

**IN THE COURT OF APPEALS OF IOWA**

No. 0-441 / 09-1947  
Filed December 22, 2010

**IN THE MATTER OF THE ESTATE OF  
BERNICE B. ROTH, Deceased,**

**RODRICK D. ROTH and  
KAREN D. SWARTZENDRUBER,**  
Intervenors-Appellants,

**vs.**

**IOWA DEPARTMENT OF HUMAN SERVICES,**  
Claimant-Appellee.

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Appeal from the Iowa District Court for Henry County, Gary G. Kimes,  
Judge.

Appeal from the district court ruling finding a settlement agreement void  
and determining the decedent had an interest in her husband's estate at the time  
of her death. **AFFIRMED IN PART AND REVERSED IN PART.**

Rebecca Boyd Dublinske, David M. Repp, and Christine Halbrook of  
Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, for appellants.

Benjamin Chatman, Des Moines, for appellee.

Thomas J. Miller, Attorney General, Barbara E.B. Galloway, Assistant  
Attorney General, Human Services Division, for appellee.

Heard by Sackett, C.J., and Potterfield and Tabor, JJ.

**SACKETT, C.J.**

The Department of Human Services filed liens in the Estates of Bernice Roth and her husband Gilbert Roth seeking to recover the cost of providing Title XIX medical assistance to Bernice. Bernice and Gilbert's three children, Lynn G. Roth, Karen D. Swartzendruber, and Rodrick D. Roth were beneficiaries under the wills of each parent. Each will specified that a remainder trust shall be created and the trustee would have sole discretion to use the funds for the support and maintenance of the surviving spouse. Upon the death of the surviving spouse, the trustee was instructed to divide the remaining funds equally among the surviving children. The children, individually and as executors of Bernice's estate, entered into an agreement with the Department to pay a sum certain to the Department from Bernice's estate in partial settlement of the claim and to authorize a distribution to the heirs in Gilbert's estate, but to withhold a sum certain pending resolution of the Department's claim in Gilbert's estate. The district court voided the settlement agreement on a finding that at the time the settlement was made the parties mistakenly believed the assets of Gilbert's estate were held in trust. It determined no trust was ever actually created and, since the parties' agreement was based on this mistake of fact, it was void.

The court also found that even though a trust was never in effect, Bernice had an interest in the assets of Gilbert's estate at the moment before her death and at her death her estate succeeded to all her interest in his estate pursuant to Iowa Code section 249A.5(2)(c) (2007). It concluded this interest can be

reached by the Department, which paid the cost of her necessary medical care, support, and maintenance. Karen and Rodrick<sup>1</sup> appeal from these findings.

**I. SCOPE OF REVIEW.** Probate matters are equitable in nature including objections to final reports and claims in probate regarding trusts. *In re Estate of Gist*, 763 N.W.2d 561, 563 (Iowa 2009). We review de novo. Iowa R. App. P. 6.907.

**II. BACKGROUND.** Bernice Roth received Title XIX medical assistance from 1993 until her death on January 1, 2008. Bernice and her husband Gilbert, who died in July of 1994, at the time of their deaths, each owned an undivided 47.5%<sup>2</sup> interest in a 131.28 acre farm in Washington County, Iowa. Both died testate and their wills made provision for the creation of what was designated as “A Remainder Trust” for the benefit of the other spouse to pay for that spouse’s care, support, and maintenance.<sup>3</sup> The trust was neither created nor funded.

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<sup>1</sup> Lynn, the third child, settled and is not a party to this litigation.

<sup>2</sup> Apparently a 5% interest portion of the farm was sold to a grandchild so Bernice could qualify for Title XIX assistance.

<sup>3</sup> Gilbert’s will in relevant part provided:

Article 4. Remainder Trust. The rest, residue and remaining assets of my estate, after setting apart the specific gifts and marital deduction, if any, shall comprise the remainder trust and shall be held, administered and distributed as follows:

(a) During the life of my spouse, if my spouse survives, the trustee shall pay to or for the benefit of my spouse so much of the income and principal of the trust in such manner and proportions as the trustee, in the trustee’s sole discretion, deems necessary for the reasonable care, health, education, support and maintenance of my spouse. Any net income not so distributed may be accumulated and added to the principal of the trust at convenient intervals.

Article 6. Preservation, Termination and Duration of Trusts. Each trust herein created shall terminate upon fulfillment of its purpose according to its terms subject to the following:

Instead, after Gilbert's death, Rodrick Roth, as executor of the estate, obtained an order to keep the estate open during Bernice's lifetime. Gilbert's estate remained open for over a decade and twelve annual reports were filed. Annual applications were made and the district court approved the estate remaining open because there was fractional ownership of land.

Following Bernice's death the farm was sold and 47.5% of the proceeds went to each estate. Gilbert's estate, never having been closed, received his share of the farm proceeds. The Department filed claims for reimbursement for Bernice's care in both estates. While this matter was in dispute, the beneficiaries of Bernice's estate made an agreement on December 22, 2008, with the Iowa Department of Human Services. Apparently believing that the trust set forth in Gilbert's will had been created, they agreed that Bernice's estate had cash of \$241,932.44 from the farm sale proceeds, of which \$220,000 would immediately be paid to the Department and the remaining funds would be held by the executors to pay any additional cost of administration including attorney fees and costs related to the claim. As to Gilbert's estate, it was agreed that the executor could obtain an order authorizing distribution to the beneficiaries provided that \$140,861.17 be put in a separate, interest-bearing account in the name of Bernice's estate pending final resolution of the claim filed by the Department.

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(a) Neither the principal nor the income of any trust herein shall be liable to be reached in any manner by the creditors of any beneficiary, and no beneficiary shall have any power to sell, assign, transfer, encumber or in any other manner to anticipate or dispose of his or her interest in any such trust or the income produced thereby prior to the actual distribution to the beneficiary.

The question of the Department's entitlement to assets in Gilbert's estate came on for hearing on October 29, 2009. On November 30, 2009, the district court filed a ruling. The court found no trust had been created, since Gilbert's estate remained open during Bernice's lifetime, and no distributions were made until the settlement agreement with the Department was made. The court also found that because the parties' agreement was based on mistaken facts, it could not enforce the agreement. The district court further found the Department could enforce its lien in total against the assets of Gilbert's estate because Bernice had an interest in his estate on her death. The district court reasoned Bernice could have enforced her interest by forcing the executor of Gilbert's estate to create a trust to provide for her care as the will directed. The court concluded that at her death, her estate succeeded to her interest in Gilbert's estate pursuant to Iowa Code section 249A.5(2)(c). The court also opined if a trust had been created it would have reached the same result.

**III. DID THE DISTRICT COURT ERR IN NOT ENFORCING THE AGREEMENT?** The beneficiaries contend that the district court erred in finding the agreement was not enforceable because the parties mistakenly believed they were dealing with a trust not an estate. They contend the mutual mistake of fact merely makes the agreement voidable, not void, and the contract cannot be voided unless one of the parties seeks avoidance. They contend neither the beneficiaries nor the Department asked to declare the contract invalid and this finding should be reversed.

The Department contends that the beneficiaries did not preserve error on this claim, because they did not object when the Department told the court that the trust had not been created. We disagree. The Department contends it raised the issues when the attorney for the Department advanced to the district court at the beginning of the hearing that this case was “about a trust or about an estate,” and while this statement was made the beneficiaries were silent. The Department contends this means the beneficiaries tacitly agreed the issue regarding a mutual mistake about the contract existed.

The statement the Department relies on is:

The Department agrees with the estate that this is fact specific based mostly on the interpretation of the Will and the interpretation of statutes as they may apply. We preliminarily believe that the Court must determine if this is a case about a trust or a case about the estate. In a recent filing the beneficiaries of the estate said no trust was ever created. That raises the question of is this even a trust case at all. So we think as part of its ruling the Court will have to decide was there a trust or not. Although that may affect the analysis of the case, we don't believe it affects the result. Whatever Gilbert Roth had at the time of his death, Bernice had an interest pursuant to the terms of the will. The only things the Court needs to consider are the objections to the final report and the resistance to the objections to the final report.

The Department filed no action to void the contract. Even if it could have raised the issue for the first time in an initial statement at the commencement of the hearing on a claim in probate, we do not believe that the attorney's statement was sufficient to put the beneficiaries on notice that the Department wished to avoid the contract. The contract should be reinstated, despite the mutual mistake of fact, since neither party sought to void it.

In *First State Bank v. Shirley Ag Service, Inc.*, 417 N.W.2d 448, 452 (Iowa 1987), the court said:

An error in expressing an agreement reached by parties, such as the erroneous reduction to writing of a term agreed upon, is a mistake as to a basic assumption underlying the contract. Such a mistake does not, however, render a contract void; it only renders the contract voidable by the adversely affected party to the contract. In the present case, neither party to the security agreement seeks to avoid its effect. Against the rest of the world . . . the agreement is valid.

In *Nichols v. City of Evansdale*, 687 N.W.2d 562, 571 (Iowa 2004), the court considered a case where a land swap was made and it was undisputed that neither party was aware the sewer lines ran under the property. The court opined the parties could not have reached an agreement with respect to the sewer lines and the mutual mistake would make the contract voidable by the parties. *Nichols*, 687 N.W.2d at 571. But, it clarified, “a mutual mistake in the formation of a contract does not render it void; it merely renders it voidable.” *Id.* (emphasis supplied). A voidable contract is one where a party, by a manifestation of the election to do so, can avoid the legal relations created by the contract. *Id.* But “if neither party seeks avoidance, the court cannot void the contract, and the contract remains valid.” *Id.* If there has been no action to void the contract, a court’s reformation of it is error. *Id.* at 571- 72. In the record before us, neither party sought avoidance of the contract; therefore we reverse that part of the district court’s decision that voided the settlement agreement.

**IV. BERNICE’S INTEREST IN GILBERT’S ESTATE.** The beneficiaries contend the district court erred in holding Bernice had an interest in the assets of Gilbert’s estate at the moment before her death. They contend she did not have an interest because (1) the trust was never funded, (2) Iowa Code section 633A.4702 supports their position, (3) Gilbert’s estate remained open until after

Bernice's death, and (4) Bernice, though notified, never challenged the order leaving the estate open nor did she object to annual reports filed in the estate. They further contend that the spendthrift provision of Gilbert's will prevented the executor and or trustee from having to pay creditors or the Department.

On the beneficiaries' last argument, the Department takes the position that since Medicaid estate recovery became effective in Iowa on July 1, 1994,<sup>4</sup> the legislative intent has been for Medicaid estate recovery programs to satisfy their claims both from assets that are subject to probate and those that are not. The Department uses a trust analysis, which it contends supports the district court's decision. It argues that because the language in Gilbert's will makes no distinction between the trustees' use of income and principal, and its language shows Gilbert's intent for the trustee to have discretion to support Bernice, the trust would be a "discretionary trust with standards." It contends in *Gist*, 763 N.W.2d at 565, and in *In re Barkema Trust*, 690 N.W.2d 50, 56 (Iowa 2004), the court found these types of trusts subject to Medicaid estate recovery. In addressing the parties' arguments we find the Iowa Supreme Court cases of *Gist* and *Barkema* provide some guidance.

**V. DISCRETIONARY TRUST WITH STANDARDS.** The Department argues Gilbert in his will directed there be established a trust that would give Bernice the right to compel minimum support from the trust. Such a trust would be classified as a discretionary trust with standards under *Gist*, 763 N.W.2d at 565-66. The beneficiaries contend *Gist* relies on different standards; for in *Gist*

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<sup>4</sup> See 1994 Iowa Acts ch. 1120 § 10.



there was a requirement of distribution at least quarterly, while here the trust gives the trustee discretion as to the manner and amount of payments. See *Gist*, 763 N.W.2d at 564. We disagree, noting the court did not discuss the need for quarterly payments in determining the *Gist* trust was a discretionary trust with standards. See *id.* at 565-66. In *Gist*, the court determined a trust that gave the trustee the discretion to distribute the income of the trust to the beneficiary “as may be necessary to provide her with a reasonable standard of living, considering any other means of support or resources which she may have,” and also gave the trustee discretion to invade the principal or corpus to provide the beneficiary with a reasonable standard of living, was a discretionary trust. *Id.*; see also *Barkema*, 690 N.W.2d at 564 (finding similar language created a discretionary support trust).<sup>5</sup>

Even if we are inclined to agree with the Department that the trust the will directed to be funded would have been a discretionary trust with standards, inquiry into whether the Department is entitled to the assets of Gilbert’s estate does not end here.

The beneficiaries further argue that Bernice did not have an interest in Gilbert’s estate at the moment immediately before her death because of Iowa Code section 633A.4702. This statute was enacted prior to *Gist* but the court did not consider the statute in its analysis there.

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<sup>5</sup> In *Gist*, the court noted that The Restatement (Third) of Trusts § 50 (2003), had classified a discretionary support trust as a discretionary trust with standards and said, “Regardless of whether we refer to a trust as a discretionary support trust or a discretionary trust with standards, they are the same animal.” *Gist*, 763 N.W.2d at 565.

Iowa Code section 633A.4702 provides:

In the absence of clear and convincing evidence to the contrary, language in a governing instrument granting trustee discretion to make or withhold a distribution shall prevail over any language in the governing instrument indicating that the beneficiary may have a legally enforceable right to distributions or indicating a standard for payments or distributions.<sup>[6]</sup>

The Department acknowledges this statute gives priority to the trustee's discretion and does not give priority to a beneficiary's interest to receive distributions, but argues the statute creates an exception to the trustee's priority when "clear and convincing evidence to the contrary" rebuts the general rule. The Department argues "clear and convincing evidence" supports a contrary finding here.

As clear and convincing evidence of Gilbert's intent to allow the Medicaid claim against the trust assets, the Department points to language in the will stating "my primary concern is the welfare of my spouse," and the fact Gilbert did not require the accumulation of trust assets for remainder beneficiaries. It also argues that, considering the will was executed in 1982 prior to the estate Medicaid recovery program enacted in 1994, Gilbert could not have intended to shield trust assets from payment to the Department. Prior to his death, the Department claims, Gilbert knew Bernice required nursing home care.

This is clear and convincing evidence Gilbert intended that the trustee provide for Bernice's reasonable care, health, and maintenance, which was paid for not from the trust but from Medicaid payments.

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<sup>6</sup> This statute was originally in the probate code but was moved to the Iowa Trust Code on July 1, 2005. It followed *Barkema* but preceded *Gist*.

The Department also notes that section 633A.1105 provides:

The terms of a trust shall always control and take precedence over any section of this trust code to the contrary. If a term of the trust modifies or makes any section of this trust code inapplicable to the trust, the common law shall apply to any issues raised by such term.

The Department contends common law principles, as well as the evidence, require the court to enforce its claim. Congress mandated states participating in the Medicaid program be given wide latitude in seeking recovery. See *Barkema*, 690 N.W.2d at 55–56. In *In re Estate of Laughead*, 696 N.W.2d 312, 317 (Iowa 2005), the court clearly stated “Iowa probate law does not control the determination of assets includable in a recipient’s estate for purposes of satisfying a Medicaid debt.” Furthermore in *Gist*, 763 N.W.2d at 567, while not going so far as to say Iowa trust law does not control the determination of assets includable in a recipient’s estate for purposes of satisfying a Medicaid debt, the court found Iowa common law recognizes a necessity exception to a spendthrift provision in a trust applies notwithstanding the enactment of the Iowa Trust Code, citing *In re Estate of Dodge*, 281 N.W.2d 447, 451–52 (Iowa 1979). In *Dodge*, the court applied the necessity exception despite its absence from the trust code, providing a creditor’s claim may be enforced against a trustee of a support trust subject to a spendthrift clause if

(1) the claim is for necessary goods or services, not officiously rendered, which the settler intended to be provided the beneficiary by trust funds; and (2) the withholding of payment for goods and services is not properly within the discretion granted the trustee by the trust instrument.

*Estate of Dodge*, 281 N.W.2d at 451. We believe the same reasoning applies here.

While the trustee named in Gilbert's will was given discretion to make distributions, there was no specific language allowing the trustee to withhold a distribution the trustee has deemed necessary for "the reasonable care, health, education, support and maintenance" of Bernice. We therefore apply the common-law necessity exception to permit the Department's claim against the money from Gilbert's estate that was put in a separate, interest-bearing account in the name of Bernice's estate pending final resolution of this matter.

We affirm on this issue.

**AFFIRMED IN PART AND REVERSED IN PART.**