

No. 08-603

Supreme Court, U.S.
FILED

JAN 22 2009

In The
Supreme Court of the United States

LEO VOS, DIRECTOR, MILLE LACS COUNTY,
MINNESOTA, FAMILY SERVICES AND
WELFARE DEPARTMENT,

Petitioner,

v.

MICHAEL F. BARG, PERSONAL REPRESENTATIVE
OF THE ESTATE OF FRANCIS E. BARG,

Respondent.

**On Petition For Writ Of Certiorari
To The Supreme Court Of Minnesota**

**REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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**REPLY ARGUMENT IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

The Court should grant a writ of certiorari. The Minnesota Supreme Court's decision conflicts with the U.S. Secretary of Health and Human Services' interpretation of federal law. The decision below is also in direct conflict with the holding of another state supreme court.

1. Minnesota's state Medicaid plan provides that any asset *held by either or both spouses* is subject to recovery. Pet. App. 93a. The Secretary's approval of this state plan provision reflects his determination that it is consistent with federal law.

Respondent does not dispute that the decision below is in irreconcilable conflict with the Secretary's interpretation. Nor does he dispute the significance of this conflict. The Secretary determines whether states are complying with the conditions tied to federal Medicaid funds. His interpretation of those conditions is not limited to Minnesota's state plan. He also approved similar spousal recovery provisions in four other state plans. In addition, the Secretary's interpretation will be applied if and when other states elect to include spousal recovery.

2. The Secretary's interpretation and the North Dakota Supreme Court's holding are both supported by the statute's plain language. Respondent's contention that the decision below is consistent with the plain language ignores the same important word that

the Minnesota Supreme Court completely ignored: “assets.”

Section 1396p(b)(4)(B) provides that states may seek recovery from any other property and “assets” that may not be part of a state-defined probate estate. Indeed, states are expressly allowed to provide for recovery from “any other real and personal property *and other assets* in which the individual had any legal title or interest at the time of death.” 42 U.S.C. § 1396p(b)(4)(B) (2000 & Supp. V 2005) (emphasis added). At the same time Congress enacted that provision, it declared that “assets,” as used in section 1396p, “includes all income and resources of the individual *and of the individual’s spouse*.” 42 U.S.C. § 1396p(e)(1) (2000 & Supp. V 2005) (emphasis added); *Omnibus Budget Reconciliation Act of 1993*, Pub. L. No. 103-66, § 13611(c) (adding definition of “assets”) and § 13612(c) (adding the allowance for states to recover from “any . . . other assets”); 107 Stat. 312, 626, 628 (1993). Therefore, when Congress referred to “any . . . other assets,” it intended to include those of a spouse in addition to those of the individual Medicaid recipient.

Respondent’s claim that the court below rejected Petitioner’s argument regarding “assets” is incorrect. Br. in Opp. 13. The Minnesota Supreme Court *never addressed* the role of the definitional statute, let alone rejected its implications. *See* Pet. App. 1a-45a.

3. Respondent incorrectly asserts that the decision below is supported by earlier decisions by the Illinois

Supreme Court and the Wisconsin Court of Appeals. Br. in Opp. 7, 16-18. Those courts, however, never reached the issue presented here about the scope of recovery. Rather, unlike the Minnesota Supreme Court, they held that federal law prohibits all spousal recovery claims. *Hines v. Dep't of Pub. Aid*, 850 N.E.2d 148, 153 (Ill. 2006); *In re Estate of Budney*, 541 N.W.2d 245, 246 (Wis. Ct. App. 1995). The Illinois and Wisconsin courts thus never considered what, if any, limitations federal law imposed on the scope of recovery.

4. Respondent wrongly suggests that the Court would need to address a state property law question if it granted certiorari. See Br. in Opp. 14. The issue raised by the petition regarding spousal recovery is purely a question of federal law; whether Medicaid law limits the scope of spousal recovery.

5. Finally, Respondent erroneously asserts that Petitioner required the recipient spouse in this case to transfer her interest in the home to the nonrecipient spouse. Br. in Opp. 6. Minnesota does not require such a transfer. See Minnesota Dep't of Human Services, Health Care Programs Manual, § 19.25.15.05 (instructing county personnel to exclude homestead property from Medicaid eligibility calculations if the long-term care resident's spouse continues to reside in the home) available at http://hcopub.dhs.state.mn.us/hcpmstd/19_25_15_05.htm (2008). Indeed, there

was no need for a transfer in this case other than to shelter the asset from future recovery.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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