

THE MASSNAELA ADVOCATE



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From the President:



“Leadership and Learning are indispensable to each other.” - John F. Kennedy

This is what I love about MassNAELA. We are a gold standard chapter that combines the wisdom and talent of our members to learn and to lead.

As we kick off our 25th anniversary year, my goals are three-fold:

Collaboration

Ensure that our vibrant chapter remains a viable and trusted voice in the fields of elder and special needs planning and to collaborate with the agencies and organizations that make these issues a top priority. We are in discussions with joining the Coalition for Elder Economic Stability led by the Mass Senior Action Council and Mass Council on Aging, as well as seventy other organizations and providers (continuing the efforts of our past

president, Dan Surprenant.)

Involvement

Encourage each and every member to participate and offer their individual experiences and knowledge with the chapter. Please check out our website for information about our committees and a link to a committee sign-up sheet. In addition, I urge you to become an active participant at the public policy meetings chaired by Susan Levin and Patti Keane Martin and at the litigation committee meetings chaired by John Ford, Paula Nedder and Jack McNicholas, each of which meet immediately prior to our monthly meetings. This is one of the best ways to stay up-to-date with legislation and case related changes.

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Legislation

Continue to sponsor legislation with the guidance of our lobbyist, Nomita Ganguly. We will re-file the Act to Support Equal Access to Community Care for Elders and the Disabled (formerly known as the PACE and Other Waivered Services bill) with the goal of expanding the Frail Elder Waiver to persons whose income is over the 300% of the Federal Benefit Rate through cost-sharing. In addition, we have finalized language for two additional bills – the first, relative to the countability of Veterans Aid and Attendance benefits when calculating income for purposes of eligibility, and second, preserving the ability for individuals over 65 to fund pooled trusts.

Efforts to Date

Beginning with the 2016 Thanksgiving break, a team of MassNAELA attorneys (Susan Levin, Emily Starr, Patti Keane Martin and Liane Zeitz) was in full gear around the clock to address the proposed MassHealth regulations which were slated to take effect on February 1, 2017. Thank you to this group which developed written comments which were submitted in response. Furthermore, MassNAELA representatives set forth our position at a public hearing on December 16, 2016. Thank you to Lisa Neeley, Pamela Greenfield and Arthur Bergeron for testifying on our behalf.

On January 5th, the Nadeau and Daley cases were heard by the SJC. Lisa Neeley, Brian Barreira and National NAELA's Ron Landsman ably presented the cases.

Upcoming Events – Please mark your calendars!

On March 2, we will be running our annual satellite breakfast meetings at four locations across the Commonwealth (Natick, Westfield, Duxbury and Peabody). The topic will be Diminished Capacity.

On March 31, the Elder Law Institute, chaired by Karen Johnson, will be held at the Federal Reserve Bank in Boston. This year's focus is Irrevocable Trusts.

On April 27-29, National NAELA's convention will be held in Boston. Judy Flynn and Margot Birke are on the Planning Committee and our own Hyman Darling will be voted in as National President.

Our remaining dinner programs, all to be held at the Boston-Newton Marriott, will be held on May 18, June 15, September 7, October 25 and our annual meeting on December 7. Watch your emails for more information and topics. If you have an idea for a topic or speaker, please let the Program Committee co-chairs know.

We also intend to run our annual litigation workshop, led by John Ford, and the paralegal program.

Finally, three new initiatives are under development. First, a new member outreach committee will be formed under the guidance of Clarence Richardson. Second, we will solicit questions for the new MassNAELA Elder Advice column in our newsletter facilitated by Jessica Batsevitsky. Lastly, to further our past president's goal of incorporating special needs into our practices, we hope to run another conference in the fall devoted to this topic.

I feel fortunate to be a part of this organization and privileged and humbled by the opportunity to lead and learn from our membership.

Join me as we take MassNAELA to new heights – onward to another 25 years!

- Laura Silver Traiger,
President MassNAELA 2017

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Probate Court Update:

Revised Massachusetts Uniform Probate Code forms will be accepted for filing on or after the effective date of March 1, 2017. See <http://www.mass.gov/courts/forms/pfc/pfc-mupc-forms-generic.html>.

Featured Board of Hearings Decision:

Office of Medicaid, Board of Hearings, Appeal #1613416-77 (January 18, 2017) For complete Decision [Click Here](#)

The appellant's re-application for MassHealth long-term care benefits was denied due to excess assets. The dispute was over whether or not real estate held in a nominee and irrevocable trust was countable. The Board of Hearings held in favor of the appellant, finding that:

- (1) The possibility that the appellant and her spouse could become beneficiaries of the realty trust does not equate unilateral access to principal.
- (2) Citing the decision of Heyn v. Director of the Office of Medicaid, a power of appointment in the irrevocable trust does not make the trust property countable.
- (3) A "use and occupancy" trust provision does not make the trust property countable. Such a provision is a potential source of income; it does not provide access to principal.

Contributed by: Brian E. Barreira, Law Offices of Brian E. Barreira, Plymouth and Hingham

Summary by: Jessica S. Batsevitsky, Law Office of Jessica S. Batsevitsky, Needham Heights

Featured MassNAELA Committee:

The Litigation Committee of MassNAELA wishes to clarify for members the Committee's goals and ways the Committee can assist MassNAELA members in their practices.

MISSION STATEMENT:

The MassNAELA Litigation Committee's continuing goals are: to provide a forum for the discussion of matters of interest to its members; to provide information, contacts, and resources to its members through legal education seminars and informative publications; and to provide a litigation support system to address matters of concern to Chapter members.

The work of the Litigation Committee supports: legal and regulatory advocacy that enhances the lives and protects the rights of older adults and people with special needs; litigation and amicus briefs filed on behalf of MassNAELA or in partnership with like-minded organizations; and establishment of good legal precedent in matters of importance to the Chapter.

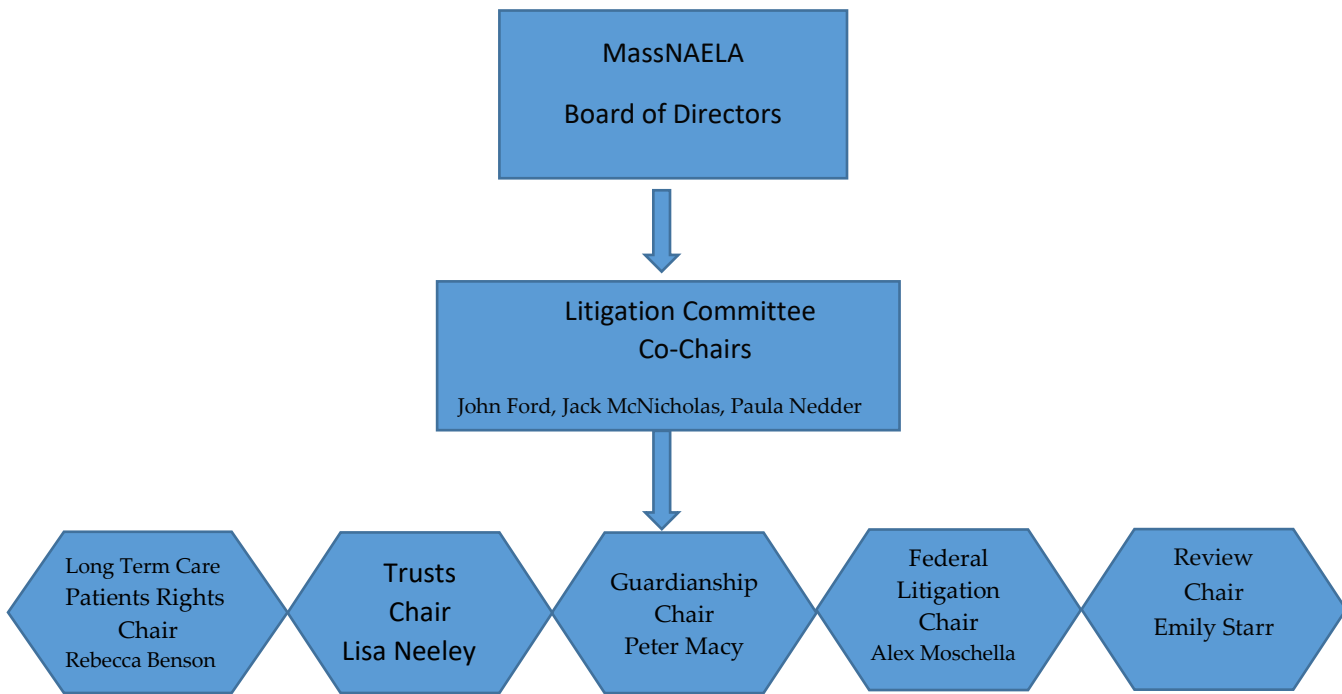
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Meetings are held on the same day as the dinner meetings at the Boston Newton Marriot, from 2:30 – 4:00pm and open to all MassNAELA members. An agenda and invitation is emailed to the general listserv prior to each meeting.

HOW TO UTILIZE THE LITIGATION COMMITTEE:

1. Come to the meetings to learn about the latest activity and to raise any litigation issue you may have
2. Become a member by joining a subcommittee (see organizational structure below) and read about each subcommittee [here](#)
3. Seek litigation assistance with a case by contacting the Litigation Review Subcommittee [here](#)

ORGANIZATIONAL STRUCTURE:



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MassNAELA Elder Advice

The MassNAELA Advocate is pleased to introduce MassNAELA Elder Advice, a new advice column written by MassNAELA members, for MassNAELA members, in the hope that those who are new to elder law and special needs planning will learn from their more experienced colleagues.

Questions? Topic ideas? Please contact Jessica Batsevitsky at jsb@maestatelaw.com.

Protecting Clients' Homes from MassHealth Liens

By Pamela Greenfield, Samuel, Sayward & Baler LLC, Dedham

On January 5, 2017, the Supreme Judicial Court heard oral argument on two irrevocable income only trusts where the MassHealth applicant placed his or her primary residence into the trust prior to applying for nursing home benefits. With the fate of irrevocable trusts literally hanging in the balance at One Pemberton Square, what other options do elder law attorneys have to advise their clients on protecting a primary residence from the placement and collection of a MassHealth lien? Often our clients' largest, and arguably most intrinsically valuable asset, avoiding the dreaded MassHealth lien truly feels like the million dollar question. Here are some options:



Long-Term Care Insurance: Advise clients to consider purchasing long-term care insurance before it's too late and too expensive. Under the MassHealth regulations, a policy which meets minimum requirements of \$125/ day of nursing home care coverage for a period of two years will prohibit MassHealth from placing a lien on the applicant's non-countable Massachusetts primary residence. An added benefit—often these policies are absolutely crucial in allowing seniors to age in place with private-duty home care services or pay for assisted living care where there are minimal public benefits available. The ideal age to apply for long-term care benefits is in your 50s and 60s so if your clients are in their 70s, 80s or 90s, this may no longer be an option.

Life Estate Deeds: Consider the pros and cons of a life estate deed. The actual concept of a life estate deed is simple to explain to clients and even simpler to execute. However the devil lies in the details, which is why it is absolutely critical for your clients to be fully versed in all of the ramifications of executing a deed with a retained life estate before giving away a substantial interest in their most important asset. In a life estate deed, the grantor-parent transfers the property to the child or other remainderperson but reserves the right to reside in the property for his or her lifetime. MassHealth is still permitted to place a lien on the home should the life tenant ever apply for nursing home benefits. However, if the applicant still owns the property at his or her death, MassHealth releases its claim and the lien extinguishes, passing to the kids without any encumbrance. Under MassHealth regulations, the "life estate" itself has one numerical value which decreases as the life tenant ages (and also changes monthly based on interest rates). The "remainder interest" is the remaining value once the "life estate" value is subtracted. This is often the much higher value. If the home is sold while the life tenant is alive, the share he or she receives from the sale is subject to MassHealth spenddown or the collection of the lifetime lien if the applicant is currently receiving benefits. Finally, some unintended consequences of life estate deeds may include capital gains tax issues, difficulty

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in mortgaging/ refinancing the property, creditor claims of the remainder beneficiaries and even uncooperative or self-interested children (and spouses of children). While life estate deeds may seem like a terrific substitute for irrevocable income only trusts, there are many issues to consider before recommending this option to your clients.

Outright transfers: Sometimes a simple “get all of the assets out of mom’s name and into the kids’ name” approach seems tempting, however most often it is not the best strategy our clients. First, all of the above-mentioned issues with life estate deeds are present here, only much worse—sweeping capital gains tax consequences regardless of when the home is sold, unfettered creditor issues, evil children and spouses with no recourse from the parents, etc. But perhaps the most important concern is more of an intangible one—your clients’ financial independence and autonomy. Don’t forget that anything we do to “protect the primary residence” does not benefit the parent-client directly. It simply allows them to rest assured that *if* they ever need nursing home care something has been done to increase the chance that *some* inheritance will pass to their children. Additionally, with many more options for care coming to the marketplace each day—most of which are not covered by MassHealth—the focus should be on addressing your clients’ most valuable goals rather than what we as elder law attorneys may perceive to be most important, given that it pains us to see our clients lose their life savings on nursing home care. Consider this before recommending a plan that strips your client completely of his or her interest in the primary residence.

The MassNAELA Elder Advice column is provided for educational purposes only. The statements contained herein may not apply to your circumstances. No professional advice is being rendered, and no attorney-client relationship is formed by the use of this publication.

Save the Dates!

MassNAELA dinner meetings and educational programs will take place on the following dates:

March 2, 2017 (Multi-site Breakfast Meeting)

March 22, 2017 (Board and Committee Meetings Only)

May 18, 2017

June 15, 2017

September 7, 2017

October 25, 2017

December 7, 2017

Paralegal Program to be Determined

Litigation Workshop to be Determined

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SEND YOUR NEWSLETTER AND E-BULLETIN CONTRIBUTIONS TO:

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