



# VTAJ REPORT

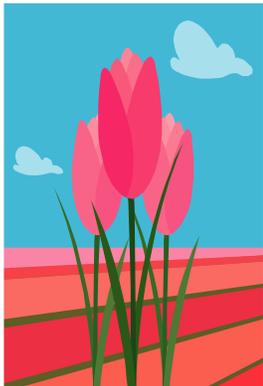
VERMONT ASSOCIATION FOR JUSTICE

*When no one is accountable, no one is safe.*

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**May 17, 2013**

### Article on BILLINGS:

## Did You Know, in Vermont, Your Parents and Other Close Relatives and Assets Are Part of Your Divorce?

*By Mary Kirkpatrick, Esq.*

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The Vermont Supreme Court's decision in Billings v Billings, 2011 VT 166 (Oct. 14, 2011), has changed Vermont divorce practice to allow a party to seek and discover potential inheritances in the wills and revocable trusts of the parents and relatives. While irrevocable trust interests have been discoverable and included for consideration in marital property division since 1992, when in Chilkott v Chilkott, 158 Vt. 193, 197, 607 A2d 883,885 (1992), the Court held that an interest in an irrevocable trust was marital property; revocable trusts and wills have not been discoverable or considered in evidence because the trial courts believed they were considered too speculative.

The Billings case has changed the landscape, and raises the specter that the greater, extended family wealth will be considered in a divorce proceeding, and weighed, considered, and subjected to the discretion of the trial court. While the question of whether a prospective inheritance could be a factor in a marital property division has been split across American jurisdictions, the Billings court has now come down on the side of allowing future inheritances to be considered as a factor in determining each party's financial condition upon divorce.

Given the open-endedness of the Billings decision, the legislature has been asked to categorically exclude expectancies in revocable trusts and wills from divorce proceedings, or in the alternative, judges and litigants must be given some standards by which such hopes of succession might be measured instead of a judge's mere speculation, especially given the unfairness of a marital property division that cannot be reopened if the inheritance fails to come to fruition.

#### The Billings Case

In Billings, the trial court was confronted with a long term (24-year) marriage, where the financial situation looked "bleak" because of poor business and real estate decisions, and the parties having sent their children to private schools. At the time of the divorce, the parties had few assets of great value. Their most significant hope for financial stability was dividing up the

husband's partial interest in his parents' home, and waiting for expected inheritances through the husband's family which were in revocable trusts or wills. On the first day of the divorce trial, the husband's motion in limine to exclude the evidence of mere expectancy future interest, was granted. The trial court considered no evidence related to the husband's potential opportunity for inheritance of assets or income from wills or revocable trusts.

The Supreme Court reversed and remanded, due to the exclusion of this evidence, relying on 15 V.S.A. Sec. 751 (b) (8), which relates to a party's opportunity for the acquisition of future assets and income. The Court agreed with the wife, stating that although the beneficial interest is not marital property if the testator or settlor is still alive, and therefore cannot be "divided" or distributed by the family court, the beneficial interest can still be considered in allocating the marital property between the parties because it may create an "opportunity ... for future acquisition of capital assets and income" under 15 V.S. A. Sec. 751 (b) (8).

It is important to note that the Court agreed that the future inheritance was an "expectancy" only, and therefore could not be "distributed" in the couple's divorce decree. Presumably, this means that the trial court cannot award the future inheritances equally to both parties in the future by an award that divides the asset equally, "when, as and if" it is received (which might be the fairest of outlooks for all inheritances and family monies for a long-term marriage). However, notwithstanding the lack of jurisdiction over the future asset, the Court held that the future expectancy can be considered and evaluated in trying to discern the post-divorce financial condition of each party in a fair and equitable manner.

How much of a bearing the future interest will have on the division of the marital property in the final order is unclear, but it will depend upon the circumstances and the degree of likelihood that the beneficial interest will be received. The only guidance given by the Court is

*(Continued on page 4)*

## Medicare Set-Asides: A Four-Step Approach

by John T. Bair  
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When an individual receives a Workers' Compensation or liability settlement that includes funds for future injury-related medical expenses, that individual is required by law to consider Medicare's interests. What does that mean for your client?

### Medicare Secondary Payer Laws

If an individual is injured and has certain types of insurance coverage, the insurance companies are responsible for paying for medical services related to the injury or illness for which the individual has received a settlement. If that payment does not cover the full cost of services, Medicare may then become responsible for the balance of payment as the "secondary payer".

The Medicare Set-Aside ("MSA") is the preferred vehicle for protecting Medicare's interests. Although The Centers for Medicare and Medicaid Services ("CMS") has released guidance through a series of official memoranda and website notifications, definitive direction remains unclear. Medicare beneficiaries risk a denial of coverage for future medical expenses if CMS determines that Medicare's interests have not been appropriately considered.

### The Four-Step Process

Employing a systematic approach to the MSA process can help ensure that your client will be protected from losing their Medicare eligibility:

**Advising to the need for a legal opinion to determine if a Medicare Set-Aside ("MSA") is required:** Determine the anticipated settlement amount, the potential need for and cost of future medical care related to the injury, and the client's Medicare status. If necessary, get an expert legal opinion as to the necessity for a MSA.

**Determining the allocation:** Involve an expert allocator early in the process who will take the time to understand a complete picture of your client's medical requirements, both covered and non-covered. The MSA allocator you select should be determined by the company's treatment of covered and non-covered medical expenses, as the inclusion of these expenses builds case value and can potentially lead to a higher settlement recovery.

**Preparing for future compliance:** Plaintiffs can choose to self-administer their MSAs, but self-administration opens the door for accounting errors and misuse of funds. A professional administration firm is generally the best option for ensuring that compliance is met when administering the MSA.

**Implementing the most cost-effective funding solution:** MSAs should be funded with annuities because of their inherent tax savings. There are two options for the type of annuity—either a structured settlement annuity or a single premium immediate annuity ("SPIA"). Although the structured settlement annuity offers the benefit of tax-exempt growth, the SPIA is typically a less expensive option with greater flexibility, as it offers living commutation (the ability to commute all or a portion of the annuity's present value during the client's lifetime).

By taking a logical, documented approach to the Medicare Set-Aside process, your client can rest assured that their future medical needs and Medicare eligibility will be protected and that they have complied with Medicare Secondary Payer laws.

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*John T. Bair is a Founder and Member of Milestone Consulting, LLC, a comprehensive settlement planning and management firm. Milestone Consulting is proud to be Platinum Business Friend with VTAJ. For more information, please visit [www.milestoneseventh.com](http://www.milestoneseventh.com).*