No. ________

In The
Supreme Court of the United States

JERRY L. GLOVER,

Petitioner,

v.

CLYDE L. REESE, III, Esq., in his official capacity as Commissioner of the Georgia Department of Community Health and BOBBY CAGLE, in his official capacity as Interim Director of the Georgia Department of Human Services Division of Family and Children Services,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

JOEL KEVIN THARPE
Counsel of Record for Petitioner
405 Broad Street, SE
Gainesville, Georgia 30501
(770) 503-1022
kevin@kevintharpe.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether the interpretations of a federal statute by an executive agency which are based on an opinion letter, as well as the policies of a state administrative agency which comport with said interpretations are entitled to deference, when those interpretations are contrary to the language of the federal statute and its legislative history.

2. Whether the asset transfer penalty provisions of 42 U.S.C. § 1396p(c)(1)(F) apply to all annuities or whether the provisions of 42 U.S.C. § 1396p(c)(1)(G) exempt certain types of annuities from any asset transfer penalties under 42 U.S.C. § 1396p, including the penalty provisions of 42 U.S.C. § 1396p(c)(1)(F).

LIST OF PARTIES

At the time of filing of the Petition for Certiorari to the Georgia Supreme Court, David Cook was the Commissioner of the Georgia Department of Community Health and Clyde L. Reese, III, Esq., was the Director of the Georgia Department of Human Services, Division of Family and Children Services.

As of the date of filing of this Petition, Clyde L. Reese, III, Esq., is now the acting Commissioner of the Georgia Department of Community Health and Bobby Cagle is now the Director of the Georgia Department of Human Services, Division of Family and Children Services.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	7
THIS COURT SHOULD RESOLVE THE SPLIT BETWEEN THE GEORGIA SUPREME COURT AND THE SIXTH CIRCUIT FEDERAL COURT OF APPEALS AS TO WHETHER THE INTERPRETATION OF CMS THAT THE ASSET TRANSFER PENALTY PROVISIONS OF 42 U.S.C. § 1396p(c)(1)(F) APPLY TO ALL ANNUITIES IS A CORRECT AND REASONABLE INTERPRETATION OF 42 U.S.C. § 1396p AND ENTITLED TO DEFERENCE	7
CONCLUSION	18

TABLE OF CONTENTS – Continued

Page

APPENDIX

Opinion, Supreme Court of Georgia, Filed July 11, 2014 ..... App. 1

Opinion, Court of Appeals of Georgia Third Division, Filed March 26, 2013 ..... App. 18

Order, Superior Court of Hall County State of Georgia, Filed May 7, 2012 ..... App. 39

TABLE OF AUTHORITIES

Page

CASES

Caremark, Inc. v. Goetz, 480 F.3d 779 (6th Cir. 2007) 8

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) 7, 10, 14, 15, 17

Cook v. Bottesch, 320 Ga.App. 796, 740 S.E.2d 752 (Ga. App. 2013) 13

Hughes v. McCarthy, 734 F.3d 473 (6th Cir. 2013) 9, 10, 11, 13

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 17

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 8, 10, 17

Tran v. Gonzales, 447 F.3d 937 (6th Cir. 2006) 16

STATUTES, RULES AND REGULATIONS

§ 408(c) of the Internal Revenue Code 4

28 U.S.C. § 1257(a) 1

42 U.S.C. § 1396(c)(2)(B)(i) 10, 11

42 U.S.C. § 1396p .... *passim*

42 U.S.C. § 1396p(c)(1) .... *passim*

42 U.S.C. § 1396p(c)(1)(F) .... *passim*

42 U.S.C. § 1396p(c)(1)(G) .... *passim*

42 U.S.C. § 1396p(c)(1)(G)(i) 4

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1396p(c)(1)(G)(ii) ....*passim*

42 U.S.C. § 1396p(e) 13

42 U.S.C. § 1396p(e)(1)......................................1, 2, 13

42 U.S.C. § 1396p(e)(2)......................................1, 3, 13

42 U.S.C. § 1396p(e)(2)(A)...13

O.C.G.A. § 50-13-19 of the Administrative Procedures Act 5

OTHER AUTHORITIES

§ 2339 of the Georgia Medicaid Manual.............4, 5, 6

Congressional Conference Committee Report 109-362, Sec. 6012, page 275.................................14

Letter to State Medicaid Directors (July 2006), Enclosure, § 6012 – Changes in Medicaid Annuity Rules under the DRA of 2005, available at http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/TOA Enclosure.pdf 6, 7, 9

OPINION BELOW

The Georgia Supreme Court opinion is reported under *Cook v. Glover* (Ga. 2014) S13G1127, and is reprinted in Appendix 17.

JURISDICTION

The Georgia Supreme Court filed its decision on July 11, 2014. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the decision of the Georgia Supreme Court on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 42 U.S.C. § 1396p(c)(1)(F), 42 U.S.C. § 1396p(c)(1)(G)(ii) and 42 U.S.C. § 1396p(e)(1)-(2).

42 U.S.C. § 1396p(c)(1)(F) provides:

> For purposes of this paragraph, the purchase of an annuity shall be treated as the disposal of an asset for less than fair market value unless –
>
> (i) the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual under this subchapter; or

(ii) the State is named as such a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value.

42 U.S.C. § 1396p(c)(1)(G)(ii) provides:

For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes an annuity purchased by or on behalf of an annuitant who has applied for medical assistance with respect to nursing facility services or other long-term care services under this subchapter unless the annuity is –

(I) is irrevocable and nonassignable;

(II) is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); and

(III) provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.

42 U.S.C. § 1396p(e)(1) provides:

In order to meet the requirements of this section for purposes of section 1396a(a)(18) of this title, a State shall require, as a condition for the provision of medical assistance for services described in subsection (c)(1) of this section (relating to long-term care services)

> for an individual, the application of the individual for such assistance (including any re-certification of eligibility for such assistance) shall disclose a description of any interest the individual or community spouse has in an annuity (or similar financial instrument, as may be specified by the Secretary), regardless of whether the annuity is irrevocable or is treated as an asset. Such application or re-certification form shall include a statement that under paragraph (2) the State becomes a remainder beneficiary under such an annuity or similar financial instrument by virtue of the provision of such medical assistance.

42 U.S.C. § 1396p(e)(2) provides:

> In the case of disclosure concerning an annuity under subsection (c)(1)(F) of this section, the State shall notify the issuer of the annuity of the right of the State under such subsection as a preferred remainder beneficiary in the annuity for medical assistance furnished to the individual.

STATEMENT OF THE CASE

The Petitioner Glover, an 84-year-old man residing in a Gainesville, Georgia, nursing home purchased an irrevocable, non-assignable, and actuarially sound

annuity for himself shortly before applying for Medicaid benefits.[1]

In connection with processing Glover's application, the Respondent, the Georgia Department of Community Health ("DCH") and the Department of Family and Children Services ("DFCS") asked Glover to verify that he had named the State of Georgia as the remainder beneficiary on the annuity and Glover refused, claiming that § 2339 of the Georgia Medicaid Manual[2] was inapplicable to his annuity and in contravention of other provisions of federal law.

Thereafter, DFCS approved Glover's application for benefits, but assessed a seven (7) month transfer of asset penalty against him. The penalty imposed precluded the payment of benefits on Glover's behalf to the nursing home during the penalty period.

Glover appealed the penalty to the Georgia Office of State Administrative Hearings, and an

---

[1] Glover also purchased an annuity with the proceeds of an Individual Retirement Account ("IRA" as defined under § 408(c) of the Internal Revenue Code). However, DCH did not ask Glover to name the State as a remainder beneficiary of this annuity, as, according to DCH, this type of annuity is exempt from the requirements of naming the State of Georgia as the remainder beneficiary under § 2339 of the Georgia Medicaid Manual and 42 U.S.C. § 1396p(c)(1)(G)(i) (addressing certain retirement related annuities).

[2] A copy of § 2339 of the Georgia Medicaid Manual can be found at http://www.odis.dhr.state.ga.us/3000_fam/3480_medicaid/MAN3480.doc.

Administrative Law Judge ("ALJ") issued an initial decision reversing the penalty imposed by DFCS.

DFCS thereafter filed a request for agency review by the Georgia Department of Community Health ("DCH"), the state agency responsible for administering Georgia's Medicaid program, and DCH issued a final decision reversing the ALJ and upholding the penalty imposed on Glover by DFCS.

Pursuant to O.C.G.A. § 50-13-19 of the Administrative Procedures Act, Glover then sought judicial review from the Superior Court of Hall County which affirmed the final agency decision upholding the penalty imposed on Glover by DFCS.

The Court of Appeals granted Glover's application for discretionary appeal and reversed the Hall County Superior Court, concluding that § 2339 of the Georgia Medicaid Manual as applied to Glover was inconsistent with the plain language of the federal Medicaid statute and that pursuant to 42 U.S.C. § 1396p(c)(1)(G)(ii), Glover's annuity was not an asset to which the asset transfer penalty would apply. (Appendix 31 and 37).

In holding that the penalty provisions of 42 U.S.C. § 1396p(c)(1)(F) did not apply to the annuity purchased by Glover, the Court of Appeals found the federal statutory language of 42 U.S.C. § 1396p(c)(1)(G) was unambiguous and refused to defer to DCH's decision which was based on a contrary interpretation of the statute provided by the United States Department of Health and Human

Services, Centers for Medicare and Medicaid Services ("CMS"), the federal agency charged with administering the Medicaid program. (Appendix 31 and 37).

Respondents, David Cook (who at the time of filing of the Petition for Certiorari to the Georgia Supreme Court was then acting in his official capacity as Commissioner of DCH) and Clyde L. Reese, III, Esq. (who at the time of filing of the Petition for Certiorari to the Georgia Supreme Court was then acting in his official capacity as Director of DFCS),[3] appealed to the Georgia Supreme Court, arguing that the Court of Appeals improperly interpreted the annuity sections of 42 U.S.C. § 1396p and erred in holding that § 2339 of the Georgia Medicaid Manual as applied to Glover violated federal law.

DCH asserted that the provisions of 42 U.S.C. §§ 1396p(c)(1)(F) and (G) are ambiguous, and DCH contended that the Georgia Court of Appeals was required to defer to CMS' interpretation of the federal statute found in an July 2006 Opinion Letter issued by CMS (hereinafter "2006 CMS Opinion Letter").[4]

The Georgia Supreme Court found that the federal statutory provisions of 42 U.S.C. § 1396p are

---

[3] Clyde L. Reese, III, Esq., is now the acting Commissioner of DCH and Bobby Cagle is the Interim Director of DFCS.

[4] Letter to State Medicaid Directors (July 2006), Enclosure, § 6012 – Changes in Medicaid Annuity Rules under the DRA of 2005, available at http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/TOAEnclosure.pdf.

ambiguous and the relevant administrative agencies' interpretations found in the 2006 CMS Opinion Letter are based on a permissible construction of the statutory language, and reversed the Court of Appeals. (Appendix 3).

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE SPLIT BETWEEN THE GEORGIA SUPREME COURT AND THE SIXTH CIRCUIT FEDERAL COURT OF APPEALS AS TO WHETHER THE INTERPRETATION OF CMS THAT THE ASSET TRANSFER PENALTY PROVISIONS OF 42 U.S.C. § 1396p(c)(1)(F) APPLY TO ALL ANNUITIES IS A CORRECT AND REASONABLE INTERPRETATION OF 42 U.S.C. § 1396p AND ENTITLED TO DEFERENCE.

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n. 9, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), this Court held that . . .

> considerable weight should be accorded to an executive department's interpretation of the construction, meaning or reach of a statute, as such an interpretation represents a reasonable accommodation of conflicting policies, unless it appears from the statute or its

> legislative history that an agency's interpretation of a federal statute is not one that Congress would have sanctioned.

In *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), this Court has also held that . . .

> to the extent that CMS has issued guidance on the federal Medicaid statutes in the form of opinion letters, an agency manual, and an amicus brief that lack the force of law, its statutory interpretations are not afforded deference but "are 'entitled to respect' under . . . , . . . but only to the extent that those interpretations have the 'power to persuade[.]' " (brackets supplied).

See also Caremark, Inc. v. Goetz, 480 F.3d 779, 787 (6th Cir. 2007) (applying *Skidmore* to interpretations of Medicaid statutes set forth by CMS).

In the case below, the Georgia Supreme Court stated that 42 U.S.C. § 1396p(c)(1) does not indicate whether subsections (F) and (G) are independent requirements each of which must be satisfied or whether the provisions of subsection (G) provide an exception for the purchase of certain types of annuities defined therein to the penalty provisions of 42 U.S.C. § 1396p(c)(1)(F). (Appendix 8-9).

Finding that the provisions of 42 U.S.C. § 1396p are silent in regards to the interplay of 42 U.S.C. §§ 1396p(c)(1)(F) and (G), and finding no specific direction from Congress in regards to the interplay of subsections (F) and (G), the Georgia Supreme Court, with no reference to or analysis of its legislative

history, relied on the 2006 CMS Opinion Letter, which interpreted that the provisions of subsection (F) apply to all annuities.[5]

The Georgia Supreme Court then held that the interpretation by CMS that the penalty provisions of subsection (F) apply to all annuities is a permissible ". . . interpretation provided by these expert agencies administering this highly complex regulatory scheme." (Appendix 16).

However, in *Hughes v. McCarthy*, 734 F.3d 473 (2013), *cert. denied*, 52 U.S. 13-898 (2014), the Sixth Circuit analyzed the same Opinion Letter issued by CMS in July 2006, and determined that "[t]o the extent [CMS] has issued guidance on the federal medicaid statutes in the form of opinion letters, an agency manual, and an amicus brief that lack the force of law, its statutory interpretation [that the penalty provisions of § 1396p(c)(1)(F) apply to all

---

[5] "Unlike the new section 1917(c)(1)(G) added by section 6012(c) of the DRA . . . , section 1917(c)(1)(F) does not restrict application of its requirements only to an annuity purchased by or on behalf of an annuitant who has applied for medical assistance for nursing facility or other long term care services. Therefore, we interpret section 1917(c)(1)(F) as applying to annuities purchased by an applicant or by a spouse, or to transactions made by the applicant or spouse."

Letter to State Medicaid Directors (July 2006), Enclosure, § 6012 – Changes in Medicaid Annuity Rules under the DRA of 2005 § II.B (July 27, 2006).

annuities] are not afforded deference under *Chevron*." *See Hughes*, 734 F.3d at 478.

Thus, there is a conflict in the opinion of the Georgia Supreme Court and the opinion of the Sixth Circuit as to whether the interpretation of CMS as expressed in the form of an opinion letter that the penalty provisions of subsection (F) apply to all annuities is a permissible and reasonable construction of the statutory language entitling it to deference under *Chevron*.

The Georgia Supreme Court even acknowledged there is conflict as to whether the interpretation of CMS as expressed in the form of an opinion letter that the penalty provisions of subsection (F) apply to all annuities is a permissible and reasonable construction of the statutory language entitling it to deference under *Chevron* or *Skidmore*. Appendix 9, n. 6. Appendix 11, n. 8.

Hughes rejects the interpretation of CMS that the statutory language of 42 U.S.C. § 1396p(c)(1)(F) applies to all annuities because it defies the text and structure of 42 U.S.C. § 1396p(c)(1). *Id*. at 484.

Reviewing the entire text of 42 U.S.C. § 1396p(c)(1), the *Hughes* court found that the text of 42 U.S.C. § 1396(c)(2)(B)(i) does not support an interpretation that the penalty provisions of subsection (F) applies to all annuities.

Instead, according to *Hughes*, the text of 42 U.S.C. § 1396(c)(2)(B)(i) creates an exception to the

penalty provisions of 42 U.S.C. § 1396p(c)(1)(F). *Id*. at 484 and 485.

Although it did not rule specifically that the provisions of subsection (G) also create an exception to the penalty provisions of subsection (F),[6] the *Hughes* decision does demonstrate that the interpretation of CMS is not supported by an interpretation and analysis of the text of subsection (F) in conjunction with the text of other parts of 42 U.S.C. § 1396p(c)(1), including the text of subsection (G)(ii).

The language of subsection (F) stating that "[f]or purposes of this paragraph" is a reference to the penalty provisions of paragraph (c)(1) of § 1396p, and is a limitation of the imposition of a transfer of asset penalty to the provisions found therein. *Hughes* at 485.

The language of subsection (c)(1)(G)(ii) stating that "[f]or purposes of this paragraph" is also a reference to the same penalty provisions of paragraph (c)(1) of § 1396p, and is also a limitation to the imposition of the penalty provisions found therein for annuities that are irrevocable and non-assignable,

---

[6] Although the *Hughes* court cited the provisions of § 1396p(c)(1)(G) in its analysis of whether the penalty provisions of 42 U.S.C. §1396p(c)(1)(F) apply to all annuities, it did not specifically address whether the annuity in question is also saved by § 1396p(c)(1)(G), given its ruling that the penalty provisions of 42 U.S.C. 1396p(c)(1)(F) do not apply to annuities which qualify under the stated exceptions of 42 U.S.C. 1396(c)(2)(B)(i). *See Hughes* at 488, n. 14.

actuarially sound and provide for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments.[7]

By excluding from the definition of assets subject to transfer penalties under 42 U.S.C. § 1396p(c)(1), the language of subsection (G)(ii) can be reasonably interpreted to carve out an exception to any transfer penalties thereunder, rather than imposing an additional requirement which must be satisfied in order

---

[7] 42 U.S.C. § 1396p(c)(1)(G) provides :

> (G) For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes an annuity purchased by or on behalf of an annuitant who has applied for medical assistance with respect to nursing facility services or other long-term care services under this subchapter unless –
>
> (i) the annuity is – (I) an annuity described in subsection (b) or (q) of section 408 of the Internal Revenue Code of 1986 [Title 26, U.S.C.A.]; or (II) purchased with proceeds from – (aa) an account or trust described in subsection (a), (c), or (p) of section 408 of such Code; (bb) a simplified employee pension (within the meaning of section 408(k) of such Code); or (cc) a Roth IRA described in section 408A of such Code; or
>
> (ii) the annuity – (I) is irrevocable and nonassignable; (II) is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); and (III) provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.

(internal paragraph formatting altered).

to avoid a transfer of assets penalty. *Hughes* at 484-485. *See also* Appendix 25-26.

The *Hughes* court also found that the language of 42 U.S.C. § 1396(e)(1)-(2) clearly supports an interpretation that the penalty provisions of subsection (F) do not apply to all annuities. *Id.* at 488, n. 15.[8]

The Georgia Court of Appeals also concluded that the language of 42 U.S.C. § 1396(e)(1)-(2) supports an interpretation and conclusion that the penalty provisions of subsection (F) do not apply to all annuities. Appendix 26-28.[9]

Thus, after an analysis of the text of 42 U.S.C. § 1396p as a whole, the correct interpretation of 42

---

[8] With respect to annuity disclosures, 42 U.S.C. § 1396p(e)(1) provides that the Medicaid application must include "a statement that under paragraph (2) the State becomes a remainder beneficiary under such an annuity or similar financial instrument by virtue of the provision of such medical assistance." The referenced "paragraph 2" of subsection (e) limits itself to annuities that are subject to § 1396p(c)(1)(F)'s annuity rules (such as naming the state as the remainder beneficiary). *See id.* § 1396p(e)(2)(A) ("In the case of disclosure concerning an annuity under subsection (c)(1)(F) of this section, the State shall notify the issuer of the annuity of the right of the State under such subsection as a preferred remainder beneficiary in the annuity for medical assistance furnished to the individual."). Thus, subsection (e) reenforces the conclusion that § 1396p(c)(1)(F) does not control all annuities. *Hughes* at 488, n. 15.

[9] "Thus, [42 U.S.C. § 1396p(e)] buttresses the conclusion that subsection (c)(1)(F) does not apply to all annuities, regardless of form." *Cook v. Bottesch*, 320 Ga.App. 796, 740 S.E.2d 752 (Ga. App. 2013). (Brackets supplied).

U.S.C. § 1396p is that the penalty provisions of subsection (F) do not apply to all annuities, especially if there are stated exceptions found in any other portion of 42 U.S.C. § 1396p, including subsection (G)(ii).

An analysis of the legislative history of subsections (F) and (G) also demonstrates that the interpretation of CMS that the penalty provisions of 42 U.S.C. § 1396p(c)(1)(F) apply to all annuities is not a reasonable interpretation of the federal Medicaid statute, and thus not entitled to deference under *Chevron*.

The Conference Committee Report[10] provides that annuities would be excluded from penalties if they

---

[10] Congressional Conference Committee Report 109-362, Sec. 6012, page 275

Conference Agreement

> The conference agreement amends section 1917(c)(1) of the Social Security Act to include, in the definition of assets subject to transfer penalties, an annuity purchased by or on behalf of an annuitant who has applied for a Medicaid-covered nursing facility or other long-term care services. Annuities that would not be subject to asset transfer penalties would include an annuity as defined in subsection (b) and (q) of section 408 of the Internal Revenue Code (IRC), or purchased with proceeds from: (1) an account or trust described in subsections (a), (c), and (p) of section 408 of the IRC; (2) a simplified employee pension as defined in section 408(k) of the IRC; or (3) a Roth IRA defined in section 408A of the IRC.

(Continued on following page)

are irrevocable and non-assignable, actuarially sound (as determined by actuarial publications of the Office of the Chief Actuary of the Social Security Administration), and provide for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments.

This same language is found in the text of subsection (G)(ii).

By stating in the Conference Committee Report that annuities would be excluded from penalties if they meet certain requirements, and by then using that same language in the text of subsection (G)(ii), Congress provides clear direction that it did not intend for the transfer of asset penalty provisions of 42 U.S.C. § 1396p(c)(1), including the penalty provisions of subsection (F) to apply to all annuities.

Thus, the interpretation of CMS that subsection (F) applies to all annuities is clearly under *Chevron* not an interpretation that Congress would have sanctioned.

Annuities would also be excluded from penalties if they are irrevocable and non-assignable, actuarially sound (as determined by actuarial publications of the Office of the Chief Actuary of the Social Security Administration), and provide for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments.

The amendments apply to transactions, including the purchase of annuity, occurring on or after the date of this Act's enactment.

Instead, the language of legislative history supports the interpretation that the transfer of asset penalty provisions of 42 U.S.C. § 1396p(c)(1)(F) apply to annuities that are not otherwise excepted by another provision of 42 U.S.C. § 1396p, including subsection (G).

If Congress had intended that the transfer of asset penalty provisions of subsection (F) applies to all annuities, regardless of whether the annuity also complies with subsection (G)(ii), then it could have stated exactly so in the text of the transfer statute itself, rather than from other less authoritative sources such as policy letters from CMS. *Tran v. Gonzales*, 447 F.3d 937, 941 (6th Cir. 2006). ["Policy [rationales] cannot prevail over the text of a statute."] (brackets supplied).

In viewing the statutory text of subsection (G) in light of the language found in the legislative history of the annuity transfer statute, Congress clearly did not intend for the penalty provisions of subsection (F) to apply to all annuities, specifically those under subsection (G).

To interpret the text of subsections (F) and (G) otherwise, would be to add text to the statute that Congress did not intend.

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other

language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987).

Accepting the interpretation of CMS that the provisions of subsection (F) apply to all annuities regardless of form, then the provisions of subsections (F) and (G) would not work together, and subsection (G) would be rendered illusory, superfluous and meaningless.

Is this the purpose Congress intended?

The interpretation that the penalty provisions of subsection (F) applies to annuities that are not otherwise excepted under another provision of the transfer statute – such as subsection (G) is a correct interpretation of 42 U.S.C. § 1396p.

It appears from the language of 42 U.S.C. § 1396p(c)(1) that considerable weight should not have been accorded by the Georgia Supreme Court to CMS' interpretation of the construction, meaning or reach of subsection (F). Such an interpretation represents an unreasonable accommodation and impermissible construction of subsections (F) and (G) under *Chevron*.

Moreover, although CMS' interpretation may be entitled to respect under *Skidmore*, in light of the language of the legislative history of subsections (F) and (G), CMS' interpretation that the transfer of asset penalty provisions of subsection (F) apply to all

annuities, lacks the power to persuade that it is an interpretation that Congress would have sanctioned.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Georgia Supreme Court.

Respectfully submitted,

JOEL KEVIN THARPE
Counsel of Record for Petitioner
405 Broad Street, SE
Gainesville, Georgia 30501
(770) 503-1022
kevin@kevintharpe.com

In the Supreme Court of Georgia

Decided: July 11, 2014

S13G1127. COOK et al. v. GLOVER.

THOMPSON, Chief Justice.

We granted certiorari in *Cook v. Bottesch,* 320 Ga. App. 796 (740 SE2d 752) (2013) to consider whether the Court of Appeals properly interpreted 42 U.S.C. § 1396p with respect to whether a Medicaid applicant's purchase of an annuity was subject to an asset transfer penalty. In this case, the Georgia Department of Human Services, Family and Children Services ("DFCS") granted appellee Jerry L. Glover's application for Medicaid benefits but imposed a multi-month asset transfer penalty on him pursuant to § 2339 of DFCS's Georgia Economic Support Services Manual (the "Eligibility Manual") due to his refusal to name the State as the remainder beneficiary on an annuity.[1] Glover appealed the penalty to

---

[1] Glover, an 82-year-old man residing in a Gainesville, Georgia, nursing home purchased an irrevocable, non-assignable, and actuarially sound annuity for himself shortly before applying for Medicaid benefits. In connection with processing his application, DFCS asked Glover to verify that he had named the State of Georgia as the remainder beneficiary on the annuity and Glover refused, claiming that § 2339 was inapplicable to his annuity and in contravention of other provisions of federal law. Thereafter, DFCS approved Glover's application for benefits, but assessed a seven-month transfer of asset penalty against him. The penalty imposed precluded the payment of benefits on Glover's behalf to the nursing home during the penalty period.

an Office of State Administrative Hearings Administrative Law Judge ("ALJ") who issued an initial decision reversing the penalty. DFCS thereafter filed a request for agency review by the Georgia Department of Community Health ("DCH"), the state agency responsible for administering Georgia's Medicaid program, and DCH issued a final decision upholding the penalty. Pursuant to OCGA § 50-13-19 of the Administrative Procedures Act, Glover then sought judicial review from the Superior Court of Hall County which affirmed the final agency decision. The Court of Appeals granted Glover's application for discretionary appeal and reversed the superior court, concluding that § 2339 of the Eligibility Manual as applied to Glover was inconsistent with the plain language of the federal Medicaid statute and that pursuant to 42 U.S.C. §§ 1396p(c)(1)(F) and (G), Glover's annuity was not an asset to which the asset transfer penalty would apply. *See Cook v. Bottesch, supra*. In holding that the penalty did not apply, the Court of Appeals found the federal statutory language was unambiguous and refused to defer to DCH's decision which was based on a contrary interpretation of the statute provided by the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services ("CMS"), the federal agency charged with administering the Medicaid program.

Appellants, David Cook in his official capacity as Commissioner of DCH and Clyde L. Reese in his official capacity as Commissioner of DFCS, appealed

to this Court arguing that the Court of Appeals improperly interpreted the annuity section of the Medicaid Act and erred in holding that § 2339 as applied to Glover violated federal law. Asserting that the statutory provisions at issue are ambiguous, appellants contend that the Court of Appeals was required to defer to CMS's interpretation of the federal statute. *See Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 843, n. 9 (104 SCt 2778, 81 LEd2d 694) (1984) (reviewing court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute). Because we find that the federal statutory provisions at issue are ambiguous and the relevant administrative agencies' interpretations thereof are based on a permissible construction of the statutory language,[2] we reverse the Court of Appeals' decision in this case.

1. Medicaid is a joint federal-state program that provides medical care to needy individuals. *See Douglas v. Independent Living Center of Southern California, Inc.,* ___ U.S. ___ (132 SCt 1204, 182 LEd2d 101) (2012). As a participant in the Medicaid program, the State of Georgia is required to have an approved state plan for medical assistance which complies with certain requirements imposed by the Medicaid Act as well as with regulations promulgated

---

[2] This case involves the judicial review of the state administrative agency's decision as well as the federal administrative agency's interpretation of a federal statute upon which the state agency relied.

by the Secretary of Health and Human Services. *See Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 502 (110 SCt 2510, 110 LEd2d 455) (1990); 42 U.S.C. § 1396a(a). As federal administrator of the Medicaid program, CMS is responsible for the approval of state Medicaid plans and for providing statutory interpretation and guidance with respect to Medicaid eligibility and the penalties for noncompliance with Medicaid rules.[3] *See Douglas, supra*, 132 SCt at 1208.

In Georgia, DCH is the state agency responsible for administering the Medicaid program and is statutorily authorized by the State "to establish such rules and regulations as may be necessary or desirable in order to execute the state plan and to receive the maximum amount of federal financial participation available." OCGA § 49-4-142(a). *See also* 42 C.F.R. § 431.10. DCH, which issues policies and procedures governing the state's Medicaid program, contracts with DFCS to make Medicaid eligibility determinations. Relevant to this case, federal law requires Georgia's plan for medical assistance to comply with the provisions of 42 U.S.C. § 1396p with respect to the transfer of assets by Medicaid applicants. *See* 42 U.S.C. § 1396a(a)(18). Specifically, in assessing an applicant's eligibility for medical assistance under the

---

[3] CMS's interpretations of the Medicaid law and regulations are binding on State Medicaid agencies. *See* CMS State Medicaid Manual, a copy of which can be accessed on the internet at http://www.cms.gov/Regulations-and-Guidance/guidance/Manuals/Paper-Based-Manuals-Items/CM S021927.html.

plan, subsection 1396p(c) requires that the state provide a penalty for the disposal of assets for less than fair market value during a five-year, look-back period. This subsection additionally sets forth rules regarding the assessment of penalties for the transfer of various types of assets, as well as provisions for protecting certain transfers from the penalty. With respect to the treatment of annuities, subsection 1396p(c)(1)(F) specifically requires:

> For purposes of this paragraph, the purchase of an annuity shall be treated as the disposal of an asset for less than fair market value unless –
>
> > (i) the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual under this subchapter; or
> >
> > (ii) the State is named as such a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value.

Next, subsection 1396p (c)(1)(G) provides:

> For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes an annuity purchased by or on behalf

of an annuitant who has applied for medical assistance with respect to nursing facility services or other long-term care services under this subchapter unless . . .

(ii) the annuity –

(I) is irrevocable and non-assignable;

(II) is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); and

(III) provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.

CMS has interpreted the interplay between these subsections as requiring that all annuities comply with both (F) and (G) in order to avoid the imposition of a penalty. *See* CMS, Changes in Medicaid Annuity Rules under the Deficit Reduction Act of 2005, § II.B (July 27,2006) Letter Enclosure § 6012.[4] *See also Hutcherson v. Arizona Health Care Cost Containment Sys. Admin.,* 667 F3d 1066, 1069-70 (9th Cir. Ariz.

[4] A copy of this letter is available at http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/TOAEnclosure.pdf.

2012). DCH Policy § 2339, which comports with the guidance set forth by CMS for determining whether the purchase of an annuity will be treated as the disposal of an asset for less than fair market value, thus first requires that the state be named a remainder beneficiary in accordance with 42 U.S.C. § 1396p(c)(1)(F), before examining the annuity to determine whether it additionally meets the requirements of subsection (G) that it be actuarially sound. In this case, Glover disclosed his annuity, which met the requirements of subsection (G); however, because it did not comply with the requirement of subsection (F) that the state be named a remainder beneficiary, he was assessed a transfer penalty.

In reversing DCH's decision upholding the penalty, the Court of Appeals noted that the CMS interpretation on which it was based, requiring an annuitant applicant to comply with both 42 U.S.C. §§ 1396p(c)(1)(F) and (G) to avoid the asset transfer penalty, was partly inconsistent with the court's own reading of the federal statute. *See Bottesch,* 320 Ga. App. at 802-803. Although agreeing that a plain reading of subsection (F) standing alone clearly required that the state be named a remainder beneficiary of any annuity, the Court of Appeals interpreted subsection (G) to unambiguously remove actuarially sound annuities benefitting Medicaid applicants from the requirements of subsection (F) by removing them altogether from the definition of "assets" with respect to a transfer of assets. *Id*. Concluding that the statutory language was plain and unambiguous and that

the intent of Congress with respect to the treatment of annuities under subsections (F) and (G) was thus clear, the Court of Appeals determined that the judicial deference generally afforded an agency's interpretation of a statute under its purview was not warranted with respect to that portion of CMS's interpretation with which the court disagreed. *See Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 843, n. 9 (104 SCt 2778, 81 LEd2d 694) (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."); *Christensen v. Harris County,* 529 U.S. 576, 588 (120 SCt 1655, 146 LEd2d 621) (2000) (where language is not ambiguous deference to agency interpretation is unwarranted). *See also Handel v. Powell,* 284 Ga. 550, 553 (2008) ("While judicial deference is afforded an agency's interpretation of statutes it is charged with enforcing or administering, the agency's interpretation is not binding on the courts, which have the ultimate authority to construe statutes.").

In reviewing the provisions of the federal Medicaid statute at issue, we disagree with the Court of Appeals' conclusion that the statutory language is plain and unambiguous and the congressional intent clear. Here, 42 U.S.C. § 1396p(c)(1) does not indicate whether subsections (F) and (G) are independent requirements each of which must be satisfied to exempt an annuity from the penalty or, alternatively, if the requirement provided in (F) only applies to an

annuity when the annuity fails the exception provided in (G). Nor do we find corresponding language in other provisions of the statute to be especially illuminating.[5] As the statute is silent with respect to the relationship between (F) and (G) and Congress has not otherwise directly addressed the precise question at issue, we find the intended relationship between these provisions to be ambiguous, at best.[6]

Thus, it is necessary for this Court to determine what deference, if any, should be accorded DCH's decision, and concomitantly, the deference due the CMS statutory interpretation on which DCH's decision was based. "Where statutory provisions are ambiguous, courts should give great weight to the interpretation adopted by the administrative agency charged with enforcing the statute." *Schrenko v. DeKalb County School Dist.,* 276 Ga. 786, 791 (582 SE2d 109) (2003). As the Georgia legislature has charged DCH with developing and implementing the policies necessary to meet Medicaid requirements, we

[5] We note that in reaching different conclusions with respect to the meaning of the statutory sections at issue, both the Court of Appeals and the superior court relied on 42 U.S.C. § 1396p(e) as support for their opposing interpretations.

[6] While CMS's interpretation that the requirements of subsection (F) apply to all annuities has been adopted by at least one federal appellate court, *see Hutcherson,* 667 F3d at 1069-1070; another has found its guidance on this issue not "entitled to respect" under *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (65 SCt 161, 89 LEd 124) (1944). *See Hughes v. McCarthy,* 734 F3d 473, 485 (6th Cir. Ohio 2013).

will defer to that agency's interpretation so long as it comports with legislative intent and is reasonable. *See Center For a Sustainable Coast v. Coastal Marshlands Protection Committee,* 284 Ga. 736, 741 (670 SE2d 429) (2008); *Georgia Real Estate Commission v. Accelerated Courses in Real Estate, Inc.,* 234 Ga. 30, 32-33 (214 SE2d 495) (1975). *See also Georgia Dept. of Community Health v. Medders,* 292 Ga. App. 439 (664 SE2d 832) (2008) (in case involving Medicaid claimant's appeal of DCH decision imposing transfer of asset penalty, Court of Appeals determined it was required to defer to the agency's reasonable conclusion that, under applicable Medicaid regulations, a renounced inheritance constituted the disposal of an asset). Moreover, the level of deference this Court gives state administrative agency decisions interpreting ambiguous statutes is in accord with that identified by the United States Supreme Court in *Chevron* as appropriate for the judicial review of a federal administrative agency's statutory interpretation. *See Chevron, supra* at 844 (when reviewing an agency's construction of a statute it administers, the court must give effect to the unambiguously expressed intent of congress; however, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute).[7]

---

[7] "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the

(Continued on following page)

Although not directly confronted with a challenge to the validity of CMS's interpretation of the relevant statutory provisions in this case, we nonetheless will consider the reasonableness of CMS's interpretation as adopted by DCH and incorporated in DCH's policy § 2339. Given that the deference Georgia courts accord state administrative agency interpretations is comparable to *Chevron*-style deference, we find no reason to accord a lesser level of deference to DCH's interpretation.[8]

---

best statutory interpretation. [Cit.]" *National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967, 980 (125 SCt 2688, 162 LEd2d 820) (2005). "*Chevron* established a 'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Id*. at 982 (quoting *Smiley v. Citibank (South Dakota), N.A.,* 517 U.S. 735, 740-741 (116 SCt 1730, 135 LEd2d 25) (1996)).

[8] There is some question as to whether the CMS opinion letter in this case actually is entitled to *Chevron*-style deference or only "entitled to respect" if it has the power to persuade. *Skidmore, supra*, 323 U.S. at 140 ("We consider that the rulings, interpretations and opinions of the [agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."); *United States v. Mead Corp.,* 533 U.S. 218, 228 (121 S Ct 2164, 150 LEd2d 292) (2001) (explaining the *Skidmore* principle that "[t]he fair measure of deference to an agency . . .

(Continued on following page)

The Court of Appeals' opinion sets forth a plausible interpretation of subsections (F) and (G) of 42 U.S.C. §§ 1396p(c)(1). However, based on our review of the statutory provisions, we find DCH's interpretation of § 2339, which is consistent with CMS's interpretation of the statute, to be reasonable and entitled to deference. Accordingly, we hold the Court of Appeals erred in finding the language of 42 U.S.C. § 1396p(c)(1) to be plain and unambiguous and erred in failing to defer to DCH's decision upholding the transfer of asset penalty in this case. *See Pruitt Corp. v. Ga. Dept. of Community Health,* 284 Ga. 158, 160 (664 SE2d 223) (2008) ("When an administrative agency decision is the subject of judicial review, judicial deference is to be afforded the agency's interpretation of statutes it is charged with enforcing or administering and the agency's interpretation of rules

---

has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." (footnotes omitted)). Although the United States Supreme Court refused to extend *Chevron* deference to "opinion letters" in *Christensen, supra*, 529 U.S. 576, and federal district courts since have interpreted this to include CMS opinion letters, *see Hughes, supra*, 734 F3d at 485; *Estate of Landers v. Leavitt,* 545 F3d 98, 107 (2nd Cir. 2008), we note that in *NationsBank of N. C., N.A. v. Variable Annuity Life Ins. Co.,* 513 U.S. 251 (115 SCt. 810, 130 LEd2d 740) (1995) the Supreme Court applied *Chevron* deference to an interpretive letter issued by the Comptroller of the Currency interpreting the National Bank Act.

and regulations it has enacted to fulfill the function given it by the legislative branch.").[9]

Judgment reversed. All the Justices concur, except Nahmias and Blackwell, JJ., who concur specially.

S13G1127. COOK et al. v. GLOVER.

NAHMIAS, Justice, concurring specially.

Although I believe the majority opinion reaches the right result, I am dubious of its conclusion that the interpretation of the federal Medicaid statute at issue, 42 USC § 1396p, by the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), and by the

---

[9] The decision in *Pruitt, supra*, is not inconsistent with the holding in this case as alleged in the concurrence. The issue in *Pruitt* involved DCH's interpretation of the phrase "last approved cost report" as used by, *but not defined in,* its manual on nursing facility policies. 284 Ga. at 158. Unlike the issue in this case which involves a claim that a DCH *policy* is based on an erroneous interpretation of the federal Medicaid statute, the issue in *Pruitt* only involved a dispute over the common meaning of words used in a DCH manual. *See id*. Moreover, in *Pruitt* this Court specifically declined to decide the issue of whether a DCH decision based on a *policy* reflected in its manual would be entitled to judicial deference. *See id*. at 160. As the propriety of a *policy* adopted by DCH based on an interpretation of the Medicaid statute is at issue in this case, under this Court's precedent, including that recognized in *Pruitt,* DCH's decision with respect to that policy is entitled to the judicial deference generally given an agency's interpretation of statutes it is charged with enforcing and administering.

Georgia Department of Community Health (DCH) is entitled to the full measure of judicial deference required by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (104 SCt 2778, 81 LEd2d 694) (1984). The CMS interpretation is "contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking," and the United States Supreme Court has said that, normally, "[i]nterpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Christensen v. Harris County,* 529 U.S. 576, 587 (120 SCt 1655, 146 LEd2d 621) (2000). Instead, an interpretation contained in an opinion letter is generally entitled only to so-called *Skidmore* deference, meaning that the agency's position is "'entitled to respect'" to the extent that it has the "'power to persuade'" the reviewing court. *Christensen,* 529 U.S. at 587 (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (65 SCt 161, 89 LE 124 (1944)).

Similarly, the DCH interpretation here is contained not in a formal rule but rather in the department's Medicaid policy manual, and this Court has held, consistent with the approach taken federally in *Christensen,* that it is erroneous for a Georgia court to give the full "deference due a [state] statute, rule or regulation to a term in a departmental manual, the terms of which ha[ve] not undergone the scrutiny afforded a statute during the legislative process or

the adoption process through which all rules and regulations must pass." *Pruitt Corp. v. Ga. Dept. of Community Health,* 284 Ga. 158, 159-160 (664 SE2d 223) (2008). As under federal law, however, under state law an administrative agency's policy reflected in a manual may still be entitled to some degree of judicial deference. *See id.* at 160 (reserving this question).

It also should be noted that Congress delegated the authority to interpret the federal Medicaid statute only to the federal Department of Health and Human Services. *See* 42 USC §§ 1302(a), 1396a(a)(17). It is therefore clear that the Georgia DCH has no authority to contradict any regulations that CMS promulgates. *See Wilder v. Virginia Hosp. Assn.,* 496 U.S. 498, 502 (110 SCt 2510, 110 LEd2d 455) (1990). But it is not clear whether our General Assembly can give DCH the authority to fill silences and resolve ambiguities left by the federal statute and CMS's formal regulations with interpretations to which state courts must defer, particularly where DCH does so in a manual rather than in a rule adopted after notice and comment. *See* OCGA § 49-4-142(a) (saying that "[DCH] is authorized to establish such rules and regulations as may be necessary or desirable in order to execute the state plan and to receive the maximum amount of federal financial participation available in expenditures made pursuant to the state plan; provided, however, the department shall establish reasonable procedures for notice to interested parties and an opportunity to be heard prior to the adoption,

amendment, or repeal of any such rule or regulation"). I note on this point that all of the decisions of this Court that the majority opinion cites for the proposition that state courts must give "great weight" to state agency interpretations involved interpretations of *state* rather than federal statutes. *See e.g.*, *Center for a Sustainable Coast v. Coastal Marshlands Protection Committee,* 284 Ga. 736, 742 (670 SE2d 429) (2008). The only case apparently giving such weight to the interpretation of federal law provided in the DCH Medicaid policy manual was decided by our Court of Appeals before this Court decided *Pruitt* and cited no state or federal administrative law authority whatsoever. *See Ga. Dept. of Community Health v. Medders,* 292 Ga. App. 439, 442 (664 SE2d 832) (2008).

I see no need to resolve these complex administrative law questions in this case. In my view, the better reading of 42 USC § 1396p – the whole of the statute, including subsection (e) as well as subsections (c)(1)(F) and (G) – accords with the reading expressed by CMS in its opinion letter and by DCH in its manual that an annuity which complies with (c)(1)(F) must also comply with (c)(1)(G) to avoid an asset transfer penalty. To the extent that ordinary statutory construction leaves any doubt, even applying just *Skidmore*-type deference, I would resolve the doubt in favor of the interpretation provided by these expert agencies administering this highly complex regulatory scheme. *See Estate of Landers v. Leavitt,* 545 F3d 98, 107 (2d Cir. 2008) (explaining that, "in

cases such as those involving Medicare or Medicaid, in which CMS, 'a highly expert agency[,] administers a large complex regulatory scheme in cooperation with many other institutional actors, the various possible standards a large complex regulatory scheme in cooperation with many other institutional actors, the various possible standards for deference' – namely, *Chevron* and *Skidmore* – 'begin to converge,'" and noting "the Supreme Court's repeated suggestion that [CMS] interpretations, in particular, should receive more respect than the mine-run of agency interpretations" (citations omitted)).

For these reasons, I concur in the result reached by the majority opinion, but I do not join all of its reasoning. I am authorized to state that Justice Blackwell joins in this special concurrence.

THIRD DIVISION
MILLER, P. J.,
RAY and BRANCH, JJ.

NOTICE: Motions for reconsideration must be physically received in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rule 4(b) and Rule 37(b), February 21, 2008) http://www.gaappeals.us/rules/

March 26, 2013

In the Court of Appeals of Georgia

A12A2268. COOK et al. v. BOTTESCH.

A12A2269. COOK et al. v. SHOREY.

A12A2506. GLOVER v. COOK et al.

A13A0006. COOK et al. v. ROBERTSON.

BRANCH, Judge.

These cases require us to determine whether Georgia has properly implemented a certain asset transfer penalty dictated by the federal Medicaid statute in connection with coverage for long-term care. The difficulty is that there appear to be conflicting provisions of the statute pertaining to the penalty, specifically, the circumstances under which the penalty applies to annuities purchased by the Medicaid applicant or his or her spouse. One provision imposes a penalty on couples who, in a five-year, look-back period, purchase an annuity without naming the State as a remainder beneficiary. The other provision excludes certain annuities from the asset transfer

penalty. In the four cases before us, the Georgia Department of Community Health (DCH) imposed an asset transfer penalty on the applicants for Medicaid benefits because either they or their spouses refused to name the State as the remainder beneficiary on an annuity. For the reasons explained herein, we rule in favor of DCH on three cases but against DCH on one case with distinguishing facts.[1]

The parties do not dispute the essential facts found by the superior courts. John Bottesch, Carol Shorey, Boyce Robertson, and Jerry Glover (the "applicants") are elderly persons who reside, or did reside before death[2], in nursing homes and who sought Medicaid benefits for that care. Near in time to Bottesch, Shorey, and Robertson applying for Medicaid benefits, their respective spouses purchased one or more irrevocable, non-assignable, and actuarially sound annuities, which provide monthly benefits to the "community spouse" (i.e., not the institutionalized spouse). Glover purchased such an annuity for himself.

In connection with processing the applicants' Medicaid benefits applications, DCH asked the purchasers of the annuities to verify that they had named the State of Georgia as the remainder beneficiary as required by § 2339 of DCH's Economic Support

---

[1] Given the similarity of the underlying facts and the controlling legal issues, we have consolidated these cases for the purpose of appeal.

[2] Carol Shorey died in January 2011.

Services Manual (the "State Medicaid Manual"). The purchasers refused and claimed that § 2339 was inapplicable and in contravention of other provisions of federal law. In each case, DCH approved the applications for benefits but also imposed a multi-month penalty in light of the purchasers' refusal. The penalty had an adverse effect on the applicants by precluding benefit payments to the nursing homes during the penalty period. The applicants thereafter sought a hearing and review before the Office of State Administrative Hearings (OSAH).

With regard to Bottesch, Shorey, and Robertson, OSAH determined that the penalty was inapplicable but that the applicants were not eligible for Medicaid benefits until they submitted a statement that they had designated the State as a remainder beneficiary. After an unsuccessful attempt at additional agency review,[3] Bottesch and Shorey petitioned for review in the Superior Court of Union County; Robertson petitioned for review in the Superior Court of Towns County. The same judge from the Enotoh Judicial Circuit was assigned to all three cases. On March 29, 2012, that judge signed orders in all three cases reversing the administrative rulings. The judge held that the State Medicaid Manual's § 2339 requirement that the community spouse name the State as a

---

[3] Bottesch and Shorey sought review of the OSAH decision by the Appeals Reviewer for DCH. The Appeals Reviewer effectively reinstituted DCH's original decision, including the penalty.

remainder beneficiary violates federal Medicaid law, both because the annuities were not "assets" for purposes of imposing a transfer of assets penalty and because the § 2339 requirement contravened separate spousal impoverishment protection provisions of the Medicaid statute. In May 2012, this Court granted DCH's applications for discretionary review in each of these three cases.

With regard to Glover, OSAH reversed the penalty and concluded that § 2339 of the State Medicaid Manual violated federal law because the annuity did not fall within the definition of an asset for purposes of imposing the penalty. DCH sought review by the Appeals Reviewer, which reinstituted DCH's decision; this final decision held that Glover was subject to the penalty. Glover petitioned for review in the Superior Court of Hall County. On May 7, 2012, the superior court affirmed the final agency decision. We granted Glover's application for discretionary review.

Thus the Bottesch, Shorey, and Robertson cases require us to determine whether the Department correctly assessed the asset transfer penalty on annuities purchased with marital assets for the benefit of the community spouse, whereas the Glover case requires us to answer the same question for an annuity purchased for the benefit of the institutionalized spouse. In all four cases, however, DCH's final decision held that the applicants were eligible for medical assistance but that they were subject to the asset transfer penalty because they failed to name the State as a remainder beneficiary.

1. "Judicial review of an administrative decision requires the court to determine that the findings of fact are supported by 'any evidence' and to examine the soundness of the conclusions of law that are based upon the findings of fact. OCGA § 50-13-19(h)." *Pruitt Corp. v. Ga. Dept. of Community Health,* 284 Ga. 158, 160(3) (664 SE2d 223) (2008). This scope of judicial review is narrow, and in a case where the facts are not in dispute, such as here, the court

> may reverse or modify the agency decision if substantial rights of the appellant have been prejudiced because the administrative decision is: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law. OCGA § 50-13-19(h).

(Punctuation omitted.) *Id*. at 161 (3); *see also Ga. Dept. of Community Health v. Medders,* 292 Ga. App. 439, 440 (664 SE2d 832) (2008). The primary issue in this case is whether § 2339 of DCH's Medicaid Manual is in violation of the Medicaid statute. Thus, we begin by interpreting that statute.

2. When construing a federal statute, "the starting point must be the language employed by Congress, and courts must assume that the legislative purpose is expressed by the ordinary meaning of the words used." (Punctuation omitted.) *A Fast Sign Co. v. American Home Svcs.,* 291 Ga. 844, 846 (734 SE2d 31) (2012), quoting *American Tobacco Co. v. Patterson,* 456 U.S. 63, 68(II) (102 SC 1534, 71 LE2d

748 (1982). And "judicial construction is necessary only when a statute is ambiguous; in fact, when the language of a statute is plain and unequivocal, judicial construction is not only unnecessary but forbidden." (Citation omitted.) *Fleming v. State,* 271 Ga. 587, 589 (523 SE2d 315) (1999).

(a) The Plain Language of the Statutory Asset Transfer Penalty. Federal law requires that a state plan for medical assistance comply with the provisions of 42 USC § 1396p with respect to transfers of assets. 42 USC § 1396a(a)(18). Subsection 1396p(c) requires that the state plan provide a penalty for disposal of assets for less than fair market value during a five-year, look-back period:

> if an institutionalized individual or the spouse of such an individual . . . disposes of assets for less than fair market value on or after the look-back date . . . , the individual is ineligible for medical assistance for [inter alia, nursing facility services] . . . during the period beginning on the [lookback] date [for a period of time related to the uncompensated value of assets transferred on or after the look-back date].

The remainder of subsection (c), including the provisions relevant here, provides additional rules regarding the assessment of penalties for transfers of various types of assets, as well as rules protecting certain transfers from the penalty.

Subsection (c)(1)(F) contains the requirement that the purchase of an annuity will be treated as the

disposal of an asset for less than fair market value unless the State is named as a remainder beneficiary:

> (F) For purposes of this paragraph, the purchase of an annuity shall be treated as the disposal of an asset for less than fair market value unless – (i) the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual under this subchapter; or (ii) the State is named as such a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value.

42 USC § 1396p(c)(1)(F). Standing alone, the plain language of subsection (c)(1)(F) is unrestricted; it applies to the "purchase of an annuity." Thus, under a plain reading of this subsection, unless the State is named as the remainder beneficiary as provided, the purchase of any annuity during the look-back period is automatically considered the disposal of an asset for less than fair market value, thereby triggering the asset transfer penalty.

The relevant portion of subsection (c)(1)(G), however, states that although in general the purchases of annuities are considered transfers of assets subject to the penalty, the purchase of certain defined annuities are not considered transfers of assets subject to the penalty:

> (G) For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes an annuity purchased by or on behalf of an annuitant who has applied for medical assistance with respect to nursing facility services or other long-term care services under this [subchapter] unless – (i) . . .[[4]]; or (ii) the annuity is irrevocable and nonassignable; is actuarially sound . . . ; and provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.

42 USC § 1396p(c)(1)(G).

We first find that the plain language of subsection (c)(1)(G) shows that it pertains only to annuities purchased "by or on behalf of an annuitant who has applied for medical assistance." An "annuitant" is the beneficiary of an annuity. Black's Law Dictionary (9th ed. 2009). The annuitant relevant to subsection (c)(1)(G), therefore, is the Medicaid applicant, i.e., the institutionalized spouse. Thus annuities naming the community spouse as the beneficiary are considered assets with respect to transfers of assets under § 1396p(c), and therefore they are not protected from the penalty even if they are irrevocable, nonassignable, and actuarially sound. Accordingly, only

---

[4] Subsection (c)(1)(G)(i) shelters certain annuities defined under the Internal Revenue Code, as well as annuities purchased with the proceeds of IRAs, simplified employee pensions, and Roth IRAs; but the annuities at issue in this opinion do not fall into these categories.

annuities benefitting the institutionalized spouse are protected from the penalty under subsection (c)(1)(G). Glover's annuity falls under this protection.

Second, the language of subsection (c)(1)(G) protects qualifying annuities benefitting the institutionalized spouse by removing them altogether from the definition of "assets" with respect to a "transfer of assets" under "this paragraph." 42 USC § 1396p(c)(1)(G). Rereading subsection (c)(1)(F) in light of the plain meaning of subsection (c)(1)(G) shows that annuities protected from the asset-transfer penalty by subsection (c)(1)(G) can never be treated as the disposal of an asset for less than fair-market value because they cannot be considered "assets" for the purpose of a transfer of assets in the first place. Thus, compliance with subsection (c)(1)(G) operates to exempt complying annuities from the requirement of having to name the State as a remainder beneficiary under subsection (c)(1)(F).[5]

Finally, subsection (e)(1)[6] requires the couple to disclose "any interest the individual or community

[5] Glover points out that DCH did not ask him to name the State as a remainder beneficiary on annuities that he owns that fall under subsection (c)(1)(G)(i) (addressing certain retirement related annuities).

[6] The full text of subsection 42 USC § 1396p(e)(1) provides:

> In order to meet the requirements of this section for purposes of section 1396a(a)(18) of this title, a State shall require, as a condition for the provision of medical assistance for services described in subsection (c)(1)(C)(i) of this section (relating to long-term care

(Continued on following page)

spouse has in an annuity . . . , *regardless of whether the annuity is irrevocable or is treated as an asset.*" (Emphasis supplied.) 42 USC § 1396p(e)(1). This provision supports our reading of subsection (c)(1)(F) and (G): it makes clear that couples must disclose both (i) annuities that are irrevocable, i.e., those annuities benefitting the institutionalized spouse that conform with subsection (c)(1)(G), and (ii) annuities that are treated as assets for the purpose of the asset-transfer penalty, i.e., all annuities benefitting the community spouse plus those annuities benefitting the institutionalized spouse *that fail to conform* with subsection (c)(1)(G).

Furthermore, subsection (e)(1) goes on to provide that the Medicaid application must include "a statement that under paragraph (2) the State becomes a remainder beneficiary under such an annuity or similar financial instrument by virtue of the provision of such medical assistance." *Id*. And the referenced "paragraph 2" of subsection (e) implicitly distinguishes

---

services) for an individual, the application of the individual for such assistance (including any recertification of eligibility for such assistance) shall disclose a description of any interest the individual or community spouse has in an annuity (or similar financial instrument, as may be specified by the Secretary), regardless of whether the annuity is irrevocable or is treated as an asset. Such application or recertification form shall include a statement that under paragraph (2) the State becomes a remainder beneficiary under such an annuity or similar financial instrument by virtue of the provision of such medical assistance.

between annuities that are subject to subsection (c)(1)(F)'s requirement (of naming the State as the remainder beneficiary) from those that are not:

> In the case of disclosure concerning an annuity under subsection (c)(1)(F) of this section, the State shall notify the issuer of the annuity of the right of the State under such subsection as a preferred remainder beneficiary in the annuity for medical assistance furnished to the individual.

42 USC § 1396p(e)(2)(A). Thus, subsection (e) buttresses the conclusion that subsection (c)(1)(F) does not apply to all annuities, regardless of form.

In sum, a plain reading of subsections (c)(1)(F) and (G) shows that annuities benefitting community spouses must name the State as a remainder beneficiary to avoid automatically being treated as the disposal of an asset for less than fair market value, but annuities benefitting applicant institutionalized spouses that conform with the requirements of subsection (c)(1)(G)(ii) need not do so.

(b) We note that the relevant administrative agency interpretation of the Medicaid statute is partly inconsistent with our reading of the plain language. The Centers for Medicare & Medicaid Services (CMS), a division of the Department of Health and Human Services, is the federal agency in

charge of administering Medicaid.[7] Consistent with our reading, CMS first interprets (c)(1)(F) to apply to annuities purchased by either spouse, and it interprets (c)(1)(G) to apply only when the institutionalized spouse is the annuitant:

> Unlike the new section [ ](c)(1)(G) . . . section [ ](c)(1)(F) does not restrict application of its requirements only to an annuity purchased by or on behalf of an annuitant who has applied for medical assistance for nursing facility or other long term-care services. Therefore, we interpret section [ ](c)(1)(F) as applying to annuities purchased by an applicant or by a spouse, or to transactions made by the applicant or spouse. . . .
>
> Unlike the new section [ ](c)(1)(F) discussed above, [new section (c)(1)(G)] does not apply to annuities for which the community spouse is the annuitant.

See Centers for Medicare & Medicaid Servs., § 6012, Changes in Medicaid Annuity Rules Under the Deficit Reduction Act of 2005, pt. (II)(B) and (C) (2006). But inconsistent with our reading, CMS then interprets the two subsections in a manner it argues that both can apply:

---

[7] *See Douglas v. Indep. Living Ctr. of S. Cal.,* ___ U.S. ___, (132 SC 1204, 1207, 182 LE2d 101 (2012); 42 USC § 1396(a). *See also* 42 USCA § 1396p(e)(3) ("The Secretary may provide guidance to States on categories of transactions that may be treated as a transfer of asset for less than fair market value.").

> [The] requirement [provided by subsection (c)(1)(G)] is in addition to those specified in [ ](c)(1)(F) pertaining to the State's position as a remainder beneficiary.

Id. at pt. (II)(C). Thus, under the CMS interpretation of the relevant statutes, even annuities that conform with subsection (c)(1)(G) requirements must meet subsection (c)(1)(F) requirements in order to be protected from the asset transfer penalty.

We recognize that "judicial deference is to be afforded [the agency's] interpretation of statutes it is charged with enforcing or administering and the agency's interpretation of rules and regulations it has enacted to fulfill the function given it by the legislative branch." (Citations omitted.) *Pruitt Corp., supra* at 159 (2) (citation omitted). *See also Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 844(II) (104 SC 2778, 81 LE2d 694) (1984) ("a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency") (footnote omitted). Nevertheless, an agency interpretation cannot contravene the plain meaning of the words chosen by the legislature when those words are not ambiguous:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as

> the agency, must give effect to the unambiguously expressed intent of Congress.

Chevron, 467 U.S. at 842-843(II); Cf. *Christensen v. Harris County,* 529 U.S. 576, 588 (120 SC 1655, 146 LEd2d 621) (2000) (where language is not ambiguous deference to agency interpretation is unwarranted). We find that that portion of CMS's interpretation that provides that an annuitant applicant must comply with both subsections (c)(1)(G) and (F) to avoid the asset transfer penalty contravenes the plain meaning of the statutory language and, therefore, is not entitled to deference.

(c) The Spousal Protection Provisions of the Medicaid Statute. Bottesch, Shorey, and Robertson contend that our interpretation of (c)(1)(F) and (G) is superseded by the combined impact of three "spousal protection" provisions of the Medicaid statute pursuant to which (i) a community spouse may retain the CSRA[8] (*see* 42 USC § 1396r-5(c)(2) and (f)(2)); (ii) unlimited transfers are allowed between spouses (*see* 42 USC § 1396r-5(c)(4) and 42 USC § 1396p(c)(2)(B)(i)); and (iii) a community spouse's income has no effect on an institutionalized spouse's Medicaid eligibility (42

---

[8] "One provision of the MCCA allows an institutionalized spouse to qualify for Medicaid assistance while reserving for the community spouse a capped amount of assets for the community spouse's benefit, known as the 'community spouse resource allowance' or 'CSRA.'" *Hutcherson v. Arizona Health Care Cost Containment System Admin.,* 667 F3d 1066, 1069(III) (9th Cir. 2012).

USC § 1396r-5(b)(1)). The applicants contend the combined effect of these provisions dictates that subsection (c)(1)(G) applies to the community spouse as well as the institutionalized spouse and frees them from the requirement of having to name the State as a remainder beneficiary. We disagree for several reasons.

First and foremost, as shown above, the plain language of subsection (c)(1)(G) specifically limits its application to annuities "purchased by or on behalf of an annuitant who has applied for medical assistance." 42 USC § 1396p(c)(1)(G). And although § 1396r-5 provides that it supersedes any other provision of the subchapter (which would include § 1396p), the annuity provisions of § 1396p were added to the Medicaid statute more recently, specifically to address the proper handling of annuities.[9] "Specific statutes

---

[9] In 1988, as a part of the Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360 (102 Stat. 683) (MCCA), Congress added the "spousal impoverishment" provisions to the Medicaid statute, which were codified at 42 USC § 1396r-5. Pub. L. No. 100-360, § 303. In 2005 (effective February 8, 2006), Congress amended the Medicaid statute as a part of the Deficit Reduction Act of 2005, Pub. L. No. 109-171 (120 Stat. 4) (DRA), and added the three subsections of § 1396p that specifically address annuities. Several cases cited by the applicants are distinguishable because they address annuities purchased before the DRA became effective or they are based on the law as it existed prior to the DRA. *See, e.g.*, *James v. Richman,* 547 F3d 214, 215 (3rd Cir. 2008); *James v. Richman,* 465 FSupp2d 395 (MD Pa. 2006); *Mertz v. Houstoun,* 155 FSupp2d 415 (ED Pa. 2001).

govern over more general statutes," *Glinton v. And R, Inc.,* 271 Ga. 864, 867 (524 SE2d 481) (1999) (citation omitted), and "the most recent legislative expression prevails." (Citations omitted.) *Jenkins v. State,* 265 Ga. 539, 540(1) (458 SE2d 477) (1995).

Second, the applicants' reliance on the various spousal protection features of the Medicaid statute is a red herring because those features concern an individual's overall eligibility for Medicaid. The application of a penalty, in the form of delayed eligibility, for failure to comply with the rules regarding purchase of an annuity, is a separate question. The applicants acknowledge this distinction: "[DCH] is correct that the issue before this Court does not involve an eligibility determination, as the [applicants have] been found eligible." And § 1396r-5 provides that it supersedes other provisions of the subchapter only "[i]n determining the eligibility for medical assistance of an institutionalized spouse." *See* 42 USC § 1396r-5(a)(1).[10] The question of whether the annuities at issue in this case are countable resources for the purpose of determining eligibility is not before us.[11]

---

[10] The Code section goes on to provide that "Except as this section specifically provides, this section does not apply to – (A) the determination of what constitutes income or resources, or (B) the methodology and standards for determining and evaluating income and resources." 42 USC § 1396r-5(a)(3).

[11] Many of the cases cited by the applicants are distinguishable because they address whether annuities are countable

(Continued on following page)

More specifically, none of three spousal protection features cited by the applicants has any bearing on the penalty provision in § 1396p(c), or vice-versa. First, the CSRA is a portion of the couple's countable resources that is not considered available to the institutionalized spouse for the question of eligibility. *See* 42 USC § 1396r-5(c)(2) and (f)(2). A "resource" for this purpose is defined in § 1396r-5(c)(5). *See also* 20 C.F.R. § 416.120(c)(3) ("Resources means cash or other liquid assets or any real or personal property that an individual owns and could convert to cash to be used for support and maintenance."). The term "assets" for the purpose of the asset transfer penalty

---

resources for the purpose of determining eligibility; and one of these cases is further distinguished because it is based on application of subsection (c)(1)(G) to annuities purchased for community spouses. *See, e.g., Lopes v. Dept. of Social Svcs.,* 696 F3d 180, 188 (2nd Cir. 2012) (issue presented was whether payment stream of annuity purchased by community spouse was a countable resource for the purposes of the institutionalized spouse's eligibility for medical assistance); *Morris v. Oklahoma Dept. of Human Svcs.,* 685 F3d 925, 938(III)(B)(4) (10th Cir. 2012) (addressing whether an annuity benefitting the community spouse is a countable resource for the purpose of determining the institutionalized spouse's eligibility; and based on application of subsection (c)(1)(G) to community spouses); *Weatherbee v. Richman,* 595 FSupp2d 607, 616-617(IV) (WD Pa. 2009) (determining that annuity cannot be treated as a countable resource); *Geston v. Olson,* 857 FSupp2d 863, 878(III)(D) (ND 2012) (addressing whether annuity payments were countable resources); *Vieth v. Ohio Dept. of Job & Family Svcs.,* 2009 WL 2332870 (2009) (whether funds used to purchase annuity for the sole benefit of the community spouse was a countable resource for Medicaid eligibility purposes).

is defined in § 1396p(h). The definition of assets includes income, resources, and other items, and the remainder of § 1396p(c) further delineates what constitutes an asset for this purpose; in so doing, it repeatedly and explicitly begins by stating "For purposes of this paragraph with respect to a transfer of assets, the term 'assets' includes. . . ." *See* 42 USC § 1396p(c)(1)(G), (I), and (J). It is clear, therefore, that the definition of "resources" under § 1396r-5(c)(5) and the definition of "assets" for the purposes of a "transfer of assets" under § 1396p(c) are not the same. Accordingly, the portions of the Medicaid statute that concern countable resources do not control our decision regarding when annuities are subject to the asset transfer penalty.

The argument that the second spousal protection feature cited by the applicants – that unlimited resource transfers are allowed between spouses – should govern our decision is also without merit. *See* 42 USC § 1396p(c)(2)(B)(i). The applicants fail to point out that the complete wording of the Code section provides that "[a]n individual shall not be ineligible for medical assistance by reason of [the asset transfer penalty] to the extent that . . . the assets . . . were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse." (Emphasis supplied.) *Id*. Notably, Bottesch, Shorey, and Robertson only argue that this provision should guide our decision; they do not argue that their spouses are the sole beneficiary of the relevant

annuities, and they cannot because their annuities name children, trusts and others as beneficiaries.

Finally, and similarly, the fact that a community spouse's *income* has no effect on an institutionalized spouse's eligibility for Medicaid benefits, *see* 42 USC § 1396r-5(b)(1), is also unrelated to assessing penalties for improper transfers of *assets*.

3. Some of the relevant provisions of Georgia's Medicaid Manual are consistent with our construction of subsections 1396p(c)(1)(F) and (G), and some are not. The Manual provides

> Effective with annuities purchased on or after 2/8/06, for [applicant/recipients] applying for or already receiving [long-term care] Medicaid, the State of Georgia must be named as the remainder beneficiary of the annuity in the first position for the total amount of medical assistance paid on behalf of the individual receiving [long-term care] Medicaid.
>
> EXCEPTION: If there is a community spouse and/or minor or disabled child(ren), the State may be named in the next position after those individuals. If that is the case and any of those individuals or their representatives dispose of any of the remainder of the annuity for less than the [fair market value], the State must then be named in the first position.

And, pursuant to the multi-step procedure for addressing annuities set forth in Section 2339 of the

Georgia Manual, Step 1 requires determining whether the applicant, spouse, or representative has given full disclosure of all annuities; if they have not, Medicaid coverage is denied. Step 2 requires verification that the State has been named as the remainder beneficiary on any annuity; if so, the procedure skips Step 3 and goes to Step 4. If the answer is no, Step 3 provides that DCH proceed with assessing a transfer of assets penalty, and the analysis is concluded. Thus, Step 4, in which certain annuities are slotted for special treatment "if the annuity is one which is exempt from the transfer of assets penalty" is only reached if the State has been named as a remainder beneficiary under Step 3.

Thus, § 2339 fails to exempt annuities that comply with subsection (c)(1)(G) from the requirement of naming the State as a remainder beneficiary, and it is therefore inconsistent with the plain language of the Medicaid statute. Because DCH's Medicaid Manual as applied to Glover is in violation of federal law and Glover's substantial rights have been prejudiced by application of the asset transfer penalty, we are authorized to reverse the agency decision below, and accordingly, the judgment of the superior court. OCGA § 50-13-19(h). *See also Medders, supra* at 440.

With regard to Bottesch, Shorey, and Robertson, we uphold the agency ruling that they are subject to the asset transfer penalty because they failed to comply with the requirement found in 42 USC § 1396p(c)(1)(F) to name the State as a remainder

beneficiary of the annuities relevant to their cases on appeal. The decisions of the superior court in their cases must therefore be reversed.

Judgments reversed in all four cases. MILLER, P.J., and RAY, J., concur.

IN THE SUPERIOR COURT OF HALL COUNTY
STATE OF GEORGIA

JERRY L. GLOVER,
ALICE ROBINSON, and
FAYE HARRISON

Petitioners,

vs.

DAVID COOK, In his official capacity as Commissioner, Georgia Department Of Community Health

and

CLYDE REESE, III In his official capacity as Commissioner, Georgia Department of Human Services, Family Children Services

Respondents

CIVIL ACTION FILE
NO.2011-CV-3066-J

ORDER

(Filed May 7, 2012)

This case is a consolidation of three Petitions for Judicial Review of three final decisions from the Department of Community Health Appellate division dealing with the applicability of transfer of asset penalties applied due to failure to name the State of Georgia as a remainder beneficiary of certain annuities.

As an initial matter, the Respondent claims that Ms. Robinson's Petition for Judicial Review was untimely. Such a petition must be filed within 30 days after the service of the final decision of the agency. O.C.G.A. § 49-4-153. The date of service is the date the decision was mailed by the agency. *Gladowski v. Department of Family & Children Services,* 281 Ga. App. 299 (2006). The certificate of service for the Final Decision in this case indicates that the decision was placed in the mail on August 23, 2011, which was a Tuesday. The 'three day rule' contained in O.C.G.A. § 9-11-6(e) does not apply in this context. *Gladowski.*

The 30th day, which was the latest day to file a timely petition for review, was September 22, 2011, a Thursday. Ms. Robinson's petition was filed on September 23, 2011.

"When an appeal of an adverse decision by an Administrative Agency is filed beyond the time allowed by law the Superior Court has no jurisdiction to take any action other than to dismiss the case." *Miller v. Georgia Real Estate Commission,* 136 Ga. App. 718 (1975). The Petition was untimely, and is DISMISSED as to Ms. Robinson.

As to Harrison, the Respondent alleges that the Petition should be dismissed because it was filed after the death of the Ms. Harrison. It appears from the record that the Petitioner died on October 18, 2011, a Final Decision was entered on November 15, 2011, and this Petition was filed on December 13, 2011.

O.C.G.A. § 50-13-19 sets out the procedure for filing a petition for judicial review such as this one. That code section is part of the Administrative Procedure Act, and the Civil Practice Act does not apply. *Fulton County Bd. of Assessors v. Saks Fifth Ave., Inc.,* 248 Ga. App. 836 (2001).

Under the Civil Practice Act, executors and administrators of estates are given standing to sue by O.C.G.A. § 9-11-17. In contrast, only "persons" may bring a petition for judicial review. A "person" is defined by O.C.G.A. § 50-13-12 as "any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency." The legislature, in the case of the Administrative Procedure Act, chose not to extend standing to the estates of persons who, like Ms. Harrison, died prior to the filing of the petition. For this reason, Ms. Harrison's Petition is DISMISSED for lack of standing.

It would appear from the record that Mr. Robinson also died prior to the filing of the petition. That Petition was dismissed above for being untimely, but would also be subject to dismissal for lack of standing.

Finally, as to Mr. Glover, the Final Decision that the Petitioner has sought review of held that the annuity at issue complied with 42 USCS § 1396p(c)(1)(G) ("Section G"), but was nevertheless proper cause - for the imposition of a transfer of assets penalty because it did not comply with 42 USCS § 1396p(c)(1)F)

("Section F") in that the State of Georgia was not made a remainder beneficiary.

When interpreting a statute, a court must "apply the fundamental rules of statutory construction that require us to construe the statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage." (Punctuation and footnote omitted.) *Ga. Transmission Corp. v. Worley,* 312 Ga. App. 855 (2011).

The Petitioner's position is that Section G is an exception to Section F – essentially that you do not have to name the State as a beneficiary as long as the annuity complies with Section G. This position is not consistent with the wording of the statute, which makes no mention of exceptions to Section F, and ignores the clear intent of 42 USCS § 1396p(c). That statute deals with the transfer of assets for less than their fair market value. It imposes a penalty for individuals who do so and that penalty is based on the *uncompensated* value of the assets disposed of – not the value of entire asset, just that portion of the asset the individual is deemed to have 'given away.' Purchasing an annuity without naming the State as a beneficiary, however, triggers an extreme penalty – the entire annuity is treated as having been disposed of for less than fair market value.

Section G is simply one of several subsections dealing with various types of assets for which the legislature identifies ways to avoid the necessity of an

analysis of whether those asset classes were bought for less than their fair market value and by how much.

As an example, pursuant to 42 USCS 1396p(c)(1)(J), the purchase of a life estate interest is not considered an asset if the purchaser lives in the home for at least a year following the date of purchase. If the individual were to purchase the life estate and then immediately move to a nursing home, the State would be forced to determine what the fair market value of that life estate was, subtract that from the amount the individual paid, and penalize them on the difference. Living in the house for a year just keeps the issue of fair market value from being reached – the State just assumes that fair market value was what was paid.

The same is true of Section G. Ensuring that the annuity is actuarially sound, irrevocable, nonassignable, and lacking in deferral or balloon payments is simply a way for the individual to avoid an analysis by the State of the fair market value of the annuity. If the annuity meets all those factors, the State assumes that fair market value was paid and doesn't consider any portion of the annuity to be uncompensated. This analysis applies, however, only when one is attempting to decide what portion of an annuity is to be considered uncompensated. If the State is not made a beneficiary, that question is not reached and the entire annuity is used in determining the penalty.

To illustrate by example, if an individual purchased a revocable annuity and named the State as beneficiary, there would be a penalty period computed using the difference between the amount paid for the annuity and the fair market value of the annuity. If that same individual *fails* to name the State as a beneficiary, the difference between market value and the amount paid is irrelevant and all that matters is the amount the individual paid. Section G exists only as a way to avoid fair market value analysis once that issue is reached, and is therefore inapplicable when fair market value analysis does not get reached.

Put bluntly, to purchase an annuity without being subject to penalties, both Section F and Section G must be complied with.

As correctly noted by the Board, this result is bolstered by the fact that 42 USCS 1396p(c)(1)(e) requires that individuals disclose a description of any interest they have in an annuity regardless of whether the annuity is irrevocable or is treated as an asset and that they include a statement that the State becomes a remainder beneficiary.

The Board also correctly noted that guidance from the Centers for Medicare and Medicaid Services (CMS) indicates that the requirements in Section G are not an exception from Section F, but rather are additional requirements once the individual has already named the State as beneficiary.

Additionally, although the Court is unaware of any binding precedent on this issue, courts in other

jurisdictions have contemplated, in addressing the Deficit Reduction Act, that purchasers of annuities must name the State as a beneficiary.

In *Hutcherson v. Arizona Health Care Cost Containment System Admin.,* 667 F.3d 1066 (9th Cir.(Ariz.) 2012), the Court explained that pursuant to the Deficit Reduction Act, "spouses may purchase an annuity to spend down their assets only if the State is named as the remainder beneficiary."

In *Geston v. Olson,* ___ F.Supp.2d ___, 2012 WL 1409344 (D.N.D. 2012), the Court explained that:

> "the Deficit Reduction Act provides that an annuity is not to be treated as a transfer of assets for less than fair market value if the state is named as the first remainder beneficiary up to the amount paid on behalf of the institutionalized spouse. *In addition,* an annuity will be treated as an asset unless the annuity is (1) irrevocable and nonassignable; (2) actuarially sound; and (3) provides for payments in equal amounts during its term with no deferral or balloon payments. The Deficit Reduction Act of 2005 also requires the disclosure on the Medicaid application of any annuities held by the community or institutionalized spouse. Annuities which comply with *these requirements* are considered qualifying annuities." (emphasis added and citations omitted).

In *Jackson v. Selig,* Slip Copy, 2010 WL 5346198 (E.D.Ark.,2010), the Court said that, "The DRA

changed the way the Medicaid Act treats annuities, by allowing for annuities to not be treated as a transfer of resources if it meets certain criteria. To qualify for the exception provided for in the DRA, an annuity must name the state as the remainder beneficiary, be purchased with qualified funds, and it must be irrevocable, non-assignable, and actuarially sound."

Based on all of the above, the Court finds that Section G is not an exception to Section F, that because Petitioner Glover did not comply with Section G he was properly assessed a penalty, and that therefore the Final Decision complained of was not in error and is AFFIRMED. This ruling would also extend to Petitioners Harrison and Robinson had their Petitions not previously been dismissed.

SO ORDERED this the 2nd day of ~~April~~ May, 2012.

/s/ Bonnie Chessher Oliver
BONNIE CHESSHER OLIVER, Judge
Superior Court of Hall County
Northeastern Judicial Circuit

Copy: J. Kevin Tharpe, Attorney for Petitioners (405 Broad Street, SE, Gainesville, GA 30501)
Michelle Townes, Attorney for Respondents (40 Capitol Square, SW., Atlanta, GA 30334)