

GREAT-WEST LIFE & ANNUITY  
INSURANCE CO. and BOTTOLFSON 1997  
TRUST, by First Financial Trust, N.A., Trustee,

Petitioners,

v.

Case No. 13-CV-0444

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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**DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW PURSUANT TO  
WIS. STAT. CHAPTER 227**

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The court has taken almost the maximum amount of time to issue its decision in this case because it has been a challenge to sift and winnow among the various issues raised by the parties. By in large, the briefs are excellent and they have greatly assisted the court. Despite the numerous subordinate issues and the competing arguments from both sides, the issue in this case is rather straightforward; it really is, rather, a simple interpretation of a state statute. The central question raised involves the interpretation of state law and both parties make convincing arguments in support of their respective positions.

Petitioners Great-West Life & Annuity Insurance Co. and the Bottolfson 1997 Trust seek judicial review pursuant to Wis. Stat. chapter 227 of a decision by the Wisconsin Tax Appeals Commission. That part is clear. The issue before the Commission was whether Respondent

properly deducted \$428,943.01 in jeopardy assessment offsets from lottery payments due to the Bottolfson 1997 Trust. The jeopardy assessments were based on Wisconsin back taxes owed by Donald Bottolfson, who originally won the lottery prize. Central to the case before the Commission, and the court today, is whether Mr. Bottolfson's transfer of lottery prize payments through the Bottolfson 1997 Trust to Stone Street Capital, Inc. violated Wis. Stat. § 565.30(6) (1997-98)<sup>1</sup>, which prohibits the assignment of rights to a lottery prize.

The parties seem to have a different take on most every aspect of this case. The Respondent's position seems to be set against the backdrop of government benevolence and the concern that lottery winners might be buffeted and manipulated by unscrupulous charlatans. The Petitioners spin a story of a man fortunate to win the lottery but subjected to the claims of his ex-wife who tried to capitalize on his good fortune who tried to put his marital troubles behind. Both sides claim the high ground in how they interpret the statute. In the middle of this story are lawyers doing what lawyers generally do, representing their clients and applying the law to the facts of the case, but basically coming to opposite conclusions based on the same facts and law. Adding to the intrigue, it has been suggested to this court that possibly the lawyers at Revenue were misled and that this court should ignore what they (perhaps unwittingly) approved. Additionally, this is not the first court to become entangled in what might by some to represent the "curse" of winning the lottery. The Polk County Judge approved one trust agreement but the parties dispute whether a fourth draft ever replaced the one approved by the court. Suffice to say, the decision before this court under the facts of this case should not hardly be cited as precedent in future cases involving assignment of lottery winnings. It is difficult, if not

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<sup>1</sup> All references to Wis. Stat. §565.30 subsections (1) and (6) are to the 1997-98 version that was in effect during the relevant time period.

impossible, to believe that the facts before this court at this time can ever or should ever be replicated.

Toward that end, this case is not about a court approving a trust only to have the trust agreement subsequently and significantly changed by the beneficiaries. As the Petitioner states, “[t]he operative Trust agreement is the agreement dated February 26, 1998, which is the only form of agreement signed by all parties and was the very form of agreement approved by both the Polk County court and Respondent.” This case also does not appear to involve some form of manipulation by some out of state company preying upon the winner of the Wisconsin Lottery. Additionally, although there appears to have been a great deal of confusion, it does not appear to this court that there has been any manipulation or deception.

Instead, based upon its review of the record, this court concludes that the Commission erred in finding that Donald Bottolfson violated Wis. Stat. § 565.30 by transferring the lottery prize to the Bottolfson 1997 Trust pursuant to a court order. Under state law, courts have the authority, if not the duty to make such approvals. Indeed, on February 25, 1998, Polk County Circuit Court Judge Rasmussen specifically and explicitly ordered that the Trust be created, that the lottery prize be paid to the Trust. More importantly, Judge Rasmussen ordered that the Trust “shall become the legal owner of the prize”. When the Trust became the payee of the lottery prize payments, Respondent could not use Wis. Stat. § 565.30(5) to deduct Mr. Bottolfson’s back taxes from the Lottery Prize payments owed to the Trust. Accordingly, the court reverses the decision of the Tax Appeals Commission.

## **FACTS**

The court relies upon the Commission’s findings of fact, which neither party contests. Those facts are summarized below.

**Donald Bottolfson wins the lottery, and Barbara Bottolfson brings suit.**

In 1994 Mr. Donald Bottolfson won the Wisconsin “Megabucks” lottery with a prize of \$9,768,197.74 (the “Lottery Prize”). The prize was payable to Mr. Bottolfson in twenty-five annual installments, spanning from 1994 to 2018. Mr. Bottolfson received his first payment of the Lottery Prize in September of 1994. (Commission 4-5.)<sup>2</sup> Mr. Bottolfson received his lottery prize payments from 1994 to 1996 without Respondent asserting that Mr. Bottolfson owed any back taxes. (Commission 5-6.)

In March of 1997, Mr. Bottolfson’s ex-wife, Barbara Bottolfson brought a claim in the Polk County Circuit Court against Mr. Bottolfson alleging that she was entitled to a share of the Lottery Prize because of a partnership agreement that existed between her and Mr. Bottolfson while living together after their divorce (the “Polk County Action”). Ms. Bottolfson brought the suit on her own accord without influence from Mr. Bottolfson or third-parties. (Commission 6.) Mr. Bottolfson denied the allegations and brought a counterclaim against Ms. Bottolfson, but Mr. Bottolfson eventually settled the suit by agreeing to give Ms. Bottolfson a 5% interest in the Lottery Prize payments through the year 2009. (Commission 7.)

**The Bottolfsons execute an initial sale agreement with Stone Street.**

In June of 1997, Donald Bottolfson entered into an agreement with Stone Street Capital, Inc. titled “Sale Agreement for Lottery Prize Payments of Donald H. Bottolfson” (“1997 Sale Agreement”). At the time, Stone Street was a financing company engaged in the business of purchasing and then reselling interests in lottery prize payments. (Commission at 16-17.) In the 1997 Sale Agreement, Mr. Bottolfson agreed to sell his rights to the annual Lottery Prize payment for the years 1997 through 2009 for a lump sum payment from Stone Street. The 1997

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<sup>2</sup> All citations to the Tax Appeals Commission Ruling and Order issued on January 9, 2013 will appear as “Commission” followed by the page number of the decision.

Sale Agreement was subject to a number of conditions. The conditions centered around Mr. Bottolfson doing the following: obtaining a court order directing the State Lottery to recognize the 1997 Sale Agreement and to make payments to Stone Street or its assigns; obtaining an unqualified agreement from the State Lottery to make lottery prize payments to Stone Street or its assigns; and making an effort to assign the Lottery Prize payments to a trust pursuant to a court order. (Commission 16-17).

The relevant portions of the 1997 Sale Agreement provided that the sale was contingent upon:

(b) The issuance of a final non-appealable order signed by a court with appropriate jurisdiction in a form acceptable to Purchaser and its assigns (the "Court Order"), directing the State Lottery to recognize this Agreement and the Terms Rider and to make the Assigned Payments, without reduction or set off (other than income tax withholding), directly to Purchaser or its named assigns, as directed by Purchaser . . .

(c) Receipt by Purchaser or its assigns of a written acknowledgment from the State Lottery in a form satisfactory to Purchaser and its assigns confirming that Lottery Winner is the winner of the Lottery Prize, including the Assigned Payments, in the amount described in the Terms Rider and acknowledging the State Lottery's unqualified agreement to make all of the Assigned Payments to Purchaser or its named assigns, in accordance with this Agreement and the Terms Rider and as directed precisely in accordance with the Court Order (the "Lottery Letter").

(Bottolfson Aff., Ex. 2, ¶ 6.)

The 1997 Sale Agreement also included an attached Terms Rider, which provided, in part:

#### EXCEPTIONS AND ADDITIONAL CONDITIONS TO SALE AGREEMENT

Notwithstanding anything in the Sale Agreement to the contrary, Purchaser and Lottery Winner agree that Lottery Winner will exercise his best efforts to have the Lottery Prize transferred to a trust, the form, substance, and trustee of which will be reasonably acceptable to Purchaser. Such transfer to a trust shall be accomplished by a court order to be obtained, or consented to by Lottery Winner . . . Upon transfer to a trust, the transaction contemplated by the Sale Agreement

shall continue on the same terms and conditions with references to "Lottery Prize" to be deemed to include a reference to the trust then owning the Lottery Prize . . .

(Bottolfson Aff., Ex. 2, Terms Rider, pp. 2-3.)

Mr. Bottolfson made certain representations and warranties in the 1997 Sale Agreement, including the following:

(d) Lottery Winner and the Lottery Prize, including the Assigned Payments, are not subject to any outstanding or unsatisfied judgment, levy or claim.

\* \* \*

(f) There are no lawsuits or claims pending or threatened against Lottery Winner, and Lottery Winner knows of no basis for any such lawsuit or claim.

(g) Lottery Winner has paid or will pay all federal, state and local taxes due through the date of this Agreement and the Assignment Date or has made or will make adequate provision for such payments.

(h) There are no outstanding or unsatisfied judgments or federal, state or local tax or other liens against Lottery Winner or the Lottery Prize, including the Assigned Payments.

(Bottolfson Aff., Ex. 2, ¶ 5.)

Ms. Bottolfson entered into a similar agreement with Stone Street in June of 1997. The agreement included the same provisions regarding obtaining an agreement by the State Lottery, obtaining a court order, and transferring the Lottery Prize to a trust. (Commission 17.)

**The Bottolfsons structure a settlement in the Polk County Action.**

To structure their settlement in the Polk County Action, on the advice of their respective counsel, Mr. and Ms. Bottolfson agreed to ask that the Polk County Circuit Court order Mr. Bottolfson to create a trust to which he would transfer the Lottery Prize payments. The Bottolfsons would then split the beneficial interests in the trust giving Ms. Bottolfson a 5% interest in lottery prize payments through 2009. (Commission 7.) At the time, Wis. Stat. § 565.30(6) (1997-98) prohibited the assignment of a lottery prize stating "The right of any person to a prize may not be assigned." However, subsection (1) of the same statute stated that a lottery

prize “may be paid to another person under a court order . . .” Wis. Stat. § 565.30(1) (1997-98). The Bottolfsons sought the court order to structure their settlement in a manner they believed was consistent with §565.30. (Commission 7.)

After a hearing on August 15, 1997, at the request of the parties, (Bottolfson Dep., Ex. 10 Polk Co. Hrg. 3:17-4:7, 17:23-25) the Polk County Court ordered that Mr. Bottolfson to create the Donald Bottolfson Revocable Trust (the “Trust”). The court also required Mr. Bottolfson to submit the court’s order to the lottery and do whatever else was necessary to obtain Respondent’s consent to assign the Lottery Prize payments from 1997 through 2009 to the Trust. (Commission 8.)

In a letter, dated August 15, 1997, Respondent informed Mr. Bottolfson that he would not receive his lottery prize payment that year because a federal tax lien for the years 1989-1993 exceeded the net payment he would have otherwise been entitled to. In the letter, Respondent did not assert that Mr. Bottolfson owed any back taxes to the state of Wisconsin. (Commission 6; Bottolfson Aff., Ex. 20; Bottolfson Dep., pp. 65-67.)

**Mr. Bottolfson’s attorneys negotiate Respondent’s consent to transfer of lottery prize Payments.**

On August 20, 1997, the attorney representing Mr. Bottolfson in the Polk County Action sent a letter to Respondent requesting Respondent’s consent to the assignment of the Lottery Prize payments to the Trust. The attorney was unable to secure Respondent’s consent. Later, in the fall of 1997 Mr. Bottolfson hired an additional attorney, William Brown, who had expertise in trust and estate matters. Consistent with the Polk County Court order, Attorney Brown continued to try and obtain Respondent’s consent to make Lottery Prize payments to the Trust to avoid the necessity of a declaratory judgment action to achieve the same result (Commission 8-9.)

Shortly after Attorney Brown became involved, Respondent referred the trust issue to the Wisconsin Department of Justice (DOJ), who assigned an assistant attorney general to handle the matter. Attorney Brown and the assistant attorney general discussed the issue and exchanged correspondence for several months. (Commission 9). The assistant attorney general took the position that allowing the Lottery Prize payments to go to the trust would contravene the anti-assignment provision in Wis. Stat. § 565.30(6), (Commission 9; Brown Aff., Ex. B at 1), because the “pass-through” nature of the trust would mean the interests were freely assignable. (Brown Aff., Ex. B at 2). Attorney Brown disagreed arguing that the parties were seeking a “direction of payment” pursuant to a court order rather than an “assignment,” and thus the transaction would be permissible under Wis. Stat. 565.30(1). (Commission 9; Brown Aff. Ex. C, at 2.) Attorney Brown and the assistant attorney general maintained their respective positions and never reached an agreement. (Commission 10). The assistant attorney general referred the matter of obtaining consent to transfer the Lottery Prize back to Respondent in January of 1998. (Commission 10.) From that point forward, all of Attorney Brown’s negotiations were with Respondent. Attorney Brown began communicating with Respondent’s Chief Legal Counsel, Attorney John Evans. (Commission 11.)

In mid-January of 1998, Attorney Brown discussed the trust issue with Attorney Evans who referred Attorney Brown to a staff attorney who worked for Respondent Department of Revenue. Attorney Evans viewed the staff attorney as having expertise in trust law, and relied on the staff attorney to determine a form of the trust agreement that would be acceptable to Respondent. The staff attorney also negotiated the language of the Amended Judgment in the Polk County action. (Commission 11-12.) Attorney Brown eventually received confirmation from Attorney Evans that the proposed Amended Judgment was adequate for Lottery Prize



payments to be made to the Trust. Attorney Evans also relayed that he received confirmation from the Lottery Division administrator that the payments would be made to the Trust pursuant to the court order. (Commission 13.)

On February 25, 1998, the Polk County Court entered an Amended Judgment in the Polk County Action. The Amendment Judgment stated that the parties had agreed to a new trust agreement, and Respondent had agreed to recognize the Trust as “the winning ticket” pursuant to Wis. Stat. § 565.30 and that all further Lottery Prize payments would be paid to the Trust, now the “legal owner of the prize.” (Commission 13; Brown Aff., Ex. K.) The lottery administrator sent an acknowledgement of the Polk County order on March 19, 1998, indicating that the lottery would comply with the order. (Commission 14.)

Following entry of the Amended Judgment, Mr. Bottolfson and the trustee of the Trust executed a new trust agreement in the form approved by Respondent. The new trust agreement was effective February 26, 1998, and assigned all of Mr. Bottolfson’s right, title, and interest in his Lottery Prize payments for the years 1998-2018 to the Trust. (Commission 15.)

**Stone Street finalizes purchases and assigns Trust interests to Great-West.**

Stone Street concluded that the Bottolfsons assigning the Lottery Prize payments to the Trust, as well as Stone Street purchasing assignments of beneficial interests in the Trust, were valid under Wisconsin law. (Commission 18.) Prior to finalizing its purchase of the beneficial interests in the Trust, Stone Street conducted lien and credit searches. At that time, Respondent had not alleged that Mr. Bottolfson owed any State of Wisconsin back taxes. Stone Street’s search revealed various liens totaling \$63,768. Only \$500.00 of this was a State of Wisconsin tax lien. Stone Street required that Mr. Bottolfson satisfy the outstanding liens as a condition of

finalizing the sale. Mr. Bottolfson agreed to allow Stone Street withhold \$75,000 from his proceeds of the sale to satisfy all liens. (Commission 18-19).

On April 29, 1998, Mr. and Ms. Bottolfson irrevocably assigned to Stone Street their beneficial interests in the Trust covering proceeds from lottery payments from 1998-2009. Stone Street then assigned its beneficial interests in the Trust to Great-West on May 5, 1998. (Commission 20.)

On September 3, 1998, Mr. Bottolfson entered into a second sale agreement with Stone Street covering his remaining lottery prize payments for the years 2010-2018 ("1998 Sale Agreement"). The agreement contained same conditions precedent contained in the 1997 Sale Agreement discussed earlier. Mr. Bottolfson assigned to Stone Street his beneficial interests in the Trust for these Lottery Prize payments on October 11, 1998. Great-West Life purchased the beneficial interests from Stone Street on October 20, 1998. (Commission 20.)

From 1998 to 2000, Respondent paid annual Lottery Prize payments to the Trust, withholding federal and state taxes due from the Trust upon its receipt of payments. Respondent did not assert at this time that Mr. Bottolfson owed any delinquent taxes. (Commission 20-21.) During these years, the Trust made annual distributions to Great-West. (Commission 21.)

On July 29, 1999, Respondent sent its first request for Mr. Bottolfson to file for tax years 1989-1992, 1996, and 1999. (Commission 23.) Respondent would continue through 2001 to send Mr. Bottolfson correspondence regarding outstanding tax liability. (Commission 23.) When making Lottery Prize payments for the years 1994-1997, Respondent never asserted that Mr. Bottolfson owed back taxes for failing to file tax returns dating back to 1989. Additionally, at no time during Attorney Brown's negotiations with Respondent did Respondent assert that Mr. Bottolfson owed back taxes for failing to file returns. (Commission 24.)

**The Trust exercises its option for a lump sum cash payment and Respondent issues jeopardy assessment offsets.**

In November of 1999, Respondent notified the trustee of the Trust that it had the option of converting the remaining Lottery Prize payments into a single lump sum cash payment. The trustee exercised this option by request in December of 2000. (Commission 21).

Respondent replied on August 6, 2001 that it was in a position to fulfill the request for the lump sum payment. On August 17, 2001 Respondent sent a check to the trustee for the 2001 annual installment of the Lottery Prize, which was accompanied by a "Notice of Deductions from Prize Winnings." The notice stated that in addition to state and federal income taxes, Respondent was also deducting \$145,352.02 for a "Jeopardy Assessment dated 7/30/01 per Sec.74 (14) WI Stats." (Commission 21.) Respondent then sent a check totaling \$2,763,865.84 for the lump sum payment on September 4, 2001. Respondent indicated that \$283,590.99 was withheld from the payment for an additional jeopardy assessment. Both jeopardy assessments were based on Mr. Bottolfson's alleged personal tax liabilities. (Commission 22.)

**DISCUSSION**

If Mr. Bottolfson had only created the trust and left it at that, it is doubtful this litigation would have ensued. It is clear reading the Respondent's brief and the decision of the Commission that the troubling part of this case is how the Trust then went on to assign its right to the money to another third party. The Respondent argues, taken as a whole, that what happened was an illegal assignment. The Petitioner, on the other hand, argues that it is anything but, and quite literally a regular business transaction.

Whether Mr. Bottolfson's transfer of the Lottery Prize to the Trust and the subsequent assignment to Stone Street violated Wis. Stat. § 565.30 requires reconciling subsections (1) and (6) of Wis. Stat. § 565.30. The court concludes that the Bottolfson's transfer of the Lottery Prize

to the Trust was valid under Wis. Stat. 565.30(1). Therefore, the Trust was the payee of the Lottery Prize payments, and Respondent was without authority to issue jeopardy assessment offsets based on back taxes owed by Donald Bottolfson against the payments owed to the Trust.

### **I. Standard of Review**

As a threshold issue, the court must determine the proper level of deference to give the decision of the Tax Appeals Commission. An administrative agency's interpretation and application of a statute is subject to one of three levels of review by a court: great weight deference, due weight deference, or *de novo* review. *Racine Harley-Davidson, Inc. v. State, Div. of Hearings & Appeals*, 2006 WI 86, ¶¶ 11-14, 292 Wis. 2d 549, 717 N.W.2d 184. The court determines the appropriate level of deference by comparing the institutional qualifications and capabilities of the court with those of the agency. *Id.* ¶ 14.

Because the issue before the court is one of first impression in Wisconsin, the court will apply *de novo* review to the Commission's interpretation of Wis. Stat. § 565.30. Generally, no deference is due to an agency's interpretation of law when the issue is one of first impression. *Bosco v. Labor & Indus. Review Comm'n*, 2004 WI 77, ¶ 20, 272 Wis. 2d 586, 681 N.W.2d 157. As the Commission itself recognized in its decision, "this is a case with little or no defining Wisconsin legal precedent." (Commission 60.)

### **II. Statutory Interpretation of § 565.30**

The purpose of statutory interpretation is to faithfully give effect to the law enacted by the legislature. To do so, requires a determination of statutory meaning. *State ex. rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *Id.* ¶ 45. "Statutory language is given its common, ordinary, and

accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Id.* The context and the structure of a statute also guide interpretation. Statutory language is to be viewed not in isolation, but as part of a whole, in relation to the language of surrounding or closely-related statutes. *Id.* ¶ 46. Courts interpret statutes “to avoid absurd or unreasonable results. *Id.* “Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.” *Id.*

The version of Wis. Stat. §565.30 in effect at the time relevant to this case stated as follows:

(1) **Payment of Prizes.** The administrator shall direct the payment of a prize . . . to the holder of the winning lottery ticket or lottery share or to a person designated under sub. (2), except that a prize may be paid to another person under a court order or to the estate of a deceased prize winner . . .

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(6) **Nonassignability.** The right of any person to a prize may not be assigned.

Wis. Stat. § 565.30 (1997-98). Subsection (6) prohibits the assignment of a right to a lottery prize, while subsection (1) allows payment of a lottery prize to another person pursuant to a court order.

In its decision, the Commission interpreted “court order” in Wis. Stat. §565.30(1) as limited to court orders regarding testamentary transfers, child support agreements, liens, maintenance, family support, and spousal support, where title of ownership passes by “operation of law.” (Commission 43, 46.) All of these examples named by the Commission are mentioned in other parts of Wis. Stat. § 565.30. The Commission then turned its attention to Mr. Bottolfon’s transfer of the Lottery Prize payments to the Trust as part of the Polk County Action. The Commission observed that the Polk County Action did not fall under any of the previously mentioned categories of cases listed in Wis. Stat. § 565.30. Thus, the Commission found that the

Polk County court order resulting in the transfer of the Lottery Prize payments to the Trust did not fall under Wis. Stat. §565.30(1). The Commission concluded that the Trust Agreement was “unquestionably an assignment, and at that time was prohibited by Wis. Stat. § 565.30. The prize for tax purposes continued to be owned by Mr. Bottolfson and the Department was required by statute to withhold the taxes Mr. Bottolfson owed.” (Commission 64.)

Petitioners argue that the transfer of Lottery Prize payments to the Trust was a “directed payment” of a lottery prize to another pursuant to a court order. (Pet. Br. 30.) Thus, Petitioners argue regardless of the general rule against assignability, the transfer of the Lottery Prize to the Trust was permissible under Wis. Stat. § 565.30(1). (Pet. Br. 30.) On the other hand, Respondents argue that the transactions involving the Trust and the transfer of Lottery Prize payments, taken as a whole, amount to a prohibited assignment under Wis. Stat. 565.30(6). (Resp. Br. 26).

The court concludes that the plain language of Wis. Stat. § 565.30(1) allows the payment of a lottery prize to another person, (or trust), pursuant to a court order. That does not mean, however, that every court should or will approve such request. In the face of an objection, the circuit court judge may decline to approve the assignment.

The text of the statute does not limit court orders to finite circumstances, such as, testamentary transfers, child support agreements, and spousal support. Under a plain reading of the statute, a court order resulting from a dispute over the original winner of the lottery prize, as was the case here is allowed under subsection (1). The court reads the provision in Wis. Stat. § 565.30(1) allowing the payment of a prize to another pursuant to a court order “or to the estate of a deceased prize winner” as broadening the scope of the subsection, not limiting what court orders are permissible. The use of the disjunctive “or” in a statute normally broadens the

coverage of a statute to reach distinct, but potentially overlapping circumstances. *Pawlowski v. Am. Family Mut. Ins. Co.*, 2009 WI 105, ¶ 22, 322 Wis. 2d 21, 777 N.W.2d 67.

Additionally, the court finds the case relied on by the Commission, *Walker v. Rogers*, of limited utility. 272 Ill. App. 3d 86, 650 N.E.2d 272 (1995). *Walker* is a decision interpreting Illinois' lottery statute that also prohibited assignments but allowed payment to another person "pursuant to an appropriate judicial order." *Id.* The only issue *Rogers* resolved is whether a lottery prize winner could sell a lottery prize to a third-party, then bring an action for declaratory judgment solely to enforce the assignment, and fall under the "appropriate judicial order" provision. *Id.* The court in *Rogers* viewed the clause on judicial orders as an exception to the general rule of nonassignability. *Id.* at 92-93. The court held that the judicial order exception was limited to circumstances where the order was entered as an appropriate remedy in a separate proceeding. *Id.* at 93. In the case at hand, there was a separate proceeding involving the Bottolfsons' dispute over who had the right to the Lottery Prize. Resolving the case by directing payment to another person certainly appears to be an appropriate remedy. *Walker* hints at some examples of what would be permissible by looking within the lottery statute, but the Court never addresses whether proceedings listed in the statute would fall under the exception, while orders in other proceedings would not. *See Id.* at 89-90, 93 This was simply not at issue in *Rogers*.

The Court concludes that Mr. Bottolfson's transfer of Lottery Prize payments to the Trust pursuant to a court order was valid under the plain language of Wis. Stat. § 565.30. Furthermore, the court concludes that the subsequent assignment of the beneficial interest in the trust to Stone Street did not invalidate the prior court approved transfer. Apparently Bottolfson made it clear to the Polk County Court his intention of eventually transferring the ownership of the Trust to another party in exchange for an agreed payment of money. (see Commission 18). The

disclosure to the Polk County judge was understandable in light of Mr. Bottolfson's desire to acquire funds to satisfy his ex-wife's demand and was if not the central purpose of the Polk County action certainly an underlying reason for its commencement. Interests in trust are assignable under the law of trusts and estates. It also appears that the Department of Revenue was aware of the possibility that the Trust might redirect its payments to a third party. Despite the concern raised by the Attorney General, the Department acquiesced.

### **III. Validity of Respondent issuing jeopardy assessments against the Trust's Lottery Prize payments.**

Next, the court must address whether the Respondent validly issued the jeopardy assessment offsets against the payments owed to the Trust. The Commission concluded Wis. Stat. 565.30(5) (2001-02) required that Respondent withhold Mr. Bottolfson's jeopardy assessment's from the Lottery Prize payments due to the Trust. (Commission 64.) Because the transfer of Lottery Prize payments to the Trust was valid under Wis. Stat. § Wis. Stat. 565.30, the Trust was the payee of the Lottery Prize payments, not Mr. Bottolfson. Therefore, Respondent did not have the authority to deduct Mr. Bottolfson's back taxes from the payments owed to the Trust.

Respondent issued the jeopardy assessments against Mr. Bottolfson pursuant to Wis. Stat. § 71.74(14) (2001-02), which provides:

**Additional remedy to collect tax.** The department may also proceed under s. 71.91(5) for the collection of any additional assessment of income or franchise taxes or surtaxes, after notice thereof has been given under sub. (11) and before the same shall have become delinquent, when it has reasonable grounds to believe that the collection of such additional assessment will be jeopardized by delay.

Respondent then withheld Mr. Bottolfson's jeopardy assessments from the Lottery Prize payments due to the Trust pursuant to Wis. Stat. § 565.30(5) (2001-02), which provides:



**Withholding of delinquent state taxes, child support or debts owed the state.**

The administrator shall report the name, address, and social security number or federal income tax number of each winner of a lottery prize equal to or greater than \$1,000 and the name, address and social security number or federal income tax number of each person to whom a lottery prize equal to or greater than \$1,000 has been assigned to the department of revenue to determine whether the payee or assignee of the prize is delinquent in the payment of state taxes . . . Upon receipt of a report under this subsection, the department of revenue shall first ascertain . . . whether any person named in the report is currently delinquent in . . . payment of state taxes under ch. 71, 72, 76, 77, 78 or 139. Upon this certification by the department of revenue or upon court order the administrator shall withhold the certified amount and send it to the department of revenue for remittance to the appropriate agency or person.

Significantly, Wis. Stat. §565.30(5) (2001-02) provides Respondent only the authority to deduct state taxes owed by the “payee or assignee of the prize.” Beginning in 1998, the Lottery Prize was being paid and taxed to the Trust. The payee of the prize was the Trust, not Mr. Bottolfson. Therefore, Respondent was without authority under Wis. Stat. 565.30(5) (2001-02) to deduct Mr. Bottolfson’s back taxes from the Lottery Prize payments owed to the Trust.

**IV. Attorney’s Fees**

Petitioners argue that they are entitled to reasonable attorney fees under Wis. Stat. § 227.483 because Respondents have allegedly put forth frivolous claims. Petitioners argue that the claims are frivolous under Wis. Stat. § 227.483(3)(b) which provides:

(3) To find a petition for a hearing or claim or defense to be frivolous under sub. (1), the hearing examiner must find at least one of the following: . . . (b) That the party or the party’s attorney knew, or should have known that the petition, claim, or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

Wis. Stat. § 227.483(3)(b).

Petitioner’s request for attorney fees is denied inasmuch as the same conclusion made by the respondent is now hereby affirmed. The facts of this case support this conclusion.

Respondent consented to a specific arrangement: the payment of the Lottery Prize into the Trust to resolve a lawsuit between the Bottolfsons. Mr. Bottolfson, Stone Street, and it appears that the Petitioners decided to test the boundaries of the law in Wisconsin. There is nothing in the record upon which this court could find any fault with the legal positions taken by either party. Indeed, early on in the matter, the Department of Justice articulated some reservation about what was proposed. Respondent's argument that the use of the Trust did not allow Petitioner's to avoid the anti-assignment statute was and a reasonable argument. The question of the interplay between Wis. Stat. § 565.30 (1) and (6) is and was apparently of first impression and although the Petitioners have prevailed today, they should not assume their case was so overwhelming as to entitle them to such fees from this court or the agency below.

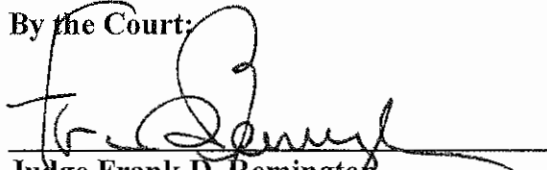
#### CONCLUSION

For the reasons stated above, the court reverses the ruling of the Tax Appeals Commission, and orders Respondent to refund \$428,943.01, plus interest, to the Bottolfson 1997 Trust. This is a final decision for purposes of appeal. No further proceedings are to be held in the circuit court.

SO ORDERED,

Dated: This 29<sup>th</sup> day of August, 2013.

By the Court:

  
Judge Frank D. Remington  
Circuit Court Judge, Branch 8