IN THE
UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 22-4698

KAREN R. SHORETTE
Petitioner,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,
Respondent.

BRIEF IN RESPONSE TO COURT'S JANUARY 18, 2023, ORDER

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COURSE OF PROCEEDINGS AND RELEVANT FACTS

Retired Air Force Command Chief Master Sergeant Charles R. Shorette has been a resident of the Northern Indiana VA Healthcare facility in Marion, Indiana, since April 2008. Mr. Shorette suffers from several medical conditions, including Primary Progressive Multiple Sclerosis and dementia, and has long been rated as 100% disabled from these service-connected conditions. Ex. A at 1. VA appointed his wife, Karen R. Shorette, as his VA "fiduciary" to manage his VA benefits in December 2008. Ex. B. Mrs. Shorette also has Mr. Shorette's General Durable Power of Attorney and Medical Power of Attorney since August 2005 and was appointed by an Indiana state court as Mr. Shorette's legal guardian in February 2009. Exs. C, D, E.

At some point, VA began to disagree with Mrs. Shorette's decisions regarding Mr. Shorette's lifestyle and medical treatment. *See, e.g.*, Ex. F (Mrs. Shorette reporting "your staff threatened to call in your ethics committee to override any decision"); *see also Response by Petitioner to Judge's October 27, 2022 Order* (Nov. 4, 2022). These conflicts culminated with charges of "misuse" of the veteran's funds against Mrs. Shorette and her replacement as VA "fiduciary" in 2018 because she would not comply with VA demands on how to spend Mr. Shorette's funds. *See generally*, Exs. G, H. Mrs. Shorette vigorously challenged

the basis for the "misuse" charge underlying her dismissal and the appointment of a stranger both she and Mr. Shorette opposed as VA "fiduciary." *See, e.g.,* Ex. I. In March 2021, however, the Program later *conceded* "that [Mrs.] Shorette did *not* misuse" Mr. Shorette's benefits, Ex. J (emphasis supplied), but did *not* reinstate her as VA Fiduciary.

On April 28, 2022, Mrs. Shorette filed a Notice of Appeal accompanied by a lengthy email. *See* CAVC Dkt. No. 22-2268. On August 8, 2022, the Court dismissed the appeal and directed opening of a separate docket for a construed petition for extraordinary relief and on January 18, 2023, ordered responses to specific questions

OVERVIEW

This case is a sad amalgam of the harms suffered by families unwilling to abandon their veterans' health and welfare to the "protection" of the VA Fiduciary Program. The pain and disruption caused by the still fundamentally unaccountable Program have, if anything, only increased since the rule change[1] prompted by this Court's seminal decision in *Freeman v. Shinseki*, 24 Vet. App. 404 (2011). In particular, the Secretary permits the Program to routinely

[1] *See* Exhibit K (*Veteran Justice Group, LLC, Detailed Comments on the Notice of Proposed Rulemaking Regarding VA Fiduciary Activities at 79 Fed. Reg. 430* (Jan. 3, 2014)).

exceed its authority well beyond managing "VA benefits to which [the veteran] is entitled," 24 Vet. App. at 408, including confiscating non-VA financial accounts (e.g., Social Security benefits, military retirement), and lifestyle and health care decisions. Refusal to comply with these *ultra vires* demands often results in charges of "misuse" of the veteran's funds and dismissal of the family member as the VA fiduciary, creation of "debts" against IRS refunds, false reports to third parties, and, upon occasion, accusations of *criminal* activity *even when no funds are missing or misspent*. Perversely, some "misuse" charges allege *not spending enough* on items demanded by Program employees, but which the VA fiduciary does not believe are in the interest of the beneficiary.

Even the term VA "fiduciary" is misleading, as at *all* times *the Secretary* wields *complete control* over *his* "fiduciary," *who cannot perform any independent action or decide the veteran's "interest*." Contrary to the moniker, VA "fiduciaries" are bound to their Program handlers under penalty of misuse charges and dismissal. Experience teaches that a VA-appointed individual acting only in the beneficiary's interest is quickly removed for failing to comply with even the most *ultra vires* Program mandate. So, while a state "fiduciary" (e.g., guardian, etc.) is appointed based on hearings and detailed evidentiary findings by an independent adjudicator, Program appointments are

opaque at best, made by interested VA employees, and often appear more related to ensuring a "compliant" relationship between the Program and the individual than any concern for the beneficiary's "interest." *See, e.g., Brown v. Shinseki*, CAVC No. 11-76 (District Court TRO prohibiting VA-appointed "fiduciaries" from avoiding recovery of veteran's funds); *Evans v. Shinseki*, CAVC No. 11-1605 (elderly couple's power shutoff threatened during heat wave because Program refused to pay power bill over budget); *Garcia v. Shinseki*, CAVC 11-1924 (VA fiduciary refused to pay for new heart medication not in the approved budget); *Solze v. Shinseki*, CAVC 12-1512 (Program attempted to cut off elderly WWII veteran's military retirement after family challenged VA-appointed fiduciary); *McDaniel v. Shulkin*, CAVC No. 17-2741 ("debt" created against spouse despite *VA possession* of the funds); *Burke v. McDonough*, CAVC 20-8651 (VA appointed "fiduciary" with *check fraud* convictions; family member replaced as "fiduciary" for questioning veteran's medical treatment); *Burke v. United States*, 3:22-cv-670-JMC (D.C.S.C.) (seeking damages for *falsely* reporting "abuse of social security funds" and "unauthorized and illegal transactions" by family member; submitting surety claim against family member while *all funds remained* in trust account).

The Program has recently developed a particular taste for charging "misuse" when, as here, a family member does *not* expend the veteran's funds in the manner VA personnel, but *not* the "fiduciary," want. This is devastating, as a family member charged with misuse of *any* amount is generally charged with misuse of the *entire amount* of the veteran's trust fund. As these trust funds can contain tens or hundreds of thousands of dollars, such charges pile financial and credit devastation on top of the burden of caring for a severely disabled family member.

In sum, the Shorette's complaints do not involve new or unique behaviors. To the contrary, the Secretary's failure to make any substantive changes to his Program of his own volition, *despite* this abhorrent history, is an important background upon which to consider the Secretary's responses in this matter.

RESPONSES TO THE COURT'S SPECIFIC QUESTIONS

I. This matter is best characterized as the veteran, acting through his legal guardian, seeking to appeal a decision to appoint an individual who would not serve his best interests as VA "fiduciary"

Mr. Shorette has a right to appeal the appointment of an individual as his VA "fiduciary." If "*the veteran* disagrees with the Secretary's manner of selecting a fiduciary, *the veteran* may appeal that decision to the Board." *Freeman*, 24 Vet. App. at 414 (emphasis supplied). Section

5502 "cannot be interpreted as precluding *a veteran* from challenging the appointment of a fiduciary." *Id.* at 414 (emphasis supplied). No statutory language "preclud[es] the Secretary's determination regarding the appointment of a fiduciary from being appealed to the Board and ultimately to this Court." *Id.* at 415.

And that is what Mr. Shorette has done here. Succinctly put, Mrs. Shorette *is* Mr. Shorette for the purpose of exercising *his* legal rights as a matter of law, for the reasons discussed below. The Secretary's refusal to recognize this long-accepted legal fiction, however, violates Mr. Shorette's federal rights and Mrs. Shorette's state authority.

II. An incompetent veteran's legal guardian has standing to initiate an appeal of any VA action.

The Secretary's statement that "Petitioner is not the beneficiary," Sec'y Sept. 13, 2022, Resp.[2] at 4, is true, but irrelevant. What is true *and relevant* is that "Petitioner *is* the *legal representative* of the beneficiary." Indeed, the Secretary's regulations explicitly recognize "[a]n individual or entity who has been appointed by a court with jurisdiction to handle the beneficiary's affairs," 38 C.F.R. § 13.100(e)(8),

[2] *Secretary's Response to the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Court's August 10, 2022, Order* (Sept. 13, 2022).

and the Secretary (or designee) is required to consider the appointment of such an individual. *Id*. § 13.100(e).

Mrs. Shorette is such an individual. The Letters of Guardianship issued by a Judge of the Circuit Court of Grant County, Indiana, "granted to Karen R. Shorette that authority to act as Guardian over Charles R. Shorette." Pet's Dec. 21. 2022, Submittal, Att. 2. This Court order also explicitly granted Mrs. Shorette authority to act as both "Guardian of the person" and "Guardian of the estate" under Ind. Code Sections 29-3-8-2(a) and Ind. Code Sections 29-3-8-4. *Id*. Those Code Sections empower Mrs. Shorette to act as and for Mr. Shorette in specific situations. Further, Indiana Code Section 29-3-8-3, "Mandatory responsibilities of guardian," directs a guardian *shall*:

- Act as a guardian with respect to the guardianship property and *observe the standards of care and conduct* applicable to trustees;
- *Protect and preserve the property of the protected person* subject to guardianship and *secure* the *protective orders or other orders that are required to protect* any other property of the protected person;
- *Conserve* any property of the protected person in excess of the protected person's current needs; and
- *Consider* recommendations relating to the appropriate standard of support, care, education, and training for the protected person.

Ind. Code 29-3-8-3 (emphasis supplied). Indeed, the Federal Rules of Civil Procedure designate a duly appointed "guardian" as one who has

"capacity" to sue on behalf of an incompetent person. *See generally* Fed. R. Civ. P. 17. Mrs. Shorette's actions in this matter are, therefore, completely within her legal authority to "protect and preserve" and "conserve" Mr. Shorette's property, including her attempts to secure "orders" of this court or any other court to protect Mr. Shorette's property. Indeed, Mrs. Shorette has a *duty* to do seek such court orders if necessary to protect Mr. Shorette's interests. Ind. Code 29-3-8-3.

It follows, therefore, that when a beneficiary has standing to initiate an appeal or petition in this Court, as Mr. Shorette does, his legal guardian has the same standing in the same legal actions *as a matter of law*. So, as Mr. Shorette's designated legal guardian charged with protecting his property and conserving his funds, Mrs. Shorette is properly seeking to exercise *Mr. Shorette's* right to initiate and participate in proceedings before the Secretary and this Court.

Moreover, the issue of state-appointed guardian's authority over a veteran's funds was addressed by the U. S. Supreme Court *years ago* in *Hines v. Stein*, 298 U.S. 94 (1936), which rejected the Secretary's theory of supremacy over state fiduciary laws.

> During many years, *Congress* has *recognized* the propriety, if not the *necessity*, of [e]ntrusting the custody and management of funds belonging to incompetent pensioners to *fiduciaries appointed by state courts*, without seeking to limit judicial power in respect of them. To the contrary, it

> has directed that *whenever any guardian, curator, or conservator fails properly to execute his trust, etc., the [Secretary] may appear in the court which has appointed* and make proper presentation of such matters. Authority of the state courts over guardians for incompetents is thus definitely recognized.
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> . . .
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> *Nothing* brought to our attention would justify the view that *Congress intended* to *deprive state courts* of their usual authority over fiduciaries, or to *sanction the promulgation of rules* to that end by executive officers or bureaus.

Hines, 298 U.S. at 98 (emphasis added) (internal citations and quotations omitted). Mrs. Shorette submits that there has been *no* change since *1936* that "would justify the view that Congress intended to deprive state courts of their usual authority over fiduciaries."

The current relevant statutory text reads.

> Where it appears to the Secretary that the interest of the beneficiary would be served thereby, payment of benefits under any law administered by the Secretary may be made directly to the beneficiary or to a relative or some other fiduciary for the use and benefit of the beneficiary, regardless of any legal disability on the part of the beneficiary.

38 U.S.C. § 5502(a)(1). This sparse language is not reasonably read to create a robust "scheme" intended to preempt extensive trusts, estate, and probate law *in all 50 states*. *Contra* 83 Fed. Reg. 32,716, 32,732-34 (Jul. 13, 2018). Indeed, Congress provided only the barest outlines of the duties and responsibilities of a VA-appointed "fiduciary." There is no discussion at all of a VA fiduciary's duties *to the beneficiary* – a

seemingly key omission for a purportedly *robust* "scheme" intended to replace state black letter fiduciary duties. If anything, the language of Section 5502 fairly *demands* reliance on state laws for the missing substance, including but by far not only, the duties and responsibilities to implement Congress's direction that an appointed fiduciary act for the "benefit of the beneficiary." 38 U.S.C. § 5502(a)(1); *see also id.* §§ 5502(b), (d), (e). This key issue issue is ripe for review.[3]

In short, the Secretary has yet to demonstrate *any* authority to ignore state law and court orders in this area and surely Congress would not have buried a change of such enormous impact on state authority in the broad language of Program statutes.

A. A legal guardian is entitled to the same notice or other due process requirements as the veteran in order to protect an incompetent veteran's appellate rights as outlined in 38 C.F.R. §§ 13.30(b), 13.600(a), (b)(2).

For the reasons discussed above, Mrs. Shorette *is* the veteran for the purposes of this litigation. Thus, the Secretary has a duty to provide the notice and other due process rights and requirements to Mrs.

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[3] To be clear, Mrs. Shorette does not dispute the Secretary's authority to appoint a VA fiduciary *when there is no state-appointed guardian or similarly empowered person*, which she contends is the only intended purpose of the program. Mrs. Shorette *does* challenge the Secretary's unnecessary and damaging intrusions into successfully functioning state-established relationships solely because he reads the law as saying "he can."

Shorette regardless of who is appointed as VA "fiduciary." Since February 5, 2009, Mrs. Shorette has had the authority to act *as* and *for* Mr. Shorette to protect his due process and other rights. Mrs. Shorette, therefore, was (and still is) the "beneficiary" here as a matter of law. The Secretary has identified nothing that supports a different result.

The above answer does not change when the legal guardian is accused of misusing VA funds, *unless the fiduciary does not challenge the charge*. When "a fiduciary is appealing a determination of misuse, the Secretary may appoint one or more temporary fiduciaries for a period not to exceed 120 days." 38 U.S.C. § 5507(d). Importantly,

> If a final decision has not been made within 120 days, the *Secretary* may not continue the appointment of the fiduciary *without obtaining a court order for appointment of a guardian, conservator, or other fiduciary* under the authority provided in [38 U.S.C. § 5502(b)].

Id. (emphasis supplied). Thus, Congress allows the Secretary to *temporarily* replace a fiduciary "charged" with misuse or other misdeeds, but must (1) resolve those charges within 120 days or (2) appear "in *any* court having original, concurrent, or appellate jurisdiction" and make "proper presentation of such matters." 38 U.S.C. § 5502(b) (emphasis supplied).

Mrs. Shorette submits that the choice of the particular language in these statutes is not a coincidence. To the contrary, the direction that

when a fiduciary fails to properly perform their duties "*the [Secretary] may appear in the court which has appointed"* that individual and "*make proper presentation of such matters*" is the precise wording used in *Hines*. 298 U.S. 94 at 98. Mrs. Shorette submits that by adopting *Hines' exact* wording, Congress also adopted the "no preemption" conclusion in that opinion. Indeed, should *this Court* agree with the Secretary that state law is preempted, then *this Court is the only court* which has "appellate jurisdiction" over VA "fiduciary" appointments and, thus, to which the Secretary *must* make "proper presentation" of his purported bases for removal in a case in which removal is contested.

In sum, the Secretary has authority under *federal* law to appoint an individual to manage a veteran's *federal* benefits. Unrecognized by the Secretary, however, to dismiss a "fiduciary" appointed under *federal* law (a "VA-appointed" individual), Congress requires *the Secretary* to petition *this* Court for the authority to *remove* the fiduciary from handling *federal* benefits. Congress also directed that the Secretary can remove a "bad actor" appointed as guardian under state law *and* a VA fiduciary under federal law but must do so by obtaining approval

from both this Court (federal authority) and the appointing state court (state authority) by appropriate means (e.g., petition).[4]

Such a reading of the law requires that the party making the assertion of bad behavior (i.e., the Secretary) *prove its case,* which is consistent with the burden(s) of any party charging another party with improprieties. It also fills the gap created by the Secretary's current disregard of state authority over beneficiaries for all purposes other than VA benefits through which the Secretary has escaped *independent* review of the "misuse" charges used to strip *state* authority from VA-appointed individuals. This issue too is ripe for review.

B. VA's action(s) and inaction(s) have frustrated this Court's future jurisdiction.

The Secretary's action to block Mr. Shorette's appeal of the appointment of an individual unknown to him by refusing to recognize Mrs. Shorette's guardianship powers, is nothing less than a denial of "one review on appeal" and access to this Court – both of which are within the Court's jurisdiction to review. As a veteran, Mr. Shorette has a right to "one review on appeal" of a VA fiduciary appointment to

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[4] The statutory language can be fairly read to place a *duty* on the Secretary to *report to the appointing court* a fiduciary accused of violating his or her legal duties to the veteran so *that court* can review the propriety of *its* appointment of that individual over non-VA issues.

the Board of Veterans' Appeals and then, if necessary, to this Court.[5] 38 U.S.C. §§ 7104, 7252; *Freeman*, 16 Vet. App. at 414. Mrs. Shorette's authority includes seeking "orders" of this Court necessary to protect Mr. Shorette's funds and to ensure they are properly used only for his benefit. *See* Ind. Code 29-3-8-3. And, given that the Secretary has never wavered from his refusal to recognize Mrs. Shorette's legal authority to do *anything*, there are no adequate alternative remedies.

III. A decision regarding appointment of *any* individual as a VA "fiduciary" is subject to judicial review.

Freeman controls resolution of this issue. If "the veteran disagrees with the Secretary's manner of selecting *a* fiduciary, the veteran may appeal that decision to the Board." *Freeman*, 24 Vet. App. at 414 (emphasis supplied). Section 5502 "cannot be interpreted as precluding a veteran from challenging the appointment of *a* fiduciary." *Id*. at 414 (emphasis supplied). No statutory language "preclud[es] the Secretary's determination regarding the appointment of *a* fiduciary from being appealed to the Board and ultimately to this Court." *id*. at 415 (emphasis supplied), or language *limiting* such a challenge in *any* way (e.g., to only initial appointments or excluding "replacement"

[5] And, as discussed in the previous section, the Secretary also has a separate – as of yet unrecognized – duty to seek court review of its "misuse" charge to remove Mrs. Shorette in the first place

fiduciaries). Thus, Mr. Shorette can challenge the appointment of the replacement VA "fiduciary," not because he replaced Mrs. Shorette, but because he is *a* fiduciary selected for appointment by the Secretary.

CONCLUSION

The Secretary is properly ordered to recognize Mrs. Shorette's authority as Mr. Shorette's guardian under applicable state law and that authority allows her to step into the shoes of Mr. Shorette for the purposes of exercising his rights and privileges as a veteran beneficiary, including challenging the Secretary's appointment of a stranger as a "fiduciary" appointed to manage his VA benefits.

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