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RSM page 33 Notary Public requirements knowledge-based authentication assessment 42

RSM page 34 Advance Directive Registry now the Advance Health Care Planning Registry - any other document that supports advance health care planning. Requires change in regulations. 43

RSM page 36 mandatory guardianship form required to be filed with guardianship complaint, <https://www.vacourts.gov/forms/circuit/cc1640.pdf>, " COVER SHEET – PETITION FOR APPOINTMENT OF GUARDIAN AND/OR CONSERVATOR." Note the absence of any provision for limited fiduciary offices, recommended by the writer in every case. 45

RSM page 36 Termination of Trust Notice Required 45

RSM page 36 Transfer on death deeds, agent requires hot power to make changes 45

RSM page 36 Beneficiary has 60 days to object to settlement of account. Form worthy. 45

RSM page 36 Informal proceedings for modification of guardianship and conservatorship order. Possible malpractice not to explain this potentially unlimited expense burden to the guardian or conservator before appointment, especially when the fiduciary is acting for an incapacitated person with modest or any assets. 45

RSM page 36 Termination of trust; notice requirements. Form worthy. 45

RSM page 36 Wills and trusts; tangible personal property [TPP]; nonexoneration. Allows a revocable trust to reference a listing of TPP in which case written statement or list shall be given the effect of a specific bequest although it does not satisfy the requirements for a trust instrument. 45

RSM page 36 court-appointed guardian and any skilled professional retained by such guardian to perform guardianship duties to complete the initial training developed by the Department within four months after the date of qualification of such guardian. Under the bill, guardians appointed prior to July 1, 2025, must complete such training by January 1, 2027.. 45

RSM page 36 Requires guardian ad litem to consider the prospective guardian's or conservator's work as a professional guardian, including whether the person does so on a full-time basis, the prospective guardian's or conservator's expected capacity as a guardian, and whether the prospective guardian or conservator is named as a perpetrator in any substantiated adult protective services complaint INVOLVING THE RESPONDENT following allegations of abuse or neglect. 45

RSM page 36 Termination of trust; notice requirements. 45

RSM page 36 Certain powers of attorney; transfer on death deeds. Provides that an agent under a power of attorney shall not have the authority to create, change, or revoke a transfer on death deed unless specifically granted in power of attorney. 45

RSM page 36 Guardianship and conservatorship; restoration of capacity or modification or termination of order; informal written communication. 45

RSM page 36 Guardianship and conservatorship; report of guardian ad litem. Adds to the considerations regarding the suitability and propriety of a prospective guardian or conservator that a guardian ad litem is required to address in his report 45

RSM page 36 Department for Aging and Rehabilitative Services; training; powers and duties of guardian; annual reports by guardians; information required. Directs the Department for Aging and Rehabilitative Services to develop and provide training for court-appointed guardians by July 1, 2025 45

RSM page 36 Guardians and conservators; order of appointment and certificate of qualification; annual report. Requires a petitioner to file with a petition for the appointment of a guardian, a conservator, or both a cover sheet on a form prepared by the Office of the Executive Secretary of the Supreme Court of Virginia. Form: <https://www.vacourts.gov/forms/circuit/cc1640.pdf> 45

RSM Page 39 Appendix B: 2024 SESSION HIGHLIGHTS 47

RSM page 51 - (see above); HB 909/SB 488 Department of Medical Assistance Services; Department of Behavioral Health and Developmental Services; 1915(c) Home and Community Based Services Medicaid Waivers; state plan amendments; program rule modifications 60

RSM page 38 Carried over Constitutional Amendment to vote, would provide that a person adjudicated by a court of competent jurisdiction as lacking the capacity to understand the act of voting shall not be entitled to vote during this period of incapacity until his capacity has been reestablished as prescribed by law. Currently, the Constitution of Virginia provides that a person who has been adjudicated to be mentally incompetent is not qualified to vote until his competency is reestablished 47

RSM page 37 Carried over Guardianship and conservatorship; duties and powers of guardian and conservator; self-dealing prohibited. 46

RSM page 37 Carried over Study issues relating to CONSERVATORSHIP in the Commonwealth and to develop recommendations for a best practices model. The bill requires the work group to submit its findings and recommendations by November 1, 2024 to House Committee for Courts of Justice and Senate Committee on the Judiciary chairpersons. Click the money icon in the page (<https://www.usdebtclock.org/>) then see "The Crushing Financial Burden of Aging at Home," Clare Ansberry and Anne Tergesen, WSJ, Sept. 4, 2024, at <https://www.wsj.com/personal-finance/caregiving-aging-at-home-retirement-103520c7>, citing Genworth's survey. The survey is at this link: <https://www.genworth.com/aging-and-you/finances/cost-of-care/cost-of-care-trends-and-insights>. Genworth reports costs for Virginia at this link: [blob:https://www.genworth.com/97f8e105-7298-437e-a922-f6773ad16918](https://www.genworth.com/97f8e105-7298-437e-a922-f6773ad16918) 46

RSM page 37 Carried Over - Uniform Estate Planning Documents Act EXCLUDING TESTAMENTARY estate planning documents. 46

Civ-Com-2023 (Mental Health) Outline Civil Mental Health Law: A Practical Guide to Virginia Civil Commitment. Presented by Karen Konicka, Esq., Thompson McMullan, PC, Richmond, Virginia 67

Loper Bright Enterprises v. Raimondo, US June 28, 2024. limited to the question whether *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, should be overruled or clarified. Under the Chevron doctrine, courts have sometimes been required to defer to “permissible” agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently. Reviewing courts applied Chevron’s framework to resolve in favor of the Government challenges by petitioners to a rule promulgated by the National Marine Fisheries Service pursuant to the Magnuson-Stevens Act, 16 U. S. C. §1801 et seq., which incorporates the Administrative Procedure Act (APA), 5 U. S. C. §551 et seq. **Held:** The Administrative Procedure Act requires courts to exercise their independent judgment 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; Chevron is overruled. Pp. 7–35. 83

Westlaw Cases Combined Bates Optimized_Redacted 197

Burns v. Sullivan, Not Reported in S.E. Rptr. (2023) RSM - adult guardianship - separated parents in conflict over appointment of father as guardian for mentally ill adult son. Court held that ex parte appointment of GAL proper; GAL report of respondent's agreement with father and waiver of counsel supported proper; no right to "status hearing;" GAL compliance with statute was all that was necessary. 197

Bradshaw v. Estate of Watson, Not Reported in S.E. Rptr. RSM - - suit for aid and guidance, fees for guardian ad litem and petitioner's attorney in terminating small trust for benefit of incarcerated beneficiary. Incarcerated beneficiary objected to fees pro se; guardian ad litem not present at telephone hearing. Beneficiary agreed to the proceeding without presence. Court held fees charged against were properly paid, impact of including 64.2-105 powers in construing trustee's administration expenses. Beneficiary permitted to appeal without contemporaneous objection when record proves he was given no power to object. 203

Bradshaw dissent - right to counsel in civil cases and power of court to appoint counsel for indigent Code § 17.1-606, with exhortation that courts "should more liberally use their powers under 17.1-606 to appoint counsel "to protect law-abiding Virginia citizens in their civil suits and ensure equal access to justice in civil trials. 210

In re Guardianship of Adducci, --- N.E.3d ---- (2024) RSM Indiana Medicaid spousal support order for community spouse (CS) appended to CS guardianship petition for institutionalized spouse (IS); Medicaid not given notice of hearing. Reversed, Medicaid granted right to intervene. Va. Code § 64.2-2023. Estate planning, (A) permits, joinder, and does not name DMAS as a party, (B), but see (B) (iv). 213

Freiner v. Secretary of Executive Office of Health and..., 494 Mass. 198 (2024) - spousal refusal - “refusal to cooperate,” as used in Medicaid regulation allowing a married applicant to retain eligibility when the applicant's spouse refuses to cooperate by assigning to the Medicaid agency any rights to support from the spouse, requires that an applicant, who has a lengthy and ongoing history of marital collaboration, demonstrate more than only the spouse's refusal to supply the requisite financial information to the applicant; substantial evidence supported Board's determination that applicant had not shown that his wife “refused to cooperate.” Va. Medicaid Manual § M1480.225. 219

Hegadorn v. Livingston County Department of Health and..., --- N.W.3d ---- (2023). "[T]he principal of an irrevocable trust formed solely for the benefit of a community spouse is not per se a “resource available” to an institutionalized spouse under 42 USC 1396r-5(c)(2) for the purpose of determining an institutionalized spouse's eligibility for Medicaid benefits," citing **Hegadorn II**, and concluding its holding that the trust principal counts if (1) the institutionalized spouse's assets form the principal, (2) the institutionalized spouse (or their spouse or an entity listed in 42 USC 1396p(d)(2)(A)(i) through (iv)) created the trust through means other than a will, 5 and (3) there are any circumstances under which payment from the trust could be made for the benefit of the institutionalized spouse." P. 224 230

Lamle by and through Lamle v. Shropshire, Slip Copy (2024). Promissory note case. Oklahoma Medicaid requested information from lender / applicant (Lamelle) concerning promissory note at issue, namely, "whether: (1) Lamle was in the business of lending money or selling property, (2) the borrower offered collateral to secure the promissory note to Lamle, (3) the borrower did anything with the assets after purchasing them from Lamle, (4) Lamle transferred the promissory note to a trust or similar device, and (5) there had been a pattern of lending and repayment between Lamle and the borrower. Lamle responded to OKDHS and stated the promissory note complied with 42 U.S.C. § 1396p(c)'s requirements, and that [Medicaid] was not allowed to ask those questions when making a Medicaid eligibility determination." Page 231. Similar facts for two other applicants. Court held that refusal to answer was proper basis for denial of benefits and for taking longer than 45 days to make decision. POMS cited (page 233). 240

In re Marriage of Moriarty, --- N.E.3d ---- (2024) Appellate Court of Illinois, First District. Mother and guardian of adult disabled child sued father for support under settlement agreement and Illinois statute. Issues included whether disability onset was prior to majority and whether child was "emancipated". Fact dependent. Mother's strong evidence prevailed. Included for SNT reference in Illinois statute, but instructive for guardians with adult disabled wards subject to Virginia's analog statute for support of adult disabled children, Va. Code § 20-61, when there is a parent who might be required to support the disabled adult child. 310

Agency for Health Care Administration v. Spence, --- So.3d ---- (2024). Trustee of payback SNT required to reimburse Medicaid during lifetime of beneficiary when trust is to be terminated. Citing POMS, appellate court required reimbursement before payment to the beneficiary who had been determined not disabled by the time he came of age. Trust contained specific requirement for this outcome (p.238). Writer's note: the the better course would have been to maintain the trust for beneficiary's lifetime after having made distributions from the trust, leaving enough in the trust to maintain it without accounting (under any Florida analog to Va. Code § 8.10-606. Could the trustee be held negligent in not doing this in Virginia? Could and should the trustee have maintained the trust Ben's 65th birthday in case aught should befall in the interim? 246

Matter of Guardianship of Hindman, Not Reported in S.W. Rptr. (2024). Texas case included here by reason of its procedural use of a bill of review to correct the trial court's ultra vires grant of powers to grant estate planning. 250

Wiedner v. Stevenson, Not Reported in Cal.Rptr. (2024). California case addressing payment of expenses of the guardian for from a recalcitrant (and self interested) trustee. See especially page 260 for detailed analysis of what can and cannot be included in reimbursement. 257

Story v. Carbone, Not Reported in Atl. Rptr. (2024). Connecticut trial court. Sibling v. sibling in suit to void quit claim deed from Medicaid recipient to disabled son on ground of oral agreement (statute of frauds) which provided that at the death of grantor, the parties' mother, the disabled son grantee would distribute the proceeds of the sale of the property to all siblings. Grantee refused to honor the agreement, which was not disputed. The Court held that the agreement was unenforceable by reason of public policy (p. 270, addressing clean hands requirement for equity), and statute of frauds, id. 275

Texas Health and Human Services Commission v. Estate of Burt, 689 S.W.3d 274 (2024). Texas Supreme Court, 6/3 opinion, interprets "home" unde state and federal law. Because the applicants did not live in the home after it was purchased (and while they were in or in process for enterhing the nursing facility), it was not exempt. The case is principally included for the dissent and its reliance on the specific provisions of the Texas Medicaid Manual (page 279) and the terrible injustice visited upon them being " compounded by the Court's and HHSC's position: that if only the Burts had bought the half interest in their home from the Wallaces and lived there for a day on their way to the nursing facility —if only they'd acted in reverse order—the value of their interest would've been excluded from their assets as a home in determining their Medicaid eligibility. So as long as elderly Medicaid applicants have read today's opinion, they can avoid falling into the trap that ensnared the Burts." The dissent also addresses (and maps) the issue of disparate treatment for federal benefis under the ABLE account regulations (page 281), and illumnes the prior occupancy requirment "disadvant[ging] renters by denying them, in the Court's words ' the preservation of a home after nursing care [in contravention of] Medicaid's purpose of promoting a return to independence.'" (Footnote omitted, second brackets in the original.) 282

Id. RSM = suspect under Loper. The U.S. Supreme Court has upheld Congress's explicit delegation of “broad authority” to the Secretary of the U.S. Department of Health and Human Services “to promulgate regulations defining eligibility requirements for Medicaid.” *Schweiker v. Gray Panthers*, 453 U.S. 34, 43, 101 S.Ct. 2633, 69 L.Ed.2d 460 (1981). Thus, the Secretary's definition of “available” resources is entitled “to more than mere weight or deference”—it's entitled to “legislative effect”. *Id.* at 44, 101 S.Ct. 2633. Section 1396a, which governs state-run Medicaid plans is littered with cross-references to the SSI program, and in particular, its resource-counting methodology. See 42 U.S.C. § 1396a(a)(10)(C)(i), (a)(10)(G), (a)(17), (m)(1). For instance, state plans must “comply with the provisions of [§] 1396p”, which regulates “transfers of assets”, *id.* § 1396a(a)(18), and incorporates SSI's definition of “resources” from Section 1382b, *id.* § 1396p(c)(5) (citing *id.* § 1382b). Section 1382b 295

Hammerberg as trustee for Leonard J. and Margaret T...., Not Reported in N.W.... Minn. Court of Appeals. Medicaid asserted liens held in a trust established by H and W to recover payments made on behalf of W, who survived H. Assets in the trust were excluded as a resource for W. H never applied for Medicaid. Lien held to have attached to real estate in part because of the reserved rights to use the real estate in the trust, page 292, and the interest which W is said to have owned in the trust property, imputing probate ownership (?) to W in observing that under Minnesota probate law, a person can only devise by will an interest in property that they personally possess." Id. For Va. lawyers, a cautionary tale. See the writer's RAPTrust, <https://majette.net/wp-content/uploads/2013/10/2014-Special-Trusts-for-For-Special-Folks-Special-Needs-Trusts-in-Virginia.pdf#page=19>. See also deference due the agency determination, and writer's question whether Loper Bright might have changed this. 297

Department of Health and Welfare v. Beason, 546 P.3d 684 (2024, Supreme Court of Idaho). Discussion of oral agreement in context of statue of frauds (page 298), evidentiary shortcomings of proffered declarations of adequate consideration (299). 303

In re Marriage of Moriarty, --- N.E.3d ---- (2024). Illinois Court of Appeal. H and W divorced with property settlement and child support agreement. Mother sought father's support for child beyond majority on basis of child's disability status. Virginia analog is Va. Code § 20-61 (<https://law.lis.virginia.gov/vacode/title20/chapter5/section20-61/>). Included for detailed evidentiary basis for establishing date of child's disability (page 302) to establish non-emancipaton and eligibility under the Illinois statute, and the Illinois reference to payback trust (page 304) to receive support payments. 310

Cavanaugh v. Geballe, Slip Copy (2024), United States District Court, D. Connecticut. Medicaid asserted then withdrew an estate recovery claim against plaintiff's inheritance decedent's estate. Plaintiff received Medicaid under the ACA. Connecticut paid more than \$57,000 for his substance abuse treatment and asserted a lien against plaintiff's interest in his grandmother's estate. The lien was withdrawn yet Plaintiff asserted a § 1983 claim against Medicaid commissioner for creating a debt and thus a taking of his property. Court held that the creation of the "debt," if one was created, was not as a result of federal laws that prohibited such liens (page 311), that there was no wrognful "taking" cognizable under the constituion, (page 312), nor a due process violation, id. 317

Matter of Ellen H., Slip Copy (2024), N.Y. Trial Court. Suit to surcharge trustee of Supplemental Needs Payback Trust. Surcharged on finding that trustee expended money from beneficiary's financial resources for payments on multiple automobile loans, personal loans, and an RV loan; purchases made while on vacation and/or trips where it is clear the beneficiary was not present; numerous unaccounted-for cash withdrawals; hot tub maintenance; driveway repaving; car repairs, home repairs, and purchases of goods. See writer's Loper index for POMS deference, page 316, and statement that trustee's malefactions as trustee were not a finding of unfitness for service as her daughter's guardian: "[t]he Court acknowledges in rendering this decision that it is not finding that Ellen H. has failed to fulfill her responsibility as person guardian for Cassandra. That relief was not sought, despite the serious and substantial financial malfeasance evident here, and there is no indication that Ellen should not Ellen should not continue as person guardian for her daughter. The Court also recognizes that the travails and challenges of being the parent of a disabled child are immeasurable, beyond the true ken of the undersigned. Nonetheless, fiduciary duty applies," page 318. 323

Matter of Estate of Abad, 540 P.3d 244 (2023) Alaska Supreme Court. In this appeal concerning estate recovery claims, state law distinguished the limitations provision for when the estate recovery claim could be filed. It held that Medicaid estate recovery claims arise before death and therefore must be filed within four months after notice to creditors. Although the State may not pursue these claims until after the Medicaid beneficiary has died, these claims arise when Medicaid services are provided, not when the claims become enforceable. 329

In re Estate of Ecklund, 998 N.W.2d 308 (2023) Court of Appeals of Minnesota. limit an estaterecovery claim to amounts paid for long-term-care services actually provided to the decedent? State asserted claim for "capitation component" payments, made to a Medical Care Organization provicer for the "'financial risk' of providing 'medical assistance services.'" Page 333. Estate recovery permitted only to amounts LTC paid on behalf of recipient, not entire capitation charge. 340

H.L. v. Division of Medical Assistance and Health Services, NJ trial court. The transfer of an asset for less than fair market value during the look-back period raises a rebuttable presumption that the asset was transferred for the purpose of establishing Medicaid eligibility. H.K. v. Dep't of Hum. Servs., 184 N.J. 367, 380 (2005) (citing N.J.A.C. 10:71-4.10(j)); see also 42 U.S.C. § 1396p(c)(1). To rebut that presumption, the applicant must present "convincing evidence that the assets were transferred exclusively (that is, solely) for some other purpose." Opinion upholds TOA penalty for undocumented payments for third party as insufficiently explained to establish that transfers were for purposes other than qualifying for Medicaid LTC benefits. 345

Hegadorn v. Livingston County Department of Health and..., --- N.W.3d ---- (2023). Michigan court of appeals, sole benefit trust for community spouse: " Supreme Court reversed, finding that both the ALJ and this Court misread the operative statute, 42 USC 1396p(d). Hegadorn II, 503 Mich. at 268-269, 931 N.W.2d 571. The Court held that the principal of an irrevocable trust formed solely for the benefit of a community spouse (like the Hegadorn SBO Trust) "is not per se a 'resource available' to an institutionalized spouse under 42 USC 1396r-5(c)(2) for the purpose of determining an institutionalized spouse's eligibility for Medicaid benefits." Hegadorn II, 503 Mich. at 264-265, 931 N.W.2d 571." 350

Hegadorn v. Livingston County Department of Health and..., --- N.W.3d - discussion of "any- circumstances-rule" and non applicability of 1396p(d) "sole benefit trusts" for spouse created other than by will. 357

Harves by Harves v. Rusyniak, 219 N.E.3d 166 (2023) Ct App Indiana. Irrevocable trust for benefit of medicaid applicant funded with applicant's property can only be considered an available resource when there is any " circumstances under which payment from the trust could be made to or for the benefit of the individual. 42 U.S.C. § 1396p(d)(3)(B)(i). In her order, the ALJ did not mention that element or discuss any language from the trust agreement that might satisfy it. Appellant's App. Vol. II pp. 16-28. 3 Similarly, the trial court did not address the element in denying [applicant's] petition for judicial review." A simple but fundamental rule of administrative law is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action b 360

Doan v. Kijakazi, Slip Copy (2023) Calif Federal Magistrate Court Plaintiff was previously awarded SSI. SSA notified plaintiff that, due to becoming the beneficiary of a special needs trust, she no longer met the resource limitations for SSI and was now ineligible for benefits. SSA issued a notice of overpayment for \$23,306.84 for payments she received while the trust was in effect. After plaintiff's request for reconsideration was denied, she appeared and testified at a hearing before an administrative law judge ("ALJ"). AR 33-41, 199-202. ALJ issued an unfavorable decision, finding that plaintiff's special needs trust was a countable resource because it failed "to include proper State(s) Medicaid plan (s) reimbursement requirement in violation of POMS SI 01120.203" in that it did not contain the POMS language "for any and all states." Page 357. In reversing, the Magistrate Judge noted that POMS creates no judicially enforceable duties on courts or ALJs, page 357, noting that "POMS is 'an internal agency document used by employees to process claims.' Carillo-Years v. Astrue, 671 F.3d 731, 735 (9th Cir. 2011). 365

Delete 206 through 211 D.C. by and through Murphy v. Modesto City Schools, Slip Copy (2023) 369

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