

Elder Law Newsletter

▲ A Publication of the Minnesota State Bar Association Elder Law Section ▲

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A Word from the Chair . . .

Fall is upon us! And with it comes a whirlwind of activities and information, including the Fall Edition of the *Elder Law Newsletter*.

This year's Elder Law Institute, held on October 14th and 15th, was heavily attended and received positive feedback. Over 250 people attended the 2004 Institute. Based on the attendance numbers, it is obvious that more and more attorneys are recognizing the need to stay updated and advised on the ever-changing laws affecting the elderly.

The Elder Law Governing Council has been busy working on ways to ensure that our members have readily available access to information regarding the issues and changes in laws that affect our clients. For instance, the Council has established a Newsletter Editorial Committee and changed the format of the Section Newsletter. It is anticipated that the Newsletter will issue at least quarterly to all Elder Law Section members via e-mail.

In addition, the Elder Law Council has recently allocated Section funds to re-design and expand the Elder Law Section website located at www.mnbar.org. Council member Kim Dayton will work on the development of the updated site. Watch for more information regarding the website in future newsletters.

The Council has also allocated \$3,000 towards hiring a law clerk to assist the Elder Law Section Legislative Committee with legal research and to help monitor developments at the Legislature during the 2005 Session.

The Council is hopeful that the additional emphasis to provide current and timely updates on the changes in law and issues affecting the elderly will provide a service that benefits all Section members and their respective clients. ▲

Your Chair,
Lori L. Guzmán

MSBA
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POOLED TRUSTS FOR PERSONS WITH DISABILITIES

by David P. Fitch, Esq.

People with disabilities have financial needs beyond essential medical care needs. Congress recognized this reality when it enacted OBRA 1993. The OBRA legislation provides for two types of trusts, which allow people with disabilities to retain their resources and still qualify for government benefits that have asset limits, such as Medical Assistance and Supplemental Security Income (SSI). These trusts are known as Special Needs Trusts and Pooled Trusts. They are described in 42 U.S.C.1396p (d)(4)(A) and (C).

Special Needs Trusts - 42 U.S.C.1396p (d)(4)(A) provides that a "trust containing the assets of an individual under age 65 who is disabled which is established for the benefit of such individual by a parent, grandparent, legal guardian or a court . . . [does not disqualify the trust beneficiary from Medicaid eligibility provided that] the State will receive all amounts remaining in the trust upon the death of such individual up to any amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title."

Like a Special Needs Trust, a Pooled Trust allows an individual with a disability to retain the benefit of excess assets without being disqualified from government programs. However, a valid Pooled Trust must satisfy certain criteria, which are set out in 42 U.S.C.1396p(d)(4)(C). The statute states that a valid Pooled Trust is a trust that contains the

assets of an individual who is disabled and that meets the following conditions:

- (i) The trust is established and managed by a non-profit association.
- (ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.
- (iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c (a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.
- (iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

Special Needs Trusts and Pooled Trusts are similar in many respects. Both trusts are funded with the assets or resources of the beneficiary (an individual with a disability). Both trusts make it possible for those assets to be retained without disqualifying the beneficiary from receiving government benefits such as Medical Assistance and SSI. Both trusts require that the trust assets be used for the sole benefit of the beneficiary, and both trusts require that trust distributions be made for goods or services that are not covered or supplied by government programs.

There are, however, important differences between the trusts. First, unlike Special Needs Trusts, a Pooled Trust account can be established by the beneficiary, which means that the trust is a self settled grantor trust with the corresponding implications of such a trust. When the disabled beneficiary is competent, a pooled trust provides a much more streamlined and less costly process for their legal counsel to establish when there are no parents, grandparents or legal guardian available. A Special Needs Trust requires establishment by a parent, grandparent, legal guardian or the court. If an individual does not have a surviving parent or grandparent and does not need a guardian or conservator, the individual must petition (or have someone else petition) the court to establish a Special Needs Trust. Seeking the court's permission to establish the trust can be timely and costly, and, most likely, the court will require the Special Needs Trust to remain under the court's continuing supervision.

The second difference is who is eligible to administer the

POOLED TRUSTS FOR PERSONS WITH DISABILITIES NOW REPORTED AVAILABLE IN MINNESOTA

The Center for Special Needs Trust Administration, Inc. of Clearwater Florida, announced, in June of 2004, the creation of "The Pooled Trust of Minnesota." The Center is the Trustee for "The National Pooled Trust," currently managing pooled trusts in Florida, Minnesota, Tennessee and California. This article is an edited and condensed version of an article submitted upon our request by David P. Fitch, Esq., The Center's Minnesota Director, to explain how pooled trusts work and how they could be used to provide supplemental benefits for Minnesotans with disabilities. The Editors of the *Elder Law Newsletter* are publishing this article for informational purposes only and are not endorsing or promoting the views expressed by Mr. Fitch, who is solely responsible for its content.

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trust. A Special Needs Trust may be administered by a family member, friend, neighbor, bank with trust powers, or other fiduciary. A Pooled Trust must be established and administered by a non-profit corporation, as defined by Section 501(C)(3) of the Internal Revenue Code.

Concerning fees for administration, the Special Needs Trust has the option to have a family member or friend manage the trust and this option may result in a reduced fee or no fee. A pooled trust, like a Special Needs Trust that is administered by a bank or fiduciary, will have some administrative fees involved. One of the significant balancing issues regarding fees is that many family member and friends of beneficiaries may not understand the rules and restrictions imposed by the various government programs and may make purchases which negatively impact the beneficiary's receipt of benefits. Professional trustees, banks, fiduciaries, or non-profit trustees, which administer numerous accounts, are more likely to be familiar with the rules and requirements of the various government programs.

Related to this second point is the method of distribution of trust corpus. The method for distributions from a Special

Needs Trust will vary depending upon the nature of the Trustee - family, friend or institution. When the trustee is a family member or a friend, the beneficiary may have direct involvement in the actual selection and purchase of the product or service. When the trustee of the Special Needs Trust is a bank or professional fiduciary there is generally an extra step involved. The beneficiary and/or legal representative determine the product or service that the beneficiary needs or wants and then makes a written request for distribution. Distribution practices for pooled trusts will vary from one non-profit Trustee to the next, however, generally, they require that prior to making a distribution, the non-profit Trustee will request the beneficiary or their legal representative to make a request in writing for the desired product or service, just like the banking or professional fiduciary in the SNT scenario. The non-profit Trustee, just like any other type of competent trustee, will then consider the request in context of the rules and limitations imposed by the government programs utilized by the beneficiary. Then, provided that making the expenditure would not disqualify the beneficiary from receiving his or her government services, the non-profit trustee will make arrange-

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Comparison of Special Needs Trusts and Pooled Trusts

	SPECIAL NEEDS TRUST	POOLED TRUST
USE	To pay for the needs of the individual with the disability that are not covered by government programs	To pay for needs of the individual with the disability that are not covered by government programs
ESTABLISHED BY (GRANTOR)	Parent, grandparent, legal guardian or court	Parent, grandparent, legal guardian, court or <i>individual with a disability</i>
FUNDED WITH	Assets belonging to the individual with the disability provided the individual is under age 65	Assets belonging to the individual with the disability— <i>no age limitation</i>
DISTRIBUTION ON DEATH	The State receives all amounts remaining in the trust upon the death of the beneficiary—up to the sum equal to the total medical assistance paid on behalf of the individual	To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary
PURPOSE	To protect the beneficiary's assets (resources) for their lifetime use	To protect the beneficiary's assets (resources) for their lifetime use
LEGAL AUTHORITY	42 U.S.C. 1396p(d)(4)(A)	42 U.S.C. 1396p(d)(4)(C)
ADMINISTERED BY (TRUSTEE)	No restrictions imposed—could be family member, friend, corporate entity, professional fiduciary, etc.	A <i>nonprofit</i> association as defined by Section 501(C)(3) of the Internal Revenue Code

DID YOU KNOW?

THE ELDER LAW PRACTICE GROUP

Legal Services Clinic, Interprofessional Center for Counseling and Legal Services, University of St. Thomas

Eight law students, one social work graduate student, one law fellow (a St. Thomas law graduate), one supervising attorney, one supervising social worker, and administrative staff—these people add up to the Elder Law Practice Group (ELPG) at the University of St. Thomas Interprofessional Center for Counseling and Legal Services. The Center, which opened last fall, is a joint effort of the law school and the departments of social work and professional psychology, dedicated to training students to be ethical and competent professionals through practical experience serving low-income and vulnerable clients.

The ELPG is one of three practice groups in the Legal Services Clinic. It provides pro bono representation to clients 60 years of age and older in Hennepin and Ramsey Counties with issues relating to long-term care, Medical Assistance, vulnerable adult abuse/exploitation, and guardianship/conservatorship. Clients are eligible if their income is below 300% of federal poverty guide-

lines, or if they are receiving long-term care. Clients are referred by social service agencies including the Office of the Ombudsman for Older Minnesotans, Mid-Minnesota Legal Services, Southern Minnesota Regional Legal Services, Ramsey County Adult Protective Services, ElderCare Rights Alliance and Catholic Charities. Cases are prioritized based on client need and access to other legal representation. The interprofessional nature of the team, including social workers and with access to professional psychologists, allows a more holistic and effective representation of elders in these difficult situations.

Do you have a nagging legal question that you wondered about, but never had the time to research? The ELPG also provides research memos on topics of interest in elder law, which are published on the ELPG page of the Center's website: <http://www.stthomas.edu/iccls/>. Elder law practitioners can suggest topics for research by contacting Jennifer Wright, professor and supervising attorney at 651-636-4451, jlwright1@stthomas.edu. ▲

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ments to pay the vendor of the product or service directly, for the beneficiary's benefit.

Third, a Special Needs Trust must be established and funded prior to the beneficiary's 65th birthday. See 42 U.S.C. 1396p(d)(4)(A). However, the Federal law does *not* state that there is an age restriction on joining a Pooled Trust. See 42 U.S.C. 1396p(d)(4)(C). Minnesota's statutory language regarding trusts created after August 1, 1993 states that these trusts shall be treated the same as under the Federal statutes. See MN Statutes Chapter 256B.056 Subdivision 3(B)(B). Minnesota's Department of Human Services Health Care Programs Manual (MDHS HCPM), states, "There are no age requirements for pooled trusts." See section titled "Pooled Trust For Disabled People" under HCPM §0909.21.05.

There is some controversy surrounding this issue. There is a HCFA Transmittal Letter 64 that suggests that a transfer penalty will follow the establishment of a pooled-account trust for transferors who are aged 65 or older. This position

was taken by HCFA because the pooled-account trust is not listed in the federal statute's list of exceptions to the application of transfer penalties. However, the statute itself does not impose an age limit on the Pooled Trust. There are also analyses of the statutory language that suggest a different result, however, given the space limitations of this newsletter they are beyond the scope of this article. Looking at real-time application of pooled trusts around the country, they are being used consistently, without penalty, for transfers by people over the age of 65 years of age in Florida, California, and Tennessee.

Finally, investment return for Pooled Trusts may be greater than Special Needs Trusts because Pooled Trusts pool numerous accounts together for investment and management purposes. Thus, they may command better interest rates and greater investment return than Special Needs Trusts.

Ultimately, it is important to understand and appreciate the similarities and differences between Special Needs Trusts and Pooled Trusts and realize that each type of trust has its advantages and disadvantages depending on the beneficiary and the beneficiary's situation. ▲

LOOKING BACK, LOOKING FORWARD

By Julian J. Zweber, Esq.
Chair, Legislative Committee

With the November election behind us, it now appears safe to predict that there will be no special session of the legislature prior to the convening of the 2005 regular session on January 4, 2005.

What Did Not Happen in 2004

A number of the Governor's proposed changes in the medical assistance asset transfer rules became stuck in the major bills blocked by the stalemate at the end of the 2004 session and thus did not become law in 2004. These proposed changes included:

- **A cause of action to recover uncompensated asset transfers reported so late in the month that a notice of denial of benefits cannot be issued in time to stop benefits until the second following month.**

Under current law, the county must issue a ten day notice prior to the start of the month in which a denial or reduction of benefits becomes effective. When an uncompensated transfer occurs, the applicant is allowed 10 days to report the transfer, and if the county agency receives notice in the last 9 or 10 days of the month, there is insufficient time to give a 10 day notice prior to the start of the next month, and the notice of denial therefore cannot be effective until the first day of the month following the next month. If the uncompensated transfer causes only one month of penalty, the penalty period ends before the denial of benefits can become effective. To remedy this situation, the Governor's proposal would give the county agency a cause of action to recover the uncompensated transfer from the transferee. The Governor's proposal would have implemented this change without a federal waiver.

- **Increasing the monthly income spend down requirement during months in a penalty period.**

Under Federal law, an uncompensated transfer of assets disqualifies an individual from long term care services, which are defined as nursing home services, home or community based services, or inpatient hospital services. However, during the penalty period, the penalized individual remains eligible for all other medical services covered by the medical assistance program. The waiver request submitted by the Department of Human Services in 2003 requests permission to disqualify a penalized individual from all medical assistance benefits. Pending approval of the waiver



request, the Governor's proposal would increase the monthly income spend-down required to qualify for medical assistance benefits by an amount equal to the penalty divisor amount used to calculate the period of ineligibility (the so-called "SAPSNF" rate). For applications submitted during the period from July 1, 2004, to June 30, 2005, the SAPSNF rate is \$4,111 per month. If this proposal had been adopted, recipients penalized at that rate would have to spend an additional \$4,111 each month on medical expenses (in addition to any other monthly income spend-down required to reach poverty income levels) before medical assistance would begin to pay benefits. This change would have been implemented without a federal waiver.

- **Overturning the Minnesota Supreme Court decision in Martin v. City of Rochester**

In the Martin case, 642 N.W.2d 1 (Minn. 2002), the Minnesota Supreme Court struck down the lien provided by Minn. Stat. § 256B.042, subd. 5, to secure the State's right to reimbursement of medical assistance benefits from settlements of personal injury lawsuits. The Court also held that the formula for reimbursing the State was in conflict with and pre-empted by federal law. The Court held that the State could recover medical assistance expenses only from settlement funds attributable to medical expenses and not from the plaintiff's other elements of recovery. The Governor's proposal would have avoided this result by

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amending the assignment statute to provide that no settlement of a personal injury lawsuit could be approved unless the State first receives full compensation for the medical assistance benefits paid by the medical assistance program. This proposal also would have been implemented without any federal waiver.

Although these proposals failed in the 2004 session, they are almost certain to be part of the Governor's legislative proposals for 2005.

What to Expect in 2005

In addition to re-introduction of the failed 2004 proposals, we can expect the Governor to call for additional initiatives to reduce expenses for the medical assistance program. With a substantial budget deficit projected for the next biennium, severe cuts from projected expenditures are likely to be part of the Governor's budget proposals. These proposals could take the form of reductions in both eligibility for benefits and the extent of benefits that will be paid for needy individuals. Any proposals to cut eligibility or cut benefits will be highly controversial.

On top of deficit reduction pressures, the Legislature will be forced to deal with prescription drug coverage changes mandated by the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (the MMA). Starting on January 1, 2006, Minnesota will no longer qualify for federal matching funds to provide prescription drug coverage under medical assistance for individuals who qualify for both Medicare and medical assistance. These individuals (called "dual eligibles") will be forced to enroll in Medicare Part D coverage, which provides prescription drug coverage only through private sector prescription drug plans. To implement the new system, changes will have to be made in Minnesota's medical assistance program during the 2005 session of the legislature.

Prospects for Repeal of the 2003 Life Estate Legislation

In view of the budget pressures facing the 2005 legislature, and the pressures to make substantial and perhaps costly changes in the medical assistance program to implement MMA, repeal of the 2003 expansion of estate recovery will likely be difficult to accomplish, for both political and financial reasons. For every four dollars collected under the expanded estate recovery statutes, Minnesota keeps only one dollar. Two dollars go back to the federal treasury and one dollar stays with the county, to reimburse the county for its recovery expenses. If the retroactive effect of the 2003 legislation is repealed, Minnesota will have to find other

revenues or make other budget cuts to compensate for the lost revenues. If the repeal legislation provides for refunds of claims collected against life estates or joint tenancies after the death of the life tenant or joint tenant, the State would have to return not just the one dollar of recovery collected and retained by the State but also the three other dollars given to the federal government and the county. Repeal of the 2003 legislation therefore will be a costly proposition in tough budget times. Nevertheless, it can be expected that bills to repeal all of the 2003 changes, and bills to repeal the retroactive effect of the 2003 changes will be introduced in the 2005 session. The chances of success for these proposals has been increased by the results of the 2004 election. ▲

UPCOMING EVENTS

Video Replays of the 2004 Elder Law Institute

- Minneapolis, Dec. 1-2, 2004, 9:00 a.m., Earle Brown Heritage Center
- Minnesota CLE Conference Center
- Albert Lee, Dec. 9-10, 2004, 9:00 a.m., Christian & Peterson; 314 South Broadway
- Duluth, Dec. 13-14, 2004, 9:00 a.m., Pausson Hotel Duluth-Harborview, 100 Superior St.
- Mankato, Dec. 1-2, 2004, 9:00 a.m., Farrish Johnson Law Office, Union Square Business Center, 201 North Broad Street #107
- Moorhead, Dec. 2-3, 2004, 9:15 a.m., Moorhead Public Library; 118 Fifth Street South
- Mora, Dec. 9-10, 2004, 8:30 a.m., Kanabec County Public Services Bldg.; 905 East Forest Ave.
- Rochester, Jan. 13-14, 2005, 9:00 a.m., Kahler Hotel; 20 Second Ave. SW
- St. Cloud, Jan. 12-13, 2005, 9:00 a.m., Kelly Inn; Highway 23 and Fourth Ave. S.

*Please register for all events 1/2 hour before replay time.

Financing Long-Term Care in the 21st Century Conference

Dec. 3, 2004, 8:30 a.m.-4:00 p.m.
Earle Brown Heritage Center

Co-sponsored by the University of Minnesota Center on Aging and Minnesota Department of Human Services, this conference is the culmination of a series of policy briefings exploring the options available for individuals to pay for their own long-term care. Questions? Call LaRhae Knatterud, DHS, 651-296-2062

SETTLING PERSONAL INJURY CASES WHEN MEDICAL ASSISTANCE IS INVOLVED IMPACT OF THE MARTIN DECISION

by Michael A. Bryant, Esq.

Settling a personal injury lawsuit is difficult when dealing with a tough defendant. The difficulty is compounded, however, when a state or federal subrogation claim is involved. Over the years, legislation and court decisions have provided some protection for plaintiffs' recoveries. (See Naig v. Bloomington Sanitation, 258 N.W.2d 891 (Minn. 1977) and Westendorf by Westendorf v. Stasson, 330 N.W.2d 699 (Minn. 1983) and Minn. Stat. 62A.095). Until the recent decision in Martin ex rel. Hoff v. City of Rochester, 642 N.W.2d 1 (Minn. 2002), however, state subrogation claims for benefits paid by the Medical Assistance program enjoyed a privileged position in relation to the subrogation claims of insurance companies and other collateral sources of benefits paid to an injured plaintiff. Despite the plaintiff's recent success in challenging the Medical Assistance subrogation rights of the State under Minn. Stat. 256B.042, the State still claims a privileged position for Medical Assistance subrogation rights. This article will discuss recent developments in government subrogation claims.

In March of 2002, the Minnesota Supreme Court issued its decision in the Martin case. In Martin, the plaintiff challenged the State's assertion of Medical Assistance subrogation rights against the plaintiff's entire recovery. The plaintiff argued that the State's subrogation claim could only be asserted against the portion of the settlement attributable to medical expenses. Because the settlement did not fully compensate the plaintiff for his damages, the State's claim deprived the plaintiff of recovery for other elements of his damages.

The Minnesota Supreme Court looked to the provisions of the federal Medical Assistance statutes, especially the provision which limits a state's ability to place a lien against an individual's personal property during his lifetime. The Court recognized that a cause of action for damages for personal injury is a "bundle of sticks" under Minnesota law. The Court then construed the federal statute to operate only as an assignment of the plaintiff's rights to recovery of medical expenses and not as an assignment of rights against the other elements of the plaintiff's damages.

The Court held that:

- Federal law preempted the State's use of a lien to secure its assignment rights.
- While the state statute allowed for recovery against **any and all settlement funds**, the federal statute limited recovery under the assignment to **settlement funds received for**



the payment of medical bills.

This means that the Minnesota statutory formula is no longer valid because of conflict pre-emption by federal law. The State may claim reimbursement for Medical Assistance payments, but if the plaintiff is not fully compensated for damages, the settlement must be apportioned among the various elements of recovery and the State's claim would be limited to recovery for medical expenses. Under the statute prior to Martin and prior practice, the State allowed the plaintiff to settle all the claims against the defendant and then asserted a subrogation claim against the entire recovery. Under the Martin decision, the plaintiff cannot settle the claim for medical expenses if Medical Assistance benefits have been paid unless the State participates in the settlement because the State, and not the plaintiff, owns the claim for medical expenses under its assignment rights.

Although the Court did not specify how a settlement should be apportioned, a solution may be to request an allocation hearing when no agreement can be reached between the State and the plaintiff. Such a hearing was approved in the workers compensation context under Henning v. Wineman, 306 N.W.2d 550 (Minn. 1981).

Naig and reverse Naig settlement agreements may be used in an appropriate case where a defendant has enough coverage.

In regards to trial following the Martin decision, the State will either have to represent itself or enter into an agreement for joint representation with the plaintiff. If this is done, the following suggestions should be considered:

- Get approval from the plaintiff about representing the State.
- Agree to represent the State by presenting the medical

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claim but require that the State be involved in any settlement negotiations before and during the trial.

- Clarify who gets reimbursement for future medical expenses.
- Get an agreement from the State to share the costs and attorneys fees regardless of the result obtained at trial.
- Confirm in writing any agreement made with the State and provide a copy to the client.

There are many questions when trying a case with a Medical Assistance claim that remain unanswered. Take, for example, motor vehicle accidents where Medical Assistance paid *after* no-fault benefits were exhausted or terminated. If the State has priority on its payment, does that mean that dollar one from the medical bills first goes to the State before any discussions concerning deductions of no-fault benefits are entertained? Such a finding could have significant impact on many cases.

Future medical expenses

In the recent case of Guzmán ex rel. Losoya v. U.S. West Inc., 667 N.W.2d 489 (Minn. App. 2003), the Minnesota Court of Appeals read Martin to not only allow the State to settle for past medical expenses, but also to control settlement of future medical expenses even when Medical Assistance is no longer paying medical expenses.

The Guzmán decision raises the question of whether the plaintiff is then guaranteed Medical Assistance for the rest of his or her life? It also raises the problem of what happens if the plaintiff is no longer qualified for Medical Assistance? Or as the Guzmán court pointed out, what if the person moves out of state?

Under 42 U.S.C. 1396k(b), the State has an obligation to collect funds to reimburse the Medical Assistance program for benefits paid. However, to the extent that the collected amount exceeds what is “necessary to reimburse the State for medical expense *payments made* on behalf of any individual with respect to whom such assignment is executed . . . the remainder of such amounts collected *shall* be paid to such individual.”

Based upon the foregoing language, it seems likely that:

- The money allocated as future damages as paid to the claimant will operate as a future credit which will need to be spent down on medical care before the claimant can again be eligible for Medical Assistance.
- If there is excess money as a result of the payments to the State, there should be a reimbursement to the plaintiff

when excess payment is identified under 42 U.S.C. § 1396k(b).

- Under 42 U.S.C. 1396a to 1396k, the State owes a fiduciary duty to the plaintiff to collect the maximum amount of money possible in order to assist in payment of the plaintiff’s claim. What will happen in cases where the State settles for far less than the overall claim for Medical Assistance benefits and the defendant claims that future medical expenses have been settled. Will the plaintiff have a claim against the State for failing to protect the plaintiff’s interest?

No Federal Money?

The State has tried to make a distinction between plaintiffs who receive federally funded Medical Assistance and those who receive general assistance medical care (GMAC), which is entirely state funded. All of these claims should be scrutinized.

Does the State Have Any Right to Uninsured Motorist Money?

Maybe and maybe not. This depends upon the weighing of the “all recoveries” language versus analysis more appropriate to the worker’s compensation system’s rights of the worker’s compensation subrogation carrier.

Settlement Examples

The State, under the law as interpreted by Martin, gets what it has paid for medical benefits. This amount could be determined by hearing or by settlement. The State receives its money “upon any judgment, award, or settlement of a cause of action, or any part of it . . .” (Minn. Stat. 256B.042, Subd. 5). The old formula allowed for the deduction of reasonable attorney’s fees and reasonable costs, and mandated that the plaintiff must receive at least one-third of any net recovery after the cost of attorney’s fees (Subd.5). The statute then allows Medical Assistance to receive everything up to the payment of the full claim, concluding that “the rest must be paid to the Medical Assistance recipient or other plaintiff.” The State will, in some cases, still attempt to offer this deal in order to resolve a case.

The benefit of this formula is that the plaintiff is guaranteed one-third of the amount received after the payment of fees and costs. But, in return, Medical Assistance does not share in the payment of attorney’s fees and expenses, nor does it share in percentages of liability.

For example:

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Settlement:	\$90,000.00
Attorney's Fees:	<u>(\$30,000.00)</u>
SUBTOTAL:	\$60,000.00
Expenses:	<u>(\$10,000.00)</u>
SUBTOTAL:	\$50,000.00
1/3 to Client:	<u>(\$16,666.66)</u>
TOTAL TO MA:	\$33,333.33

Using this example, Medical Assistance receives everything it paid, up to \$33,333.33. Any difference between what Medical Assistance paid, and the total received in settlement is returned to the plaintiff.

The final step for the plaintiff's attorney is to obtain a release from Medical Assistance in exchange for the money that Medical Assistance receives. Often the defendant will include the State on the settlement check and release, so that the defendant is also free of the burden created by the statute.

A very fertile area for negotiation arises if the plaintiff has a pre-existing condition. While the State will maintain that it has very little negotiation room because of Federal mandates, the State will listen to arguments concerning anything that is reasonable concerning problems with proof on the actual injury. The State will maintain that it cannot negotiate on issues of liability. Thus, when available, look at causation.

HMO Standing In Place of Medical Assistance

Due to recent changes in Minn. Stat. 256B.042, health maintenance organizations which receive Medical Assistance payments to provide health care services to Medical Assistance recipients may be covered by the State's assignment rights. The State may argue that the HMO's medical expenses should be included in the State's assignment of medical expenses. These claims should be reviewed carefully. The State only pays a premium to an HMO. Therefore, it could be argued that the State's interest is only for the amount the State actually paid, which is the cost of the premium. This may be a fertile area for appeal with the right fact record.

Minnesota's New Theory of Recovery on Medical Assistance Subrogation Claims

Despite the State's loss in *Martin*, the State now asserts a new theory to give it a privileged position in recovering medical assistance benefits from plaintiffs' settlements. The State now claims that federal law requires that the Medical Assistance program receive full recovery from a tortfeasor before the parties can settle other elements of damages.

To support its legal argument, the State attempted to amend

Minn. Stat. § 256B.056, by adding a new subdivision to read as follows:

Subd. 8c. [SETTLEMENT.] Pursuant to United States Code, title 42, section 1396k(b), no judgment, award, or settlement of any action or claim by or on behalf of a medical assistance recipient to recover damages from a third party potentially liable for all or part of the recipient's medical costs shall be acceded to or satisfied by the recipient or the recipient's legal representative or approved by the court without granting the state agency first recovery from the liable third party to the full extent of its medical expenditures, minus pro rata costs and attorney fees, regardless of whether the recipient has been fully compensated.

Luckily, the proposed amendment was part of an omnibus bill which fell victim to the end-of-session logjam. It can be expected that the Pawlenty Administration will push for passage of this language in the 2005 session.

Medicare Subrogation Rights

Medicare subrogation rights are governed by 42 U.S.C. 1395y(b), codified at 42 C.F.R., part 411. Dealing with Medicare means dealing with the United States Government and the Medicare secondary payor investigator. The plaintiff benefits again through Medicare because Medicare pays as little as one-third of the amount billed by the medical provider. As with the State Government, the Federal Government can recover from the plaintiff, the plaintiff's attorneys, and the tortfeasor. The regulations require payment within 60 days of the receipt of settlement or insurance proceeds. The Federal Claims Collection Act in 45 C.F.R. 40.13, goes further to provide for the assessment of interest on amounts not paid within 30 days of the due date. Unlike Medical Assistance liens, Medicare will negotiate the amount of its recovery and does provide for pro rata payments of attorney's fees and costs.

Unlike Medical Assistance, Medicare does not require that the plaintiff receive a minimum percentage of the recovery. Under 42 C.F.R. 411.37(d), Medicare has the right, after paying its pro rata share of attorney's fees and expenses, to take the rest of the recovery. The key in dealing with Medicare is protecting your client's rights through negotiation.

42 C.F.R. 411.37 sets forth the Medicare formula. As an example, when Medicare has paid \$30,000:

Recovered Amount:	\$90,000
1/3 Attorney's Fees:	<u>(\$30,000)</u>
SUB-TOTAL:	\$60,000
Litigation Expenses:	<u>(\$10,000)</u>
SUB-TOTAL:	\$50,000

Settling Personal Injury Cases . . . continued on page 10

Congratulations to the 2004 Mary Alice Gooderl Award Winner, Kathy Eveslage

The Mary Alice Gooderl Award was created in honor of Mary Alice Gooderl, an amazing woman who dedicated her time to working with seniors and people with disabilities. The award is presented annually to exemplary attorneys who, like Mary Alice Gooderl, have dedicated themselves to providing direct legal services to needy elderly.

Kathy Eveslage grew up in St. Joseph, Minnesota. She graduated with honors from St. Cloud State in 1981 with a double major in Criminal Justice Studies and Psychology. She went to work as a full time paralegal with St. Cloud Area Legal Services in 1982. She split her time between seniors work, family law, and volunteer attorney coordinator.

After 4½ years with St. Cloud Area Legal Services, Kathy was hired in St. Paul as a full time paralegal with the Senior Law Project of Southern Minnesota Regional Legal Services (SMRLS). Two years later, she began law school at William Mitchell College of Law, graduating cum laude in 1990. Kathy was promoted to a staff attorney position with SMRLS upon being sworn into the bar in 1990.

In her years of service at the Senior Law Project, Kathy has provided legal services to the low income senior citizens of Ramsey, Washington and Dakota Counties. Kathy handles Social Security disability cases, obtains medically necessary services for needy Medical Assistance recipients, fights improper nursing home discharges, obtains MA waivers on behalf of needy elderly, and works on housing discrimination cases on behalf of elderly with physical or mental disabilities. Kathy regularly prepares articles for the *Good Age* newspaper and frequently presents to residents of subsidized housing units, minority senior clubs and to caregiver support groups.

Kathy is dedicated to providing direct legal services to needy elderly. Congratulations Kathy! ▲



**2004 Mary Alice Gooderl Award Winner,
Kathy Eveslage**

Settling Personal Injury Cases . . . continued from page 9

Ratio of Costs to Settlement is then determined.

$$\$40,000/\$90,000 = .44$$

(Attorney's Fees plus costs divided by recovered amount.)

$$.44 = \text{Medicare's pro rata share}$$

$$\$30,000 \times .44 = \$13,200$$

(Medicare's subrogation interest x ratio = pro rata share)

$$\$30,000 - \$13,200 = \$16,800$$

(Medicare's payment minus pro rata share = payment to Medicare)

$$\text{Payment to Medicare: } \$16,800$$

AMOUNT TO PLAINTIFF: \$33,200

The final step is to receive a release for the money paid by Medicare.

If Medicare's pro rata share exceeds the sub-total after deductions for attorney's fees and costs, the client statutorily receives nothing. However, the attorney can negotiate a deal resulting in the client receiving a recovery, even though the statutory formula might have resulted in the client receiving nothing.

Conclusion

Because State and Federal Governments are able to reach beyond settlement and back to the attorney, it is essential to understand the details of Medical Assistance, Medicare, and State or Federal program payments. Timely notice, full scrutiny of all bills, and obtaining releases are the goals. Ignoring or attempting to circumvent these goals can have dire consequences. Confronting the goals head-on and negotiating, when appropriate, provides for the payment of necessary medical benefits for the client and the maximization of the client's recovery. ▲

Michael A. Bryant is a partner in the law firm of Bradshaw & Bryant, PLLC. His practice areas include personal injury and criminal defense. Mike was the 1999/2000 MTLA Member of the Year and is a past president of the Minnesota Consumer Alliance. He co-chairs the MTLA Amicus and Legislative Committees and also serves on the Board of Governors and the Finance, Trial PAC, Publications and No-Fault Committees. Mike is certified as a civil trial advocate by the MSBA and the NBTA.

July 2004* MINNESOTA HEALTH CARE PROGRAMS FOR SENIORS

INCOME AND ASSET ELIGIBILITY FIGURES

by Long & Reher, P.A.

Program	Income		Assets	
	SINGLE	COUPLE	SINGLE	COUPLE
Medical Assistance (MA) 100% FPG*** 75% FPG (Method B spenddown standard)	\$776 \$582	\$1,041 \$781	\$3,000	\$6,000
Qualified Medicare Beneficiary (QMB) (120% FPG)	\$796	\$1,061**	\$10,000	\$18,000
Service Limited Medicare Beneficiary SLMB (130% FPG)	\$951**	\$1,269**	\$10,000	\$18,000
QI- 1 (135% FPG)	\$1,068**	\$1,426**	\$10,000	\$18,000
Prescription Drug Program	\$951**	\$1,269**	\$10,000	\$18,000

MEDICAL ASSISTANCE FOR NURSING HOME RESIDENTS

Income

A nursing home resident must pay all of his/her income to the nursing home less allowable deductions including a \$74 personal needs allowance (\$90 for certain veterans and spouses of veterans) and an allowance for payment of medical insurance premiums. Further, a community spouse is entitled to a spousal allocation to bring his or her income to \$1,562/month (or up to \$2,319 if shelter costs are greater than \$469 per month). MA pays the rest of the nursing home cost. Community spouse keeps all his/her income.

Assets

In addition to exempt and unavailable assets, a nursing home resident may have only \$3,000. If married, the community spouse keeps \$26,190 or ½ of all available assets owned by either spouse up to \$92,760. Assets must be reduced properly. Current penalty for uncompensated transfers is \$4,111 per month.

ELDERLY WAIVER (EW)

Income

There are two income limits for EW. People with incomes equal to or less than the Special Income Standard (SIS) (currently \$1,692) are eligible for EW without an MA spenddown. They must contribute any income over the maintenance needs allowance (\$766) and other applicable deductions to the cost of services received under EW. This is known as the waiver obligation. All other MA services are provided without a spenddown. Recipients whose income is equal to or less than \$766 are eligible for EW and MA without a spenddown or waiver obligation. People with incomes greater than \$1,692 must spend down income in excess of the current MA medically needy income standard of \$582. Excess income must be applied towards the cost of EW services and other medical services. Recipients are responsible for paying bills used to meet the spenddown. A community spouse is entitled to a spousal income allowance.

Assets

The rules are the same as those for MA for nursing home residents (above). Spousal impoverishment rules apply to EW recipients.

ALTERNATIVE CARE (AC):

A recipient is eligible if income and assets would be inadequate to fund a nursing facility stay for more than 180 days subject to a limit of \$28,000. Spousal impoverishment rules apply.

* Updated January and July each year

** \$20 disregard is included in totals

*** Federal poverty guidelines

DESCRIPTION OF MINNESOTA'S HEALTH CARE PROGRAMS

Medical Assistance (MA)

Full MA benefits, pays Medicare Part A and Part B premiums, deductibles, co-insurance and co-pays. Will also pay for home health care and for skilled and custodial care in a nursing home.

Qualified Medicare Beneficiary (QMB)

Pays Medicare Part A and Part B premiums, co-pays, and deductibles.

Service Limited Medicare Beneficiary (SLMB)

Pays Medicare Part B premiums

Qualified Individuals—Group 1 (QI-1)

Pays Medicare Part B premiums. Limited funding.

Prescription Drug Program

Pays prescription drugs for QMB and SLMB enrollees with a \$35 monthly deductible.

Elderly Waiver

Pays full MA benefits plus home and community based services for people who are 65 years of age or older who require the level of care provided in a nursing facility.

Alternative Care

Minnesota funded program pays home care and community services. Recipient may have to pay a fee depending upon recipient's assets and income.

2004 SOCIAL SECURITY ADMINISTRATION BENEFITS

Retirement Survivors Disability Insurance (RSDI)

Maximum Benefit: \$1,825/month

Retirement Earnings Limit for the Year Turning

Age 65: \$31,080/year‡

Retirement Earnings Limit for Years Before Age 65:

\$11,640/year‡‡

‡ Applies only to months prior to attaining full retirement age. \$1 in benefits will be withheld for every \$3 in earnings above the limit.

‡‡ \$1 in benefits withheld for every \$2 in earnings above the limit.

Medicare

Part A Premium: \$343 for less than 30 quarters of Medicare-covered employment; \$189 for 30-39 quarters of Medicare-covered employment; \$0 for 40 quarters or more of Medicare-covered employment

Part A Skilled Nursing Facility Co-Payment: Up to \$109.50 per day for days 21-100

Part A In patient Hospital Deductible: \$876 per spell of illness

Part B Premium: \$66.60/month

Part B Deductible: \$100 per year

Supplemental Security Income (SSI)

Individual: \$564/month

Couple: \$846/month ▲

Long Prairie Firm Challenges MA Liens on Life Estates

The firm Randolph T. Brown, P.A., of Long Prairie, is challenging a medical assistance lien imposed against a deceased client's life estate. The action for declaratory judgment has been removed to Ramsey County District Court under the name Dwaine Marten and Dwight Marten v. Minnesota Department of Human Services, Court File No. 62-04-008428. The plaintiffs have

moved for partial summary judgment. A hearing is scheduled for December 14, 2004, at the Ramsey county Courthouse. A complete set of plaintiff's pleadings can be found at the firm's website, www.brownlawcenter.com.

Please note: The Winter Edition of the *Elder Law Newsletter* will focus on the court challenge to zombie liens.