

MSBA ELDER LAW SECTION E-NEWSLETTER
May 3, 2011

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E-Newsletter Editorial Staff:

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THOUGHTS FROM THE CHAIR

This month I would like to draw our members' attention to a recent set of proposed revisions to the federal regulations governing home and community-based services (HCBS) waivers. These are the rules that govern the waived care programs in Minnesota, including Elderly Waiver (EW), Community Alternatives for Disabled Individuals (CADI), Community Alternative Care (CAC), Traumatic Brain Injury (TBI), and Alternative Care (AC) waivers. The proposed rules are still subject to comment, which must be received by the Centers for Medicaid and Medicare Services (CMS) no later than 5 p.m. on June 14, 2011. Instructions for how to comment, as well as the explanation and text of the proposed rules are found at this link: <http://www.gpoaccess.gov/fr/retrieve.html>. From this link, scroll to the bottom of this page, enter page number 21311. This will take you to the area including the proposed rules.

These proposed rules do several things, some of which may be helpful, and some of which are potentially quite harmful to our elder clients. The rules permit the states to combine waiver programs serving the elderly and disabled, the mentally retarded or developmentally disabled, and the mentally ill. Currently, services to each of these groups must be provided by states under a separate waiver. Many elder advocates have bemoaned the random division between services available under one waiver and another, and the arbitrary distinctions made between individuals with overlapping disabilities and similar needs. This change could be beneficial if it persuades Minnesota to combine and rationalize some of its waived services programs.

The proposed rules also emphasize individualized and person-centered care planning, which emphasizes the importance of individual participation in, and direction of, care planning. The proposed rules provide for inclusion of helpers chosen by the individual in the care planning process. In reading these rules, with their laudable emphasis on individual rights and autonomy, I wonder how they will affect individuals who may not be able to understand and participate in their care planning to the extent anticipated by the rules. Will the rules be applied to encourage the maximum possible participation of mentally impaired individuals, including individuals under guardianship, in their own

care planning? Or, will the rules serve as a barrier to HCBS for some significantly impaired individuals?

Finally, the proposed rules impose some serious limitations on which care settings will be eligible to provide HCBS under a waiver. The rules are intended to ensure that HCBS are provided in settings that are truly community-based. Individuals receiving these waived services are not to be shunted off into institution-based care, segregated from the general community, and falsely labeled “community-based”. However, the rules as proposed are likely to have a serious negative effect on the ability of cognitively impaired elders and, indeed, many other elders in Minnesota, to receive HCBS under a waiver.

The proposed rules would mean that individuals could not receive waived services for any living situation that is:

- located in a building that also provides inpatient institutional treatment or custodial care (an assisted living residence in a complex with a nursing home?);
- located on the grounds of, *or immediately next to*, a “public institution” (a school? a post office? a hospital?);
- located in a housing complex designed around residents’ disabilities (a continuing care retirement community?); or
- determined by the Secretary of Health and Human Services to have “qualities of an institutional setting”.

The explanation of the proposed rules states that the intention of the rules is not to exclude assisted living from HCBS waiver coverage, although the rules on their face would exclude many assisted living residences in Minnesota. The explanation indicates that elders could still receive HCBS waived care in an assisted living residence, but only if the assisted living residence includes a long list of qualities, including, among other things:

- individual cooking areas in all apartments;
- individuals’ lockable access to all apartments;
- individuals’ ability to freely leave the settings when and for as long as they choose.

It appears to me that the proposed rules, read together with the attached explanations, would likely preclude elders in need of memory care from receiving waived care in assisted living, forcing them into nursing homes. The proposed rules will also preclude elders from receiving waived care in quite a few other existing assisted living residences in Minnesota and in general drastically restrict the options available to folks seeking HCBS waived services.

I am not entirely sure that this dramatic restriction on the choices of elders regarding HCBS options is intended by CMS. CMS does respond to comments that they receive from the community at-large on proposed rules. I strongly encourage section members who are interested in the issues relating to HCBS and waived services in Minnesota to carefully read, ponder, and discuss these rules, and then to follow the directions to provide their comments to CMS prior to June 14.

Submitted by Jennifer L. Wright
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ITEM OF INTEREST

Notice of Elections: MSBA State Bar Foundation and Minnesota CLE Board of Directors:

MSBA State Bar Foundation:

Elections for membership on the MSBA State Bar Foundation will take place at the June 24, 2011, meeting of the MSBA Assembly. MSBA Members are encouraged to invite any Association member, who is interested in being nominated, to submit a Qualifications and Interest Statement to the MSBA office by Friday, May 6.

The Assembly, sitting as the members of the *Minnesota State Bar Foundation*, will elect directors of the Foundation. The three-year terms of the following directors expire on June 30, 2011: Linda Barbe, St. Louis County; James P. Barone, Ramsey County; Bruce Candlin, Ramsey County; Richard Hendrickson, Hennepin County; and Nancy Kleeman, Hennepin County. Ms. Barbe, Mr. Candlin and Mr. Hendrickson are eligible and interested in serving an additional term. Mr. Barone and Ms. Kleeman are not interested in serving an additional term.

Minnesota CLE Board of Directors:

The terms of Hildy Bowbeer, Ramsey County; Don Nichols, Hennepin County; and Steve Reyelts, St. Louis County, expire June 30, 2011. Ms. Bowbeer and Mr. Reyelts are eligible and interested in serving another term; Mr. Nichols is not interested in serving another term.

Submitted by Lori D. Skibbie, Esq.
lskibbie@hennsnoxlaw.com

LINK OF THE WEEK

Vulnerable Adult Training Manual

The Minnesota Department of Human Services publishes a lengthy (200+ pages) training manual for vulnerable adult investigators and adult protection workers. The manual is intended to assist county workers in the investigation of vulnerable adult reports, and provides guidance on the Vulnerable Adult Act, as well as assessment tools, information on interviewing vulnerable adults and alleged perpetrators, etc.

The link is available at:

http://www.dhs.state.mn.us/main/groups/aging/documents/pub/dhs16_139381.pdf

Submitted by Laura Zdychnec, Esq.
Secretary, Elder Law Section
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ELDER LAW NEWS

Abuse of elders, often by family members, is a growing problem
<http://minnesota.publicradio.org/display/web/2011/04/27/elder-abuse/>

Park Nicollet gets sobering lesson in Medicare economics
<http://www.startribune.com/lifestyle/wellness/121033564.html>

Lotterman: Medicare hurting a lot worse than Social Security
http://www.twincities.com/business/ci_17944189?nclick_check=1

UCare informational meeting to be held in Alexandria
<http://www.echopress.com/event/article/id/84207/group/News/>

MINNESOTA CASES

There are no Minnesota Cases to report this week.

STATUTES, REGULATIONS, BULLETINS

There are no Statutes, Regulations, or Bulletins to report this week.

UPCOMING EVENTS AND CLE PROGRAMS

Hennepin County Bar Association

Webcast CLE

Live Replay: Elder Law, 2011 and Beyond

May 12, 2011

Contact information: <https://www.hcba.org/Calendar/Signup.aspx?EventNo=3584>

Minnesota State Bar Association

Probate & Trust Law Section Conference

June 6 & 7, 2011

Contact Information: <http://www.minncle.org/seminardetail.aspx?ID=100641101>

Ramsey County Bar Association

Dealing with Elderly Parents

June 8, 2011

Contact information:

https://netforum.avectra.com/eWeb/DynamicPage.aspx?Site=RCBA&WebCode=EventDetail&evt_key=50a28f4a-6eda-49a1-80d0-2f2aae562239

ELDER LAW SECTION ACTIVITIES

MA COMMITTEE MEETING: The next MA Committee meeting will be at 3:30 p.m. on Tuesday, June 28, 2011. Topics for the meeting may be submitted to MA Committee Chair, Cathryn Reher, at creher@mnellderlaw.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. 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 3:30 p.m. on Friday, June 17, 2011, in conjunction with the Elder Law Section Annual Meeting. The meeting will be held at 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. For further information, please contact Jennifer Wright, Chair, at jlwright1@stthomas.edu.

ELDER LAW SECTION ANNUAL MEETING: The 2011 Annual Meeting of the Elder Law Section will be held at 3:30 p.m. on Friday, June 17, 2011, at the offices of Estate & Elder Law Services (formerly MAO Legal Services), located at Monroe Village, 1900 Central Avenue NE, Suite 106, Minneapolis. Please note the meeting date and location changes. 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. For further information, please contact Jennifer L. Wright at jlwright1@stthomas.edu.

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 Marjorie Austin at mj@mjaustinlaw.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.

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>.