2014 WL 5091824 (N.D.) (Appellate Brief)
Supreme Court of North Dakota.

Shirley BLEICK, Appellant,
v.
NORTH DAKOTA DEPARTMENT OF HUMAN SERVICES, Appellee.

No. 20140103.
July, 2014.

Appeal from the District Copurt Burleigh County, North Dakota South Central Judicial District
Honorable David E. Reich
District Ct. No. 08-2013-CV-00365

Brief of Appellee

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ISSUE

Under Medicaid eligibility law, all assets an applicant has a legal right to access are available. A life estate holder has a right to the income derived from the land and has a legal claim against anyone who keeps that income. Brian Bleick is attorney in fact for his mother, Shirley Bleick, who suffers from severe dementia. Therefore, Brian owes Shirley fiduciary duties. Brian kept Shirley's life estate income for himself, and requested Medicaid to pay Shirley's nursing home bill. Is Shirley's claim to recover this life estate income an available asset?

STATEMENT OF THE CASE

This is an appeal under N.D.C.C. ch. 28-32 from an Order issued by the Executive Director of the Department of Human Services ("Department") finding Appellant Shirley Bleick's ("Shirley") assets exceed the maximum allowed under Medicaid eligibility rules. (Appendix (App.) 16-27). At issue is Shirley's claim to recover her life estate income, a right valued well over the $3,000 Medicaid asset limit. (*Id.*)

I. Statement of the Facts.

Shirley and Alvin Bleick ("Alvin") owned a homestead and farmland in Grant County. (R. at 114, 117-18). In 1985, they deeded the SE1/4 of Section 27 to their son, Brian Bleick ("Brian"), and his wife. (R. at 193). Alvin died in July 1988 and in October 1988, Shirley deeded the W1/2 and the NE1/4 of Section 27 and the SE1/4 of Section 28 to Brian, retaining a life estate in that land. (R. at 116-17, 194). The life estate totals 640 acres: 480 acres in Section 27 and 160 acres in Section 28. (R. at 194, 198-200). Much is fertile cropland; some is pasture land. (R. at 53, 115, 195-97).

Brian testified Shirley said in 1988 she did not want rent for the life estate land. (R. at 118-22). Brian farmed the life estate land rent free until 1992, when he began renting a portion to Kerry Ulmer ("Ulmer") for $20 per acre. (R. at 118-19, 123, 195-96). The current lease remains at $20 per acre, unchanged since it was entered in 1992. (R. at 122-23, 197). Ulmer pays the same rent he was paying 20 years ago. (R. at 195-97). This is not a valid reflection of trends in farmland rental rates, which have increased over the past twenty years. (R. at 202-41).

Brian continued using the life estate land rent free, although Brian testified some is currently idle because in his opinion, it is unusable due to bad fencing. (R. at 118-19, 122, 141-42). Brian testified he believes he has a right to the rent money, that he has not used any of it on Shirley's behalf, and Shirley received none of the life estate money. (R. at 122-25, 146-47). Brian testified he believed Shirley was aware of this arrangement and she has had nothing to do with the land since 1988. (R. at 122, 125).

Shirley saw an attorney in November 1999, and discussed releasing the life estate. (R. at 27-28). Shirley worked as a county tax assessor for over twenty years and was very familiar with land values. (R. at 113-14). Despite Shirley's alleged acquiescence to the arrangement, ultimately, she chose not to release the life estate and it remains in effect. (R. at 29).

Shirley has severe dementia or Alzheimer's; she was not present and did not participate in the hearing. (R. at 4, 113). Brian became Shirley's attorney in fact on June 16, 1997. (R. at 163-66). Brian testified she had difficulty managing her own affairs since 1997 and he has been taking care of Shirley's **finances** since early 2000 because she was unable to do it. (R. at 127, 148).

Shirley entered a basic care facility in 2004 and her funds were used to pay for her care until her funds were exhausted. (R. at 126-28). Although Shirley has a life estate interest and a legal right to receive the life estate income, Brian continued his free use of the land, kept the income for himself and applied for Medicaid for Shirley in 2007. (R. at 128, 130, 167-81). Brian disclosed the life estate on the application; however, the eligibility worker, who was a good friend of Shirley's, failed to properly consider the life estate when processing the application. (R. at 43-44, 94-95, 151, 174).

Because the eligibility worker did not process Shirley's application correctly, Shirley erroneously received nearly $128,000 in Medicaid benefits from 2007 until 2011, when the eligibility worker's error was discovered during an audit conducted by Janet

Helbling ("Helbling") of the State Medicaid office. (R. at 38-39, 161). The eligibility worker clearly knew how to process life estate cases correctly, as evidenced by other cases she completed that were also audited, but in Shirley's case, the life estate was ignored upon application and during each annual review. (R. at 43-46, 49, 71, 242-74). The eligibility worker is no longer employed with the county. (R. at 81-82).

In June 2011, Shirley's Medicaid benefits were discontinued and her case closed. (R. at 182-84). Brian reapplied for benefits in July 2011. (R. at 185-92). The denial notice was sent in August 2011, using a $9,733 estimated annual value of the life estate income Shirley should have received over the years because the life estate acreage details were then unknown. (R. at 161-62). No independent appraisal information regarding appropriate rental value of the land was provided so Helbling used Farm Service Agency information and County Rents and Values to prepare a more detailed account of the rental income amount imputed to Shirley. (R. at 40, 82, 84, 198-241). Brian submitted nothing to the Department to substantiate the rental values being less than average. (R. at 147). Helbling noted $20 per acre was the average rental value in 1992 when the contract was first signed, but average per acre rental had increased consistently and substantially since that time. (R. at 56, 67, 201-41).

Medicaid was denied because Shirley's right to claim the life estate income is a countable asset that is available, placing Shirley above the asset limit. (R. at 96-98, 161-62). Because the case involved an eligibility worker's error, the Department did not ask for repayment of the $128,000 already paid out in Medicaid benefits. (R. at 39, 80, 98).

II. Statement of the Proceedings.

An evidentiary hearing was held May 17, 2012. (R. at 3). Shirley did not participate in the proceeding due to severe dementia or Alzheimer's. (R. at 4, 113).

After the parties filed post-hearing briefs, the Administrative Law Judge ("ALJ") submitted the Recommended Findings of Fact, Conclusions of Law and Order to the Executive Director of the Department. (R. at 320-32). The Executive Director issued an Amended Findings of Fact, Conclusions of Law and Final Order that affirmed the County's action. (R. at 306-17). Shirley requested reconsideration, which was deemed denied. (R. at 297-304). Shirley appealed the Executive Director's Order to the District Court. (App. 3-10). The District Court affirmed the Department's decision. (App. 29-35). This appeal followed. (App. 36).

LAW AND ARGUMENT

I. Summary of the Argument.

As a life estate holder, Shirley is entitled to possession and use of the life estate land, including rents and profits the land generates during her life, as long as the life estate endures. Brian testified Shirley allowed him free use of the life estate in 1988; she did not charge him rent. In 1992, Brian rented some of the life estate land to Ulmer and continued his free use of the land. Brian also kept Ulmer's rental money instead of giving it to Shirley. In 1997, Brian became Shirley's attorney in fact because she was getting forgetful.

Brian testified he believed Shirley was aware of the arrangement. Even assuming she was aware, this does not mean Brian could continue his free use of Shirley's life estate land and continue keeping Ulmer's rent money forever. Shirley saw an attorney in 1999 to discuss releasing the life estate. She chose NOT to release it and it remains in effect; therefore, under the law, Shirley has legal authority to assert her right to the life estate income, regardless of whether it was gifted in the past.

Over the years, Shirley's mental capacity deteriorated and Brian handled all of her **financial** matters. By 2004, she was unable to live independently due to dementia. Shirley's money was depleted, but she lacked the mental capacity to assert her right to the life estate income on her own.

Further, Brian, the person entrusted with asserting Shirley's right to this income as her attorney in fact, is the very person profiting from not asserting her right to this money by keeping it for himself and using Shirley's life estate land for free. Although Brian has the lawful power to give the life estate rent to Shirley without any legal proceedings, he believes he can keep the money and continues to do so. Brian has breached his fiduciary duties to Shirley by continuing his free use her life estate land and keeping the life estate rent, even after Shirley became destitute and he was obligated to support her. Therefore, Shirley has a legal claim against Brian, resulting in Shirley's ineligibility.

Under Medicaid eligibility law, all assets an applicant has a legal right to access are considered available to an applicant. This includes assets an applicant would have to take legal action to make available. The value of this asset is equal to what the applicant could receive if the applicant were to take legal action. The value of Shirley's right to the life estate income exceeds the $3,000 Medicaid asset limit; therefore, Shirley is ineligible.

II. Scope of Review.

A court's review of an administrative appeal is limited. N.D.C.C. § 28-32-49 The agency's decision should be affirmed if its findings of fact are supported by a preponderance of the evidence, its conclusions of law are supported by its findings of fact, its decision is supported by the conclusions of law, its decision is in accordance with the law and does not violate the claimant's constitutional rights, and if the agency's rules or procedures did not deprive the claimant of a fair hearing. *Kryzsko v. Ramsey County Soc. Servs.*, 2000 ND 43, ¶5, 607 N.W.2d 237. The reviewing court does not make independent findings of fact or substitute its judgment for that of the agency. *Bohac v. Graham*, 424 N.W.2d 144, 145 (N.D. 1988).

"Ordinarily, determinations of an administrative body are presumed to be correct and valid." *Barnes County v. Garrison Diversion Conservancy Dist.*, 312 N.W.2d 20, 25 (N.D. 1981). An agency is also afforded a "reasonable range of informed discretion in the interpretation and application of its own rules." *In re Bottineau County Water Res. Dist. v. N.D. Wildlife Soc'y, 424 N.W.2d 894, 900* (N.D. 1988).

Although interpretations of administrative regulations are questions of law and are fully reviewable, "[w]hen an administrative agency's interpretation of a regulation does not contradict the clear and unambiguous language of the regulation, its interpretation is entitled to some weight." *Americana Healthcare Ctrs. v. N.D. Dep't of Human Servs., 510 N.W.2d 592, 594* (N.D. 1994). "[A]n administrative agency's interpretation of its own rules is entitled to some deference." *Hakanson v. N.D. Dep't of Human Servs., 479 N.W.2d 809, 814* (N.D. 1992). This Court has consistently accorded an administrative agency "a reasonable range of informed discretion in the interpretation and application of its own rules." *Bottineau County*, 424 N.W.2d at 900. *See also Americana Healthcare Ctr. v. N.D. Dep't of Human Servs., 540 N.W.2d 151, 153* (N.D. 1995) (recognizing the basic principle that "'determinations of administrative bodies are presumed to be correct..." and "'the expertise of the agency is entitled to respect and appreciable deference."' (citations omitted).) The Department's interpretation of its rules in this case is a reasonable construction of the rules.

Finally, the court reviews the Findings and Order of the Department, not the recommendations of the ALJ. *See Schultz v. N.D. Dep't of Human Servs.*, 372 N.W.2d 888, 892 (N.D. 1985). In *Schultz*, this Court stated the applicable criteria for a court's review of an administrative agency's decision, as follows:

The administrative officer deciding a case need not actually hear the witnesses testify or hear oral argument, but the officer deciding the case must consider and appraise the evidence before reaching a decision... A court's review of an agency decision does not include probing an agency decisionmaker's mental process if a hearing was given as required by law.

Id. (citation omitted).

A court is not to second guess the Executive Director's modification or rejection of an AL's recommendations if "[t]he findings, conclusions, and decision [are] sufficient to explain the rationale for not following the hearing officer's recommendation." *Id.*

Subsequently, this Court reviewed the issue in *Speedway, Inc. v. Job Service North Dakota, 454 N.W.2d 526, 527-28* (N.D. 1990), and again rejected the argument the court should review the referee's decision because, as argued therein, the referee was the only party that saw and heard the evidence and witnesses first hand. The court noted "[o]ur inquiry is limited to a review of the findings, conclusions, and decision of the agency under the appropriate standard of review." *Id.* at 528 (quoting *Schultz*, 372 N.W.2d at 892).

This Court has consistently applied this criteria. *See Houn v. Workforce Safety & Ins., 2005 ND 115,* ¶*&P& 5-7, 698 N.W.2d 271; Carlson v. Job Serv. N.D., 548 N.W.2d 389, 392-93* (N.D. 1996); *Kackman v. N.D. Workers' Comp. Bureau, 488 N.W.2d 623, 625* (N.D. 1992); *McCarter v. Pomeroy, 466 N.W.2d 562, 567* (N.D. 1991); *Marion v. Job Serv. N.D., 470 N.W.2d 609, 612* (N.D. 1991); Speedway, 454 N.W.2d at 528-29; Bottineau County, 424 N.W.2d at 902.

The Executive Director's Order explained why she rejected and amended some of the ALJ's recommended findings of fact and conclusions of law. The Executive Director found Findings of Fact #11 and the last two paragraphs under "*Discussion*" were irrelevant and deleted them. (R. at 306-07). The Executive Director found Conclusion of Law #4 to be contrary to law, explaining that under N.D. Admin. Code § 75-02-02.1-28(21), a life estate is an excluded asset for Medicaid eligibility determinations. (R. at 307). The Executive Director also found Conclusion of Law #5 to be contrary to law, explaining it is not the value of the life estate, but the value of the income owned by Shirley and kept by Brian that creates an asset exceeding the $3,000 asset limit for Medicaid eligibility. (R. at 307). The Executive Director concluded regardless of the difference in valuation between the Department's calculation and Brian's assertions of Ulmer's rent, Shirley is over the asset limit and she is also entitled to rent from Brian for his use of the life estate land. (R. at 316). This income is an available asset and Shirley presented no evidence establishing a legal action against Brian would be unsuccessful. (R. at 316-17). Finally, the Executive Director clarified the recommended order is correct in affirming the Grant County determination but rejected the rationale for the recommended order because it is contrary to law. (R. at 317). The Executive Director's findings, conclusions, and decision are sufficient to explain the rationale for not following all of the ALJ's recommendations. *See Schultz*, 372 N.W.2d at 892.

For these reasons, in reviewing the Executive Director's Order, this Court is not to "make independent findings of fact or substitute [its] judgment for that of the agency, but determine only whether a reasoning mind could have reasonably determined that the factual conclusions were supported by the weight of the evidence." Bohac, 424 N.W.2d at 145. To the extent Shirley argues the court should review the recommendations of the ALJ that were not adopted by the Executive Director, that argument is not supported in law.

The Department's interpretation of its rules is consistent with Medicaid law and should be accorded deference by this Court. Additionally, the factual findings are supported by the evidence, its decision is in accordance with the law, and this Court should uphold the Department's determination Shirley had excess assets because of her legal right to the life estate income and her claim against Brian for breach of fiduciary duty for failing to give her this income and therefore, she does not qualify for Medicaid benefits.

III. The Medicaid Program requires individuals exhaust their own assets before they can be eligible for Medicaid benefits.

The Medicaid program is a jointly **financed** federal-state program administered by the state designed to provide health care to needy individuals. 42 U.S.C. § 1396 et seq. The plan established by congress requires individuals to exhaust their assets before taxpayer revenues are used to pay for their medical care. *See N.Y. State Dep't of Soc. Servs. v. Bowen,* 846 F.2d 129, 133 (2d Cir. 1988) (quoting the Senate Report that "Medicaid is intended to be the payer of last resort, that is, other available resources must be used before Medicaid pays for the care of an individual enrolled in the Medicaid program." (citation omitted)). This Court recognized this congressional intent in *Allen v. Wessman, 542 N.W.2d 748, 752* (N.D. 1996). *See also Wahl v. Morton County Soc. Servs., 1998 ND 48,1 18, 574 N.W.2d 859.*

The Medicaid program is governed by an interplay of federal and state law and regulations. 42 U.S.C. § 1396. The Secretary of the United States Department of Health and Human Services, through the Center for Medicare and Medicaid Services, administers the program at the federal level. Each state electing to participate in the Medicaid program must establish a state plan to implement the program. 42 U.S.C. § 1396a. As long as the state establishes program terms that represent a reasonable construction of the federal standards, the state's decision will be respected by a reviewing court. *See Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 495-96 (2002).

North Dakota participates in Medicaid and designated the Department as the state agency to implement the program. N.D.C.C. § 50-24.1-01.1. The Department adopted rules to implement the program and to determine the conditions of eligibility for Medicaid benefits. *See* N.D. Admin. Code ch. 75-02-02.1.

In determining eligibility, the Department considers whether the applicant has sufficient assets to meet the costs of necessary medical care and services. N.D.C.C. § 50-24.1-02. The total value of an applicant's assets must not exceed $3,000. N.D. Admin. Code § 75-02-02.1-26(1). In making this determination, all assets available to the applicant are considered. N.D. Admin. Code § 75-02-02.1-25. Certain assets are excluded from consideration. N.D. Admin. Code § 75-02-02.1-28. However, assets an applicant has the lawful power to make available are counted. N.D. Admin. Code § 75-02-02.1-25(1). Additionally, a public official's error does not create eligibility or additional benefits for an applicant or recipient who is adversely affected. N.D. Admin. Code § 75-02-02.1-03(4).

The applicant for Medicaid benefits has the burden of establishing eligibility. N.D. Admin. Code § 75-02-02.1-02.1; *Wagner v. Sheridan County Soc. Servs. Bd.*, *518 N.W.2d 724, 729* (N.D. 1994). As discussed below, Shirley failed to meet this burden.

IV. Shirley has a legal right to the life estate income and a claim against Brian for breach of fiduciary duty because he used her life estate land for free and kept the life estate rents.

The Department's rules governing Medicaid eligibility provide, as relevant to this case, as follows:

All actually available assets must be considered in establishing eligibility for medicaid. Assets are actually available when at the disposal of an applicant, recipient, or responsible relative;... when the applicant, recipient, or responsible relative has the lawful power to make the asset available, or to cause the asset to be made available.

N.D. Admin. Code § 75-02-02.1-25(1).

This Court has a long history recognizing an asset does not have to be "in hand" to be actually available. *See Schmidt v. Ward Cty. Soc. Servs. Bd., 2001 ND 169, ¶13, 634 N.W.2d 506.* Specifically, this Court has found that having to take legal action does not mean an asset is not available. *See, e.g., Post v. Cass County Soc. Servs., 556 N.W.2d 661, 665 (N.D. 1996); Schmidt, 2001 ND 169, ¶14, 634 N.W.2d 506; Opp v. Ward County Soc. Servs. Bd., 2002 ND 45, 111, 640 N.W.2d 704; Linser v. Office of Attorney Gen., 2003 ND 195, ¶ 11, 672 N.W.2d 643.* "If an applicant has a colorable legal action to obtain assets through reasonable legal means, the assets are available and the burden is on the applicant to show a legal action would be unsuccessful." *Makedonsky v. N.D. Dep't of Human Servs., 2008 ND 49, ¶10, 746 N.W.2d 185.*

A. Shirley has the right to the life estate income.

It is well settled, as a life estate holder, Shirley is entitled to both the possession and the use of the life estate land, including the right to rents and profits generated by the land during her life, which right continues as long as the life estate endures. *See Sabo v. Keidel, 2008 ND 41, ¶12, 745 N.W.2d 661*, In 1999, Shirley contemplated releasing the life estate and even discussed it with an attorney. However, Shirley did not release the life estate and therefore, retained the legal authority to assert her right to the rent from this land, regardless of how the rent was allocated in the past. In other words, it is Shirley's legal right to start

collecting fair market rent from Brian and from Ulmer. However, Shirley suffers from severe dementia, and has been unable to assert that right on her own. It is questionable whose interests are being represented in this case.

B. Brian has a confidential relationship with Shirley which entails fiduciary duties.

Brian is Shirley's attorney in fact, and as such, an agency has been created that entails a confidential relationship with Shirley and fiduciary duties towards her. *See Alerus Fin., N.A. v. W. State Bank, 2008 ND 104, ¶ 20, 750 N.W.2d 412*. Further, a person "who disposes of assets or income to someone in a confidential relationship is presumed to have transferred the assets or income to an implied trust in which the individual is the beneficiary," N.D. Admin. Code § 75-02-02.1-33.2(18). Thus, when Shirley made Brian her attorney in fact and gave him control of her **finances**, her assets and income formed an implied trust where she is the beneficiary and he is the trustee. Because the trust is revocable, the corpus of the trust is an available asset. N.D. Admin. Code § 75-02-02.1-31.(3)(a)(1).

C. A constructive trust arose in favor of Shirley.

"'There are two types of implied trusts: resulting and constructive."' *Spagnolia v. Monasky, 2003 ND 65, ¶15, 660 N.W.2d 223* (citation omitted). "'A constructive trust has two essential elements: unjust enrichment and a confidential relationship."' *Id.* ¶ 16 (citation omitted). "A constructive trust is an equitable remedy to compel a person who unfairly holds a property interest to convey it to the rightful owner." *Id.* ¶ 15. A constructive trust is imposed to prevent the unjust enrichment of the person wrongfully interfering with the owner's possession of the property. *Loberg v. Alford, 372 N.W.2d 912, 915* (N.D. 1985).

Brian, as Shirley's attorney in fact, is the only person who can assert her right to the life estate income. He is also the person receiving the life estate income. The evidence does not support the assertion that Shirley wished it to remain this way forever. The fact Shirley sought the advice of an attorney in 1999, thought about releasing the life estate and chose NOT to release it indicates she intended to reserve the right to get the life estate income at some point in the future; likely when she needed it, after her own funds ran out in 2007. However, by that time, she had dementia and was unable to assert her right to the income.

However, instead of acting on Shirley's behalf and giving her the life estate income, Brian continued using the land for free and keeping Ulmer's rent money; in effect, transferring Shirley's money to himself. Therefore, a constructive trust arose in favor of Shirley due to Brian unjustly enriching himself by interfering with Shirley's right to this money. *See Roberts v. N.D. Dep't of Human Servs., 2005 ND 50, ¶&P& 12-13, 692 N.W.2d 922; Allard v. Johnson, 2006 ND 243, ¶ 6,* 724 N.W.2d 331.

Certain trust statutes relied upon in the cases cited above were repealed in 2007 when the North Dakota Uniform Trust Code ("UTC") was adopted. *See* 2007 N.D. Sess. Laws ch. 549, § 27 (repealing N.D.C.C. ch. 59-01 and adopting UTC). However, the common law of trusts and principles of equity supplement the UTC. N.D.C.C. § 59-09-06. Thus, case law dealing with trusts still is good law.

D. The Uniform Trust Code provides a remedy to recover the lost life estate income.

The statutes under the UTC also apply. As Shirley's attorney in fact, Brian is her agent. See *Alerus Fin., 2008 ND 104, ¶20, 750 N.W.2d 412*. As Shirley's agent, Brian cannot do any act that a trustee is forbidden to do by any of the UTC provisions. N.D.C.C. §&S& 3-02-05; 59-09-01. N.D.C.C. § 3-02-05 "establishes the general rule that an agent is a fiduciary and has an obligation to his principal analogous to that of a trustee towards his beneficiary, and that the acts of the agent will be judged with substantially the same degree of strictness as those of a trustee." *In re Estate of Mehus, 278 N.W.2d 625, 631* (N.D. 1979). The applicable standard for a trustee is set forth in the UTC. *See* N.D.C.C. Chs. 59-09 through 59-19.

The UTC requires a trustee administer the trust in good faith. N.D.C.C. § 59-16-01; see also N.D.C.C. § 59-16-02 (trustee shall administer the trust solely in the interest of the beneficiary); N.D.C.C. § 59-16-09 (trustee shall take reasonable steps to protect

the trust property); N.D.C.C. § 59-18-01 (trustee's violation of a duty to the beneficiary is a breach of trust). A transaction involving the trust property is presumed to be affected by a conflict between the trustee's personal interest and the fiduciary duty if it is entered into by the trustee with the trustee's parents. N.D.C.C. § 59-16-02(3). When a trustee obtains any advantage from a beneficiary, there is a presumption the transaction was entered without sufficient consideration and under undue influence. N.D.C.C. § 59-18-01.1. Appellant's Brief fails to address these presumptions.

The UTC also provides remedies for breach of trust, including recovering the property' proceeds to restore the value of the trust to what it would have been had the breach not occurred. N.D.C.C. §&S& 59-18-01, 59-18-02.

E. Shirley's claim against Brian for breach of fiduciary duty is worth over $3,000.

The laws, as applied in this case, establish Brian had a duty to oversee Shirley's money and property, to protect it, and to use it for Shirley's benefit, not to profit from any transaction he made as attorney in fact N.D.C.C. chs. 59-16; 59-18. Although Brian testified Shirley said in 1988 she did not want any rent, whether an agent has authorization for a particular act at a particular time depends, "not only on what the principal told the agent, but upon a great variety of other factors, including changes in the situation after the instructions were given." Burlington N. & Sante Fe Ry. Co. v. *Burlington Res. Oil & Gas Co., 1999 ND 39, ¶28, 590 N.W.2d 433* (citation omitted). By at least 2004, Shirley lacked the capacity to ratify Brian's free use of the life estate land and his retention of the life estate rents for his own use. *See* N.D.C.C. § 59-18-09. By 2007, Shirley was out of money. Brian was obligated to support her. N.D.C.C. § 14-09-10. Brian had a duty to pay for his use of Shirley's land, collect fair market rent from Ulmer, and use the income on Shirley's behalf, not keep it. Because Shirley received less than fair market value and lacks capacity to have full knowledge and understanding of all material facts concerning the transaction, the difference (or the uncompensated value) is considered an available asset for Medicaid eligibility purposes. N.D.C.C. § 59-18-09; N.D. Admin. Code § 75-02-02.1-33.2(18); Medicaid Policy Manual*(1)* 510-05-70-10(6).

Shirley has a colorable claim against Brian. Brian breached his fiduciary duties by using Shirley's life estate land for free and keeping the life estate rental income for himself, essentially transferring Shirley's money to himself, leaving her destitute. It was reasonable for the Executive Director to conclude Shirley has a right to the life estate income and her claim for breach of fiduciary duty is an available asset in excess of $3,000. (R. at 316-17). The asset is available because Shirley has a cause of action against Brian to recover the money. The Department's decision is in accordance with the law and should be affirmed.

IV. Brian failed to prove he did not violate his fiduciary duty to Shirley and failed to rebut the presumptions of conflict, insufficient consideration and undue influence.

Under N.D.C.C. § 59-16-02(3), a presumption of conflict exists between Brian and Shirley. Any transactions where Brian obtained an advantage from Shirley are presumed to have been entered into without sufficient consideration and under undue influence. N.D.C.C. § 59-18-01.1. "A relation of personal confidence triggers the presumption of undue influence for any transaction." *Estate of Wenzel-Mosset v. Nickels, 1998 ND 16, 29, 575 N.W.2d 425*. "'[I]f a person assumes a relation of personal confidence, he becomes a trustee, and any transaction he enters into with the other person by which he gains an advantage is presumed to be made under undue influence.*" Id. (quoting Estate of Zins,* 420 N.W.2d 729, 731 (N.D. 1988).

If a party establishes sufficient facts that the person who assumed a relation of personal confidence has gained an advantage from the beneficiary, the burden shifts to the other party to rebut the presumption. *See Estate of Zins,* 420 N.W.2d at 731. Brian must rebut these presumptions. Under N.D.R.Ev. 301(a), a presumption substitutes for evidence of the presumed fact until the trier of fact finds from credible evidence that the presumed fact does not exist. No credible evidence has been presented to rebut the presumptions. Brian testified Shirley told him in 1988 that she did not want any rent. He also testified he kept taking the money because she intended him to have it. As Shirley's attorney in fact, Brian was the only witness who testified as to what Shirley allegedly said. Shirley is presently incompetent and has been for some time. Shirley lacks the capacity to testify. Additionally, Shirley has been unable to manage her **finances** for over a decade. According to Brian, she was showing signs of

memory loss around the time he became attorney in fact in 1997, and he has managed her **finances** since early 2000 because she was unable to do so. Shirley moved into a basic care facility in 2004 due to her memory issues. Brian' self-serving testimony that Shirley intended him to have the life estate income is simply not credible or reliable. There is no verifying documentation, written contract, or testimony from any disinterested party. Shirley is incompetent and unable to testify as to present or past intent. Even if Shirley told Brian she did not want any rent in 1988, it is not equivalent to saying she intended him to have her life estate income *forever*.

Additional facts show the presumptions have not been rebutted. Shirley did not release the life estate when she had the capacity to do so, evidencing the fact she did not want to do it. At the time she was considering releasing the life estate, she was familiar with land values. If she wanted to release the life estate, she would have done so; instead, she chose not to release the life estate and purposefully refrained from doing so. This is evidence she intended to reserve the right to the life estate income.

Further, Brian argues he did not take the life estate rental money, but says Shirley gave it to him. (Appellant's Br. 19). The evidence contradicts this argument. Brian testified Ulmer would pay the rent directly to him. (R. at 133). Brian kept the rent; Shirley did not give it to him. In fact, Shirley never had the money in her possession.

Brian benefitted from the free use of the life estate land and life estate rental income. These transactions trigger the presumptions of a conflict, insufficient consideration, and undue influence. Brian has not rebutted these presumptions and the remedy for the breach is to recover the assets.

Moreover, it is Brian's own actions which are under scrutiny, giving him a motive to present self-serving testimony. Testimony may be uncontradicted but not credible, and a trier of fact need not accept undisputed testimony. *In re Estate of Clemetson, 2012 ND 28, ¶19, 812 N.W.2d 388.* Likewise, when a witness has an interest in a question at issue, his uncontradicted testimony need not be accepted by the fact finder. *Farley v. Champs Fine Foods, Inc., 404 N.W.2d 493, 495 (N.D. 1987).* Brian has a stake in the outcome of this case, and the Department need not accept his testimony as to Shirley's intent as credible.

Finally, Brian presented no evidence to support the contention that Shirley fully understood the circumstances and still intended to give the life estate income to Brian in the five years prior to applying for Medicaid or when she needed the money to pay for her care in 2007. To the contrary, the evidence is that by 2004 and even before, Shirley lacked mental capacity due to dementia and thus could not consent, release or ratify the transaction constituting the breach. *See* N.D.C.C. § 59-18-09. Brian obtained an advantage from Shirley that is presumed to be a conflict, entered without sufficient consideration and under undue influence. N.D.C.C. §&S& 59-16-02; 59-18-01.1. This gives rise to a legal right for Shirley to force the money to be returned to her. N.D.C.C. §&S& 59-18-01; 59-18-02.

The Executive Director considered all evidence presented during this hearing. It was reasonable for the Executive Director to conclude Shirley's claim for life estate income is an available asset in excess of $3,000. (R. at 316-17). The Department's decision is in accordance with the law and should be affirmed.

VI. Shirley failed to establish the asset is not actually available and that a legal action to obtain the asset would be unsuccessful.

It is the burden of the Medicaid applicant to prove the asset at issue is not actually available and that a legal action to obtain the available asset would be unsuccessful. *Reinholdt v. N.D. Dep't of Human Servs., 2009 ND 17, ¶ 20, 760 N.W.2d 101*. When a course of legal action is available to an applicant, the burden is on the applicant to demonstrate that the applicant would be unsuccessful in exercising the legal right. *Opp, 2002 ND 45,*¶*&P& 22-23,* 640 N.W.2d 704.

In *Opp,* this Court found Opp had the potential to obtain a partial distribution of her inheritance from her brother by recourse to the probate court. *Id.* 1 22. The Court recognized the probate court might deny Opp's request for a partial distribution; however,

the court found that did not obviate the requirement that Opp make the effort. *Id.* ¶ 23. Relying on its earlier cases, the Court explained the Medicaid applicant's responsibility, as follows:

However, speculating whether Opp would ultimately succeed in obtaining a partial distribution from the estate is not the primary inquiry under our decisions in *Post* and *Schmidt.* Rather, *Post and Schmidt* require a Medicaid recipient to attempt to access the asset through reasonable legal means.

Id. (emphasis added).

Because Opp had not made an effort to access, at least partially, the inheritance from her brother's estate, the Court found that "a reasonable person could reasonably conclude Opp's inheritance is available to her, and... the Department's decision that Opp had failed to prove the assets were not 'actually available' to her is supported by a preponderance of the evidence." *Id.*

Similarly, Shirley has the burden of establishing her life estate income is not "actually available" and that a legal action against her attorney in fact for breach of fiduciary duty would be unsuccessful. *Reinholdt, 2009 ND 17,* ¶&*P& 20, 23, 760 N.W.2d 101*. Shirley presented absolutely no evidence of attempting to access the asset.

Instead, Shirley simply made arguments and arguments are not proof. Further, Brian is Shirley's attorney in fact and he is the one receiving the life estate income and using her land for free. He already has the lawful power to make the income available *without* any legal proceeding. The action is only necessary because Brian refuses to make the income available. Due to the conflict this creates, someone other than Brian needs to act on Shirley's behalf.

Shirley's argument Brian was continuing a gifting pattern (Appellant's Br. 19-21) ignores the impact of N.D.C.C. § 14-09-10 and Brian's duty to support Shirley when she was unable to support herself. "This Court has recognized that 'a child is liable to a third party for actual necessaries furnished to the child's parent, regardless of whether or not the child has been notified of, or agreed to pay for, the services rendered."' *Four Season's Healthcare Ctr., Inc. v. Linderkamp, 2013 ND 159, ¶ 25, 837 N.W.2d 147* (citation omitted). This duty is imposed on "children of parents who are unable to support themselves to maintain their parents to the extent of the ability of each child, which may be enforced by any person furnishing necessaries to the parents." Id. Thus, the pattern of gifting would not be an acceptable defense to Shirley's claim to recover the life estate income.

Shirley's argument regarding the statute of limitations is meritless. (Appellant's Br. 21-22) Limitations of actions against the trustee are set forth in N.D.C.C. § 59-18-05. However, the time is extended by five years due to Shirley's mental incapacity. *BASF Corp. v. Symington, 512 N.W.2d 692, 697* (N.D. 1994). The time does not start to run until Shirley becomes aware of the existence of a potential claim for breach of trust. The Department became aware of the processing error in 2011, but due to Shirley's severe dementia, she cannot be said to be aware of it.

Shirley's argument regarding estoppel is likewise baseless. (Appellant's Br. 24-27). Shirley cites *Erickson v. Brown, 2012 ND 43, 813 N.W.2d 531,* for the elements of promissory estoppel and argues if she were to bring an action against Brian, she would be estopped from arguing the gift she made in 1988 has been completed for over 20 years. (Appellant's Br. 24-26). "The elements of promissory estoppel are: '(1) a promise which the promisor should reasonably expect will cause a change of position by the promisee; (2) a substantial change in the promisee's position through action or forbearance; (3) justifiable reliance on the promise; and (4) injustice which can only be avoided by enforcing the promise"'. Erickson, 2012 ND 43, ¶ 14, 813 N.W.2d 531 (citation omitted).

The only evidence of any "promise" in this case is the self-serving hearsay testimony of Brian that Shirley told him in 1988 she did not want any rent. If said, it cannot be implied that Shirley did not EVER want any rent, especially in light of the fact that she could have released the life estate, considered releasing it in 1999 and purposefully refrained from doing so. There is no evidence to support the assertion that Shirley wanted to continue giving away her life estate income, even after she ran out of funds to pay for her own care in 2007. Like in *Erickson,* there is no clear, definite, and unambiguous promise, so estoppel does not apply.

The equitable remedy that applies is not estoppel but a constructive trust. Shirley did not have the capacity to assert any change in the arrangement and has not had capacity since Brian took over her **finances** in 2000. The person who would assert the change on her behalf is Brian, the same person who is benefitting from the arrangement at her expense by keeping the life estate rental money and using the land for free. Brian is keeping Shirley's life estate income and is being unjustly enriched while Shirley has no money and no person acting on her behalf to obtain it for her.

Shirley asserts she did not receive a fair hearing because her arguments were not given full consideration. (Appellant's Br. 12-15) The Department did consider Shirley's evidence and arguments, but rejected them, as seen in the "Discussion" portion of the decision ("it was troubling that Brian expressed entitlement to Shirley's rental income because 'that was the way she wanted it' and 'that was the way it was always done"') and in Conclusions of Law 4 and 5 (Shirley was entitled to the life estate rental income and rent from Brian for the land he was using and no evidence established that a legal action against Brian would be unsuccessful.) R. at 314, 316-17.

It is not the Department's or Court's responsibility to review an administrative decision to determine whether an asset can be made available. *See Opp, 2002 ND 45, ¶ 23, 640 N.W.2d 704*. The record contains no evidence that Shirley could not succeed and no evidence a claim would fail. Shirley failed to meet her burdens of proving the asset is not actually available and that a legal action would be unsuccessful. The Department's decision is in accordance with the law and should be affirmed.

VII. The evidence does not support the existence of an oral agreement between Brian and Shirley transferring the life estate interest.

Brian testified Shirley has never received any rent money for the life estate land. Based on Shirley's alleged statement in 1988 that she did not want any rent money, Brian farmed the life estate land for free until 1992, then began renting part of it and keeping the money (while continuing to use part of the life estate land for free). Brian testified Shirley had "deeded" the land to him. (R. at 123-24). Apparently, Brian concluded he had a right to the income based on a conversation said to have occurred in 1988 where Shirley allegedly said she did not want any rent from the life estate land Brian was farming. (R. at 131). Shirley simply did not mention it again. (R. at 124).

Essentially, Brian is arguing he had an oral agreement with Shirley that transferred the life estate interest to him and he has the right to all income from the land. He supports this argument by claiming he has never paid rent and has kept the life estate income received from Ulmer for several years, including the years after 1997 when he became attorney in fact, after 2000 when he began managing Shirley's **financial** affairs, after 2004, when she became mentally incapacitated to the point of requiring basic care due to dementia, and even after she ran out of funds to pay for her care in 2007. No further evidence of specific terms of this alleged oral agreement was offered. No documentation exists to support the existence of this alleged oral agreement and Shirley is incompetent. Brian argues he should be able to continue to use the life estate land rent free and keep the rental income while Medicaid pays for Shirley's care. There is no legal basis for this argument.

Specifically, the statute of frauds requires agreements for the transfer of an interest in land to be memorialized in writing, signed by the parties to be bound by the contract, with sufficient content to evidence the contract. *See* N.D.C.C. § 9-06-04; *Wachter Dev. v. Gomke, 544 N.W.2d 127, 131* (N.D. 1996). Whether an oral contract exists is a question of fact. In re Estate of Thompson, 2008 ND 144, 110, *752 N.W.2d 624*. However, oral testimony as to the existence of such agreement is incompetent evidence under the statute of frauds. *Irish Oil & Gas, Inc. v. Riemer, 2011 ND 22, 148, 794 N.W.2d 715*. Courts will consider part performance of the purchaser, such as making valuable, substantial, and permanent improvements, when determining whether an oral contract may be taken outside of the statute of frauds. *Thompson, 2008 ND 144, ¶ 12,* 752 N.W.2d 624. However, part performance must be consistent only with the existence of the alleged oral contract in order to take it out of the statutes of frauds. *Id. See also, Knorr v. Norberg, 2014 ND 74, ¶ 12, 844 N.W.2d 919*. Further, the quantum of proof necessary to successfully assert part performance of an oral contract to remove it from the statute of frauds is "'evidence that is clear and

unequivocal and which leaves no doubt as to the terms, character and existence of the contract...'" *Thompson, 2008 ND 144, 113, 752 N.W.2d 624* (citation omitted).

No evidence was offered as to the specific terms of the alleged oral contract. Brian may have farmed the life estate land for free and kept the rental money when he began renting a portion; Shirley may even have been fine with this arrangement for a time, but that does not mean Shirley transferred the life estate interest to Brian. Although Brian may have performed some maintenance and may have paid taxes on the property, there is no proof he did not use Shirley's money to make those payments.

Finally, performing maintenance and paying taxes are not consistent only with an alleged oral agreement to transfer the life estate interest. Brian was required to maintain the property and pay the taxes under the durable power of attorney. (R. at 163-66). Performing maintenance and paying taxes is also consistent with a son farming his mother's life estate land and maintaining the property that he stands to inherit when she passes. Given the confidential relationship between Brian and Shirley, the fiduciary duties he owed her, and her incompetence, keeping the rental money is consistent with a breach of fiduciary duties. There is insufficient evidence to support a definite, knowing and intentional transfer of life estate interest from Shirley to Brian. The Department's decision should be affirmed.

VIII. Assuming Shirley intended to gift the life estate income would disqualify her from Medicaid benefits and she would still be ineligible.

Even if this case were analyzed as involving a disqualifying transfer instead of an excess asset case, Shirley would be ineligible. A presumption that a transfer for less than fair market value (*i.e.*, giving money away) was made for purposes that include qualifying for Medicaid exists, because Brian transferred the money to himself as Shirley's attorney in fact and the transfers left Shirley with insufficient funds to meet her living expenses and medical costs reasonably anticipated to be incurred in the month of transfer and the 59 months following the transfer. N.D. Admin. Code §&S& 75-02-02.1-33.2(10)(a), (e). Further, the presumption applies in any case in which the individual was an applicant or recipient of Medicaid before the date of transfer. N.D. Admin. Code § 75-02-02.1-33.2(10)(c). Brian claims Medicaid eligibility played no part in the transfers; however, these presumptions have not been rebutted. N.D. Admin. Code § 75-02-02.1-33.2(11).

Further, assuming, without conceding, Shirley acquiesced to the arrangement in 1988, when Brian became her attorney in fact in 1997, he could no longer benefit from this arrangement without Shirley's knowing consent, which is lacking here. N.D.C.C. § 59-18-09. Thus, even if this were treated as a disqualifying transfer instead of an available asset, Shirley would be ineligible for Medicaid benefits.

CONCLUSION

For the reasons given above, the Department respectfully requests the Court affirm the Executive Director's denial of Shirley Bleick's Medicaid eligibility on the grounds of excess assets.

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