

STATE OF MICHIGAN
WAYNE COUNTY PROBATE COURT

IN THE MATTER OF [REDACTED]
Irrevocable Trust

PATRICIA E. KEFALAS DUDEK,
Trustee & Petitioner

Case No. [REDACTED]
Honorable Milton Mack

v.

[REDACTED],
Former Co-Trustee

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PETITIONER'S BRIEF IN SUPPORT OF THE CONTINUATION
OF THE SPECIAL NEEDS TRUST F/B/O [REDACTED]

I. FACTUAL BACKGROUND

██████████ (hereinafter ██████████) is a twenty-four year-old person (date of birth October 15, 1982) with several disabilities, including cerebral palsy; permanent and extensive brain damage; mild retardation and developmental delay.¹ His disabilities stem from medical malpractice. He is currently living at ██████████ Murray Crescent Drive, ██████████, Michigan 48076.

The ██████████ Irrevocable Trust dated October 8, 1998 (hereinafter "Trust") was set up for his benefit on October 8, 1998, with ██████████ (hereinafter "██████████") acting as Co-Trustee and attorney.² As stated on pages four (4), six (6), seven (7), eight (8), twelve (12), and eighteen (18) of the Trust agreement, the sole purpose of the Trust is to protect proceeds from the Wayne County Circuit Court settlement of a lawsuit stemming from the accident which caused some of ██████████'s disabilities (Case No. 96-814993-NH), to qualify ██████████ for government benefits, and to protect ██████████ *Exhibit B*.

As a result of an annual 're-determination of benefits' form not being returned to the Family Independence Agency, and the denial of benefits from the Social Security Administration, ██████████ stopped receiving government benefits during 1999 and did not receive any from 1999 until just recently *Exhibit C*, when Petitioner Dudek assisted ██████████ with obtaining such benefits. *Exhibit D*. ██████████ as former Co-Trustee, did not assist ██████████ in applying for Social Security Disability Insurance (SSDI), Supplemental Security Income (SSI), Food Stamps, Mental Health Services, or Medicaid.

As documented on the Annual Accounts submitted by ██████████, ██████████ incurred medical expenses in excess of \$23,000.00. *Exhibits E thru M*. Those medical expenses should not have been paid from the Trust. Had ██████████ been eligible for Medicaid and Mental Health Services, public benefits would have paid these expenses.

Trust assets were needlessly lost also, in connection with obtaining housing for ██████████. At some point between October 1999 and October 2000, the trust paid \$20,000 towards the

¹ see *Exhibit A of Petitioner's Brief in Support of Supplemental & Amended Objection to Attorney Fees and all Accounts Including Final Account*

² see *Exhibit B of Petitioner's Brief in Support of Supplemental & Amended Objection to Attorney Fees and all Accounts Including Final Account*.

purchase of a home, located in Detroit, Michigan, for ██████'s benefit.³ ██████ failed to secure and protect the \$20,000 distribution from the trust and the assets and trust payment were lost in a subsequent foreclosure sale. In December of 2001, ██████ as Trustee of the trust contributed ~~\$200,000.00~~ towards the purchase of a second home located in Southfield, Michigan, for the benefit of ██████⁴ For reasons unknown to Dudek, the house was transferred to ██████'s mother, ██████ (former Co-Trustee of the trust, hereinafter referred to as '██████'), In 2006, when Dudek was hired by ██████ and appointed Co-Trustee of a revised Exception A Special Needs Trust drafted and requested by Dudek and discovered the transfer to Reese and the failure of the Trust-owned house to abide by the "sole-benefit" requirements of the Trust, Dudek required the title of the property to be transferred back to the trust.⁵

As Co-Trustee, ██████ paid a \$1,000 monthly stipend to be paid to ██████ for Co-Trustee fees and for the "care" of ██████⁶ The income was used to make house payments for the Southfield house and to support ██████ Mr. ██████, Co-Trustee ██████ and other family members in violation of one sole benefit rule. This trust has been under the Supervision of this Honorable Court since January 19, 1999.⁷ On November 8, 2001, this Court appointed Joseph Buttiglieri as *Guardian ad Litem* for Andrew.⁸ Since 1998, the trust has disbursed monies in excess of \$23,000.00 to ██████ for her services, which included drafting, obtaining court approval for, and giving advice to a trust that failed to ever be used for its intended purpose. Over thirty hearings have been held regarding the administration of this trust. *Exhibit V.*

Due to Dudek's diligence, Petitions for Guardianship and Conservatorship were filed on February 23, 2007, in the Oakland County Probate Court and transferred to and granted by this Honorable Court. *Exhibit W.* Additionally, several government benefit applications have been filed and, only very recently approved in August 2007.

³ see Exhibits N and O of Petitioner's Brief in Support of Supplemental & Amended Objection to Attorney Fees and all Accounts Including Final Account.

⁴ see Exhibits P and Q of Petitioner's Brief in Support of Supplemental & Amended Objection to Attorney Fees and all Accounts Including Final Account.

⁵ see Exhibit R of Petitioner's Brief in Support of Supplemental & Amended Objection to Attorney Fees and all Accounts Including Final Account.

⁶ see Exhibit S of Petitioner's Brief in Support of Supplemental & Amended Objection to Attorney Fees and all Accounts Including Final Account.

⁷ see Exhibit T of Petitioner's Brief in Support of Supplemental & Amended Objection to Attorney Fees and all Accounts Including Final Account.

⁸ see Exhibit U of Petitioner's Brief in Support of Supplemental & Amended Objection to Attorney Fees and all Accounts Including Final Account.

II. ISSUE

Does the benefit of continuing the Special Needs Trust for the benefit of [REDACTED] outweigh the cost of administration?

III. ANALYSIS

a. Previous and Current Costs of Administration, Including Legal Fees

[REDACTED] charged a total of \$26,504.70 for attorney services between 1999 and 2006. She did not differentiate between Co-Trustee and Attorney charges. Specifically, for the first accounting, she charged \$2,035.00 (Exhibit E); for the second accounting she charged \$2,931.50 (Exhibit F); for the third accounting she charged \$2,810.00 (Exhibit G); for the fourth accounting she charged \$5,876.00 (Exhibit H); for the fifth accounting she charged \$4,565.00 (Exhibit I); for the sixth accounting she charged \$2,134.00 (Exhibit J); for the seventh accounting she charged \$2,828.20 (Exhibit K); for the final (withdrawn) accounting she charged \$2,447.50 (Exhibit L); and for the actual final accounting she charged \$2,447.50 (Exhibit M).

The total guardian ad litem costs for years 2000 through 2006 were \$6,886.25. Specifically, for the second accounting the GAL charged \$975.00 (Exhibit F); for the third accounting the GAL charged \$481.25 (Exhibit G); for the fourth accounting the GAL charged \$2,510.00 (Exhibit H); for the fifth accounting the GAL charged \$900.00 (Exhibit I); for the seventh accounting the GAL charged \$1,120.00 (Exhibit K); and for the final accounting the GAL charged \$900.00 (Exhibit M).

In 2006, the current Trustee (Dudek), and Mall Malisow & Cooney, P.C., charged a combined total of \$7,364.72 for services rendered as Trustee (the sum of \$7,117.22 and \$247.50, their respective charges (Exhibits X and Y). In 2007, the current Trustee has charged \$20,193.42 for services rendered as Trustee (Exhibit AA). Please note that the total charges for Trustee services in 2006-2007 exceed ordinary annual trustee fees due to the charges associated with setting up a guardianship and obtaining government benefits. Based on past experience, Petitioner assures this Honorable Court that once benefits are obtained and the guardianship is finalized, Trust administration costs will be significantly lower.

An additional \$3,620.75 has been charged in 2006, and \$28,128.74 in 2007, for costs associated with the action against [REDACTED] (the sum of the charge for Dudek's services (\$6,355.48, Exhibit Z and BB) and the charge for Mall Malisow & Cooney services (\$21,773.26, Exhibits Y and CC).

b. Potential Benefits of a Properly Administered Special Needs Trust, and Losses to the Trust Resulting from Failures in Prior Trust Administration

As a person with a developmental disability, with a properly administered Special Needs Trust and diligence on the part of all the parties involved, Andrew will have no problem

becoming eligible for community based mental health services, Medicaid insurance, Social Security Income, and Food Assistance Program benefits.

Community-based services are support services that are provided for people with disabilities, like ██████ who live in their own homes and communities. Community-based services provide help for all aspects of a person's life and may include the following:

- ◇ Residential services and facilities, including supervised apartments or group homes.
- ◇ Personal assistance services, including assistive technology.
- ◇ Care planning, case management, and a comprehensive individualized plan, that includes a case manager, the person in need of services, and other people that support the individual.
- ◇ Day programs, including placement in activity centers and adult skills programs.
- ◇ Vocational services, including supported employment programs, job training and placement, and job coaching.
- ◇ Other quality of life services, such as recreation, leisure, and transportation.

According to a recent report published by the Kaiser Commission on Medicaid and the Uninsured, and the Urban Institute, per enrollee Medicaid spending for community based services for persons with disabilities is \$34,930.00 annually.⁹ In addition to the community based services, the average Medicaid medical spending per "disabled" enrollee in Michigan is estimated as being \$10,629.00 per year. *Exhibit DD.*¹⁰ Furthermore, a person similarly situated with ██████ would receive a total of \$50,268.00 in Social Security Income disbursements for years 1999 through 2006. *Exhibit EE.*

Using these very conservative numbers and assuming that ██████ would have been eligible for services since 1999, over the past seven years he could have received approximately \$65,847.00 in Medicaid medical benefits, \$279,440.00 in community based services, and \$50,268.00 in SSI benefits. *see chart, next page.* The total amount of potential benefits, \$395,555.00, combined with \$61,905.68 in expenses incurred by the Trust for covered services and expenses such as medical bills, prescriptions, and tutoring, combined with the loss the Trust suffered as a result of the Detroit house expenditure, results in a total loss of \$457,460.68. This significant loss could have been avoided had ██████'s eligibility for government assistance been sustained. This Honorable Court must not permit a discontinuation of the Trust which will result in continued loss of Trust assets which could be used for ██████ benefit.

⁹ The Urban Institute & Kaiser Commission on Medicaid and the Uninsured, *Medicaid's Long-Term Care Beneficiaries: An Analysis of Spending Patterns*, published November 2006
< <http://www.kff.org/medicaid/upload/7576.pdf> > (accessed April 16, 2007).

¹⁰ According to the Kaiser Family Foundation's "Medicaid and the Uninsured" datasheet for fiscal year 2002, the average Medicaid payment, per "disabled" enrollee, in Michigan, was estimated as being \$6,234.00. *see Exhibit T.* Without being able to find additional information on Michigan per-enrollee spending for the years 1999-2001, and 2003, 2005, and 2006, the annual increases in spending listed in the Table for those years are estimates. The per-year difference used to estimate the per-enrollee spending for the years 2003, 2005, and 2006 is \$2,197.50 (the difference between the 2004 value of \$10,629.00 and the 2002 value of \$6,234.00, divided by two). For the years of 1999, 2000, and 2001, the 2002 rate of \$6,234.00 was reduced by one-thousand per year.

Applying the current Medicaid, SSI, and community based service estimates to future years, with a properly administered Trust, [REDACTED] would be eligible for approximately \$56,741.00 in government benefits annually. As of 2006, [REDACTED]'s monthly income is \$2,951.70, resulting in an annual income of \$35,420.40. With a properly administered Trust, many of [REDACTED]'s expenses (such as food, medical expenses, tutoring, psychological services, and any of the community services listed *supra*) would be paid for by the government; allowing the Trust's corpus to grow and better provide for [REDACTED]'s supplemental needs. Instead of [REDACTED] expending his monthly income of \$2,952.70 on items and services that could be paid for by Medicaid, Social Security, or FAP benefits, the money could be spent for his benefit or saved for a crisis situation, like when family is no longer able or willing to take care of him.

	<u>Potential Medicaid Medical Benefits</u>	<u>Potential SSI Benefits</u>	<u>Potential Benefits of Community Based Services</u>		<u>Actual "Covered" Expenses, Incurred by Trust</u>
1999	\$3,234.00	\$3,084.00	\$34,930.00		
2000	\$4,234.00	\$6,312.00	\$34,930.00	Acct 2:	\$20,000.00
2001	\$5,234.00	\$6,533.00	\$34,930.00	Acct 3:	\$4,660.75
2002	\$6,234.00	\$6,708.00	\$34,930.00	Acct 4:	\$4,437.90
2003	\$8,431.50	\$6,792.00	\$34,930.00	Acct 5:	\$6,025.00
2004	\$10,629.00	\$6,936.00	\$34,930.00	Acct 6:	\$4,931.78
2005	\$12,826.50	\$7,116.00	\$34,930.00	Acct 7:	\$19,950.25
2006	\$15,024.00	\$6,787.00	\$34,930.00	Acct 8:	\$1,900.00
<u>SubTotals:</u>	\$65,847.00	\$50,268.00	\$279,440.00		\$61,905.68
Total of Lost Potential Benefits:	\$395,555.00				
<u>Total Loss:</u>	\$457,460.68				

c. Comparison of Costs of Administration and Benefits of Continuing the Trust

As this Honorable Court is aware, a claim is pending against former Co-Trustee [REDACTED] for recovery of Trust assets lost as a result of her incompetence. Thus far, the cost of the action against [REDACTED] has been \$31,749.49. Had the Trust been properly administered, and had Medicaid, SSI benefits, food stamps, and community based living services been

obtained, the Trust would have saved \$61,905.68 in covered expenses, and ██████ could have received an estimated \$395,555.00 in government benefits. In addition to requesting a recovery of the benefits and losses associated with ██████'s malpractice, Petitioner is requesting reimbursement by Bobrin to the Trust for attorney fees paid during her term as Co-Trustee, in the amount of \$26,504.70.

Further, if Petitioner prevails on the action against ██████, Petitioner will request that the court not only reimburses the Trust for the \$457,460.68 in lost benefits/expenses, and ██████'s fees in the amount of \$26,504.70, but also for the \$31,749.49 in attorney fees associated with the action against ██████. If Petitioner prevails and this Honorable Court approves the request for fees, then there is no question that the benefit of bringing this action outweighs the cost as the Trust could stand to acquire \$515,714.87. If we prevail and the court does not approve a request for fees, then the benefit of bringing this action could still be as large as \$483,965.38; vastly outweighing the cost of not bringing the action.

If Petitioner does not prevail in the action against ██████, the Trust will have to reimburse the firms for approximately \$31,749.49 in attorney fees. However, even if Petitioner does not prevail in the action against ██████, her diligent actions as Trustee will have led to Andrew being eligible for approximately \$56,741.00 per year in Medicaid, community based services, food stamps, and SSI benefits. Thus, even if the legal action is fruitless, the overall cost will be overshadowed within one year's time by the benefit of the acquired government benefits.

Furthermore, applying the current government benefit estimates to future years, with a properly administered Trust, ██████ could be eligible for an estimated \$56,741.00 in government benefits annually. As stated *supra*, though the 2007 cost of Trust administration is quite high (\$20,193.42), it is expected that once all of ██████'s government services and benefits are acquired, the annual cost of administration will be greatly reduced. The 2007 costs of administration reflect a highly contentious battle of wills between all the parties involved. If all the parties continue to fail to cooperate in the future, and if the annual cost of administration is still approximately twenty thousand dollars, the fifty-seven thousand dollars in potential annual government benefits will continue to greatly outweigh the price of administration.

d. Maximizing Government Benefits While Maintaining Flexibility

This Honorable Court is rightly concerned with the practicality of providing for ██████'s needs while the vast majority of his assets are "tied up" in the Trust. This Honorable Court requested an explanation as to how ██████ can maintain a higher standard of living when he is technically living at poverty levels. While it is true that Andrew will not be able to have direct control over his assets, and the Trust cannot "support" him, there are very few short hurdles for him to clear in order to receive distributions for supplemental needs.

If ██████ receives Medicaid, his medical needs will be taken care of by the government. If ██████ receives SSI and FAP benefits, he will be able to afford food and other expenses that the Trust is unable to pay for. If ██████ becomes eligible for community based living services expenses related to his vocational, educational, recreational, and leisure needs could be reduced or completely paid for. Any supplemental needs that ██████ may have, that are not covered by any other source, are permissible distributions under the Trust. Permissible distributions include

dental work not covered by Medicaid, furniture, haircuts, appliances, musical instruments, over the counter medications, snow removal, telephone service, and utility bills. An extensive list of permissible distributions is included as Exhibit FF.

As long as the Trust functions appropriately, with all of his basic needs met by Medicaid, SSI, FAP, and community based living services, and with all of his supplemental needs met by the Trust, there is no need for [REDACTED] to live in poverty. Further, if [REDACTED]'s family members are unable to be gainfully employed due to their extensive efforts in caring for [REDACTED], there is no need for [REDACTED] family to live in poverty. Under the terms of the Trust, family members can be reimbursed for the time and effort spent caring for [REDACTED]. If the family paid rent to the Trust, they should be able to continue residing with [REDACTED] and helping him reach his maximum potential. The Trust may pay for [REDACTED]'s utilities and other housing expenses, such as lawn maintenance and furniture, to the extent these are incurred solely for [REDACTED]'s benefit.

If this Honorable Court terminates the Trust, [REDACTED] will suffer. If [REDACTED] and Mr. [REDACTED] have control over the assets, [REDACTED] will be ineligible for all government benefits. Even if this Honorable Court assumes that Mr. [REDACTED] would aid [REDACTED] in properly managing the assets, there is a high likelihood that the funds would be depleted prior to [REDACTED] obtaining a ripe age. If the Trust is discontinued, [REDACTED] will be left facing an uncertain future, with the Trust he has SSI, Medicaid, Medicare (at some point) and mental health services.

If this Honorable Court permits the Trust to continue providing for [REDACTED]'s supplemental needs, thereby ensuring eligibility for government assistance, the only thing that could throw a wrench into the beautiful art of Special Needs Trust administration is if Mr. [REDACTED] continues to thwart Dudek's honest efforts at sheltering for [REDACTED] by failing to communicate [REDACTED]'s needs and by failing to cooperate with the certification and annual recertification process associated with obtaining and continuing government assistance.

IV. RELIEF REQUESTED

ARGUMENT

RELIEF REQUESTED

I declare under the penalties of perjury that this Petition has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Respectfully submitted,

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