

No. A10-1352

STATE OF MINNESOTA

IN COURT OF APPEALS

In re the Estate of:
Richard L. Perrin, Decedent

REPLY BRIEF OF APPELLANT COMMISSIONER OF THE
MINNESOTA DEPARTMENT OF HUMAN SERVICES

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ARGUMENT

I. THE PARTIES' STIPULATIONS DO NOT PRECLUDE THE ALLOWANCE OF HENNEPIN COUNTY'S MEDICAL ASSISTANCE RECOVERY CLAIM.

The Estate of Richard Perrin ("Estate") argues that *In re Estate of Barg*, 752 N.W.2d 52 (Minn. 2008), permits a claim but that *permitting* a claim does not equate to *allowing* the claim. Estate Response at p. 17. The Estate cites no legal authority for this distinction.

The county may file a claim against the estate of a surviving spouse to recover Medical Assistance benefits paid on behalf of a deceased Medical Assistance recipient. Minn. Stat. § 256B.15, subd. 1; *In re Estate of Barg*, 752 N.W.2d 52, 68 (Minn. 2008). Section 256B.15, subdivision 1, which authorizes the county to file such a claim, contains no requirement that the court determine whether the recipient had an interest in any of the assets in the estate prior to filing the claim. *See* Minn. Stat. § 256B.15, subd. 1. The courts must look further to provisions such as subdivision 2 and section 519.05 to determine which assets are available to satisfy the claim. Accordingly, the parties' stipulations do not control whether Hennepin County's claim must be allowed.

Further, allowing the claim, to preserve the State's ability to seek reimbursement from any future found – but yet unknown – assets, and then determining if the assets are available to satisfy the claim is an appropriate course of action for several reasons. Denying the claim precludes the State from attempting to recover assets that may be

found prior to or after closing the estate.¹ Also, a court can adequately exclude assets in the surviving spouse's current estate from being used to satisfy an estate recovery claim, in the event that recovery using section 519.05 is not permissible, through express findings and conclusions, while preserving the claim so that it can be satisfied from potential future assets in which the recipient spouse had an interest. Accordingly, *allowing* the claim in accordance with *Barg* is legally and practically correct.

The Estate also appears to argue that the Commissioner of Human Services ("Commissioner") agreed to be bound by *Barg* – including its alleged holding that the State cannot recover Medical Assistance benefits under section 256B.15 from the surviving spouse's assets. Estate Response at pp. 18-19. The Commissioner has clearly, through the proceedings, here and below, disputed this issue. The Estate's attempt to apply the Commissioner's limited concession – which is that *Barg* applies to allow a claim under section 256B.15, subdivision 1 – as a concession on the major issue in this appeal should be quickly rejected.

Accordingly, the Estate provides no legal basis for denying Hennepin County's claim. The Commissioner respectfully requests that the district court's denial of the claim be reversed.

¹ See Minn. Stat. § 524.3-1008 (claims previously disallowed are barred).

II. COLLATERAL ESTOPPEL DOES NOT APPLY.

A. In The Context Of *Barg* And The Current Appeal, The Commissioner Does Not Dispute Privity.

Determining privity in the context of collateral estoppel requires a careful examination of the circumstances of each case. *Margo-Kraft Distribs., Inc. v. Minneapolis Gas Co.*, 200 N.W.2d 45, 47 (Minn. 1972). Privity can be found if the party to be estopped (1) had a controlling participation in the first action, (2) had an active self-interest in the previous litigation, or (3) had a right to appeal from a prior judgment. *State v. Lemmer*, 736 N.W.2d 650, 661 (Minn. 2007) (citations omitted). Coincidental interests alone, even when combined with an opportunity to participate in and contribute to the prior action, are not sufficient to establish privity. *Denzer v. Frisch*, 430 N.W.2d 471, 474 (Minn. Ct. App. 1988); *Bogenholm by Bogenholm v. House*, 388 N.W.2d 402, 405-07 (Minn. Ct. App. 1986).

The United States Supreme Court requires courts to scrutinize the use of collateral estoppel more carefully when a party seeks to apply it against the government. *U.S. v. Mendoza*, 464 U.S. 154, 159 (1983). The state, as sovereign, and government agencies will not automatically be considered in privity because their respective functions and responsibilities are so distinct that applying collateral estoppel would “interfere with the proper allocation of authority between them.” *Lemmer*, 736 N.W.2d at 661 (quoting Restatement (Second) of Judgments § 36 (1982)).

Here, in the context of *Barg*, for the purposes of this appeal and his argument that section 519.05 in conjunction with section 256B.15, subdivision 1, provides authority for

estate recovery against the surviving spouse's interest in the estate, the Commissioner does not dispute privity. The Commissioner does *not*, however, concede privity based simply on his relationship with the county under the regulatory framework established in federal and state law as found by the district court in its orders or as argued by the Estate. *See* A.Add. 4; A.Add. 10-12; Estate Brief at pp. 8-14.

As demonstrated in the Commissioner's principal brief and as supplemented by this reply, the question of privity in this case does nothing to overcome the Estate's inability to establish a necessary element of collateral estoppel – a final judgment on the merits of recovery using section 519.05.

B. *Barg* Does Not Demonstrate A Decision On The Merits Of Recovery Using Section 519.05.

Barg is void of any discussion or analysis on the applicability or preemption of section 519.05 in estate recovery matters – a point conceded by the Estate. *See Barg*, 752 N.W.2d at 52-74; Estate Response at p. 19. In Minnesota, issue preclusion “must rest upon a more solid legal basis than mere speculation as to what was actually adjudicated in the prior action.” *Parker v. MVBA Harvestore Sys.*, 49 N.W.2d 904, 906 (Minn. Ct. App. 1992); *see also Canal Capital Corp. v. Valley Pride Pack, Inc.*, 169 F.3d 508, 514 (8th Cir. 1999). Although left to speculation as to why, many plausible explanations support the conclusion that *Barg* did not decide the merits of estate recovery under section 519.05.

It is without question that section 256B.15 is the mainstay of estate recovery in Minnesota. The *Barg* court was presented with the issue of whether one of the principal

provisions of section 256B.15 – subdivision 2 – was preempted by federal law. Mille Lacs County also, albeit minimally, proposed estate recovery under section 256B.15, subdivision 1, and section 519.05 as a plausible alternative theory of recovery. While courts may at times avoid questions of constitutionality if there is an alternative legal basis to resolve the issue, it makes no sense to do so where – as in *Barg* – the legal question was likely to be raised again and a significant provision of the State’s principal estate recovery statute was in question. Further, even if the court looked at recovery using section 519.05, the court would still have been required to consider whether the alternative scheme was preempted by federal law. Accordingly, it is reasonable that *Barg* addressed head-on the potential preemption of subdivision 2. To reach that decision, *Barg* did not have to – and in fact did not – address the merits of section 519.05 as it pertains to estate recovery.

Further, the section 519.05 theory of recovery had never been a focal point of the dispute between the Estate and the county in *Barg*. The theory was raised for the first time at the court of appeals as an illustration of the statutory treatment of spousal assets that consumed only one paragraph in 141 pages of briefing. When section 519.05 was raised in briefing to the supreme court, its discussion appeared in only seven of the 203 pages in briefing. Moreover, that discussion was focused on the alternative argument that if the supreme court affirmed the court of appeals’ holding that the recipient spouse had a joint tenancy interest valued at one half, then joint and several liability allowed the reaching of the other one-half interest to fully satisfy the claim. A.App. 79-80. The supreme court’s reversal of the court of appeals joint tenancy holding likely caused the

court to forego an evaluation of the joint and several liability alternative. Although the briefing was sufficient to provide the court with the analysis required by *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979), and the factual background to conduct the analysis, the briefing was clearly *not* the focal point of the appeal. The court's failure to address it should be no surprise.

In addition, *Barg* fails to discuss section 519.05 or conduct the necessary analysis for determining whether it is preempted. That analysis required *Barg* to do more than simply determine that the law was in conflict with federal statutes. This is only the first step mandated by *Hisquierdo*. The next analytical step mandated a discussion and evaluation of the federal objective and whether applying section 519.05 did major damage to those objectives. Without this next level of analysis, the Estate's assertion that *Barg* decided the question of preemption regarding section 519.05 is without merit. Additionally, the *Barg* court may have questioned the application of section 519.05 to estate recovery matters.² This possible outstanding question, coupled with the many factors above, makes it reasonable to conclude that *Barg* did not address the merits of an estate recovery claim under section 256B.15, subdivision 1, and section 519.05, and saved that question for another day.

Many plausible reasons exist for the court's silence, but its silence leaves only speculation as to the court's opinion of recovery under section 256B.15, subdivision 1,

² At the time *Barg* was decided, section 519.05 did not expressly indicate its application to estate recovery. Section 519.05 was later amended to clarify that its provisions are to be applied in conjunction with estate recovery under section 256B.15. *See* 2009 Minn. Laws ch. 79, art. 5, § 73.

and section 519.05. Collateral estoppel requires more than silence, and therefore, the silence in *Barg* must *not* be interpreted as a decision on the merits of estate recovery under section 256B.15, subdivision 1, and section 519.05.

C. The Medicaid Context And Background Is Relevant And Necessary To Resolution Of Whether Collateral Estoppel Is Available.

The purpose of collateral estoppel is to prevent needless consideration of issues decided in earlier litigation. *Deli v. Hasselmo*, 542 N.W.2d 649, 656 (Minn. Ct. App. 1996). As the Commissioner previously articulated, *Barg* fails to conduct the preemption analysis required by the United States Supreme Court to conclude that a state family law statute – section 519.05 – is preempted by federal law. *See Hisquierdo*, 439 U.S. at 581; Commissioner’s Brief at p. 31. Where *Barg* never decided the preemption of section 519.05, allowing the Commissioner and County to argue the merits of that question is not needless. The Commissioner includes the Medicaid and estate recovery background as relevant and necessary factual background to demonstrate what a *Hisquierdo* analysis would look like and what *Barg* would have considered had it really contemplated estate recovery under section 256B.15, subdivision 1, and section 519.05. Accordingly, consideration of the Medicaid and estate recovery background is both appropriate and necessary.

D. Even If The Doctrine Of Collateral Estoppel Is Available, The District Court Abused Its Discretion By Applying It Against The State Agency And Ignoring The Ramifications Of Giving Precedential Effect To Silence In Appellate Court Decisions.

Barg focuses on whether federal law limits estate recovery to assets in which the recipient had an interest *at the time of her death*³ and is silent on whether section 519.05 provides sufficient legal authority to recover from the surviving spouse's interest. The district court's decision turns *Barg's* silence on recovery using section 519.05 into precedent and, in doing so, abused its discretion. It gives precedential effect to the silence in appellate court decisions and invites parties to review briefing in appellate matters to determine if a minute alternative theory, not addressed by the court, could be used against another party. Precedent should be reserved for clearly decided issues on which the court has provided its analysis. Accordingly, the Commissioner respectfully requests that the district court's decision be reversed.

³ See *Barg*, 752 N.W.2d at 63.

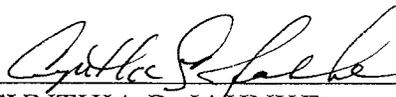
CONCLUSION

For these reasons, the Commissioner respectfully requests that the court reverse the district court decision thereby allowing Hennepin County's claim, holding that collateral estoppel is not available to bar the use of section 519.05 to satisfy the claim, and remanding the matter for a decision on the merits.

Dated: December 6, 2010.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

The undersigned certifies that the Brief submitted herein contains 2,019 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.



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