No. 102649-8

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 56806-3-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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ESTATE OF DAVID LYNCH,

Appellant,

v.

WASHINGTON HEALTH CARE AUTHORITY,

Respondent.

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# PETITION FOR REVIEW

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Attorney for Appellant:

Gregory A. McBroom, WSBA No. 33133
Matthew J. Smith, WSBA No. 33309
Smith McBroom, PLLC
16400 Southcenter Pkwy, Ste. 210
Seattle, WA 98188
Phone: (206) 778-5128
Greg@SmithMcBroom.com

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## I. IDENTITY OF PETITIONER

The Estate of David Lynch (Estate) petitions for review of the Court decision referenced below.

## II. COURT OF APPEALS DECISION

Division II Court of Appeals (the "Court") procedurally dismissed petitioner's APA judicial review action for lack of standing because David Lynch died during the pendency of appellate review.[1] *Estate of David Lynch v. Washington Health Care Authority*, No. 56806-3-II (Nov. 14, 2023) (Slip op.), attached as Appendix A. The dismissal left undecided the important legal issue of whether HCA's Medicaid third-party resource rule violates established law by automatically taking monetary benefits provided by the U.S. Department of Veteran

[1] "The doctrine of standing generally assesses whether that interest exists at the outset, while the doctrine of mootness considers whether it exists throughout the proceedings." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021). "The parties do not dispute that Lynch, while alive, had standing." Slip op. at 15. But the Court's unsettled opinion takes away standing upon death of the aggrieved party. Slip op. at 18.

Affairs (VA) to poverty-stricken, ill, and disabled wartime veterans *specifically allocated for medical expenses and services* ***not covered by Medicaid***.

## III. ISSUES PRESENTED FOR REVIEW

Whether the Court's termination of APA standing because of Mr. Lynch death during appellate review creates an unjust barrier to judicial review by (1) rejecting the express authority of estates to step into the shoes of decedents for APA causes of action; (2) deciding injury-in-fact terminates upon death; (3) denying redressability by rejecting restitution to return monies wrongfully taken; (4) defining "zone of interests" in terms of how Medicaid does not benefit estates but instead provides for agency recovery against estates; and (5) failing to determine whether the case involves a matter of continuing and substantial public interest necessitating review?

## IV. STATEMENT OF THE CASE

In 2019, David Lynch (Lynch) was a retired military veteran with disabilities and medical conditions. Administrative

Record (AR) 2-3. He qualified for 158 hours of in-home care per month (7.5 hours per weekday) funded by Medicaid. *Id*. Those services did not cover all his medical needs. *Id*. His unmet needs were dental implants (estimated cost $57,000) and weekend in-home care. *Id*. Medicaid would not pay for either. *Id*.

Lynch applied for increased pension benefits from the U.S. Department of Veteran Affairs (VA) to pay for implants and weekend care. *Id*. VA awarded him $765.00 in Aid and Attendance (AA) benefits for weekend care and $46.00 in Unusual Medical Expenses (UME) benefits for implants, for a total of $811 per month. *Id*.

In December 2019, the Health Care Authority (HCA) inexplicably decided Lynch's VA benefits were "third-party resources" (TPR) under WAC 182-513-1340(2), increasing Lynch's monthly Medicaid cost from $105 to $916 to maintain his existing hours of weekday care. AR 2–4. This prevented Lynch from obtaining weekend care or dental implants. *Id*.; Verbatim Report of Proceedings 50–57.

In January 2020, Lynch requested a due process hearing to contest the agency's designation of UME and AA as TPR. AR 4. A hearing was conducted on May 28, 2020. AR 1. In July 2020, an administrative law judge (ALJ) found in Lynch's favor, reversing the agency's TPR determination ***based on established case law***. AR 243-45. HCA appealed. AR 468. In September 2020, a review judge from the HCA Board of Appeals reversed the ALJ and upheld the agency action. AR 13. Deciding "the WAC has provisions which determine the outcome of this issue," the review judge refused to consider case law on whether HCA's actions were authorized by Medicaid law. AR 9.

In October 2020, Lynch petitioned for judicial review of the agency order and sought to invalidate the agency rule. Clerk's Papers (CP) 9-12. Lynch challenged the designation of AA and UME benefits as TPR, contending WAC 182-513-1340(2) violates Medicaid law by creating an irrebuttable presumption that AA and UME benefits are always considered TPR for Medicaid-provided services. *Id*.

In March 2022, the superior court certified the case to the Court for direct review under RCW 34.05.518, the State Administrative Procedure Act (APA). CP 121-22.

Lynch died on June 23, 2022. He is survived by two adult children, Brian and Jennifer. Brian was appointed personal representative of his father's estate. The Estate was substituted as a party by order under RAP 3.2. Both sides filed briefs on the merits. HCA then asserted the Estate lacks standing to seek judicial review because of Mr. Lynch's death. Agreeing with HCA, the Court dismissed the appeal for lack of standing under RCW 34.05.530.

## V. ARGUMENT FOR REVIEW

### A. Under Washington Law, the Estate Stepped into Mr. Lynch's shoes in the APA Cause of Action Regarding HCA's Per Se Rule Requiring Payment of His VA Benefits Intended for Non-Medicaid Services.

This case presents a critical issue of first impression in Washington: whether a pending APA judicial review of an administrative agency's final decision and a challenge to the validity of an agency rule is extinguished by the death of the

aggrieved party or whether Lynch's estate has standing to continue the appeal. Under the Court's rationale, the death of a challenging party leads to the automatic dismissal under the Washington APA's standing requirements. This does not comport with Washington or other jurisdictions.

The Estate has a "direct interest" in the APA judicial review. *Cf. Hays Elliott Props., LLC v. Horner*, 25 Wn. App. 2d 868, 874, 528 P.3d 827 (2023) (because estate steps into shoes of decedent, personal representative has "direct interest" in action executed by decedent's guardian); *In re Estate of Hatfield*, 46 Wn. App. 247, 251, 730 P.2d 696 (1986) (same). This is particularly true where substitution occurs while an appeal is pending. *Colburn v. Spokane City Club*, 20 Wn.2d 412, 413-14, 147 P.2d 504 (1944) (in action surviving death of suing party, substitution of executrix of estate for appealing party who dies during appeal "does not affect the appeal taken, but the proper representative of the decedent may be made a party and the appeal may proceed as in other cases" because executrix "stands

in the shoes of the decedent"); *see* RAP 3.2 (appellate court will substitute personal representative for deceased on review).

But the Court ruled the Estate does not have standing because (1) no Washington case has decided that an estate has standing when an aggrieved party dies during an APA appeal, and (2) the personal representative's general powers to "step into the shoes of the decedent" under RCW 11.48 do not extend to continuing an APA judicial review involving Medicaid cost recovery. *See* Appx. A, Slip op. at 15-16 & n. 10.

But Washington case law is replete with affirmations of the power of an estate to substitute for the deceased. *Vovos v. Grant*, 87 Wn.2d 697, 700, 555 P.2d 1343 (1976) ("An interest in the subject matter of the litigation sufficient to confer standing may be established either in a personal or a representative capacity."); *Harden v. State Bank of Goldendale*, 118 Wash. 234, 237, 203 P. 16 (1922); *In re Cannon's Estate*, 18 Wash. 101, 106, 50 P. 1021 (1897); *Ostling v. City of Bainbridge Island*, 872 F. Supp. 2d 1117, 1125 (W.D. Wash. 2012). In fact, no Washington

case has held the personal representative of a deceased party ***does not*** have standing to pursue an APA judicial review.

The Court overlooks the *source* of a personal representative's powers to continue a statutory cause of action under the APA: the survival statute, RCW 4.20.046(1). It states:

> ***All causes of action*** by a person or persons against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter, whether such actions arise on contract or otherwise[.]

RCW 4.20.046(1) (emphasis and bold added).

The survival statute allows recovery of "economic losses on behalf of the decedent's estate…in such amounts as determined by a trier of fact to be just under all the circumstances of the case." RCW 4.20.046(2).

> Washington's general survival statute, RCW 4.20.046(1), does not create a separate claim for the decedent's survivors, but merely preserves the causes of action a person could have maintained had he or she not died…the survival statute allows the decedent's existing causes of action to survive and continue as an asset of his estate.

*Woodall v. Avalon Care Ctr.-Fed. Way, LLC*, 155 Wn. App. 919,

931, 231 P.3d 1252 (2010); *Barker v. Mora*, 52 Wn. App. 825, 830, 764 P.2d 1014 (1988) ("When [RCW 4.20.046 - .050] are combined, the result is that ***no actions abate*** upon the death of a party.") (emphasis added); *Crawford v. Franklin*, No. 37902-3-II, 2009 Wash. App. LEXIS 1472, *8 (Wash. Ct. App. June 16, 2009) (unpublished) (reversing agency decision in favor of estate because decedent had rights to tax exemption before her death that created survivorship rights for a cause of action).

"Cause of action" is "[a] legal theory of a lawsuit" or "[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person." *Estate of Dormaier v. Columbia Basin Anesthesia, P.L.L.C.*, 177 Wn. App. 828, 854 n. 9, 313 P.3d 431 (2013) (quoting Black's Law Dictionary (9th ed. 2009)). "A cause of action is a thing with value. It is owned and can be conveyed." *Legal v. Monroe Sch. Dist.*, 4 Wn. App. 2d 776, 423 P.3d 915, 920 n.5 (2018).

In referring to causes of action preserved, the word "all"

in RCW 4.20.046 "means all" with no exceptions. *Wilson v. Grant*, 162 Wn. App. 731, 739, 258 P.3d 689 (2011). Since RCW 4.20.046 is a remedial statute that is liberally construed, Lynch's "statutory cause of action" to pursue judicial review survived his death. *Cavazos v. Franklin*, 73 Wn. App. 116, 118, 867 P.2d 674 (1994); *cf. Sierra Club v. Trump*, 977 F.3d 853, 876 (9th Cir. 2020) ("States have a cause of action under the APA"); *Blue Spirits Distilling, LLC v. Wash. State Liquor & Cannabis Bd.*, 15 Wn. App. 2d 779, 792, 478 P.3d 153 (2020) (referring to "bring[ing] a claim under the APA" and "filing an APA claim"); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1326-27 (D.C. Cir. 1996) (referring to a "statutory cause of action" under Sec. 702 of federal APA).

Washington's Supreme Court has also looked to what courts in other jurisdictions have done to preserve the "right to appeal" when a party dies during litigation. *See, e.g., State v. Webb*, 167 Wn.2d 470, 476-78, 219 P.3d 695 (2009) (reviewing other state decisions and applying RAP 3.2(a) broadly to allow

heirs to substitute for deceased criminal defendant); *Fox v. City of Bellingham*, 197 Wn.2d 379, 388, 482 P.3d 897 (2021) (in case of first impression, Court adopted "expansive approach" in ruling brother is close relative of decedent who has standing to sue for tortious interference).

Many other jurisdictions recognize a decedent's estate has standing to seek judicial review of Medicaid decisions by state agencies. *See, e.g., Diversicare of Winfield, LLC v. Ala. Medicaid Agency*, No. CL-2022-0714, 2023 Ala. Civ. App. LEXIS 45, at *7 (Ala. Ct. App. Apr. 14, 2023) ("the personal representative could seek judicial review following Steele's death."); *Turner v. Md. Dep't of Health*, 226 A.3d 419, 434-436 (Md. App. 2020) (personal representative has standing to petition for judicial review from denial of long-term care Medicaid benefits); *Freese v. Dep't of Soc. Servs.*, 169 A.3d 237, 248 (Conn. App. 2017) (personal representatives of deceased Medicaid applicants have standing to seek judicial review of agency's denial of benefits because "decedents…suffered

personal legal injuries as a result of the defendant's denials ….”); *Carespring Healthcare Mgmt., LLC v. Dungey*, No. 1:16-cv-1051, 2018 U.S. Dist. LEXIS 34460, at *34 (S.D. Ohio Mar. 2, 2018) (nursing homes have authority under survival statute to file action against Medicaid agency for unlawful calculation of patient liability for Medicaid benefits arising from claims of deceased beneficiaries); *In re Gorney Estate*, 886 N.W.2d 894, 902 (Mich. App. 2016) (personal representative who step into shoes of decedent has standing to claim Medicaid agency violated decedents’ due process rights); *Joyner v. North Carolina Dep’t of Health*, 715 S.E.2d 498 (N.C. App. 2011) (Estate has standing under APA to seek judicial review of agency decision terminating long-term benefits of deceased beneficiary).

### B. The Court Erred in Applying an Approach that Circumscribes Access to the Courts Upon Death, Inconsistent with the Legislative Intent of the APA.

“[S]tanding refers to a party’s right to bring a legal claim and is not intended to be a ‘high bar’ to overcome.” *Maslonka v. Pub. Util. Dist. No. 1 of Pend Oreille Cnty.*, 1 Wn.3d 815, 827,

533 P.3d 400 (2023). "Washington APA provisions on standing are still consistent with general standing law." *City of Burlington v. Wash. State Liquor Control Bd.*, 187 Wn. App. 853, 873 n. 16, 351 P.3d 875 (2015) (*quoting Washington Administrative Law Practice Manual* § 10.02[C] (WSBA 2008)).

The State APA is remedial legislation that should be liberally construed in conformity with court cases interpreting the federal APA and similar acts of other states. *See* RCW 34.05.001 ("The legislature intends…to provide greater public and legislative access to administrative decision making… courts should interpret provisions of this chapter consistently with decisions of other courts interpreting similar provisions of other states, the federal government, and model acts."); *Navajo Nation v. U.S. Dep't of the Interior*, 819 F.3d 1084, 1090 (9th Cir. 2016) ("The [APA] creates a comprehensive remedial scheme for those allegedly harmed by agency action."); *W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1122 (9th Cir. 2009) ("The APA expressly declares itself to be a comprehensive remedial

scheme" addressing "a person suffering legal wrong because of agency action [] or adversely affected or aggrieved by agency action….") (quoting 5 U.S.C. § 702); *Paramount Farms, Inc. v. Morton*, 527 F.2d 1301, 1303 (7th Cir. 1975) ("Section 702 of the APA has been liberally construed…").

APA standing is a three-pronged test: injury-in-fact, zone of interests, and redressability. Slip op. at 13-14; *City of Burlington*, 187 Wn. App. at 862; *see also* RCW 34.05.530. "These three conditions are derived from federal case law." *Seattle Bldg. & Const. Trades Council v. Apprent. & Training Council*, 129 Wn.2d 787, 793, 920 P.2d 581 (1996).

**1. The Estate Meets the Injury-in-Fact Test.**

"Washington courts interpret the injury-in-fact test consistently with federal case law." *Snohomish Cnty. Pub. Transp. Benefit Area v. Wash. Pub. Emp't Relations Comm'n*, 173 Wn. App. 504, 513, 294 P.3d 803 (2013). The injury-in-fact requirement is meant to ensure plaintiff has "a personal stake in the outcome of the controversy." *Susan B. Anthony List v.*

*Driehaus*, 573 U.S. 149, 158 (2014) (citation omitted). A "personal stake in the outcome of the controversy…assure[s] that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." *Jeckle v. Crotty*, 120 Wn. App. 374, 382, 85 P.3d 931 (2004).

> the [injury-in-fact] requirement serves to filter out those with merely generalized grievances who are bringing suit to vindicate an interest common to the entire public. The injury-in-fact requirement is very generous to claimants, demanding only that the claimant allege some specific, identifiable trifle of injury. It is not Mount Everest.
> …
> Typically, a plaintiff's allegations of financial harm will easily satisfy each of these components, as financial harm is a classic and paradigmatic form of injury in fact. Indeed, we have explained that where a plaintiff alleges financial harm, standing is often assumed without discussion.

*Cottrell v. Alcon Labs.*, 874 F.3d 154, 162-63 (3rd Cir. 2017); *City of Burlington*, 187 Wn. App. at 869 ("The injury in fact test is not meant to be a demanding requirement. Typically, if a litigant can show a potential injury is real, that injury is sufficient for standing."). Indirect harm to the Estate does not preclude standing. *See Warth v. Seldin*, 422 U.S. 490, 504-05 (1975).

The Estate's claim of economic loss is sufficient to establish injury in fact. *See Seattle Bldg.*, 129 Wn.2d at 795 (courts "routinely recogniz[e] probable economic injury resulting from agency actions," even when the injury "may not be immediate"); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210 (1995) (plaintiff "of course" had standing to seek damages for alleged past economic injury); *Cottrell*, 874 F.3d at 168 ("financial harm has already occurred, it is not merely possible, or even probable"); *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 55 (2d Cir. 2016) ("Any monetary loss suffered by the plaintiff satisfies [the injury-in-fact] element; '[e]ven a small financial loss' suffices."); *Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011) (overpayment claim "is a quintessential injury-in-fact").

**2. Blending Standing with the Merits, the Court Uses an Unprincipled Approach to Find the Estate Failed to State a Claim.**

The Court decided that the Estate cannot pass the "injury-in-fact" test because it lost no money from the agency's decision,

and it must establish its own independent injury separate from Lynch. Slip op. at 15. According to the Court, the Estate could not stand in the shoes of Lynch and claim any derivative injury-in-fact. Slip op. at 16-18. His claimed injury (HCA's wrongful taking of VA monetary benefits) was nullified upon his death. Slip op. at 16-18. This was error.

The Court mistakenly assumed UME and AA benefits are protected only if they are reimbursement for out-of-pocket expenses actually incurred. Slip op. at 16-18. Federal law defines UME to include estimated prospective expenses, even when they are not incurred out-of-pocket expenses. *See* 38 C.F.R. § 3.262(l) ("An estimate based on a clear and reasonable expectation that unusual medical expenditure will be realized may be accepted for the purpose of authorizing prospective payments of benefits subject to necessary adjustment in the award upon receipt of an amended estimate or after the end of the calendar year upon receipt of an income questionnaire."); Slip op. at 12, citing 38 C.F.R. § 3.262(l); *see Cordall v. State*, 96 Wn. App. 415, 425,

980 P.2d 253 (1999) ("A&A is not reimbursement for out-of-pocket medical expenses…it is a monetary allowance that the veteran may use to purchase care from another, such as full time nursing care…."). The Court's reference to *Edwards v. Griepentrog,* (Slip op. at 12) is misplaced as it clearly states, "a state cannot require a recipient to assign his or her UME check to the state." 804 F. Supp. 1310, 1312 (D. Nev. 1992).

Standing is generally measured at the outset of judicial review. *See, e.g., Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 187 (4th Cir. 2018) ("the standing inquiry asks whether a plaintiff had the requisite stake in the outcome of a case 'at the outset of the litigation.'"). Lynch had standing to seek judicial review of the adverse administrative decision in October 2020 when he petitioned for review. *See* 42 C.F.R. § 431.245 (applicant or beneficiary has "right to…seek judicial review, to the extent that either is available to him").

"[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal[.]" *Warth,*

422 U.S. at 500; *Cottrell*, 874 F.3d at 165-66 ("This logic flips the standing inquiry inside out, morphing it into a test of the legal validity of the plaintiffs' claims of unlawful conduct. But…a valid claim for relief is not a prerequisite for standing."); *Cottrell*, 874 F.3d at 164. ("whether a plaintiff has alleged an invasion of a 'legally protected interest' does not hinge on whether the conduct alleged to violate a statute does, as a matter of law, violate the statute.").

The Court erroneously decided HCA's action in 2022 (over two years after the challenged agency action) to increase care hours on weekends demonstrated no injury in fact. Slip op. at 7 n.6 & 17-18. It likewise committed error by claiming Lynch failed to request an ETR (Exception to Rule), wholly overlooking the agency's specific refusal to even pursue an ETR in January 2020 (all ETR requests must be initiated by the agency, not the care recipient). AR 386 & 459; Slip op. at 4. Lynch also had no right to appeal ETR decisions. *See* WAC 182-501-0160(6). But HCA's specific refusal to provide weekend care between

December 2019 and March 2022, while forcing Lynch to pay his AA benefits towards participation costs, violated Medicaid third-party liability rules. *See Cordall*, 96 Wn. App. at 425 (State can recover VA benefits only "[w]hen Medicaid provides the aid and attendance").

In addressing standing, the Court made every presumption against the validity of Lynch's claims, and decided all inferences in favor of HCA. The Court cited *Edwards v. Griepentrog* while ignoring its essential holding: expressly barring all states within the Ninth Circuit from applying Medicaid "third party liability" in any way that requires a VA UME recipient to pay its VA UME benefits toward his or her Medicaid care or expenses. *Edwards*, 804 F. Supp. at 1314.

The Court' dismissive was improper. *See Fox*, 197 Wn.2d at 382 (when standing raised as a defense, court must "construe the alleged facts and inferences in the light most favorable to the nonmoving party"); *Cottrell,* 874 F.3 at 165 (same); *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (same)

### 3. The Court Erred in Applying the Redressability Test and Disregarded Restitution as an Available Form of Relief.

Applying an unconventional test, the Court decided "a remedy in form of refund would not redress Lynch's inability to purchase additional care since he is now deceased" and also shows "the Estate cannot establish injury-in-fact." Slip op. at 18. In other words, even if HCA violated Medicaid law in taking Lynch's VA monetary benefits, the Court indicated it could fashion no remedy to address the malfeasance. This was error.

The "burden to demonstrate redressability is relatively modest." *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018). "In analyzing redressability, [courts] assume its existence." *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020); *M.S.*, 902 F.3d at 1083 (courts "assume that the plaintiff's claim has legal merit").

> The burden imposed by [redressability] is not onerous. Plaintiffs need not show that a favorable decision will relieve their every injury. Rather, plaintiffs need only show that they personally would benefit in a tangible way from the court's intervention.

*Deal*, 911 F.3d at 189. Redressability "requires an analysis of whether the court has the power to right or to prevent the claimed injury." *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir.1982). "In the context of declaratory relief, a plaintiff demonstrates redressability if the court's statement would require the defendant to act in any way that would redress past injuries or prevent future harm." *Microsoft Corp. v. U.S. Dep't of Justice*, 233 F. Supp. 3d 887, 903 (W.D. Wash. 2017). Even an award of nominal damages by itself can redress a past, completed violation of a legal right sufficient to establish redressability. *Uzuegbunam*, 141 S. Ct. at 796. Specific relief in the form of restitution is an equitable remedy available against an agency under the APA. *America's Community Bankers v. FDIC*, 200 F.3d 822, 829-30 (D.C. Cir. 2000).

Lynch's petition requested "an order awarding retroactive compensation, back benefits, or other damages for UME and AA benefits wrongfully taken…." CP 9-12, 16. Lynch sought declaratory relief in the form of an order finding HCA committed

an error of law not within its statutory authority, reversing the agency's final order, and invalidating WAC 182-513-1340(2) as a *per se* rule that prevented Lynch from using his UME and AA benefits for non-Medicaid services. CP 15-16.

Redressability here is based on (1) invalidating HCA's action, and (2) restitution of Medicaid overpayments HCA required Lynch to make. *See* 42 C.F.R. § 431.246(a) ("agency must promptly make corrective payments, retroactive to the date an incorrect action was taken…."); *cf. Brown-Thomas v. Hynie*, 441 F. Supp. 3d 180, 202 (D. S.C. 2019) (redressability shown by complaint requesting declaratory relief and damages for financial harm).

Denying the Estate the opportunity to address this discrete Medicaid question of law ignores the "vital function of judicial review of agency action." *See City of Burlington*, 187 Wn. App. at 875.

> The vital function performed by judicial review of agency action [is] to keep administrative agencies within the bounds set for them by legislative and constitutional command. During judicial review

> courts support the legislative process by insisting that legislatively prescribed boundaries of agency action are respected...
>
> [J]udicial review confers legitimacy on the administrative process, in essence, certifying that the agency action is legislatively authorized, and hence is democratically accountable.

*Id*. at 875-76 (*quoting* William R. Andersen, *The 1988 Washington Administrative Procedure Act—An Introduction*, 64 Wash. L. Rev. 781, 819-820 (1989)); *accord, Seattle Bldg.*, 129 Wn.2d at 798.

Judicial review is particularly necessary here. HCA must comply with federal Medicaid statutes and regulations. *Samantha A. v. Dep't of Soc. & Health Servs.*, 171 Wn.2d 623, 630, 256 P.3d 1138 (2011). The agency exceeds its statutory authority by promulgating a rule in direct conflict with federal Medicaid law. *Jenkins v. DSHS*, 160 Wn.2d 287, 295, 157 P.3d 388 (2007). Despite these requirements, the review judge who issued the agency's Final Order patently refused to consider federal and state Medicaid law. AR 9-12.

**4. The Estate Meets the Zone of Interests Test.**

The Court decided the Estate does not meet the "zone of interests" test of standing because the "Medicaid statutory and regulatory scheme" indicates no legislative intent to protect the interests of a deceased Medicaid recipient's estate. Slip op. at 18 n. 12. This was error.

Lynch was within the zone of interests when he petitioned for judicial review in October 2020. *See Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 964 (9th Cir. 2015) ("There can be no doubt the Village more than amply met the forgiving 'zone of interests' test when it instituted this APA action.").[2] The Estate stepped into Lynch's shoes upon his death.

The Estate meets the standard as well. In APA cases, the zone of interests test is not "especially demanding." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130

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[2] Medicaid provides a right to a fair hearing and judicial review. *See* 42 U.S.C. § 1396a(A)(3); 42 C.F.R. § 431.220(a)(2); 42 C.F.R. § 431.220(a)(1)(iii); 42 C.F.R. § 431.221(a - b); 42 C.F.R. § 431.242; 42 C.F.R. § 431.245.

(2014); *accord, Seattle Bldg.*, 129 Wn.2d at 797. The "generous review provisions" of the APA are construed "not grudgingly but as serving a broadly remedial purpose." *Assoc. of Data Processing Service Organizations, Inc v. Camp*, 397 U.S. 150, 156 (1970); *Hammond v. United States*, No. 1:13-00139-JMC, 2014 U.S. Dist. LEXIS 40655, (D. S.C. Mar. 27, 2014).

Rejecting a "stringent zone of interest analysis," this Court held "it is not necessary that a statute expressly state that those interests are required to be considered"—a party has standing "even though no statute expressly state[s] the agency ha[s] to consider [that party]'s interest." *Seattle Bldg.*, 129 Wn.2d at 793 n.1, 920 P.2d 581 (1996) ( "statutes explicitly addressing standing are relatively unusual"); *accord, Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 (1987) ("[T]here need be no indication of congressional purpose to benefit the would-be plaintiff."). The zone of interest test focuses on whether the legislature intended the agency to protect the party's interests when taking the action. *Seattle Bldg*., 129 Wn.2d at 797.

The Court decided the Estate is not an intended beneficiary of Medicaid benefits because HCA may recover funds from an estate for Medicaid-provided services and there is no apparent legislative intent to preserve estate funds. Slip op. at 18 n.12. But the Court overlooked remedial APA interests. *Cf. Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 14 Wn. App. 2d 945, 983, 474 P.3d 1107 (2020).

Employing a stringent approach, the Court did not give the Estate the benefit of the doubt. *See Lexmark Int'l*, 572 U.S. at 130 ("lenient approach" is appropriate means of preserving flexibility of APA's judicial review provision for violations of statutes that do not themselves include causes of action for judicial review). The test is particularly lenient in APA cases, where there is a "presumption in favor of judicial review of agency action." *Clarke*, 479 U.S. at 399.

> [F]or APA challenges, a plaintiff can satisfy the [zone of interest] test…if it is a suitable challenger to enforce the statute—that is, if its interests are sufficiently congruent with those of the intended beneficiaries that the litigants are not more likely to frustrate than to further statutory objectives.

*Sierra Club*, 977 F.3d at 877.

The Estate is a suitable challenger. Its interests are aligned with those of Lynch, the deceased Medicaid beneficiary. The Estate is more likely to further Medicaid objectives by ensuring HCA correctly implements federal law in determining whether VA benefits can be taken as TPR. HCA did not allege prejudice when substituting the Estate and the Court found none. *Cf. Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 319-20, 76 P.3d 1183 (2003) ("It is the distinct preference of modern procedural rules to allow appeals to proceed to a hearing on the merits in the absence of substantial prejudice to other parties.").

### C. This is a Matter of Continuing and Substantial Public Interest that if Left Unchecked Stands to Have Far Reaching Harmful Consequences.

Even if technical standing requirements could not be satisfied, courts can also take a more liberal approach to standing for matters of substantial public interest. *See Lee v. State*, 185 Wn.2d 608, 618-19, 374 P.3d 157 (2016) (case may be justiciable under public interest exception even where the requirements of

standing are not strictly met). This petition involves an issue of substantial and continuing public interest of an agency rule adversely affecting all poverty-stricken, ill, and disabled wartime veterans on Medicaid who receive VA UME and AA benefits to meet their daily care needs. RAP 13.4(b)(4).

## VI. CONCLUSION

This Court should accept review, reverse the lower court's decision, and remand for a decision on the merits.

SUBMITTED: this Thursday, December 14, 2023

The undersigned certifies this petition contains 4,995 words in compliance with RAP 18.17.

SMITH MCBROOM, PLLC

Gregory A. McBroom, WSBA No. 33133
Matthew J. Smith, WSBA No. 33309
Attorneys for Petitioner Estate of David Lynch

# APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

November 14, 2023

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| ESTATE OF DAVID LYNCH,<br><br>Appellant,<br><br>v.<br><br>WASHINGTON HEALTH CARE AUTHORITY,<br><br>Respondent. | No. 56806-3-II<br><br>UNPUBLISHED OPINION |

LEE, J. — David Lynch appealed to the superior court a Health Care Authority (HCA) Board of Appeals Final Order, reversing an Office of Administrative Hearings (OAH) initial order and upholding a Department of Social and Health Services (DSHS) cost of care calculation for Lynch's Medicaid-provided in-home care services. Lynch challenged DSHS's designation of certain U.S. Department of Veteran Affairs (VA) benefits, specifically Aid and Attendance (AA) and Unusual Medical Expense (UME) benefits, as third party resources. Lynch also argued that the applicable regulation, WAC 182-513-1340(2), was invalid because it violated Medicaid law by creating an irrebuttable presumption that AA and UME benefits are always considered third party resources for Medicaid-provided services.

The superior court certified the case to the Court of Appeals for direct review under RCW 34.05.518. After Lynch's counsel submitted an opening brief, the parties were informed that Lynch had passed away. Lynch's estate (Estate) was substituted as a party. The HCA asserts that

the Estate does not have standing and, regardless, Lynch had failed to exhaust his administrative remedies. Because the Estate cannot establish standing under RCW 34.05.530, we dismiss this appeal.

## FACTS

### A. BACKGROUND

David Lynch was a military veteran who received in-home care through Medicaid funded programs. Specifically, Lynch received care through Community First Choice (CFC) and Community Options Program Entry System (COPES). *See generally* WAC 182-513-1210; WAC 182-513-1100; ch. 388-106 WAC.

Lynch also collected a monthly pension from the VA and monthly Social Security benefits. In November 2019, DSHS[1] issued a cost of care letter to Lynch, which informed Lynch of his contribution for his in-home care. DSHS calculated Lynch's participation amount by adding together Lynch's income—his Social Security Benefit with his VA benefit—and then subtracting a Personal Needs Allowance (PNA).[2]

Lynch received 158 hours of in-home care per month, which translated into in-home care Monday through Friday for seven and a half hours per day. Lynch did not receive in-home care

[1] DSHS, as a delegate of the HCA, administers long term care services under the Washington Medicaid program. *See* WAC 388-106-0010. DSHS and the HCA will both be referred to depending on which agency made the relevant decision.

[2] An individual's PNA is "an amount set aside from a person's income that is intended for personal needs. The amount a person is allowed to keep as a PNA depends on whether the person lives in a medical institution, [an alternate living facility], or at home." WAC 182-513-1100; *see generally* WAC 182-513-1105.

on Saturday or Sunday. He required additional assistance on weekends, but did not have the money to pay for another caregiver.

Lynch also needed dental implants, which were estimated to cost $57,000. Medicaid did not cover the cost of dental implants, so Lynch intended to take out a loan or finance the cost. While Lynch obtained an estimate and loan projection for the dental implants, the record does not show that he took out a loan or incurred any dental expenses.

Because CFC and COPES did not meet Lynch's need for weekend in-home care or for dental implants, Lynch applied to the VA for increased benefits to help cover the additional costs. Specifically, Lynch applied for AA payments and UME payments from the VA.

In December 2019, the VA increased Lynch's monthly benefits to include an AA benefit and an UME benefit. The VA backdated the benefits award to February 2019 and issued a lump sum payment to Lynch for $8,130. Lynch used the lump sum payment to pay down credit card debt. The record does not show whether that credit card debt related to medical or dental expenses.

DSHS received notice of Lynch's increase in VA benefits. Then, on December 18, DSHS mailed a letter to Lynch stating that his contribution amount for his in-home services was increasing, effective January 1. DSHS designated Lynch's AA and UME benefits as a "Third Party Resource." Administrative Record (AR) at 390. The letter did not delineate between AA and UME benefits within the broader category of "Veteran's Benefits." AR at 390. However, the letter stated:

> [W]e are reviewing this change in VA benefits to make sure this is really countable income. We want you to have this notice, right away, showing the change in monthly cost of care. . . . If we determine that the new VA benefit is not countable, we will, of course, mail you a corrected letter for January.

AR at 388. Lynch contested DSHS's designation of the AA and UME benefits as third party resources in its cost of care calculation.

B. PROCEDURAL HISTORY

1. Administrative and Superior Court Proceedings

In January 2020, Lynch requested a hearing with the OAH regarding DSHS's assignment of his VA benefits as a third party resource. At that time, Lynch also communicated with a DSHS representative to explore whether Lynch could request an "exception to rule" (ETR) such that Medicaid would pay for Lynch's dental work. The DSHS representative informed Lynch that "since an ETR [was] not likely," the representative would submit for a hearing on the issue. AR at 459. Shortly after a hearing was requested, Lynch submitted additional information regarding dental implant expenses. DSHS determined that those expenses did not meet the criteria for "allowable medical expenses" under WAC 182-513-1350(6).[3] AR at 386.

[3] WAC 182-513-1350(6) provides:

> (a) The following incurred medical expenses may be used to reduce excess resources:
> (i) Premiums, deductibles, coinsurance, or copayment charges for health insurance and medicare;
> (ii) Medically necessary care defined under WAC 182-500-0070, but not covered under the state's medicaid plan. Information regarding covered services is under chapter 182-501 WAC;
> (iii) Medically necessary care defined under WAC 182-500-0070 incurred prior to medicaid eligibility. Expenses for nursing facility care are reduced at the state rate for the specific facility that provided the services.
> (b) To be allowed, the medical expense must:
> (i) Have been incurred no more than three months before the month of the medicaid application;
> (ii) Not be subject to third-party payment or reimbursement;
> (iii) Not have been used to satisfy a previous spenddown liability;
> (iv) Not have been previously used to reduce excess resources;

In February 2020, Lynch received an updated participation cost letter from DSHS. The letter stated in part:

> Upon audit of your cost of care letter dated December 18, 2019, was found to have errors with the calculation of your cost of care and how we count your Aid & Attendance (A&A), Unusual Medical Expenses (UME), from your VA disability improved pension. The A&A and [UME], are considered a third-party resource and should be directly contributed to your provider, in addition to any other income above the [PNA] and/or allowable deductions, per WAC 182-513-1350(6) and WAC 182-515-1509 for your participation.

AR at 405.

In May 2020, OAH held a hearing. During the hearing, DSHS argued that under WAC 182-513-1340(2),[4] it properly treated Lynch's AA and UME benefits as a third party resource that it could collect. Lynch argued that under *Cordall*,[5] UME and AA benefits are not considered third party resources.

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> (v) Not have been used to reduce participation;
> (vi) Not have been incurred during a transfer of asset penalty under WAC 182-513-1363; and
> (vii) Be an amount for which the person remains liable.

[4] WAC 182-513-1340 "describes income the agency or its designee excludes when determining a client's eligibility and participation in the cost of care for long-term care (LTC) services." Specifically, WAC 182-513-1340(2) provides:

> The agency . . . treats Department of Veterans Affairs (VA) benefits as follows:
> (a) Any VA dependent allowance is countable income to the dependent unless it is paid due to unusual medical expenses (UME);
> (b) UME, aid and attendance allowance, special monthly compensation (SMC) and housebound allowance are third-party resources;
> (c) Benefits in subsection (2)(b) of this section for a client who receives long-term care services are excluded when determining eligibility, but are available as a third-party resource (TPR) as defined under WAC 182-513-1100 when determining the amount the institutionalized client contributes in the cost of care.

[5] *Cordall v. State*, 96 Wn. App. 415, 980 P.2d 253 (1999), *review denied*, 139 Wn.2d 1017 (2000).

In an initial order, OAH reversed DSHS's calculation of Lynch's cost of care, holding that DSHS made "a *per se* determination that the AA allowance is always a third party resource" under WAC 182-513-1340(2) and in Lynch's case, AA "should not be considered a third party resource available to reimburse the State for the cost of Medicaid services." Clerk's Papers (CP) at 24-25 (emphasis in original). OAH also reversed DSHS in regard to the UME benefits, holding that "where the UME portion of the VA pension *is not* reimbursement for Medicaid services, the State *is not entitled* to recover the UME portion of the pension as a third party liability." CP at 25 (emphasis in original). OAH based its decision on *Cordall*.

DSHS petitioned the HCA Board of Appeals for review of OAH's initial order. DSHS argued that based on federal and state Medicaid regulations, it was entitled to recover Lynch's AA and UME benefits under Medicaid third party liability. Additionally, DSHS argued that Lynch's projected expenses for dental implants were neither incurred nor medically necessary, as required under WAC 182-513-1350.

The HCA Board of Appeals Review Judge issued a final order, reversing the OAH initial order and holding that OAH improperly relied on case law when the regulations alone resolved Lynch's challenge. The Review Judge also held that DSHS correctly determined Lynch's Medicaid participation amount and third party resource contribution.

Lynch challenged the Review Judge's final order under the Administrative Procedure Act (APA), chapter 34.05 RCW, and what Lynch identified as an "inflexibl[e]" application of WAC 182-513-1340. CP at 8.

In March 2022, Lynch filed a motion in superior court to certify his APA claims for direct review at the Court of Appeals under RCW 34.05.518. The superior court granted Lynch's motion and certified the APA claims for direct review at the Court of Appeals.[6]

2. Substitution of Estate and Submission of Additional Evidence

In January 2023, Lynch's attorney filed Lynch's opening brief with this court. Then, in February, the HCA filed a motion to stay or strike the briefing deadline and to dismiss the proceeding (Motion to Stay or Strike). The HCA stated that Lynch had passed away approximately eight months earlier, in June 2022. The HCA argued that the case was now moot because this court would not be able to grant Lynch relief and "[b]ecause [Lynch] was deceased an opening brief could not be filed on his behalf, and [the HCA] should not be under any obligation to respond to it." Mot. to Stay or Strike at 3 (Feb. 7, 2023).

In response, Lynch's personal representative filed a motion to substitute the Estate as a party and requested that a substitution order be retroactive to the appeal filing date. The HCA argued that the Estate did not have standing under RCW 34.05.530 and asked this court to deny the motion to substitute. This court granted the motion to substitute the Estate pursuant to RAP 3.2(b)[7] and denied the HCA's Motion to Stay or Strike. The ruling stated:

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[6] Separately, in March 2022, Lynch requested an ETR for additional personal care hours from DSHS. DSHS granted Lynch's request and authorized an additional 179 hours of care. Lynch assigned the additional 179 hours to a weekend caregiver, who provided five hours of care per day on Saturdays and Sundays.

[7] RAP 3.2(b) provides: "A party with knowledge of the death or declared legal disability of a party to review, or knowledge of the transfer of a party's interest in the subject matter of the review, shall promptly move for substitution of parties. The motion and all other documents must be served on all parties and on the personal representative or successor in interest of a party, within the time and in the manner provided for service on a party. If a party fails to promptly move for

> This ruling does not imply any determination of respondent's argument in opposition that the Estate lacks standing. The question of standing does not inform the RAP 3.2(b) determination. . . .
>
> . . . The appeal may proceed now that the Estate has been substituted as the appellant, and respondent is free to raise the standing issue in its briefing and argument to the panel.

Ruling on Mot. to Substitute at 1 (Feb. 27, 2023).

In March 2023, the HCA filed its response to the Estate's opening brief. The HCA also filed a motion to consider additional evidence not contained within the clerk's papers or administrative record "for the limited purpose of determining whether [this court's] jurisdiction . . . has been properly invoked." Mot. to Consider Additional Evid. at 1 (Mar. 20, 2023). The HCA specifically identified Appendix A and Appendix B of its brief as the additional evidence it sought to include. We granted the motion pursuant to RAP 9.11(a) "for the limited purposes of evaluating the jurisdictional issue." Ruling on Mot. to Consider Additional Evid. (Mar. 21, 2023).

## ANALYSIS

The Estate appeals the HCA Board of Appeals Review Judge's final order. Specifically, the Estate argues that the Review Judge erred in determining that AA and UME benefits qualified as third party resources.

The HCA argues that the Estate does not have standing to pursue this action and that Lynch failed to exhaust his administrative remedies. We hold that the Estate does not have standing under the APA and dismiss this appeal.

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substitution, the personal representative of a deceased or legally disabled party, or the successor in interest of a party, should promptly move for substitution of parties."

## A. LEGAL BACKGROUND

To place the standing issue in context, a review of Medicaid long term care benefits and veteran's benefits is helpful.

### 1. Medicaid Long Term Care Services

Medicaid is a cooperative arrangement between state and federal governments to provide medical care for eligible individuals. *See generally* 42 U.S.C. § 1396a; 42 C.F.R. § 430.10; *see Cordall*, 96 Wn. App. at 423, 980 P.2d 253. Washington participates in the Medicaid program. RCW 74.09.500. The HCA is the designated agency to administer Washington's Medicaid program and it may collaborate with other agencies in doing so. RCW 74.09.530; RCW 74.09.010. DSHS administers long term care services under Medicaid. *See* RCW 74.04.050; WAC 388-106-0010; WAC 388-106-0015; *see Samantha A. v. Dep't of Soc. & Health Servs.*, 171 Wn.2d 623, 630, 256 P.3d 1138 (2011).

Long term care services include services received through home and community based (HCB) waiver programs, such as COPES. WAC 182-515-1505; WAC 182-513-1100. HCB services are long term care services that are provided in a person's home or residential setting, as opposed to in an institution. WAC 182-513-1100.

Individuals eligible for HCB services must pay towards their cost of care. WAC 182-515-1509; WAC 182-515-1505. "A single client who lives in their own home . . . keeps a personal needs allowance (PNA) . . . and must pay the remaining available income toward cost of care after allowable deductions described in subsection (4) of this section." WAC 182-515-1509(2)(a). A person may deduct "[i]ncurred medical expenses which have not been used to reduce excess resources." WAC 182-515-1509(4)(f). "A client must pay the client's provider the sum of the

room and board amount, and the cost of care after all allowable deductions, and any third-party resources defined under WAC 182-513-1100." WAC 182-515-1509(7). WAC 182-513-1340(1) lists incomes that DSHS excludes when it determines an individual's participation in the cost of care for long term care services.

A third party resource means "funds paid to or on behalf of a person by a third party, where the purpose of the funds is for payment of activities of daily living, medical services, or personal care. The agency does not pay for these services if there is a third-party resource available." WAC 182-513-1100.[8] DSHS designates certain VA benefits as third party resources. WAC 182-513-1340(2)(b). Specifically, WAC 182-513-1340(2)(b) provides that "UME, aid and attendance allowance, special monthly compensation (SMC) and housebound allowance are third-party resources." Additionally, "[b]enefits in [WAC 182-513-1340(2)(b)] . . . for a client who receives long-term care services are excluded when determining eligibility, but are available as a third-

[8] The federal Medicaid program requires that a state Medicaid program must provide

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

42 U.S.C. § 1396a(a)(25)(H); *see also* 42 C.F.R. § 435.610(a) (stating "as a condition of [Medicaid] eligibility, the agency must require legally able applicants and beneficiaries to . . . [a]ssign rights to the Medicaid agency to medical support and to payment for medical care from any third party"); 42 C.F.R. § 433.136 ("Third party means any individual, entity or program that is or may be liable to pay all or part of the expenditures for medical assistance furnished under a State plan.").

party resource (TPR) as defined under WAC 182-513-1100 when determining the amount the institutionalized client contributes in the cost of care." WAC 182-513-1340(2)(c).

2. Veterans' Benefits

The VA provides pensions to disabled veterans. *See generally* 38 U.S.C. §§ 1501 et seq.; 38 U.S.C. § 1521. A disability pension may be comprised of different kinds of payments, such as AA and UME benefits. *See generally* 38 U.S.C. § 1503.

a. Aid and Attendance benefits

AA benefits are "a monetary allowance that the veteran may use to purchase care from another, such as full-time nursing care, 'based on an assessment of the veteran's physical and medical need[.]'" *Cordall*, 96 Wn. App. at 425 (alteration in original) (quoting *Estate of Krueger v. Richland County Soc. Servs.*, 526 N.W.2d 456, 463 (N.D. 1994)). WAC 182-513-1340(2) provides that AA benefits "are third-party resources." WAC 182-513-1340(2)(b). For individuals who receive institutional long term care services, AA benefits "are available as a third-party resource . . . when determining the amount the institutionalized client contributes in the cost of care." WAC 182-513-1340(2)(c).

If Medicaid provides aid and attendance care, "the State can recover its cost because 'the Veterans Administration aid and attendance allowance program is a third party obligated to pay for those Medicaid-rendered services,' even though there is no statutory mandate requiring the veteran to use the allowance for such care." *Cordall*, 96 Wn. App. at 425 (internal quotation marks omitted) (quoting *Krueger*, 526 N.W.2d at 463).

b. Unusual Medical Expense benefits

UME benefits are provided when an eligible veteran has an unreimbursed medical expense "to the extent that such amounts exceed 5 percent of the maximum annual rate of pension . . . payable to such veteran." 38 U.S.C. § 1503(a)(8); *see also* 38 C.F.R. § 3.262(l). Lynch qualified for, and received, UME benefits.

Generally, "VA pensioners receive UME payments as *reimbursement* for previously incurred *out-of-pocket* medical expenses." *Edwards v. Griepentrog*, 804 F. Supp. 1310, 1312 (D. Nev. 1992) (emphasis in original). If UME benefits are paid due to unusual medical expenses, it is not considered countable income for the purposes of determining a participant's cost of contribution. WAC 182-513-1340(2)(a). However, if UME benefits are claimed for Medicaid-provided services, "the State is entitled to recover that amount of the veteran's pension as third-party liability under the Medicaid statutory scheme." *Cordall*, 96 Wn. App. at 430.

Whether dental work is a Medicaid-provided service depends on many factors, including the particular Medicaid coverage the recipient receives, the type of dental work needed, and the necessity for the dental work. Given the record, Lynch's dental implants appear to not be a Medicaid-provided service. *See generally* WAC 182-501-0060; WAC 182-501-0070; WAC 182-535.

B. STANDING

1. Legal Principles

To obtain judicial review under the APA, a person must have standing. RCW 34.05.530. A person[9] has standing if they are aggrieved or adversely affected by an agency action. RCW 34.05.530. A person is aggrieved or adversely affected if all of the following conditions are met:

> (1) The agency action has prejudiced or is likely to prejudice that person;
> (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
> (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

RCW 34.05.530; *see also Sarepta Therapeutics, Inc. v. Health Care Auth.*, 19 Wn. App. 2d 538, 549, 497 P.3d 454 (2021), *review denied*, 200 Wn.2d 1030 (2023) ("All three requirements must be established for a person to have standing.").

We review standing de novo. *Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 14 Wn. App. 2d 945, 981, 474 P.3d 1107 (2020). "The petitioner bears the burden of establishing standing." *Sarepta Therapeutics*, 19 Wn. App. 2d at 549. The three prongs are divided into two tests: the injury-in-fact test and the zone of interests test. *Id.* at 550.

a. Injury-in-fact test

The first and third prongs of RCW 34.05.530 "constitute the 'injury-in-fact' test." *City of Burlington v. Liquor Control Bd.*, 187 Wn. App. 853, 862, 351 P.3d 875, *review denied*, 184 Wn.2d 1014 (2015) (quoting *Allan v. Univ. of Wash.*, 140 Wn.2d 323, 327, 997 P.2d 360 (2000). An

[9] "Person" is defined as "any individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character, and includes another agency." RCW 34.05.010(14).

individual has suffered an injury-in-fact if he or she can show "that the agency decision caused some specific and perceptible harm. In other words, there must be an invasion of a legally protected interest." *Sarepta Therapeutics*, 19 Wn. App. 2d at 550 (internal citation omitted). "'Conjectural or hypothetical injuries are insufficient to confer standing.'" *Id.* (quoting *Freedom Found. v. Bethel Sch. Dist.*, 14 Wn. App. 2d 75, 86, 469 P.3d 364 (2020), *review denied*, 196 Wn.2d 1033 (2021)). Furthermore, a person must show that a favorable decision will redress the injury. *KS Tacoma Holdings, LLC v. Shorelines Hr'gs Bd.*, 166 Wn. App. 117, 129, 272 P.3d 876, *review denied*, 174 Wn.2d 1007 (2012).

b. Zone of interests test

The second prong is called the "'zone of interests'" test. *Sarepta Therapeutics*, 19 Wn. App. 2d at 550 (quoting *Allan*, 140 Wn.2d at 327). "The zone of interest test limits judicial review of an agency action to litigants with a viable interest at stake, rather than individuals with only an attenuated interest in the agency action." *City of Burlington*, 187 Wn. App. at 862. A party must show that the legislature intended that an agency protect the party's interests when taking an action. *KS Tacoma Holdings*, 166 Wn. App. at 127.

2. No Standing

The HCA argues that this appeal should be dismissed because the Estate does not have standing under the APA. Specifically, the HCA argues that the Estate cannot meet either the injury-in-fact test or zone of interests test. The Estate argues that "[s]tanding under RCW 34.05.530 is determined by review of the person who filed the petition for judicial review," and that it should not matter if a petitioner who clearly has standing passes away while a case is pending. Reply Br. of Appellant at 30. Given our record, we agree with the HCA.

a. Burden to establish standing

A party must have standing to obtain judicial review under the APA. RCW 34.05.530. The parties do not dispute that Lynch, while alive, had standing. However, the Estate does not cite any authority for the proposition that standing is determined by review of the person who filed for judicial review and not whomever later stands in that person's shoes. The Estate alleges because Lynch had standing, it need not establish its own independent standing. The Estate points to cases where a "personal representative steps into the shoes of the decedent." Reply Br. of Appellant at 32; *see Colburn v. Spokane City Club*, 20 Wn.2d 412, 413-14, 147 P.2d 504 (1944); *In re Estate of Hatfield*, 46 Wn. App. 247, 251, 730 P.2d 696 (1986), *review denied*, 108 Wn.2d 1018 (1987); *Sadler v. Wagner*, 3 Wn. App. 353, 355, 475 P.2d 901 (1970).

However, none of the cases address an estate's standing under the APA.[10] Both *Hatfield* and *Sadler* address a personal representative's administration of a deceased's estate and litigation

[10] The Estate also cites RCW 11.48.010 and RCW 11.48.090 as authority for it to proceed with this appeal. RCW 11.48.010 provides in part:

> It shall be the duty of every personal representative to settle the estate, including the administration of any nonprobate assets within control of the personal representative under RCW 11.18.200, in his or her hands as rapidly and as quickly as possible, without sacrifice to the probate or nonprobate estate. . . . The personal representative shall be authorized in his or her own name to maintain and prosecute such actions *as pertain to the management and settlement of the estate*.

(Emphasis added). RCW 11.48.090 provides: "Actions for the recovery of any property or for the possession thereof, and all actions founded upon contracts, may be maintained by and against personal representatives in all cases in which the same might have been maintained by and against their respective testators or intestates."

Here, the Estate is not prosecuting or maintaining an action as it pertains "to the management and settlement of" Lynch's estate. Therefore, RCW 11.48.010 is not applicable. Similarly, reading "actions" in RCW 11.48.090 in the context of RCW 11.48.010, it is clear the

directly related to administration of those estates. *See Hatfield*, 46 Wn. App. at 251; *Sadler*, 3 Wn. App. at 355. In *Colburn*, our Supreme Court allowed the executrix of a deceased party to be substituted for the deceased, and an appeal to proceed, in an action where the deceased was not the sole litigant and based on a statute that was since repealed in 1957. *Colburn*, 20 Wn.2d at 413-14; *see* Rem. Rev. Stat. § 1743, *recodified* as former RCW 4.88.250, *repealed by* LAWS OF 1957, ch. 7, § 10.

"[T]he Legislature did not confer standing on simply anyone who is dissatisfied with the outcome" of an agency decision. *Allan v. Univ. of Wash.*, 92 Wn. App. 31, 35-36, 959 P.2d 1184 (1998), *aff'd*, 140 Wn.2d 323 (2000). As it stands, the Estate, and not Lynch, is the current party requesting judicial review. Accordingly, the Estate bears the burden of establishing standing. *Sarepta Therapeutics*, 19 Wn. App. 2d at 549.

b. Injury-in-fact

The Estate argues that is entitled to repayment of Lynch's AA and UME benefits that DSHS had allegedly incorrectly included in Lynch's cost of care calculation.[11] The HCA argues that Lynch can no longer receive the care he originally had wanted the benefits for and "and there

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legislature contemplated property actions "as pertain to the management and settlement of the estate." The Estate does not provide any argument as to how RCW 11.48.090 is applicable or why it should prevail on the issue of standing under the APA based on Washington's probate statutes.

Furthermore, to the extent that the Estate claims a protected property interest in the VA benefits, it fails to support the claim with any legal authority. The U.S. Supreme Court has held that "an expectation of public benefits [does not] confer a contractual right to receive the expected amounts." *Richardson v. Belcher*, 404 U.S. 78, 80, 92 S. Ct. 254, 30 L. Ed. 2d 231 (1971).

[11] We note that the Estate does not walk through a full standing analysis.

is no record that [Lynch] ever incurred out-of-pocket healthcare expenses relating to his AA or UME that the Estate could recoup or pay toward debt it holds." Br. of Resp't at 31.

Here, Washington's Medicaid regulations directly address AA and UME benefits—such benefits may be recouped by the State as third party resources to the extent that the benefits were claimed for Medicaid provided services. WAC 182-513-1340(2)(b); *see Cordall*, 96 Wn. App. at 431. The record does not contain Lynch's application to the VA for his AA or UME benefits, so we cannot assess how Lynch claimed the benefits. During the OAH hearing, Lynch asserted that he claimed the AA and UME benefits for dental implants. Lynch additionally stated he "could use" the AA benefits for weekend in-home care. 3 Verbatim Rep. of Proc. (May 28, 2020) at 54.

Even assuming Lynch's assertions to be true, the record does not show that Lynch incurred any unreimbursed dental expenses or unreimbursed expenses for additional in-home care and, thereby, leaving the Estate at a loss. Indeed, when Lynch initially applied for the VA benefits, the VA backdated the award of benefits such that he received a lump sum payment of $8,130, which he used to pay down credit card debt. Because the record does not show whether that credit card debt was for medical or dental expenses, and because Lynch presented only *estimates* to DSHS rather than receipts, an inference arises that the $8,130 lump sum did not pay for medical or dental services.

UME benefits are payments to veterans as *reimbursement* for out-of-pocket medical expenses. *Edwards*, 804 F. Supp. at 1312. This proposition is supported by Washington's Medicaid regulatory scheme, which states that for a medical expense to reduce excess resources, that expense must have been *incurred* and an amount for which an individual remains liable. WAC 182-513-1350(6)(b). Similarly, WAC 182-513-1340(2)(a) provides that VA benefits shall be

considered countable income *unless* it has "been paid due to unusual medical expenses." Again, the record does not show that Lynch, and now the Estate, incurred or was out of pocket for dental or other medical expenses.

Furthermore, the purpose of AA benefits is to pay for aid and attendance care, which Lynch was already receiving from Medicaid—albeit not at the level he needed—so DSHS was entitled to recover the AA payments. *See Cordall*, 96 Wn. App. at 425; WAC 182-513-1340(2). The proper mechanism for those AA payments to count towards weekend in-home care was for Lynch to request additional care hours via an ETR under WAC 388-106-1305. *See* WAC 388-106-1305. It appears that Lynch later did so and was granted weekend in-home care hours.

Finally, Lynch's challenge was to DSHS's designation of the AA and UME benefits as third party resources. Lynch's "injury" was that he could not purchase the additional medical and dental care he needed because of DSHS's decision to recoup the AA and UME payments as third party resources. Therefore, Lynch's remedy, via a refund from DSHS, would have been the ability to purchase his needed medical and dental care. However, now that he is deceased, any remedy that this court could provide to the Estate would not redress the original injury. *See* RCW 34.05.530(3).

Because the record does not show that Lynch, or his Estate, incurred any out of pocket medical or dental expenses and because a remedy in form of a refund would not redress Lynch's inability to purchase additional care since he is now deceased, the Estate cannot establish injury-in-fact.[12] Thererfore, we dismiss this appeal for lack of standing. *Allan*, 140 Wn.2d at 326-27.

[12] We note that the Estate also fails to meet the zone of interests test. The purpose of Medicaid, and specifically Medicaid long term care services, is to "support persons who need such services

ATTORNEY FEES

The Estate requests an award of attorney fees pursuant to RAP 18.1 and RCW 74.09.741(8). RAP 18.1 provides a party the "right to recover reasonable attorney fees or expenses on review" before this court, so long as the party requests the fees and "applicable law" grants the right to recover. RAP 18.1(a). RCW 74.09.741(8) provides in pertinent part that "[i]n the event the superior court, the court of appeals, or the supreme court renders a decision in favor of the applicant or recipient, the person is entitled to reasonable attorneys' fees and costs."

Here, the Estate is not the prevailing party in this appeal. Therefore, we deny the Estate's request for attorney fees.

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at home or in the community." RCW 74.39A.005. It is the legislature's intent that DSHS "[e]nsure[s] that long-term care services are coordinated in a way that minimizes administrative cost." RCW 74.39.005(5); *see also* RCW 74.39A.007(3) (The legislature intends that "[l]ong-term care services be responsive and appropriate to individual need and *also cost-effective for the state*." (Emphasis added)). Federal Medicaid regulations direct that state Medicaid programs "must require legally able applicants and beneficiaries to . . . [a]ssign rights to the Medicaid agency to medical support and to payment for medical care from any third party." 42 C.F.R. § 435.610. In addition, the legislature has instructed DSHS to recover costs of state-funded long term care services from a person's estate. *See* RCW 43.20B.080(3); RCW 74.39A.170(1).

Based on the language of the Medicaid statutory and regulatory scheme, it is clear that the legislature did not intend DSHS to contemplate the interests of an individual's estate and the preservation of that estate, especially since DSHS may recover funds from an estate for Medicaid provided services. *See KS Tacoma Holdings*, 166 Wn. App. at 127.

The viability of the interest at stake is based on whether a party can show the legislature intended an agency to protect its interests when taking an action. *City of Burlington*, 187 Wn. App. at 863. Because the Estate cannot point to legislative intent to preserve funds in an estate when it comes to recovery of Medicaid costs, the Estate fails to meet the zone of interests test.

## CONCLUSION

Because the Estate cannot establish standing under RCW 34.05.530, we dismiss this appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Glasgow, CJ

Glasgow, CJ

Che, J.

Che, J.

## CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I filed and served the foregoing as follows:

| | |
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| Attorney General of Washington<br>C/O Assistant Attorneys General:<br>Joshua Campbell, WSBA No. 51251<br>Nissa A. Iverson, WSBA No. 46708<br>Marko Pavela, WSBA No. 49160<br>7141 Cleanwater Dr SW<br>Mailing: PO Box 40124<br>Olympia, WA 98501 | Messenger Service ☐<br>First Class U.S. Mail ☐<br>E-Service ☒<br>Electronic Mail ☒ |

DATED: October 15, 2021, at Seattle, Washington.

*s/ Gregory A. McBroom*
Gregory A. McBroom

## SMITH MCBROOM, PLLC

## December 14, 2023 - 3:58 PM

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