

STATE OF MICHIGAN
IN THE SUPREME COURT

In re Estate of IRENE GORNEY.

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

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

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. 153370
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. 153370
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. 153370
Court of Appeals No. 326642
Bay Probate Court
LC No. 14-049740-CZ

**REPLY BRIEF OF APPELLANTS DEPARTMENT OF HEALTH AND
HUMAN SERVICES**

Bill Schuette
Attorney General

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

Matthew Schneider (P62190)
Chief Legal Counsel

Brian K. McLaughlin (P74958)
Geraldine A. Brown (P67601)
Assistant Attorneys General
Attorneys for Michigan Department
of Health and Human Services
Plaintiffs-Appellants
P.O. Box 30758
Lansing, MI 48909
(517) 373-7700

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INTRODUCTION

The Court of Appeals misapplied substantive due process to nullify estate recovery by holding that the decedents should receive hundreds and thousands of Medicaid benefits free and clear of the Michigan Medicaid estate recovery program, MCL 400.112g *et seq.* But MCL 400.112g(5) does not limit what Medicaid benefits are recoverable, and the estates' do not argue that the Department of Health and Human Services filed claims before the federal government approved the Medicaid State Plan in May 2011. And the decedents here enrolled in Medicaid *after* estate recovery was enacted in 2007. MCL 400.112k. The Department is not imposing a new legal obligation for estate recovery on benefits received before enactment.

By misapplying substantive due process, the Court of Appeals set aside estate recovery based on a nonexistent constitutional “right to elect whether to accept benefits and encumber [one’s] estate[], or whether to make alternative healthcare arrangements.” *In re Gorney Estate*, _ Mich App _ (2016); slip op at 9-10. But there is simply no vested right to evade the prospective application of a statute and nothing precluded such an election or alternatives.

Additionally, the estates sidestep the issue presented in the Department’s application for leave—MCL 400.112g(4) is not a defense to estate recovery that is litigated in the *probate courts*. The statute does not create such a defense because cost-effectiveness is a determination made by the Department.

The estates concede that the issue raised in the application is important and that leave should be granted. This Court should grant the Department’s application and reverse for the reasons articulated in the well-reasoned dissent.

ARGUMENT

I. **There is no substantive-due-process violation because MCL 400.112g *et seq.* is not applied retroactively.**

There is no substantive-due-process violation because the estate recovery program is not being applied retroactively to deprive the decedents of a constitutionally protected interest.¹

The test for substantive due process is “whether the legislation is reasonably related to a legitimate governmental purpose.” *TIG Ins Co, Inc v Dep’t of Treasury*, 464 Mich 548, 557-558 (2001). Federal law requires all states participating in Medicaid to pursue estate recovery or forfeit federal funding for Medicaid. 42 USC 1396c; 42 CFR 430.35. Thus, the Legislature’s enactment of MCL 400.112g rationally serves a legitimate government interest in complying with federal law in pursuing recovery and preserve public benefits for future recipients.

Here, no one claims that the Department filed claims prior to federal approval. Thus, MCL 400.112g(5) is not being applied retroactively because it does not limit what Medicaid payments the Department may recover; it only controls when the Department may engage in recovery activities. To create retroactivity, the statute would have to be rewritten to say that the Department “shall not implement a Michigan medicaid estate recovery program until approval by the

¹ Based on the estates’ questions presented, they abandon the procedural-due-process argument, and only substantive due process is an issue on the Department’s application for leave. (Appellees’ Ans at 2-3.) In any event, this Court recently denied leave on the notice question. *In re Estate of Keyes*, 498 Mich 968 (2016).

federal government is obtained *and shall only collect amounts subject to estate recovery that are paid after the approval date.*” The Legislature did not insert this language into the statute and did not limit the amount of recovery to post-approval benefits. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 66 (2002) (“The role of the judiciary is not to engage in legislation.”).

The plain language of MCL 400.112g(5) does not limit recovery to post-approval benefits; it only limits when the Department may engage in recovery. Rather, MCL 400.112g(3)(a) and (b) required the Department to seek federal approval for which services and recipients would be subject to estate recovery.

Likewise, federal law requires that “the State shall seek adjustment or recovery of *any medical assistance* correctly paid on behalf of an individual *under the State Plan . . .*” 42 USC 1396p(b) (emphasis added). But federal law also provides that the State Plan is effective the first day of the calendar quarter it was submitted, which was July 1, 2010. 42 CFR 447.256(c). Thus, the Department pursues recovery for benefits received from July 1, 2010—the effective date of the State Plan. Bridges Administrative Manual 120, p 7 (available at <http://www.mfia.state.mi.us/olmweb/ex/html/>) (accessed May 2, 2016).

To the extent the estates attempt to broaden the Court of Appeals’ due-process violation to defeat all of estate recovery, that argument must also fail. Estate recovery satisfies rational basis because it applies only prospectively for those who began receiving Medicaid long-term care *after* September 30, 2007, when the Legislature enacted MCL 400.112g and MCL 400.112k. MCL 400.112k

provides, “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.” Because all the decedents here enrolled in Medicaid *after* MCL 400.112k was enacted, their rights must be viewed in light of this change in the law. That is, “[p]eople are presumed to know the law.” *Adams Outdoor Advertising v East Lansing (After Remand)*, 463 Mich 17, 27 n 7 (2000). At the time the decedents began receiving benefits they were presumed to be aware of estate recovery via MCL 400.112k and that their probate estates would be subject to recovery, MCL 400.112h.

Both the Court of Appeals and the estates ignore this unambiguous change in the law to suggest that the Department violated due process by retroactively applying MCL 400.112g to deprive the decedents of the right to dispose of one’s property. Although the Legislature previously did not collect from a recipient’s estate, at the threat of the federal government stopping all federal funding for Medicaid, the Legislature ended the era of providing long-term care benefits without recovery in 2007 when it enacted MCL 400.112g and MCL 400.112k. “It is the general rule that that which the legislature gives, it may take away.” *Lahti v Fosterling*, 357 Mich 578, 589 (1959); see also *In re Kurzyniec Estate*, 207 Mich App 531, 538 (1994) (the Department is free to change its policy to comply with state and federal law). The decedents did not have a vested right to receive Medicaid benefits under pre-estate recovery law.

Had the Department sought recovery for benefits received *before* September 30, 2007, the estates' retroactivity argument might have some merit. But since it did not, these cases do not involve retroactivity but merely a unilateral expectation to be immune from legislative changes to the laws governing public benefits. This statutory enactment did not impose new obligations on already received benefits predating estate recovery; it modified the rights for those who enrolled in Medicaid post-enactment. This is no different than the Legislature eliminating a tax exemption. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 324-325 (2011) (tax exemptions do not create rights that exist in perpetuity that cannot be altered by the Legislature); *City of Detroit v Walker*, 445 Mich 682, 703 (1994) (no vested right in continuance of a tax law).

To support its retroactivity argument, the estates primarily rely on *Landgraf v USI Film Products*, 511 US 244, 269 (1994). In *Landgraf*, plaintiff was employed by defendant during 1984 through 1986. *Id.* at 247-248. Plaintiff quit her job and commenced a suit against defendant under Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq.* *Id.* While plaintiff's appeal was pending, Congress enacted the Civil Rights Act of 1991 in November 1991 that created a new right to compensatory damages; the prior law limited relief to purely equitable relief and back pay. *Id.* at 249. The Court declined to apply the 1991 Act retroactively because it would attach a new legal obligation on defendant's past conduct *before* the statute was even enacted. *Id.* at 282-283.

Landgraf is inapposite to the facts here because these decedents were not currently receiving long-term care benefits when the Legislature enacted MCL 400.112g. The Department is not attaching a legal obligation to benefits received before estate recovery was enacted. There is no retroactivity.

Not only is estate recovery not applied retroactively, but the decedents' property rights cannot be examined in a vacuum for purposes of due process. The Court of Appeals ignores that the nature of Medicaid benefits were prospectively altered because the Legislature enacted MCL 400.112g and MCL 400.112k. Property rights are not absolute but "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law" *Bd of Regents of State Colleges v Roth*, 408 US 564, 577 (1972). The estates cannot use substantive due process to insulate themselves from the Legislature making substantive changes to how Medicaid treats homesteads *before* they even enrolled in Medicaid long-term care. See *Saxon v Dep't of Social Services*, 191 Mich App 689, 701 (1991) (Legislature is not precluded from making substantive changes to public benefits); see also *Richardson v Belcher*, 404 US 78, 81 (1971) (due process does not limit power of Congress to make substantive changes to public benefits); *United States v Carlton*, 512 US 26, 33-35 (1994) (Congress may change Internal Revenue Code without violating due process because there is no vested right in the continuation of any specific tax statute).

As the *Landgraf* Court recognized, a law is not retroactive simply because a person anticipated the law would not change:

[e]ven uncontroversial[] prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; a new law banning gambling harms the person who had begun to construct a casino before the law's enactment [*Landgraf*, 511 US at 270 n 24.]

Whatever expectations the decedents had to receive all the benefits of Medicaid long-term care, and simultaneously leave an inheritance at the taxpayers' expense, ignores that the Department has only applied MCL 400.112g and MCL 400.112k prospectively for those who enrolled in long-term care after its enactment.

While ignoring this prospective change, the Court of Appeals creates the right to engage in estate planning that prevents the Legislature from modifying the law for estate recovery. Applying this illogical right creates a precedent that infects every part of estate recovery because “[i]f every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.” *Landgraf*, 511 US at 270 (citation omitted). That is, “a vested right cannot be premised on an expectation that general laws will continue” *GMAC LLC v Dep’t of Treasury*, 286 Mich App 365, 378 (2009). The Court of Appeals’ created right establishes a standard that cannot be satisfied without somehow impacting some aspect of the decedent’s property or existing estate plan to circumvent estate recovery. The decedents do not have a vested right to receive unencumbered public benefits because substantive due process does not insulate individuals from changes in the law. See *id.*

Moreover, the estates’ unfairness argument rings hollow, as the decedents affirmatively agreed to estate recovery. Each decedent elected to continue receiving

Medicaid knowing that their estates would be subject to recovery when they signed the following acknowledgment: “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.*” *Gorney*, slip op at 4 (emphasis added).

The Court of Appeals improperly interpreted MCL 400.112g(5) as precluding recovery of medical assistance paid prior to federal approval. This Court should grant leave and correct these errors.

II. Cost-effectiveness is an agency determination and is not subject to litigation in the probate courts.

In their answer, the estates now argue that MCL 400.112g(4) is subject to judicial review similar to other administrative determinations made by the Department consistent with Const 1963, art 6, § 28; MCL 24.306; and MCL 600.631. (Appellees’ Ans at 11.) But that is not what occurred here.

These proceedings did not involve *circuit court* review of administrative determinations under those provisions. The Court of Appeals read into the statute that an estate may raise MCL 400.112g(4) as a defense to defeat estate recovery in the *probate courts* or to prevent the Department from ever making a claim. All four cases originated in the probate courts, not in an administrative appeal from the Department’s determination. Thus, the issue was not whether the Department’s cost-effectiveness determination is reviewable at all, but whether the probate courts can force the Department to litigate the issue in decedent estate proceedings, which will likely increase the estate recovery cases on appeal to the Court of Appeals.

Even the Court of Appeals recognized “[t]he statutes provide no guidance on the application of MCL 400.112g(4).” *Gorney*, slip op at 6. But the State Plan provides, “Recovery is considered cost-effective when the potential recovery amount of the estate exceeds the cost of filing the claim and any legal work dealing with the claim, or if the recovery amount is above a \$1,000 threshold.” (Medicaid State Plan 4/1/2012, 4.17-A, p 3 available at <http://www.mdch.state.mi.us/dch-medicaid/manuals/MichiganStatePlan/MichiganStatePlan.pdf>) (accessed May 19, 2016). Contrary to the estates’ argument, the “legal work dealing with the claim” refers to the Department’s costs of litigating the personal representative’s wrongful disallowance of its claim, not the litigation costs incurred by the estates to preserve an inheritance. (Appellees’ Ans at 12.) The estates suggest that the Department should have to guarantee that it would be successful in recovery by jumping over the litigation hurdles imposed by the estates in preserving an inheritance.

The problem with opening MCL 400.112g(4) up to judicial determination is that the Department cannot predict how much is available for estate recovery until after probate administration is completed. What the estates argue is essentially that the Department should not even make a claim unless it can overcome escalating litigation costs when the estates unilaterally disallow otherwise legitimate claims to prevent estate recovery. If this decision stands, the heirs have nothing to lose by fighting estate recovery.

In sum, MCL 400.112g(4) should not be subject to litigation in the probate courts because it is a determination left to the Department.

CONCLUSION AND RELIEF REQUESTED

Medicaid—a federal program designed to assist the poor—is not intended to use benefits to subsidize inheritances for recipient’s heirs. The Court of Appeals incorrectly found a right to dispose of property as an inheritance by ignoring that MCL 400.112k was enacted before the decedents enrolled in Medicaid. These cases do not involve retroactivity, and the implementation of estate recovery did not violate procedural or substantive due process. Whether the costs of recovery are in the best economic interests of the state is left to the Department’s determination; it is not a defense litigated in the probate courts.

In sum, the Department respectfully requests that this Court grant leave to appeal and reverse the Court of Appeals for the reasons articulated in the dissent.

Respectfully submitted,

Bill Schuette
Attorney General

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

Matthew Schneider (P62190)
Chief Legal Counsel

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

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