

Missouri Chapter NAELA



A quarterly newsletter provided by the Missouri Chapter National Academy of Elder Law Attorneys, Inc.

Summer Edition 2010

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Message From The (former) President

Greetings,

It has been my honor and privilege to serve as your Chapter President for the past year — twelve months that really flew by. As I pass the proverbial gavel to Tim Murphy, I want to thank all of our officers and board members for all their efforts; and Ann Bickel for keeping us organized. I also want to extend a special thanks to:

- Reg Turnbull for staying on top of legislative developments and keeping our members informed;
- Chris Gilsinan for rising above my procrastination and getting our newsletters in a timely fashion; and
- All of our members for sharing their time and talents with others, and for their efforts in zealously representing their clients, to the benefit of all of us.

Keep up the good work on behalf of the elderly and disabled throughout the state of Missouri.

I hope all of you can make it to Columbia on August 20th for our summer meeting. See you then.

Cheers — Keith

Value Added Meeting!

The August meeting of the general membership will be held in Columbia, MO on August 20th. Here are the details:

Friday, August 20, 2010 ■ 10:00 AM

Courtyard by Marriott

3301 Lemone Industrial Blvd. ■ Columbia, MO ■ Phone: 573-443-8000

In addition to catching up with fellow members, our Program and Education Chair, Dianne Hansen, has arranged a presentation **which qualifies for the three (3) hour continuing education credit necessary to maintain your accreditation for VA benefits!**

NOTE: This three hour education seminar does **NOT** qualify for the initial training necessary to qualify as an accredited attorney/agent. For answers to questions about accreditation see the FAQ's at: http://www4.va.gov/ogc/accred_faqs.asp

The educational seminar on August 20, 2010 will consist of presentations by:

Dr. Lana Zerrer, Director of Primary Care at the Veterans Health Administration, Columbia, MO, who will present a one-hour session on access to veterans medical care benefits; and

Mary McCormick, Rudy Beck, Brigid Fernandez, and Dianne Hansen who will provide a two-hour session on hot topics in getting applicants qualified for Veterans Administration benefits.

ANNUITY CASE ON APPEAL IN MISSOURI

As you are aware, on April 20, 2010, the Western District Appellate Court reversed the trial court in J.P., et al. v. Missouri State Family Support Division (WD70994), a case dealing with the availability of a community spouse annuity for purposes of vendor MoHealthNet application. The holding: Where the state denied Medicaid eligibility to couples, who sought long-term care benefits, based on the community spouse's ownership of an annuity, the policy violated federal Medicaid law, so the trial court erred in denying declaratory and injunctive relief to the couples.

Plaintiffs were represented by attorneys Barbara J. Gilchrist, Mary R. McCormick, John J. Ammann, Dianne M. Hansen and Michael C. Weeks.

The Western District Court's opinion is here:
<http://www.courts.mo.gov/file.jsp?id=38277>

A summary of the case is here:
<http://www.courts.mo.gov/file.jsp?id=38283>

The State's motion for rehearing was denied. The State requested transfer to the Missouri Supreme Court. We await the Missouri Supreme Court's decision about transfer.....

PERSONAL SERVICES CONTRACTS

In Dambach v. Department of Social Services (June 8, 2010; <http://www.courts.mo.gov/file.jsp?id=39194>), the Eastern District of the Missouri Court of Appeals held that payments pursuant to an oral agreement to provide personal care services did not constitute disqualifying transfers where, at the time of the agreement, there was no requirement that it be in writing. In this case, the agreement predated the requirement that the agreement be in writing; see Sec. 208.213.1, RSMO and IM-98 [September 28, 2007] at http://www.dss.mo.gov/fsd/iman/memos/memos_07/im98_07.html . . . Marcia Mulcahy and Sherry Snyder were part of the team involved in the representation of the successful party.

An article about personal care contracts worth reviewing is located at:
<http://www.mobar.org/e936a860-c83c-4e5f-a414-222f776dfe88.aspx>

Authored by Vincent G Rapp and Michael C. Weeks, the article predates enactment of 208.213.1 and IM-98 but contains a valuable review of another personal services contract case, Reed v. DFS, 193 SW2d 839 (Mo. App. E.D. 2006).

HEALTH CARE DECISIONS DAY, APRIL 16, 2010

Springfield Area

Dianne Hansen reported from Springfield that, for the 3rd year, she and other lawyers partnered with the Springfield Metropolitan Bar Association and held all-day free health care directive signings at the Springfield Main Library.

Local KY-3 (the NBC affiliate) carried news about the event during the 5 and 6 pm newscasts the night before the event. KY-3 also sponsored "call a lawyer" from 5 p.m. to 6:30 P.M. the night before the event; the topic was health care directives.

Volunteer attorneys and their paralegals each worked 2 hour shifts, working from 10 am to 7 pm. About 75 people signed forms.

St. Louis Area

Brigid Fernandez organized the effort this year. Brigid provided attorneys from BAMSL, MONAELA and the Missouri Probate and Trust Committee who worked at about 15 senior citizen centers and one public library (Webster Groves). Brigid estimated that in the City and County of St. Louis, about 130 HCDPA's were signed and attorneys clarified or handed out another 130 forms.

Prior to the effort at the Webster Groves public library, an article in the local newspaper, *Webster-Kirkwood Times*, caused several people to sign forms or gather information.

Kansas City Area

Samantha Shepherd reports that her efforts in Kansas City bore fruit. It was the first time the event was tried in the Kansas City area. (This national effort was begun three years ago.). Six attorneys from various firms volunteered. The event was held at a local CCRC and at least fifty of the Missouri Bar packets were distributed.

Other Efforts

Reg Turnbull attended a Rotary International conference in Springfield on April 15, 16 and 17. Reg is part of a committee of Rotarians that promotes charitable giving to the Rotary Foundation. He was in charge of a booth at the conference as well as a guest speaker to the conference attendees. He dovetailed the charitable giving and making bequests with health care decisions. In fact he asked a co-speaker who was a nurse to speak about her experiences about health care POA and directives.

REG'S LEGISLATIVE ROUNDUP

The legislature was recently in town in special session costing the state money while passing more tax breaks and reducing retirement benefits for new state employees.

I have waited awhile since the regular session ended on May 14, 2010, before reporting what happened as far as Elder Law issues are concerned in the 2010 session, the Second Session (i.e., year) of the 95th General Assembly. The bill numbers were higher than in a first session of a biennial General Assembly.

The bills (or parts of bills) which I am reporting upon become effective August 28, 2010. I have explained the acronyms in parens the first time used with each bill to showcase that each was frequently changed through the respective processes.

A bill that might be seen as very important for the Home Health industry emphasizes community services rather than Vendor nursing home services. It is CCS (Conference Committee Substitute) for HCS (House Committee Substitute) for SB (Senate Bill) 1007. In new section 198.016, for example, it specifies, "Prior to admission of a MO HealthNet individual into a long-term care facility, the prospective resident or his or her next of kin, legally authorized representative, or designee shall be informed of the home and community based services available in this state and shall have on record that such home and community based services have been declined as an option."

SB 1007 also sets out that the evaluations (i.e., 21-point test) to qualify for home and community-based waiver services can be done through contract by a third-party assessor or by Department of Health and Senior Services employees, see section 208.895. Provisions are also in the bill for telephone tracking system confirmation that consumer-driven and other home health services are provided as contracted, see sections 208.909 and 660.023. Investigations of in-home services could also be received and initially processed by contract, see section 660.300. Other provisions in the bill are more administrative affecting the providers more than the patients. The Governor signed SB 1007 on June 25, 2010.

This was a year of "tweaking" in that the legislators passed bills that certain special interest lobbyists wanted passed to make some small changes. Nothing big from a public policy point of view was even introduced.

For example SS (Senate Substitute) for SCS (Senate Committee Substitute) for HCS for HB 2201, amended section 475.190 to permit deposits by conservator in credit union accounts guaranteed by the National Credit Union Share Insurance Fund (similar to FDIC for banks already in the section since last year). The Governor approved this on July 7, 2010.

Also, it seemed that certain sections passed in several bills probably because legislators and lobbyists were unsure what would pass and what would not in both legislative bodies as the House and Senate differences continued to provide the only fireworks (the Republicans had large majorities in each body) as the state was downsizing without any measures taken to increase revenue.

For example CCS for SCS for HBs 2226, 1824, 1832, & 1990 and SCS for SB 583 both modified section 208.215 to permit electronic computerized records from the MO HealthNet Division to be prima facie proof of what the state paid for and also to require the state to collect from private insurance companies on a subrogation basis if MO HealthNet paid when the participant also had insurance coverage. The Governor approved HB 2226, et al, on July 7 and SB 583 on July 13.

SCS for SB 583 also requires unearned (canceled or person died) portions of Long Term Care Insurance (section 376.882) and Medicare Supplement Insurance (section 376.110) premium to be refunded within 20 days of notice and each such policy to notify of the right to cancel on its first page. Many of us have clients who pay annually, and this would address problems in receiving refunds upon cancellation.

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CCS #2 for HCS for SCS for SB 754 and SS for SCS for HCS #2 for HBs 1692, 1209, 1405, 1499, 1535, & 1811 amended section 208.010.4 to clarify how the state is to be repaid any overpayments on preneed or insurance assignments for the prepaid funerals first reimbursing itself if person on MO HealthNet and then paying to designated beneficiaries. The bill also adds a sentence stating: “In determining eligibility and the amount of benefits to be granted under federally aided programs, the value of any life insurance policy where a seller or provider is made the beneficiary or where the life insurance policy is assigned to a seller or provider, either being in consideration for an irrevocable prearranged funeral contract under chapter 436, shall not be taken into account or considered an asset of the beneficiary of the irrevocable prearranged funeral contract.” This section was included in the bill which made many “housekeeping” changes in Senate Bill No. 1, which passed in 2009 to address the preneed industry abuses, and it appears that preneed insurance folks wanted the statute to expressly authorize their sales. The Governor approved SB 754 on July 9 and HB 1692, et. al., on July 12.

Thank you, Reg, for summarizing legislative action so well.

YOUTUBE and YOU

And speaking of Reg, he took the time to post an explanation of the Missouri out-of-hospital Do Not Resuscitate Rules (19CSR 30-40.600, based on RSMO 190.600-190.621) at

<http://www.youtube.com/watch?v=hLiBC3hvr5c>

ESTATE TAX CONUNDRUM

Mark Gingrich, JD, of Williams-Keepers LLC, Columbia, Missouri, answered the editor’s call for a “short summary” of the Estate Tax Conundrum:

On January 1—whether you knew it or not—you woke up in a country without a federal estate tax. The result of a 2001 budgetary gimmick, the estate tax was scheduled to expire at the end of 2009 only to reappear in 2011. All planners expected some congressional action to reinstate the tax for 2010. However, 2010 rolled around without reinstatement. With the new year, many planners expected the estate tax to be reinstated retroactively to the beginning of the year. Now, with the year half over, planners have the revised expectation that an estate-tax-free 2010 could remain intact. While a world without an estate tax seems like a good thing, it presents difficulties for many estates.

Under the estate tax regime in effect for 2009, only large estates (i.e., roughly speaking, estates exceeding \$3.5 million) were subject to the estate tax. However, property owned by all decedents received a basis generally equal to the property’s fair market value (“FMV”) at date of death. For appreciating assets, the basis “stepped up” to a higher FMV. A higher basis is a good thing. To illustrate, consider a decedent whose only asset at death was a parcel of land worth \$1.8 million. She paid \$200,000 for the parcel. If she died December 31, 2009, this parcel could pass to her son without triggering any federal estate tax. The son could subsequently sell the parcel for \$1.8 million and owe no federal income tax because his basis is also \$1.8 million.

With the disappearance of the federal estate tax in 2010, the “stepped-up” basis rules also vanish and are replaced with “modified carryover basis” provisions. Under these new provisions, property transferred at the decedent’s death generally will receive a basis equal to the smaller of the decedent’s adjusted basis or the property’s FMV on the date of death (i.e., no step-up). However, a decedent’s estate generally will be permitted to increase the basis of appreciated assets transferred up to the lower of (1) the appreciation; or (2) \$1.3 million, increased by certain unused tax losses generated by the decedent. The basis of appreciated property transferred to a surviving spouse can be increased by an additional \$3 million.

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Returning to our previous example and assuming a January 1, 2010 death, there would still be no estate tax due on the transfer of the land. However, the son's basis would be only \$1.5 million—\$200,000 increased by \$1.3 million. When he sells the land for \$1.8 million, he will have \$300,000 taxable income resulting in \$45,00 additional federal income tax.

In addition to a possible increased total tax burden on some estates, the modified carryover basis rules impose greater administrative burdens for estates of individuals dying in 2010 with net wealth exceeding \$1.3 million. First, the personal representatives or trustee must work to determine the decedent's basis in the property. For many types of property—such as personal property acquired in the distant past—this basis may be quite difficult to determine.

Second, he or she must determine the property's FMV at death. This was previously required for estates near the estate tax return filing threshold (\$3.5 million in 2009). However, the modified carryover basis regime requires this determination for many smaller estates.

Finally, he or she must decide how to allocate the basis increase permitted under the new rules. This increase must be allocated by the executor—or, if there is none, by those in possession of the estate's assets. For most taxpayers, this allocation would be made on a return due April 15 of the year following death.

In summary, for families of wealthy individuals dying in 2010, the one-year disappearance of the estate tax for 2010 could drastically increase the amount of wealth transferred to the next generation. However, the corresponding suspension of the “stepped up” basis regime threatens increased tax bills and compliance costs for medium-sized estates.

Thank you, Mark.

SEE YOU IN COLUMBIA, AUGUST 20.