

MSBA ELDER LAW SECTION E-NEWSLETTER
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E-Newsletter Editorial Staff:

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ITEMS OF INTEREST

In working with grandparents and other third party custodians, I have been asked a very practical question that typical goes like this:

What's the difference between guardianship and custodianship? See, we have custody of our grand-daughter, and my employer won't let her have [place a particular type of] benefits unless we have guardianship over her.

So, during June, I will address this topic. First, we'll look at the technical, legal definitions of custodianship and guardianship. Then, we'll look at some data that indicates that a potential grand-parent/third-party tsunami is on the horizon. Finally, we'll consider some practical steps to assist clients who might be "squeezed" by the distinction between custodianship and guardianship.

To begin, the following analysis of custodianship and guardianship was drafted by Adam J. Rohne. Adam graduated from the University of St. Thomas Law School this spring. During his last year, Adam served as a student member on the MSBA Elder Law Section Governing Council as well as a Certified Law Student in UST's Elder Law Practice Group. Adam has clerked at Anderson, Larson, Hanson & Saunders PLLP in Willmar, MN and is currently clerking in the University of St. Thomas' Office of Purchasing Services.

Guardians

Guardianship over a minor child is governed by the Minnesota Probate Code. A guardian may be appointed by a minor child's parents through a will or health care directive or by the court upon petition of a person interested in the welfare of the minor.ⁱ^[i] A guardianship established by the parent becomes effective when the appointing parent dies or becomes incapacitated.ⁱⁱ^[ii] A guardianship established by the court becomes effective after meeting the specific procedural requirements for notice and hearing set forth in Minn. Stat. § 524.5-205 and a finding that the appointment is in the child's best interest.ⁱⁱⁱ^[iii] While "parents have a *paramount* right to the custody of their child," that right is subject to the child's welfare and best interests.^{iv}^[iv] However, the appointment

of a guardian is not permanent, and custody may be granted to another, including a parent, if it is in the child's best interest.v[v]

In general, a guardian has the powers and responsibility of a parent.vi[vi] However, a guardian is not legally obligated to provide for the ward from their own funds.vii[vii] In particular, a guardian must take reasonable care of the ward's personal effects and commence protective proceedings if necessary to protect other property of the ward.viii[viii] A guardian may receive money on behalf of the ward to use for the ward's support, care, and education, and must exercise due care to preserve excess money for the ward's future needs.ix[ix] The guardian is empowered to facilitate the ward's education, social, or other activities and may authorize necessary medical or other professional care.x[x] A guardian may consent to the marriage or adoption of the ward.xi[xi] A guardian may be entitled to reasonable compensation for their services and reimbursement for expenditures made on behalf of the ward.xii[xii] A guardianship of a minor terminates upon the minor's death, adoption, emancipation, attainment of majority, or court order.xiii[xiii]

Custodians

Custodians are appointed by the court and fall into two general categories: legal and physical. A legal custodian may determine the child's upbringing, including education, health care, and religious training, while a physical custodian is responsible for a child's routine daily care and control and the child's residence.xiv[xiv] A person can be both the legal and physical custodian of a child. Custody determinations most commonly follow divorce or separation; however, a person other than the natural parent may be appointed custodian upon the death or neglect of the child's parent(s).xv[xv] A parent may be deprived of custody over their child if a court determines they are unfit to care for their child. Like guardianships, custody determinations are not permanent, and may be modified by court order.

Submitted by Joel Button, Esq.
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REMINDER: ELI PLANNING COMMITTEE

Our next planning meeting is June 22! The 2011 ELI Planning Committee will meet over the summer to develop the program for this year's ELI, which will be held on October 6-7, 2011. The ELI Planning Committee will meet at the Minnesota CLE offices in St. Paul from 11:00 a.m. to 1:00 p.m. on June 22, 2011. A box lunch will be served at all meetings.

Anyone interested in serving on the ELI Planning Committee, submitting ELI program ideas, or speaking at the ELI, may contact the 2011 Elder Law Institute Chair, Suzy Scheller, at suzy@schellerlegalsolutions.com

ELDER LAW NEWS

Raise awareness for elder abuse

http://lacrossetribune.com/houstonconews/news/opinion/editorial/columnists/article_36da5900-91d6-11e0-bd14-001cc4c002e0.html

Whistleblower: Dental woes left a bad taste

<http://www.startribune.com/local/123690254.html>

Rate of health care spending drops in Minn.

<http://www.businessweek.com/ap/financialnews/D9NNT35G1.htm>

Hard times stalling health spending

<http://www.startribune.com/lifestyle/wellness/123456884.html>

State shutdown would be a leap into unknown – Nursing home and home health care at risk?

<http://www.startribune.com/politics/statelocal/123693874.html>

No good from shutdown

<http://www.ifalldailyjournal.com/news/editorials/no-good-shutdown-106>

Franken hears concerns from senior citizens

<http://abcnewspapers.com/2011/06/09/franken-hears-concerns-from-senior-citizens/>

Keep your aging parents safe at home

http://money.cnn.com/2011/05/25/retirement/keeping-parents-safe.moneymag/?section=money_latest

Inspector General report: 1 in 7 nursing home residents are incorrectly prescribed psychotropic medications

<http://www.mcknights.com/inspector-general-report-1-in-7-nursing-home-residents-are-incorrectly-prescribed-psychotropic-medications/article/202565/>

MINNESOTA CASES

The following published decision was released by the Minnesota Court of Appeals on June 6, 2011:

A10-1336, A10-1505

Fannie Mae, Respondent, vs. Heather Apartments Limited Partnership d/b/a Vintage Lakes Apartments, et al., Defendants; Andrew C. Grossman, Appellant.

COLLINS, Judge

Before the beneficiary of a spendthrift trust receives trust proceeds, a district court may not (1) enjoin the beneficiary from transferring or otherwise disposing of the proceeds or (2) order application of the proceeds, as they come due, to satisfy a judgment against the beneficiary.

The district court lacked authority to issue the June 2 and June 16 orders because the orders preceded appellant's receipt of any proceeds of the spendthrift trust. Reversed.

The decision is available at:

<http://www.lawlibrary.state.mn.us/archive/ctappub/1106/opa101336-0606.pdf>.

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

Mental Health and Addiction in Older Adults

June 22

Elimination of Bias Credits

<https://www.hcba.org/Calendar/Signup.aspx?EventNo=3649>

Minnesota State Bar Association

2011 Elder Law Institute

SAVE THE DATE: October 6 and 7, 2011

The Elder Law Institute (ELI), a collaboration between the MSBA's Elder Law Section and Minnesota Continuing Legal Education, is an annual conference designed to provide educational and networking opportunities for attorneys and others interested in the practice of Elder Law. The ELI offers a wide range of educational programming, ranging from discussions of nursing home and Medical Assistance issues to legislative updates and policy analysis. ELI Attendees receive from nine to eleven Continuing Legal Education credits, depending upon the length of the conference.

Stay tuned for more information and online registration.

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>.

i[i] See MINN. STAT. § 524.5-202; MINN. STAT. § 524.5-205.

ii[ii] MINN. STAT. § 525.5-202(c).

iii[iii] MINN. STAT. § 524.5-204; See MINN. STAT. § 524.5-205.

iv[iv] *Campbell v. Baker*, 11 N.W.2d 786, 790 (1943).

v[v] See, *State ex rel. Gravelle v. Rensch*, 40 N.W.2d 881 (1950).

vi[vi] MINN. STAT. § 524.5-207 subdiv. 1.

vii[vii] *Id.*

viii[viii] MINN. STAT. § 524.5-207 subdiv. 2(a).

ix[ix] *Id.* at subdiv. 2(b).

x[x] *Id.* at subdiv. 2(a).

xi[xi] *Id.* at subdiv. 2(c).

xii[xii] MINN. STAT. § 524.5-209(b).

xiii[xiii]xiii[xiii] MINN. STAT. § 524.5-210(a).

xiv[xiv] See MINN. STAT. § 518.003(a), (c).

xv[xv] See MINN. STAT. § 257C De Facto Custodian and Interested Third Party