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

APPELLANT'S RESPONSE

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I. INTRODUCTION

This case involves a trust established by a husband (Mr. Berto) for his wife (Mrs. Berto). The trust was established by Mr. Berto's Will and funded at his death with his assets. None of Mrs. Berto's assets were included in the trust. In fact, Mrs. Berto spent all of her assets on her care before she applied for Medicaid.

II. ARGUMENT

A. WAC 182-516-0100(11) does not serve to include trust principal, but rather excludes trust principal where both subparts are satisfied.

The Healthcare Authority (HCA) properly argues that WAC 182-516-0100(5) makes trusts established by a spouse available unless the trust was established by a Will. Br. Respondent at 17. Since the Berto Special Needs Trust was established by Mr. Berto's Will, it fell into an exception and is not an available asset under WAC 182-516-0100(5). It is important to note, however, that Subsection (5) does say that every trust established by a spouse for the benefit of the other spouse is available unless "established by will." The WAC specifically does make that exception.

The HCA then argues that the trust principal is available under WAC 182-516-0100(11). This WAC Subsection was drafted to exempt trust principal for trusts (a) when the beneficiary has no control AND (b) the trust "was established with funds of someone other than the client, spouse or legally responsible person." WAC 182-516-0100(11). In asking the Court to interpret the language of Subsection (11), the HCA is ignoring the word "AND."

Subsection (11) states that if both subparts (a) and (b) are satisfied, the Department will "only count income and not principal." It does not say (a) or (b). The HCA has requested that the Court ignore (b) in the interpretation of this Subsection. Br. Respondent at 14 *footnote 7.* Subsection (11) does not say that if a trust does not satisfy (a) and (b) that the principal will be counted.

There are many trusts that exempt principal from inclusion that do not pass subpart (b). Subpart (b) says the trust must not hold assets of the client, client's spouse, or legally responsible person. We know, however that under state and federal law, you can place a client's assets in trust that will exempt principal. See WAC 182-516-0100(6)-(7). We also know that a spouse can leave their assets in a testamentary trust for their spouse and those assets are not included as available under Subsection (5).

If WAC 182-516-0100(11) was interpreted to make principal available for all trusts that do not satisfy (a) and (b), then only 3rd party trusts would be exempt. That is absurd, and not an appropriate interpretation of Subsection (11). Obviously Subsection (11) is a failsafe provision for those 3rd Party trusts that do satisfy (a) and (b). If a trust does not satisfy (a) and (b), the Department will not guarantee the principal is exempt, but (11) does not mean that the principal is automatically available. The Department must look at the terms of the trust or to other law to see if it is available.

B. Mrs. Berto, as beneficiary, did not have "control" over the Berto Special Needs Trust because she could neither demand distributions nor direct the Trustee to use trust funds for her benefit or support.

The Board of Appeal held in Findings of Fact, "The Testamentary Trust provides that the Appellant may not be the sole trustee, and may not alone determine the amount of any distribution from the trust." AR, FF 5. [Emphasis added.] "Distribution from either trust income or principal is **discretionary**, and for the beneficiary's 'health, education, maintenance and support.' However, if the beneficiary is receiving, or is 'eligible to apply' for government assistance, the Trustee is to distribute 'net income [and principal] that will not cause such beneficiary to be ineligible for government financial assistance benefits.'" AR, FF 7. [Emphasis added.]

Mrs. Berto could not alone determine the amount of a distribution and distributions were discretionary if Mrs. Berto was not eligible to apply for Medicaid or not permitted at all if she was eligible to apply. Accordingly, Mrs. Berto held no legal or enforceable right as beneficiary, or otherwise, to utilize or direct the Testamentary Trust assets for her benefit or support. The fact Mrs. Berto may have been Co-Trustee does not change her lack of ability as beneficiary to control, utilize or demand support from the trust. Nor does it change the fact that neither she nor the other Co-Trustee could make any distributions from the trust as such distributions may result in ineligibility for government assistance.

There is no statute or case law in Washington State that supports the HCA's argument that if a beneficiary of a testamentary spousal trust

has control, the assets are available. Also, there are no statutes or case law in Washington that defines "control."

HCA states that if WAC 182-516-0100(11) is unclear, the Court should look to federal guidance. Br. Respondent at 15. They correctly state that the federal government's State Medicaid Manual (POMS) does not have the force of law and is persuasive authority. HCA also cited to other state's case law for legal authority. We agree the statute is not ambiguous on its face and also agree that "control" is not defined in the Washington Administrative Code and is an issue of first judicial impression in Washington. HCA suggests out of state court cases and refers to the federal POMS for support for the definition of Control.

The POMS and supplemental out of state court cases provide that assets in a trust are available if the beneficiary can direct the use of principal for his or her support under the terms of the trust. Under the terms of the Berto Special Needs Trust, Mrs. Berto was a Co-Trustee and the trust stated that she could not direct distribution of funds to herself; it was the fiduciary responsibility of the other Co-Trustee to determine distributions. The terms of the trust also provide that if Mrs. Berto was otherwise eligible for Medicaid assistance, the Trustees could not make distributions to Mrs. Berto. When Mrs. Berto applied for Medicaid, all of her assets were gone and she was eligible to apply for Medicaid. Therefore, under the terms of the trust, the Trustees could not make any distributions, let alone could Mrs. Berto direct distributions.

1. POMS SI 01120.200. "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." Br. Respondent at 15 citing POMS SI 01120.200D [emphasis added]. Here, the terms of the trust do not permit Mrs. Berto to direct use of the trust principal for her support because the trust is discretionary and discretion resided solely with the Co-Trustee and not Mrs. Berto. Further, if Mrs. Berto were eligible to apply for Medicaid, then the discretion was removed altogether and no distribution could be made.

POMS SI 01120.200B(10) defines that "A discretionary trust is a trust in which the Trustee has full discretion as to the time, purpose and manner of all distributions... The beneficiary has no control over the trust." Here, Mrs. Berto's Co-Trustee and not Mrs. Berto, had full discretion to make or not make distributions and, accordingly Mrs. Berto as beneficiary had no control. It is not merely fortuitous that the language in POMS nearly matches that of WAC 182-516-0100(11). POMS clearly directs to count only trusts over which the applicant can actually direct distribution.

"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.'" Br. Respondent at 15 [emphasis

added.] Here again, the terms of the Berto Special Needs Trust do not permit Mrs. Berto the use of the trust principal as distribution amounts were within the sole control of the Co-Trustee, not Mrs. Berto. Further, the terms of the trust specifically restrict the ability to use trust income or principal for support and maintenance if doing so would result in ineligibility.

"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.* Here, Mrs. Berto lacked the authority under the terms of the trust to withdraw principal, as either a Co-Trustee or as a beneficiary, because all distributions were discretionary (or not permitted) in the sole discretion of Mrs. Berto's Co-Trustee.

2. Pohlmann ex rel. Pohlmann v. Neb. Dept. of Health and Human Servs., 271 Neb. 272. "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." Br. Respondent at 20 citing *Pohlmann ex rel. Pohlmann v. Neb. Dept. of Health and Human Servs.*, 271 Neb. 272 [emphasis added]. Here, the Healthcare Authority cites persuasive authority from the Supreme Court of Nebraska that the test for the Department should be whether the applicant can actually compel distributions of the trust assets. Because the Berto Special Needs Trust was discretionary in the sole

judgment of Mrs. Berto's Co-Trustee when Mrs. Berto was heathy, and that no distributions could be made once Mrs. Berto was otherwise eligible to apply for Medicaid, the Department and the Board of Appeals erred in determining that Mrs. Berto could compel distributions. As Mrs. Berto could not compel distributions, she, accordingly, lacked the control necessary to include the trust as available.

The Healthcare Authority declares that the "massive loophole" that Appellant seeks to create would result in "absurd results." Br. Respondent at 21. With respect, we disagree that Appellant is either seeking creation of a loophole or that the concepts that support this appeal are absurd or even uncommon. In this instance, we have a spouse who left his (not his spouse's) assets in a trust at his death. As allowed by WAC 182-516-0100(5), he left very strict conditions on the trust including that his spouse could not make or demand any distributions nor could any distributions be made if she applied for Medicaid (regardless of status as Co-Trustee). He could have left his assets to anyone, but he chose to leave his estate to this trust, with very specific restrictions. Even if the Berto Special Needs Trust were considered a third party trust, because Mrs. Berto could not legally use or compel distribution of the trust property for her support, the trust should be deemed unavailable for eligibility purposes.

C. Attorney's Fees.

Appellant is seeking review and reversal of an Administrative decision. A prevailing qualified party in a judicial review of agency action

"shall" be awarded fees and other expenses, "including reasonable attorney fees, unless the court finds that the agency's action was substantially justified or that circumstance make an award unjust." RCW 4.84.350(1). A qualified party means "an individual whose net worth did not exceed one million dollars at the time the initial petition for judicial review was filed." RCW 4.84.340(5). The right to obtain an award of costs and reasonable attorney fees, where such right is statutorily available, is "extremely valuable and should never be compromised or diminished through inadequate reward." *Griffen v. Eller*, 130 Wn.2d 58, 69, 922 P.2d 788 (1996). Mrs. Berto and her family have endured a significant amount of stress and burden to bring this action against the Department. She, while alive, was undisputedly a "qualified party" and, therefore, her estate should be awarded costs and reasonable statutory attorney fees upon prevailing in this matter.

RCW 4.84.340(1) is not discretionary, but requires the court to award attorney's fees unless the court determines the agency was substantially justified or circumstances would make the award unjust.

III. CONCLUSION

WAC 182-516-0100(5) clearly allows a person to leave assets in a trust for his spouse in a Will. WAC 182-516-0100(11) does not exclude the principal of this trust but also does not make it available either.

There is no Washington Statute or case law that says trust principal in a testamentary supplemental needs trust established for a spouse is

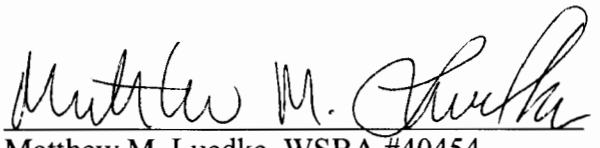
available if the spouse is a Co-Trustee (the sole basis by which HCA claims there is control). There is no statute or case law in Washington that defines control.

POMS and several out of state cases interpreting federal law provide that control exists if, under the terms of the trust, the beneficiary can compel distributions or direct distributions for their support. Under the terms of the Berto Special Needs Trust, Mrs. Berto could not compel distributions. Accordingly, there was no control. The principal of the trust is not available.

The Board of Appeals erred in determining that the Healthcare Authority did not erroneously interpret or apply Subsection (11) to the Berto Special Needs Trust and that Mrs. Berto held any control of the trust for her support such that the trust should be considered available. Accordingly, Appellant respectfully requests that the decision be reversed.

Respectfully submitted this 17th day of March, 2016.

MOULTON LAW OFFICES, P.S.



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COURT OF APPEALS, DIVISION III, OF THE STATE OF WASHINGTON

ESTATE OF MARGARET L. BERTO, Petitioner, vs. STATE OF WASHINGTON, DEPARTMENT OF SOCIAL & HEALTH SERVICES, WASHINGTON HEALTHCARE AUTHORITY, Respondent.	Case No.: 335917 **DECLARATION OF MAILING**

On March 17, 2016 in Spokane County, Washington, I mailed via United States Postal Service the Appellant's Response in the above entitled action to Respondent and the Washington State Attorney General, at the below addresses:

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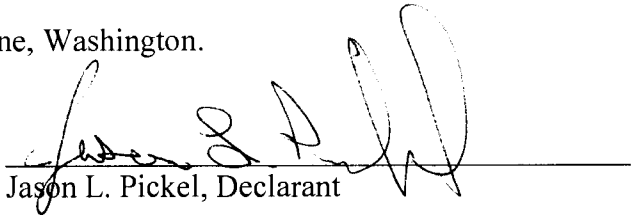
I certify under penalty of perjury under the laws of the State of Washington that the foregoing statements are true.

Dated this 17th day of March, 2016 at Spokane, Washington.



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