

MSBA ELDER LAW SECTION E-NEWSLETTER

July 7, 2009

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Note: Due to the Fourth of July Holiday, this issue is coming out one day late.

2009 MA LEGISLATIVE UPDATE—PART TWO

Submitted by Julian J. Zweber, Legislative Coordinator

The following is the second part of a summary of the amendments to the medical assistance eligibility and estate recovery statutes passed by the 2009 Legislature as part of the Omnibus Health and Human Services Finance Act of 2009. The Governor signed the Act on May 14, 2009.

MAINTENANCE OF EFFORT REQUIRED BY

RECEIPT OF STIMULUS MONEY

The effective dates of the changes described in this summary are postponed until January 1, 2011 (or perhaps later), because of conditions attached to the State's receipt of federal stimulus money. As a condition of receiving federal stimulus money from the American Recovery and Reinvestment Act of 2009 (ARRA), which was signed into law on February 17, 2009, the State of Minnesota may not enforce any medical assistance eligibility standards, methodologies or procedures more restrictive than those in effect on July 1, 2008. If Minnesota has any eligibility standard, methodology or procedure in place which is more restrictive than those in effect on July 1, 2008, the State had until July 1, 2009, to reverse the policy. DHS believes that these restrictions will only be binding on the State until January 1, 2011 (or perhaps later if a waiver is required). As a result, there are a number of medical assistance eligibility changes which were originally included in Governor Pawlenty's 2009 Budget Recommendations to become effective July 1, 2009, which had to be modified following the passage of ARRA. The Governor's reaction was to recommend delaying the effective date of these proposed changes to January 1, 2011 (or perhaps later if a waiver is required). The Governor's recommendations, taken together, were projected to save significant funds for the

medical assistance program. Because of the proposed savings, all of them were included and booked as savings in the Omnibus Health and Human Services Finance Act of 2009, which was signed by the Governor on May 14, 2009. These changes to become effective in the future are now part of Laws of Minnesota 2009, Chapter 79, Article 5. The most important changes affecting future eligibility for medical assistance benefits are summarized below.

REDUCTION OF EXCESS ASSETS IN MONTH OF APPLICATION

Laws 2009, Ch. 79, Art. 5, Sec. 18, amending Minn. Stat. § 256B.056, Subd. 3d

Under current law, if an applicant is eligible for benefits by the last day of the month and applies for medical assistance benefits by the last day of the month, the applicant is eligible for benefits back to the first day of the month. That is current month coverage, not retroactive coverage. Retroactive coverage is coverage for a month prior to the month of application. Under current law, if there are excess assets in the month of application, they can be reduced in any way which does not cause a period of ineligibility for benefits. This means that excess assets can be reduced on anything for value up to the day before the day of application for benefits. This allows the excess assets to be used to pay medical expenses for months prior to the month of application, credit card debt, household expenses and other liabilities. Effective January 1, 2011, the new amendment would make clear that excess assets in the month of application could be used only to pay bills incurred for health services in the retroactive period, if retroactive coverage is requested. If current coverage is requested, excess assets could no longer be used to establish a funeral account (a separate bank account designated for funeral and holding no more than \$1,500) and the remaining excess assets could be used only to pay bills for health services incurred during the 45 or 60 day period required by Rule 9505.0090 for the processing of an application which would otherwise be paid by medical assistance. The effect of this change would be to require excess assets to be reduced prior to the end of the month before the month of application if they are needed to pay other bills. Excess assets in the month of application could only be used to relieve the medical assistance program of expenses it otherwise would be required to pay. This change might require a change in federal law or approval of a waiver request before it can be implemented, although the amendment does not recognize this possibility.

ELIMINATING REDUCTION OF PENALTY PERIODS FOR PARTIAL RETURN OF UNCOMPENSATED TRANSFERS

Laws 2009, Ch. 79, Art. 5, Sec. 21, amending Minn. Stat. § 256B.0595, Subd. 2

Under current law, a penalty period for an uncompensated transfer of assets is reduced dollar-for-dollar by a partial return of the transferred assets. This interpretation of federal law has been in effect since November of 1993. This allows a portion of transferred assets to be retained by the transferee once a penalty period starts to apply. This is

commonly known as the "apply/deny" strategy by which all excess assets are transferred to another family member in one lump sum, the individual then applies for medical assistance benefits, and the penalty period then starts running. Once the penalty period starts to run, the penalty period is shortened by one month for each month after the start of the penalty period, and the penalty period is further reduced by returning part of the transferred assets each month as the original transferor needs funds to pay medical expenses not covered by medical assistance. This strategy can result in other family members being allowed to keep substantial portions of transferred assets.

To stop this practice, or at least hinder it as much as possible, the new amendment allows a penalty period to be eliminated only if all transferred assets are returned within 12 months of the start date of the penalty period. The amendment also prohibits adjustment of a penalty period unless the full value of the transferred assets is returned.

This change is effective for periods of ineligibility established on or after January 1, 2011. This change might require a change in federal law or approval of a waiver request before it can be implemented, although the amendment does not recognize this possibility.

UPDATED INCOME AND ASSET ELIGIBILITY FIGURES

Submitted by Laurie Hanson, Esq.

Updated income and asset eligibility figures for Minnesota Health Care Programs for July 2009 are available at: <http://www.mnbar.org/sections/elder-law/documents.asp>.

ELDER LAW RESOURCES NEEDED FOR PRO BONO PRACTITIONERS

The Elder Law Section's Member Education Committee, in conjunction with the Minnesota State Bar Association and Minnesota Legal Services Coalition, will meet at **noon on Wednesday, July 22, 2009** at the MSBA offices, 600 Nicollet Mall, Suite 380, ("Honors" room) Minneapolis, MN, to discuss collection and organization of elder law resources for use by attorneys representing low-income clients. (Bring a lunch if you like.) MSBA and MLSC administer the website ProJusticeMN.org, which provides resources for pro bono and legal services practitioners representing low-income or

disadvantaged clients. Access to these resources is invaluable to those assisting low-income elders.

All section members are welcome to attend and assist in this important effort, and representatives both from MSBA and MLSC will be in attendance. Specifically, we need pleadings, practice aids, legal research materials, and relevant links that relate to the following elder law topics:

- Advance Directives
- Elder Abuse
- Government Benefits Planning
- Guardianship & Conservatorship
- Medicare & Medicare Part D
- Power of Attorney
- Probate & Probate Alternatives
- Wills, Trusts & Estate Planning

If you are unable to attend on July 22nd, but have resources to contribute, please contact Brian Bell at bbell@mnbar.org or 612-278-6309, or Laura Zdychnec at lzdychnec@mnelderlaw.com or 952-929-0622.

ELDER LAW NEWS

Nation's nursing homes have fewer residents, beds: study

<http://www.mcknights.com/Nations-nursing-homes-have-fewer-residents-beds-study/article/139493/>

Minnesota 18-county EHR moves forward

<http://www.examiner.com/x-14940-Minneapolis-Health-Care-Business-Examiner~y2009m7d2-Minnesota-18county-EHR-moves-forward>

Minnesota's Medicare payment disparity could be impetus for national reform

http://www.twincities.com/ci_12701954?source=most_email

A measure of private health insurance coverage of Americans shows a 50-year-low, CDC says

<http://www.startribune.com/lifestyle/health/49627107.html?elr=KArksUUUoDEy3LGDjO7aiU>

St. Louis Park health worker accused of sexual abuse

<http://minnesota.publicradio.org/display/web/2009/06/15/patientabuse/>

DFLers seek health care options in wake of governor's cuts

http://minnesota.publicradio.org/display/web/2009/07/03/gmac_unallotment_cuts/

Richfield couple accused of taking elderly relative's income reach plea deal
http://www.twincities.com/ci_12720177?IADID=Search-www.twincities.com-www.twincities.com

Firm Misled Seniors With Free-Lunch Pitches, SEC Says
<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a6wW5.1dIsoM>

Study shows swine flu's spread can be tracked through air travel
<http://www.startribune.com/lifestyle/health/49452972.html?elr=KArksUUUoDEy3L>

How to get help in a hurry in the ER
<http://www.cnn.com/2009/HEALTH/06/25/emergency.room.care/index.html?iref=new>

MINNESOTA CASES

The following is a published decision released by the U.S. District Court for the District of Minnesota released on June 24, 2009:

Civil No. 08-5874 (DWF/JSM) (D. Minn. 6/24/2009)

Bernstein v. Extencicare Health Svcs., Inc.

DONOVAN W. FRANK, Judge of United States District Court

ORDER:

"This matter is before the Court upon a Motion for Costs and Attorneys' Fees brought by Defendants Extencicare Health Services, Inc. and Extencicare Homes, Inc. ('Defendants'). Based upon the submissions and argument in this case, the Court having reviewed the contents of the file and record, and the Court being otherwise duly advised in the premises, the Court hereby enters the following:

1. Defendants' Motion for Costs and Attorneys' Fees (Doc. No. 35) is GRANTED IN PART and DENIED IN PART as follows:

a. Defendants request for an award of attorneys' fees is DENIED;

b. Defendants request for an award of costs in the amount of \$3,428.13 is GRANTED.

2. Defendants shall have judgment, jointly and severally, against the law firms of Stritmatter Kessler Whelan Coluccio; The Garcia Law Firm; and Pearson, Randall, Schumacher & LaBore, PA."

EDITOR'S NOTE: [An accompanying memorandum explains the background and the rationale. Among other issues, it addresses computerized legal research as costs rather than fees, and that failure of a legal claim to survive even early motions to dismiss is not per se proof its proponent knew it was groundless, but cautions that counsel's knowledge of the claims' failures to date could change the determination if there were to be a later similar claim.]

The decision is available on the Pacer system.

STATUTES, REGULATIONS, BULLETINS

DHS BULLETIN #09-25-06: ALTERNATIVE CARE PROGRAM ALLOCATES FUNDS FOR FY 2010. Effective July 1, 2009, program appropriation will change for the Alternative Care (AC) Program, including allocation of funds to support local AC access and service delivery. The bulletin provides new information about requirements related to local AC program administration, including implementation of new budget limits for certain AC participants. The bulletin, dated July 1, 2009, is available at: http://www.dhs.state.mn.us/main/groups/publications/documents/pub/dhs16_145291.pdf.

DHS BULLETIN #09-21-08: CERTAIN 2009 LEGISLATIVE CHANGES TO MEDICAL ASSISTANCE (MA). The 2009 Minnesota Legislature passed legislation that modified several Medical Assistance (MA) policies. In addition, several sections of statute were amended to provide clarification of current law. The bulletin provides information and, where applicable, instructions for implementing these policies. This bulletin is the first in a series that will provide information and instructions on the 2009 legislative changes. The bulletin is broken down into three main sections of legislation: (1) policy clarifications; (2) policy changes effective on and after July 1, 2009; and (3) policy changes effective on and after July 1, 2011. The bulletin, dated June 23, 2009, is available at: http://www.dhs.state.mn.us/main/groups/publications/documents/pub/dhs16_145290.pdf.

DHS BULLETIN #09-19-01: DHS ANNOUNCES NEW PROCESS FOR COST EFFECTIVE HEALTH INSURANCE REVIEWS. The DHS Benefit Recovery Section (BRS) reviewed the criteria and process for determining approval or denial of payment of insurance premiums for Medical Assistance (MA) and General Assistance Medical Care (GAMC) enrollees. BRS worked with counties during the past several months to gain important input about the forms and the process. BRS conducted a pilot in Washington, Pine and Dodge counties and incorporated their recommendations in developing this material. This bulletin provides information and instructions for implementing the changes, including a new process approved by the Centers for Medicare and Medicaid Services (CMS) for determining the approval or denial of payment for insurance premiums as cost effective for the MA program as well as for GAMC clients; and new and revised forms to help streamline and expedite cost effective reviews and approvals. The bulletin, dated June 19, 2009, is available at:

http://www.dhs.state.mn.us/main/groups/publications/documents/pub/dhs16_145267.pdf.

MEETINGS TO PROVIDE UPDATES ON HOME AND COMMUNITY-BASED SERVICES

Human services consumers, providers and program administrators are invited to attend legislative update meetings across the state in July. Ten forums and two videoconferences are being held to address changes in home and community-based services following the 2009 Minnesota Legislative session. More information, including meeting fliers and registration information, is available at:

http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=id_000083#.

TEMPLATE AVAILABLE FOR HOME AND COMMUNITY-BASED WAIVER SERVICES

As a condition of the Elderly Waiver (EW) renewal, effective July 1, 2008, DHS agreed to require all counties and tribes to use a standardized contract template. The contract template is aimed at improving consistency, accountability and consumer access. The Home and Community Based Services Waiver contract template is a tool provided to lead agencies to enable the state to meet Centers for Medicare/Medicaid Services requirements. The template is available at:

http://www.dhs.state.mn.us/main/groups/aging/documents/pub/dhs16_144767.pdf.

UPCOMING EVENTS AND CLE PROGRAMS

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

MEMBER EDUCATION COMMITTEE MEETING: The Elder Law Section's Member Education Committee, in conjunction with the Minnesota State Bar Association and Minnesota Legal Services Coalition, will meet at **noon on Wednesday, July 22, 2009** at the MSBA offices, 600 Nicollet Mall, Suite 380, ("Honors" room) Minneapolis, MN, to discuss collection and organization of elder law resources for use by attorneys

representing low-income clients. (Bring a lunch if you like.) If you are unable to attend on July 22nd, but have resources to contribute, please contact Brian Bell at bbell@mnbar.org or 612-278-6309, or Laura Zdychnec at lzdychnec@mnellderlaw.com or 952-929-0622.

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@mnellderlaw.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>.