

# **MSBA ELDER LAW SECTION E-NEWSLETTER**

**November 3, 2009**

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## **WHAT'S NEW IN THE ELDER LAW SECTION?**

### **Unauthorized Practice of Law Update**

On several occasions this year, members of the Elder Law Section have reported activities of local organizations that appear to constitute the unauthorized practice of law. Most recently, several members reported a company that holds seminars in Minnesota for the purpose of “walking through” pre-printed wills, living wills, and durable powers of attorney with seminar registrants, who pay a fee for the service. The company sells this service to churches, schools, and other organizations as a “fundraiser,” with a percentage of the seminar proceeds going to the organizing group, in return for inviting its members to register and pay for the seminars. No attorneys appear to be involved in the process.

While the elder law section governing council is interested in hearing about such cases, neither the section nor the MSBA currently has a process in place to report or legally pursue suspected cases of the unauthorized practice of law.

### **Ohio Case - Companies/Individuals Convicted of Unauthorized Practice of Law**

Tom O’Connell recently submitted a posting of an Ohio case involving the unauthorized practice of law, which is of special interest to elder law attorneys:

*Court Fines 2 Cos. \$6.4M for Unauthorized Law Practice, Bans Them From State Posted Oct 14, 2009 By [Martha Neil ABA Journal](#)*

*The Ohio Supreme Court has fined two "trust mill" companies \$6.4 million for the unauthorized practice of law and banned them from doing business in the state. Its ruling this morning imposed \$6,387,990 in penalties against American Family Prepaid Legal Corporation; Heritage Marketing and Insurance Services Inc.; and co-owners Jeffrey and Stanley Norman, according to the [Associated Press](#) and the [Columbus Dispatch](#). The case, which was pursued by the Columbus Bar Association, concerned telemarketing and in-person sales calls that persuaded elderly residents of the state to obtain \$1,995 living trusts instead of preparing wills. Although the payment purportedly included an array of legal services, the court says in its written opinion, "almost exclusively ... the only legal service that the plan members received was the preparation of a living-trust document and related estate-planning instruments such as powers of attorney and a living will."*

It is interesting to note that the Ohio case was pursued by the Columbus Bar Association. While the MSBA does not currently offer a process for reporting or pursuing suspected instances of the unauthorized practice of law, we've inquired about the possibility of creating an internal process to report and/or pursue legal action against offending companies. We'll keep you posted on any new developments on this issue. For the present, individuals should continue to report suspected cases of the unauthorized practice of law to the state Attorney General's office.

Have a great week!

Vicki McIntyre

Chair, Elder Law Section Governing Council

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**[ELDER LAW NEWS](#)**

**[Medicaid: The OTHER Public Option](#)**

<http://swampland.blogs.time.com/2009/10/29/medicaid-the-other-public-option/>

In Medicaid Fraud Cases, Some Unlikely Suspects

[http://www.nytimes.com/2009/10/30/nyregion/30scam.html?\\_r=1](http://www.nytimes.com/2009/10/30/nyregion/30scam.html?_r=1)

Health care reform: not just a national issue

<http://www.tcdailyplanet.net/news/2009/10/28/health-care-reform-not-just-national-issue>

Consider effort of caregivers

<http://www.ifalldailyjournal.com/news/letters-editor/consider-effort-caregivers-110>

Average Cost of Nursing Home Inches Closer to \$80,000 a Year

<http://www.elderlawanswers.com/resources/article.asp?id=7921&Section=4&state=>

Fighting health care fraud a difficult battle

<http://minnesota.publicradio.org/display/web/2009/10/23/medicare-medicaid-fraud/>

### **MINNESOTA CASES**

*The Minnesota Court of Appeals released the following unpublished decision on October 27, 2009.*

**A09-654**

*John M. Sell, Respondent, vs. Donald K. Sell, individually and as trustee of the Donald Sell Trust, established pursuant to the Will of Caroline Sell dated November 23, 1964, and as general partner of the Sell Family Limited Partnership, Appellant.*

STONEBURNER, Judge

Appellant trustee was found by the district court to have breached his fiduciary duty to respondent beneficiary of a trust and to have converted trust funds that should have been distributed to respondent. In this appeal, appellant challenges the district court's (1) calculation of respondent's "base damages"; (2) award of reasonable growth of base damages through the date of trial; (3) reopening of the record, requiring production of evidence not produced at trial; and (4) post-trial appointment of an expert witness to determine reasonable growth of base damages and post-trust farm income.

Because the district court failed to define base damages, awarded multiple recovery for some trust assets, and awarded reasonable growth of some damages for which caselaw mandates only simple interest, we reverse the award of damages and remand for a recalculation of damages consistent with this opinion.

By notice of review, respondent challenges the district court's (1) finding that respondent failed to establish that appellant breached his fiduciary duties as general partner in a limited partnership or breached the partnership agreement and (2) denial of respondent's request for attorney fees. Because the record supports the district court's conclusion that respondent failed to prove appellant's breach of fiduciary duties as general partner or breach of the partnership agreement and because there is no authority for an award of attorney fees to respondent, we affirm the district court on these issues.

The opinion is available at:  
[http://www.dhs.state.mn.us/main/groups/publications/documents/pub/dhs16\\_146816.pdf](http://www.dhs.state.mn.us/main/groups/publications/documents/pub/dhs16_146816.pdf).

*Unpublished opinions may not be cited except as provided by Minn. Stat. Section § 480A.08, Subd. 3 (2008).*

## STATUTES, REGULATIONS, BULLETINS

**DHS BULLETIN #09-21-14: MINNESOTACARE FOUR-MONTH RULE WAIVED FOR FORMER MINNESOTA COBRA PREMIUM SUBSIDY ENROLLEES.** The Department of Human Services (DHS) is seeking federal approval to waive the four-month rule for federally funded populations (i.e., parents, relative caretakers, children and pregnant women) who were formerly enrolled in the Minnesota COBRA Premium Subsidy and are seeking MinnesotaCare coverage. Until it is known if Minnesota will receive federal approval for this policy, these individuals, as well as adults without children for whom this exemption also applies, will be enrolled in state-funded MinnesotaCare indefinitely. If federal approval is secured, parents, relative caretakers, children and pregnant women will be transitioned to federally funded MinnesotaCare. For information on the four-month rule see Health Care Programs Manual (HCPM) Section 15.05 – MinnesotaCare Other Health Care Coverage Barriers.

The bulletin, dated October 22, 2009, is available at:

[http://www.dhs.state.mn.us/main/groups/publications/documents/pub/dhs16\\_146816.pdf](http://www.dhs.state.mn.us/main/groups/publications/documents/pub/dhs16_146816.pdf)

## UPCOMING EVENTS AND CLE PROGRAMS

### **Elder Law Institute**

### **Video Replays**

November 12, 2009 – Moorhead

November 13, 2009 – Hibbing

November 13 & 16, 2009 – St. Cloud

November 20, 2009 - Park Rapids

November 17-18, 2009 – Minneapolis

December 4, 2009 – Mankato

January 21-22, 2010 – Duluth

Contact Information: <http://www.minncle.org/SeminarList.aspx> or 1 800-759-8840.

## **Estate Planning in Uncertain Times (including Medical Assistance)**

### **Video Replay**

November 3, 2009 – Minneapolis

November 20, 2009 – Rochester

November 20, 2009 – St. Cloud

November 23, 2009 – Minneapolis

December 1, 2009 – Moorhead

December 10, 2009 – Mankato

December 11, 2009 – Crookston

December 11, 2009 – Park Rapids

February 12, 2010 - Duluth

Contact Information: <http://www.minncle.org/SeminarList.aspx> or 1 800-759-8840.

## **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, December 18, 2009, at the MAO offices, 2021 E. Hennepin, Suite 200, Minneapolis. All members are welcome to attend. To participate by phone, please contact Vicki McIntyre at [vmcintyre2@yahoo.com](mailto:vmcintyre2@yahoo.com) or 612-722-8572.

**MA COMMITTEE MEETING:** The next MA Committee meeting will be at 3:30 p.m. on Tuesday, December 15, 2009, at the MAO Offices, 2021 E. Hennepin, Suite 200, Minneapolis. Topics for the meeting may be submitted to MA Committee Chair, Cathryn Reher, at

[creher@mnelderlaw.com](mailto:creher@mnelderlaw.com), or faxed 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.

**VULNERABLE ADULT COMMITTEE MEETING:** The next meeting of the Vulnerable Adult Committee will be Thursday, January 28, 2010 at Noon, at the offices of Pearson, Randall, Schumacher & LaBore, P.A., 100 S. 5<sup>th</sup> Street, Suite 1025, Minneapolis, 612.767.7500. Contact co-chairs Ken LaBore at [klabore@prslegal.com](mailto:klabore@prslegal.com) or Joel Smith at [joel@koslaw.com](mailto:joel@koslaw.com) for more information.

**GREATER MINNESOTA COMMITTEE:** Please contact Bonita Kallestad at 1-320-235-9600 or [bkallestad@westernlegal.org](mailto:bkallestad@westernlegal.org) with issues you would like the Greater Minnesota Committee to address. Also contact Bonita if you would like to serve on the Greater Minnesota Committee.

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**DON'T FORGET THAT THE ELDER LAW WEBSITE IS A GREAT RESOURCE.**  
Here's what you can find on the Website: Links to the DHS Health Care Programs Manual, the DHS Bulletin on treatment of uncompensated transfers, the Minnesota Bankers Association Compliance Bulletin on Powers of Attorney, legislative summary; Practice Links to organizations such as NAELA, ABA Commission on Law and Aging, 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>.

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Please send E-Newsletter contributions by noon on Saturday of each week to Suzy Scheller at [sscheller@prslegal.com](mailto:sscheller@prslegal.com).

If you do not wish to receive this E-Newsletter, send your request to be removed from the mailing list to Elyse Farnsworth at [efarnsworth@statebar.gen.mn.us](mailto:efarnsworth@statebar.gen.mn.us).

Current and prior E-Newsletters are posted on the website for the MSBA Elder Law Section and are available at: <http://www2.mnbar.org/sections/elder-law/newsletters.asp>.