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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

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Alabama Medicaid Agency

v.

I. Ripton Britton, Jr., as trustee of the Cinnamon
Calhoun Supplemental Needs Trust

Appeal from Talladega Circuit Court
(CV-14-900099)

EDWARDS, Judge.

The Alabama Medicaid Agency ("the Agency") appeals from an April 5, 2019, order entered by the Talladega Circuit Court ("the trial court") regarding the final settlement of the

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Cinnamon Calhoun Supplemental Needs Trust ("the trust"). Specifically, the Agency appeals regarding the trial court's approval of a \$1,500 fee paid to I. Ripton Britton, Jr., in his capacity as trustee of the trust, for his services as trustee during 2018.

Based on the record before us, the trial court established the trust for Cinnamon Calhoun ("Cinnamon") pursuant to an order entered under 42 U.S.C. § 1396p and as reflected in a trust agreement dated December 16, 1997 ("the trust agreement"). The corpus of the trust apparently was derived from the settlement of litigation for Cinnamon's benefit. The trust agreement states that Cinnamon suffered from severe physical and mental disabilities and that the trust was intended to provide "a system for fiscal management, investment and disbursement, respite care, personal attendant services, advocacy, social development services, rehabilitation, care, and management for Cinnamon." The trust agreement states that the "secondary intention" of the trust was to conserve the trust corpus without displacing Cinnamon's eligibility for public or private benefits that might be available to her. Article III of the trust agreement states

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that the duration of the trust was for Cinnamon's life and that, upon her death,

"any assets remaining in the [t]rust estate shall be distributed by the [t]rustee to the [Agency] or any such other agency as may provide or administer Medicaid assistance to [Cinnamon] to the extent that such agency has expended funds for the use and benefit, care or treatment of [Cinnamon]; and, if after such distribution, any funds remain, then they shall be distributed to the heirs-at-law of [Cinnamon]

"After the [t]rustee has reimbursed itself for all fees and expenses, the [t]rustee shall then wind up and close the [t]rust estate."

The trust agreement further provides that "the Trustee may be reasonably compensated for its services" and authorizes the trustee (1) to "pay such expenses, costs and taxes, if any, deemed by the [t]rustee to be lawfully chargeable to the [t]rust estate ... and to exercise all powers granted by law" and (2) to "pay from and out of the income of the trust estate, or the principal thereof if necessary, any and all expense reasonably necessary for the administration of the trust"

Regions Bank served as the initial trustee of the trust. In August 2014, Regions Bank resigned as trustee, and the trial court appointed Britton as the successor trustee of the

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trust ("the trustee"). Cinnamon died in October 2018. The trustee notified the Agency of Cinnamon's death, and the Agency thereafter filed a claim with the trustee for the lesser of \$51,744.28 or the balance of the trust corpus. Based on an affidavit from a representative of the Agency, \$51,744.28 was the amount of Medicaid benefits the Agency had paid on Cinnamon's behalf from January 1997 through July 2010. The Agency's claim was included with a letter to the trustee dated December 6, 2018.

On December 27, 2018, the trustee paid himself \$1,500 as compensation ("the December 2018 compensation") from the trust. On January 8, 2019, the trustee filed a petition for final settlement of the trust in the trial court. In part, the petition alleged that the Agency had filed a claim with the trust that exceeded the \$12,024.27 remaining balance of the trust corpus. The petition further alleged that the trustee had filed annual reports with Cinnamon's mother in 2015, 2016, and 2017 and that those reports reflected the payment of the trustee's compensation in the amounts of \$1,938.28, \$1,875, and \$1,500, respectively. The petition

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also included a report for 2018 that reflected that the trustee had paid himself the December 2018 compensation.

The trial court held a hearing regarding the trustee's petition for final settlement. The hearing was attended by the trustee and his counsel, counsel for the Agency, Cinnamon's mother, and Cinnamon's former guardian ad litem. At the hearing, the Agency objected to the trustee's payment of the December 2018 compensation; the Agency had no objection to the trustee's compensation paid before Cinnamon's death. According to the Agency, because the December 2018 compensation was for services provided during Cinnamon's life, 42 U.S.C. § 1396p(d)(4)(A), as interpreted by the Social Security Administration's Program Operations Manual System ("POMS"),¹ prohibited any payment of that compensation until after the Agency received full payment for its claim.²

¹On the date this opinion was released, the most current version of the POMS could be located online at the following Web address: <https://secure.ssa.gov/apps101>.

²The Alabama Uniform Trust Code, Ala. Code 1975, § 19-3B-101 et seq., provides that its provisions do not

"apply to any special needs trust, ... including without limitation, any trust established pursuant to the provisions of 42 U.S.C. § 1396p(d)(4)A or C ... to the extent that such provision would

On March 6, 2019, the trial court entered a final-settlement order that states:

"The [t]rustee has provided periodic reports of his actions to the beneficiary, to which there has been no objection previously made to the [t]rustee, and has brought his reporting up to date for the Court. The [t]rust balance at the present time is \$12,024.27.

"The Court accepts the accounting as provided by the [t]rustee. The duly appointed Guardian ad Litem also informed the Court that he reviewed the accounting submitted by the [t]rustee and it was complete and proper in all respects.

"The only objection to the [t]rustee's report was made by the [Agency] regarding the December 2018 trustee fee of \$1,500.00. This fee was taken by the [t]rustee after the death of Cinnamon Calhoun. The fee was for the [t]rustee's services that were rendered in 2018 prior to the death of Cinnamon Calhoun. [The Agency's] objection was based on the provision of the federal Medicaid Act that sets up the resource counting exclusion for special needs trusts. That provision requires that all funds remaining in a special needs trust be paid to [the Agency] (up to the amount of medical assistance provided) upon the death of beneficiary. 42 U.S.C. § 1396p(d)(4)(A). [The Agency] argued that the Court should follow the Social Security Administration's interpretation of § 1396p(d)(4)(A), which is found in the SSA's Program Operations Manual System

disqualify such trust beneficiary at any time from eligibility for public needs-based assistance benefits for which the beneficiary would otherwise qualify."

Ala. Code 1975, § 19-3B-1101.

(POMS). The applicable provision in POMS allows for certain types of distributions to be made prior to [the Agency's] reimbursement. POMS SI 001120.203E.1. The provision also specifically excludes certain types of distributions. POMS SI 001120.203E.2. [The Agency] objected to the December 2018 trustee fee being taken prior to [the Agency's] reimbursement on the grounds that such a distribution under the federal statute and POMS is a third-party debt that might be satisfied from the [t]rust after [the Agency's] reimbursement or made as a creditor claim against the estate of the beneficiary.

"The Court, however, finds that the [t]rustee is not a third-party debtor. The \$1,500.00 ... fee is proper and falls under the 'Allowable Administrative Expenses,' specifically -- 'reasonable fees for administration of the trust estate'"

The March 2019 order approved the trustee's payment of the December 2018 compensation, accepted the trustee's accounting, and ordered the final distribution of the \$12,024.27 remaining in the trust, including distributions of \$10,441.47 to the Agency, \$1,250 for the trustee's attorney's fees incurred in connection with the final settlement, and \$332.80 for court costs.

The Agency timely filed a postjudgment motion, arguing that

"[§] 1396p(d)(4)(A) states '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.' 42 U.S.C.A. § 1396p(d)(4)(A) The Agency] has interpreted that provision to allow a reasonable trustee fee (and the associated attorney's fees) for closing or settling the trust that is taken before [the Agency] is reimbursed, but also to forbid a trustee fee for services provided during the beneficiary's life that is taken after the beneficiary's death and before [the Agency] is reimbursed.

"The plain language of ... § 1396p(d)(4)(A) does not speak directly to the issue of whether a reasonable trustee fee (and the associated attorney's fees) for closing or settling the trust that is taken before [the Agency] is reimbursed is allowable or forbidden. Nor does it speak directly to the issue of whether a trustee fee for services provided during the beneficiary's life that is taken after the beneficiary's death and before [the Agency] is reimbursed is allowable or forbidden. As noted below, regarding the silence in the provision, [the Agency] could take a stricter interpretation of § 1396p(d)(4)(A) and interpret the provision to require that nothing is allowed to be paid before [the Agency] is reimbursed. But [the Agency] has not chosen to do so, and instead takes the more expansive interpretation.

"If the plain language of § 1396p(d)(4)(A) did speak to the issue, then neither type of fees would be allowable; both would be forbidden. If a court found that the plain language is not silent or ambiguous, and that the phrase 'upon the death of the beneficiary' is absolute and immediate, then any distribution before [the Agency] is reimbursed would be forbidden. Since the language of § 1396p(d)(4)(A) does not speak directly to that issue, [the Agency] has interpreted the provision and its reasonable interpretation is due deference.

"[The Agency], as does POMS, has interpreted § 1396p(d)(4)(A) to also exclude '[1] Taxes due from

the estate of the beneficiary other than those arising from inclusion of the trust in the estate; [2] Inheritance taxes due for residual beneficiaries; [3] Payment of debts owed to third parties; [4] funeral expenses; and [5] Payments to residual beneficiaries.' POMS SI 001120.203.E.2. [The Agency] interprets the statute to exclude these because if not excluded, these types of distributions would in many cases exhaust a trust before [the Agency] is reimbursed. That result is clearly not what Congress intended by requiring the Medicaid payback provision. As noted above, [the Agency's] interpretation of § 1396p(d)(4)(A) allows it to treat trustee fees for services provided during the beneficiary's life but that are not taken before the beneficiary's death the same as it treats funeral expenses. [The Agency] interprets § 1396p(d)(4)(A), as does POMS, to allow funeral expenses to be pre-paid before the beneficiary's death but not to be paid after the beneficiary's death before [the Agency] is reimbursed. POMS SI 001120.203.E.3. [The Agency's] interpretation of the statute is reasonable. ...

"[The Agency] could take a stricter interpretation of § 1396p(d)(4)(A) and interpret the provision to require that nothing is allowed to be paid before [the Agency] is reimbursed. [The Agency] could object to the payment of any kind of distribution before it is reimbursed; however, [the Agency] has chosen to interpret the provision expansively and allow the 'allowable expenses' noted above. While the stricter interpretation is reasonable, so is [the Agency's] more expansive interpretation."

The Agency's postjudgment motion was denied by operation of law. See Rule 59.1, Ala. R. Civ. P. The Agency appealed to this court.

The Agency argues on appeal that the trial court's approval of the December 2018 compensation is contrary to the Agency's interpretation of § 1396p(d)(4)(A), as reflected in POMS, Supplemental Security Income ("SI") 01120.203E.³ The Agency makes no argument that the \$1,250 for the trustee's attorney's fees incurred in connection with the final settlement or the \$332.80 for court costs were improper. The Agency also makes arguments on appeal that it did not make before the trial court. For example, the Agency argues that the plain language of § 1396p(d)(4)(A) alone and that the language of the trust required the trial court to reject the trustee's position that he could pay the December 2018 compensation before the Agency's claim was fully satisfied. It is well settled, however, that trial-court error cannot be predicated on an argument not made to that court, and we will

³The Agency presented no evidence to the trial court indicating that the Agency had adopted a policy other than as reflected in POMS SI 01120.203E., and the Agency has not directed this court to any regulation or formally adopted policy of the Agency that differs from POMS SI 01120.203E. Likewise, the Agency has not argued that its interpretation of § 1396p(d)(4)(A), although inconsistent with POMS SI 01120.203E., is nevertheless a reasonable interpretation of § 1396p(d)(4)(A). Instead, the Agency has consistently argued that its interpretation of § 1396p(d)(4)(A) is accurately reflected by POMS SI 01120.203E.

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not consider those arguments. See, e.g., Alexander v. Burch, 968 So. 2d 992, 997 n.3 (Ala. 2006).⁴

The pertinent facts are undisputed, and the Agency's argument concerns the law and the application of the law to those facts. We review such matters de novo. See, e.g., Ex parte Skelton, 275 So. 3d 144, 150 (Ala. 2018); Ex parte Capstone Bldg. Corp., 96 So. 3d 77, 81 (Ala. 2012).

Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., governs Medicaid, a medical-assistance program jointly financed by federal and state governments. The Agency administers the Medicaid plan for Alabama. As noted above, the trust was created pursuant to 42 U.S.C. § 1396p in order to take advantage of a resource exception described in § 1396p(d)(4)(A); that exception provides that the existence of

⁴Application of this principle of appellate review is particularly appropriate in the present case because the Agency's argument to the trial court was predicated on the deference that the trial court owed to the relevant administrative interpretation of § 1396p(d)(4)(A) as reflected in POMS SI 01120.203E. See Alabama Medicaid Agency v. Hardy, 202 So. 3d 690, 698 (Ala. Civ. App. 2016). In contrast to that argument, the Agency's plain-language argument addresses a different issue, namely, whether the trial court erred by not following the plain language of § 1396p(d)(4)(A) in contravention of the interpretation of the Agency and the Social Security Administration as reflected in POMS SI 01120.203E.

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the trust corpus and the income from the trust would not disqualify Cinnamon from eligibility for Medicaid benefits. See 42 U.S.C. § 1396p(d)(1) ("For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan ..., subject to paragraph (4) [of § 1396p(d)], the rules specified in paragraph (3) [of § 1396p(d)] shall apply to a trust established by such individual."); 42 U.S.C. § 1396p(d)(2)(A)(iii) (providing that a trust created by a court may be treated as having been created by the individual); 42 U.S.C. § 1396p(d)(3) (describing when a trust is included as part of an individual's available resources for purposes of determining the individual's eligibility for Medicaid benefits).

Section § 1396p(d)(4)(A) states that a trust shall not be included for purposes of determining an individual's eligibility for Medicaid benefits when that

"trust contain[s] the assets of an individual under age 65 who is disabled ... and ... is established for the benefit of such individual by ... a court 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 [42 U.S.C. § 1396 et seq.]."

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The Agency's argument regarding the meaning and application of § 1396p(d)(4)(A) hinged on the following provision from POMS SI 01120.203:

"E. Allowable and Prohibited Expenses

"The following instructions, about trust expenses and payments, apply to Medicaid special needs trusts

"1. Allowable administrative expenses

"Upon the death of the trust beneficiary, the trust may pay the following types of administrative expenses from the trust prior to reimbursement of the State[] for medical assistance:

- "• Taxes due from the trust to the State[] or Federal government because of the death of the beneficiary;

- "• Reasonable fees for administration of the trust estate, such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust.

"2. Prohibited expenses and payments

"Upon the death of the trust beneficiary, the following are examples of some of the types of expenses and payments not permitted prior to reimbursement of the State[] for medical assistance:

"• Taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate;

"• Inheritance taxes due for residual beneficiaries;

"• Payment of debts owed to third parties;

"• Funeral expenses; and

"• Payments to residual beneficiaries.

"[Note omitted.]

"3. Applicability

"This restriction on payments from the trust applies upon the death of the beneficiary. Payments of fees and administrative expenses during the life of the beneficiary are allowable as permitted by the trust document and are not affected by the State Medicaid reimbursement requirement."⁵

The Agency argues that it "has chosen to interpret [§ 1396p(d)(4)(A)] in the same way the Social Security

⁵The title to POMS SI 01120.203 is "Exceptions to Counting Trusts Established on or after January 1, 2000." However, POMS SI 01120.200 discusses policy instructions for trusts established before January 1, 2000, and references POMS SI 01120.203 regarding the treatment of trust exceptions for purposes of Medicaid eligibility.

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Administration has interpreted that provision" in POMS SI 001120.203E. and that the Agency's

"reasonable interpretation of its governing federal statute is due 'great weight and deference.' Ex parte Chesnut, 208 So. 3d 624, s40 (Ala. 2016); see City of Mobile v. Lawley, 246 So. 3d 147, 149 (Ala. Civ. App. 2017) (stating that a reviewing court should give deference to an agency's interpretation unless it is unreasonable or unsupported by law (quoting Ex parte State Dep't of Revenue, 683 So. 2d 980, 983 (Ala. 1996))."

The Agency is correct that in Ex parte Chesnut, 208 So. 3d 624, 640 (Ala. 2016), the supreme court discussed the general rule that "a reviewing court will accord an interpretation placed on a statute or an ordinance by an administrative agency charged with its enforcement great weight and deference." See also City of Mobile v. Lawley, 246 So. 3d 147, 149 (Ala. Civ. App. 2017); Ex parte State Dep't of Revenue, 683 So. 2d 980, 983 (Ala. 1996). POMS is not a statute, nor is POMS a regulation; nevertheless, it has been held that POMS may receive deference under Skidmore v. Swift & Co., 323 U.S. 134 (1944). See, e.g., Draper v. Colvin, 779 F.3d 556, 560 (8th Cir. 2015);⁶ see also Alabama Medicaid

⁶According to the Draper court, the deference referenced in Skidmore is applied because "Congress left a gap" for the Social Security Administration to fill for purposes of

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Agency v. Hardy, 202 So. 3d 690 (Ala. Civ. App. 2016). The issue of deference is of no assistance to the Agency's argument, however.

The trial court concluded that reading POMS SI 001120.203E. as a whole supported the conclusion that the December 2018 compensation was within the "[r]easonable fees for administration of the trust estate, such as ... required actions associated with termination and wrapping up of the trust," POMS SI 001120.203E.1., rather than being like the prohibited expenses described in POMS SI 001120.203E.2., such as the trust beneficiary's funeral expenses or "debts owed to third parties." Comparison of the categories of "[a]llowable

interpreting and applying a statute. Draper, 779 F.3 at 560.

"Such deference operates along a spectrum. [United States v. Mead Corp., 533 U.S. 218,] 228, 121 S. Ct. 2164[, 150 L. Ed. 2d 292 (2001)]. The amount of deference afforded to an agency interpretation under Skidmore turns on several factors, including: (1) the thoroughness of the agency's consideration, (2) the validity of its reasoning, (3) consistency with earlier and later pronouncements, (4) formality, (5) expertise of the agency, and (6) all those other factors 'which give it power to persuade, if lacking power to control.' Id. at 228-29, 121 S. Ct. 2164 (quoting Skidmore, 323 U.S. at 140, 65 S. Ct. 161)."

779 F. 3d at 560-61.

administrative expenses" in POMS SI 001120.203E.1. and the "[p]rohibited expenses and payments" in POMS SI 001120.203E.2. supports the trial court's conclusion, and the Agency's argument to the contrary is not a reasonable reading of the language of POMS SI 001120.203E.⁷ See State v. Hammans, 870 N.E.2d 1071, 1081 (Ind. Ct. App. 2007) ("[L]ogic dictates that the trust corpus becomes subject to distribution only when the process of terminating the trust[, which included the payment of compensation to the trustees for services rendered during the beneficiary's lifetime,] is completed."); see also Stell v. Boulder Cty. Dep't of Soc. Servs., 92 P.3d 910, 917 (Colo. 2004) (stating that § 1396p(d)(4)(A) does not specify whether "'all amounts remaining in the trust'" is "gross or net" of trust expenses). See generally 90A C.J.S. Trusts § 678 (2010) (citing Hammans in support of the well-settled proposition that the "[t]ermination of a trust necessarily requires

⁷The Agency relies on two opinions issued by the attorney general. See Ala. Op. Att'y Gen. No. 2018-005 (Oct. 30, 2017); Ala. Op. Att'y Gen. No. 2002-296 (July 26, 2002). Such advisory opinions are not binding on this court, see Health Care Auth. for Baptist Health v. Central Alabama Radiation Oncology, LLC, [Ms. 1171030, June 28, 2019] ___ So. 3d ___ (Ala. 2019), and neither of those opinions discusses the issue before us.

settlement of all claims against the trust estate"). The December 2018 compensation, which relates to an obligation of the trust itself, is unlike an obligation arising from a trust beneficiary's estate or an obligation relating to residual beneficiaries of the trust other than the Agency. Further, although the Agency argues that the trial court's understanding of POMS SI 001120.203E. was erroneous, the Agency has directed us to no legal authority discussing the application of POMS SI 001120.203E., particularly construing its language as precluding the payment of compensation like the December 2018 compensation as a "[r]easonable fee[] for administration of the trust estate."⁸ Accordingly, we agree

⁸The Agency's argument also requires the unnecessary conclusion that Congress intended to upend the application of generally accepted trust law when it enacted § 1396p(d)(4)(A), without clearly expressing such an intent. Trust law provides that a trustee, who is a party to a trust, has a lien for payment of his or her services to a trust; the trustee is not a third-party creditor of the trust. See Corretti v. First Nat'l Bank of Birmingham, 290 Ala. 280, 288, 276 So. 2d 141, 147 (1973) (The trustee's right to payment "vested in the trustee continuously with the passage of time and as services were rendered to the trust estate."); see also Commissioner of Internal Revenue v. Davis, 132 F.2d 644, 647 (1st Cir. 1943); see generally Mary F. Radford, George Gleason Bogert & George Taylor Bogert, Bogert's The Law of Trusts and Trustees § 975 (3d ed. 2006) (noting the common-law rule that the trustee has a lien on the trust corpus until the trustee has been paid); and Restatement (Third) of Trusts § 38, General Comment,

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with the trial court's conclusion that the December 2018 compensation was due to be paid before the distribution of the trust corpus to the Agency.

The Agency also argues that the trial court was precluded from approving the December 2018 compensation because of the doctrine of immunity. See Alabama Medicaid Agency v. Southcrest Bank, 268 So. 3d 72, 75 (Ala. Civ. App. 2018) ("Reducing [the Agency's] award to pay Southcrest's attorney fee would affect the State coffers."). Southcrest Bank involved a purported award of another party's attorney's fees from interpleaded property awarded to the Agency. Unlike the attorney's fee at issue in Southcrest Bank, the December 2018 compensation was for a trustee's compensation for services rendered before [the Agency] was entitled to receive the remainder of the trust corpus; the trustee's lien on the trust corpus attached as the trustee performed the services for which the December 2018 compensation was paid. See authorities cited in note 8, supra. The Agency's right to payment from the trust, however, arose only upon Cinnamon's

subpart b (2003) ("Before distributing income or principal of the trust, the trustee may withhold funds for such reimbursement or for appropriate compensation.").

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death, and any lien of the Agency could not have attached before her death, i.e., after the attachment of the trustee's lien for the December 2018 compensation. See 42 U.S.C. § 1396p(a)(1) ("No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except" in instances not pertinent to the present case.). Also, the Agency's argument presupposes the conclusions that the Agency's claim to the gross trust corpus is correct on the merits and that immunity means that the Agency's assertion of a claim to property may not be adjudicated in any manner other than in favor of the Agency. Neither Southcrest Bank nor other immunity precedents support such conclusions.

Based on the foregoing, the April 2019 order approving the payment of the December 2018 compensation is affirmed.

AFFIRMED.

Donaldson and Hanson, JJ., concur.

Moore, J., concurs in the result, without writing.

Thompson, P.J., recuses himself.