

Case No. 09-1821

State of Minnesota
In Court of Appeals

In the Appeal of Edna R. Rosckes for
Medical Assistance:

Edna R. Rosckes and Bernard Rosckes,
Trustee of the Edna R. Rosckes
Irrevocable Trust Dated
February 18, 2002,

Appellants,

v.

County of Carver, Community Social
Services, and Commissioner
Minnesota Department of Human Services,

Respondents.

APPELLANTS' REPLY BRIEF

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STATEMENT OF NEW LEGAL ISSUES

I. DOES THE FACT THAT THE ROSCKES TRUST WAS ESTABLISHED BY EDNA ROSCKES AS AN INDIVIDUAL BENEFICIARY BY USING HER ASSETS MAKE A SELF-FUNDED TRUST INTO A SELF-SETTLED TRUST THAT CREATES A COMPLIMENTARY RIGHT TO INVAD E PRINCIPAL ONCE THE TRUSTEE HAS EXERCISED A DISCRETIONARY RIGHT TO DISTRIBUTE INCOME, THAT HAS NOW BECOME INADEQUATE?

Trial Court Ruled on Appeal: A right to invade principal was created because the payment of trust income was a discretionary right exercised by the trustee in a self-settled trust. The court did not agree there was no discretionary prohibition on the availability of principal that could be interpreted from 42 U.S.C. 1396 p(d)(2)(A) or (3)(B). Apposite: In re Leona Carlisle Trust, 498 N.W.2d 260 (Minn. App. 1993); O'Shaughnessy, 517 N.W.2d 574 (Minn. Supreme Court 1994)

II. WAS BERNARD ROSCKES AN AGGRIEVED PARTY WHO COULD NOT APPEAL THE COMMISSIONER'S ORDER? (NOTICE OF REVIEW ISSUE)

Trial Court Ruled in Order Filed February 9, 2009: Bernard Rosckes, Trustee of the Edna R. Rosckes Irrevocable Trust dated February 18, 2002 is dropped as a party in this matter. Apposite: Ramsey County v. Minnesota Public Utilities, 345 N.W.2d 740; Matter of Sandy Pappas, 488 N.W.2d 795

III. DID THE DISTRICT COURT LACK SUBJECT MATTER JURISDICTION BECAUSE AN APPEAL OF THE COMMISSIONER'S ORDER WAS NOT PERFECTED BY AN AGGRIEVED PARTY? (NOTICE OF REVIEW ISSUE)

Trial Court Ruled in Order Filed February 9, 2009. Apposite: Minn. R. Civ. App. P., 143.02

ARGUMENT

I. DOES THE FACT THAT THE ROSCKES TRUST WAS ESTABLISHED BY EDNA ROSCKES AS AN INDIVIDUAL BENEFICIARY BY USING HER ASSETS MAKE A SELF-FUNDED TRUST INTO A SELF-SETTLED TRUST THAT CREATES A COMPLIMENTARY RIGHT TO INVADE PRINCIPAL ONCE THE TRUSTEE HAS EXERCISED A DISCRETIONARY RIGHT TO DISTRIBUTE INCOME, THAT HAS NOW BECOME INADEQUATE?

Respondents now argue in their Brief that the federal Medicaid eligibility law defining self-funded trusts is one and the same as a so-called “self-settled trust”. They then conclude, with unjustified reliance upon a totally distinguishable trust case identified as “self-settled”, In re Kindt 542 N.W.2d 301 (Minn. Ct. App 1996), that the Rosckes Trust is self-settled because Rosckes used her own funds to establish her irrevocable trust. To the contrary, as the Commissioner’s hearing judge pointed out in her Conclusions of Law 3 citing 42 USC 1396 P(d)(2)(A) for “the treatment of trust amounts, ... an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals establish such trust other than by will:

- (i) The individual
- (ii) The individual’s spouse

(iii) A person ... with legal authority to act in place of or on behalf of the individual

(iv) A person ... acting at the direction or upon the individual.”(A-79)

In spite of the federal statute recognizing the validity of self-funded trusts, Respondents attempt to debunk the undisputed cases of U.S. v. O’Shaughnessy 517 N.W.2d 574 and In Re Leona Carlisle Trust 498 N.W.2d 260, that prohibited the settlor from claiming a right to principal or income as available assets in an irrevocable discretionary trust, and that hold a trustee does not have to exercise discretion. Respondents claim those cases are not self-settled trusts, O’Shaughnessy being an irrevocable trust established by grandparents and Carlisle established by a beneficiary’s mother. The distinction is non-existent under 42 USC 1396 P(d)(2)(A). The Rosckes Trust is treated the same as the trusts in O’Shaughnessy and Carlisle. Respondents also make the incorrect conclusion that “... in 1995 Minnesota incorporated the federal Medicaid eligibility provision relating to self-settled trusts established after August 10, 1993” (*Emphasis added*).

Promoting the Rosckes Trust with a self-settled trust label is the faulty basis for Respondents to claim that “This law requires Minnesota to deem to be an available resource whatever part of a trust’s corpus that could be paid under “any circumstance” to or for the benefit of the beneficiary.” Having been identified as a self-settled trust, Respondents argue the principal is an available resource

“regardless whether a trustee exercises any discretion under the trust.” This theory, similar to the court’s, is justified by Respondents and the court solely by the unfounded assumption that the Rosckes Trust is a “self-settled” irrevocable discretionary trust (Court references at A-92, 95).

This uncritical reliance on an erroneous interpretation of the federal statute has resulted in contradictions in applying legal interpretations between Respondents, the Court, and the Commissioner’s hearing judge. The Respondents acknowledge the Trustee’s broad discretion over income is limited where Rosckes has a right to trust income when her other income is insufficient. They then state “That right is a limitation on the trustee’s broad discretion over distributions (or nondistributions even (“event” in the brief should be “even”) to the extent of exclusion) from income and principal (*Emphasis added*). The Court is more concise in his contradiction: “under no circumstances does the Grantor have the right to distribution of principal for her “care, comfort and support” (A-94). Seven sentences later, in the same last paragraph, the Court in referring to the necessity to provide for the Grantor’s care, comfort and support when the income is insufficient, states unequivocally “Because there is no such limitation on the distribution of principal, the Trustees have complete discretion as to its distribution under Section 3.5”. (A-95)

Even admitting for the sake of argument that the faulty premise of a self-settling trust allows for the complete distribution or non-distribution of principal by the Trustee, there is no explanation why or how the discretionary disbursement of principal is analogous to the exercise of discretion where “the Trustees shall” expend income in whole or in part for Grantor’s care subject to the Trustee’s discretion. The word “shall” used in Article 3.1 of the Trust Agreement to disburse income is absent in 3.5 for any discretionary authority to expend principal. In fact the absence is emphasized in referring to 3.1 that prohibits the exercise of Trustees’s “sole and complete discretion” to distribute principal. Even under Article 3.5 in the trustee’s sole discretion he “may” pay income and principal to the primary beneficiary “at such time and in such portions as the trustee deems advisable.” (A 1, 2)

At the time of execution of the Trust on February 18, 2002, the Trust corpus consisted of the homestead and an adjoining lot which were sold in October 2003 with the principal net sale proceeds invested with Wells Fargo Investment (A-63). That the income generated from the Trust principal was paid into the Trust checking account and periodically after September 2003 income distributions were made from the Trust account to the Edna Rosckes checking account because other sources of income were not sufficient for her care. (A-66). Appellants contend that between February 18, 2002 and October 2003, Article 3.6 required the Trustee to

add undistributed income to principal. Article 3.5 provided that the Trustee “may pay income and principal at such time and in such portions as the trustee deems advisable.” If the Trust checking account had accumulated undistributed income that could have been added to the existing principal in a separate account, the trustee had the discretion to distribute that new principal or pay the income to the primary beneficiary during the interim before the Trustee exercised his discretion under Section 3.1 that it was necessary to distribute all of the income because the Grantor’s available income from all other sources was not sufficient.

The intention of the Grantor did not create a conflict between Section 3.1 and 3.5 that would transform an irrevocable discretionary trust into a support trust that makes principal or income an available asset as a matter of right. Contrary to the Court’s impression, the concept of principal in Section 3.5 does not have a completely different meaning than principal in Section 3.1. (A-95) The Court and Respondents have misinterpreted the combination of the mandatory language that the Trustee’s discretion shall be exercised conditionally to expend income while prohibiting its exercise to expend principal in Section 3.1. At the same time the Trustee retains his unconditional discretion under Section 3.5 to distribute any undistributed income that has been allocated as additional principal or is additional income available to be added to that part of the net income being distributed under Section 3.1. This recognition of the difference in the discretionary distribution of

principal and income under Section 3.5 from the mandatory limitation of discretion of income under Section 3.1 is reflected in the Court's irreconcilable opinion that "Because there is no such limitation on the distribution of principal, the Trustees have complete discretion as to its distribution under Section 3.5."

The misinterpretation of the trust language by the Respondents and the Court results in a legal distortion of the Grantor's intent that ends up in contradicting the legal basis for Judge Klein's decision. The decision makes no reference to a "self-Settled" trust that makes principal available in an irrevocable discretionary trust because the Grantor funded it individually. But inexplicably the hearing judge interprets 42 USC 1396 p(d)(2)(A) combined with 42 USC 1396 p(d)(3)(B) to restrict the definition of "individual" to be only when the Grantor and beneficiary of the trust are the same person. Being so restricted, Paragraph 7 of the Conclusions of Law Interprets the (3)(B) reference to "individual" as only applying to an identical Grantor beneficiary established trusts, and this restricted identification alone constitutes the "circumstance" that makes the principal and income an available resource to the individual. This convoluted interpretation completely ignores the fact that (2)(A) also includes individuals who are spouse, grandparents, mother, and any other individual person of blood lineage or not, "acting at the direction or upon the request of the (funding) individual or the (funding) individual's spouse." (A-79) This selective, restrictive interpretation

allows the hearing judge to conveniently reject the O'Shaughnessy and Leona Carlisle precedents. It is noteworthy that the hearing judge refrains from concluding the exclusive rejection of individual Grantor-beneficiary funded trusts has changed a discretionary irrevocable trust into a supportive trust. The Commissioner upon denying applicant's reconsideration request, cited In re Flygare 725 N.W.2d 114, a supportive trust case that ignores the absolute discretion of the Trustee recognized by both Respondents and the trial court. Respondents erroneously also claim this is the "circumstance" that makes the trust corpus available. Respondents also contradict the hearing judge by claiming Rosckes has a "right" that limits the Trustee's discretion over "nondistributions" (partial or exclusive) from income and principal, and at the same time does not limit the Trustee's broad discretion over trust principal. The trial court also created a contradictory "right" by concluding "The restriction on principal in Section 3.1 must then be real in light of this "right" created in the Grantor". (A-94) Both Respondents and the trial Court contradict the hearing judge's Conclusion of Law that "... paragraph 3.1 does not contain any rights of the appellant that would affect the Trustee's ability to exercise his right to distribute from the principal as set forth in paragraph 3.5." The O'Shaughnessy court held that a beneficiary did not have any right to nondistributed trust principal or income before trustees

exercised discretionary powers of distributions under the trust agreement. (At Pg. 575)

II. WAS BERNARD ROSCKES AN AGGRIEVED PARTY WHO COULD NOT APPEAL THE COMMISSIONER'S ORDER?

Minn. Stat. § 256.045 subd.7, Judicial Review states any party who is aggrieved by an order of the commissioner of human services, may appeal the order to the district court of the county responsible for furnishing assistance. The trial court was in error in its Order of February 3, 2009, when it dropped Bernard Rosckes, Trustee as a party in this matter. (A-86) A person aggrieved by a final agency decision is afforded statutory judicial review and has standing to invoke judicial review even though it is not a contested case. Matter of Sandy Pappas 488 N.W.2d 795. See also Ramsey County v. Minnesota Public Utilities 315 N.W.2d 740. Bernard Rosckes as Trustee will have to invade principal if the trial court's decision is not reversed. He is also a beneficiary of the Trust and has standing.

III. DID THE DISTRICT COURT LACK SUBJECT MATTER JURISDICTION?

In its February 3, 2009 Order and Memorandum the trial court, acting as an appellate court under Minn Stat. § 256.045 subd. 8, ruled the Respondent's Motion to Dismiss for lack of jurisdiction is denied. (A-86) The Court correctly ruled that "If a party entitled to appeal dies before filing a Notice of Appeal, the Notice of Appeal may be filed by the decedent's personal representative or, if there is no

personal representative, by the attorney of record within the time prescribed by these rules. Minn. R. Civ. App. P. 143.02. There are no provisions for the death of a party within Minn. Stat. § 256.045.” (A-89).

It is well settled that any court must have original or appellate jurisdiction in order to hear or try a case procedurally before it can make a decision. In the Rosckes case, pursuant to the Minn. Const. Art. VI § 3¹ and MINN. STAT. § 256.045² gives the Commissioner of Human Services state agency jurisdiction to hear and decide the subject matter application for medical assistance benefits. Under Subd. 7, “any party aggrieved by the order of the commissioner of human services may appeal the order to the district court of the county responsible for funding assistance.....” It is a fundamental distinction and expressly stated in the statute that the appeal is not limited to the medical assistance petitioner, but has blanket application to any party that is aggrieved.

In deciding the jurisdiction issue raised by the Attorney General, there is no question that the District Court has subject matter appellate jurisdiction over a denial of medical assistance benefits as provided by Subd. 7 entitled Judicial Review. Once the petitioner applicant has satisfied all of the jurisdictional rules required under the state agency’s administrative procedural requirements set forth in MINN. STAT. § 256.045,

¹ Jurisdiction of district court. “Sec. 3. The district court has original jurisdiction in all civil and criminal cases and shall have appellate jurisdiction as prescribed by law.”

² “MINN. STAT. § 256.045 Subd. 7 Judicial review. Except for a prepaid health plan, any party who is aggrieved by an order of the commissioner of human services, or the commissioner of health in appeals within the commissioner's jurisdiction under subdivision 3b, may appeal the order to the district court of the county responsible for furnishing assistance, ”

and a timely Notice of Appeal is served and filed, there is no issue about District Court subject matter jurisdiction and the District Court then sits as an appeals court, not as a trial court.

Just from a factual public policy interpretation, unlike the situation in a tort injury case where the plaintiff dies before judgment or settlement is obtained, the death of Mrs. Rosckes does not deprive her personally of an award or direct payment of money. If the Commissioner's Order is affirmed, the Trustee being the aggrieved party, has to pay the arrearage at the nursing home, whereas under the terms of the trust he has no legal authority to pay out principle. The Trustee then has to invade principal, and consequently he and the heirs' inheritance is diminished by the amount owing the nursing home.

From the perspective of jurisdiction over the person, that argument hypothetically might have been available if she had died before she made her agency appeal May 21, 2008 (See Decision of State Agency On Appeal Finding of Fact, Par. 1). (A-77) She died on June 8, 2008. (A-77) It is noteworthy that the applicant's appeal letter marked "Received May 21, 2008" was sent by her present attorneys. If the applicant's attorneys can do the "appealing" from the beginning of the case to establish agency jurisdiction, it follows that the attorneys can continue the appeal into District Court, nothing to the contrary stated in the statute.

Since Rosckes' appeal is to a constitutional court, the District Court, it is analogous to an appeal to the Minnesota Court of Appeals whose Civil Procedure Rule 143.02 provides as follows:

“If a party entitled to appeal dies before filing a notice of appeal, the notice of appeal may be filed by his personal representative or, if he has no personal representative, by his attorney of record within the time prescribed by the rules of appellate.”

Considering the appellate issues had already been joined in the statutory appellate proceedings while Mrs. Rosckes was still alive, the County's reliance on Minn. Stat. § 524.3 – 703 (c) the probate statute that requires the appointment of a personal representative is misplaced. The argument erroneously assumes a personal representative must be appointed in every instance upon death because the personal representative has statutory standing to sue and be sued in the courts. In the Rosckes appeal there is no estate to be probated and the Human Services agency statute does not require a personal representative to appear because it recognizes the personal status of the Trustee as the real party in interest. The statutory exception prevails similar to the Affidavit of Collection statute that does not require a personal representative to “collect” assets of a decedent under \$20,000.00. See MINN. STAT. § 524.3-1201.

If somehow the Commissioner had objected to jurisdiction over the person, it is too late. Under Minn. R. Civ. P. 12.08(a) a Motion would have had to be

made before the Commissioners made a decision, and therefore that defense is waived.

Consequently, the District Court sitting as an appeals court does have subject matter jurisdiction, and personal jurisdiction over this case and parties, and both Appellants, Edna Rosckes and the Trustee, have standing to appeal. Accordingly, the Attorney General's request to reverse the District Court's Order should be denied.

The cases cited by Respondents are factually and legally distinguishable. In Onuska v. State of Connecticut Dept. of Social Services 2000 WL 1918026, the Plaintiff's son on January 29, 1999, requested a hearing for his father applicant who had died on November 30, 1998. Rosckes, as applicant, had already scheduled a hearing, to the legal satisfaction of the hearing judge, through her attorney before she died. Likewise, In Re Poupore's Estate 157 N.W. 649 Minn. is inapplicable. In that case a widow's petition in probate court for her statutory allowance had been filed by a person other than the widow after she had died. The Supreme Court held that when a court already has jurisdiction over the parties and a party dies, then the court can proceed to the final disposition of the case. The Poupose's Estate case supports Rosckes' subject matter claim.

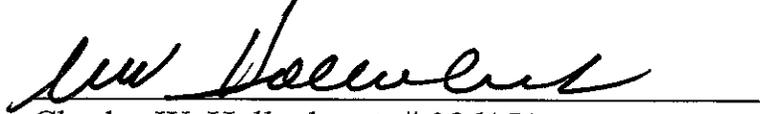
CONCLUSION

The decision of the District Court must be reversed because it did not, and could not, affirm the Commissioner's decision based on its analysis of appellant's Trust Agreement. Its analysis and interpretation, as well as that of Respondents, are replete with contradictions and errors of law that are irreconcilable with the Commissioner's decision and require a reversal of the District Court's appellate decision. The arguments of the Commissioner and Respondent are so contrived without any justification, much less substantial justification, that the District Court should be instructed to award Appellant its attorneys' fees and costs as allowed under Minn. Stat. § 15.472. Respondents mistakenly allege Appellant is not a "party" as defined by Minn. Stat. § 15.471 subd. 6 that applies only to "a court action or contested case proceeding, whereas Appellant is a "party" under Minn. Stat. § 256.045 subd. 7, and is entitled to relief under Minn. Stat. § 15.472(a) as a prevailing party in a civil action ...brought by or against the state". (*Emphasis added*) Rosckes is a party to a civil action.

Respectfully submitted,

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Date: December 14, 2009

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

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CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 3,586 words and was prepared using Microsoft Word.

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