

MSBA ELDER LAW SECTION eNEWSLETTER

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eNewsletter Editorial Staff:

Chair: Jonathan Dyrud, Esq.

Editor in Chief: Vicki McIntyre, Esq.

Contributing Editors: Laurie Hanson, Esq., Kim Dayton, Esq., Peter Hendricks, Esq., Amanda Christman, Esq., Joel Button

UPDATE: *In Re Estate of Francis E. Barg*: The Minnesota Supreme Court heard oral arguments in the *Barg* case on Tuesday, November 6, 2007. A summary of the arguments appears below under the "Minnesota Cases" section.

Streaming video and audio of the oral argument is available at:

<http://www.tpt.org/courts/MNJudicialBranchvideo.php?number=A05-2346>

ELDER LAW NEWS

On Minnesota's lonely, isolated elders

<http://www.tcdailyplanet.net/article/2007/11/05/minnesotas-lonely-elders.html>

Adult foster homes for elderly become more common

<http://www.startribune.com/462/story/1528435.html>

First flu case of the season diagnosed in Chaska

<http://www.chaskaerald.com/node/3058>

Editor's note: 85% of influenza fatalities occur in the 65+ population

'Be friendly to people and don't complain too much,' advises local centenarian

<http://www.stillwatergazette.com/articles/2007/11/08/news/news220.txt>

ELDER LAW SECTION ACTIVITIES

NEW ELDER LAW SECTION COMMITTEES: Please watch this space for more information about volunteering for the three new Elder Law Section committees approved by the Governing Council at its last meeting. The new committees are: The Greater Minnesota Support Committee, the Pro Bono Committee, and the Member Education Committee.

MINNESOTA CASES

SUMMARY OF ORAL ARGUMENT BEFORE MINNESOTA SUPREME COURT

IN RE ESTATE OF FRANCIS E. BARG

Court File No. A05-2346

Present for the hearing: Chief Justice Russell Anderson, Justice Alan C. Page, Justice Helen M. Meyer, Justice Sam Hanson, Justice G. Barry Anderson, Justice Lorie Skjerven Gildea

Not taking part: Justice Paul H. Anderson (recused)

The Minnesota Supreme Court heard oral arguments in the case of *In re Estate of Barg* on November 6, 2007. This case will have great impact on elder law practice as it deals with whether the state can recover medical assistance benefits paid for a recipient from the estate of the community spouse's estate, specifically from the value of the homestead in which the recipient did not hold title at the time of death.

Assistant Mille Lacs County Attorney Dawn R. Nyhus presented the county's argument. The desired outcome of the county and Commissioner of Human Services is that the state can recover from the entire value of the homestead titled only in the surviving spouse from the surviving spouse's estate for expenses incurred by the recipient spouse. Dawn's arguments focused on the propositions that the state and federal Medicaid statutes work in harmony, and that the laws of property (common law and statutory) are altered where medical assistance applies, thus allowing a non-vested, inchoate interest to have transferable value when DHS wishes.

Within the first several minutes, the Court began asking questions in what became a regular volley of questions and answers. The court acknowledged the Amicii brief, submitted on behalf of the Elder Law Section of the MN Bar Association, and used the specific language, "unvested, inchoate interest" from the brief to describe the nature of Mrs. Barg's interest in her husband's estate at the time of her death. Specifically, Justice Hanson asked, "What is the nature of this interest and particularly under subd. 2 of the MN statute, what is the value of the interest that the wife had at the time of her death?" And a minute later, Justice Hanson asked, "Could it be sold, for example, prior to her death, could she sell that interest to anyone? Could it be marketable?" Justice Hanson came back to this concern several times throughout the hearing.

Assistant Attorney General Robin Vue-Benson presented the arguments of the Commissioner of Human Services. These arguments could be summarized as:

1. Since CMS approved the MN Medicaid plan, the court should give deference to that decision. Also, CMS approval of state's plan means there is no preemption conflict.
2. Where Medicaid applies, property law is different. Everywhere in the federal medical assistance statutes where the spouse is mentioned, the spouses are treated as one collective unit, their property is combined and everything, titled or not, is considered assets (of course, this argument misrepresents the federal statutes, which treat spouses differently in several respects.)

3. Since states were making direct claims against the estates of community spouses prior to OBRA '93, and since OBRA did not specifically prohibit this action, Minnesota can do it.

Attorney Thomas Mainz of Princeton, Minnesota, presented the Estate's arguments. Mainz began by asking that the Court find that no recovery be allowed, in spite of the fact that the Estate originally offered to pay the county the value of a life estate as suggested by the Court of Appeals decision in the *Gullberg* case. Mainz then pointed out that the federal statute begins with the words "No recovery of correctly paid medical assistance benefits" shall be allowed except under three narrowly drawn exceptions.

In steady and measured manner, Mainz spent the remainder of his time answering pointed questions from the Justices. Tom's responses argued that this unvested, inchoate interest had no value and no one would pay for it and is not transferable, that according to *Marten ex rel Hoff v. City of Rochester*, an agency's approval of a state's medical assistance plan does not require the court to defer to that decision, that the county improperly applies a marital property analysis to find that this unvested, inchoate interest had value because, according to MN Statute 518.54 (now 518.003 subd 3), the marital property concept applies only to dissolutions, and that the word "legal" in the federal statute modifies both title and interest.

Joel Button, 3L Student
William Mitchell College of Law

Don't forget that the Elder Law Website is a great resource. Here's what you can find on the Website: Links under "What's New" to the DHS Health Care Programs Manual, the updated Income and Asset Eligibility Figures for Minnesota Health Care Programs, the DHS Bulletin on treatment of uncompensated transfers, the Minnesota Bankers Association Compliance Bulletin on Powers of Attorney, and a legislative summary; Practice Links to organizations such as NAELA, ABA Commission on Law and Aging, Minnesota Senior Federation; Links to Federal and State Government Agencies, Statutes, and Regulations; Meeting Notices, Listings of Officers and Council Members, Section Bylaws, and more.

To access the ELDER LAW SECTION WEBSITE

Click here: <http://www2.mnbar.org/sections/elder-law/index.asp>

Please send eNewsletter contributions by noon on Saturday of each week to Vicki McIntyre at vmcintyre2@yahoo.com

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