

# MassNAELA.com eNews

Next **Dinner Meeting**, Tuesday, April 30, 2013, **Starting at 5:30 PM**



**Holly K. Harris**  
Chapter  
President

## **PRESIDENT'S MESSAGE**

Here's a question for all of you for spring, 2013: What is MassNAELA, what are we as an organization, all about?

Here's my answer: Membership, membership, membership.

Maybe it's because I spent nearly a decade in charge of shepherding chapter membership that I see our members as the foundation of all we do. I suggest that some renowned experts would agree with me, though, experts like Peter Drucker, management guru for business, governmental, and nonprofit organizations, as just one example. He puts it very plainly: "Non-profit institutions exist for the sake of their mission, and this must never be forgotten." So let's review MassNAELA's mission statement as updated just this last year:

"The mission of MassNAELA is to establish MassNAELA members as the premier providers of legal advocacy, guidance and services in Massachusetts to enhance the lives of people with disabilities and special needs and people as they age.

"MassNAELA's further mission is to promote the highest standards of technical expertise while maintaining ethical awareness among its members who represent the most frail and vulnerable individuals".

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## **Additions to [www.MassNAELA.com](http://www.MassNAELA.com) and Items of Interest**

### **MASSEALTH ELIGIBILITY – TRANSFER, COUNTABLE ASSETS AND INTENT** **[2013 04 01](#) *Hearing Decision – Taunton, March 18, 2013***

Transfer was not disqualifying when assets were transferred from Applicant's bank account to the estate of a deceased spouse, because the transfer was made to correct an unauthorized transfer.

Applicant's son made an unauthorized transfer of his deceased father's assets to the Applicant. The transfer was unauthorized because son made the transfer using his father's power of attorney, but did so after his father's death and with knowledge that his father was deceased. The money was later returned to his father's account and passed into a testamentary trust for the Applicant's benefit. MassHealth imposed a transfer penalty for returning the decedent's assets and the Applicant appealed. The Appellant argued that the assets were never the Appellant's because at all times they legally belonged to the spouse's estate, and the Hearing Decision referenced intent. Appeal Approved. *Contributor: David Corriera, Esq.*

### **MASSEALTH ELIGIBILITY – ASSETS IN IIOT NOT COUNTABLE** **[2013 04 02](#) *Hearing Decision – Springfield, March 7, 2013***

MassHealth denied benefits based on a determination that assets held in an Irrevocable Income Only Trust (IIOT) were countable and exceeded program limits. MassHealth used [Doherty](#) and [Cohen](#) to argue that the following trust provisions, read together, rendered the trust principal within Appellant's control: 1) The right to live in property held by the trust, 2) the power to appoint trust principal to issue, 3) the power to change the schedule of beneficiaries (but as limited by power of appointment), and 4) the power to substitute assets of equal value. Appellant argued that she had a right to fund the trust prior the 60-month look back period, and that none of the trust provisions allowed access to trust principal. Decision: Assets held in an IIOT are non-countable assets because the Appellant has no discretion to access trust principal ("not even a peppercorn"). Appeal Approved. *Contributor: Hy Darling, Esq.*

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**President's Message,**  
Continued from Page 1

So our mission is to serve our members. Think about it, though: To accomplish this mission, *MassNAELA depends on* its members. Programs, publications and website, public policy, ethical inquiries, public relations coordination, litigation review, special projects—member volunteers lead all these chapter endeavors.

To be sure, our volunteer efforts are supported and supplemented by dedicated Chapter Administrators Barbara and Myron Cohen; skilled guidance in the public policy arena from Deb Thomson of The PASS Group; litigation support from Neighborhood Legal Services in Lynn, specifically, John Ford and other staff as needed; and our public relations consultant, Beth Bryant of BBWrites Strategic Communications.

The backdrop for these paid elements of our operations, however, is a fabric of member volunteers who work tirelessly on behalf of all chapter members in furtherance of *MassNAELA's* mission. We could not do it without them.

So, why am I going on about this? I have two reasons.

First of all, I want to remind you of the work that your Board of Directors and Chapter committees do throughout the year to help you become and maintain your status as “the premier providers of legal advocacy, guidance and services” for our Massachusetts clients and their family members, and to take this opportunity to say a springtime thank-you to these attorney volunteers whose efforts serve us all so well all year long.

Secondly, I want to challenge each of you to identify a colleague who would be a better attorney for elders and those with disabilities if he or she became a member of *MassNAELA*. We all know at least one such person.

→

Maybe it's a seasoned attorney who is undergoing a career change and entering a new area of practice. Maybe it's a new member of the bar who's just hung out a shingle. Maybe it's someone you've been informally mentoring for a while now. Take the next step of inviting that attorney to a dinner meeting (or two) as your guest. If you've already done that, then encourage him or her to join NAELA and the Massachusetts Chapter. It's an investment in that individual, an investment in the quality of the elder and special needs bar in the Commonwealth of Massachusetts, and an investment in *MassNAELA*. Consider it your extra little bit toward accomplishing our common mission.

“All membership, all the time.” Won't you join me this year in repeating this mantra for *MassNAELA*? –*Holly*

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**MASSACHUSETTS LEGISLATIVE STATUS  
SPRING UPDATE** by Deb Thomson



For the past few months Tim Loff and I have been participating on a work group to recommend rate stabilization and other measures to improve **long term care insurance products (LTCI)**. Chapter 312 of the Acts of 2012 appointed *MassNAELA* to the work group, which is charged with submitting a report to the Legislature. The Division of Insurance is charged with promulgating new regulations based on the work group's recommendations.

While it is exciting that NAELA was asked to participate in this legislatively established work group, the work involved has been considerable. Tim and I have attended several work group meetings plus two public hearings. We have submitted written comments with our recommendations on LTCI reform and have drafted testimony for submission to an upcoming hearing on a proposed State Partnership bill. Most importantly, we have written to the MassHealth Estate Recovery Unit asking for its interpretation of the provision in Chapter 312 mandating that minimum benefits for purposes of estate recovery are valued as of the date of purchase, not the date of institutionalization. The provision provides asset protection for most policy holders with a minimum level of LTCI benefits at the time of purchase.

We are also carefully watching the impact of our work on the implementation of a **LTCI Partnership Waiver**. While the waiver as proposed in federal statute would result in greater asset protection for some policy holders, it would not be as advantageous as the current mechanism for recipients whose estate includes a home. The Partnership allows exclusion of additional assets equal to the amount of claims paid on the policy. The current estate waiver would waive recovery for an entire estate, in most cases a house, with much greater dollar value than the Partnership.

Tim and I will continue to work on these issues and represent the interests of *MassNAELA* and its clients. If you have comments to make concerning LTCI reform, please contact me or Tim. The comments we have submitted to the Division of Insurance will be posted on the Public Policy page of the *MassNAELA* website. *Deb*



Jessica Batsevitsky

## When Your Elder Client's Child is Getting Divorced: An Overview

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Your elder client's adult child is getting divorced. Your client may have questions for you such as these: "What involvement will I have in the legal proceeding?"; "Will my child's spouse 'come after' our family money?"; "Should I amend my estate plan?"; "I received a subpoena from the attorney representing my child's spouse. It requires disclosure of documents regarding my finances and my estate plan. How much do I have to disclose?" While a comprehensive treatment of these topics would exceed the space allowed for this article, the following is an overview of issues to consider if your elder client raises these concerns.

There are five basic components of any divorce action that must be resolved, either by agreement between the divorcing spouses or by court order: (1) child custody and a parenting schedule for minor children; (2) child support for minor children; (3) alimony; (4) health insurance and expenses; and (5) property division. Unless there are special circumstances, such as the elder parent providing regular

financial support to the adult child's family, the parent of a divorcing spouse has minimal – if any – legal involvement in the first four issues. However, there may be some involvement in the division of marital property, especially if your client is wealthy.

If the divorcing spouses cannot agree on how marital property will be divided, the court will make the determination based on a number of statutory factors, including the opportunity of each spouse for future acquisition of capital assets and income. When considering this factor, the court may take into account evidence of either spouse's expected inheritance. For this reason, one spouse may seek information about the other spouse's expected inheritance, and the parent of a divorcing spouse may be required to disclose information about his or her estate plan. This is an acceptable and expected part of the discovery process.

Usually, parents of a divorcing spouse are not required to produce original documents such as wills and trusts. They may instead prepare and sign affidavits (so-called "Vaughan affidavits," named after the unpublished decision of Vaughan v. Vaughan) that set forth: (1) the parent's approximate net worth; (2) a general description of the current estate plan; and (3) the date, if any, when the estate plan was last amended. According to the Supreme Judicial Court, this is a fair way to balance the parent's right to privacy and the divorcing spouse's right to discover information about the other spouse's expected inheritance. The parent should have his or her own independent legal advice regarding

the preparation of Vaughan affidavits.

Before the court weighs the statutory factors and divides marital property, however, there must first be a determination of what is included in the marital property. In Massachusetts, the definition of marital property is very broad. It includes all property to which either spouse holds title, whenever and however acquired. G.L. c. 208, §34; Rice v. Rice, 372 Mass. 398, 400 (1977). There is no specific exclusion for gifts or inheritances, unless a properly executed and enforceable prenuptial agreement holds otherwise. Therefore, if your client leaves property outright to an adult child in a will, then dies, and the inheritance vests before the divorce is finalized, the inheritance will be subject to division. Zeh v. Zeh, 35 Mass. App. Ct. 260, 264-65 (1993).

As for property held in trust, a divorcing spouse's beneficial interest in a trust is subject to division if it is "present, enforceable and valuable," as opposed to a "mere expectancy." Lauricella v. Lauricella, 409 Mass. 211, 216-17 (1991).

A spendthrift clause does not protect trust property from inclusion in the marital estate. Dwight v. Dwight, 52 Mass. App. Ct. 739, 743 (2001); D.L. v. G.L., 61 Mass. App. Ct. 488, 497 (2004). Trust interests may be too remote and speculative for inclusion in the marital estate under conditions such as these: 1) the beneficiary does not have a present, enforceable right to use the trust principal;

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## When Your Elder Client's Child is Getting Divorced - *continued from Page 3*

2) the beneficiary's interest is contingent and the contingencies are unlikely to be satisfied; 3) payments of principal are in the uncontrolled discretion of trustees; 4) the trust is generational in nature and is set up to meet long-term needs; 5) there have never been any distributions of principal made to the beneficiary; and 6) there are checks and balances in the trust provisions regarding payments of principal. D.L. v. G.L., 61 Mass. App. Ct. at 497. Of course, the court will also take into account whether the interest is revocable or irrevocable, and will weigh an irrevocable interest more heavily.

Keep in mind the concerns associated with property that is jointly held by an elder parent and his or her adult child. We are all aware of the risks presented by creditors and divorce actions in the case of jointly held real estate.

However, even something as simple as adding the adult child's name to the elder's checking account, for the sake of convenience, can result in unintended consequences if the child gets divorced.

A court may consider at least one-half of the balance in such an account to be marital property, even if all of the funds were originally owned by the elder parent. →

Ordinarily, when a final divorce judgment enters, property division is truly final and neither spouse will be allowed to seek a modification later. If your elder client wishes to amend his or her estate plan in anticipation of a child's divorce, he or she must disclose the date of amendment in a Vaughan affidavit. Consider having a discussion with the child's divorce attorney to determine the implications of such amendments on the divorce action, as long as your client and the adult child are comfortable with it.

One more issue to consider. Under the Massachusetts Uniform Probate Code, G.L. c. 190B, §2-804, except as otherwise provided by a governing instrument, court order or contract, a divorce or annulment will revoke any revocable disposition or appointment of property, grant of power of appointment, or nomination for service as fiduciary or representative to the former spouse or **a relative of the former spouse**. If the adult child's spouse made any such provisions regarding your elder client, they will be automatically revoked by the divorce judgment, unless additional actions are taken.

*Jessica Batsevitsky practices Elder Law and Family Law at the Law Office of Jessica S. Batsevitsky, LLC, in Needham, Massachusetts. The author acknowledges and thanks Cynthia Grover Hastings, Esq. of the Perocchi Family Law Group in North Andover for her contributions to this article.*

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### Items of Interest

**[MASSHEALTH LETTER IN RESPONSE TO CONCERNS RAISED BY MassNAELA's Public Policy Committee](#)**. Despite an encouraging opening statement, the letter simply restates and defends each MassHealth policy at issue. The correspondence shows no intent to effectuate positive change. [Read EOHHS Letter](#).

### **[JIMMO SETTLEMENT ON CMS WEBSITE](#)**

CMS has acknowledged the *Jimmo* Settlement on its website (see link below). Manual Revisions and other implementation measures are still pending, but advocates should use this affirmative acknowledgment in cases where providers/contractors continue to apply the wrong standard.

[CMS Website](#)

### **[FOURTH CIRCUIT DECISION VICTORY FOR COMMUNITY LIVING](#)**

The U.S. Court of Appeals for the Fourth Circuit Tuesday denied North Carolina's request for a rehearing in *Pashby v. Delia*, upholding an important ruling protecting the rights of persons with disabilities to receive crucial Medicaid services. [Read National Health Law Program Summary](#).

**MassNAELA Member JOHN FORD  
Receives Prestigious  
THERESA AWARD**

We are pleased to report that our own John J. Ford is this year's recipient of the ***Theresa Award***. This is an annual community service award presented by the Theresa Alessandra Russo Foundation to a NAELA member in recognition of his or her advocacy and support of individuals with special needs. Through the efforts of the NAELA member, individuals with special needs are able to achieve a better quality of life, protect their rights, and preserve their dignity. NAELA member Vincent J. Russo and his wife Susan created the Foundation to honor the memory of their special needs daughter, who died at age five.

We can think of no one more deserving of the ***Theresa Award*** than John. John began his career with Neighborhood Legal Services as a law student in 1968, and remains there 45 years later as the Director of the Elder Law Project. (His goal is 50 years!) He has written and lectured extensively on topics such as Medicare, Medicaid, guardianship, elder protective services, and nursing home residents' rights. John has prevailed in many major cases that have improved the quality of life for seniors and people with special needs. One such decision is Rudow v. DMA, 429 Mass. 218 (1999), which held that a deduction may be made from a nursing home resident's monthly patient paid amount to pay for guardianship services and related legal expenses.

John was one of the founders of the statewide Elderly Legal Coalition in 1978, a coalition of lawyers and aging advocates which has been a premier advocacy force on elder rights issues. John also spearheaded guardianship reform efforts in the legislature through a number of special projects, and as a member of the Massachusetts Attorney General's Task Force. While the recent passage and implementation of Article V of the MUPC seemed to happen overnight, it only happened as a result of decades of dedication and commitment by John Ford and others who led the charge for guardianship reform.

As a guiding force of our Chapter's Litigation Initiative, John has assisted countless members to defend against the systemic abuses and wrongful denials of MassHealth. John is always giving of his time and expertise and has led us all by example for decades. We've been blessed to have John as a valuable member of the *MassNAELA* family for so many years. He is actually one of the Chapter's founding members and is a Past-President. We congratulate John and look forward to celebrating with him when he marks his 50th anniversary at Neighborhood Legal Services!

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