IN THE IOWA SUPREME COURT

NO. 18-0026

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

v.

IOWA DEPARTMENT OF HUMAN SERVICES,
Respondent-Appellee

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

APPELLANTS' REPLY BRIEF

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REPLY ARGUMENT

I. THE DISTRICT COURT'S RULING AND ORDER ON PETITION FOR JUDICIAL REVIEW SHOULD BE REVERSED, BECAUSE THE FINAL DECISIONS THE COURT AFFIRMED VIOLATE NUMEROUS PROVISIONS OF IOWA CODE SECTION 17A.19(10).

A. Preservation of Error and Standard of Review.

In its Brief, Respondent Iowa Department of Human Services ("the Department") asserts that Edward and Susan did not preserve their claim that the Department violated Iowa Code section 17A.19(10)(g). Department's Brief, pp. 14, 15, n. 1. Edward and Susan specifically raised and relied upon Iowa Code section 17A.19(10)(g), which provides for reversals or modifications of agency actions that are inconsistent with a rule of the agency, in their briefs to the District Court. App. 87, 118. The Court's Ruling and Order on Petition for Judicial Review recognized that it may grant Edward and Susan's requested relief if it found that their substantial rights had been prejudiced because the agency action met one of the criteria listed in Iowa Code section 17A.19(10), which included subsection (g). App. 161. The Court ruled upon these grounds in its holding that the agency action at issue was "supported by sufficient authority, and therefore, not erroneous." App. 167. Thus, Edward and Susan did preserve error with respect to Iowa Code section 17A.19(10)(g). See Meier v. Senecaut, 641

N.W.2d 532, 536 (Iowa 2002) (holding that error preservation requires that the issue be raised and decided by the district court) (citing Metz v. Amoco Oil Co., 581 NW.2d 597, 600 (Iowa 1998); Peters v. Burlington N. R.R., 492 N.W.2d 399, 401 (Iowa 1992)).

The Department's Brief does not clearly identify the level of deference it believes the agency should be given. Rather, it quotes from a 2002 Supreme Court case to assert it should be given "substantial deference." See Department's Brief, p. 15 (quoting Strand v. Rasumussen, 648 N.W.2d 95, 100 (Iowa 2002)). Since the Strand v. Rasumussen decision in 2002, the Court has specifically held that the Department is *not* clearly vested with interpretive authority over Medicaid-related rules and thus, the Court should not defer to the Department's interpretation of such rules and regulations. Eyecare v. Department of Human Services, 770 N.W.2d 832, 836 (Iowa 2009). The Department is also not vested with discretion to interpret federal statutes and rules relating to Medicaid. See Perry v. Dowling, 95 F.3d 231, 236 (2d Cir. 1996) (citing Turner v. Perales, 869 F.2d 140, 141 (2d Cir. 1989) (holding that when state agency is involved in interpreting a federal statute, deference is not appropriate). Thus, the District Court erred when it failed to apply the non-deferential error at law standard to its review of the Department's actions in this matter. See Iowa

Dental Ass'n v. Iowa Insurance Division, 831 N.W.2d 138, 143 (Iowa 2013) (holding that deference is only given if the legislature clearly vested interpretive authority with the agency); Iowa Code § 17A.19(11).

B. The Department's Final Decision, and the District Court's Approval of it, Erroneously, Irrationally, Unreasonably and Arbitrarily Penalized Edward and Susan.

The Department agrees that Edward and Susan validly created pooled special needs trusts and thus, such assets could not be counted as a resource when determining whether they were eligible for Medicaid. App. 419 (holding that the parties agree that the trusts involved here qualify as pooled or C trusts under federal and state rules and regulations); App. 324-25 (Appeal Summary re: Edward quoting policy specialist who stated that "the trust retains its exempt status, the assets are not considered a countable resource…"); App. 326-27 (Appeal Summary re: Susan stating that the trust was approved and that the trust met "all required qualifications."). Where the parties' arguments diverge is whether the deposits into such trusts should lead to a penalty period for Edward and Susan's eligibility for Medicaid benefits. Based upon the relevant regulations and statutes and the evidence in the record, Edward and Susan should not be subject to a transfer penalty.

1. Edward and Susan's deposits were not a transfer or disposal of assets.

As set forth in Edward and Susan's initial Brief, the deposit of funds by Edward and Susan into their respective pooled trusts do not fit under the definition of "transfer or disposal of assets" set forth in Iowa Administrative Code section 441-75.23(8). The Department attempts to avoid this argument by asserting that the definition is not exclusive and should be read more generally. See Department's Brief, pp. 43-46. Notably, the Department's definition includes some trust-related transfers in its definition – such as transfers into trusts not available to a grantor – but not deposits made into pooled trusts that *are* available to a grantor for the purposes specified in the trust documents. See Iowa Admin. Code r. 441-75.23(8). If the Department had intended and desired this definition to include the general or expanded definition that they now proclaim, they could have drafted it more broadly and/or not included the specific list of transfers. They chose not to do so and should not be able to attempt to expand the rule's meaning when it suits their argument. See De Stefano v. Apartments Downtown, Inc., 879 N.W.2d 155, 183 (Iowa 2016) (quoting Kucera v. Baldazo, 745 N.W.2d 481, 487 (Iowa 2008); Meinders v. Dunkerton Community School District, 645 N.W.2d 632, 637 (Iowa 2002)) (stating that the intent of a statute can be expressed by omission and the express mention of one thing implies the exclusion of others not mentioned).

Because the deposit of funds into the respective pooled trusts were not transfers of assets under the Department's rules, the federal provisions upon which the Department relies to impose the transfer penalties on Edward and Susan are inapplicable. Furthermore, as set forth more fully in the Amicus Curiae Brief, 42 U.S.C. section 1396p(d), which is entitled "Treatment of trust amounts," controls this analysis rather than 42 U.S.C. section 1396p(c), which is entitled "Taking into account certain transfers of assets." Subsection (c) provides the statutory framework for treatment of transfers by the applicant to third parties. See 42 U.S.C. § 1396p(c). Subsection (d) provides for the treatment of amounts in certain trusts, including pooled trusts such as those utilized by Edward and Susan here. That provision provides that for purposes of "determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, *subject to paragraph (4)*, the rules specified in paragraph (3) shall apply to a trust established by such individual." 42 U.S.C. § 1396p(d)(1) (emphasis added). Here, Edward and Susan's trusts are irrevocable and thus, they would generally be subject to section 1396p(d)(3)(B), which provides that irrevocable trusts that could be used for the benefit of the individual shall be considered income and shall be considered a transfer of assets. 42 U.S.C. § 1396p(d)(3)(B); App. 227 (at § 1.4). However, as quoted above, the

applicability of subsection (3) is subject to subsection (4), which provides that certain trusts are *not* subject to being treated as income or a transfer of assets. Importantly, this list of exempt trusts includes the exact type of trusts utilized by Edward and Susan. See 42 U.S.C. § 1396p(d)(4)(C) (providing that a trust for a disabled individual meeting certain conditions is exempt from coverage under the provisions treating trust amounts as income and/or as a transfer of assets).

In its Brief, the Department asserts three reasons why it believes this analysis – that subsection (d) and not subsection (c) applies – is in error. See Department's Brief, pp. 46-49. First, the Department argues that subsection (d) does not govern long term care eligibility. See Department's Brief, pp. 47-48. That argument is belied by the plain language of subsection (d), which provides that it relates to "determining an individual's eligibility for, or amount of, benefits". 42 U.S.C. § 1396p(d)(1). Long term care eligibility for Medicaid is certainly within the broad language of "eligibility for, or amount of, benefits." Id. Furthermore, one of the other trusts included in the exceptions of subsection (d) only serves one purpose – to allow over-income individuals in states with an income cap to qualify for long term care

benefits.[1] See 42 U.S.C. § 1396p(d)(4)(B) (exempting Miller Trusts); Center for Medicare & Medicaid Services, State Medicaid Manual, § 3259.7C, at p. 3-3-109.34, available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html (accessed April 16, 2018); see also https://www.nolo.com/legal-encyclopedia/how-income-trusts-help-if-you-have-too-much-income-medicaid.html (accessed April 13, 2018) (describing Miller Trusts for use in income cap states to allow Medicaid applicants with excess income to qualify for Medicaid for long term care costs). Because long term care is the only purpose of a Miller Trust, it is nonsense to assert that the provisions in subsection (d) do not apply to long term care eligibility issues.

The Department next asserts that making subsection (d) the controlling provision would render 42 U.S.C. sections 1396p(c)(2)(B)(iii) and (iv) superfluous. See Department's Brief, pp. 48-49. This is incorrect. These two provisions are not rendered superfluous. They simply apply to

[1] The fact that Miller Trusts and pooled trusts are both contained under the exception in 42 U.S.C. section 1396p(d)(4) is instructive. Miller Trusts have the specific purpose of allowing individuals with too much income in income cap states to qualify for long term care and such benefit is primarily needed by individuals age 65 and over. Accordingly, it makes sense that Congress would also seek to exempt pooled trusts that meet the stated requirements to allow the individuals utilizing such trusts to also qualify for long term care benefits.

different situations. Sections 1396p(c)(2)(B)(iii) and (iv) allow for certain transactions into trusts for the benefit of others, namely the disabled child of a Medicaid applicant or other disabled individuals under the age of 65. 42 U.S.C. §§ 1396p(c)(2)(B)(iii), (iv). Subsection (d) allows the beneficiary to fund his or her own trust meeting the requirements of one of the trusts described in subsection (4) without treating such funds as income or as a transfer of assets for Medicaid eligibility purposes. Id. at § 1396p(d); see also § 1396p(d)(3)(B)(ii) (providing that for irrevocable trusts not otherwise excepted under subsection (4), a transfer occurs upon the later of the date the trust is established or the date the payment to the individual is foreclosed).

Finally, the Department asserts that section 1396p(d) applies to transfers *from* trusts rather than *to* trusts, "save for a single reference." See Department's Brief, p. 49 (immediately recognizing that 42 U.S.C. section 1396p(d)(3)(B)(ii) discusses transfers *to* irrevocable trusts where the transferor does not have access to the funds and is thus, subject to the penalty provisions of 42 U.S.C. section 1396p(c)). In reality, section 1396p(d) clearly covers the assets of the disabled individual "contained in" the trust. Id. at § 1396p(d)(4)(C). This would certainly include anything that was deposited into the trust from the individual, as that would be the only way for it to be "contained in" the trust. To find otherwise would mean that

individuals over 65 could establish these trusts but not fund them. This argument would for all practical purposes eliminate the use of such pooled trusts, despite Congress' clear intent to protect them from impacting Medicaid eligibility. See id. While the Department attempts to minimize the significance of this "single reference" to assert that subsection (d) is not "all-encompassing", the Department is unable to deny that the provision, as stated in the Amicus Curiae Brief, "cover[s] every conceivable trust a person might use and reaches every dollar a future Medicaid applicant put into one…." See Amicus Curiae Amended Brief, p. 14.

The Department relies upon a recently issued case from the federal district court in Maine and mirrors its above arguments upon such decision. See Department's Brief, pp. 24, 25, 49, 50 (citing Richardson v. Hamilton, 2018 WL 1077275 (D. Me. Feb. 27, 2018)). The case is currently on appeal to the First Circuit. In its relatively brief discussion of the merits – most of the decision focused on ripeness and standing – the Court incorrectly dismissed the argument made above regarding the applicability of 42 U.S.C. section 1396p(d)(4) to pooled trust deposits. See Richardson, 2018 WL 1077275, *16-18.[2] For the reasons set forth above and herein, such

[2] Even the Department narrowed the Court's decision in Richardson when it recognized that the provisions at issue do discuss transfers to trusts. See Department's Brief, p. 49.

arguments ignoring or unduly limiting the applicability of 42 U.S.C. section 1396p(d)(4) to the situation presented herein are without merit.

2. Even if the deposits by Edward and Susan are "transfers", such deposits are exempt from the penalty period.

The Department asserts that there are eight categories of transfers that are exempted from having a penalty period applied. See Department's Brief, Argument § I.C.2 (citing 42 U.S.C. § 1396p(c)(2)(A), (B)). The Department, however, completely ignores two additional categories under 42 U.S.C. sections 1396p(c)(2)(C) and 1396p(c)(2)(D):

> (2) An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that –
> ***
> (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, (ii) the assets were transferred exclusively for a purpose other than to qualify for medical assistance, or (iii) all assets transferred for less than fair market value have been returned to the individual; or
> (D) the State determines, under the procedures established by the State (in accordance with standards specified by the Secretary), that the denial of eligibility would work an undue hardship as determined on the basis of criteria established by the Secretary.

42 U.S.C. §§ 1396p(c)(2)(C), (D). The Department ignores these additional exceptions by simply stating that they do not contain the same age-related language. See Department's Brief, p. 22, at n. 2. While they may not contain the same age-related language, the provisions still provide clearly

stated exceptions that the Department was required to assess prior to simply making a per se decision on the basis of the date and timing of Edward and Susan's deposits into their respective special needs trusts. To ignore these provisions violates the basic rules of statutory construction. See Miller v. Westfield Insurance Co., 606 N.W.2d 301, 305 (Iowa 2000).

The resources upon which the Department relies in its own Brief recognize that the age of the transferee is not the only fact upon which eligibility penalties are based. See Department's Brief, p. 27 (citing State Medicaid Manual Ch. 3: Eligibility §§ 3258.10(B)(2), 3259.7(B)) (providing that transfers are not subject to a penalty under the transfer of assets provisions if "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" and that such transfers "may or may not" be a transfer for less than fair market value).

The Department criticizes the authorities cited by Edward and Susan by alleging that they have a "mistaken" understanding of the Medicaid Act. See Department's Brief, pp. 28-30. What each of these cases do, however, is simply recognize that there must be a fair market value analysis utilized to assess deposits into pooled trusts by individuals over age 65. Peittersen v. Minnesota Department of Human Services, Findings of Fact, Conclusions of

Law and Order, Case No. 19HA-CV-11-5630 (Minn. 1st Judicial District, Oct. 2, 2012), App. 334-35; Beach v. State of Tennessee Department of Human Services, Memorandum and Order, Case No. 09-2120-III (Tenn. Chancery Ct. Sept. 8, 2010), App. 340-41, 355-65; Estate of Wierzbinski v. State of Michigan, Department of Human Services, Opinion and Order, Case No. 2010-4343-AA (Macomb County Cir. Ct. July 26, 2011), App. 370-71[3]; Masters v. State of Michigan, Department of Human Services, Opinion and Order, Case No. 2011-5372-AA (Macomb County Cir. Ct. Aug. 9, 2012), App. 374-78. The cases also hold that deposits like those made by Edward and Susan should not lead to delayed eligibility for Medicaid covering long term care, because they are for fair market value. Peittersen, Findings of Fact, Conclusions of Law and Order, App. 334-35; Beach, Memorandum and Order, App. 355-65; Estate of Wierzbinski, Opinion and Order, App. 370-71; Masters v. State of Michigan, Department of Human Services, Opinion and Order (on Motion for Reconsideration), Case No. 2011-5372-

[3] The Department claims the decision in the Estate of Wierzbinski v. State of Michigan, Department of Human Services in inapplicable because it addressed whether the state correctly treated the trust as an annuity. Department's Brief, p. 30. While the Court did address this issue and find that the trust was not an annuity, the Court also specifically addressed whether the deposit of cash into the trust was for fair market value. Estate of Wierzbinski, Opinion and Order, App. 370-71. The Court specifically held that "the funding of the trust with the cash was not a transfer for less than fair market value…." Id., App. 371.

AA (Macomb County Cir. Ct. Oct. 3, 2012), App. 382; see also In re Schultz, 368 B.R. 832, 835-37 (Bankr. D. Minn. 2007) (holding that transfer into pooled trust was in exchange for "reasonable equivalent value"). Furthermore, these cases recognize the practical implication – as pointed out in Edward and Susan's initial Brief – of the Department's decision. While the pooled trusts are not to be used to count against Edward and Susan, they effectively do so in that they prevent eligibility until the funds would be fully expended on the cost of nursing facility care.

3. The Department's arguments regarding fair market value exhibit the impractical and illogical nature of its analysis.

For the first time,[4] the Department argues that Edward and Susan are not prejudiced by the penalty period, because they can have their penalty period reduced "after the fact" if the "improperly transferred assets are returned to them." See Department's Brief, pp. 31-35. In other words, the Department claims the penalty period can be shortened if Edward and/or Susan are able to spend the money faster than what the average monthly cost of private patient nursing facility pay costs. This, however, still leaves

[4] Failure to raise an argument with the district court or during the administrative process constitutes waiver of the argument. In re N.V., 744 N.W.2d 634, 639 (Iowa 2008) ("Ordinarily, issue not presented to the trial court are not reviewable when raised for the first time on appeal."). This is also contrary to or at least not stated to be the case in the Proposed Decision and Final Decisions. App. 416-27, 447-55.

Edward and Susan prejudiced, because it effectually makes the funds in the trust a countable resource and renders them ineligible for Medicaid until they spend all the money in their respective trusts – a point that all parties agree is not supposed to occur. See 42 U.S.C. § 1396p(d)(4)(C); Iowa Admin. Code r. 441-75.24(3)(c). In simple terms, the Department's analysis (and the Centers for Medicare and Medicaid analysis on which it purports to rely) effectively eliminates the pooled special needs trust exception for anyone over age 65, because a person over 65 can create such a trust (which is not supposed to count against their eligibility), but they apparently cannot place any funds in it (or a penalty period will apply). This eliminates the purpose of the pooled special needs trust exception, which is to allow certain individuals living with chronic diseases or disabilities to pay for goods and/or services that would sustain their most basic needs. Lewis v. Alexander, 685 F.3d 325, 332-33 (3d Cir. 2012), cert. denied 133 S.Ct. 933 (2013).

The Department's argument ignores a very important part of the requirements for establishing a qualifying pooled trust – such trust must pay remaining funds in the trust to the State up to the amount of medical assistance paid on behalf of the beneficiary. 42 U.S.C. § 1396p(d)(4)(C)(iv). If the pooled trusts were intended to work the way the Department describes,

there would be no money remaining to pay Medicaid at the beneficiary's death, because the beneficiary would have had to spend all such funds before even having access to Medicaid benefits. Thus, there would be no need for this "payback" requirement.

The Department also argues that there is nothing guaranteeing that Edward and Susan will receive fair market value for their transfers, because the Trustee is given "sole and absolute" discretion. See Department's Brief, p. 34. In making this argument, the Department blatantly ignores important provisions of the trust documents, which limit the discretion of the Trustee. The trust documents specifically provide that any items and/or services paid by the trust for Edward or Susan *shall be* at fair market value, they prohibit the Trustee from using the funds for anything less than adequate or full consideration, and they prohibit the Trustee from using the funds for items that would create Medicaid ineligibility. App. 229-30, 232, 234, 237-38 (at §§ 2.11, 3.1, 5.1, 5.2, 5.7, 8.8); App. 244, 271 (at § 2.03). The trust documents also limit the Trustee's authority by stating that it does not have authority to "purchase, exchange or otherwise deal with or dispose of the assets of any Trust sub-account for less than adequate or full consideration in money or money's worth, or to enable any person to borrow the assets of any Trust sub-account, directly or indirectly, without adequate interest or

security." App. 237-38 (at § 8.8). The Department also ignores the Budget/Financial Plan for each beneficiary, which indicates that the funds can only be used for items under Iowa's supplementation statute. App. 307-320; Iowa Code § 249A.4(10) (citing to 42 C.F.R. § 483.10(f)(11)(ii)).

4. The Department did not conduct a fair market value analysis.

Despite being unable to cite to anything in the underlying record[5] showing such analysis, the Department claims that it conducted a fair market value analysis. See Department's Brief, p. 35. The Department further asserts that Edward and Susan's deposits into the pooled trusts are "as a matter of fact" transfers for less than fair market value and not for other valuable consideration. See Department's Brief, p. 35. In support of this argument, the Department asserts that Edward and Susan lost the value of their assets when they transferred control to the Trustee and compares the trust to a gift card. See Department's Brief, pp. 38-39. Interestingly, the Department even asserts that they – not Edward and Susan – are the real

[5] The Department cites to the Administrative Law Judge's Proposed Decision and the District Court's Ruling and Order for this assertion. Neither of these show any factual analysis completed by the Department regarding a fair market value determination. As set forth in Edward and Susan's initial Brief, the Department admitted at the hearing that it did not conduct any analysis beyond reliance on its Employee Manual. App. 324-28, 405-08, 410 (Tr. 20:21-21:1, 23:16-24:20, 27:3-23) (providing testimony of Department that it did not do any analysis to determine whether the transfers were for fair market value or other valuable consideration).

beneficiaries of having the Trustee control the funds. See Department's Brief, pp. 40-42.

Once again, the Department's argument ignores the very purpose of a pooled trust and the provisions governing Edward and Susan's pooled trusts. Edward and Susan certainly received (or thought they were receiving) a benefit by utilizing a pooled trust. They received the benefit of the services of the Trustee in that the Trustee would be managing the funds and ensuring that they maintained eligibility for Medicaid while at the same time being able to obtain items for their well-being and comfort not covered by Medicaid. App. 232, 234 (at §§ 5.1, 5.2, 5.7); Iowa Code § 249A.4(10). Thus, the Department's assertion that Edward and Susan received nothing in return for placing the funds in the pooled special needs trust is simply without merit. See also Peittersen, Findings of Fact, Conclusions of Law and Order, p. 7, App. 335 (holding that because the trust provisions required Peittersen's funds to be used for her supplemental needs and to enhance her quality of life without replacing, reducing or substituting government assistance, then it could not be determined that the transfer was for less than fair market value); Beach, Memorandum and Order, App. 337-66 (holding that exchanging legal ownership for equitable ownership when depositing funds into a pooled special needs trust is a fair market value transfer,

because the beneficiary receives the benefit of the goods and services purchased by the trust).

Additionally, the fact that the Trustee receives compensation for handling the trust funds does not change the fair market value analysis. See Department's Brief, p. 40. Certainly, this is a benefit to Edward and Susan in that it allows them to ensure that the funds are used properly and in a manner that does not impact their Medicaid eligibility. App. 234 (at § 5.7). There is nothing in the record indicating that the Trustee is charging more than fair market value for its services, and these charges would be no different than what any institution or provider charges for handling accounts or funds. See also Hutson v. Mosier, 401 P.3d 673, 682 (Kan. Ct. App. 2017) (holding that it seems clear that these types of services provided by the Trustee have value).

The Department also questions Edward and Susan's intent to dispose of the assets at fair market value. See Department's Brief, p. 42. The Department asserts that there is no evidence of intent, because Edward and Susan did not testify at the hearing. See Department's Brief, p. 42. Intent can be shown by evidence other than testimony, and it was here. The Centers for Medicare and Medicaid Services resource cited by the Department specifically recognizes the importance of obtaining intent from

written, rather than verbal, evidence. Department's Brief, p. 43 (citing State Medicaid Manual, Ch. 3, Eligibility § 3258.10(C)(1)). The trust documents specifically indicate the intent of Edward and Susan as do the directives given by Edward and Susan as to the use of the funds. App. 234, 237-38 (at §§ 5.7, 8.8) (providing that Trustee does not have authority to purchase, exchange or otherwise deal with or dispose of assets for less than adequate or full consideration); App. 244, 271 (at § 2.03) (providing that the purchases of items and/or services shall be at fair market value); App. 291-99, 307-20.

5. Edward and Susan's interpretation is the only one that recognizes and practically allows for Congress' intent to except pooled trusts from eligibility penalties.

The Department attempts to escape Edward and Susan's arguments by citing the amount of money placed into Edward and Susan's respective trusts. Department's Brief, p. 51. Congress did not, however, provide that to qualify as a pooled trust the amount of funds in such trust must be under a certain amount. See 42 U.S.C. § 1396p(d)(4)(C). Thus, the Department cannot do so in order to avoid application of the exception. Furthermore, as discussed previously, any money remaining in Edward's and Susan's respective trusts at the time of their deaths will return to the state, thereby

allowing the Department to recover monies expended on Edward and Susan's behalf. See id. at § 1396p(d)(4)(C)(iv).

It is also important to note that Edward and Susan were only 65 when the deposits were made and when they began living in a long term care facility. They have life expectancies of over 17 years (Edward) and over 20 years (Susan). App. 312. By opining that Edward and Susan can "afford" to pay for their care, the Department shows its true colors – it is using the assets in Edward's and Susan's respective trusts as a countable resource, which is in clear violation of the law. 42 U.S.C. § 1396p(d)(4)(C); Iowa Admin. Code r. 441-75.24(3)(c).

The Department also claims that Edward and Susan's position risks the Department's federal funding. Interestingly, there is no evidence that any of the other states that have made decisions consistent with Edward and Susan's position have lost their federal Medicaid funding. See Peittersen, Findings of Fact, Conclusions of Law and Order, App. 329-36 (Minnesota); Beach, Memorandum and Order, App. 337-66 (Tennessee); Estate of Wierzbinski, Opinion and Order, App. 367-71 (Michigan); Masters, Opinion and Order (on Motion for Reconsideration), App. 380-83 (Michigan).

For all the reasons stated herein and in Edward and Susan's initial Brief, the Department's determination is erroneous, irrational, inconsistent,

illogical, unreasonable, lacks any foundation in rational agency policy and/or is an abuse of discretion. Iowa Code §§ 17A.19(10)(b), (c), (g), (i), (k), (l), (m), (n). Furthermore, because the Final and Proposed Decisions and the District Court's approval of the decision to delay Edward and Susan's eligibility for Medicaid benefits was based upon a determination that is not supported by any evidence and ignored important information that would lead to the opposite conclusion, such decision must be reversed. See Iowa Code §§ 17A.19(10)(f), (j).

CONCLUSION

WHEREFORE for all the reasons stated herein and in the initial Brief, Appellants, Edward A. Cox and Susan E. Cox, respectfully request the Court reverse the Department's decision and find that Appellants were eligible for Medicaid as of the date of his or her application for such benefits, along with any allowable period of retroactivity. Appellants further respectfully request the costs of this action and any other order or relief as is allowed by law.

REQUEST FOR ORAL SUBMISSION

Pursuant to Iowa Rule of Appellate Procedure 6.908, Appellants request oral argument in this matter.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on May 2, 2018, I electronically filed this Reply Brief in accordance with Chapter 16 of the Iowa Rules of Court, which will electronically serve the following attorneys of record:

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/s/ *Rebecca A. Brommel* *May 2, 2018*

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