

No. A06-0559

In The
Court of Appeals of the
State of Minnesota

In Re: Appeal of Decision of the Commissioner
of Human Services in the Appeal of Lillian Flygare
for Medical Assistance,

Lillian Flygare,

Appellant,

County of Nicollet,

Respondent,

Minnesota Department of Human Services,

Respondent.

RESPONDENT'S BRIEF

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LEGAL ISSUES

1. Did the Legislature, in enacting changes to Minn. Stat. § 501B.89, prohibit as against public policy trust provisions which preclude resort to trust assets in order to make a beneficiary eligible for public assistance?

The trial court held that the Legislature made significant changes in the common law.

Most apposite cases and statutes: Minn. Stat. § 501B.89 (2003); Akers v. Akers, 233 Minn. 133, 46 N.W.2d 87 (1951); In re Leona Carlisle Trust, 498 N.W.2d 260 (Minn. App. 1993); In re Horton Irrevocable Trust, 668 N.W.2d 208 (Minn. App. 2003).

2. Do the provisions of the Flygare Trust, even under the rules asserted by Lillian Flygare require trust assets to be available for her basic needs?

The trial court held trust assets must be expended before public assistance is available.

Most apposite cases and statutes: U.S. v. O'Shaughnessy, 517 N.W.2d 574 (Minn. 1994); McNiff v. Olmstead County Welfare Dept., 287 Minn. 40, 176 N.W.2d 888 (1970); In re Horton Irrevocable Trust, 668 N.W.2d 208 (Minn. App. 2003).

STATEMENT OF THE CASE

This matter comes before this Court on appeal from the decision of the trial court affirming the decision of the Commissioner regarding Flygare's claim to public assistance. The material facts were not disputed, with the record consisting of little more than the Flygare Trust and the Commissioner's decision.

Flygare applied for public assistance in the form of medical assistance Nicollet County in August 2004. (Appellant's Appendix, page A13; AA13). The County denied those benefits based upon the available trust assets. (AA13).

On January 13, 2005, Flygare appealed that decision to the Commissioner of Human Services. (AA13). A hearing was held before Appeals Referee J. Philip Peterson

on March 15, 2005. (AA12). The record remained open until March 29, 2005. (AA13). On May 23, 2005, Referee Peterson issued Findings of Fact, Conclusions of Law and Recommendation. (AA16). That recommendation was adopted by the Chief Appeals Referee Kenneth M. Mentz on May 25, 2005. (AA16). The decision thus became the Decision of State Agency on Appeal. (AA12).

After the Decision denying Flygare's right to public assistance due to the available trust assets, Flygare brought a timely appeal to state district court in Nicollet County. (AA1). The parties agreed to the record before the district court and the issue was argued on a summary judgment basis. (AA9). On January 17, 2006, the trial court issued an Order affirming the Agency determination. (AA32). Flygare then brought this timely appeal. (AA45).

STATEMENT OF THE FACTS

The facts are not disputed. On or about August 20, 1993, Ronald J. Flygare executed his Last Will and Testament. In that Will, Mr. Flygare divided the majority of his estate into two parts. (AA19-20). One part, the "Marital Share," represented the assets specifically designated to his spouse, E. Lillian Flygare. The other part, the "Family Share," was placed into a trust. (AA19-20).

Under the terms of that Trust, the "net income of this trust shall be paid to my spouse." (Flygare Will, page 3, paragraph III. D. First; AA20). In the event that the trustee determined that Lillian Flygare had sufficient other assets, the trustee could distribute the funds to other heirs or retain the net income and add it to the principal.

(Flygare Will, page 3, paragraph III. D. First; AA20). Unlike other provisions of the Trust, the trustee had no discretion in determining whether to distribute the income. The sole decision was whether Ms. Flygare had “adequate other income.” (Flygare Will, page 3, paragraph III. D. First; AA20).

The Trust provisions went on to require the trustee to invade the principal of the Trust “for the benefit of my spouse as my trustee, Marcus R. Flygare deems necessary and advisable in order to provide for the proper support and maintenance of my spouse.” (Flygare Will, page 3, paragraph III. D. Second; AA20). Marcus Flygare, as trustee, acted in his “sole and exclusive discretion” in making this decision. (Flygare Will, page 3, paragraph III. D. Second; AA20). The Trust went on the limit that discretion by providing that no principal could be paid “in the event that my spouse would be eligible for assistance under any government funded program.” (Flygare Will, page 3, paragraph III. D. Second; AA20).

In December 1993, Ronald J. Flygare died. (AA33). As a result, the trust was funded. (AA20).

Over the ensuing years, the Marital Share was depleted. (AA33). On August 26, 2004, Ms. Flygare applied for medical assistance – elderly, to assist in the payment of her long term care facility expenses. (AA13). The denial of benefits issued by the County (AA13) brought about these proceedings.

ARGUMENT

This matter is before the Court based upon the decision of the trial court affirming the denial of public assistance benefits. Judicial review is available pursuant to Minn. Stat. §§ 14.69, 256.045, subd. 9 (2004). Although not entirely clear, Flygare apparently appeals the decision based solely upon “other error[s] of law” in the Agency decision. Minn. Stat. § 14.69(d). The trust beneficiary has the burden of proof to establish the trust is not an available asset. In re Leone Carlisle Trust, 498 N.W.2d 260, 263 (Minn. App. 1993). This Court reviews issues of statutory interpretation *de novo*. Hibbing Educ. Ass’n v. Public Employment Relations Bd., 369 N.W.2d 527, 529 (Minn. 1985). Whether an asset is available for medical assistance eligibility is also a question of law. Carlisle, 498 N.W.2d at 263.

1. The terms of the Flygare Trust violate State statute which obviated the common law rule.

The issues raised in this case are issues of first impression in this State. Prior to the 1992 and 1993 amendments to the statutes, this State adopted a common law approach towards trust assets and the impact of those assets on public assistance eligibility. Under the common law rules, Minnesota recognized two types of trusts, a “support trust” and a “discretionary trust.” Carlisle, 498 N.W.2d at 264. “A support trust directs the trustee to distribute trust income or principal as necessary for the support and maintenance of the beneficiary. A discretionary trust gives the trustee complete discretion to distribute all, some, or none of the trust income or principal to the beneficiary, as the trustee sees fit.” Carlisle, 498 N.W.2d at 264 (citations omitted). As a result, the issue at common law

turned on the language of the trust and the intent of the creator of the trust as gleaned from the trust documents. In re Horton Irrevocable Trust, 668 N.W.2d 208, 214 (Minn. App. 2003).¹ These common law rules, however, have been abrogated by Minn. Stat. § 501B.89 (2003).

a. The impact of the statute.

In 1992, the Minnesota Legislature passed an amendment to Chapter 501B. Under that amendment, any trust provision created after July 1, 1992 “purporting to make assets or income unavailable to a beneficiary if the beneficiary applies for or is determined eligible for public assistance or a public health care program is unenforceable.” Minn. Stat. § 501B.89 (1992). In 1993, the Legislature acted again, recognizing an exception to this restriction for supplemental needs trusts and revising subdivision 1 to provide that:

a provision in a trust that provides for the suspension, termination, limitation or diversion of the principal, income, or other beneficial interest of a beneficiary of a trust if the beneficiary applies for, is determined eligible for, or receives public assistance or benefits under a public health care program is unenforceable as against public policy of this state, regardless of the irrevocability of the trust or the purpose for which the trust was created.

Minn. Stat. § 501B.89, subd. 1 (1993). The statute further made the effective date for the amendment retroactive to July 1, 1992. Minn. Laws 1993, c. 108, § 2.

The Will at issue here was signed on August 20, 1993, and the Trust provision became effective, subject to the necessary steps to create the trust, upon Ronald J.

¹ Even though Horton was decided after the effective date of the statute, the court did not consider the impact of Minn. Stat. § 501B.89 because the trust at issue was created before the effective date of the statute.

Flygare's death on December 17, 1993. As a result, the Trust is undisputedly governed by the 1993 amended language of the statute.

The Legislature may abrogate the common law. State v. Soyka, 181 Minn. 533, 536, 233 N.W. 300, 302 (1930) (recognizing that the Legislature had altered the rules for witness competency by passing a statute addressing the issue). Generally, it does so by passing a statute which purports to cover the field. Akers v. Akers, 233 Minn. 133, 139, 46 N.W.2d 87, 91 (1951). The court may not ignore the language of a statute where the plain language covers the situation at hand, even if the statute does not abrogate the entire field. Anker v. Little, 541 N.W.2d 333 (Minn. App. 1996) (the Court must apply the seat belt gag rule even though it might not apply in some situations, might led to a troubling but not absurd result, and did not violate the state constitution).

Here, the statute completely controls the field. It expressly makes unenforceable any provision in a trust to limit the beneficial interest of the beneficiary in order to create a right to public benefits. Instead, the trustee must fund the needs of the beneficiary before the public can be required to do so.

In addition, the Legislature used the specific language that a provision limiting the obligation of the trustee to provide payments is "unenforceable as against public policy of this state." Minn. Stat. § 501B.89, subd. 1 (1993). The basis for the distinction in the common law between a "support trust" and a "discretionary trust" was the ability of the beneficiary to enforce the payment requirement. Carlisle, 498 N.W.2d at 264. By making unenforceable the limitation on the "supplementary trust" that allows a trustee to

withhold payment for the needs of the beneficiary, the Legislature has effectively made the assets available in all circumstances where the public may be called upon to make payments, legislatively removing the discretionary language from the trust and making payment for needs mandatory.

The language of the Legislature becomes even more apparent when the last clause of the section is considered. The prohibition against resort to public funds applies “without regard to ... the purpose for which the trust was created.” Minn. Stat. § 501B.89, subd. 1. This is a clear reference to the prior common law rule recognizing the difference between a “support trust” and a “discretionary trust.”² A support trust provided for the needs of the beneficiary without any discretion in the trustee to provide for those needs; its purpose was to meet the basic living requirements of the beneficiary. The discretionary trust, on the other hand, provided for the beneficiary’s needs but only within the discretion of the trustee and generally as a supplement to the basic needs of the beneficiary; its purpose was to supplement the income of the beneficiary from other sources, such as governmental benefits. *See Carlisle*, 498 N.W.2d at 262 (discretionary trust where the payments were for very limited purposes).

Since the Legislature has established a policy of the use of private funds to pay the costs of long term care before the use of public dollars, and has expressly stated that any effort to avoid that goal is a violation of public policy, this court is bound to enforce that law, as did the trial court. As a result, the language in the trust which purports to protect

those assets, including the discretionary decisions of the trustee, is a violation of public policy and cannot be enforced.

b. The Agency interpretation.

When called upon to interpret a statute, the courts will look to interpretation given by the agency charged with administering the statute. It is in the first instance the agency's duty to determine the standards that will fulfill the legislative policy. *See In re Indep. Spent Fuel Storage Installation*, 501 N.W.2d 638, 649 (Minn. App. 1993) (applying the rule in an environmental regulation context); *see also In re Rochester Express Limousine Service, Inc.*, 508 N.W.2d 788 (Minn. App. 1993) (an agency interpretation of a statute is entitled to some deference if the meaning of the statute is in doubt). The agency interpretation is entitled to deference and will be upheld absent a finding that it is in conflict with the legislative purpose and intent. *Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988).³ When an agency has interpreted the statute, it is the role of the legislature or supreme court to overrule the interpretation. *In re Univ. of Minn.*, 566 N.W.2d 98, 103 (Minn. App. 1997).

Here, the Agency charged with administering the public assistance programs has interpreted the statute and disseminated that interpretation through the Minnesota

² The legislature is presumed to know the law and to act in consideration of prior interpretation of the law. *Ozmun v. Reynolds*, 111 Minn. 459 (1866).

³ Where the statute is clear and unambiguous, no deference will be given to the agency on an issue of law. *Rochester Express*, 508 N.W.2d at 789. Thus, if the County's position of the clarity of the statute is correct, this Court need not defer to the Department. If, however, some lack of clarity exists, the Department's view of the law should be considered.

Department of Human Services Health Care Program Manual. In that Manual, the Department states that provisions which divert trust funds to another, or limit the trust benefits, if the beneficiary applies for public assistance are unenforceable. (Respondent Nicollet County's Appendix, page RA2; RA2). Thus, the Agency interpretation is also consistent with the view that the Legislature has abrogated the common law and established a new policy in this State.

Appellant has not addressed the Department's interpretation of the statute nor how it would impact this case. However this Court views the statute, the Department's interpretation is an issue which must be considered. Appellant's failure to address that interpretation is further indication of the problems with Flygare's position in this case.

c. Flygare's analysis does not alter this result.

Flygare argues extensively in her Brief that the Will can simply be redlined and the specific reference to access to public funds deleted, thus protecting the assets from consideration by the County. Her argument, however, fails to consider the "purpose" provision in the statute. Flygare's Brief simply fails to address the fundamental issue which this Court must consider – the impact of the all of the language of the statute on this trust. The Legislature included the "purpose" provision with the clear intent to prohibit precisely the kinds of trusts Flygare asserts exists in this case. Without some explanation of how to avoid the clear impact of the "purpose" language in the statute, Flygare's attempts to redline the trust or otherwise rewrite its provisions fail.

In addition, of course, the Legislature did not merely void provisions which expressly provide that trust assets need not be used where public assistance is available. If it had intended to do so, it could have easily written such language. For example, the statute could have read that “a provision of a trust that provides that public assistance shall be the first source of payment for the needs of the beneficiary, and that no payment need be made from the trust when public assistance is available to cover those needs, shall be unenforceable as against public policy.” Instead, it chose a much more all encompassing approach, voiding as against public policy any provision which had the effect of creating eligibility for public assistance. Giving the trustee the sole discretion to distribute trust assets is a “limitation” on the distribution of the trust assets, based upon the eligibility or receipt of public assistance, which directly violates that public policy. Thus, regardless of the redlining of the Will, the trust assets must be available for Ms. Flygare to pay her care costs before resort to public assistance.

This Court, therefore, should affirm the decision of the trial court.

2. The Agency correctly determined that the Trust assets were available to Ms. Flygare.

Even if this Court were to examine this case under the common law structure as the Appellant contends, the result remains the same. As noted above, the common law analysis started with a determination of the nature of the trust and the intent of the creator of the trust as gleaned from the trust documents. Horton, 668 N.W.2d at 214. Examination of this trust demonstrates that is a “support trust” and that it was the intent of the Testator, Mr. Flygare, to provide for his wife’s needs.

- a. The Trust document reveals that it is a support trust, designed to ensure the needs of Ms. Flygare are met.

The Trust, in addressing the rights of the Trustee to invade the principal of the Trust, contains conflicting provisions. On the one hand, the Trustee is vested with discretion to determine whether to pay some of the principal to Ms. Flygare or for her benefit. On the other hand, the Trust requires the Trustee to act as he “deems necessary and advisable to provide for the proper support and maintenance of my spouse.” (Flygare Will, page 3, paragraph III. D. Second; AA20). The Trust language, therefore, does not clearly set forth the limitations on the trustee which Flygare asserts.

Consideration of the entire trust language demonstrates that the principal is an available asset to provide for the needs of Ms. Flygare in the form of a “support trust.” The language provides that the Trustee must make a determination about the “proper” needs for support and maintenance for Ms. Flygare. The Trust further provides that no payment shall be made if Ms. Flygare has other assets available to provide these needs, implying that if not, payment is mandated. As a result, the Trustee must consider those needs. In doing so, the Trustee has no discretion with regard to making expenditures to meet Ms. Flygare’s basic needs.

The Trustee maintains discretion to determine the total amount and, perhaps, the extent of “proper support and maintenance” but certainly could not let her starve or die from want of medical care. The purpose of the Trust is to ensure that while alive, Ms. Flygare has a comfortable life. Thus, Ms. Flygare has the ability to bring an action to challenge the failure to make payments necessary to “provide for [her] proper support and

maintenance.” See U.S. v. O’Shaughnessy, 517 N.W.2d 574, 577 (Minn. 1994) (even when vested with complete discretion, the trustee cannot violate the settlor’s intent or the trust’s purpose without committing an abuse of discretion). As a result, this Trust is more closely akin to a “support trust” than a “discretionary trust.”

The strength of this analysis is further bolstered by a comparison to the other decisions relied upon by Flygare. In Carlisle, the Court examined a trust which limited the purposes for which payments could be made. Carlisle, 498 N.W.2d at 262. The basic necessities of life – food, shelter and clothing – were expressly precluded from being included in the reasons for payment. Carlisle, 498 N.W.2d at 262. The trust went on to state that the trustee was under no obligation to make any payment to the beneficiary. Carlisle, 498 N.W.2d at 262. As a result, it was determined to be a “discretionary trust.” Carlisle, 498 N.W.2d at 264-65.

In contrast here, the Trust is expressly intended to provide for the “proper support and maintenance” of Ms. Flygare. The basic necessities of life are thus the express purpose for which the Trust exists. In addition, as noted above, the Trustee has discretion, but it is limited by the requirement that Ms. Flygare receive “proper support and maintenance.” If Mr. Flygare had intended a more narrow reading of his Will, and the Trust it created, he could have used language to do so.

Flygare also relies heavily upon Horton. There, the trust provided that the trustee “may pay” amounts necessary to provide for the proper support and maintenance of the donor or his family. Horton, 668 N.W.2d at 214. Nothing in that trust language

established a requirement that the trustee determine the needs of the beneficiary or to ensure those needs were met. Horton, 668 N.W.2d at 215. The entire document was in the permissive form. Horton, 668 N.W.2d at 215. As a result, the Court determined that no payment could be compelled, placing heavy emphasis on the “may pay” language. Horton, 668 N.W.2d at 214-15.

Here, in stark contrast, the Trust requires the Trustee to consider the needs of Ms. Flygare and to make payments to meet those needs. Nothing in the Trust gives the Trustee the discretion to ignore those needs. As discussed below in relation to the intent of the Trust, the goal of ensuring Ms. Flygare’s “proper support and maintenance” is the function of this Trust.⁴ As a result, this Trust is distinguishable from the trust in Horton as well.

Thus, a review of the entire Trust demonstrates that it is more akin to a “support trust” and should be available for the County to consider in Ms. Flygare’s assets.

- b. The intent of the Testator was to provide for his wife’s needs and to use all of the Trust assets if necessary to do so.

The second issue to be considered is the intent of the settlor. “Such intention is to be gathered from everything contained within the four corners of the instrument, read in light of surrounding circumstances.” McNiff v. Olmstead County Welfare Dept., 287 Minn. 40, 43, 176 N.W.2d 888, 891 (1970).

⁴ The Trust provision which prevents alienation of a beneficiary’s interest in the Trust does not alter this analysis. It simply limits the rights of others to invade the Trust assets until distributed. It says nothing about *when* those assets must be distributed or for what purpose.

Here, the Trust does not expressly set forth an unambiguous intent in any specific provision. It does not, as in Carlisle, limit the uses of the trust assets. The settlor's intention must, therefore, be gleaned from the entirety of the trust. A review of the entire Trust, however, makes the intent clear.

Ms. Flygare first received a share of Mr. Flygare's Estate as her "Marital Share." This created an asset pool for her exclusive use. The balance of the Estate was placed in a Trust. Under the terms of that Trust, Ms. Flygare received the income while alive, unless she had "adequate other income." This provision demonstrates an intention to ensure that Ms. Flygare can meet her basic needs, not provide for "extras."

The principal of the Trust can be invaded to supply Ms. Flygare's "proper support and maintenance." Again, this is language that expresses an intention to ensure that Ms. Flygare's basic needs are met. If it was intended to supplement her other available assets, it would have directly said so, stating that the principal could be invaded to "supplement my spouse's other assets" or something similar.

The clause Flygare admits is unenforceable further supports this intent. The Trustee need not make payments, as Flygare reads the clause, if Ms. Flygare is eligible for government benefits. If she was eligible, then her basic needs would be met and no need would exist for payments from the Trust. Absent those payments, the settlor intends for

this Trust to meet those needs.⁵

Even the last clause of the “Second” provision expresses this intention. It precludes a payment from the principal to Ms. Flygare where “there are funds reasonably available ... to provide for the purposes hereinbefore set forth.” (Flygare Will, page 4, paragraph III. D. First; AA21). The *only* such purposes are Ms. Flygare’s “proper support and maintenance.”

Finally, the Trust acknowledges that the entire corpus may be expended. It does not hold out any particular amount for any other heir. Instead, it provides that upon the death of Ms. Flygare, “the then remaining balance of this trust shall be distributed.” (Flygare Will, page 3, paragraph III. D. Fourth.). Mr. Flygare’s primary intention, as expressed in this paragraph, was to provide for his wife’s needs, regardless of the financial impact on his other heirs. McNiff, 287 Minn. at 43, 176 N.W.2d at 891.

Thus, a review of the entire Trust shows that the intent here was to ensure that Ms. Flygare lived a comfortable existence in her later years and that her basic needs were met. The intention of Mr. Flygare could only be clearer if the Trust expressly stated that the

⁵ Even this clause raises an interesting interpretation challenge. The clause precludes payment to Ms. Flygare if she “would be eligible for assistance under any government funded program.” This language seems clear. However, the clause also provides that “no such sums of principal or interest shall be paid to or applied for the benefit of my spouse, *except for the assets available to the trustee*” if such eligibility exists. Since all assets are available to the Trustee and can be invaded by the Trustee, the italicized clause would appear to allow payment regardless of eligibility for government assistance. The Trust itself, therefore, may require payment regardless of governmental assistance.

purpose was to provide for those basic needs. As the Court stated in McNiff:

Respondent argues that the testator intended his retarded daughter to receive the major portion of the trust property as long as an alternative means of support, namely state medical assistance, was available to his widow. However, this contention implies that the testator intended his widow to be a public charge. It is not proper to say that the testator wanted the benevolence of the state to be used as the vehicle for preserving the trust estate for the benefit of his daughter.”

McNiff, 287 Minn. at 43-44, 176 N.W.2d at 891.

Nor does Flygare’s analysis of the statute alter this result. Flygare asserts that the statute does not preclude provisions in a trust which allow for the trust to supplement income where other sources outside of government benefits are available. The argument appears to then assert that the fact that this intention to supplement such nongovernmental income sources is evidenced in the Flygare Trust, means the statute has no application when considering governmental resources. Such an analysis flies directly in the face of the statutory language, and the intent of the Legislature in enacting this limiting statute.

First, as noted above, Minn. Stat. § 501B.89, subd. 1, bars any provision in a trust which has the effect of creating eligibility for government programs where it would otherwise not exist. The legislative plan is to require the use of private resources before expending governmental resources. Nothing in Flygare’s analysis suggests how this plan can be met and still remain consistent with the language of this Trust and Mr. Flygare’s intention.

Second, and more importantly, the argument flows from a fundamentally flawed assumption. It assumes that the Trust can be available to Ms. Flygare, but not be considered an available asset so she can still be eligible for benefits. That is, Ms. Flygare

can receive public assistance and whatever funds the Trustee may choose to distribute, and still be eligible. Such an analysis begs the question. If the Trust assets are available to Ms. Flygare, she is not eligible for public assistance; if they are not, she is eligible. Since it is undisputed that the assets are available to Ms. Flygare, she is not eligible.

Finally, even the decisions cited by Flygare acknowledge that the settlor's intent cannot be followed where it would violate law and public policy. McNiff, 287 Minn. at 43, 176 N.W.2d at 891. To allow the intent of the settlor to leave his spouse as a public charge, where assets are otherwise available to avoid that result, would conflict with law and public policy as declared by the Legislature in the statute.

As a result, even the consideration of Mr. Flygare's intent demonstrates that he wanted the Trust to be used to care for his wife. As a result, the assets are available for consideration of eligibility and the trial court's decision affirming the Commissioner's decision should also be affirmed.

CONCLUSION

This matter is before this Court on appeal from a decision by the trial court affirming the decision by the Commissioner of Human Services finding the Trust assets were available to Ms. Flygare in determining her eligibility for medical assistance. Both decisions were based upon the impact of legislative changes in 1993 making it "against public policy" to create a trust which allowed public funds to be expended before private trust assets. Given the clarity of the legislative language, the trial court should be affirmed. Even assuming the settlor's intent was relevant, the same result follows – the trust funds are

available to meet Ms. Flygare's basic needs and must be expended for that purpose. As a result, the trial court should be affirmed.

Dated this 23 day of May 2006.



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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).