

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 reversing the outcome of the decision of the Minnesota Supreme Court in *In re the Matter of: Esther Schmalz and the Commissioner of the Minnesota Department of Human Services, Renville County Human Services, A18-2156 (Minn. App. 6/24/2020)* by clarifying that Minn. Stat. §256B.15, subd. 4a applies to life estates owned by the community spouse as well as the spouse applying for medical assistance when 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.

On June 24, 2020, the Minnesota Supreme Court held that the word "individual" in Minn. Stat. § 256B.056, subd. 4a, did not apply to the spouse of an institutional spouse (known as the community spouse). *In re the Matter of: Esther Schmalz and the Commissioner of Minnesota Department of Human Services, Renville County Human Services* (Court File A18-2156) June 24, 2020. The original version of Subd. 4a was passed in 1995 (Laws of 1995, Ch. 248, Art. 17, S. 1). The current version has remained substantially the same since then. The statute clarified that life estates owned by institutional spouses were not saleable and therefore did not apply to medical assistance asset limits for an institutional spouse who was applying for medical assistance benefits. It was thought that the statute also applied to life estates in non-homestead real property owned by the community spouse. As a result, neither spouse had to make efforts to sell a life estate to establish that it could not be sold by itself. The *Schmalz* decision presents a dilemma for a married person who is applying for medical assistance benefits. Federal law requires that the same methodology be used to evaluate the assets owned by all persons whose assets are taken into account in determining the eligibility for benefits of a person who is applying for medical assistance benefits. This would include spouses and sponsors. If a life estate is not saleable for the institutional spouse, it should be treated the same as for a community spouse, but the

Schmalz decision takes the community spouse out of the safe harbor afforded to the institutionalized spouse.

The proposed bill clarifies that the term “individual” in Minn. Stat. § 256B.056, subd. 4a, applies to life estates owned by any person whose assets are taken into account in determining an individual’s eligibility for medical assistance benefits. This would apply to spouses and sponsors whose assets must be taken into account. The bill would amend the statute retroactively to June 24, 2020, to change the result in *Schmalz*.

Why should the MSBA support this proposal?

The Governing Council of the Elder Law Section believes that Subd. 4a should apply to both spouses under federal law. The Section’s membership represents substantial numbers of clients who apply for medical assistance benefits and would be adversely affected by this decision. The Governing Counsel believes that the Court might be correct in holding that the Legislature did not include community spouses in Subd. 4a as originally enacted, but the result conflicts with federal law regarding treatment of assets owned by spouses. The MSBA should support the proposed bill to conform Subd. 4a to long-standing interpretation and application of Subd. 4a, to cure any deficiency in the statute as originally enacted, and to be in uniformity with federal law on similar treatment of assets for the purposes of determining medical assistance eligibility regardless of the status of the individual as an institutional or community spouse.

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?

The Minnesota Department of Human Services (DHS) has interpreted the *Schmalz* decision to allow DHS to force life estates in non-homestead real property owned by community spouses to count against asset limits for the community spouse unless the life estate is transferred to the MA spouse. This violates the principle that the same standards should apply to assets owned by the community spouse as to those owned by the MA applicant. This harms married couples where a spouse would be eligible for benefits without having to sell or transfer a life estate in non-homestead real property. This violates long-standing interpretation of federal medical assistance law as previously applied in Minnesota. The proposed bill clarifies that the same guidelines apply to life estates in non-homestead real property apply to either spouse’s life estates.

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.

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 has 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.

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: 5 hours.

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

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

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: 
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