SUMMARY
July 14, 2022

2022COA75

No. 21CA0206, *Matter of Brockman Disability Trust* — Trusts — Colorado Uniform Trust Code — Disability Trusts — Modification or Termination of Trust — Modification or Termination of Noncharitable Irrevocable Trust by Consent

A division of the court of appeals holds that Colorado Uniform Trust Code, section 15-5-411(5), C.R.S. 2021, is not applicable when a trust terminates by its terms and that Department of Health Care Policy and Financing Regulation 8.100.7.E.6.b.i.e, 10 Code Colo. Regs. 2505-10, is not inconsistent with federal law.

COLORADO COURT OF APPEALS **2022COA75**

Court of Appeals No. 21CA0206
El Paso County District Court No. 20PR30527
Honorable Vincent N. Rahaman, Magistrate

In the Matter of Mendy Brockman Disability Trust,

Jason Brockman, as Trustee of the Mendy Brockman Disability Trust,

Appellant,

v.

Colorado Department of Health Care Policy and Financing,

Appellee.

ORDER AFFIRMED

Division I
Opinion by JUDGE BERGER
Dailey and Tow, JJ., concur

Prior Opinion Announced June 9, 2022, WITHDRAWN

OPINION PREVIOUSLY ANNOUNCED AS "NOT PUBLISHED PURSUANT TO C.A.R. 35(e)" ON JUNE 9, 2022, IS NOW DESIGNATED FOR PUBLICATION

Announced July 14, 2022

Solem, Woodward & McKinley, P.C., R. Eric Solem, Lance E. McKinley, Englewood, Colorado, for Appellant

Philip J. Weiser, Attorney General, Alisa Campbell, Senior Assistant Attorney General, Ryan Lorch, Assistant Attorney General, Denver, Colorado, for Appellee

¶ 1 Jason Brockman, trustee of the Mendy Brockman Disability Trust, appeals the order, entered by a district court magistrate, terminating the trust.[1] We address and reject the trustee's arguments and therefore affirm.

I. Relevant Facts and Procedural History

A. Creation of the Disability Trust

¶ 2 Under federal law, states must consider a beneficiary's interest in a trust when determining financial eligibility for Medicaid. 42 U.S.C. § 1396p(d)(1)-(3). But there are exceptions. One such exception is a disability trust established under 42 U.S.C. § 1396p(d)(4)(A). A qualifying disability trust is *not* considered when determining financial eligibility for Medicaid. *Id.* The beneficiary of a qualifying disability trust must be under age sixty-five. *Id.* The beneficiary must also be disabled as defined by 42 U.S.C.

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[1] The record discloses that the parties either consented (or at a minimum did not object) to a magistrate hearing the matter. No party challenged either in the district court or on appeal the authority of the magistrate. An order issued with consent of the parties is not subject to review by a district court judge under C.R.M. 7(a) but must be appealed directly to this court under the Colorado Rules of Appellate Procedure in the same manner as an order of a district court judge. C.R.M. 7(b). Accordingly, we have appellate jurisdiction.

§ 1382c(a)(3). 42 U.S.C. § 1396p(d)(4)(A). A qualifying disability trust must also provide that the state Medicaid agency must "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." *Id.*

¶ 3 After Mendy Brockman was gravely injured in a car accident, her husband, Mr. Brockman, petitioned the El Paso County district court sitting in probate to establish the Mendy Brockman Disability Trust so that Mrs. Brockman could remain financially eligible for Medicaid. The Colorado Department of Health Care Policy and Financing (Department) reviewed the trust and determined that it conformed to the federal and state requirements for disability trusts. The court approved the trust. The trustee of the trust is Mr. Brockman.

¶ 4 The trust was funded from various sources. After a trial in a personal injury case, Mrs. Brockman was awarded a $31,761,724.04 judgment.[2] Funds recovered from that judgment were placed in the trust.

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[2] The record is silent regarding the amount paid on account of the judgment. That uncertainty has no bearing on our analysis.

¶ 5 A few years later, based on a periodic review of Mrs. Brockman's financial resources, the El Paso County Department of Human Services determined that Mrs. Brockman no longer qualified for Medicaid because she had resources, held outside of the trust, that exceeded the $2,000 Medicaid resource limit. A few months later, the Department demanded that the trust be terminated and that the Department be reimbursed $422,486.60 for medical assistance paid on behalf of Mrs. Brockman.

B. The Federal Lawsuit

¶ 6 Mrs. Brockman did not appeal the El Paso County Department of Human Services' determination that she was no longer financially eligible for Medicaid. Instead, she sought declaratory and injunctive relief in the United States District Court for the District of Colorado. *Brockman v. Bimestefer*, Civ. A. No. 19-CV-1153-WJM-KMT, 2020 WL 730308, at *1 (D. Colo. Feb. 13, 2020).

¶ 7 Mrs. Brockman argued that even though she was then ineligible for Medicaid, she remained disabled and under age sixty-five, so it was possible that she would again, at a later date, be eligible for Medicaid benefits.

¶ 8 The Department moved to dismiss Mrs. Brockman's complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. The federal court dismissed the case for lack of subject matter jurisdiction after concluding that the interpretation of the trust was a matter of state law and there was no statutory basis for federal court jurisdiction. Mrs. Brockman did not appeal the federal court's dismissal.

C. The State Lawsuit

¶ 9 After the federal case was dismissed, the Department filed a petition to terminate the trust in the El Paso County district court. The trustee moved to dismiss under C.R.C.P. 12(b)(5) for failure to state a claim. After allowing the parties to submit supplemental briefing and hearing oral argument on the issue, the district court granted the Department's petition to terminate the trust. The trustee appeals.

II. The Federal Court's Order Does Not Have Preclusive Effect

¶ 10 The trustee argues that the federal court's substantive analysis in its order dismissing the case for lack of subject matter jurisdiction required the district court, and us, to give the order preclusive effect. The federal court's order stated that the trust had

not terminated because there was "no allegation that Mrs. Brockman is no longer qualified to participate in Medicaid, *i.e.*, that she could not be re-approved for Medicaid should she re-apply." We reject the argument that the federal court order has preclusive effect.

¶ 11 When a court concludes that it lacks subject matter jurisdiction, the court must dismiss the case for lack of jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Simply put, a court that determines it lacks subject matter jurisdiction has no authority to address or give an advisory opinion on matters beyond the question of subject matter jurisdiction. *Id.*; *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

¶ 12 Action taken by a court that lacks subject matter jurisdiction is a nullity. *People v. Dillon*, 655 P.2d 841, 844 (Colo. 1982); *People v. Sandoval*, 2016 COA 57, ¶ 47. Thus, the federal court's views on the merits of the dispute before it are a legal nullity.

¶ 13 Because the federal court's analysis regarding the merits is legally void, it is not entitled to any preclusive effect, under either the doctrine of issue preclusion or claim preclusion. *In re Jacobson*,

614 B.R. 321, 328 (Bankr. E.D. Wis. 2020); *accord Pailes v. U.S. Peace Corps*, 783 F. Supp. 2d 1, 6 (D.D.C. 2009).[3]

III. The Plain Language of the Trust Requires Termination on Mrs. Brockman's Death or if Mrs. Brockman Becomes Otherwise Ineligible for Medicaid Benefits in Colorado

¶ 14 The interpretation of a trust is a question of law that we review de novo. *Denver Found. v. Wells Fargo Bank, N.A.*, 163 P.3d 1116, 1122 (Colo. 2007). "Our objective in construing [a] trust, as with any other contract or will, is to determine the intent of the settlors." *Id.* The intent of the settlor should be ascertained from the instrument itself and given effect. *Mass. Co. v. Evans*, 924 P.2d 1119, 1122 (Colo. App. 1996).

¶ 15 Section 15-5-410, C.R.S. 2021, addresses the termination of trusts.

> (1) In addition to the methods of termination prescribed by sections 15-5-411 to 15-5-414, a trust terminates to the extent that:
>
> (a) The trust is revoked or expires pursuant to its terms;

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[3] Though not preclusive, as a matter of comity, we have considered the federal court's views on the merits of this dispute. Respectfully, we do not agree with those views. Instead, for the reasons articulated below, we conclude that the district court correctly applied the applicable law.

> (b) No purpose of the trust remains to be achieved; or
>
> (c) The purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.

¶ 16 The trust's termination provision states:

> This trust shall cease and terminate on the death of Beneficiary or as required by law. Pursuant to Colorado State Medicaid regulations, the Trust is required to terminate if Beneficiary becomes otherwise ineligible for Medicaid benefits in the State of Colorado pursuant to law.

¶ 17 The Department determined that Mrs. Brockman was financially ineligible for Medicaid benefits in Colorado. Mrs. Brockman did not appeal or challenge that determination. Therefore, the trust terminated by its own terms.

IV. Section 15-5-411(2) Does Not Apply to Disability Trusts

¶ 18 Despite the clear and unambiguous trust language, providing that the trust terminates if Mrs. Brockman "becomes otherwise ineligible for Medicaid," the trustee argues that the district court erred by terminating the trust because Mrs. Brockman did not consent to termination.

¶ 19 The trustee relies on the following statute:

> (2) *Other than a trust established by court order under Title XIX of the federal "Social Security Act," 42 U.S.C. sec. 1396p(d)(4)*, a noncharitable irrevocable trust may:
>
> (a) Be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.

§ 15-5-411(2), C.R.S. 2021 (emphasis added).

¶ 20 The Mendy Brockman Disability Trust was approved and established by court order under 42 U.S.C. § 1396p(d)(4). Accordingly, the plain language of section 15-5-411(2) does not apply to the trust, and the trustee's argument (including his argument that the district court erred by failing to apply section 15-5-411(2)) fails.

V. The District Court Did Not Err by Not Addressing Section 15-5-411(5)

¶ 21 The trustee next argues that the district court erred by failing to apply section 15-5-411(5). He claims that statute requires a factual determination that the interests of Mrs. Brockman will be adequately protected before permitting the termination of the trust.

¶ 22 Section 15-5-411(5) states:

> If not all of the beneficiaries consent to a proposed modification or termination of a trust

> pursuant to subsection (1) or (2) of this section, the modification or termination may be approved by the court if the court is satisfied that:
>
> (a) If all of the beneficiaries had consented, the trust could have been modified or terminated pursuant to this section; and
>
> (b) The interests of a beneficiary who does not consent will be adequately protected.

¶ 23 This section is inapplicable, when, as here, the trust terminates by its terms, as permitted by section 15-5-410(1)(a). The Department determined that Mrs. Brockman was ineligible for Medicaid, an event that required termination under the express terms of the trust. Accordingly, this argument fails.

VI. The Colorado Regulation is Not Inconsistent with Federal or State Law

¶ 24 The trustee also contends that the district court erred by terminating the trust because Department of Health Care Policy and Financing Regulation 8.100.7.E.6.b.i.e, 10 Code Colo. Regs. 2505-10, is inconsistent with federal and state law.[4]

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[4] The trustee also argues that he reserved a right to challenge Department of Health Care Policy and Financing Regulation 8.100.7.E.6.b.i.e, 10 Code Colo. Regs. 2505-10, in the trust instrument. The trustee is correct. But, as we conclude in this

A. Applicable Law

¶ 25 The federal statute outlines the minimum requirements of a disability trust. 42 U.S.C. § 1396p(d)(4)(A). One of those requirements is that the state Medicaid agency must "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." *Id.*

¶ 26 Under Colorado law, a disability trust must provide that, "upon the death of the beneficiary or termination of the trust during the beneficiary's lifetime, whichever occurs sooner, the department of health-care policy and financing receives any amount remaining in the trust up to the total medical assistance paid on behalf of the individual." § 15-14-412.8(2)(b), C.R.S. 2021.

¶ 27 Section 15-14-412.8(4) further states that "[n]o disability trust shall be valid unless the department of health-care policy and financing, or its designee, has reviewed the trust and determined

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opinion, the Colorado regulation is not inconsistent with federal or state law. Therefore, the trust terminates by its own terms, which require termination if Mrs. Brockman "becomes otherwise ineligible for Medicaid." *See* § 15-5-410(1)(a), C.R.S. 2021.

that the trust conforms to the requirements of this section and any rules adopted by the medical services board."[5]

¶ 28 Department of Health Care Policy and Financing Regulation 8.100.7.E.6.b.i.e, 10 Code Colo. Regs. 2505-10, states that a disability trust "terminates upon the death of the individual or if the trust is no longer required for Medical Assistance eligibility."

B. The Colorado Regulation is Not Inconsistent with Federal Law

¶ 29 The trustee argues that the Colorado regulation implementing 42 U.S.C. § 1396p(d)(4)(A) is inconsistent with federal law because Congress has directly spoken on the precise question at issue.

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[5] The trustee challenges this statute under Colorado's nondelegation doctrine. The nondelegation doctrine prohibits the General Assembly from delegating legislative power to another branch of government. *People v. Holmes*, 959 P.2d 406, 409 (Colo. 1998). "The General Assembly does not improperly delegate its legislative power 'when it describes what job must be done, who must do it, and the scope of [the] authority.'" *Id.* (quoting *Swisher v. Brown*, 157 Colo. 378, 388, 402 P.2d 621, 626 (1965)). Section 15-14-412.8(4), C.R.S. 2021, does just that. Moreover, as explained below, the Colorado regulation is not inconsistent with, nor does it add to, change, or modify, any existing Colorado statute. *See Graham Furniture Co. v. Indus. Comm'n*, 138 Colo. 244, 249, 331 P.2d 507, 510 (1958); *In re Estate of Liebhardt*, 132 Colo. 554, 557, 290 P.2d 1107, 1108 (1955). Accordingly, the trustee's nondelegation argument fails.

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

¶ 30 But federal law does not prescribe when a disability trust terminates. It does not require a disability trust to terminate when a beneficiary dies or becomes ineligible for Medicaid benefits. Nor does it prohibit a disability trust from terminating under such circumstances.

¶ 31 Federal courts have recognized that states are free to impose additional requirements in areas where Congress has legislated, provided that those additional requirements are not inconsistent with federal law. *Igartua de la Rosa v. United States*, 842 F. Supp. 607, 610 (D.P.R.), *aff'd*, 32 F.3d 8 (1st Cir. 1994); *Zila, Inc. v. Tinnell*, 502 F.3d 1014, 1024 (9th Cir. 2007); *see also Chevron*, 467 U.S. at 842-43 (explaining that when the federal statute "has not directly addressed the precise question at issue," "the question for the court is whether the agency's answer is based on a permissible construction of the statute").

¶ 32 In the disability trust context, this court held that "federal statutes tell the states how to count trusts established pursuant to state law for Medicaid purposes, but none prohibit the states from

requiring trusts to have provisions not set forth in the federal law." *Colo. Dep't of Health Care Pol'y & Fin. v. Est. of Roberts*, 18 P.3d 813, 815-16 (Colo. App. 2000). "[N]othing in the federal law prohibits Colorado from adopting additional trust requirements . . . ." *Id.* at 816.

¶ 33 The trustee attempts to distinguish *Roberts* on the basis that Colorado adopted the Uniform Trust Code after this court announced *Roberts*. But Colorado's Uniform Trust Code does not prohibit termination of disability trusts before the death of the beneficiary. Instead, contrary to the trustee's argument, Colorado's Uniform Trust Code allows trusts to terminate under their own terms. § 15-5-410(1)(a).

¶ 34 The trustee also argues that the Colorado regulation is not a permissible construction of the federal statute because the regulation leads to an absurd result — the forfeiture of trust assets even if a beneficiary is determined to be financially ineligible for Medicaid for one month but may again qualify for Medicaid benefits at a later date.

¶ 35 Even if this were true, "a harsh or unfair result will not render a literal interpretation absurd." *Smith v. Exec. Custom Homes, Inc.*,

230 P.3d 1186, 1191 (Colo. 2010). The Department has conceded that nothing prevents disability trust beneficiaries from establishing a new disability trust if they again become eligible for Medicaid benefits.

¶ 36 For these reasons, we conclude that the Colorado regulation requiring disability trusts to terminate on death or if no longer required for Medicaid eligibility is not inconsistent with federal law.

C. The Colorado Regulation is Not Inconsistent with Section 15-5-411(2)

¶ 37 The trustee also argues that the Colorado regulation is inconsistent with section 15-5-411(2).

¶ 38 As analyzed above, section 15-5-411(2) specifically excepts disability trusts. In doing so, section 15-5-411(2) cites 42 U.S.C. § 1396p(d)(4). The trustee argues that 42 U.S.C. § 1396p(d)(4)(A) permits disability trusts to terminate *only* on the beneficiary's death. Based on this reading of the federal statute and the fact that section 15-5-411(2) (which allows for early trust termination with consent) does not apply to disability trusts, the trustee argues that section 15-5-411(2) prohibits disability trusts from terminating before the beneficiary's death.

¶ 39 To the extent we understand this argument, it fails. As discussed above, the federal statute does not provide that a disability trust may only terminate on the death of the beneficiary.

¶ 40 But there is a more fundamental problem with the trustee's argument. By its express terms section 15-5-411(2) does not apply to disability trusts. It is a mystery to us how a statute that does not apply to the trust at issue can govern such a trust.

¶ 41 Finally, Department of Health Care Policy and Financing Regulation 8.100.7.E.6.b.i.e, 10 Code Colo. Regs. 2505-10, is not inconsistent with, nor does it add to, change, or modify, section 15-5-411(2). *See Graham Furniture Co. v. Indus. Comm'n*, 138 Colo. 244, 249, 331 P.2d 507, 510 (1958); *In re Estate of Liebhardt*, 132 Colo. 554, 557, 290 P.2d 1107, 1108 (1955).

¶ 42 Accordingly, the Colorado regulation, which mandates when disability trusts terminate, is not inconsistent with section 15-5-411(2).

VII. Any Error in Granting the Department's Petition to Terminate Before the Trustee Filed an Answer was Harmless

¶ 43 The trustee contends that the district court erred in granting the Department's petition to terminate the trust after he filed a

motion to dismiss under C.R.C.P. 12(b)(5) and before he filed an answer to the Department's petition to terminate.

¶ 44 We need not delve into the complexities of the procedural rules applicable to probate adjudications because, even if the district court procedurally erred, any error did not affect the substantial rights of the parties.

¶ 45 The Colorado Rules of Civil Procedure instruct us to "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." C.R.C.P. 61. Thus, we reverse only if the error resulted in substantial prejudice to a party. *Walker v. Ford Motor Co.*, 2017 CO 102, ¶ 21. An error is harmless if the court reached the correct outcome. *City of Colorado Springs v. Givan*, 897 P.2d 753, 761 (Colo. 1995).

¶ 46 We have rejected the trustee's claims of error and concluded that the district court properly terminated the trust. Accordingly, any procedural error in granting the petition to terminate before the trustee filed an answer was harmless.[6]

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[6] The trustee further argues that Mrs. Brockman was denied her constitutional right to present evidence at a hearing after the motion to dismiss under C.R.C.P. 12(b)(5) was denied. The

VIII. Disposition

¶ 47 The order terminating the Mendy Brockman Disability Trust is affirmed.

JUDGE DAILEY and JUDGE TOW concur.

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interpretation of a trust is a question of law. *Denver Found. v. Wells Fargo Bank, N.A.*, 163 P.3d 1116, 1122 (Colo. 2007). We have already concluded that the trust terminated by its own terms. *See supra* Part III. We have also concluded that section 15-5-411(5), C.R.S. 2021, which the trustee argues requires a factual determination that Mrs. Brockman's interests will be adequately protected, is inapplicable. *See supra* Part V. The trustee has not cited, and we are not aware of, any authority that confers a constitutional right to an evidentiary hearing when there are no disputed issues of material fact. *See St. Vrain Valley Sch. Dist. RE-1J v. A.R.L.*, 2014 CO 33, ¶ 9.