

COURT OF PROBATE

COURT OF PROBATE, Torrington Area Probate District

DISTRICT NO. PD23

ESTATE OF/IN THE MATTER OF

Dennis Balogh (09-235830)
FBO Special Needs Trust

At a court of probate held at the time and place of hearing set by the Court, together with any continuances thereof, as of record appears, on the petitioner's application for Petition to Terminate Trust and allowance and approval of Final Financial Report

PRESENT: Hon. Michael F. Magistrali, Judge

After due hearing, THE COURT FINDS that:

All persons known to be interested in the proceeding have received notice of their right to request a hearing in this matter.

The pertinent facts are as follows:

Dennis Balogh is a fifty-six year old man with an intellectual disability. On July 27, 2006 a guardian was appointed for him pursuant to General Statutes §45a-676. On June 24, 2009 a conservator of his estate was appointed since he was about to inherit a substantial sum of money from his mother's estate. On November 3, 2009 the Court granted the conservatrix's application to establish and fund an intervivos trust for Mr. Balogh with the funds he was to inherit from his mother. The trust was drafted to comply with the Omnibus Budget Reconciliation Act of 1993 (OBRA '93)¹ so that Mr. Balogh would continue to receive various benefits from the State of Connecticut. The Court's decree specifically found that the proposed trust complied with the requirements of 42 U.S.C. § 1936p(d)(4)(A) and State of Connecticut Department of Social Services Uniform Policy Manual ("UPM") § 40.30.80D(6).

On July 8, 2010 the Court allowed and approved the conservatrix's Final Financial Report that showed a distribution of \$121,580.13 to the trustee of the Special Needs Trust. The Trustee's Inventory dated June 17, 2010 reported that amount as the amount on hand at the inception of the trust. An interim Financial Report for the period from November 3, 2009 through December 31, 2014 showing an amount on hand of \$21,618.86 at the end of the accounting period was approved and allowed by the Court on May 1, 2015.

On November 17, 2015 the trustee filed an application to terminate the trust and a Final Financial Report that reported a payment of \$4,150.19 to a funeral home to fund an irrevocable pre-paid funeral contract and a burial plot², and assets on hand in the amount of \$1,582.75 that was proposed to be distributed to Mr. Balogh, the lifetime beneficiary of the trust.

¹ Referred to frequently as a "Special Needs Trust", "Supplemental Needs Trust", "OBRA '93 Trust", "Social Security Trust", or "Medicaid Qualifying Trust".

² The trustee states that Mr. Balogh himself purchased the funeral contract and burial plot. That is not entirely accurate. Documents attached to the trustee's Post Hearing Brief show that on October 5, 1992 Mr. Balogh did sign an Irrevocable Pre-Need Funeral Contract with Frank Polke & Son, Inc. having a "total funeral estimate" of \$3,459.50. On October 13, 1992 Mr. Balogh deposited with Frank Polke & Son, Inc. the sum of \$1,800 in partial payment of the estimate. Exhibit B to Post Hearing Brief. By January 21, 2015, that deposit had grown to \$2,874.81. On January 21, 2015, Mr. Balogh's guardian, Michael Lundie, executed a Revocable Burial Plot Funeral Contract with Lesko & Polke Funeral Home, the successor to Frank Polke & Son, Inc., for the benefit of Mr. Balogh. That contract had a value of \$3,770.00. Exhibit C to Post Hearing Brief. That the guardian of a person with an intellectual disability has no authority to enter into such contracts on behalf of their ward has not been raised as an issue by any party. Thereafter, on February 4, 2015, the trustee

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On November 30, 2015 the State of Connecticut filed an objection to both the Financial Report and the Application to Terminate Trust, arguing that a special needs trust may only terminate upon the death of the beneficiary or upon exhaustion of all trust assets, and that the funding of a prepaid funeral contract is not a permitted expenditure from an OBRA/Special/Supplement Needs Trust since such a payment does not provide a benefit to the trust beneficiary during his lifetime. The State seeks a surcharge against the Trustee in the amount of that payment, \$4,150.19.

A hearing was held on January 12, 2016. Thereafter, the trustee filed a substitute Final Financial Statement that again reported the payment of \$4,150.19 to the funeral home and included additional fees and expenses that exhausted the trust assets. The State of Connecticut continues to object to the funding of the prepaid funeral contract and to termination of the trust should the Court impose a surcharge and order the Trustee to restore funds to the trust.

The Court finds that the funding of the prepaid funeral contract during the lifetime of Mr. Balogh is not prohibited by the trust indenture or state or federal law and that it is an allowable expense. The Court, therefore, approves and allows the substitute Financial Report and grants the Petition to Terminate Trust since the trust has been depleted.

Both 42 USC § 1936p(d)(4)(A) and UPM § 4030.80 D. 6 provide that a trust containing the assets of an individual under age 65 who is disabled (as defined in 42 U.S.C. § 1382c (a)(3)) and which is established for the benefit of such individual by, inter alia, a court, and that requires that the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan will not be treated as an "asset" for purposes of determining eligibility for Medicaid benefits. Neither the federal statute nor the state regulation expressly states any other requirements for such trusts or prohibitions of specific expenditures. Thus, it cannot be found that a payment to fund a prepaid funeral contract is expressly prohibited by either.

Likewise, there is no express language in the trust indenture itself that prohibits such a payment. Section 3.1 of the trust indenture simply states that "[t]he Trust Property shall be held hereunder, IN TRUST, for the sole benefit of Dennis Balogh..." and that "[t]his trust is established for the sole benefit of DENNIS BALOGH, in compliance with the provisions of, inter alia, 42 U.S.C. § 1936p(d)(4)(A) and 42 U.S.C. § 1382b(e)(5) and Connecticut Law..."

Section 3.8 of the trust indenture states that "...[t]he income and principal of the Trust hereunder shall be used only for the personal benefit of Dennis Balogh and no distributions or expenditures of trust property shall be made except to or for the benefit of Dennis Balogh."

The resolution of the State's objection rests on the Court's interpretation of the words "for the benefit of such individual" in 42 U.S.C. § 1936p(d)(4)(A) and UPM § 4030.80 D. 6 and the words "for the sole benefit of Dennis Balogh" and "for the personal benefit of Dennis Balogh" found in the trust indenture. The State argues that those words necessarily require that the benefit derived must be

sent a check to Lesko & Polke Funeral Home in the amount of \$4150.19, the amount in dispute, with \$380.19 allocated to the 1992 Irrevocable Pre-Need Funeral Contract and \$3,770 to the 2015 Revocable Burial Plot Funeral Contract. Exhibit C to Post Hearing Brief.

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realized during Mr. Balogh's lifetime and that, because the performance of the prepaid funeral contract will be delayed until after Mr. Balogh's death, the contract cannot be for his sole benefit. The Court disagrees with that interpretation and finds that there is no requirement that the benefit accruing to a special needs trust beneficiary by virtue of a prepaid funeral contract be realized during his lifetime, that a prepaid funeral contract is, in fact, for the sole benefit of a special needs trust beneficiary, and that the funding of such a prepaid funeral contract is not, therefore, prohibited by the terms of the trust indenture, 42 U.S.C. § 1936p(d)(4)(A), or UPM § 4030.80 D. 6.

The cases cited by the State do not compel a different result.

The legal issue presented in *Hobbs v. Zenderman*, 542 F.Supp. 2d 1220 (D. New Mexico, 2008) was whether states have continuing authority to monitor expenditures from an OBRA '93 Trust to ensure the trust assets are being used for the sole benefit of the individual. In that case the State of New Mexico had terminated Medicaid benefits to a special needs trust beneficiary on the ground that payments to his mother for caretaking services were not for his sole benefit. That court first held that states do have continuing authority to monitor expenditures from special needs trusts. Then, although recognizing that the issue was, perhaps, a mixed question of fact and law that it should not address, the court went on to find that "...payment of a salary to Plaintiff's mother for caretaker services, while certainly in Plaintiff's best interests, is not for his sole benefit as contemplated by section 1396p(d)(4)(A). It provides too much *direct financial benefit to Plaintiff's family*, the entity that is liable for Plaintiff's medical expenses if his trust is not excluded as a resource." *Hobbs v. Zenderman*, supra, 1235 (emphasis added). That case is plainly distinguishable from the case before the Court here since the disputed payment is to a third party and does not provide a financial benefit whatsoever to Mr. Balogh's family. In fact, Mr. Balogh has no immediate family.

Lewis v. Alexander, 685 F.3d 325 (3d Cir. 2012) also does not provide support to the State's argument. First, that case involved a pooled special needs trust. Second, it was a preemption case in which the Third Circuit held that the Commonwealth of Pennsylvania's regulation requiring that "any expenditure from the trust must have a reasonable relationship to the needs of the beneficiary" imposed a requirement not found in 42 U.S.C. § 1396p(d)(4)(C) and was, therefore, preempted by federal law. *Lewis v. Alexander*, supra, 350. Third, it does not stand for the proposition that allowable expenses from a special needs trust may only include expenses that Medicaid does not cover, nor does it stand for the proposition that the list of expenses generally paid from a special needs trust mentioned in the court's decision, i.e., "... books, television, internet, travel and even such necessities as clothing and toiletries..." is exhaustive. *Id.*, 333. Finally, the court held that Pennsylvania's attempt to limit expenditures from a pooled special needs trust to "those items, products or services not covered by the medical assistance program, insurance or other third-party liability source for which a beneficiary of a special needs trust or his parents are personally liable and that can be provided to the beneficiary to increase the beneficiary's quality of life and to assist in and are related to the treatment of the beneficiary's disability" was also preempted by 42 U.S.C. § 1936p(d)(4)(C). *Lewis v. Alexander*, supra, 350.

In order to agree with the State of Connecticut in the case at bar, the Court would have to read into 42 U.S.C. § 1936p(d)(4)(A) and UPM § 4030.80 D. 6 the words "during his lifetime" either

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before or after the words “for the benefit of such individual.” This it cannot do. “Courts cannot, by construction, read into statutes provisions which are not clearly stated...” *O'Rourke v. Commissioner of Motor Vehicles*, 156 Conn.App. 516, 536 (Conn.App. 2015), or “...read into the statute a specific and detailed provision that the legislature has not seen fit to enact. *State v. Anonymous*, 680 A.2d 956, 237 Conn. 501 (Conn. 1996). If Congress had intended to so limit expenditures from a special needs trust, it could have done so. The same is true for the State of Connecticut concerning the UPM, although it appears to the Court that even if the State of Connecticut had attempted to so limit expenditures in the UPM, that attempt would be found to have been preempted by federal law under *Lewis v. Alexander*, supra, 685 F.3d 325, since no such limitation appears in 42 U.S.C. § 1936p(d)(4)(A).

In addition, the position taken by the State of Connecticut is inconsistent with its own regulations and would lead to an absurd consequence and bizarre result. The State of Connecticut considers burial funds and burial plots to be assets available to an individual for purposes of eligibility for Medicaid benefits, see, e.g., UPM § 4030, although an irrevocable burial fund with a value up to \$5,400 and a burial plot of any value are considered to be exempt assets. UPM § 4030.10, UPM § 4030.15P. If those assets are considered by the State of Connecticut to be “available” to an individual, the State cannot be heard to argue that those assets are not for the individual’s sole benefit.

Finally, under current Connecticut statute and regulation, there could have been no objection to the funding of an irrevocable prepaid burial fund or burial plot on behalf of Mr. Balogh by his conservator prior to the creation and funding of the special needs trust, provided they did not exceed the asset limits set forth in the UPM. See, General Statutes §45a-655(d)(“ In the case of any person receiving public assistance, state-administered general assistance or Medicaid, the conservator of the estate shall apply toward the cost of care of such person any assets exceeding limits on assets set by statute or regulations adopted by the Commissioner of Social Services.”)

For all these reasons, the Court overrules the objection of the State of Connecticut to the payment of \$4,150.19 to Lesko & Polke Funeral Home.

The Court notes that the Trustee erroneously reported that payment along with payments to Community Systems, Inc. and Petricone’s Pharmacy as administrative expenses when all those expenditures were actually distributions to or for the benefit of the beneficiary, Mr. Balogh. The Financial Report will be adjusted accordingly to correct that error.

And it is ORDERED AND DECREED that:

The Financial Report dated November 17, 2015 is adjusted to delete the “Other Expenses” in the amount of \$18,385.61 reported under Administrative Expenses Paid and to change the total amount of Administrative Expenses Paid from \$21,622.00 to \$3,236.39. It is further adjusted to report Total Amount of Distributions to Dennis Balogh in the amount of \$18, 385.61 as itemized on the PC-180 Second Sheet attached thereto.

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The Financial Report dated November 17, 2015, as adjusted, be and hereby is allowed and approved.

The assets of the Special Needs Trust having been depleted, said Trust is hereby terminated.

It is further ORDERED AND DECREED that said fiduciary shall submit an Affidavit of Closing of Estate, PC-213.

Dated at Torrington, Connecticut, this 8th day of March, 2016.


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Michael F. Magistrali, Judge

CERTIFICATION

The undersigned hereby certifies that a copy of the above decree was mailed on 3/9/16 to the following as provided in the Probate Court Rules of Procedure, section 8.2:

Name and Address

Jill Sweeney, Department of Social Services, Eligibility Services, 62 Commercial Blvd., Torrington, CT 06790

John McGuire, Department of Developmental Services, Northwest Center, 195 Alvord Park Road, Torrington, CT 06790

Gary G. Williams, Asst. Attorney General, Office of the Attorney General, 55 Elm Street, 4th Floor, P.O. Box 120, Hartford, CT 06141

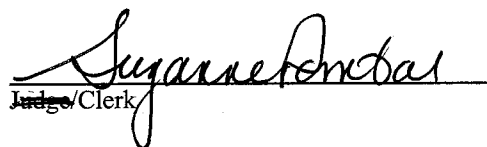
Commissioner, Department of Administrative Services, Financial Services, 165 Capitol Avenue, Fifth Floor, Hartford, CT 06106

Ellen C. Marino, Esq., 596 Main Street, Winsted, CT 06098

David C. Shepard, Esq., P.O. Box 81, Canton, CT 06019

Denise Decker, Community Systems, Inc., 295 Alvord Park Road, Torrington, CT 06790

Michael Lundie, 48 Ridge Road, Terryville, CT 06786


Judge/Clerk