

THE MASSNAELA ADVOCATE



A PUBLICATION OF THE MASSACHUSETTS CHAPTER OF THE NATIONAL ACADEMY OF ELDER LAW ATTORNEYS

Honoring Choices Massachusetts

A new tool to promote advance directives

By Christine Boutin, Esq.

Recently, I spoke to Ellen DiPaola, Esq., co-founder and president of Honoring Choices Massachusetts, a free on-line tool to promote advance directives.

The mission of Honoring Choices Massachusetts is to encourage adults of all ages to start discussions about their choices for care during all stages of life and health.

Spreading the word about understanding rights and the importance of talking about end-of-life care is a second career for Ellen. Prior to her work with Honoring Choices Massachusetts, Ellen was in private practice, specializing in guardianships and conservatorships.

In her work, she began to realize that many of her clients lamented having “never executed a Health Care Proxy or expressed their preferences regarding end of life care to family members and friends.

“Lack of information was the problem,” Ellen says.

People wanted to talk

about the issues, but didn’t have direct access to information to help them formulate preferences.

Fears of high legal fees prevented some from consulting with attorneys, while others simply waited for their doctors to raise the subject.

Understanding that reaching the consumer directly was the key, Ellen and co-founder Kathy Hankel, RN MSN, launched their website, www.honoringchoicesmass.com in 2013. Their goal: to provide free online information to the general public to enable consumers to make a health care plan that reflects their values and choices for the best possible care

through all stages of life.

“Senior citizens found it empowering,” says Ellen.

Once the website debuted, community organizations such as senior centers and veterans’ groups helped to spread the word. Honoring Choices Massachusetts then began to grow its network of Community Partners (such as home health care agencies) and Alliance Partners (larger medical and health organizations), to promote accessibility to its information and tools to their clients and patients.

Honoring Choices Massachusetts also lists a number of elder law and estate planning attorneys as Community Partners on its

website. Being an attorney, Ellen recognizes the important role attorneys play in encouraging the execution of advance directives.

“The most important step an attorney can take [to reach potential clients] is to unbundle services,” Ellen says. “Cost is the biggest barrier.”

Offering to prepare a single document, such as a Durable Power of Attorney, makes the process more accessible and empowering to consumers.

The network of Community and Alliance Partners now stretches from eastern Massachusetts into Worcester County. The goal is to expand into western Massachusetts and throughout the state.

Ellen stresses that “There are so many misconceptions about the law in this area. Education is the key. We need everyone to speak the same language [regarding health care plan preferences] and to use the same tools, whether a consumer or a provider.”

To find out more about Honoring Choices Massachusetts, go to www.honoringchoicesmass.com.

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FROM THE PRESIDENT



By Margot Birke
Elder Law Solutions

“This organization operates only because of the volunteers... who work for all of us.”

I am very happy to report that the first MassNAELA Institute held on April 1, “Special Needs Planning: How to Counsel, Draft and Implement the Plan,” was a great success.

If you were not able to attend, the materials and recording are available for purchase. The program was sold out and the responses on the survey sent to registrants were very positive. An excellent launch of a new tradition!

The next “new thing” that is coming to fruition is webinars. In addition to the six-part Special Needs Advocacy series, we are working on programs on irrevocable trusts and the new ABLE accounts. Stay tuned.

All members were asked to follow the lead of the Public Policy Committee and to contact their state senators and representatives and clients in order to educate them regarding Outside Section 11 of Governor Baker’s House 2 budget proposal for Fiscal Year 2017, which would expand estate recovery for MassHealth members to non-probate assets.

It also would have allowed MassHealth to recover assets to pay for the prescription drug “clawback,” which are the funds states are required to pay the federal government for the cost of Medicare Part D.

Our efforts, along with those of other groups, have resulted in this proposed section to be absent from the House proposed budget. This is a prime example of how, as a group, we can

work at making a difference in the legislation that affects both our clients and us.

The battle is not over.

We will be requesting additional advocacy on the part of the membership. If you have not yet joined the fray, it is now time to do so. Go to our website — www.massnaela.com — to learn how you can help.

On March 31 we hosted our sixth Past Presidents dinner. It was very well attended and gave us the opportunity to bring our past presidents up to date on the current activities of the chapter and for them to provide us with their perspective on the issues facing NAELA and the chapter.

NAELA and MassNAELA were represented at the Massachusetts School of Law job fair. We were able to connect with a number of current and graduating students and extend an invitation to those who are interested in elder law to join us at one of our dinner meetings in order to network with many elder law attorneys and get different perspectives on practicing in this area.

This is just another reminder that this organization operates only because of the volunteers who contribute their time and energy to represent and work for all of us.

Volunteering is personally and professionally rewarding, and once again I urge those of you who want to contribute to a chapter that gives you so much to jump in and give the rest of us the benefit of your knowledge and energy.

CONGRATULATIONS TO OUR FRIENDS AND FELLOW MASSNAELA MEMBERS

- **Steve Pepe** on being named to the Reverse Mortgage Funding LLC President's Club.
- **Mark Worthington** on his appointment as a full-time Professor of Law at Western New England University School of Law and as the new Director of the Graduate Program in Elder Law and Estate Planning (LLM).

The editorial staff of the MassNAELA Advocate welcomes news about our members to share. Please send news to jsb@maestatelaw.com.

The Battle is Not Over Yet!

Find out how you can help the effort to oppose Governor Baker's proposal for expanded estate recovery at www.massnaela.com.

NAELA is coming to Boston!

Next year's national conference will take place in Boston and will coincide with our chapter's 25th anniversary. Our volunteer planning committee is meeting weekly to get ready. Want to volunteer? Have ideas to contribute? Contact John Ford at jford@njc-ma.com.

Did you know...

Effective April 15, 2016, the Massachusetts Probate and Family Court requires the use of certain new and revised forms?

A second set of changes to forms is anticipated to take place in May.

For more information, [click here](#).



MassNAELA committees

Ethics Committee: Tim Loff (loff.law@verizon.net) and Denise Yurkofsky (dyurk@comcast.net)

Finance Committee: Steve Mann (steven@smannlaw.com)

Litigation Committee: John Ford (jford@njc-ma.com), Jack McNicholas (jjmcnicholas2@verizon.net), and Paula Nedder (paula@heaneyandsmall.com)

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Public Relations Committee: Tim Loff (loff.law@verizon.net) and Pam Greenfield (greenfield@ssbllc.com)

Public Policy Committee Update

[Click here](#) for news from the Public Policy Committee

Litigation Committee Update

[Click here](#) for news from the Litigation Committee.

CALL FOR CONTRIBUTIONS

Our newsletter relies on your contributions. Please submit your fair hearing decisions (adverse or favorable), cases, articles, etc. Thank you! Send your contributions to Jessica Batsevitsky at jsb@maestatelaw.com.

Thank you

Thank you to Amanda Hsiao of Pathway Law, Boston and Belmont, Massachusetts, for her assistance in copy editing this issue of the MassNAELA Advocate.

NEW CASES AND BOARD OF HEARING DECISIONS

For summaries and links to these and other cases of interest to your practice, [click here](#). Case summaries on the Cases of Interest page of the new MassNAELA website are searchable. Instructions can be found at the top of the page.

IRREVOCABLE INTEREST ONLY TRUST; ANNUITY

[Heyn, personal representative of the estate of Everlenna Roche v. Director of the Office of Medicaid](#), Massachusetts Appeals Court No. 15-P-166 (April 15, 2016).

With respect to an Irrevocable Interest Only Trust, a trustee's power to sell trust assets and invest the proceeds in other forms of investment, including annuities, does not mean the trustee has power to distribute principal. Also, a provision making trust principal available to persons other than the grantor does not by its nature make the principal available to the grantor. Further, the trustee's power to exchange assets of equivalent value would not affect the distribution of trust principal. There were no circumstances under which the trustee could distribute trust principal to the grantor. MassHealth eligibility should not have been terminated. Judgment reversed.

UNDUE INFLUENCE

[In the Matter of the Estate of William E. Weaver](#), 89 Mass. App. Ct. 1109 (2016).

Three adult children of the decedent objected to the probate of their father's will, arguing that the will was the product of their stepmother's undue influence. The children argued that their father had a problem with drugs and alcohol, which their stepmother enabled or encouraged. However, there was no allegation that the decedent was under the influence of drugs or alcohol or otherwise misunderstood the contents of the will when he executed it. Additionally, the stepmother died prior to the decedent's death, providing the decedent ample time, free from her influence, to change his will if he wished. Decision to strike affidavits of objection affirmed.

FIDUCIARY DUTY; NURSING HOME; POWER OF ATTORNEY

[Merrimack Health Group, Inc. v. Heroux](#), Mass. App. Div., Dist. Ct. Dept. No. 15 ADMS 10024 (2016).

There is no fiduciary relationship between a nursing home and the son of a deceased resident who served as the resident's attorney-in-fact. The district court found that the son had breached his fiduciary duty by using his mother's funds for his own purposes, and but for that breach, funds would have been available to pay to the nursing home for services rendered. On appeal, the Appellate Division held that a fiduciary relationship existed only between the son and his mother. The relationship between the son and the nursing home was only a business relationship. Judgment reversed.

HOMESTEAD DECLARATION

[Nealon v. Matthews](#), U.S. Bankruptcy Appellate Panel for the 1st Circuit, BAP No. MW 15-035, No. 14-40719-HJB (2016).

The debtor owned a parcel of land upon which his home was located, as well as three adjacent parcels of vacant land.

The Massachusetts homestead exemption extended to the debtor's home and all three adjacent lots, because the debtor and his family used and occupied the vacant lots as part of, and in connection with, the principal residence at the time of the declaration.

For summaries and links to these Board of Hearings decisions, [click here](#) for our new Featured Board of Hearings page.

IRREVOCABLE INTEREST ONLY TRUST (FAVORABLE)

[Board of Hearings Appeal #1509625](#) (November 2, 2015)

MassHealth denied Appellant's application for benefits because it determined that her home, held in an irrevocable trust, was countable and exceeded program limits. MassHealth took this position because under the terms of the trust the Appellant had the right to live in the house to the exclusion of others, and the right to pay for expenses just as a true owner would. MassHealth also pointed to the Trustee's power to determine what is considered principal versus income, and the Appellant's ability to use and occupy the principal of the trust, arguing this constitutes a "payment" from the Trust. The Board of Hearings held that the home held in trust should not be countable. If the right to occupy the property is a payment, it is an income payment and not a payment from principal.

IRREVOCABLE INTEREST ONLY TRUST (FAVORABLE)

[Board of Hearings Appeal #1501183 and #1501994](#) (July 15, 2015)

MassHealth denied Appellant's application for benefits due to excess assets. Appellant had transferred title to real property from a nominee trust to an irrevocable trust. The Board of Hearings reversed, finding that the property was validly transferred; a confirmatory deed dated several years after the transfer did not affect the date of the transfer; the right to live in the property does not give the Appellant access to principal; ownership under the tax laws does not equate to ownership under MassHealth or Medicaid regulations; and the trustee's broad powers do not include the distribution of principal to the Appellant or his spouse.



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Support An Amendment to Preserve Eligibility for the PACE Program and Waivered Programs Serving Frail Seniors

Representative Benson

What the amendment does:

This amendment would allow PACE and Frail Elder Waiver participants who meet clinical and asset tests to remain on the program receiving care in the community and being charged a reasonable premium despite having a modest increase in income over program limits.

Who it helps:

Frail seniors who are clinically eligible for nursing home care but want to remain at home.

Background:

The PACE Program (Program of All-Inclusive Care for the Elderly) is a jointly funded program between MassHealth and Medicare, the program provides a continuum of community based care.

The Frail Elder Waiver programs provide a broad scope of health and social support services to elders including PCA, Choices program, Home Health Aide, skilled nursing, supportive day program, home delivered meals and others.

Clinical/Asset Eligibility: for PACE and Frail Elder Waiver programs – a maximum of \$2000 in assets and clinically eligible for nursing home care. Income must be at or below 300% of the federal poverty level which is \$2199 per month.

Income Eligibility: If a participant has income over 300% fpl, then they will be required to spend down to \$542 which is the federal Medicaid level and well below the federal poverty level, leaving the senior who is living at home, with very little to maintain herself and her home. Even one dollar of income above the eligibility level will result in this large out-of-pocket expense.

Current Status: Many elders are unable to maintain their community living on just \$542 and are forced out of the program ending up in a nursing home costing the MassHealth three times what it pays for an individual in the PACE and waiver program.

How the amendment helps:

- This amendment would provide that PACE and Waiver participants with income over program limits be charged a premium equal to his/her income above the program income limits and below the average monthly cost of nursing home care.
- Eligibility and premium levels would be capped at the cost of nursing home care.

Support:

The amendment is supported by **MassPACE** and **MassNAELA**, the National Academy of Elder Law Attorneys Massachusetts Chapter. For information please contact Nomita Ganguly (MassNAELA) 781.354.2444 or Martha Farlow (MassPACE).

From the Publications Committee

The MassNAELA Publication Committee is instituting a NEW initiative to develop a list of free resources available online that may benefit MassNAELA members.

In order to cultivate a list of resources, we are seeking suggestions from you about resources you use to stay updated in the areas of elder law, special needs, and estate planning.

We are seeking resources (online, hardcopy) in the following areas of law: Court cases, fair hearing decisions, legislative/public policy matters; MassHealth publications and regulations; Social Security publications and regulations; Veterans Benefits publications and regulations; any other relevant resources.

Please send your suggestions to:

Brandon C. Walecka, Esq., LL.M.

Publications Committee

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2016 Meeting Schedule

MAY 25

Dinner Meeting Schedule

JUNE 10

Paralegal Program
“Preparing Long Term
MassHealth Applications”

SEPTEMBER 21

Dinner Meeting Schedule

OCTOBER 26

Dinner Meeting Schedule

DECEMBER 14

Dinner Meeting Schedule

The topic of each meeting will be posted on the Home Page and on the Chapter Meetings page of the MassNAELA website.

SEND YOUR NEWSLETTER CONTRIBUTIONS TO:

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