

Elder Law Newsletter

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

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A Word from the Chair . . .

Things got off to a shaky start for me. Lori Guzman asked me to Chair the annual meeting of the Elder Law Governing Board for her on June 9th, 2005, at the Minneapolis Convention Center. Thanks to heavy rush hour traffic, some incredibly bad driving directions from Yahoo and several high school graduation ceremonies, I arrived just as the meeting ended. I had just been elected Chair for the 2005–2006 year, despite my less-than-stellar beginnings.

I am excited to take on the duties of Chair and look forward to a very productive year. The planning committee for the 2005 Elder Law Institute has already been assembled and we are well on our way to finalizing the topics and locating speakers. Other committees are moving forward with the business of the section as well.

I would like to thank all the past and present council members for their willingness to pitch in and get things done. I'm impressed that we have such a dedicated and talented group of people to lead the section. Despite hectic schedules, someone is always willing to do one more thing to help out. I am confident that this behavior will continue, based on my past experience with our members. I am also very grateful for all the help that council members have offered me as I stumble into my new role as Chair. I just pray that people don't start blocking my calls.

Looking forward to a great year,

Your Chair,
Kathleen M. Eveslage, Esq.

Elder Law Newsletter Editorial Committee

Chair: Jonathan Dyrud, Esq.

Editor In Chief: Brigitta Sharpe, Esq.

Committee Members: Julian Zweber, Esq.,
Kim Dayton, Esq., Vicki Ahl, Esq., Sharon K. Kirts, Esq.

Featured Contributors: Julian Zweber, Esq. and Erin R. Furlong, Marcus C. Stubbles, Esq. and Randy Brown, Esq., Kim Dayton, Esq., Terrie Lewis, Esq.

MSBA



SESSION LIKELY TO END IN A “TRAIN WRECK”

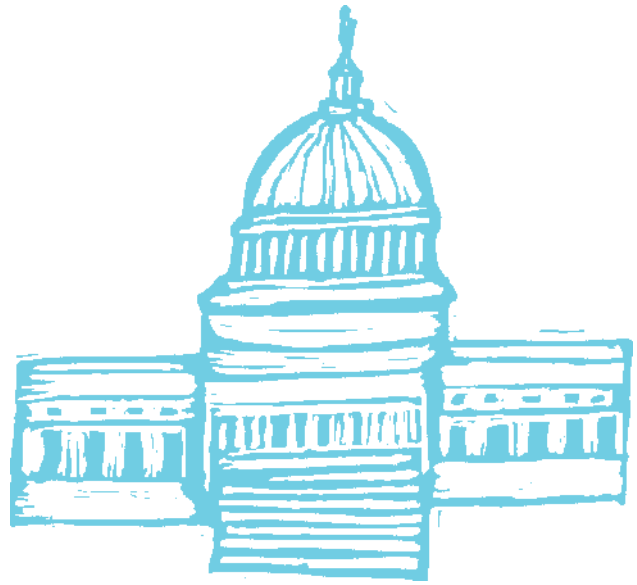
by Julian J. Zweber, Legislative Coordinator
and Erin R. Furlong, Student Clerk

With only two weeks to go to the deadline for adjournment of the 2005 regular session, which according to the Minnesota Constitution must occur by midnight, May 23, 2005, the Minnesota Legislature appears on track for a repetition of the closing days of the 2004 session. With the House controlled by Republicans, 68 to 66, and the Senate controlled by Democrats, 35 to 31 (with one Independent to spare, who caucuses with the Democrats), and with Governor Pawlenty standing by his pledge to run state government without any tax increases, the differences between the House and Senate appear to have increased instead of decreasing as the end of session approaches. Many observers are questioning whether a new budget for Fiscal Year 2006 can be in place by July 1, 2005, when the next fiscal year begins. Unlike the federal government, which uses continuing resolutions to keep the federal government running until a new budget can be put in place, state government comes to a halt if no budget is enacted by the start of the new fiscal year. The next two weeks will tell whether the session ends in a train wreck or a grand compromise of vastly different approaches to funding state government.

The Elder Law Section Legislative Committee has had two priorities for the 2005 session: to support full repeal of the 2003 expansion of the medical assistance estate recovery statutes, especially the provisions for claims and liens against life estates and joint tenancies after death, and to oppose the DHS proposal introduced in March to expand estate recovery to allow additional claims against certain trusts and annuities.

Prospects for Repeal of Life Estate and Joint Tenancy MA Claims

In the 2004 session, House and Senate Democrats supported full repeal of the 2003 expansion of MA estate recovery. Twenty four House Republicans supported a bill introduced by Rep. Morrie Lanning (R-Moorhead) to repeal the retroactive effect of the 2003 legislation. Nothing came of these bills because of the logjam at the end of the 2004 session. At the beginning of the 2005 session, it was expected that Republicans and Democrats in the House and Senate would take similar positions, except that the House would be composed of far fewer Republicans than the previous year.



Senate Bills Introduced to Repeal All or Parts of 2003 Expansion

In the Senate, a number of bills were introduced to repeal all or parts of the 2003 legislation.

S.F. 254 was authored by Sens. Berglin (DFL-Minneapolis), Pogemiller (DFL-Minneapolis), Johnson D.E. (DFL-Willmar), Lourey (DFL-Kerrick), and Koering (R-Fort Ripley). Article 2 of this bill would have repealed estate recovery of alternative care benefits retroactive to July 1, 2003, remove the provisions for claims against life estates and joint tenancies after death of the life tenant or joint tenant and eliminate liens against those zombie life estate and joint tenancies. This bill would have made technical corrections, but leave in place the provisions which currently authorize Notices of Potential Claims (NPCs), which can be filed up to one year after the decedent's death. The bill would have restored other estate recovery provisions affecting surviving spouses, disabled children and other protected relatives to their pre-2003 condition.

The failure of this bill to remove NPC provisions from the 2003 legislation was a serious concern. With zombie life estate and joint tenancy claims no longer possible, there appeared to be no good reason to keep the NPC, except to encumber title in the hands of protected survivors.

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Legislative Report, continued from page 2

Following a recipient's death, or the death of the surviving spouse, whichever occurred later, a claim against real property owned by the recipient or the recipient's spouse would still be pursued in probate or in a decree of descent proceeding without any need for a separate post-mortem lien. The recent decision of the Nevada Supreme Court in *State of Nevada DHS v. Est. of Ullmer*, 120 Nev. Advance Opinion 16, suggested that any attempt to impose post-mortem liens against property owned by a surviving spouse would have to meet certain due process requirements, none of which was included in the Minnesota NPC statute. NPC provisions as amended by S.F. 254 would still have technical defects and due process concerns. The amendment to 256B.15, subd. 1d, governing the effect of the recorded notice would have eliminated references to life estates and joint tenancies after death of the life tenant or joint tenant. It would still provide that a recorded notice would be notice of the state's claims to anyone who owns an interest in the property from the time the notice takes effect, even against owners who did not receive any actual notice of the NPC or the actual opportunity to challenge it. The NPC would still be filed without any prior notice or opportunity for hearing. Erroneous filings have occurred and would continue to occur, putting innocent property owners to the expenses of requesting removal. Once an NPC is filed and becomes effective as a lien, the burden would still be placed on the property owner to challenge the validity of the lien. Placing a lien against a person's real property by the government without first giving the owner prior notice and opportunity for hearing would still raise denial of due process issues. Because the NPC can be filed up to a year after the recipient's death and becomes a lien immediately upon filing if filing occurs following the recipient's death, the NPC would still cause title examination and closing problems for real estate practitioners, title companies and closers. Marketability of title would still be affected. There would still be no good way to be sure that a NPC is not effective without holding the closing in the County Recorder's office to be able to check whether a NPC has been filed prior to recording of the new owner's deed. If an NPC is filed prior to a recipient's death, the procedures for imposing a post-mortem lien through the probate process would still increase the complexity and expense of probate for no good reason. When these provisions were passed by the Senate Health and Family Security Committee they were thought likely to remain in the Senate Omnibus Health and Human Services Finance Bill when it would be proposed for passage by the Senate.

Other bills were introduced in the Senate to repeal parts of the 2003 legislation. S.F. 154 was authored by Sens. Fredrickson (R-New Ulm), Belanger (R-Bloomington),

Kierlin (R-Winona), Vickerman (DFL-Tracy) and Sams (DFL-Staples). After committee amendments, this bill would have repealed estate recovery for alternative care benefits, repealed alternative care liens; and repealed claims against life estates and joint tenancies after death of the life tenant or joint tenant. This bill would not have repealed the provisions allowing NPC and providing for liens which become effective when a NPC becomes effective. This bill would not have repealed the post-mortem liens imposed on property of the deceased recipient which pass to surviving spouses, disabled children or other protected relatives through probate. As a result of committee amendments, this bill was amended to conform to Sen. Berglin's S.F. 254.

S.F. 174 was authored by Sens. Kiscaden (IP-Rochester), and Wergin (R-Princeton). This bill would have eliminated the retroactive effect of the 2003 expansion of MA estate recovery, but leave all other provisions of that expansion in effect. This bill died in the Health and Family Security Committee.

S.F. 175 was authored by Sens. Skoe (DFL-Clearbrook), Lourey (DFL-Kerrick), Dille (R-Dassel), Koering (R-Fort Ripley), and Stumpf (DFL-Thief River Falls). As a result of committee amendments, this bill was amended to conform to Sen. Berglin's S.F. 254.

New Estate Recovery Provisions Introduced in Senate Omnibus Bill

Following approval of the repeal bills in the Senate Health and Family Security Committee, it was quite a surprise when the Senate Omnibus Health and Human Services Finance Bill sponsored by Sen. Berglin in the Health and Human Services Budget Division introduced completely different language than was approved earlier in the committee process. As passed by the Senate in S.F. 2278, the Omnibus Health and Human Services Appropriations bill now repeals only selective parts of the 2003 legislation. First, it would repeal Alternative Care claims retroactively to July 1, 2003, but specifically deny refund of any claims already collected. It would direct the Commissioner of Human Services to release medical assistance liens against family farms and income producing property owned by a surviving joint tenant or remainder person after the medical assistance recipient's death. The property would have to meet an extensive list of requirements to qualify as family farm property or income producing property. The bill would not change any other provisions of the 2003 expansion of estate recovery. It would not protect homesteads owned in joint tenancy by unmarried couples, although a floor amendment offered by Sen. Lourey would delay enforcement of the state's lien until the survivor died,

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stopped residing on the property or sold the property.

Although the Democrat-controlled Senate supported full repeal in the 2004 session, the Democrat strategy in 2005 tries to restore as many benefits cut in 2003 as possible. Full repeal of the 2003 legislation would cost a substantial amount of money which otherwise could be used to restore benefits. The limited protections afforded family farms and other income producing properties in the Senate Omnibus bill are estimated to cost only \$4 million in FY 2006, compared to \$28 million for full repeal.

Surprise in the House: Bradley and DHS Accept Repeal of Retroactive Effect of 2003 Life Estate Legislation

After refusing to allow a hearing on any of the four bills introduced in the 2005 session to repeal all or part of the 2003 estate recovery legislation, Rep. Fran Bradley (R-Rochester), chair of the House Health Policy and Finance Committee, surprised observers by including the provisions of Rep. Morrie Lanning's bill in the House Omnibus Health Care Finance bill released on April 19, 2005. Rep. Lanning's bill repealed the retroactive effect of the 2003 legislation. The repeal provisions from Rep. Lanning's bill now appear in Article 3 of the House Omnibus Health Care Finance Bill, H.F. 1422. They include provisions for refund of all claims against life estates and joint tenancies collected post-mortem since August 1, 2003. The fiscal note shows that repeal of the retroactive effect and refund of the sums already collected will cost the state approximately \$14 million in FY 2006. Funds for repeal and refund will come from substantial cuts in the Alternative Care program and other state supported health care programs. Commissioner of Human Services, Kevin Goodno, testified in support of the repeal of the retroactive effect of the 2003 legislation.

Conference Committee

The Conference Committee on H.F. 1422 and S.F. 2248 began meeting on May 9. The committee's work will not be completed until a final agreement is reached among the Governor, the House and the Senate as to how to end the 2005 session. No one at the Legislature is expecting that an agreement can be reached prior to the deadline for adjournment on May 23, 2005.

Partnership and Long-Term Care Insurance Tax Credit Bills

The Bush Administration has proposed two initiatives to encourage purchase of long term care insurance. The first

would increase the tax credits for purchase of long term care insurance. The second would remove the 1993 prohibition against additional states adopting the Health Care Partnership Program.

Prior to 1993, four states, California, Connecticut, Indiana and New York, allowed residents to shelter assets against medical assistance asset limits to the extent the resident and the resident's spouse purchased long term care insurance in an equal amount. The practice was stopped for additional states by the Omnibus Budget Reconciliation Act of 1993 (OBRA '93). The Bush Administration supports repeal of the restriction.

H.F. 309, which would raise the state income tax credit for long term care insurance premiums to \$500 per year is included in the House Omnibus Tax bill.

S.F. 540, which included Sen. Berglin's proposal to allow the Partnership Program to be implemented in Minnesota is included in the Senate Omnibus Health and Human Services Appropriations Bill.

Bush Proposals

Congressman John Peterson (R-PA) has introduced H.R. 1406, to allow the states to implement long-term care partnership legislation. H.R. 1406 would allow states to create long-term care partnerships to promote long-term care insurance and provide asset protection. In addition, this legislation removes the OBRA '93 restrictions which prohibit expansion of the partnership programs beyond the four states currently participating. Partnerships are supported by the Bush Administration, and were included in the FY 2005 budget. This bill will not have a federal budget impact and is expected to reduce federal matching funds. It is also expected to reduce state Medicaid funding for long-term care as more people choose to purchase long-term care insurance and protect their assets from Medicaid eligibility calculations.

DHS Bill To Expand MA Estate Recovery Against Certain Trusts and Annuities

The DHS Departmental Bill, H.F. 1422, proposed to add a new section to Minn. Stat. Chapter 501B, which would affect every trust or annuity created by an individual or by a husband or wife on or after July 1, 2005, wherever situated, if the individual or the individual's spouse ever receives medical assistance, alternative care or general assistance medical care benefits. The new statute would have allowed recovery against the full value of the individual's interest or the spouse's interest in the trust or annuity. In effect, the

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new statute would have made the State of Minnesota an unnamed beneficiary of any such trust or annuity. This new law, as originally proposed, would have applied to all new retirement plans involving a trust or annuity.

Robert McLeod, speaking on behalf of the Probate and Trust Law Section, testified against this proposal. Rep. Fran Bradley, the bill's chief author, then agreed to remove the criticized section from the Departmental bill and re-introduce it as a separate bill. Separation of the criticized provisions allowed those proposals to go first to the House Civil Law Committee and then the House Commerce Committee without requiring the entire departmental bill to take those detours. The new bill, H.F. 2019, was introduced on March 21, and received strong criticism from the banking and insurance industries. As a result of these criticisms the provisions affecting annuities were dropped from the bill. The trust provisions have undergone several changes and are expected to undergo additional changes in conference committee. The current version of this proposal applies only to inter-vivos irrevocable trusts created on or after July 1, 2005. The current language would treat such a trust as revocable but only for purposes of medical assistance eligibility determinations.

Impact of the Marten Decision

On March 18, 2005, Judge Teresa Warner issued her decision in the Marten case. *Marten and Marten v. Minn. Dept. of Human Services*, Ramsey County District Court File No. C9-04-8428. [See related article on page 6.] Judge Warner granted the Martens' motion for partial summary judgment, holding that the MA lien filed under Minn. Stat. §514.981 against their remainder interest was unconstitutional on the grounds that it impaired the remainder persons' vested rights. Unfortunately, she also granted the State's motion to grant partial summary judgment on the State's motion to dismiss the Marten's claims against §256B.15 itself, on the grounds that they lacked standing to challenge its provisions. The deadline for appeal will run later this month. DHS is taking the position that the Marten decision only applies to the Marten case. If the House position in favor of repeal of the retroactive effect prevails in conference committee, the Marten case will be mooted. The Marten case, and the threat of additional lawsuits to challenge the retroactive effect of the 2003 legislation have been cited by DHS officials to explain the Department's support of repeal. If the Senate provision prevails, additional lawsuits can be expected after session end. ▲

LEGISLATIVE REPORT UPDATE

June 13, 2005

by Julian J. Zweber, Legislative Coordinator

With some parts of state government scheduled to shut down on July 1, there is still no agreement in the special session on the final size of the health and human services budget or on the policy changes which will be needed to conform to spending limits and priorities.

In the meantime, Lindquist & Vennum P.L.L.P. of Minneapolis, and Thomas F. Pursell, a member of the firm, have filed a class action lawsuit to recover funds collected by the Minnesota Department of Human Services from life estates and joint tenancies continued after the death of the life tenant or joint tenant under Minn. Stat. 256B.15. The lawsuit was filed on June 8, 2005, in Ramsey County District Court. See Brian R. Schultz, et al., on behalf of themselves and all others similarly situated v. Kevin Goodno, as Commissioner of the State of Minnesota Department of Human Services, Ramsey County District Court, Court File No. C8-05-5756. The case has been assigned to District Judge Steven Wheeler. ▲

LOOK FOR NEW LEGISLATION ON THE ELDER LAW SECTION WEBSITE AT

<http://www2.mnbar.org/sections/elder-law/index.htm>

UPCOMING EVENTS

2005 Elder Law Institute

October 20th and 21st
Minnesota CLE Conference Center
Third Floor City Center, 7th St. and Nicollet Mall
Minneapolis ▲

LIFE ESTATE LIEN LITIGATION: *MARTEN V. MINNESOTA DEPARTMENT OF HUMAN SERVICES*

by Marcus C. Stubbles, Esq. and Randy Brown, Esq.

On March 18, 2005, Judge Teresa Warner of Ramsey County issued her formal opinion granting in part and denying in part the Plaintiffs' motion for summary judgment in the case of *Marten v. Minnesota Department of Human Services*. Judge Warner held that application of the legislature's 2003 changes to Minn. Stat. §514.981, the medical assistance lien statute, to the remainder interest owned by Dwaine and Dwight Marten would be unconstitutional under the Minnesota state constitution.

This ruling calls into serious question the validity of hundreds, if not thousands, of similar liens all over Minnesota, as well as the validity of the liens' close legal cousin, the "notice of potential claim" created in 2003 by the same changes. For bonus points, of course, the State has been collecting on these liens for the better part of two years already, and one source suggests that the State may have to refund up to nine million dollars if the ruling were upheld on appeal or otherwise given statewide effect.

A little background on the *Marten* case. In 1989, an elderly couple, Otto and Lillie Marten, came to see Randy Brown, one of the authors of this article, at his law office in Long Prairie, Minnesota. The Martens needed advice about how to plan their estates. They knew that within a few years it was likely they would need to apply for medical assistance to pay their medical bills. On Mr. Brown's advice, they

transferred the family farm to their sons, Dwaine and Dwight, and reserved a life estate for themselves. In 1996, a second deed removed a clause which would terminate the life estate if they moved off the property, and shortly thereafter Lillie Marten began receiving medical assistance. Otto Marten, meanwhile, passed away.

In 2003, of course, the legislature made a number of changes to the medical assistance recovery statutes. (See the article by Julian J. Zweber in the Spring 2004 Elder Law Newsletter for a detailed review of these changes). Suffice it to say that the Marten family's planning was ruined. In September of 2003, Lillie Marten was one of the first individuals to receive a Notice of Lien Imposition under the new statute, and Dwaine Marten, managing his frail mother's affairs, returned to our office. Upon reflection and research, and in consultation with other attorneys, we concluded that the 2003 changes were unconstitutional. We decided to bring a formal legal challenge.

We appealed the imposition of the lien through the administrative process, then up to District Court. We paused the case for a few months in hopes that the 2004 legislature would repeal the changes, but to no avail. Meanwhile, Lillie Marten passed away in May of 2004, at the age of 96. To avoid procedural snarls we agreed to dismiss the adminis-

Life Estate Lien Litigation, . . . , continued on page 7

Update on *Marten v. Minnesota Department of Human Services*

On May 19, 2005, the State filed a Notice of Appeal in the Marten case. *Dwaine Marten and Dwight Marten v. Minnesota Department of Human Services* Ramsey County District Court File No. C9-04-8428. The State summarizes the issue on appeal as follows: "The district court incorrectly concluded that the application of Minnesota Statutes 514.981, subd. 6(c) in this case is unconstitutional because it interferes with Respondents' vested rights."

Attorneys Randy Brown and Marcus Stubbles will be meeting with the Marten brothers as soon as possible to consider whether to cross appeal the District Court's dismissal of their challenge to the provisions of Minn. Stat. 256B.15 which retroactively abrogated the common law of life estates and remainder interests.

Meanwhile, in the legislature, H.F. 1422, the House Omnibus Health Care Finance bill, which is in conference committee with S.F. 2278, the Senate Omnibus Health and Human Services Appropriations bill, contains language which would repeal the retroactive effect of the 2003 legislation back to its original effective date and refund the money collected from zombie life estate and joint tenancies since then, without interest. The Senate language would repeal Alternative Care benefit recovery back to July 1, 2003, but not refund any money collected since then, would direct the Commissioner of Human Services to release a medical assistance lien (but not the claim) against a survivor's family farm or income producing property after the death of the recipient, and delay enforcement of a medical assistance lien against a survivor's homestead until the survivor dies, stops residing in the property or sells the property. No one is predicting with any confidence how these differences ultimately will be resolved. ▲

Life Estate Lien Litigation. . . . continued from page 6

trative appeal and re-file the case as a declaratory judgment action in the names of Dwaine and Dwight Marten. The case was moved to Ramsey County. In October of 2004 we filed for partial summary judgment on two of our five constitutional arguments (our briefs, and the State's responses, are posted on our web site; see below). The motion was heard on December 14th, 2004, by Judge Warner. As noted above, she issued her decision on March 18th, 2005 (she also issued an amended order a few weeks later to correct some clerical errors in the original draft).

Judge Warner, to begin with, agreed with the State that the Plaintiffs did not have standing to contest the 2003 changes to the probate code, Minn. Stat. §256B.15, because no probate had been commenced. Thus, part of our summary judgment motion was denied. But when confronted squarely with the question of whether Minn. Stat. §514.981 was constitutional if applied to the Martens' situation, Judge Warner sided with the Plaintiffs. The best short summary of her reasoning appears at page 10:

"Defendant admits that the Martens engaged in lawful estate planning when they created the life estate. The purpose of this estate planning was to ensure that Plaintiffs' interest in the property would be preserved. When Plaintiffs granted Lillie Marten a life estate in 1996, they had every reason to expect that at Lillie Marten's death, any Medical Assistance lien against Lillie Marten's life estate would terminate, and Plaintiffs would regain possession of the property free and clear of any liens asserted against Lillie Marten's life estate. It is not reasonable for Plaintiffs to be subject to a lien created by the 2003 amendment to Minn. Stat. §514.981 when they bear no responsibility for creating the debt giving rise to the lien."

As of the writing of this article, the State has not chosen to appeal the decision. They still have plenty of time to do so, of course. But we are beginning to suspect that they will not appeal, taking the position that the Marten case applies only to its own facts, and that anyone who wishes to obtain a similar result for their own client(s) will have to bring a similar suit. This would be a classic penny-wise, pound-foolish decision, since the issue will not go away and, if anything, attorneys around the state should be emboldened now to make their own challenges. In addition, a binding statewide decision is only a matter of time, either because a challenger will lose somewhere and appeal the adverse decision, or because a class action civil rights suit will be commenced (we're seriously thinking about that; we could get our attorney fees paid by the State).

We encourage attorneys statewide to commence their own challenges to these laws—it can be done! Resources to help

you are freely available on our web site, www.brownlaw-center.com, under the "Life Estate Lien Litigation" heading, including our briefs, the State's opposition briefs, and (in the next few days) Judge Warner's opinion. If the State decides to appeal, we'll post the notice ASAP. Make full use of these materials; making future challenges easier is exactly why we posted them.

Lastly, we should acknowledge the wonderful help we've received in taking this case forward. We've enjoyed the expert advice of practicing attorneys, academics, and law students from around the state. Julian Zweber (private practice) has been invaluable, especially in knowing the legislative history and in coordinating everyone's efforts. Chuck Hoyum (Old Republic Title), Prof. Jennifer Wright (St. Thomas), Tracey Setter (student at St. Thomas), Prof. Eileen Roberts (William Mitchell), and Prof. Mary Jane Morrison (Hamline) all contributed their advice on general strategy and specific aspects of our briefs. And we certainly thank all of you who have wished us well on this project. It's been our pleasure. ▲

SUPPLEMENTAL NEEDS TRUSTS: HOW MUCH DISCRETION DO TRUSTEES HAVE IN MAKING DISTRIBUTIONS?

By Terrie Lewis, Esq., Garvey & Boggio, P.A.

On December 14, 2004, the State of Minnesota Court of Appeals released an unpublished opinion in *In re The Irrevocable Supplemental Needs Trust of Jennifer Collins Created Pursuant to a Court Order Dated February 2, 1998*. The Court reversed a Ramsey County District Court order disallowing certain discretionary disbursements from a supplemental needs trust.

The Court noted that a court “will not substitute their discretion for that of a trustee except when necessary to remedy an abuse of discretion.” Reviewing six factors presented in *In re Trusts A and B of Divine*, 672 NW.2d 912, 919-920 (Minn. App. 2004), the Court held the trustee had not abused his discretion as trustee. According to the trust provisions, the trustee had sole discretion to make expenditures for the beneficiary’s entertainment. In this case, the district court allowed entertainment expenditures for a bicycle and accessories, dance lessons and clothing, skates, sled, boots and socks, but disallowed expenditures for a child’s snowmobile and concert tickets. Concluding that the appropriateness of an expenditure for these items requires an exercise of discretion faced constantly by parents of disabled and non-disabled children and that the trustee exercised, but did not abuse, his “sole discretion,” the Court reversed the district court’s order disallowing the expenditure. The Court asserted that the “district court substituted its own discretion for appellant’s when it arbitrarily disallowed these expenses.”

See www.lawlibrary.status.mn.us/archive to find the actual opinion.

TIPS FOR TRUSTEES:

- Keep detailed records (receipts, bills, invoices).
- File fiduciary tax returns annually.
- Follow the prudent investor’s rules when investing trust money.
- Remember: trust money can only be spent on items and services that are for the sole benefit of the beneficiary.
- Set up separate checking and savings accounts in the name of the trust.
- Use checks for all expenses and keep receipts.

ADDITIONAL TIPS FOR TRUSTEES OF COURT-SUPERVISED TRUSTS:

- Notify the court, attorney and surety company of any changes in address.
- File Inventory and Accountings in a timely manner.
- Be realistic about whether assistance is needed to complete accountings.
- Do not obtain any loans without the court’s approval.
- Seek legal advice from an attorney specializing in Supplemental or Special Needs Trusts before making any expenditure over \$1,000 or before making any questionable expenditures so that the attorney can determine if court approval of the expenditure is necessary. ▲

July 2005* 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) Full MA benefits, pays Medicare Part A and Part B premiums, deductibles, co-insurance and co-pays.	\$798 \$599	\$1,070 \$803	\$3,000	\$6,000
Qualified Medicare Beneficiary (QMB) (100% FPG) Pays Medicare Part A and Part B premiums, co-pays, and deductibles.	\$818*	\$1,090*	\$10,000	\$18,000
Service Limited Medicare Beneficiary SLMB (120% FPG) Pays Medicare Part B premiums	\$977*	\$1,303*	\$10,000	\$18,000
QI - 1 (135% FPG) Pays Medicare Part B premiums. Limited funding.	\$1,097*	\$1,464*	\$10,000	\$18,000
Prescription Drug Program Pays prescription drugs for QMB and SLMB enrollees with a \$35 monthly deductible.	\$977*	\$1,303*	\$10,000	\$18,000

ELDERLY WAIVER (EW)

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.

Income Eligibility

There are two income limits for EW. People with incomes equal to or less than the Special Income Standard (SIS) (currently \$1,737) are eligible for EW without an MA spenddown. They must contribute any income over the maintenance needs allowance (\$789) 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. A recipient whose income is equal to or less than \$789 is eligible for EW and MA without a spenddown. A recipient who has income greater than \$1,737 must spend down his or her income in excess of the current MA medically needy income standard of \$599. Excess income must be applied towards the cost of

EW services and other medical services needed by the applicant. The applicant is responsible for paying bills used to meet the spenddown. A community spouse is entitled to a spousal income allowance as explained above.

Asset Eligibility

The rules are the same as those for MA for Nursing Home Residents (below).

ALTERNATIVE CARE (AC)

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

* \$20 disregard included

** FPG is Federal Poverty Guidelines

July 2005* MINNESOTA HEALTH CARE PROGRAMS FOR SENIORS

MEDICAL ASSISTANCE FOR NURSING HOME RESIDENTS

In addition to full MA benefits, pays for home health care and for skilled and custodial care in a nursing home.

Income Eligibility

A nursing home resident must pay all of his/her income to the nursing home less allowable deductions including a \$76 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 \$1,604/month (or up to \$2,378 if shelter costs are greater than \$482 per month). MA pays the rest of the nursing home cost. Community spouse keeps all his/her income.

Asset Eligibility

In addition to exempt and unavailable assets, a nursing home resident may have only \$3,000. If married, the community spouse keeps \$26,898 or 1/2 (one-half) of all available assets owned by either spouse up to \$95,100. Assets must be reduced properly. Current penalty for uncompensated transfers is \$4,198 per month.

2005 SOCIAL SECURITY ADMINISTRATION BENEFITS

Retirement Survivors Disability Insurance (RSDI)

Maximum Benefit: \$1,939/month (Age 65 and 6 months)

Retirement Earnings Limit for the Year Turning

Age 65: \$31,080/year‡

Retirement Earnings Limit for Years Before Age 65:

\$12,000/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: \$375 for less than 30 quarters of Medicare-covered employment; \$206 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 \$114 per day for days 21-100

Part A In patient Hospital Deductible: A total of \$912 per spell of illness for hospital stay of 1-60 days; \$228 per day for days 61-90; \$456 per day for days 91-150; All costs for each day beyond 150 days.

Part B Premium: \$78.20/month

Part B Deductible: \$110 per year (Plus 20% of the Medicare-approved amount for services after the deductible has been met.

Supplemental Security Income (SSI)

Individual: \$579/month (Asset Limit: \$2,000)

Couple: \$869/month (Asset Limit: \$3,000) ▲

ANNOUNCEMENTS

ELDER LAW SECTION HIRES FIRST STUDENT CLERK

by *Julian J. Zweber, Legislative Coordinator*

In December 2004, the Elder Law Section Governing Council authorized hiring of the Section's first student clerk, and approved a budget of \$4,000 to cover the clerk's wages and expenses for the fiscal year ending June 30, 2005. The Probate and Trust Law Section has employed a student clerk to assist its Legislative Committee for many years. The hiring of a student clerk was recommended by the Strategic Planning/Finance Committee earlier in 2004.

A committee composed of Douglas J. Debner, Gina M. Nelson, Jennifer L. Wright and Julian J. Zweber screened well-qualified applicants from each of Minnesota's law schools. After interviewing the top four finalists, the committee offered the position to Erin B. Furlong, a joint degree student at the University of Minnesota.

Erin impressed the committee with her academic credentials, interest in elder law issues, and depth of experience. By the time of her interview, Erin had been employed at the Minnesota Department of Human Services for the past year, beginning as an Executive Pathways intern and then moving into a full-time position during the summer of 2004. At DHS, she worked on policy initiatives in long-term care reform. One of her primary projects was researching long-term care private financing options. Her research became the appendix to the full report on private sources of financing for long term care expenses, presented to the legislature in January of 2005.

During the 2004-2005 academic year, Erin is serving as a teaching director for the Maynard Pirsig Moot Court.

Erin also serves as an Admissions Ambassador at the University of Minnesota Law School. She has clerked for an attorney in solo practice and volunteered as a legislative clerk for the Disability Law Center in the spring of 2003.

Erin expects to receive a Masters Degree in Public Health Policy and Administration through the University's Law, Health and Life Science Program in May 2005, and a Juris Doctor degree from the Law School in December 2005. She graduated cum laude from the College of St. Benedict in St. Joseph, Minnesota, in 2002.

Erin began working in January on Section legislative activities, reporting to Julian Zweber. She works between 10 and 15 hours each week, monitoring developments in the legislature and assisting Julian with various legislative activities. With the approval of both the Section's supervising committee and her supervisor at DHS, Erin has continued

working for DHS as a part-time analyst providing additional research and policy advice on the private financing study.

At the end of this academic year, Erin has accepted a summer internship at the ABA Commission on Law and Aging in Washington D.C. She will work under the supervision of Charles Sabatino, a nationally recognized expert on issues affecting the elderly. ▲

FUNDING OF FIRST POOLED TRUST APPROVED BY RAMSEY COUNTY HUMAN SERVICES DEPARTMENT

On March 9, 2005, David P. Fitch, Esq., Director of The Pooled Trust of Minnesota, announced that the Ramsey County Human Services Department approved funding of a pooled trust under a master trust agreement naming The Pooled Trust of Minnesota as trustee. The pooled trust will hold settlement proceeds for an individual over 65 years of age.

According to Mr. Fitch, the beneficiary of the pooled trust is a woman in her 70's who secured a personal injury settlement after being injured in a nursing facility. At the time of the injury the woman was receiving medical assistance benefits for long-term care. The Ramsey County Human Services Department approved the use of the pooled trust to hold the woman's settlement proceeds. By placing her assets in a pooled trust, the woman was allowed to continue receiving medical assistance benefits without interruption and without having to first deplete the settlement funds.

For more information about pooled trusts, see the article titled "Pooled Trusts for Persons with Disabilities" in the Fall 2004 Elder Law Newsletter. Additional information is also available by visiting the pooled trusts resources shown in the Web Resources Section of this newsletter, starting on page 13. ▲

WEB-BASED RESOURCES

ELDER LAW PRACTICE RESOURCES

The list below includes a variety of Web-based resources on elder law and related topics such as estate planning, disability law, and health care. You can access this list via the section website at <http://www2.mnbar.org/sections/elder-law/links.htm>. If you know of a link that you would like to see added to this page, please email the site editor at towanda@mn.rr.com

Useful Documents

Basic Estate Planning Concepts (July 15, 2004 rev.)
www2.mnbar.org/sections/elder-law/basic-estate-planning.pdf

Organizations

American Bar Association, Commission on Law and Aging, www.abanet.org/aging/

Elder Law Section, Minnesota State Bar Association,
<http://www2.mnbar.org/sections/elder-law/index.htm>

National Academy of Elder Law Attorneys,
www.naela.org

National Elder Law Network-Elder Law
Bibliographies, www.neln.org/bibs/bibindex.html

American College of Trust and Estate Counsel,
www.actec.org

ACTEC Commentaries on the Model Rules of
Professional Conduct, www.actecfoundation.org/pdf-docs/COMMENTA1.PDF

Minnesota Senior Federation,
<http://front.mnseniors.org/regions.html>

Minnesota Health Care Choices 2005 On-line,
<http://www.mnseniors.org/HCCMain.cfm>

Government Agencies

FEDERAL

Social Security Administration, www.ssa.gov

SSA Forms, <http://www.ssa.gov/online/>

SSA Program Operations Manual (POMS), <http://policy.ssa.gov/poms.nsf/aboutpoms>

OASDI Trustees' Report-2005,
<http://www.ssa.gov/OACT/TR/TR05/>

Department of Health and Human Services,
www.hhs.gov

HHS-Aging Issues,
<http://www.hhs.gov/aging/index.shtml>

HHS-Centers for Medicare and Medicaid Services,
www.cms.gov

CMS Manuals On-line, <http://www.cms.hhs.gov/manuals/>

CMS State Medicaid Manual,
http://www.cms.hhs.gov/manuals/pub45/pub_45.asp

CMS Medicare Modernization Act of 2003-
Implementation Info,
<http://www.cms.hhs.gov/mmu/default.asp>

HHS-Administration on Aging, www.aoa.gov

AoA Resource Room-Professionals,
<http://www.aoa.gov/prof/prof.asp>

AoA Resource Room-Elders and Families,
<http://www.aoa.gov/eldfam/eldfam.asp>

Internal Revenue Service, www.irs.gov

IRS Forms, <http://www.irs.gov/formspubs/index.htm>

STATE

State of Minnesota-official website
<http://www.state.mn.us/cgi-bin/portal/mn/jsp/home.do?agency=NorthStar>

Minnesota Department of Human Services,
http://www.dhs.state.mn.us/main/groups/agencywide/documents/pub/dhs_About_dhs.hcsp

DHS-Aging Issues,
http://www.dhs.state.mn.us/main/groups/aging/documents/pub/dhs_Aging.hcsp

DHS-Health Care Issues,
http://www.dhs.state.mn.us/main/groups/healthcare/documents/pub/dhs_Health_Care.hcsp

DHS-Disability Issues,
http://www.dhs.state.mn.us/main/groups/disabilities/documents/pub/dhs_Disabilities.hcsp

DHS Manuals On-line,
http://www.dhs.state.mn.us/main/groups/county_access/documents/pub/dhs_id_007910.hcsp

Web-Based Resources, continued on page 13

Web-Based Resources, continued from page 12

DHS Combined Manual On-Line,
<http://www.dhs.state.mn.us/ecs/ReguProc/CM/default.htm>

Minnesota Legislature, <http://www.leg.state.mn.us/>
Legislative Reference Library (state documents),
<http://www.leg.state.mn.us/lrl/mndocs/mndocs.asp>
Minnesota Board on Aging, <http://www.mnaging.org/>

Statutes and Regulations

FEDERAL

United States Code-searchable,
<http://www.gpoaccess.gov/uscode/>
Compilation of the Social Security Laws,
www.ssa.gov/OP_Home/ssact/comp-ssa.htm
Internal Revenue Code,
<http://www.access.gpo.gov/uscode/title26/title26.html>
Code of Federal Regulations-searchable,
<http://www.gpoaccess.gov/cfr/index.html>

General Legal Information and Indexes

Elder Law.Com-Robert Fleming, <http://www.elder-law.com/index.htm>
Elder Law Newsletter (published weekly),
<http://www.elder-law.com/archives.html>
Elder Law Answers, elderlawanswers.com/default.asp
Senior Law.Com, seniorlaw.com/attorney.htm
TN-Elder Law.Com-Tim Takacs (not just Tennessee),
www.tn-elderlaw.com/
Elder Law Fax, www.tn-elderlaw.com/elderfax.html

Miscellaneous

Elderweb On-line, <http://www.elderweb.com/>
Senior Net, <http://www.seniornet.org/php/default.php>

POOLED TRUSTS RESOURCES

General Information and FAQs

The Florida Pooled Trust (general information about pooled trusts), <http://www.firstpooledtrust.org/>
Pooled Trust Information (from Guardian and Protective Services, Inc., Fargo/Bismark, ND),
<http://www.gapsinc.org/trust.htm>
Pooled Charitable Trusts—Tax Breaks for Small Fry (from NOLO, Law for All), <http://www.nolo.com/lawcenter/ency/article.cfm/ObjectID/3045416C-EDC6-48F2-A310DAF212E2361D/catID/257899BC-C5FA-435D-BA9BCC083F55357E>
The Pooled Trust as an Asset Conservation/Medicaid Planning Tool (from Steven Perlis),
<http://perliselderlaw.com/ContentPage.aspx?WebPageId=2662&GroupId=723>
FAQs about the Tennessee Pooled Trust (from Tim Takacs) (provides general as well as state-specific information),
<http://www.tn-elderlaw.com/tpafaq.html>

Selected Statutes

FEDERAL

42 U.S.C. § 1382c (definitions),
http://www.ssa.gov/OP_Home/ssact/title16b/1614.htm
42 U.S.C. § 1396p (liens, transfers, etc.),
http://www.ssa.gov/OP_Home/ssact/title19/1917.htm

STATE

Minn. Stat. 256B.056,
<http://www.revisor.leg.state.mn.us/stats/256B/056.html>

Sample Trust Documents

Minnesota Pooled Trust (from the Center for Special Needs Trust Administration, Inc.), http://www.snt-center.org/Download_Page_Minnesota.htm
North Dakota Pooled Trust (from Guardian and Protective Services, Inc.),
<http://www.gapsinc.org/GAPSPooledTrustMstrApr03.pdf>

Miscellaneous

The Arc, Pooled Trust Policy, Recommended Policy for Pooled Trusts Administered by Chapters of The Arc, <http://www.thearc.org/policies/pooledtrust.doc> (this is a Word Document)
National Guardianship Association, Pooled Trust Manual (order form), <http://www.guardianship.org/store/listitem.cfm?itemnumber=3> ▲

ELECTION OF NEW ELDER LAW SECTION GOVERNING COUNCIL OFFICERS AND MEMBERS FOR 2005–2006

The proposed slate of candidates to serve on the 2005–2006 Elder Law Section Governing Council was approved by the Elder Law Section membership at the Annual Meeting on June 9, 2005. The following is the approved slate:

Council Members seeking election this year

Ms. Kathleen M Eveslage—Chair
Ms. Vicki M Ahl
Mr. Mark L Anderson
Mr. Stuart C Bear
Ms. Cynthia J Capin
Mr. Douglas J Debner—Vice-Chair
Ms. Barbara F Goldstein
Mr. Richard D Hawke—Treasurer
Ms. Sharon K Kirts
Ms. Monica Lewis
Ms. Gina M Nelson
Mr. Robert L Russell, III
Mr. Thomas O'Connell
Mr. Thomas Wilson
Mr. Joel Mullen—Student Member
Mr. Mike Pexa—Student Member

Members whose term expires in 2006 and who are not currently up for re-election

Ms. Linda L Bogut
Mr. Robert H Chesley
Mr. Robert F Collins
Ms. A Kimberley Dayton
Mr. Jonathan A Dyrud
Ms. Lori L Guzman
Ms. Laurie A Hanson
Ms. Bonita A Kallestad
Mr. David B Kuehner
Ms. Lynn R Lindsay
Mr. Raymond J Peterson
Ms. Cathryn D Reher—Secretary
Ms. Suzanne M C Sandahl
Ms. Jennifer L Wright
Mr. Julian J Zweber

Retiring Council Members

Mr. Jeffrey W Schmidt
Mr. Craig P. Goldman ▲

DID YOU KNOW?

REORGANIZATION AND EXPANSION OF THE ELDER LAW SECTION WEBSITE

The website for the Elder Law Section is being reorganized and expanded! Over the next several months, the Governing Council will be working with MSBA on a website redesign that will make the site easier to navigate and more useful to the section membership. Content additions will include an expanded list of useful links, full text documents, and regularly updated information about national and regional CLE programs and conferences of interest to practitioners. The site will also include a search form enabling the public to locate Minnesota elder law attorneys in their communities. The long term goal of the Council is to develop the section website into a one-stop gateway to statutes, regulations, and documents relevant to the

practice of elder law in Minnesota, and to provide information to the public about what the section does and why the elder law specialty is of growing importance.

The Elder Law Section's website is located at <http://www2.mnbar.org/sections/elder-law/index.htm>. Bookmark this address if you have not done so already, and check the site regularly to follow our progress in restructuring the site. If you have suggestions about how you think the site can be revised, or ideas about content that you would like to see included within the site, please send them to the site editor, Kim Dayton, at towanda@mn.rr.com. We look forward to hearing from you! ▲