

No. A05-2346

STATE OF MINNESOTA
IN SUPREME COURT

In Re the Estate of
Francis E. Barg, a/k/a Francis Edward Barg

RESPONDENT'S SUPPLEMENTAL RESPONSIVE BRIEF

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RESPONSE

“No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except” 42 U.S.C. §1396p(b)(1).

These opening words of the federal medical assistance recovery statute, when applied to the remainder of the statute, prohibit Appellant from recovering in this case, and resolve and refute Appellant’s arguments to the contrary throughout this case and in Appellant’s Supplemental Brief. Appellant has repeatedly ignored these words and their plain meaning while arguing the federal statute does not contain any limitations on how a state may recover medical assistance benefits correctly paid. Although the statute provides an exception that the state shall seek recovery “in the case of an individual who is 55 years of age or older when the individual receives such medical assistance,” the statute limits the State to “seek adjustment or recovery from the individual’s estate....” 42 U.S.C. §1396p(b)(1)(B) (emphasis supplied). The “individual’s estate” is narrowly defined in 42 U.S.C. §1396p(b)(4)(A) and (B). These exceptions and definitions follow and must be read together with the opening language that prohibits recovery in all cases except those specifically allowed. In Martin v City of Rochester, 642 N.W.2d 1 (Minn. 2002) this Court said clearly, “We read and construe a statute as a whole....”

1. Medical Assistance correctly paid is not a loan or a debt.

The opening language of the federal statute is “No...recovery may be made of any “medical assistance correctly paid....” (emphasis supplied). The statute describes the medical assistance as “correctly paid” rather than “loans or debts” as Appellant refers to

them. The Estate, in its Court of Appeals Addendum, included a study showing the percentage of nursing home spending recovered nationally in 2004 was less than one per cent, and that the funds are returned to a State's general fund rather than to the Medicaid program. (Resp. App. Br. Add., United States Department of Health and Human Services Policy Brief No. 6 "Medicaid Estate Recovery Collections" September 2005). The program is not a revolving loan fund. The federal statute allows recovery of medical assistance only in very limited circumstances and never characterizes these benefits as loans or debts. The Illinois Supreme Court recognized this limitation in Hines v. Department of Public Aid, 850 N.E.2d 148 (Ill. 2006). The Court said that after married couples have experienced the hardship of the spend-down for medical assistance "The Medicaid Act affords an additional element of financial protection to the families of Medicaid recipients by limiting the circumstances in which the state may seek reimbursement for the payments it made on the recipient's behalf." Clearly, the Hines Court understood medical assistance "correctly paid" is not established as a loan or debt.

2. The federal statute strictly limits recovery of medical assistance.

Appellant claims the exception in 42 U.S.C. §1396p(b)(1) providing that the "State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual..." actually "contains no condition of limitation that would constrain how states meet the mandate that they seek recovery of the benefits...." (App. Supp. Br. at 6). Such an assertion totally ignores the opening language of this statute that precedes the exception and which, again, begins "No...recovery of any medical

assistance correctly paid on behalf of an individual under the State plan may be made...” (emphasis supplied). The statutory limitation language is plain and clear.

Appellant claims the provision of 42 U.S.C. §1396p(b)(1)(B) that the State shall seek recovery from the individual’s estate in the case of an individual 55 years of age or older when the individual received medical assistance has no limitation except that there “be recovery.” Again, the language of the statute that prohibits recovery unless an exception specifically allows recovery is completely ignored in the Respondent’s Supplemental Brief. The statute only mandates that the State “seek...recovery” but then carefully prescribes the limited property rights against, and situations in which, actual recovery may be made. (emphasis supplied).

3. Minnesota’s “sovereign power” is limited by the federal statute.

In Hines the Court explained that “States are not required to participate in the Medicaid program. Once they elect to do so their “...plans and standards must comport with the Medicaid Act...” (emphasis supplied). Hines at 3 in Resp. Br. Add.

Minn. Stat. §256B.15 Subd. 1(a), after setting out Minnesota’s policy statement that individuals or couples use their own assets to pay their share of medical assistance, requires that the policy must be applied “according to applicable federal law...” (emphasis supplied). Appellant acknowledges this federal limitation on the state’s power under the Medicaid program. App. Br. p 6-7.

Despite the federal statute prohibiting recovery except as allowed, Appellant argues in its Supplemental Brief (p 10) that the Minnesota 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.” (sic).

Because the federal medical assistance laws set the parameters for the medical assistance program, a state cannot simply redefine property rights and other rights to read the federal definitions and limitations out of existence. Yet that is what Appellant claims Minnesota can and did use its “sovereign power” to do. If allowed to do so, the State can continue to define away all federal statutory exceptions to recovery. As the Hines Court said, “...where a statute specifies exceptions to a general rule, no exceptions other than those designated will be recognized.” Hines at 4 in Resp. Br. Add.

4. The 2003 amendments to §256B.15 do not apply in Barg.

The 2003 amendments to Minn. Stat. §256B.15 Subd. 1 and 1c-1k are a legislative redefinition of centuries-old life estate and joint tenancy property rights to avoid the limitations of the federal recovery statute. 42 U.S.C. §1396p(b)(4)(B) allows a state to add optional property interests to the estate of the deceased recipient. However, the federal statute limits all such optional interests to those in which the individual recipient had any legal title or interest “at the time of death,” and which transfer at the recipient’s death. That statute would allow the State to include the decedent’s undivided portion of a joint tenancy interest or a life estate interest that the decedent owned at the time of death in the State’s definition of “estate” with respect to a deceased recipient, and thus allow recovery against such an asset. The Minnesota 2003 amendments redefined life estate and joint tenancy property interests of a deceased medical assistance recipient to

provide that they “shall not end upon the person’s death.” Obviously the statute contemplates they were owned at death. The statute then values a joint tenancy interest as though it was an interest as a tenant in common on the “date the person died.” §256B.15 Subd. 1h(c). Even the Minnesota statute, however, requires that a joint tenancy interest be valued as a fractional interest where recipient and other joint tenants “held title to the property...on the date the person died.” Dolores Barg conveyed her undivided one-half joint tenancy homestead interest to her non-recipient surviving spouse during her lifetime, and therefore held no title on the date she died. Therefore the 2003 amendments redefining and continuing a joint tenancy interest do not apply in this case.

Appellant claims these definitions in the 2003 amendments are important because they demonstrate “how Minnesota gives effect to the ‘extent of such interest’ limitation within the context of non-spousal recoveries.” Appellant alleges this redefinition process allows the state to redefine the scope of spousal liability and spousal recoveries. App. Supp. Br. at 13. This alleged power to redefine property interests is nothing more than a claimed power to define the federal statutory limits out of existence.

5. Federal law preempts Minnesota from allowing recovery against the estate of a non-recipient surviving spouse.

After the federal statute prohibits all recovery with the opening language that “No...recovery...may be made...”, the statute allows an exception in 42 U.S.C. §1396p(b)(1)(B) for recovery in the case of an individual who is 55 years of age or older when the individual received medical assistance only “from the individual’s estate....”

No direct recovery is permitted from any other estate. In 42 U.S.C. §1396p(b)(4) the definition of recipient's "estate" contains no language allowing a claim against the estate of a non-recipient surviving spouse. The Estate has supported its argument that based upon the principles of conflict preemption set forth in Martin, federal law is preemptive in situations where "compliance with both federal and state law is impossible or because the state law is an obstacle to the accomplishment of the purpose of the federal scheme." The plain language of the federal law is clear and unambiguous that no recovery is allowed except under limited circumstances, and federal law never allows recovery or an exception for recovery against the estate of the non-recipient surviving spouse. Appellant again ignores the opening prohibitive language of the statute and makes the unsupported assertion that the federal statute does not impose limitations on spousal recoveries.

Appellate courts from other states have had no hesitation in reading and upholding the plain language of the federal statute to prohibit recovery against the estate of the non-recipient surviving spouse:

- **Estate of Budney, 541 N.W. 2d 245 (Wis.Ct.App. 1995)**

"In the first section, the statute plainly prohibits a State from recovering medical assistance except in certain situations.***After this initial prohibition, the statute does not specifically authorize a State to recover medical assistance benefits from a recipient's surviving spouse's estate." Budney at 3 in Resp. Br. Add.

- **Hines v. Department of Public Aid, 850 N.E.2d 148 (Ill. 2006)**

"Nothing in the Medicaid Act authorizes such recourse. ...the Act provides three

and only three exceptions for when the state may seek reimbursement for costs correctly expended on behalf of a Medicaid recipient. All are specifically directed to the estate of the recipient. No provision is made for collection from the estate of the recipient's spouse." Hines at 4 in Resp. Br. Add. (emphasis supplied).

- **Estate of Smith, No. M2005-01410-COA-R3-CV, 2006 WL 3114250**

(Tenn.Ct.App. Nov. 1, 2006)

"By its plain language 42 U.S.C. §1396p(b)(1) prohibits recovery of correctly paid Medicare benefits.***It is important to note that even under the three exceptions, recovery is allowed only against the estate of the person who actually received the benefits (the recipient)." Smith at 3 in Resp. Br. Add. (emphasis supplied) .

The Minnesota Court of Appeals in Estate of Gullberg, 652 N.W.2d 709 (Minn.Ct.App. 2002) implicitly recognized this limitation on claims against a surviving spouse's estate and instead attempted to create an estate for the predeceased recipient spouse using the fiction that the predeceased recipient would be treated as surviving the community spouse. Neither the facts nor the federal law support the Gullberg attempt to create this fictional interest. After this 2002 decision, the legislature did not attempt to amend §256B.15 in 2003 to redefine or to continue the unvested or inchoate rights a predeceased recipient spouse might have had in the estate of a surviving community spouse as if the predeceased spouse had survived the later-to-die community spouse.

The Minnesota Court of Appeals in Estate of Barg, 722 N.W.2d 492 (Minn. Ct.App. 2006) appears to have ignored the portion of the federal definition of the

recipient's estate that limits assets in such an estate to those in which the deceased recipient "had any legal title or interest at the time of death." (emphasis supplied). The Court, without any analysis, adopted the Gullberg conclusion that under the federal statute Dolores Barg's lifetime conveyance to her non-recipient surviving spouse constituted an "other arrangement" transfer at death.

Both Barg and Gullberg Courts failed to note Minnesota, unlike other states, never conformed the State recovery statute to the full optional definition of a recipient's estate in 42 U.S.C. §1396p(b)(4)(B). The federal statute contains the "other arrangement" language, but even an "other arrangement" transfer is limited by that statute to a property interest in which a deceased recipient "had any legal title or interest at the time of death."

The federal statute allows states ample opportunities for recovery of medical assistance correctly paid, within the limitations and restrictions of the statute, but not under the Barg facts. In making such recovery the State must follow the rule of law as laid down in the federal statutes regardless of the State's policy preference.

- 6. The 2003 amendments to §256B.15 did not define marital property for recovery purposes and cannot create a right of recovery against a non-recipient surviving spouse's estate.**

Appellant claims Minnesota also used its "Sovereign Power to Define the Extent of a Recipient's Spouse's Interest in Marital Property...with a Spouse." App. Supp. Br. at II.B.2, p 13. In 1987 Minnesota added portions of §256B.15 Subd. 1a and 2 that purport to allow a claim against the estate of a surviving spouse and against assets in that estate

that were “marital property...at any time during the marriage.” The amendments to the federal statute in 1993 prohibit claims against a surviving spouse’s estate and provide no exception to allow a claim against “marital property.” Although Minnesota in 2003 redefined life estate and joint tenancy interests, the legislature did not define “marital property” for recovery purposes. The Estate, in its original brief to this Court, explained that the definition of marital property in Minnesota’s marriage dissolution statutes (§518.54 Subd. 5) is specifically limited to application in marriage dissolutions. The definition Appellant cites in its Supplemental Brief is from Black’s Law Dictionary, which makes clear that “in some jurisdictions” (which would include Minnesota based on definitions and limitations of §518.54) “on dissolution of the marriage” these interests are “divided in proportions as the court deems fit.” (emphasis supplied). Prior to such court determination there is no right vested in either party. Neither spouse can or ever does own one hundred per cent of the marital property of the other spouse. Further, in Barg, the Appellate Court was “unable to find a legal basis for incorporating this definition” (from §518.54 Subd. 1, 5) “into the estate recovery statute.” Barg at 6 in Resp. Br. Add.

When, as in Barg, the recipient spouse predeceases the community spouse, the recipient’s unvested and inchoate marital rights terminate under Minnesota law. Minnesota did not redefine these rights in the 2003 amendments to §256B.15. The Gullberg Court resorted to the fiction that a predeceased recipient spouse might have “some interest” in the marital property of the surviving non-recipient community spouse. There is no basis for this fiction in law or fact.

CONCLUSION

Federal and state law provide no basis for Appellant to recover medical assistance from the estate of Francis E. Barg or from Dolores Barg's former real property interest. Medical assistance recipient Dolores Barg conveyed her undivided one-half joint tenancy interest in real property during her lifetime to her non-recipient surviving spouse Francis E. Barg, and she had no legal title or interest of any ascertainable value in any of his real property at the time of her death. Therefore the 2003 amendments to Minn. Stat. 256B.15 (amended in 2005) have no application to this case. Further examination of these provisions only adds undue complexity to the consideration of the relevant issues in this case, and such analysis provides no basis for any recovery by Appellant in this case or similar cases. An application of the plain meaning of the federal medical assistance recovery statute is all that is necessary to resolve this case, as courts of other states have already determined. Therefore, on the facts and applicable law and the entire record before this Court, the Estate respectfully requests that this Court order Appellant Mille Lacs County should recover nothing.

Dated: February 11, 2008


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