

No. A08-1691

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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In re Estate of Sylvester G. Grote

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**JOINT BRIEF OF RESPONDENT CHISAGO COUNTY AND  
INTERVENOR-RESPONDENT COMMISSIONER OF HUMAN SERVICES**

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## ISSUES

- I. Does federal Medicaid law imposes conditions on states that conflict with those Minnesota Medicaid benefit recovery statutes that require recovery from a surviving spouse's probate estate of the value of benefits received by both spouses?

***Holding Below:***

The district court held that recovery of Lavina Grote's benefits from her surviving spouse's probate estate was consistent with federal law because at the time of her death she had a joint tenancy interest in properties now in his probate estate.

***Apposite Authorities:***

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

Minn. Stat. § 256B.15, subd. 1a

42 U.S.C. § 1396p(b)(4)(B)

42 U.S.C. § 1396p(e)(1)

Minnesota State Medicaid Plan, Attachment 4.17A

- II. When recovery is from property owned jointly by spouses, does federal law require that their respective interests be identified and apportioned?

***Holding Below:***

The district court did not rule on this specific question. It did imply that apportionment was required when it assessed the extent of Lavina Grote's joint tenancy interest. A holding that no apportionment is required is an alternative ground for affirming the district court.

***Apposite Authorities:***

42 U.S.C. § 1396p(b)(4)(B)

42 U.S.C. § 1396p(e)(1)

Minnesota State Medicaid Plan, Attachment 4.17A

- III. Assuming that apportionment of interests is required, what was the extent of Lavina Grote's joint tenancy interest in jointly-owned property at the time of her death, that is during concurrent ownership and before any severance or partition?

***Holding Below:***

The district court held that Lavina Grote's joint tenancy interest was not one-half but rather was in the entirety of the property and .

***Apposite Authorities:***

*Jamestown Terminal Elevator, Inc. v. Knopp*, 246 N.W.2d 612(N.D. 1976)

*Bonnell v. Bonnell*, 344 N.W.2d 123 (Wis. 1984)

*Brown v. Vonnahme*, 343 N.W.2d 445 (Iowa 1984)

*Mahlin v. Goc*, 547 N.W.2d 129 (Neb. 1996)

## STATEMENT OF THE CASE AND FACTS

Lavina Grote died on November 13, 1996 at age 79. Appellant's Appendix ("AA") AA6. She was married to Sylvester Grote. *Id.* At the time of her death, she and Sylvester owned two pieces of property as joint tenants with right of survivorship.<sup>1</sup> *Id.*; *see also* Respondents' Supplemental Record and Addendum ("RA") RA3-RA4 (property deeds showing conveyances to the Grotes as joint tenants with survivorship). Sylvester survived Lavina and continued to own the two properties until his death on May 28, 2006. AA7. During Lavina's lifetime, the state paid \$71,262.70 for her benefit through its Medicaid program, known as Medical Assistance. AA6. Sylvester also received Medicaid benefits during his lifetime, totaling \$54,796.86. AA3.

Following Sylvester's death, informal probate proceedings were initiated. AA8. Chisago County Health and Human Services filed claims against Sylvester's probate estate for the recovery of the Medicaid benefits received by both Sylvester and by Lavina. AA2, AA4. The estate's personal representative, Helen Anderson, allowed the claims only in the amount of Sylvester's benefits, disallowing the portion representing Lavina's benefits. AA3, AA5. The County petitioned for full allowance of the claims. AA9, RA1-RA2.

The matter was presented on stipulated facts to Chisago County District Court, the Honorable Robert G. Rancourt. AA6. The County and Personal Representative jointly

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<sup>1</sup> The Stipulated Facts state that the 1996 combined value of the Grote's jointly-owned real properties was \$76,900. AA6. According to publicly available property tax records, the most recent estimated market values for these properties are \$193,600 for the Chisago County property, RA5, and \$59,500 for the Pine County property, RA6; a combined estimated value of \$254,100.

requested that the court stay its decision, however, until the Minnesota Supreme Court issued its decision in *In re Estate of Barg*, 752 N.W.2d 52 (Minn.), *reh'g denied* (July 21, 2008), *pet. for cert. pending*, U.S. Sup. Ct. Docket No. 08-603 (petition filed November 3, 2008). AA10. A decision in *Barg* was issued May 30, 2008.

On July 23, 2008, after receiving supplemental briefs from the parties addressing *Barg*, the district court issued its decision. The court granted the County's petitions for full allowance. AA18. In its thorough memorandum opinion, the court explained that allowing the County's recovery claim for Lavina's benefits against the formerly jointly-owned properties now in Sylvester's probate estate was required by the caselaw interpreting federal and state statutes. *See* AA16. The court rejected the Personal Representative's argument that recovery should be limited to only one-half the value of the former joint tenancy assets. *Id.* The court concluded that "a joint tenant has an interest in the entire property and an undivided share in the whole estate." AA16. The court reasoned that "[t]he value of a joint tenant's interest is not half of the property . . . but instead is the total value of the property." AA17. The court then held that "the County may recover against the entire estate, as Lavina's joint tenancy interest consisted of the total value of the property." *Id.*

The Personal Representative appealed. AA1. She argues on appeal that no recovery is permitted in this case under Minnesota law because the statute that specifically allows for recovery from a joint tenancy interest is only effective for joint tenancy interests established on or after August 1, 2003. App. Br. 9-12. She then argues,

in the alternative, that if recovery is allowed, it is limited to one-half the 1996 value of the joint tenancy property. App. Br. 12-18.

On November 18, 2008, the Court granted the Commissioner of Human Services' motion to intervene. The Commissioner's interests are aligned with Respondent Chisago County and the following joint argument is submitted in response.

Before turning to that argument, a brief clarification is warranted. The Personal Representative states that the issues in this appeal are related to the Minnesota Supreme Court's *Barg* decision. App. Br. 5. In *Barg*, the surviving spouse did not himself receive Medicaid benefits. *Barg*, 752 N.W.2d at 57. Also, the recipient spouse in *Barg* had transferred her joint tenancy interest in the couple's real property to the surviving spouse. *Id.* Thus, this case is factually distinguishable from *Barg* because Sylvester, the surviving spouse, also received Medicaid benefits. (The claim for the amount of his benefits was allowed by the Personal Representative and is not at issue.) This case is also distinguishable from *Barg* in that Lavina did not transfer her joint tenancy interest and, therefore, at the time of her death she did have a formal ownership interest in the property. Because of these differences, the Minnesota Supreme Court did not necessarily address the issues presented here, as discussed in further detail, below.

## ARGUMENT

Minnesota law requires that the value of Lavina's Medicaid benefits be recovered from Sylvester's probate estate. Federal Medicaid law allows states to classify nonprobate property and assets as subject to recovery. In particular, federal law gives states discretion to include the property of a recipient's spouse as subject to recovery. It does this by incorporating all spousal assets in the scope of optional recovery through the definition of "assets" found in the federal statute. Thus, Minnesota's recovery laws validly reach the interests of both spouses in assets in the surviving spouse's probate estate. Because of this allowable reach, there is no need to distinguish between the interests of joint tenants when they are spouses. Only when a joint owner is a nonspouse third-party is it necessary demarcate the boundaries of the individual recipient in the jointly-owned property.

In this case, even if the Court does not adopt the above reading of federal law, Lavina's joint tenancy interest reaches the whole of the property and therefore the district court's order should be affirmed. Although Sylvester has the same joint tenancy interest, allowing recovery to the full extent of Lavina's identical interest will only affect his right of conveyance of the properties to his heirs. Otherwise, Sylvester continued during his lifetime to be able to use, enjoy, and even dispose of the property as he wished. Finally, the current value of the properties should be used, not the 1996 valuations, to avoid giving a windfall to Sylvester and Lavina's heirs at the expense of fully reimbursing the public funds that were used to provide for their care.

**I. RECOVERY OF THE VALUE OF LAVINA'S BENEFITS FROM SYLVESTER'S PROBATE ESTATE IS REQUIRED BY MINNESOTA LAW AND IS CONSISTENT WITH FEDERAL LAW.**

**A. Minnesota Law Requires Satisfaction Of A Recovery Claim For A Predeceased Spouse's Medicaid Benefits From The Surviving Spouse's Probate Estate.**

The policy of the State of Minnesota is 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." Minn. Stat. § 256B.15, subd. 1(a) (2006). Consequently, Minnesota law makes the probate estate of the individual, or that of the individual's surviving spouse, liable for a claim for recovery of the value of Medicaid benefits received by either or both spouses. Minn. Stat. § 256B.15, subd. 1a (2006).

Minnesota imposes several prerequisites and limits on this recovery. First, recovery applies only if the Medicaid recipient was age 55 and over or was permanently institutionalized when she received Medicaid benefits. Minn. Stat. § 256B.15, subd. 1a (a), (b). Second, any recovery is delayed until after the death of a surviving spouse and when there are no dependent children. Minn. Stat. § 256B.15, subd. 3 (2006). Third, the amount of the claim is limited to the benefits received when the recipient was age 55 and over or while institutionalized. Minn. Stat. § 256B.15, subd. 2 (2006). Fourth, if the claim is made in a surviving spouse's probate estate and that spouse did not himself receive Medicaid benefits, the claim "is limited to the value of the assets of the estate that were marital property or jointly owned property at any time during the marriage." *Id.*

These basic recovery provisions have remained essentially unchanged in substance since 1987 when the express provision was made for the recovery from a surviving spouse's probate estate. *See In re Estate of Jobe*, 590 N.W.2d 162, 164 n. 1 (Minn. Ct. App.); *rev. denied* (Minn. May 26, 1999). These provisions were in effect at the time of Lavina's death in 1996. The County's claims in this case are authorized and required by these provisions.

Amendments made in 2003 to the Medicaid estate recovery statute substantially expanded its length. Act of June 5, 2003, ch. 14, art. 12 §§ 40-52, 90; 2003 Minn. Laws (1st Sp. Sess.) 1751, 2205-18, 2250-51; *codified generally* at Minn. Stat. § 256B.15, subs. 1c to 1k. Those amendments, however, do not apply to this case because recovery from a surviving spouse's probate estate of benefits received by the predeceased spouse is governed by the already-existing statutes, described above. The 2003 amendments focused on ensuring that the joint tenancies and life estates in real property held by recipients would be subject to recovery of Medicaid 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 the purpose of benefit recovery). Before the amendments, state law did not provide a means of recovering from those interests when a recipient died unless, as here, the property was marital property or jointly owned with a surviving spouse. The 2003 amendments thus were intended to address situations different from those found in spousal recoveries like the one here. The mechanisms provided by the 2003 amendments for effecting recovery from joint tenancy interests are unnecessary when recovery is from the value of jointly-owned property in a surviving spouse's

probate estate. In short, the assets that are liable to satisfy recovery of the benefits received by Lavina are *already* in Sylvester's probate estate, hence there is no need to bring them into probate using the mechanisms provided by the 2003 amendments.<sup>2</sup>

**B. Recovery From Sylvester's Probate Estate Of The Value of Lavina's Benefits Is Consistent With Federal Medicaid Law.**

Recovery of the value of the predeceased spouse's Medicaid benefits from the probate estate of the surviving spouse is consistent with federal Medicaid law. This Court held in *Jobe* that recovery from a surviving spouse's probate estate of benefits received a recipient spouse who was a joint tenant at the time of death was consistent with federal Medicaid law. *Jobe*, 590 N.W.2d at 166-67. The Personal Representative claims that *Jobe* is no longer good law after the state supreme court's *Barg* decision because that court rejected *Jobe's* reasoning. App. Br. 12. *Barg*, however, did not involve a recipient who had a joint tenancy ownership interest at the time of death and, therefore, the supreme court was not presented with the same facts as in *Jobe*. Moreover, the supreme court in *Barg* did not express any opinion on the continuing force of *Jobe*. *Jobe* remains good law until it is overruled. Cf. *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22 (1989) (stating that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the

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<sup>2</sup> That the 2003 amendments do not apply to spousal recovery situations is illustrated by the 2003 provision that the continuation of joint tenancy interests under the those 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); Minn. Stat. § 514.981, subd. 6(c)(8) (2006).

case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”). Moreover, the essential holding of *Barg* is that spousal recovery from a nonrecipient surviving spouse’s estate is valid as long as it is from an asset in which the recipient spouse had an ownership interest at time of death. *Barg*, 752 N.W.2d at 71. Here, there is no dispute that Lavina had such an interest at the time of death.

The correctness of *Jobe*’s holding is confirmed by the plain language of the federal statute and the federal government’s own interpretation of that language. As a condition of receiving Federal funds for Medicaid, states are generally prohibited from seeking recovery of those benefits from recipients. 42 U.S.C. § 1396p(b)(1) (2000 & Supp. V 2005). That general prohibition, however, does not apply to the recovery of benefits received by recipients who are age 55 and over. 42 U.S.C. § 1396p(b)(1)(B). For that class of individuals, state’s are required to seek recovery and must do so “from the individual’s estate.” *Id.*

Because mandatory recovery is condition attached to acceptance of federal Medicaid funds, Congress was required to give states clear notice of that condition and what it required them to do in order to satisfy that condition. *See Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296, 126 S.Ct. 2455, 2459 (2006) (stating that whether a Spending Clause-based law imposed a condition on states is based on whether the law “furnishes clear notice” regarding the condition); *South Dakota v. Dole*, 483 U.S. 203, 207, 107 S.Ct. 2793, 2796 (1987) (holding that when Congress uses its Spending Clause power to impose a condition on states it must state the condition unambiguously). To provide this clear notice, Congress included a mandatory

classification of the property and assets from which a state must seek recovery. That provision states that the term “estate” when used in 42 U.S.C. § 1396p(b) “shall include all real and personal property and other assets included within the individual’s estate, as defined for purposes of State probate law.” 42 U.S.C. § 1396p(b)(4)(A). Thus, all states must seek recovery from the property and assets that are in an individual’s probate estate.

When Congress made that scope of recovery mandatory, however, it also recognized that some states already had mature recovery programs. Therefore, Congress allowed states the discretion to classify additional nonprobate property and assets as being subject to recovery. It did so in the companion provision to the mandatory classification. The discretionary classification provision states that “estate”: “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).” 42 U.S.C. § 1396p(b)(4)(B) (emphasis added). In this way, Congress expressly allowed states to classify nonprobate property and assets as subject to recovery.

Congress, in turn, unambiguously declared that the term “assets,” as used throughout section 1396p, “includes all income and resources of the individual *and of the individual’s spouse.*” 42 U.S.C. § 1396p(e)(1) (2000 & Supp. V 2005) (emphasis added). Congress adopted this meaning of “assets” at the same time it adopted section 1396p(b)(4)(B)’s discretionary recovery classification, which uses the term “assets.” Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13611(c) (describing the meaning of “assets”); § 13612(c) (adding the discretionary recovery classification),

107 Stat. 312, 626, 628 (1993). The meaning of assets cannot be ignored in construing the discretion Congress allows states in classifying nonprobate property and assets as subject to recovery. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733 n.5, 95 S.Ct. 1917, 1924 n.5 (1975) (noting that in interpreting a statute, Congress's definition of a word used in a statute cannot be ignored).

Giving effect to Congress's stated reach of the term "assets" fully supports Minnesota's law requiring recovery from assets and property in a surviving spouse's probate estate. When "assets" is used in a provision, Congress expressly expanded the reach of that provision to include the resources of an individual's spouse. Therefore, in section 1396p(b)(4)(B) the clause "any . . . assets in which the individual had any legal title or interest" means "any . . . assets in which [either or both the individual and the individual's spouse] had any legal title or interest." Minnesota's law seeking recovery from the value of assets in a surviving spouse's probate estate simply reflects Minnesota's including "any . . . other assets" in its recovery laws. By including the resources of both "the individual" and "of the individual's spouse" in the meaning of "assets," Congress clearly intended that a spouse's resources fall within the scope of section 1396p(b)(4)(B).

The fact that Minnesota's spousal recovery laws comply with federal Medicaid conditions is confirmed by the Secretary of the U.S. Department of Health and Human Services' express approval of those recovery provisions. On June 27, 2007, the Secretary, acting through the Centers for Medicare and Medicaid Services, approved an amendment to Minnesota's state Medicaid plan that incorporated the spousal recovery

provisions at issue in this case. *Transmittal and Notice of Approval of State Plan Material*, Transmittal No. 07-005 (June, 27, 2007) (copy provided in the Addendum to this brief at RA8-RA22). This approval is based upon the determination that the amendment's recovery provisions comply with federal Medicaid statutory conditions. 42 U.S.C. §§ 1396a(b) ("The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section"); 1396a(a)(18) (incorporating the condition of compliance with terms of § 1396p).

The approved state plan amendment incorporated the substance of Minnesota's spousal recovery laws and explained how the state applied those laws. As amended, the state plan provides that Minnesota recovers from the estates of surviving nonrecipient spouses. It then explains that "[a]ny assets, proceeds of assets and income from such assets, that were jointly owned property at any time during the marriage or marital property including all property in which either spouse had an interest at the time of marriage and property acquired by either or both during the marriage, regardless of how acquired, titled or owned are subject to recovery." RA18-RA19. Approval of a state plan amendment is the Secretary's determination that a state has complied with the conditions imposed by federal Medicaid laws. 42 C.F.R. § 430.15(a)(1) (providing that "Determinations as to whether State plans (including plan amendments and administrative practice under plans) originally meet or continue to meet the requirements for approval are based on relevant Federal statutes and regulations.")<sup>3</sup>

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<sup>3</sup> The Secretary's approval of Minnesota's state plan warrants deference if the underlying federal statute is ambiguous and the Secretary's construction of the statute is a

**C. Minnesota Does Not Need To Formally Incorporate The Federal Discretionary Recovery Provision Into Its Recovery Laws In Order To Recover From Joint Tenancy Interests.**

The Personal Representative's position that there can be no recovery of Lavina's benefits because Minnesota did not adopt a formal definition of "estate" to include joint tenancy interests until 2003, App. Br. 10-11, is not supportable by governing law.

As discussed above, Congress allows states the discretion to classify nonprobate property and assets as subject to recovery — including those of a recipient's spouse as long as one of the spouses had an interest at the time of the recipient's death. Nowhere do the federal statutes require a state to formally adopt the discretionary recovery classification in its probate code or elsewhere in order to exercise that discretion. Conditions imposed on states through the acceptance of federal funds must be unambiguously stated to provide states with clear notice of such conditions. *Arlington Cent. School Dist. Bd. of Educ.*, 548 U.S. at 296, 126 S.Ct. at 2459; *South Dakota*, 483 U.S. at 207, 107 S.Ct. at 2796. Asserting that there is a condition requiring Minnesota to adopt a formal definition of "estate" expressly incorporating the discretionary recovery classification of joint tenancy interests as subject to recovery is at odds with this basic tenet of Spending Clause jurisprudence.

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permissible one. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82 (1984). In addition, federal approval of Minnesota's state Medicaid plan, incorporating the statutes at issue here is "compelling evidence" that federal law "is susceptible to different reasonable interpretations." *Cf. In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 521 (Minn. 2007).

In addition, this Court recognized in *Jobe* that Minnesota's recovery laws meet federal requirements without having to be a formal definition. The Court stated that 42 U.S.C. § 1396p(b)(4)(B) "clearly and unambiguously authorizes a state to define an individual's estate to include non-probate assets, such as those conveyed to a survivor spouse through joint tenancy." *Jobe*, 590 N.W.2d at 165. The Court obviously did not mean a literal definition, but rather the functional definition embodied in Minnesota's laws. This intention is evident from the Court's conclusion that:

Because federal law now allows states to opt for a definition of estate that may include '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,' *the state statute that allows medical assistance benefit reimbursement from the estate of a surviving spouse from "assets of the estate that were marital property or jointly-owned property at any time during the marriage" is entirely consistent with federal law and not preempted.* We therefore affirm the district court's allowance of this claim against the estate.

*Id.* at 166-67 (emphasis added; citations omitted). Consequently, the Court should reject the Personal Representative's argument that recovery from joint tenancy interests in a surviving spouse's probate estate can only take place based upon the 2003 amendments.

## **II. MINNESOTA AND FEDERAL LAW DO NOT REQUIRE APPORTIONING THE INTERESTS OF JOINT OWNERS WHEN THE JOINT OWNERS ARE SPOUSES.**

Minnesota estate recovery law does not require, in the case of spouses, the apportionment of interests in jointly-owned property. It requires a recovery claim against the surviving spouse's probate estate to be for the *total* amount of benefits received by the couple. Minn. Stat. § 256B.15, subd. 1a. If the surviving spouse was not himself a Medicaid recipient, Minnesota law then places a ceiling on the claim at the value of

assets in the probate estate that were marital property or jointly-owned property. Minn. Stat. § 256B.15, subd. 2. (Here, Sylvester did receive Medicaid benefits so that ceiling is inapplicable.) Thus, even when the surviving spouse is not also a Medicaid recipient, there is no requirement to apportion the spouses interests in jointly owned property and limit recovery to only the recipient spouse's portion.

The Personal Representative argues that if recovery is allowed it can only be from a fraction of the jointly-owned property. App. Br. 12-18. The parties below apparently assumed that this was true and focused on the extent of a joint tenant's interest in property. The district court agreed with the County that a joint tenant's interest is in the whole property and rejected the Personal Representative's argument that Lavina's interest was limited to one-half.

It is not necessary, however, for the Court to address the question of the extent of a joint tenant's interest in property during the period of concurrent ownership. The premise that federal law requires an apportionment of interests in order to limit recovery to the recipient's interest is incorrect when the joint tenants are spouses and no third party is a joint tenant with them. This premise is incorrect because, as discussed above, 42 U.S.C. § 1396p(b)(4)(B) gives states the discretion to classify as subject to recovery the property and assets of the recipient spouse as well as those of the recipient's spouse—regardless of which spouse is the formal owner.

This distinction is consistent with federal Medicaid law. A basic “background principle” of Medicaid is that spouses are expected to support one another. *Wisconsin Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 494, 122 S.Ct. 962, 974

(2002); *see also Schweiker v. Gray Panthers*, 453 U.S. 34, 47-48, 101 S.Ct. 2633, 2642 (1981) (noting that in Medicaid “Congress treated spouses differently from most other relatives by explicitly authorizing state plans to ‘take into account the financial responsibility’ of the spouse.”). This principle is embodied in the Medicaid statutes concerning spouses. Those provisions all allow or require states to consider a couple’s assets to be available to pay for the care of the recipient spouse, *regardless* of formal ownership.<sup>4</sup> The flip side of that principle is that nonspouses are *not* held responsible for the costs of a recipient’s medical care. *See* 42 U.S.C. § 1396a(a)(17)(D) (prohibiting states from taking into account the responsibility of others to support a recipient with the exception of the recipient’s spouse).

Applied to the situation of a recipient’s joint ownership, apportionment is not required if the co-owner is the recipient’s spouse. No apportionment is required because Medicaid law allows states to recover from that spouse’s interests. 42 U.S.C. §§ 1396p(b)(4)(B) (allowing states to include “any . . . other [nonprobate] property or assets” in recovery); 1396p(e)(1) (defining “assets” to include those of the individual and of the individual’s spouse).

If a co-owner is a nonspouse third party, then apportionment is necessary to protect that person’s interest from recovery. Minnesota established the method for such

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<sup>4</sup> *See, e.g.*, 42 U.S.C. § 1396r-5(c)(2)(A) (requiring that “all the resources held by *either* the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse” for eligibility purposes (emphasis added)); 42 U.S.C. § 1396p(c)(1)(A) (imposing an eligibility penalty for a transfer by *either* spouse of assets at less than fair market value to a third party); and 42 U.S.C. § 1396p(d)(2)(A)(ii) (requiring, for eligibility purposes, the counting of assets in a trust if the trust assets are those of the individual *or those of the individual’s spouse*).

apportionment as part of the 2003 amendments. Those amendments declare that a joint tenant's interest will be that of a tenant in common and that a life tenant's interest will be determined based on an actuarial table. Minn. Stat. § 256B.15, subds. 1h(c) and 1i(c) (2006). That method, however, does not apply when the shared ownership is between spouses.

The Court should hold that apportionment of interests is not required here because the joint tenants are spouses. Even though it would be on a different ground, the Court should thus affirm the district court's holding. Doing so "is but an application of the doctrine that the trial court will be sustained whether or not it gave the right reason for a correct decision." *Warner v. E. C. Warner Co.*, 70, 33 N.W.2d 721, 724 (Minn. 1948); *accord Myers v. Price*, 463 N.W.2d 773, 775 (Minn. Ct. App. 1990).

**III. IF FEDERAL LAW REQUIRES THE APPORTIONMENT OF SPOUSAL INTERESTS IN JOINTLY OWNED PROPERTY, RECOVERY FROM THE WHOLE OF THAT PROPERTY WHEN SPOUSES ARE THE JOINT TENANTS SHOULD BE ALLOWED BASED ON THE CHARACTERISTICS OF JOINT OWNERSHIP.**

Federal Medicaid law does not require states to apportion the interests in jointly owned property when the joint owners are spouses. If the Court decides otherwise, however, it should affirm the district court's correct holding that a joint tenant's interest reaches the entirety of the property, making the whole property liable to a benefit recovery claim.

**A. The District Court Correctly Determined That A Joint Tenant's Interest Reaches The Whole Of The Property During Concurrent Ownership.**

At the time of her death, Lavina owned the properties that are now in Sylvester's probate estate with him as a joint tenant with right of survivorship. See RA3 and RA4. The nature and extent of a joint tenant's interest in the jointly-owned property must be based upon the fundamental characteristics of joint tenancy.

A joint tenant's interest "rests upon the original conveyance" and thus does not arise from a transfer from the estate of a predeceased joint tenant. *Anderson v. Grasberg*, 78 N.W.2d 450, 455 (Minn. 1956). Minnesota courts have apparently not squarely addressed the nature of a joint tenant's ownership interest during the period of concurrent ownership. Nevertheless, the highest courts in a number of other states have held that a joint tenant's interest is an undivided interest in the whole of the estate. See *Brown v. Vonnahme*, 343 N.W.2d 445, 451 (Iowa 1984) ("a joint tenant owns an undivided interest in the entire estate"); *Mahlin v. Goc*, 547 N.W.2d 129, 132 (Neb. 1996) ("an interest held in joint tenancy is considered 'per my et per tout'—by the half and by the whole—which means that each joint tenant owns the whole of the property from the time at which the interest is created."); *Longacre v. Knowles*, 333 S.W.2d 67, 70 (Mo. 1960) (joint tenants have but one estate; they hold by the moiety or half *and* by the whole) (quotation marks omitted, emphasis in original)); *Downing v. Downing*, 606 A.2d 208, 211 (Md. 1992) ("[j]oint tenancy means that each joint tenant owns an undivided share in the whole estate, has an equal right to possess, use, and enjoy the property, and has the right of

survivorship” (citing 2 Herbert T. Tiffany, *The Law of Real Property* §§ 418, 419 (Basil Jones ed., 3d ed. 1939)).

The Maryland Court of Special Appeals explained the origins of joint tenancy in ways relevant to the determination of property interests here. *See Spessard v. Spessard*, 494 A.2d 701, 705 (Md. Ct. App. 1985). That court explained that the law of real property has its roots in English common law with its feudal concepts concerning property. *Id.*; *see also Davidson v. Minnesota Loan & Trust Co.*, 197 N.W. 833, 834 (Minn. 1924) (recognizing that feudal common law rules concerning interests in real property “still determine, to a large extent, the rights and obligations arising from the relation of a landlord and tenant”). The Maryland court then explained that “[f]eudal society favored [joint] tenancy over other forms of co-ownership, because it was based upon the legal fiction that all of the grantees together constituted one entity.” *Id.* By contrast, the “tenancy in common was disfavored in feudal times because, unlike the joint tenancy, the co-owners had separate interests—they did not comprise a single entity, and there was no survivorship feature.” *Id.* Modern joint tenancy “has substantially the same characteristics as it did in feudal times: ... *joint tenants are both seized of the whole property and have equal undivided interests in it.*” *Id.* Thus, a joint tenant’s ownership interest reaches to the entirety of the property.

The Kentucky Supreme Court further explains the distinct nature of the joint tenancy interest, by reference to a tenancy by the entirety, in which “the survivor takes the entire estate at the death of the deceased co-tenant *not* by virtue of that death, but because, in law, each was viewed to own the *entire* estate from the time of its creation.”

*Sanderson v. Saxon*, 834 S.W.2d 676, 678 (Ky. 1992); *see*, *Bonnell v. Bonnell*, 344 N.W.2d 123, 126 n. 3 (Wis. 1984) (explaining that “[a] tenancy by the entirety is essentially a joint tenancy, modified by the common law theory that husband and wife are one person.”); *accord*, *Hendrickson v. Minneapolis Federal Sav. & Loan Ass’n*, 161 N.W.2d 688, 690 (Minn. 1968).

A joint tenant’s interest is not, as argued by the Personal Representative, limited to a one-half share. For example, the Wisconsin Supreme Court reversed a lower court’s holding that a joint tenant had only a fifty-percent interest in jointly-owned property. *Bonnell*, 344 N.W.2d at 127. The court explained that: “A joint tenancy is one estate in which each owner has an equal, undifferentiated share of the entire estate. Each of the joint tenants possesses a present estate, and is seized of the whole estate; he has an undivided share of the whole estate rather than the whole of an undivided share.” *Id.* (quotation marks and citations omitted).

The Personal Representative’s arguments focus on a joint tenant’s interest *after* severance of the joint tenancy or *after* the partition of the jointly-owned property. *See* App. Br. 15-16. The Personal Representative’s arguments do not address the fundamental nature of joint ownership *during* the joint tenancy. Severance and partition *convert* jointly-owned property into a tenancy in common with proportional ownership. *During* joint ownership, however, the tenancy in common measurement of interest is simply inapplicable. The Colorado Supreme Court explained that, under “the law governing real property held in joint tenancy,” the “[r]ights in real property held in joint tenancy are fixed and vested in the joint tenants at the time of the creation of the

tenancy.” *First Nat. Bank of Southglenn v. Energy Fuels Corp.*, 618 P.2d 1115, 1118 (Colo. 1980). As to the nature of a joint tenancy interest during the period of joint ownership, that court stated that “[u]ntil the joint tenancy is severed, each joint tenant owns an undivided interest in the real property as a whole.” *Id.* (emphasis added).

The Personal Representative contends that the only difference between a joint tenancy and a tenancy in common is the right of survivorship. App. Br. 13-14. Her contention suggests that, therefore, a joint tenant’s interest can be measured as if it were a tenancy in common. This contention fails to acknowledge the fundamental nature of ownership in joint tenancy. The North Dakota Supreme Court explained that “The interest of two joint tenants is not only equal or similar, but is also one and the same. . . . [W]hile it continues, each of two joint tenants has a concurrent interest in the whole . . . .” *Jamestown Terminal Elevator, Inc. v. Knopp*, 246 N.W.2d 612, 613-14 (N.D. 1976). This characterization reflects the fundamental qualities of the joint tenancy form of concurrent ownership. These qualities are aptly described by Blackstone:

But, while it continues, each of two joint tenants has a concurrent interest in the whole; and therefore, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest, which the survivor originally had, is clearly not divested by the death of his companion; and no other person can now claim to have a joint estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time as his own; neither can anyone claim a separate interest in any part of the tenements, for that would be to deprive the survivor of the right which he has in all, and every part. As, therefore, the survivor’s original interest in the whole still remains; and as no one can now be admitted, either jointly or severally, to any share with him therein, it follows that his own interest must now be entire and several and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.

*Knopp*, 246 N.W.2d at 613-14 (quoting 2 W. Blackstone, *Commentaries* 184-85).

Blackstone's explanation of joint tenancy, as quoted in *Knopp*, includes the element that each joint tenant has an interest in the *entire* property. This can be contrasted with an interest in common, under which each tenant has an individual *proportional* interest in the property. The right of survivorship contributes this key difference. A surviving joint tenant's interest in the whole is not acquired from the deceased joint tenant, but arises out of the interest the survivor held from the creation of the joint tenancy. This interest is not an equal fractional share, but is the same as that of the other joint tenant. A joint tenant's interest in concurrently-owned property is an undivided interest in the *whole* of that property. Each joint tenant has an interest in the *entire* property. The extent of a joint owner's interest in property is therefore co-extensive with the whole of the property. Each joint tenant has an equal right to share in the enjoyment of the whole of the property, for his or her life, when property is held in joint tenancy.

For purposes of Medicaid benefit recovery in this case, the question is not the extent of Lavina's ownership interest at the time of a partition or a severance, rather it is the extent of her interest *during her concurrent ownership*. See 42 U.S.C. §1396p(b)(4)(B) (allowing states to define "estate" for purposes of recovery 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)"); *In re Estate of Gullberg*, 652 N.W.2d 709, 713 n. 1 (Minn. Ct. App. 2002) (interpreting "at time of death" to mean "a point in time immediately before death."); *accord*, *In re Barkema*

*Trust*, 690 N.W.2d 50, 56 (Iowa 2004). Therefore, the question is what is the extent of a joint tenant's interest in jointly-owned property during the period of concurrent ownership. The answer, based on fundamental principles and concepts of real property law is that Lavina's interest as a joint tenant is in the whole property.

The Personal Representative may assert that identifying Lavina's interest in this way does not account for Sylvester's interest as a joint tenant. Sylvester, as the other joint tenant, after all, had the same interest. Because recovery from the properties is delayed until after both spouses have died, Sylvester's interest is recognized in that following Lavina's death, he continued to have the full use and enjoyment of the property. The recovery based on Lavina's interest is made only if the property is in Sylvester's probate estate. If Sylvester had sold the properties and used all of the profits from the sale during his lifetime, then Lavina's interest would effectively be wiped out for recovery purposes.<sup>5</sup> However, because the properties *are* in Sylvester's probate estate, they are subject to recovery. The only thing Sylvester is not able to do is to pass those properties to his heirs without first repaying the public for the value of Lavina's benefits (and his own benefits). In other words, only his right to conveyance upon his death is negated by estate recovery, and then only to the extent necessary to recover the value of Medicaid benefits.

This is the outcome that this Court has already held to be consistent with federal Medicaid purposes. In *Jobe*, the Court concluded that "[B]ecause both federal and state

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<sup>5</sup> Any transfer by Sylvester for less than fair market value, nevertheless, could have subjected him to eligibility penalties when he himself applied for or received Medicaid benefits. See 42 U.S.C. § 1396p(c) (2000 & Supp. V 2005).

law allow recovery only after the death of an individual's surviving spouse, dual interests are served." *Jobe*, 590 N.W.2d at 166. It explained that "[o]ne policy prevents the impoverishment of the surviving spouse during his or her lifetime. Once that spouse dies and the need for protection from impoverishment ceases, allowing a state to recover medical assistance benefits previously paid furthers the broader purpose of funding future services to the medically needy," consequently, "[t]hese policies are both served by allowing the state to recover medical assistance benefits paid to or on behalf of a predeceased spouse from a surviving spouse's estate, to the extent the assets contained in that estate were jointly owned by the couple during their marriage. *Id.* (citations omitted).

**B. The Severance And Partition Statutes And Cases Cited By The Personal Representative Relies Should Be Disregarded As Inapplicable Because They Do Not Address The Nature of Joint Ownership.**

The Personal Representative relies on severance and partition statutes in her argument that a joint tenancy interest must be treated the same as a tenancy in common. *See* App. Br. 15-16. Those statutes, however, are not relevant here. Those statutes address circumstances whereby a joint tenancy is destroyed and converted to a tenancy in common. At the time of Lavina's death, however, there was no such action pending. Therefore, those statutes cannot be used to address the nature of her joint tenancy interest during the period of concurrent ownership.

In addition to the severance and partition statutes, the Personal Representative cites to this Court's opinion in *Barg* and that opinion's reference to a joint tenant having a one-half interest. App. Br. 17. Even though that part of the opinion was reversed by the

supreme court, the Personal Representative maintains that “the method of determining the value of [the] interest should guide this Court.” App. Br. 17.

This Court in *Barg*, however, did not provide a method for determining the extent of a joint tenant’s interest. The Court simply stated that “A joint tenant’s interest in property is an undivided one-half interest in the property’s value.” *In re Estate of Barg*, 722 N.W.2d 492, 497 (Minn. Ct. App. 2006). The Court then cited the state supreme court’s decision in *Kipp v. Sweno*, 683 N.W.2d 259 (Minn. 2004), to support that proposition.

The *Kipp* decision also did not provide a method for determining the extent of a joint tenant’s interest in property during the period of concurrent ownership. The issue in *Kipp* was whether a joint tenancy with right of survivorship could be severed in a judicial sale ordered to satisfy a judgment against one of the joint tenant spouses. *Kipp*, 683 N.W.2d at 260. *Kipp* specifically addressed the application of Minn. Stat. § 510.02’s monetary value limitation on the homestead exemption. *Id.* The debtor spouse in *Kipp* had filed a declaration of homestead rights claiming a “one-half interest.” *Id.* at 261. The supreme court then referenced the “one-half interest” declaration several more times. Without citation or analysis, the court stated later that “Appellant and his spouse each have an undivided one-half interest in this homestead property, which includes the present right of use and occupancy and the right of survivorship.” *Id.* at 263. The court then discussed unilateral severance of a joint tenancy and the effect thereof on the nondebtor spouse’s joint tenancy interest. *Id.* at 263-64. There is no indication in *Kipp* that the extent of a joint tenant’s interest was at issue.

**C. Alternatively, Even If Lavina's Interest Is Only One-Half, The Valuation Of That Interest Should Be Based On The Properties' Current Value.**

The district court ordered that the County's petitions for full allowance be granted and that the County's \$71,262.70 recovery claim be allowed against Sylvester's estate. AA18. The Personal Representative asserts that the recoverable interest must be valued as of the time of Lavina's death in 1996. App. Br. 18. As the apparent combined 1996 value of the properties was \$76,900, the value of a half interest would be \$38,450.

The current combined valuation of the properties is \$254,100. RA6, RA6. One-half of this current valuation is more than enough to repay the value of Lavina's Medicaid benefits. By using the current value of property, the decrease or increase in value is borne by the public. For a decedent who passed away when the housing market is cresting, it would be argued to be unfair to use that value at a later time when the market is in a trough and the interest can only be liquidated for less than the earlier valuation. No interest is assessed during the period that recovery is delayed. Consequently, Lavina and Sylvester's heirs would receive a windfall if the 1996 valuation is used and the public expenditures go unrecovered in full.

Because recovery is made against the interest Lavina had at the time of death, and not against the market valuation of that interest at the time of her death, the 1996 values are not relevant and should not be used. The recovery on Lavina's interest occurs in the present, not the past. Therefore, the present value of that interest should be the basis for recovery.

**CONCLUSION**

The County and Commissioner respectfully request that the Court affirm the district court's order granting allowance of the County's recovery claim against the entirety of formerly jointly-owned property in Sylvester G. Grote's probate estate.

Dated: 11/26/08

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