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19-P-591 Appeals Court

IN THE MATTER OF THE VALERIE R. PECCE SUPPLEMENTAL NEEDS TRUST (and a companion case[1]).

No. 19-P-591.

Essex. October 7, 2020. - March 31, 2021.

Present: Rubin, Desmond, & Englander, JJ.

MassHealth. Medicaid. Trust, Mistake, Reformation, Remainder interests, Beneficiary, Assets of trust, Removal of trustee. Executor and Administrator, Removal. Uniform Trust Code. Administrative Law, Regulations, Agency's interpretation of statute. Attorney at Law, Drafting of will. Will. Mistake. Declaratory Relief. Practice, Civil, Findings by judge, Attorney's fees, Declaratory proceeding.

Petition for probate of a will filed in the Essex Division of the Probate and Family Court Department on February 17, 2009.

A motion for removal of a personal representative, filed on August 31, 2015, was heard by Theresa A. Bisenius, J., and a motion for attorney's fees was considered by her.

Petition for reformation of a trust filed in the Essex Division of the Probate and Family Court Department on February 13, 2015.

A motion for removal of a trustee and appointment of a successor trustee, filed on September 1, 2015, was heard by

[1] In the Matter of the Estate of Albert Pecce.

Theresa A. Bisenius, J., and a motion for attorney's fees was considered by her.

James R. Knudsen for Gino DiGiacomo.
Julia Kobick, Assistant Attorney General, for MassHealth.

ENGLANDER, J. This case presents the question whether a trust created with reference to the Federal Medicaid statutes -- the Valerie R. Pecce Supplemental Needs Trust (2001 trust) -- should be reformed due to mistake. According to the petitioner, Gino DiGiacomo, the 2001 trust incorrectly and unnecessarily provides that trust assets must first be used to reimburse the Massachusetts division of medical assistance (hereinafter MassHealth) for benefits provided to Valerie during her lifetime, before any remaining assets can be distributed to other 2001 trust beneficiaries. To resolve this contention, we must examine the Federal statutes governing eligibility for Medicaid benefits, and in particular those statutes applicable to transfers of assets by or for the benefit of Medicaid recipients, see 42 U.S.C. § 1396p(c) and (d). The Probate and Family Court judge ruled that the clause of the 2001 trust requiring reimbursement to MassHealth was not a mistake, and declined to reform the trust. We agree only in part; while assets that Albert Pecce transferred to the 2001 trust during his lifetime are properly subject to the payback provision, we perceive no basis for the same to be true for assets that poured

over to the 2001 trust from Albert's estate after his death. We consequently vacate the relevant judgments and remand with directions to provide some of the relief DiGiacomo seeks.

Background. Albert Pecce[2] established the 2001 trust in September of 2001, for the benefit of his daughter, Valerie. Albert was seventy years old at the time, and Valerie was thirty-eight. Valerie had been born with disabilities, and as of 2001 had been receiving Medicaid benefits through MassHealth for many years. The principal purpose of the 2001 trust was to supplement, but not to supplant, available Federal, State, and local assistance programs for Valerie. The 2001 trust explicitly provided that it was established under 42 U.S.C. § 1396p(d)(4)(A) as a so-called "supplemental special needs trust, for the benefit of a disabled person." Albert transferred $200,000 to the 2001 trust at its inception. Valerie did not transfer any of her funds to the 2001 trust at any time.

On the same date that the trust was created in September of 2001, Albert also executed his will. Relevant here, the will provided that at his death all of Albert's assets would go to the 2001 trust. Albert died in 2007. He had substantial assets

[2] Because Albert and his daughter, Valerie R. Pecce, share the same last name, we refer to them hereinafter by their first names.

at his death, which poured over into the 2001 trust. Pursuant to the 2001 trust terms, the petitioner DiGiacomo, who is Albert's cousin, succeeded Albert as the trustee.[3]

Valerie died in 2015. Her death terminated the 2001 trust and triggered the provisions of article 6 of the trust, which sets forth how to dispose of trust assets upon Valerie's death. According to article 6, trust assets are to be used first, to pay Valerie's funeral and burial expenses; second, to reimburse MassHealth for "all Medical Assistance provided to [Valerie] during [her] lifetime, . . . as required by law to be reimbursed upon [Valerie's] death"; and third, as to any remainder, to pay same to certain members of Albert's family -- as it turns out, the only remainder beneficiary is DiGiacomo.

DiGiacomo filed a petition in 2015, seeking to reform the 2001 trust, in particular, by removing the MassHealth reimbursement provision set forth in article 6.2 (payback provision). DiGiacomo's position is that Albert (or Albert's counsel) mistakenly formed the 2001 trust as a special needs

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[3] Following Albert's death, a protracted legal battle ensued between DiGiacomo, who had been named executor of Albert's estate, and Attorney Faith Delaney, who had been appointed as Albert's permanent guardian in March 2007. Attorney Delaney had transferred certain of Albert's property into another trust created for Valerie's benefit (which the parties call the "2007 trust") around the time of Albert's death in August of 2007. After a trial in Probate and Family Court, the litigation culminated in a 2012 judgment ordering the return of the transferred property to Albert's estate.

trust under 42 U.S.C. § 1396p(d)(4)(A) (hereinafter [d][4][A]); that the 2001 trust actually should have been formed as a "third-party special needs trust" described in a different section of the Federal statute, see 42 U.S.C. § 1396p(c)(2)(B)(iv) (hereinafter [c][2][B][iv]); and that such a (c)(2)(B)(iv) trust, established by a third party and not by the Medicaid recipient, did not need the MassHealth payback provision to preserve the beneficiary's eligibility for Medicaid.

MassHealth opposed DiGiacomo's petition for reformation. In MassHealth's view, Albert did intend the payback provision, because it was necessary to ensure that Albert's transfer of assets to the 2001 trust did not render Albert ineligible for Medicaid, in the event that he might otherwise seek such benefits in the future. MassHealth sought additional relief, including the removal of DiGiacomo as trustee of the 2001 trust and as personal representative of Albert's estate, based on DiGiacomo's failure to perform his obligations in those roles.[4]

After a two-day trial, the judge issued written findings and a rationale, in which she ruled that reformation of the 2001

[4] The estate administration and the petition to reform the trust are separate matters in the Probate and Family Court and have separate docket numbers there. The matters proceeded together throughout this litigation, and the identical judgments were entered on each docket.

trust was not appropriate. The judge acknowledged that the 2001 trust was not a (d)(4)(A) special needs trust and was improperly designated as such in the trust documents, but she found that Albert did intend the payback provision and, therefore, it should not be reformed. The judge also removed DiGiacomo as trustee of the 2001 trust and as personal representative of Albert's estate. DiGiacomo appeals.

Discussion. To succeed on his petition to reform the 2001 trust, DiGiacomo needed to show, by clear and convincing evidence, that the provisions he seeks to reform were the result of a mistake. Section 415 of the Massachusetts Uniform Trust Code (MUTC), G. L. c. 203E, specifically authorizes reformation on that basis:

> "The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that the settlor's intent or the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement."

Although the MUTC is of recent vintage, enacted in 2012, it was not intended to replace Massachusetts common-law principles, which "supplement [the MUTC], except to the extent modified" by specific statutory language. G. L. c. 203E, § 106. See De Prins v. Michaeles, 486 Mass. 41, 45 (2020). But while the Massachusetts common law has not been displaced, the language of G. L. c. 203E, § 415, is nevertheless instructive. It makes

explicit a judge's power to reform a trust instrument to conform to the settlor's intention. The power to reform extends to those instances where "the terms of the trust were affected by a mistake of . . . law," including "in expression." G. L. c. 203E, § 415. See DiCarlo v. Mazzarella, 430 Mass. 248, 250 (1999), quoting Pond v. Pond, 424 Mass. 894, 897 (1997) ("To ascertain the settlor's intent, we look to the trust instrument as a whole and the circumstances known to the settlor on execution").

1. The question of reformation of the payback provision. DiGiacomo posits that the 2001 trust was affected by just such a mistake of law: that the drafter, Attorney Lisa Nahil,[5] thought that she was creating, and needed to create, a (d)(4)(A) supplemental special needs trust in order to preserve Valerie's eligibility for Medicaid benefits, when in fact the drafter did not create a (d)(4)(A) trust, nor did she need to create a (d)(4)(A) trust to preserve Valerie's Medicaid eligibility. Rather, DiGiacomo argues, the drafter could have created a third-party special needs trust under 42 U.S.C. § 1396p(c)(2)(B)(iv), which would have preserved Valerie's Medicaid eligibility and did not require a MassHealth payback provision as the (d)(4)(A) trust did. Accordingly, DiGiacomo

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[5] Attorney Nahil passed away in 2009, and therefore did not testify at the trial.

argues, the MassHealth payback provision was included in error, and ought to be removed.

To begin, we acknowledge that all parties agree that the 2001 trust is not, in fact, a (d)(4)(A) trust. A (d)(4)(A) trust must contain (at least in part) assets of the disabled individual;[6] the 2001 trust does not contain any of Valerie's assets, and thus does not qualify as a (d)(4)(A) trust. Since the 2001 trust expressly states that it is "established" and shall be "administered" and "interpreted" as a (d)(4)(A) trust, that much of the trust document, at least, is a clear mistake.

While recognizing this error, the trial judge nevertheless refused to reform the 2001 trust because she determined that the payback provision in article 6.2 was not a mistake. In essence, the judge concluded that Albert had three purposes in establishing the 2001 trust: (1) to provide Valerie with assets to supplement her government benefits; (2) to ensure Valerie's continuing eligibility for Medicaid; and (3) to ensure Albert's Medicaid eligibility in the event that he sought such benefits within the applicable, three-year look-back period. She reasoned that the third of these purposes justified Albert's inclusion of the payback provision, because absent such a

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[6] Section 1396p(d)(4)(A) of 42 U.S.C. states that it applies to "[a] trust containing the assets of an individual under age [sixty-five] who is disabled . . . and which is established for the benefit of such individual . . . ."

provision, any transfer by Albert to the 2001 trust would cause him to lose his Medicaid eligibility for three years.[7] And after considering the trial evidence, the judge made an express finding to that effect: "The [c]ourt finds that the inclusion of the payback provision is not a mistake, but that Albert had a rational reason for creating the 2001 [t]rust with a payback provision, which was to ensure his eligibility for Medicaid."

On appeal DiGiacomo argues that Albert could not have intended to include the payback provision. He points out, correctly, that Albert retained substantial assets in 2001, and argues that this demonstrates that Albert was not in a position to qualify for Medicaid in any event. And he points out, again correctly, that for estate planning purposes the pour-over provision of Albert's will cannot be reconciled with the payback

[7] We note that for a third-party special needs trust under (c)(2)(B)(iv), if Valerie had been the sole beneficiary of the 2001 trust, then the payback provision would not have been necessary to preserve Albert's eligibility. However, as the judge's decision reflects, because the 2001 trust contained a clause distributing any assets remaining at Valerie's death to other beneficiaries, the trust likely would not qualify as being for the "sole[] . . . benefit" of Valerie unless the payback provision was included. 42 U.S.C. § 1396p(c)(2)(B)(iv). See also State Medicaid Manual, Health Care Finance Administration Pub. No. 45, Transmittal No. 64, § 3257(B)(6) (Nov. 1994) (State Medicaid Manual) (providing guidance on interpretation of "sole benefit" language under § 1396p[c][2][B][iv]). Whether the payback provision could protect Albert's Medicaid eligibility under the applicable law is a point of contention between the dissent and us, see note 10, _infra_; however, the result we reach does not depend on the outcome of the debate, and thus we do not resolve it.

provision of the 2001 trust; even assuming that Albert was concerned about his Medicaid eligibility while he was living, Albert surely would not have been concerned about Medicaid eligibility after his death. It thus does not make sense for the will to pour over Albert's estate to a trust whose assets must first be distributed to MassHealth. DiGiacomo argues that these objective facts -- in addition to the acknowledged mistake that the trust self-identifies as a (d)(4)(A) trust -- demonstrate that the trial judge committed clear error.

We are not persuaded that the payback provision was a mistake in its entirety. First of all, the issue the judge decided presents in the first instance as a question of fact -- what was Albert's (the settlor's) intent regarding the 2001 trust? To overturn the judge's factual finding that Albert intended the MassHealth payback provision in order to protect his own Medicaid eligibility, DiGiacomo would have to show that the finding was clearly erroneous, but on appeal DiGiacomo has not even provided us with the trial transcript. We cannot determine that a finding of fact was clearly erroneous under these circumstances. See Mass. R. A. P. 8 (b) (1), as appearing in 481 Mass. 1611 (2019). See also _Connolly_ v. _Connolly_, 400 Mass. 1002, 1003 (1987) ("In order to review factual findings, we must have a record of all the evidence which was before the

judge. The [appellant] has the burden of producing that evidence . . .").

What DiGiacomo appears to argue, however, is that on this record we could decide the question of mistake as a matter of law -- that is, that given the undisputed facts, the only valid legal conclusion is that the payback provision was unnecessary to preserve Albert's Medicaid eligibility, and should not have been included. Once again, we cannot agree. While it is true that Albert held substantial assets in 2001, he was by then seventy years old, and facing the possibility that his own health could deteriorate.[8] The fact that Albert had significant assets in 2001 would not have precluded him from thereafter seeking Medicaid benefits, since Albert could subsequently have transferred his assets into the 2001 trust for Valerie (or to a similar trust vehicle), which would have allowed Albert to be eligible for Medicaid.[9] At the least, and absent a trial

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[8] While perhaps of limited relevance to Albert's intent when the 2001 trust was created, we note that in 2007 Albert was placed under guardianship due to a deterioration of his health.

[9] Indeed, Albert's guardian, Attorney Faith Delaney, testified that just before Albert's death in 2007, she had attempted to dispose of Albert's remaining assets in just such a way, which would have maintained his eligibility for Medicaid benefits had he lived on. The estate plan filed by Attorney Delaney in 2007 outlined how the creation of the 2007 trust, as well as a smaller contribution to a pooled trust for the benefit of Albert, would avoid gift taxes on the transfers and allow Albert to qualify for Medicaid by reducing his total assets to $2,000.

transcript, we cannot say that the judge clearly erred in finding that Albert intended to include the payback provision for this purpose.[10]

2. Reformation of the 2001 trust with respect to assets transferred after Albert's death. We accordingly decline to overturn the judge's ruling, to the extent that it refused to strike the MassHealth payback provision from the 2001 trust.

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[10] The learned dissent is devoted primarily to arguing a question of law that was not argued by DiGiacomo: it contends that under the applicable Medicaid laws the payback provision in the 2001 trust probably could not have served the purpose of preserving Albert's Medicaid eligibility, and accordingly that the judge erred when she concluded that was the purpose of the clause. Post at .

There are two problems with the dissent's analysis (in addition to the fact that the argument was not raised). The first is that the judge's conclusion as to Albert's purpose was a finding of fact, which could only be overturned for clear error after review of a trial record that we were not provided. The second problem is that the dissent is likely incorrect when it contends that Albert could not protect his own Medicaid eligibility by including the payback provision. Post at . The dissent argues as a matter of law that the payback provision could not "play any role in rendering the trust qualifying under (c)(2)(B)(iv)." Post at . It is not at all clear, however, why that should be true. If a parent (Albert) wishes to set up a special needs trust for his daughter (Valerie) with the parent's money, and also wishes to have unused funds pass to other beneficiaries upon the daughter's death, the payback provision would be entirely consistent with the policy of protecting Medicaid's interests while accomplishing these goals. And while the law in this regard is hardly a model of clarity, the applicable Federal guidance document indicates that a special needs trust can satisfy the "sole[] . . . benefit" requirement of (c)(2)(B)(iv) by "provid[ing] that any funds remaining in the trust upon the death of the individual must go to the State, up to the amount of Medicaid benefits paid on the individual's behalf." State Medicaid Manual, supra.

That is not the end of this matter, however. The judge's finding only supplies a basis for the payback provision to apply to transfers made by Albert while Albert was alive, and potentially in need of Medicaid. There was absolutely no need for the payback provision to apply to transfers made after Albert's death. Yet absent reformation, the payback provision of the 2001 trust would apply even to assets transferred to the 2001 trust as a result of the pour-over clause of Albert's will.

We conclude, based upon the operative documents and the judge's findings, that reformation of the 2001 trust is appropriate to prevent the payback provision from applying to assets transferred after Albert's death. As the judge found, there clearly was a "mistake" in the "expression" of the 2001 trust documents. G. L. c. 203E, § 415. The drafter misidentified the legal basis for the 2001 trust, and carried that mistake through several sections of the trust document. The statutory predicate for reformation is thus established. The drafter's error was compounded, moreover, by the will provision that poured over Albert's remaining assets to the 2001 trust at his death. These errors have led to exposing Albert's entire estate to reimbursement to MassHealth.

Albert would not have intended that his estate assets go to the Commonwealth, where they could otherwise go to the beneficiaries he identified from his family. Under the

circumstances, where a mistake is clear in a trust document and where the result of the mistake is evidently at odds with the settlor's intent, reformation is called for. In that regard, we think this case is not unlike First Agric. Bank v. Coxe, 406 Mass. 879, 882 (1990), in which the Supreme Judicial Court concluded that it was appropriate to reform a settlor's will and trust documents, and to separate certain assets in a trust so as to avoid Federal generation skipping transfer (GST) taxes with respect to those separated assets. The court concluded: "We have no doubt that the circumstances the trustee has presented warrant our issuing a declaratory statement or instruction concerning the authority of the trustee to separate Trust A assets in some way so that the GST tax will not apply to [certain trust] distributions . . . ." Id. A similar course is appropriate here. On remand, the judge should reform the trust document, to ensure that assets transferred to the 2001 trust from Albert's estate are not subject to the article 6.2 payback provision.[11,12] The judge should also make such changes as are

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[11] The dissent describes this distinction as being "without principle," but we think the principle is clear. Post at . Transfers of Albert's assets during his lifetime could have affected his Medicaid eligibility, and thus the payback provision had a purpose as to those transfers; the same is not true for estate assets transferred after his death, as to which the payback provision is a clear mistake.

[12] On appeal DiGiacomo presented an alternative argument -- that even if article 6.2 was not removed from the 2001 trust

necessary to ensure that the language referencing (d)(4)(A) no longer has operative effect, in line with the finding that the identified legal basis for the trust was clearly a mistake.

3. The removal of DiGiacomo as trustee and personal representative. After concluding that the 2001 trust would not be reformed, the trial judge also granted MassHealth's petitions to remove DiGiacomo as the personal representative of Albert's estate, see G. L. c. 190B, § 3-611 (b), and as trustee of the 2001 trust, see G. L. c. 203E, § 706 (b). See also Shirk v. Walker, 298 Mass. 251, 259 (1937) ("petition for removal of a trustee is addressed to the reasonable discretion of the court"). Because we conclude that DiGiacomo was correct (in part) that the 2001 trust should be reformed, we also must vacate the portions of the judgments granting the petitions and ordering the removal of DiGiacomo as personal representative of

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document by reformation, MassHealth still was not entitled to any reimbursement upon Valerie's death, due to the language in article 6.2 that MassHealth is to be paid back "as required by law" (emphasis added). DiGiacomo argues that no "law" requires MassHealth's reimbursement, and thus that the payback provision of article 6.2 does not apply.

We note that DiGiacomo attempted to amend his pleadings, belatedly, to present this argument in a request for a declaratory judgment, but the trial judge denied his motion. Passing that point, we find no merit to his contention. In light of our decision today, the payback provision remains in the 2001 trust document and retains its force as to Albert's assets transferred during his lifetime.

Albert's estate and as trustee of the 2001 trust, and remand for reconsideration of those petitions.

General Laws c. 203E, § 706 (a), states that a judge may remove a trustee for, among other grounds, a "persistent failure of the trustee to administer the trust effectively," if "the court determines that removal of the trustee best serves the interests of the beneficiaries." Similarly, G. L. c. 190B, § 3-611 (b), provides that a personal representative may be removed for cause if he has "failed to perform any duty pertaining to the office."

The judge's decisions removing DiGiacomo as trustee of the 2001 trust and as personal representative of Albert's estate were in each instance based, in part, upon findings that DiGiacomo failed to file the necessary accountings and inventories, or to keep the required records for both the trust and the estate for several years between Albert's death[13] and the institution of the action to reform the trust in 2015. These findings are not affected by our decision today. However, the judge's rationale also cited the facts that DiGiacomo did not reimburse MassHealth "in accordance with the provisions of the 2001 [t]rust," and "failed to distribute the assets of the

[13] While DiGiacomo, by the terms of the 2001 trust, became successor trustee upon Albert's death, DiGiacomo was not appointed personal representative of Albert's estate until 2009.

estate." Each of these findings was reached in light of the judge's conclusion that the 2001 trust should not be reformed, and that MassHealth was entirely correct about what it was owed. Given our decision today, the findings that DiGiacomo failed to properly distribute the estate and the trust are no longer valid.

We accordingly must vacate the removal orders, and remand those issues so they may be considered anew. We express no view on the ultimate outcome. Trustees and personal representatives are required to administer trusts and estates effectively, and to prepare certain inventories and accountings. See, e.g., G. L. c. 190B, §§ 3-703, 3-706; G. L. c. 203E, §§ 801, 810. Those duties are not to be taken lightly. On the other hand, in this case DiGiacomo correctly identified a serious mistake in the 2001 trust document and in the over-all estate plan, and litigated that issue, despite significant opposition, to a successful result that is faithful to Albert's intent to preserve more of his estate for his beneficiaries, in the event of Valerie's death. See Hardiman v. Hardiman, 11 Mass. App. Ct. 626, 629 (1981) ("Removal is not required, as [a] matter of law, even where there [are grounds that may suffice under some circumstances,] . . . [the court's duty is] to exercise its best judgment under all the circumstances" [quotation and citation omitted]).

Conclusion. Accordingly, the corrected judgments entered on January 15, 2019,[14] in the Probate and Family Court are vacated. On remand, the judge should reform the 2001 trust in accordance with the discussion herein. The judge should also reassess the petitions to remove DiGiacomo as personal representative and as trustee, as well as DiGiacomo's motion for attorney's fees, in light of the reasoning herein.[15]

So ordered.

[14] Nunc pro tunc to April 10, 2017.

[15] DiGiacomo has requested an award of attorney's fees "associated with this appeal." His request is denied, without prejudice to him seeking such fees as may be awardable before the Probate and Family Court judge.

RUBIN, J. (dissenting). In this case, MassHealth seeks to claim for itself hundreds of thousands of dollars from Gino DiGiacomo, the heir of the late Albert Pecce. The trial judge essentially rewrote the trust document for the trust containing that inheritance, saying that it was created to protect Pecce's eligibility for Medicaid under 42 U.S.C. § 1396p(c)(2)(B)(iv) (hereinafter [c][2][B][iv]), and that MassHealth should receive the money. But if one thing is clear, it is that the trust created by this document was not, as the judge concluded, intended to be a trust described under (c)(2)(B)(iv). The majority notes the most obvious indicator that this is not such a trust -- the provision of the will, prepared at the same time as the trust, that made the trust the beneficiary of Pecce's estate. I agree with the majority's conclusion that the money from that estate thus should not go to MassHealth. But the logical consequence of recognizing this trust for what it is, is that MassHealth is not entitled to the corpus of the trust either, and that it, too, may not go to MassHealth but to Pecce's rightful heir. I therefore respectfully dissent from the portion of the majority opinion that, taking an avenue not urged by any party, distinguishes without principle the money from the estate from the remaining corpus of the trust, requiring the latter be paid to MassHealth.

1. Introduction. There are two types of trusts that are relevant to understanding this case. In order to qualify for Medicaid, the total value of an individual applicant's "countable assets" cannot exceed $2,000. 130 Code Mass. Regs. § 520.003(A)(1) (1999).[1] Before one with assets above that amount may qualify for Medicaid, she must pay out of pocket for the expenses for her care until her assets are depleted. See Daley v. Secretary of the Executive Office of Health & Human Servs., 477 Mass. 188, 192 (2017). After her assets have become depleted and are equal to or lower than $2,000, she is then eligible for Medicaid.

Congress concluded that it would be beneficial to certain disabled persons with assets that would otherwise disqualify them from receiving Medicaid if they could utilize those assets for their needs during their lifetime, while having their care paid for by Medicaid. Consequently, Congress enacted 42 U.S.C. § 1396p(d)(4)(A) (hereinafter [d][4][A]). Under this provision, such an individual may place her assets in a (d)(4)(A) trust, and they may be utilized to pay for certain expenses that assistance programs do not cover. These assets, now in a (d)(4)(A) trust, will not be counted in determining the individual's Medicaid eligibility. See Reames v. Oklahoma ex

[1] I cite throughout to the version of the regulations in effect in 2001 when the trust and the will were executed.

rel. Okla. Health Care Auth., 411 F.3d 1164, 1166 (10th Cir. 2005), cert. denied, 546 U.S. 1225 (2006) ([d][4][A] "enables the 'assets' of a disabled individual under the age of [sixty-five] to be contributed to a Special Needs Trust for her benefit without having such assets treated as countable assets for Medicaid purposes"). And, although most transfers of assets during what is described as a look-back period, which can be a period of up to sixty months prior to seeking Medicaid eligibility, renders one ineligible for Medicaid for a certain period of time, see Maine Pooled Disability Trust v. Hamilton, 927 F.3d 52, 56 (1st Cir. 2019); 42 U.S.C. § 1396p(c)(1), a transfer of one's assets into a (d)(4)(A) trust does not render her ineligible for Medicaid.

Although a disabled individual can, in this way, get some benefit from her assets without losing Medicaid eligibility, the point is to protect the individual, not to shield her completely from paying for medical care when she can afford it and instead have Medicaid pay for it. Thus, a trust will qualify as a (d)(4)(A) trust only "if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter." Trusts under (d)(4)(A) thus must contain, as the trust at issue in this case does, a payback provision that provides for this.

In addition, the statute makes clear that a (d)(4)(A) trust must contain the assets of the individual, though it does not prohibit the addition of third-party assets to the trust.

There is a second kind of trust called a "third-party special needs trust," which, as the name suggests, is funded not by the beneficiary, but by someone else. Such a trust may be set up under State law by, for example, a parent, to provide support for an adult disabled child. Under 130 Code Mass. Regs. § 520.024(A)(3) (1999), even though such a trust will benefit a disabled child eligible for Medicaid, it is not counted among her assets for purposes of determining Medicaid eligibility, so long as the trustee has discretion and is not required to distribute the assets or income of the trust to the third party. See, e.g., Miller v. Ibarra, 746 F. Supp. 19, 26-27 (D. Colo. 1990) (listing cases from various States holding that assets in discretionary trust are not considered resource for Medicaid eligibility). There is no requirement that a third-party special needs trust contain a payback provision, and at the death of the disabled beneficiary, if there is any remaining money in the trust, it goes wherever the trust directs.

The transfer of assets of a third party to a trust for the benefit of a disabled individual may not only implicate the beneficiary's eligibility for Medicaid, but -- assuming the

grantor anticipates needing Medicaid within three years[2] -- also the grantor's, because transferring assets during the look-back period can trigger the disqualifying asset transfer rules and make the grantor ineligible for Medicaid. If an individual makes a disqualifying asset transfer during the look-back period, he or she is ineligible to receive MassHealth benefits for a period of time equal to the amount of resources transferred, divided by the average monthly cost to a private patient receiving nursing facility services in Massachusetts. See 130 Code Mass. Regs. § 520.019(G)(1) (1999).

Thus, Congress included in the Medicaid statute (c)(2)(B)(iv). This protects grantors from the asset transfer rules if the assets were transferred to a trust "established solely for the benefit of an individual under [sixty-five] years of age who is disabled." 42 U.S.C. § 1396p(c)(2)(B)(iv).[3]

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[2] The look-back period when Pecce made his asset transfer was three years, though it has been extended to five years since February of 2006. See 42 U.S.C. § 1396p(c)(1)(B); 130 Code Mass. Regs. § 520.023(A)(1) (1999). For present purposes, only a concern about the three years following the transfer of assets into the trust is relevant.

[3] A third party can also protect his own Medicaid eligibility if that is a concern by transferring his own assets to the disabled individual's (d)(4)(A) trust. As described by the majority, the trust at issue here is not a (d)(4)(A) trust because it included none of the disabled individual's own assets. DiGiacomo argues with some force that, if Pecce's assets had been put in a properly created (d)(4)(A) trust, the payback provision would not apply to them because the statutory restriction that requires repayment from the assets in the trust

Third-party special needs trusts that qualify under (c)(2)(B)(iv) protect the Medicaid eligibility of the disabled beneficiary and the third-party grantor. Significantly, such trusts do not require a payback provision in order to protect the grantor from disqualification from Medicaid due to the asset transfer to the trust. Rather, the trust must be for the sole benefit of the disabled individual. This has been construed by some courts to mean that no other individual or entity except for the beneficiary can benefit from the assets transferred in any way at the time of the transfer or any time in the future. See Hobbs ex rel. Hobbs v. Zenderman, 579 F.3d 1171, 1186 (10th Cir. 2009). It appears to be an open question whether such trusts qualify under (c)(2)(B)(iv) if they have a contingent beneficiary who takes the corpus of the trust upon the death of the beneficiary, as the trust at issue in this case does. The United States Court of Appeals in at least one circuit has indicated that it does. See Hughes v. McCarthy, 734 F.3d 473,

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in order for the trust corpus not to count as an asset in determining Medicaid eligibility applies only to the assets of the disabled individual that are placed in the trust, so that repayment from third-party funds like Pecce's is not required by law, and therefore not called for by the trust instrument. Section 1396p(d)(2)(B) of 42 U.S.C. provides that "the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual." Because this is not in the end a (d)(4)(A) trust, I need not reach the question whether that is a correct reading of the statute. I respectfully dissent, however, from the majority's rejection without analysis of this argument. See ante at note 12.

481-483 (6th Cir. 2013), cert. denied, 572 U.S. 1034 (2014) (sole benefit in related annuity provision of statute does not necessarily mean contingent beneficiary cannot be named). MassHealth, on the other hand, cites a letter dated June 27, 2005, to a Maryland attorney from the director of the division of eligibility, enrollment and outreach at the Department of Health & Human Services Center for Medicaid and State Operations, disabled and elderly health programs group (2005 letter) that states that a third-party special needs trust can qualify under (c)(2)(B)(iv) only if any remaining trust funds pass to the beneficiary's estate at her death.

But even assuming that is true, there is no construction under which a payback provision is required, or under which a payback provision renders an otherwise noncompliant trust qualifying under (c)(2)(B)(iv). If the rule permits a contingent beneficiary, here, ultimately, DiGiacomo, what remains in the trust could pass to him without disqualifying the trust under (c)(2)(B)(iv). If a (c)(2)(B)(iv) trust must have no contingent beneficiary -- and of course, the trust in this case does -- in order for this trust to qualify, any trust assets remaining in the trust at the time of the beneficiary's death must pass to her estate. MassHealth does have the statutory authority to seek reimbursement from an individual's estate for benefits paid on behalf of the disabled individual,

but only those benefits paid after the individual turned age fifty-five. See 42 U.S.C. § 1396p(b)(1)(B); 130 Code Mass. Regs. § 501.013(A)(1) (1998). In this case, Pecce's daughter died at age fifty-two, so, even if the 2005 letter on which MassHealth relies were correct, had this trust been set up properly as a (c)(2)(B)(iv) qualifying trust -- a trust to protect Pecce's own Medicaid eligibility while providing funds to his daughter -- with the remainder of the trust passing at his daughter's death to her estate, MassHealth would not be entitled to collect anything from the daughter's estate. And in neither case would a payback provision either be required, or play any role in rendering the trust qualifying under (c)(2)(B)(iv). Payback provisions are ordinarily a feature of (d)(4)(A) trusts, and only (d)(4)(A) trusts.

2. Discussion. The trust at issue here states that the trust is a (d)(4)(A) trust. It is set up to benefit Pecce's severely disabled adult daughter. Indeed, the trust specifically says that it shall be "interpreted by all interested parties solely in a manner which is consistent with" (d)(4)(A). There is no suggestion that it is drafted as anything other than a (d)(4)(A) trust. It includes a payback provision, as all (d)(4)(A) trusts must.

It was, however, not funded with any assets of the disabled individual, here, Pecce's daughter. For this reason and this

reason alone, it is not a proper (d)(4)(A) trust; indeed, if even one dollar of Pecce's daughter's had been placed in the trust along with Pecce's assets, it would be a valid (d)(4)(A) trust.

The majority and I agree that this is not properly a (d)(4)(A) trust. Although the trust was intentionally written to include a payback provision, as all (d)(4)(A) trusts must be, because it is not a (d)(4)(A) trust, none was required. Rather, the way to carry out Pecce's intention to provide for his daughter while protecting her Medicaid eligibility would be by reforming the trust into a third-party special needs trust, without the unwarranted payback provision: if one wanted to achieve the goals of a person who set up a (d)(4)(A) trust -- providing for Pecce's disabled daughter, while preserving her eligibility for Medicaid -- and one understood that when funding it with only the grantor's assets, no payback under (d)(4)(A) is required, one would set up a third-party special needs trust. Such trusts have no payback provisions because they are unnecessary.

MassHealth argues, though, that even if we conclude that Pecce's intent was to protect his daughter, and that inclusion of the payback provision was unnecessary to achieve that goal and would have been a mistake requiring reformation, the payback provision must nonetheless be enforced and must be used to pay

MassHealth the assets in the trust at Pecce's daughter's death, <u>and</u> Pecce's entire estate, because Pecce, the grantor, intended with this trust to protect his <u>own</u> Medicaid eligibility. The judge found as a fact that that was Pecce's intent.

But even assuming that factual finding is not clearly erroneous -- and for reasons described herein, I am certain it is -- it cannot justify the payback provision. MassHealth argues that by including the payback provision, Pecce created a trust that would qualify under (c)(2)(B)(iv) and therefore preserve <u>his</u> Medicaid eligibility. MassHealth asserts that "Albert wished to preserve his own Medicaid eligibility in 2001 by including a payback provision that would exempt the trust from the disqualifying transfer rule." MassHealth also says that if a special needs trust "provides for distribution of trust assets to a contingent beneficiary in the event of the death of the disabled beneficiary, a [S]tate Medicaid program could seek reimbursement of benefits paid on behalf of the disabled individual <u>or, alternatively, the trust could directly provide for reimbursement to the State before distribution to the contingent beneficiary</u>" (emphasis added).

But there is no support for that highlighted statement and it appears to be incorrect. A payback provision is not required in a sole benefit trust in order for it to qualify under (c)(2)(B)(iv) and, more importantly, inclusion of such a

provision appears not to render the trust compliant with (c)(2)(B)(iv). The source MassHealth cites in support of the proposition highlighted above, the 2005 letter, does not say that it does. The letter specifically says instead that if a grantor sets up a trust for a disabled child and wants it to qualify under (c)(2)(B)(iv) to protect the grantor's own Medicaid eligibility, "there should be no contingent or remainder beneficiaries. At the death of the beneficiary any remainder could be payable to the beneficiary's estate. This would . . . permit the State Medicaid program to enforce a claim for reimbursement of amounts it has paid out to the individual, if any." As described above, the only amounts subject to reimbursement by the beneficiary's estate in such circumstances are those spent after the individual turns age fifty-five; there are no such amounts at issue here.[4]

[4] The 2005 letter notes that a grantor can also protect himself under (c)(2)(B)(iv) by transferring his assets to a (d)(4)(A) trust that complies with the "requirement that the trust instrument provide that any funds remaining in the trust upon the death of the individual, i.e. the disabled trust beneficiary, not the original transferor, must go to the State up to the amount of Medicaid benefits paid on the individual's behalf." But of course, the majority is in agreement that this is not a (d)(4)(A) trust. A provision of the State Medicaid Manual that was cited by the judge for the proposition that the payback provision renders the trust qualifying under (c)(2)(B)(iv) likewise refers only to placement of one's assets in an existing (d)(4)(A) trust.

The majority argues that inclusion of a payback provision "likely" would work to protect the grantor's Medicaid eligibility. Ante at note 7. It notes that it is "not at all clear" why it would not work. Ante at note 10. For the reasons described, I think such a provision appears not to render the trust qualifying under (c)(2)(B)(iv), so a trust including one likely would not protect the grantor. For the reasons it gives, the majority thinks it likely would. What is clear is that this is an open question that has never been litigated in any jurisdiction anywhere in the United States.

But that proves my point. This trust was not put together willy-nilly by a pro se party. A trained lawyer drafted it and, if the intent of the grantor was to protect his Medicaid eligibility, no trained lawyer would do so using an untested mechanism -- a payback provision -- when there is a settled way to do so, one that, in the case of the beneficiary's death before age fifty-five, as ultimately occurred here, would have resulted in no payments to MassHealth being required, rather than the payment of everything left in the trust. The judge's conclusion that the payback provision evinces an intent on Pecce's part to protect his Medicaid eligibility is thus based on an error of law.

Even assuming the 2005 letter has some authoritative weight, because this trust contains a contingent beneficiary, it

could under the letter not protect Pecce's Medicaid eligibility. Nor, if the trust were intended to do so, would its drafter have included a payback provision. Nor, if the trust had been drafted properly in order to protect Pecce's Medicaid eligibility, as a sole benefit trust that directed any remaining trust assets to Pecce's daughter's estate at her death, would MassHealth be entitled to any reimbursement under the facts of this case.

Thus, even if the judge were correct that Pecce intended to preserve his Medicaid eligibility in the face of the disqualifying transfer rules, he would not have needed to create a trust with a payback provision to ensure that eligibility, nor would inclusion of such a payback provision be a rational way to render the trust qualifying under (c)(2)(B)(iv).

Nor, in any event, is there any other indication anywhere in the trust document itself that it was intended to protect Pecce's Medicaid eligibility. Indeed, there is clear documentary evidence in its text that this trust was <u>not</u> intended to preserve Pecce's own eligibility for Medicaid. First, MassHealth has not explained why, if one did set up a trust that qualified under (c)(2)(B)(iv) because one was concerned about qualifying for Medicaid, one would not place all or substantially all of one's countable assets in that trust or other qualifying trusts. In this case, the great bulk of

Pecce's assets were not put in the trust, which he funded with only $200,000. His other liquid assets were valued at about $450,000, almost certainly putting him significantly over the $2,000 countable asset limit, and would have disqualified him for Medicaid regardless of whether he transferred the assets to a (c)(2)(B)(iv) trust or not. There is no reason put forward by MassHealth that one would create a (c)(2)(B)(iv) trust and put some small amount of one's assets in it leaving the rest subject to the depletion requirement before one could be eligible for Medicaid.

Second, and most tellingly, as part of the same package of documents that included the trust, Pecce executed a will, which left his entire estate to the trust. As the majority correctly notes, no one would ever do that if this were intended as a trust qualifying under (c)(2)(B)(iv). The point of such a trust is to transfer assets to a disabled individual for her use without triggering the asset transfer rules for oneself. Of course, once one has died, one has no need to worry about the asset transfer rules or qualifying for Medicaid, so there would be no point in transferring one's estate into a (c)(2)(B)(iv) qualifying trust. Putting one's estate into such a trust with a payback provision (or even a trust potentially subject to a claim for reimbursement from MassHealth) would amount to needlessly gifting it to the State after death -- which is

precisely what one is trying to avoid by creating an estate plan. There is no basis, except a misunderstanding of the law, for imputing to Pecce this irrational intent.

The majority, being composed of reasonable people, of course recognizes this latter point and, as a consequence, it holds that the money in Pecce's estate must go to his heir not to the trust. But the logical consequence of recognizing that these provisions, Pecce's actions, and, indeed, the state of Federal law, are inconsistent with this being a (c)(2)(B)(iv) qualifying trust, would be to conclude that this is <u>not</u> a (c)(2)(B)(iv) qualifying trust, and that nothing in the trust, either the assets put into it or the estate that was supposed to be paid into it, must be paid over to MassHealth. To the extent the majority, rather than following this logic to its conclusion, decides to split the baby and to give MassHealth money placed in the trust to which it is not entitled, I respectfully dissent.