

NO. A05-2346

State of Minnesota
In Supreme Court

In Re the Estate of
Estate of Frances E. Barg, a/k/a Frances Edward Barg

RESPONDENT'S BRIEF AND ADDENDUM

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

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LEGAL ISSUES

- I. 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 spouse who left no estate?

Court of Appeals disposition: The Court of Appeals determined that the predeceased recipient spouse retained a joint tenancy interest in the homestead at the time of the recipient's death despite having deeded the homestead to the surviving spouse prior to her death thereby allowing recover to the extent of one-half of the value of the homestead.

- II. Whether under applicable state and federal law Mille Lacs County is entitled to a claim for medical assistance provided to the deceased recipient against the estate of the deceased recipient's surviving spouse?

Court of Appeals disposition: Mille Lacs County is limited to a claim for a one-half interest (valued at the recipient's death) in the joint tenancy homestead property obtained during the marriage and transferred to the surviving spouse during the recipient's lifetime.

- III. Whether the Estate of Francis Barg adequately preserved for review the issue of whether Mille Lacs County may recover Medicaid benefits correctly paid on behalf of a predeceased spouse from the estate of a surviving spouse?

Court of Appeals disposition: This issue was not raised or considered by the Court of Appeals.

STATEMENT OF THE CASE

Although the probate court allowed \$63,880 of Mille Lacs County's claim for reimbursement of medical assistance rendered to his deceased spouse Dolores Barg, the County contested the disallowance of \$44,533.53. (Estate of Barg, Mille Lacs County District Court File PX-04-701). On November 2, 2005 the Honorable Steven P. Ruble, Judge of District Court in Mille Lacs County, denied the County's petition and awarded the amount previously allowed by the Estate. Mille Lacs County appealed on November 28, 2005. On October 17, 2006 the Court of Appeals reduced the claim of Mille Lacs County to \$60,400 using a different reasoning than the District Court. (Estate of Barg, 722 N.W.2d). On November 16, 2006 the County filed a petition with this Court for review. The Estate filed a response seeking this Court's affirmance of the Court of Appeals decision. The Estate also requested conditionally that this Court review whether the County may recover Medicaid benefits correctly paid on behalf of a predeceased spouse from the estate of the surviving spouse. The Court granted review.

STATEMENT OF FACTS

Dolores J. Barg and Francis E. Barg were married August 11, 1948. After 53 years of marriage, Dolores Barg entered Elim Care nursing home in Mille Lacs County on October 24, 2001. AA1 and AA2 (reference is to pages in Appellant's Appendix in Court of Appeals). Her nursing home care was initially paid at private expense until December 1, 2001 when she became eligible for and began receiving medical assistance benefits. Dolores and Francis Barg purchased their homestead property as husband and wife and joint tenants in two transactions, one in 1962 and one in 1967. AA1. Dolores applied for medical assistance December 20, 2001 and under the terms of the assessment was informed of her right to transfer her interest in protected assets to her spouse. AA2. As allowed by medical assistance, she transferred her interest in the homestead real property to her husband Francis Barg by deed dated July 2, 2002. The conveyance was recorded July 18, 2002. AA3. Dolores Barg died January 1, 2004 having received medical assistance benefits in the amount of \$108,413.53.

Francis Barg died May 27, 2004 having never received medical assistance. AA4-5. Francis Barg's Will dated February 27, 2002 left his estate to his descendants who survived him with no provision for Dolores. In the probate proceeding commenced in Mille Lacs County, Personal Representative Michael Barg partially allowed Mille Lacs County's claim to the extent of \$63,880 and disallowed the claim in the amount of \$44,553.53. The Mille Lacs County District Court, in the probate proceeding, on October 11, 2004 allowed Mille Lacs County's claim in the amount of \$63,880 and disallowed the

balance. The District Court based its decision on the laws of intestacy which would have granted Dolores Barg a life estate in the homestead and a \$5,000 personal property allowance if she had survived Francis. AA36. The County appealed, and on October 17, 2006 the Court of Appeals issued its opinion. The Court of Appeals reduced the County's recovery to \$60,400, which represented one-half of the value of the Barg homestead at the time of Dolores Barg's death. Barg at 497. The Court of Appeals stated that the District Court "erred by applying a probate law method of calculation" which had been suggested as a possible valuation method by the Minnesota Court of Appeals in Estate of Gullberg, 652 N.W.2d 709. Barg at 498.

SCOPE OF REVIEW

The Respondent agrees with Appellant that this Court may review the issues de novo.

SUMMARY OF ARGUMENT

The question before this Court is the extent to which federal law limits recovery of medical assistance benefits correctly paid on behalf of a deceased recipient from the estate of a surviving spouse who was never a recipient. The plain language of 42 U.S.C. §1396p(b), the applicable federal statute, does not allow recovery of medical assistance in this case, and Minn. Stat. §256B.15 is in conflict with the federal provision. Unless and until Congress changes the federal statute, the federal statute must prevail over the state statute. The decisions of the Minnesota Court of Appeals in Estate of Gullberg, 652 N.W.2d 709 (Minn. Court App. 2002) and in Estate of Barg, 722 N.W.2d 492 (Minn. Court App. 2006) rely on legal fictions to allow recovery rejected by the courts of several other jurisdictions. The Respondent Estate partially allowed Appellant's claim in the probate court in reliance on the Court of Appeals decision in Gullberg. The District Court and the Court of Appeals in Barg both allowed the claim in part. Respondent Estate requests in the alternative that this Court uphold the Barg appellate decision, or hold that the federal statute allows no recovery.

The federal law regarding Medicaid was enacted in 1965 as Title XIX of the Social Security Act. Medicaid is jointly funded by federal and state governments. State participation is voluntary but states that choose to participate must comply with federal statutes and regulations in order to receive federal Medicaid funds. Estate recovery is governed by 42 U.S.C. §1396p(b)(1)(B) which states that, "no adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may

be made” except as permitted by the federal statute. The federal statute provides “In the case of an individual who is 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual’s estate...” The federal statute requires that a claim be made against the individual’s estate as defined by state probate law. This case does not involve a claim against the individual’s probate estate.

In 1993 Congress enacted the Omnibus Budget Reconciliation Act of 1993 (OBRA '93) which in 42 U.S.C.§1396p(b)(4)(B) allows the states to expand the definition of “estate” to include “any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.” This case questions whether the state option to expand the definition of “estate” can be used to support a direct claim against the probate estate of a community spouse.

In 1990 prior to enactment of the federal statute, Minnesota enacted Minn. Stat. §256B.15 Subd. 2, which directs that a “claim against the estate of a surviving spouse who did not receive medical assistance, for medical assistance rendered for the predeceased spouse, 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.” Because the state plan allows recovery against the estate of a surviving spouse who was not a recipient and

the federal law allows recovery only against the estate of the individual who received benefits, there is a clear conflict in the plain language and meaning of these statutes.

The Minnesota Court of Appeals in Gullberg, 652 N.W.2d 709 (Minn.Ct.App. 2002) found that the federal statute preempted the Minnesota statute in part. The Court concluded the Minnesota statute allows “claims against a surviving spouse’s estate only to the extent of the value of the recipient’s interest in marital or jointly owned property at the time of the recipient’s death.” (emphasis supplied) Id. at 714. Although the Court in Gullberg that the deceased recipient “did not hold legal title to the homestead” at the time of his death because he had conveyed his interest in the homestead to his surviving spouse wife during his lifetime, the Court concluded that he continued to have some “interest” in the homestead when he died and that his lifetime conveyance to his spouse was a conveyance by “other arrangement” under the federal statute. The Gullberg Court directed the district court to determine the extent of the interest, either based on a theory of common ownership interest in property acquired during coverture or based upon the probate concept that a homestead descends to a surviving spouse free from any testamentary disposition to which the surviving spouse has not consented.

Relying on Gullberg the Estate in District Court partially allowed Mille Lacs County’s claim for reimbursement to the extent of the value of Dolores Barg’s life estate interest in the couple’s homestead property when she died, even though she predeceased her spouse and any life estate right she had was therefore purely fictional. Minn. Stat. §524.402(a)(2) awards a surviving spouse a life estate and the decedent’s descendants the

remainder interest in a couple's homestead. Mille Lacs County continued to seek full reimbursement in the District Court arguing Dolores Barg had a 100% marital interest in the homestead property at the time she died. The District Court agreed it was bound under Gullberg to find some interest, and determined that probate analysis, based upon a life estate valuation, was the most appropriate interest analysis to apply in the probate court. The District Court then partially allowed Mille Lacs County's claim. Mille Lacs County appealed asking the Court of Appeals to award it the full value of the homestead from the probate estate of the surviving spouse.

The Court of Appeals declined to reverse the Gullberg finding that conflict preemption applied to Minn. Stat. §256B.15. However, the Court of Appeals rejected both of the interests identified in Gullberg (the marital interest and the probate interest) and substituted real property law principles to determine the nature of the interest and its value. The Court of Appeals, Respondent argues, correctly determined that a "joint tenant's interest in property is an undivided one-half interest in the property's value." Barg at 497. The appellate court rejected the argument that Gullberg should be reversed on the preemption issue. The Court of Appeals established a definite and potentially workable method of valuing an interest that could be recovered from the probate estate of a surviving community spouse. The appellate court relied on the Gullberg Court's conclusion that a lifetime transfer from the deceased recipient spouse to the surviving spouse constituted an "other arrangement" under the federal statute.

If this Court agrees with the logic and reasoning of the Court of Appeals, the Court's decision determining that the Estate should pay one-half of the joint tenancy value of the marital homestead real property at the time of the recipient's death, in the amount of \$60,400, should be affirmed. If this Court agrees that federal law preempts Minnesota law in this area and concludes that Dolores Barg had no interest in the property of her husband Francis Barg at the time of Dolores' death, Appellant Mille Lacs County should recover nothing.

ARGUMENT

I. FEDERAL LAW LIMITS ESTATE RECOVERY OF CORRECTLY PAID MEDICAL ASSISTANCE TO THE ESTATE OF THE RECIPIENT ONLY.

Because the Medicaid program is a federal program under Title XIX of the Social Security Act, the starting point to determine recovery standards is the federal statute. The language of the federal statute is plain, clear and concise. When States choose to participate in the program they are bound by the federal statute.

A. The Omnibus Budget Reconciliation Act of 1993 (OBRA '93) expressly and intentionally limits estate recovery to the estate of the recipient, but Minnesota law has not been brought into compliance.

Estate recovery is authorized by federal law only in the estate of the recipient. 42 U.S.C. §1396p(b)(1) begins immediately with limiting language: “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:... (B) 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, but only for medical assistance consisting of... (i) nursing facility services....” (emphasis supplied). There is no provision for recovery against the estate of anyone except the individual who received

assistance. The Respondent Estate agrees that although the County must seek recovery under the statute, recovery is limited to the recipient's estate only.

Although Appellant Mille Lacs County characterizes "federal and Minnesota Medicaid estate recovery laws" as working "in harmony to permit maximum estate recovery" (Appellant Summary of Argument page 4) there is no basis in the federal statute now being examined for the conclusion that federal law was made with consideration of Minnesota's law. The language of federal law and the language of Minnesota law, which are now in conflict, were adopted in different years. The federal statutory language was adopted as part of the Omnibus Budget Reconciliation Act of 1993 (OBRA '93) and the relevant language of Minn. Stat. §256B.15 was enacted in 1987. The federal legislative history clearly indicates the language finally adopted, while it permitted a limited expansion of the State's right to recover medical assistance, had very carefully defined limits.

As the Estate showed in its brief to the Court of Appeals, the language passed by the House of Representatives was more expansive in allowing recovery than the version Congress finally adopted (See Resp. App. brief at page 23). The definition of "estate" in the House version read, "For purposes of this section the term 'estate', with respect to a deceased individual, 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, including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, survivorship, life estate, living trust, or other arrangement." (emphasis

supplied). The version as finally adopted and as previously provided by the Estate in its brief to this Court reads, “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 estate...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.” (emphasis supplied). The expansion of allowable assets against which recovery can now be made was limited.

Further, the House version, which was rejected at passage, contained language that “The program provides for the collection consistent with paragraph 3 of an amount (not to exceed the amount described in clause (ii)) from – (I) the estate of the individual; (II) in the case of an individual described in subparagraph (B)(ii) from the estate of the surviving spouse;...” (emphasis supplied) (Resp. App. brief at page 22). The type of case described in (B)(ii) is “the case of such an individual who was married at the time of death, when the surviving spouse dies.” Id. at 22. The language as finally passed eliminated all reference to allowing a claim against the estate of a non-recipient community spouse for benefits paid to the deceased recipient spouse. Minnesota has not amended the provisions of Minn. Stat. §256B.15 Subd. 2, to comply with the limitations of the OBRA ’93 language limiting claims to the estate of the recipient only.

As the Estate noted in its appellate court brief at page 24, the revisions in the final draft, explained in part by the Conference Report, limited recovery of the cost of nursing facility services provided to a beneficiary to recovery “from the estate of such beneficiary.” The language limiting recovery to other assets “in which the beneficiary had any legal title or interest at the time of death” was also continued in the final version. In fact, the initial limiting language of 42 U.S.C. §1396p(b)(1) of OBRA '93 retained the previous statutory language (of §1917(b)(1)), “No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except....” *Id.* at 25.

Appellant does not acknowledge the conflict between these state and federal laws, concluding instead in III.E of its brief to this Court that “Minnesota’s estate recovery law is in harmony with federal Medicaid law.” The current statutory language and this history refute Appellant’s claims throughout its brief to this Court that Congress intended recovery to be full recovery, that any asset a couple owned during their marriage or jointly owned was entirely subject to recovery, and that any claim necessarily includes a spouse’s resources. (Appellant’s brief pgs. 32 and 38).

B. The recipient’s estate is limited to the probate estate under state law and may include an expanded, but limited, definition of the recipient’s estate at the option of the State.

The definition of the “individual’s estate” is contained in §1396p(b)(4)(A). The statute reads: “(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;..." (emphasis supplied). In Minn. Stat. §524.2-201(7) the Minnesota Uniform Probate Code defines "probate estate" to mean "property that would pass by intestate succession if the decedent dies without a will." Conversely, in Minn. Stat. §524.2-205 various non-probate assets are listed including "(1) property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death." Property included under this category consists of:... "(ii) The decedent's interest in property held with the right of survivorship. "

Then, at §1396p(b)(4)(B) the federal statute allows expansion of the definition of the recipient individual's estate, within limits, so that it "may include, at the option of the State... any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest) 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." (emphasis supplied). Clearly the federal statute continues to limit the estate against which recovery can be made and the assets which can be looked to for recovery. There is no provision in this statute for recovery against the estate of a surviving spouse who is not a recipient. The expanded definition of estate limits the individual recipient's estate to property "in which the individual had any legal title or interest at the time of death (to the extent of such interest)." Dolores Barg had no legal title or interest at the time of her

death in the parties' homestead. She conveyed her undivided one-half joint tenancy interest to her community spouse during her lifetime. The remaining language of the expanded definition of estate refers to transfers at death to "a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement." (emphasis added). All the transfers listed at the end of this statutory section are transfers that occur at death when property owned by the individual recipient passes outside probate to become the property of a survivor, heir or assign. Dolores Barg owned nothing that passed outside probate administration at her death to any other person.

C. The Gullberg and Barg Courts have applied the term "other arrangement" to include lifetime transfers between spouses, which is inconsistent with the language and construction of the federal statute.

The last sentence of the expanded federal definition of estate lists five specific kinds of transfers at death and concludes with the words "or other arrangement." These concluding words, the Estate respectfully argues, have been misinterpreted and misapplied by the Court of Appeals in Gullberg and Barg, and the District Court in Barg. In Gullberg, Walter Gullberg was the Medicaid recipient and transferred his undivided one-half joint tenancy interest in the couple's homestead to his wife Jean Gullberg during his lifetime. The Gullberg Court at 713 concluded, "Moreover, the homestead was conveyed to Jean Gullberg through some 'other arrangement'." This conclusion was without discussion other than a reference that the North Dakota Supreme Court in Estate

of Wirtz, 607 N.W.2d 282 (N.D. 2000) “recognizes that 'other arrangement' language has been interpreted by courts to include community property and homestead interests.” Id.

The District Court in its Conclusions of Law concluded Dolores Barg’s lifetime transfer to her husband Francis of her undivided one-half interest in the parties’ joint tenancy homestead constituted an “other arrangement” pursuant to 42 U.S.C. §1396p(b)(4)(B) because of the Gullberg language. This summary conclusion by both courts was stated without discussion of the term “other arrangement” appearing in the federal statute as the last type of transfer at death that followed five other specific types of transfers at death. All these examples followed the reference to 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 these specific types of transfers without probate. To conclude that the words “other arrangement” refer to any lifetime transfers reads the federal statutory limitation to “assets in which the individual had any legal title or interest at the time of death (to the extent of such interest)” out of existence. If lifetime transfers are included in this list then the plain language carefully limiting these transfers would have no meaning.

The Court of Appeals in Barg (Barg at 496) adopted the “other arrangement” interpretation of Gullberg. Although the Court rejected Gullberg’s probate law or marital property law valuation principles in favor of real property law principles instead, the Court concluded a “recipient’s interest in marital property for purposes of estate

recovery is limited to that person's legal interest in the property at the time of death. And, under federal law and Gullberg, this interest includes a conveyance of a joint tenancy to a spouse." Barg at 497. That statement is cited to Gullberg, which the Court of Appeals noted was "(stating that recipient maintains joint-tenancy interest in property even after conveyance to spouse because conveyance constitutes 'other arrangement'.)" (emphasis supplied). Again, the Barg appellate court did not independently examine statutory location or context of the words "other arrangement."

The federal recovery statute 42 U.S.C. is a limiting and restrictive statute that begins in §1396p(b)(1), "No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except,...." One of those exceptions is when an individual was 55 years of age or older when receiving the medical assistance. This is the exception under which recovery could be made against the estate of the recipient Dolores Barg, if she had an estate that met the federal definition. Her estate as defined in §1396p(b)(4) includes the probate estate under Minnesota law. The statute expands the definition of the individual recipient's estate as previously set forth herein. That statute deserves a careful reading in light of how the Gullberg and Barg Courts have applied the term "other arrangement." All the specifically cited examples are interests held at the time of death only. Those interests move from the decedent recipient at death to a survivor, heir or assign through these specifically recited transfers that occur at death outside of probate. The last two words "other arrangement" clearly would be limited to other types of transfers that occur at

death.

Although Appellant Mille Lacs County states in its brief at page 31 that, “The use of the catchall phrase 'or other arrangement' at the end of the definition 'suggests that Congress intended the definition to be as all inclusive as possible’” the plain language of the statute states otherwise. The words “other arrangement” can only add other legal titles or interests held at the time of the recipient’s death which pass because of that death without probate to a survivor, heir or assign of that deceased recipient individual. To read those words to include any transfer the decedent ever made during lifetime would make the statutory language that precedes those words meaningless.

The Gullberg Court characterized a lifetime conveyance by a decedent recipient as an “other arrangement” and then used that definition as a basis for creating a fictional estate in the decedent recipient based on the concept of a marriage dissolution or the fiction that Mr. Gullberg who predeceased his wife actually survived her and was able to take some interest from her estate. The federal statute limits the expanded definition to legal titles or interests the individual recipient had “at the time of death” and that moved from that individual to a survivor, heir, or assign. The definition does not include real or fictional interests that moved from a survivor spouse to a predeceased spouse.

II. ALTHOUGH FEDERAL LAW PREEMPTS MINNESOTA LAW REGARDING ESTATE RECOVERY PROVISIONS, THE MINNESOTA COURT OF APPEALS HAS ALLOWED RECOVERY BEYOND THE

LIMITS OF FEDERAL LAW.

The direct conflict between the plain meaning of the state and federal statutes raises the issue whether federal law preempts state law. The Respondent Estate argues that pursuant to this Court's decision in Martin v. City of Rochester, 642 N.W.2d 1 (Minn. 2002), federal law does preempt Minnesota law. The Estate also argues the Minnesota Appellate Court has allowed recovery despite this preemption.

A. The principles of conflict preemption analysis described in Martin apply in Barg.

In Martin, the Court examined the federal law of preemption and indicated there are three situations in which federal law preempts and invalidates state law. The first is where state law is preempted when Congress "explicitly states that the federal scheme preempts any state action in the field." Martin at 10-11. The second is when Congress "implicitly preempts state involvement in a particular field of law because the scope of federal involvement or interest is so extensive that it fully 'occupies the field.'" Id. at 11. The third type of preemption Martin identified as "conflict preemption" which this Court said takes two forms and "arises when state law conflicts with federal law, either because compliance with both federal and state law is impossible or because the state law is an obstacle to the accomplishment of the purposes of the federal scheme." Id. The Court in Martin determined that when states permit some action regarding Medicaid there is no explicit or implicit federal preemption of the field. Therefore, as in Barg, conflict exists because "state law conflicts with specific federal Medicaid law or is an obstacle to federal

Medicaid purposes.” Id. Respondent Estate submits to this Court the plain meaning of the federal statute regarding recovery conflicts with the language of the Minnesota statute, and state law is an obstacle to federal Medicaid purposes.

Despite Appellant’s assertion in its brief at page 31 that “The plain language of the federal statute reveals no basis for finding preemption of the scope of a claim against a surviving spouse’s estate,” the Estate argues that as in Martin the limitations expressed in the federal statute mean exactly what they say - that no recovery may be made except in limited circumstances, only from the individual recipient’s estate, and only as that individual recipient’s estate is defined in the federal statute. There is clear conflict with the Minnesota statutory language requiring “The total amount paid for medical assistance rendered for the person and spouse shall be filed as a claim against the estate of the person or the estate of the surviving spouse in the court having jurisdiction to probate the estate.” (emphasis supplied) Minn. Stat. §256B15 Subd. 1a. The federal statute does not allow any claim against the estate of a non-recipient spouse, and limits the definition of estate of the recipient spouse to interests an individual had at the time of death that are transferred at death without probate. The last words in this specific list of at death transfers were “or other arrangement” and as the Estate has argued at every level of this case, those last few words can refer only to assets that transfer at death.

The state law in §256B.15 Subd. 2, limits the claim for reimbursement against the estate of a surviving spouse who did not receive medical assistance, but the limitation is only “to the value of the assets of the estate that were marital property or jointly owned

property at any time during the marriage.” The State limitation clearly goes beyond the limiting language of the federal statute, which limits recovery even under the expanded definition of estate, to “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).” The state law expressly allows claims against the estate of a surviving spouse (in contradiction of federal law) and allows the claim against any assets that were marital or jointly owned at any time during the marriage. This would allow claims against property transferred to the surviving non-recipient spouse during the deceased recipient’s lifetime. These direct conflicts in the state and federal law, the Estate argues, are similar to direct conflicts in the statutes analyzed in Martin. The Court in Martin, as it continued this examination and analysis, concluded “...compliance with the provisions of both state and federal law 'is not possible' because the federal law prohibits exactly what the state law allows.” Id. at 16.

The Court in Martin consistently stressed the need to examine the particular language of the competing state and federal statutes and explained, “Allowing the state to...get indirectly what it is prohibited from obtaining directly would defeat the purpose of the federal...provision...” (emphasis supplied) Id. at 20. The Court characterized the state law as allowing “an end-run around the protections” of the federal statute. (emphasis supplied) Id. All these same problems arise in reconciling the state and federal statutory language regarding medical assistance reimbursement.

The Estate therefore argues federal law preempts the Minnesota statute to the

extent Minnesota law allows a claim against the estate of a surviving non-recipient spouse, and to the extent recovery is allowed against assets of the estate that were marital or jointly owned property at any time during the marriage of the deceased recipient Dolores Barg and the surviving community spouse Francis Barg.

B. The Court of Appeals in Gullberg and Barg found Minnesota's statute was partially preempted by federal law, but the Court in both cases relied upon legal fictions to allow Minnesota to recover indirectly what it could not recover directly.

1. Estate of Gullberg, 652 N.W.2d 709 (Minn.Ct.App. 2002)

On October 29, 2002 the Minnesota Court of Appeals In Estate of Gullberg undertook to resolve the conflict between the federal and the state laws governing medical assistance recovery in a case having nearly identical facts to the Barg case. Prior to his death recipient Walter Gullberg conveyed his joint tenancy interest in the homestead he owned with his non-recipient spouse Jean Gullberg to her. Jean Gullberg survived Walter by six years and a claim for assistance provided to Walter was made against Jean's estate. The Court looked squarely at the language of 42 U.S.C. §1396p(b), particularly (4)(A) and (4)(B) and Minn. Stat. §256B.15 Subd. 2, and began by discussing the three different situations in which federal law will preempt state law as set forth in Martin. The Court concluded the Gullberg case presents a "conflict preemption" situation, in which preemption will arise only "when state law conflicts with federal law, either because compliance with both federal and state law is impossible or because the

state law is an obstacle to the accomplishment of the purposes of the federal scheme.” Id. (citations omitted by the appellate court). After reciting the federal statutory definition of estate and the optional definition of estate that a state may adopt, the Court noted Minnesota law allows recovery against the “estate of a surviving spouse” but those claims are limited to “the value of the assets of the estate that were martial property or jointly owned property at any time during the marriage.”

The Court then noted that in In Re Estate of Jobe, 590 N.W.2d 162 (Minn.Ct.App. 1999), the Court of Appeals allowed a claim against a surviving spouse’s estate. However, in Jobe the homestead of the couple “was held by the couple in joint tenancy and became the property of the surviving spouse on the death of the recipient.” Gullberg at 713. In Jobe the Court found no preemption because the deceased medical assistance recipient had not transferred the joint tenancy interest to the community spouse during the deceased recipient’s lifetime. Mr. Gullberg, the recipient, did convey his interest by quit claim deed to his community spouse during his lifetime. The Gullberg Court concluded that although Walter Gullberg did not hold legal title to the homestead when he died because he had conveyed his interest to his wife during his lifetime, “he continued to have some legal 'interest' in the homestead because he and Jean Gullberg were still married at the time of his death.” Id. This legal interest because he was still married was referenced as follows: “See Searles v Searles, 420 N.W.2d 581, 583 (Minn. 1988) (‘The law recognizes that spouses have a common ownership interest in property acquired during coverture, regardless of who holds title’); Minn. Stat. §524.2-402(a), (c)

(2000), (homestead descends to surviving spouse free from any testamentary disposition to which surviving spouse has not consented, but subject to claim filed under 256B.15 for medical assistance benefits).” (emphasis supplied) Id.

The troublesome language of the federal statute then appears in the Gullberg opinion in its conclusion that “The homestead was conveyed to Jean Gullberg through some 'other arrangement’.” (emphasis supplied) Id. This conclusion was referenced to Bonta v Burke, 120 Cal.Rptr.2d 72 (2002), for the proposition that “Recipient, who conveyed homestead to her daughters but retained a life estate and right to revoke the remainder, held significant interest in property until her death.” (emphasis supplied) Id. However, unlike Gullberg, this was a transfer at death. The Gullberg Court also cited this conclusion to Wirtz, noting only “North Dakota Supreme Court recognizes that 'other arrangement' language has been interpreted by courts to include community property and homestead interests.” Id.

Then the Court concluded, “Walter Gullberg continued to have some legal interest in the homestead, albeit contingent upon any number of factors.” Id. The important footnote to this conclusion (footnote 2) reads in part, “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.” (emphasis supplied) Id. (The Barg appellate court found the district court “erred” in following this direction).

In Jobe and Bonta the deceased recipient owned some legal title at death that passed to a survivor outside probate administration. Walter Gullberg’s interest was

conveyed prior to his death not to a survivor but to a joint tenant.

The Gullberg Court found partial statutory preemption of Minn. Stat. §256B.15 Subd. 2, which allows recovery against the estate of the surviving community spouse “to the value of the assets of the estate that were marital property or jointly owned property at any time during the marriage...” and “goes beyond what is allowed by federal law, which allows recovery only 'to the extent of the individual’s legal interest at the time of death.'” (emphasis supplied) Id. at 714. The Court interpreted the Minnesota statute to allow claims against a surviving spouse’s estate “only to the extent of the value of the recipient’s interest in marital or jointly owned property at the time of the recipient’s death.” With this interpretation the Court would allow some tracing of property that at any time was owned by the deceased recipient and the surviving community spouse during their marriage.

2. Estate of Barg, 722 N.W.2d 492 (Minn.Ct.App. 2006)

The parties in Barg relied directly on Gullberg in their arguments to the district court and the Court of Appeals. Appellant Mille Lacs County primarily argued Dolores Barg had a 100% interest in the couple’s marital property in her surviving spouse’s estate even though she had no ownership in it at the time of her death. The Gullberg decision never indicated such an interest was ever held 100% by one spouse or the other. Throughout these proceedings the County has relied on the definition of marital property from Minn. Stat. §518.54 Subd. 5. However, that subdivision is preceded by Minn. Stat. §518.54 Subd. 1, titled “Terms,” and reads in total: “For the purposes of 518.54 to

518.66, the terms defined in this section shall have the meanings respectively ascribed to them.” Subd. 5 defines marital property: “Marital property’ means property, real or personal,... acquired by the parties or either of them, to a dissolution, legal separation or annulment proceeding at any time during the existence of the marriage relation between them....” As Appellant Mille Lacs County correctly notes in its brief herein at page 18, “all property acquired by either spouse subsequent to the marriage and before the valuation date is presumed to be marital property regardless of whether title is held individually or by the spouses in a form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property.” However, the next sentence of the statute reads, “Each spouse shall be deemed to have a common ownership in marital property that vests not later than the time of the entry of the decree in a proceeding for dissolution or annulment. The extent of the vested interest shall be determined and made final by the court pursuant to §518.58. If a title interest in real property is held individually by only one spouse, the interest in the real property of the non-titled spouse is not subject to claims of creditors or judgment or tax liens until the time of entry of the decree awarding an interest to the non-titled spouse.” This definition of marital property is limited to use in a marriage dissolution action, and the interest of the party in this marital property is not determined for any purpose until a court in a marriage dissolution action enters a decree establishing the interest. The Barg Court of Appeals rejected using a marital property approach, correctly determining the plain language of §518.54 “explicitly restricts its definitions to the context of marital

dissolution only.” Therefore, the Court said, “We are unable to find a legal basis for incorporating this definition into the estate-recovery statute.”

The Estate, relying on Gullberg, argued the probate law analysis of Gullberg was an appropriate method to determine the interest of the deceased recipient. The District Court agreed, as did the District Court in Ramsey County in Estate of Bast, (Ramsey County District Court No. P9-03-5115, February 2004, unreported) based on identical facts to Barg. (Resp. App. Addendum). The Court in Bast, as in Barg, was sitting as a probate court in which the claim and disallowance were made. Minn. Stat. §256B.15 Subd. 1a limits claims for recovery to probate actions. The statute reads, “If a person receives any medical assistance hereunder, on the person’s death, if single, or on the death of the survivor of a married couple, either or both of whom received medical assistance, the total amount paid for medical assistance rendered... shall be filed as a claim against the estate of the person or the estate of the surviving spouse in the court having jurisdiction to probate the estate....” (emphasis supplied). The District Court in Barg noted, in this probate setting, “The legal factors for valuation of assets in a marital dissolution setting are not suitable for a proceeding such as this one where the spouses are not the actual parties.” Appellant’s Appendix in Ct. App. at AA37. For that reason the District Court used the probate approach.

The Court of Appeals adopted the Gullberg conclusion that the deceased recipient spouse continued to have some interest in the estate of the surviving community spouse. However, Gullberg suggested two methods of valuation of this interest, both predicated

upon fictional events, and directed the District Court to value the interest. One scenario would have Dolores and Francis Barg, both of whom are now deceased, arguing the equities of their own marital dissolution property division before the probate court. The other fiction is that the deceased recipient Dolores Barg survived the surviving community spouse, Francis Barg, and asked the probate court to award her a life estate in the parties' homestead even though she was deceased. The Court of Appeals in Barg rejected the probate analysis because it is "based on an artificial assumption that the surviving spouse predeceased the recipient instead of the converse." Id. at 496. The Court of Appeals also rejected the marital property approach because that would "require us to read into the estate-recovery statute a definition from Minn. Stat. §518.54 (2004), which explicitly restricts its definitions to the context of marital dissolution... We are unable to find a legal basis for incorporating this definition into the estate-recovery statute." Id. The Court cited the last conclusion to Genin v 1996 Mercury Marquis, 622 N.W.2d 114 (Minn. 2001) "(stating that rules of statutory construction prohibit adding words or meanings to statute when legislature has not)." Id.

The Estate has argued throughout this matter that the probate method and the marital property method under a dissolution statute are both based on artificial assumptions and fictions. But in an attempt to carry out the Gullberg recovery process the Court of Appeals in Barg created a third fiction – that the joint tenancy interest Dolores deeded to her community spouse during her lifetime was retained by her estate at her death. Following Gullberg's reasoning that Dolores Barg had a fictional interest in

the estate of her surviving spouse required the Barg Court to create a right to recovery where none exists in the federal law.

However, since the Barg Court of Appeals upheld the Gullberg determination that the deceased recipient spouse had some interest in the estate of the surviving community spouse, and since the Court found property law should be the preferred valuation method, the Barg case has been resolved. A final standard has been determined to value the interest of the recipient spouse in the couple's homestead – determining the property value on the date of the recipient's death of the recipient's one-half interest in the couple's joint tenancy real property. The Barg estate agrees this method and the specific determination Mille Lacs County is awarded \$60,400 can and should be upheld by this Court.

III. THE COURT OF APPEALS DECISION IN BARG IS NOT SUPPORTED BY MINNESOTA REAL PROPERTY LAW OR BY STATUTE.

A. The statutory basis referenced by the Court of Appeals does not apply to the Barg case.

Interestingly, the Court of Appeals in Barg rejected the Gullberg Court's two suggested methods for evaluating the fictional interest of a deceased medical assistance recipient in the estate of the recipient's surviving spouse. The Barg Court called the Gullberg suggestions "passing references to marital and probate law." Barg at 496. However, the Court of Appeals then adopted its own valuation process based on the

artificial assumption that the deceased recipient's joint tenancy interest conveyed to the surviving spouse during the recipient's lifetime was retained by the recipient at the time of her death. This is cited to Minn. Stat. §256B.15 Subd. 1(3). (Note: The Estate believes this citation is actually to §256B.15 Subd. 1(a)(3) since there does not appear to be a Subd. 1(3)). This subdivision was adopted August 1, 2003, approximately thirteen months after Dolores Barg conveyed her joint tenancy interest in the property to her community spouse on July 2, 2002. That statute continues a recipient's life estate or joint tenancy interest in real property after the recipient's death for potential recovery of medical assistance benefits paid.

In 2005 the Minnesota legislature modified that statute in §256B.15 Subd. 1(c) eliminating retroactive application of the August 1, 2003 law regarding a recipient's life estate or joint tenancy interest in real property created prior to August 1, 2003. The statutory change reads: "All provisions in this subdivision.... related to the continuation of a recipient's life estate or joint tenancy interests in real property after the recipient's death for the purpose of recovering medical assistance, are effective only for life estates and joint tenancy interests established on or after August 1, 2003." (emphasis supplied). Also in 2005 §256B.15 Subd. 7 was added: "Medical assistance liens and liens under notices of potential claims that are of record against life estate or joint tenancy interests established prior to August 1, 2003, shall end, become unenforceable and cease to be liens on those interests upon the death of the person named in the lien or notice of potential claim...." Dolores Barg and Francis Barg took title to their homestead real

estate as joint tenants by deeds dated July 12, 1962 and July 6, 1967. Dolores Barg, on July 2, 2002 deeded her undivided one-half interest as a joint tenant in the parties' homestead to her community spouse Francis Barg and he survived her (stipulated facts in Appellant's brief to the Court of Appeals). Therefore, the Estate argues the Minnesota statute does not allow any claim against Dolores Barg's joint tenancy interest pursuant to the analysis of the Barg appellate court under §256B Subd. 1(a)(3).

B. The Barg appellate court's continuation of a deceased recipient's joint tenancy interest following a lifetime conveyance as an "other arrangement" is misapplied.

Even without a basis under §256B.15 for this joint tenancy interest of Dolores Barg to continue after her death, the Barg Court, using property law principles, states, "A recipient's interest in marital property for purposes of estate recovery is limited to that person's legal interest in the property at the time of death. And, under federal law and Gullberg, this interest includes a conveyance of a joint tenancy to a spouse." Id. at 497. The Barg Court adopted the Gullberg characterization of this lifetime transfer as an "other arrangement" under the federal statute. The Estate has already provided an analysis of the federal statute in this brief demonstrating the term "other arrangement" should have no application to lifetime transfers. The Estate also argues that §256B.15 Subd. 1(a)(3) only continues a recipient's "...life estate or joint tenancy interest in real property after the recipient's death for the purpose of recovering medical assistance..." if the life estate or joint tenancy interest is actually owned at the time of death and was not

transferred during lifetime. Minn. Stat. §256B.15 Subd. 1(a)(2) provides that §§1(c) to 1(k) “expanding the interest included in an estate for purposes of recovery under this section give effect to the provisions of United States Code, title 42, section 1396p, governing recoveries....” The Estate in this brief has already previously argued that when the plain meaning of the federal statute is examined, transfers made during lifetime are not subject to any recovery.

C. Minnesota real property law limits a joint tenancy interest to a proportional share.

Although the Court of Appeals in Barg incorrectly relied on the fiction that Dolores Barg’s estate retained the homestead interest she had conveyed to her spouse during her lifetime, the Court correctly determined that when there are two joint tenants “A joint tenant’s interest in property is an undivided one-half interest in the property’s value.” (emphasis supplied) Barg at 497. In 46 Dunnell Minn. Digest, Tenancy in Common, §1.00(a) (4th ed. 2000) tenancy in common is defined: “An ‘undivided interest’ generally references a tenancy in common” (cited to Chapman Place Ass’n. v. Prokasky, 507 N.W.2d 858 (Minn.Ct.App. 1993). “When property is held in tenancy in common there is unity of possession whereby each owner has an undisputed interest and cannot claim any specific portion of the property until partition.” (also cited to Chapman). “A joint tenancy is distinguished from a tenancy in common by the fact that a surviving joint tenant succeeds to the person with whom he shared the joint tenancy.” (emphasis supplied) (cited to Hendrickson v Minneapolis Fed Sav and Loan Ass’n, 281 Minn. 462,

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

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

The obvious and only difference between a joint tenancy interest and a tenancy in common interest is the right of survivorship. A joint tenant who survives another joint tenant owns that joint tenancy interest at the death of the other. The interest never reverts from the surviving joint tenant to the predeceased joint tenant.

Numerous Minnesota statutes make clear that neither joint tenant owns the entire property but only an undivided interest in the whole. Both cannot own the entire or whole property. Minn. Stat. §500.19 Subd. 5 allows a joint tenant to sever the joint

tenancy several ways including “If (1) the instrument of severance is recorded in the office of the county recorder... where the real estate is situated; or (2) the instrument of severance is executed by all the joint tenants....” In the first instance the instrument of severance may be signed by only one joint tenant. Minn. Stat. §507.09 provides for approved real estate forms in Minnesota and Form 125-M titled Severance of Joint Tenancy is a document to be completed by an individual owner with no other person joining in the document. Pursuant to Minn. Stat. §500.19 Subd. 5(1) the document recites in part, “I hereby sever and terminate the joint tenancy with the intention that I hold my interest in the real property as a tenant in common.” Only the proportional interest of the joint tenant signing the severance document is changed to an interest as a tenant in common. Minn. Stat. §507.02 allows, “If the owner is married, no conveyance of the homestead, except a mortgage for purchase money under §507.03, a conveyance between spouses pursuant to §500.19, Subd. 4 or a severance of a joint tenancy pursuant to §500.19 Subd. 5, shall be valid without the signatures of both spouses.” (emphasis supplied). Again, the statute allows one joint tenant to sever the joint tenancy because each joint tenant only owns a proportional interest.

Minn. Stat. §558.01 and following provides the statutory scheme for a partition of real estate. Section 558.01 reads, “When two or more persons are interested, as joint tenants or as tenants in common, in real property in which one or more of them have an estate of inheritance or for life or for years, an action may be brought by one or more of such persons against the others for a partition thereof according to the respective rights

and interests of the parties interested therein, or for a sale of such property, or a part thereof, if it appears that a partition cannot be had without great prejudice to the owners.” (emphasis supplied). If property cannot be divided equally in-kind, §558.16(4) provides that after sale expenses the residue shall be applied “among the owners of the property sold, according to their respective shares.” (emphasis supplied). Minn. Stat. §558.01 allows any individual joint tenant to bring this action and ultimately recover that individual joint tenant’s “respective share.”

D. Dolores Barg, as a joint tenant in the Barg homestead, does not ever own or control the entire real property.

In Section IV.C of its brief, Appellant relies on various judicial interpretations, mostly from courts outside Minnesota, to argue that Dolores Barg as a joint tenant owns and controls the entire property during her joint tenancy. However, the language cited from the various cases indicates “a joint tenant owns an undivided interest in the entire estate” and “an undivided share in the whole estate,” and that joint tenants “have equal undivided interests” in the property. This same language is used in the Dunnell’s definition of tenancy in common: “An ‘undivided interest’ generally references a tenancy in common.” It is the survivorship right that distinguishes the joint tenancy, not the undivided ownership in the whole during the tenancy. Therefore the Court of Appeals is correct in determining Dolores Barg’s interest was an undivided one-half interest only. The Estate has argued, however, that Dolores Barg’s interest in this real property terminated when she and her husband executed a document of conveyance to her

husband. The joint tenancy was severed, and her ability to further convey the property, partition the property or claim an interest in the property ended with that conveyance.

IV. THE ESTATE HAS PRESERVED FOR REVIEW THE ISSUE OF WHETHER THE COUNTY MAY RECOVER MEDICAID BENEFITS CORRECTLY PAID ON BEHALF OF A PREDECEASED SPOUSE FROM THE ESTATE OF A SURVIVING SPOUSE.

In its order granting Mille Lacs County's petition for review of the Court of Appeals' decision in this case (order dated January 16, 2007), this Court also granted the Estate's petition for "conditional cross-review." The Court also ordered, "Briefs shall address whether the Estate of Francis Barg has adequately preserved for review the issue of whether the County may recover Medicaid benefits correctly paid on behalf of a predeceased spouse from the estate of a surviving spouse." This is the issue submitted by the Estate for conditional review. This was also the issue before the Gullberg Court. The Barg estate, the Appellant and the Commissioner have all argued the Gullberg decision was incorrect but for different reasons, thereby actually addressing the Estate's conditional issue. Appellant Mille Lacs County and the Commissioner have argued federal law does not preempt Minnesota law and therefore full recovery from the estate of a surviving spouse is allowed. The Estate argued Gullberg correctly determined federal law preempted state law due to a plain language conflict, but the Estate argued the Gullberg Court then misconstrued the federal statute and allowed possible recovery based

on fictional events.

The Estate has included and addressed this issue from the beginning of this matter in the District Court. The Estate's Notice of Disallowance or Partial Allowance of Claim (Appellant's Appendix in the Court of Appeals at AA30) read in part "At the time of the death of Dolores Barg, the spouse of Francis E. Barg and the medical assistance recipient, Dolores Barg did not have any legal title in any assets of Francis E. Barg." This language was included as a basis to partially disallow the claim because 42 U.S.C. §1396p(b)(1) reads "No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except...(B) in the case of an individual who is 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery of the individual's estate...." Section 1396p(b)(4) defines estate as previously set forth in this brief. That basic definition of estate includes assets that would be included in the individual's estate under state probate law, and the expanded definition was limited to other assets in which the individual had "any legal title or interest at the time of death (to the extent of such interest)..." (emphasis supplied).

The Estate in its brief to the District Court in Respondent's ISSUE I (beginning at page 4) argued Dolores Barg had no legal title or interest in any property at the time of her death and no property that would constitute her estate for the purpose of recovery. In Respondent's ISSUE II (beginning at page 8) the Estate argued the assets of the estate of the community spouse Francis E. Barg are not liable for reimbursement of this medical

assistance. Respondent in ISSUE III of its District Court brief (beginning on page 9) argued that under the Gullberg finding of conflict preemption no recovery could be made against the estate of the community spouse, but that Gullberg allowed recovery if the deceased medical assistance recipient had some “interest” in the homestead transferred by the decedent to the community spouse, either because the parties had been married to each other when they owned the property or because there might be some probate claim on behalf of the deceased recipient. The Estate argued the Gullberg conclusion that decedent recipient Walter Gullberg had “some legal interest in the homestead albeit contingent upon any number of factors,” (Gullberg at 713) did not provide a basis for recovery when the recipient had deeded his interest to the community spouse in the parties’ homestead during recipient’s lifetime. The Estate argued no contingency ever arose that would move the title from the community spouse back to the medical assistance recipient spouse because the recipient spouse predeceased the community spouse.

The Estate in the Court of Appeals continued this same argument. In ISSUE I at page 9 the Estate argued, “The federal law is clear and unambiguous that States may recover correctly paid medical assistance benefits only from the estate of the individual recipient or from an asset in which the individual had a legal title or interest at the time of his or her death.” The Estate expanded this argument specifically addressing the limitation of 42 U.S.C.§1396p(b)(1)(B) that recovery could be made only from the individual recipient’s estate. Further in ISSUE I.C the Estate stated, “Nowhere in the

federal statutes does Congress provide for recovery of benefits from the estate of the spouse of the recipient.” The Estate continued to argue throughout its appellate court brief that no recovery was allowed under the facts of the Barg case by the federal law. However, the Estate noted the Gullberg decision created a fictional interest of recipient Dolores Barg in the estate of Francis Barg, the community spouse who survived her. The conclusion of Respondent’s appellate brief began, “Although federal law on its face does not appear to allow appellant Mille Lacs County to make any claim against the estate of Francis E. Barg for medical assistance provided to his predeceased spouse Dolores Barg....”

In its brief to this Court Appellant Mille Lacs County claims the Estate has failed to preserve for review by this Court whether Mille Lacs County may recover Medicaid benefits correctly paid on behalf of Dolores Barg from the estate of her surviving spouse Francis Barg. The County cites portions of the District Court transcript in its Appendix. While the Estate acknowledged to the District Court it was not contesting the entire claim amount, the Estate clarified this was only because of the Gullberg decision. That transcript as presented in Mille Lacs County’s Appendix at AA47 also quotes the Estate as arguing that the District Court is “required by the Minnesota Court of Appeals in Gullberg to make its own decision about the extent of property interest of Dolores Barg at the time of her death.” But the Estate in its written materials and oral argument always maintained the federal statute allows no recovery, and that but for the fictions of the Gullberg case the matter would not even be presented to the District Court.

The Appellant would like to frame this issue as a constitutional issue but the Gullberg Court did not do so. The Gullberg Court considered the Gullberg case as “an issue of statutory construction.” Id. at 712. The Gullberg Court cited the Martin case with approval that a “finding of preemption implicates obligation to interpret statute to avoid constitutional defects.” Id. Therefore the conclusion of the Gullberg Court was that it did not base its decision on the constitutionality of Minnesota law, but rather found “partial' preemption fulfills our obligation to construe statutes to avoid constitutional defects.” Id. citing Martin.

The County also examined the potential conflict of state and federal statutes in its District Court brief in I.A through D. At the Court of Appeals Mille Lacs County continued this analysis in Sections V, VI, and VII, and throughout the entire brief. At Section II.A of Appellant’s brief to the Court of Appeals, Mille Lacs County reviewed the extent of recovery allowed under the federal law, noting the “statutory context is evidence that Congress intended the optional definition of estate to be freeing rather than restraining to state recovery efforts.” In Section II.B2 Appellant reviewed congressional intent to expand the definition of estate, and at page 43 while discussing the expanded definition of estate Appellant argued, “The optional open-ended definition allowed states wide latitude to go beyond traditional probate law in their recovery efforts.” The Commissioner’s brief in the Court of Appeals reviewed at length the interplay of relevant state and federal statutes at length in Argument Sections II and III.

Finally, Appellant argues the Estate failed to preserve the issue whether any estate

recovery can be made in these circumstances because the Estate did not seek review under Rule 106 of Minn. R. Civ. App. P. That rule provides, "A respondent may obtain review of a judgment or order entered in the same action which may adversely affect respondent by filing a notice of review with a clerk of the appellate courts." Rather, Respondent, under Rule 117 Subd. 4, filed a response to Appellant's petition for review seeking affirmation of the Court of Appeal's decision and also conditionally seeking "review of additional designated issues not raised by the petition." Respondent did so because Respondent is satisfied with this Court upholding the decision of the Court of Appeals. However, since this Court can review these matters de novo and pursuant to Rule 103.04 of Minn. R. Civ. App. P. "take any other action the interest of justice may require," the Estate argues this Court may consider the Estate's conditional issue which both parties and the Commissioner have briefed and argued throughout this case. Appellant in its petition for review, Appellant listed three reasons for granting review. Reason number 2 is that a "decision by the Supreme Court will help develop, clarify, or harmonize the law; and the case calls for the application of a new principle or policy; and the resolution of the question presented has possible statewide impact; and a decision by the Supreme Court will resolve conflict among two or more Court of Appeals' decisions."

For all of these reasons the Estate argues the conditional issue has been preserved for review by this Court.

V. COURTS IN OTHER JURISDICTIONS AGREE THAT NO RECOVERY MAY BE MADE IN THESE CIRCUMSTANCES FROM THE ESTATE OF THE SURVIVING COMMUNITY SPOUSE.

The Estate's position that Appellant and/or the State of Minnesota may not recover medical assistance paid to Dolores Barg from the estate of her surviving community spouse Francis Barg is supported by courts of several other states, which based their decisions on the plain language of 42 U.S.C. §1396p(b). These courts found the federal statute prohibits recovery against the estate of a community spouse who has not received benefits. The courts have been unwilling to read the limitations of the federal statute out of existence by creating any fictional interest in the predeceased recipient in the estate of the surviving community spouse. The Commissioner's brief to this Court at Section I.B claims the decisions of courts of Illinois, Tennessee and Wisconsin in the opinions that follow are based on flawed reasoning. The Estate argues all three of these courts examined the plain language of the federal statute and determined the language was clear and unambiguous.

A. Hines v. The Department of Public Aid, 850 N.E.2d 148 (Ill. 2006)

Following the close of briefing to the Minnesota Court of Appeals in Barg, the Supreme Court of Illinois filed the Hines decision May 18, 2006. Respondent provided this decision to the appellate court following oral argument and prior to the filing of the decision, all pursuant to Rule 128.05 of the Minn. R. App. P. The facts were agreed upon by the executor of the Estate of Beverly Tutinas (the surviving spouse of Julius Tutinas

who was a medical assistance recipient) and the Illinois Department of Public Aid. Julius predeceased Beverly and at the time of his death he and Beverly were joint owners of their marital home and automobile. The Hines Court noted that at the time of Julius' death "full ownership of the home and car passed to Beverly." Hines at 150. When Beverly died the Illinois Department of Public Aid filed a claim against Beverly's estate for medical assistance benefits provided to Julius. The Hines Court viewed the purpose and operation of the Medicaid Act, noting it was a cooperative program between state and federal governments, that states are not required to participate in the Medicaid program, and that once states do participate they must "comport with the Medicaid Act and regulations promulgated thereunder...." Id. at 151. The Court also reviewed the spousal impoverishment provisions that allow the community spouse to retain some resources and income that do not have to be spent down for the recipient spouse. The Court then noted, "The Medicaid Act affords an additional element of financial protection to the families of Medicaid recipients by limiting the circumstances in which a state may seek reimbursement for the payments it made on the recipient's behalf." (emphasis supplied) Id. at 152.

The Illinois Court cited the OBRA '93 language, "No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the state plan may be made" except in the three circumstances, one of which is, "The State shall seek adjustment or recovery from the individual's estate" if that individual was 55 years of age or older when the individual received medical assistance. The Court further noted such

recovery “may only be made after the death of the Medicaid recipient’s surviving spouse” (*Id.*) and the Court reviewed the federal statutory definition of the deceased recipient’s estate, which has been discussed at length by the Estate in this brief. Then the Court wrote, “Under the foregoing provisions, the Department clearly had a right to seek reimbursement from Julius’ estate, as defined by Illinois law, following Beverly’s death. That, however, is not what it is attempting to do. Through this action, it seeks reimbursement from the estate of Beverly, his surviving spouse, even though she, herself, received no Medicaid benefits. Nothing in the Medicaid Act authorizes such recourse.” (emphasis supplied) *Id.* at 153. The three exceptions when the State may seek reimbursement, the Court said, “All are specifically directed to the estate of the recipient. No provision is made for collection from the estate of the recipient’s spouse. Where, as here, the language of a statute is clear and unambiguous, the court must enforce it as written.” (emphasis supplied) *Id.*

The Illinois Supreme Court noted the Illinois Public Aid Code did give the State the right to make a claim against the estate of a recipient or the estate of the recipient’s spouse for assistance provided to the deceased recipient, but said the right conferred by the statute is expressly limited. In particular, the Illinois statute stated that reimbursement is permitted only to the “extent permitted under the federal Social Security Act.” *Id.* The Court concluded, “Such a limitation is required by the primacy of federal law. Although a state possesses wide discretion in administering its Medicaid programs, that discretion is qualified by its mandate to adhere to federal statutes and

corresponding federal regulations.” (emphasis supplied) Id.

However, under the Social Security Act the Illinois Court said, “Assets conveyed to a spouse the way the house and automobile were conveyed to Beverly could have been defined by the Illinois General Assembly to remain part of the Medicaid recipient’s estate for purposes of recovering Medicaid payments.” Id. at 154. In this Illinois case “the way” the assets were conveyed was through a transfer at death from recipient Julius to community spouse Beverly because the couple owned the assets jointly at the time of Julius’ death. No transfer had been made of Julius’ interest in these assets during his lifetime. In reviewing the laws from several other states that might have allowed a claim under the circumstances of a transfer at death, the Court specifically recited several other state’s laws that included the language of the expansive definition of estate regarding “assets conveyed to a survivor, heir, or assign of the recipient through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.” The Illinois Court noted that Minnesota in Jobe, 590 N.W.2d 162, 164 (Minn. App. 1999), allowed recovery and that in Jobe the recipient spouse and the community spouse owned property as joint tenants at the time of the recipient’s death. According to the Illinois Court, the State of Illinois at one time had also adopted the more expansive definition of estate under the federal statute to include transfers at death (included in 42 U.S.C.§1396p(b)(4)(B)) but prior to Julius’ death the law had been changed and did not contain this provision.

For all these reasons the Supreme Court of Illinois upheld the Court of Appeals

decision and denied the claim for recovery.

**B. Estate of Smith, No. M2005-01410-COA-R3-CV, 2006 WL 3114250
(Tenn.Ct.App. Nov. 1, 2006)**

After the decision of the Minnesota Court of Appeals in Barg, the Court of Appeals of Tennessee filed the opinion in the Estate of Smith November 1, 2006 also denying recovery against the estate of a surviving community spouse. The time for appeal has expired without either party seeking review. The facts are similar to those in Barg. Mary Smith and James Smith were married for over 60 years before Mary Smith needed nursing home care. Medical assistance benefits were paid on her behalf. James did not receive benefits and he survived Mary. When Mary was first institutionalized the Smith's assets were \$217,000, all acquired during marriage. When an asset assessment was done later Mary had less than \$2,000 in her checking account and all assets had been transferred to James within one year after the Medicaid approval, which met Medicaid regulations. James Smith died three months after his wife. A probate court allowed the State to recover from his estate for benefits provided to his wife.

To determine whether this decision was correct the Tennessee Court of Appeals began its analysis: "The answer to this question lies in the federal statute that governs recovery of Medicaid benefits. By its plain language, §42 U.S.C.1396p(b) prohibits recovery of correctly paid Medicaid benefits with three narrowly drawn exceptions. Unless an exception applies, the State may not recover correctly paid benefits." (emphasis supplied) (Smith at 2). The Tennessee Court, like the Court in Hines,

concluded, “It is important to note that even under the three exceptions, recovery is allowed only against the estate of the person who actually received the benefits (the recipient).” Id. The Court quoted the federal statute including the expanded definition of estate and concluded the State cannot recover under the federal statute since Mary Smith “never left an ‘estate’ as that term is defined in subsection (b)(4).” Id. The Court noted the State did not argue Mrs. Smith left an estate under Tennessee probate law; therefore the State had to rely on the second method of defining estate under the federal statute in §1396p(b)(4)(B). The Tennessee Court explained, “These ‘optional assets’ are assets that the recipient had an interest in at the time of death but may not become part of the recipient’s estate under state law because they passed directly to the heir or survivor at death without technically passing through the estate. Depending on applicable state law, these assets may pass to the deceased heirs or survivors through joint tenancy, survivorship, etc. The State argues that since Mrs. Smith once had an interest in the assets comprising Mr. Smith’s estate, then the State can, in effect, ‘follow’ these assets once held by Mrs. Smith to the estate left by her spouse.” (emphasis supplied) Id.

The facts in Smith were stipulated including that Mrs. Smith “conveyed all her interest in their jointly held assets to Mr. Smith before she died” (Id.) and in accordance with Medicaid requirements. (In footnote 1 of this opinion the Court pointed out, “It is critical to note that this transfer of assets is not challenged by the State as fraudulent or improper in any respect. Counsel for the parties informed the Court that this transfer to the husband was contemplated, if not required, by Medicaid. *See 42 U.S.C. §1396r-5(f).*”

Id. at 2. The Court then continued to quote from §1396r-5(f)(1): “An institutionalized spouse may... transfer an amount equal to the community spouse resource allowance.... This transfer... shall be made as soon as practicable after the date of the initial determination of eligibility....” Id.) Therefore, the Court wrote, “In order to be part of Mrs. Smith’s ‘estate’, under subsection (b)(4)(B), she had to have legal title or interest in the property ‘at the time of her death’. Because Mrs. Smith had no interest in any property when she died, there is no estate of the benefit recipient. Recovery is not allowed under 42 U.S.C. §1396p(b)(1)(B).” Id. at 4.

The Tennessee Court acknowledged some courts have interpreted the federal statute “to prohibit the ‘tracing’ or following of a recipient’s estate to a surviving spouse’s estate,” (Id.) citing to Hines and Budney. Then the Court observed, “Where recovery has been allowed we note it appears recipient spouse had an interest in the property comprising the estate of the surviving spouse at the time of the recipient’s death,” (emphasis supplied) Id. (citing to Estate of Thompson in North Dakota and Estate of Jobe in Minnesota). The Tennessee Court concluded this discussion, “Because we have decided that the benefit recipient, Mrs. Smith, had no estate as the term is defined in 42 U.S.C. §1396p(b)(4), we need not resolve the question of whether the State can recover from a recipient’s estate through the estate of a surviving spouse.” Id. Implicitly, the Court did not interpret the last words of §1396p(b)(4), “other arrangement” as including any transfers during lifetime by the recipient to the community spouse.

Pointedly, however, the Tennessee Court wrote there “is one state, however,

where recovery may be allowed against a surviving spouse's estate if the surviving spouse's estate is composed of property that was at any time held jointly with recipient spouse, regardless of whether the recipient spouse had an interest in the property at the time of the decedent's death. The North Dakota Court reached this conclusion in In Re Wirtz..." (emphasis supplied) Id. The Tennessee Court noted the North Dakota Court "concluded that the language in §1396p(b)(4)(B), which defined a recipient's estate to include assets conveyed to a spouse by 'other arrangement' included a recipient's 'interest' in assets conveyed by recipient prior to death" and the North Dakota Court "found the terms 'interest' and 'other arrangement' are ambiguous..." (emphasis supplied) Id. The Tennessee Court then concluded, "We must respectfully disagree with the rationale of Wirtz since under 42 U.S.C. §1396p(b)(4)(B), in order to be potentially recoverable, an asset must be one in which the recipient had a 'legal title or interest at the time of death.'" Id. at 5. Because the parties in Smith stipulated Mrs. Smith conveyed the assets at issue to Mr. Smith before his death, and the State did not argue that Mrs. Smith had any interest in those assets when she died, there existed no recipient estate subject to recovery.

C. Estate of Budney, 541 N.W.2d 245 (Wis.App. 1995)

As early as 1995 the Wisconsin Court of Appeals in Estate of Budney also determined there could be no recovery for benefits paid on behalf of a recipient from a surviving spouse's estate. Grace Budney received medical assistance. Her husband Paul died a year after she did. The Wisconsin recovery statute §49.496(3) allowed the State of

Wisconsin to file a claim against the estate of a recipient or against the estate of the surviving spouse of a recipient for medical assistance paid to the recipient. After quoting the federal statute the Budney court concluded, “The statute plainly prohibits a State from recovering medical assistance benefits except in certain situations.” Id. at 246. The Budney Court said, “After this initial prohibition, the statute does not specifically authorize the State to recover medical assistance benefits from a recipient’s surviving spouse’s estate. Because the statute does not counter the initial blanket prohibition by specifically authorizing a State to recover medical assistance benefits paid on behalf of a recipient from a surviving spouse’s estate, we conclude that section 49.496(3)a, Stats., which allows such recovery, exceeds the authority provided by the federal statute.” Id. The Court noted that Estate of Craig 624 N.E. 2d 1003 (N.Y. 1993) was in accord with that conclusion.

The Court framed the issue in its opinion as whether the Wisconsin state law allowing recovery against the estate of the surviving spouse “violates” federal law and wrote simply, “We conclude that it does.” Id.

VI. APPELLANT’S OTHER THEORIES FOR RECOVERY ARE NOT GROUNDED IN FACT OR LAW.

A. Recovery under Minn. Stat. §519.05 is not applicable in this case.

Appellant Mille Lacs County argues that if this Court agrees with the Court of Appeals that Dolores Barg had only a proportional ownership interest in the property in

Francis Barg's estate, the Estate is nevertheless liable for medical assistance reimbursement. Appellant claims Minn. Stat. §519.05 holds spouses liable for necessary medical services for each other. This argument fails for several reasons. First, the federal statutory language quoted by both parties many times in their briefs begins, "No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made except...." under the clear exceptions of the federal statute that have been discussed at great length. As Appellant stated in its Statement of the Case in its brief to this Court at page 3, "On January 1, 2004 Dolores J. Barg died leaving no estate." Second, and very importantly, under §519.05 the joint and several liability between spouses applies only when "husband and wife are living together." (emphasis supplied). Dolores and Francis Barg unfortunately could not continue to live together because she needed care in a nursing home. Pursuant to the stipulation of facts of the parties in District Court, none of the benefits Appellant now seeks to recover were provided to Dolores Barg when she and Francis Barg were living together. Finally, the prohibition on recovery in the federal statute conflicts with Appellant's argument that §519.05 allows or requires recovery under a simple spousal liability statute. The conflict can be resolved by the conflict preemption doctrine described in Martin, and federal law would control because compliance with both state and federal law would be impossible.

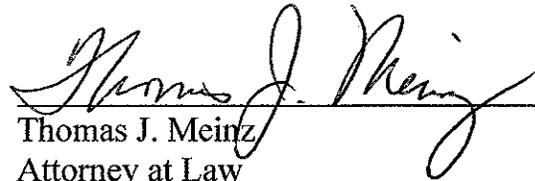
B. Continuation of the Medicaid program is not dependent upon estate recovery.

In its brief to the appellate court in Section VI the Estate pointed out Minnesota spent \$2,383,100,000 in the Medicaid program in 2003 and recovered \$16,600,000 or 0.70% of the long-term care expenditures for the year. (See also App. Ct. Addendum Section “United States Department of Health and Human Services Policy Brief Numbers 6, etc.”) Those funds were returned to the State’s general fund rather than the Medicaid program. The Estate has discussed decisions in the courts of Illinois, Tennessee and Wisconsin which denied recovery against the estates of surviving spouses without concern about medical assistance programs in those states continuing. Although Appellant claims in its brief to this Court at page 9 that “the purpose of estate recovery is to re-use public funds for other needy people by recovering the value of those funds...” the Medicaid program is not a revolving loan fund.

CONCLUSION

The Minnesota Court of Appeals' decision in this case established a definite and potentially workable method of valuing real property in a Medicaid recipient's estate for recovery, under Gullberg, from the estate of the surviving spouse. Although that decision relies on assumptions and arguably exceeds recovery allowed under the federal statute, the Estate requests this Court affirm that decision awarding Mille Lacs County \$60,400 in full satisfaction of its claim against the Estate of Francis E. Barg. Alternatively, the Estate requests this Court uphold the public policy as expressed by the United States Congress in 42 U.S.C.§1396p and conclude that Dolores Barg had no interest in the property of her husband Francis Barg's estate at the time of her death. The Estate therefore requests that this Court determine Appellant Mille Lacs County should recover nothing.

Dated: May 8, 2007


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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 13,805 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.

A handwritten signature in cursive script, reading "Thomas J. Mainz", is written over a horizontal line.

Thomas J. Mainz
Attorney for Respondent