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IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 20-0534

ESTATE OF MARILYN SCHEIDECKER,

Petitioner and Appellant,

v.

MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES,

Respondent and Appellee.

MOTION FOR LEAVE TO APPEAR AS *AMICUS CURAE*

On Appeal from the First Judicial District Court, Lewis and Clark County,
the Honorable Michael McMahon, Presiding

The National Academy of Elder Law Attorneys, Inc. ("NAELA"), a not-for-profit organization with over 4,500 attorney members in all fifty states, and Montana Elder Law, Inc., a Montana law firm with offices in Missoula and Kalispell, and

whose managing attorney, Stefan Kolis, is a NAELA member, move for leave to file an *amicus* brief in this matter pursuant to Mont. R. App. P. 12(7).

I. Statement of Interest.

The mission of NAELA is to establish its members as the premier providers of legal advocacy, guidance and services to enhance the lives of people with special needs and people as they age. *Amicus* briefs filed by NAELA have been acknowledged by several courts for their helpful analysis. *See, e.g., DeCambre v. Brookline Housing Auth.*, 826 F.3d 1, 15 n. 17 (1st Cir. 2016); *Saccone v. Board of Trustees*, 219 N.J. 369, 377-378, 98 A.3d 1158, 1163 (2014); *Hughes v. McCarthy*, 734 F.3d 473, 480-481 (6th Cir. 2013) [agreeing with position of NAELA]. NAELA has previously appeared as *amicus curiae* in this court in *Timm v. Montana Dep't of Public Health & Human Servs.*, 2008 MT 126, 343 Mont. 11, 184 P.3d 994.

Based on the fact that the Uniform Trust Code (“UTC”) permits an irrevocable trust to be terminated with the consent of all the beneficiaries and the trustee, the Court below found the Appellant’s “trust’s corpus/principal was a countable asset for purposes of [Appellant’s] Medicaid eligibility under the ‘any circumstances test.’” (Judicial Review Petition Order, p. 2.) But, as the court below held, the trust is irrevocable and the Appellant cannot access the principal of the trust; therefore, the assets of the trust are unavailable to Appellant. If the decision of the Court below is affirmed, many people with special needs or limited means will be denied Medicaid

benefits that Congress intended them to receive.

II. Why an *Amicus* Brief is Desirable.

The Medicaid program is a federal and state partnership, so while states have some options in the design of their Medicaid plans, most issues are controlled or preempted by federal law. Likewise, while the law of trusts is largely state based, subject to minor state-by-state variations, the UTC, including Montana's version, is intended to be uniform among the states, as its name reflects. The *amici* bring both a national perspective to the issues in this case, through NAELA, as well as a local perspective, through Montana Elder Law, Inc., about how residents of Montana will have their estate planning affected by this court's decision.

III. Party whose Position *Amici* Support.

The named *amici* support the position of the Appellant.

IV. Proposed Date for Filing *Amici's* Brief.

Counsel asks the Court to set the deadline for filing the *amicus* brief on the same day the Appellant's brief is due, which is February 5, 2021. A proposed order granting leave for *amici* to participate is submitted concurrently.

V. Opposing Party's Consent.

Counsel for the Department of Public Health and Human Services conditioned the Department's consent on: (1) *amici* filing their brief concurrently with the filing of the Appellant's brief, and (2) *amici* agreeing to refrain from addressing some of

the arguments the Appellant could raise on appeal. The *amici* will file their brief on or before the deadline for Appellant's brief, but are not willing to restrict the arguments they can make. Therefore, *amici* understand the Department does not consent to this motion.

DATED this 19th day of January, 2021.

/s/ T. Thomas Singer
T. Thomas Singer
Axilon Law Group, PLLC
Attorneys for Amici Applicants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed in double-spaced, proportionately-spaced, 14-point, Times New Roman Typeface, and the word count calculated by Microsoft Word is 563 words, excluding the certificate of compliance and the certificate of service.

DATED this 19th day of January, 2021.

/s/ T. Thomas Singer
T. Thomas Singer

CERTIFICATE OF SERVICE

I, T. Thomas Singer, hereby certify that I have served true and accurate copies of the foregoing Motion - Amicus to the following on 01-19-2021:

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Electronically signed by Connie Johnson on behalf of T. Thomas Singer
Dated: 01-19-2021