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

PRACTICE UPDATE

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President's Message

by Attorney Edward G. Lang

In her message to all members last year, Amy Orlando pointed out that the major benefits of membership with CTNAELA are the strength and reach of our Public Policy and Lobbying efforts, the Continuing Legal Education offerings, and the collegiality and support that exists among and between our members. One of my goals for my term as President is to make all members aware of issues that impact our clients on the state and national level and our efforts to protect the communities that we represent. We have the ability to make a difference and I hope to motivate many of you to participate in our committees, legislative outreach, and seminars.

Many of us have observed the growth of private companies who advertise that they can help people in nursing homes apply for Medicaid benefits. Some of us have been told by our clients that a nursing home recommended that the resident's family use a private company instead of an attorney. Attorneys throughout the state have determined that applicants have been improperly advised to make payments to nursing homes that were not legally required. Our Policy Committee has been reaching out to legislators and other statewide organizations to address this problem as a consumer protection issue. If you become aware of cases of consumers receiving improper information, please contact Steve Rubin, chair of our Policy Committee or me. Specific examples are one of the most effective tools for obtaining legislative action.

Aid in Dying is an issue that will be discussed during the upcoming legislative session. This is a multifaceted issue and we intend to provide information to our membership about the proposed legislation and the positions of various groups. The Program Committee would appreciate knowing if you are interested in having a presentation on this topic at our Spring seminar.

Elder financial exploitation is a serious issue and is a subject of proposed legislation and regulation at the state and local level. As many of you know, legislation was proposed in 2018 that would have allowed financial institutions the right to suspend activity in a bank or brokerage account if the institution suspected abuse. Our Policy Committee actively worked with key legislators, the State Banking Department and the Elder Law Section of the Connecticut Bar Association to point out serious flaws with this proposal. This legislation did not pass and CTNAELA has been asked to participate in an informal work group with the State Banking Department, the Connecticut Bankers' Association, and the General Assembly Banking Committee to address our concerns and draft a bill for the 2019 legislative session.

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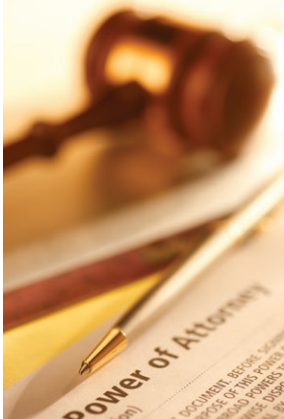
FEATURES IN THIS EDITION:



The Valliere Decision: The Probate Court Order Survives DSS' Attack

by Attorneys Carmine Perri and E. Jennifer Reale

Earlier this year, in a unanimous decision, the Connecticut Supreme Court upheld the Probate Courts' authority to issue a spousal support order so long as the conserved spouse did not yet apply and is not receiving Title XIX benefits.[i]

Protecting married couples from impoverishment when one spouse is institutionalized, while the other spouse remains in the community, was one of the objectives of the federal legislature when enacting the Medicare Catastrophic Coverage Act of 1988.[ii] Accordingly, federal law provides for spousal allowance when one of the spouses remains in the home.[iii] While federal law provides for the calculation of the spousal allowance, the same statute also states that if there is a court order for spousal support, the spousal allowance cannot be less than what the court order provides.[iv] Connecticut General Statute § 45a-655 authorizes Probate Courts to allocate some or all of a conserved person's income for the support of his or her spouse, so long as the institutionalized spouse did not yet apply and is not receiving Title XIX benefits.[v]

In Valliere, the conservator filed a petition to divert the institutionalized wife's income for the support of her husband, pursuant to § 45a-655. The Probate Court granted the request and ordered the conservator to divert $1,170.33 per month for the husband's support. When determining the amount of support, the Probate Court used the "proper under the circumstances" standard.[vi] Later, the conservator applied for Title XIX benefits for the institutionalized spouse. The Department of Social Services (DSS) granted the application, but reduced the spousal allowance to $898.45 per month, as calculated by the Department purportedly in accordance with Medicaid standards.[vii] The Department argued that as the sole agency to determine Medicaid eligibility, the Department did not have to abide by the Probate Court's order.[viii] A lengthy appeal followed.[ix]

Relying on the plain language of the federal statute, in a unanimous decision, the Supreme Court held that the Department must follow the prior Probate Court Order.[x] The Supreme Court emphasized that DSS must receive notice of the spousal support application in the probate proceedings, and thus, has the right to be present and be heard even if there is no pending Title XIX application.[xi] Noting that the Department is able to participate via telephonic or other electronic means, the Supreme Court rejected the argument that attending all Probate hearings for spousal support would place an undue burden on the Department.[xii] DSS, however, remains the sole agency to determine spousal allowance if no Court entered an order for spousal support prior to an application for Title XIX benefits.[xiii]

Shortly after the Supreme Court issued its decision, the Department filed a Legislative Proposal to amend § 45a-655. Specifically, the suggested legislation would make the Probate Court's spousal support order "null and void" if the conservator filed for Title XIX benefits. In support of the proposed legislation, the Department argued that DSS anticipates conservators will now routinely take advantage of § 45a-655 to secure better benefits for the conserved person's family, and thus, the burden on the Department to attend Probate Court hearings would increase substantially. The Department further implied that the Probate Court orders unfairly shift the cost of long term care from the family to the State.[xiv]

While Probate Court orders may allocate an increased amount for the support of the community spouse, these orders are consistent with the objective of the Medicare Catastrophic Coverage Act, which is to prevent the impoverishment of the spouse remaining in the community. Probate Courts do not blindly award lavish allowances, but rather look at the facts and circumstances of each case. As Probate Courts use the "proper under the circumstances" test when determining the amount of allowance, our Probate Judges are able to balance the potential future burden on the State for providing long term care with the need of the community spouse to remain in the home. Unlike the Department's strict calculation, this balancing standard leads to fair results in every circumstance. ■

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[i] *Valliere v. Comm'r of Soc. Servs.*, 328 Conn. 294, SC 19701 (2018).

[ii] *O'Callaghan v. Comm's of Soc. Servs.*, 53 Conn. App. 191, 195 (1999).

[iii] 42 U.S.C.A. § 1396r-5(d)(2) (LEXIS 2016).

[iv] § 1396r-5(d)(5).

[v] Conn. Gen. Stat. § 45a-655 (2018).

[vi] § 45a-655(b).

[vii] *Valliere*, 328 Conn. 294, SC 19701.

[viii] *Id.* (relying on 42 U.S.C.A. § 1396a (a)(5) (LEXIS 2016) and Conn. Gen. Stat. § 17b-261b (2018)).

[ix] DSS made its determination for spousal support on January 21, 2014. A Fair Hearing was held on July 7, 2014. The Fair Hearing Officer agreed with the Department's position. The Department denied the Applicants' Request for Reconsideration on October 18, 2014. The family appealed to the Superior Court on December 8, 2014. Judge Noble overturned the Department's determination on November 24, 2015. The Department appealed and the Supreme Court transferred the case to itself. More than four years after the initial determination, the Supreme Court issued its decision on February 1, 2018.

[x] *Valliere*, 328 Conn. 294, SC 19701. The Court noted that there are no directly applicable decisions from other states, but found *M.E.F. v. A.B.F.*, 393 N.J. Super. 543, 925 A.2d. 12 (2007) persuasive. In that case, the New Jersey court concluded that the community spouse could not seek an increase of allowance in the family court, because the institutionalized spouse was already receiving Medicaid benefits. The New Jersey court emphasized that the past tense of 42 U.S.C. § 1396r (d)(5) means that there must be a prior court order before the application is filed. *But see, Ark. Dept. of Health & Human Servs. v. Smith*, 370 Ark. 490, 262. S.W.3d 167 (2007).

[xi] *Id.* (citing Conn. Gen. Stat. § 17b-261b(b)).

[xii] *Id.* at fn. 24. (citing Probate Court Rules § 66.1a (2018)). The Supreme Court also noted that the statistics the Probate Court Administrator's amicus brief provided show that there were only a handful of spousal support petitions filed in recent years. *Id.* Specifically, there were only sixteen petitions in 2014, three in 2015, and nine in 2016. *Id.*

[xiii] *See id.*

[xiv] DSS's Agency Legislative Proposal -2018 Session on Probate Support Orders dated March 1, 2018.

Thoughts Regarding Court Orders of Support in a Medicaid Context

by Attorney Stephen B. Keogh

A. Introduction

In *Valliere v. Commissioner of Social Services,* 328 Conn. 294 (Conn. 2018), the Connecticut Supreme Court opened the door to the issuance of Probate Court orders of support in conservatorships under CGS Section 45a-655(b), orders that are binding on the Department of Social Services in the determination of what assets and income are allocated to a Community Spouse in the context of a spousal Medicaid application. The enactment of Public Act 01-0002 in 2001 had restricted the Probate Court's jurisdiction in regard to those orders for applicants receiving or applying for public assistance, but the *Valliere* court ruled that Public Act 01-0002's restrictions did not apply to cases where the conserved person was not receiving and had not applied for public assistance.

In so doing, the Court breathed life into a practice that had laid moribund since 2001, and Connecticut's elder law attorneys now have both the opportunity and the responsibility to analyze prospective spousal Medicaid applications as possible candidates for such a spousal support order in the Probate Court. Such an analysis will involve a number of considerations, including whether a Medicaid application has already been filed, whether the Institutionalized Spouse is a proper candidate for conservatorship, and whether the spousal assets and income are amenable to protection through such an order.

The purpose of this article is not to consider each one of these factors, but rather to focus on those aspects of a client's circumstances that make more compelling an argument in favor of a spousal support order in the Probate Court.

B. Court Orders of Support Can Address Circumstances in which the Income First Rule Has the Potential to Create Spousal Impoverishment

There are situations in which the income-first methodology, including caps on the Minimum Monthly Maintenance Needs Allowance (MMNA) and the resulting Community Spouse Protected Amount (CSPA), threatens the Community Spouse's ability to remain in his or her home and avoid impoverishment, which are fundamental policies promoted by the Medicare Catastrophic Coverage Act of 1988 (MCCA) (codified at 42 USC 1396r-5).

1. High Housing Costs to the Community Spouse. It is not uncommon that Community Spouses in high-property value (or high-tax) municipalities can have property tax bills that cannot be paid if the Community Spouse is held to the MMNA cap. But there are numerous other seniors who are carrying substantial home debt, with first and second mortgages eating up a disproportionate share of their income. Sometimes this debt has been incurred as a result of the Institutionalized Spouse's increasing care needs in the years leading up to the Medicaid application.

In Connecticut, the methodology for adjusting the MMNA cap pursuant to UPM Section 1570.25.D.3 is very narrow, focusing on the care needs of the Community Spouse or other dependent family members, and specifically excluding housing costs that would push the MMNA over the cap. A court has the ability, however, to take these very real costs into account, and thereby enable the Community Spouse to remain in his or her home and avoid impoverishment.

2. Community Spouse and Future Care Needs. The nature of the process of determining "exceptional circumstances resulting in significant financial duress" has a tendency to consider *current* circumstances, making the determination as of a fixed point in time, in a manner that risks ignoring the reality of the progressive decline of an ill Community Spouse. By deciding based on the Community Spouse's present needs, it can give short shrift to Community Spouses who are going to have greater needs in the future.

For example, a Community Spouse with a diagnosis of early stage Alzheimer's disease may not *currently* require a level of assistance that would constitute "exceptional circumstances", but it is highly likely that as time progresses she will require a level of care that would meet that standard. If one makes the determination of exceptional circumstances based on the Community Spouse's current needs, this would not allow an adjustment of the MMNA cap for such a Community Spouse, but a court of competent jurisdiction, in an effort to provide truly adequate spousal support both now and in the future, and acting with a sufficient factual basis and in conformance with federal and state law, could do so.

3. Working Community Spouse. An increasing number of people continue to work well past age 70, whether by necessity or by choice. The prevalence of second marriages itself often results in significant age disparities between spouses, increasing the likelihood of a younger, working Community Spouse.

Likewise, dementias or other disabilities can occur at an earlier age, when a family's financial needs are not those associated with an elderly population (expenses of minor children, college tuition, etc.), often involve Community Spouses who are fully engaged in the work force.

Using the "income first" methodology, a working Community Spouse is likely to have his or her ability to get a Community Spouse Allowance or CSPA increase extremely limited or eliminated altogether. This, in spite of the fact that later the Community Spouse may be unable to work, and in need of the sort of CSPA increase that would allow him or her to continue to avoid impoverishment.

4. Disappearing Income of the Institutionalized Spouse. The "Income First" methodology is based on the faulty assumption that the income of the Institutionalized Spouse will continue for the life of the Community Spouse. In fact, an Institutionalized Spouse pension can and often does terminate upon the death of the Institutionalized Spouse. Similarly, if the Community Spouse's income requirements are met by both spouses' Social Security benefits, there is a reduction in the benefits available for the Community Spouse's support when the Institutionalized Spouse dies. The result is that

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Thoughts Regarding Court Orders of Support in a Medicaid Context

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the surviving Community Spouse now has a monthly income level that can be significantly below the MMNA, the level that the government defines as being necessary to avoid impoverishment.

These are but several of the examples of circumstances in which the income first methodology can fail to meet their very real and justifiable needs of the Community Spouse.

The fundamental policy goal of MCCA was to avoid impoverishment of the Community Spouse, and to allow that Community Spouse to continue to live at home. The use of court orders of support can promote that policy goal in situations in which the federal and state statutes and regulations are structured in a way that do not otherwise allow them to do so.

C. Court Orders of Support Can Give Couples Direct Access to a Decision-Maker who has Greater Independence and Scope of Authority and Legal Experience than an Administrative Hearing Officer

The administrative hearing officers who conduct fair hearings regarding the MMNA and CSPA are not members of the judiciary, and depending on the jurisdiction, may not be lawyers at all. In Connecticut they are actual employees of the Department of Social Services, and to the extent that they get legal advice, they get it from the Department's in-house legal counsel.

If there are issues with the state regulations being applied at the administrative hearing, it is unlikely that the hearing officer will be open to arguments regarding the invalidity of a particular regulation of departmental practice based on its conflict with federal or state statute.

Administrative hearing officers may well be highly skilled in applying the Medicaid rules and statutes, but some cases turn on questions of law (trust interpretation, respective rights and obligations of property owners regarding housing costs, characterization of what is income and what is not, etc.) that may be beyond the core abilities of a hearing officer whose education and training in the area is limited to the application of the Medicaid rules.

On the other hand, a judge who is not regularly engaged in support orders in a Medicaid context will be unfamiliar with the tools and the considerations that apply in that context. Counsel representing a Community Spouse in such a proceeding may need to educate the judge on these and other considerations in the field in order to arrive at a result that meets the needs of the situation.

The differences between a court proceeding and an administrative hearing can come out in other ways as well. For example, there may very well be a practical requirement of separate legal representation for the Institutionalized Spouse, against whom the support order is being sought. Such representation can sometimes be problematic, especially when the Institutionalized Spouse has impaired capacity.

D. A Court Order of Support is One Alternative Among Others to Protecting the Community Spouse Outside of the Fair Hearing Context

Seeking a court order of support is not always the best alternative to seeking an increase in the CSPA through a fair hearing. DRA-compliant spousal annuities and other tools that may be allowed jurisdiction-by-jurisdiction may meet the client's needs without going through the time and expense of a court order.

I would suggest, however, that court orders of support have a certain fundamental durability as a tool for protecting the Community Spouse, because they are straightforward in seeking relief based on the actual (and often compelling) circumstances of the individual case.

Various spousal Medicaid planning tools depend on an intelligent application of the precise and complicated rules of the Medicaid system. For example, not only does a spousal annuity have very specific and stringent requirements for validity, but its effectiveness also relies not only on timing, but also on the statutory provisions disregarding post-eligibility acquisition of assets by the Community Spouse. Likewise, the inapplicability of the legally liable relative rules in regard to annuity income itself depends on the limitation of those rules to taxable income.

As a result, a number of the tools that are used can be hothouse flowers, vulnerable to technical changes in regulations or administrative practice that can have an outsized effect on their effectiveness. And given the highly technical nature of a lot of these tools, when they are under attack and need us to defend them, our efforts to explain and/or justify them to legislators or the public at large can often leave both groups scratching their heads.

This ever-present threat of an aggressive policy of limiting planning tools as "loopholes" and "gimmicks" by regulatory or legislative means, on either the federal or the state level, is an ongoing risk to sophisticated spousal Medicaid planning tools. Elder law attorneys should be ready and able to take the issue head-on in a court context, if only because at the end of the day, the important role of a court in assuring a Community Spouse necessary economic security is something that is both easily understood and fundamentally fair. ■

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2017 Tax Cuts & Jobs Act Provisions of Interest to Elder Law Practitioners

by Attorney Joseph A. Cipparone

The Tax Cuts and Jobs Act passed by Congress and signed by President Trump on December 22, 2017 ('the Act') contains many new federal tax provisions. What changes will affect seniors and individuals with special needs? Here is a summary:

ABLE Accounts

Section 11025 of the Act allows a beneficiary of a college savings plan (i.e. – a 529 plan) to roll over a 529 plan balance to an ABLE account (under IRC 529A) for the beneficiary or a member of his or her family (e.g. - spouse, child, brother, sister, niece, nephew and first cousins). The rollover cannot exceed the $15,000 annual limit from all contributions. Only one ABLE account is allowed per individual. Thus, before rolling over a 529 plan balance to an ABLE account, the 529 plan beneficiary must know how much has already been contributed to the ABLE Account for the intended beneficiary. Staggering the rollover to cover 2 separate tax years may make sense.

Beginning in 2018, in addition to the $15,000 contribution, employed beneficiaries can contribute up to the federal poverty level for income ($12,060 in 2018) to their ABLE account. Section 11024(a) of the Act. The beneficiary must earn compensation up to the amount contributed and the beneficiary cannot be covered by a retirement plan through work. This provision expires in 2026 like all of the other individual tax cuts.

An ABLE account allows family members to save funds for the care of a disabled individual without jeopardizing the individual's eligibility for government programs. The Connecticut State Treasurer announced in October, 2017, that Connecticut will partner with the State of Oregon to create its ABLE account. Connecticut residents can open ABLE accounts sponsored by any other state. The states that currently have ABLE Accounts are Alabama, Alaska, Washington D.C., Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Washington. You can compare the requirements and characteristics of each state's ABLE account at www.ablenrc.org .

ABLE accounts operate in much the same manner as 529 College Savings Plans. Any person may contribute to an ABLE account on behalf of the eligible individual. They become completed gifts once made. Earnings on contributions to ABLE accounts are not taxable income for either the person who made the contribution or the eligible beneficiary.

To be eligible as a beneficiary of an ABLE account, the beneficiary must have a disability that occurred before age 26 and be either entitled to benefits under the Supplemental Security Income (SSI) program or under the Social Security disability program or provide a qualified disability certification from the disabled individual or his or her parents or guardian.

Distributions from ABLE accounts are not considered income. Investments held in ABLE accounts are considered exempt assets for purposes of Medicaid eligibility. Note that contributions to and distributions from an ABLE account are also disregarded for purposes of the Temporary Family Assistance, Low-Income Home Energy Assistance Program, any other federally funded assistance program, as well as need-based institutional aid grants offered by state colleges and universities.

A designated beneficiary can take distributions for qualified disability expenses. Qualified disability expenses are any expenses related to the eligible individual's disability. The ABLE Act specifies that qualified expenses include the following:

- education
- housing
- transportation
- employment training and support
- assistive technology and personal support services
- health
- financial management and administrative services
- legal fees
- expenses for oversight and monitoring
- funeral and burial expenses
- basic living expenses

Under SSI, the major advantage of ABLE accounts over Special Needs Trusts is that they cover housing expenses such as the mortgage, real property taxes, rent, heating fuel, electricity, water and sewer. The POMS recently changed to allow first-party Special Needs Trusts to contribute to ABLE accounts. *See* SI 01130 TN 74 of the POMS (effective 4/2/18). SSI will disregard the first $100,000 in an ABLE account. Following the death of a designated beneficiary, the State of Connecticut can recover an amount equal to the total medical assistance paid by the State under the Medicaid program after creation of the account.

Qualified Disability Trusts

Under IRC §151, individuals received a personal exemption of $4,050 in 2017. Section 11041(a)(2) of the Act changes the personal exemption for individuals to zero. Congress, however, did not change the personal exemption for a trust ($100 for complex trusts; $300 for simple trusts paying out all income) under IRC §642. Qualified Disability Trusts under IRC §642(b)(2)(C) also remain intact. Third-Party Supplemental Needs Trusts qualify under IRC §642(b)(2)(C). Self-settled Special Needs Trust usually do not qualify for such an exemption because they are grantor trusts for income tax purposes. Third-Party Supplemental Needs Trusts will receive a $4,150 exemption in 2018.

Kiddie Tax

If a child under the age of 19 or a child under the age of 24 and attending school full-time receives unearned income (e.g. – income

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FREE CLE On-Demand Webinars for NAELA Membership

The following CLE courses are being offered FREE of charge by National NAELA to NAELA members:

Accounting for Lawyers – Stetson Series on Solo Practitioners

Product Details:

This one-hour webinar featuring Stetson Law Dean Christopher M. Pietrusczkiewicz provides a basic overview of reading and understanding financial statements (balance sheet, income statement, statement of cash flows) and generally accepted accounting standards to appreciate the business needs of clients and the accounting (and tax) issues important to all. This series focuses on the myriad of specialties a small or solo office practitioner needs to know and is offered free of charge courtesy of Stetson Law.

Member Price: $0.00

New VA Pension Benefit Rule

Product Details:

Presenters: Felicia Pasculli; Valerie Peterson; Michael Weeks and Eric Barnes

Description:

On October 18, the Department of Veteran's Affairs (VA) new rule related to net worth, asset transfers, and income exclusions for needs-based benefits went into effect. The amended regulations impose a new-look back period for asset transfers, establish new requirements for evaluating net worth, and identify which medical expenses may be deducted from countable income. Learn about what's in the new rule from members of NAELA's VA Task Force. By clicking on this course, members have immediate access to a 55-slide power point presentation.

Member Price: $0.00

Advanced Medicaid Planning 2017

Product Details:

This session reviews some common and not so common asset protection strategies that can be used when planning for Medicaid benefits for clients. Hear some twists and old strategies and some new and advanced strategies which you can add to your Medicaid planning tool bag. Presented by: Letha Sgritta McDowell, CELA

Member Price: $0.00

Advanced Drafting Considerations for First Party SNT

Product Details:

Taking your practice to the next level? This recorded webinar discusses special need trusts for the first-party and various forms and provisions.

Member Price: $0.00

To access these courses, simply sign into the members section of the NAELA website, and click on the link for "Shop" at the top of the page.

2017 Tax Cuts & Jobs Act Provisions of Interest to Elder Law Practitioners

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from dividends, interest or capital gains, or income from a trust or Uniform Transfers to Minors Act (UTMA) account), they must pay tax on that income. In 2017, the child's parent recorded the income on the parent's return so the income was taxed at the parents' highest rate. Parents don't pay the top tax rate (39% in 2017) unless their taxable income exceeds $600,000.

Starting in 2018, the tax rate of the child's parent no longer matters. Unearned income of a child will be taxed at the rate paid by trusts and estates. Trusts and estates pay the top tax rate (now 37%) if their taxable income exceeds only $12,500. Thus, a child receiving investment income will pay much higher taxes on that money than their parents would pay. This change in tax rates could have a major effect on Special Needs Trusts with large principal balances.

It will be interesting to see if the IRS comes out with a separate tax return for children with unearned income subject to the kiddie tax. The change in tax rates only applies from 2018 to 2025. Unless Congress changes the tax code before then, the tax on a child's income will once again appear on the parents return starting in 2026.

Standard Deduction vs. Itemized Deductions

Seniors will need to consider the value of simplifying their returns by claiming a standard deduction instead of itemized deductions. For single filers, the standard deduction has increased from $6,350 in 2017 to $12,000 for tax years 2018 to 2025. For married couples filing jointly, the standard deduction increased from $12,700 in 2017 to $24,000 for tax years 2018 to 2025. A large standard deduction could simplify income tax returns for many seniors.

Yet, for some seniors, itemized deductions could still exceed the standard deduction. Section 11027(b) of the Act lowers the threshold for medical expense deductions to 7.5% of adjusted gross income for tax years 2017 and 2018. In 2019 and beyond, medical expenses can only be deducted if they exceed 10% of adjusted gross income. The deduction for state and local taxes on real estate, motor vehicles, and income cannot exceed $10,000. See Section 11042 of the Act. For senior couples in Connecticut, the "SALT limitation" as it's called could make the standard deduction especially attractive. Mortgage interest and charitable deductions remain deductible but miscellaneous expense deductions for tax preparation, legal fees and investment management fees no longer exist.

These provisions only touch the surface of the numerous changes to the federal income and estate tax law. For more on the Act, see the *Complete Analysis of the Tax Cuts & Jobs Act* from Thomson Reuters or the voluminous but helpful *Joint Explanatory Statement of the Committee of Conference* at https://rules.house.gov/conference-report/hr-1 ■

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Is Disclosure of Connecticut Medicaid Fair Hearing Decisions on the Horizon?

by Attorney David Craig Slepian

On April 4, 2016, CTNAELA filed an appeal with the State Freedom of Information Commission (FOIC) of the Department of Social Services' denial of our request for disclosure of all long-term care Medicaid Fair Hearing Decisions dating back to January 1, 2013. The FOIC decided the appeal in our favor and ordered the disclosure. The State appealed to Superior Court for the Judicial District of New Britain, in *Commissioner, State of Connecticut Department of Social Services, and State of Connecticut Department of Social Services v. Freedom of Information Commission and David Slepian and the Connecticut Chapter of the National Academy of Elder Law Attorneys*, Docket No. HHB-CV-17-0637383-S.

A year ago, in this publication we reported that while the State case was pending, we had also commenced an action in the United States District Court for the District of Connecticut (Case #3:17-cv-01470-WWE).

The federal case is a 42 USC § 1983 action seeking an injunction and declaratory relief for deprivation of rights under federal law. CTNAELA claims that the state was required to provide the public with access to the Fair Hearing decisions under 42 U.S.C. § 1396a(a)(3) and more particularly implementing regulation 42 C.F.R. § 431.244(g) which states:

> (g) The public must have access to all agency hearing decisions, subject to the requirements of subpart F of this part for safeguarding of information.

We have been in active negotiations with the state for some time. Because the litigation is ongoing, we are unable to provide complete details of these negotiations in this article. However, we are optimistic that these negotiations will conclude shortly as to the federal case, and lead to full disclosure of redacted editions of all long-term care Medicaid Fair Hearing Decisions dating back to January 1, 2013, and on an ongoing basis for the future. It is likely that these will be made available in a publicly accessible web-based database.

While we expect the federal case to resolve the federal law issue shortly, we do not expect to resolve the Superior Court case which is a claim under the state Freedom of Information Act C.G.S. 1-200 et seq., and in that event the Freedom of Information Commission along with CTNAELA will continue to aggressively defend the FOIC decision. If our negotiations concerning the federal case are successful, the continuation of the state case will not delay the disclosure of the Fair Hearing decisions.

The question may be asked whether the FOIC decision if upheld would have any precedential value in regard to future requests for disclosure of other records. The fact is that because requests for disclosure under the Freedom of Information Act must be very specific, the FOIC decisions tend to have little precedential value. However, we believe that by conducting itself with integrity and perseverance in these cases, CTNAELA has proven itself to be a tough adversary and an honorable negotiating partner. This should lead to good results in future encounters with the DSS.

We look forward to updating you on our progress in future issues of this publication. ■

Attorney Slepian is a partner with the firm of Garson & Slepian in Fairfield.

CTNAELA Membership Opportunities

The Executive Director of NAELA recently wrote that "when I first joined NAELA I was taken with the Academy's culture. I was told that with NAELA, you would experience a collegiality and camaraderie that couldn't be found in other attorney associations, and that this culture formed the foundation of the organization. Over the years, that's proven to be true. Even more so, the NAELA culture has been a driving force in the success of both practitioners and the profession as a whole". This statement is equally true for CTNAELA.

The Programs committee of CTNAELA works diligently to create interesting and innovative programs that satisfy the educational needs of our members while providing CLE credits.

The Publications committee creates thoughtful and helpful Practice Updates. The committee members continually work to provide pertinent commentary and/or practical instructional support as part of their publications.

The Website committee has created a useful and practical website that provides case law, UPM citations, fillable DSS forms, practice updates as well as a list of CTNAELA members.

The Public Policy committee members are actively involved with legislative committees, legislators, state agencies, lobbyists and interest groups to promote legislation that enhances the lives of our clients and in opposition to harmful changes in laws, policies, and procedures.

The Legislation committee seeks to initiate actions when necessary to challenge actions of state agencies, as a party to appropriate litigation, and to protect our ability to represent our clients.

The Mentor committee provides information, guidance, and training to those entering the field of Elder Law.

For the many attorneys who support CTNAELA, their involvement is driven by a belief in our mission and recognition that helping NAELA and CTNAELA achieve its objectives helps them achieve their objectives personally and professionally. To become a part of the NAELA culture, you need to become engaged.

Who's Minding the Practice of Law in Connecticut?

by Attorney Amy Todisco

The unauthorized practice of law in Connecticut appears to have become commonplace, with no consequences to the actors. In the business law arena, companies such as Legal Zoom help customers create legal documents (including Wills, trusts and business formation documents) without hiring a lawyer. Connecticut real estate lawyers have reported an alarming number of out-of-state non-lawyer companies representing clients throughout the entire closing process. In the elder law practice area, we all know about "Medicaid advisors," non-lawyer companies who have aggressively flooded Connecticut (and many other states), offering services to families to assist in the Medicaid application process. Unfortunately, the unauthorized practice of law ("UPL") in Connecticut is not being policed and the practice of law itself is not being protected.

In Connecticut, the practice of law is defined in Practice Book §2-44A, and Rule 5.5 of the Connecticut Rules of Professional Conduct prescribes the conduct that constitutes the unauthorized practice of law. While federal regulations authorize lay assistance and representation in the Medicaid application and hearing process (42 C.F.R. §435.904 and 42 C.F.R. §435.908), the problems arise when these non-lawyers start to advise families in areas that are beyond mere assistance with the Medicaid application and hearing process and they start providing legal advice. In three separate cases at three different Fairfield County nursing homes, community spouses were told by the Medicaid advisor that Medicaid eligibility for the institutionalized spouse was conditioned upon fifty per cent (50%) of the equity in the home residence being paid to the nursing home. Fortunately, in one of these cases, the community spouse suspected that the advice being given could not be accurate and sought legal advice from an elder law attorney; the other two families did not seek legal advice, followed the incorrect advice they were given and paid the nursing homes.

In four other states, activities of Medicaid advisors have been held to constitute the unauthorized practice of law. In Florida, for instance, the Florida Bar Standing Committee on the Unlicensed Practice of Law issued an advisory opinion at the request of the Supreme Court of Florida, concluding that the following activities constitute the practice of law, and if provided by a non-lawyer, constitute the unauthorized practice of law: the drafting of personal service contracts; the preparation, execution, funding of and determination of the need for a qualified income trust; developing a plan to structure or spend the client's assets and drafting legal documents to execute the plan.[i] In Ohio, the Ohio Supreme Court has held that marketing and representations by a Medicaid advisor as a "Medicaid specialist" who could create a strategy to reduce resources to be become Medicaid eligible, and providing or offering Medicaid planning by a non-lawyer to create a strategy to reduce resources to be become Medicaid eligible constitute the unauthorized practice of law.[ii] In New Jersey, the Committee on the Unauthorized Practice of Law, concluded that while federal law requires states to permit non-lawyers to assist applicants and beneficiaries with Medicaid applications and to represent persons in hearings, non-lawyers engage in the unauthorized practice of law when they provide advice in matters that require the professional judgment of a lawyer, and only a lawyer may provide legal advice on: strategies for Medicaid eligibility; provisions to be included in wills and powers of attorney; the need for guardianships and the authority to transfer assets; nursing home laws; transfers of property; impact of marriage and divorce; and estate administration and the elective share.[iii] The Tennessee Office of the Attorney General issued an opinion stating that "whether conduct by a non-attorney…would constitute unauthorized practice depends on whether the legal assessments or advice at issue would require the professional judgment of a lawyer and is offered for a valuable consideration."[iv]

In addition to the UPL issue, the activities of these Medicaid advisors also raise consumer protection issues. In some cases, specifically with one Medicaid advisor based in New Jersey, the Medicaid advisor is owned by the same company hired by nursing homes to perform the billing and collections for the nursing home as well as collection/accounts receivable operations.[v] This information and the relationship between the Medicaid advisor and nursing home is not disclosed to the family. There is a conflict of interest or worse, because the Medicaid advisor really works for the nursing home, not the family who pays its fee. The Medicaid advisor is privy to all the financial information of the Medicaid applicant and releases this information to the nursing home, without the knowledge of the consumer.[vi] The Medicaid advisor's spend-down advice to a family almost always is to pay the nursing home until all funds are exhausted (when there may be other options). If families were told about the relationship between the Medicaid advisor and the nursing home, such advice may be more routinely questioned and disastrous consequences (such as with the Fairfield County nursing homes' advice mentioned above) would be averted.

While I was Chair of the CBA Elder Law Section, I made the following efforts to address the complaints we heard about the activities being engaged in by Medicaid advisors:

1. I met with the Connecticut Bar Association Unauthorized Practice of Law Committee to request an informal (non-binding) opinion on the activities of Medicaid advisors, with a goal to deliver such an opinion to the Judiciary for action — nothing happened, and the Committee has since been disbanded;
2. I proposed a bill that would amend Connecticut General Statute §51-88 to enumerate the estate planning activities that would constitute the unauthorized practice of law if performed by non-attorneys (specifically as those activities relate to Medicaid advisors); the proposed bill was raised in the Senate. I testified individually in support of the bill at the public hearing before the Judiciary Committee as did other attorneys, but it was not voted out of committee;
3. I spoke to the Unauthorized Practice of Law Division of the Office of Chief Disciplinary Counsel and was told that while that office can and does pursue complaints of unauthorized practice of law, the cases are considered on an individual case by case basis;
4. I contacted the Attorney General's Office which in turn referred me to the Department of Social Services Quality Control Unit. I never heard anything more; and

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5. I called the legal counsel to the Judicial Branch, but never received a return call.

In response to our concerns about the unauthorized practice of law, Jonathan Shapiro, then President-Elect and now President of the CBA, promised to convene a task force to address our Section's concerns about Medicaid advisors and the unauthorized practice of law as well as concerns raised by other CBA committees, with a goal to having proposed legislation ready to be introduced in the 2019 legislative session. The members of the Task Force were to include all the stake-holders and necessary parties, including the judiciary, the State's Attorney's Office, the Office of Chief Disciplinary Counsel, the Attorney General's office, legislators and attorneys. As of the date of the writing of this article, it is my understanding that one meeting of the Task Force has been held but critical participants were not available to attend and that Jonathan Shapiro is supposed to be meeting individually with those who were not at that first meeting.

While other states aggressively police and defend the practice of law and pursue those engaging in the unauthorized practice of law, Connecticut does not. Connecticut General Statutes § 51-88(c) provides that anyone can bring a lawsuit against someone engaged in the unauthorized practice of law, but this is not a solution and should not be the responsibility of individual attorneys. It is my position that until there is a central office to which complaints can be filed against those engaged in the unauthorized practice of law for investigation and which will investigate and prosecute those complaints (similar to the Statewide Grievance Committee which receives and investigates complaints against lawyers and the Office of Chief Disciplinary Counsel which prosecutes those complaints), actors will continue to engage in the unauthorized practice of law in Connecticut with impunity. The practice of law and conduct of attorneys are strictly regulated in Connecticut but nothing exists to protect the public from activities by non-attorneys constituting the unauthorized practice of law. Until something is done to address this epidemic in Connecticut, the public will continue to suffer the consequences. ■

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[i] Florida Bar Standing Committee on the Unlicensed Practice of Law FAO#2011-4 "Medicaid Planning Activities by Nonlawyers," (October 14, 2014).

[ii] Board on the Unauthorized Practice of Law of the Supreme Court of Ohio Advisory Opinion UPL 11-01 (October 7, 2011).

[iii] Committee on the Unauthorized Practice of Law, Appointed by the Supreme Court of New Jersey, Opinion 53, Non-Lawyer Medicaid Advisors (Including "Application Assistors") and the Unauthorized Practice of Law (May 16, 2016).

[iv] State of Tennessee Office of the Attorney General Opinion No. 07-166, "Practice of Law; Medicaid Eligibility (December 18, 2007).

[v] Based on information provided by the NAELA Consumer Protection/ UPL Committee.

[vi] *Id.*

President's Message

(continued from front cover)

Included in this newsletter is an article by David Goldfarb, Senior Public Policy Manager for NAELA, addressing NAELA's efforts during the past two years to oppose changes in the Medicaid program that would result in significant hardships for many of our clients. Our experience in Connecticut has been similar to the national experience. With the active involvement of a number of members of our Policy Committee and the assistance of the lobbying firm Sullivan and LeShane, we have successfully opposed legislative proposals to reduce Medicaid benefits, while continuing to promote legislative actions such as retroactive Medicaid eligibility for home-care services, increasing the community spouse protected amount, preserving VA benefits, preserving the rights of prior title holders, and creating an independent office for adjudicating Fair Hearings.

In addition to advocating for our clients, CTNAELA committee members are actively working to provide tools to help us better serve our clients and our profession. Our Policy Committee is currently engaged in litigation to require the Department of Social Services to publicly release Fair Hearing Decisions. Our DSS Task Force has established an informal working group to enhance communication between elder law attorneys and the Department. The members of this Task Force have successfully convinced the Department to delay or cancel the implementation of policy changes that were designed to reduce benefits to Medicaid recipients.

Communication, education, and mentoring are activities that significantly enhance the value of our organization. Our Publications and Website Committees work very hard to keep us all informed. Similarly, the Programs Committee members are committed to provide useful and informative seminars each Fall and Spring. As president of CTNAELA, I have the opportunity to observe the passion and dedication that the committee chairs and members bring to their respective activities. I thank them for their service and encourage members to join a committee and become an active participant.

If you have any suggestions for how we may better serve you, please contact me or any of the board members. Our telephone numbers and e-mail information are on the website. ■

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Coming Out of the Fog: Reflecting on Two Years of Political Uncertainty

by Attorney David Michael Goldfarb

Since the election of 2016, I started to think about my lobbying for NAELA in military metaphors. My time on the hill becoming "deployments" fighting "battles in the trenches." Perhaps that's because we have faced some of the most dangerous, probable threats to the practice of elder and special needs law since the Deficit Reduction Act of 2005.

The process was one that we could not control. We never knew when a "surprise attack" in the form of a harmful provision tied to another piece of legislation, could occur. Even today, it's unclear what risks might remain in any end-of-year package.

The threats we've faced came twofold: first from the majority in Congress and second from the Administration.

Legislative Limits to Medicaid

Throughout much of 2017, Republican leadership sought to "repeal and replace" the Affordable Care Act and undertake radical structural reform of the Medicaid program. Although the proposals changed over time, the reforms to Medicaid would have led to around $1 trillion over 10 years in loss of federal funding to the program.

Second, House Republican leadership, as part of the process to repeal and replace the Affordable Care Act, also included a number of limits to Medicaid eligibility that would impact your clients. Those were:

- Requiring half the income of a community spouse annuity to be available as income to the institutionalized spouse;
- Ending a state option to expand the home equity limits above the federal floor; and
- Repealing prior quarter coverage of Medicaid for those who could be shown to have been eligible during that time period.

NAELA had success curtailing each of these during health reform; a process that ultimately failed on its own. But, those proposals continued to remain under consideration to offset the cost of other legislation, such as the Children's Health Insurance Program, throughout Congress.

Medical Expense Deduction and Tax Reform

As if these proposals were not bad enough, the House majority sought to get rid of the medical expense deduction in tax reform. Its elimination would have been devastating to families paying for LTSS, cancer patients, and other individuals who pay high out-of-pocket medical expenses.

Few health care organizations early on understood the impacts of eliminating the medical expense deduction, because they focus on health policy not tax policy. NAELA stepped in, and thanks to the broad expertise of NAELA members, we were able to educate these major health care groups, the media, and Congress on the harmful impacts.

In the end, proposing to eliminate the medical expense deduction caused such an outrage that the final bill not only did not eliminate it, but actually expanded it for two years.

Waiving the Rules Goodbye

The second front is the Administration's abuse of Section 1115 waivers. The day CMS Administrator Seema Verma took her oath of office, she and then Secretary of HHS Tom Price sent a letter to Governors that they sought to usher in "a new era" for Medicaid "where states have more freedom to design programs."

By law, the secretary can waive much of the mandatory requirements of the Medicaid program, so long as it is for an experimental, pilot or demonstration project that is likely to assist in promoting the objectives of the Medicaid Act.

Much of the focus of these harmful waivers has been on the Medicaid expansion population. However, states have also gotten approved to limit retroactive coverage for LTSS.

A major outstanding issue is Maine's request to add a new requirement to individual and community spouse annuities. Effectively, any annuity purchased in the last 5 years would need to be equal to at least 80 percent of the life expectancy of the beneficiary or it would be considered a transfer penalty.

If approved, such a waiver of Section 1917 of the Social Security Act would be unprecedented. That Section contains nearly the entire rules related to resources, including home equity, estate recovery, promissory notes, and special needs trusts. If they can add a restriction to Section 1917, what else could they do?

A major victory occurred against the abuse of waivers after HHS approved Kentucky's waiver to impose work requirements, premiums, and a myriad of other new restrictions, primarily but not entirely to the Medicaid expansion population.

When the National Health Law Program backed plaintiffs to sue HHS, they brought in "the big guns:" former acting Solicitor General Ian Gershengorn. Part of Gershengorn's career at the Department of Justice included leading the constitutional defense of the Affordable Care Act at the district court level.

NAELA joined in an amicus brief supporting the plaintiffs with Justice in Aging, AARP, AARP Foundation, and the Disability Rights and Education Defense Fund. The ruling was critical, because so little law exists on the ability of HHS to waive the mandatory eligibility requirements in a restrictive manner.

Thankfully, the court ruled that Medicaid's purpose is to provide health "coverage." The Secretary could not redefine it to mean something amorphous like "promoting health." Following that fact, the court held that HHS violated the Administrative Procedures Act because it did no analysis on how the waiver would

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Succession Tax Finally Put to Rest

by Attorney David Craig Slepian

Those of us who are "seasoned" lawyers will recall that CGS 12-340 imposed a succession tax on assets passing to certain classes of beneficiaries. The legislature began phasing the tax out in earnest in 1985, finally eliminating the tax on the last class of beneficiaries (Class C) to whom it applied, for all estates of decedents who died on or after January 1, 2005. However, even today, the succession tax comes to light with estates of decedents who died before January 1, 2005 that have not been completed, especially when it comes time to sell real estate involved, necessitating a release of the succession tax lien.[i]

Practitioners should note that Substitute House Bill No. 5433 Section 4 (Public Act 18-26) repeals CGS Section 12-340 as to all estates, except those that have, prior to October 1, 2018, filed a succession tax return under section 12-359 or have been assessed a tax under section 12-367. The Bill was considered a "technical corrections" act and was passed by the House by a vote of 149-0 on May 3, 2018, the Senate by 36-0 on May 8, and signed by the Governor on May 29. In other words, even though the succession tax had applied, any estates that did not file returns by October 1, 2018 get a 'free pass' unless the Department of Revenue Services (DRS) had assessed the tax as of October 1, 2018.

There is virtually no legislative history on this bill. Kevin Sullivan, Commissioner of the DRS, submitted testimony (no other agency did), but no comment regarding Section 4. Nevertheless, it would be reasonable to conclude that the DRS elected to repeal the succession tax, as the cost of administering it likely outweighed the benefit. We do know that the DRS is overextended and has limited staff to devote to the estate, succession and gift taxes.

Since October 1, 2018 has passed as of this writing, we can now safely consider *"ye olde"* succession tax essentially dead and buried. ■

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[i] Old estates involving real estate that have not been probated pose a special problem. The writer chairs a sub-committee of the CBA Estates and Probate Section which, along with the CBA Real Estate Section, is working on a bill with the Probate Court Administrator's office and the DRS to create a special process for obtaining releases of estate tax liens and probate court liens on certain old estates.

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impact health coverage. Kentucky had estimated 96,000 would be dropped from the program.

Going on the Offensive

NAELA did not have to spend all of its time on defense. And in the weird world of politics, someone proposing policy you oppose one day may be your champion on another issue.

Rep. Brett Guthrie (KY-R), for instance, lead the way on cutting Medicaid spending and imposing new eligibility limits, but he's also become a big supporter of Home and Community-Based Services.

In particular, Guthrie worked with Rep. Debbie Dingell (D-MI) to reauthorize the Money Follows the Person demonstration project, which pays for transition services out of a nursing home and back to a community.

This is a reminder that the focus of NAELA is not on politics but on policies.

Survival and Process

Since the Democrats took the House, we will likely reach a "stalemate" in Congress with a major focus on investigations and oversight. For instance, Congress has not held a single hearing on the Administration's use of Section 1115 waivers. That could prove very important, especially now that Maine's former head of health, Mary Mayhew, will now oversee the Medicaid program. ■

Attorney Goldfarb is NAELA's Senior Public Policy Manager.

Updated Connecticut Medicaid Figures for 2018

	2017 Amounts	2018 Amounts
Community Spouse Protected Amount (Maximum) *(Changes Jan. 1st)*	$120,900	$123,600
Community Spouse Protected Amount (Minimum) *(Changes Jan. 1st)*	$24,180	$24,720
Institutionalized Spouse Asset Limit *(Changes Jan. 1st)*	$1,600	$1,600
Monthly Maintenance Needs Allowance (Maximum) *(Changes Jan. 1st)*	$3,022.50/mo.	$3,090/mo.
Monthly Maintenance Needs Allowance (Minimum) *(Changes every July 1st)*	$2,030/mo.	$2,057.50/mo.
Home Equity Exemption (if home not occupied by spouse or disabled child, or minor child) *(Changes Jan. 1st)*	$840,000	$858,000
Average monthly cost of care (for penalty calculations) *(Changes every July 1st)*	$12,604	$12,851
Shelter Allowance *(Changes every July 1st)*	$609	$617.25
Utility Allowance *(Changes every Oct. 1st)*	$728	$736
Personal Needs Allowance *(Changes every July 1st)*	$60	$60
Connecticut Home Care Program for Elders (Level 3 Medicaid)		
• Asset Limit	$1,600	$1,600
• Income Limit	$2,205/mo.	$2,250/mo.

CTNAELA
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National Academy of Elder Law Attorneys