

Call for Justice, LLC—United Way 211 Training Paper

Session 3 Refreshed: Elder Law—Again

July 30 and 31, 2015: Genevieve Gaboriault, Supervising Attorney, Senior Law Project of Mid-Minnesota Legal Aid

Featured Speaker’s Topic

This session, Genevieve Gaboriault from Mid-Minnesota Legal Aid’s Senior Law Project will revisit various Elder Law issues that we covered in May 2012; she’ll also talk about some new topics relative to the legal rights of seniors.

Note: This is a supplement to our original Session 3 training which took place in May 2012; thus, while Genevieve will cover some of the same topics from that session (211 staff, please see that training paper in your notebook/website viewers, scroll up to “Session 3”), what follows are also some supplemental topics.

A Few Words about the Senior Law Project of Mid-Minnesota Legal Aid

The Senior Law Project works with seniors (age 60 and older) in Hennepin and Anoka Counties to provide legal advice or representation on the following topics:

- Housing
- Public Benefits (Social Security, Supplemental Security Income [SSI], Minnesota Supplemental Aid [MSA], General Assistance [GA], food stamps)
- Health care (Medicare, Medical Assistance [MA], Elderly Waiver Program, Alternative Care Program)
- Grandchild care and custody
- Consumer legal matters
- Utility legal issues
- Advice and referral on conciliation court, powers of attorney, health care directives, basic wills

Senior Law Project clients are not screened for income; instead, they are prioritized on the basis of urgency of need and access to other available legal resources.

“Assisted Living” Legal Mechanics

a. What is “Assisted Living”?

Assisted living is a type of rental housing that includes services like daily meals, housekeeping, help with daily living, recreation activities and emergency call services. There are different names for Assisted Living, like “housing with services” and “customized living” and as well, there are different types of assisted living, which include:

- nursing homes

- in-home residential and assisted living situations
- retirement communities
- adult day care
- Alzheimer's and hospice care
- a whole range of independent living situations

The average cost for assisted living is \$3,350 per month but can be a lot less or a lot more.

b. Monetary Issues with Assisted Living

Persons applying for government help to pay for their assisted living start with a Medical Assistance (MA) long-term care application and a MN Choices questionnaire (formerly called a Long-Term Care Consultation [LTCC]). An applicant might have to pay for home care on their own until their MA application is approved, something which could take weeks or even months.

MA might pay for various services a person needs but that person may be responsible for rent or room and board at the assisted living facility. Some people may be able to get help from Group Residential Housing up to \$877/mo.

“Spend downs” is a term of art and refers to reducing or “spending down” one’s assets (cash, stock, property) in order to qualify for MA eligibility. A person with significant assets should talk to a lawyer who specializes in MA planning in order to determine the proper spend down and the best way to preserve income and assets.

Not all assisted living facilities take payments from public assistance agencies for services or housing and food, so it’s critical that a person searching for assisted living ensure that the facility works with MA recipients. Further, there may be charges for additional services that are not covered by MA.

c. Legal Rights of Assisted Living Residents

Think of assisted living as just a regular apartment with a services contract; consequently, regular landlord-tenant laws apply to assisted living situations. For example:

- 1) A person in an assisted living situation must pay rent (which may be called a “monthly service fee” or something similar) and adhere to the rules of the facility; the obligation to pay rent and follow rules usually are codified in a lease or some other contract.
- 2) The facility owner (e.g. the landlord) is under an obligation to keep the facility in good repair.
- 3) The facility owner/landlord must follow fair housing laws, which includes reasonable accommodations or making repairs to a resident’s unit if needed.

4) An assisted living resident has the right to effective communication by the landlord or staff members, which means the right to information in a way that the resident understands best. This might be another language, or braille or an ASL interpreter.

5) An assisted living resident can't be evicted without the facility owner filing a case in court.

6) A facility owner can end a services contract (that is, a contract to supply meals or other services) with notice but the assisted living client has the right to keep living at the facility and bring in their own services.

7) An assisted living resident is protected by the Home Care Bill of Rights found in MN Statutes 144A.44 and 144A.441.

d. Nursing Homes (Skilled Nursing Facilities)

Nursing homes are different than assisted living facilities and are governed by additional laws and regulations. Medicare might pay for part of a person's nursing home stay; Medicare does not pay for assisted living services. Also, Medical Assistance rules change for nursing homes.

Nursing home residents are protected by landlord-tenant laws along with additional protections, including the right not to be discharged against a patient's will unless certain conditions exist. Thus, there are only 6 reasons why a person can be involuntarily discharged from a nursing home:

- 1) The nursing home resident's health improves.
- 2) The nursing home closes.
- 3) The resident owes the nursing home rent.
- 4) The resident engages in unsafe behavior.
- 5) Other residents engage in unsafe behavior, putting other residents at risk.
- 6) The facility can't meet the resident's needs.

The Health Care Bill of Rights (Minnesota Statute 144.651) protects a resident against being forced to take medications or treatments that he/she refuses.

Attached to this supplement is a Sample Nursing Home Notice of Transfer or Discharge. As you can see, it sets forth an appeal procedure with the right to request a hearing before a person is discharged from a nursing home against their will.

RED FLAG to 211 I&R Folks: If you talk to a nursing home resident or family member related to a nursing home resident who has received a Notice of Transfer or Discharge, remind them to read the Notice carefully and to note the time period for an appeal. They should make the effort to calculate out the last date for appealing; do not make that calculation for the caller, however, since this is something they must do on their own.

Guardianships, Conservatorships and Powers of Attorney

a. Guardianship and Conservatorship

A court has the power to name a person to help another person with their affairs. The two ways to do this are called guardianships and conservatorships.

- Guardianships are for assisting another person with their personal needs, such as decisions relative to medical care or where a person will live. (The person being helped is referred to as the “ward.”)
- Conservatorships are for overseeing another person’s financial affairs, such as dealing with bank accounts and assets and paying bills. (The person being helped is referred to as the “protected person.”) This isn’t done without court oversight; at various increments (usually annually), the conservator must file a report advising what money came in and how it was spent and why.

In both instances, the person who needs help does not have to be incompetent. (Incompetent means being incapable of making one’s own decisions relative to their life needs.) In a usual guardianship or conservatorship situation, the person who needs help doesn’t lose basic rights like the right to vote or the right to personal privacy, unless the court has a good reason to order otherwise. Moreover, in both instances, the guardian or the conservator must act in the best interests of the person they are serving; a failure to do so can result in personal liability to (or criminal prosecution of) the person serving as guardian or conservator.

The person being protected by either a guardian or conservator has the right to:

- Be treated respectfully, which includes adhering to the person’s medical preferences and religious beliefs.
- Get medical treatment in a timely manner.
- Control the things that the person being protected wants to control him or herself (assuming that the court hasn’t ordered otherwise).
- Have as guardian or conservator a person who actually meets their needs.
- Ask the court to intervene if they don’t want to be moved from one living place to another.
- Decide what should be done with personal belongings like clothes, furniture and vehicles. They also have the right to ask the court to review a guardian or conservator’s plans to deal with their personal belongings.
- Personal privacy.
- Choose who they want to talk to or have visit them (unless there is reason to believe that the visit may harm their safety or health).
- Marry and have children. A ward or protected person has the right to consent or object to sterilization.

- Ask the court to end or change the guardianship or conservatorship.
- Be represented by an attorney in any proceeding, including help with asking the court for changes in their guardian or conservatorship situation. Note: an attorney will be appointed for the ward/protected person if they can't afford an attorney.
- Vote.
- Make a Health Care Directive and appoint a health care agent.

Guardianships and conservatorships are set up through the court system. A person files a case asking the court to name them or another person as guardian or conservator for the person at issue. The person at issue is then given notice of the application for guardianship or conservatorship and they have the right to contest the proceeding. (They can also voluntarily consent to the guardianship/conservatorship.) The person filing the case must show “clear and convincing” evidence that a guardianship or conservatorship is needed. If the person at issue and subject to the proceeding doesn't agree to the guardianship or conservatorship, the court may decide not to order that a guardian or conservator be appointed; or, it may so order despite the person at issue's objection.

Once established, a guardianship or conservatorship can be ended if the ward or protected person shows the court that they no longer need help or protection. Usually, a doctor or social worker will have to testify in court that the ward/protected person has the ability to handle his/her own affairs. The court then terminates the guardianship/conservatorship and the person at issue is free to make their own decisions.

b. Power of Attorney

A power of attorney is a document which gives written consent to act on behalf of another person relative to their financial matters or affairs. The person granting a power of attorney does not actually lose the power to also act relative to their finances.

A conservatorship differs from a power of attorney in that the protected person in a conservatorship *does* lose the power to act relative to their financial matters. Additionally, a court order is required to set up a conservatorship; there's no need for a court order when giving another person power of attorney.

Reporting Elder Abuse

On July 1, 2015, the Minnesota Adult Abuse Reporting Center opened to receive reports of elder/adult abuse. <http://mn.gov/dhs/people-we-serve/adults/services/adult-protection/index.jsp>

The Minnesota Adult Abuse Reporting Center is open 24/7/365 and provides a toll-free number, **844-880-1574**; the general public can call to report suspected maltreatment of vulnerable adults. Mandated reporters—including law enforcement, educators, doctors, nurses,

social workers and other licensed professionals—can use a web-based reporting system. Reports will be promptly submitted to the appropriate investigative agencies.

A **vulnerable adult** can be anyone over age 18 who:

- Has a physical, mental or emotional disorder that makes it difficult for the person to care for themselves without help and to protect themselves from maltreatment.
- Is in a hospital, nursing home, transitional care unit, assisted living, housing with services, board and care, foster care or other licensed care facility.
- Receives services such as home care, day services, personal care assistance or other licensed services.

Maltreatment includes:

- Abuse, including physical, emotional and sexual abuse, use of restraints, involuntary seclusion or punishment.
- Neglect, including failure to provide necessary food, shelter, clothing, health care or supervision because of neglect by a caregiver or because the vulnerable adult cannot meet their own needs.
- Financial exploitation, including theft or withholding of money or property and/or use of money or property not for the vulnerable adult's benefit.

Minnesota encourages good faith reporting of suspected maltreatment of vulnerable adults by any person. If you make a report, your identity is confidential and cannot be released without a court order. Reports are reviewed to see if immediate protective services are needed. Reports of an alleged crime are referred to law enforcement. All reports of suspected maltreatment are also referred to a lead investigative agency, which may be the Minnesota county or the state departments of Health or Human Services.

Mandated reporters

Mandated reporters include law enforcement, educators, doctors, nurses, social workers and other licensed professionals. They can use an online reporting tool or can report by telephone. Instructions on how to use the tool will be provided through licensing agencies, boards and professional organizations. Use of the mandated reporting form is self-explanatory and does not require training or experience. The form asks for information about the vulnerable adult, suspected maltreatment and alleged perpetrator. When the completed form is submitted, mandated reporters will receive a report reference number for their records. Mandated reporters can download, save and print a copy of their report.

Legal Resources

1. Elder Law—Primary Referrals

Mid-Minnesota Legal Aid (612-334-5970)(<http://www.midmnlegal.org>) does **both estate planning and government benefits work** through its Seniors Law Project which accepts cases involving housing, nursing homes, government benefits, debt collection, utility disputes, grandchild custody, general probate, powers of attorney, and health care directives. **The Senior Law Project works with people 60 years or older who live in Hennepin and Anoka Counties without regard to income.** (However, we're also advised that the Project prioritizes the needs of clients who contact them, and as such, it overwhelmingly serves people at 125% Federal Poverty Guidelines or less.)

The Disability Law Center serves Minnesotans who live with disabilities; again, there is no income cutoff, but cases are screened on the basis of pressing need. **The DLC can be reached through the MMLA number above.**

Central Minnesota Legal Services (612-332-8151) (<http://www.centralmnlegal.org>) will represent seniors in third party custody cases and no-children divorces where there's a language barrier or domestic abuse or displaced homemaker issue and the client needs assistance to obtain income for self-support. Again, this will be at 125% FPG or less.

NE Seniors Clinic (612-781-5096) (www.neseniors.org) operates a legal clinic for age 60+ seniors/elders on **real estate related issues**. The clinic provides an opportunity to meet with an attorney on an individual basis. **Note: an appointment is required beforehand.**

Frequency: 1st Wednesday of every month

Time: 10:30

Location: 2600 Kenzie Terrace, Saint Anthony MN (go to leasing office building in Autumn Woods).

Volunteers of America—Estate and Elder Law Services (612-676-6300)

(estate&elderlaw@voamn.org). They advertise that they do both “private pay” and “subsidized services: sliding fee scale.” They limit their services to adults 60+ and persons with disabilities.

Qualifying factors: assets of less than \$10,000 (for individuals) or \$20,000 (for families), excluding automobiles and homes. Contact the program for more information about assets.

They have a great subsidized rate for wills ranging from \$75 to \$200 for individuals or \$100 to \$250 for couples depending on income.

The private pay rates are \$195/hr for legal advice and services; \$300 for a basic will; and \$1,200 for a basic trust.

There is no wait list for the Volunteers of America Estate and Elder Law Services.

The Senior Citizens Law Project of the Legal Aid Service of Northeastern Minnesota (218-726-4800) (<http://www.lasnem.org/dnn/Home/SeniorCitizensLawProject/tabid/63/Default.aspx>).

Serves senior residents of St. Louis, Lake, Cook, Carlton, Itasca, Koochiching, and Aitkin Counties on matters involving health care, housing, door-to-door salespeople, home repairs, warranty enforcement, unfair sales practices, nursing homes and family issues.

The Senior Linkage Line (800-333-2433)(operated by the Minnesota Board on Aging)(mba@state.mn.us) provides some referrals for attorneys on who deal with elder law; however advise callers to specifically be aware that some the law firm referrals through the Senior Linkage Line may be stale or don't usually take pro bono clients via a cold call.

2. Back-up/Fallback Referrals

LawHelpMN.org: This will be a good general resource for callers on a back-up basis, with explanation sheets about guardianships, conservatorships and powers of attorney. www.LawHelpMN.org

Minnesota Legal Advice Online: This is a good resource if a caller has a general question on an elder law topic that they can't figure out from other resources. www.MNLegalAdvice.org.

Please consult the original Session 3 training materials for other topics/strategies for legal referrals. We'll cover that material during our training session/presentation.

Thank you!

Ellie and Emily, the Call for Justice, LLC staff