

MSBA ELDER LAW SECTION E-NEWSLETTER
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E-Newsletter Editorial Staff:

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THOUGHTS FROM THE CHAIR

The Elder Law Institute is almost here! Come to hear from Lucinda Jesson, Commissioner of the Department of Human Services, and David Godfrey, Medicaid Director for Minnesota. Stay for panel discussions on Medicare benefits, Life Care Planning, End of Life Planning, and Tax/Estate Planning as well as numerous breakout sessions. The Institute is entitled *More than Medical Assistance: The Intersection of Elder Law with Other Practice Areas*, and is being held on October 6 & 7 at the MN CLE Conference Center, 600 Nicollet Mall # 370, 3rd Floor City Center, Minneapolis, MN 55402-1641. If you have not registered yet, please do so at <http://www.minncle.org/SeminarDetail.aspx?ID=103441201>. Register today!

Suzy Scheller, Chair of the Elder Law Section
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ARTICLE OF THE WEEK

**UTMA AND 529 ACCOUNTS
FOR A CHILD WITH SPECIAL NEEDS
By Laurie Hanson and Laura Zdychnec
Long, Reher & Hanson, P.A.**

Mark has cerebral palsy. He was approved for SSI and Medicaid when he turned 18. His father, Paul, disclosed to the Social Security Administration at the time of application that Mark had \$30,000 in a UTMA (“Uniform Transfers to Minors Act”) account, and \$20,000 in a Qualified Tuition Program (QTP) or 529 Plan. Social Security assured Paul that the UTMA and 529 Plan would not affect Mark’s eligibility for SSI benefits.

Mark is now 25 years old. In January, Mark received \$3,000 from the 529 Plan. He spent \$2,800 for tuition and fees. He intends to spend the remaining \$200 on books. The distribution was properly reported to the Social Security field office.

In February, Mark received a notice from the Social Security Administration that he was ineligible for SSI because of his \$30,000 UTMA account and he would have to repay two years

of SSI benefits totaling over \$14,000. Mark and his father were stunned. Paul disclosed the UTMA and 529 Plan when Mark first applied for SSI and he and Mark are both diligent about complying with all of SSI's rules. Mark and his father are now concerned that the 529 Plan as well as any distribution from the account could cause additional problems.

What is a UTMA account: A Uniform Transfer to Minors Act or UTMA account is an account to hold money that is gifted to a child who has not yet reached the age of majority. A few states are still governed by the Uniform Gift to Minors Act and call these "UGMA" accounts. Both UGMA and UTMA accounts are controlled by state law. They are similar but the UTMA allows any asset to be placed in a UTMA account, while UGMA are limited to cash and securities. For ease of reference, this article refers to these accounts as UTMA accounts, but the SSI rules are the same for both accounts. In Mark's case the UTMA account was established when he was an infant to hold periodic cash gifts from his grandparents.

A UTMA account is considered to be owned by the child and is held under the child's social security number. The account is controlled by a custodian designated by the person who originally set up the account. State law determines when the UTMA account will terminate, typically when the child turns 18 or 21. When the account terminates, the funds are legally available to the child.

What is a 529 Plan: 529 Plans allow an individual to prepay or contribute to an account established for a designated beneficiary's post-secondary education expenses at an eligible educational institution. There are two types of 529 Plans: savings plans and pre-paid plans.

Savings plans can be established for a beneficiary of any age. They provide investment options, such as mutual funds or money market funds. The value of the account is not guaranteed, and may fluctuate with the financial markets.

Prepaid plans must be established before the designated beneficiary reaches a certain age or grade. A prepaid plan allows individuals to purchase units or credits at a participating college or university for tuition, thereby allowing individuals to avoid future tuition rate increases.

Paul established the 529 account for Mark as a college savings plan when Mark was five. A 529 Plan is owned by the donor (in this case, Paul), who can direct use of the funds. Most plans allow the account owner to reclaim the funds at any time. The designated beneficiary is the individual who is to receive the benefit of the funds in the account (in this case, Mark).

How does SSI treat UTMA accounts: Social Security does not count a UTMA account established by a third party as a resource for SSI purposes until the account is considered available under state law. The rules on UTMA accounts are set out in the policy manual for the Social Security Administration, called the POMS (*POMS 01120.205*). Interest or dividend income generated from a UTMA account is also not counted as income of the SSI recipient. Any distribution of cash to the child from the account would be counted as income to the child for that month. SSI does count the UTMA account as an available resource in the month in which the child reaches the age where state law considers the account to be available to the child. In Mark's state, the UTMA account was available to him when he turned 21.

Unfortunately, the Social Security Administration does not remind parents when their child is close to the age of majority that a UTMA account will now be counted as an available resource. In Mark's case his UTMA account of \$30,000 made him ineligible for SSI and Medicaid as of his twenty-first birthday when state law determined that the account was available.

How does SSI treat 529 Plans: 529 Plans are usually owned by the person who funded the account, typically a parent or grandparent. The owner of the account retains the ability to withdraw funds in the account (*POMS 01140.150*). In most cases, the designated beneficiary (in this case, Mark) is not the owner and does not have any right to withdraw funds in the account. So Mark's \$20,000 529 Plan will not be treated as a resource of Mark's that would disqualify him from receiving SSI.

Assuming Mark is on SSI, distributions from the 529 Plan that are used for educational expenses of the designated beneficiary are excluded as income in the month of receipt. Educational expenses do not include food or shelter for the student. The \$2,800 Mark received from the 529 Plan that is spent on tuition and fees will not be treated as income to Mark and so his SSI will not be reduced or eliminated. If Mark does not spend a distribution on educational expenses in the month of receipt, the distribution will still be excluded as a resource for 9 months as long as the funds are not spent for non-educational expenses and as long as Mark still intends to spend the distribution on educational expenses.

If Mark spends any portion of the 529 distribution for a purpose other than educational expenses, the funds are considered income in the month the funds are spent. If Mark does not intend to use a 529 distribution for educational expenses, the distribution will be treated as income in the month he makes that decision. So if Mark uses the remaining \$200 distribution from the 529 plan on books within 9 months, his SSI benefits will not be affected. If he spends the \$200 on groceries instead of books, the \$200 will be income to Mark in the month the groceries are purchased. If Mark decides not to use the \$200 on education expenses and instead decides to save the money, the \$200 will be income in the month he makes that decision not to use the money for education expenses. In that case the \$200 will be a countable resource in the following month.

Missed opportunity: Before Mark turned 21 the UTMA account could have been transferred into a special needs trust for Mark's benefit. The trust would be required to have a "Medicaid payback" since the trust would be funded with Mark's own money. After Mark repays the Social Security Administration for the overpayment he will transfer his remaining funds into a special needs trust so that he can re-qualify for SSI as of the first of the next month. Unfortunately is too late to save the \$14,000 that must be repaid to the Social Security Administration for the overpayment. In most cases the Social Security Administration will limit an overpayment to two years of SSI benefits if it agrees that the SSI beneficiary was not at fault in causing the overpayment.

Lessons learned:

- Parents, financial advisors and legal counsel should review any UTMA accounts for a child with special needs who is approaching the age of majority. Serious eligibility

issues with government benefits can be avoided by transferring the UTMA account into a special needs trust before the account is available to the child under state law.

➤ 529 plans for a child with special needs may provide significant flexibility to parents or grandparents depending on their situation. As long as the account owner and SSI beneficiary are careful to apply distributions to education expenses, these accounts can help pay for post-secondary schooling and training without affect the child's SSI benefits. If the account owner determines that the special needs child is unlikely to use the funds for education expenses, the owner can change the designated beneficiary to a member of the *beneficiary's* family.

➤ If a parent or grandparent wants to provide for educational expenses for a child living with disabilities, the 529 Plan is probably better than the UTMA account simply because the 529 Plan will never become an available resource as happened to Mark when he turned 21. A properly managed 529 Plan can provide for educational opportunities throughout the child's life and not be a resource to the child.

Submitted by Laurie Hanson, Esq. and Laura Zdychnec, Esq.
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LINK OF THE WEEK

There is no link of the week.

ELDER LAW NEWS

'Granny cams' are catching on as a tool to deter elder abuse
<http://www.startribune.com/local/130091608.html>

Care Givers Say Mandated Counseling Is Overreach
<http://minnesota.cbslocal.com/2011/09/19/care-givers-say-mandated-counseling-is-overreach/>

New state-mandated counseling for seniors irks assisted-living industry
<http://minnesota.publicradio.org/display/web/2011/09/18/new-state-mandated-counseling-for-seniors-irks-assisted-living-industry/>

Time to make Medicare Part D changes starts soon
<http://www.echopress.com/event/article/id/88051/group/homepage/>

Medicare confuses seniors, boomers
<http://m.startribune.com/business/?id=130115858&c=y>

Preparing for life's final stage
<http://www.startribune.com/local/130032813.html>

Submitted by Joel Smith, Esq.
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ELDER LAW CASES

The following is a decision released by the Minnesota Supreme Court on September 21, 2011:

A09-1208

In re the Estate of: Patrick W. Butler, Deceased

1. Under Minn. Stat. §524.6-204(a) (2010), the surviving owner of certificates of deposit, designated as joint accounts, is entitled to the funds upon the death of the other joint owner, as against the decedent's estate, unless there is clear and convincing evidence of a different intention or there is a different disposition made by a valid will, either of which must specifically refer to the certificates of deposit.
2. When considering only the evidence "specifically referring" to the certificates of deposit, the respondents failed to prove by clear and convincing evidence that the decedent had a different intention than for the appellant, as the surviving owner, to receive the proceeds of the certificates upon decedent's death.

Reversed and remanded.

OPINION

This case presents the question of whether the respondents presented sufficient evidence to overcome the statutory presumption in favor of survivorship rights for joint accounts under the Minnesota Multiparty Accounts Act. See Minn. Stat. §§ 524.6-201 to -214 (2010). Because Minn. Stat. § 524.6-204(a) requires that the evidence offered to overcome the statutory presumption must "specifically refer[]" to the joint accounts at issue, we conclude that the respondents failed to present sufficient evidence to satisfy their burden of proof. We therefore reverse the district court and remand for entry of judgment as a matter of law in favor of the appellant.

The opinion is available [here](#).

Submitted by Andrea Palumbo, Esq.
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STATUTES, REGULATIONS, BULLETINS

DHS Bulletin #11-25-04: 2011 Legislative Changes to the Long Term Care Consultation, Elderly Waiver, and Alternative Care Programs. The purpose is to summarize policy and implementation requirements related to these amendments. The bulletin, dated September 22, 2011, is available [here](#).

Submitted by Peter M. Hendricks, Esq.
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UPCOMING EVENTS AND CLE PROGRAMS

Ramsey County Bar Association

Medical Assistance – Dealing with the Five-Year Look-Back Period and the Problems It Can Cause

September 23, 2011

https://netforum.avectra.com/eweb/DynamicPage.aspx?Site=RCBA&WebCode=EventDetail&vt_key=0c13d08e-2371-468e-9b90-ca1da1e3a849

Minnesota CLE

2011 Elder Law Institute

October 6 and 7, 2011

The Elder Law Institute is entitled *More than Medical Assistance: The Intersection of Elder Law with Other Practice Areas*.

Offerings include:

- Keynote Address from Lucinda Jesson, Commissioner of the Minnesota Department of Human Services;
- Discussion of Medicaid funding from David Godfrey, Medicaid Director for Minnesota;
- Several Panel Discussions, including on Medicare Benefits; Life Care Planning; End of Life Issues; and Tax and Estate Planning;
- “Basics” breakout sessions on Medical Assistance Eligibility; ABCs of Elder Law (breaking down acronyms); and Opening your First Probate;
- Panel for students and lawyers new to Elder Law on starting an Elder Law Practice;
- Numerous breakout sessions highlighting the intersection of Elder Law with other practice areas, including Family Law; Medical Malpractice; Veterans Administration benefits; Mediation; Guardianships and Conservatorships; and Long Term Care insurance; and
- **Sessions for Elimination of Bias and Ethics Credits

Please register at <http://www.minncle.org/SeminarDetail.aspx?ID=103441201>.

MSBA

**An Overview of Service Animal and Assistance Animal Law
October 13, 2011**

<http://www.mnbar.org/sections/animal-law/10-13-11.html>

ELDER LAW SECTION ACTIVITIES

MA COMMITTEE MEETING: The next MA Committee meeting will be at 3:30 p.m. on Tuesday, October 18, 2011. The Medical Assistance Committee is a study group to analyze Elder Law Section member questions and case studies and to discuss administrative policies and procedures in relation to Medical Assistance in Minnesota. Cathryn D. Reher of Long, Reher & Hanson, P.A., is Committee Chair. For directions, or to attend by phone, please contact Tracie Fenske with Long, Reher & Hanson, P.A., at [952-929-0622](tel:952-929-0622) at least 24 hours in advance of the meeting. Topics for the meeting may be submitted to tfenske@mnelderlaw.com under the subject heading "MA Committee Topic", or faxed to [952-542-9201](tel:952-542-9201). Please be reminded that the meeting location is: Estate & Elder Law Services (formerly MAO Legal Services), Monroe Village, 1900 Central Avenue NE, Suite 106, Minneapolis, Minnesota 55418. There are a few parking spaces behind the building and lots of street parking. People should walk to the back of the building and come to the back door which faces directly into the meeting room.

GOVERNING COUNCIL: The next meeting of the Elder Law Section Governing Council will be 4:00 p.m. on Friday, October 7, 2011. The meeting will be held following the Elder Law Institute at Minnesota CLE in Minneapolis. For further information, please contact Suzy Scheller, Chair, at: suzy@schellerlegalsolutions.com.

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

Please send E-Newsletter contributions by 10 p.m. on Sunday of each week to Allison Burke at allison@twincities-elderlaw.com.

If you do not wish to receive this E-Newsletter, send your request to be removed from the mailing list to Tamara Patton at tpatton@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://www2.mnbar.org/sections/elder-law/newsletter.asp>.