Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub/
11/03/2026 01:03 PM CST

In re Estate of Virginia Lee Cushing, deceased. Lawrence Cushing, Jr., Personal Representative of the Estate of Virginia Lee Cushing, deceased, appellant, v. Nebraska Department of Health and Human Services, appellee.

810 N.W.2d 741

Filed March 23, 2012. No. S-11-614.

1. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
2. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
4. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
5. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

Appeal from the County Court for Douglas County: Craig Q. McDermott, Judge. Affirmed as modified.

Hugh I. Abrahamson, of Abrahamson Law Office, for appellant.

Ronald L. Sanchez, Special Assistant Attorney General, and Matthew G. Dunning for appellee.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, and Miller-Lerman, JJ.

Stephan, J.

The Nebraska Department of Health and Human Services (DHHS) provided Medicaid benefits for Virginia Lee Cushing

(Cushing) during the final years of her life. After her death, DHHS filed a claim against Cushing's estate for recovery of the benefits pursuant to Neb. Rev. Stat. § 68-919 (Reissue 2009). The personal representative of the estate appeals from an order of the county court for Douglas County allowing the claim and awarding interest. The principal issues are whether DHHS timely presented its claim and, if so, whether it was proved as a matter of law. We conclude the claim was both timely presented and proved as a matter of law. But we modify the award of interest.

BACKGROUND

The claim which is the subject of this appeal was made pursuant to Nebraska's Medicaid estate recovery statute, § 68-919, which provides in relevant part:

> (1) The recipient of medical assistance under the medical assistance program shall be indebted to [DHHS] for the total amount paid for medical assistance on behalf of the recipient if:
>
> (a) The recipient was fifty-five years of age or older at the time the medical assistance was provided . . . .
>
> . . . .
>
> (2) The debt accruing under subsection (1) of this section arises during the life of the recipient but shall be held in abeyance until the death of the recipient. Any such debt to [DHHS] that exists when the recipient dies shall be recovered only after the death of the recipient's spouse, if any, and only when the recipient is not survived by a child who either is under twenty-one years of age or is blind or totally and permanently disabled as defined by the Supplemental Security Income criteria.

The relevant facts are undisputed. DHHS administers the State of Nebraska's medical assistance program, commonly known as Medicaid. From April 6, 1997, to May 5, 2010, DHHS paid $78,594.45 on behalf of Cushing for drugs, medical supplies, and medical services covered by Medicaid. Cushing was over the age of 55 during this period. She died testate on May 9, 2010, and Lawrence J. Cushing, Jr., was appointed as the personal representative of the estate. Cushing was not survived

by a spouse, a child who was under the age of 21, or a child who was blind or totally and permanently disabled.

Beginning on July 2, 2010, notice of the informal probate of Cushing's will was published in an Omaha newspaper. The notice stated that creditors of the estate "must file their claims with [the county court for Douglas County] on or before September 2, 2010 or be forever barred." (Emphasis omitted.) Proof of publication of this notice was filed with the county court on July 16.

On September 14, 2010, DHHS filed a demand for notice with the county court, indicating it had a Medicaid estate recovery claim pursuant to § 68-919. The attorney for the estate sent DHHS the published notice to creditors on September 24.

On January 18, 2011, DHHS filed a claim against the estate, seeking a payment of $78,594.15 pursuant to § 68-919. The personal representative filed a notice of disallowance of the claim on March 10. DHHS then filed a petition for allowance of the claim, alleging it paid $78,594.15 for medical assistance received by Cushing when she was 55 years of age or older.

DHHS moved for summary judgment on the petition and sought interest pursuant to Neb. Rev. Stat. § 30-2488(e) (Reissue 2008). DHHS asserted that its claim against the estate was timely filed because it was not given notice in accordance with Neb. Rev. Stat. §§ 25-520.01 and 30-2483 (Reissue 2008), which meant that under Neb. Rev. Stat. § 30-2485(a)(2) (Cum. Supp. 2010), it had 3 years from Cushing's death to file its claim. The county court granted DHHS' motion for summary judgment and entered judgment against the estate in the amount of $78,594.15, with interest at a rate of 2.188 percent per annum, from and after November 1, 2010. The personal representative filed a timely notice of appeal.

ASSIGNMENTS OF ERROR

The personal representative assigns, restated, that the county court erred in (1) finding DHHS timely filed its claim against the estate, (2) granting summary judgment to DHHS on its claim against the estate, and (3) taxing and calculating interest and court costs against the estate.

STANDARD OF REVIEW

[1] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.[1]

[2] An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2]

ANALYSIS

Timeliness of Claim

In evaluating the personal representative's first assignment of error, we must apply § 30-2485, which sets time limitations for filing claims against an estate. The statute provides in relevant part:

> (a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate . . . unless presented as follows:
>
> (1) Within two months after the date of the first publication of notice to creditors if notice is given in compliance with sections 25-520.01 and 30-2483 . . . . If any creditor has a claim against a decedent's estate which arose before the death of the decedent and which was not presented within the time allowed by this subdivision, including any creditor who did not receive notice, such creditor may apply to the court within sixty days after the expiration date provided in this subdivision for additional

---

[1] *In re Interest of Katrina R.*, 281 Neb. 907, 799 N.W.2d 673 (2011).

[2] *Latham v. Schwerdtfeger*, 282 Neb. 121, 802 N.W.2d 66 (2011).

> time and the court, upon good cause shown, may allow further time not to exceed thirty days;
>
> (2) Within three years after the decedent's death if notice to creditors has not been given in compliance with sections 25-520.01 and 30-2483.
>
> (b) All claims . . . against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate . . . unless presented as follows:
>
> (1) A claim based on a contract with the personal representative, within four months after performance by the personal representative is due;
>
> (2) Any other claim, within four months after it arises.

Our first task is to determine when the claim in question arose. If it arose before Cushing's death, the time limitations set forth in § 30-2485(a) apply. If it arose at or after Cushing's death, the time limitations set forth in § 30-2485(b) apply. Relying upon *In re Estate of Tvrz*,[3] the personal representative argues that the claim arose after Cushing's death. The Medicaid reimbursement statute which we construed in *In re Estate of Tvrz* in part provided that "[t]he estate of a decedent who has received medical assistance benefits . . . shall be indebted" to DHHS.[4] In rejecting the contention in *In re Estate of Tvrz* that the debt arose during the lifetime of the recipient, we noted the absence of language in the statute to support the contention. To the contrary, we concluded that the language of the statute "focuses on one point in time, i.e., the death of the recipient, and requires a determination of whether the recipient's estate is obligated to reimburse DHHS as of that point."[5]

---

[3] *In re Estate of Tvrz*, 260 Neb. 991, 620 N.W.2d 757 (2001).

[4] Neb. Rev. Stat. § 68-1036.02(1) (Reissue 1996). See *In re Estate of Tvrz, supra* note 3.

[5] *In re Estate of Tvrz, supra* note 3, 260 Neb. at 999, 620 N.W.2d at 762.

In response to our decision in *In re Estate of Tvrz*,[6] the Legislature amended the Medicaid estate recovery statute,[7] which is now codified in § 68-919. As noted, the statute now provides that the debt is owed by the "recipient"[8] of medical assistance benefits and "arises during the life of the recipient but shall be held in abeyance until the death of the recipient."[9] Thus, *In re Estate of Tvrz* is no longer authoritative on when DHHS' claim arises. Instead, the statute now clearly states that indebtedness to DHHS resulting from its payment of medical assistance benefits arises during the life of the recipient. Accordingly, DHHS' claim arose before Cushing's death and is therefore subject to the time limitations set forth in § 30-2485(a).

Whether the claim is subject to the 2-month limitations period set forth in § 30-2485(a)(1) or the 3-year period set forth in § 30-2485(a)(2) depends upon whether DHHS was given notice "in compliance with sections 25-520.01 and 30-2483."[10] Section 30-2483 requires "the clerk of the court upon the appointment of a personal representative [to] publish a notice once a week for three successive weeks in a newspaper of general circulation." The notice must "announc[e] the appointment and the address of the personal representative, and notify[] creditors of the estate to present their claims within two months after the date of the first publication of the notice or be forever barred."[11] Moreover,

> [t]he party instituting or maintaining the proceeding or his or her attorney is required to mail the published notice and give proof thereof in accordance with section 25-520.01. If the decedent was fifty-five years of age or older or resided in a medical institution as defined in

---

[6] See Floor Debate, 97th Leg., 1st Sess. 1374 (Feb. 20, 2001).

[7] 2001 Neb. Laws, L.B. 257, § 1.

[8] § 68-919(1).

[9] § 68-919(2).

[10] § 30-2485(a)(1). Accord § 30-2485(a)(2).

[11] § 30-2483.

> subsection (1) of section 68-919, the notice shall also be mailed to [DHHS].[12]

Section 25-520.01 in relevant part provides:

> In any action or proceeding . . . where a notice by publication is given as authorized by law, a party instituting or maintaining the action or proceeding with respect to notice or his attorney shall within five days after the first publication of notice send by United States mail a copy of such published notice to each and every party appearing to have a direct legal interest in such action or proceeding whose name and post office address are known to him. Proof by affidavit of the mailing of such notice shall be made by the party or his attorney and shall be filed with the officer with whom filings are required to be made in such action or proceeding within ten days after mailing of such notice.

We held in *In re Estate of Emery*[13] that a creditor who did not receive mailed notice pursuant to §§ 25-520.01 and 30-2483 was entitled to the 3-year period provided by § 30-2485(a)(2), notwithstanding the fact that the creditor had not sought the 60-day extension provided for in § 30-2485(a)(1). Similarly, in *Baye v. Airlite Plastics Co.*,[14] we held that creditors who did not receive the notice required by §§ 25-520.01 and 30-2483 had 3 years from the date of the decedent's death to file their claims against the estate.

Here, the personal representative argues he gave the requisite notice to DHHS on September 24, 2010. But by that date, the deadline for creditors to file claims against the estate had passed. We read § 30-2483 to require that the notice to DHHS comply with § 25-520.01, which requires mailing within 5 days of first publication, so that DHHS will have the same opportunity as other creditors to file a timely claim against the estate. Because the notice to DHHS was not mailed within 5 days of July 2, 2010, the date the notice to creditors was first

---

[12] *Id.*

[13] *In re Estate of Emery*, 258 Neb. 789, 606 N.W.2d 750 (2000).

[14] *Baye v. Airlite Plastics Co.*, 260 Neb. 385, 618 N.W.2d 145 (2000).

published, the personal representative failed to comply with §§ 25-520.01 and 30-2483 and the 3-year limitations period of § 30-2485(a)(2) applies. DHHS' filing date of January 18, 2011, was well within this time period. The personal representative's first assignment of error is without merit.

Summary Judgment

[3] In his second assigned error, the personal representative contends that the county court erred in granting summary judgment in favor of DHHS. Here, DHHS moved for summary judgment. As the party moving for summary judgment, DHHS had the burden to show that no genuine issue of material fact existed and to produce sufficient evidence to demonstrate that it was entitled to judgment as a matter of law.[15]

[4] DHHS offered evidence that Cushing was 55 years of age or older when the medical assistance benefits were provided. This established a prima facie showing that Cushing was indebted to DHHS pursuant to § 68-919(1)(a). DHHS also offered evidence that Cushing was not survived by a spouse, a child under the age of 21, or a child who was blind or totally and permanently disabled. This established that the debt became recoverable after Cushing's death, pursuant to § 68-919(2). Finally, DHHS offered its payment records authenticated in the manner required by § 68-919(4), thereby establishing the total amount paid on Cushing's behalf. Thus, DHHS presented evidence which, if uncontroverted, would entitle it to judgment for the amount of the indebtedness as a matter of law. After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.[16] Here, the personal representative offered no evidence showing the existence of a genuine issue of material fact as to

---

[15] See, *Dresser v. Union Pacific RR. Co.*, 282 Neb. 537, 809 N.W.2d 713 (2011); *Tolbert v. Jamison*, 281 Neb. 206, 794 N.W.2d 877 (2011).

[16] *Id.*

any of the essential elements of DHHS' claim. Accordingly, the county court did not err in granting the motion for summary judgment and the personal representative's second assigned error is without merit.

Interest

[5] Finally, the personal representative assigns error to the county court's award of costs and prejudgment interest to DHHS. We address only that portion of this assignment dealing with interest, because the personal representative makes no argument with respect to costs. To be considered by this court, an alleged error must be both specifically assigned and *specifically argued* in the brief of the party asserting the error.[17]

In its July 1, 2011, order granting summary judgment to DHHS, the county court awarded interest at an annual rate of 2.188 percent, from and after November 1, 2010. The personal representative asserts this award was improper based on § 30-2488(e). That subsection provides:

> Unless otherwise provided in any final judgment in any court entered against the personal representative, allowed claims bear interest at the legal rate for the period commencing sixty days after the time for original presentation of the claim has expired unless based on a contract making a provision for interest, in which case they bear interest in accordance with that provision.

Under § 68-919(3), the statutory debt owed by a Medicaid recipient to DHHS "shall not include interest." Thus, any award of interest must be based upon § 30-2488(e), which we have not previously interpreted. The North Dakota Supreme Court interpreted a nearly identical statute in *In re Estate of Kiesow*.[18] That case addressed whether interest could be awarded on a claim for reimbursement for medical assistance benefits under a statute[19] which provided:

---

[17] *Walsh v. State*, 276 Neb. 1034, 759 N.W.2d 100 (2009).

[18] *In re Estate of Kiesow*, 615 N.W.2d 538 (N.D. 2000).

[19] N.D. Cent. Code § 30.1-19-06(5) (2010).

> Unless otherwise provided in any judgment in another court entered against the personal representative, allowed claims bear interest at the legal rate for the period commencing sixty days after the time for original presentation of the claim has expired unless based on a contract making a provision for interest, in which case allowed claims bear interest in accordance with that provision.

The court looked to North Dakota's nonclaim statute, which set forth time limitations for filing claims against an estate, to determine when the time for original presentation of the claim had expired. North Dakota's statute, like § 30-2485, provided for a 3-year period of limitations for claims against a decedent's estate which arose before the death of the decedent, if notice to creditors was not published and mailed. The Supreme Court of North Dakota determined that the time for original presentation of the claim was 3 years, because no notice to creditors was mailed or published.

The facts in this case are slightly different, in that notice to creditors was published and mailed to some creditors, not including DHHS. But we conclude that the language in § 30-2488(e) which fixes the date at which interest begins to run as "sixty days after the time for original presentation of the claim" is specific to the claim of the creditor seeking interest, in this case DHHS. Pursuant to our application of § 30-2485 above, the time for original presentation of DHHS' claim was 3 years from Cushing's death. The 3-year period would extend to May 9, 2013, and no interest could begin to accrue under § 30-2488(e) until 60 days after that date, which is July 8. We are not persuaded by the argument of DHHS that the county court had discretion to vary the date on which interest would begin to accrue under the facts presented here.

CONCLUSION

DHHS' claim for medical assistance benefits provided to Cushing arose before her death and was enforceable against her estate following her death. DHHS timely filed its claim and made a sufficient showing, which was uncontroverted by the personal representative, that it was entitled to judgment as a matter of law. However, interest does not begin to

accrue on the judgment "from and after November 1, 2010," as ordered by the county court, but, rather, from and after July 8, 2013. We modify the judgment to that extent and affirm as modified.

AFFIRMED AS MODIFIED.

IN RE INTEREST OF KARLIE D., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. GARY D., APPELLEE, AND MARTHA D., INTERVENOR-APPELLEE.

811 N.W.2d 214

Filed March 23, 2012. No. S-11-616.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other.
2. **Juvenile Courts: Jurisdiction: Appeal and Error.** In juvenile cases, as elsewhere, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Juvenile Courts: Adoption: Child Custody.** A juvenile court, except where an adjudicated child has been legally adopted, may always order a change in the juvenile's custody or care when the change is in the best interests of the juvenile.
4. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
5. **Final Orders: Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
6. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which the appeal is taken.
7. **Juvenile Courts: Final Orders: Constitutional Law: Parent and Child.** The substantial right of a parent in juvenile proceedings is a parent's fundamental, constitutional right to raise his or her child.