

NO. A05-2346

State of Minnesota
In Supreme Court

In re the Estate of:

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

APPELLANT'S BRIEF, APPENDIX AND ADDENDUM

JANICE S. KOLB
Mille Lacs County Attorney
DAWN R. NYHUS (#0329733)
Assistant Mille Lacs County Attorney
Courthouse Square
535 Second Street S.E.
Milaca, MN 56353
(320) 983-8305

Attorneys for Appellant

LORI SWANSON
Attorney General, State of Minnesota
ROBIN CHRISTOPHER VUE-BENSON
(#033408X)
Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 296-8714

*Attorneys for Amicus Curiae
Commissioner of Human Services*

THOMAS J. MEINZ (#7181X)
Attorney at Law
106 Rum River Drive South
Suite 2
Princeton, MN 55371-1816
(763) 389-1243

Attorney for Respondent

JULIAN J. ZWEBER (#120294)
1360 Energy Park Drive, Suite 310
St. Paul, MN 55108-5252
(651) 646-4354

*Attorney for Elder Law Section of the
Minnesota State Bar Association and the
National Senior Citizens Law Center*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	IV
LEGAL ISSUES	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
MEDICAID CONTEXT AND BACKGROUND	5
STATEMENT OF FACTS	9
SCOPE OF REVIEW	13
ARGUMENT	14
I. THE ESTATE FAILED TO PRESERVE THE ISSUE OF THE CONSTITUTIONALITY OF THE COUNTY'S CLAIM WHEN IT DID NOT RAISE THAT QUESTION BEFORE THE DISTRICT COURT OR THE COURT OF APPEALS	14
A. The Estate Waived Or The Validity Issue At The District Court	14
B. The Estate Failed To Preserve The Validity Question For Appellate Review Through Filing A Notice Of Review	16
II. MINNESOTA REQUIRES RECOVERY FROM THE FULL VALUE OF MARITAL PROPERTY IN FRANCIS BARG'S ESTATE FOR THE BENEFITS RECEIVED BY DOLORES BARG	17
A. The Legislature Intended Full Recovery From Marital Property Or Jointly Owned Property	17
B. The Court Of Appeals Nullified Or Otherwise Failed To Give Full Effect To The Terms "Marital Property" and "Jointly Owned Property" In Minnesota's Recovery Statute	18
III. MINNESOTA'S ESTATE RECOVERY STATUTE IS CONSISTENT WITH FEDERAL MEDICAID LAWS AND THEIR PURPOSES, THEREFORE, THERE IS NO PREEMPTION	20
A. Federal Statutory Context And The Gullberg Decision	20
B. The Preemption Analytical Framework Requires That A State Statute Be Upheld Unless Congress Expressed A Manifest Intent To Preempt It	22

1.	The intent of Congress, for purposes of preemption analysis, is reflected by the statutory context and history, not by any individual word or phrase	23
2.	The Estate must overcome strong presumptions in favor of upholding Minnesota's estate recovery law	25
C.	There Is No Evidence Of Any Congressional Intent To Preempt States From Recovering The Value Of Medicaid Benefits From The Estate Of A Recipient's Surviving Spouse	26
1.	The plain language of federal statutes demonstrates the absences of preemptive intent	26
2.	Legislative history confirms that Congress never intended to preempt state laws such as Minnesota's	27
D.	There Is No Evidence Of Congressional Intent To Preempt States From Recovering From The Full Extent Of Marital Property Or Property That Was Formerly Jointly Owned When Making A Recovery Claim Against A Surviving Spouse's Estate	30
1.	The plain language of the federal statute reveals no basis for finding preemption of the scope of a claim against a surviving spouse's estate	30
2.	Legislative history demonstrates that Congress's inclusion of the expanded estate option was intended only to facilitate recovery by superseding Citizens Action League v. Kizer, not to inhibit recovery	32
3.	Events and conditions leading to passage of OBRA 1993 demonstrate that Congress only intended to expand recovery, not impose new limits on recovery	34
E.	Minnesota's Estate Recovery Law Is In Harmony With Federal Medicaid Law	37
1.	Compliance With Both Federal And Minnesota Law Is Possible	37
2.	Minnesota law is not an obstacle to the federal purpose of delaying recovery to protect property for use during the lifetime of a recipient and her spouse	38
3.	Minnesota law helps achieve the federal objective that Medicaid no subsidize inheritances	38

IV.	ALTERNATIVELY, EVEN IF GULLBERG’S FINDING OF PARTIAL PREEMPTION IS CORRECT, THE COUNTY’S CLAIM MUST STILL BE FULLY SATISFIED WITHIN THAT FRAMEWORK	41
A.	Dolores Barg Had A Recoverable Interest In Property In the Estate That Is An Interest In the Whole	41
B.	Joint and Several Liability Of Spouses Requires Full Recovery From Marital Property	44
C.	If Joint Tenancy Provides The Basis For Dolores' Interest, The Court of Appeals Erred By Measuring That Interest As One-Half When, During Concurrent Ownership, A Joint Tenant's Ownership Interest Is Over The Whole Of The Property	45
	CONCLUSION	52

APPENDIX & INDEX

ADDENDUM

TABLE OF AUTHORITIES

Page

CASES

<u>Amaral v. Saint Cloud Hosp.</u> , 598 N.W.2d 379 (Minn. 1999)	24
<u>Anderson v. Grasberg</u> , 78 N.W.2d 450 (Minn. 1956)	48
<u>Aquilino v. United States</u> , 363 U.S. 509 (1960).....	32, 42
<u>Barlau v. Minneapolis-Moline Power Implement Co.</u> , 9 N.W.2d 6 (Minn. 1943)	28
<u>Bd. Of Educ. Of Minneapolis v. Sand</u> , 34 N.W.2d 689 (1948)	43
<u>Belshe v. Hope</u> , 38 Cal.Rptr.2d 917 (Cal. Ct. App. 1995).....	34
<u>Bonta v. Burke</u> , 120 Cal.Rptr.2d 72 (Cal. Ct. App. 2002).....	6, 31, 45
<u>Brookfield Trade Ctr., Inc. v. County of Ramsey</u> , 584 N.W.2d 390 (Minn. 1998)	13
<u>Brown v. Vonnahme</u> , 343 N.W.2d 445 (Iowa 1984).....	48
<u>Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.</u> , 507 U.S. 218 (1993)	26
<u>California Fed. Sav. & Loan Ass'n v. Guerra</u> , 479 U.S. 272 (1987)	25
<u>Citizens Action League v. Kizer</u> , 887 F.2d 1003 (9th Cir. 1989)	21, 33, 34, 35
<u>County of Brown v. Siebert</u> , 220 N.W. 156 (Minn. 1928)	46
<u>Crosby v. Nat'l Foreign Trade Council</u> , 530 U.S. 363 (2000).....	38, 39
<u>Davidson v. Minnesota Loan & Trust Co.</u> , 197 N.W. 833 (Minn. 1924).....	48, 49
<u>Downing v. Downing</u> , 606 A.2d 208 (Md. 1992)	48
<u>Estate of Atkinson</u> , 564 N.W.2d 209 (Minn. 1997).....	8
<u>Estate of Barg</u> , 722 N.W.2d 492 (Minn. Ct. App. 2006).....	passim
<u>Estate of Brandt</u> , C5-98-1924, 1999 WL 319180 (Minn. Ct. App. 1999).....	21
<u>Estate of Eggert</u> , 72 N.W.2d 360 (Minn. 1955)	26

<u>Estate of Gullberg</u> , 652 N.W.2d 709 (Minn. Ct. App. 2002).....	passim
<u>Estate of Jobe</u> , 590 N.W.2d 162 (Minn. Ct. App. 1999)	21, 43, 45
<u>Estate of Laughead</u> , 696 N.W.2d 312 (Iowa 2005)	5, 45
<u>Estate of Thompson</u> , 586 N.W.2d 847 (N.D. 1998).....	31
<u>Estate of Turner</u> , 391 N.W.2d 767 (Minn. 1986)	9, 39
<u>Florida Lime & Avocado Growers, Inc. v. Paul</u> , 373 U.S. 132 (1963).....	38
<u>Forster v. R.J. Reynolds Tobacco Co.</u> , 437 N.W.2d 655 (Minn. 1989)	26
<u>Fort Halifax Packing Co., Inc. v. Coyne</u> , 482 U.S. 1 (1987)	23
<u>Gade v. Nat’l Solid Wastes Management Ass’n</u> , 505 U.S. 88 (1992).....	24
<u>Harris v. McRae</u> , 448 U.S. 297 (1980)	7
<u>Hines v. Davidowitz</u> , 312 U.S. 52 (1941)	39
<u>In re Barkema Trust</u> , 690 N.W.2d 50 (Iowa 2004).....	51
<u>In re Haggerty</u> , 448 N.W.2d 363 (Minn. 1989).....	25
<u>Jacobsen v. Anheuser Busch</u> , 392 N.W.2d 868 (Minn. 1986)	25
<u>Jamestown Terminal Elevator, Inc. v. Knopp</u> , 246 N.W.2d 612 (N.D. 1976).....	49, 50
<u>Kipp v. Sweno</u> , 683 N.W.2d 259 (Minn. 2004)	51, 52
<u>Kizer v. Hanna</u> , 767 P.2d 679 (Cal. 1989)	10
<u>Longacre v. Knowles</u> , 333 S.W.2d 67 (Mo. 1960).....	48
<u>New York State Dep’t of Soc. Servs. v. Dublino</u> , 413 U.S. 405 (1973)	24
<u>O’Malley v. Ulland Bros.</u> , 549 N.W.2d 889 (Minn. 1996).....	13
<u>Phalen Park State Bank v. Reeves</u> , 251 N.W.2d 135 (1977)	52
<u>Phelps v. Commonwealth Land Title Ins. Co.</u> , 537 N.W.2d 271 (Minn. 1995)	15
<u>Pilot Life Ins. Co. v. Dedeaux</u> , 481 U.S. 41 (1987).....	24
<u>Plain v. Plain</u> , 240 N.W.2d 330 (Minn. 1976).....	46

Raynold’s Estate, 18 N.W.2d 238 (1945)24

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)24

Sanderson v. Saxon, 834 S.W.2d 676 (Ky. 1992).....49

Schweiker v. Gray Panthers, 453 U.S. 34 (1981).....24

Sevcik v. Comm’r of Taxation, 100 N.W.2d 678 (1959)33

Spessard v. Spessard, 494 A.2d 701 (Md. Ct. App. 1985)48

State v. Soto, 378 N.W.2d 625 (Minn. 1985).....45

Thayer v. Amer. Financial Advisers, Inc., 322 N.W.2d 599 (Minn. 1982).....15

Thiele v. Stich, 425 N.W.2d 580 (Minn. 1988).....15

United States v. Menasche, 348 U.S. 528 (1955).....18

Watson v. United Services Auto. Ass’n, 566 N.W.2d 683 (Minn. 1997)15

West Virginia v. U.S. Dep’t of Health & Human Servs., 132 F.Supp.2d 437 (S.D.W.Va. 2001).....9

West Virginia v. U.S. Dep’t Health & Human Servs., 289 F.3d 281 (4th Cir. 2002).6,7,26

Wisconsin Dep’t of Health & Family Servs. v. Blumer, 534 U.S. 473 (2002).....7, 46

STATUTES & RULES

42 C.F.R. §§430-36, 440-42, 455-567

42 C.F.R. §430.07

42 U.S.C. § 1396a7

42 U.S.C. § 1396a(a)(18)17

42 U.S.C. § 1396p(b)passim

42 U.S.C. §1396.....7, 8

42 U.S.C. §1396r-5(c)(1)(A)(i)46

Minn. R. Civ. App. P. 106.....16

Minn. R. Civ. App. P. 133.03 16

Minn. Stat. §256B.055 8

Minn. Stat. §256B.056 9

Minn. Stat. §256B.15 passim

Minn. Stat. §510.04 44

Minn. Stat. §510.05 44, 52

Minn. Stat. §518.003 (2006) 19, 43

Minn. Stat. §518.54 (1986) 43

Minn. Stat. §518.54 (2004) 19

Minn. Stat. §519.05 45

Minn. Stat. §524.2-402 12

Minn. Stat. §524.3-801 11

Minn. Stat. §524.3-806 14

Minn. Stat. §645.16 18, 33, 44

Minn. Stat. §645.17 39

OTHER AUTHORITIES

48A C.J.S. Joint Tenancy (1981) 51

Administration's 1994 Health Budget: Hearing Before the Sen. Comm. on Finance,
103d Cong. (1993) 36

GAO, Medicaid: Recoveries From Nursing Home Residents' Estates Could Offset
Program Costs (1989) 37, 38

H.R. 2138, 103rd Cong. 1st Sess. § 5112(c) (1993) 34

H.R. 2264, 103rd Cong. 1st Sess. § 5102 (1993) 34

H.R.Rep. No.100-105 (1988) 40

H.R.Rep. No.103-213 (1993) 37

Herbert T. Tiffany, <u>The Law of Real Property</u> β β 418, 419 (Basil Jones ed., 3d ed. 1939).....	48
<u>Medicare and Medicaid Budget Reconciliation: Hearing Before the Subcomm. on Health and the Environ. of the H. Comm. on Energy and Commerce,</u> 103d Cong. (1993).....	33
<u>OBRA '93 and Medicaid: Asset Transfers, Trust Availability, and Estate Recovery</u> <u>Statutory Analysis In Context,</u> 47 Soc. Sec. Rep. Serv. 757 (1995).....	35
Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, §13611(c)	32
Omnibus Budget Reconciliation Act of 1993, S. 1134 § 7421 (1993) (as amended June 23, 1993).....	37
S.Rep. No.86-1856 (1960).....	28
S.Rep. No.89-404 (1965)	29, 30
S.Rep. No.103-403 (1994).....	8, 9
S.Rep. No.97-494 (1982)	40
<u>Social Security Amendments of 1950, Pub. L. No. 81-734, 64 Stat. 514 (1950).....</u>	6
<u>Social Security Amendments of 1960, Pub. L. No. 86-778, 74 Stat. 982 (1960).....</u>	6, 28
<u>Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965).....</u>	6
U.S. Dep't of Health & Human Servs., <u>Issues in Medicaid Estate Recoveries: A Report to the United States Congress</u> (1989).....	35
U.S. Dep't of Health and Human Servs., Office of Inspector General, <u>Medicaid Estate Recoveries: National Program Inspection</u> (1988)	36
W. Blackstone, <u>Commentaries</u> 184-85)	50

LEGAL ISSUES

- I. A party is generally prohibited from raising a new issue on appeal. Did the Estate fail to adequately preserve the constitutionality of Minn. Stat. § 256B.15, subd. 1a as an issue for review by this court?

Court of appeals disposition: As the Estate did not properly raise the constitutionality of section 256B.15, subd. 1a before either the district court or the court of appeals, this issue was not ruled upon below.

Thiele v. Stich, 425 N.W.2d 580 (Minn. 1988)

Minn. R. Civ. App. P. 106

Minn. Stat. § 524-3.806

- II. Minnesota law requires recovery from the full value of property in the estate of a Medicaid recipient's surviving spouse when that property was "marital property or jointly owned property. Did the court of appeals err by not allowing full recovery here where marital assets in the estate were greater than the County's claim?

Court of appeals disposition: The court of appeals limited recovery to one-half the value of real property in which the recipient had once been a joint tenant.

United States v. Menasche, 348 U.S. 528 (1955)

Minn. Stat. §256B.15, subd. 2

Minn. Stat. §256B.16

- IIIA. Federal law neither prohibits nor requires states to file claims in the estates of surviving spouses to recover Medicaid funds expended for the predeceased spouse when the surviving spouse did not also receive Medicaid benefits. Minn. Stat. §256B.15, subd. 1a requires such a claim. Do state and federal law conflict in such a way as to require Minnesota law to be preempted (assuming the Estate properly preserved the question for review)?

Court of appeals disposition: This question was not raised before the court of appeals.

Estate of Jobe, 590 N.W.2d 162 (Minn. Ct. App. 1999)

Estate of Thompson, 586 N.W.2d 847, 851 (N.D. 1998)

California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 284 (1987)

42 U.S.C. § 1396p(b)
Minn. Stat. §256B.15, subd. 1a
U.S. Const. art. 1, § 8, cl. 1

- III.B. Minn. Stat. § 256B.15, subd. 2, limits recovery of a claim in the estate of a non-recipient surviving spouse to the value of “marital property or jointly owned property any time during the marriage.” Mille Lacs County claim is for less than the value of the marital homestead, formerly jointly owned, in the Francis Barg estate. What is the allowable scope of the County’s recovery claim?

Court of appeals disposition: The court of appeals used a one-half interest to determine the extent of a joint tenant’s ownership interest in real property.

Minn. Stat. §256B.15, subd. 2
Minn. Stat. §518.003, subd. 3b
42 U.S.C. §1396p
U.S. Const. art. 1, § 8, cl. 1

- IV. Alternatively, if this Court finds that the section 256B.15 is partially preempted, what is scope of recovery, where the recipient spouse has an interest in marital property and the non-recipient surviving spouse has a joint and several obligation to support his spouse?

Court of appeals disposition: The court of appeals did not give effect to the statute’s definition of marital property, and further calculated any joint tenancy interest as a one-half interest, rather than an interest in the whole of the real property.

Wisconsin Dep’t of Health & Family Servs. v. Blumer, 534 U.S. 473 (2002)
Jamestown Terminal Elevator, Inc. v. Knopp, 246 N.W.2d 612 (N.D. 1976)
Aquilino v. United States, 363 U.S. 509 (1960)

Minn. Stat. §519.05
42 U.S.C. § 1396a(a)(17)(D)

STATEMENT OF THE CASE

Appellant Mille Lacs County appeals from the decision of the Minnesota court of appeals in Estate of Barg, 722 N.W.2d 492 (Minn. Ct. App. 2006). This matter involves a claim against a decedent's estate for the recovery of Medicaid benefits paid on behalf of his predeceased wife.

On January 1, 2004, Dolores J. Barg died, leaving no estate. Appellant's Appendix ("AA") 3. On May 27, 2004, her husband, Francis E. Barg, died. AA4. The district court consented to formal probate of his will on July 14, 2004. See Estate of Barg, Mille Lacs County District Court File No. PX-04-701.

On July 30, 2004, Mille Lacs County Family Services and Welfare Department ("Mille Lacs County" or "the County") filed a claim against the Estate of Francis Barg ("Estate"), for recovery of \$108,413.00 in Medicaid long-term care benefits paid on behalf of Dolores Barg. AA23. The Estate contains assets totaling over \$146,000.00. AA5.

On October 7, 2004, the Estate partially allowed the claim in the amount of \$63,880.00, but disallowed the remaining \$44,533.53. AA30. The County filed a Petition for Allowance of Claim on October 11, 2004, contesting the partial disallowance. AA33. On November 2, 2005, Mille Lacs County District Court, the Honorable Steven P. Ruble, denied the County's petition, holding that only \$63,880.00 of the claim was to be satisfied. AA36. Mille Lacs County appealed on November 28, 2005. AA39.

On October 17, 2006, the court of appeals issued a decision reversing the district court based on different reasoning, and remanded to the district court with instructions to further limit the claim to \$60,400. 722 N.W.2d at 498. On November 16, 2006, the County petitioned this Court for review. The Estate then sought conditional review of the constitutional validity of the claim on preemption grounds, an issue not previously raised. On January 16, 2007, the Court granted the County's petition and granted the Estate's requested conditional review.

SUMMARY OF ARGUMENT

Federal and Minnesota Medicaid estate recovery laws work in harmony to permit maximum estate recovery. The Estate seeks to re-frame this issue by challenging the constitutionality of Minnesota's recovery statute, despite having failed to properly raise or preserve the question. The only issue before this Court, then, is the scope of recovery afforded by these laws.

Minnesota law requires recovery from the full value of property now in Francis Barg's estate that was marital property or jointly owned with his predeceased wife, Dolores Barg. The court of appeals erred by failing to give full effect to Minnesota law.

The court of appeals failed to do so based on its 2002 decision in Estate of Gullberg, which held that Minnesota law was partially preempted. Federal law, however, does not preempt Minnesota's estate recovery statute. Congress intended to give states flexibility to enhance estate recovery and in so doing recognized that it is state law that properly defines property interests from which recovery is possible. The court of appeals

also failed to conduct the necessary preemption analysis and relied on faulty reasoning in limiting the scope of recovery.

Nevertheless, should this Court find that some preemption of state law exists, as Gullberg found and as followed below, the County's claim must still be satisfied in full. This recovery is warranted from the entirety of the Medicaid spouse's interest in marital property and jointly owned property now in the estate of the surviving nonrecipient spouse. The court of appeals failed to correctly identify the scope of recovery by disregarding the true extent of these interests. Mille Lacs County respectfully requests that this Court reverse the court of appeals decision below and overturn the Gullberg decision to the extent that it held Minnesota laws to be preempted in any way.

MEDICAID CONTEXT AND BACKGROUND

This case is about the interpretation and application of federal and state Medicaid laws. Although the issues in this case arose procedurally in probate, Medicaid laws must be the primary framework for any analysis because they are the sources that define and, purportedly, constrain the County's recovery claim. Other courts have recognized this distinction. The Iowa Supreme Court held that a general probate code provision does not apply when a specific Medicaid estate recovery law addresses the particular issue. Estate of Laughead, 696 N.W.2d 312, 317 (Iowa 2005). Similarly, the California court of appeals held that the meaning of a term used in Medicaid estate recovery must be ascertained not by its use in real property or in probate law, "but as a term of art for the

purposes of the Medicaid . . . program[.]” Bonta v. Burke, 120 Cal.Rptr.2d 72, 76 (Cal. Ct. App. 2002).

Medicaid’s “Cooperative Federalism”

What is popularly known as “Medicaid”¹ was created as part of the Social Security Act. It began as part of Title I of that act, concerning Old Age Assistance, as an amendment to extend federal matching funds to be used for medical care in addition to income assistance. Social Security Amendments of 1950, Pub. L. No. 81-734, 64 Stat. 514 (1950). In 1960, medical assistance was expanded, providing for the use of federal funds to pay for medical care for non-Old Age Assistance recipients who did not have the financial resources to meet their medical needs. Social Security Amendments of 1960, Pub. L. No. 86-778, 74 Stat. 982 (1960). Finally, in 1965, Congress expanded the medical assistance model, creating Title XIX (“Medicaid”) of the Social Security Act to do so, using the 1960 amendments as its framework. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965).

Medicaid is an exercise of Congress’s Spending Clause powers. West Virginia v. U.S. Dep’t Health & Human Servs., 289 F.3d 281, 286 (4th Cir. 2002). Unlike Social Security and Medicare, which are purely federal programs, Medicaid “is a cooperative endeavor in which the federal government provides financial assistance to participating states to aid them in furnishing health care to needy persons.” Harris v. McRae, 448 U.S.

¹ Known in Minnesota as “Medical Assistance.” See Minn. Stat. Ch. 256B. “Medicaid” will be used to refer to both the federal and the state programs.

297, 308 (1980). State participation in Medicaid is voluntary. West Virginia, 289 F.3d at 284.

As with other Spending Clause-based laws, federal Medicaid payments are accompanied by certain broad conditions with which a state must comply in order to receive the federal matching payments. West Virginia, 289 F.3d at 284. These conditions are found in the Medicaid Act and in its implementing regulations. 42 U.S.C. §1396 *et. seq.*; 42 C.F.R. §§430-36, 440-42, 455-56. Within this Medicaid statutory and regulatory framework, participating states enact their own state-specific legislation and rules for the administration and implementation of their state programs. State laws and policies are then incorporated into State Medicaid Plans, which must be approved by the U.S. Secretary of Health and Human Services before a state may receive federal payments. 42 U.S.C. § 1396a.

Congress intended Medicaid to provide states with flexibility in designing programs to meet each state's needs, and states are given considerable latitude in formulating the terms of their plans. Wisconsin Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473, 495 (2002); see also 42 C.F.R. §430.0. The result is that there is not one uniform national Medicaid program, but over fifty distinct Medicaid programs in states and territories.

Medicaid Is A Social Welfare Safety Net Program

Unlike Social Security and Medicare, which are premised on a social insurance model in which individuals make specific contributions through payroll taxes entitling

them to future benefits, Medicaid is based on a social welfare model in which society as a whole funds the current costs of benefits. The social welfare model is necessary because Medicaid was conceived as, and continues to be, a safety net program that is the payor of last resort — intended only for those without sufficient resources to pay for their necessary medical services. 42 U.S.C. §1396.

Medicaid's role as a safety net is reflected in its eligibility categories and criteria. There are two general categories of eligibility for Medicaid: those who are "categorically needy" and those who are "medically needy." S.Rep. No.103-403, at 175 (1994) ("Developments in Aging: 1993," Sen. Sp. Comm. on Aging). Medicaid coverage of the categorically needy is mandated as a condition of federal cost-sharing. Id. The categorically needy are recipients of cash assistance programs such as Temporary Assistance to Needy Families (which replaced Aid To Families Dependent Children) and Supplemental Security Income ("SSI"). Id.; Minn. Stat. §256B.055 (2006) (Minnesota eligibility categories).

Medicaid's second eligibility category covers those who are considered to be "medically needy." Individuals eligible under this category have resources that are otherwise sufficient for daily living expenses (based on state-determined income levels), but that are not adequate to pay for their medically necessary services. S.Rep. No.103-403, at 175. Those with excess income or assets are required to "spend down" their assets on medical expenses until they meet an eligibility threshold similar to that for cash-assistance programs. Estate of Atkinson, 564 N.W.2d 209, 211 (Minn. 1997).

Recipients in all categories must meet specific income and resource standards that are set by each state. S.Rep. No.103-403, at 175. In Minnesota, individuals with assets over \$3,000, and couples with assets over \$6,000, are ineligible for Medicaid. Minn. Stat. §256B.056, subd. 3 (2006). The value of a home, however, is not counted for eligibility purposes. See Minn. Stat. §256B.056, subd. 2 (2006). The result of the home's exclusion as a countable resource, for eligibility purposes, is that "someone with a potentially valuable asset [is allowed] to receive benefits along with those who have greater financial need." West Virginia v. U.S. Dep't of Health & Human Servs., 132 F.Supp.2d 437, 440 (S.D.W.Va. 2001). "Congress addressed this anomaly through estate recovery." Id.

"Estate recovery" is the term for the general process by which a state seeks reimbursement, after a Medicaid recipient's death, for Medicaid benefits received. See U.S. Dep't of Health & Human Servs., HHS, Issues in Medicaid Estate Recoveries: A Report to the United States Congress, 1-2 (1989) (copy included in addendum to this brief). Recovery must be delayed until after the death of a surviving spouse and when there are no dependant or disabled children. 42 U.S.C. §1396p(b)(2); Minn. Stat. §256B.15, subd. 3. Recovery only applies to Medicaid recipients who were permanently institutionalized or over age 55. 42 U.S.C. §1396p(b)(1); Minn. Stat. §256B.15, subd. 1a. The purpose of estate recovery is to reuse public funds for other needy people by recovering the value of those funds from property that, but for Medicaid's existence, would have itself been depleted to pay for the recipient's medical care. See Estate of

Turner, 391 N.W.2d 767, 770 (Minn. 1986); Kizer v. Hanna, 767 P.2d 679, 681-82 (Cal. 1989). This recovery occurs post-death, when the property is no longer needed by the recipient or dependants, hence it is known as “estate” recovery.

STATEMENT OF FACTS

In 1962 and 1967, Dolores and Francis Barg (hereinafter “Dolores” and “Francis” or the “Bargs”) obtained homestead property in Princeton, Minnesota, together as husband and wife, as joint tenants with the right of survivorship. AA7-9. On December 20, 2001, Dolores applied for and began receiving long-term care Medicaid benefits. AA2.

At that time, the Bargs’ total assets were \$137,272.63. AA10-11. An asset assessment included all assets, regardless of whether title was in the name of Dolores, Francis, or both. Id. Of that total, assets equaling \$104,875, primarily the Bargs’ home then valued at \$92,000, were not counted as being available to pay for Dolores’ care because they were set aside for Francis’ support. See AA10.

Seven months later, on July 2, 2002, Barbara Anderson, Guardian to the Estate of Dolores Barg and the Bargs’ daughter, executed a Guardian’s Deed, conveying the property to Francis’ name only.² AA13, 18. Dolores was also deleted as an owner on the couple’s bank accounts. AA20-22.

Dolores died January 1, 2004. AA34. Between December 1, 2001, and the date

² The court of appeals incorrectly stated that the transfer occurred before Dolores applied for Medicaid. Barg, 722 N.W.2d at 497.

of her death, Dolores received \$108,413.53 in Medicaid benefits. Id. Six months after Dolores' death, Francis, who did not himself receive Medicaid benefits, died leaving a solvent estate with assets totaling \$146,446.29. AA5, AA24-29. Included among these assets was the homestead property, the estimated market value of which was \$120,800.00 for 2004. AA25. All other assets in the estate were also either jointly held or traceable to jointly-held assets acquired by Dolores and Francis at some time during the their marriage. See AA4.

On August 11, 2004, Michael Barg, Personal Representative for Francis' estate and the Bargs' son, filed a "Notice to Commissioner of Human Services" regarding possible claims for Medicaid recovery under Minn. Stat. §256B.15. AA5; see Minn. Stat. §524.3-801(d)(1)(2006) (requiring such notice). Pursuant to Minnesota's Medicaid estate recovery laws, Mille Lacs County filed a claim for \$108,413.53 against the estate. AA23. The Personal Representative partially disallowed the claim in the amount of \$44,533.53, serving his Notice of Disallowance or Partial Allowance of Claim on October 7, 2004. AA30. On October 11, 2004, the County petitioned Mille Lacs County District Court for allowance of the previously disallowed part of its claim; the parties did not contest the \$63,880.00 allowed by the Estate. See AA31-33, AA46-47.

In written and oral argument before the district court, the County and the Personal Representative advanced differing theories on how to determine the extent of Dolores' interests in property now in Francis' estate for purposes of recovery — both attempting to apply the holding in Estate of Gullberg, 652 N.W.2d 709 (Minn. Ct. App. 2002).

Gullberg had held that a claim in similar circumstances was allowed, but went on to hold the scope of such a claim was limited to the extent of the recipient spouse's interest in property in the surviving spouse's estate. Id. The County contended that Dolores had an undivided interest in the whole of all the property now in Francis' estate based on its status as marital property.

The Estate advanced a theory that valuation was determined by reference to probate law. Under the Estate's probate theory, Dolores' interest is valued based largely on the probate statute concerning the descent of homestead property. See Minn. Stat. §524.2-402, subd. (a) (2006) (if there is a surviving spouse and surviving descendants, then the spouse has a life estate interest in the homestead with the descendants as remaindermen).

Following briefing and oral arguments on these theories, the district court issued a decision denying Mille Lacs County's petition. AA34-38. In explaining its decision, the court recognized that Dolores "undisputed[ly]" had an interest in the property now in Francis' estate. AA35. In valuing Dolores' interest, however, the district court selected the Personal Representative's probate method, thereby limiting the scope of recovery. AA36.

The County appealed, arguing that Dolores' marital property interest supported full recovery of the County's claim. The Estate maintained that the life estate analysis was appropriate.

On October 17, 2006, the court of appeals issued its opinion. Barg, 722 N.W.2d 492. The court acknowledged that Minnesota's estate recovery statute is in keeping with federal law's authorization of an expanded definition of an individual's "estate" for recovery purposes. Id. at 495-96. However, the court rejected both parties' arguments on valuation. Id. at 496.

Setting aside both marital property and probate analyses, the court of appeals stated, without discussion, that the "plain meaning of the estate recovery statute" compelled it to apply real property law principles. Id. at 497. The court reasoned that the continued interest Dolores Barg retained at her death was that of joint tenancy in the Bargs' homestead, then defined the "extent" of her interest as an undivided one-half interest in the property's value — \$60,400.00, based on the estimated fair market value, but less than what had already been allowed on the claim. Id.³

SCOPE OF REVIEW

The issues here present legal questions subject to de novo review. Brookfield Trade Ctr., Inc. v. County of Ramsey, 584 N.W.2d 390, 393 (Minn. 1998). A lower court's conclusions on these questions, therefore, do not bind this Court's review. O'Malley v. Ulland Bros., 549 N.W.2d 889, 892 (Minn. 1996).

³ The court of appeals' decision, however, did not take into account Dolores' interests in the Bargs' bank accounts and other personal property. See AA27-28.

ARGUMENT

I. THE ESTATE FAILED TO PRESERVE THE ISSUE OF THE CONSTITUTIONALITY OF THE COUNTY'S CLAIM WHEN IT DID NOT RAISE THAT QUESTION BEFORE THE DISTRICT COURT OR THE COURT OF APPEALS

Minnesota Statutes section 256B.15, subdivision 1a, requires the filing of a claim in the estate of a surviving spouse for the recovery of Medicaid benefits paid on behalf of their predeceased spouse. In its response to the petition for review, the Estate challenged the constitutional validity of the County's claim by asking the Court to also consider "Whether[,] under 42 U.S.C. § 1396p(b)[,] Mille Lacs County may recover from the estate of a surviving spouse for Medicaid benefits correctly paid on behalf of a predeceased recipient spouse who left no estate." Resp. Pet. Rev. at 2. (Hereinafter, "constitutional validity" or "validity" will be used to refer to the question thus presented.) This question was not raised before either the district court or the court of appeals and, as the Estate conceded, it is "a much broader issue than the one considered by the court of appeals." *Id.* at 4. Although the Court granted cross-review on the question, the Court also asked the parties to address whether the Estate adequately preserved this issue for review. At each stage of the litigation, the Estate has failed to raise or otherwise preserve the validity issue. Therefore, the Court should not consider the issue.

A. The Estate Waived Or The Validity Issue At The District Court

The Estate allowed the County's claim in the amount of \$63,880.00 and disallowed the remaining \$44,533.53. AA30. The Estate did not change its disallowance before the district court and is not able to do so now. See Minn. Stat. §524.3-806 (2006)

(requiring good cause and a district court order before a personal representative can change a disallowance of a claim). At the beginning of the district court hearing, the court asked the Estate whether it was only contesting the disallowed amount of the claim, not the full amount. AA46. The Estate conceded that only the disallowed amount was at issue. Id. The Estate reaffirmed later in the hearing that it was “not asking the Court to disallow this entire recovery.” AA47. By its partial allowance and subsequent concessions, the Estate has waived any challenge to the County’s claim other than to its scope.

Moreover, the district court’s reliance on the Estate’s concessions lead it not to consider the validity question, making it inappropriate to now consider the question. Appellate courts only consider “those issues that the record shows were presented and considered by the trial court in deciding the matter.” Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988) (quoting Thayer v. Amer. Financial Advisers, Inc., 322 N.W.2d 599, 604 (Minn. 1982). “Nor may a party obtain review by raising the same general issue litigated below but under a different theory.” Id. Thus, the Estate did not properly preserve this issue and it need not be addressed by the Court.⁴

⁴ The Court has, on rare occasions, made an exception to the general rule to consider an issue raised for the first time on appeal. See Watson v. United Services Auto. Ass’n, 566 N.W.2d 683, 688 (Minn. 1997). However, an issue challenging the constitutionality of a statute faces a steeper path to overcoming this general prohibition, see, e.g., Phelps v. Commonwealth Land Title Ins. Co., 537 N.W.2d 271, 277 (Minn. 1995) (declining to consider first-time review of statute’s constitutionality).

B. The Estate Failed To Preserve The Validity Question For Appellate Review Through Filing A Notice Of Review

The Estate did not properly raise the validity issue before the district court. Nevertheless, if the Court concludes that the issue was properly raised before, and decided by, the district court, then appellate review is still precluded because the Estate did not ensure that it was properly before the court of appeals.

The Estate was required to file a notice of review within 15 days after the County's notice of appeal in order to obtain review of a ruling "which may adversely affect respondent." Minn. R. Civ. App. P. 106. The Estate did not file a notice of review. See Minn. Appellate Courts Docket for No. A05-2346. Nor did the Estate otherwise suggest that it would seek review of a broader issue than the scope of recovery issue that was the subject of the County's appeal. See, e.g., Minn. R. Civ. App. P. 133.03 (respondent may serve statement of the case "clarifying or supplementing" appellant's statement, but no additional statement need be filed if respondent agrees with the particulars set forth in appellant's statement of the case). Because the Estate did not follow these procedures, it failed to preserve the issue for review.

Furthermore, the district court adopted the Estate's position. See AA38. The Estate then asked the court of appeals to affirm the district court. Estate's CoA Br. at 8. Now the Estate takes a contrary position that, if agreed to by this Court, would require reversing both the court of appeals and the district court to deny the claim in its entirety. Allowing the Estate to successfully raise its challenge at this stage, after it has repeatedly represented to lower courts that it was only contesting the claim to the extent of the

amount previously disallowed, is not in the interest of justice and would encourage future parties to adopt similar inconsistent positions.

II. MINNESOTA REQUIRES RECOVERY FROM THE FULL VALUE OF MARITAL PROPERTY IN FRANCIS BARG'S ESTATE FOR THE BENEFITS RECEIVED BY DOLORES BARG

A. The Legislature Intended Full Recovery From Marital Property Or Jointly Owned Property

Under Minnesota law, a recovery claim may not be filed until after the death of a surviving spouse or when there are dependent children or disabled children. Minn. Stat. § 256B.15, subd. 3 (2006); accord 42 U.S.C. §1396p(b)(2). These provisions incorporate into Minnesota law conditions required for federal financial participation. See 42 U.S.C. §1396a(a)(18) (requiring state plans comply with section 1396p). As a result, recovery is delayed until a time when there is no spouse or dependents. This delay can be relatively brief, as is the case here (five months) AA3-4, or long, as in Gullberg (over six years), 652 N.W.2d at 710.

When the Medicaid recipient is survived by a spouse, Minnesota requires a claim to be filed in that surviving spouse's estate, regardless of whether the surviving spouse himself received Medicaid benefits. Minn. Stat. §256B.15, subd. 1a (2006). The amount of that claim is the amount of Medicaid benefits received by either or both spouses. Id. Minnesota specifically limits a claim against a non-recipient spouse's estate for benefits received by the predeceased spouse to the value of property in the estate that was marital property or jointly owned property at any time during the marriage. Minn. Stat. §256B.15, subd. 2 (2006). In this case, it is stipulated that all property in Francis' estate

was once marital property or jointly owned with Dolores. See AA4 at ¶16. Consequently, Minnesota law requires satisfaction of the County's claim from the entirety of the property in Francis' estate.

B. The Court Of Appeals Nullified Or Otherwise Failed To Give Full Effect To The Terms "Marital Property" and "Jointly Owned Property" In Minnesota's Recovery Statute

The court of appeals held that the County's claim was limited to only half the value of real property in the estate that had previously been held in joint tenancy. Barg, 722 N.W.2d at 497. This holding is contrary to the legislature's intended effect of section 256B.15, subdivision 2, because it gave no effect to the term "marital property" as the upper limit on a recovery claim in the circumstances of this case. Nor did the court give effect to the legislature's express intent that the full value of property jointly owned with the recipient spouse be subject to recovery.

The court of appeals, however, refused to give effect to the legislature's use of marital property. "Every law shall be construed, if possible, to give effect to all its provisions. Minn. Stat. §645.16 (2006). Courts have a "duty to give effect, if possible, to every clause and word of a statute," United States v. Menasche, 348 U.S. 528, 538-39 (1955) (quotation marks omitted).

The court of appeals rejected the County's position that the legislature's use of "marital property" in 256B.15, subd. 2, could be informed by the definition of "marital property," found elsewhere in statute, that defined "marital property" as "real or personal property" acquired by either spouse subsequent to the marriage . . . regardless of whether

title is held individually or by the spouses in a form of co-ownership such as joint tenancy, tenancy-in-common, tenancy by entirety, or community property.” Minn. Stat. §518.54, subd. 5 (2004) now codified at Minn. Stat. §518.003, subd. 3b (2006). The court simply concluded that it was “unable to find a legal basis for incorporating this definition [of marital property] into the estate-recovery statute.” 722 N.W.2d at 496. However, in refusing to use the only existing statutory definition of the term, the court of appeals failed to ascribe any meaning to the legislature’s use of “marital property” — nullifying that term.

The court of appeals believed it was constrained in applying section 256B.15, subdivision 2, to this case by its 2002 decision in Estate of Gullberg, 652 N.W.2d 709 (Minn. Ct. App. 2002). See Barg, 722 N.W.2d at 497. As will be discussed below, Gullberg concluded that subdivision 2 was partially preempted by federal Medicaid statutes. Because that conclusion is incorrect, see, infra § III, Barg must be reversed to the extent it relied on Gullberg’s partial preemption conclusion. Alternatively, even if Gullberg’s partial preemption conclusion is correct and recovery is limited to the extent of a recipient spouse’s interest in property now in the surviving spouse’s estate, Barg must be reversed because it failed to correctly identify Dolores’ interests and their extent. see, infra § IV.

III. MINNESOTA'S ESTATE RECOVERY STATUTE IS CONSISTENT WITH FEDERAL MEDICAID LAWS AND THEIR PURPOSES, THEREFORE, THERE IS NO PREEMPTION

A. Federal Statutory Context And The Gullberg Decision

The federal provisions that purportedly preempt Minnesota's estate recovery statute are part of 42 U.S.C. §1396p(b).⁵ The first of these provisions is in the form of a condition on receiving federal matching payments. That condition is that a state's plan for medical assistance include a provision that:

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:

. . . . (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.

42 U.S.C. §1396p(b)(1)(B). The plan must also provide that such recovery "may be made only after the death of the individual's surviving spouse, if any, and only at a time" when there are no children who are blind, disabled, or under age 21. 42 U.S.C. §1396p(b)(2). Also, recovery may be waived if it would prove to be an undue hardship. 42 U.S.C. §1396p(b)(3).

The second provision at issue was added in 1993, when Congress made estate recovery mandatory for states to receive federal matching payments. This provision states that "estate" "shall include" all property included in a state's probate law definition

⁵ This statute and other pertinent statutes are reproduced in the Addendum to this brief.

of estate. 42 U.S.C. §1396p(b)(4)(A). It then provides that states “may include,” at their option “any other real and personal property and other assets in which the [deceased] individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed . . . through joint tenancy . . . or other arrangement.” 42 U.S.C. §1396p(b)(4)(B). This option was included in response to a 1989 U.S. Ninth Circuit Court of Appeals decision holding that recovery was limited to a probate estate. See Citizens Action League v. Kizer, 887 F.2d 1003, 1006 (9th Cir. 1989) cert. denied 494 U.S. 1056 (1990) (discussed *infra* at § III.D.2.).

Thus, the only prohibition on recovery expressed in Federal law regards the timing of recovery, which must be delayed until the death of a surviving spouse and when there are no dependant or disabled children. 42 U.S.C. §1396p(b)(2). The details of how to make recoveries, including the enabling laws necessary to carry out recoveries, are left to each state.

While the court of appeals has consistently upheld Minnesota’s estate recovery statute in the face of preemption challenges,⁶ a majority of the panel in Estate of Gullberg, concluded that Minnesota law “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.” Id. at 714. The basis for this holding was the parenthetical phrase “to the extent of such interest” in 42 U.S.C. §1396p(b)(4)(B), supra. The majority did not explain its

⁶ Estate of Jobe, 590 N.W.2d 162 (Minn. Ct. App. 1999), Estate of Brandt, C5-98-1924, 1999 WL 319180 (Minn. Ct. App. 1999); Estate of Gullberg, 652 N.W.2d 709 (Minn. Ct. App. 2002).

conclusion using a preemption analysis. Judge Minge, however, specially concurred based on the assumption that, even under the majority's position, the state would still achieve full recovery on its claim. Gullberg, 652 N.W.2d at 715 (Minge, J., specially concurring).⁷

Here, the court of appeals relied on Gullberg, but used different reasoning to determine the recoverable interest. The panel, which included the author of the Gullberg majority opinion, refused the amicus curiae Commissioner of Human Services' request to reexamine Gullberg's partial preemption conclusion. Barg, 722 N.W.2d at 498.

Fidelity to the law of preemption, however, requires that Barg and Gullberg be reversed and overturned to the extent that they hold that Minnesota's estate recovery statute is preempted. (The following discussion includes analysis of the question of the constitutional validity of the claim, raised for conditional review, on the ground that federal law prohibits recovery from a nonrecipient surviving spouse's estate.)

⁷ Judge Minge disagreed with the majority's reasoning because it went "down the wrong road" in limiting the state's ability "to deal with the unfortunate, but persistent, efforts of some to enhance their final estate by sheltering and divesting assets in order to qualify for Medical Assistance." Id. Judge Minge added that preemption could be avoided by construing the terms of the federal statute "to include any estate, interest, or arrangement that the state by law establishes for purposes of recovery of Medical Assistance (Medicaid) benefits." Id.

B. The Preemption Analytical Framework Requires That A State Statute Be Upheld Unless Congress Expressed A Manifest Intent To Preempt It

Adhering to the preemption analytical framework is critical in determining whether the federal Medicaid statute actually preempts the County's claim or the recoverable scope of its claim.

1. The intent of Congress, for purposes of preemption analysis, is reflected by the statutory context and history, not by any individual word or phrase

A federal law preempts a state law in any of three circumstances: by expressly preempting all state laws; by impliedly preempting state laws by occupying the field; or, when neither express nor implied, by conflicting with state law. Martin v. City of Rochester, 642 N.W.2d 1, 10-11 (Minn. 2002). "Because Medicaid is a cooperative state and federal program, neither express nor implied preemption apply." Id. at 11. Thus, section 256B.15 can only be preempted if it "conflicts with specific federal Medicaid law or is an obstacle to federal Medicaid purposes." Id. Even so, when preemption is found to exist, state laws are preempted "only to the extent that they are in conflict with federal law." Id.

The U.S. Supreme Court has explained that, in any preemption analysis, "the purpose of Congress is the ultimate touchstone." Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 9 (1987). The ultimate task for a court in any preemption case, then, is to determine whether a state law "is consistent with the structure and purpose of the [federal] statute as a whole . . . [by] [l]ooking to 'the provisions of the whole law, and to

its object and policy.’” Gade v. Nat’l Solid Wastes Management Ass’n, 505 U.S. 88, 98 (1992) (plurality) (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987)).

Because of the respect for dual sovereignty, any Congressional intent must be clearly expressed before preemption can be found, and the challenger’s burden is to demonstrate such clearly-expressed intent. See New York State Dep’t of Soc. Servs. v. Dublino, 413 U.S. 405, 417 (1973) (clear manifestation of congressional intent must exist before state statute superseded); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 237 (1947) (legislative amendments to Warehouse Act made clear intent to terminate dual system of regulation).

In determining Congress’s intent with respect to Medicaid estate recovery, conventions of statutory interpretation apply. Moreover, when examining the actual language of a statute, effect should be given to all of its provisions, while at the same time avoiding the singling out or emphasis of one word or phrase in opposition to the statute’s overall intent. Amaral v. Saint Cloud Hosp., 598 N.W.2d 379, 384 (Minn. 1999); Raynold’s Estate, 18 N.W.2d 238, 241 (1945) (literal construction not adopted if contrary to general policy and object of statute). This caution is particularly relevant in interpreting a Medicaid provision. The U.S. Supreme Court has recognized Medicaid’s extreme complexity, making interpretation of its provisions fraught with difficulty. See Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981) (Social Security Act is “among the most intricate ever drafted by Congress.”). Because of the nature of preemption analysis,

greater importance is given to the overall statutory scheme and other expressions of Congressional intent than to individual words or phrases.

Consequently, this court's preemption inquiry, as with the interpretation of statute itself, must take into account the entire Medicaid framework and be attentive to its legislative history and historical context. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 284 (1987) (stating that the purpose of Congress is the "ultimate touchstone" to preemption analysis, and examining federal statute's language "against the background of its legislative history and historical context"). Thus, rather than being a secondary mode of analysis to plain language, extrinsic sources which illuminate the statute's language play a key role in arriving at the congressional intent that is the focus of the preemption inquiry.

2. The Estate must overcome strong presumptions in favor of upholding Minnesota's estate recovery law

The invalidation of a state law by federal preemption raises a constitutional issue. Therefore, the general presumptions regarding the constitutionality of statutes are applicable to preemption analysis. "Minnesota statutes are presumed constitutional, and [the Court's] power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." In re Haggerty, 448 N.W.2d 363, 364 (Minn. 1989). The party challenging a statute's constitutionality must demonstrate beyond a reasonable doubt that it violates a constitutional provision. Jacobsen v. Anheuser Busch, 392 N.W.2d 868, 872 (Minn. 1986), cert. denied, 479 U.S. 1060 (1987).

So, too, is the onus on the challenging party to show that preemption is appropriate. “Preemption of state laws is generally disfavored.” Martin, 642 N.W.2d at 11. The U.S. Supreme Court has stated that “[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.” Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 224 (1993). The Supreme Court has also stated that it is “reluctant to infer preemption.” Id.

Analyzing federal legislative intent also requires a presumption against preemption particularly when the objectives of state and federal law are in harmony. See Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655, 658 (Minn. 1989). This presumption against preemption is particularly true in areas where states are exercising their traditional powers as sovereigns. Public welfare, provision of medical assistance, and probate are just such areas traditionally within a state’s purview. West Virginia, 289 F.3d. at 294 (“health care and inheritance are subject matters generally reserved to the states”); see also Estate of Eggert, 72 N.W.2d 360, 362 (Minn. 1955) (“It is well settled that the descent and distribution of property of a decedent is a matter within the exclusive control of the [state] legislature.”). Finally, the Court should be mindful that in a preemption analysis it is not searching for affirmative federal allowance or authorization for the particular state law in question, rather it is looking for a manifest intent by Congress to prohibit the state action reflected in the state law.

C. There Is No Evidence Of Any Congressional Intent To Preempt States From Recovering The Value Of Medicaid Benefits From The Estate Of A Recipient's Surviving Spouse

1. The plain language of federal statutes demonstrates the absences of preemptive intent

The language of the section 1396p(b)'s provisions does not affirmatively prohibit Minnesota from recovering the value of Medicaid benefits from estate of the surviving spouse of a recipient. Nor do the provisions limit the scope of such a claim to something less than the value of property in the estate that was marital property or jointly owned property during the marriage.

In the context of the other provisions of section 1396p(b), it is clear that Congress did not intend to preempt section 256B.15's provisions relating to spousal estate recoveries. For example, subsection 1396p(b)(2) is the only provision that overtly limits how states can accomplish estate recovery. Subsection 1396p(b)(2) requires that a state plan provide that recovery is delayed until the death of a surviving spouse and a time when there are no children who are blind, disabled, or under age 21. This provision implicitly recognizes that recoveries can be made from the estates of surviving spouses because delaying recovery necessarily results in claims against a surviving spouse's estate being the only means of accomplishing recovery.

2. Legislative history confirms that Congress never intended to preempt state laws such as Minnesota's

The origin of section 1396p(b) estate recovery provision confirms that Congress did not intend to preclude a recovery claim against a surviving spouse's estate or to limit the scope of such a recovery claim to something less than the entirety of marital property.

The provision now in section 1396p(b) regarding liens and recoveries first appeared in 1960 as part of amendments to Title I of the Social Security Act which was part of an expansion of the use of federal Old Age Assistance funds to pay for medical services in addition to cash assistance. See Social Security Amendments of 1960, Pub. L. No. 86-778, §601(b), 74 Stat. 924 (1960), as reprinted in 1960 United States Code, Congressional, and Administrative News (hereinafter "U.S.C.C.A.N.") 1299, 1377.

The provision, at the time, read: "there shall be no adjustment or recovery (except, after the death of such individual and his surviving spouse, if any, from such individual's estate) of any medical assistance for the aged correctly paid on behalf of such individual under the plan." Id. The Senate Report, which provides the only explanation of Congress's intent behind this provision,⁸ stated that "the bill would permit the recovery from an individual's estate after the death of his spouse if one survives him. This provision was inserted in order to protect the individual and his spouse from the loss of

⁸ "Committee reports often persuasively show the intended legislative meaning [of a statute]." Barlau v. Minneapolis-Moline Power Implement Co., 9 N.W.2d 6, 11-12 (Minn. 1943).

their property, usually the home, during their lifetime.” S.Rep. No.86-1856 (1960), as reprinted in 1960 U.S.C.C.A.N. 3608, 3615 (emphasis added).

This legislative history provides the only express statement ever of Congress’s purpose behind the Medicaid estate recovery provision. That purpose was not to protect the transfer of property to heirs or to otherwise protect inheritances from being used to pay for the costs of medical care — which would be the consequence of Gullberg’s holding and of the holding in this case below. Instead, the only purpose was “to protect the individual and his spouse from the loss of their property, usually the home, during their lifetime.” This purpose does not support a narrow interpretation precluding recovery claims against a surviving spouse’s estate or limiting the scope of such a claim to less than the value of marital property or jointly owned property.

The 1965 amendments to the Social Security Act added Title XIX to the Act, establishing Medicaid, using the 1960 amendments as a framework. See S.Rep. No.89-404 (1965), as reprinted in 1965 U.S.C.C.A.N. 1943, 2014. One of the elements carried forward from the 1960 amendments as part of the 1965 amendments was the lien and recovery provision. As part of Medicaid, the provision required that a State Plan for medical assistance:

(18) provide that property liens will not be imposed, on account of medical assistance provided under the plan, during a recipient’s lifetime . . . and preclude adjustments or recovery of medical assistance correctly paid except from the estate of a recipient who was at least age 65 when he received such assistance, and then only after the death of his surviving spouse and at a time when he has no surviving child who is under 21, blind, or permanently and totally disabled

Id. at 2147 (emphasis added). The primary Senate report noted that Title I, after the 1960 amendments, precluded recovery “except from the estate of an aged person after his death and that of his surviving spouse.” Id. at 2020. The congressional committee then explained that the 1965 provision broadened the existing provision “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.” Id. Based on this explanation, the original purpose of the provision, protecting property for use during the lifetime of a recipient and spouse, remained unchanged except to extend such protection to dependant children. As with the 1960 amendment, the 1965 provision does not express an intention to remove property from recovery forever, or to limit the scope of recovery. Id.

D. There Is No Evidence Of Congressional Intent To Preempt States From Recovering From The Full Extent Of Marital Property Or Property That Was Formerly Jointly Owned When Making A Recovery Claim Against A Surviving Spouse’s Estate

The Gullberg majority’s conclusion that Minnesota’s estate recovery law was partially preempted in its scope of recovery was based on the parenthetical phrase “to the extent of such interest” found 1396p(b)(4)(B). That subpart was added in 1993 as part of the Omnibus Budget Reconciliation Act of 1993 (“OBRA 1993”). P.L. 103-66. However, there is no evidence that Congress intended this amendment to preempt state laws such as Minnesota’s.

1. The plain language of the federal statute reveals no basis for finding preemption of the scope of a claim against a surviving spouse's estate

First, the immediate statutory context does not evidence a manifest intention by Congress that the phrase “to the extent of such interest” have the effect of precluding states from recovering from the full extent of marital property or former jointly owned property in the estate of a surviving non-recipient spouse. Rather, the context indicates that Congress intended the option to include any other property or asset, for purposes of recovery, to be freeing rather than a restraint on states’ recovery programs. Congress gave the states the option of going beyond a probate definition of “estate” to increase rather than limit the scope of recovery. Any reading of “interest” that has the effect of limiting the scope of recovery would be inconsistent with the expansive nature of the definition. The North Dakota Supreme Court concluded that the optional definition reflected “the Congressional purpose to broaden states’ estate recovery programs.” Estate of Thompson, 586 N.W.2d 847, 851 (N.D. 1998) (emphasis added). That court referred to the optional definition as an “expansive definition.” Id. at 850. Moreover, the use of the catchall phrase “or other arrangement” at the end of the definition “suggests that Congress intended the definition to be as all-inclusive as possible.” Bonta v. Burke, 120 Cal.Rptr.2d 72, 76 (Cal. Ct. App. 2002).

Second, the expanded definition encompasses “any . . . other assets.” Congress’s definition of “assets” also reflects its intent to be all-inclusive. Congress defined “assets,” as used in section 1396p, to mean “all income and resources of the individual

and of the individual's spouse." 42 U.S.C. §1396p(e)(1) (emphasis added). This definition of "assets" was added to section 1396p at the same time as the optional definition of estate that used that term. Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, §13611(c). Therefore, the scope of a claim against an estate, under the plain language of the section, necessarily includes a spouse's resources, too.⁹

Third, the expanded definition containing the phrase "to the extent of such interest" was part of legislation in which Congress fundamentally altered Medicaid estate recovery by transforming recovery from merely an option for states into a mandatory condition for receiving federal financial participation to pay the costs of Medicaid. Considering that each state would have its own separate regime for regulating these programs under their police powers, this phrase should be read as nothing more than an acknowledgement that each state would define interests in property for purposes of estate recovery. Cf. Aquilino v. United States, 363 U.S. 509, 512-13 (1960) (holding that state law controls when determining the nature of a taxpayer's interest in property sought to be reached by federal revenue statute). For all of these reasons, the optional definition and inclusive language of the statute does not preempt the scope of recovery granted under Minn. Stat. §256B.15.

⁹ The tightened restrictions and penalties for asset transfers that complement the estate recovery provisions contained in 42 U.S.C. §1396p(c) also demonstrate Congress's intent to prevent a couple's resources from being transferred to avoid future recovery — enabling those assets to be used for the recipient spouse's medical expenses, support of the community spouse, or to eventually be available for future estate recovery. See, e.g., 42 U.S.C. §1396p(c)(2)(A).

2. **Legislative history demonstrates that Congress's inclusion of the expanded estate option was intended only to facilitate recovery by superseding Citizens Action League v. Kizer, not to inhibit recovery**

A court may “consider events leading up to the legislation” when interpreting legislative intent. Sevcik v. Comm’r of Taxation, 100 N.W.2d 678, 687 (1959); see also Minn. Stat. § 645.16(1), (3) (2006) (a court may consider “the occasion and necessity for the law” and “the mischief to be remedied”).

In late 1989, the Ninth Circuit ruled in Citizens Action League v. Kizer that because Congress did not define “estate” in the federal Medicaid recovery statute the default definition had to be a state’s probate definition. Citizens Action League v. Kizer, 887 F.2d 1003, 1006 (9th Cir. 1989) cert. denied 494 U.S. 1056 (1990). This ruling was a significant obstacle to estate recovery because substantial assets, such as a home, were often not included in probate estates and thus escaped recovery. During the congressional hearings that were part of the development of OBRA 1993’s Medicaid provisions, Gerald Rohlfs, an official with the California Department of Human Services, explained that the Kizer holding required California to refund \$5 million, increased its workload, reduced its recoveries, and overall impeded estate recovery. Medicare and Medicaid Budget Reconciliation: Hearing Before the Subcomm. on Health and the Environ. of the H. Comm. on Energy and Commerce, 103d Cong. at 350 (1993). Mr. Rohlfs specifically recommended changing federal law to overcome the effect of the Kizer decision. Id. This is the only testimony or other legislative history relating to the inclusion of any definition of “estate” in OBRA 1993.

California sought a writ of certiorari which was denied. The U.S. Department of Health and Human Services' position was that Kizer was wrongly decided. Nevertheless, the Solicitor General recommended denial of certiorari because the Department believed the decision could be addressed with either an administrative regulation or by Congress passing corrective legislation.¹⁰ The expanded definition of estate in the OBRA 1993 amendments, then, were effectively the legislation that corrected Kizer by freeing states from its narrow interpretation of "estate." See Belshe v. Hope, 38 Cal.Rptr.2d. 917, 924-25 (Cal. Ct. App. 1995) (discussing Kizer and OBRA 1993).

In addition, the expanded estate option has its roots in a uniform national estate recovery program that prescribed major elements of state programs that was proposed by California Representative Henry Waxman. See H.R. 2138, 103rd Cong. 1st Sess. § 5112(c) (1993) (as introduced). The House adopted his proposal. See H.R. 2264, 103rd Cong. 1st Sess. § 5102 (1993) (as passed by the House). The final version of OBRA 93 bifurcated the definition into the mandatory minimum definition that is tied to state probate law and the optional expansive definition. Thus, the minimum definition essentially acknowledged Kizer's holding and the optional open-ended definition allowed states wide latitude to go beyond traditional probate law in their recovery efforts.¹¹

¹⁰ Brief for U.S. Department of Human Services in Opposition to Petition for Certiorari, available at <http://www.usdoj.gov/osg/briefs/1989/sg890217.txt>.

¹¹ The only explanation that has been provided for the definition's bifurcation was that some states, such as Florida, faced state constitutional barriers to recoveries from jointly owned homestead property. These states feared that their inability to make recoveries could jeopardize their federal matching funds and succeeded in persuading Congress to

(Footnote Continued On Next Page.)

Congress's inclusion of an open-ended definition of "estate" was intended to help states expand their recovery efforts beyond probate estates. The court of appeals' decisions in Barg and Gullberg, which interpret the expanded optional definition to limit recovery are, therefore, incorrect and contrary to proper preemption analysis, particularly in light of the circumstances leading to the inclusion of that definition.

3. Events and conditions leading to passage of OBRA 1993 demonstrate that Congress only intended to expand recovery, not impose new limits on recovery

Several reports requested by Congress leading up to OBRA 1993 also reflect Congress's intent to expand, not restrict, recovery with the 1993 amendments. In the mid and late 1980's, Congress instructed the Department of Health and Human Services ("HHS") and the General Accounting Office ("GAO") to study Medicaid estate recovery. HHS, Issues in Medicaid Estate Recoveries: A Report to the United States Congress, 1-2 (1989) (hereinafter "HHS, Issues in Medicaid Estate Recoveries"); GAO, Medicaid: Recoveries From Nursing Home Residents' Estates Could Offset Program Costs, at 1 (1989). These studies were aimed at identifying how estate recoveries could be an effective complement to other efforts in controlling Medicaid long-term costs, increasing non-tax revenues, and lessening the fiscal impact of spousal anti-impoverishment reforms. HHS, Issues in Medicaid Estate Recoveries at 1-2; GAO, Medicaid Recoveries at 2-3; U.S. Dep't of Health and Human Servs., Office of Inspector General, Medicaid

limit the scope of mandatory recovery to probate estates. Ira Stewart Wisener, OBRA '93 and Medicaid: Asset Transfers, Trust Availability, and Estate Recovery Statutory Analysis In Context, 47 Soc. Sec. Rep. Serv. 757, 780 n.147 (1995).

Estate Recoveries: National Program Inspection, iv (1988). These studies found that fewer than half of the states had estate recovery programs and concluded that mandating that all states implement recovery programs modeled after the most effective states could recover over half a billion dollars a year — primarily from the value of home equity. See, e.g., GAO, Medicaid Recoveries at 3-4. The absence of effective estate recovery programs was also identified as a factor in elderly not using cost-containment strategies such as private long-term care insurance or relying on family care to delay admission to costly nursing homes. HHS, Issues In Medicaid Estate Recoveries at 3.

These reports set the stage for Congress's substantial expansion of Medicaid estate recovery through amendments included in OBRA 1993. Pub. L. No.103-66, § 13612 (amending 42 U.S.C. §1396p(b)). Based on the above studies, and faced with the need to come up with program savings, administration, House, and Senate proposals all aimed to making estate recovery stronger. See Administration's 1994 Health Budget: Hearing Before the Sen. Comm. on Finance, 103d Cong. 90 (1993) (statement of Donna E. Shalala, Secretary of Health and Human Services); Medicare and Medicaid Budget Reconciliation Act of 1993, H.R. 2138, 103d Cong. §5112 (1993) (as introduced May 17, 1993 by Rep. Henry A. Waxman); Omnibus Budget Reconciliation Act of 1993, S. 1134 § 7421 (1993) (as amended June 23, 1993). The final version of OBRA 1993 was signed into law August 10, 1993.

The legislative history accompanying OBRA 1993 reflects the objective and recommendations of these reports to increase estate recovery. In the OBRA 1993

conference committee report, Congress explained the estate recovery amendments as providing that “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.” H.R. Rep. No.103-213 (1993), as reprinted in 1993 U.S.C.C.A.N. 1088, 1524 (Conf. Rep.). The home is not mentioned anywhere in the actual statute, but in its description of the effect of the expanded definition, Congress described the recoverable estate as “including the home” — indicating that the most significant marital or jointly-owned asset was entirely subject to recovery. Had Congress intended to limit such recovery, its conference report could have qualified the phrase “including the home” to read “including the individual’s interest in the home” or “including an interest in the home.”

Particularly when placed in context of the GAO’s report, Congress’s reference to “the home” is significant. The GAO report based its conclusions regarding the amount of funds recovered on the assumption that the primary source of recovery would be the home equity of recipients and their spouses See GAO, Medicaid Recoveries, at 49. The GAO’s methodology assumed recovery would include claims against the estates of surviving spouses and assumed that recovery would be from all of the property remaining after the surviving spouse has died. *Id.* Thus, a key government report to Congress leading up to OBRA ’93 was premised on full recovery. Nowhere is there evidence that Congress had a different premise underlying its statement that recovery included the home.

E. Minnesota's Estate Recovery Law Is In Harmony With Federal Medicaid Law

It is possible to comply with both Minnesota's estate recovery law and federal Medicaid law. Also Minnesota's law is not an obstacle to the accomplishment of the purposes of federal law.

1. Compliance With Both Federal And Minnesota Law Is Possible

Preemption may be found when "it is impossible for a private party to comply with both state and federal law." Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372-73 (2000) (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963)). Assuming that this element applies to a federal-state cooperative program, as opposed to regulations aimed at private conduct, Minnesota can comply with both section 256B.15 and section 1396p(b).

Federal law requires states to recover at least the amount of benefits paid for "nursing facility services, home and community-based services, and related hospital and prescription drug services" from the probate estates of recipients. 42 U.S.C. §1396p(b)(1)(B)(i). Nowhere does Congress express an intent that this mandatory scope of recovery is the exclusive scope of recovery. Minnesota's estate recovery laws concerning claims against the estates of surviving spouses go beyond these basic federal requirements without violating the only express federal prohibition, i.e. when recovery can be made. See Minn. Stat. §256B.15, subd. 3.

2. Minnesota law is not an obstacle to the federal purpose of delaying recovery to protect property for use during the lifetime of a recipient and her spouse

Preemption may also be found where, “under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Crosby, 530 U.S. 373 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). “What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.” Id.

The only purpose of the federal estate recovery provisions ever expressed by Congress is “to protect the individual and his spouse from the loss of their property, usually the home, during their lifetime.” S.Rep. No.86-1856, 1960 U.S.C.C.A.N. at 3615. Minnesota’s delayed recovery from a non-recipient spouse’s estate is no obstacle to this purpose.

3. Minnesota law helps achieve the federal objective that Medicaid no subsidize inheritances

In general, courts should construe statutes to favor the public interest over a private interest. See Minn. Stat. §645.17(5) (2006). As this Court recognized in Estate of Turner, the real parties in interest in opposing Minnesota estate recovery laws are not the actual recipient and her spouse, but rather “the disappointed nondependent devisees, legatees, and heirs of the estate.” Estate of Turner, 391 N.W.2d 767, 770 (Minn. 1986). A finding of preemption here would result in a windfall to Francis’ heirs — thereby favoring a private interest at the expense of the public interest. The Estate must present

evidence demonstrating beyond a reasonable doubt that this result was Congress's clear intent.

Such evidence does not exist. Congress has repeatedly emphasized its intention that Medicaid was never meant to allow people, including couples, to protect assets for their heirs. This policy was made clear in 1982 when Congress amended Medicaid law to loosen restrictions on placing liens on homes. See 42 U.S.C. §1396p(a)(1)(B). Congress intended this change "to assure that all of the resources available to an institutionalized individual, including equity in a home, which are not needed for the support of a spouse or dependent children will be used to defray the costs of supporting the individual in the institution." S.Rep. No.97-494, at 38 (1982), as reprinted in 1982 U.S.C.C.A.N. 781, 814 (emphasis added).

Again, in 1988, when Congress tightened restrictions on asset transfers, it stated that "Medicaid — an entitlement program for the poor — should not facilitate the transfer of accumulated wealth from nursing home patients to their non-dependent children." H.R.Rep. No.100-105 (1988), as reprinted in 1988 U.S.C.C.A.N. 857, 896. To this end, Minnesota's expressed policy mirrors Congress's intentions: "It is the policy of this state that individuals or couples, either or both of whom participate in the medical assistance program, use their own assets to pay their share of the total cost of their care during or after their enrollment in the program according to applicable federal law and the laws of this state." Minn. Stat. §256B.15, subd. 1(a).

Holding that the claim in this case, against the estate of a surviving spouse, is valid will serve to accomplish the federal purpose of ensuring that resources are used to pay for the costs of medical care. Such a holding is also consistent with the purpose of federal law only to protect property for use during the lifetimes of a recipient and her spouse — not to forever remove it, or a significant part of it, from future recovery.

In summary, analysis that is conducted with fidelity to preemption standards results in the conclusion that federal law in no way bars estate recovery beyond the parameters of Minn. Stat. §256B.15. The context of the language of the federal statute itself, coupled with the expressed legislative intent behind 42 U.S.C. §1396p support an expansive reading of estate recovery and do not support the contention that Congress intended to hinder this recovery.

IV. ALTERNATIVELY, EVEN IF GULLBERG'S FINDING OF PARTIAL PREEMPTION IS CORRECT, THE COUNTY'S CLAIM MUST STILL BE FULLY SATISFIED WITHIN THAT FRAMEWORK

Should this Court follow the court of appeals and hold that the phrase "to the extent of such interest" partially preempts Minnesota's estate recovery, the claim in this case should still be satisfied in full because Dolores had interests in property reaching to the full extent of the value of marital property or jointly owned property now in Francis' estate. The decision below, allowing only partial recovery and failing to recognize the scope of this interest, should still be reversed.

A. Dolores Barg Had A Recoverable Interest In Property In the Estate That Is An Interest In the Whole

States, not the federal government, define interests in property. The Medicaid Act does not define the term "interest" or even suggest how the "extent" of an interest in real or personal property or assets should be determined. This silence is particularly salient in a case in which the marital homestead is the primary asset and it is a surviving spouse's estate from which recovery is being sought. Without such guidance, state law must be followed in applying the term "interest" to the facts of this case and in determining the "extent" of that interest under state law for purposes of estate recovery. Cf. Aquilino v. United States, 363 U.S. 509, 51213, (1960) (holding that state law controls when determining the nature of a taxpayer's interest in property sought to be reached by federal revenue statute). For purposes of Medicaid estate recovery, Minnesota has defined a spouse's interest in marital property or former jointly-owned property in the surviving spouse's estate as reaching the entirety of that property.

The legislature provided that a claim such as the County's is limited to the value of "marital property or jointly owned property at any time during the marriage. Minn. Stat. §256B.15, Subd. 2. The plain language of the statute unambiguously reflects an intent that the entirety of marital or jointly owned property be subject to recovery. This intent is clear because defining the value of claims in this manner necessarily leads to recovery from the whole of those assets.

This clarity is evident in a number of ways. The provision in question was added to the estate recovery statute in 1987 to address a court of appeals decision requiring express authorization for a claim against a community spouse's estate. Estate of Jobe, 590 N.W.2d 162, 164 n.1 (Minn. Ct. App. 1999). In making this addition, the legislature chose a term that already had a statutory definition. See Minn. Stat. §518.54, subd. 5 (1986) (defining "marital property") recodified at Minn. Stat. §518.003 (2006). Indeed, this is still the only statutory definition of the term. Thus, the two statutes are inextricably related because they use the same specific term, and reference to the "marital property" definition is appropriate in construing the legislature's intention. See Bd. Of Educ. Of Minneapolis v. Sand, 34 N.W.2d 689, 694 (1948) (courts may look to other statutes when term left undefined).

Any doubt that the legislature intended that an institutionalized spouse's interest be an interest in the whole of marital property should be dispelled by the legislature's clear directive that recovery laws and laws "involved" in recovery be construed liberally to achieve their purposes. Minn. Stat. §256B.15, subd. 1(a)(4). Applying that directive

here, the combination of recovery statutes and the incorporated definition of marital property require a holding that fulfills the legislature's intention that each spouse has an undivided interest in marital property and that the recipient spouse's undivided interest allows recovery up to the full value of the marital property in the surviving spouse's estate. See Minn. Stat. §256B.15, subd. 2; see also Minn. Stat. §645.16 (the object of statutory interpretation is to realize the legislature's intent).¹²

Minnesota's use of "marital property" to determine the scope of a recovery claim is a valid exercise of state power to define the recoverable interest for the purpose of Medicaid estate recovery. Minnesota created a specific claim and defined what property interests can be used to satisfy the claim. At the same time, Minnesota has created an interest in marital property — consistent in scope with federal Medicaid law — for purposes of satisfying that claim as part of estate recovery.

In Barg, the court of appeals found that the institutionalized spouse's interest was defined using principles of real property, stating that the application of marital property or probate principles presented "problems." 722 N.W.2d at 497. However, in so holding the court improperly elevated property law concepts in disregard to the estate recovery

¹² Furthermore, using marital property's presumption of an undivided interest in the whole to define, for the purposes of recovery, a recipient spouse's interest in marital property is proper considering how the legislature has otherwise prioritized Medicaid recovery from a homestead. A homestead is generally protected from the claims of creditors without regard to which spouse holds title or which spouse is the debtor. Minn. Stat. §510.04 (2006). The legislature, however, includes Medicaid recovery claims among the few exceptions to this exemption. Minn. Stat. § 510.05 (2006). This exception is not limited to a half-interest in the homestead but results in the whole of the homestead being subject to a claim.

statute directing the scope of recovery. *Contra* Estate of Laughead, 696 N.W.2d 312, 317 (Iowa 2005); Bonta v. Burke, 120 Cal.Rptr.2d 72, 76 (Cal. Ct. App. 2002). Although property law developed through common law, common law notions of property cannot prevail over statutes that have since displaced or modified the common law. See Jobe, 590 N.W.2d at 166 (citing State v. Soto, 378 N.W.2d 625, 628 (Minn. 1985)).

B. Joint and Several Liability Of Spouses Requires Full Recovery From Marital Property

Even if the Court concludes that Dolores had only a proportional ownership interest in property in Francis' estate, Francis' joint and several liability for Dolores' necessary medical expenses allows recovery from the remaining interest held by Francis. Although generally a spouse is not liable for the debts of the other spouse, an exception is "for necessary medical services that have been furnished to either spouse." Minn. Stat. §519.05 (2006). For these debts, a husband and wife are jointly and severally liable. *Id.* Such liability is congruent with how the legislature has defined a couple's mutual responsibility for Medicaid recoveries. See Minn. Stat. §256B.15, subd. 2; see also Minn. Stat. §256B.15, subd. 1(a) (stating that "It is the policy of this state that individuals or couples, either or both of whom participate in the medical assistance program, use their own assets to pay their share of the total cost of their care during or after their enrollment in the program according to applicable federal law and the laws of this state."). Joint and several liability is also consistent with other federal Medicaid provisions such as the general presumption of spousal support, 42 U.S.C. §1396a(a)(17)(D), and that the assets of either spouse, regardless of title, are considered

available for purposes of determining long-term care benefit eligibility, 42 U.S.C. §1396r-5(c)(1)(A)(i). Indeed, the United States Supreme Court has described spousal support as Medicaid's "background principle." Wisconsin Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473, 494 (2002).

Spousal liability for medical expenses also exists under the common law. Plain v. Plain, 240 N.W.2d 330, 332-33 (Minn. 1976). This Court has recognized that this duty is sufficient to support recovery by public authorities from a husband for public assistance given to his wife. County of Brown v. Siebert, 220 N.W. 156, 157 (Minn. 1928). Thus, spousal support for these types of medical expenditures has a long legacy in Minnesota.

Joint and several liability of spouses applies here in several ways. First, the Medicaid statutory scheme itself is built on the background principle of spousal support, meaning that Congress is unlikely to have intended, when the recovery claim concerns a spouse's joint assets, to treat the community spouse as it would a non-spouse by precluding recovery from that spouse's interest in marital property. Second, because a spouse has a shared undivided common interest in the entirety of marital property, the greatest extent of this interest is to reach the whole of the property; this does not offend principles of equity given the inter-spousal joint and several liability. Third, even assuming the court of appeals correctly held that Dolores had only a one-half interest in real property jointly owned with Francis, the principles of joint and several liability of spouses would permit his interest in the property to be reached as well, to the extent necessary to satisfy the recovery claim.

C. If Joint Tenancy Provides The Basis For Dolores' Interest, The Court of Appeals Erred By Measuring That Interest As One-Half When, During Concurrent Ownership, A Joint Tenant's Ownership Interest Is Over The Whole Of The Property

The court of appeals concluded, as did the district court, that the Dolores' quit claim deed of her joint tenancy interest to Francis was a transfer by an "other arrangement" within the meaning of 42 U.S.C. §1396p(b)(4)(B)'s expanded definition of estate. See Barg, 722 N.W.2d at 496; see also AA36 (district court order concluding transfer was "other arrangement"). The court of appeals then concluded that Dolores's estate "retained a joint-tenancy interest in the homestead at the time of her death" for purposes of Medicaid estate recovery. Barg, 722 N.W.2d at 497.

The County agrees that Dolores Barg's estate retained at least a joint tenancy interest in the homestead property. See AA7-9 (deeding the property to the Bargs as joint tenants with the right of survivorship). The court of appeals, however, erroneously concluded that the extent of her joint tenancy interest, and consequently the extent of estate recovery, was a one-half interest. Barg, 722 N.W.2d at 497. The court of appeals appeared to assume that joint tenants' only ownership interests are proportional shares, but that assumption does not reflect ownership status during ownership, as opposed to at the time of a partitions or the conversion of a joint tenancy into a tenancy in common. See generally Minn. Stat. Ch. 558 ("Partition of Real Estate"). In practice, if this common assumption were so, then the extent of ownership interests would be identical to a tenancy in common. Yet, a joint tenant's interest is not the same as that of a common tenant's ownership interest. Because the court of appeals operated from a misapplication

of the joint tenancy interest, additional explanation of the value of this interest is warranted.

A joint tenant's interest "rests upon the original conveyance" and thus does not arise from a transfer from the estate of a predeceased joint tenant. Anderson v. Grasberg, 78 N.W.2d 450, 455 (Minn. 1956). The highest courts in many states have held that a joint tenant's interest is considered an undivided interest in the whole of the estate. See Brown v. Vonnahme, 343 N.W.2d 445, 451 (Iowa 1984) ("a joint tenant owns an undivided interest in the entire estate"); Longacre v. Knowles, 333 S.W.2d 67, 70 (Mo. 1960) (joint tenants have but one estate; they hold by the moiety or half and by the whole); Downing v. Downing, 606 A.2d 208, 211 (Md. 1992) ("[j]oint tenancy means that each joint tenant owns an undivided share in the whole estate, has an equal right to possess, use, and enjoy the property, and has the right of survivorship" (citing 2 Herbert T. Tiffany, The Law of Real Property § 418, 419 (Basil Jones ed., 3d ed. 1939))).

The Maryland Court of Special Appeals explained the origins of joint tenancy in ways relevant to the valuation of property interests here. Spessard v. Spessard, 494 A.2d 701, 705 (Md. Ct. App. 1985). The law of real property has its roots in English common law with its feudal concepts concerning property. Id.; see also Davidson v. Minnesota Loan & Trust Co., 197 N.W. 833, 834 (Minn. 1924) (recognizing that feudal common law rules concerning interests in real property "still determine, to a large extent, the rights and obligations arising from the relation of a landlord and tenant"). The Maryland court explained that "Feudal society favored [joint] tenancy over other forms of co-ownership,

because it was based upon the legal fiction that all of the grantees together constituted one entity.” Id. By contrast, the “tenancy in common was disfavored in feudal times because, unlike the joint tenancy, the co-owners had separate interests—they did not comprise a single entity, and there was no survivorship feature.” Id. Modern joint tenancy “has substantially the same characteristics as it did in feudal times: ... joint tenants are both seized of the whole property and have equal undivided interests in it.” Id. (emphasis added).

The Kentucky Supreme Court further explains the distinct nature of the joint tenancy interest, in reference to a tenancy by the entirety, in which “the survivor takes the entire estate at the death of the deceased co-tenant *not* by virtue of that death, but because, in law, each was viewed to own the *entire* estate from the time of its creation.” Sanderson v. Saxon, 834 S.W.2d 676, 678 (Ky. 1992).

The North Dakota Supreme Court explained that “The interest of two joint tenants is not only equal or similar, but is also one and the same. * * * [W]hile it continues, each of two joint tenants has a concurrent interest in the whole” Jamestown Terminal Elevator, Inc. v. Knopp, 246 N.W.2d 612, 613-14 (N.D. 1976). This characterization reflects the fundamental qualities of the joint tenancy form of concurrent ownership. These qualities are aptly described by Blackstone:

But, while it continues, each of two joint tenants has a concurrent interest in the whole; and therefore, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest, which the survivor originally had, is clearly not divested by the death of his companion; and no other person can now claim to have a joint estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking

effect at the same time as his own; neither can anyone claim a separate interest in any part of the tenements, for that would be to deprive the survivor of the right which he has in all, and every part. As, therefore, the survivor's original interest in the whole still remains; and as no one can now be admitted, either jointly or severally, to any share with him therein, it follows that his own interest must now be entire and several and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.

Knopp, 246 N.W.2d at 613-14 (quoting 2 W. Blackstone, Commentaries 184-85) (emphasis in original).

Blackstone's explanation of joint tenancy, as reflected in Knopp, includes the notion that each joint tenant has an interest in the entire property. This can be contrasted with an interest in common, under which each tenant has an individual proportional interest in the property. The right of survivorship contributes this key difference. A surviving joint tenant's interest in the whole is not acquired from the deceased joint tenant, but arises out of the interest the survivor held from the creation of the joint tenancy.

Thus, A joint tenant's interest in concurrently owned property is an undivided interest in the whole of that property. Each joint tenant has an interest in the entire property. The extent of a joint owner's interest in property is therefore co-extensive with the property.¹³ Each joint tenant has an equal right to share in the enjoyment of the whole of the property, for his or her life, when property is held in joint tenancy. 48A

¹³ NB: Minn. Stat. §256B.15, subd. 1h (2006) treats the extent of a nonspouse joint tenant's interest as if it were a tenancy in common. That provision only applies when a joint tenant is a nonspouse, if the joint tenant is a spouse, then section 256B.15, subdivision 2, applies.

C.J.S. Joint Tenancy 2 (1981). For purposes of estate recovery, the question is not the extent of Dolores' ownership interest at the time of a partition or severance, rather it is the extent of Dolores' interest during her concurrent ownership. See 42 U.S.C. §1396p(b)(4)(B) (allowing states to define "estate" for purposes of recovery 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 death¹⁴ (to the extent of such interest)")." Therefore, the question is what is the extent of a joint tenant's interest in jointly owned property during the period of concurrent ownership. The value of Dolores' interest as a joint tenant reaches an undivided interest in the whole.

The court of appeals cited Kipp v. Sweno, 683 N.W.2d 259, 263 (Minn. 2004) as authority for the proposition that a joint tenant has only an undivided one-half interest in a property. Barg, 722 N.W.2d at 497. The issue in Kipp, however, was the exercise of the homestead exemption by a debtor spouse and a creditor's ability to force s severance of a joint tenancy to effect a sale of the property despite the presence of a non-debtor spouse. Kipp, 683 N.W.2d at 260. Kipp's reference to a "one-half interest" appears to be derived from the facts of that case, in which the debtor spouse, through filing a certificate of ownership and designation of homestead, claimed "an 'undivided one-half interest' in the property." Id. at 261. Because Kipp did not concern the issue of the

¹⁴ "[A]t the time of death' must be construed to mean a point in time immediately before death. Any other reading of this phrase would render the estate recovery statute meaningless because upon death, property immediately passes to beneficiaries." In re Barkema Trust, 690 N.W.2d 50, 56 (Iowa 2004) (citing Estate of Gullberg, 652 N.W.2d 709, 713 n.1 (Minn. Ct. App. 2002)).

extent of a joint tenant's interest during concurrent ownership, the reference to an undivided one-half interest should be limited to the facts of that case. See Phalen Park State Bank v. Reeves, 251 N.W.2d 135, 141 (1977) (holding in that case resulted from, and is limited to, the unique facts and circumstances presented).¹⁵

¹⁵ In addition, Kipp's focus on construing the homestead exemption also makes that case, to the extent it may appear to relate to issues here, inapposite because a Medicaid recovery claim is specifically excepted from the application of the homestead exemption. See Minn. Stat. §510.05 (2006) (providing that “[s]uch homestead exemption shall not extend to a claim filed pursuant to section 256B.15”).

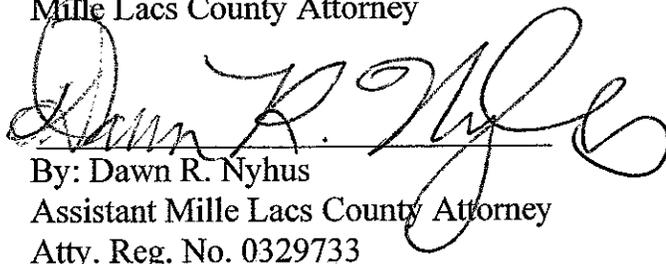
CONCLUSION

For the reasons set forth above, Mille Lacs County respectfully requests that this Court confirm that Minnesota's estate recovery statute is not preempted by federal law, and that the scope of permissible recovery is from the entirety of marital property and joint property now held in the community spouse's estate. As the court below failed to properly recognize this interest or recovery to the fullest extent under this interest, Mille Lacs County also respectfully asks this Court to reverse the decision of the court of appeals and remand this matter back to the district court for payment of its estate recovery claim in full.

Dated: 3/12/07

Respectfully submitted,

JANICE S. KOLB
Mille Lacs County Attorney


By: Dawn R. Nyhus
Assistant Mille Lacs County Attorney
Atty. Reg. No. 0329733

Courthouse Square
525 2nd Street Southeast
Milaca, MN 56353
ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE

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

The undersigned certifies that the Brief submitted herein contains 13,724 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 2003, the word processing system used to prepare this Brief.

A handwritten signature in cursive script, appearing to read "Dawn R. Nyhus", written over a horizontal line.

DAWN R. NYHUS
Assistant Mille Lacs County Attorney