Special Needs Trust Update

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Legislation

CARES Act. Congress adopted the Coronavirus Aid, Relief, and Economic Security Act on March 27, 2020 (P.L. 116-136).

This far-reaching legislation addressed a number of topics and provided funding for several wide-ranging programs. But among those most significant for special needs practitioners were these:

1. Direct payments to most individuals (or at least those who are not listed as someone else's dependent), regardless of whether the recipients are taxpayers or even tax filers. Notably, these payments (of up to $1,200 per person) are not taxable income and do not affect public benefits eligibility. In fact, if a public benefits recipient receives a CARES Act payment, he or she has 12 months to spend or dispose of the payment before any residue will be counted as an available resource. Social Security has tried to make clear that the payments are not Social Security (or SSI), and belong to the beneficiary; a representative payee is counseled to assist the beneficiary to handle the funds, but they are not part of the representative payee's reporting requirements, either. For more detail, see the Social Security's FAQs on the CARES Act payments.
2. Mortgage payments may in some circumstances be extended for up to two 180-day periods. This only applies, however, to federally-backed mortgages – which probably excludes a significant share of any mortgages being paid by special needs trusts.
3. Required minimum distributions from IRAs and defined contribution retirement plans are suspended for calendar year 2020. On the other side of

the equation, withdrawals of up to $100,000 from IRAs or defined contribution retirement plans for coronavirus-related purposes will avoid the 10% early distribution tax (though distributions are still treated as, and taxed as, ordinary income). Participants may borrow up to $100,000 from their own defined contribution plans for coronavirus-related purposes, and loan repayment requirements are suspended for one year.

Families First Coronavirus Response Act (FFCRA). Congress adopted the Coronavirus Aid, Relief, and Economic Security Act on March 18, 2020 (P.L. 116-127). Congress extended the coverage of the Family and Medical Leave Act (the FMLA) to all employers with fewer than 500 employees and granted subsidized leave rights to employees suffering from, or dealing with, COVID-19 illness (or care concerns occasioned by quarantine orders) until December 31, 2020.

Cases

Pfoser v. Harpstead, 939 N.W.2d 298 (Minn. App., January 13, 2020). Medicaid transfer penalty imposed for transfer to pooled SNT after age 65 is reversed by appeals court.

David Pfoser had severe Parkinson's Disease and was disabled mentally and physically. He injured himself while living in the home he and his siblings inherited from their parents. When he moved to a long-term care facility, his siblings sold the home, and his share (about $28,000) was put into the Lutheran Social Services (LSS) pooled SNT. Pfoser was 65 years old at the time. DHS imposed a Medicaid transfer penalty. Pfoser appealed. The director of the LSS pooled SNT submitted an affidavit at the fair hearing in which she explained that the Medicaid rules only allowed Pfoser to keep $97 each month from his Social Security disability benefits. Pfoser's LSS trust sub-account would pay for goods and services to enhance the quality of his life, which Pfoser could not afford to purchase with his $97 personal needs allowance and which are not covered by Medicaid or other government benefit programs. The director of the LSS pooled SNT also asserted in this affidavit that the money in Pfoser's LSS trust sub-account would easily be spent for Pfoser's benefit in a few years according to their assessment. The Commissioner of DHS confirmed the decision to impose the Medicaid transfer penalty. The District Court reversed. The Court of Appeals affirmed the decision of the District Court, holding

that the Commissioner should have considered both the fair market value of the trust sub-account and other consideration. DHS has since been granted review by the Minnesota Supreme Court, and Pfoser has since died. This is Laurie Hanson's case. Ron Landsman submitted an amicus brief on behalf of NAELA and Minnesota NAELA, and David Shaltz submitted an amicus brief on behalf of the SNA.

Alabama Medicaid Agency v. Britton, _____ So.3d _____ (Ala. Civ. App., July 10, 2020). Appeals court allows first-party SNT trustee to take fees after the death of the beneficiary and prior to Medicaid reimbursement.

At a hearing on the trustee's petition for final settlement of an SNT, the Alabama Medicaid Agency objected to a $1,500 compensation payment that was made to the trustee after the beneficiary's death but before Medicaid reimbursement to the state. The trial court approved the payment. The Alabama Medicaid Agency appealed. The remaining balance of the SNT at the time of the beneficiary's death was about $12,000. The Agency argued that the trustee was a third-party debtor and payment of the trustee fees were not authorized according to the scheme outlined in the SSI POMS in its interpretation of 42 U.S.C. 1396p(d)(4)(A). The state intermediate court held that the trustee was not a third-party debtor, and the trustee fees were allowed as a reasonable administrative expense of the trust estate.

Black v. Black v. Anyone Mr. Black Knows Or Is Related To. The case that keeps on giving, and giving, and giving. . . .

Some background facts from the prior cases, to set the stage for the three (we're not kidding, there are THREE!) new Black cases this year.

The Black siblings' mother died in New York in 2012. Mother's Will devised two-thirds of her estate to an SNT ("Supplemental Needs Trust") for her daughter, Joanne, who suffers from schizophrenia, and one-third to a trust ("Issue Trust") for her son ("Mr. Black") and his children. Mother's estate consisted of multiple accounts with a total value of approximately $3 million. Shortly before her death, mother designated 95% of the value of the accounts payable-on-death ("POD") directly to Joanne, and 1% POD to each of Mr. Black's five children from his first marriage.

This situation did not sit well with Mr. Black, or with Mr. Black's second wife, with

whom he had two children. Mr. Black, is a tenured law professor who has written on the subject of corporate directors' fiduciary duties. His wife, Katherine Litvak, is also a tenured law professor. Mr. Black decided that the best course of action was to seek appointment as Joanne's conservator. Then, acting on Joanne's behalf, he could "disclaim" the money in the POD accounts, and the money would revert to the estate and be distributed as mother originally intended. In this way, Mr. Black could correct the "mistake" made in mother's designation of the POD accounts.

Joanne was in Denver, so Mr. Black initiated the conservatorship action there. He told the court that the assets were at risk of being "wasted and dissipated" because mother had "inadvertently" designated the accounts as POD to Joanne, rather than routing the funds through the SNT. In 2013, the probate court appointed Mr. Black as Joanne's conservator and authorized him to disclaim Joanne's interests in the POD accounts and place the assets into the SNT. Mr. Black promptly executed the disclaimer and, notably, redistributed the assets two-thirds to the SNT and one-third to the Issue Trust. At that time, in his role as Joanne's conservator, Mr. Black created an additional trust to hold workers compensation payments and other income and assets for Joanne's benefit ("2013 Trust").

It's a long story, but, in 2015, Joanne's court-appointed counsel filed a motion to void the disclaimer, and ultimately argued that Mr. Black's conduct amounted to civil theft. Following a hearing, the court found that Mr. Black had indeed engaged in civil theft, and the court enjoined Mr. Black from accessing any trust funds belonging to his sister and surcharged Mr. Black in the amount of the improperly diverted assets and trebled the damages.

Mr. Black appealed. In January 2018, the Colorado Court of Appeals affirmed the probate court's order, and denied Mr. Black's petition for a rehearing in May of 2018.

In 2017, Joanne's conservatorship estate filed the foreign judgment in the circuit court of Cook County, where Mr. Black lives. Later that year, Mr. Black filed a petition asking to vacate the filing of the foreign judgment as void. Mr. Black argued that the Colorado probate court had lacked subject matter jurisdiction to enter the judgment for various reasons, and that the Colorado probate court had lacked personal jurisdiction over him on a technicality. In June of 2018, the circuit court denied Mr. Black's petition, observing that the foreign judgment was presumed to be valid and that it was Mr. Black's burden to rebut that presumption.

Mr. Black appealed. The Appellate Court of Illinois affirmed the decision of the circuit court in every respect. The court evaluated all of the subject matter

jurisdiction issues raised by Mr. Black, and concluded that the circuit court had not erred in determining that Mr. Black had failed to rebut the presumption that the foreign judgment was valid.

Litvak v. Black, 2019 ILApp1st 181707, _____ N.E.3d _____ (November 22, 2019, rehearing denied December 19, 2019). Illinois appellate court vacates agreed judgment requiring repayment to trustee's wife of hundreds of thousands of dollars allegedly owed to her by three different trust, and the court holds that this agreed judgment was the product of collusion.

In September of 2017, Bernard Black's wife, Katherine Litvak, brought an action in the circuit court in Illinois against her husband and stepson (Samuel Black) in their capacities as co-trustees of two trusts established for the benefit of her husband's sister, Joanne Black (the "Supplemental Needs Trust" and the "2013 Trust") and one trust established for the benefit of her husband and his children from his first marriage (the "Issue Trust") alleging that the three trusts were jointly and severally indebted to her for a total of approximately $400,000. The circuit court granted her motion and entered the judgment, and Ms. Litvak began collection proceedings on November 7, 2017.

It turned out that a cousin of the Blacks, Anthony Dain, was also a co-trustee of the Supplemental Needs Trust and the 2013 Trust, and that Joanne had a new conservator in New York named Jeanette Goodwin. Ms. Litvak had failed to notify either of them regarding her actions. When Mr. Dain and Ms. Goodwin learned about the agreed judgment, both of them filed motions to intervene and to vacate the agreed judgment.

The circuit court held a hearing on the motions to intervene and vacate the judgment on February 16, 2018. Ms. Litvak argued that, because Mr. Dain was not a trustee of the Issue Trust and Joanne was not a beneficiary of the Issue Trust, neither of them had standing to bring a motion to vacate the agreed judgment with respect to that trust. The circuit court denied Mr. Dain's motion to intervene, finding that the Supplemental Needs Trust and the 2013 Trust were already represented as parties by Mr. Black and Samuel Black, as trustees of those trusts. However, the circuit court granted Ms. Goodwin's motion to intervene, finding that she had made at least a *prima facie* showing that Joanne's interests were materially affected by these proceedings. The court then granted the motion to vacate the

agreed judgment with respect to the Supplemental Needs Trust and the 2013 Trust, but allowed the judgment to stand against the Issue Trust. The Colorado court had not decided to undo the transactions that had caused the Issue Trust to be funded, but instead had decided to surcharge Mr. Black, and this precluded Joanne from asserting any interest over the funds held in the Issue Trust. Ms. Goodwin appealed.

The Illinois appeals court determined that the agreed judgment was the product of collusion, and substantial justice required that the entire agreed judgment be vacated. Moreover, the appeals court was persuaded by Ms. Goodwin's arguments that Joanne's interests were materially affected by the agreed judgment. Recovery of the funds the Colorado court found Mr. Black stole from Joanne my require separate collection proceedings, but that should not prevent Ms. Goodwin from protecting Joanne's interests in the Issue Trust to prevent further wasting or dissipation of those assets that Mr. Black strategically moved into the one trust that established by his mother that was not set up for Joanne's benefit. If the Issue Trust funds are allowed to be distributed, they may never be recovered. However, if the agreed judgment is vacated in its entirety, Ms. Litvak will still have the opportunity to present her own claim to those funds.

The Illinois appeals court vacated the agreed judgment in its entirety, and the case was remanded to the circuit court for a decision on the merits of Ms. Litvak's claims, with Ms. Goodwin's full participation on Joanne's behalf.

Matter of Black v. Black, _____ P.3d _____ (Colo Ct. App., April 9, 2020, rehearing denied June 11, 2020). Colorado court of appeals finds that probate court has in rem jurisdiction over funds transferred from conservatorship to out-of-state trusts, and personal jurisdiction over brother in his capacity as individual, conservator, and trustee, but lacked subject matter jurisdiction to change form of relief granted for disclaimers during pendency of appeal.

This Colorado appeals court decision has a table of contents. That's not surprising given the number of orders and appeals at issue in this case. With that said, much of the court's decision is a repeat of the many facts and legal maneuverings recited above.

In 2015, the Colorado probate court found that Mr. Black had engaged in civil theft when he disclaimed his sister, Joanne Black's POD interest in their mother's $3,000,000 estate and diverted two-thirds of those funds to a Supplemental Needs Trust for Joanne ("Supplemental Needs Trust") and one-third to a trust for himself and his five children from his first marriage ("Issue Trust"). The court enjoined Mr. Black from accessing any trust funds belonging to his sister and surcharged Mr. Black in the amount of the improperly diverted assets and trebled the damages. The Colorado appeals court affirmed this decision in 2018.

At some point, Mr. Black's son, Samuel Black, became a co-trustee of the Supplemental Needs Trust and the Issue Trust, and Mr. Black's cousin, Anthony Dain, became a co-trustee of the Supplemental Needs Trust. On a series of subsequent motions, the probate court authorized Mr. Dain, as co-trustee of the Supplemental Needs Trust, to use trust funds to pay the beneficiary's out-of-state litigation expenses (see above!). There were several expense orders, all of which went through a series of appeals. Finally, the court of appeals granted a limited remand for resolution of jurisdictional issues. On remand, the probate court found that it had in rem jurisdiction over conservatorship assets transferred to out-of-state trusts, and personal jurisdiction over Mr. Black and Samuel Black as co-trustees of those out-of-state trusts. The probate court also granted Joanne's motion to vacate the disclaimer of her POD interest in her mother's estate to the trusts, and, sua sponte, ordered Samuel Black to pay the disclaimed funds into the court registry. Mr. Black and Samuel Black appealed.

On appeal, Mr. Black and Samuel Black challenged four of the probate court's orders: 1. and 2. Orders entered in October 2016 and October 2017 authorizing Mr. Dain to disburse assets from the Supplemental Needs Trust, 3. A January 2018 order suspending Mr. Black and Samuel Black as trustees of the Supplemental Needs Trust, and 4. The April 2018 order summarized at the end of the last paragraph.

The court of appeals affirmed all of the decisions of the probate court, with two exceptions. The court of appeals found that Samuel Black had not been provided with adequate notice of the action that resulted in the January 2018 order, so the court reversed his suspension as a co-trustee of the Supplemental Needs Trust. The court also reversed the portion of the April 2018 order vacating the disclaimer of Joanne's POD interest in her mother's estate. The probate court lacked subject matter jurisdiction to vacate the disclaimer, because Mr. Black was actively appealing that issue at the time of the April 2018 order.

Black v. Goodwin, 2020 WL 4053176, _____ F.Supp.2d _____ (N.D. Ill. July 20, 2020). Trustee alleges in diversity suit that conservator assisted in a scheme to take control of certain trust assets, and U.S. District court dismisses suit on 12(b)(1) motion by conservator.

Bernard Black ("Mr. Black") was one of the co-trustees of three trusts established by his mother: two trusts established for the benefit of Mr. Black's sister, Joanne Black (the "Supplemental Needs Trust" and the "2013 Trust"), and one trust established for the benefit of Mr. Black and his children from his first marriage (the "Issue Trust").

Mr. Black alleged in federal court that a former co-trustee of all three trusts, Anthony Dain, and his sister, Cherie Wrigley, both of whom are cousins of Mr. Black's, pursued a scheme to divert and strip assets from all three trusts for their personal benefit. To execute this scheme, Mr. Dain allegedly used his position as a co-trustee of the trusts to pursue litigation to reverse Joanne's POD disclaimers, which was the method that Mr. Black had used to fund the Supplemental Needs Trust and the Issue Trust. The Colorado probate court had found that Mr. Black had engaged in civil theft when he executed the POD disclaimers, and the court enjoined Mr. Black from accessing any trust funds belonging to his sister and surcharged Mr. Black in the amount of the improperly diverted assets and trebled the damages.

According to Mr. Black, Mr. Dain's efforts to reverse the POD disclaimers had led Mr. Black's children to sue both Mr. Black and Ms. Wrigley in the Eastern District of New York, and Mr. Black and another co-trustee (his son, Samuel Black) had brought a separate suit against Ms. Wrigley in the Eastern District of New York. Mr. Dain had successfully petitioned the Colorado probate court to replace Mr. Black as Joanne's conservator with a lady named Jeanette Goodwin. Ms. Goodwin had conspired with Mr. Dain and Ms. Wrigley to get permission from the Colorado probate court to spend money from all three trusts on the legal fees associated with lawsuits against various members of the Black family, and Ms. Goodwin had concealed from the Colorado probate court further expenditures that she had made with these legal fees and other related expenses. To make matters worse, none of these efforts has allegedly benefitted Joanne or any of the three trusts, but approximately $2,000,000 has been spent in pursuing these frivolous lawsuits.

Ms. Goodwin, on Joanne's behalf, argued that the probate exception to federal jurisdiction and the *Rooker-Feldman* doctrine deprived the federal court of jurisdiction over Mr. Black's claims. The probate exception reserves to state probate courts the probate or annulment of a will and the administration of a

probate estate, and it holds that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*. The *Rooker-Feldman* doctrine holds that lower federal courts have no jurisdiction to hear cases brought by state-court-losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.

The federal district court found that the probate exception barred one of Mr. Black's claims, but the *Rooker-Feldman* doctrine barred all three. Ms. Goodwin's 12(b)(1) motion to dismiss was granted, although Mr. Black was given until August 10, 2020 to file an amended complaint in an effort to cure the jurisdictional defect.

Commonwealth v. Bradley, 2020 PA Super 109, _____ A.3d _____ (August 7, 2020). Attorney/trustee convicted for stealing money from SNTs and victimizing clients by not completed work for which they had paid him probably got his sentence shortened by convincing the appeals court that he should have been eligible for a recidivism risk reduction incentive program.

Bradley was an attorney/trustee who stole $127,000 from six SNTs and victimized 11 clients by not completing work for which they had paid him a total of $41,000. Bradley was convicted and sentenced to 17 to 34 years' incarceration. He argued that he should have been given a shorter sentence, because it was a de facto life sentence, plus he needed to get out and work to pay restitution, and he had had "pure intentions" in committing non-violent offenses, because he had health problems and really needed the money. The state appellate level court found that Bradley had not preserved his sentencing claims, but the court wasn't persuaded by his arguments in any case. However, the trial court had found appellant ineligible for the Recidivism Risk Reduction Incentive (RRRI) Act program due to a conviction for disorderly conduct more than 20 years before, which the trial court felt showed that Bradley had a "history of past violent behavior." The appellate level court disagreed with the trial court on the RRRI issue, vacated Bradley's judgment of sentence, and remanded for the imposition of an RRRI minimum sentence.

Gonzalez v. Gonzalez, _____ So.3d _____ (Ala. Civ. App., July 10, 2020). Divorce decree was unmodified, because appeals court didn't sympathize with the ex-husband who insisted that the settlement agreement did not reflect the understanding of the parties had not read

that settlement agreement before he signed it.

Update from last year. A January 2016 divorce decree required Carlos to transfer his whole life insurance policy to an SNT for the Gonzalez's son, pursuant to a settlement agreement between Carlos and English. Carlos filed a motion for relief from that judgment, saying it did not reflect the understanding of the parties, although he admitted that he hadn't read the settlement agreement before he signed it. The trial court found that the parties had not intended to fund the SNT before Carlos's death. On appeal, the state intermediate court found that the disabled child was an indispensable party and required the trial court to appoint a guardian ad litem to represent the interests of the child. This is where the case picks up again this year. After receiving the testimony of the guardian ad litem, the trial court modified the divorce decree to allow Carlos to take his life insurance back, but preventing him from encumbering it, and requiring him to pay the premiums and provide English with semi-annual statements. Claudia was also ordered to pay the sum of $73,000 back to the whole life insurance policy in Carlos's name. Carlos appealed again. English filed a cross-appeal. The state intermediate court reversed the judgment of the trial court as to English's appeal and dismissed as moot Carlos's appeal. The original divorce decree remains in place. Carlos should have read the settlement agreement before he signed it!

Puff v. Puff, 222 A.3d 493 (Conn., January 14, 2020). Ex-wife who was found in contempt by trial court, and then not in contempt by appeals court, is ordered by state supreme court to face a new trial court judge for further proceedings regarding the possibility of litigation misconduct instead.

Update from two years ago. Gregory and Claudia divorced in 2002. Gregory was ordered to pay alimony to Claudia in the amount of $5,900 per month for a ten-year period. In 2009 and 2010, Claudia sought an increase in the amount and duration of the alimony payments, due to her deteriorating health and a recent diagnosis of multiple sclerosis. After an initial order and further proceedings, in 2014, the parties stipulated in court to an oral agreement. Gregory would pay the amount of $10,000 per month to an SNT for Claudia, with Gregory as the residual beneficiary of this trust. Claudia would obtain a tax opinion regarding the alimony being taxed to her and tax-deductible for Gregory. A few months later, Gregory filed a form of trust and asked for an order formalizing the oral agreement. The court complied. After various motions to reargue and reconsider, Claudia was found in contempt of

court and ordered to pay $169,000 of Gregory's attorney and expert witness fees. Claudia appealed. The state appellate level court affirmed the terms of the settlement agreement, the SNT language, and the tax treatment, but reversed the contempt citation against Claudia. Claudia's argument that the settlement had not been finalized was not contemptuous. This is where the case picks up again this year. Gregory appealed, arguing that the order requiring Claudia to pay his attorney and expert witness fees was based on contempt and litigation misconduct (Gregory felt that, after settling five years of litigation by stipulating to a deal, Claudia failed to meet her obligations under that stipulation and instead contested her own settlement through improper procedural mechanisms). The state supreme court asked the trial court judge for clarification on this issue and was not satisfied with the trial court judge's answer. As a result, the state supreme court affirmed the appellate court's reversal of the contempt charges, but remanded to a new trial court judge for further proceedings regarding the possibility of litigation misconduct by Claudia.

Conservatorship of O.B., 9 Cal.5th 989, ___ P.3d ___ (Calif. July 27, 2020). Appellate review of trial court decision applying "clear and convincing evidence" standard of proof must be adjusted to recognize the higher standard required.

O.B., an adult with autism, was found by the trial court to be incapacitated and her mother and sister were appointed as limited conservators of her person. The California Court of Appeal upheld the finding, ruling that the trial court was required to find incapacity by clear and convincing evidence, but that the standard of appellate review was whether the trial court's decision was supported by substantial evidence.

The California Supreme Court reverses the appeals court's decision (but not the underlying trial court decision), ruling that the standard of review "must account for the level of confidence this [higher trial court] standard demands." The Supreme Court remands to the Court of Appeals for review to determine whether that higher standard has been met.

While not actually involving a special needs trust, this reported decision from a state high court does deal with the standard of proof required when finding a need for protective proceedings for adults with autism. It is striking that the trial court in this

case heard evidence that O.B. is able to make many (most?) of her own decisions, that she has "at least average intelligence," and that she is verbal, and able to talk about her likes and dislikes. It is also worth noting that the gravamen of her appeal seems to be that the conservatorship order effectively modified her IEP (by naming a new conservator who could advocate for a modification, apparently), and that the federal and state education laws were beyond the scope of the conservatorship court.

McCampbell by and through Hidani v. McCampbell, 2020 WL 2307622, _____ F.Supp.2d _____ (D. Minn., May 8, 2020). U.S. District Court does not grant motion for summary judgment by son/trustee defendant with respect to ambiguously-worded trust hinging on mother's intent with regard to son/trustee inheriting home and whether he would have to provide a lifetime of care to mother and sister.

In early 2013, David and his wife, Laura, moved from Wisconsin to Minnesota to care for David's aging parents, Richard and Jean, and also to care for David's sister, Martha, who is now approximately 60 years old and suffers from medical and mental health conditions that inhibit her ability to care for herself. On several occasions prior to the move, David's parents apparently told him that he could have their home in exchange for providing care, and David now claims that it was understood that, unless David and Laura moved in with Richard, Jean, and Martha to provide care, there was no other option that could avoid the sale of Richard and Jean's home and the institutionalization of Richard, Jean, and Martha.

Apparently, David and Laura did provide a lot of care, but Jean paid them $4,300 per month in exchange for that care, and she also paid for David and Laura's food and living expenses. Martha paid $600-700 per month to cover her "room and board."

Jean met with an estate planning attorney in February 2013, but the estate planning took several months, involved Jean's children, and included multiple drafts of a trust. The estate planning attorney forwarded the final draft of the trust to Jean, and her children, David, Julie, and Richard Jr., along with a cover letter explaining Jean's intent to leave her home to David and Laura, and that an SNT for Martha would come into existence only if David, Laura, Julie, and Richard Jr. all died before Jean. Jean ultimately executed the trust in August 2013.

The trust named David and Laura as the primary beneficiaries of all of Jean's assets, including her home in Minnesota (specifically identified by its address), and the trust stated Jean's understanding that David and Laura intended to provide care for her and Martha until their respective deaths. The trust further stated that Jean's daughter, Julie Hidani, would receive the remaining trust assets if David and Laura predeceased Jean, then Richard Jr., and then finally Jean's daughters, Mary, Sheila, and Martha, with Martha's share going to the SNT for her if Martha was under the age of 65 at the time.

David and Laura lived in the home with Jean and Martha until December 2014, when the home in Minnesota was sold and another (more handicap-accessible) home in Wisconsin was purchased. The Wisconsin home was titled in the names of David, Laura, and Jean as joint tenants, and the proceeds from the sale of the Minnesota home were used to pay off the mortgage on the Wisconsin home.

Jean suffered a stroke in December 2016 and subsequently moved into a skilled nursing facility. Jean continued to pay David and Laura for care until February 2017 when it became clear that she would be unable to return to the home, and Jean paid the household expenses and homeowner's insurance until August 2017 when she died.

Sometime after Jean's death, Mary, Julie, and Sheila wrote to David and Laura asserting that the McCampbell siblings had grown up knowing that all Mom and Dad had when they died would be given to Martha. The letter also asserted that David and Laura had been generously compensated for everything they had done so far, and the letter expressed concern about David and Laura inheriting the rest of the estate unless they continued to care for Martha for the remainder of her life. Finally, the letter requested an accounting for the past four years, and modifications to the trust naming Martha as the sole beneficiary, stipulating a standard of care for Martha, establishing contingency plans in the event that David and Laura were unable or unwilling to care for Martha, and requiring annual trust accountings going forward.

In August 2017, Martha moved back to Minnesota to live with Julie. Martha lived with Julie until January 2018 when she moved into an assisted living facility. By that time, David and Laura had sold the Wisconsin property and used the proceeds to purchase another home for themselves. Martha, by and through Julie as her guardian and conservator, sued, alleging that the proceeds of the sale of the Wisconsin home should have been distributed to her SNT as required by her mother's trust. David and Julie brought four counterclaims and moved for summary judgment on all four of those counterclaims.

The US District Court in Minnesota denied the summary judgment motion, finding that the trust language is ambiguous and genuine issues of material fact preclude summary judgment.

Indiana Family and Social Services Administration v. Anderson, _____ N.E.3d _____ (Ind.Ct. App., September 3, 2020). Indiana court of appeals affirms trial court's denial of State's motion to dismiss Medicaid recipient's petition for judicial review, but overturns trial court's denial of State's motion to dismiss Medicaid recipient's § 1983 claim.

In February 2015, Bonnie Anderson ("Anderson") entered a nursing home. She applied for Medicaid and was eventually approved. In March 2016, the Anderson Family Supplemental Needs Trust ("SNT") was established for Anderson's benefit and was funded by Anderson's farm property. Anderson died in July 2018. In October 2018, the Indiana Family and Social Services Administration ("FSSA") sent a notice imposing a Medicaid transfer penalty extending from February 2016 through March 2019 on the basis that property had been transferred for the purpose of rendering Anderson eligible for Medicaid benefits.

Anderson's representative appealed the FSSA determination. After a fair hearing, an ALJ reversed the imposition of the Medicaid transfer penalty in a decision issued in January 2019. The FSSA requested an agency review of the ALJ's decision. A few days after that request, counsel for Anderson submitted a document to the FSSA demanding that Anderson be reimbursed $80,000 that the SNT had been forced to pay to the nursing home because the FSSA incorrectly considered the SNT to be an available resource of Anderson's. The FSSA later withdrew its request for the agency review of the ALJ's decision.

In February 2019, Anderson filed in the trial court a petition for judicial review challenging the ALJ's decision and a complaint seeking damages under 42 U.S.C. § 1983. The FSSA moved to dismiss the petition and complaint on the grounds that Anderson lacked standing to seek judicial review, had failed to exhaust her administrative remedies before seeking judicial review, and had failed to state a claim under § 1983. The trial court conducted a hearing and later denied the motion on all three counts. The FSSA filed an interlocutory appeal with the Indiana court of appeals.

The Indiana court of appeals found that Anderson clearly had standing under the Indiana Administrative Orders and Procedures Act to request a judicial review, since

she was a party to the proceedings of the ultimate authority that led to the final agency action. Nevertheless, the FSSA argued that Anderson lacked standing because she prevailed in the decision by the ALJ and "received complete relief from the ALJ." The court of appeals determined that Anderson had hardly received complete relief. The ALJ did reverse the Medicaid transfer penalty, but the ALJ's decision omitted any determination or direction to the FSSA regarding the treatment of the SNT trust property and whether it constituted an available resource to Anderson.

The Indiana court of appeals also found that Anderson had not failed to exhaust her administrative remedies before seeking judicial review. The court of appeals held that the document that Anderson submitted to the FSSA demanding that Anderson be reimbursed $80,000 was not a response to the FSSA's request for agency review of the ALJ's decision, but was a request for an agency review in its own right. It was not clear to the court why the agency had not addressed Anderson's submission. However, once the agency had dismissed the agency review and stated that it would take no further action, Anderson had exhausted her administrative remedies.

The § 1983 claim seems like a bit of red herring in this case. The bottom line is that the U. S. Supreme Court has determined that it is not permissible to bring a § 1983 claim against administrative agencies of the state, and a § 1983 claim against the Secretary of the FSSA may only be brought for injunctive relief, which was not sought by Anderson in this case.

The Indiana court of appeals affirmed the trial court's denial of the FSSA's motion to dismiss Anderson's petition for judicial review, but overturned the trial court's denial of the FSSA's motion to dismiss Anderson's § 1983 claim.

Ex parte N.G., _____ So.3d _____ (Ala., September 4, 2020). Alabama supreme court denies petition by the father and his SNT trustee for a writ of mandamus directing the local juvenile court to vacate an order transferring to the local circuit court a claim asserted by the mother alleging the fraudulent transfer of the father's personal injury proceeds to his SNT instead of paying the father's past-due child support.

In 2005, N.G., Jr. ("the father") was involved in an automobile accident and was rendered permanently disabled. His mother was appointed as his guardian, and she commenced a personal injury action on his behalf. The personal injury action was

settled in 2013, and the settlement proceeds were placed in an SNT for the father.

In August of 2019, P.W. ("the mother") filed a petition in the local juvenile court seeking to recover approximately $70,000 in past-due child support allegedly owed to her by the father. The mother also named the guardian, in her individual capacity and as the father's guardian, as a defendant and alleged that she had secreted the father's assets. The mother later amended her petition to add the SNT as a defendant and to assert a claim alleging that a fraudulent transfer occurred when the settlement proceeds were transferred into the SNT instead of being paid to her as past-due child support.

The father, the guardian, and the SNT ("the petitioners") moved to dismiss the fraudulent transfer claim, asserting that the juvenile court did not have subject-matter jurisdiction over it. The juvenile court agreed that it lacked jurisdiction but, instead of dismissing the fraudulent transfer claim, the juvenile court severed the fraudulent transfer claim from the child support claim and transferred it to the local circuit court. The petitioners filed a petition for a writ of mandamus in the Alabama court of appeals, which denied the petition by order. The petitioners then filed a mandamus petition with the Alabama supreme court.

The Alabama supreme court indicated that a petition for a writ of mandamus is an appropriate means of challenging the allegedly improper transfer of a case from one court to another, and that normally, if a court lacks subject-matter jurisdiction over a case, it must dismiss the case. However, there is a specific Alabama statute that requires a court to transfer a case to another court in the same county if it appears that the case should have been brought in that other court. The supreme court held that a writ of mandamus is an extraordinary remedy, and the petitioners have the burden of showing a clear right to relief. In this case, the petitioners did not demonstrate that the juvenile court was without the power to transfer the mother's fraudulent transfer claim to the circuit court, and the petition was denied.

Unpublished Cases

Stevens v. Stevens (In re Marriage of Cseto), 2020 WL 5228139 (Cal. App., September 9, 2020). Parents of adult incapacitated children may have an obligation of support, and an unfunded estate planning special needs trust will not satisfy that obligation.

Ildiko Cseto and Andrew Stevens divorced in 2009 after fifteen years of marriage. The divorce decree awarded a Beverly Hills residence and "substantial" commercial real estate holdings to Ildiko, and the parties agreed that there would be no child support or spousal maintenance.

When the couple's son Armand was 14, Ildiko petitioned to set aside the divorce decree, arguing that the waiver of child support violated public policy. Andrew was ultimately ordered to pay $4,248/month until Armand reached age 19. Andrew unsuccessfully sought to set aside the earlier property transfers (including a first appellate cycle).

In 2018, a few months before Armand's 19th birthday, Ildiko petitioned for a finding that Armand was "incapacitated from earning a living and without sufficient means," the language of the state statute allowing imposition of child support orders for adult children. The parties stipulated that Armand was incapacitated and unable to be self-supporting, and Ildiko introduced evidence that he suffered from Tourette syndrome and "autism spectrum disorder without intellectual impairment, with language impairment." The couple (and their respective experts) disagreed about some of the particular treatments being implemented, including neurofeedback and speech therapies.

Andrew's evidence included testimony about a revocable living trust, funded with multiple pieces of real estate and $50,000 in cash. The terms of the trust directed that upon Andrew's death all real estate would be distributed to two other children, but the cash (possibly including the $1.5 million note received from recent sale of a piece of real estate) would be held in trust for Armand's benefit.

The trial court decided that Ildiko had not carried her burden of proving Armand's incapacity to earn a living and his lack of sufficient means to be self-supporting. The trial judge also found that Andrew had created a "special needs trust" for Armand's benefit, and that it had been funded with up to $5.9 million of assets. Therefore, the request for adult child support was denied, and the related request for a security interest in Andrew's property was also rejected.

The California Court of Appeals, in an unreported decision, reverses the trial court finding regarding incapacity. While expert testimony is ordinarily required to establish the entitlement to adult child support, ruled the appellate judges, here the parties had stipulated to Armand's incapacity and the evidence supported that stipulation.

With regard to the ruling on Armand's ability to be self-supporting, the appellate court notes that the gravamen of the finding is to determine whether the person in question would otherwise become a public charge. Since there was little evidence on the revocability of Andrew's trust, or the amount that might be expected to flow

to it upon Andrew's death, the trial court improperly relied on that trust to determine that Armand could be self-supporting.

The trial judge's denial of adult child support is reversed, and the matter remanded for a determination of the amount of support to be awarded. Though this decision is unreported, it may be a helpful guide to at least one state's standards for awarding child support for the benefit of an adult incapacitated child.

Estate of McGill, 2020 WL 3529455 (unpublished) (Cal Ct App, June 30, 2020). State appellate level court finds that the wording of a trust was unambiguous, both on its face and in light of the evidence presented at trial.

A trust left the parents' condo plus 40% of the trust estate to an SNT for their daughter, and 20% of the trust estate to each of their other two daughters and their son, provided that their son's 20% would include a second piece of real property, and he would only get additional trust assets if that real property was worth less than 20%. The son was sure that the real property coming to him was worth more than 20% of the trust estate, so he never had that property appraised. One of the daughters didn't like this, and she argued that the trust was unambiguous and required the two pieces of real estate to be included in the 40% and 20%, respectively. Both properties should therefore be appraised.

The trial court reviewed the wording of the trust and conducted a trial. The daughter argued at the trial that the trust was unambiguous and could only be interpreted the way she interpreted it, and both parties presented extrinsic evidence that they felt supported their positions. The court was not persuaded by the extrinsic evidence presented at the trial, and found that the trust provisions were very clear and gave precise directions to the trustee.

In an unpublished opinion, the state Court of Appeals affirmed the trial judge's decision. The court agreed with the daughter that the trust was unambiguous. Just not the way she thought.