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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

In the Matter of the Estate of Frederick Ardell Krueger, deceased, Jerilyn Braaten, Personal Representative of the Estate of Frederick Ardell Krueger, deceased, Petitioner/Appellant, v. Jodi L. Fugleberg, Respondent, and North Dakota Department of Human Services, Claimant/Appellee.	**Supreme Court No. 20180237** **District Ct. 18-2017-PR-00066**

APPEAL FROM THE DISTRICT COURT
ORDER DATED APRIL 10, 2018
GRAND FORKS COUNTY, NORTH DAKOTA
NORTHEAST CENTRAL JUDICIAL DISTRICT

HONORABLE JOHN A. THELEN

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Paragraphs(s)**

Statutes and Rules

Other Authorities

JURISDICTIONAL STATEMENT

[¶1] The Court has appellate jurisdiction over this matter pursuant to N.D.C.C. § 28-27-01. The appeal was timely filed in accord with Rule 4(a)(1) of the North Dakota Rules of Appellate Procedure.

STATEMENT OF THE ISSUE

[¶2] Whether all of a joint tenancy interest in property held by a Medicaid recipient at the time of her death is available, upon the death of her surviving spouse, for recovery of benefits paid to the recipient.

STATEMENT OF THE CASE

[¶3] Appellee, North Dakota Department of Human Services (DHS), is satisfied with Appellant Jerilyn Braaten's (Appellant Braaten's) statement of the case.

STATEMENT OF THE FACTS

[¶4] DHS is satisfied with Appellant Braaten's statement of the facts, none of which are in dispute.

STANDARD OF REVIEW

[¶5] The issue raised in this appeal turns on the interpretation of federal and state Medicaid recovery statutes, as well as North Dakota's statutory definition of a joint tenancy interest. The "[i]nterpretation of a statute is a question of law, which is fully reviewable by the Court." Estate of Wirtz, 2000 ND 59, ¶ 8, 607 N.W.2d 882 (citing Jensen v. Workers Comp. Bureau, 1997 ND 107, ¶ 9, 563 N.W.2d 112).

ARGUMENT

I. Federal Medicaid statutes permit DHS to recover the joint tenancy interest of a Medicaid recipient upon the death of a surviving spouse.

[¶6] The Medicaid program "provides joint federal and state funding of medical

care for individuals who cannot afford to pay their own medical costs[.]" Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 275 (2006). "Congress, in crafting the Medicaid legislation, intended that Medicaid be a 'payer of last resort.'" Id. at 291 (quoting S.Rep. No. 99–146, at 313 (1985)). Consequently, the states are given "wide latitude in seeking Medicaid benefit recoveries." Wirtz, 2000 ND 59 at ¶ 13, 607 N.W.2d 882.

[¶7] Under federal law, Medicaid benefits paid to a recipient can be recovered from the recipient's "estate," which is expanded to "include, at the option of the State . . . any . . . real . . . property . . . 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 . . . through joint tenancy[.]" 42 U.S.C. § 1396p(b)(4)(B).

[¶8] This Medicaid recovery statute recognizes a

> surviving spouse's right to possession and enjoyment of the marital property by delaying execution until after the death of the surviving spouse. This accommodation protects the surviving spouse from impoverishment while allowing the Department to recover Medicaid benefits when the surviving spouse dies in order to fund future services to needy persons.

Estate of Marusich v. State, 313 P.3d 1272, 1279-80 (Wyo. 2013) (footnote and citations omitted).

[¶9] In Estate of Thompson, this Court noted that the "broad purpose of providing for the medical care for the needy" was advanced by "[a]llowing states to recover from the estates of persons who previously received assistance" because "the greater amount recovered by the state allows the state to have more funds to provide future services." 1998 ND 226, ¶ 14, 586 N.W.2d 847 (internal quotation marks and citation omitted). This Court also noted that this "broad purpose is

furthered more fully by allowing states to trace a recipient's assets and recover them from the estate of a recipient's surviving spouse [pursuant to the broad definition of estate in 42 U.S.C. § 1396p(b)(4)]". Id. This Court therefore held that § 1396p(b)(4) allows a state "to trace the assets of recipients of medical assistance and recover the benefits paid when the recipient's surviving spouse dies." Id. at ¶ 15.

[¶10] Thus, it is settled law in this Court (and elsewhere) that the federal Medicaid recovery statutes permit a state Medicaid program to pursue the joint tenancy interest of a Medicaid recipient upon the death of a surviving spouse. Here, Appellant Braaten does not dispute this settled principle, but merely the ***extent*** of the recovery to which DHS is entitled from the real property Medicaid recipient Lorraine Krueger conveyed through joint tenancy to her surviving husband at the time of her death.

II. The state Medicaid statute permits DHS to recover Medicaid benefits to the full extent permitted by federal law.

[¶11] The North Dakota Medicaid statute that governs the traceability of assets for Medicaid benefit recoveries is found at N.D.C.C. § 50-24.1-07. The current statute provides in relevant part that:

> On the death of any recipient of medical assistance who was a resident of a nursing facility, intermediate care facility for individuals with intellectual disabilities, or other medical institution and with respect to whom the department of human services determined that resident reasonably was not expected to be discharged from the medical institution and to return home, or who was fifty-five years of age or older when the recipient received the assistance, and on the death of the spouse of the deceased recipient, the ***total amount of medical assistance paid on behalf of the recipient*** following the institutionalization of the recipient who cannot reasonably be expected to be discharged from the medical institution, or following

> the recipient's fifty-fifth birthday, as the case may be, ***must be allowed as a preferred claim against the decedent's estate***[.]

N.D.C.C. § 50-24.1-07(1) (emphasis added). In Wirtz, this Court interpreted a previous version of the statute (substantively identical for all relevant purposes) and held that it "fully implements 42 U.S.C. § 1396p(b)." 2000 ND 59, ¶ 6, 607 N.W.2d 882. This full implementation necessarily includes § 1396p(b)'s expanded definition of a recipient's estate, a definition that permits the traceability of joint tenancy interests conveyed by a Medicaid recipient at the time of death to a surviving spouse. See also Thompson, 1998 ND 226, ¶¶ 8-12, 586 N.W.2d 847 (construing § 50-24.1-07 together with § 1396p(b)(4) to permit DHS to recover benefits under the latter's "broad definition" of "estate"); Estate of Bergman, 2004 ND 196, ¶¶ 6-8, 688 N.W.2d 187 (same).

[¶12] North Dakota's full implementation of the federal statute and its traceability of interests conveyed by a Medicaid recipient to a surviving spouse is further evidenced by subsection 5, which currently provides that "[a]ll assets in the decedent's estate of the spouse of a deceased medical assistance recipient are presumed to be assets in which that recipient had an interest at the time of the recipient's death." N.D.C.C. § 50-24.1-07(5).

[¶13] Thus, it is also settled law in this Court that North Dakota has adopted § 1396p(b)(4)'s expanded definition of estate, which permits DHS to trace and recover Medicaid benefits, upon the death of a surviving spouse, from all interests conveyed by a Medicaid recipient at the time of death to a surviving spouse. Here, again, Appellant Braaten does not dispute this settled principle, but merely the ***extent*** of the recovery to which DHS is entitled from the real property Medicaid

recipient Lorraine Krueger conveyed through joint tenancy to her surviving husband at the time of her death.

III. DHS can recover 100% of a Medicaid recipient's joint tenancy interest upon the death of her surviving spouse.

[¶14] Appellant Braaten contends DHS is only entitled to claim 50% of the net sale proceeds from the home that Medicaid recipient Lorraine Krueger owned as a joint tenant at the time of her death. That assertion is incorrect and misunderstands the nature of a joint tenancy interest. The assertion also conflates the concepts of joint tenancy and a tenancy-in-common, treating the two distinct property interests as interchangeable. As a joint tenant, Lorraine Krueger held a 100% interest in her marital home at the time of her death, concurrent with her spouse's 100% interest.

[¶15] Under North Dakota law, a joint tenancy interest is defined as "one owned by several persons in equal shares by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants." N.D.C.C. § 47-02-06.

[¶16] As this Court recognized in Jamestown Terminal Elevator, Inc. v. Knopp, the unique nature of a joint tenancy is that the joint tenants' interests are "not only equal and similar, but also . . . one and the same." 246 N.W.2d 612, 613-14 (N.D. 1976) (quoting 2 William Blackstone, Commentaries *184-185). As a consequence, unless the "concurrent interest in the whole" is severed by alienation or forfeiture prior to the death of one joint tenant, "the sole interest in the whole remains to the survivor" upon "the death of his companion." Id. at 614 (quoting

Blackstone). The unique nature of a joint tenancy – permitting an interest in the whole to be transferred automatically by operation of law upon the death of a joint tenant – necessarily means that prior to death both joint tenants also hold an interest in the whole and "not merely in the . . . joint tenant's moiety."[1] Id. at 613.

[¶17] Here, Lorraine Krueger's "concurrent interest in the whole" was never severed by alienation or forfeiture prior to her death. Thus, at the time of her death she held a concurrent interest in the whole property. That concurrent interest in the whole became traceable and recoverable under the applicable federal and state Medicaid statutes following the death of her surviving spouse.

[¶18] As the district court aptly explained, a "joint tenant owns property both '*per my et per tout* -- [b]y the half and by the whole.'" Appellant's App. at 28 (quoting Estate of Grote, 766 N.W.2d 82, 86 (Minn. Ct. App. 2009)) (in turn quoting Black's Law Dictionary 1177 (8th ed. 2004)); see also 48A C.J.S. Joint Tenancy § 28 (2018) ("Each joint tenant is seized of the whole estate; he or she has an ***undivided share of the whole rather than the whole of an undivided share of the estate.***") (emphasis added). Thus, at the time of her death, Lorraine Krueger held an undivided share of the whole property, not just a share equal to 50% of the property.

[¶19] Although this Court may not have addressed the precise issue raised in this appeal,[2] other courts have and have held that a state Medicaid program is entitled

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[1] "Moiety" means a "half" or a "part, portion, or share." The American Heritage Dictionary 807 (2nd College ed. 1991).

[2] This Court did, however, affirm the full amount of DHS's claim in Thompson without discussing whether any portion of the assets that had earlier passed to the surviving spouse at the time of the Medicaid recipient's death should be exempt

to trace and recover 100% of a Medicaid recipient's interests in real property conveyed through joint tenancy to a surviving spouse at the time of the recipient's death, not just 50%. See Grote, 766 N.W.2d at 87 ("The extent of the interest conveyed through joint tenancy to [the surviving spouse] by [the Medicaid recipient's] death was her interest in the entire property, which is therefore available for [medical assistance benefits] recovery."); Marusich, 313 P.3d at 1280 (holding that an entirety property held in tenancy by the entirety[3] by a Medicaid recipient was "available to the Department for reimbursement of Medicaid benefits once both spouses have died").

[¶20] In doing so, those courts recognized the unique nature of a joint tenancy interest, whereby both spouses have an interest in the entire property prior to the death of the first spouse. See Grote, 766 N.W.2d at 86-87; Marusich, 313 P.3d at 1278-80.

[¶21] In arguing that DHS's recovery should be limited to just 50% of a property held in joint tenancy by a Medicaid recipient, Appellant Braaten improperly relies upon situations where a joint tenancy is severed before it can pass by operation of law to a survivor upon the death of the first joint tenant. See Appellant Br. at ¶¶ 7, 10-11. Here, however, Lorraine Krueger's concurrent interest in the whole

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from recovery. See Thompson, 1998 ND 226, ¶ 11 n.2 & ¶ 17, 586 N.W.2d 847; see also Marusich, 313 P.3d at 1280-81 (noting this Court's affirmance of the recovery in Thompson and stating "[i]n that case, the property was held jointly by the spouses with a right of survivorship and had earlier passed to the surviving spouse by operation of law").

[3] A tenancy by the entirety is the same as a joint tenancy in all respects save for "the additional characteristic of unity of person which exists only in the case of a husband and wife." Id. at 1279 (quoting Wambeke v. Hopkin, 372 P.2d 470, 475 (Wyo. 1962)).

property was never severed prior to her death. Her entire interest passed by operation of law to her surviving spouse at the time of her death. The full extent of an interest held by a Medicaid recipient ***at the time of death*** is subject to recovery under the applicable Medicaid statutes. See 42 U.S.C. § 1396p(b)(4) (permitting recovery of "any . . . real . . . property . . . 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 . . . through joint tenancy") (emphasis added). At the time of Lorraine's death, she did not hold a 50% interest in the property, but rather a full 100% interest concurrent with the full 100% interest held by her joint tenant and spouse. See Knopp, 246 N.W.2d at 613-14 (noting a joint tenant's "concurrent interest in the whole" absent severance by alienation or forfeiture prior to the death of one joint tenant).

[¶22] Because the interest DHS can recover from a Medicaid recipient is measured "at the time of death" of the predeceased spouse, 42 U.S.C. § 1396p(b)(4), Appellant Braaten is incorrect when she argues the subsequent measures taken by DHS to recover benefits upon Frederick's death operate as a severance of the joint tenancy. By that time, the purpose of the joint tenancy had already been accomplished; Lorraine's concurrent interest in the whole had already passed by operation of law to Frederick without the joint tenancy ever having been severed by alienation, forfeiture, or the execution and sale of the interest by a judgment creditor.

[¶23] With respect to property held in joint tenancy, the Medicaid statutes' expanded definition of estate essentially operates as if the Medicaid recipient

survived her spouse. If Frederick Krueger had died before Lorraine, Frederick's interest would have passed by operation of law to Lorraine. Consequently, the 100% interest held by her at the time of death would all be subject to Medicaid recovery. Accomplishing the same result when the Medicaid recipient predeceases her spouse is precisely the purpose of Medicaid's expanded definition of estate.

[¶24] In cases where a recipient predeceases her spouse, Congress protected the surviving spouse's right to possession and enjoyment of the marital property until his death, but also advanced the intent that Medicaid be a payer of last resort by permitting the full recovery of a Medicaid recipient's joint tenancy property upon the death of the surviving spouse. See Thompson, 1998 ND 226, ¶¶ 14-15, 586 N.W.2d 847; see also Marusich, 313 P.3d at 1279-80.

[¶25] Appellant Braaten's approach to joint tenancy property would eviscerate the purpose of delaying recovery until the death of a surviving spouse, and frustrate the broad purpose of enhancing the amount DHS can recover through a Medicaid recipient's expanded estate in order "to have more funds to provide future services" to others who are in need of medical care. Thompson, 1998 ND 226, ¶ 14, 586 N.W.2d 847 (internal quotation marks and citation omitted).

[¶26] This Court should disregard Appellant Braaten's reliance upon the discussion of joint tenancy property in Estate of Fisk, 2010 ND 64, ¶¶ 17, 26, 780 N.W.2d 697. That opinion was withdrawn and replaced by Estate of Fisk, 2010 ND 186, 788 N.W.2d 611, and thus the withdrawn opinion has no precedential value.

[¶27] In addition, respectfully, the discussion in the withdrawn opinion was unsound. With respect to the withdrawn opinion's reference to the medical assistance eligibility rules found at N.D. Admin. Code § 75-02-02.1-32(4)(b), Appellant Braaten correctly concedes that those rules do "not control medical assistance estate recovery." Appellant Br. ¶ 7.

[¶28] And the withdrawn opinion dissent's rationale that N.D.C.C. § 50-24.1-07 can operate to sever the joint tenancy of a Medicaid recipient at the time of death, Fisk, 2010 ND 64, ¶ 26, 780 N.W.2d 697, was incorrect. As explained above, when a Medicaid recipient holds a joint tenancy interest at the time of death and predeceases a spouse, the interest passes by operation of law to the surviving spouse without having been severed. Medicaid's expanded definition of a recipient's estate freezes the recipient's interest in the joint tenancy property as of the time of death, but simply delays recovery of that interest until the death of the surviving spouse. The joint tenancy interest remains unsevered upon the death of the surviving spouse, essentially treating a recipient as though she had survived her spouse instead of vice versa. This intended result permits the recovery of benefits from the entire property held in joint tenancy upon the death of the surviving spouse.

[¶29] Thus, if Raymond Fisk held a joint tenancy interest in property that passed to his wife upon his death, that interest was never severed. The interest remained intact under § 1396p(b)(4)'s expanded definition of a recipient's estate, and then became fully recoverable upon Mary Fisk's death. The notion that N.D.C.C. § 50-24.1-07 can operate to sever a joint tenancy that existed at the time of a recipient's

death is directly contrary to the very purpose of Medicaid's expanded definition of a recipient's estate.

[¶30] Finally, the Court should also disregard Appellant Braaten's reliance upon the Supreme Court of Iowa's decision in Estate of Serovy, 711 N.W.2d 290 (Iowa 2006). Serovy did not involve a joint tenancy interest between a Medicaid recipient and a surviving spouse, but rather a joint tenancy between a Medicaid recipient and a surviving son and daughter-in-law. See Serovy, 711 N.W.2d at 291-92. The federal Medicaid statute treats those two circumstances differently, a point never addressed or discussed in Serovy.

[¶31] Mary Serovy's son, Allan, lived in the home at issue for approximately nine years before Mary died on October 11, 1998, during which time he and his wife "provide[d] Mary with care and assistance in her daily living." Id. at 292. Allan also lived in the home and provided his mother care for approximately eight years before her "condition required her relocation to a nursing home." Id. at 292. Pursuant to federal law, the home was therefore not subject to Medicaid recovery upon Mary Serovy's death. See 42 U.S.C. § 1396p(b)(2)(B)(ii) (prohibiting Medicaid recovery in circumstances where a "son or daughter of the individual (who was residing in the individual's home for a period of at least two years immediately before the date of the individual's admission to the medical institution, and who establishes to the satisfaction of the State that he or she provided care to such individual which permitted such individual to reside at home rather than in an institution), is lawfully residing in such home [and] who has lawfully resided in such home on a continuous basis since the date of the individual's admission to the

medical institution").

[¶32] In addition to this disregard of federal law, Serovy also conflates the principles of joint tenancy with the principles of a tenancy-in-common (the same mistake Appellant Braaten urges this Court to make). In its discussion of the extent of the interest in the home subject to administration in probate (an issue that never would have been reached had the federal Medicaid statute been enforced correctly), the Iowa Supreme Court cites and relies upon this Court's decision in Green v. Gustafson, 482 N.W.2d 842 (N.D. 1992). See Serovy, 711 N.W.2d at 296. Green, however, dealt with property in which a father and two sons "held title as tenants in common[.]" 482 N.W.2d at 843.

[¶33] Interests in property held by tenants in common are not the same as interests in property held by joint tenants. Compare N.D.C.C. § 47-02-08 (defining the interest held by a tenant in common) with N.D.C.C. § 47-02-06 (defining the interest held by a joint tenant). Importantly, a tenancy-in-common interest consists of a divisible share, and does not have the "concurrent interest in the whole" characteristic that is unique to a joint tenant's interest. Knopp, 246 N.W.2d at 614 (internal quotation marks and citation omitted).

CONCLUSION

[¶34] Adopting Appellant Braaten's position would conflate the principles of joint tenancy and a tenancy-in-common, and treat the two distinct property interests as interchangeable. Adopting such a position would also be inconsistent with the Medicaid statutes' expanded definition of a recipient's estate, which is intended to preserve the full extent of a recipient's joint tenancy interests at the time of her

death, and make the full interest recoverable upon the subsequent death of a surviving spouse.

[¶35] For the reasons stated above, DHS respectfully requests that this Court affirm the decision of the district court.

Dated this 21st day of August, 2018.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Matter of the Estate of Frederick Ardell Krueger, Deceased	
Jerilyn Braaten, personal representative of the Estate of Frederick Ardell Krueger, deceased,	**AFFIDAVIT OF SERVICE BY REGULAR AND ELECTRONIC MAIL**
Petitioner/Appellant,	**Supreme Court No. 20180237**
v.	**District Ct. 18-2017-PR-00066**
Jodi L. Fugleberg,	
Respondent,	
and	
North Dakota Department of Human Services,	
Claimant/Appellee.	

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

[¶1] Melissa Castillo states under oath as follows:

[¶2] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶3] I am of legal age and on the 13th day of August, 2018, I served the following **BRIEF OF APPELLEE** upon Shannon P. Uglem, by electronic mail as follows and upon Jodi L. Fugleberg by placing a true and correct copy thereof in an envelope addressed as follows:

Shannon P. Uglem
Uglem Law PC
shannon@uglemlaw.com

Jodi L. Fugleberg
797 140th Avenue NE
Portland, ND 58274

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Melissa Castillo

Subscribed and sworn to before me
this 13th day of August, 2018.

Notary Public

DONNA J CONNOR
Notary Public
State of North Dakota
My Commission Expires Aug. 6, 2021