STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
[Jansen, P.J. and Cavanagh and Gleicher, J.J.]

In re Estate of OLIVE RASMER.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellee,

vs

RICHARD RASMER, Personal Representative of the Estate of OLIVE RASMER,

Defendant-Appellant.

Supreme Court No. 153356
Court of Appeals No. 326642
Bay Probate Court
LC No. 14-049740-CZ

In re Estate of IRENE GORNEY.

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

ESTATE OF IRENE GORNEY,

Defendant-Appellee.

Supreme Court No. 153370
Court of Appeals No. 323090
Huron Probate Court
LC No. 13-039597-CZ

In re Estate of WILLIAM B. FRENCH.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

DANIEL GENE FRENCH, Personal Representative for the Estate of WILLIAM B. FRENCH,

Defendant-Appellee.

Supreme Court No. 153371
Court of Appeals No. 323185
Calhoun Probate Court
LC No. 2013-000992-CZ

In re Estate of WILMA KETCHUM.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

ESTATE OF WILMA KETCHUM,

Defendant-Appellee.

Supreme Court No. 153372
Court of Appeals No. 323304
Clinton Probate Court
LC No. 14-28416-CZ

In re Estate of OLIVE RASMER.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

RICHARD RASMER, Personal Representative of the Estate of OLIVE RASMER,

Defendant-Appellee.

Supreme Court No. 153373
Court of Appeals No. 326642
Bay Probate Court
LC No. 14-049740-CZ

BRIEF ON APPEAL OF APPELLEE MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES IN DOCKET NO. 153356

ORAL ARGUMENT REQUESTED

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

Matthew Schneider (P62190)
Chief Legal Counsel

Geraldine A. Brown (P67601)
Brian K. McLaughlin (P74958)
Assistant Attorneys General
Attorneys for Michigan Department of Health and Human Services
Plaintiff/Appellee
Health, Education & Family Services Division
P.O. Box 30758
Lansing, MI 48909
(517) 373-7700

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TABLE OF CONTENTS

Page

Index of Authorities iii

Statement of Jurisdiction vii

Counter-Statement of Questions Presented viii

Statutes Involved ix

Introduction 1

Counter-Statement of Facts and Proceedings 3

Standard of Review 6

Argument 7

I. MCL 400.112g-k permits the Department to seek estate recovery for medicaid services provided to an individual before that individual received notification of the estate recovery program from the plaintiff. 7

A. State law does not require notice before estate recovery may occur. 7

B. There is no federal law, federal regulation, or federal policy statement that requires the Department to provide notice of estate recovery. 11

C. At the time of signing the application certifying the receipt of information about estate recovery, each applicant submitted the application and accepted benefits knowing that his/her estate would be subject to estate recovery. 14

D. State and federal law provide notice to beneficiaries of Medicaid long-term care that their estates are subject to estate recovery. 16

E. The Department has taken no retroactive actions related to estate recovery. 18

F. Where there is no bar to recovery in the language of the statute the courts may not impose one. 19

II. The Rasmer Estate and other Claimants received all due process protections necessary, and the Department's claims are not limited by any due process violation. 22

A. The Claimants had statutory and actual information about estate recovery and made the deliberate choice to subject their probate estates to the full, unlimited estate recovery claim. 22

B. The Rasmer Estate did not suffer a substantive due process violation. 25

C. The Rasmer Estate's asserted notice failure does not constitute a procedural due process violation. 26

Conclusion and Relief Requested 28

INDEX OF AUTHORITIES

Cases

Adams Outdoor Advertising v East Lansing (*After Remand*),
463 Mich 17 (2000) 23

Anderson National Bank v Luckett,
321 US 233 (1944) 16

Bonner v City of Brighton,
495 Mich 209 (2014) 6

Bradley v Saranac Cmty Sch Bd of Ed,
455 Mich 285 (1997) 20

Chesapeake & O Ry Co v Michigan Pub Serv Comm,
59 Mich App 88 (1975) 20

City of Kentwood v Sommerdyke Estate,
458 Mich 642 (1998) 16, 17

Cook v Dep't of Social Servs,
225 Mich App 318 (1997) 25

Davis v Michigan Dept of Treasury,
489 US 803 (1989) 6

Department of Community Health v Anderson,
299 Mich App 591 (2013) 20

Driver v Naini,
490 Mich 239 (2011) 19

Ellsworth v Grand Rapids,
27 Mich 250 (1873) 17

Goldberg v Kelly,
397 US 254 (1970) 27

IBM v Dep't of Treasury,
496 Mich 642 (2014) 6

In re Adams Estate,
257 Mich App 230 (2003) 25, 27

In re Beck,
287 Mich App 400 (2010) 25

In re Estate of Catherine Klein,
__ Mich App __ (July 19, 2016) 14

In re Estate of Clark,
unpublished opinion per curiam of the Court of Appeals, issued May 28, 2015 (Docket No. 320720) 14

In re Estate of Gorney,
___ Mich App ___ (issued Feb 4, 2016) 23, 24

In Re Estate of Ketchum,
____ Mich App ____ (March 1, 2016) 7, 13

In re Estate of Keyes,
310 Mich App 266 (2015) 7, 10, 13, 28

In re Estate of Keyes,
498 Mich 968 (2016) 7

In re Harper,
302 Mich App 349 (2013) 19

Lesner v Liquid Disposal,
466 Mich 95 (2002) 6, 21

Mettler Walloon, LLC v Melrose Twp,
281 Mich App 184 (2008) 26

Michigan Fedn of Teachers & Sch Related Pers, AFT, AFL-CIO v Univ of Michigan,
481 Mich 657 (2008) 20

Papas v Michigan Gaming Control Bd,
257 Mich App 647, 658; 669 NW2d (2003) 11

People v Mihelsic,
468 Mich 908 (2003) 21

Pohutski v City of Allen Park,
465 Mich 675 (2002) 6

Reed v Reed,
265 Mich App 131 (2005) 25

Roberts v Mecosta Co Gen Hosp,
466 Mich 57 (2002) 21

Ronney v Dep't of Social Servs,
210 Mich App 312 (1995) 28

Stowers v Wolodzko,
386 Mich 119 (1971) 20

Taylor v Michigan Pub Utilities Comm,
217 Mich 400 (1922) 20

Texaco v Short,
454 US 516 (1982) 16

Tyler v Livonia Pub Schs,
459 Mich 382 (1999) 21

United States v Morton,
467 US 822 (1984) 6

Usery v Turner Elkhorn Mining Co,
428 US 1 (1976) 17

Vicencio v Jaime Ramirez, MD, PC,
211 Mich App 501 (1995) 27

Wickens v Oakwood Healthcare Sys,
465 Mich 53 (2001) 21

Statutes

42 USC 1396c 22

42 USC 1396p 1

42 USC 1396p(b) ..... passim

42 USC 1396p(b)(1) 17

42 USC 1396p(b)(2) 3

42 USC 1396p(c) 19

42 USC 1396p(c)(1) 16

MCL 400.112g ..... passim

MCL 400.112g(1) 2, 19
MCL 400.112g(2) 2
MCL 400.112g(3) 2, 10
MCL 400.112g(4) 2
MCL 400.112g(5) 2, 18
MCL 400.112g(6) 2
MCL 400.112g(7) 2, 8, 21
MCL 400.112g(8) 2
MCL 400.112h ..... passim
MCL 400.112i ..... passim
MCL 400.112j ..... passim
MCL 400.112k ..... passim
MCL 700.2404 24
MCL 700.3703 ..... 23, 24
MCL 700.3804 5
MCL 700.3805 ..... 1, 24
MCL 700.3805(f) 1, 24

Regulations

42 CFR 430.16 18
42 CFR 430.20 18
42 CFR 433.36 7
42 CFR 447.256 18

STATEMENT OF JURISDICTION

On July 8, 2016, this Court granted Defendant/Appellant, the Estate of Olive Rasmer, leave to appeal the February 4, 2016 opinion of the Court of Appeals in SC No. 153356. This Court has jurisdiction pursuant to MCL 600.215(c) and MCR 7.303(B)(1).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

This Court's grant of cross-applications in these consolidated cases identified three questions presented:

1. Whether and to what extent MCL 400.112g-k permit the plaintiff to seek estate recovery for medicaid services provided to an individual before that individual received notification of the estate recovery program from the plaintiff;

2. Whether and to what extent estate recovery for such pre-notification services constitutes a violation of the individual's substantive and/or procedural due process rights; and

3. Whether and to what extent a challenge to the plaintiff's estate recovery efforts under MCL 400.112g(4) is subject to judicial review.

The Department is addressing questions 2 and 3 as the appellant in *In re Gorney Estate*, SC No. 153370. Here, as appellee in *In re Estate of Olive Rasmer,* SC No. 153356, the Department addresses questions 1 and 2 to fully respond to the *Rasmer* appellant's brief.

1. Whether MCL 400.112g-k permit the plaintiff to seek estate recovery for medicaid services provided to an individual before that individual received notification of the estate recovery program from the plaintiff.

Appellant's answer: No.

Appellees' answer: Yes.

Trial courts' answer: No.

Court of Appeals' answer: Yes, but only back to July 1, 2011.

2. Whether estate recovery for such pre-notification services constitutes a violation of the individual's substantive and/or procedural due process rights.

Appellant's answer: Yes.

Appellees' answer: No.

Trial courts' answer: The trial court never addressed this issue.

Court of Appeals' answer: Only for services before July 1, 2011.

STATUTES INVOLVED

42 USC § 1396a. State plans for medical assistance

(a) Contents

A State plan for medical assistance must—

* * *

(18) comply with the provisions of section 1396p of this title with respect to liens, adjustments and recoveries of medical assistance correctly paid . . . ;

* * *

42 USC § 1396c. Operation of State plans

If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this subchapter, finds—

(1) that the plan has been so changed that it no longer complies with the provisions of [42 USC § 1396a]; or

(2) that in the administration of the plan there is a failure to comply substantially with any such provision;

the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

42 USC § 1396p. Liens, adjustments and recoveries, and transfers of assets

* * *

(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 (but not including medical assistance for Medicare cost-sharing or for benefits described in section 1396a(a)(10)(E) of this title).

* * *

MCL 400.112g. Michigan medicaid estate recovery program; establishment and operation by department of community health; development of voluntary estate preservation program; report; establishment of estate recovery program; waivers and approvals; duties of department; lien.

(1) Subject to section 112c(5), the department of community health shall establish and operate the Michigan medicaid estate recovery program to comply with requirements contained in section 1917 of title XIX. The department of community health shall work with the appropriate state and federal departments and agencies to review options for development of a voluntary estate preservation program. Beginning not later than 180 days after the effective date of the amendatory act that added this section and every 180 days thereafter, the department of community health shall submit a report to the senate and house appropriations subcommittees with jurisdiction over department of community health matters and the senate and house

fiscal agencies regarding options for development of the estate preservation program.

(2) The department of community health shall establish an estate recovery program including various estate recovery program activities. These activities shall include, at a minimum, all of the following:

(a) Tracking assets and services of recipients of medical assistance that are subject to estate recovery.

(b) Actions necessary to collect amounts subject to estate recovery for medical services as determined according to subsection (3)(a) provided to recipients identified in subsection (3)(b). Amounts subject to recovery shall not exceed the cost of providing the medical services. Any settlements shall take into account the best interests of the state and the spouse and heirs.

(c) Other activities necessary to efficiently and effectively administer the program.

(3) *The department of community health shall seek appropriate changes to the Michigan medicaid state plan and shall apply for any necessary waivers and approvals from the federal centers for medicare and medicaid services to implement the Michigan medicaid estate recovery program. The department of community health shall seek approval from the federal centers for medicare and medicaid regarding all of the following*:

(a) Which medical services are subject to estate recovery under section 1917(b)(1)(B)(i) and (ii) of title XIX.

(b) Which recipients of medical assistance are subject to estate recovery under section 1917(a) and (b) of title XIX.

(c) Under what circumstances the program shall pursue recovery from the estates of spouses of recipients of medical assistance who are subject to estate recovery under section 1917(b)(2) of title XIX.

(d) What actions may be taken to obtain funds from the estates of recipients subject to recovery under section 1917 of title XIX, including notice and hearing procedures that may be pursued to contest actions taken under the Michigan medicaid estate recovery program.

(e) *Under what circumstances the estates of medical assistance recipients will be exempt from the Michigan medicaid estate recovery program because of a hardship. At the time an individual enrolls in medicaid for long-term care services, the department of community health shall provide to the individual written materials explaining the process for applying for a waiver from estate recovery due to hardship.* The department of community health shall develop a definition of hardship according to section 1917(b)(3) of title XIX that includes, but is not limited to, the following:

(i) An exemption for the portion of the value of the medical assistance recipient's homestead that is equal to or less than 50% of the average price of a home in the county in which the medicaid recipient's homestead is located as of the date of the medical assistance recipient's death.

(ii) An exemption for the portion of an estate that is the primary income-producing asset of survivors, including, but not limited to, a family farm or business.

(iii) A rebuttable presumption that no hardship exists if the hardship resulted from estate planning methods under which assets were diverted in order to avoid estate recovery.

(f) The circumstances under which the department of community health may review requests for exemptions and provide exemptions from the Michigan medicaid estate recovery program for cases that do not meet the definition of hardship developed by the department of community health.

(g) Implementing the provisions of section 1396p(b)(3) of title XIX to ensure that the heirs of persons subject to the Michigan medicaid estate recovery program will not be unreasonably harmed by the provisions of this program.

(4) The department of community health shall not seek medicaid estate recovery if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interest of the state.

(5) The department of community health shall not implement a Michigan medicaid estate recovery program until approval by the federal government is obtained.

(6) The department of community health shall not recover assets from the home of a medical assistance recipient if 1 or more of the following individuals are lawfully residing in that home:

(a) The medical assistance recipient's spouse.

(b) The medical assistance recipient's child who is under the age of 21 years, or is blind or permanently and totally disabled as defined in section 1614 of the social security act, 42 USC 1382c.

(c) The medical assistance recipient's caretaker relative who was residing in the medical assistance recipient's home for a period of at least 2 years immediately before the date of the medical assistance recipient's admission to a medical institution and who establishes that he or she provided care that permitted the medical assistance recipient to reside at home rather than in an institution. As used in this subdivision, "caretaker relative" means any relation by blood, marriage, or adoption who is within the fifth degree of kinship to the recipient.

(d) The medical assistance recipient's sibling who has an equity interest in the medical assistance recipient's home and who was residing in the medical assistance recipient's home for a period of at least 1 year immediately before the date of the individual's admission to a medical institution.

(7) *The department of community health shall provide written information to individuals seeking medicaid eligibility for long-term care services describing the provisions of the Michigan medicaid estate recovery program, including, but not limited to, a statement that some or all of their estate may be recovered.* [Emphasis added.]

* * *

MCL 400.112k. Applicability of program to certain medical assistance recipients

The Michigan medicaid estate recovery program shall only apply to medical assistance recipients who began receiving medicaid long-term care services after the effective date of the amendatory act that added this section.

INTRODUCTION

Medicaid Assistance for Long-term Care is intended for the truly needy who would otherwise go without medical care. That has always been its purpose. Public funds are scarce, and Congress never intended to provide a taxpayer-subsidized inheritance program for families of Medicaid recipients, which is why federal law requires states to pursue estate recovery after the recipient's death. After all, every dollar passed to an heir is a dollar that cannot go to someone in real need. This case is about whether Michigan taxpayers can expect reimbursement from Olive Rasmer's Estate for $178,000.00 in Medicaid assistance she received.

Since Congress amended 42 USC 1396p in 1993, estate recovery is mandated for every beneficiary over the age of 55 of Medicaid Assistance for Long-term Care (MA-LTC or Medicaid). In MCL 400.112k, Michigan made the estates of all beneficiaries of Medicaid who began receiving those benefits at any time after September 30, 2007, subject to estate recovery. Also effective September 30, 2007, the Legislature amended MCL 700.3805 in the Estates and Protected Individual's Code (EPIC) to reflect that the Michigan Medicaid Estate Recovery Program claim was a priority claim. MCL 700.3805(f). These statutes are unambiguous.

Olive Rasmer and all of the other deceased beneficiaries in the consolidated appeal (Claimants) were over the age of 55 and began receiving Medicaid benefits after September 30, 2007. By law, their estates were subject to estate recovery. 42 USC 1396p; MCL 400.112k. Although Congress and the Michigan Legislature did impose certain limitations on recovery, no statutory limitations or bars to recovery exist for these claimants.

There is no federal law or regulation requiring a state to provide Medicaid long-term care applicants with notice of any kind for estate recovery, and even the Michigan Legislature did not require anything termed "notice." MCL 400.112g(7), does, though, include the requirement that certain information be provided:

> The department of community health shall provide written information to individuals seeking medicaid eligibility for long-term care services describing the provisions of the Michigan medicaid estate recovery program, including, but not limited to, a statement that some or all of their estate may be recovered. [MCL 400.112g(7).]

This is the only substantive provision in MCL 400.112g-k requiring information, and it contains no requirement as to *when* the information must be provided. This is not surprising because the Legislature established the estate recovery program on September 30, 2007, MCL 400.112g(1) & (2); § 112k, even though it was aware that other activities needed to be completed before the program could be implemented. MCL 400.112g(3); MCL 400.112g(5). Although the statutes contain limited restrictions on collection, MCL 400.112g(4), (5), (6), (8); § 112h; § 112k, there is no express or implied bar to recovery for any failure or insufficiency related to the provision or timing of information. The purpose of the law was to authorize the Department to pursue estate recovery to avoid the imminent threat of CMS withholding federal Medicaid funding as a result of Michigan's failure to pursue medicaid estate recovery. The Legislature would not surreptitiously put up roadblocks that would bring about the very catastrophe they were enacting these statutes to prevent. (See Dep't Appellant Br (in 153370), p 5.)

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Olive Rasmer and the other Medicaid recipients in these consolidated cases, Irene Gorney, William French, and Wilma Ketchum (Claimants), were over the age of 55 and received Medicaid long-term care benefits beginning after September 30, 2007. By both federal and state law enacted well before they ever sought benefits, their estates were subject to estate recovery. 42 USC 1396p(b)(2) (enacted in 1993); MCL 400.112k (enacted Sept. 30, 2007). Each received written information about estate recovery on a reapplication, and after receiving that information, each chose to continue receiving MA-LTC benefits. (Dep't Appellant's App (in 153370), p 281a); (Rasmer Appellant's Br, pp 1-2). These four Claimants were approved for Medicaid benefits because their countable assets were limited to $2,000.00, and their homestead was excluded as an asset *for application purposes* (as opposed to estate recovery purposes). BEM[1] 400, pp 5, 32. Nothing in law or policy advised those seeking Medicaid assistance that they could preserve these assets for their heirs while they collected public benefits. Olive Rasmer's Estate was the only estate out of the four consolidated cases that appealed the decision of the *Gorney* Court, and the Department therefore confines its discussion to that Estate even though most of the arguments apply to all four estates.

Taxpayers paid $178,133.02 in Medicaid long-term care expenses for Olive Rasmer's care in the nursing home. (Dep't Appellant's App (in 153370), p 282a.) If

[1] The Bridges Eligibility Manual (BEM) provides the standards used by Department Eligibility Specialists to determine eligibility for the various programs.

the family had to pay for these same services at private pay rates, the bill would have been well over $200,000.00.

Each year, pursuant to policy, a reapplication form is mailed to the authorized representative the month before it must be submitted to the Department for continuing benefits. Since October 2011, every application has contained information about estate recovery. On reapplication seeking continuing benefits, Gayle S. Dore, as Olive Rasmer's authorized representative for Medicaid benefits, signed the Medicaid application, making the following certification:

> I certify that I have received and reviewed a copy of the Acknowledgments that explains additional information about applying for and receiving Medicaid. [Dep't Appellant's App (in 153370), pp 264a, 279a.]

The Acknowledgments that she certified that she had received *and reviewed* contained the following information:

> Estate Recovery. I understand that upon my death the Michigan Department of Community Health has *the legal right to seek recovery from my estate for services paid by Medicaid*. MDCH will not make a claim against the estate while there is a legal surviving spouse or a legal surviving child who is under the age of 21, blind, or disabled living in the home. An estate consists of real and personal property. Estate Recovery only applies to certain Medicaid recipients who received Medicaid after the implementation date of the program. MDCH may agree not to pursue recovery if an undue hardship exists. For further information regarding Estate Recovery call 1-877-791-0435. [DHS 4574 (Rev. 10–11) Application, Dep't Appellant's App (in 153370), pp 265a, 279a (emphasis added).]

At the same time Gayle S. Dore signed an affidavit that stated: "I swear that this application has been examined by or read to the applicant." (Dep't Appellant's App (in 153370), pp 264a, 280a.) After receiving that information on behalf of Olive Rasmer, the application was submitted, and Olive Rasmer continued to accept and

receive benefits. (*Id.*, p 281a.) These facts are not under dispute. (Rasmer Appellant's Br, p 3.)

At the time Olive Rasmer received the information, she still owned her home and still had countable assets of $2,000.00 or less. (BEM 400, pp 5, 32.) She was in the same financial condition that she was in at the time of her initial enrollment. She, or someone on her behalf, was free to take any estate-planning action at that time that they could have taken at her first application, and it would have had the same result. No estate-planning activity to preserve assets had been foreclosed to her over the period she was collecting benefits. After Olive Rasmer's authorized representative certified that she received the above Acknowledgments, and that she knew that Michigan could seek recovery from her estate of any amount paid on her behalf by Medicaid, Rasmer made the deliberate choice to continue receiving Medicaid benefits until her death. (Dep't Appellant App (in 153370), p 281a.) There is no evidence that Olive Rasmer, nor anyone on her behalf, engaged in any estate planning or other activities to minimize the potential for estate recovery after receiving information about estate recovery in 2012.

After Olive Rasmer's death, the Department filed its Medicaid estate recovery claim as required by federal law. 42 USC 1396p(b); (Rasmer App, p 3a). Richard Rasmer, Olive Rasmer's son, as personal representative for the Estate, disallowed the Department's claim, and the Department was forced to file its civil action to preserve that claim. MCL 700.3804. (Dep't Appellant's App (in 153370), p 268a.) The Bay County Probate Court granted the Estate's motion for summary

disposition and dismissed the Department's civil action for the allowance of its claim. (Dep't Appellant's App (in 153370), pp 282a–284a.) The Department timely filed a claim of appeal, and the case was consolidated with the other Claimants' appeals in *In re Gorney Estate* case before the Court of Appeals. This brief is in response to the Rasmer Estate Appeal SC No. 153356.

STANDARD OF REVIEW

This court reviews de novo issues of statutory interpretation. *IBM v Dep't of Treasury*, 496 Mich 642, 647 (2014). A court must "give the words of a statute their plain and ordinary meaning," *Pohutski v City of Allen Park*, 465 Mich 675, 683 (2002); and must "apply the language of the statute as enacted, without addition, subtraction, or modification." *Lesner v Liquid Disposal*, 466 Mich 95, 101-02 (2002). This principle applies when construing federal statutes too: "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v Michigan Dept of Treasury*, 489 US 803, 809 (1989), citing *United States v Morton*, 467 US 822, 828 (1984).

This Court also reviews de novo questions of constitutional law, such as whether a party has been afforded due process. *Bonner v City of Brighton*, 495 Mich 209, 221 (2014). Accordingly, this Court's review of both issues addressed in this brief is de novo.

ARGUMENT

I. MCL 400.112g-k permits the Department to seek estate recovery for medicaid services provided to an individual before that individual received notification of the estate recovery program from the plaintiff.

MCL 400.112g-k contain no express or implied bars to estate recovery. A plain reading of MCL 400.112g reveals a single requirement for written information at § 112g(7), which the Department has fully met. The unambiguous language of the remaining sections contain no additional requirements for written information or for the timing of such information at § 112g(3). *In re Estate of Keyes*, 310 Mich App 266, 274 (2015), app den sub nom. *In re Estate of Keyes*, 498 Mich 968 (2016); *In Re Estate of Ketchum*, ____ Mich App ____ (March 1, 2016); slip op at 10.

A. State law does not require notice before estate recovery may occur.

This Court directed the parties to address "whether and to what extent MCL 400.112g-k permit the plaintiff to seek estate recovery for medicaid services provided to an individual before that individual received notification of the estate recovery program from the plaintiff." Estate recovery is authorized (mandated) by 42 USC 1396p(b), 42 CFR 433.36, and MCL 400.112g–k. And MCL 400.112g–k contain no limitation or bar to recovery based on any failure or insufficiency of notice or information given to applicants or recipients of Medicaid.

But in spite of this express federal and state authority, the Estate of Olive Rasmer asserts that recovery is barred because she did not receive information about the estate recovery program at initial enrollment for long-term care benefits.

Despite the fact that at her redetermination Olive Rasmer's authorized representative certified that she had received and reviewed information about estate recovery, the Rasmer Estate still denies that the Estate *ever* received sufficient or statutory notice at all because it was not received at "enrollment," which the Estate claims must be the first application.

This is the flawed foundation of all of the Rasmer Estate's claims, based on a misreading of § 112g(3) that the Estate concludes must limit or bar estate recovery due to insufficiency of notice. But the Court of Appeals, on several occasions, has examined the statute in detail and has provided the correct interpretation of MCL 400.112g based on its plain language. And the Court of Appeals finds no language limiting or barring estate recovery based on MCL 400.112g(7), which is the only substantive requirement for written information actually in the statute. Moreover, related to time frames for estate recovery, the Legislature deliberately enacted MCL 400.112k to assign September 30, 2007, as the date after which the estate of anyone who began receiving MA-LTC *was* subject to estate recovery. MCL 400.112k.

The Legislature divided the state statute, MCL 400.112g, into multiple sections that it has numbered, and the divisions are purposeful and clear. The single section requiring notice is MCL 400.112g(7), and it provides:

> The department of community health shall provide written information to individuals seeking medicaid eligibility for long-term care services describing the provisions of the Michigan medicaid estate recovery program, including, but not limited to, a statement that some or all of their estate may be recovered.

There is no temporal provision other than providing it to "individuals seeking medicaid eligibility" and no suggestion of a related limit on the Department's ability to pursue estate recovery.

Although the Rasmer Estate attempts to find another requirement for written information in the statute and a bar to recovery, which was not the intent of the Legislature. The purpose of the statute was to see that the program was established and operated to avoid sanctions by CMS, and placing barriers to the Department's ability to administer the program would be in conflict with the object of the law. The first three subsections of 112g are illustrative and demonstrate the Legislature's intent regarding the different activities. Section 112g(1) authorizes and directs the Department to "establish and operate" the program to comply with federal Medicaid law. Section 112g(2) instructs the Department to establish those Departmental activities necessary to the workings of the program.

Section 112g(3) is unlike the first two, because the Department alone is not developing the plan of activity. Instead, § 112g(3) authorizes the Department to work with the Centers for Medicare and Medicaid Services (CMS) to develop the provisions that can be approved for the State Plan Amendment to the Michigan State Medicaid Plan under which the program will be administered. Section 112g(3) provides:

> (3) The department of community health *shall seek* appropriate changes to the Michigan medicaid state plan and *shall apply* for any necessary waivers and approvals from the federal centers for medicare and medicaid services to implement the Michigan medicaid estate recovery program. The department of community health *shall seek*

> approval from the federal centers for medicare and medicaid regarding all of the following: . . . . [Emphasis added.]

Following this and subject to this section, and after four other subsections, § 112g(3)(e) is listed as one of the provisions that the Department is "to seek approval for." This is the section on which the Rasmer Estate bases its claims. Section 112g(3)(e) provides that the Department shall seek approval regarding:

> (e) Under what circumstances the estates of medical assistance recipients will be exempt from the Michigan medicaid estate recovery program because of a hardship. At the time an individual enrolls in medicaid for long-term care services, the department of community health shall provide to the individual written materials explaining the process for applying for a waiver from estate recovery due to hardship. The department of community health shall develop a definition of hardship . . . .

The Court of Appeals properly concluded that "Subsection (3)(e) is part of the larger Subsection (3), which requires the Department to seek approval from the federal government regarding the items listed in the subdivisions." *Keyes*, 310 Mich App at 391. There are no substantive requirements on the Department in § 112g(3) other than to offer certain provisions to CMS.

In short, Section 112g(3) was enacted to empower estate recovery, not to bar it. The Department's responsibility under this section was to present provisions including "all of the following" to CMS and perhaps to advocate for their approval. MCL 400.112g(3). And the Department *did seek* and did receive approval for some of the provisions, but CMS did not approve the portion of 112g(3)(e) that would have required that specific written information at enrollment even though that requirement was offered to CMS several times. And in fact, giving an applicant

information about how his or her heirs can apply for a hardship after that applicant's death would be of questionable value to the applicant.

The statute is not ambiguous. The statute does not contain any language barring estate recovery. There is no requirement at § 112g(3)(e) for the Department to provide written information about hardship waivers, or anything else *at enrollment*. "An ambiguity of statutory language does not exist merely because a reviewing court questions whether the Legislature intended the consequences of the language under review." *Papas v Michigan Gaming Control Bd*, 257 Mich App 647, 658; 669 NW2d 326 (2003). There is nothing in the plain text of the statute that provides a bar or limit to Medicaid estate recovery for the failure to provide a notice of the process of applying for a waiver. The Rasmer Estate has made no effective statutory defense to estate recovery.

B. There is no federal law, federal regulation, or federal policy statement that requires the Department to provide notice of estate recovery.

Although no federal law or federal regulation requires information about estate recovery to be disseminated, the Department has tried to make that information widely accessible, and pamphlets have been available at all county offices, and information about estate recovery has been on the Department website since June 2011. There was no benefit to the Department in preventing information from reaching the widest possible audience. The Department put the information on the applications, not because it was required or because a signature was needed,

but rather to ensure that it was not only presented but called to the attention of each applicant.

Contrary to the Rasmer Estate's assertions, although the CMS State Medicaid manual *suggests* that written notice be provided, it is *not* a *requirement*. (Rasmer Appellant's Br, pp 19–22.)

The pertinent portion of the State Medicaid Manual provides:

> 3810. MEDICAID ESTATE RECOVERIES
> Under the estate recoveries provisions in § 1917(b) of the Act, you must recover certain Medicaid benefits correctly paid on behalf of an individual. The following instructions explain the rules under which you must recover from an individual's estate Medicaid benefits correctly paid and incorrectly paid.
>
> A. Adjustment and Recovery.--You must seek adjustment or recovery of medical assistance correctly paid on behalf of an individual under your State plan as follows.
>
> * * *
>
> I. Notice.--
>
> 1. General Notice.--You should provide notice to individuals at the time of application for Medicaid that explains the estate recovery program in your State.
>
> 2. Recovery or Adjustment Notice.--You should give a specific notice to individuals affected by the proposed recovery whenever you seek adjustment or recovery. The notice should be served on the executor or legally authorized representative of the individual's estate, or, if these are not known to the state, other survivors or heirs. [Dep't Appellant Index, pp 187-188.]

The language is plain: "you *must* recover," "you *must* seek adjustment or recovery," and "you *should* provide notice." (Emphasis provided.) The language is perfectly clear, and CMS, like our Legislature, understands how to write a requirement *when it intends one*. The Rasmer Estate's attestations of mandates on the Department in the CMS State Medicaid Plan related to notice of estate recovery are misplaced.

(Rasmer Appellant's Br, pp 19-22.) The Rasmer Estate also neglects to mention that the Footnote 25[2] from the policy brief, on which it relies, actually says that the section describes what states should do, *not* what they must do. (See Rasmer Appellant's Br, p 21.) Michigan does require the Department to "provide written information to individuals seeking medicaid eligibility for long-term care services . . . ," and the Department has done this. There are no additional requirements and no bar or limitation to recovery. Olive Rasmer and the other Claimants received the information printed on the Medicaid application at redetermination. (Dep't Appellant's App (in 153370), pp 36a ¶ 19; 112a ¶¶ 3-4; 115a ¶¶ 6-7; 175a ¶¶ 4-5; 279a ¶ 7.) There is no other requirement for written information required of the Department.

In almost identical circumstances, *Keyes* concluded that "the Department provided the estate with timely notice when the estate sought Medicaid benefits." *Keyes,* 310 Mich App at 268. Citing *Keyes,* the *Ketchum* Court agreed, stating, "§ 112g(3)(e) simply required the department to seek approval of certain provisions from the federal government in developing the estate recovery program." *Estate of Ketchum v Dept of Health & Human Services*, ___ Mich App ___ (March 1, 2016); slip op at 9–10, citing *Keyes*, 310 Mich App at 268. And another panel also

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[2] Footnote 25 cited by the Rasmer Appellant Br, p 21, is not, as stated, from the CMS State Medicaid Manual, it is from the web site policy brief that the Rasmer Estate has attached at pp 85a-92a. The complete Footnote states: "These are described in Section 3810 of the State Medicaid Manual. See especially Section 3810.G. Note that this section describes what states should do, not what they must do."

interpreted the statute the same way. *In re Estate of Catherine Klein*, __ Mich App __ (July 19, 2016); slip op at 4 ("MCL 400.112g(3) merely instructs DCH to seek approval from the federal government on the topics enumerated in its subsections"), citing *In re Estate of Clark*, unpublished opinion per curiam of the Court of Appeals, issued May 28, 2015 (Docket No. 320720); slip op at 7; *Klein*; slip op at 4 ("We find *Clark*'s interpretation of MCL 400.112g(3) persuasive and adopt it as our own.").

In short, the Michigan Court of Appeals has been clear that there is only one notice requirement, found at § 112g(7), and the Department has sufficiently and timely met its obligation with respect to this section when it provided the information printed on the application to Olive Rasmer and the other Claimants at redetermination. More importantly, nothing in the plain text of the statute prohibits the Department from pursuing estate recovery from a decedent's estate based on notice or information.

C. At the time of signing the application certifying the receipt of information about estate recovery, each applicant submitted the application and accepted benefits knowing that his/her estate would be subject to estate recovery.

Upon receiving the estate recovery information on the application, Gale S. Dore, as authorized representative for Medicaid for Olive Rasmer, like the other Claimants in this appeal, affirmed by her signature that she had received and reviewed the information. (Dep't Appellant's App (in 153370), p 279a); (Rasmer App, p 54a). In the plainest language, the notice states:

> I understand that upon my death the Michigan Department of Community Health has the legal right to seek recovery from my estate

> for services paid by Medicaid. [Dep't Appellant's App (in 153370), p 279a.]

The notice says "for services paid by Medicaid." There is no limitation as to dates. Nor apparently did Ms. Dore seek to inquire further. Receiving the information that Olive Rasmer's Estate would be subject to estate recovery for services paid by Medicaid, she submitted the application, and Olive Rasmer continued to accept benefits. (Dep't Appellant App (in 153370), p 281a.)

Michigan citizens are generous in their care for individuals who are not financially able to provide for their own care. And it is assumed that before burdening taxpayers, individuals will use their own resources. It is not surprising that individuals, even those needing care, would prefer to leave their homes to their family members. But it *is* unreasonable to ask taxpayers to subsidize an inheritance program for the children of Medicaid recipients when such a program is not available to their own children.

The Rasmer Estate complains that Olive Rasmer received notice of estate recovery too late to use estate-planning techniques to shield her assets. But this is not true. At the time of her first application there was no action that she could have taken then, that she could not also take later, with the same consequences. We know that she had only $2,000.00 or less and her exempt home because she qualified for benefits. (BEM 400 pp 5, 32.) At all times, she was still free to create a trust, use a "ladybird" deed, or do limited divestment (see Rasmer Appellant's Br, p 31), and the resulting impact on her Medicaid eligibility would have been exactly the same as on the day of her first application. In other words, the full arsenal of

tools developed by clever Medicaid planners was available to her prior to every annual application for benefits and she never used them, even after notice that the Department would pursue recovery from her estate. To actually dispose of assets without divestment penalty for Medicaid, the action must be taken at least five years before application because of the statutory "lookback" period. 42 USC 1396p(c)(1).

Olive Rasmer, by her authorized representative, knowing that her estate was subject to estate recovery for services paid by Medicaid, chose to accept benefits without attempting to use the various planning techniques available to her. She suffered no harm or loss due to the fact that "written information" about estate recovery was not provided to her at her first application.

D. State and federal law provide notice to beneficiaries of Medicaid long-term care that their estates are subject to estate recovery.

Even before she applied for the first time, Olive Rasmer always had basic information available about estate recovery. Federal law mandating estate recovery was enacted in 1993, and MCL 400.112k was effective in 2007. It is an established principle of law that land owners are presumed to have knowledge of the laws that affect the disposition of their property. *Anderson National Bank v Luckett*, 321 US 233, 243 (1944); *Texaco v Short*, 454 US 516, 531 (1982). In *City of Kentwood v Sommerdyke Estate*, 458 Mich 642, 655 (1998), this Court recognized that statutes provide notice to property owners, as discussed by the *Texaco* Court, and held that the legislature may impose regulatory restraints on property even to the continued

retention of that property as long as the restriction is reasonable and "designed to further legitimate legislative objectives." *Id.* at 652; see also *Ellsworth v Grand Rapids*, 27 Mich 250 (1873). By the same principle, the state and federal statutes here provided notice of estate recovery.

The Michigan Medicaid Estate Recovery Program (MMERP) is reasonably designed to further state goals of maximizing the welfare dollars that it has to spend. The establishment of the Michigan Medicaid Estate Recovery Program was not only necessary to comply with federal law, but to avoid the devastating results to all Michigan Medicaid programs if CMS withheld federal funding for failure to comply with 42 USC 1396p(b)(1). The preservation of Michigan's Medicaid program and the services it provides to thousands of recipients in need of those services and unable to pay for them on their own, must be considered a "legitimate legislative objective."

"Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Kentwood* at 653, quoting *United States v Locke*, 471 US 84, 104 (1985), citing *Usery v Turner Elkhorn Mining Co*, 428 US 1, 16 (1976). Here, the statutes that themselves created the Medicaid benefits also mandated estate recovery and so also notified recipients of long-term care assistance from Medicaid that they could expect that their estates are subject to the estate recovery program. Any property, real or personal, owned at the time of their death, which they were permitted to retain rather than use for their support, may be claimed by the State of Michigan to recoup expenses paid by Medicaid.

E. The Department has taken no retroactive actions related to estate recovery.

MCL 400.112k was enacted effective September 30, 2007, making the estates of anyone who began receiving MA-LTC *after* that date immediately subject to estate recovery, and nothing in statute or policy limits recovery due to notice. The Department has never sought recovery from anyone for MA-LTC services *before* that date. In fact, based on MCL 400.112g(5) and the effective date of the State Plan Amendment for estate recovery to the Michigan Medicaid State Plan assigned by CMS, the Department only seeks to collect for Medicaid expenses back to July 1, 2010.

Although the *Gorney* Court found due process violations related to collection of Medicaid expenses paid before July 1, 2011, the Department relied on the federal agency's dating, which was done pursuant to federal regulation. 42 CFR 430.20; 42 CFR 447.256. State plans and state plan amendments are effective the first day of the quarter in which the approvable plan was submitted. 42 CFR 430.20; 42 CFR 447.256. It must be assumed that if CMS assigns an effective date, it does so because it expects the state to use that date. Any other interpretation makes two federal regulations not merely useless, but contradictory. The dating is reasonable because states are in negotiation with CMS over the amendments and are aware before an approval letter is sent out if the plan or amendment has been found to be acceptable. 42 CFR 430.16.

F. Where there is no bar to recovery in the language of the statute the courts may not impose one.

The "primary goal" of statutory interpretation "is to discern the intent of the Legislature by first examining the plain language of the statute." *In re Harper*, 302 Mich App 349, 354 (2013); *Driver v Naini*, 490 Mich 239, 246–247 (2011). The purpose and intent of the Legislature from the plain language of the statutes, §§ 112g-k, was to establish the Michigan Medicaid Estate Recovery Program and to authorize and empower the Department to take the necessary steps to see that Michigan complied with 42 USC 1396p(c), to avoid the loss of federal funding for the State's Medicaid program. Therefore, enabling estate recovery was the Legislative intent. MCL 400.112g(1).

The Legislature was able to impose limitations on estate recovery where it chose to do so and *did* include very specific limitations to estate recovery in the statute but never with regard to the timing, wording, or amount of information provided to applicants. For example, the Department cannot collect for benefits paid before September 30, 2007. MCL 400.112k. Section 112g(6) does not permit the Department to recover assets from the home if there is a surviving spouse or minor or disabled child residing in the home. Section 112g(6) precludes the Department from pursuing recovery from the home if a caretaker relative who provided care to the Medicaid recipient lives in the home, or if the Medicaid recipient has a sibling who has an equity interest in the home. And pursuant to § 112g(8), the Department may not charge interest on any estate recovery

payments. In addition, MCL 400.112h limits estate recovery to any type of property subject to probate.

Where the Legislature stated a limitation or bar on estate recovery for certain situations, it intended to exclude all others. "This Court recognizes the maxim *expressio unius est exclusio alterius;* that the express mention in a statute of one thing implies the exclusion of other similar things." *Chesapeake & O Ry Co v Michigan Pub Serv Comm*, 59 Mich App 88, 100 (1975); *Bradley v Saranac Cmty Sch Bd of Ed*, 455 Mich 285, 298 (1997), *holding mod by Michigan Fedn of Teachers & Sch Related Pers, AFT, AFL-CIO v Univ of Michigan*, 481 Mich 657 (2008), citing *Stowers v Wolodzko*, 386 Mich 119, 132 (1971). "The provisions of this statute cannot be enlarged by implication, as they expressly exclude any such intendment." *Taylor v Michigan Pub Utilities Comm*, 217 Mich 400, 403 (1922). The statute states every limitation on estate recovery that the Legislature intended. Because the clear language of the statute does not offer any limitation related to the written information on estate recovery, it must be assumed that there is none.

And because the Legislature chose not to impose a consequence for any failure to provide information, the courts may not do so. In *Department of Community Health v Anderson*, 299 Mich App 591, 601 (2013), the court rejected a sanction despite the Department's failure to follow the statutory time frame. Even though the provision was mandatory, because there was no consequence for its violation, the court determined that it was intended as a guideline. *Id.* at 601-602. "No sanction should be read into a clear statute that is not within the manifest

intention of the Legislature as derived from the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63 (2002). "In other words, the role of the judiciary is not to engage in legislation." *Lesner v Liquid Disposal*, 466 Mich 95, 101-102 (2002); *Tyler v Livonia Pub Schs*, 459 Mich 382, 392-393, n 10 (1999).

The Legislature wrote the requirement for written information that it wanted in MCL 400.112g(7). It did not include any directive related to the timing other than that it would be "provided to individuals seeking medicaid eligibility for long-term care services," and the Department fully complies with that provision of the statute. The Legislature could have repeated the provision from § 112g(3)(e) that it asked the Department to suggest for inclusion in the State Plan Amendment for estate recovery, but it did not. It also did not suggest a penalty. Even if this Court were to determine that the Department did not provide the written information required, in the plain language of MCL 400.112g-k there is no provision for any sanction or bar to recovery for insufficient written information and no cause of action for the Department's failure. "If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and the statute is enforced as written." *People v Mihelsic*, 468 Mich 908, 909 (2003); *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60 (2001). The Department gives notice that fully meets every actual requirement of the law. And there is nothing in statute that provides or even suggests that the Legislature intended this section to render the entire Michigan Medicaid Estate Recovery Program ineffective and risk

the loss of federal funds for Michigan's Medicaid program. MCL 400.112g-k; 42 USC 1396c.

II. The Rasmer Estate and other Claimants received all due process protections necessary, and the Department's claims are not limited by any due process violation.

There is no timing requirement for written information in § 112g(7) and no requirement of any sort for written information in § 112g(3). The only statutory limitation on recovery is found at MCL 400.112k, which limits recovery of services before September 30, 2007. But even beyond the issue of whether the statute requires notice, the Rasmer Estate alleges due process violations everywhere (Rasmer Appellant's Br, §§ II, III, and IV), and the *Gorney* majority incorrectly found a due process violation for lack of information based on the timing of the delivery of the State Plan Amendment. (See Dep't Appellant's Br (in 153370).)

A. The Claimants had statutory and actual information about estate recovery and made the deliberate choice to subject their probate estates to the full, unlimited estate recovery claim.

In finding a due process violation that barred recovery of estate recovery claims dated before July 1, 2011, the *Gorney* Court improperly brushed aside the Department's argument that the Claimants did not have a "vested right" to inherit the homes of the deceased medicaid beneficiaries. The *Gorney* Court agreed that "the right to inherit is not a definite right; it is an expectancy," but claimed that the personal representatives,

> were not acting to protect their inheritance interests. Rather, the personal representatives stepped into the shoes of the decedents and

> fought to protect the interests held by the decedents during their lives, and thereby to settle the decedents' estates in accordance with their wills or the law. [*In re Estate of Gorney*, ___ Mich App ___ (issued Feb 4, 2016); slip op at 9. See MCL 700.3703.]

Not only did federal law, namely 42 USC 1396p(b), make the estate of Olive Rasmer subject to estate recovery for Medicaid benefits that she received, Olive Rasmer began receiving Medicaid after the enactment of MCL 400.112g-k in September 2007. *Gorney*; slip op at 3 ("[T]he decedents began receiving Medicaid benefits after the September 30, 2007 passage of 2007 PA 74."). (Dep't Appellant's App (in 153370), p 278a.) And MCL 400.112k, in the plainest language made her estate subject to estate recovery because she began receiving those benefits after September 30, 2007. People are presumed to know the law. *Adams Outdoor Advertising v East Lansing* (*After Remand*), 463 Mich 17, 27 n 7 (2000). When she sought long-term care benefits created under programs created by state and federal law, she was therefore presumed to be aware of the fact that estate recovery was a part of that program, MCL 400.112k, and that her probate estate was subject to recovery consistent with MCL 400.112h.

She accepted that "I understand that upon my death the Michigan Department of Community Health [now the DHHS] has the legal right to seek recovery from my estate for services paid by Medicaid." (Dep't Appellant's App (in 153370, p 279a.) The Rasmer Estate does not dispute that she received this acknowledgment. (*Id.*, p 279a ¶ 7.) Thus, Olive Rasmer, deliberately and with knowledge, accepted Medicaid long-term care assistance, fully aware from not only federal and state statutes but from the written information she was given, that any

asset in her probate estate, including her home, would be subject to estate recovery. Richard Rasmer, as personal representative, had the duty to follow the law to administer the estate for the benefit of the estate, not just an individual heir like himself. MCL 700.3703. And the law makes estate recovery a priority claim. MCL 700.3805(f).

The Department agrees with the *Gorney* Court that "[t]he decedents had a right to coordinate their need for healthcare services with their desire to maintain their estates." *Id.*; slip op at 9. But rather than go without nursing home care that she otherwise could not afford, Olive Rasmer accepted the terms of estate recovery. (Dep't Appellant App (in 153370), p 243a.) 42 USC 1396p(b). She made this decision about the disposition of her property, of all types. Many recipients receive benefits far in excess of the value of their property. Olive Rasmer received benefits of $178,133.00 paid by Medicaid, and because Medicaid pays lower amounts than private-pay individuals, these expenses would have been far higher if she had not been enrolled in the program. Her home was sold for $95,000.00 on June 23, 2015, and the program collects what it can only *after* payment of other claims of higher priority, like administration costs and legal fees, funeral expenses, and the $14,000.00 of exempt property allowed to Richard Rasmer as her son. MCL 700.3805; MCL 700.2404. Olive Rasmer made a smart choice.

B. The Rasmer Estate did not suffer a substantive due process violation.

To the extent that the Rasmer Estate raises an unfairness issue, we address the matter of substantive due process, despite the fact that the Estate's claim is based on not receiving information at a time when it was not required. The constitutions of both the United States and Michigan prohibit governments from depriving persons "of life, liberty, or property without due process of law." *In re Beck*, 287 Mich App 400 (2010); *Reed v Reed*, 265 Mich App 131, 159 (2005). "The essence of due process is 'fundamental fairness.'" *Beck,* 287 Mich App at 402; *In re Adams Estate*, 257 Mich App 230, 233-234 (2003).

There is nothing unfair about requiring estate recovery from those who voluntarily accepted Medicaid when estate recovery was an inherent part of the Medicaid program. Olive Rasmer, like the other Claimants, sought public assistance for nursing home care that she presumably could not provide for herself. Medicaid is, and always has been a program for the needy, and as such is means tested. *Cook v Dep't of Social Servs*, 225 Mich App 318, 320 (1997). Individuals are expected to contribute what they can for their care. Since 2007, well before Olive Rasmer applied for benefits, Michigan law made the estates of recipients of this type of care subject to estate recovery. MCL 400.112k. Congress mandated this program to ease the burgeoning cost of the program so that states could continue to offer such benefits to people like Olive Rasmer. 42 USC 1396p(b).

Substantive due process involves "the arbitrary deprivation of liberty or property interests." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 201

(2008). To prevail on such a claim, the Rasmer Estate must prove that "the action was so arbitrary (in the constitutional sense) as to shock the conscience." *Id.* at 200. Since the Department is required by federal and state laws to pursue this claim, and because all 49 other states have initiated similar programs, many going back to 1993, this clearly is not the case. Until MCL 400.112g-k was passed in 2007, the Department faced the imminent threat that the federal government would withhold Medicaid funds unless Michigan established its Michigan Medicaid Estate Recovery Program as quickly as possible. And with the enactment, in 2007 the program *was* established, the Department *was* authorized to take all necessary actions, and as of that date, new Medicaid recipients became subject to recovery. The Program is reasonably designed to further state goals of complying with federal law, maximizing the welfare dollars that it has to spend and still permitting Medicaid recipients to retain their homes while they might need them. Olive Rasmer had notice of estate recovery. She voluntarily applied for benefits knowing that her estate was subject to estate recovery, and she accepted the benefits. After her death, her estate had the opportunity to contest estate recovery if they believed that it was unlawful or incorrect. Estate recovery in the estate of Olive Rasmer is not arbitrary or unfair.

C. The Rasmer Estate's asserted notice failure does not constitute a procedural due process violation.

Due process requires only that before any property is taken, an individual must have the opportunity for a fair hearing and adequate notice of that hearing.

"At the very least, due process requires the court (1) to offer to hold a hearing before it deprives the litigant of a property interest and (2) to provide notice of the hearing to the litigant." *In re Adams Estate*, 257 Mich App at 234. The due process of law is the hearing at which an individual may present his or her case to an impartial decision-maker. *Goldberg v Kelly*, 397 US 254, 267–68 (1970) ("The fundamental requisite of due process of law is the opportunity to be heard."). The notice advises the individual that the hearing will be held so that they may attend and offer his or her objections. *Id.* ("The hearing must be at a meaningful time and in a meaningful manner.") Due process "requires that the notice given be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 504 (1995).

There is no dispute that the Rasmer Estate was afforded a hearing, notice of the hearing, the opportunity to file briefs, and present oral argument supporting its position. In fact this protracted matter is proof positive of those facts. But that is not really what the Rasmer Estate wants. They ask this Court to find some fundamental right to be sufficiently informed in order to have the opportunity to do estate planning to shield assets before a Medicaid application. That is the "notice" that they are trying to find in the estate recovery statutes. But there is no constitutional right that affords this. And there is no provision for this in the statute. "The Medicaid program would be at fiscal risk if individuals were

permitted to preserve assets for their heirs while receiving Medicaid benefits from the states." *Ronney v Dep't of Social Servs*, 210 Mich App 312, 319 (1995).

The *Keyes* Court expressly rejected these constitutional arguments." *Keyes,* 310 Mich App at 273. "[T]he estate was personally apprised of the Department's action seeking estate recovery, and it had the opportunity to contest the possible deprivation of its property in the probate court. It received both notice and a hearing, which is what due process requires." *Id*. at 275. The Rasmer Estate has suffered no constitutional or due process violations.

CONCLUSION AND RELIEF REQUESTED

Medicaid estate recovery is required of all states as a condition of receiving federal funding, which is crucial to the Department's program. The Legislature made the estates of any beneficiary of Medicaid benefits for long-term care subject to estate recovery if they began receiving those benefits after September 30, 2007.

Because public funds are a limited resource, it is not unfair to ask those who have burdened the taxpayers to pay back from their estates what amounts they can, when they knew about estate recovery and still chose to accept the benefits.

The Department respectfully requests that this court affirm the holding in *In re Keyes*, 310 Mich App 266 (2015), that individuals who received the information on the application when seeking continuing benefits received sufficient and timely notice for the Department to pursue estate recovery.

Respectfully submitted,

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

Matthew Schneider (P62190)
Chief Legal Counsel

/s/ Geraldine A. Brown
Geraldine A. Brown (P67601)
Brian K. McLaughlin (P74958)
Assistant Attorneys General
Attorneys for Michigan Department
of Health and Human Services
Plaintiff/Appellee
Health, Education & Family
Services Division
P.O. Box 30758
Lansing, MI 48909
(517) 373-7700

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