



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.

APPELLANT'S BRIEF AND APPENDIX

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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).

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STATEMENT OF LEGAL ISSUES

I. IS THE ROSCKES IRREVOCABLE TRUST PRINCIPAL AN AVAILABLE ASSET FOR PURPOSES OF DETERMINING APPELLANT'S ELIGIBILITY FOR MEDICAL ASSISTANCE?

Trial Court Ruled on Appeal: The principal of an irrevocable discretionary trust is available to the beneficiary and therefore medical assistance benefits were properly denied. Apposite. *In re Leona Carlisle Trust*, 498 N.W.2d 260 (Minn. App. 1993). *U.S. v. O'Shaughnessy*, 517 N.W.2d 574 (Minnesota Supreme Court 1994).

II. DOES THE DISCRETIONARY POWER OF THE TRUSTEE TO DISTRIBUTE INCOME TO THE BENEFICIARY GIVE THE TRUSTEE "COMPLETE DISCRETION" TO DISTRIBUTE PRINCIPAL AND IS AN AVAILABLE ASSET BECAUSE THE BENEFICIARY HAS A RIGHT TO THE PRINCIPAL AND THE TRUST WAS "SETTLED WITH THE BENEFICIARY'S OWN FUND?"

Trial Court Ruled on Appeal: The beneficiary had a right to the principal because of a self-settled trust, if qualified as an available asset, and payment of Trust income then made the principal available. Apposite. *Carlisle Trust* and *U.S. v. O'Shaughnessy supra*.

III. WAS THE COMMISSIONER'S LEGAL REASON FOR DENYING MEDICAL ASSISTANCE BENEFITS SUBSTANTIALLY JUSTIFIED AND IF NOT, SHOULD ATTORNEYS' FEES BE AWARDED TRUSTEE PURSUANT TO MINN. STAT. §15.472.

Trial Court Did Not Rule.

STATEMENT OF THE CASE

Appellant Edna Rosckes applied for medical assistance with Carver County Community Social Services (“CCCSS”) on January 24, 2008 (A-66). On May 6, 2008 by written memorandum and on June 2, 2008, the Minnesota Department of Human Services, by its agency CCCSS, by written notice of denial denied the application (A-77). On May 21, 2008, Appellant sent the agency her letter of appeal (A-77). On June 8, 2008, the Appellant died (A-77).

On July 9, 2008, Human Services Judge Ruth Graunke Klein received the Appellant’s and Agency’s Stipulation of Facts and arguments, and she closed the record on that date. (A-77). On July 14, 2008, Judge Klein made a Recommended Order that the Commissioner affirm the Agency’s June 2, 2008 decision (A-80). On July 15, 2008, the Commissioner of Human Services made his Order adopting the Judge’s recommended Findings of Fact, Conclusions of Law, and Order (A-81).

On August 14, 2008, Appellant sent a letter to reconsider the decision to the Appeal’s Office of the Department of Human Services (A-68 through A-70). On August 25, 2008, the Assistant Chief Human Services Judge sent Appellant’s attorney a letter denying the request for reconsideration (A-71).

On September 23, 2008, pursuant to Minn. Stat. §256.045, Subd. 7 Judicial Review, Appellant's attorney served and filed her Notice of Appeal to the Carver County District Court (A-72-75).

On November 25, 2008, Appellant requested the Commissioner and Attorney General by letter to provide copies of any memorandum, notes, letters or transcriptions of telephone conversations sent by the Attorney General to the Commissioner and Stearns County Human Services (attorneys) why the Attorney General told them "the County and Commissioner will not consider the principle assets of the Bense Trust (**case**) as "available" for the purpose of determining Irena Bense's eligibility for Minnesota Medical Assistance ("MA")" (A-83).

On December 8, 2008, the Commissioner, represented by the Minnesota Attorney General requested by letter brief to the Presiding Judge in the Rosckes case to consider whether the Court had jurisdiction to hear that appeal.

On December 19, 2008, Appellant served and filed a brief responding to the jurisdictional issue raised by the Commissioner in his letter of December 8, 2008.

On December 24, 2008, the Attorney General replied to Appellant's letter of November 25, 2008 refusing to provide the material requested (A-85).

On February 9, 2009, the Court filed an Order and Memorandum denying Respondent's motion to dismiss the case for lack of jurisdiction and dropping

Bernard Rosckes, Trustee of the Rosckes Irrevocable Trust, as an aggrieved party in the case (A-86).

On August 19, 2009, the District Court made its Order affirming the Administrative Agency Decision (A-91). On October 2, 2009, Appellant served and filed its Notice of Appeal to the Minnesota Court of Appeals (A-96).

STATEMENT OF FACTS

On June 30, 2008, the attorneys for Appellant and CCCSS entered into a Stipulation of Facts that was used by Judge Klein the hearing officer (A-62 through A-67). The Exhibits attached to the Stipulation and numbered alphabetically A through Q have now been identified as Appendix Exhibits 1 through 61.

ARGUMENT

I. IS THE ROSCKES IRREVOCABLE TRUST PRINCIPAL AN AVAILABLE ASSET FOR THE PURPOSE OF DETERMINING APPELLANT'S ELIGIBILITY FOR MEDICAL ASSISTANCE?

The proceeds of the sale of Appellant's home and lot constitute the principal of the Trust (A-61 through A-66, A-77). The relevant sections of the Trust governing the disposition of principal and income are as follows (A-1):

- 3.1 During the lifetime of the Settlor, the trustees shall not pay to the Grantor any net income from the trust estate. If at any time or from time to time the Trustees shall find that the income available to Grantor from all sources is not sufficient to reasonably provide for her care, comfort and support, then and in such event the Trustees shall, in the exercise of their sole and complete discretion, expend all or any part of said balance of said income, but not the principal assets, for and on behalf of the Grantor in order to reasonably provide for such care, comfort and support.

- 3.5 Subject to the rights of the primary beneficiary under Paragraph 3.1, until the trust terminates, the trustee may pay income and principal to the primary beneficiary at such times and in such portions as the trustee deems advisable.

- 5.2 *Administrative Powers.* I give to my trustee the following powers to be exercised as they would be exercised by an ordinarily prudent person in managing the person's own property.
 - 5.28 To allocate between principal and income in the trustee's discretion, all receipts and disbursements.

The Commissioner erroneously found that the trustee of petitioner's irrevocable trust had the "ability to exercise his right" to distribute trust principal for petitioner's support and maintenance (A-80). That trust agreement does not authorize the trustees

under any circumstances to distribute principal held in trust on February 18, 2002, to the petitioner.

The Commissioner's decision erroneously interprets federal and state policies instead of Minnesota Courts of Appeal cases that prohibit the settlor from claiming a right to principal or interest as available assets in a discretionary trust. The Commissioner's decision erroneously relies solely on 42 U.S.C. 1396p(d) and Human Services Program Manual at 19, 25, 35, and 30 established after August 11, 1993 (A-79). The Trust at 6.2.1 provides "... the law of Minnesota shall govern the validity meaning and legal effect to this agreement and the administration of the trust" (A-73). *In the Matter of the Leona Carlisle Trust*, 498 N.W.2d 260 (1993) holds "This manual is advisory and is not a formal rule or law."

The Commissioner's decision does not reference the essential Conclusion of Law that the Rosckes Trust is either a "Support" trust or a "Discretionary" Trust upon which a legal basis existed to deny medicare benefits. This omission is intentional because the plain language of the irrevocable trust instrument in Article 3.1, 3.5 and 5.2.8 makes it a discretionary trust. Although the Human Services Judge refused to identify the Trust as discretionary she recognized under Par. 6, that the beneficiary under Article 3.1 "...does not contain any rights of the appellant..." that would require the trustee to exercise his discretion (A-80)

The Commissioner has refused to follow existing case law as set forth in *U.S. v. O'Shaughnessy*, 517 N.W.2d 574 (1994) and *In re Leona Carlisle*, 498 N.W.2d 260. These are discretionary Trust cases that hold 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. Also, they hold that even though trustees would not have express authority to exclude a beneficiary from receiving any trust income or principal, sole discretion given trustees under trust agreements is absolute and binding on all persons in interest rendering trusts discretionary.

For all of the above reasons, the decisions of the Commissioner of Human Services refusal to reconsider and adopting the Appeals Judge's recommendation to affirm Carver County's denial of Edna Rosckes' application for medical assistance should be reversed. For additional reasons, the Appellants should be awarded reasonable attorney and agent (Trustee) fees as authorized under Minn. Stat. Ann. § 15.472, on the grounds that the position of the state was not substantially justified. The Judge and the Commissioner refused to follow and implement the law as decided in Minnesota applicable to discretionary trusts when there are no available principal assets for a trust beneficiary who is applying for medical benefits to pay for nursing home expenses.

In a similar case interpreting discretionary trust law, brought to the attention of both the Judge and the Commissioner, *Irena Bense v. Stearns County*, MDHS, Docket No. 46144 (1995), the Minnesota Attorney General, Hubert Humphrey III's Assistant

Attorney General William Mondale conceded 10 days before oral argument at the Court of Appeals that the Commissioner could not deny medical benefits. In a letter dated November 25, 2008, Appellant's attorney requested the Commissioner and the Attorney General provide the written documentation that would reveal why the Attorney General informed the Commissioner why the principal assets of the *Bense* Trust were not an available asset (A-83 through A-84). The admission, which was the basis for settling the appeal to the Court of Appeals was intended to show Carver County District Court there was no justification for the Rosckes denial and the admission could be determined to be evidence that is necessary for a more equitable disposition of the appeal. In a reply letter dated December 24, 2008, the Attorney General refused to comply (A-85). Here in the Rosckes case, the Commissioner's letter in denying reconsideration cites *In re Flygare*, 725 N.W. 2d 114 (Minn. App. 2006) a case clearly identified and distinguished as a Support Trust. Judge Klein's Decision does not identify the Trust as discretionary, which it clearly is, because if it did, then the state could not pretend the U.S. Code and Welfare Manual apply. The state's arbitrary decision has no facts or law to support it and the Court of Appeals should reverse the decision of the District Court.

II. DOES THE DISCRETIONARY POWER OF THE TRUSTEE TO DISTRIBUTE INCOME TO THE BENEFICIARY GIVE THE TRUSTEE "COMPLETE DISCRETION" TO DISTRIBUTE PRINCIPAL AND IS AN AVAILABLE ASSET BECAUSE THE BENEFICIARY HAS A RIGHT TO THE PRINCIPAL AND THE TRUST WAS "SETTLED WITH THE BENEFICIARY'S OWN FUND?"

When the controlling language of the Trust is examined in its entirety, particularly the Grantor's intent expressed in Sections 3.1 and 3.5, it is clear the corpus of the trust identified as principal is not to be an available asset. If any other assets came into possession of the trustee, he had the authority to allocate those assets between principal and income, and in his sole discretion under 3.5, he could pay income and principal to the primary beneficiary "as such times and in such portions as the trustee deems advisable" (A01). The Respondents have interpreted the language to fit the exigencies of the financial needs of the Grantor. In effect, they construe the discretionary authority of the trustee to be modified if the discretionary income that the Grantor is receiving becomes inadequate.

The language and the intent is clear that the existing principal identified in the trust corpus is not subject to discretionary distribution. It seems equally clear that if additional assets, such as stocks, bonds that have been redeemed and the cash includes principal and interest, then the trustee has the power under 5.2.8 to allocate between principal and interest (A-1). Even then he has sole discretion under 3.5.

Since there is no evidence to the contrary, the Court's Order Affirming the Administrative Agency Decision has identified the trust as a "self-settled trust" and in addition, Mrs. Rosckes created a trust that was "... settled with the beneficiary's own funds" (A-95). Identifying the trust as a "self-settled trust" allows the Court to disregard the precedent in *Carlisle* and *O'Shaughnessy* because in those trusts, they were not

“settled” with the beneficiary’s own funds (A-95). To establish its blood line argument, the Court relies on *In re Kindt*, 542 N.W.2d 391, 394 (Minn. Ct. App. 1996 (A-92)). The Commissioner’s decision and re-determination did not consider *Kindt*.

Kindt is readily distinguishable from Rosckes’ case. *Kindt* is an incompetent individual’s trust. The South Dakota court, as “grantor” executed an agreement creating an irrevocable trust. *Kindt* held that “the beneficiary’s entitlement to compensation the result of an accident made the settlement trust self-settled.” Also a self-settled trust is established by the person whose cause of action funds it; also, if the trust is established by a person acting on the beneficiary’s behalf with funds to which the beneficiary has some entitlement. None of these exceptions apply to the Rosckes trust.

The Court also relies on *Flygare* that states the Court review agency interpretations of trust language *de novo* (A-92). The Court fails to recognize that *Flygare* is a supportive trust and not a discretionary trust, a distinction that reflects on the motive of the Commissioner in denying the Appellant’s claim. In essence, it demonstrates, for whatever reason, the denial was unjustified.

III. WAS THE COMMISSIONER’S LEGAL REASON DENYING MEDICAL ASSISTANCE BENEFITS SUBSTANTIALLY JUSTIFIED AND IF NOT, SHOULD ATTORNEYS’ FEES BE AWARDED TRUSTEE PURSUANT TO MINN. STAT. §15.472?

Appellant had argued in her Memorandum of Law to the District Court on appeal that the decision of the Commissioner was not substantially justified and that pursuant to Minn. Stat. §15.472 Fees and Expenses, the Court “. . . shall award fees and other expenses to the party, unless special circumstances made an award unjust.” The Court, in its Order Affirming Administrative Agency Decision, logically concluded “. . . there is no need to address Petitioner’s request for fees under Minnesota Statutes Section 15.572 nor the Trustee’s status as an aggrieved party.” (A-95). However, to arrive at that conclusion the Court had to use hindsight and hypothetically attribute its subsequent legal analysis and conclusion to the Commissioner’s judge and her decision.

In its Memorandum, the Court abandons the hearing judge’s reliance on her interpretation of the Federal Statute 42 U.S.C. 1396p(d)(2)(A) and (3)(B) and the Human Services Program Manual 19.25.35.30. (A-79). Both have been held to be irrelevant under the decisions of *Carlisle* and *O’Shaughnessy*. The District Court here, recognizing that reliance on those two Federal statutory references have been discredited, so that thousands of irrevocable discretionary trusts have sustained their validity for a trustee’s discretionary authority that excludes any inherent right of a beneficiary, had to create a new theory for an inherent “right” of the beneficiary.

As previously discussed above, the Court gave the trust a new identity as a “self-settled trust,” that supposedly lays an irrevocable discretionary trust open to

interpretation debate, especially if the beneficiary is also the Grantor. But the Court still had to find some legal justification to circumvent the prohibitions language of Section 3.1 that “. . . the Trustees shall, in the exercise of their sole and complete discretion spend all or any part of said balance of said income, but not the principal assets” (A-1). This required the Court to create a “right” to principal that does not exist because the discretionary authority is absolute and cannot be invoked by the beneficiary. Using an analogy that is contradictory in its conception, the Court hypothesizes that once the Trustee has used his discretion to pay income, as provided in Section 3.1, it creates a “right” in the Grantor (A-98). At the same time, the Court correctly creates a limitation on discretionary duplications that “under no circumstances does the Grantor have the right to distribution of principal for her “care, comfort and support,” the inference being that is the exclusive area of discretionary income payments (A-94).

But then the Court creates an exception to the absolute prohibition, that when the income is insufficient the Trustee having exercised sole and complete discretion to pay income, that exercise now carries over to principal and having been triggered for income it is mandatory that the Trustee now invades principal because if it is necessary to do so in order to provide for the Grantor’s care, comfort and support (A-94). In other words, the Court is saying that once an after-the-fact “right” to income has been exercised by a discretionary decision for

income alone, as provided for in 3.1 of the trust, the precluded right to principal then has no more limitation by virtue of the prohibiting language, and now “the Trustee has complete discretion as to its distributions under Section 3.5 (A-95). The Court omits to state the fallacy in reasoning: There is no longer any discretion to exercise under 3.5 because the exercised discretionary income “right” is complimentary as a matter of law to compel a mandatory exercise of discretion to distribute principal to provide for care when the income falls short. Appellant submits there is no construction of the trust to allow for such an interpretation..

The Court’s construction of a tangible “right” created by a perceived or actual association with beneficiary’s personal needs is totally contradictory to the hearing judge’s Conclusion of Law paragraph 6 that states “. . .but paragraph 3.1 does not contain any rights of the appellant that would affect the trustee’s ability [discretion] to exercise his right to distribute from the principal as set forth in paragraph 3.5” (A-80).

The hearing judge was satisfied with the interpretation that the trustee’s discretion to pay principal and income under 3.5 was subject to a compelling interpretation of discretion under 3.5 since the primary beneficiary (Appellant) had no rights under 3.1 (A-80). This contradiction in legal analysis serves to provide the argument for Appellant that the decision of the Commissioner was not justified,

much less justified to any degree. The Court's analysis does not remedy this deficiency; it emphasizes it.

Therefore Appellant submits that upon reversal, the District Court be instructed to award Appellant its attorneys' fees and costs as allowed under Minn. Stat. §15.472. *City of Mankato v. Mahoney*, 542 N.W.2d 689 (Minn. App. 1996).

CONCLUSION

The District Court's Order Affirming the Commissioner's Decision if not reversed will create legal problems for the Commissioner in attempting to interpret future irrevocable discretionary trusts. If such trusts can now be considered self-settled and the Grantor is the beneficiary, such trust assets will be available regardless of the discretionary language. Or if the trustee has already exercised discretion to pay income, the trustee's exercise of discretion for principal has been waived for the purpose of determining the asset is available. It will also require attorneys to determine anew how to draft a discretionary irrevocable trust if *Carlisle* and *O'Shaughnessy* do not retain legal precedence. Appellants believe the lower court decision should be reversed for its erroneous conclusion as well as the erroneous conclusions of the Commissioner, and remanded for determination of the Agency paying attorneys' fees and costs.

Respectfully submitted,

NICKLAUS, BRAATEN & HOLLENHORST, PLLC

Date: October 30, 2009

A handwritten signature in black ink, appearing to read "C. W. 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 3,611 words and was prepared using Microsoft Word.

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