NO. A05-2346

State of Minnesota
In Supreme Court

In re the Estate of:

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

APPELLANT'S REPLY BRIEF AND ADDENDUM

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REPLY ARGUMENT

I. THE FEDERAL RECOVERY STATUTE'S PLAIN LANGUAGE DOES NOT PROHIBIT A RECOVERY CLAIM AGAINST A SURVIVING SPOUSE'S PROBATE ESTATE

The Estate concludes that "clear conflict" exists between the plain language of federal and Minnesota recovery laws as applied to the estates of surviving spouses. Resp.Br. 20. In particular, the purported conflict arises with Minnesota's statute requiring a claim against a surviving spouse's estate, Minn.Stat. §256B.15, subd. 1a, and section 1396p(b)(1)(B), which the Estate claims allows recovery only from the individual's probate estate. Resp.Br. 11. This argument misconstrues the statute's language and context. The actual language provides that, "In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate." 42 U.S.C. §1396p(b)(1)(B) (2000). A complete plain language analysis supports a conclusion that the federal provision does not manifestly conflict with Minnesota's law and is at best ambiguous.

The plain meaning of a statute is not considered in a contextual vacuum. The test is situation-specific, i.e. whether the words of the statute "in their application to an existing situation" are clear and free from all ambiguity. Minn.Stat. §645.16 (2006). "A statute, like other writings, cannot be considered independently of its subject-matter." Hansen v. Walsh, 247 N.W. 523, 524 (Minn. 1933).

In this appeal, the situation to which the federal recovery statute is being applied is recovery of the value of Medicaid benefits provided to one spouse from the probate estate of the other spouse—who did not himself directly receive Medicaid benefits. The reason for seeking recovery from the surviving spouse's estate is that another provision of the federal law requires that no recovery occur during the lifetime of a surviving spouse, despite the general recovery mandate. 42 U.S.C. §1396p(b)(2). These dual requirements are never reconciled within the federal statute. See Estate of Jobe, 590 N.W.2d 162, 166 (Minn.Ct.App. 1999) (discussing reconciliation of the dual interests reflected in federal statute). Thus, the question here is whether the federal statute clearly and unambiguously states whether a claim in the surviving nonrecipient spouse's probate estate is prohibited and, if not, whether the scope of the claim is clearly and unambiguously limited.

Whether statutory language is plain or ambiguous is determined by a three-level analysis considering "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997). This analysis recognizes that a consistent interpretation requires a construction of the particular language in the context of other related provisions to determine its true meaning and avoid it being read in isolation. Kollodge v. F.&L. Appliances, Inc., 80 N.W.2d 62, 64 (Minn. 1956); Martin v. City of Rochester, 642 N.W.2d 1, 12 (Minn. 2002); see also Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.").

Using the three-level statutory analysis, the Court should reject the Estate's conclusion that there is a clear conflict. The full statutory context indicates that Congress did not intend the recovery statute to preclude states, as a condition of receiving federal Medicaid matching payments, from filing claims against the probate estates of surviving spouses who did not themselves receive Medicaid.

A. The Federal Statutory Language Is Not Limited To A Recipient's Probate Estate

The Estate focuses on the phrase "from the individual's estate" in section 1396p(b)(1)(B), which it asserts means that any exception to the section's "no recovery" preface is limited to a claim only against the recipient's probate estate. Resp.Br 7.

"Estate," as used here, however, has a much broader meaning. This Court has explained that "the word 'estate' at common law is most comprehensive" in describing property interests. Minnesota Debenture Co. v. Dean, 89 N.W. 848, 849 (Minn. 1902). Black's Law Dictionary defines estate as "The amount, degree, nature, and quality of a person's interest in land or other property." Black's Law Dictionary 586 (8th ed. 2004). It also defines the term as "All that a person or entity owns, including both real and personal property," and as "The property that one leaves after death; the collective assets and liabilities of a dead person." Id. at 588.

Thus, the statutory language relied upon by the Estate, in using the broad term "estate" rather than the more specific variant "probate estate," indicates an openness contrary to the Estate's narrow interpretation. The statute allows recovery, regardless of whose formal probate estate in which the claim is made, as long as the recovery is from

property connected to the recipient. See Estate of Bergman, 688 N.W.2d 187, 191 (N.D. 2004) (recognizing the tracing of assets for purposes of recovery).

B. The Immediate Statutory Context Creates Ambiguity

Three contextual features cast doubt on the Estate's claim of a clear prohibition. First, states have the option, which Minnesota exercises, to go beyond probate estate property to include any real or personal property real or other assets connected to the individual. 42 U.S.C. §1396p(b)(4)(B). The term "assets" is expressly defined to "include[] all income and resources of the individual and of the individual's spouse." 42 U.S.C. §1396p(e)(1). Thus, the plain language provided by Congress is inclusive of a spouse's property as well as that of the recipient.

Second, other courts have held that the state option to go beyond the minimum probate meaning is broad enough to include a claim in a surviving spouse's estate to recover from property in which the recipient spouse had an interest in at death. E.g., Estate of Wirtz, 607 N.W.2d 882 (N.D. 2000); Estate of Gullberg, 652 N.W.2d 709 (Minn.Ct.App. 2002).

Third, section 1396p(b)(2), delaying recovery until after the death of a surviving spouse, raises doubt that Congress intended to restrict recovery claims to the actual probate estate of the recipient spouse. Such a reading would render other parts of section 1396p(b) ineffective. See Estate of Brandt, No. C5-98-1924, 1999 WL 319180 at *3 (Minn.Ct.App. Apr. 20, 1999). It would also result in no recovery unless the surviving spouse happened to die while the recipient spouse's estate was still open. Ohio Dep't of

Job & Family Servs. v. Tultz, 787 N.E.2d 1262, 1265-66 (OhioCt.App. 2003). Also, not surprisingly, the nonrecipient spouse is usually in better health than the Medicaid spouse, meaning this spouse will usually be the survivor of the couple. With the required delay in recovery, the Estate's interpretation leads to the absurd result of not just delaying recovery, but actually precluding any recovery in these instances.

C. The Context of the Statutory Scheme Creates Further Ambiguity

Throughout the Medicaid statutory scheme, spouses are treated differently from unmarried people. The resources of one spouse are presumptively available for the support of the other spouse and spousal assets and other resources are often held together. See Wisconsin Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473, 478, 494 (2002). Nothing in the recovery statute suggests that this background principle would be inexplicably and silently voided when it comes to Medicaid recovery.

Three specific provisions within Medicaid also reflect this background principle and strongly suggest that the plain reading advocated by the Estate is inconsistent with the Medicaid statutory scheme. First, section 1396a(a)(17)(D) expressly allows states to take into account the financial responsibility of a spouse for the other spouse's medical expenses. 42 U.S.C. §1396a(a)(17)(D) (2000). This allowance is an exception from a general prohibition on making other relatives financially responsible. Second, section 1396r-5, concerning treatment of income and resources of institutionalized spouses, allows the total resources of both spouses to be considered as available to pay for the recipient spouse's medical care. 42 U.S.C. §1396r-5(c)(1)(A)(i) (2000). At the time of

an initial eligibility determination, all of the resources are considered available—regardless of formal ownership and regardless of state laws on the division of marital property. 42 U.S.C. §1396r-5(c)(2)(A). Notably, for purposes of Medicaid, state laws determining shares of marital property are irrelevant—joint resources are joint resources. Third, the asset-transfer provisions of section 1396p demonstrate the recipient and her spouse are treated as one for purposes of available resources for medical care. 42 U.S.C. §1396p(c). All of these provisions cut against the prohibition suggested by the Estate.

The Estate also claims that because Congress did not ultimately adopt the legislation as initially passed by the House, which included a mandatory spousal recoveries, Congress must have intended to prohibit such recoveries. Resp.Br. 12. The failure of Congress to enact the House proposal, enacting instead the Senate's moderate version, is not equal to prohibition. The federalism-based compromise reflected in the enacted version is in no way a new limitation, but rather an allowance for states to do recovery at a different pace. To suggest that Congressional silence in this case is tantamount to the kind of prohibition necessary for preemption turns a blind eye to the realities of the legislative process itself. See Berry v. Branner, 421 P.2d 996, 998 (Or. 1966) ("Legislative inaction is a weak reed upon which to lean in determining legislative intent."). The modifications made in reaching this compromise are not the same as rejecting the legislation in toto.

The Estate and its supporting amici ignore the significant legislative history and context confirming that Congress's only intention with any limitations on recovery is to

preserve the use of assets for the recipient and spouse for their lifetime. See App.Br. 28-30. Relying on extrajudicial writings, the Amici energetically argues for ignorance of historical and legislative context, all the while mischaracterizing the analysis of both Appellant and the Commissioner. See AmiciBr. 10; but see Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 611, n. 4 (1991) ("[C]ommon sense suggests that inquiry benefits from reviewing additional information rather than ignoring it"). Because of the ambiguity of the federal provisions when applied to surviving spouses, these arguments must fail.

II. THE SCOPE OF RECOVERY ON A CLAIM IN A SPOUSE'S ESTATE IS NOT LIMITED BY THE FEDERAL STATUTE

The Estate also claims that a conflict in their plain language exists between the federal expanded estate option, 42 U.S.C. §1396p(b)(4)(B), and that of Minn.Stat. §256B.15, subd. 2, which defines the scope of a recovery claim in a nonrecipient spouse's estate. In addressing this argument, the same plain language analysis used in the preceding section applies—a multi-level analysis of language in the statutory context.

A. Section 1396p(b)(4)(B)'s Language Is Consistent With Minnesota's Scope Of Recovery

Section 1396p(b)(4)(B) consists of two clauses. The first clause states, in part, that "'estate,' with respect to a deceased individual . . . 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 such interest)." 42 U.S.C. §1396p(b)(4)(B). This clause establishes Congress's intent to allow states freedom to reach any property

interest connected to the recipient. Estate of Thompson, 586 N.W.2d 847, 850 (N.D. 1998). This intent is further demonstrated by the language in three ways.

First, the clause's language comprehensively identifies all possible classes of property: real and personal. "Assets" are also included in the clause, functioning as a catch-all term. Second, the clause begins with the permissively expansive phrase "may include." "May" is a permissive term, suggesting only openness, not constraint or limitation. This Court has also refused to interpret the term "including" as creating a limitation. Janssen v. Janssen, 331 N.W.2d 752, 755-56 (Minn. 1983) ("includes" is usually a word of enlargement, not limitation). Third, the degree of connection between the individual and the property or asset is also expansive. The option allows a state to recover from property or an asset in which the individual "had any legal title or interest at the time of death." 42 U.S.C. §1396p(b)(4)(B) (emphasis added). The term "interest" is the "most general term that can be employed to denote a right, claim, title, or legal share in something . . . or any right in the nature of property, but less than title" Black's Law Dictionary 812 (6th ed. 1991); see also Black's Law Dictionary 828 (8th ed. 2004) (defining interest as "A legal share in something; all or part of a legal or equitable claim to or right in property"). In using both "legal title" and "interest" in its definition of "estate," Congress demonstrated its intent to include two different types of property interests, both legal and equitable.

The Estate's attempts to construe the statutory language restrictively are unavailing. Its analysis gives no consideration to the immediate or broader statutory

contexts. For example, the Estate's claim that recovery can only be from property that the recipient "owns and controls" at the time of death creates a new test beyond the plain meaning of the statute. Nor does the Estate appear conscious of the fact that recovery in this case is from the probate estate of the recipient's spouse—not from that of a stranger or a distant relative. Medicaid gives specialized consideration to marital resources.

The Estate claims that examples listed in the second clause of section 1396p(b)(4)(B) ("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") mean that the entire expanded estate provision is limited to nonprobate transfers. The Estate's attempt to use this list to modify and narrow the more general first clause should be rejected. "Including," followed by a list of examples is nonexclusive and cannot be read as a limitation, which is the Estate's interpretation. Jones v. American Postal Workers Union, 192 F.3d 417, 426 (4th Cir. 1999). Instead, the examples listed in the second clause simply demonstrate the breadth of the effect of the first clause. Moreover, the transfer-at-death examples are scenarioes that are susceptible to being opposed on the rationale that, for example, the recipient spouse has no interest as a joint tenant or a life tenant when she dies. See, e.g., Jobe, 590 N.W.2d at 166 (rejecting that argument). The inclusion of the list of examples denies any such reasoning and highlights how far the expanded estate option reaches. This list also directly addresses the scenario in Kizer, whose plaintiffs were "a class comprised of persons who by right of survivorship have succeeded to property they formerly held in

joint tenancy with a benefits recipient." Citizens Action League v. Kizer, 887 F.2d 1003, 1005 (9th Cir. 1989).

B. Immediate Statutory Context Allows the Scope of Recovery Or Is At Best Ambiguous

The immediate statutory context further indicates that the expanded estate option was intended to be open to allow states flexibility. In particular, the statute's structure parallels another addition to the subsection made in 1993. That provision stated that the scope of Medicaid benefits subject to the new minimum mandatory recovery requirement was long-term care and community-based services and related services—i.e., at minimum, a recovery claim had to be for the value of those services. 42 U.S.C. §1396p(b)(1)(B)(i). The provision also gave states the option to recover for "any items or services" covered by the state's Medicaid plan. Id. As with the expanded estate option of section 1396p(b)(4)(B), the scope of benefits recovered option provided a minimum requirement followed by an all-encompassing state option. Here, the "minimum" is all property in the state's probate law definition of estate. Above that minimum, however, states have the option to reach "any other real and personal property and other asset" in which the decedent had an interest. The parallel statutory structures demonstrate that allowing states an expanded scope of recovery was more likely the intent than to impose a new restriction on states.

C. The Medicaid Statutory Scheme Creates Further Doubt That Congress Intended To Prohibit State Laws Like Minnesota's Concerning Spouses

The same Medicaid statutory framework concerning treatment of spouses that was discussed in Section I also applies here to demonstrate that Respondents' interpretation is inconsistent with the Medicaid statute as a whole.

D. History & Context Is Selectively Viewed by Respondents

As discussed in the Appellant's and Commissioner's briefs, the history and context of the federal estate recovery provisions support the conclusion that Minnesota's spousal recovery statutes are consistent with the intent and purposes of the federal statutes. Both the Estate and its amici seek to examine only selective aspects of this context and draw their conclusions accordingly.

The ambiguity of the federal recovery statute's provisions not only warrants attention to the broader context, but requires the Court to review the context in an effort to resolve the ambiguity. So too, must this Court look at all valid external sources, not simply those selected by the Amici as valid. See Minn.Stat. §645.16 (listing factors to consider when language of statute is ambiguous). Thus, the Amici's argument that the OBRA 1993 conference committee is the only valid external reference ignores the many factors that can be considered. It further disregards that the conference committee report does not state any intention to limit state recovery efforts. The report simply restates the terms of the legislation. Significantly, though, the conference committee expressly states the intention that the expanded estate option includes recovery of the home. See Amici Addendum 19.

The change in the language of the expanded definition, removing "legally cognizable" and replacing it with "(to the extent of the interest)" is not as clear as the Estate suggests. Resp.Br. 11-12. The subsequent modification of the definition, which essentially substituted the "extent of such interest" phrase for "legally cognizable" as a qualifier to "any interest," does not change this analysis. The parenthetical phrase appears to have been included by the conference committee after the Senate had removed "cognizable" from its version. Compare H.R. 2264, § 13612 (as passed by both houses) ("in which the individual had any legal title or interest at the time of death (to the extent of such interest)"); with H.R. 2264, § 5112 (as passed by the House) ("other assets in which the individual had any legally cognizable title or interest at the time of his death"); and S.1134, § 7421 (as passed by the Senate) ("in which the individual had any legal title or interest at the time of death"). Thus, "(to the extent of such interest)" merely serves as a synonym for "legally cognizable." Again, the Estate seeks to view this issue outside of its greater context.

E. With No Clear Prohibition, The Federal Estate Recovery Provisions Do Not Preempt Minnesota's Recovery Laws

Preemption requires a clear statement of prohibition from Congress. The Estate fails to demonstrate any such prohibition. The absence of clarity in the federal recovery statute as it relates to spousal recoveries and their scope is illustrated by the fact that a number court decisions have interpreted those provisions in the same way as Minnesota. See, e.g., Thompson, 586 N.W.2d 847; Wirtz, 607 N.W.2d 882. If the statutory language were as plain and clear as claimed by Respondents, then all of these opinions are

unreasonable. Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 739 (1996) (questioning characterization of a statutory term as unambiguous when its meaning has generated a division of opinion in the lower courts). Indeed, the Wyoming Legislature adopted a scope of recovery provision nearly identical to Minnesota's following the passage of OBRA 1993 and did so explicitly to put into effect the OBRA 1993 changes. Wyo.Stat. §42-4-206(c); Knori v. Dep't of Health, 109 P.3d 905, 907-08 (Wyo. 2005); see also Mo.Stat. §473.399 (2) (limiting liability of community spouse's estate to the value of marital property on the date of the recipient's death); S.D.Stat. §28-6-23.1 (same). Because, at minimum, the federal provisions are ambiguous, the Estate's preemption claims must be rejected.

III. UNDER THIS COURT'S MARTIN DECISION, THERE IS NO PREEMPTION OF MINNESOTA'S RECOVERY STATUTES AND FULL RECOVERY IS PERMITTED.

The Estate asserts that this Court's decision in Martin v. City of Rochester, 642 N.W.2d 1 (Minn. 2002), supports its preemption claim. Resp.Br. 19-22. The Estate's invocation of Martin, however, is baseless because Martin demonstrates that Minnesota's recovery statutes are not preempted.

A. Unlike Martin, There Is No Clear Conflict Here Between Federal and State Statutes

In Martin, the Court considered federal and state Medicaid statutes concerning liens, assignment of rights, and subrogation. 642 N.W.2d at 8-9. It held that, although Medicaid does not expressly or impliedly preempt state laws, the particular statutes considered were preempted because of clear conflict and interference with federal objectives. Id. at 16-20. Martin focused on the Medicaid condition that state Medicaid

plans assure that "No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except..." and provided a list of exceptions. 42 U.S.C. §1396p(a)(1) (2000). Because the recipient in Martin was not in one of the categories that was excepted from this prohibition, the Court needed to only look to the "unequivocal" prohibition that "no lien" could be placed on the recipient's property. See Martin at 9 & 12, n.11 (stating no statutory exception applied).

Section 1396p(b)(1), concerning recovery, is structured similarly to section 1396p(a)(1), but with different results when properly applied. The section begins with a general prohibition of recovery, applying to Medicaid recipients of all ages—e.g., poor families with young children and the disabled. Next, an exception is made for a broad category of the Medicaid population, allowing recovery for those who are permanently institutionalized (of any age) or who received benefits when age 55 or older. 42 U.S.C. §1396p(b)(1).[1]

Unlike the situation in Martin, where no exception was applicable to the Court's analysis, the focus here is on the exception for recovery in the case of someone who was over age 55, rather than the "no recovery" preface of the section. This is a significant exception which directly applies to the circumstances before the Court in the present case. Because the force of the recovery statute as applied to this case is not found in this

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[1] The different treatment of those over 55 from other Medicaid recipients was upheld by this court in Estate of Turner, 391 N.W.2d 767 (Minn. 1986).

initial language, but rather in its exceptions—and interpretation of those exceptions—there is no basis to find the statute unambiguous and in conflict with state law, ending the Court's inquiry because of the requirement of clarity for preemption to apply.[2]

B. There Is No Conflict Here Because Compliance With Both Federal and Minnesota Recovery Statutes Is Possible

The Estate asserts that in this case the federal statute prohibits exactly what the state statute allows. Resp.Br. 21. But, as discussed above, the federal recovery statute does not "exactly" prohibit anything that Minnesota statutes require. Minnesota complies with the clearly expressed conditions for recovery in section 1396p such as limiting the claim to the total amount of benefits received, delaying recovery until after a surviving spouse's death, and providing an undue hardship waiver for heirs affected by recovery. Compare Minn.Stat. §256B.15, subds. 2, 3 & 5 (2006); with 42 U.S.C. §1396p(b)(1)-(4).

As discussed in the County's initial brief and the Commissioner's brief, compliance with both federal and state law is possible here. App.Br. 38; Comm'rBr. 26. The federal law makes an exception to "no recovery" for those 55 and older and then requires states to recover from the recipient's probate estate. Minnesota complies with these minimum requirements then exercises the options to go beyond them.

C. With No Clear Conflict, This Court Is Left to Determine Whether State Law Presents an Obstacle To A Federal Objective; No Such Obstacle Exists Here

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[2] Because the federal statute in Martin contained a level of clarity not found here, the Court's reasoning that Chevron-level deference was inapplicable is also inapposite to this case. See Martin, 642 N.W.2d at 21.

When a state statute goes beyond a federal requirement and there is no explicit prohibition, Martin held that the correct approach is to evaluate whether the state statute "interferes with the purposes of the federal Medicaid scheme." 642 N.W.2d at 17.

In following that analysis, the Court in Martin held that Minnesota's broader statute there frustrated the anti-lien provision's purpose of protecting a recipient's limited assets during their lifetime. Id. at 18. The frustration was the result of circumventing the clear "no lien" statute. However, when examining the state subrogation statute, the Court went on to observe that simply going beyond the requirements of the federal statute was not a basis for finding conflict when there was no prohibition on doing so. Id. at 20. The Court observed that the federal statute set a minimum, but did not appear to set a maximum. It concluded that compliance with both the state and federal requirements was possible, because the federal statute did not contain an explicit prohibition. Instead, the Court determined that the analysis was limited to whether the state provision was an obstacle to a federal goal or objective. Id.

The Estate and Amici have not shown the requisite obstacle to a federal purpose to invoke preemption. As discussed by the County and the Commissioner, the federal objective in the estate recovery provision is to protect resources for use by the recipient and spouse only during their lifetime. Cf Martin, 642 N.W.2d at 14 (purpose of anti-lien statute is protection of property for use during recipient's lifetime). Minnesota statutes do not interfere with this protection and champion this purpose by delaying recovery. Minn Stat 256B.15, subd. 1a. That purpose ends, however, with the death of the

surviving spouse. When the purpose of protecting assets for use during a surviving spouse's lifetime has been accomplished, the other purpose of recovery statutes, recovering the value of benefits, then takes priority. See Jobe, 590 N.W.2d at 166. Again, state law accomplishes this federal purpose.

The Estate and its supporting Amici do not disagree with these stated purposes nor offer acceptable objectives in the alternative. The Estate's argument would increase the heirs' inheritance at the expense of the public. See Turner, 391 N.W.2d at 770 (real parties in interest are "disappointed" heirs of estate). Dolores and Francis Barg had fair notice of Minnesota's estate recovery when they applied for Medicaid and in doing so subjected themselves to the recovery laws. See West Virginia ex rel. McGraw v. U.S Dep't of Health & Human Servs., 132 F.Supp.2d 437, 441 (S.D.W.Va. 2001) ("Persons subject to estate recovery elect to receive Medicaid benefits and the regulations demand that such recipients receive notice of the estate recovery requirement when choosing to accept or reject Medicaid long-term care benefits."). No federal objective is served by defending a windfall to heirs at public expense. Minn. Stat. §645.17(5) (presumption that legislation intended to favor public interests over private). In addition, the "strong public interest" posited by the Amici, including free alienation of property between spouses, is also inappropriate here. See AmiciBr. 12. Property law and family law are areas determined by state law, not federal law. Those areas are not federal objectives, and so are irrelevant to the preemption analysis. Minnesota's legislature can exercise its sovereign powers to change those laws and make benefit recovery a priority. Minn.Stat.

§256B.15, subd. 1(a)(4) (requiring that all laws related to recovery be construed in favor of purpose of recovery). Thus, with no federal objective at risk of obstruction, Minnesota's recovery provisions are not preempted.

IV. DOLORES BARG HAD LEGAL INTERESTS AT THE TIME OF HER DEATH THAT ARE A SUFFICIENT BASIS FOR RECOVERY HERE

A. Dolores Barg Had Marital And Homestead Interests At The Time Of Her Death

Respondents assert that no recovery is possible in this case because, they claim, Dolores Barg had no legal interest in assets now in Francis Barg's probate estate at the time of her death. Resp.Br. 14-15; AmiciBr. 26-28. This argument centers on the premise that a spouse who does not hold title to property has no legal interest in that property until, at earliest, a dissolution decree has been entered. This Court has already rejected the claim that a nontitled spouse has no interest in property. Searles v. Searles, 420 N.W.2d 581 (Minn. 1988).

Contrary to Respondents' assertions, a spouse's legal interest in homestead property is real and present throughout the marriage, regardless of title. This interest gives the nontitled spouse control over the disposition of that property. Murphy v. Renner, 109 N.W. 593, 594 (Minn. 1906). For example, Francis could not convey the homestead to someone else without Dolores' consent and signature on the conveyance. Minn.Stat. §507.02 (2006); see also Murphy, 109 N.W. at 594 (any transfer without spouse's signature is void for all purposes, not simply voidable). Other cases from this Court have recognized the interest of a nontitled spouse. See, e.g., Brokl v. Brokl, 158

N.W. 250 (Minn. 1916) (nontitled spouse a necessary party to an action involving the marital homestead); Cocker v. Cocker, 10 N.W.2d 734, 735 (Minn. 1943) (nontitled spouse a proper party defendant to a suit involving her title to homestead property—even though her interest was inchoate).

B. The Earlier Transfer Should Not Allow The Homestead To Be Sheltered From Recovery

The transfer of Dolores' interest to Francis, by way of a quit-claim deed executed by her daughter acting as guardian, should not be allowed to undermine future estate recovery from the homestead. Doing so is an absurd result of an unintended consequence of asset-transfer statutes.

The Amici states, "All other property previously owned by the recipient's spouse had been legitimately transferred to the other spouse as allowed and required by the medical assistance eligibility rules." AmiciBr. 4. This transfer, although allowed, was not required. It was allowed as a transfer between spouses, consistent with Medicaid framework of keeping assets within the couple without penalty. However, had no transfer taken place, the Barg homestead would have still remained an unavailable resource for eligibility purposes with no requirement that Dolores transfer her joint tenancy interest. As long as her spouse resided there, the homestead was excluded. See Dep't of Human Services, Health Care Programs Manual, §19.25.15.05 (available in Reply Addendum and at http://hcopub.dhs.state.mn.us/hcpmstd/19_25_15_05.htm under heading "Long-Term Care Facility (LTCF) Residents").

When a transfer such as this has occurred without necessity, it suggests that the only objective accomplished is to prevent recovery of Medicaid benefits from that asset. Thus, the transfer, however technically permissible, has the effect of being purposefully withheld to avoid a statutory creditor. In no other circumstance would transfers with similar impact be condoned. See Minn. Stat. § 513.44 (2006) (describing when a transfer is fraudulent).

C. Federal Law Does Not Limit Recovery to "Vested Interests" And State Law Encompasses Vested and Unvested Interests

The Amici argue that Dolores' marital interest is not an adequate basis for recovery because it is only an "unvested inchoate" interest. Amici Br. 21-22. The federal statute, however, does not require that the interest be vested, only that it be a legal interest. 42 U.S.C. §1396p(b)(4)(B). Marital assets are an available asset regardless of title or vesting of that interest. See 42 U.S.C. §1396r-5(c)(1)-(2). Thus, Minn.Stat. §256B.15, subd. 2 properly encompasses a wide range of property and assets which, whether vested or unvested, depict an interest held by the recipient spouse and are thus recoverable consistent with Medicaid law.

D. Minnesota Law Defines The Recoverable Interest as Coextensive With Marital Property

Minnesota state law has provided a method for valuing the interest of a recipient spouse for purposes of Medicaid recovery.[3] This valuation is supported by a state's ability to define "estate" under the federal recovery provision, and how state law treats these concepts.

The Gullberg court complicated this analysis by limiting its view to one word or phrase at the expense of the federal statute as a whole. It further narrowed recovery by apportioning spousal interests artificially and unnecessarily. In Estate of Wirtz, the North Dakota Supreme Court rejected this approach and gave effect to the phrase "to the extent of such interest" by simply saying the state cannot reach separately owned property. Wirtz, 607 N.W.2d at 886. The Minnesota Legislature has already provided for limitations to recovery in Minn.Stat. §256b.15, subdivision 2.

Here, the Court should construe subdivision 2, as defining the extent of the interest of the predeceased spouse in the marital or jointly owned property that is now in the estate of the surviving spouse. This interpretation is supported by the legislative history of the amendment to this subdivision in 1987. The Legislature amended the provision in response to Estate of Messerschmidt, 352 N.W.2d 774 (Minn.Ct.App. 1984), by expressly allowing a claim in a surviving spouse's estate. See Jobe, 590 N.W.2d at 164 n.1. The Legislature then went further than was necessary to respond to Messerschmidt by defining the scope of the recipient spouse's interest in the property in the surviving

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[3] For full discussion of the Minnesota's definition of the recipient spouse's interest as an interest in the whole of marital property and joint property, see Appellant's Ct. App. Br. 24-32 (excerpt provided in Reply Addendum).

spouse's probate estate as coextentsive with the value of that property. Comm'r Addendum 49-51. This additional change was done by the amendment to the original bill. It can be inferred that subdivision 2 was amended in recognition of the federal provision allowing recovery "from [the recipient spouse's] estate"—in other words, the legislature could have viewed "from his estate" as a limitation requiring Minnesota to identify the extent of the recipient spouse's property interests in the surviving spouse's estate. Thus, Minn.Stat. §256B.15, subd. 2 can be construed as defining the extent of the interest, which in turn becomes the full value of marital property and jointly held property between spouses. The Court should consider that Minnesota state law has provided for this valuation in accord with the federal recovery provisions, and has done so under its authority to define property interests as the state legislature deems appropriate.[4]

V. JOINT & SEVERAL LIABILITY OF SPOUSES APPLIES HERE

The Estate asserts that Minn.Stat. §519.05, making spouses joint and severally liable for necessary medical expenses, is inapplicable to this case. Resp.Br. 51. To the contrary, that statute is applicable and is an independent basis for granting full recovery.

While the Estate points to the statute's "while living together" phrase and claims that it renders the statute inapplicable in this case, the phrase does not have that effect. When spouses are not physically residing together for medical purposes, this Court has refused to consider them as not living together. Donaldson v. Mankato Policemen's

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[4] Even if this construction is a "less natural" one, this Court is under an obligation to adopt the construction in order to render the statute fully constitutional. Martin, 642 N.W.2d at 12 n.12.

Benefit Ass'n, 278 N.W.2d 533, 537 (Minn. 1979). Also, the origins of the "living together" phrase come from the husband's liability at common law for a wife's purchase of necessary household items. See S.E. Olson Co. v. Youngquist, 78 N.W. 870, 871 (Minn. 1899). This Court construed the liability for necessaries to include medical expenses. Plain v. Plain, 240 N.W.2d 330, 332-33 (Minn. 1976).

Rather than interpret "living together" as "residing together," a more reasonable reading is that the phrase intends to limit joint and several liability only when the spouses are separated or one has abandoned the other. See Minn.Stat. §518.06 (2006) (providing for legal separation). So, even though they could not reside in the same home, Francis did not abandon Dolores and, but for the medical necessity of a nursing home placement, they continued to live and share their lives together. Under the Estate's interpretation, anytime a spouse incurs expenses as a hospital inpatient or is in a nursing facility, even temporarily, the statute would not cover those expenses—yet those are exactly the times when joint and several liability would be necessary given the cost of those kinds of care. The Estate's reading would simply lead to absurd results.

Finally, the Estate argues that, even if the statute applies, it is preempted by the federal recovery statute. Resp.Br. 51. First, Medicaid's exception allowing states to hold spouses financially responsible for each other, 42 U.S.C. §1396a(a)(17(D), clearly undermines that argument. Cf. Poindexter v. State ex rel. Dept. of Human Services, ___N.E.2d___, 2007WL1545249*8 (Ill.Ct.App. May 17, 2007) (available in Reply Addendum) (rejecting preemption claim against state spousal responsibility law and

stateing "Medicaid is not designed to supplant the traditional notions, enshrined in law and custom, that family members, particularly spouses and parents, have the responsibility to support their spouses and children.").

Furthermore, preemption of a state family law statute requires satisfying a substantial showing of damage to federal interests. The United States Supreme Court explained that when state family law comes into conflict with a federal statute, it requires that Congress have directly and clearly intended to preempt that state law. Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (holding that state family and family-property law must do "major damage" to "clear and substantial" federal interests before Supremacy Clause will override). The Estate has not met this test when applied to Minnesota's estate recovery law and the enforcement of joint and several liability. With that failure, this Court is presented with an independent basis for concluding that the County's claim is satisfied in full and that Minnesota estate recovery law is not preempted.

VI. ESTATE'S CASES ARE INAPPLICABLE AND UNPERSUASIVE

A. Hines Is Inapplicable Because Of Differences In State Laws

In Hines v. Dep't of Pub. Aid, 850, N.E.2d 148 (Ill. 2006), the Illinois Supreme Court determined that recovery was not permitted but did so in full recognition that it was their state probate scheme that compelled this decision, stating: "[T]he [Medicaid] Act bestows on Illinois the option of defining the estate of a Medicaid recipient...more expansively than under this state's normal probate law." Id. at 154. The court went on to discuss how several states, including Minnesota, have utilized an optional definition of "estate" which the Illinois legislature no longer permitted. Id.

B. Budney And Smith Are Unpersuasive

In Estate of Budney, 541 N.W.2d 245 (Wis.Ct.App. 1995), the Wisconsin Court of Appeals summarily concluded that the federal statute did not authorize estate recovery through assets now held by the surviving spouse. This holding provides no guidance to this Court and has been rejected by the court of appeals in both Jobe and Gullberg and by the North Dakota Supreme Court. Thompson, 586 N.W.2d at 850.

Estate of Smith, No. M2005-0140-COA-R3-CV, 2006WL3114250 (Tenn.Ct.App. Nov. 1, 2006), is an unpublished decision from an intermediate court that does not have precedential force even within its own jurisdiction. Moreover, Smith's reasoning provides no guidance to the Court because it largely relied on a stipulation that the recipient had conveyed all of her interest in joint assets before she died without considering the existence of marital interests or Medicaid's treatment of spousal resources. In addition, Estate of Bergman, which Smith declines to follow, is a better-reasoned decision.

C. North Dakota's Wirtz Decision, However, Is Persuasively Reasoned

In Estate of Wirtz, the North Dakota Supreme Court considered which assets in the community spouse's estate were subject to recovery given the definition of "estate" contained in 42 USC §1396p(b)(4)(B). 607 N.W.2d 882, 884. The court held that a Medicaid recovery claim could be validly asserted against "real or personal property in which [the recipient spouse] had *any* legal title or other interest at the time of death." Id. at 885. The court clarified that this did not include all property ever held by either party

during marriage, but rather "assets in which the deceased recipient once held an interest." Id. at 886. The analysis in Wirtz also recognized the legislative intent to broaden recovery in support of tracing assets to determine a recipient's interest. The court listed limitations on recovery, which are consistent with Minnesota's definition of marital property and the provisions already made in Minnesota law to limit recovery to the value of "marital or jointly owned property." Id. Wirtz gives effect to the unique relationship of spouses under Medicaid law, something unacknowledged by the Estate here.

Where courts have misapplied the federal statute, this Court's decision can serve to provide clarity by reiterating that a recipient spouse retains an interest in marital assets at the time of death. This is particularly true where states have confused scope of recovery with ability to recover. Furthermore, this Court's decision will not only provide clarity on the fundamental issue of recovery, but will further guide other jurisdictions in examining the scope of recovery in light of the federal statute's expanded estate option within the context of Medicaid's treatment of spousal resources.

CONCLUSION

For the reasons above, Mille Lacs County respectfully requests this Court conclude that Minnesota's estate recovery statute is not preempted by federal law and that the scope of permissible recovery is from the entirety of marital property now held in the community spouse's estate.

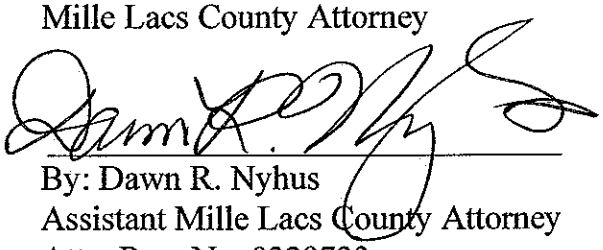
The plain language reading of the federal statute is at best ambiguous, and further analysis, including a contextual treatment of the statute, demonstrates that there is no "clear conflict" between state and federal law. In addition, a careful review of Martin reveals that preemption is not supported when, as in the present case, compliance with federal and state law is possible and federal objectives are achieved through the state statute. Minnesota's recovery law defines Dolores Barg's legal interest at death as the entirety of marital property and joint property; this interest exists for recovery purposes regardless of title or vesting.

As the court of appeals failed to properly recognize the recipient spouse's interest or the scope of recovery as the fullest extent of this interest, Mille Lacs County respectfully requests reversal of the decision below and remand of this matter to the district court for payment of its claim in full.

Dated: June 5, 2007.

Respectfully submitted,

~~JANICE S. KOLB~~
Mille Lacs County Attorney



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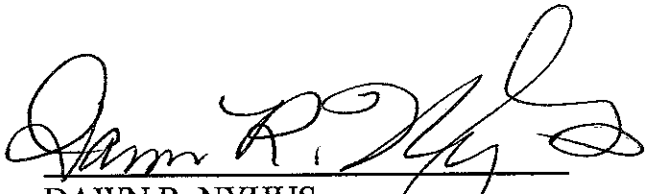
CERTIFICATE OF COMPLIANCE

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

The undersigned certifies that the Brief submitted herein contains 6,975 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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