

## **2009 MA LEGISLATIVE UPDATE—PART ONE**

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The following is the first part of a summary of the amendments to the medical assistance eligibility and estate recovery statutes passed by the 2009 Legislature as part of the Omnibus Health and Human Services Finance Act of 2009. The Governor signed the Act on May 14, 2009. The following changes are effective July 1, 2009.

### **USE OF MONTHLY INCOME TO PAY MEDICAL EXPENSES NOT COVERED BY MEDICAL ASSISTANCE**

**Laws 2009, Ch. 79, Art. 5, Sec. 20, amending Minn. Stat. § 256B.0575**

Under current law, an institutionalized person who is receiving medical assistance benefits can use monthly income only for certain purposes. One of those purposes is to pay for medical expenses not covered by medical assistance. The University of St. Thomas Legal Aid Clinic was successful in forcing the State to allow current income to be used for old medical expenses. The 2008 amendment provided that current monthly income of the recipient could only be used for "reasonable expenses incurred for necessary medical or remedial care." This new amendment, effective July 1, 2009, adds additional restrictions to the 2008 amendment. Because no delayed effective date is specified, DHS must believe these changes are not barred by American Recovery and Reinvestment Act of 2009 (ARRA).

### **PENALTIES FOR TRANSFERRING ASSETS INTO POOLED TRUSTS AFTER THE BENEFICIARY REACHES AGE 65**

**Laws 2009, Ch. 79, Art. 5, Sec. 21, amending Minn. Stat. § 256B.0595, Subd. 1**

Until recently, it was widely believed that an individual's excess assets could be used to fund a Pooled Trust after the individual reached age 65. Recent guidance from CMS re-interprets long-standing federal law to penalize such transfers after the individual reaches age 65. This amendment, which becomes effective July 1, 2009, codifies the recent CMS guidance on this issue and adds additional restrictions against spouses and other parties transferring funds into a Pooled Trust for a disabled individual. Because no delayed effective date is specified, DHS must believe these changes are not barred by ARRA. Laurie A. Hanson of the firm of Long, Reher & Hanson, P.A., in Golden Valley, Minnesota, is challenging this recent change in federal policy.

### **MA ESTATE RECOVERY EXPANDED TO INCLUDE ASSETS PASSING BY LIVING TRUST**

**Laws 2009, Ch. 79, Art. 5, Sec. 39, amending Minn. Stat. § 256B.15, Subd. 1a**

Effective July 1, 2009, the medical assistance program can assert estate recovery claims under Minn. Stat. § 256B.15 against assets of the recipient which pass to others at the time of death through a living trust.

## **DIRECT MA ESTATE RECOVERY EXPANDED BEYOND THE ESTATES OF SPOUSES**

### **Laws 2009, Ch. 79, Art. 5, Sec. 39, amending Minn. Stat. § 256B.15, Subd. 1a**

Under the current version of Minn. Stat. § 256B.15, direct medical assistance estate recovery claims are asserted only against the estates of a medical assistance recipient and the recipient's surviving spouse. The state and county agencies can trace funds from those estates into the hands of others, but the claims must start with the estates of the recipient and the recipient's surviving spouse. Effective July 1, 2009, the medical assistance program can assert a direct estate recovery claim under Minn. Stat. § 256B.15 against any assets of the recipient or the recipient's surviving spouse which pass to others at the time of recipient's death or the death of the recipient's surviving spouse.

## **PROPERTY RIGHTS OF MARRIED COUPLES MODIFIED TO UNDO THE MINNESOTA SUPREME COURT DECISION IN ESTATE OF FRANCIS E. BARG**

### **Laws 2009, Ch. 79, Art. 5, Secs. 38 to 42, amending Minn. Stat. § 256B.0595, Subds. 1, 1a, 1h, 2, and by adding a new Subd. 2b, respectively**

On May 30, 2008, the Minnesota Supreme Court issued an historic decision in the case of In re the Estate of Francis E. Barg, Court File No. A05-2346. In Barg, the Court by a 5-0 vote, held that the current medical assistance estate recovery statute is in conflict with the federal restrictions on estate recovery. In Barg, the homestead was transferred to the community spouse prior to the death of the medical assistance spouse. Mille Lacs County filed a claim against the community spouse's estate following his death. The only significant asset in his estate was the homestead. The Court interpreted the federal statutes to only allow recovery against assets in the recipient's probate estate and assets of value which transfer from the recipient's estate to another person's estate at the time of the recipient's death. Slip Op. at 31. The Court specifically held that marital rights held by the recipient at the time of death do not qualify as a legal title or interest of value which transfers at death to the surviving spouse's estate. Slip Op. at 34. The Court's interpretation of federal law would greatly restrict the State's ability to recover medical assistance benefits from the estates of surviving spouses who never receive medical assistance benefits.

Needless to say, the Commissioner of Human Services has refused to accept the correctness of the Barg decisions. A petition for Writ of Certiorari filed by Mille Lacs County is currently pending before the United States Supreme Court, under the name Leo Vos, Director, Mille Lacs County, Minnesota, Family Services and Welfare Department v. Michael F. Barg, Personal Representative of the Estate of Francis E. Barg, Docket No. 08-603. On March 2, 2009, the U.S. Supreme Court approved the Commissioner of Human Services' petition to intervene in the proceedings pending in the Supreme Court. On May 29, 2009, the U.S. Solicitor General filed her Amicus Brief, urging the Supreme Court to deny the County's Petition for Writ of Certiorari. On June 8, 2009, the County filed a Supplemental Brief, taking issue with the Solicitor General's recommendations. The

Barg/Vos case has been scheduled for Conference on Thursday, June 25, 2009. Any action taken at the Conference will be announced at 10:00 a.m., Monday, June 29. The Barg/Vos case, therefore, remains on the Elder Law Section's most watched list.

To avoid the potential adverse impact of the Barg/Vos case, DHS has obtained amendments to various provisions of the medical assistance estate recovery statute, Minn. Stat. § 256B.15, to re-define the property rights of individuals who receive medical assistance benefits and their spouses. These changes, which become effective July 1, 2009, would do the following:

a. For the purpose of medical assistance estate recovery, the estate of a recipient of medical assistance will consist of "all the legal title and interests the deceased individual's predeceased spouse had in jointly owned or marital property at the time of the spouse's death, as defined in subdivision 2b [see below for the new subdivision 2b], and the proceeds of those interests, that passed to the deceased individual or another individual, a survivor, an heir, or an assignee of the predeceased spouse through a joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement." Minn. Stat. § 256B.15, subd. 1a, clause (c).

b. The term "other arrangement" is defined to include "any other means by which title to all or any part of the jointly owned or marital property or interest of a predeceased spouse is transferred to another including, but not limited to, transfers between spouses which are permitted, prohibited, or penalized for purposes of medical assistance." Minn. Stat. § 256B.15, subd. 1a, clause (d). This amendment applies to the estates of married and single recipients of medical assistance. This amendment appears to be intended to allow direct estate recovery against others who inherit property from a deceased medical assistance recipient but estate recovery cannot be pursued while the recipient is survived by a spouse, child under age 21 or child who is blind or totally and permanently disabled.

c. The value of the property in the estate of a surviving spouse from which a medical assistance claim can be paid is defined to include "the full value of all of the predeceased spouse's assets and interests which are part of the surviving spouse's estate under subdivisions 1a and 2b." Recovery of medical assistance expenses in the estate of a surviving spouse who never received medical assistance "is limited to the value of the assets of the estate that were marital property or jointly owned property at any time during the marriage," but does not include the "value of assets or proceeds of assets in the estate attributable to a predeceased spouse whom the individual married after the death of the predeceased recipient spouse for whom the claim is filed" or assets acquired with the proceeds of non-marital property. Minn. Stat. §256B.15, subd. 2.

d. A new subdivision 2b is added to Minn. Stat. § 256B.15 to provide the following "controlling provisions." Because of the breathtaking scope of this subdivision, it is reproduced here in full:

Subd. 2b. **CONTROLLING PROVISIONS.** (a) For purposes of this subdivision and subdivisions 1a and 2, paragraphs (b) to (d) apply.

(b) At the time of death of a recipient spouse and solely for purpose of recovery of medical assistance benefits received, a predeceased recipient spouse shall have a legal title or interest in the undivided whole of all of the property which the recipient and the recipient's surviving spouse owned jointly or which was marital property at any time during their marriage regardless of the form of ownership and regardless of whether it was owned or titled in the names of one or both the recipient and the recipient's spouse. Title and interest in the property of a predeceased recipient spouse shall not end or extinguish upon the person's death and shall continue for the purpose of allowing recovery of medical assistance in the estate of the surviving spouse. Upon the death of the predeceased recipient spouse, title and interest in the predeceased spouse's property shall vest in the surviving spouse by operation of law and without the necessity for any probate or decree of descent proceedings and shall continue to exist after the death of the predeceased spouse and the surviving spouse to permit recovery of medical assistance. The recipient spouse and the surviving spouse of a deceased recipient spouse shall not encumber, disclaim, transfer, alienate, hypothecate, or otherwise divest themselves of these interests before or upon death.

(c) For purposes of this section, "marital property" includes any and all real or personal property of any kind or interests in such property the predeceased recipient spouse and their [sic] spouse, or either of them, owned at the time of their marriage to each other or acquired during their marriage shall be presumed to be marital property for purposes of recovery medical assistance unless there is clear and convincing evidence to the contrary.

(d) The agency responsible for the claim for medical assistance for a recipient spouse may, at its discretion, release specific real and personal property from the provisions of this section. The release shall extinguish the interest created under paragraph (b) in the land it describes upon filing or recording. The release need not be attested, certified, or acknowledged as a condition of riling or recording and shall be filed or recorded in the office of the county recorder or registrar of titles, as appropriate, in the county where the real property is located. The party to whom the release is given shall be responsible for the paying all fees and costs necessary to record and file the release. If the property described in the release is registered property, the registrar of title shall accept it for recording and shall record it on the certificate of title for each parcel of property described in the release. If the property described in the release is abstract property, the recorder shall accept it for filing and file it in the county's grantor-grantee indexes and any tract index the county maintains for each parcel of property described in the release.

## **COORDINATOR'S COMMENTS ON THE 2009 EXPANSION OF ESTATE RECOVERY:**

*Although the foregoing amendments to Minn. Stat. § 256B.15 apply only to married couples where one or both spouses receive medical assistance benefits, these changes have the potential to affect the property rights of all married couples. These changes impair the separate property rights of all married individuals, because their property rights will be modified by operation of law if one or the other applies for medical assistance benefits. This obviously discriminates against married individuals and their spouses on the basis of receipt of federally secured benefits. In effect, married couples, one of whom applies for medical assistance benefits, would no longer have separate property rights. The property rights of a spouse who survives a medical assistance recipient would be severely curtailed. Whether these rights can be impaired by operation of law when one or the other applies for benefits raises serious practical and constitutional problems.*

*Although these provisions are supposedly effective July 1, 2009, they cannot be implemented without the State first obtaining CMS approval of State Plan Amendments to implement these changes. If the Bush Administration was still in control of CMS, such approval would no doubt be forthcoming. Whether the Obama Administration will rubber stamp such changes remains to be seen. During the Clinton Administration, requests for approval of medical assistance modifications were sometimes denied on the grounds that "these changes would deny benefits to individuals that they otherwise were entitled to receive." These changes are likely to be challenged at the CMS approval level.*

*In the Barg case, the Minnesota Supreme Court had to construe the federal medical assistance estate recovery statutes to reach its decision. The Minnesota Supreme Court held that the current state statutes are in conflict with the federal statutes. If the Barg case is ultimately sustained by the United States Supreme Court, these 2009 amendments are also likely to violate the federal medical assistance statutes, just as the prior statutes were found to be in violation. Pending final resolution of the Barg case, these new amendments appear intended to require re-litigation of the issues presented in the Barg case. Even if Barg is sustained, it will be necessary to disallow medical assistance estate recovery claims based on these new amendments and litigate the validity of them if the survivors of the deceased medical assistance recipient want to force the State to abide by federal law.*

## **ADDITIONAL PAPERWORK FOR SPECIAL NEEDS TRUSTS AND POOLED TRUSTS**

**Laws 2009, Ch. 79, Art. 5, Sec. 72, amending Minn. Stat. § 501B.89, by adding a new Subd. 4**

Effective for medical assistance applications or renewals submitted on or after July 1, 2009, for beneficiaries of special needs trusts or pooled trusts, the special needs trust or pooled trust will have to submit a statement to the commissioner of human services to provide certain information about the trust. The trust will have to submit annual accountings to the commissioner to update that information. The initial filing must include:

- (1) a copy of the trust instrument;
- (2) an inventory of the beneficiary's trust account assets and their value.

Subsequent annual filings must include:

- (1) an inventory of trust assets and their values at the beginning of the previous accounting period;
  - (2) additions to the trust during the previous accounting period and the source of those additions;
  - (3) itemized distributions from the trust during the accounting period, including the purpose of the distribution and recipient of the distribution;
  - (4) an inventory of trust assets and their value at the end of the accounting period;
- and
- (5) any changes to the trust instrument during the accounting period.

These reporting requirements will obviously increase Pooled Trust administrative expenses, leaving less money available to benefit trust beneficiaries.

## **LIABILITY OF SPOUSES FOR MEDICAL ASSISTANCE CLAIMS AND OTHER GOVERNMENTAL CLAIMS**

### **Laws 2009, Ch. 79, Art. 5, Sec. 73, amending Minn. Stat. § 519.05**

Effective July 1, 2009, the basic creditor liability statute for married couples is amended to make husband and wife, while they are living together, jointly and severally liable for "any claims arising under section 246.53, 256B.15, 256D.16 or 261.04." The current statute limits joint and several liability of spouses, while they are living together, only for necessary medical services that have been furnished to either spouse and necessary household articles and supplies furnished to and used by the family. Minn. Stat. §256B.15, Subd. 1, also states that it is the public policy of the State that couples "use their own assets to pay their share of the total cost of their care during or after their enrollment in the [medical assistance] program according to applicable federal law and the laws of this state."

**2009 MA LEGISLATIVE UPDATE—PART TWO**, covering amendments to the medical assistance eligibility statutes which will not become effective until January 1, 2011, or later, will follow in subsequent issues of the Elder Law Section e-Newsletter.