Special Needs Trust Update

2021 Stetson SNT Conference
October 15, 2021

Robert W. Fechtman
Fechtman Law Office
Indianapolis, Indiana
www.IndianaElderLaw.com
RFechtman@IndianaElderLaw.com

Robert B. Fleming
Fleming & Curti, PLC
Tucson, Arizona
www.Elder-Law.com
Fleming@FlemingAndCurti.com

Legislation

Clarification of effect of various government payments on SSI benefits.

Over the course of the past year, several government benefit payments have been distributed to large swaths of the public. Each of those benefits have been enacted with specific provisions to minimize their effect on needs-based benefits like Supplemental Security Income (SSI), Medicaid, Temporary Assistance for Needy Families (TANF), public housing, or Supplemental Assistance Nutrition Program (SNAP). For example:

Child Tax Credit amounts received after adoption of the American Rescue Plan Act of 2021 on March 11, 2021, are not treated as available resources (either income or, to the extent that funds remain as of the first of the next month) for one year after receipt. Monthly payments of $250 or $300 per child began to be distributed as of July 15, 2021.

Economic Impact Payments received pursuant to the CARES Act of March 27, 2020, the Consolidated Appropriations Act of December 27, 2020, and the American Rescue Plan Act of March 11, 2021, are similarly not treated as income or, to the extent saved, available resources for one year after receipt.

As the one-year anniversary of multiple payments arrive (beginning in March, 2021, and continuing until December, 2022, and possibly later), unspent benefits payments may begin to become problematic for eligibility purposes. Planning options will include spending and, for some beneficiaries, transfers to ABLE Act accounts.

Cases

Pfoser v. Harpstead, 953 N.W.2d 507 (Minn., January 20, 2021). Medicaid transfer penalty imposed for transfer to pooled SNT after age 65 was reversed by appeals court, and now that reversal has been upheld by the state supreme 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 was 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.

The Commissioner of the Minnesota DHS made some interesting arguments, including the idea that valuable consideration should include only assets that are themselves countable for the purposes of determining Medicaid eligibility and that valuable consideration should not include the value of future goods and services, but the court found those arguments unavailing. The Minnesota Supreme Court

affirmed the decision of the Minnesota Court of Appeals.

Matter of Valerie R. Pecce Supplemental Needs Trust, 167 N.E.3d 429, 99 Mass.App.Ct. 376 (March 31, 2021). Appeals court determines that funds left to (d)(4)(A) trust by settlor's will are not available for Medicaid pay-back.

Albert Pecce established the "2001 trust" in September of 2001, for the benefit of his daughter, Valerie. Albert was 70 years old at the time, and Valerie was 38. Valerie had been born with disabilities, and had been receiving Medicaid benefits through MassHealth for many years as of 2001 when the trust was established. The 2001 trust explicitly provided that it was established under 42 U.S.C. § 1396p(d)(4)(A) for the benefit of a disabled person. Albert transferred $200,000.00 to the trust at its inception. Valerie did not transfer any of her funds to the 2001 trust at any time.

On the same date that the trust was established in September of 2001, Albert also executed his will, and the will provided that at his death all of Albert's assets would go to the 2001 trust for Valerie. Albert died in 2007. At that time, Albert had substantial assets, which poured over into the 2001 trust. Albert's cousin, Gino DiGiacomo, succeeded Albert as the trustee.

Valerie died in 2015. This triggered the "payback" provision of the trust. DiGiacomo filed a petition in 2015, seeking to reform the 2001 trust to remove the payback on the theory that adding it in the first place was a mistake. In DiGiacomo's view, the 2001 trust should have been established as a "third-party special needs trust" under 42 U.S.C. § 1396p(c)(2)(B)(iv). The (d)(4)(A) trust was not needed to preserve Valerie's eligibility for Medicaid, and Albert had such significant assets during his lifetime that he did not need to accomplish the transfer to the 2001 trust in such a way as to preserve his own eligibility for Medicaid in the future. It so happened that DiGiacomo was the sole remainder beneficiary of the 2001 trust.

MassHealth opposed DiGiacomo's petition for reformation of the 2001 trust, and they also asked the court to remove DiGiacomo as trustee of the 2001 trust and as the personal representative of Albert's estate, based on DiGiacomo's failure to perform his obligations in those roles.

After a two-day trial, the judge ruled that reformation of the 2001 trust was not appropriate, because she found that Albert did intend the payback provision. She

also removed DiGiacomo as trustee and as personal representative. DiGiacomo appealed this decision.

The Massachusetts court of appeals determined that, while the characterization of the trust as a (d)(4)(A) trust was clearly a mistake, the payback provision was intentional, or at the very least DiGiacomo failed to prove that Albert did not intend to include the payback provision. Perhaps Albert was concerned about his own eligibility for Medicaid in the future. On the other hand, though, the court of appeals could not reconcile the pour-over provision of Albert's will with the payback provision of the 2001 trust. Albert could not have been concerned about his own eligibility for Medicaid after his death, and he would not have intended that his estate assets to go the state when they would otherwise go to the beneficiaries he had designated from his own family The court therefore remanded this issue and instructed the trial court to reform the 2001 trust to remove the payback as to the assets inherited from Albert, and also to reconsider the removal of DiGiacomo as trustee and personal representative in light of this decision.

Black v. Wrigley, 997 F.3d 702 (7th Cir., May 10, 2021). U. S. Court of Appeals denies law professor's request for a new jury trial in her suit against two defendants for defamation and intentional infliction of emotional distress.

Yes, the Blacks are back! Some background facts from the prior cases, to set the stage for the new one.

Katherine Black (Katherine also goes by the last name Litvak) and her husband, Bernard Black, are both tenured law school professors.

Bernard's mother died in New York in 2012 leaving behind a roughly $3 million estate. The Blacks expected to inherit about one-third of that estate, but it turned out that Bernard's mother had cut them out of her will and left virtually the entire estate to Bernard's homeless and mentally ill sister, Joanne, who lived in Denver. So, in late 2012, Bernard had himself appointed as Joanne's conservator and then worked to redirect much of her inheritance to himself and Katherine.

Meanwhile, Bernard's cousin, Cherie Wrigley, sought to locate Joanne and successfully used a private investigator to find her.

Joanne relocated to New York in 2013. Bernard filed suit in New York state court seeking to be appointed guardian of Joanne's property. Wrigley filed a cross-

petition to be appointed Joanne's guardian instead.

Back in Denver, the guardian *ad litem* discovered that Bernard had diverted much of Joanne's inheritance to himself. As a result, the guardian *ad litem* hired a forensic accountant named Pamela Kerr to investigate Bernard. On April 2, 2015, the Denver probate court held a hearing that became contentious and, that day, entered an order suspending Bernard as Joanne's conservator. After the hearing, Wrigley allegedly said to Katherine, "you, you, you need a sex change operation. And I will arrange this for you, whether you want it or not." Wrigley then allegedly confronted Katherine at the airport and threatened to file a false report with child services to have her children taken away.

The Denver probate court ultimately found that Bernard had committed civil theft by stealing $1.5 million from Joanne. After trebling the damages under Colorado law, the court entered a $4.5 million judgment against Bernard. This judgment was confirmed upon appeal. See *Black v. Black*, 422 P.3d 592 (Colo. App. 2018).

We have covered numerous related cases in prior years. There was the Illinois case (Katherine and Bernard Black live in Illinois) where the Illinois court upheld the foreign judgment of the Colorado court. There was another Illinois case where Katherine unsuccessfully sued Bernard and one of his sons from his first marriage, in their roles as co-trustees of two trusts for Joanne and one trust for Bernard and his children from his first marriage, alleging that these trust were indebted to her in the amount of $400,000.00. There was another Colorado case where the Colorado court confirmed its *in rem* jurisdiction over conservatorship funds that had been transferred to out-of-state trusts. Finally, there was the case in the U. S. District court in the Northern District of Illinois where Bernard's suit against Wrigley and her brother, who were Joanne's conservators in New York, alleging that they had colluded in a scheme to strip the three previously-mentioned trusts of assets for their own purposes, was dismissed on a 12(b)(1) motion.

Now, back to the New York guardianship proceedings. On January 7, 2016, Katherine submitted a 23-page letter to the New York court laying out her contentions regarding Joanne and the Denver probate case. Katherine chose to put this letter on the letterhead of the university where she and Bernard both teach. Soon afterward, Wrigley called the deans of the university's law and business schools (Bernard teaches at both) to complain that Katherine had used their letterhead to make false statements to the New York court. Kerr (the forensic accountant from Colorado) also called the law school dean and sent Wrigley a draft of a letter to the dean. Kerr never sent the letter to the dean, but Wrigley thought she had, so Wrigley attached it to an ethics complaint she then submitted to the

university.

On January 6, 2017, Katherine sued Wrigley and Kerr in federal district court in Chicago. She brought claims against both of them for defamation (based on the statements submitted to the university) and against Wrigley for intentional infliction of emotional distress (based on the threats she had allegedly made to Katherine in Colorado).

The jury trial began in August 2019 and lasted about two weeks. Nothing went as Katherine had hoped, especially toward the end when Katherine's trial counsel informed the court that Katherine had elected to make her own closing argument. The court denied this request because Katherine was represented by counsel. Katherine then attempted to fire her counsel right then and there, which the court also refused to allow, accusing Katherine of gamesmanship and attempting to manipulate the proceeding. At that point, Katherine's counsel apparently had some sort of a breakdown (wouldn't you?!) and the court ultimately decided to continue the closing arguments until the following Monday. Katherine's counsel finished the trial on Monday, but the jury rejected Katherine's claims and returned a verdict for Wrigley and Kerr.

Katherine appealed *pro se* and argued that the trial was riddled with errors, including statements made during closing arguments, omissions from the jury instructions, alleged incapacity of her attorney, and more. The U. S. Court of Appeals found no reversable errors and denied Katherine's request for a new trial.

M.E.W. v W.L.W, 2020 PA Super 229, 240 A.3d 626 (September 18, 2020). State appellate court refused to reduce father's child support payment based on adult disabled child's special needs trust assets and receipt of SSI.

Mother and father were married on August 11, 1990, and separated on September 8, 2006. They were divorced by decree dated January 7, 2011. They are the parents of three children, two of whom are now emancipated. The third child, J.Z.W., has Down Syndrome and his mother is the guardian over both his person and estate. According to the divorce settlement agreement, father is required to pay mother alimony of $800.00 per month for the rest of J.Z.W.'s life. The settlement agreement expressly provides that the dollar amount of this alimony is not modifiable upward or downward.

It is a long story, but mother and father battled over child support for all three of the children over many years. Until recently, father was paying no child support for J.Z.W., but in 2016 mother filed a petition asking to add J.Z.W. back to the support order. After various hearings and numerous appeals, even though father had monthly income of more than $20,000.00 and mother had monthly income of less than $3,000.00, the trial court issued an opinion in May of 2019 that reduced father's child support obligation to medical insurance only, based on assets of J.Z.W.'s (including a special needs trust that was referenced nowhere else in the opinion), J.Z.W.'s monthly SSI, the $800.00 monthly alimony that father was already paying to mother, and the interest that father was paying on a promissory note that allowed him to become a 50% shareholder in his business partner's ophthalmic practice. Mother appealed this order.

The state appellate court reversed the order of the trial court, holding that the trial court was not permitted to deviate from normal child support guidelines for any of its stated reasons.

Wright v. Wright-White, 2021 WL 1151926, _____ So.3d _____ (Ala. Civ. App., March 26, 2021). State appellate court affirmed trial court decision to increase father's child support to pay for respite care that he was no longer providing, and refused to consider SSI benefits and special needs trust assets as resources available to the child.

Mother and father were divorced by a judgment entered by the trial court on November 18, 2004. Among other things, the divorce judgment ordered father to pay $1,300.00 per month in child support to a special needs trust created for the benefit of the parties' disabled son, Thomas. Upon receipt of the monthly payments, the trustee was to distribute the $1,300.00 to mother. Father was awarded weekend visitation with Thomas, which, according to the divorce judgment, also served as "mandatory respite care" for Thomas. In the event father did not exercise that visitation, he was required to pay for the respite care.

Father moved to Tennessee in 2009, hardly ever visited Thomas after that, and stopped providing the respite care.

On November 6, 2017, father filed a petition to modify his child support to reflect the fact that Thomas was, by then, receiving SSI. On July 2, 2019, mother filed a

petition to modify father's child support to cover the costs of Thomas's respite care. The two actions were later consolidated, and father's modification action was dismissed by the court on January 3, 2020. At trial, mother testified that she needed 96 hours of respite care for Thomas every month, at the cost of approximately $1,700.00 per month. She claimed that she was unable to obtain this respite care through either of the Medicaid providers in her area.

After the trial, the trial court entered a judgment on March 9, 2020, increasing father's child support to $3,000.00 and awarding mother $10,000.00 in attorney fees. Father filed a post-judgment motion on March 24, 2020. On May 1, 2020, the trial court entered an order granting the father's post-judgment motion, in part, by vacating the award of attorney fees to the mother. Father appealed this order. Mother cross-appealed.

The state appellate court upheld the trial court's order, both with respect to the increase in father's child support and with respect to vacating the award of the mother's attorney fees. The court refused to consider the child's SSI benefits and the special needs trust money as resources available to the child, either to pay for the respite care or to reduce the father's child support obligation. The court determined that the decision whether to award attorney fees in a domestic relations case is within the sound discretion of the trial court.

Matter of James H. Supplemental Needs Trusts, 194 A.D.3d 1167 (3rd Dep't 2021), 148 N.Y.S.3d 313 (May 6, 2021). State appellate court held that trial court could authorize disbursement of attorney fees, guardian fees, and guardian's attorney's fees from supplemental needs trusts.

Update from two years ago. James H. is the beneficiary of five special needs trusts. James' brother, John H., who happens to be an attorney, was the trustee of three of these trusts. Only one of these three trusts, a first-party SNT, had been funded. The other two of these trusts were third-party SNTs that were meant to be funded with assets from the estate of James' and John's mother, who died in 2014. John had not acted, either in his role as the trustee or as the executor of his mother's estate, to ensure that these two trusts were funded.

In 2015, following the death of their mother, James' cancer diagnosis, and the deterioration of the brothers' relationship, James began to have financial difficulties. Mental Hygiene Legal Service successfully petitioned to have a guardian appointed

for James' property. Thereafter, the guardian, who brought an action on behalf of James, began to work with James to request that John make various distributions from the SNTs. John was reticent to do so. As trustee, John did not communicate effectively with James' guardian, he refused to make timely payment for various expenses, he did not seem to understand the SNTs or what expenses were permissible under the trust agreements, and the records showed that he took issue with some of the guardian's actions and retaliated by refusing to make payment from the SNT for appropriate expenses.

Eventually, all of this led to the guardian petitioning the court to remove John as the trustee of the self-settled SNT. At the hearing, the guardian orally moved to amend her petition to encompass all three SNTs over which John was the trustee. The court granted the guardian's amended petition and removed John as the trustee of all three SNTs. Subsequently, there was a rehearing and then an appeal, all of which John lost, thereby cementing his removal as the trustee of the SNTs.

This is where the case picks up again in 2021. The guardian, who was also an attorney, performed numerous services on James' behalf. Her legal work included her successful efforts at removing John as the trustee of the three SNTs. When John filed his appeal, the guardian had to hire an attorney to represent her. Of course, there were also the guardian's non-attorney services in her role as a guardian. The guardian petitioned for and the trial court granted her attorney fees of $17,213.00, her guardian fees of $36,000.00, and her guardian's attorney's fees of $30,600.00 and expense reimbursement of $393.19, all fees to be paid from the SNTs.

John, who is the remainder beneficiary of all of the SNTs appealed, contending that the court should not have authorized the fees to be paid from the SNT, because the SNT funds should be reserved for things that will improve the quality of life for the trust beneficiary, and also that the attorney fees charged by the guardian were in effect a form of double billing. The appellate court affirmed the award of fees to be paid by the SNTs, noting that they thought the successful removal of John as the trustee did in fact improve the quality of James' life, and emphasizing that the guardian's experience as an elder law attorney put her in an excellent position to provide relevant legal services to James while acting as his guardian.

Matter of Joseph M.W., 188 A.D.3d 1563 (4th Dep't 2020), 135 N.Y.S.3d 692 (November 13, 2020). State appellate court held that state was entitled to Medicaid payback at the time of (d)(4)(A) trust beneficiary's death,

even though a Medicaid subrogation lien was paid at the time of the settlement that funded the trust.

In 1998, Joseph, a developmentally disabled individual, was rendered a quadriplegic after falling down a flight of stairs at a state-operated residential care facility. Following the accident, two tort actions were commenced. Joseph received significant proceeds as a result of these tort actions, a Medicaid subrogation lien was paid, and the balance of the proceeds were placed in a (d)(4)(A) trust for the benefit of Joseph.

Joseph died in 2016. Thereafter, the Court Examiner commenced this proceeding to compel the trustee (and a remainder beneficiary of the SNT) to file a judicial settlement of the SNT. In response, the trustee sought an order determining that any Medicaid liens against the SNT had been fully satisfied and discharged, and that she was therefore entitled to the remainder of the SNT corpus. In response to that, New York Medicaid argued that the existing Medicaid lien on the SNT was substantially greater than the remaining trust corpus.

The trial court conducted a hearing to ascertain the value of the alleged Medicaid lien, during which New York Medicaid submitted a historical claim detail report (CDR), which listed the Medicaid expenses for Joseph from 1996 until his death in 2016. Following the hearing, the court determined that New York Medicaid has an existing Medicaid lien against the SNT in an amount greater than the remaining trust corpus and directed the trustee to pay the remaining balance to New York Medicaid in satisfaction of its lien. The trustee appealed.

The state appellate court affirmed the trial court's ruling that the prior payment of the Medicaid subrogation lien at the time of settlement did not, in whole or in part, satisfy or discharge the payment of the Medicaid lien on the trust at the time of the beneficiary's death. However, the appellate court also ruled that the trial court erred in admitting the CDR as evidence of the amount of the Medicaid lien, and that matter was remitted to the trial court for a new hearing to determine the amount of the Medicaid lien.

Matter of Dousmanis, 190 A.D.3d 548 (1st Dep't 2021), 136 N.Y.S.3d 713 (January 19, 2021). State appellate court affirmed trial court refusal to reform a testamentary trust for the now-deceased brother of the

testator, and therefore held that the trust assets were available to satisfy a Medicaid lien.

Andrew was an incapacitated person living in New York. The will of Andrew's deceased brother, Peter, appointed Dousmanis as executor, and directed that Dousmanis place the remaining property in his estate into a general benefit trust for Andrew's benefit, support, maintenance, health, and education. The will appointed Dousmanis as the trustee and residual beneficiary of this trust.

Upon Andrew's death, New York Medicaid sought to impose a Medicaid lien on the funds that remained in the trust. Dousmanis argued to the court that Peter had intended to create an SNT rather than a general benefit trust, and the remaining trust assets should pass to him as the remainderman. Dousmanis admitted, though, that he had failed to turn over trust assets to Andrew's guardians for use during Andrew's lifetime. He also admitted that he did not comply with a court order directing him to set up an SNT for Andrew pursuant to EPTL 7-1.12 (a New York law).

The trial court issued an order directing that Andrew's assets held in the general benefit trust be used to satisfy the Medicaid lien. Dousmanis appealed. The state appellate court affirmed the order of the trial court. The court indicated that courts are generally hesitant to reform a testamentary instrument unless the reformation effectuates the testator's intent, and the court found nothing in Peter's will that indicated an intention to create an SNT.

Broadway National Bank v. Yates Energy Corporation, 2021 WL 1940042, _____ S.W.3d _____ (Tex., May 14, 2021). Texas Supreme Court reversed decision of state appellate court and held that the original parties to a deed transferring mineral rights to SNT beneficiary could validly execute a correction instrument, even after a third party had acquired an interest in the original transaction.

Mary had an inter vivos trust that held property in two Texas counties. A few months before Mary's death in 2003, she amended her trust to allocate its property to her descendants. The 2003 amendment divided the property among Mary's four children, with the share for Mary's son, John, to be distributed to the trustee to hold

in a separate SNT for John. Mary's trust named Broadway National Bank as the trustee. Any assets remaining in the SNT at the time of John's death were to go to one of Mary's daughters and one of grandsons, or their respective descendants, per stirpes.

In 2005, the Bank, acting as the trustee of Mary's trust, executed a mineral deed that conveyed the trust's mineral interests to her children as had been designated by Mary in the 2003 trust amendment. However, John received his share in fee simple, which the Bank later asserted was a mistake. To correct the mistake, the Bank, as trustee, filed a Corrected Mineral Deed in 2006, explaining that John was only entitled to a life estate in the minerals conveyed by the 2005 deed. This corrected deed also specified the residual beneficiaries of John's SNT. Because some of the mineral interests were already under lease to Yates Energy Corporation, the trustee sent a copy of the recorded 2006 Correction Deed to Yates with instructions to pay royalties to the grantees.

In 2012, John executed a Royalty Deed conveying his royalty interests from oil and gas leases to Yates Energy Corporation. Yates then assigned these royalty interests acquired from John out to a few other companies pursuant to a "farmout agreement." A title attorney working for one of these companies raised questions about the extent of John's royalty interests. Among other things, this title attorney questioned the validity of the 2006 Correction Deed, because it was signed only by the trustee and not by John and his siblings, who were the grantees in the 2005 Mineral Deed. These concerns were conveyed to the Bank. In 2013, the Bank, as trustee, executed an Amended Correction Deed, which was signed by all of the parties to the original 2005 Mineral Deed. A few months later, John died.

John's death ignited this court dispute over the extent of his 2012 conveyance to Yates. The Bank sought declaratory relief in the probate court. The probate court granted summary judgment for the Bank and the remaindermen, declaring that the 2013 Amended Correction Deed was valid and conveyed to John only a life estate in the mineral interests, effectively replacing the 2005 Mineral Deed. The probate court further concluded that Yates and its assignees were not bona fide purchases because they had received a copy of the recorded 2006 Correction Deed at the time of its execution. Yates and its assignees appealed.

The state appellate court reversed the judgment of the probate court and held that the 2013 Amended Correction Deed was invalid. The appellate court did not address the bona fide purchaser question, because it was immaterial once they determined that the correction instrument was invalid. The Bank and remaindermen appealed. Yates and its assignees responded in part that their

property interests were protected because of their status as bona fide purchasers.

The state supreme court reversed the judgment of the appellate court and held that the 2013 Amended Correction Deed was valid. However, the court remanded the bona fide purchaser issue to the appellate court for consideration in light of the state supreme court's decision.

Matter of ABB Trust, 44 Arizona Cases Digest 9, 491 P.3d 1120 (Ariz. Ct. App., May 11, 2021). Arizona court of appeals reversed probate court's dismissal of children's undue influence claim against second wife who induced the settlor to instruct the trust protector to amend trust in her favor, vacated probate court's enforcement of the trust's *in terrorem* clause, and remanded to probate court for further proceedings consistent with its opinion.

Austin divorced Kay, his wife of 57 years, in 2016. He was 78 years old and in declining health. He was also romantically involved with Lindi, his caretaker. Soon after the divorce became final, Austin married Lindi. Shortly before the divorce became final, Austin hired his estate planning attorney, Deloughery, to create an irrevocable trust (the ABB Trust). At the time, Austin expressed his fear that the women in his life would exert too much pressure on him to change his estate plan. As originally created, therefore, the Trust directed the Trustee, upon Austin's death, to distribute 45% of the Trust corpus to his former wife, Kay, 45% to his three adult daughters, and 10% to Lindi. Austin selected a professional trustee to manage the Trust's assets, and he appointed his attorney, Deloughery, to serve as the Trust Protector. The Trust provided that Austin could not alter, amend, or revoke the Trust in any way, but the Trust Protector was authorized to amend or modify the Trust in any manner consistent with Austin's estate planning objectives.

The Trust Protector twice amended the Trust in the first six months after its creation. In March of 2017, he added an *in terrorem* clause. In May of 2017, he eliminated Kay as a beneficiary, made Lindi the sole income beneficiary of the Trust at Austin's death, and authorized the Trustee to distribute the Trust's assets to Lindi as "advisable for any purpose." This second amendment also reduced Austin's daughters to remainder beneficiaries upon Lindi's death and added Lindi's sons from a prior marriage as remainder beneficiaries.

Austin's daughters and Kay (the Petitioners) sought to invalidate the Second Amendment because it was the product of undue influence by Lindi. The Petitioners brought this claim against Lindi, not the Trust Protector, alleging that Lindi indirectly caused the Trust Protector to adopt the Second Amendment by exerting undue influence upon Austin, who, they claimed, was susceptible to undue influence because he was in ill health, dependent upon Lindi for care, and had diminished capacity.

The Trust Protector testified that Lindi brought Austin to his office, initially did all of the talking, and demanded changes to the Trust that would be in her favor. The Trust Protector was able to interview Austin privately, and Austin indicated that he wanted to provide for Lindi but he did not want to give her an outright distribution. The result of this meeting was the Second Amendment.

There were more manipulations by Lindi involving the professional trustee and evidence of Austin's obvious incapacity. When Lindi demanded that the Trust Protector make even further trust amendments in her favor, the Trust Protector resigned. In April of 2018, Lindi filed paperwork to remove the professional trustee and appoint her daughter's friend as a replacement trustee, and Austin authorized this change with his thumbprint rather than his signature. He died five months later.

Lindi moved to dismiss the undue influence claim, arguing that the Petitioners only alleged she unduly influenced Austin, rather than the Trust Protector, and Austin had no power to amend the Trust. The probate court dismissed the Petitioners' undue influence claim and then enforced the Trust's *in terrorem* clause, divesting the Petitioners of their beneficial interest under the Trust. The Petitioners appealed.

The state appellate court accepted the Petitioners' argument that Lindi induced or caused the Second Amendment's creation when she exerted undue influence on Austin to pressure the Trust Protector's adoption of the amendment. This argument was bolstered by the terms of the Trust, which required the Trust Protector to look to Austin's preferences and desires in managing the Trust, and to assist in achieving Austin's objectives. As a result, the appellate court reversed the probate court's decision and remanded the Petitioners' undue influence claim, and also vacated the probate court's application of the *in terrorem* clause.