IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-[redacted]-00335

MISSISSIPPI DIVISION OF MEDICAID IN THE OFFICE OF THE GOVERNOR — **APPELLANT**

VERSUS

ESTATE OF ARLYN E. DARBY, DECEASED, LINDA DARBY STINSON, EXECUTRIX — **APPELLEE**

BRIEF OF APPELLEE

APPEALED FROM THE CHANCERY COURT OF DESOTO COUNTY, MISSISSIPPI CAUSE NO. 09-06-1179

J. Harland Webster, MSB #[redacted]
CHAPMAN, LEWIS & SWAN, PLLC
Post Office Box 428
Clarksdale, MS 38614
(662) 627-4105

Robert Lawson Holladay, MSB #[redacted]
TOWNSEND, McWILLIAMS & HOLLADAY, LLP
P.O. Box 288
Drew, Ms 38737
(662) 745-8517

Attorneys for Appellee

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for the Appellee, Linda Darby Stinson, Executrix, hereby certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate potential disqualifications or recusal.

1. Honorable Mitchell M. Lundy, Jr., Chancellor of the 3rd Chancery Court District
2. Office of the Governor - Division of Medicaid - Appellant/Respondent
3. Estate of Arlyn E. Darby, Linda Darby Stinson, Executrix - Appellee/Petitioner
4. William H. Mounger, Esq. - Attorney for Division of Medicaid
5. Charles P. Quarterman, Esq. - Attorney for Division of Medicaid
6. Robert Lawson Holladay, Esq. - Attorney for Estate of Arlyn E. Darby
7. J. Harland Webster, Esq. - Attorney for Estate of Arlyn E. Darby

CHAPMAN, LEWIS & SWAN, PLLC
Attorney for Appellees
Post Office Box 428
Clarksdale, MS 38614

J. Harland Webster, MSB No. [redacted]

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B. Whether the contract with Medicaid applies to exempt property.

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IN THE SUPREME COURT OF MISSISSIPPI
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MISSISSIPPI DIVISION OF MEDICAID IN THE OFFICE OF THE GOVERNOR — **APPELLANT**

VERSUS

ESTATE OF ARLYN E. DARBY, DECEASED, LINDA DARBY STINSON, EXECUTRIX — **APPELLEE**

STATEMENT OF POSITION REGARDING ORAL ARGUMENT

The Appellee respectfully requests oral argument. It is undisputed by both sides that this appeal presents an issue of first impression. Additionally, this appeal presents complicated facts and legal issues, and an oral argument would be beneficial to this Court and to the parties. The Appellee therefore respectfully submits that oral argument would be appropriate in this case.

I.

STATEMENT OF THE ISSUES

A. Whether Medicaid is entitled to reimbursement from exempt property as provided by Mississippi statutes.

1. The Estate concedes that Medicaid is entitled to reimbursement for services paid for long term care derived from non-exempt property.

2. Medicaid cannot pursue exempt property that, by definition, is not part of the decedent's Estate.

B. Whether the contract with Medicaid applies to exempt property.

The standard of review for these issues is de novo. See *Jackpot Miss. Riverboat, Inc. v. Smith*, 874 So. 2d 959, 960 (Miss. 2004).

II.

STATEMENT OF THE CASE

Procedural History.

Appellee agrees substantially with Appellant's version of the procedural history and the record reflects the substantive action on behalf of both parties.

Statement of Facts.

Mr. Arlyn E. Darby, the deceased, was 83 years of age at the time of his death and a widower. He owned and claimed as his homestead his dwelling house and lots in the City of Hernando, Desoto County, Mississippi, described in Exhibit "B" to the Objection to Probated Claim filed in this case. (R. 20-22) At the time of his death, Mr. Darby owned his dwelling house and lots and a small amount of personal property. (*Id.*)

The value of the homestead does not exceed $75,000.00, and the value of his other property does not exceed $10,000.00.

The Division of Medicaid filed a probate of claim against the estate in the amount of $123,716.13 as a creditor of the estate under Section 43-13-317, Mississippi Code of 1972, as amended. (R. 3)

The homestead of Mr. Darby (his dwelling house and lot) were devised and bequeathed, along with his other property, to his children and one grandchild under his Last Will and Testament, the original of which Will has been probated in this case. (Book 35, Page 378 Desoto County Chancery Clerk Minutes). The dwelling house and lots constituting his homestead and the small amount of personal property owned by him at the time of his death are all exempt and are not subject to the debts of his creditors under Mississippi law. *Miss. Code Ann. §85-3-49.*

III.

SUMMARY OF THE ARGUMENT

It is undisputed that the central issue on appeal is an issue of first impression before the Supreme Court of the State of Mississippi - whether Medicaid is entitled to reimbursement from exempt property as provided by Mississippi statutes.

One must first review the statutes and then apply the statutes to the present situation with Medicaid. A cursory review of all statutes involved reveals several key points: 1) pursuant to the homestead statute, real property is exempt up to $75,000 net equity in value, and personal property up to $10,000.00 in value, 2) the property passes to heirs with homestead and exemption rights attached, 3) heirs can still assert homestead and exemption rights after decedent's death. The Homestead Act, § 85-3-21, provides that land valued at up to $75,000 shall be exempt from sale or seizure. Medicaid has

91-1-19
85-3-33

stipulated the land is valued at only $34,889.00. (R. 12, 21) Section 91-1-19 provides that exempt property shall descend to children or grandchildren free and clear. The property then continues to be exempt under Section 85-3-33 as the heirs may declare the homestead of the decedent. The statute does not provide a timeline for such action, and certainly Medicaid is not suggesting that the heirs must file homestead simultaneously upon the death of their father and grandfather.

Secondly, the Estate of Arlyn E. Darby does not dispute that Medicaid has the right to recover from estate property. Unfortunately, Mr. Darby's homestead property admittedly is not valued at greater than the $75,000 exemption. Should Mr. Darby have owned homestead property worth $175,000, then Medicaid would be entitled to reimbursement of $100,000.00. The Estate did not write the law - the Legislature did. Medicaid cannot assert rights not provided to it under statute.

Thirdly, Medicaid's argument regarding the contract signed by Linda Stinson is likewise defeated since the contract explicitly states the recovery is against property of the estate. Exempt property is not property of the estate and Medicaid's argument on this issue is disingenuous, misleading and without merit. Exempt property descends immediately to the spouse, children, and/or grandchildren free from the claims of creditors and costs of the estate.

Accordingly, since the property in dispute is exempt property, it is not considered part of the Estate of Arlyn E. Darby and cannot be treated as such as a matter of law. Therefore summary judgment was properly granted.

IV.

ARGUMENT

A. Whether Medicaid is entitled to reimbursement from exempt property as provided by Mississippi statutes.

The determination of the classification of estate property is paramount to this appeal. The Mississippi Legislature clearly defined real property under homestead protection as exempt property.

Notably, Medicaid ignores the unambiguous language in the federal statute that leaves the definition of estate property exclusively to the states. 42 U.S.C. §1396p(b)(4). Currently, Mississippi law does not afford Medicaid the relief it seeks.

1. The Estate concedes that Medicaid is entitled to reimbursement for services paid for long term care derived from non-exempt property.

It is not disputed that the Mississippi Division of Medicaid paid long term nursing home care for the decedent, Mr. Arlyn Eugene Darby, during his lifetime. Mr. Darby properly qualified for such benefits under the laws of the state and was grateful for those services and benefits. This is also not in dispute. What is disputed is the *source* of reimbursement funds.

Medicaid, once again, conspicuously failed to draw the lower court or this Court's attention to 42 U.S.C. 1396p(b), specifically subsection (4)(A), because that provision abruptly ends the argument.

OBRA 1993 (42 U.S.C. 1396p(b)(4)(A) states unequivocally:

> "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..."

The State of Mississippi's definition of estate property is the only operable definition under this law. Therefore, Medicaid's argument of a "federal mandate" is

either mistaken, resulting from a failure to read the entire law, disingenuous, or intentionally misleading.

This Court has recognized that an estate is defined as any property that is **not exempt**. Miss. Code Ann. § 85-3-21, provides that "every citizen of this State being a householder shall be entitled to hold exempt from seizure or sale, under execution or attachment, the land and buildings owned and occupied as a residence, but the quantity of land shall not exceed 160 acres, nor the value thereof, inclusive of improvements, the sum of $75,000.00."

Therefore, the Division of Medicaid's source of reimbursement is clearly defined. Medicaid cannot step outside of those bounds.[1]

2. Medicaid cannot pursue exempt property that, by definition, is not part of the decedent's Estate.

The laws and statutes of the State of Mississippi protect the property owned by Mr. Darby since it was "exempt property" to him, and remains "exempt property" after his death since he left the property by Will to his children and grandchild, who are entitled to the property free and clear of any debts and claims of Medicaid or any other creditors.

In Matter of Estate of Franzke, 634 So.2d 117 (Miss. 1994), the Supreme Court reviewed the case fully and the application of the statutes relating to exempt property in this State. The *Franzke* case is notable, albeit in a somewhat reverse fashion from the

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Medicaid apparently ignores MRE 408 - offers to compromise are not admissible. Therefore, Appellee is uncertain why Medicaid would mention their offer to compromise in the amount of $17,444.50 other than an attempt to bolster the validity of their claim, or else in order to appear to be acting reasonably, while otherwise acting outside the scope of the law. *See Brief of Medicaid, page 6-7.*

case at bar. In *Franzke*, the Court noted that Miss. Code Ann. § 85-3-49, provides that: "The exempt property, real or personal, disposed of by the owner, shall not by disposal become liable to the debts of the owner; and any debtor leaving the State may take with him his personal property which is exempt from execution." The Court also noted that Miss. Code Ann. § 91-1-21, provides:

> "If there shall not be either a surviving wife or husband or children or grandchildren of the decedent, the exempt property shall be liable for the debts of the decedent and may be disposed of in all respects as other property of such decedent."

It stands to reason that if there shall be children or grandchildren, the exempt property, under § 91-1-19 shall not be liable for the debts of the decedent. Mr. Darby's property was left directly to his children and one grandchild only. They are not liable for his debts under the law.

The facts in *Franzke* were different since only an ex-spouse was left the property. The Court went on to note:

> "We hold that the former homestead of the deceased should be liable for payment of the hospital's claim. This conclusion takes into account **the purpose of the homestead exemption statute, which this Court has stated is 'granted as a family shield . . .** ' (citation omitted) Obviously, the former husband of the decedent is not within the class of persons designated in Section 91-1-21 to be protected from the debts of the decedent." Matter of Estate of Frankze, supra, at page 123. Emphasis added.

While Franzke's ex-spouse does not fall under the family shield purpose, clearly Mr. Darby's children and grandchild are protected.

In sum, Appellant Medicaid ignores long-standing statutory and case law that exempt property is not considered part of the estate of the decedent. The federal law clearly leaves this power up to the States to define what is the probate estate. Mississippi has failed to change its laws in order to seek reimbursement on currently exempt property. The complaints of Medicaid are political and budgetary issues. The current

law "on the books" does not support Medicaid's position, and the Chancery Court of Desoto County was correct in upholding the law.

The law in this case is clear. In Matter of Estate of Franzke, 634 So.2d 117 (Miss. 1994), the Supreme Court interpreted Section 85-3-49 and Section 91-1-21. In that case, the decedent, Mrs. Franzke, died leaving no surviving spouse, child, or grandchild. However, in her Will, the decedent left her exempt homestead property to her former husband, Jon Franzke. The Memorial Hospital at Gulfport, Mississippi, a community hospital, organized and existing under the provisions of Section 41-13-10, et seq. of the Mississippi Code of 1972, as amended, probated a claim against the estate for services rendered to the deceased in the amount of $11,359.80. The question on appeal in this case was whether the residence of the deceased was liable for her debts, including particularly the debt to the Memorial Hospital after her death, or whether the residence was exempt as a homestead. The Supreme Court reviewed the case fully and the application of the statutes relating to exempt property in this State. The Court noted that Section 85-3-49, MCA, provides that: "The exempt property, real or personal, disposed of by the owner, shall not by disposal become liable to the debts of the owner; and any debtor leaving the State may take with him his personal property which is exempt from execution." The Court also noted that Section 91-1-21, MCA, provides:

> "If there shall not be either a surviving wife or husband or children or grandchildren of the decedent, the exempt property shall be liable for the debts of the decedent and may be disposed of in all respects as other property of such decedent."

The Court discussed earlier cases and the history behind the statutes in detail in this decision.

After thorough discussion of the statutes regarding exempt property and decedents, the Supreme Court said:

> "We hold that the former homestead of the deceased should be liable for payment of the hospital's claim. This conclusion takes into account the purpose of the homestead exemption statute, which this Court has stated is 'granted as a family shield ... .' (citation omitted) Obviously, the former husband of the decedent is not within the class of persons designated in Section 91-1-21 to be protected from the debts of the decedent." Matter of Estate of Frankze, supra, at page 123.

Other statutes of this State clearly provide that the homestead and the small amount of personal property of Mr. Darby are exempt from the claims of his creditors, including the Division of Medicaid. Section 85-3-21, MCA, provides that every citizen of this State being a householder shall be entitled to hold exempt from seizure or sale, under execution or attachment, the land and buildings owned and occupied as a residence, but the quantity of land shall not exceed 160 acres, nor the value thereof, inclusive of improvements, the sum of $75,000.00. The statute also clearly says: "The husband or wife, widower or widow, over 60 years of age, who has been an exemptionist under this section, shall not be deprived of such exemption because of not residing therein."

Further, Section 85-3-33, MCA, provides that in all cases where a deceased person has left a widow or husband or other heirs at law, then such widow or husband or other heirs at law, or both, who may be entitled by law to inherit from the deceased person, shall be entitled to have the homestead exempt, whether selected, designated or declared by said decedent in his lifetime or not, and such person or persons so entitled to inherit by law may select, designate, or declare for such homestead ... and have the same set apart to them, or either of them, as the homestead of the decedent.

Section 85-3-49, MCA, is discussed in the Frankze case set out above. According to the statute and the Frankze case, a decedent may make a Will leaving his or her homestead and all exempt property to a child free and clear of the debts of the decedent

and the claims against the decedent's estate. Further, Section 91-1-19, MCA, clearly provides that "the property, real and personal, exempted by law from sale under execution or attachment shall, on the death of the husband or wife owning it, descend to the survivor of them and the children and grandchildren of the decedent, as tenants in common ... ." As also discussed in the Frankze case, Section 91-1-21, MCA, clearly provides that: "If there shall not be either a surviving wife or husband or children or grandchildren of the decedent, the exempt property shall be liable for the debts of the decedent and shall be disposed of in all respects as other property of such decedent." In Weaver v. Blackburn, 294 So.2d 786 (Miss. 1974), the Supreme Court said that where a decedent died intestate and without children, the decedent's widow inherited the homestead in fee simple free of decedent's debts. The homestead was, therefore, not liable for the debts of the decedent's estate after the widow died, having passed title to the homestead to twelve devisees.

Under Section 85-3-1, MCA, there shall be exempt from seizure under execution or attachment tangible personal property ... selected by the debtor, not exceeding $10,000.00 in cumulative value, including household goods, motor vehicles, implements, professional books or tools of the trade, cash on hand, and professionally prescribed health aids. Under Section 91-1-19, MCA, this property is transferred by the Will of Mr. Darby to his children and grandchildren, free and clear of any claims or debts against Mr. Darby and his estate.

MEDICAID IS NOT ENTITLED TO REIMBURSEMENT FROM EXEMPT PROPERTY AS A MATTER OF LAW

Medicaid argues that Federal law requires that the exempt property in Mr. Darby's estate be used to reimburse Medicaid in this case. Medicaid is simply dead wrong about that issue.

It should be understood that the Federal Act does not apply to the Darby Estate, but rather applies to whether the State Medicaid Plan complies with Federal law. Under Section 42 U.S.C., Section 1396a(a)(18), "the State plan must comply with the provisions of Section 1396p of this title with respect to liens, adjustments, and recoveries for medical assistance correctly paid, transfers of assets, and treatment of certain trusts." Thus, Federal law only applies between the Federal government and the State Medicaid Division in regard to whether the State plan is in compliance.

Under 42 U.S.C. Section 1396p(b)(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:

> (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."
>
> Section 42 U.S.C. 1396p(b)(4) provides: "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 ... ."

Under the statutes of the State of Mississippi and case law for many years, exempt property is not part of the estate of a decedent to be administered and descends directly under the statute to the spouse or children, and it is not subject to the claims of

creditors since it is exempt. For over seventy-five (75) years, this has been the law of the State of Mississippi. Federal law does not change this, and in fact, the Federal statutes cited above clearly provide that the term "estate" is defined for such purposes under State probate law.

The Supreme Court in De Baum v Hulett Undertaking Company, 169 Miss. 488, 153 So. 513 (1934) clearly held:

> "Section 1410, Code of 1930 (now Section 91-1-19) provides that the real and personal property exempt from the debts of a decedent shall, in case there are no children or descendants of children, descend to the surviving wife or husband. The exempt property is no part of the estate to be administered and descends directly under the statute, (Citations omitted) and this is true whether the estate be solvent or insolvent. (Citation omitted). Section 1656, Code of 1930, (now Section 91-7-117) requires the appraisers to set aside to the widow and children or to the widow if there be no children, the decedent's exempt personal property and make report thereof to the Court, but provides that such action on the part of the appraisers shall not be necessary to vest title in them, but title shall vest in them by operation of law on the death of the husband and father. The exempt property descends free, not only from the debts incurred by the owner in his lifetime, but also the expenses of his last illness and funeral, and this is true whether the estate is solvent or insolvent. Under Section 1724, Code of 1930, (now Section 91-7-261), if the estate be insolvent, the expenses of the last illness and funeral are preferred, but in determining its solvency, exempt property is not taken into consideration, it is no part of the estate administered for the benefit of creditors. The personal representative has nothing to do with exempt real estate, it descends at once under Section 1410 (now Section 91-1-19) as does the exempt personal property also. . . . In other words, where Section 1410, Code of 1930, (now Section 91-1-19), comes into operation, neither the exempt real estate nor exempt personal property forms any part of the estate to be administered by the personal representative for the benefit of the creditors." De Baum v. Hulett Undertaking Company supra, 153 So. at page 515.

Thus, Federal law does not mandate that the exempt personal property be subject to the claims of Medicaid, and in fact, Federal law mandates that the Division of Medicaid may not seek reimbursement from exempt property since in Mississippi (and

under Mississippi probate law), the exempt property is not part of the estate as set forth in the statutes and case cited above.

In response to the Federal law, Mississippi enacted Section 43-13-317. Subsection 1 of that statute provides: "The Division shall be noticed as an identified creditor against the estate of any deceased Medicaid recipient under Section 91-7-145." Subsection 2 provides:

> "In accordance with applicable Federal law and rules and regulations, including those under Title XIX of the Federal Social Security Act, the Division may seek recovery of payments for nursing facility services, home - and community - based services and related hospital and prescription drug services from the estate of a deceased Medicaid recipient who was 55 years or older when he or she received the assistance. The claim shall be waived by the Division (a) if there is a surviving spouse; or (b) if there is a surviving dependent who is under the age of 21 years or who is blind or disabled; or (c) as provided by Federal law and regulation, if it is determined by the Division or by Court order that there is undue hardship."

It is very clear from reading this statute that the Mississippi legislature did not change the law on "exempt property," did not say that a creditor like Medicaid must be paid out of the exempt property of a deceased person, and specifically did not change the law on exempt property in Mississippi in any way.

Medicaid, in its brief, seems to want to re-write Mississippi statutes and case law to fit its purpose. There is absolutely no law in this State that the children of a deceased party must live in a house to claim the property as exempt property of their parent. In fact, the most recent case from the Mississippi Supreme Court, the Frankze case cited above, shows otherwise. The legislature has not amended Section 91-1-19, Section 91-7-117, Section 85-3-33, Section 85-3-49, Section 85-3-21, nor Section 85-3-1, of the Mississippi Code of 1972 in any manner to indicate that exempt property is subject to the claims of Medicaid and no other creditor.

If the Mississippi legislature had intended to do this, it would have done so. However, if it had done so, it would have violated the Federal law cited above which provides that a State plan may only seek recovery "from the individual's estate" and the term "estate" with respect to a deceased individual shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law." Under the De Baum case set forth above, and the Mississippi statutes cited therein, the exempt property is not part of the probate estate and is not subject to claims of creditors, including the claim of Medicaid as a creditor.

Medicaid also tries to confuse exactly what Section 43-13-317(2), MCA, really means. First, any recovery under State law by Medicaid must be in accordance with Federal law as set forth in subsection 2. As set forth above, this may not include recovery or reimbursement from exempt property, since it is not part of the individual's estate as defined for purposes of State probate law. Medicaid attempts to confuse what subsection 2 really says. The last sentence provides: "The claim shall be waived by the Division (a) if there is a surviving spouse; or (b) if there is a surviving dependant under the age of 21 years, or who is blind or disabled; or (c) as provided by Federal law and regulation, if it is determined by the Division or Court order that there is undue hardship." This part of Section 43-13-317 does not change Mississippi law on the descent of exempt property to children and grandchildren in any way. The last sentence provides situations where the Division of Medicaid may waive a claim for reimbursement under three situations. This statute talks of a waiver of the claim and not reimbursement.

Black's Law Dictionary, Revised 4th Edition, page 1751, defines waiver as "the intentional or voluntary relinquishment of a known right or when one dispenses with the

performance of something he is entitled to exact, or one when in possession of any right, whether conferred by law or by contract, with full knowledge of the material rights, does or forbears to do something, the doing of which or the failure of forbearance to do which is inconsistent with the right, or his intention to rely upon it." (Also see: Gault v. Branton, 222 Miss. 111, 75 So.2d 439, 445 (1954).

Thus, in certain situations, Medicaid is authorized to completely waive a claim against an estate which may have property subject to its claims. For instance, if Mr. Darby had $20,000.00 in cash in the bank, and had a surviving spouse or a surviving dependent who was under the age of 21 years, or who was blind or disabled, Medicaid could waive the claim, even though it was entitled to seek reimbursement from part of the $20,000.00. This in no way changes the law on descent of exempt property to children free and clear of the claims of creditors.

Medicaid does not seem to understand the definition of "exempt property." Exempt property is not subject to the claims of creditors by seizure, sale, under execution, or attachment, or in any other way. Exempt property is exempt property. It is by definition not subject to the claims of any creditor, even if the creditor is Medicaid.

Medicaid cites the case of Weaver v. Blackburn, 294 So. 2d 786 (Miss. 1974), but apparently has not read it. In the Weaver case, a creditor sought to have the homestead sold to satisfy its judgment. In Weaver v. Blackburn, 258 So. 2d 755 (Miss. 1972), the Supreme Court said that the homestead was exempt and could not be sold to satisfy the creditor's judgment because it was exempt property. The homestead descended to Mr. Mason's widow under Section 91-1-19, MCA, which is also relied upon by the Executrix herein. The Court said that Section 91-1-19 specifically controls the descent of exempt property, and those entitled thereto under the statute inherit the exempt property in fee

simple, free of decedent's debts. The Court said: "Only when the decedent leaves no surviving spouse or children or grandchildren does the exempt property become liable for the decedent's debts under Section 91-1-21." Weaver v. Blackburn, 294 So.2d., at page 787.

Medicaid cites cases saying that the purpose of a homestead exemption statute is to provide a "family shield" with which we agree. The family shield is carried out by the legislature because they want to permit parents to leave their children and grandchildren some property. To do this, the exemption laws provide that the homestead and certain other exempt property descends to the children of a deceased free and clear from the claim of the deceased's creditors. All of the cases support the Executrix and not Medicaid.

Medicaid also cites the case of Norris v. Callahan, 59 Miss. 140 (1881). This case supports the Executrix and not Medicaid. The quotation set forth by Medicaid that "the chief object of exemption law is to secure a home for the children during their infancy" was made by the Appellants in that case and not by the Court. Further, a reading of the case shows that the homestead was exempt from the claims of the deceased's creditors as it descended to his children, some of whom were adults, and some were minors. This case clearly does not support Medicaid herein.

Medicaid wrongfully argues that Section 91-1-21 requires children of the deceased to be occupying the house as their residence. There is simply no statutory or case law which supports that argument. In fact, all of the statutes and case set forth in the brief of Executrix show otherwise. Medicaid is simply wrong. Medicaid also cites Chrisman v. Mauldin, 130 Miss. 259, 94 So. 1 (1922). This case does not apply to Mr. Darby's estate. In the Chrisman case, the question was whether a judgment debtor may

claim a homestead exemption against sale by a judgment creditor where the debtor does not actually occupy the land, claimed as the homestead, which is levied upon and offered for sale under execution. The Court found that Mr. Mauldin and his wife had not actually occupied the land which they claimed to be exempt as a homestead prior to the time the injunction was issued and the creditor's sale was stopped. Of course, the Supreme Court held that the property was not a homestead because the debtor did not live upon it nor claim it as his homestead prior to the time the judgment was entered on the judgment roll.

In this case, there is no doubt that Mr. Darby, the debtor, had actually resided upon the property, claimed it as his homestead, and that the property is exempt property. The children and grandchildren of Mr. Darby do not have to claim it as their homestead to have it exempt because it was exempt as Mr. Darby's homestead when he died. The children and grandchildren of Mr. Darby are not debtors to Medicaid. Mr. Darby was the only debtor. In earlier cases, Medicaid has cited the case of Acker v. Trueland, 56 Miss. 30 (1878) and argued to the Court that if some member of the family does not occupy the premises as a homestead, the exemption ceases. A clear reading of this case shows that the case was decided under the Code of 1857, because the debt of the decedent was contracted in 1861. A subsequent statute of 1865 deleted the requirement of occupancy of a child or spouse after the death of the decedent, and this has been the law for 145 years. In the face of clear law for over 145 years, Medicaid continues to erroneously tell the Court that the children of a deceased party must occupy the exempt homestead in order for the exemption to continue. This is not the law and has not been the law for 145 years. In fact, under Section 85-3-21, MCA, a person over 60 years of age, who has been an exemptionist under this section, shall not be deprived of such exemption because of not residing therein." Since Mr. Darby was well over 60 years old, neither he nor his

children and grandchildren have to live in the house for the homestead to remain exempt from the claims of all creditors, including Medicaid.

Medicaid makes an argument that the Court should apply the "exemption provided under State law at Section 43-13-317 of the Mississippi Code Annotated (as) similar to those provided under Federal law." First, there are no exemptions under Section 43-13-317, as it only speaks of waivers. Secondly, neither Federal law nor State law requires that exempt property which is not subject to the claims of creditors and is not part of the estate under state probate law, be used to reimburse Medicaid as a creditor of Mr. Darby's estate. The balance of the argument by Medicaid has no validity at all. If the U.S. Congress had wanted to mandate that State exemptions from the claims of creditors were invalid, it would have done so. If the Mississippi legislature had wanted to change the descent of exempt property to children and grandchildren, it would have done so. Nothing in the Federal statutes and nothing in the Mississippi statutes supports Medicaid in its argument.

Medicaid also argues principles of statutory construction. There is nothing in the Federal law to show that the Congress intended to supercede State law, and in fact, the Federal statutes specifically adopt the State definition of an "estate" from which reimbursement may be had by the State plan. Medicaid argues that the most recent statute and more specific statute controls. The most recent statute has nothing to do with the descent of exempt property, and does not support Medicaid in any way. It deals with reimbursement and waivers of reimbursement by Medicaid.

In Leasy v. Zollicoffer, 389 So. 2d 1378, 1381 (Miss. 1980), the Supreme Court said that: "In enacting the amendment of Section 85-3-1 (10)(a), the legislature used absolutely no language indicating any intent to change the garnishment procedure. Had

they intended to change such procedure, it would have been a simple thing for them to have done so by appropriate language or to have stated that such was their purpose."

If the legislature had intended to change the descent of exempt property to children and grandchildren, it could have done so in clear and appropriate language. The legislature totally failed to do so because no change in the exempt property laws was intended by Section 43-13-317. In fact, if the legislature had intended to change exempt property so that it was subject to the claims of Medicaid, the legislature would have violated the State plan with Medicaid and Federal law as set forth in this brief.

B. Whether the contract with Medicaid applies to exempt property.

Medicaid presents the ultimate red-herring to this Court. An agreement was signed by Linda Stinson, daughter of Mr. Darby, and Executrix herein. The agreement is clear. Medicaid only has the right to proceed against property of the estate - both real and personal. Mr. Darby's estate, by definition, consists solely of property that is not otherwise exempt. The issue rests solely on this Court's ruling on the issue addressed above - unfortunately for Medicaid, as the Chancellor in Desoto County ruled, and as the Appellee contends, Mr. Darby's estate has no real property or personal property to proceed against.

Medicaid ignores the exempt property law and the plain language of the contract in order to insert a meaning into the contract that does not exist.[2] The "contract" is merely an acknowledgment of Section 43-13-317, MCA.

Accordingly, Medicaid's argument is without merit on this issue as well.

2

Medicaid drafted the contract and any ambiguity must be construed against the drafter, as governed by basic contract law.

V.

CONCLUSION

The trial court properly granted summary judgment. The statutes must be given full effect as they exist presently and the statutes do not conflict with federal law. The Appellee, the Estate of Arlyn E. Darby, would respectfully request that the ruling of the lower court be affirmed. Medicaid's claim seeks to take every last penny from the poorest citizens of our country and should be denied by this Court.

Respectfully submitted,

CHAPMAN, LEWIS & SWAN, PLLC
Attorney for Appellant
501 First Street
P. O. Box 428
Clarksdale, MS 38614
(662) 627-4105

By: _____
J. Harland Webster (MSB[redacted])

Robert Lawson Holladay, Esq.
TOWNSEND, McWILLIAMS & HOLLADAY, LLP
P.O. Box 288
Drew, Ms 38737
(662) 745-8517

By: _____
Robert Lawson Holladay (MSB[redacted])

CERTIFICATE OF MAILING AND SERVICE

I, the undersigned, do hereby certify that I have this day mailed via Federal Express, and pursuant to MRAP 31(b), the original and three (3) copies of the Brief of Appellee to Kathy Gillis, Clerk of the Supreme Court of Mississippi at the address of the Court, 450 High Street, Jackson, Mississippi, 39201-1082, via mail, a true and correct copy of the above and foregoing Brief of Appellee to:

Honorable Mitchell M. Lundy, Jr.
Chancellor - 3rd District
P.O. Box 471
Grenada, MS 38902-0471

William H. Mounger, Esq.
Charles P. Quarterman, Esq.
Special Assistant Attorneys General
Division of Medicaid
550 High Street, Suite 1000
Jackson, Ms 39201

This, the 15th day of July, 2010.

J. Harland Webster