ELECTRONICALLY FILED MAY 02, 2018 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-0026

SUSAN E. COX and EDWARD A. COX,
Petitioners-Appellants,

vs.

IOWA DEPARTMENT OF HUMAN SERVICES,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE SCOTT D. ROSENBERG, JUDGE

APPELLEE'S FINAL BRIEF

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2018, I electronically filed this Brief with the Clerk of the Iowa Supreme Court in accordance with Chapter 16 of the Iowa Rules of Court, which will electronically serve all registered counsel of record in this matter

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STATEMENT OF THE ISSUES PRESENTED FOR RE-VIEW

1. Whether the District Court Properly Affirmed the Department's Application of an Eligibility Penalty Period to the Coxes' Long-Term Care Medicaid Benefits.

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Supplemental Needs Trusts for People with Disabilities: The Development of a Private Trust in the Public Interest, 10 B.U. Pub. Int. L. J. 91, 134 (2000)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court as it presents a substantial issue of first impression to this Court. Iowa R. App. P. 6.1101(2)(c). No court of the State of Iowa has previously interpreted the meaning of the statutes and rules at issue here, and thus no binding judicial precedent governs this judicial review.

STATEMENT OF THE CASE

This case is a proceeding for judicial review of an administrative agency action under the Iowa Administrative Procedure Act, Iowa Code § 17A.19. This case concerns whether the Iowa Department of Human Services (the "Department") appropriately determined that funds transferred to a "pooled trust" for the benefit of individuals over the age of 65 constituted a transfer of assets for less than fair market value, triggering a penalty period for Medicaid long-term care benefits.

On June 14, 2016, the Coxes individually received notices of decision notifying them that "Medicaid payment of long-term care services has been denied because you transferred assets for less than fair market value." App'x. 195-198. Both appealed this determination.

On September 27, 2016, an administrative law judge ("ALJ") held a hearing and received evidence. App'x. 403-415. The ALJ considered the evidence, and determined that the Department's application of the penalty period

to the Coxes was appropriate. App'x. 416-425. The ALJ looked at the plain language of the governing statute, relevant authority from the Centers for Medicare & Medicaid Services ("CMS"), and applicable case law. App'x. 420-422. The ALJ also noted that the Department conceded that, to the extent the Coxes actually received payment for their benefit from the Trust prior to the beginning of the penalty period, such amount should be deducted from the amount of uncompensated transfer used to calculate the penalty periods. App'x. 424, 392. Only Mrs. Susan Cox's date was determined to be affected. *Id.*

The Coxes sought director review of the ALJ's proposed decision on December 21, 2016. App'x. 428-441. On February 24, 2017, the Director issued a Final Decision, adopting the ALJ's proposed decision. App'x. 447-455. The Coxes then sought judicial review.

After a review of the record, oral arguments, and briefing on both sides, the District Court affirmed the Department's Final Decision on December 6, 2017. App'x. 159-169. The Coxes now appeal.

STATEMENT OF THE FACTS

Susan and Edward Cox are husband and wife. App'x. 159-169. They are both currently residents of a nursing facility in Warren County. *Id.* They were both born in 1950, and, relevant to this proceeding, were thus at or over the age of 65 in 2016. *Id.*; App'x. 285, 291. On February 8, 2016, Mr. Edward Cox deposited $101,921.81 in a pooled trust sub-account. App'x. 242. On that same

day, Mrs. Susan Cox deposited $474,457.88 into a pooled trust sub-account. App'x. 267. Both of the Coxes deposited into the same pooled trust (hereinafter the "Trust"), and executed joinder agreements. App'x. 243-250, 268-283. The trust is also governed by a "Reformed, Amended, and Restated Declaration of Trust," and is administered by the Center for Special Needs Trust Administration, Inc. (hereinafter the "Trustee"). App'x. 251-267.

On June 14, 2016, the Coxes both individually received notices of decision notifying them that "Medicaid payment of long-term care services has been denied because you transferred assets for less than fair market value." App'x. 195-198. Mrs. Susan Cox was determined to be ineligible for long-term care services from April 1, 2016 through July 22, 2023. App'x. 195. Mr. Edward Cox was determined to be ineligible for long-term care services from January 1, 2016 through July 25, 2017. App'x. 197.

ARGUMENT

I. The District Court's Holding Correctly Concluded that the Department's Application of a Penalty Period to the Coxes Was in Full Conformity with Federal and State Law.

A. Preservation of Error.

The Department agrees that the Coxes have preserved error on the issue of whether the Department appropriately applied a penalty period to the Coxes for their transfers of assets to a pooled trust. The Department does not believe

that the record reflects the Coxes preserved their claim of a violation of Iowa Code § 17A.19(10)(g). App'x. 12-14, 41-42.

B. Scope and Standard of Review

The scope of this appeal is limited to whether the Department's Final Decision, which determined the Coxes transferred assets for less than fair market value, was correct under the Medicaid Act and the Department's obligations under the Iowa Administrative Procedure Act.

The judicial review provisions of the Administrative Procedure Act are the exclusive means for judicial review of administrative agency action. Iowa Code § 17A.19; *see also Norland v. Iowa Dep't of Job Service*, 412 N.W.2d 904, 908 (Iowa 1987). When exercising the power of judicial review under Iowa Code § 17A.19, the court functions in an appellate capacity to correct errors of law. *Ludtke v. Iowa Dep't of Transp.*, 646 N.W.2d 62, 64-65 (Iowa 2002). Grounds for relief are specified in section 17A.19(10). The burden is on the petitioner to identify and establish the grounds for relief alleged. Iowa Code § 17A.19(8)(a).

The appropriate standard of review depends on the grounds for relief alleged. *Burton v. Hilltop Care Cntr.*, 813 N.W.2d 250, 256 (Iowa 2012). Appellants allege violations of Iowa Code §§ 17A.19(10)(b), (c), (f), (i), (j), (k), (l), (m), and

(n).[1] Courts "are authorized to grant relief only if the agency's action is affected by error of law, unsupported by substantial evidence in the record, or characterized by abuse of discretion." *George A. Hormel & Co. v. Jordan*, 569 N.W.2d 148, 151 (Iowa 1997); *see also Bridgestone/Firestone, Inc. v. Employment Appeal Bd.*, 570 N.W.2d 85, 90 (Iowa 1997). "We accord substantial deference to the interpretation of regulations within the agency's expertise. This deference is particularly warranted when we are called upon to construe the Medicaid act." *Strand v. Rasmussen*, 648 N.W.2d 95, 100 (Iowa 2002). But where interpretation of the law has not been vested in the discretion of an agency, legal issues are subject to *de novo* review. *Bearinger v. Iowa Dep't of Transp.*, 844 N.W.2d 104, 106 (Iowa 2014).

An agency action is "unreasonable, arbitrary, or capricious" only if the action was "taken without regard to the law or facts of the case," was "unreasonable or lacked rationality," or if it is "clearly against reason and evidence." *City of Sioux City v. Iowa Dep't of Rev. & Fin.*, 666 N.W.2d 587, 590 (Iowa 2003). The abuse-of-discretion standard is "deferential" to the agency. *Thoms v. Iowa Public Employees' Retirement Sys.*, 715 N.W.2d 7, 12 (Iowa 2006).

In a substantial-evidence challenge to agency fact-findings, a reviewing court's charge is not to "determine whether the evidence supports a different

[1] On page 48 of their brief, the Coxes also allege Iowa Code § 17A.19(10)(g) as a ground for reversal. However, this does not appear to have been raised on petition for judicial review. App'x. 13, 42.

finding; rather [the court's] task is to determine whether substantial evidence … supports the findings actually made." *Abbas v. Iowa Ins. Div.*, 893 N.W.2d 879, 891 (Iowa 2017) (ellipses in original). An agency's action does not lack substantial evidence because inconsistent conclusions may be drawn from the same evidence. *Evenson v. Winnebago Indus., Inc.*, 881 N.W.2d 360, 366 (Iowa 2016).

C. The Coxes Transferred Assets for Less Than Fair Market Value By Transferring Funds Into a Pooled Trust Without Compensation.

1. The Medicaid Act Treats Long-Term Care Benefits Eligibility and General Eligibility Differently.

Medicaid (also known as "medical assistance" or the "medical assistance program") is a cooperative state and federal aid program that helps states provide medical assistance to the poor. *Lankford v. Sherman*, 451 F.3d 496, 504 (8th Cir. 2006); *see* Iowa Code § 249A.2(3), (6), (7), (10). Participation in Medicaid is voluntary and includes both mandatory and optional service coverage, but those states that elect to participate must follow the federal government's statutory and regulatory framework. Failure to comply with federal requirements may jeopardize federal funds. 42 U.S.C. §§ 1396a(a)(1)-(65), 1396c; s*ee* Iowa Code § 249A.4 (introductory paragraph and subsections (6) and (9)(b)); Iowa Code § 249A.2(7). Among these requirements, states must "comply with the provisions of section 1396p of this title with respect to ... transfers of assets,

and [the] treatment of certain trusts." 42 U.S.C. § 1396a(a)(18); *Ctr. for Special Needs Trust Admin., Inc. v. Olson*, 676 F.3d 688, 694–95 (8th Cir. 2012).

The Medicaid program "was designed to serve individuals and families lacking adequate funds for basic health services, and it was designed to be a payer of last resort." *In re Estate of Melby*, 841 N.W.2d 867, 875 (Iowa 2014). Thus, "the program contemplates that families will spend available resources first, and when those resources are completely depleted, Medicaid may provide payment." *Id.*; *see also*, *Strand*, 648 N.W.2d at 101 (referring to "the needs-based test for Medicaid eligibility" and the problem of individuals who "were permitted 'to have [their] cake and eat it too,' at the expense of those who were truly unable to financially care for themselves."); *Ahrendsen v. Iowa Dep't of Human Services*, 613 N.W.2d 674, 676 (Iowa 2000) (describing Medicaid as a "welfare program"); *Ford v. Iowa Dep't of Human Services*, 500 N.W.2d 26, 28, 31 (Iowa 1993) (describing Medicaid as a program for "welfare recipients").

In making determinations of eligibility for Medicaid benefits, states are tasked with conducting an evaluation of an applicant's income and resources based on what is "available" to the applicant. 42 U.S.C. § 1396a(a)(17) (authorizing states to apply reasonable standards to determine what income and resources are "available" to applicants); 42 C.F.R. § 435.600 *et seq.* (corresponding regulations). Generally, funds held in trust are counted as resources for determining Medicaid eligibility. 42 U.S.C. § 1396p(d)(3). Three types of trusts are

not subject to this general rule, however. These trusts (often called "Medicaid" or "special needs" trusts) are enumerated in 42 U.S.C. § 1396p(d)(4). The one relevant to this matter is delineated in 42 U.S.C. § 1396p(d)(4)(C), and is known as either a "C" trust or, as will be referred to in this brief, a "pooled" trust.

Pooled trusts are "special arrangement[s] with a non-profit organization that serves as trustee to manage assets belonging to many disabled individuals, with investments being pooled, but with separate trust 'accounts' being maintained for each disabled individual." *Lewis v. Alexander*, 685 F.3d 325, 333 (3rd Cir. 2012), *cert. denied* 133 S. Ct. 933 (2013) (internal citation omitted). Pooled trusts are "intended for individuals with a relatively small amount of money. By pooling these small accounts for investment and management purposes, overhead and expenses are reduced and more money is available to the beneficiary." *Id.* Upon death of the beneficiary, remaining funds in a pooled trust sub-account, as with all Medicaid trusts, are payable to the State in an amount up to the total amount of medical assistance paid for by the State for the beneficiary. 42 U.S.C. § 1396p(d)(4)(C)(iv). As noted by the Coxes in their brief, funds transferred to a pooled trust at any age enjoy their exempt status for purposes of determining available resources for general Medicaid eligibility. (Appellant Br. at 25-26).

However, when an individual applies to Medicaid for long-term care benefits, such as the nursing facility services for which the Coxes applied, eligi-

bility for those long-term care benefits is subject to an additional analysis. 42 U.S.C. § 1396p(c). States are required to review and investigate whether such applicant transferred assets for less than fair market value within a look-back period. 42 U.S.C. § 1396p(c)(1)(A). If so, then the "individual is ineligible for medical assistance for" long-term care benefits for a temporary period of time. *Id.* Practically, this means that states are required to apply a "penalty period" (a delay in eligibility for those long-term care benefits) to the applicant-transferor. 42 U.S.C. § 1396p(c)(1)(E). This penalty period does not affect eligibility for Medicaid benefits other than long-term care benefits. 42 U.S.C. §§ 1396p(c)(1)(A), (c)(1)(C)(i); *In re Pooled Advocate Trust*, 813 N.W.2d 130, 143 (S.D. 2012) (discussing distinction between medical-only Medicaid coverage and delay in long-term benefits eligibility).

The Medicaid Act explicitly outlines a handful of exceptions to this general rule, however. The Act provides:

> **(2)** An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that--
>
> > . . .
> >
> > **(B)** the assets--
> >
> > > . . .
> > >
> > > **(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)(iv); *see also* Iowa Admin. Code r. 441-75.23(5)(b)(4) (state corollary). As stated previously, the subsection cited, 42 U.S.C. § 1396p(d)(4), describes, *inter alia*, pooled trusts. The question before this Court is whether the language of 42 U.S.C. § 1396p(c)(2)(B)(iv) permitted the Department to determine that the Coxes' transfer of assets to a pooled trust for their own benefit when they were both at or over the age of 65 was a transfer for less than fair market value. For the following reasons, this Court should follow the overwhelming legal authority on this exact issue and affirm the District Court.

As will be shown below, pursuant to 42 U.S.C. § 1396p(c)(2)(B)(iv), transfers to pooled trusts for beneficiaries at or over age 65 are *per se* transfers for less than fair market value under the Medicaid Act at the time the transfer is made. *See* (discussion at Section I.C.2.). Transferors may later, however, make a showing that they have received fair market value for some or all of the resources they transferred, thereby reducing their penalty period. *See* (discussion at Section I.C.3.). As a result, the State's application of a penalty period for the Coxes' transfer was appropriate and consistent with the text and purposes of the Medicaid Act.

2. As Shown by the Plain Language of the Medicaid Act, Congress Intended for Transfers of Assets into Pooled Trusts by Beneficiaries Age 65 or Older to be Subject to a Transfer Penalty Period.

". . . Congress intended for transfers of assets into 'C' pooled trusts by beneficiaries age 65 or older to be subject to a transfer penalty period . . . ." *Olson*, 676 F.3d at 703 (8th Cir. 2012).

When asked to interpret a statute, the Supreme Court first considers the plain meaning of the statute's language. *State v. Nall*, 894 N.W.2d 514, 518 (Iowa 2017). If unambiguous, the statute is applied as written. *Id.* If ambiguous, the Court may then resort to other interpretive tools. *Id.* Although this Court holds the authority to interpret federal law independently, it does give respectful consideration to federal decisions. *Top of Iowa Coop. v. Sime Farms, Inc.*, 608 N.W.2d 454, 460 (Iowa 2000).

The plain language of the Medicaid Act makes clear that transfers of assets to pooled trusts when the beneficiary is over the age of 65 are transfers for less than fair market value at the time they are made, triggering a penalty period for long-term care benefits eligibility. The Medicaid Act specifically identifies eight categories of transfers for less than fair market value that would trigger a penalty period but for their specific exemption. 42 U.S.C. §§ 1396p(c)(2)(A), (B). Both parties agree that only one is at issue here – the specific exemption for transfers to Medicaid trust accounts, including pooled trusts, for beneficiar-

ies under the age of 65. 42 U.S.C. § 1396p(c)(2)(B)(iv). The inclusion of this specific category of transfers is dispositive. "Legislative intent is expressed by omission as well as by inclusion of statutory terms." *Oyens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186, 193 (Iowa 2011) (internal citation omitted). Under the doctrine of "*expression unius est exclusion alterius*," the "expression of one thing is the exclusion of another." *Homan v. Branstad*, 887 N.W.2d 153, 166 (Iowa 2016); *see also Hennepin Cnty. v. Fed Nat. Mortg. Ass'n*, 742 F.3d 818, 821 (8th Cir. 2014) ("The existence of statutory exceptions indicates that Congress considered whether there was need for any exception and 'limited the statute to the ones set forth.'") (*citing U.S. v. Johnson*, 529 U.S. 53, 58, 120 S. Ct. 1114 (2000)).

Here, Congress specifically identified eight categories of transfers that would be subject to a penalty period for long-term care benefits eligibility but for their delineation as a specific exemption. Transfers to Medicaid trusts for beneficiaries under the age of 65 are specifically exempt from transfer penalties.[2] However, transfers to Medicaid trusts for beneficiaries at or over the age of 65, necessarily, are not exempt. Had Congress intended a differing interpretation, it could have included language to that effect. *See State v. Iowa Dist. Ct. for*

[2] Significantly, 42 U.S.C. § 1396p(d)(4)(C) does not contain the same age-related language. *State v. Iowa Dist. Ct. for Jones Cnty*, 888 N.W.2d 655, 667 (Iowa 2016) ("When the legislature selectively places language in one section and avoids it in another, we presume it did so intentionally.") (internal citation omitted).

Jones Cnty, 888 N.W.2d 811, 818 (Iowa 2017) ("Under the doctrine of legislative acquiescence, 'we presume the legislature is aware of our cases that interpret its statutes.'") (internal citation omitted); *accord. Stringer v. St. James R-1 School Dist.*, 446 F.3d 799, 804 (8th Cir. 2006). Thus, at the time a beneficiary at or over age 65 transfers assets to a pooled trust, it is a transfer for less than fair market value, triggering a penalty period under subsection (c).

The Eighth Circuit reached this conclusion in *Olson*, a case which involved the same pooled trust trustee as this case. In *Olson*, a Medicaid applicant transferred approximately $50,000 to a pooled trust at the age of 78. *Olson*, 676 F.3d at 693-94. The State of North Dakota erroneously determined the applicant was only 54 at the age of the transfer. *Id.* at 694. Upon the applicant's death, the state recognized it had wrongly determined the applicant was immediately eligible for long-term care benefits. *Id.* The trustee refused to reimburse North Dakota for long-term care payments made during what would have been the applicant's penalty period. *Id.*

The Eighth Circuit rejected the trustee's numerous arguments that 42 U.S.C. § 1396p(c)(2)(B)(iv) did not apply to pooled trusts funded by a Medicaid applicant at or over the age of 65. *Id.* at 702-03. Instead, the Eighth Circuit held:

> When all paragraphs of the statute are read together, a disabled individual over 65 may establish a type "C" pooled trust, but may be subject to a delay in Medicaid benefits. Despite the lack of an

> age limit within paragraph 1396p(d)(4)(C) for purposes of counting resources [for general Medicaid eligibility], Congress intended to exempt transfers of assets into pooled trusts from the transfer penalty rules of subsection 1396p(c)(1) only if the transfers were by those under age 65. 42 U.S.C. § 1396p(c)(2)(B)(iv).

Id. at 702. The Eighth Circuit went on to hold that North Dakota law was not preempted "[b]ecause Congress intended for transfers of assets into 'C' pooled trusts by beneficiaries age 65 or older to be subject to a transfer penalty period." *Id.* at 703. The same logic holds true here: had Congress intended for transfers to pooled trusts by beneficiaries age 65 or older to be exempt from transfer penalties, it could have excluded the age-based language in Section 1396p(c)(2)(B)(iv) as it did in Section 1396p(d)(4)(C). Congress' election not to do so is presumed to be intentional, and an expanded exemption should not be forged now.

The United States District Court for the District of Maine recently reached this same conclusion in circumstances comparable to this appeal. In that case, a Medicaid applicant deposited proceeds from the sale of her home into a pooled trust when she was at or over the age of 65. *Richardson v. Hamilton*, No. 2:17-cv-00134-JAW, 2018 WL 1077275, at *1 (D. Me. Feb. 27, 2018). There, the applicant desired to make purchases to increase her quality of life, including for entertainment, clothing, and manicures. *Id.* at *3. The applicant argued that the penalty period as applied to her was contrary to federal law.

In its thorough analysis, the court in *Richardson* found that the text of 42 U.S.C. § 1396p(c)(2)(B)(iv) explicitly limited its scope to transfers to trusts for beneficiaries under age 65, and that "[a]ll transfers not covered by an exclusion [in paragraph (c)(2)(B)]—including the transfers at issue here—are subject to penalty." *Id.* at *16. The court reasoned:

> Subsection (c) penalizes transfers of assets that it does not exempt. It exempts transfers to special needs trusts for individuals age sixty-four and younger. It does not exempt transfers to such trusts for older individuals. Thus such transfers for individuals over age sixty-four are subject to penalty.

Id. at *17. The court's reasoning tracks with established principles of statutory interpretation. Congress specifically identified four categories of transfers that are exempted from penalties: by specifically exempting transfers to pooled trusts for beneficiaries under age 65, Congress made the policy determination that transfers to pooled trusts for beneficiaries age 65 or over would be subject to transfer penalties.

Similarly, the Third Circuit has stated in dicta that, "[t]hrough a quirk of the Medicaid statute, elderly individuals (65 and over) transferring assets into a pooled trust are made ineligible for Medicaid for a period of time." *Lewis*, 685 F.3d at 351 (*citing* Rosenberg, *Supplemental Needs Trusts for People with Disabilities: The Development of a Private Trust in the Public Interest*, 10 B.U. Pub. Int. L. J. 91, 134 (2000) ("[A] person 65 or older who transfers assets into a pooled trust triggers a penalty period of ineligibility for Medicaid . . . .")). The Kansas Court

of Appeals similarly remarked that "while we recognize that in some cases the impact of a transfer penalty may seem harsh, the imposition of such penalties are specifically authorized by federal law as well as state regulation, and they serve a legitimate purpose." *Hutson v. Mosier*, 54 Kan. App. 2d 679, 690 (2017).

Perhaps most importantly, however, the Department's interpretation of the Medicaid Act is in accordance with, and mandated by, Medicaid's federal regulators, CMS.[3] CMS promulgates a State Medicaid Manual as an official medium by which it "issues mandatory, advisory, and optional Medicaid policies and procedures to the Medicaid state agencies." Center for Medicare & Medicaid Services, "The State Medicaid Manual," *available at* https://www.cms.gov/Regulations-and-Guidance/guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html (last visited March 21, 2018) (hereinafter "SMM"), Ch. 1, Foreword § A.[4] Instructions in the SMM are "official interpretations of law and regulations, and, as such, are binding on the Medicaid State agencies." SMM, Ch. 1, Foreword § B. The SMM is entitled to deference to the extent it is "consistent with the purposes of the federal statute and provide a reasonable interpretation thereof." *Hobbs v. Zenderman*, 579 F.3d 1171,

[3] CMS was previously known as the Health Care Financing Administration ("HCFA"), and is sometimes still referred to as such.

[4] The portions of the State Medicaid Manual cited herein are also referred to as "Transmittal 64," and may also be accessed at https://attorney.elderlawanswers.com/uploads/media/documents/hcfa_transmittal_64_-_sec._3257_-_3259.pdf (last visited March 21, 2018).

1186, n.10 (10th Cir. 2009); *Sai Kwan Wong v. Doar*, 571 F.3d 247, 261 (2d Cir. 2009) (noting Transmittal 64 is entitled to deference "at the high end of the spectrum of deference when the interpretation in question is not merely ad hoc but is applicable in all cases.") (internal quotation marks and citation omitted).

In turn, CMS unambiguously interprets the Medicaid Act as requiring state agencies to apply a penalty period to transfers to pooled trusts for beneficiaries at or over the age of 65. The SMM reads:

> Resources placed in an exempt trust for a disabled individual are subject to imposition of a penalty under the transfer of assets provisions unless the transfer is specifically exempt from penalty as explained in §3258.10 or unless the resources placed in the trust are used to benefit the individual, and the trust purchases items and services for the individual at fair market value.

SMM, Ch. 3: Eligibility § 3258.10(B)(2) (emphasis in original); *accord*. App'x. 397, SMM Ch. 3: Eligibility § 3259.7(B) ("Establishing an account in [pooled trusts] may or may not constitute a transfer of assets for less than fair market value. For example, the transfer provisions exempt from a penalty trusts established solely for disabled individuals who are under age 65 or for an individual's disabled child. As a result, a special needs trust established for a disabled individual who is age 66 could be subject to a transfer penalty."). As a result, CMS has provided binding guidance to the Department supporting the common sense conclusion that, because the Coxes' transfers were not "specifically exempt from penalty" or had yet been used for their benefit, the transfers "are

subject to imposition of a penalty under the transfer of assets provisions." SMM, Ch. 3: Eligibility § 3258.10(B)(2). CMS's interpretation is buoyed by that of another federal agency, the Social Security Administration ("SSA"), which has similarly stated in its Program Operation Manual System ("POMS") that "a transfer of resources to a trust for an individual age 65 or over may result in a transfer penalty." SSA POMS SI 01120.203(B)(2)(a), *available at* https://secure.ssa.gov/poms.nsf/lnx/0501120203 (last visited March 21, 2018); *see also* SSA POMS SI 01150.121, *available at* https://secure.ssa.gov/poms.nsf/lnx/0501150121 (last visited March 21, 2018). Thus, the Department's Final Decision was consistent with its legal obligations so as suffice under Iowa Code § 17A.19(10)(b), (c), (i), (j), (k), and (n).

In arguing in favor of an *ad hoc* fair market value analysis of the Coxes' transfers, the Coxes cite a handful of unpublished state district court opinions and state agency decisions and urge this Court to ignore the copious authorities outlined above. However, the cases upon which the Coxes rest their appeal are distinguishable and should be ignored.

First, the Coxes cite to *Beach v. Tennessee*, a Tennessee district court case that based an opinion on a mistaken understanding of the Act. *Ruby Beach v. State of Tenn. Dep't of Human Servs.*, No. 09-2120-III (Tenn. Ch. Ct. 20th Jud. Dist. Of Davidson Cnty. Sept. 8, 2010); App'x. 337-366. In that case, the petitioner applied for long-term care benefits. App'x. 337. The petitioner was de-

termined to be ineligible for long-term care benefits for 77 months based on, *inter alia*, an impermissible pooled trust transfer. App'x. 337-338. As the opinion shows, however, the court in *Beach* did not reconcile the differing functions of Section 1396p(c) and Section 1396p(d). For example, despite the fact the ineligibility period was assigned to the petitioner's long-term care benefits eligibility under Section 1396p(c), the court concluded that "the pooled trust account in this case is an exempt resource according to 42 U.S.C. § 1396p(d)(4)(C) and should not have been used as a countable resource in determined [petitioner's] transfer penalty." App'x. 355. The opinion continues in this way, analyzing the Section 1396p(c) transfer under Section 1396p(d). This misunderstanding, which the Coxes' share, fails to recognize the distinctions between long-term care benefits eligibility under Section 1396p(c) and general Medicaid eligibility under Section 1396p(d) and is fatal to the Tennessee court's analysis. While funds transferred to a pooled trust for the benefit of a beneficiary at or over age 65 are not resources for medical services eligibility under Section 1396p(d), they are still subject to the transfer restrictions affecting long-term care benefits eligibility as provided by Section 1396p(c). As a result, the *Beach* opinion should be afforded no weight, as it failed to accurately assess and interpret the Medicaid Act.

This misunderstanding also serves as the premise for the *Beach* court's second flawed conclusion: that Section 1396p(c)(2)(B)(iv) applies only to third-

party trusts. There, the court adopted wholesale the petitioner's analysis of the issue, which again conflated the distinct purposes of Section 1396p(c) and Section 1396p(d). App'x. 364-365. This interpretation is contrary to the language provided in Section 1396p(c)(2)(B)(iv). As the Eighth Circuit explained, "the plain language of this paragraph does not address, let alone restrict, the creator of the trust . . . [Section 1396p(c)(2)(B)(iv)] necessarily includes trusts created by the beneficiary, because subsection (d)(4)(C) includes trusts created by the beneficiary." *Olson*, 676 F.3d at 702 (rejecting the court's ruling in *Beach*). For this reason *Beach* should again be ignored.

The Coxes also cite to a number of other unpublished state court and state agency decisions. *See* (Appellant Br. at 39-42, 52-55). Some of these address unrelated issues. *E.g., Estate of Wierzbinski v. Michigan*, No. 2010-4343-AA (Macomb Cnty. Cir. Ct. July 26, 2011); App'x. 367-372 (whether state agency was correct in treating a trust as an annuity). But all fail to engage in a substantive analysis of the Medicaid Act, including the controlling guidance issued by CMS in the State Medicaid Manual, the effect of the Medicaid Act's retrospective penalty period readjustment (discussed below), or whether, as a matter of law, the petitioner's transfer to a trust was a transfer for less than fair market value on its own (also discussed below). For these reasons, again, these opinions offer little guidance here.

3. The Coxes Can Reduce Their Penalty Period By Showing They Received Fair Market Value After the Trust Makes Expenditures for Their Benefit, But Not Before.

The Coxes are not prejudiced by the application of a penalty period after their transfer because the Medicaid Act provides that their penalty period may be reduced after the fact if the improperly transferred assets are returned to them. At the time the penalty period determination is made, it is made according to a formula provided by the Medicaid Act. 42 U.S.C. § 1396p(c)(1)(E)(i). For institutionalized individuals such as the Coxes, the formula is generally the value of the assets divided by the average monthly cost to a private patient nursing facility under Medicaid. *Id.* However, the penalty period determined at this time is not set in stone: applicants are not ineligible for Medicaid long-term care benefits to the extent that they make a "satisfactory showing" that "all assets transferred for less than fair market value have been returned to the individual . . . ." 42 U.S.C. § 1396p(c)(2)(C). For the Coxes, this means that to the extent the trustee makes permissible disbursements for the benefit of the Coxes, their penalty period may be reduced. Rather than requiring States to make determinations of fair market value "blind" prior to the actual disbursement of trust funds, the Medicaid Act allows for applicants to make a showing of fair market value exchange to reduce their penalty period after they have actually received fair market value. This not only ensures the integrity of Medicaid trust

expenditures but also prevents States from being required to engage in the legal esoterica of litigating which trust transfers are or are not for fair market value.

This reading is also confirmed by CMS. "When a penalty has been assessed and payment for services denied, a return of the assets requires a retroactive adjustment, including erasure of the penalty, back to the beginning of the penalty period." SMM Ch. 3: Eligibility § 3258.10(C)(3) (also noting that the returned resources may still then be considered as available resources for eligibility determinations, again underscoring the critical distinction between long-term care benefits eligibility and general Medicaid eligibility). The State Medicaid Manual goes on to state: "When only part of an asset or its equivalent value is returned, a penalty period can be modified but not eliminated. For example, if only half the value of the asset is returned, the penalty period can be reduced by one-half." *Id.* This interpretation, binding on the states, illustrates the unworkability of the Coxes' interpretation: if states are required to engage in a fair market value analysis at the time assets are transferred to a pooled trust, 42 U.S.C. § 1396p(c)(2)(C) serves no purpose. The Medicaid Act already explicitly provides a mechanism for applicants to reduce (or eliminate) the Coxes' penalty periods based on a showing of receipt of fair market value. In light of that fact, another mechanism would prove superfluous.

The State Medicaid Manual further provides support for this interpretation in the context of payments made from Miller Trusts (another form of Medicaid trust) for medical care:

> An individual cannot be considered to have received fair market value for funds placed in a trust until payments for some item or service are actually made . . . When income [or resources] placed in the trust exceeds the amount paid out of the trust for medical services or other items or services which benefit the individual, the excess income is subject to penalties under the transfer of assets provisions …. When income [or resources] placed in the trust exceeds the amount paid out of the trust for medical services or other items or services which benefit the individual, the excess income [or resource] is subject to penalties under the transfer of assets provisions.

App'x. 400, SMM Ch. 3: Eligibility § 3259.7(C)(3). The same reasoning applies to resources placed in a pooled trust. The Coxes argue that the language of the trust agreement indicates the transfer was for fair market value (a factual assertion the Department disputes). However, this argument assumes that payments will actually be made for the benefit of the Coxes from the Trust—a fact that has not been shown for the entirety of the assets. Once the trust actually does disburse the funds for appropriate expenses for the sole benefit of the Coxes, then the transfer is for fair market value, but not before. In other words, the State should not (in fact, under the State Medicaid Manual, cannot) be required to assume that a transfer to a trust will be made to be for fair market value before fair market value is received.

This reading of the plain language of the Medicaid Act is corroborated by the Supreme Court of South Dakota in *In re Pooled Advocate Trust*, 813 N.W.2d 130 (S.D. 2012). There, the penalized applicants also alleged that their transfers to the pooled trust were for fair market value. *Id.* at 147. The court rejected this argument. In doing so, the court noted the applicants could not identify . . .

> . . . items or services purchased for them by the trust, nor do they establish that these purchases were for fair market value. Furthermore, under the trust document, the decision to distribute funds to a beneficiary lies solely within the trustee's discretion. That is, there's nothing guaranteeing that a beneficiary's transfer will be used to benefit that beneficiary.

Id.

The same reasoning applies here. At the time the transfer was made, there was nothing guaranteeing that the Coxes would receive fair market value for their transfers—as in *In re Pooled Advocate Trust*, the trust documents vest "sole and absolute" discretion regarding disbursements in the trustee. App'x. 244 § 2.04, 232 § 5.1. Prior to the start of the penalty period, Susan did receive fair market value disbursements for some items and/or services. App'x. 424. The Department did account for this by adjusting her penalty period to reflect this fact. App'x. 424, 392. Similarly, the Coxes may receive a reduced transfer penalty period in the future, but only after they have received fair market value—not before. Once again, this shows that the Department's Final Decision

was reasonable and based on a cogent application of the law. Iowa Code § 17A.19(10)(i), (j), (l), (n).

4. By Giving Away Discretion and Claim Over Their Assets Without Compensation, The Coxes Made a Transfer for Less Than Fair Market Value.

Due to the nature of trusts, the "absolute and complete" discretion vested in the Trustee, and Trustee fees, the Coxes' transfer of assets to the pooled trust was a transfer for less than fair market value and not a transfer for other valuable consideration. To be clear: although the Department maintains that the Medicaid Act allows for *per se* determinations of penalized transfers in this instance, the Department did engage in a case-specific fair market value analysis in this case, as found by the ALJ and District Court. App'x.159, 416. The Coxes nonetheless assert their transfer was a transfer for fair market value. For this, the Coxes rely on 42 U.S.C. § 1396p(c)(2)(C)(i), which provides that individuals are not subjected to a penalty period for long term care benefits to the extent "a satisfactory showing is made to the State . . . that (i) the individual intended to dispose of the assets either at fair market value, or for other valuable consideration." (Appellant Br. at 38). The Coxes emphasize the latter portion of this language, namely, whether the transfer was for "other valuable consideration."

As an initial matter, if "other valuable consideration" were intended to broaden the scope of transfers exempted from penalties to include transfers that were for consideration equal to some amount less than fair market value,

the reference to "fair market value" throughout 42 U.S.C. § 1396p(c) would be superfluous. Instead, "other valuable consideration" has to be read to complement the meaning of "fair market value." Thus, "other valuable consideration" is best understood to mean consideration, other than liquid assets, that are approximately equal to the fair market value of the transferred assets. Thus, the analysis for "fair market value," and "other valuable consideration," are substantially the same.

The SMM supports this interpretation. CMS defines valuable consideration to mean . . .

> . . . that an individual receives in exchange for his or her right or interest in an asset some act, object, service, or other benefit which has a tangible and/or intrinsic value to the individual that is *roughly equivalent to or greater than* the value of the transferred asset.

SMM Ch. 3: Eligibility § 3258.1(A)(2) (emphasis added). Based on the record, the Coxes cannot establish their transfer was for fair market value or other valuable consideration.

The record is absent of any evidence that the Coxes received anything in exchange for transferring funds to the pooled trust. As a result, the analysis hinges on this: are the Coxes' assets in the Trust as valuable as assets in the bank? Because unrestricted cash is its own fair market value, the answer must be 'no.' *See* SMM § 3258.1(A)(1) (defining fair market value as "an estimate of

the value of an asset, if sold at the prevailing price at the time it was actually transferred.").

First, the Coxes lost value in their assets when they transferred the right to control the expenditure of the assets to the Trustee. When the Coxes transferred their assets to the Trust, they did so pursuant to a Trust Joinder Agreement. App'x. 242-284. The terms of the agreement explicitly provide that:

> 2.04 Discretion of Trustee; Use of Assets; Desires for Use of Assets. The Grantor recognizes and acknowledges that all distributions are subject to the Trustee's *sole and absolute discretion*, that the Trustee shall only make distributions solely for the Beneficiary's supplemental needs and supplemental care, and that the Trustee shall possess and exercise the authority to allocate all distributions between principal and income as it determines in its *sole and absolute discretion*. With this recognition and acknowledgment in mind, the Grantor has expressed the Grantor's desires as to how assets in the Trust sub-account might be used on behalf of the Beneficiary during the Beneficiary's lifetime.

App'x. 244 § 2.04, 271 § 2.04 (emphasis and some punctuation added); *see also* App'x. 232§ 5.1 (providing "sole and absolute discretion" to Trustee). As this language makes clear, the Coxes transferred to the Trustee any right to dictate how or if their assets are expended. Although the joinder agreement provides that the assets will be expended for the supplemental needs and care of the beneficiary, the joinder agreement does nothing to require the Trustee to actually expend the funds—in fact, it carefully guards against it.

This is reinforced by the language of the Declaration of Trust, which is incorporated by the joinder agreements. In the Declaration of Trust, it is made

clear that "Beneficiaries Have No Claim on Trust Assets," and that "[t]he Trustee *may act unreasonably in exercising its discretion*, and the judgment of any other person or entity shall not be substituted for the judgment of the Trustee." App'x. 230 § 3.1 (emphasis added). The record is devoid of evidence the Coxes received any consideration for their transfer of such discretion and "claim" to the Trust.

The discretionary nature of pooled trust disbursements was persuasive to the Supreme Court of South Dakota in *In re Pooled Advocate Trust* when it rejected the appellants' argument their transfers thereto were for fair market value. 813 N.W.2d at 147. Similarly, the Kansas Court of Appeals found the discretionary language in a pooled trust to be indicative of a transfer for less than fair market value, although that court did conclude it could not make that determination as a matter of law. *Hutson*, 54 Kan. App. 2d at 682.[5] Here, the Coxes' absolute transfer of ultimate authority to control funds is, on its own, sufficient to conclude their transfers were for less than fair market value. As when a consumer purchases a gift card, the additional restrictions (i.e. lack of absolute discretion) placed on the funds lessen the value of the underlying funds. *See, e.g.,* GiftRocket, "Your Gift Card is Worth Less Than You Think," *available at*

[5] Notably, although the court in *Hutson* remanded for determination of whether the appellant's transfer was for fair market value, the court did not expressly consider the role of 42 U.S.C. § 1396p(c)(2)(C)(iii) vis-à-vis a time-of-transfer fair market analysis. This distinguishing characteristic is vital, and undermines the persuasive authority of the *Hutson* opinion on that issue.

https://www.giftrocket.com/your-gift-card-worth (last visited March 22, 2018) (discussing why gift cards sell for less than their face value). Here, the Coxes gave away their discretion to control their funds and received no additional consideration in return. This alone is sufficient to render these transfers as transfers for less than fair market value as a matter of law.

CMS has made its opinion on this point clear as well. In 2008, two regional offices of CMS issued guidance pertaining to the appropriate treatment of transfers to pooled trusts for beneficiaries at or over age 65. The letters are almost identical in substance, both noting:

> 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.

CMS State Agency Regional Bulletin No. 2008-05, *available at* http://www.sharinglaw.net/elder/CMS-d4c.pdf (May 12, 2008); CMS Regional State Letter No. 08-03, *available at* http://lawyersusaonline.com/wp-files/pdfs/08-03-cms-pool-trusts.pdf (July 2008) (accessible via Internet Explorer).[6] One letter goes one step further, stating that:

> 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 . . . federal statute re-

[6] The Coxes make a passing reference to the fact that these letters, one of which was cited by the District Court, are not in the record. (Appellant Br. at 44). As legal authorities, however, they do not need to be.

> quires the application of the transfer rules in this situation: it is not a decision for each State to make.

CMS Regional State Letter No. 08-03, *available at* http://lawyersusaonline.com/wp-files/pdfs/08-03-cms-pool-trusts.pdf (July 2008) (accessible via Internet Explorer). As contemplated in these letters, the Coxes transferred ownership of the funds and did not receive "anything of comparable value in return." The only reason individuals like the Coxes would have incentive to transfer assets to a Medicaid pooled trust would be to keep the assets from being used for direct healthcare costs—this is precisely what the Medicaid Act is intended to control with its narrow and carefully crafted exemptions. Thus, even a factual analysis, as requested by the Coxes, is unavailing.

Second, not only does the Trustee not compensate the Coxes for giving away their discretion over the transferred funds, but the Trustee is entitled to, and has received, fees for managing the Coxes' assets. App'x. 245, 263 § 8.9, 272, 304-305 (showing $14,024.60 spent in trustee fees from February 2016 to mid-August 2016). Doubtlessly, the Trustee performs a service of value by holding, supervising, and managing the funds and disbursements thereof and should be compensated for that service. However, the value of this service is not one that is received by the Coxes – it is a service the value of which is enjoyed by State Medicaid agencies, not the beneficiaries. Thus, the service cannot

be said to ameliorate the fact the Coxes transferred the funds for less than fair market value.

This is illustrated by the context in which much of the language in Section 1396p was developed. As both parties acknowledge, trusts (and transfers to them) generally count against Medicaid applicants for eligibility purposes. (Appellant Br. at 25-26); 42 U.S.C. § 1396p(d)(3). In 1993, Congress excepted three types of trusts from that general rule. *Lewis*, 685 F.3d 325, 333 (3rd Cir. 2012). In doing so, "[t]he primary concern of Congress was to prevent 'gaming' and misuse of the Medicaid program by the elderly." Rosenberg, 10 B.U. Pub. Int. L.J. at 129. In return, however, States are entitled to payment from the remaining balance upon the death of the beneficiary up to the total value of medical assistance provided to the beneficiary. *Id.* at 131; 42 U.S.C. § 1396p(d)(4); App'x. 272. Thus, there are exactly two parties with an interest in a Medicaid beneficiary's pooled trust assets and to whom a Trustee owes fiduciary duties: the beneficiary and the state Medicaid agency. App'x. 272 (noting "all States where the Beneficiary received government assistance are clearly identifiable residual beneficiaries . . .").

From this, it is clear that the services provided by a pooled trust trustee are not entirely for the benefit of the Medicaid beneficiary. The trustee acts as an additional layer of supervision for the disbursement of funds in which Medicaid has an interest and is meant, *inter alia*, to ensure the proper disbursement

of funds to Medicaid on death of the beneficiary. Thus, although the trustee is paid from the funds of the transferor, the trustee's services are for the benefit of the State Medicaid agency in exchange for allowing the beneficiary to have some interest in the funds without them being considered 'available' for eligibility purposes. As a result, the Trustee fees from the amounts transferred by the Coxes are not for services that inure to the benefit of the Coxes. Instead, they inure to the Department. If this were not the case, there would be no reason to differentiate between Medicaid trusts, which are not considered resources, and other trusts, which almost always are.[7] As a result, because the Coxes make payment for the entirety of Trustee services, but receive only a portion (if any) of the benefits resulting therefrom, the transfers were for less than fair market value.

Finally, in order to qualify for the exception provided under Section 1396p(c)(2)(C)(i), the Coxes must have made a "satisfactory showing" regarding their intent to dispose of the assets at fair market value or for other valuable consideration. The record is devoid of any evidence on this matter: neither of the Coxes testified at their administrative hearings, and there is no other direct evidence regarding their intent. Certainly, there is no evidence that they at-

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[7] The sole exception being irrevocable trusts where there are no circumstances in which payment from the trust could be made to or for the benefit of the individual. 42 U.S.C. § 1396p(d)(2)(B).

tempted to dispose of the assets for fair market value, as required by the State Medicaid Manual:

> Intent to Dispose of Assets for Fair Market Value or for Other Valuable Consideration.--See §3258.1 for a definition of the term "valuable consideration." In determining whether an individual intended to dispose of an asset for fair market value or for other valuable consideration you [the State Medicaid agency] should require that the individual establish, to your satisfaction, the circumstances which caused him or her to transfer the asset for less than fair market value. Verbal statements alone generally are not sufficient. Instead, require the individual to provide written evidence of attempts to dispose of the asset for fair market value, as well as evidence to support the value (if any) at which the asset was disposed.

SMM Ch. 3: Eligibility § 3258.10(C)(1). In the absence of a satisfactory showing as defined above Section 1396p(c)(2)(C)(i) cannot avail the Coxes, and the Final Decision must be upheld. Iowa Code § 17A.19(10)(f), (i), (j), (m), (n).

5. Both Federal and State Law Classify the Coxes' Action As a "Transfer" Subject to Penalty Under 42 U.S.C. § 1396p(c) and Iowa Admin. Code r. 441-75.23.

Under both Iowa and federal law, the Coxes' provision of funds to the Trust constitutes a transfer of assets for purposes of 42 U.S.C. § 1396p(c) and Iowa Admin. Code r. 441-75.23. The Coxes urge this Court to adopt an extremely narrow reading of Iowa Admin. Code r. 441-75.23(8), which defines a "transfer or disposal of assets" for purposes of the state corollary to 42 U.S.C. § 1396p(c). This argument fails for two critical reasons: first, federal law, which preempts conflicting state law, makes clear that transfers to pooled trusts are

transfers for purposes of 42 U.S.C. § 1396p(c). Second, the definition of "transfer or disposal of assets" under Iowa Admin. Code r. 441-75.23(8) is expansive so as to include the Coxes' transfer, and the list provided therein is illustrative, not exclusive.

Transfers to pooled trusts are transfers for purposes of 42 U.S.C. § 1396p(c). If, as the Coxes assert, this were not the case, the exemption provided for in Section 1396p(c)(2)(B)(iv) would be meaningless, as the non-transfer would be exempt regardless. As a result, there would be no need for this Court, nor any of the other courts cited in both parties' briefs, to have wrestled with the language of 42 U.S.C. § 1396p(c)(2)(B)(iv). More importantly, the Coxes' position renders that provision frivolous, and is contrary to the plain language meaning of the term "transfer." *See Petition of Chapman*, 890 N.W.2d 853, 857 (Iowa 2017) ("[W]e apply the fundamental rule of statutory construction that we should not construe a statute to make any part of it superfluous."); *State v. Bonstetter*, 637 N.W.2d 161, 164 (Iowa 2001) ("We normally construe statutes on the basis of their ordinary and commonly understood meanings."); Merriam-Webster, "Definition: Transfer," *available at* https://www.merriam-webster.com/dictionary/transfer (last visited March 15, 2018) (defining transfer as "to convey from one person, place, or situation to another," or "to cause to pass from one to another."). Indeed, in a similar context, the Medicaid Act provides assets "shall be considered to be transferred by such individual when

any action is taken . . . that reduces or eliminates such individual's ownership or control of such asset." 42 U.S.C. § 1396p(c)(3). The Coxes' transfer falls within the plain language of the Medicaid Act.

Regardless, the Department has opted to provide additional guidance regarding the definition of the word "transfer" in this context. In so doing, the Department has made clear that the term is to be construed expansively, defining transfers or disposals of assets as "*any* transfer or assignment of *any* legal or equitable interest in *any* asset as defined above, including: . . . ." Iowa Admin. Code r. 441-75.23(8) (emphasis added). The rule subsequently identifies six transfers that are included in the above definition. The Coxes argue that these should be read to be exclusive. This is mistaken: as the broad general definition above makes clear, the list following the word "including" is illustrative, and in no way limits the breadth.

"[W]hen a statute uses the word 'includes' rather than 'means' in defining a term, it does not imply that items not listed fall outside the definition." *White v. Nat'l Football League*, 756 F.3d 585, 595 (8th Cir. 2014). To be certain, context is crucial to determining if the word "includes" (or "including") is limiting or illustrative. *See, e.g., Eyecare v. Dep't of Human Servs.*, 770 N.W.2d 832, 837-38 (Iowa 2009). However, "[t]he term 'including' usually is interpreted as a term of enlargement or illustration, having the meaning of 'and' or 'in addition to.'" *State Pub. Defender v. Iowa Dist. Ct. for Black Hawk Cnty*, 633 N.W.2d 280, 283

(Iowa 2001). This general rule applies here: the definition of a transfer under Iowa Admin. Code r. 441-75.23(8) is so broad and all-inclusive that to read it as consisting entirely of the six enumerated transfers would completely contradict the plain language of the general definition, which refers to any transfer of any interest in any asset. This language is meaningless under the Coxes' proposed interpretation, and would be contrary to, and preempted by, federal law.

Regardless, as discussed above, the Coxes' transfer does qualify as "giving away" an interest, as provided in Iowa Admin. Code r. 441-75.23(8)(1). Prior to the transfer, they held complete ownership of the funds. After the transfer, the Coxes transferred part of that interest to the Trustee, which now has ultimate control of the assets. Again, this illustrates that the Department's Final Decision was legally sound. Iowa Code § 17A.19(10)(b), (c), (i), (j), (l), (n).

6. Subsection 1396p(d) Has Limited, If Any, Substantive Applicability to Transfers of Assets Affecting Long-Term Care Benefits Eligibility.

Whereas 42 U.S.C. § 1396p(d) governs the treatment of trusts for purposes of general Medicaid eligibility, 42 U.S.C. § 1396p(c) is the exclusive authority for transfers of assets affecting long-term care benefits eligibility. Amici argue that the provisions of 42 U.S.C. § 1396p(d) are so comprehensive of all matters related to trusts as to, essentially, preempt any applicability 42 U.S.C. § 1396p(c) could have to transfers to trusts. (Amici Curiae Br. at 13-22, 38-39). This reading should be rejected for three reasons: First, while Section 1396p(d)

may "cover every dollar going into or coming out of any trust used by a Medicaid applicant" (Amici Curiae Br. at 19) related to general Medicaid eligibility, the scope of that subsection is clearly limited to that issue, and does not purport to govern the long-term care benefits eligibility that is the concern of 42 U.S.C. § 1396p(c). Second, if Section 1396p(d) is the blanket authority for transfers to fund trusts, then Sections 1396p(c)(2)(B)(iii) and (iv) are superfluous, as it would then unnecessarily exempt certain transfers to trusts from its provisions. Third, Section 1396p(d) pertains to transfers from trusts, not to trusts, as is the case here.

First, 42 U.S.C. § 1396p(d) was not drafted with the intent of serving as the polestar of transfer analyses for long-term care service eligibility. Instead, it is the authority for how to address trusts in the context of general Medicaid eligibility. The plain language of the Act says as much. Section 1396p(c) identifies its scope clearly in its first paragraph: "[I]f an . . . individual . . . disposes of assets for less than fair market value . . . the individual is ineligible for medical assistance for services described in subparagraph (C)(i) . . . ." 42 U.S.C. § 1396p(c)(1)(A). Subparagraph (C)(i) refers to long-term care benefits. In contrast, Section 1396p(d) has a different scope in mind: that subsection pertains to "an individual's eligibility for, or amount of, benefits under a State plan under this subchapter . . . ." 42 U.S.C. § 1396p(d)(1). The subchapter referred to is subchapter XIX of the Social Security Act, the subchapter governing Medicaid

as a whole—not specifically long-term care benefits. Whereas Section 1396p(c) was intended to address eligibility to long-term care benefits, Section 1396p(d) has the distinct purpose of regulating eligibility for Medicaid generally, such a prescription drug coverage or medical services. *See also* Iowa Admin. Code rr. 441-75.23, 75.24 (Iowa corollary); *In re Pooled Advocate Trust*, 813 N.W.2d at 143 (discussing South Dakota corollary). Amici may be correct that Section 1396p(d) may be comprehensive within that scope, but that is as far as it goes. Because the intended scope of Section 1396p(d) is limited to when trust funds are to be considered resources for Medicaid eligibility purposes, amici's expanded reading is unsupported.

Second, Amici's reading of the statute would render the provision at issue here superfluous, and would thus result in an improper construction of the Medicaid Act. Amici posits that Section 1396p(d) should be read to be the ultimate authority on trusts writ large, including when transfers to or from trusts may be subject to the transfer penalties outlined in Section 1396p(c). (Amici Curiae Br. at 13-21). However, this reading is once again contradicted by the language in Section 1396p(c)(2)(B)(iv), which exempts certain transfers to trusts from being considered transfers for less than fair market value. If Section 1396p(d) was intended to be the ultimate authority on trusts amici advocates for, then it would be antithetical to outline when transfers to a trust are exempt from the transfer analysis of Section 1396p(c). In other words, if Section

1396p(d) was the end-all-be-all of trust authority, Section 1396p(c)(2)(B)(iv) would be meaningless.

Third, save for a single reference, Section 1396p(d) only addresses transfers (or potential transfers) from trusts, and makes no reference to transfers to trusts. As the court in *Richardson* concluded:

> Subsection (d) speaks repeatedly and exclusively to transfers *from* trusts—that is funds *outgoing from* trusts (to beneficiaries)—not to transfers *into* trusts. This corresponds to the implication from the subsection's title—"treatment of trust amounts." It stands to reason that an amount does not become a "trust amount" until it is transferred into the trust. [The State Medicaid agency] penalizes transfers of funds pursuant to subsection (c) when they are transferred—conceptually prior to the completed transfer and deposit into the trust and conversion into "trust amounts."

Richardson, 2018 WL 1077275, at *16 (emphasis in original). The language of the Act validates this reasoning. *See* 42 U.S.C. § 1396p(d)(3)(A)(iii) (referring to "payments from the trust"); 42 U.S.C. § 1396p(d)(3)(B)(i)(II) (also referring to circumstances under which "payment from the trust could be made"). The sole possible exception to this construction is found in Section 1396p(d)(3)(B)(ii), which provides that transfers to irrevocable trusts where the transferor does not have any access to those transferred funds is subject to the penalty provisions of Section 1396p(c). This is hardly the all-encompassing trust authority amici purports it to be, and further illustrates the rationality of the Department's Final Decision. Iowa Code § 17A.19(10)(i), (j), (l), (n).

7. **The Department's Interpretation of the Medicaid Act is Consistent with its Purpose, but the Coxes Would Require the Department to Risk Federal Funds.**

As previously cited, pooled trusts are "intended for individuals with a relatively small amount of money." *Lewis*, 685 F.3d at 333. The numerous cases cited by both sides bear this out: amounts transferred in other cases tend to be fairly low, usually hovering around $50,000. *See, e.g., Richardson*, 2018 WL 1077275, at *3 ($38,500); *Hutson*, 54 Kan. App. at 680 ($59,528.42); *In re Pooled Advocate Trust*, 813 N.W.2d at 135 ($50,883.57); *Olson*, 676 F.3d at 693 ($54,450); *Beach* at App'x. 337 ($5,000); *Masters v. Michigan*, No. 2011-5372-AA (Macomb Cnty. Cir. Ct. Aug. 9, 2012); App'x. 372 ($22,072.92); *Peittersen v. Minnesota Dep't of Human Servs.*, No. 19HA-CV-11-5630 (Minn. 1st Jud. Dist. Oct. 2, 2012); App'x. 329 ($36,498.69); *but see Estate of Wierzbinski* at App'x. 367 ($283,663.59). Indeed, this is consistent not only with the purposes of pooled trusts specifically, but of Medicaid in general. *See, e.g.*, *Strand*, 648 N.W.2d at 101 (referring to "the needs-based test for Medicaid eligibility" and the problem of individuals who "were permitted 'to have [their] cake and eat it too,' at the expense of those who were truly unable to financially care for themselves."); *Ahrendsen*, 613 N.W.2d at 676 (describing Medicaid as a "welfare program"); *Ford*, 500 N.W.2d at 31 (describing Medicaid as a program for "welfare recipients"); *Hunter Labs., L.L.C. v. Virginia*, 828 F.3d 281, 283 (4th Cir. 2016) (Medicaid is "for individuals who cannot afford to pay their own medical costs.");

Morris v. Oklahoma Dep't of Human Servs., 685 F.3d 925, 928 (10th Cir. 2012) (same); *Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana State Dep't of Health*, 699 F.3d 962, 969 (7th Cir. 2012) (Medicaid is for the "needy"); *John B. v. Emkes*, 710 F.3d 394, 398 (6th Cir. 2013) (for the "poor"); *NB v. District of Columbia*, 794 F.3d 31, 35 (D.C. Cir. 2015) (for the "poor").

The Coxes' situation highlights the purpose behind a limited, strictly construed exemption from transfers of asset penalties. In stark contrast to the cases cited by both sides, the Coxes could hardly be said to have transferred a "relatively small amount of money." Together, they transferred over half a million dollars—$474,457.88 for Susan, and $101,921.81 for Edward. App'x. 195-198. The Coxes are a far cry from the "poor" for whom Medicaid was designed. They *can* afford to pay for their long-term care services—in Susan's case, the Department determined her transfer could pay for 87 months' worth of nursing facility costs. Recognizing that some individuals may have severe needs over the course of a lifetime, the Medicaid Act specifically exempts transfers to pooled trusts for beneficiaries under age 65, without limit. But this is as far as it goes—the Coxes are not the (relatively) younger, high-needs individuals 42 U.S.C. § 1396p(c)(2)(B)(iv) was designed to protect. As a result of their age, their life expectancies are shorter. More of the Coxes' resources are supposed to be spent on direct healthcare costs. Congress made a conscious choice in not carving out an exemption for those like the Coxes. In light of this fact,

the Department's position is entirely consistent with the underlying purpose and function of the Medicaid Act, and the Coxes' appeal cannot be maintained. Iowa Code § 17A.19(10)(i), (j), (k), (l), (n).

In contrast, judgment in favor of the Coxes may put federal funding at risk. As previously stated, CMS has issued binding guidance to the states regarding the issue before this Court, and has determined that transfers to pooled trusts for beneficiaries at or over age 65 are transfers for less than fair market value. *See* (discussion in section I.C.2.). CMS is vested with significant authority under the Medicaid Act to withhold federal dollars if it determines that a participating state is failing to comply with its federal obligations. 42 U.S.C. § 1396c. As a result, an order by this Court contrary to what CMS and numerous state and federal courts have required states to do could put the Department in the hapless position of being disallowed from following CMS's guidance while, simultaneously, subjecting the Department to potential penalization from CMS for noncompliance.

CONCLUSION

The Medicaid Act, while often prolix, circuitous, and stupefying, seeks to establish and regulate a program that is intended to ensure that those basic medical needs of the poorest among us are met. In so doing, it places a high priority on Medicaid's status as a payer of last resort, and seeks to conserve state resources in pursuit of its overarching goal. To this end, Congress crafted

a narrow exception to ineligibility for expensive long-term care benefits when younger, high-needs Medicaid applicants place relatively small amounts of funds in a pooled trust. The Coxes now seek to apply that exception to their nearly $600,000 in transfers they made at or over the age of 65.

As illustrated above, this is not what Congress intended, nor is it what the plain language and overall construction of the Medicaid Act provides. The Coxes did not receive fair market value for their transfers, but have instead signed away all control over their funds. This was a transfer that required a penalty period pursuant to 42 U.S.C. § 1396p(c), as confirmed by multiple federal agencies and federal and state courts. The Department's assessment of a penalty period to the Coxes was and remains an accurate and mandatory interpretation of law.

For this and all other reasons, Respondent-Appellee, the Iowa Department of Human Services, prays this Court enter an order AFFIRMING the Department's Final Decisions of long-term care benefits ineligibility and awarding the Department costs pursuant to Iowa R. App. P. 6.1207. The Department also respectfully prays this Court grant any such other, further, or different relief as the Court deems just and proper.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT-APPELLEE

REQUEST FOR ORAL SUBMISSION

Given the complexity of the Medicaid Act and applicable regulations, guidance, and other authorities, Respondent-Appellee, the Iowa Department of Human Services, hereby requests that this matter be submitted for oral argument before the Court.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using **Garamond** in **size 14** and contains **10,670** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: May 2, 2018

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