

MSBA ELDER LAW SECTION E-NEWSLETTER

September 9, 2019

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E-Newsletter Editorial Staff:

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E-NEWSLETTER HIGHLIGHTS

2019 Minnesota Elder Law Institute

October 10 - October 11, 8:55 AM - 4:30 PM, Minnesota CLE Conference Center, Minneapolis.

The Institute features new law and developments as well as helpful and practical sessions on a variety of topics and processes you need to know to practice elder law in Minnesota.

Register here: [2019 Minnesota Elder Law Institute](#).

Scholarships

Elder Law Institute Scholarships are being offered again this year! Click here for more information and the application itself: [Elder Law Scholarship](#).

Submitted by Maya Missaghi.

Nominations Sought for Elder Law Section Awards

The Awards Committee of the Elder Law Section is seeking nominations for Section awards to be presented at the Minnesota CLE Elder Law Institute on October 10, 2019. Nominations are being sought for the following Awards:

The Mary Alice Gooderl Memorial Award

The Mary Alice Gooderl Memorial Award is presented by the Elder Law Section to acknowledge outstanding contributions to the field of Elder Law by a member of the Elder Law Section, as exemplified by Mary Alice Gooderl, one of the founders of the Elder Law Section.

The Lifetime Service Award

The Lifetime Service Award is presented to a member of the section who has made outstanding contributions to the Elder Law Section over an entire career or many years of service.

The Elder Law Section Hall of Fame

The Elder Law Section Hall of Fame was started in 2015. The criteria for admission to the Hall of Fame include:

1. Membership in the Elder Law Section.
2. Success in litigation or other public or private advocacy having a substantial positive impact on the elderly or on the way Elder Law attorneys practice Elder Law.
3. Success in persuading CMS, DHS or another government agency to adopt substantial positive changes in medical assistance or other government programs or policies affecting the Elderly.
4. Publication of important works in the literature or other media to educate consumers or Elder Law attorneys regarding any important subject affecting the Elderly.
5. Success in obtaining legislation to protect or improve the rights or condition of the Elderly.
6. Efforts to accomplish the criteria in sections 1 to 4 that fall short of success but still deserve recognition for substantial efforts toward an important goal.
7. Other important activities by Section members that the committee members believe deserve recognition in our Hall of Fame.

Special Recognition Awards

These awards are for special efforts or accomplishments of a more isolated nature that deserve special recognition since the last Awards ceremony.

Nominations will close at 5 pm on Friday, September 13, 2019. Please submit nominations to Julian J. Zweber at 1360 Energy Park Drive, Suite 310, St. Paul, MN 55108-5252, telephone 651-646-4354 or 651-646-4539 (FAX) or julianzweber@qwestoffice.net.

Submitted by Julian J. Zweber, Chair, and Stuart C. Bear, Vice-Chair, Awards Committee.

ELDER LAW NEWS

COURT OF APPEALS SHUTS DOWN THE INFAMOUS “LIFE ESTATE MEMO”

It has taken almost ten years, but we may finally have seen the end of what became known as the life estate memo.

For those unfamiliar with this issue, a little background. In 2010, Minnesota’s Department of Human Services (“DHS”) circulated to county agencies an undated, unsigned memorandum purporting to explain how life estates are evaluated when determining eligibility for long-term care Medical Assistance for an institutionalized spouse. The memorandum indicated that a life estate “counts” toward the community spouse resource allowance if titled in the name of a community spouse, but does not count toward the standard allowance if titled in the name of the

institutionalized spouse. The memorandum was not made available to the public, was not published in any notice or bulletin, was not prompted by a change in federal or state law, and was not the subject of formal rule-making procedures.

The life estate memo's premise was first successfully challenged when the Ninth Judicial District Court, acting as an appellate court, reversed the Commissioner of Human Services' decision in *Audrey Larson v. Minnesota Department of Human Services and Polk County Social Services*, Court File No. 60-CV-13-465 (Oct. 4, 2013). DHS, however, quickly made it clear that they would not be bound by the District Court's determination.

Subsequently in 2014, the life estate memo was dealt another blow when Human Services Judge Alvarado reversed Renville County's denial of Medical Assistance benefits through the administrative hearing process. *In re: Appeal of Vait*, Docket #155286, *Decision of State Agency on Appeal* (Dec. 23, 2014). HSJ Alvarado concluded that a life estate has no value for purposes of eligibility unless it is sold, regardless of which spouse owns it.

In 2018, Renville County again denied eligibility based on a community spouse's retention of a non-homestead life estate. The human services judge upheld the denial, and the decision was appealed to the district court. As in *Larson*, DHS intervened. The National Academy of Elder Law Attorneys (NAELA), Minnesota chapter, also intervened at the district court level as an amicus. The district court reversed, concluding that Minnesota Statute § 256B.056, Subd. 4a unambiguously states that a life estate interest is not salable, and therefore does not count, regardless of ownership. DHS appealed to the Court of Appeals.

On Monday, August 12th, the Minnesota Court of Appeals issued a published decision in *In re the Matter of Esther Schmalz and the Commissioner of Minnesota Department of Human Services, Renville County Human Services*. <https://mn.gov/law-library-stat/archive/ctappub/2019/OPa182156-081219.pdf>

The *Schmalz* decision relies solely on state law, without delving into federal spousal impoverishment provisions. Accordingly, you are encouraged to remain vigilant – shortly after the life estate memo made its appearance, on January 1, 2011, the Health Care Programs Manual (now Eligibility Policy Manual) was amended to, for the first time in history, require married couples to identify which assets would be retained by the community spouse before an eligibility determination is made. Under federal law, ownership between spouses is irrelevant because the combined assets of the couple are used to determine eligibility. We are aware of counties using this so-called “attribution” of assets to inappropriately deny eligibility based on a community spouse's ownership in other types of “unavailable” assets.

If you have questions regarding this issue, please contact Laura Zdychnec at Long, Reher, Hanson & Price - lzdychnec@mnelderlaw.com. Laura represented the Larson family (with Mike Brouse), the Vait family, and NAELA – Minnesota Chapter in the *Schmalz* case.

Submitted by: Laura Zdychnec.

Please submit news articles of interest to mardell@mardellpreslerlaw.com.

SEPTEMBER CLE

A Demonstration of CLEWills

September 12, 2019, 12:00 to 1:00 pm at Wells Fargo Building, First Floor Conference Room Suite 175, Saint Paul, MN.

A demonstration of CLEWills, the new automated document system developed by Minnesota CLE as a companion to its popular Drafting Wills & Trust Agreements book of forms. Due to be released this fall, CLEWills will allow practitioners to generate drafts of wills, revocable trust agreements, powers of attorney, and health care directives through a Hot Docs-based interview that will simplify the process of selecting the appropriate options to be included in the final document, generating a working draft that should require far less hand editing, greatly increasing efficiency. Sampson is a member of the editorial committee that maintains the Minnesota CLE forms and that has worked to convert the forms to work with the automated document system. The presentation will allow for an up-close experience of the interview process for a will and a revocable trust agreement and a chance to see the output in real time.

Registration and lunch will begin at 11:30 am, the CLE program will run from 12:00 pm to 1:00 pm. Lunch is included in your registration.

Presenter: Michael P. Sampson| Maslon LLP.

Click here to register: [A Demonstration of CLEWills](#).

Dialogue with the Minnesota Office of Lawyers Professional Responsibility on Sticky Issues facing Elder Law Attorneys

September 19, 2019, from 12:00 – 1:30 p.m. Glacial Lakes Room / Minnesota State Bar Association Minneapolis. Remote participation available.

Lunch will be provided. On-site registration will begin at 11:30 am. The program will begin at noon.

The practice of Elder Law includes daily considerations of two main issues addressed in the Minnesota Rules of Professional Conduct – 1) who is the client; and 2) does the client have capacity. From the answers to these two questions flow ethical duties related to confidentiality, communication, protection, client conflict, and informed consent. These issues become sticky when considering many (if not most) clients are operating within a principal/agent relationship and some (if not many) clients have some form of diminished capacity. There are many practical considerations in representation when considering the rules and talking with the Office of Lawyers Professional Responsibility on interpretation of the rules for Elder Law attorneys. Clarity, understanding, and dialogue is needed to further the objectives of both professional ethical conduct and meeting the needs of elder clients, who may go underserved without the assistance of an agent or family member.

Susan Humiston, Director of the Minnesota Office of Lawyers Professional Responsibility, will provide a short presentation followed by Q&A to encourage dialogue on the following sticky issues facing Elder Law Attorneys:

- What is the practical application of “informed consent” under MRPC 1(f), particularly for a client with mild to moderate cognitive impairment?
- How is an agent to give consent to representation on behalf of the principal?
- How is conflict addressed between the agent and the principal, based on MRPC 1.7 and 1.8?
- What is the practical application of MRPC 1.4 as to communication and MRPC 1.6 as to confidentiality, when working with a principal and agent?
- What is the practical application of MRPC 1.14 as to working with a client with diminished capacity?

Speaker: Susan Humiston, Director, Minnesota Office of Lawyers Professional Responsibility.

Moderator: Suzanne Scheller, Esq., Attorney, Scheller Legal Solutions, LLC.

Click here to register: [Dialogue with the Minnesota Office of Lawyers Professional Responsibility on Sticky Issues facing Elder Law Attorneys](#). Remote participation via webcast is available. Please indicate this option when registering. Instructions will be emailed to you the week day prior to the CLE.

ELDER LAW SECTION ACTIVITIES

ADVOCACY SUPPORT COMMITTEE:

The Advocacy Support Committee meets at the offices of Long, Reher, Hanson & Price. Telephone participation is available. Please contact committee chair Laura Zdychnec at lzdychnec@mnelderlaw.com for call-in instructions or more information.

Upcoming meeting dates to be announced.

COMMUNICATIONS COMMITTEE:

The Communications Committee oversees the monthly Elder Law E-Newsletter and the Elder Law Section website. The committee is composed of the e-newsletter editor, web editor, associate editors, contributors, and any other interested section members. Meetings are to be held every other month to review issues related to the e-newsletter and the website, and to conduct an annual member survey. Upcoming meetings for the Communications Committee are as follows:

October 9th, 2019 at 8:30 a.m.

December 11th, 2019 at 8:30 a.m.

February 12th, 2019 at 8:30 a.m.

April 8th, 2019 at 8:30 a.m.

June 10th, 2019 at 8:30 a.m.

August 12th, 2019 at 8:30 a.m.

The meeting location is Julian's Office at 1360 Energy Park Drive, Saint Paul, MN 55108 in the First Floor Conference Room.

Anyone interested in serving on the committee or suggesting ideas for the newsletter or website may contact Communications Committee chair Mardell Presler to mardell@mardellpreslerlaw.com or 763-360-7833.

DIVERSITY COMMITTEE:

Meetings will be held via teleconference on the second Tuesday of every month from 9:30-10:15 am.

Please contact Maya Missaghi at maya@mmlawservices.com if you would like to join!

EDUCATION COMMITTEE:

The Education Committee plans CLE seminars sponsored by the Elder Law Section and meets by telephone on the second Thursday of each month from 9:30 A.M. to 10:30 A.M.

If you would like to participate, please contact the committee chair, Laura Orr at laura.orr@smrls.org.

LAW STUDENT COMMITTEE:

The Law Student Committee helps attract students to become the next generation of elder law attorneys. The committee meets as needed during the school year. Our goal for this bar year is to host a panel event at each local law school where students can ask questions about the practice of elder law. We are always looking for other ways to engage students, so please feel free to attend meetings and make suggestions.

If you have questions about the committee, contact Jack Austin at jack@hawkelawgroup.com.

LEGISLATIVE COMMITTEE

The Elder Law Section's Legislative Committee monitors proposed legislation at the state and federal level affecting the Section's membership; reviews legislative proposals put forward by other Sections and Committees of the MSBA; reviews proposals from other groups, agencies and individuals; keeps Section membership informed of proposed legislation; provides comment and other responses to legislative proposals; makes recommendations concerning support of, or opposition to, legislative proposals; develops relationships with other organizations affected by legislation of interest to the Section; acts as a coordinator for the Section's legislative activities; develops legislative proposals for inclusion in the MSBA legislative agenda; provides witnesses

and testimony in support of, or opposition to, legislative proposals; and in general supports the MSBA and the Section's legislative agendas. Members interested in joining the committee or learning more about the legislative issues being reviewed by the committee may contact the Legislative Committee Chair, Suzy Scheller, at (763) 647-0042 or suzy@schellerlegalsolutions.com; or Vice-Chair, Julian J. Zweber, at (651) 646-4354 or julianzweber@qwestoffice.net.

Please contact Tram Nguyen at tnguyen@mnbars.org to be added to the Elder Law Section Community Forum.

MEDICAL ASSISTANCE COMMITTEE:

The Medical Assistance (MA) Committee meetings will be at 3:30 p.m. on the third Tuesday of even-numbered months. The next meetings will be:

October 15th at 3:30 p.m.

December 17th at 3:30 p.m.

February 18th at 3:30 p.m.

April 21st at 3:30 p.m.

To attend by telephone, call 1-800-226-9607 at the designated meeting time. When prompted, enter Conference Identification Number [or Participant Code] 8157976029# to be connected to the conference.

The Medical Assistance Committee is a study group to analyze the members' questions and case studies and to discuss administrative policies and procedures in relation to Medical Assistance in Minnesota. For directions, or to attend by phone, please contact Traci Sherman with Pluto Boes Legal, PLLC, at tsherman@plutoboeslegal.com or 507-247-5900 at least 24 hours in advance of the meeting. Topics for the meeting may be submitted to tsherman@plutoboeslegal.com under the subject heading "MA Committee Topic," or faxed to 507-247-5868.

The Committee is hosted by Estate & Elder Law Service at Monroe Village, 1900 Central Avenue NE, Minneapolis, MN 55418. Parking is available behind the building and along adjacent streets. In-person attendees should enter through the door facing the parking lot behind the building. This door leads directly into the community room.

MA Committee members are invited to join the Medical Assistance Community forum at my.mnbar.org. Please contact Tram Nguyen at tnguyen@mnbars.org to be added to the community.

NEW LAWYERS COMMITTEE:

Meetings will be held the second Thursday of even-numbered months at noon. Each meeting has a different topic based upon input from the new lawyers committee. Minutes of past meetings are

available. The meetings are formatted so that a seasoned elder law attorney will speak for the first half hour, and the second half hour will be questions and answers.

Meetings will be held at Chestnut Cambronne PA, 17 Washington Ave N #300, Minneapolis, MN, 55401. Please contact Pook Grathwol at pgrathwol@chestnutcambronne.com or (612) 336-2919.

PRO BONO COMMITTEE:

The Pro Bono Committee, due to lack of attendance, is suspending committee meetings until further notice. Please contact Jennifer Wright, Chair, at jlinderwright@gmail.com, if you have an interest in working with the Pro Bono Committee.

STRATEGIC PLANNING COMMITTEE:

The next Strategic Planning Committee meeting date is to be announced. Meetings are held at the law office of Maser, Amundson, Boggio & Hendricks, P.A., located at 6601 Lyndale Avenue South, Suite 320, Richfield, MN 55423. Questions may be directed to Brenna Galvin at bgalvin@maserlaw.com.

VULNERABLE ADULT COMMITTEE:

Contact Marit Peterson at marit.peterson@elderjusticemn.org or 651-440-9303, if you are interested in participating in this committee.

The MSBA Elder Law Section's Website contains information about section committees and leadership. It also contains useful practice resources.

You may email Bridget-Michaele Reischl at bridget@decorolaw.com to suggest changes to website content.

Please send E-Newsletter contributions by 10 p.m. on the last day of each month to Mardell Presler at mardell@mardellpreslerlaw.com. The E-Newsletter is distributed on the first Monday of each month. If the first Monday occurs on a holiday, the E-Newsletter will be distributed on the following Monday.

If you do not wish to receive this E-Newsletter, send your request to be removed from the mailing list to Tram Nguyen at tnguyen@mnbars.org.

Current and prior E-Newsletters are posted on the website for the MSBA Elder Law Section and are available [HERE](#).