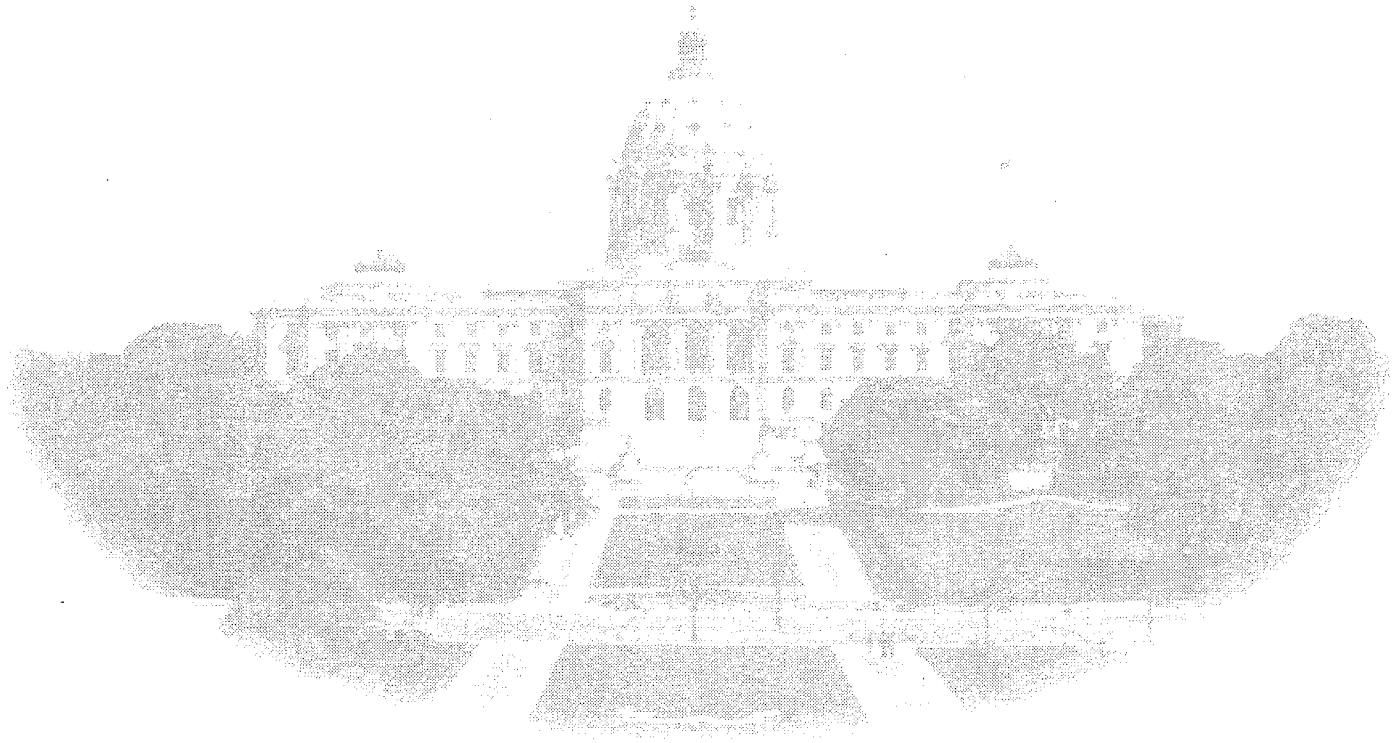
REPORT OF THE
REVISOR OF STATUTES

CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT AND COURT OF APPEALS



Submitted to the Legislature of the State of Minnesota
November 2002

— Minn. Stat. 3C.04 Subd. 3 —

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Office of the Revisor of Statutes
Minnesota Legislature

Michele L. Timmons
REVISOR

November 15, 2002

The Honorable Don Samuelson
President of the Senate
Room 121
Capitol Building

The Honorable Steve Sviggum
Speaker of the House of Representatives
Room 463
State Office Building

Dear Mr. Speaker and Mr. President:

Minnesota Statutes, section 3C.04, subdivision 3, requires the Office of the Revisor of Statutes to biennially report to the Legislature on statutory changes recommended or statutory deficiencies noted in opinions of the Supreme Court and Court of Appeals of Minnesota.

I am, therefore, pleased to transmit to you our report on opinions issued by those courts between October 1, 2000, and September 30, 2002.

Sincerely,

Michele L. Timmons

Michele L. Timmons
Revisor of Statutes

cc: The Honorable John C. Hottinger
Majority Leader of the Senate

The Honorable James P. Metzen
President of the Senate-Elect

The Honorable Dick Day
Minority Leader of the Senate

The Honorable Jane Ranum
Chair, Senate Judiciary Committee
And Members

The Honorable Erik Paulsen
Majority Leader of the House of Representatives

The Honorable Matt Entenza
Minority Leader of the House of Representatives

The Honorable Steve Smith
Chair, House Civil Law Committee
And Members

MLT:kmj

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Minnesota Court of Appeals
November 7, 2000

Review Denied January 26, 2001

The city of Northfield adopted a rezoning ordinance that, in effect, allowed a large commercial retail establishment to build a store near the city's central business district. The district is listed on the National Register of Historic Places. Some city residents brought suit arguing, inter alia, that the construction would result in a violation of the Minnesota Environmental Rights Act (MERA), Minnesota Statutes, chapter 116B. The residents argued that (1) the act protects ". . . natural resources located within the state from pollution, impairment, or destruction" under Minnesota Statutes, sections 116B.01 and 116B.02, subdivision 5, (2) the buildings in the city's central business district are protected historical resources, (3) historical resources, while not defined in MERA, are a type of natural resource listed in Minnesota Statutes, section 116B.02, subdivision 4, and are protected under MERA, and (4) the "new . . . store 'is likely to materially adversely affect' those buildings," in violation of Minnesota Statutes, section 116B.02, subdivision 5, because of the resulting adverse economic disadvantages to the central business district merchants.

The court of appeals noted that the term "historical resources" is not defined in MERA and, therefore, is ambiguous. The court found that the state supreme court had previously identified certain criteria to be considered when determining what constituted historical resources, which primarily addressed "buildings or other places, which we note are the criteria for inclusion on the National Register of Historic Places." In determining the legislature's intent for MERA and similar laws "to accomplish environmental ends, not economic ones," the court concluded:

> [I]t appears that the best interpretation of "historical resources" excludes the economic and cultural factors the Northfield residents seek to protect in the Central Business District.

In addition, the court found the appellants' argument alleging essentially a resulting decline in the central business district was "too attenuated as a matter of law" because allowing MERA to be based:

> on the possible remote effects of economic forces would convert the statute from an environmental protection law to an economic regulation. The Northfield residents' interpretation of the statute is unreasonable and produces a result that is plainly at variance with the policy of the statute considered as a whole. We need not consider such an interpretation.

Minnesota Statutes, sec. 204B.41
Election Ballots

Erlandson et al. v. Kiffmeyer et al.
Minnesota Supreme Court
October 31, 2002

ORDER (Opinion to Follow)

Following the death of the Democratic-Farmer-Labor Party nominee for the U. S. Senate, Erlandson and others brought a petition for relief under Minnesota Statutes, section 204B.44, clause (d), alleging that certain election officials did not properly "administer the instructions, the absentee ballots and the supplemental ballots for the general election scheduled for November 5, 2002." The vacancy occurred after absentee ballots had been mailed and "after the 16th day before the general election" under Minnesota Statutes, section 204B.41, which states:

> When a vacancy in nomination occurs through the death . . . of a candidate after the 16th day before the general election, the officer in charge of preparing the ballots shall prepare and distribute a sufficient number of separate paper ballots which shall be headed with the words "OFFICIAL SUPPLEMENTAL BALLOT." This ballot shall contain the title of the office for which the vacancy in nomination has been filled and the names of all the candidates nominated for that office. The ballot shall conform to the provisions governing the printing of other official ballots as far as practicable. The title of the office and the names of the candidates for that office shall be blotted out or stricken from the regular ballots by the election judges. The official supplemental ballot shall be given to each voter when the voter is given the regular ballot or is directed to the voting machine. Regular ballots shall not be changed nor shall official supplemental ballots be prepared as provided in this section during the three calendar days before an election. Absentee ballots that have been mailed prior to the preparation of official supplemental ballots shall be counted in the same manner as if the vacancy had not occurred. Official supplemental ballots shall not be mailed to absent voters to whom ballots were mailed before the official supplemental ballots were prepared.

The court held a hearing on October 31, 2002, and issued an order (with opinion to follow) which stated in pertinent part related to Minnesota Statutes, section 204B.41:

> 2. If a voter has already cast a regular absentee ballot and requests, in any manner, an official supplemental ballot, the county election official shall provide the official supplemental ballot and a second regular absentee ballot, as a set, by mail using methods authorized for mailing of absentee ballots in Minn. Stat. ch. 204B, or in person if requested in person, to be utilized by the voter. Instructions shall accompany the ballot set clearly stating that if the voter wishes to vote in the races on the regular ballot the second regular absentee ballot must be completed and returned, and the second regular absentee ballot will replace the first regular absentee ballot cast by the voter.

* * *

9. Minnesota Statutes ... 204B.45 (2000) provides that voters residing in municipal areas with fewer than 400 registered . . . [voters] may vote by mail. Mail balloting is a procedure different than absentee balloting. If a voter has already submitted a "mail ballot" and requests, in any manner, an official supplemental ballot, the local election official shall provide the official supplemental ballot and a second regular ballot, as a set, by mail using methods authorized for mailing of absentee ballots in Minn. Stat. ch. 204B or in person if requested in person, to be utilized by the voter. Instructions shall accompany the ballot set clearly stating that if the voter wishes to vote in the races on the regular ballot the second regular ballot must be completed and returned, and that the second regular ballot will replace the first regular ballot cast by the voter.

(Full text of the order may be found in the appendix. In the absence of the opinion, it is unclear whether or not the court found any statutory language to be unconstitutional or ambiguous, or merely interpreted it. When the opinion is issued, the revisor's office will review it and, if constitutionality, ambiguity, or other legal problems are identified, we will supplement this report.)

Minnesota Statutes, secs. 256B.042, subd. 1; 256B.056, subd. 6; and 256B.37, subd. 1
Preemption of Medical Assistance Lien, Assignment, and Subrogation Laws

Martin ex rel. Hoff, and State v. City of Rochester et al.
Minnesota Supreme Court
March 21, 2002

Martin settled a personal injury suit brought against alleged third-party tortfeasors on behalf of her disabled son, Hoff, for $220,000. About six years earlier, to be eligible to receive medical assistance pursuant to Minnesota Statutes, section 256B.056, subdivision 6, Martin, as Hoff's authorized representative, assigned to the state all of Hoff's rights to payment for medical care from any third party liable for Hoff's injuries. The state filed a lien on Hoff's causes of action arising out of the accident that caused Hoff's disability. The lien was for medical costs already paid through state medical assistance and for future medical assistance benefits. The state asserted its medical assistance lien under Minnesota Statutes, section 256B.042, subdivision 1, and a claim for subrogation under Minnesota Statutes, section 256B.37, subdivision 1, to obtain a portion of the settlement proceeds as reimbursement for its expenses in providing Hoff with medical care, which by that time exceeded $600,000.

The district court granted Martin's motion to dismiss the state's claim against the settlement proceeds finding that "Hoff's right to recover medical expenses was completely assigned to the state, leaving Martin . . . with no right to collect for medical expenses. Hoff's remaining rights to recover included all of his claims for personal injury damages except for medical expenses. Martin settled . . . remaining claims . . . for $220,000. The state released . . . defendants . . . , apparently relying only on its lien and subrogation rights to recover medical expenses paid on Hoff's behalf . . . . [T]he state was not entitled to . . . the settlement funds . . . . [T]he state's lien and subrogation rights were preempted by federal law."

The state appealed. The Minnesota Court of Appeals reversed, holding generally that state statutes did not conflict with the federal Medicaid scheme, that the statutes were not preempted by federal law, and that the state's lien and subrogation claims were valid.

On further appeal, the Minnesota Supreme Court, in a 4-3 decision, reversed the court of appeals and remanded the case to the district court for further action.

The court phrased the issues as "whether Minnesota's medical assistance lien, assignment, and subrogation statutes are preempted by the federal anti-lien statute."

Federal Anti-lien Law

The federal anti-lien law provides that ". . . no lien may be imposed against the property of any individual prior to his death on account of medical assistance paid . . . ." The court found the language to be unambiguous and found that it operated in harmony with other federal Medicaid

provisions to accomplish ". . . dual objectives: first, protection of the recipient's limited assets from encroachment by the state for reimbursement for medical expenses paid; second, requiring recovery and reimbursement from third parties liable for the recipient's medical expenses that were paid by Medicaid."

State Lien Statute

The state's medical assistance lien statute, Minnesota Statutes, section 256B.042, subdivision 1, reads in pertinent part:

> When the state . . . provides . . . medical care, it shall have a lien for the costs of the care upon any and all causes of action . . . for health care or injury, which accrue to the person to whom the care was furnished . . . .

The court found that the federal anti-lien statute prohibited a lien being placed on a medical assistance recipient's property before the recipient's death and held that "section 256B.042, . . . is preempted to the extent that it allows a lien for medical assistance paid to be placed on a medical assistance recipient's cause of action before a recipient's death.

State Assignment Statute

The state's assignment statute, Minnesota Statutes, section 256B.056, subdivision 6, reads in pertinent part:

> To be eligible for medical assistance a person must . . . agree to apply all proceeds received or receivable by the person . . . from any third person liable for the costs of medical care . . . . The state . . . shall require from any applicant or recipient of medical assistance the assignment of any rights to medical support and third party payments. * * * By signing an application for medical assistance, a person assigns . . . all rights the person may have to medical support or payments for medical expenses from any other person or entity . . . and agrees to cooperate with the state in . . . obtaining third party payments.

The court found that to interpret "for the costs of medical care" to modify "third party liable" would allow the state to recover proceeds for more than just the costs of medical care allowed under the federal law. To resolve this conflict, the court held that the phrase, instead, modified "all proceeds" in order for the state statute to conform with federal law (i.e., ". . . all proceeds . . . for the costs of medical care . . . ."). The court held "when a medical assistance recipient has a cause or causes of action against potentially liable third parties for his injuries, the medical assistance assignment statute grants to the state an assignment right to all claims for medical care, but it does not grant an assignment right to any other claims or the recovery therefrom."

State Subrogation Statute

The state's subrogation statute, Minnesota Statutes, section 256B.37, subdivision 1, reads in pertinent part:

> Upon furnishing medical assistance to any person who . . . a cause of action arising out of an occurrence that necessitated the payment of medical assistance, the state . . . shall be subrogated, to the extent of the cost of medical care furnished, to any rights the person may have . . . under the cause of action.

Since the statute is not limited to causes of action to recover medical assistance costs, the court felt that "allowing a subrogation right outside of the state's assigned right to medical expenses would be an obstacle to the purposes of the federal Medicaid scheme." The court held "that the state subrogation provision is preempted to the extent that it allows the state to assert a subrogation right against causes of action or settlements for other than medical expenses."

Minnesota Statutes, sec. 507.02
Spousal Signature Requirement to Convey Homestead

Wells Fargo Home Mortgage, Inc. v. Newton
Minnesota Court of Appeals
July 9, 2002

Newton entered into a contract for deed to purchase a house. About two years later she married Witkowski, after which they resided in the house as their homestead. Subsequently, they separated and Newton began divorce proceedings. Before the divorce was final, Newton borrowed $116,600 and executed a promissory note and a mortgage on the property as security for the note. Witkowski did not sign the note or the mortgage and was not named as a mortgagor. Newton used $55,034.74 to pay off the contract for deed and the remaining $61,565.26 to pay closing costs and personal expenses. Subsequently, Newton failed to make mortgage payments and Wells Fargo (appellant) brought an action against Newton and Witkowski for money owed, for property foreclosure, and for a declaration that the appellant's claim is superior to that of any other claimant.

Wells Fargo contended that the money was owed under a purchase money mortgage, which is an exception to the signature requirement for married persons to make a valid conveyance of the homestead under Minnesota Statutes, section 507.02. That section states, in part: "If the owner is married, no conveyance of the homestead, except a mortgage for purchase money unpaid thereon, . . . shall be valid without the signatures of both spouses." The district court disagreed, finding in favor of Newton and Witkowski that the mortgage was not a purchase-money mortgage and was invalid because it was not signed by both Newton and Witkowski.

Wells Fargo appealed. The court of appeals took the case to "determine whether Minn. Stat. ... section 507.02 applies to a mortgage when funds obtained with the mortgage are used partly to refinance a contract for deed and partly to pay personal expenses."

The court found the statute to be ambiguous and phrased the issue as a determination whether Minnesota Statutes, section 507.02 "applied to a mortgage when funds obtained with the mortgage are used partly to refinance a contract for deed and partly to pay personal expenses." The court of appeals stated that the policy objective of the statute is to "ensure a secure homestead for families" and to protect against "the alienation of the homestead without the willing signatures of both spouses" but not to preserve the property against even just "demands for unpaid purchase money." The court concluded that under the statute "to the extent that the mortgage Newton signed secures amounts other than the unpaid purchase price under Newton's contract for deed, the mortgage is invalid. But to the extent that the mortgage secures the $55,034.74 unpaid purchase price under the contract for deed, it is a mortgage for purchase money unpaid on the homestead. Therefore, the spousal-signature requirement in Minn. Stat. ..., section 507.02, does not apply to that portion of the mortgage, and the mortgage is a valid mortgage for $55,034.74 even though it was not signed by Witkowski."

Minnesota Statutes, sec. 510.02
Defining Value of Homestead Exemption

Baumann, et al. v. Chaska Building Center, Inc.
Minnesota Court of Appeals
January 23, 2001

In a creditor-debtor dispute, the district court interpreted the value of the debtor's homestead under the homestead-exemption statute as being its fair market value. Baumann (the debtor) appealed, arguing that "value of the homestead exemption" referred to the debtor's equity in the property. The homestead-exemption statute, Minnesota Statutes, section 510.02, reads in pertinent part:

> *** The value of the homestead exemption . . . may not exceed $200,000 or, if . . . used primarily for agricultural purposes, $500,000 . . . .

The court found the statute to be susceptible to more than one reasonable interpretation and, therefore, ambiguous.

After an analysis of statutes related to the homestead-exemption statute, the legislative history of the statute, and public policy reasons, the court held that its analysis supported the meaning of "value of the homestead exemption" as referring to "the value of the debtor's equity in the property," not the property's fair market value.

Minnesota Statutes, sec. 518.551, subd. 5, para. (f)
Calculating Child Support Payments

Svenningsen v. Svenningsen
Minnesota Court of Appeals
March 26, 2002

John Svenningsen, appellant, appealed the decision of the district court regarding his child support obligation. The appellant incurred a debt of more than $130,000 in student loans for medical school. The divorce agreement provided that the debt would be considered in determining the appellant's support obligation under Minnesota Statutes, section 518.551, subdivision 5, paragraphs (d) through (f). The appellant's salary increased to $116,160 per year and the parties agreed that the support should increase but that a downward departure from the guidelines was warranted because of the debt. However, the parties disagreed over the duration of the downward departure.

Minnesota Statutes, section 518.551, subdivision 5, paragraph (f), reads in pertinent part:

> Any further departure below the guidelines that is based on . . . debts owed to private creditors shall not exceed 18 months in duration, after which the support shall increase automatically to the level ordered by the court. [Emphasis added.]

The court stated that "it is unclear exactly what the phrase 'further departure' references." Before 1986, the sentence including the phrase "further departure" was preceded by a sentence that read "The court shall order child support in accordance with the guidelines and any departure therefrom." Even though the preceding sentence had been removed, the appellant argued the two words assume some other departure from the guidelines has occurred, not the case in this instance. Therefore, since this downward departure is not a "further departure," the 18-month duration limitation does not apply.

The court found that case law and commentators had consistently ignored the word "further" and had held that a downward departure for private debt was limited to 18 months, even when that was "the only basis for departure." The court considered the word superfluous and held that paragraph (f) "prohibits any departure below the guidelines based on a consideration of private debts to exceed 18 months."

Minnesota Statutes, sec. 609.108, subd. 2
Patterned Sex Offender Sentence Enhancement

State v. Grossman
Minnesota Court of Appeals
December 13, 2001

Grossman was convicted of six felony counts, including first-degree criminal sexual conduct, which carries a maximum sentence of 30 years' imprisonment. The trial court judge found that Grossman qualified under Minnesota Statutes, section 609.108, subdivision 1, as a patterned sex offender and, pursuant to the sentencing enhancement provisions of subdivision 2 of that statute, sentenced Grossman to 40 years' imprisonment. The Minnesota Supreme Court had previously held that the findings required in subdivision 1 of the statute to support a determination that a convicted person is a patterned sex offender need only be based on a preponderance of the evidence. *State v. Christie*, 506 N.W.2d 293 (Minn. 1993). Minnesota Statutes, section 609.108, subdivision 2, reads in pertinent part:

> If the factfinder determines, at the time of the trial or the guilty plea, that a predatory offense was motivated by, committed in the course of, or committed in furtherance of sexual contact or penetration, . . . and the court is imposing a sentence under subdivision 1, the statutory maximum imprisonment penalty for the offense is 40 years, notwithstanding the statutory maximum imprisonment penalty otherwise provided for the offense.

Grossman appealed, claiming the sentence violated due process in light of the U. S. Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The court in *Apprendi* held:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

The court found that the sentencing court necessarily had to make findings under subdivision 1, under a preponderance of the evidence standard, to impose a penalty greater than authorized by the jury's verdict, which was based on the reasonable doubt standard. In addition, the court relied on the *Apprendi* analysis that "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Under this analysis, it is irrelevant whether the findings are traditionally those made by a sentencing court and the court concluded:

> The effect of the sentencing court's findings, when coupled with the jury's finding of sexual penetration, was to increase by 10 years the prison sentence to which Grossman was exposed. Due process requires that each of these findings be made by a jury based on proof beyond a reasonable doubt. *** Thus, Minn. Stat. . . . 609.108, subd. 2, as applied to Grossman, is unconstitutional.

The court also stated in a footnote:

While Grossman has not made a facial challenge to Minn. Stat. . . . 609.108, subd. 2, we feel compelled to note our doubts as to whether there are any circumstances under which subdivision 2 could be constitutionally applied.

Minnesota Statutes, sec. 609.749, subd. 5

Overlapping Criminal Acts in Pattern Harassment

State v. Richardson

Minnesota Court of Appeals

October 2, 2001

Richardson was convicted of eight felony counts of patterns of harassing conduct toward four victims. Minnesota Statutes, section 609.749, subdivision 5, paragraph (b), reads in pertinent part ". . . a 'pattern of harassing conduct' means two or more acts . . . that violate the provisions of . . . [various statutes prohibiting criminal acts]...."

The defendant argued that, at most, the statute allowed for only three counts to be charged because each pattern of harassing conduct required at least two distinct unlawful acts separate from two other, different acts used as the basis for each additional count of harassing conduct. The trial court convicted the defendant of eight counts of pattern harassment, consisting of (1) counts that had as a basis an underlying act that "overlapped" against one victim, in which, for example, the second underlying act of one count was used as the first underlying act of a second count against the same victim and (2) counts that "overlapped" against more than one victim in which, for example, an underlying criminal act was used to form not only a basis for a count against one victim but also a basis for a count against a second victim.

The court of appeals determined that the phrase "two or more acts" was "open to at least two interpretations" and, thus, ambiguous. Because it was interpreting a penal statute, the court stated that it must "strictly construe . . . [the ambiguous language] in favor of Richardson." The court concluded that each count required "at least two separate and discreet criminal acts" as a basis for the offense as to each victim, so that a specific criminal act used in forming the basis for one count of pattern harassment could not "overlap" and be used to also form the basis for another count of pattern harassment directed at the same victim. However, the same criminal act perpetrated against two or more individuals may be used as a basis for two or more counts and the specific act "would not be overlapping when applied to each victim."

Minnesota Statutes, sec. 631.04

Unconstitutional Restriction on Minors in the Courtroom

State v. Lindsey

Minnesota Supreme Court

August 23, 2001

Based on Minnesota Statutes, section 631.04, which was originally enacted in 1891, the trial court refused to allow two minors to remain in the courtroom during Lindsey's trial for murder. The minors were neither parties nor witnesses, nor did they have any other direct interest in the trial. Minnesota Statutes, section 631.04, reads in pertinent part:

> A minor under the age of 17 who is not a party to, witness in, or directly interested in a criminal prosecution or trial before a . . . court, may not be present at the trial. ***

Lindsey sought a new trial under his Sixth Amendment right to a public trial. The court found that "it was error for the trial court to rely on section 631.04 to exclude the two children from the courtroom" but concluded that "the regulation of spectators in the courtroom during a criminal trial is procedural and has nothing to do with the substantive aspects of the offense or punishment," and that "the values sought to be protected by a public trial were in fact protected."

The court held that "the exclusion of two children on the facts presented did not violate Lindsey's right to a public trial."

However, the court also held that Minnesota Statutes, section 631.04, "unconstitutionally encroaches upon a judicial function in violation of the separation of powers doctrine."

APPENDIX

STATE OF MINNESOTA

IN COURT OF APPEALS

C3-00-708

Virginia Stansell, et al., on behalf of

themselves and the State of Minnesota,

Appellants,

vs.

City of Northfield,

Respondent,

Target Stores, a division of Dayton Hudson Corporation,

Respondent.

Filed November 7, 2000

Affirmed

Schumacher, Judge

Rice County District Court

File No. C7991593

Michael B. Chase, 1604 Firstar Center, 101 East Fifth Street, St. Paul, MN 55101 (for appellants)

George C. Hoff, Paula A. Callies, Hoff, Barry & Kuderer, P.A., 7901 Flying Cloud Drive, Suite 260, Eden Prairie, MN 55344 (for respondent City of Northfield)

John B. Gordon, Michael A. Ponto, Paul B. Civello, Faegre & Benson LLP, 2200 Norwest Center, 90 South Seventh Street, Minneapolis, MN 55402-3901 (for respondent Target Stores)

Considered and decided by Schumacher, Presiding Judge, Stoneburner, Judge, and Huspeni, Judge.

SYLLABUS

1. A party qualifies as a "person aggrieved" for the purpose of challenging a municipality's land-use action under Minn. Stat. § 462.361, subd. 1 (1998) if the action adversely operates on the party's rights of property or bears directly upon the party's personal interest.

2. The Minnesota Environmental Rights Act does not protect as a "historical resource" a business district as an economic entity, even when the business district is composed of historic buildings.

OPINION

SCHUMACHER, Judge

Appellants Virginia Stansell, Gary Stansell, Judy Swanson, Stephen Swanson, Marilyn Haugen, Georgiana Campbell, Arthur Campbell, and Keith Harrison, on behalf of themselves and the State of Minnesota (the Northfield residents), sued respondent City of Northfield, alleging that the Northfield city council lacked authority to adopt two ordinances that allegedly contradicted an ordinance adopted by the initiative of the voters and that the council's actions in doing so violated various statutes, including the Minnesota Environmental Rights Act (MERA). Respondent Target Stores, a division of Dayton Hudson Corporation, was granted leave to intervene as a defendant. Northfield and Target moved for summary judgment, and the district court granted the motions. On appeal, the Northfield residents challenge only the district court's rulings that the city council had the authority to adopt the two ordinances and that the council's actions did not violate MERA. We affirm.

FACTS

In late 1997 or early 1998, Target began to investigate the possibility of building a store in Northfield. At the time, the zoning for the site Target wanted to build on would not allow uses of that nature. In October 1998, a group of Northfield residents presented an initiative petition to adopt an ordinance permitting development of large-scale retail projects such as the Target store. Attached to the initiative petition, as required by the city charter, was a proposed ordinance. The proposed ordinance, however, was in draft form; it included various comments, questions, and explanations in bracketed italics scattered throughout the text of the ordinance. When the city council did not enact the ordinance in a final form acceptable to the sponsoring committee within 60 days, the sponsoring committee requested that it be put to a vote of the electorate.

The proposed draft ordinance was published three times before the election, the first and third times including the bracketed questions, comments, and explanations, the second time without them. When the voters went to the polls, however, they apparently did not have before them the exact text of a proposed ordinance. Instead, the voters voted yes or no to the following initiative question: "Shall the City of Northfield enact an ordinance to permit planned development zones for large-scale retail establishments in highway commercial districts?" A majority of voters voted yes.

After the election, the city council continued working with Target on the final form of an ordinance that would allow Target to proceed with its project. The city council eventually passed Ordinances 718 and 719. The ordinances differed in some areas from the initiative ordinance proposed by the sponsoring committee.

The Northfield residents sued Northfield to prevent the city council from implementing Ordinances 718 and 719, claiming that those ordinances contradicted the initiative passed by the voters, violated several statutes, and were otherwise illegal. The district court granted Target leave to intervene as a defendant. Northfield and Target brought separate motions for summary judgment, both of which the district court granted.

ISSUES

1) Do the Northfield residents have standing to challenge the city council's authority to adopt Ordinances 718 and 719?

2) Did the trial court err in granting Northfield's and Target's motions for summary judgment on the MERA claim?

ANALYSIS

On an appeal from summary judgment, we ask whether there are any genuine issues of material fact in dispute and whether the trial court erred in applying the law. *State by Cooper v. French,* 460 N.W.2d 2, 4 (Minn. 1990). We review de novo the district court's interpretation of the law, including questions of statutory interpretation. *Sorenson v. St. Paul Ramsey Med. Ctr.,* 457 N.W.2d 188, 190 (Minn. 1990); *Associated Builders & Contractors v. Carlson,* 590 N.W.2d 130, 134 (Minn. App. 1999), *aff'd,* 610 N.W.2d 293 (Minn. 2000). We view the evidence in the light most favorable to the party against whom summary judgment was granted and accept as true that party's factual allegations. *Fabio v. Bellomo,* 504 N.W.2d 758, 761 (Minn. 1993). Summary judgment on a claim is mandatory against a party with the burden of proof who fails to establish an essential element of its claim, because that failure renders all other facts immaterial. *Lloyd v. In Home Health, Inc.,* 523 N.W.2d 2, 3 (Minn. App. 1994). We will affirm a grant of summary judgment if it can be sustained on any ground. *Winkler v. Magnuson,* 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

1. The first issue we address is whether the city council had the authority to adopt Ordinances 718 and 719. If they had no such authority, we need not consider whether the ordinances violated MERA. The threshold question on this issue is whether the Northfield residents have standing to challenge the city council's authority to adopt the ordinances. Because the district court did not address standing, the Northfield residents question whether this issue is properly before the court, but "[s]tanding may be raised at any time." *Cochrane v. Tudor Oaks Condominium Project,* 529 N.W.2d 429, 433 (Minn. App. 1995) (citation omitted), *review denied* (Minn. May 31, 1995).

Although the Northfield residents' complaint alleges that they are "individuals * * * who have been injured by and have standing to challenge illegal actions by the Northfield City Council,"

they do not allege that they have suffered any specific injuries as the result of the city council's actions. Instead, they seem to be litigating a matter of public interest. Indeed, both their complaint and their brief on appeal claim they are prosecuting this action "on behalf of themselves and the State of Minnesota."

Persons who wish to bring suit on a matter of public interest must demonstrate "either (1) damages distinct from the public's injury, or (2) express statutory authority." *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 146 (Minn. App. 1999) (citations omitted), *review denied* (Minn. Mar. 14, 2000). The Northfield residents have alleged no distinct damages. As a result, absent statutory authority to sue, they would lack standing.

Minnesota law, however, does include a statute granting the right to sue to challenge a municipality's land-use actions:

> Any person aggrieved by an ordinance, rule, regulation, decision or order of a governing body or board of adjustments and appeals acting pursuant to sections 462.351 to 462.364 may have such ordinance, rule, regulation, decision or order, reviewed by an appropriate remedy in the district court, subject to the provisions of this section.

Minn. Stat. § 462.361, subd. 1 (1998). The Northfield residents may therefore maintain their action if they qualify as "person[s] aggrieved" by the city council's action.

Neither the statute nor any published Minnesota case defines the term "person aggrieved" for the purpose of Minn. Stat. § 462.361. The term has, however, been defined in the context of other statutes. In order for an "aggrieved party" to have the right to appeal a decision under the Minnesota Administrative Procedure Act, for example, the person must be "injuriously or adversely affected by the judgment or decree when it operates on his rights of property or bears directly upon his personal interest." *In re Getsug,* 290 Minn. 110, 114, 186 N.W.2d 686, 689 (1971). This definition has also been applied to other statutes. *See, e.g., In re Black,* 522 N.W.2d 352, 355 (Minn. App. 1994) (interpreting provision of Minn. Stat. § 46.044 allowing "person aggrieved" to obtain judicial review of Commissioner of Commerce's determination), *review denied* (Minn. Nov. 29, 1994).

As a matter of statutory construction, we presume that the legislature uses the same words the same way, even in different statutes. *Angell v. Hennepin County,* 565 N.W.2d 475, 479 (Minn. App. 1997), *aff'd,* 578 N.W.2d 343 (Minn. 1998). We therefore interpret the term "person aggrieved" in Minn. Stat. § 462.361 to grant standing to a person when an action by the municipality adversely "operates on his rights of property or bears directly upon his personal interest." *In re Getsug,* 290 Minn. at 114, 186 N.W.2d at 689. Because the Northfield residents have not alleged any such particularized injuries, they lack standing to challenge the city council's authority to adopt Ordinances 718 and 719.

2. The Northfield residents also claim that the ordinances violate the Minnesota Environmental Rights Act (MERA). MERA protects "air, water, land and other natural resources located within the state from pollution, impairment, or destruction." Minn. Stat. § 116B.01 (1998). Under the

statute, the definition of the term "natural resources" includes "historical resources." Minn. Stat. § 116B.02, subd. 4 (1998). The term "historical resources" is not defined.

There is no dispute that Northfield's Central Business District is listed on the National Register of Historic Places. But the Northfield residents do not merely claim that the buildings in the district are protected "historical resources." They also claim that the Central Business District as a functioning economic entity is a protected historical resource.

The Northfield residents cite *Chinese Staff & Workers Ass'n v. City of New York,* 502 N.E.2d 176 (N.Y. 1986), as an example of a case where economic and cultural considerations were held protectible under an environmental statute. That case is not much help in determining the scope of "historical resources" for MERA's purposes, however, because the statute in that case is more expansive than MERA, expressly defining the protected "environment" to include "existing patterns of population concentration * * * and existing community or neighborhood character." *Id.* at 179.

Because the term "historical resources" is not defined in MERA, the Minnesota Supreme Court has

> identified certain factors that should be taken into account in determining whether a building falls under the protection of MERA, looking principally to the criteria used to determine what buildings are included on the National Register of Historic Places * * * .

State by Archabal v. County of Hennepin, 495 N.W.2d 416, 421 (Minn. 1993). Although the criteria are quite broad, they do not naturally encompass the economic vitality or way-of-life concerns that the Northfield residents contend are protectible "historical resources." Read as a whole, the criteria primarily address buildings or other *places,* which we note are the criteria for inclusion on the National Register of Historic *Places.* Nonetheless, nothing in the criteria obviously forecloses the Northfield residents' interpretation, either.

Without specific authority from either Minnesota or other jurisdictions, we must look to general principles of statutory construction to determine whether the Central Business District as a functioning economic entity is a protectible "historical resource."

> If a statute is ambiguous, we must determine and give effect to the intent of the legislature. In determining the legislature's intent, we may consider the mischief to be remedied by the statute.

In re Estate of Nordlund, 602 N.W.2d 910, 913 (Minn. App. 1999) (citations omitted), *review denied* (Minn. Feb. 15, 2000). When the language of a statute is unclear, a reviewing court should interpret the statute as consistently as possible with the purpose of the act. *Huffman v. School Bd. of Indep. Consol. Sch. Dist. No. 11,* 230 Minn. 289, 292, 41 N.W.2d 455, 457 (1950). When construing a statute, we may consider "the consequences of a particular interpretation." *Grudnosky v. Bislow,* 251 Minn. 496, 498, 88 N.W.2d 847, 850 (1958).

As Northfield and Target point out, to interpret MERA as the Northfield residents suggest would have far-reaching economic consequences, often conferring a significant economic advantage on businesses that happen to be located in historic buildings or districts—even including, as the facts of this case show, the ability to prevent otherwise lawful competition. Given that both state and federal antitrust law are designed to foster competition, it is unlikely that the legislature intended to impede such economic competition through the unusual vehicle of an environmental protection law. Such laws are designed to accomplish environmental ends, not economic ones. As a result, considering both the mischief sought to be prevented by MERA and the mischief that could be caused by the Northfield residents' interpretation, it appears that the best interpretation of "historical resources" excludes the economic and cultural factors the Northfield residents seek to protect in the Central Business District.

But that does not conclude our analysis. In order to make out a prima facie case under MERA,

> [f]irst, there must be "a protectible natural resource" * * *. Second, conduct by the defendant must cause or be likely to cause "pollution, impairment or destruction" * * * of that resource.

State by Schaller v. County of Blue Earth, 563 N.W.2d 260, 264 (Minn. 1997) (citations omitted). "Pollution, impairment or destruction" is defined as "any conduct which materially adversely affects or is likely to materially adversely affect the environment." Minn. Stat. § 116B.02, subd. 5 (1998).

There is no dispute that at the very least, the *buildings* in the Central Business District are protected "historical resources." The Northfield residents argue that they have provided detailed expert evidence that demonstrates that the new Target store "is likely to materially adversely affect" those buildings. Kennedy Smith, the Director of the National Main Street Center for the National Trust for Historic Preservation, offered two affidavits in which Smith opined, based both on experience with other communities and a study of Northfield, that opening the new Target store will lead to a decline in sales in the Central Business District, which will lead to merchants going out of business, which will lead to abandoned buildings, which will lead to the physical deterioration of those buildings.

The district court rejected this argument as "speculative and tenuous." We agree. Because the Northfield residents' chain of causation relies so heavily on economic considerations that are beyond MERA's intended scope, their causal chain is too attenuated as a matter of law. If successful, the Northfield residents' attempt to invoke MERA based on the possible remote effects of economic forces would convert the statute from an environmental protection law to an economic regulation. The Northfield residents' interpretation of the statute is unreasonable and produces a result that is plainly at variance with the policy of the statute considered as a whole. We need not adopt such an interpretation. *See Wegener v. Commissioner of Revenue,* 505 N.W.2d 612, 615 (Minn. 1993).

DECISION

The district court did not err in granting summary judgment to Northfield and Target.

Affirmed.

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

STATE OF MINNESOTA

IN SUPREME COURT

C7-02-1879

Mike Erlandson, et al.,

Petitioners,

vs.

Mary Kiffmeyer, Minnesota Secretary of State, and Patrick H. O'Connor, Hennepin County Auditor/Treasurer, individually and on behalf of all County and Local Election Officers,

Respondents.

O R D E R

PER CURIAM.

The above-entitled matter came on for hearing before the court sitting en banc on Thursday, October 31, 2002 on the petition of Mike Erlandson, John Eisberg and Mollie Lorberbaum for relief pursuant to Minn. Stat. § 204B.44(d) (2000), alleging that the respondents Mary Kiffmeyer, Secretary of State, Patrick H. O'Connor, Hennepin County Auditor/Treasurer, and other county election officials have erred in failing to properly administer the instructions, the absentee ballots and the supplemental ballots for the general election scheduled for November 5, 2002.

Senator Paul Wellstone was the nominee for the United States Senate on behalf of the Democratic-Farmer-Labor Party for the general election. On October 25, 2002, Senator Wellstone died, creating a vacancy on the ballot under Minn. Stat. § 204B.41 (2000). On October 31, 2002, the Democratic-Farmer-Labor Party filed a nomination certificate naming Walter Mondale as the party's nominee. On October 31, 2002, county election officials began preparing official supplemental ballots with Mr. Mondale's name in substitution for Senator Wellstone.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. An official supplemental ballot must be prepared in accordance with Minn. Stat. § 204B.41 as a result of Senator Wellstone's death.

2. If a voter has already cast a regular absentee ballot and requests, in any manner, an official supplemental ballot, the county election official shall provide the official supplemental ballot and a second regular absentee ballot, as a set, by mail using methods authorized for mailing of absentee ballots in Minn. Stat. ch. 204B, or in person if requested in person, to be utilized by the voter. Instructions shall accompany the ballot set clearly stating that if the voter wishes to vote in the races on the regular ballot the second regular absentee ballot must be completed and returned, and that the second regular absentee ballot will replace the first regular absentee ballot cast by the voter.

3. If a voter casts two regular absentee ballots, the ballot with the later date on the return envelope shall be counted.

4. If a voter casts a regular absentee ballot but does not cast an official supplemental ballot, the ballot shall be counted in the same manner as if the vacancy had not occurred.

5. If a voter casts a second regular absentee ballot and an absentee official supplemental ballot, the second regular absentee ballot shall be counted for all races except the office of United States Senator. The official supplemental ballot shall be counted for the office of United States Senator.

6. County election officials shall personally provide an official supplemental ballot and a second regular ballot to agents designated by persons in health facilities pursuant to Minn. Stat. § 203B.06, subd. 3(b) (2000).

7. County election officials must timely deliver official supplemental ballots and second regular ballots to health care facility residents who received a regular ballot pursuant to Minn. Stat. § 203B.11 (2000).

8. A person may write in the name of a candidate either on the regular absentee ballot or the official supplemental ballot.

9. Minnesota Statutes § 204B.45 (2000) provides that voters residing in municipal areas with fewer than 400 registered ballots may vote by mail. Mail balloting is a procedure different than absentee balloting. If a voter has already submitted a "mail ballot" and requests, in any manner, an official supplemental ballot, the local election official shall provide the official supplemental ballot and a second regular ballot, as a set, by mail using methods authorized for mailing of absentee ballots in Minn. Stat. ch. 204B or in person if requested in person, to be utilized by the voter. Instructions shall accompany the ballot set clearly stating that if the voter wishes to vote in the races on the regular ballot the second regular ballot must be completed and returned, and that the second regular ballot will replace the first regular ballot cast by the voter.

10. So as not to impair the orderly election process, this order is issued with opinion(s) to follow.

Dated: October 31, 2002

STATE OF MINNESOTA

IN SUPREME COURT

C3-00-398

Court of Appeals

Anderson, Paul H., J.
Dissenting, Anderson, Russell A., J.,
Stringer, J., and Lancaster, J.

Joan Martin, guardian ad litem

for Troy Hoff, petitioner,

Appellant,

and

State of Minnesota, plaintiff on impleader,

Filed: March 21, 2002
Office of Appellate Courts

Respondent,

vs.

City of Rochester, et al.,

Defendants.

S Y L L A B U S

Minnesota Statutes § 256B.042 (2000), the state medical assistance lien provision, is preempted by 42 U.S.C. 1396p (1994), the federal Medicaid anti-lien provision, to the extent that it allows a lien for medical assistance paid to be placed on a medical assistance recipient's cause of action before a recipient's death.

Minnesota Statutes § 256B.056, subd. 6 (2000), the state medical assistance assignment statute, is to be construed such that "for the costs of medical care" modifies "all proceeds." When a medical assistance recipient has a cause of action against potentially liable third parties for his injuries, the medical assistance assignment statute grants to the state the right to an assignment of

all claims for medical care, but does not grant an assignment right to other claims or the recovery therefrom.

Minnesota Statutes § 256B.37, subd. 1 (2000), the state's medical assistance subrogation provision, is preempted by the anti-lien provision to the extent that it allows the state to assert a subrogation right against a medical assistance recipient's claims or settlements for other than medical expenses.

Reversed and remanded.
Heard, considered, and decided by the court en banc.

OPINION

ANDERSON, Paul H., Justice.

Joan E. Martin settled a personal injury cause of action against multiple defendants on behalf of her disabled son, Troy Hoff. The state asserted a medical assistance lien against the proceeds as reimbursement for Hoff's medical expenses paid by the state through medical assistance. The state also asserted a subrogation right to the proceeds. The district court dismissed the state's claim to the proceeds, finding that the state medical assistance lien and subrogation provisions were preempted by federal law. The state appealed to the Minnesota Court of Appeals, which reversed the district court, holding that federal law did not preempt the state's lien and subrogation rights. Martin appealed to this court. We reverse.

Troy Hoff and Donald Tlougan were involved in a single-car accident on July 10, 1991, near Rochester, Minnesota. Tlougan died as a result of the accident. Hoff suffered permanent and totally disabling injuries and was rendered mentally incompetent.

Hoff's mother, Joan E. Martin, sought medical assistance from the State of Minnesota on Hoff's behalf. The state began making medical assistance payments for Hoff's care on November 25, 1991. About a year and a half later, on May 23, 1993, Martin assigned to the state all of Hoff's rights to payment for medical care from any third party liable for Hoff's injuries. Martin made the assignment as Hoff's authorized representative.[1]

The state filed a public assistance lien in the Olmsted County Recorder's Office on June 21, 1993. The lien was specifically placed upon Hoff's causes of action arising out of the accident. This lien was for $267,754.50 of past medical assistance benefits paid on Hoff's behalf, and also included any future medical assistance benefits to be paid as a consequence of the accident.

Martin, as guardian ad litem for Hoff, sued Tlougan's estate, the City of Rochester, Rochester Township, and the County of Olmsted.[2] Martin sought recovery for past and future expenses for medical care and treatment, past and future pain and suffering, disability, disfigurement, past loss of earnings, loss of earning capacity, and other general and specific damages. Martin joined the state as an involuntary plaintiff on impleader, alleging that, as a result of the state's medical assistance lien, the state's presence was necessary for a "just adjudication of all rights." As a

result of joining the state as a plaintiff on impleader, Martin was able to plead a claim on behalf of the state alleging that the defendants were liable to the state for past and future expenses for medical care, treatment, sheltered living, and other general and specific damages.

After being joined as a plaintiff on impleader, the state filed an answer and cross-claims against Martin. In its answer, the state specifically denied Martin's characterization of the state as an appropriately named plaintiff and alleged that "as a lienholder on the present cause of action," it did not need to be named as a plaintiff on the pleadings. Instead, the state, in its cross-claim against Martin, relied on its lien rights under Minn. Stat. § 256B.042, subd. 1 (2000), claiming the right to reimbursement for medical expenses it paid on Hoff's behalf from any judgment, award, or settlement of Hoff's causes of action.[3] After filing its answer and cross-claims, the state was not significantly involved in the litigation and did not independently pursue its claim against defendants for medical expenses as pleaded by Martin on its behalf.

Nearly 6 years after commencing this action, Martin negotiated settlements with the defendants, first with the City of Rochester and then with Tlougan's estate and Rochester Township. The combined total of the settlements was $220,000. The settlement agreements encompassed all causes of action and claims.

The district court explicitly stated in its orders approving these settlement agreements that it was aware of the nature and extent of Hoff's injuries, the damages claimed, the respective positions of the parties regarding liability, and the consequences of further litigation between the parties. The court found that the settlements were fair, just, and in the best interests of Hoff. The court also stated that it was aware of a dispute between Martin and the state regarding the state's claim to part of the settlement proceeds. However, the court concluded that this dispute did not involve the settlements directly and only concerned the eventual disbursement of the balance of the settlement proceeds. The court concluded that the dispute between Martin and the state should not delay the settlement with the defendants and that the interests of Martin and the state in the settlement proceeds could be protected by depositing the balance of the proceeds in an interest-bearing account with the court administrator. In compliance with the order of the court approving each settlement, Martin and the state released all three defendants from further liability and stipulated to a dismissal with prejudice on their claims. It is unclear from the record what claims were part of the settlement and how, if at all, the settlement proceeds were allocated among the respective claims.

After the settlements with the three defendants had been agreed upon, Martin and the state pursued their separate dispute regarding the state's cross-claim.[4] Specifically, the state asserted that its medical assistance lien entitled it to obtain out of the remaining settlement proceeds $58,561.82 as reimbursement for the over $600,000 it had paid by that time for Hoff's medical care.[5]

Martin filed a motion to dismiss the state's claim, arguing that federal law prohibited the state from placing a lien on a medical assistance recipient's property. Martin argued that the settlement proceeds were solely Hoff's property because the assignment to the state of Hoff's rights to medical expenses left Martin with no power to collect or sue for medical expenses on Hoff's behalf. Therefore, Martin asserted that the settlement proceeds were solely Hoff's

property because the settlement was made only on Hoff's remaining personal injury claims, i.e., damages for pain and suffering, disfigurement, disability, emotional distress, loss of earnings, and loss of earning capacity, but not medical expenses.

In response to Martin's motion, the state argued (1) that the federal anti-lien statute does not apply to third-party recoveries, (2) that the lien does not attach to the cause of action but instead to the proceeds, and (3) that proceeds are the property of the liable third parties. Additionally, the state contested Martin's argument on the effect of the assignment, arguing that the assignment did not deprive Martin of the ability to sue and collect for medical expenses. The state asserted that the assignment left both Martin and the state with the ability to pursue a recovery of medical expenses. Therefore, the state argues, the settlement included a recovery for medical expenses. Moreover, in its argument to the district court, the state did not assert that part of the settlement included the state's independent claim as pleaded by Martin. At this point in the proceedings, the state for the first time raised a subrogation claim under Minn. Stat. § 256B.37 (2000) for the medical assistance paid.

The district court granted Martin's motion to dismiss the state's claim to any of the settlement proceeds. The court found that, as a result of the assignment in the medical assistance application, neither Martin nor Hoff had any right to recover medical expenses from the defendants. The court then found that the settlement proceeds were Hoff's sole and exclusive property. The court further found that, because federal law bars imposition of a lien on any of Hoff's property during his lifetime and state lien laws permit a lien against Hoff's property, state lien laws conflicted with federal laws and thus were preempted. The court also rejected the state's subrogation claim on the grounds it was also prohibited by the federal anti-lien statute and because it was not timely asserted.

Although the foregoing proceedings were at times confusing, the final outcome in the district court can best be summarized as follows. The court found that Hoff's right to recover medical expenses was completely assigned to the state, leaving Martin, as Hoff's guardian, with no right to collect for medical expenses. Hoff's remaining rights to recover included all of his claims for personal injury damages except for medical expenses. Martin settled all of Hoff's remaining claims arising out of the accident against the three defendants for $220,000. The state released the three defendants from further liability for its claims, apparently relying only on its lien and subrogation rights to recover medical expenses paid on Hoff's behalf. The court then found that the state was not entitled to any of the settlement funds. The court concluded that the state's lien and subrogation rights were preempted by federal law.

The combined result of the settlement agreements, releases, and the district court's order left the state without the ability to recover its medical expenses paid on Hoff's behalf. That is to say, the state could not collect anything, either directly through a cause of action against the defendants or indirectly through the use of liens or subrogation against the settlement proceeds.[6]

The state appealed, arguing that the federal anti-lien provision preempts neither the state's medical assistance lien statute nor the state's subrogation statute. The court of appeals agreed with the state and reversed the district court, concluding that Minnesota's medical assistance statute does not conflict with the federal Medicaid statutory scheme because compliance with

both the state and federal provisions was possible. The court of appeals concluded that federal law therefore did not bar the state from placing a lien on the settlement proceeds. The court of appeals also concluded that the third-party settlement was subject to the state's subrogation claim. Martin then appealed to this court.

I.

This case presents three legal questions. The questions are whether Minnesota's medical assistance lien, assignment, and subrogation statutes are preempted by the federal anti-lien statute. Whether federal law preempts state law is generally an issue of statutory construction. *Pikop v. Burlington N. R.R. Co.*, 390 N.W.2d 743, 748 (Minn. 1986). Statutory construction is reviewed de novo. *Am. Family Ins. Group v. Schroedl,* 616 N.W.2d 273, 277 (Minn. 2000).

A. Statutory Background

For an understanding of the legal issues in this case, it is first necessary to understand the relevant Medicaid statutes. Medicaid, enacted in 1965 as Title XIX of the Social Security Act, is a publicly funded program to ensure medical care to certain individuals who lack the resources to cover the costs of essential medical services. 42 C.F.R. § 430.0*; see Norwest Bank of N.D., N.A. v. Doth,* 159 F.3d 328, 331 (8th Cir. 1998). Medicaid was intended to be the payor of last resort. *See* H.R. Conf. Report No. 99-453, at 542 (1985). Medicaid is jointly funded by the federal and state governments. 42 C.F.R. § 430.0. Each state administers its own program within federally mandated requirements. *Id.* On the federal level, the Health Care Financing Administration (HCFA) is responsible for administering the Medicaid program.

The focus of our analysis is on the relationship between federal and state laws addressing the government's right to recover funds it has expended for medical care under the Medicaid program. The most relevant federal statute is an anti-lien provision prohibiting states from imposing a lien on property of a Medicaid recipient because of medical assistance paid. 42 U.S.C. § 1396p(a)(1) (1994) ("[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid * * *."). Despite this federal prohibition, a Minnesota statute grants to the state lien rights for the cost of care arising from the injuries which lead to the need for medical assistance. Minn. Stat. § 256B.042, subd. 1 (2000). More specifically, the Minnesota statute provides in relevant part:

> When the state agency provides, pays for, or becomes liable for medical care, it shall have a lien for the cost of the care upon *any and all causes of action* or recovery rights under any policy, plan, or contract providing benefits for health care or injury, which accrue to the person to whom the care was furnished, or to the person's legal representatives, as a result of the illness or injuries which necessitated the medical care.

Id. (emphasis added). The statute specifically directs that a lien be placed on a cause of action or recovery rights. A cause of action, often referred to as a claim, is "[a] group of operative facts giving rise to one or more bases for suing" or "[the] legal theory of a lawsuit." Black's Law Dictionary 214 (7th ed. 1999).[7] Under Minnesota law, a cause of action is personal property.[8] *See State v. Royal Mineral Ass'n*, 132 Minn. 232, 236, 156 N.W. 128, 130 (1916)

("[T]he term "credits," as used in the taxing statutes, embraces only choses in action which are in their nature personal property."); *Mattson v. Minnesota & N. Wis. R.R.*, 95 Minn. 477, 488, 104 N.W. 443, 448 (1905) (holding that the right to pursue damages for personal injuries is a property right); *see also* Minn. Stat. § 550.37, subd. 22 (2000) (listing "[r]ights of action for injuries to the person" as exempt property).

In addition to the anti-lien provision, federal law also mandates that a state's medical assistance plan require that medical assistance recipients assign to the state the right to receive payments for medical expenses from third parties liable for payment of those expenses. 42 U.S.C. § 1396k(a) (1994).[9] Minnesota's medical assistance plan includes such an assignment requirement, although it arguably requires assignment of more rights than the federal provision. Minn. Stat. § 256B.056, subd. 6 (2000).[10]

It is apparent that there is a conflict between the state lien and assignment provisions and the federal requirements. Despite the federal anti-lien provision, state law gives the state a lien on a medical assistance recipient's causes of action and recovery rights. Also, despite the limited scope of the federal assignment of rights requirement, state law can be read to require that medical assistance recipients, as a condition of eligibility, assign to the state more rights than the federal provision requires. *Compare* 42 U.S.C. § 1396k *with* Minn. Stat. § 256B.056, subd. 6. In addition, the state is subrogated to any rights under a recipient's cause of action arising out of an occurrence necessitating medical assistance—although, at first glance, this subrogation provision does not run afoul of any federal restrictions. Minn. Stat. § 256B.37, subd. 1 (2000).

B. Preemption

Because of the conflict between the federal and state provisions, we must answer the question whether the federal provisions supersede the state statutes. To do so, we need to examine the law of federal preemption. There are three distinct situations in which federal law preempts and invalidates state law. *Pikop,* 390 N.W.2d at 748. First, state law is preempted when Congress explicitly states that the federal scheme preempts any state action in the field. *See Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). The second arises when Congress implicitly preempts state involvement in a particular field of law because the scope of federal involvement or interest is so extensive that it fully "occupies the field." *See, e.g., Cipollone v. Ligget Group, Inc.,* 505 U.S. 504, 516 (1992); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta,* 458 U.S. 141, 153 (1982); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). The final type of preemption, "conflict preemption," takes two forms and arises when state law conflicts with federal law, either because compliance with both federal and state law is impossible or because the state law is an obstacle to the accomplishment of the purposes of the federal scheme. *See Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963); Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). Preemption of state laws is generally disfavored. *See Cipollone,* 505 U.S. at 516, 518; *Forster v. R.J. Reynolds Tobacco Co.,* 437 N.W.2d 655, 658 (Minn. 1989). When federal laws do preempt conflicting state laws, the state laws are preempted only to the extent that they are in conflict with federal law. *Dalton v. Little Rock Family Planning Servs.,* 516 U.S. 474, 476 (1996); *De Canas v. Bica,* 424 U.S. 351, 357-58 n.5 (1976); Forster, 437 N.W.2d at 658.

Congress specifically permits state action regarding Medicaid; in fact, it requires that a participating state's Medicaid plan conform to federal requirements. *Schweiker v. Gray Panthers,* 453 U.S. 34, 37 (1981); *see also* 42 U.S.C. § 1396a(a) (1994 & Supp. V 1999). Thus, there is no explicit or implicit federal preemption of the field. Instead, the conflict between the federal and state provisions requires a determination that preemption will apply here only if state law conflicts with specific federal Medicaid law or is an obstacle to federal Medicaid purposes. To make this determination, we first must compare the federal anti-lien provision with the state lien provision, then compare the federal and state assignment provisions with each other, and, finally, compare the federal anti-lien and state assignment provisions. Before making such comparisons, it is important to have a more complete description of the federal Medicaid scheme.

1. The Federal Law

The federal anti-lien provision ensures that property of a Medicaid recipient not be depleted during his life by a state seeking reimbursement for medical assistance paid. At the same time, the federal assignment and third-party recovery provisions enable a state to recover, to the extent of third-party liability, amounts the state has paid on behalf of Medicaid recipients. These provisions may be in conflict; therefore, our first step is to examine and seek to harmonize the federal law.

Fundamental principles of statutory construction require that courts give effect to the plain meaning of a statute when the language is clear. *See, e.g., Robinson v. Shell Oil Co.,* 519 U.S. 337, 340 (1997); *see also* Minn. Stat. § 645.16 (2000); *Correll v. Distinctive Dental Servs.,* P.A., 607 N.W.2d 440, 445(Minn. 2000). The state argues that the federal anti-lien provision clearly does not apply to third-party recoveries. Alternatively, the state argues that if we conclude the anti-lien provision is ambiguous, we should defer to clarifying agency interpretations under the doctrine articulated in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842-43 (1984). But we conclude the federal anti-lien provision is unambiguous. It unequivocally provides that "[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid * * *." 42 U.S.C. § 1396p(a)(1).[11] Further, there is no indication in the statute's language that this anti-lien provision does not apply to third-party recoveries. The provision means exactly what it says—prior to his death, no lien may be placed on the property of a medical assistance recipient for recovery of medical assistance paid. Therefore, we will give effect to the plain meaning of the federal anti-lien provision.[12]

We read and construe a statute as a whole and "interpret each section in light of the surrounding sections to avoid conflicting interpretations." *Schroedl,* 616 N.W.2d at 277; *see also United States v. Morton,* 467 U.S. 822, 828 (1984). Further, we are required, when possible, to give effect to all of a law's provisions. *See Duncan v. Walker,* 533 U.S. 167, 121 S. Ct. 2120, 2125 (2001); *see also* Minn. Stat. § 645.16. We are mindful of these requirements as we next seek to harmonize the plain meaning of the anti-lien provision with other federal provisions.

There are two other significant federal Medicaid requirements regarding a state's ability to recover medical assistance paid that must be construed in concert with our interpretation of the

anti-lien provision. The first of these is the federal law that requires states to obtain from recipients, as a condition of eligibility for medical assistance, an assignment of rights to payment for medical care. 42 U.S.C. § 1396k. The specific provision requires a medical assistance recipient to "assign the State any rights, of the individual * * * to payment *for medical care* from any third party." 42 U.S.C. § 1396k (emphasis added). The second requirement directs states to recover the cost of care from potentially liable third parties. *See* 42 U.S.C. 1396a(a)(25)(H) (Supp. V 1999). The third-party recovery provision provides

> that to the extent that payment has been made under the State plan *for medical assistance* in any case where a third party has a legal liability to make payment *for* such assistance, the State has in effect laws under which, to the extent that payment has been made under the State plan *for medical assistance for health care items or services* furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party *for such health care items or services.*

42 U.S.C. 1396a(a)(25)(H) (emphasis added).

Both of these provisions specifically refer to payments for medical or health care. The required assignment of rights under federal law is for payment from any third party *for medical care* only. Similarly, a state's right to recover from third parties is specifically limited under federal law to payment *for health care items or services* only.[13] Thus, federal law requires a state to obtain an assignment of rights from the medical assistance recipient, but only for payments for medical or health care expenses.

The right assigned to the state is the medical assistance recipient's right to recover medical expenses from third parties liable for payment of those expenses.[14] An assignment generally operates to transfer all rights possessed by the assignor and the assignor retains no interest in the right transferred. *Marquette Appliances, Inc. v. Econ. Food Plan, Inc.,* 256 Minn. 169, 173, 97 N.W.2d 652, 655 (1959). By assigning the right to recover medical expenses, the Medicaid recipient no longer owns that right of recovery, i.e., the right is no longer the property of the recipient. Therefore, state enforcement of the assignment for medical expenses does not violate the anti-lien provision because recovery under the assignment does not operate on the property of the recipient. Moreover, this assignment allows the state to follow the federal directive to pursue third parties that may be liable for the costs of medical care. Although the state may not file a lien, the assignment does give the state the ability to pursue the third parties directly.

The foregoing analysis convinces us that there is no need to engage in an arduous or belabored statutory construction to harmonize the three federal statutes. Taking notice of the plain meaning of each is sufficient to achieve harmony. The anti-lien provision protects the personal property of a medical assistance recipient—here, Hoff's cause of action—from a state's effort to recover for medical expenses. The assignment transfers to the state the recipient's right to recover medical expenses, and therefore the ability to pursue directly potentially liable third parties for medical assistance expenses paid. The anti-lien provision protects all of a recipient's nonassigned rights to recover. The recovery provision, on the other hand, requires that the state pursue the third parties for medical expenses paid by the state, and the state does so under the

assignment. The result is that the anti-lien provision operates in harmony with other federal Medicaid provisions and gives effect to all of the provisions.[15]

The three federal statutes reflect dual federal objectives: first, protection of the recipient's limited assets from encroachment by the state for reimbursement for medical expenses paid; second, requiring recovery and reimbursement from third parties liable for the recipient's medical expenses that were paid by Medicaid.[16] The statutes reflect these objectives by insulating the recipient's property from the state's recovery through the anti-lien provision, while at the same time requiring assignment to the state of the recipient's right to collect from third parties liable for the costs of medical care paid by the state and by requiring the state to exercise its recovery rights.[17]

It is critical to note that the federal scheme reflects the concept that the assigned right to recover for medical expenses is no longer the property of the medical assistance recipient and therefore the anti-lien provision does not prohibit a state from pursuing recovery under this assigned right. Essentially, at the time of an accident, the injured party acquires in tort one or more rights of action or claims against those responsible for the injuries. These rights of action or claims can be likened to a "bundle of sticks." *See United States v. Ben-Hur,* 20 F.3d 313, 317-18 (7th Cir. 1994) (stating that property rights are likened to "bundle of sticks," each stick separately alienable); *In re Nelson*, 92 B.R. 837, 842 (Bankr. D. Minn. 1988) (reflecting the implicit concept that property rights are divisible). As a condition of receiving medical assistance from a state, a medical assistance recipient assigns to the state one stick from that bundle—the specific claim to recover medical expenses from those responsible for the injuries. At this point, the state becomes the sole owner of the claim against any third parties for medical expenses. But the recipient retains ownership of the remaining sticks in the bundle—that is to say, the claims for pain and suffering, emotional distress, disability, disfigurement, loss of earnings, and loss of earning capacity. To the extent that any settlement with the responsible third parties is for this larger bundle of sticks (the original tort action minus the claim for medical care), the settlement proceeds are the recipient's personal property, and as such are protected by the federal anti-lien provision.

The dissent expresses concern about our willingness to recognize these separate claims and cites a medical assistance eligibility case, *In re Welfare of K.S.,* as support for its analysis. In *K.S.,* we attempted to determine the availability of certain assets for purposes of medical assistance eligibility. 427 N.W.2d 653, 658-59 (Minn. 1988). Specifically, we addressed whether the purpose for which a tort settlement fund was received affected the fund's availability for medical assistance eligibility. *Id.* at 659. We do not disagree with the holding in *K.S.,* but do not see its relevance to the case before us.[18] In *K.S.*, we concluded that the state medical assistance subrogation provision, Minn. Stat. § 256B.37, indicated a clear legislative intent that the availability of a settlement fund for medical assistance eligibility purposes does not depend on the purpose for which the settlement was received. *K.S.,* 427 N.W.2d at 659. We also noted that the medical assistance lien provision indicated a legislative intent to place the burden of medical assistance on the tortfeasor and therefore on the tort recovery. *Id.* at 660. However, because the issue before the court in *K.S.* was eligibility for medical assistance and not the validity of a medical assistance lien, we did not address the federal anti-lien provision and its impact on state

medical assistance laws. As developed in detail below, the federal anti-lien provision is critical to the resolution of the case before us.

2. State Medical Assistance Lien

Having set forth the federal law, we must now juxtapose the federal anti-lien provision and Minnesota's medical assistance lien to determine whether compliance with both is impossible or whether the state law is an obstacle to accomplishment of the purposes of the federal Medicaid scheme. The state lien provision gives the state a lien for the cost of care "upon any and all causes of action" which accrue to the medical assistance recipient as a result of the injuries that necessitated the medical care. Minn. Stat. § 256B.042, subd. 1. But as previously noted, these causes of action or claims are the personal property of the medical assistance recipient. *See Royal Mineral Ass'n,* 132 Minn. at 236, 156 N.W. at 130*; see also Mattson,* 95 Minn. at 488, 104 N.W. at 448. Therefore, the state medical assistance lien provision appears to conflict with the federal anti-lien provision and should be subjected to a preemption analysis.

Under conflict preemption, federal law preempts state law when compliance with both is impossible or when the state statute is an obstacle to the purposes of the federal scheme. *See Fla. Lime & Avocado Growers,* 373 U.S. at 142-43; *Hines,* 312 U.S. at 67. Here, the federal anti-lien statute prohibits placing a lien upon a medical assistance recipient's personal property before the recipient's death. This provision can coexist with the federal assignment provision because the assignment removes from the property of the recipient his claim for medical care. Yet the state's medical assistance lien provision allows a lien to be placed on a variety of claims that are still the recipient's personal property. This result is in direct conflict with the federal anti-lien provision. Therefore, we conclude that compliance with both provisions is not possible because the federal law prohibits exactly what the state law allows.

Having concluded that the state lien provision is in conflict with federal law, we are now presented with two options for the ultimate fate of the state law. One option is to hold that the state law is preempted entirely. However, preemption is disfavored, and a state law should be preempted only to the extent that it is in conflict with federal law. *See Weber v. Heaney*, 995 F.2d 872, 875 (8th Cir. 1993); *Forster*, 437 N.W.2d at 658. But given the clear and broad prohibition of the "no lien" language in the federal anti-lien provision, we are not able to ascertain an appropriate limiting construction to the state's medical assistance lien provision. Therefore, we hold that section 256B.042, Minnesota's medical assistance lien statute, is preempted to the extent that it allows a lien for medical assistance paid to be placed on a medical assistance recipient's cause of action before a recipient's death.

II.

Having held that the state cannot place a lien on a medical assistance recipient's personal property on account of medical assistance paid before the recipient's death, we must determine whether the state can otherwise recover under the assignment obtained under section 256B.056, subd. 6, Minnesota's assignment statute. To make this determination, we must juxtapose federal Medicaid law and Minnesota's assignment statute to determine whether compliance with both is

also impossible or whether the state law is an obstacle to accomplishment of the purposes of the federal Medicaid scheme.

The Minnesota assignment statute, like the federal assignment law, requires an assignment of the medical assistance recipient's rights to medical expenses. The specific assignment language reads as follows:

> The state agency shall require from any applicant or recipient of medical assistance the assignment of any rights to medical support and third party payments. * * * By signing an application for medical assistance, a person assigns to the department of human services all rights the person may have to medical support or payments for medical expenses from any other person or entity on their own or their dependent's behalf and agrees to cooperate with the state in establishing paternity and obtaining third party payments.

Minn. Stat. § 256B.056, subd. 6. It also provides that an applicant must agree to apply *"all proceeds* received or receivable by the person * * * from any third person liable for the costs of medical care * * *." *Id.* (emphasis added).

In the "all proceeds" sentence, reading the clause "for the costs of medical care" to modify "any third person liable" appears to be the more conventional reading of the language of the statute; therefore, we will first proceed to analyze this interpretation of the language. If under this reading preemption is not required, our analysis of this provision will be complete. However, if we conclude that this reading requires preemption in whole or in part, we will then look further to determine whether the statute is susceptible to another interpretation that does not raise a constitutional defect. *See Hince v. O'Keefe,* 632 N.W.2d 577, 582 (Minn. 2001) (explaining that we are under an obligation to interpret our statutes to avoid constitutional defects).

Under the foregoing construction of the statute, when "for the costs of medical care" is read to modify "any third person liable," "all proceeds" is not limited to payments received or receivable for medical care and includes *any* payments ("all proceeds") from third parties who are liable for medical care. Thus, the assignment provision appears to give the state an assignment for more than what the federal law mandates because the federal law only requires that states obtain an assignment of the medical assistance recipient's *right to recover medical expenses* from liable third parties. However, the state's ability to recover medical expenses paid is not limited to a recovery only from a recipient's right to recover for medical expenses. Therefore, it appears that the statute may be broader than federal law and should be subjected to a preemption analysis.

While Minnesota's assignment provision appears broader than the federal requirement, this does not mean that the statute and federal law are in conflict per se. The federal assignment requirement appears to set a minimum requirement for what state plans for medical assistance must contain and for what recipients must assign, but there is no indication that the federal assignment requirement sets a maximum that states cannot exceed. Unlike the anti-lien provision, the assignment provision contains no explicit prohibition or restriction. So compliance with both the federal assignment requirement and the state assignment requirement is possible; the state provision just goes above and beyond what the federal provision absolutely

requires. However, the breadth of the state assignment may implicate the second form of conflict preemption if it interferes with the purposes of the federal Medicaid scheme.

Under the state assignment provision, the state is not only assigned the recipient's right to payments for medical care, but is also assigned the rights to "all proceeds" from third parties liable for medical care. The implication of the "all proceeds" language is that the state has a right to *any* payment made to a medical assistance recipient by a third party liable for the recipient's medical care—including settlement proceeds from a cause of action exclusive of medical expenses. The rights to these other causes of action are not required to be assigned by the federal assignment provision, and as we have already concluded, these nonassigned rights to recover or claims *are* protected by the anti-lien provision. The state cannot place a lien on this property during the recipient's life because it is personal property of the recipient.

Despite the foregoing restriction, the state's broad assignment right allows the state to take by an assignment what is protected by the anti-lien provision. Allowing the state to expand the range of the required assignment to defeat the anti-lien provision interferes with the federal scheme. In essence, it circumvents the anti-lien provision and eliminates the efficacy of that provision's protection. The purpose of the anti-lien provision is to protect the recipient's limited assets, including nonassigned rights to recover, and the assignment statute frustrates this purpose. Therefore, we conclude that under the foregoing reading of Minnesota's assignment statute, the statute is broader than its federal counterpart and interferes with the purposes of the federal Medicaid scheme generally and the anti-lien provision in particular.

Accordingly, we conclude that under this construction the statute is preempted in part. To the extent that the state assignment provision gives the state rights to more than the recipient's claim for medical expenses, it should be preempted by federal law. However, to the extent that the state assignment mirrors the federal assignment provision and requires that medical assistance recipients assign to the state all rights to payment for medical care from third parties liable for the injuries that necessitated medical assistance, the state assignment provision should not be preempted.[19]

Alternative Interpretation

As noted earlier, we are under an obligation to interpret our statutes to avoid constitutional defects. *Hince,* 632 N.W.2d at 582. Therefore, if the state assignment provision is susceptible to an alternative interpretation that allows it to operate in harmony with the federal Medicaid scheme and not be preempted, we must apply that interpretation. Here, the state medical assistance assignment provision differs from the federal mandate in one important respect—the "all proceeds" sentence. It reads, "[t]o be eligible for medical assistance a person must have applied or must agree to apply all proceeds received or receivable by the person or the person's spouse from any third person liable for the costs of medical care for the person, the spouse, and children." Minn. Stat. § 256B.056, subd. 6. The "all proceeds" sentence is apparently a state innovation and not required by the federal law.[20]

Our first interpretation of this statute would give the state the right to all proceeds received from liable third parties. Recovery under this interpretation is not limited to proceeds for medical

care. But this section is susceptible to an alternative interpretation. The clause "for the costs of medical care" can be read to modify either "all proceeds" or "from any third person liable."

If we interpret the statute such that "for the costs of medical care" modifies "all proceeds," we can avoid an interpretation that necessitates preempting part of the state statute. When we read the statute in this way, it gives the state no more rights against the recipient than the federal requirement.[21] Under this interpretation of the statute's language, the state has assignment rights to all proceeds *for medical care,* but does not have rights in any other part of a recovery. Because our canons of interpretation instruct us to interpret statutes to avoid constitutional problems, we conclude that "for the costs of medical care" modifies "all proceeds." Therefore, we hold that when a medical assistance recipient has a cause or causes of action against potentially liable third parties for his injuries, the medical assistance assignment statute grants to the state an assignment right to all claims for medical care, but it does not grant an assignment right to any other claims or the recovery therefrom.

This limited interpretation of the statute allows the federal scheme to function appropriately. The state assignment provision is now functionally equivalent to the federal assignment provision. The state has an assignment of rights limited to the right to medical expenses and may no longer pursue "all proceeds" from third parties. Effectively, the state is entitled to an assignment of the recipient's right to recover for medical expenses against all third parties that are potentially liable for the injuries that necessitated medical assistance.

III.

The next question before this court is whether the statute granting the state a subrogation right is preempted by federal law.[22] In addition to asserting statutory lien rights, the state also asserts a subrogation right to the settlement proceeds under Minn. Stat. § 256B.37, subd. 1.[23] This provision gives the state a subrogation right "to the extent of the cost of medical care furnished" to any rights the medical assistance recipient may have under the cause of action "arising out of an occurrence that necessitated the payment of medical assistance." *Id.* The scope of the subrogation right is broader than the rights given to the state in the federal medical assistance assignment provision. The subrogation right is not limited to claims for medical expenses. In fact, the subrogation right specifically includes "all portions of the cause of action, notwithstanding any settlement allocation." *Id.* As we interpret the subrogation provision, it allows the state a subrogation right for the cost of care against any recovery on a cause of action arising out of the incident that necessitated medical assistance, even if the recovery also included claims other than for medical expenses.

The federal anti-lien provision does not explicitly prohibit states from asserting subrogation rights with respect to a medical assistance recipient's cause of action arising out of an occurrence that necessitated the payment of medical assistance. Therefore, the same is true here as with the assignment provision—compliance with both federal and state laws is not impossible per se. But as with the assignment provision, we have to determine whether allowing a subrogation right outside of the state's assigned right to medical expenses would be an obstacle to the purposes of the federal Medicaid scheme. *See Fla. Lime & Avocado Growers,* 373 U.S. at 142-43; *Hines,*

312 U.S. at 67 (stating that state law is preempted if it is an obstacle to accomplishment of federal purpose).

Our preemption analysis of the state's subrogation right will be very similar to the analysis of the state's assignment provision because a subrogation right has the same practical effect as an assignment—it puts the state in the shoes of the medical assistance recipient with respect to the recipient's rights against third parties for medical expenses. *See Hermeling v. Minn. Fire & Cas. Co.*, 548 N.W.2d 270, 273 (Minn. 1996) (explaining the distinction between subrogation and indemnity) (overruled on other grounds).

We have already concluded that the anti-lien provision prohibits a state from attempting to recover its medical assistance costs from the property of the recipient through a lien and that the state cannot require an assignment of more than the recipient's right to receive third-party payments *for medical care.* The federal scheme does permit a state to recover medical expenses paid by authorizing an assignment of those rights, but the anti-lien provision effectively prevents the state from recovering the costs of care directly from the recipient. Allowing the state to assert a subrogation right and thus get indirectly what it is prohibited from attaining directly would defeat the purpose of the federal anti-lien provision in the same manner as the broad assignment of rights discussed above. Pursuing a subrogation right allows an end-run around the protections of the anti-lien provision by using a subrogation right instead of a lien to take part of the recipient's personal property that is protected by the anti-lien provision. Essentially, for purposes of our preemption analysis, an assignment of rights to the state and the state's subrogation right are the same. Therefore, we hold that the state subrogation provision is preempted to the extent that it allows the state to assert a subrogation right against causes of action or settlements for other than medical expenses.

When the state actually obtains the assignment of rights to third-party payments for medical expenses, subrogation is no longer appropriate because the state is now the owner of the medical assistance recipient's claim and no longer needs to be subrogated. *See, e.g., Employers Mut. Cas. Co. v. A.C.C.T., Inc.*, 580 N.W.2d 490, 493 (Minn. 1998) (explaining that subrogation does not give a subrogee any independent rights, but merely allows a subrogee to step into the shoes of the subrogor). But subrogation may be appropriate in situations where medical assistance payments have begun before the assignment is made,[24] when a medical assistance recipient refuses to make an assignment, or when an assignment is not properly made. In those circumstances, the state will still be able to assert a subrogation right to the extent of medical assistance payments made, but only as to the recipient's right to recover on a claim for medical expenses.

IV.

The state makes three additional arguments to supplement its main argument that the plain language of Minnesota's lien, assignment, and subrogation statutes does not conflict with federal law or the purposes behind the Medicaid provisions. These arguments are that the state's position is supported by (1) deference to HCFA's interpretation of the federal anti-lien provision, (2) decisions from other jurisdictions, specifically Washington and Utah, and (3) equitable considerations. None of these arguments are persuasive, and we will address each in turn

A. Deference to HFCA

The state argues that we must defer to HCFA's interpretation of the federal anti-lien provision. The state asserts that HCFA has decided that the anti-lien provision does not bar a state from imposing a lien on a medical assistance recipient's rights to recover for other than medical care. Deference to agency interpretation is called for, however, only when there is an ambiguity in the expression of congressional intent. *Chevron,* 467 U.S. at 842 ("If the intent of Congress is clear, that is the end of the matter."); *see also United States v. LaBonte,* 520 U.S. 751, 762 n.6 (1997) (concluding no ambiguity, and thus no need to decide whether Sentencing Guidelines Commission is owed deference). We have already concluded that there is no ambiguity in the statement that "[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan * * *." 42 U.S.C. § 1396p(a)(1). Similarly, the federal assignment requirement and the third-party recovery provision are not ambiguous and interact smoothly with our interpretation of the anti-lien provision. Because the intent of Congress is clear, there is no need for deference to an agency interpretation on the grounds that the statute is ambiguous.

Even if we were to conclude that the federal assignment requirement and third-party recovery provision inject some ambiguity into federal law, agency deference is still not appropriate here. When an agency statement does not reflect formal rules or agency adjudications, yet attempts to address an ambiguity in the law, deference to the agency under *Chevron* is not appropriate. *See Christensen v. Harris County,* 529 U.S. 576, 587 (2000) (concluding that opinion letters, policy statements, agency manuals, and enforcement guidelines are not warranted *Chevron*-style deference). Such agency interpretations are only "entitled to respect * * * to the extent that those interpretations have the power to persuade." *Id.* (internal quotation marks omitted); *see also Wis. Dep't of Health and Family Servs. v. Blumer,* ___ U.S. ___, 122 St. Ct. 962, 976 (2002) ("The Secretary [of Health and Human Services'] position [regarding Medicaid law] warrants respectful consideration.").

The state urges us to defer to various agency letters, directives, and approvals demonstrating the agency's interpretation of the anti-lien provision as not prohibiting a state from recovering on third-party actions for other than medical care. These materials include a "Best Practices Guide" that cites Minnesota's subrogation statute as "model legislation" and various letters from HCFA's administrators to state administrators and others stating that medical assistance liens are not prohibited under federal law. These agency materials are not accorded deference because they do not reflect formal rules or adjudications. *Christensen,* 529 U.S. at 587. And, although these materials are entitled to some respect and may be used to persuade this court, we are not persuaded by the interpretations contained in these materials.

The state has referenced two agency adjudications that, if relevant, would be entitled to deference under a *Chevron* analysis. The two adjudications were made by the Department of Health and Human Services Appeals Board (Board).[25] *Cal. Dep't of Health Servs.,* DAB No. 1504 (Dep't of Health & Human Servs. Jan. 5, 1995); *Wash. State Dep't of Soc. and Health Services,* DAB No. 1561 (Dep't of Health & Human Servs. Feb. 7, 1996). Both adjudications addressed whether HCFA properly withheld federal funds from a state program based on the

state's failure to recover a sufficient amount from settlements between recipients and third-party tortfeasors. In both the California and Washington adjudications, the Board stated that HCFA properly characterized recoveries from third parties first as payments for medical care. The Board reasoned that "[t]his characterization prevents manipulation of tort awards by recipients who seek to prevent the public from being reimbursed for the funds it has advanced for their medical care (e.g., by suing for pain and suffering or lost wages rather than for medical costs)." DAB No. 1561, p. 5.

We need not defer to these agency adjudications because they do not address the central issue presented here, which is whether the federal anti-lien provision preempts state laws that purport to allow states to impose liens on recovery of amounts not designated as payment for medical expenses. Indeed, the agency adjudications do not mention the federal anti-lien provision.[26]

We are nonetheless mindful of the concern expressed in the agency adjudications that Medicaid recipients could fashion a settlement to exclude payment for costs of medical care so as to avoid any obligation to reimburse the state and federal governments. But the state has options other than to ignore a clear provision in federal law that prohibits a lien from being imposed against the property of any individual on account of medical assistance paid. The state can protect its right to reimbursement by participating in the litigation so as to ensure recovery of medical costs paid. In this case, the state did not actively participate in the litigation until settlement, despite being a plaintiff on impleader. But the state did participate at the settlement and did release each defendant from any liability to the state for medical expenses. At this time, the state did establish its claim to part of the settlement proceeds—but in a dispute solely with Martin.

B. Other Jurisdictions [27]

The state asserts its position is supported by decisions from Washington and Utah. However, in reaching their respective holdings, neither Washington nor Utah addressed the issue of preemption. In *Wilson v. State,* the Washington Supreme Court concluded that the federal anti-lien provision was irrelevant because the state placed a lien on the recovery itself, and therefore not on the "property" of the recipient. 10 P.3d 1061, 1065-66 (Wash. 2000). Similarly, in two companion cases, the Utah Supreme Court concluded that the anti-lien provision was not implicated when a state lien was placed on a settlement recovery. *S.S. v. State,* 972 P.2d 439, 442 (Utah 1998); *Wallace v. Estate of Jackson,* 972 P.2d 446, 448 (Utah 1998). The Utah court concluded that "payments made by a third party do not legally become the property of the recipient until after a valid settlement which must include reimbursement to the State for Medicaid benefits." *Wallace,* 972 P.2d at 448 (citing *S.S.,* 972 P.2d at 442). Washington relied on Utah, which in turn relied on the New York case, *Cricchio v. Pennisi,* which also concluded that the lien on settlement proceeds attaches to the property of a third party. 683 N.E.2d 301, 306 (N.Y. 1997).

The New York court, and later the Washington and Utah courts, reached the conclusion that settlement proceeds were not the property of the medical assistance recipient. But when they reached this conclusion, they failed to unbundle the sticks that make up a personal injury action. These courts correctly recognize that the federally-required assignment of rights to third-party medical expense recoveries gives a state the right, up to the amount of the state's expenditures, to

any recovery or settlement for that right to recover. To the extent that a settlement is for medical expenses, those proceeds are the property of the state by virtue of the required assignment. But these courts failed to recognize that a personal injury tort action against potentially liable third parties comprises more than a right to recover for medical expenses. The tort action includes claims for pain and suffering, emotional distress, loss of earnings, and other familiar tort claims. The part of any settlement attributable to these unassigned claims is the property of the medical assistance recipient during his life, and the state has no right to these claims under the assignment. So while the other states' courts are correct in their conclusions that a recovery for medical expenses is not the property of a medical assistance recipient, they ignore the part of the recovery or settlement for claims other than medical expenses. We are therefore unpersuaded by the analysis of the Washington and Utah courts on this issue.

Additionally, the cases from New York, Utah, and Washington cannot be relied upon because of other problems in their analysis. In *Cricchio,* the New York court apparently concluded that New York's statutory analogue to the federal anti-lien provision was not violated by the imposition of a state lien because the state statute created an exception for the lien, yet the court did not explain how this state-created exception could trump the federal anti-lien provision. *Cricchio,* 683 N.E.2d at 304. But the state exception was not the basis for the court's holding; rather, the court relied upon the conclusion that the anti-lien provision was not violated because the lien attaches to the settlement proceeds which the court deemed to be the property of the third party. *Id.* at 305.

The dissent and the aforementioned cases implicitly acknowledge that whether the cause of action or settlement proceeds are the property of the recipient determines the applicability and relevance of the anti-lien provision. Each determines that the federal anti-lien provision is irrelevant by concluding that the settlement proceeds are no longer the property of the recipient. But, by doing so, they fail to grapple with the key issue that underlies our analysis. This key issue, in fact, is the property issue. Specifically, both the dissent and the cases cited gloss over why these causes of action are no longer the property of the medical assistance recipient. On the other hand, our analysis recognizes the limited nature of the required assignment. Therefore, after a full analysis, we conclude that the causes of action and claims for other than medical expenses—and settlement proceeds therefrom—are the property of the recipient and therefore the federal anti-lien provision is relevant.

C. Equitable Considerations

We are also mindful of the state's equitable argument that it needs to preserve and recover Medicaid assets. But our resolution of the issue before us does not eliminate the state's ability to recover medical expenses when third parties are liable. Rather, our conclusion leaves the federal scheme intact and the state retains the assignment of a medical assistance recipient's right to recover for medical expenses against potentially liable third parties. Indisputably, the state's rights are limited—they only extend to a recipient's right to recover for medical expenses. The state has no interest under the assignment in any of the recipient's recoveries from third parties for claims other than for medical expenses. But the state does not have to wait for the recipient to initiate an action. Under harmonized federal and state law, medical assistance recipients are required to assign to the state their rights to receive payment for medical expenses from any

potentially liable third parties. This assignment enables the state to acquire the recipient's property rights to this particular claim and to take independent legal action, or, as in this case, to be joined as a party to the recipient's action. Thus, the state can take an active role as a plaintiff in its own right and does not have to rely on the efforts of others to ensure a recovery of medical assistance expenses.[28] Therefore, even though the method of obtaining medical assistance reimbursement that the state seeks in this litigation is not available to it, the state has other alternatives available to recover medical expenses.[29]

The state uses Minnesota's guaranteed one-third recovery scheme to support its position. But the same rationale that would allow a medical assistance recipient to receive a guaranteed one-third recovery also would allow the state to take away that guarantee and leave the recipient with nothing until the state had been paid back in full. Thus, by emphasizing the reasonableness of its position, the state fails to acknowledge the logical consequences of its argument.

We also note that the dissent fails to consider that as a logical consequence of its reasoning, Minnesota's participation in the Medicaid program may be jeopardized. The current mechanism in section 256B.042, subd. 5, allowing a one-third guaranteed recovery to a plaintiff/recipient is much the same as the systems in California and Washington that were criticized by the Department of Health and Human Services' Departmental Appeals Board (Board) because specified percentages or amounts of third-party recoveries were given back to recipients. *See* Part IV, A, *supra.* Under a pure application of the Board's analysis as adopted by the dissent, Minnesota would be unable to guarantee any recovery to the recipient, because the Medicaid expenses must first be taken from any recovery, regardless of its "label." Thus, even under the dissent's analysis, Minnesota's third-party recovery system is in jeopardy.

Our decision also does justice to Hoff and other medical assistance recipients. The state has paid for Hoff's medical expenses and should be entitled to reimbursement when a third party is liable for those expenses. But, in the words of now Chief Justice Gerry L. Alexander of the Washington Supreme Court, "the fund should be replenished only from amounts that a Medicaid recipient receives as reimbursement for elements of damage for which the State has assumed responsibility." *Wilson,* 10 P.3d at 1070 (Alexander, J., dissenting). Here, the state attempts to recover for medical expenses from a settlement for a cause of action that included pain and suffering, loss of earnings, loss of earning potential, and disfigurement—none of which is compensated by the state through medical assistance. These claims belong to Hoff alone, and may provide some relief or an increase in quality of life that is not possible through medical care.

V.

We must now apply these holdings to the specific facts of this case. At the time of the accident, Hoff acquired a "bundle of sticks," which represented all of his potential rights to recover against those responsible for his injuries. As a condition of receiving medical assistance from the state, Martin, on Hoff's behalf, assigned to the state one stick from that bundle—Hoff's specific right to recover medical expenses from those responsible for Hoff's injuries.[30] At that point, the state became the sole owner of Hoff's right to recover against any third parties for medical expenses. But Hoff retained ownership of the remaining sticks in the bundle—that is to say, his right to recover for pain and suffering, emotional distress, disability, disfigurement, loss of earnings, and

loss of earning capacity. To the extent that Martin's settlement with the defendants was for this larger bundle of sticks (the original tort action minus the right to recover for medical care), the proceeds are Hoff's personal property, and as such are protected by the federal anti-lien provision.[31]

It is unclear from the record what claims or rights to recover were part of the settlements. Martin, in her memoranda of law to the district court and in her briefing on appeal, erroneously characterizes the nature of the settlements as only for Hoff's claims and not for the state's claim pleaded by Martin for the state as plaintiff on impleader (i.e., the state's assigned claim for medical expenses). The settlement agreement with the city specifically incorporated the amended complaint by reference and purported to encompass all claims stated in the amended complaint, which included Hoff's claim for medical expenses and the separately pleaded claim for medical expenses paid by the state. The settlement agreements with the township and Tlougan's estate were not as comprehensive as the agreement with the city and did not contain similar language that clearly encompassed all claims in the amended complaint. This omission calls into question whether the state's claim pleaded by Martin was included in the settlement with the township and Tlougan's estate. But these settlement agreements do contain sufficient language indicating that the settlement was in satisfaction of the state's claims, although this language is not as straightforward as that in the settlement agreement with the city. Therefore, based upon our reading of the record below, we conclude that the settlements with defendants included and released all claims in the amended complaint, including the state's claim for medical expenses.

The state initially received an assignment of Hoff's rights to recover for medical expenses against any potentially liable third parties, including defendants, but as part of the settlements the state released defendants from all further liability. Because of the assignment made in the medical assistance application and by virtue of the state's claim pleaded by Martin on impleader, the state's assigned claim for medical expenses was necessarily a part of the settlements. The result of the settlements and the releases is that the state's recovery of expenses from the defendants for Hoff's medical care is now limited to the settlement proceeds. Therefore, the state is entitled to that part of the settlements that represents a recovery on its claim for medical expenses.

We are not able to determine from the record what part of the settlement proceeds is attributable to Hoff's nonassigned personal injury claims and what part is attributable to the state's separately owned right to recover medical expenses. In fact, it appears that the district court did not make such a determination. Accordingly, the district court's grant of Martin's motion to dismiss the state's claim to any of the settlement proceeds was in error. The court's conclusion that the settlement proceeds were Hoff's sole and exclusive property is not supported by the record, and therefore we must remand to the district court for further proceedings and clarification on the distribution of the settlement proceeds between Hoff's claims and the state's claim. Ultimately, that part of the settlement proceeds attributable to payment for medical expenses belongs to the state under the assignment; the remainder of the proceeds belongs to Hoff.

On remand, the district court must specifically consider that the state's claim was part of the settlements and must specifically allocate the settlement proceeds among Hoff's nonassigned personal injury claims (excluding any recovery for medical care or expenses) and the state's

separately owned claim for medical expenses. Here, it is important to remember that this case involves a settlement, and as with all settlements, represents a compromise of the parties' claims and damages. Had this case gone to trial, a jury would have been required to allocate the damages among the component claims. This court-approved settlement is no different and should be similarly allocated by the court in recognition of the nature of the settlement as a compromise. Once the court has made that allocation, that part of the settlement proceeds which represents payment for Hoff's medical expenses paid by the state must be awarded to the state; all other settlement proceeds belong to Hoff.

Reversed and remanded.

DISSENT

ANDERSON, Russell A., Justice (dissenting).

I respectfully dissent. At the time Martin settled the personal injury cause of action against multiple defendants on behalf of her disabled son, the state, at her request, had expended over $600,000 towards his medical treatment. The medical treatment and the payments of public money for that treatment continued. Yet the effect of the majority's holding is that the state should not be able to recover on its lien for reimbursement of even a portion of the public money expended for medical treatment. Given the state's significant expenditure on Hoff's behalf, the settlement funds at issue here belong to and should be returned to the public to the extent necessary to partially reimburse Medicaid.

The majority's holding is contrary to the purposes of the federal Medicaid law. The majority purports to construe the federal statute as a whole and interpret the federal anti-lien provision in light of the surrounding sections, but ultimately fails to adequately address the federal requirement that states recoup their expenditures out of proceeds from liable third parties. In addition, despite the contrary results reached in every other court that has considered the question presented in this case, the majority fails to acknowledge even an ambiguity that would allow it to defer to the federal agency charged with day-to-day administration of this complex statute. Focusing on the anti-lien provision, the court allows parties to subvert the principle that Medicaid should be the payor of last resort and jeopardizes the state's recovery of any of the significant funds extended for payment of medical expenses on behalf of Medicaid beneficiaries.

Although the federal anti-lien provision is broad, we must read related statutes *in pari materia,* keeping in mind the purposes of the entire federal scheme and the strong presumption against preemption of state law. *See Erlenbaugh v. United States,* 409 U.S. 239, 243-44 (1972); *Forster v. R.J. Reynolds Tobacco Co.,* 437 N.W.2d 655, 658 (Minn. 1989). In my view, the majority has lost sight of these important principles. Although appellant had a property right in her cause of action against the third party, she disposed of this property right to the extent of medical expenses paid when in her application for medical assistance benefits she agreed to apply *all* proceeds from a liable third party and when she assigned to the state *any* rights to third-party payments. *See* Minn. Stat. § 256B.056, subd. 6 (2000). The right to dispose of property has long been considered an inherent aspect of property ownership, *see Congdon v. Congdon,* 160 Minn. 343, 363, 200 N.W. 76, 83 (1924), and nothing in the federal or state Medicaid law, including the

anti-lien provision, suggests the right to dispose of a cause of action through assignment to the state is impaired.

Once that broad assignment was made, the anti-lien provision was no longer operative because the recipient's causes of action (to the extent of the state's expenditures) were no longer his property,[32] and the conflict between state and federal law the majority finds is irrelevant. By looking first and foremost at the anti-lien provision instead of construing all provisions together, the majority overlooks a construction of the statute that avoids preemption problems.

This construction is consistent with the third-party recovery provisions requiring states to recover the full amounts of their expenditures under Medicaid. The federal statutes prohibit a lien on the recipient's property during the recipient's lifetime, but at the same time require the recipient to give the state, "*to the extent that payment has been made under the State plan* * * * the rights of such individual to payment by any other party for such health care items or services." 42 U.S.C. § 1396a(a)(25)(H) (Supp. V 1999) (emphasis added). Under federal law, "the State is considered to have acquired the rights of such individual to payment by any other party for * * * health care items or services * * * ." *Id.* The federal mandatory assignment provision requires states to enact laws that require recipients to assign "any rights * * * to support * * * and to payment for medical care from any third party." 42 U.S.C. § 1396k(a) (1994).

The majority construes the third-party recovery provision as limited to the recipient's right to recover payment for medical expenses. However, the statute requires a state to have in place laws:

> that to the extent that payment has been made under the State plan for medical assistance in any case where a third party has a legal liability to make payment for such assistance, the State has in effect laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services.

42 U.S.C. § 1396a(a)(25)(H). A fair reading of the statute indicates that "such health care items or services" in the last clause refers to what the state has paid for, not what the recipient might recover through a settlement. Congress' intent is to limit the recovery only "to the extent that payment has been made under the State plan," not to amounts out of a third-party settlement that the recipient agrees to label payment for medical expenses.

Accordingly, the state's assignment provision requires that the recipient apply or agree to apply "*all proceeds* received or receivable" from any third party liable for the costs of the medical care, and that the applicant assign to the state "any rights to medical support *and* third party payments." Minn. Stat. § 256B.056, subd. 6 (2000) (emphasis added). This statute conforms with federal statutory requirements that state laws require a recipient to assign rights to the state for medical payment and that the laws give states the right to those payments to the extent that payment has been made under the state plan. 42 U.S.C. §§ 1396a(a)(25)(H) and 1396k(a). With respect to the state assignment provision, the state law does not conflict with federal law, but advances the purposes and objectives of the federal law.

Other state courts attempting to harmonize the federal anti-lien provision and the state's right to recover from third parties have applied this reasoning. In *Wallace v. Estate of Jackson*, 972 P.2d 446 (Utah 1998), *cert. denied, McNeil v. Utah, Medicaid Section,* 528 U.S. 810 (1999), the Utah Supreme Court held that payments made by a third party do not legally become the property of the recipient until after settlement "'because third party settlement proceeds have been specified by the recipient as belonging to the State Medicaid Agency as a precondition of the recipient's eligibility.'" *Id.* at 448 (quoting state's brief). The Utah court noted that the anti-lien provision has coexisted for many years with the requirement that states seek reimbursement from third parties who are legally liable for the medical payments, and noted that harmony between these provisions can be achieved if the assigned rights are not considered part of the recipient's property. *Id.*

Likewise, in *Wilson v. State,* 10 P.3d 1061, 1064-65 (Wash. 2000), the Washington Supreme Court held that all settlement proceeds belong to the state because they were assigned as such. The court stated, "due to the lien being placed on the settlement prior to it becoming the property of the Medicaid recipient, the [anti-lien provision] is irrelevant." *Wilson,* 10 P.3d at 1065 n.2; *see also Cricchio v. Pennisi,* 683 N.E.2d 301, 305 (N.Y. 1997) (reasoning that because the recipient has assigned rights to the state to recover medical expenses from a third party, and the state is subrogated to the recipient's rights, the settlement proceeds are the property of the third party which are owed to the state). Thus, the Washington and Utah supreme courts treat all third-party settlement proceeds in the same fashion that the majority treats only third-party payments for medical expenses. Presented with the identical issue as is presented here, the Washington court concluded that, "the state is not limited to recovery from only that portion of the settlement specifically allocated to medical expenses. The federal statute states recovery is to the extent of payment made by the state for health care items or services." 10 P.3d at 1066.[33]

Likewise, federal courts have not considered the federal anti-lien provision to bar states from pursuing settlement proceeds to satisfy a lien based on the state assignment and subrogation rights. *Sullivan v. County of Suffolk,* 174 F.3d 282, 286 (2d Cir. 1999) (holding that, based on the assignment and subrogation scheme, the state may first satisfy its lien before the settlement proceeds are placed in a supplemental needs trust for the recipient*); Norwest Bank of N.D., N.A. v. Doth,* 159 F.3d 328, 333-34 (8th Cir. 1998) (holding that the state may satisfy its lien from settlement proceeds before funds are placed in a special needs trust but declining to rule on the effect of the anti-lien provision).[34] At a minimum, what the majority finds to be patently clear has eluded the Second and Eighth Circuits and the highest courts of three states, every court that has considered the issue.

Instead the majority here attempts to harmonize the federal statutes by limiting the effect of the assignment provision to payments for medical expenses. This construction frustrates the purpose of the Medicaid program, however. As the Eighth Circuit held, allowing Medicaid recipients to avoid reimbursing the state for amounts paid on the recipient's behalf would "eviscerate Congress's clearly expressed intention that these funds be repaid and negate the Social Security Act's comprehensive scheme permitting states to place these liens." *Doth*, 159 F.3d at 333 (internal quotation marks omitted). Thus, while the anti-lien provision is broadly written,

equally clear from the entire context of federal Medicaid law is the principle that the state must be able to recoup what it has spent on medical care for Medicaid recipients.

Congress' apparent intent is to replenish and preserve Medicaid funds, providing support only when no other resources are available. Consolidated Omnibus Budget Reconciliation Act, H.R. Conf. Rep. No. 99-453, at 542 (1985); *Wilson,* 10 P.3d at 1064. Federal statutes accomplish this policy by requiring that a recipient assign rights of recovery to the extent of a third party's liability and that states retain the amount collected under the assignment to first reimburse Medicaid. 42 U.S.C. § 1396k (1994).

To allow recipients to shield from recovery by the state amounts labeled "pain and suffering" or other elements of damage conflicts with the clear congressional intent that Medicaid be the payor of last resort, and that the state be able to recoup its expenditures from funds to which the beneficiary was entitled before the assignment.[35]

The majority's willingness to parse out the "sticks" of Hoff's settlement is also inconsistent with our previous treatment of tort settlements as they relate to eligibility for Medicaid. In *In re Welfare of K.S.,* 427 N.W.2d 653 (Minn. 1988), we addressed whether a tort settlement was an available asset for purposes of determining eligibility for medical assistance. In that case an amicus curiae advocated a construction of the term "available assets" that would allow only that portion of a tort settlement intended to compensate the beneficiary for future medical expenses to be considered available, leaving compensation for pain and suffering or other claims not available. *Id.* at 659. We noted that the state's subrogation right extends to "all portions of the cause of action, 'notwithstanding any settlement * * * or apportionment that purports to dispose of portions of the cause of action not subject to subrogation.'" *Id.* (quoting Minn. Stat. § 256.37, subd. 1). In *K.S.,* we found this statute demonstrated a clear legislative intent that the purpose for which a settlement was received, whether for medical expenses or pain and suffering, did not determine the availability of those funds for purposes of eligibility for medical assistance. 427 N.W.2d at 659. Today the majority makes the directly opposite conclusion, by holding that settlement funds *must* be parsed out according to purpose and the state's right to recover its expenses is limited to those labeled as for medical costs.

Despite the fact that the highest courts of two states reached the opposite conclusion than that reached by the majority, and despite the purposes of the Medicaid law to allow the states to recover their expenditures, and despite our previous rejection of parsing out portions of a settlement fund depending on the purpose for which it was received, the majority refuses to acknowledge even an ambiguity with respect to the anti-lien provision and the third-party recovery provisions. These provisions create at least an ambiguity with respect to the reach of the anti-lien provision, which should compel us to acknowledge the rulings of the federal agency charged with administering this complex statute. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843-44 (1984) (holding that if a court finds ambiguity in the federal statute, it must defer to the administrating agency's interpretation if that interpretation is reasonable.)

The two adjudications[36] referenced by the majority are entitled to deference, as they reflect the agency's interpretation of the scope of the assignment and lien provisions. In the California

decision, the Board upheld HCFA's interpretation of Medicaid statutes as requiring full Medicaid reimbursement before the recipient may collect any third-party settlement proceeds. *Cal. Dep't of Health Servs.,* DAB No. 1504 (Dep't of Health & Human Servs. Jan. 5, 1995). HCFA thereby disapproved of California's practice of allowing recipients to retain portions of third-party settlements that did not represent payment for medical care. The Board stated:

> HCFA's position is directly supported by these provisions of the Act. Recipients, as a condition of eligibility, must assign their rights to payment for medical care. States are then charged with the responsibility of seeking third party recovery pursuant to such assignments. States are further required to seek as much reimbursement as possible, i.e., to the extent of the third party's liability. Finally, when a recovery is made, the Act sets forth a distribution scheme which requires the Medicaid program to be reimbursed prior to distributing any funds to the recipient. While section 1912(a) refers to assignment only of "payment for medical care," the statutory scheme as a whole contemplates that the actual recovery might be greater and, if it is, that Medicaid should be paid first.

DAB No. 1504, p. 4.

The Washington adjudication involved a state law that allowed the state to reduce the amount of its lien if the settlement amount was not sufficient to pay all medical expenses and other types of damages. *Wash. State Dep't of Soc. & Health Servs.*, DAB No. 1561 (Dep't of Health & Human Servs. Feb. 7, 1996). HCFA maintained that, under the mandatory assignment provision, Medicaid must be reimbursed in full before the recipient receives any settlement proceeds. The Board concluded that HCFA reasonably characterized third-party recovery proceeds first as payments for medical care, stating, "[i]n cases where a third party has caused the need for medical care and is liable for its payment, the Act looks to that third party to reimburse the public." DAB No. 1561, p. 5. The Board found that "[t]his characterization prevents manipulation of tort awards by recipients who seek to prevent the public from being reimbursed for the funds it has advanced for their medical care (e.g., by suing for pain and suffering or lost wages rather than for medical costs)." *Id.*[37]

We may not impose our own construction of the statute and are bound by the agency's interpretations established in adjudications if they are reasonable. *Chevron*, 467 U.S. at 843-44. The agency's interpretations recognize the conflict between seeking reimbursement to the full extent of a third party's liability and the potentially limiting language of collecting "payments for medical care," just as conflict appears at first glance between the third-party recovery statutes and the anti-lien provision. Relying on the overall scheme of the Medicaid statutes and the policy that Medicaid is to be the payor of last resort, the agency resolves any perceived conflict by interpreting the statutes to require that recipients assign to the state rights to *any* payments from a liable third party for purposes of reimbursing Medicaid. Because appellant thereby disposed of any property right she had in a third-party recovery (to the extent of medical expenses paid), the anti-lien provision was not operative.

The majority dismisses the agency adjudications as not addressing the anti-lien provision. However, in each case the state argued that the assignment provision was limited to payment for medical care, and that HCFA could not be reimbursed out of funds designated for other

purposes, just as the majority holds. The agency soundly rejected that position in light of the very real possibility of manipulation of tort awards by recipients who seek to prevent the public from being reimbursed. Manipulation is exactly what the majority allows. Under the majority's interpretation of this statute, appellant would be able to characterize the entire $220,000 as payment for pain and suffering, despite the significant damages in the form of medical expenses that have been incurred on Hoff's behalf. As the agency explained:

> Contrary to what California argued, it is not unfair completely or substantially to deny Medicaid recipients access to their settlements. If Medicaid had not paid their medical expenses, these recipients would have both unrestricted access to their settlements and enormous medical debts to be paid from those settlements. As Medicaid recipients, they do not have such debts because the public has paid their medical expenses. Therefore, in cases where Medicaid has incurred the "debt" for recipients, it is not unfair for HCFA to require complete reimbursement from these liability funds.

DAB No. 1504, p. 8. In this case, appellant does not have over $600,000 in debt for medical expenses because the state Medicaid program has paid for Hoff's medical care. Yet under the majority's theory the state is shackled from recovering any of its expenditures unless appellant designates payments out of a settlement as for medical expenses instead of pain and suffering or other elements of damages. Thus, the majority allows appellant's labeling of her items of damages to control whether the government can recoup its expenditures. In this case, the state will continue to pay for Troy Hoff's medical expenses while appellant has at her disposal not insignificant funds from liable third-party tortfeasors that might be used to satisfy that obligation. That result seems to me both absurd and contrary to congressional intent.

As the agency adjudications illustrate, the federal government is quick to penalize states for failure to recoup the amounts the federal government has expended on behalf of Medicaid recipients. The majority's ruling jeopardizes Minnesota's participation in the Medicaid program by making it nearly impossible for the state to recover from third parties responsible for injuries and disabilities of Medicaid recipients. At a minimum, the ruling will require the state to pursue third-party tortfeasors independently, notwithstanding the fact that the legislature has specifically allowed the attorney general to initiate and prosecute an independent action only if "no action has been brought" by the recipient. Minn. Stat. §§ 256.015, subd. 3, 256B.042, subd. 3 (2000). To that extent, the majority ruling is further contrary to legislative intent. Moreover, while the state can pursue third-party tortfeasors directly, nothing would prevent the recipient from intervening in that lawsuit and labeling a settlement pain and suffering so as to thwart the government's recovery. Again, that cannot be what congress or the legislature intended.

I would hold, consistent with the decisions of other courts interpreting the federal Medicaid laws, that the federal Medicaid law does not preempt state law in cases where the state seeks reimbursement for a Medicaid recipient's medical costs by placing a lien against third-party settlement proceeds.

STRINGER, Justice (dissenting).

I join in the dissent of Justice Russell A. Anderson.

LANCASTER, Justice (dissenting).

I join in the dissent of Justice Russell A. Anderson.

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[1] It is unclear from the record what legal authority Martin had to make this assignment for Hoff. Nevertheless, for purposes of this appeal, it is undisputed that Martin made a valid assignment of Hoff's rights.

[2] Martin subsequently dismissed her action against the County of Olmsted.

[3] The state also pleaded a second cross-claim, relying on the assignment of rights provision in the medical assistance application. However, this cross-claim only attempted to recover the no-fault insurance proceeds from Tlougan's no-fault insurer. Martin and the state later reached a settlement regarding the state's claim to the no-fault proceeds.

[4] Martin filed a motion to dismiss the state's cross-claim after the settlement with the City of Rochester had been approved, but before the settlement with Rochester Township and the estate of Donald Tlougan had been approved by the court, although it appears that a dollar amount had been agreed upon.

[5] Although the state had paid over $600,000 for Hoff's medical care, the state only sought to recover $58,561.82 of the settlement proceeds. State law requires that reasonable costs of collection, including attorney fees, be deducted first from a Medicaid recipient's recovery and the full amount of medical assistance paid to the recipient be deducted second. Minn. Stat. § 256B.042, subd. 5 (2000). In any case, under Minnesota's third-party recovery system, the recipient must receive at least one-third of the net recovery after attorney fees and other collection costs. *Id.*

[6] The state is also prohibited from suing a medical assistance recipient directly. *See* 42 U.S.C. § 1396p(b)(1) (1994).

[7] *See also* A Dictionary of Modern Legal Usage 140 (Bryan A. Garner ed., 2d ed. 1995) (defining cause of action as "a group of operative facts, such as a harmful act, giving rise to one or more rights of action").

[8] For purposes of the anti-lien provision, HCFA defines property as "the homestead and all other personal and real property in which the recipient has a legal interest." 42 C.F.R. § 433.36(b).

[9] The federal assignment requirement reads as follows:

> (a) For the purpose of assisting in the collection of medical support payments and other payments for medical care owed to recipients of medical assistance under the State plan approved under this subchapter, a State plan for medical assistance shall —

(1) provide that, as a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required —

(A) to assign the State any rights, of the individual or of any other person who is eligible for medical assistance under this subchapter and on whose behalf the individual has the legal authority to execute an assignment of such rights, to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party.

42 U.S.C. § 1396k(a).

[10] The state assignment provision reads as follows:

To be eligible for medical assistance a person must have applied or must agree to apply all proceeds received or receivable by the person or the person's spouse from any third person liable for the costs of medical care for the person, the spouse, and children. The state agency shall require from any applicant or recipient of medical assistance the assignment of any rights to medical support and third party payments. * * * By signing an application for medical assistance, a person assigns to the department of human services all rights the person may have to medical support or payments for medical expenses from any other person or entity on their own or their dependent's behalf and agrees to cooperate with the state in * * * obtaining third party payments.

Minn. Stat. § 256B.056, subd. 6.

[11] There are several exceptions, none of which apply to these facts. *See, e.g.,* 42 U.S.C. § 1396p(a)(1)(A), (B).

[12] The dissent claims that by looking first and foremost at the anti-lien provision instead of construing all provisions together, we overlook a construction that avoids preemption. However, given its broad scope and plain language, the federal anti-lien statute is and must be the beginning point of our analysis. There is little ambiguity about "[n]o lien may be imposed." Further, we thoroughly consider and give effect to limitations in companion provisions regarding payment for "health care" and "medical care" and the nature of the property assigned. We must give effect to the statute as a whole, but cannot ignore the plain import of the broad anti-lien provision.

[13] The dissent reads the third party recovery provision such that the final clause "for such health care items or services" refers to what the state has paid for and acts only as a limitation on the *amount* of the state's recovery, and not as a limitation on the character of the recovery. The dissent's interpretation is undercut by the plain language of the provision and is inconsistent with the rest of the federal Medicaid scheme. In particular, the reference in the third-party recovery provision to the state having "acquired the rights of such individual" can only refer to the federally required assignment which, by its plain meaning, is also limited to an assignment of payment for medical care. Thus, when interpreted according to its plain language and as

consistent with the federal scheme, the only fair reading of the third-party recovery provision limits the state's recovery to third-party payments for medical or health care.

[14] Accordingly, the federally required assignment encompasses the right to payments from potentially liable tortfeasors as well as insurers or others liable for the payments but who are not liable for the underlying injuries.

[15] The dissent asserts that we are interpreting the statute as a whole, yet reading out a federal requirement. What we have done is look to the plain meaning of the federal statutes to determine whether they operate in harmony with each other. The dissent argues that we have failed to adequately address the requirement that states recoup their expenditures out of proceeds from third parties, but by doing so misconstrues the federal requirement. As noted above, states are required to recover their expenditures from medical assistance recipients, but only from third party payments *for medical care*. 42 U.S.C. § 1396a(a)(25)(H) (referring specifically to "health care items or services"). The dissent correctly cites the "for medical care" language as contained in the statute, but then ignores this language in its analysis. We conclude that it is impossible to correctly construe the federal requirement without focusing on this language.

The dissent also states that our analysis loses sight of the presumption against preemption of state law. We acknowledge a presumption against preemption of state law. *See, e.g., Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224 (1993). But we cannot completely disregard the plain meaning of a federal statute because of a presumption against the preemption of state laws. Were the opposite to be true, the presumption against preemption of state law would override our obligation to adhere to the plain meaning of federal statutes, federal preemption of state law under conflict preemption would never occur, and the category would be irrelevant. If plain meaning can be ignored, courts would almost always be able to find an interpretation that prevents preemption.

[16] The dissent inordinately focuses on the third-party recovery aspect of the Medicaid system and fails to adequately address the federal purpose and objective of protecting a medical assistance recipient's property during his lifetime. In our analysis, we must confront all of the purposes and objectives of the federal Medicaid system.

[17] The dissent opines that our interpretation of the assignment statute frustrates the purpose of the Medicaid program and would "eviscerate Congress's clearly expressed intention that these funds be repaid," quoting language from *Norwest Bank of North Dakota, N.A. v. Doth,* 159 F.3d 328, 333 (8th Cir. 1998). In doing so, the dissent exaggerates the impact of our opinion on the state's ability to recover. Further, in an effort to buttress its position, it takes *Doth* out of context. *Doth* addressed medical assistance recipients' ability to place third-party settlement proceeds in supplemental needs trusts (SNT) ahead of the state's medical assistance liens. Funds in SNTs remain inaccessible to the state until the recipient's death. *Doth*, 159 F.3d at 331-32. *Doth* dealt with a situation in which recipients were attempting to place the *entire* recovery from third-party tortfeasors into a SNT, whereas this case only defines the limits of the state's ability to recover. In *Doth*, the court was addressing a very different and more drastic limitation on states' ability to recover. Furthermore, *Doth* specifically declined to address the validity of the state's liens, and did not determine whether the liens were able to be satisfied out of the entire settlement, or only

that part attributable to medical expenses. *Id.* at 334. Importantly, *Doth* did not mention the anti-lien provision at all.

[18] We note the impact of our holding in *K.S.* may have been changed in light of the availability of a SNT. In 1993, Congress passed the Omnibus Budget Reconciliation Act of 1993, which provides that a SNT may be created for the benefit of a disabled individual if the assets of the trust are to be transferred to the state upon the death of such individual. 42 U.S.C. 1396p(d)(4) (1994). The assets of such a properly created SNT are not considered for purposes of determining eligibility for medical assistance. *Id.* Minnesota currently recognizes the validity of SNTs created under federal law. Minn. Stat. § 501B.89, subd. 3 (2000).

[19] The dissent implies that our decision impairs the right of a medical assistance recipient to transfer his/her causes of action by assignment. But this misses the point. We acknowledge that medical assistance recipients have the right and thus are *able* to assign any and all of their causes of action or claims to the state (or, for that matter, to anyone else). However, there is no *obligation* under federal law to assign more than a claim for medical care. The problem here is that the dissent's interpretation of the state assignment provision transforms a right to transfer into an obligation to transfer more than what the federal law requires. Such an expansive obligation runs headlong into the federal anti-lien provision.

[20] Otherwise, the state assignment provision parallels the federal requirements of 42 U.S.C. §§ 1396a(a)(25)(H) and 1396k(a). To the extent that it appears to give rights against more than recovery for medical care, it is an innovation; to the extent that it has a retroactive effect—as an award of the proceeds (for medical care) that may have been paid out *before* a settlement—it does conform to section 1396a(a)(25)(H).

[21] However, the "all proceeds" language may operate to give the state rights in any recovery made before the assignment—a retroactive effect. This goes beyond the requirement in the federal assignment provision, but it gives effect to the third-party recovery requirement in § 1396a(a)(25)(H).

[22] Martin asserts that the state waived its subrogation claim because it was not timely filed. Upon review of the record, we conclude that the issue was properly raised before the district court. *See Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997) (explaining that Minnesota is a notice pleading state); *Anderson v. Rengachary*, 608 N.W.2d 843, 852 (Minn. 2000) (Gilbert, J., concurring in part and dissenting in part).

[23] In pertinent part, the subrogation statute provides:

Upon furnishing medical assistance to any person who has * * * a cause of action arising out of an occurrence that necessitated the payment of medical assistance, the state agency * * * shall be subrogated, to the extent of the cost of medical care furnished, to any rights the person may have * * * under the cause of action.

The right of subrogation created in this section includes all portions of the cause of action, notwithstanding any settlement allocation or apportionment that purports to dispose of portions of the cause of action not subject to subrogation.

Minn. Stat. § 256B.37, subd. 1.

[24] Martin's medical assistance application and assignment of rights was not completed until approximately 18 months after medical assistance payments first began.

[25] If a state disagrees with HCFA's determinations regarding federal financial participation in a state medical assistance program, the dispute is resolved in an adjudication before the Department of Health and Human Services Departmental Appeals Board. 42 C.F.R. § 430.42(b); 45 C.F.R. §§ 16.1-.23.

[26] As the dissent notes, agency interpretations are only entitled to *Chevron* deference if they are reasonable. *Chevron*, 467 U.S. at 843-44. In the California adjudication, the Board acknowledges that the statute only refers to an assignment of "payment for medical care." DAB No. 1504; *see also* DAB No. 1561 (relying on DAB No. 1504). However, the Board then concludes that "the statutory scheme as a whole contemplates that the actual recovery might be greater, and, if it is, that Medicaid should be paid first." *Id.* This broad analytical leap is such a significant departure from the plain language of the statute that we conclude it to be unreasonable and not entitled to deference under *Chevron.*

[27] The dissent relies upon state supreme court cases from Utah, Washington, and New York, as well as a single case each from the Second and Eighth Circuits. The state cases are distinguished below and rejected. Additionally, neither federal court of appeals specifically addressed the federal anti-lien provision or considered preemption of state laws. Specifically, the Second Circuit addressed the "general rule that the state may not encumber a Medicaid recipient's property prior to death," but cited only a New York version of the anti-lien statute and relied upon a New York state-created exception. *Sullivan v. County of Suffolk*, 174 F.3d 282, 285 (2nd Cir. 1999). Moreover, the Eighth Circuit did not address the issue before this court—the validity of state medical assistance liens and whether such liens were able to be satisfied out of the entire settlement, or only that part attributable to medical expenses. *Doth,* 159 F.3d at 334. Further, as previously noted, *Doth* did not mention the anti-lien provision at all. *Id.*

[28] It is important to remember that this case is not about the amount of recovery, but rather the method of recovery. Contrary to the implication of the dissent that our holding drastically curtails the state's ability to recover, the state's active participation in recovery efforts may in some cases actually increase its ultimate recovery. Under Minn. Stat. § 256B.042, subd. 5, the state is limited to a two-thirds recovery under the medical assistance lien, even if the only claim is for recovery of medical expenses. Under our holding, the state has no such limitation on the *amount* of its recovery. Rather, the state is entitled to recover the full amount of the assigned claim for medical expenses due from potentially liable third parties.

[29] Contrary to the dissent's assertion, the state will not be "shackled" from recovering its medical assistance expenditures unless the recipient designates a part of a settlement for medical

expenses. The state will not be forced to rely on the recipient's "labeling" of settlement amounts. Rather, as noted above, the state has its own independently owned claim for medical expenses against potentially liable third parties. With such a claim, the state must take appropriate steps with respect to its assigned claim for medical expenses, whether that is initiating a lawsuit, participating in a lawsuit initiated by the recipient, or taking part in settlement negotiations. Here, the state is only entitled to a part of the settlement proceeds because it released the third parties from further liability, relying solely on its lien and subrogation rights.

[30] The assignment in Martin's medical assistance application reads as follows:

As a condition of eligibility for medical assistance, I assign to the State of Minnesota any rights available to me under automobile or private health care coverage and any rights to payment for medical care from any third party for myself or my dependents. I agree to cooperate with the State in any legal action brought against a third party for payment of medical expenses or subsistence.

[31] In the workers' compensation area, we have long recognized a compensation recipient's ability to settle third-party claims for bodily injury and exclude from those settlements claims or damages not recoverable under workers' compensation, so long as there is notice to the employer or carrier. *See, e.g., Naig v. Bloomington Sanitation*, 258 N.W.2d 891, 894 (Minn. 1977); *Lang v. Williams Bros. Boiler & Mfg. Co.*, 250 Minn. 521, 531, 85 N.W.2d 412, 419 (1957). As we see no relevant distinction for our analysis, we also recognize the divisibility of a medical assistance recipient's claims against a third party into claims for medical expenses (assigned to the state) and claims for other damages (owned by the recipient).

[32] The majority claims this analysis "misses the point." However, it is the same analysis that the majority applies. That is, I agree with the majority that the medical assistance recipient has assigned *something*, on which the anti-lien provision does not operate because once assigned the cause of action is no longer the property of the recipient. I differ with the majority with respect to the *scope* of what has been assigned, not with respect to whether the assignment reflects a right or an obligation.

[33] The majority accuses the highest courts of two sister states of failing "to grapple with the key issue" by concluding that the settlement proceeds are no longer the property of the recipient. Again, this is the same *method* by which the majority gives effect to the assignment provision, however. Like the Utah and Washington high courts, the majority also considers the assigned causes of action to not be the property of the recipient, but simply concludes that the assignment is more limited (to medical expenses) than the assignment as interpreted by the Utah and Washington supreme courts.

[34] The majority claims that *Doth* is here taken out of its context, which involves the placement of an entire recovery from third party tortfeasors in a special or supplemental needs trust (SNT) so as to avoid the state's lien. The distinction the majority makes between shielding an entire recovery (not allowed) and shielding only part of a recovery (apparently allowable) eludes me. However, other than using the vehicle of a SNT, shielding the entire recovery is exactly what

Martin seeks to do here. She claims she is entitled to the full $220,000 from the third party tortfeasor.

While the majority and I both acknowledge that *Doth* did not deal expressly with the anti-lien statute, the court in *Doth* did expressly reject a construction of the SNT statute that would "eviscerate Congress's clearly expressed intention that these funds be repaid and negate the Social Security Act's comprehensive scheme permitting states to place these liens." 159 F.3d at 333 (internal quotation marks omitted).

[35] The majority claims that this analysis fails to consider the objective of protecting a medical assistance recipient's property during his lifetime. As explained herein, the anti-lien provision operates to give effect to this purpose for nonassigned property.

[36] I agree with the majority that agency letters, directives and approvals are not entitled to full deference because they do not reflect formal rules or adjudications. However, as the United States Supreme Court has recently made clear, *Chevron* did not eliminate a court's ability to give some lesser form of deference to agency interpretations appearing in other forms, "given the 'specialized experience and broader investigations and information' available to the agency." *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164, 2167 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944). The agency pronouncement may be due a "respect proportional to its 'power to persuade'." *Mead*, 533 U.S. at ____, 121 S. Ct. at 2167 (quoting *Skidmore*, 323 U.S. at 140).

Of the various materials respondent directs us to, one memorandum from HCFA adequately describes the agency's interpretation of the anti-lien provision and is entitled to this lesser form of deference. A 1994 memorandum from the HCFA regional administrator to state Medicaid directors stated that liens are valid against a tortfeasor's property or against funds set aside to settle litigation that are not the recipient's property. Health Care Financing Administration Regional Identical Letter No. 94-134 (Sept. 1994). The memo acknowledges the anti-lien provision and interprets it not to apply to recoveries from third-party tortfeasors because such funds are not the recipient's property. This agency interpretation is consistent with the rulings in *Wallace* and *Wilson*, and while not accorded full *Chevron* deference, we should consider it to have some persuasive force.

[37] Rather than adopt in their entirety these board adjudications as the majority claims, I cite these adjudications only for the agency's construction of the federal third-party recovery provision supporting its conclusion that the public should be repaid before a medicaid recipient enjoys the fruits of a settlement with a third-party tortfeasor. Whether the agency would view Minnesota's one-third recovery provision in section 256B.042, subdivision 5 as depriving the federal Medicaid program of reimbursement dollars was not before the agency and is not now before the court.

STATE OF MINNESOTA

IN COURT OF APPEALS

C1-02-16

Wells Fargo Home Mortgage, Inc.,

Appellant,

vs.

Michelle R. Newton, a/k/a Michelle R. Newton-Witkowski,

Respondent,

John Doe, et al.,

Defendants,

Theodore Witkowski,

Respondent.

Filed July 9, 2002

Affirmed in part, as modified, reversed and remanded in part.

Peterson, Judge

Anoka County District Court

File No. C90010025

Gary B. Bodelson, 247 Third Avenue South, Minneapolis, MN 55415 (for appellant)

Michelle R. Newton, 4821 Fourth Avenue South, Minneapolis, MN 55409 (pro se respondent)

Christopher E. Brevik, Brevik & Associates, 8566 Xenium Lane North, Maple Grove, MN 55369 (for respondent Theodore Witkowski)

Considered and decided by Schumacher, Presiding Judge, Peterson, Judge, and Poritsky, Judge.*

SYLLABUS

1. Under Minn. Stat. § 507.02 (1998), when a married person obtains a loan by mortgaging homestead property and uses part of the loan proceeds to pay off the contract for deed for the homestead and part of the loan proceeds for other purposes, if the married person's spouse does not sign the mortgage, it is a valid mortgage only for the amount used to pay off the contract for deed.

2. A married woman's right under Minn. Stat. § 519.02 (1998) to manage property she owned when she married free from the control of her husband does not include the right to mortgage homestead property without complying with Minn. Stat. § 507.02.

3. A complaint that contains a short and plain statement that a lender is entitled to a judgment against a borrower for money owed under a promissory note and demands recovery of a specific amount of money satisfies the requirements of Minn. R. Civ. P. 8.01.

OPINION

PETERSON, Judge

Appellant Wells Fargo Home Mortgage, Inc., challenges the district court's grant of summary judgment in favor of respondent Theodore Witkowski. Wells Fargo contends that (1) the district court erroneously determined that a mortgage executed by respondent Michelle R. Newton is not a purchase-money mortgage; (2) under Minn. Stat. § 519.02 (1998), the spousal-signature requirement in Minn. Stat. § 507.02 (1998) does not apply to the mortgage because Newton owned the mortgaged property when she married Witkowski; and (3) the district court erroneously dismissed its claims against Newton regarding money owed under her promissory note. We affirm in part, as modified, and reverse and remand in part.

FACTS

On July 27, 1988, Newton, then a single person, entered into a contract for deed with Elmer and Ruth Haase to purchase a house in Coon Rapids. On May 18, 1990, Newton and Witkowski were married. Following the marriage, the couple lived in the house in Coon Rapids. In February 1999, the couple separated, and Witkowski moved out of the house. Soon after, Witkowski petitioned to dissolve the marriage.

In October 1999, while the dissolution proceeding was pending, Newton borrowed $116,600 from First State Mortgage Corporation and executed a promissory note and a mortgage for the Coon Rapids property to secure the note. The mortgage did not name Witkowski as a mortgagor, and Witkowski did not sign the mortgage. The mortgage was assigned to Norwest Mortgage Inc., which is now known as Wells Fargo Home Mortgage, Inc. Newton used $55,034.74 of the amount borrowed to pay off the contract for deed, and the remaining amount borrowed ($61,565.26) to pay closing costs and personal expenses.

Newton failed to make mortgage payments after April 2000, and in November 2000, Wells Fargo filed suit against Newton, Witkowski, and others, seeking: (1) a declaration that the mortgage is a purchase-money mortgage superior to the claim or right of any defendant; (2) a judgment against Newton for the whole sum secured by the mortgage, plus interest and costs and disbursements, including attorney fees; (3) a decree of foreclosure directing the sale of the property; (4) a declaration that the defendants' interests in the property are inferior to Wells Fargo's lien, and the defendants are barred from any right, title, or interest in the property, except the right of redemption; and (5) a deficiency judgment against Newton, if the sale proceeds are insufficient to satisfy the judgment.

Wells Fargo and Witkowski each moved for summary judgment. Newton appeared at the hearing on the motion, but she was not allowed to participate because she had not filed an answer to Wells Fargo's complaint or paid a filing fee. The district court granted Witkowski's motion for summary judgment, denied Wells Fargo's motion for summary judgment, and dismissed Wells Fargo's claims against Witkowski.

Wells Fargo appealed. This court dismissed the appeal because the district court had dismissed Wells Fargo's claims against Witkowski but had not dismissed Wells Fargo's claims against Newton, and, therefore, the judgment was a nonappealable, partial judgment. The district court issued a new order that, in addition to the relief granted in the earlier judgment, dismissed Wells Fargo's claims against Newton. Judgment was entered, and Wells Fargo appealed again.

ISSUES

1. Is the mortgage Newton executed exempt from the spousal-signature requirement in Minn. Stat. § 507.02 (1998) because it is a purchase-money mortgage?

2. Under Minn. Stat. § 519.02 (1998), is the mortgage Newton executed valid without Witkowski's signature because Newton owned the mortgaged property when she married Witkowski?

3. Did the district court err in dismissing Wells Fargo's claims against Newton arising under the promissory note?

ANALYSIS

A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law.

Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993).

On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law.

State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990) (citation omitted). We "must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio,* 504 N.W.2d at 761.

When the district court grants a summary judgment based on its application of statutory language to the undisputed facts, * * * its conclusion is one of law and our review is *de novo*.

Lefto v. Hoggsbreath Enters., Inc., 581 N.W.2d 855, 856 (Minn. 1998).

1. Purchase-Money Mortgage

When interpreting a statute, we first look to see whether the statute's language, on its face, is clear or ambiguous. A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation.

American Family Ins. Group v. Schroedl, 616 N.W.2d 273, 277 (Minn. 2000) (citations and quotations omitted).

Minn. Stat. § 507.02 (1998) states, in part:

> If the owner is married, no conveyance of the homestead, except a mortgage for purchase money unpaid thereon, * * * shall be valid without the signatures of both spouses. A spouse's signature may be made by the spouse's duly appointed attorney-in-fact.
>
> A husband and wife, by their joint deed, may convey the real estate of either. A spouse, by separate deed, may convey any real estate owned by that spouse, except the homestead, subject to the rights of the other spouse therein; and either spouse may, by separate conveyance, relinquish all rights in the real estate so conveyed by the other spouse.

Wells Fargo argues that Minn. Stat. § 507.02 does not apply to the mortgage Newton signed because the loan proceeds obtained with the mortgage were partly applied to the purchase price of the house, and, therefore, the mortgage is a purchase-money mortgage. The district court determined that because the transaction in which the mortgage was created was a refinancing of a prior obligation, and more than half of the money borrowed in the transaction was used to pay personal expenses rather than the purchase price of the house, the mortgage is not a purchase-money mortgage, and Minn. Stat. § 507.02 applies to the mortgage. Because the language of Minn. Stat. § 507.02 is subject to either interpretation, the statute is ambiguous, and we must determine whether Minn. Stat. § 507.02 applies to a mortgage when funds obtained with the mortgage are used partly to refinance a contract for deed and partly to pay personal expenses.

It has long been the law in Minnesota that a purchase-money mortgage is superior to any other party's interest in the property. *See Stewart v. Smith,* 36 Minn. 82, 83, 30 N.W. 430, 431 (1886) (purchase-money mortgage takes precedence over any other claim or lien arising through the mortgagor). Consistent with this principle, Minn. Stat. § 507.02 does not apply when a mortgage

on a homestead is "a mortgage for purchase money unpaid." But the statute does not define "a mortgage for purchase money unpaid."

A purchase-money mortgage is one given to secure unpaid purchase money. *O'Halloran v. Marriage,* 167 Minn. 443, 445, 209 N.W. 271, 272 (1926). In other words, financing the purchase of a parcel of land by granting a mortgage on the land as security creates a purchase-money mortgage. *Marin v. Knox,* 117 Minn. 428, 430-32, 136 N.W. 15, 16-17 (1912).

When a third party furnishes a part of the purchase price and takes a mortgage therefor from the vendee, the mortgage may be given effect as a purchase-money mortgage. It is unnecessary that the deed and the mortgage should be executed at the same moment, or even on the same day, provided the execution of the two instruments constitutes part of one continuous transaction and was so intended.

Olson v. Olson, 203 Minn. 199, 202, 280 N.W. 640, 641 (1938) (citations and quotations omitted).

The mortgage Newton signed meets this definition of a purchase-money mortgage. A third party (Wells Fargo's predecessor) furnished a part of the purchase price for Newton's house (the amount Newton used to pay off the contract for deed). When Newton paid off the contract for deed, she received a deed for the property, and the third party took a mortgage from her to secure its loan. The deed and the mortgage were intended to be part of one transaction to refinance Newton's house.

Under *Marin v. Knox,* a mortgage used to refinance a contract for deed can be a purchase-money mortgage. In *Marin*, E.R. Keplinger, the vendor of real property, gave the vendee, Austin C. Knox, "a contract agreeing to convey for $3,200." *Marin,* 117 Minn. at 429-30, 136 N.W. at 16. The vendee took possession, but five years later, was unable to make payments as agreed. *Id.* at 430, 136 N.W. at 16. To pay the remaining $2,116.40 due under the contract for deed, the vendee borrowed $1,500 and gave two separate mortgages to secure the loan. *Id.* The entire amount borrowed was paid to the vendor as part of the purchase price. *Id.* at 431, 136 N.W. at 16. The vendee also gave the vendor a mortgage for $616.40 to secure the remaining balance due. *Id.* at 430, 136 N.W. at 16. When the vendee's judgment creditor obtained title to the property upon an execution sale under a judgment against the vendee, the issue arose whether the mortgages were purchase-money mortgages that had priority over the judgment. *Id.* at 430-31, 136 N.W. at 16. The supreme court stated:

> [The judgment creditor] earnestly contends that, because the contract for purchase of the land was made in 1902, there could be no agreement to take back a purchase-money mortgage in 1908; the written contract containing no provision for a mortgage. We fail to see the force of this position. In *Laidley v. Aiken*, 80 Iowa, 112, 45 N.W. 384, 20 Am. St. Rep. 408, the contract to convey had been given 3 years before the purchase-money mortgage was made. Knox had failed to make the payments stipulated in the contract, and Keplinger, by giving the 30-day notice required, was in a position to terminate all rights under the contract. In this situation, had Keplinger given a deed upon receiving back a mortgage from Knox for the amount due and unpaid, could it for a moment be

> claimed that the mortgage was not entitled to be considered as a purchase-money mortgage? When [the judgment creditor] obtained his judgment, it did not become a lien on the unpaid amount of the purchase price, and he should not be heard to object to whatever agreement the parties mutually agreed upon to secure the same, as long as the equity of Knox in the land was not diminished.
>
> We conclude, from the examination of the testimony and admitted facts, that the court was fully warranted in finding that at the time the mortgages were delivered $2,116.40 was due Keplinger upon the purchase price of the land; that the execution and delivery of the deed by Keplinger to Knox, and the mortgages from the latter to [the parties who made the $1,500 loan] and Keplinger, together with the payment to Keplinger of the proceeds of the $1,500 loan upon the unpaid purchase price of the land, constituted but one transaction; that the intent and agreement of all said parties was that the title to the land should vest in Knox, subject to the purchase-money mortgage liens of said three mortgages; and hence that said three mortgages in fact do represent and secure the payment of the purchase price of the land, and no other amount whatsoever.

Id. at 432-33, 136 N.W. at 17.

As in the mortgage transaction in *Marin v. Knox,* several years after entering into a contract for deed, Newton obtained a loan to refinance the contract for deed and gave the lender a mortgage to secure repayment of the loan. The fact that Knox gave the mortgages to refinance a prior obligation did not prevent the mortgages from being purchase-money mortgages; under *Marin v. Knox,* if Newton had used the loan proceeds only to refinance her contract for deed, the mortgage would be a purchase-money mortgage. But unlike the transaction in *Marin v. Knox,* Newton did not use every dollar obtained by means of her mortgage to pay the balance due on her contract for deed. Instead, she used more than half of the amount she obtained to pay closing costs and personal expenses. Consequently, unlike the mortgages in *Marin v. Knox,* the mortgage Newton signed does not "represent and secure the payment of the purchase price of the land, and no other amount whatsoever."

Because Newton used loan proceeds to pay expenses other than the balance due on her contract for deed, it is not completely accurate to say that the mortgage she signed is a mortgage for purchase money unpaid on her homestead. But because Newton used almost half of the loan proceeds to pay the balance due on her contract for deed, it is also not completely accurate to say that the mortgage is not a mortgage for purchase money unpaid. However, Newton signed only one mortgage, and Minn. Stat. § 507.02 does not indicate whether the exception for "a mortgage for purchase money unpaid" ceases to apply if funds obtained by means of the mortgage are used to pay both purchase money and other expenses. Faced with this dilemma, the district court concluded that the mortgage is not a purchase-money mortgage, and, therefore, under Minn. Stat. § 507.02, the mortgage is invalid because it was not signed by both Newton and Witkowski.

Because the district court concluded that the mortgage is invalid, it dismissed all of Wells Fargo's claims. If affirmed, this would mean that Wells Fargo could not enforce Newton's mortgage to recover any of the money Newton borrowed even though Newton applied $55,034.74 of the borrowed money to the purchase price of her house. Although we recognize

that the district court's interpretation of Minn. Stat. § 507.02 is a reasonable interpretation of the statutory language, and we see merit in an interpretation that requires a determination that a single conveyance either is, or is not, a purchase-money mortgage, we conclude that the harsh result produced by the district court's interpretation of Minn. Stat. § 507.02 is not consistent with the policy objective of the statute.

The supreme court has explained that Minn. Stat. § 507.02 "evidences the clear and unambiguous legislative policy of ensuring a secure homestead for families." *Dvorak v. Maring,* 285 N.W.2d 675, 677-78 (Minn. 1979). The basic policy objective of the statute is "protecting the alienation of the homestead without the willing signatures of both spouses." *Id.* at 678.

In order to insure a stable and independent citizenry and thereby promote the public welfare, it has always been the policy of the law to protect with jealous zeal the homestead right of the citizen and his wife and minor children. This right is based on the fundamental conception that the home should be a citadel of security against the misfortunes and uncertainties of life. Our statutes have been carefully designed to effectuate this policy and to preserve the homestead to the family even at the sacrifice of just demands.

Holden v. Farwell, Ozmun, Kirk & Co., 223 Minn. 550, 558-59, 27 N.W.2d 641, 646 (1947) (citations omitted).

But the legislative policy of preserving the homestead against even just demands does not extend to preserving the homestead against demands for unpaid purchase money. *Craig v. Baumgartner,* 191 Minn. 42, 254 N.W. 440 (1934), which involved circumstances somewhat similar to the facts before us, illustrates the limits of legislative policy that the supreme court has recognized when applying the law to protect the homestead right of a citizen who did not join in his spouse's attempt to convey an interest in their homestead.

In *Craig,* Catherine Craig entered into a contract for deed in 1909 to purchase a house for $5,500. *Id.* at 43, 254 N.W. at 440. Craig and her husband occupied the house as their homestead. *Id.* In 1916, while still owing $2,200, Craig failed to make the payments under the contract for deed. *Id.* Also in 1916, entirely apart from the contract for deed, Craig's husband became indebted to the contract-for-deed vendor in the amount of $2,500. *Id.* Craig surrendered the original contract to the vendor and entered into a new contract in which the vendor agreed to convey the property upon payment of $4,700, which represented the unpaid balance of the 1909 contract and the husband's separate debt to the vendor. *Id.* The husband signed the new contract only as a witness. *Id.* Craig paid a substantial amount under the 1916 contract and then went into default. *Id.*

In 1932, after the contract-for-deed vendor died, the representatives of his estate served the proper statutory notice to cancel the 1916 contract. *Id.,* 254 N.W. at 441. Craig brought suit to enjoin the cancellation on the grounds that the 1916 contract was an equitable mortgage. *Id.* The trial court made findings and ordered judgment for the estate. *Id.* at 43-44, 254 N.W. at 441. Relying on the predecessor to Minn. Stat. § 507.02, which was not substantively different from the current statute,[1] the supreme court reversed and ordered a new trial.

The rationale of the supreme court's decision was that when Craig surrendered the 1909 contract for deed, she did so by merely handing over the contract without any accompanying written instrument. *Id.* at 44, 254 N.W. at 441. But at the time she did so, she had paid more than one half of the purchase price for the property and had an equitable interest in the property to the extent of payments made. *Id.* Therefore, under the statute, if the property was a homestead, Craig could not alienate this equitable interest by surrendering the contract without the signature of her husband. *Id.* Consequently, because the record did not show that there was ever any attempt to cancel the 1909 contract according to the statutory cancellation procedure, the 1909 contract remained in force, and the 1916 contract was of no effect. *Id.* The supreme court explained that the execution of the 1916 contract represented a misconceived notion of the status of the parties. Where a person holds a contract for deed which has not been canceled or validly surrendered, the taking of another contract on the same land is of no effect. The argument that the second contract is a mortgage when the first one is still in force defeats itself.

Id.

But because the case had been tried on the theory that the 1909 contract had been validly surrendered, and, therefore, the defendants had no reason to show at trial that the surrender did not violate the statutory predecessor of Minn. Stat. § 507.02, the supreme court ordered a new trial to give the defendants an opportunity to do so. The court explained:

> If defendants can show a valid cancellation of the 1909 contract, that the property was not plaintiff's homestead, or that there was a written instrument signed by plaintiff's husband accompanying the surrender of the 1909 contract, they should be given a chance so to do. In the event that they are not able so to do, defendants should recover nothing, and, upon payment of the balance due under the 1909 contract, if any, plaintiffs should be entitled to the land in fee. **Even if defendants are able to show a valid surrender of the 1909 contract and if it is found that the 1916 contract is a mortgage, we do not think that under our statute it can be a mortgage for more than the amount of the unpaid purchase price on the 1909 contract.**

Id. at 48, 254 N.W. at 443 (emphasis added).[2]

In other words, even if the representatives of the vendor's estate could show that the surrender of the 1909 contract for deed was valid because it did not violate the statutory requirement that both spouses sign a conveyance of a homestead, the 1916 contract, which was not signed by Craig's husband, could convey a mortgage interest only in the unpaid purchase price under the 1909 contract. Any mortgage interest created by the 1916 contract could not apply to the husband's $2,500 debt that the 1916 contract was also intended to secure.

This is precisely the situation presented in the present case. Newton's mortgage is for an amount that includes the unpaid purchase price on her contract for deed and other debts unrelated to the purchase of her homestead. Under the supreme court's statement in *Craig*, the mortgage cannot be for an amount greater than the unpaid balance of the contract for deed because the mortgage was not signed by both Newton and Witkowski. But this limitation on the amount of the

mortgage does not invalidate the entire mortgage. There can be a valid mortgage in the amount of the unpaid purchase price under Newton's contract for deed.
We conclude that under Minn. Stat. § 507.02, to the extent that the mortgage Newton signed secures amounts other than the unpaid purchase price under Newton's contract for deed, the mortgage is invalid. But to the extent that the mortgage secures the $55,034.74 unpaid purchase price under the contract for deed, it is a mortgage for purchase money unpaid on the homestead. Therefore, the spousal-signature requirement in Minn. Stat. § 507.02 does not apply to that portion of the mortgage, and the mortgage is a valid mortgage for $55,034.74 even though it was not signed by Witkowski.

2. *The Married Woman's Act*

Wells Fargo argues that because Newton entered into the contract for deed and acquired an interest in the property when she was single, she had a right under Minn. Stat. § 519.02 to mortgage the property free from Witkowski's control. Statutory construction is a question of law, which this court reviews de novo. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998).

Minn. Stat. § 519.02 (1998) states:

> All property, real, personal, and mixed, and all choses in action, owned by any woman at the time of her marriage, shall continue to be her separate property, notwithstanding such marriage; and any married woman, during coverture, may receive, acquire, and enjoy property of every description, and the rents, issues, and profits thereof, and all avails of her contracts and industry, free from the control of her husband, and from any liability on account of his debts, as fully as if she were unmarried.

Minn. Stat. § 519.02 was originally enacted to abolish the common-law concept of legal unity of husband and wife. *Gillespie v. Gillespie*, 64 Minn. 381, 383, 67 N.W. 206, 207 (1896). The legal-unity concept deprived a married woman of a separate legal existence and the right to a legal estate in her own property. *Id.* In enacting the statute, the legislature sought to eliminate the disabilities concomitant to being a married woman by, among other things, placing married women on an equal footing with their husbands "in respect to the management and control of [their] separate property." *Drake v. Drake*, 145 Minn. 388, 390, 177 N.W. 624, 624 (1920) (emphasis added), *overruled on other grounds by Beaudette v. Frana*, 285 Minn. 366, 373 n.10, 173 N.W.2d 416, 420 n.10 (1969).

"By its terms, the statute clearly applies to property a wife acquires separately from her husband before the marriage." *Abrahamson v. Abrahamson*, 613 N.W.2d 418, 422 (Minn. App. 2000). The statute also applies to property a married woman acquires on her individual credit during the marriage. *Hoover v. Carver*, 135 Minn. 105, 108, 160 N.W. 249, 250-51 (1916). The statute, however, does not apply to property that a husband and wife acquire jointly during the marriage. *Abrahamson*, 613 N.W.2d at 422.

Because Newton acquired an interest in the property through a contract for deed before she was married, it appears that Minn. Stat. § 519.02 applies to this interest. But because Newton and

Witkowski used the property as their homestead, Newton's right under Minn. Stat. § 519.02 to manage the property free from the control of her husband conflicts with the restriction in Minn. Stat. § 507.02 that prevents her from conveying the homestead without her husband's signature.

When a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions be irreconcilable, the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted at a later session and it shall be the manifest intention of the legislature that such general provision shall prevail.

Minn. Stat. § 645.26, subd. 1 (2000).

Minn. Stat. § 519.02 applies to all property owned by a woman at the time of her marriage, and Minn. Stat. § 507.02 applies only to real property used by a married person as a homestead. Therefore, Minn. Stat. § 519.02 is a general provision in a law that applies to all property, and it conflicts with a special provision in Minn. Stat. § 507.02 that applies only to homestead property. Because Newton's right under Minn. Stat. § 519.02 to manage her property free from the control of her husband cannot be reconciled with the restriction in Minn. Stat. § 507.02 that prevents her from conveying the homestead without her husband's signature, the special provision in Minn. Stat. § 507.02 prevails and is an exception to the general provision in Minn. Stat. § 519.02.

The language in Minn. Stat. § 507.02 also indicates that it should be construed as an exception to Minn. Stat. § 519.02. Minn. Stat. § 507.02 states:

> A spouse, by separate deed, may convey any real estate owned by that spouse, **except the homestead**, subject to the rights of the other spouse therein.

(Emphasis added.) This language recognizes the right of either spouse to convey that spouse's real estate, but explicitly states that this right does not include the right to convey the homestead.

This construction of section 519.02 is consistent with the legislative policy of placing married women on an equal footing with their husbands in respect to the management and control of their separate property. Under this construction, neither a married woman nor a married man who owns property at the time of the marriage and uses that property as a homestead during the marriage can mortgage the property without regard to their spouse's homestead rights.

3. *Wells Fargo's Claims Against Newton*

Wells Fargo argues that the district court erred by dismissing its claims against Newton based on the promissory note that she signed at the same time as she signed the mortgage. In the memorandum that accompanied the summary judgment, the district court stated:

> [Wells Fargo] sued both parties claiming this matter involved a purchase money mortgage. [Wells Fargo] did not plead any alternative theories of recovery against either

defendant. Since this court determines that the transaction is a refinancing, this action is dismissed as to both respondents.

Minn. R. Civ. P. 8.01 states:

> A pleading which sets forth a claim for relief * * * shall contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought; if a recovery of money is demanded, the amount shall be stated. Relief in the alternative or of several different types may be demanded.

The purpose of the complaint is to advise the defendant as to the nature of the plaintiff's claim. *Wilson v. N. Pac. Ry.*, 111 Minn. 370, 373, 127 N.W. 4, 5 (1910). In determining whether a complaint states a claim, the test is whether the facts alleged, liberally construed, entitled plaintiff to any relief, either legal or equitable. *Lucas v. Medical Arts Bldg. Co.*, 207 Minn. 380, 383, 291 N.W. 892, 894 (1940).

In its complaint, Wells Fargo alleged:

> That said Defendant Michelle R. Newton aka Michelle R. Newton-Witkowski has failed, neglected and refused to pay the installments upon said Note and Mortgage which became due on May 1, 2000 and on the first day of each and every month since that date. That because of the default Plaintiff, by virtue of the acceleration clause contained in said Mortgage does hereby elect and declare the total of principal and interest due and payable immediately. That there is due and owing upon said Mortgage the sum of One Hundred Sixteen Thousand Three Hundred Eighty Five and 95/100 ($116,385.95) Dollars together with interest from April 1, 2000 at the mortgage rate.

Wells Fargo's complaint also included the following request:

> That Plaintiff have judgment against the Defendant Michelle R. Newton aka Michelle R. Newton-Witkowski for the sum of $116,385.95 plus interest, from and after April 1, 2000 at the note rate, costs and disbursements, including attorneys' fees as allowed by law in such an amount as the Court shall determine.

This language satisfies the requirements of rule 8.01. It is a short and plain statement of Wells Fargo's claim that it is entitled to a judgment against Newton for money owed under the promissory note, and it demands recovery of a specific amount of money. The language also advised Newton as to the nature of the claims against her. Therefore, we reverse the district court's dismissal of Wells Fargo's claim against Newton based on the promissory note that she signed.

DECISION

Because $55,034.74 of the amount Newton obtained by means of the mortgage on her homestead was applied to the purchase price of the homestead, the mortgage is a valid mortgage for purchase money unpaid in that amount even though Witkowski did not sign the mortgage. But

because Witkowski did not sign the mortgage, the mortgage is not valid for any amount greater than $55,034.74. Newton did not have a right under Minn. Stat. § 519.02 to convey the homestead without Witkowski's signature. Wells Fargo's complaint adequately stated a claim against Newton for money owed under the promissory note. The district court's determination that the mortgage Newton signed is not valid without Witkowski's signature is affirmed to the extent that the mortgage secures any amount greater than $55,034.74. The district court's dismissal of Wells Fargo's claim against Newton for money owed under the promissory note is reversed and remanded.

Affirmed in part, as modified, reversed and remanded in part.

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

[1] 2 Mason Minn. St. 1927, § 8340, the statute cited by the supreme court, stated:

> But if the owner be married, no mortgage of the homestead, except for purchase money unpaid thereon, nor any sale or other alienation thereof, shall be valid without the signatures of both husband and wife.

[2] We recognize that this statement in *Craig* is dicta. But we find the statement to be a persuasive explanation of the meaning of an ambiguous statute because it was made almost 70 years ago, and during the intervening period, Minn. Stat. § 507.02 has not been substantively changed. *Cf. In re Estate of Bush*, 302 Minn. 188, 207, 224 N.W.2d 489, 501 (1974) (stating that supreme court dicta is entitled to "considerable weight" if it contains "an expression of the opinion of the court").

STATE OF MINNESOTA

IN COURT OF APPEALS

CX-00-1208

Harlan Baumann, et al.,

Appellants,

vs.

Chaska Building Center, Inc.,

Respondent,

C.H. Robinson Company, et al.,

Defendants.

Filed January 23, 2001

Reversed and remanded

Holtan, Judge

Carver County District Court

File No. C5991099

Eric Robert Heiberg, Coleman, Hull & Van Vliet, PLLP, 8500 Normandale Lake Boulevard, Suite 2110, Minneapolis, MN 55437 (for appellants)

Michael Joseph Orme, Orme & Associates, 3140 Neil Armstrong Boulevard, Suite 203, Eagan, MN 55121 (for respondent)

Considered and decided by Willis, Presiding Judge, Shumaker, Judge, and Holtan, Judge.

S Y L L A B U S

1. The homestead-exemption statute, Minn. Stat. § 510.02 (1998), is ambiguous regarding whether it protects the "value" of the debtor's property or the "value" of the debtor's equity.

2. The relevant execution-related statutes and the legislative history of Minn. Stat. § 510.02 both indicate that the legislature intended the homestead-exemption statute to apply to the value of the debtor's equity.

3. In determining the quantity of real estate exempted under section 510.02, the district court must determine if the area surrounding the real estate is conclusively urban or rural in nature. If the surrounding area is conclusively urban, the claimant's exemption is limited to one-half acre. If the surrounding area is conclusively rural, up to 160 acres of property is exempt. If the surrounding area is not conclusively rural or urban, the district court must determine the character of the real estate itself.

OPINION

HOLTAN, Judge

Appellants Harlan and Cheryl Baumann appeal the district court's summary judgment in favor of respondent Chaska Building Center. The district court concluded that because the market value of appellants' home exceeded $200,000, the homestead exemption protected only $200,000 of its market value. Appellants claim the homestead exemption applies to their equity in the property, not its market value. By notice of review, respondent challenges the portion of the summary judgment ruling that because appellants' property is located outside a laid-out or platted portion of a city, the property qualifies for a homestead exemption under Minn. Stat. § 510.02 (1998). We reverse and remand.

FACTS

Appellants Harlan and Cheryl Baumann owned 3.9 acres of real property and occupied it as their homestead. The property is not located within the laid-out or platted portion of any city and is not within the city limits of any city. The county's 1999 real-estate valuation notice classified the property as "residential homestead."

In June 1998, respondent Chaska Building Center, Inc. sued appellant Harlan Baumann based on a personal guaranty he executed on behalf of Ahlquist Corporation, d/b/a Gunnard Company (Gunnard). The guaranty was for debts Gunnard owed to respondent. In July 1998, respondent obtained a default judgment against Gunnard and appellant Harlan for $13,647.60. The judgment was later modified and increased to $15,049.13. After entry of the judgment, Gunnard became insolvent.

In 1999, appellants sold their property to David and Connie Rikke for $370,000 and used all of the sale proceeds to pay off three mortgages on the property. The mortgages totaled more than the property's sale price. Wanting to remove the cloud on the title caused by the 1998 default judgment, appellants sought a declaratory judgment that the default judgment was unenforceable against their homestead. On summary judgment, the district court ruled that the geographic limitation contained in the homestead-exemption statute, Minn. Stat. § 510.02 (1998), did not apply to appellants' property because the property was outside a laid-out or platted portion of a

city. The district court also ruled that because the property's market value exceeded $200,000, the homestead exemption applied to only the first $200,000 of that market value.

ISSUES

I. Does the homestead-exemption statute, Minn. Stat. § 510.02 (1998), apply to the market value of the property or the value of the debtor's equity in the property?

II. Did the district court err in concluding that because appellants' property is located outside a laid-out or platted portion of a city, the amount of property exempted may exceed that allowed if the property was in the laid-out or platted portion of a city?

ANALYSIS

On appeal from a summary judgment where the parties agree that the material facts are not in dispute, the only questions before this court are questions of law. *Reads Landing Campers Ass'n, Inc. v. Township of Pepin,* 546 N.W.2d 10, 13 (Minn. 1996). The interpretation of statutes is a question of law which we review de novo. *Boutin v. LaFleur,* 591 N.W.2d 711, 714 (Minn. 1999) (citation omitted).

I.

Appellants challenge the district court's ruling that the homestead-exemption statute, Minn. Stat. § 510.02 (1998), protects $200,000 of the market "value" of their property. They allege that the word "value" as used in the statute is ambiguous and applies to the debtor's equity in the homestead rather than the market value of the property. A statute is ambiguous if "it is reasonably susceptible to more than one interpretation." *Astleford Equip. Co., Inc. v. Navistar Int'l Transp. Corp.,* 611 N.W.2d 33, 37 (Minn. App. 2000) (citation omitted). If a statute is ambiguous, courts, in construing a statute, may examine related statutes and use the statute's legislative history to determine how the ambiguous language should be read. *See Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 385-86 (Minn. 1999) (illustrating proper analysis of a statute). Here, section 510.02 states:

> The homestead may include any quantity of land not exceeding 160 acres, and not included in the laid out or platted portion of any city. If the homestead is within the laid out or platted portion of a city, its area must not exceed one-half of an acre. *The value of the homestead exemption,* whether the exemption is claimed jointly or individually, *may not exceed $200,000* or, if the homestead is used primarily for agricultural purposes, $500,000, exclusive of the limitations set forth in section 510.05.

Id. (emphasis added). Section 510.02 refers to "[t]he value of the homestead exemption." The phrase "homestead exemption" is not otherwise defined and its" value" could be read to refer to the market value of the property used as a homestead or to only the debtor's equity therein. Because the word "value" has an ascertainable but neutral meaning, it does not suggest a preference for one reading of "value of the homestead exemption" over the other. Therefore, we

conclude that section 510.02 is ambiguous under *Astleford.* The district court construed the statute to refer to the property's market value.

C. A. Related Statutes

"Statutory construction is a question of law subject to de novo review." *See Astleford,* 611 N.W.2d at 37 (citing *Wynkoop v. Carpenter,* 574 N.W.2d 422, 425 (Minn. 1998)). A statute should be interpreted, whenever possible, to give effect to all of its provisions, and "no word, phrase, or sentence should be deemed superfluous, void, or insignificant." *Amaral,* 598 N.W.2d at 384 (citing *Owens v. Federated Mut. Implement & Hardware Ins. Co.,* 328 N.W.2d 162, 164 (Minn. 1983)). "Various provisions of the same statute must be interpreted in light of each other." *Baker v. Ploetz,* 616 N.W.2d 263, 269 (Minn. 2000) (citation omitted). Courts should also construe a statute to avoid absurd and unjust consequences. *Id.* (citation omitted).

Respondent claims that Minn. Stat. § 550.175 (1998), the execution statute, supports the determination that "value," as used in section 510.02, refers to "fair market value" because the execution statute repeatedly refers to "the value of the property" or "the value of the homestead," but does not refer to the owner's equity in the property or homestead. *See* Minn. Stat. § 550.175, subd. 3 ("The debtor must designate the legal description of the homestead property to be sold separately and the debtor's estimate of *the value of the property*") (emphasis added); *id.*, subd. 4(b) ("If the executing creditor is dissatisfied with the homestead property designation or the debtor's *valuation of the property* * * * the executing creditor is entitled *to a court approved designation of the homestead and a court determination of value*") (emphasis added); *id.*, subd. 4(d) ("If the court determines that *the property claimed as a homestead exceeds in value* the amount of the homestead exemption * * * the court shall order the sale of the entire property, including the designated homestead") (emphasis added). But, while section 550.175, subdivision 3, outlines a procedure for estimating "the value of the property" and subdivision 4(b) allows a creditor to challenge that valuation, neither provision equates the "value" of the property with the "value" of the exemption. Both provisions contemplate that valuing the property is but one step in the process of determining whether the limits on the homestead exemption have been exceeded, i.e., whether the total value of the property, minus any pre-existing encumbrance, exceeds $200,000.

Specifically, sales of a homestead under execution are accomplished by bid and the bids will reflect any prior encumbrance or encumbrances on the property. Therefore, the sale price of a homestead under execution will reflect the property's equity. No bid on a homestead under execution can be accepted unless the bid "exceeds the amount of the homestead exemption." Minn. Stat. § 550.175, subd. 4(e). Thus, "[i]f no bid exceeds the exemption, the homestead is exempt." *Id.* Alternatively stated: if there is less equity in a homestead than is protected by the homestead-exemption statute, all of that equity is exempt. Similarly, from the proceeds of a sale of a homestead sold under execution, "the court shall pay the debtor the amount of the homestead exemption" and apply the remainder on the execution. Minn. Stat. § 550.175, subd. 4(d). Thus, if there is more equity in a homestead than is protected by the homestead-exemption statute, the full amount protected by the statute is paid to the debtor and only the remainder is used to satisfy the execution. For this reason, we conclude that statutes related to the homestead-exemption

statute support the conclusion that the homestead is exempt from execution unless the debtor's equity therein exceeds $200,000.

D. B. Legislative History

The legislative history of the homestead-exemption statute also supports construing "value of the homestead exemption" to refer to the debtor's equity in the property. *See Tuma v. Commissioner of Econ. Sec.*, 386 N.W.2d 702, 706 (Minn. 1986) (stating that legislative history can be considered in interpreting a statute only after the statute is found to be ambiguous).

The homestead-exemption statute was amended to include the $200,000 limit in 1993 based on a bill introduced by Representative Thomas Pugh. When explaining his bill to the civil law subcommittee of the judiciary committee, he stated that it "proposes to * * * limit the [exempt] value, equity, in a home to $200,000.00 * * *." *Hearing on H.F. No. 592 Before the Civil Law Subcomm. of Judiciary* (March 10, 1993) (emphasis added). When explaining to Representative Solberg how the bill worked, he further stated:

> What this [bill] does, in essence, is to provide the procedure for [the] sale of the property and more particularly, provide a procedure in the event that the debtor and creditor disagrees to the value of the property. In other words, we're *protecting up to $200,000.00 in equity.*

Id. (emphasis added). When Representative Pugh introduced his bill to the Committee on Judiciary, he was asked by Representative Limmer the following question:

> On section 2(a), I'm just following the bill semi, but it says it limits the exemption to $200,000 in equity. That's not in value of the property, its $200,000 in equity?

Hearing on H.F. No. 592 Before the Judiciary Comm. (Mar. 15, 1993). Representative Pugh replied: "Mr. Chair, Representative Limmer, that is correct. *The equity." Id.* (emphasis added). Later, in describing the bill to the entire House of Representatives, Representative Pugh once again explained the bill:

> What House File 592 does is limit that amount that is subject to protection to the sum of *$200,000 in equity* over and above any mortgaged value for a homestead in residential areas * * *.

House Floor Debate on H.F. No. 592 (Apr. 15, 1993) (statement of Rep. Pugh) (emphasis added).

While the Senate made some amendments to the bill, none affected the portion at issue in this appeal. Based on this legislative history, we cannot help but conclude that the legislature that amended the statute intended the amended statute to exempt up to $200,000 in homestead equity.

C. Effect of Contrary Interpretation

To read "value of the homestead exemption" to refer to the market value of the property would seriously erode the protection afforded by the homestead exemption. It would allow a creditor to force the sale of a homestead even where the debtor's equity is less than $200,000. Such a result would violate the purpose of the exemption—to allow debtors to retain their family home as a safe harbor—and would not accomplish any practical benefit for the creditor. The homestead would be sold subject to prior encumbrances and the court would distribute the proceeds to the debtor to the extent of the exemption as required by section 550.175, subdivision 4(d). Thus, while the debtor would lose his or her home and receive the net proceeds from the sale, the creditor would receive nothing. It is only where the debtor's equity exceeds $200,000 that the creditor can achieve any benefit from the sale on execution. Thus, there is no public policy rationale for allowing an execution sale of homestead unless the debtor's equity exceeds $200,000.

In light of the ambiguity in section 510.02, the interaction of that provision with aspects of other relevant statutes, the unmistakably clear legislative history of the 1993 amendment of the provision, and the counterproductive results of reading the statute to protect market value rather than equity, we conclude that the phrase "value of the homestead exemption" used in section 510.02 refers to the value of the debtor's equity in the property.

II.

Respondent claims that the district court erred in concluding that because appellants' 3.9-acre property is located outside a laid-out or platted portion of a city, it qualifies for a homestead exemption of up to 160 acres under section 510.02. Where a district court applies a statute in light of its factual findings, the district court's "conclusion of law will include a determination of mixed questions of law and fact, determination of `ultimate' facts, and legal conclusions." *Maxfield v. Maxfield,* 452 N.W.2d 219, 221 (Minn. 1990). Under these circumstances, we will affirm if the findings of fact "are not without support in the evidence" and if the conclusions based on those facts are not contrary to the statutory mandate. *Colburn v. Pine Portage Madden Bros.,* 346 N.W.2d 159, 161 (Minn. 1984).

Geographically, for a homestead to be exempt from legal process, it

> may include any quantity of land not exceeding 160 acres, and not included in the laid out or platted portion of any city. If the homestead is within the laid out or platted portion of a city, its area must not exceed one-half of an acre.

Minn. Stat. § 510.02. It is undisputed that appellants' property is not located within the laid-out or platted portions of any city and is not within the city limits of any city Rather, the property is part of a lakeshore subdivision in Carver County. Respondent, however, claims that the nature of the property, rather than whether the property is in a "city," is dispositive.

The courts have long struggled with the language of the homestead-exemption statute. *See In re Becker,* 215 B.R. 585, 586 (8th Cir. BAP 1998) (stating that the language and application of section 510.02 has long vexed the Minnesota courts); *National Bank v. Banholzer,* 69 Minn. 24, 26, 71 N.W. 919, 919 (1897) (stating that the "court has struggled with this statute ever since its

passage"); *Smith's Estate v. Schubert,* 51 Minn. 316, 316, 53 N.W. 711, 711 (1892) (characterizing the statute as "crude"); *Mintzer v. St. Paul Trust Co.,* 45 Minn. 323, 325, 47 N.W. 973, 974 (1891) (characterizing the statute as "beyond any satisfactory construction"). *Banholzer* was the last case to do an in-depth analysis of how to determine whether property is within a "city" under the language of what is now section 510.02. [1] In *Banholzer*, the Minnesota Supreme Court, after several prior attempts to interpret the statute, "adopt[ed] the distinction between rural and urban as the controlling principle." *Banholzer,* 69 Minn. at 26, 71 N.W. at 919. In doing so, the Supreme Court established a two-part test:

> If, as a factual matter, the surrounding area is conclusively urban in character, the claimants are limited to the one-half acre permitted under section 510.01. If the surrounding area is conclusively rural, the claimants are permitted to exempt up to 160 acres. However, if the surrounding area is not conclusively rural or urban, a second factual determination must be made as to the character of the homestead itself.

Becker, 215 B.R. at 587 (citing *Banholzer,* 69 Minn. at 28-29, 71 N.W. at 920). Here, the record does not conclusively show that the surrounding area is rural in nature or urban in nature and the district court did not make a finding as to the nature of appellants' property. Because the district court did not make the findings required by the law, we reverse and remand to with instruction that it apply the *Banholzer* test.

DECISION

Section 510.02 is ambiguous regarding whether it refers to the market "value" of the property or the "value" of the debtor's equity in the property. Related statutes, the legislative history of section 510.02, and the nonviability of alternative interpretations of the statute indicate that the statutory homestead exemption applies to the value of the debtor's equity. Therefore, we reverse the district court's conclusion to the contrary. In addition, because the trial court did not make the findings required to determine whether appellants' property is rural or urban, we reverse and remand with instruction that such a finding be made. Whether to reopen the record on remand shall be discretionary with the district court. We express no opinion on how to resolve the remanded issue.

Reversed and remanded.

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

[1] The *Banholzer* court did not apply Minn. Stat. § 510.02, but rather, Gen. Stat. 1894, § 5521. However, other than different acreage limitations, on the critical issue of whether the property was within a platted portion of land, the language of both statutes is essentially the same.

STATE OF MINNESOTA

IN COURT OF APPEALS

C3-01-1271

In Re the Marriage of:

John S. Svenningsen, petitioner,

Appellant,

vs.

Lacretia A. Svenningsen,

Respondent.

E. Filed March 26, 2002

Affirmed as modified

Klaphake, Judge

Scott County District Court

File No. F9907405

Gerald O. Williams, Jr., Hellmuth & Johnson, PLLC, 10400 Viking Drive, Suite 560, Eden Prairie, MN 55344 (for appellant)

Matthew L. Fling, 5100 Eden Avenue, Suite 306, Edina, MN 55436 (for respondent)

Considered and decided by Lansing, Presiding Judge, Klaphake, Judge, and Huspeni, Judge.*

S Y L L A B U S

The duration of a departure from the child support guidelines based on private debts is limited to 18 months under Minn. Stat. § 518.551, subd. 5(f) (2000).

O P I N I O N

KLAPHAKE, Judge

John Svenningsen appeals from a district court order modifying his child support obligation. He challenges the court's interpretation of Minn. Stat. § 518.551, subd. 5(f) (2000). Because the district court properly interpreted the statute, but miscalculated the amount of the child support obligation after 18 months, we affirm as modified.

FACTS

Upon dissolution of their marriage in May 1999, the court awarded appellant and respondent Lacretia Svenningsen joint physical custody of their minor child. The dissolution allocated 65% of parenting time to respondent and 35% of parenting time to appellant. The court calculated child support obligations pursuant to the Hortis/Valento formula and ordered appellant to pay $178 per month in child support to respondent.

During the marriage, appellant studied to become a physician and incurred student loans totaling more than $130,000. The marital termination agreement provided that [t]he student loans incurred during [appellant's] medical school education are anticipated to be paid back in installments with interest, and [appellant] shall pay, indemnify and hold the [respondent] harmless from these debts; provided such payments will be considered for purposes of determining his support obligation, in any future proceedings in accordance with [Minn. Stat.] § 518.551, subd. 5 (d-f)[.]

On July 1, 2001, appellant's salary increased from $34,284 to $116,160 per year, and he also began making payments on his student loans. The parties agree that appellant's child support obligation should increase and that a downward departure is warranted due to his significant student loans. They disagree, however, as to the duration of the downward departure. The district court concluded that under Minn. Stat. § 518.551, subd. 5(f) (2000), the departure is limited to 18 months.

ISSUE

Did the district court err in its interpretation of Minn. Stat. § 518.551, subd. 5(f)?

ANALYSIS

Modification of child support is within the district court's broad discretion and will not be reversed absent an abuse of that discretion. *Moylan v. Moylan*, 384 N.W.2d 859, 864 (Minn. 1986). We review questions of statutory interpretation, however, de novo. *In re Senty-Haugen,* 583 N.W.2d 266, 268 (Minn. 1998).

Appellant argues that the district court misinterpreted the guidelines provision that allows consideration of his private debts when establishing child support. The guidelines enumerate six factors that a court must take into consideration "in setting or modifying child support or in determining whether to deviate from the guidelines." Minn. Stat. § 518.551, subd. 5(c)(1)-(6) (2000). Among those six factors, the court must consider a parent's debts "as provided in paragraph (d)." Paragraph (d) allows consideration of debts owed to private creditors if, among other things, the district court determines that the debt "was reasonably incurred for necessary

support of the child or parent or for the necessary generation of income." Minn. Stat. § 518.551, subd. 5(d)(2) (2000).

The district court properly found that appellant complied with all the provisions of subdivision 5(d), so as to allow consideration of his student loans. The court then determined that under Minn. Stat. § 518.551, subd. 5(f) (2000), it could not consider appellant's monthly student loan payments for longer than 18 months. The issue for this court is the interpretation of Minn. Stat. § 518.551, subd. 5(f), which states:

> Any further departure below the guidelines that is based on a consideration of debts owed to private creditors shall not exceed 18 months in duration, after which the support shall increase automatically to the level ordered by the court. Nothing in this section shall be construed to prohibit one or more step increases in support to reflect debt retirement during the 18-month period.

Appellant argues that the phrase "further departure" implies that some other departure has already occurred. Appellant argues that because the only departure here is based on his student loan debts, subdivision 5(f) does not apply. We disagree.

In reading subdivision 5(f), it is unclear exactly what the phrase "further departure" references. The phrase was first added to the statute in 1984. 1984 Minn. Laws ch. 547, § 18. At that time, the statute included an additional sentence preceding the "further departure" phrase that stated: "The court shall order child support in accordance with the guidelines and any departure therefrom." *Id.* Thus, in 1984 the statute required that a court first order child support based on the guidelines and then consider any departure. Any "further departure" based on debts was to be limited to 18 months. In 1986, the legislature moved the sentence preceding the "further departure" phrase to subdivision 5(a). 1986 Minn. Laws ch. 406, § 4. We conclude that the legislature's actions have left the meaning of "further departure," which is currently in subdivision 5(f), unclear.

Case law has tended to ignore the term "further" when interpreting subdivision 5(f). *In Potocnik v. Potocnik*, 361 N.W.2d 414, 416-17 (Minn. App. 1985), we addressed the consideration of educational loans when establishing child support payments and concluded that "[d]eparture based exclusively on consideration of private debts can be for a term of no more than eighteen months." In *Rouland v. Thorson*, 542 N.W.2d 681, 684 (Minn. App. 1996), we concluded that a court may "under certain circumstances consider debts owed to 'private creditors' and order a departure below the guidelines for a period not to exceed 18 months."

Commentators have discussed subdivision 5(f) in a similar vein:

> A departure below the guidelines that is based on a consideration of debts owed to private creditors may not exceed eighteen months duration, after which the support will automatically increase to the level ordered by the court.

1 *Minnesota Family Law Practice Manual* §7.07[C], at 7-43 (Cathy E. Gorlin ed., LexisNexis 3d ed. 2001) (footnote omitted).

Thus, subdivision 5(f) has consistently been interpreted in cases and by legal commentators as allowing a departure for private debts only for a period of 18 months, even if that is the only basis for departure. This interpretation is consistent with public policy.

The legislature did not allow consideration of debts for child support purposes until 1984. *See* 1984 Minn. Laws ch. 547, § 18. Child support is intended, in part, to provide a child with a standard of living similar to what the child would have experienced had the parties remained married. *Desrosier v. Desrosier*, 551 N.W.2d 507, 509 (Minn. App. 1996). Thus, children are entitled to benefit from increases in a parent's income, particularly as those increases benefit the parent's standard of living. *Id.*

Because the paramount concern of child support is the welfare of the child, it would be absurd to allow a departure for 10 years, until appellant has repaid his student loan debt. Depriving the child of the full benefit of appellant's increased income and standard of living for 10 years while he repays his long-term debt is not in the child's best interest. *Tammen v. Tammen*, 289 Minn. 28, 30, 182 N.W.2d 840, 842 (1970) (concluding that in matters of support, paramount concern is child's welfare). For all these reasons, we consider the word "further" superfluous and conclude that Minn. Stat. § 518.551, subd. 5(f) prohibits any departure below the guidelines based on a consideration of private debts to exceed 18 months.

Appellant further argues that the district court incorrectly calculated the amount of his child support obligation after 18 months, because it continued to deduct respondent's student loan payments when calculating her net income. The district court found that during the next 18 months, appellant's net monthly income with deductions, including his student loan payments, is $3,940.66, and that respondent's net income is $2,259, with deductions that include her student loan payments. Given the split of custody of 65% to respondent and 35% to appellant, the court calculated appellant's child support obligation at $640 and respondent's obligation at $198, resulting in appellant's net obligation totaling $442.

After 18 months, the court determined that appellant's obligation will automatically increase to $735, given his net income of $5,742, without consideration of his student loan payments. Appellant, however, correctly notes that this second calculation overlooked and continued to deduct respondent's $165 per month student loan payment. We therefore modify the order so as to set appellant's child support amount after 18 months at $721 per month.

DECISION

We conclude, therefore, that the district court properly interpreted Minn. Stat. § 518.551, subd. 5(f) to allow consideration of the parties' student loan payments for 18 months, but miscalculated appellant's child support obligation after the 18-month period. We therefore affirm the district court's order as modified.

Affirmed as modified.

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

STATE OF MINNESOTA

IN SUPREME COURT

C8-00-459

Court of Appeals

Lancaster, J.

State of Minnesota, petitioner,

Appellant,

vs.

Filed: December 13, 2001
Office of Appellate Courts

Jay Joseph Grossman,

Respondent.

SYLLABUS

Due process requires that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

Minnesota Statutes § 609.108, subd. 2 (2000), as applied to a defendant convicted of first-degree criminal sexual conduct and sentenced to an enhanced 40-year prison term upon findings made by the sentencing court on a preponderance of the evidence standard, violates due process.

Affirmed and remanded for imposition of a 30-year sentence.

Heard, considered, and decided by the court en banc.

OPINION

LANCASTER, Justice.

This case involves application of the United States Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to Minnesota's patterned sex offender sentence enhancement statute, Minn. Stat. § 609.108 (2000).

Jay Grossman was convicted of, inter alia, first-degree criminal sexual conduct (fear of imminent great bodily harm) in violation of Minn. Stat. § 609.342, subd. 1(c) (1998), an offense that carries a maximum sentence of 30 years' imprisonment. Minn. Stat. § 609.342, subd. 2 (1998). The sentencing court enhanced Grossman's sentence pursuant to Minn. Stat. § 609.108, subd. 2 (2000), imposing a 40-year sentence after making a series of findings by a preponderance of the evidence. Grossman appealed his sentence, arguing that Minn. Stat. § 609.108, as applied to him, violates *Apprendi*. The court of appeals accepted Grossman's argument and remanded for imposition of a 30-year sentence. *State v. Grossman*, 622 N.W.2d 394, 399 (Minn. App. 2001). We affirm.

On November 24, 1998, R.C. met a number of her coworkers for happy hour at Al Baker's, a restaurant and bar in Eagan, Minnesota. At some point during the evening, R.C. and one of her coworkers left Al Baker's and went to Moose Country, a restaurant in Lilydale, Minnesota, to attend a birthday party. R.C., feeling that she was too intoxicated to drive, left her car at Al Baker's and rode to Moose Country with her coworker.

The bouncers at Moose Country eventually asked R.C. to leave because they perceived that she was highly intoxicated. R.C. and her coworker left at that time. R.C. wanted to wait outside because she wished to speak with a man who was still inside. After trying for 30-45 minutes to persuade R.C. to ride home with him, her coworker drove home without her.

Meanwhile, Grossman was at Moose Country for a separate birthday celebration. R.C. did not know Grossman or anyone in his party. When Grossman left Moose Country, he saw one or two of his friends talking with R.C. outside. R.C. told them that she was stranded and in need of a ride home. Grossman agreed to give R.C. and a woman in his party a ride home.

Grossman first dropped the other woman off at her apartment in Saint Paul, Minnesota, and then continued on toward Al Baker's, where R.C. planned to pick up her car. When they got close to Al Baker's, R.C. realized that she was still too intoxicated to drive. She requested that Grossman take her to her friends' townhouse nearby. Grossman drove around the area in search of the townhouse and parked his car when R.C. spotted a friend's parked vehicle.

R.C. testified that the next thing she remembered was opening her eyes to find Grossman on top of her, raping her.[1] She was lying on her back in a field, naked from the waist down. R.C. tried to scream, at which point Grossman stopped raping her and put his hands over her mouth. She fought back; biting, punching, kicking, and scratching Grossman. He responded by punching her repeatedly in the face, chest, and stomach. Grossman then placed his hands around R.C.'s neck and began to strangle her. R.C. testified that she could not breathe and that Grossman only stopped choking her when she pretended to be dead. According to R.C., Grossman then raped her again and left her lying in the field.

R.C. remained in this position for 30 minutes, waiting to move until she was sure Grossman was gone. When she felt it was safe, R.C. got up and knocked on the doors of two houses in the area. The residents called 911 and the police arrived on the scene shortly thereafter.

Testimony of medical personnel established the extent of R.C.'s injuries, including multiple abrasions; scratches on her chest, abdomen, legs, and inner thighs; bruising to her face, forehead, ear, eyes, jaw, neck, chest, arms, legs, and inner thighs; a fractured left rib; a torn lingular frenelum (the tissue that attaches the tongue to the bottom of the mouth); bloodshot eyes and hemorrhaging around the eyes; irritation of the iris; and chipped teeth. In addition, there was testimony that red spots called "petechiae" observed on R.C.'s face and neck were consistent with her having been strangled.

In his testimony at trial, Grossman admitted that he severely beat R.C. and caused her injuries. He denied, however, that he raped R.C. and stated that he never intended to kill her.

The jury returned guilty verdicts on six counts: attempted second-degree murder in violation of Minn. Stat. § 609.19, subd. 1(1) (2000); first-degree assault (great bodily harm) in violation of Minn. Stat. § 609.221, subd. 1 (2000); third-degree assault (substantial bodily harm) in violation of Minn. Stat. § 609.223, subd. 1 (2000); first-degree criminal sexual conduct (fear of imminent great bodily harm) in violation of Minn. Stat. § 609.342, subd. 1(c); first-degree criminal sexual conduct (force or coercion) in violation of Minn. Stat. § 609.342, subd. 1(e)(i); and first-degree criminal sexual conduct (mentally impaired, mentally incapacitated, or physically helpless) in violation of Minn. Stat. § 609.342, subd. 1(e)(ii).

At the sentencing hearing, the court entered convictions for attempted second-degree murder and first-degree criminal sexual conduct (fear of imminent great bodily harm) and then proceeded to sentence Grossman for first-degree criminal sexual conduct. The court began by noting that "violation of [Minn. Stat. § 609.342] carries with it a penalty of not more than 30 years in prison, a fine of $40,000.00 or both, unless you are determined by this court to be a patterned sex offender [under Minn. Stat. § 609.108], in which case the penalty is not more than 40 years in prison."

The sentencing court, based upon its review of a court-ordered psychological and psychosexual evaluation, found that Grossman qualified as a patterned sex offender. The sentencing court also made the following findings pursuant to Minn. Stat. § 609.108: that Grossman's crime was motivated by sexual impulses and was part of a predatory pattern of behavior that had criminal sexual conduct as its goal; that he is a significant danger to the public; that he needs long-term treatment or supervision beyond the presumptive term of imprisonment and supervised release; and that the record was "filled with aggravating circumstances." After making these findings, the court sentenced Grossman to 40 years' imprisonment under Minn. Stat. § 609.108, subd. 2.

Grossman appealed his sentence, claiming that the 40-year prison term violates due process. *Grossman*, 622 N.W.2d at 395. Specifically, he argued that Minn. Stat. § 609.108, as applied to him, runs afoul of *Apprendi*, in which the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory

maximum must be submitted to a jury and proved beyond a reasonable doubt," 530 U.S. at 490. *Grossman*, 622 N.W.2d at 395.

The court of appeals agreed and "remanded [Grossman's sentence] for imposition of the statutory maximum sentence of 30 years under Minn. Stat. § 309.342, subd. 2 (1998)." *Grossman*, 622 N.W.2d at 399. The court of appeals determined that Minn. Stat. § 609.108, subd. 2, authorized the sentencing court to impose an enhanced sentence based on its findings concerning three factual issues. *Grossman*, 622 N.W.2d at 398. However, the court of appeals read *Apprendi* to require that all such findings be made by a jury based on proof beyond a reasonable doubt. *Grossman*, 622 N.W.2dat 399. We granted the state's petition for review and now affirm the decision of the court of appeals.

This court reviews the constitutionality of a statute de novo. *State v. Wolf*, 605 N.W.2d 381, 386 (Minn. 2000); *State v. Chambers*, 589 N.W.2d 466, 479 (Minn. 1999). Statutes are presumed constitutional. *Boutin v. LaFleur*, 591 N.W.2d 711, 714 (Minn. 1999); *Chambers*, 589 N.W.2d at 479. A party challenging a statute on constitutional grounds must demonstrate, beyond a reasonable doubt, that the statute violates a provision of the constitution. *Wolf*, 605 N.W.2d at 386; *Boutin*, 591 N.W.2d at 714.

Grossman argues that Minn. Stat. § 609.108, as applied to him, violates the rule of due process announced by the Court in *Apprendi*. In *Apprendi*, the defendant was charged under New Jersey law with second-degree possession of a firearm for an unlawful purpose. 530 U.S. at 469. The charges stemmed from his firing several gunshots into the home of an African-American family that had recently moved into a previously all-white neighborhood. *Id.* A New Jersey statute set the range of penalties for a second-degree offense at 5 to 10 years. *Id.* at 470. A separate hate crime statute established an enhanced sentencing range of 10 to 20 years if the trial court found, by a preponderance of the evidence, that the defendant's offense was committed with a purpose to intimidate an individual or group of individuals because of, inter alia, race. *Id.* at 468-69.

Apprendi pleaded guilty to the second-degree possession charge. *Id.* at 469. The sentencing court then held an evidentiary hearing, concluded by a preponderance of the evidence that Apprendi's crime "was motivated by racial bias," and sentenced him under the hate crime statute to an enhanced term of 12 years. *Id.* at 470-71. Apprendi appealed, arguing "that the Due Process Clause of the United States Constitution requires that the finding of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt." *Id.* at 471. The New Jersey appellate court upheld the enhanced sentence and the state supreme court affirmed. *Id.* at 471-72.

The United States Supreme Court reversed and remanded, holding that the procedure employed by the sentencing court violated Apprendi's constitutional rights under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, as applied to the states by the Fourteenth Amendment. *Id.* at 476 (citing *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)). The Court articulated the following constitutional rule: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the

prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

Although Grossman was convicted and sentenced prior to the Court's decision in *Apprendi*, its holding must be applied on this direct appeal. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (holding that new rules for the conduct of criminal prosecutions must be applied retroactively to all criminal cases pending on direct review).

Grossman was convicted of and sentenced for first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(c). Minnesota Statutes § 609.342, subd. 2, provides that an individual convicted of this offense "may be sentenced to imprisonment for not more than 30 years." Thus, the jury's guilty verdict exposed Grossman to, at most, a 30-year prison term. Grossman was sentenced to 40 years of imprisonment, a term that exceeded the prescribed statutory maximum for his offense by 10 years.

The sentencing court imposed Grossman's enhanced sentence pursuant to Minn. Stat. § 609.108. Subdivision 1(a) of section 609.108 requires a court to impose a sentence of not less than double the presumptive sentence and not more than the statutory maximum sentence when each of the following three conditions is satisfied: First, the court must be imposing a sentence for a conviction of any of four enumerated offenses, including first-degree criminal sexual conduct, or for a conviction of any other predatory crime "if it reasonably appears to the court that the crime was motivated by the offender's sexual impulses or was part of a predatory pattern of behavior that had criminal sexual conduct as its goal." Minn. Stat. § 609.108, subd. 1(a)(1) (2000). Second, the court must find "that the offender is a danger to public safety." *Id.* subd. 1(a)(2). Third, the court must also find "that the offender needs long-term treatment or supervision beyond the presumptive term of imprisonment and supervised release." This finding "must be based on a professional assessment by an examiner experienced in evaluating sex offenders that concludes that the offender is a patterned sex offender." *Id.* subd. 1(a)(3). As interpreted by this court in *State v. Christie*, 506 N.W.2d 293 (Minn. 1993), the findings required by subdivision 1 must be based on a preponderance of the evidence. *Id.* at 299.

Section 609.108, subdivision 2, permits a court to impose a sentence of up to 40 years, "notwithstanding the statutory maximum imprisonment penalty otherwise provided for the offense." A defendant can be sentenced to an increased penalty under subdivision 2 only if "the factfinder determines, at the time of the trial or the guilty plea, that a predatory offense was motivated by, committed in the course of, or committed in furtherance of sexual contact or penetration, as defined in section 609.341, and the court is imposing a sentence under subdivision 1." *Id.*

According to the state, the court's findings under section 609.108,subdivision 1, by themselves, do not authorize imposition of a penalty exceeding 30 years, the prescribed statutory maximum for first-degree criminal sexual conduct. That much is true; a sentence under section 609.108, subdivision 1(a), is limited by the statutory maximum for the substantive offense. From here, the state's argument proceeds to the proposition that the only finding that subjected Grossman to an enhanced sentence was a determination by "the factfinder"-in this case, the jury-that his offense "was motivated by, committed in the course of, or committed in furtherance of sexual contact or

penetration." *Id.* subd. 2. The state urges this court to isolate the "sexual penetration" requirement in determining whether Grossman's sentence is constitutional in light of *Apprendi*.

> Because "sexual penetration with another person" is an element of first-degree criminal sexual conduct, the jury's guilty verdict on this count necessarily included a finding beyond a reasonable doubt that Grossman had engaged in sexual penetration. See Minn. Stat. § 609.342, subd. 1. Yet the jury's finding of sexual penetration did not, by itself, expose Grossman to an increased sentence. Section 609.108, subdivision 2, contains the additional mandate that "the court is imposing a sentence under subdivision 1." As demonstrated above, subdivision 1 requires the sentencing court to make a series of findings by a preponderance of the evidence.

In essence, the sentencing court's authority to act under subdivision 2 was subject to two conditions precedent: (1) the jury had to find sexual contact or penetration; and (2) the court had to make the findings required by subdivision 1. Both the finding of the jury and those of the court were necessary, but neither was sufficient. To separate the two conditions would be to disregard the text of subdivision 2, which places the conjunctive "and" between them. Interpreting the statute in a manner that ignores its plain and unambiguous language would violate well-established rules of statutory construction. See *Burkstrand v.Burkstrand*, 632 N.W.2d 206, 210 (Minn. 2001); *Kersten v. Minnesota Mut. Life Ins. Co.*, 608 N.W.2d 869, 874-75 (Minn. 2000) ("When the language of the statute is plain and unambiguous, it manifests the legislative intent and we must give the statute its plain meaning.").

The state also argues that the present case can be distinguished from *Apprendi* on the grounds that, unlike the factor at issue in *Apprendi*, the factors contained in Minn. Stat. § 609.108, subd. 1, are sentencing factors that relate to the defendant rather than the offense and have been traditionally determined by the sentencing court.

New Jersey made a similar argument in *Apprendi*, claiming that "[t]he required finding of biased purpose is not an 'element' of a distinct hate crime offense, but rather the traditional 'sentencing factor' of motive." 530 U.S. at 492. The Court characterized New Jersey's line of reasoning on this point as "nothing more than a disagreement with the rule we apply today," *id.* at 492, and described the distinction between "elements" and "sentencing factors" as "constitutionally novel and elusive," *id.* at 494.[2] As the Court made clear, "the relevant inquiry is one not of form, but of effect-does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.*

Under *Apprendi*, then, the fact that the findings listed in Minn. Stat. § 609.108, subd. 1, are of a kind traditionally left to the sentencing court rather than the jury is simply not relevant to the constitutional issue at hand. The effect of the sentencing court's findings, when coupled with the jury's finding of sexual penetration, was to increase by 10 years the prison sentence to which Grossman was exposed. Due process requires that each of these findings be made by a jury based on proof beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. Thus, Minn. Stat. § 609.108, subd. 2, as applied to Grossman, is unconstitutional.[3]

In *Apprendi*, the Court quoted Justice Holmes's observation that "'[t]he law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them.'" *Apprendi*, 530 U.S. at 476 (quoting Oliver Wendell Holmes, *The Common Law* 40 (M. Howe ed. 1963)). In this case, it is clear that Minnesota threatened Grossman with certain pains-specifically, up to 30 years in prison-if he committed first-degree criminal sexual conduct. Minnesota threatened him with additional pains-specifically, up to an additional 10 years in prison-if the conditions of Minn. Stat. § 609.108, subd. 2, were satisfied. "As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect [Grossman] from unwarranted pains should apply equally" to all of the facts Minnesota has singled out for enhanced punishment. *Apprendi*, 530 U.S. at 476.

Affirmed and remanded for imposition of the statutory maximum sentence of 30 years under Minn. Stat. § 609.342, subd. 2.

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[1] Grossman's testimony at trial filled in the gap in R.C.'s memory. Grossman stated that he struck R.C. in the face soon after they got out of his car, knocking her unconscious.

[2] The Court stated that its analysis on this point "is not [meant] to suggest that the term 'sentencing factor' is devoid of meaning." *Apprendi*, 530 U.S. at 494 n.19. The Court explained as follows:

> The term ["sentencing factor"] appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence within the range authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense.

Id.

[3] While Grossman has not made a facial challenge to Minn. Stat. § 609.108, subd. 2, we feel compelled to note our doubts as to whether there are any circumstances under which subdivision 2 could be constitutionally applied.

STATE OF MINNESOTA

IN COURT OF APPEALS

C2-00-1817

State of Minnesota,

Respondent,

vs.

Richard Richardson,

Appellant.

Filed October 2, 2001

Affirmed in part, reversed in part, and remanded

Parker, Judge

Clay County District Court

File No. K6991518

Mike Hatch, Attorney General, Natalie E. Hudson, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, MN 55103; and

Lisa Nelson Borgen, Clay County Attorney, Clay County Courthouse, 807 North 11th Street, Moorhead, MN 56560 (for respondent)

John M. Stuart, State Public Defender, Theodora Gaitas, Assistant Public Defender, 2829 University Avenue Southeast, Suite 600, Minneapolis, MN 55414 (for appellant)

Considered and decided by Harten, Presiding Judge, Willis, Judge, and Parker, Judge.

S Y L L A B U S

1. Minn. Stat. § 609.749, subd. 5 (1998), does not limit the manner in which the state can charge multiple occurrences of a pattern of harassment offense, including using the same occurrence of a criminal act as a predicate act for multiple counts of pattern harassment.

2. The jury instruction for a pattern of harassing conduct offense must include elements of the offense and define the underlying criminal acts that constitute the pattern, but need not necessarily link the specific predicate acts to each separate pattern of harassment count.

3. Evidence is sufficient to sustain a conviction for pattern of harassing conduct where an individual's life or safety is threatened on two occasions, even though, on one occasion, the individual is not specifically named as the recipient of a threatening letter or postcard.

4. Minn. Stat. § 609.749, subd. 5, requires that there be at least two separate and discrete incidents of an underlying criminal act committed against a single victim for each pattern of harassing conduct charge in order for each pattern of harassing conduct conviction to be sustained. A conviction will not stand if one incident of the underlying criminal act must be applied as a predicate act in multiple pattern harassment counts against a single victim.

5. Where a pattern of criminal conduct is broken and sporadic over a four-year period of time and there is no unity of place, there can be no single behavioral incident for sentencing purposes.

OPINION

PARKER, Judge

Richard Richardson appeals his eight felony convictions and sentences for patterns of harassing conduct under Minn. Stat. § 609.749, subd. 5, claiming that (1) the statute on pattern of harassing conduct does not permit the state to bring multiple charges of pattern harassment using overlapping predicate acts, (2) the trial court erred in its jury instructions regarding the law on pattern of harassment, (3) the evidence was not sufficient to convict him of pattern harassment against Kenneth Gillette, (4) the statute on pattern of harassing conduct does not allow multiple convictions that are based on overlapping predicate acts, and (5) the trial court erred in imposing separate sentences for each of the eight pattern harassment convictions.

FACTS

In August 1991, appellant Richard Richardson applied for public assistance in Clay County. Julie Gillette, a financial caseworker at that time, approved Richardson's application for food stamps and medical assistance, but denied his application for cash assistance because Richardson was unable to confirm his county residency. Richardson appeared pleasant at the time and Gillette treated him as she did any other client.

Over the next couple of months, Richardson wrote several scathing letters to the Clay County office. In the letters, Richardson called Gillette stupid and threatened to sue her and Dennis Lien (her supervisor at the time), to destroy her life, and to make sure she was imprisoned. Julie Gillette testified that the letters frightened her and subsequently caused her to suffer panic attacks and to quit her job with the county. Ultimately, criminal charges were brought against Richardson. He pled guilty to attempting to coerce and was sentenced to 90 days in jail.

In January 1993, the Clay County social services office, and Julie Gillette and Dennis Lien at

their homes, each received a frightening postcard with essentially the same message. One stated "Liens and Gillettes on list for Feb! 1/2 down 1/2 on finish of job. You know where!"

In December 1995, Dennis Lien, his wife Barbara, their two children, and Julie Gillette each received threatening postcards at their homes. The postcards addressed to the Lien children stated "Merry Xmas! I'll soon pay back what I owe your dad." The postcards addressed to Julie Gillette and Dennis and Barbara Lien threatened that Richardson would pay them back for the 100 days he lost as a result of being in prison. These threats caused fear in each of the households.

In October 1997, Christopher Lien received notice that Richardson's address had changed to Moorhead. In November 1997, Dennis Lien received a letter from AT&T requiring him to sign the paperwork for his request to change his telephone services. Dennis Lien testified that he had not filled out the change-of-service card, felt harassed by the correspondence, and believed that Richardson had filled it out but not signed it.

In April 1998, Julie Gillette and the four Liens each received a change-of-address postcard informing them that Richardson would be receiving mail in Fargo, North Dakota. Each postcard had written on it: "I was innocent last time! 100 days for a crime not committed," and was signed with Richardson's name.

On July 9, 1999, Dennis Lien received a threatening postcard at the Clay County social services office that referred to him receiving "paybacks." On July 12, 1999, Barbara Lien received a similar postcard at home that threatened her and her family. The Lien family felt frightened for their lives.

On July 12, 1999, a postcard, addressed to Julie Gillette, was received at the Clay County office, although she no longer worked there, which threatened the lives of her and her family. On July 13, 1999, Julie Gillette received a postcard at her new home (forwarded from her old address) threatening "paybacks." Julie Gillette testified that she believed Richardson was threatening to kill, first, the Lien family and then her family. She testified that she and her family were frightened as a result of these postcards.

In August 1999, Julie and Kenneth Gillette received a postcard at their new home address, again threatening them with "paybacks for false arrest and jail time," and causing them to feel frightened. Dennis and Barbara Lien also received a postcard at their home in August threatening them and causing them to be fearful.

In June 2000, a jury found Richardson guilty of all eighteen counts in the complaint, which consisted of three counts of gross misdemeanor harassment, one count of felony aggravated harassment, six counts of terroristic threats, and eight counts of felony pattern of harassing conduct. The trial court vacated the six terroristic threat convictions as lesser-included offenses. The trial court then imposed concurrent sentences on the three gross misdemeanor harassment convictions, and concurrent sentences on each of the felony convictions (with a stay of execution on the pattern harassment conviction for count 18). Richardson now challenges the eight felony pattern harassment convictions.

ISSUES

1. Does the statute on pattern of harassing conduct allow the state to bring multiple counts of pattern of harassing conduct charges using the same underlying criminal act as a predicate act for different counts of pattern harassment?

2. Did the trial court properly instruct the jury on the pattern of harassing conduct charges?

3. Was the evidence sufficient to sustain the conviction for pattern of harassing conduct against Kenneth Gillette?

4. Does the statute on pattern of harassing conduct allow convictions of multiple counts of pattern harassment that use the same underlying criminal act as a predicate act for different counts of pattern harassment?

5. Did the trial court err in imposing separate sentences for each of Richardson's eight convictions for pattern of harassing conduct?

ANALYSIS

I.

Richardson argues that Minn. Stat. § 609.749, subd. 5 (2000), does not allow the state to charge multiple pattern of harassing conduct offenses using the same occurrence of a criminal act as a predicate act for different pattern of harassment counts. In other words, Richardson contends that there can be no overlapping predicate acts to establish multiple counts of pattern harassment.

Statutory construction is a question of law, which this court reviews de novo. *State v. Azure,* 621 N.W.2d 721, 723 (Minn. 2001). The purpose of interpreting statutes is to ascertain and effectuate the intent of the legislature. Minn. Stat. § 645.16 (2000). Every law shall be construed, if possible, to give meaning to all its provisions. *Id.* If a statute is unambiguous, the court examines only its plain language. *State v. Edwards*, 589 N.W.2d 807, 810 (Minn.App.1999), *review denied* (Minn. May 18, 1999). The fundamental rule is to "look first to the specific statutory language and be guided by its natural and most obvious meaning." *Id.* (quotation omitted). If, however, there is any doubt concerning the legislature's intent, the statute must be strictly construed in favor of the defendant. *State v. Olson,* 325 N.W.2d 13, 19 (Minn. 1982).

Under Minn. Stat. § 609.749, subd. 5(b), a "pattern of harassing conduct" means "two or more acts within a five-year period that violate the provisions of" twelve specifically enumerated statutory offenses. This language indicates that a pattern harassment charge can be brought when two criminal acts occur. Nothing in this language, however, expressly limits the prosecutor's discretion in determining how to charge a defendant with pattern harassment when the defendant commits at least three of the underlying criminal acts within a five-year period. Nor does it expressly prohibit the prosecutor from overlapping a predicate act to charge a

defendant with multiple counts of pattern harassment. Notably, in the absence of any limiting statutory language, we give deference to the prosecutor's discretion to evaluate the facts of a case, which may lead to various combinations of charges, and to select the particular charges best suited to achieve justice. *See State v. Hanson,* 285 N.W.2d 483, 485 (Minn.1979) (finding theft statute gives prosecutor discretion, as does the general criminal code, to either prosecute seriatim or to aggregate certain types of theft offenses). Consequently, we find no error here in the manner in which the state chose to charge Richardson with pattern harassment.

II.

Richardson next argues that the trial court's jury instructions on the pattern of harassing conduct charges did not provide the jury with an accurate and complete definition of the underlying offenses required to form a pattern of harassing conduct offense or with the elements of those underlying offenses. Richardson seeks to have his eight convictions for pattern of harassing conduct reversed, contending that the trial court's omission was an error of fundamental law and was substantially prejudicial.

As a threshold matter, the state claims that, because Richardson failed to object to the jury instructions at trial,[1] appellant has waived his right to review or, at most, that this court review under a plain-error test. We agree that no objection was raised. In general, a defendant's failure to object to jury instructions before they are presented to the jury constitutes a waiver of the right to appeal. *State v. Cross,* 577 N.W.2d 721, 726 (Minn.1998). On review, this court may nonetheless review unobjected-to jury instructions "if the instructions contain plain error affecting substantial rights or an error of fundamental law." *Id.* If this court finds any error in the jury instructions, a new trial is not required if the error was harmless. *State v. Hare*, 575 N.W.2d 828, 833 (Minn.1998). On review, the trial court's jury instructions must be read as a whole, and if the instructions correctly state the law in a manner in which the jury could understand them, there is no reversible error. *Cross,* 577 N.W.2d at 726

The trial court instructed the jury that, in order to find Richardson guilty of pattern harassment, the state must prove beyond a reasonable doubt all of the elements of the crime of pattern of harassing conduct. Following the standard jury instruction, 10 *Minnesota Practice,* CRIMJIG 13.58 (1999), the trial court specifically instructed the jury on the elements of the pattern of harassing conduct offense:

> First, the defendant engages in a pattern of harassing conduct. A pattern of harassing conduct means two or more criminal acts within a five-year period.
>
> Second, the defendant engaged in this conduct with respect to each of the above-mentioned individuals.
>
> Third, the defendant knew or had reason to know that each of the above-mentioned individuals would feel terrorized or fear bodily harm.
>
> Fourth, each of the above-mentioned individuals felt terrorized or feared bodily harm as a result of the defendant's conduct.

> And, fifth, that the defendant's act took place on or about April 28, 1998 with respect to Dennis Lien; on or about April 28, 1998 with respect to Barbara Lien; on or about July 12, 1999 with respect to Barbara Lien; on or about July 9, 1999 with respect to Dennis Lien; on or about July 12, 1999 with respect to Julie Gillette; on or about July 13, 1999 * * * with respect to Julie Gillette; on or about August 6, 1999 with respect to both Dennis and Barbara Lien; and on or about August 6, 1999 with respect to both Julie and Kenneth Gillette, all occurring within Clay County and the State of Minnesota.

Appellant contends that the trial court, in stating the first element of pattern of harassing conduct, committed an error in fundamental law by failing to articulate each element of the underlying "criminal act" listed within the statute and repeatedly committed by appellant to create the alleged pattern of harassment.

Appellant was separately charged with harassment and terroristic threats, which are included in the list of underlying criminal acts that can form a pattern of harassing conduct. *See* Minn. Stat. § 609.749, subd. 5(b). The trial court instructed the jury separately on these offenses, including all the statutory elements the state was required to prove beyond a reasonable doubt.

The pattern harassment statute does not require proof of convictions of the underlying criminal acts, although the jury here did convict appellant of harassment and terroristic threats. *State v. Schmitz,* 559 N.W.2d 701, 705 (Minn.App.1997), *review denied* (Minn. Apr. 15, 1997); *cf. Cross,* 577 N.W.2d at 727 (noting that domestic abuse murder statute did not require proof of pattern of domestic abuse convictions). It might have been helpful to the jury to repeat the elements of those underlying offenses when instructing on pattern harassment. *See* 10 *Minnesota Practice,* CRIMJIG 13.58, n.1 (1999) (suggesting that trial court should instruct on elements of underlying crimes if necessary). But because the court outlined those elements in a separate section of the instructions, it was not necessary to do so.

In a recent case, the supreme court has held that it was error to fail to instruct the jury on all elements of the substantive crime of first-degree controlled substance offense that was the object of the conspiracy charged against the defendant. *State v. Kuhnau,* 622 N.W.2d 552, 558 (Minn.2001). But in *Kuhnau,* although the court read the statutory definition of the substantive crime in another part of the instructions, it never provided the jury with all essential elements of that offense. *Id.* at 557-58. Further, the court in *Kuhnau* found that the defendant had properly objected to the instruction and thus reviewed the challenge under an abuse of discretion standard. *Id.* at 555-56.

This court must view the jury instructions in their entirety. *State v. Flores,* 418 N.W.2d 150, 155 (Minn.1988). A complete reading of the elements of harassment and terroristic threats, although coming in a separate part of the instructions, was adequate to inform the jury of the elements of pattern harassment. Accordingly, it was not reversible error to fail to repeat those elements in instructing the jury on pattern harassment. *See generally State v. Cross,* 577 N.W.2d at 726-27 (assessing adequacy of jury instruction on "pattern of domestic abuse").

III.

Richardson also argues that the evidence is insufficient to support the conviction for the pattern of harassing conduct offense against Kenneth Gillette. Richardson contends that there was no evidence at trial of a pattern of harassing conduct, which requires two or more acts, towards Kenneth Gillette because only one postcard was specifically addressed to Kenneth Gillette, and therefore, only one harassing act occurred.

In considering the sufficiency of the evidence, the reviewing court must view the evidence in the record in the light most favorable to the jury's verdict and must assume the jury believed the state's witnesses and disbelieved contrary evidence. *State v. Robinson,* 539 N.W.2d 231, 238 (Minn. 1995). In so reviewing the evidence, this court must determine if the evidence was sufficient to allow the jury to reasonably conclude the defendant was guilty of the charges beyond a reasonable doubt. *Id.*

A conviction of pattern harassment requires proof beyond a reasonable doubt of all elements of the pattern harassment statute, including that defendant acted within the elements of the underlying offenses. *Schmitz,* 559 N.W.2d at 705.

There was evidence presented that numerous postcards were sent to the Gillette home. In addition to the postcard specifically addressed to Kenneth Gillette in August 1999, Julie Gillette received two threatening postcards in July 1999, each of which made her feel as if her family was in danger. Kenneth Gillette was aware of the contents of the July 1999 letters and testified that the threats frightened him. In this light, a jury could reasonably conclude that Richardson was guilty beyond a reasonable doubt of a pattern of harassing conduct against Kenneth Gillette. The record thus supports this conviction.

IV.

Richardson further argues that five of the eight convictions of pattern of harassing conduct must be reversed, claiming that these five convictions were based on overlapping predicate acts. Richardson claims that, under the pattern harassment statute (Minn. Stat. § 609.749, subd. 5(b)), a single incident of criminal conduct could not be used repeatedly to support multiple convictions of pattern of harassing conduct. In other words, Richardson claims that the statute does not allow for overlapping predicate acts to sustain convictions.

As indicated earlier, we review the language of a statute de novo. *Azure,* 621 N.W.2d at 723. And, if there is any ambiguity in the language or the legislature's intent, we will strictly construe a penal statute in favor of the defendant. *Olson,* 325 N.W.2d at 19. The statute at issue here defines a "pattern of harassing conduct" to mean "two or more acts within a five-year period that violate the provisions of" twelve specifically enumerated offenses. Minn. Stat. § 609.749, subd. 5(b).

The language "two or more" acts is open to at least two interpretations. The statute implies that "two or more" acts in a five-year period can support either one conviction or multiple convictions if at least three criminal acts occur. Assuming three criminal acts, as listed in the statute, occur against a single individual in a five-year period, one interpretation is that the second criminal act

cannot be used as a basis to convict a defendant of a second count of pattern harassment, based on the second and third criminal acts, because the defendant has already been convicted of a count of pattern harassment in which the second act has been used. Because the express language of the statute is silent as to the effect of using such overlapping predicate acts, another interpretation is that the statute does not prohibit a conviction of pattern harassment where the second criminal act has been used as the basis for a conviction on two separate counts of pattern of harassing conduct.

In light of the statute's ambiguity, we must strictly construe it in favor of Richardson. We conclude that the necessary inference is that a conviction of pattern harassment can stand only when at least two separate and discrete criminal acts against a single individual occur. This is not to say that a single predicate act committed against two individuals is limited to being used only as a basis for one conviction of pattern harassment. In such an instance, the single predicate act would not be overlapping when applied to each victim.

In this case, the jury could not have convicted Richardson of all eight felony counts of pattern harassment based on separate and discrete criminal acts. The jury could have, at most, applied separate predicate acts to seven of the pattern harassment counts without "overlapping" criminal acts as to any single individual, in the following way:

F. Dennis Lien
Count 3 December 1995 and April 28, 1998
Count 8 November 1997 and July 9, 1999

G. Barbara Lien
Count 2 December 1995 and April 28, 1998
Count 10 *April 28, 1998 and July 12, 1999* – vacated
Count 16 July 12, 1999 and August 6, 1999

H. Julie Gillette
Count 12 December 1995 and July 12, 1999
Count 14 April 28, 1998 and July 13, 1999

I. Kenneth Gillette
Count 18 July 1999 and August 6, 1999

Thus, we hold that Richardson's count 10 conviction of pattern harassment against Barbara Lien contained an overlapping predicate act involving the July 12, 1999, incident and must be vacated. We therefore order that the conviction and sentence as to count 10 be vacated.

V.

Finally, Richardson argues that receiving a sentence for each of his pattern of harassing conduct convictions violates the statutory prohibition against multiple punishments for the same conduct. "[I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses * * *." Minn. Stat. § 609.035 (2000). Thus, if a

defendant commits numerous crimes against the same person during a single behavioral incident, Minn. Stat. § 609.035 provides that the defendant may be sentenced for only one of those offenses. *State v. Bookwalter,* 541 N.W.2d 290, 293 (Minn.1995). In determining whether two convictions arose from a single behavioral incident, this court must examine the offenses to see whether they were motivated by a desire to obtain a single criminal objective. *State v. Soto,* 562 N.W.2d 299, 304 (Minn.1997). Additional factors that must be considered include determining "the unity of time and of place of the behavior." *Bookwalter,* 541 N.W.2d at 294 (quotation omitted). The determination of whether multiple offenses constitute a single behavioral act is not, however, a mechanical test, but requires an examination of all the facts and circumstances. *Soto,* 562 N.W.2d at 304.

In evaluating the facts and circumstances of this case, we find it distinguishable from the supreme court's decision in *State v. Schmidt,* 612 N.W.2d 871 (Minn.2000). In *Schmidt,* the supreme court concluded that conduct occurring on the street in front of the alleged victims' home during the course of a single time period spanning one year, and where the alleged conduct was directed toward a single criminal objective of harassing the victims, constituted a single behavioral incident for sentencing purposes. *Id.* at 876.

In this case, there were multiple victims of the pattern of harassing conduct offense: Dennis Lien, Barbara Lien, Julie Gillette, and Kenneth Gillette. The fear that Richardson's conduct instilled in these individuals occurred between 1991 and 1999. The criminal acts leading to the current convictions and sentences occurred in December 1995, November 1997, April 1998, July 1999, and August 1999. We cannot say that Richardson's acts occurred in a single and continuous time period where the pattern of his criminal conduct was broken and sporadic over almost four years. Neither can we determine that there was unity of place in Richardson's conduct, as there was in *Schmidt.* The four individuals received the threatening postcards at various locations: the Gillettes' two different homes, the Liens' home, and the county's social services office. Although in the broader sense Richardson may have had a single purpose of harassing his victims, he inflicted fear and stress upon them over a lengthy period of time. We do not think his actions can be considered one course of conduct for sentencing purposes for the seven pattern of harassing conduct convictions. We therefore reject his argument on multiple sentencing and remand only for the trial court to vacate the conviction and sentence as to count 10, and to recalculate the sentence on the other counts, if appropriate.

DECISION

The state did not violate the pattern harassment statute by charging Richardson with multiple counts of pattern of harassing conduct using overlapping predicate acts. The trial court properly instructed the jury on the law of pattern of harassing conduct. The evidence is sufficient to sustain the conviction for pattern of harassing conduct against Kenneth Gillette. The evidence is sufficient to sustain seven felony pattern of harassing conduct convictions without applying the same underlying criminal act as a predicate act for the various counts of pattern harassment. We therefore remand for the trial court to vacate the conviction and sentence on count 10 because it is based on an overlapping predicate act. If that conviction affected any subsequent sentence, the district court has the authority to make required adjustments. The trial court did not err in

imposing separate sentences for the pattern of harassing conduct convictions as separate behavioral incidents.

Affirmed in part, reversed in part, and remanded.

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

[1] We note that, although Richardson was a pro se defendant with standby counsel at trial, this does not affect our decision on review. *See State v. Worthy*, 583 N.W.2d 270, 276 (Minn.1998) (noting trial court's practice of holding pro se defendants to the same standard as licensed attorneys after defendants waived their right to counsel).

STATE OF MINNESOTA

IN SUPREME COURT

C0-00-1167

Ramsey County Page, J.

State of Minnesota,

Respondent,

vs.

Filed: August 23, 2001
Office of Appellate Courts

Charles Edward Lindsey, petitioner,

Appellant.

S Y L L A B U S

1. Minnesota Statutes § 631.04 (2000) unconstitutionally encroaches on a judicial function in violation of the doctrine of separation of powers by regulating who may be present at a criminal trial.

2. The trial court erred when it excluded two unidentified children under the age of 17 from appellant's trial based on Minn. Stat. § 631.04 (1992).

3. Appellant's right to a public trial was not violated when two unidentified children under the age of 17 were excluded from the courtroom and the record does not indicate that members of the general public, the press, appellant's family, friends, or any witnesses were excluded from trial.

4. The trial court did not abuse its discretion by refusing to give appellant's proposed jury instruction on witness identification and the postconviction court's decision to deny relief was not clearly erroneous.

5. The trial court did not abuse its discretion in concluding that statements of a police interrogator were relevant and not inflammatory or unduly prejudicial and the postconviction court's decision to deny relief was not erroneous.

6. The trial court did not abuse its discretion in awarding $32,682.93 in restitution despite appellant's claimed inability to pay, nor in awarding restitution for certain funeral expenses, and the postconviction court's decision to deny relief was not clearly erroneous.

7. Because it is not clear from the record whether the claimed expenses for moving costs for the murder victim's girlfriend and, presumably, victim's child, were properly included as expenses of a "victim" under the restitution statute, remand is necessary for the postconviction court to determine whether there is a basis for this portion of the restitution award.

8. The trial court did not impose multiple adjudications for the same criminal act in violation of Minn. Stat. § 609.04, subd. 1(1) (2000).

9. The prosecutor did not engage in misconduct by failing to identify a witness as an informant.

10. Appellant's claimed deprivation of the right to a direct appeal is not ripe for adjudication.

11. Appellant is not entitled to relief on postconviction petition because nothing in the photographic lineup or the procedures used suggests appellant was singled out for identification.

Affirmed in part and remanded.

Heard, considered, and decided by the court en banc.

OPINION

PAGE, Justice.

A jury found appellant Charles Lindsey guilty of first- and second-degree murder for the shooting death of Craig Clark, and guilty of attempted first- and second-degree murder for the shooting of Randy Lusby. No direct appeal was filed, but in March 2000 Lindsey filed a pro se petition for postconviction relief, claiming: (1) he was denied his right to a public trial; (2) the trial court erred when instructing the jury on eyewitness identification; (3) the trial court erred by refusing to redact an audiotaped interrogation before playing it to the jury; and (4) the trial court's restitution order should be vacated. Lindsey also raised prosecutorial misconduct, ineffective assistance of trial counsel, and police use of impermissibly suggestive identification procedures as issues. The postconviction court denied relief without holding an evidentiary hearing. In this court, in addition to the issues raised before the postconviction court, Lindsey argues that two of his convictions must be vacated under Minn. Stat. § 609.04, subd. 1(1) (2000). We affirm in part and remand for a determination of whether restitution to the murder victim's girlfriend was proper.

On December 30, 1993, Lindsey arrived at a St. Paul bar at about 12:30 a.m. accompanied by his brother, Freeman Lindsey, Freeman's girlfriend, Renie Bernier, and her uncle, Keith Richardson. When Freeman began arguing with the bartender, the bartender threatened to call the police and ordered the group to leave. Before leaving, Freeman picked up a stool and threw it over the bar.

When the group reached their car, Freeman realized that Lindsey was not with them and told Richardson to go back and get him. Richardson testified that, when he opened the door upon returning to the bar, he saw Lindsey talking to a man standing nearby, and saw Lindsey point the gun and fire. After the shooting, Richardson and Lindsey returned to the car. Bernier testified that, as they drove away, Lindsey said, "I think I killed someone in the bar," and that he had shot two people, one of them in the face or head. Freeman similarly testified that Lindsey said that he shot two people, one of them in the face, neck, or head. Richardson testified that Lindsey said, "I shot one of them marks in the face and I shot the other one in the head," and that both Lindsey and Freeman then "giggled a little bit." Richardson also testified that he then told Bernier that Lindsey and Freeman were crazy and asked her to take him home. Shortly after he was dropped off, Richardson called the police and reported what had happened.

The police arrested Lindsey at his mother's house at approximately 6:30 a.m. on December 30, 1993. At police headquarters, Sgt. Richard Freichels of the St. Paul Police Department conducted an audiotaped interview of Lindsey. Freichels testified that, as he was bringing Lindsey to jail after the interview, Freichels told Lindsey that the man Lindsey shot was probably going to die and that Lindsey would go to prison for murder. According to Freichels, Lindsey responded, "my uncle killed a few people; he only went to jail for eight years," and then laughed. Lindsey was charged with first- and second-degree murder under Minn. Stat. §§ 609.185, subd. 1, and 609.19, subd. 1(1) (2000), and first- and second-degree attempted murder under Minn. Stat. §§ 609.17 (2000), 609.185, subd. 1, and 609.19, subd. 1(1).

At trial, Lindsey was identified as the shooter by Richardson, Lusby, the bartender's sister, and a customer who also identified Lindsey as the shooter during a photo lineup. Over Lindsey's objection, the audiotape of the police interrogation was played to the jury during Freichels' testimony. Lindsey, testifying at trial in his defense, denied shooting either Lusby or Clark and, at one point, implicated Richardson as the shooter.

During the direct examination of one witness, the court interrupted and asked counsel for both parties to approach the bench for an off-the-record discussion out of the jury's hearing. Following this discussion, the court stated:

> Let me observe that some additional spectators have entered the courtroom and I need to call attention to the adults with them that minors under the age of seventeen are not permitted in the courtroom during a criminal trial. I have to ask them to leave the courtroom.

After a brief pause, the court said, "The record may indicate that they have now left the courtroom." Apparently two children left the courtroom during the pause. Although initially the court did not provide any basis for excluding the children, it subsequently indicated that they were "under the age described [as being] proscribed by the statute." The parties agree that the court was referring to Minn. Stat. § 631.04 (1992).[1] Lindsey made no objection on the record to the exclusion of the children and the record does not reflect whether he objected during the off-the-record discussion. There is no indication of the identity of the children and their relation, if any, to Lindsey. Nor does the record indicate that anyone else was excluded from the courtroom at that or any other time during the trial.

On May 7, 1994, the jury returned verdicts of guilty on all four charges. The trial court sentenced Lindsey to consecutive terms of life in prison for the first-degree murder conviction and 240 months for the attempted first-degree murder conviction. No direct appeal was ever filed, but Lindsey did file a petition for postconviction relief. The postconviction court denied the petition without holding an evidentiary hearing. This appeal followed.

I.

We will not reverse a postconviction court's decision absent an abuse of discretion, and will consider only whether sufficient evidence supports the postconviction court's conclusions. *Woodruff v. State,* 608 N.W.2d 881, 884 (Minn. 2000). We first consider the issues Lindsey raises through counsel and then turn to the additional issues Lindsey raises pro se.

II.

During oral argument, we raised the question whether the statute on which the trial court relied to exclude minor spectators, Minn. Stat. § 631.04, encroaches on this court's authority to regulate matters of trial procedure in violation of the doctrine of separation of powers. *See State v. Olson,* 482 N.W.2d 212, 215 (Minn. 1992). Because the parties had not briefed this issue, the court ordered supplemental briefs addressing (1) whether section 631.04 violates the separation of powers doctrine and, (2) if so, what relief is appropriate.

"[D]ue respect for coequal branches of government requires this court to exercise great restraint in considering the constitutionality of statutes particularly when the consideration involves what is a legislative function and what is a judicial function." *State v. Johnson,* 514 N.W.2d 551, 554 (Minn. 1994). This court has "primary responsibility under the separation of powers doctrine for the regulation of evidentiary matters and matters of trial and appellate procedure." *Olson,* 482 N.W.2d at 215. The legislature, in turn, determines matters of substantive law. *Johnson,* 514 N.W.2d at 554. The determination of whether section 631.04 encroaches upon a judicial function in violation of the separation of powers doctrine therefore turns on whether the statute deals with substantive or procedural law.

The legislature has the power to declare what acts are criminal and to establish the punishment for those acts as part of the substantive law. *State v. Olson,* 325 N.W.2d 13, 17-18 (Minn. 1982). In contrast, the court regulates the method by which the guilt or innocence of one who is accused of violating a criminal statute is determined. *State v. Wingo,* 266 N.W.2d 508, 513 (Minn. 1978). Put another way, "'[a] statute is procedural when it neither creates a new cause of action nor deprives defendant of any defense on the merits.'" *Johnson,* 514 N.W.2d at 555 (citation omitted).

Lindsey argues that section 631.04 violates separation of powers because it attempts to control access to criminal trials, thereby encroaching on the judiciary's authority over courtroom functions. The state responds by arguing that: (1) section 631.04 is a statute of mixed substantive and procedural law, that if it is not clearly procedural, it cannot violate separation of powers, and that if it can reasonably be viewed as either substantive or procedural it should be

found substantive because the courts must exercise great restraint before declaring a statute unconstitutional; (2) even if the statute is procedural, it does not violate separation of powers because it was enacted before a 1956 amendment to the Minnesota Constitution that stripped the legislature of rule-making powers and has not been superseded by any conflicting court rule; and (3) this court should permit section 631.04 to stand as a matter of comity.

As an initial matter, we emphasize the grave responsibility trial courts have in overseeing and regulating courtroom conduct and procedure during trials, including criminal trials. Minn. R. Gen. Prac. 2.02. Because an appellate court cannot glean from a transcript the atmosphere or particular threats to order and decorum in the courtroom, trial courts are vested with broad discretion in deciding matters of courtroom procedure. *Minneapolis Star & Tribune v. Kammeyer,* 341 N.W.2d 550, 559 (Minn. 1983) (emphasizing, in determining whether a trial court abused its discretion "when it excluded the public from [a] pretrial hearing or when it restricted access to portions of the record" from that hearing, that a "trial court must have control of its courtroom"); *see also Rice Park Props. v. Robins, Kaplan, Miller & Ciresi,* 532 N.W.2d 556, 556 (Minn. 1995) (noting that "the trial court has considerable discretion in * * * furthering what it has identified as the interests of judicial administration and economy"). We consider the state's arguments with this discretion in mind.

First, we see no basis for concluding that section 631.04 is substantive in nature. Determining who may be present at a criminal trial has nothing to do with defining crimes or prescribing punishments. *See Johnson,* 514 N.W.2d at 554. Nor does section 631.04 create a new cause of action or deprive a defendant of any defense on the merits. *See Johnson,* 514 N.W.2d at 555. In short, the regulation of spectators in the courtroom during a criminal trial is procedural and has nothing to do with the substantive aspects of the offense or punishment.

The state cites Minn. Stat. § 480.059, subd. 7 (2000), which provides that "statutes relating to the pleadings, practice, procedure, and the forms thereof in criminal actions shall be effective until modified or superseded by court rule." The state argues that, even if the statute is procedural, it does not violate separation of powers because it has not been superseded by any conflicting court rule. But this court's authority over procedure in criminal actions is not derived from any grant of authority by the legislature, but from the court's inherent power. *Johnson,* 514 N.W.2d at 553. Therefore, the legislature cannot restrict this court's authority to strike down procedural statutes to situations involving a conflicting court rule. *See id.* at 554 n.5 ("Of course, if the legislature passes a statute in an area not already governed by a rule, the court, as a matter of comity, may let it stand.").

Finally, the state argues that the court should allow section 631.04 to stand as a matter of comity.[2] The state claims that the procedural/substantive distinction is not clear and therefore calls for the exercise of comity. The procedural matter in this case—regulating courtroom attendance at criminal trials—is particularly sensitive, however, given that it implicates a criminal defendant's constitutional right to a public trial. We can envision an application of this statute that would result in an error that rises to the level of a violation of the public trial guarantee. Accordingly, we decline the state's invitation to permit section 631.04 to stand as a matter of comity and conclude that it unconstitutionally encroaches upon a judicial function in violation of the separation of powers doctrine.

As such, it was error for the trial court to rely on section 631.04 to exclude the two children from the courtroom. The statute by its terms, however, does not grant to the defendant in a criminal action any particular right that was violated by its application in this case. The statute appears to be intended to protect individuals under the age of 17 from the unseemly details that may attend a criminal case. Accordingly, Lindsey appropriately relies on his Sixth Amendment right to a public trial in seeking a new trial.[3]

As the United States Supreme Court has explained:

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . . . .

Waller v. Georgia, 467 U.S. 39, 46 (1984) (citations and internal quotation marks omitted). Moreover, "[i]n addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury." *Id.* To protect these values, the Supreme Court has established the following rules for when a criminal trial may be closed without violating the public trial guarantee:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Waller, 467 U.S. at 48; *see also State v. Fageroos,* 531 N.W.2d 199, 201 (Minn. 1995) (adopting *Waller* standard).

In this case, the trial court's action was not a true closure, in the sense of excluding all or even a significant portion of the public from the trial. *See State ex rel. Baker v. Utecht,* 221 Minn. 145, 149, 21 N.W.2d 328, 331 (1946) (distinguishing removal of "persons of immature years" from removal of the entire public). In this respect, this case is similar to *People v. Woodward,* 841 P.2d 954 (Cal. 1992), where the trial court ordered the courtroom doors locked during a portion of the prosecutor's closing argument, although members of the public already present in the courtroom were not required to leave. 841 P.2d at 955. On appeal, the California Supreme Court concluded that, "although the court erred in failing to notify defendant of the closure, defendant's basic public trial right was not violated." *Id.* at 957. Instead, the court found that, "[u]nlike the situation in the public exclusion cases relied on by defendant, the courtroom was never cleared to remove all spectators for a significant period." *Id.* at 958.

Likewise, in *Peterson v. Williams,* 85 F.3d 39 (2d Cir. 1996), the trial court excluded spectators from the courtroom during the trial testimony of an officer who was still engaged in undercover operations. 85 F.3d at 41. Following the officer's testimony, the court inadvertently failed to open the trial while the defendant testified briefly in his defense. *Id.* On appeal, the Second Circuit concluded that this "unjustified closure * * * was too trivial to amount to a violation of

the [Sixth] Amendment." *Id.* at 42. The court clarified that a triviality standard should not be understood to dismiss a Sixth Amendment claim on the basis that the defendant was guilty anyway or did not suffer prejudice. *Id.* Rather, the court explained its inquiry was whether the actions of the court deprived the defendant of the protections guaranteed by the Sixth Amendment. *Id.*

Applying that standard in this case, we conclude that Lindsey was not deprived of the protections of a public trial. At no time was the courtroom cleared of all spectators. The trial was open to the general public and the press at all times. Indeed, Lindsey does not contend and the record does not suggest that members of the general public and the press were absent during any stage of Lindsey's trial. Nor does the record suggest that Lindsey, his family, his friends, or any witnesses were improperly excluded. The only spectators excluded were two children of unknown age and unknown relationship to Lindsey. Therefore, the values sought to be protected by a public trial right were in fact protected. We therefore hold that the exclusion of the two children on the facts presented did not violate Lindsey's right to a public trial.

III.

Lindsey next argues that the trial court erred when it refused to give the jury instructions he requested regarding the state's burden of proving identity. Jury instruction lies within the discretion of the trial court. *State v. Daniels,* 361 N.W.2d 819, 831 (Minn. 1985). A trial court's instructions are evaluated as a whole. *Id.* at 831-32. A trial court need not give a requested instruction if the substance of the requested instruction is contained in the court's charge. *Id.* at 832.

Specifically, Lindsey sought to have the trial court give a one and a half page, single-spaced instruction.[4] In declining to give Lindsey's proposed instruction, the trial court equated the requested instruction to closing argument on the subject. In addition, the trial court noted that the instruction suggests words that might distract the jury from the obligation to make findings beyond a reasonable doubt. In his argument to this court, Lindsey focuses our attention on one paragraph of the proposed instruction:

> The prosecution has the burden of proving identity, beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

While this section of the proposed instruction is largely unobjectionable, we are satisfied that, when viewed in its entirety, the trial court was correct when it equated the proposed instruction to defense counsel's closing argument and noted that it could potentially distract the jury from making findings beyond a reasonable doubt.

Moreover, the instruction given by the trial court conveyed the relevant aspects of witness identification to the jury. That instruction reads:

> Testimony has been introduced in this case tending to identify defendant as the person observed at the time of the alleged offense. You should carefully evaluate this testimony. In doing so you should consider such factors as the opportunity of the witness to see the person at the time of the alleged offense, the length of time the person was in the witness's view, the circumstances of that view including light conditions and the distance involved, the stress the witness was under at the time, and the lapse of time between the alleged offense and the identification.

If the witness has seen and identified the person before trial and after the alleged offense, you should also consider the circumstances of that earlier identification, and you should consider whether in this trial the witness's memory is affected by that earlier identification.

See 10 Minn. Dist. Judges Ass'n, *Minnesota Practice—Jury Instruction Guides, Criminal,* CRIMJIG 3.19 (3d ed. 1990). In addition, the trial court instructed the jury that the state had the burden of proving beyond a reasonable doubt each element of the crimes charged, including the element that it was the defendant who committed the acts. Thus, the jury was adequately instructed on the state's burden of proof of identity. *See State v. Spann,* 287 N.W.2d 406 (Minn. 1979). The trial court did not abuse its discretion by refusing to give Lindsey's proposed instruction and the postconviction court did not err when it denied relief on this claim.

IV.

Lindsey also argues that the trial court committed error when it refused to redact portions of his audiotaped interrogation before it was played to the jury. An evidentiary ruling by a trial court will not be reversed absent an abuse of discretion, and a defendant who asserts that a trial court erroneously admitted evidence has the burden of showing the error and any resulting prejudice. *State v. Grayson,* 546 N.W.2d 731, 736 (Minn. 1996).

Before trial, Lindsey moved to suppress statements he made to the police during his interrogation. The trial court denied the motion, finding that Lindsey's statements were made with knowledge and understanding and, therefore, were admissible.[5] Lindsey then argued that the interrogator made inflammatory and prejudicial statements during the interrogation that the interrogator knew were not based on fact, and that those portions should be redacted. The investigator accused Lindsey of lying, asked him about gang involvement, and told him, "[Y]ou been had," "I've got you made on this," "[Y]ou're gonna go," and "I just have to get you charged this morning." Lindsey further claims that the interrogator lied to him about the evidence the police had against him. The trial court allowed the audiotaped interrogation to be played to the jury in its entirety, and the postconviction court found the interrogator's statements to be probative and not unfairly prejudicial.

The mere fact that a "defendant waives his right and agrees to talk with the police does not mean that everything that is asked by the officers or said by the defendant in response is necessarily admissible." *State v. Hjerstrom,* 287 N.W.2d 625, 627 (Minn. 1979). We further stated in *Hjerstrom* that "[t]he only tenable rule is that, assuming a proper objection, immaterial and

irrelevant portions of an extrajudicial interrogation of a defendant should generally not be received in evidence." 287 N.W.2d at 627.

Relying on this language, Lindsey argues that, "[c]ertainly if a defendant's truthful comments about his prior misconduct must be redacted, then an officer's lies and gratuitous comments about appellant's credibility must go." Lindsey's argument is unpersuasive given the obvious distinction between the admission of otherwise inadmissible statements about a defendant's prior crimes or imprisonment, *see* Minn. R. Evid. 404(b), and statements made during a police interrogation concerning the crime with which a defendant is presently charged. The interrogator's statements were relevant because they assisted the jury in putting Lindsey's statements in context. They also were not unfairly prejudicial. Moreover, the record reflects that Lindsey's trial counsel had ample opportunity to cross-examine the interrogator about his statements. We therefore conclude that the trial court did not clearly abuse its discretion in concluding that the interrogator's statements were relevant and not inflammatory or unduly prejudicial and the postconviction court's decision denying relief was not clearly erroneous.

V.

Lindsey next challenges the trial court's restitution order. At sentencing, the trial court ordered that Lindsey pay $32,682.93 in restitution and that Lindsey's prison earnings be applied toward that obligation. Lindsey claims that, because he is indigent, the trial court abused its discretion by ordering him to pay restitution, and seeks vacation or modification of the restitution order.

Lindsey acknowledges that under Minn. Stat. § 609.10, subd. 5 (2000), it is within a trial court's discretion to order restitution when imposing a felony sentence. He argues, however, that the trial court failed to consider his income and resources as required by Minn. Stat. § 611A.045 (2000), and *State v. Maidi,* 537 N.W.2d 280 (Minn. 1995). However, the postconviction court, which was also the trial court, specifically stated that it "considered the petitioner's ability to pay when it ordered restitution to be paid from prison earnings." We see no abuse of discretion in the amount of restitution ordered in light of Lindsey's ability to pay.

Lindsey also argues that several of the murder victim's funeral expenses, including the cost of funeral clothes, postage stamps for thank-you cards, a hotel room for a relative and reception, the cost of hiring a soloist, a limousine service, and other miscellaneous items were unreasonable. Minnesota Statutes § 611A.04 (2000) explicitly provides for funeral expenses, and we have held that this statute gives trial courts "significant discretion to award restitution for a victim's expenses." *State v. Tenerelli,* 598 N.W.2d 668, 671 (Minn. 1999) (trial court within its discretion in ordering restitution for expenses related to a traditional Hmong healing ceremony). Given the explicit authorization for funeral expenses to be included as part of restitution, and the broad discretion afforded the trial court in awarding restitution, the postconviction court was not clearly erroneous in rejecting this claim.

Lindsey next asserts that the trial court erred when it ordered him to pay restitution for expenses incurred by the murder victim's girlfriend who was also the mother of the victim's child. A crime victim is entitled to receive restitution, Minn. Stat. § 611A.04, subd. 1(a) (2000), and for these purposes when "the victim is a natural person and is deceased, 'victim' means the deceased's

surviving spouse or next of kin." Minn. Stat. § 611A.01(b) (2000). It is not clear from the record whether the claimed expenses for moving costs for Clark's girlfriend (and, presumably, Clark's child) are properly included. We therefore remand this issue to the postconviction court to determine whether there is a basis for this portion of the restitution award.

VI.

Lindsey also claims that he was subject to improper multiple convictions by being convicted of the second-degree charges as lesser-included offenses of the first-degree charges. Under Minn. Stat. § 609.04, subd. 1(1) (2000), a defendant convicted of a crime may not be convicted of "[a] lesser degree of the same crime." *See also State v. Pflepsen,* 590 N.W.2d 759, 766 (Minn. 1999). In *Pflepsen,* we reaffirmed:

> [W]hen the defendant is convicted on more than one charge for the same act * * * the court [is] to adjudicate formally and impose sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time. If the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated conviction(s), one of the remaining unadjudicated conviction(s) can then be formally adjudicated and sentence imposed * * *.

Id. at 766 (quoting *State v. LaTourelle,* 343 N.W.2d 277 (Minn. 1984)) (alterations in original).

Here, a jury found Lindsey guilty of all four counts charged, but he was convicted of only the first-degree murder and attempted first-degree murder offenses. These convictions were for the separate acts of murdering Clark and shooting Lusby. The trial court did not formally adjudicate the finding of guilt on the two second-degree charges. Because the trial court did not formally adjudicate separate convictions on the same criminal act, the court did not violate section 609.04.

VII.

We turn to Lindsey's pro se arguments. Lindsey asked the state in pretrial discovery whether any witnesses to be called at trial were police informants. Lindsey now alleges that the prosecutor engaged in prosecutorial misconduct by failing to disclose that Richardson was a police informant. Richardson was a witness in the unrelated criminal trials of two individuals. With respect to one of the trials, Richardson apparently contacted the St. Paul police regarding the crime and gave grand jury testimony against the defendant in that trial. However, there is no evidence that Richardson had an established relationship with the police or that he was compensated for his assistance. Moreover, even if we concluded that the prosecutor should have disclosed Richardson as an informant, Lindsey was free to explore Richardson's relationship with the police on cross-examination, and thus was not prejudiced by any discovery violation. *State v. Daniels,* 332 N.W.2d 172, 179 (Minn. 1983). Therefore, there is no basis for concluding that the prosecutor engaged in misconduct by failing to identify Richardson as an informant.

Lindsey next alleges that he was denied his constitutional right to a direct appeal through ineffective assistance of counsel. He claims that after the sentencing he requested to speak to his trial counsel about an appeal, but that his attorney refused and told Lindsey that he would be

working closely with appellate counsel to appeal the convictions and would be in contact with Lindsey within 60 days. In his petition for postconviction relief, Lindsey alleged that his trial counsel never discussed with him the appeal process or time limitations for bringing a direct appeal and claims the failure constitutes ineffective assistance of counsel. Lindsey does not assert, however, that he has ever attempted to file a direct appeal. Accordingly, his claimed deprivation of the right to direct appeal is not ripe for adjudication.[6]

Finally, Lindsey asserts that the police used impermissibly suggestive identification procedures. He contends the police initially showed witnesses from the bar a photo lineup that included photographs of both Lindsey and his brother, but not of Richardson. Lindsey argues that, because a photograph of Richardson was not included, the photo lineup was impermissibly suggestive. Lindsey cites no authority for the proposition that a photo lineup must include the person the defendant asserts committed the crime, however. Nor does he explain why the photo lineup used was, in and of itself, impermissibly suggestive. Nothing in the lineup or the procedures used suggests Lindsey was singled out for identification. *State v. Ostrem,* 535 N.W.2d 916, 921 (Minn. 1995). Accordingly, the postconviction court did not abuse its discretion in denying the petition on this ground as well.

For the foregoing reasons, we conclude that the postconviction court did not err when it denied Lindsey's petition for postconviction relief. We remand the case to the postconviction court, however, to determine whether the award of restitution to the murder victim's girlfriend was proper.

Affirmed in part and remanded.

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[1] The 1992 version of Minn. Stat. § 631.04 provided in pertinent part:

> A minor under the age of 17 who is not a party to, witness in, or directly interested in a criminal prosecution or trial before a district, county, or municipal court, may not be present at the trial. A police officer, constable, sheriff, or other officer in charge of a court and attending upon the trial of a criminal case in the court, shall exclude a minor under age of 17 from the room in which the trial is being held. This section does not apply when the minor is permitted to attend by order of the court before which the trial is being held.

Section 631.04 was amended in 1998 to eliminate references to "county" or "municipal" courts. Act of Feb. 18, 1998, ch. 254, art. 2, § 73, 1998 Minn. Laws 158, 179.

[2] We have "occasionally permitted a statute to stand as a matter of comity, even where the legislature has encroached somewhat upon a judicial function, so long as the statute does not conflict with this court's inherent authority to make the final decision." *State by Humphrey v. Jim Lupient Oldsmobile Co.,* 509 N.W.2d 361, 363 (Minn. 1993).

[3] Both the federal and Minnesota constitutions provide that "[i]n all criminal prosecutions the accused shall enjoy the right to a * * * public trial." U.S. Const. amend. VI; Minn. Const. art. I, § 6.

[4] Eyewitness Identification

One of the most important issues in the case is the identification of the defendant as the perpetrator of the crime. The prosecution has the burden of proving identity, beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

1. Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were the lighting conditions, whether the witness had had an occasion to see or know the person in the past and the stress the witness was under at the time of the offense.

2. Are you satisfied that the identification made by the witness subsequent to the offense was the product of his or her own recollection?

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see the defendant as a factor bearing on the reliability of the identification.

3. You may take into account any occasions on which the witness failed to make an identification of the defendant, or made an identification that was inconsistent with his identification at trial.

4. Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he or she is truthful, and consider whether he or she had the opportunity to make a reliable observation of matters covered in his or her testimony.

The prosecutors [sic] burden of proof extends to every element of the crime charged, this specifically includes the burden of proving beyond a reasonable doubt the identity of the perpetrator of the crime charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

[*U.S. v. Telfaire*], 469 F.2d 552[] (D.C. Cir. 1972)[.]

[5] Lindsey has not raised the trial court's failure to suppress his statements as an issue during these postconviction proceedings.

[6] A defendant is entitled to at least one right of review by an appellate or postconviction court. *Hoagland v. State,* 518 N.W.2d 531, 534 (Minn. 1994). Although we do not reach the merits of Lindsey's claim that he was denied his right to a direct appeal, we note that the postconviction proceedings have afforded him ample opportunity to assert challenges to his convictions and that we have thoroughly considered each challenge that he has raised. Therefore, it is unclear whether any issues remain to be pursued through a direct appeal.