PRESIDENT’S MESSAGE

In the rush of everyday, I find it all too easy to lose track of the larger picture. Each case is unique and important, with the needs, goals, concerns, and personalities of the particular client and his or her family members. Over time, however, the volume of cases in virtually every aspect of elder and special needs law highlights recurring systemic issues which are either impossible to address on a case-by-case basis or which are more efficiently dealt with via the legislative or administrative regulatory processes or, if necessary, through court action.

Enter public policy, the thoughtful consideration of what is happening on the larger stage and assessment of what MassNAELA can do to effect positive change. Our Public Policy Committee, long and ably chaired by Susan Levin (Rosenberg, Freedman & Lee, LLP, Newton), works to identify issues the Chapter will focus on and to create and implement action plans to address these issues. There are more issues than hours (volunteer and paid combined) available to tackle them, and the issues the Committee does take up are too numerous even to merely list them in this message. Nevertheless, here are three current Committee projects to give you

Additions to www.MassNAELA.com and Items of Interest

RECENT MASSHEALTH DECISIONS CONCERNING IRREVOCABLE INCOME ONLY TRUSTS (IIOT): Three recent hearing decisions have emerged resulting from the denial of benefits to applicants who have funded irrevocable trusts. The common thread concerns MassHealth’s interpretation of access to principal, as evidenced by the Springfield fair hearing decision included in our April newsletter <2013_04_02> and the two Chelsea decisions below. New to the Chelsea decisions, MassHealth argues that transfers of principal made to non-applicant beneficiaries should render the trust assets countable. The Board of Hearings continues to uphold irrevocable trusts and to overturn the MassHealth denials.

MASSHEALTH ELIGIBILITY – ASSETS IN IIOT NOT COUNTABLE

2013_06_01 Hearing Decision – Chelsea, May 30, 2013

MassHealth denied benefits based in part on a determination that assets held in an irrevocable income only trust (IIOT) were countable and exceeded program limits. On appeal, MassHealth made a number of now-familiar arguments about why assets held in the IIOT should be countable, including: 1) that distributions of principal had been made to other trust beneficiaries, 2) that the appellant retained the right to live in the real estate and the right to income, 3) that the appellant paid real estate taxes, and 4) that the appellant retained a power of appointment. The appellant argued that the IIOT was created well before the look back period and that the rights retained by the appellant did not grant the appellant access to trust principal. The appeal was approved as it related to the IIOT, but denied in regards to additional assets held outside of the trust. Appeal Approved in Part and Denied in Part.

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a sense of MassNAELA's ongoing public policy activities.

1. The Spousal Elective Share (“SES”) Workgroup continues its survey of other states’ SES statutes in order to identify and evaluate alternative approaches to modernizing Massachusetts’ own SES statute. The group’s ultimate goal is to determine whether to propose amendments to legislation introduced this January by Senator Cynthia Creem (D., Newton) or to oppose Senator Creem’s bill and recommend a different alternative entirely. For more background, read the Chapter’s correspondence to the Massachusetts Bar Association (1/28/13) and the Boston Bar Association (2/11/13).

2. On May 14, 2013, a group of Chapter representatives met with Dr. Julian Harris, Director of Massachusetts’ Office of Medicaid. Dr. Harris was appointed by President Obama to the federal Long-Term Care Commission earlier this year. Chapter legislative and administrative advisor Deb Thomson (The PASS Group) arranged the May 14 meeting to introduce Dr. Harris to MassNAELA and to offer our perspective and assistance on the difficult issues he and fellow Commission members will face. The Chapter’s initial suggestions to Dr. Harris appear in the June 5, 2013, correspondence, crafted by Deb Thomson (see Deb’s Legislative Update in this issue) with input from other Public Policy Committee members. As Board Member Tim Loff (Law Offices of Timothy R. Loff, Newton) aptly observed, such thoughtful suggestions not only assist our clients, they also boost MassNAELA’s recognition as a significant player in this area of the law.

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3. Public Policy’s Subcommittee on Litigation convenes regularly to vet Chapter members’ requests for assistance from MassNAELA’s Litigation Initiative in seeking judicial review of adverse agency decisions. Past President Emily Starr (Starr & Vander Linden, Fitchburg and Worcester) chairs the Subcommittee, which reviews cases submitted using the forms and procedures detailed on the Litigation Initiative News page of the Chapter website. Cases covered in John Ford’s (Neighborhood Legal Services, Lynn) case law updates all entered the Litigation Initiative via this process. To read the referral process materials and see how the Litigation Initiative may be of help to you, <click here>.

Clearly, this president’s message is intended in praise of public policy. MassNAELA’s Public Policy Committee holds its regular meetings prior to each Chapter dinner meeting. Come early and learn more of what’s happening and how you can get involved. Play a part in shaping the larger picture.

-Holly

P.S. Remember the “one new member in 2013” challenge issued in April and our collective mantra, “All membership, all the time.” Let me know how you’re doing.

MASSACHUSETTS LEGISLATIVE STATUS REPORT: MassNAELA WEIGHS IN ON NATIONAL LONG-TERM CARE POLICY by Deb Thomson

The National Commission on Long-Term Care (established by a provision of the American Taxpayer Relief Act of 2012) is charged with “developing a plan for the establishment, implementation and financing of a comprehensive, coordinated and high-quality system that ensures the availability of long-term services and supports”. Members of the Commission include Congressional representatives, health care consumers, health care workers, employers, insurers and state agencies. Among those appointed to the Commission is Dr. Julian Harris, Director of the Massachusetts Office of Medicaid. MassNAELA recently met with Dr. Harris to discuss our perspective on long-term care services. Follow this link to a letter sent by MassNAELA to Dr. Harris, outlining our issues and concerns. <click here>. - Deb

ALER!

TESTIMONY NEEDED ON SPONSORED LEGISLATION.

We anticipate that the following bills will be scheduled for hearing before August recess:

- H1047/S5516 IRA Exclusion from CSRA
- H1021/S503 Transfer of Assets
- H1027/S502 Undue Hardship Waiver
- S517 PACE Spenddown

PLEASE, look at the listed bills and identify whether you would be willing to testify, or if you have a client (or representative) who would be willing to testify. If you have never done this before, it is a great experience. Repeat performances are welcome. Contact our legislative liaison Deb Thomson at dthomson@thepassgroup.com
MassHealth denied benefits based on a determination that assets held in an irrevocable trust were countable and exceeded program limits. Prior to application, the trust made distributions to the appellant's child who was a principal beneficiary of the trust. The child deposited the money into her own bank account, and then used the money to pay for the appellant's assisted living. On appeal, MassHealth relied on Cohen to argue that the trust assets were available to the appellant because they had been used for her benefit. Appellant argued that once trust funds were distributed to a beneficiary, it was up to the beneficiary to choose what to do with his or her money, which had no bearing on the availability of trust assets to the applicant. Further, there was no agreement, either written or oral, about how the appellant's daughter must use trust distributions. The Fair Hearing Officer found for the appellant, stating that "the 'circumstances' test as set forth in Cohen requires that those circumstance permitting distributions of principal to an applicant must exist within the language of the trust document itself, not in some extrinsic series of events". Appeal Approved.

Contributor: Dawn Forman, Esq.