

MSBA ELDER LAW SECTION E-NEWSLETTER
November 8, 2011

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E-Newsletter Editorial Staff:

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ITEM OF INTEREST

REMINDER: "SUBMIT A PROPOSAL" CONTEST DEADLINE IS NOVEMBER 18TH

Submission Process: Please submit your idea(s) for a one-time or ongoing project or service that should be undertaken by the Elder Law Section this year. The project should benefit section members and/or the community served by section members. Please describe the project or service, how it would work, and what costs would be involved in the implementation and support of the project or service.

Submit proposals to: Vicki McIntyre, Chair-Strategic Planning Committee,
at: vmcintyre2@yahoo.com.

Submission deadline: Friday, November 18th.

Prizes: First prize is a full registration to the 2012 Elder Law Institute. Second and third prizes will be \$25 gift cards. Others may receive an Honorable Mention in the newsletter. Winners will be announced following the December Governing Council meeting.

Submit your ideas now!

Vicki McIntyre
Chair, Elder Law Section Strategic Planning Committee
vmcintyre2@yahoo.com

FREE SERVICES AVAILABLE FROM UPPER MIDWEST PENSION RIGHTS PROJECT

The Upper Midwest Pension Rights Project (UMPRP) provides free services which may be of interest to Elder Law attorneys. The UMPRP will assist Minnesota residents or non-residents with a Minnesota-related pension issue in applying for pension benefits, correcting benefit miscalculations, and receiving spousal and survivor pension benefits. The UMPRP also provides services to assist with "lost pensions," which often occur when a person's former employer moves, merges, changes names, or goes out of business.

All services provided by UMPRP are free and do not have any financial eligibility requirements. For more information, or to refer a client, call toll free at 1-866-783-5021.

Vicki McIntyre
Chair, Elder Law Section Strategic Planning Committee
vmcintyre2@yahoo.com

LINK OF THE WEEK

Compassion & Choices

Compassion & Choices is a nonprofit organization committed to improving care and expanding choices for individuals at the end of their lives. Its team of advocates works to monitor legislative and policy initiatives, set enforceability standards for health care directives, and ultimately shape best-practice standards for end-of-life care.

The organization's website includes documents from its litigation efforts as well as a state-by-state legislation report.

Compassion & Choices's website is located at www.compassionandchoices.org.

Submitted by Laura Orr, Esq.
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ELDER LAW NEWS

St. Paul police up efforts to fight crimes against elderly
<http://www.kare11.com/news/article/945210/391/St-Paul-police-up-efforts-to-fight-crimes-against-elderly>

Opportunities abound with aging population
<http://abcnewspapers.com/2011/11/02/opportunities-abound-with-aging-population/>

Not enough to just talk about long-term care
<http://www.startribune.com/opinion/otherviews/132824578.html>

Health beat: Medicare measures quality in the stars
<http://www.startribune.com/local/133200278.html>

Watchdog: Hoping to swap health plans? Now is the time
http://www.twincities.com/ci_19236182

Minn. Food Shelves Targeting Hungry Seniors
<http://kstp.com/news/stories/S2359873.shtml?cat=1>

62 and older study their interests for \$10 per credit
<http://www.mndaily.com/2011/11/03/62-and-older-study-their-interests-10-credit>

Submitted by Joel Smith, Esq.
joel@koslawfirm.com

ELDER LAW CASES

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2010).

STATE OF MINNESOTA
IN COURT OF APPEALS
A11-561

**In re the Matter of:
Rodney Fimon,
Appellant,**

vs.

**Commissioner of Minnesota Department of Human Services,
Respondent,**

**Mower County Human Services,
Respondent.**

Filed October 24, 2011
Affirmed
Bjorkman, Judge

Mower County District Court
File No. 50-CV-10-2325

Peter D. Plunkett, Plunkett & Associates, Inc., Austin, Minnesota (for appellant)

Lori Swanson, Attorney General, Barry R. Greller, Assistant Attorney General, St. Paul, Minnesota (for respondent Commissioner of Minnesota Department of Human Services)

Kristen Nelsen, Mower County Attorney, Aaron Jones, Assistant County Attorney, Austin, Minnesota (for respondent Mower County Human Services)

Considered and decided by Larkin, Presiding Judge; Bjorkman, Judge; and Collins, Judge.*

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges the district court's decision affirming the decision of the Commissioner of the Minnesota Department of Human Services that appellant is subject to a penalty against his medical-assistance (MA) eligibility for an improper transfer of assets. Appellant argues that (1) the commissioner's decision is not supported by substantial evidence and (2) the district court abused its discretion by refusing to consider additional evidence on appeal from the commissioner's decision. We affirm.

This opinion is available at: <http://www.lawlibrary.state.mn.us/archive/ctapun/1110/opa110561-102411.pdf>

Midas Life Settlements, LLC v. BNC National Bank

[Civil No. 11-841 ADM/AJB](#) (D. Minn. 10/20/2011)

ANN D. MONTGOMERY, U.S. DISTRICT JUDGE

Court's introduction:

“On August 23, 2011, the undersigned United States District Judge heard oral argument on Plaintiff Midas Life Settlements, LLC's ('Midas') Motion . . . for Judgment on the Pleadings, and Defendant Patricia C. Murdock's ('Mrs. Murdock') Motion . . . for Judgment on the Pleadings or, in the Alternative, Summary Judgment. Midas and Mrs. Murdock have asserted competing declaratory judgment claims under 28 U.S.C. § 2201, seeking entitlement to the proceeds of a \$13 million life insurance policy (the 'Policy') issued on the life of Mrs. Murdock's late husband, Norman Murdock ('Mr. Murdock'). For the reasons set forth below, Midas' Motion is denied, and Mrs. Murdock's Motion is granted.”

Excerpts:

“[T]he pivotal issue is whether a Closing Date occurred before Mr. Murdock died. If it did, the Policy transferred to CFC, Midas' predecessor-in-interest, on September 5, 2010 If it did not, the Transfer Agreement terminated[U]nder the unambiguous language of the Transfer Agreement, 'Closing Date' simply means the date on which the conditions precedent set forth in Section 3 are satisfied. . . . Midas urges all conditions precedent had been satisfied on or before September 5, 2010. Mrs. Murdock contends the Section 3 conditions precedent were not satisfied when Mr. Murdock died on September 11, 2010. . . .

Midas insists that Mrs. Murdock cannot cite a condition precedent of the Transfer Agreement that was not satisfied on or before September 5, 2010, and so the Closing Date and the Transfer Date occurred simultaneously. However, as the party seeking to enforce the Transfer Agreement, Midas bears the burden of establishing that the terms and conditions required to transfer the Policy have been satisfied. . . . Moreover, in the Eighth Circuit, the burden of proof in a declaratory judgment action 'rests upon the party who, as determined by the pleadings, asserts the affirmative of an issue and it remains there until the termination of the action. It is generally upon the party who will be defeated if no evidence relating to the issue is given on either side.' . . . Here, Midas argues for the affirmative on the question of whether all conditions precedent set

forth in Section 3 have been satisfied. Accordingly, though Mrs. Murdock is in the procedural posture of plaintiff in her declaratory judgment Counterclaim, the burden of proof principles are not altered. . . . Requiring Midas to bear the burden of proving the Paragraph 3.2 Conditions Precedent were satisfied also prevents Mrs. Murdock from having to prove a negative. . . . Thus, to enforce its rights under the Transfer Agreement, Midas is required to establish the Paragraph 3.2 Conditions Precedent were satisfied or waived prior to Mr. Murdock's death on September 11, 2010. Midas has offered no evidence to meet this burden. . . .

In sum, the pleadings do not establish the Paragraph 3.2 Conditions Precedent were satisfied or explicitly waived (i.e., that a Closing Date occurred) before Mr. Murdock died. Thus, Midas cannot show it is entitled to judgment as a matter of law, and its Motion is denied. Additionally Midas bears the burden of proving the Closing Date occurred before Mr. Murdock died, and Midas has presented no evidence of specific facts that would demonstrate when the Closing Date occurred. Because Midas has failed to raise a genuine issue of material fact for trial, Mrs. Murdock's Motion is granted.”

Submitted by Paulette Joyer, Esq.
pjoyer@voamn.org

Taft v. Wells Fargo Bank, N.A.
[Civil No. 10-2084 \(SRN/FLN\)](#) (D. Minn. 11/1/2011)
SUSAN RICHARD NELSON, United States District Judge

Court's introduction:

"This matter is before the Court on Defendant Wells Fargo Bank, N.A.'s Motion to Dismiss [Doc. No. 34] and on Plaintiff's Motion for Partial Summary Judgment [Doc. No. 37]. For the reasons stated below, this Court grants the Motion to Dismiss, denies the Motion for Partial Summary Judgment, and dismisses the Second Amended Complaint [Doc. No. 33] with prejudice."

Excerpts:

"Plaintiff Elizabeth Taft is the personal representative for the estate of her mother, Ethel Taft. Elizabeth Taft contends that her mother entered into a reverse mortgage loan with Defendant Wells Fargo, and that this reverse mortgage violated several Minnesota statutes, one South Dakota statute, a federal law, and constituted a breach of contract and unjust enrichment. In this lawsuit, she seeks to represent a class of similarly situated individuals. . . .

At issue are three types of fees Wells Fargo charged Plaintiff's mother: origination fees, servicing fees, and mortgage insurance charges. . . . Plaintiff does not contend that charging such fees was in itself improper. Rather, the crux of her Complaint is that, by adding these fees to the principal loan amount, Wells Fargo charged an effective interest rate that was higher than the parties' agreement and higher than both Minnesota and South Dakota law allow. Plaintiff also contends that Minnesota and South Dakota law prohibit including these types of fees in the principal loan amount. . . .

The question in this case is whether a state may, in the context of fixing interest rates that are applicable to a reverse mortgage loan, also define what constitutes interest. . . . Plaintiff contends that the Court need not determine whether any of the state statutes on which the Second Amended Complaint relies are preempted because the parties have opted out of any possible federal preemption. . . .

Having determined that the parties have not opted out of the preemption analysis, the Court must now determine whether the state statutory provisions on which Plaintiff relies are preempted by federal law. . . . [Pursuant to the Court's analysis of the relevant statutes,] Plaintiff's claims that Wells Fargo violated state laws and the National Bank Act by including payments for mortgage insurance, origination fees, and servicing fees in the principal balance of her mother's reverse mortgage loan must be dismissed."

Court's conclusion:

"Although a national bank may choose to be bound to a state's interest rate ceiling, that bank, when making a loan specifically authorized by federal law, is not also bound by how the state defines interest. Plaintiff's claims to the contrary are without merit."

Submitted by Andrea Palumbo, Esq.
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STATUTES, REGULATIONS, BULLETINS

CMS issued a Fact Sheet on October 27, 2011 giving details for Medicare premiums and deductibles for 2012 Medicare. Subject to the income adjustment, Part B premiums will be \$99.90 in 2012 which represents a \$15.50 decrease for those who went on Medicare for the first time in 2011. For most people, this will be a modest increase of \$3.50. The daily co-pay for days 21-100 in a skilled nursing facility will be \$144.50. For more information [click here](#).

#11-21-10 Changes to Medical Assistance (MA) Transfer Penalty The purpose is to explain a policy change that prohibits recalculation of a transfer penalty based on a partial return of transferred assets and explains new policy on ending a transfer penalty based on a full return of transferred assets. The bulletin, dated November 4, 2011, can be found [here](#).

Submitted by Laurie Hanson, Esq.
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UPCOMING EVENTS AND CLE PROGRAMS

"What's so special about special care" -- Dealing with units that specialize in Dementia Care

Join us for a webinar on **November 8th, 2:00pm ET/11:00pm PT**

Title: *"What's so special about special care"*

-- Dealing with units that specialize in Dementia Care

Date: Tuesday, November 8, 2011

Time: 11:00 PM - 12:00 PM PDT / 2:00 PM - 3:00 PM EDT

After registering you will receive a confirmation email containing information about joining the Webinar. Space is limited. Reserve your Webinar seat now at:

<https://www3.gotomeeting.com/register/154415718>

Submitted by Kim Dayton, Esq.

kim.dayton@wmitchell.edu

ELDER LAW SECTION ACTIVITIES

MA COMMITTEE MEETING: The next MA Committee meeting will be at 3:30 p.m. on Tuesday, December 20, 2011. The Medical Assistance Committee is a study group to analyze Elder Law Section member questions and case studies and to discuss administrative policies and procedures in relation to Medical Assistance in Minnesota. Cathryn D. Reher of Long, Reher & Hanson, P.A., is Committee Chair. For directions, or to attend by phone, please contact Tracie Fenske with Long, Reher & Hanson, P.A., at [952-929-0622](tel:952-929-0622) at least 24 hours in advance of the meeting. Topics for the meeting may be submitted to tfenske@mnelderlaw.com under the subject heading "MA Committee Topic", or faxed to [952-542-9201](tel:952-542-9201). Please be reminded that the meeting location is: Estate & Elder Law Services (formerly MAO Legal Services), Monroe Village, 1900 Central Avenue NE, Suite 106, Minneapolis, Minnesota 55418. There are a few parking spaces behind the building and lots of street parking. People should walk to the back of the building and come to the back door which faces directly into the meeting room.

GOVERNING COUNCIL: The next meeting of the Elder Law Section Governing Council will be on Friday, December 16, 2011 at 3:30 pm at the offices of the Volunteers of America (VOA) at 1900 Central Avenue NE, Suite 106, Minneapolis, MN 55418. For further information, please contact Suzy Scheller, Chair, at: suzy@schellerlegalsolutions.com.

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://www.mnbar.org/sections/elder-law/index.asp>

Please send E-Newsletter contributions by 10 p.m. on Sunday of each week to Allison Burke at allison@twincities-elderlaw.com.

If you do not wish to receive this E-Newsletter, send your request to be removed from the mailing list to Tamara Patton at tpatton@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/newsletter.asp>.