THE MASSNAELA ADVOCATE

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From the President

As we find out ourselves in the midst of a technological revolution, the challenge transcends simply accessing technology to recognizing how these revolutionary changes intersect with the law. While social media has redefined the term interconnected, there are many estate planning considerations which few consider. Who will have access to my digital assets post death? Where are my digital assets retained? Are my terms of service governed by contract law? Are there state laws which vary from Federal Law? The answers to many of these questions continue to evolve as does the underlying technology. As a result, proper estate planning should incorporate your digital assets.

Similarly how can we employ technology to better assist the senior and disabled populations? Although an assisted living resident may not be reaching for a tablet or phone to play Fortnite, are there other ways in which digital media can enhance the quality of one's life? From a practitioner's perspective, is video-conferencing an alternative for disabled client's with limited mobility? Oftentimes the benefit of technology seems geared towards the provider as opposed to the end user. The degree in which technology becomes user friendly tends to decline with age, at least historically. However, that divide is changing.

For seniors residing in longer care facilities, social isolation can often lead to other detrimental health effects. However, with the advent of virtual reality, many seniors with declining cognitive abilities and memory impairments can now benefit from shared experiences. The ability to recollect and see the world without boarding a plane can be a powerful and meaningful enhancement. It's an exciting time in Elder Law to be part of the conduit in bridging the gap between innovative technology and the disabled persons who stand to benefit.

Matthew Albanese,
President, MassNAELA

Featured Article: Estate Planning - Protecting Your Digital Assets

By Angelina P. Stafford, Esq., Doherty, Wallace, Pillsbury and Murphy, P.C.

When taking inventory of property, most people focus on the tangible, material items they own, such as their house, car, clothing, jewelry, and photographs. Property, however, is not limited solely to these types of possessions. As people have become more reliant on technology, more aspects of their personal lives are being shared online. For example, it is just as easy to post vacation photos to Facebook as it is to print copies, and to tweet the latest personal updates rather than calling family and friends. Likewise, it is more convenient to finish Christmas shopping on Amazon, instead of braving the local mall during the busy holiday season.

All of this electronic information makes up a person's "digital assets" and, just like material belongings, people accumulate various digital assets during their lives. Digital assets include, for example, blog posts; social media accounts (like Facebook, Twitter, LinkedIn, Tumblr); email accounts; photos, videos, and communications shared or stored electronically; and financial accounts (such as PayPal or Amazon).

It is simple enough to share and store information electronically, but accessing these digital assets after incapacity or death becomes much more difficult. Although the personal representative of an estate is charged with collecting and administering a deceased person's assets, at this time Massachusetts laws are unclear as to the scope of a personal representative power to access a decedent's online accounts. In fact, only a handful of states have enacted statutes authorizing fiduciaries to access a decedent's electronic information and to terminate online accounts.

In many cases—in part because fiduciaries lack authority to access digital assets—the service-provider agreement (which the user agreed to when creating the account or sharing the information) controls who is authorized to access online accounts and, ultimately, what happens to them. For a variety of reasons, including privacy laws, some service-provider agreements are stringent and provide only for the termination of the account upon verification of the user's death. Yahoo!, for example, will remove a deceased user's account after receiving verification of death, but explicitly refuses to provide access to the accounts. Because access to the user's accounts are not allowed, it would be difficult to retrieve and save information, including photographs, video, letters, or other posts, which will eventually be deleted when the account is removed by the service provider.

On the other hand, some service providers have developed mechanisms that enable a deceased user's family to keep the account active or to retrieve information from the user's online accounts. In 2013, Google began to offer a solution called the "inactive account manager," which allows a user to elect what would happen to their data once the account has been inactive for a designated period of time, by either having all data deleted or sending it to a nominated individual. Most recently, in February 2015, Facebook added a feature that allows users to designate a "legacy contact" who can manage the user's account after they pass away. Once notified that the user has died Facebook will memorialize the account, and the legacy contact will be able to post on the timeline, respond to new friend requests, and update the user's profile photo. Like Google's inactive account manager, Facebook users may even give the legacy contact permission to download an archive of the photos and posts they shared on Facebook.

Massachusetts courts have recently tackled the issue of "digital assets" in the context of an estate's administration. Specifically, in Ajemian v. Yahoo, 478 Mass. 169 (2017), the personal representatives sought access to a decedent's email account. Yahoo! declined to provide access claiming, among other things, that it was prohibited from granting access by the Stored Communications Act ("SCA") and the terms of service agreement associated with the account. The probate court, on summary judgment, concluded that the "estate had a common-law property interest in the contents of the account" but declined to decide whether the terms of service agreement limited the property interest of the decedent and, thus, the personal representatives' right to access the account. Ajemian v. Yahoo, 478 Mass. at 173.

In its decision, our Supreme Judicial Court accepted the tenet that digital assets, including e-mail accounts, are property of the decedent's estate that may be accessed by a personal representative. In fact, the SJC noted that prohibiting the personal representatives from providing consent to access the accounts would "curtail the ability of personal representatives" to perform their duties under state probate and common law, and "would result in a class of digital assets . . . that could not be marshalled." More importantly, the SJC recognized that e-mail accounts often contain billing and other financial information that is essential to an estate's administration, and the inability to access those accounts could interfere with management of the decedent's estate. In so holding, the SJC determined that the SCA could not serve as a barrier for internet service providers, like Yahoo!, to deny access to a validly appointed personal representative. What our courts have not squarely addressed, and what remains to be decided, is whether the internet service provider's "terms of service agreement" could serve as an enforceable contract that allows the service provider to deny access to the contents of the account, and even to destroy them.

The inability to access digital assets may result in a significant loss—particularly when these assets, if they had existed in physical form, could have been collected by the fiduciary and used for administration or easily distributed to family and friends. Unless someone is able to access these accounts directly, and until Massachusetts establishes a law that gives fiduciaries the power to access digital assets, the disposition of digital assets is based primarily on the service-provider agreement.

It is important to begin a discussion with your clients about the types of digital accounts and digital assets that they own to ensure that they are being properly considered in the context of their estate plans, and the administration of their estates. If needed, review the terms and conditions of each service provider the client has an account with (particularly for more valuable digital assets) to preemptively consider barriers to access that the agreement may present once the client no longer has the ability to directly access the account. Clients should also consider creating an inventory that that includes account information, passwords, instructions about how to access the accounts, and instructions offering guidance about how these accounts should be handled on their behalves (for example, the client may want to keep the account active for family and friends to visit, or to have the account deleted). Providing a means of entry into the account, coupled with appropriate authority in the client's will and/or power of attorney, should allow the chosen fiduciary to act on the client's behalf without the need to involve the internet service provider (which will be, at best, reluctant to grant access).

Angelina P. Stafford *is an attorney at the Springfield-based law firm of Doherty, Wallace, Pillsbury and Murphy, P.C. She is admitted to the bar in Massachusetts and Connecticut, and her practice encompasses all areas of estate and long-term care planning, estate and trust administration, and probate litigation.*

NAELA Notes

Hearing Aids May Help Delay Dementia, Depression in Elders - For older adults, hearing aids may delay some forms of mental and physical decline associated with hearing loss and aging, a U.S. study suggests. Among people who'd been diagnosed with hearing loss, those who used hearing aids were up to 18 percent less likely to be diagnosed with dementia, depression, or fall-related injuries over the next three years compared to people not using the devices researchers report in the Journal of the American Geriatrics Society. CLICK HERE for the full article.

Medicare Fraudsters Now Tap Telemedicine in Medical Equipment Scams - While prescriptions for durable medical equipment, such as orthotic braces or wheelchairs, have long been a staple of Medicare fraud schemes, the manipulation of telemedicine is relatively new. The practice appears to be increasing as the telemedicine industry grows.

Typically, scammers use sham telemedicine companies to scale up their operations quickly and cheaply — they can have a couple of doctors remotely writing a large number of prescriptions. CLICK HERE for the full article.

Social Security COLA for 2020 is 1.6% - Social Security and Supplemental Security Income (SSI) benefits for nearly 69 million Americans will increase 1.6 percent in 2020. The earnings limit for workers who are younger than "full" retirement age (age 66 for people born in 1943 through 1954) will increase to $18,240. The earnings limit for people turning 66 in 2020 will increase to $48,600. There is no limit on earnings for workers who are "full" retirement age or older for the entire year. Read more about the COLA, tax, benefit, and earning amounts for 2020 (pdf file). CLICK HERE for the SSA Press Release.

Google Partners With Major U.S. Health System, Gaining Access to Vast Patient Data in the Process - Google has quietly launched a project with one of the nation's largest nonprofit health systems in which it has gained access to millions of patient records, including names and birth dates, to help deliver more targeted medical treatment. CLICK HERE for the full article.

New Video Series Teaches Veterans How to File Disability Claims Online - The Department of Veterans Affairs is transforming the way veterans learn about and apply for compensation benefits through a new video tutorial highlighting the digital Disability Compensation Benefits Claims tool released earlier this year. CLICK HERE for the VA Press Release.

Legislative Update

Each legislative session which lasts two calendar years (2019-2020), MassNAELA advocates for legislation that will help our elderly clients, clients with special needs, and their families here in Massachusetts. To learn more and for links to the text of the bills please visit the Advocacy Initiatives page on our website at: https://massnaela.com/about-massnaela/advocacy-initiatives/. To see the most recent report regarding our legislation CLICK HERE.

Featured Court Decision

James M. Ryan, Executor v. Mary Ann Morse Healthcare Corp.

At issue in this case is the extent to which Massachusetts assisted living residences (ALRs) are subject to the strictures of the security deposit statute, G. L. c. 186, § 15B. The defendant operates an ALR in Framingham that charges new residents an upfront "community fee," in addition to the first month's rent and the last month's rent permitted by G. L. c. 186, § 15B. The community fee was intended to cover upfront administrative costs, an initial service coordination plan, move-in assistance, and a replacement reserve for building improvements. The plaintiff alleges that the community fee violates G. L. c. 186, § 15B, as it exceeded the upfront costs allowed by the security deposit statute. The defendant moved to dismiss the suit, arguing that ALRs are not subject to G. L. c. 186, § 15B. The motion to dismiss was granted, and the plaintiff appealed.

We conclude that G. L. c. 19D, the ALR statute, incorporates applicable consumer protection laws, including G. L. c. 186, § 15B, but allows for additional upfront charges for the distinctive services assisted living facilities provide that are not applicable to traditional landlord-tenant relationships. Indeed, the ALR statute and corresponding regulations expressly provide for the payment of particular fees related to initial assessments of residents to determine their

suitability for placement in an assisted living facility. Such services and fees have no applicability to the traditional landlord-tenant relationship, and are thus not subject to the security deposit law. Accordingly, ALRs may institute upfront charges beyond those permitted by G. L. c. 186, § 15B (1) (b), to the extent that such charges correspond to the distinct services enumerated in G. L. c. 19D, § 13, or to other services designed specifically for assisted living residences. If, however, an ALR charges upfront fees that are not used to fund such distinct assisted living services, it does so in violation of § 15B.

In the instant case, further factual development is required to determine whether the fee at issue was permissibly charged and used for services distinct to ALRs, and thus the motion to dismiss was not properly allowed. One or more components of the defendant's community fee appear to have been charged for initial assessments mandated by the ALR statute. Such a service and fee would be specific to assisted living facilities and not governed by the security deposit statute. However, further clarification and factual development as to the purpose and use of other components of the community fee is required, particularly for the replacement reserve fee for building improvements. We cannot discern on this record whether each component of the community fee was imposed and used for services distinct to assisted living facilities but inapplicable to the traditional landlord-tenant relationship. We therefore reverse the decision allowing the motion to dismiss and remand the case to the Superior Court for further proceedings consistent with our decision.

Summary provided in decision.

Featured Board of Hearings Decision

APPROVAL ON LIMITED POWER OF APPOINTMENT TO CHARITIES, TRUSTEE COMPENSATION, AND USING TRUST PRINCIPAL TO PURCHASE LIFE INSURANCE

Board of Hearings Appeal #1941766

- MassHealth argued that the Donor's limited power of appointment to charitable organizations allows the Donor to appoint principal to a charitable nursing facility for payment of her long-term-care services. The Hearing Officer held that "once distributed to the organization, it is by no means certain that funds distributed would be used specifically for appellant's care. Accordingly, MassHealth's argument on this point falls short."
- MassHealth argued that the Donor could appoint herself as Trustee and use all of the trust principal to pay herself compensation. The Hearing Officer held that "this trust does limit the appellant's access to trust principal; it limits trustee compensation to a reasonable amount….MassHealth's determination that all trust principal is accessible to appellant is not supported by the facts or relevant case law."
- MassHealth argued that the Trustee's power to use trust principal to purchase life insurance, annuities, and other forms of life insurance for the benefit of appellant is a circumstance that makes trust principal available to her. The Hearing Officer held that the trust language goes permit the trustee to "purchase annuities or life insurance policies 'for the benefit of any beneficiary'(emphasis added)." However, "the trust instrument must be construed as a whole. Considered as a whole, this trust does not contain other explicit or implicit indications that evidence an expectation or intent that the trustee will invade trust assets when necessary to ensure appellant's comfort or well-being…Upon review of all of the trust terms, there is no evidence that the trust was structured to provide appellant or the trustees with any flexibility to respond to appellant's need by invading trust principal…Given the express statement in the trust that the trustee shall have no power to make any distributions to or for the benefit of appellant, MassHealth's argument that appellant has access to trust principal under this provision falls short."

Contributed and Summarized by: F. Tenney Lantz, Esq., https://www.lantzlawinc.com/

Note from the Chapter Director

At the end of each year it is nice to look back and see what you have been able to accomplish, but it is also the time to look forward and prepare for the upcoming year. As my first year as your Chapter Director wraps up I would like to thank all of you for making this a great year. We held several successful programs, members worked together to receive favorable fair hearing decisions, and we moved our legislative agenda forward. Without your hard work much of this would not have happened. However, as I'm sure all of you know our work is never done! In preparation for the upcoming year I would like to share some of the things that we will be working on and ask for your help if you are interested in any of these projects.

One thing that the MassNAELA Board will be working on is the creation of a strategic plan. If you are interested in being part of this process or have any thoughts regarding this topic, please let me know. The board will be holding their strategic planning kickoff meeting on Friday, January 24, 2020, so please reach out to me before then if you would like to participate in this process.

On the legislative side of things, we have seen several of our bills start moving through the legislative process. The most notable is the Pooled Trust bill for individuals over 65. Several MassNAELA members met with legislators recently regarding this bill, so keep an eye out for any upcoming calls to action. Another bill that has gained some traction is the Community Care Bill. Our lobbyist Nomita Ganguly is looking for story and cases to present to the legislators, so please see her report (link above) and reach out to her if you can help.

Although there are many other projects that will come up throughout the year the final issue that I will address here is Estate Recovery. A group of MassNAELA members is already hard at work on this topic, because the tactics of the Estate Recovery Unit are becoming more and more extreme. If you have any stories that you would like to share or if you want to become involved with this group please let me know!

As always please reach out to me at Clarence@MassNAELA.com if you have any questions about becoming more involved! Wishing everyone a safe and happy holiday season!

- Clarence Darrow Richardson, Jr.

Save the Dates

Please save the dates for our Chapter dinner meetings and other events coming in 2020:

Wednesday, January 29, 2020:	Dinner Meeting Schedule – Estate Recovery
Friday, March 6, 2020:	**Elder Law Institute** – The Physical, Social and Legal Challenges of Assisting Younger Clients Needing Complex Care in Massachusetts
Thursday, June 4, 2020:	Dinner Meeting Schedule
Thursday, September 17, 2020:	Dinner Meeting Schedule
Friday, October 16, 2020:	Daytime program, with a focus on Special Needs
Wednesday, December 2, 2020:	Dinner meeting schedule and Vendor Fair

Upcoming Conference Calls (For call in information contact Clarence)

Program Committee:	January 15, 2020 at 12pm (Third Wednesday)
Publications and Website Committee:	TBD (Third Monday at 3pm)
Membership Committee:	January 14, 2020 at 9am (Second Tuesday)
Due Process Workgroup	TBD (First Wednesday at 4pm)
Special Needs:	TBD (Normally Friday at 12pm)

PLEASE SEND YOUR NEWSLETTER CONTRIBUTIONS TO: CLARENCE D. RICHARDSON, JR.

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