As these tangles accumulate, the neuron loses its functionality and may eventually die. Although both plaques and tangles accumulate in the brains of those with AD, it is the accumulation of tangles that correlates more strongly with the severity of memory loss and other symptoms. The current scientific investigation and debate centers on whether it is the plaques, tangles or both which cause AD or, whether they are simply a byproduct of some other disease process at work.

It is unknown what causes the vast majority of the current cases of AD. The most common form of the disease, so-called "sporadic cases", afflict more and more individuals as they advance into their 70's, 80's and beyond. By age 85, nearly half of all people will show some signs of AD. Alzheimer's is not merely a natural process of aging; something causes the plaques and tangles to form in the brain. Scientists have discovered particular mutations in the genes of those with the relatively rare "early-onset AD" which cause the formation of beta-amyloid suggesting that beta-amaloid is central to the development of the disease.

A majority of researchers believe that the toxic protein beta-amyloid lies at the foot of the disease. Beta-amyloid damages brain cells essential for learning and memory. As beta-amyloid accumulates, communication between brain cells is disrupted and more and more brain cells die. It is thought that tau is spurred on by the accumulation of beta-amyloid resulting in the tangles that also play a key role in damaging the parts of the brain involving memory and thought.

Dr. Netzer's research focuses upon trying to develop drugs or treatments that inhibit formation of specific, toxic beta-amyloid groups as well as deciphering the cellular mechanisms that regulate production of beta-amyloid in the brain. Currently, all AD drugs

in use focus solely on the relief of symptoms but do not slow the rate of progression of AD. The goal of the current research is to discover drugs that actually slow or stop AD progression.

The Ethics of Medicaid Planning

I also attended a general session dealing with the ethics of Medicaid planning. It was structured as an Oxford style debate with two attorneys presenting the case that Medicaid planning is ethical and two attorneys rebutting the ethics of Medicaid planning. The opening argument presented the case that Medicaid planning is not only ethical, but is also required under our cannons of ethics. The policy issues supporting this position were framed as follows. First, healthcare is a basic human right which requires an ethical country to provide basic healthcare to its citizens. Long term care is a basic healthcare necessity and the ethical duty to provide long term care is most compelling where the need arises due to conditions beyond the citizen's control and is not the result of the citizen's failure of individual responsibility. Furthermore our nation has made some economic policy choices, including disfavoring intact families and requiring two wages earners, which limit the ability to provide full time care. The way in which we have structured our Medicaid system is unethical because it will only guarantee basic long term care in a nursing home and nursing homes are unduly expensive, regulated medical institutions and are "institutional relics" of an outdated, expensive system of institutional care and furthermore are inherently depersonalizing. It is fundamentally unethical for a country to discriminate in the provision of healthcare between conditions requiring hospitalization and conditions requiring nursing home care.

There are essentially two kinds of Medicaid planning. The planning coincident to the application for benefits and the advance planning for sheltering assets beyond the five year look-back period. Both types of planning are ethical and legal. Attorneys must inform clients about the law and their knowledge must be shared with the client without any bias or filtering on the attorney's part. In the context of Medicaid planning, it is the duty of the attorney to inform the client about the law and its application, in all respects and circumstances.

What if a client fails to disclose assets in Medicaid planning? Assume that your client reveals the existence of cash and gold worth thousands of dollars in a safe deposit box. The lawyer must inform the client of the requirement to disclose the existence of the contents of this safe deposit box. But what if the client then questions "how would the state know about this safe deposit box if it was not disclosed?" May the lawyer advise that the failure to disclose may not be discovered or must the lawyer so advise? It is clear that the lawyer may advise of the consequences of failure to follow the law under ABA Model Rules of Professional Conduct (2004) Rule 1.2(d):

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Does the scope of "legal consequences" include advising the client that the state does not have the personnel to investigate each applicant for undisclosed assets? Under Model Rule 2.1 the lawyer may advise of these "social and political" factors:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Given the unpopularity of Medicaid planning and the potential weapons available to the state against attorneys providing this advice such as aiding and abetting, accessory theory and conspiracy, this can be a difficult course to navigate.

What if a lawyer believes that the Medicaid agency has issued a policy that flatly contradicts a federal statute or is an illegal abuse of discretion under state law? May the lawyer disregard the illegal policy and present an application in conformance with the lawyer's, soundly held, view of the law? The answer is no. Model Rule 3.4 states:

A lawyer shall not: (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

Lawrence A. Frolik from the University of Pittsburgh School of Law presented the other side of the argument that Medicaid planning is unethical. His argument focused on our legal systems requirement that an attorney act zealously when representing a client. With Medicaid planning the state is granting a benefit that is premised upon the beneficiary having the requisite financial need. The reason for Medicaid assistance is the beneficiary is the

victim of circumstances beyond his or her control, the punishing cost of nursing home care. When an individual deliberately impoverishes himself in order to shift the cost of his care to the state who in turn taxes others to pay for his care he acts unethically. The attorney, who advised the client to impoverish himself, acted as an ethical attorney but in doing so encouraged and abetted an immoral act. By virtue of her professional obligations as an attorney, she was required to act in a manner that promoted immoral behavior.

Medicaid planning, similar to most estate planning, results in actions and undertakings that occur only to create Medicaid eligibility or preserve assets. The Medicaid anti-transfer rule with the 5 year look back, however, expresses the Congressional determination that individuals cannot create eligibility by gifting, because gifting is perceived as a form of the retention of the economic benefit of the transferred item. The transferor receives value when the transferee receives and retains the gift. Congress understood the derivative enjoyment of a gift by the grantor and so predicated Medicaid eligibility on a gift completed 5 years before a Medicaid application. Congress believed that a gift 5 years ago reflects a sufficient cost to the grantor since it occurred long enough ago that it no longer creates significant value to the grantor and therefore it is not a source of value at the time of application for Medicaid.

When Medicaid planners find ways for clients to circumvent the law by taking advantage of loopholes, combined with the Congressional failure to address these planning devices, though legal, it is unethical. Unfortunately, by permitting these planning techniques to subvert the intent of the Medicaid statute, the law strongly encourages immoral behavior by the client. As attorneys we are compelled by our professional ethics to assist our clients to engage in unethical acts.

In the next issue, I will detail Robert Mason's presentation on the use of trusts in VA benefit planning, with specific reference to opinions of the Office of General Counsel applicable income and capital gains tax issues. Finally, I will share practice development and marketing strategies discussed at the NAELA annual meeting.

Attorney William O'Connor is Principal of the Law Office of F. William O'Connor LLC in Avon.

CT-NAELA Launches Website

By Marialta Sparagna, Esq.

Recently, the Connecticut Chapter of NAELA launched a chapter website. The website, located at http//:www.CTNAELA.ORG has information about the organization and elder law attorneys for the general public, as well as a special section for members only.

On the site you will find a comprehensive calendar of events for elder law attorneys. The calendar includes CT NAELA events and programs, as well as Connecticut Bar Association section meetings for the elder law and estates and probate sections. You will also find our chapter newsletters and informative articles about various topics of interest to elder law attorneys.

One of the most valuable features of membership in the NAELA Connecticut Chapter is a free listing on the website for each member. The website has a search feature which enables website visitors to locate an elder law attorney. The listing provides the member's contact information, including a link to the member's website.

Another feature of the website member only section is a database of written decisions with respect to Medicaid applications issued by hearing officers from the State of Connecticut Department of Social Services. This data base of decisions with respect to Medicaid applications is being developed from member submissions. If you have a decision that you can share, please contact a member of the website committee.

The website is a work in progress which is continually being updated and improved. We welcome comments and suggestions about the content of the website. We encourage our members to contribute to the website by submitting forms that you would like to share, or articles that you have written.

If you are a member of the Connecticut NAELA Chapter, you should have received an email from a NAELA CT Board Member with a username and password which allows you to login to the member only section of the website. If you have not received your username and password, for assistance with website related matters, or to contribute a form or article, please contact website committee members Marialta Sparagna at sparagnalaw@comcast.net or Hank Weatherby at hank@weatherby-associates.com.

Attorney Marialta Sparagna is a Principal of Melanson & Sparagna LLC in Simsbury.

Calendar of Events

JUNE, 2011

6/10/11	9 a.m.	CT-NAELA Annual meeting
6/22/11	9 a.m.	"Oddities & Challenges in Probate Law" – June 22, 2011
6/23/11	6 p.m.	Connecticut Bar Association Annual Meeting
	3 p.m.	NAELA Chapter Presidents Meeting

JULY, 2011

AUGUST, 2011

SEPTEMBER, 2011

Please contact the CT-NAELA President, Joe Cipparone (jac@kccaz.com; 860-442-0150), if you have any questions about these calendar items. See the CT-NAELA web site (www.ctnaela.org) for calendar updates under Events.