Special Needs Trust Update

2023 Stetson SNT Conference

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

Elizabeth Noble Rollings Friman
Fleming & Curti, PLC
Tucson, Arizona
www.Elder-Law.com
Friman@FlemingAndCurti.com

Cases

In re Eva Marie Hanson Living Tr. dated Dec. 11 , 1995, No. A22-0826, 2023 WL 1095034 (Minn. Ct. App. January 30, 2023). Minnesota Court of Appeals reversed and remanded the decision of the Trial Court, holding when the unambiguous terms of a trust instrument provide an exclusive method to amend the trust, Minnesota law prohibits consideration of any other method of amending the trust found in another writing (e.g. power of attorney).

Eva Marie and her husband, Lawrence had a son and a daughter. Their son, Randy, was injured in an automobile accident. Randy began receiving medical assistance and benefits, including Social Security Disability. Eva Marie had a revocable trust that she amended in 2013 when she created a financial power of attorney (FPOA). This FPOA appointed her daughter, Shari, as her attorney-in-fact.

Eva survived her husband and her capacity declined. Shari took over the management of Eva's Trust as Successor Trustee. Using the authority bestowed to her under as Eva Marie's attorney-in-fact, in 2017 Shari amended Eva Marie's trust, so that if her brother, Randy, survived their mother, his share of the trust estate would be distributed to a special needs trust (SNT), rather than to him outright. Once Eva Marie died, Shari distributed the trust assets. Half of the trust estate was distributed to Shari outright and free of trust and the other half was distributed to an SNT for Randy. At the time of Randy's death, the assets of his special needs trust were distributed to his wife.

Randy's children brought an action to invalidate the 2017 trust amendment created by Shari, arguing that the trust was improperly amended and that the trust assets ought to be returned

and redistributed pursuant to an earlier version of the trust. The terms of the 2013 trust included statements as follows: “I [Eva Marie] shall have the absolute right to amend or revoke my trust, in whole or in part, at any time” and “This right to amend or revoke my trust is personal to me [Eva Marie], and may not be exercised by any legal representative or agent acting on my behalf.” The Court concluded that the 2017 trust amendment was valid because the financial power of attorney created by Eva Marie expressly gave Shari the authority to amend the trust, even though the 2013 amended trust expressly granted power to amend to Eva Marie.

On appeal, the Court of Appeals reversed and remanded the Trial Court’s opinion. The Court acknowledged the FPOA, however the Court focused its analysis on the language of the 2013 trust. Reasoning that the language of the trust was unambiguous, the Appellate Court did not consider extrinsic evidence, which included the FPOA. It found that Eva Marie’s power to amend trust was personal to her. Eva Marie’s express and personal power to amend trust was unqualified in that only she could exercise power to amend trust, and power to amend trust could “not be exercised by any legal representative or agent acting” on her behalf. For this reason, Shari did not have authority to amend the 2013 amended trust.

Black v. Black, 2023 WL 1989793 (D. Colo., February 14, 2023). U. S. District Court Magistrate Judge rules that Mr. Black’s attempt to remove a single motion from a state court case to federal court is procedurally flawed, that the federal court lacks subject matter jurisdiction over probate matters, that Mr. Black shall pay his sister’s attorney fees related to the removal action, and that the Clerk of Court shall refer Mr. Black to the disciplinary authorities of the New York State Bar.

Some background facts from the numerous prior cases, to set the stage for this new one.

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 $1.5 million for the money he stole from Joanne. After trebling the damages under Colorado law, the court entered a $4.5 million judgment against Bernard. The Probate Court did not at that time void the POD disclaimers. Mr. Black appealed.

In January 2018, the Colorado Court of Appeals affirmed the probate court's order. *Black v. Black*, 422 P.3d 592 (Colo. App. 2018) (*"Black I"*). In 2019, the Colorado Supreme Court denied certiorari. *Black v. Black*, No. 18SC419, 2019 WL 2178077 (Colo. May 20, 2019). Meanwhile, in a subsequent appellate decision addressing additional expense orders by the Probate Court, the Colorado Court of Appeals granted a limited remand for resolution of certain jurisdictional issues. *Black v. Black*, No. 16CA0625, 2018 WL 549917 (Colo. App., Jan. 25, 2018) (unpublished) (*"Black II"*).

On remand, in April 2018, the Probate Court found that it had *in rem* jurisdiction over the conservatorship assets, and that it had personal jurisdiction over Mr. Black and his co-trustee son, Samuel. It also granted Joanne's motion to vacate the POD disclaimers. These orders, too, were appealed.

In April 2020, the Colorado Court of Appeals affirmed all the decisions of the Probate Court, with two exceptions. The Court of Appeals found that Samuel 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. Those discrete issues were then remanded to the Probate Court. *Black v. Black*, 482 P.3d 460 (Colo. App. 2020) (*"Black III"*). In 2021, the Colorado Supreme Court denied certiorari. *In re Joanne Black*, No. 20SC554, 2021 WL 1030354 (Colo. March 15, 2021).

Back to the new case in a little bit. . .

Numerous cases in multiple jurisdictions have grown out of this original case, and many other family members and other parties have come into play. I will list just a few of the many examples. *Black v. Dain*, 2017 WL 11696660 (E.D.N.Y., August 16, 2017. *Litvak v. Black*, 147 N.E.3d 835 (Ill. App. 2019), where the federal court dismissed based on the probate exception to federal jurisdiction all the claims seeking to limit the authority of the Denver Probate Court to make rulings related to the Estate and various trusts. *Black as Trustee of Joanne Black 2013 Trust Agreement v. Goodwin*, 2020 WL 4053176 (N.D. Ill., July 20, 2020), where the federal court dismissed for lack of federal jurisdiction based on the probate exception and the *Rooker-Feldman* doctrine a suit by Mr. Black against Joanne's conservator where he claimed that she aided and abetted in a breach of fiduciary duty. *JP Morgan Chase Bank v. Black*, 2021 WL 4459482 (N.D. Ill., September 29, 2021), which is an interpleader action involving trust funds subject to competing claims, including claims being litigated in the Denver Probate Court.

Back to the new case. . .

Following the Colorado Court of Appeals remand, on May 10, 2021, the Probate Court directed Joanne to file a motion asking to void the POD disclaimers, require the return of conservatorship asses as previously ordered by the court, suspend or remove Mr. Black and Samuel as Trustees from all trusts holding assets derived from the conservatorship estate, and requesting personal liability and damages against Samuel. Consistent with the Probate Court's order, Joanne filed her motion on November 4, 2022.

On November 30, 2022, Mr. Black purportedly removed this action to federal court. On December 2, 2022, the United States District Court in the District of Colorado issued an order to show cause why the matter should not be remanded to state court for lack of subject matter jurisdiction. On December 7, 2022, Mr. Black filed a 43-page motion to transfer the removed motion to either the Northern District of Illinois or the Eastern District of New York. On December 19, 2022, Mr. Black submitted a response to the order to show cause, and then filed a supplement to that response on January 3, 2023. Joanne responded to Mr. Black's filings, Mr. Black replied in support of removal, and then oral arguments were heard on February 3, 2023.

In its decision, the court examine Mr. Black's numerous attempts at forum shopping and his obvious efforts to complicate and delay the matter of whether and how Joanne's assets would be returned to her (for example, Mr. Black placed Joanne's diverted conservatorship funds into 25 different accounts in the names of one or more of the trusts). A good quote from the decision is as follows: "Mr. Black's arguments are all-the-more egregious because he is both a

lawyer and a law professor. There is no justification for the kinds of procedural and rhetorical games Mr. Black is playing. He should, and in the Court's view, does, know better. He is using his myriad legal skills to file cases across the country, engage in procedural gymnastics to avoid legitimate court judgments, impose undue and unnecessary legal costs on Joanne's conservator, and inappropriately pressure for settlement. He has imposed significant burdens on multiple courts for no legitimate or justified reason. The victims of this chicanery are his disabled sister and the state and federal court systems that he is abusing."

The court determined that Mr. Black's attempt to remove a single motion from a state court case to federal court is procedurally flawed, that the federal court lacks subject matter jurisdiction over probate matters, that Mr. Black shall pay his sister's attorney fees related to the removal action, and that the Clerk of Court shall refer Mr. Black to the disciplinary authorities of the New York State Bar.

Daniel C. v. White Mem'l Med. Ctr., 83 Cal.App.5th 789, 299 Cal.Rptr. 3d 571 (September 28, 2022). California Court of Appeals reverses Trial Court in part, holding in part that the trial court failed to determine what portion of settlement was attributable to past medical expenses. The Court upheld the Trial Court's ruling that Federal Medicaid Act did not preempt California law permitting California Department of Health Care Services (DHCS) to impose a lien to recover amounts paid for a beneficiary's medical care through Medi-Cal (California's Medicaid program).

Daniel is a profoundly disabled minor child who is completely dependent on the assistance of others for his daily care. His severe disabilities were caused by congenital abnormalities that went undetected for the first few months of his mother's pregnancy. Through his mother and guardian ad litem, Daniel sued his mother's prenatal healthcare provider for wrongful life. Daniel's health care expenses were covered through Medi-Cal, a program of the California Department of Health Care Services (DHCS). Daniel settled his action against the medical provider for $1,250,000, subject to Court approval. DHCS asserted a lien on the settlement awarded to Daniel and sought to recover what Medi-Cal had already paid for his medical care.

The Trial Court approved the settlement and created a special needs trust for Daniel's benefit. The Court granted DHCS the full amount of Daniel's past medical expenses. More than $300,000 of the settlement was held back pending a determination of DHCS's lien. Daniel appealed.

On appeal, Daniel argued three things, 1) that the Medi-Cal Act provision authorizing the DHCS to assert a lien is preempted by the anti-lien and anti-recovery provisions of the federal

Medicaid Act, 2) there was no evidence the parties allocated any portion of the settlement to past medical expenses and 3) the court failed to equitably allocate the settlement.

First, the Court of Appeals rejected Daniel's argument that DHCS lien was preempted by federal law and held that the federal anti-lien and anti-recovery provisions did not preempt California law because the DHCS lien attaches only to the portion of the settlement that is State property. Second, Court found that the Trial Court did not err by concluding that Daniel's settlement included past medical expenses. To this point, the Court, noted that "the Medi-Cal Act provides that DHCS 'shall have a right to recover…the reasonable value of benefits' provided to a Medi-Cal beneficiary and that the court, not the Medi-Cal beneficiary determines what portion of a settlement is fairly allocated to satisfy DHCS's lien."

The Court of Appeals focused on Daniel's final argument and found that Trial Court failed to equitably allocate the settlement. The Court of Appeals reversed the Trial Court's ruling in part. While both Daniel and DHCS agreed that DHCS could impose a lien on past medical expenses, they disagreed about the Trial Court's role to allocate the settlement proceeds between past medical expenses and other damages. Relying on Arkansas Department of Health and Human Services v. Ahlborn (2006) 547 U.S. 268, the Court of Appeals held that the Trial Court erred in failing to apportion the settlement between past medical expenses and other damages. Daniel's case was remanded to the Trial Court to allocate between past medical expenses, other compensable past expenses paid by plaintiff and any future compensable medical expenses that DHCS has not demonstrated it was reasonable likely to pay. In its finding, the Court of Appeals noted that in making the allocation the Trial Court was not required to use the Ahlborn formula, but the Court must distinguish past medical expenses from other damages on the basis of a rational approach. Once the allocation is made, the Court pointed out that DHCS may only recover its lien from only the portion of the settlement reasonably allocated to past medical expenses (as reduced by DHCS's statutory share of attorney fees and costs).

In re Krame, 284 A.3d 745 (D.C., November 3, 2022). District of Columbia Court of Appeals suspends attorney for eighteen months when, in an extremely persistent effort to be compensated as a trustee based on a percentage of the trust funds he administered, rather than hourly as two judges had ordered, the attorney knowingly made false statements to the court, disobeyed court orders, and altered time records.

Not long after Krame joined the District of Columbia Bar in 1983, he developed an expertise in administering special needs trusts. He preferred to be compensated based on a flat percentage of trust assets, typically 1%, determined annually. While that was once a fairly standard

compensation scheme, by 2005, much to Krame's chagrin, judges in the Probate Division of the D.C. Superior Court indicated that he and other trustees should instead be paid on an hourly basis. Krame resisted that change in various ways, which eventually drew the attention of the Disciplinary Counsel and prompted an investigation into his handling of three special needs trusts.

At the conclusion of its investigation, Disciplinary Counsel charged Krame with violating seven Rules of Professional Conduct, most of them several times over. After a ten-day evidentiary hearing, the three members of the Ad Hoc Hearing Committee were ultimately divided as to which violations Krame had committed and as to what sanction should be imposed. There was some limited unanimity among the committee members, though.

The Hearing Committee unanimously found that Krame violated Rule 3.4(c) (knowingly violating an obligation to a tribunal) on two occasions. The first was when he submitted a fee petition seeking thousands of dollars in compensation for his personal crusade to be paid on a percentage basis, despite a court order directing him not to do so. The second was when he failed promptly to return $200 in compensation following a court order to do so. The Hearing Committee also unanimously found that Krame made a false claim in an appellate brief about the non-existence of time records that could support an hours-based fee request, thereby violating Rules 3.3(a)(1) (making a false statement to a tribunal), 8.4(c) (dishonesty), and 8.4(d) (serious interference with the administration of justice). Finally, it unanimously found that Krame again violated Rules 8.4(c) and 8.4(d) when he recklessly (but not intentionally) submitted four altered time entries in support of a trustee fee petition.

A majority of the Hearing Committee then determined that the remaining Rule violation charges were not supported by clear and convincing evidence. Because the three Hearing Committee members did not reach consensus on the charged violations, they recommended three different sanctions, ranging from a suspension of six months to eighteen months. Both Krame and Disciplinary Counsel took exception to the Hearing Committee's report and recommendation.

On review, the Board largely agreed with Disciplinary Counsel. The key difference between the Hearing Committee's determination and that of the Board was that the Board determined that some of Krame's violations of Rules 3.3(a)(1), 8.4(c), and 8.4(d) were intentional. Therefore, the recommendation of the Board was that Krame be disbarred. Krame filed exceptions to the Board's report and recommendations.

The District of Columbia Court of Appeals held that the Hearing Committee's credibility findings were binding on the Board when making findings on the ultimate issue of Krame's intent, but that Krame did in fact violate five different rules of professional conduct. Considering the Board's incorrect reliance on its determination that Krame's rule violations were intentional, and aggravating factors, such as the vulnerability of the trust beneficiaries

involved, and mitigating factors, such as Krame's otherwise unblemished record, his long history of serving the disabled and elderly communities, the significant time Krame has devoted to the profession, and the amicus brief that over a dozen of Krame's longstanding clients filed on his behalf, the Court decided to suspend Krame ffrom the practice of law in the District of Columbia for eighteen months.

Starr v. Ashbrook, 87 Cal.App.5th 999, 304 Cal.Rptr. 3d 275 (January 3, 2023), as modified on denial of rehearing (Jan. 26, 2023). California Court of Appeals upheld Trial Court, holding that a beneficiary's allegations that settlor was incompetent supported his standing to bring the probate petition for surcharge against trustee and allegations that trustee breached fiduciary duties by using trust assets to fund litigation (found to be without merit) did not arise out of filing and funding litigation, a protected activity.

Arnold, a retired neurology professor was 90 years old and the father of three adult sons. In his earlier years, he created a revocable trust to hold his home in Laguna Beach, an apple orchard and his investment accounts. Amidst his cognitive decline, he married Sandie, a former student and bonded over hobbies with his neighbor, Ashbrook. Between 2017 and 2019, Arnold received legal services from five different attorneys. In 2017, he updated his estate plan to nominate his sons to serve in various fiduciary roles. Once his wife learned that Arnold's sons were involved with the administration of his estate, she shared her concerns with Ashbrook.

Arnold was determined to be incapacitated by a clinical psychologist. Despite the psychologist's findings, Arnold agreed to make a gift of his apple orchard to UC Irvine and updated his estate plans several more times. Arnold's wife Sandi monitored his emails, home telephone and limited his access to family and friends. Ashbrook supervised visits by Arnold's sons and Ashbrook became Arnold's Trustee and Ashbrook's wife became the Trust Protector of Arnold's trust.

Arnold created a handwritten note, modifying the terms of the trust to include a $2M cash gift to UC Irvine and additional gifts to his wife. Ashbrook filed a Petition for Instructions to confirm that this handwritten note was a valid trust amendment. After the petition was filed, Arnold's signature appeared on a consent and waiver form filed with the Court. His sons believed this signature to be a forgery. Arnold's son, Jonathan, contacted Ashbrook's attorney to object formally to the use of Trust funds to pursue the Petition for Instructions.

Ashbrook filed a complaint against Arnold's sons for elder abuse, willful misconduct, intentional and negligent infliction of emotional distress, and breech of fiduciary duty. Although the lawsuit was brought in the name of Arnold as an individual, not the trust,

Ashbrook authorized the sale of Arnold's apple orchard and the distribution of trust funds to fund the lawsuit. A guardian ad litem (GAL) was appointed for Arnold and after investigation, the GAL reported to the Court that Arnold wanted to see his family, that he would be surprised to learn that he had filed a lawsuit against his sons and that there was no indication that his sons had mistreated Arnold. The GAL informed the Court that the ongoing isolation from his family combined with Ashbrook's petition to significantly alter Arnold's estate plan, suggested that Arnold was likely unduly influenced by Ashbrook and Sandie.

Arnold's son, Jonathan, eventually filed a surcharge petition alleging that Ashbrook had wasted and misused trust assets by pursuing a meritless petition for instructions and using trust assets to fund elder abuse litigation against Jonathan and his brothers. Ashbrook responded by filing a special motion to strike ("anti-SLAPP motion") on the theory that Jonathan was suing him for filing and funding litigation, a protected activity. The Trial Court denied the anti-SLAPP motion and Ashbrook appealed.

Before analyzing the Trial Court's opinion, the Court of Appeals examined whether Jonathan (a contingent trust beneficiary) had standing to challenge Ashbrook's actions as Trustee. The Court found that the allegations in Jonathan's petition were sufficient to confer standing on Jonathan, subject to his ability to meet his ultimate burden of proving his father's incapacity. The Appellate Court affirmed the Trial Court's ruling.

The core issue presented on appeal was whether the surcharge cause of action arose out of allegations of waste and misuse of trust assets, which are not activities protected by law or from allegations of pursuing and funding litigation, which are constitutionally protected activities. Jonathan did not allege that the petition for instructions or elder abuse lawsuit in itself produced the injury or gave rise to liability. Rather, the waste and misuse of trust assets caused the injury. In its opinion, the Court stated "Misconduct in the administration of a trust and preservation of trust assets is not action in furtherance of a person's right of petition or free speech…Ashbrook is responsible for his actions undertaken as trustee whether or not he benefitted from them."

The Court of Appeals affirmed the Trial Court's ruling, finding the surcharge cause of action did not arise out of allegations of protected activity. Instead, the surcharge cause of action arose from the alleged waste and misuse of trust assets was the injury-producing activity allegedly giving rise to Ashbrook's liability for breach of trust.

McGee v. State Dept. of Health Care Services, 91 Cal.App.5th 1161, 309 Cal.Rptr. 3d 93 (May 4, 2023). California Court of Appeals held that the Trial Court abused its discretion by applying the wrong legal standard when it defined "special needs" narrowly, which had led the Trial Court to surcharge the trustee accordingly.

In 2012, the trial court established a special needs trust for the benefit of Dianna McGee (the beneficiary) as part of the settlement in a medical malpractice action. The terms of the trust indicated that the trust funds should be used to "supplement public resources and benefits when such resources and benefits are unavailable or insufficient to provide for the Special Needs of the Beneficiary." Special Needs was defined as "the requisites for maintaining the Beneficiary's good health, safety, and welfare when, in the discretion of the Trustee, such requisites are not being provided by any public agency, office, or department of the State of California, or of any other state, or of the United States of America." The trust stated that "Special Needs include without limitation special equipment, programs of training, education and habilitation, travel needs, and recreation, which are related to and made reasonably necessary by this Beneficiary's disabilities." The trust also indicated that "[a]ll payments made under this Trust must be reasonably necessary in providing for this Beneficiary's special needs, as defined herein.

The original trustee filed first and second accountings in 2013 and 2014, respectively, and the trial court approved these accountings. The successor trustee, Daniel McGee (trustee), had more trouble. When he filed a third accounting in 2016, the state Department of Health Care Services filed an objection to the accounting, contending the trustee had used trust funds to make multiple unnecessary purchases. Following hearings, the trial court rejected the accounting in part, finding that the trust funds had been spent on things that did not qualify as "special needs" under the trust instrument because they were not related to the beneficiary's disabilities. The court disallowed over $13,000 in trust disbursements for food for the beneficiary and food for caregivers while traveling, over $39,000 in trust disbursements for the beneficiary's animals and their care, and over $14,000 in trust distributions for interest paid on credit cards, donations, taxes, jewelry and clothing, gifts, and other miscellaneous items. The court ultimately surcharged the trustee in the amount of $73,000. The trustee did not appeal this order.

When the trustee filed the fourth accounting in 2019, he stated that he had returned to the trust $20,800 in partial payment of the sanctions the court had imposed on him, and he asked the court to reduce his sanctions by the amount the trust owed him for his services during the accounting period. In later testimony, the trustee asked for further reductions of his sanctions for additional personal funds the beneficiary had contributed to the trust, including a separate worker's compensation award of $20,000, a property damage insurance settlement of about $12,000, and personal payments on her credit cards totaling about $41,000.

Not only did the trial court reject the trustee's request for reductions of his sanctions, but the court surcharged him another $59,000 for the use of trust funds to pay for food, animal expenses, automobile use and gas, furniture, taxes, utilities, vehicle maintenance, insurance, mortgage payments, etc. The trustee appealed this order.

The California Court of Appeals evaluated the trustee's interpretation of the terms of the trust by looking at various treatises, related case law, and the SSI POMS. The court quoted fairly long passages from the POMS regarding trust distributions for assets like household goods and personal effects that are excluded from the beneficiary's countable resources. (By the way, you'll be glad to know that the POMS examples of pets that are excluded resources include "a cat, dog, hamster, horse, monkey, or snake."). Because the trust instrument in this case defines "special needs" broadly as including more than just items or services reasonably related to the beneficiary's disability, and because that definition is consistent with the interpretation of the federal statute and the Social Security Administration's treatment of special needs trusts, the appeals court concluded that the trial court abused its discretion by applying the wrong standard when it defined "special needs" more narrowly than allowed under the trust instrument and special needs trust law in general. The case is remanded to the trial court to exercise its discretion under the proper standard.

Doan v. Kijakazi, Acting Commissioner, 2023 WL 6215794 (E.D. Cal., September 25, 2023). In judicial review of a final decision of the Commissioner of Social Security, U.S. District Court grants summary judgment for plaintiff and rules that SNT payback provision was sufficient, SNT was an exempt asset, and SSI benefits were properly paid.

Billie Doan was previously awarded SSI benefits. Then, on May 15, 2018, the SSA notified Doan that, due to becoming the beneficiary of a special needs trust, she no longer met the resource limitations for SSI and was now ineligible for benefits. The SSA also issued a notice of overpayment in the amount of $23,306.84 for payments Doan received for the months of April 2016 through April 2018. After Doan's request for reconsideration was denied, Doan appeared and testified at a hearing before an ALJ. On May 21, 2019, the ALJ issued an unfavorable decision, finding that Doan's SNT was a countable resource because it failed to include a proper payback provision according to 42 U.S.C. § 1396p(d)(4)(A). The Appeals Council then denied Doan's request for review. Doan sought judicial review.

The District Court for the Eastern District of California reviewed the facts and the decision of the ALJ. The ALJ had concluded that the special needs trust was a countable resource because it provided "solely for reimbursement to California." He determined that the SNT's failure to provide for reimbursement for "any and all states" was contrary to POMS SI 01 120.203, which requires that a trust "contain specific language that provides that, on the death of the individual, the State(s) will receive all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s)."

Doan argued that the trust satisfied section 1396p(d)(4)(A) and that the ALJ improperly relied on POMS guidance to find the trust non-compliant. Because the statute is unambiguous, POMS is not entitled to deference. The District Court agreed with this argument. In addition, since Doan had only received Medicaid benefits from the State of California, the Court reasoned that the SSA would have the ability to re-assess Doan's eligibility for SSI if she moved to another state. In any case, the Court believed that the SNT in question allows for reimbursement to any state that provided Medicaid assistance. While paragraph 4.8.1.1 of the trust only mentions reimbursement to the State of California upon the beneficiary's death, paragraph 5.2 of the trust mentions reimbursement to the State of California *or any other state*. Accordingly, the District Court granted summary judgment in favor of Doan.

Of special note in this opinion is a reference to 42 U.S.C. § 1396p(d)(5). The Court claimed that "the Commissioner's narrow interpretation of the statute and trust language amount to an undue hardship on plaintiff, contravening the humanitarian purpose of the Social Security program and the trust exemption statute itself, which provides for the waiver of any provision that 'would work an undue hardship on the individual.'"

Matter of Trust of Hewitt, 989 N.W.2d 784 (Iowa, April 28, 2023). Iowa Supreme Court held that pooled SNT could retain the entire amount of funds in beneficiary's sub-account following his death, and trustee had no obligation to provide DHS with an accounting of how those funds would be or had been used.

In December 2018, Scott Hewitt used funds he received from a worker's compensation settlement to fund a pooled special needs trust by executing a joinder agreement for the Iowa Pooled Trust to establish a sub-account with the National Pooled Trust. On February 28, 2019, The Center for Special Needs Trust Administration, Inc. (the Center), as trustee of the National Pooled Trust, accepted the joinder agreement, and Mr. Hewitt transferred $32,899.92 from the worker's compensation settlement to the pooled special needs trust.

Mr. Hewitt died on July 6, 2019. The Iowa Department of Human Services (DHS) had paid a total of $100,217.48 through the Iowa Medicaid program to cover medical expenses for Mr. Hewitt between 2005 and the time of his death. In response to DHS's claim against Mr. Hewitt's estate, the Center informed DHS that Mr. Hewitt's estate had no assets, his pooled special needs trust sub-account had a balance of $25,876.85, and that the trust was retaining all of those funds. As further detailed during litigation, the Center verified that the funds retained from Mr. Hewitt's sub-account "were never transferred into an operating account used for the benefit of the trustee" but had "been retained in the trust's master client account." The master client account is an account "used to administer the pooled trust," and all of its funds "are used for the benefit of the beneficiaries of the pooled trust."

On November 3, 2020, DHS filed a petition to invoke jurisdiction over the irrevocable trust in the Iowa district court and sought a "detailed accounting of how the retained funds have been or will be used, and [an] order [that] any funds after the payment of properly retained funds be paid to DHS from the assets of the trust." In response, the Center filed an initial and final report covering the activity in Mr. Hewitt's sub-account during the three or four months it was funded during his lifetime and reflecting that its remaining balance had been retained by the trust, resulting in a final balance of $0. Later, the Center supplemented this report with a description of how it uses retained funds for the benefit of other trust beneficiaries, generally, and an explanation that it could not provide a more detailed accounting of how the retained funds from Mr. Hewitt's account were used because the funds were no longer segregated in an individual sub-account.

DHS filed an objection to the supplemental report, and the parties later filed competing motions for summary judgment. The district court granted summary judgment for the Center. DHS appealed to the Iowa Supreme Court.

DHS argued on appeal that a pooled special needs trust can only retain funds from an individual beneficiary's sub-account for specific authorized purposes and that, as a beneficiary of the sub-account, DHS is entitled to an accounting to ensure proper disposition of any retained funds. The Iowa Supreme court determined that such an accounting is not required under Iowa law, because Mr. Hewitt's death triggered the termination of the trust sub-account and ended the need for any further trust accountings. The court also determined that, according to 42 U.S.C. 1396p(d)(4)(C), DHS's interest as a contingent beneficiary is contingent on whether the trust retains the remaining funds. Accordingly, the Iowa Supreme Court affirmed the district court's summary judgment in favor of the Center.

Matter of Trust of Muller, 989 N.W.2d 766 (Iowa, April 28, 2023). Iowa Supreme Court again held that pooled SNT could retain the entire amount of funds in beneficiary's sub-account following his death, and trustee had no obligation to provide DHS with an accounting of how those funds would be or had been used.

This case involves the same parties and legal issues as the *Matter of Trust of Hewitt* covered above. However, this was a different district court, which, misunderstanding the way pooled trust sub-accounts work, entered summary judgment for DHS. So, this time, the Iowa Supreme Court reversed the decision of the district court and remanded for entry of summary judgment for the Center.

Cockey v. Mead, 324 Or. App. 526 ___ P.3d ___ (March 8, 2023). Oregon Court of Appeals affirmed the Trial Court's ruling, holding that the Plaintiff's malpractice

claims were barred by the two-year statute of limitations and the Plaintiff knew or should have known that he had been harmed by his former attorney.

In 2016 Scott was concerned about the safety of his disabled adult daughter, Megan. She was living with her mother, Scott's ex-wife, who was serving as her guardian. Scott's attorney, George (of the Mead Law Firm) was retained by Scott to remove and replace his ex as Megan's guardian. Parties ultimately agreed to a settlement whereby Megan's mother would be removed and replaced with an independent guardian, Tiffany & O'Shea. There were no limitations imposed on the new guardian or the term of the guardianship. During settlement discussions Scott agreed to establish and fund a 3rd party SNT to benefit Megan and pay for expenses related to her care.

Not long after Tiffany & O'Shea's appointment as Laura's guardian, Scott learned that Laura would be placed in a group home. Scott hired a new attorney to petition the Court to appoint him guardian and remove Tiffany & O'Shea as guardian. Tiffany & O'Shea moved for an order compelling Scott to fund the SNT to pay for the guardian's professional and legal fees. After substantial litigation, the court ruled that Tiffany & O'Shea was properly appointed as guardian without limitations, and Scott was also responsible for Tiffany & O'Shea's professional guardianship fees and the substantial attorney fees incurred Tiffany & O'Shea's attorneys. Further, the Court ordered Scott to fund the SNT by "depositing a meaningful sum sufficient to satisfy reasonable debts incurred in the care of the Protected Person [Megan], including necessary attorney fees" based on the Court's finding that through the settlement agreement Scott stipulated to funding the trust.

Scott filed a malpractice claim against his former attorney, alleging that George committed malpractice when he failed to ensure that Tiffany & O'Shea's appointment as an independent guardian was a temporary appointment and by binding Scott to fund the SNT. As a result of George's negligence, Scott alleged that he incurred damages of $195,733.00, which included guardianship fees, attorney's fees, and other professional fees in attempts to undo the consequences of Attorney, George Mead's negligence. Scott admitted that he knew of this negligence claim when he hired a new attorney to replace George and remove Tiffany & O'Shea as Megan's guardian. The Trial Court found that the statute of limitations began to run from when the harm accrued, not when its full extent was discovered, and granted George Mead's motion for summary judgment, finding that Scott's claim was barred by the two-year statute of limitations.