CTNAELA

The Connecticut Chapter of the
National Academy of Elder Law Attorneys

CT NAELA Practice Update

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President's Message

By Joseph A. Cipparone, Esq.

What an incredible time to be an elder law attorney in Connecticut. First, President Obama signs the new federal estate tax law on December 17, 2010, creating portability of the estate tax exemption between spouses and raising the exemption to $5 million. Then Governor Malloy proposes reducing the available State of Connecticut estate tax exemption and changing the Medicaid asset rules to repeal Public Act 10-73. The proposed change in Public Act 10-73 will return us to the bad old days of figuring out the date of institutionalization, splitting a couples assets into two equal shares, and spending down the institutionalized spouse's half to $1,600. Sometime this Summer or Fall, we also expect the Second Circuit to rule in *Lopes v. Starkowski* on the treatment of spousal immediate annuities by Connecticut's Department of Social Services.

With all that is changing there is no more important time for you to be a member of CT-NAELA. We will fight to keep the Community Spouse Protected Amount at the maximum federal amount ($109,560) and to assure passage of the undue hardship regulations negotiated with DSS. We will help you Integrate Veterans Benefits into Your Practice with a great seminar on April 29, 2011. Victoria Collier, a national authority on veterans' benefits, will educate us at the Farmington Club. You won't want to miss this opportunity to learn from a renowned expert.

If you are new to elder law, you may want to seek the counsel and guidance of experienced attorneys in our Mentor Program. Your mentor will act as a guide, helping you define the issues and directing you to the applicable reference materials. In addition, the mentor may offer guidance on practice management concerns, professionalism and ethics. In return, you agree to frame legal issues in your mind before e-mailing or calling your mentor, pose questions in a hypothetical

manner without the names of parties, and refrain from referring to the mentor in client meetings unless approved by your mentor in advance. If you would like a mentor, contact Board member Brendan Daly at (860) 594-7995 or Brendan@ctseniorlaw.com.

We want to provide the greatest assistance possible to Connecticut elder law attorneys in this volatile time. Check out our web site (www.ctnaela.org), join us at a seminar, and devour all of the law and insights provided in this edition of CT-NAELA Practice Update. It will build your expertise and enhance your elder law practice.

Road to the Final 3029.10 H. 4: An Update on the Status of Partial Return in Connecticut

By Whitney Lewendon, Esq. and Judy Hoberman, Esq.

INTRODUCTION: DSS proposes change in partial return rule.

On April 10, 2007, the Connecticut Department of Social Services (DSS) issued proposed regulations intended to implement the Deficit Reduction Act of 2005 (DRA) that are still wending their way through the requirements of the state's administrative procedures act. After a public comment period that closed in May 2007, DSS finally issued responses and submitted the proposed regulations to the state legislature's Regulations Review Committee in March 2009.

Among the submitted provisions was the "partial return" rule found at Uniform Policy manual (U.P.M.) Section 3029.10 H.4:

"The part of the asset that is returned to the individual is ***considered available to the individual during the time period from the date of its transfer to the date of its return****, and remains available for as long as the individual has the legal right, authority or power to liquidate it." (emphasis supplied).*

Dating back to the initial publication, advocates objected to the partial return rule as inconsistent with federal statutory and case law. The highlighted provision of the rule above would allow DSS to treat assets as available to an individual applying for Medicaid even though such assets are not in that person's actual possession. This has the effect of deeming to the individual assets in the possession of a third party who is not applying for Medicaid benefits. Deeming is prohibited by the federal Medicaid statute. 42 U.S.C. 1396 a (a)(17). Requiring the state agency to count only those assets which are actually available to the individual is a principle long established in Connecticut, *Buckner vs. Maher.* 424 F. Supp. 366 (D.Conn.1976).

As written, the partial return rule can have the effect of actually extending the length of the penalty for a period of time longer than the term of the penalty authorized by federal law, due to the attribution of the asset to the individual during the entire period of time between the date of the original transfer and the date of the asset's return.

The Legislative Commissioners' Office (LCO) of the General Assembly, in rendering legal advice to the Regulations Review Committee in a written report, expressed substantive concerns with Section 3029.10 H.4 on precisely the same grounds. Citing both the federal Medicaid statute and the Buckner case, the LCO report found that the rule, in deeming assets to the Medicaid applicant that might not actually be available, may render it unconstitutional; furthermore, it is not authorized by the DRA, and violates federal statutory Medicaid law that prohibits such deeming. On June 9, 2009, the Regulations Review Committee rejected, without prejudice, all of the regulatory provisions DSS had submitted.

DSS asks Centers for Medicare and Medicaid Services (CMS) for guidance on the partial return rule

On July 13, 2009, approximately a month after the DSS proposed DRA regs were rejected by the Connecticut legislature's Regulations Review Committee, DSS Commissioner Michael Starkowski wrote to Richard McGreal, Associate Regional Administrator for CMS in Boston, Massachusetts, asking CMS to confirm that the DSS proposal concerning partial returns was "consistent with the CMS guidance and federal law."

DSS claims that its proposed partial return rule was based upon a section of the State Medicaid Manual (SMM). It is this very section that in fact, long before DRA, had originally created the opportunity for partial returns and the resulting reduction in the length of the penalty period due to transfer of assets. DSS cited SMM section 3258.10 c 3, which states in part:

"Return of the assets in question to the individual leaves the individual with assets which must be counted in determining eligibility during the retroactive period."

DSS wrote to CMS that the SMM **requires** that assets which had been given and then returned are "available assets which ***must be counted retroactively to the date of the original transfer.***" (emphasis supplied).

Curiously, DSS never mentioned that it had requested an opinion from CMS during a meeting with advocates at a session convened by the chairs of the Regulations Review Committee that brought together advocates and

DSS policy staff in August 2009 after the DSS DRA regs had been rejected. The chairs of the legislative committee had directed the advocates and DSS staff to work with each other to determine if there were areas of agreement that would resolve the objections to the DSS proposed DRA regs.

The coalition of advocates that had formed to comment on DSS proposed regulations consisted of Attorney Amy Todisco acting on behalf of the CT NAELA Chapter, Attorney Richard Fisher acting on behalf of the Alzheimers Association, Attorneys Kevin Brophy and Joelen Gates acting on behalf of Connecticut's Legal Services programs, Attorney Maureen Weaver representing the Connecticut Association of Not For Profit Providers, and the authors acting on behalf of the Connecticut Bar Association Elder Law Section.

The DSS July letter to CMS came to light only during an appeal pending in Superior Court from an adverse fair hearing decision, Goodwin vs. Commissioner, in which the appellant was represented by Attorney Brendan Daly. Brendan circulated the DSS July 2009 letter among advocates.

In October 2009, the advocates who had worked together to oppose the DSS DRA regs requested the opportunity to provide the CMS Boston office input about the issues raised by DSS, participated in a phone conference with CMS staff and subsequently provided written comments stating the objections to the partial return rule.

Approximately a year later, and with frequent contact by advocates with CMS staff, in October 2010, CMS issued an opinion letter to DSS, citing its problems with the DSS partial return rule. DSS requested further clarification in November 2009. At that time, DSS sought CMS guidance as to whether the SMM section required treatment of returned assets as available starting with the date of the original transfer if there was a full return requirement.

In December 2010, CMS issued a second letter stating that it did not view the SMM as requiring treatment of returned assets as available from the date of the gift.

Why had DSS insisted on treating assets as available to an individual when not in that person's possession? The entire purpose of the proposed partial return rule is to delay the start date of the penalty period. Under DRA, there are three factors which must be met in order for a penalty to start, assuming that there has been a transfer that results in a penalty. The individual must:

- apply for Medicaid benefits;
- otherwise be receiving long term care services; and
- be financially eligible for Medicaid.

The DSS partial return rule is intended to prevent any individual who has made a gift that results in a penalty from meeting the third element of the criteria to start the penalty period running.

By declaring an individual as having assets available, DSS can then rule that the individual is not financially eligible for Medicaid benefits. Because the individual is not then financially eligible, the penalty cannot start.

SMM 3258.10 c 3

"When a penalty has been assessed and payment for services denied, a return of the assets requires a retroactive adjustment, including erasure of the penalty back to the beginning of the penalty period. However, such an adjustment does not necessarily mean that benefits must be paid on behalf of the individual. A return of the assets in question to the individual leaves the individual with assets which must be counted in determining eligibility during the retroactive period. Counting these assets as available may result in the individual being ineligible for Medicaid for some or all of the retroactive period (because of excess income/ resources) as well as for a period a time after the assets are returned."

One obvious conclusion in reviewing the SMM provision is that there is no language whatsoever which requires States to count returned assets as having been available from the date of the transfer.

It is not a stretch to concede that there may be some ambiguity in the language of this old SMM section. Nonetheless, it must be interpreted in the context of the rules in effect at the time the SMM section was adopted. At that time, the Medicaid rules governing the start date of a penalty period resulting from a transfer provided that the penalty began as of the date of the gift. While one might debate the meaning of the SMM section in the context of the pre-DRA transfer rules, it is impossible to extract any meaningful guidance from that section given the change in the start date rules enacted by DRA.

CMS Responds to DSS: October 28, 2010

CMS noted that DSS had "requested confirmation of its interpretation of the State Medicaid Manual that returned assets **must be counted as having been available from the date of the transfer."** (emphasis supplied).

In a preface to its analysis, CMS notes that the SMM section predated the DRA and was written at a time when the start date rules for a transfer of asset penalty were quite different. The start date rules were changed by DRA.

CMS noted an important distinction in the effect of the DRA changes. While acknowledging that those changes altered the start date of a penalty period from

the date of transfer to a later date, CMS notes pointedly that "the DRA did not address the issue of availability of the returned funds" and, significantly "did not change the start date of Medicaid eligibility."

CMS concluded that the DSS proposed rule as applied could have the effect of establishing a new, later penalty period based on an adjustment to an individual's eligibility determination. It told DSS that it is inappropriate to read the SMM provision in combination with the DRA to reach that result.

CMS then enunciated two distinct "significant" problems with the proposed partial return rule. First, the DSS rule has the effect of changing an individual's eligibility as a way to justify a new or later start date of a penalty. Next, CMS noted that the length of the penalty created by application of the DSS rule could end later than the date of the original penalty period, a result that "is not permissible."

Despite advocates' efforts, CMS did not describe the proposed DSS rule as having the effect of deeming assets, the treatment prohibited by the federal Medicaid statute. CMS did not cite the federal Medicaid statute or case law. Nor did it advise DSS that it could not attempt to create rules regarding the effect of partial returns of assets. Rather, CMS gave DSS a relatively clear choice: allow partial cures which involve a return of assets and a reduction of the penalty period from the back end rather than an extension of the penalty period to a later date; or provide that there will be only a reduction in the transfer penalty when there has been a full return.

Second CMS Letter to DSS: December 16, 2010

Not being satisfied with the CMS original opinion letter, DSS wrote twice to CMS in November 2010, asking for confirmation that the SMM requires States to count returned assets as having been available to the individual from the date of original transfer.

Repeating its earlier analysis about the relative effective dates of the SMM and DRA, CMS advised DSS that the SMM "does not address the current, post-DRA circumstances. Consequently, this section of the SMM does not apply to this situation."

CMS next noted that there has been no additional guidance on the issue of the availability of returned funds after enactment of the DRA. Finally, in a clear contradiction to the DSS assertion, CMS declared that "we do believe that the state is not required to count the fully returned assets as having been available to the individual from the date of transfer."

In closing, CMS advised DSS that it must adhere to controlling federal regulations that require advance notice of an adverse action to a Medicaid applicant and an opportunity for hearing on the issue. This closing comment must be read as a caution to DSS that it cannot irrebutably presume assets as available to an individual even though not in that person's possession from the date of transfer to the date of return and must provide an individual notice of that determination and the opportunity to rebut it.

Governor's Full Return Proposal

Following DSS' hints that it might jettison partial return in favor of requiring full return as compensation - including the deeming of the asset as available from the date of the gift through its return the authors spoke by conference call with DSS counsel and policy staff to advocate that this would be an unwise and unlawful policy. No commitment about DSS' intended course was forthcoming during that discussion.

DSS' decision became known upon the release of the Governor's 2011 budget and implementing legislation shortly before the writing of this article. Governor's Bill 1013, Section 40 seeks to amend C.G.S. 261a by adding subsection (d), stating:

"An institutionalized individual shall not be penalized for the transfer of an asset if the entire amount of the transferred asset is returned to the institutionalized individual. The partial return of a transferred asset shall not result in a reduced penalty period."

Additional sub-paragraphs specify (1) that the total amount of multiple transfers to the same or different individuals must be returned to be considered a full return; (2) that DSS can consider the circumstances surrounding the transfer and full return to determine whether the intent of the individual, spouse or her representative was to alter the start date of the penalty period to shift nursing home costs to the Medicaid program, and, if so, deem the entire amount as available from the date of the transfer to its return; and (3) treat the transfer and subsequent full return of an asset for the purpose of shifting costs to the Medicaid program as a "trust-like device" that will be considered an available asset for determining Medicaid eligibility.

At the time of this writing, this piece of legislation is pending and will require strong advocacy efforts to persuade the legislature that the elimination of a reduced penalty for partial returns is not sound public or fiscal policy. Moreover, this proposal is legally flawed, in that it would deem assets as available based on circumstantial intent, and create "trust-like devices", establishing presumptions that are nearly or actually irrebuttable by the Medicaid applicant.

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The Unequal Treatment Of Retirement Plans Under Connecticut's Medicaid Program

By Joseph A. Cipparone, Esq. & David C. Slepian, Esq.

Connecticut treats IRAs, 401(k)s, 403(b)s and other defined contribution retirement plans differently than defined-benefit pension plans under its Medicaid program. This article explores Connecticut's treatment of retirement plans in Medicaid, compares Connecticut's treatment of those plans with the treatment of such plans by other states, and proposes legislation to address this inequality.

1.Connecticut's Treatment of Retirement Accounts

Connecticut currently counts defined contribution retirement plans as countable assets for Medicaid. See UPM sec. 4030.65 (non-home property required to be sold). They are considered available assets because they can be liquidated. See UPM sec. 4000.01, 4005.05. By contrast, Connecticut excludes monthly pension payments from the Medicaid eligibility calculation; they are only considered income. UPM sec. 5050.09. Unlike Medicaid, under the Food Stamp program, defined contribution retirement accounts are not countable assets in Connecticut. See UPM sec.4030.66.

Defined contribution retirement plans like IRA, 401(k), and 403(b) plans have replaced traditional defined benefit pension plans as the predominant way that employees save for retirement. Janice Kay McClendon, The Death Knell Of Traditional Defined Benefit Plans: Avoiding A Race To The 401(K) Bottom, 80 Temple Law Review 809, 814 (2007) [http://www.temple.edu/law/tlawrev/content/issues/80.3/80.3_mcclendon.pdf].

It also hurts small business because small business owners are the least likely to have defined benefit plans. Treating defined contribution retirement plans as countable assets discourages employees from saving for retirement and places small business at a competitive disadvantage vis-a-vis larger employers who have monthly pensions. Connecticut's policy discriminates against individuals who did not work for a large company or a government agency with a monthly pension.

Let's compare John and Bill, two buddies living in a nursing home at the age of 75. At age 65, John began receiving a civil service pension of $3,000 per month. Assume John lives 20 years and his pension increases in value 2% per year. John will receive $594,000 over that time from his defined benefit pension. If John applies for Medicaid, his pension will be completely excluded from the Medicaid asset calculation. His pension payment will be regarded as income and applied to the cost of his care. By contrast, Bill worked for a small business. At age 75, he had a $300,000 IRA that he had accumulated from saving part of his paycheck. Bill's IRA has less value than John's pension. Because Bill has an IRA instead of a pension, however, his retirement plan is not excluded from the Medicaid asset calculation. Unlike John who had a more generous pension, Bill does not qualify for Medicaid. He will have to spend down and pay income taxes on his IRA until he reaches $1,600 in countable assets.

Many clients incur substantial income tax to liquidate retirement accounts at a time when they are most in need. If the participant did not pay income tax on the contribution to the retirement account, any amount distributed from the account will incur income tax at ordinary income tax rates. IRC sec. 402(a). Ordinary income tax rates range from 10% to 35%.

Federal law governs the Medicaid program. In general, a state that provides benefits to the medically needy cannot have a Medicaid Plan which treats resources in a more restrictive manner than the Supplemental Security Income (SSI) program. 42 USC sec. 1396a(a)(10)(C)(i), (r)(2)(B); *Ross v. Giardi*, 237 Conn. 550, 572, 680 A2d 113 (1996). Connecticut has a medically needy component to its Medicaid state plan. *Ross v. Giardi*, supra, at 572. Connecticut's Medicaid Plan predates the SSI program which was adopted in 1972. Connecticut is a 209(b) state. Even if the above federal statutes regarding medically needy benefits did not apply, IRAs, 401(k)s, 403(b)s and other defined contribution retirement plans did not exist in 1972. Therefore, Connecticut cannot treat these retirement plans differently than the SSI program treats them. The SSI program exempts all retirement plans in periodic payment status from countable assets. POMS sec. SI 01120.210. The SSI program excludes retirement accounts held by a community spouse from its definition of countable assets. 20 C.F.R. sec. 416.1202(a); POMS sec. SI 01330.120.

In *Lopes v. Starkowski*, Docket No. 3:10-CV-00307(JCH)(D.Conn. 8/12/10), the U.S. District Court ruled that Connecticut's treatment of an immediate annuity owned by a community spouse as a countable asset violates federal law because it is more restrictive than SSI treatment of such annuities. Judge Hall relied on 42 USC sec. 1396a(a)(10)(C)(i) and (r)(2)(b), just like in *Ross v. Giardi*. The State of Connecticut did not argue that because Connecticut is a 209(b) state, it can treat annuities more restrictively than SSI. This case is on appeal to the Second Circuit of the US Court of Appeals. Unless the Second Circuit overturns the portion of Judge Hall's decision related to SSI, Connecticut will continue to have to count assets in a way that is not more restrictive than the way assets are counted in the SSI program. To reward employees who save for retirement, federal law protects retirement plans from creditors.

29 USC sec. 1056(d)(1); IRC sec.401(a)(13); 11 USC sec. 522(d)(12). In Connecticut, retirement plans qualified under Section 401, 403, 404, 408, 408A or 409 of the Internal Revenue Code are also exempt from claims of creditors. CGS sec. 52-321a. Yet, Connecticut does not recognize this exemption when determining eligibility for Medicaid.

Because an annuity in a qualified retirement plan cannot be sold, immediate annuities or annuitized deferred annuities are not available assets if held inside an IRA or qualified retirement plan. See, Memorandum to Individuals Who Commented on Regulation 06-14/RA Medicaid Eligibility from Michael P. Starkowski, DSS Commissioner, entitled "Response to Comments on the Proposed Regulation", dated February 11, 2009, at 24. Consequently, a community spouse with an IRA can use IRA assets to purchase an immediate annuity and avoid having the IRA counted as an asset.

Yet, why should community spouses have to jump through such hoops? Furthermore, this strategy provides no protection for applicants without spouses who have IRAs or other defined contribution retirement plans.

The federal Medicaid statute contains provisions intended to prevent the impoverishment of spouses when one member of a couple is institutionalized and applies for Medicaid. The assets of an individual's spouse count toward the asset limit. Conn. UPM sec. 4025.67. Prior to May, 2010, in Connecticut, on the date of institutionalization, the state took a snapshot of the couples' assets and attributed one-half of those assets to each spouse. Conn. UPM sections 1507.05; 1500.01. The date of institutionalization ("DOI") is the date the individual began receiving at least 30 days of care in a hospital or nursing home or through a Medicaid waiver (like CHCPE). Conn. UPM sec. 1500.01. The spouse living in the community ("the community spouse") could keep assets that equal at least the minimum community spouse resource allowance but no more than the maximum community spouse resource allowance (CSRA). 42 USCA sec. 1396r-5(f)(2). Connecticut law refers to the CSRA as the Community Spouse Protected Amount (CSPA). Conn. UPM sec. 4022.05. As of January 1, 2011, the minimum CSPA is $21,912 and the maximum CSPA is $109,560. Conn. UPM Policy Transmittal No. UP-09-18. The CSPA usually changes every January, but in 2011 it remained the same as in 2010. Prior to May, 2010, a couple could keep $1,600 for the institutionalized spouse and the lesser of the community spouse's one-half share or the maximum CSPA.

With the passage of Connecticut Public Act 10-73, the couple can keep up to the maximum CSPA ($109,560 in 2011) plus the Medicaid asset limit ($1,600). This short Public Act reads as follows:

Notwithstanding any provision of subsection (g) of section 17b-261 of the general statutes, the Commissioner of Social Services shall amend the Medicaid state plan to require that the spouse of an institutionalized person who is applying for Medicaid receives the maximum community spouse protected amount, as determined pursuant to 42 USC 1396r-5. The commissioner shall adopt regulations, in accordance with chapter 54 of the general statutes, to implement the provisions of this section.

This change is effective for eligibility determinations for May, 2010 and thereafter. Governor Malloy has proposed the repeal of this provision of Public Act 10-73. See Senate Bill 1013, Connecticut General Assembly.

Fortunately, the CSPA protects many defined contribution retirement plans held by the community spouse. Nevertheless, a community spouse with a monthly pension does not have to consume the CSPA with his or her retirement plan and the CSPA provides no protection for an applicant without a spouse.

If a community spouse's income does not reach the minimum monthly maintenance needs allowance, the spouse is entitled to a community spouse allowance. UPM sec. 5035.30. If Connecticut treated IRAs and 401(k)s like monthly pension plans, the applicant's minimum required distributions under his or her IRA, 401(k) or 403(b) plan could be paid to the community spouse if the community spouse's income does not reach the minimum monthly maintenance needs allowance.

2. Other States' Treatment of Retirement Accounts

Currently, IRAs are not countable assets for Medicaid purposes in a number of states with some differences:

- Rhode Island
- New York
- Pennsylvania
- Florida
- Vermont
- New Jersey

Rhode Island

In Rhode Island, retirement funds that are eligible for periodic retirement benefits (monthly, quarterly, etc.) are not a resource but unearned income. Thus, they are not counted for purposes of their resource limit. RI Reg. 0382.15.30. The applicant does not have to terminate employment to make the retirement fund available. In that instance, it is not a countable resource.

If the applicant has a retirement account that is not eligible for periodic payment, then the retirement account is counted as a resource. An applicant must apply for the

benefits of the account or liquidate it. If the applicant is over 70, the applicant must take required minimum distributions (RMDs) to avoid the retirement account being counted as a resource.

New York

In 1998, the New York State Office of Medicaid management issued an internal Medicaid policy notice, GIS 98 MA/024, which instructed local district Medicaid Commissioners and Medicaid Directors to treat qualified retirement accounts as countable resource if the individual (Medicaid applicant or recipient) is not entitled to periodic payments, but is allowed to withdraw any of the funds.

However GIS 98 MA/24 treats the retirement account principal as unavailable if the individual (Medicaid applicant or recipient) applies for and receives periodic payments from the retirement account. The individual (Medicaid applicant or recipient) must select the maximum income payment that could be made available over the individual's lifetime. Once the individual (Medicaid applicant or recipient) is eligible for the maximum periodic payment and receives them, the periodic payments are counted as the Medicaid applicant or recipient's income. The retirement account undistributed principal is not counted as a resource.

Further, GIS 98 MA/024 confirms 98 ADM-36 that for Medicaid financial eligibility purposes retirement accounts owned by the community spouse are available to the spouse applying for or receiving Medicaid. The retirement account is applied to the $109,560.00 maximum community spouse protection amount. Example: A community spouse who has a $50,000.00 IRA and qualifies for the Maximum Community Spouse Resource Amount may keep an additional $59,560.00.

In 2002, In the Appeal of Arnold S. May 28, 2002, NYS Fair Hearing No. 3701203H upheld the Medicaid applicants recipients rights to count a retirement account in payout status as an income stream pursuant to GIS 98 MA/024.

Pennsylvania and New Jersey

Pennsylvania and New Jersey take a different approach. They exclude any retirement account held by a community spouse whether or not the retirement account is in periodic payment status. These states rely on case law interpretation of federal statutes to exempt retirement accounts of community spouses.

In *Mistrick v. Division of Medical Assistance and Health Services*, 299 NJ Super. 76, 690 A2d 651 (NJ Super. AD 1997), Sophie Mistrick was institutionalized at Wayne View Convalescent Center. At that time, she had been married to Joseph Mistrick for forty-two years. The couple's income and resources exceeded Medicaid resource limitations. Joseph Mistrick was still employed by his long-time employer, International Specialty Products, which, since it did not offer a company pension plan, had designated his 401(k) program as his retirement account. The employer had made regular contributions to the 401(k) which had a face value of $118,800 in October 1994. In addition, at that time the couple owned their marital residence; Joseph had an additional Vanguard IRA account with a balance of some $23,783, savings accounts totalling some $42,800, and life insurance having a cash surrender value of some $15,500; Sophie had a savings account in her own name with a balance of some $34,000. Joseph retired in April 1995. As a condition of his retirement, he was required to roll the 401(k) plan over into an IRA account, which he did. His monthly income then totalled about $2,400, consisting of social security, payments from the IRA, and a small monthly pension payment of $178 from an unidentified source. In April, 1995, Sophie and Joseph applied for Medicaid after they had "spent down" their available assets for Spohie's medical expenses. At that time, Joseph had remaining only the marital residence, his IRAs, and the community spouse's resource allowance which was $23,800 at that time. The application was denied on the ground that Joseph's IRAs were an includable resource, bringing the total remaining resources over the eligibility level. Sophie appealed to the Appellate Division of the New Jersey Superior Court.

The Court noted that pension plans and IRAs of the spouse of the person requiring medical assistance are not countable resources under the SSI program. 20 CFR sec. 416.1202(a). When a state provides medically-needy benefits, it must comply with 42 USC sec. 1396(a)(10)(C)(i)(III) which requires that the state's Medicaid plan include a description of the single standard for determining income and resource eligibility and a methodology to be employed in determining eligibility that is no more restrictive than the methodology employed under the SSI program. Id. at 80-81. The Court found that if Sophie applied for Medicaid as an SSI recipient Joseph Mistrick's IRAs would not be includable resources in determining eligibility. Id. at 82. Because of the "no more restrictive" proviso of sec. 1396(a)(10)(C)(i)(III), the Court held IRAs are not includable for determining resource eligibility. *Id.*

Vermont

In Vermont, state regulations exclude retirement funds owned by a member of the financial responsibility group requesting Medicaid when:

1. The individual must terminate employment in order to obtain any payment; or

2. The individual does not have the option of withdrawing a lump sum from the fund; or

3. The individual is not eligible for periodic payments; or

4. The individual has reached retirement age and the individual is drawing on retirement funds at a rate consistent with the individuals life expectancy.

Vermont Department for Children & Families, Reg. sec. 4248.5.B.

If the individual is eligible for lump sum or periodic benefits, the individual must choose the periodic benefits. If the individual receives a denial on a claim for periodic retirement benefits but can withdraw the funds in a lump sum, the Department counts the lump sum value in the resources determination for the month following that in which the individual receives the denial notice. When a member of the financial responsibility group who is seeking long-term care Medicaid services holds pension funds held in an individual retirement account (IRA) or in work-related pension plans (including Keogh plans) as defined by the Internal Revenue Code, no change in title of ownership to these funds is required in order for them to be treated as an excluded resource for the benefit of the community spouse.

Florida

In Florida, if an individual is eligible to receive regular payments from a retirement fund, the payments are considered unearned income and the fund is not considered a countable asset to the individual. If the individual is eligible to receive payments but elects not to, he is ineligible due to failure to file for other benefits to which he is entitled. Florida Reg. sec. 1640.0505.04 Retirement Funds.

If an individual is not eligible to receive payments from the retirement fund, the value of funds currently available is considered a countable asset. Any penalty imposed due to early withdrawal can be deducted when computing the value of the retirement fund, but any taxes due are not deductible. A retirement fund is not an asset if an individual must terminate employment in order to obtain any payment. Retirement funds that are unavailable due to legal restrictions are not counted. The eligibility specialist must obtain a written opinion from legal counsel on availability. An example could be a divorce decree.

Once regular payments begin, the payment is considered unearned income. The value of the retirement fund continues to be an excluded asset as long as regular payments continue. *Id*.

Pension funds owned by a community spouse are excluded from assets for deeming purposes; however, any income received is deemed to the applicant.

Florida Reg.1640.0505.05 Retirement Funds of Spouses.

When the applicant has a community spouse:

1. At the time of application, if the community spouse receives regular payments from their retirement funds, the funds are not considered an asset when computing the couple's total countable assets. The payment is considered unearned income to the community spouse when computing the community spouse income allowance.

2. At the time of application, if the community spouse does not receive regular payments from a retirement fund he owns, but he has the option of withdrawing a lump sum, the total value of the funds must be considered an asset when computing the couple's total assets and the community spouse's asset eligibility. Early withdrawal penalties are excluded from the value of the funds, but any imposed taxes cannot be deducted. *Id*.

3. Proposed Legislation

What would Connecticut legislation creating equality between defined contribution and defined benefit retirement plans look like? It should reflect similar laws in other states and be commensurate with the treatment of retirement plans under SSI. The authors proposed the following legislation:

Be it enacted by the Senate and House of Representatives in General Assembly convened:

The Commissioner of Social Services shall amend the Medicaid state plan to provide that if an individual or the individual's spouse receives periodic payments from a defined contribution retirement plan, the retirement fund shall be treated in the same manner as a defined benefit retirement plan making a periodic payment. Such periodic payments shall be considered unearned income and the retirement fund shall not be considered a countable asset for Medicaid eligibility purposes. Defined contribution retirement plans include, but are not limited to: (1) 457 plans (plans for state and local governments and other tax-exempt organizations); (2) 401(k) plans; (3) federal employee thrift savings plans; (4) Section 403(b) plans (tax-sheltered annuities provided for employees of tax-exempt organizations and state and local educational organizations); (5) Section 501(c)(18) plans (retirement plans for union members consisting of employee contributions to certain trusts that must have been established before June 25, 1959); (6) individual retirement accounts (IRAs), both Roth and Traditional IRAs; (7) simplified employee pension plans or SEP-IRAs; (8) individual retirement annuities under Internal Revenue Code sec. 408(b); (9) Keogh plans; (10) SIMPLE retirement accounts; (11) money purchase plans; and (12) profit sharing plans. The Commissioner shall adopt regulations, in accordance with chapter 54 of the general statutes, to implement the provisions of this section.

This language clarifies the equal treatment of all retirement plans as long as they are in periodic payment status. If an IRA owner refuses to take required minimum distributions, then Connecticut could treat the retirement plan as a countable asset. Connecticut would treat the periodic payments as income. If the applicant owns the retirement plan, the income would be applied to the cost of care unless the community spouse has insufficient income to cover the monthly maintenance needs allowance. If the community

spouse owns the retirement plan, the income will support the community spouse.

CT-NAELA floated a proposed bill in the Connecticut General Assembly in January 2011, that would accomplish what the authors have proposed. Unfortunately, certain legislators believed the legislation will cost the state money because some people spend down their IRA on the cost of nursing home care before they become Medicaid eligible. Of course, most clients with an elder law attorney who do not have any remaining CSPA to protect their IRA spend their IRAs on items other than nursing home care. They use their IRA to purchase exempt items like cars, home improvements, prepaid funerals, etc. Legislators also expressed concern that when the applicant with an IRA dies, the remaining balance may go to the family. Yet, federal law under the SSI program does not require state recovery of retirement plan balances at the death of the applicant. In this period of large budget deficits, achieving fairness apparently takes less priority than equality or compliance with federal law. It may take litigation to implement what the authors have proposed.

4. Conclusion

In conclusion, treating defined contribution retirement plans in periodic payment status like monthly pension plans will help:

- Ensure the community spouse does not become impoverished.

- Apply an applicant's required minimum distributions to the cost of the applicant's long-term care just like monthly corporate and civil service pension payments are applied to long-term care.

- Protect both parties while reflecting the policy of Connecticut to keep people living independently rather than in an institution.

- Ensure that if the community spouse becomes disabled and needs long-term care, those regular retirement checks will be applied toward their long-term care.

- Reverse discrimination against small business and the disincentive the current law imposes on saving for retirement.

Eligibility for Title 19 should not rest on what type of retirement plan the applicant or the community spouse received for years of work. It is time Connecticut created parity between defined contribution retirement plans and monthly pension plans.

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NAELA UNPROGRAM 2011

By Linnea J. Levine, CELA

In January, 114 elder law attorneys from 36 states attended the NAELA UnProgram in Grapevine, Texas. For those unfamiliar with the term, an "UnProgram" is an unstructured learning experience that emphasizes peer-to-peer education, brainstorming, networking, the free-flowing exchange of ideas and forms, and the sharing of substantive information. This year, UnProgram sessions included the marketing of the elder law practice, law firm personnel issues, the development of a multistate elder law practice, the future of Medicaid, and the income taxation of special needs trusts.

MARKETING THE ELDER LAW PRACTICE

Many attorneys find marketing to be an unnatural and intimidating process. At the first session of the UnProgram, James Campbell of Integrity Marketing Solutions shared some marketing strategies for improving firm name recognition and developing client base. The use of social media is one such strategy. Campbell advised that interactive websites with blogging and the use of Twitter on a daily basis will attract traffic to a website. He suggested that a video of the attorney on the attorney's website will also grasp a visitor's attention. Interestingly, Campbell noted that it usually takes at least three contacts within a relatively ahort period of time to get a potential client's attention, and ten to twenty contacts before a potential client makes a financial commitment to an attorney.

Campbell suggested that every attorney should develop a written marketing plan which includes an annual marketing budget, and monthly, weekly and daily marketing goals with deadlines. He warned that the marketing may not produce new clients immediately. The goal of the marketing plan is to make the law firm stand out above its competition and to target the marketing efforts to a distinct population in a distinct geographical area. Too broad a target population or a geographic area will dilute the marketing efforts; too narrow a geographic area or population will be under-productive. A marketing plan should include activities with which the attorney is comfortable, Campbell said, such as presenting to other professionals, seniors, or family members, writing articles, blogging, sending newsletters and thank you cards to professionals and past clients, as long as these activities are frequent and consistent. Campbell suggested that the attorney record marketing hours in the same way that he or she records billing hours. In this way, the attorney can measure marketing efforts against the results.

HUMAN RESOURCE ISSUES

One session included a spirited discussion of law firm personnel issues, and particularly the subject of disgruntled employees. The consensus reached among

the attendees is that one employee with a bad attitude who is not committed to the positive growth of the law firm, can inflict damage to the firm's name and reputation, and sully the work-place environment. The attorneys agreed that, in these trying economic times, it is better to fire such an employee and to do so sooner rather than later. Clearly, the firm must be sure that the grounds for termination are well documented.

MULTISTATE PRACTICE OF LAW

There was a lively discussion on the issues arising when favorite clients relocate from one state to another for tax, Medicaid, employment, or weather reasons or to move closer to family members. The topics included the unauthorized practice of law, how to serve in an "of counsel" capacity to a law firm in another state in order to retain clients who have residences in more than one state (such as New York or Florida), and office management solutions to running a successful multistate practice.

An attorney who drafts estate documents for clients residing in a state in which the attorney is not licensed to practice law is acting unlawfully and exposes the attorney to sanctions and disbarment. The attorney must be licensed in each state in which he or she practices law. Attorneys should carefully check reciprocity regulations between states, and comply with the same.

If an attorney has obtained proper licensing to practice law in another state, the attorney must also be sure to comply with each state's continuing legal education and fiduciary account requirements. Note that each state may have different malpractice insurance carriers, and clarification is required to confirm that the attorney has full coverage in each state where he or she practices.

If the attorney intends a part-time practice in another state, an "of counsel" relationship with a local firm may be the answer. That firm's malpractice insurance policy may not require coverage of the "of counsel" attorney if the counsel limits the work to less than 20 or 30 hours,

Clearly, great strides in technology allow access to computer servers and files from one state to another and e-mail has become a law practice necessity and

convenience. Use of voice-over technology allows a client calling from Fairfield, Connecticut to dial a (203) exchange to talk with an attorney located in Florida, and use of video conferencing can provide a client with reassuring "face-time" with legal counsel.

MEDICAID AND THE STATE BUDGET BATTLES

Another break-out session dealt with the changing face of Medicaid, given each State's aging population and burgeoning budget deficits. Attorneys from different states reported on the various approaches to Medicaid belt-tightening that they are seeing back home. A Wisconsin attorney reported that its social services department may expand the definition of the probate estate from which DSS can recover. Texas has threatened to opt out of the Federal Medicaid program in favor of a block grant. Other attorneys reported that some states are deliberately misinterpreting federal Medicaid laws if the misinterpretation will benefit the states, figuring that the applicant is too sick and too poor to litigate the issue. Some states are processing the applications slowly and even denying "clean" Medicaid applications simply to delay paying Medicaid benefits.

TAXATION OF SPECIAL NEEDS TRUSTS

Tucson elder law attorney, Robert B. Fleming, assisted one break-out group with clarifying the income taxation of various special needs trusts: self settled, third party and specifically qualified disability trusts ("QDT"). Qualified disability trusts requirements are governed by I.R.C. sec. 642(b)(2)(C). That Code section provides that, except as otherwise provided in the paragraph, a trust shall be allowed an income tax deduction of $100. A trust which, under its governing instrument, is required to distribute all of its income currently is allowed a deduction of $300.

Special income tax rules apply to qualifying disability trusts that, by their nature, may authorize the trustee to accumulate principal and income. Under sec. 642(b)(2)(C), a qualified disability trust means any trust that is a disability trust described in subsection (c)(2)(B)(iv) of section 1917 of the Social Security Act (42 U.S.C. 1396p), and in which all of the beneficiaries of the trust as of the close of the taxable year are determined by the Commissioner of Social Security to have been disabled (within the meaning of section 1614(a)(3) of the Social Security Act, 42 U.S.C. 1382c (a)(3)) for some portion of such year.

If the criteria is satisfied, the qualifying disability trust shall be allowed an income tax deduction equal to the exemption amount allowed individuals under sec. 151(d) of the Code, subject, however, to sec. 67(e) limitations on the use of miscellaneous itemized deductions for any taxable year to the extent that the aggregate of such deductions exceeds 2 percent of adjusted gross income.

Attorney Fleming emphasized that, in order to be qualified under this statute, the disability trust must be irrevocable, established for the sole benefit of the disabled person during his or her life, must have a disability determined by the Social Security Administration, must be a non-grantor trust and not a self-settled trust, and can be a third-party special needs trust. The grantor cannot serve as trustee, nor can the grantor have any reversionary rights to trust corpus or the power to substitute property in trust.

Thus, the tax benefit of a QDT is the allowance of a personal income tax exemption which allows some trust income to remain in the trust without being subject to a trust's high income tax rate.

SUMMARY

The NAELA 2011 program was, as it is every year, a very informative reality check for experienced attorneys to consider what they are doing well, what they need to address and improve, and the challenges to their respective elder law practices coming down the pike.

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Calendar of Events

MARCH, 2011

3/3/11, 9 a.m.	CT-NAELA Finance Committee meeting
3/4/11, 9 a.m.	Medicaid Update 2011, NBI, Sheraton Hartford Hotel
3/7/11, 6 p.m.	Connecticut Bar Association Estates & Probate Executive Committee meeting, New Haven, CT
3/8/11, 9 a.m.	CT-NAELA Board Meeting
3/15/11, 6 p.m.	Connecticut Bar Association Elder Law Section Meeting
3/18/11, 9 a.m.	Be Prepared for the Unexpected: Receipt of PI Settlements, Inheritances, and Other Windfalls by the Elderly Client, CBA Elder Law Section Seminar, CBA Law Center, New Britain, CT
3/24/11, 3 p.m.	NAELA Chapter Presidents Meeting

APRIL, 2011

4/4/11, 6 p.m.	Connecticut Bar Association Estates & Probate Section, Open meeting, New Haven, CT
4/12/11, 9 a.m.	CT-NAELA Board Meeting
4/12/11, 6 p.m.	Connecticut Bar Association Elder Law Section Meeting
4/28/11, 3 p.m.	NAELA Chapter Presidents Meeting
4/29/11, 9 a.m.	**Integrate Veterans Benefits Into Your Practice with Victoria Collier, CT-NAELA Spring Seminar, Farmington Club, Farmington, CT**

MAY, 2011

5/2/11, 6 p.m.	Connecticut Bar Association Estates & Probate Executive Committee meeting, New Haven, CT
5/6/11, 9 a.m.	Probate Accountings & Fiduciary Liability, CBA Estates & Probate Section Seminar, CBA Law Center, New Britain, CT
5/10/11, 9 a.m.	CT-NAELA Board Meeting
5/11/11 to 5/15/11	**NAELA Elder & Special Needs Law Annual Meeting, Las Vegas, Nevada**
5/17/11, 6 p.m.	Connecticut Bar Association Elder Law Section Meeting
5/26/11, 3 p.m.	NAELA Chapter Presidents Meeting

JUNE, 2011

6/7/11, 9 a.m.	CT-NAELA Board Meeting
6/23/11, 3 p.m.	NAELA Chapter Presidents Meeting

rev. March 1, 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.