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## Trusts - Payment or Distribution of Proceeds of Trust Property: Categorizing a Trust for the Purpose of Determining Eligibility for Medical Assistance

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TRUSTS—PAYMENT OR DISTRIBUTION OF PROCEEDS  
OF TRUST PROPERTY: CATEGORIZING A TRUST FOR  
THE PURPOSE OF DETERMINING ELIGIBILITY  
FOR MEDICAL ASSISTANCE

*Hecker v. Stark County Social Service Board*,  
527 N.W.2d 226 (N.D. 1994)

I. FACTS

Herman Hecker is a developmentally disabled fifty-four year old male who resides in a group home.<sup>1</sup> He is the sole beneficiary of a trust (the Hecker trust) established by his now-deceased mother, Wilhelmina Hecker.<sup>2</sup> The trust was established in 1984 and amended and restated in 1987.<sup>3</sup> In Article III of the restated trust agreement, the settlor expressed that it was her intention in creating the trust that “it continue in existence as a supplemental fund to public assistance for her handicapped child, Herman Hecker.”<sup>4</sup> Distribution of trust assets to or for the benefit of the beneficiary were to be made “as the Trustee in the Trustee’s sole discretion may from time to time deem necessary or advisable for the satisfaction of the beneficiary’s special needs.”<sup>5</sup>

In June 1993, Hecker applied to the Stark County Social Service Board (the Board) for medical assistance benefits from the state-administered Medicaid program.<sup>6</sup> The Board determined that the value of Hecker’s assets exceeded the prescribed maximum of \$3,000.00, and denied his application.<sup>7</sup> Hecker appealed the Board’s denial to the North Dakota Department of Human Services (the Department), which upheld the Board’s denial.<sup>8</sup> The Department’s hearing officer found the Hecker trust to be a support trust, and its assets were deemed to be available to Hecker for his support.<sup>9</sup> The Department’s order was

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1. *Hecker v. Stark County Soc. Serv. Bd.*, 527 N.W.2d 226, 228 (N.D. 1994). Justice Beryl Levine wrote for the majority.

2. *Id.*

3. *Id.* The trust established by Wilhelmina Hecker was originally a revocable trust, but it became irrevocable by her death on July 23, 1992. Brief of Appellant, at 4, *Hecker v. Stark County Soc. Serv. Bd.*, 527 N.W.2d 226 (N.D. 1994) (No. 94-0180).

4. *Hecker*, 527 N.W.2d at 228.

5. *Id.*

6. *Id.* at 229. This application and subsequent appeals were made through Herman’s brother and guardian, Peter Hecker, the trustee of the Hecker trust. *Id.*

7. *Id.* The prescribed \$3,000.00 maximum is set by North Dakota Administrative Code section 75-02-02.1-26. For the purposes of this appeal, the value of the trust corpus was significant only as a disqualifying asset. *Hecker*, 527 N.W.2d at 229 n.2. Neither party raised the issue of distribution of trust income to Herman from the trust corpus, which was valued at \$81,000.00. *Id.*

8. *Hecker*, 527 N.W.2d at 229.

9. *Id.*; see N.D. ADMIN. CODE § 75-02-02.1-31(3)(a) (1994) (defining a “support trust” as a trust which has the support or care of a beneficiary as a purpose of the trust).

appealed by Hecker to Burleigh County District Court, which affirmed the Department's decision.<sup>10</sup> Hecker then appealed to the North Dakota Supreme Court.<sup>11</sup>

Since the issue on appeal stemmed from an administrative agency decision, the record reviewed was that of the administrative agency, and not that of the district court.<sup>12</sup> The issue before the court was whether the factual conclusions of the agency were supported by a preponderance of the evidence.<sup>13</sup> The standard of judicial review was "whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record."<sup>14</sup>

On appeal, the North Dakota Supreme Court reversed and remanded.<sup>15</sup> The court *held* that a parent may establish a trust to benefit an adult developmentally disabled child which provides funds for special needs that are not provided for by public assistance without making the beneficiary ineligible to receive Medicaid benefits.<sup>16</sup>

## II. LEGAL HISTORY

### A. THE MEDICAID PROGRAM

Medicaid is a program which provides medical assistance to the disabled and elderly of limited resources.<sup>17</sup> The program is jointly funded by federal and state governments.<sup>18</sup> Each state which has elected to participate in the Medicaid program has the authority to set eligibility requirements for medical assistance, but this authority is limited by federal regulations.<sup>19</sup>

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10. *Hecker*, 527 N.W.2d at 229.

11. *Id.*

12. *Id.*; see N.D. CENT. CODE §§ 28-32-19 to -21 (1995) (requiring the court to consider the record of the agency's determination and affirm unless the agency's factual conclusions were not supported by a preponderance of the evidence).

13. *Hecker*, 527 N.W.2d at 229 (citing *Hins v. Lucas W.*, 484 N.W.2d 491, 494 (N.D. 1992) (reversing a denial of unemployment compensation benefits by Job Service North Dakota on the grounds that Job Service's findings were not supported by a preponderance of the evidence)).

14. *Id.* at 229 (citing *Power Fuels, Inc. v. Elkin*, 283 N.W.2d 214, 220 (N.D. 1979) (holding that the statutory requirement that the supreme court determine on review whether an administrative agency's findings of fact are supported by a preponderance of the evidence is constitutional)).

15. *Id.* at 228.

16. *Id.* The North Dakota Supreme Court instructed the district court to remand to the Department for a redetermination of Herman's eligibility for Medicaid benefits without considering the value of the trust corpus as an asset. *Id.* at 236.

17. 42 U.S.C. §§ 1396a-1396d (1988). Medicaid is also known as the Medical Assistance Program.

18. § 1396a(a)(2).

19. § 1396a(a)(17). Arizona has elected not to participate in the Medicaid program, but does offer its own alternative medical assistance program. 3 MEDICARE AND MEDICAID GUIDE ¶ 15,554.

For a majority of states, eligibility for Medicaid is based on Supplemental Security Income eligibility guidelines.<sup>20</sup> A minority of states, including North Dakota, have been authorized to employ eligibility requirements more restrictive than Social Security Insurance (SSI) eligibility guidelines.<sup>21</sup> These states, commonly referred to as "section 209(b) states," had employed more restrictive guidelines prior to the 1972 amendments to the Social Security Act, and were allowed by the amendments to retain their own guidelines.<sup>22</sup>

Federal guidelines also require states to provide coverage for the "categorically needy."<sup>23</sup> Additionally, a state may opt to extend coverage to the "medically needy."<sup>24</sup> North Dakota is one state which has elected to provide coverage to the "medically needy."<sup>25</sup>

As a "section 209(b) state," a state is allowed to employ eligibility guidelines for "categorically needy" recipients which are more restrictive than SSI guidelines.<sup>26</sup> However, even a "section 209(b)" state is bound to use a financial methodology no more restrictive than that of SSI once it has opted to provide coverage to the "medically needy."<sup>27</sup> Thus, North Dakota, as "section 209(b) state" which has opted to provide Medicaid coverage to the "medically needy," is bound to employ an eligibility methodology which is no more restrictive than SSI guidelines.<sup>28</sup>

An applicant's assets are classified by SSI program regulations as "available assets" when the applicant has an actual ability to obtain resources from them.<sup>29</sup> Available assets are defined as those resources in which the applicant has a legal interest in a liquidated sum and over which he or she has the legal ability to compel distribution for his support.<sup>30</sup> Therefore, assets held in trust may affect the eligibility of the

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20. Mayer Y. Silber, *The Effect of a Trust on the Eligibility of Liability of the Trust Beneficiary for Public Assistance*, 26 REAL PROP., PROB. & TRUST J. 133, 138, n.15 (1991) (citing Carol Ann Mooney, *Discretionary Trusts: An Estate Plan to Supplement Public Assistance for Disabled Persons*, 25 ARIZ. L. REV. 939, 966 n.154 (1983)). The financial methodology used by these states to determine Medicaid eligibility "shall be no more restrictive than the methodology which would be employed under the supplemental security income program in the case of groups consisting of aged, blind, or disabled individuals." 42 U.S.C. § 1396a(a)(10)(C)(i)(III) (1988).

21. See Silber, *supra* note 20, at 139.

22. Social Security Amendments of 1972, Pub. L. No. 92-603, § 209(b), 86 Stat. 1329, 1381 (1972).

23. 42 U.S.C. § 1396a(a)(10)(A) (1988). Individuals considered to be "categorically needy" include those eligible to receive Aid to Families with Dependent Children (AFDC) or SSI benefits. *Id.*

24. 42 U.S.C. § 1396a(a)(10)(C). The "medically needy" are those individuals who lack the ability to pay for medical expenses, yet have incomes too large to qualify as "categorically needy." *Id.*

25. N.D. ADMIN. CODE § 75-02-02.1-05(3) (1994).

26. 42 U.S.C. § 1396a(f) (1988).

27. § 1396a(a)(10)(C)(i)(III).

28. *Hecker*, 527 N.W.2d at 233.

29. 20 C.F.R. § 416.1201(a)(1) (1995).

30. 45 C.F.R. § 233.20(a)(3)(D) (1994).

beneficiary if the assets are considered to be available to the applicant.<sup>31</sup> The type of trust in which the assets are held is important, as some will give to the beneficiary the legal right to compel distribution,<sup>32</sup> while others will not.<sup>33</sup>

North Dakota has authorized the Department of Human Services to implement and promulgate Medicaid program regulations, including eligibility requirements.<sup>34</sup> These rules, when properly promulgated, have the force and effect of law.<sup>35</sup>

In North Dakota, Medicaid eligibility is based on a consideration of whether an applicant has sufficient assets to meet the needs of necessary medical care.<sup>36</sup> All of an applicant's available assets, including trust assets, are considered, unless those assets are exempt.<sup>37</sup>

## B. TYPES OF TRUSTS

North Dakota Administrative Code section 75-02-02.1-31 sets forth five classifications of trusts.<sup>38</sup> A trust is classified by the North Dakota Administrative Code as revocable—irrevocable, Medicaid qualifying, support, discretionary, or other.<sup>39</sup> The classification of a trust can be determinative of an applicant's eligibility, because classification defines the availability of trust assets.<sup>40</sup>

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31. N.D. ADMIN. CODE § 75-02-02.1-31 (1994).

32. § 75-02-02.1-31(3)(b).

33. § 75-02-02.1-31(4)(a).

34. N.D. CENT. CODE § 50-24.1-01.1 (1989). In determining eligibility, the Department considers whether the applicant has sufficient assets to meet the costs of necessary medical care and services. § 50-24.1-02. All assets available to the applicant are considered. N.D. ADMIN. CODE § 75-02-02.1-25(1) (1994).

35. N.D. CENT. CODE § 28-32-03(3) (Supp. 1995). When promulgating rules, a state agency is not allowed to exceed its statutory authority. *See Berger v. State Personnel Bd.*, 502 N.W.2d 539, 542 (N.D. 1993) (establishing that an administrative regulation may not exceed statutory authority, and that a regulation which exceeds legislative authorization is void) (citing *Moore v. N.D. Workmen's Compensation Bureau*, 374 N.W.2d 71, 74 (N.D. 1985)). In North Dakota, this limitation on the rule making ability of the agency also includes the inability to overrule or ignore judicial precedent. *See Public Serv. Comm'n v. City of Williston*, 160 N.W.2d 534, 537-38 (N.D. 1968) (ruling that the Public Service Commission did not have the power to reverse a ruling of the North Dakota Supreme Court which stated the Commission did not have the power to control electricity rates charged by a utility to a city). The North Dakota Supreme Court has previously ruled that an agency regulation which exceeds the agency's authority is void and without force. *Berger*, 502 N.W.2d at 539.

36. N.D. CENT. CODE § 50-24.1-02 (1989).

37. N.D. ADMIN. CODE §§ 75-02-02.1-25 to -31 (1994). North Dakota Administrative Code section 75-02-02.1-31 states that trust assets are not exempt to the extent that those assets are available to the applicant.

38. 75-02-02.1-31.

39. *Id.*

40. *Id.*

### 1. *Revocable—Irrevocable*

A revocable trust grants someone, usually the settlor, the power to remove all or some of the property from the trust.<sup>41</sup> Under an irrevocable trust, this power does not exist.<sup>42</sup> A beneficiary of an irrevocable trust must count as his or her available assets the greater of the amount actually distributed from the trust and the amount which must be distributed under the terms of the trust, whether or not it is actually distributed.<sup>43</sup> Amounts actually distributed are not considered if the trust is classified as a Medicaid-qualifying or support trust.<sup>44</sup> Therefore, the beneficiary of an irrevocable trust which is a support or Medicaid qualifying trust must count all trust assets as available assets, whether or not actually distributed.<sup>45</sup>

### 2. *Support Trusts*

A support trust directs the trustee to distribute trust income or principal as necessary for the support or maintenance of the beneficiary.<sup>46</sup> The North Dakota Administrative Code defines a support trust as a trust which has as a general purpose the provision of care to the beneficiary.<sup>47</sup> Conventionally, words such as "support," "care," or "maintenance" are present in the trust instrument, although no particular language is necessary to create a support trust.<sup>48</sup> A support trust also includes trusts which are called "discretionary support trusts" or "discretionary trusts," *as long as support is a trust purpose*.<sup>49</sup>

The supreme court has concluded that all assets held in a trust with a support purpose are properly considered a beneficiary's assets when determining a beneficiary's eligibility for state assistance.<sup>50</sup> In *Bohac v. Graham*,<sup>51</sup> the court upheld a North Dakota Department of Human Services ruling which denied medical benefits to the trust beneficiary because her assets, including the trust corpus, exceeded eligibility

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41. *Id.*

42. *Id.*; see Brief of Appellant at 4, *Hecker* (No. 94-0180) (stating that no funds have been expended because the trust is irrevocable).

43. N.D. ADMIN. CODE § 75-02-02.1-31(1)(d) (1994).

44. *Id.*

45. *Id.* Medicaid-qualifying trusts need not be considered here as the *Hecker* trust was not a Medicaid-qualifying trust because it was not established, as required, by the beneficiary or his spouse. See § 75-02-02.1-31(2)(a)(1) (defining a Medicaid-qualifying trust as one which in pertinent part is established by an individual or his spouse and has the individual as the trust beneficiary).

46. RESTATEMENT (SECOND) OF TRUSTS § 154 (1959).

47. N.D. ADMIN. CODE § 75-02-02.1-31(3)(a).

48. *Id.*

49. *Id.*

50. See *Bohac v. Graham*, 424 N.W.2d 144, 148 (N.D. 1988) (finding that the trust a support trust since it had been created with the settlor's intent of providing for future care of the beneficiary).

51. 424 N.W.2d 144 (N.D. 1988).

guidelines.<sup>52</sup> Under this ruling, the trustee was compelled to use trust assets for the beneficiary's support.<sup>53</sup>

### 3. Discretionary Trusts

A trustee of a discretionary trust may not be compelled to distribute trust assets, even if needed for the support of the beneficiary.<sup>54</sup> A discretionary trust gives the trustee complete discretion to distribute all, some, or none of the trust assets to the beneficiary, as the trustee sees fit.<sup>55</sup> Only those distributions of trust income or corpus actually made by the trustee may be considered as assets for eligibility purposes.<sup>56</sup> Since distribution cannot be compelled, the corpus of a discretionary trust is not considered an asset of the beneficiary for the purpose of determining eligibility.<sup>57</sup>

#### C. THE CLASSIFICATION OF A TRUST

North Dakota case law has established that conflicts over classifications of trusts may be settled by ascertaining the intent of the settlor.<sup>58</sup> The settlor's intent is a question of fact.<sup>59</sup> Intent is established by the language of the trust instrument.<sup>60</sup> The court has the duty to uphold the settlor's intent as long as it does not violate public policy.<sup>61</sup> If a trust instrument is unambiguous, the settlor's intent must be determined from the trust document itself.<sup>62</sup> The issue of ambiguity is a question of law, fully reviewable on appeal.<sup>63</sup>

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52. *Bohac v. Graham*, 424 N.W.2d 144, 148 (N.D. 1988); see also N.D. ADMIN. CODE § 75-02-02.1-26 (providing that an individual may not be eligible for assistance if his assets exceed \$3,000.00).

53. See *Bohac*, 424 N.W.2d at 147.

54. *Id.* at 146; see also N.D. ADMIN. CODE § 75-02-02.1-31(4)(a) (providing that the term discretionary trust does not include trusts which are defined as support trusts under subsection 2).

55. RESTATEMENT (SECOND) OF TRUSTS § 155 (1959).

56. N.D. ADMIN. CODE § 75-02-02.1-31(4)(b).

57. *Id.*

58. *In re Larson*, 341 N.W.2d 627, 629 (N.D. 1983) (establishing the primary objective of the court in construing a trust instrument is to ascertain the intent of the settlor).

59. *In re Estate of Klein*, 434 N.W.2d 560, 561 (N.D. 1989) (stating that a trial court's finding concerning the testator's intent will not be set aside unless it is clearly erroneous) (citing *Schatz v. Schatz*, 419 N.W.2d 903 (1988)).

60. *Larson*, 341 N.W.2d at 629.

61. *Hecker v. Stark County Soc. Serv. Bd.*, 527 N.W.2d 226, 230 (citing *In re Leona Carlisle Trust*, 498 N.W.2d 260 (Minn. 1993)).

62. *Bohac v. Graham*, 424 N.W.2d 144, 146 (N.D. 1988) (finding that a testamentary trust was ambiguous as to whether it was a discretionary or support trust so that extrinsic evidence must be considered to determine the settlor's intent).

63. *Klein*, 434 N.W.2d at 561.

### III. CASE ANALYSIS

The primary issue on appeal was the North Dakota Department of Human Service's classification of the Hecker trust as a support trust.<sup>64</sup> The Department supported its classification of the Hecker trust with arguments concerning the nature of the trust, the effect of administrative regulations, and public policy.<sup>65</sup> Because this case was reviewed on appeal from an administrative agency decision, the North Dakota Supreme Court was required to consider the record of the agency's determination and affirm the finding of the agency unless its factual conclusions were not supported by a preponderance of the evidence.<sup>66</sup>

The Department's classification of the Hecker trust determined what assets it could consider when evaluating Hecker's eligibility for Medicaid.<sup>67</sup> The Department agreed that the plain language of the trust instrument indicated the settlor did not intend the trust to be a support trust.<sup>68</sup> However, it argued that North Dakota Administrative Code section 75-02-02.1-31(3) operated to negate both the plain language of the instrument and the stated intent of the settlor.<sup>69</sup> Under its application of the regulation, the Department concluded that, regardless of the nature of the trust, the entire trust corpus was available to Herman for his support.<sup>70</sup>

The Department also argued that even if North Dakota Administrative Code section 75-02-02.1-31 could not be employed, the supplemental and special needs provisions of the Hecker trust should be disregarded because they violated both North Dakota and federal public policy.<sup>71</sup>

The North Dakota Supreme Court held that the disputed portion of North Dakota Administrative Code section 75-02-02.1-31(3)(a), as

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64. *Hecker*, 527 N.W.2d at 229.

65. *Id.*

66. *Id.*; see N.D. CENT. CODE §§ 28-32-19 to -21 (1991).

67. *Hecker*, 527 N.W.2d at 229. North Dakota law establishes that if a trust under review could reasonably be interpreted as a support trust, the assets of the trust can be considered assets of the beneficiary for the purpose of computing eligibility. N.D. ADMIN. CODE § 75-02-02.1-31(3) (1994); see *Chenot v. Bordeleau*, 561 A.2d 891, 894 (R.I. 1989) (relying on six references of the trustee's sole discretionary powers within the testamentary instrument in finding that a father of a developmentally disabled son had created a discretionary trust for the benefit of his son).

68. *Hecker*, 527 N.W.2d at 231.

69. *Id.*; see N.D. ADMIN. CODE § 75-02-02.1-31(3) (stating that the term "support trust" also includes trusts which are called "discretionary support trusts" or "discretionary trusts," so long as support is a trust purpose). The Department contended that this regulation was the determining factor in interpreting a trust for the purposes of Medicaid eligibility. *Hecker*, 527 N.W.2d at 231.

70. *Hecker*, 527 N.W.2d at 231. In response to the Department's application of section 75-02-02.1-31(3), Hecker argued that the code section was void, as it overruled judicial precedent and exceeded the rule making authority of the Department. *Hecker*, 527 N.W.2d at 232.

71. *Hecker*, 527 N.W.2d at 234. Upon review of this contention, the court concluded that the Department had erroneously based this contention on North Dakota Administrative Code section 75-02-02.1-31(7), which applies only to support and Medicaid-qualifying trusts. *Id.*; see N.D. ADMIN. CODE § 75-02-02.1-31(7) (establishing that the amount available to the beneficiary of a "special needs" trust is the maximum amount permitted to be distributed under the trust).

applied by the Department, would overrule the explicit intent of the settlor of the Hecker trust.<sup>72</sup> This result would supersede North Dakota case law holding that the settlor's intent determines whether a trust is a support or discretionary trust.<sup>73</sup> Therefore, the court declared this portion of the North Dakota Administrative Code void.<sup>74</sup>

Additionally, the Court concluded that the Hecker trust assets could not qualify as available assets under the federal definition of availability because Hecker had no legal ability to compel distribution.<sup>75</sup> However, by applying federal financial methodology, Hecker would qualify for Medicaid.<sup>76</sup> Since the Department's regulation rendered Hecker ineligible for Medicaid, it was more restrictive than the federal financial methodology, and thus, invalid.<sup>77</sup> Consequently, the Department's regulation which declared discretionary trust fund assets as available assets for eligibility purposes<sup>78</sup> was rendered void and unenforceable.<sup>79</sup>

The court stated that North Dakota case law firmly supported the public policy concept that medical assistance should be available only to the truly needy, so that applicants are required to exhaust their own resources before they can qualify for assistance programs.<sup>80</sup> The court found that allowing Hecker to qualify for medical assistance, even though he was a trust beneficiary, would be consistent with this line of cases.<sup>81</sup> The court concluded that the assets of the Hecker trust were not assets of Hecker himself, nor did he have a legal right to the proceeds of the trust or to compel any distribution of the trust principal or income.<sup>82</sup> Thus, the court determined that Hecker should be classified as a truly

72. *Hecker*, 527 N.W.2d at 231; see N.D. ADMIN. CODE § 75-02-02.1-31(3).

73. See *Bohac v. Graham*, 424 N.W.2d 144, 146 (N.D. 1988); *In re Larson*, 341 N.W.2d 627, 629 (N.D. 1983). There is no North Dakota statutory authority permitting the department to over-rule case law and declare this type of a discretionary trust to be an available asset for eligibility purposes. Cf. MINN. STAT. ANN. § 501B.89 (West Supp. 1994) (making unenforceable any provision in a trust which attempts to make assets unavailable to a beneficiary if that beneficiary applies for or is declared eligible for any type of public assistance program). The dissent did not agree that the department had superseded judicial precedent by its regulation. *Hecker*, 527 N.W.2d at 236 (VandeWalle, C.J., dissenting). The dissent contended that the department has specific power under state statute to enact the regulations necessary to determine medical assistance eligibility for needy persons. *Hecker*, 527 N.W.2d at 236; see N.D. CENT. CODE § 50-24.1-02(3) (1991) (limiting eligibility for medical assistance to those meeting criteria established by the department of human services). The dissent stated that the majority's reliance on *Bohac v. Graham* was misplaced because the court in *Bohac* decided the issue of what the trustor intended, and not the issue of how the trustor's intent affects the applicant's eligibility for medical assistance under the department regulations. *Hecker*, 527 N.W.2d at 236-37 (VandeWalle, C.J., dissenting).

74. *Hecker*, 527 N.W.2d at 232.

75. *Id.*; see 20 C.F.R. § 416.1201(a)(1) (1995); 45 C.F.R. § 233.20(a)(3)(iii) (1994).

76. *Hecker*, 527 N.W.2d at 233.

77. *Id.*; see 42 C.F.R. § 435.601(d)(3) (1994).

78. N.D. ADMIN. CODE § 75-02-02.1-31(3) (1994).

79. *Hecker*, 527 N.W.2d at 233-34.

80. *Id.* at 234; see *In re McMullen*, 470 N.W.2d 196 (N.D. 1991); *Bohac v. Graham*, 424 N.W.2d 144 (N.D. 1988); *Penuel v. Penuel*, 415 N.W.2d 497 (N.D. 1987).

81. *Hecker*, 527 N.W.2d at 235.

82. *Id.*

needy person.<sup>83</sup> As a result, the Hecker trust was not found unenforceable since it did not conflict with public policy.<sup>84</sup>

Similarly, the court stated the Hecker trust could not be successfully challenged on the public policy grounds of a parent's duty to support a child.<sup>85</sup> The court said that North Dakota public policy concerning this issue is well established.<sup>86</sup> The burden of supporting the disabled falls on the state once they reach adulthood.<sup>87</sup> The court noted that although Wilhelmina Hecker was Herman's mother, she had no legal duty to support her disabled son in his adulthood.<sup>88</sup> The court stated the lack of legal duty to support is a factor to be considered when attempting to make an inference of the settlor's intent.<sup>89</sup>

The court also rejected the Department's contention that most individuals with substantial assets would prefer to support needy relatives rather than forcing them to rely on public assistance on the ground that public assistance was no longer necessarily seen as charity.<sup>90</sup> The majority, adopting a statement of the Wisconsin Supreme Court, concluded that there was no public policy prohibiting an individual with no duty to support from giving a charity patient "extra comforts or luxuries."<sup>91</sup>

Finding no violation of public policy, the majority ruled that the Hecker trust was a discretionary trust, its assets not "available" for the purpose of determining Medicaid eligibility.<sup>92</sup> The court concluded that the Department could not, absent legislative authority, include the trust assets in evaluating Herman's assets.<sup>93</sup> The court reversed and remanded

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83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*; accord *Freyer v. Freyer*, 427 N.W.2d 348, 340 (N.D. 1988) (holding that parental duty to support generally terminates at the age of majority); N.D. ADMIN. CODE § 75-02-02.1-25 (1994) (considering the financial ability of a parent of a disabled child in determining Medicaid eligibility only until the child reaches eighteen years of age).

89. *Hecker*, 527 N.W.2d at 236.

90. *Id.* For similar treatment in other jurisdictions, see for example, *Town of Randolph v. Roberts*, 195 N.E.2d 72 (Mass. 1964), *Estate of Escher*, 407 N.Y.S.2d 106 (Sur. Ct. 1978), *Lang v. Pennsylvania Dept. of Pub. Welfare*, 528 A.2d 1335 (Pa. 1987).

91. *Hecker*, 527 N.W.2d at 236 (citing *In re Wright's Will*, 107 N.W.2d 146, 149 (Wis. 1961)). In a strong dissent, Chief Justice VandeWalle noted his earlier and continuing opposition to a public policy which would allow eligibility for public assistance while the recipient's family holds substantial assets. *Id.* (VandeWalle, C.J., dissenting) (quoting from his dissent in *Nielson v. County Soc. Servs. Bd.*, 395 N.W.2d 157, 163 (N.D. 1986)). Admitting that the majority's position was supported in other jurisdictions, Chief Justice VandeWalle nevertheless contended that it ran contrary to the North Dakota ethos. *Id.*

92. *Id.*

93. *Id.*

the matter to the Department, instructing them to redetermine Herman's eligibility for Medicaid without considering the trust corpus as an asset.<sup>94</sup>

#### IV. IMPACT

As a result of *Hecker*, a disabled individual's eligibility for medical assistance benefits may be affected if the applicant is a trust beneficiary. Under *Hecker*, assets held in a support trust may affect a beneficiary's eligibility for public assistance programs. However, assets held in a discretionary trust are not available to, or under the control of, the beneficiary and do not affect the beneficiary's eligibility.

As a result of this distinction, a settlor who wishes to create a special needs or supplemental trust to benefit a disabled individual without making him or her ineligible for governmental assistance must create a discretionary trust. A settlor must clearly evidence his or her intent by including in the trust instrument a statement of purposes or goals. An incorporation of the statement of purposes is especially important if the state in which the trust is executed is one, like North Dakota, in which a settlor's intent determines how the trust is classified.

Additionally, the trust instrument must clearly preserve for a trustee the sole discretion to distribute trust assets as he or she sees fit. The sole discretionary power of a trustee completely removes the trust assets from the control of a beneficiary. Following *Hecker*, assets which are unavailable to a beneficiary do not affect his or her eligibility for public assistance.

Although the *Hecker* court clarified the relationship between availability of trust assets and eligibility for public assistance programs, this issue will continue to require judicial review and refinement. This review will be necessitated by the continually rising costs of medical and institutional care for the disabled and aged. As the number of elderly in need of health care steadily rises in the coming years, the financial burdens on the states will likewise increase. States will likely respond with attempts to insure that only those who have no alternative means of support receive government assistance. In determining eligibility, there will be an increased focus on identifying all available resources.

The availability of resources held in a discretionary trust may be affected by future legislative action. First, state agencies may request

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94. *Id.* Of interest is the Department's argument in a petition for rehearing that North Dakota, as a "section 209(b) state," should be allowed to use eligibility criteria for the "medically needy" which are more restrictive than that of the SSI program. Pet. for Reh'g at 1, *Hecker* (No. 94-0180). However, the court dismissed the petition without addressing North Dakota's section 209(b) status. *Hecker*, 527 N.W.2d at 237. In dismissing, the court concluded that "[a] state's § 209(b) status does not insulate it from complying with the federal requirement that assets be actually available to an applicant." *Id.* (citing *Dokos v. Miller*, 517 F. Supp. 1039, 1042 (N.D. Ill. 1981)).

legislative changes in the public assistance statutes so that trust assets could be declared available for the purpose of determining eligibility for state assistance programs. Secondly, the federal government may amend the Medicaid and SSI eligibility statutes to include all trust interests in the list of available assets.

Any such actions by the state and/or federal government would most likely have a chilling effect on families contemplating setting up a trust to support disabled relatives. As a result, a family may choose to prevent a disabled family member from owning or having an interest in any assets. This type of action would serve to impoverish the disabled individual by discouraging any type of familial support. Consequently, a state could increasingly find itself providing support for disabled individuals from affluent families who had previously been receiving support from their families and had not needed public assistance. Keeping in mind the rising costs of health care, the end result would most likely be an overall decrease in benefits to those on assistance, including those with legitimate needs. This result would be accompanied by an increase in the financial burden on the state.

To combat just such a result, a state may wish to limit the extent to which it may seek indemnification from a beneficiary's trust assets.<sup>95</sup> Under this type of limitation, the families of a disabled trust beneficiary would be required to cooperate with the state by providing a portion of the trust assets for the support for the disabled individual. This alternative allows a state to provide only that support which is genuinely not available to the individual, while protecting some of the trust corpus for the future support of the disabled beneficiary. Limiting liability in such a manner would not discourage families from providing trusts to benefit disabled relatives in the same way that breaking the trust would.

If either the income or the principal of a discretionary trust were seized by the state for the support of a needy beneficiary, the likely result would be the exhaustion of the trust.<sup>96</sup> Mindful of the high costs of medical and institutional care, it is highly probable that such assets of the trust would be of no real consequence in assisting the state with the support of a disabled or institutionalized beneficiary. However, if a state honors the settlor's intent of a properly established discretionary trust, the trust would be able to provide for the disabled beneficiary an opportunity of a better life, one funded beyond the bare basics of public assistance.

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95. See, e.g., TEX. REV. CIV. STAT. ANN. art. 5547-300 § 61(g) (West 1991) (providing that trust assets are only liable for government care to beneficiaries within certain limits).

96. Lawrence A. Frolik, *Discretionary Trusts for a Disabled Beneficiary: A Solution or a Trap for the Unwary?*, 46 U. PITT. L. REV. 335, 371 (1985).

