

No. A05-2346

JUN -9 2008

STATE OF MINNESOTA
IN SUPREME COURT

FILED

In re the Estate of:

Francis E. Barg, a/k/a Francis Edward Barg

APPELLANT'S PETITION FOR REHEARING

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TO: The Supreme Court of the State of Minnesota.

Pursuant to Minnesota Rule of Civil Appellate Procedure 140.01, Appellant Mille Lacs County petitions for rehearing of the holding in Section III of *In re Estate of Barg* that Minnesota Statutes section 256B.15, subdivision 2, is partially preempted by federal law.¹ This petition is based on the following three grounds:

1. The Court's opinion overlooked, failed to consider, or misapplied a controlling federal statute, namely 42 U.S.C. § 1396p(e)(1) (2000). That statute defines the term "asset," as it is used throughout section 1396p, to expressly include the resources of *both spouses*, regardless of whether both spouses actually applied for or received Medicaid benefits. *Id.* The Court's analysis relies upon the expanded estate option found at 42 U.S.C. § 1396p(b)(4)(ii) (2000), which uses the term "assets" to describe the scope of the expanded recovery option. That analysis, however, is without any reference the statutory definition of "assets" that is plainly applicable and controlling.

2. The Court's opinion overlooked, failed to consider, or misapplied the principle of law that a statutory provision must be interpreted in context and harmonized with related provisions. The Court's analysis of subsection 1396p(b)(4)(ii) does not address related statutes regarding treatment of spousal assets, which demonstrate that recovery reaching up to the resources of both spouses is consistent with the federal Medicaid scheme. The related provisions are: 42 U.S.C. § 1396a(a)(17)(D) (2000), allowing states to consider the financial responsibility of spouses for each other; 42

¹ The Commissioner of Human Services supports this petition.

U.S.C. § 1396r-5(c)(2)(A) (2000), requiring that all spousal assets be considered presumptively available for the care of an institutionalized spouse regardless of formal ownership; 42 U.S.C. § 1396p(c)(1)(A) (2000), requiring that transfer by either spouse of any asset to a third party result in an eligibility penalty; 42 U.S.C. § 1396p(e)(1), defining “assets” to include the resources of *both* spouses.

3. The Court’s opinion overlooked, failed to consider, or misapplied the federal government’s specific and express approval of Minnesota’s scope of spousal recovery. *Transmittal and Notice of Approval of State Plan Material*, Transmittal No. 07-005 (June, 27, 2007); attached as Exhibit E to the Second Affidavit of Jan Taylor, at pp. 11-12 (“Transmittal No. 07-005”). The federal government addressed the precise question before the Court and determined that recovering from the full extent of marital assets in a community spouse’s estate does not conflict with federal Medicaid law.

Rehearing is crucial in this case because the effect of the Court’s opinion is onerous and inequitable. First, the Commissioner of Human Services estimates that the limitation on the scope of recovery from community spouses’ estates imposed by the *Barg* decision will reduce Minnesota’s annual Medical Assistance recoveries by an excess of \$4 million. This money will be unavailable to federal, state, and county governments to ensure that all truly needy persons receive financial help and adequate medical care. Second, the decision creates inequitable recovery outcomes for Minnesotans. Couples who are fortunate enough to have one healthy spouse will escape recovery, while in which both spouses need Medical Assistance will be subject to recovery from all their assets. Finally, the near universal practice of the transfer of title

from a recipient spouse to the community spouse, though permitted, was never intended to create a loophole to eventual recovery after the community spouse passes away. “To do so ‘would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.’” *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631, 93 S.Ct. 2469, 2484 (1973) (quotation marks omitted).

DISCUSSION

I. THE COURT OVERLOOKED THAT CONGRESS HAS SPECIFICALLY DEFINED THE TERM “ASSETS” TO INCORPORATE *BOTH* SPOUSES’ RESOURCES.

The Court’s opinion overlooks subsection 1396p(e)(1). This provision expressly incorporates spousal resources into the expanded estate option, which states that the term “estate” “may include, at the option of the State, . . . any other real and personal property *and other assets* in which the individual had any legal title or interest at the time of death” 42 U.S.C. § 1396p(b)(4)(ii) (emphasis added)²; Slip op. at 29.

² Because formal ownership of a spousal asset is irrelevant for Medicaid purposes, *see, e.g.*, 42 U.S.C. §§ 1396p(c)(1)(A) (asset transfer) and 1396r-5(c)(2)(A) (eligibility), the phrase “in which the individual had any legal title or interest” means “in which [either or both spouses] had any legal title or interest.”

The “at time of death” clause means at the time of the recipient spouse’s death because, at that point, the spousal relationship ends. Minnesota gives effect to the “at time of death” clause by excluding from recovery any asset attributable to a surviving spouse’s subsequent remarriage or that was otherwise acquired with nonmarital resources. Transmittal No. 07-005 at 12. Other states comply with this limit differently. South Dakota, for example, allows the surviving spouse to petition within six months of the death of the recipient spouse to limit the financial responsibility of the estate of the surviving spouse so that it “may not exceed the value of the estate of the surviving spouse as of the date of the death of the medical assistance recipient.” S.D. Codified Laws § 28-6-23.1 (2007) (enacted in 1997).

Subsection 1396p(e)(1) states that anywhere the term “assets” is used in section 1396p, it, “with respect to an individual, includes all income and resources³ of the individual *and of the individual’s spouse.*” 42 U.S.C. § 1396p(e)(1) (emphasis added). This definition of “assets,” applying to all of section 1396p,⁴ was adopted *at the same time* as – and within three pages of – subsection 1396p(b)(4)(ii), which uses the term “assets.” *Omnibus Budget Reconciliation Act of 1993*, Pub. L. No. 103-66, § 13611(c), (adding definition of “assets”); § 13612(c) (adding expanded estate option), 107 Stat. 312, 626, 628 (1993).

The Court’s opinion does not once mention this controlling federal definitional statute.

II. THE PRINCIPLE OF LAW THAT STATUTES ARE INTERPRETED IN CONTEXT AND IN HARMONY WITH RELATED PROVISIONS REQUIRES THAT OTHER SPOUSE-RELATED MEDICAID PROVISIONS BE CONSIDERED.

In addition to overlooking and failing to consider the definition of “asset” in subsection 1396p(e)(1), the Court’s opinion overlooked and failed to consider the Medicaid statutory context and related federal Medicaid provisions. Other Medicaid provisions relating to spousal assets establish that Medicaid law does not prohibit states

³ The term “resources” includes “the home.” *See* 42 U.S.C. § 1396p(e)(5) (providing that “[t]he term ‘resources’ has the meaning given such term in section 1382b of this title, without regard (in the case of an institutionalized individual) to the exclusion described in subsection (a)(1) of such section.” The exclusion that is referenced is “the home (including the land that appertains thereto).” 42 U.S.C. § 1382b(a)(1) (2000)).

⁴ *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60-61, 125 S.Ct. 460, 467 (2004) (describing Congress’s terminology for parts of a section).

from seeking recovery from spousal assets, even though the recipient spouse does not have formal ownership interests at the time of her death.

It is a fundamental principle of law that a statute must be interpreted in light of the context of related provisions and the overall statutory scheme. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35-36, 118 S.Ct. 956, 962 (1998) (stating that a “central tenet” of interpretation is “that a statute is to be considered in all its parts when construing any one of them.”). Literally construing isolated words in a statute often defeats rather than effects legislative intention. *Stafford v. Briggs*, 444 U.S. 527, 535, 100 S.Ct. 774, 780 (1980). “[I]t is well settled that, in interpreting a statute, [a] court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law. . . .” *Id.* (quotation marks omitted). An interpretation of a provision in isolation from other related provisions should be rejected, with guidance not from “a single sentence or member of a sentence, but [from] the provisions of the whole law, and [from] its object and policy.” *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185, 92 S.Ct. 383, 400-01 (1971).

The other Medicaid provisions that relate to the treatment of spouses and spousal assets all allow or require states to consider those resources to be available to pay for the care of the recipient spouse, *regardless* of formal ownership. These provisions include subsection 1396p(e)(1)’s definition of “assets,” discussed above, and the following:

- Subsection 1396a(a)(17)(D) allows states to take into account the financial responsibility of a spouse even though it generally prohibits states from considering the responsibility of other relatives.
- Subsection 1396r-5(c)(2)(A) requires that “all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse.”
- Subsection 1396p(c)(1)(A) imposes an eligibility penalty for a transfer of assets at less than fair market value by either spouse to a third party.

No Medicaid provision *prohibits* states from eventually seeking the use of all spousal assets through recovery to pay for a recipient spouse’s care, with the limited exception for assets and income to support the community spouse during that spouse’s lifetime. *See, e.g.*, 42 U.S.C. § 1396r-5(f)(1) (2000) (allowing transfer of resources to community spouse or for the sole benefit of the community spouse). Indeed, the above Medicaid provisions demonstrate a general Medicaid policy that a spousal asset *can* be used to pay for a recipient spouse’s care, even though the recipient spouse does not formally own the asset. Congress did not require states to seek recoveries from community spouses’ estates, but nonetheless left that as an option. Of course, Minnesota’s recovery law seeks repayment only after both spouses have passed away and only from spousal assets that were marital property.

The Court’s opinion overlooks these statutory provisions and the statutory context they provide when construing the intended scope of the key Medicaid provision. No reference is made to subsection 1396a(a)(17)(D) and only passing reference is made to

subsections 1396r-5(c)(2)(A) and 1396p(c)(1)(A) – without discussion of their role as providing context for the scope of recovery question.⁵

The principle of law that a statutory provision must be interpreted in context and harmonized with related provisions means that the plain language analysis in the Court's opinion must be expanded to consider the full statutory context of how Medicaid treats spousal assets. The Court's opinion focuses on isolated words and phrases to the exclusion of the entire context. Consideration of the complete context requires that the expanded estate option of subsection 1396p(b)(4)(ii) be interpreted to include recovery even from assets in which the recipient spouse did not have an interest as long as the community spouse did at the time of the recipient spouse's death (and the asset is in the community spouse's probate estate). This interpretation harmonizes the expanded estate option with the overall Medicaid statute's treatment of spousal assets. *See Weinberger*, 412 U.S. at 631-32, 93 S.Ct. at 2484 (stating that the Supreme Court's "task in interpreting separate provisions of a single Act is to give the Act the most harmonious, comprehensive meaning possible in light of the legislative policy and purpose."

⁵ After describing the latter two provisions, the Court's opinion stated that "Medicaid thus balances the obligation of community spouses to contribute to the payment of medical expenses for their recipient spouses against the accommodation of the community spouse's need to provide for his or her own support." Slip op. at 8. This statement is correct as it applies to the period when one or both spouses are living. The provisions do not mean, however, that once the purpose of providing support for one or both spouses ends, that those assets that were preserved during their lifetimes to provide such support are prohibited from being recovered should a state choose to do so. *See In re Estate of Jobe*, 590 N.W.2d 162, 166 (Minn. Ct. App.) *rev. denied* (Minn. 1999) (holding that the policy of preventing the community spouse's impoverishment ceases at that spouse's death and that the recovery of Medical Assistance then assumes priority).

(quotation marks omitted)). Furthermore, at a minimum, these provisions require a holding that subsection 1396p(b)(4)(ii) is ambiguous about whether the scope of spousal recovery is limited to only assets in which the recipient spouse had an interest at the time of death. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-41, 117 S.Ct. 843, 846 (1997) (stating that plainness or ambiguity is determined from context, with coherence and consistency of the overall statutory scheme also considered).

III. THE EXPRESS AND PRECISE FEDERAL APPROVAL OF MINNESOTA'S SCOPE OF SPOUSAL RECOVERY MUST BE GIVEN DEFERENCE.

On June 27, 2007, the Secretary of the United States Department of Health and Human Services, acting through his delegee, the Centers for Medicare and Medicaid Services ("CMS"), approved an amendment to Minnesota's State Medicaid Plan. The State Plan is the controlling document for the federal-state relationship in which federal funds match state funds for Medical Assistance. Congress has delegated to the Secretary substantial authority and responsibility for administering Medicaid and determining state compliance with Medicaid's statutory conditions.

The approved amendment *expressly incorporates* Minnesota's scope of spousal recovery provisions into the State Plan. Federal approval is premised on a determination that the amendment's provisions comply with federal Medicaid statutory conditions. The State Plan now includes the following description of Minnesota's estate recovery as it applies to nonrecipient spouses:

Minnesota also recovers from the estate of the deceased spouse of a predeceased Medicaid recipient according to Minnesota Statutes §256B.15. Recovery of a claim against the estate of a spouse who did not receive medical assistance ("nonrecipient spouse"), for medical assistance paid on

behalf of his or her predeceased spouse, applies to the full value of all assets and interests in the estate of the nonrecipient spouse that were property of or can be traced to property held by the recipient spouse or the nonrecipient spouse or both during the marriage. *Any assets, proceeds of assets and income from such assets, that were jointly owned property at any time during the marriage or marital property including all property in which either spouse had an interest at the time of marriage and property acquired by either or both during the marriage, regardless of how acquired, titled or owned are subject to recovery.* Recovery in the estate of the nonrecipient spouse does not apply to assets attributable to a subsequent spouse when the nonrecipient spouse has remarried, or to assets acquired individually with non-marital assets or interests by the nonrecipient spouse after the death of the recipient spouse.

Transmittal and Notice of Approval of State Plan Material, Transmittal No. 07-005 (June, 27, 2007); attached as Exhibit E to the Second Affidavit of Jan Taylor, at pp. 11-12 (emphasis added).

The federal government has thus expressly addressed the precise question before the Court and determined Minnesota and federal law do *not* conflict. Moreover, if the Medicaid provisions discussed above show that federal Medicaid law is ambiguous about the scope of spousal recovery, long-established precedent requires that the Court defer to CMS' determination that no conflict exists and, therefore, no preemption occurs. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980, 125 S.Ct. 2688, 2699 (2005).

Because the Court's opinion makes no reference to the June 27, 2007, State Plan Amendment approval, the Court should grant rehearing and reconsider its decision.

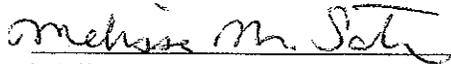
CONCLUSION

Mille Lacs County respectfully requests that the Court grant rehearing.

Dated: June 9, 2008

Respectfully submitted,

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