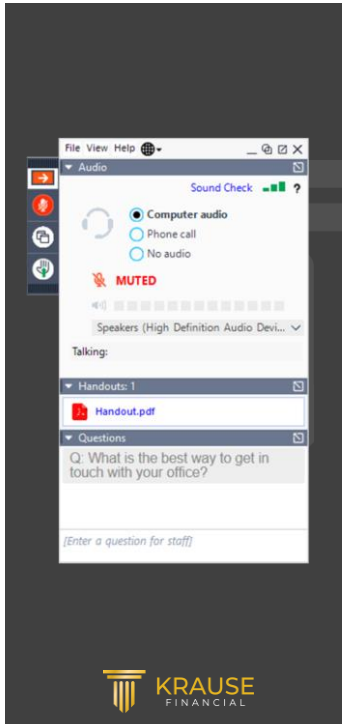


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# Interactive Agenda

Don't forget to complete the survey at the end of today's presentation!



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# Elder Law Debrief

Presented by:

**Jim Wolverton**

*Director of Legal Education*

July 25, 2024

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## About Us

Krause Financial is an attorney-led firm that provides asset preservation solutions for estate planning and elder law attorneys and their clients. Using our specialized insurance products, resources, and support, we help attorneys streamline the process of advising clients planning for long-term care.

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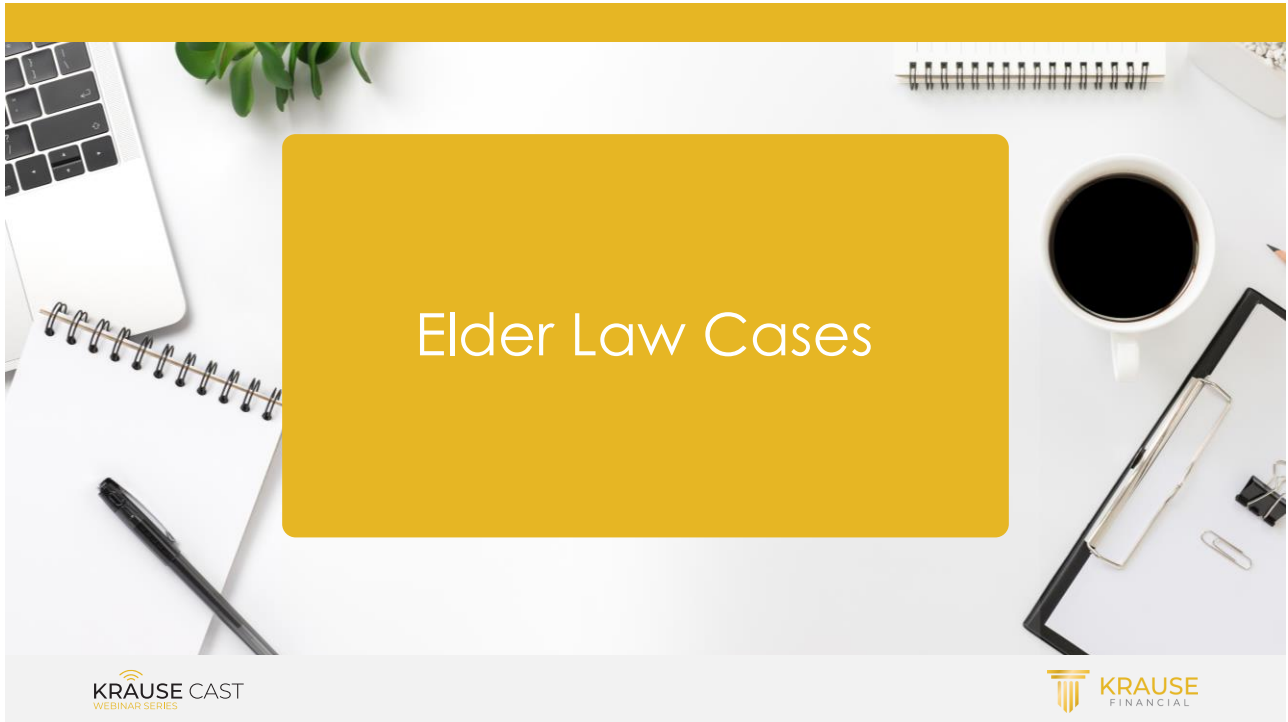


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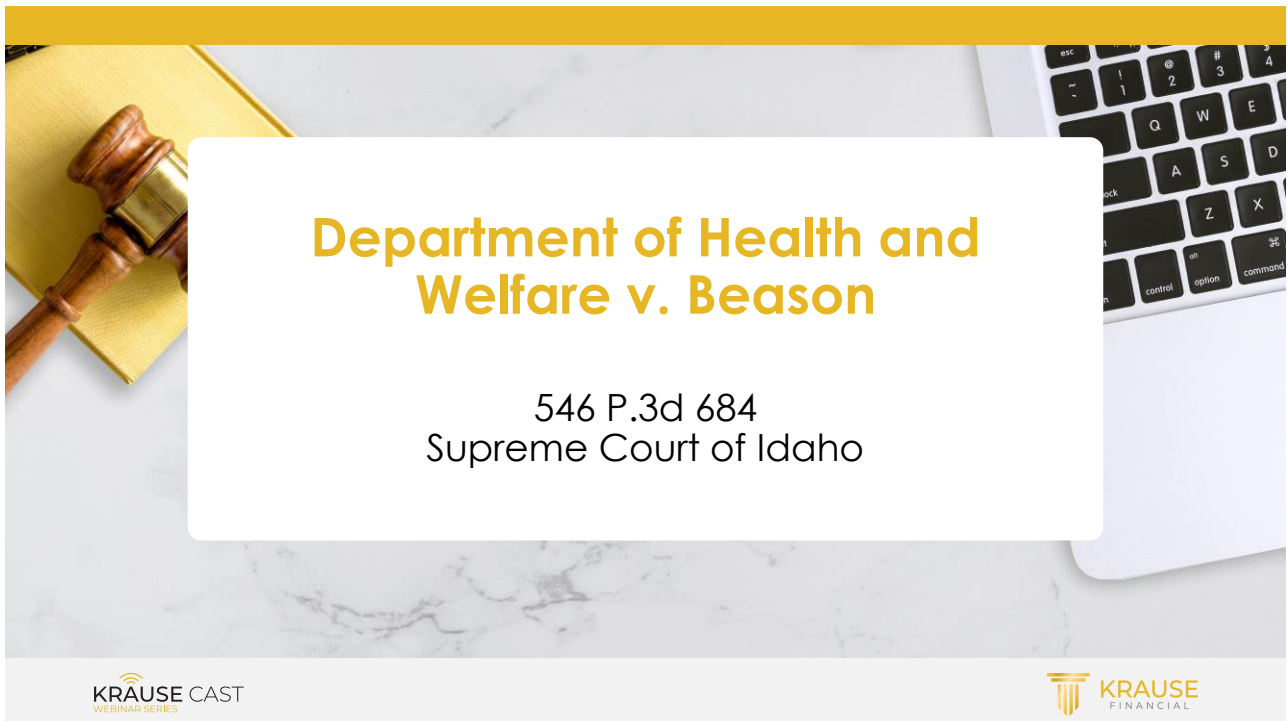


Elder Law Cases

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**Department of Health and  
Welfare v. Beason**

546 P.3d 684  
Supreme Court of Idaho

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## Case Facts

- Robert and Juanita owned property but were divorced in 2005. On the day of their divorce they deeded two quitclaim deeds splitting their property and transferring their respective interests to themselves and their five grandchildren.
- Both deeds stated that the property was transferred “for valuable consideration received”.
- Juanita received Medicaid benefits from 1996 until her death in 2015, totaling \$137,023.29. Robert received Medicaid benefits from 2006 to 2008 totaling \$3,248.31. Robert died in 2017. Robert's and Juanita's estates were probated shortly after his death.

## Case Facts

- In late 2017, the Idaho Department of Health and Welfare (the Department) filed a claim against Juanita's estate.
- The personal representative filed a list of known claims which included a claim by Earl L. Beason based on an injury suffered in 1988. He claimed he was injured on the property and had to be life-flighted to the hospital, which resulted in substantial medical bills. It also stated that Robert and Juanita didn't have insurance that would cover the medical costs stemming from the injury so they agreed to transfer the property to the grandchildren in lieu of litigation.

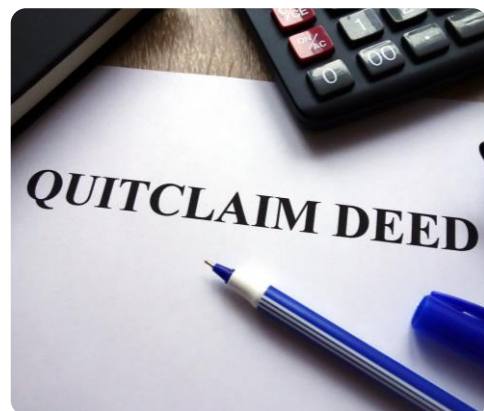
## Case Facts

- In 2021, the Department filed an action against the two estates and the five grandchildren to set aside the two quitclaim deeds.
- The Department alleged that Robert and Juanita did not receive any consideration for the deeds and per Idaho estate recovery statutes the deeds could be set aside.



## Case Facts

- All the grandchildren but Earle L. admitted the transfers were without consideration.
- Earle L. argued that the claim was barred by the statute of limitations and that there was adequate consideration for the transfer.
- The district court ruled for the department on Summary Judgment setting aside the quitclaim deeds.



## Holding – Statute of Limitations

- Idaho estate recovery statutes provide that transfers of real or personal property by recipients of such aid, or their spouses, without adequate consideration are voidable and may be set aside by an action in district court.
- The parties do not dispute that the Department's action to set aside the quitclaim deeds accrued on January 11, 2018. The Department filed this action on February 1, 2021, just over three years after its cause of action accrued.

## Holding – Statute of Limitations

- There are three different statutes of limitations that may apply:
  - A ten year statute of limitations for actions by the State regarding real property by right or title to the property;
  - A four year catch-all statute of limitations; or
  - A three year limitation for an action upon liability created by statute, other than penalty or forfeiture.

## Holding – Statute of Limitations

- The appropriate statute of limitations is determined by the substance, not the form, of the action.
- The focus in Idaho is not on the remedy sought or the type of damages, but on the source of damages.
- The court concludes the catch all statute of limitations of four years applies because the plain language of the other limitations do not apply.

## Holding – Summary Judgment

- The court rules that the Earle L. did not establish a genuine issue of material fact regarding adequate consideration.
- Earle L. alleged that a 1988 agreement, whereby Robert and Juanita agreed to transfer the property to avoid a lawsuit for his injuries provided adequate consideration and that he also made contributions to the property that also provided adequate consideration.



## Holding – Summary Judgment

- The Department met its initial burden of showing the lack of genuine issue regarding adequate consideration by alleging that there was no consideration and the other grandchildren admitted the same.
- The burden then shifted back to Earle. He submitted his own declaration about that agreement and that he maintained the property over the years.

## Holding – Summary Judgment

- He asserted that his parents discussed how to pay for the medical bills and reached an agreement with his grandparents not to sue if the property was turned over to the grandchildren.
- Earle L.'s statements in his declaration are inadmissible due to lack of foundation. He does not state he was present for these conversations or when the agreement was made.





## Holding – Summary Judgment

- His statement about personal contributions to maintain the property do not establish a genuine issue of material fact because they are conclusory and fail to establish both value and an agreement with his grandparents to transfer the property in exchange for the contributions.



## Texas Health and Human Services Commission v. Estate of Burt

689 S.W.3d 274  
Supreme Court of Texas

## Case Facts

- Clyde and Dorothy Burt purchased a house in Cleburne, Texas and lived there many years. In 2010, they sold the house to their daughter and son-in-law, Linda and Robby Wallace. The Burts moved into a rental property the Wallaces owned.
- In August 2017, the Burts moved into a skilled nursing facility. The Burts then purchased back a one-half interest in the Cleburne house from the Wallaces and executed a Lady Bird deed in favor of the Wallaces.

## Case Facts

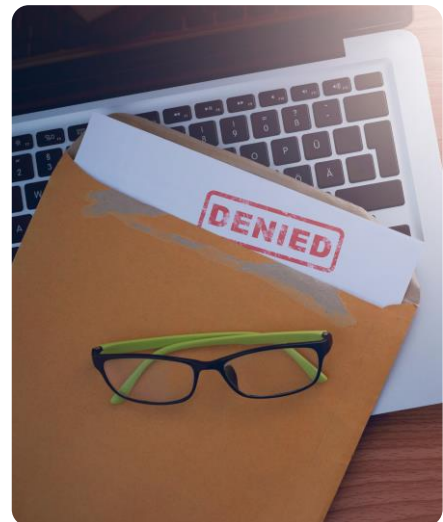
- By executing the Lady Bird deed, the Burts granted their newly acquired one-half interest back to the Wallaces reserving an enhanced life estate.
- As a result, the Burts' undivided one-half interest in the Cleburne house reverted to the Wallaces upon the Burts' deaths.
- After these transactions, the Burts were left with qualifying resources of \$2,016.10.

## Case Facts

- On the day of the sale, Clyde executed Form H1245 stating that he intended to return to the Cleburne as his principal place of residency.
- They submitted the rest of the Medicaid application but they both passed away while it was pending and they never left the skilled nursing facility.
- They incurred \$23,479.35 in costs for their care.

## Case Facts

- The Medicaid application was denied by the agency because the Burts' interest in the Cleburne house was not excludable as a resource for determining Medicaid eligibility.
- On administrative appeal, the agency reasoned that the property interest was not excludable as the Burts' home because the home had not been the Burts' residence in the years before they entered the nursing facility.



## Case Facts

- The executor appealed and the trial court reversed.
- The court of appeals affirmed, holding that an applicant's principal place of residence and home for Medicaid eligibility purposes turns on the applicant's subjective intent.
- They reasoned that the purposes of Medicaid are better served by allowing an applicant to claim the home exemption for a home he buys while in a nursing facility because renters and homeowners will be in the same need of a home upon discharge from the institution.

## Case Facts

- The agency appealed arguing that the expansive interpretation of "home" fails to comport with definition of "home" under state and federal law.



## Holding

- Federal Medicaid statutes state – in determining the resources of an individual there shall be excluded the home (including the land that appertains thereto). The federal law does not define “the home”.
- When a term is undefined by statute we turn to its dictionary definitions. The word “home” is defined in the dictionary as one’s principal place of residence: domicile, and a place where one lives and resides, not merely a structure in which one possesses a partial ownership interest.

## Holding

- At the time the Burts applied for Medicaid, they did not reside in the Cleburne house nor was it their principal place of residence or domicile during the preceding seven years.
- Under the plain language of the statute, the Cleburne house was not their “home”.



## Holding

- The home exemption prevents applicants from having to sell their homes to pay for their care; it does not authorize the conversion of available resources to make them unavailable after the claim for assistance arises.
- The resources calculation instead does the opposite, requiring liquidation of nearly all assets except a home. If an applicant does not own a home before entering care, then the exclusion does not apply.

## Holding

- The Burts' ownership, occupancy, and intent to return home never coincided in the property before their claim for Medicaid assistance arose.
- The agency did not err in calculating the Burts' ineligibility for Medicaid. The Court reverses judgment and renders judgement for the agency.

## Holding

- In a three justice dissenting opinion the focus is rather on the 36 years the Burts lived in the home and that they rented a home for seven years then were in skilled nursing for only three months prior to passing away.
- If anything, being removed from their long-term home for seven years only inspired the Burts to return.



## Lamle by and through Lamle v. Shropshire

Case No. CIV-22-00391-JD  
United States District Court, W.D. Oklahoma

## Case Facts

- Penelope Lamal lives in a nursing home and is physically unable to care for herself. She transferred assets to her son in exchange for a promissory note equal to \$357,000.
- She applied for Medicaid benefits and the agency reached out inquiring about further details concerning the promissory note.



## Case Facts

- The agency asked her whether:
  - she was in the business of lending money or selling property;
  - the borrower offered collateral to secure the promissory note;
  - the borrower did anything with the assets after purchasing them;
  - was the note transferred to a trust or similar device; and
  - was there a pattern of lending and repayment between the parties.



## Case Facts

- She responded stating the note complied with 42 USC 1396(p)(c) and the agency wasn't allowed to ask those questions when making a Medicaid eligibility determination.
- The attorney general's office reached out multiple times and each time she refused to answer.
- The application was denied 197 days after the application was submitted.

## Case Facts

- Two other plaintiffs with similar facts joined this appeal to the federal district court. The agency moved to dismiss the action appealing their Medicaid denials.



## Holding – Agency Asking Questions

- When making the determination of whether something is a resource, the court defers to the POMS.
- For a promissory note to not be considered a resource, it must be from an informal loan that is bona fide.



## Holding – Agency Asking Questions

- An informal loan is bona fide if it meets all of the following requirements:
  - enforceable under state law;
  - loan agreement in effect at time of transaction;
  - acknowledgement of an obligation to repay;
  - plan for repayment; and
  - repayment plan must be feasible
    - POMS SI 1120.220(D)

## Holding – Agency Asking Questions

- Limits on the agency to require information are stated in 42 CFR 435.907(e).
  - The agency may only require an applicant to provide the information necessary to make an eligibility determination for a purpose directly connected to the administration of the State Medicaid plan.
  - The agency may request information necessary to determine eligibility for other insurance affordability or benefit programs.

## Holding – Agency Asking Questions

- The questions asked by the agency were needed to determine whether the regular or trust method should be used to characterize the loan, the loan was informal, and if repayment was feasible.
- Because Plaintiffs allege that they refused to provide the agency answers to these questions and the court determines they were necessary for the agency to make eligibility determinations they have failed to state a plausible claim for relief.

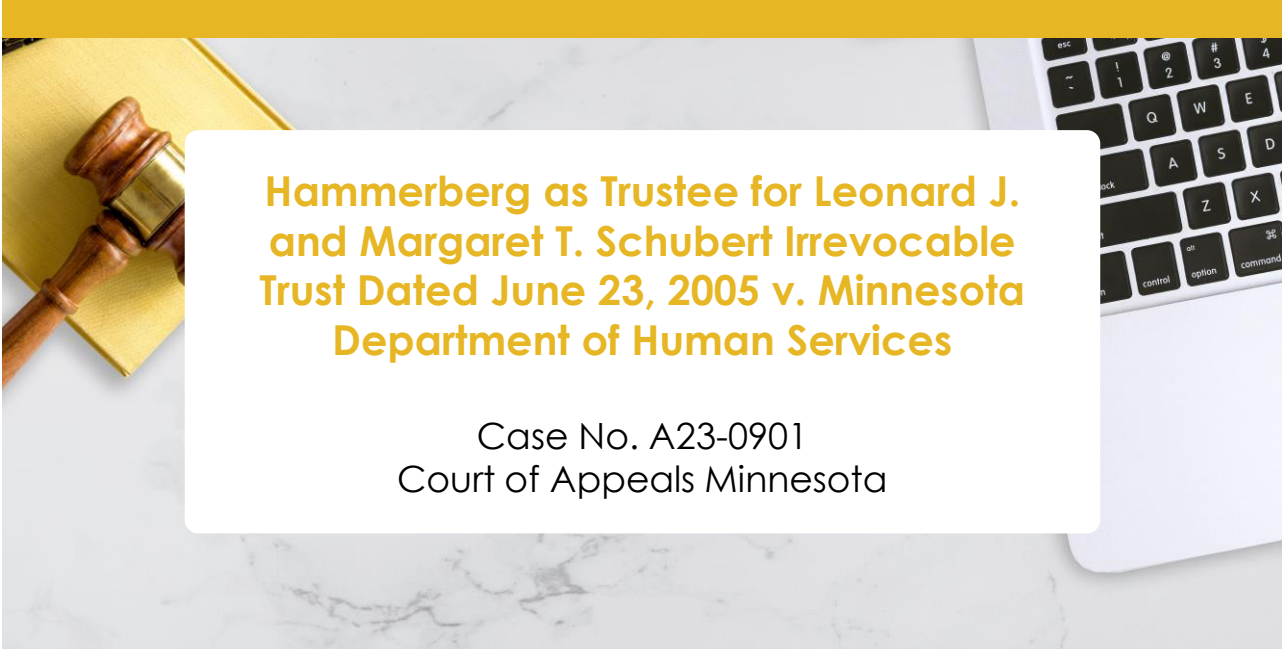


## Holding – Determination Within 45 Days

- Federal Medicaid statutes require reasonable promptness to eligible individuals.
- Reasonable promptness is expounded upon at 42 CFR 435.912 which states the eligibility of any applicant may not exceed forty-five days if exceptions do not apply.
- The agency must determine eligibility with the standards except in unusual circumstances, for example – when the agency cannot reach a decision because the applicant delays or fails to take a required action.

## Holding – Determination Within 45 Days

- The agency asked questions and the Plaintiffs did not provide the information the agency needed to determine their eligibility.
- The reason they did not get their decision within 45 days is because they failed to answer the questions.
- Plaintiffs case is dismissed.
- Plaintiffs have appealed the case to the 10<sup>th</sup> Circuit.



## Hammerberg as Trustee for Leonard J. and Margaret T. Schubert Irrevocable Trust Dated June 23, 2005 v. Minnesota Department of Human Services

Case No. A23-0901  
Court of Appeals Minnesota

## Case Facts

- Leonard and Margaret Schubert created an irrevocable trust in 2005 naming Hammerberg as Trustee.
- They conveyed real property valued at \$480,228 to the trust.
- The trust document stated: “the settlors or survivor of them shall be entitled to the use and possession of any real estate held in trust”.
- They also had a right to trust income.

## Case Facts

- Margaret applied for Medicaid benefits and the real property held in the trust was not considered an asset for qualification purposes.
- She died after receiving \$210,396.93 in Medical Assistance.
- DHS recorded notices of potential claims against the real property held in the trust to recover MA paid on behalf of Margaret.
- Hammerberg requested that the liens be withdrawn because Margaret did not own the real property at the time of her death.
- DHS declined to withdraw the liens.

## Case Facts

- Hammerburg requested a fair hearing and lost at all levels of administrative appeal.
- Hammerburg won at district court. DHS appealed.



## Holding

- Minnesota has expanded their definition for purposes of estate recovery to include:
  - any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust or other arrangement.



## Holding

- DHS requests the court to reverse the district court as the real property held in trust is part of Margaret's estate because, absent the lien, the real property would pass to her heirs upon death via a living trust.
- The trust instrument provided that, upon Margaret's death, the real property would be conveyed to Margaret's heirs through a living trust as required for the real property to be part of Margaret's "estate". Thus, the conveyance falls within the plain language of the statute.

## Holding

- Principles of real property and probate law form the basis for determining whether someone has a legal interest in property at the time of their death.
- For the purposes of estate recovery, “at the time of death” means “a point in time immediately before death”.
- The court concludes Margaret had a legally recognized interest in the real property held in the trust at the time of her death recognized under both real property and probate law.

## Holding

- Based on real property principles, Margaret possessed a qualified beneficial interest in the trust because she was entitled to use, possess and collect any income from the property until her death.
- Probate law similarly indicates Margaret possessed a legal interest in the real property at the time of her death. The trust provided her with the right to determine through her will how the property would be distributed upon her death. Under probate law, a person can only devise by will an interest in property that they personally possess.



## Holding

- The district court's decision is reversed on the ground that the agency correctly determined the real property held in trust was subject to the estate recovery liens.



## Freiner v. Secretary of Executive Office of Health and Human Services

235 N.E.3d 248  
Supreme Court of Massachusetts

## Freiner Case

- Spousal refusal case where community spouse refused to provide information regarding her finances.
- Behind the Case Video:  
<https://access.krausefinancial.com/video-library/freiner-case/>



## Elder Law News

# Chevron Deference Overruled by U.S. Supreme Court

- Chevron doctrine **overruled** in *Loper Bright Enterprises v. Raimondo* on June 28, 2024.
- The Supreme Court determined the Administrative Procedure Act requires courts to exercise their independent judgement in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous.
- Potential implications:
  - Trickle down to state Medicaid agencies interpretation of federal and state Medicaid rules should not hold the weight it once did for the courts?
  - Fair hearings may become more "fair" because the agencies know the courts will exercise independent judgement?
  - Prior deference to state Medicaid agencies could be fertile ground for appeals?

# No Food Reduction for In-Kind Support

- The Social Security Administration updated its regulations to remove food from the unearned income calculations of In-Kind Support and Maintenance (ISM) for SSI benefits.
- Only shelter expenses (room, rent, mortgage payments, real property taxes, heating fuel, gas, electricity, water, sewerage, and garbage collection services) will be considered for ISM deductions.
- The rule goes into effect September 30, 2024.

## Florida Attorney General Gets Involved

- Leo Govoni and other members of the Directed Benefits Foundation, Inc. have been sued personally by the Florida Attorney General for their role in stealing over \$143 million from special needs trusts.
- The civil action was brought under actions for Theft, violating the Florida Anti-Fencing Act and Florida Deceptive and Unfair Trade Practices Act.
- Defendant, Karen Fisher, entered a Consent Final Judgment and Stipulated Permanent Injunction. She is enjoined from engaging in any entity that engages in the business of providing trust administration services including special needs trusts and a civil penalty of \$10,000. Her attached affidavit gives an insight about how this fraud was orchestrated (in the materials).
- The fallout from the bankruptcy case of Center for Special Needs Administration continues to expand: beneficiary lawsuits, campaign donations, Big Storm Brewery eviction, etc.

## US Supreme Court Denies Certiorari

- On June 17, 2024, U.S. Supreme Court denied the Petition for Writ of Certiorari filed by Laurie Dermody.
- The case dealt with state remainder beneficiary status for community spouse annuities.
- See our coverage at: <https://www.krausefinancial.com/blog/u-s-supreme-court-denies-hearing-for-dermody-case/>

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