IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IN THE MATTER OF THE ESTATE OF: GEORGE D. PERRY, Deceased.	Case No. CV-IE-2009-05214 MEMORANDUM DECISION AND ORDER

Currently before the Court is an appeal from the March 10, 2005, order of the Honorable Christopher M. Bieter, dismissing the State's Medicaid reimbursement claim in probate proceedings. For the reasons stated below, the opinion of the magistrate will be affirmed.

FACTS AND PROCEDURAL HISTORY

George D. Perry ("George") died February 25, 2009. His late wife, Martha J. Perry ("Martha" or "recipient"), was the owner, as her sole and separate property, of certain real property in Ada County prior to her marriage to George. On November 18, 2002, well into the couple's marriage, Martha executed a quitclaim deed on the real property, with the grantor named as "Martha Jean Boyle" (her prior name) and the grantee as "Martha Jean Perry & George Donald Perry." Several years later, with Martha's health declining, George and Martha needed assistance in paying for Martha's medical care. To qualify for government assistance with medical costs, the couple and Martha, individually, could not exceed certain maximum asset criteria. On or about July 31, 2006, George made the transfer now in dispute, assigning

Martha's remaining interest in the real property to himself alone, by signing a quitclaim deed on behalf of Martha pursuant to a power of attorney.

A few months later, on or about September 15, 2006, George and Martha applied to the Department of Health and Welfare for medical assistance to help pay for Martha's medical care. Since October 1, 2006, Martha has been a recipient of medical payments. The Department provided payments for Martha's medical care through the Medicaid program in the sum of at least $108,364.23.

Although it was Martha's health which was in decline, George predeceased Martha. After George passed away, the Appellant, Human Services Division of the State Attorney General, (the State) sought funds from his estate, specifically from the sale of the property, as reimbursement for taxpayer funds previously expended on his wife's behalf. The magistrate denied this request, holding that because Martha had conveyed her interests in the property during her lifetime, she had no interest in the property from which the State could seek reimbursement. The Attorney General subsequently filed this appeal. Martha, the recipient, died while this appeal was pending.

ISSUES PRESENTED ON APPEAL

A. Whether the magistrate erred in determining that the general power of attorney held by George Perry gave him authority to make a gift to himself of Martha Perry's real property.

B. Whether the magistrate erred in its application and interpretation of Idaho Code § 56-218, in refusing to allow the State's claim against the estate of George Perry.

C. Whether the magistrate erred in its application and interpretation of 42 U.S.C. § 1396p as preempting application of Idaho Code § 56-218.

D. Whether the magistrate erred in failing to apply the Idaho Supreme Court holding in *Idaho Department of Health and Welfare v. Jackman*, 132 Idaho 213, 970 P.2d 6 (1998) to the facts of this case.

E. Whether the State is entitled to attorney fees on appeal.

STANDARD OF REVIEW

When a district judge considers an appeal from a magistrate judge, the district judge is acting as an appellate court, not as a trial court. *State v. Kenner*, 121 Idaho 594, 826 P.2d 1306, 1308 (1992); IRCP 83(u)(1). Accordingly, the standards of review are the same as those applied by the Idaho Supreme Court or Court of Appeals in a regular appeal: the district court upholds the lower court's factual findings if based on substantial and competent, though conflicting, evidence; and affirms conclusions of law which demonstrate proper application of legal principles to the facts found. *Hentges v. Hentges*, 115 Idaho 192, 194, 765 P.2d 1094 (Ct. App. 1988). Interpretation of an instrument, such as the power of attorney, is a question of law. *Chavez v. Barrus*, 146 Idaho 212, 192 P.3d 1036 (2008)

Where issues on appeal involve questions of law, a reviewing court exercises free review. *Clements Farms, Inc. v. Ben Fish & Son*, 120 Idaho 185, 814 P.2d 917 (1991). An issue involving statutory construction and interpretation is a question of law, which is reviewed *de novo*. *State Dept. of Health and Welfare v. Housel*, 140 Idaho 96, 100, 102, 90 P.3d 321, 325, 327 (S. Ct. 2004).

ANALYSIS

I. Power of Attorney and Transfer of Property

The parties agree that the transfer of Martha's interest in the property to George was not performed by Martha, but by George acting pursuant to a power of attorney from Martha. The State argues that the magistrate erred in its determination that George had the authority and valid power of attorney to transfer Martha's interest in the property to himself. The State argues that

George could only make a valid transfer with an *express* power of attorney, which specifically granted him the authority to make gifts of Martha's property on her behalf. It argues that the magistrate failed to make any requisite factual inquiry regarding whether Martha consented to the transfer by interspousal agency or any other form of consent.

Although not addressed in detail in the magistrate's written opinion, at the hearing this issue was addressed and decided by the magistrate. The magistrate made a factual and legal determination regarding the extent of the authority granted to George, and found that although the gifting language in paragraph H was not the "clearest kind of authority," "[i]t certainly can be read that way"; and considering "all of the language in that power of attorney", "the document was entitled to give George Perry as broad of authority as possible, . . including the right to deal with interest in real property."

Idaho Code § 32-912 prohibits either spouse, individually, from conveying the community estate, unless by use of an "express power of attorney."

As cited by the parties, the opening statement of the power of attorney, which declares in all capital letters that "powers granted by this document are broad and sweeping." A subsequent section states:

> (H) Estate, trust, and other beneficiary transactions. To accept, receipt for, exercise, release, reject, renounce, assign, disclaim, demand, sue for, claim and recover any legacy, bequest, devise, gift or other property interest or payment due or payable to or for the principal; assert any interest in and exercise any power over any trust, estate or property subject to fiduciary control; establish a revocable trust solely for the benefit of the principal that terminates at the death of the principal and is then distributable to the legal representative of the estate of the principal; and, in general, exercise all powers with respect to estates and trusts which the principal could exercise if present and under no disability; provided, however, that the Agent may not make or change a will and may not revoke or amend a trust revocable or amendable by the principal or require the trustee of any trust

> for the benefit of the principal to pay income or principal to the Agent unless specific authority to that end is given. (emphasis added)

The Court agrees with the State that the language relied upon by the personal representative in Paragraph H is attenuated, and appears to refer to the agent's ability to act with regards to additional property that the principal may obtain. However, Paragraph A of the power of attorney allowed George to convey Martha's interests in real property as he deemed proper. The power of attorney was executed in 2005 prior to the enactment of the current Uniform Power of Attorney Act, Idaho Code § 5-12-101 *et seq,* in 2008. The present act requires express authority to make gifts, but it is not applicable here. No authority has been cited requiring such language prior to the adoption of the act. Based on the record before it, this Court affirms the interpretation by the magistrate.

II. Statutory Interpretation and Preemption

This appeal also involves a question of statutory interpretation. A statute must be construed as a whole, taking the literal words of the statute, which words must be given their plain, usual, and ordinary meaning. *Thomson v. City of Lewiston*, 137 Idaho 473, 50 P.3d 488 (2002); *State v. Hart*, 135 Idaho 827, 25 P.3d 850 (2001). If a statute is not ambiguous, the court does not construe it, but simply applies the ordinary meaning. *Hansen v. State Farm Mut. Auto. Ins. Co.*, 112 Idaho 663, 735 P.2d 974 (1987). Unless the result is palpably absurd, or legislative intent is clearly to the contrary, a court must assume that the legislature means what is clearly stated in the statute. *Miller v. State*, 110 Idaho 298, 715 P.2d 968 (1986); *Garza v. State*, 139 Idaho 533, 82 P.3d 445 (2003).

Both parties agree that the Medicaid program is a jointly funded and "cooperative endeavor in which the Federal Government provides financial assistance to participating States to aid them in furnishing health care to needy persons." *Harris v. McRae,* 448 U.S. 297, 308, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). Thus, participating states enact legislation and rules, incorporate them into

state medical assistance plans, and submit those plans to the U.S. Secretary of Health and Human Services ("HHS") for approval. 42 U.S.C. § 1396a(a)-(b) (2000 & Supp. III 2003).

At issue in this case are those provisions dealing with the ability of the State to recover costs of medical care from the estate of the recipient and the recipient's spouse. The State argues that the state and federal provisions allow it to recover costs from the estate of the recipient and the recipient's spouse if those assets were once part of the recipient's estate and were transferred from the recipient to the recipient's spouse. In other words, the State argues that I.C. § 56-218(1) allows recovery from the estate of a recipient's spouse, including any "assets" within the definition of "estate" under 42 U.S.C. 1396p(b)(4). The definition of "assets" includes property transferred to one's spouse prior to death under 42 U.S.C. 1396p(h)(1).

The personal representative argues that the magistrate's position is correct. The magistrate held that the State's ability to recover costs is limited to those "assets" which were transferred to the recipient's spouse at the time of death by operation of law. Because the recipient transferred her property prior to her death, and because that transfer was not of the same nature considered in the statutes allowing state cost recovery, the magistrate disallowed the State's claim.

A. Interpretation, Construction, and Application of 42 U.S.C. § 1396p(b)(4)

Title 42 of the United States Code, Section 1396p is entitled "Liens, adjustments and recoveries, and transfers of assets." Subsection (b) addresses "[a]djustment or recovery of medical assistance correctly paid under a State plan" and requires "the State shall seek adjustment or recovery from the [receiving] individual's estate" under certain circumstances. 42 U.S.C. § 1396p(b)(1)(A),(C)(i). Subsequent sections further define what is meant by an individual's "estate," and define which forms of property are subject either to mandatory or discretionary recovery by a state. Those provisions state:

> (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), 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.

The State disputes the magistrate and personal representative's interpretation, which places emphasis on the phrases limiting the property and assets of the recipient of benefits held "at the time of death." The magistrate found that this definition of "estate" did not permit a state agency to look back and recover property interests that the recipient divested prior to death. This Court agrees. The language and definition of "estate" is broad, and includes all interests, including any which may have automatically transferred upon the death of the recipient. However, it goes without saying that where a recipient has long ago been divested of any particular interest, it would not fall within that individual's estate. Moreover, nothing in this provision seeks to preserve interests that were divested well before death, something which the drafters were clearly able to articulate in those provisions dealing with Medicaid eligibility requirements.

Indeed, when addressing the eligibility requirements for assistance, under § 1396p(c)(1)(A), the drafters made those who transfer property "for less than fair market value" ineligible for assistance. The State argues that it would be absurd to prohibit the recipient and/or recipient's spouse from disposing of assets below market value in eligibility determinations, while allowing assets to be transferred at no cost post-eligibility for purposes of avoiding reimbursement or

recovery payments in probate. However, § 1396p(c)(1)(A) deals specifically with eligibility, not recovery. Had the drafters sought to include this same provision in the area of probate and recovery matters, they easily could have made such distinction. The Court notes, however, that even in the context of eligibility, "[a]n individual shall not be ineligible for medical assistance . . . to the extent that (A) the assets transferred were a home and title to the home was transferred to (i) the spouse of such individual[.]" 42 U.S.C. 1396p(c)(2). Thus, even in the stricter setting of eligibility determinations, the drafters recognized and permitted the transfer of a recipient's interest in the home to that recipient's spouse. In addition, the drafters were clearly able to articulate specific instances and circumstances where look-back dates should be used to counteract suspect transfers of property.

Finally, for reasons which will become apparent later, the Court notes that provision (B) allows the state latitude in applying this expanded definition of "estate," except "in the case of an individual to whom paragraph (1)(C)(i) applies[.]" Paragraph (1)(C)(i) addresses "[a]djustment or recovery of medical assistance", mandating state recovery of medical assistance where benefits were paid to any individual of 55 years of age or older when the medical assistance was received. However, that clause and related provisions limit recovery to certain forms of medical assistance, including long-term care services and nursing facility services. *Id.* In this scenario, which appears to be the circumstance in this case, the state is required to include this expanded version of "assets."

B. Interpretation, Construction, and Application of 42 U.S.C. § 1396p(h)

The State also disputes the magistrate's interpretation of the definitions under § 1396p(h), particularly as applied to § 1396p(b)(4). That provision states:

> (h) Definitions[:] In this section, the following definitions shall apply:

> (1) The term "assets", with respect to an individual, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action--
>
> (A) by the individual or such individual's spouse,

The State argues that "assets" includes the property which originally belonged to the recipient, but of which she was divested due to the action of her spouse, even it he was acting as her agent at the time. The Court has several problems with this interpretation.

First of all, "assets" as described in this definition include "income or resources." The Court notes that real property, while it might be described as an "asset" or "resource," is much more clearly described as "real property." The drafters of this section were likely aware of this, as they had previously used the phrase "real property" in multiple sections, including § 1396p(b)(4)(A),(B), above.

More importantly, the definition of "resources" as listed in 1396p(h)(5), "has the meaning given such term in section 1382b[.]" Thus, the definition of "resources," specifically excludes "the home (including the land that appertains thereto)." 42 U.S.C. 1382b(a)(1). Accordingly, where "resources" as contained in this section (1396p(h)) specifically excludes the home, the Court finds it necessarily excludes it from the definition of "assets" as well. Thus, even with this expanded definition of "assets" applied to § 1396p(b)(4)(A),(B), the Court finds it fails to expand that recovery provision to include real property owned by a recipient prior to death.

C. Interpretation, Construction, and Application of I.C. § 56-218.

Idaho Code § 56-218(1) is entitled "Recovery of certain medical assistance" and states:

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

> assistance may be recovered from the individual's estate, and the estate of the spouse, if any, for such aid paid to either or both:

The State argues this language clearly includes the option of recovery from "the estate of the spouse" and does not limit the "estate of the spouse" to property in which the recipient had an interest at the time of death. The Court recognizes and agrees that this departure from the language of the federal provisions indicates a more aggressive policy adopted by this state to recover costs from the estate of the recipient's spouse.

As far as I.C. § 56-218 is concerned, the Court agrees with the State that this section clearly indicates an intent to recover medical costs from the estate of the spouse of a recipient. However, several concerns remain regarding whether this provision, standing alone, allows the state to look back to any period beyond those transfers effectuated at death.

First of all, the subsequent provisions of §56-218 further define and limit what is meant by "estate." Subsection (4)(a)-(b) of I.C. § 56-218, states "the term "estate" shall include:"

> (a) All real and personal property and other assets included within the individual's estate, as defined for purposes of state probate law; and
>
> (b) 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.

Id. This language should look familiar, because it is, almost without exception, the same language used in the federal code, 42 U.S.C. § 1396p(b)(4)(A), (B). The personal representative argues that because I.C. §56-218(4)(a)-(b) mirrors the language of the federal statute, it should be interpreted accordingly. As discussed above, this language taken in the context of the federal statute clearly limits the recovery-eligible estate of the recipient's spouse to property transferred at or around the time of death. Thus, the "assistance [which] may be recovered from the . . . estate of the spouse"

appears to be limited accordingly. However, when taken in the context of the Idaho Code section, and the broader language targeting recovery costs from the estate of the recipient's spouse, the ability to recover from a spouse appears to be expanded. In I.C. § 56-218(1), it refers to the recipient as the "individual," and the spouse as the "spouse." The language of § 56-218(4)(a),(b) refers only to the "individual's estate" or the estate of the recipient. It contains no reference or limitation on the estate of the spouse.

The State's interpretation of these provisions, and the intent to reach the assets of a Medicaid recipient's spouse is further supported and explained by the internal rules and regulations of the Department. IDAPA 16.03.09.900 is entitled Liens and Estate Recovery, and "sets forth the provisions for recovery of medical assistance," among other things. IDAPA 16.03.09.905.01, states in relevant part:

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

Id. The plain language of this section does not restrict the language of I.C. § 56-218, which allows the Department broad authority to seek recovery against the "estate of the spouse." I.C. § 56-218(1). A subsequent provision, IDAPA 16.03.09.905.05 states:

> A marriage settlement agreement or other such agreement which separates assets for a married couple does not eliminate the debt against the estate of the deceased participant or the spouse. Transfers under a marriage settlement agreement or other such agreement may be voided if not for adequate consideration.

Id.

Taking into account the broad language of I.C. § 56-218, in addition to the specific provisions in the Idaho Administrative Rules (which have the same force and effect of law per

Mallonee v. State, 139 Idaho 615, 619, 84 P.3d 551, 555 (2004)), it is clear that Idaho law permits recovery from the estate of the recipient spouse, limited only by the broad interpretation of "estate" of I.C. § 56-218(4)(a)-(b) and time and community property restraints of IDAPA 16.03.09.905.01. Thus, the clear and plain language of Idaho law (without considering the federal provisions and effect they have) would allow the State to recover from the estate of the spouse, so long as the property sought was community property held by the participant after October 1, 1993, which was the case here.

E. Preemption Doctrine

This Court has found that the plain meaning of the Idaho and federal Medicaid provisions differ, in that the Idaho provisions clearly and unambiguously broaden the ability of the State to recover from separate assets of the recipient's spouse beyond those assets in which the recipient had an interest at the time of death. This juxtaposition requires a discussion regarding the validity of the Idaho regulations in light of the doctrine of preemption.

The basis for the doctrine of preemption is found in Article VI, cl. 2 of the United States Constitution, which states that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Consequently, the United States Supreme Court has established that a state law that conflicts with federal law is "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407, 422-23 (1992); *M'Culloch v. Maryland,* 17 U.S.(4 Wheat) 316, 427, 4 L.Ed. 579, 606 (1819); *Lewis v. State, Dept. of Transp.*, 143 Idaho 418, 146 P.3d 684 (Ct. App. 2006).

Congressional purpose is " 'the ultimate touchstone' " of the preemption inquiry. *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978) (quoting *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn,* 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963)).

This Court's primary focus in the analysis must be to ascertain the intent of Congress. *See Cal. Fed. Sav. & Loan Ass'n v. Guerra,* 479 U.S. 272, 280-81, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987). The United States Supreme Court has explained that "[c]onsideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). Thus, preemption is generally disfavored. *Cipollone,* 505 U.S. at 516, 518, 112 S.Ct. 2608).

Federal law may preempt state law in two ways, either expressly or impliedly. *Boundary Backpackers v. Boundary County,* 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996). Express preemption occurs where Congress exhibits intent to occupy a given field of law. *Lewis v. State, Dept. of Transp.*, supra. Where such intent is shown, then any state law encroaching into that field is preempted. *Id.* In this instance congress clearly did not intend to occupy the entire field of Medicaid law. Rather, the intent appears to be to the contrary, as the laws in this area are full of provisions which encourage the States to enact legislation and rules, and incorporate them into their overall medical assistance plans. See *inter alia* 42 U.S.C. § 1396a(a)-(b). Nevertheless, many of the sections contained in the federal code require that the states must "comply with the provisions of the federal code, particularly with respect to liens and other recovery for assistance paid. 42 U.S.C. § 1396p; 42 U.S.C. § 1396a(a)(18).

Thus, where congress has not expressed the intent to occupy a given field of law, state law may still run afoul of the preemption doctrine to the extent the state law conflicts with federal law. *Lewis v. State, Dept. of Transp.*, supra. This is called "conflict preemption" and requires that state

law is preempted to the extent it conflicts with the federal law. *Id.* However, conflict preemption is only found where compliance with both state and federal laws is impossible (*Fla. Lime Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-143, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963)), or when the state law is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

In *Stafford v. Idaho Dept. of Health & Welfare*, 145 Idaho 530, 534, 181 P.3d 456, 460 (S. Ct. 2008), the court conducted a review of the Idaho rules regarding Medicaid, in particular the rules involved with Medicaid qualification. While that court noted the need for the State to promulgate rules, it also found that "both the federal government and state government expect federal law to predominate" in that regard. *Id.* at 460, 534.

In the case of *In re Estate of Barg*, 752 N.W.2d 52, 64 (Minn. 2008), the court specifically dealt with a conflict involving the federal statutes at issue in this case. As that court noted, the federal statute regarding recovery contains specific language limiting the field of available recovery. *Id.* Title 42 of the United States Code, Section 1396p is entitled "Liens, adjustments and recoveries, and transfers of assets." Subsection (b) addresses "[a]djustment or recovery of medical assistance correctly paid under a State plan." Parenthesis (1) begins the subsection with the broad rule prohibiting recovery in general, and then requiring the State seek recovery in certain circumstances. That provision states:

> 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:

42 U.S.C. 1396p(b)(1). Thus, the federal government has outlined a general rule prohibiting recovery. As such, Congress has indicated its object and desire to prevent recovery in all but a

limited number of circumstances. It follows then, that if these circumstances are expanded by a particular state law, the state law becomes an obstacle to the accomplishment and execution of the full purposes and objectives of Congress to limit recovery, and is thereby preempted.

Subsection (B) explains the required recovery exception against the estate of the recipient individual who was 55 years of age or older when assistance was received, but further limits recovery to care costs at nursing facilities, home and community. For convenience, that provision states:

> 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).

42 U.S.C. 1396p(b)(1)(B)(i-ii). This provision limits recovery by age, by type of service, or by types of allowed services any particular state might choose to include. Neither party has argued regarding the ability to recover for services in this case. Thus, the issues in this case bring us back, full circle, to the interpretation and effect of 42 U.S.C. 1396p(b)(4), 42 U.S.C. 1396p(h)(1), and I.C. § 56-218(1), regarding whether recovery may be had against the assets of the recipient's spouse in which the spouse did not have any interest prior to the time of death. As discussed in detail above, the federal provisions limit such recovery to assets of the spouse in which the recipient had an interest at death.

Because the federal provisions seek, overall, to limit recovery except in certain circumstances, because exceptions to a general statement of policy are to be construed narrowly, and

because the state provisions expand this recovery policy, the Court finds the State provisions are preempted. *Comm'r v. Clark,* 489 U.S. 726, 739, 109 S.Ct. 1455, 103 L.Ed.2d 753 (1989).

D. Effect of *Idaho Department of Health and Welfare v. Jackman*

Up to this point in the process of interpreting and applying the provisions above, the Court has relied upon relatively little case law. By so doing, the Court has followed the rules of statutory construction as required by Idaho law. The Court first considered the plain language contained in the provisions, which it found unambiguous. Consequently, legislative intent and case law are not necessary to further interpret the language. *George W. Watkins Family v. Messenger,* 118 Idaho 537, 797 P.2d 1385 (1990); *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 197, 46 P.3d 9, 14 (S. Ct. 2002) (citing *Lawless v. Davis,* 98 Idaho 175, 560 P.2d 497 (1977) ("Where the language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to construe the language.")).

The State, however, argues throughout its briefing that Idaho has clear precedent interpreting these provisions differently. In the case of *Idaho Department of Health and Welfare v. Jackman*, 132 Idaho 213, 970 P.2d 6 (1998), the recipient's spouse received nearly all community property of the recipient pursuant to a marriage settlement agreement. After both the recipient and the spouse had died, the Department sought recovery from the estate of the spouse. *Id.* at 214, 7. The language of I.C. § 56-218 as it existed at that time allowed recovery from the spousal estate only where the estate of the recipient contained absolutely nothing. Thus, although there was clear legislative intent that the State should be able to seek recovery from the spousal estate, this expressed intent of the legislature would virtually never occur, where the imprecise, express language of the statute led to an absurd result. *Id.* at 215, 8.

The Idaho Supreme Court found that a more reasonable interpretation, which would be in line with the legislature's intent, would be to allow recovery against the spousal estate where the estate of the recipient was insufficient. *Id.* However, in the very next section, the court found federal law preempted the Department's authority given by I.C. § 56-218 to recover from the spouse's separate estate. *Id.* at 216, 9. The court's analysis in that case involved state and federal provisions which have since been replaced and/or amended. This Court finds it offers little or no guidance to the relevant and determinative issues in this case.

The State's reliance on *Jackman* is based largely on the original opinion in that case, which has since been substituted. The State urges this Court to consider this opinion, arguing that it clearly shows the court's intent to give "assets" a broad interpretation, and that the decision would have been different if the court had been able to apply the statutes in their current form. The Court does not agree. The full reasons for issuing a substitute opinion are not ascertainable by simple comparison of a substitute opinion. Given Internal Rule of the Idaho Supreme Court 15(f)'s prohibition against citation of unpublished opinions, the Court will not speculate about a withdrawn opinion to determine how the clear and unambiguous language of the statutes in question should be interpreted, or to determine the applicability of the preemption doctrine.

III. Attorney's Fees

Pursuant to I.A.R. 35(b)(5) and I.C. § 12-117, each party has reserved the right to attorney's fees on appeal. Idaho Code § 12-117(1) requires this Court to award reasonable attorney's fees and expenses to the prevailing party "if it finds that the nonprevailing party acted without a reasonable basis in fact or law." Where questions of law are raised, attorney's fees should be awarded only if the nonprevailing party advocates a plainly fallacious, and, therefore, not fairly debatable, position. *Lowery v. Board of County Com'rs for Ada County*, 115 Idaho 64, 764 P.2d 431 (S. Ct. 1988). A

state agency acted without reasonable basis where it has no authority to take a particular action. *Reardon v. Magic Valley Sand and Gravel, Inc.*, 140 Idaho 115, 90 P.3d 340 (S. Ct. 2004). In this case the State acted in accordance with the authority granted it by I.C. § 56-218 and corresponding agency regulations. Although this Court found that provision to be preempted, the magistrate did not make such a clear finding. Given this, and the fact that this is a matter of first impression, the State acted based on reasonable argument and authority.

CONCLUSION

Based on the reasoning above, the decision of the magistrate is AFFIRMED.

IT IS SO ORDERED.

Dated this 16th day of March, 2011.

Kathryn A. Sticklen
District Judge

CERTIFICATE OF MAILING

I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, one copy of the MEMORANDUM DECISION AND ORDER as notice pursuant to Rule 77(d) I.R.C.P. to each of the attorneys of record in this cause in envelopes addressed as follows:

PETER C. SISSON
SISSON AND SISSON
2402 W. JEFFERSON STREET
BOISE IDAHO 83702

W. COREY CARTWRIGHT
DEPUTY ATTORNEY GENERAL
3276 ELDER, SUITE B
BOISE IDAHO 83720-0036

HON. MAGISTRATE CHRISTOPHER M. BIETER
VIA: INTERDEPARTMENTAL MAIL

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

Date: 3/17/11

By _____
Deputy Clerk