

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Matter of the Estate of Frederick Ardell
Krueger, Deceased

Supreme Court No. 20180237

Jerilyn Braaten, Personal Representative of the
Estate of Frederick Ardell Krueger, deceased,

District Ct. 18-2017-PR-00066

Petitioner/Appellant,

APPELLANT'S BRIEF

vs.

Jodi L. Fugleberg,

Respondent,

and

North Dakota Department of Human Services,

Claimant/Appellee

APPEAL FROM MEMORANDUM DECISION AND ORDER DATED APRIL 10, 2018

THE HONORABLE JOHN A. THELEN

NORTHEAST CENTRAL JUDICIAL DISTRICT

GRAND FORKS COUNTY, NORTH DAKOTA

BRIEF OF APPELLANT

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STATEMENT OF ISSUES

¶ 1. Whether the District Court erred in ruling that the Department of Human Services may recover 100% of the net proceeds from the sale of a house in the estate of a non-recipient spouse, when the predeceased recipient spouse held a joint tenancy interest in the house prior to death.

STATEMENT OF THE CASE

¶ 2. Jerilyn Braaten was informally appointed Personal Representative of the Estate of Frederick Ardell Krueger on May 17, 2017. Shortly thereafter, notice and the probate application was send to the Department of Human Services as required by N.D.C.C. 50-24.1-07(3) showing that an estate was being probated for Frederick Ardell Krueger and Lorraine Krueger was his predeceased spouse. The Department then filed a claim against Frederick's Estate for \$278,182.13 of medical assistance provided to Lorraine Krueger from April 1, 2000 to August 14, 2004. The Personal Representative filed a Petition to Approve Accounting and Proposed Estate Distribution proposing to pay 50% of the net proceeds from the formerly jointly owned home to the Department. The Department filed an objection to the proposed distribution claiming entitlement to recover from 100% of the net proceeds of the home. The District Court issued its Memorandum Decision and Order deciding the issue and ruling that the Department may recover 100% of the net proceeds from the home.

STATEMENT OF FACTS

¶ 3. There were no factual disputes in this matter. On July 29, 1975 Frederick Ardell Krueger a/k/a Ardell Krueger and his wife Lorraine Krueger took title to a home at 907 Washington Ave., Northwood, North Dakota as joint tenants. (see deed Exhibit 1 to Brief in Support of Petition to Approve). Late in life Lorraine received medical assistance totaling

\$278,182.13 (DHS Claim). Lorraine died on 8/13/2004. Frederick died on 4/6/2017. Frederick owned the 907 Washington Ave. home at the time of his death. After Frederick's death the Personal Representative and family cleaned, repaired, marketed and finally sold the home from the Estate.

ARGUMENT

¶ 4 Medicaid is a joint Federal and State program to pay for medical care including skilled nursing home care for qualifying individuals. Federal law requires States to pursue recovery of medical assistance for nursing facility services from the estates of individual recipients who received benefits when age 55 or older (U.S.C. § 1396p(b)). The federal law defines "estate" as the property in the individual's estate as defined for purposes of State probate law and permits the States to adopt a more expansive definition 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 (U.S.C. § 1396p(b)(4)(B)).

¶ 5 The statutory law pertaining to estate recovery of medical assistance in North Dakota is N.D.C.C. § 50-24.1-07 which provides in part:

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 also states that a claim need not be paid during the lifetime of the decedent's surviving spouse (2(a)), and states that all 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 (5). Since the state statute does not fully define the extent of the assets that may be pursued, the North Dakota Supreme Court has ruled on several cases to better define that issue. This Court in *Estate of Bergman*, 2004 ND 196, 688 N.W.2d 187 summarized applicable prior holdings as follows:

[¶6] In *Thompson*, 1998 ND 226, ¶ 15, 586 N.W.2d 847, this Court construed applicable Medicaid law in N.D.C.C. § 50-24.1-07 and 42 U.S.C. § 1396p(b) to allow states to trace the assets of recipients of medical assistance and to recover the benefits paid when the recipient's surviving spouse dies. We said "[b]ecause the expansive federal definition of 'estate' in 42 U.S.C. § 1396p(b)(4) extends only to assets in which the medical assistance benefits recipient 'had any legal title or interest in at the time of death,' it is a matter of little moment whether the Department seeks to recover the benefits paid by filing a claim in the estate of the recipient after the death of the recipient's surviving spouse or by filing a claim in the surviving spouse's estate." *Thompson*, at ¶ 15 n.3.

[¶7] In *Wirtz*, 2000 ND 59, 607 N.W.2d 882, we again considered the meaning of those federal and state Medicaid statutes. We relied on 42 U.S.C. § 1396p(b) to provide meaning to N.D.C.C. § 50-24.1-07, stating the federal statute limits the situations in which states can recover Medicaid benefits from the surviving spouse's estate. *Wirtz*, at ¶ 7. In *Wirtz*, at ¶ 14, we construed those statutes to allow states to trace a recipient's assets and to recover money from the estate of a recipient's surviving spouse:

We hold any assets conveyed by [the institutionalized spouse] to [the community spouse] before [the institutionalized spouse's] death and traceable to [the community spouse's] estate are subject to the department's recovery claim. However, the recoverable assets do not include all property ever held by either party during the marriage. Cf. *Estate of Jobe*, 590 N.W.2d 162, 166 (Minn. Ct. App. 1999). 42 U.S.C. § 1396p(b) contemplates only that assets in which the deceased recipient once held an interest will be traced. It does not provide that separately-owned assets in the survivor's estate, or assets in which the deceased recipient never held an interest, are subject to the department's claim for recovery. Thus, recovery from a surviving spouse's separately-owned assets because of a past obligation to pay a now deceased Medicaid recipient's medical expenses as necessities, or recovery from the surviving spouse's entire estate, including assets not traceable from the recipient, is not allowed.

¶ 6 The federal statute permits the states to enact laws to expand estate recovery from the recipient's probate estate to capture the value of assets in which the recipient held any legal title or interest at the time of death in order to capture the value of assets of the recipient that pass outside of probate. Based upon the inclusion of words relating to the recipient's spouse in N.D.C.C. § 50-24.1-07, this Court has interpreted the state statute to allow the Department to trace assets of the medical recipient to the recipient spouse's estate. The federal statute mentions joint tenancy, survivorship, life estate, living trust, or other arrangements that convey the value of the recipient's assets to a survivor, heir or assigns. The federal statute specifically contains the words: "to the extent of such interest". The rational meaning of these words are to limit recovery to the value of the recipient's share of co-owned assets and prohibit recovery from the value of a co-owner's share.

¶ 7 The question then becomes how North Dakota medical assistance recovery law applies to a joint tenancy interest. This appears to be a matter that this Court has not made a final ruling upon. The Court only addressed this issue in a withdrawn opinion Estate of Mary Ann Fisk, 780 N.W.2d 697 (N.D. 2010). In the withdrawn opinion both the majority and the dissent suggest the share of joint tenancy property subject to recovery should be the fractional share representing the recipient's share in the property (majority at § 17 and dissent at § 26). The majority cited the state medical assistance eligibility rules which state that "The value of a partial or shared interest is a proportionate share of the total value of the asset equal to the proportionate share of the asset owned by the applicant or recipient" N.D. Admin. Code § 75-02-02.1-32(4)(b). While medical assistance eligibility rules may not control medical assistance estate recovery, the general proposition that a recipient's share of co-owned assets, including joint tenancy assets, is

their fractional share, is logical and equitable. The dissent's rationale was as follows: "the statute N.D.C.C. § 50-24.1-07 severed the joint tenancy and the Department could only recover its claim from (the recipient spouse) Raymond Fisk's joint tenancy, one-half of the proceeds from the sale of the home. The dissent suggested the Estate did not raise and therefore waived the non-recipient spouse Mary Ann Fisk's one half share of the proceeds by not raising this issue. The Court's commentary on this issue was removed after a rehearing presumably on the basis that the Estate had not raised and argued the issue. See replacement opinion Estate of Mary Ann Fisk, 788 N.W. 2d 611 (N.D. 2010).

¶ 8 This is the precise issue for the Court to decide in this case. The Personal Representative contends that the Department's recovery extends only to 50% of the net proceeds in the house that represents the recipient spouse Lorraine's share from the sale of the formerly jointly held home. The non-recipient spouse Frederick has an interest that is not subject to the creditor claims of the other joint owner.

¶ 9 There are limitations in comparing the rulings on this issue from other States, as each state has chosen to write and often have amended their medical assistance recovery laws to more specifically set forth the policy they wish to implement. For example, at one end of the spectrum, California has specifically barred recovery when there is a surviving spouse and when no surviving spouse only from probate assets. CA Welf & Inst Code § 14009.5 (2017). At the other end of the spectrum, Minnesota enacted a law that states: A deceased recipient who, at death, owned the property jointly with the surviving spouse shall have an interest in the entire property. 2017 Minnesota Statutes 256B.15(1a)(c). Rather, the law of the state of Iowa appears to be similar to the interpretation this Court has given to the North Dakota Statute with the

exception that the North Dakota statute does not refer to the recipient's child. The Iowa statute defines "estate" for the purposes of recover as follows:

For purposes of this section, the estate of a medical assistance recipient, surviving spouse, or surviving child includes any real property, personal property, or other asset in which the recipient, spouse, or child had any legal title or interest at the time of the recipient's, spouse's, or child's death, to the extent of such interests, including but not limited to interests in jointly held property, retained life estates, and interests in trusts. Iowa Code 2018, Chapter 249A.53(c).

¶ 10 The Supreme Court of Iowa in Estate of Mary H. Serovy, 711 N.W.2d 290 (Iowa 2006), in upholding an order permitting medical assistance recovery from the decedent's one-third interest in the property held as joint tenants with her son and daughter-in-law, stated "The situation is the same as if a judgment creditor had levied on and sold her joint interest in the property during her lifetime". It is a long-standing common-law-concept that the creditor of one joint tenant cannot enforce its claims from the entire value of jointly held property. Instead, the execution and sale by a judgment creditor of a joint tenant's interest creates a severance of the joint tenancy. See Frederick v. Shorman, 259 Iowa 1050, 147 N.W.2d 478 (1966); In Re King's Estate, 261 Wis. 266, 52 N.W.2d 885 (1952); Rauer's Collection Co. v. Higgins, 87 Cal.App.2d 248, 196 P.2d 803 (1948). In Frederick the Iowa Supreme Court stated:

The individual interest of one joint tenant is subject to levy and sale upon execution against him. Such interest may be sold and without making the other co-parceners parties to the action. The levy and sale operate as a severance of the joint tenancy, and the purchaser at the sale becomes a tenant in common with the other coowners. Citing 4 Thompson on Real Property, (191 Replacement) § 1780.

The Court went on to state:

During the continuance of joint tenancy, each joint tenant has a liability to have his fractional interest taken for the satisfaction of his debts. Any such taking, when completed, works a severance of the joint tenancy. Citing 4 Powell on Real Property, § 618.

¶ 11 The Department’s claim against the estate of the non-recipient spouse is akin to the claim by a creditor of one joint tenant. The debt is that of the recipient spouse and only extends to the estate of the non-recipient spouse to the degree it contains assets in which the recipient spouse once held an interest, to the extent of that interest. No more than the recipient spouse’s share upon severance is available to the creditors of that particular owner. To apply any sales proceeds belonging to a non-recipient joint owner to the medical assistance claim of another would be inequitable, result in an improper government taking, and violate the restrictive language in the federal law “to the extent of such interest”.

¶ 12 N.D.C.C. § 47-02-06 defines joint tenancy interest as follows:

A joint interest is 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.

As the statute clearly states, jointly owned property is owned by several persons in equal shares, not exclusively owned by one party. Despite this clear statutory language defining the shares of joint owners as equal, the Department argues instead that the historic common-law concept of unity of ownership of joint tenants permits a claim to 100% of the net proceeds from formerly jointly owned property. The common-law concept of unified ownership of title at the time of its development was necessary to justify the right of survivorship and thereby avoid centuries old English laws passing property to the oldest son, or avoiding duties or rights relating to the lord or king after death. See Peter M. Carozzo, Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships, 85 Marq. L. Rev. 423 (2001). “But, while it continues, each of two joint tenants has a concurrent interest in the whole; and therefore, on the death of his companion, the sole interest in the whole remains to the survivor.” Jamestown Terminal Elevator, Inc. v. Knoop, 246 N.W.2d 612 (N.D. 1976) citing 2 W. Blackstone, Commentaries

*184-185. There is also the creditor protection aspect that derives from the unified ownership concept, in that the creditor of a joint tenant has nothing to pursue after the debtor dies Id.

¶ 13 While this unity of ownership concept justifies the right of survivorship and termination of creditor claims at death, it does not justify applying the creditor claims of one joint owner to the entire property. As previously described, common law with regard to creditors of joint tenants limits the recovery from the debtor's share upon severance. As the North Dakota statute states, the joint owner's shares are equal, which translates for two joint owners to be 50% each. Selecting one of several combined concepts and rights relating to joint tenancy to justify estate recovery of 100% is improper. A joint tenancy is a package of rights including equal right to income, equal right to occupancy and possession, and equal right to become the sole owner contingent upon survivorship, and in most cases the equal right to value upon severance by partition, execution sale or other manner.

CONCLUSION

¶ 14. For the foregoing reasons, the Appellant requests that the Court reverse the Order of the District Court and remand to apply the Department's claim to 50% of the net sales proceeds from the home after the reasonable costs of administration.

Dated July 18, 2018.

/s/ Shannon P. Uglem

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

<p>In the Matter of the Estate of Frederick Ardell Krueger, Deceased</p> <p>Jerilyn Braaten, Personal Representative of the Estate of Frederick Ardell Krueger, deceased,</p> <p style="text-align:right">Petitioner/Appellant,</p> <p style="text-align:center">vs.</p> <p>Jodi L. Fugleberg,</p> <p style="text-align:right">Respondent,</p> <p style="text-align:center">and</p> <p>North Dakota Department of Human Services,</p> <p style="text-align:right">Claimant/Appellee</p>	<p>Supreme Court No. 20180237</p> <p>District Ct. 18-2017-PR-00066</p> <p style="text-align:center">AFFIDAVIT OF SERVICE</p>
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STATE OF NORTH DAKOTA)
) ss.
GRAND FORKS COUNTY)

The undersigned, being of legal age, being first duly sworn deposes and says that on the below date she served a true and correct copy of the attached:

Appellant's Brief
Appellant's Appendix

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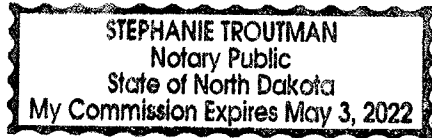
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Ranae Sotvik, legal assistant Uglem Law PC
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Subscribed and sworn to before me this 18th day of July, 2018.



Notary Public

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Matter of the Estate of Frederick Ardell
Krueger, Deceased

Supreme Court No. 20180237

Jerilyn Braaten, Personal Representative of the
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STATE OF NORTH DAKOTA)
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The undersigned, being of legal age, being first duly sworn deposes and says that on the below date he served a true and correct copy of the attached:

Appellant’s Brief (with clerk’s requested corrections to table of authorities)
Appellant’s Appendix (with clerk’s requested corrections to appendix pg no’s and notice of appeal)

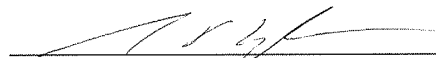
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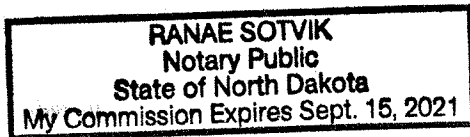
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Shannon P. Uglem

Subscribed and sworn to before me this 23rd day of July, 2018.




Notary Public