NO. A05-2346

State of Minnesota
In Supreme Court

In re the Estate of:

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

AMICI CURIAE BRIEF AND ADDENDUM OF THE ELDER LAW SECTION OF THE MINNESOTA STATE BAR ASSOCIATION AND OF THE NATIONAL SENIOR CITIZENS LAW CENTER

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DESCRIPTION OF AMICI

The Elder Law Section of the Minnesota State Bar Association consists of more than 460 attorneys who practice law in Minnesota.[1] The membership of the Elder Law Section includes certified elder law specialists, certified real property specialists, and attorneys with expertise in the federal and state statutes which govern administration of the medical assistance program in Minnesota.

The National Senior Citizens Law Center (NSCLC) is a non-profit corporation with offices in Washington, D.C., Los Angeles, California, and Oakland, California. The NSCLC publishes a newsletter with national distribution concerning senior rights. The NSCLC acts as a clearinghouse for information concerning the rights of seniors. The NSCLC directly litigates cases on medical assistance issues, and has served as Amicus in a number of federal and state appeals involving the medical assistance program.

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[1] Counsel for the Elder Law Section certifies that this brief was authored entirely by counsel for the Elder Law Section with assistance from other members of the section and substantial contributions from law student Joel R. Button, and that no person or entity other than the Elder Law Section made any monetary contribution to the preparation or submission of this brief. The National Senior Citizens Law Center joins in submission of this brief. This brief reflects official positions taken by the Elder Law Section on behalf of its membership but does not represent any official position taken by the Minnesota State Bar Association on behalf of its entire membership.

STATEMENT OF INTEREST OF AMICI CURIAE

The interest of the proposed amici in this appeal is public in nature. The NSCLC and members of the Elder Law Section advise private clients, other attorneys and members of the public regarding the proper interpretation and application of the federal and state medical assistance statutes, including the estate recovery statutes. We represent clients who are affected by the medical assistance statutes. Other attorneys and members of the public will conform their behavior and their legitimate estate planning activities to advice provided by the NSCLC and members of the Elder Law Section. The NSCLC and the Elder Law Section, and our elderly and disabled clients, have a direct interest in the correct application of medical assistance statutes. Our clients are hurt by improper application of the medical assistance statutes. Our clients and their families are entitled to the protections of the medical assistance statutes as passed by Congress.

SUMMARY OF ARGUMENT

This case requires interpretation of a federal statute which has never been reviewed by this Court. Under certain circumstances specified by federal law, the states are allowed to recover correctly paid medical assistance benefits from the estates of medical assistance recipients. Federal law requires the states to make claims against the probate estates of medical assistance recipients to recover correctly paid benefits. Federal law also allows the states to expand the definition of "estate" to include non-probate assets owned by a recipient at the time of the recipient's death. Nothing in the federal medical assistance statutes authorizes a direct medical assistance claim against the estate of any person other than the recipient of benefits.

Despite strong pressure from the states and others, in 1993 the Congress refused to enact legislation to allow direct claims against the estates of non-recipient surviving spouses. Under the current statute, the states are permitted to pull back into a recipient's estate any real or personal property or other assets in which the recipient held a legal title or interest at the time of death (to the extent of the interest). For many years, multiple-party bank accounts and securities registered in beneficiary form have been pulled back into a decedent's probate estate to the extent necessary to pay claims against the decedent's insolvent estate. Multiple-party accounts and securities registered in beneficiary form are assets owned and controlled by a decedent until death.

Since 1987, the Minnesota estate recovery statute, Minn. Stat. §256B.15 (2006), has required that a medical assistance claim be filed against the estate of a deceased recipient, but also requires that a claim be asserted against the estate of a surviving spouse who never received medical assistance benefits. The Minnesota Court of Appeals in the case of In re Estate of Gullberg, 652 N.W.2d 709 (Minn. Ct. App. 2002) held that the Minnesota statute conflicts with federal law to the extent that it allows recovery against assets in the surviving spouse's probate estate which were marital property or jointly owned property at any time during the marriage. Id. at 714. The Court of Appeals in Gullberg held that such a claim could be asserted only against assets in which the predeceased recipient spouse held a legal time or interest at the time of death to the extent of the interest. The Gullberg court was correct in both these holdings, but it never settled whether a deceased recipient's unvested, inchoate marital rights could be treated as assets subject to recovery under the federal law.

A recipient's unvested, inchoate marital rights in the property of the other spouse are not assets at the time of death or prior to death. They have no value that can be pulled back into the estate of the predeceased recipient spouse. In the instant case, the recipient owned only a small amount of funds in a checking account and personal effects of no significant value at the time of death. All other property previously owned by the recipient spouse had been legitimately transferred to the other spouse as allowed and required by the medical assistance eligibility rules. No assets, other than the small amount of personal funds and personal effects, transferred to the

surviving spouse at the time of the recipient's death. If state law provided for pulling these transferred assets back into the recipient's probate estate, they could be subjected to a recovery claim, provided, however, that no claim could be asserted while the surviving spouse remained alive. The Court of Appeals in the instant case erred in finding that the recipient spouse owned a joint tenancy interest in her spouse's homestead at the time of her death. The recipient spouse owned unvested, inchoate interests in the homestead at the time of her death, but these interests disappear at death and do not transfer at the time of death. They cannot be pulled back into the decedent's "estate" for purposes of recovery of benefits permitted by federal law.

Under the facts of this case, the restrictions contained in federal law, and the state's failure to conform its recovery statute to the 1993 federal amendments, no claim can be asserted against the homestead owned by Francis Barg at the time of his death.

ARGUMENT

I. THE COURT MAY CONSIDER ALL THE ISSUES RAISED BY THE RESPONDENT IN RESPONDENT'S BRIEF

A. The County In Its Petition for Review Raised the Issue Whether Federal Law Limits The Scope of Estate Recovery Under Minnesota Law

The Court has directed the parties to address whether the Estate of Francis Barg has "adequately preserved for review the issue whether the county may recover Medicaid benefits correctly paid on behalf of a predeceased spouse from the estate of a surviving spouse." Spec. Term Order of Jan. 16, 2007. The County asserts that the issue was not preserved because of the Estate's failure to file a Notice of Review under Rule 106, Minn. R. Civ. App. P.

The Court of Appeals relied on the Court of Appeals' decision in Gullberg, as the starting point in its analysis. The parties to Gullberg never sought review of the Court of Appeals' decision and this Court has never considered whether Gullberg was correctly decided. The standard of review in the instant case is *de novo* review by this Court. Martin *ex rel* Hoff v. City of Rochester, 642 N.W.2d 1, 9 (Minn. 2002), citing Am. Family Ins. Group v. Schroedl, 616 N.W.2d 273, 277 (Minn. 2000). The correct application of Gullberg is therefore part of the law of this case.

The first issue raised in the County's petition for review was:

> 1. To what extent, if any, does federal law actually limit the scope of estate recovery under Minnesota law when an otherwise valid Medical Assistance (MA) claim is filed in the estate of a surviving spouse

> containing former martial property in order to recover benefits paid on behalf of the predeceased spouse? App. Pet. at 1.

The County itself has raised the issue whether federal law permits recovery in this case.

B. The Respondent In Its Response to the Petition for Review Preserved the Same Issue

Respondent satisfied the requirements of Rule 106 by complying with Rule 117, subd. 4., which allows a respondent, in its response to a Petition for Review, to "conditionally" seek review of issues not designated in the Petition for Review. The Estate's response included the following:

> 1.A. Statement of additional designated issues not raised by Petition for which Respondent seeks conditional review of the Petition of Mille Lacs County for review is granted:
>
> ISSUE: Whether under 42 U.S.C. §1396p(b) Mille Lacs County may recover from the estate of a surviving spouse for Medicaid benefits correctly paid on behalf of a predeceased recipient spouse who left no estate. Resp. Response to Pet. for Rev. at 2.

C. The Court May Suspend the Rules of Civil Appellate Procedure To Allow Consideration Of All Issues Necessary for Review of This Case

Rule 102 allows the Court to suspend the requirements of the appellate rules "[i]n the interest of expediting decision upon any matter before it, or for other good cause shown." The purpose of Rule 102 is to clearly grant the court the power to suspend or modify the rules if the interests of justice require. See 3 Eric J. Magnuson and David F. Herr, *Minnesota Practice: Appellate Rules Annotated* 102 (2007 ed.). Amici Add. at 40. It is within the "sound discretion" of this Court to decide whether

to suspend the procedural requirements of Rule 106. Arndt v. Am. Family Insur. Co., 394 N.W.2d 791, 794 (Minn. 1986).

II. OVERVIEW OF MEDICAL ASSISTANCE PROGRAM

This Court most recently construed some of the federal medical assistance statutes in the Martin case. In Martin, this Court recognized that the purpose of the medical assistance program is to "ensure medical care to certain individuals who lack the resources to cover the costs of essential medical services. (citations omitted)." Martin, 642 N.W.2d at 9. The federal statutes which govern the Medicaid program are complicated and sometimes contradictory. The terms and phrases used in the federal estate recovery statute cannot be found anywhere else in the medical assistance statutes.

III. OVERVIEW OF STATE AND FEDERAL LAW GOVERNING RECOVERY OF MEDICAL ASSISTANCE BENEFITS CORRECTLY PAID

A. Minnesota Common Law Does Not Permit Recovery of Medical Assistance Benefits From the Estates of Recipients

Under Minnesota's common law, the state has no right to recover medical assistance benefits from the estates of recipients or anyone else. In re Estate of Messerschmidt, 352 N.W.2d 774 (Minn. Ct. App. 1984).

Federal statutes place limits on the state's powers to define the scope of recovery of medical assistance benefits correctly paid. The limits are set forth in 42

U.S.C. §1396p. Martin, 642 N.W.2d at 1; Arkansas Dept.of Health and Human Services v. Ahlborn, 547 U.S. 268 (2006).

B. Minn. Stat. §256B.15 Governs Estate Recovery of Medical Assistance Benefits Correctly Paid

Minn. Stat. §256B.15 (2006), the state statute which authorizes recovery of medical assistance benefits from the estates of individuals, provides in pertinent part as follows:

> . . . A claim against the estate of a surviving spouse who did not receive medical assistance, for medical assistance rendered for the predeceased souse, 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. . . .

C. 42 U.S.C. §1396p(b) Allows and Restricts Estate Recovery of Medical Assistance Benefits Correctly Paid

The federal statute which applies in pertinent part to this case states:

> 42 U.S.C. §1396p(b) **Adjustment or recovery of medical assistance correctly paid under a State plan**
>
> (1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:
>
> (A) In the case of an individual . . . , the State shall seek adjustment or recovery from the individual's estate . . . .
>
> * * *
>
> (4) For purposes of this subsection, the term "estate", with respect to a deceased individual --
>
> (A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and

(B) may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies),[2] 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.

IV. BLACK LETTER CANONS OF STATUTORY CONSTRUCTION APPLY TO INTERPRETATION OF THE FEDERAL AND STATE STATUTES

A. There Are No Special Rules of Statutory Construction Applicable to Either The Federal or State Medical Assistance Statutes

The County asserts that because of the complexity of Medicaid, special rules of statutory construction must be applied when interpreting medical assistance statutes. App. Brf. 24-25. These claimed special rules require looking first to the legislative history of the medical assistance statutes to determine the intent of the legislative body.[3] Looking first at the legislative history of a statute has been termed "dice loading." "Dice loading" has been criticized because of the danger that this approach could bias the court for or against a particular result before the text of the statute is considered. See Maura D Corrigan & J. Michael Thomas, *"Dice Loading" Rules of*

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[2] This is a reference to an individual who purchased a long-term-care insurance policy through a state long-term-care insurance partnership program authorized prior to OBRA '93.

[3] Justice Antonin Scalia has rejected such an approach to statutory construction. "Unfortunately, the legislative debates are not helpful. Thus, we turn to the other guidepost in this difficult area, statutory language." Justice Antonin Scalia, *A Matter of Interpretation* 31 (Amy Gutmann, ed., Princeton Univ. Press 1997). Amici Add. at 72.

Statutory Interpretation, 59 N.Y.U. Ann. Surv. Am. L. 231 (2003), Amici Add. at 22-23, 26 and 29-30.

The ordinary canons of statutory construction direct the court to first look to the plain language of a statute before considering the legislative history. See Martin, 642 N.W.2d at 11. (when called upon to construe medical assistance statutes governing recovery against third parties, the Minnesota Supreme Court applied the ordinary canons of statutory construction); Amaral v. St. Cloud Hospital, 598 N.W.2d 379 (Minn. 1999).

There is nothing in federal law to provide that legislative history or public policy arguments should be consulted first when considering the meaning of statutes. In the Barnhart case, the United States Supreme Court repudiated the use of legislative history to determine the meaning of a clear statute. Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 457 (2002) ("We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text."). There are a number of cases decided by the courts of other states which did not use public policy arguments or special rules of statutory construction to interpret 42 U.S.C. §1396p(b)(4) to allow the state to recover from the estate of the deceased community spouse. See In re Estate of Budney, 541 N.W.2d 245 (Wis. Ct. App. 1995); Hines v. Dept. of Public Aid, 850 N.E.2d 148 (Ill. 2006); and In re Estate of Smith, Slip Opinion, WL 3114250 (Tenn. Ct. App. 2006).

Minnesota law does not provide any special rules of statutory construction for medical assistance statutes. The policy statement in Minn. Stat. §256B.15, subd. 1 (2004) requires liberal construction of the statute to accomplish the purposes of the statute. The principal purpose of the statute is to recover benefits within the limits allowed by federal law.

Minn. Stat. §645.17, subd. 5 (2006) states that "the legislature intends to favor the public interest as against any private interest." Several Minnesota cases have cited this rule, but the public interest was analyzed only after the basic rules of statutory construction were first applied. See, e.g., Amaral, 598 N.W.2d at 385-387; Matter of Welfare of M.D.C., 501 N.W.2d 688, 688-689 (Minn. Ct. App. 1993).

The Commissioner asserts that the public interest in this case is served by expansive recovery of medical assistance benefits. See App. Brf., 3-5. But there is also a strong public interest in defense of fundamental concepts of property law, including free alienation of property between spouses, avoidance of interference with settled concepts of family law, bankruptcy law, probate law and real property law, and proper construction of federal and state statutes.

B. Federal Statutes Are Construed According to The Ordinary Canons of Statutory Construction

1. Whenever Possible, Statutes Are Construed According to the Plain Meaning of the Language

When interpreting a federal statute, a court should determine the objective meaning of the text. Barnhart v. Walton, 535 U.S. 212, 216 (2002); Corrigan &

Thomas, 238, Amici Add. at 30. While a court is supposed to determine the intent of the legislature, this intent should be deduced from the text. Aldridge v. Williams, 44 U.S. 9, 24 (1845). Justice Scalia has written, "Men may intend what they will; but it is only the laws that they enact which bind us." Scalia, at 17, Amici Add. at 70. When the plain language of the statute in question is "coherent and consistent," and free from ambiguity, courts should give effect to the plain meaning of the statute. Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997); Martin, 642 N.W.2d at 11; Norman Singer, 2A Sutherland on Statutes and Statutory Construction, §46:4, Amici Add. at 78; See also Minn. Stat. §645.16 (2006) ("when the words of a law . . . are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.")

2. If a Statute Is Ambiguous Intrinsic Aids Should Be Used First To Determine Meaning

A statute is ambiguous if it is susceptible to more than one reasonable interpretation. Sutherland §46:4; State v. Stevenson, 656 N.W.2d 235, 238 (Minn. 2003). When a statute is ambiguous, the court should turn to traditional tools of statutory construction to determine the "legislative intent" underlying the unclear words. See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-843 & n. 9 (1984); See Corrigan & Thomas, 239, Amici Add. at 30. Intrinsic aids to construction focus on the language of the statute, grammar, punctuation,

missing words, the relationship of words, and other factors.[4] The meaning of the federal estate recovery statute can be analyzed sufficiently using fundamental rules of statutory construction that are limited to intrinsic aids. If the statute is still found to be ambiguous after application of intrinsic aids, then and only then, extrinsic aids can be consulted. Sutherland §48:1, Amici Add. at 86-87. As Corrigan and Thomas concluded in their analysis of Michigan jurisprudence,

> Judges should not load the dice for or against a particular result unless and until they have exhausted all possible means of discerning the objective meaning of the text. Corrigan & Thomas at 240, Amici Add. at 31.

Extrinsic rules of statutory construction, which allow the court to look outside of the language of the statute are listed in Sutherland §48.[5] Extrinsic rules should be applied in the order of their persuasiveness.

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[4] See Sutherland §47. Some examples of intrinsic aids include the doctrines of *ejusdem generis, expressio unius est exclusio alterius,* and the use of common, technical, legal and trade or commercial terms as appropriate to the subject matter of the statute. Amici Addend. at 75.

[5] Sutherland §48 describes in descending order of persuasiveness extrinsic aids to interpreting a statute. These range from most persuasive - history of the enactment process from messages of the executive, reports of standing committees and special committees – to least persuasive – testimony of members of the legislature and explanations of initiative and referendum measures. Amici Add. at 77.

C. The Minnesota Supreme Court Has Used Ordinary Canons of Statutory Construction to Determine The Meaning of Federal Medical Assistance Statutes

When the Minnesota Supreme Court has construed federal medical assistance statutes, it has applied the ordinary canons of statutory construction rather than special "medical assistance" rules.[6]

V. THE COMMISSIONER'S VERSION OF THE LEGISLATIVE HISTORY OF THE FEDERAL STATUTE IS MISLEADING AND THERE IS NO LEGISLATIVE HISTORY FOR THE STATE STATUTE.

A. The Conference Committee Report of H.R. 2264 is the Only Pertinent Legislative History of 42 U.S.C. §1396p(b)(4)(B)

The Commissioner in his Amicus Brief contends that 42 U.S.C. §1396p(b)(4)(B), as enacted as part of the Omnibus Budget Reconciliation Act of 1993, P.L. 103-66 (OBRA '93) and as it still exists today, was the culmination of "a process begun in 1987" to expand estate recovery "as a means of funding medicaid long term care," (Comm. Am. Brf. at 16) and to overturn the result in Kizer. Kizer v. Hanna, 767 P.2d 679 (Cal. 1989) (Comm. Am. Brf. at 16). The Commissioner's argument would be more persuasive if the Congress had actually adopted the House version of H.R. 2264. H.R. 2264, as passed by the House, arguably accepted the recommendations of the studies cited by the Commissioner. H.R. 2264, as passed by the House, required the states to promptly ascertain when the individual and the

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[6] "There is no need to engage in an arduous or belabored statutory construction to harmonize the three federal statutes. Taking notice of the plain meaning of each is sufficient to achieve harmony." Martin, 642 N.W.2d at 13.

surviving spouse, if any, dies, to provide for the collection of the amounts correctly paid by medicaid on behalf of the individual from the estate of the individual or the surviving spouse, and to establish systems to track resources of the individual and the individual's spouse. H. Rep. 103-111, Sec. 5112, *as reprinted in* U.S.C.C.A.N. 378 at 535-536 Amici Add., at 15-16.

In describing the reasons for expanding estate recovery, the House Budget Committee's Report on H.R. 2264 makes no mention of the Kizer case. H. Rep. 103-111, Sec. 5115, at 535-536 Amici Add. at 15-16.

The Congress did not enact H.R. 2264 as passed by the House. The Conference Committee on H.R. 2264 did not accept the provisions of H.R. 2264 which allowed a direct claim against the estate of the surviving non-recipient spouse. See House Conf. Rep. No. 103-213, Title XIII, Subch. B, Part II, Sec. 13611, *as reprinted in* 1993 U.S.C.C.A.N. 1088 at 1523 to 1524 Amici Add. at 18-19.

The Conference Committee also rejected the language in H.R. 2264 which would have allowed recovery against

> . . . "estate" . . . includes all real and personal property and other assets in which the individual had any legally cognizable title or interest at the time of his death, ... H.R. 2264, as passed by the House, Sec. 5112. (emphasis added)

in favor of the language in the current statute which allows recovery against

> . . . "estate" . . . (B) may 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 the interest), ... 42 U.S.C. §1396p(b)(4)(B). (emphasis added)[7]

Where language is rejected by the Congress and not contained in the statute, it indicates that Congress intentionally rejected the language. See Sutherland §48:4 Amici Add. at 89.

The Conference Committee stopped short of accepting all of the recommendations made in the reports and studies cited by the Commissioner.

> [I]t should be remembered the statements made by persons in favor of a rejected or failed bill are meaningless and cannot be used as an extrinsic aid (citation omitted). Likewise, commentaries printed with the general statutes which were not enacted into law by the legislature are not treated as binding authority by the court (citation omitted). Sutherland §48:1 Amici Add. at 86.

If the legislative history recounted in the Commissioner's Brief has any value, it shows that the Congress refused to accept the expansive arguments now urged by the County and the Commissioner. Cp. Comm. Am. Brf. at 16-24 and Conf. Rep. Sec. 13612 at 1523-1524 Amici Add. at 18-19.

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[7] The term "other real and personal property and other assets" in Clause (B) refers back to the real and personal property and other assets described in Clause (A) to be included in a decedent's probate estate as defined by state law. This reference back to property in the probate estate of the decedent under Clause (A) suggests that the assets referenced in Clause (B) are assets similar to probate assets except for the fact that Clause (B) assets pass outside of probate.

B. Minn. Stat. §256B.15 Has No Legislative History To Aid In Construction of the Statute

There are no committee reports or other history which can assist in determining the Minnesota Legislature's intent when it passed the 1987 amendment to Minn. Stat. §256B.15 (1987), which allowed for the first time a direct medical assistance claim against the estate of a non-recipient surviving spouse. 1987 Laws of Minnesota, Ch. 403, Art. 2, Sec. 82. Amici Add. at 1. For legislative intent, we are left with nothing more than the language of the amendment, itself.

The Commissioner's Brief asserts that pressure to change federal law to allow expanded estate recovery began in 1987. Comm. Am. Brf. 16. Since Minnesota amended its statute prior to any change in federal law which would have explicitly allowed such an expansion of estate recovery, it must be presumed that Minnesota passed its amendment in hopes of changes in federal law which did not occur. Since 1993, Minnesota has failed or refused to fully conform its estate recovery statute to the changes made by OBRA '93.

VI. MINN. STAT. §256B.15, SUBD. 2, IS IN PARTIAL CONFLICT WITH FEDERAL LAW.

The plain language of Minn. Stat. §256B.15, subd. 2 (2004), is obviously different from the plain language of 42 U.S.C. §1396p(b)(4)(B). The different language in the Minnesota statute would allow broader recovery than allowed by the words of the federal statute. The Gullberg court correctly concluded that the

Minnesota statute conflicts with federal law and that it "goes beyond what is allowed by federal law . . . ." Gullberg, 652 N.W.2d at 714.

VII. THE GULLBERG COURT FAILED TO DETERMINE THE EXACT NATURE OR VALUE OF THE RECIPIENT'S INTEREST IN THE HOMESTEAD AT THE TIME OF DEATH

The Gullberg court remanded the case to the District Court to determine "and reevaluate" Walter Gullberg's interest in his spouse's homestead at the time of his death. Gullberg 652 N.W.2d at 714-715. While it referenced marital property law and probate law as potential sources of an "interest," the Gullberg court did not determine the exact nature of any interests or their value for recovery purposes. See Id. at 713, 714-715.[8] Because Gullberg did not determine the actual value of Walter Gullberg's interest for purposes of recovery, the Court of Appeals in Barg was forced to treat this issue as a question of first impression. See In re Estate of Barg, 722 N.W.2d 429, 496 (Minn. 2006).

[8] "The value of Walter Gullberg's interest in the homestead at the time of his death is a matter for the district court to determine on remand." Id. at 715. The Gullberg case never turned to the Court of Appeals for further review.

VIII. THE FEDERAL AND STATE STATUTES MUST BE CONSTRUED *DE NOVO* BY THIS COURT

A. The Terms of a Federal Statute Must Be Construed According to Their Common and Ordinary Usage Unless A Familiar Legal Sense Applies

The starting point in reconciling the state recovery statute with the federal statute is to determine the meaning of the federal statute. See Martin, 642 N.W.2d at 9.

The ordinary canons of statutory construction provide the tools necessary to determine the meaning of the federal statute. In construing the language of a federal statute, Justice Felix Frankfurter has observed that statutes use "familiar legal expressions in their familiar legal sense." Justice Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. Rev. 527, 537 (1947) Amici Add. at 38.

The Court must determine the meaning of the terms and phrases in Clause (B) which are not defined by the federal statute. The Court of Appeals in this case did not attempt to define these terms, but instead applied "Gullberg, the relevant statutes, and the principles of property law" to reach its conclusion that a "legal interest" existed at the time of Dolores' death, which would support recovery of the County's claim. See Barg, 722 N.W.2d at 497. This Court must determine for itself the meaning of the terms and phrases used in Clause (B).

B. Unvested Inchoate Interests In a Spouse's Property Are Not Real Property, Personal Property, Or Other Assets

At the time of Dolores Barg's death in 2004, her probate estate would have included only funds in a small checking account held jointly with her spouse and personal effects of no significant value. All other marital property was then owned by her spouse Francis. Stip. of Facts, ¶¶ 14 and 15, App. Crt. of Appeals Addend., at AA4 and AA5.

1. Unvested Inchoate Interests Are Mere Expectancies That Have No Value Until They Vest

The plain language of Clause (B) refers to "other real or personal property or other assets." This reference to "other real or personal property or other assets" refers back to property interests that pass through probate under Clause (A). Clause (B) allows the states to expand estate recovery to include assets of the recipient which the recipient owns and controls at the time of death, which assets otherwise would pass through probate, but which do not pass through probate because of "other arrangements" which take effect at the time of death.

An asset is property owned by an individual that can be used for support or to pay debts. What Dolores owned at the time of her death was a mere expectancy interest, an unvested inchoate interest in her husband's property. The Gullberg Court identified two potential sources of these inchoate rights: the kind of marital rights recognized in the Searles case (Gullberg 652 N.W.2d at 713, citing to Searles v. Searles, 420 N.W.2d 581, 583 (Minn. 1988)) and the rights of a surviving spouse as

identified in the Minnesota descent of homestead statute, Minn.Stat. 524.2-402 (2006), and other probate statutes.

An expectancy interest is not the kind of property which can be treated as an asset.

> During the life of the parties, the interest of each spouse in the realty of the other is inchoate and contingent. It is not an estate or vested interest. It is a mere expectancy or possibility incident to the marriage relation. 25 Dunnell Minn. Digest, *Husband and Wife* §6.00 (4th ed. 1994) Amici Add. at 35.

Dolores' expectancy interest in the homestead was contingent upon the death of her title-holding husband. Since Dolores died prior to Francis, her rights in his homestead never vested. Therefore, the common legal understanding of "interest" dictates that at the time of Dolores' death, her expectancy interest was at most a contingent hope.

2. Unvested Inchoate Interests Cannot Be Transferred At The Time of Death To Others

"Real property" is "[l]and and anything growing on, attached to, or erected on it." Black's Law Dictionary 1254 (8th ed. 1999). "Personal property" is "[a]ny movable or intangible thing that is subject to ownership and not classified as real property." (emphasis added) Id. at 1254. The federal statute refers to "real and personal property and other assets . . . ." (emphasis added) 42 U.S.C. §1396p(b)(4)(B).

In the common and ordinary use of the term, and in the familiar legal sense, an "asset" is something that can be used for support, transferred to another by gift or in exchange for value, or transferred to an heir or devisee. The unvested inchoate rights Dolores would have held in her spouse's property at the time of her death could not have been transferred to another. These unvested inchoate rights would not have qualified as "assets" within the meaning of the federal statute. Under the *ejusdem generis* canon of statutory construction, the language of the federal statute refers to real and personal property interests which are other types of assets.

C. The Federal Statute Requires Both The Existence of An Asset And A Legal Title or Interest In The Asset To Support Recovery Against The Asset

In everyday usage, the term "interest" has many meanings. The Court of Appeals in Gullberg found that Walter Gullberg did not hold any legal title in the property of his spouse Jean at the time of his death, but continued to have some legal "interest" in her property. Gullberg 652 N.W.2d at 713. The Court of Appeals in Barg followed Gullberg. Barg 722 N.W.2d at 497. The Gullberg Court did not determine the source, value or characteristics of those interests. Gullberg 652 N.W.2d at 715. The Court of Appeals in this case went one step further to determine the nature and value of the interests held by the predeceased spouse at the time of the predeceased spouse's death. See Barg 722 N.W.2d at 497.

The Appellate Court in Gullberg and Barg equated unvested rights in assets with vested rights in assets. The Budney, Hines, and Smith cases in Wisconsin, Illinois and Tennessee, respectively, did not.

IX. UNVESTED INCHOATE MARITAL PROPERTY RIGHTS AND PROBATE PROPERTY RIGHTS ARE NOT "REAL OR PERSONAL PROPERTY OR OTHER ASSETS"

A. The Court of Appeals Was Correct in Rejecting Marital Property Analysis To Find a Recoverable Interest in the Recipient's Unvested, Inchoate Marital Rights at The Time of Death

The Barg Court stated that using a marital-property law analysis is improper because Minn.Stat. §518.54 (2004) (renumbered in 2006 without change as Minn. Stat. §518.003, subd. 3b (2006)(Amici Add. at 4) "explicitly restricts its definition to the context of marital dissolution, and provides that marital property 'means property . . . acquired by the parties, or either of them, to a dissolution, legal separation, or annulment proceeding.'" Barg, 722 N.W.2d at 496 (citing §518.54, subds. 1, 5).

Minnesota courts have consistently rejected the use of marital property law concepts outside of the context of dissolution, separation or annulment to determine spousal interests. See In re Estate of Asperson, 470 N.W.2d 692 (Minn. Ct. App. 1991) (holding that marital property is a family law concept that does not apply under the Uniform Probate Code.); See, also Rindahl v. St. Louis County Welfare Bd., 437 N.W.2d 686, 693 (Minn. Ct. App. 1989) (rejecting use of Minnesota's marital property statute to determine ownership of spousal income for purposes of Medicaid income allocations to the non-recipient spouse).

Finally, in 1997 the United States Bankruptcy Court for the District of Minnesota was asked to determine whether the Bankrupt estate included the property of the non-bankrupt spouse because of the marital property rights of the bankrupt spouse in the non-bankrupt spouse's estate. In re Johnson, 210 B.R. 153 (Bankr. D. Minn. 1997) (Amici App. at 7). The Bankruptcy Court ruled that Minn.Stat. §518.54 subd. 5 "does not confer on marital partners those rights of disposition which owners of property interests routinely enjoy." Id. at 155. The court stated that it was not "persuaded that the mere classification of property as 'marital property' is sufficient to create cognizable property rights." Id. at 155. The Johnson Bankruptcy Court was not willing to treat an inchoate unvested property right as an asset, and neither should this Court.

B. The Court of Appeals Was Correct in Rejecting Probate Analysis to Find A Recoverable Interest in a Recipient's Unvested Inchoate Property Rights At The Time of Death

The Court of Appeals in Barg was unable to find a legal basis for imposing a probate-law analysis to identify assets which would be subject to recovery. Barg, 722 N.W.2d at 496. To do otherwise, "the court would have to assume that Dolores Barg survived her husband and received a life-estate interest in his property as his surviving spouse." Id. at 497. The Court of Appeals was not willing to engage in such a fiction, and neither should this Court.

X. DOLORES BARG DID NOT OWN A JOINT TENANCY INTEREST IN HER HUSBAND'S HOMESTEAD AT THE TIME OF HER DEATH

A. The Court of Appeals Erred in Finding That Dolores Barg Retained a Joint Tenancy Interest in the Homestead Previously Conveyed to Her Non-Recipient Surviving Spouse Prior to Her Death

The Court of Appeals relied at least in part on the 2003 amendments of Minn. Stat. §256B.15, subd. 1, clause (3) (2003), in reaching its conclusion that Dolores Barg retained a joint tenancy interest in her husband's homestead at the time of her death despite having transferred all of her interests in the property by deed to her spouse prior to her death. Id. at 497. The Court developed this theory on its own without any benefit of briefing or oral argument by the parties. The Respondent's Brief correctly notes that the 2005 amendments to this statute provided that the 2003 amendments would no longer apply to joint tenancy interests created prior to August 1, 2003. Resp. Brf. 30. The Bargs' joint tenancy was created in separate transactions in 1962 and 1967. Stip. of Facts, ¶¶ 3 and 4, App. Crt. of Appeals Addend. at AA 1-2. The 2003 amendments do not apply to this joint tenancy.

The Court of Appeals also cited "principles of property law" as additional support of its conclusion that Dolores Barg retained a joint tenancy interest in her spouse's homestead at the time of her death. Barg, 722 N.W.2d at 497. The homestead was conveyed to Francis by a guardian's quitclaim deed. Stip. of Facts, ¶ 10, App. Crt. of Appeals Addend. at AA3. Principles of real property law do not support the notion that a grantor in a quitclaim deed retains a legal title or interest in

the property after the property is conveyed in its entirety to a spouse. A quitclaim deed passes all of the estate of the grantor to the grantee. Minn. Stat. §507.06 (2004). Following the conveyance of the Barg homestead to Francis Barg, Dolores Barg retained no legal rights or interests in the fee interest in the property under any principle of real property law. She swapped her legal title and interest in the property for unvested, inchoate rights in the same property by reason of her status as spouse of the grantee. A spouse may convey all or part of his or her respective interests in real property to the other spouse. Minn. Stat. §500.19, subd. 4. (2004). Real property law principles do not permit creation of the fiction that Dolores retained a real property interest in the homestead after it had been conveyed in its entirety to Francis.

B. The 2003 Amendments to Minn. Stat. §256B.15 Apply Only to Life Estate or Joint Tenancy Interests Owned By A Medical Assistance Recipient at the Time of Death.

The 2003 amendments to Minn. Stat. §256B.15 (2003) do not apply to life estate or joint tenancy interests owned by someone other than a medical assistance recipient at the time of death. The amendments contain numerous references to life estates or joint tenancies to be continued after death. See Minn. Stat. §256B.15, subds. 1, 1a, 1d, 1f, 1g, 1h, 1i, 1j, 6 and 7 (2003). These references, in context, make it clear that the 2003 amendments do not continue interests conveyed to others before the recipient's death. Mr. Joseph Rubenstein, Staff Attorney in the Benefit Recovery Section of the Minnesota Department of Human Services and spokesperson for the Department in the hearings which led to enactment of the 2003 amendments,

explained the 2003 legislation in a presentation to the Elder Law Institute that year. S. Joseph Rubenstein, *Probate & Title Issues Raised by the New Joint Tenancy/Life Estate MA Recovery Statutes*, Elder Law Institute 2003, Minn. CLE (Oct. 2003). A copy of his written materials is reproduced in the Amici Add. at 44-68. His materials make it clear that the Department of Human Services, which sponsored the 2003 amendments, believed that the 2003 amendments applied only to life estates or joint tenancies that a medical assistance recipient owned at the time of death. See Rubenstein at 1, 4, 5, 8, 9, 10, 13 and 14.

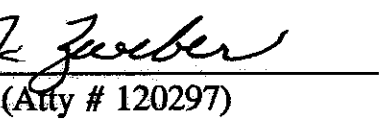
Relying in part on the 2003 amendments to Minn. Stat. §256B.15 (2003), the Barg Court concluded that a spouse's joint tenancy or life estate interest in a homestead continues even though the homestead is conveyed in its entirety to the other spouse. Barg, 722 N.W.2d at 497. This conclusion raises uncertainty over the effect of deeds between spouses. It brings into doubt title to property transferred between spouses. This conclusion raises many troubling implications for probate law, bankruptcy law, family law and real property law far beyond the facts of this case. This Court should remove this doubt and the potential for unintended consequences by explicitly reversing the Court of Appeals on this point.

XI. CONCLUSION

This Court should affirm the Court of Appeals' holding that Minn. Stat. §256B.15, subd. 2 (2004), conflicts with 42 U.S.C. §1396p(b)(4)(B) (2004), in part. This Court should hold that unvested, inchoate rights which arise from marital property analysis or probate analysis are not real or personal property or other assets. This Court should hold that interests of this type do not transfer at death by any type of arrangement. This Court should reverse the Court of Appeals' holding that Dolores Barg owned a joint-tenancy interest in her spouse's homestead at the time of her death. This Court should clarify that medical assistance claims can only be asserted against the estate of the medical assistance recipient and that state law should be amended to remove provisions that do not conform to the restrictions in federal law. Because Minnesota has failed to conform the current recovery statute to federal law to only permit a pull-back of assets that transferred to Francis Barg at the time of his spouse's death, this Court should disallow Mille Lacs County's medical assistance claim against the estate of Francis Barg in its entirety.

Respectfully submitted.

Dated: May 16, 2007



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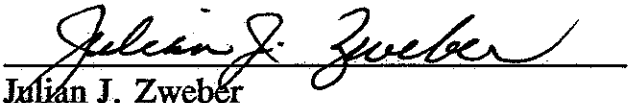
CERTIFICATE OF COMPLIANCE
WITH MINN. R. CIV. APP. P 132.01, SUBD. 3

The undersigned certifies that the Brief submitted herein contains 6925 words and complies with the type/volume limitations of Rule 132, Minnesota Rules of Civil Appellate Procedure. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on WordPerfect 5.1+, the word processing system used to prepare this Brief.



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