

# Elder Law Newsletter

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

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## *A Word from the Chair . . .*

Do the Elder Law Section members need encouragement? I ask because not long ago I did. I, however, have received encouragement and so I now hope to impart some of the same to you.

For me, the discouragement arose from politics. Personally, I find politics very discouraging in general but even more so in the area of Elder Law.

However, as Elder Law attorneys, it will be impossible to ignore politics, as the Deficit Reduction Act (or DRA for short) proved yet again just a few months ago. As our population ages and Medicaid's share of the government budget grows, it will continue to be the subject of heated debates in Congress and the state legislatures.

Fortunately, there is hope. The hope I have found is in the women and men of our Section who give so freely of themselves and their time to keep the rest of us informed and able to provide those services so many of the elderly desperately need. While there are many instances that evidence this commitment, I am now thinking primarily of this year's Elder Law Institute and all the hard work that continues to go into it.

The theme for this year's Elder Law Institute is "The Ever Expanding Elder Law Experience." This is due to the fact that the changes to Medicaid included in DRA can, at first glance, give the impression that there is little left to be done for the elderly person entering the nursing home for a long term stay. However, as many of you are probably already aware, that is far from the truth. So, once again we are called upon to re-educate ourselves in service to our clients. And so, I believe, our Institute is aptly named. It is my hope that many of you will be able to attend the live presentation of the Elder Law Institute as I believe you will find it as encouraging as I have.

Douglas J Debner, Hero & Debner Law Office PA

## **Elder Law Newsletter Editorial Committee**

**Chair:** Jonathan Dyrud, Esq.

**Editor In Chief:** David A. Rephan, Esq.

**Co-Editor:** Joel Mullen

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

**Featured Contributors:** Kim Dayton, Esq.



## UPCOMING EVENT

The 16th Annual  
Elder Law Institute  
“The Ever Expanding Elder  
Law Experience”

Thursday & Friday,  
October 5 & 6, 2006

MNCLE Conference Center,  
Minneapolis ▲



## New DHS Bulletin

The long-awaited DHS Bulletin to implement the new DRA asset transfer rules was issued on September 12, 2006. The bulletin number and name is 06-21-13, “Medical Assistance (MA) Policy Changes for Uncompensated Transfers.” To view this bulletin, go to the DHS website and on the left side click on “Bulletins,” and then click on “2006.” Scroll down to “Minnesota Health Care Programs” and then to the bulletin number. You can also click on the following link:

[http://www.dhs.state.mn.us/main/groups/publications/documents/pub/dhs16\\_136375.pdf](http://www.dhs.state.mn.us/main/groups/publications/documents/pub/dhs16_136375.pdf) ▲



## COMMITTEE UPDATES

### The Legislative Committee

by Julian J. Zweber, Legislative Coordinator

The Legislative Committee has started compiling a list of legislative proposals that might stand a chance of becoming law if the November election produces a Governor and Legislature more willing to favorably consider legislative proposals from the Elder Law Section. Until the election results become known, the Committee is biding its time, concentrating its attention on the medical assistance changes introduced by the Deficit Reduction Act of 2005 (DRA), and watching for opportunities to cooperate with other advocates for the elderly to push for legislation in 2007 to mitigate some of the harsh results that might otherwise flow from implementation of DRA. At the top of the list for the 2007 session will be attempts to carve out safe harbors to avoid medical assistance penalties for uncompensated transfers to religious organizations and charities. Other proposals might have to wait for the 2008 session.

Anyone interested in joining the Legislative Committee or submitting a proposal for legislation should contact the Committee Chair Julian J. Zweber at 651-646-4354 or [julianzweber@qwest.net](mailto:julianzweber@qwest.net).

### The Medical Assistance Committee

The committee meets the third Tuesday of each month at 3:30 p.m. at the MAO Office located at 2021 E. Hennepin, Suite 200, Minneapolis, Minnesota. Cathryn D. Reher of Long, Reher & Hanson, P.A., and Jeffrey W. Schmidt of Schmitz and Schmidt, P.A. are co-chairs. The purpose of the committee is to explore Medical Assistance issues that arise in practice and share information about developing laws and policies. The next scheduled meeting is October 17, 2006. Private attorneys who are members of the Elder Law Section of the Minnesota State Bar Association are eligible for membership. Out-state members may participate by phone. If you are interested in joining the committee, please contact Tracie Fenske with Long, Reher & Hanson, P.A., at 952-929-0622.

CHAIR: Cathryn D. Reher, Long, Reher & Hanson, P.A.,  
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# MA CLAIMS AGAINST COMMUNITY SPOUSE ESTATES; GULLBERG REVISITED

by *Thomas J. Meinz, Esq.*  
*Princeton, Minnesota*

Most Elder Law practitioners have read the Minnesota Court of Appeals decision in In re Estate of Gullberg, N.W.2d 709 (Minn App 2002). Since issuance of that decision in 2002, the question has remained: What does this decision mean? Sometime within the next year, the Minnesota Court of Appeals will be forced to answer that question when it decides the appeal in the case In re Estate of Francis E Barg, Docket No. A05-2346.

The facts in Barg are not in dispute and were stipulated by the Estate and the Mille Lacs County Human Services Department. Dolores Barg and Francis Barg were married in 1948. In 2001, Delores Barg entered a nursing home, applied for medical assistance, and received over her lifetime \$108,413.53 for care. During the couple's marriage they acquired both personal property and residential real estate. Prior to her death on January 1, 2004, Dolores Barg transferred to her spouse the remainder of her personal property and all of her undivided one-half (1/2) interest as a joint tenant in the couple's homestead. These transfers were all non-penalized transfers under the medical assistance eligibility rules. Francis Barg died almost five months after Dolores, on May 27, 2004. At the time of his death, he was the sole legal owner of the couple's residential and personal property. He did not receive medical assistance. His will left his entire estate to his children.

In the proceeding to probate his will and administer his estate, Mille Lacs County Human Services Department filed a medical assistance claim in the full amount of the medical assistance provided to Dolores. The Personal Representative of the Estate, the couple's son Michael F. Barg, allowed the claim in the amount of \$63,880 and disallowed the balance of the claim in the amount of \$44,535.53. He did so relying on the Court of Appeals decision in 2002 in the Gullberg case and the post-Gullberg decision by Ramsey County District Court Judge Margaret Marrinan in the Estate of Bast, Ramsey County District Court File No. P9-03-5115.

The Court of Appeals in Gullberg determined that a person in the position of Delores Barg had some "legal interest" in the homestead she had previously deeded to her spouse Francis Barg because she was still married to him at the time of her death. The Gullberg Court referenced two potential sources of that interest: her common ownership interest in her husband's property because it was acquired during coverture, and her interest under Minn. Stat. 524.2-402(a)(c) (2000), as a surviving spouse with a right to claim

an interest in the homestead, which in this case would have been limited to a life estate interest. Based on Delores Barg's age at the time of her death, her life estate in the homestead, had she survived Francis Barg, would have been .48742 of the total value, according to the Medical Assistance Life Estate Mortality Table. The parties agreed that the fair market value of the homestead as of the date of Delores' death was \$120,880. Based on the Mortality Table, the life estate interest would have been worth \$58,880. Based on Judge Marrinan's decision in the Bast case, the Personal Representative also allowed \$5,000 toward the County's claim, recognizing that Delores would have been allowed to claim a personal property allowance. The Personal Representative therefore offered a total of \$63,880 to settle the County's claim.

Mille Lacs County rejected the offer and filed a petition in Mille Lacs County District Court to allow the previously disallowed balance of the claim. The parties stipulated to the facts, filed hearing briefs, and held oral argument before the Honorable Steven P. Ruble, Judge of District Court. The hearing was held on August 4, 2005. The County argued that full recovery under these circumstances was required by federal and state law. The County argued that under Gullberg, Dolores Barg had a common interest in the marital property in her spouse's estate and characterized her interest as an "undivided whole interest in the marital homestead." The Estate argued that the Gullberg Court did not decide the nature and extent of the medical assistance spouse's interest in the community spouse's property at the time the medical assistance spouse's death, but remanded that issue for determination by the Court below. The Estate maintained that under 42 U.S.C. 1396(p)(b)(4)(B), Dolores Barg had no legal title or interest in the property of Francis Barg at the time of her death, but acknowledged that the Gullberg Court held to the contrary. The Estate argued that if there was an interest, it was limited to the value of a life estate in the homestead.

Judge Ruble determined that Delores Barg had an "interest in the estate of the surviving spouse" pursuant to Gullberg and concluded that the Gullberg Court found the existence of this legal interest "by favorably pointing to both marital-dissolution and intestate laws." Judge Ruble decided that intestacy law was more appropriate to apply in the Barg case than marital dissolution law because the legal factors for evaluation of assets in a marital dissolution setting "are not suitable for a proceeding such as this one where the spouses are not actual parties." He determined Delores

Gullberg Revisited, continued on page 4

### Gullberg Revisited, continued from page 3

Barg's transfer to Francis Barg constituted an "other arrangement" under the federal estate recovery statute. He valued Dolores Barg's interest pursuant to the Medical Assistance Mortality Table at \$58,880 and added a personal property allowance of \$5,000, for a total of \$63,880. He denied Mille Lacs County's claim for payment of the balance. In his Memorandum of Law, Judge Ruble indicated that his decision needed to be made under the Gullberg case, but noted Gullberg gave "no direction to the lower courts" as to which area of the law (marital dissolution law or intestacy law) should be followed. He determined, however, that the Searles case cited by the Court of Appeals in Gullberg, and upon which Mille Lacs County relied, did not stand for the proposition that the "common ownership interest of non-title holding spouses is equal to the total value of the home-stead; on the contrary, they stand for the proposition that the interest of the non-title holding spouse and the total value of the property are not identical."

Mille Lacs County appealed Judge Ruble's decision. The Court of Appeals allowed the Minnesota Commissioner of Human Services to intervene, file a brief, and participate in oral argument. The County and the Estate expanded upon their previous arguments in their appellate briefs. The Estate also argued that since the Gullberg Court directed the District Court to determine the nature and extent of the interests held by the medical assistance spouse in the community spouse's property at the time of the medical assistance spouse's death, and to place a value on that interest, it was critically important that the Court of Appeals uphold Judge Rubel's decision when he followed those directions. The Commissioner of Human Services argued that a marital property analysis should be applied to determine Dolores Barg's interest and that a marital property analysis was the only appropriate analysis to apply to comply with the federal estate recovery statute. The Commissioner also argued that although the Gullberg decision was correct in allowing a claim against the estate of a community spouse under these facts, the Gullberg court did not address the impact of the federal statutory phrase "to the extent of such interest" and therefore the part of the Gullberg decision which could be interpreted to limit the extent of the county claim should be ignored.

Oral argument was heard by the Court of Appeals on July 20, 2006, in St. Cloud, before the Honorable Harriet Lansing (presiding judge), the Honorable Roger M. Klaphake (author of the decision in Gullberg), and the Honorable Edward Parker (retired judge, sitting by appointment). Mille Lacs County and the Commissioner of Human Services (as amicus) divided the fifteen minutes allowed for Appellant's argument. The Court questioned the Appellants quite

aggressively. Counsel for the County and the Commissioner argued that the measure of recovery should be 100% of the value of the property in the community spouse's estate which was previously owned as marital property. The Court questioned whether the Appellants could cite any authority to the effect that either party to a marriage has a separate right to 100% of the marital property. The Estate argued that the definition of marital property under Minn. Stat. 518.54 did not and could not be applied effectively to resolve the extent of the property interests that might be recoverable from the community spouse's estate.

A decision by October 19, 2006, is expected.

The Estate wishes to thank the Elder Law Section, especially Attorneys Randy F. Boggio and Julian J. Zweber, for the valuable encouragement and assistance provided throughout the appeal process. ▲

### THE DEFICIT REDUCTION ACT OF 2006

by Kim Dayton, Professor of Law, William Mitchell College of Law/Of Counsel, Long, Reher & Hanson

The Deficit Reduction Act of 2006, signed by the President on February 8 of this year, made a number of important changes to the Medicaid asset transfer rules and other provisions of the federal Medicaid statute. The list of web sites below includes general summaries of the DRA as it affects the elder law practitioners and their clients as well as discussion of specific aspects of the DRA, including its asset transfer, long term care partnership, and community spouse “income first” provisions.

#### Bill Text

<http://www.govtrack.us/data/us/bills.text/109/s/s1932.pdf>

- Full text of the bill as passed by the House and signed by the President

#### Tim Takacs' Federal Statute Mark Up

<http://www.tn-elderlaw.com/060208-dra1396p-1396r-5.pdf>

- This shows federal law with changes made by the DRA in blue text. Extremely valuable!

#### Minnesota Department of Human Services

[http://www.dhs.state.mn.us/main/groups/agencywide/documents/pub/dhs\\_Home\\_Page.hcsp](http://www.dhs.state.mn.us/main/groups/agencywide/documents/pub/dhs_Home_Page.hcsp)

- Use search form to search for term “Deficit Reduction Act of 2005” to located all DHS publications on implementation of the DRA in Minnesota

#### General Overviews

##### Centers for Medicare and Medicaid Services

##### Opportunities for Reform: Deficit Reduction Act and Beyond

<http://tinyurl.com/ojhpmp>

- A CMS powerpoint presentation on the DRA, highly partisan in favor of the changes effected by the bill.

##### Disability Policy Collaboration (The ARC and United Cerebral Palsy),

##### The Deficit Reduction Act of 2005 , P. L. 109-171

- Two disability advocacy organizations’ analysis of the bill

##### Families USA, Medicaid Alert,

##### Overview: Medicaid and the Deficit Reduction Act 101

<http://www.familiesusa.org/assets/pdfs/DRA-101.pdf>

- A review of changes in federal law, by a client-advocacy organization with special expertise in Medicaid issues

##### Indiana Association of Homes and Services for the Aging, Deficit Reduction Act of 2005

<http://tinyurl.com/qvgfj>

- The DRA from the perspective of the nursing home and senior services industry—which are significantly adversely affected by the bill

##### National Academy of Elder Law Attorneys,

##### Memorandum Explaining the Deficit Reduction Act of 2005 (Medicaid Provisions)

<http://www.naela.org/Applications/News/index.cfm?fuseAction=fullArticle&ArticleID=195>

- This is NAELA’s lobbyist’s take on the DRA.

##### National Conference of State Legislatures, Deficit Reduction Act of 2005: Summary of Medicaid/Medicare/Health Provisions

<http://www.ncsl.org/print/health/SumS1932Jan3106.pdf>

- An overview of the important provisions of the DRA from the states’ perspective. ▲