NO. 33591-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ESTATE OF MARGARET L. BERTO,

Appellant,

v.

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

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

> 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 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. These resource standards exist to ensure that Medicaid is available for the neediest individuals who do not have resources to pay for medical care.

HCA denied Margaret Berto's application for long-term care Medicaid services because she had resources available to her worth $128,221.80, significantly more than the permissible limit of $2,000. The assets of a trust established by Ms. Berto's spouse in his will were available to Ms. Berto because Ms. Berto was the beneficiary of the trust and had control of its assets as co-trustee.

Ms. Berto's Estate appealed the Medicaid denial, asserting only that HCA incorrectly interpreted and applied the law when it determined

that the assets contained in the trust were available to Ms. Berto. HCA correctly determined that the trust was an available resource because Ms. Berto was the beneficiary of a trust she controlled. There is no exemption under federal or state law for assets in such a trust. As a result, Ms. Berto was not entitled to Medicaid.

II. ISSUES PRESENTED

1. Were assets in the Testamentary Trust available to Ms. Berto, making her over-resourced and ineligible for Medicaid?

2. The Estate should not prevail in this appeal, but if it does, should the Estate be entitled to attorney's fees and expenses when it has failed to request them in accordance with RAP 18.1?

III. COUNTERSTATEMENT OF THE CASE

A. Statutory and Regulatory Background

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 has been designated by the Legislature as the single-state agency authorized to administer the cooperative federal-state Medicaid program in Washington State.[1] *See* RCW 74.09.530; RCW 41.05.021. 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). These standards must take into account "only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient." 42 U.S.C. § 1396a(a)(17)(B).

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* title 182-513 WAC. HCA takes into account only resources it determines are available to an applicant. WAC 182-512-0250. To be resource eligible for long-term care Medicaid benefits, an unmarried individual must

[1] HCA has authorized the Department of Social and Health Services (the Department) to determine 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 the Department are made as HCA's designee.

typically have available resources of $2,000 or less. WAC 182-513-1315; WAC 182-513-1350(1); *see also* WAC 182-513-1301.

HCA determines whether a trust is an available resource to a Medicaid applicant or beneficiary under the state regulation WAC 182-516-0100. A trust is broadly defined as property that is transferred to a trustee for the benefit of the grantor or another party. WAC 182-516-0001. As an overarching rule, trust assets are considered available assets if the Medicaid applicant is the trust beneficiary and controls the trust. Social Security Admin., Dept. of Health & Human Services, Program Operations Manual System (POMS) SI 01120.200D (Dec. 2013), https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120200; WAC 182-516-0100(11). 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).[2] If a trust meets the definition of special needs trust, HCA determines whether it is an available resource for Medicaid eligibility purposes under the provisions of

[2] The Department considers a trust to be established by the client when the assets are at least partially from the client or the client's spouse; the trust is not established by will; and the trust was established by the client or the client's spouse or a person with legal authority to act on behalf of the client or client's spouse. WAC 182-516-0100(5)(a)(ii). Trusts created by a will are trusts created from the estate of a deceased person and are called testamentary trusts. WAC 182-516-0001.

WAC 182-516-0100(6) and (7).[3] In this case, Ms. Berto both controlled the trust as co-trustee and was the beneficiary of the trust, so the trust assets were deemed available under POMS SI 01120.200D and WAC 182-516-0100(11).

B. Factual and Procedural Background

On January 19, 2009, Margaret Berto's husband passed away. Administrative Record (AR) 2, Findings of Fact (FF) 4. At that time, Ms. Berto was the beneficiary and trustee of two separate trusts: the Margaret Berto Special Needs Trust[4] (Testamentary Trust), and the Berto Living Trust (Living Trust). AR 2; FF 2, 3, 4, 6. The Living Trust was established by Ms. Berto and her husband. AR 2, FF 3. Upon his death, she became the sole trustee. *Id*. The Testamentary Trust was established by Mr. Berto in his will and named Ms. Berto as the beneficiary and co-trustee. AR 2, FF 4.

On December 9, 2010, as the trustee of the Living Trust, Ms. Berto divided the assets of the Living Trust between the Living Trust and the Testamentary Trust. AR 3, FF 8; AR 207. She placed all assets, including

[3] Special needs trust means an irrevocable trust meeting all of the following conditions: (1) It is for the sole benefit of a disabled individual (as determined by SSA criteria) under sixty-five years old; (2) it was created by the individual's parent, grandparent, legal guardian, or by the court; and (3) it contains a provision that upon the death of the individual, the state will receive the amounts remaining in the trust up to the total amount of Medicaid paid on behalf of the individual. WAC 182-516-0001.

[4] This trust did not meet the definition of "special needs trust" in WAC 182-516-0001; thus, the Department did not consider it to be a special needs trust and did not evaluate it under WAC 182-516-0100(6) or (7).

real property valued at $227,500, in the Living Trust, and executed a promissory note from the Living Trust to herself, as trustee of the Testamentary Trust, for $120,000, approximately one half of the estimated value of the Living Trust. AR 3; FF 8, 9. When the real property in the Living Trust actually sold, it netted $147,561.00 to the Living Trust. AR 3, FF 10. Even though the property sold for $80,000 less, and the promissory note was based on the higher value, Ms. Berto, as trustee of the Living Trust, transferred $120,000 to herself, as trustee of the Testamentary Trust, in satisfaction of the promissory note. AR 3, FF 11. After the transfer to the Testamentary Trust, and payment of the promissory note, Ms. Berto spent the remaining assets in the Living Trust. AR 3, FF 14.

Ms. Berto applied for Medicaid on June 20, 2013. AR 2, FF 1. At that time, Ms. Berto was the sole beneficiary and co-trustee of the Testamentary Trust. AR 2, FF 2, 4, 5, 6. Ms. Berto's authority as co-trustee was not limited except that she could not be a sole trustee and she could not alone determine the amount of a distribution. AR 2, FF 5. 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 2, FF 6, 7. 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 2, FF 7. This provision applies to distribution of principal as well as income. *Id*.

Ms. Berto's application for medical assistance was denied because she had available assets worth $128,221.80, well above the resource limit of $2,000. AR 3, FF 15; AR 2, FF 4; AR 81. In the denial notice, the Department of Social and Health Services (the Department), as HCA's designee, stated that the assets in the Testamentary Trust were available because Ms. Berto was both the beneficiary and the co-trustee of the trust, resulting in the assets being free of the trust conditions. AR 78. The Department cited to WAC 182-516-0001, WAC 182-516-0100, and the POMS SI 01120.200 to justify the determination. *Id.* After receiving notice that her application for benefits was denied because the assets in this trust were available resources, she resigned as a co-trustee. AR 3, FF 13. Ms. Berto requested a hearing to contest the denial. AR 4, FF 16.

An administrative hearing was held to address the availability of the Testamentary Trust as a resource for Medicaid eligibility purposes and the interpretation of WAC 182-516-0100. AR 1, 33. The Administrative Law Judge found that Ms. Berto exercised control over the Testamentary Trust; thus, the Testamentary Trust was an available asset per

WAC 182-516-0100(11). AR 37. Ms. Berto petitioned for review to HCA's Board of Appeals. AR 1.

The Board of Appeals affirmed the denial. The Board of Appeals concluded that WAC 182-516-0100(11) provides the rule for the initial determination of the availability of the assets in the Testamentary Trust, and that the rule does not apply just to HCA's determination of post-eligibility Medicaid participation. AR 8, Conclusions of Law (CL) 14. It held that the standard in WAC 182-516-0100(11) is not ambiguous and is the controlling authority. AR 9, CL 15. It acknowledged that the Department took cognizance of federal guidance because the denial notice cited POMS SI 01120.200D, but concluded that it did not need to look to federal guidance to interpret the regulation because it is not ambiguous. *Id*. It held that per WAC 182-516-0100(11), the standard is whether Ms. Berto had any control over a trust and concluded that Ms. Berto did not qualify as having no control over the trust. AR 9, CL 16. Thus, at the time of application, the trust assets were available to Ms. Berto under WAC 182-516-0100(11) and she was not eligible for Medicaid because the value of the funds remaining in the trust exceeded the $2,000 resource standard. AR 9, CL 17.

After Ms. Berto's death, her Estate petitioned Spokane County Superior Court for review of the Board of Appeals' Review Decision and

Final Order. Clerk's Papers (CP) at 1-31. The superior court denied the Estate's petition and affirmed the Board of Appeals. CP at 69-75.

IV. ARGUMENT

A. Standard of Review

Review of agency action is governed by the Administrative Procedure Act, title 34.05 RCW. The burden of demonstrating the invalidity of agency action is on the party asserting the invalidity. RCW 34.05.570(1). A reviewing court may invalidate an agency's final order only for specific, enumerated reasons. RCW 34.05.570. Under RCW 34.05.570(3), relief may be granted only if:

> (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied; (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law; (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure; (d) The agency has erroneously interpreted or applied the law; (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter; (f) The agency has not decided all issues requiring resolution by the agency; (g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion; (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by

> stating facts and reasons to demonstrate a rational basis for inconsistency; or (i) The order is arbitrary or capricious.

Although the Estate has failed to cite to the Administrative Procedure Act standard of review and identify under which of the enumerated reasons in RCW 34.05.570 it appeals, this Court can overturn the final order only for one of those enumerated reasons.[5]

When the challenged action is an agency order, the appellate court's review is limited to the order issued by the final decision-maker for the agency, not a preliminary or initial decision or the order of the superior court. *Verizon Nw., Inc. v. Wash. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008); *Campbell v. State Emp't Sec. Dep't*, 180 Wn.2d 566, 569, 326 P.3d 713 (2014) ("We sit in the same position as the superior court and apply the APA standards directly to the administrative record. . . . Thus, the decision we review is that of the agency, not of the ALJ or the superior court.").[6]

Questions of law are reviewed de novo. *Ames v. Dep't of Health*, 166 Wn.2d 255, 260-61, 208 P.3d 549 (2009). While the Court may

[5] Based on the arguments presented in its briefing, HCA is assuming that the Estate is relying on RCW 34.05.570(3)(d) and arguing that HCA erroneously interpreted or applied WAC 182-516-0100.

[6] The Estate has not identified the appropriate order that is being appealed and erroneously assigns error on the part of the superior court. Brief of Appellant (Br. Appellant) at 1. ("The Trial Court Erred . . . ."; "Did the Trial Court err . . . ."). The superior court is not part of HCA and its ruling does not constitute an agency action. Thus, under the Administrative Procedure Act, this Court can review only the Review Decision and Final Order, not the superior court order.

substitute its interpretation of the law for that of an agency, it should grant substantial deference to the agency's interpretation of ambiguous statutes that the agency administers. *Pub. Util. Dist. 1 v. Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002). This is especially true when the issue falls within the agency's area of expertise. *Ames*, 166 Wn.2d at 261. An agency's interpretation of its regulations is entitled deference as "it has expertise and insight gained from administering the regulation that the reviewing court does not possess." *Swedish Health Servs. v. Dep't. of Health*, 189 Wn. App. 911, 914, 358 P.3d 1243 (2015), *quoting Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 56, 239 P.3d 1095 (2010).

Challenged facts are reviewed under the substantial evidence standard. RCW 34.05.570(3)(e). A challenged finding of fact will be upheld if it is supported by "evidence that is substantial when viewed in light of the whole record before the court." *Id.* This standard is highly deferential to the agency fact finder. *ARCO Prods. Co. v. Wash. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). The reviewing court is not to weigh the evidence or substitute its view of the facts for that of the agency. *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 929 P.2d 510 (1997). Rather, if the administrative record contains sufficient facts from which a reasonable person could make the same

findings as the agency, the findings should be upheld, even if the reviewing court would make a different finding. *Id*.

B. Findings of Fact Not Challenged Are Verities on Appeal

It does not appear that the Estate has evoked RCW 34.05.570(3)(e) and argued that the final order is unsupported by substantial evidence, but even if it had, no specific findings of fact in the final order have been challenged. An appellant challenging the factual findings in an administrative order must specifically assign error to "each finding of fact" it is challenging. Rules of Appellate Procedure (RAP) 10.3(g); *see also Markam Group, Inc. P.S. v. Dep't of Emp't Sec*., 148 Wn. App. 555, 561-62, 200 P.3d 748 (2009). In addition to properly assigning error, an appellant challenging an administrative adjudicative order must also set forth a separate statement of each error the party contends was made by the agency, together with issue statements pertaining to each assignment of error. RAP 10.3(h). Unless the appellant properly assigns error or clearly discloses the challenged findings in its issue statements, the factual findings will not be reviewed. RAP 10.3(g). Thus, all factual findings in the Board of Appeal's Review Decision and Final Order are verities on appeal. *See, e.g., Roller v. Dep't of Labor & Indus*., 128 Wn. App. 922, 927, 117 P.3d 385 (2005).

C. Assets in the Testamentary Trust Were Available to Ms. Berto, Making Her Ineligible for Medicaid

1. The Board of Appeals Correctly Concluded That the Assets in the Testamentary Trust Were Available to Ms. Berto Under WAC 182-516-0100(11)

HCA determines how trusts affect eligibility for Medicaid programs by applying WAC 182-516-0100. AR 8, CL 12. Under WAC 182-516-0100(11), HCA counts trust principal in an initial resource eligibility determination if the applicant is the beneficiary of the trust and has control over that trust. AR 9, CL 14. In Ms. Berto's case, HCA applied this rule and determined that the Testamentary Trust was an asset available to Ms. Berto for Medicaid eligibility purposes because she was the beneficiary of the trust and controlled it. AR 9, CL 14, 16, 17.

When interpreting a regulation, the court first considers the plain language; if the plain language is unambiguous then the court's inquiry ends. *Swedish Health Servs.*, 189 Wn. App. at 914. The plain language of WAC 182-516-0100(11) provides that only the income, and not the principal, of a trust will be counted if (a) the beneficiary has no control over the trust; and (b) it was established with funds of someone other than the client, spouse or legally responsible person. The Testamentary Trust at issue here did not satisfy the first factor of WAC 182-516-0100(11)

because Ms. Berto was the beneficiary of the Testamentary Trust and controlled it as co-trustee.[7] AR 2, FF 4, 5, 6. Consequently, HCA counted the trust principal as available to Ms. Berto. AR 9, CL 16, 17.

Even if WAC 182-516-0100(11) is considered by this Court to be ambiguous, HCA's interpretation of the rule is in accordance with applicable federal guidance. The federal Centers of Medicare and Medicaid Services has published guidance on the treatment of trust assets as available resources in the Medicaid program. Centers for Medicare and Medicaid Services, U.S. Dep't of Health & Human Servs., State Medicaid Manual, § 3259, https://www.cms.gov/Regulations-and-Guidance/guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html. The federal government's State Medicaid Manual does not have the force of law, but it is owed deference when its interpretations are consistent with statutory language, statutory purpose, and are reasonable. *Hobbs ex rel. Hobbs v. Zenderman*, 579 F.3d 1171, 1187 (10th Cir. 2009). The Manual directs states to deal with testamentary trusts by "using applicable cash assistance program policies." State Medicaid Manual § 3259.1. The applicable cash

[7] The Estate seems to argue that the second factor of WAC 182-516-0100(11) somehow precludes HCA from applying this subsection of the rule to determine the availability of the Testamentary Trust. Br. Appellant at 7. There is simply no support in the plain language of the rule for the Estate's argument that subpart (11) cannot apply to testamentary trusts created by an applicant's spouse's will. Nothing in the rule indicates that testamentary trusts deriving from the will of an applicant's spouse cannot be considered under the subpart (11) when the applicant is the beneficiary of and controls the trust. The Board of Appeals did not consider the second factor of the subpart (11) because it was determined that the Testamentary Trust did not satisfy the first factor.

assistance policies are found in the POMS, through which the Social Security Administration construes the statutes governing its operations. *E.g.*, *Lopes v. Dept. of Soc. Servs.*, 696 F.3d 180, 186 (2nd Cir. 2012). Like the State Medicaid Manual, the POMS does not have the force of law, but is entitled to persuasive authority. *E.g.*, *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001 (9th Cir. 2006).

The POMS directly addresses treatment of trusts as resources. POMS SI 01120.200D. This POMS provision applies to all trusts, including testamentary trusts. *Id*. According to the POMS, "if an individual can direct the use of the trust principal for his or her support and maintenance under the terms of the trust, the trust principal is a resource for SSI purposes." *Id*. The POMS states that if a beneficiary has the "authority under the trust to direct the use of the trust principal. . . . the beneficiary's equitable ownership in the trust principal and his or her ability to use it for support and maintenance means it is a resource." Also, the POMS states that if the trustee "has the legal authority to withdraw and use the trust principal for his or her own support and maintenance, the principal is the trustee's resource." *Id*.

As specified by the federal guidance on trusts as resources in POMS SI 01120.200D, a trust is a beneficiary's resource when the beneficiary has the authority to direct the use of the trust principal. HCA's

interpretation of WAC 182-516-0100(11) follows this guidance—a trust controlled by the beneficiary of the trust is available to that beneficiary.[8] Ms. Berto was the beneficiary and co-trustee of the Testamentary Trust. AR 2, FF 2, 5, 6. As co-trustee, she had control of the Testamentary Trust assets. AR 2, FF 5; AR 9, CL 16. These factual findings by the Board of Appeals have not been challenged by the Estate and are verities on appeal. Therefore, according to the applicable provision in the federal guidance, POMS SI 01120.200D and WAC 182-516-0100(11), the trust principal was an available asset to Ms. Berto. Because Ms. Berto had available assets over the resource limit, the Board of Appeals did not erroneously interpret or apply the law and Ms. Berto was correctly determined ineligible for Medicaid.

[8] The Washington Courts have not previously interpreted or applied WAC 182-516-0100 or POMS SI 01120.200D. When considering the treatment of a trust asset in a Medicaid eligibility determination, the Alabama Court of Appeals gave great weight to the provision in the POMS that says that trust principal is not a resource if the beneficiary does not have access to it. *Alabama Medicaid Agency v. Primo*, 579 So.2d 1355 (Ala. Civ. App. 1991). The court gave great weight to the POMS because Congress

> conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the Act; specifically the provision that participating states must grant benefits to eligible persons 'taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant.'

Id., *quoting* 42 U.S.C. § 1396a(a)(17)(B).

2. WAC 182-516-0100(5)(a)(ii) Does Not Exempt Testamentary Trusts From Availability Determinations

The Estate argues that the Testamentary Trust cannot be considered a resource available to Ms. Berto because, as a trust created by will, it is exempt from availability determinations under WAC 182-516-0100(5). Brief of Appellant (Br. Appellant) at 7, 8. The Estate claims that because WAC 182-516-0100(5) does not apply to testamentary trusts, all testamentary trusts are exempt in availability determinations, even if the applicant is the beneficiary of the testamentary trust and controls it. *Id*. The Estate's arguments have no basis in law and fail for the following reasons.

First, nothing in WAC 182-516-0100 indicates that the rule creates an "exemption" for testamentary trusts. WAC 182-516-0100(5) explains how the agency determines whether self-settled trusts created after 2003 are assets available to Medicaid applicants. Under WAC 182-516-0100(5)(a), a trust is considered by HCA to be self-settled when (1) the assets are at least partially from the client or the client's spouse; (2) *the trust is not established by will*; and (3) the trust was established by the client, client's spouse, or someone acting with legal authority or at the direction of the client. Accordingly, trusts established by a will are not self-settled and are not subject to the resource availability

provisions found in WAC 182-516-0100(5). However, that does not mean that testamentary trusts cannot be evaluated under any other provisions of law to determine whether they are available resources. WAC 182-516-0100(5)(a)(ii) does not exempt all testamentary trusts from resource availability determinations—it simply explains that testamentary trusts are not self-settled and, thus, not evaluated under subpart (5). The Estate cannot take subpart (5)(a)(ii) out of the context of (5)(a) and claim that it exempts all will-established trusts from all availability rules. WAC 182-516-0100(5) did not apply to the Testamentary Trust, but HCA found that WAC 182-516-0100(11) did apply because Ms. Berto was the beneficiary of the trust and controlled it. AR 9, CL 16. Under WAC 182-516-0100(11), the Testamentary Trust was available to Ms. Berto.

Second, the Estate's interpretation of WAC 182-516-0100(5) is not supported by federal law. Br. Appellant at 6. WAC 182-516-0100(5) derives from the federal statute 42 U.S.C. § 1396p(d)(3), which places limits on the use of self-settled trusts as a Medicaid qualifying tool.[9] Testamentary trusts are not evaluated under this statute. 42 U.S.C.

[9] 42 U.S.C. § 1396p(d)(3) states that if there are any circumstances under which payment from an irrevocable self-settled trust could be made to or for the benefit of the applicant, that portion of the self-settled trust is an available resource. Any payments from the self-settled trust not available to the applicant are considered to be assets transferred by the individual, which triggers a penalty period of benefits ineligibility. 42 U.S.C. § 1396p(d); *Wong v. Daines*, 582 F. Supp. 2d 475, 481 (S.D.N.Y. 2008).

§ 1396p(d)(2)(A) ("an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the trust and if any of the following individuals established such trust other than by will[.]"). However, contrary to the Estate's claim, this does not mean that all testamentary trusts are unavailable to applicants because 42 U.S.C. § 1396p(d)(2)(A) of the federal statute does not apply to testamentary trusts. 42 U.S.C. § 1396p(d) does not apply to testamentary trusts, but it does not preclude states from evaluating testamentary trusts under other regulations to determine whether they are available assets. 42 U.S.C. § 1396p(d) was passed and amended several times to close loopholes that allowed applicants to use self-settled trusts to avoid resource eligibility rules.[10] There is no evidence that the statute was enacted to create a loophole for beneficiary-controlled testamentary trusts.

In support of this point, this Court can consider a ruling of the Supreme Court of Nebraska that clearly indicates that testamentary trusts

[10] The Omnibus Budget Reconciliation Act (OBRA) of 1993 amended Medicaid law to tighten the restrictions on self-settled trust loopholes. Pub. L. No. 103-66 § 13611, 107 Stat. 312 (1993). At a committee hearing before the passage of the act, President Clinton's administration testified that the proposed statutory language would "close numerous loopholes in the Medicaid law which allow persons with substantial assets to qualify for Medicaid and ensure that those with substantial personal assets pay a fair share for nursing home care and other medical services before Medicaid starts to pay." Ira Stewart Wiesner, *OBRA '93 and Medicaid: Asset Transfers, Trust Availability, and Estate Recovery Statutory Analysis in Context*, 19 Nova L. Rev. 679, 681 n.4 (1995), *quoting* Hearings on H.R. 2264 Before the Subcomm. on Health and the Environment, 103rd Cong., 1st Sess. 6 (1993).

may be evaluated under provisions of law other than 42 U.S.C. § 1396p. In *Pohlmann ex rel. Pohlmann v. Neb. Dept. of Health and Human Servs.*, 271 Neb. 272, 710 N.W.2d 639 (2006), a Medicaid applicant challenged the state's determination that a testamentary trust was an asset available to her under 42 U.S.C. § 1396p. *Pohlmann*, 271 Neb. at 275. The Nebraska Supreme Court concluded that the state inappropriately applied 42 U.S.C. § 1396p to the trust because that statute does not apply to testamentary trusts. *Pohlmann*, 271 Neb. at 278. The Court noted that 42 U.S.C. § 1396p was enacted to restrict loopholes in the Medicaid act through which self-settled trusts were being used to exclude assets from consideration in Medicaid eligibility determinations and that testamentary trusts are not within the purview of that law. *Pohlmann*, 271 Neb. at 277-78. However, the Court also held that the state may still evaluate testamentary trusts under other state regulations that discuss the availability of trust principal for Medicaid purposes. *Id*. at 279. The Court evaluated the specific trust terms under Nebraska regulations and held that its assets were unavailable to the applicant because as beneficiary she could not compel distribution of the assets. *Id*. at 281.

HCA did exactly that in this case. The Testamentary Trust did not fall within the purview of WAC 182-516-0100(5), so the agency evaluated it under WAC 182-516-0100(11). As explained above,

WAC 182-516-0100(11) is in line with federal guidance that a trust is a beneficiary's resource when the beneficiary has the authority to direct the use of the trust principal. POMS SI 01120.200D. Because Ms. Berto, as the beneficiary, controlled the Testamentary Trust, HCA correctly applied the law and determined that the trust assets were available to her as a resource.

Finally, even if this Court finds WAC 182-516-0100 ambiguous as to how to treat testamentary trusts in Medicaid eligibility determinations, the Estate's alleged "exemption" for testamentary trusts would lead to absurd results. Courts must 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).

If this Court was to accept the Estate's interpretation of WAC 182-516-0100, assets in testamentary trusts could never be considered available resources, even if applicants both benefited from and controlled the trust assets. This would directly contradict the POMS guidance regarding trusts as resources and create a massive loophole in the Medicaid program, which 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. An applicant who has access to resources does not qualify for Medicaid, yet the Estate's alleged "exemption" would provide a path towards eligibility for those applicants benefiting from and controlling assets in testamentary trusts. The Estate's alleged "exemption" is illogical and does not give meaning to the intent of Medicaid as a medical-assistance program for the neediest individuals.

The Board of Appeals correctly determined the Testamentary Trust to be an available resource to Ms. Berto. The Estate cannot show that the Board of Appeals erroneously interpreted or applied the law. This Court should affirm the Review Decision and Final Order.

D. The Estate Should Not Prevail in This Appeal, but if It Does, the Estate Is Not Entitled to Attorney's Fees

The last line of the conclusion of the Estate's opening brief asks that this Court award it attorney's fees and costs, but the Estate does not devote a separate section of its brief to its request for fees and expenses as required by RAP 18.1(b). Br. of Appellant at 9. The requirement that the requesting party devote a section of its opening brief to the request for fees or expenses is mandatory. *Wilson Ct. Ltd. P'ship v. Tony Maroni's*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998). The rule requires more than a bald request for attorney's fees on appeal; argument and citation to authority are required to advise the court on the grounds for an award of

attorney fees. *Id.* Because the Estate has failed to devote a section of its opening brief to its request for fees and expenses, or include argument or citation to authority to support its request, this Court should deny the Estate's request for attorney's fees and costs.

V. CONCLUSION

The Board of Appeals correctly concluded that Ms. Berto was ineligible for Medicaid because she had resources available to her worth more than the $2,000 resource limit. Assets in a Testamentary Trust were available to Ms. Berto because she was the beneficiary of the trust and controlled the trust. The Estate cannot show that HCA erroneously interpreted or applied the law. Therefore, the Review Decision and Final Order should be affirmed.

RESPECTFULLY SUBMITTED this 18 day of February, 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 18th day of February 2016, at Tumwater, Washington.

Nicole Beck-Thorne

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Legal Assistant