

Legislative Proposal Form

Minnesota State Bar Association

For questions related to this form, contact Sherri Knuth, sknuth@mnbars.org or 612-278-6330

Section(s) or Committee(s) submitting proposal:

Elder Law Section

Succinctly state the legislative proposal. (You will have the opportunity to explain in greater detail below.) Please use one form for each legislative issue; do not combine multiple legislative issues on one form.

Resolved that the Elder Law Section supports the following position:

Given that medical assistance planning is a main practice area for attorneys in the Elder Law Section and the clients they serve, we support repeal of Minn. Stat. §501C.1206 to conform to federal law at 42 USC 1396p(d) by not treating certain irrevocable trusts created on or after 7/1/2005 as revocable for the purposes of determining medical assistance eligibility.

MSBA GUIDELINES FOR LEGISLATIVE PROPOSALS

The MSBA Bylaws provide that the MSBA, sections and committees may take a position “on pending or prospective legislation which is within the expertise of the profession or related to access to justice and is within the purposes of the MSBA.” Article 12 of the MSBA Bylaws govern Legislation.

SECTION I: BACKGROUND

What process did your section or committee use to approve this position?

Approval by the Elder Law Section Governing Council on Request of Chair and Vice Chair of the Elder Law Section Legislative Committee

Sections and committees are strongly encouraged to present legislative recommendations to the Assembly for approval as MSBA positions, but they are also authorized to take positions on their own behalf. Are you seeking to take a position in the name of your section or committee only, or in the name of the MSBA?

MSBA

Section-only or Committee-only*

***If this is a section-only or committee-only proposal, please certify the following in accordance with the MSBA's bylaws and policies:**

The proposed position was submitted for comment to every member of the section or committee before this form was submitted to the MSBA.

- The proposal was approved in accordance with the section's bylaws or by the majority of a quorum of the committee.
- The vote totals of the section's or committee's members or governing body on the proposal:
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- I understand that no action may be taken for three business days after this form is submitted to the MSBA.
- I understand that the MSBA President may preempt section or committee legislative action at any time and that the Council may reverse or amend the President's decision by a majority vote of Council members present and voting.

Are you seeking to support an existing bill, oppose an existing bill, or pass your own bill? If you are proposing a new bill, please attach.

- Support existing bill Oppose existing bill Pass own bill

Does the proposal amend an existing statute, create a new statute, or relate to funding for an agency or program? If you are proposing new statutory language, please attach.

- Amends statute Creates statute Agency or program funding

Describe the issue addressed by this legislative proposal and explain who will benefit if the desired result is achieved.

In 2005, the Legislature enacted Minn. Stat. §501B.895. The statute was repealed and re-enacted word for word in 2015 as part of the new Minnesota Uniform Trust Code as Minn. Stat. §501C.1206 (Laws 2015, Ch. 5, Art. 12, Sec. 6). In 2020, Senator Bill Weber (Republican, District 22) introduced SF 4259 to repeal Minn. Stat. §501C.1206. The companion bill, H.F. 3587, was introduced in the House on February 20, 2020, by Rep. Joe Schomacker (Republican, District 22A). A copy of SF 4259 (2021 session) is attached for reference. HF 3587 contains the same language. Minn. Stat. §501C.1206 is a statute that treats an irrevocable trust created on or after July 1, 2005, as revocable if the settlor or the settlor's spouse is treated as creator of the trust and either the settlor or the settlor's spouse later applies for MA benefits. Neither bills advanced beyond introduction, but it is expected that the bills will have bipartisan support to be re-introduced in the 2021 session. The Elder Section, though its Governing Council, supports repeal of Minn. Stat. §501C.1206.

Why should the MSBA support this proposal?

The Minnesota District Court has held that Minn. Stat. §501B.895 and its successor Minn. Stat. §501C.1206, violate federal law for treatment of irrevocable trusts for medical assistance purposes as set forth in 42 USC 1396p(d). See *Beth Braland v Commissioner of Human Services*, Court File 18-CV-11-2249 (Crow Wing County, January 20, 2012) with respect to Minn. Stat. §501B.895; and most recently *In re Matter of Dorothy Geyen*, Court File 10-CV-19-1076 (Carver County, August 8, 2020) with respect

to Minn. Stat. §501C.1206. The Braland case was never appealed. The Geyen case is on appeal to the Minnesota Court of Appeals, Appellate Court File No. (October 9, 2020). Despite not appealing the Braland case, DHS continues to apply the successor statute, Minn. Stat. §501C.1206, to new applications for medical assistance benefits. Repeal is necessary to prevent the Minnesota Department of Human Services (DHS) from continuing to apply an unconstitutional statute to evaluation of assets held in irrevocable trusts when determining medical assistance eligibility. The persistence of DHS in applying Minn. Stat. §501C.1206 following the decision in Braland shows a complete disregard for the Rule of Law and the rights of applicants for medical assistance benefits.

What adverse consequences will occur if the desired result of this proposal is not achieved? Are there other reasons why this proposal must be pursued during the upcoming legislative session?

Applicants for medical assistance benefits and their spouses will continue to be put to the trouble and expense of challenging the constitutionality of Minn. Stat. §501C.1206, when the statute clearly violates federal law at 42 USC 1396p(d). Minn. Stat. §501C.1206 continues to interfere with lawful estate planning practices that have negative ramifications if medical assistance benefits are needed, creating traps for the unwary for elder law attorneys, estate planning attorneys, and their clients.

How did this proposal originate? If your section or committee was asked by another organization to support this initiative, please identify the organization.

This proposal originates from members of the Elder Law Section.

Please list any other group or individual that has sponsored a comparable proposal in recent years. Please explain whether that group or individual is currently sponsoring comparable legislation, and if not, why they are no longer sponsoring comparable legislation.

The Minnesota Chapter of the National Academy of Elder Law Attorneys (MN NAELA) is expected to seek similar legislation in the 2021 Session of the Minnesota Legislature.

SECTION II: VETTING

A. INTERNAL VETTING. *The MSBA will forward this proposal to all sections and committees, but it is the proposing section's or committee's responsibility to solicit feedback, at the earliest possible time, from other sections and committees that may have an interest in the proposal.*

Have any MSBA sections or committees reviewed this proposal and taken a position in support?

Not yet. The Position will be circulated to the Probate and Trust Law Section and the Real Property Section.

Have any MSBA sections or committees reviewed this proposal and opposed or objected to all or any portion of the proposal? What were their objections?

Not yet.

Have any MSBA sections or committees not responded to your request that they review this proposal?

Not yet.

B. EXTERNAL VETTING. *You should solicit feedback from groups and individuals that might be interested in your proposal. No weight will be given to assumptions about support from other interest groups.*

Are there any MSBA-affiliated organizations or other organizations of Minnesota lawyers that might have an interest in this proposal? If they object to the proposal, have you discussed their objections with them? What was the outcome of those discussions?

Support from other organizations have not been formally requested as yet.

Are there any other groups or individuals that might have an interest this proposal? What is their response to it? If they object to the proposal, have you discussed their objections with them? What was the outcome of those discussions?

Support would be solicited from affected advocacy groups.

If this proposal affects a uniform law, what is the Uniform Law Commissioners' position on the proposal?

Not applicable

If this proposal affects a State Agency, what is the Agency's position on the proposal?

DHS can be expected to oppose the proposed legislation.

Have you discussed your proposal with any legislators? If so, identify the legislators and briefly describe their position on the issue.

Not yet. We expect the Minnesota Chapter of NAELA to take the lead in advocating for repeal of this statute.

SECTION III: LOBBYING RESOURCES

The average legislative initiative requires approximately 50 hours of lobbyist support from the MSBA. Estimated number of lobbyist hours for this proposal: Minimal

Describe the anticipated lobbying activities that form the basis of your time estimate.

The Elder Law Section expects the Minnesota Chapter of NAELA to carry the bulk of lobbying activities but would hope for some monitoring of committee hearings by the MSBA lobbying team.

Describe the anticipated activities of your section or committee in support of this proposal and provide the email address and phone number for at least one primary contact person.

The Section will be seeking volunteers to perform lobbying activities in coordination with MN NAELA volunteers. The Section will use its e-Newsletter to publicize the status of the efforts to repeal the statute.

Please identify any other stakeholders that will provide lobbying support for this proposal.

MN NAELA

Note regarding volunteer lobbying: No section or committee legislative action may be taken without first coordinating with the MSBA lobbying team. ("Legislative action" includes: attempting to persuade elected officials or government agencies; letters, statements, comments, or testimony concerning legislative matters; joining coalitions related to legislative matters; seeking bill authors; and providing technical advice and drafting assistance.)

Note regarding bill drafting: If you need assistance with getting your proposal drafted and formatted for the Legislature, or if you want political advice about your proposal, contact the MSBA's lobbyist, Bryan Lake, at 612-227-9504 or bryan@lakelawmn.com.

Signed: John J. Luntz

Title/Position: Chair, MSBA Elder Law Section

Date: 2/10/2021

Please submit this form and any proposed bill or statutory language (if applicable) to Sherri Knuth sknuth@mnbars.org