CTNAELA
The Connecticut Chapter of the National Academy of Elder Law Attorneys

PRACTICE UPDATE

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President's Message

By Attorney Matthew Stillman, President, CTNAELA

My term as CTNAELA's President is coming to a close and I am pleased to announce that our organization has had a very successful year. Our membership now counts over 150 members (our highest total ever) and our members are looking to the future, to lead the Elder Law Bar in Connecticut for years to come.

Two particular events occurred this year which give me tremendous pride as this organization's leader: 1) Our (current) success at winning the Freedom of Information Act (FOIA) request to obtain prior DSS fair hearing results; and 2) assisting our President-elect to avoid DSS' attachment of applied income for homecare clients.

FOIA

Past President David Slepian and Treasurer Henry Weatherby led our efforts to obtain past DSS fair hearing results and transcripts through the Freedom of Information Commission. Our attempts to obtain prior hearing results began last year when David was President, continued during my tenure, and now has led to a successful resolution. Initially, the FOIC hearing officer ruled in our favor, and then his decision was ratified before the full commission. DSS' efforts to try and first prevent and then limit our access to full hearing records was met with resounding opposition in the form of continued denials to their position. We are still waiting for the appeal to conclude. However, given the success of the initial hearing and the full committee ratification, we anticipate continued and ongoing success in this endeavor.

CTNAELA's website committee is already considering how best to catalog the decisions released as a result of the FOIA request so that CTNAELA members will have access to the decisions via our website. At this point, we aim to catalog all prior hearing decisions both by subject matter and/or UPM section for ease of access and review (of the information). This will allow our members to effectively and quickly search the material to locate/source material in representing the elderly and disabled in Connecticut.

My thanks and gratitude to Dave and Hank, both longtime Executive Board members, and associate Counsel Kristen Sweet, for their work on this issue.

Collaborative Effort With DSS

In January, Amy Orlando led a workgroup of members from CTNAELA, the Elder Law section of the CBA, Legal Services, and PLAN of CT to collaborate with DSS in a non-adversarial way. This "non-adversarial" approach met with great success in encouraging DSS to modify its position on Applied Income payments for homecare

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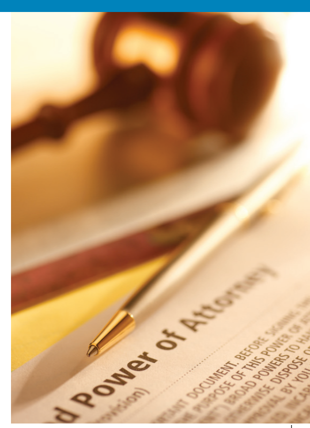
FEATURES IN THIS EDITION:



Day v. Seblatnigg: What Powers Does A Voluntarily Conserved Person Retain?

By Attorney Joseph A. Cipparone

Elder law attorneys should keep an eye on a conservatorship case winding through our Connecticut appellate courts. In a case of first impression, *Day v. Seblatnigg* will determine what rights a voluntarily conserved person retains after the appointment of a Conservator. It also involves the jurisdiction of Probate Courts over trusts in conservatorship matters. The trial court decision appears at 61 Conn.L.Rptr. 558, 2015 WL 9871322 (JD Stamford-Norwalk December 23, 2015). It is on appeal to the Connecticut Appellate Court with a Docket No. AC 38734. See the briefs and all of the exhibits online under the case name (use Seblatnigg) at http://appellateinquiry.jud.ct.gov/CaseNameInq.aspx.

Susan Elia suffers from Parkinson's disease and lung cancer. Susan has 2 children – Marc and Christine. Susan worries that her children will take over her life and her money. In 2007, when she was 63 years old, Susan created and funded a revocable trust drafted by Renee Seblatnigg, Susan's attorney for over 30 years ("the Connecticut Revocable Trust"). For 4 years, Susan, as Trustee, managed the securities in the Connecticut Revocable Trust for her benefit. Susan had over $6,000,000 in her Connecticut Revocable Trust.

Susan became increasingly fearful of interference by her children. Susan appointed Seblatnigg and her financial advisor, Salvatore Mulia, as Co-Trustees of her Connecticut Revocable Trust on June 9, 2011. On Seblatnigg's recommendation, Susan also filed a voluntary petition in the Greenwich Probate Court to appoint Seblatnigg as Conservator of her estate and Richard DiPaola as Conservator of her person. The Greenwich Probate Court approved the appointments on June 28, 2011. The Decree empowered Seblatnigg to manage the conservatorship estate, including supporting Susan, paying her debts and collecting debts due her.

Susan continued to be concerned about protecting her wealth from her children. Consequently, Seblatnigg consulted with Attorney Richard Mauceri, a Connecticut attorney and manager of First State Facilitators, LLC. First State Facilitators, a Delaware LLC, provides sophisticated asset protection services to clients of substantial net worth, who, for professional or other reasons, are particularly exposed to the risk of lawsuits or other risks of loss. See http://firststatefacilitators.com/forms/form01.pdf. Mauceri recommends that Susan transfer her assets to a Delaware limited liability company owned by a self-settled Delaware domestic asset protection trust. An LLC will insulate assets from creditors and keeps control in the manager. A Delaware asset protection trust lets settlors retain beneficial title to assets while insulating those assets from creditors' claims.

On September 15, 2011, Seblatnigg, as Conservator, enters into an asset protection agreement with First State Facilitators and a legal representation agreement with Mauceri. Susan, as Grantor, signs the Susan D. Elia Irrevocable Trust with Seblatnigg and Mulia as Trustees and First State Fiduciaries, LLC, as Trust Protector ("the Delaware Irrevocable Trust"). During Susan's lifetime, the Trustees must pay to or for the benefit of the group consisting of Susan, any charitable organization and Susan's grandchildren so much of the net income and/or principal of the trust, in such proportions and amounts as the Independent Trustees shall determine, in their absolute and uncontrolled discretion. The Independent Trustees are not required to distribute any net income of the trust currently, and may, in their absolute and uncontrolled discretion, accumulate all or any part of the net income of the trust and add it to principal. Thus, like most asset protection trusts, the Delaware Irrevocable Trust not only provided for Susan it also gave the Trustees the power to gift trust assets to her grandchildren or charities.

On September 20, 2011, Seblatnigg and Mulia, as Trustees of the Connecticut Revocable Trust, and Susan individually, authorize Morgan Stanley Smith Barney to accept the assets of the Connecticut Revocable Trust held by Goldman Sachs in Delaware. The Co-Trustees of the Delaware Irrevocable Trust then create Peace At Last, LLC ("the Delaware LLC"), with the Irrevocable Trust as owner. The Co-Trustees of the Delaware Irrevocable Trust open an account at Morgan Stanley Smith Barney in the name of the Delaware LLC. Between September 2011 and April 2012, the Co-Trustees of the Connecticut Revocable Trust transfer $6,538,415.49 to the Delaware LLC; Seblatnigg, as Conservator, transfers $80,000 to the Delaware LLC. Seblatnigg, as Conservator, did not obtain the authorization of the Greenwich Probate Court to enter into the asset protection agreement, transfer funds to the Delaware LLC, or create and fund the Delaware LLC.

On April 5, 2013, Seblatnigg resigns as Conservator of Susan's estate at the request of Susan's litigation counsel. On May 20, 2013, Seblatnigg files a Final Account. On May 21, 2013, the Greenwich Probate Court appoints Mulia as the Conservator of Susan's estate. Two days later, the Probate Court appoints Susan's sister, Margaret E. Day, as conservator of Susan's person. Seblatnigg apparently had a falling out with Susan. On December 17, 2013, Susan objects to Seblatnigg's attorneys' fees and conservator fees shown in the Final Account. See the Complaint in *Seblatnigg v. Elia*, Docket No. FST-CV16-6029702S (Stamford JD September 16, 2016). On January 9, 2014, at Susan's request, the Probate Court names Day the co-conservator of Susan's estate for the limited purpose of any matters related to Susan's interest in the Delaware Irrevocable Trust. Apparently, Mulia had a conflict of interest because he was one of the Co-Trustees of the Delaware Irrevocable Trust and Susan wanted the funds returned to the Conservatorship estate.

On March 4, 2014, Day commences the present declaratory judgment action in the Connecticut Superior Court, Stamford-Norwalk Judicial District. On February 26, 2015, Day seeks summary judgment on the ground that C.G.S. §45a-655(e) required Seblatnigg, as the conservator of Elia's estate, to obtain approval from the Greenwich Probate Court to create and fund the Delaware Irrevocable Trust. Because Seblatnigg failed to obtain such approval, Day argues the Delaware Irrevocable Trust is *void ab initio* and unenforceable and the assets from Susan's conservatorship estate—including the assets from the Connecticut Revocable Trust, in which she held an equitable interest— must be returned to the conservatorship estate.

In its analysis of the motion for summary judgment, the Court noted that C.G.S. §45a-646 provides that "[a]ny person may make application to the court of probate in the district in which he resides or has his domicile for voluntary representation either for the appointment of a conservator of the person or a conservator of the estate, or both. The conservator of the person or estate or both, has all the powers and duties of a conservator of the person or estate of an incapable person appointed pursuant to section 45a-650." C.G.S. §45a-646. C.G.S. §45a-650 is the statute giving the court the power to appoint a conservator in an involuntary case. Section CGS §45a-655(a) sets forth the duties of Conservator under either a voluntary or an involuntary case:

> A conservator of the estate appointed under section 45a-646, 45a-650 or 45a-654 shall, within two months after the date of the conservator's appointment, make and file in the Court of Probate, an inventory, under penalty of false statement, of the estate of the conserved person, with the properties thereof appraised or caused to be appraised, by such conservator, at fair market value as of the date of the conservator's appointment. Such inventory shall include the value of the conserved person's interest in all property in which the conserved person has a legal or equitable present interest, including, but not limited to, the conserved person's interest in any joint bank accounts or other jointly held property. The conservator shall manage all the estate and apply so much of the net income thereof, and, if necessary, any part of the principal of the property, which is required to support the conserved person and those members of the conserved person's family whom the conserved person has the legal duty to support and to pay the conserved person's debts, and may sue for and collect all debts due the conserved person. The conservator shall use the least restrictive means of intervention in the exercise of the conservator's duties and authority.

The Court concludes that the primary difference between a voluntary conservatorship and an involuntary conservatorship is that the Probate Court, in granting an application for a voluntary conservatorship, "shall not make a finding that the petitioner is incapable." See, *Day v. Seblatnigg, supra, at 563 citing* C.G.S. §45a-646. *Id.* Thus, whether Seblatnigg had been appointed the conservator of Susan's estate as a result of a voluntary application or an involuntary application, Seblatnigg's powers and duties as conservator would be the same.

First State Fiduciaries, the Trust Protector, led the defense of the transfer of assets to the Delaware Irrevocable Trust and the Delaware LLC. First State Fiduciaries' claimed that Day lacked standing because Seblatnigg was domiciled in Florida and the court lacked jurisdiction because all of the Connecticut Revocable Trust assets were in Delaware even when Goldman Sachs held them. The trial court (Judge Donna Heller) dismissed the standing issues by finding that Susan maintained a residence in Greenwich and was present in Greenwich during the conservatorship process. *Day v. Seblatnigg*, 61 Conn.L.Rptr. 558, 561.

As to jurisdiction, the Court found that the estate of a conserved person includes all property in which the conserved person has a legal or equitable interest. *Id.* at 562. The Court ruled that Susan, as beneficiary of her Connecticut Revocable Trust, had an equitable interest in the assets of the Connecticut Revocable Trust, so at the time of transfer of those assets to the Delaware LLC the Greenwich Probate Court had jurisdiction over them. *Id.*

In her appellate brief, Seblatnigg takes issue with the notion that trust assets are part of a conservatorship estate. Brief of the Defendant-Appellant at 21; Reply Brief of Defendant-Appellant at 3. Only Trustees have legal title to trust assets. In Day's reply brief, she concedes that a trust for the benefit of a conserved person divests the conserved person of legal title but the conserved person remains the equitable owner of the trust assets. Brief of the Plaintiff-Appellee at 12 *citing DSS v. Saunders,* 247 Conn. 686, 710 (1999).

The reason why the assets in the conservatorship estate matter is because Day relies on C.G.S. §45a-655(e) to argue that the assets from Susan's conservatorship estate must be returned to the conservatorship estate. C.G.S. §45a-655(e) states:

> (e) Upon application of a conservator of the estate, after hearing with notice to the Commissioner of Administrative Services, the Commissioner of Social Services and to all parties who may have an interest as determined by the court, the court may authorize the conservator to make gifts or other transfers of income and principal from the estate of the conserved person in such amounts and in such form, outright or in trust, whether to an existing trust or a court-approved trust created by the conservator, as the court orders to or for the benefit of individuals, including the conserved person, and to or for the benefit of charities, trusts or other institutions described in Sections 2055(a) and 2522(a) of the Internal Revenue Code of 1986,[1] or any corresponding internal revenue code of the United States, as from time to time amended. Such gifts or transfers shall be authorized only if the court finds that: (1) In the case of individuals not related to the conserved person by blood or marriage, the conserved person had made a previous gift to that unrelated individual prior to being declared incapable; (2) in the case of a charity, either (A) the conserved person had made a previous gift to such charity, had pledged a gift in writing to such charity, or had otherwise demonstrated support for such charity prior to being declared incapable; or (B) the court determines that the gift to the charity is in the best interests of the conserved person, is consistent with proper estate planning, and there is no reasonable objection by a party having an interest in the conserved person's estate as determined by the court; (3) the estate of the conserved person and any proposed trust of which the conserved person is a beneficiary is more than sufficient to carry out the duties of the conservator as set forth in subsections (a) and (b) of this section, both for the present and foreseeable future, including due provision for the continuing proper care, comfort and maintenance of such conserved person in accordance with such conserved person's established standard of living and for the support of persons the conserved person is legally obligated to support; (4) the purpose of the gifts is not to diminish the estate of the conserved person so as to qualify the conserved person for federal or state aid or benefits; and (5) in the case of a conserved person capable of making an informed decision, the conserved person has no objection to such gift. The court shall give consideration to the following: (A) The medical condition of the conserved person, including the prospect of restoration to capacity; (B) the size of the conserved person's estate; (C) the provisions which, in the judgment of the court, such conserved person would have made if such conserved person had been capable, for minimization of income and estate taxes consistent with proper estate planning; and (D) in the case of a trust, whether the trust should

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be revocable or irrevocable, existing or created by the conservator and court approved. The court should also consider the provisions of an existing estate plan, if any. In the case of a gift or transfer in trust, any transfer to a court-approved trust created by the conservator shall be subject to continuing probate court jurisdiction in the same manner as a testamentary trust including periodic rendering of accounts pursuant to section 45a-177. Notwithstanding any other provision of this section, the court may authorize the creation and funding of a trust that complies with section 1917(d)(4) of the Social Security Act, 42 USC 1396p(d)(4), as from time to time amended.

The creation of a Delaware Irrevocable Trust and the Delaware LLC in this case falls within the language of C.G.S. §45a-655(e) because the Delaware Irrevocable Trust allowed the Trustees to make gifts of Susan's assets to Susan's grandchildren or charities. What is odd is that C.G.S. §45a-655(e) is normally used by a conserved person to qualify for Title 19. That is why Section 45a-655(e) requires the Connecticut Departments of Social Services and Administrative Services to receive notice. Susan was trying to protect the assets from her children. She probably made grandchildren and charities potential beneficiaries to strengthen the Trust's asset protection. Certainly, with over $6 million to protect she was not trying to qualify for Title 19 (Medicaid). Could C.G.S. §45a-655(e) not apply to a case in which the intent was asset protection as opposed to divestment of assets to qualify for Title 19?

The Court states that nothing in C.G.S. §45a-655(e) authorizes a conservator to create and fund a trust with assets of the conserved person's estate without Probate Court approval. *Day v. Seblatnigg*, supra at 564. Yet, C.G.S. §45a-655(e) requires a gift to others or the creation of a Special Needs Trust to trigger its provisions. C.G.S. §45a-655(e) does not prohibit the creation of a non-Special Needs Trust that solely benefits the conserved person.

The Court concludes that under C.G.S. §45a-655(e), Seblatnigg was required to seek the approval of the Probate Court. Failure to do so rendered the Irrevocable Trust void ab initio and unenforceable. Consequently, the Court ordered return of the assets to Susan's conservatorship estate. *Id*. at 564.

The Court then considered the significance of Susan signing the Delaware Irrevocable Trust. If Susan signed the Delaware Irrevocable Trust and as a capable person she had the power to sign the Delaware Irrevocable Trust, why did it matter that Seblatnigg, as conservator, failed to obtain Probate Court approval? The Court notes that, when a conservator is appointed pursuant to a petition for voluntary representation, the powers of the conserved person are not as clearly framed. *Id*. at 565. "Because no finding of incapacity is reached when applications for voluntary conservatorships are granted, and because the enabling statute is silent, it is not clear to what extent persons so represented remain legally capable to contract, convey title, or have charge of their persons. Retention of legal capacities of this kind would appear inconsistent with the purposes of voluntary representation." *Id*.at 565 citing *Whitnum-Baker v Appeal from Probate*, 2013 WL 4734887 (JD Stamford-Norwalk 2013) [citing and quoting Folsom, Incapacity, Powers of Attorney & Adoption in Connecticut § 2:5 (3d ed.2000)]. As Seblatnigg points out in her briefs, the treatise cited was written before the passage of Public Act 07-116 which totally revised the law of conservatorships. Reply Brief of Defendant-Appellant at 10, 12.

The Court notes that nothing in C.G.S. §45a-655(a) suggests that the legislature intended to distinguish between a voluntary and an involuntary conservatorship with respect to whether a conserved party retains any authority to manage his or her own estate while the conservatorship remains in effect; see *Reale v. Reale*, supra, Superior Court, Docket No. CV–12–FA–99–70340–S (January 12, 2000, Klaczak J.) [26 Conn. L. Rptr. 311]; the only difference is that under a voluntary conservatorship, the conserved party may seek to be released from the conservatorship upon thirty days' notice pursuant to C.G.S. §45a-647 and upon such release, the conserved party again has the legal capacity to manage his or her own affairs. The court then concludes that, the conservator, as the agent of the Probate Court, has the exclusive authority to manage the affairs of the conserved person.

Yet, the trial court conducted no analysis of whether Susan's signing of the Delaware Irrevocable Trust was the least restrictive means of intervention in the exercise of the conservator's duties. C.G.S. §45a-655(a) places a duty on conservators to use the least restrictive means of intervention in the exercise of the conservator's duties. Nothing in C.G.S. §45a-655(a) limits the use of the least restrictive means of intervention to conservators in involuntary conservatorships. Letting a capable person, like Susan Elia, sign the Delaware Irrevocable Trust was, as required by C.G.S. 45a-655(a), the least restrictive means of intervention in the exercise of the conservator's duties. In fact, it seems counterintuitive that the only difference between an involuntary conservatorship and a voluntary conservatorship would be that the conserved person can terminate the conservatorship. What about the capabilities of the conserved person? Should that not be a factor in defining what duties the conservator assumes?

Day contends that no one will want to accept the position of conservator if the conserved person retains the right to dispose of his property. See, Brief of Plaintiff-Appellee at 27. Yet, agents under Durable Powers of Attorney face that prospect every day and there does not seem to be a shortage of agents to serve under Durable Powers of Attorney.

In summary, the outcome of this case will have significant effects on conservator duties and the treatment of trusts in which a conserved person is a beneficiary. The Appellate Court could bring trust assets under the jurisdiction of the probate courts as well as change the meaning of what constitutes probate assets. The Appellate Court could clarify the meaning of the term "the least restrictive means of intervention" in voluntary conservatorships. What the outcome of this appeal will be is anyone's guess. Elder law attorneys should keep a close watch on this case as it percolates through the Connecticut appellate courts. ■

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Anatomy of *Harborside v. Witte*

By Attorney Scott D. Rosenberg and Attorney Miguel Almodóvar

"If your friend owes you money, and he can't pay you because he was robbed, you don't get to sue the robber." This thought began our involvement[i] in the case against Arline Witte, which has given the elder law community some additional ammunition against overreaching collections actions by nursing homes.

The underlying facts of *Harborside Connecticut Ltd. Partnership.*[ii] *v. Witte* are both unfortunate and fairly common. The defendant's husband was a resident of plaintiff's nursing home, Arden House. The defendant managed the couple's significant joint finances in the community, but was suffering growing deficits of her own. After a history of late payments, the defendant accidentally bounced a check for three months of occupancy at the facility, and when her husband passed a few weeks later, she refused to reissue a good check in its place. Neither spouse had signed an admissions agreement, nor had Mrs. Witte executed a voluntary surety agreement, and as Mrs. Witte continued to decline and eventually was conserved herself, voluntary payment seemed likely to constitute a breach of fiduciary duty.

The facility elected to file a collections action directly against Mrs. Witte for the whole balance due; no attempt was made to open probate or file a claim against the decedent. In the absence of any clear remedy in contract,[iii] the facility couched its allegations in equitable claims of conversion and unjust enrichment, centered around the decedent's long-term care insurance policy. The plaintiff alleged that policy payments were sent to the defendant, that they were only issued after the facility had submitted invoices for services rendered, and that those checks "belonged to or should have been possessed by" the facility, but were not turned over for those final three months.

While there were significant issues of legal sufficiency on both the conversion[iv] and unjust enrichment[v] claims, trial counsel moved to dismiss rather than to strike, arguing that underneath the plaintiff's verbal gymnastics was the simple case of an unpaid debt of the decedent, which is within the exclusive original jurisdiction of the Probate Court. Somewhat surprisingly, the trial court (Hon. Brian Fischer), agreed. Noting that the courts "have long eschewed the notion that pleadings should be read in a hypertechnical manner",[vi] and that plaintiff never alleged the defendant had any personal duty to remit insurance proceeds or any other payment to plaintiff, the court held: "a fair reading of the complaint is that the plaintiff is seeking to recover for a personal obligation of [Mr.] Witte, who is now deceased. The plaintiff must do this by filing a claim against Witte's estate in the Probate Court. . . . To the extent that the defendant has been unjustly enriched or has converted money, it is the responsibility of the fiduciary of Witte's estate, when appointed, to bring these claims against the defendant."[vii]

The plaintiff appealed, alleging that the trial court failed to construe the complaint in the light most favorable to it, and in the alternative that it should have been allowed a requested evidentiary hearing to establish its direct right of action against the defendant. In reply, we focused on the defects of the complaint counts (see footnotes iv & v), treating the trial court's generalized construction as an appropriate "last bite of the apple" to the appellant upon the failure of its more specific claims. We also noted the prohibition against compelled spousal surety agreements for nursing home care,[viii] and the broader public policy it suggests.

At oral arguments, Judge Lavine challenged the appellant to demonstrate how the trial court's conclusions about the nature of the case and the lack of privity between the parties were incorrect. Judge Prescott questioned the appellant even more aggressively on the subject, with particular focus on the appellant's failure to produce the LTC policy with its complaint or to specifically allege a duty of the defendant to remit policy payments to them. Judge Bishop focused more squarely on the dismissal standards, and was skeptical of the trial court in that regard. While acknowledging that the complaint had deficiencies, he challenged counsel on whether there was truly no reading of the complaint that could suggest a direct cause of action against the appellant, noting that the existence of any such reading should be sufficient to survive dismissal on the pleadings.

Given the tenor of oral arguments, the 2-1 decision affirming the trial court along these lines (with written dissent) was anticipated. What we did not expect – and what may be a small coup for elder law practitioners – is that the majority wholly endorsed the logic of the trial court, without reference to the other failings of the complaint. Calling the trial court's memorandum "thoughtful," the appellate panel, (Lavine, J.), concluded that, "[t]he allegations of the complaint must be given such reasonable construction as will give effect to [it] in conformity with the general theory which it was intended to follow, and do substantial justice between the parties.[ix] . . . [T]he salient allegations of its complaint are that [the plaintiff] had an agreement with the decedent to render services to him, it rendered the requested services, but the decedent has not paid for those services. Moreover, nowhere in its complaint did the plaintiff allege that the defendant was responsible, contractually or otherwise, for the debts of the decedent. We agree with the trial court that regardless of the labels the plaintiff attached to its causes of action, it is the substance of the allegations that control the nature of the cause of action."[x]

The ultimate impact of *Harborside v. Witte* remains to be seen. On the one hand, the language supporting the court's broad conclusion that a decedent's private-pay nursing home debt must be collected through the estate is both specific and explicit, and should be a go-to citation in opposing third-party collections actions where the defendant is not conceded to be a contracting party. At the same time, the basis of the case in mechanics of long-term care policy payments makes for an easy point of distinction, and the failure to allege the defendant had a legal duty of any kind is an easy issue for plaintiff's to sidestep in future litigation. Moreover, Judge Bishop's argument in dissent – that challenged pleadings must be favorably interpreted as stated in the words of the pleading, and not as the jurist thinks it would have been more properly presented – is founded in well-established law, and could lead other trial courts to opposite conclusions in like circumstances. At the very least, though, our ex-

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Probate Court Rejects State's Contention That the Trustee of a Special Needs Trust Cannot Purchase a Prepaid Funeral Contract for the Trust Beneficiary During Her Lifetime

By Attorney Carmine Perri and Attorney Taylor Equi

Is a Trustee's purchase of a prepaid funeral contract for a special needs trust ("SNT") beneficiary during her lifetime permissible? The State, in one of Czepiga Daly Pope's recent cases, said no. The Probate Court, *In the Matter of Julia A. Meretsky*, Probate Court District of Saybrook (July 19, 2016), disagreed with the State.

The facts of In the Matter of Julia A. Meretsky are as follows: Julia Meretsky ("Ms. Meretsky") receives Medicaid benefits from the State of Connecticut (the "State"). Ms. Meretsky is conserved, and in 2011, her Conservator of the Estate, acting by Decree of the Probate Court, established the Julia Meretsky Special Needs Trust Agreement (the "Trust"). The Trust is an irrevocable SNT established pursuant to 42 U.S.C. § 1396p(d)(4)(A).

After the Trust was established, in 2014, Ms. Meretsky's Conservator of the Person signed a prepaid funeral contract (the "funeral contract") on behalf of Ms. Meretsky. The Trustee then disbursed funds, in the amount of $15,218.00, directly to the funeral home for the purchase of the funeral contract.

After the purchase of the funeral contract, the Trustee filed a periodic accounting with the Probate Court. The State of Connecticut Department of Administrative Services (the "State") objected to the accounting claiming that the purchase of the funeral contract is not for the sole benefit of Ms. Meretsky since Ms. Meretsky cannot realize the benefit during her lifetime.

The Probate Court ultimately overruled the State's objection, and agreed with the arguments of the Trustee.

First, the Trustee argued that a prepaid funeral contract benefits no one but the contract's intended beneficiary. No third party could possibly benefit from the purchase of a funeral contract. The Probate Court agreed finding that "Insofar as whom is benefitted by the prepayment of the funeral expenses, it necessarily can only be the trust beneficiary. The relatives of the beneficiary are under no obligation to pay the funeral expenses of the trust beneficiary after she has died." *In the Matter of Julia A. Meretsky*, Probate Court District of Saybrook, 3 (July 19, 2016)

Second, there is no Federal law, rule, regulation, case law, or any other support that would prohibit the Trustee of a SNT from paying for a prepaid funeral contract from SNT funds for its beneficiary. The Probate Court agreed holding "In the instant case, neither Congress, the Connecticut General Assembly nor any state or federal agency has imposed the restriction on Special Needs Trust expenditures which the Attorney General requests that this Court impose." *Id*. at 2-3.

Specifically, nowhere in 42 U.S.C. § 1396p(d)(4)(A), does Congress prohibit the payment of funeral contracts while the SNT beneficiary is still living.

Additionally, the POMS do not prohibit the payment of a prepaid funeral contract. POMS § SI 01120.203.B.3.b., "Prohibited expenses and payments", does prohibit the payment of funeral expenses after the death of the SNT beneficiary and before the repayment of the State. However, nowhere in the POMS does the Social Security Administration prohibit the payment of funeral expenses before the death of the SNT beneficiary. The Probate Court noted that "the arguments set forth by the Attorney General seem persuasive. . . ." However, the Probate Court continued, "as the United States Supreme Court stated in *Rodriguez v. United States*, 480 U.S. 522, 535 (1987): '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Id*. at 2.

The Probate Court agreed with the Trustee that what the State asked the Probate Court to do is to apply a meaning to the POMS that renders an absurd result. The Social Security Administration clearly, and unequivocally, prohibited trustees of SNTs from paying funeral expenses after the death of SNTs' beneficiaries. If the Social Security Administration wanted to prohibit the payment of funeral expenses before the death of a SNT beneficiary, it would have done so.

Third, the purchase of a prepaid funeral contract is not inconsistent with State law; rather, the purchasing of a prepaid funeral contract is wholly consistent with Medicaid eligibility laws. An Irrevocable Burial Fund contract is an excluded asset for Medicaid eligibility per U.P.M. §§ 4020.10 I. and 4030.10 C. As such, when an individual is completing an application for Medicaid benefits, the applicant may use funds to purchase exempt items during the period of time the individual is spending excess assets in order to meet eligibility limits. Other exempt assets are funds which are held in a qualifying SNT.

In this line of reasoning, the assets which exceed the Medicaid eligibility limit were first placed into the SNT, and then the Trustee of said trust paid for the purchase of the irrevocable burial agreement. The Probate Court agreed with this question: how is the procedure of funding a SNT first, and then using trust funds to pay for the funeral contract different than paying for the funeral contract prior to funding a SNT? To think that there is a difference in what is proper order of when the transactions occur, was yet another absurdity in the State's argument.

Ultimately, the Probate Court agreed with this reasoning, and found that "the Trustee of the Julia A. Meretsky Special Needs Trusts possesses the authority to prepay the funeral expenses as set forth in the accounting".

Fortunately, the Probate Court did not allow the State to use the Probate Court to effectuate its decision to change its policy by disallowing the purchase of a prepaid funeral for the beneficiary of a SNT from trust assets during the beneficiary's lifetime, a policy change that has no foundation in Federal or State law. ■

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The Infinite Lien for Probate Fees and Estate Taxes Creates Title Problems: CBA Workgroup Drafting Proposal to Create Special Procedure for Release

By Attorney David Craig Slepian

The Probate fee lien and estate/succession tax liens are of infinite duration (CGA 45a-107b and CGA 12-398). It is not unusual to come across real property where someone in the chain of title has died and the estate has never been administered. This is often the case where the decedent had a retained life estate or the property was owned in survivorship. The problem is not discovered until someone later in the chain attempts to sell or mortgage the property. The CBA Real Property section has also identified several instances where a lender gave a mortgage without first clearing these liens. Many years may elapse before the defect is discovered, by which time it may be impossible to obtain the information needed about the estate to file a reasonably accurate estate tax return. The family of the decedent may have insufficient knowledge of the estate assets, and especially in a foreclosure matter, little incentive to cooperate with the lender in clearing title.

The CBA Real Property section and Estates and Probate section created a workgroup to craft a "special procedure" in coordination with the Probate Court Administrator's ("PCA") office, to be proposed as a bill, that would solve this conveyancing problem. As a member of the workgroup, this author thanks Judge Paul Knierim and his staff for their invaluable input resulting in a conceptual framework that we can now take to the Department of Revenue Services for further discussion.

My thoughts, which were shared with the workgroup, are that the "special procedure" should not create an incentive for parties to deliberately avoid or circumvent the normal probate and estate tax process. It should not sabotage the normal process. It should not enable a party to avoid paying the statutory probate fee and estate taxes on the rest of the estate if it later becomes possible to properly probate the estate. Therefore, it should be a narrow remedy that applies only in limited circumstances, and one approach under consideration is to limit it to retained life estates and survivorship property. It should only apply where there is no alternative because the information necessary to properly probate the estate cannot be obtained, and only after sufficient time has passed since the decedent's death that it is clearly apparent that such information is unlikely to be developed in the future. There should be a reasonable cost or fee paid to invoke the remedy if it is to be in lieu of the normal procedure. The conceptual framework developed by the workgroup reflects these and other considerations.

I look forward to reporting on our progress in future CTNAELA publications. ■

Attorney Slepian is a partner with Garson & Slepian, with an office in Fairfield.

Four Medicaid Provisions to Watch This Congress

By Attorney David Michael Goldfarb

The demise for now of the American Health Care Act (AHCA) doesn't mean changes to Medicaid can't happen this Congress. For one, funding for the Children's Health Insurance Program (CHIP) will expire at the end of September. Many advocates expect potential Medicaid cuts as potential cost offsets to the legislation. Here's the top four provisions Elder Law attorneys should watch this congress:

Limitations to Community Spouse Annuities

H.R. 181, the Closing Annuity Loopholes in Medicaid (CALM) Act, would make half the income of a community spouse's annuity available to the institutionalized spouse. It is identical to the legislation from last congress (H.R. 1771).

The proposal arose primarily in response to several states losing federal appeals cases challenging their use. A 2014 GAO report also noted the existence of $1 million annuities, fueling concerns of abuse.

The legislation got approved in February by the key subcommittee, ostensibly as part of what would become the American Health Care Act. Rep. Morgan Griffith (R-VA), who voted for the legislation in subcommittee, raised the issue of divorce, and the need to exclude non-marital property from consideration as the legislation develops to its final form.

NAELA has also educated Congress on our broader concerns with the legislation. While NAELA does not condone the rare use of wealthy individuals using annuities, the current draft would fall most heavily on working-class couples. Moreover, without the security an annuity provides a spouse, divorce will likely increase. At a more technical level, NAELA has argued that the draft's inclusion of all non-IRA retirement accounts is overbroad for its intended purpose.

Likely thanks in part to NAELA lobbying, the legislation did not get included in the health reform package. But, we expect the legislation to continue to move forward in one form or another.

Ending Three-Month Retroactive Coverage

AHCA included provisions to end the requirement that states provide three months of retroactive benefits to Medicaid beneficiaries eligible during that time-period. Rep. Markwayne Mullin (R-OK) also introduced this provision as a stand-alone bill.

Three-month retroactive coverage helps smooth the transition into long-term services and supports. NAELA remains concerned that, if enacted, facilities may feel the need to sue families to recoup expenses from uncompensated care. Worse, family caregivers may hold off on seeking professional care until the person qualifies for Medicaid instead of when care is necessary, a potentially dangerous situation.

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ABLE Accounts: A Quick Overview

By Attorney Stephen B. Keogh

ABLE accounts are a relatively straightforward and cost-effective method for disabled individuals of modest means, and their families, to set aside money for the disabled person's use. This is money that is exempt for public benefits purposes, but set up without the expense and complications entailed in establishing a special needs trust.

The ABLE account was created by the Achieving a Better Life Experience (ABLE) Act of 2013 (Division B of Public Law 113-295). That act amended Section 529 of the Internal Revenue Code (which permits and regulates tax-advantaged college savings plans commonly known as "529 Plans") to allow state-sponsored accounts for disabled persons. Public Law 114-113 (2015) amended the statute, most importantly eliminating the requirement that an applicant be limited to his or her own state's ABLE account program when opening an ABLE account.

ABLE accounts can receive funding, on either a first-party or third-party basis, up to $14,000.00 per year, for persons who became disabled before age 26. Excess contributions are not permitted, and will be returned to the contributor, along with any accrued income attributable thereto. At present, rollovers from 529 college savings plans are not allowed, though there have been legislative proposals to allow this. No individual is allowed to have more than one ABLE account.

ABLE Accounts and Public Benefits

Medicaid Eligibility: ABLE account funds are exempt for the purpose of Medicaid eligibility, no matter how much accumulates in the account.

SSI Eligibility: In regard to SSI benefits, ABLE account funds below $100,000.00 are also exempt for eligibility purposes. However, when an ABLE account balance exceeds $100,000.00, SSI benefits are suspended (not terminated), and are reinstated when the ABLE account balance drops below $100,000.00 again.

Payback Provisions: The Act also requires that the amount remaining in the ABLE account upon the beneficiary's death is paid over to the state, up to the amount of medical assistance paid for the beneficiary, but not including premiums paid on behalf of the beneficiary under a Medicaid Buy-In program. IRC §529A(f).

Who is "Disabled" for the Purposes of Establishing an ABLE Account?

Individuals receiving Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits are automatically considered disabled for the purposes of ABLE account eligibility, provided they were disabled prior to age 26.

In addition, individuals not receiving SSI/SSDI disability benefits can still be eligible for an ABLE account if the individual's disability is included on the Social Security Administration's List of Compassionate Allowances Conditions, available at: https://www.ssa.gov/compassionateallowances/conditions.htm.

The individual, or the individual's parent or guardian, can also qualify by: 1) certifying, to the satisfaction of the Secretary of the Treasury, that the individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months, or is blind (within the meaning of section 1614(a)(2) of the Social Security Act); 2) certifying that such blindness or disability occurred before the date on which the individual attained age 26; and 3) including a copy of the individual's diagnosis relating to the individual's relevant impairment or impairments, signed by a physician meeting the criteria of section 1861(r)(1) of the Social Security Act.

Note that proof of disability (other than a certification by the applicant in the application) is generally not required to be submitted to open an account, but can be required for verification of eligibility at a later point in time. The IRS has indicated, in an Interim Guidance (Notice 2015-81), that the final regulations to be issued in regard to ABLE accounts will simply require that the individual (or the individual's agent under a power of attorney or parent or legal guardian) certify under penalties of perjury that they have the signed physician's diagnosis, and that the signed diagnosis will be retained and provided to the ABLE program or the IRS upon request.

Setting Up an ABLE Account

Enrollment procedures for ABLE accounts vary from state to state, and generally can be accomplished through an online enrollment procedure. As with 529 college savings plans, ABLE accounts are established under the auspices of state governments "or agency or instrumentality thereof" (often state treasurer's offices). Various states are in different stages of development and implementation of the program; Connecticut does not yet have its own ABLE program up and running.

However, it is possible to establish an ABLE account in any one of the states that are open to depositors nationwide; *there is no requirement that an individual establish an ABLE account in his or her state of residence*. (As of March 23, 2017, states with ABLE programs are: Alabama, Alaska, Florida*, Illinois†, Iowa, Kansas†, Kentucky*, Michigan, Minnesota†, Nebraska, Nevada†, North Carolina†, Ohio, Oregon, Rhode Island, Tennessee, Vermont*, Virginia. (*State residents only. †Participates in National ABLE Alliance: https://savewithable.com. All states listed are available on a national basis except for states designated "State residents only".)

Qualified Expenses

ABLE account withdrawals for "qualified disability expenses" are exempt from adjusted gross income for income tax purposes. The term "qualified disability expenses" means any expenses related to the eligible individual's blindness or disability which are made for the benefit of an eligible individual who is the designated beneficiary, including the following expenses: education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses, which are approved by the Secretary under regulations and consistent with the purposes of this section." IRC §529A(e)(5).

"In order to implement the legislative purpose of assisting eligible individuals in maintaining or improving their health, independence, or quality of life, the Treasury Department and the IRS conclude that the term "qualified disability expenses" should be broadly construed to permit the inclusion of basic living expenses and should not be limited to expenses for items for which there is a medical necessity or which provide no benefits to others in addition to the benefit to the eligible individual. For example, expenses for common items such as smart phones could be considered qualified disability expenses if they are an effective and safe communication or navigation aid for a child with autism. […]." Internal Revenue Bulletin: 2015-27, July 6, 2015, REG–102837–15, "Notice of Proposed Rulemaking Guidance under Section 529A: Qualified ABLE Programs".

Penalties and Income Tax on Nonqualified Expenses

To the extent that distributions to or for the benefit of the designated beneficiary are not spent on qualified disability expenses, those nonqualified distributions are includible in the gross income of the distributee/beneficiary for income tax purposes.

In addition, the nonqualified distributions are subject to a 10 percent additional tax under the Proposed Regulations issued by the IRS. "This additional tax does not apply, however, to distributions on or after the designated beneficiary's death or to returns of excess contributions, excess aggregate contributions, or contributions to additional purported ABLE accounts made by the due date (including extensions) of the designated beneficiary's tax return for the year in which the relevant contributions were made." Internal Revenue Bulletin: 2015-27, July 6, 2015, REG–102837–15, "Notice of Proposed Rulemaking Guidance under Section 529A: Qualified ABLE Programs"

Managing an ABLE Account

One of the advantages of an ABLE account is the relative ease of administration when compared to supplemental needs trusts, particularly self-settled trusts. These is no need to apply to a trustee for payment of expenses, and no need to request court permission for payments.

The enforcement mechanism for compliance with the "qualified disability expense" provisions is the inclusion of nonqualified distributions as taxable income, with a 10 percent additional tax.

Rollovers: A designated beneficiary can roll over from one ABLE account into another (so long as the first account is closed), or into an ABLE account belonging to "an eligible individual who is a member of the family of the designated beneficiary." This can be done only once every 12 months. IRC §529A(c)(1)(C)(i).

Change of Beneficiary: The beneficiary of an ABLE account can be changed to another "eligible individual who is a member of the family of the former beneficiary" without being treated as a distribution. IRC §529A(c)(1)(C)(ii).

Note that the State will be interested in these accounts both from the point of view of eligibility for Medicaid, but also in its capacity as creditor for reimbursement of benefits paid, at the death of the designated beneficiary. Note that IRC §529A does not appear to provide a basis for any finding that amounts paid for other than qualified disability expenses are improper in such a manner as to impact the designated beneficiary's eligibility for benefits. Nevertheless, even qualified disability expenses, if used for housing expenses, could impact an SSI beneficiary's benefits by inclusion as income for SSI purposes (even though those payments are not includible as income for income tax purposes). Likewise, payment of non-qualified expenses, depending on their nature, could conceivably have an impact on eligibility, based on their potential inclusion as taxable income for federal income tax purposes.

In advising and representing clients in regard to the establishment and administration of ABLE accounts, care should be given to encourage clients to regularly consult counsel to determine whether a particular expense is a qualified disability expense, if there is any doubt, and the extent to which such distributions may be reportable to the Social Security Administration or DSS as income for benefits purposes. Particular emphasis should be placed on record-keeping, both to be able to respond to any audits or requests from the ABLE program itself or the IRS, but also to be able to respond to any inquiries that might come from the Social Security Administration or DSS. ■

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Four Medicaid Provisions to Watch This Congress

(continued from page 7)

Limiting the State Option to Expand Home Equity

Currently, states must include home equity above the $560,000 limit as a countable asset in Medicaid for individuals living without a spouse, child under 21, or a child with disabilities. However, states have the option to expand this up to $840,000 (figures adjusted for inflation yearly).

H.R. 1082, The Medicaid Home Improvement Act, also included in AHCA, would take away a state's option to exempt home equity beyond the current floor. The idea being that these individuals could take a reverse mortgage or home line of credit and spend down the extra home equity.

NAELA remains concerned that some individuals may not be able to get access to credit, forcing a sale of the home. This would subject all proceeds from the fire sale to spend-down. Worse, those who wished to return home after a stay at an institution could find there is no home to return to.

Extending Money Follows the Person

The Money Follows the Person demonstration project, which covers transition services, expired last year. The program has helped tens of thousands of individuals move out of an institution and back into the community. NAELA lobbied with many groups at the end of last Congress for an extension along with some modest improvements. Bipartisan support exists, but will require additional advocacy to ensure an extension occurs. ■

Attorney Goldfarb is a Senior Public Policy Manager at (National) NAELA.

Applied Income and Pooled Trusts–We Can Work it Out

By Attorney Rebecca A. Hajosy

Think of what you're saying,
You can get it wrong and still you think that it's alright.
Think of what I'm saying,
We can work it out and get it straight, or say good night.
We can work it out.
– The Beatles

This article is about recent action by the Connecticut Department of Social Services ("DSS") to require an applied income from the income diverted to a pooled trust for recipients of Community Based Services (CBS), and how efforts from our elder law community, working with DSS, have resulted in a moratorium on this practice. Working together – we worked it out.

The Issue. The 2017 monthly income limit for most Community Based Services, such as the Connecticut Home Care Program for Elders Waiver (CHCPE)[i], is $2,205[ii]. If an applicant is over this "hard income limit", the applicant will not qualify for the program unless the applicant diverts the excess income to a specialized trust.

In addition to the $2,205 hard income limit, a recipient also has a Personal Liability Amount (PLA) that is required to be paid towards the cost of the care provided by DSS as a monthly applied income payment. This "soft income limit" is calculated with methodology set forth in DSS Uniform Policy Manual (UPM) §§ 5035.20 and 5035.25, for individuals without and with spouses respectively[iii]. Under these Sections, any income over the Medically Needy Income Limit (MNIL) is required to be given towards the cost of the care provided by DSS as a monthly applied income payment. The MNIL is set at 200% of the Federal Poverty Level for a household of one. For 2017, that amount is $1,980. This figure goes up July 1 of every year.

For many years, DSS has allowed recipients of Community Based Services to divert excess income into a pooled trust to qualify for services and avoid an applied income (if the amount diverted is under the MNIL limit[iv]). Thus, it is common practice to divert, not just enough income to get under the hard income limit, but any income in excess of the MNIL limit, so an applied income is avoided.[v]

Once the trust is set-up, DSS has historically allowed the recipient to use the diverted funds to pay expenses and services of any kind, not covered by Medicaid, if they are for the benefit of the recipient[vi].

The Centers for Medicare and Medicaid Services (CMS) have informed DSS that although the State Medicaid Manual allows for the diversion of income for eligibility purposes, that same diversion is not allowed in the post eligibility treatment of income[vii]. Thus, when determining if a particular recipient is required to pay a Personal Liability Amount (i.e. applied income), any amount over the MNIL diverted to a pooled trust will now be considered income over the MNIL and thus will be required to be given towards the cost of the care provided by DSS as a monthly applied income payment.

The How. DSS began implementation of the applied income contribution for CHCPE in the later part of 2016, when DSS started initiating the new ImpacCT computer system. It was to be phased in by region and move across the State over the course of 2017. The State allowed deductions from the applied income for the expenses set forth in UPM §§ 5035.20 and 5035.25, but not for any other monthly expenses.

What's the Big Deal? This is causing many of our clients, and the elderly and disabled of Connecticut, to be forced into a higher level of care, as they can no longer meet their monthly living expenses in the community. For example, a recipient's monthly household expenses total $2,800 and the recipient is only allowed to keep the MNIL of $1,980. The recipient diverts all income over the $1,980 to a PLAN pooled trust, but can no longer use that money for expenses as it is now applied income. This creates a short fall of $820 in the recipient's income. There are no assets to cover that gap, as the recipient is under the $1,600 asset limit. This recipient would have no choice but to move to a long-term care facility.

This problem is amplified for those living in assisted living facilities and receiving community based services as their monthly expenses are upwards of $5,000, on average. Forcing these individuals into long-term care facilities decreases the quality of life for Connecticut seniors and increases costs to the Connecticut taxpayers.

This procedural change was a surprise to most of us. CTNAELA and the Connecticut Bar Association Elder Law Section teamed up with other elder law groups and mounted opposition to this change. This Applied Income Work Group (Work Group) has been working with DSS to find a workable solution.

The Work Group met with 7 members of DSS on January 27, 2017. Through that meeting and subsequent meetings and communications, DSS agreed, on January 31, 2017, to immediately implement a moratorium on the applied income change affecting CBS recipients contributing income to pooled trusts. They also agreed to reverse any changes that were already made to clients' applied incomes. This was great news!

This collaboration is setting forth a cooperative atmosphere for DSS and elder law practitioners with great results. Hopefully, the collective need and desire to protect the rights and quality of life of Connecticut's elderly and disabled will continue to help shepherd in compassionate and fiscally mindful policies, regulations and legislation. In fact, in late March, DSS agreed to create a "task force" to discuss other "hot topics" with practitioners. We can work it out!

Wait, can't DSS end the moratorium anytime they want? DSS has agreed not to stop the moratorium without letting the Work Group know. During the moratorium, DSS agreed to review and assess budgetary implications and policy options and to continue to meet with the Work Group to collect data and crunch numbers on how these changes will really affect the State's residents and bottom line. We know we must continue to advocate, ensuring that, when DSS is ready to implement a change, it is favorable to Connecticut seniors and the disabled.

The Discussions. As a part of the discussions, the Work Group is advocating for a change to UPM §§ 5035.20 and 5035.25 to allow for deductions from the PLA (applied income) for housing expenses, utility expenses and other costs to safely remain in the community. These expenses would also include assisted living costs. The

State Medicaid Manual requires there to be a cost cap, which would need to be discussed. However, even with a cost cap, this should provide most of our clients with the resources needed to remain in the community.

As this matter progresses, we here at CTNAELA will keep you posted!

SUPPLEMENTAL MATERIALS

UPM Section 5035.20 C. Post-Eligibility Deductions for LTCF/CBS Units Without Community Spouses-Deductions For CBS Units

The following monthly deductions are allowed from the income of assistance units receiving Community Based Services:

1. an amount to meet the basic community maintenance needs of the individual to the extent that it is equivalent to:
   a. the MNIL for one person for those who are eligible under the model waiver; or
   b. 200% of the Federal Poverty Level for those eligible under the PAS or DMR (DDS) waiver;
2. an amount of income diverted to meet the needs of a family member who is in the community home to the extent of increasing his or her income to the MNIL which corresponds to the size of the family;
3. Medicare and other health insurance premiums, deductibles, and coinsurance costs when not paid for by Medicaid or any other third party;
4. expenses recognized as medical costs for which the recipient is currently liable, and which are not covered by Medicaid.

UPM Section 5035.25 C. Post-Eligibility Deductions for LTCF/CBS Units With Community Spouses-Deductions For CBS Units

The following monthly deductions are allowed from the income of assistance units receiving Community Based Services:

1. an amount to meet the basic community maintenance needs of the individual to the extent that it is equivalent to:
   a. the MNIL for one person for those who are eligible under the model waiver; or
   b. 200% of the Federal Poverty Level for those eligible under the PAS or DMR (DDS) waiver;
2. a Community Spouse Allowance (CSA), when appropriate; (Cross Reference 5035.30)
3. a Community Family Allowance (CFA), when appropriate; (Cross Reference 5035.35)
4. Medicare and other health insurance premiums, deductibles, and coinsurance costs when not paid for the Medicaid or any other third party;
5. expenses recognized as medical costs for which the recipient is currently liable, and which are not covered by Medicaid.

d(4)(A) Trust (42 U.S.C. § 1396p(d)(4)(A)) "Self-Funded Special Needs Trust":

(i) A trust containing the asset of an individual under age 65;
(ii) who is disabled (as defined in section 1382c(a)(3) of this title), and which is;
(iii) established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court[viii];
(iv) if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

d(4)(C) Trust (42 U.S.C. § 1396p(d)(4)(C)) "Pooled Trust": A trust containing the asset of an individual who is disabled (as defined in section 1382(c)(a)(3) of this title) that meets the following conditions:

(i) The trust is established and managed by a non-profit association[ix];
(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts;
(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court;
(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account, an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter. ■

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[i] There are other programs that also have this limit, such as the Acquired Brain Injury (ABI) Waiver, Katie Becket Waiver, Personal Care Assistance (PCA) Waiver, DHMAS Waiver and DDS Waivers.

[ii] This income limit is set at 300% of SSI and thus, may change each January.

[iii] These UPM Sections are set forth as supplemental materials at the end of the Article.

[iv] The recipient can divert income to either a (d)(4)(A) trust or a (d)(4)(C) trust, depending on their age. If the applicant is under the age of 65, the applicant can set-up a (d)(4)(A) self-funded special needs "payback" trust. These trusts are derived from federal statutory authority at 42 U.S.C. § 1396p(d)(4)(A) and cannot be funded after the age of 65. If the recipient is over the age of 65, the applicant must use a pooled trust, as set forth under 42 U.S.C. § 1396p(d)(4)(C), which allows a person of any age to establish a pooled trust. Use of a pooled trust is more common for excess income than the use of a d(4)(A) special needs trust as most recipients are over the age of 65. The relevant sections of 42 U.S.C. § 1396p(d)(4) are set forth as supplemental materials at the end of the Article.

[v] This also has the added benefit of qualifying many individuals for a Medicare Savings Program, which also has income limits.

[vi] DSS Informational Bulletin 09-02 dated April 5, 2009, sets forth these guidelines. Under the guidelines, if a recipient transfers more than $408.40 a month (the 2017 average cost of one day's private pay rate at a LTC facility), they are required to expend the excess income, in its entirety, within 6 months. The recipient must also have a spending plan, approved by DSS, that sets forth the anticipated expenses to be paid from this excess diverted income. These guidelines were implemented in response to the CMS State Agency Regional Bulletin No. 2008-05 dated May 12, 2008, in which CMS clarified Medicaid policy with respect to these transfers.

[vii] CMS contacted Marc Shok at DSS on November 22, 2013 stating, "Income placed in special needs or pooled trusts is not counted as income under the eligibility process, but is counted as income under the post eligibility process. (See Section 3259.7 of the State Medicaid Manual)."

[viii] On December 13, 2016, the 21st Century Cures Act was signed into law (H.R. 34 Sec. 5007). It allows an individual to establish their own (d)(4)(A) trust in addition to those authorized to establish trusts under this Section.

[ix] The Planned Lifetime Assistance Network (PLAN) of Connecticut is the only nonprofit trustee offering local pooled trusts in Connecticut.

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President's Message

(continued from front cover)

recipients; an approach that over 40 (SSI) states in the country currently utilize.

In this Practice Update, CTNAELA Vice President Rebecca Hajosy relates the details of the DSS change in policy and the efforts of the AI workgroup, so I will not re-hash it all here.

Amy Orlando, through her role as CTNAELA President-elect, created and led the AI workgroup. Through its meeting with DSS, the AI workgroup directly prevented the imposition of an unfavorable and (what would have been) dramatic reversal of existing policy, a policy that would likely have forced the institutionalization of hundreds or thousands of Connecticut Homecare recipients. Although all members of the group deserve credit, CTNAELA can be singled out for both helping create the group and expeditiously following up with DSS as well. Our thanks to Amy Orlando and the workgroup for leading the way on this issue.

Our hope is that, in the future, this workgroup will continue to work jointly with DSS in a non-adversarial manner to effect and/or shape policy that benefits both our constituency and the State.

Summary

NAELA is one, if not the only, national Elder Law organization; all other legal groups that lobby/affect/opine on Medicaid are statewide organizations and/or address Medicaid as a related matter to their primary interests. Because NAELA is a national organization, we benefit from the insight of elder law and legislative experts based in this nation's Capital, as we see from Attorney Goldfarb's article in this Practice Update. Given the State of Connecticut's current fiscal climate combined with the Federal Administration's efforts to limit Medicaid spending, NAELA and CTNAELA are needed to protect our clients' interests more than ever before.

Aside from the successes stated here, we continue to be effective in our efforts to improve our clients' lives. Moreover, those efforts are continually being recognized within the state.

Although it is a considerable financial commitment to join CTNAELA, I believe our members receive value for their professional investment. Members receive educational programs from both our national and state organization(s) (some of it at no cost), weekly, quarterly, and bi-annual publications on national and state activity, and a free referral system to members among other benefits not listed here. If you haven't done so already, I invite you to become one of the leaders of the Elder Law bar by joining and becoming active within our organization. If you have any questions about becoming a CTNAELA member, please speak with any one of Board members who can either discuss these issues directly or point you to people who can answer your questions.

Finally, as outgoing President, I offer my heartfelt thanks and appreciation to our members for both their hard work and the considerable time they donated to our organization over the past year. I take great pride not just in our accomplishments but our efforts as a whole, all which should benefit the Senior/Elderly community statewide.

As always, please contact me with any questions at mstillman@stillmanlegal.net ■

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Anatomy of *Harborside w. White*

(continued from page 5)

perience with *Harborside v. Witte* suggests that judges do recognize overreaching actions in this sphere when they see them, and are willing to apply appropriate scrutiny and discretion to head them off. ■

[i] Scott D. Rosenberg was appointed conservator for the Defendant during the pendency of this action. Miguel Almodóvar, Jacobs & Rozich, LLC, was retained as lead counsel on the appeal.

[ii] Harborside Connecticut Limited Partnership is a wholly-owned subsidiary of Genesis Healthcare, and the record owner of most of its Connecticut SNFs.

[iii] In subsequent litigation, Harborside did attempt to amend an implied contract count; our objection to the amendment was under consideration when the case settled.

[iv] Recovery in conversion requires an alleged ownership interest in "specific property," typically chattel, that has been interfered with. While a specific financial instrument or cash horde can qualify in limited circumstances, a conversion action cannot be used to remedy a debt which can be discharged by money generally, or which is truly in the nature of contract. See Deming v. Nationwide Mutual Insurance Co., 279 Conn. 745, 772, 905 A.2d 623 (2006); *Macomber v. Traveler's Property and Casualty Corp*., 261 Conn. 620, 650, 804 A.2d 180 (2002)

[v] Unjust enrichment claims must be predicated upon an exhaustion of remedies in contract, i.e., filing a probate claim), and are generally limited to the original parties to an exchange that has failed to give rise to a contract. *See generally, Cecio Bros., Inc. v. Town of Greenwich,* 156 Conn. 561, 244 A.2d 404 (1968)

[vi] *Grenier v. Commissioner of Transportation,* 306 Conn. 523, 536, 51 A.3d 367 (2012)

[vii] *Harborside Connecicut Ltd. Partnership v. Rosenberg, Conservator,* Superior Court, New Haven J.D., No. CV14-6051449S (July 14, 2015). Also available on Casemaker under the prior caption Harborside C.L.P. v. Witte.

[viii] 42 U.S.C. § 1396r(c)(5)(A)(1), Conn. Gen. Stat. § 19a-550(b)(26)

[ix] *See O'Halloran v. Charlotte Hungerford Hospital*, 63 Conn.App. 460, 463, 776 A.2d 514 (2001)

[x] (Internal citations and punctuation omitted.) *Harborside Connecticut Ltd. Partnership v. Witte*, 170 Conn.App. 26, 34-36, ___ A.3d ___ (2016).

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