

NO. A05-2346

State of Minnesota
In Court of Appeals

In Re

Estate of Frances E. Barg
a/k/a Frances Edward Barg

RESPONDENT'S BRIEF, APPENDIX AND ADDENDUM

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United States Department of Health and Human Services Policy Brief No. 6,
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LEGAL ISSUES

- I. May the district court conclude that at the time of the death of a Medicaid recipient, the value of the interest of the deceased Medicaid recipient in the estate of the recipient's surviving community spouse may be determined by application of Minnesota probate law when such a determination does not result in full satisfaction of a Medicaid recovery claim?

The district court held: Yes.

Estate of Wirtz

Minn. Stat. § 256B.15, subd. 2 (2004)

STATEMENT OF THE CASE

The Respondent Estate agrees with the STATEMENT OF THE CASE as set forth by the Appellant in its Brief, but would note, however, the following addition:

The trial court based its decision on the application of intestacy law as the appropriate manner in which to evaluate and determine Dolores Barg's interest in the assets of the estate of Francis E. Barg at the time of Dolores' death.

STATEMENT OF FACTS

Respondent agrees with the STATEMENT OF FACTS as set forth by Appellant in its brief, subject to several objections and additions as follows:

1. The Estate believes that beginning with the first full paragraph of Appellant's STATEMENT OF FACTS on page 20 (The paragraph begins, "In written and oral argument...") and continuing nearly through the conclusion of Appellant's STATEMENT OF FACTS on page 22 of Appellant's Brief, the material is not a statement of the facts but is more in the nature of argument. None of the material contained in these sections is part of the stipulated facts presented to the district court.
2. Respondent adds the following to Appellant's STATEMENT OF FACTS:
 - a. Francis E. Barg died May 27, 2004 (Appellant's Index 34); and
 - b. Michael F. Barg, the Personal Representative of the Estate of Francis E. Barg, allowed \$63,800 (sixty-three thousand eight hundred dollars) of Mille Lacs County's claim (Id. 35).

SCOPE OF REVIEW

The matter before this Court regarding the extent of the right of Mille Lacs County to recover medical assistance payments from this estate focuses the parties and the courts on an extremely important issue – respect for the rule of law. The federal statutes governing the recovery of medical assistance provide limitations on recovery and are the public policy enacted by the United States Congress. The Minnesota statute regarding recovery, an expression of public policy by the Minnesota legislature, was found by the Minnesota Court of Appeals in In re Estate of Gullberg, 652 N.W.2d 709 (Minn. App. 2002) to be partially preempted by the federal statute because it allowed recovery beyond the limits of the federal statutes. The Gullberg court suggested two different methods the district court should use to determine the recovery - a probate method and a marital property method. Several Minnesota district courts since the Gullberg decision in 2002 have resolved these issues based on the Gullberg direction. In the Barg case now before this Court, the Mille Lacs County District Court chose the probate method for valuation, which did not result in full recovery for Mille Lacs County. The County appealed, asking this Court to order the district court to use the other method suggested in Gullberg, claiming that method would allow full recovery.

The Gullberg decision governs the district courts and provides a basis for Minnesota citizens, and the attorneys who represent them, to resolve these recovery claims. After Gullberg it should be unnecessary to treat the matter now before the Court as a “purely legal one involving statutory interpretation and the examination of

legislative intent” as the Appellant alleges in its Brief (Scope of Review, page 23). The Estate, however, is compelled to argue these matters because the Appellant and the Commissioner of Human Services have done so in their Briefs. The Estate submits, however, that because the district court followed the direction of the Gullberg court, which interpreted public policy as expressed in federal and state law, the scope of review should be limited to whether the district court acted within its discretion. The Estate argues that it did.

MEDICAID OVERVIEW AND ESTATE RECOVERY

The federal medical assistance program (commonly called Medicaid) is a huge federal and state health care program providing health care to financially needy people of all ages. This publicly funded program was created in 1965 by enactment of Title XIX of the Social Security Act, and is jointly financed and administered by the federal and state governments. Participation by each state is voluntary, and all 50 states have chosen to participate. Therefore, Medicaid is not one seamless and coordinated program, but 50 different programs, accumulated over the 40 years since 1965. States that participate in this program must comply with federal statutes and regulations and develop a State Plan to show compliance (including compliance with the federal estate recovery provisions). The federal government pays approximately half of the medical assistance costs in states like Minnesota. States are required to pay the portion not paid by the federal government. There are no county funds in Minnesota's Medicaid program; the counties are reimbursed for their expenses in administering the medical assistance program.

Federal Medicaid law sets the guidelines within which the States must operate if they choose to participate in the Medicaid program and receive from the federal government matching funds needed to provide medical care for eligible individuals. Schweiker v. Gray Panthers, 453 U.S. 34, 36-37 (1981). States must agree to comply with federal law if they choose to participate. 42 U.S.C. § 1396(a)(18). States are not required to participate. State of West Virginia v. U.S. Dept. HHS, 289 F.3d 281, 286

(4th Cir. 2002), citing, New York v. United States, 505 U.S. 144, 168 (1992). Participating states that do not comply with federal Medicaid guidelines by implementing standards that are either more or less stringent than federal law requires risk the loss of federal funds. Id. at 284, citing; 42 U.S.C. § 1396c, and Bowen v. Massachusetts, 487 U.S. 879, 885 (1988), see also, Estate of Atkinson v. State, Dep't of Human Servs., 564 N.W.2d 209, 210 (Minn.1997) (“The federal government shares the cost of Medicaid with the states that elect to participate in the program and, in return, the states are required to administer their programs in a way that complies with the federal statutes and regulations.”).

In 1990, Minnesota passed Minn. Stat. § 256B.15, subd. 2, which directs that a claim be filed against the estate of a surviving spouse who did not receive medical assistance, to recover medical assistance benefits rendered to the predeceased spouse, but limiting the claim to the value of the assets of the surviving spouse’s estate that were marital property or jointly owned property at any time during the marriage. The language in the state statute differed at the time from the language on estate recovery then found in the federal statutes and regulations.

In 1993, Congress enacted the Omnibus Reconciliation Act of 1993 (OBRA ‘93), which added additional specific language regarding the recovery of medical assistance benefits correctly paid. The statute mandated that states seek recovery of medical assistance correctly paid on behalf of an individual under the state plan and specifically defined the term “estate” with respect to the deceased individual. The statute provided

that the term "estate" shall include real and personal property and other assets included within the individual's estate as defined for purposes of state probate law.

The federal statute added a state option to define the term "estate" with respect to a deceased individual to include any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest). The statute indicated that these assets shall include such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement. There is no question that Congress in OBRA '93 allowed the states to expand the definition of "estate" for medical assistance estate recovery purposes to include assets that would not normally be included within the individual's estate as defined by probate law. However, the state's ability to expand the traditional state probate law definition of "estate" is limited by the language of 42 U.S.C. § 1396p(b)(4)(B).

SUMMARY OF ARGUMENT

Federal law governs and limits the ability of individual states to recover benefits paid to a recipient from the assets of the recipient's surviving spouse. Federal law and Minnesota law are in conflict regarding recovery matters. The Minnesota Court of Appeals in In re Estate of Gullberg, 652 N.W.2d 709 (Minn. Ct. App. 2002) determined the Minnesota statute was partially preempted by federal law and that federal law limited how recovery might be made by the state. The Gullberg court directs district courts to determine the state's collection rights in a case like this on a

case-by-case-basis, using either a probate law analysis or a marital property analysis at the discretion of the district court.

In the case now before the Court, the Mille Lacs County District Court, at the direction of and relying on Gullberg, chose a probate method to determine whether recipient Dolores Barg had any legal title or interest at the time of her death in any real or personal property. Based on the probate approach the district court determined that Dolores Barg, at the time of her death, had a life estate interest in the homestead of her surviving spouse Francis Barg and the right to \$5,000 in personal property, which totaled less than Mille Lacs County's full claim for recovery. The district court partially allowed Mille Lacs County's claim, but denied Mille Lacs County's claim for more.

Although the Gullberg court identified two methods to resolve this matter, the County argues the district court was required to use the method that the County preferred. The Estate argues the district court properly relied on the probate method in Gullberg and respectfully requests that the judgment of the district court be upheld.

ARGUMENT

I. FEDERAL LAW IS CLEAR AND UNAMBIGUOUS THAT STATES MAY RECOVER CORRECTLY PAID MEDICAL ASSISTANCE BENEFITS ONLY FROM THE ESTATE OF THE INDIVIDUAL RECIPIENT OR FROM AN ASSET IN WHICH THE INDIVIDUAL HAD A LEGAL TITLE OR INTEREST AT THE TIME OF HIS OR HER DEATH.

The federal statute addressing the issue of estate recovery for medical assistance benefits properly paid to an individual is clear and concise. The Medicaid program is a benefit program. In order to become eligible to receive Medicaid benefits, the individual must meet stringent income and asset restrictions. See generally Minn. Stat. § 256B.056. If the individual is married, his or her spouse's assets are taken into account at the time of application for benefits. Once eligibility is determined, benefits are provided to the individual. The Medicaid program is not a loan program. No repayment agreements are required to be signed at the time eligibility is determined. The state's ability to recover benefits provided to the individual is clearly set forth in 42 U.S.C. § 1396p(b). This statute is the exclusive authority for the states to conduct their estate recovery programs.

A. Federal Law Mandates Recovery Only Against the Probate Estate of the Individual Pursuant to 42 U.S.C. § 1396p(b)(4)(A).

42 U.S.C. § 1396p(b) entitled "Adjustment or Recovery of Medical Assistance correctly paid under a State Plan," initially provides in subsection (1):

No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the state plan may be made except that the state shall seek adjustment or recovery of any medical assistance correctly paid on

behalf of an individual under the state plan in the case of the following individuals: . . . (emphasis added)

(B) in the case of an individual who is 55 years of age or older when the individual received such medical assistance, the state shall seek adjustment or recovery from the individual's estate but only for medical assistance consisting of . . . (i) nursing facility services . . .

The introductory language in this portion of the statute states a general rule of no recovery of medical assistance benefits correctly paid. The exceptions set forth then allow recovery under certain limited circumstances. Throughout this portion of the statute, Congress uses the term "individual".

42 U.S.C. § 1396p(b)(4)(A) provides:

For purposes of this subsection, the term "estate", with respect to a deceased individual –

(A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of state probate law;

This definition of "estate", when read with 42 U.S.C. § 1396p(b)(1)(B)(i), sets forth the federal requirement that each state must seek recovery of benefits provided to individuals over the age of 55 when they received medical assistance benefits for payment to nursing facilities and that the recovery must be made from the individual's probate estate as defined by state law. This provision of the statute does not provide a "minimum" definition of the term "estate" but rather mandates collection from the assets included in the individual recipient's probate estate.

B. Federal Statutes Allow States to Expand the Definition of an Individual's Estate to Include Assets in Which the Individual Had Legal Title or Interest at the Time of the Individual's Death Pursuant to 42 U.S.C. § 1396p(b)(4)(B).

42 U.S.C. § 1396p(b)(4)(B) provides that:

The term "estate", with respect to a deceased individual –

may include, at the option of the estate . . . , any other real and personal property and any other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement. (emphasis added)

This provision is the sole authority for any expansion of estate recovery to allow recovery against assets which are not included in the individual's traditional probate estate. Despite assertions in the Appellant's brief to the contrary, there is no option or other broad authority given to the states to define the term "estate" for recovery purposes to permit recovery beyond the specific language and circumstances found at 42 U.S.C. § 1396p(b)(4)(B).

Dolores Barg did not have any legal title in any of her spouse's assets at the time of her death. It is not disputed that the title to Francis and Dolores Barg's homestead, which was the subject of the estate's recovery efforts, had been transferred as required by the Medicaid program from Francis and Dolores Barg into Francis Barg's name alone prior to Dolores Barg's death.

C. Nowhere in the Federal Statutes Does Congress Provide for Recovery of Benefits from the Estate of the Spouse of the Recipient.

Throughout the federal statutes regarding estate recovery of medical assistance benefits, there is no reference to recovery from the estate of the individual's spouse, the surviving spouse, or the community spouse. The statute is consistent in its reference to the estate of the "individual".

The only reference to the recipient's spouse in the statute is found at 42 U.S.C. § 1396p(b)(2), which provides that:

any adjustment or recovery under paragraph (1) may be made only after the death of the individual's surviving spouse, if any, and only at a time –

(A) when he has no surviving child over the age 21, or . . . is blind or permanently and totally disabled

This reference to the individual's surviving spouse only provides that, if the individual is survived by a spouse, any recovery of medical assistance benefits provided to the individual may not be made during the lifetime of the spouse. There is no language in the statute which allows a state to make a separate direct claim against the surviving spouse's estate. The Wisconsin Court of Appeals has determined that a claim can never be made against the estate of a surviving community spouse who never received medical assistance. Matter of Estate of Budney, 541 N.W.2d 245, 246 (Wis. App. 1995). The Budney court found that "because the statute does not counter the initial blanket prohibition [of adjustment or recovery] by specifically authorizing a state to recover medical assistance benefits paid on behalf of a recipient from a surviving

spouse's estate, we conclude that [the Wisconsin statute in question], which allows such recovery exceeds the authority provided by the federal statute."¹ Id.

D. The Language and Legislative History of the Federal Statutes Demonstrate a General Purpose to Limit and Restrict State Recovery of Medical Assistance Benefits Correctly Paid.

1. Federal Law Prior to the Medicare Catastrophic Coverage Act of 1988.

The medical assistance program, since its creation in 1965, has always included a general prohibition against state attempts to recover medical assistance benefits correctly paid. See the Social Security Amendments of 1965, P.L. 89-97, Title I, Part 2, § 121(a), 79 Stat. 344. As originally enacted, this prohibition was included in the statute that set forth the requirements for a state plan and stated the general rule as follows:

STATE PLANS FOR MEDICAL ASSISTANCE

Sec. 1902. [42 U.S.C. § 1396a] (a) A State plan for medical assistance must –

* * *

¹ Section 49.496(3) of the Wisconsin Statutes made no attempt to limit medical assistance claims to the type of assets that can be traced into the estate of the surviving community spouse under federal law. The Budney court decision, therefore, never reached the issue of whether the community spouse had legal title or interest in assets at the time of death, because the state law did not take into account the federal definition of "estate"; presumably the definition was never argued before the court. The Budney decision is correct, as far as it goes, however, because claims cannot be filed directly against the estates of surviving community spouses, but only against the assets in the estate of the surviving community spouse that fall within the federal definition of "estate". The Wisconsin and Minnesota Estate Recovery statutes are similar in that neither statute took into consideration the 1993 federal definition of "estate".

(18) provide that no lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the plan (except pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual), and that there shall be no adjustment or recovery (except, in the case of an individual who was 65 years of age or older when he received such assistance, from his estate, and then only after the death of his surviving spouse, if any, and only at a time when he has no surviving child who is under age 21 or is blind or permanently and totally disabled) of any medical assistance correctly paid on behalf of such individual under the plan; (emphasis added)

The exceptions contained in the original prohibition allowed recovery from the estate of the individual, but only after the death of his surviving spouse and only then if the individual had no surviving child who was under age 21 or was blind or permanently and totally disabled. The original provision does not authorize a separate direct claim against the estate of a spouse. The Senate Finance Committee Report on H.R. 6675 (the bill enacted by the House) explained the language as follows:

Titles I and XVI authorizing the medical assistance for the aged program [predecessor to the current medical assistance program] now provide that the States may not impose a lien against the property of any individual prior to his death on account of medical assistance payments except pursuant to a court judgment concerning incorrect payments, and prohibit adjustment or recovery for amounts correctly paid except from the estate of an aged person after his death and that of his surviving spouse. This provision, under the committee bill, has been broadened so that such an adjustment or recovery would be made only at a time when there is no surviving child who is under the age of 21 or who is blind or permanently and totally

disabled. Senate Report No. 404, U.S. Code Congressional and Admin. News, 1965, Vol. 1, p. 2020. (emphasis added)

In 1982, the estate recovery provisions of the federal statute were amended as part of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA '82), P.L. 97-248, Title I, Subtitle B, § 132, 96 Stat. 370. These amendments greatly increased the restrictions against medical assistance recovery. Section 132 of TEFRA '82 amended Title XIX of the Social Security Act, Section 1902(a)(18) [42 U.S.C. § 1396a(18)] to read as follows:

[The state plan must]

(18) comply with the provisions of section 1917 with respect to liens, adjustments and recoveries of medical assistance correctly paid, and transfers of assets.

Section 132 then added a new section 1917 [42 U.S.C. § 1396p] to read in pertinent part as follows:

[lien restrictions omitted] (b)(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except -

(A) in the case of an individual described in subsection (a)(1)(B), from his estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of such individual, and

(B) in the case of any other individual who was 65 years of age or older when he received such assistance, from his estate.

(2) Any adjustment or recovery under paragraph 91) may be made only after the death of the individual's surviving spouse, if any, and only at a time —

(A) when he has no surviving child who is under age 21, or (with respect to states eligible to participate in the State program established under Title XVI) is blind or permanently disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1614 [42 U.S.C. § 1382c(a)(3)]; and (emphasis added)

(B) in the case of a lien on an individual's home under subsection (a)(1)(B), when -

(i) no sibling of the individual (who was residing in the individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution), and

(ii) no son or daughter of the individual (who was residing in the individual's home for a period of at least two years immediately before the date of the individual's admission to the medical institution, and who establishes to the satisfaction of the State that he or she provided care to such individual which permitted such individual to reside at home rather than in an institution), is lawfully residing in such home and has lawfully resided in such home on a continuous basis since the date of the individual's admission to the medical institution.

* * *

[transfer of asset provisions omitted]

The 1982 amendments continued the previous restrictions on state recovery of medical assistance benefits correctly paid and added additional restrictions.

2. The Medicare Catastrophic Coverage Act of 1988.

The Medicare Catastrophic Coverage Act of 1988 (MCCA), P.L. 100-360, made substantial changes in the way the income and assets of a married couple were to be treated for purposes of determining an individual's eligibility for medical assistance. These changes prohibited the states from treating the income of a community spouse as an available resource to an institutionalized spouse who is seeking medical assistance. See P.L. 100-360, Sec. 303, which added a new section 1924 to Title XIX of the Social Security Act [42 U.S.C. § 1396r-5; Treatment of Income and Resources for Certain Institutionalized Spouses]. The MCCA amendments also made substantial changes in the treatment of assets owned individually or jointly by the married couple and provided for a substantial increase in the amount of assets protected for the community spouse ("the Community Spouse Asset Allowance"). These changes are commonly called "the spousal impoverishment rules," even though they are intended to prevent impoverishment of the individual's spouse.

While making some of the most substantial changes in the eligibility rules since creation of the medical assistance program in 1965, MCCA made no changes whatsoever in the medical assistance recovery statutes. The committee reports that accompanied MCCA made no mention of any interplay between the new spousal impoverishment rules and the pre-existing recovery statutes. The notion that Congress intended an interplay between the spousal impoverishment

provisions and the medical assistance recovery statutes has no support in the language of MCCA or in the legislative history that accompanied MCCA or the separate prior enactments.

3. Omnibus Budget Reconciliation Act of 1993.

The State asserts that estate recovery statutes such as Minnesota's were specifically contemplated by Congress when it passed OBRA '93. (Amicus Br. pg. 16) The actual language and legislative history of OBRA '93 do not support these assertions or arguments.²

OBRA '93 was the result of intense and protracted budget negotiations among the leaders of the House of Representatives, the Senate, and the Clinton Administration. The stated purpose of these negotiations was to reduce projected growth in federal expenditures, increase projected federal revenues, and thereby

² There is also no reference whatsoever in the legislative history of OBRA '93 that Congress was in any way reacting to the case of Citizen's Action League v. Kizer, 887 F.2d 1003, 1006 (9th Cir. 1989).

Appellant argues that, "The expanded definition of estate in the OBRA '93 amendments was effectively the legislation that corrected Kizer," (App. Br. pg. 43), and, *** "Congress's inclusion of an open-ended definition for estate thus was intended to help states expand their recovery efforts beyond probate estates." (App. Br. pg. 44)

The Citizen's Action League was decided four years prior to the OBRA '93. Given the breadth and scope of OBRA '93, as set forth below, the Congress was hardly reacting to a single case not mentioned in any committee report.

reduce future projected federal budget deficits.³

The amendments made to the medical assistance recovery statutes by Title XIII, Ch. 2, Subch. B, Part II, §§ 13611(a)-(c) and 13612(a)-(c) were a very small part of this massive act.⁴

The OBRA '93 medical assistance recovery provisions finally enacted by Congress were substantially different from the provisions passed by the House of Representatives. A comparison of the provisions contained in H.R. 2264 as initially passed by the House of Representatives and the version passed by the Congress after Conference Committee will illustrate these differences:

³ The Conference Report on H.R. 2264 (the bill which later became P.L. 103-66) recognized this fact in the following language: "The Conference Agreement on the Omnibus Budget Reconciliation Act of 1993 is a carefully crafted, rational and constructive compromise which implements the basic objectives of both the House and the Senate bills. It embodies the President's economic program and meets the objectives of the House and Senate conferees. It confirms and extends those budget process changes enacted in the Budget Enforcement Act of 1990 which have exercised effective discipline over the Federal budget. House Conference Report No. 103-213, August 3, 1993, U.S. Code Congressional and Admin. News, 1993, Vol. 2, at p. 1088."

⁴ OBRA '93 included twelve separate Titles affecting federal spending in the following general areas: agriculture and related programs; armed services; banking and housing; student loans and ERISA; transportation and public works; communications licensing and spectrum allocation; nuclear regulatory commission programs; patent and trademark office programs; merchant marine programs; natural resources; civil service and post office programs; veterans' affairs programs; revenue, health care, human resources, income security, customs and trade provisions; food stamp program, and timber sales; and budget process provisions. See P.L. 103-66, Sec. 2.

H.R. 2264
as passed by
the House

H.R. 2264
as passed by
Congress

Sec. 5112. Medicaid Estate Recoveries.

(a) REQUIRING ESTABLISHMENT
OF ESTATE RECOVERY
PROGRAMS.--

(1) IN GENERAL.--Section 1902(a)(51)
(42 U.S.C. § 1396a(a)(51)) is amended
by striking "and (B)" and inserting "(B)
provide for an estate recovery program
that meets the requirements of section
1917(b)(1), and (C)".

(2) REQUIREMENTS FOR ESTATE
RECOVERY PROGRAMS.--Section
1917(B)(42 U.S.C. § 1396p(b)) is
amended--

(A) in paragraph (1)--

(i) by striking "(b)(1)" and inserting
"(2)", and

(ii) by striking "(a)(1)(B)" and inserting
"(a)(1)(B)(i)";

(B) in paragraph (2), by striking "(2)
Any adjustment or recovery under" and
inserting "(3) Any adjustment or
recovery under an estate recovery

SEC. 13612. MEDICAID ESTATE
RECOVERIES.

(A) MANDATE TO SEEK
RECOVERY.--Section 1917(b)(1) (42
U.S.C. § 1396p(b)(1)) is amended by
striking "except--" and all that follows
and inserting the following:

"except that the State shall seek
adjustment or recovery of any medical
assistance correctly paid on behalf of
an individual under the State plan in
the case of the following individuals:

"(A) In the case of an individual
described in subsection (a)(1)(B), the
State shall seek adjustment or recovery
from the individual's estate or upon
sale of the property subject to a lien
imposed on account of medical
assistance paid on behalf of the
individual. (emphasis added)

"(B) In the case of an individual who
was 55 years of age or older when the
individual received such medical
assistance, the State shall seek
adjustment or recovery from the
individual's estate, but only for
medical assistance consisting of--
(emphasis added)

"(i) nursing facility services, home
and community based services, and
related hospital and prescription drug
services, or

program under"; and

(C) by inserting before paragraph (2), as designated by subparagraph (A), the following:

"(b)(1) For purposes of section 1902(a)(51)(B), the requirements for an estate recovery program of a State are as follows:

"(A) The program provides for identifying and tracking (and, at the option of the State, preserving) resources (whether excluded or not) of individuals who are furnished any of the following long-term care services for which medical assistance is provided under this title: (emphasis added)

"(i) Nursing facility services.

"(ii) Home and community-based services (as defined in sections 1915(d)(5)(C)(i)).

"(iii) Services described in sections 1905(a)(14)(relating to services in an institution for mental diseases).

"(iv) Home and community care provided under section 1929.

"(ii) at the option of the State, any items or services under the State plan.

"(C)(i) In the case of an individual who has received (or is entitled to receive) benefits under a long-term care insurance policy in connection with which assets or resources are disregarded in the manner described in clause (ii), except as provided in such clause, the State shall seek adjustment or recovery from the individual's estate on account of medical assistance paid on behalf of the individual for nursing facility and other long-term care services.

"(ii) Clause (i) shall not apply in the case of an individual who received medical assistance under a State plan of a State which had a State plan amendment approved as of May 14, 1993, which provided for the disregard of any assets or resources--

"(I) to the extent that payments are made under a long-term care insurance policy; or

"(II) because an individual has received (or is entitled to receive) benefits under a long-term care insurance policy."

"(v) Community supported living arrangements services provided under section 1930.

"(B) The program provides for promptly ascertaining--

"(i) when such an individual dies;

"(ii) in the case of such an individual who was married at the time of death, when the surviving spouse dies; and

"(iii) at the option of the State, cases in which adjustment or recovery may not be made at the time of death because of the application of paragraph (3)(A) or paragraph (3)(B).

"(C)(i) The program provides for the collection consistent with paragraph (3) of an amount (not to exceed the amount described in clause (ii)) from—

"(I) the estate of the individual;

"(II) in the case of an individual described in subparagraph (B)(ii), from the estate of the surviving spouse; or
(emphasis added)

"(III) at the option of the State, in a case described in subparagraph (B)(iii), from the appropriate person.

"(ii) The amount described in this clause is the amount of medical assistance correctly paid under this title for long-term care services described in subparagraph (A) furnished on behalf of the individual."

(b) HARDSHIP WAIVER.--Section 1917(b) (42 U.S.C. § 1396p(b)) is

(b) HARDSHIP WAIVER.-- Section 1917(6) (42 U.S.C. § 1396p(b)) is

further amended by adding at the end the following new paragraph:

"(4) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency waives the application of this subsection if such application would work an undue hardship (in accordance with criteria established by the Secretary)."

(c) DEFINITION OF ESTATE.-- Section 1917(b) (42 U.S.C. § 1396p(b)) is further amended by adding at the end the following new paragraph:

"(5) For purposes of this section, the term 'estate', with respect to a deceased individual, includes all real and personal property and other assets in which the individual had any legally cognizable title or interest at the time of his death, including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, survivorship, life estate, living trust, or other arrangement." (emphasis added)

amended by adding at the end the following new paragraph:

"(3) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency shall waive the application of this subsection (other than paragraph (1)(C)) if such application would work an undue hardship as determined on the basis of criteria established by the Secretary."

(c) DEFINITION OF ESTATE.-- Section 1917(b) (42 U.S.C. § 1396p(b)), as amended by subsection (b), is amended by adding at the end the following new paragraph:

"(4) For purposes of this subsection, the term 'estate', with respect to a deceased individual—

"(A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and

"(B) may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual

through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement." (emphasis added)

* * *

* * *

(2) The amendments made by this section shall not apply to individuals who died before October 1, 1993. Journal of the House of Representatives, 103rd Congress, First Session, May 27, 1993, at p. 528.

(2) The amendments made by this section shall not apply to individuals who died before October 1, 1993. P.L. 103-66, Section 1620

There are significant differences between the language of the House bill and the language of OBRA '93 as finally enacted. The House bill clearly would have allowed a separate, direct claim against the estate of a community spouse to recover medical assistance benefits provided only to the institutionalized spouse. The House language also would have required a "tracking" system to keep tabs on estate assets that escape collection at the time of the medical assistance recipient's death. This type of tracking system would be consistent with the state's theory of this case.

The House language, however, was not accepted as proposed. The House language was substantially revised in the final draft of the Conference Report. The Conference Report explains the final language as follows:

Medicaid Estate Recoveries (Section 13612) --Requires States to recover the costs of nursing facility and other long-term care services furnished to Medicaid beneficiaries from the estate of such beneficiaries. Further requires States to establish hardship procedures for waiver of recovery in cases where undue hardship would result. At the option of the State, the estate against such recovery is sought

may include any real or personal property or other assets in which the beneficiary had any legal title or interest at the time of death, including the home. Different estate recovery provisions apply to certain individuals who purchase specified long-term care insurance policies in designated States. Effective October 1, 1993. (emphasis added)

House Conf. Report No. 103-213 at p. 835. U.S. Code Congressional and Admin. News, 1993, Vol. 2, at p. 1524.

The Conference Report makes no mention of recoveries against the estates of community spouses. It does, however, make clear that the states would be permitted to make recoveries from non-probate assets in which the medical assistance beneficiary had any legal title or interest at the time of death, including the home. Recovery from the estate of the medical assistance beneficiary is not the same thing as recovery from all assets owned by the community spouse at the time of the medical assistance beneficiary's death. The final Conference Report language expands medical assistance estate recovery, but still keeps estate recovery within specified bounds. Both the House bill and the final Conference Report keep the pre-existing introductory language of Section 1917(b)(1) [42 U.S.C. § 1396p(b)(1)] in the new law:

"(b) Adjustment or recovery of medical assistance correctly paid under State plan

(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the state plan may be made, except: (emphasis added)

If Congress intended in OBRA '93 to impose on the states a broad new general duty to recover medical assistance benefits correctly paid, as the State

argues, one would expect that this introductory language, which traces back to the original enactment of the medical assistance program, would have been modified. Instead, Congress imposed a more limited duty on the states to recover medical assistance benefits from the probate estates of the recipients, which would be a relatively easy burden.

Congress also allowed the states to seek recovery from non-probate assets in which the individual (a clear reference to the medical assistance recipient) had a legal title or interest at the time of death. This also would be relatively easy for the states. States could identify the decedent's ownership interests at the time of death, and attempt to collect assets shortly after the time of death if there was no impediment then preventing collection. If there was such an impediment, then collection could be made later against previously identified assets when any statutory impediments to collection ceased to apply.

Congress did not allow a claim against assets in which the individual (the medical assistance recipient) no longer had any legal title or interest at the time of death. Congress did not allow the states to chase after difficult to collect claims against uncertain assets long after the medical recipient has died. In making this measured expansion and adjustment of the medical assistance recovery statutes, Congress adopted a reasoned compromise, as the Conference Report asserted. By making probate claims mandatory, Congress was accomplishing important fiscal goals.

When estate recovery was optional upon the states, the federal government could expect a certain amount of recovery based on past experience, but recovery depended entirely upon state efforts that could flag under pressures to cut state budgets. By converting an optional (and revenue uncertain) recovery program into a mandatory recovery program, the expected recoveries to the federal treasury could be more confidently estimated and counted in the budget reconciliation projections. On the other hand, Congress clearly retained the previous general policy of not requiring or allowing recovery of medical assistance benefits correctly paid, except as specifically authorized or directed by act of Congress.

In such a situation, where the language adopted by the Congress is carefully weighed, compared, measured and adjusted, the Court should not read into the plain language of the statute an ambiguity that exists only in the eye of the State of Minnesota when it attempts to impose its own fiscal policy preferences and selective interpretation of statutory language. The broad general purposes of the medical assistance program must be found in the language of the federal statutes as enacted.

II. IN 2002 THE MINNESOTA COURT OF APPEALS DETERMINED THAT THE FEDERAL STATUTE LIMITS AND PARTIALLY PREEMPTS THE MINNESOTA MEDICAL ASSISTANCE RECOVERY STATUTE AND SETTLED THE MANNER IN WHICH DISTRICT COURTS SHOULD RESOLVE THESE CLAIMS.

As correctly noted in the Mille Lacs County District Court's Memorandum of Law, the Estate of Gullberg, 652 N.W.2d 709, (Minn. App. 2002) is the "seminal Minnesota case dealing with the application of the federal and state statutes affecting a county's claim for reimbursement for medical assistance."

As summarized in the Gullberg opinion, Walter and Jean Gullberg were married to each other when they purchased their homestead in 1983 as joint tenants. In 1992 Walter conveyed his interest in this property to his wife Jean Gullberg. Several weeks later Walter Gullberg applied for medical assistance and valued the home on the application at between \$57,300 and \$59,000. Prior to his death in 1994 at age 70, Walter received \$40,081.31 in medical assistance benefits. His surviving spouse Jean Gullberg died September 11, 2000, having never received medical assistance benefits. The only asset in her probate estate inventory was the homestead, which was then valued at \$119,000. Dakota County filed a claim against Jean Gullberg's estate for the amount paid on behalf of Walter. The personal representative disallowed the claim, Dakota County filed a petition seeking allowance, and Dakota County District Court denied the County's claim. The district court ruled that because federal law limits the definition of "estate" to property and assets in which the recipient had legal title at the time of death, federal law preempted the Minnesota statute that defines "estate" to

include any property that was jointly owned at any time during the marriage. The Appellate Court found Walter Gullberg “did not hold legal title to the homestead” at the time of his death. However, the court determined:

He continued to have some legal “interest” in the homestead because he and Jean Gullberg were still married at the time of his death. See Searles v. Searles, 420 N.W.2d 581, 581 (Minn. 1988) (“The law recognizes that spouses have a common ownership interest in property acquired during coverture, regardless of who holds title”); Minn. Stat. § 524.2-402(a),(c)(2000) Homestead descends to surviving spouse free from any testamentary disposition to which surviving spouse has not consented, but subject to claim filed under 256B.15 for medical assistance benefits. Moreover, the homestead was conveyed to Jean Gullberg through some ‘other arrangement’.”

The court also determined federal law partially preempts the Minnesota recovery statute § 256B.15, subd.2 because:

To the extent that Minnesota’s estate recovery statute allows recovery “to the value of the assets of the estate that were marital property or jointly owned property at any time during the marriage” we conclude that it goes beyond what is allowed by federal law, which allows recovery only “to the extent of” the individual’s legal interest at the time of death.

The court concluded that at the time of his death Walter Gullberg “continued to have some legal interest in the homestead, albeit contingent upon any number of factors.” (emphasis added) (The court footnoted this statement indicating, “The value of Walter Gullberg’s estate in the homestead at the time of his death is a matter for the district court to determine on remand.”) Based on this reasoning the Gullberg court concluded:

That Minn. Stat. § 256B.15, subd. 2 allows claims against a surviving spouse’s estate only to the extent of the value of the recipient’s interest in

marital or jointly owned property at the time of the recipient's death. This construction allows some tracing of assets back through the marriage but restricts recovery to the value of the recipient's interest in those assets at the time of the recipient's death. (emphasis added)

The court then reversed the district court's disallowance of the claim and remanded for the district court to evaluate Walter Gullberg's "interest in the homestead at the time of his death. The County's claim is limited to recovering only to the extent of that interest."

On remand, without appearance by the personal representative of the Gullberg estate, the district court allowed the \$40,081.31 claim of Dakota County in full on the basis that decedent recipient Walter Gullberg had a "legal interest in the entire homestead property at the time of his death pursuant to Searles v. Searles...." The claim, however, was less than half of the \$119,000 value of the homestead at the time of Jean Gullberg's death. In re Estate of Jean Gullberg, Dakota County District Court File No. P8-01-6555 (December 19, 2003).

Therefore, at this time in Minnesota, according to the Gullberg Appellate Court decision, district court judges must determine the nature and extent of the interest of a deceased recipient in the estate of the surviving spouse based on either a marital property analysis or a probate analysis. The Gullberg court, however, never defined "marital" property. The court did cite Minn. Stat. § 524.2-402 for the proposition that a homestead descends to a surviving spouse free from any testamentary disposition

from which the surviving spouse has not consented but subject to a claim for medical assistance benefits under Minn. Stat. § 256B.15.

The Gullberg Appellate Court's direction to the district courts is based more on a legal fiction than an economic reality. Walter Gullberg, the medical assistance recipient did not survive his spouse and would never have been entitled to the probate share of her estate when he died or when she died. Because the Gullbergs never divorced, no family law court ever determined the appropriate division of marital property between them⁵.

Despite the Gullberg Appellate Court's reliance on the fiction that divested rights can support recovery, these are the two methods by which the district courts have

⁵ Minn. Stat. § 518.54, subd. 5 defines "marital property" only for the purpose of marriage dissolution actions. The statute indicates, "Each spouse shall be deemed to have a common ownership in marital property that vests not later than the time of the entry of the decree in a proceeding for dissolution or annulment. The extent of the vested interest shall be determined and made final by the court pursuant to §518.58. If a title interest in real property is held individually by only one spouse, the interest in the real property of the nontitled spouse is not subject to claims of creditors or judgments or tax liens until the time of entry of the decree awarding an interest to the nontitled spouse." (emphasis added) Minn. Stat. § 518.58, subd. 1 states that "Upon a dissolution of marriage... the court shall make a just and equitable division of the marital property of the parties.... . The court shall base its findings on all relevant factors including the length of the marriage, any prior marriage of a party, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, needs, opportunity for future acquisition of capital assets, and income of each party." (emphasis added) Clearly none of these determinations had been made by any court regarding the Gullbergs; therefore, there is no basis to determine what marital property would have been awarded to either one of them had there been a divorce.

been directed to resolve claims for recovery of medical assistance benefits in administrations of estates of surviving spouses who never received benefits.

III. MINNESOTA DISTRICT COURTS HAVE FOLLOWED AND RELIED ON GULLBERG TO RESOLVE THE MEDICAL ASSISTANCE RECOVERY CLAIMS

A. Estate of Ahrens, Hennepin County District Court File No. P7-02-0075 (February 12, 2004)

Medical assistance recipient Dean Ahrens deeded his interest in the homestead he owned with his spouse Marlys Ahrens to Marlys alone prior to his death. During Dean's lifetime Marlys sold the home and placed the money in a bank account in her name alone. The couple also jointly owned a brokerage account that was transferred to Marlys' name alone prior to Dean's death. \$100,000 of the proceeds of the sale of the homestead was placed in that brokerage account by Marlys. Dean predeceased Marlys, and at the time of Marlys' death she still owned the brokerage account with a balance exceeding the amount placed in it from the homestead sale.

The district court noted there were two issues: First, should tracing be allowed to determine whether the brokerage account balance came from moneys owned by the parties during their marriage, and second, what was the extent of Dean Ahrens' interest, if any, in the property of Marlys Ahrens when Dean died. The district court discussed both Gullberg and In re Estate of Wirtz, 607 N.W.2d 882 (N.D. 2000) and concluded, "Unfortunately, none of the reported cases determine the meaning of the term 'to the extent of that interest' in the federal statute." The district court noted in

both those cases the value of the estates of the surviving spouses had been twice the amount of the medical assistance claim, so concluding that half the estate was property in which the recipient spouse had an interest would be sufficient to satisfy the claim. However, in Ahrens, the district court, using a broad statement that public policy is to recover the amount of money paid by the public, concluded either of the two theories advanced by the County (as promulgated in the Gullberg Appellate decision) should result in recovery of the full claim. The first theory was that Dean Ahrens had an interest in the whole property (which was attributed to Searles v. Searles, 420 N.W.2D 581 (Minn. 1988)), and the second theory was that Dean Ahrens had an interest in the entire property under intestacy laws. This assumed there were no descendants of Marlys Ahrens (unlike the Barg case now before this Court). Therefore, the Ahrens court simply allowed the claim in full. Again, legal fictions were required to reach the conclusion, under either theory, that Dean Ahrens had any interest in the property of Marlys Ahrens when he died because the parties were not divorced and Marlys did not predecease Dean.

B. Estate of Bast, Ramsey County District Court File No. P9-03-5115 (February 25, 2004)

The facts in the Bast case, which also followed the Gullberg decision, were similar to the Barg case now before the Court. Medical assistance recipient Robert Bast conveyed his interest in the parties' homestead to his wife Ardis Bast in 1997. On that same date Ardis executed a Will making no provision for Robert (In the Barg case

Francis E. Barg executed a Will leaving his estate to his children and making no provision for Dolores Barg). In June 1999, Robert applied for medical assistance. At that time he had a joint investment account with Ardis. Several weeks later Robert Bast was removed as an owner of that account pursuant to medical assistance requirements and thereafter he received \$157,000 in medical assistance. Robert died November 18, 2002. Ardis Bast never received medical assistance and died December 12, 2002, holding title to the homestead property and the investment account. The home was sold July 30, 2003 for \$242,000. Ramsey County District Court Judge Margaret M. Marrinan analyzed these facts in light of the directive of the Appellate Court in Gullberg. Pursuant to Gullberg, Judge Marrinan concluded Robert Bast had a legal interest in the homestead and the investment account at the time of his death. Based on those findings, Judge Marrinan allowed recovery in the amount of \$145,000, which was not the full amount of the medical assistance claim. Judge Marrinan attached a Memorandum to her decision that began, "In light of the Gullberg decision..." and included the following statement:

It is clear not only that Robert Bast had an interest in both the homestead and the Piper Jaffray account at the time of his death, but also that Dakota County should be reimbursed to the extent of the value of Mr. Bast's interest in these assets at the time of his death. What is not clear from Gullberg, however, is the method on which courts should rely in placing value on the Medicaid recipient's interest in marital or jointly owned property at the time of their deaths. (emphasis added)

The Barg Estate contends that Judge Marrinan was absolutely correct in saying the Gullberg court did not provide one particular method for courts to rely on in

valuing the recipient's interest. Judge Marrinan noted Gullberg relied on Searles in discussing the possible common interest in marital property and relied on Minn. Stat. § 524.2-402 regarding a spousal interest in the homestead when that spouse is preceded in death by the other spouse. Judge Marrinan then observed, "Since this is not a dissolution, the court cannot accurately determine the extent of Mr. Bast's interest in the properties" based upon the common interest discussion of Searles by the Gullberg Appellate Court. She therefore relied on the "probate" approach in determining the value of Mr. Bast's interest in the property at the time of his death. The Barg Estate believes Judge Marrinan correctly concluded that if one applies the legal fiction that Mr. Bast had a legal interest based on his wife predeceasing him, the probate approach would have provided a life estate to him. Using the mortality tables supplied by the county, Judge Marrinan then determined Mr. Bast's life estate was worth \$117,988 or .48742 of the sale price. This was based on his age at the time of his death and the tables supplied to all counties from the Minnesota Department of Human Services. Under the same legal fiction, Judge Marrinan also said Mr. Bast would have received exempt property in the amount of \$5,000 under Minn. Stat. § 524.2-403 and a family allowance of up to \$27,000 under Minn. Stat. § 524.2-404. While it seems most appropriate under Gullberg to use the probate approach, even though the recipient spouse did not survive the community spouse, it continues to require a resort to legal fiction to determine Robert Bast had any interest of real substance in the property of his

surviving spouse. It would seem entirely inappropriate to allow a family allowance to Mr. Bast for 15 months after he predeceased his spouse.

C. **In re The Estate of Frances E. Barg, Mille Lacs County District Court File No. PX-04-0701 (November 2, 2005)** (Note that the title of the order misspelled Mr. Barg's first name, which is correctly spelled Francis. It is correctly spelled later in the order.)

In the case now before this Court the facts are nearly identical to those in Bast. Dolores Barg, the medical assistance recipient, transferred her interest in the parties' homestead to her husband Francis prior to her death. This transfer was done in a manner and at a time allowed under the medical assistance statutes and did not result in Dolores Barg being ineligible for medical assistance benefits. Dolores Barg then received medical assistance benefits totaling \$108,413.53. At the time of her death on January 1, 2004, she was survived by her husband Francis. Prior to his death on May 27, 2004, Francis Barg had prepared a Will leaving his entire estate to his three children and making no provision for Dolores Barg. Had Dolores Barg survived Francis Barg (which she did not) she would have received a life estate in the homestead and the Barg children would have received the remainder interest in that homestead. Minn. Stat. § 524.2-402 (a). Dolores Barg was the same age as Robert Bast at the time of her death. Her interest in the homestead would have been .48742 of the sale price. At the time of Dolores Barg's death the Mille Lacs County Assessor's fair market value assessment of the Barg homestead was \$120,800; therefore against the assessor's valuation Dolores' share would have been \$58,880. With the addition of \$5,000 in

personal property allowance, this would have allowed Dolores Barg to claim \$63,880 as her share of the estate of Francis Barg, had she survived him. This is the amount of claim allowed by the personal representative in this probate action, based on Judge Marrinan's method of determining the interest of Robert Bast, a method Judge Marrinan arrived at, "in light of the Gullberg decision..." Although Judge Marrinan allowed a family allowance of \$1,500 per month for 18 months following the death of Robert Bast, the personal representative in the Barg Estate did not include that in the offer to Mille Lacs County. While it is one thing to fictionalize the order of death in this case, it is quite another to fictionalize that Dolores survived Francis for 18 months and had a right to a family allowance. The personal representative in the Barg Estate did not deny Mille Lacs County's claim, but rather partially allowed the claim.

In applying the law to these facts the Honorable Steven P. Ruble cited Gullberg for the proposition that in Minnesota a deceased spouse who received medical assistance benefits "retains an interest in the estate of the surviving spouse, irrespective of whether the deceased spouse had transferred legal interest in marital property to the surviving spouse" Barg Conc. of Law, p 2. He then noted Gullberg "without much explanation - expressly found the existence of this legal interest by favorably pointing to both marital-dissolution and intestate laws" Barg Conc. Of Law, p 2. In his Findings and Conclusions, Judge Ruble determined that the conveyance by Dolores Barg to Francis Barg of her undivided one-half (1/2) interest in the homestead constituted an "other arrangement" pursuant to 42 U.S.C. § 1396p(b)(4)(B). He

determined Dolores Barg's "recognizable legal interest in the homestead property at the time of her death as discussed in the Gullberg decision" was \$58,880 pursuant to Minn. Stat. §524.2-402(a)(2). He added to that amount a personal property allowance of \$5,000 pursuant to Minn. Stat. § 524.2-403 and allowed the County's claim in the amount of \$63,880, the same amount allowed by the personal representative.

In his Memorandum, Judge Ruble indicated the Gullberg case is the "seminal Minnesota case dealing with the application of Minn. Stat. § 256B.15, subd. 2 and 42 U.S.C. § 1396p(b)(4)(B) to a county's claim for reimbursement for medical assistance." He noted the Gullberg court cited Searles in its discussion of marital property, but again Judge Ruble noted that Gullberg relied on both "a marital dissolution case and intestacy law." He concluded the Gullberg court gave no direction to the lower court as to which of these approaches should be relied upon. In choosing which method to use, Judge Ruble rejected the common ownership theory of the Searles case because he said the Searles court did not address the "extent of nor the value to be placed on that interest." He said that simply recognizing "some interest exists in a non-title holder spouse is not synonymous with the right of common ownership." (emphasis added) Judge Ruble continued, "Therefore, these cases do not stand for the proposition that the common ownership interest of non-title holding spouses is equal to the total value of the homestead; 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." (emphasis added) Based on that analysis he concluded marital law "lacks certainty as a method of

valuation. The legal factors for valuation of assets in a marital dissolution setting are not suitable for proceedings such as this one where the spouses are not actual parties.” He therefore adopted the intestacy approach as discussed above, and awarded \$63,880 to the County. In doing so, he rejected a family allowance indicating awarding such an allowance is “conditional on a number of factors, including need. It is not automatically granted and it is not applicable here.” Judge Ruble did not deny Mille Lacs County’s claim; he allowed the claim in part, based on the reasoning of the Gullberg court, and at the direction of the Gullberg court that the district court judge should determine the nature and extent of the medical assistance recipient’s interest at the time of death in the property of the surviving spouse (in this case the nature and extent of Dolores Barg’s interest at her death in the property of her surviving spouse Francis Barg).

IV. THREE YEARS AFTER THE GULLBERG DECISION, THE APPELLATE COURT OF ILLINOIS RULED NO CLAIM CAN BE MADE TO RECOVER MEDICAL ASSISTANCE TO A RECIPIENT FROM THE ESTATE OF THAT RECIPIENT’S SURVIVING SPOUSE.

In 2005 the Appellate Court of Illinois, in Betty J. Hines v. The Department of Public Aid, (Ill. App. 3d 2005), denied the Illinois Department of Public Aid claim for recovery of medical assistance paid to the deceased recipient from the estate of the recipient’s surviving spouse after the surviving spouse’s death. Beverly and Julius Tutinas held joint title to a home in Moline, Illinois, and to an automobile. In 1994 Julius began receiving medical assistance, which he received until his death in 1997.

No probate estate was created upon his death due to the joint ownership of assets. His wife Beverly died in May 2001. Following her death the home was sold for \$69,641.89 and the automobile was sold for \$2,000. The Department of Public Aid filed a claim against Beverly's estate for \$61,154,48, the total medical assistance provided to Julius. Beverly never received medical assistance. The circuit court indicated that 42 U.S.C. § 1396p(b)(4)(B) and the Illinois law that included an expanded definition of assets consistent with the federal statute provided the basis to allow the Department's claim. After quoting the language of 42 U.S.C. § 1396p(b)(4)(B) and other portions of the federal statute, the Appellate Court wrote:

A plain reading of the statute discloses a blanket prohibition against states' recovery of medical assistance benefits, except in three specified situations, and because that initial prohibition is not lifted by an express authorization to recover medical assistance benefits from the estate of a surviving spouse, Illinois law allowing just such a recovery exceeds the authority granted states under the federal law. This was the rationale applied by the Wisconsin Court of Appeals in In re Estate of Budney, 197 Wis. 2d 948, 951, 541, N.W.2d 245, 246 (Wis. App. 1995), which concluded that its state statutes authorizing recovery of medical assistance payments from the estate of a recipient's surviving spouse exceeded the authority granted by the federal statute.

The Illinois Court disagreed with the North Dakota decision in North Dakota Department of Human Services v. Thompson, 586 N.W.2d 847 (N.D. 1998). The

Illinois Court stated:

We disagree with Thompson's conclusion that the expanded definition of "estate" in paragraph IV of the federal statute (42 U.S.C. § 1396p(b)(4)(2000)) is broad enough to encompass a claim against the estate of a surviving spouse. No definition of Julius' estate, no matter how broad, can trump the statute's absolute prohibition against recovery from any person

not covered by an express exception. In other words, which definition of "estate" is applicable is irrelevant if federal law does not permit states to seek recovery of medical assistance payments from the estate of the surviving spouse of a recipient. The federal statute clearly and unambiguously states that the recovery of any medical payments is generally not permitted. That statute goes on to list *three* specific exceptions to that rule... Surviving spouses are not included in those exceptions.

The Court of Appeals in both Illinois and Wisconsin held to plain language readings of the federal statute and both were unwilling to use fictions to allow any recovery of medical assistance against the estate of the surviving spouse of a recipient.

V. FEDERAL MEDICAID LAW TREATS SPOUSES AS SEPARATE INDIVIDUALS EXCEPT FOR CERTAIN PURPOSES AT CERTAIN POINTS IN TIME.

It cannot be disputed that the federal Medicaid statutes take into account whether an individual is single or married. It is misleading, however, to assert, as the Commissioner of Human Services does in his Amicus Brief, that federal Medicaid law treats all of a couple's marital assets, whether title is in both or either of the spouse's names together, as if the couple was one economic unit. It is true that all of the couple's assets, whether marital or not, are taken into account when one spouse is applying for medical assistance long-term care benefits, or if both spouses are applying for benefits at the same time. At all other times spouses are treated as separate economic units. This can be easily demonstrated by looking at the federal statutes and the Medicaid policies, practices and guidelines that are mandatory upon the States and that are being administered every day here in Minnesota.

For example, there are numerous references to the "individual" scattered throughout the Medicaid Act. There are also numerous references to "the individual's spouse." These terms are not synonymous. They are not used interchangeably. A cursory reading of any section of the Medicaid Act, as amended through the years, shows the Act was drafted to apply to individuals rather than couples.

Sec. 1092 of the Social Security Act, 42 U.S.C. § 1396a(a), which sets forth requirements and options for state plans, includes the following mandatory requirement:

(a) A State plan for medical assistance must--

* * *

(8) provide that all individuals wishing to make application for medical assistance under the plan shall have the opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals;

* * *

(10) provide--

(A) for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5), (17) and (21) of § 1905(a) to--

(i) all [eligible] individuals--

* * *

As a result, applications for medical assistance for long-term care benefits are taken from individuals, even when the individual is married. If a married individual is not capable of applying for medical assistance benefits for himself or herself, the spouse cannot submit the application without first receiving authorization from the applicant spouse or establishing by a physician's statement that the spouse is unable to sign an authorization. See Minnesota Department of Human Services Health Care Programs Manual (HCPM) at 0904.11.

Unlike other social welfare programs such as Temporary Assistance for Needy Families (TANF) or Minnesota Care, eligibility for medical assistance long-term care benefits is determined individual by individual, not by family unit. See Minn. Stat. § 256B.0595. Spouses who are not living together are treated as separate households. See HCPM 0908.05, which states in pertinent part:

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Include any of these people who live with an adult in that adult's household size:

- The person's spouse. Do not consider spouses in the same long-term care facility to be living together even if they are in the same room.

* * *

Use a household size of 1 in determining asset limits for LTCF residents beginning:

- The 1st full month after admission to the LTCF for a client with no community spouse.

- The month of institutionalization for the client with a community spouse. Use a household size of 1 for an LTC spouse when determining asset limits beginning the month the LTC spouse begins receiving home care services through elderly waiver.

The Medicare Catastrophic Coverage Act of 1988, the remnants of which are codified at 42 U.S.C. § 1396r-5, generally provides for separate treatment of the income and assets of spouses after one spouse is institutionalized. 42 U.S.C. § 1396r-5(b) states the income rule as follows:

(1) SEPARATE TREATMENT OF INCOME. ...During any month in which an institutionalized spouse is in the institution, except as provided in paragraph (2),⁶ no income of the community spouse shall be deemed available to the institutionalized spouse. (emphasis added)

⁶ Paragraph 2 establishes rules for identifying the income of each spouse.

42 U.S.C. § 1396r-5(c)(4) establishes the following rule to protect the separate assets of the community spouse after an application for long-term care benefits for the institutionalized spouse has been approved:

(4) SEPARATE TREATMENT OF RESOURCES AFTER ELIGIBILITY FOR BENEFITS ESTABLISHED ... During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this title, no resources of the community spouse shall be deemed available to the institutionalized spouse. (emphasis added)

Protection for the separate assets of the community spouse is carried forward into federal restrictions on medical assistance liens and estate recovery.

42 U.S.C. § 1396p(a) prohibits the states from imposing liens to secure recovery of medical assistance benefits, except under certain circumstances:

(a) Imposition of Lien Against Property of an Individual on Account of Medical Assistance Rendered to Him Under a State Plan (emphasis added)

(1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid on his behalf under the State plan, except—

(A) pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual,

or

(B) in the case of the real property of an individual—

(i) who is an inpatient in a nursing facility..., and

(ii) with respect to whom the State determines, after notice and opportunity for a hearing... that he cannot reasonably be expected to be discharged from the medical institution and to return home, except as provided in paragraph (2).

(2) No lien may be imposed under paragraph (1)(B) on such individual's home if—

(A) the spouse of such individual..., is lawfully residing in such home.

* * *

(b) Adjustment or recovery of medical assistance correctly paid under a State plan (emphasis added)

(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:

(A) In the case of an individual described in subsection (a)(1)(B) of this section, the State shall seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.

The federal restrictions distinguish between property owned by the individual and property owned by the individual's spouse. Nothing in the above-cited statutes allows a State to file a lien against property owned by a community spouse. Nothing in the federal estate recovery statutes specifically authorizes a direct claim against the community spouse's estate.

It is true that at the time a spouse applies for medical assistance for long-term care benefits, any assets, whether marital or not, which are considered available to the community spouse are also considered available to the applicant spouse, unless the asset is protected for the community spouse or protected for the applicant spouse. See, generally 42 U.S.C. § 1396r-5(c), which establishes rules for treatment of resources available to the community spouse at the time the other spouse applies for long-term care benefits (the so-called "spousal impoverishment" rules). 42 U.S.C. § 1396r-5(c) establishes procedures for calculating and protecting the Community Spouse Asset Allowance. This is the only section of the federal Medicaid statutes which treats a

husband and wife as one economic unit, and it does so only for the limited period while one of them is applying for medical assistance long-term care benefits. Even then, the Spousal Impoverishment rules have no impact on the ownership of marital or non-marital property under state law. The Spousal Impoverishment Rules only establish national guidelines to determine whether the applicant spouse will be considered eligible for long-term care benefits after taking into account the resources available to his or her spouse.

It does not follow that because spousal resources are treated as one pot of assets at the time a spouse applies for long-term care benefits that spouses are to be treated as one economic unit for other purposes at other points in time. The federal estate recovery statutes are a separate part of Medicaid law, as shown by the separate history and evolution of the federal estate recovery statutes over the decades.

VI. RECOVERY OF MEDICAID FUNDS HAS LITTLE IMPACT ON THE FUNDING AND CONTINUATION OF THE MEDICAID PROGRAM AND RECOVERED FUNDS ARE NOT NECESSARILY RETURNED TO THE PROGRAM.

The current operation and the future of the Medicaid program does not depend upon estate recovery efforts or results. In 2004 the American Bar Association (ABA) Commission on Law and Aging, with financial support from AARP (formerly known as American Association of Retired Persons) studied Medicaid estate recovery practices in

the 50 states⁷. Importantly, the State of Minnesota recovered \$16,600,000 (sixteen million six hundred thousand dollars) from probate claims and liens for fiscal year 2003, with total long-term care expenditures in the Medicaid program for the same fiscal year of \$2,383,100,000 (two billion three hundred eighty-three million one hundred thousand dollars)⁸. The amount recovered in fiscal year 2003 represented 0.70% of the state's total long-term care expenditures for the fiscal year⁹ (In other words, 99.3% of long-term care expenditures for medical assistance were not offset by estate recoveries). Following that study, the U.S. Department of Health and Human Services (DHS), in its report titled, "Medicaid Estate Recovery Collections" dated September 2005, showed Minnesota probate collections in 2004 totaled \$24,999,595 (twenty-four million nine hundred ninety-nine thousand five hundred ninety-five dollars). (Table 3, page 10). The DHS report showed on page 2 that estate recovery collections nationally in 2004 totaled \$361,766,396 (three hundred sixty-one million seven hundred sixty-six thousand three hundred ninety-six dollars) against Medicaid nursing home spending that year of \$45,835,646,786 (forty-five billion eight hundred thirty-five million six hundred forty-six thousand seven hundred eighty-six dollars).

⁷ "Medicaid Estate Recovery: A 2004 Survey of State Programs and Practices," by Naomi Karp, Charles P. Sabatino and Erica F. Wood, AARP Public Policy Institute, June 2005. See Appendix of The Estate.

⁸ Id. at pages 50 and 51.

⁹ Id. at page 51

The DHS report at page 8 on Table 1 indicates the collections as a percentage of nursing home spending in the 50 states ranged from 0% to 10.4% in 2004 with the United States average being 0.8%. Clearly, the recoveries are not a significant factor in the operation and the continuation of these programs.

Funds recovered under Minn. Stat. § 256.B.15 are not returned to the Medicaid program. The State's share of recovery is deposited to the State general fund and does not affect the amount of funds appropriated by the State for health care programs for the biennium. Of the money recovered, Minn. Stat. § 256B.15, subd. 1 1a, clause (a) allows the County to retain one-half (1/2) of the State share of any estate recoveries attributable to County efforts. The County's share goes to the County's general fund and is not used to support the medical assistance program. Medical assistance is paid from state and federal appropriations. County property taxes pay no share of medical assistance expenditures. For fiscal year 2006-2007 Minnesota already has appropriated \$2,768,175,000 (two billion seven hundred sixty-eight million one hundred seventy-five thousand dollars) for four categories of the medical assistance program: LTC facilities (nursing homes), LTC waivers (EW and other waived MA programs), MA Basic for Aged and Disabled, and MA Basic-MFIP (Laws of Minn., 1st Spec. Sess., Ch. 4, Art. 9, Sec. 2). For the fiscal year 2007-2008, the legislature has appropriated \$2,984,977,000 (two billion nine hundred eighty-four thousand nine hundred seventy-seven thousand dollars) for the same four categories (See, again, Laws of Minn., 1st Spec. Sess., Ch. 4, Art. 9, Sec. 2). Recovery of the medical assistance claim in this

case will not increase the amount appropriated for medical assistance during the current biennium unless the legislature appropriates additional funds in the 2006 session.

The AARP study at page 7, paragraph 7, notes that the public policy issues raised by estate recovery actions have not been carefully examined by policy makers:

There has been practically no study of the impact of estate recovery on state budgets or on recipients and their families. Fully evaluating estate recovery requires taking into account a multitude of competing societal values: public versus private responsibility for long-term care, the fair distribution of public burdens, the importance of inheritance, the promotion of programs to enhance the independence of elders, the pros and cons of estate planning, and the protection of vulnerable populations. Moreover, estate recovery is part of a much larger Medicaid picture involving the related issues of eligibility, transfer of asset rules, and the purchase of long-term care insurance as part of the Long-Term Care Partnership program.

Critical questions about estate recovery remain, such as whether recovery is an equitable mechanism for ensuring that Medicaid recipients pay a fair share of the cost of their long-term care compared with other financing options; whether it is a barrier to receipt of Medicaid services; whether it contravenes social policy on prevention of spousal impoverishment; and whether the costs justify the financial benefit to the states.

Clearly, many of these issues need to be addressed by legislative bodies rather than by the courts, since the legislative bodies determine public policy. While the County, and the Commissioner of Human Services in his Amicus Brief, set forth their wishes about what public policy should be, the issue before the Court is what the law is now. The Estate argues these are not the same.

VII. LETTERS FROM THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES HEALTH CARE FINANCING ADMINISTRATION (HCFA) WERE DETERMINED BY THE TRIAL COURT TO BE PART OF THE RECORD AND SHOULD BE AVAILABLE FOR CONSIDERATION BY THIS COURT ON APPEAL.

In its STATEMENT OF THE CASE Appellant lists two issues to be raised on appeal. While Appellant has addressed the first issue at length, Appellant has not addressed its second issue in paragraph 5 of the STATEMENT OF THE CASE listed as follows: "Whether the Court may consider certain correspondence included in its appendix." The Estate assumes "its" refers to the Estate's appendix, which included two letters from HCFA dated in 1999 and 2000. The Estate believes it is required to respond to this issue cited for appeal by the Appellant.

When Mille Lacs County served its reply brief in the district court on the Estate, it included a one-page motion to strike the two letters referred to from the record. The one-page motion was not accompanied by a Notice of Motion or affidavit. The district court heard arguments about this matter immediately prior to the oral argument on the merits of the case and denied the County's motion to strike. The Estate argues the district court acted well within its discretion in doing so. Decisions regarding admission of evidence are within the district court's discretion (A decision on the sufficiency of the foundation for evidence is within the discretion of the trial court McKay's Family Dodge v. Hardrives, Inc., 480 N.W.2d 141, 147 (Minn. App. 1992), review denied (Minn. Mar. 26, 1992), and J. W. ex rel. D. W. v. C. M., 627 N.W.2d 687, 697 (Minn. App. 2001), review denied (Minn. Aug. 15, 2001). A decision on an

evidentiary ruling can only be reversed if there is a clear abuse of discretion (Johnson v. Washington County, 518 N.W.2d 594, 601 (Minn. 1994)).

These letters dated in 1999 and 2000, six and seven years after Congress amended the Medicaid and Medicare law in 1983, responded to questions from attorneys regarding whether transfers from a community spouse in any manner make the institutionalized spouse ineligible for continued medical assistance benefits. The 1999 letter signed by Robert Reed, Chief, Medicaid Branch, Division of Medicaid and State Operations, states:

After the eligibility determination any resources belonging to the community spouse are solely the property of that spouse. That spouse can do whatever he or she wants to with them, including leaving them, via a will, to particular heirs that do not include the institutionalized spouse. (emphasis added)

The 2000 letter from Ronald Preston, Associate Regional Administrator of HCFA states:

Under the transfer of assets provisions in Section 1917(c) of the Social Security Act (the Act), transfers between spouses are exempt from any transfer penalty. Under the spousal impoverishment provisions of Section 1924 of the Act, once eligibility is determined, the resources of the community spouse are no longer considered available to the institutionalized spouse. Thus, after the month in which an institutionalized spouse is determined eligible for Medicaid, any resources belonging to the community spouse are solely the property of that spouse. That is, the community spouse can do whatever he or she wants to with them. (emphasis added)

Mr. Preston said his office would provide a notice that the state policy in question needed to be revised to be consistent with federal requirements.

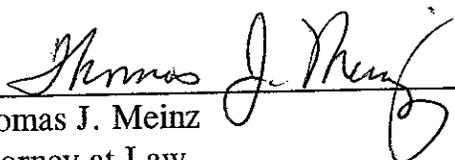
The Minnesota Department of Human Services in its Amicus Brief alleges at page 4: "Medicaid treats all of a couple's marital assets, whether titled in both or either spouse's name together, as if the couple was one economic unit." Clearly the administrators of the federal department that oversees these programs do not support that position. The HCFA letters show that HCFA believes that the community spouse can do whatever the community spouse wishes with his or her own assets and that the community spouse is not part of one economic unit with the medical assistance recipient.

CONCLUSION

Although federal law on its face does not appear to allow Appellant Mille Lacs County to make any claim against the estate of Francis E. Barg for medical assistance provided to his predeceased spouse Dolores Barg, the Minnesota Court of Appeals in Gullberg has determined that Dolores Barg had some legal interest in the homestead of Francis E. Barg at the time of her death. The Court directed the district courts to determine that interest based either on a probate analysis or a marital property analysis without directing either approach. The district court in Mille Lacs County followed Gullberg and determined that the interest of Dolores Barg should be based on a probate analysis. The district court's decision was thoughtful and within its discretion and the Estate respectfully requests that the decision be upheld.

Dated: March 23, 2006

Respectfully submitted,



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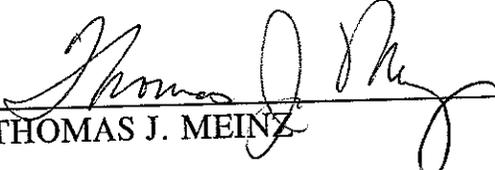
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CERTIFICATE OF COMPLIANCE

WITH MINN. R. APP. P 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 13,750 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2000, the word processing system used to prepare this Brief.


THOMAS J. MEINZ

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).