

JUN 10 2008

No. A05-2346

FILED

STATE OF MINNESOTA

IN SUPREME COURT

In Re the Estate of

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

RESPONDENT'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, Respondent the Estate of Francis E. Barg petitions for rehearing of this Court's determination in Section V of In Re Estate of Barg that Respondent Estate is not relieved of its obligation to pay the allowed portion of Appellant Mille Lacs County's claim for medical assistance reimbursement based upon the following grounds:

1. The Estate did not voluntarily agree to pay any part of Mille Lacs County's claim for reimbursement of medical assistance paid for or on behalf of Dolores Barg. The Personal Representative signed the Notice of Disallowance or Partial Allowance of Claim on October 7, 2004. In that document the Personal Representative stated "At the time of the death of Dolores Barg, the spouse of Francis E. Barg and a medical assistance recipient, Dolores Barg did not have any legal title in any assets of Francis E. Barg." This Court wrote in Section V of its opinion at p. 36 that "...we have decided as a matter of law in our preemption analysis that the State is preempted from requiring reimbursement from assets in a spouse's estate in which the recipient spouse had no interest at the time of her death...." That is exactly what the Estate maintained to the District Court from the beginning. However, the law in this state at the time of the Partial Allowance was enunciated by the Minnesota Court of Appeals in Estate of Gullberg, 652 N.W. 2d 709 (Minn. App. 2002). Although the Gullberg Court determined at the time of his death recipient Walter Gullberg "did not hold legal title to the homestead" he continued to have "some legal 'interest' in the homestead because he and Jean Gullberg

were still married at the time of his death.” The Gullberg Court referenced two possible methods to determine the valuation of this “interest,” namely, some type of common (marital) ownership in spouses or a life estate pursuant to the Minnesota laws of intestacy under Minn. Stat. §524.2-402(a), (c)(2000) . The Gullberg court ruled the District Court must determine this “interest.” In an attempt to comply with the law, and understanding the District Court could not overrule Gullberg, the estate involuntarily allowed a life estate value even though legal and factual fictions were necessary to do so. The District Court determined that based upon Gullberg Dolores Barg had “some legal interest” in the homestead of the parties and chose the “intestacy law” as the appropriate method for valuing that interest under Gullberg.

2. In its brief to the District Court, the Estate argued Dolores Barg had no legal interest in the homestead property previously owned by Dolores and Francis Barg, that the term “other arrangement” in 42 U.S.C. § 1396p(b)(4)(B) does not include property transferred by a deceased recipient to her spouse during her lifetime, and therefore that no claim could be made against the assets in the Estate of Francis E. Barg. The Estate in its conclusion in that brief requested that the District Court determined Mille Lacs County should recover nothing. However, based upon the law as enunciated in Gullberg the Estate indicated in the alternative that the Gullberg legal fiction that Dolores Barg retained a life estate interest in the property should be the most awarded to Mille Lacs County. The Estate was compelled to partially allow the claim under Gullberg and was compelled to provide an alternative remedy to the District Court under

Gullberg. But for the Gullberg decision the Estate would have disallowed the claim in its entirety.

3. The Estate in its brief to the Court of Appeals again recognized the Gullberg decision as controlling in probate court determinations regarding allowances of medical assistance claims under the facts of the Barg case. The Estate continued to characterize the methodology put forth under Gullberg as relying on fiction both for the factual and the legal determinations contained in Gullberg. In the Appellate brief at p. 37 the Estate noted the Honorable Steven P. Ruble in District Court noted that Gullberg “without much explanation – expressly found the existence of this legal interest by favorably pointing to both marital-dissolution and intestate laws.” He referred to the Gullberg decision as the “seminal Minnesota case dealing with the application of Minn. Stat. §256B.15, subd. 2 and 42 U.S.C. § 1396p(b)(4)(B) to a county’s claim for medical assistance.” Like the Estate, Judge Ruble felt compelled to apply Gullberg as the law of Minnesota at that time. In its conclusion to the appellate brief, the Estate again concluded that “Federal law on its face does not appear to allow Appellant Mille Lacs County to make any claim against the Estate of Francis E. Barg for medical assistance provided to his predeceased spouse Dolores Barg....” However, because of Gullberg the Estate requested the Appellate Court to uphold the District Court decision.

4. This Court’s opinion in Barg agreed with all of the arguments made by the Estate beginning with the Notice of Disallowance and continuing through the District, Appellate and Supreme Court briefs and arguments “that the County’s claim for full

recovery against all the assets in Francis Barg's estate was preempted by federal law because recovery is limited to assets in which Dolores Barg had an interest at the time of her death." This Court agreed with the Gullberg and the Barg courts that the State's ability to recover was limited to the recipient's interest in marital or jointly owned property at the time of the recipient's death. But then this Court determined that contrary to Gullberg and Barg Dolores Barg had no interest in such property and further that the Gullberg and Barg references to property transferred by recipient under the "other arrangement" language of the federal law could not include property transferred by the recipient to her spouse during her lifetime. This Court at p. 30 stated "To read 'other arrangement' to include a lifetime transfer would be to read the words 'at the time of death' out of the statute." The conclusions reached by this Court are exactly the positions advanced by the Estate throughout this matter.

5. In Section V of this Court's opinion at p. 37 the Court recognized the inherent power of the probate court to relieve the Estate of the partial disallowance of the claim. The Court cited Minn. Stat. §524.3-806(a)(2006), in particular the section that the court may "for cause shown permit the personal representative to disallow" a previously allowed claim. The more complete statutory language is "The court at any time before payment of such claim may for cause shown permit the personal representative to disallow such claim" (emphasis supplied). This Court then indicated the personal representative "made no such request here." However, the probate court matter was never final due to the continuing appeals of Mille Lacs County. The Personal

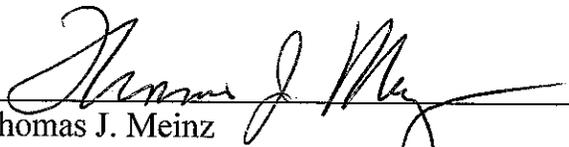
Representative, until this Court confirmed the Estate's position that no claim could be made under these facts and the law, would have been premature in asking the Court to disallow the previously allowed claim. No payment has been made to date. Now the Estate representative has the basis in law to make that request to the probate court and plans to do so. This decision should then be left to the probate court under the statute.

CONCLUSION

The Estate respectfully requests the Court grant rehearing on the matter addressed in this petition. This Court's opinion confirmed the arguments that the Estate advanced from the commencement of this matter are valid, that as a matter of law no recovery is allowed in these circumstances, and the probate court under its inherent authority under Minnesota law may now permit the Personal Representative to disallow any claim.

Dated: June 9, 2008

Respectfully submitted,



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