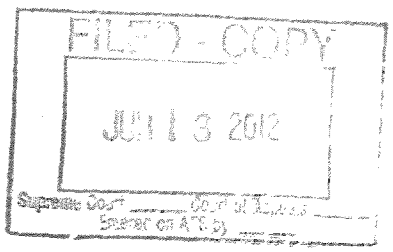
6-13-2012

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE ESTATE OF: **VIVIAN M. 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. WIGGINGS,** **Respondent.**	**SUPREME COURT NO. 39129**



RESPONDENT'S BRIEF

APPEAL FROM THIRD JUDICIAL DISTRICT, WASHINGTON COUNTY,
THE HONORABLE LINDA COPPLE TROUT, PRESIDING

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

S. KAY CHRISTENSEN, ISB NO. 3101
CHIEF CONTRACTS AND
ADMINISTRATIVE LAW DIVISION

W. COREY CARTWRIGHT, ISB NO. 3361
Deputy Attorney General
3276 Elder, Ste. B
P.O. Box 83720
Boise, Idaho 83720-0009

ATTORNEY FOR APPELLANT

R. BRAD MASINGILL
Attorney at law
27 W. Commercial Street
P.O. Box 467
Weiser, Idaho 83672
ISB No. 2083

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

STATUTES

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from a Memorandum Decision by Judge Frates, Washington County Magistrate and from the decision on appeal to the District Court, former Justice Trout presiding, both disallowing a creditor's claim in a probate proceeding and Respondent's application for attorney's fees and costs pursuant to Idaho Code 12-117 and Idaho Code 12-121. This case involves the State of Idaho, Department of Health and Welfare (hereinafter Department or State) seeking recovery of Vivian Wiggins' (hereinafter Vivian) bill for Medicaid assistance against the separate property of her husband, Emerson Wiggins (hereinafter Emerson). The Department seeks collection through **Idaho Code § 56-218,** which is limited in its application by a federal statute, **42 U.S.C. § 1396p**.

Course of Proceedings

The Personal Representative was appointed in the Wiggins estate on May 22, 2009. The Department filed a creditor's claim in the amount of $264,674.45 on November 23, 2009. On November 24, 2009, the Department received a Notice of Disallowance of Claim from the Personal Representative. On November 30, 2009, the Department filed its Petition for Allowance of Claim. Hearing was held on the Department's Petition on February 3, 2010. At the hearing, the Department entered into a stipulation which provided that in order for Vivian to have been qualified to receive Medicaid funds there must have been an agreement transmuting Vivian and Emerson's community property, equally, to their sole and separate property. The transmutation agreement determined the amount of spend-down required of Vivian before she could be eligible for Medicaid. Over the course of a year or two after the transmutation agreement was executed, the Department determined that Vivian had spent down her resources and because she had no interest in any other property, including Emerson's, she was granted Medicaid eligibility.

Despite stipulating that a transmutation agreement must have existed in order for Vivian to become eligible, the Department, on appeal to the District Court, insisted it had not so stipulated.

The Department, after providing the vehicle for transmutation, seeks to recover its debt from Emerson's sole and separate property. In fact, the Department supervised the spend-down of Vivian's only assets in order to make her eligible for assistance. Vivian died and was followed in death by Emerson.

The Department alleges a joint probate took place. In fact, the only asset subject to probate was the separate property. Vivian was made a part of the probate proceedings simply to permit any property in which she might have an interest and which might be unknown to the Personal Representative to be dealt with. The "joint" probate should not be confused with the actual facts. There were no joint or community assets administered by the probate. The only asset in the probate was the separate property of Emerson, in the form of cash. Tr. 000022-000024 and Tr. 000050.

The Magistrate denied the Department's claim on the basis that Emerson's separate property is not subject to Medicaid recovery. Tr. 000116.

The Department appealed the Magistrate's decision to the District Court. Former Justice, Linda Copple Trout also denied the Medicaid claim as against Emerson's separate property. Tr.000427.

Another case was making its way through the probate system in Ada County, described herein as ***In Re the Estate of Perry***. Tr. 000339. This Court heard oral argument on the Department's appeal of a denial of a claim against the separate property of one of the decedents

on June 4, 2012. The **Perry** Magistrate denied the Department's claim based in part on the same statutory and case law applicable hereto.

The simple way to state the issue before the Court is that the two cases in the Magistrate level and the two cases on appeal to the District Court found that the separate property of the non-recipient spouse is not subject to Medicaid recovery.

The Respondent sought attorney's fees and costs against the Department and timely filed its appeal of the denial of attorney's fees and costs at the Magistrate and District Court level. Tr. 000190. The issue of attorney's fees and costs pursuant to ***Idaho Code 12-117*** and ***12-121*** are before this Court. Tr. 000260.

Statement of the Facts

Emerson Wiggins ("Emerson") was born [redacted] and died February 9, 2009, at the age of 98. Vivian Wiggins ("Vivian") was born [redacted] and died January 30, 2009, at the age of 98. At all times material to this proceeding, until the death of Vivian, Emerson and Vivian were husband and wife. The Department describes the "facts" in its Appellate Brief before Justice Trout without mention of the transmutation it participated in, nor the spend down of Vivian's assets to allow her to qualify for Medicaid. The Department instead states:

> "About June 7, 2002, Vivian was admitted to a nursing home in Weiser, Idaho. Emerson and Vivian applied for medical assistance, also known as Medicaid, on or about November 18, 2002, to help pay for Vivian's medical care. As the State's brief indicates, Vivian became eligible for Medicaid on September 1, 2003, and between that time and Vivian's death the Department provided payment for Vivian's medical care, through the Medicaid program, in the sum of at least $272,134.68.[1] The property of this estate consists of a bank account with an inventory value of $78,659.44. Tr. 000269-000270.

The Department's participation in the transmutation is entirely inconsistent with its subsequent effort to recover against Emerson's separate property. The record does not show that the Department, or its agents, informed either Vivian or Emerson (who were blind and cared for by their son, the Personal Representative) of its intention to come after Emerson's separate property upon his death. The Department's participation in the transmutation caused, as a matter of law, Vivian to have no interest in Emerson's separate property. There is an inherent contradiction created by the Department's participation in the transmutation, only to subsequently "interpret" the statutes and case law as holding that Emerson's separate property is subject to Medicaid recovery. Because of the transmutation, which occurred in 2002, the Wiggins did not seek counsel to determine their legal rights. The Department, however, simply waited until both Emerson and Vivian died and then came after Emerson's separate property.

ISSUES ON APPEAL

1. **Transmutation Agreement.** In the appeal to the District Court and in Briefing to the Magistrate, the Department took the position that it did not stipulate that a Marriage Settlement Agreement existed. Tr. 000286. It has abandoned that contention before this Court. Thus, there is no question of fact about the existence of a Marriage Settlement Agreement, that it had apparently been lost, and that such MSA transmuted Vivian Wiggins and Emerson Wiggin's community property to separate property.

2. **State Statute.** Did the Magistrate and District Court correctly determined that ***Idaho Code 56-218(1)*** did not allow the Department to recover on its debt to Vivian against Emerson's separate property?

3. **Federal Statute.** Did the Magistrate and District Court correctly interpret ***42 U.S.C. § 1396p,*** and its subsections and definitions, as prohibiting the Department from recovering on its debt to Vivian against the separate property of Emerson?

4. ***Barg***. Was ***Barg*** directly on point, pointing out the preclusion of recovery on its debt to Vivian from Emerson's separate property?

5. **Jackman**. Did the Magistrate and District Court properly interpret the Idaho Supreme Court's holding in ***Idaho Department of Health and Welfare v. Jackman,*** 132 Idaho 213 (1998) as precluding the Department's recovery on its debt to Vivian from Emerson's separate property?

6. **In re Perry**. Did the Magistrate and District Court correctly interpret ***Perry*** as agreeing with those Court's determination that Vivian's debt to the Department could not be collected against Emerson's separate property?

7. **Paxton**. Is ***Williams v Paxton*** applicable?

8. **Attorney's Fees and Costs at the Magistrate and District Court Level.** Is the Estate entitled to an award of attorney's fees against the Department pursuant to ***Idaho Code 12-117*** and/or ***Idaho Code 12-121*** at the Magistrate and District Court levels?

9. **Attorney's Fees on Appeal.** Is the Estate entitled to attorney's fees and costs on appeal pursuant to ***Idaho Code 12-117*** and/or ***Idaho Code 12-121?***

ARGUMENT

I.

STANDARD OF REVIEW

This case involves the interpretation of state and federal statutory and case law. The interpretation of a statute is a question of law over which this Court exercises free review. ***Curlee v. Kootenai County Fire & Rescue***, 148 Idaho 391 (2008) *citing* ***State v. Hart***, 135 Idaho 827 (2001).

This case reveals significant flaws by the Department in its procedural and substantive processes, its flawed interpretation of the State statute, its equally flawed analysis of the controlling Federal statute, as well as failure to follow case law in Idaho and elsewhere on this issue.

The standard of review of issues of law by this Court will simply require proper statutory and case law interpretation, all of which is clearly inapposite to the State's position.

II.

IDAHO CODE § 56-218 DOES NOT PERMIT MEDICAID RECOVERY AGAINST EMERSON'S SEPARATE PROPERTY

A. The Stipulation.

To understand the predicate for the Stipulation it is best to review the procedure used in the underlying Medicaid processes. Vivian was determined to be eligible for Medicaid as previously discussed. Between September 1, 2003 and the time of her death the Department provided medical assistance benefits to Vivian in the sum of $272,134.68. Emerson died less than two weeks after

Vivian and a probate was opened. The property of the Estate consists solely of a bank account which the estate inventory valued at $78,659.44, all of which is the separate property of Emerson. Tr. 000022-000024. In fact, the funds still in existence are the funds transmuted to Emerson by the Department and agents. The funds were declared Emerson's separate property at the time of the transmutation and were listed in the probate inventory and schedules as his sole and separate property. Tr. 000022-000024. The Magistrates in both the Ada County case and in the case at bar, as well as the District Courts in both proceedings on appeal, ruled recovery of Medicaid funds provided to Vivian are not recoverable from the separate property of the non-recipient surviving spouse (Emerson). The Department now appeals Judge Frates' and former Justice Trout's ruling.

The Department stipulated in open court that it is impossible for Vivian to have been eligible for Medicaid without the transmutation. See the Transcript of the hearing on the 3rd day of February, 2010, which states in pertinent part as follows::

> "Judge Frates: And it my understanding after having met with both counsel in chambers that there would be at least some stipulation of facts we can put on the record.
>
> Mr. Masingill: Your Honor, this is what we've stipulated to. **That the Department treated the couple, Emerson and Vivian, as though they had a marriage settlement agreement that divided their assets. The marriage settlement agreement would have transmuted the property from community property to separate property to each party.** The marriage settlement agreement would have been dated approximately 2002. That we agreed to the admission—stipulate to the admission of the Exhibits that I have presented which are Exhibit A through G, I believe is the last one. At any rate, they're Bates nos. 001 through 097.
>
> We stipulate that the first application for Medicaid took place in 2002 and it is shown as Bates nos. 033 through 097. That the second application was applied for on 8-27-03 and it is Bates nos. 058-060.
>
> **We've stipulated that unless the MS—the marriage settlement had been – unless it had been executed, Vivian would not have been eligible to received Medicaid benefits.....**
>
> Judge Frates: Okay. Just a second. **Mr. Cartwright is that the stipulation on behalf of the State-the claimant?**

Mr. Cartwright: **That is correct, your Honor**. I would offer one other stipulation at this point and that's that neither party has been able to locate the original marriage settlement agreement." (emphasis added).

See also Judge Frates' comment after the stipulation was entered on the record:

> Judge Frates: This appears, based on the stipulation, to be, you know, a matter of law. It involves federal laws and state laws and there are a couple of cases involved.

Judge Frates was well within his judicial province to accept the stipulation and treat this case as one of determination of the law applied to those facts. The Department's previous express assertion that there was some factual dispute after the stipulation, and its implication in its brief to the District Court that the stipulation did not mean what it clearly said, is inappropriate considering the Magistrate's proper reliance thereon.

In fact, the Estate had a witness who was going to testify that the Department regularly used Marriage Settlement Agreements and that a substantial amount were lost by the Department after being transmitted from her (the Weiser office) to the Department. The stipulation on the record came about on the date of hearing after the Department's counsel was advised in chambers of the nature of the witnesses' proposed testimony. Given the propensity to lose the written agreements, and the fact that Vivian could not have become eligible for benefits without one, convinced the Department that indeed one existed. The stipulation by the Department is a judicial admission. ***In re Universe Life Ins. Co.***, 144 Idaho 751 (Idaho, 2007).

The stipulation on the record resolved any issue, illusory or not, that Emerson's property was transmuted into his separate property.

B. Idaho Code 56-218(1) Does Not Permit the Department to Recover Medicaid Funds From the Non-Recipient Spouse's Separate Property.

Idaho Code § 56-218(1) reads as follows:

> 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"

The glaring problem with ***Idaho Code § 56-218(1)*** is its failure to define the **"estate of the spouse"**. As the Court is aware, Idaho is a community property state and property held by an individual of this State can be characterized as community property or separate property (this is not intended to imply those are the only types of property holding allowed in Idaho such as joint tenancy or the like, but are those at issue).

To determine what the legislature meant by the "estate of the spouse", the usual method is finding a definition of the same. However, ***Idaho Code § 56-218*** does not contain a definition. A review of the legislative history, however, does clarify the legislative intent, and directly contradicts the Department's position that separate property is part of the "estate of the spouse" for purposes of Medicaid recovery.

When the language of a statute is ambiguous, the intention of the legislation can be ascertained by its history. ***State v Yzaguirre,*** 144 Idaho 471 (2007). The following is the language from the Senate bill, thereafter becoming ***Idaho Code 56-218.*** The legislative history specifically states that its purpose is to limit recovery to the *community property* of the non-institutionalized spouse, not the separate property of the non-institutionalized spouse:

> "MEDICAL ASSISTANCE - Amends existing law to clarify when medical assistance may be recovered; and to specify when the cause of action accrues to void a transfer which was made without adequate consideration.

LEGISLATURE OF THE STATE OF IDAHO
STATEMENT OF PURPOSE
RS 13525

Under federal and state law, the state is authorized to set aside transfers of assets owned by recipients of Medicaid where the transfer is made without adequate consideration and those assets could have been used to pay for the medical assistance provided through Medicaid. In a recent decision, a state district court ruled that the state's action was barred by a four year statute of limitations which ran from the date of the transfer even though the circumstances of the transfer were not reasonably discovered by the state until after the four years had elapsed. The proposed legislation adds language to Idaho Code Section 56-218 that would prevent the statute of limitations from running until such time as the state discovers, or reasonably could have discovered, that the asset transfer was without adequate consideration. "Discovers" or "reasonably could have discovered" as used in proposed subsection 56-218(8) is intended to have the same meaning as "discovery", as interpreted by the courts, in subsection 5-218(4), Idaho Code. The proposed legislation also makes a technical correction to Idaho Code 56-218 to clarify that the non-Medicaid spouse of a Medicaid recipient need not survive the Medicaid recipient in order for the department to file a **claim against the "community property" of the non-Medicaid spouse's estate**. (emphasis added)."

The foregoing legislative history shows that the Idaho legislature never intended the statute to permit recovery of Medicaid from the separate property of the surviving spouse.

The Department's initial position encompasses such situations as occur when two older folks marry, both having substantial separate property from their former relationships. The Department's position was such that the subject couple can do nothing to protect each other's separate property from Medicaid recovery. It is unconscionable to think that folks who get married the second or third time around, presumably in their later years, would lose their separate property to Medicaid recovery provided to a spouse. The statute as applied in the manner originally demanded by the Department, is overbroad and unconstitutional. ***State v Bitt***, 118 Idaho 584 (1990).

The statute need not be interpreted as unconstitutional, as it is clear the legislature intended only "community property" of the non-institutionalized spouse to be subject to Medicaid recovery.

The Department's claim that its recovery can be made against the non-Medicaid recipient's separate property is not supported by the legislative history of ***Idaho Code 56-218(1).***

The Department in its Appellant's Brief now claims that its recovery can be limited to "once community property", thus shielding the second marriage example above from its reach. The Department still is unable to point to any language in ***Idaho Code 56-218***, or elsewhere, which supports its modified view of recovery.

Furthermore, the Department's claim that the administrative rules it has promulgated make that distinction is merely an attempt to avoid having to recognize that there is no language in ***Idaho Code 56-218*** which supports its position. The administrative rule ruse is in direct conflict with the legislative history.

C. Property Which was Community "at Some Time" Does Not Makes it Subject Recovery.

The Department argues in its Brief on appeal to the District and to this Court that it does not matter if the property it is seeking to recover is now separate property, so long as it was community property at some time in the past. Such a conclusion is not a substitute for reading the statutory and case law on this subject. In the case at bar, it is the Department's own actions which transmuted the community property of Emerson and Vivian into separate property. It cannot now claim its action in doing so had no effect.

In fact, once property is deemed separate, Idaho law applies. Idaho law does not distinguish between "once upon a time community but now separate property" and other forms of property ownership. No case law makes that distinction that this author could locate. The definitions of separate and community property are supplied by statute. The Idaho legislature did not mention in ***Idaho Code § 56-218*** such a distinction, nor does the legislative history discuss such a thing. It is

presumed the legislature knows its other enactments when it signs new law into effect. ***Druffel v. State, Dep't of Transp.***, 136 Idaho 853 (2002). Had the legislature made such a distinction between kinds of separate property, it had an obligation to change the law to that effect.

Its failure to do so requires construction of the statute and the definitions of separate and community property already in existence. Despite the attempt by the Department to create a new kind of separate property by administrative rule, the right to create property designations is solely within the province of the legislature.

By way of conclusion, there are no set of facts and no law (either statutory or by case) which supports the Department's right to recover its debt against the separate property of Emerson.

III.

FEDERAL MEDICAID LAW DOES NOT ALLOW RECOVERY OF EMERSON'S SEPARATE PROPERTY.

A. The General Portion of the Statute. The federal statute pertinent to this case, ***42 U.S.C. 1396p,*** starts with the general statement that no recovery will be allowed, except for those expressly allowed. See ***42 U.S.C. 1396p(b)(1)*** which states:

"(b) Adjustment or recovery of medical assistance correctly paid under a State plan.

(1) **No** adjustment or **recovery** of any medical assistance correctly paid on behalf of an individual under the State plan **may be made**, ***except*** that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:

(A) In the case of an individual described in subsection (a)(1)(B) of this section, the State shall seek adjustment or recovery from the ***individual's estate*** or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.

(B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the ***individual's estate***, but only for medical assistance consisting of

(i) nursing facility services, home and community-based services, and related hospital and prescription drug services, or

(ii) at the option of the State, any items or services under the State plan."

As the Court can readily see, there is basis in the general portion of the statute for recovery from the "spouse's estate". The word "individual" cannot be reasonably construed as meaning the "spouse's" estate.

B. The Definition Section. ***U.S.C. 1396p*** has definitions which explain the intention of the recovery legislation (contrary to the Idaho statute). The definition section, ***42 U.S.C. 1396p(b)(4)***, is quoted in pertinent part:

"(4) 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 (and shall include, in the case of an individual to whom paragraph (1)(C)(i)* applies) [*if the Medicaid was improperly granted], 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 added)

The definition section of the federal statute specifically mentions only "individual" and "individual's estate". At no place in the aforementioned portion of the federal statute will the Court

find any language which mentions a spouse, a spouse's assets, a spouse's estate, a spouse's separate property, or the like.

Furthermore, the case at bar does not include any of the "other arrangements" such as joint tenants, and the like described in ***U.S.C. 1396p(b)(4)***. The Magistrate Court specifically found that the federal statute mentioned some of the arrangements to which recovery might apply, and found that those arrangements are not of the kind represented in the case at bar. Tr. 000121.

In fact, applying statutory principles of construction, the failure to specifically grant a remedy against a spouse, or a spouse's separate estate, or a spouse's separate property, when the right to recovery is only given as an exception to the anti-recovery rule of the statute, shows there is no right of recovery against Emerson's separate property. Without it, all of the Appellant's arguments fail.

If Congress intended the separate property estate of the non-Medicaid spouse to be available for recovery, it would have been included in the language of the statute. Its failure to do so is, by statutory construction, evidence of Congress' prohibition of recovery from the non-Medicaid spouse's separate property. ***Barg***, supra; ***C. Forsman Real Estate Co. v. Hatch***, 97 Idaho 511, 515, 547 P.2d 1116, 1120 (1976); ***Thomson v. City of Lewiston***, 137 Idaho 473, 478, 50 P.3d 488, 493 (2002); and ***Callies v. O'Neal***, 216 P.3d 130 (Idaho, 2009).

See also ***State v. Maybee***, 148 Idaho 520 (Idaho, 2010) which stated:

> "rules of statutory construction dictate that a reviewing court shall not interpret a statute in a manner that leads to an absurd result, ***In re Daniel W.***, 145 Idaho 677, 183 P.3d 765, 768 (2008), and the legislature in drafting a statute is charged with knowledge of applicable statutory background and legal precedent. ***Druffel v. State, Dep't of Transp.***, 136 Idaho 853, 856, 41 P.3d 739, 742 (2002). "

There has been no authority offered by the Department which agrees with its interpretation of the federal statute. The federal statute is clear and unambiguous, and states that only the "estate" of the individual or property in which the individual had an interest at death, are liable for recovery.

C. In re the Estate of Barg.

The Department has not pointed this Court to any decision which contradicts the well-founded and articulated case of ***In re the Estate of Barg,*** *752 N. W. 2nd 54 (Minn. 2008)*, hereinafter ***Barg***. The ***Barg*** case was not cited by the ***Jackman*** court because ***Barg*** was decided nearly 10 years later. If the ***Jackman*** Court had been privy to the analysis in ***Barg***, it is likely the flawless logic of that decision would have found its way into the ***Jackman*** decision.

The law in Idaho announced in ***Jackman*** disallows recovery from the non-recipient spouse's separate property. It dealt with a pre-1993 federal statute. It was the post-1993 federal statute, which was analyzed by ***Barg***, and it is the post-1993 federal statute which is applicable to the instant case. Despite the Department's attempt to use ***Jackman*** as authority for its position and to disregard ***Barg***, that attempt is flawed. As the Court is aware, State statutes are preempted by federal legislation, and this Court has so stated in ***State Dept. of Health and Welfare*** **v.** ***Hudelson,*** 146 Idaho 439 (2008):

> "The Court considered 42 U.S.C. § 1396p, the **anti-lien** provision of the federal Medicaid statute, and found that it limited a state's ability to recover medical expenses it paid on a Medicaid recipient's behalf. Id. at 284, 126 S. Ct. at 1763, 164 L.Ed.2d at 473-74. ***A state Medicaid plan must comply with section 1396p, which generally prohibits States from placing liens against a Medicaid recipient's property***. 42 U.S.C. § 1396a(a)(18)." (emphasis added).

Hudelson brings home the truth about the Medicaid statute. It is a prohibition against any recovery **unless specifically authorized by the exceptions** in the federal statute. The statute is

"anti-lien". Thus, there is no right to recovery (under Idaho law) unless the federal Medicaid statute authorizes it specifically as an exception to the mandatory lien prohibition.

Barg was quoted in a Missouri case, ***In re the Estate of Bruce***, 260 S.W. 3rd 398 (Mo. App. 2008) in which an award in favor of the State of Missouri was reversed where tenancy in entirety was involved. In **Bruce**, supra, the Supremacy clause required Missouri to comply with **42 USC 1396p(b)(4)B**. Missouri's claim was disallowed based on the same rationale as in the case at bar. **Bruce,** supra, makes the very same distinction as does the Respondent, Judge Frates, and former Justice Trout as to subsection **(b)(4)B**, as well as agreeing with Respondent's interpretation of **subsection (b)(4)A.**

D. Jackman.

The case of ***Idaho Dept. of Health and Welfare v. Jackman***, 132 Idaho 213 (1998), hereinafter ***Jackman***, is not helpful to the Department. Should the Department attempt to use before this Court what it has previously described as a "draft" of the ***Jackman*** case, the Court should entirely ignore the same and not give it any weight whatsoever.

Jackman is cited in national publications for the following proposition:

> "States have, however, occasionally been aggressive against the estate of a surviving spouse, even when this appears to fly in the face of the law. *[See Idaho Dep't of Health and Welfare v Jackman,* 132 Idaho 213, 970 P.2d 6 (1998), which permitted recovery after the death of the surviving spouse, ***to the extent of the predeceasing recipient-spouse's community interest*** ***acquired after institutionalization."*** *See* ***Elder Law Answer Book, Second Edition, Aspen Publishers, Robert B. Fleming and Lisa Nachmias Davis****, authors.*

Other than the Department's contention that the Idaho Supreme Court decided the ***Jackman*** case incorrectly, and revised it (the evidence of which is an unsigned and unfiled draft presented by

Mr. Cartwright to the Magistrate. Tr. 000084) , the reported ***Jackman*** case, found at 132 Idaho 213 (1998) reads exactly the way the national publication cited above has depicted it.

What is before this Court is reported cases, and the language of the federal and state statutes.

IV.

STATE PROPERTY LAW

A. Separate Property. As to Emerson's separate property, Idaho law clearly states that separate property is exempt from any interest of a spouse.

Idaho Code 32-903 states as follows:

> "All property of either the husband or the wife owned by him or her before marriage, and that acquired afterward by either by gift, bequest, devise or descent, or that which either he or she shall acquire with the proceeds of his or her separate property, shall remain his or her sole and separate property. "

Separate property in Idaho is guarded by the Courts. The owner is free to do with his or her separate property as he or she pleases, including gifting, devising, or transferring, without any notice to a spouse. See ***Simplot v. Simplot***, 96 Idaho 239, 526 P.2d 844 (Idaho, 1974) which stated:

> "The right to preserve separate property was acknowledged in the Malone case."

In ***Vanwassenhove v. Vanwassenhove***, 134 Idaho 198 (Idaho App., 2000) the Idaho Court of Appeals reinforced this concept by holding:

> "It is a well-settled principle of Idaho community property law that only net income from separate property becomes community property. ***Malone v. Malone***, 64 Idaho 252, 261, 130 P.2d 674, 678 (1942); ***Weilmunster v. Weilmunster***, 124 Idaho 227, 236, 858 P.2d 766, 775 (Ct.App.1993). The Idaho Supreme Court has explained that to "hold otherwise would cause the community to, in time, entirely consume the separate estates of the members thereof and would nullify [§ 32-903] and [§ 32-906] of the code." ***Malone***, 64, Idaho at 261, 130 P.2d at 678. Thus, the net income rule protects both "the rights and interests of individual spouses in the preservation and maintenance of separate property as well as . . . the interests of the community." ***Houska v. Houska***, 95 Idaho 568, 571, 512 P.2d 1317, 1320

(1973). (emphasis added).

The right of the Department to recover money lawfully paid on behalf of an institutionalized spouse is restricted by the terms of the federal statute and by Idaho's separate property statute and case law. The Court is asked to remember that even if the legislature subsequently sees fit to lay claim to the non-Medicaid spouse's separate property, it is not lawful to do so unless the federal Medicaid statute authorized it as an exception to the prohibition against recovery.

B. Statutory Construction Belies the Department's Entire Case. Had the Idaho legislature have intended to apply ***Idaho Code 56-218(1)*** to the separate property of the non-recipient spouse, it could have so stated. Its failure to do so is deemed to have expressed its intention not to do so. With the **(a)** legislative history showing community property of the non-recipient spouse to be the only target intended by the statute, **(b)** the legislature's failure to state therein that separate property of the non-recipient spouse was subject to recovery, and **(c)** its failure to provide for the same in a definition section, there is no way to read ***Idaho Code 56-218(1)*** to include recovery against the separate property of the non-recipient spouse. In fact, statutory construction makes such an interpretation unreasonable.

The Idaho Supreme Court stated in ***Kelso & Irwin, PA v. State Ins. Fund***, 134 Idaho 130 (Idaho, 2000) as follows:

> "An interpretation of a statute is a question of law over which we exercise free review. See ***State v. Hagerman Water Right Owners***, 130 Idaho 727, 732, 947 P.2d 400, 405 (1997). Additionally, if it is necessary for this Court to interpret a statute, then we will attempt to ascertain legislative intent. Id. at 733, 947 P.2d at 406. Finally, in construing a statute, this Court may examine the language used, the reasonableness of the proposed interpretations, and the policy behind the statute. Id."

As mentioned infra, the legislature in drafting a statute is charged with knowledge of applicable statutory background and legal precedent. A statutory construction of ***Idaho Code 56-218*** and ***42 U.S.C. 1396p*** reveals only one reasonable interpretation, that the separate property of the non-institutionalized spouse is not subject to Medicaid recovery.

C. Avoiding Right to Receive Assets-Subsection (h). The Department claims in its Appellant's Brief that the proper definitions to apply to this recovery action are found in ***42 U.S.C. 1396p(h).*** The Department has seriously misinterpreted subsection (h). ***42 U.S.C. 1396p(h)(1)*** provides a definition of "***assets***" which includes "***all income***" and "***resources***" which the individual or such individuals spouse is entitled to "***but does not receive***" because of action of the individual or such individual's spouse. This section discusses "***resources***" and "***income***" which the individual or spouse "***does not receive***", because it is referring to eligibility, not recovery.

The definitions of what can be *recovered* are located in ***42 U.S.C. 1396p(b),*** not in ***subsection (h).*** Subsection (h) clearly is intended to prohibit a Medicaid recipient from efforts to avoid "receiving" *income* or *resources*. It has nothing to do with recovery. It does not prohibit a transmutation of the character of property as was done in the case at bar. By transmuting their property, the Wiggins did not avoid "***receiving***" *income* or *resources*.

An action which would trigger subsection (h), for example, is the refusal to receive a distribution of assets from a gift, trust, life insurance policy, or estate to the Medicaid recipient, as the intended beneficiary. Such an action would cause that individual "not to receive it" and subsection (h) prohibits such action. An action which causes an individual "not to receive" an asset unambiguously governs subsection (h). Subsection (h) would apply to (and make such an asset of

the individual for eligibility purposes) any asset which would have been received by either the individual or spouse but for:

(1) a refusal to receive the same by the action of the individual or spouse (subsection (h)(1)(A),

(2) a refusal to receive the same by the action of a conservator for example (subsection (h)(1)(B), or

(3) a refusal to receive the same by the action of a trustee of a trust pursuant to a power of appointment or pursuant to a trust or by power of attorney, by way of examples (subsection (h)(1)(C).

The attempt by the Department to confuse the clear wording of the recovery statute, geared to recover assets in which the recipient of Medicaid owned an interest *at the time of death* [subsection (b)] with the portion of the statute which is intended to apply to efforts by the individual, spouse, or others on their behalf to avoid "receiving" property, and thus to avoid ineligibility [subsection (h)], is without merit.

The proper statute for assessing if an asset is recoverable is ***42 U.S.C. 1396p(b)(4)***. It has been discussed infra, however to fully rebut that issue as discussed by the Appellant's Brief, an "estate" has been defined by ***42 U.S.C. 1396p(b)(4)*** [the recovery statute] as follows:

"(4) 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 (and shall include, in the case of an individual to whom paragraph (1)(C)(i)* applies) [*if the Medicaid was improperly granted], 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.**

We also are not dealing with a home in the case at bar. Thus, the Department's reference to the spousal impoverishment portion of the statute is not relevant.

Once again, the federal statute at play in the case at bar focuses on the recipient's interest in assets at the date of death. That portion of the statute applies to the "estate" and separate property. The Department is simply attempting to muddy the definitions in the recovery portion of the statute i.e. subsection (b) by inserting the definition of assets involving efforts to avoid "receipt" thereof as clearly provided in subsection (h).

By reviewing the words used in subsection (h) such as "*income*", "*resources*", and "*is entitled to but does not receive*", the statutory construction alleged by the Department is shown to be flawed and inapplicable.

By reviewing the words used in subsection (b) such as "*estate*", "*in which the individual had any legal title or interest*", and "*at death*", the clear statutory language for recovery from estates is shown to be as that proposed by the Respondent, both Magistrates, and both Judges on appeal to the District Court.

D. Automatic Transfers at Death. Just as ***Idaho Code 56-218(2)*** does not allow a life estate to avoid recovery, it finds its applicability from ***42 U.S.C. 1396p(b)(4)*****(B)** which specifically allows (contrary to the anti-recovery statute) recovery against certain types of attempts to remove assets from a Medicaid recipient's estate, such as joint tenancies, life estates, and those other specifically allowed recoveries. Judge Frates properly interpreted the same as automatic transfers. Tr. 000121. Such automatic transfers take effect as a legal fiction just prior to death.

Thus, they are normally not included in an estate. The Department criticizes Judge Frates' insight into the intricacies of the federal statute, but that criticism is unfounded as the automatic transfers described in subsection ***(b)(4)(B)*** are clearly excluded from the anti-recovery portion of the statute and thus makes them recoverable. Nothing else, including Emerson's separate property, is recoverable under subsection ***(b)(4)(B).***

V.

WILLIAMS V PAXTON DISTINGUISHED

The Department cites ***Williams v Paxton***, 98 Idaho 155 (1977) as authority that a Medicaid recovery action can get at separate property. Such is not worthy of inclusion in a brief to this Court. First, the Department emphasizes that its recovery action is not contractual in nature, but is a recovery rooted in a statute. Appellant's Brief at pages 14-16. By way of contradiction, ***Paxton*** involves a contractual issue. Furthermore, ***Paxton*** involved an action by a creditor of both spouses to get at the separate property of the spouses to the contract. As this Court has repeated held and did so in ***Paxton***, a creditor of a party to a contract may seek recovery against that party's community property or separate property. ***Paxton***, and its citation to this Court, is inapplicable in every respect.

VI.

THE ESTATE IS ENTITLED TO ATTORNEY'S FEES AND COSTS PURSUANT TO IDAHO CODE 12-117

A. The Statute. ***Idaho Code 12-117*** was enacted to provide mandatory relief to estates which have incurred attorney's fees and costs because a governmental agency acted without any basis in law or fact.

Idaho Code 12-117 reads as follows:

> "In any administrative or civil judicial proceeding involving as adverse parties a **state agency**, a city, a county or other taxing district and a person, the court **shall** award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered **acted without a reasonable basis in fact or law**."

In the Memorandum decision, Judge Frates found the Department's interpretation of federal law to be unreasonable. Tr. 000121. Such is all that is required for an award of attorney's fees pursuant to this code section.

B. Case Law.

Idaho Code 12-117 has been applied against the State of Idaho regarding its improper attempt to impose its lien under the very same code section, ***Idaho Code 56-218***. See ***In re the Matter of Estate of Elliott*** which stated as follows:

> " [I]n any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law. I.C. § 12-117(1)(2004). This Court has held that the purpose of this statute is "two-fold: `(1) to serve as a deterrent to groundless or arbitrary agency action; and (2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies never should ha[ve] made." ***Rincover v. State, Dep't of Fin., Secs. Bureau***, 132 Idaho 547, 549, 976 P.2d 473, 475 (1999) (quoting ***Bogner v. State Dep't of Revenue & Taxation***, 107 Idaho 854, 859, 693 P.2d 1056, 1061 (1984)). If the Court determines that a party acted without a reasonable basis in fact or law, an award of attorney fees under I.C. § 12-117 is mandatory. Id."

C. No Law or Facts. ***Idaho Code 12-117*** is applicable to the present case. The Department had no law upon which it could make a cogent argument. Furthermore, the facts of the case clearly showed, as the Department so stipulated, that the property the Department was seeking to recover was not community property of Mr. and Mrs. Wiggins, not the separate property of Mrs.

Wiggins, but the separate property of Emerson D. Wiggins. There are no facts upon which the Department could have been justified in bring this recovery action. Further, as previously discussed, the legislative history of ***Idaho Code § 56-218*** only speaks of recovery from community property of the non-recipient spouse. Thus, no law justifies the Department's attempt to collect from Emerson's separate property.

D. On Appeal. The Respondent requests attorney's fees and costs on appeal pursuant to **Idaho Code 12-117.**

VII.

THE ESTATE IS ENTITLED TO ATTORNEY'S FEES AND COSTS PURSUANT TO IDAHO CODE 12-121

The Estate was clearly the prevailing party in every issue in this case, at the Magistrate and District Court. The Estate is entitled to attorney's fees and costs pursuant to ***Idaho Code 12-121,*** because of the frivolous and unreasonable actions and positions taken by the Department. ***Idaho Code 12-121*** confers the broad power of the court to "award reasonable attorney fees to a prevailing party or parties" in any civil action. An award under this code section requires an analysis of ***IRCP 54(e),*** which generally provides that attorney fees can only be awarded when the Court finds, from the facts presented, that the case was brought, pursued or defended frivolously, unreasonably, or without foundation.

By way of synopsis, the following reasons show the Department's attempt to recover against Emerson's separate property was frivolous under ***Idaho Code 12-121:***

a. Joint Probate: First, the Department claimed that the filing of a joint probate rendered its lien and recovery valid against Emerson. The filing of a joint probate, when the schedules of property show that all the assets are the separate property of Emerson, is frivolous. In fact, joint probates are filed all the time, but which decedent owns property is set forth in the schedules. The claim that a joint filing makes the State's recovery effective against the separate property of one of the decedents is frivolous. Filing a joint probate did not transmute Emerson's separate property into community property or into property to which the State's recovery attaches.

b. Emerson's Separate Property: Second, the Department claimed that the fact that there was no Marriage Settlement Agreement or the like had an impact on the Court's decision. That claim was frivolous. In open Court, as well as by written stipulation, the Department stipulated that the property at issue in this case is Emerson's separate property.

c. Perry: The Department claimed the ***Perry*** decision did not address the dispositive authorities. That claim is frivolous. The ***Perry*** decision discussed the appropriate statutes, both federal and state and the dispositive case, ***In re the Estate of Barg,*** *752 N. W. 2nd 54(Minn. 2008).*

d. Failure to Alert. The State of Idaho, Department of Health and Welfare, lost the identical issue in the ***Perry*** case. The State failed to alert the Magistrate or opposing counsel of the ***Perry*** decision, despite its obvious relevance to this case. The failure to disclose dispositive, relevant case law would be the subject of a bar reprimand if done by private counsel. The State of Idaho's counsel should be held to a higher standard. The Department's blatant failure to disclose the ***Perry*** decision to the Magistrate is relevant to the issue of attorneys fees and costs pursuant to ***Idaho Code 12-121.***

e. Stipulation. The Department denied the obvious intention and effect of its own stipulation put on record before the Magistrate.

f. Idaho Code 15-3-720. The Department attempted to convince the Magistrate that the Personal Representative had a conflict whereby the Estate could not collect attorney's fees despite ***Idaho Code 15-3-720*** which provides in pertinent part:

> "a personal representative who defends or prosecutes any proceeding in good faith, whether successful or not.... is entitled to receive from the estate his necessary expenses and disbursements including reasonable+ attorney's fees incurred."

g. On Appeal. The Respondent requests attorney's fees and costs on appeal pursuant to **Idaho Code 12-121.**

VIII.

COSTS

A. Costs Generally:

In Idaho, "costs" incurred in an action are to be paid as set forth in the rules of the court. **Idaho Code 12-101** states as follows:

> "**12-101. Costs.** Costs shall be awarded by the court in a civil trial or proceeding to the parties in the manner and in the amount provided for by the Idaho Rules of Civil Procedure."

B. Costs as a Matter of Right. Costs as a matter of right are set forth in **IRCP 54(d)(1)(C).** Those costs include service fees. The cost of subpoenaing witnesses is such a cost. The Estate is entitled to recover the $20.00 it spent for the subpoena service. This Court is requested an award of those costs, as more fully set forth in Exhibit A to the Affidavit of R. Brad Masingill in Support of Motion for Attorney Fees and Costs filed in the case in chief. Further, costs on appeal are requested.

Discretionary costs are also allowed pursuant to **IRCP 54(d)(1)(D).** This Court, in addition to an award of costs on appeal, is requested to affirm the award of costs for the consultation with an elder law expert, Dennis Voorhees, in the amount of $700.00.

Additionally, **IRCP 54(e)(5)** provides for attorney's fees as costs. The fees incurred to Dennis Voorhees were awarded by the Court and are requested to be further awarded on appeal under the not to well known provision of ***IRCP 54***. That award is applicable to the present case by virtue of ***IRCP 54(e)(8)*** which provides:

> "The provisions of this ***Rule 54(e)*** relating to attorney fees shall be applicable to all claims for attorney's fees made pursuant to section ***12-121, Idaho Code,*** and to any claim for attorney fees made pursuant to any other statute, or pursuant to any contract, to the extent that the application of this ***Rule 54(e)*** to such a claim for attorney fees would not be inconsistent with such other statute or contract."

CONCLUSION

In summary, the following facts and law support the position that the Department's attempted recovery against Emerson's separate property must fail:

a. The claim filed by the Department only applied to property to which Vivian had an interest as of the date of death, and does not apply against Emerson's separate property; and

b. The Department provided Vivian and Emerson with a Marriage Settlement Agreement which transmuted their community property to their respective separate property; and

c. The Federal statute clearly provides what the State may recover. It can only recover (i) property in Vivian's estate, (ii) property Vivian had an interest in at death, and (iii) community property of Emerson; and

d. ***Jackman***, the only Idaho case dealing with this issue, has concluded that the Department can only seek recovery against the community property of the spouse; and

e. ***Barg***, the most thorough and logical interpretation of the federal statute, concludes the federal statute does not permit recovery from Emerson's separate property; and

f. All the documents in the Wiggins file, entered into evidence as Exhibits A through G, fail to advise the Wiggins of the remedy the Department now seeks against Emerson's separate property; and

g. Transmutation of community property to separate property, only to seek recovery of the separate property upon the death of the non-recipient spouse, is contradictory to the Department's position; and

h. The 1993 Omnibus Budget Reconciliation Act of 1993, ***42 U.S.C. 1396p(b)(1),*** and ***(4)*** *(*the federal statute) allows recovery only against the "individual's estate; and

i. ***Idaho Code 56-218*** and Idaho case law is preempted by the federal statute which prohibits recovery against Emerson's separate property; and

j. Recovery against Emerson's separate property is not supported by federal law.

k. ***In re Perry*** supports the Magistrate's decision that the Department's and the decision of Justice Trout.

l. The Estate is the prevailing party and entitled to attorney's fees and costs pursuant to ***Idaho Code 12-117,*** on the underlying case and on appeal.

m. The Estate is the prevailing party and entitled to attorney's fees and costs pursuant to ***Idaho Code 12-121***, on the underlying case and on appeal.

For all the reasons set forth above, it is respectfully submitted that the Department have provided this Court with no authority upon which to grant it recovery against Emerson's separate property.

Respectfully submitted,

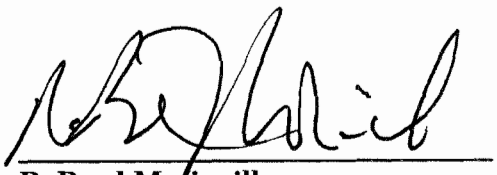
R. Brad Masingill
Attorney for Respondent

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT on the 8TH day of June, 2012, a true and correct copy of the foregoing Respondent's Brief was mailed by regular United States mail, postage prepaid thereon to the following:

Lynn Wiggins
1520 W. 2nd Street
Weiser, ID 83672

Idaho Department of Health and Welfare
c/o Corey Cartwright
Deputy Attorney General
3276 Elder, Ste. B
P.O. Box 83720
Boise, ID 83720-0009



R. Brad Masingill