

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

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THOUGHTS FROM THE CHAIR

Finding a Way to Keep it Real

Minnesota law and policy encourages the elderly to stay in their homes as long as practicable, and if they become a nursing home resident, to return home whenever possible. Easier said than done, particularly if the elderly person is receiving Medical Assistance and has few loved ones to help. For at least one nursing home resident on Medical Assistance of which I am aware, the system appears to prevent the very thing it is supposed to encourage. More hurdles exist than realized, not the least of which is a 60 day window to have a discharge meeting with the nursing home; make the home safe and ready; work with multiple entities contracted with the county to develop a home care plan for services that meet the resident's needs AND come within allowable spending limits; ensure decision-makers are in place on behalf of the resident; and monitor the health of the resident to make the return home possible. With this particular resident, I believe we are at our fourth 60 day window to try to accomplish all that needs to fall into place. The task seems insurmountable.

However, instead of focusing on what is out of our control, my colleague spearheaded efforts to do what could be accomplished – make the home ready. A few weeks ago he and I and a group of friends spent a few hours at the home of the resident to clean, organize, repair, and paint, in preparation for the resident's return from the nursing home. What a great experience! Instead of spinning our wheels, we actually saw progress. We were encouraged to see the tangible difference in the home. The resident was encouraged by the progress we made and focused energy once again on finally getting home.

We can make a difference in many ways, not just on the legal issues. Thanks to the many in our section who are trying to make a positive impact on our clients and practice area. I encourage you to find a way to keep it real. By the way, a discharge date is planned for later this month. HOPEFULLY, this time it will allow one resident the chance to see if they can make it at home. We hope for the best.

Sincerely,
Suzy Scheller, Chair of the Elder Law Section
suzy@schellerlegalsolutions.com

ITEM OF INTEREST

A lawsuit was recently filed against DHS trying to stop its new gift penalty policy from taking effect on December 1, 2011 (Ellis v. Jesson). The policy by DHS was issued in a surprise bulletin on November 4, 2011 (DHS Bulletin #11-21-10), to take effect on December 2, 2011. The bulletin stops the current partial credit rule that gives partial credit against a Medical Assistance transfer penalty if part of the gift is returned. Under the new policy, it is all or nothing (i.e. no credit unless all of the gift is returned). The plaintiff, Angeline Ellis, had loaned her son \$17,000 four years ago, but he had only been able to return about \$12,000. The lawsuit argued that the new policy violates the federal health reform law prohibiting states from enacting Medical Assistance "eligibility standards, methodologies or procedures" that are more restrictive than those in effect as of March 23, 2010. During the hearing before federal judge Susan Richard Nelson, DHS reversed its policy to some extent, stating that there could in fact be a partial credit for a partial return depending on the timing of the imposition of the penalty period. The judge required DHS to put this new policy in an affidavit to the court, which it did, stating that a new bulletin will be issued with the revised policy. In an important footnote #6 in the judge's decision, the judge relied in part on this revised policy in making her decision not to stop the policy from taking effect on December 2nd. The judge issued her decision on November 30th. DHS has not yet issued its revised bulletin.

Submitted by David A. Rephan, Esq.
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(**Editor's Note:** DHS Bulletin #11-21-10 can be found [here](#). The case mentioned is discussed below, in the "Elder Law Cases" section.)

LINK OF THE WEEK

As parents and loved ones are living longer, elderly adults are the fastest growing segment of the population. "The New Old Age" is a blog from The New York Times that explores the intergenerational challenges surrounding the aging population. To check out the blog, click [here](#).

Submitted by Megan K. Stowers
stow5755@stthomas.edu

Minnesota now has a single point of entry to long-term care decision making and choice that can assist you. During the 2011 Special Session of the Legislature, a new initiative was adopted that requires the Senior LinkAge Line® and Lead Agencies (counties, Tribes, and health plans) to expand access to Long Term Care Consultation to those entering a Registered housing with service setting. The new service is called Provision of Long Term Care Options Counseling. [Read the legislative language](#) (scroll to line 177.3). To read more, click [here](#).

Submitted by Carol Thacher, Esq.
csthatcher@comcast.net

ELDER LAW NEWS

2010 Census shows more elderly than ever before in the U.S. | [CNN](#)

Judge says state can tighten Medicaid rule | [Star Tribune](#)

Caring for Caregivers-Help for those who help others | [AARP](#)

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

Paying price for helping son | [Star Tribune](#)

Submitted by Carol Thacher, Esq.
csthatcher@comcast.net

ELDER LAW CASES

Ellis v. Minn. Department of Human Services

[Civil No. 11-3411 \(SRN/FLN\)](#)

(D. Minn. 11/30/2011)

SUSAN RICHARD NELSON, United States District Judge

This matter is before this Court on the motion for a temporary restraining order and a preliminary injunction by Plaintiff Angeline Ellis. Plaintiff seeks to prevent the implementation of a new state Medicaid rule, scheduled to impact any recalculations of penalty periods imposed on or after December 1, 2011, under the assumption that it will result in a longer period during which she will be unable to receive long-term care benefits. For the reasons stated below, however--including the fact that the new state rule simply will not adversely impact Plaintiff under the governing facts in this case--this Court denies the motion.

The full opinion 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>.