**S T A T E  O F  M I C H I G A N**

**C O U R T  O F  A P P E A L S**

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| DOROTHY EDWARDS, a Minor, by her Next Friend Darlene EDWARDS and DARLENE EDWARDS, individually,<br><br>Plaintiff-Appellees, | UNPUBLISHED<br>March 28, 1997 |
| v | No. 185399<br>Wayne Circuit Court<br>LC No. 92-204192 |
| HUTZEL HOSPITAL,<br><br>Defendant,<br><br>and<br><br>MICHIGAN ATTORNEY GENERAL on behalf of the MICHIGAN DEPARTMENT OF MENTAL HEALTH,<br><br>Intervenor-Appellant. | |

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Before: Saad, P.J., and Griffin and M.H. Cherry,* JJ.

PER CURIAM.

The Michigan Department of Health ("the Department"), as a creditor, seeks to reach the assets of a discretionary trust, which was established for the benefit of Dorothy Edwards, a minor. The trust was funded by defendant hospital, in partial consideration for plaintiffs' settlement of a medical malpractice case against the hospital. We hold that, under the version of the Mental Health Code ("Code") applicable at the time the trust was established, the Department may reach the assets. We reverse the trial court's order and remand.

Dorothy Edwards was born at defendant hospital and suffered injuries allegedly due to defendant's negligence. Plaintiffs and the hospital reached a settlement agreement under which

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* Circuit judge, sitting on the Court of Appeals by assignment.

$249,533.82 was to be placed into a discretionary trust "set up for the purpose of supplementing any governmental benefits that may be there . . . which means that monies that go to this child . . . are deemed not available for medical care but are to supplement governmental benefits which would otherwise pay for this care." The circuit judge was satisfied that this mechanism would protect the money for Dorothy's benefit, and issued an order on May 14, 1993, approving the settlement, and ordering the hospital to pay the funds into the discretionary trust.

On July 28, 1994, plaintiffs filed a motion to clarify and/or amend the May 14, 1993, order. Plaintiffs stated that the "intent" of the original order was that "the settlement funds should go directly into an irrevocable discretionary trust for Dorothy Edwards, to protect her from the loss of medicaid, ADC, and other governmental benefits to which she is or may be entitled," and they requested that the court amend its order to reflect this intention. On August 15, 1994, the Michigan Department of Mental Health filed a "notice of intervention," and a brief in opposition to plaintiffs' motion to clarify, asserting that it was a present and future creditor of Dorothy because it had provided and would continue to provide government benefits on Dorothy's behalf. On September 1, 1994, the circuit court rejected the Department's position and granted plaintiffs' motion to clarify, ordering that the proceeds be distributed to the discretionary trust.

The intervenor Department now appeals by leave granted, and we reverse and remand.

## DISCUSSION

### I

As a threshold matter, we reject the plaintiffs' argument that the Department did not "properly" intervene in this case. MCL 14.101; MSA 3.211 permits the attorney general to "intervene in any action . . . whenever such intervention is necessary in order to protect any right or interest of this state." The Department's interest in this case arises under MCL 330.1804; MSA 14.800(804), which provides that, "an individual who receives services from the Department of Mental Health is financially liable for those services and the department, subject to certain restrictions, may attach the assets and income of those individuals to pay for the services." Indeed, the only situation in which a trial court has discretion to deny intervention under this statute is where "intervention by the attorney general is clearly inimical to the public interest." *Gremore v Peoples Comm Hosp Auth,* 8 Mich App 56, 59; 153 NW2d 377 (1967).

The procedure controlling intervention is set forth in MCR 2.209(C), which provides:

> A person seeking to intervene must apply to the court by motion and give notice in writing to all parties under MCR 2.107. The motion must (1) state the grounds for intervention, and (2) be accompanied by a pleading stating the claim or defense for which intervention is sought.

Here, the Department filed a "notice of intervention" and a brief in opposition which set forth the basis of the Department's claim and the grounds for intervention. On the facts of this case, we conclude that this provided the requisite notice to the court and the parties.

II

The next issue which must be addressed is whether, without regard to the trust issues (which will be addressed below), the Department can reach the proceeds of a personal injury settlement to satisfy its claim. We conclude that, according to the statute in effect prior to March, 1996, it may.

According to the version of the Mental Health Code in effect at the time of the circuit court's ruling, "the individual, the spouse, and the parents . . . shall be financially liable for services provided to the individual by the department." MCL 330.1804; MSA 14.800(804). The amount of liability is "based on ability to pay." MCL 330.1820(b); MSA 14.800(820)(b). This ability to pay:

> shall be determined from a consideration of [the individual's or the parents'] total financial situation. Such considerations include, but need not be limited to, the following factors: income, expenses, insurance proceeds, number and condition of dependents, assets, and liabilities. MCL 330.1820(c); MSA 14.800(820(c).

Under this statutory scheme, the proceeds of a settlement would be assets, and would therefore be available to the Department, absent consideration of the trust issues to be discussed below.[1]

III

We turn finally to the trust issues. As our Supreme Court stated in *Miller v Dep't of Mental Health,* 432 Mich 426, 429; 442 NW2d 617 (1989):

> There are, for purposes of this discussion, three kinds of trusts. Firstly, a trust vesting in the beneficiary the right to receive some ascertainable portion of the income or principal. Secondly, a trust providing that the trustee shall pay so much of the income or principal as is necessary for the education or support of the beneficiary, called a support trust. Thirdly a trust providing that the trustee may pay to the beneficiary so much of the income or principal as he in his discretion determines, called a discretionary trust.

The parties do not dispute that the trust at issue here is a discretionary trust. Where a trust is discretionary and the beneficiary has no right to a disbursement from the trust other than what the trustee in his sole discretion chooses to distribute, the beneficiary's creditors cannot compel the trustee to pay any part of the income or principal in order that the creditors may be paid. *In re Johannes Trust,* 191 Mich App 514, 517; 479 NW2d 25 (1991). However, this rule only applies where the *settlor* of the trust is different than the *beneficiary* of the trust. *Id,* 191 Mich App at 518. In other words, a person cannot set up this kind of trust for himself. The rationale for this is that a person ought not to be able to shelter his assets from his creditors in a discretionary trust of which he is the beneficiary and thereby be able to enjoy all the benefits of ownership of the property without any of the burdens. *Id.*

This brings us to the question of who is the settlor of the discretionary trust at issue here. Plaintiffs argue that the court itself has acted as settlor, in that the Order for Distribution was approved

by the circuit court judge. The Department argues that Dorothy, though her next friend, is the settlor. The Department is correct.

If the hospital were to pay the settlement proceeds directly to Dorothy, she obviously could not prevent the Department from reaching the funds. Here, plaintiffs attempt to avoid this result by the fact that Dorothy never actually "held" the funds. (The settlement order approved payment of the funds directly from the hospital to the trust.) However, in reality, the circuit court authorized Dorothy to exchange one form of property -- her lawsuit -- for another form of property -- a beneficial interest in a discretionary trust. This concept was addressed in *Ronney v Dep't of Social Services,* 210 Mich App 312, 317-319; 532 NW2d 910 (1995). In *Ronney,* the DSS was attempting to terminate Ronney's benefits, in light of the fact that she had recently been named the beneficiary of a trust, established by her legal guardian. This Court found that the DSS was entitled to terminate the benefits, because Ronney was the settlor of the trust, and therefore the trust's assets were includable in the Department's calculation of her assets:

> In *Forsyth v Rowe,* 226 Conn 818, 826; 629 A2d 379 (1993), the Connecticut Supreme Court held that when a trust is funded with proceeds from the settlement of a personal injury claim brought by the guardian on the ward's behalf, the ward, in effect, is the individual who established the trust. The *Forsyth* court specifically noted that "[a] trust is established by the person who provides the consideration for the trust even though in form it is created by someone else." *Id.* at 826.
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> In this case, petitioner's guardian established the trust for petitioner's benefit, using consideration provided by petitioner through her inheritance. Accordingly, we hold that petitioner, through her guardian, is the individual who established the trust. *Ronney,* 210 Mich App at 317-318.

Thus, where, as here, an individual establishes a trust funded with proceeds from the settlement of a lawsuit brought on behalf of that individual, it is the individual herself who has established the trust (i.e. the individual is the settlor).

This issue was also persuasively discussed in *In re Lennon,* 294 NJ Super 303; 683 A2d 239 (1996), where a trust for Matthew, an incompetent, had been established with proceeds of his medical malpractice action. The guardian sought to amend the trust's terms "so that the trust funds will only be used to meet those needs which cannot be met through any public or private program of financial entitlements, services, or other benefits." However, the New Jersey court declined to permit this amendment, finding that Matthew was the settlor of the trust because he had "furnished the consideration needed for the creation of the trust when he exchanged his claim against defendants for settlement funds later deposited in trust." Accordingly, the entire amount of the trust was available for

Matthew's use, and for consideration by Medicaid in determining eligibility. See also *Forsyth v Rowe,* 226 Conn 818; 629 A2d 379 (1993).

We therefore conclude that Dorothy was the settlor of her trust.

IV

Plaintiffs rely on *In re Moretti,* 159 Misc2d 654; 606 NYS2d 543 (1993), for the proposition that the addition of certain language to the trust (i.e. requiring any funds left in the trust at Dorothy's death be made available to the Department) should preclude the Department from any right to funds during Dorothy's life. We are unaware of any adoption by the Michigan Legislature of the portion of the Omnibus Reconciliation Act of 1993, concerning medicaid eligibility requirements in self-settled trusts, which plaintiffs discuss in their brief. Therefore, 42 USC 1396p(d)(2)(A) appears to be irrelevant here, other than by analogy, which we decline to adopt.

V

Where do these conclusions leave the Department in this case? Under the version of the Mental Health Code in effect at the time the trust was established (October 7, 1993), and when the circuit court's orders were signed (May, 1993 and September, 1994), the Department would be entitled to consider the assets of the trust in its determination of Dorothy's "ability to pay." Therefore, it seems certain that the Department would conclude that at least certain of the trust assets would be available for reimbursement of the Department's expenses on Dorothy's behalf.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Michael H. Cherry

[1] Because this issue may arise on remand, we note that in March, 1996, a new version of the Code took effect. MCL 330.1818; MSA 14.800(818) provides a comprehensive and somewhat complex method to determine a "responsible party's" ability to pay for mental health services, "on the basis of the adult responsible party's *income*" (emphasis added). In particular, the Department is to consider that party's "*taxable income* as set forth in the responsible party's most recently filed state income tax return." MCL 330.1818(1)(a); MSA 14.800(818)(1)(a). It therefore appears that the key concern is *taxable income,* not *assets* in general as under the previous scheme.