IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 937016-1

(Court of Appeals No. 33591-7-III)

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

Respondent,

v.

ESTATE OF MARGARET L. BERTO,

Petitioner.

PETITION FOR REVIEW

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Regulations

A. IDENTITY OF PETITIONER

Petitioner, Estate of Margaret Berto, seeks review of the Court of Appeals decision designated in Part II of this petition.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the decision filed by Division III of the Court of Appeals on July 19, 2016, affirming the trial court's judgment against the Estate of Margaret Berto. A copy of the decision is in the Appendix. App 1-6. Petitioner's Motion for Reconsideration was denied by Order Denying Motion for Reconsideration filed September 1, 2016. App 7.

C. ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals erroneously hold that a trust will generally be considered an available resource for the trust's beneficiary under WAC 182-512-0200. App. 3-4.

D. STATEMENT OF THE CASE

A. Factual Background

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) CP 73. Following his passing, Appellant prepared a

good faith inventory of the estate based upon statements and professional opinions of value. Id. This inventory provided the values for an equal division of the estate. Id.

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, representing Virgil Berto's one half community property interest of the Berto Living Trust. CP 73.

The terms of the Berto Special Needs Trust specifically limit what discretionary distributions of income and principal may be made by the Appellant if eligible to apply for Medicaid. CP 22 FF7. Specifically, Article Three Section 2 of the Berto Special Needs Trust 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. CP 22 FF 14. 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.

B. Procedural History

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. CP 16. CL 12.

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 CP 17. The primary basis for affirming the denial was WAC 182-516-0100. CP16 FF 12. Applying WAC 182-516-0100 the Administrative Law Judge held "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..." Id.

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. CP 29. "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." CP

28 CL 14. "The standard in the regulation is whether the Appellant had any control over the trust." CP 28 CL 16.

In its Order Denying Appellant'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." CP 75.

On December 17, 2015, Appellant filed an appeal to Division III of the Court of Appeals. On July 19, 2016 by Published Opinion, the Court of Appeals affirmed the decision of the lower courts citing different grounds. On August 2, 2016, Appellant filed a Motion for Reconsideration which was denied by Order filed September 1, 2016.

Petitioner is requesting further review because the Court of Appeals' holding cites tests and regulations not raised by the Department or any lower court and Petitioner has not had adequate opportunity to respond. Further, and more troubling, is that the Court of Appeals' holding fundamentally shifts the burden of the Department determining that a trust is a resource and available to the presumption that the trust is available unless specifically proven excluded by an applicant.

E. ARGUMENT

1. WAC 182-512-0200 does not determine availability of resources.

The Court of Appeals Division III held that,

"[A trust] fits into the broad definition of what DSHS considers a 'resource.' WAC 182-512-0200(1). Consequently, the principal of a trust will generally be considered an available resource for the trust beneficiary. WAC 182-516-0100, the primary provision at issue in this case, delineates particular treatment for specific types of trusts." App. 3-4.

Accordingly, the Court of Appeals started with the presumption that a trust with "generally be considered an available resource." WAC 182-512-0200 provides a "Definition of Resources," however WAC 182-512-0200(7) states that "a resource is countable toward the resource limit only if it is available and not excluded." Emphasis added. The Court of Appeals' discussion of WAC 182-512-0200 is the first reference to this regulation in the record and at no point has the Department nor any lower judge held that WAC 182-516-0200 resulted in the Berto Special Needs Trust being deemed an available resource.

The Court of Appeals spent considerable time examining WAC 182-516-0100 and determined that nothing contained within WAC 182-516-0100 excluded the Berto Special Needs Trust. ("Since the testamentary trust was established by will, subsection (5) does not apply." App 5. "Consequently, subsection (11) does not exempt the testamentary trust. None of the regulations exempt the testamentary trust from being

considered an available asset for its beneficiary, Ms. Berto." App 6. Most notably, the Court of Appeals did not hold that a provision of WAC 182-516-0100 made the testamentary trust available as the lower courts had done.

While the Court of Appeals may have correctly determined that none of the exemptions found in WAC 182-516-0100 exempt the Berto Special Needs Trust, the Court failed to provide citation or reference to a regulation other than the "broad definition" of WAC 182-512-0200 that would determine the testamentary trust was available.

2. WAC 182-512-0250 and WAC 182-516-0100 determine whether a trust is an available resource.

WAC 182-512-0250 states in pertinent part:

(1) The agency considers personal and real property to be available to a Washington apple health (WAH) applicant or recipient if the applicant or recipient:

(a) Owns the property;

(b) Has the authority to convert the property into cash;

(c) Can expect to convert the property to cash within twenty working days; and

(d) May legally use the property for his or her support.

(6) A person may provide evidence showing that a resource is unavailable. A resource is not counted if the person shows sufficient evidence that the resource is unavailable.

(8) The value of a resource is its fair market value minus encumbrances.

Here, Ms. Berto, due to the specific limitations of the trust, did not own the property of the testamentary trust except as co-fiduciary, did not have the authority to convert the trust to cash and could not legally use the trust for her support. Accordingly, the trust is not considered available under subsection WAC 182-512-0250(1). Further, Ms. Berto provided evidence in the form of the trust language which showed the trust principal could not be used for her support. Finally, the value of trust would be zero under subsection (8) as Ms. Berto could not sell her interest.

While the trust may not be an available resource under WAC 182-512-025, the Review Decision and Final Order of the Health Care Authority Board of Appeals correctly enumerated the test for availability of trust assets:

> The Department determines how trusts affect eligibility for medical programs. Whether the Appellant owns or has particular resources available is determined under WAC 182-512-0250. However, WAC 182-516-0100 specifically deals with trusts. The assets at issue are held in trust for the Appellant. If the rules applying to trusts make the assets available to her, then they would be available under WAC 182-512-0250(1). Although WAC 182-512-0250(1) has its own test for availability, we apply the regulation that applies specifically to trusts. CP 27 CL 12 Emphasis Added.

As the Board of Appeals pointed out, the test is whether under WAC 182-516-0100 the regulation makes the trust available. The Court of Appeals erred in reversing this test in holding that the trust would generally be available unless excluded under WAC 182-516-0100. The test is not whether WAC 182-516-0100 makes a trust exempt, but rather whether it

makes a trust available. WAC 182-516-0100 does not contain a regulation which provides that a testamentary trust is available.

The Administrative Board of Appeals and, subsequently, the Spokane Superior Court, incorrectly held that subsection (11) was more than an exclusionary rule. This holding was specifically reversed by the Court of Appeals, "Although phrased poorly, the meaning is clear. If both conditions are satisfied, DSHS will not count the principal as an available resource... Consequently, subsection (11) does not exempt the testamentary trust." App 6.

If the Court of Appeals, Division III thought that subsection (11) was a test to determine availability, and not as they did, a test to determine excludability, the decision would have held that the trust was available pursuant to subsection (11). However, it did not. The Court of Appeals correctly held subsection (11) to be a test to determine excludability and overturned the lower court's determination on this important point based on the plain and clear language of subsection (11). DSHS has not met the burden of providing a regulation in support of the conclusion that WAC 182-516-0100 "makes" the testamentary trust available, merely just that it is not excluded.

The Court should grant review to ensure that the "broad definition" of WAC 182-512-0200 resources is not expanded to determine the availability of resources of trusts. Further, the Court should grant review

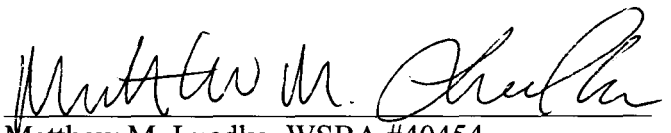
to require DSHS to cite specific regulations declaring a trust to be considered available and not permit the inverse and shift of burden, that all trusts are resources unless explicitly excluded.

F. CONCLUSION

For all of the foregoing reasons, Petitioners respectfully ask the Court to grant review of the Court of Appeals' decision.

Respectfully submitted this 30 day of September, 2016.

MOULTON LAW OFFICES, P.S.



Matthew M. Luedke, WSBA #40454
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FILED
July 19, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

IN THE MATTER OF THE ESTATE OF MARGARET L. BERTO, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF SOCIAL & HEALTH SERVICES, WASHINGTON HEALTHCARE AUTHORITY, Respondent.	)	No. 33591-7-III PUBLISHED OPINION

KORSMO, J. — This appeal arose from the denial of Ms. Margaret Berto's application for Medicaid benefits. Her estate argues in this appeal that the contents of a testamentary trust established by her late husband should not have been considered available assets that disqualified her from Medicaid eligibility. We reject her argument and affirm.

FACTS

Sometime in the mid-2000s, Ms. Berto and her husband placed all of their assets, including their home, in a living trust that named themselves as both beneficiaries and trustees. When her husband died in January 2009, his will created a second trust to

contain all of his assets. Ms. Berto was the sole beneficiary of this testamentary trust. It allowed distributions for her "health, education, maintenance and support" at the discretion of the trustees. Ms. Berto was one trustee. The trust provided that she could not be the sole trustee and could not alone determine the amount of any distribution. The trustees were restricted to distributing "net income that will not cause such beneficiary to be ineligible for governmental financial assistance benefits." The trust also limited Ms. Berto's use of the trust distributions to purposes other than those supplied by government assistance.

In order to account for her husband's share of the marital estate, Ms. Berto divided the value of her home between the living trust and the testamentary trust. She valued the home at approximately $240,000. Acting as a trustee for the living trust, she issued a promissory note for $120,000 to herself as a trustee for the testamentary trust, and assigned ownership of the home to the living trust. The living trust spent $25,000 preparing the home for sale, before selling it for $150,000. Ms. Berto satisfied the promissory note and transferred $120,000 from the living trust to the testamentary trust.

In June 2013, Ms. Berto applied for state assistance. The Washington Healthcare Authority (WHA) denied her application after finding that her available assets exceeded the $2000 eligibility limit. In February 2014, Ms. Berto resigned as trustee and requested a hearing to challenge the denial of her benefits. She argued that the testamentary trust was not truly an available asset because of her limited control and the restrictions on

distribution. The reviewing judge for the Department of Social and Health Services (DSHS) affirmed the order. Ms. Berto timely appealed to this court.

ANALYSIS

The sole question is whether the testamentary trust constitutes an available resource for determining Ms. Berto's eligibility for Medicaid. This requires an examination of the rules concerning the treatment of trusts for eligibility purposes.

The facts are unchallenged and, therefore, are verities on appeal. *Campbell v. Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 888, 83 P.3d 999 (2004). Ms. Berto argues that the WHA erred in its legal interpretation of regulations promulgated by DSHS. We review an agency's conclusions of law de novo. *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 42-43, 26 P.3d 241 (2001). We interpret regulatory language consistent with the rules of statutory construction. *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 51, 239 P.3d 1095 (2010). Where a rule is plain and unambiguous on its face, we will give effect to that language. *Id.* at 52.

Essentially, the beneficiary of a "trust" has a type of property right in the contents of the trust. This entitles them "to the beneficial enjoyment of property to which another person holds the legal title." 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 fits

into the broad definition of what DSHS considers a "resource." WAC 182-512-0200(1).[1] Consequently, the principal of a trust will generally be considered an available resource for the trust's beneficiary.[2] WAC 182-516-0100, the primary provision at issue in this case, delineates particular treatment for specific types of trusts. Although somewhat obtusely phrased, this rule is unambiguous.

Subsection (1) states the DSHS's authority over eligibility determinations involving trusts. Subsections (2)-(4) address trusts created prior to August 1, 2003, while subsection (5) addresses the type of trust at issue here. This subsection is derived from federal law and addresses a class of trusts that DSHS treats as if they were established by the client. *See* 42 USC § 1396p(d). Trusts that are established by an individual or certain related individuals, with assets that are partially from the individual or their spouse, and that are not established by a will, are considered exactly the same as trusts created by that individual. WAC 182-516-0100(5)(a). The principal of such a trust remains an available asset until it can no longer be distributed to the client; at that point it is considered a transfer of assets. WAC 182-516-0100(5)(d-e).

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[1] "A resource is any cash, other personal property, or real property that an applicant, recipient or other financially responsible person: (a) Owns; (b) Has the right, authority, or power to convert to cash (if not already cash); and (c) Has the legal right to use for his/her support and maintenance." WAC 182-512-0200(1).

[2] Most of Ms. Berto's arguments appear to be premised on the faulty assumption that a trust will not be considered an available resource unless the regulations explicitly describe that type of trust.

Since the testamentary trust was established by a will, subsection (5) does not apply. However, Ms. Berto argues that a provision within this subsection exempts the testamentary trust: "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." WAC 182-516-0100(5)(b). It appears that this provision was intended to only apply to those trusts established by the client. Regardless, Ms. Berto failed to read the entire sentence. This provision only applies "when part of the trust assets were contributed by persons other than the client or the client's spouse." *Id.* Since no third party contributed to the testamentary trust, this provision is inapplicable.[3]

Subsections (6) through (9) address special needs trusts created to care for disabled individuals; the parties agree these provisions are inapplicable. Subsection (10) states that distributions from trusts are considered unearned income. Although income is important for other considerations, it is irrelevant in this action.

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[3] If this provision applied, there would be an open question concerning what portion of the principal was actually contributed by her husband's will. Ms. Berto attributed a value of $240,000 to their home, and issued a promissory note to the testamentary trust for $120,000. The record does not indicate the origin of that dubious valuation. Immediately afterwards, Ms. Berto sold the home and realized just $125,000. She satisfied the note and placed $120,000 in the testamentary trust. Functionally, Ms. Berto bought her husband's share of the home for almost double its value in order to move her assets into the testamentary trust. Roughly $57,500 of the principal in the trust probably should be considered directly contributed by Ms. Berto and $62,500 should be considered contributed by her husband's will.

Subsection (11) is the final provision of interest. It reads,

> 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.

WAC 182-516-0100. Although phrased poorly, the meaning is clear. If both conditions are satisfied, DSHS will not count the principal as an available resource. If a third party creates a trust over which the beneficiary has no control, the trust principal will not count as an available resource for the beneficiary.

Here, neither condition is satisfied. As co-trustee, Ms. Berto had some control over the trust and all of the funds came from either her husband or herself. Consequently, subsection (11) does not exempt the testamentary trust. None of the regulations exempt the testamentary trust from being considered an available asset for its beneficiary, Ms. Berto. DSHS correctly considered the testamentary trust to be an available asset.

The judgment is affirmed.

Korsmo, J.

WE CONCUR:

Fearing, C.J.

Siddoway, J.

FILED
SEPT 1, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

IN THE MATTER OF THE ESTATE OF MARGARET L. BERTO, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF SOCIAL & HEALTH SERVICES, WASHINGTON HEALTHCARE AUTHORITY, Respondent.	)	No. 33591-7-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of July 19, 2016 is hereby denied.

PANEL: Judges Korsmo, Fearing, Siddoway

FOR THE COURT:

George Fearing

GEORGE FEARING
Chief Judge

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.: 335917-7-III **DECLARATION OF MAILING PETITION FOR REVIEW**

On September 30, 2016 in Spokane County, Washington, I delivered by personal service to the Court of Appeals, Division III, and mailed via United States Postal Service the Petition for Review in the above entitled action to Respondent, Washington State Attorney General at the below addresses:

Catherine Kardong
Nissa Ann Iversen
Office of the Attorney General
PO Box 40124
Olympia, WA 98504-0124

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

Dated this 30th day of September, 2016 at Spokane, Washington.

Matthew M. Luedke, Declarant

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