

No. A05-2346

STATE OF MINNESOTA

IN SUPREME COURT

OFFICE OF
APPELLATE COURTS

JUN 13 2008

FILED

In Re the Estate of

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

RESPONDENT'S ANSWER TO 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 140.02, Respondent Estate of Francis E. Barg hereby answers the Appellant's Petition for Rehearing as follows:

1. Appellant's claim that this Court's Opinion "overlooked, failed to consider, or misapplied" 42 U.S.C. § 1396p(e)(1)(2000) is without merit. Both the Appellant and the Minnesota Commissioner of Human Services as Amicus Curiae argued that this general definition applied to the issues in dispute in this case. In Appellant's brief to the Court of Appeals at p. 39, Appellant specifically cited this broad, general definition of "assets." The Commissioner argued at p. 30 of his brief that this definition compelled recovery against the community spouse's estate. This Court was unpersuaded that this broad definition of asset compelled the result sought by the County and the Commissioner and concluded that "assets" as used in 42 U.S.C. § 1396p(b)(4)(B) are limited to those "in which the individual had a legal title or interest at the time of death." It would make no difference whether the general term "assets" included the assets of the community spouse at the time of the medical assistance recipient's death, because recipient Dolores Barg had no interest of value in Francis Barg's assets at the time of her death. Slip op. at 29.¹ This issue was plainly considered by this Court and Appellant's position was rejected.

2. Appellant's argument that this Court's Opinion "overlooked, failed to

¹ Appellant's Petition for Rehearing cites to 42 U.S.C. §1396p(b)(4)(ii) which does not exist.

consider, or misapplied” other federal statutes is without merit. Appellant cites several provisions of 42 U.S.C. that were not previously argued or cited to this Court, and therefore are not timely. Additionally, the Appellant’s argument requires this Court to arrive first at a conclusion and then work backwards to find language somewhere in the statutes to support the prior conclusion. The brief submitted by The Elder Law Section of the Minnesota State Bar Association and The National Senior Citizens Law Center, as amici curiae, included in its Addendum at p. 00022 an article on “Dice-Loading” the rules of statutory interpretation. According to the authors, this statutory interpretation process involves using preferential, or “dice-loading,” rules to interpret laws without regard to the plain meaning of the language in a statute. The authors further note at p. 00024 that “Most judges agree that statutory interpretation begins with the text. When the words of a statute are unambiguous, the task *should* end there – if the legislature has clearly spoken, nothing is left to construe.” This Court analyzed the types of assets available for recovery under the recovery portion of 42 U.S.C. § 1396p and made numerous references to the “plain meaning” and “plain statutory language and its context.” Slip op. at 29 and 30. This Court clearly considered the appropriate interpretation of the recovery statute.

Appellant’s Petition for Rehearing alleges, “No Medicaid provision *prohibits* states from eventually seeking the use of all spousal assets through recovery to pay for a recipient’s spouse’s care....” This Court directly rejected that claim when it reviewed the terms “such assets” and “conveyed” and expressly limited assets subject to recovery

to those in which the recipient had a legal interest at the time of death. Slip op. at 29-30. This Court could not more plainly have considered and rejected Appellant's argument.

3. Appellant's argument that this Court's Opinion "overlooked, failed to consider, or misapplied the federal government's specific and express approval of Minnesota's scope of spousal recovery" is without merit. Appellant references "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)." Respondent is not aware this correspondence was ever made part of the record by this Court. The Court noted that a previous motion by the Commissioner to supplement the record to include, among other things, "Minnesota Medicaid State Plan, Transmittal No. 06-10" was granted. Slip op. at 5, fn.3. However, Transmittal No. 07-005 submitted to the federal Centers for Medicare and Medicaid Services (CMS) on March 28, 2008, after the deaths of both Francis and Dolores Barg, was not part of the record.

The Commissioner's brief to this Court at p. 36 cites Chevron U.S.A., Inc., v Natural Resources Defense Council, Inc. 467 U.S. 837 (1984) regarding deference that should be accorded an administrative agency interpretation of statute. The Commissioner notes Chevron deference "is called for when Congress has not 'directly spoken to the precise question at issue.'" Chevron, 467 U.S. at 842. This Court determined Congress spoke directly to the precise question of recovery. Slip op. at 19-20. Therefore, the mere acceptance of a state proposal by an administrative agency would not be sufficient to

interpret the intent of Congress as expressed in the plain meaning of the recovery statute.

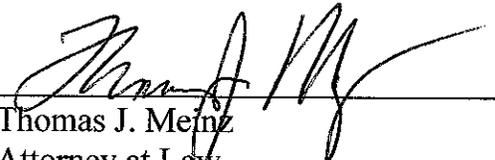
Appellant's reference to the Commissioner's estimate regarding reduced Medical Assistance recoveries as a result of the Barg decision is also without merit. The Commissioner previously addressed this issue in his brief at p. 5, and the Estate addressed the issue in its brief to this Court at p. 52 and previously in its Addendum to its Appellate Court brief. The Estate demonstrated that the amount of recovery in cases with similar facts to the Barg case is minimal and that recovered funds are placed in the general funds of the various governmental bodies that share in the recoveries and not automatically returned to replenish the Medicaid fund. See Minn. Stat. § 256B.15, subd. 1a(c). The County's argument on the estimated fiscal impact of this Court's decision is a political argument rather than a legal argument. The fiscal impact of this Court's Opinion is not an appropriate consideration in determining the correct interpretation of the laws governing recovery of medical assistance correctly paid.

CONCLUSION

The Estate respectfully requests this Court deny Appellant's Petition for Rehearing in its entirety. All matters raised in that petition were briefed and argued to this Court and carefully considered by this Court prior to issuance of the Opinion in this matter.

Dated: June 12, 2008

Respectfully submitted,



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