



# **PRE-CONFERENCE: Pooled Trust Intensive**

**Wednesday, October 14, 2015**

**Breakout Session 1**

**1:00 P.M. – 1:50 P.M.**

**Too Old for a Pooled SNT? – Think Again!  
Funding Pooled Trust Subaccounts for  
Beneficiaries Age 65 and Older – 2015 Update**

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- Materials
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- PowerPoint

**Stetson University College of Law presents:**

2015 SPECIAL NEEDS TRUSTS

THE NATIONAL CONFERENCE

October 14-16, 2015

The Vinoy Renaissance Resort & Golf Club

## **Funding Pooled Trust Subaccounts for Beneficiaries Age 65 and Older – 2015 Update.**

By Megan Brand and Laurie Hanson

### **INTRODUCTION**

Marnie\* funded her Colorado Fund for People with Disabilities (CFPD) pooled trust sub-account with \$34,240.00 just a couple of weeks before her 95th birthday. She was living in an independent living apartment at Porter Place, an Assisted Living Facility. Before establishing her CFPD Pooled Trust sub-account, a CFPD Case Manager met with her in her residence to discuss her background and needs and then developed a spending plan for spending the funds that would be transferred into trust. Marnie was a mother of four and her husband had recently died. She had been a primary caregiver to their four children and had worked off and on as a substitute teacher and cashier at the grocery store. Since living in the Assisted Living, Marnie enjoyed shopping, watching TV, spending time with her family and attending church at the facility. She also greatly benefited from paid companion services to assist her in participating in community activities.

Per the spending plan submitted and approved by HCPF (Colorado's Dept. of Healthcare, Policy and Financing), CFPD planned to use Marnie's trust for a Sleep Number Twin Bed, annual family visits (as she was not able to travel), companionship services, clothing and personal needs items, hair/nail care, cable TV service, and renter's insurance.

At the projected annual rate of spending, coupled with one time expenditures, the plan concluded that Marnie's trust would be exhausted ahead of her life expectancy of 3.26 years.

Over the next 3 ½ year, funds from Marnie's sub-account were used for all of the above purposes, greatly enriching her life by allowing her to participate in community activities with a companion, visiting with her very close-knit family, and having the enjoyment of getting her hair/nails done and cable television to watch during her down time.

In January 2015, the trust was able to provide for some additional supplemental care giving while Marnie transitioned to the memory care unit at Porter Place due to a decline in health; this final expense closed her trust with CFPD. Marnie passed away in June 2015. In a follow up survey, her son noted:

"Engaging CFPD in 2011 was a positive choice in managing my mother's financial assets after my father passed in June of that year. The fund was able to supplement her lifestyle, giving her an enjoyable quality of life at Porter Place. When her health problems became an issue, we were able to use the remaining funds to assist in caregiver services. We have had a very positive experience with CFPD and our case manager..."

*\*Name has been changed*

Marnie was lucky – she was living in Colorado at a time when HCPF was allowing individuals age 65 and older to transfer funds into pooled trust sub-accounts without imposing a transfer penalty. If Marnie had lived in the neighboring states of Utah, Wyoming or New Mexico in 2011 – or if this had happened in Colorado in 2015 - a period of ineligibility would have been imposed following her deposit of funds into the pooled trust sub-account and the state Medicaid program would not have paid for her long-term care services during that period.

Based on an informal survey of lawyers and pooled trust administrators,<sup>1</sup> nineteen states allow transfers by individuals over the age of 64 without penalty<sup>2</sup> and twenty two states impose a period of ineligibility without considering whether the individual transferring assets to pooled trust sub-accounts has received fair market value.<sup>3</sup> Five states are in flux – either advocates are currently litigating the imposition of a penalty or are developing fair market value criteria<sup>4</sup> and we currently have no information about two states.<sup>5</sup>

The authors of this paper are from Colorado and Minnesota, two states in which the fair market value issue has been litigated. It is our hope that pooled trust administrators start to allow individuals age 65 and older to establish sub-accounts with their trusts and to support the beneficiaries in challenging agency impositions of penalty periods by showing that fair market value was received. So far, to our knowledge, all cases where fair market value was argued at

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<sup>1</sup> Informal survey of 50 states and the District of Columbia, conducted by and on file with Laurie Hanson, Long, Reher & Hanson, P.A., Minneapolis, Minnesota. Last updated August 16, 2015.

<sup>2</sup> (*Id.*) – they are: AL, AK, CA, CT, DE, FL, IA, IN, ID, KS, KY, MA, MD, MT, NY, OH, OK, RI, WV, WI, AND DC (20 states and DC).

<sup>3</sup> (*Id.*) – they are AZ, GA, HI, LA, ME, MS, NC, ND, NH, NJ, NM, NV, OR, PA, SC, SD, TX, UT, VA, VT, WA, WY

<sup>4</sup> (*Id.*) – they are CO, MI, MN, TN (Fair Market Value/Litigation) IL (allows a public guardian to establish a pooled trust sub-account for a ward without penalty but imposes a penalty on all other applicants and recipients. 305 ILCS 5/3-1.2 (Section 3-1.2)(2013). This is a distinction without precedent in federal Medicaid law.)

<sup>5</sup> (*Id.*) - they are AR and NE.

the first stage of the appeal (or better yet, when the application was made) have been successful to reverse the imposition of a period of ineligibility. The purpose of this paper is to outline the various strategies to prove that fair market value was received and to provide the law supporting such strategies.

### **A BRIEF HISTORY OF POOLED TRUSTS AND TRANSFERS**

In enacting the Omnibus Reconciliation Budget Act of 1993 (OBRA '93), Congress sought to stop divestment of assets into irrevocable trusts by wealthy individuals seeking to qualify themselves for MA-LTC without suffering the otherwise applicable penalty periods. It succeeded. OBRA '93 eliminated this practice by providing that the income and assets of self-settled trusts would be deemed available if a trustee could make a distribution to the grantor under “any circumstances.”<sup>6</sup> If the trustee could not be compelled to make a distribution to the grantor, then a period of ineligibility would be imposed if the transfer was made within the relevant look back period.<sup>7</sup>

Congress did not stop the establishment of trusts by individuals altogether; rather it established three exempt trusts<sup>8</sup> thereby acknowledging the importance of certain trusts to provide a means for people living with chronic diseases or disabilities to save money to pay for extras not afforded by the personal needs allowance or income they are allowed to keep when relying on Medical Assistance for their most basic needs.<sup>9</sup> Congress specifically permitted the

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<sup>6</sup>42 U.S.C. § 1396p(d)(3)(B)(i).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* – The Special Needs Trust, Miller Trust, and Pooled Trust 1396p(d)(4)(A)(B) and (C).

<sup>9</sup> *Lewis v. Alexander*, 695 F.3d 325 (3<sup>rd</sup> Cir., 2012), cert denied, 184 L.Ed.2d 724 (2013) “[Congress’s] primary objective was unquestionably to prevent Medicaid recipients from receiving taxpayer-funded health care while they sheltered their own assets....But its secondary objective was to shield special needs trust from impacting Medicaid eligibility.” Slip op. at 32-33.



use of pooled special needs trusts for individuals of any age. Congress also specifically stated that only the trust rules in the federal statute apply to trusts. The imposition of a penalty *per se* for individuals over age 64 establishing pooled trust sub-accounts is not supported by the federal statute. In fact, states that impose a penalty, especially without a fair market value analysis are out of compliance with federal law.

## DEFINITIONS PERTINENT TO UNDERSTANDING TRANSFERS AND TRUSTS

- *Medical Assistance for Long-term Care (MA-LTC)*. There are many bases of eligibility, each of which has different financial eligibility criteria. Relevant to this discussion is MA-LTC which is the MA program which pays for long-term care services, most importantly assisted living and nursing home care. This also includes eligibility for the waiver programs which pay for extended home and community based services. An individual over the age of 64 may fund a pooled trust sub-account without penalty for MA, but not for MA-LTC.
- *Individual* means a person applying for or currently receiving MA-LTC as well as the individual for whom the pooled trust sub-account is *established*.
- *Basic Eligibility for MA-LTC:*<sup>10</sup>
  1. The individual may have only \$3,000 [your state's limit] in *available assets*.
  2. The individual's *income*:
    - a. Must be below 100% of the Federal Poverty Guidelines (currently \$958.00 per month); OR
    - b. Must be less than the cost of care; and
  3. The individual *must not have transferred assets* for less than fair market value in the 60 months immediately preceding the application or while receiving benefits.
- *Available assets* are those assets that can be converted to cash to pay for long-term care that are neither exempt nor unavailable. Whether or not *assets in a trust* are available for purposes of MA-LTC depends upon the type of trust:
  - Assets in *revocable trusts* are always available because the grantor can revoke or amend the trust and have all assets available to pay for care.
  - Assets in an *irrevocable trust* are available if there is any way the individual (in the state agency's opinion) can force the trustee to distribute the assets to pay for care.

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<sup>10</sup> Figures may differ from state to state.

For instance if there is an articulated standard, the assets in the trust will be available. Only if the trustee has sole and absolute discretion, including discretion not to distribute assets at all would assets be considered unavailable.

- *Exempt or excluded assets* are not counted when determining eligibility for Medical Assistance. For instance, the homestead, one automobile, personal belongings are exempt. Assets or income in special needs trusts and pooled trust sub-accounts are exempt/excluded.
- *Special Needs Trust or (d)(4)(A) trust* means a first party special needs trust in accordance with the federal Medicaid statute.<sup>11</sup> The trust is for the benefit of a disabled individual under age 65; it is established by the person's parent, grandparent, court, or guardian and is funded with only the assets of the disabled person. The trust agreement must state that, at the death of the disabled person, any remaining trust assets must be distributed first to the state as repayment for any Medical Assistance received by the disabled person. When these requirements are met, the assets held in trust are not considered available to the disabled person except to the extent they are distributed to the disabled person, and the transfer of the disabled person's assets into trust is not penalized.
- *Pooled SNT or (d)(4)(C) trust* means a first party pooled special needs trust in accordance with the federal Medicaid statute.<sup>12</sup> A pooled trust is managed by a non-profit corporation and is made up of individual sub-accounts for individual disabled persons of any age. Each account established for the benefit of a disabled person holds only the assets of the disabled person and is maintained for that person. The trust sub-account may be established by a parent, grandparent, guardian, court, or by the disabled person. The trust must provide that any assets remaining at the death of the disabled person, to the extent that they are not held in trust for other disabled persons, must be paid to the state for Medical Assistance that the person received.
- *Grantor* – in the case of a pooled trust, the grantor is the non-profit corporation establishing the trust. Generally, a grantor is an individual who establishes and funds a trust.
- *Pooled Trust Sub-account* means an account established within a pooled trust for the sole benefit of the individual in accordance with 42 U.S.C. § 1396p(d)(4)(C). The individual's social security number is used when establishing the sub-account because the money in the sub-account belongs to the individual. Sometimes the establisher of a sub-account is also called a grantor.

## MA-LTC ELIGIBILITY, TRANSFERS AND TRUSTS<sup>13</sup>

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<sup>11</sup> 42 U.S.C. § 1396p(d)(4)(A);

<sup>12</sup> 42 U.S.C. § 1396p(d)(4)(C);

<sup>13</sup> See Attachment A.

MA-LTC rules provide that if an individual transfers assets for less than fair market value within the five years prior to applying for MA-LTC, a period of ineligibility will be imposed during which the MA program will not pay for long-term care services. The period of ineligibility is calculated by dividing the amount transferred by the statewide average nursing facility payment (currently, for instance in Minnesota is \$6,141). So, for instance if the individual transfers \$100,000, the individual would not be eligible for MA-LTC for 16.29 months ( $\$100,000 \div \$6,141$ ).<sup>14</sup>

The rules regarding transfers and trusts depend upon who is transferring assets into the trust, who is the grantor of the trust, who is the beneficiary of the trust, and whether the trust is revocable or irrevocable. The rules can be summarized as follows:

- A transfer of assets into a revocable trust is not penalized because the assets are available.
- Transfers into irrevocable trusts where there is no retained interest by the individual are penalized if the transfer occurs within 60 months of application or while receiving benefits. 42 U.S.C. § 1396p(d)(3)(B)(i).
- Since the pooled trust has an articulated standard, then technically the trust is an available asset but since the trust account is exempt it is excluded and cannot be considered available.
- Transfers into (d)(4)(A) trusts are not penalized (there is no specific authority). Assets in the trust are not exempt if the individual is over the age of 64.
- Transfers into (d)(4)(B) trusts for individuals of any age are not penalized (again, no specific authority – and not penalty for individuals age 65 and older).
- Transfers into (d)(4)(C) trusts by individuals under age 65 are not penalized (likewise, there is no specific authority).
- Transfers into (d)(4)(C) by individuals over age 64 are penalized in some states and not in others.
- Transfers by the individual applying for MA into a trust established for the sole benefit of the individual's child are exempt.<sup>15</sup>
- Transfers by the individual applying for MA into a special needs trust or a pooled special needs trust for a person **other than the individual** under the age of 65 are exempt. (Emphasis added).<sup>16</sup>

## EMERGENCE OF THE FAIR MARKET VALUE ANALYSIS

The authors believe that that the transfer rules do not apply to transfers of assets into pooled trust sub-accounts. That is not the subject of this paper and will not be explored here. This paper explores what it means if your state determines that the transfer provisions do apply. Since the

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<sup>14</sup> 42 U.S.C. § 1396p(c);

<sup>15</sup> 42 U.S.C. § 1396p(c)(2)(B)(iii). *See also* Attachment A.

<sup>16</sup> 42 U.S.C. § 1396p(c)(2)(B)(iv). *See also* Attachment A.

federal Medicaid statute does not impose a period of ineligibility per se on transfers by individuals over age 64 into pooled trust sub-accounts, the transfer must be analyzed like any other transfer in the Medicaid context. Given the lack of clarity and the inconsistent interpretations over the years by state Medicaid agencies, the Center for Medicaid and Medicare Services (CMS) issued a series of letters to the regional offices in 2008 and 2009 attempting to clarify this issue. The letter to the Chicago Regional Office reads in pertinent part:

Although a pooled trust may be established for beneficiaries of any age, funds placed in a pooled trust established for an individual age 65 or older *may* be subject to penalty as a transfer of assets for less than fair market value. When a person places funds in a trust, the person gives up ownership of those funds. ***Since the individual generally does not receive anything of comparable value in return, placing funds in a trust is usually a transfer for less than fair market value.*** The statute does provide an exception to imposing a transfer penalty for funds that are placed in a trust established for a disabled individual. However, only trusts established for disabled individuals age 64 or younger are exempt from application of the transfer of assets penalty provisions (see section 1917(c)(2)B(iv) of the Act.)<sup>17</sup>

If States are allowing individuals age 65 or older to establish pooled trusts ***without applying the transfer of assets provisions***, they are not in compliance with the statute.<sup>18</sup> (Emphasis added)

This letter did not settle the issue at all. Seven years later less than half the states impose the transfer provisions and less than half the states allow the transfers without penalty. Some states that were allowing them before 2008 now impose a transfer penalty and others that were not imposing a penalty, now do. Changes occurred legislatively and by “Policy Clarification.” As a result, beneficiaries began appealing the imposition of periods of ineligibility arguing they received fair market value— and state district courts are agreeing with them. The following is a list of arguments and procedures that have been successful.

A. ***The establisher of a pooled trust sub-account does not lose value because of the change from legal to equitable owner.*** When Marnie placed the assets in her pooled trust sub-account those assets could be used only for her during her life time. The establisher of a pooled trust subaccount receives fair market value upon creation of the subaccount because no value is

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<sup>17</sup> Chicago Regional Letter, July, 2008 (Attachment B)

<sup>18</sup> *Id.*

lost when legal title is exchanged for equitable title.<sup>19</sup> The beneficiary is not divesting himself or herself of the assets; rather he or she becomes the equitable owner<sup>20</sup> of the assets in the trust, so that fair market value is received.<sup>21</sup> This is underscored by the sole benefit requirement. ***No one else*** can benefit from the trust account during the beneficiary's lifetime, and the assets are always available for his or her supplemental needs.

. . . a disabled person who funds a pooled trust for her sole benefit during her lifetime has not made a disqualifying transfer because the individual has received market value for the transfer . . . and has merely exchanged legal ownership for equitable ownership.<sup>22</sup>

The assets are thus of no value to anyone else, and they have not disappeared. The beneficiary still has the full value of the assets he or she conveyed to the trustee.

B. ***The contractual obligation to use the funds for the individual gives fair market value.*** The creation of a trust is equivalent to the creation of a contract because the “deal between

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<sup>19</sup> In *Beinke vs. Minnesota Dep't of Human Services*, CV-14-271 (Minn. Dist. Ct Blue Earth Co. June 24, 2014), a 72-year old disabled individual placed funds received from a workers compensation settlement into a pooled (d)(4)(c) trust. The court, on appeal, held that “when Appellant transferred her assets into the pooled trust, she vested in herself an equitable interest in the trust assets . . . and received FMV for her assets when she transferred them into the pooled trust.” *Id.* at 7. (Attachment C) See also *In re Guardianship of Scott G.G.*, 261 Wis. 2d 679, 659 N.W.2d 438 (Wisc. Ct. App. 2003). (A guardian sought authority to transfer a settlement fund into a special needs trust for the ward. The court reasoned that the transfer was an exchange for equal value and that the disabled beneficiary “will receive the beneficial interest in the trust in return for relinquishing his legal title to the property.” *Id.* at 442.

<sup>20</sup> *Id.* See also *Dep't of Social Services v. Saunders*, 247 Conn. 686, 724 A.2d 1093 (Conn. 1999). The funding of a special needs trust by a conservator was permissible because even though “transferring a ward’s assets into a trust does indeed divest the ward of legal title to the assets, the ward remains the sole person who can benefit from the trust . . . [and] therefore, the equitable owner of the assets.” *Id.* at 1105; See also *Ruby Beach v. State of Tennessee, Dep't of Human Services*, No. 09-2120-III (Tenn. Chancery Ct. 2010)

<sup>21</sup> *Wierzbinski v. State of Michigan, Dep't of Human Services*, Case No. 2010-4343-AA (Mich. Cir. Ct. Macomb Co. July 26, 2011). A 95-year old beneficiary funded a pooled trust and the court reversed the imposition of a penalty by the administrative agency because all of the trust principal and/or income could be paid to the beneficiary and “as a result, the funding of the trust with the cash was not a transfer for less than fair market value.” The Administrative Law Judge found that in accordance with 42 U.S.C. section 1396p(c)(2)(c); See also *Bilbrey v. Tennessee Department of Human Services; State of Tennessee Department of Human Services; division of appeals and hearings*; Docket number: MA 081101584; March 4, 2009.(Mrs. Bilbrey’s representatives placed the funds in the pooled trust for her sole use and benefit to purchase at fair market value services not provided by the nursing home and did not transfer the funds to the pooled trust for the purpose of qualifying her for Medicaid coverage.) (Attachment D)

<sup>22</sup> *Ruby Beach v. State of Tennessee, Dep't of Human Services*, No. 09-2120-III (Tenn. Chancery Ct. 2010), p. 29 (Attachment E)

grantor and trustee is functionally indistinguishable from the modern third-party-beneficiary contract.”<sup>23</sup> When a trust is created, and a grantor places property into the trust, there is a contract “within the meaning of the contract clause of the Federal Constitution.”<sup>24</sup> A Medicaid recipient or applicant receives full consideration when he/she receives something of value pursuant to a legally binding agreement (e.g., a contract, a bill of sale, a deed) that was in effect at the time of transfer. When a Medicaid applicant or recipient joins a pooled trust, a contractual relationship between the grantor and the trustee arises. The individual agrees to deposit his money subject to the terms and conditions and fees of the non-profit managing the trust. For consideration received, the non-profit agrees to conserve and distribute the funds solely for the individual’s benefit pursuant to the distribution standard set by the trust. The joinder agreement is a contract between the individual and the pooled trust setting forth the rights and responsibilities of the parties and the fees for joining. An individual placing funds in a special needs pooled trust sub-account is receiving market-value consideration - ensuring that his or her present and future needs will be met, the funds will be protected, and those funds will be used for very particular and necessary expenses. Master trust agreements provide that assets in an individual’s sub-account must be used for the individual’s sole benefit during the individual’s life time and that the trustee must make distributions to meet the beneficiary’s supplemental needs, to promote her/his comfort and well-being, and to enhance her quality of life so long as

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<sup>23</sup> John H. Langbien, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 627 (1995)(“The management trust has brought forth a new type of trustee--the corporate fiduciary, a service provider for hire, hardly different in function from professionals who contract to supply services in industry, commerce, finance, law, accounting, and so forth”).

<sup>24</sup> *Coolidge v. Long*, 282 U.S. 582, 595 (1931). *See also Underhill v. U.S. Trust Co.*, 13 S.W.2d 502, 505 (1929) ( A voluntary deed of trust ... “is a binding contract between the settlor and the trustee acting for the cestuis que trust, supported by a legal and valuable consideration, namely the benefits contemplated and resulting to the settlor and the beneficiaries from the creation of the trust.”)

the distributions do not replace, reduce or substitute government benefits.<sup>25</sup> Beneficiaries of a pooled trust sub-account have a right to rely on the terms of the joinder agreement and *believe that* the trustee will expend funds in accordance with the terms of the master trust agreement.<sup>26</sup> Not only must the trustee abide by the terms of the master trust agreement, but the trustee also has a statutory fiduciary duty to manage and conserve the funds strictly pursuant to the terms of the trust. Consider obtaining an affidavit or testimony from the pooled trust administrator speaking to all of these issues such as that set forth in Exhibit F.

***C. The funds in the pooled trust sub-account will be used over Marnie's life expectancy.*** *Marnie* has a life expectancy of anywhere from 3.26 years.<sup>27</sup> In preparation for the hearing, CFPD prepared a Fair Market Value assessment showing that the assets in this trust will last less than three years.<sup>28</sup> The services identified in the assessment are services not covered by medical assistance and are needed to care for Marnie.

***D. Burden of proof – agency failed to rebut applicant's showing of value – rejection of a per se rule.*** If your state imposes a penalty *per se* without considering whether or not your client received fair market value issue, you can still make a showing of fair market value at a hearing and argue that the penalty should not have been imposed. Two Minnesota courts<sup>29</sup> have rejected the state agency's reliance on a *per se* rule in the face of evidence of fair market value. In *Dzuik*

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<sup>25</sup> See e.g. any pooled master trust agreement and *Peittersen v. Minnesota Dep't of Human Services*, Attachment C, at page 7 (Ms. Peittersen, a 73-year old disabled MA-LTC recipient placed funds received from a personal injury settlement into a pooled (d)(4)(C) trust. The county Medicaid agency imposed a period of ineligibility because she was over the age of 64 at the time of the transfer. Peittersen appealed and at the administrative hearing testified that she placed the assets in the trust so she would have funds available to "leave the nursing home, obtain an apartment, and live as independently as possible." *Id.* The trustee of the pooled trust told her that she would approve the use of trust funds to help her establish independence and the District Court held that she "rightfully believed that to be the case." *Id.* at 4. The court found that the Commissioner's order was arbitrary and capricious, because there was no factual finding as to whether or not the transfer was made for fair market value. *Id.* at p. 6.

<sup>26</sup> *Peittersen* Attachment C, at page 3.

<sup>27</sup> See *supra*, p. 1.

<sup>28</sup> See Assessment and Plan, Attachment G.

<sup>29</sup> Besides *Dzuik*, discussed in this subsection, the other was the *Peittersen*, discussed in the previous subsection respecting pooled trust sub-account obligations as contracts.

*v. Minnesota Dep't of Human Services*,<sup>30</sup> the Douglas County District Court in the initial appeal held that the decision of the agency was not supported by substantial evidence because the agency did not perform an analysis of whether Mr. Dziuk received adequate compensation when he placed assets into a pooled trust sub-account.<sup>31</sup> On remand for further proceedings on that factual question,<sup>32</sup> even absent any evidence regarding the lack of fair market value, the Commissioner ruled that a penalty should be imposed because Mr. Dziuk was over 64.<sup>33</sup> On the second appeal, the court reversed the Commissioner's decision imposing a penalty.<sup>34</sup> The court held that there was "not substantial evidence in the record to support the Minnesota Department of Human Services' conclusion that Appellant transferred funds for less than fair market value."<sup>35</sup>

Likewise, in *Peittersen*, in reversing the Commissioner's decision as arbitrary and capricious, the court held that without a factual finding that the transfer was made for less than fair market value, the commissioner's order is arbitrary and capricious."<sup>36</sup>

In *Bienke vs. Minnesota Dep't of Human Services*, the court found that the appellant would not have been penalized has she been under the age of 65<sup>37</sup> and stated that "the principle of the Fourteenth Amendment applies when a "law neither burdens a fundamental right nor targets a suspect class, a classification adopted by a law must bear some rational relation to a legitimate

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<sup>30</sup> *Dziuk v. Minnesota Dep't of Human Services*, 21-CV-09-1074 (Minn. Dist. Ct. Douglas Co. Dec. 15, 2009). Attachment H.

<sup>31</sup> *Dziuk*, at 3. Mr. Dziuk had multiple sclerosis and requires complete care due to his multiple sclerosis but he is active mentally. At the hearing Mr. Dziuk presented evidence that he placed the last of his funds - \$12,320 (after having spent hundreds of thousands of dollars on nursing home care) into the pooled trust sub-account so that it could be used for things not covered by MA-LTC to allow him to engage in the world beyond the nursing home such as "a telephone; telephone bill; a television; cable television bill; books; magazine and newspaper subscriptions; food outside the nursing home's food; handicap van transportation; clothing; haircuts; ... a motorized wheelchair and maintenance; a manual wheelchair; hearing aids; donations; CDs; and DVD.s."

<sup>32</sup> *Id.*

<sup>33</sup> 21-CV-09-1074 (Minn. Dist. Ct. Douglas Co. February 7, 2012). Attachment I.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Peittersen*, at 6

<sup>37</sup> CV-14-271, p. 7 (Minn. Dist. Ct Blue Earth Co. June 24, 2014). Attachment J.



end.”<sup>38</sup> The Court held “that the statutory provision relied upon to penalize appellant bears no relation to a legitimate end.”<sup>39</sup>

## **I. CONCLUSION**

The transfer provisions contained in 42 U.S.C § 1396p(c) do not apply to trusts established for the individual applicant or recipient of Medicaid benefits. Rather, the provisions contained in 42 U.S.C § 1396p(d)(3) and (4), *and only those provisions*, govern trusts established for the benefit of the individual applicant or recipient of Medicaid benefits. If, however, the transfer provisions are applied, individuals have a due process the right to show that fair market value was received when the pooled trust sub-account was funded. In those states, pooled trust administrators should develop a spending plan at the time the sub-account is funded and that should be submitted with the application for benefits or when the sub-account is reported to the state Medicaid agency. Remember, the federal law does not impose a penalty per se when an individual age 65 and older places funds in a pooled trust sub-account. This fair market value argument can be made in every case where the state imposes a period of ineligibility so that disabled individuals over the age of 65 may protect some funds to pay for those goods and services not covered by MA-LTC to enhance the quality of their lives.

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<sup>38</sup> Id. quoting *Romer v. Evans* 517 U.S. 620, 631, 116 S. Ct. 1620 (1996).

<sup>39</sup> Id. at 9. The court also found her age to be wholly immaterial in assessing the cause and extent of her disabilities ... [and] the only reason why her transfer is not exempt is because she is over the age of 65, the penalty bears no rational relation to any legitimate state interest.

## § 1396p (c)

### Transfers

(1)(A) If an institutionalized individual or spouse of such an individual disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance for services described in paragraph (C)(i) or (C)(ii).

(2) An individual is not ineligible for medical assistance if the assets:

(B)(i) were transferred to **the** individual's spouse or to another for the sole benefit of **the** individual's spouse,

(B)(ii) were transferred from **the** individual's spouse to another for the sole benefit of **the** individual's spouse,

(B)(iii) were transferred to, or to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of, **the** individual's child described in subparagraph (A)(ii)(II), or

(B)(iv) were transferred to a trust (including a trust described in subsection (d)(4)) established for the benefit of **an** individual under 65 years of age who is disabled.

## § 1396p (d)

### Trusts

(d)(1) For purposes of determining an individual's eligibility ... subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

(3)(B) In the case of an irrevocable trust –

(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income --

(I) to or for the benefit of the individual, shall be considered income of the individual, and

(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c) of this section; and

(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

(4) This subsection shall not apply to any of the following trusts:

- (A) Special Needs Trusts
- (B) Miller Trusts
- (C) Pooled Trusts

Department of Health & Human Services  
Centers for Medicare & Medicaid Services  
233 North Michigan Avenue, Suite 600  
Chicago, Illinois 60601-5519



July, 2008

**CHICAGO REGIONAL STATE LETTER NO.: 08-03**

**Subject: Pool Trusts**

The purpose of this letter is to provide clarification on the application of transfer of assets penalty provision's for individuals age 65 and older who have established pool trusts.

A pooled trust is a trust that can be established for a disabled individual under the authority of section 1917(d)(4)(C) of the Social Security Act (the Act). A trust that meets the requirements of this section of the statute is exempt from being treated under the normal Medicaid trust rules in section 1917(d) of the Act. A pooled trust is run by a non-profit organization. The trust (or more accurately, a sub-account within the trust) is established for each individual beneficiary. All the beneficiary sub-accounts are pooled for investments and management purposes. Upon the death of the disabled individual, the balance remaining in the account is paid back to the State Medicaid agency in the amount equal to the medical assistance paid on behalf of the beneficiary. The statute also allows the trust to retain some portion of the balance remaining after the death of the beneficiary.

Although a pooled trust may be established for beneficiaries of any age, funds placed in a pooled trust established for an individual age 65 or older may be subject to penalty as a transfer of assets for less than fair market value. When a person places funds in a trust, the person gives up ownership of those funds. Since the individual generally does not receive anything of comparable value in return, placing funds in a trust is usually a transfer for less than fair market value. The statute does provide an exception to imposing a transfer penalty for funds that are placed in a trust established for a disabled individual. However, only trusts established for disabled individuals age 64 or younger are exempt from application of the transfer of assets penalty provisions (see section 1917(c)(2)(B)(iv) of the Act).

If States are allowing individuals age 65 or older to establish pooled trusts without applying the transfer of assets provisions, they are not in compliance with the statute. As explained above, federal statute requires the application of the transfer rules in this situation: it is not a decision for each State to make.

ATTACHED PAGES

Page 2

Please let us know if you have any questions regarding this policy. We are available to provide you with any assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Verlon Johnson".

Verlon Johnson  
Associate Regional Administrator  
Division of Medicaid & Children's Health Operations

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

Case Type: Other Civil  
Appeals from Administrative Agencies

Dawn Peittersen,

Court File No. 19HA-CV-11-5630

Appellant,

vs.

Minnesota Department of Human  
Services & Dakota County Social  
Services,

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER  
AND JUDGMENT**

Respondents.

The above-captioned matter came on for hearing on August 23, 2012, before the Honorable Mary J. Theisen, Judge of District Court. Laurie Hanson, Long, Reher, Hanson, P.A., appeared on behalf of Appellant Dawn Peittersen. Barry R. Greller, Assistant Minnesota Attorney General, appeared on behalf of Respondent Minnesota Department of Human Services. There was no appearance on behalf of Respondent Dakota County Social Services. The record closed on September 21, 2012, upon the parties' submission of proposed findings of fact and conclusions of law.

Having considered the arguments of the parties and reviewed the entire file and record of the proceedings before the Commissioner of Human Services, and being fully advised, the Court makes the following:

#### **FINDINGS OF FACT**

1. Appellant Dawn Peittersen ("Ms. Peittersen" or "Appellant") is a disabled 73-year-old woman who has resided at Augustana Care Center, a long-term care facility, since 2006.

FILED DAKOTA COUNTY  
CAROLYN M. RENN, Court Administrator

OCT 02 2012

She receives Medical Assistance (“MA”) benefits to pay for her long-term care. She also receives Social Security benefits.

2. On January 19, 2011 Ms. Peittersen received a personal injury settlement payment in the amount of \$54,904.48. Ms. Peittersen deposited the settlement proceeds into her bank account.
3. Ms. Peittersen thereafter reduced her assets with the intent of remaining eligible for MA. After payment of certain expenses, she paid a \$1000.00 enrollment fee and deposited \$36,498.69 into a “qualified pooled trust” sub-account at Lutheran Social Services (“LSS”), a nonprofit entity.
4. The sub-accounts of the qualified pooled trust are maintained by trustee LSS for each beneficiary of the pooled trust. The trust is irrevocable. Sub-accounts are established solely for the benefit of the disabled individual. Upon death of that person, the trust retains a 10% portion to be paid to the trust. The remainder is paid to the State up to the total amount of MA paid on behalf of the individual.
5. The trustee has sole discretion as to distribution of the qualified pooled trust funds. The trust agreement entered into between Ms. Peittersen and LSS provides:

*The Trustee will apply to or expend for the benefit of the Beneficiary such sum or sums from the income or principal of the Trust as the Trustee will determine, in the Trustee's sole discretion, to be necessary or advisable to provide for the supplemental care or supplemental needs of the Beneficiary. The Trustee will possess and exercise the sole discretion and authority to allocate all distributions between income and principal. Any income not distributed from a Sub-Account will be added to the principal of that Sub-Account. The Trustee is under no obligation to direct the expenditure of income or principal and the Trustee will have the discretion to refuse to make any distributions.*

2010 Amended and Restated LSS Pooled Trust Agreement (“Agreement”), Agency Ex.

9, art. 5, ¶ 5.01, at p. 6 (emphasis added).



6. Ms. Peittersen placed the funds into the pooled trust with the hope and expectation that she could use the funds to “leave the nursing home, obtain an apartment, and live as independently as possible.” Joinder Agreement for LSS Pooled Trust, p. 11. The LSS trustee told Ms. Peittersen that she would approve the use of trust funds to help her establish independence, and Ms. Peittersen rightfully believed that to be the case. It is unknown, however, when Ms. Peittersen will be able to live independently.
7. Pursuant to the trust contract, LSS has an obligation to pay for items or services for the sole benefit of the sub-account beneficiary as long as the items or services supplement and do not supplant government benefits, and as long as the expenditures promote the comfort and well-being of the beneficiary. A denial of a reasonable request meeting these criteria would breach the trust contract.
8. With the funds in the pooled trust, Ms. Peittersen has been able to purchase desired clothing and cosmetics. She also has funds available to pay for “telephone service, cable television, internet, transportation to restaurants, durable medical equipment not covered by Medical Assistance, books, CD’s, DVD’s, cosmetics, etc.” October 12, 2011 Decision of State Agency on Appeal, p. 4 note 2. The record is silent as to the amounts expended or value of items purchased.
9. When Dakota County became aware of Ms. Peittersen’s transfer of funds into the pooled trust, Dakota County determined that she would be subject to a transfer penalty. Dakota County reasoned that because Ms. Peittersen was over age 65 and receiving MA payment for long-term care services, the law required imposition of a transfer penalty.
10. Dakota County advised Ms. Peittersen’s representative of this determination by memo dated February 24, 2011. Dakota County informed the representative that Ms. Peittersen

would be subject to a long-term care penalty of 6.79 months effective April 1, 2011, and that her long-term care services would not be paid during this period.

11. Ms. Peittersen appealed this determination, and a fair hearing was held before a Department of Human Services Judge on May 2, 2011. At the hearing, Dakota County clarified that the penalty period for the transfer to the pooled trust was 3.39 months for Ms. Peittersen and 3.39 months for her husband, who is also receiving long-term care services through MA.<sup>1</sup>
12. On May 31, 2011, Department of Human Services Judge Douglass C. Alvarado recommended reversal of the Dakota County decision, finding in part that as “it cannot be determined that the transfer [by Ms. Peittersen into the pooled trust] was for less than fair market value[]”, that the decision of Dakota County to impose a transfer penalty of 3.39 months on Ms. Peittersen was incorrect. Recommendation of Judge Alvarado at ¶ 17 (“Alvarado Recommendation”). Judge Alvarado recommended reversal of the 3.39 penalty. *Id.* at p. 9.
13. Co-Chief Human Services Judge Inta M. Sellars did not adopt all of Judge Alvarado’s recommendations. Instead, Judge Sellars concluded in part that because the transfer was made while Ms. Peittersen was over age 65, the transfer was improper and the 3.39 month penalty was properly imposed. The 3.39-month penalty was thus affirmed. It is unclear as to whether Judge Sellars adopted and incorporated Judge Alvarado’s recommended conclusion on the issue of whether the transfer was made for fair market value. Order of Judge Sellars dated October 12, 2011. Judge Sellars’ Order became the Order of the Commissioner of Human Services (“Commissioner’s Order”).

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<sup>1</sup> The 3.39-month disqualification period for Ms. Peittersen is the only disqualification period at issue in this appeal.



14. Ms. Peittersen timely appealed the Commissioner's Order to this court on October 25, 2011.

### CONCLUSIONS OF LAW

1. This action is before the court for review of the Commissioner's Order pursuant to Minn. Stat. § 14.69 (2010). Ms. Peittersen argues that the Commissioner's Order is not supported by substantial evidence in that there was no finding by Judge Sellars that she did not receive fair market value for the monies transferred into the pooled trust. Therefore, Ms. Peittersen argues that the Commissioner's Order is arbitrary and capricious and should be reversed.
2. The parties agree that the LSS joint trust at issue in this case is a "qualified pooled trust" for purposes of 42 U.S.C. § 1396p(d)(4)(C), and that Ms. Peittersen is a disabled person as defined by 42 U.S.C. 1832c(a)(3). The parties also agree that Ms. Peittersen placed the settlement proceeds into the qualified pooled trust with the objective of remaining eligible for MA.
3. With certain exceptions not at issue here, transfers of assets to a qualified trust by a person age 65 or greater are generally subject to a transfer penalty for Medicaid eligibility purposes. "If an institutionalized individual . . . disposes of assets *for less than fair market value* on or after the look-back date [here 60 months] . . . the individual is ineligible for medical assistance. . . ." 42 U.S.C. 1396p(c)(1)(A).
4. Minnesota law prohibits "an institutionalized person" over age 65 from giving away, selling, or disposing of assets "for less than fair market value" on or after the 60-month look-back date when done "for the purpose of establishing or maintaining medical assistance eligibility." Minn. Stat. § 256B.0595, subd. 1(b). These prohibited transfers

specifically include transfers into a qualified pooled trust by a person age 65 or older. Id. at subd. 1(k).

5. The issue here is therefore whether the transfer of monies by Ms. Peittersen into the qualified pooled trust was an unauthorized transfer because it was made for less than fair market value. If it was for less than fair market value, the 3.39 month penalty was correctly imposed. If it was made for fair market value, the penalty was not correctly imposed.
6. The Commissioner's Order is unclear as to whether it contains a finding or conclusion that the transfer was made for fair market value. In the Commissioner's Order, Judge Sellars specifically rejected paragraphs 15 – 18 of Judge Alvarado's recommendation "to the extent the judge concludes that the pooled trust is not an available asset for purposes of determining [Ms. Peittersen's] medical assistance eligibility." Commissioner's Order, "Amended Conclusions of Law" preamble (page inserted between pages 10 and 11 of the Commissioner's Order). Paragraph 17 of Judge Alvarado's recommendation contained a finding that there had not been a showing that the transfer was not made for fair market value. Alvarado Recommendation ¶ 17. It is unclear to this Court whether Judge Sellars intended to reject that finding in the final order, or whether that finding remains in the final order.
7. It appears from the Commissioner's Order, however, that the conclusion was made that because the transfer was made when Ms. Peittersen was over age 65, it was *per se* an improper asset transfer. As noted herein, this Court concludes that the transfer would be prohibited only if the transfer was made for less than fair market value. Therefore, without a finding that the transfer was made for less than fair market value, the

Commissioner's Order is arbitrary and capricious because a necessary finding is omitted. If the Commissioner's Order is properly read to include Judge Alvarado's recommended conclusion that "it cannot be determined that the transfer was for less than fair market value," then the Commissioner's Order should be reversed as arbitrary and capricious because the Order would be contrary to the findings and conclusions. In either event, the Order should be reversed.

8. The Court has thoroughly reviewed the record in this case and all filings. As to the issue of fair market value, the Court defers to Judge Alvarado's factual findings and agrees with and incorporates herein his legal conclusion. As found by Judge Alvarado:

The articles of the amended pooled trust agreement provide that the assets in [Ms. Peittersen's] sub-account can and must be used to meet [Ms. Peittersen's] supplemental needs to promote her comfort and well-being. Distributions are for her sole benefit to enhance the quality of her life so long as they do not replace, reduce or substitute government assistance. Inasmuch as the value of assets in [Ms. Peittersen's] LSS pooled trust sub-account had an equal value of the assets transferred into the account, and the corpus of the trust as well as the income on the corpus may only be used to benefit [her], *it cannot be determined that the transfer was for less than fair market value.*

Alvarado Recommendation, ¶ 17 (emphasis added).

9. It has not been shown that Ms. Peittersen's transfer of the settlement proceeds into the joint pooled trust sub-account was made for less than fair market value.<sup>2</sup> The Commissioner's Order is therefore arbitrary and capricious and not supported by substantial evidence. It should be reversed.

---

<sup>2</sup> Respondent urges this Court to give deference to an April 2008 letter from the Centers for Medicare and Medicaid Services ("CMS"), the division responsible for administering Medicaid at the federal level. In that letter, CMS stated in part that "placing funds in a trust is usually a transfer for less than fair market value." As recently held by the 8<sup>th</sup> Circuit Court of Appeals, however, while according the CMS letter due respect, a district court "should not [defer] to the CMS letter." *Center for Special Needs Trust Administration v. Olson*, 676 F.3d 688, 701 n. 4 (8<sup>th</sup> Cir. 2012). This Court therefore does not defer to the conclusions contained in the CMS letter.

**ORDER**

1. Appellant Ms. Peittersen's requested relief is **GRANTED**. The Commissioner's Order is **REVERSED** and Dakota County's determination of the ineligibility period of 3.39 months is **REVERSED**.

**IT IS SO ORDERED. LET JUDGMENT BE ENTERED ACCORDINGLY.**

BY THE COURT

Dated

10/2/12

Mary J. Theisen  
Mary J. Theisen  
Judge of District Court

**JUDGMENT**

I HEREBY CERTIFY THAT THE ABOVE ORDER  
CONSTITUTES THE JUDGMENT OF THE COURT.

CAROLYN M. DEHN, COURT ADMINISTRATOR

BY: Carolyn M. Dehn  
DATED: 10/2/12 DEPUTY  
(SEAL)

## Affidavit of James McGill

### Medical Assistance Appeal for Walter White, Docket #

State of Minnesota       )  
  ) ss.  
County of Ramsey        )

James McGill, upon being first duly sworn on oath, deposes as says:

1. My name is James McGill. I am the director of the LSS pooled trust, operated by Lutheran Social Service of Minnesota (LSS). My office is located at St. Paul, MN.
2. Lutheran Social Service is Minnesota's largest non-profit social service organization. We have a staff of about 2,300, serving about 100,000 people in all 87 counties in Minnesota. We serve children and families, people with disabilities, and older adults. We work in the areas of adoption, credit counseling, guardianship and conservatorships, mental health counseling, refugee services, housing, etc. Another area we are active in is pooled trusts.
3. A pooled special needs trust is a trust where subaccounts are established for persons with disabilities. Pooled trusts are operated by non-profit organizations such as Lutheran Social Service. The accounts are funded with money from the persons with disabilities. The money may come from a personal injury award, an inheritance, a retirement account, etc.
4. Lutheran Social Service operates a pooled special needs trust and a pooled supplemental needs trust. Between the two, we have about 280 subaccounts. As director of the pooled trust, I am responsible for the overall administration of all pooled trust sub-accounts.
5. The subaccounts of the pooled special needs trust are for clients of ours who meet the Social Security definition of being "disabled." Each person signs a Joinder Agreement that provides the obligations of each party.
6. The LSS Pooled Trust was established to fill an identified gap in services in the disability community in the state of Minnesota. Further, administering a pooled trust to preserve assets of disabled individuals to provide funds to supplement government benefits is an excellent way to further the LSS Guardian/Conservator Services' *Mission to preserve the integrity, independence and wellbeing of vulnerable adults in the least restrictive manner possible.*
7. LSS has a contractual obligation to pay for items or services for the sole benefit of sub-account beneficiaries as long as the expenditure promotes the comfort and well-being of the beneficiaries. Id. Further, it is LSS's position that if a beneficiary requests a distribution that is reasonable and meets this criteria, a denial would be a breach of contract and would be in bad faith.
8. The Lutheran Social Service of Minnesota Board of Directors would demand a change in procedure if it determined that the Trustees were not allowing expenditures that met the above criteria.

9. Lutheran Social Service views its discretion to be limited by the above criteria and by the spendthrift clause.
10. On or about December 23, 2014, we entered into a Joinder Agreement with Walter White. (Exhibit 3). We received the following checks which have been deposited in Mr. White's subaccount:
  - a. A check dated December 24, 2014 from Mr. White in the amount of \$1,000 for the enrollment fee;
  - b. A check dated December 23, 2014 from Mr. White's attorney in the amount of \$46,910.69;
  - c. A check dated December 24, 2014 from Mr. White in the amount of \$979.54
  - d. A check dated December 24, 2014 from Mr. White in the amount of \$1,520.

The total deposited in the pooled trust sub-account, including the enrollment fee, was \$50,410.23 (Exhibits 5, 6, and 9).

11. Mr. White resides in a skilled nursing facility, the cost of which is paid for by Medical Assistance. While on Medical Assistance, he may keep only \$97 of his income each month as a personal needs allowance. The balance of his monthly income must be paid to the nursing home. In accordance with the terms of the pooled trust and the joinder agreement, funds in Mr. White's pooled trust subaccount will be used to pay for goods and services for him to enhance the quality of his life – which he cannot purchase with his \$97 personal needs allowance and which are not covered by Medical Assistance.
12. In Schedule B of the Joinder Agreement, Mr. White indicated he wants us to provide a television set, recliner, clothes, and extra blankets. In addition, because Mr. White has a brain injury, it is necessary that other services are provided to him to ensure his health, safety, and overall wellbeing. For instance, he has no family in Minnesota. Thus, a geriatric care manager must be hired to manage his care and to communicate with his attorney-in-fact, Skyler White, who lives in Seattle, Washington. Someone outside the nursing home must monitor his care. Further, funds in Mr. White's pooled trust subaccount will be used to pay for care otherwise not covered by Medical Assistance, including vision, hearing, podiatry and dental care. Lutheran Social Service will also pay for companion services and other services in compliance with his plan of care.
13. The fair market value assessment included with this affidavit outlines the yearly ongoing expenditures of Mr. White's pooled trust subaccount. It is my belief that the trust money will be easily spent for Walter's benefit over the course of six (6) to eight (8) years, as reflected in the assessment.

14. Since the commencement of the subaccount, we have paid for goods and services for Mr. White. When Lutheran Social Service enters into a Joinder Agreement with a beneficiary, we fully intend to pay for goods and services for the beneficiary's benefit. In fact, we are legally bound to do so. We fully intend to continue to pay for goods and services as long as there are funds remaining in the subaccount.

Dated: \_\_\_\_\_

\_\_\_\_\_  
James McGill

Subscribed and sworn to before me  
this \_\_\_\_\_ day of May, 2015,  
by James McGill

\_\_\_\_\_  
Notary Public

Colorado Fund for People with Disabilities  
Assessment and Plan

**Date:** September 8, 2011

**Trust No.** 690

**Beneficiary:** [REDACTED]

**Mailing Address:** c/of Porter Place  
[REDACTED]  
Denver, CO 80210

**Home Address:** c/of Porter Place  
1001 E. Yale Ave., Apt. 322  
Denver, CO 80210

**Phone:** (303) 980-1114

**D.O.B:** [REDACTED]/1916

**Life Expectancy:** 3.26

**SS#:** [REDACTED]

**Benefits:** Medicaid; SSA

**Medicaid #:** [REDACTED]

**Initial Deposit:** \$34,240.00

**Next of Kin:** [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**Background Information:** [REDACTED] joins the trust with funds from her late husband's life insurance settlement. I met with [REDACTED] at Porter Place, her Assisted Living Facility, her son, [REDACTED], joined us via phone. [REDACTED] was born in Oklahoma, she married her husband, [REDACTED], just a couple of months before the start of WWII. [REDACTED] served in the war for 4 years. [REDACTED] and [REDACTED] were both part of large farm families. They went on to have four children: [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. After [REDACTED]'s service in the war, he held a job at Chevron. This position moved the family from Utah to Wyoming, and then to Colorado.

**Housing:** In May of 2011, both [REDACTED] and [REDACTED] were approved for Medicaid. They moved into Porter Place in early June 2011. Theo moved into a Nursing Home less than a week later, he died within a couple of days after that of heart failure. [REDACTED] remained at Porter Place. She has an individual room and reports that she likes it very much. It is well furnished, including a new TV. [REDACTED] mentioned the possibility of purchasing [REDACTED] a nicer Sleep Number bed; she currently has an older twin bed.

**Medical:** About a year ago, [REDACTED] broke both wrists. She was in rehabilitation for 6 weeks. [REDACTED] and his wife came out to Colorado from Illinois for 11 months to help his parents during this time. [REDACTED] has also had



both hips replaced. She has a diagnosis of Nueropathy, Cognitive Impairment, Hypertension, Osteoporosis, Insomnia, Edema, and Reflux. [REDACTED] presents a very healthy woman, and she is very sharp minded. There are no current pressing health issues.

Further, [REDACTED] receives TLC. They assist [REDACTED] with all her health appointments and transportation to/from appointments. She anticipates new glasses in the next couple of weeks since she has an optometry visit scheduled.

**Mobility:** There are no mobility issues. [REDACTED] uses no adaptive equipment.

**Dental:** There are no concerns in this area. [REDACTED] still has all of her teeth and has a standard dental exam and cleaning appointment scheduled this month.

**Social:** [REDACTED] enjoys shopping, watching TV, walking, and activities within Porter Place. [REDACTED] attends church service within the facility. When [REDACTED] and [REDACTED] were initially connected with TLC, they received in-home services. One of their companions, [REDACTED], has continued to visit [REDACTED] and spend time with her. [REDACTED] and [REDACTED] feel that [REDACTED] is an excellent companion and would like to enlist her services formally with funds from the trust. [REDACTED] has nursing experience and will be able to transport [REDACTED] on outings.

**Education:** [REDACTED] has a High School degree and attended a couple years of college, although she did not graduate.

**Employment:** Over the years, [REDACTED] would work occasionally as a substitute teacher for grade school. [REDACTED] also reports that while [REDACTED] was at war, she held a job at Safeway for four years. [REDACTED]'s recalled that [REDACTED] was primarily a stay-at-home mom.

**Transportation:** Porter Place provides most transportation. [REDACTED] has reserved Wednesdays as her medical appointment day, and thus leaves the facility with Porter Place transportation.

**End of Life Plans:** [REDACTED] has a pre-need plan in place; it has been paid in full. She will be buried next to her husband in Fort Logan.

**Summary:** [REDACTED] deferred to [REDACTED] to answer most of my questions while she listened. [REDACTED] was extremely informed on [REDACTED]'s history and her current needs. He handles the majority of his mother's affairs—in regards to both her health and finances. Before and after the formal meeting, I visited with [REDACTED]. She is still very independent but knows when to defer to her son on certain matters. She speaks very highly of Michael; he will be the primary contact for issues regarding the trust. [REDACTED] is unable to travel so we discussed an annual visit for [REDACTED] to visit [REDACTED].

#### One Time Expenditures:

CFPD Joinder Fee	\$ 684.80
CFPD Set Up Fee	\$ 250.00
Sleep Number Twin Bed	\$1,000.00
Annual Visits from Michael (3 visits \$1,500.00/visit)	\$4,500.00
<b>Total, One Time Expenditures:</b>	<b>\$6, 434.40</b>

**Ongoing Annual Expenditures:**

CFPD Case Management Fees (based on 1.5 hrs/month \$65/hour)	\$1,170.00
Companionship Services (4 hours/week at \$24/hour)	\$4,992.00
Clothing and Personal Needs Items (\$150/month)	\$1,800.00
Hair/Nail Care (\$60/month)	\$ 720.00
Cable TV Service (\$50/month)	\$ 600.00
Renter's Insurance (annual)	\$ 150.00

**Total Annual Expenditures**

**\$9,432.00**

After all one time expenditures have been completed, the balance on [REDACTED]'s account will be \$27,806.00. At the \$9,432 annual rate of spending, [REDACTED]'s trust will be exhausted in just under three years, ahead of her life expectancy of 3.26 years.

Written By: [REDACTED] Date: 9.27.2011

Reviewed: M. Brand Digitally signed by Megan  
DN: cn=Megan, o=CFPD,  
ou,  
email=mbrand@cfpdtrust.  
org, c=US  
Date: 2011.10.11 09:02:47  
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FILED  
DISTRICT COURT

FEB 07 2012

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF DOUGLAS DOUGLAS COUNTY  
COURT ADMINISTRATOR

SEVENTH JUDICIAL DISTRICT

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David Dziuk, by his attorney-in-fact,  
Claudia O'Donnell,

Court File No. 21-CV-09-1074

Appellant,

vs.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
ORDER FOR JUDGMENT,  
AND JUDGMENT

Minnesota Department of Human Services, and  
Douglas County Social Services,

Respondents.

---

The above-entitled matter comes before the Honorable Ann L. Carrott at the Douglas County Courthouse in Alexandria, Minnesota, on the Appellant's appeal of the Commissioner of Human Services' Decision of State Agency on Remand from District Court. The parties have not requested a hearing.

Based on the memorandums, the record of the proceedings below, and all of the files and records herein, the Court now makes the following

FINDINGS OF FACT

1. This matter comes before the Court on appeal from the agency's decision following remand.
2. In its earlier decision, the Court held that "[t]he Minnesota Department of Human Services properly applied 42 U.S.C. section 1396p(c) to the transfer of funds by Appellant

to a qualified pooled trust.” (Findings of Fact, Conclusions of Law, Order for J. & J., conclusion para. 1, Dec. 15, 2009.)

3. However, the Court went on to hold that “[t]here is not substantial evidence in the record to support the Minnesota Department of Human Services’ conclusion that Appellant transferred funds for less than fair market value.” (Id. at conclusion para. 2.)
4. The Court then remanded for further proceedings on the factual question of whether or not the Appellant transferred funds for less than fair market value.
5. On remand, neither party introduced any additional evidence, the Respondent argued that the issue could be decided as a matter of law, and the administrative law judge concluded as a matter of law that the Respondent had shown that the Appellant transferred funds for less than fair market value.

#### CONCLUSIONS OF LAW

1. There is not substantial evidence in the record to support the Minnesota Department of Human Services’ conclusion that Appellant transferred funds for less than fair market value.

#### ORDER FOR JUDGMENT

1. The Appellant’s requested relief is GRANTED. The Minnesota Department of Human Services’ decision is REVERSED and Douglas County Social Services’ determination that the Appellant is subject to an ineligibility period for medical assistance long-term care of 2.69 months is REVERSED.
2. The attached Memorandum of Law is incorporated by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY.

It is so ORDERED this 7<sup>th</sup> day of February, 2012

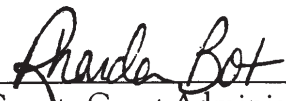
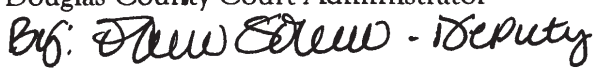
  
Hon. Ann L. Carrott  
Judge of District Court

JUDGMENT

**COURT SEAL**

The above Order for Judgment is hereby adopted as the Judgment on the file herein.

Dated this 7<sup>th</sup> day of February, 2012.

  
Douglas County Court Administrator  
By:  - Deputy

STATE OF MINNESOTA

COUNTY OF DOUGLAS

FILED  
DISTRICT COURT

FEB 07 2012

DISTRICT COURT

SEVENTH JUDICIAL DISTRICT

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DOUGLAS COUNTY  
COURT ADMINISTRATOR

David Dziuk, by his attorney-in-fact,  
Claudia O'Donnell,

Court File No. 21-CV-09-1074

Appellant,

MEMORANDUM OF LAW

vs.

Minnesota Department of Human Services, and  
Douglas County Social Services,

Respondents.

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Because this matter was returned to the Administrative Law Judge on remand from this Court, the proceedings on remand were constrained by the law of the case. See generally Mattson v. Underwriters at Lloyd's of London, 414 N.W.2d 717, 719-720 (Minn. 1987). Under this doctrine as generally recited, when the Court of Appeals has ruled on a legal issue and remanded for further proceedings, the trial court may not permit the issue to be relitigated, but may address issues not decided by the Court of Appeals. Id. However, the law of the case has a broader meaning, in that the once an issue is considered and adjudicated by *any* court, that issue should not be reconsidered by that court or by any lower court. State v. Dahlin, 753 N.W.2d 300, 305 n.7 (Minn. 2008).

This Court specifically held that the Respondents had not offered substantial evidence on the question of whether or not the Appellant had received fair market value. (Findings of Fact,

Conclusions of Law, Order for J. & J., conclusion para. 1, Dec. 15, 2009.) This Court specifically held that the burden was on the Respondent to offer such evidence. (Memo. of Law, p. 6, Dec. 15, 2009.) This Court specifically remanded this matter back to the Administrative Law Judge to allow the Respondents an opportunity to offer such evidence.

If the Respondents disagreed with the Court's actions on the first appeal, then their remedy was to appeal the Court's Judgment of December 15, 2009, within 60 days of the date it was entered. Minn. R. Civ. App. P. 104.01, subd. 1 (2009); Minn. Stat. § 256.045, subd. 9 (2009).

The Respondents did not appeal the Court's decision. The Respondents did not offer any additional evidence on remand as the Court had directed. The Respondents instead attempted to have the Administrative Law Judge contradict this Court's conclusions of law, which the Administrative Law Judge cannot do. Therefore, the Respondents have again failed to offer substantial evidence on the question of whether or not the Appellant had received fair market value, and have failed to meet the burden of proof necessary for their decision to be affirmed.

For these reasons, the Court holds that the Appellant's requested relief is GRANTED. The Minnesota Department of Human Services' decision is REVERSED and Douglas County Social Services' determination that the appellant's is subject to an ineligibility period for medical assistance long-term care of 2.69 months is likewise REVERSED.

A.L.C.





STATE OF MINNESOTA  
COUNTY OF BLUE EARTH

DISTRICT COURT  
FIFTH JUDICIAL DISTRICT  
File No. CV-14-271

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Lee Ann Beinke,

Appellant,

vs.

State of Minnesota Department of Human  
Services, and Blue Earth County Human  
Services Department,

Respondents.

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**ORDER**  
(Administrative Docket No. 147298)

#### **PREFACE**

This matter came on for hearing before the Court on the 29<sup>th</sup> day of April, 2014, at the Blue Earth County District Court, Mankato, Minnesota. Appellant appeared and was represented by Robert H. Chelsey, Attorney at Law, Mankato, Minnesota. Aaron Winter, assistant Minnesota Attorney General, appeared on behalf of Respondent Minnesota Department of Human Services (DHS). Mark Lindahl, assistant Blue Earth County Attorney, appeared on behalf of Respondent Blue Earth County Human Services (BECHS). The matter was brought on by Appellant's motion to reverse the Minnesota Human Services Judge's January 8, 2014 decision to impose a penalty on Appellant's eligibility to receive Medical Assistance payments. The Court took the matter under advisement. Based upon the testimony and exhibits received at the hearing, written submissions by counsel, and the Court's independent review of the applicable statutes and case law, the Court now makes the following:

FILED 6/24/14  
NO. CV-14-271  
Court Administrator  
Blue Earth County, Minnesota

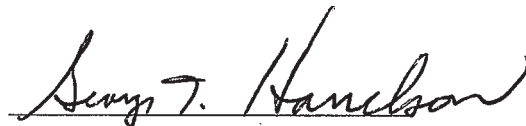


**ORDER**

1. The Appellant's Motion to Reverse is hereby GRANTED.
2. The Minnesota Human Services Judge's decision to impose a 22.63 month penalty on Appellant's eligibility for Medical Assistance payments is REVERSED.
2. The attached Memorandum is to be considered part of this Order.

Dated 6-24-14

BY THE COURT

A handwritten signature in cursive script, appearing to read "George I. Harrelson", written over a horizontal line.

George I. Harrelson  
Judge of District Court

## MEMORANDUM

Appellant, in her Motion to Reverse, appeals a decision by the Minnesota Human Services Judge's (HS Judge) imposing a 22.63 month penalty on Appellant's eligibility to receive Medical Assistance (MA) payments. In her Motion, Appellant claims that the DHS and BECHS are judicially and collaterally estopped from imposing a penalty on her MA eligibility, that the Commissioner's decision that Appellant did not receive fair market value (FMV) for her assets in question, and that she did in fact receive FMV for said assets. Because the Court finds (1) that the Commissioner's decision regarding FMV was not supported by substantial evidence, and (2) the statutory provision upon which the Commissioner relies is unconstitutional as applied to Appellant, the Court hereby reverses the Commissioner's decision to impose a penalty upon Appellant.<sup>1</sup>

## **FACTS**

The undisputed facts are as follows: Appellant is a resident at Pathstone Living, an assisted living facility located in Mankato, Minnesota. She is 72 years old. In 1978, she had her left hand amputated as a result of a work place accident. Up until 2012, she had been living at home by herself and was able to take care of herself. In 2012, she permanently injured her right hand in a washing machine accident at home. As a result of that accident, she only has use of two and a half fingers on her right hand. For the most part, she is wheelchair bound, but she can walk short distances with a specialized walker.

As a result of her lack of working hands, Appellant cannot dress herself, bathe herself, or prepare meals for herself. She also has difficulty toileting herself. After the accident in 2012, Appellant could no longer live independently. As a result, she moved into Pathstone Living.

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<sup>1</sup> Because the Commissioner's decision must be reversed on these grounds, the Court need not address the issue of judicial estoppel or collateral estoppel, and will not do so in this Memorandum.

When her assets were exhausted, she applied for and was determined eligible to receive MA, as well as long term care services provided through Respondent BECHS by a program called Elderly Waiver.

In 2012, Appellant brought a worker's compensation claim for benefits relating back to the 1978 workplace accident. Respondent DHS was among the parties to this claim. After several months of litigation, a settlement was reached. Appellant received a gross settlement of \$150,000. The interveners, including Respondent DHS, received payments over and above the \$150,000 Appellant received, all as part of the same agreement. The parties agreed that, after a deduction for attorney's fees and purchasing some furnishings for her apartment at the assisted living facility, Appellant would transfer the remainder to a subaccount of a Lutheran Social Services pooled trust.

Lutheran Social Services (LSS) operates a pooled trust for disabled persons. LSS maintains a subaccount for each person who contributes funds to the pooled trust. Under the Joinder Agreement, the trust principal is used for things requested by the beneficiary's representative to enhance the beneficiary's quality of life. This takes the form of purchasing things that MA will not provide, such as paying for a private room in a nursing home, dental care not deemed medically necessary by MA, or extra baths not deemed medically necessary by MA. According to the terms of the Joinder Agreement, when a beneficiary dies, any assets remaining in the subaccount go back to the State of Minnesota to the extent that the State has paid MA benefits. The trust satisfies all requirements of 42 U.S.C. §1396p(c)(2)(B)(iv) and Minn. Stat. §256B.0595, Subd. 4(a)(6), other than with respect to Appellant's age.

In this case, the pooled trust pays for a larger room at Pathstone than what Appellant's Elderly Waiver benefits would pay for. The difference is \$629.00 per month. The larger unit

contains a larger bathroom. The larger bathroom accommodates Appellant's specialized walker. As a result, Appellant can often go to the bathroom without an attendant. The larger apartment gives her a feeling of more privacy, greater self-worth, and more independence. Appellant testified that her quality of life is now 100% better than when she was in a smaller unit.

In September of 2013, Appellant disclosed the transfer of funds into the pooled trust to Respondent BECHS, who sent a request to Respondent DHS, asking for an opinion on the transfer to the pooled trust. DHS responded that, since Appellant was over the age of 64, a transfer to a pooled trust was not an exempt transfer, and that she could no longer qualify for MA payments without the imposition of a penalty. BECHS then imposed a 22.63 month penalty on Appellant, making her ineligible for her Elderly Waiver long term care benefits through the county for a period of 22.63 months.

Appellant appealed BECHS's decision to DHS. A hearing was held by teleconference. Appellant testified to the above at that hearing. Several affidavits were also submitted at the hearing, including one from LSS, attesting to the fact that it, as trustee, is contractually bound to pay out things requested by Appellant, as beneficiary, through her representative. BECHS introduced no evidence regarding the issue of whether Appellant received fair market value for her worker's compensation settlement proceeds when she transferred them into the pooled trust. After the hearing, a Human Services Judge issued a decision affirming BECH's decision to impose a penalty.

### ANALYSIS

Appellant seeks reversal of the Human Services Judge's decision to impose a 22.63 month penalty on her eligibility for long term care benefits. The decision is reviewable by this Court under Minn. Stat. §256.045, Subd. 8. As such, the scope of review is governed by Minn.

Stat. §14.69. *Zahler v. Minn. Dept. of Human Services*, 624 N.W.2d 297, 301 (Minn.2001).

Accordingly, the Court may reverse the decision if:

the substantial rights of the petitioners may have been prejudiced because of the administrative finding, inferences, conclusion, or decisions are: (a) in violation of constitutional provisions; or (b) in excess of the statutory authority or jurisdiction of the agency; or (c) made upon unlawful procedure; or (d) affected by other error of law; or (e) unsupported by substantial evidence in view of the entire record as submitted; or (f) arbitrary and capricious.

Minn. Stat. §14.69. Questions of law are reviewed de novo. *Wynkoop v. Carpenter*, 574 N.W.2d 422, 425 (Minn.1998). Questions of fact are reviewed using the substantial evidence test. Minn. Stat. §14.69(e); *Johnson v. Minn. Dept. of human Services*, 565 N.W.2d 453, 457 (Minn.App.1997).

Substantial evidence under the test is defined as: (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) evidence considered in its entirety. *Minn. Ctr. For Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 464 (Minn.2002), citing *Cable Communications Bd. v. Nor-West Communications Partnership*, 356 N.W.2d 658, 668 (Minn.1984).

#### **I. Transfer of Appellant's Assets Into a Pooled Trust**

Under both 42 U.S.C. 1396p and Minn. Stat. §256B.0595, transfers of assets for less than fair market value can subject a recipient of MA or long term care benefits to a penalty. Fair market value for purposes of these provisions is "the price at which a willing seller and a willing buyer will trade, both having a reasonable knowledge of the facts." *Klapmeier v. Telecheck Intern., Inc.*, 482 F.2d 247, 252 (8<sup>th</sup> Cir.1973), citing *Douglas Hotel Co. v. Comm'r of Int. Revenue*, 190 F.2d 766, 772 (8th Cir.), cert denied, 342 U.S. 893, 72 S.Ct. 200, 96 L. Ed. 669 (1951). While transfers of assets into a pooled trust of this kind are considered exempt transfers

for disabled persons generally, Appellant's transfer is not exempt because she is over the age of 64. 42 U.S.C. §1396p(c)(2)(B)(iv); Minn. Stat. §256B.0595, Subd. 4(a)(6). As such, a FMV analysis applies to Appellant's transfer under these provisions.

The Human Services Judge concluded that Appellant had not received fair market value for her assets. Respondent offered no evidence in support of a finding that Appellant did not receive FMV. Generally, regarding trusts, a beneficiary has a vested equitable interest in the trust assets. *Reinecke v. Smith*, 289 U.S. 172, 174-75, 53 S.Ct. 570 (1933); *U.S. v. O'Shaughnessy*, 517 N.W.2d 574, 577 (Minn.1994)<sup>2</sup>; Uniform Trust Code §103(3)(A); Am.Jur. Trusts §240. Here, when Appellant transferred her assets into the pooled trust, she vested in herself an equitable interest in the trust assets, the value of those assets equaling roughly the value of Appellant's interest. As noted in its Affidavit, LSS, as trustee, is obligated to pay out trust assets upon Appellant's reasonable request in order to enhance her quality of life, and LSS has already done so on more than one occasion. Given this, the Court concludes that Appellant received FMV for her assets when she transferred them into the pooled trust. The Court further concludes that there was not substantial evidence upon which to base a finding that Appellant did not receive FMV.

Respondent grossly understates the value that Appellant received when she transferred her assets into the trust. According to Respondent, Appellant did not receive any value whatsoever at the moment the transfer was made.<sup>3</sup> The Court has already concluded above that

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<sup>2</sup> Although the Court in *O'Shaughnessy* held that the beneficiary's interest in the trust in question amounted to a "mere expectancy," the case stands for the general principle that beneficiaries have an immediate, vested equitable interest in the trust assets. The reason the Court limited the nature of the beneficiary's interest in *O'Shaughnessy* is because there they were dealing with a purely discretionary trust. The pooled trust in this case is not a purely discretionary trust – in fact, LSS, as trustee must distribute the trust assets to Appellant upon reasonable requests made by Appellant, through her representative. So, although the result of *O'Shaughnessy* is distinguishable from this case, the general rule remains the same – the beneficiary of a trust has a vested equitable interest in the trust assets.

<sup>3</sup> Respondent urges the Court to conduct the FMV analysis by looking only at what Appellant received on the day of the transfer. *See In re Pooled Advocate Trust*, 813 N.W.2d 130, 147 (S.D.2012).

Appellant did in fact receive value for her assets when she received a vested equitable interest in the trust assets. The trust in question is not, as Respondent claims, a purely discretionary trust. LSS is obligated to comply with Appellant's reasonable requests for distribution of assets, potentially all the way up to the amount transferred. Respondent further argues that, even if the Court looks at all of the value Appellant has received up until this point, she has at best received some value (i.e. the value of her large apartment, specialized walker, and other amenities and services purchased from trust assets), but not fair market value. Appellant has indeed already received some value through distribution of trust assets, but this is not the only value Appellant has received. She has also received the value of an equitable interest in the remaining trust assets, as well as the value of LSS, as trustee and fiduciary, managing and investing the assets for her benefit.

## **II. Equal Protection**

The Court may also reverse the decision of the Human Services Judge if the decision is in violation of constitutional provisions (see above). It is well established that the Fourteenth Amendment promises "that no person shall be denied equal protection of the laws..." *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620 (1996). Under this principle, even where a law neither burdens a fundamental right nor targets a suspect class, a classification adopted by a law must bear some rational relation to a legitimate end. *Id.* at 632. Here, Respondents have penalized Appellant pursuant to 42 U.S.C. 1396p and Minn. Stat. §256B.0595, under a theory that she transferred her assets for less than FMV. As noted above, Respondents could not have penalized Appellant under this theory had she been under the age of 65.



The Court concludes that the statutory provision relied upon to penalize Appellant bears no relation to a legitimate end in this case.<sup>4</sup> Appellant receives MA benefits, as well as long-term care benefits through the County, in large part due to her inability to properly care for herself. Her inability to care for herself derives from a work-related accident and subsequent accident at home, leaving her with no left hand and only limited use of her right hand. Her age is wholly immaterial in assessing the cause and extent of her disabilities. The pooled trust into which Appellant transferred her assets conforms in every respect to trusts that are exempt under 64. 42 U.S.C. §1396p(c)(2)(B)(iv) and Minn. Stat. §256B.0595, Subd. 4(a)(6). If Appellant were under the age of 65, her transfer of assets would be exempt. In fact, the only reason why her transfer is not exempt is because she is over the age of 65. Thus, in this case, the penalty bears no rational relation to any legitimate state interest. Although the reason for creating an exemption in 42 U.S.C. 1396p and Minn. Stat. §256B.0595 may afford disabled persons needed protections while at the same time preventing misuse of MA and similar services by the elderly, in this case it denies Appellant protections afforded to all other disabled persons simply because of her age. Accordingly, 42 U.S.C. 1396p and Minn. Stat. §256B.0595 are unconstitutional as applied to Appellant.

### CONCLUSION

The decision to impose a penalty upon Appellant must be reversed under both Minn. Stat. §14.69(a) and (c). First, the finding below – that Appellant did not receive FMV – is not only erroneous, but also unsupported by evidence. Notwithstanding the above, 42 U.S.C. 1396p and Minn. Stat. §256B.0595 treat Appellant differently than other similarly situated disabled persons for no other reason than her age. They therefore create an impermissible classification – one

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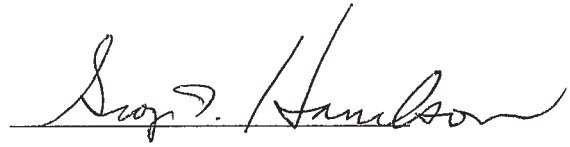
<sup>4</sup> Without addressing the question of whether 42 U.S.C. 1396p and Minn. Stat. §256B.0595 are facially unconstitutional, the scope of the Court's Fourteenth Amendment analysis is limited to the constitutionality of 42 U.S.C. 1396p and Minn. Stat. §256B.0595 as applied to Appellant.



which has no rational relation to any legitimate governmental interest – and therefore cannot serve as a basis for penalizing Appellant. The decision to impose a penalty must therefore be, and the same hereby is, reversed.

Dated 6-24-14

BY THE COURT

A handwritten signature in cursive script, reading "George I. Harrelson", written over a horizontal line.

George I. Harrelson  
Judge of District Court

OF MINNESOTA DEC 15 2009

IN DISTRICT COURT

COUNTY OF DOUGLAS

SEVENTH JUDICIAL DISTRICT

Court Administrator

*[Signature]*

Deputy

David Dziuk, by his attorney-in-fact,  
Claudia Dziuk-O'Donnell,  
Appellant,

Court File No. 21-CV-09-1074

v.

Minnesota Department of  
Human Services and Douglas  
County Social Services,  
Respondents.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
ORDER FOR JUDGMENT,  
AND JUDGMENT**

This matter came on for a hearing on October 14, 2009, before the Honorable Ann L. Carrott, at the Douglas County Courthouse in Alexandria, Minnesota. Attorney Laurie Hanson appeared with and on behalf of Appellant. Assistant Attorney General Patricia Sonnenberg appeared on behalf of the Minnesota Commissioner of the Department of Human Services.

Based on all of the files and proceedings herein, the Court makes the following:

**FINDINGS OF FACT**

1. This appeal is governed by Minnesota Statute section 256.045, subdivisions 7 and 8 (2009). The scope of this Court's review is governed by Minnesota Statute section 14.69 (2009).
2. The procedural history is as follows:
  - a. October 30, 2008 – Douglas County sent Appellant written notice indicating that Appellant was ineligible for a period under Medical Assistance Long Term Care because it had determined that the \$12,320 Appellant had deposited in a Minnesota Special Needs Pooled Trust for the benefit of Appellant in August 2008 along with a \$500 administrative fee was an uncompensated transfer.

- b. November 26, 2008 – Appellant filed an appeal to the Minnesota Department of Human Services (hereafter “DHS”).
  - c. January 6, 2009 – The Department Human Services Judge held a hearing regarding Appellant’s first appeal.
  - d. February 25, 2009 – The Human Services Judge issued her recommended order denying Appellant’s requested relief which was subsequently adopted as the Order of the Commissioner of Human Services on February 27, 2009.
  - e. March 30, 2009 – Appellant filed a Request for Reconsideration.
  - f. April 1, 2009 – The Commissioner of DHS denied Appellant’s Request for Reconsideration.
  - g. April 30, 2009 – Appellant timely filed notice of appeal with this Court.
  - h. August 19, 2009 – Appellant filed his memorandum of law.
  - i. September 11, 2009 – Respondent filed its responsive memorandum of law.
  - j. September 17, 2009 – Appellant filed his reply memorandum of law.
  - k. October 14, 2009 – The Court held a hearing.
- 3. Claudia Dziuk-O’Donnell is Appellant’s daughter and his attorney-in-fact.
  - 4. Appellant is an 83-year-old man with multiple sclerosis. Although he requires complete physical care due to the multiple sclerosis, he is still active mentally.
  - 5. Appellant is living in a nursing home which he was paying for with his own funds. Since his funds were dissipating, his daughter, Ms. Dziuk-O’Donnell, filed an application for Medical Assistance Long Term Care benefits.
  - 6. In August 2008, Ms. Dziuk-O’Donnell, as power of attorney for her father, transferred \$12,320 of Appellant’s money from Bremer Bank and deposited it into a Minnesota Special Needs Pooled Trust managed by Guardian and Protective

Services, Inc., a non-profit corporation. Ms. Dziuk-O'Donnell also paid \$500 of Appellant's money as an administration fee to Guardian and Protective Services, Inc. to enter into the pooled trust.

7. The parties do not dispute that the pooled trust is a qualified pooled trust which has the following characteristics:
  - a. The trust is irrevocable.
  - b. Disbursements from the trust are at the discretion of the trustee, Guardian and Protective Services, Inc.
  - c. Guardian and Protective Services, Inc., a non-profit association, established and manages the trust.
  - d. A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts. These separate accounts are called "sub-accounts" in the trust.
  - e. A sub-account was established solely for the benefit of Appellant, who is disabled, by Appellant through Ms. Dziuk-O'Donnell, his attorney-in-fact.
  - f. To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary.
8. Appellant transferred money into the pooled trust account so it could be used for needs which are in addition to Appellant's normal care needs, including things such as: a telephone; telephone bill; a television; cable television bill; books; magazine and newspaper subscriptions; food outside of the nursing home's food; handicap van transportation; clothing; haircuts; medical insurance premiums of \$800 per month; a

motorized wheelchair and maintenance; a manual wheelchair; hearing aids; donations; CDs; and DVDs.

9. Appellant receives social security disability payments and was determined to be disabled by the Social Security Administration in 1973.
10. If the transfer of assets penalty provision applies, the penalty period of ineligibility is 2.69 months.


#### **CONCLUSIONS OF LAW**

1. The Minnesota Department of Human Services properly applied 42 U.S.C. section 1396p(c) to the transfer of funds by Appellant to a qualified pooled trust.
2. There is not substantial evidence in the record to support the Minnesota Department of Human Services' conclusion that Appellant transferred funds for less than fair market value.

#### **ORDER**

1. Appellant's requested relief is **DENIED**. The Minnesota Department of Human Services' Decision is **AFFIRMED in part** and **REMANDED in part**.
2. The Memorandum of Law below is incorporated by reference.

It is so ORDERED this 15th day of December, 2009.

  
Hon. Ann L. Carrott  
Judge of District Court

LET JUDGMENT BE ENTERED ACCORDINGLY.


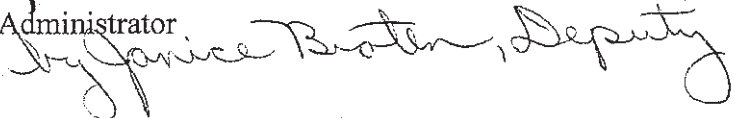
COURT SEAL

#### **JUDGMENT**

The above Order is hereby adopted as the Judgment on file herein.

WITNESS, the Honorable Ann L. Carrott, this 15th day of December, 2009.

BY THE COURT:

  
Court Administrator  
4  Deputy

COURT SEAL

## MEMORANDUM OF LAW

The issue before the Court is whether the transfer of Appellant's funds into a qualified pooled trust account is subject to the transfer of assets provisions in 42 U.S.C. §1396p(c).

### **1. Scope and Standard of Review**

The scope of the Court's review is set forth in Minnesota Statute section 14.69 which states:

In a judicial review under sections 14.63 to 14.68, the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted;  
or
- (f) arbitrary or capricious.

Minn. Stat. §14.69. Appellant argues that this Court should reverse the decision of the Commissioner of Human Services pursuant to sections 14.69(c) (the decision was made upon an unlawful procedure), 14.69(d) (the decision was affected by an error of law), 14.69(e) (the decision was unsupported by substantial evidence in view of the entire record as submitted), and 14.69(f) (the decision was arbitrary and capricious).

The standard of review in this case is de novo since it involves the interpretation of a statute which is a question of law. Wynkoop v. Carpenter, 574 N.W.2d 422, 425 (Minn. 1998). Any factual issues are reviewed using the substantial evidence test. Minn. Stat. §14.69(e). The substantial evidence test reflects the substantial judicial deference to the fact-finding processes of an administrative agency. Quinn Distributing Co. v. Quast Transfer, Inc., 288 Minn. 442, 448,

181 N.W.2d 696, 699 (Minn. 1970). “A decision is supported by substantial evidence when it is supported by (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” Minnesota Ctr. for Envtl. Advocacy v. Minnesota Pollution Control Agency, 644 N.W.2d 457, 464 (Minn. 2002) (citation omitted). Under the substantial evidence test, the reviewing court is to evaluate the evidence relied upon by the agency in view of the entire record as submitted. Cable Commc’ns Bd. v. Nor-West Cable Commc’ns P’ship, 356 N.W.2d 658, 668 (Minn. 1984). Where more than one inference may be drawn from the evidence, or where the record contains conflicting evidence supporting more than one conclusion, the reviewing court should uphold the agency’s decision. Pomrenke v. Comm’r of Commerce, 677 N.W.2d 85, 94 (Minn. Ct. App. 2004), rev. denied May 26, 2004; CUP Foods, Inc. v. City of Minneapolis, 633 N.W.2d 557, 562 (Minn. Ct. App. 2001), rev. denied November 13, 2001.

In order to determine the legislature’s intent, the principal method is “to rely on the plain meaning of the statute.” State v. Thompson, 754 N.W.2d 352, 255 (Minn. 2008). “Every law shall be construed, if possible, to give effect to all its provisions.” Minn. Stat. §645.16. When the words of a statute are inexplicit, the legislative intention may be ascertained by considering, among other things: “the occasion and necessity for the law; . . . the mischief to be remedied; . . . the object to be attained; . . . the consequences of a particular interpretation; . . . and; the legislative and administrative interpretations of the statute.” Id.

## **2. Medicaid Background**

Congress enacted Medicaid as Title XIX of the Social Security Act in 1965 to ensure medical care, through public funding, to individuals who do not have the resources to cover

essential medical services. In re Estate of Barg, 752 N.W.2d 52, 58 (Minn. 2008) (citing Martin ex rel. Hoff v. City of Rochester, 642 N.W.2d 1, 9 (Minn. 2002)). Medicaid was intended to be the payor of last resort. Martin, 642 N.W.2d at 9 (citing H.R. Conf. Report No. 99-453, at 542 (1985)). The Federal Government and “participating states” jointly fund Medicaid. Barg, 752 N.W.2d at 58 (citing Harris v. McRae, 448 U.S. 297, 308 (1980)). Participating states are able to receive federal payments after enacting legislation and rules which are incorporated into their state medical assistance plans and are approved by the U.S. Secretary of Health and Human Services. 42 U.S.C. §1396a(a)-(b) (2000 & Supp. III 2003); 42 U.S.C. §1396 (2000). Each state administers its own program within the federal requirements, and at the federal level, the Centers for Medicare and Medicaid Services (hereafter “CMS”) administer the program and approve state plans. Barg, 752 N.W.2d at 58-59 (citing Martin, 642 N.W.2d at 9). One of the requirements imposed on state plans is that they must comply with the provisions of 42 U.S.C. section 1396p with respect to transfers of assets and treatment of certain trusts. 42 U.S.C. §1396a(a)(18).

A person must meet certain qualifications to receive Medicaid. Barg, 752 N.W.2d at 59. If the assets of a Medicaid applicant exceed the qualifying threshold, he or she must “spend down” assets until he or she is at or below the qualifying threshold. Id. “If a potential Medicaid recipient transfers assets below fair market value within a certain period of time before eligibility, the recipient is deemed ineligible for benefits for a time period mandated by statute.” Id. (citing 42 U.S.C. §1396p(c)). “This provision prevents people who are not needy from becoming eligible for Medicaid by transferring their assets away.” Barg, 752 N.W.2d at 59.

In 1986, Congress amended the Medicaid Act to enact 42 U.S.C. section 1396a(k) which had the purpose of closing “a loophole that had allowed individuals who were not otherwise



eligible for public assistance to shield their assets in trusts in order to receive Medicaid.” Ronney v. Dept. of Soc. Services, 210 Mich. App. 312, 318, 532 N.W.2d 910, 913-914 (1995). Congress amended the Medicaid Act again in 1993 with the Omnibus Budget Reconciliation Act (“OBRA”) of 1993. The 1993 amendments repealed section 1396a(k) and replaced it with section 1396p, which broadened the types of trusts that could be considered to preclude applicants from becoming eligible for Medicaid. 42 U.S.C. §1396p. The purpose of OBRA 1993 was to effect reductions in the cost of the Medicare program in an effort to repair an “ailing economy.” H.R. Rep. No. 103-111, at 3, *as reprinted in* 1993 U.S.C.C.A.N. 378, 381.

### **3. Statutes at Issue**

#### **a. 42 U.S.C. §1396p(c)**

Subsection (c) of 42 U.S.C. section 1396p governs transfers of assets. In paragraph (1) of subsection (c), it states that the State plan must provide that if an institutionalized individual disposes of assets for less than fair market value on or after the look-back date, the individual is ineligible for specified medical assistance services for a specified time period. 42 U.S.C. §1396p(c)(1)(A). The look-back date in Appellant’s case would be 60 months before the first date on which he was both an institutionalized individual and applied for medical assistance under the Minnesota Medicaid plan. 42 U.S.C. §1396p(c)(1)(B)(i) & (ii). Subsection (c) also provides exceptions when the look-back period would not apply:

An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that

(B) the assets –

- (i) were transferred to the individual’s spouse or to another for the sole benefit of the individual’s spouse,
- (ii) were transferred from the individual’s spouse to another for the sole benefit of the individual’s spouse

- (iii) were transferred to, or to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of, the individual's child described in subparagraph (A)(ii)(II), or
- (iv) *were transferred to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1382c(a)(3) of this title);*

42 U.S.C. §1396p(c)(2)(B) (emphasis added).

**b. Minnesota Statute section 256B.0595 (2008)**

Minnesota Statute section 256B.0595 (2008) governs transfer of assets. If the transfer of assets provisions in the section apply, Appellant would be subject to a 60 month look-back period. Minn. Stat. § 256B.0595, subds. 1(b) and 2(c) (2008). The statute has a similar exemption for disabled persons under the age of 65 as does the Federal statute:

An institutionalized person who has made, or whose spouse has made a transfer prohibited by subdivision 1, is not ineligible for long-term care services if one of the following conditions applies:

...

- (6) for transfers occurring after August 10, 1993, the assets were transferred by the person or person's spouse:
  - (i) into a trust established for the sole benefit of a son or daughter of any age who is blind or disabled as defined by the Supplemental Security Income program; or
  - (ii) *into a trust established for the sole benefit of an individual who is under 65 years of age who is disabled as defined by the Supplemental Security Income program.*

Minn. Stat. §256B.0595, subd. 4(6) (2008) (emphasis added).

**c. 42 U.S.C. §1396p(d)**

Subsection (d) of 42 U.S.C. section 1396p governs how the trust amounts are treated.

Paragraph (1) states that the rules specified in paragraph (3), subject to paragraph (4), shall apply to a trust established by an individual for purposes of determining an individual's eligibility for, or amount of, benefits under a state plan under the subchapter. 42 U.S.C. §1396p(d)(1).

Paragraph (3)(B) states the rules regarding eligibility for Medicaid when considering irrevocable trusts. 42 U.S.C §1396p(d)(3)(B). Paragraph (4) describes certain trusts, including irrevocable trusts, to which subsection (d) shall not be applied. 42 U.S.C. §1396p(d)(4). It states:

*this subsection shall not apply to:*

...

(C) A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions:

- (i) The trust is established and managed by a non-profit association.
- (ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.
- (iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.
- (iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

42 U.S.C. §1396p(d)(4)(C) (emphasis added). This essentially states that a qualifying pooled trust is exempt from the provisions in subsection (d). The parties do not dispute and the Court agrees that the trust at issue is a qualified pooled trust.

**d. Minnesota Statute section 256B.056 (2008)**

Minnesota Statute section 256B.056 subdivision 3b(b) (2008) governs the treatment of trusts. Minn. Stat. §256B.056, subdivision 3b(b) (2008). According to the statute, trusts established after August 10, 1993 are treated according to section 13611(b) of OBRA 1993. Id. Section 1396p(d) was enacted by section 13611(b) of OBRA 1993 to govern the treatment of trusts. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, §13611(b), 107 Stat. 312, 625 (codified in 42 U.S.C. §1396p(d)). Therefore, the treatment of trusts in Minnesota is governed by 42 U.S.C. section 1396p(d). Minn. Stat. §256B.056 (2008).

#### **4. Application of the Federal and State transfer of assets provisions**

##### **a. Application of section 1396p(d)**

In this case, Douglas County correctly applied 42 U.S.C. section 1396p(d) as directed by Minnesota Statute section 256B.056 (2008) when considering how to treat Appellant's application for Medical Assistance. The Court finds that the trust in which Appellant deposited his assets was a qualified pooled trust because it meets the requirements of section 1396p(d)(4)(C). Since it is a qualified pooled trust, subsection (d) does not apply. 42 U.S.C. §1396p(d)(4)(C). Although subsection (d)(4)(C) states that subsection (d) does not apply to a qualified pooled trust, it never states that section 1396(c) does not apply to the qualified pooled trust. Id. Therefore, Douglas County was not precluded from applying section 1396(c) to the trust for which Appellant was a beneficiary.

Appellant argues that since section 1396(d)(3) does not say that a transfer of funds into a pooled trust is a "transfer," that any analysis under the section 1396(c) transfers of assets provisions is improper. (Oct. 14, 2009 Hearing.) However, the only authority Appellant provides to indicate that subsection (c) should not apply is HealthQuest #6046. HealthQuests are issued by an Agency financial worker, MinnesotaCare representative, or tribal eligibility worker. (See

HealthQuests #9227 and 9250.) They provide case-specific guidance and are not to be construed as legal advice. Id.

The wording of the statute compels the conclusion that the two subsections are not to be read and analyzed in a vacuum, since the exemption listed in 42 U.S.C. section 1396p(c)(2)(B)(iv) explicitly applies to trusts described in subsection (d)(4) (which describes qualifying pooled trusts, among others). In addition, CMS issued a memorandum in April 2008 which stated that a trust established for the benefit of a disabled individual over the age of 65 may be subject to penalty as a transfer of assets for less than fair market value. CMS also issued a letter in July 2008 which indicated that the transfer of asset penalties listed in subsection (c) apply to a transfer of funds into a pooled trust. These documents from CMS were issued before Appellant had transferred the funds into the account. The CMS April 2008 memorandum and the July 2008 letter are administrative interpretations of the statute which may be considered when interpreting the legislative intent of the statute. Minn. Stat. § 645.16(8) (2009). Although the HealthQuest #6046 supports Appellant's position, all other HealthQuests contained in the record<sup>1</sup> and the CMS April 2008 memorandum and July 2008 letter combined with the wording of the statute itself indicates that Douglas County was not limited to only applying section 1396p(d) and that the transfer of assets provisions in section 1396p(c) apply in this case.

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<sup>1</sup> The information from the HealthQuests submitted into the record is as follows: (1) HealthQuest #5093 dated July 11, 2006 states: "You need to evaluate whether an improper transfer was made when the applicant transferred the proceeds from the sale of her life estate into the pooled trust." (2) HealthQuest #5909 dated November 22, 2006 states: "If a client qualifies for [long term care] services . . . you may need to evaluate whether an improper transfer was made when the applicant transferred funds into the trust." (3) HealthQuest #8793 dated July 18, 2008 states: "Placing an asset into a pooled trust for an individual age 65 and over is considered an uncompensated transfer . . . If the proceeds from the sale of this client's home are put into a pooled trust do the following: . . . determine a transfer penalty for the uncompensated transfer." (4) HealthQuest #8773 dated July 22, 2008 states: "[T]he placement of any assets into the pooled special needs trust for a person age 65 or older [is considered] to be an uncompensated transfer." (5) HealthQuest #9227 dated October 2008 states: "A transfer penalty for an uncompensated transfer begins the first month the client is requesting and is eligible to receive payment of [long term care] services if the transfer occurred on or after 2/8/06 and the client is requesting [medical assistance] payment of [long term care] services on or after July 1, 2006." (6) HealthQuest #9250 dated October 2008 states: "[E]ven though a pooled special needs trust can be established for a disabled person 65 or older, any assets placed in the trust by that disabled person would be considered an uncompensated transfer."

**b. Application of section 1396p(c)**

To be eligible for medical assistance without any look-back penalty, Appellant must have disposed of his assets for at least fair market value before the beginning of the 60 month look-back period. 42 U.S.C. §1396p(c)(1); Minn. Stat. § 256B.0595, subds. 1(b) and 2(c) (2008). Douglas County found that Appellant was eligible for medical assistance, but that due to his disposal of assets for less than fair market value after the look-back date, he was subject to a 2.69 month penalty during which he would not receive certain benefits from medical assistance.

Section 1396p(c)(2)(B) creates an exception when the penalty listed in section 1396p(c)(1) would not apply. 42 U.S.C. §1396p(c)(2)(B). If assets are transferred to a trust established solely for the benefit of a disabled individual under 65 years of age, the penalty in section 1396(c)(1) does not apply. 42 U.S.C. §1396p(c)(2)(B)(iv). Appellant contends that this penalty does not apply. (Oct. 14, 2009 Hearing.) Appellant's theory is that section 1396p(c)(2)(B)(iv) only applies to trusts that are created to benefit a third party. Id. Appellant bases his contention on the language in section 1396p(c)(2)(B)(iv), which reads "an" individual instead of "the" individual. (Id.)

In the case where the words of a statute are inexplicit, the legislative intention may be ascertained by considering, among other things: (1) the occasion for the law; (2) the circumstances under which it was enacted; (3) the mischief to be remedied and the object to be attained; (4) the consequences of a particular interpretation; and (5) the legislative and administrative interpretations of the statute. Minn. Stat. §645.16 (2009).

**i. Occasion for the Law**

The occasion for the amendments to Medicaid in 1986 was to close "a loophole that had allowed individuals who were not otherwise eligible for public assistance to shield their assets in



trusts in order to receive Medicaid.” Ronney v. Dept. of Soc. Services, 210 Mich. App. at 318, 532 N.W.2d at 913-914 (1995). The 1993 OBRA further tightened Medicaid eligibility requirements in order to reduce Medicaid spending. H.R. Rep. No. 103-111, at 3, *as reprinted in* 1993 U.S.C.C.A.N. at 381.

Appellant urges the Court to interpret the statutes in a manner that would preclude the application of subsection (c) which contains the transfer of assets provisions and penalties. Such a provision has the effect of reducing the number of individuals to whom the penalty provisions would apply while at the same time increasing the amount Medicaid will spend. Such an interpretation runs contrary to the occasion for the law which was to *reduce* Medicaid spending. See Id. Conversely, the interpretation of the statute which applies the transfer of assets penalty provisions to specified individuals who fund a qualified pooled trust supports the occasion for the law.

#### **ii. Circumstances Under Which it was Enacted**

The Medicaid amendments at issue in this case were also enacted when the federal government was attempting to adjust the federal budget to remedy economic hardship. Id. The Court’s interpretation of the statute harmonizes with the circumstances under which the statute was enacted.

#### **iii. Mischief to be Remedied and Object to be Attained**

Medicaid sought to ensure medical care, through public funding, to individuals who do not have the resources to cover essential medical services through public funding. Barg, 752 N.W.2d at 58 (citation omitted). Medicaid was intended to be the payor of last resort. Martin, 642 N.W.2d at 9 (citing H.R. Conf. Report No. 99-453, at 542 (1985)). The Court’s interpretation of the statute conforms with the purpose of the statute which is to ensure that

Medicaid remains the payor of last resort and that it is available for individuals who do not have the resources to cover essential medical services. See Barg, 752 N.W.2d at 58 (citation omitted).

#### **iv. Consequences of a Particular Interpretation**

The Court has determined that subsection (c)(2)(B)(iv) applies to any individual, including both an individual who created a self-settled trust, such as Appellant, and also to an individual creating a trust for a third-party beneficiary – as long as the disabled individual creating the trust is under 65 years of age. Appellant’s argument for why subsection (c) does not apply in this case is that if Congress would have wanted to include an individual creating a self-settled trust, it would have written subsection (c)(2)(B)(iv) to read “the” individual instead of “an” individual. However, the consequence of Appellant’s interpretation is that if Congress were to have written the statute to read “the” individual in subsection (c)(2)(B)(iv), it would have completely eliminated the inclusion of *any* trusts that would be for third parties. The Court is not persuaded that Congress intended such a narrow reading of the statute. Instead, the Court is persuaded that the precise wording of subsection (c)(2)(B)(iv) to read “an” individual meant that *both* individuals who were the creators and the beneficiaries of trusts as well as individuals who were third party beneficiaries were to be included within the subsection.

#### **v. Legislative and Administrative Interpretations**

The CMS is the federal agency charged with administering the Medicaid program. 42 U.S.C. §1396a. The CMS issues a state Medicaid Manual to guide the states in administering Medicaid laws. In 1994 CMS revised its Medicaid Manual to update the Manual with the 1993 OBRA amendments to Medicaid. The 1994 revision to the Manual indicated in section 3259.7 that transfer penalties may apply to a trust established for the benefit of a disabled person over the age of 65. In addition, as previously noted, CMS issued a memorandum in April 2008 and a



letter in July 2008 regarding pooled trusts. The April 2008 memorandum indicated that “[a]lthough a pooled trust may be established for beneficiaries of any age, funds placed in a pooled trust established for an individual age 65 or older may be subject to penalty as a transfer of assets for less than fair market value.” (CMS April 2008 memo, ¶ 3.) The memorandum went on to state that “only trusts established for a disabled individual age 64 or younger are exempt from application of the transfer of assets penalty provisions (see section 1917(c)(2)(B)(iv) of the Act).” Id. The CMS July 2008 letter indicated that the transfer of asset penalties listed in subsection (c) apply to a transfer of funds into a pooled trust.

The Court considers the CMS April 2008 memorandum and July 2008 letter to be administrative interpretations of the statute, and has determined that the CMS April 2008 memorandum and July 2008 letter correspond with all other documentation presented by CMS and all other HealthQuests, except for HealthQuest #6046. (See footnote 1, p. 12.) HealthQuest #6046 is the only outlier from the CMS information and all of the HealthQuests before and after HealthQuest #6046<sup>2</sup>. HealthQuests are used as guidance whereas information from CMS is considered to be an administrative interpretation. Consequently the Court has determined that HealthQuest #6046 was an anomaly and therefore is not persuasive as to the issue before the Court.

The Court also determines that the Commissioner of the Minnesota Department of Human Services did not change any prior rule when it issued its Manual Letter 17 which clarified the addition to the manual on pooled trusts. An agency is not deemed to have promulgated a new rule if its interpretation merely restates an existing policy, is consistent with the plain meaning of the rule, or is consistent with the regulation it implements. Nor-West Cable

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<sup>2</sup> HealthQuest #6046 dated December 2006 states: “There is no age criteria for a pooled trust. There is no improper transfer if the pooled trust meets the [statutory criteria for a qualified pooled trust].”

Commc'ns P'ship, 356 N.W.2d at 667. The manual letter merely restates the existing policy and the Court finds that it is also consistent within the plain meaning of the rule and the regulation it implements.

### **5. Fair Market Value of the Assets Transferred**

Since the Court has concluded that the transfer of assets provisions in subsection (c) apply, the Court must also find that the record contained substantial evidence that Appellant transferred his assets for less than fair market value before it can also apply the 2.69 month look-back penalty. 42 U.S.C. §1396p(c)(1)(A) & (B). The Court finds that there is not substantial evidence to support the conclusion regarding the fair market value of the assets. Marge Pasche, on behalf of Douglas County admitted at the hearing on January 6, 2009, that Douglas County did not perform an analysis of whether Appellant received adequate compensation when he placed his assets into the pooled trust. Although some HealthQuests suggest that this situation may be one where an uncompensated transfer is involved (see footnote 1 p. 12), HealthQuests are case-specific and therefore, this individual case should be analyzed to determine whether Appellant received fair market value for the assets he placed into the qualified pooled trust.

Respondent's argument—that Appellant has not received adequate value of the assets based on the fact that there has been no indication that money from the trust has paid for anything on behalf of Appellant thus far—is misplaced since the analysis must focus on whether, *at the time Appellant applied for Medical Assistance*, Appellant received less than fair market value for his assets transferred into the pooled trust. 42 U.S.C. §1396p(c)(1). Therefore the Court remands to determine whether Appellants assets were transferred for less than their fair market value at the time he applied for Medical Assistance.

## 6. Conclusion

The Court concludes that the Commissioner's decision to apply the transfer of assets provisions contained in section 1396p(c) is proper, was neither arbitrary and capricious nor based on an unlawful procedure or an error of law. However, the Court finds that there is not substantial evidence to determine whether Appellant received fair market value for the assets transferred and therefore the decision to apply the transfer of assets penalty was in error.

The decision to apply the transfer of assets provisions in subsection (c) is affirmed. This case is remanded to determine whether, at the time Appellant applied for Medicaid, he had transferred the assets into the pooled trust for less than fair-market value. Consequently, the Commissioner of Human Services' Decision is affirmed in part and remanded in part.

A.L.C.

A handwritten signature in black ink, appearing to be 'Au' or similar, written below the typed name 'A.L.C.'.

## Too Old for a Pooled SNT? – Think Again!"

Funding Pooled Trust Subaccounts for Beneficiaries  
Age 65 and Older – 2015 Update

Megan Brand, Exec. Dir. CFPD CO Fund for People with Disabilities  
Laurie Hanson, Esq. Long, Reher and Hanson, PA

## Meet Marnie

- Marnie set up her CFPD pooled trust sub-account with \$34,240 just shy of her 95<sup>th</sup> birthday.
- At that time she was living in an Independent Living Apartment of an Assisted Living Facility.
- The funds were from her husband's life insurance.
- BEFORE Marnie joined the trust, the CFPD case manager went out and met with Marnie and her son to assess her and determine if she could spend the \$34,240 in her actuarial life expectancy of 3.26 years.

## Marnie, cont.

- Marnie and her son and the CFPD Case Manager determined the funds could be used for the following:
  - A Sleep Number bed
  - Annual visits from her family (Marnie was not able to travel)
  - Companionship services (especially important after just losing her husband)
  - Clothing and personal needs items (Shopping was Marnie's FAVORITE pastime)
  - Hair/nail care
  - Cable TV (watching TV was one of Marnie's beloved activities)
  - Renter's insurance

## Marnie, cont.

- Three and one half years later, Marnie transitioned into the Memory Care Unit of the Assisted Living and increased her one-on-one companionship services.
- This final expense closed her trust in early 2015 after it was completely spent down.
- Marnie died in June, 2015. In a follow up survey, her son noted: "Engaging CFPD in 2011 was a positive choice in managing my mother's financial assets after my father passed in June of that year. The fund was able to supplement her lifestyle, giving her an enjoyable quality of life at Porter Place [Assisted Living]. When her health problems became an issue, we were able to use the remaining funds to assist in caregiving services. We have had a very positive experience with CFPD and our case manager."

## History

Historical Treatment of Transfers into the Pooled Trust for Individuals age 65 and older ("transfers")

- Omnibus Reconciliation Act of 1993—Congress sought to stop the process of divestment of assets into irrevocable trusts by wealthy individuals trying to qualify for Medicaid.
  - d4A (individual) trusts are limited to those 64 and younger
  - d4C (pooled) trusts were permitted for individuals any age.

## But those transfer rules get in the way...

- Section 1396p(c) establishes the general rules for transfers.
  - Section 1396p(c)(2)(B) sets forth the exceptions to the general rules. Section 1396p(c)(2)(B)(iii) and (iv) sets forth the exceptions for certain trusts.
- This section does **NOT** say that transfers into FISA by individuals age 64 and older should be penalized ... only that they are exempt.
- Conclusion: Must do a fair market analysis.
  - Section 1396p(c)(2)(C) "a satisfactory showing is made to the State in accordance with regulations promulgated by the Secretary) that (i) the individual intended to dispose of the assets either at **fair market value**, or for other valuable consideration, ...

1976 (c)	1976 (d)
<p><b>Transfers</b></p> <p>(1)(A) If an institutionalized individual or spouse of such an individual transfers assets for less than fair market value on or after the look back date specified in subparagraph (B)(ii), the individual is ineligible for medical assistance for services described in paragraph (c)(3)(A) or (C)(ii).</p> <p>(2) An individual is not ineligible for medical assistance if the assets:</p> <p>(B)(i) were transferred to the individual's spouse so as to qualify for the sole benefit of the individual's spouse;</p> <p>(B)(ii) were transferred from the individual's spouse to another for the sole benefit of the individual's spouse;</p> <p>(B)(iii) were transferred to, or to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of, the individual's child described in subparagraph (1)(B)(ii); or</p> <p>(B)(iv) were transferred to a trust (including a trust described in subsection (d)(4)) established for the benefit of an individual under 65 years of age who is disabled.</p>	<p><b>Trusts</b></p> <p>(d)(1) For purposes of determining an individual's eligibility under (c)(3)(A) or (C)(ii), the rules specified in paragraph (3) shall apply in a trust established by such individual:</p> <p>(3)(A) In the case of an irrevocable trust:</p> <p>(i) If there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and</p> <p>(ii) to or for the benefit of the individual, shall be considered income of the individual; and</p> <p>(B) For any other purposes, shall be considered a transfer of assets by the individual subject to subsection (c) of this section; and</p> <p>(4) Any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as if for the benefit of the individual (for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.</p> <p>4(c) This subsection shall not apply to any of the following trusts:</p> <p>(A) Special Needs Trusts</p> <p>(B) Miller Trusts</p> <p>(C) Pooled Trusts</p>

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**The infamous 2008/2009 CMS Letter**

Although a pooled trust may be established for beneficiaries of any age, funds placed in a pooled trust established for an individual age 65 or older **may** be subject to penalty as a transfer of assets for less than fair market value. When a person places funds in a trust, the person gives up ownership of those funds. **Since the individual generally does not receive anything of comparable value in return, placing funds in a trust is usually a transfer for less than fair market value.** The statute does provide an exception to imposing a transfer penalty for funds that are placed in a trust established for a disabled individual. However, only trusts established for disabled individuals age 64 or younger are exempt from application of the transfer of assets penalty provisions (see section 1917(c)(2)(B)(iv) of the Act.)

If States are allowing individuals age 65 or older to establish pooled trusts **without applying the transfer of assets provisions**, they are not in compliance with the statute. (Emphasis added)

Chicago Regional Letter, July, 2008 (Attachment D)

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**What is Fair Market Value?**

- §416.1246 defines Fair market value as "Fair market value is equal to the current market value of a resource at the time of transfer or contract of sale, if earlier."
- Four ways to prove Fair Market Value:
  - No value is lost when a pooled trust is established,
  - Contractual Obligation of the Transfer Agreement
  - Spending Plan/Assessment of use over life expectancy
  - Beneficiary/MA Recipient has burden of proof to show if Fair Market Value was received. BUT, the Agency must refute that it does not exist.

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### Fair Market Value—no value lost

- No value is lost when legal title is exchanged for equitable title. Beneficiary does not divest themselves of the asset—he/she becomes an equitable owner.
  - Sole Benefit—no one else can benefit from the trust.
  - See POAIS: S101110.515C.2
  - "People with Disabilities, Age 65 and Over, Can Establish a Self-Settled Pooled Special Needs Trust That Protects Their Medicaid Benefits" Beltran, Thomas E. (2009)
- In *Beinke vs. Minnesota Dep't of Human Services*, CV-14-271 (Minn. Dist. Ct. Blue Earth Co. June 24, 2014), a 72-year old disabled individual placed funds received from a workers compensation settlement into a pooled (d)(4)(c) trust. The court, on appeal, held that "when Appellant transferred her assets into the pooled trust, she vested in herself an equitable interest in the trust assets ... and received FMV for her assets when she transferred them into the pooled trust."

### Fair Market Value-Contractual Obligation

- When a trust is created, and a grantor places property into the trust, there is a contract "within the meaning of the contract clause of the Federal Constitution."
  - *Coolidge v. Long*, 282 U.S. 582, 595 (1931). See also *Underhill v. U.S. Trust Co.*, 13 S.W.2d 502, 505 (1929) ("A voluntary deed of trust ... is a binding contract between the settlor and the trustee acting for the cestuis que trust, supported by a legal and valuable consideration, namely the benefits contemplated and resulting to the settlor and the beneficiaries from the creation of the trust.")

### Fair Market Value – Spending Plan over life expectancy

- Unique spending plan based on the person's:
  - age,
  - disability,
  - life expectancy, (Either Social Security or Medicaid's table)
  - needs, desires, (You must meet with the individual and/or reps)
  - government benefits and (each waiver may have different benefits)
  - amount placed into the trust.

## Fair Market Value -- Spending Plan over life expectancy

**Spending Plan**

Date: \_\_\_\_\_  
 Trust No: \_\_\_\_\_  
 Beneficiary: \_\_\_\_\_  
 D.O.B.: \_\_\_\_\_ Life Expectancy: \_\_\_\_\_  
 Benefits: \_\_\_\_\_  
 Background Information: \_\_\_\_\_  
 Housing: \_\_\_\_\_  
 Medical: \_\_\_\_\_  
 Mobility: \_\_\_\_\_  
 Dental: \_\_\_\_\_  
 Social: \_\_\_\_\_  
 Education: \_\_\_\_\_  
 Employment: \_\_\_\_\_  
 Transportation: \_\_\_\_\_  
 End of Life Plans: \_\_\_\_\_

ONE-TIME EXPENDITURES	
Category	Estimated Amount
Total	
Current Trust Balance	
One-Time Expenditures Total	
Balance After One-Time Expenditures	

ONGOING ANNUAL EXPENDITURES	
Category	Estimated Amount
Total	
Additional Deposits Required	
Adjusted Life Expectancy	

**Summary:**  
 \*Amounts are calculated based on the use of the time for spending plan.  
 See notes.

## Fair Market Value -- Spending Plan over life expectancy

- This deflates the argument of the 95 year old millionaire placing all of their money in the pooled trust to become eligible for Medicaid.
- Connecticut utilizes spending plans for those in the community and is beginning to use them for those in Nursing Facilities, State of CT: Informational Bulletin 09-02 (2009):

First, if the individual transfers less than \$311.14 monthly into the pooled trust, there is no penalty. The \$311.14 amount, which will be revised each July, represents the average cost for one day's stay incurred by a private pay resident at an LTCF. Because we do not impose a penalty of less than one day, we do not consider a transfer of less than \$311.14 to have been made in order to qualify for Medicaid.

Second, if the individual transfers or assigns \$311.14 or more monthly into the pooled trust, he or she must expend the excess in its entirety within six months to avoid a penalty. The individual must indicate how he or she will use the funds. He or she must have a definite plan, which must be approved by the department, and must receive fair value for those funds. Supervisors can approve such plans. The Adult Support Team is available for guidance if it is needed. For example, a WOT applicant who needs the excess to pay for property taxes every six months may assign or transfer income or assets into a pooled trust in an amount sufficient to pay for the taxes.

## Fair Market Value Spending Plan over life expectancy

- Colorado was using these plans successfully from 2006-2012. CO is now in litigation and is being supported by the NAELA Foundation

 **NAELA** Leading the Way in Special Needs and Elder Law

For Immediate Release  
 July 16, 2015  
 Contact: Abby Malgoures, Communications Associate  
 703-512-5711 x230

### NAELA Foundation Awards Grant to Colorado Fund for People with Disabilities (CFPD)

Washington, D.C. — The [NAELA Foundation](#) awarded \$7,500 and 10 hours of pro bono work provided by the NAELA Litigation Committee to the [Colorado Fund for People with Disabilities](#) (CFPD). The grant will support litigation to confirm that individuals age 65 and older can establish and fund a pooled trust without penalty.



Fair Market Value-MA Recipient has burden of Proof, but Agency must refute

- If your state imposes a penalty per se without considering the fair market value issue— you can argue at hearing that the beneficiary received fair market value.
  - In *Drink v. Minnesota Dept. of Human Services*, the Douglas County District Court in the initial appeal held that the decision of the agency was not supported by substantial evidence because the agency did not perform an analysis of whether Mr. Drink received adequate compensation when he placed assets into the pooled trust sub account. *Drink v. Minnesota Dept. of Human Services*, 23 CV 0017 (Minn. Dist. Ct. Douglas Co. Dec. 15, 2009) (en banc 11).
- Mr. Drink had multiple subaccounts and requires complete care due to his multiple sclerosis, but he is not totally disabled. At the hearing, Mr. Drink presented evidence that he placed the last of his funds— \$12,120 (after having spent hundreds of thousands of dollars on nursing-home care) into the pooled trust sub account so that it could be used for things not covered by MA-THU to allow him to engage in the world beyond the nursing home such as a telephone; telephone bill; a television; cable television bill; books; magazine and newspaper subscriptions; food outside the nursing home's food; handicapped transportation; clothing; haircuts; a motorized wheelchair and maintenance; a manual wheelchair; hearing aids; donations; CDs; and DVD's.<sup>8</sup>

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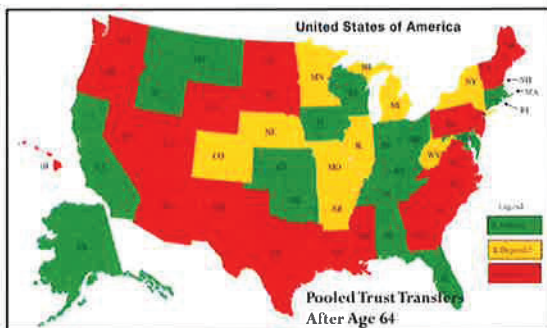
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## State Trends and Review of the Survey



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## State Trends and Review of the Survey

As of August 16, 2015:

- 20 states allow transfers without penalty,
- 22 states penalize transfers,

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