

NO. A08-1691

STATE OF MINNESOTA

IN COURT OF APPEALS

In Re

Estate of Sylvester G. Grote

APPELLANT'S BRIEF AND APPENDIX

SALLY K. MORTENSON
Attorney at Law
2500 West County Road 42,
Suite 160
Burnsville, MN 55337
(952)431-2222
License No. 75632

Attorney for Appellant

JANET REITER
County Attorney
Kristine Nelson Fuge
Assistant County Attorney
County of Chisago
313 North Main Street, Room 373
Center City, MN 55012

Attorney for Respondent

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

TABLE OF
AUTHORITIES.....iii

LEGAL
ISSUES.....1

STATEMENT OF
CASE.....2

STATEMENT OF
FACTS.....3

SCOPE OF
REVIEW.....4

INTRODUCTION.....5

BACKGROUND, HISTORY OF FEDERAL AND MINNESOTA LAW
CONCERNING MEDICAID RECOVERY.....6

ARGUMENT

I. THE OMNIBUS BUDGET RECONCILIATION ACT OF 1993 (OBRA '93), AS INTERPRETED BY THE MINNESOTA SUPREME COURT (IN RE ESTATE OF BARG) PERMITS MINNESOTA TO EXPAND THE ASSETS FROM WHICH MEDICAID BENEFITS CAN BE RECOVERED TO INCLUDE JOINT TENANCY INTERESTS. HOWEVER, MINNESOTA DID NOT EXPAND ITS DEFINIITION OF ESTATE ASSETS UNTIL 2003, SEVEN YEARS AFTER MRS. GROTE'S DEATH, AND TERMINATION OF HER JOINT TENANCY INTEREST. THEREFORE, SHE OWNED NO ASSETS FROM WHICH RECOVERY CAN BE MADE IN THE ESTATE OF HER HUSBAND, SYLVESTER GROTE.....9

II. IF THE COURT DETERMINES THAT THE RECIPIENT'S JOINT TENANCY INTEREST IS SUBJECT TO RECOVERY FROM THE ESTATE OF HER SURVIVING SPOUSE, SUCH RECOVERY IS LIMITED TO THE VALUE OF HER INTEREST AT THE TIME OF HER DEATH, OR ONE-HALF OF THE VALUE OF THE JOINT TENANCY PROPERTY IN 1996.....12

CONCLUSION.....18

CERTIFICATE OF COMPLIANCE..... 20

APPELLANT'S APPENDIX

Notice of Appeal.....AA.1
Claim of Chisago County.....AA2
Partial Denial of Claim.....AA3
Second Claim of Chisago County.....AA4
Second Denial of Claim.....AA5
Stipulated Facts.....AA6
Order, July 23, 2008..... AA8

TABLE OF AUTHORITIES

FEDERAL STATUTES

42 U.S.C §1396(p).....8
42 U.S.C §1396(p)(b).....1
42 U.S.C §1396(p)(b)(1).....6
42 U.S.C §1396(p)(b)(4).....9, 10
42 U.S.C §1396(p)(b)(4)(A).....7
42 U.S.C §1396(p)(b)(4)(B).....6, 10, 11, 12, 18
Omnibus Budget Reconciliation Act of 1993 (OBRA '93).....6

MINNESOTA STATUTES AND RULES

Minn. Stat. §256B.15.....1,7,9, 10, 11, 12, 18
Minn. Stat. §256B.15, Subd. 1(c).....9
Minn. Stat. §500.19, Subd.4.....15
Minn. Stat. §500.19, Subd.15
Minn. Stat. §500.19, Subd. (1).....15
Minn. Stat. §507.02.....15
Minn. Stat. §507.03.....15
Minn. Stat. §507.09.....15
Minn. Stat. §524.6-201.....8

Minn. Stat. §524.6-214.....	8
Minn. Stat. §524.6-214.....	8
Minn. Stat. §524.6-301.....	8
Minn. Stat. §524.6-307.....	8
Minn. Stat. §524.6-311.....	8
Minn. Stat. §524.6-702(b)(3).....	14
Minn. Stat. §525.313.....	7
Minn. Stat. §558.01.....	16
Minn. Stat. §558.16(4).....	16

MINNESOTA CASES

<u>Chapman Place Ass’n. v. Prokasky</u> , 507 N.W.2d 858 (Minn.Ct.App. 1993)...	13
<u>Duluth Firemen’s Relief Association v. City of Duluth</u> , 361 NW 2 nd 381 (Minn. 1985).....	11
<u>Estate of Barg</u> , 722 N.W.2d 492 (Minn.Ct.App. 2006).....	13, 17
<u>Estate of Barg</u> , 752N. W. 2d 52 (Minn. 2008).....	1,2,5, 10, 12, 13
<u>Estate of Edhlund</u> , 444 N.W.2d 861 (Minn.Ct.App. 1989).....	11
<u>Estate of Hanson</u> , 451 N.W.2d 364 (Minn.Ct.App. 1990).....	11

Hendrickson v. Minneapolis Fed. Sav. & Loan Ass'n, 462 N.W. 2d 688 (1968).....14,16, 17

Estate of Jobe, 590 N.W.2d 162 (Minn.Ct.App. 1999).....1, 12

Johnson v. Gray, 533 N.W.2d 57 (Minn.Ct.App.1995).....14

Morton Bldgs., Inc. v. Comm'r of Revenue, 488 N.W. 2d 254 (Minn. 1992)...4

O'Malley v. Utland Bros., 549 N.W. 2d 889 (Minn., 1996).....4

Wendt v. Hane, 401 N.W.2d 457 (Minn.Ct. App. 1987).....17

FEDERAL CASES

O'Hagen v. U.S., 86 F3rd 776 (8th Circuit 1996).....16

SECONDARY AUTHORITIES

28 Dunnell Minn. Digest Joint Tenancy §1.00 (4th ed. 1995).....14

46 Dunnell Minn. Digest Tenancy in Common §1.00 (4th ed. 2000).....13

Minnesota Uniform Conveyancing Form 125-M Severance of Joint Tenancy.....15

LEGAL ISSUES

I. THE OMNIBUS BUDGET RECONCILIATION ACT OF 1993 (OBRA '93), AS INTERPRETED BY THE MINNESOTA SUPREME COURT (IN RE THE ESTATE OF FRANCIS E. BARG) PERMITS MINNESOTA TO EXTEND ITS RECOVERY RIGHTS FOR MEDICAID BENEFITS PAID BEYOND THE RECIPIENT'S PROBATE ASSETS TO INCLUDE THE RECIPIENT'S INTEREST IN JOINT TENANCY PROPERTY. SHOULD CHISAGO COUNTY BE PERMITTED TO RECOVER ITS CLAIM FROM JOINT TENANCY ASSETS WHEN THE RECIPIENT'S DEATH OCCURRED SEVEN YEARS PRIOR TO MINNESOTA AMENDING ITS STATUTES TO PERMIT RECOVERY FROM SUCH ASSETS?

The district court held: Yes.

Estate of Barg, --N. W. 2d --, 2008 WL 2229453 (Minn. 2008)

Estate of Jobe, 590 N.W.2d 162 (Minn. Ct. App. 1999)

Minn. Stat. §256B.15

42 U.S.C §1396(p)(b)

II. IF THE COURT DETERMINES THAT THE RECIPIENT'S JOINT TENANCY INTEREST IS SUBJECT TO RECOVERY FROM THE ESTATE OF HER SURVIVING SPOUSE, IS RECOVERY IS LIMITED TO THE VALUE OF HER INTEREST AT THE TIME OF HER DEATH, OR ONE-HALF OF THE JOINT PROPERTY'S VALUE IN 1996?

The district court held: No.

Estate of Barg, --N. W. 2d --, 2008 WL 2229453 (Minn. 2008)

Estate of Jobe, 590 N.W.2d 162 (Minn. Ct. App. 1999)

Minn. Stat. §256B.15

42 U.S.C §1396(p)(b)

STATEMENT OF THE CASE

The Estate of Sylvester Grote, by its personal representative, appeals the decision of the Chisago County District Court allowing reimbursement of Medicaid benefits. Appellant's Appendix (hereinafter "AA") AA 1. The matter involves the right of the County to recover Medicaid benefits paid to a pre-deceased spouse from assets which were owned by her as a joint tenant.

On September 21, 2006, Chisago County filed a claim in the estate of Sylvester Grote for Medicaid benefits paid for his pre-deceased spouse, Lavina Grote in the sum of \$27,038.93 and for benefits paid for his benefit in the sum of \$56,053.55. AA 2. On January 18, 2008, the Estate's Personal Representative, Helen Anderson, disallowed \$ 1,256.69 of the claim for benefits for Mr. Grote, and the entire claim for benefits paid for Mrs. Grote. The County has not disputed the disallowance of a portion of the claim for Mr. Grote. AA 3

On March 25, 2007, the County filed a second claim for benefits paid for Mrs. Grote. AA 4 The Estate disallowed this second claim. AA 5

On May 23, 2007, the County requested a hearing on the disallowance. AA 6.

The County and Estate stipulated to facts concerning the disputed claim. AA 7-8.

Arguments to the District Court were presented in written memorandums. The District Court delayed a decision on the claim pending the decision by the Minnesota Supreme Court in the case In Re Estate of Barg. On July 23, 2008, following the Barg decision and supplemental briefs by the parties, the District Court allowed the entire claim against the joint tenancy assets. AA 9-19

On September 26, 2008, the Estate filed its Notice of Appeal of that decision.

STATEMENT OF FACTS

The parties to this matter submitted the disputed claim to the District Court on stipulated facts. The stipulated facts were:

1. Lavina Grote was born September 9, 1917 and died November 13, 1996.
2. At the time of her death, Mrs. Grote was married to Sylvester Gordon Grote. Prior to her death, Mrs. Grote received Medical Assistance benefits through Chisago County, Minnesota in the sum of \$71,262.70.
3. At the time of Mrs. Grote's death, Lavina Grote and Sylvester Grote owned real property located in Chisago County, Minnesota as joint tenants and legally described as:

NE ¼ of NW ¼ of Section 2, Township 37, Range 22

At the time of her death, the value of this property was \$54,100.

4. At the time of Mrs. Grote's death, Lavina Grote and Sylvester Grote owned real property located in Pine County, Minnesota, as joint tenants and legally described as:

That part of the East ½ of SW ¼, Section 35, Township 38, Range 22 lying on west side of the regularly laid out road known as the Greely farm road as now laid out and running over said tract.

At the time of Mrs. Grote's death, the value of this property was \$22,800.

5. At the time of Mrs. Grote's death, Lavina Grote and Sylvester Grote owned a joint checking account with a balance of \$2,229.12 and a joint savings account with a balance of \$8,695.25. Mr. Grote paid \$5,757 from their funds for funeral expenses for Lavina Grote.
6. Mrs. Grote was survived by her husband, Sylvester Gordon Grote. He owned the above-described real estate at the time of his death on May 28, 2006.

SCOPE OF REVIEW

The question in this case, the allowable scope of a Medicaid recovery claim, is a purely legal question involving statutory interpretation. Application of a statute to a set of undisputed facts is a question of law. O'Malley v. Utland Bros, 549 N.W. 2d 889, 892 (Minn. 1996). Questions of law are reviewed *de novo*. Morton Bldgs., Inc. v. Comm'r of Revenue, 488 N.W. 2d 254, 257 (Minn. 1992)

INTRODUCTION

The issue before this court is the determination of the claim of Chisago County for re-imbusement of Medicaid (note: federal law and many states refer to the program as Medicaid; Minnesota's program is designated Medical Assistance; the term "Medicaid" will be used in this brief) benefits paid for the benefit of Lavina Grote.

The Minnesota Supreme Court addressed the issue of recovery of benefits from the estate of a surviving spouse in the recent decision In Re the Estate of: Francis E. Barg, a/k/a Francis Edward Barg, -- N.W.2d--, 2008 WL 2229453 (Filed May 30, 2008; Citations to this opinion will use the page numbers in copy of the opinion in the Appendix to this brief). This matter involves two questions related to the Barg decision- whether any recovery is permitted from Mr. Grote's estate; and if recovery is permitted, what amount may be recovered from Mr. Grote's estate?

The District Court allowed the entire claim, relying primarily on pre-Barg decisions, and on the determination that Mrs. Grote's joint interest in the parties' property was the total value of the assets.

BACKGROUND, HISTORY OF FEDERAL AND MINNESOTA

LAW

The federal law regarding Medicaid was enacted in 1965 as Title XIX of the Social Security Act. Medicaid is jointly funded by federal and state governments. State participation is voluntary but states that choose to participate must comply with federal statutes and regulations in order to receive federal Medicaid funds. Estate recovery is governed by 42 U.S.C§1396p (b) (1) (B) which states that, “no adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made” except as permitted by the federal statute. The federal statute provides “In the case of an individual who is 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...” The federal statute requires that a claim be made against the individual’s estate as defined by state probate law. This case does not involve a claim against Mrs. Grote’s probate estate. She died in 1996, and owned no probate assets.

In 1993 Congress enacted the Omnibus Budget Reconciliation Act of 1993 (OBRA '93) which in 42 U.S.C§1396p(b)(4)(B) permits states to expand the definition of “estate” to include “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.”

Estate recovery in Minnesota is set forth in Minn. Stat. §256B.15. At the time of Mrs. Grote’s death in 1996, that statute provided:

If a person receives any medical assistance hereunder, on the person’s death, if single, or on the death of the survivor of a married couple, either or both of whom received medical assistance, the total amount paid for medical assistance rendered for the person and spouse shall be filed as a claim against the estate of the person or the estate of the surviving spouse in the court having jurisdiction to probate the estate.

A claim shall be filed if medical assistance was rendered for either or both persons under one of the following circumstances: (a) the person was over 65 years of age, and received services under this chapter....”

Federal law limits recovery to the recipient’s probate estate [42 USC§1396p (b) (4) (A)] unless a state expands its definition of “estate” to include non-probate assets (such as joint tenancy property). Minnesota did not expand its definition of estate for Medicaid recovery purposes until 2003.

At that time Minnesota Statute 256B.15 was amended to include joint tenancy interests The 2003 amendment provided, in part, as follows:

Subdivision 1. Policy, applicability, purpose, and construction; definition. (a) It is the policy of this state that individuals or couples, either or both of whom participate in the medical assistance program, use their own assets to pay their share of the total cost of their care during or after their enrollment in the program according to applicable federal law and the laws of this state. The following provisions apply: (A) subdivisions 1c to 1k shall not apply to claims arising under this section which are presented under section 525.313; (2) the provisions of subdivisions 1c to 1k expanding the interest

included in an estate for purposes of recovery under this section give effect to the provisions of United States Code, title 42, section 1396p governing recoveries, but do not give rise to any express or implied liens in favor of any other parties not named in these provisions; (3) the continuation of a recipient's life estate or joint tenancy interest in real property after the recipient's death for the purpose of recovering medical assistance under this section modifies common law principles holding that these interests terminate on the death of the holder

Subd. 1h. Estates of specific persons receiving medical assistance. (a) For purposes of this section, paragraphs (b) to (k) apply if a person received medical assistance for which a claim may be filed under this section and died single or the surviving spouse of the couple and was not survived by any of the persons described in subdivisions 3 and 4.

(b) For purposes of this section, the person's estate consists of: (1) their probate estate; (2) all of the person's interests or proceeds of those interests in real property the person owned as a life tenant or as a joint tenant with a right of survivorship at the time of the person's death; (3) all of the person's interests or proceeds of those interests in securities the person owned in beneficiary form as provided under sections 524.6-301 to 524.6-311 at the time of the person's death, to the extent they become part of the probate estate under section 524.6-307; and (4) all of the person's interests in joint accounts, multiple party accounts, and pay on death accounts, or the proceeds of those accounts, as provided under sections 524.6-201 to 524.6-214 at the time of the person's death to the extent they become part of the probate estate under section 524.6-207. Notwithstanding any law or rule to the contrary, a state or county agency with a claim under this section shall be a creditor under section 524.6-307.

(c)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.

In 2005, Minn. Stat. §256B.15 was again amended. That amendment limited claims against joint tenancy interest in those interests created on or after August 1, 2003. Minn. Stat. §256B.15, subd.1 (c).

ARGUMENT

THE OMNIBUS BUDGET RECONCILIATION ACT OF 1993 (OBRA '93), AS INTERPRETED BY THE MINNESOTA SUPREME COURT IN BARG PERMITES MINNESOTA TO EXTEND ITS RECOVERY RIGHTS TO INCLUDE JOINT TENANCY INTERESTS. HOWEVER, MINNESOTA DID NOT EXPAND ITS DEFINITION OF ASSETS FROM WHICH RECOVERY MAY BE OBTAINED UNTIL 2003, SEVEN YEARS AFTER MRS. GROTE'S DEATH, AND TERMINATION OF HER JOINT TENANCY INTEREST.

The Minnesota Supreme Court in Barg determined that Minn. Stat. §256B.15 permits recovery from the estate of a surviving spouse, but that federal law limits the assets against which recovery may be obtained and the amount which may be recovered. The Court determined that 1396p (b) (4) allows states to

expand the definition of estate beyond probate law... [r]eal property law principles informed by principles of probate law should be the basis for ascertaining any interests at the time of death. An interest recognized must be consistent with the underlying foundational rationale that recovery from a surviving spouse's estate is allowed only because of its relationship to the recipient's estate, from which federal law expressly allows recovery...[f]or an interest to be traceable to and recoverable from a surviving spouse's estate, the interest must be (1) an interest recognized by law,(2) which the Medicaid recipient held at the time of death, and (3) that resulted in a conveyance of an interest of some value to the surviving spouse that occurred as a result of the recipient's death. Further, to the extent that the interest is not part of the standard probate estate, Minnesota law must have

expanded the definition of estate to include the interest as authorized by section 1396p(b)(4)..... in 2003, the Minnesota legislature amended section 256B.15 by extending the definition for Medicaid recovery purposes to include assets owned by a recipient spouse in joint tenancy or life estate at the time of her death. Act of June 5, 2003, ch.14, art. 12, §§40-50,2003 Minn. Laws Spec. Sess. 1751, 2205-2217 (codified as amended at Minn. Stat. §256B.15, subd 1, 1c-1k). ...the legislature chose to include only two forms of ownership in the expanded definition of estate. In 2005, the legislature retroactively made the provisions continuing life estates and joint tenancies effective only for life estate and joint tenancy interests created on or after August 1, 2003. Act of July 14, 2005, 1st Special Sess. Ch.4, art.7, 2005 Minn. Laws 2454,2649 [codified as Minn. Stat. §256B.15, subd 1(c)]. (emphasis added) Barg 31-33

The Court went on to state that even if Mrs. Barg had owned a joint tenancy interest, it would not be covered by the 2003 law because the interest was created many years before August 1, 2003. Barg at 36

The Barg decision gives this court three principles for deciding this matter. Recovery from the estate of a surviving spouse is permitted by federal law, provided that three conditions are met: a) the deceased spouse must have owned an interest in the property at the time of death; b) the state expands its definition of estate to include non-probate assets; c) recovery is limited to “to the extent of such interest” [42U.S.C§1396p(b)(4)(B)] of the deceased recipient in such assets.

At the time of her death in 1996, Mrs. Grote owned an interest as a joint tenant in two parcels of real estate and two bank accounts. Those interests ended upon her death. It is the Estate’s position is that recovery may not be made from

Mr. Grote's estate because Minnesota did not expand its definition of "estate" to include non-probate assets until 2003, seven years after she died.

In Minnesota, no statute may be construed to be applied retroactively unless "clearly and manifestly so intended by the legislature." Minn. Stat. §645.21(1986) Before a statute will be afforded application, there must be clear evidence that the legislature intended retroactive application, "such a mention of the word 'retroactive.'" Duluth Firemen's Relief Association v. City of Duluth, 361 NW 2nd 381, 385 (Minn. 1985). The Minnesota Court of Appeals has consistently ruled that the determinative date for County's right to recover Medicaid benefits paid for a recipient is the date of death of the recipient. In Re Estate of Edhlund, 444 N.W. 2nd 861 (Minn. App., 1989); In Re Estate of Hanson, 451 N.W. 2nd 364 (Minn. App., 1990).

In 1996, when Mrs. Grote died, federal law mandated a claim for recovery against a recipient's probate estate. Mrs. Grote did not have a probate estate.

Federal law also permitted states to expand the definition of the recipient's estate to include non-probate assets. Minnesota had not taken any such action by 1996. None of the expanded interests listed in 42 U.S.C §1396p(b)(4)(B) – "tenant in common, survivorship, life estate, living trust, or other arrangement" appear in the Minnesota recovery statutes in effect in 1996. Those words do not appear until the 2003 amendments to Minnesota Statute §256B.15.

The District Court in this matter relied on In Re the Estate of Jobe, 590 N.W.2d 162 (Minn.Ct.App. 1999). In that case, the County was permitted to recover benefits paid for Mrs. Jobe (the pre-deceased recipient spouse) from joint tenancy property she owned with Mr. Jobe from Mr. Jobe's estate.

The Barg decision rejected the reasoning used in Jobe. In Barg, the Supreme Court specifically determined that the 2003 amendments to Minn. Stat. §256B.15, "...implement the optional expanded definition of 'estate' authorized by the 1993 amendments to the federal law. The 2003 amendments to the Minnesota estate recovery law modify common law to provide for continuation of a recipient's life estate or joint tenancy interest in real property after his death for the purpose of recovering medical assistance and include that continued interest in the recipient's estate." Barg at 12.

II. IF THE COURT DETERMINES THAT LAVINA GROTE OWNED AN INTEREST WHICH IS SUBJECT TO RECOVERY FROM THE ESTATE OF SYLVESTER GROTE, RECOVERY IS LIMITED TO ONE-HALF OF THE VALUE OF THE JOINTLY OWNED PROPERTY AT THE TIME OF HER DEATH IN 1996.

Federal law limits recovery from the assets owned by a recipient as a joint tenant to the recipient's "interest at the time of death (to the extent of such interest)." 42U.S.C§1396p(b)(4)(B). Although the Estate's position is that the County's claim should be denied in its entirety, if this Court determines that the

claim should be allowed, the claim should be limited to one-half of the value of the assets at the time of Mrs. Grote's death.

The County argued and the District Court found that Lavina Grote as a joint tenant owned and controlled the entire property during her joint tenancy, and thus the County's claim was allowed against all joint tenancy assets.

The Court of Appeals decision in Barg applied a real property analysis to determine Mrs. Barg's interest in assets at the time of her death, 722 N.W. 2d at 497; the Supreme Court's decision in Barg also applied a real property analysis to determine her interest in non-probate assets. Barg at 33. A real property analysis of Mrs. Grote's interest in the assets to determine the extent of her interest in the property shows that her interest was one-half of the value of the assets at her death.

In 46 Dunnell Minn. Digest, Tenancy in Common, §1.00(a) (4th ed. 2000) tenancy in common is defined: "An 'undivided interest' generally references a tenancy in common" (cited to Chapman Place Ass'n. v. Prokasky, 507 N.W.2d 858 (Minn.Ct.App. 1993)). "When property is held in tenancy in common there is unity of possession whereby each owner has an undisputed interest and cannot claim any specific portion of the property until partition." (also cited to Chapman). "A joint tenancy is distinguished for a tenancy in common by the fact that a surviving joint tenant succeeds to the person with whom he share the joint tenancy.")(emphasis

supplied) (cited to Hendrickson v. Minneapolis Fed. Sav. and Loan Ass'n, 281 Minn.462, 161 N.W.2d 688 (1968)). “Under a tenancy in common, with each of the parties owning an undivided interest therein, there is no right of survivorship, but instead the interest of the tenant in common passes to that tenant’s estate.” (cited to Johnson v. Gray, 533 N.W.2d 57 (Minn.Ct.App.1995)).

Joint tenancy is described in 28 Dunnell Minn. Digest, Joint Tenancy, §1.00 (4th ed. 2000): “The doctrine of survivorship by which, on the death of one joint tenant, the survivors succeed to the entire estate is a distinctive incident of joint tenancy.” (cited to Hendrickson). The Dunnell description of joint tenancy continues with a reference to Minn. Stat. §525.90 (now renumbered 524.2-702(b)(3)), which reads in its entirety: “Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived. If there are more than two joint tenants and all of them have so died, the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants.”(emphasis added)

The obvious and only difference between a joint tenancy interest and a tenancy in common interest is the right of survivorship. A joint tenant who survives another joint tenant owns that joint tenancy interest at the death of the

other. The interest never reverts from the surviving joint tenant to the predeceased joint tenant.

Numerous Minnesota statutes make clear that neither joint tenant owns the entire property but only an undivided interest in the whole. Both cannot own the entire or whole property. Minn. Stat. §500.19 Subd. 5 allows a joint tenant to sever the joint tenancy several ways including “If (1) the instrument of severance is recorded in the office of the county recorder...where the real estate is situated; or (2) the instrument of severance is executed by all the joint tenants...” In the first instance the instrument of severance may be signed by only one joint tenant. Minn. Stat. §507.09 provides for approved real estate forms in Minnesota and Form 125-M titled Severance of Joint Tenancy is a document to be completed by an individual owner with no other person joining in the document. Pursuant to Minn. Stat. §500.19 Subd.5(1) the document recites in part, “I hereby sever and terminate the joint tenancy with the intention that I hold my interest in the real property as a tenant in common”. Only the proportional interest of the joint tenant signing the severance document is changed to an interest as a tenant in common. Minn. Stat. §507.02 allows, “If the owner is married, no conveyance of the homestead, except a mortgage for purchase money under §507.03, a conveyance between spouse pursuant to §500.19, Subd. 4 or a severance of a joint tenancy pursuant to §500.19 Subd. 5, shall be valid without the signatures of both spouses.”

Again, the statute allows one joint tenant to sever the joint tenancy because each joint tenant only owns a proportional interest.

Minn. Stat. §558.01 and following provides the statutory scheme for a partition of real estate. Section 558.01 reads, “When two or more person are interested, as joint tenant or as tenants in common, real property in which one or more of them have an estate of inheritance or for life or for years, an action may be brought by one or more of such persons against the others for a partition thereof according to the respective rights and interest of the parties interest therein, or for a sale of such property, or a part thereof, if it appears that a partition cannot be had without great prejudice to the owners.” (emphasis supplied). If property cannot be divided equally in-kind, §558.16(4) provides that after sale expenses the residue shall be applied “among the owners of the property sold, according to their respective shares.” (emphasis supplied). Minn. Stat. §558.01 allows any individual joint tenant to bring this action and ultimately recover that individual joint tenant’s “respective share.”

The Eighth Circuit reviewed Minnesota law concerning joint tenancy rights in O’Hagen v. U.S., 86 F3rd 776 (8th Circuit 1996).

Under Minnesota law, Mr. O’Hagan has an undivided interest, as a joint tenant with Mrs. O’Hagan, in the property. As such, Mr. O’Hagan has a right of survivorship to Mrs. O’Hagan’s interest in the joint tenancy property, as well as a present right to use and occupy the real estate. See generally Hendrickson v. Minneapolis Fed. Sav. & Loan Ass’n, 462 N.W.

2d 688 (1968). Moreover, a joint tenant generally has the right to unilaterally sever the joint tenancy, so long as the joint tenant satisfies at least one of the statutory methods for doing so. See Wendt v. Hane, 401 N.W.2d 457, 459 (Minn.Ct.App.1987). Once the joint tenancy has been severed it converts into a tenancy in common and extinguishes the other joint tenant's right of survivorship. See Hendrickson, 161 N.W.2d at 690-91.

The Court of Appeals in Barg determined that Mrs. Barg's continued interest in the property was a joint tenancy interest at the time of her death; that portion of the Court of Appeals decision was reversed. However, the method of determining the value of her interest should guide this Court. The Court of Appeals interpreted the language "extent of such interest" contained in 42 U.S.C§1396p(b)(4)(B), means ½ of the value of the property at the time of her death:

The "extent of her interest" is defined by the joint tenancy. A joint tenant's interest in property is an undivided one-half interest in the property's value. Kipp v. Sweno, 683 N.W. 2nd 259, 260, 263 (Minn. 2004) Because the stipulated facts state that the joint tenancy property was valued at \$120,800 at the time of Delores Barg's death, the extent of the value of Delores Berg's interest at the time of her death was \$60,400. Barg, 722 N.W. 2d 497

The Estate's position limiting recovery to one-half the value of the joint assets at the time of Mrs. Grote's death is further supported by the amendments to Minn. Stat. §256B.15 adopted in 2003. Throughout those amendments the joint tenancy interest is defined as:

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. See Minn. Stat. §256B.15 subd.1h(c); 1i(c)

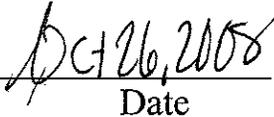
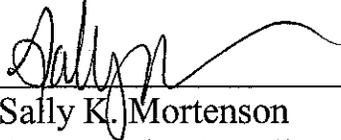
The joint tenancy real estate owned by Mr. and Mrs. Grote in 1996 had a total value \$76,900; one-half of that value is \$38,950. The claim should, therefore, be limited to \$38,950, from the joint real estate currently in Mr. Grote's estate.

CONCLUSION

The Minnesota Supreme Court has ruled that federal law permits Minnesota to recover benefits paid to a recipient from the estate of a surviving spouse, provided that the claim for recovery meets three conditions: a) the deceased spouse must have owned an interest in property at the time of death; b) the state expands its definition of estate to include non-probate assets; c) recovery is limited to "to the extent of such interest" [42U.S.C§1396p(b)(4)(B)] of the deceased recipient in such assets;

The recovery rights are determined based on the facts and law at the time of the death of the recipient. In this matter, Mrs. Grote owned a joint tenancy interest in the property at the time of her death. However, the state had not met the second condition- an expansion of the definition of estate to include non-probate assets- at the time of her death. Thus, there may be no recovery from the estate of her surviving husband, Sylvester Grote.

If the Court determines that Minnesota law permits recovery from his estate, then the recovery is limited to the "extent of her interest" in the property. Her interest in the property was ½ of its value at the time of her death in 1996. Therefore, if any recovery is allowed, it should be limited to that value.



Sally K. Mortenson

Date

Attorney for Appellant-Personal Representative

2500 County Road 42 West, Suite 160

Burnsville, MN 55337

Atty. I.D. No. 75632

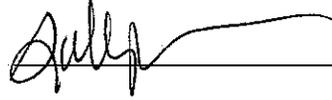
Telephone: 952-431-2222

Fax: 952-224-0901

CERTIFICATE OF COMPLIANCE

WITH MINN. R. APP. P 132.01, Subd. 3

The undersigned certifies that the brief submitted herein is less than 45 pages in length as required by the limitations of the Minnesota Rules of Appellate Procedure 132.



Sally K. Mortenson
Attorney for Appellant