

No. A06-0559

STATE OF MINNESOTA
IN COURT OF APPEALS

Lillian Flygare,

Appellant,

vs.

County of Nicollet,

Respondent,

Minnesota Department of Human Services,

Respondent.

**BRIEF, SUPPLEMENTAL RECORD, AND ADDENDUM OF RESPONDENT
MINNESOTA COMMISSIONER OF HUMAN SERVICES**

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LEGAL ISSUES

- I. A beneficiary's interest in trust principal is an available resource for purposes of Medicaid eligibility if she has a right to use the principal for her support. If a trust is intended to provide support to a beneficiary and does not give a trustee complete discretion to exclude the beneficiary, the beneficiary can compel its use for her support. The Flygare Trust was established to provide for Appellant's proper support and maintenance and the trustee does not have complete discretion over trust principal. Is the Flygare Trust an available resource to Appellant?

Rulings Below:

The Commissioner and the district court concluded that the trust principal is an available resource.

Apposite Authorities:

In re Carlisle Trust, 498 N.W.2d 260 (Minn. Ct. App. 1993).

McNiff v. Olmsted County Welfare Dep't., 287 Minn. 40, 176 N.W.2d 888 (1970).

- II. Effective July 1, 1992, trust provisions that limit or exclude a beneficiary from trust resources by considering the availability of public welfare programs are unenforceable as against public policy. Are provisions in the Flygare Trust that explicitly or implicitly exclude Appellant enforceable?

Rulings Below:

The Commissioner and the district court concluded that both the explicit and the implicit trust provisions are contrary to public policy and are therefore unenforceable pursuant to Minnesota Statutes section 501B.89.

Apposite authority:

Minnesota Statutes section 501B.89.

STATEMENT OF FACTS

On August 20, 1993, Ronald H. Flygare executed a will. A29.¹ His will provided that if his spouse E. Lillian Flygare survived him, his property would be divided into two parts labeled the “Marital Share” and the “Family Share.” A19-20. The marital share consisted of the amount of the estate that was allowed to pass tax free while qualifying for a marital deduction. A19, A23, RSR6.²

The Family Share consisted of any remaining assets that were to be placed in trust. A20. The will instructed that net income from the family share be distributed to Lillian or, if the trustee determined that she had adequate other income, the trust income could be either distributed to Ronald’s children or added to the principal. A20.

At issue are the will’s instructions regarding the trust’s purpose and the availability of the trust’s principal for achieving that purpose. These instructions authorize the trustee to withdraw installments of principal “during the time this trust is being held for the benefit of [Lillian]” to use for her benefit as the trustee “deems necessary and advisable in order to provide for the proper support and maintenance of [Lillian].” A20. The instructions qualified this authorization by stating that “no such sums of principal or income shall be paid to or applied for the benefit of [Lillian], except for the assets available to the trustee, in the event [Lillian] would be eligible for assistance under any government-funded program and in such event, no such trust funds

¹ “A[page number]” refers to Appellant’s Appendix.

² “RSR[page number]” refers to Respondent Commissioner of Human Services’ Supplemental Record.

shall be so expended.” A20. The will also instructed that no payments were to be made if, in the trustee’s judgment, Lillian had “funds reasonably available” of her own or from other sources for her proper support and maintenance. A21.

Upon Lillian’s death, the will directs that any remaining balance in the trust be distributed to Ronald’s children. A21. Ronald appointed his son, Marcus R. Flygare, as trustee along with Lillian. A28; Appellant’s Brief (“App. Br.”) at 5. Marcus, however, is the sole trustee over the Family Share while it is held for Lillian’s benefit. A20.

Ronald died on December 17, 1993. RSR6. His estate was probated in Sibley County. RSR2. The estate was closed December 19, 1994. App. Br. at 5. The Marital Share was distributed to Lillian outright. RSR6.

By 2004, Lillian’s assets had been depleted. RSR6. She had less than \$3,000 in personal assets available to her. App. Br. at 5. On August 26, 2004, Marcus — acting as Lillian’s attorney-in-fact and authorized representative — applied through the Nicollet County Department of Social Services for Medical Assistance. A4. At the time of her application, the principal in the trust established using the Family Share totaled \$300,000.00. RSR1.

Initially, Lillian applied for home and community-based services under Medical Assistance’s “Elderly Waiver” option. A4.³ While her application was pending, Lillian apparently had to enter a nursing facility. A4. On December 23, 2004, Nicollet County

³ The Elderly Waiver allows people who require a nursing home level of care to receive Medical Assistance services while remaining in their homes. *See* Minn. Stat. § 256B.0915 (2004).

notified her that her application was denied. RSR4. It was denied because the County determined that the trust was an available resource to pay for Lillian's care thereby placing her above the asset-eligibility limit. RSR4; Minn. Stat. § 256B.056, subd. 3 (2004).

Acting through Marcus, Lillian appealed the County's denial and an administrative fair hearing was held before a Department of Human Services appeals referee on March 15, 2005. A4. Lillian's counsel at the hearing argued that the terms of the trust evidenced Ronald's intent that the trust only supplement rather than supplant public assistance; therefore, the trust could not be considered an available resource for purposes of Medical Assistance eligibility. A5, RSR5-6.

The referee concluded that the language of the trust unambiguously sought to "deny [Lillian's] access to the Family Share of the trust." A6. The referee, relying on Minnesota Statutes section 501B.89, concluded that any intent by Ronald to exclude Lillian from trust income or principal to qualify for Medical Assistance was contrary to public policy. A6. The referee's recommendation that Nicollet County's eligibility denial be affirmed was adopted by the Commissioner of Human Services on May 25, 2005.

On June 21, 2005, Lillian appealed the Commissioner's order to Nicollet County District Court. A2. The Honorable Allison L. Krehbiel heard argument on the appeal on November 28, 2005. A32. Both Nicollet County and the Commissioner defended the order. A32; *see* Minn. Stat. § 256.045, subd. 7 (providing that the Commissioner "may elect to become a party to the proceeding in the district court."). On January 17, 2006,

the district court issued an order affirming the Commissioner's order. A32-42. On March 20, 2006, Lillian appealed. A45.

BACKGROUND

I. MEDICAID MEDICAL ASSISTANCE AND ELIGIBILITY.

Minnesota participates in Medicaid through its Medical Assistance program.⁴ Medicaid and Medical Assistance combine federal and state funds to pay for medical care for people whose income and resources are insufficient to meet their health care needs. *See Atkins v. United States*, 477 U.S. 154, 156, 106 S. Ct. 2456, 2458 (1986); *see also McNiff v. Olmsted County Welfare Dep't.*, 287 Minn. 40, 44-45, 176 N.W.2d 888, 892 (1970). The purpose of the program is to “provide a nationwide program of medical assistance for low-income families and individuals.” *West Virginia University Hospitals, Inc. v. Casey*, 885 Fed. 2d 11, 15 (3d Cir. 1989); 42 U.S.C. § 1396 *et. seq.*

In establishing the program, Congress stated its intent that Medicaid be the payment source of last resort and that all other available resources must be used before Medicaid funds are made available to eligible recipients. *See S. REP. No. 146, 99th Cong., 2d Sess. 312 (1985), reprinted in 1986 U.S.C.C.A.N. 279; In re Barkema Trust*, 690 N.W.2d 50, 55 (Iowa 2004); *Kryzsko v Ramsey County Soc. Servs.*, 607 N.W.2d 237, 239 (N.D. 2000). To that end, program rules require applicants for Medicaid to spend the vast majority of their assets on their care before they can qualify for assistance.

⁴ “Medicaid” will be used to refer to the federal program generally and “Medical Assistance” to refer to Minnesota’s particular program.

Medical Assistance's status as a safety net program for society's neediest is reflected in its eligibility standards. Persons with asset resources over \$3,000 are ineligible. Minn. Stat. § 256B.056, subd. 3 (2004).⁵ Only "available" asset resources are factored into eligibility. 42 U.S.C. § 1396a(a)(17)(B) (2000). The methods of the Supplemental Security Income ("SSI") program are generally used in determining income and assets for people age 65 or older applying for Medical Assistance. Minn. Stat. § 256B.056, subd. 1a (2004).

Under SSI regulations, an available resource is "cash or other liquid assets or any real or personal property that an individual . . . owns and could convert to cash *to be used for his or her support and maintenance.*" 20 C.F.R. § 416.1201(a) (2004) (emphasis added). SSI regulations then define property to be an available resource "If the individual has *the right*, authority, or power to liquidate the property or his or her share of the property." 20 C.F.R. § 416.1201(a)(1) (emphasis added).

The Social Security Administration's Program Operations Manual System ("POMS") is the primary source of information used by federal employees to process social security claims and contains the methods used for counting income and assets for SSI.⁶ POMS includes the Social Security Administration's general policy on trusts as available resources. *In re Carlisle Trust*, 498 N.W.2d 260, 264 (Minn. Ct. App. 1993).

⁵ Some assets, such as burial plots and household goods, are exempt from this calculation. Unless an asset is specifically exempted by statute, it is counted. Minn. Stat. § 256B.056 (2004).

⁶ See <http://policy.ssa.gov/poms.nsf/aboutpoms> and POMS parts SI 005 to SI600.

According to POMS, “If an individual . . . can direct the use of the trust principal for his/her support and maintenance under the terms of the trust, the trust principal *is* a resource for SSI purposes.” POMS § SI 01120.200 D.1.a. Concerning a beneficiary, if specific trust provisions allow the beneficiary to control trust principal or if a beneficiary has the ability to order actions by a trustee, “the beneficiary’s equitable ownership in the trust principal and his/her ability to use it for support and maintenance means it *is* a resource.” POMS § SI 01120.200 D.1.b. If a beneficiary has no ability to direct the use of trust principal, then the principal is not an available resource. POMS § SI 01120.200 D.2. POMS then instructs that “[T]he ability to direct the use of the trust principal depends on the terms of the trust agreement and/or on State law.” *Id.*; *see also Carlisle*, 498 N.W.2d at 264-66.

II. MINNESOTA STATUTES SECTION 501B.89.

Soon after Medicaid’s inception, the Minnesota Supreme Court recognized that placing assets in a trust for the support of another person but withholding consideration of those resources for that person’s Medical Assistance eligibility was against public policy. *McNiff*, 287 Minn. at 44-45, 176 N.W.2d at 892. In addition, Congress has expressed its animosity toward practices that result in Medicaid eligibility, such as placing assets into a trust, which have the effect of sheltering those assets for heirs. *In re Kindt*, 542 N.W.2d 391, 398 (Minn. Ct. App. 1996), *citing* H.R. Rep. No. 265, 99th Cong., 1st Sess., pt. 1, at 71-72 (1985). The broad policy expressed by Congress is clear: people who have the means should pay for their health care and not shelter available resources to potentially enrich their heirs. *See id.* at 395.

In 1992, the Minnesota Legislature enacted a statute, now codified at Minnesota Statutes section 501B.89, to clarify its position concerning trusts that were structured to limit payments in cases where a beneficiary could access public assistance. Act of April 29, 1992, ch. 513, art. 7, § 129; 1992 Minn. Laws (1992 Sess.) 835, 1083. This statute was amended and augmented during the 1993 legislative session. Act of May 7, 1993, ch. 108; § 1; 1993 Minn. Laws (1993 Sess.) 298, 300. This statute provides that:

a provision in a trust that provides for the suspension, termination, limitation, or diversion of the principal, income, or beneficial interest of a beneficiary 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 the public policy of this state, without regard to the irrevocability of the trust or the purpose for which the trust was created.

Minn. Stat. § 501B.89, subd. 1(a) (2004).

Part of the 1993 amendments augmented the statute to allow a narrow exception to this blanket prohibition in the form of “supplemental needs” trusts. Such trusts are designed to assist people with disabilities when public assistance programs would fall short of meeting their basic needs and reasonable living expenses. Minn. Stat. § 501B.89, subd. 2 (2004). To qualify as a special needs trust, the trust’s general purpose “must be to provide for the reasonable living expenses and other basic needs of a person with a disability when benefits from publicly funded benefit programs are not sufficient to provide adequately for those needs.” Minn. Stat. § 501B.89, subd. 2(d). In particular, to qualify as a special needs trust, the trust “must contain provisions that prohibit disbursements that would have the effect of replacing, reducing, or substituting for publicly funded benefits.” *Id.*

Section 501B.89, including the 1993 amendments, applies to all trusts created after July 1, 1992. After that date, no trust provisions are enforceable that limit access to trust income or principal based on the availability of government-funded benefit programs except for those in qualified special needs trusts. The trust in this case was created in 1993, and is therefore subject to this statute.

SCOPE OF REVIEW

This Court has jurisdiction over this matter under Minnesota Statutes section 256.045, subdivision 9 (2004), which allows for appeal “as in other civil cases” from a district court’s order reviewing a Commissioner’s decision. Minn. Stat. § 256.045, subd. 9 (2004). This Court’s review is limited to evaluating the Commissioner’s decision in light of the record presented at the administrative fair hearing. *In re Kindt*, 542 N.W.2d at 398. Appellant has the burden of demonstrating that the Commissioner’s order should be reversed on grounds that it is based on an error of law, or that it is not based on substantial evidence, or because it is arbitrary or capricious. *Brunner v. State*, 285 N.W.2d 74, 75 (Minn. 1979); *Markwardt v. State Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977). Administrative adjudications within an agency’s area of expertise are presumptively valid. *Herman v. Ramsey County Cmty. Human Servs. Dep’t*, 373 N.W.2d 345, 347 (Minn. Ct. App. 1985).

Whether trust principal is an available resource to a beneficiary for Medical Assistance eligibility purposes is a question of law. *In re Carlisle*, 498 N.W.2d 260, 263 (Minn. Ct. App. 1993). Here, this question hinges on the interpretation of language in a testamentary trust, which is also a matter of law. *See Smith v. Smith*, 517 N.W.2d 394, 397-98 (Neb. 1994). The primary consideration in such an interpretation is the intent of the settlor as evidenced by the plain language of the will. *In re Fiske's Trust*, 242 Minn. 452, 460, 65 N.W.2d 906, 910 (1954). An intention that is contrary to law or against public policy cannot be given effect, however. *McNiff*, 287 Minn. at 43, 176 N.W.2d at 891; *Carlisle*, 498 N.W.2d at 265. In examining a trust instrument, a court will not read into it provisions that do not expressly appear or arise by implication from the plain meaning of the words used. *In re McCann's Will*, 212 Minn. 233, 240, 3 N.W.2d 226, 230 (1942).

ARGUMENT

I. THE FLYGARE TRUST IS A SUPPORT TRUST GIVING LILLIAN THE ABILITY TO COMPEL THE TRUSTEE TO USE TRUST PRINCIPAL FOR HER SUPPORT; THEREFORE, TRUST PRINCIPAL IS AN "AVAILABLE RESOURCE" FOR PURPOSES OF MEDICAL ASSISTANCE ELIGIBILITY.

A. A Trust Established For the Purpose Of Supporting The Beneficiary Is A Support Trust.

Minnesota case law determines whether a trust is an available asset by categorizing it as either a discretionary trust or a support trust. *Carlisle*, 498 N.W.2d

at 264. Support trusts and discretionary trusts serve different roles.⁷ A support trust is one in which the settlor expressed an intent to provide for the support of the beneficiary. In that case, the beneficiary has a legal right to require the trustee to pay or to apply trust property to the extent needed for his or her support. See George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* (“*Bogert on Trusts*”) § 229 at 534 (2d ed. 1992); see also Restatement (Second) of Trusts (“*Rest. 2d Trusts*”) § 154 (1959).

A discretionary trust is one in which the trustee may, “in his *absolute discretion* refuse to make *any* payment to the beneficiary or to apply *any* of the trust property for his benefit.” Rest. 2d Trusts § 155, Subsection 1, Cmt. C (emphasis added). When the trustee has discretion merely as to the time of payment, however, and when the beneficiary is ultimately entitled to the whole or to a part of the trust property, the trust is not a pure discretionary trust. *Id.* Minnesota recognizes this important difference. See *Carlisle*, 498 N.W.2d at 265 (distinguishing the trust in *McNiff* from a “true discretionary trust” because the *McNiff* beneficiary had power to compel disbursement of trust assets).

⁷ The terms “support trust” and “discretionary trust” are technical terms not originally intended for use in a public assistance context. They are designed to assist courts in determining whether a beneficiary’s creditors can access trust income or principal. Support trusts, for example, can only be accessed to provide food, clothing, shelter, medical care, or other support items for the beneficiary as designated in the trust document. They normally cannot be accessed by creditors unless such access would result in providing support for the beneficiary. Rest. 2d Trusts § 154 (1959). By contrast, discretionary trusts vest complete discretion in the trustee as to whether benefits are disbursed for the beneficiary for any purpose. Because of this unalloyed discretion, the income and assets of such trusts normally cannot be accessed by the beneficiary’s creditors for any reason. Rest. 2d Trusts § 155. Nor can the beneficiary compel the trustee to disburse any resources because the trust creates no obligation to do so for any reason. See, e.g., *United States v. O’Shaughnessy*, 517 N.W.2d 574, 577-78 (Minn. 1994).

Because of this discretion, the beneficiary of a pure discretionary trust does not have any legal or equitable right to the trust income or principal. *Bogert on Trusts* § 228 at 524-25.

In Minnesota, a support trust is an available asset for purposes of Medical Assistance eligibility, while a discretionary trust is not. *Carlisle*, 498 N.W.2d at 264. In *Carlisle*, this Court distinguished between the two types of trusts depending on the trust's purpose and the trustee's discretion. *Id.* The Court explained that "A support trust directs the trustee to distribute trust income or principle *as necessary for the support and maintenance of the beneficiary.*" *Id.* (emphasis added). A support trust is usually considered to be an available asset because the beneficiary can legally compel a trustee to distribute trust assets for the beneficiary's support. *Id.* In contrast, the Court observed that "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*" and generally is not considered an available asset. *Id.* (emphasis added). When a trust instrument clearly vests "full discretion" in a trustee and states that the trustee is under "no obligation" to make any expenditures to the beneficiary, a discretionary trust is established. *Carlisle*, 498 N.W.2d at 264-65.⁸ The underlying logic of *Carlisle* is that a beneficiary of a support trust can legally compel the trustee to distribute trust assets to him or her to provide support, but a beneficiary of a discretionary trust has no such

⁸ Notably, the Social Security Administration's definition of a discretionary trust is consistent with the definition used in *Carlisle*. POMS defines a discretionary trust as "a trust in which the trustee has *full* discretion as to the *time, purpose, and amount* of all distributions. The trustee may pay to or for the benefit of the beneficiary, all or none of the trust as he/she considers appropriate. The beneficiary has no control over the trust." POMS § SI 01120.200 B.10 (emphasis added).

power. *Id.*; see also *United States v. O'Shaughnessy*, 517 N.W.2d 574, 578 (Minn. 1994) citing Rest. 2d Trusts § 198 cmt. c.⁹

B. The Flygare Trust Is A Support Trust Because Its Purpose Is To Provide For Lillian's "Proper Support And Maintenance."

The Flygare trust is expressly intended to support Lillian. Ronald authorized Marcus as trustee to withdraw trust principal only for the benefit of Lillian and only as deemed "necessary and advisable in order to provide for [her] proper support and maintenance." A20. Thus, the only purpose for which trust principal may be used during the time it is being held for Lillian's benefit is for her support and maintenance. Far from having complete discretion over distribution of trust assets, the trustee can only withdraw from principal when necessary for Lillian's support. Under *Carlisle*, the Flygare trust language meets the definition of a support trust because it directs the trustee to distribute trust principal "as necessary for the support and maintenance of the beneficiary." See *Carlisle*, 498 N.W.2d at 264.

⁹ Several neighboring states recognize a third, hybrid, category of trust: a "discretionary support trust" in which trustees are given some discretion, but the discretion is subservient to effectuating the trust's support purpose. See *In re Barkema Trust*, 690 N.W.2d 50, 54 (Iowa 2004); *Smith v. Smith*, 517 N.W.2d 394, 398 (Neb. 1994); *Bohac v. Graham*, 424 N.W.2d 144, 146 n.3 (N.D. 1988); *Strojek v. Hardin County Bd. of Supervisors*, 602 N.W.2d 566, 571 (Iowa Ct. App. 1999). Minnesota courts have implied the existence of this third category. See, e.g., *Carlisle*, 498 N.W.2d at 265 (distinguishing a "true discretionary trust" from a discretionary trust in which the beneficiary has the power to compel the trustee to disburse trust assets). Beneficiaries of discretionary support trusts have a legal right to compel use of trust principal for their support, making the principal an available resource for medical assistance eligibility. *Barkema*, 690 N.W.2d at 56; cf. *Smith*, 517 N.W.2d at 398; *Martin v. Martin*, 374 N.E.2d 1384, 1389 (Ohio 1978). Thus, if this Court were to recognize this category of trusts and find that the trust here is a discretionary support trust, the result, for purposes of Medical Assistance eligibility, will be the same as if the trust were classified as a support trust.

In addition to the directive that trust principal may only be withdrawn for Lillian's support and maintenance, other language in the will demonstrates that Ronald intended the trust assets to be available for Lillian's support when, as now, she has inadequate resources of her own. First, the trustee is only authorized to invade the trust principal when it is necessary to do so to provide for Lillian's proper support and maintenance. A20. This limitation preserves trust principal for when Lillian truly needs support. Second, although the trust comes from the "Family Share," Ronald instructed that, while Lillian lived, none of the principal could be paid "to or for the benefit of my children, for their support and maintenance." A20. This provision further preserves trust principal for Lillian's benefit. Third, the general spendthrift clause found in the third subdivision of Article IV protects trust principal for Lillian's benefit by prohibiting her and the residual beneficiaries from alienating their equitable interests or by otherwise making the principal accessible to their creditors. A23.¹⁰ These measures ensure that trust principal is preserved for when Lillian is most in need of support.

¹⁰ The existence of a spendthrift clause, however, is irrelevant to the question whether Lillian, as beneficiary, has a right to compel the trustee to distribute trust principal to meet the purpose of the trust. A spendthrift clause is designed to preserve the use of trust assets for the named beneficiary by preventing the beneficiary from assigning her interest to creditors. *Morrison v. Doyle*, 582 N.W.2d 237, 240 (Minn. 1998). The question here is not whether Lillian *as a creditor* or equitable subrogee can gain access to the trust principal, but whether the trustee can deny benefits to Lillian *as beneficiary* and whether she has no legal right to compel the trustee to act otherwise. If the County were attempting to assert a claim against the trust for benefits already paid to Lillian, then the spendthrift clause might be relevant. See *Metz v. Ohio Dept. of Human Servs.*, 762 N.E.2d 1032, 1040-41 (Ohio Ct. App. 2001).

Furthermore, the limited discretion Ronald gave the trustee would permit the use of all of the trust principal when necessary for Lillian's support. This ability indicates Ronald's intention to create a support trust. For example, in *McNiff*, the supreme court noted that by giving the trustee discretion to distribute principal to the extent of depleting the entire corpus, the settlor provided more evidence of his intent to create a support trust. "Such language, it seems to this court, cannot more clearly express the intention of the testator that both his wife and daughter be provided for out of the trust property." *Id.* at 891. Similarly, in this case, Ronald gave the trustee discretion to distribute principal to Lillian even to the extent of depleting the entire corpus. *See* A20. The settlor specifically directed the trustee to consider amounts of principal as necessary to provide for "the proper support and maintenance" of Lillian. A20. Furthermore, the trust expressly provides that it is intended "for the benefit of" Lillian alone. *Id.*

C. The Flygare Trust Cannot Be A Discretionary Trust Because The Trustee Is Not Given Complete And Unfettered Discretion Over Use Of Trust Principal.

Appellant contends that her husband created a discretionary trust that is not available for her support. App. Br. at 18-21. Under the terms of the trust, however, Marcus is not given *any* authorization to use trust principal for purposes other than Lillian's support and maintenance. A20. Nor is Marcus allowed to exclude Lillian from trust principal when access to principal is necessary for her support. *Id.* This limited discretion is far from the "complete discretion" over distribution of assets found in *Carlisle*. *Compare* A20; *with Carlisle*, 498 N.W.2d at 264-65. The clauses relied upon by Appellant simply do not give the trustee the kind of pure discretion necessary to

conclude that the Flygare trust is a discretionary trust is unavailable for Lillian's support.

See App. Br. at 18-19.

1. The Trust's language does not make it a discretionary trust because it does not give the trustee unalloyed discretion.

First, the phrases "sole and exclusive discretion" (A20) and "acting alone without my spouse" (A20, A21) simply do not give absolute unfettered discretion to Marcus. These phrases merely ensure that Lillian, who is also named as a trustee (A28) is not authorized to make distributions to herself. Rather than giving Marcus unfettered discretion over trust principal, those phrases merely prohibit Lillian from participating in decisions that involve withdrawals of principal for her support. Such an arrangement preserves the principal for when it is truly needed by Lillian by not allowing her direct control over it. In addition, this arrangement could also have been an attempt to aid Lillian's case for eligibility for government-funded benefit programs by avoiding the appearance that Lillian had direct power to use trust principal for her support. *See* POMS § SI 01120.200 D.1.a. (deeming a resource available if the beneficiary has power to direct its use for her support). In short, the references to Marcus's "sole discretion" and "acting alone" are insufficient to preclude Lillian, as beneficiary, from compelling Marcus to follow the terms of the trust and use trust principal when doing so is necessary to provide for her proper support and maintenance.

Second, any discretion that Marcus has must still be exercised according to specific conditions and standards set out in the trust. Marcus's discretion is limited to making withdrawals of principal for Lillian's support and maintenance. A20. Further, he

is only authorized to make withdrawals when necessary and advisable. *Id.* The only permissible consideration for necessity and advisability is what is sufficient for Lillian's proper support and maintenance.¹¹ The use of the modifier "proper" imposes a standard on Marcus requiring him to ensure that Lillian has "appropriate" and "suitable" support and maintenance — in contrast to support distributions that are nominal or ineffective. *See The American Heritage Dictionary, Second College Edition* (1982) (defining "proper" as "suitable; appropriate"). Thus, the exercise of discretion, in addition to a general standard of reasonableness and consideration for the beneficiary, is cabined by standards as to timing (when necessary), purpose (to provide support and maintenance), and sufficiency (proper support).

In sum, the Flygare trust cannot be considered a discretionary trust from which Lillian has no legal right to compel distributions for her support and maintenance. *Compare* A20; *with Carlisle*, 498 N.W.2d at 264 (defining discretionary trust as giving trustee "complete" discretion to distribute funds "as the trustee sees fit"); *and* POMS § SI 01120.200 B.10 (defining discretionary trust as one "in which the trustee has full discretion as to the time, purpose, and amount of all distributions").

¹¹ Provisions in the trust that attempt to limit or to prevent the use of trust principal when government-funded programs exist are invalid, as discussed below. The inclusion of these restrictions, though invalid, also demonstrates that very limited discretion of the trustee.

2. Appellant's right as beneficiary to compel use of trust principal for her support is sufficient to make the trust an available resource.

Appellant contends that the trustee's discretion to determine the amount and time of disbursements means that she has no "property rights" in the trust principal. App. Br. at 18-19. This argument misconceives the "available resource" requirement and is not supported by any authority.

The trustee's discretion as to the timing and amount of disbursements is limited, as noted above, to that required to adhere to the trust's support purpose. Failure to make timely or adequate disbursements when necessary "in order to provide for [Lillian's] proper support and maintenance" undermines the very purpose of the trust. For example, in *McNiff*, 287 Minn. 40, 176 N.W.2d 888, the trustee was given discretion to decide the amount and proportion of principal and income to distribute to each of two beneficiaries. The trust provided that "the trustee shall apply the income in such proportion together with *such amounts of the principal as the trustee, in its discretion, deems advisable for the maintenance, care, support and education of both my wife and my said daughter.*" *Id.* at 891 (emphasis added). Despite language conferring discretion upon the trustee to decide the proper amount to give to each beneficiary, the Court held that because the trustee was ordered to disburse the principal and income and did not have the discretion to exclude either beneficiary, it was not discretionary and therefore was available to some extent to each of the beneficiaries. *Id.* at 892; *see also Bogert on Trusts* § 228 at 521-22. (stating that a "trustee must have complete discretion to pay or apply or to totally exclude the beneficiary, if the trust is to be called 'discretionary' in a technical sense," and that a

discretionary trust should be distinguished from a trust where “the discretion of the trustee pertains only to the time or manner of the payments, or to the size of the payments needed to achieve a certain purpose, for example, to support the beneficiary”).

For an asset to be deemed available, a beneficiary only needs a legal right to obtain it, not actual possession. *Barkema*, 690 N.W.2d at 55; *see also McNiff*, 287 Minn. at 45; 176 N.W.2d at 892 (holding that a legal right to compel disbursement of at least a portion of trust assets is sufficient to qualify the trust as a ‘liquid asset’ of the beneficiary). In a similar context, this Court affirmed that even though an applicant did not actually possess the proceeds of a charge against a surety, “they were available to her upon demand and thus constituted a liquid asset large enough to render her ineligible for medical assistance.” *Herman v. Ramsey County Cmty. Human Servs. Dep’t*, 373 N.W.2d 345, 347 (Minn. Ct. App. 1985). If Lillian could compel Marcus to use reasonable discretion to disburse only one percent of the \$300,000 in trust principal for her support, she has available resources over the Medical Assistance asset limit.

3. Concluding that the Flygare Trust’s language creates an available support trust is consistent with how other states have interpreted similar or even stronger trust language in describing trustee discretion.

Adopting Appellant’s position and interpreting the trust language here to create a discretionary trust from which Lillian has no ability to compel the trustee to make distributions of principal is out of line with how other appellate courts have interpreted similar or even stronger trust language. The following are examples of trust provisions

that courts concluded created support trusts that were available resources to beneficiaries for purposes of Medicaid eligibility:

- “If possible, only the income from said share shall be used for [the beneficiary], however, *if necessary for her proper support and maintenance, then the corpus of said trust may be invaded to the extent said trustees deem necessary.*” *In re Barkema Trust*, 690 N.W.2d 50, 52 (Iowa 2004).
- “My trustee shall, from time to time, pay to or apply for the benefit of my daughter, Marie Helen Strojek, such sums from the income and principal as my trustee in the exercise of her *sole discretion* deems necessary or advisable, to provide for her proper care, support, maintenance and education.” *Strojek v. Hardin County Bd. of Supervisors*, 602 N.W.2d 566, 568 (Iowa Ct. App. 1999) (emphasis added by the court).
- “I devise Margaret Lee Kryzsko . . . share of my estate to my Trustee to administer said share for the benefit of her by paying to or *applying for her benefit so much of the income and/or principal of such share as the Trustee, in her sole discretion, thinks necessary or advisable to provide for the proper care, maintenance, support, and education* of Margaret Lee Kryzsko . . . provided, that the Trustee must make at least an annual distribution of the Trust income, or more frequent distribution as the Trustee, *in its sole discretion deems necessary.*” *Kryzsko v. Ramsey County Social Services*, 607 N.W.2d 237, 240 (N.D. 2000) (ellipses by the court, emphasis added).
- “The Trustee shall distribute all the net income annually unto my sister, Anne Bohac, and is further authorized to give my said sister *any portion of the Trust Property as my said Trustee may deem necessary for her support, maintenance, medical expenses, care, comfort and general welfare.*” *Bohac v. Graham*, 424 N.W.2d 144, 145-46 (N.D. 1988). (emphasis added).
- “Until such time as the principal of each trust has been distributed in the manner hereinafter provided, the Trustees shall from time to time pay to the child for whom such trust is designated . . . so much of the net income and, if necessary, of the principal of such trust held for such child as Walter H. Zebulskie, as one of the Trustees, or any successor appointed to succeed him as trustee, *in his or her sole and absolute discretion, shall deem necessary or advisable for the comfort, care, support and education of such adult*

child of Donor.” *Martin v. Martin*, 374 N.E.2d 1384, 1388 (Ohio 1978). (emphasis added).

- “The trust provided that the trust income and/or principal shall be expended for appellant as the trustee, ‘in its sole discretion, shall determine to be necessary, with due regard to the individual need for health, education, care, maintenance and support’ of appellant.” *Metz v. Ohio Dept. of Human Servs.*, 762 N.E.2d 1032, 1035-36 (Ohio Ct. App. 2001) (emphasis added).

These appellate courts uniformly held that the trust language created a support trust, not a discretionary trust. All of the courts also held that the principal in these trusts was an available resource for the purposes of Medicaid/Medical Assistance eligibility. Appellant provides no basis or authority for Minnesota to depart from this body of case law.

D. Lillian, As Beneficiary, Has A Present Right To Compel The Trustee To Exercise Discretion To Achieve The Purpose Of Trust: Her Proper Support And Maintenance.

A refusal to use trust principal when necessary for Lillian’s support defeats the express purpose of the trust to provide for her “proper support and maintenance.” The Minnesota Supreme Court has held that “Even where trustees have absolute, unlimited, or uncontrolled discretion, any attempt to violate the settlor’s intent or the trust’s purpose is considered an abuse of discretion.” *United States v. O’Shaughnessy*, 517 N.W.2d 574, 577 (Minn. 1994). The Ohio Supreme Court similarly held that a trustee’s “absolute discretion” must be exercised with reference to the trust’s stated purpose of providing for the beneficiaries’ care or maintenance. *Bureau of Support v. Kreitzer*, 243 N.E.2d 83, 85 (Ohio 1968).

As noted in the Restatement (Third) of Trusts, Section 50, comments b and c to subsection 1 (2003), “Absent language of extended (*e.g.*, ‘absolute’ or ‘uncontrolled’) discretion, a court will intervene if it finds the payments made, *or not made*, to be unreasonable as a means of carrying out the trust provisions. For example, a beneficiary may be *entitled to amounts sufficient to provide support*, or to meet some other standard, and the amounts being paid by the trustee may be clearly excessive or inadequate for the purpose.” *Id.* (emphasis added).

Here, nothing in the record suggests that Marcus as trustee has actually exercised his discretion or determined that supporting Lillian is unnecessary. Apparently he has not exercised his discretion or has done so unreasonably. Indeed, a refusal to exercise discretion or a conclusion that supporting Lillian with trust funds is unnecessary would be an abuse of discretion. Such an inference of an abuse of discretion is particularly strong given Marcus’s status as a residual beneficiary with a personal interest in preserving the assets in the trust for his own gain. *See In re Trusts A & B of Divine*, 672 N.W.2d 912, 920 (Minn. Ct. App. 2004) (identifying “the motive of the trustee in exercising or refraining from exercising the power” as one of six factors to be considered when determining whether a trustee has abused his discretion). Even when a trustee is given discretion about disbursing income and principal, it is considered an abuse of that discretion to violate the settlor’s intent or the trust’s purpose. *O’Shaughnessy*, 517 N.W.2d at 577.

Lillian’s own resources have been depleted so that she must apply for Medical Assistance. She apparently requires a nursing home level of care. Her income from the

trust is insufficient to pay for her nursing home care, the average monthly cost of which in Minnesota is \$4,198.¹² Furthermore, Marcus is not authorized to give weight to any interest he and other residual beneficiaries may have in avoiding depletion of the trust principal by costs of Lillian's necessary care. *Cf. McNiff*, 287 Minn. at 43-44, 176 N.W.2d at 891 (rejecting argument that settlor could have intended a trustee to totally exclude one of two life beneficiaries from trust principal).

Lillian would likely prevail in a suit to compel the trustee to disburse the trust principal as necessary to provide for her support. For example, in *In re Sullivan's Will*, 12 N.W.2d 148 (Neb. 1943), the Court held that where the trustee was given "full and uncontrolled discretion" to apply the income and as much principal as necessary for the beneficiary's support, the trustee abused its discretion by refusing to make disbursements. *Id.* at 150-51. Likewise, in *Matthews v. Matthews*, 450 N.E.2d 278, 280 (Ohio 1981), the court concluded that "A trust conferring upon the trustees power to distribute income and principal in their 'absolute discretion,' but which provides standards by which that discretion is to be exercised with reference to needs of the trust beneficiary for education, care, comfort or support, is neither a purely discretionary trust nor a strict support trust, and the trustees of such trust may be required to exercise their discretion to distribute income and principal for those needs." *Id.* at 280-81.

¹² Laurie A. Hanson, et. al, "Analysis and Overview of 'Transfer' Issues" at 31, in Minnesota State Bar Association Continuing Legal Education, *Medical Assistance "Reform" '06* (March 2006).

In sum, the agency and its appeals referee properly interpreted the will to find that the trust principal is an available resource. Under the trust's terms, Lillian has equitable ownership in the trust principal that allows her to compel the trustee to use it for her support. Marcus, as trustee, has asserted a defense that relies on trust terms that prohibit using trust principal when public welfare programs are available to pay for Lillian's support. As shown below, however, such a defense must be rejected.

II. TRUST PROVISIONS EXCLUDING OR LIMITING LILLIAN'S ACCESS TO TRUST RESOURCES BASED ON THE AVAILABILITY OF MEDICAL ASSISTANCE ARE INVALID AND CANNOT BE USED TO DENY LILLIAN SUPPORT FROM THE TRUST.

Prior to 1992, even in the case of a support trust, a settlor could express an intent to supplement rather than supplant any government benefits that might be available to the beneficiary. *Carlisle*, 498 N.W.2d at 265-66. In other words, the settlor could direct the trustee to provide for the support and maintenance of the beneficiary, but could also direct the trustee to withhold such benefits if the beneficiary could obtain public assistance to meet his or her needs. Based on this rule, the court noted, "[w]hen the trust instrument states an intent to supplement rather than supplant any government financial assistance which is or may be available to the [Medical Assistance] recipient, most courts give effect to the settlor's intent and find the trust is not an available asset." *Id.* at 265.¹³ As a result, even if a court determined that the trust was a support trust, if the settlor indicated a desire for the trust not to be used in place of government assistance but only

¹³ Although the *Carlisle* opinion was issued in March 1993, it concerned a trust that was created in 1985 and, therefore, the court noted that its decision was not based upon or affected by section 501B.89. *Carlisle*, 498 N.W.2d at 264 n 3.

to supplement benefits provided by the government, the courts would deem the trust unavailable for purposes of determining Medical Assistance eligibility.

A. Section 501B.89 Makes A Settlor's Intent To Shift The Support Burden To Public Welfare Programs Unenforceable And Applies To All Trust Provisions That Explicitly Or Implicitly Offend Public Policy.

As discussed earlier, in 1992 the Legislature made a settlor's intent to have public programs support a beneficiary unenforceable as against public policy when it enacted section 501B.89. Appellant concedes that the language in Article III, Section D, Second subdivision of the trust (A20) violates this statute and cannot be given effect. App. Br. 15-16.

Appellant further argues that select portions of offending language should simply be stricken from the document, that the settlor's intent should be evaluated without any consideration of the stricken language, and that a permissible "deeper intent" exists that the Court should honor by concluding that the trust is unavailable in this case. These arguments are flawed for several reasons.

In light of the enactment of section 501B.89, the second prong of the *Carlisle* analysis is no longer necessary. This analysis was not used to determine the settlor's intent in a general sense; the settlor's intent is already part of the consideration in determining what kind of trust the settler intended to establish. Rather, this second prong was intended for the specific purpose of allowing the settlor, even in the case of a support trust, to withhold distribution of trust income and principal when government assistance was available. *Carlisle*, 498 N.W. 2d at 265, citing *Trust Co. Okla. v. Stater, ex rel. Dep't of Human Serv's*, 825 P.2d 1295, 1303 (Okla. 1991). ("The courts holding that a

trust is not an available resource give effect to the settlor's intent, expressed through the trust instrument. They recognize that a settlor may want to supplement rather than to supplant public financial assistance.”). The Minnesota Legislature has intervened to limit this practice to specially delineated special needs trusts. In the case of a support trust, however, courts can no longer enforce a settlor's intent that support be limited to supplementing rather than supplanting public assistance.¹⁴ Here, section 501B.89 essentially removes any defense a trustee might put forward that he cannot be compelled to use a support trust's assets to support a beneficiary because a public welfare program could instead be used to pay for the support.

B. Even If A Settlor's Intent Were Recognized Beyond The Question Of The General Type Of Trust, An Intent Contrary To Public Policy Is Still Unenforceable.

Appellant claims that even after section 501B.89, courts must still honor a settlor's intent as long as it does not overtly conflict with public policy. Even if the Court were still required or allowed to consider the settlor's intent here, however, the intent would violate public policy and be unenforceable. Appellant claims that the Court should ignore the trust language that expressly violates section 501B.89, and should review the remaining language in the trust to conclude that the trust expresses a valid intent that the Court should honor. The language Appellant refers to provides that if the trustee determines that Lillian has “sufficient other funds, from whatever source,” available for her needs, the trust income and principal shall not be disbursed to her. App. Br. at 12-14.

¹⁴ Unless, of course, the trust qualifies as a supplemental needs trust for a person with a disability under the specific criteria set forth in section 501B.89, subdivision 2.

This language, Appellant argues, establishes that the intent of the settlor was for the trust to supplement, not supplant, *all* of her financial resources and not to be a primary financial resource itself. *Id.* at 20. Appellant argues that this intent does not violate section 501B.89 itself because it does not target government benefit programs, but rather it targets any resource that might be available to Lillian, which may include government programs. *Id.*

Appellant's argument should be rejected. First, the notion that the Court should *ignore* a clear expression of the settlor to deny benefits in the event Lillian could qualify for public assistance is untenable. The parties agree that the Court should not effectuate this provision. When determining the settlor's intent in creating the trust as a whole, the Court must consider all of the contents of the document. Adopting the Appellant's approach would essentially force the Court to pretend that the settlor did not express any opinion about how the trust should be used in the event Lillian could qualify for Medical Assistance. The settlor *did* express an intent — one that violates the law and cannot be honored. Appellant's position that one can violate public policy so long as the intent to do so is not outright should be rejected. Furthermore, adopting Appellant's position would sabotage section 501B.89 by allowing settlors to accomplish by a wink and a nod what they cannot do overtly.

Secondly, even if the settlor's intent were as benign as Appellant claims, the trust still violates section 501B.89 because it contains provisions that would limit benefits where the beneficiary is eligible for public assistance. Additionally, the supreme court in *McNiff* noted that when a trust contains language limiting payments when "other funds"

are available, and when such language would mean that government assistance constitutes the “other funds,” a court should not read the settlor’s intent to preclude a beneficiary’s access to the trust because the settlor’s intent would be “improper.” *Id.* at 891. Moreover, Appellant’s suggestion that “funds reasonably available” from “other sources” was intended by Ronald to encompass government-funded programs, App. Br. at 19-20, creates a redundancy because Ronald had already specified that government-funded programs should provide support before withdrawing trust principal. Appellant now asks that the “other sources” clause include government-funded programs when there is no evidence that Ronald intended this redundancy.

Finally, the statute itself provides that when a trust provision would result in violate the statute, it is “unenforceable as against the public policy of this state, without regard to . . . the purpose for which the trust was created.” Minn. Stat. § 501B.89. The intent of the settlor to shift responsibility to any available public welfare program when he created this support trust is clear: he wanted to provide for his wife’s needs but he did not want to pay for anything that the government would cover. This intent is impermissible under State law. Section 501B.89 operates to preserve the laudable intent to support Lillian in her time of need by making unenforceable the improper intent to shelter trust assets for the residual beneficiaries at public expense.

CONCLUSION

The Flygare Trust is a support trust expressly intended to provide for Lillian's "proper support and maintenance." The trustee's only discretion is limited to fulfilling this purpose. Trust provisions that — on their face or as applied by the trustee — serve to limit access to trust resources due to the availability of publicly-funded programs cannot block availability of a support trust to the beneficiary. The Commissioner respectfully asks that this Court affirm his order denying Medical Assistance eligibility because Lillian Flygare has \$300,000 in trust assets available for her support.

Dated: _____

5/25/06

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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).