

MSBA ELDER LAW SECTION E-NEWSLETTER

June 30, 2009

E-Newsletter Editorial Staff:

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Barg Update: Supreme Court Denies Certiorari

Submitted by Julian J. Zweber, Esq.

On June 29, 2009, the U.S. Supreme Court announced that it has denied certiorari in the Barg case. *Leo Vos, Director, Mille Lacs County, Minnesota, Family Services and Welfare Department, et al., v. Michael E. Barg*, U.S. Supreme Court Docket No. 08-603. Under Supreme Court rules, the Petitioner still has 25 days to file a petition for reconsideration.

We will have to see whether the State finally accepts the Minnesota Supreme Court's interpretation of federal estate recovery law as interpreted in Barg. Even then, we still have to face the 2009 amendments to Minn. Stat. § 256B.15 which attempt to undo the result in Barg for future cases. In the meantime, it appears that the end is near for the many cases in the pipeline waiting for Barg to become final.

News from the Center for Elder Justice and Policy at William Mitchell

Submitted by Kim Dayton, Esq.

The inaugural issue of the Elder Policy Post, an occasional newsletter of the Center for Elder Justice and Policy, has just been published at <http://www.cejp.org/resources/EPPSu09.pdf>. The EPP was designed, written, and illustrated by law students in the Elder Justice and Policy Keystone at William Mitchell in partial fulfillment of the technology component of the course requirements. Please take a few minutes to look over their work and read about the Center's activities of the past year.

You Can Use a MA Recipients' Income for Pre-Eligibility Medical Expenses

Submitted by Nicholas E. Halbur, Esq., Clinical Law Fellow, University of St. Thomas

A June 4, 2009 recommendation by an Administrative Law Judge (ALJ) made clear that the recipient of Medical Assistance (MA) may use income to pay pre-eligibility medical expenses, but the final decision of the DHS on the recommendation improperly limits this rule to expenses from the three months prior to application.

Federal law requires that, as part of the monthly spenddown, a Medical Assistance (MA) recipient must be allowed to use current income to pay for past medical expenses, thereby reducing the MA recipient's contribution to current care and increasing the amount that the county must pay to the provider to cover the current month's bill. Recipients and medical providers benefit by having the debts paid, but the County ends up paying more out than it would without this rule. Application of this rule to nursing home bills is particularly important because it provides an MA recipient with a way to repay a past-due amount and avoid a discharge. It could also be used to apply the income of a recipient spouse to pay for bills to which the community or well spouse might otherwise be responsible.

Under federal law a recipient of MA for Long Term Care must be allowed to apply current income to past due medical expenses that are not subject to payment by any third party. 42 U.S.C. § 1396a(r)(1)(A); 42 C.F.R. 435.725(c)(4)(ii). States can put reasonable limitations on the use of this rule, but must do so in their State Medicaid Plan. State Medicaid Manual § 3703.8 (1989). The only limitation submitted to CMS by Minnesota is that the rule cannot be used to pay for bills incurred as the result of the imposition of a transfer of assets penalty period. *Minnesota State Plan Under Title XIX of the Social Security Act, Supplemental 3 to Attachment 2.6-A, OMB No.: 0938-0193, Approval Date: May 31, 2006, Effective Date: July 1, 2005.*

Counties were rejecting requests to allow recipients to apply their current income to pre-eligibility nursing home bills. On an appeal of one such rejection to the Commissioner of DHS, the County, which had initially rejected the request in full, took the position that the rule did apply, but only to bills from no more than three months before the month of application, citing Minn. Stat. § 256B.0575(a)(9) as a reasonable limitation.

Though the ALJ submitted a decision for the recipient, the Commissioner adopted the County's position and ordered that the County allow the recipient to pay for medical expenses incurred in only the three months before the month of application. The ALJ's and Commissioner's decisions are available at <http://appeals.dhs.state.mn.us/AppealsSearch.aspx> by searching for the docket number, 108603, and including the date 6/4/2009 (the Commissioner's changes to the ALJ decision are at the very end). The Commissioner excluded the possibility of following federal law and stated, "This administrative review mechanism is not going to declare a duly promulgated statute invalid even if we were inclined to do so."

While we are pleased that the ALJ's decision makes clear that income made be used for pre-eligibility medical expenses, the limit of three months prior to applying for MA is not supported by law or the CMS. The Commissioner's decision is in error because this limitation based on Minn. Stat. § 256B.0575(a)(9) is not reasonable and has not been submitted to CMS. This new, but still inadequate policy in Minnesota, is functionally equivalent to that rejected by CMS in Md. Dep't. of Health and Mental Hygiene v. Centers for Medicare and Medicaid Services, 542 F.3d 424 (4th Cir. 2008). As indicated in Part 1 of Julian Zweber's legislative summary last week, available at <http://www2.mnbar.org/sections/elder-law/newsletters/2008-09/2009%20MA%20LEGISLATIVE%20UPDATE%20PART%20ONE%20-%206-23-09%20edition.pdf>, the legislature has expanded the limitations found in § 256B.0575(a)(9). The Commissioner may attempt to apply those limitations, despite the conflict with federal law, unless practitioners and/or CMS challenge these violations.

We encourage you to request that Counties recalculate your clients' spenddown and resident contributions to allow them to pay for medical expenses that they incurred before eligibility for MA. We will continue to work on expanding the Commissioner's ruling to more than three months as allowed by law. I would like to acknowledge the hard work of Certified Law Student Kristine Pasowicz on this issue, and wish her the best of luck on the bar exam later this summer. You can contact me at the UST Legal Services Clinic for more information or briefs, 651-962-4960.

ELDER LAW NEWS

Advocates say budget cuts target most vulnerable

http://minnesota.publicradio.org/display/web/2009/06/25/unallotment_homeless/

Senior Federation dissolving; most programs to live on

http://www.startribune.com/lifestyle/health/48733957.html?elr=KArks7PYDiaK7DUqEiaDUiD3aPc:_Yyc:aUU

Thomson Reuters Study Finds Baby Boomers Face Healthcare Cost Hurdles

<http://news.prnewswire.com/DisplayReleaseContent.aspx?ACCT=104&STORY=/www/story/06-22-2009/0005047553&EDATE=>

CMS nursing home guidance focuses on resident quality of life, environment and choice

<http://www.mcknights.com/CMS-nursing-home-guidance-focuses-on-resident-quality-of-life-environment-and-choice/article/138796/>

Minnesota passes 500 cases of H1N1 (CDC says health-care personnel are not following infection-control recommendations closely enough)

http://news.postbulletin.com/newsmanager/templates/localnews_story.asp?z=2&a=405518

Census: World's older population will triple by 2050, adding stress to government programs

<http://www.startribune.com/nation/48878237.html?elr=KArksUUUoDEy3LGDio7aiU>

Less Frequent Social Activity Connected To More Rapid Loss Of Motor Function In Older Adults

http://www.redorbit.com/news/health/1709537/less_frequent_social_activity_connected_to_more_rapid_loss_of/index.html

Survey: Elderly, Poor Narrow Broadband Service Gap

<http://www.cbsnews.com/stories/2009/06/19/ap/hightech/main5098289.shtml?tag=contentMain;contentBody>

MINNESOTA CASES

The following is a published decision released by the Minnesota Court of Appeals released on June 23, 2009:

A08-1556

Candace Yath, Appellant, vs. Fairview Clinics, N. P., d/b/a Fairview Cedar Ridge Clinic, et al., Respondents; Navy Mao Tek, et al., Defendants; Net Phat, Respondent.

Judge Kevin G. Ross. Concurring specially, Judge Matthew E. Johnson.

Hennepin County District Court, Hon. William R. Howard.

1. Posting private information on a publicly accessible Internet website satisfies the publicity element of an invasion-of-privacy claim.
2. The Health Insurance Portability and Accountability Act does not preempt Minnesota Statutes section 144.335 (2006), which gives patients a private right of action for improper disclosure of their medical records.

Affirmed in part, reversed in part and remanded.

The decision is available at:

<http://www.lawlibrary.state.mn.us/archive/ctappub/0906/opa081556-0623.pdf>

The following is an unpublished decision from the Minnesota Court of Appeals released on June 23, 2009:

A08-1219

In re the Estate of: Peter Barna, Deceased

TOUSSAINT, Chief Judge

Appellant Samantha A. Matson challenges the probate court order denying her a share of the remainder of her deceased uncle Peter Barna's estate, arguing that the probate court's findings that Barna's will and accompanying codicil were ambiguous and that Barna did not intend her to share in the remainder of his estate were clearly erroneous. Because the district court's findings were not clearly erroneous, we affirm.

The decision is available at:

<http://www.lawlibrary.state.mn.us/archive/ctapun/0906/opa081219-0623.pdf>

Unpublished opinions may not be cited except as provided by Minn. Stat. Section 480A.08, Subd. 3 (2008).

STATUTES, REGULATIONS, BULLETINS

DHS BULLETIN #09-32-10: FINANCIAL INFORMATION TO ASSIST COUNTIES WITH PREPARATION OF CY 2010 HUMAN SERVICES BUDGET.

The American Recovery and Reinvestment Act (ARRA) of 2009 increased the reimbursement rate for Medical Assistance through December 31, 2010. This bulletin provides county human service agencies information on caseloads, rates, costs and expected revenues for the preparations of their 2010 budgets, in light of the ARRA. However, county funding reductions may change after “unallotment” provisions, signed by the Governor, are known. The DHS will provide further information on any reductions as they are announced. The bulletin, dated June 16, 2009, is available at: http://www.dhs.state.mn.us/main/groups/publications/documents/pub/dhs16_145184.pdf.

UPCOMING EVENTS AND CLE PROGRAMS

Medicaid's HCBS State Plan Option

National Legal Resource Center (NLRC) Webinar

July 1, 2:00 p.m. (EDT)

Contact Information: <https://www1.gotomeeting.com/register/142273192> or Jessica Hiemenz, National Elder Rights Training Project, Jhiemenz@nclc.org, 651.227.8266

The Basics of Elder Law

Video

July 17 – Rochester

July 20 – Minneapolis

Contact Information: <http://www.minncle.org/SeminarList.aspx> or 1 800-759-8840.

Elder Law Institute

October 8-9, 2009

Minnesota CLE Conference Center

ELDER LAW SECTION ACTIVITIES

VULNERABLE ADULT COMMITTEE MEETING: The next meeting of the Vulnerable Adult Committee will be Thursday, July 30, at Noon, at the offices of Pearson, Randall, Schumacher & LaBore, P.A., 100 S. 5th Street, Suite 1025, Minneapolis, 612.767.7500. Contact co-chairs Ken LaBore at klabore@prslegal.com or Joel Smith at joel@koslaw.com for more information.

MA COMMITTEE MEETING: The next MA Committee meeting will be at 3:30 p.m. on Tuesday, August 18, 2009, at the MAO Offices, 2021 E. Hennepin, Suite 200, Minneapolis. Topics for the meeting may be submitted to MA Committee Chair, Cathryn Reher, at creher@mnelderlaw.com, or faxed to 952-542-9201. For directions, or to attend by phone, please contact Tracie Fenske with Long, Reher & Hanson, P.A. at 952-929-0622.

GOVERNING COUNCIL MEETING: The next meeting of the Elder Law Section Governing Council will be at 3:30 p.m. on Friday, August 21, 2009, at the MAO offices, 2021 E. Hennepin, Suite 200, Minneapolis. All members are welcome to attend. To participate by phone, please contact Vicki McIntyre at vmcintyre2@yahoo.com or 612-722-8572.

DON'T FORGET THAT THE ELDER LAW WEBSITE IS A GREAT RESOURCE. Here's what you can find on the Website: Links under "What's New" to the DHS Health Care Programs Manual, the updated Income and Asset Eligibility Figures for Minnesota Health Care Programs, the DHS Bulletin on treatment of uncompensated transfers, the Minnesota Bankers Association Compliance Bulletin on Powers of Attorney, and a legislative summary; Practice Links to organizations such as NAELA, ABA Commission on Law and Aging, Minnesota Senior Federation; 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://www2.mnbar.org/sections/elder-law/index.asp>

Please send E-Newsletter contributions by noon on Saturday of each week to Suzy Scheller at sscheller@prslegal.com.

If you do not wish to receive this E-Newsletter, send your request to be removed from the mailing list to Kim Basting at kbasting@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://www.mnbar.org/sections/elder-law/newsletters.asp>.