HEALTH – MARITAL ASSETS IN GENERAL: THIS IS WHY WE CAN'T HAVE NICE THINGS: NEW LIFE ESTATE RULING MAKES SECURING ASSETS AND OBTAINING MEDICAID BENEFITS TROUBLESOME

In re Schmalz, 945 N.W.2d 46 (Minn. 2020)

ABSTRACT

Estate planning attorneys have used life estates as powerful legal vehicles to secure clients' assets for decades. Because they are excluded from impacting Medicaid eligibility, life estates are a popular option for farm families to help them qualify for Medicaid benefits without needing to deplete the value of their farmsteads. However, in June 2020, the Minnesota Supreme Court changed the legal landscape for estate planners. The court in *Schmalz held* the term "individual" in Minnesota Statutes, section 256B.056, subdivision 4a refers solely to the institutionalized spouse (*i.e.*, spouse receiving long-term care), making the non-homestead life estate interest of a community spouse (*i.e.*, spouse not receiving care) available for purposes of determining the institutionalized spouse's Medicaid eligibility. After years of the Minnesota Department of Human Services and Minnesota courts interpreting "individual" to mean both the institutionalized and community spouse, the Minnesota Supreme Court viewed the term differently. Now, a non-homestead life estate interest of a community spouse counts towards the institutionalized spouse's asset limit and could significantly affect the institutionalized spouse's ability to obtain Medicaid. This decision has affected those in the agricultural community who rely on the income produced by their farmland in their later years. What once was a viable option to keep farmsteads in the family for the next generation has become greatly wounded. The benefits of life estates now hang in the balance, and their use in estate planning could drastically change. Although this case was decided in Minnesota, farming communities in North Dakota should be aware of this change, and attorneys should remain informed about alternate methods of protecting their client's assets.

I. FACTS

Esther Schmalz was born on July 15, 1930 and married her husband, Marvin Schmalz, in the early 1950s.[1] Shortly after they wed, the Schmalzes purchased their first farm together in the small town of Buffalo Lake, Minnesota.[2] During their marriage, Esther and Marvin accumulated a total of three parcels of non-homestead farmland.[3] As time breezed on and the Schmalzes grew old together, they began the process of handing down the

1. *Obituary of Esther Schmalz*, DIRKS-BLEM FUNERAL SERVS. INC., https://dirksblem.com/tribute/details/1328/Esther-Schmalz/obituary.html (last visited Aug. 11, 2020).
2. *Id*.
3. *In re* Schmalz, 945 N.W.2d 46, 48 (Minn. 2020).

family farm to their children in order to carry on the farming tradition.[4] Esther and Marvin sold their three parcels of farmland to their children pursuant to warranty deeds, reserving for themselves a life estate in each parcel.[5] Although title to the farmland transferred to their children, the creation of life estate interests in the properties allowed Esther and Marvin to retain ownership and rent the farmland for income.[6]

In 2015, Esther was institutionalized at Buffalo Lake Health Care Center, a long-term nursing home facility, at the age of 85, while 93-year-old Marvin continued to reside at the couple's home.[7] In 2017, to help pay for long-term care, Esther applied for medical assistance benefits and submitted an application for Medical Assistance Long Term Care ("MA-LTC")[8] in Renville County, Minnesota.[9] In determining Esther's medical assistance eligibility, Renville County Human Services (hereinafter "RCHS") conducted an "asset assessment" of the Schmalzes' assets.[10] The asset assessment required the Schmalzes to submit a list of all their assets, and RCHS subsequently measured the value of those assets to determine whether Esther met eligibility requirements.[11] In RCHS's assessment, it included the Schmalzes homestead property, joint checking account, life insurance policies, and, most notably, the value of the three non-homestead life estate interests in farmland as the couple's "countable assets."[12] RCHS valued the Schmalzes' countable assets to a cumulative total of $618,074.94.[13] The majority of this

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4. *In re Schmalz*, 934 N.W.2d 114, 115 (Minn. Ct. App. 2019), *rev'd*, 945 N.W.2d 46 (Minn. 2020); Schmalz v. Minn. Dep't of Hum. Servs., No. 65-CV-18-157, 2018 Minn. Dist. LEXIS 417, at *2-3 (Minn. 8th Jud. Dist. Nov. 29, 2018).

5. *Schmalz*, 934 N.W.2d at 115.

6. *Id.*

7. *Id.*

8. *Id.; see 2.4 Medical Assistance for Long-Term Care Services,* MINN. DEP'T OF HUM. SERVS., HEALTH CARE PROGRAMS – ELIGIBILITY POL'Y MANUAL (June 1, 2016), http://hcopub.dhs.state.mn.us/epm/2_4.htm (defining LTC services as skilled nursing services; nursing facility services in an inpatient medical hospital; intermediate care facility for disabled person; and services covered by home and community-based services waivers).

9. *In re* Schmalz, 945 N.W.2d 46, 48 (Minn. 2020); *see generally 2.41 Eligibility Requirements*, MINN. DEP'T OF HUM. SERVS., HEALTH CARE PROGRAMS – ELIGIBILITY POL'Y MANUAL (Apr. 2018), http://hcopub.dhs.state.mn.us/epm/#t=2_4_1.htm (stating claims for MA-LTC services cannot be paid until the applicant is eligible).

10. *Schmalz*, 945 N.W.2d at 48.

11. *Id.*; *see generally 2.4.2.1.1 Asset Assessment for Planning Purposes*, MINN. DEP'T OF HUM. SERVS., HEALTH CARE PROGRAMS – ELIGIBILITY POL'Y MANUAL (Dec. 1, 2020), http://hcopub.dhs.state.mn.us/epm/#t=2_4_2_1_1.htm (defining "asset assessment" as a list of all assets owned by a married couple, either individually or jointly, on a specific date or on the date one spouse applies for MA-LTC).

12. *Schmalz*, 945 N.W.2d at 48-49; *see* MINN. STAT. § 256B.059(2), (3) (2020) (establishing "countable assets" as those held by either the medical assistance applicant or community spouse which are not explicitly excluded against the asset limit of the applicant).

13. Brief of Appellant at 22, *In re* Schmalz, 945 N.W.2d 46 (Minn. 2020) (No. A18-2156). To be eligible for medical assistance in Minnesota, an applicant may only retain $3,000 in countable assets. *See* MINN. STAT. § 256B.056(3)(a) (2020). In addition, if the applicant is married, their

total derived from the Esther and Marvin's three life estate interests. Specifically, RCHS determined the value of Esther's non-homestead life estate interests to be $336,880.79, and Marvin's interests in the same to be $236,746.12.[14]

Next, RCHS requested that Esther verify which assets would be attributed to Marvin's community spouse asset allowance.[15] Rather than doing so, Esther appealed RCHS's asset assessment contending that the value of her and her husband's life estate interests should never have been included in the couple's countable assets.[16] In September of 2017, an evidentiary hearing was held in front of a human services judge to review the assessment.[17] The human services judge recommended that RCHS's assessment be affirmed.[18] This recommendation was ultimately adopted by the Commissioner of the Minnesota Department of Human Services (hereinafter "Commissioner"), who remanded Esther's application back to RCHS for completion.[19]

On remand, Esther attributed all $236,746.12 of Marvin's non-homestead life estate interests as part of his community spousal asset allowance and submitted her completed MA-LTC application to RCHS.[20] Esther's application was denied by RCHS because Marvin's assets exceeded the statutory amount allotted to community spouses.[21] According to RCHS, Marvin's assets were available to pay for Esther's medical care because they exceeded his asset allowance.[22] In 2018, Esther sought review of this determination by a human services judge, who recommended the denial of Esther's MA-LTC application be affirmed, which the Commissioner adopted in making his final decision to deny Esther medical assistance.[23]

Esther sought the denial of her benefits to be reviewed afresh, but this time, by the Renville County District Court.[24] Along with RCHS, the Commissioner asserted himself as a party to the action and was represented by the

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spouse (i.e., the community spouse) must also only retain $120,900 in countable assets. *See id*. § 256B.059(3).

14. Brief for Respondent at 12, *In re* Schmalz, 945 N.W.2d 46 (Minn. 2020) (No. A18-2156); *see also Schmalz*, 945 N.W.2d at 49 n.2 (stating the unequal value of shared life estates due to different ages of Marvin and Esther).

15. *Schmalz*, 945 N.W.2d at 49.

16. *Id*.

17. Schmalz v. Minn. Dep't of Hum. Servs., No. 65-CV-18-157, 2018 Minn. Dist. LEXIS 417, at *2-4 (Minn. 8th Jud. Dist. Nov. 29, 2018).

18. *Schmalz*, 945 N.W.2d at 49.

19. *Id*.

20. *Id*.

21. *Id*.

22. *Id*.

23. *Id*.

24. An appeal to the district court for denying medical assistance is made pursuant to Minnesota Statutes, section 256B.045, subdivision 7 and after exhausting all administrative appeals.

Office of the Minnesota Attorney General.[25] The district court viewed Esther and Marvin's life estate interests differently than the Minnesota Department of Human Services (hereinafter "MN DHS"), and reversed the Commissioner's determination.[26] The district court concluded that Marvin was an "individual" based on the unambiguous language of subdivision 4a in section 256B.056 of the Minnesota Statutes;[27] therefore, his life estate interests were nonsalable[28] and unavailable for purposes of determining Esther's medical assistance eligibility.[29] The Commissioner's decision to deny Esther medical assistance was thereby ruled arbitrary and capricious.[30]

After the district court ruling, the Commissioner sought reconsideration from the Minnesota Court of Appeals.[31] The court of appeals granted review and affirmed the district court's conclusion that the term "individual" in subdivision 4a in section 256B.056 indeed covered both Marvin, the community spouse, as well as Esther, the institutionalized spouse.[32] Using this reasoning, Marvin's life estate interest was nonsalable and unavailable to Esther for purposes of determining eligibility.[33] The Commissioner desired further review and the Minnesota Supreme Court granted certiorari.[34]

II. LEGAL BACKGROUND

Medicaid, referred to as "medical assistance" in Minnesota and North Dakota, is a government program that pays for medical care of qualified individuals, such as long-term care for the elderly.[35] But before one can receive Medicaid benefits, he or she must first be eligible in his or her respective state.[36] To achieve Medicaid eligibility, an applicant, and if married, his or her spouse, must meet certain qualifications with respect to income earned

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Schmalz v. Minn. Dep't of Hum. Servs., No. 65-CV-18-157, 2018 Minn. Dist. LEXIS 417, at *4 (Minn. 8th Jud. Dist. Nov. 29, 2018).

25. The National Academy of Elder Law Attorneys, Minnesota Chapter also was approved for permissive intervention as amicus curiae at this time. *Id*. at *1, 3.

26. *Schmalz*, 945 N.W.2d at 49.

27. MINN. STAT. § 256B.056(4a) (2020).

28. *See Salable*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "salable" as an items ability to be sold).

29. Schmalz v. Minn. Dep't of Hum. Servs., No. 65-CV-18-157, 2018 Minn. Dist. LEXIS 417, at *9 (Minn. 8th Jud. Dist. Nov. 29, 2018).

30. *Id*.

31. *In re* Schmalz, 934 N.W.2d 114, 115 (Minn. Ct. App. 2019), *rev'd*, 945 N.W.2d 46 (Minn. 2020).

32. *Id*. at 116 (citing MINN. STAT. § 256B.056 (4a) (2019)).

33. *Id*.

34. *In re* Schmalz, 945 N.W.2d 46, 48 (Minn. 2020).

35. 42 U.S.C. § 1396-1.

36. *Id*. §§ 1396a(a)(10)(C), 1396d(a).

and assets owned.[37] As a general rule, applicants whose assets exceed the maximum asset allowance do not qualify for Medicaid.[38] Certain assets are excluded from determining Medicaid eligibility.[39] Most notably, under federal law, eligibility for Medicaid will not be denied due to ownership of a life estate that cannot be sold, as it is not considered an available asset to the institutionalized nor the community spouse.[40] This rule, however, has not survived in Minnesota.

A. STATES' PARTICIPATION IN MEDICAID PROGRAM

Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396s, more popularly known as the Medicaid Act, is a cooperative entitlement program between federal and state governments to furnish medical assistance to individuals and families whose income and assets are insufficient to meet the costs of necessary medical care.[41] The phrase "medical assistance" means payment of all or part of statutorily defined medical services, for example, inpatient and outpatient hospital services, preventative care, prescription drugs, and long-term nursing home care.[42] The federal government shares the payments of these health care costs with states that elect to participate in the program.[43] The Secretary of the U.S. Department of Health and Human Services administers Medicaid to the states through the Centers for Medicare and Medicaid Services.[44]

Although a state's participation in the program is voluntary, the Medicaid Act requires participating states to follow certain federal statutory and regulatory requirements.[45] Participating states must offer Medicaid coverage to specific individuals under the Act, known as "categorically needy" individuals.[46] However, participating states are granted the discretion whether or

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37. *Id.* § 1396a (a)(10)(A); *see* MINN. STAT. § 256B.056(3)(a) (2020); *see also* N.D. ADMIN. CODE § 75-02-02.1-26 (2020).

38. *See* Laura Zdychnec, *The Perilous Path to Long-Term Care*, 70 BENCH & B. MINN. 18, 19 (2013).

39. *See* 42 U.S.C. § 1382b(a), (b).

40. *Id.* § 1396b(b)(2).

41. *Id.* § 1396-1; *see also* Atkins v. Rivera, 477 U.S. 154, 156-57 (1986).

42. *See generally* 42 U.S.C. § 1396d(a)(iii); *see also* MINN. STAT. § 256.02(8) (2020) (defining "medical assistance" as "payment of part or all of the cost of care and services identified in section 256B.0625, for eligible individuals whose income and resources are insufficient to meet all of this cost."); *see* N.D. CENT CODE § 50-24.1-00.1(2) (2020) (defining "medical assistance" as benefits paid under Title XIX of the Social Security Act).

43. *Atkins*, 477 U.S. at 156-57.

44. Zdychnec, *supra* note 38, at 19.

45. 42 U.S.C. §§ 1396-1, 1396a.

46. *Id.* § 1396a(a)(10)(A)(i); *see generally* 42 C.F.R. § 435.4 (2020) (defining "categorically needy" as families and children, aged, blind, or disabled individuals, and pregnant women eligible for Medicaid).

not, and to what extent, they may offer coverage to "medically needy" individuals.[47] In developing standards for determining Medicaid eligibility and assessing assets of the medically needy, Congress requires participating states to follow the income and asset computations prescribed by the U.S. Secretary of Health and Human Services.[48] Participating states must follow these computations to make their determination about whether to extend medical assistance coverage to an applicant.

B. MINNESOTA'S MEDICAL ASSISTANCE QUALIFICATION REQUIREMENTS

Minnesota participates in the Medicaid program and refers to its state program as "medical assistance."[49] The MN DHS administers medical assistance through individual county social services agencies to categorically needy as well as medically needy individuals.[50] In Minnesota, to be "medically needy," the person must not be otherwise eligible for Supplemental Security Income or Aid to Families with Dependent Children benefits, but must nonetheless "incur medical expenses in an amount that effectively reduces their income to roughly the same position as those who are eligible for those programs."[51] Accordingly, a person will be considered medically needy and qualify for medical assistance in Minnesota if he or she does not individually own more than $3,000 in assets or $6,000 in assets as a household, and whose income does not exceed federally-defined eligibility thresholds.[52] Assets in excess of $3,000 must be used to pay for health care; after all, "Medicaid was intended to be the payor of last resort . . . ."[53] Therefore, individuals or households whose assets exceed this eligibility standard are required to "spend down" their assets until they are at or below the threshold amount if they desire to obtain medical assistance benefits in Minnesota.[54]

A person who fits the definition of medically needy goes through an application process to obtain benefits.[55] If the applicant is married, the applicant

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47. 42 U.S.C. §§ 1396a(a)(10)(C), 1396d(a); *see generally* 42 CFR § 435.4 (2020) (defining "medically needy" as families, children, aged, blind, or disabled individuals, pregnant women who are categorically needy but who may be eligible for Medicaid because of their income and resources are within limits set by the state Medicaid plan).

48. 42 U.S.C. § 1396a(a)(17); *see also* 42 C.F.R. § 435.831 (2020) (instructing State agencies to use prospective period of not more than six months to measure income of medically needy).

49. MINN. STAT. § 256B.02(8) (2020).

50. *See id*. §§ 256B.04(1), 256B.05(1).

51. Estate of Atkinson v. Minn. Dep't of Hum. Servs., 564 N.W.2d 209, 211 (Minn. 1997).

52. MINN. STAT. § 256B.056(3)(a) (2020) (noting $200 will be added to asset limit for each additional legal dependent greater than two residing in the household).

53. *In re* Estate of Barg, 752 N.W.2d 52, 58 (Minn. 2008).

54. *Atkinson*, 564 N.W.2d at 211.

55. *See* MINN. STAT. § 256B.059(2) (2020).

and their spouse will undergo an "asset assessment" along with the application.[56] The appropriate county agency will conduct the asset assessment to verify ownership, value the couple's assets, and determine which assets are countable and which are excluded from the applicant's asset limits.[57] At that time, the applicant will also designate which assets will be retained by his or her spouse to ensure the spouse has adequate financial resources while the applicant receives care, otherwise known as the "Community Spouse Asset Allowance."[58] Upon completion of the assessment, if the applicant meets all the requisite financial eligibility specifications, the State of Minnesota may extend medical assistance coverage.

C. THE MEDICARE CATASTROPHIC COVERAGE ACT

Prior to 1988, participating states saw numerous underlying issues when determining Medicaid eligibility of married applicants, as spouses often bear each other's financial responsibility by jointly possessing assets and sharing income.[59] State Medicaid programs would often leave the community spouse impoverished while attempting to qualify the institutionalized spouse for medical assistance.[60] Seeking to avoid the pauperization of the community spouse, the Medicare Catastrophic Coverage Act ("MCCA") added "spousal impoverishment provisions" to the Medicaid Act.[61] Additionally, the MCCA sought to prevent couples with ample means from qualifying for Medicaid by titling their assets in the name of the community spouse to obtain benefits.[62]

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56. *Id.*; *see* 42 U.S.C. § 1396r-5(C)(1)(A). Some sources, including the MN DHS's eligibility manuals, use the phrase "asset evaluation" in congruence with "asset assessment" to describe the process of valuing a couple's assets and determine MA eligibility. It is unclear why both phrases are used interchangeably, but because both appear to be synonymous, "asset assessment" will be used for purposes of this article. *Compare In re* Schmalz, 945 N.W.2d 46, 48 (Minn. 2020) (using "asset assessment"); *and 2.4.2.1.1 Asset Assessment for Planning Purposes*, MINN. DEP'T OF HUM. SERVS., HEALTH CARE PROGRAMS- ELIGIBILITY POL'Y MANUAL (Dec. 1, 2020), http://hcopub.dhs.state.mn.us/epm/2_4_2_1_1.htm; *with 2.4.2.1. Community Spouse Asset Allowance*, MINN. DEP'T OF HUM. SERVS. (Dec. 1, 2020), http://hcopub.dhs.state.mn.us/epm/#t=2_4_2_1_2.htm (using "asset evaluation"); *and In re* Schmalz, 934 N.W.2d 114, 115, *rev'd*, 945 N.W.2d 46 (Minn. 2020) (using "asset evaluation").

57. *2.4.2.1.1 Asset Assessment for Planning Purposes*, MINN. DEP'T OF HUM. SERVS., HEALTH CARE PROGRAMS- ELIGIBILITY POL'Y MANUAL (Dec. 1, 2020), http://hcopub.dhs.state.mn.us/epm/2_4_2_1_1.htm. The couple needs to submit a list of all assets and proof the couple in fact legally own those assets. *See id.*

58. MINN. STAT. § 256B.059(3) (2020).

59. Wisc. Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473, 473 (2002).

60. *Id.*

61. *Id.*

62. Brief for National Academy of Elder Law Attorneys as Amicus Curiae Supporting Respondent at 5, *In re* Schmalz, 945 N.W.2d 46 (Minn. 2020) (No. A18-2156) (citing *Blumer*, 534 U.S. at 480).

To achieve these twins aims, the MCCA allows the community spouse to retain assets up to a certain dollar amount without affecting the institutionalized spouse's Medicaid eligibility by establishing a federally determined minimum and maximum Community Spouse Asset Allowance ("CSAA").[63] All assets held by the community spouse above the CSAA will be considered "available" to the institutionalized spouse to pay for medical expenses.[64] Because the MCCA incorporated these statutory requirements within the Medicaid Act, states must comply with the MCCA to participate in the Medicaid program.[65]

Minnesota complies with the MCCA through section 256B.059 of the Minnesota Statutes.[66] The relevant authorities in Minnesota establish a CSAA to provide every community spouse with the federal maximum asset allowance.[67] Thus, Minnesota permits community spouses to retain $120,900 in assets without being deemed available to pay for the institutionalized spouse's care.[68]

The MCCA requires all assets held by the institutionalized spouse and community spouse to be available to the institutionalized spouse when determining eligibility.[69] Therefore, if the community spouse exceeds $120,900 in countable assets, the assets in excess of $120,900 will count towards the institutionalized spouse's $3,000 asset limit which, in turn, could affect the institutionalized spouse's eligibility if she exceeds $3,000. In other words, although section 256B.059 sets aside an asset amount that the community spouse may retain, the institutionalized spouse must still meet the eligibility requirements by having assets under $3,000.[70]

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63. Federal law sets the CSAA at a maximum cap at an amount indexed to inflation. 42 U.S.C. § 1396r-5(c)(1)(A)-(2), (f)(2); *see generally* Brief of Appellant, *supra* note 13, at 5, 6 n.2, (stating MCCA uses the acronym "CSRA" rather than "CSAA," the difference being the word "resource" and "asset," which are both used in reference to laws governing federal social security eligibility; therefore, despite the discrepancy, meanings are synonymous).

64. 42 U.S.C. § 1396-5(c)(2)(A).

65. *Id.* § 1396r-5(b), (c).

66. MINN. STAT. § 256B.059(4)(b) (2020); *see also* Estate of Atkinson v. Minn. Dep't of Hum. Servs., 564 N.W.2d 209, 213 (Minn. 1997) (stating section 256B.059 conforms with the MCCA).

67. MINN. STAT. § 256B.059(3)(1) (2020).

68. S*ee generally 2.4.2.1.2 Community Spouse Asset Allowance*, MINN. DEP'T OF HUM. SERVS., HEALTH CARE PROGRAMS – ELIGIBILITY POL'Y MANUAL (Dec. 1, 2020), https://www.hcopub.dhs.state.mn.us/epm/4_2_2_1_2.htm (stating the maximum CSAA is updated annually).

69. MINN. STAT. § 256B.059(5)(a) (2020); *see generally* 42 U.S.C. § 1396r-5(c)(2) (providing that only assets that meet definition of "resource" are counted towards eligibility determination irrespective of ownership interest); 42 C.F.R. § 416.1201(a)(1) (2020) (defining "resource" "[c]ash or other liquid assets or any real property that an individual (or spouse, if any) owns or could convert to cash to be sued for his or her support and maintenance.").

70. *In re* Schmalz, 945 N.W.2d 46, 52 (Minn. 2020).

D. EXCLUDED ASSETS: LIFE ESTATE INTERESTS

Despite both the community and institutionalized spouse's assets potential impact on the institutionalized spouse's medical assistance eligibility, not every asset will be considered "available." Certain assets are excluded from counting towards the institutionalized and community spouse's asset limits.[71] In determining eligibility in Minnesota, section 256B.056 expressly excludes numerous assets from affecting the institutionalized spouse's eligibility such as homestead property, personal effects, and motor vehicles to name a few.[72] One exclusion is of particular relevance and was the main issue in *Schmalz*, that is, non-homestead life estate interests.[73] Minnesota Statutes, section 256B.056, subdivision 4a states:

> Asset Verification. For purposes of verification, an *individual* is not required to make a good faith effort to sell a life estate that is not excluded under subdivision 2 and *the life estate shall be deemed not salable* unless the owner of the remainder interest intends to purchase the life estate, or the owner of the life estate and the owner of the remainder sell the entire property. This subdivision applies only for the purpose of determining eligibility for medical assistance, and does not apply to the valuation of assets owned by either the institutional spouse or the community spouse under section 256B.059, subdivision 2.[74]

"Accordingly, an applicant may have an asset total that exceeds $3,000 and still qualify for MA-LTC if the assets that cause the total to exceed $3,000 constitute assets such as those in subdivision 4a."[75] To what extent section 256B.056, subdivision 4a applies to a community spouse, however, has been subject to controversy in Minnesota.

Application of the term "individual" in subdivision 4a to both the institutionalized spouse and community spouse has produced a multitude of interpretations.[76] Many courts, including both the trial court and appellate court

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71. *See* 42 U.S.C. § 1382b(a), (b); MINN. STAT. § 256B.056(3)-(4a) (2020).

72. *See* MINN. STAT. § 256B.056(3) (2020).

73. *In re* Schmalz, 945 N.W.2d 46 (Minn. 2020); *see generally 2.3.3.2.7.4.2 Non-Homestead Real Property*, MINN. DEP'T OF HUM. SERVS., HEALTH CARE PROGRAMS – ELIGIBILITY POL'Y MANUAL (Apr. 1, 2019), http://hcopub.dhs.state.mn.us/epm/2_3_3_2_7_4_2.htm (defining "non-homestead property" as land with or without buildings or immovable objects attached permanently to the land that are not the person's principal place of residence).

74. MINN. STAT. § 256B.056(4a) (2020) (emphasis added).

75. *Schmalz*, 945 N.W.2d at 51.

76. *See, e.g.*, *In re Schmalz*, 934 N.W.2d 114, 119 (Minn. Ct. App. 2019), *rev'd*, 945 N.W.2d 46 (Minn. 2020) (holding *unambiguous language* of "individual" refers to community spouse as well as institutionalized spouse; therefore, life estates interests are non-salable and unavailable to institutionalized spouse for purposes of determining eligibility); Larson v. Minn. Dep't of Hum. Servs., No. 60-CV-13-465 (Minn. 9th Jud. Dist. Oct. 4, 2013) (holding MN DHS policy arbitrary and capricious because *plain language* of "individual" in section 256B.056 (4a) requires county to

in *Schmalz*, have identified the language of subdivision 4a to be "unambiguous," yet have interpreted it differently.[77] Even the MN DHS has changed its own interpretation of section 256B.056, subdivision 4a in its Eligibility Policy Manual, and previously took the position that life estate interests of both institutionalized and community spouses were excluded.[78] Thus, the meaning of "individual" in subdivision 4a in section 256B.056 is precisely why the Minnesota Supreme Court granted review.

III. ANALYSIS

In *Schmalz*, the issue before the Minnesota Supreme Court was whether, based on the interpretation of "individual" in section 256B.056, subdivision 4a, Marvin's life estate interests are available to pay for Esther's medical care under section 256B.059, thereby warranting the denial of Esther's MA-LTC application.[79] A unanimous court reversed the Minnesota Court of Appeals and held the Commissioner's denial of Esther's application was not arbitrary and capricious.[80] The Minnesota Supreme Court discredited Esther's argument that the term "individual" in section 256B.056, subdivision 4a refers generally to both the institutionalized and community spouse.[81] In doing so, the court concluded the unambiguous term "individual" refers only to the medical assistance applicant (*i.e.*, the institutionalized spouse) and not the community spouse.[82] Thus, Marvin's non-homestead life estate interests were considered an available asset to Esther.[83]

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consider assets of *both* spouses in the process of medical assistance eligibility; thus, Legislature intended "individual" to mean both community and institutionalized spouse); *In re* Appeal of Leroy Vait, Doc. No. 155286 (Minn. Dep't of Hum. Servs. Dec. 23, 2014) (stating section 256B.056(4a) does not specify only applicants are not required to make a good faith effort to sell a life estate; thus, drawing guidance from 42 U.S.C. § 1382b(b), concluded regardless of whether held by institutionalized spouse or community spouse, life estate interests are not assets which must be utilized to meet an institutionalized medical assistance needs).

77. Todd Nelson, *Life Estate Ruling Sows Concern*, MINN. LAW., July 2, 2020, at 1.

78. *Compare 2.3.3.2.7.4.3 Life Estates and Remainder Interests, Life Estate Evaluation*, MINN. DEP'T OF HUM. SERVS., HEALTH CARE PROGRAMS – ELIGIBILITY POL'Y MANUAL (Apr. 1, 2017), http://hcopub.dhs.state.mn.us/epmarchive/2_3_3_2_7_4_3ar3.htm (stating "a *person* is not required to make a good faith effort to sell a life estate because life estates are assumed to not be saleable [sic]. *Therefore, non-homestead life estates are considered not available and are not counted*.") (emphasis added); *with 2.3.3.2.7.4.3 Life Estates and Remainder Interests, Evaluation of Life Estate Owner's Interest*, DEP'T OF HUM. SERVS., HEALTH CARE PROGRAMS – ELIGIBILITY POL'Y MANUAL (Jan. 1, 2019), http://hcopub.dhs.state.mn.us/epm/2_3_3_2_7_4_3.htm (stating "*MA enrollees* are not required to make a good faith effort to sell a life estate interest in non-homestead real property because life estates are assumed to not be salable. *The life estate interest is considered unavailable and is not counted towards the MA asset limit*.") (emphasis added). *See In re* Schmalz, 934 N.W.2d 114, 117 n.3 (Minn. Ct. App. 2019), *rev'd*, 945 N.W.2d 46 (Minn. 2020).

79. Schmalz, 945 N.W.2d at 49-50 (Minn. 2020).

80. *Id*. at 54.

81. *Id*. at 52.

82. *Id*.

83. *Id*.

The court explained that the language of subdivision 4a "plainly states that life estates will be 'deemed not salable . . . *only* for the purpose of determining eligibility for medical assistance'" and also plainly lays out that it "does not apply to the valuation of assets owned by either the institutional spouse or the community spouse under section 256B.059, subdivision 2."[84] Thus, the non-homestead life estate interests of the community spouse are in fact available to the applicant.[85]

The court stated section 256B.056 itself refers to the "individual" as the medical assistance applicant based on the term's use throughout the statute.[86] The court pointed to subdivision 1 of section 256B.056, which discusses residency requirements where "the *individual* is absent from the state[;]" subdivision 3e(2), which identifies circumstances when "the *individual* is eligible for a refund . . . when the *individual* dies[;]" and subdivision 4b, which notes "an *individual* may be required to submit additional verification," all of which represent the word "individual" to mean only the medical assistance applicant.[87] Additionally, the court said the use of the term "individual" only means someone other than the applicant when the Minnesota Legislature deliberately expressed so in the statute.[88] The term "individual" as stated in subdivision 4a has not been given this special treatment by the Legislature.[89]

Moreover, the court stated that reading the statute to include the community spouse as an "individual" would not harmonize the purpose of the chapter.[90] First, the purpose of subdivision 4a relates to "asset verification" for qualifying an applicant for medical assistance, which cannot be accomplished with respect to a community spouse because they are not the one applying.[91] Second, the treatment of an asset for one purpose in section 256B.056 is not inconsistent with treating it differently for another purpose in section 256B.059 when the purposes of such differ.[92] Particularly, the court stated that section 256B.056 has no bearing on the functionality of section 259B.059 because section 256B.056 pertains to an applicant's eligibility regardless of whether the applicant holds a nonsalable life estate while, by comparison, section 256B.059 pertains to the amount of assets a community

84. *Id*. (quoting MINN. STAT. § 256B.056(4a) (emphasis added)).

85. *Id*. at 52.

86. *Id*. at 53.

87. *Id*. (quoting MINN. STAT. § 256B.056(1)(c), (3e)(2), (4b) (emphasis added)).

88. *Id*. (citing MINN. STAT. § 256B.056(2)) (setting forth individuals other than the applicant by stating "[a homestead will be excluded if it is the primary residence used] by one of the following individuals: (1) the spouse; (2) a child under age 21; . . . .").

89. *Id*.

90. *Id*. at 54.

91. *Id*. at 53.

92. *Id*.

spouse can retain without affecting the applicant's eligibility.[93] The differing purposes of the two sections, therefore, support the difference in treatment of a life estate for an applicant and a community spouse.[94] A contrary reading, the court reasoned, would render a portion of subdivision 4a superfluous because it "*does not apply* to the valuation of assets owned by either the institutional spouse or the community spouse under section 256B.059, subdivision 2."[95] Accordingly, "individual" in subdivision 4a can logically only refer to the medical assistance applicant and not a community spouse in order to keep chapter 256B in harmony.[96]

Therefore, after years of differing interpretations, the Minnesota Supreme Court finally clarified who exactly an "individual" includes under the statute. As of June 24, 2020, "individual" means *only* the institutionalized spouse. What seems to be a minor deviation from previous interpretations has the potential to produce substantial obstacles for both medical assistance applicants and practitioners in the wake of this ruling. Medical assistance applicants and their spouses will now be required to spend down their life estate interests in non-homestead property which were previously thought to be protected from affecting medical assistance eligibility. This clarification announced in *Schmalz* could also significantly impact estate planning strategies for Minnesota and North Dakota practitioners because "[l]ife estates may no longer offer much promise as a planning tool for the future."[97]

IV. IMPACT OF DECISION AND APPLICATION ON MINNESOTA AND NORTH DAKOTA LAW

To understand the impact *Schmalz* will have, it is important to first understand life estates and their use in estate planning. A "life estate" is an ownership interest in real property which allows the occupant, or "life tenant," to have possession of property during his life, while after his death, another person, the "remainderman," may obtain ownership of that property.[98] During their lifetime, life tenants retain the right to enjoy certain benefits of ownership, such as acquiring income from renting or using the property.[99] Because

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93. *Id*.

94. *Id*. at 54.

95. *Id*. at 52-53, 54 (citing MINN. STAT. § 256B.056 (4a)) (emphasis added).

96. *Id*. at 54.

97. Kate Z. Graham *Why Life Estates May No Longer Protect Farmland: In Re Schmalz*, KATE Z. GRAHAM (Oct. 22, 2020), https://katezgraham.com/blog/2020/10/21/why-life-estates-may-no-longer-protect-farmland-in-re-matter-of-schmalz.

98. Schroeder v. Buchholz, 2001 ND 36, ¶ 21, 622 N.W.2d 202; *see generally* First & Am. Nat'l Bank v. Higgins, 293 N.W. 585, 590 (Minn. 1940) ("Where an absolute interest passes without words of inheritance, a life or some lesser estate can be created only by language restraining and qualifying the grant or gift to the interest intended.").

99. *Schroeder*, 2001 ND 36, ¶ 21.

a life estate transfers property upon death, it acts as a method of asset protection.[100] Therefore, life estates are often an effective tool to avoid probate and maximize tax benefits.[101] Life estates are also widely used to protect an individual's real property from potential long-term care expenses.[102] This has been due in large part to the fact that life estates are considered "wasting assets."[103] Meaning, the older the person's age, the smaller the life estate interest.[104] Eventually at the life tenant's death, "no value remains to be seized by the state for reimbursement for medical costs."[105] Since its value decreases as time passes, life estates in both homestead and non-homestead property have been historically excluded from affecting Medicaid eligibility.[106]

As such, farming families, in particular, have employed the use of life estates to rent their farmsteads for income to cover any health care costs in their later years while also ensuring their farmsteads pass to their children.[107] Seeing that Minnesota and North Dakota's largest economic industries are agriculture, there is no wonder that estate planning attorneys in these states have been utilizing life estates to protect clients' assets for decades.[108] However, the shift of interpretation articulated in *Schmalz* has the potential to create some very concerning issues for Minnesota families, and those same issues may also be looming on the horizon in North Dakota.

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100. *See* Kelly Nuckolls, *Where There's a Will There's a Way. Or is There?: Transition Tools Farm Operations Should Consider First Before Opting to Write a Will*, 54 IDAHO L. R. 671, 686-87 (2018).

101. *See id.* at 686; *Overview of Life Estates*, MULLEN & GUTTMAN PLLC, https://mullenguttman.com/blog/overview-of-life-estates/ (last visited Feb. 5, 2021).

102. Nuckolls, *supra* note 100, at 686.

103. PETER SPERO, ASSET PROTECTION: LEGAL PLANNING, STRATEGIES AND FORMS, ¶ 14.05[3][c] (Warren, Gorham & Lamont/RIA ed., 2001), Westlaw (database updated Nov. 2020).

104. *Id.*

105. *Id.*

106. DONALD H. KELLEY ET AL., ESTATE PLANNING FOR FARMERS AND RANCHERS § 12:44 (3rd ed. 2019), Westlaw ESTPLANFR.

107. Mark Balzarini, *Establishing a Life Estate for Your Farm has Pros, Cons*, FARM PROGRESS, (Nov. 17, 2017), https://www.farmprogress.com/farm-succession/establishing-life-estate-your-farm-has-pros-cons; Montana State University Extension, *Life Estate: A Useful Estate Planning Tool*, MONT. L. HELP, https://www.montanalawhelp.org/resource/life-estate-a-useful-estate-planning-tool (last visited Aug. 17, 2020).

108. *See Agriculture*, MINN. DEP'T OF LAB. & INDUS., https://www.dli.mn.gov/business/workforce/agriculture (last visited Aug. 17, 2020) [hereinafter MINN. DEP'T OF LAB. & INDUS.]; *Agriculture Fact Sheet*, N.D. DEP'T OF COM. (Dec. 21, 2020) https://www.nd.gov/sites/www/files/documents/Fact%20Sheets/AgFactSheet_Web.pdf [hereinafter N.D. DEP'T OF COM.].

A. THE FATE OF THE LIFE ESTATE IN MINNESOTA

1. In the Beginning

For decades, Minnesota attorneys have been utilizing life estates when planning clients' estates and protecting their assets.[109] Prior to 1995, the MN DHS evaluated non-homestead life estates held by either an institutionalized spouse or a community spouse like any other non-homestead real property interests.[110] Following the federal approach, the value of life estate interests were excluded from counting towards the institutionalized and community spouse's asset limits so long as the spouse holding the interest engaged in "reasonable efforts to sell" the property.[111] This was essentially because life estates harbored no value unless or until they were sold.[112]

Its exclusion allowed life estates to be a very effective legal vehicle for Minnesotans. However, the Minnesota Legislature added subdivision 4a to section 256B.056 in 1995.[113] Additionally, in 2003 the Minnesota Legislature passed a bill that allowed the state to attach medical assistance liens to the life estate interests of life tenants when they died.[114] Consequently, the MN DHS began clandestinely moving away from the federal approach, and started taking the position that non-homestead life estates held by a community spouse counted towards the CSAA.[115] The MN DHS instructed county agencies to follow suit, and more individuals holding life estate interests in non-homestead property were being denied medical assistance.[116] Minnesota courts began getting involved as denied applicants were seeking judicial review, which eventually led to the Minnesota Supreme Court making its decision in *Schmalz*. The *Schmalz* ruling impacted more than just decades of settled law; it fatally wounded a valuable estate planning tool for the agricultural community. Minnesota's deviation from federal law could lead to unfortunate results for medical assistance applicants.

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109. Nelson, *supra* note 77, at 20.

110. Brief for National Academy of Elder Law Attorneys as Amicus Curiae Supporting Respondent, *supra* note 62, at 5.

111. *See* 42 U.S.C. § 1382b(b)(2) (stating the Commissioner shall not require the disposition of any real property so long as the owner's reasonable efforts to sell it have been unsuccessful); *see also* 20 C.F.R. § 416.1245(b) (2020) (setting forth the standard of what constitutes "reasonable efforts to sell").

112. *In re* Appeal of Leroy Vait, Doc. No. 155286 (Minn. Dep't of Hum. Servs. Dec. 23, 2014).

113. June 1, 1995, ch. 248, 1995 Minn. Laws 2475.

114. H.B. 6, 83rd Leg., 1st Spec. Sess. (Minn. 2003).

115. In 2010, the MN DHS distributed the infamous "Life Estate Memo" to county social services agencies. This memo began the shift of no longer allowing the community spouse's non-homestead life estate interest to be excluded. Zoom Interview with Laura Zdychnec, Partner, Long, Reher, Hanson, & Price, P.A., member of Nat'l Acad. of Elder L. Att'ys, and Prob. and Tr. L. Sections of Minn. State Bar Ass'n (Aug. 25, 2020).

116. *Id.*

2. Minnesota's Departure from Federal Law

Interpretation of federal law, although discussed minimally by the court in *Schmalz*, was at the forefront of the party's briefs. In the appellant's brief, the Commissioner argued that Congress plainly did not exclude life estate interests from asset computations under the provisions of the SSI program.[117] The Commissioner took the position that if Congress did not explicitly *exclude* an asset from the SSI program, then it was Congress's intent to *include* that asset for purposes of determining medical assistance eligibility.[118] The Commissioner's main force being that a community spouse's non-homestead life estate interest is salable,[119] and must therefore be sold if the community spouse exceeds the CSAA.[120] In other words, if the community spouse has the power or right to sell property, it is considered an available asset that should be used towards paying for medical expenses.

While in many respects the SSI provisions do lay out numerous explicitly excluded assets, one of which is not a life estate interest,[121] federal law grants the states discretion on more specific exclusions.[122] Federal law likewise provides that "[t]he Commissioner of Social Security shall not require the disposition of any real property for so long as it cannot be sold because . . . the owner's reasonable efforts to sell it have been unsuccessful."[123] Consequently, Elder Law attorney Laura Zdychnec suggests life estates were meant to be excluded according to federal law.[124]

> Life estates continue to shrink as a percentage of the property interest as the life tenant grows older, and terminate at the death of the life tenant, so no one wants to buy them. Although the Medicaid Act does not outright exclude life estates, they are considered unavailable because there is no market for them. Counting life estate interests towards eligibility in Minnesota is futile and blatantly ignores

117. Brief of Appellant, *supra* note 13, at 15. "SSI" is an acronym for "Supplemental Security Income."

118. *Id.*

119. *See Salable*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "salable" as an items ability to be sold).

120. Under the Commissioner's interpretation, life estates of community spouses are available, while life estates of institutionalized spouses are excluded. Brief of Appellant, *supra* note 13, at 19.

121. *See* 42 U.S.C. § 1382b(a), (d).

122. *See id.* § 1382b(a)(3), (4); *see also* MINN. STAT. § 256B.056(1a) (2020) ("*Unless specifically required by state law or rule of federal law or regulation* . . . the methodologies for the Supplemental Security Income program shall be used . . . .") (emphasis added).

123. 42 U.S.C. § 1382b(b)(2).

124. Zoom Interview with Laura Zdychnec, Partner, Long, Reher, Hanson, & Price, P.A., member of Nat'l Acad. of Elder L. Att'ys, and Prob. and Tr. L. Sections of Minn. State Bar Ass'n (Aug. 25, 2020).

> federal law requiring like treatment of assets regardless of which spouse holds title.[125]

Said another way, all reasonable efforts to sell a life estate interest, whether held by an institutionalized or a community spouse, will be unsuccessful due to their unmarketability so they should not affect eligibility. Even if federal law did not intend for life estates to be excluded, Zdychnec contends Minnesota state law created a presumption that a life estate is nonsalable for both spouses under the language of subdivision 4a in section 256B.056, and should therefore be excludable for both.[126]

The Minnesota Supreme Court, by contrast, did not see subdivision 4a in the same light and held the presumption of non-salability only applies to the institutionalized spouse.[127] The court appears to deviate from federal law in this respect, and this may be a cause for concern for medical assistance applicants and Minnesota practitioners alike.[128] The interpretation announced in *Schmalz* creates notable *non sequiturs*[129] that seem to contradict policy concerns federal law likely sought to avoid in enacting the Medicaid Act and the MCCA. The *Schmalz* conclusion that a community spouse's life estate interests are salable creates an assumption that attacks the most important of these policy concerns, that is, the impoverishment of the community spouse.

In so holding, *Schmalz* assumes community spouses have the ability to sell their life estate interest in the first place. While life tenants may technically have the ability to sell their interests, there is essentially no market for life estate interests from individuals like 93-year-old Marvin Schmalz whose interest terminates at his death. The value of such an interest would be impractical to sell and imprudent to buy. On the other hand, if the community spouse does sell his life estate, the *Schmalz* holding will surely impoverish those community spouses who rely on the property for income as they could lose their livelihood during a fragile stage of life.

Although the Minnesota Supreme Court provides a well-reasoned holding in terms of analyzing the statutory language and the legislature's intent, its reasoning nonetheless seems incomplete when considering some inconsistencies that could arise in application. For instance, if an applicant is denied medical assistance because of her spouse's life estate interests, the community spouse could seemingly apply for medical assistance himself, thereby

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125. *Id*.

126. *Id*.

127. *In re* Schmalz, 945 N.W.2d 46, 53 (Minn. 2020).

128. Brief for National Academy of Elder Law Attorneys as Amicus Curiae Supporting Respondent, *supra* note 62, at 5; *see generally* Graham, *supra* at note 97.

129. *Non sequitur*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2003) (translating "non sequitur" to "it does not follow" and specifically defining it as "an inference that does not follow logically from the premises.").

causing his otherwise countable life estate to be excluded. In addition, if the only thing preventing an applicant from obtaining medical assistance is her spouse's life estate interests, then the applicant could instantaneously become eligible by virtue of her spouse's death when his life estate interests extinguish.

The *Schmalz* ruling's most noteworthy conundrum was understandably pointed out by the district court.[130] How is the very same land owned by a community spouse and institutionalized spouse as life tenants simultaneously salable and nonsalable? In theory, the Minnesota Supreme Court's interpretation in *Schmalz* appears logically sound and in accordance with rules of statutory construction. Applying such interpretation, however, could likely create even more complexities with medical assistance. Therefore, these anomalies represent that predicting consistent results for applicants will likely become increasingly thorny for practitioners due to Minnesota's departure from federal law. Unpredictability with laws governing medical assistance could greatly impact Minnesota estate planners as it could certainly disrupt previously established methods of protecting clients' assets.

3. The Impact of Schmalz on Minnesota Farming Families

In addition to the unpredictability with medical assistance, the *Schmalz* ruling poses an even greater challenge to the agricultural community. Agriculture persists as the core of Minnesota's economy and shows no signs of slowing down. Minnesota ranks fifth in total agricultural production in the United States, and despite other industries such as manufacturing and energy creeping into the state, agriculture reigns supreme as Minnesota's largest industry.[131] As of 2017, there are 68,822 farms currently operating in the State of Minnesota, 96 percent of which are family-owned.[132] Of the 110,000 farmers operating farmsteads in the state, 68,407 are between the ages of 35 and 64, and 33,146 are 65 years of age or older.[133] With the average age of Minnesota farmers being around 55 years, many farmers are nearing retirement and looking to pass down the farming tradition to their children.[134]

Similar to the Schmalzes' situation, many farmers want to preserve assets for their children while also paying for necessary expenses in their later years. Many farmers do so by renting out their non-homestead farmland and

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130. Schmalz v. Minn. Dep't of Hum. Servs., No. 65-CV-18-157, 2018 Minn. Dist. LEXIS 417, at *7-8 (Minn. 8th Jud. Dist. Nov. 29, 2018).

131. *See* MINN. DEP'T OF LAB. & INDUS., *supra* note 108.

132. *2017 Census of Agriculture- State profile: Minnesota*, U.S. DEP'T OF AGRIC. (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Online_Resources/County_Profiles/Minnesota/cp99027.pdf.

133. *Id.*

134. Michael Peterson, *Average MN Farmer is 55 Years Old*, MINN. STATE DEMOGRAPHIC CTR. 3 (2015), https://mn.gov/bms-stat/assets/average-mn-farmer-is-55-popnotes-march2015.pdf.

using the rental proceeds for their retirement.[135] This rental income is especially important for community spouses whose spouse is institutionalized in a long-term care facility.[136] In an interview with MINNESOTA LAWYER, Esther Schmalzes' attorney, Jon Saunders, pointed out, "[f]or many community spouses in rural Minnesota their income consists of Social Security and rent from their farmland."[137] Additionally, estate planning attorney Stephanie Harbott, who practices in rural Polk County, Minnesota, stated, "farmers use the rental income obtained from their farmland for the majority of their retirement. Without this, the farming community may be especially affected from the *Schmalz* ruling."[138] When considering that nursing home expenses range from $5,000 to $8,000 or more each month, community spouse's assets can rapidly deplete if their spouse is denied medical assistance.[139] Thus, even with the protections against pauperization in the MCCA, attorneys fear that the *Schmalz* ruling will impoverish community spouses and undercut the MCCA entirely.[140]

Because the *Schmalz* ruling affects the community spouse's entire nonhomestead life estate interest and not just income derived therefrom, Minnesota will most likely begin to see county agencies denying medical assistance to applicants unless the community spouse transfers his entire life estate interest to the applicant or sells it altogether.[141] In light of the percentage of family-owned farms in Minnesota, many rural communities may be immediately affected by the *Schmalz* ruling as a result. For example, suppose the community spouse does not transfer his life estate interest to the applicant. In that case, the couple will either need to pay substantial out-of-pocket medical expenses or risk losing the family farm. "Farmland is expensive and will nearly always exceed a married couple's asset allowance. So now that it counts towards asset limits, estate planners will have to find other creative ways to help farmers keep this rental income."[142]

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135. Interview with Stephanie J. Harbott, Partner, Reynolds, Harbott, Knutson & Larson, P.L.L.P., in Crookston, Minn. (Aug. 25, 2020).

136. *Id*.

137. Nelson, *supra* note 77, at 20.

138. Interview with Stephanie J. Harbott, Partner, Reynolds, Harbott, Knutson & Larson, P.L.L.P., in Crookston, Minn. (Aug. 25, 2020).

139. *Spousal Impoverishment*, MEDICAID.GOV, https://www.medicaid.gov/medicaid/eligibility/spousal-improverishment/index.html (last visited Sept. 19, 2020).

140. Nelson, *supra* at note 77, at 20; *see generally* Graham, *supra* at note 97 (explaining the *Schmalz* ruling will make life estates no longer a useful planning tool because it will no longer protect the income from farmland for non-Medical Assistance spouse.).

141. Nelson, *supra* at note 77, at 20.

142. Interview with Stephanie J. Harbott, Partner, Reynolds, Harbott, Knutson & Larson, P.L.L.P., in Crookston, Minn. (Aug. 25, 2020).

Therefore, the usefulness of life estates, especially when it comes to farming communities, has lost its punch. Before *Schmalz*, farmers could retain their farmland and use it for their retirement without having to worry about having it depleted to pay for their spouse's health care. Those days are gone as farming families will now likely choose between fronting health care costs themselves or losing the family farm. As such, *Schmalz* may have squandered any vitality the life estate possessed in protecting non-homestead property.

B. THE *SCHMALZ* DECISION'S IMPACT ON NORTH DAKOTA

Minnesota estate planning attorneys are not the only ones who utilize the benefits of life estates and may not be the only ones affected by *Schmalz*. Estate planners use life estates by the same token in North Dakota as an avenue to avoid probate and assist elderly persons in obtaining medical assistance.[143] Considering the recent *Schmalz* decision and the many similarities the two states share, North Dakota practitioners should remain cognizant of this Minnesota court ruling as North Dakota may be trailing right behind its sister state with a curveball of its own. The question of whether this decision may impact North Dakota in the imminent future remains unclear. However, the unforeseen circumstances resulting from the *Schmalz* decision are cruelly reminding the Minnesota legal community that there is always a possibility for an abrupt change in the law.

1. Similarities Between North Dakota and Minnesota

North Dakota and Minnesota share many of the same qualities. Like Minnesota, North Dakota has a large farming community. Agriculture is North Dakota's largest industry and there are nearly 30,000 farms across the state, 87 percent of which are family owned.[144] Thus, as with Minnesota, farming families in the state of North Dakota especially benefit from the use of non-homestead life estates in order to preserve their family farms and obtain medical assistance.[145] These similarities stretch farther than just the two state's economic industries, however. The laws of each state echo one another in many respects, as well.

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143. *Life Estate Deed: What is it?*, SEVERSON, WOGSLAND & LIEBL PC (Nov. 21, 2018) https://www.swlattorneys.com/life-estate-deed/.

144. N.D. DEP'T OF COM., *supra* note 108; *2017 Census of Agriculture- State profile: North Dakota*, U.S. DEP'T OF AGRIC. (2017) https://www.nass.usda.gov/Publications/AgCensus/2017/Online_Resources/County_Profiles/North_Dakota/cp99038.pdf.

145. *See generally* Keven J. Kercher, *Addressing Concerns About Medical Assistance*, OHNSTAD L. (Mar. 1, 2016), https://ohnstadlaw.com/addressing-concerns-about-medical-assistance/.

Generally speaking, Minnesota and North Dakota share many similarities in each other's laws.[146] The neighboring states both sit in the Eighth Circuit and will, on occasion, look to each other's laws and court rulings as guidance in enacting and interpreting their own laws.[147] Among these similarities are the two state's statutes and rules governing medical assistance.[148]

As noted above, to reap the benefits from the federal Medicaid program, participating states must comply with federal statutory and regulatory requirements.[149] While the Medicaid Act permits states some leeway in enacting its own laws in this area, all participating states comply with the same federal law; therefore, their laws typically resemble one another.[150] Notably, Minnesota and North Dakota share striking similarities with one another's laws in this area. Minnesota and North Dakota both provide medical assis-

146. *See generally* Bartels v. City of Williston, 276 N.W.2d 113, 120 (N.D. 1979) ("Minnesota, by case law, has substantially the same principles of law as North Dakota regarding the adoption of an act from another state . . . .").

147. *See, e.g.*, Kortum v. Johnson, 2008 ND 154, ¶ 22, 755 N.W.2d 432 (drawing guidance from Minnesota courts to interpret North Dakota's Business Corporations Act); *Bartels*, 276 N.W.2d at 120 (adopting Minnesota's comparative negligence statute, North Dakota court stated it likewise adopts Minnesota's interpretation of the adopted that statute) Locken v. Locken, 2011 ND 90, ¶ 18, 797 N.W.2d 301 (noting similar authorities between Minnesota and North Dakota mortgage foreclosure statute of limitations); Mock v. Mock, 2004 ND 14, ¶ 31, 673 N.W.2d 635 (Maring, J., dissenting) (stating North Dakota often looks to Minnesota for guidance in realm of family law); *cf.* Olson v. Hartwig, 180 N.W.2d 870, 872 (Minn. 1970) ("[W]hen we adopt a statute from another state which has been interpreted by the highest court of that state, we take the interpretation with the statute.").

148. *See* MINN. STAT. §§ 256B.001 – 256B.85 (2020); N.D. CENT CODE §§ 50-24.1-00.1 – 50-24.1-41 (2019).

149. *See supra* Part II.A.

150. *See, e.g.*, FLA. STAT. § 409.902(1) (2020) (describing the Florida Medicaid program as "the single state agency authorized to make payments for medical assistance and related services under Title XIX of the Social Security Act."); 305 ILL. COMP. STAT. 5/5-2 (2020) (stating the Illinois Medicaid program provides medical assistance to persons who fail to qualify on the basis of need, and who have insufficient income and resources to meet the costs of necessary medical care qualify under Title XIX of the Social Security Act); MINN. STAT. § 256B.056 (2020) (stating Minnesota Medicaid program provides medical assistance for needy persons whose resources are not adequate to meet the cost of medical care as provided under Title XIX of the Social Security Act); N.D. CENT CODE § 50-24.1-02 (2019) (stating North Dakota's Medicaid program provides medical assistance to needy persons resulting from insufficient resources and income to meet the costs of healthcare as provided under Title XIX of the Social Security Act); TENN. CODE ANN. § 71-5-102(a) (West 2020) (describing the purpose of Tennessee's Medicaid program "to make possible medical assistance to those recipients determined to be eligible under this chapter to receive medical assistance that conforms to the requirements of Title XIX of the Social Security Act . . ."); WIS. STAT. § 49.45(1) (2020) (stating the purpose of the Wisconsin's Medicaid program is to provide health care for eligible persons and obtain benefits under Title XIX of the federal social security act).

tance to medically needy individuals and have similar eligibility requirements ,[151] each state's asset allowances for institutionalized spouses and community spouses are identical,[152] both comply with the MCCA,[153] and both grant their respective Department Human Services administrative powers in carrying out the state's medical assistance program.[154]

North Dakota also follows the same approach as Minnesota, as applicants whose assets exceed the $3,000 limit are considered "available" to be used for medical care, and must be spent down before they will be eligible[155] because "[t]he Medicaid program is intended to be a payor of last resort, and available resources must be exhausted before Medicaid will pay for an individual's care."[156]

Therefore, the possibility North Dakota will look to Minnesota to interpret its own laws on medical assistance is almost to be expected. If North Dakota makes a change in its treatment of non-homestead life estates, it may desire following the interpretation in *Schmalz* to justify its own. Keeping in mind that North Dakota has a large agricultural community, a shift in the law like this would likely create the same problems Minnesota will experience. It will be desirable for North Dakota practitioners to keep abreast with alternative ways to secure clients' non-homestead property to avoid this latent change in the law.

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151. *Compare* N.D. CENT CODE § 50.24.1-02 (2019) (providing medical assistance benefits to eligible persons who are medically needy persons due to having insufficient resources and income to meet the costs of healthcare); *with* MINN. STAT. § 256B.01 (2020) (setting forth medical assistance for needy persons whose resources are not adequate to meet the cost of such medical care).

152. *Compare* N.D. ADMIN. CODE § 75-02-02.1-26 (2020) (stating a person is eligible for medical assistance in North Dakota if total value of his individual assets does not exceed $3,000 or $6,000 for a two-person household); *and* N.D. CENT. CODE § 50-24.1-02.2 (2019) (stating "the department shall establish a community spouse resource allowance equal to the maximum provided by 42 U.S.C. § 1396r-5(f)(2)[,]", i.e., $120,900); *with* MINN. STAT. § 256B.056(3)(a) (2020) (defining asset limits of the institutionalized spouse to be $3,000 in assets or $6,000 in assets as a household); and MINN. STAT. § 256B059(3) (2020) (permitting the community spouse's retention of assets up to $120,900 (previously $119,220, adjusts annually) without being considered available to institutionalized spouse).

153. *Compare* N.D. CENT. CODE § 50-24.1-02.2 (2019); *with* MINN. STAT. 256B.059 (2020).

154. *Compare* N.D. CENT CODE §§ 50-24.1-00.1 – 50-24.1-41 (granting ND DHS authority to establish minimum income threshold for medically needy individuals, so long as income level is no less than required by Medicaid Act); *with* MINN. STAT. § 256B.04 (1)(2020) (authorizing Commissioner's supervision in the administration of medical assistance for eligible recipients by county agencies thereunder).

155. N.D. ADMIN. CODE § 75-02-02.1-26(1)(a) (2020); *see generally In re* Estate of Gross v. N.D. Dep't of Hum. Servs., 2004 ND 190, ¶ 8, 687 N.W.2d 460 (holding assets are "actually available" largely fact specific but generally occurs when at the disposal of applicant "who has a legal interest in a liquated sum and that person has the legal ability to make the sum available for support, maintenance, or medical care.").

156. Makedonsky v. N.D. Dep't of Hum. Servs., 2008 ND 49, ¶ 9, 746 N.W.2d 185 (quoting *In re* Estate of Pladson v. Traill Cty. Soc. Servs., 2005 ND 213, ¶¶ 10-11, 707 N.W.2d 473); *see In re* Estate of Barg, 752 N.W.2d 52, 58 (Minn. 2008).

2. Differences Between North Dakota and Minnesota

Despite the similarities between the two state's laws on medical assistance, and the possibility North Dakota may look to Minnesota to interpret them, there may be one reconciling difference. After the *Schmalz* decision, that one reconciling difference is each state's treatment of life estate interests for purposes of medical assistance eligibility. Although North Dakota courts have never directly ruled on the issue,[157] the North Dakota Department of Human Services (hereinafter "ND DHS") takes a clear stance on its treatment of life estate interests held by couples.[158] In its Administrative Code, the ND DHS explicitly excludes "the *value* of a life estate" from counting towards an applicant's asset limits.[159] The exclusion applies both to life estate interests held by the institutionalized spouse and the community spouse.[160] The ND DHS draws a bright line rule on the exclusion of the value of life estates for purposes of medical assistance eligibility, while Minnesota has ruled to the contrary.[161]

North Dakota and Minnesota have not always been so disjoined in this area. In fact, before *Schmalz*, North Dakota and Minnesota shared similarities with their treatment of life estate interests. After the *Schmalz* ruling, however, there are stark differences. North Dakota excludes the value of life estates in determining asset limits for community spouses while Minnesota does not. For attorneys who practice in both states, the *Schmalz* decision boasts even higher importance. On one hand, a life estate in North Dakota may be a completely safe legal tool to protect a client's non-homestead property, while just one state over, a life estate in non-homestead property may no longer be a workable option.[162]

Life estates are not limitless devices in North Dakota. The North Dakota Supreme Court ruled that the income stream derived from a life estate is an "available asset" to count towards a couple's countable assets.[163] However,

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157. *See generally* Bleick v. N.D. Dep't of Hum. Servs., 2015 ND 63, ¶ 26, 861 N.W.2d 138 (discussing availability of income stream derived from life estate in determining medical assistance eligibility but does not directly speak to treatment of interests held in non-homestead life estates generally).

158. N.D. ADMIN CODE § 75-02-02.1-28(21) (2020).

159. *See id*. (emphasis added).

160. *See id*. § 75-02-02.1-24(2)(c), -24(4); *id*. § 75-02-02.1-28.1(2) (stating all countable assets held by institutionalized spouse, community spouse, or both will be considered available to institutionalized spouse; however, countable assets are those not specifically excluded in section 75-02-02.1-28.1, which includes the value of the community spouse's life estate).

161. *Id*. § 75-02-02.1-28.1(1); *id*. § 75-02-02.1-24(4) (stating countable assets of the institutionalized and community spouse include all assets *not specifically excluded* in section 75-02-02.1-28.1, which permits the exclusion of the value of a life estate); *see also id*. § 75-02-02.1-24(2)(c) (defining "countable assets" to include all assets held by the institutionalized spouse, community spouse, or both).

162. Nelson, *supra* at note 77, at 20; Graham, *supra* at note 97.

163. Bleick v. N.D. Dep't of Hum. Servs., 2015 ND 63, ¶ 26, 861 N.W.2d 138.

no court in North Dakota has ever spoken as to the value of the life estate itself, or whether section 75-02-02.1-28, subdivision 21 of North Dakota's Administrative Code encompasses non-homestead life estates. The section's clear exclusion of life estates from both institutionalized and community spouse's asset limits may likely be why it has been shielded from scrutiny. However, the fact that "non-homestead life estate" is missing from the code could motivate the ND DHS or North Dakota courts to provide an interpretation similar to that in *Schmalz*.

While the true likelihood of this occurring remains unknown, if North Dakota follows *Schmalz*, North Dakota could likely see the same major changes on medical assistance coverage for farm families as Minnesota. This could mean more inconsistencies in couple's asset valuations and difficulties protecting a farm family's non-homestead farmland. Therefore, it is important that North Dakota practitioners understand the current differences in each state's treatment of life estates for purposes of medical assistance eligibility and also remain mindful of the implications of *Schmalz* in order to be proactive if their own state law changes.

V. CONCLUSION

A famous artist once wrote, "[t]his is why we can't have nice things, darling."[164] Since the *Schmalz* ruling, many individuals in Minnesota applying for medical assistance can relate to this artist's problem of not being able to have "nice things." After all, those things, more specifically life estate interests in non-homestead property, could be exactly what prevents someone from obtaining medical assistance.

Schmalz interpreted the term "individual" to refer only to the medical assistance applicant and not the community spouse deviating from previously understood interpretations of the word. As a consequence, non-homestead life estate interests of a community spouse now are available in determining the applicant's eligibility as they will count toward the applicant's total countable assets.[165] While the court expressed sound reasoning as to why such an interpretation was necessary, the impact of *Schmalz* will forever change the legal landscape for estate planning in Minnesota. Practitioners who relied on the use of life estates in protecting clients' non-homestead farms will likely encounter new and unexpected obstacles. By the same token, more complex legal issues involving life estates and medical assistance eligibility will inevitably arise due to this sudden shift in interpretation. Estate planners in both Minnesota and North Dakota should, therefore, understand the implications of *Schmalz* and be prepared to use alternative methods of

164. Taylor Swift, "*This is Why We Can't Have Nice Things*," REPUTATION (2017).
165. *In re* Schmalz, 945 N.W.2d 46, 49-50 (Minn. 2020).

protecting client assets. Like the MN DHS, the ND DHS possesses considerable powers as to how Medicaid is carried out in the state. They are the gatekeepers on who will receive benefits and who will be denied. More importantly, the ND DHS has the power to change the state's administrative code which governs the treatment of life estates for purposes of determining medical assistance eligibility. Therefore, change could be tiptoeing around the corner in North Dakota. But as for Minnesota, the repercussions of this ruling are immediate; thus, practitioners should inform their clients how a once deep-seated life estate has been uprooted and may no longer protect their "nice things."

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[*] University of North Dakota School of Law, J.D. expected May 2021. I am grateful to my parents Todd and Denise, and my grandfather, Duke, for their continued support. I also thank Tatiana Hamilton, Joseph Hackman, Ashley Vander Wal, Kristen Clow, Elliot Stoll, and the amazing editors of North Dakota Law Review for their invaluable suggestions and tireless efforts over the course of the publication process. This Case Comment is dedicated to my wonderful wife, AnneMarie, the epitome of wise, warmhearted, and affirming, from whom has devoted so much to me and whom I learn so much from.