

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of BARBARA HERTSBERG INTER  
VIVOS TRUST.

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UNPUBLISHED  
July 5, 1996

EDIE COLMAN, Trustee,

Petitioner-Appellant,

v

No. 181189  
LC No. 91-209988

DEPARTMENT OF MENTAL HEALTH, SIDNEY  
COLMAN, and MACOMB OAKLAND  
GUARDIANSHIP,

Respondents-Appellees.

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Before: Smolenski, P.J., and Holbrook, Jr. and F.D. Brouillette,\* JJ.

PER CURIAM.

Petitioner, Edie Colman, the trustee of the inter vivos trust created on January 23, 1986, (Hertsberg Trust) on behalf of Barbara Hertsberg, appeals as of right the trial court's order determining that Barbara Hertsberg (Barbara) was a beneficiary and a settlor of the trust. Consequently, the Michigan Department of Mental Health (DMH) was permitted to seek reimbursement and payments for care it provided Barbara pursuant to the Mental Health Code, MCL 330.1800; *et. seq.*; MSA 14.800(800) *et. seq.* We reverse.

Barbara is a developmentally disabled, legally incompetent, sixty-six-year-old woman. In 1983, on behalf of Barbara, Elaine Levy filed a complaint in Wayne Circuit Court alleging that Edith Hertsberg, Barbara's now-deceased mother, neglected Barbara and failed to provide for her with the social security benefits Edith Hertsberg had received on behalf of Barbara. A consent judgment was entered in the case on January 17, 1986. Under the terms of the judgment, Edith Hertsberg was

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

ordered to fund a trust for the benefit of Barbara with \$150,000. On January 23, 1986, a discretionary trust with a spendthrift provision was established. The trust agreement named Edith Hertsberg as the grantor and Elaine Levy and petitioner Edie Colman as co-trustees. Upon the death of Barbara, the trust principal was to be distributed in equal shares to Edith Hertsberg, and Sidney and Edie Colman.

As a recipient of state mental health services by the Michigan Department of Mental Health through the Macomb-Oakland Regional Center, Barbara was subject to a financial liability determination by the DMH. In May of 1994, the DMH made a financial liability determination regarding Barbara's financial status and concluded that she was responsible, by way of the Hertsberg Trust, for reimbursing the state for \$90,800 in past services provided and for \$729 a month for continued care by the state. The trustee filed an administrative appeal of the DMH's financial liability determination, but this appeal was adjourned by the consent of the parties because the parties agreed that the matter should be determined by a court.

The matter was then presented to the probate court. The probate court determined that the Hertsberg Trust was a discretionary trust established for the benefit of Barbara and noted that a discretionary trust normally protects the assets of the trust from creditors of the beneficiary. However, the trial court determined that the creditors of Barbara could reach the trust's corpus because Barbara Hertsberg was the true settlor of the trust. The court concluded that because Barbara was the plaintiff in the lawsuit from which the trust assets were gained, she was the true settlor of the trust and the DMH could reach the assets of the trust.

On appeal, petitioner contends that Edith Hertsberg was the true settlor of the Hertsberg Trust because she created the trust, incurred taxes on the trust, and retained a contingent remainder in the trust. The parties in this case agree that an individual who receives services from the DMH is financially liable for those services and a recipient's income and assets may be used to pay for services provided by the department. *In re Johannes Trust*, 191 Mich App 514, 517; 479 NW2d 25 (1991). The parties agree that the trust established on January 23, 1986, is a discretionary trust containing a spendthrift provision established for the benefit of Barbara Hertsberg.

Creditors of a beneficiary under a discretionary trust containing a spendthrift provision cannot normally reach the assets of the trust. *Miller v Dep't of Mental Health*, 432 Mich 426, 436; 442 NW2d 617 (1989). However, the creditor's of a beneficiary under a discretionary trust may reach the assets of the trust where the beneficiary is also a settlor to the trust by contributing assets to the trust. *Johannes Trust*, *supra* at 518-519. Therefore, the issue before this Court is whether Barbara was a settlor under the trust agreement.

This Court was faced with a similar issue in *Johannes Trust*, *supra*. In that case, this Court needed to determine whether the beneficiary under a discretionary trust, Martha Johannes, was also the settlor of the trust, thereby allowing the DMH to reach the assets of the trust for reimbursement for care provided to Martha. *Id.* at 518-519. The petitioner in that case, as guardian over Martha, established

a discretionary trust to benefit Martha from assets that Martha inherited. *Id.* at 516. This Court determined that if the petitioner created the discretionary trust with assets provided by Martha, Martha would also be a settlor of the trust to the extent of the assets she contributed. *Id.* at 520. Consequently, this Court concluded that the DMH could reach the assets of the trust that were contributed by Martha. *Id.* The case was remanded so that the trial court could determine whether any of Martha's assets were used in establishing the trust. *Id.* at 520-523. The *Johannes* Court went on to instruct the trial court that if Martha's inheritance was paid to petitioner rather than Martha, then legal title vested in the petitioner. *Id.* at 520-521.

In light of *Johannes Trust*, we find that the trial court erred when it determined that Barbara Hertsberg was a settlor of the trust. Initially, we find that Edith Hertsberg was a settlor to the trust because she created the trust. *Id.* at 520 (citing 1 Restatement Trusts, 2d, § 3[1]). The trust agreement stated that Edith Hertsberg was the trust Grantor and pursuant to the agreement, she created the trust. Barbara Hertsberg would also be a settlor under the trust agreement if she furnished consideration for the creation of the trust. *Johannes Trust, supra*. However, we find that Barbara did not contribute any of the assets that were used to create the trust.

When reviewing a trust, the intent of the settlor should be carried out as much as possible and the settlor's intent can be gained from the trust document. *In re Maloney Trust*, 423 Mich 632, 639-640 (Cavanagh, J., with Williams, C.J., and Levin, J., concurring), 641 (Ryan, J., with Williams, C.J., and Levin J., concurring); 377 NW2d 791 (1985). Pursuant to the trust agreement, Edith Hertsberg created the trust by transferring \$150,000 to the trustees. The transfer of the money directly to the trustees indicated that Edith Hertsberg never intended for Barbara to receive the money. Because the \$150,000 was never transferred to Barbara, she did not contribute any of her assets to the creation of the trust. See *Johannes Trust, supra* at 520-521. Therefore, the trial court erred when it concluded that Barbara Hertsberg was a settlor of the trust.

Reversed.

/s/ Michael R. Smolenski  
/s/ Donald E. Holbrook, Jr.  
/s/ Francis D. Brouillette