

Missouri Chapter NAELA



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

June 2011

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Message From The President

My message in this edition of our newsletter coincides with the end of my term as President. It has been a distinct honor to serve as President of our Chapter over the last year. Dan Reuter will be taking the reins in July, and we will certainly be in capable hands going forward.

The last year has been marked by a number of successes for our Chapter and for our clients and practices. Members have achieved success in litigation efforts. As well documented by Reg Turnbull (see article below), most of the legislation in which we had a particular interest was passed. In the last few months, we have attained record numbers of members in our chapter. We have introduced and continue to develop our chapter website. We continue to be encouraged by the enthusiasm and efforts of our younger members, which of course bodes well for the future.

I want to express my gratitude to our officers and board members, and to the committee chairs. They have been immensely helpful to me personally, and they have done great service for MoNAELA.

To all of our members: We continue to ask that each member participate in at least one of the standing committees. The Chapter needs the participation, but you will also benefit from new acquaintances and the exchange of ideas and information that is vital to our group.

We also hope all members will make the effort to attend the summer meeting in Columbia on August 12, 2011. The meetings allow individual members to contribute their ideas and perspectives to the business of the chapter. Just as importantly, we have a good time seeing our friends again.

In closing, and as I have stated before, we can all be very proud of the Missouri chapter. We are blessed with members who are great lawyers and strong advocates for their clients – but who are not reluctant to assist and advise their colleagues. The future is bright.

Tim Murphy

JOPLIN TORNADO RELIEF EFFORTS

Although we have no formal avenue for rendering assistance to the residents of post-tornado Joplin, our Informal Goodwill Ambassador, Reg Turnbull, made the effort to contact our lone chapter member residing and working in Joplin, Christopher Dumm, Esq. of Elder Law Center, LLC, 512 South Virginia, Joplin, MO. Reg talked to a staff member, Anna Feagans, who reported that the law office was fine (not hit), as it sits between 4th and 5th Streets. The closest the tornado came was 18th Street, as it went West to East on 20th Street.

Anna further reported that Attorney Dumm and his immediate family are fine, and his staff are fine. Some staff had family members who were in the tornado's destructive path and some of their clients were affected.

When Reg asked Anna if there was anything that our members could do for them or

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Joplin Tornado Relief Efforts continued....

their office, Anna responded “no” and mentioned some of the charities that were responding. She also remarked, however, that help is becoming a bit harder to find so many days after the storm, even though problems are occurring with the storm’s residual effects.

Reg told Anna that many of us were participating in various Joplin-relief efforts, and she said, “thank you.”

An obvious conclusion: it is not over — and contributing now to relief efforts would be VERY helpful. An article at an online news site (eMissouri.com) suggested that checks be made payable to the American Red Cross Disaster Relief Fund (Joplin tornado), American Red Cross, PO Box 4002018, Des Moines, IA 50340-2018. When mailing a check, please indicate your designation (JOPLIN TORNADO RELIEF EFFORT) on the check’s memo line.

MISSOURI CHAPTER NAELA MEETING - August 12 (Friday), 2011 Begins at 10:00 AM

Courtyard by Marriott
3301 LeMone Industrial Blvd.
Columbia, MO 65201
Telephone: 573.442.8000

Join us on August 12 for a chapter meeting, lunch, and program. Registration information and program details will follow soon. Tim Dolan, President of Dolan Residential Care Centers, Chesterfield, MO will discuss the multiple care centers he has developed that specialize in long-term care for Alzheimer’s and dementia patients and how these centers may be a model for the future in the long-term care industry.

Paul Gantner, with Purcell & Amen, LLC, St. Louis, will address the impact of Medicaid estate recovery and federal taxation on estate planning for family owned businesses and farms in Missouri. Total CLE credit will be 2.4 hours.

Questions: Contact Diane Hansen at dhansen@ozarkselderlaw.com or 417-868-8200 or Ann Bickel at ann@homecaremissouri.org or 573-634-7772.

NEW, IMPROVED AND FILLABLE HEALTH CARE POWER OF ATTORNEY AND DECLARATION NOW AVAILABLE ON-LINE

As we all know, establishing advance directives regarding future health care decisions can ensure that a person’s wishes are met and can also relieve families from having to make difficult decisions at a time of great stress. The Missouri Bar has developed and makes available as a public service a “Durable Power of Attorney for Health Care and Health Care Directive” for use by the general public.

The DPA and its accompanying HIPAA form (available in a separate link) are now fillable and saveable PDF forms (sometimes called “interactive” forms). Once someone has filled in the forms, they can be printed and/or saved to the computer. If saved, one can open them later to finish or to make changes.

Members of the public can go to <http://missouribar.org> and click on the tab marked “public” in the upper right gray area. A link to the fillable and saveable revised Durable Power of Attorney for Health Care and Health Care Directive form (with its accompanying HIPAA form) is available there.

If a person does not want (or is unable) to fill-in-the-blanks (with handy FAQs which “pop up” on clicking), he can chose the “non-fillable” forms option, which links to the DPA/HIPPA packet (16 pages).

The fillable forms require Adobe Acrobat Reader 8.0 or higher to complete, save and print. The Adobe Acrobat Reader can be downloaded from the same web page.

THE UNSURPASSED UnPROGRAM

After an hiatus of several years, the 2011 MoNAELA Unprogram was held March 4 and 5, 2011 at the Columbia Courtyard by Marriott. The UnProgram is a unique, two-day event—it allowed Missouri attorneys who practice elder law to get together in an informal and casual setting to learn, exchange ideas, share substantive information, brainstorm to problem solve, and meet and connect with their peers. The Missouri Bar approved the “Unprogram” for 6 hours of CLE and 1 hour of Ethics credit, thanks to Program Chair, Dianne Hansen.

The UnProgram cost only \$100; the room to stay overnight (Friday/Saturday) a mere \$99.

EDITOR’S NOTE: A terrific value for CLE credit, colleague get-together and more....

If you did not attend, here are some of the discussions (and practical how-tos) you missed:

- *The Use of Annuities for Medicaid Planning: How the Case Was Won.*
- *Special Needs Trusts: When to Use Them, How to Report Income Tax on Them, Issues in Administering Them –and, When Not To Use Them.*
- *Difficult Issues in Missouri Guardianship – Conservatorship and How To Handle Them*
- *How to Protect Your Trust Protector*
- *How to Win Your Fair Hearing and Appeal*
- *How to Get Medicaid Waivers and Supplemental Nursing Grants*

FROM THE LISTSERVS:

On the Mo Probate Listerv, Steve Gorin posted that, occasionally, The Missouri General Assembly website is offline. The posting drew a response from David Crandall, who noted that the information is available for free on Fastcase (<http://www.mobar.org/fastcase/login.asp>) for Missouri Bar members and on CaseMaker

(<http://www.ksbar.org/members/casemaker>) for all Kansas Bar members.

Reg Turnbull noted that you can still get to either the House page or the Senate page. On either page, you can get copies of bills (all the versions and actions) and information about the respective chamber members. Reg noted he usually doesn’t go to the General Assembly website without going to one or the other of the House or Senate website. The House website is <http://www.house.mo.gov/> The Senate website is <http://www.senate.mo.gov/>

Also from the Mo Probate listserv:

.....The new [Health Care Power of Attorney and Health Care Directive] form consists of a durable power of attorney for health care (“DPOA HC”) and a health care directive (HCD). Each have requirements. If a person wants to execute the complete form including both, then the acknowledgment and the witnesses are required.

In Missouri, we must have our DPOA HC’s acknowledged the same way as real estate conveyances because required by statute—sections 404.705 and 404.810. Section 404.810 for DPOA HC’s incorporates section 404.705 by reference....

The health care directive must be proved by clear and convincing evidence—see the Cruzan case. The witnesses have been thought necessary for years in the forms that we use to meet that requirement which is not set by statute but by Missouri case law.

The Committee studied forms used by ALL states and those forms used by various organizations. Nearly all have witnesses. Not all are required to be acknowledged—only in about half a dozen states—including Missouri.

The new form is designed so that only the DPOA HC, which would need to be acknowledged could be used, and alternatively only the HCD might be chosen to be used which would have witnesses....In a court of law, we can prove a person’s directive with clear and convincing oral evidence.....[but having the directive witnessed supplies the same, but in writing].

CASES OF NOTE

Robert Seek, Esq., of Eldon, MO, was successful in representing estates and prevailing against the State Department of Social Services in a couple of estate recovery cases originating in Miller County—In re Estate of Wright v. MO Dept. of Social Services (WD 72706, April 19, 2011; <http://www.courts.mo.gov/file.jsp?id=46038>) and In re Estate of Strayer v. MO Dept of Social Services (WD 72707, April 19, 2011; <http://www.courts.mo.gov/file.jsp?id=46039>).

Besides the legal holdings in the cases, both cases demonstrate that sometimes we would better serve our clients by scheduling claims hearings and requiring claimants to prove up their claims rather than just paying them. Mr. Seek is a good trial attorney, having served in the past as Miller County prosecutor for several years. We who do probate might brush up on our litigation skills.

The legal holding in both cases construed section 473.398.4 to require that both statutory prongs be proved by the state at a hearing when the claim is disputed or the evidence is objected to. The subsection reads as follows:

“4. Claims consisting of moneys paid on the behalf of a participant as defined in 42 U.S.C. 1396 shall be allowed, except as provided in subsection 3 of this section, upon the showing by the claimant of proof of moneys expended. Such proof may include but is not limited to the following items which are deemed to be competent and substantial evidence of payment:

(1) Computerized records maintained by any governmental entity as described in subsection 1 of this section of a request for payment for services rendered to the participant; and

(2) The certified statement of the treasurer or his designee that the payment was made.”

In both cases, the state argued that the computerized records (all of us are familiar with them) were sufficient; therefore, the certified statement was not necessary. The court pointed out that the records are just numbers and there must be also be the statement that the payments were paid [for services to the participant].”

Another holding in the cases reinforced the familiar precept that the burden is upon the claimants (the State, in these cases) to prove their claims—not the personal representative being required to disprove them—in claims hearings.

In Strayer, the computerized record misspelled the lady participant’s name. Although a social security number was on the records, the state failed to prove that the social security number was that of the lady.

Our thanks to Reg Turnbull, for the foregoing.

LEGISLATION: In Case You Missed Reg’s posts to the Listserv, here they are (*with his kind permission*).

I think that the session that ended was good for lawyers practicing probate and trust law! All of the sections endorsed by the Missouri Bar Board of Governors at the behest of the Probate and Trust Committee overwhelmingly passed. Of course, none seemed to be controversial or required additional state spending.

The bills are not considered enacted until signed by the Governor. He has 45 days after the session technically ends on May 30—i.e., July 15—to sign the bills, veto them, or permit them to become law without his signature. I’ll send out another message upon hearing that the Governor has signed any of the bills below.

It was challenging to our Bar lobbyist, Catherine Barrie, and our Bar and Committee leadership because all of the bills endorsed by The Bar became vehicles for other sections (arguably unrelated) added by legislators at the behest of various constituencies. It became difficult to deal with the “add-ons” because none of the original bills made it through intact without other sections added. Scope issues might be raised in court about some bills covering more than one subject or having subjects changed from the way originally introduced. Catherine skillfully brought to our various committees the provisions for us to give feedback and enlist legislators to moderate the changes as acceptable or not.

I will refer to bills below with abbreviations thusly “SB 59,” for example, after giving their complete designations including various substitutes.

The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (“UAGPPJA”) was “Truly Enacted and Finally Passed” three times—first, in the Conference Committee Substitute for House Committee Substitute for Senate Committee Substitute for Senate Bill 59 (“SB 59”); second, in the House Committee Substitute for Senate Committee Substitute for Senate Bill 213 (“SB 213”); and Senate Substitute # 2 for Senate Committee Substitute for House Committee Substitute for House Bill 111 (“HB 111”).

Although I have not analyzed the three versions line by line, I believe that they are identical as to the UAGPPJA provisions. All three have sections other than the UAGPPJA in them. SB 59 has the Bar-endorsed provisions originally introduced in SB 59 and SB 60.

Professor David English says that Missouri is the thirtieth (30th) state to enact the UAGPPJA (we may have been the first to have passed it in three different bills in the same session!), and that Kansas is the only state of the eight surrounding Missouri which has not yet passed it. As you are no doubt aware, for the UAGPPJA to work properly on jurisdictional issues arising in a particular case both states involved should have passed it.

Section 475.115 to enable Public Administrators to transfer a case to a Public Administrator where a ward has moved or been placed was also “Truly Agreed to and Finally Passed” in three different bills—the same SB 59 and HB 111 as well as House Committee Substitute for Senate Committee Substitute for Senate Bill 57. As with the UAGPPJA, all three bills have sections other than the public administrator transfer provision in them.

In addition to including both the UAGPPJA and the Public Administrator transfer provisions, SB 59 contains all of the other sections recommended by the Probate and Trust Committee. It would expand the powers required to be specifically referenced in DPOA’s in Section 404.710; modify the UTC to have consents of representatives bind beneficiaries in section 404.3.301; allow decanting from one trust to another in Section 456.4-419; limit claimants ability to reach holders of testamentary powers of appt in Section 404.5.505; limit creditors ability to reach holders of special and general testamentary powers of appointment in 404.5.508; double the notice

period in section 456.8-813 from 60 to 120 days; and modifies certain provisions of the Uniform Principal and Income Act sections 469.411, 469.437, and 469.459. Finally, it added a provision about how tenancy by the entireties property is to be held in a trust (this latter provision may take some thinking through and was added late in the session at the insistence of some legislators—fortunately P & T Committee members Scott Boulton and Cliff Brown came up with language we could live with).

NOTE: The new section on decanting from one Trust to another one will be very useful not only for special needs planning but also for situations wherein the part of the trust would otherwise continue for the benefit of children under certain ages such as 25 or 30. A simpler trust could have the sub-trust share or later distribution to occur when the beneficiary is older decanted into it.

SCS/SB 70 passed to revise the provisions establishing the Missouri Family Trust and its Board of Trustees, a non-profit quasi-governmental organization established for the purpose of pooling and administering special needs trust accounts. It clarified how the accounts can be used in first-party (requiring payback) and third-party (without payback) to be more consistent with state and Federal law.

House Committee Substitute for SB 60 did not pass although the Missouri Bar provisions were taken from it and put in SB 59.

Next year we will likely have more bills to have considered by the legislature, for example (A) a family consent default medical decision making bill for incapacitated persons without guardians or DPOA agents and (B) a bill adding a section to the UTC clarifying the use of trust protectors.

I expect that next year will be a bit different because it is an election year and because of the experience gained by the high number of first-termers in this session.

Participate in committee activities. We need you as we seek to make a difference for our clients!

Again, our thanks to Reg Turnbull for the foregoing.