

1987

Jerry Grandson v. Suzanne Dandoy : Reply Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO. 870099 ~~IN THE~~ COURT OF APPEALS

STATE OF UTAH

JERRY GRANDSON,	:	
	:	
Petitioner and	:	
Appellant	:	
	:	NO. 870099-CA
vs.	:	
	:	
SUZANNE DANDY, in her capacity	:	Category No. 14(a)
as Executive Director of the	:	
Utah Department of Health,	:	
	:	
Respondent and	:	
Appellee.	:	

APPELLANT'S REPLY BRIEF

Appeal from the Memorandum Decision
and Order of the 7th District Court
for San Juan County
Hon. Boyd Bunnell, Judge

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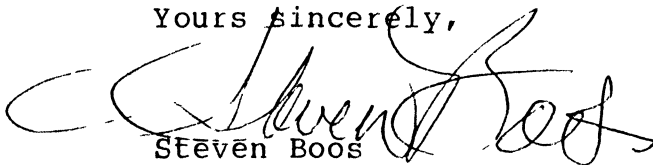
Timothy Shea, Clerk
Utah Court of Appeals
400 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102

Re: Grandson v. Dandoy

Dear Mr. Shea:

Pursuant to Rule 24(j), Rules of the Utah Court of Appeals, the appellant, Jerry Grandson, wishes to advise the Court of supplemental authority, pertinent to this action, not previously cited by either party. In Olson v. Reagan (S.D. Iowa 1986) 669 F.Supp. 282, 283, the United States District Court granted a motion for summary judgment which declared that the denial of Medicaid eligibility based on sibling income is a violation of the Social Security Act. This decision is pertinent to arguments made at pages 17 and 18 of the Appellant's Brief.

Yours Sincerely,


STEVEN BOOS
Attorney at Law

SB/isb

cc: Brian Farr
Assistant Utah Attorney General
236 State Capitol
Salt Lake City, Utah 84114

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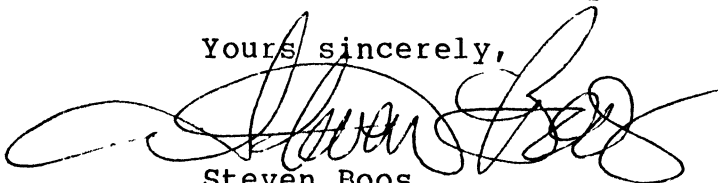
RE: Grandson v. Dandoy; No. 8700099-CA

Dear Mr. Shea:

Pursuant to Rule 24(j), Rules of the Utah Court of Appeals, the appellant, Jerry Grandson, wishes to advise the Court of supplemental authority, pertinent to this action, not previously cited by either party. In Olson v. Norman (1987 8th Cir.) 830 F.2d 811, the Eighth Circuit Court of Appeals upheld a federal District Court ruling which declared that the denial of Medicaid eligibility based on sibling income is a violation of the Social Security Act. A similar ruling was made in Ward v. Wallace (M.D. Ala. 1987) 652 F.Supp. 301. These decisions are pertinent to arguments made at pages 17 and 18 of the Appellant's Brief.

A third decision supports arguments made by the respondent. In Sundberg v. Mansour (6th Cir. 1987) 831 F.2d 610, the Court reversed a District Court decision which had declared the income deeming to be in violation of the Social Security Act.

Yours sincerely,



Steven Boos
Attorney at Law

SB/mb

cc: Brian Farr
Assistant Utah Attorney General
236 State Capitol
Salt Lake City, Utah 84114

IN THE COURT OF APPEALS

STATE OF UTAH

JERRY GRANDSON,	:	
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Petitioner and	:	
Appellant	:	
	:	NO. 870099-CA
vs.	:	
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SUZANNE DANDROY, in her capacity	:	Category No. 14(a)
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Utah Department of Health,	:	
	:	
Respondent and	:	
Appellee.	:	

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JURISDICTIONAL STATEMENT

This action is an appeal from a decision rendered by the Seventh Judicial District Court on a Petition For Review of a Final Determination made by the Director of the Utah Department of Health on a Medicaid application. The Court of Appeals has jurisdiction over this appeal pursuant to U.C.A. §78-2a-3(2)(a).

STATEMENT OF REPLY ISSUES

1. Whether the federal statute which bars the inclusion of income from any relative, except that of a parent or spouse, in the calculation of a child applicant's eligibility for medicaid benefits is clear, unequivocal, and unambiguous on its face and is therefore not subject to judicial construction.
2. Whether the legislative history of 42 U.S.C. §1396a(a)(17)(D) fails to support the Executive Director's contention that the statute allows the unrestricted inclusion of income within a nuclear family in the determination of medicaid eligibility.
3. Whether the legislative history of the Deficit Reduction Act of 1984 shows that it was intended to revise only AFDC eligibility standards and not Medicaid eligibility rules.
4. Whether the interpretive authority of the U.S. Secretary of Health and Human Services is not absolute and may not be used to construe any statute so as to circumvent a prohibition clearly stated by Congress, nor construe it in a way which violates the Secretary's own regulations.
5. Whether unamended federal law continues to bar deeming of Social Security Old Age Disability and Survivors benefits, paid through a representative payee, in a manner which would attribute them as being available to a medicaid applicant who is not the actual beneficiary of those benefits.

DETERMINATIVE LAW

42 U.S.C. §1396a(a) (17)(D):

A State plan for medical assistance must... include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, but only in the case of applicants or recipients of assistance under the plan who are not receiving aid or assistance under any plan of the State approved under title I, X, XIV, or XVI, or part A of title IV, [42 USCS §§301 et seq., 1201 et seq., 1351 et seq., 1381 et seq.], based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which... do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child who is under 21 or (with respect to States eligible to participate in the State program established under title XVI [42 USCS §§1381 et seq.]), is blind or permanently and totally disabled, or is blind or disabled as defined in section 1614 [42 USCS § 1382c] (with respect to States which are not eligible to participate in such program); and provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums or otherwise) incurred for medical care or for any other type of remedial care recognized under State law;...

42 U.S.C. §1396a(a) (17) (B):

A State plan for medical assistance must... include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, but only in the case of applicants or recipients of assistance under the plan

who are not receiving aid or assistance under any plan of the State approved under title I, X, XIV, or XVI, or part A of title IV, [42 USCS §§301 et seq., 1201 et seq., 1351 et seq., 1381 et seq.], based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which... provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient and (in the case of any applicant or recipient who would, except for income and resources, be eligible for aid or assistance in the form of money payments under any plan of the State approved under title I, X, XIV, or XVI, or part A of title IV [42 USCS §§301 et seq., 1201 et seq., 1351 et seq., 1381 et seq., 601 et seq.], or to have paid with respect to him supplemental security income benefits under title XVI [42 USCS §§1381 et seq.]) as would not be disregarded (or set aside for future needs) in determining his eligibility for such aid, assistance, or benefits,....

42 U.S.C. §602(a) (38):

A State plan for aid and service to needy families with children must- ...

(38) provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part [42 USCS §§601 et seq.]) include-

- (A) any parent of such child, and
- (B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (20) of section 406(a) [42 USCS §606(a)], if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with

respect to the family (notwithstanding section 205(j) [42 USCS §405(j)], in the case of benefits provided under title II [42 USCS §§401 et seq.]); and

42 C.F.R. §435.113:

The agency must provide Medicaid to individuals who would be eligible for AFDC except for an eligibility requirement used in that program that is specifically prohibited under title XIX.

42 U.S.C. §405(j)(1) and (2):

(1) When it appears to the Secretary that the interest of an applicant entitled to a payment would be served thereby, certification of payment may be made, regardless of the legal competency or incompetency of the individual entitled thereto, either for direct payment to such applicant, or for his use and benefit to a relative or some other person.

(2) Any certification made under paragraph (1) for payment to a person other than the individual entitled to such payment must be made on the basis of an investigation, carried out either prior to such certification or within forty-five days after such certification, and on the basis of adequate evidence that such certification is in the interest of the individual entitled to such payment (as determined by the Secretary in regulations). The Secretary shall insure that such certification are adequately reviewed.

42 U.S.C. §408(e):

Whoever... (e) having made application to receive payment under this title for the use and benefit of another and having received such a payment, knowingly and willfully converts such a payment, or any party thereof, to a use other than for the use and benefit of such other person; ... shall be guilty of a felony and upon conviction thereof shall be fined not more than \$5000 or imprisoned for not more than five years, or both.

SUMMARY OF ARGUMENT

In the Appellee's Response Brief, the Executive Director of the Department of Health argues that the legislative histories of 42 U.S.C. 1396a(a)(17)(D) and the Deficit Reduction Act of 1984 (P.L. 98-369, §2640, "DEFRA" below) indicate that Congress intended to permit the deeming of income from persons other than spouses or parents in determining Medicaid eligibility, despite the contrary language of subsection (17)(D). However, this argument ignores the well-established rule that when a federal statute is clear, unambiguous and unequivocal on its face, courts are barred from engaging in judicial construction of the statute and will not examine its legislative history to ascertain its meaning. Subsection (17)(D) presents such an unambiguous statute, for it clearly prohibits the deeming of income from any individual but a spouse or parent. The judicial construction urged by the Executive Director is therefore inappropriate and section 1396a(a)(17)(D) must be enforced according to its plain terms. If this enforcement is made, the Executive Director's Final Determination, which deemed sibling income as available to Jerry Grandson, is rendered invalid.

The legislative history of section 1396a(a)(17)(D) does not, in any event, support the Executive Director's contention that all "nuclear family" income may be deemed as available to an applicant for Medicaid. All courts which have examined the legislative history of the section have concluded that Congress simply had no intention to allow the inclusion of income from any

individual other than a spouse or parent. The legislative history is entirely consistent with the plain prohibition of section 1396a(a)(17)(D).

The legislative history of the Deficit Reduction Act of 1984 does not support the argument that it somehow amended Medicaid eligibility rules. Once again, all courts which have analyzed the legislative history of DEFRA conclude that it modified only AFDC eligibility rules, and they refuse to find that DEFRA was intended to alter the express prohibition of section 1396a(a)(17)(D) which governs Medicaid eligibility.

The Executive Director then argues that, despite the prohibitions created by the plain language and legislative histories of these statutes, the U.S. Secretary of Health and Human Services has interpreted them so as to allow the prohibited deeming and this interpretation must be accorded legislative effect and great deference. This argument ignores the rule that the Secretary's interpretative pronouncements are only entitled to legislative effect if they do not exceed his statutory authority. Nor are these interpretations entitled to great deference if they violate the Secretary's own regulations. And, in fact, the courts have found that section 1396a(a)(17)(D) is a statutory limitation on the Secretary's interpretative authority which renders void, rather than giving legislative effect to, his rule permitting the deeming of income from individuals other than a spouse or parent. In the same vein, the courts have held that the Secretary's own regulation, 42 C.F.R. §435.113, which states

that Medicaid may not be denied as a consequence of an AFDC eligibility requirement prohibited by the Medicaid statute, also places a constraint on the Secretary's interpretative authority. In short, the Secretary's interpretation carries no weight here.

Finally, prior to DEFRA there was a well-recognized rule that benefits paid through a representative payee, such as Aid To Families With Dependent Children or Social Security Old Age Disability And Survivors Insurance, could only be used for the actual beneficiary, and any eligibility determination which assumed that income to be available to another person was invalid as a consequence. The Executive Director argues that DEFRA removed this ban in regard to AFDC eligibility and, because AFDC and Medicaid eligibility rules are identical, the ban must also be lifted in regard to Medicaid benefits paid through a representative payee. Jerry Grandson agrees that the ban may have been removed in AFDC cases, though the courts differ on this conclusion. What is clear is that, once again, DEFRA applies only to AFDC eligibility and, by its plain terms, removed the ban only in AFDC cases. In addition, AFDC and Medicaid eligibility rules are separate, rather than identical, so it does not necessarily follow that specific removal of a general prohibition, as it applies to AFDC, also works to remove that prohibition in Medicaid cases, or indeed, any other case involving benefits paid through a representative payee.

ARUGMENT

- I. THE FEDERAL STATUTE WHICH BARS THE INCLUSION OF INCOME FROM ANY RELATIVE, EXCEPT THAT OF A PARENT OR SPOUSE, IN THE CALCULATION OF A CHILD APPLICANT'S ELIGIBILITY FOR MEDICAID BENEFITS IS CLEAR, UNEQUIVOCAL, AND UNAMBIGUOUS ON ITS FACE AND IS THEREFORE NOT SUBJECT TO JUDICIAL CONSTRUCTION.

In Points I, II, and III of the Respondent's Brief, the Executive Director of the Department of Health argues that this case may only be resolved through statutory construction of 42 U.S.C. §1396a(a)(17)(D) (which bars the State from taking into account the financial responsibility of any individual for another individual, other than a spouse or parent of a minor child, in Medicaid eligibility determinations) and section 2640 of the Deficit Reduction Act (which permits such deeming of income in determining eligibility for the Aid To Families With Dependent Children program). The Executive Director specifically argues that the legislative history of section 17(D) indicates that it was intended to remove the burden of financial responsibility of adult children for elderly parents, that Congress intended minor children to be included in a nuclear family filing unit thus permitting the Secretary of Health and Human Services to deem the income of minor children to be available to that filing unit and, finally, that Congress was aware that DEFRA would change Medicaid eligibility and desired this result so as to re-allocate scarce public resources.

The Executive Director leaps into this statutory construction without first examining whether such interpretation is

warranted by the canons of construction. However, under one of the primary canons, such construction is rendered inappropriate in the present case.

It is a well-established rule that when a federal statute is clear, unambiguous, and unequivocal on its face, the courts are barred from engaging in judicial construction of the statute and will not examine its legislative history to ascertain its meaning. Rubin v. United States (1981) 449 U.S. 424, 430; T.V.A. v. Hill (1978) 437 U.S. 153, 184 n.29; Ex Parte Collette (1949) 337 U.S.55, 61; Miles v. Wells (1900) 22 Utah 55, 61 P. 534, 536; see, Board of Education v. Granite School District v. Salt Lake County (1983) Utah, 659 P.2d 1030, 1035. The United States Supreme Court has given a rationale for this rule. In Gemsco Inc. v. Walling (1945) 324 U.S. 244, the Court observed

[t]he plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.

Id., at p.260.

This rule of construction supplies the short answer to the Executive Director's arguments regarding statutory intent. Section 1396a(a)(17)(D) plainly, clearly, and unambiguously states that

[a] State plan for medical assistance must ... include reasonable standards ... for determining eligibility ... which ... do not take into account the financial responsibility of any individual for any applicant or recipient of

assistance ... unless such applicant or recipient is such individual's spouse or such individuals child who is under 21....(Emphasis supplied)

The statute only permits deeming of income from spouses or the parents of minor children. By its clear terms it bars the deeming of income from grandparents, siblings, or any other relatives. Any argument which attempts to broaden the scope of the statute by permitting the accounting of the financial responsibility of individuals other than a spouse or parent must necessarily ignore the plain language of section 17(D). Any argument which attempts to circumvent this plain language, through judicial construction of the statute based upon legislative history, also necessarily ignores the canon of construction barring such interpretation. Such a result is impermissible.

The Courts which have already considered this issue uniformly agree that section 17(D) is plain and unambiguous. In Vance v. Hegstrom (9th Cir. 1986) 793 F.2d 1018, the Court noted that

...the plain language of subsection (17)(D) explicitly prohibits the deeming of income from persons other than a Medicaid applicant's spouse, or a parent in the case of a child who is under twenty-one, blind or permanently and totally disabled. There is no clearly expressed legislative intent to the contrary.

Id. at p. 1024. Other courts have reached similar holdings which find that the unequivocal language of section 17(D) absolutely bars the deeming of income from persons other than a spouse or parent of a minor child. Reed v. Blinzinger (S.D. Ind. 1986) 639

F. Supp. 130, 134; Olson v. Reagen (S.D. Iowa 1986) 631 F.Supp. 154, 159 ["...both the clear language of the statute and the legislative history indicate that it is impermissible ... to deem available to the filing unit income from relatives other than a spouse or the parent of a minor child."]; Gibson v. Puett (M.D. Tenn. 1985) 630 F. Supp. 542, 544-545 [Deeming of sibling income in determining Medicaid eligibility is specifically prohibited by section 1396a(a)(17)(D);]; Malloy v. Eichler (D.Del. 1986) 628 F. Supp. 582, 593-594, 598 [Plain language of the Medicaid Act limits the Secretary's authority to deem income as available only from a parent or spouse, and not from a sibling.]; Sundberg v. Mansour (W.D. Mich. 1986) 627 F.Supp. 616, 620 ["...section 1396a(a)(17)(D) prohibits the Secretary from requiring states to consider sibling income and resources in making medicaid eligibility determinations."].

Given the clarity of the prohibition contained in section 1396a(a)(17)(D), it would be inappropriate for this Court to engage in a judicial construction of the statute as the Executive Director urges. Rather, the canons of construction require that the statute be enforced according to its plain meaning. If such enforcement is made then the Executive Director's Final Determination, and Judge Bunnell's decision in upholding that decision, must be held to have violated the unambiguous dictate of the statute.

II. THE LEGISLATIVE HISTORY OF SECTION 1396a
(a)(17)(D) DOES NOT SUPPORT THE EXECUTIVE
DIRECTOR'S CONTENTION THAT IT ALLOWS THE

UNRESTRICTED INCLUSION OF INCOME WITHIN A
NUCLEAR FAMILY.

In Point I of her Brief, the Executive Director argues that the legislative history of section 1396a(a)(17)(D) indicates that Congress only enacted the statute to prevent adult children from being saddled with financial responsibility for their elderly parents. The Executive Director concludes that, whatever the language of the statute, Congress intended that the income of minor children would be counted in eligibility determinations. However, the Executive Director does admit that "... there is no indication that Congress has ever considered the income of minor children." Respondent's Brief at p.11.

The legislative history of section 1396a(a)(17)(D) simply does not support the Executive Director's position. The courts have focused upon the Congressional intent indicated by the following report extract:

The committee has heard of hardships on certain individuals by requiring them to provide support and to pay for the medical care needed by relatives. The committee believes it is proper to expect spouses to support each other and parents to be held accountable for the support of their minor children and their blind or permanently and totally disabled children even though 21 years of age or older. Such requirements for support may reasonably include the payment by such relative, if able, for medical care. Beyond such degree of relationship, however, requirements imposed are often destructive and harmful to the relationship among members of the family group. Thus, States may not include in their plans provisions for requiring contributions from relatives other than a spouse or the parent of a

minor child or children over 21 who are
blind or permanently and totally disabled.

S.Rep. 404, 89th Cong., 1st Sess. 78 (Finance Committee) (June 30, 1965), reprinted in 1965 U.S.Code Cong. & Ad.News 1943 1943, 2018; H.Rep. No. 213, 89th Cong., 1st Sess. 68 (Ways and Means Committee) (March 29, 1965) [emphasis added].

In Malloy v. Eichler(supra) 628 F.Supp. at pp. 594-595, the federal District Court stated that this provision showed a

...desire to prevent family discord [which] cannot be limited to cases where an adult child must support a geriatric parent. The Secretary's argument that such a shackle should be placed on Congressional sympathy is not supported by the legislative history which makes it clear "beyond doubt that Congress was wary of imputing the income of others to a Medicaid applicant." Schweiker v. Gray Panthers, 453 U.S. at 47, 101 S.Ct. at 2642 (emphasis added). Only the income of spouses and parents was thought to be a reasonable exception to the actual availability principle.

Accord, Vance v. Hegstrom (supra) 793 F.2d at p.1024 ["The legislative history refers only to a spouse, or the parent of a minor child, or the parent of children over twenty-one who are blind or permanently and totally disabled, and does not include the term "nuclear family".]; Sundberg v. Mansour (supra) 627 F.Supp. at pp. 620-621 ["As the Supreme Court has recognized, Congress thus decided to treat spouses (and parents) differently than other relatives in determining the financial eligibility of Medicaid applicants and recipient. [citation] [Par.] There is no indication, however, that Congress intended to include siblings...."].

There is no support in the legislative history of section 1396a(a)(17)(D) for the Executive Director's argument that she may include sibling income in her medicaid eligibility determinations. Rather, the history underscores the plain language of the statute which bars such inclusions.

III. THE LEGISLATIVE HISTORY OF THE DEFICIT
REDUCTION ACT OF 1984 ONLY SUPPORTS A
VIEW THAT IT WAS INTENDED TO REVISE
AFDC ELIGIBILITY STANDARDS BUT NOT MEDI-
CAID ELIGIBILITY RULES.

In Point III of her Brief, the Executive Director contends that Congress, when it enacted DEFRA, was cognizant of the fact that AFDC and Medicaid eligibility determinations are linked together, that Congress desired to re-allocate scarce public resources through DEFRA, and that Congress must have intended to changed Medicaid eligibility simultaneously with AFDC eligibility. However, the courts which have examined the legislative history of DEFRA have rejected this argument.

In a very well-reasoned holding, the Ninth Circuit Court of Appeals stated, in Vance v. Hegstrom (*supra*) 793 F.2d at pp. 1024 - 1025, that

The Secretary also contends that his definition of a Medicaid filing unit is consistent with Congress's reason for passing DEFRA, which was to reduce spending in light of a huge federal deficit. [citation] The Secretary relies on statements made by members of Congress, and statements made in Congressional staff reports, that changes in the AFDC filing unit would result in decreases in the number of children receiving Medicaid, thus suggesting Congress

recognized a change in the AFDC filing unit would also affect Medicaid eligibility. [citation] It does not follow, however, that Congress intended to deny persons such as appellees Medicaid benefits when it enacted the AFDC amendments. The only express statements referring to the impact of the AFDC amendments on Medicaid are contained in reports prepared by staff personnel of members of Congress. These reports merely reflect the administration's view that changes in AFDC would also effect Medicaid eligibility. They are not statements of what Congress intended when it passed DEFRA. The statute finally enacted by Congress which required states to include sibling income when determining AFDC eligibility is directed solely to the provisions of 42 U.S.C. § 602, which is a component of the AFDC statute, and not to subsection (17)(D). We must assume that Congress was aware of subsection (17)(D) when it enacted the AFDC amendments, could have amended subsection (17)(D), and chose not to do so. [citation] (emphasis supplied.)

Accord, Malloy v. Eichler (supra) 628 F.Supp. at pp. 596-597 ["...the legislative history is ... silent about any change in the purpose of subsection (17)(D) [Par.] [and] [t]he Court cannot presume that Congress intended to cut Medicaid assistance because it reduced the availability of AFDC."]; Olson v. Reagan (supra) 631 F.Supp. at p.159; Reed v. Blinzinger (supra) 639 F.Supp at p.134 ["The evidence is insufficient to find that Congress intended for §2640 to modify the express provisions of 42 U.S.C. §1396a(a)(17)(D) and allow the income of a sibling to be assumed available to a Medicaid applicant."].

There is nothing contained in the legislative history of DEFRA which suggests that Congress intended to alter the unambiguous dictate of §1396a(a)(17)(D). Taken together, the legis-

lative histories of that statute and DEFRA will only support an application of section 17(D) which bars the inclusion of sibling income in a Medicaid eligibility determination. The plain meaning of section of section 17(D) is reinforced by examination of the legislative histories. As a consequence, the Executive Director's decision to circumvent the prohibition of the section rendered her Final Determination legally invalid.

IV. STATUTORY INTERPRETATIONS MADE BY THE U.S. SECRETARY OF HEALTH AND HUMAN SERVICES ARE NOT ENTITLED TO DEFERENCE OR LEGISLATIVE EFFECT WHERE THOSE INTERPRETATIONS VIOLATE CLEAR CONGRESSIONAL PROHIBITIONS AND THE SECRETARY'S OWN REGULATIONS.

In Point II of her Brief, the Executive Director contends that by interpreting sibling income as being income which is "available" (under §1396a(a)(17)(B)) to a nuclear family filing unit, the Secretary of Health and Human Services is making an administrative determination which is entitled to legislative effect. And in Point V, the Executive Director argues that such interpretations must, in addition, be accorded great deference by the courts. However, whatever the authority of the Secretary, it is certainly not absolute and cannot be used to interpret statutes in a manner which avoids an unequivocal Congressional prohibition. The Secretary may also not use this authority to violate his own regulations.

The former principle is best illustrated by a case much cited by the Executive Director: Schweiker v. Gray Panthers (1981) 453 U.S. 34. In that case, the Supreme Court held that

the Secretary's definition of the term "available" (for income determinations) is entitled to legislative effect. Id., at p.44. But this does not render the Secretary's power absolute, and the courts may review his definitions to determine whether they are made in a manner which exceeds his statutory authority. Ibid. The Court noted that spousal income could be deemed as "available" by the Secretary because such attribution was not barred by section 1396a(a)(17)(D). Id. at pp. 44-49. However, the Court emphasized that this result was possible only because of the clear distinction between spousal deeming and the deeming of other relatives' income which Congress had drawn in section 1396a(a)(17)(D). The tenor of the holding strongly suggests that if the Secretary attempted deeming of other relatives' income, such deeming would exceed the Secretary's statutory authority and his definition would not be entitled to legislative effect or deference from the courts.

And, indeed, the courts which have examined deeming of sibling and other relatives' income in Medicaid cases have found that it is done in excess of the Secretary's statutory authority and is therefore impermissible. Vance v. Hegstrom (supra) 793 F.2d at p.1024 ["Although the Secretary has been granted broad authority under subsection (17)(B) to prescribe standards setting eligibility requirements for State Medicaid plans, [citation], the Secretary's statutory authority is not unlimited In structuring a Medicaid filing unit by defining it in such a way as to include sibling income, the Secretary is doing through sub-

section (17)(B) that which he is expressly precluded from doing by subsection (17)(D)."]; Reed v. Blinzinger (*supra*) 639 F.Supp. at p.134 ["The Secretary's interpretation of [DEFRA] conflicts with the Medicaid statute, regulations, and congressional intent of the Medicaid Act. [] Therefore, the Secretary's interpretation is not controlling...."]; Olson v. Reagan (*supra*) 631 F.Supp. at 159 [The deeming sought by the Secretary is "... contrary to the Congressional intent to limit that responsibility to spouses and parents. It follows that the Secretary has exceeded her statutory authority ..."]; Malloy v. Eichler (*supra*) 628 F.Supp. at p. 598) ["... the use of section 2640 of DEFRA to determine Medicaid eligibility contravenes the mandate of subsection (17)(D) of Title XIX. The Secretary's views do not deserve legislative effect or substantial weight because they are wholly inconsistent with the legislative and judicial history of the statutes involved.]; Sundberg v. Mansour (*supra*) 627 F.Supp. at p.620.

The Secretary is also prohibited from making a statutory interpretation which violates his own regulations, for those regulations have the force of law until properly amended or repealed. Vance v. Hegstrom (*supra*) 793 F.Supp. at p.1025; Flores v. Bowen (1986 9th Cir.) 790 F.2d 740, 742. By deeming sibling income as available in Medicaid eligibility determinations, the Secretary does violate a valid regulation.

Section 453.113, Title 42, of the Code of Federal Regulations, states

The agency must provide Medicaid to individuals who would be eligible for AFDC except for an eligibility requirement used in that program that is specifically prohibited under title XIX.

The significance of the regulation is apparent. AFDC eligibility rules which permit deeming of sibling income may not be used to determine Medicaid eligibility because that kind of deeming is specifically prohibited by section 1396a(a)(17)(D) of Title XIX. That regulation is binding on the Secretary and he may not circumvent it through statutory interpretation. Vance v. Hegstrom (supra) 793 F.2d at p. 1025.

The Secretary's interpretations of DEFRA and subsection (17)(D) are not entitled to either legislative or judicial deference because his interpretations exceed his statutory authority and ignore his own valid, unrepealed regulations. The Executive Director's reliance upon this interpretative authority is therefore erroneous and renders her Final Determination arbitrary and capricious.

V. UNAMENDED FEDERAL STATUTES CONTINUE TO
BAR DEEMING OF SOCIAL SECURITY OLD AGE
DISABILITY AND SURVIVORS BENEFITS PAID
THROUGH A REPRESENTATIVE PAYEE.

In Part II of the Appellant's Brief, Jerry Grandson pointed out that federal statutes and regulation required that Social Security benefits paid through a representative payee for a third person may only be applied to that third person's use, and that violations of this restriction constitute a federal

felony. 42 U.S.C. §405(j)(1) and (2); 42 U.S.C. §408(e). The Brief also discussed pre-DEFRA cases which held that deeming of such income was prohibited by these regulations in the determination of AFDC eligibility. Even after the passage of DEFRA, the courts are divided as to whether this bar has been lifted in AFDC cases. Finally, Jerry Grandson noted that, even if DEFRA had removed this bar in AFDC cases, DEFRA was strictly limited to amending AFDC eligibility rules and could not be seen as removing the representative payee deeming bar as it relates to any other benefits payments, such as Social Security Survivor's benefits.

The Executive Director's response (in Point IV of her Brief) is twofold: first, she reiterates that courts have held the representative payee deeming bar to be lifted by DEFRA in AFDC eligibility determinations; second, because AFDC and Medicaid eligibility standards are identical, as argued elsewhere in her Brief, removal of the bar on such deeming in AFDC cases necessarily works the same result in Medicaid cases. The first contention misses the point of the appellant's discussion, and the second contention is merely wrong.

Section 2640 of DEFRA may have removed the bar on deeming representative payee income in AFDC cases. However, as was discussed in the Appellant's Brief and the preceeding sections of this Reply, the courts have been uniform in their holdings that DEFRA applies only to the AFDC eligibility rules of the Social Security Act. Thus, the fact that some, most, or even all, courts have found the representative payee bar lifted in AFDC

eligibility determinations does not effect Medicaid cases. But these authorities do show that there was a recognized bar which had to be lifted through actual Congressional action.

The Executive Director finds the Congressional action by reconciling AFDC and Medicaid eligibility requirements. The extent of this argument is a statement that

[b]ecause the Medicaid agency must apply the financial eligibility requirements of the AFDC program [citation], the removal of this bar logically extends to the Medicaid program as well.

Appellee's Response Brief at p.22.

The preceeding sections of this Brief have already demonstrated the invalidity of the premise of the Executive Director's statement. The AFDC and Medicaid eligibility rules are not identical. AFDC eligibility is governed by Title II of the Social Security Act, and Medicaid is controlled by section 1396a of Title XIX. DEFRA may have amended Title II, but it had no effect on Title XIX. If the linkage of eligibility rules does not exist, but instead we find separate sets of rules, then removal of a bar or prohibition applicable to one set of rules does not remove that bar as to the other set. The Executive Director's statement is fallacious and does not suggest a legitimate ground for abolition of the prohibition on deeming of representative payee OADSI benefits in Medicaid cases.

By its terms, section 2640 of DEFRA has removed the bar against deeming representative payee OADSI income in AFDC cases

only. But there is nothing in DEFRA or its legislative history which suggests that Congress intended to remove this bar for any other kinds of benefits paid through a representative payee. Because Jerry Grandson's siblings received their Social Security Survivor's benefits through a representative payee, the Executive Director's Final Determination violated federal law by deeming this income as being available to Jerry.

CONCLUSION

In her Brief, the Executive Director of the Department of Health argues that this case may only be resolved by examining the legislative histories of 42 U.S.C. §1396a(a)(17)(D) and the Deficit Reduction Act of 1984. Such an examination is said to reveal Congress' intent to permit deeming of sibling income in determining Medicaid eligibility, despite the clear prohibition of section 1396a(a)(17)(D) which bars such deeming unless the income is from a spouse or parent of a minor child. In addition, the Executive Director argues that such deeming is based upon a statutory interpretation by the U.S. Secretary of Health and Human Services, and this interpretation must be accorded great deference and legislative effect. Finally, the Executive Director argues that a ban on deeming of benefit income received through a representative payee must be removed for Social Security Old Age Survivors and Disability Insurance benefits if Congress removed it for AFDC benefits.

In reply, Jerry Grandson has pointed out that the canons of statutory construction render it inappropriate for a

court to engage in the judicial construction of an unambiguous statute through examination of its legislative history. Section 1396a(a)(17)(D) fits this rule for it clearly bans the deeming of income from any individual other than a spouse of parent of a minor child. Thus the statute is entitled to be enforced in accordance with its plain terms.

Such enforcement would be consistent with the legislative histories of the statutes in any event. The courts have consistently found that Congress intended to bar all deeming of income from any persons other than spouses or parents in Medicaid eligibility determinations through the enactment of section 1396a(a)(17)(D). The courts also find no evidence that Congress intended to change this rule through enactment of DEFRA, which they instead find was concerned solely with eligibility for AFDC benefits.

Finally, there is also no evidence that the bar on deeming of representative payee income has been waived in any but AFDC cases. The statute removing that ban for AFDC eligibility determinations refers only to AFDC and not to any other benefit program. As a consequence, the bar must remain in place for other programs, such as Social Security Survivors benefits.

Because there are no appropriate arguments which allow the deeming of sibling income in determining Medicaid eligibility, the Executive Director's Final Determination, which did allow such deeming, violated federal and state statutes and regulations. Her decision was therefore arbitrary and capricious

and deserved to be reversed. The failure of the District Court to take that action was an error of law.

Date: 29 June 1987

A handwritten signature in cursive script, appearing to read "Steven Boos", written over a horizontal line.

Steven Boos
DNA-PEOPLE'S LEGAL SERVICES
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ADDENDUM

Note: House Report No. 213 is fully reproduced at Item No. 11 in the addenda of the Appellee's Response Brief, and is not reproduced again here.

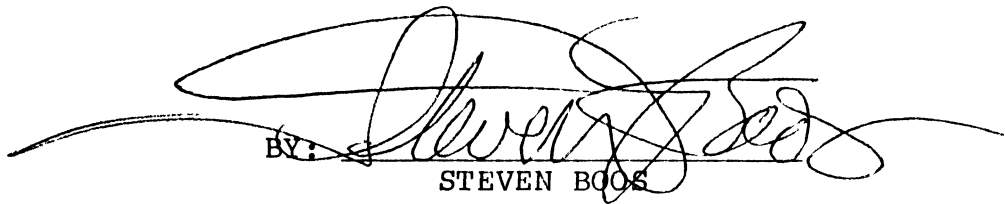
CERTIFICATE OF MAILING

I hereby certify that 4 true copies of the foregoing APPELLANT'S REPLY BRIEF were mailed by first class, pre-paid post to

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This 24th day of June, 1987.

BY: 
STEVEN BOOS