

No. A05-2346

STATE OF MINNESOTA
IN SUPREME COURT

In re the Estate of:

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

APPELLANT'S SUPPLEMENTAL BRIEF

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QUESTIONS PRESENTED

A. What is the relationship, if any, between the 2003 and 2005 amendments to Minn. Stat. § 256B.15, particularly subdivisions 1 and 1c-1k regarding real property a predeceased spouse owned as a life tenant or a joint tenant with right of survivorship, and the authority appellant argues exists under section 256B.15, subdivisions 1a and 2, to recover Medical Assistance payments made to a predeceased spouse against the estate of a nonrecipient surviving spouse, and how, if at all, does that relationship affect the preemption analysis regarding appellant's authority under section 256B.15, subdivisions 1a and 2?

B. Does the limitation of the scope of subdivisions 1c-1k to life estates and joint tenancies, see, e.g., Minn. Stat. § 256B.15, subd. 1(c) (2006), affect the scope of the recovery authority granted in subdivisions 1a and 2, in general and specifically as applied to the facts of this case?

C. Does the limitation of the scope of subdivisions 1c-1k to life estates and joint tenancies established on or after August 1, 2003, see Minn. Stat. § 256B.15, subd. 1(c) (2006), affect the scope of the recovery authority granted in subdivisions 1a and 2, in general and specifically as applied to the facts of this case?

ARGUMENT

I. BENEFIT RECOVERY CLAIMS MADE IN THE PROBATE ESTATES OF NONRECIPIENT SPOUSES ARE NOT DIRECTLY AFFECTED BY, OR SUBJECT TO, THE 2003 AMENDMENTS TO MINN. STAT. § 256B.15

Minnesota's post-death benefit recovery statute makes the probate assets of a surviving spouse liable for repayment of the value of Medical Assistance ("MA") benefits received by his predeceased spouse — regardless of whether he himself received MA benefits. Minn. Stat. § 256B.15, subd. 1a (2006). A recovery claim in the surviving spouse's probate estate is specifically required by statute and is distinct from a claim in a recipient's probate estate. Id.

Any limit on a claim against the assets of a surviving spouse is independent of any limits originating with the 2003 amendments to Minn. Stat. § 256B.15. First, any recovery is delayed until after the death of the surviving spouse and when there are no dependent children. Minn. Stat. § 256B.15, subd. 3 (2006). Second, the amount of the claim cannot be for more than the value of the total benefits received by the couple. Minn. Stat. § 256B.15, subd. 2. Third, the ceiling on recovery from a claim in the probate estate of a spouse who did not himself receive benefits is the value of assets in that spouse's probate estate that were marital property or that were jointly owned during the couple's marriage. Id.

Appellant Mille Lac County's claim in this case is made pursuant to and constrained only by these provisions. This authority is independent of the 2003 amendments to the recovery statute.

The legislature's 2003 amendments to sections 256B.15 (recovery claims) and 514.981 (recovery liens) do not affect a claim, like the one in this case, for recovery of benefits from marital assets in the probate estate of a surviving nonrecipient spouse. Act of June 5, 2003, ch. 14, art. 12 §§ 40-52, 90; 2003 Minn. Laws (1st Sp. Sess) 1751, 2205-18, 2250-51. These amendments focused on ensuring that the joint tenancies and life estates in real property held by Medical Assistance ("MA") recipients would be subject to recovery of MA benefits after their deaths. See, e.g., Minn. Stat. § 256B.15, subd. 1d(2)(2) (providing that continuation of life estate and joint tenancy interests is only for purpose of benefit recovery). Before the amendments, state law did not provide a means of recovering from those interests when a MA recipient died. See Dep't of Human Servs., Bulletin #03-19-01: M.A. Recovery Laws Broadened; Recovery Extended to Alternative Care, at 2 & 3 (Aug. 14, 2003) (available in addendum).

The specific mechanisms that continue joint tenancy and life estate interests for purposes of recovery are MA liens and the newly created Notice of Potential Claim (NPC). If a lien or NPC is filed, the recipient's existing life estate or joint tenancy interest is continued for purposes of recovery. See Minn. Stat. § 256B.15, subds. 1c, 1g, 1h, 1i, § 514.981, subd. 6(c). (Importantly, a recipient's joint tenancy or life estate interest is not continued simply as a matter of law, but only when a lien or NPC is filed and made part of the public record.) These mechanisms reflect the function of the 2003 amendments as capturing interests in property that traditionally dissipate at death and are therefore not probate assets against which a claim could be made.

The legislature intended that the 2003 amendments address situations different from those found in spousal recoveries. Such mechanisms as provided by the 2003 amendments are unnecessary to recover from the value of marital assets in a surviving spouse's probate estate, as required by Minn. Stat. § 256B.15, subds. 1a and 2. The assets that are liable to satisfy recovery of the benefits are already in the probate estate, hence there is no need to bring them into probate.

In addition, the continuation of joint tenancy interests under the 2003 amendments does not apply to homestead property that is jointly owned with a surviving spouse who continues to reside in the home. Minn. Stat. § 256B.15, subd. 1(a)(6) (2006);¹ Minn. Stat. § 514.981, subd. 6(c)(8) (2006). Because of this exemption, generally the only means of effecting recovery from what is usually the most significant asset remaining after eligibility is through a recovery claim against the surviving spouse's estate.

¹ Minn. Stat. § 256B.15, subd. 1(a)(6) provides, in part, that:

the provisions of subdivisions 1c to 1k continuing a recipient's joint tenancy interests in real property after the recipient's death do not apply to a homestead owned of record, on the date the recipient dies, by the recipient and the recipient's spouse as joint tenants with a right of survivorship. Homestead means the real property occupied by the surviving joint tenant spouse as their sole residence on the date the recipient dies and classified and taxed to the recipient and surviving joint tenant spouse as homestead property for property tax purposes in the calendar year in which the recipient dies.

II. THE 2003 AMENDMENTS DO RELATE TO THE COURT'S PREEMPTION ANALYSIS IN THAT THEY DEMONSTRATE THAT MINNESOTA HAS USED ITS SOVEREIGN POWERS TO VALIDLY DEFINE INTERESTS SUBJECT TO RECOVERY IN SUBDIVISION 2'S SCOPE OF RECOVERY PROVISION

Although the 2003 amendments do not have a direct relation or affect on spousal recoveries, they do demonstrate how Minnesota has used its sovereign power to determine what interests in property are liable for benefit recovery. In particular, the 2003 amendments highlight that Minnesota has, for real property in joint ownership and with remaindermen, identified the dividing line between the extent of the interests that are subject to recovery and those held by nonspouses that are not liable. However, this relatedness is only relevant if federal Medicaid law imposes an unambiguous condition.

A. The Preemption Issue Is Whether Federal Medicaid Law Contains A Clear Condition On Federal Funds That Prohibits Minnesota From Making The Probate Estate Of A Surviving Spouse Liable For the Recovery Of The Medicaid Benefits Paid On Behalf Of His Spouse

The United States Supreme Court long ago stated that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. [citations omitted] By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 1540 (1981). Minnesota's recovery law makes the probate estate of a surviving spouse liable for repayment of the MA benefits paid on behalf of his predeceased spouse. Minn. Stat. § 256B.15, subd. 1a. If the surviving spouse did not himself receive MA benefits, then such liability is limited to the extent his probate estate contains assets that were either marital property or were jointly owned during the couple's marriage. Minn.

Stat. § 256B.15, subd. 2. Therefore, the preemption issue in this case is whether federal Medicaid unambiguously imposes a condition on Minnesota's receipt of federal funds that prohibits Minnesota from exercising its sovereign power to make a spouse's probate estate liable to the extent it contains marital property or jointly held property.

1. The Unambiguous Conditions Of Federal Medicaid Law Do Not Contain Any Limitations On How A State May Recover The Benefits Expended On Behalf Of The Class of Recipients Aged 55 And Older

Reading the federal Medicaid provisions that are disputed in this case does not reveal any unambiguous conditions that prohibit Minnesota's spousal recovery laws. The "No adjustment or recovery" clause that the Estate and its amici focus on does not apply in this case because the MA benefits for which recovery is sought are not those paid on behalf of a member of the general MA population. Rather, the benefits paid on behalf of Dolores Barg are within the broad exception to that clause that actually mandates states to seek recovery of those benefits paid on behalf of the class of recipients who were age 55 or older when they received the benefits.

Subsection (b)(1) provides that:

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

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

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

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

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

(C) [beneficiaries of long-term care insurance policies who also receive Medicaid benefits]

42 U.S.C. § 1396p(b) (2000) (emphases added)

This subsection supports three points. First, the beginning of this subsection makes a distinction between recovery of benefits paid on behalf of a member of the general class of Medicaid recipients and recovery of benefits paid on behalf of the class of recipients who were age 55 and over when they received the benefits. This distinction is important because it treats the benefits received by the under 55 population as a grant that need not be repaid. Benefits received by the 55 and over population, however, are not grants but essentially are loans or debts.

Second, The exception broadly mandates that states “shall seek . . . recovery of any medical assistance correctly paid on behalf of an individual . . . in the case of the following individuals.” This mandate contains no condition of limitation that would constrain how states meet the mandate that they seek recovery of the benefits received by the excepted classes of individuals.

Third, the specific language of the exception for the 55 and over class does not contain limiting language on the people or the assets from which states must seek recovery. That language provides that states shall seek recovery of benefits “In the case

of an individual who was 55 years of age or older when the individual received such medical assistance.” The only condition is that there be recovery.

That language is followed by the clause “the State shall seek adjustment or recovery from the individual’s estate.” In addition to imposing an affirmative duty to recover from individual’s estate, the Estate and its amici claim that this clause also imposes a prohibition on seeking recovery from anything other than an individual’s estate. That claim requires inserting “only” after “shall” in the clause in order to create both the requirement and the limitation. Yet implicitly adding a word to the plain language of the statute violates the basic tenant of statutory construction that courts are not free to add words to a statute or imply terms that are not present on the face of the statutory language.

**2. Federal Provisions Concerning The Meaning Of “Estate”
Simply Impose A Minimum Condition And Do Not Impose
Limitations On Spousal Recoveries; Substantive Due Process
Provides The Only Limits**

From the above, it is clear that the “no recovery” clause does not apply in this case in that there are no express conditions in section 1396p(b)(1) that limit how a state may effect recovery of benefits once an exception applies. The next subpart to examine is that providing the scope of the term “estate.” That subpart provides that

(4) For purposes of this subsection, the term “estate”, with respect to a deceased individual--

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

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

These paragraphs only impose one condition — found in paragraph A — which is that a state’s mandatory recovery be, at a minimum, from property and assets in the individual’s probate estate as defined by state probate law.²

Paragraphs A and B serve distinct purposes. Paragraph A provides clear notice to states of the scope of the obligation incurred by acceptance of federal Medicaid matching funds. A statement of what assets and property states must seek recovery from, and tying that scope to generally applicable state law, also ensures that states that are resistant to recovery will not be able to circumvent the condition by limiting their recovery efforts. See, e.g., West Virginia v. Thompson, 475 F.3d 204 (4th Cir. 2007) (affirming CMS rejection of state plan that would have undermined recovery rather than accomplished recovery).

The purpose of paragraph B is not to narrowly limit the scope of required recovery. Rather, paragraph B provides states that already had active recovery program with relief from the Citizens Action League v. Kizer decision, 887 F.2d 1003 (9th Cir. 1989),

² The form that CMS requires states to use in submitting their State Medicaid Plans expressly includes this condition. Minnesota State Medicaid Plan at page 53d (state plan form requiring states to define ‘estate’ in this context as it is “defined under State probate law”) (available in Commissioner of Human Services’ Appendix 22). This and the other Federal conditions are clearly presented to states when they establish their written agreements with the federal government. See id. at 53a-53e / 19-23.

narrowly construing “estate” and thereby creating a barrier to recovery beyond the minimum mandate of paragraph A.

The Estate has claimed that paragraph B contains limiting language in its use of the parenthetical phrase “(to the extent of such interest).” This phrase does not impose a condition on states receiving Medicaid funds affecting their ability to make a spouse’s probate estate liable for recovery benefits received by a predeceased spouse. Such a reading is irreconcilable with the rest of Medicaid law, especially the use of the term “assets” which is defined to include “all income and resources of the individual and of the individual’s spouse”. See 42 U.S.C. § 1396p(e)(1). Given the Medicaid context and Medicaid’s treatment of spousal resources elsewhere, the only plausible limitation that can be derived from the “to the extent of” phrase as it relates to spousal recovery is that states may not seek recovery from nonliable “innocent” third parties. See 42 U.S.C. § 1396a(a)(17)(D) (prohibiting states from holding others liable for medical expenses except for an individual’s spouse).

This limitation is also consistent with substantive due process principles. Due Process imposes a reasonableness requirement on legislation affecting property interests that is satisfied by passing the rational relationship standard of review. See, e.g., Honeywell v. Minn. Life & Health Ins. Guaranty Ass’n, 110 F.3d 547 (8th Cir. 1997). Because there is a rational relationship between holding a spouse’s probate estate liable to the extent it contains marital property and the legitimate governmental purpose of recovering MA benefits, spousal recovery passes substantive due process. Any limits

imposed by the phrase “(to the extent of such interest)” should only be co-extensive with substantive due process or equal protection.

Using substantive due process to evaluate the scope of recovery as it affects nonrecipient spouses or third parties provides a clearer and more practical framework than a parenthetical phrase divorced from its statutory context. Substantive due process also demonstrates that the holding Appellant that asks the Court to reach in this case will not give a state carte blanche in seeking recoveries. Due process and other constitutional protections will continue to provide restraint and prevent overreaching.

At bottom, the Court’s preemption analysis in this case should recognize that the absence of an unambiguous condition prohibiting or limiting spousal recoveries requires a holding that section 256B.15, subdivisions 1a and 2, as they apply to spousal recoveries, are fully constitutional. Because the Estate has never challenged Appellant’s position that those provisions, absent the preemption challenge, require full recovery from the marital property now in Francis Barg’s estate, no further inquiry is necessary if there is no preemption.

B. Alternatively, If Federal Law Imposes A Condition That Limits The Scope of Spousal Recoveries “to the extent” of the Recipient Spouse’s Legal Interests, The 2003 Amendments Demonstrate That Minnesota’s Limitation Of Recovery To Marital Property Or Jointly Owned Property Satisfies That Condition

Examination of the 2003 amendments demonstrates that Minnesota has complied with any condition limiting the scope of spousal recovery because the legislature has used its sovereign power to define the extent to which property that a MA recipient has a legal interest in that is therefore subject to recovery. In these amendments, Minnesota

determined the interests in property subject to recovery and protected the interests of the nonliable nonspouse joint tenants and remaindermen. Minnesota used its sovereign power to define interests in property and, in doing so, determined the extent of the recipient spouse's ownership interests that are subject to recovery.

1. The 2003 Amendments Demonstrate Minnesota's Inherent Power to Define Interests In Property, Including the Extent of Such Interests Liable For Recovery

The 2003 amendments changed the common law to enable recovery from joint tenancy and life estate interests through the use of liens and Notices of Potential Claims. Because this change affected nonspouse joint tenants and remaindermen who are not liable for recovery of MA benefits the legislature included provisions that specifically define and limit a MA recipient's interests in those form of property. This determination of the extent of joint tenancy and life estate interests subject to recovery is made using the legislature's inherent power to define interests in property and regulate transfers of property and inheritance. See Acquilino v. United States, 363 U.S. 509, 512-13, 80 S.Ct. 1277, 1280 (1960) (holding that state law controls when determining the nature of a taxpayer's interest in property liable under a federal revenue statute); In re Estate of Eggert, 72 N.W.2d 360, 362 (Minn. 1955) (stating "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.").

For life estate interests, the legislature declared that "[t]he life estate in the person's estate shall be that portion of the interest in the real property subject to the life estate that is equal to the life estate percentage factor for the life estate as listed in the Life Estate

Mortality Table of the health care program's [sic] manual for a person who was the age of the medical assistance recipient on the date of the person's death." Minn. Stat. § 256B.15, subdivision 1h(c).³ Thus, when the legislature needed to define the extent of recoverable interest in a life estate, it turned to an existing framework for defining the extent of the interest to be recovered from.

For a joint tenancy interest, the legislature also incorporated an existing framework for demarcating the recovery interest and protecting the nonspouse co-owner. The legislature declared that "The joint tenancy interest in real property in the estate shall be equal to the fractional interest the person would have owned in the jointly held interest in the property had they and the other owners held title to the property as tenants in common on the date the person died." Minn. Stat. § 256B.15, subd. 1h(c). A tenancy in common is presumptively a fractional ownership in contrast to a joint tenancy with right of survivorship in which each joint tenant has an undivided interest in the whole, shared during lifetime but with the survivor succeeding to unconditional ownership. In defining a mechanism for valuation in a joint tenancy with right of survivorship, the legislature again incorporated an external framework and mandated its application in the benefit recovery context. Using its authority to determine the nature and scope of interests in property, the legislature drew a line using tenants in common as the measure.

The method used by the legislature to determine recovery involving nonspouse joint tenants and remaindermen in the 2003 amendments is important because it demonstrates

³ The Life Estate Mortality Table is found in the Health Care Programs Manual, section 19.25.15.20. http://hcopub.dhs.state.mn.us/hcpmstd/19_25_15_20_.htm.

how Minnesota gives effect to any “to the extent of such interest” limitation within the context of nonspousal recoveries. This demonstration is relevant to the preemption analysis of spousal recoveries because Minnesota has used the same method that will give effect to the “to the extent of such interest” phrase in defining the scope of liability in spousal recoveries.

2. Subdivision 2 demonstrates that Minnesota has used its Sovereign Power To Define The Extent Of A Recipient Spouse’s Interest In Marital Property And Jointly Owned Property With A Spouse

In 1987, the legislature added the provisions now found in section 256B.15 subdivisions 1a and 2 regarding benefit recovery claim in the probate estates of surviving spouses. Act of June 12, 1987, ch. 403, art. 2 § 82, 1987 Minn. Laws 3255, 3347. The immediate purpose for the 1987 amendments was to supersede the Court of Appeals’ holding in In re Estate of Messerschmidt, 352 N.W.2d 774 (Minn. Ct. App. 1984), denying a spousal recovery claim because the state statute did not expressly authorize one. To supersede Messerschmidt, all the legislature had to do was enact the amendment that is now in subdivision 1a which expressly allows for a spousal recovery claim. Yet, the legislature did more.

The 1987 amendments also added the limitation on recovery to the value of assets that were marital property or jointly owned property that is now codified in subdivision 2. This second amendment, which actually was added to the bill after it had been introduced, was not in response to any court decision. Instead, the limitation is likely the legislature’s recognition of any limiting condition found in then-existing federal law. In

1987, the federal “no recovery . . . except . . .” provision featured the same language as in its current mandatory form in that recovery of benefits received by older Medicaid recipients was to be “from his estate.” 42 U.S.C. § 1396p(b)(1) (see the redlined version of the section showing 1993 amendments in the addendum to the Commissioner of Human Services’ amicus brief, pages 15-17). Federal Medicaid law at the time, as now, also provided that states could not hold anyone liable for a recipient’s medical expenses except for a spouse. 42 U.S.C. § 1396a(a)(17)(D).

Thus, the only explanation for the legislature’s inclusion of the nonrecipient spouse limitation that consistent with the context of the amendments is that Minnesota, at that time, defined the extent of recoverable interests as the entirety of marital property or jointly owned property of the couple that was in the surviving spouse’s probate estate. The legislature’s use of marital property recognized joint and several liability of spouses for necessary medical expenses found in Minnesota common law and statute. The use of marital property as the framework for determining the scope of recovery also set boundaries on recovery that recognized the nonliability of assets in the estate that may be from a second marriage, were separately-owned throughout the marriage, or were acquired after the predeceased spouse’s death.

The legislature used the same approach with the 1987 amendments as it did with the 2003 amendments in defining the extent of recoverable interests. That approach is to identify an existing framework and incorporate it for use in declaring the extent of the recoverable interest in assets that have multiple owners. The existing framework the legislature chose in 1987 was the concept of “marital property.” The term “marital

property” had a statutory meaning in 1987 as well as having a common meaning. See Minn. Stat. 518.54, subd. 5 (1986); Black’s Law Dictionary 873 (5th ed. 1979) (defining “Marital property” as “Property purchased by persons while married to each other and which, in some jurisdictions, on dissolution of the marriage is divided in proportions as the court deems fit.”).⁴ Defining the extent of liability as the entirety of marital property or jointly owned property is also consistent with spouses’ joint and several liability.

It is significant that the legislature’s approach to determining the extent of recoverable interests in the 1987 amendments is the same as it used in the 2003 amendments. Assuming there is a limitation in the phrase “to the extent of such interest,” a preemption analysis of the 2003 amendments would ask whether the legislature’s use of a mortality table and tenancy in common to define life estate and joint tenancy interests conflicts with “to the extent of such interest.” Asking that question readily reveals the inadequacy of “to the extent of such interest” as the basis of any meaningful analysis. The question also demonstrates that “to the extent of such interest” simply cannot constitute an unambiguous condition that states could be certain of when accepting federal Medicaid matching funds. Instead, the only grounds for challenging the validity of how the legislature determined the scope of recovery would be substantive due process or equal protection.

⁴ The argument by the Estate that “marital property” can only have meaning in an actual dissolution proceeding and therefore is meaningless as used in subdivision 2 is absurd. That argument suggests no alternative interpretation of that term and no reasonable basis to ignore the legislature’s deliberate choice of that term. In addition, the term “marital property” can simply be construed as property that is marital, i.e., acquired during marriage by a couple.

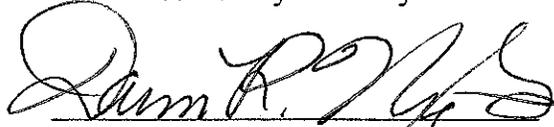
CONCLUSION

For the reasons above, Mille Lacs County respectfully requests the Court hold that Minnesota Statutes section 256B.15, subdivisions 1a and 2, as applied to spousal recoveries, are not preempted by any federal conditions, that the Court of Appeals decision is reversed to the extent its holding is inconsistent, and that the case be remanded to district court with instructions to grant the county's claim in full.

Dated: January 25, 2008.

Respectfully submitted,

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

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