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In Re Estate of Wiggins Appellant's Brief Dckt. 39129

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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE ESTATE OF)
VIVIAN WIGGINS AND EMERSON D.)
WIGGINS, DECEASED.)
_____)

STATE OF IDAHO, DEPARTMENT OF)
HEALTH & WELFARE,)

Petitioner-Appellant,)

v.)

LYNN WIGGINS, personal representative of)
THE ESTATE OF VIVIAN WIGGINS and)
EMERSON D. WIGGINS,)

Respondent.)
_____)

SUPREME COURT NO. 39129

APPELLANT'S BRIEF

APPEAL FROM THIRD JUDICIAL DISTRICT, WASHINGTON COUNTY

THE HONORABLE LINDA COPPLE TROUT, PRESIDING

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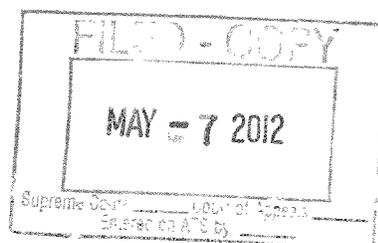


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STATEMENT OF THE CASE

Nature of the Case

This is an appeal from an order disallowing a creditor's claim in a probate proceeding. It involves Medicaid, also known as "medical assistance," and estate recovery, as provided in Idaho Code § 56-218. Estate recovery is a program, required by federal law and authorized by state statute and rules, that seeks to recover assets of deceased Medicaid recipients to reimburse the state and federal treasuries for medical payments made on their behalf during their lives. This matter involves a claim filed by the Idaho Department of Health and Welfare (hereinafter the "Department") in the joint estate of a deceased Medicaid recipient and her spouse.

Course of Proceedings

The personal representative was appointed on May 22, 2009. R. p. 2. The Department was first notified of this matter upon receipt of the personal representative's Petition for Approval of Final Settlement filed November 16, 2009.¹ R. p. 8. The Department immediately filed a Claim Against Estate (R. p. 13), a Demand for Notice (R. p. 16), and an Objection to Final Settlement (R. p. 18). The personal representative then filed a Notice of Disallowance of Claim. R. p. 20. The Department filed a Petition for Allowance of Claim, as required to preserve its rights by Idaho Code § 15-3-806(a).

A hearing held on February 3, 2010, on the Department's Petition for Allowance of Claim, and on March 30, 2010, Judge Frates issued his Memorandum Decision Denying Petitioner's Claim Against the Estate. The Department filed a Notice of Appeal (to the District Court) on April 7, 2010.

¹Idaho Code §§ 56-218(5) and 15-3-801(d) require a personal representative to notify the Department of his or her appointment within 30 days of appointment. That did not occur in this case.

Later, on April 30, 2010, the court entered its Order re: Attorney's Fees and Costs, disallowing attorney fees and costs, except permitting additional briefing on the issue of attorney fees pursuant to Idaho Code § 12-117. On June 23, 2010, the court entered its Order on Attorney Fees, denying attorney fees requested pursuant to Idaho Code § 12-117. Oral argument on appeal to the District Court was held on February 8, 2011, and the District Court's Memorandum Decision on Appeal was filed July 20, 2011.

Statement of the Facts

Vivian and Emerson Wiggins were husband and wife. In 2002, when Vivian was 90 years old, she needed nursing care and entered the nursing home. R. p. 36. Emerson applied for Medicaid benefits to assist in paying Vivian's nursing home costs, and Medicaid was approved effective September 1, 2003. R. p. 36. There is some question as to how this was accomplished. After the death of both Vivian and Emerson in 2009, Emerson was in possession of \$78,508.59 in cash assets. R. p. 22. The personal representative asserted these funds were the residue of the couple's community property which had been transmuted into Emerson's separate property through a marriage settlement agreement when Vivian's Medicaid eligibility was being established in 2002. A married person can have no more than \$3,000 in countable resources (such as cash) to qualify for Medicaid. IDAPA 16.03.05.201. While no marriage settlement agreement was ever found, by determining that Vivian was eligible for Medicaid in 2003, the Department treated Vivian as if she had transferred almost all of her countable resources to Emerson. The magistrate concluded that a marriage settlement agreement must have existed and that it transferred Vivian's assets to Emerson sometime in 2002. R. p. 117.

Between September 1, 2003, and the time of her death, the Department expended \$272,134.68 on behalf of Vivian through the Medicaid program. R. p. 14. Vivian died January 30, 2009, at the age of 97. R. p. 37. Emerson died less than two weeks later on February 9, 2009. R. p. 37. He was 98 years old.

Joint probate for Vivian and Emerson was opened on May 22, 2008. R. p. 2. Joint probate is permitted where the “marital community has been dissolved by the death of either spouse at any time, the survivor was then entitled to all of the property of the decedent by will, law, or both, and the survivor died before any proceeding had been commenced for the probate of the estate of the spouse whose death occurred first . . .” Idaho Code § 15-3-111. Therefore, because Vivian died first, all of Vivian’s assets passed to Emerson either by operation of law or through the presumed marriage settlement agreement.

The inventory showed assets of \$78,508.59 in “C.D.’s, Notes and Cash.”

ISSUES ON APPEAL

1. Whether the Magistrate erred in its application and interpretation of Idaho Code § 56-218, in refusing to allow the Department's claim against assets which had been community property, but had become the separate property of Emerson Wiggins.

2. Whether the Magistrate erred in holding that Idaho Code § 56-218(1) – which authorizes recovery from the estate of the spouse where the assets had been community property, or had been the property of the Medicaid spouse – is preempted by federal law.

ARGUMENT

I.

STANDARD OF REVIEW

As explained in *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 563, 249 P.3d 362 (2011):

In an appeal from the district court, acting in its appellate capacity, this Court:

reviews the trial court (magistrate) record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure.

Nicholls v. Blaser, 102 Idaho 559, 561, 633 P.2d 1137, 1139 (1981), *quoted in Doe v. State*, 137 Idaho 758, 759–60, 53 P.3d 341, 342–43 (2002).

Idaho Dept. of Health & Welfare v. Doe, 150 Idaho at ____, 249 P.3d at 364-5. Moreover, as stated in *Carter v. Carter*, 143 Idaho 373, 146 P.3d 639 (2006):

When reviewing the decision of a district court acting in its appellate capacity over the magistrate division, this Court reviews the magistrate court's decision independently of, but with due regard for, the district court's intermediate appellate decision. This Court will uphold the magistrate court's findings of fact if they are supported by substantial, competent evidence in the record.

Carter v. Carter, 143 Idaho at 378, 146 P.3d at 645. If there are no genuine issues of fact, the Court freely reviews the issues of law. *Doe v. Idaho Dept. of Health & Welfare*, 150 Idaho 491, ____, 248 P.3d 742, 746 (2011).

II.

DECISIONS BELOW

The magistrate court disallowed the Department's claim against the joint estate. Judge Frates concluded that the Department could not recover from Emerson Wiggins's separate property, even though that property had once been the couple's community property. This conclusion seems to have been the result of Judge Frates's view that the Idaho legislature intended to allow couples to avoid repayment to Medicaid by executing a marriage settlement agreement:

Marriage Settlement Agreements are recognized under Idaho law and require specific statutory compliance 32-916 et. Seq. An MSA allows one spouse to transmute community property to the other. Furthermore, the Idaho legislature contemplated that transfers could be made by recipients of Medicaid and/or their spouses without compensation in order to avoid repayment.

Memorandum Decision Denying Petitioner's Claim Against the Estate, p. 6 (emphasis added) (R. p. 121).

While the briefing and argument before Judge Frates had included discussion of federal preemption and the case of *In re Estate of Barg*, 752 N.W.2d 52 (2008) *cert. denied sub nom Vos v. Barg*, 129 S.Ct. 2859, 174 L.Ed.2d 576 (2009), Judge Frates's decision does not mention or discuss preemption. However, in the Conclusion of his decision, Judge Frates stated, "The Department may only recover against property in which the recipient spouse had an interest at the time of her death." Memorandum Decision Denying Petitioner's Claim Against the Estate, p. 7 (R. p. 122). This language seems to be from the discussion relating to the *Barg* case. Therefore, it is possible that federal preemption played a role in the decision of the magistrate court.

The District Court, acting in its appellate capacity, affirmed the decision of the magistrate. Judge Trout believed the Department should be required to bring separate actions to void marriage settlement agreements in order to recover property which had been the couple's community property but was transmuted before death. In her view, Emerson's separate property assets were available for recovery, but only if the Department first voided the marriage settlement agreement. In her discussion of the definition of "assets" in 42 U.S.C. § 1396p(h), Judge Trout stated:

That provision, which is difficult to understand at best, broadens what should be included in the recipient's estate and appears to include resources which the recipient would have had in his or her estate but for the actions of the recipient or the recipient's spouse. While this would appear to include property transmuted by virtue of an MSA as the Department argues, there is nothing in the statute that makes this happen automatically. In other words, simply because the definition of "assets" could include that property doesn't mean that such transactions are set aside without further action. There should be some action taken to recover those resources into the recipient's estate, such as setting aside the MSA, which will be discussed later in this Decision.

* * *

... Some action should be required in order for those resources to be included and I.C. § 56-218(2) is the vehicle for doing so.

Memorandum Decision on Appeal, pp. 11, 13 (R. pp. 437, 439). Judge Trout understood that such a set-aside action would have been impossible in this case because of the statute of limitations.

Memorandum Decision on Appeal, p. 13 (R. p. 439). However, she felt that this was a defect in the statute that could be corrected by the Legislature. *Id.*

III.

IDAHO CODE § 56-218 PERMITS RECOVERY FROM THE ESTATE OF EITHER SPOUSE OR BOTH, WITHOUT REGARD TO WHETHER THE ASSETS WOULD BE CHARACTERIZED AS COMMUNITY OR SEPARATE.

Idaho Code § 56-218 authorizes recovery from the estate of both the Medicaid recipient and her spouse:

Except where exempted or waived in accordance with federal law medical assistance pursuant to this chapter paid on behalf of an individual who was fifty-five (55) years of age or older when the individual received such assistance may be recovered from the individual's estate, and the estate of the spouse, if any, for such aid paid to either or both;

Idaho Code § 56-218(1) (underline added). Nothing in the statute limits this recovery to property characterized as community or separate property. It is clear and unambiguous. Likewise, Department rules make confirm that separating a couple's assets through a marriage settlement agreement will not vitiate the Department's estate recovery claim against the estate of the spouse:

05. Marriage Settlement Agreement or Other Such Agreement. A marriage settlement agreement or other such agreement which separates assets for a married couple does not eliminate the debt against the estate of the deceased participant or the spouse. Transfers under a marriage settlement agreement or other such agreement may be voided if not for adequate consideration. (3-30-07)

IDAPA 16.03.09.905.05 (underline added).² The Department's rules have the same force and effect as law. *Mallonee v. State*, 139 Idaho 615, 619, 84 P.3d 551, 555 (2004).

²In the briefing below this rule was cited as IDAPA 16.03.09.900.24. Judge Trout believed that this provision, and the other rule cited here, IDAPA 16.03.09.905.01, cited below as Rule 900.20, were deleted in 2010. Memorandum Decision on Appeal, p. 9 (R. p. 435). This is incorrect. These rules were simply renumbered.

Another Department rule limits the Department's recovery of the spouse's separate property to assets in which the Medicaid spouse had previously held an interest:

01. Limitations on Estate Claims. * * * A claim against the estate of a spouse of a participant is limited to the value of the assets of the estate that had been, at any time after October 1, 1993, community property, or the deceased participant's share of the separate property, and jointly owned property. * * *

IDAPA 16.03.09.905.01. This rule limits the Department's claim against the estate of the spouse to assets which had been community property, jointly owned assets, or property of the Medicaid recipient after the effective date of OBRA '93,³ as required by this Court's decision in *Idaho Department of Health and Welfare v. Jackman*, 132 Idaho 213, 216, 970 P.2d 6, 9 (1998). This is the date the states were authorized to adopt the expanded definition of "estate" found in 42 U.S.C. § 1396p(b)(4). The rule does not expand, but rather limits, the application of Idaho Code § 56-218 to avoid federal preemption that could otherwise result, as discussed in *Jackman*.

Idaho law permits recovery from the estate of either spouse, so long as the assets are traceable to the couple's community or jointly owned property, or the assets had been the property of the Medicaid recipient. Nothing in the law or rules otherwise limits recovery based on the final characterization of the assets as separate or community. As discussed, below, it is this tracing of assets that may have been transferred to the spouse, that the Medicaid recovery law specifically intends.

³Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66.

IV.

THE TREATMENT OF A COUPLE'S ASSETS, UNDER FEDERAL MEDICAID LAW, CHANGES WHEN THEY PASS AWAY AND ESTATE RECOVERY BEGINS.

Both the Magistrate and the District Court seemed troubled that assets excluded for purposes of determining Medicaid eligibility would suddenly be included for the purpose of Medicaid estate recovery. Indeed, Judge Frates thought that a marriage settlement agreement would only serve its purpose if it allowed the couple to avoid estate recovery. *See* Memorandum Decision Denying Petitioner's Claim Against the Estate, p. 6 (R. p. 121). Likewise, Judge Trout felt that the Department should be required to bring a separate action to set-aside the marriage settlement agreement before recovery could be made. *See* Memorandum Decision on Appeal, pp. 11, 13 (R. pp. 437, 439). However, excluding certain property for eligibility, but including that same property for estate recovery is exactly what the law intends.

As discussed by the Court in *Stafford v. Idaho Dept. of Health & Welfare*, 145 Idaho 530, 181 P.3d 456 (2008), Medicaid eligibility for elderly couples involves complex rules allowing certain assets to be shifted from the spouse needing Medicaid eligibility to the non-Medicaid spouse. Some assets, such as the couple's home, are "excluded" and not counted in determining eligibility. When, as permitted by the rules, assets are shifted to the non-Medicaid spouse, they are excluded and not counted, in determining the Medicaid spouse's eligibility. This exclusion, however, disappears when both the Medicaid recipient and her spouse have passed away.

OBRA '93, referenced above, enacted provisions greatly expanding recovery of the assets of elderly Medicaid recipients. These provisions are found in section 1396p of title 42. This is the section

of the federal Medicaid law that provides for estate recovery and the treatment of asset transfers, including transfers to trusts. Included among the changes made by OBRA '93 was the "expanded definition of estate" codified at 42 U.S.C. § 1396p(b)(4). Also included were new definitions, including a sweeping definition of "assets" that clearly includes the property of the Medicaid recipient's spouse. This definition is now found at 42 U.S.C. § 1396p(h)(1):

- (1) The term "assets", with respect to an individual, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action—
- (A) by the individual or such individual's spouse,
 - (B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse, or
 - (C) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse.

42 U.S.C. § 1396p(h)⁴ (underline added). This definition greatly increases the scope of estate recovery to include assets that had been shifted to the non-Medicaid spouse for purposes of Medicaid eligibility.

Further revealing the change in the treatment of a couple's assets after their death is the definition of "resources" found in 42 U.S.C. § 1396p(h)(5). "Resources," for purposes of eligibility, is defined in 20 C.F.R. § 416.1201 to mean, with some qualifications, "cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance." 42 U.S.C. § 1382b, provides certain exclusions to the definition of "resources," among which is the exclusion for the family home:

⁴These definitions were previously found at subsection (e) of 42 U.S.C. § 1396p.

- (a) Exclusions from resources
In determining the resources of an individual (and his eligible spouse, if any) there shall be excluded –
 - (1) the home (including the land that appertains thereto)

42 U.S.C. § 1382b(a)(1). This is why, when determining Medicaid eligibility, the couple's home is excluded. However, the definition of "resources" for purposes of estate recovery, found in 42 U.S.C. § 1396p(h)(5), specifically includes the family home:

(5) The term "resources" has the meaning given such term in section 1382b of this title, without regard . . . to the exclusion described in subsection (a)(1) of such section.

42 U.S.C. § 1396p(h)(5) (underline added). These provisions in section 1396p show that the law intends that assets excluded for eligibility be included for estate recovery. Recovery is made only after the death of both the Medicaid recipient and the spouse, when the reason for shifting the assets in the first place, has ceased to exist. 42 U.S.C. § 1396p(b)(2).

If these provisions in section 1396p are not clear enough by themselves, the intent of these changes enacted in OBRA '93 were clearly explained by the House Budget Committee as follows:

Under the Committee bill, States are required to establish an estate recovery program that meets certain requirements. **The program must identify and track resources (whether or not excluded for eligibility purposes) of individuals who receive nursing facility, home and community-based services, and other specified long-term care services. The program must promptly ascertain when the individual and the surviving spouse, if any, dies, and must provide for the collection of the amounts correctly paid by Medicaid on behalf of the individual for long-term care services from the estate of the individual or the surviving spouse.** The term "estate" is defined as all real and personal property of a deceased individual and all other assets in which the individual had any legally cognizable title or interest at the time of his death, including assets conveyed to a survivor, heir, or assign through joint tenancy, survivorship, life estate, living trust, or other arrangement.

H.R. Rep. 103-111, P.L. 103-66, OBRA 1993 (May 25, 1993), Section 5112. (emphasis added).

The changes enacted in OBRA '93 followed, and at least in part, grew out of, the Spousal Impoverishment provisions of the Medicare Catastrophic Coverage Act (MCCA), enacted in 1988. Perhaps not coincidentally, Idaho's estate recovery statute was passed that same year. This new estate recovery statute provided for recovery from the estate of the spouse:

56-218 Recovery of certain medical assistance.

(1) Medical assistance pursuant to this chapter paid on behalf of an individual who was sixty-five (65) years of age or older when the individual received such assistance may be recovered from the estate, or if there be no estate the estate of the surviving spouse, if any, shall be charged for such aid paid to either or both . . .

Idaho Code § 56-218(1) (1988) (underline added). As described in *Stafford v. Idaho Dept. of Health & Welfare*, 145 Idaho 530, 181 P.3d 456 (2008), the MCCA protected the non-Medicaid spouse by assuring that he was able to have sufficient income and resources to provide for his own needs. However, the legislature seemed to recognize that this meant that the non-Medicaid spouse would have assets that had been shifted to him during the eligibility process, and that any of those assets remaining after both spouses had died should be recovered. Therefore, it provided for recovery from the estate of the non-Medicaid spouse.

The MCCA was intended to provide a benefit to both the Medicaid recipient and her spouse, but there is nothing in the law, the rules, or the legislative history, that suggests that the couple's non-dependent heirs were intended beneficiaries of this assistance. In discussing the Department's rules relating to transfers of assets to trusts by Medicaid recipients, this Court recognized the clear rationale:

The rationale of the rule is readily apparent—to prevent third parties from benefitting from the home property when one of the spouses is seeking or receiving Medicaid nursing home assistance.

Stafford, 145 Idaho at 538, 181 P.3d at 464. The spousal estate recovery provisions are no different. After the death of both spouses, when their needs have been fully met, then recovery is to be made from their remaining assets, no matter which estate they may be found in.

V.

**THE CLAIM FOR MEDICAID RECOVERY IS STATUTORY
AND NOT BASED ON A CONTRACT WITH THE COUPLE.**

Underlying the decisions of the courts below is the assumption that there was a contract for repayment of Medicaid benefits binding Vivian Wiggins, but not Emerson, and therefore, Emerson's separate property should not be chargeable for Vivian's debt. Indeed, this assumption is demonstrated by the District Court's comment regarding Idaho Code § 32-912:

There is nothing in the record to indicate that Emerson signed in writing agreeing to bind his separate property for the debts of Vivian. While that may very well have been part of the Medicaid application process, it is not in the record.

Memorandum Decision on Appeal, p. 7 (R. p. 433). This underlying assumption, however, is incorrect. Applying for Medicaid is not a commercial transaction. There is no bargained for exchange or *quid pro quo*. While there are notices given to the couple, relating to estate recovery and other obligations that come with receiving Medicaid, there is no contract or agreement for repayment. Qualification for Medicaid benefits is entirely based on meeting the requirements of the relevant statutes and rules.

Estate recovery, likewise, is based entirely on the statute, not on any contract or agreement.

Idaho Code § 56-218(1) states:

Except where exempted or waived in accordance with federal law medical assistance pursuant to this chapter paid on behalf of an individual who was fifty-five (55) years of age or older when the individual received such assistance may be recovered . . .

Idaho Code § 56-218(1). The sole precondition for recovery is the payment of Medicaid benefits after the recipient reaches fifty-five years of age.

An application for Medicaid may be made by someone who is an “authorized representative” or “someone acting responsibly for the applicant,” rather than someone who could legally enter into a contract on behalf of the applicant. 42 C.F.R. § 435.907. For some who already receive other federal benefits, no separate application for Medicaid is required. 42 C.F.R. § 435.909. These provisions are clearly not designed to require applicants to contractually bind themselves to repay a debt. Indeed, there is no enforceable “debt” until both spouses have passed away. Idaho Code § 56-218(1)(a). There are potential remedies if a Medicaid recipient or her spouse transfers assets without adequate consideration. *See e.g.* Idaho Code § 56-218(2) (such transfers may be voidable) and 42 U.S.C. § 1396p(c) (eligibility penalties). However, there are no circumstances that repayment of correctly paid Medicaid can be demanded from a living spouse. There is no debt to the living Medicaid recipient or her non-Medicaid spouse. Rather, there is a statutory right to recover from the estate alone. The claim is not a claim based on a contract, but solely on statute.

As described in *Stafford*, both spouses are intimately involved in the eligibility process. *See Stafford*, 145 Idaho at 534-6, 181 P.3d at 460-2 (discussing of the Spousal Impoverishment provisions of the MCCA). This process benefits both the Medicaid spouse and the non-Medicaid spouse:

The chief purpose of the MCCA was to end the “pauperization [of the community spouse] by assuring that [she] has a sufficient—but not excessive—amount of income and resources available” while the other spouse is institutionalized. H.R.Rep. No. 105(II), 1988 U.S.C.C.A.N. at 888. The goal of the MCCA was to provide sufficient income and resources for the community spouse while also ensuring that a fair share of the couple’s resources were employed for the care of the institutionalized spouse.

Stafford, 145 Idaho at 534, 181 P.3d at 460 (quoting *Cleary v. Waldman*, 167 F.3d 801, 805 (3rd Cir.1999) cert. denied 528 U.S. 870, 120 S.Ct. 170, 145 L.Ed.2d 144 (1999)). Therefore, even if the Medicaid application process could be analogized to a contract, it would be a contract in which both spouses participated and both spouses benefitted. Therefore, the separate property of the non-Medicaid spouse would still be subject to the Medicaid recovery “debt.” *Williams v. Paxton*, 98 Idaho 155, 162, 559 P.2d 1123, 1130 (1977).

The reality is, estate recovery is an entirely statutory remedy which is enforceable, not against the couple individually, but only against their estates after they pass away. Other than the tracing of joint assets, as previously discussed, there is no occasion to determine whether the estate consists of community or separate property.

It is for this same reason that it is unnecessary for the Department to seek to set-aside marriage settlement agreements. Those agreements serve a valuable purpose under the Spousal Impoverishment provisions to preserve assets for the non-Medicaid spouse. However, because recovery does not depend on the ultimate characterization of the couple’s property, it is not necessary to set aside the marriage settlement agreement.

VI.

CONCLUSION

Idaho Code § 56-218 permits the recovery of the assets of this joint estate whether they can be characterized as community or separate property. The Department's claim should be allowed.

DATED this 7 day of May, 2012,



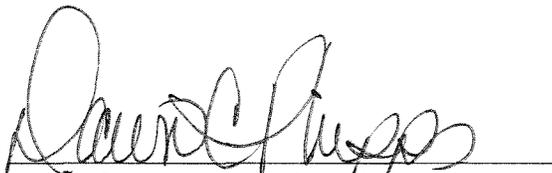
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CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing document were mailed, postage pre-paid, to the following:

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DATED this 9 day of May, 2012.



Dawn C. Phipps, Legal Assistant