

MSBA ELDER LAW SECTION E-NEWSLETTER
November 15, 2011

Vol. 4, No. 45

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ARTICLE OF THE WEEK

DHS ANNOUNCES ALL OR NOTHING RETURN POLICY FOR UNCOMPENSATED TRANSFERS

A new Bulletin on treatment of penalties for uncompensated transfers was released by DHS on November 8, 2011. Here is the link to the new Bulletin #11-21-10 **Changes to Medical Assistance (MA) Transfer Penalty Policy**:

http://www.dhs.state.mn.us/main/groups/publications/documents/pub/dhs16_164914.pdf

This Bulletin announces that effective for penalty periods imposed on or after December 1, 2011, partial return of transferred assets will no longer shorten the penalty period and all assets transferred for less than fair market value during the five year look-back period must be returned within 12 months of the date the period of ineligibility began in order to eliminate the penalty period. These changes were enacted by the 2009 Legislature to originally become effective for periods of ineligibility established on or after January 1, 2011. The 2009 amendment is now codified in Minn. Stat. 256B.0595, subd. 2, clause (f):

(f) A period of ineligibility established under paragraph (c) may be eliminated if all of the assets transferred for less than fair market value used to calculate the period of ineligibility, or cash equal to the value of the assets at the time of the transfer, are returned within 12 months after the date the period of ineligibility began. A period of ineligibility must not be adjusted if less than the full amount of the transferred assets or the full cash value of the transferred assets are returned.

Since 2009, the effective date of this paragraph has been amended twice. The current effective date provision is shown in the Revisor's Note to Minn. Stat. § 256B.0595:

Note: The amendment to subdivision 2 by Laws 2009, chapter 79, article 5, section 22, is effective for periods of ineligibility established on or after January 1, 2014, or upon the date when it is no longer subject to the maintenance of effort requirement in Public Law 111-148. The

commissioner of human services shall notify the revisor of statutes of that date. Laws 2009, chapter 79, article 5, section 22, the effective date, as amended by Laws 2010, First Special Session chapter 1, article 24, section 11; and Laws 2011, First Special Session chapter 9, article 6, section 86.

The Bulletin also announces that uncompensated transfers must be returned by the same person who received the transfer; If the transfer was real estate, the same real estate must be returned and any reduction in value since the original transfer must be made up by cash; and all returns must be directly to the transferor rather than to third parties for the benefit of the transferor.

Implementation of the policies announced in Bulletin #11-21-10 appear to be in conflict with HCFA (now CMS) Transmittal No. 64's interpretation of the federal statute on partial return of uncompensated transfers. Transmittal No. 64 was issued in November of 1994 following the asset transfer changes made by the Omnibus Budget Reconciliation Act of 1993, which became effective in August of 1993. It can be found in the State Medicaid Manual (published by CMS to be binding on the states) at Section 3258.10.C.3.

Implementation of this change also appears to be blocked by federal maintenance of effort (MOE) requirements that prohibit the states from applying MA eligibility policies, practices or methodologies that are more restrictive than those in effect in the past. The current maintenance of effort requirement is found in Pub. L. 111-148 and was not expected to end prior to January 1, 2014 (2019 for the CHIPS program). The current MOE prohibits the states from applying eligibility policies, practices or methodologies more restrictive than those in effect on March 23, 2010. Previous maintenance of effort requirements in effect on March 23, 2010 prohibited the states from applying eligibility policies, practices or methodologies more restrictive than those in effect on July 1, 2008.

Since the federal MOE statutes have not changed, it would appear that the proposed changes in Bulletin #11-21-10 can only be implemented if Minnesota has received a waiver or some other dispensation to allow implementation. Inquiries are being made to determine whether a waiver or other dispensation has been received by DHS and the Revisor of Statutes notified that implementation of this change will no longer violate Pub. L. 111-148 (the Affordable Care Act).

Submitted by Julian J. Zweber, Esq.
Legislative Coordinator
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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

GUARDIANSHIP/CONSERVATORSHIP EDUCATIONAL VIDEO

Earlier this year, a project team led by Judge Jay M. Quam and Steve Bittick completed work on a new Guardianship/Conservatorship Educational Video. The new video was created to help educate and inform proposed guardians and conservators about their roles and responsibilities prior to the hearing and appointment. The goal of the video is to help prepare guardians/conservators for their roles and to also decrease the number of successor petitions filed with the Court.

Effective December 1, 2011, the Fourth Judicial District Court in Hennepin County, MN will require all proposed guardians and /or conservators to watch this video before they appear at their initial hearings. The Fourth District has also been granted permission to require that proposed guardians/conservators file a modified version of the *Oath and Acceptance form*, which states that they watched the video and understand the duties and responsibilities for which they seek appointment. Letters will not be issued until the proposed guardian/conservator has watched the video and filed the Hennepin-specific Oath and Acceptance form with the Court.

Both the video and the Oath and Acceptance form will be available on the Probate/Mental Health Court section of the Fourth District website at:

www.mncourts.gov/district/4/?page=4501

When creating the video, the project team purposely kept the video from being County-specific so that it could be used by other districts.

For questions and inquiries, please contact:

Steve Bittick
Court Operations Manager

Probate/Mental Health Division
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Submitted by Touch Thouk
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LINK OF THE WEEK

AARP is a nonprofit organization that is committed to serving and improving the lives of people 50 and over. To ensure that our nation's elders have a voice in the judicial system, AARP Foundation Litigation is consistently advocating for them in many areas that affect their everyday lives. This webpage allows you to look at some of the pending litigation as well as some of the cases that they have taken in courts all over the country.

http://www.aarp.org/aarp-foundation/legal_advocacy/

Submitted by Brenna Galvin
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ELDER LAW NEWS

Minnesota is 49th for per capita federal dollars

<http://www.sctimes.com/apps/pbcs.dll/article?AID=2011111100051>

Seeking to avoid assisted living, aging Americans turn to 'villages' for rides, chores

<http://www.startribune.com/nation/133740693.html>

UnitedHealth may lose 500,000 enrollees

<http://www.startribune.com/business/130168158.html>

Not enough to just talk about long-term care

<http://www.startribune.com/opinion/otherviews/132824578.html>

Wealthier age more slowly, are more mobile

http://www.upi.com/Health_News/2011/11/07/Wealthier-age-more-slowly-are-more-mobile/UPI-89201320718151/

2 sentenced in reverse-mortgage scheme

http://www.upi.com/Top_News/US/2011/11/04/2-sentenced-in-reverse-mortgage-scheme/UPI-65041320439535/

Submitted by Joel Smith, Esq.
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ELDER LAW CASES

Lewis v. Wells Fargo Bank, N.A.
Civil No. 11-1286 (SRN/FLN) (D. Minn. 11/4/2011)
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 . . . For the reasons discussed in this Court's Order dismissing Taft v. Wells Fargo Bank, N.A., Civil No. 10-2084 . . ., and for the reasons stated below, the Court grants [Defendant's] Motion to Dismiss and dismisses the Amended Complaint [Doc. No. 2] with prejudice."

Excerpts:

"Plaintiff Ann D. Lewis entered into a reverse mortgage loan with Defendant Wells Fargo for her home in Bloomington, Minnesota. She contends that this reverse mortgage violated several Minnesota statutes, a federal law, and constituted a breach of contract and unjust enrichment. She also seeks to represent a class of similarly situated individuals. . . .

At issue are three types of fees Wells Fargo charged Plaintiff: origination fees, servicing fees, and mortgage insurance charges. . . . [T]he 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 Minnesota law allows. Plaintiff also contends that Minnesota prohibits 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."

The full decision is available on PACER.

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

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

UPCOMING EVENTS AND CLE PROGRAMS

There are no upcoming events or CLE programs to report this week.

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>.