STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Michael J. Kelly, Cynthia Diane Stephens, and Colleen A. O'Brien

RALPH HEGADORN, AS PERSONAL REPRESENTATIVE OF MARY HEGADORN,

Plaintiff-Appellant,

v

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant-Appellee.
_____/

Supreme Court No. 156132

Court of Appeals No. 329508

Livingston Circuit Court
No. 2014-028394-AA

The appeal involves a ruling that a State governmental action is invalid.

ESTATE OF DOROTHY LOLLAR, BY DEBORAH D. TRIM, PERSONAL REPRESENTATIVE,

Plaintiff-Appellant,

v

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant-Appellee.
_____/

Supreme Court No. 156133

Court of Appeals No. 329511

Livingston Circuit Court
No. 2014-028395-AA

ROSELYN FORD,

Plaintiff-Appellant,

v

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant-Appellee.
_____/

Supreme Court No. 156134

Court of Appeals No. 331242

Washtenaw Circuit Court
No. 2015-000488-AA

BRIEF ON APPEAL OF APPELLEE DEPARTMENT OF HEALTH AND HUMAN SERVICES

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

On March 7, 2018, this Court granted Plaintiffs-Appellants Mary Ann Hegadorn, Estate of Dorothy Lollar, by Deborah D. Trim, and Roselyn Ford's ("Claimants") application for leave to appeal the June 1, 2017 opinion of the Court of Appeals, which was approved for publication on July 27, 2017. This Court has jurisdiction pursuant to MCL 600.232 and MCR 7.303(B)(1).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. The assets of both spouses must be calculated for the initial Medicaid eligibility determination for Long-Term Care for either spouse. For this threshold inquiry, assets in irrevocable trusts are countable if there are *any* circumstances under which distributions could be made to the beneficiary. Community spouses Ralph Hegadorn, Dallas Lollar, and Herbert Ford each had an irrevocable trust that required payment of all assets to him. Were those trust assets countable at the eligibility stage for their spouses' Medicaid applications?

   Appellants' answer: No.

   Appellee's answer: Yes.

   Trial court's answer: No.

   Court of Appeals' answer: Yes.

2. The Department must comply with all federal law and regulation for Medicaid determinations. The Department detected an error that workers were making in certain trust evaluations for Medicaid eligibility that conflicted with federal law by granting benefits to individuals who were not entitled to them. Was the Department correct to immediately stop making the error?

   Appellants' answer: No.

   Appellee's answer: Yes.

   Trial court's answer: No.

   Court of Appeals' answer: Yes.

STATUTES, RULES, AND POLICIES INVOLVED

42 USC 1382b. Resources

(a) Exclusions from resources

In determining the resources of an individual (and his eligible spouse, if any) there shall be excluded—

***

(c) Disposal of resources for less than fair market value

(1)(A)(i) If an individual or the spouse of an individual disposes of resources for less than fair market value on or after the look-back date described in clause (ii)(I), the individual is ineligible for benefits under this subchapter for months during the period beginning on the date described in clause (iii) and equal to the number of months calculated as provided in clause (iv).

***

(C) An individual shall not be ineligible for benefits under this subchapter by reason of the application of this paragraph to a disposal of resources by the individual or the spouse of the individual, to the extent that—

***

(ii) the resources—

(I) were transferred to the transferor's spouse or to another for the sole benefit of the transferor's spouse;

(II) were transferred from the transferor's spouse to another for the sole benefit of the transferor's spouse;

***

(e) Trusts

(1) In determining the resources of an individual, paragraph (3) shall apply to a trust (other than a trust described in paragraph (5)) established by the individual.

(2)(A) For purposes of this subsection, an individual shall be considered to have established a trust if any assets of the individual (or of the individual's spouse) are transferred to the trust other than by will.

(B) In the case of an irrevocable trust to which are transferred the assets of an individual (or of the individual's spouse) and the assets of any other person, this subsection shall apply to the portion of the trust attributable to the assets of the individual (or of the individual's spouse).

(C) This subsection shall apply to a trust without regard to—

(i) the purposes for which the trust is established;

(ii) whether the trustees have or exercise any discretion under the trust;

(iii) any restrictions on when or whether distributions may be made from the trust; or

(iv) any restrictions on the use of distributions from the trust.

(3)(A) In the case of a revocable trust established by an individual, the corpus of the trust shall be considered a resource available to the individual.

(B) In the case of an irrevocable trust established by an individual, if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual (or of the individual's spouse), the portion of the corpus from which payment to or for the benefit of the individual (or of the individual's spouse) could be made, shall be considered a resource available to the individual.

***

(6) For purposes of this subsection—

(A) the term "trust" includes any legal instrument or device that is similar to a trust;

(B) the term "corpus" means, with respect to a trust, all property and other interests held by the trust, including accumulated earnings and any other addition to the trust after its establishment (except that such term does not include any such earnings or addition in the month in which the earnings or addition is credited or otherwise transferred to the trust); and

(C) the term "asset" includes any income or resource of the individual (or of the individual's spouse), including—

(i) any income excluded by section 1382a (b) of this title;

(ii) any resource otherwise excluded by this section; and

(iii) any other payment or property to which the individual (or of the individual's spouse) is entitled but does not receive or have access to because of action by—

(I) the individual or spouse;

(II) a person or entity (including a court) with legal authority to act in place of, or on behalf of, the individual or spouse; or

(III) a person or entity (including a court) acting at the direction of, or on the request of, the individual or spouse.

42 USC § 1396p. Liens, adjustments and recoveries, and transfers of assets

***

(c) Taking into account certain transfers of assets

(1)(A) … the State plan must provide that if an institutionalized individual or the spouse of such an individual (or, at the option of a State, a

noninstitutionalized individual or the spouse of such an individual) disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance … during the period beginning on the date specified in subparagraph (D) and equal to the number of months specified in subparagraph (E).

***

(2) An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that--

(A) the assets transferred were a home and title to the home was transferred to

(i) the spouse of such individual.

***

(B) the assets--

(i) were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse;

(ii) were transferred from the individual's spouse to another for the sole benefit of the individual's spouse.

(d) Treatment of trust amounts

(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

(2)(A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

(i) The individual;

(ii) The individual's spouse;

(iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse;

(iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) In the case of a trust, the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.

(C) Subject to paragraph (4), this subsection shall apply without regard to--

(i) the purposes for which a trust is established;

(ii) whether the trustees have or exercise any discretion under the trust;

(iii) any restrictions on when or whether distributions may be made from the trust; or

(iv) any restrictions on the use of distributions from the trust.

***

(3)(B) In the case of an irrevocable trust--

(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income--

(I) to or for the benefit of the individual, shall be considered income of the individual; and

(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c) of this section; and

(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

***

(h) Definitions

In this section, the following definitions shall apply:

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

(A) by the individual or such individual's spouse;

(B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse; or

(C) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse.

(2) The term "income" has the meaning given such term in section 1382a of this title.

(3) The term "institutionalized individual" means an individual who is an inpatient in a nursing facility, who is an inpatient in a

medical institution and with respect to whom payment is made based on a level of care provided in a nursing facility, or who is described in section 1396a(a)(10)(A)(ii)(VI) of this title.

(4) The term "noninstitutionalized individual" means an individual receiving any of the services specified in subsection (c)(1)(C)(ii) of this section.

(5) The term "resources" has the meaning given such term in section 1382b of this title, without regard (in the case of an institutionalized individual) to the exclusion described in subsection (a)(1) of such section.

42 USC § 1396r-5. Treatment of income and resources for certain institutionalized spouses

(a) Special treatment for institutionalized spouses

(1) Supersedes other provisions

In determining the eligibility for medical assistance of an institutionalized spouse (as defined in subsection (h)(1) of this section), the provisions of this section supersede any other provision of this subchapter (including sections 1396a(a)(17) and 1396a(f) of this title) which is inconsistent with them.

***

(c) Rules for treatment of resources

(1) Computation of spousal share at time of institutionalization

(A) Total joint resources

There shall be computed (as of the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse)—

(i) the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest, and

(ii) a spousal share which is equal to ½ of such total value.

***

(2) Attribution of resources at time of initial eligibility determination

In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property--

(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and

(B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) of this section (as of the time of application for benefits).

***

(5) Resources defined

In this section, the term "resources" does not include--

(A) resources excluded under subsection (a) or (d) of section 1382b of this title, and

(B) resources that would be excluded under section 1382b(a)(2)(A) of this title but for the limitation on total value described in such section.

***

(f) Permitting transfer of resources to community spouse

(1) In general

An institutionalized spouse may, without regard to section 1396p(c)(1) of this title, **transfer an amount equal to the community spouse resource allowance** (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred

to (or for the sole benefit of) the community spouse. [Emphasis added.]

***

(h) Definitions

In this section:

(1) The term "institutionalized spouse" means an individual who--

(A) is in a medical institution or nursing facility or who (at the option of the State) is described in section 1396a(a)(10)(A)(ii)(VI) of this title, and

(B) is married to a spouse who is not in a medical institution or nursing facility; but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.

(2) The term "community spouse" means the spouse of an institutionalized spouse.

42 CFR § 435.201. Individuals included in optional groups

(a) The agency may choose to cover as optional categorically needy any group or groups of the following individuals who are not receiving cash assistance and who meet the appropriate eligibility criteria for groups specified in the separate sections of this subpart:

(1) Aged individuals (65 years of age of older);

(2) Blind individuals (as defined in § 435.530);

(3) Disabled individuals (as defined in § 435.541);

(4) Individuals under age 21 (or, at State option, under age 20, 19, or 18) or reasonable classifications of these individuals; and

(5) Parents and other caretaker relatives (as defined in § 435.4).

(b) If the agency provides Medicaid to any individual in an optional group specified in paragraph (a) of this section, the agency must

provide Medicaid to all individuals who apply and are found eligible to be members of that group.

(c) States that elect to use more restrictive eligibility requirements for Medicaid than the SSI requirements for any group or groups of aged, blind, and disabled individuals under § 435.121 must apply the specific requirements of § 435.230 in establishing eligibility of these groups of individuals as optional categorically needy.

42 CFR § 435.320. Medically needy coverage of the aged in States that cover individuals receiving SSI

If the agency provides Medicaid to individuals receiving SSI and elects to cover the medically needy, it may provide Medicaid to individuals who—

(a) Are 65 years of age and older, as specified in § 435.520; and

(b) Meet the income and resource requirements of subpart I of this part.

42 CFR § 435.840. Medically needy resource standard: General requirements

(a) To determine eligibility of medically needy individuals, a Medicaid agency must use a single resource standard that meets the requirements of this section.

(b) In States that do not use more restrictive criteria than SSI for aged, blind, and disabled individuals, the resource standard must be established at an amount that is no lower than the lowest resource standard used under the cash assistance programs that relate to the State's covered medically needy eligibility group or groups of individuals under § 435.301.

(c) In States using more restrictive requirements than SSI:

(1) For all individuals except aged, blind, and disabled individuals, the resource standard must be set in accordance with paragraph (b) of this section; and

(2) For all aged, blind, and disabled individuals or any combination of these groups of individuals, the agency may establish a separate single medically needy resource

standard that is more restrictive than the single resource standard set under paragraph (b) of this section. However, the amount of the more restrictive separate standard for aged, blind, or disabled individuals must be no lower than the higher of the lowest categorically needy resource standard currently applied under the State's more restrictive criteria under § 435.121 or the medically needy resource standard in effect under the State's Medicaid plan on January 1, 1972.

(d) The resource standard established under paragraph (a) of this section may not diminish by an increase in the number of persons in the assistance unit. For example, the resource standard for an assistance unit of three may not be less than that set for a unit of two.

42 CFR § 435.845. Medically needy resource eligibility

To determine eligibility on the basis of resources for medically needy individuals, the agency must:

(a) Consider only the individual's resources and those that are considered available to him under the financial responsibility requirements for relatives in § 435.602.

(b) Deduct the amounts that would be deducted in determining resource eligibility for the medically needy group as provided for in § 435.601 or under the criteria of States using more restrictive criteria than SSI as provided for in § 435.121. In determining the amount of an individual's resources for Medicaid eligibility, States must count amounts of resources that otherwise would not be counted under the conditional eligibility provisions of the SSI or AFDC programs.

(c) Apply the resource standard specified under § 435.840.

Social Security Administration Program Operations Manual System Supplementary Security Income (SI) 01120.201(D)

D. Policy–Treatment of Trusts

1. Revocable Trusts

a. General Rule Revocable Trusts

In the case of a revocable trust established with the assets of the individual, the entire corpus of the trust is a resource to the individual. However, certain exceptions may apply. For exceptions to counting trusts established on or after 01/01/00, see SI 01120.203.

NOTE: The exceptions in SI 01120.203A only apply to counting a trust under the statutory provisions of section 1613(e) of the Act. A trust that meets the definition of a resource is still countable and must be developed under SI 01120.200.

b. Relationship to Transfer Penalty

Any disbursements from a trust that is a resource that are not "to or for the benefit of" the individual are a transfer of resources. For information on payments for the benefit of or on behalf of the individual, see SI 01120.201F.1. in this section. For transfer of resource provisions, see SI 01150.100.

c. Example

Willie Jones is a young adult with intellectual disabilities. Mr. Jones had a revocable trust established after 01/01/00. His guardian spent all but $5,000 of funds in the trust on Mr. Jones' behalf. His mother files for SSI for him, but he is not eligible because of the money in the trust. His mother takes a $4,500 disbursement from the trust and makes a down payment on a new car that she says she will use to transport Mr. Jones. However, she registers the car in her own name. Even though his mother will use the car to transport Mr. Jones, the purchase of the car is a transfer of resources since the car does not belong to him. For policy on purchases for the benefit of the individual and titling of property, see SI 01120.201F.1. in this section.

2. Irrevocable Trusts

a. General Rule – Irrevocable Trusts

In determining whether an irrevocable trust established with the assets of an individual is a resource, we must consider how the trust can make payments. If the trustee

can make any payments to or for the benefit of the individual or individual's spouse, the portion of the trust from which the trustee can make payments and that is attributable to the individual is a resource. However, certain exceptions may apply. For possible exceptions, see SI 01120.203. For information on payments for the benefit of or on behalf of the individual, see SI 01120.201F.1. in this section. For information on revocability, see SI 01120.200D.1.b.

b. Circumstance under which payment can or cannot be made

Take into consideration any restrictions on payments to determine whether the trustee can make payments to or for the benefit of the individual. Restrictions included in the trust may include use restrictions, exculpatory clauses, or limits on the trustee's discretion. However, if the trust can make a payment to or for the benefit of the individual under **any** circumstance, no matter how unlikely or distant in the future, the general rule in SI 01120.201D.2.a. in this section applies: the portion of the trust from which payment can be made to or for the benefit of the individual and that is attributable to the individual is a resource, provided that no exception from SI 01120.203. applies. For information on payments for the benefit of or on behalf of the individual, see SI 01120.201F.1. in this section.

c. Examples of irrevocable trusts and their resource treatment

- An irrevocable trust provides that the trustee can make a one-time disbursement that totals $2,000 to, or for the benefit of, the individual out of a trust with $20,000 in assets. Only $2,000 is considered a resource under SI 01120.201D.2.a. in this section. The other $18,000 is considered to be an amount that cannot, under any circumstances, be paid to the individual and may be subject to the transfer of resources provisions in SI 01120.201E. in this section, SI 01150.100., and SI 01150.121.

- A trust contains $50,000 that the trustee can pay to the beneficiary only in the event that he or she needs a

heart transplant or on his or her 100th birthday. The entire $50,000 could be paid to the individual under these specific circumstances and therefore is considered a resource.

- An individual establishes an irrevocable trust with $10,000 of his assets. His parents contribute another $10,000 to the trust. The trust permits distributions to, or for the benefit of, the individual only from the portion of the trust contributed by his parents. The trust is not a resource under the provisions in this section because the portion attributed to the beneficiary is not available. The portion of the trust contributed by the individual is subject to evaluation under the transfer of resources provisions in SI 01150.100 (see also SI 01120.201E. in this section). The portion of the trust contributed by his parents is subject to evaluation under SI 01120.200.

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The goal of the Medicaid program is to ensure that essential health care services are made available to those who otherwise could not afford them. Medicaid is also known as Medical Assistance (MA).

The Medicaid program is comprised of several sub-programs or categories. To receive MA under an SSI-related category, the person must be aged (65 or older), blind, disabled, entitled to Medicare or formerly blind or disabled.

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[page 2]

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Medicaid eligibility is determined on a calendar month basis. Unless policy specifies otherwise, circumstances that existed, or are expected to exist, during the calendar month being tested are used to determine eligibility for that month.

When determining eligibility for a future month, assume circumstances as of the processing date will continue unchanged unless you have information that indicates otherwise.

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[page 3]

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Use the following policies if the trust is a Medicaid trust:

- COUNTABLE ASSETS FROM MEDICAID TRUSTS.

[page 4]

- COUNTABLE INCOME FROM MEDICAID TRUSTS.
- TRANSFERS FOR LESS THAN FMV.

***

Resources - all income and assets of a person and the person's spouse. It includes any income and assets the person or spouse is entitled to but does not receive because of action:

- By the person or spouse.
- By someone else (including a court or administrative body) with legal authority to act in place of or on behalf of the person or spouse.
- By someone else (including a court or administrative body) acting at the direction or upon the request of the person or spouse.

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[page 12]

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Irrevocable Trust

Count as the person's countable asset the value of the countable assets in the trust principal if there is any condition under which the

principal could be paid to or on behalf of the person from an irrevocable trust.

Count as the person's countable asset the value of the trust's countable income if there is any condition under which the income could be paid to or on behalf of the person.

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[page 1]

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SSI-Related MA Only

Use this item to determine asset eligibility for the first period of continuous care (see DEFINITIONS in this item) that began on or after 9-30-89 when a L/H (LTC), PACE, or waiver client:

- Has a community spouse . . . .

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[page 1]

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Resource means all the client's and spouse's assets and income. It includes all assets and all income, even countable [page 2] and/or excluded assets, the individual or spouse receive. It also includes all assets and income that the individual (or their spouse) were entitled to but did not receive because of action by one of the following:

- The client or spouse.
- A person (including a court or administrative body) with legal authority to act in place of or on behalf of the client or the client's spouse.
- Any person (including a court or administrative body) acting at the direction or upon the request of the client or his spouse.

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INTRODUCTION

In this Medicaid eligibility case, three couples (the Hegadorns, the Lollars, and the Fords), sought Medicaid Assistance for Long-Term Care to pay for nursing home expenses, despite having assets far in excess of the amounts Congress permits for eligibility of applicants under the program. In defining what assets to consider for such long-term care, Congress expressly specified that "[t]he term 'assets,' with respect to an individual, includes all income and resources of the individual *and of the individual's spouse* . . . ." 42 USC 1396p(h)(1) (emphasis added); 42 USC 1382b(e)(6)(C) ("the term 'asset' includes any income or resource of the individual (*or of the individual's spouse*)") (emphasis added). But here, each couple transferred their excess assets (for one couple, more than $300,000) into a trust for the community spouse (i.e., for the non-institutionalized spouse, who is still living at home), and each applicant then claimed that those assets were unavailable and uncountable for all Medicaid means-testing.

The purpose of Medicaid is to assist individuals who cannot afford care for themselves. Congress did not intend to allow applicants to shield assets in trusts to maintain a preferred lifestyle for community spouses, at taxpayer expense.

The claimants here have misread Medicaid law and policy and so are attempting to evade Congress's explicit limits and to create an exemption that would allow them to keep all of their assets and get benefits too. But such evasion, if allowed, would come at a cost to the taxpayers: in Michigan, allowing this practice would cost tens of millions of dollars for excess Medicaid payments. And it would divert funds from their intended beneficiaries—the poor who actually need it.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Background concerning Medicaid

Title XIX of the Social Security Act (Medicaid Act), 42 USC 1396 *et seq*, enacted in 1965, is a federal aid program that provides federal funding to states furnishing medical assistance to needy individuals. *Pharm Research & Mfrs of Am v Walsh*, 538 US 644, 650 (2003). Medicaid is a well-developed, highly structured program intended to fairly distribute taxpayer supported medical care to individuals who are too poor to provide it for themselves. *Wisconsin Dep't of Health & Fam Servs v Blumer*, 534 US 473, 480 (2002). An individual is entitled to benefits only if he meets the established Medicaid criteria, and couples are expected to contribute to the cost of their own and each other's care. *Schweiker v Gray Panthers*, 453 US 34, 36-40 (1981).

Although the dollar amounts for the eligibility limits are found in the Medicaid statutes (which are at 42 USC 1396 *et seq*), SSI standards from another federal statutory program (Supplemental Security Income for the Aged, Blind, and Disabled, or SSI, at 42 USC 1382 *et seq*) are used to define assets, resources, and income for the programs. *Id.* at 39; 42 USC 1396a(a)(10)(C)(i)(II); 42 USC 1396a(m)(1)(B),(C).

As a condition of receiving federal funding, each state must conform to all federal law and regulation in administering its Medicaid program. *Id;* 42 USC 1396a(a)(10), (17). Failure to comply with federal law or regulation in all respects can result in the loss or reduction of this funding. 42 USC 1396c; 42 CFR 430.30.

Although Medicaid is intended for the needy, attorneys devised strategies using trusts to shield their clients' assets and so to qualify for Medicaid eligibility without actually giving up those assets. *Lewis v Alexander*, 685 F3d 325, 333 (CA 3, 2012). Well-off individuals thus obtained taxpayer-funded healthcare while preserving their assets for themselves and their heirs. "Congress understandably viewed this as an abuse and enacted stricter statutory standards in 1986." *Id.* "Congress sought to combat the rapidly increasing costs of Medicaid by enacting statutory provisions to ensure that persons who could pay for their own care did not receive assistance." *Mackey v Dep't of Human Services*, 289 Mich App 688, 695 (2010); see also *Ramey v Reinertson*, 268 F3d 955, 961 (2001) ("Medicaid is, and always has been, a program to provide basic health coverage to people *who do not have sufficient income or resources to provide for themselves*. When affluent individuals use [trusts] and similar "techniques" to qualify for the program, they are diverting scarce Federal and State resources from low-income elderly and disabled individuals, and poor women and children.") (quoting HR Rep No 265, 99th Cong, 1st Sess, pt 1, at 72 (1985)) (emphasis added by court); *Cook v Dep't of Soc Servs*, 225 Mich App 318, 322 (1997) (quoting same language).

In 1993, Congress enacted even more stringent trust provisions at 42 USC 1396p(d). "In the 1993 OBRA amendments (OBRA 1993), Congress established a general rule that trusts *would be counted* as assets for the purpose of determining Medicaid eligibility." *Lewis,* 685 F3d at 332; (emphasis added). These are the

current trust provisions under which the claimants' trusts are assessed. 42 USC 1396p(d) (Medicaid Act trust policy); 42 USC 1382b(e) (SSI trust policy).

While establishing strict rules that applied to trusts for individuals seeking benefits as "medically needy," Congress specifically created an exemption for the assets in special needs trusts, which are not counted for Medicaid. 42 USC 1382b(e)(1) and 42 USC 1396p(d)(1) state the exemption for these trusts (which are not at issue here), and 42 USC 1382b(e)(2) and 42 USC 1396p(d)(2) state the policy for *all other* trust beneficiaries (including the claimants here) whose assets must be counted for Medicaid applications.

The claimants and the trusts

Mary Ann and Ralph Hegadorn, Dorothy and Dallas Lollar, and Roselyn and Herbert Ford sought Medicaid Assistance for Long-Term Care (MA-LTC) to pay for nursing home expenses for each of the wives. In Medicaid parlance, the wives are "institutionalized individuals." 42 USC 1396p(h)(3). Their husbands, Ralph, Dallas, and Herbert, continued to live at home and were the "community spouses." 42 USC 1396r-5(h)(1) & (2) (definitions).

Medicaid counts the assets, including trust assets, of *both* spouses in the determination of financial eligibility for long-term care for the institutionalized spouse. 42 USC 1382b(e)(6)(C) (counting resources "of the individual (or of the individual's spouse)"); 42 USC 1396p(h)(1) (same); 42 USC 1396r-5(c)(1)(A) (counting total joint resources); 42 USC 1396a(a)(17)(D). To meet the eligibility standards to qualify the institutionalized individuals for long-term care, each of

these couples needed to reduce their countable assets. They chose not to spend the assets for the care of the institutionalized spouse. Instead, each couple funded their excess assets into a trust for the community spouses (the husbands) that guaranteed that distributions from the trust could be made only to that community spouse and that all trust assets would be paid out to him within his expected life time. (Appellants' Appendix, pp 192a-193a; pp 203a-204a; pp 216a-218a.) These provisions made the trusts "Solely for the Benefit of" Trusts (SBO Trusts), which ensure that the beneficiary is the only one who can benefit from the trust.

The Hegadorn Trust set aside more than $305,000 for the husband to spend during his lifetime (Appellants' Appendix, pp 12a, 256a) and the Ford Trust more than $188,000 (Appellee's Appendix, pp 104b-105b), while the Lollar Trust included about $19,000. (Appellants' Appendix, p 255a.) These Trust assets were amounts over and above the protected amount calculated for each Community Spouse, as the amount they were allowed to retain without disqualifying the institutionalized spouse.

The Lollar and Ford Trusts each had a provision that delayed the initial payment until it was expected that the eligibility of the institutionalized spouse would be determined. (Appellants' Appendix, p 192a, § 2.2; p 218a, § 2.2.) On this basis, the claimants asserted that the trust assets were not available for the application period and therefore could not be considered countable assets. (Cl Br, pp 8, 21, ¶¶ 3, 5.) But the Hegadorn Trust did not actually have this provision, and

the Ford Trust provision expired on August 1, 2014, which was prior to her eligibility determination.

The applications

Mary Hegadorn submitted her application on April 24, 2014, without all required verifications of assets. The Hegadorns continued submitting verifications for assets as late as July 11, 2014. (Appellee's Appendix, p 0016b.) The Department cannot determine eligibility until the application is complete and cannot provide benefits until the claimant has demonstrated that they are eligible. *Lavine v Milne*, 424 US 577, 587 (1976). Her eligibility determination was issued August 14, 2014, which is within 45 days after the Department had a complete application. See 42 USC 1396a(a)(8) (requiring state plans to furnish assistance "with reasonable promptness to eligible individuals"); 42 CFR 435.911(c)(3)(ii) (requiring most eligibility determinations to be made within 45 days).

Dorothy Lollar submitted her application on July 31, 2014, and her eligibility determination was issued August 29, 2014. This was less than 45 days.

Roselyn Ford submitted her application on January 30, 2014, and her eligibility determination was issued September 29, 2014. The record in this case provides no evidence about why this delay occurred, but the Fords never requested a hearing that is the remedy if applications are not "acted upon with reasonable promptness." 42 USC 1396a(a)(3).

The Hegadorns, Lollars, and Fords all had substantial income and assets and did not qualify for mandatory Medicaid coverage as categorically needy (those

receiving SSI payments). 42 USC 1396a(a)(10)(A)(i); 42 CFR 435.110-170. They also did not qualify as optionally categorically needy (those who would qualify for SSI but receive other subsidy programs instead of SSI). 42 USC 1396a(a)(10)(A)(ii); 42 USC 1396a(a)(10)(G); 42 CFR 435.200-236; *Herweg v Ray*, 455 US 265, 269 (1982). Instead, the Hegadorns, Lollars, and Fords applied for benefits as medically needy and so applied under 42 USC 1396r-5.

The medically needy are those individuals and their spouses who have sufficient income and assets to meet ordinary needs but who have incurred medical expenses that reduce their income and assets to eligibility levels. 42 USC 1396a(a)(10)(C); *Davis v Shah*, 821 F3d 231, 238-39 (CA 2, 2016); *Roach v Morse,* 440 F3d 53, 59 (2006). To qualify for Medicaid benefits, the medically needy must spend-down their assets and income to the levels of the categorically needy where "any further expenditures for medical expenses then would have to come from funds required for basic necessities." *Atkins v Rivera,* 477 US 154, 158 (1986).

The Department concluded that the claimants were not eligible as medically needy because the assets in the Hegadorn, Lollar, and Ford Trusts were countable assets for the applications for Mary Ann Hegadorn, Dorothy Lollar, and Roselyn Ford, and therefore each had too many assets to qualify for long-term care.

Because this was an eligibility determination, not a divestment determination, the Department did not assess a divestment penalty period—in other words, a period of time for which the claimant must pay for the medical care

received because the claimant transferred away assets that could have been used to pay for the care received.

Administrative and judicial proceedings

After the eligibility denials from the Department, each couple requested a hearing from the Department, and in each case the presiding administrative law judge upheld the Department's determination, finding that the Department had correctly followed policy. (Appellants' Appendix, pp 68a-173a.)

All three claimants appealed their decisions to the appropriate circuit courts, where the Hegadorn and Lollar cases were consolidated and heard in Livingston County, and Ford was heard in Washtenaw County. Judge Michael P. Hatty and Judge Timothy Connors issued orders but did not write opinions. (Appellants' Appendix, pp 175a-178a.) In each circuit court case the Department was reversed, and both circuit courts found that the assets in the Trusts were not countable.

The Department timely filed applications for leave to appeal to the Michigan Court of Appeals. The Hegadorn and Lollar cases were accepted as a consolidated case on December 22, 2015, and the Ford case was later accepted and consolidated on April 27, 2016. The consolidated cases were heard by the Court of Appeals, and an opinion was issued on June 1, 2017 and approved for publication on July 27, 2017. (Appellants' Appendix, pp 179a-190a.) This opinion upheld the Department's original determinations that the Trust assets of each community spouse were countable assets for the institutionalized spouse.

The claimants' application for leave to appeal to this Court was granted on March 7, 2018.

STANDARD OF REVIEW

Issues of statutory interpretation are questions of law that this Court reviews de novo. *Lash v City of Traverse City*, 479 Mich 180, 186 (2007).

While not binding on the court, "the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons." *Boyer-Campbell Co v Fry*, 271 Mich 282, 296 (1935) (internal quotations omitted). "Boyer–Campbell remains good law, and it has been used repeatedly by this Court." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 104 (2008); *Ins Inst of Michigan v Commr, Fin & Ins Services, Dept of Labor & Econ Growth*, 486 Mich 370, 385 (2010).

In federal statutory interpretation, "[i]f the intent of Congress is clear, that is the end of the matter for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, USA, Inc v Nat Res Def Council, Inc*, 467 US 837, 842-843 (1984).

"The first criterion in determining intent is the specific language of the statute." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63 (2002). "Undefined statutory terms must be given their plain and ordinary meanings." *Halloran v Bhan*, 470 Mich 572, 578 (2004); *Donajkowski v Alpena Power Co*, 460 Mich 243, 248-249 (1999). And "a court may read nothing into an unambiguous statute that is

not within the manifest intent of [Congress] as derived from the words of the statute itself." *Roberts*, 466 Mich at 63, citing *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311 (1999).

SUMMARY OF ARGUMENT

Eligibility for Medicaid long-term care counts the assets of *both* spouses against the mean-testing limits established by Congress. Governing Medicaid and Supplemental Security Income statutes provide that if there is any condition under which payments from a trust can be made to one of the spouses, the assets are countable for the application of either.

Despite these clear requirements, the claimants rely on phrases that apply only to a different group in a different context to escape the mandates and limits that Congress has fashioned for the Medicaid program. But pursuant to federal law, regulation, and policy, the assets in each of these Claimants' trusts were both available and countable.

The federal laws, regulations, SSI policy, and the Department policy that makes assets in these trusts countable have not changed in any way that affects these determinations since 1993. And even though an error had crept into some Department trust evaluations, allowing some individuals who had too many assets to improperly qualify for benefits, when the mistake was detected, the Department could not, and did not, knowingly continue to render decisions it knew to be wrong and contrary to law and policy.

There was no retroactive application of Department policy. When the Department discovered its error, it at once corrected its policy implementation and applied that to all pending eligibility determinations. The correction did not make new policy – it made sure that the law and the Department's actual current written policy was followed. All eligibility determinations from that day forward were based on the correct implementation of law and policy for trusts.

ARGUMENT

I. Trust assets payable to community spouses are countable assets for the Medicaid applications of their institutionalized spouses.

For Medicaid long-term-care eligibility determinations where there is an institutionalized spouse and a community spouse, the total assets of *both* individuals must be calculated. 42 USC 1396r-5(c)(1)(A) (addressing "total joint resources"), (c)(2) ("all the resources held by either [spouse], or both, shall be considered to be available to the institutionalized spouse"); 42 USC 1396a(a)(17)(D); 42 USC 1382b(e)(6)(C) (defining "asset" to include any resource "of the individual (or of the individual's spouse)"); 42 USC 1396p(h)(1) (materially the same). This approach flows from the legislative judgment that it is reasonable to expect a spouse to help pay medical expenses. *Gray Panthers*, 453 US at 37, 44. Applying these statutes, the Department correctly reviewed all assets, including trust assets, of each individual spouse and determined that each couple's total combined assets were too high to qualify for Medicaid, and the institutionalized spouse in each case was denied benefits.

A. Trusts containing assets available to the community spouse count for Medicaid eligibility determinations.

"States that choose to participate in Medicaid must comply with federal requirements." *In re Estate of Rasmer*, 501 Mich 18, 25 (2017), quoting *Gray Panthers*, 453 US at 37. And applicants for Medicaid benefits like long-term care must meet stringent eligibility requirements. This includes the requirements not only of the Medicaid Act but also of the SSI standards for determining income and resource eligibility. *Atkins v Rivera*, 477 US 154, 157-58 (1986); *Schweiker v Hogan*, 457 US 569, 581-582 (1982); *Gray Panthers*, 453 US at 38-39.

The starting point for determining the eligibility for long-term care for individuals like these claimants—i.e., for medically needy institutionalized individuals with community spouses—is the comprehensive framework of 42 USC 1396r-5. Section 1396r-5 describes the actual calculations and limits for the long-term care program and relies on the SSI provisions of 42 USC 1382a (for income) and 42 USC 1382b (for assets) to define what constitutes income or assets (resources) for the program. 42 USC 1382b(e)(6)(C) ("the term 'asset' includes any income or resource of the individual (or of the individual's spouse) . . ."); see also 42 USC 1396p(h)(1) (materially the same); 42 USC 1396r-5(a)(3), (c)(5); *Atkins*, 477 US at 158; 42 USC 1396a(m).

In setting out those limits for couples, § 1396r-5 provides that when calculating the total joint resources at the time of institutionalization (i.e., at the eligibility determination), the total combined value of the assets of each individual spouse are counted "to the extent that *either* the institutionalized spouse or the

community spouse has an ownership interest for eligibility determinations for either spouse." 42 USC 1396r-5(c)(1)(A) (emphasis added); *Gray Panthers*, 453 US at 37; 42 USC 1396a(a)(17)(D). While the statute allows the community spouse to keep certain resources (up to $117,240.00 in 2014), 42 USC 1396r-5(f)(2); (Appellee's Appendix, p 019b); other than that protected amount, "all the resources held by either the institutionalized spouse, community spouse, or both, *shall be considered to be available* to the institutionalized spouse." 42 USC 1396r-5(c)(1)(B) (emphasis added); *Blumer*, 534 US at 482-483.

1. Transfers to "Solely for the Benefit of" Trusts (SBO Trusts) are countable assets.

Applicants must show that the combined value of the institutionalized spouse's assets and the community spouse's assets are not greater than the amount calculated for them, using the provisions of 42 USC 1396r-5(c)(1), (2), as the amount the community spouse is allowed to keep without it being considered available to the institutionalized spouse. *Blumer*, 534 US at 482. But the couple may *not* just give away the excess assets to bring their assets down low enough to qualify. 42 USC 1382b(c) ("if an individual or the spouse of an individual disposes of resources for less than fair market value" a penalty period is imposed during which Medicaid does not pay for benefits); 42 USC 1396p(c)(2) (materially the same).

Giving away or transferring assets without receiving full fair market value in return is a *divestment* for which a penalty period is calculated and imposed during which Medicaid will not pay for medical services. 42 USC 1382b(c); 42 USC

1396p(c). Essentially, Medicaid will not pay benefits for the amount of time the divested assets could have provided care. 42 USC 1382b(c)(1)(A); 42 USC 1396p(c)(1)(B).

Direct transfers between spouses are an exception that does not qualify as a divestment. 42 USC 1382b(c)(1)(C)(ii) and 42 USC 1396p(c)(2)(B). This is logical because the assets of both spouses are still counted for eligibility purposes, so it doesn't matter which spouse has them. And, for divestment purposes, transfers to a trust solely for the benefit of the spouse are treated in the same way as a direct transfer. To qualify as an SBO Trust, the trust must provide that distributions can be made only to the beneficiary and that all trust assets *must* be paid out before the end of the beneficiary's life expectancy. 42 USC 1382b(c)(1)(C)(ii); 42 USC 1396p(c)(2)(B).

The SBO Trusts established for each community spouse in these consolidated cases had the requisite SBO provisions, and the Department did *not* assess a divestment penalty for the transfer of the spouses' assets into an irrevocable trust for any of the applicants. But this is not a case about divestment, this case is about the *countable excess assets*, and thus the assets in each of the community spouses' Trusts made these institutionalized spouses ineligible for Medicaid benefits.

For long-term care, SBO Trust provisions exist for one and only one purpose: to avoid a divestment penalty for the transfer to the Trust. But for all calculations of total assets of the couples *for eligibility purposes*, these Trusts are treated like any other irrevocable trust.

2. The Trust assets of community spouse are countable assets for the eligibility determination of the institutionalized spouse.

Eligibility for long-term care tests the combined assets of *both* individual spouses against the means-tested limits using the Medicaid and SSI methodology and standards, and *any* trust for *either* spouse must be evaluated.

Both the Medicaid Act and the SSI statutes describe the treatment of trusts to evaluate the trust assets for anyone whose assets must be counted for an eligibility determination. 42 USC 1382b(e) (SSI); 42 USC 1396p(d) (Medicaid). In these cases, that includes *any* trust assets of *either* or both individuals.

Although the wording of the two statutes is not identical, under each statute the assets in these Trusts are *not* subject to divestment penalties under the divestment or transfer rules. 42 USC 1382b(c)(1); 42 USC 1396p(c)(1). But they *are countable* as trust assets for the eligibility determination of the institutionalized spouse. 42 USC 1382b(e); 42 USC 1396p(d).

a. Under § 1382b(e), these trusts are countable assets for eligibility determinations.

Aside from one specific type of trust not at issue here (special needs trusts under § 1382b(e)(1)), § 1382b(e)(2) provides the general rules for *all other* trusts for *any* individual(s) whose assets must be counted for *any* benefits determination. Thus, for the claimants' benefits determination for long-term care, the assets of both spouses are counted.

Section 1382b(e)(2)(A) provides that "an individual shall be considered to have established a trust if any assets of the individual (or of the individual's

are transferred to the trust other than by will." That applies here: for these claimants, an individual or the individual's spouse transferred assets to the Trust. Thus, for long-term care eligibility, the word "individual" includes *either* the institutionalized spouse *or* the community spouse. 42 USC 1382b(e)(2)(A). And because assets of both spouses are counted, it does not matter whose asset or resource it is. 42 USC 1382b(e)(2)(A).

42 USC 1382b(e)(2)(B) provides that assets in trusts owned by individuals *other than the spouses* are not counted; in other words, it confirms that assets in trusts that are owned *by spouses* should be counted. And 42 USC 1382b(e)(2)(C) provides that the trust provisions apply *without regard* to any restrictive or limiting terms in the trust, including terms that restrict "when or whether distributions can be made." These restrictions, like the minor delays on the first distributions that the claimants wrote into their Trusts, thus do *not* affect the availability or countability of these Trust assets. 42 USC 1382b(e)(2)(C).

42 USC 1382b(e)(3)(B) further makes clear that assets in an irrevocable trust for an individual or spouse must be counted if there are "any circumstances" in which the assets could be available to either member of the couple:

> if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual (or of the individual's spouse), the portion of the corpus from which payment to or for the benefit of the individual (or of the individual's spouse) could be made shall be considered a resource available to the individual.

Each of the Claimants' Trusts contained provisions that *required* that *all* Trust assets *must* be paid out to the community spouse within his expected lifetime. (Appellants' Appendix, p 192a, § 2.2; p 204a, § 2.2; p 218a, § 2.2.) Thus, there *were*

"circumstances under which payment from the Trust could be made to or for the benefit of the individual (or the individual's spouse)" from all the assets in these Trusts. The statute only requires *any* circumstance—these Trusts guaranteed distributions. Because payments could be made to one of the spouses, they are considered resources of either spouse and are counted for the eligibility determination of the institutionalized spouse. 42 USC 1382b(e)(3)(B).

Section 1382b(e)'s definition of "asset" points in the same direction. It defines the term "asset" to include *any* income or resource of the individual (*or of the individual's spouse*), including—

i. any income excluded by section 1382a(b) of this title;
ii. any resource otherwise excluded by this section; and
iii. any other payment or property to which the individual (or of the individual's spouse) is entitled but does not receive or have access to because of action by the individual or spouse. [42 USC 1382b(e)(6)(C).]

The Hegadorn, Lollar, and Ford Trusts were irrevocable trusts, which required payment of all assets to the community spouse during his lifetime. Pursuant to 42 USC 1382b(e)(3)(B), the assets in each Trusts were countable assets to at least one of the spouses. And because the assets of both spouses are counted for the eligibility determination for long-term care for a medically needy institutionalized individual applying for benefits under 42 USC 1396r-5, the Department was correct in finding that due to the Trust assets, these applicants had too many assets to qualify.

Despite all of these provisions, the claimants take a single phrase in 42 USC 1396a(a)(10)(G) out of context from the 90-page statute to escape the section 1382b's

SSI trust requirements. (Claimants' Br, pp 24, 29.) But this phrase applies only to the optional categorically needy, 42 USC 1396a(a)(10)(A)(ii); 42 CFR 434.4, who meet-SSI eligibility standards but receive other public benefits rather than SSI payments that would automatically qualify them for Medicaid. *Lewis v Thompson*, 252 F3d 567, 570 (CA 2, 2001); *Herweg v Ray*, 455 US 265, 269 (1982).

The 42 USC 1396a(a)(10)(G) individuals are identified at 42 USC 1396a(a)(10)(A)(ii) and 42 CFR 434.4 and seek benefits under SSI eligibility criteria, i.e. that they have assets less than $2,000.00 and income below $750.00 per month. (Appellee's Appendix, p 18b.) The Hegadorns, Lollars, and Fords have far more assets or income than would allow them to qualify for SSI eligibility. They can qualify as medically needy only if their medical expenses are large enough to bring their assets down to the limits of the Medicaid long-term care program in 42 USC 1396r-5. This section—42 USC 1396a(a)(10)(A)(ii)—does *not* apply to them just because they are not receiving SSI payments.

b. These trusts are also countable under 42 USC 1396p.

The provisions of 42 USC 1396p(d) in the Medicaid Act also apply to these claimants' Trusts. 42 USC 1396a(a)(18) (requiring state plans to comply with § 1396p). Section 1396p(d)(1), like § 1382b(e)(1), provides the special treatment for special needs trusts, but those are not at issue here. And again, § 1396p(d)(2), like § 1382b(e)(2)(A), gives the general instructions for *all other* trusts that are owned or beneficial (equitable ownership) to *any* individual whose assets, including trust

assets, must be evaluated and counted for a Medicaid application. For long-term care, the institutionalized spouse and the community spouse are each "an individual" whose assets, including trust assets, must be reviewed and counted for the eligibility determination of the institutionalized spouse under 42 USC 1396r-5(a). Thus, the assets and resources of both individuals, the institutionalized spouse and the community spouse, must be counted.

42 USC 1396p(d)(2) provides that "*an* individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will: (i) The individual; (ii) The individual's spouse." In these consolidated cases, under this section *either* the institutionalized spouses or the community spouses may be considered an individual who has established a trust. And § 1396p(h)(1) confirms that both spouses' assets count:

> The term "assets," with respect to an individual, includes all income and resources of the individual *and of the individual's spouse*, including any income or resources which the individual *or such individual's spouse* is entitled to but does not receive because of action by the individual or such individual's spouse. [§ 1396p(h)(1)(A) (emphasis added).]

The term "resources" in § 1396p is defined by reference to its meaning in § 1382b (SSI Standards) and so means the countable assets after excluded assets are removed from the total. 42 USC 1396p(h)(5). (Excludable assets are not an issue in these cases, because even setting excludable assets aside, each couple still have excess countable assets.)

As in 42 USC 1382b(e)(2)(C), the provisions of 42 USC 1396p(d) apply *without regard* to any restrictions or limits on distributions from the Trusts. 42 USC 1396p(d)(2)(C).[1] Nevertheless, the claimants assert that the assets in the Trusts are unavailable because, "[n]o distributions from each trust could be made to the spouse beneficiary at the time the applications were filed." (Claimants' Br, p 8.)

This is simply incorrect. The Hegadorn Trust never had any limitations on timing of distributions, and the entire trust corpus could have been distributed to the beneficiary at any time. The assets in the Hegadorn Trust were always countable. And although the Ford Trust had a delayed initial distribution date, that expired well before the eligibility was determined, and the application date does *not* end the scrutiny of assets.

To create this fiction that the money in the Lollar and Ford Trusts was not available to them, the claimants delayed the initial distribution date out from the application date to a date they anticipated would be beyond the eligibility determination date. So, although a community spouse's assets are not counted again *after* an eligibility determination, 42 USC 1396r-5(d)(c)(2), until that occurred all assets are still under review for eligibility. And since the statute states that its provisions apply *without regard* to any restrictions on when or whether distributions can be made from the Trusts, this attempt to make assets unavailable

[1] If the Claimants had successfully made payments from the Trusts not payable to either spouse under any circumstance, all Trust assets would have been divestments for which divestment penalties must be served. 42 USC 1396p(d)(3)(B)(ii).

was not successful for any of the Trusts. 42 USC 1382b(e)(2)(C); 42 USC 1396p(d)(2)(C).

For § 1396p(d), *an* individual is considered to have established a trust if assets of that individual or of that individual's spouse were put into a trust. 42 USC 1396p(d)(2)(A). And for an individual who has established a trust,

> if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which . . . payment to the individual could be made shall be considered resources available to the individual. [§ 1396p(d)(3)(B).]

In these cases, we know that the community spouses (or their spouses) funded the Trusts and they are the beneficiaries of the Trusts and that by the terms of those Trusts, they are the individuals who *must* receive distributions in a manner calculated to distribute all assets to them within their life expectancy. (Appellants' Appendix, pp 192a-193a; pp 203a-204a; pp 216a-218a.)

Because there are circumstances in which they will receive payment from trust assets—indeed, that is the entire point of these Sole-Benefit-Of trusts—the trust assets are their resources (and therefore their assets). 42 USC 1396r-5(a); 42 USC 1396p(h)(1)(A). And since the assets of both spouses are counted for the eligibility determination of the institutionalized spouse, in each case these couples have too many assets to qualify for long-term care. 42 USC 1396r-5(d).

3. The statute uses the term "an individual" to apply broadly and uses narrower terms where it intends a restrictive meaning.

The claimants attempt to evade the provisions of the Treatment of Trusts in § 1396p by attempting to limit the application of the broad term "an individual" to

apply *only* to the applicant—that is, only to the institutionalized individual. (Appellant Br, § III.) This would exclude all evaluation of trust assets for any other individual including the community spouse. But this approach conflicts with the plain language of multiple provisions and would defeat the statutory purpose of determining who is truly needy. In this case, the assets of both individuals, the institutionalized spouse *and* the community spouse, count.

From the beginning of the Medicaid program, the assets of *both* spouses were counted for the eligibility of either spouse because "Congress intended to presume spousal support." *Gray Panthers*, 453 US at 44; *Blumer* 534 US at 479 ("spouses . . . bear financial responsibility for each other."); 42 USC 1396a(a)(17)(D). Section 1396r-5, under which these claimants seek benefits, requires the Department to use "the total of all of the couple's resources (whether owned jointly or separately)" in making the calculations in the statute. 42 USC 1396r-5(c)(1)(A). Yet, these claimants ask this Court to limit the plain language Congress used in the statute to make this evaluation impossible.

Section 1396p, as well as all the other statutes in the Medicaid Act and the SSI program, use the generic term "individual" and at times, the "individual's spouse." Section 1396p(h)(3) defines the term "institutionalized spouse," and where Congress intended to refer only to the institutionalized spouse, it did that.

Indeed, throughout the statute, when Congress intends to refer specifically to the applicant, a benefits recipient, or another identifiable person other than any "individual," it uses clear and specific language. For example, the first provision of

the statute refers to "any individual prior to his death on account of medical assistance paid or to be paid on his behalf." 42 USC 1396p(a)(1). This individual's circumstances are specifically identified and do not apply to an "applicant" or "institutionalized individual" only. Limiting the word "individual" to mean only "applicant" changes the meaning of the statute. And that is just the first line.

"Undefined statutory terms must be given their plain and ordinary meanings." *Halloran v Bhan*, 470 Mich 572, 578 (2004); *Donajkowski v Alpena Power Co*, 460 Mich 243, 248-249 (1999); *Koontz v Ameritech Service*s, *Inc,* 466 Mich 304, 312 (2002). The common usage of "*an* individual" is *not* an applicant for Medicaid benefits or an institutionalized individual—it is *any* individual, or *any* person. And, "[a] person's a person, no matter how small." Dr. Seuss, *Horton Meets a Who* (New York: Random House, 1954).

"Nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself." *Roberts,* 466 Mich at 63. This includes changing the meaning of the word "individual" in this statute to effectively eliminate trust review for many who need that trust review to qualify others.

The claimants' proposed interpretation would render Congress's intricate and interrelated plans for calculating resources of both spouses in provisions of 42 USC 1396r-5 (the MCCA spousal-impoverishment provisions) superfluous and unnecessary—anyone with assets would simply put them in a trust, and according to the claimants' interpretation, those assets would just disappear. Congress's

plans to appropriately allocate Medicaid benefits only to the needy individuals would be meaningless.

The United States Supreme Court has said, "we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Marx v Gen Revenue Corp*, 568 US 371, 386 (2013), quoting *Mackey v Lanier Collection Agency & Service, Inc*, 486 US 825, 837 (1988), but that is what the claimants' interpretation would do to the Medicaid Act.

Congress deliberately stiffened the requirements on trust assets to make them countable. It strains credulity to suggest that Congress would require the assets of both spouses to be counted and then would write the statute to make that impossible. Congress did not intend to allow couples to put any amount (even millions of dollars) in a trust that would not be considered for eligibility.

4. The Social Security Administration reads the statutes the way the Department does.

Michigan is one of 34 states that has an agreement with the Social Security Administration in which individuals who receive Supplemental Security Income receive Medicaid automatically. Https://secure.ssa.gov/poms.nsf/lnx/0501715020. SSI qualified individuals are categorically eligible and so do not need to apply separately for Medicaid benefits. The Administration has these agreements only with states that use SSI methodology to determine Medicaid eligibility. 42 USC 1383c; POMS SI 01715.020.

The Social Security Administration publishes the Program Operating Manual System (POMS) as guidance for Social Security and SSI claims. *Wash State Dep't of Soc & Health Servs v Guardianship Estate of Keffeler*, 537 US 371, 385 (2003). "While not the product of formal rulemaking, the POMS provide guidance to the courts and warrant respect." *Id*. See *Mackey v Dep't of Human Serv*, 289 Mich App 688, 703 (2010); *Bubnis v Apfel*, 150 F3d 177, 181 (CA 2, 1998) ("We have held that POMS guidelines are entitled to 'substantial deference' and will not be disturbed as long as they are reasonable and consistent with the statute."). Courts generally decline to use the POMS as reliable guidance only where "the plain language of the statute and its implementing regulation do not permit the construction contained within the manuals." *Oteze Fowlkes v Adamec*, 432 F3d 90, 96 (CA 2, 2005).

Because the POMS are the written policy for SSI determinations, and as a State with an agreement with the Social Security Administration, Michigan uses the *same* policy for Medicaid eligibility; the POMS are an accurate guide for that policy. And in the case of trust policy, POMS offer clear and comprehensible explanations. The applicable POMS states that trusts that may make payments to the spouse are countable:

POMS SI 01120.201 Trusts Established with the Assets of an Individual on or after 01/01/00

D. Policy on the treatment of trusts

2. Irrevocable trusts

a. General rule for irrevocable trusts

In determining whether an irrevocable trust established with the assets of an individual is a resource, we must consider how the trust

> can make payments. If the trustee can make any payments to or for the benefit of the individual *or individual's spouse*, the portion of the trust from which the trustee can make payments and that is attributable to the individual is a resource. (Emphasis provided.)

b. Circumstances under which payment can or cannot be made

> Take into consideration any restrictions on payments to determine whether the trustee can make payments to or for the benefit of the individual. Restrictions included in the trust may include use restrictions, exculpatory clauses, or limits on the trustee's discretion. However, if the trust can make a payment to or for the benefit of the individual under **any** circumstance, no matter how unlikely or distant in the future, the general rule in SI 01120.201D.2.a. in this section applies: the portion of the trust from which payment can be made to or for the benefit of the individual and that is attributable to the individual is a resource. (Emphasis in the original.)

In fact, the federal guidance provides an example that shows if there is any possibility (no matter how unlikely) that the spouse could get money from the trust, then the trust assets must be counted:

> A trust contains $50,000 that the trustee can pay to the beneficiary only in the event that he or she needs a heart transplant or on his or her 100th birthday. The entire $50,000 could be paid to the individual under these specific circumstances and therefore is considered a resource. [POMS SI 01120.201D c. (explaining "irrevocable trusts and their resource treatment").]

As these policy statements show, SSI policy standards for long-term care regard all the assets in the claimants' Trusts as countable for Medicaid eligibility.

Because individuals with assets had attempted to use trusts to shield those assets and still obtain benefits, Congress established the trust rules that (except for special needs trusts, which are not at issue here) trust assets *would be counted* as assets for the purpose of determining Medicaid eligibility." *Lewis,* 685 F3d at 332; (emphasis added). In short, the plain text of § 1382b(e) and § 1396p(d), in

combination with § 1396r-5 calculations for medically needy individuals with community spouses, makes clear that assets in these claimants' Trusts are countable and each of the couples had too many assets for the institutionalized spouses to qualify for benefits.

The Department requests that this Honorable Court affirm the opinion of the Michigan Court of Appeals.

II. The Department was obligated to immediately correct its trust evaluation process when it discovered that it conflicted with federal law, regulation, and policy and its own BEMs policy.

The claimants also argue that (1) that the Department changed its policy when it deemed all Sole-Benefit-Of trusts to be countable and (2) that even if this change was legally permissible, it could not be applied retroactively to them. They are wrong on both points. (Appellant Br, § IV.)

States that choose to participate in Medicaid and receive federal funding for their programs "must comply with federal requirements." *Rasmer*, 501 Mich at 25, quoting *Schweiker v Gray Panthers*, 453 US 34, 36 (1981). As just explained, federal law requires counting Sole-Benefit-Of trusts, and always has. When the Department discovered its error (namely, that one of its policies had been overlooked for a period of time), it could not deliberately continue to grant benefits in conflict with the law to applicants who did not qualify for them.

A. The Department must apply correct law and policy when it issues eligibility determinations.

No law or regulation or even the Department's own written policy (found in the Bridges Eligibility Manuals) had a change. Thus, there was no start date related to a change. If the Department finds that its policy is not in accord with federal law, it can change those policies and the timing of such changes are within that authority. *In re Kurzyniec Estate*, 207 Mich App 531, 538-39 (1994); *Tompkins v Dep't of Social Services,* 97 Mich App 218 (1980). That is what the Department would have done if its policy had been incompatible with federal law. And it would have the authority to set the time for the change. *Id.*

But the Department's written policy was not in conflict with § 1382b(e) or § 1396p(d). The detected error was not that the policy was wrong, but that part of the policy was not being followed. Specifically, workers had an omitted step in the trust evaluation process of certain types of trusts, and as a result, some countable trust assets were not correctly identified. When this omission was discovered, it was corrected. This is not a change in policy. A memo was circulated to workers reminding them of the *current correct* application of policy. (Appellants' Appendix, p 228a.) Any analyst who had made errors was expected to correctly process any trusts for eligibility determinations after that date. This was a prospective application of the correction, and it applied what the federal law had always been, since long before any of the claimants filed their applications. It is the claimants who are seeking a retroactive application of an error previously made by the Department. And they cannot show a rational purpose that would justify

retroactively granting them benefits they do not qualify for. *Pension Benefit Guaranty Corp v Gray*, 467 US 717, 730 (1984).

The Department may never deliberately incorrectly apply law or policy. To do so risks the loss of federal funding for the Michigan Medicaid program. 42 USC 1396c; 42 CFR 430.30. The Department's adherence to law and policy means consistency with the objectives of the program and helps to ensure that Medicaid benefits will be available in Michigan for those who truly need them. 42 CFR 435.901.

In any event, these claimants did not suffer any loss. They received the correct application of the law as it exists and has existed in all 50 states for all applicants. That they had patterned their conduct in reliance that the Department would continue a mistake does not give them a vested right to demand a different result for their trust assets. *Romein v Gen Motors Corp*, 436 Mich 515, 528 (1990).

Retroactivity necessarily involves a vested interest. See *City of Detroit v Walker*, 445 Mich 682, 698 (1994). "A vested right is an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice." *Gillette Commercial Operations N Am & Subsidiaries v Dep't of Treasury*, 312 Mich App 394 (2015). It must be "more than such a mere expectation" of an "anticipated continuance of the present general laws." *Walker*, 445 Mich at 699. For these claimants, it was the mere hope that the Department would fail to identify the countable assets in their Trusts. Because others had evaded the limits of the law, they wanted the same result. This is like demanding

the right to speed on a portion of highway because others got away with it. The Department's interpretation does not change the existing law, it merely ensures the law is being correctly applied to protect the limited Medicaid resources for the legitimately needy.

B. No notice was required to advise applicants for benefits that the Department would follow the law in making eligibility determinations.

As in *Rasmer*, these claimants assert that they were entitled to notice of any changes related to Medicaid benefits and that the failure to receive such notice was a constitutional due process violation. *Rasmer*, 501 Mich at 43-44. (Cl Br, pp 35-36.) Although the *Rasmer* Court agreed that "the United States Supreme Court has determined that statutory entitlements to benefits, such as those offered by the Medicaid program, also are appropriately treated as a form of 'property' protected by the Due Process Clause," *Id.* at 43, citing *Atkins v Parker*, 472 US 115, 128 (1985), these applicants never achieved such entitlement because they did not qualify for the benefits. Under law, regulation, and policy, they always had too many assets.

Due process of law requires only a fair hearing before an impartial decision maker and adequate notice of the hearing. *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 606 (2004). These claimants have already had three hearings and were sufficiently advised of all of them. See *Rasmer,* 501 Mich at 46-47.

And each of the claimants had statutory notice of the correct law and policy. "[W]e presume that the citizenry knows the law as long as [Congress] has enacted and published the law, and afforded the citizenry a reasonable opportunity to familiarize itself with its terms," *Rasmer*, 501 Mich at 45, quoting *Mudge v Macomb Co*, 458 Mich 87, 109 n 22 (1998), and *Texaco, Inc v Short*, 454 US 516, 532 (1982); accord *Kentwood v Sommerdyke Estate*, 458 Mich 642, 664 (1998), citing *Texaco*, 454 US at 530. "This is true even when the government makes changes in the law affecting property rights." *Rasmer*, 501 Mich at 45, citing *Texaco*, 454 US at 536. "And participants in a benefits program have no greater right to advance notice of a legislative change than do any other voters." *Id.,* quoting *Atkins,* 472 US at 130. Here again, these claimants, were not even participants because they were unable to qualify for benefits.

The claimants can demonstrate no injury because their complaint is that the Department followed the law, rather than make a mistake on their applications. They have no due process issues and no basis to demand personal notice to tell them that the Department would follow its own pre-existing policy without making mistakes. This failure to demonstrate harm defeats their claims. *Rasmer*, 501 Mich at 18, 45.

C. Claimants have presented no basis on which they should be granted benefits that they do not qualify for.

The statutory scheme at § 1396p(d) and § 1382b(e) is clear that it was not the intent of Congress to permit institutionalized spouses and their community spouses

to evade the strict requirements of the Medicaid program with the use of trusts. *Lewis,* 685 F3d at 332. It is axiomatic that Medicaid is intended for the needy, and thus it was unrealistic for individuals to think that they should keep wealth that they could pass on to their children by placing the burden on taxpayers, rather than contributing to the cost of their own care.

D. Failure to determine eligibility within 45 days of the time an application is submitted is not a basis to grant benefits to ineligible applicants.

The Court's phrasing of the second question in its order (referring to a 45-day delay) may suggest that the Department delayed in making its determinations so that it could apply its policy correction retroactively. But the Department made two of the three eligibility determinations within the normal 45-day window, and there is no evidence that the delay in the third determination was related in any way to the policy correction.

In any event, the issue of retroactively is not triggered until there is a property right (as opposed to pending application), so it cannot be triggered before the eligibility determination that establishes an entitlement in the first place.

1. The claimants' benefits determinations were timely.

For agencies that make determinations of benefits, "timeliness standards" are the maximum period of time in which every applicant is entitled to a determination of eligibility, subject to the certain exceptions. 42 CFR 435.912(1). And unless an exception applies, the determinations of eligibility for any applicant

may not exceed 45 days. 42 CFR 435.912(c)(3)(ii). An exception is permitted "when the agency cannot reach a decision because the applicant delays or fails to take a required action." 42 CFR 435.912(e)(1).

An agency, like the Department, *cannot* make a determination of benefits until it has received a completed application with all necessary information and verifications. Although the Department will assist in any way possible, it is always the applicant's burden to show that they are entitled to public benefits. *Lavine,* 424 US at 583.

The Lollar eligibility determination was issued 29 days after his application was submitted. It was therefore timely.

Dorothy Hegadorn submitted her application on April 24, 2014, with incomplete information. After requests from the Department, she returned the final verification documents on July 11, 2014, and her eligibility determination was issued on August 14, 2014. This was 34 days after her application was complete. Because the same regulation that imposes the 45-day requirement also exempts the Department from that requirement "[w]hen the agency cannot reach a decision because the applicant . . . delays or fails to take a required action"—here, submitting the necessary verification—this determination was also timely. 42 CFR 435.912(e)(1).

In these cases, the Department "acted upon [the applications] with reasonable promptness" and met the requirements of 42 CFR 435.912. For the Ford

application, the record is not clear about why the eligibility determination process took so long, but the Fords did not request a hearing on the matter.

The delay for the Fords might have resulted from the fact that it takes time for applicants to gather information, so the Department sometimes makes the eligibility determination more slowly, rather than immediately denying the application. This benefits determination can be complicated. Long-term care is for the medically needy, and they have assets and income that, until they incurred large medical bills, had been sufficient. Thus, the process can be far more ponderous and often creates difficulty for the individuals who are frequently the elderly or ill, and who, over the years, may have acquired scattered accounts and assets that they must now find, report, and verify. To complete the long-term care application process, a couple must report and verify *every* asset to demonstrate the total asset value for two different dates: (1) the first date continuous institutionalization and (2) the application date. For the separate divestment analysis, the couple must report and verify every gift or transfer for less than fair market value they made during the five years before the application date. 42 USC 1382b(c); 42 USC 1396p(c). Every asset for these three reviews must be reported and the amount verified for that date. All trusts of any kind, annuities, notes, and loans, are sent to the DHHS Office of Legal Affairs to be analyzed to determine if the contract establishes a divestment, if done for less than fair market value, or if it includes countable assets.

Many couples, even those represented by attorneys, have difficulty in locating and gathering the necessary information and documents. Although applications can be denied based on the applicant's failure to verify assets and divestments, the Department attempts to assist if possible and county workers are hesitant to deny applications due to "failure to verify" just to meet the standard of promptness, rather than wait for documentation.

E. The appropriate remedy for Department failure to act on a claim with reasonable promptness is to request a fair hearing.

For any applicant who believes that the Department has not acted upon his or her claim for medical benefits with reasonable promptness, Congress has provided the single remedy — a fair hearing from the Department. 42 USC 1396a(a)(3); 42 CFR 431.200(a); 42 CFR 431.220(a)(1). None of the Claimants in this case requested such a hearing, which would have resolved any issues caused by dilatoriness of the Department.

There is no law, regulation, or policy that requires or even suggests that long-term care should be granted to applicants who have not shown that they are entitled to those benefits. None of these Claimants were eligible for benefits under all law, regulation, and policy as it was at the time, had been previously, and still is. The timing of the applications related to the determinations is not significant because the Department applied correct law and policy for their eligibility determinations.

While Congress provided a remedy to address any delay in the processing of an application, 42 USC 1396a(a)(3), it did not take the extra step of providing a penalty against the Department if the delay was in fact established. So, it must be assumed that this is what Congress intended. A court "may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts*, 466 Mich at 63; *Empire Iron Mining Partnership v Orhanen,* 455 Mich 410, 421 (1997) (Courts should not "judicially legislate by adding language to the statute.").

CONCLUSION AND RELIEF REQUESTED

The Medicaid result these claimants received conforms to federal law and regulations, as well as federal SSI policy and Michigan Medicaid policy applicable to trusts for Medicaid eligibility. The Department correctly determined that, although there was no divestment for the transfers to the claimants' Trusts, all assets in the Trusts were countable for one of the individuals whose assets must be counted for the Medicaid eligibility determination.

Returning to the circuit court error would obliterate Congress's plan to provide care for the needy and would encourage Medicaid planners to write trusts that allow any individual, no matter how wealthy, to shift the entire burden of his nursing home expenses to taxpayers.

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