

ELDERLY WAIVER BRIEF BY MARGARET GRATHWOL

IN RE: THE APPEAL OF  
XXXXX OOOOO,

APPELLANT

**MEMORANDUM OF LAW**

Docket No. 111111

**I. INTRODUCTION**

Appellant Xxxxx Ooooo applied for health care benefits to assist her to pay for her assisted living costs. She applied to Hennepin County Department of Economic Assistance. Appellant indicated on the application that she either lived in a nursing facility or would need elderly waiver benefits. The Hennepin County Department of Economic Assistance failed to make the required referral to Aging and Disability Services for a necessary assessment of her need for nursing facility level of care. Further, the Aging and Disability Services Division of Hennepin County failed to communicate with the Department of Economic Assistance adequately in order to initiate such an assessment. A qualified assessment, however, was performed by a registered nurse at the facility where Appellant lived on August 23<sup>rd</sup>, 2007. Said assessment was used by the long term care consultation team (LTCC Team) in making a determination that the Appellant was qualified for Elderly Waiver benefits. The assessment performed in a face-to-face interview at the facility in August mirrors the assessment later performed in December by the LTCC Team member. Appellant should not be deprived of benefits for which she is entitled because of the County's two fold failure to send a team member to have a face-to-face interview with Appellant. The assessment performed at the facility meets the requirements of the statute. Said Assessment is already part of the record used by the LTCC team to determine that the Appellant is qualified for the Elderly Waiver program. Appellant meets all criteria to qualify for both Medical Assistance and Elderly Waiver and is entitled to benefits from both programs as of September 1, 2007.

**II. FINDINGS OF FACT**

1. Appellant Xxxxx Ooooo is a 70 year older woman living with Alzheimer's. She lived independently in her home until August 17, 2006. She moved, at that time, from her home into a memory care unit at Alterra Claire Bridge of Plymouth (hereinafter referred to as "Claire Bridge"). Before her placement into Claire Bridge, Appellant was put on the wait list for placement at Sholom Home, a nursing care facility in St. Louis Park. After due care and consideration by her children, the family decided she would receive better care at an assisted living/memory care facility and, as such, moved her into Claire Bridge. Appellant paid for her care privately. By May of 2007, Appellant no longer had funds available to pay for her care, thus her children paid for her care from their private funds. The Claire Bridge contract required Appellant to pay privately for 1

year before she would be allowed to pay through a government program. August 17, 2007, marked the 1 year anniversary of Appellant's placement at Claire Bridge.

2. At Claire Bridge, Appellant was assessed by a licensed registered nurse every 3 months to determine the level of care needed. Among many other assessments by registered nurses, Appellant was assessed by Ms. Jane Manske, RN, on August 23, 2007. Said assessment (Appellants' Exhibits "I" and "J" hereinafter referred to as the "Manske Assessment") was performed by a registered nurse with over 10 years experience in home care. Ms. Manske does not work for the County, rather she works for Allied Professionals of Edina. Claire Bridge contracts with Allied Professionals for nursing staff. The Manske Assessment was made in a face-to-face interview with Appellant. It was conducted to determine the health, psychological, and social needs of the Appellant.

3. Appellant applied September 19, 2007, to Hennepin County Department of Economic Assistance for a Minnesota Health Care Program to assist in payment for her health care. (Appellant's Exhibit "C"). Appellant Ooooo requested benefits to begin September 1, 2007. On the application she indicated that she either (a) lived in a long term care facility, or (b) wished to receive waived program services. Appellant did not live in a nursing facility; rather she lived in a memory care facility/assisted living facility, Claire Bridge.

4. The Hennepin County Department of Economic Assistance received the application and assigned the processing of the application to Team 254. County case worker, Mr. Sahr Sandi, processed the application and approved Medical Assistance benefits for Appellant to begin September 1, 2007. Mr. Sandi testified, and his notes reflect, that he was aware that Appellant lived in an assisted living and might have been eligible for SIS-EW. (Appellants' Exhibits "D" and "E"). In spite of the County's knowledge that a long term care consultation screening was required; Mr. Sandi made no referral to Aging and Disability Services for a long term care screening. Mr. Sandi did not communicate to either family, counsel or the Aging and Disability Services Division the need for an LTCC.

5. Attorney. Jessica Keating of the Grathwol Law office contacted the County and spoke to Silvia Kuubitz, a financial case worker, concerning the client obligation listed on the Remedial Care Calculation from the County. Ms. Kuubitz did not inform Ms. Keating, counsel for the Appellant, that there was a need for an LTCC.

6. On December 13, 2007, the daughter of Appellant, Aaaa Bbbb, received a notice from Claire Bridge (Brookdale Senior Living) that her mother would be evicted for non-payment for services rendered. The amount due and owing to Claire Bridge at that time was approximately \$18,000.00. That same day Aaaa Bbbb contacted the Grathwol law Office and this office called Aging and Disability Services Division and initiated for an appointment for an assessment. On December 13, 2007, County social worker Ms. Susan Boege was assigned to the case from Aging and Disability Services. She is a member of the LTCC Team appointed to make a determination whether or not Appellant qualified for the Elderly Waiver program. As part of collecting data about Appellant for such

determination, Ms. Boege requested and received from Claire Bridge on December 13, 2007, several copies of previous face-to-face assessments performed by registered nurses at Claire Bridge, including the Manske Assessment from August 23, 2007. On December 17, 2007, Ms. Susan Boege met face-to-face with Appellant, her family and her counsel and assessed Appellant's need for care. (Appellant's Exhibit "K" hereinafter referred to as the "Boege Assessment").

7. Elderly Waiver benefits were approved for Appellant starting December 17, 2007. Appellant continued to be pursued for eviction by Claire Bridge. In February of 2008, in order to prevent eviction of their mother, the children of Appellant paid to Claire Bridge (Brookdale Senior Living) the balance due and owing, approximately \$18,000.00.

### III. CONCLUSIONS OF LAW

**Appellant is precisely the kind of individual the EW Statute is designed to help.**

1. Appellant is a model applicant for a health care program through state and federal funds. Appellant appropriately used all her own funds to pay for her care, and when her funds were exhausted, she came to the County for assistance with her medical bills. State law provides "it is a matter of State concern to meet the medical needs of persons whose resources are not adequate to meet the cost of their care . . . to provide such care a statewide program of Medical Assistance is established." Minn. Stat. 256B.01. This state has a long history of caring for the medical needs of its citizens. Further, the Elderly Waiver program is designed specifically to assist families to keep their loved ones in the community for as long as possible. Where the expense of community care is less than institutional care, it is in the interest of the State and the family to keep the medically needy person in the community.

**Elderly Waiver Saves the State Money.**

2. The Elderly Waiver program is authorized under Section 1915(c) of the Social Security Act and Minn. Stat. § 256B.0915 (2008). The Elderly Waiver (EW) program funds home and community based services for people who are: (1) age 65 years and older, (2) eligible for Medical Assistance, (3) require the level of medical care provided in a nursing facility, and (4) choose to reside in the community at a cost less than a nursing facility. Minnesota Department of Human Services Manual, Elderly Waiver Section, Chapter 23 (herein after referred to as the "Manual"). The Waiver is a request by the State of Minnesota to the federal government to allow Medicaid funds to be used to provide home and community based services to individuals who, but for the provisions of such services, would require a nursing facility level of care. Renewal for the Home and Community Based Waiver for Persons who are Elderly and at Risk of Nursing Facility Level of Care (hereinafter referred to as the "Waiver Request"), Appellants Exhibit "G". The Elderly Waiver program is favored in this State because it is a better use of federal funds to pay for a less costly level of care for an individual than to pay for the same individual to live in a nursing care facility. Appellant is over 65. Appellant's level of care was such that she was qualified to enter Sholom home in August, 2006. The

family, however, chose a less expensive option that provided more appropriate care for Appellant's illness. Appellant was not admitted to a nursing facility nor pre-screened by the County, in August of 2006. Appellant chose to live in an assisted living facility for 1 year and fully exhaust her funds and considerable funds of her children, before applying for Medical Assistance/Elderly Waiver in September 2007. Had Appellant chosen to live at Sholom Home, she would have spent her funds down more quickly thereby qualifying for Medical Assistance sooner and costing the State more in benefits. This would have been a more expensive option for the State. Had Appellant chosen the more costly option, to live in a nursing facility, all medical bills would have been paid immediately upon approval of the Medical Assistance application. Appellant chose, however, to live in an assisted living, a less costly level of care for both Appellant, and more importantly for the State. The State has an interest in encouraging individuals to choose the least costly level of care. Minnesota law places an affirmative obligation on the commissioner and the agency to "seek to maximize the use of available federal and state funds and establish the *broadest program possible* within the funding available." . Minn. Stat. 256B.0911, Subd.1. . (*emphasis supplied*)

**Aging and Disability Services violates the law; Appellant denied benefits because of Agency's failure to Act.**

3. Appellant applied for Medical Assistance/Elderly Waiver in September of 2007. The Waiver Request provides an affirmative obligation on the part of the agency to "provide for an evaluation . . . of the need for a level of care indicated . . . (nursing facility) . . . when there is a reasonable indication that the individuals might need such services. Waiver Request, B1, Page 2. The Aging and Disability Services Division of the Agency oversees, among other programs, the Elderly Waiver program. Hennepin County Aging and Disability Services failed to comply with the law in a timely manner. They did not "provide for an evaluation when there was reasonable indication" that Appellant might need such services. State law and the Waiver Request both provide an affirmative obligation on the case manager to initiate an assessment of the individual. "Case managers *shall* initiate and oversee the process of assessment and reassessment of the individual's care and review plan of care at intervals specified in the approved waiver plan". *Id, B(a) 1, page 1.(emphasis supplied)* and Minn. Stat. Section 256B.0915, Subd. 1.a (2008). The case manager, however, in the instant case, violated Minnesota law by failing to initiate and oversee an assessment in a timely manner. The Aging and Disability services had available to it as soon as September 19, 2007, the following information:

- Appellant was over 65
- Appellant lived in an assisted living facility
- Appellant sought elderly waiver benefits
- Appellant was eligible for Medical Assistance

All of the above is more than enough indication that Appellant "might need services" from the Elderly Waiver program, thus triggering the mandate from the statute that the case manger **shall initiate** an assessment. No assessment, however, was ever *initiated* by the case manager

4. The case manager in this case was Ms. Louella Kaufer, Social Work Unit Supervisor for Hennepin County Aging and Disability Services. In her testimony, Ms. Kaufer, could not identify any way in which her unit initiates assessments. When asked the question she responded that the unit holds seminars in the community. When questioned further, Ms. Kaufer responded that there was no way her unit could assess the needs of the entire population of Hennepin County. The statute, however, does not require an assessment of the entire population of Hennepin County, only those that she has reason to believe might need services. An example might be a person, such as Appellant, who (a) has applied for Medical Assistance, (b) is over 65 (c) lives in an assisted living, and (d) has requested long term care or Elderly Waiver. Such a person is ascertainable by a cross reference of files between Economic Assistance and Aging and Disability Services. Ms. Kaufer further testified that the general practice of her division is to wait. Ms. Kaufer testified that her unit waits for a call from the assisted living facility before an assessment file is started. It was her belief that this was an efficient process because the assisted living facility would want payment from the County. Ms. Kaufer testified that her unit waits to start an assessment file until she hears a request from a family member who may have received the telephone number of Aging and Disability Services from another member of the community. Finally, Ms. Kaufer testified that her unit waits to start an assessment file until her unit receives a call from a family member who is directly referred from Economic Assistance. In all the circumstances, Ms. Kaufer's unit does not initiate an assessment; rather the unit waits until an outside person calls the division and requests an assessment. The common practice of Aging and Disability Services is to wait and not initiate an assessment. This is in violation of the letter of the law which governs the Elderly Waiver program. This practice is particularly egregious to applicants for Elderly Waiver benefits, as benefits under the Statute do not begin to flow until such an assessment is performed.

**Department of Economic Assistance violates the law and such violation denies Appellant EW benefits.**

5. A financial case worker at the County is directed in the Manual to refer a person applying to the County for long term care (either in a nursing facility or in the community) to the Aging and Disability Services Division of DHS for a Long Term Care Consultation Screening. Manual at 23.20. (emphasis supplied) No such referral was made by the County in this case. Further, the financial case worker is also instructed to verify that either (1) the applicant has had a Long Term Care Consultation Screening or (2) that the applicant is exempt from the Long Term Care Consultation Screening. Finally, the Manual warns financial case workers that, "No LTCC, No Services", meaning if the screening is not performed an applicant for Elderly Waiver will not receive program benefits. Id. The Manual is clear, and offers case workers three separate mandates or warnings about the absolute need for a referral of the applicant to Aging and Disability Services. However, neither Mr. Sahr Sandi nor Ms. Silvia Kuubitz, both case workers who worked on Appellant's case, ever referred Appellant to Aging and Disability Services for a screening. Nor did either case worker contact Aging and Disability Services, on behalf of the Appellant and request a screening. Worse yet, it was

the testimony of Mr. Sandi that he has never referred a case to Aging and Disability Services. He was unaware of the provision requiring such referral in the Manual. The supervisor of Team 254 (Appellant's Team for services), Lynette Bourcy too, testified that she was unaware of the law which provides that her team of financial workers is required to make such a referral to Aging and Disability Services.

6. Many have been denied benefits for which they are entitled, and clearly Appellant was denied such benefits. The aggregate consequences to the families of Hennepin County of such an oversight are almost beyond measure. In this case, however, the measure is simply math, \$18,000.00 plus the agony of a family whose very vulnerable mother was almost evicted from her home. The Manual is a clear guide to financial workers and warns them that, "No LTCC, No Services". The requirement for a referral under the law could not be clearer.

### **Long Term Care Consultation Screening - Nursing Facility Placement – MA**

7. To be eligible for Long Term Care benefits an individual must have a Long Term Care Consultation Screening. Manual Chapter 23. This long term care may be provided to an individual either in a nursing facility or in the community. If an individual lives in a nursing facility, Medical Assistance is the program that pays for the long term care benefit. If the individual lives in the community, Elderly Waiver is the program that pays for the long term care benefit. If Appellant had entered Shalom home, the nursing facility she was wait listed to enter in 2006, she would have been screened by the County pursuant to Minn. Stat. 256B.0911, Subd. 4c. The County could have screened Appellant by telephone or in a face-to-face interview. *Id.* The County could have determined no face-to-face interview was necessary to determine her need for nursing facility level of care, and based their determination on information obtained from other health care professionals, *Id.* At 4c(a)(1), such as the Manske Assessment. Further, The County consultation team may have considered an assessment by Appellant's Physician and other personnel as deemed appropriate by the County to make their determination of the need for nursing facility level of care. Minn. Stat. 256B.0911Subd4a(d). Minnesota State law, in short, would allow the consultation team making an assessment of Appellant, in a nursing facility setting, to consult with a physician, use the Manske Assessment, or even make the assessment without the advantage of a face-to-face assessment. In all cases, the date of benefits is not tied to the date of assessment, rather is tied to the 1<sup>st</sup> day of the month in which an individual applied for long term care benefits for a nursing facility placement.

### **Long Term Care Consultation Screening - Community Placement – EW**

8. To receive Elderly Waiver benefits, an applicant must be over 65 and determined, among other criteria, eligible for Medical Assistance. Manual Chapter 23. Appellant is 70 years old and, in fact, started to receive Medical Assistance benefits on September 1, 2007. In addition, in order to be eligible for Elderly Waiver, an applicant must have a Long Term Care Consultation Screening. *Id.* The purpose of the screening is to determine whether, although the applicant lives in the community and seeks Elderly

Waiver benefits to pay for such care, the applicant could in fact live in a nursing facility and seek Medical Assistance benefits to pay for such care; the later being more expensive than the former. It is in the interest of the State to “maximize the use of federal and state funds”. Minn. Stat. 256B.0911, Subd.1. Elderly Waiver benefits do just that. It is not, however, in the interest of the State to pay state and federal funds out to persons who live in the community but do not qualify for nursing facility placement. Such is the need for the Long Term Care Consultation Screening which determines whether the applicant, in fact, could live in a nursing facility.

### **The Assessment - Who Can Assess**

9. The qualification of the individual performing the initial evaluation to assess whether the individual needs a level of care that would be provided by a nursing facility shall be, pursuant to the Waiver Request, a registered nurse, a licensed social worker, or other . . . Waiver Request page D1-1 (emphasis supplied). The Manske Assessment of Appellant dated August 23<sup>rd</sup>, 2007, was performed by a registered nurse, as prescribed by the Waiver Request. Minnesota Statute provides that a team shall be established to determine if an individual is qualified to receive benefits. A team shall be established by the county board of commissioners to perform the Long Term Care Consultation Services. The Long Term Care Consultation Services defined in the statute are specifically 11 different services. *Id.*, subd. 1a. Two in particular refer to assessment of the person’s health, psychological and social needs and preadmission screening to determine the need for a nursing facility level of care. *Id.* Subd., 1a(3) and (8). This team shall consist of at least 1 social worker and 1 public health nurse. *Id.* Subd 3. In certain circumstances, however, a registered nurse can be approved to be a member of the Long Term Care Consultation Team. *Id.* Such inclusion is upon approval by the commissioner. *Id.* The assessment *may* be performed by either a social worker or a public health nurse. Minn. Stat. 256B.0911 Subd.3a. The statute is silent as to whether only those individuals must perform the assessment or whether a registered nurse may also perform the assessment. The statute is clear, however, that the team members must confer regarding the most appropriate level of care for each individual screened. *Id.* The date of a face-to-face assessment starts the eligibility start date for benefits, provided all other criteria are met. Minn. Stat. 256B.0911 subd. 3a.(i).

10. All criteria with regard to the face-to-face assessment have been met in accordance with the Statute. Appellant was assessed both by a registered nurse, Ms. Jane Manske and a licensed social worker, Ms. Susan Boege. Appellant was assessed August 23<sup>rd</sup>, 2007, and again on December 17, 2007. Both assessments were conducted with the Appellant in a face-to-face interview. Both Assessments were used as part of the determination to grant benefits to Appellant. Both assessments covered line by line the exact same need for care for Appellant. (Manske Testimony). Ms. Boege, a member of the LTCC Team, specifically requested previous assessments of Appellant, (among them the Manske Assessment), as part of her determination to assess Appellant later in the week. The Manske Assessment was thereby already made a part of the team determination that Appellant qualified for the program. The facts that (1) the Manske Assessment was performed by a non- County employee, and (2) without the pre-approval

of the commissioner, are distinctions without substance. Ms. Jane Manske's experience in the community would have qualified her to make the assessment and be a member to the LTCC Team if necessary.

**The County cannot hide behind Minn. Stat 256B.0911Subd.3a.(i) to deny Appellant benefits.**

11. The County argues that Minn. Stat. Section 256B.0911, Subd.3a.(i) prevents an effective eligibility start date to be prior to the Boege Assessment, December 17, 2007. "The effective eligibility start date can never be prior to the date of assessment." Minn. Stat. 256B.0911, Subd,3a(i). The purpose of this statute is to verify that the applicant for waiver benefits in fact requires a level of medical care provided in a nursing care facility. It is an important purpose and assists the State to ensure that the program benefits are used "to maximize the use of available federal and state funds and establish the *broadest program possible* within the funding available." Minn. Stat. 256B.0911, Subd.1. . (*emphasis supplied*). The statute even places an expiration date on the assessment, 60 days. This time limit requirement anticipates circumstances in which an applicant may in fact improve in condition and may not need such a high level of care 61 days after the assessment was made. The Statute also anticipates circumstances in which an applicant might require a level of medical care provided in a nursing care facility on the date of assessment but may not have needed such medical care one day before the date of assessment, to wit the language "can never be prior to the date of assessment". Both limitations on the shelf life of the assessment prevent the unjust payment of benefits to an individual who is not entitled to such benefits. Minn. Stat. 256B.0911, Subd,3a(i) drives to the heart of Minn. Stat. 256B.0911 which mandates the State to maximize the use of state and federal funds, that is, never allow benefits to be paid to persons who are not eligible to receive such benefits. This statute also, presupposes that all other laws and mandates of the Elderly Waiver law would have been upheld, namely, Aging and Disability Services would have initiated an assessment, and that the financial case workers would have made a referral for an assessment. Both of which did not happen in the instant case. It is against public policy to allow the County to hide behind Section 256B.0911, Subd.3a(i) and not at the same time hold the County accountable to comply with laws which require the County to initiate an assessment and refer clients for the assessment. How can an applicant ever receive the assessment and thus benefits if the County does not comply with Minn. Stat. Section 256B.0915, Subd. 1.a (2008) (case manager shall initiate an assessment) and Manual Section 23.20 (financial worker shall refer the applicant to Aging and Disability Services for an assessment)? To allow the County to hide behind a technicality in the law would subvert the entire purpose behind the Medical Assistance law which is to "meet the medical needs of persons whose resources are not adequate to meet the cost of their care . ." Minn. Stat. 256B.01.

12. In the present case, however, there is no dispute that Appellant needed care that rose to the level to qualify her to enter a nursing care facility. She in fact was on the wait list at Sholom Home more than 1 year prior to the date for which she seeks benefits. Her illness is such that it does not improve. She did not break her hip and then recover and no longer need a high level of care. Appellant, sadly, has Alzheimer's. The nature of the

progression of this disease is such that if she needed a high level of care in August of 2006, then she would need as high or a higher level of care a year later. As evidenced by the Manske Assessment, Appellant's need for care on August 23<sup>rd</sup>, 2007, was exactly the same level of need for care as on December 17, 2007, the date of the Boege Assessment. To allow the County to use both assessments to determine that Appellant qualifies for benefits starting September 1, 2007, more accurately reflects the spirit of the law.

#### **IV. CONCLUSION.**

The County erred in denying Appellant Elderly Waiver benefits from September 1, 2007, to December 17, 2007. Appellant qualified for both Elderly Waiver benefits and Medical Assistance benefits starting September 1, 2007. Appellant respectfully requests the Court to order the County to (1) grant Elderly Waiver benefits to Appellant starting September 1, 2007, (2) pay attorney's fees to Appellant associated with legal representation from December 13, 2007, to present, and (3) any other relief the Court deems just and equitable.

Dated: June 16, 2008

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