# COURT OF APPEALS – DIVISION III

## NO. 33591-7-III

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ESTATE OF MARGARET L. BERTO,

Appellant.

v.

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

Respondent.

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APPEAL FROM THE SUPERIOR COURT

FOR SPOKANE COUNTY

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# Brief of Appellant

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## I. INTRODUCTION

This case involves a very specific provision in the Washington Administrative Code as it applies to a Testamentary Supplemental Needs Trust established by one spouse for the other in their Will and whether the assets contained in that Trust should be counted as resources for Medicaid eligibility when the surviving spouse is nominated as a Co-Trustee of the Trust. The Trial Court affirmed the Review Decision and Final Order of the Department of Social and Health Services Board of Appeals holding that WAC 182-516-0100(11) applied and determined that the assets in the Margaret Berto Special Needs Trust should be included in determining Mrs. Berto's eligibility for Medicaid.

## II. ASSIGNMENT OF ERROR

The Trial Court Erred In Its Affirmation of the Review Decision and Final Order of the Department of Social and Health Services Board of Appeals that the Berto Special Needs Trust Was an Available Resource to Mrs. Berto Under WAC 182-516-0100(11), Making Her Over Resourced and Ineligible For Medicaid.

## III. ISSUE PRESENTED

Did the Trial Court err in applying WAC 182-516-0100(11) to a Supplemental Needs Trust established by the deceased spouse in their Will and, accordingly, counting the assets in that Trust as an available resource for determining Medicaid eligibility?

## IV. STATEMENT OF THE CASE

In January 2009, Mrs. Berto's husband passed away, leaving his half of the joint estate, including his half of the Berto (Revocable) Living Trust, to the Trustees of the Testamentary Supplemental Needs Trust established under his Last Will and Testament (hereinafter referred to as the Berto Special Needs Trust). Following his passing, Appellant prepared a good faith inventory of the estate based upon statements and professional opinions of value. This inventory provided the values for an equal division of the estate.

On December 9, 2010, Mrs. Berto, as Personal Representative of the Estate of Virgil Berto and as Trustee of the Berto Living Trust, funded the Berto Special Needs Trust with a Promissory Note payable from the Living Trust for $120,000, representing Virgil Berto's one half community property interest of the Berto Living Trust.

The terms of the Berto Special Needs Trust specifically limit what discretionary distributions of income and principal may be made by the Appellant if serving as Co-Trustee. The discretion is limited because Appellant was functionally eligible to apply for Medicaid assistance. Specifically, Article Three Section 2 states, "No part of the trust share set aside for such beneficiary shall be used to supplant or replace public assistance benefits of any state or federal agency..." Additionally, Article Five Section 5 states, "The Co-Trustee serving with MARGARET L. BERTO will always have the authority to determine the amount of any distribution made to MARGARET L. BERTO."

Between December 2010 and June 2013, Mrs. Berto spent the remaining assets in the Berto Living Trust. On June 20, 2013, Mr. West, as Attorney in Fact for Appellant, submitted a Medicaid Application for LTC Services. The purpose of the application was to begin benefits due to being financially and medically needy.

On January 22, 2014, seven months following the submission of the application, the Department of Social and Health Services denied Mrs. Berto's initial application for benefits, determining that Mrs. Berto, as beneficiary, maintained some "control" over the Berto Special Needs Trust. (Initial Order at 2).

On March 25, 2014, the matter came before the Office of Administrative Hearings for Fair Hearing. By written opinion mailed April 09, 2014, Debra H. Pierce, Administrative Law Judge, affirmed the department's denial. (Initial Order at 5). The primary basis for affirming the denial was WAC 182-516-0100. (Initial Order at 4). Applying WAC 182-516-0100 the Administrative Law Judge held, "if a trust was established by the recipient of public assistance, or the recipient's spouse, the maximum amount allowed to be distributed under the terms of the trust is considered available income to the recipient if the recipient could be the beneficiary of all or part of the payments from the trust, the distribution of payments is determined by one or more of the trustees and the trustees are allowed discretion in distributing payments to the recipient. In this case, the trust was established by the recipient's spouse, and the entire principal and income could be distributed to the Appellant at the trustees' discretion." (Initial Order at 4 ¶ 10).

Additionally, the Administrative Law Judge relied upon WAC 182-516-0100 stating that "The Appellant has not established that she had no control over the trust. Only funds of the Appellant or her spouse established the trust and remain as assets of the trust. Therefore, the trust principal is correctly considered a resource to the Appellant..." (Initial Order at 4 ¶ 12).

On October 10, 2014, the Department of Social and Health Services Board of Appeals in its Review Decision and Final Order held that the Berto Special Needs Trust was an available resource to Mrs. Berto under WAC 182-516-0100(11), making her over resourced and ineligible for Medicaid. "The language of subsection (11) reads like an initial determination of the

availability of the assets in the trust, even if it is poorly written." (Review Decision and Final Order at 9 ¶ 14). "The standard in the regulation is whether the Appellant had any control over the trust." (Review Decision and Final Order at 9 ¶ 16).

In its Order Denying Appllant's Petition to reverse the Review Decision and Final Order of the Department of Social and Health Services Board of Appeals the Trial Court held: "The estate makes the argument that the review judge erroneously expanded the scope of 182-516-0100(11) beyond third-party trusts. This Court does not understand that to be the holding of the review judge. Here the trust in question was formed by will provisions and was funded (depending on how you view it) by the estate or the living trust by way of assets received by the estate." (Order on Judicial Review, Attachment page 3).

## V. ARGUMENT

The only question in this appeal is whether Washington Administrative Code Section 182-516-0100(11) applies only to Trusts established by a third party or does it extend to all Trusts including a Trust established by a spouse in their Will.

### 1. WAC 182-516-0100(5)(a) Excludes Assets in a Trust Established by a Spouse in Their Will for Purposes of Determining Medicaid Eligibility for the Surviving Spouse.

When analyzing whether assets in a Trust should be counted for Medicaid eligibility purposes, we must first read the Trust to see if the assets are available to the beneficiary. If the language of the Trust says the assets are not available, then we look to WAC 182-516-0100 to see if the law makes them available despite the language in the trust. The relevant text of WAC 182-516-0100(5) states:

5. For trusts established on or after August 1, 2003;

a. The department considers a trust as if it were established by the client when:

i. The assets of the trust, as defined under WAC 388-470-0005, are at least partially from the client or the client's spouse;

ii. **The trust is not established by will**; and

iii. The trust was established by:

A. The client or the client's spouse;

B. A person, including a court or administrative body, with legal authority to act in place of or on behalf of, the client or the client's spouse; or

C. A person, including a court or administrative body, acting at the direction of or upon the request of the client or the client's spouse.

b. **Only the assets contributed other than by will to the trust by either the client or the client's spouse are available to the client or the client's spouse** when part of the trust assets were contributed by persons other than the client or the client's spouse.

c. (omitted)

d. For a revocable trust established as described under subsection (5)(a) of this section:

i. The full amount of the trust is an available resource of the client;

ii. Payments from the trust to or for the benefit of the client are income of the client; and

iii. Any payments from the trust, other than payments described under (5)(d)(ii), are considered a transfer of client assets.

e. For an **irrevocable trust established as described under subsection (5)(a) of this section**:

i. Any part of the trust from which payment can be made to or for the benefit of the client or the client's spouse is an available resource. When payment is made from such irrevocable trusts, the department will consider the payment as:

A. Income to the client or the client's spouse when payment is to or for the benefit of either the client or the client's spouse; or

B. The transfer of an asset when payment is made to any person for any purpose other than the benefit of the client or the client's spouse;

ii. **A trust from which a payment cannot be made to or for the benefit of the client or the client's spouse is a transfer of assets**. For such a trust, the transfer of assets is effective the date:

A. The trust is established; or
B. The client or client's spouse is prevented from receiving benefit, if this is after the trust is established.

**Emphasis added** to highlight relevant provisions.

This particular section of the Code emphasizes that any Trust created by a client or their spouse will be counted as a resource. The main exception to this is Subsection (5)(a)(ii) which removes from this consideration a Trust that has been established by a Will. The reason the statute has made an exception for trusts established by a spouse's Will is that the federal law provides that exception. 42 USC 1396p(d)(2)(A) provides:

> (A) For purpose of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by Will:
> (ii) The individual's spouse

Medicaid is a joint program between the Federal Government and the States. Washington State must follow the Federal law to receive matching funds from the Federal Government. The Berto Special Needs Trust is a testamentary trust from which Appellant's spouse contributed assets "by will." Accordingly, the Berto Special Needs Trust falls squarely within the exception under WAC 182-516-0100(5) and should not be considered as available.

**2. WAC 182-516-0100(11) Applies to Trusts Established With Funds From a Third Party and Not to Trusts Established With Funds From a Spouse.**

The next step in this analysis is to determine whether WAC 182-516-0100(11) applies to all Trusts or just to Trusts funded by a third party. WAC 182-516-0100(11) provides:

> (11) The department will only count income received by the client from trusts and not the principal, 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.

Subpart (b) specifically refers to a Trust established with funds of someone other than the client or their spouse. There is no ambiguity in this statement. If WAC 182-516-0100(11) applied to Trusts funded by a spouse, the law makers would not have added Subpart (b) to specifically exclude Trusts established with the funds of the spouse.

The reason WAC 182-516-0100(11)(b) is needed is because WAC 182-516-0100(5) already clearly addresses Trusts funded with assets from a spouse, client or legally responsible person. In fact Subsection (5)(b) states that it does not matter if the spouse has control or not, the assets in a Trust established by a spouse (other than by a will) will be considered a resource. The only gap that needed to be filled by Subsection (11) are Trusts established by a third party. By adding Subsection (11) the law makers attempt to close that gap and state that if a person is a beneficiary of a Trust funded by someone other than themselves or their spouse and the client has control over that Trust, then those assets will be counted as a resource.

### 3. The Assets in the Trust Established by the Will of the Deceased Spouse are Assets from the Spouse not a Third Party.

The only remaining question is, does the Code intend for us to consider assets in a Trust established by a spouse's Will to be assets from the spouse and exempt under WAC 182-516-0100(5)(a)(ii) or are the assets in that Trust to be considered as originating from a third party that should be subject to the control restrictions of WAC 182-516-0100(11).

The answer is that if we consider assets in the Trust established by the spouse's Will to be from a third party and not the spouse it renders WAC 182-516-0100(5)(a)(ii) completely moot and illogical. Subsection (5) states that if a spouse contributes assets directly to a trust, they are available, but if a spouse contributes the same assets by a Will to a trust, they are not available. Just because the spouse's assets go to the trust through a Will and probate does not somehow make them non-spouse third-party assets. The language in Subsection (5)(b) further

supports this logical conclusion. In (5)(b), the lawmakers clearly reference assets being contributed by a "spouse" by Will. As Wills are not executed until death, this statement has but one logical conclusion – that a spouse can posthumously contribute assets to a protected trust. The spouse owned the assets at death and the Will transferred them to a trust. The trust established in this case was created and funded by Mr. Berto's assets through his Will so they are exempt under Subsection (5).

**4. Conclusion**

WAC 182-516-0100 was written to clarify the rules of trust asset inclusion. Each part must stand on its own. If a trust is exempt under one part, it cannot then become available because it doesn't qualify as exempt under another part. Otherwise every trust would be available. There is no trust that would qualify under all 11 parts. If Subsection (11) applies to all trusts, then we must throw out the exemptions contained in Subsections (4), (5), (6) and (7) as no (4), (5), (6) or (7) trust would satisfy Subsection (11). Subsection (11) is a protection rule not an exclusion rule. If a trust satisfies Subsection (11) the principal is exempt. If it does not satisfy the rule, it is not automatically available. The trust can still be protected under (4), (5), (6) or (7).

In summary, Subsection (5) of WAC 182-516-0100 exempts assets held by a Trust if a spouse contributed to that trust by a Will. WAC 182-516-0100(11) specifically excludes from its scope any Trusts funded with assets from a client or their spouse. The assets contributed to the Berto Special Needs Trust were owned by Mr. Berto. He held these assets in the Berto Living Trust which clearly stated that those were his assets and he could do whatever he wanted with them. At his death, they became part of his estate and funded a trust through his Will. Clearly this is a trust created and funded by Mr. Berto's assets through his probate and Will. WAC 182-516-0100(11) does not apply to this Trust and the assets should not be counted towards Mrs. Berto's eligibility for Medicaid benefits.

**WHEREFORE**, the Appellant respectfully requests that the Court make a determination that the Trial Court erred in its interpretation and application of WAC 182-516-0100(11) and overturn the Review Decision and Final Order of the Department of Social and Health Services Board of Appeals adjudging the Berto Special Needs Trust to be a countable resource, determine Mrs. Berto eligible for Medicaid benefits as of June 2013, and award Attorney's fees and costs to Appellant.

Respectfully submitted this 17 day of December, 2015.

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