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STATE OF MICHIGAN
IN THE SUPREME COURT

MARY ANN HEGADORN,

Plaintiff-Appellant,

vs.

DEPARTMENT OF HUMAN SERVICES DIRECTOR,

Defendant-Appellee
_______________________________________/

Supreme Court No. 156132
Court of Appeals No. 329508
Livingston CC: 2014-028394-AA

ESTATE OF DOROTHY LOLLAR, by DEBORAH D TRIM, Personal Representative

Plaintiff-Appellant,

vs.

DEPARTMENT OF HUMAN SERVICES DIRECTOR,

Defendant-Appellee
_______________________________________/

Supreme Court No. 156133
Court of Appeals No. 329511
Livingston CC: 2014-028395-AA

ROSELYN FORD,

Plaintiff-Appellant,

vs.

DEPARTMENT OF HUMAN SERVICES DIRECTOR,

Defendant-Appellee
_______________________________________/

Supreme Court No. 156134
Court of Appeals No. 331242
Washtenaw CC: 15-000488-AA

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TABLE OF CONTENTS

INDEX OF AUTHORITIES. iv

STATEMENT OF CORPORATE DISCLOSURE. ix

INTERESTS OF AMICUS CURIAE. ix

RESTATEMENT OF QUESTIONS PRESENTED. x

STATEMENT OF THE CASE. 1

SUMMARY OF ARGUMENT. 2

ARGUMENT. 3

I. THE DEPARTMENT AND THE COURT OF APPEALS ERR IN ANALYZING A TRUST FOR THE SOLE BENEFIT OF THE COMMUNITY SPOUSE AS THOUGH IT WERE FOR THE BENEFIT OF THE APPLICANT.. 4

A. The Federal Statute Comprehensively Governs Trusts Created or Funded by a Medicaid Applicant or his Spouse.. 4

B. Subsection (d) treats a trust for a spouse differently than trust for the applicant; subsection (d)'s abrogation of state law to trusts for Medicaid applicants does not apply.. 11

1. The plain words of the statute rebut the idea that 42 U.S.C. 1396p(d)(3)(B)(i) applies to trusts for the community spouse.. 11

2. Closely related provisions underscore that Congress elected not to treat trusts for the benefit of the spouse as trusts for the benefit of the applicant.. 14

3. The exceptions for spousal trusts make no sense if (d) treats spousal trusts as trusts for the benefit of the applicant, rather than as transfers. 17

II. SPOUSAL IMPOVERISHMENT DIRECTS THAT THE SSI RULES APPLY. 19

III. THE SBO TRUST RULES ARE PART OF A SYSTEM DESIGNED TO PROTECT THE COMMUNITY SPOUSE WITHOUT CREATING VEHICLES FOR FAMILY WEALTH TRANSFER.. 20

CONCLUSION. 26

RECEIVED by MSC 7/2/2018 9:28:23 PM

RECEIVED by MSC 7/2/2018 9:28:23 PM

INDEX OF AUTHORITIES

CASES

Barnhart v. Sigmon Coal Co.
534 US 438, 440; 122 S Ct 941 (2002). 13

Chenot v. Bordeleau
561 A2d 891 (RI, 1989). 8

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.
467 US 837; 104 S Ct 2778; 81 L Ed2d (1984).. 7

First National Bank of Maryland v. Dep't. of Health and Mental Hygiene
284 Md 720; 399 A2d 891 (1979). 9

Gulick v. Department of Health and Rehabilitative Services
615 So 2d 192 (Fla 1st Dist App, 1993). 5

Hecker v. Stark County Social Service Board
527 NW2d 228; 1994 ND (1994). 8

Herweg v. Ray
455 US 265 (1982).. 15

Hughes v. McCarthy
734 F3d 473 (CA 6, 2013). 24

Keip v. Wis. Dept. of Health and Family Services
232 Wis 2d 380; 2000 WI App 13; 606 NW2d 543 (1999). 19,24

Kryzsko v. Ramsey County Social Services
607 NW2d 2379.. 8

Lang v. Commonwealth
515 PA 428; 528 A2d 1335 (1987). 8

Lewis v. Alexander
685 F3d 325 (CA 3, 2012). 9,22

People v. Peralta
489 Mich 174; 803 NW2d 140 (2011). 12,13

Pollak v. Department of Health and Rehabilitative Services
579 So 2d 786 (Fla 4th Dist App, 1991). 5

Russello v. United States
464 US 16; 104 S Ct 296 (1983). 12,13

Singleton v. Commonwealth of Kentucky
843 F3d 238 (CA 6, 2016). 24

Skidmore v. Swift & Co.
323 US 134, 140; 65 S Ct 161; 89 L Ed 124 (1944) 25,26

In the Matter of the Leona Carlisle Trust
498 NW2d 260 (Minn App, 1985). 8

Trust Company of Oklahoma v. Department Human Services
825 P2d 1295 (Okla, 1992). 5

United States v. Mead Corp.
533 US 218; 121 S Ct 2164; 150 L Ed 2d 292 (2001). 25

Young v. Ohio Dept. Of Human Services
76 Ohio St 3d 547; 668 NE2d 908 (1996). 8

STATUTES

42 USC 1382b(e)(3)(B). 14

42 USC 1392b. 14,15

42 USC 1396a(a)(10)(G). 15

42 USC 1396a(k)(since repealed). 5

42 USC 1396p(c). . . . . *passim*

RECEIVED by MSC 7/2/2018 9:28:23 PM

42 USC 1396p(c)(1)(A). 17

42 USC 1396p(c)(1)(F) and (G). 24

42 USC 1396p(c)(1)(G)((ii)(II). 24

42 USC 1396p(c)(1)(I)(i). 24

42 USC 1396p(c)(2)(A) and (B). 17

42 USC 1396p(c)(2)(B)(i) and (ii). 18

42 USC 1396p(c)(2)(B)(i)-(iv). 8,10,22,24

42 USC 1396p(c)(2)(B)(iii). 18

42 USC 1396p(c)(2)(C) and (D). 17

42 USC 1396p(c)(3)(A)(i). 21

42 USC 1396p(c)(3)(B)(i). 18,21

42 USC 1396p(c)(3)(B)(ii). 18

42 USC 1396p(d). . . . . *passim*

42 USC 1396p(d)(1). ix,11,13

42 USC 1396p(d)(2)(A)(i). 9,18

42 USC 1396p(d)(2)(A)(ii). 9,10,11

42 USC 1396p(d)(2)(D). 7

42 USC 1396p(d)(3)(A)(i). 7,13

42 USC 1396p(d)(3)(A)(iii). 8

42 USC 1396p(d)(3)(B)(i). ix,1,7,9,10,11,12,13,18

RECEIVED by MSC 7/2/2018 9:28:23 PM

42 USC 1396p(d)(3)(B)(i)(II). 7,13

42 USC 1396p(d)(3)(B)(ii). viii,8,13,18

42 USC 1396p(d)(4). 17

2 USC 1396p(d)(4)(A). 22

42 USC 1396p(d)(4)(A)-(C). 8,10

42 USC 1396p(d)(4)(B)(ii). 22

42 USC 1396p(d)(4)(C)(iv). 22

42 USC 1396p(h)(1). 10,11

42 USC 1396p(h)(1)(A). 9,11

42 USC 1396r-5(a)(1). 19

42 USC 1396r-5(a)(3)(A) and (B). 19

42 USC 1396r-5(c)(1)(I). 24

42 USC 1396r-5(c)(5). 20

42 USC 1396r-5(d)(1)(A). 24

42 USC 1396r-5(d)(3)(A). 24

42 USC 1396r-5(d)(5) and (f)(3. 23

42 USC 1396r-5(e)(2)(B) and (C). 23

OTHER AUTHORITIES

42 CFR 434.4 (2017). 15

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State Medicaid Manual, § 3258.11, p. 3-3-109.22. 25

RECEIVED by MSC 7/2/2018 9:28:23 PM

RECEIVED by MSC 7/2/2018 9:28:23 PM

Centers for Medicare and Medicaid Services (CMS),
State Medicaid Manual, § 3258.9B, p. 3-3-109.15. 22

Centers for Medicare and Medicaid Services (CMS),
State Medicaid Manual, § 3259.3, p. 3-3-109.26. 6

Ron M. Landsman, "*Special Needs Trusts*," in
A Practical Guide to Estate Planning, ch. 14, p. 197-198
(Jay Soled, ed., ABA 2012). 3

Omnibus Budget Reconciliation Act of 1993 (OBRA 1993),
Pub.L. 103-66, Title XIII, §§ 13611-13612, 107 Stat. 622-626
(August 10, 1993). 4,5,6,9,17

POMS SI 01730.048E.. 16

Transmittal 64. 6

Ira Stewart Wiesner, *OBRA '93 and Medicaid, Asset Transfers,
Trust Availability, and Estate Recovery Statutory Analysis in
Context*, 19 Nova Law Review, Volume 19, Issue 2 5

RECEIVED by MSC 7/2/2018 9:28:23 PM

STATEMENT OF CORPORATE DISCLOSURE

The National Academy of Elder Law Attorneys, Inc. (NAELA), is a non-profit membership organization without corporate stock and without a coorporate parent.

INTERESTS OF AMICUS CURIAE

NAELA is a professional organization of attorneys concerned with the rights of the elderly and disabled. It provides a professional center, including public interest advocacy, for attorneys whose work enhances the lives of people with special needs and of all people as they age.

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RESTATEMENT OF QUESTIONS PRESENTED

I. Does the statutory term "the individual" as used in 42 USC 1396p(d)(3)(B)(i) and (ii) mean the individual referenced in *id.* § 1396p(d)(1) whose application for Medicaid is governed by "the rules specified in paragraph (3)" [§ 1396p(d)(3)]?

The Administrative Law Judge in effect answered this question no.
The Circuit Court's answer: Yes
Court of Appeal's answer: No
Appellant's answer: Yes
Appellee's answer: No

II. Is treating a trust for the sole benefit of a community spouse under third party trust rules consistent with the general pattern of providing for the spouses of nursing home residents receiving Medicaid long term care benefits?

The Administrative Law Judge in effect answered this question no.
The Circuit Court in effect answered this question yes.
Court of Appeal in effect answered this question no.
Appellant in effect answered this question yes.
Appellee in effect answered this question no.

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STATEMENT OF THE CASE

This appeal involves three cases with a common fact pattern. A wife was admitted to a nursing home. Her husband then established and funded a trust for his sole benefit ("solely for the benefit of," or "SBO"), not to be counted for his wife's eligibility purposes, so that his remaining non-trust assets were less than the community spouse resource allowance (CSRA) in his case. Each then applied for Medicaid long term care benefits for the wife, the institutionalized spouse, and each application was denied by the local departments applying a new interpretation from the Department of Health and Human Services (the Department) of its manual paraphrasing the relevant federal statute. Two county circuit courts reversed the agency, but the Court of Appeals in turn reversed them and ruled in favor of the Department.

The Department argued that the community spouses' trusts were governed by the self-settled trust provision, subsection (3)(B)(i), of Section 1396p(d), which its guidelines paraphrase as providing "if there are any circumstances under which the assets can be [sic: distributed] to or for the benefit of *a* person, those are countable assets for the person" (emphasis added), not limited to the applicant, Brief for Department, *Hegadorn v. Department*, p. 17 (emphasis added). Given that premise, it could then argue logically that the spousal rules would require that these trust assets be considered in assessing eligibility.

The Court of Appeals accepted that argument, indeed did not even recognize that the applicants disagreed and that the theory was contested. "At the outset, it is undisputed that each trust at issue in this case was, in fact, a Medicaid trust. …" Decision at 7. It then quoted from the state Medicaid manual the provision drawn from the federal statute, but more broadly worded:

> 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,

applying 1396p(d) but not limited (as the statute is) to trusts for Medicaid applicants. With that premise, the court said the issue was to determine whether there were any such conditions allowing distribution.

SUMMARY OF ARGUMENT

The decision in this case turns entirely on the meaning of a federal statute. That statute, 42 U.S.C. § 1396p(d), exquisitely designed to frustrate Medicaid eligibility except where Congress intended, separates trusts by beneficiary and then provides clear and specific exceptions to its rules. A trust for the sole benefit of the spouse of Medicaid applicant, like the ones at issue here, is one of those exceptions.

The Department and the Court of Appeals come to a contrary result by analyzing a document that is not the statute and whose differences from the statute, if slight, are not trivial, like the difference between a horse chestnut and a chestnut

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horse. Recognizing that the Medicaid statute does not support its position, the Department struggles to bring its case within the SSI trust statute, again with similar but not identical language, and where the difference goes to the very issue in dispute. The statutory language flatly rejects the Department's approach.

Finally, both of the federal agencies with responsibility for administering these trust statutes – the Social Security Administration and the Centers for Medicare and Medicaid Services – come to the opposite conclusion from the Department in how they analyze the statutes that apply.

ARGUMENT

To call something a "Medicaid trust" is not the end of analysis but the beginning.[1] It tells you nothing about what rules to apply. There are many types of trusts created by and/or for Medicaid applicants. Some thwart eligibility; some advance eligibility; some have little direct effect on eligibility. Who funded the trust, who is the beneficiary, the standards that guides the trustee, all of these and other factors can lead to diametrically different results under one provision or another. Many trusts, like the ones in this case, are the specific subject of federal legislation. In looking at Congress' action in this area, proper application of the

[1] By contrast, the notion of special needs trust as one designed to coordinate public benefits and private wealth is reasonably well understood. Ron M. Landsman, "Special Needs Trusts," in A Practical Guide to Estate Planning, ch. 14 (Jay Soled, ed., ABA 2012); see pp. 197-198. But even there, there is a wide variety of such trusts, first- or third-party, individual or pooled, SSI-complaint or not, and so forth.

law requires both appreciating the context in which any provision sits, while paying due attention to the specific language Congress used.

I. THE DEPARTMENT AND THE COURT OF APPEALS ERR IN ANALYZING A TRUST FOR THE SOLE BENEFIT OF THE COMMUNITY SPOUSE AS THOUGH IT WERE FOR THE BENEFIT OF THE APPLICANT.

The decision in these cases turns on the meaning of subsection (d) of 42 USC 1396p, "Treatment of trust amounts," which thoroughly and definitively addresses trusts funded by Medicaid applicants or their spouses. The question that divides the parties is whether subsection (d) directs that these "sole benefit" trusts for the husbands be treated as the self-settled trust for the wives/Medicaid applicants, as the Department argues, or whether they are to be treated as transferred for the benefit of the husbands and so subject to the transfer rules, as the husbands/community spouses argue. There appears to be little dispute beyond that. If not treated as self-settled trusts of the Medicaid applicant wives, the trusts are subject to analysis under the SSI resource rules, which undergird the spousal rules and control what constitutes an asset of the spouse for Spousal Impoverishment (SI) purposes.

A. The Federal Statute Comprehensively Governs Trusts Created or Funded by a Medicaid Applicant or his Spouse.

One cannot overstate how determined Congress was to stop the abusive use of trusts by Medicaid applicants when it enacted the Omnibus Budget Reconciliation

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Act of 1993 (OBRA 1993).[2] A previous effort proved unsatisfactory.[3] State governors and Medicaid directors, supported by the long term care insurance industry, provided Congress with extensive descriptions of how "some non-poor elderly are using 'estate planning' techniques to shelter assets that otherwise would have kept them from becoming Medicaid eligible."[4] Many aspects of Medicaid planning were addressed, including the look-back date, how to calculate penalty periods, allocation of penalties involving married couples, treatment of jointly held assets, exemptions and affirmative defenses. But trusts were the focus, "the single most offensive Medicaid estate planning vehicle," whose use Congress "tried, in almost every manner short of criminalization, to inhibit ..." [5]

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[2] Pub.L. 103-66, Title XIII, §§ 13611-13612, 107 Stat. 622-626 (August 10, 1993).

[3] The "Medicaid qualifying trust" provision, 42 USC 1396a(k)(since repealed), provided that trust assets were available if the trustee had discretion to distribute them to the beneficiary. While one case allowed an applicant to avoid that rule by having distribution subject to consent of remainderman, *Pollak v. Department of Health and Rehabilitative Services*, 579 So 2d 786 (Fla 4th Dist App, 1991), most efforts to avoid the impact of the statute were usually rejected, e.g., *Gulick v. Department of Health and Rehabilitative Services*, 615 So 2d 192 (Fla 1st Dist App, 1993); but see *Trust Company of Oklahoma v. Department Human Services*, 825 P2d 1295 (Okla, 1992).

[4] National Governors Association, Proposed Policy on Medicaid Transfer of Assets (NGA, Tallahassee, Fla), July 1992, Preface, quoted in Ira Stewart Wiesner, *"OBRA '93 and Medicaid: Asset Transfers, Trust Availability, and Estate Recovery Statutory Analysis in Context,"* 19 Nova Law Review (No. 2), p. 679, 693 (1995).

[5] Wiesner, p. 703. It was not just those paying the bills, or the commercially interested insurance industry, who sought to limit the use of trusts in Medicaid planning. Advocates of Medicaid like Rep. Henry Waxman (D-CA), the primary sponsor of the initial administration bill, were sharply critical of those who sought to "tak[e] advantage of the Medicaid program ... to finance the transmission of wealth to their heirs at federal and state taxpayer expense." Harry Margolis, U.S. Rep. Waxman Explains Role in

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Notwithstanding, at the same time Congress authorized the use of trusts for spouses and certain others, and these spousal SBO trust fall squarely within that carefully crafted system. As we will show, the Department's arguments should be directed to Congress if it wants to undo what Congress has specifically authorized.

The key provision implementing this new "anti-trust" policy – subsection (d) of 42 USC 1396p – is a marvel of effective draftsmanship, exquisitely designed to frustrate those who would try to use trusts to their advantage when seeking Medicaid benefits. It not only renders all such trusts ineffectual, it makes their use counter-productive except for narrow exceptions, all of which are written to prevent abuse as vehicles for family wealth transfer.

These rules are comprehensive and all-encompassing. The trust provisions "apply to any individual who establishes a trust and who is an applicant for or recipient of Medicaid." Centers for Medicare and Medicaid Services (CMS), State Medicaid Manual, § 3259.3, p. 3-3-109.26. Provisions concerning purpose, trustee discretion, or limitations are all irrelevant. §1396p(d)(2)(D).

The question, in any case, is which aspect of subsection (d) applies. It covers all trusts created by a Medicaid applicant or her spouse, but it does not treat all such trusts the same way, and the biggest single determinant is who is the beneficiary of

Medicaid Changes," ElderLaw Report, July-Aug. 1993, p. 2, quoted in Wiesner, at 682 n. 8.

the trust. Congress divided trusts into two groups, both of which frustrate Medicaid eligibility, albeit it in opposite ways.

- ***Trusts for the Medicaid applicant*** – This comprises first-party trusts ***for*** the applicant, funded by the applicant or spouse. All assets in such trusts are deemed available "if there are any circumstances" allowing payment to or for the applicant. *Id.* §1396p(d)(3)(A)(i) and (3)(B)(i) ("available trusts"). These trusts thwart Medicaid eligibility by making all assets available as a matter of law. This is the provision which the Department would apply to these trusts.
- ***Trusts for anyone other than the applicant*** – These are trusts for others where the applicant can get no benefit. Where "no payment could under any circumstances be made to the individual" applicant, 42 USC 1396p(d)(3)(B)(ii)("unavailable trusts"), or distributions to or for others are made from otherwise available trusts, 42 USC 1396p(d)(3)(A)(iii) and (B)(i)(II), those are transfers. These trusts thwart eligibility by being treated as transfers subject to analysis and penalties under subsection (c). This is the provision the spouses of the Medicaid applicants say applies.

Each of these in turn has limited exceptions.

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- Self-settled trusts that meet certain requirements are exempt. These are the first-party special needs trusts, which are exempt from all of these rules if they have pay back and meet other requirements. 42 USC 1396p(d)(4)(A)-(C).
- Trusts for others for whom Congress provided additional protections. These are primarily spouses and disabled children, but can include other disabled individuals under age 65. 42 USC 1396p(c)(2)(B)(i)-(iv).

Under this general federal rule, irrevocable self-settled trusts of Medicaid applicants, if not exempt, are thus to be read – notwithstanding anything in the trust document or state law to the contrary – as though they were support trusts, which have historically been available for SSI and Medicaid purposes, *Kryzsko v. Ramsey County Social Services*, 607 NW2d 237; ND (2000), but not otherwise; *Lang v. Commonwealth*, 515 PA 428; 528 A2d 1335 (1987); *Chenot v. Bordeleau*, 561 A2d 891 (RI, 1989); *Hecker v. Stark County Social Service Board*, 527 NW2d 228; 1994 ND (1994); *In the Matter of the Leona Carlisle Trust*, 498 NW2d 260 (Minn App, 1985); *Young v. Ohio Dept. Of Human Services*, 76 Ohio St 3d 547; 668 NE2d 908 (1996); *First National Bank of Maryland v. Dep't. of Health and Mental Hygiene,* 284 Md 720; 399 A2d 891 (1979). This rule applies, in the case of an individual's application for Medicaid eligibility, if she or her spouse

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established or funded a trust, subsection (d)(2)(A)(i) and (ii); (h)(1)(A), where "there are any circumstances" allowing payment "to or for the benefit of the individual" who applied for Medicaid. Subsection (d)(3)(B)(i).

This rule, imposed by Congress on self-settled trusts for the benefit of the individual who applies for benefits, reflects Congress' choice to interfere, to a limited extent, in state trust law when federally funded Medicaid benefits are involved. In enacting OBRA 1993, Congress did not seek to establish a general body of federal trust law, *Lewis v. Alexander*, 685 F3d 325, 347 (CA 3, 2012), but it did intend to establish the rules to be applied to trusts in the Medicaid context. *Id.* at 343-344 and 347.

It bears repeating how comprehensive these provisions are. The earlier "Medicaid qualifying trust" statute attempted to define a specific group of trusts to be treated adversely. Subsequent litigation focused on whether any particular trust was within that group or not, and if not, the Medicaid planning applicant won.[6] Congress recognized the limits of that approach and, in OBRA 1993, went in the opposite direction, covering every dollar going into or coming out of any trust used by a Medicaid applicant. But for the exceptions – for certain self-settled trusts in subsection (d), for trusts for certain others in subsection (c) – no one who uses a trust can do better than just giving the assets away, and might do worse. And the

[6] The cases cited above, in footnote 3, are typical.

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exceptions all come with limits that protect Medicaid, either payback, (d)(4)(A)-(C), or "sole benefit" of the protected beneficiary, (c)(2)(B)(i)-(iv).

Congress chose its words with great care in reaching every trust created or funded by a person who later seeks Medicaid benefits, the applicant. It included as the self-settled trust of the applicant trusts all trusts for the applicant created *by* the spouse of the applicant, (d)(2)(A)(ii), and those funded *by* the spouse of the applicant, 42 USC 1396p(h)(1), and it subjected those trusts to its own unique availability rule.

What Congress did not do is apply these rules for self-settled trusts to trusts *for* the spouse of the applicant.

B. Subsection (d) treats a trust for a spouse differently than trust for the applicant; subsection (d)'s abrogation of state law to trusts for Medicaid applicants does not apply.

There are three compelling reasons why the self-settled trust rule of subsection (d)(3)(B)(i) does not apply to trusts for the spouse. First, the plain words of the statute say so. Second, an analogous statute was specifically drafted to achieve the result the Department seeks, which negates its argument that Congress achieved the same result without saying so. And third, reading the statute as a whole, as we must, the Department's reading renders other provisions nugatory, violating the most fundamental rules of statutory construction.

1. The plain words of the statute rebut the idea that 42 U.S.C. 1396p(d)(3)(B)(i) applies to trusts for the community spouse.

The statute by its plain terms applies to trusts funded by an applicant where the trustee may, under any possible circumstance, make payment to or for the benefit of the applicant. The community spouses who are the beneficiaries of these three trusts, however, are not applicants at this time.[7]

Subsection (d) provides that for "determining an individual's [Medicaid] eligibility," its provisions apply to trusts "established by such individual." Subsection (d)(1). The subsection is quite clear when the "individual" is to include the spouse. Thus, a trust with the individual's assets is "considered to [be] established" by the individual if established by "[t]he individual's spouse." 42 USC 1396p(d)(2)(A)(ii). Similarly, the term assets, "with respect to an individual[] includes all income and resources of the individual and of the individual's spouse ..." *Id.*, § 1396p(h)(1). This includes income and resources of either spouse that they do not receive because of action "by the individual or such individual's spouse." Id., § 1396p(h)(1) & (A).

By contrast, (d)(3)(B)(i) applies to trusts where payment may be made "to or for the benefit of *the* individual" who has applied for Medicaid benefits.

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[7] These trusts will thwart eligibility under (d)(3)(B)(i) if and when the husbands later apply for Medicaid benefits, as Congress intended. See pages 21-22 below.

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Subsection (d)(3)(B)(i)(emphasis added). Congress's not including the spouse here, when it did so elsewhere, requires the inference that it intended not to include the spouse. "Generally, when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion." *People v. Peralta*, 489 Mich 174, 184; 803 NW2d 140, 146 (2011). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 US 16, 23; 104 S Ct 296, 300 (1983) (citations omitted).

Before this Court, the Department argues for reading the word "individual" broadly to include the community spouse, claiming that "[l]imiting the word 'individual' to mean only 'applicant' changes the meaning of the statute.'" Brief on Appeal, p. 23 (Brief). It says "individual" is an "undefined statutory term," and that in

> common usage[,] "*an* individual" is *not* an applicant for Medicaid benefits or an institutionalized individual – it is *any* individual, or *any* person.

Brief at 23 (emphasis in original). It asserts that this is in contradistinction to places elsewhere in the statutes where Congress, "when [it] intends to refer specifically to the applicant, ... uses clear and specific language." *Id.*, p. 22.

But the relevant provisions of the statute do not refer to "*an* individual."

They all – and there are numerous ones – refer to "*the* individual," (d)(3)(A)(i), (d)(3)(B)(i), (d)(3)(B)(i)(II), and (d)(3)(B)(ii)(emphasis added), and *the* individual to which they refer is the one who applied for benefits and whose eligibility for Medicaid benefits is being determined based on (d)(3)(B)(i). *See* (d)(1).

It is difficult to see how Congress could have been more clear. When Congress meant to include the spouse, it said so. When discussing to whom trust payments may be made, it refers to "the individual," (d)(3)(B)(i) and (d)(3)(B)(ii), not to "an individual," as the Department misquotes it, nor to "the individual and his spouse," as the Department would have the Court read it. Congress knew how to include the spouse, but it limited the "any circumstances" test to trusts payable to or for "the individual" whose application for benefits was at issue. See *Peralta and Russelo*, above, p. 11. The omission of "and the spouse," when used elsewhere in the same statute, precludes reading the term in as the Department have would this Court do. This is "a general principle of statutory construction..." *Barnhart v. Sigmon Coal Co.*, 534 US.436, 440; 122 S Ct 941, 944 (2002), To claim that limiting "the individual" to the individual applicant "changes the meaning of the statute" is to argue that black is white.

2. Closely related provisions underscore that Congress elected not to treat trusts for the benefit of the spouse as trusts for the benefit of the applicant.

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When it enacted comparable trust provisions for the closely related Supplemental Security Income (SSI) program[8] six years later, Congress took a different approach, and that difference precludes a cavalier reading of the Medicaid trust provision as though it said the same thing.

The SSI trust statute provides that where a trust may "ma[k]e payment to or for the benefit of the individual *(or of the individual's spouse)*," the corpus from which such payment "could be made shall be considered a resource available to the individual." 42 USC 1382b(e)(3)(B) (emphasis added). There, Congress specifically chose to make the self-settled trust of the spouse a resource of the applicant. The SSI provision addresses what is available to the applicant, but it then brings in – as (d) does not – the trust for the benefit of the spouse of the applicant. Courts are not free to disregard such differences.

The Department would avoid the distinction by arguing that the SSI trust rules themselves apply in the face of a specific statutory provision that they do not. Brief at 18. The claim that this broadly worded trust exclusion, 42 USC 1396a(a)(10)(G), is limited to the "optional categorically needy" is utterly unsupported by legal authority. Eliminating intervening provisions, that sentence states in its entirety:

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[8] Eligibility for SSI and Medicaid are closely related. Except for those states that opted to freeze their Medicaid program in pre-SSI rules, so-called "209b States," SSI beneficiaries in all other states are entitled to community Medicaid benefits, so-called "SSI States." Michigan is an SSI State.

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> (a) A State plan for medical assistance must – (10) provide – (G) that, in applying eligibility criteria of the [SSI program] for purposes of determining eligibility for medical assistance under the State plan of an individual who is not receiving [SSI], the State will disregard the provisions of subsections (c) and (e) of section 1392b of this title...

The statute and cases cited by the Department identify or elaborate on the meaning of categorical eligibility; they do not address the trust provisions or their application; indeed, *Herweg v. Ray*, 455 US 265 (1982), could hardly address the SSI trust provisions since it was decided 17 years before they were enacted; the CFR reference, 42 CFR 434.4 (2017), concerns State plan requirements for fiscal agents.

To the contrary, the general rule is that the specific controls over the general, which is in essence what 42 USC 1396a(a)(10)(G) does, making clear that the later-enacted SSI trust rules govern SSI eligibility, while the Medicaid-specific trust rules continue to govern Medicaid eligibility. While the SSI rules generally control for determination of Medicaid in SSI States like Michigan, this provision excludes the SSI trust rules in favor of the more specific Medicaid trust rules.

There is in the statute not a hint of a whisper of a clue that it is limited as the Department theorizes.

Perhaps the most serious problem with the Department's position is that while the Department thinks the SSI and Medicaid trust rules are identical, SSI does not. Most states, including Michigan, have agreements with SSI for the

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federal agency to determine Medicaid eligibility for individuals who qualify for SSI (so-called "1634 states"). The POMS, which the Department says "warrant respect" (Brief at 25), directs its staff *not* to apply the SSI trust rules to Medicaid determinations. People may qualify for SSI, but they may still be affected by the different Medicaid trust provisions. POMS SI 01730.048E. Where there is a trust, "follow the procedures in SI 01.120.200 to determine if the trust is countable *for SSI purposes*." POMS SI 01730.048E, first unnumbered paragraph (emphasis added). These are the trust provisions that the Department says it should apply *because* it is a 1634 State. But SSI says the opposite (*id.*, emphasis in original):

> If the individual resides in a section 1634 State, do **not** attempt to determine whether the trust is countable or excludable for Medicaid purposes. ... Existence of a Medicaid trust will result in a referral of the case to the Medicaid State agency for a Medicaid eligibility decision.

For 1634 States, SSI is tasked with making the Medicaid eligibility decision. It *does* determine whether a trust satisfies the SSI requirements, but it does not determine whether the trust, under different rules, satisfies the Medicaid trust requirements; it leaves that to the State agency. If the standards were identical, as the Department claims, that referral would be pointless.[9]

[9] There are other reasons to make the referral to the State agency, e.g., determining hardship waiver, which is referred to separately *Id.*

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For the same reasons, the reliance on the Social Security Administration's POMS, Brief at 24-27, is misplaced; they concern a different statute with different, indeed polar opposite, terms.

3. The exceptions for spousal trusts make no sense if (d) treats spousal trusts as trusts for the benefit of the applicant, rather than as transfers.

The broad reach of the OBRA 1993 trust rules – touching every single trust created or funded by Medicaid applicants – required that Congress also address which trusts would be exempt from those broad, comprehensive rules. Self-settled trusts were all treated as available – thus thwarting Medicaid eligibility – or exempt under subsection (d)(4). Trusts for others were all treated as transfers and referred to subsection (c), where its provisions come into play; it has its own distinct set of exemptions, aside from four affirmative defenses.[10] There are eight exemptions, four related to the applicant's home and four others. Subsection (c)(2)(A) and (B). Of the latter four, the first two are for the spouse; the latter two are for the applicant's disabled child or for a trust for other disabled individuals under age 65.

[10] These are (1) the individual intended to get fair market value, (2) the assets were transferred exclusively for a reason other than Medicaid eligibility, (3) the assets were returned, or (4) imposition of a penalty would impose undue hardship. Subsections (c)(2)(C) and (D). There is also the fundamental question under (c)(1)(A) of whether the applicant received fair market value.

Thus, where a Medicaid applicant establishes a trust for her disabled child and can herself get no benefit under it, (d)(3)(B)(ii) applies and refers the case to subsection (c), which exempts it from the penalty provision. (c)(2)(B)(iii). Similarly, a transfer for the community spouse, from which the applicant can get no benefit, similarly falls within (d)(3)(B)(ii), which refers it to (c), which exempts from penalty transfers by either spouse "to another for the sole benefit of the individual's spouse." (c)(2)(B)(i) and (ii).

In arguing that (c)(2)(B)(i) and (ii) are irrelevant, because they concern transfers, and not availability, Brief at 13-14, the Department inadvertently concedes the point because the significance of the transfer exception is the opposite of what the Department claims. If putting money into a trust for a spouse is a transfer, as the Department concedes it is, then it must be analyzed as a transfer under (c)(3)(B)(ii) and not as the self-settled trust of the applicant under (c)(3)(B)(i). To be sure, Congress could have chosen, as it did with the SSI trust rules, to specifically apply an "any circumstance" test to trusts for spouses as well as applicants. But it did not do so. The Department cannot show otherwise.

The Department and the Court of Appeals relied on application of the "any circumstances" test of (d)(3)(B)(i) to find that the SBO trust assets were available to the community spouse. The foregoing shows that that was error. The question to be answered, then, is what standard does apply. Fortunately, the law in this area is clear and indeed there is little dispute between the parties.

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II. SPOUSAL IMPOVERISHMENT DIRECTS THAT THE SSI RULES APPLY.

Having applied subsection (d) to render all trust assets available, the Court of Appeals then noted that the Spousal Impoverishment or SI rules plainly bring into the eligibility analysis the available assets of the community spouse. It is the premise that is wrong, as explained in Part I, so that the next question is what rules do apply in determining whether the SBO trust assets are an available resource.

Plaintiffs-Appellants correctly set out the SSI rules that show that the SBO trust assets are not available to the community spouse. Appellants' Brief on Appeal, pp. 18-21. The Spousal Impoverishment rules specifically incorporated existing rules, whether SSI or 209b, concerning what constituted resources or "the methodology and standards for determining and evaluating ... resources." 42 USC 1396r-5(a)(3)(A) and (B). Since existing underlying rules about assessing resources and availability are specifically incorporated into the Spousal Impoverishment rules, they are not inconsistent with the terms of SI. *Cf.*, 42 USC 1396r-5(a)(1). *Keip v. Wis. Dept. of Health and Family Services*, 232 Wis 2d 380, 397-398; 2000 WI App 13; 606 NW2d 543 (1999). This means that the existing SSI or the relevant pre-SSI rules in 209b states apply. This is underscored by the provision which adopts the SSI exclusion rules, overruling any contrary provision in 209b states. 42 USC 1396r-5(c)(5).

The Court of Appeals' reference to the general Spousal Impoverishment provisions on attribution at the time of application and the definitions, Decision at 10-11, elides the underlying, more fundamental rule, that the references to "resources" is controlled by other provisions drawn from SSI law. That oversight is error.

The Department agrees that the underlying SSI rules control in the spousal context, Department's Brief on Appeal, p. 12.

III. THE SBO TRUST RULES ARE PART OF A SYSTEM DESIGNED TO PROTECT THE COMMUNITY SPOUSE WITHOUT CREATING VEHICLES FOR FAMILY WEALTH TRANSFER.

The larger policy question standing behind this analysis is who are the intended beneficiaries of the Medicaid long-term care program. The Court of Appeals posits that the program is only for low-income individuals, in contradistinction to "wealthier individuals" taking advantage of loopholes to get government assistance for costs "they otherwise could afford." Decision at 2.

This is not an accurate dichotomy. For twenty years now, Congress has been adapting the Medicaid program to accommodate the needs and interests of decidedly non-poor spouses of individuals who need long term care. The provisions at issue here are part of that system, and their use as sought by the appellants' community spouses is well within the range of options Congress has offered to community spouses. Congress' goal has always been to protect the

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community spouse, not to create a mechanism for family wealth transfer, and that is exactly what SBO spousal trusts are designed to do. This is part of the larger pattern, allowing transfers for disabled children and some others without loss of Medicaid long term care, provided that the trust meets the statutory requirements set by Congress designed to assure that the funds are used as intended. All of the trust provisions, including those at issue here, are designed to that end.

That is to say, one spouse may qualify for Medicaid, preserving assets for the community spouse. But if that community spouse himself later requires long term care, all of these mechanisms for protecting him then have the opposite effect of guaranteeing that he will not also qualify for benefits, or at least won't be able to pass significant assets onto the next generation (unless disabled). Everything said above to show the SBO trust is not the trust of the applicant when it is for the community spouse merely underscores that it is the trust of the Medicaid applicant if and when that spouse latter needs institutional care himself. "Sole benefit" guarantees that it is available for his or her care, forestalling Medicaid eligibility until those resources are spent. That is of course the very purpose of subsection (d) in making such trusts available as a matter of law. Subsection (c)(3)(A)(i) and (B)(i).

All of the excepted or exempt trusts serve to secure benefits for a protected individual, while limiting the benefits to the intended beneficiary, not other family

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members.

The special needs trusts are probably the best known of the trusts authorized by Congress. All three of the self-settled first party special needs trusts require payback, that is, before a dollar is distributed to family members or other heirs or legatees, the Medicaid program must be reimbursed for all expenditures to the full extent of remaining trust assets at the death of the beneficiary. Subsections (d)(4)(A), (B)(ii) and (C)(iv). But even here, the provision goes beyond that, allowing pooled trusts to retain funds for their own charitable purposes in lieu of pay back. Subsection (d)(4)(C)(iv). *Lewis*, 685 F3d 325.

Similarly, the pattern for third party trusts is that they be for the sole benefit of the other person. This is true of trusts for disabled children of an applicant, for any other disabled person under age 65, and for the spouse of the Medicaid long term care applicant. Subsection (c)(2)(B)(i)-(iv). Part of the gloss on "sole benefit" is that the assets be distributed to the beneficiary on an actuarially sound basis. CMS, State Medicaid Manual, § 3258.9B, p. 3-3-109.15. That term was used in the annuity context to separate out those annuities that might be a hidden mechanism for getting assets to someone other than the beneficiary, *e.g.,* to children. An 85-year-old man might do this, for example, by purchasing a "life plus twenty years term certain"[11] annuity, when his life expectancy is only about 5.2 years. *Id.* p. 3-3-

[11] A life or "twenty years certain" annuity would pay for the period of the person's life but not less than 20 years. Where the term is longer than the person's life expectancy, the monthly payments are of course much less than they would be if the annuity were life

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109.17 (Life Expectancy Tables – Male). That term, as used by CMS, means no longer than the life expectancy of the beneficiary. A transfer occurs if the person "is not reasonably expected to live longer than the guarantee period of the annuity," because they will not get back fair market value for what they paid out. That is when a transfer occurs, not otherwise. *Id.*, p. 3-3-109.16.

While the Department focuses on the limitations of the Spousal Impoverishment provisions, that section hardly defines the last word in what Congress authorized to protect community spouses. Indeed, SI itself includes provisions unheard of in other public benefits programs, *e.g.,* obtaining individual, case-specific judicial determinations allowing community spouses to retain or get additional income or resources beyond the standard allowances. 42 USC 1396r-5(d)(5)(income) and (f)(3)(resources). There are less expensive administrative mechanisms for obtaining like results. Section 1396r-5(e)(2)(B) and (C).

There are yet other ways in which SI is far more generous than the Department acknowledges. For example, there is no limit on the income of a community spouse before his or her institutionalized spouse can qualify. Many states disregard the retirement plans of community spouses, which reflects accumulated pre-tax income, and which was specifically required in *Keip v. Wis. Dept. of Health and Family Services*, above. While the institutionalized spouse's

only, or life with a shorter term certain. The reduced current benefits are the mechanism by which the transfer is made to contingent beneficiaries.

income must go toward cost of care, and may be reduced for low income community spouses, 42 USC 1396r-5(d)(3)(A), it is never increased because of how high the community spouse's income is. *See* § 1396r-5(d)(1)(A), providing deductions from her income, but not additions, in determining the institutionalized spouse's cost of care.

Moreover, in the wake of Spousal Impoverishment, yet other ways to protect community spouses were developed with Congress' acquiescence or approval. Community spouses are allowed to annuitize what would otherwise be excess resources, converting them to income for their sole use. 42 USC 1396p(c)(1)(F) and (G). *Hughes v. McCarthy*, 734 F3d 473 (CA 6, 2013). They are also allowed to convert assets into income streams through promissory notes. *Id.*, § 1396r-5(c)(1)(I).

The common feature of all of these provisions is either pay back (in the case of special needs trusts), sole benefit, or actuarial soundness (in the case of annuities, but also including pay back), *Singleton v. Commonwealth of Kentucky*, 843 F3d 238, 240 (CA 6, 2016). *See* subsection (c)(I)(G)((ii)(II), (c)(1)(I)(i), (c)(2)(B)(i)-(iv).

CMS has acknowledged that SBO trusts like the ones at issue in this case are appropriate and *may* affect eligibility, as they were intended to. In discussing

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transfers and the Spousal Impoverishment rules in its State Medicaid Manual, CMS noted that unlimited transfers between spouses

> should have little effect on the eligibility determination ... because resources belonging to both spouses are combined in determining eligibility for the institutionalized spouse [and] are still [to] be considered available to the institutionalized spouse for eligibility purposes.

Id., § 3258.11, p. 3-3-109.22. But, it said, this is not so with "transfers to a third party for the sole benefit of the spouse." Those do affect eligibility, "because resources may potentially be placed beyond the reach of either spouse and thus not be counted for eligibility purposes." *Id.*, p. 3-3-109.23. This goal, condoned by CMS, is achieved where the "sole benefit" requirement is "fully met":

> This definition is fairly restrictive, in that it requires that any funds transferred be spent for the benefit of the spouse within a time-frame actuarially commensurate with the spouse's life expectancy. *Id.*

The decision of the Court of Appeals, and the approach of the Department, requires that such trusts not affect eligibility. Indeed, that is the policy argument the Department makes. But it is flatly contradicted by CMS, in a considered document which is, as to these provisions, clear, consistent, and true to the statutory terms, without introducing inconsistences or odd results, and thus entitled to deference under the *Skidmore* doctrine, *United States v.Mead Corp., 533 US*

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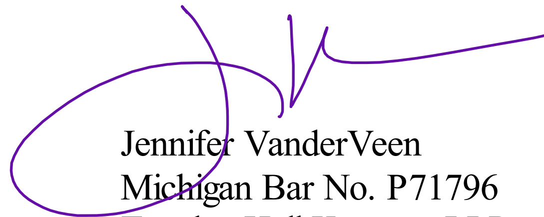
218, 228; 121 S Ct 2164; 150 L Ed 2d 292(2001) (citations omitted) (quoting *Skidmore v. Swift & Co.,* 323 US 134, 140; 65 S Ct 161; 89 L Ed 124 (1944), because it has "the power to persuade, if lacking power to control."

CONCLUSION

The decision in this case turns on the application of 42 USC 1396p(d) to the sole benefit trusts here. The Department's dissatisfaction with the results amounts to a policy argument with Congress about how generous Medicaid should be with married couples. The plain and clear language of the statute, as reasonably construed by the responsible federal agency, is flatly inconsistent with the Department's position and the decision of the Court of Appeals. That position should be rejected and the decision of the Court of Appeals reversed.

Respectfully submitted,



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