

No. A05-2346

STATE OF MINNESOTA

IN SUPREME COURT

In Re the Estate of

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

RESPONDENT'S SUPPLEMENTAL BRIEF AND ADDENDUM

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## SUPREME COURT QUESTIONS

Following submission of the parties' formal briefs and the amici briefs, the parties orally argued this matter before this Court November 6, 2007. Following oral argument, the Court issued an Order dated December 11, 2007 requiring the parties to file informal supplemental briefs addressing the following questions:

- A. What is the relationship, if any, between the 2003 and 2005 amendments to Minn. Stat. §256B.15, particularly subdivisions 1 and 1c-1k regarding real property a predeceased spouse owned as a life tenant or a joint tenant with right of survivorship, and the authority appellant argues exists under §256B.15, subdivisions 1a and 2, to recover Medical Assistance payments made to a predeceased spouse against the estate of a nonrecipient surviving spouse, and how, if at all, does that relationship affect the preemption analysis regarding appellant's authority under §256B.15, subdivisions 1a and 2?
- B. Does the limitation of the scope of subdivisions 1c-1k to life estates and joint tenancies, *see, e.g.*, Minn. Stat. §256B.15, subd. 1(c)(2006), affect the scope of the recovery authority granted in subdivisions 1a and 2, in general and specifically as applied to the facts of this case?
- C. Does the limitation of the scope of subdivisions 1c-1k to life estates and joint tenancies *established on or after August 1, 2003*, *see* Minn. Stat. § 256B.15, subd. 1(c)(2006), affect the scope of the recovery authority granted in subdivisions 1a and 2, in general and specifically as applied to the facts of this case?

## ARGUMENT

### QUESTION A

- I. What is the relationship, if any, between the 2003 and 2005 amendments to Minn. Stat. §256B.15, particularly subdivisions 1 and 1c-1k regarding real property a predeceased spouse owned as a life tenant or a joint tenant with right of survivorship, and the authority appellant argues exists under §256B.15, subdivisions 1a and 2, to recover Medical Assistance payments made to a predeceased spouse against the estate of a nonrecipient surviving spouse, and how, if at all, does that relationship affect the preemption analysis regarding appellant's authority under §256B.15, subdivisions 1a and 2?**

The 2003 and 2005 amendments to Minn. Stat. §256B.15 did not expand the State's right of medical assistance recovery and do not apply to the facts in this case. The provisions of Subd. 1 modify Minnesota's common law by providing for continuation after death of a life estate or joint tenancy interest in real property owned at the time of death by a deceased recipient of medical assistance benefits. Subdivisions 1c-1k provide methods for securing collection of medical assistance claims, depending on whether or not immediate collection after death of the recipient is allowed by federal law. Subdivisions 1a and 2 continue prior statutory provisions which direct county agencies to file medical assistance claims against the estates of surviving spouses who never received medical assistance to recover medical assistance benefits paid for a predeceased spouse. The mandatory claim is limited by Subd. 2 to assets that were marital property or jointly owned property at any time during the marriage. The Minnesota Court of Appeals in Estate of Gullberg, 652 N.W.2d 709 (Minn.Ct.App. 2002) held that this language in Subd. 2 provided for recovery in excess of the recovery allowed by federal law. The

provisions of 42 U.S.C. §1396p(b) enacted in 1993 continue to limit and preempt the State's right to recover medical assistance benefits under Minn. Stat. §256B.15. The subdivisions in Minn. Stat. §256B.15 questioned by this Court are related to the extent they are each part of an elaborate and extremely complicated statutory scheme to maximize potential recovery against all property of a married couple even when one of them did not receive medical assistance. This new statutory scheme ignores the limitations contained in federal law as did the previous statute.

The refusal of the State to conform to the federal law enacted in 1993 is at the heart of this case. In this case, Dolores Barg did not own and had no legal title or interest in any life estate or joint tenancy real property at the time of her death. Consequently, no such interest could be continued after her death by the 2003 and 2005 amendments. Because federal law does not allow a direct claim against the estate of a non-recipient surviving spouse, any interest Dolores Barg lawfully conveyed to her spouse during her lifetime was not part of her estate at the time of her death and cannot be recovered from her surviving spouse's estate. The 2003 and 2005 amendments to Minn. Stat. §256B.15 are therefore irrelevant to this appeal. They are also irrelevant to any determination whether the existing State statute can be properly applied to other cases involving the estates of surviving spouses who never received medical assistance benefits.

**A. Federal law limits recovery to the recipient's probate estate and, at the option of the State, to certain non-probate assets.**

As the Estate has argued throughout this case, 42 U.S.C. §1396p(b)(1) begins with

the unequivocal words: “No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except....” The federal statutes then lists specific exceptions, one of which allows recovery from the “individual’s estate....” 42 U.S.C. §1396p(b)(4) 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 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).

The statute enacted in 1993 rejected the version passed by the House of Representatives, which would have allowed direct recovery against the estate of a surviving spouse (see Est. Br. at 12). No provision is made in the federal law for any direct recovery against the estate of any deceased person who did not directly receive medical assistance benefits correctly paid.

**B. The 2003 Amendments to Minn. Stat. §256B.15 purporting to allow certain recoveries are subject to applicable federal law.**

Under Minn. Stat. §256B.15 as amended in 1987 the State of Minnesota anticipated changes in the federal statute and amended §256B.15 to allow recovery of medical assistance paid on behalf of a deceased recipient from the estate of the recipient's surviving spouse. These federal changes to allow a claim against the estate of a non-recipient surviving spouse were never made. The House language allowing such a claim was specifically rejected in the final 1993 federal amendments. However, Minnesota never revised its statute to conform to the federal law as finally enacted.

It was not until 2003 that the Minnesota Department of Human Services urged the Minnesota Legislature to make the first effort to amend the statute to exercise the State option to expand recovery against non-probate assets. Before 2003 a decedent recipient's life estate or joint tenancy interest was a non-probate asset and not part of a decedent's estate under Minnesota law. Minn. Stat. §256B.15 Subds. 1 and 1c-1k, as added to the recovery statute made life estates and joint tenancies in real estate, multi-party bank accounts and securities registered in beneficiary form part of a person's estate for medical assistance collection. The 2003 amendments made "all of the person's interests or proceeds of those interests in real property the person owned as a life tenant or as a joint tenant with a right of survivorship at the time of the person's death..." part of the decedent's medical assistance estate (see Subd. 1h(b)(2)) (emphasis supplied). These amendments, however, must be read in combination with the §256B.15 Subd. 1(a) policy

statement “that individuals or couples...use their own assets to pay their share of the total cost of care during or after their enrollment in the medical assistance program.” However, the policy must be applied “according to applicable federal law and the laws of this state.” (emphasis supplied). A proper application of the federal law necessarily limits the Minnesota provisions to those that are not in conflict with the federal law.

**C. In 2005 the retroactive application of the 2003 amendments regarding recovery against the predeceased spouse’s real property interests owned as a life tenant or a joint tenant with right of survivorship was abrogated.**

The continuation of a life estate or joint tenancy interest in real property after a recipient’s death for recovering medical assistance took effect August 1, 2003, against all such interests established before or after that date. The retroactive application to interests created before the effective date raised questions whether the retroactive provision was unconstitutional because it impaired vested property rights without due process of law.

**1. Marten v. Minnesota Department of Human Services (Ramsey County District Court File No. C9-04-8428 March 18, 2005)**

On March 18, 2005 the Honorable Teresa R. Werner, Judge of District Court in Ramsey County, Minnesota, in Marten concluded the retroactive application is unconstitutional as it was being applied under Minn. Stat. §514.981 (the medical assistance lien statute) because it interfered with vested rights. A life estate was created in Lillie Marten September 9, 1995 by a quit claim deed. She received medical

assistance benefits after that date and died May 10, 2004. After the 2003 enactment of the amendments to Minn. Stat. §514.981 and §256B.15, the remainder owners sought judicial determination the law could not be applied retroactively. The Court found the remainder owners “have vested rights in the property and that the retroactive application of Minn. Stat. §514.981 is unconstitutional because it interferes with those vested rights.” Marten at 12. The Minnesota Department of Human Services filed an appeal and then filed a Notice of Voluntary Dismissal “because the Minnesota Legislature, effective August 1, 2005 is repealing the retroactive portions of the Minnesota medical assistance lien statutes at issue in this appeal, and thus, the appeal is moot.”

**2. Legislative repeal of the retroactive provisions of §256B.15**

In 2005 the Legislature did in fact add additional language to Minn. Stat. §256B.15 ending the retroactive application of that statute. Subdivision 1(c) was added to provide that “All provisions in this subdivision, and subdivisions 1d, 1f, 1g, 1h, 1i, and 1j, related to the continuation of a recipient’s life estate or joint tenancy interest 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.” Subdivision 7 as added reads in part: “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, and 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, shall be disregarded by examiners of title after the death of the life tenant

or joint tenant, and shall not be carried forward to a subsequent certificate of title.”

**D. Neither the 2003 amendments to Minn. Stat. §256B.15 that added Subds. 1 and 1c–1k, nor the 2005 amendments that limited their application, increased Appellant’s authority under federal law to assert estate recovery claims against a surviving spouse’s estate under §256B.15 Subds. 1a and 2 . The amendments to Subds. 1a and 2 have no bearing on the scope of recovery permitted by federal law against the Estate in this case.**

There is no dispositive relationship between the 2003 and 2005 amendments to Minn. Stat. §256B.15, and the authority Appellant argues exists under §256B.15, Subds. 1a and 2 to recover medical assistance payments made on behalf of a predeceased spouse against the estate of a surviving non-recipient spouse, because these statutory provisions deal with different, although related, aspects of recovery.

**1. Minn. Stat. §256B.15 Subdivisions 1 and 1c–1k**

The 2003 amendments to §256B.15 in Subds. 1c–1k allow recovery against certain real property interests only if they are actually owned by the recipient at the time of the recipient’s death. That limitation is based upon the actual statutory language. Minn. Stat. §256B.15 Subd. 1h(b)(2) indicates that for the purpose of medical assistance collection allowed under this statute, the person’s estate consists of “all of the person’s interests or proceeds of those interests in real property the person owned as a life tenant or as a joint tenant with the right of survivorship at the time of the person’s death;....”

(emphasis supplied). The statute does not make these interests part of the probate estate; rather, these real property interests are included as part of the optional medical assistance estate of a deceased recipient as permitted by 42 U.S.C. §1396p(b)(4)(B). The limitation of these interests to property owned by the recipient at the time of death is required by 42 U.S.C. §1396p(b)(4)(B), which gives the State the option of including as part of the person's medical assistance 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). Clearly, by the very terms of the state and federal statutes, the interest must be one that transfers from the deceased recipient to another person at the recipient's death.

## **2. Minn. Stat. §256B.15 Subdivisions 1a and 2**

Minn. Stat. §256B.15, Subd. 1a purports to allow the State to file a claim for medical assistance recovery against the estate of the deceased recipient or the estate of the deceased recipient's surviving spouse even if the surviving spouse did not receive medical assistance. Subdivision 2 then limits the claim against the estate of the surviving spouse who did not receive medical assistance to the "value of the assets of the estate that were marital property or jointly owned property at any time during the marriage." The Court notes in Question A that the subdivisions cited in the Court's question are the subdivisions of §256B.15 that the Appellant argues allow recovery against the estate of

the non-recipient spouse for medical assistance provided only to the predeceased recipient spouse. As the Estate has argued at all times in this matter, 42 U.S.C. §1396p(b)(1)(A) allows recovery of medical assistance only from the individual recipient's estate. The individual described in the federal statute is clearly the person who received the medical assistance for which recovery is sought. The federal statute does not permit, as an exception to the general prohibition against recovery of medical assistance benefits correctly paid, recovery against any other estate, including the estate of the deceased recipient's surviving spouse who did not receive medical assistance.

**E. Because of conflicts between federal and Minnesota law regarding estate recovery, certain Minnesota provisions are preempted.**

The Minnesota statutory provisions in §256B.15 Subds. 1a and 2 purporting to allow recovery against the estate of the surviving spouse who was not a medical assistance recipient are in conflict with federal law and therefore are preempted by federal law. In its formal brief to this Court the Estate set forth the principles of conflict preemption analysis described in Martin ex rel. Hoff v City of Rochester 642 N.W.2d 1 (Minn. 2002) and concluded that federal and state law are clearly in conflict regarding medical assistance recovery against the estate of the non-recipient community spouse (see Est. Br. at 19-21). As the Estate argued, the federal law governing recovery begins with the language in 42 U.S.C. §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...." (emphasis supplied). The only exception relevant to this case is the recovery

from the individual recipient's estate. 42 U.S.C. §1396p(b)(4)(A) defines that estate to include the real and personal property and other assets included within the individual's estate as defined for the purposes of state probate law. The statute in 42 U.S.C. §1396(p)(b)(4)(B) then provides that the estate "may include, at the option of the State..." certain other defined assets.

Federal law is clear, therefore, that no recovery is allowed against the estate of the non-recipient surviving spouse. Minnesota law allows the claim against the estate of the surviving spouse, whether or not the surviving spouse received medical assistance. Under the principles of conflict preemption enunciated in Martin, preemption "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 purpose of the federal scheme." Martin at 11. The plain language of the federal statute means exactly what it says. To allow recovery under §256B.15 Subd. 1a, using a claim against the estate of the non-recipient community spouse, would be to allow "the state...to get indirectly what it is prohibited from obtaining directly..." which "would defeat the purpose of the federal...provision..." Id. at 20.

The provisions of Minn. Stat. §256B.15 Subd. 2 allow a claim for recovery against the estate of a surviving spouse who did not receive medical assistance "to the value of the assets of the estate that were marital property or jointly owned property at any time during the marriage." This allowance is also in conflict with federal law and therefore is preempted. Federal law allows the recovery claim only against the estate of the deceased

recipient. The recipient's estate is limited to the assets of the recipient's probate estate as defined by state law and, if the State chooses to do so, to the assets included in the expanded definition of estate (not necessarily included in the State's definition of the probate estate). Even then, federal law limits a state's right to expand estate recovery to include only assets in which the deceased recipient "had any legal title or interest at the time of death (to the extent of such interest)" that transfers to someone else at the recipient's death. The inclusion of marital property that was transferred to the non-recipient surviving spouse during the deceased recipient's lifetime violates the federal policy to focus on the recipient's property ownership at the time of death. Such a definition exceeds the authority granted in the federal statute, which makes no reference to marital property and specifically limits the types of property subject to recovery. The Minnesota estate recovery statute does not include any definition of marital property to be applied in the context of estate recovery. The unlimited nature of the concept of marital property would allow recovery beyond the federal statutory allowances. The claim in this case is therefore preempted by federal law.

## QUESTION B

- II. Does the limitation of the scope of subdivisions 1c–1k to life estates and joint tenancies, *see, e.g.*, Minn. Stat. §256B.15, subd. 1(c)(2006), affect the scope of the recovery authority granted in subdivisions 1a and 2, in general and specifically as applied to the facts of this case?**
- A. The recovery process of Subds. 1c–1k allows recovery only against certain life estate and joint tenancy interests owned by the deceased medical assistance recipient at the time of the recipient's death.**

The Estate has set forth in the argument in this brief regarding Question A the language of 42 U.S.C. §1396p(b)(4)(B) that allows the State the option of expanding property against which recovery might be sought. The optional property includes real property in which the deceased recipient “had any legal title or interest at the time of death (to the extent of such interest). . . .” (emphasis supplied). Included in the list of properties is a life estate or a joint tenancy interest conveyed to a survivor, heir or assign of the deceased individual.

**1. The 2003 life estate and joint tenancy amendments**

In 2003 the Minnesota legislature attempted to expand the scope of recovery to some of this optional property by continuing life estates and joint tenancy interests owned by the recipient at the time of the recipient’s death, no matter when those interests were established. Minnesota did not adopt the language of §1396p(b)(4)(B), but rather limited the optional interests. The 2005 amendment in §256B.15 Subd. 1(c) made the 2003 amended authority regarding life estates and joint tenancy interests effective only for those established on or after August 1, 2003.

Minn. Stat. §256B.15 Subd. 1g enacted in 2003 references claims against real property interests of a deceased recipient that were owned as a life tenant or as a joint tenant with right of survivorship, and indicates those interests shall be part of the decedent’s estate. This right of survivorship necessarily requires the deceased recipient actually owned the interest at the time of death.

Subdivision 1h attempts to enlarge the definition of the estate of the person who

received medical assistance against which recovery might be sought. Subdivision 1h(b) includes in the recipient's estate "(1) their probate estate, (2) all of the person's interests or proceeds of those interests in real property the person owned as a life tenant or as a joint tenant with a right of survivorship at the time of the person's death; ...", and some other types of assets not addressed in the Court's Question B. The expansion of this concept of estate to include these life estate or joint tenancy interests if the deceased recipient had any legal title or interest in them at the time of the recipient's death is permitted under 42 U.S.C. §1396p(b)(4)(B) as optional additions by the State. The federal definition indicates in part that these assets included in the expanded definition are those "conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy... or life estate...." Conveyances to a survivor through these methods necessarily require the decedent recipient owned these assets at the time of death. Therefore, any life estate or joint tenancy interests of a deceased recipient transferred to the surviving spouse during the deceased recipient's lifetime would never be part of the recipient's estate under either the federal or the state law because both require the deceased recipient to own or have a legal title or interest in the property at the time of the person's death.

Subdivision 1h(c) further defines the life estate in "the person's estate" as "that portion of the interest in the real property subject to the life estate that is equal to the life estate percentage factor for the life estate as listed in the Life Estate Mortality Table of the Health Care Programs Manual for a person who was the age of medical assistance

recipient on the date of the person's death." Similarly the joint tenancy interest in real property in that person's estate is defined as equal to the "fractional interest the person would have owned if the jointly held interest in the property had they and the other owners held title to the property as tenants in common on the date the person died." The statute always defines these interests as being owned by the medical assistance recipient on the date of that person's death.

**2. The Minnesota Department of Human Services acknowledged limitations of the 2003 amendment.**

The Minnesota Department of Human Services in its own materials acknowledges the limitation of the 2003 amendment. In his materials titled "Probate and Title Issues Raised by the New Joint Tenancy/Life Estate MA Recovery Statutes", prepared for the 2003 Elder Law Institute, Department of Human Services staff attorney Joseph Rubenstein confirmed the limitation on the real estate interests that might be recovered under the new law. The article is included in the Amici Curiae Brief of The Elder Law Section of the Minnesota State Bar Association and of The National Senior Citizens Law Center Addendum at pages 00044 and following. In the "INTRODUCTION" to his materials Mr. Rubenstein wrote that the new law "expanded the definition of estate for medical assistance recovery purposes to include the life estate and joint tenancy interest in real estate that a recipient owns when they die... and provided for the continuation of medical assistance liens under the recipient's life estate and joint tenancy interests in real property after their death." (emphasis supplied) *Id.* at 00047. In Section IV of his

materials, titled “Recovery under a Notice of Potential Claim Where an Estate is Opened”, Mr. Rubenstein in IV. A.(2) defines life estates and joint tenancies. Life estates are based on the interest in the real property that is equal to the life estate factor listed in the Department’s eligibility manual “for a person of the decedent’s age on the date of their death.” Id. at IV. A.(2) at 00055. The joint tenancy is defined as the portion of the interest the recipient “would have owned on the date of their death if they and the other joint tenants had owned the interests as tenants in common.” (emphasis supplied) Id.

**B. Minn. Stat. §256B.15 Subds. 1a and 2 allow recovery against the estate of a non-recipient surviving spouse, which is prohibited by federal law.**

The scope of recovery granted in Minn. Stat. §256B Subd. 1a purports to allow recovery not only against the estate of the deceased recipient of medical assistance, but also against the estate of the surviving spouse of that deceased recipient even if the surviving spouse never received medical assistance. Subdivision 2 limited the recovery against the estate of a surviving spouse who did not receive medical assistance to the value of the assets of the estate of that surviving spouse that were marital property or jointly owned property at any time during the marriage. This definition includes any property transferred by the deceased recipient’s spouse at any time before the recipient’s death. It also includes “marital property” for which there is no definition in Minnesota law that applies to recovery as the Barg Court of Appeals confirmed (Estate of Barg, 722 N.W.2d 492 (Minn.Ct.App. 2006) (see Est. Br. at 25-27).

The expansion under Minnesota law to include marital property and property

jointly owned at any time during the marriage is not allowed by the federal statute and these types of assets are specifically excluded. Similarly, federal law does not allow recovery of any assets of this nature against the estate of the community spouse who is not a medical assistance recipient. The earlier language of 42 U.S.C., cited numerous times by the Estate in its formal brief, reads, “No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except....” (emphasis supplied). The only exception in 42 U.S.C. §1396p(b)(1)(B) that is applicable here is to recover “from the individual’s estate....” The federal definition of that individual’s estate in 42 U.S.C. §1396p(b)(4)(B) cited previously in this brief limits even optional assets. At all times the federal statute limits recovery to the estate of the individual deceased recipient of medical assistance. The federal statute never allows recovery against the estate of a surviving spouse who did not receive medical assistance.

The purported allowance of a claim against the assets in the estate of a surviving spouse who did not receive medical assistance that were “marital property or jointly owned property at any time during the marriage” is completely in conflict with the federal statute. 42 U.S.C. §1396p(c)(2)(A)(i) explicitly allows spouses to transfer title to their home to each other at any time without either spouse being ineligible for medical assistance by reason of that transfer. Minn. Stat. §256B.0595 Subd. 3(1)(i) also specifically allows an institutionalized person to transfer title to a homestead to a spouse with no adverse effect on the person’s medical assistance eligibility. These homestead transfers are suggested and encouraged by Minnesota county social service

representatives involved in determining medical assistance eligibility. After such a conveyance to the non-recipient community spouse, no interest ever transfers back to the recipient or the deceased recipient's estate by joint tenancy law. Because 42 U.S.C. §1396p(b)(1)(B) allows claims only against the estate of a recipient and contains no exception for a claim against the estate of a non-recipient surviving spouse, federal law preempts the State, under Martin, from making such a claim based on Minn. Stat. §256B.15 Subd. 1a to recover from the estate of a non-recipient spouse "indirectly what it is prohibited from obtaining directly...." Martin at 20.

**C. Conveyances by a deceased recipient to a surviving spouse by "other arrangement" must necessarily be transfers made at the time of the recipient's death.**

The federal statute allows recovery only from the individual recipient's estate, and the recipient's estate may only include the recipient's probate estate under state law and other assets which the individual recipient had "any legal title or interest at the time of death." The statute, by a list of examples, clarifies that these legal titles or interests at the time of death include a number of interests that are conveyed to a survivor, heir or assign of the deceased individual (necessarily requiring a transfer at death) through a number of ownership interests that are all transfers on death. The Estate explained, in response to this Court's questioning at oral argument and in its formal brief to this Court (see Est. Br. at 31), that the last transfer in this list of transfers on death, called "other arrangement," necessarily refers to transfers at death because the earlier language of the statute limited

the optional assets of an estate for recovery purposes to those assets in which the individual had a “legal title or interest at the time of death” (emphasis supplied).

**D. The only interest Dolores Barg had in any real property at the time of her death was an unvested inchoate interest that had no value.**

At oral argument the Court made substantial inquiry to confirm that the only legal title or interest Dolores Barg had in any asset at the time of her death would have been the inchoate interest she had in her husband’s assets if she had survived her husband. She did not survive her husband. The Amici Curiae Brief of The Elder Law Section of the Minnesota State Bar Association and of The National Senior Citizens Law Center (filed with this Court) correctly noted an unvested inchoate right is “a mere expectancy or possibility incident to the marriage relation,” which in the case of Dolores Barg never vested and upon her death could not and did not transfer to any other person. (See Amici Curiae Brief at 22, citing to 25 Dunnell Minn. Digest, *Husband and Wife* §600(4<sup>th</sup> ed. 1994). The interest had no value.)

As the Estate noted in its formal brief, the Minnesota Court of Appeals in the Gullberg and Barg decisions created fictional interests in real property in the estate of a predeceased recipient that the deceased recipient conveyed to a surviving community spouse during the recipient’s lifetime. In Gullberg recoveries were potentially allowed against these fictional interests as though they were part of the deceased recipient’s estate when these interests were actually part of the non-recipient surviving spouse’s estate against which federal law does not allow a claim to be made. The Barg appellate court

created a fictional interest in Dolores Barg after her death in a joint tenancy interest she had conveyed to her surviving spouse during her lifetime; once this interest was conveyed, Dolores Barg had only an inchoate interest, which never became a claim for a life estate interest against her surviving husband's estate. Minn. Stat. §256B.15 only continues an existing life estate; the statute does not create a life estate out of an inchoate interest that never vested. Dolores Barg had no legal title or interest at the time of her death in the joint tenancy property, her estate had no interest of value in the real property since it was then owned by her surviving spouse, and federal law prohibits any claim against the estate of a non-recipient surviving spouse.

**E. The limitation of the scope of §256B.15 Subds. 1c–1k does not affect the scope of the recovery authority granted in Subds. 1a and 2.**

Generally the limitation of the scope of Minn. Stat. §256B.15 Subds. 1c–1k to life estates and joint tenancies involves a different recovery process from the recovery process granted in Minn. Stat. §256B.15 Subds. 1a and 2. Therefore the limitation of Subds. 1c–1k to life estates and joint tenancies does not affect the scope of recovery authority granted in Subds. 1a and 2. Recovery under Subds. 1c–1k may only be made against life estates and joint tenancies in which the deceased recipient had a legal title or interest at the time of the recipient's death. Recovery under Subds. 1a and 2 may be made against the estate of the deceased recipient, but Minnesota also purports to allow recovery against the estate of the surviving spouse for medical assistance provided only to the deceased recipient. Federal law contains no exception for such recovery.

**F. The facts of the Barg case do not allow recovery for medical assistance provided to the deceased recipient Dolores Barg under any provisions of Minn. Stat. §256B.15.**

Pursuant to the stipulated facts in the Barg case, Dolores Barg had no legal title or interest in any real property either as a life tenant or a joint tenant at the time of her death. Under the language of Minn. Stat. §256B.15 Subd. 1h she certainly had no interest in any property of this nature that she “owned as a life tenant or as a joint tenant with a right of survivorship” at the time of her death. The property had been conveyed by her during her lifetime to Francis Barg, her community spouse. Therefore she had no life estate or joint tenancy interest in any real property when she died as that term is defined by the federal statute or the optional language which Minnesota could adopt, or as defined by Mr. Rubenstein of the Department of Human Services.

No recovery is allowed by Appellant Mille Lacs County against any real property interest Dolores Barg had conveyed during her lifetime because under the federal statute she had no legal title or interest at the time of death in any joint tenancy or life estate in real property that transferred to any other person at the time of her death.

No recovery is allowed by Appellant Mille Lacs County against Dolores Barg’s estate under Minn. Stat. §256B.15 regarding the joint tenancy and life estate interests because none of those interests was owned by Dolores Barg at the time of her death and therefore she had no interest in her estate against which a claim could be made.

No recovery is allowed by Appellant Mille Lacs County against any interest in the

joint tenancy real property interest Dolores Barg conveyed to her surviving spouse prior to her death because federal law has no provision for recovery of medical assistance provided to Dolores Barg against the estate of Francis Barg who did not receive assistance.

Therefore, under the facts in Barg, the recovery provisions of Minn. Stat. §256B.15 Subds. 1c-1k, and Subds. 1a and 2 are not relevant, and Appellant's claim for recovery fails under these statutes.

**G. Appellant's inability to recover in Barg is limited by the law and facts of this case.**

The Estate argues the Appellant may not recover medical assistance provided to Dolores Barg based on the state and federal law as applied to the facts of this case. The Supreme Court of Illinois in Hines v. The Department of Public Aid, 850 N.E.2d 148 (Ill. 2006) agrees with the Estate's argument that public policy expressed by Congress in federal law limits recovery under these facts. The Hines court wrote: "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." Id. at 152. Courts in Wisconsin and Tennessee as noted in the Estate's formal brief also have found federal recovery provisions limited. While it is convenient for the Appellant and the State of Minnesota to seek recovery pursuant to the expansive language of Minnesota law which exceeds federal authority, the Estate argues the Appellant and Minnesota are bound by federal law

as it now exists until such time as Congress is persuaded to change that law.

### QUESTION C

**III. Does the limitation of the scope of subdivisions 1c–1k to life estates and joint tenancies *established on or after August 1, 2003*, see Minn. Stat. § 256B.15, subd. 1(c)(2006), affect the scope of the recovery authority granted in subdivisions 1a and 2, in general and specifically as applied to the facts of this case?**

In answers to Questions A and B in this brief the Estate has explained there are two processes for recovery contained in portions of Minn. Stat. §256B.15. One recovery process in Subds. 1c–1k applies to life estates and joint tenancies. A second process outlined in Subds. 1a and 2 allows recovery against the estate of the deceased recipient and the estate of the non-recipient surviving spouse. The deceased recipient’s real property life estate or joint tenancy interests are continued under Subds. 1c–1k only for interests “owned...at the time of the person’s death.” The continuation of these interests was limited by the 2005 amendment to Minn. Stat. §256B.15 to life estate and joint tenancy interests established on or after August 1, 2003. Therefore these statutory provisions, when applied to these real estate interests established on or after August 1, 2003 arguably would allow recovery against those interests of the deceased recipients that were owned by the deceased recipients at the time of death. Similar interests owned by the deceased recipient at the time of death which were established before August 1, 2003 would not be subject to recovery.

The recovery authority in Subds. 1a and 2 which allows recovery against the estate of the non-recipient surviving spouse, exceeds the authority granted in 42 U.S.C.

§1396p(b)(4)(A) and (B). The Estate in this supplemental brief has previously discussed the conflict between the federal statute allowing recovery only against the estate of the deceased recipient spouse and the Minnesota statute also allowing recovery against the estate of the non-recipient surviving spouse.

Generally, then, pursuant to state and federal statutes there would be potential recovery against the deceased recipient's life estate or joint tenancy interest if the recipient owned or had any legal title or interest in the real property interest which was established on or after August 1, 2003, but there would not be recovery allowed against the estate of the deceased recipient's surviving spouse.

The stipulated facts of the Barg case acknowledge that all of Dolores Barg's joint tenancy interest in the real property was established before August 1, 2003. However, because she had conveyed her interest in this property during her lifetime to her non-recipient surviving spouse she had no legal title or interest in that property at the time of her death against which any claim can be made under the federal law, whether or not her interest in this property was established before or after August 1, 2003. Further, because the federal statute allows recovery only against Dolores Barg's estate and not against the estate of her non-recipient surviving spouse Francis Barg, the Minnesota recovery provisions in Subds. 1a and 2 allowing such recovery are in conflict and are preempted by the federal statute.

Therefore, under the facts of the Barg case Appellant's claim fails under the recovery schemes of Minn. Stat. §256B.15 Subds. 1c-1k, and Subds. 1a and 2.

## CONCLUSION

The 2003 amendments to Minn. Stat. §256B.15 (as amended in 2005), which the Court ordered the parties to review, do not provide any basis for the Appellant to recover medical assistance provided to Dolores Barg from real property conveyed by her during her lifetime to her surviving spouse, or from the estate of her spouse Francis E. Barg. Dolores Barg neither owned nor had any legal title or interest in any real property at the time of her death, which under both federal and state law is necessary to sustain recovery. Federal law limits recovery of medical assistance correctly paid on behalf of recipient Dolores Barg to recovery against her estate only, and does not provide an exception allowing recovery of such assistance against the estate of any other person. Therefore, federal law preempts provisions of Minnesota law to the contrary. Based on the facts and applicable law of this case, and on the entire record before this Court, the Estate respectfully requests that this Court order Appellant Mille Lacs County should recover nothing.

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