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.

BRIEF OF AMICUS CURIAE NATIONAL ACADEMY OF ELDER LAW ATTORNEYS, INC., AND MONTANA ELDER LAW, INC.

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

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The National Academy of Elder Law Attorneys ("NAELA") and Montana Elder Law, Inc., appreciate the Court granting leave to file this *amicus* brief and the opportunity to explain why controlling federal law and the Uniform Trust Code ("UTC") mandate reversing the decision of the District Court.

I. CONGRESS THROUGH STATUTE ESTABLISHED PUBLIC POLICY; NEITHER THE DEFENDANT NOR THE COURTS CAN CHANGE THAT POLICY

For middle class Montanans facing the high costs of long-term care, the medical assistance ("Medicaid") program is essential to their financial well-being. The average annual cost of nursing home care in Montana last year, according to a survey conducted by Genworth, a long-term care insurance company, was $91,980.[1] The cost of nursing home care in Montana is also computed by the Montana Department of Public Health & Human Services (the "Department"). It puts the cost at $252.18 per day, or $92,045.70 per year.[2]

At those prices, long-term care in Montana costs almost three times the annual per capita income of Montana residents and nearly twice the median household income of Montanans aged 65 years and over.[3]

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[1] *Cost of Care Survey*, Genworth, https://www.genworth.com/aging-and-you/finances/cost-of-care.html (search for "Montana", then select "Annual").
[2] *Combined Medicaid 404-2: Penalty Periods for Asset Transfer*, MT Dept. Health Human Servs. (July 1, 2020), https://dphhs.mt.gov/Portals/85/hcsd/documents/mamanual/CMA404-2July012020.pdf?ver=2020-10-13-143407-860.
[3] *See*, *Income Statistics for Montana Zip Codes*, Income By Zip Code, https://www.incomebyzipcode.com/montana (last visited January 28, 2021).

Given the disparity between the price of long-term care and the incomes of most Montanans, it is easy to understand why courts have concluded that "reasonable and competent" people "prefer that the costs of … care be paid by the State…."[4] Thus, Medicaid planning, like tax planning, is now common. Of course, Medicaid planning is "carefully defined and circumscribed" by federal and state law, but, as the Supreme Court of New Jersey said, "[b]y its actions, Congress has set the public policy for this program and although some might choose a different course, the law has not."[5] Echoing that point, two federal courts of appeal said, "Policy rationales cannot prevail over the text of a statute."[6] The Minnesota Supreme Court made the same point just last month – even as it "acknowledge[d] that Medicaid is intended to be the payor of last resort" and "that trust instruments should not be permitted to shield available resources of an individual" – by upholding a special needs trust on the grounds that the Court "will not disregard a statute's clear language to pursue the spirit of the law."[7]

These rulings are not unprecedented. Over 20 years ago, New York courts explained their reason for endorsing a transfer that had been made for purposes of Medicaid planning in this way:

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[4] *See, e.g., In re Keri*, 181 N.J. 50, 63, 853 A.2d 909, 916 (2004).
[5] *Id.*, 181 N.J. at 69, 853 A.2d at 920.
[6] *Hughes v. McCarthy*, 734 F.3d 473, 489 (6th Cir. 2013), (*quoted with approval in Zahner v. Sec'y Pa. Dep't of Human Servs*., 802 F.3d 497, 509 (3d Cir. 2015))..
[7] *Pfoser v. Harpstead*, No. A19-0853, 2021 Minn. LEXIS 4, at *25 (Jan. 20, 2021) (quoting *Lee v. Fresenius Med. Care, Inc*., 741 N.W.2d 117, 123 (Minn. 2007)).

> [N]o agency of the government has any right to complain about the fact that middle class people confronted with desperate circumstances choose voluntarily to inflict poverty upon themselves when it is the government itself which has established the rule that poverty is a prerequisite to the receipt of government assistance in the defraying of the costs of ruinously expensive, but absolutely essential, medical treatment.[8]

The principle these courts endorse was also articulated by Judge Learned Hand shortly after World War II in the context of tax law:

> Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands….[9]

Courts enforce the legislative purpose of all statutes – including the laws governing Medicaid – as that purpose is expressed in the applicable statutory provisions, not upon what others say the ultimate purpose of the law is.[10]

II. THE FEDERAL STATUTE AND GUIDANCE FOCUS ON THE TERMS OF THE TRUST AS WRITTEN; COURTS MUST DO THE SAME

Because "the Medicaid Act is a 'complex and comprehensive system of asset-counting rules[]' in which 'Congress rigorously dictates what assets shall

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[8] *In re Shah*, 257 A.D.2d 275, 282-283, 694 N.Y.S.2d 82 (App. Div. 2nd Dept. 1999), *affirmed and quoted with approval in Helen Hayes Hosp. v. DeBuono (In re Shah)*, 95 N.Y.2d 148, 163, 711 N.Y.S.2d 824, 832, 733 N.E.2d 1093, 1101 (2000).
[9] *Commissioner v. Newman*, 159 F.2d 848, 850-851 (2d Cir. 1947) (Hand, Learned, dissenting).
[10] *James v. Richman*, 547 F.3d 214, 219 (3d Cir. 2008); *see also Mertz v. Houstoun*, 155 F. Supp. 2d 415, 427-28 (E.D. Pa. 2001); *Mackey v. Dep't of Human Servs.*, 289 Mich. App. 688, 698, 808 N.W.2d 484, 489 (2010).

count and what assets shall not count toward Medicaid eligibility,'" states are preempted from imposing any additional limitations.[11]

Under 42 U.S.C. § 1396p(d)(3)(B), when a trust agreement precludes any "payment" being made to the grantor (as the trust in this case does), then the trust corpus is not counted in determining the grantor's Medicaid eligibility.[12] The term "payment" is not defined in the Medicaid Act; however, it is defined by the United States Center for Medicare and Medicaid Services ("CMS") – the federal agency that administers the Medicaid program – in its form State Medicaid Manual ("SMM").[13] Courts rely on the SMM to fill gaps Congress left in the Medicaid law; they apply "*Skidmore* deference" because the SMM "constitute[s] a body of experience and informed judgement to which courts and litigants may properly resort."[14]

The SMM defines a "payment" from a trust as "any disbursal from the corpus of the trust … which benefits the party receiving [the disbursal]."[15] Applying that definition here, it is not possible for a "payment" to be made to the grantor in this case both because the trust specifically bars the grantor from

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[11] *Zahner*, 802 F.3d at 515.
[12] 42 U.S.C. § 1396p(d)(3)(B)(ii).
[13] The SMM can be found at https://www.cms.gov/regulations-and-guidance/guidance/manuals/paper-based-manuals-items/cms021927.
[14] *See*, *e.g.*, *Wong v. Doar*, 571 F.3d 247, 250 (2d Cir. 2009) (*quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 164 (1944)).
[15] SMM § 3259.1.A.8.

"receiving" any disbursal, and because the party receiving the benefit of any disbursal will be a beneficiary, rather than the grantor. Thus, the definition of "payment" in the SMM doubly confirms that money paid to a beneficiary of this trust is not a "payment to the individual" for purposes of determining the grantor's eligibility for Medicaid.[16]

III. THE DISTRICT COURT ERRED IN HOLDING THE TRUST COULD BE TERMINATED AND THE TRUST ASSETS WERE AVALIABLE TO THE GRANTOR

The District Court made three key holdings, two of which are unassailable. First, the lower court held that plaintiff's trust is irrevocable.[17] Second, the District Court held that the terms of the trust prohibit distributions of principal to the grantor. As the Court said:

> Here, the SM Trust contains specific language that precludes the trustee from using the trust's corpus for Marilyn's benefit.
>
> > The Trustee has no power to invade principal for the Settlor's benefit and shall not do so under any circumstance.[18]

Third, incongruously, and immediately after finding that the Trustee could not distribute any principal to the grantor, the lower court held:

> Notwithstanding, however, in the event the SM Trust was terminated in accordance with Mont. Code Ann. § 72-38-

[16] 42 U.S.C. § 1396p(d)(3)(B)(i).
[17] Judicial Review Petition Order at 9 (*see,* Exhibit H to Appellant's Opening Brief).
[18] *Id.* at 15-16 (*quoting* SM Trust, Art. IV., B.).

> 411(1) or (2), the trustee would have been required [to] "distribute the trust property as agreed by the beneficiaries." Mont. Code Ann. § 72-38-411(4) (2019). In that event, the beneficiaries **could** thereafter, individually, jointly, directly, or indirectly, give Marilyn this trust property for her benefit.[19]

Stated otherwise, the District Court assumed that people with an adverse interest to the grantor – the beneficiaries and the trustee of the trust who, incidentally, owed an unalterable duty to act in good faith and in the interests of the beneficiaries[20] – might agree amongst themselves to terminate the irrevocable trust, and then, after the trust was terminated, the beneficiaries could agree to distribute the assets of the former trust to the grantor.

It is always possible to imagine scenarios where trustees or beneficiaries of a trust ignore their own interests or violate their statutory duties, but a "speculative possibility of collusion" that is not supported by evidence does not "render[a trust] 'available' to the grantor[] for the purpose of determining Medicaid eligibility."[21] The grantor's eligibility for Medicaid under the governing federal law is determined by looking at the terms of the trust.[22] The District Court focused,

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[19] *Id.* at 16 (emphasis in original).
[20] The UTC mandates that a trustee act in good faith and in accordance with the purpose of the trust; these obligations are so fundamental to the UTC that the terms of the trust cannot alter the trustee's obligations in this respect. § 72-38-103(21), MCA (defining "terms of trust"); § 72-38-105(2)(b), MCA.
[21] *In re Estate of Braiterman*, 169 N.H. 217, 229, 145 A.3d 682, 692 (2016) (citing *Verdow ex rel. Meyer v. Sutkowy*, 209 F.R.D. 309, 310 (N.D.N.Y. 2002) and *Spetz v. New York State Dept. of Health*, 190 Misc. 2d 297, 737 N.Y.S.2d 524 (Sup. Ct. 2002)).
[22] 42 U.S.C. § 1396p(d)(3) and SMM § 3259.

instead, on what the trustee and all the beneficiaries could hypothetically agree to do despite the terms of the trust.

If the imaginary facts to be assumed are that adverse parties will return the assets to the grantor (something those adverse parties have no obligation to do and no interest in doing since, by definition, they hold an "adverse" interest), then for purposes of the Medicaid Act, the corpus of every irrevocable trust would always be available to the grantor, regardless of terms of the trust to the contrary.

Following the District Court's decision to its logical extreme, no effective asset transfer could ever occur under the Medicaid Act. For example, looking at an outright transfer to a child made more than five years before the transferor applies for Medicaid (which would not otherwise disqualify the applicant for benefits[23]), a court applying the District Court's analysis would imagine the child deciding to return the transferred assets and deny Medicaid benefits to the transferor. Decisions like that would nullify some of the most analyzed and litigated sections of the Medicaid Act.[24]

CONCLUSION

If the District Court's decision were the law, then unknown numbers of Montanans who have relied on the specific language of Montana's UTC and 42

[23] 42 U.S.C. § 1396p(c)(1).
[24] 42 U.S.C. § 1396p(c), (d).

U.S.C. § 1396p(d)(3)(B)(ii) will be denied the care they need to sustain their lives.

This Court is obligated to read statutes in their entirety, giving meaning to all parts and neither inserting nor omitting language therein.[25] Based on that elementary principle of law, the District Court's decision must be reversed.

DATED this 4th day of February, 2021.

/s/ T. Thomas Singer
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[25] § 1-2-101, MCA; *Nelson v. State*, 2008 MT 336, ¶ 26, 346 Mont. 206, 195 P.3d 293.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed in double spaced, proportionately-spaced, 14-point, Times New Roman Typeface, and the word count calculated by Microsoft Word is 1,867 words, excluding the table of contents, table of authorities, certificate of service and certificate of compliance.

DATED this 4th day of February, 2021.

/s/ T. Thomas Singer
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CERTIFICATE OF SERVICE

I, T. Thomas Singer, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 02-04-2021:

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