

MSBA ELDER LAW SECTION E-NEWSLETTER

SEPTEMBER 30, 2008

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REGISTER NOW FOR THE ELDER LAW INSTITUTE

The 18th Annual Elder Law Institute is being presented this week, on Thursday and Friday, October 2nd and 3rd, at the Minnesota CLE Conference Center, Third Floor, Seventh & Nicollet Mall, Minneapolis. Programs include:

- Update on the Supreme Court decision in the *Barg* case
- The latest on Transfer on Death Deeds
- Practice pointers for effectively representing clients in fair hearings
- Remedies for clients who have been financial exploited
- Recovery of medical assistance benefits
- Dealing with parties and clients with diminished capacity
- Understanding Long-term Care Partnership Program issues
- Consumer protection for clients in Assisted Living facilities
- Law and bases of liability under nursing home admission agreements
- The dos and don'ts of Special Needs Trust administration
- And MORE . . . including additional sessions, lunch, prizes, and networking
- PLUS . . . 10.5 CLE credits applied for, including 1.0 ethics credit

There is still time to register for this valuable presentation, co-sponsored by Minnesota CLE and the MSBA Elder Law Section. For information and registration, call 651-227-8266 or 800-759-8840, or go to: www.minncle.org.

THOUGHTS FROM THE CHAIR: Age Discrimination at the “Pool”?

For 15 years, we have established Pooled Special Needs Trusts for individuals over the age of 65. This made sense because the federal law authorizing Pooled Trusts has no age limit. 42 U.S.C. § 1396p(d)(4)(c). If it is valid to create a Pooled Trust for someone over the age of 65, it would be sensible to conclude that the person would also be allowed to fund such a trust. That sensible conclusion has been the reality for many years.

Recently, however, the Centers for Medicare and Medicaid Services (CMS) has served notice on the States that a transfer into a Pooled Special Needs Trust by a person aged 65

or older must be treated as a transfer for less than fair market value subject to the asset transfer analysis.

The problem stems from the undeniable fact that the exceptions to the imposition of a period of ineligibility include transfers to a trust for the benefit of a person with a disability who is under the age of 65. *See*, 42 U.S.C. § 1396p(c)(2)(B)(iv). At first blush this seems like an all too logical conclusion; the exception is only for a person with a disability who is under 65. But this narrow focus on one statutory provision ignores the long-standing practice in most states, including Minnesota, of allowing both the establishment of a Pooled Trust account and the placement of funds into a Pooled Trust account to make it worthwhile. It is only logical that if a 65-year-old can create an account, they should also be able to fund it. This change also ignores the strong argument that a transfer to a Pooled Trust account, which must be used for the sole benefit of the beneficiary, is a transfer for value that should not be subject to a period of ineligibility.

A HealthQuest answer from the Department of Human Services (DHS) in July states that transfers into a Pooled Special Needs Trust by someone 65 or older should be subject to a period of ineligibility. This follows hard on the heels of a memo from the Chicago Regional office of CMS stating the same thing. Official DHS policy has not changed, and Pooled Trusts for people over age 65 still appear to be working. But use caution. The State, for such a long-standing practice, should only make the policy change through the rule-making or legislative process; but be warned that DHS has a long history of dictating policy without process, resulting in ragged and inconsistent implementation by the counties. Of course, if and when this policy is implemented, the lack of process itself should be grounds for a challenge.

We will use this newsletter to keep you informed about developments with this issue. Please tell me about your Pooled Trust experiences.

Jeffrey W. Schmidt
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INPUT SOUGHT FOR ELDER CARE GUIDE

Ken LaBore, a partner with the law firm of Pearson, Randall, Schumacher & LaBore, P.A., and associate Suzy Scheller, announce the spearheading of a long-term “Elder Care Guide” project to assist in protecting Minnesota's vulnerable adults. The project is an outgrowth of Ken's experiences handling prior claims of abuse and neglect at care facilities, where he observed the risks that vulnerable adults experience in many care facilities. Because the governing law and representations by various facilities regarding the services they provide is confusing, the project will provide the basis for clarification of existing law and practices, as well as recommendations regarding needed change.

A detailed overview of Ken and Suzy's project appears below under "Special Elder Law Project: Elder Care Guide." Thank you to Ken and Suzy for undertaking this ambitious and important project.

ELDER LAW NEWS

A bipartisan spirit marked a forum in St. Cloud where the candidates for four area legislative seats agreed that today's health care system is inadequate for meeting tomorrow's needs.

<http://www.sctimes.com/apps/pbcs.dll/article?AID=/20080924/NEWS01/109230049/1009>

AARP reports that biotechnology drug costs in the U.S. rose 8.7 percent.

<http://www.bloomberg.com/apps/news?pid=20601103&sid=aUyyxhX3D3p4&refer=us>

Minnesota visiting nurse agency announces public flu shot clinics.

<http://www.marketwatch.com/news/story/minnesota-visiting-nurse-agency-announces/story.aspx?guid=%7B16BA1656-F65B-4D40-B4D8-83F04447C239%7D&dist=hppr>

St. Benedict's Senior Community in St. Cloud is hosting an open house to celebrate the renovation of portions of the existing care center and the opening of the new addition from 6 p.m. to 8 p.m. on Thursday, October 2.

http://millelacscountytimes.com/index.php?option=com_content&task=view&id=995&Itemid=1

Duluth health system's decision to drop 'Advantage' private fee-for-service plans shows need for program overhaul.

<http://www.businessnorth.com/exclusives.asp?RID=2678>

Forty-four percent of Minnesota grandparents take care of their grandchildren.

http://www.twincities.com/ci_10533637?source=most_viewed

The legal battle over trust funds for pets continues.

http://www.newyorker.com/reporting/2008/09/29/080929fa_fact_toobin

UPCOMING EVENTS AND CLE PROGRAMS

The New Transfer on Death Deed (TODD) Legislation

Presented by Julian Zweber and Minnesota CLE Faculty

Tuesday, October 14, 2008 - 9:00 a.m. - 12:15 p.m.

Minnesota CLE Conference Center, 3rd floor City Center, Minneapolis

Application has been made for 3.0 CLE credits or 3.0 Advanced Real Estate

Specialist credits

More information and online registration is available at:

<http://www.minncle.org/AABuy1.asp?ITEMTYPE=S&ITEMNMBR=101850901&ArticleID=> or call 800-759-8840.

8th Annual National Aging and Law Conference - Setting the Agenda: Advocating for Elders After the Election

Sponsored by the AARP Foundation, the American Bar Association Commission on Law and Aging, National Senior Citizens Law Center, The Center for Social Gerontology, Center for Medicare Advocacy, Inc., NAELA, National Consumer Law Center, and the National Association of State Units on Aging

Wednesday through Saturday, December 3-6, 2008

Doubletree Hotel, Arlington, Virginia

More information and registration is available at: www.aarp.org/nltp

ELDER LAW SECTION ACTIVITIES

GOVERNING COUNCIL MEETING. The next meeting of the Elder Law Section Governing Council will be at 3:30 p.m. on Friday, October 10, 2008, at the MAO offices, 2021 E. Hennepin, Suite 200, Minneapolis. All members are welcome to attend. To participate by phone, contact Karla Nelson with Schmitz & Schmidt, P.A., at 651-291-2405.

MEDICAL ASSISTANCE COMMITTEE MEETING. The next Medical Assistance Committee meeting will be at 3:30 p.m. on Tuesday, October 21, 2008, at the MAO offices, 2021 E. Hennepin, Suite 200, Minneapolis. If there are specific MA topics you would like to discuss at the meeting, please email Chair Cathryn Reher at creher@mnelderlaw.com or fax materials to 952-542-9201. For directions, or to attend by phone, please contact Tracie Fenske with Long, Reher & Hanson, P.A. at 952-929-0622.

LEGISLATIVE COMMITTEE MEETING. The next Legislative Committee meeting will be at noon on Wednesday, November 19, 2008, at the offices of Garvey and Boggio, P.A., 9995 Lyndale Avenue South, Bloomington. Section members are welcome to attend. Please RSVP by November 18, 2008, to Peter Hendricks at 952-881-4996 or phendricks@gblawoffice.com.

SPECIAL ELDER CARE PROJECT: ELDER CARE GUIDE

Overview Submitted by Ken LaBore and Suzy Scheller

A preliminary description of the Elder Care Guide project being undertaken by Ken LaBore and Suzy Scheller includes identifying the current types of care-giving facilities and services and reporting on their corresponding features such as governing law, licensure and eligibility requirements, and governmental oversight, if any. It is intended that the final product benefit multiple parties, including: (1) those seeking to

find the appropriate level of care while preserving maximum autonomy; (2) those seeking to uphold eligibility requirements; (3) those seeking to enforce standards of care; and (3) those seeking to find redress for injuries sustained as a result of not meeting standards of care.

Goals of the project are to:

- Provide a comprehensive guide to Elder Care facilities and services for the benefit of elders and their loved ones seeking appropriate care by identifying and clarifying governing law, types of services provided, and eligibility and payment issues
- Connect the common name for care facilities with the name used by licensing departments or governing bodies
- Clarify existing confusion regarding which Minnesota Departments issue particular licenses or registrations for certain facilities and the corresponding oversight they provide
- Inform the Elder Care legal community regarding legal recourse for aggrieved parties
- Identify potential loopholes in the current law that do not allow for maximum protection for the recipient of care, which could be used in future reform efforts

Tasks intended to be completed by the project include identification of:

- Type of facility or care provided and the corresponding Minnesota Department granting licensure, registration, or oversight to the facility
- Corresponding Minnesota Statutes and Administrative Rules governing the services provided by the facility or care provider
- Services provided and those that are not provided by the facility
- Legal loopholes in the current structure of licensure or care

Ken and Suzy seek input from the Elder Law community on what pieces of information would be most helpful to include in the project as well as the sharing of data already gathered that could be useful in completing the information. An early draft of the project will be presented at the upcoming Elder Law Governing Council meeting on October 10, 2008. Please send comments and suggestions to Ken LaBore klabore@prslegal.com (612.767.7503) or Suzy Scheller at sscheller@prslegal.com (612.767.7508).

MEMBERS IN THE NEWS

Section member John H. Kaul has been named General Counsel of WayPoint, Inc., an investigative and consulting firm of retired FBI, IRS, and other federal and local investigators specializing in fraud and abuse investigations. Company employees have conducted probate and conservatorship investigations and have served as Special Masters. More information is available at www.waypointinc.com

MINNESOTA CASES

Beck v. Sunrise Senior Living Mgmt., 2008 WL 3412096, 2008 U.S. Dist. LEXIS 61252 (D.Minn. 2008)

The wife and attorney-in-fact of an assisted living resident sued the assisted living for negligence, consumer fraud, and deceptive acts against senior citizens and disabled persons. Despite language in Minn.Stat. 325F.71 stating that there are private remedies for senior citizens and disabled persons (see below), the court found that there was no private right of action under the consumer statutes for the plaintiff, but only under the Minnesota private attorney general statute. This plaintiff did not qualify under that statute because she sought only individual relief for individual harm.

Minn. Stat. 325F.71, Subd. 4. Private remedies. A person injured by a violation of this section may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney's fees, and receive other equitable relief as determined by the court.

STATUTES, REGULATIONS, BULLETINS

DHS BULLETIN #80-25-07: DHS ISSUES MONTHLY SERVICE CASE MIX CAPS FOR ALTERNATIVE CARE AND ELDERLY WAIVER PROGRAMS.

The purpose of this bulletin is to notify interested parties of individual client monthly service caps and changes effective October 1, 2008. Limits for the AC and EW programs included in the bulletin include: AC/EW monthly individual service caps increase; MMIS service agreement COLA processing instructions; Customized Living Services, 24-hour Customized Living Services, Adult Foster Care, and Residential Care service limits for EW; AC/EW Consumer-Directed Community Support budgets. The complete bulletin, dated September 26, 2008, is available at:

http://www.dhs.state.mn.us/main/groups/publications/documents/pub/dhs16_142555.pdf

DON'T FORGET THAT THE ELDER LAW WEBSITE IS A GREAT RESOURCE. Here's what you can find on the Website: Links under "What's New" to the DHS Health Care Programs Manual, the updated Income and Asset Eligibility Figures for Minnesota Health Care Programs, the DHS Bulletin on treatment of uncompensated transfers, the Minnesota Bankers Association Compliance Bulletin on Powers of Attorney, and a legislative summary; Practice Links to organizations such as NAELA, ABA Commission on Law and Aging, Minnesota Senior Federation; Links to Federal and State Government Agencies, Statutes, and Regulations; Meeting Notices, Listings of Officers and Council Members, Section Bylaws, and more.

To access the ELDER LAW SECTION WEBSITE

Click here: <http://www2.mnbar.org/sections/elder-law/index.asp>

Please send eNewsletter contributions by noon on Saturday of each week to Vicki McIntyre at vmcintyre2@yahoo.com.

If you do not wish to receive this eNewsletter, send your request to be removed from the mailing list to Kim Basting at kbasting@statebar.gen.mn.us