COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1280 **Cir. Ct. No. 2008CV22**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

EDMUND T. WISYNSKI,

PETITIONER-APPELLANT,

V.

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Iron County: PATRICK J. MADDEN, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Edmund Wisynski appeals an order affirming an administrative law judge's determination that the Department of Health and

Family Services[1] properly terminated his medical assistance eligibility. Wisynski contends the Department should be estopped from considering an irrevocable trust as an asset in the eligibility determination. We reject his argument and affirm the order.

¶2 The underlying facts of this case are undisputed. In February 2001, Wisynski established the Wisynski Family Irrevocable Trust, with himself as a beneficiary. It had an estimated starting value of $35,000. Under the Department's Medicaid Eligibility Handbook at the time, irrevocable trusts were not considered available assets. In August 2005, Wisynski applied for medical assistance benefits; his request was granted in February 2006.

¶3 In April 2007, the Department produced a new eligibility handbook indicating that an irrevocable trust is an available asset for medical assistance eligibility purposes. The new handbook was necessary to correct the Department's erroneous interpretation and application of the underlying statutes governing medical assistance payments. In August 2007, when the Department became aware of Wisynski's trust, it revoked his eligibility status. Wisynski sought review of that determination. His position was that "the new policy should not be applied retroactively because he relied upon the old policy to his detriment."

¶4 The ALJ concluded that, under the statutes which had been in effect and remained unchanged since the creation of the trust, the trust had always been an available asset. The ALJ rejected the estoppel argument, noting that Wisynski

[1] The Department has since been reorganized and renamed the Department of Health Services.

failed to prove the required elements and, further, the statutes controlled. The circuit court affirmed the ALJ's determination.

¶5 Because this case involves an administrative agency determination, we review the ALJ's decision, not the circuit court's. ***Virginia Sur. Co. v. LIRC***, 2002 WI App 277, ¶11, 258 Wis. 2d 665, 654 N.W.2d 306. There are generally three levels of deference to be applied to an administrative agency's conclusions of law and statutory interpretation. ***Sauk County v. WERC***, 165 Wis. 2d 406, 413-14, 477 N.W.2d 267 (1991). Here, we need not decide which level is appropriate because the Department concedes that de novo review—the level of lowest deference and highest scrutiny—is appropriate.

¶6 WISCONSIN STAT. § 49.47 is the provision on eligibility requirements for medical assistance. WISCONSIN STAT. § 49.454 explains how the Department is to treat trusts.[2] Under WIS. STAT. § 49.82, the Department publishes the eligibility handbook to make eligibility requirements and other information available to the counties and the public at large.

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[2] WISCONSIN STAT. § 49.454 states, in relevant part:

> (3) TREATMENT OF IRREVOCABLE TRUST AMOUNTS. For purposes of determining an individual's eligibility for, or amount of benefits under, medical assistance:
>
> (a) If there are circumstances under which payment from an irrevocable trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to or for the benefit of the individual could be made is considered a resource available to the individual, and payments from that portion of the corpus or income:
>
> 1. To or for the benefit of the individual, are considered income of the individual.

¶7 For whatever reason, prior to 2007, the Department interpreted WIS. STAT. §§ 49.454 and 49.47 in such a way that irrevocable trusts were not considered in eligibility determinations. The Department evidently realized it had erred and corrected the handbook to correctly reflect the statutes. Wisynski does not challenge the Department's revised statutory interpretation. Instead, he argues the Department should be estopped from applying the new, correct interpretation to him.

¶8 Generally, equitable estoppel requires a showing of (1) action or inaction (2) by the party against whom estoppel is asserted (3) that induces reasonable reliance by the party claiming estoppel (4) to that party's detriment. ***Kamps v. DOR***, 2003 WI App 106, ¶20, 264 Wis. 2d 794, 663 N.W.2d 306. When estoppel is asserted against the government, the party invoking it faces a heavy burden: "the evidence must be so clear and distinct that the contrary result would amount to a fraud." ***Id.***

¶9 Here, Wisynski cannot satisfy the estoppel requirements even under the non-governmental standard because he shows neither reliance nor detriment. On appeal, Wisynski simply makes the bald, sweeping assertion that "there was reliance," with no elaboration and no record citation. However, the ALJ specifically held that even if he had equitable powers, "I would not use them in this matter because you [Wisynski] have not shown that that policy affected your decision in setting up the trust…." We defer to the ALJ on factual findings unless they are contrary to the great weight and clear preponderance of the evidence. ***General Cas. Co. v. LIRC***, 165 Wis. 2d 174, 178, 477 N.W.2d 322 (Ct. App. 1991). Even on appeal, Wisynski has not attempted to demonstrate that medical assistance eligibility was a consideration when he established the trust approximately four and a half years prior to applying for benefits.

¶10 Moreover, Wisynski cannot establish any detriment. The trust corpus grew from approximately $35,000 to over $100,000, and Wisynski received medical payments to which he was not otherwise entitled.[3] Wisynski also fails to show that, had he not created the trust, he would be or would have been presently eligible for benefits. There is no basis for invoking estoppel.

¶11 Wisynski also argues the new interpretation is inconsistent with the Department's prior practice and, under WIS. STAT. § 227.57(8), the ALJ must be reversed. The Department asserts this is a restatement of the estoppel argument. However, it has a different legal underpinning we must address.

¶12 WISCONSIN STAT. § 227.57(8) states, in part, that a court should "reverse or remand the case to the agency if it finds that the agency's exercise of discretion … is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency…." Wisynski focuses only on the first portion of this language and ignores the fact that reversal because of an inconsistency is appropriate only if the Department's deviation is not satisfactorily explained.

¶13 Here, the deviation is satisfactorily explained. The Department erroneously interpreted the relevant statutes and created a new policy to bring itself in line with the appropriate legislative mandates. It is incumbent upon our state agencies and departments to adhere to the terms of the statutes. *See*

[3] We note that the Department seeks only to invalidate benefits going forward. It has not, in this action, attempted to apply the new interpretation retroactively to recoup past payments.

Schoolway Transp. Co. v. DMV, 72 Wis. 2d 223, 229, 240 N.W.2d 403 (1976). We cannot permit administrative agencies to circumvent the statutes through administrative policy, no matter how long those policies have been in place. To do so upsets the balance of power and undermines the legislative branch through executive power.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.