

NO. 93706-1

SUPREME COURT OF THE STATE OF WASHINGTON

ESTATE OF MARGARET BERTO,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL & HEALTH
SERVICES, WASHINGTON HEALTH CARE AUTHORITY,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In order to ensure that Medicaid funds are spent appropriately, federal and state law requires that the Health Care Authority (HCA) determine what resources are available to Medicaid applicants and deny eligibility if an applicant possesses resources above \$2,000. In a published opinion, the Court of Appeals correctly affirmed HCA's denial of Margaret Berto's application for Medicaid services because, under eligibility rules promulgated by the State, it was determined that her resources included \$128,221.80 available to her as the beneficiary of the testamentary trust. The Estate's Petition for Review (Petition) of the Court of Appeals' decision should be denied because the Estate does not establish that it conflicts with precedent, that it presents a significant constitutional question, or that the issues raised are of substantial public interest.

II. COUNTERSTATEMENT OF THE ISSUE

Did the Court of Appeals properly hold that the testamentary trust was an asset available to Ms. Berto when she was the beneficiary of the trust and the trust was not exempt from being considered an available asset under WAC 182-516-0100?

III. COUNTERSTATEMENT OF THE CASE

A. Determining Resource Eligibility for Medicaid Applicants

Medicaid is a cooperative state-federal program through which states receive federal financial assistance to provide medical assistance to individuals that have insufficient income and resources to meet the costs of medical care. *Atkins v. Rivera*, 477 U.S. 154, 156, 106 S. Ct. 2456, 91 L. Ed. 2d 131 (1986). State participation in the Medicaid program is optional, but once a state chooses to participate, it must adopt a plan that conforms to the requirements of federal law, and has been approved by the federal Centers for Medicare and Medicaid Services. *Schott v. Olszewski*, 401 F.3d 682, 685 (6th Cir. 2005); 42 C.F.R. §§ 430.10 and .14 (2010).

HCA is the single-state agency authorized to administer the Medicaid program in Washington State. *See* RCW 74.09.530; RCW 41.05.021. HCA has authorized the Department of Social and Health Services (DSHS) to make initial eligibility decisions for medical assistance programs by administering HCA's regulations (found in chapter 182 WAC). *See, e.g.*, WAC 182-500-0010; WAC 182-503-0050; RCW 74.09.530. All such decisions made by DSHS are made as HCA's designee.

One of HCA's responsibilities in administering the Medicaid program is to establish reasonable standards for assessing an individual's

income and resources in order to determine his or her eligibility for medical assistance under the program. 42 U.S.C. § 1396a(a)(17); RCW 74.09.530(1)(b), (c). Accordingly, HCA has promulgated regulations that specify the standards it uses to determine income and resource eligibility for Medicaid-paid long-term care benefits in Washington State. *See* WAC 182-513. To be resource eligible for long-term care Medicaid benefits, an unmarried individual must typically have available resources of \$2,000 or less. WAC 182-513-1315; WAC 182-513-1350(1); *see also* WAC 182-513-1301.

When making resource eligibility determinations, HCA considers whether a resource is available to the applicant. WAC 182-512-0200, -0250. One such resource HCA must consider is trusts. Under federal law, assets in certain kinds of trusts will be considered resources available to Medicaid applicants. 42 U.S.C. § 1396p. Congress passed these laws to prevent individuals with significant assets from obtaining Medicaid eligibility by placing assets in trusts.

Medicaid is, and always has been, a program to provide basic health coverage to people who do not have sufficient income or resources to provide for themselves. When affluent individuals use Medicaid qualifying trusts and similar ‘techniques’ to qualify for the program, they are diverting scarce Federal and State resources from low-income elderly and disabled individuals, and poor women and children. This is unacceptable to the Committee.

Ramey v. Rizzuto, 72 F. Supp. 2d 1202, 1212 (D. Colo. 1999), *quoting* H.R. Rep. No. 365, 99th Congress, 1st Sess. pt. 1 at 72 (1985).

In accordance with federal law, WAC 182-516-0100 explains how HCA treats certain kinds of trust assets in Medicaid eligibility determinations. If a trust meets the definition of client-established trust (self-settled trust), HCA determines whether it is an available resource for Medicaid eligibility purposes under the provisions of WAC 182-516-0100(3), (4), and (5). If a trust is third party (meaning it is established by someone other than the client or the client's spouse), HCA determines whether the trust is an available resource for Medicaid eligibility purposes under WAC 182-516-0100(11).

B. Ms. Berto's Medicaid Application Is Denied Because She Is Over the Resource Limit

In 2004, Ms. Berto and her husband placed their assets in the Berto Living Trust (living trust), which named them as both trustees and beneficiaries. Administrative Record (AR) at 2, 120-93. In 2009, when Ms. Berto's husband died, his will created a second trust (a testamentary trust). AR at 2. Ms. Berto was named as the sole beneficiary and co-trustee of this testamentary trust. AR at 2. This trust stated that Ms. Berto could not be the sole trustee and could not alone determine the amount of distributions from the trust. AR at 2. Distribution of either trust income or principal was to be determined by the trustees in their discretion for the

beneficiary's "health, education, maintenance and support." AR at 2. However, if the beneficiary was receiving or "eligible to apply" for government assistance, the trustees were to distribute income that would not cause ineligibility for assistance. AR at 2.

On December 9, 2010, Ms. Berto divided the assets of the living trust between the living trust and the testamentary trust. AR at 3, 207. She placed all assets, the bulk of which was a piece of real property assigned a value of \$227,500, in the living trust. AR at 3. Acting as trustee for the living trust, she executed a promissory note for \$120,000, approximately one half of the purported value of the living trust, to herself as trustee for the testamentary trust. AR at 3. The living trust spent \$25,000 preparing the property for sale, and sold it for approximately \$150,000, about \$80,000 less than its purported value. AR at 3. Ms. Berto satisfied the promissory note by transferring \$120,000 to the testamentary trust. AR at 3. Ms. Berto then spent the remaining assets in the living trust. AR at 3.

Ms. Berto applied for Medicaid on June 20, 2013. AR at 2. At that time, Ms. Berto was the sole beneficiary and co-trustee of the testamentary trust. AR at 2. Ms. Berto's application for medical assistance was denied because she had available assets worth \$128,221.80 in the testamentary trust, well above the resource limit of \$2,000. AR at 2-4, 81. She resigned as a co-trustee of the testamentary trust in 2014. AR at 3.

C. The Court of Appeals Affirms the Denial Because the Testamentary Trust Was a Resource Available to Ms. Berto

Ms. Berto requested a hearing to contest the denial. AR at 4. Ms. Berto argued that the testamentary trust was not available to her as a resource because she had limited control of the trust under the trust terms. Verbatim Report of Proceedings 26:21-29:9; AR at 76-77. The administrative law judge concluded that the testamentary trust was available to Ms. Berto for purposes of determining financial eligibility for long-term care services and upheld the denial of her Medicaid application. AR at 33-37. On Ms. Berto's subsequent appeal, the HCA Board of Appeals issued a Review Decision and Final Order affirming the denial of Ms. Berto's application because the testamentary trust was an available resource that put her over the resource limit. AR at 1-10.

Ms. Berto's Estate sought judicial review from Spokane County Superior Court, which affirmed HCA's Review Decision and Final Order. Clerk's Papers at 61-63. The Estate appealed once again, and the Court of Appeals agreed with HCA that the testamentary trust was an available resource. *Berto v. Dep't of Soc. & Health Servs.*, 195 Wn. App. 128, 379 P.3d 146 (2016). The court held that the trust was available because none of the provisions in WAC 182-516-0100 exempt the testamentary trust from being considered available to its beneficiary, Ms. Berto. *Id.* at

133. The Estate now seeks this Court's review of the Court of Appeals decision.

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

A petition for discretionary review should be granted only if one of the circumstances in RAP 13.4(b) is fulfilled. The Estate has not argued that its request for review fulfills any of these circumstances. Even if it had, the Estate would not be able to demonstrate a basis for review. This appeal involves the straightforward application of HCA regulations to a testamentary trust to determine whether the trust was an available resource. It does not conflict with any decisions of this Court or the Court of Appeals. Since the decision merely interprets existing regulations and case law and applies them to the particular facts in this case, the case does not involve an issue of substantial public interest that requires an authoritative determination by this Court. The Court of Appeals' decision neither creates a holding on a constitutional issue, nor does it establish a constitutional precedent. Therefore, it does not involve a significant question of law under the constitution. The Estate's Petition for Review should be denied.

A. The Court of Appeals' Decision Is Consistent With Previous Decisions by This Court and the Court of Appeals

This Court may accept review of a Court of Appeals decision if it conflicts with this Court's prior decision or a Court of Appeals decision.

RAP 13.4(b)(1)-(2). Here, the Estate has not argued that the Court of Appeals' decision is inconsistent with any previous case law. Instead, it argues that this Court should accept review because the Court of Appeals erred when it held that a trust is a resource that will generally be considered available to the beneficiary unless it satisfies one of conditions specified in regulation. Petition at 8-9. It appears from this argument that the Estate believes the Court of Appeals incorrectly interpreted WAC 182-512-0200 and WAC 182-516-0100. However, the Estate cannot demonstrate that the Court of Appeals' application of these regulations conflicts with decisions from this Court or the Court of Appeals because these regulations have never been analyzed or applied by the Court of Appeals or the Supreme Court before, and the Court of Appeals' interpretation of the regulation is consistent with well-settled rules of regulatory construction. Discretionary review is not justified when the Court of Appeals' decision utilizes well-established legal principles.

1. The Plain Language of the Regulations Supports the Court of Appeals' Conclusion That the Testamentary Trust Is an Available Resource

Regulations are interpreted consistent with rules of statutory construction. *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 51, 239 P.3d 1095 (2010). When a rule is plain and unambiguous, the court gives effect to that language. *Id.* at 52. If a term is undefined, the court

may look to a dictionary for its ordinary meaning. *In re Estate of Blessing*, 174 Wn.2d 228, 231, 273 P.3d 975 (2012). Consistent with this Court's precedent regarding the rules of regulatory construction, the Court of Appeals' decision gave effect to the plain language of the unambiguous regulations to conclude that the testamentary trust was an asset available to Ms. Berto. *Berto*, 195 Wn. App. at 131-34.

First, the court found that a trust is generally a resource of the trust's beneficiary because it meets the definition of resource in WAC 182-512-0200(1). *Id.* at 131-32. The court stated, consistent with the dictionary definition and this Court's authority, that a trust beneficiary has a type of property right in the contents of a trust that entitles them to "the beneficial enjoyment of property to which another person holds the legal title." *Id.* at 131 *citing* Black's Law Dictionary 1740 (10th ed. 2014); *accord State ex rel. Wirt v. Superior Court*, 10 Wn.2d 362, 369, 116 P.2d 752 (1941). This property right to the contents of the trust fits the definition of resource in WAC 182-512-0200(1). *Berto*, 195 Wn. App. at 131. Therefore, under the plain language of this regulation, the trust is generally a resource of the trust's beneficiary. *Id.*

Second, the court found that under the plain language of WAC 182-516-0100, the testamentary trust was not excluded from resource availability. *Id.* at 133. The court concluded that none of the

unambiguous provisions of WAC 182-516-0100 applied to the testamentary trust to exempt it from being available to Ms. Berto. *Id.* WAC 182-516-0100(3)-(10) did not apply to the testamentary trust. *Id.* Under WAC 182-516-0100(11), if a third party creates a trust over which the beneficiary has no control, the trust principal is unavailable to the beneficiary. *Id.* The court considered WAC 182-516-0100(11) and found that the conditions were not satisfied. *Id.* In accordance with the plain language of the rules, the court rejected the Estate’s assumption that a trust will not be considered an available resource unless WAC 182-516-0100 explicitly describes that type of trust, and held that the testamentary trust was available because no provisions under the rule exempted it from being considered an available asset. *Id.* at 131-34.

2. The Court of Appeals Correctly Concluded That the Testamentary Trust Is Available Because It Is Not Exempt Under WAC 182-516-0100(11)

The Estate agrees with the Court of Appeals that the testamentary trust was not exempt from availability under WAC 182-516-0100, but claims that the Court of Appeals erred because it cited no regulation that “makes the trust available.” Petition at 7. The heart of the Estate’s argument appears to be that the Court of Appeals “expanded” the definition of WAC 182-512-0200 because it concluded that a trust is generally available to a beneficiary under that rule. Petition at 5-9. The

Estate appears to be claiming that a trust cannot be available to a beneficiary unless WAC 182-512-0250 or WAC 182-516-0100 “makes the trust available” by specifically describing the trust and stating that it is available. Petition at 7. This argument fails for several reasons.

First, the Estate’s argument is unfounded because the Court of Appeals never held that a trust will be generally considered an available resource for the trust’s beneficiary “under WAC 182-512-0200.” The Court of Appeals actually concluded that a trust meets the definition of resource under WAC 182-512-0200 and, therefore, it will be available to the beneficiary unless it fits one of the exceptions of WAC 182-516-0100. *Berto*, 195 Wn. App. at 131-32. The Estate had ample opportunity during the administrative hearing to argue that a trust does not meet the definition of a resource under WAC 182-512-0200, but never raised that argument. Instead, on appeal, Ms. Berto conceded that the trust was a resource, but argued that the trust was unavailable to her under WAC 182-516-0100(11) because she had no control over it. AR at 77.

The Court of Appeals held that it is WAC 182-516-0100 that determines whether or not the trust is an available resource, not WAC 182-512-0200. *Berto*, 195 Wn. App. at 133. This holding does not “shift the burden” to the applicant to demonstrate that a trust is unavailable—under the rules whether the trust is available or unavailable

to the beneficiary will be determined by the conditions of WAC 182-516-0100. Because the testamentary trust did not fall under the exemption in WAC 182-516-0100(11), the trust was available to Ms. Berto. *Id.*

Additionally, the Estate's argument that the trust was unavailable because WAC 182-516-0100 did not "make" the trust available is unsupported by the plain reading of the rules. Plain meaning is derived from the "ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). WAC 182-516-0100 describes how trusts are treated by HCA. The only provision of that rule that could apply to the testamentary trust is WAC 182-516-0100(11). WAC 182-516-0100(11) unambiguously explains that a trust is unavailable to its beneficiary if certain conditions are met. Although the regulation does not state that the trust is available if conditions are not met, there is no other way to read the rule that gives it effect. If it was accepted that the rule must describe the specific trust at issue as available in order for it to be considered available, all testamentary trusts would be unavailable, regardless of whether they were exempt from availability under WAC 182-516-0100(11), because there are no such provisions. It

would make no sense for HCA to create an exception to availability for the trusts described in WAC 182-516-0100(11) if it was intended that all testamentary trusts were unavailable. The court should avoid interpretations of rules that are unlikely or absurd; agency rules should be construed in a rational and sensible manner that gives meaning to underlying policy and intent. *Odyssey Healthcare Operating BLP v. Dep't. of Health*, 145 Wn. App. 131, 143, 185 P.3d 652 (2008). The Court of Appeals rightly rejected the Estate's argument that a trust will not be available unless the regulations explicitly describe that type of trust as available. *Berto*, 195 Wn. App. at 132 n.2. The Court of Appeals' application of WAC 182-516-0100 to the testamentary trust gave full effect to the plain language of the regulation.

Finally, the Estate should not be allowed to relitigate the case. The Court of Appeals noted that the Estate's arguments before it were "premised on the faulty assumption that a trust will not be considered an available resource unless the regulations explicitly describe that type of trust." *Id.* That same assumption, rejected by the Court of Appeals, is the basis for the Estate's arguments in support of its Petition. The Estate should not get another chance to relitigate this issue before this Court.

The Court of Appeals followed well-established principles of statutory construction when it concluded that the testamentary trust was an

asset available to Ms. Berto because it is not exempt under the regulations. This decision creates no conflict with court precedent and provides no basis for review under RAP 13.4(b).

B. There Is No Issue of Substantial Public Interest That Should Be Determined by the Supreme Court

The Estate makes no claim that this case raises an issue of substantial public interest that should be reviewed by this Court under RAP 13.4(b)(4). Even if it had, any argument that review of the Court of Appeals decision raises an issue of substantial public interest would fail. The Court of Appeals applied the plain language of the rules to the unique facts surrounding Ms. Berto's testamentary trust. It concluded that Ms. Berto's trust was an available resource because she was a beneficiary of it and it did not meet the conditions of WAC 182-516-0100(11). *Berto*, 195 Wn. App. at 133-34. Consequently, she was ineligible for Medicaid long-term care services. *Id.* There is simply no issue of substantial public interest that should be determined by this Court in this case.

Additionally, the Estate's request for this Court to create a Medicaid eligibility loophole does not raise an interest of substantial public interest because it directly contradicts the policy behind the Medicaid program. The Medicaid program is intended to provide medical assistance to those whose income and resources are insufficient to meet

the costs of necessary medical care. *Atkins*, 477 U.S. at 156. Because there are finite federal and state resources, Medicaid law is designed to ensure that those who are in most need of assistance receive it. *Ramey*, 72 F. Supp. 2d at 1212. The Estate has asked this Court to create a trust loophole that would allow an individual with significant assets to obtain Medicaid eligibility. The creation of such a loophole is not an issue of substantial public interest because it would be benefiting one individual at the expense of those individuals without assets in need of medical assistance.

C. This Case Does Not Involve a Significant Question of Law Under the Constitution of the State of Washington or of the United States

The Court of Appeals' decision rests upon the application of HCA regulations to a testamentary trust to determine whether the trust was an available resource. The decision does not invoke either constitution, nor does it involve any significant question of constitutional law.

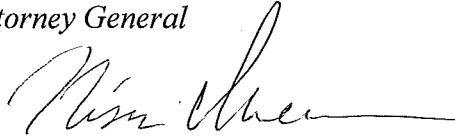
The Estate does not argue that a significant question of constitutional law is raised by the Court of Appeals' decision. It also fails to demonstrate that the ruling creates a constitutional precedent or makes a holding on any constitutional issue. Because the Estate fails to assert that there is a significant constitutional question of law that needs to be addressed, there is no basis for review under RAP 13.4(b)(3).

V. CONCLUSION

Review by this Court is not warranted. The Court of Appeals used well-settled legal principles concerning statutory construction to determine that the testamentary trust was an available resource for Ms. Berto under HCA regulations. The Estate's Petition fails to meet the criteria required for granting review under RAP 13.4(b). HCA requests that the Court deny the Petition for Review.

RESPECTFULLY SUBMITTED this 2 day of December 2016.

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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 2nd day of December 2016, at Tumwater, Washington.



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