FILED
United States Court of Appeals
Tenth Circuit

September 30, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

IVAN D. ROSE, as next friend of Nelta Rose and as attorney-in-fact; MICHAEL SCOTT MILLER and SHAWN TREY MILLER, Co-Personal Representatives of the Estate of Idabelle Schnoebelen, Deceased,

Plaintiffs - Appellants,

and

PAUL BAKER, personal representative of the estate of Lois Isabelle Matti, deceased,

v.

JUSTIN BROWN, Director of Oklahoma Department of Human Services, in his official capacity; KEVIN CORBETT, Director of Oklahoma Health Care Authority, in his official capacity,

Defendants - Appellees.

No. 20-6132
(D.C. No. 5:19-CV-00479-R)
(W.D. Okla.)

ORDER

Before **MATHESON**, **BACHARACH**, and **CARSON**, Circuit Judges.

This matter is before the court *sua sponte* to correct an URL on page 5 of our September 28, 2021 opinion. The Clerk shall file the attached corrected opinion effective

nunc pro tunc to the date the original opinion was filed.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

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PUBLISH

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Defendants - Appellees.

No. 20-6132

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D.C. No. 5:19-CV-00479-R)

Michael Craig Riffel (Katresa J. Riffel and Jonathan F. Benham, with him on briefs), Riffel Law Firm, Enid, Oklahoma, for the Plaintiff-Appellants.

Susan L. Eads, Deputy General Counsel, Oklahoma Health Care Authority; and John R. Pettifer, Assistant General Counsel, Department of Human Services (Whitney Herzog Scimeca, Deputy General Counsel, Oklahoma Health Care Authority; and John K.F. Langford, Assistant General Counsel, Department of Human Services, with them on the brief) Oklahoma City, Oklahoma, for the Defendants-Appellees.

Before **MATHESON**, **BACHARACH**, and **CARSON**, Circuit Judges.

BACHARACH, Circuit Judge.

This case arose from cancellation of long-term-care Medicaid benefits for two claimants when an Oklahoma agency concluded that the claimants' resources exceeded the regulatory cap for eligibility. *See* Okla. Admin. Code § 317:35-5-41(a). One claimant, Ms. Idabelle Schnoebelen died, mooting her claim. The eligibility of the other claimant, Ms. Nelta Rose, turns on whether her resources include a 2018 promissory note.

The Oklahoma agency concluded that Ms. Rose's resources include this promissory note, putting her resources over the regulatory cap. The district court concluded that the agency's conclusion did not conflict with federal law. In our view, however, a reasonable factfinder could disagree.

Ms. Rose's Challenge

1. State agencies regard the 2018 promissory note as a resource.

In 2017 and 2018, Ms. Rose loaned money to her daughter-in-law in exchange for three promissory notes. The daughter-in-law provided the first two promissory notes in 2017 (before Ms. Rose applied for Medicaid benefits). The Oklahoma Department of Human Services[1] initially approved Ms. Rose for Medicaid, declining to regard the 2017 promissory notes as resources.

In 2018, Ms. Rose's daughter-in-law provided the third promissory note. But the Department of Human Services concluded that the 2018 promissory note

- was a resource because the payment to the daughter-in-law did not constitute a bona fide loan and
- was a deferral that turned the 2017 promissory notes into resources.

The extra resources put Ms. Rose over the eligibility limit for Medicaid, so the Department of Human Services cancelled Ms. Rose's benefits. Ms. Rose filed an administrative appeal, and an administrative law judge upheld the Department of Human Services' conclusion and the cancellation.

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[1] The Health Care Authority administers Medicaid payments in Oklahoma, but has delegated eligibility determinations to the Department of Human Services. 63 Okla. Stat. § 5009(B); 42 C.F.R. § 431.10(c).

2. The district court grants summary judgment to the State agencies.

Ms. Rose challenged the agency's conclusion, invoking 42 U.S.C. § 1983 to sue the pertinent State agencies (the Department of Human Services and the Health Care Authority) for declaratory and injunctive relief. *See* 42 U.S.C. §§ 1396a(a)(8), 1396p(c)(1)(I) & (c)(2)(C).[2] The district court granted summary judgment to the State agencies, concluding that the daughter-in-law's 2018 promissory note to Ms. Rose constituted a resource because

- Ms. Rose had not entered the promissory note in good faith and
- the promissory note resembles a trust.

Ms. Rose appealed.

3. Our review is de novo.

For summary-judgment rulings, we apply de novo review. *Navajo Nation v. San Juan Cnty.*, 929 F.3d 1270, 1280 (10th Cir. 2019). In applying de novo review, we consider the evidence in the light most favorable to Ms. Rose. *Stender v. Archstone-Smith Operating Trust*, 910 F.3d 1107, 1111 (10th Cir. 2018). With this view of the evidence, we

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[2] The State agencies have not questioned the availability of a cause of action under § 1983 to establish eligibility for Medicaid. *Compare Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1224 (10th Cir. 2018) (holding that 42 U.S.C. § 1396a(a)(23) creates a cause of action), *with Hobbs ex rel. Hobbs v. Zenderman,* 579 F.3d 1171, 1181–83 (10th Cir. 2009) (holding that 42 U.S.C. § 1396a(10)(C) does not create a cause of action).

consider whether the State agencies have shown (1) the lack of a genuine dispute of material fact and (2) an entitlement to judgment as a matter of law. Fed. R. Civ. P. 56(a).

4. Ms. Rose is ineligible for Medicaid if her resources exceed $2000.

Congress created Medicaid "to provide 'health care to persons who cannot afford such care.'" *Morris v. Okla. Dep't of Human Servs.*, 685 F.3d 925, 928 (10th Cir. 2012) (quoting *Brown v. Day*, 555 F.3d 882, 885 (10th Cir. 2009)). If a state participates, its plan must satisfy federal statutory and regulatory requirements. *Brown*, 555 F.3d at 885; *see* 42 U.S.C. § 1396a (setting out the requirements for state programs).

To determine the pertinent eligibility requirements, we focus on the Medicaid program at issue. Ms. Rose applied for long-term care, which pays for nursing-home care. 42 U.S.C. § 1396a(a)(10)(A)(ii)(V). Individuals may be eligible if they have resources of $2000 or less. Okla. Admin. Code §§ 317:35-5-41(a) (referring to Okla. DHS App'x C-1, Schedule VIII.D. (Jan. 1, 2021), available at https://oklahoma.gov/content/dam/ok/en/okdhs/documents/searchcenter/okdhsformresults/c-1.pdf).

Oklahoma must extend Medicaid eligibility at least as far as eligibility for Supplemental Security Income. 42 U.S.C. §§ 1396a(10)(C)(i)(III), 1396a(r)(2); *Houghton ex rel. Houghton v. Reinertson*, 382 F.3d 1162, 1170 (10th Cir. 2004). So when identifying

resources for the purposes of Medicaid, we consider the rules for Supplemental Security Income. 42 U.S.C. § 1382b. These rules create two ways to characterize an asset as a resource:

1. the regular method and
2. the trust method.

The regular method provides that "[i]f the individual has the right, authority, or power to liquidate the property . . . , it is considered a resource"; but absent this right, authority, or power, we do not ordinarily consider the property as a resource. 20 C.F.R. § 416.1201(a)(1). The trust method creates an exception for trusts and trust-like devices, which count as resources even when they cannot be liquidated. *See* 42 U.S.C. § 1396p(d)(3), (6) (Medicaid); *see* 42 U.S.C. § 1382b(e) (Supplemental Security Income).

Along with these statutes and regulations, the Social Security Administration maintains a program manual (called the "Program Operations Manual System"), which creates standards for determining whether a transaction involves a cash loan, a trust, or a trust-like device.[3] POMS SI §§ 1120.220, 1120.201.

[3] We've previously regarded the program manual as "controlling unless plainly erroneous or inconsistent with the regulation." *Gragert v. Lake*, 541 F. App'x 853, 856 n.1 (10th Cir. 2013) (unpublished) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). But our approach has changed under *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). Deference is now required only if we determine that

5. Characterization of the 2018 promissory note as a resource turns on disputed facts.

In our view, disputed factual issues affect characterization of the 2018 promissory note as a bona fide nontransferable loan or a trust-like device. So we reverse the district court's grant of summary judgment to the State agencies.

A. For purposes of summary judgment, the 2018 promissory note could be considered bona fide and nontransferable.

When we view the evidence favorably to Ms. Rose,[4] we conclude that a factfinder could consider the 2018 promissory note bona fide and nontransferable, which would prevent its characterization as a "resource."

i. A nontransferable promissory note is not a resource.

The district court concluded that a nontransferable promissory note is not a resource. The State agencies do not question this conclusion; nor do we. *See Gragert v. Lake*, 541 F. App'x 853, 857 (10th Cir. 2013)

- the statute is "genuinely ambiguous" and
- the program manual's interpretation is "reasonable," "made by" the Social Security Administration, "implicates its substantive expertise," and reflects a "fair and considered judgment."

Kisor v. Wilkie, 139 S. Ct. 2400, 2415–18 (2019). Of course, we may always defer to the program manual "to the extent it has the 'power to persuade.'" *Id.* at 2414 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

[4] *See* Part 3, above.

(unpublished) ("If a promissory note cannot be transferred, . . . then it is not convertible to cash and therefore not a resource.").

When a regulation is unambiguous, it controls even if it creates a loophole. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). For instance, in *Morris v. Oklahoma Department of Human Services*, a Medicaid applicant bought an annuity for her spouse, apparently to preserve the asset without losing eligibility for Medicaid benefits. 685 F.3d 925, 928 (10th Cir. 2012). We concluded that courts can't close loopholes created by Congress. *Id.* at 933–34.

There, as here, the key statute was 20 C.F.R. § 416.1201, which provides:

> (a) Resources; . . . property that an individual . . . owns and could convert to cash to be used for his or her own support or maintenance.
>
> (1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual . . . .

Id. Under this regulation, we must consider whether Ms. Rose could convert the 2018 promissory note to cash. If she could not do so (and the note is bona fide), the promissory note would not constitute a resource. 20 C.F.R. § 416.1201(a)(1).

The 2018 promissory note expressly provides that "[n]either the Borrower nor the Lender may grant, bargain, sell, assign, convey or

transfer this note or any payments hereunder except Lender may assign or transfer this note for estate planning purposes to a revocable trust . . . ." Appellants' App'x vol. 1, at 109. Under this provision, Ms. Rose cannot convert the promissory note to cash.

In *Gragert v. Lake*, the Court addressed a similar promissory note. 541 F. App'x 853 (10th Cir. 2013) (unpublished).[5] There the plaintiff sold his son a house in exchange for a nontransferable promissory note. *Id.* at 854. The plaintiff could qualify for Medicaid only if the promissory note were not a resource. *Id.* at 854, 856–57. The Court held that the promissory note wasn't a resource because it couldn't be assigned, transferred, or sold. *Id*. at 857–58; *see also James v. Richman*, 547 F.3d 214, 218 (3d Cir. 2008) (concluding that an asset isn't a resource even if an applicant has "the *de facto* ability to effect a change in ownership" if the change would breach a contractual duty and create liability).

The circumstances here are similar. An administrative law judge concluded that the 2018 promissory note hadn't stripped Ms. Rose of the *power* to sell the loan. Appellants' App'x vol. 1, at 123. But the judge didn't

- consider the ultimate question of whether the 2018 promissory note could be converted to cash or

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[5] Though *Graegert* is not precedential, it is persuasive. *See* 10th Cir. R. 32.1(A).

- address the effect of Oklahoma contract law.

These oversights mattered because Oklahoma contract law prevented Ms. Rose from converting the 2018 promissory note into cash. *See In re Kaufman*, 37 P.3d 845, 848 n.4, 853 (Okla. 2001) (holding that anti-assignment clauses are enforceable if their "language is clear and definite," such as "Plaintiffs agree that they maintain no right to . . . have power to sell, mortgage, encumber, or anticipate the future payments, or any part thereof by assignment or otherwise").

* * *

Ms. Rose could not convert the 2018 promissory note into cash. So if the 2018 promissory note is bona fide, it would not constitute a resource under the regulation.

ii. The program manual shows that Ms. Rose's 2018 promissory note may be bona fide.

We thus must decide whether a reasonable factfinder could regard the 2018 promissory note as bona fide. To answer, we consider the program manual.[6] Application of the program manual turns on

- how it defines "bona fide" and
- how the 2018 promissory note could meet this definition.

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[6] We defer to the program manual's guidance because the program manual's interpretation is "reasonable," "made by" the Social Security Administration, "implicates its substantive expertise," and reflects a "fair and considered judgment." *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415–18 (2019); *see also* note 3, above.

We conclude that (1) the program manual defines "bona fide" in POMS SI § 1120.220(D) and (2) the 2018 promissory note may fit this definition.

The "Cash Loans" section, POMS SI § 1120.220, provides two definitions of "bona fide" in subsections (B)(3) and (D):

B. DEFINITIONS 3. Bona fide agreement A bona fide agreement is legally valid under the applicable State's law and made in good faith.	D. Policy Requirements For A Bona Fide Informal Loan An informal loan is a loan between individuals who are not in the business of lending money or providing credit. An informal loan can be oral or written . . . . An informal loan (oral or written) is bona fide if it meets all of the following requirements. 1. Enforceable under State law . . . 2. Loan agreement in effect at time of transaction . . . 3. Acknowledgement of an obligation to repay . . . 4. Plan for repayment . . . 5. Repayment plan must be feasible . . .

POMS SI § 1120.220(B)(3), (D) (explanations omitted).

The district court held that a promissory note can be "bona fide" only if it fits subsections (B)(3) and (D). Ms. Rose argues that good faith is

present if the promissory note fits subsection (D), eliminating other requirements for good faith.[7]

We agree with Ms. Rose that subsection (D) sets out the only requirements for an informal loan based on

- the language of subsection (D),
- the conflict between the district court's approach and both subsection (D) and Tenth Circuit case law, and
- the redundancy if we were to apply both subsections (B) and (D).

First, subsection (D) states that "[a]n informal loan . . . *is* bona fide if it meets all of the following requirements." POMS SI § 1120.220(D) (emphasis added). Because any loan satisfying subsection (D) requirements "is bona fide," no other requirements could affect the loan's status as bona fide. *See* POMS SI § 1120.220(E)(2) ("After consulting any regional instructions for applicable state law, determine whether the loan is bona fide under the criteria in section D.").

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[7] The State agencies argue that Ms. Rose did not present this argument in the administrative proceedings or in district court. Appellees' Resp. Br. at 24. We don't have the record of the administrative proceedings. But in district court, Ms. Rose

- cited SI § 1120.220(D) and
- stated that this subsection controlled.

The district court recognized that Ms. Rose had relied on subsection (D). So we consider the merits of this argument.

Second, the district court's use of a separate good-faith test would conflict with the substance of subsection (D) and Tenth Circuit precedent. The district court used the nine-factor test set out in *Sable v. Velez*, 437 F. App'x 73 (3d Cir. 2011) (unpublished). But three of the nine factors conflict with either the program manual or Tenth Circuit precedent:

1. whether the lender is in the business of lending money

2. whether the loan came about the same time that the lender applied for Medicaid

3. whether the amount of the loan brought the lender under the cap for eligibility

See id. at 76–77.

The first factor conflicts with the program manual, which states that an informal loan exists only when the lender is "not in the business of lending money." *See* POMS SI § 1120.220(D). Under the program manual, bona fide status is supported—not undercut—by the fact that the applicant isn't in the business of making loans.

The other two factors conflict with *Gragert* and *Morris*, which recognized the acceptability of Medicaid planning. *See Gragert v. Lake,* 541 F. App'x 853, 857–58 (10th Cir. 2013) (unpublished); *Morris v. Okla. Dep't of Human Servs.*, 685 F.3d 925, 933–34 (10th Cir. 2012); *see also* Part V(A)(i), above. So *Sable*'s test for good faith would conflict with the program manual and our case law.

Finally, subsection (B)(3) and subsection (D) are redundant: Subsection (B) requires that a bona fide loan be "legally valid under the applicable State's law"; subsection (D) requires that a bona fide informal loan be "enforceable under the applicable State law." POMS SI § 1120.220(B)(3), (D)(1). This redundancy suggests that subsection (D) creates the only requirements for bona fide informal loans. *See Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019).

The State agencies argue that an independent definition of good faith prevents Medicaid applicants from entering informal promissory notes in bad faith. But this argument misconstrues Ms. Rose's position: She argues that subsection (D) defines "good faith" for informal loans; she's not suggesting that applicants can use bad faith to skirt the limit on resources.

So we conclude that the 2018 promissory note needed to satisfy subsection (D), but not subsection (B)(3).

iii. A genuine dispute of fact exists on satisfaction of subsection (D).

The district court addressed only the independent good-faith requirement and did not address the subsection (D) requirements, so the district court used the wrong legal standard. Given the use of an erroneous test, we must remand "unless the record permits only one resolution of the factual issue." *Underwood v. Bank of Am. Corp.*, 996 F.3d 1038, 1056 (10th

Cir. 2021). Because multiple ways exist to resolve the feasibility prong of the program manual's test,[8] remand is necessary.

The parties don't define "feasibility," but the program manual instructs reviewers to "consider the amount of the loan, the individual's resources and income, and the individual's living expenses." POMS SI § 1120.220(D)(5); *see Roach v. Morse*, 440 F.3d 53, 60 (2d Cir. 2006).

After considering these factors for feasibility, we conclude that a genuine dispute of material fact exists. The parties agree that the daughter-in-law

- timely paid the amounts due and
- reduced the principal that she owed Ms. Rose.

But the summary-judgment record lacks any other evidence about the daughter-in-law's other resources, income, and living expenses. *See* Appellants' App'x vol. 1, at 125 (administrative law judge remarking on the lack of evidence on this question).

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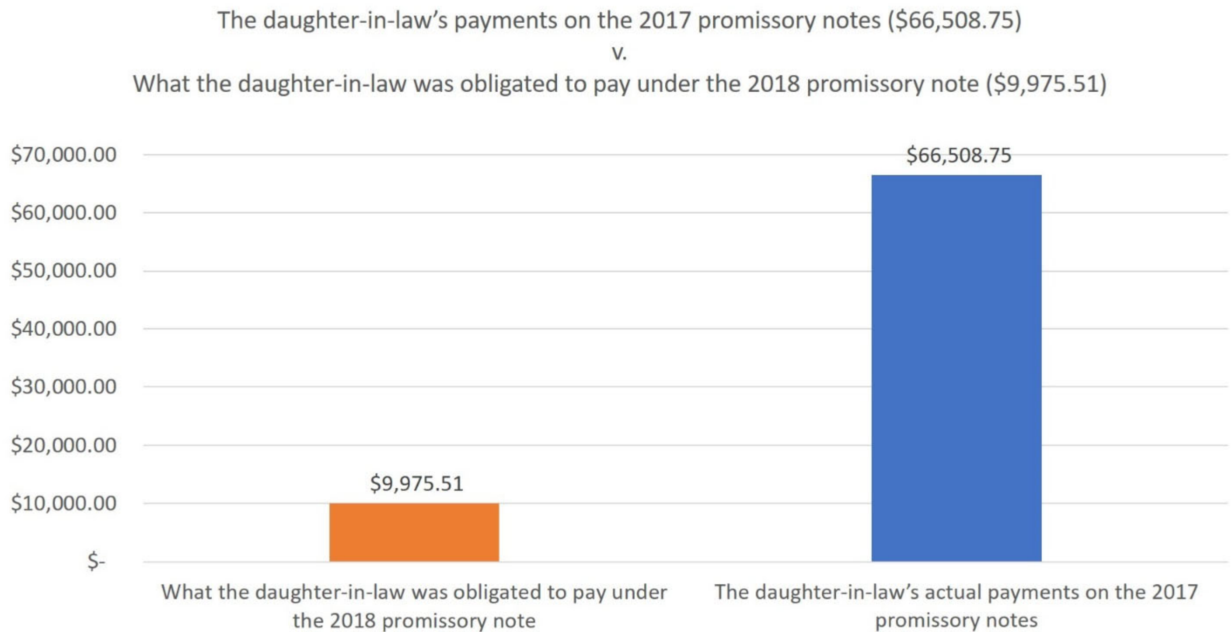
[8] The State agencies also claim to challenge prong four, existence of a repayment plan. But they argue only that Ms. Rose "never had a true plan for repayment because within a month of the [the daughter-in-law] making [her] first payment[, Ms. Rose] would purchase a second promissory note for almost the exact same amount as the first Payment." Appellee's Resp. Br. at 32. The agencies concede that the 2018 promissory note had terms and amortization schedules showing the due dates and amounts of each payment. *Id.* at 26. So we consider this argument as a challenge to the feasibility prong.

Without evidence of other assets, the parties dispute the daughter-in-law's ability to continue making payments. The State agencies argue that the repayment plan contemplated the perpetual creation of new loans, preventing the daughter-in-law from "materially" reducing the total amount that she owed Ms. Rose. Ms. Rose suggests that (1) this argument concedes some reduction in the total amount owed, (2) Ms. Rose had made substantial payments, showing her reliability, and (3) the succeeding notes covered lower amounts than the annual payments owed, reducing the principal owed over time.

For the 2017 promissory notes, the daughter-in-law had already made an annual payment of over 6.5 times what she needed to pay annually on the 2018 promissory note.



From the payments on the 2017 promissory notes, the factfinder could reasonably infer the daughter-in-law's ability to comply with the payment plan.

The payments in 2018 suggested that the principal balance on the debt would drop each year. In 2018, the daughter-in-law borrowed only $37,700.00, substantially less than the $304,015.20 that she had borrowed a year earlier. And she had made her first annual payment of $66,508.75 on that earlier debt.[9] Because her new loan ($37,700.00) was less than the annual payment she had made ($66,508.75), she trimmed the total owed on the loans. The factfinder could reasonably infer that continuation of this pattern would steadily reduce the total principal balance on the loans.

* * *

A factfinder could reasonably find that the 2018 promissory note had satisfied subsection (D), constituting a bona fide nontransferable promissory note. This finding would prevent the factfinder from considering the 2018 promissory note as a regular "resource" for Ms. Rose. *See* POMS SI § 1120.220(C)(2)(c).

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[9] The daughter-in-law also paid $28,900.81 to the nursing home.

B. A genuine dispute of material fact exists on classification of the 2018 promissory note as a trust-like device.

Even if an asset isn't a resource under the regular method, the asset can be a resource if it consists of a trust or device "similar to a trust." 42 U.S.C. § 1396p(d)(3), (6) (Medicaid); *see also* 42 U.S.C. § 1382b(e) (Supplemental Security Income). The phrase "similar to a trust" is not defined in the statute or regulations. So the phrase is ambiguous, and we consider whether to defer to the program manual's interpretation of the phrase.

According to the program manual, a device is trust-like if three elements exist:

1. The grantor "provides the assets to fund the instrument,"
2. the grantor "transfers property . . . to an individual or entity with fiduciary obligations . . . ," and
3. the grantor "makes the transfer with the intention that the individual or entity hold, manage, or administer the property for the benefit of the grantor . . . ."

POMS SI § 1120.201(B)(4). In our view, this guidance is reasonable, implicates the Social Security Administration's substantive expertise, and reflects a fair and considered judgment. So we defer to the program

manual's interpretation.[10] *See Kisor v. Wilkie,* 139 S. Ct. 2400, 2415–18 (2019); *see also* note 3, above.

The district court relied on the presence of evidence on each element. But the presence of evidence didn't entitle the State agencies to summary judgment. To the contrary, summary judgment would be available only if the State agencies had shown the lack of a "genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). A dispute is genuine if there's enough evidence on each side that a rational trier of fact could resolve the issue either way. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986).

The trier of fact could decide either way on the second and third elements:

- whether Ms. Rose transferred money to a fiduciary and
- whether the transfer was intended to benefit Ms. Rose.

"Under Oklahoma law, the existence of a fiduciary relationship is a question of fact." *Quinlan v. Koch Oil Co*., 25 F.3d 936, 942 (10th Cir. 1994). In resolving this question, the factfinder can consider the daughter-in-law's status as a borrower, her marriage to Ms. Rose's attorney-in-fact (Ms. Rose's son), and her position as the sole member of the limited liability company (Jivin, LLC) that holds the loan proceeds.

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[10] The State agencies argue that the program manual provides only "guidance to courts." Appellees' Resp. Br. at 41. But the agencies do not address the pertinent factors or give a reason to use some other test.

The State agencies' expert witness testified that as the borrower, the daughter-in-law owed no fiduciary duty to Ms. Rose. The daughter-in-law's husband might have had a fiduciary duty as Ms. Rose's attorney-in-fact, but this duty would not necessarily extend to his spouse.

Ms. Rose also created a genuine dispute of material fact on the purpose of the loans. If Ms. Rose intended for herself to be the beneficiary of a trust, the daughter-in-law could not use the money for herself. *See* Restatement (Second) of Trusts § 170(1) (1959) ("The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary."). The daughter-in-law would instead need to use the loan proceeds solely for Ms. Rose's benefit. *See id.*

But under the summary-judgment evidence, a factfinder could reasonably infer broad discretion to the daughter-in-law on how to use the money. For example, the loan proceeds went to a company whose articles of incorporation reflect a broad purpose: transacting "any and all lawful business for which a limited liability company may be organized" under the applicable statute. Appellant's App'x vol. 3, at 689. And Ms. Rose's attorney-in-fact (the daughter-in-law's husband) gave conflicting testimony in two depositions. He testified that the company's purpose was to "take care of [Ms. Rose's] needs." *Id.* at 616. Elsewhere, though, he testified that the promissory notes were intended to help with the needs of both Ms. Rose and her daughter-in-law.

When we view the evidence in the light most favorable to Ms. Rose, we conclude that a factfinder could reasonably conclude that the loans had been intended not only to benefit Ms. Rose but also her daughter-in-law. The dual purpose suggests a fundamental difference with a trust. So when viewing the evidence favorably to Ms. Rose, we must reject the State agencies' classification of the 2018 promissory note as a device "similar to a trust."

* * *

We conclude that a genuine factual dispute exists on whether the 2018 promissory note is a resource:

- The 2018 promissory note may be considered as bona fide and nontransferable, preventing characterization as a regular resource, and

- a disputed question of fact exists on characterization as a trust-like device.

C. The 2018 promissory note did not turn the 2017 promissory notes into disqualifying transfers.

The State agencies also argue that the 2018 promissory note constituted a deferral of payments for the earlier notes, rendering the earlier notes disqualifying transfers.[11] But all of the promissory notes

[11] The district court rejected this argument, reasoning that the transfers would be disqualifying only if Ms. Rose had been institutionalized. But Ms. Rose is institutionalized—she lives in a nursing home. *See* 42 U.S.C. § 1396p(h)(3) ("Definitions"). So we consider this argument.

satisfied the relevant statute, and the State agencies have not explained how any combination of the promissory notes would violate the statute.

Under the statute, the 2017 loans were not disqualifying transfers if the corresponding promissory notes were not "assets":

> (I) . . . [W]ith respect to a transfer of assets, the term "assets" includes funds used to purchase a promissory note . . . unless such note . . .
>
> > (i) has a repayment term that is actuarially sound . . . ;
> >
> > (ii) provides for payments to be made in equal amounts during the term of the loan, *with no deferral* and no balloon payments made; and
> >
> > (iii) prohibits the cancellation of the balance upon the death of the lender.

42 U.S.C. § 1396p(c)(1)(I) (emphasis added); *see* 42 U.S.C. § 1396p(c)(1)(A), (E) (stating when a transfer of assets makes an applicant ineligible). A factfinder could reasonably infer that the 2017 promissory notes had satisfied these requirements, so the corresponding loans would not constitute disqualifying transfers for purposes of summary judgment.

Nor would a disqualifying transfer arise from a combination of the promissory notes. The State agencies' expert witness didn't say whether a deferral would arise when a lender returns funds to the borrower for a new promissory note. And Ms. Rose's expert witness testified that the 2018 promissory note was not a deferral.

A factfinder could reasonably credit Ms. Rose's expert's testimony. Ms. Rose didn't return all of the 2017 proceeds to her daughter-in-law; over 40% went to pay for Ms. Rose's nursing home. *See* note 9, above.

By crediting this testimony, a factfinder could reasonably find that Ms. Rose had given her daughter-in-law a new loan through the 2018 promissory note, rather than defer payment under the 2017 promissory notes. So at the summary-judgment stage, the Court cannot characterize the loans or promissory notes as disqualifying transfers.[12]

* * *

In our view, material disputes of fact exist on whether the 2018 loan was a countable resource under the regular method and the trust method. So we reverse the grant of summary judgment to the State agencies on Ms. Rose's claim and remand for the district court to conduct further proceedings.

Ms. Schnoebelen's Claim

While this appeal was pending, Ms. Idabelle Schnoebelen died, mooting her claim for prospective injunctive relief. *Tandy v. City of Wichita*, 380 F.3d 1277, 1290 (10th Cir. 2004); *see Pecha by & through*

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[12] Ms. Rose also urges that even if the 2017 and 2018 promissory notes had constituted transfers, they would not have been disqualifying because the purpose extended beyond eligibility for Medicaid. Appellants' Reply Br. at 11–12 (quoting 42 U.S.C. § 1396p(c)(2)(C)(ii)). We need not address this argument.

Pecha-Weber v. Lake, 864 F.3d 1100, 1105 (10th Cir. 2017) (Hartz, J. concurring) (noting that even if the Court certifies that a deceased plaintiff is eligible for Medicaid, the certification "can have no effect on future benefits"). So we dismiss Ms. Schnoebelen's appeal.