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Case Law and Legislative Update

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1. **Guardianship of Robbins**, 2018 WL 3581501, ___ N.E.3d ___ (Ind App July 26, 2018). Trial court's arbitrary cap on amount to be transferred to special needs trust is overturned.

Timothy Robbins (then 42) was injured when his vehicle was side-swiped by a semi in 2013. Timothy was comatose for weeks, and remains a total-care patient in a nursing facility. In 2017, a jury trial resulted in a \$18.5 million verdict; the judgment was reduced to \$17.5 million by negotiations during the pending appeal.

After payment of fees, costs and liens, Timothy was slated to receive \$11.2 million. His guardian (his father) proposed to structure \$4.5 million and to place the remaining \$6.75 million in a self-settled special needs trust.

Although the guardianship judge indicated that he was familiar with the trade-offs involved in establishing a funding a special needs trust, he opined that he personally had trouble with "the legal fiction of impoverishment". The judge authorized just \$1 million to be transferred into the special needs trust, and ordered that the remaining \$5.75 million be distributed to the guardianship. The judge specifically found that: 1. The full funding of a special needs trust would transfer "considerable expenses" to the Medicaid program and taxpayers. 2. The amount of the judgment and later settlement was enough to satisfy Timothy's needs. 3. The use of a special needs trust appeared to benefit Timothy's father and descendants, rather than Timothy.

The Court of Appeals reversed the trial court's decision. Noting that public policy decisions by the Congress and the Indiana legislature should not be challenged, the appellate court the trial judge had exceeded the bounds of his authority.

The appellate judges also pointed out that the argument that the trust benefited only Timothy's heirs was wrong as a matter of law. Because of the requirement of Medicaid payback, and the requirement that the trust be operated for the exclusive benefit of Timothy during his life, the guardian and Timothy's descendants would not benefit from the trust.

"The judgment of the trial court is reversed in relevant part and remanded with instructions to direct that the full, available amount of settlement proceeds be placed in Timothy's special needs trust." [NB: NAELA, SNA and NELF Board officer Robert Fechtman, and NAELA member Elizabeth Homes joined in filing an *amicus curiae* brief on behalf of the Indiana Chapter of NAELA.]

2. **In the Matter of The Heupel Family Revocable Trust**, 914 N.W.2d 571 (S.D., June 20, 2018). Trustee breached fiduciary duty. Trustee not entitled to attorney fees or travel expenses, and could be required to pay beneficiary's attorney fees.

On September 22, 2012, Cordavee Heupel died. Her five adult children survived her (Colin Heupel, Chad Heupel, Renee Hansen, Casey Heupel, and RaeDeen Heupel). The Heupel Family Revocable Trust was activated, and the Family Trust created the Renee Hansen Share Trust and the RaeDeen Rose Heupel Share Trust (a special needs trust). Colin and BankWest were the co-trustees of all three trusts. Colin resigned as co-trustee and appointed Chad in his place. The Family Trust corpus included 160 acres of land in Meade County, South Dakota.

The siblings disputed the distribution of the land. BankWest petitioned the circuit court for judicial supervision of the Family Trust and for distribution of the trust property, including the sale of the Meade County property at a public auction.

On September 10, 2013, the circuit court entered an order assuming supervision of the Family

Trust. The family continued to argue about the sale of the property, and about purchase offers made by various family members and/or the partition of the property. A trial commenced on April 1, 2015. However, on that same day, the siblings settled their dispute over the property, and the circuit court approved the parties' written stipulation on April 30, 2015.

On September 15, 2015, BankWest filed a "Verified Petition for Approval of Final Accounting, Discharge of Co-Trustees, Termination of Court Supervision of Trust and Resignation of Co-Trustee BankWest as Trustee of the RaeDeen Heupel Special Needs Trust and Renee L. Hansen Share Trust." Chad, Casey, RaeDeed, and Colin objected to the fee claimed by BankWest. They argued that BankWest had contractually agreed to accept a 1% fee rather than the 2.5% fee BankWest now claimed.

On November 2, 2015, the circuit court entered an order dismissing BankWest as the co-trustee of the Renee Hansen Share Trust, although BankWest would remain a co-trustee of RaeDeen's SNT and of the Family Trust. The order further required Chad, as the remaining co-trustee of Renee's trust, to nominate a new financial institution to act as a successor co-trustee, "which nominee shall be approved by the court."

The parties settled their dispute over BankWest's fees, and BankWest agreed to be paid the contracted amount of 1%. BankWest also agreed to reimburse the Family Trust the fees paid out of the Family Trust, which were incurred by BankWest as a result of the fee dispute. On January 7, 2016, the circuit court entered an order accepting the terms of the parties' settlement, and accepting BankWest's resignation as a co-trustee of RaeDeen's SNT and of the Family Trust. The court order also indicated that "supervision of the Heupel Family Revocable Trust shall terminate effective immediately."

Chad selected Family Heritage as the successor co-trustee of Renee's trust. In March 2016, Renee filed a motion for an order to show cause why Chad should not be held in contempt of court for his failure to comply with the circuit court's order requiring that Chad obtain the circuit court's approval of the appointment of the successor co-trustee of her trust. Renee's motion further requested that the court order Chad to account for misappropriated funds from Renee's trust and that Chad be required to pay Renee's costs and attorney fees.

The litigation continued, with Chad arguing that the court did not have subject matter jurisdiction to act in regard to Renee's Share Trust after the court entered its order terminating judicial supervision of the Family Trust. Ultimately, the circuit court determined that it had the authority to enforce its November 2015 order, and it held Chad in contempt, found that he breached his fiduciary duties, found that he misappropriated funds, ordered him personally to reimburse the trust, and ordered him to pay Renee's attorney fees. Chad appealed. The Supreme Court of South Dakota affirmed.

3 *Scott v. McDonald*, 26 Cal.App.5th 463 (August 22, 2018). Trustee of SNT surcharged almost \$100K for poor decisions. A'Yana McDonald was the beneficiary of a special needs trust established in December, 2004, with Melodie Z. Scott as trustee. About \$230K was initially deposited in the trust. The trust document itself required Melodie to file annual court accountings, and to use the trust to benefit A'Yana and provide for her special needs.

In July, 2012, Melodie filed her first trust report with the court. At the same time, she filed a petition to terminate the trust as uneconomical to administer.

Melodie's report indicated that she had paid herself \$34,229.55 in fees during the seven years

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