

## CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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### *Thomas Thorpe v Audelith Jenivee Reed, as Trustee* 12/13/12

#### **Special Needs Trust; Compensation of Trustee**

Danny Reed was 21 years old when he attended the Burning Man Festival. While he was asleep in his tent a drunken driver drove through the tent and caused him permanent brain damage and orthopedic injury. The Santa Clara County Superior Court appointed his mother Jolaine Allen as his conservator in 1997. Jolaine filed a personal injury suit on Danny's behalf and the suit was settled in 1999 for \$815,000. Within the conservatorship proceeding, the probate court established a "special needs trust" for Danny and ordered the net settlement proceeds conveyed to the trust with Jolaine appointed as special trustee.

The trust provided as follows: "a special trustee and any successor trustee shall not be entitled to receive reasonable compensation for services in the administration of this trust." Danny was involved in a second accident, when he was hit by a car in a crosswalk, and Jolaine settled that suit in 2002 for \$900,000. The probate court ordered the net settlement proceeds conveyed to the special needs trust.

Jolaine did not take any compensation for her services as trustee. She lived with Danny and his two sisters in a townhouse she had purchased for the trust with \$270,000 and a \$150,000 mortgage. She and the sisters paid part of the mortgage obligation, and Danny paid part via his government disability income. In 2008, Jolene was overseeing approximately \$650,000 deposited for the trust in a Washington Mutual bank account when the country's financial crisis occurred. Concerned about the bank's stability, she obtained a probate court order permitting her to withdraw the money and redeposit it in seven different banks

so that each account would be below the \$100,000 threshold for FDIC insurance.

In 2009, a probate court investigator discovered that Danny's trust had never received a required biennial review. He tried but could not contact Jolaine, and also could not determine the whereabouts of the money. The probate court issued an order to show cause directing Jolaine to appear and show cause why she should not be removed as conservator. At the hearing Jolaine was removed and the Public Guardian was appointed temporary conservator and temporary trustee. The Public Defender was selected to represent Danny.

At a hearing in May, 2010, County Counsel, the Public Guardian's attorney, informed the probate court that Jolaine had been unable to deposit two of the seven checks, and had mistakenly deposited one in Danny's name, placing his government benefits at risk. Counsel further reported that he believed Jolaine, "...got a little overwhelmed." He stated that the finances, right now, "...are a mess." Counsel recommended a private fiduciary for the conservatorship and the trust. The Public Defender and Jolaine sought a continuance of the hearing, indicating Danny had a desire to seek an order dissolving the conservatorship, and stating she had a desire to meet with a special needs attorney before any further action was taken. Jolaine also indicated that her daughter had agreed to act as successor trustee, and that her daughter had agreed to assist her in handling the bank paperwork.

The probate court stated that nothing in writing to that effect was before the court. It extended the Public Guardian's temporary conservatorship until July, 2010, ordered Jolaine to produce an accounting and moved to appoint plaintiff Thomas Thorpe as the temporary fiduciary with regard to the trust. At the July hearing the parties agreed that no money was missing. The Public Defender stated that Danny was very concerned about the cost of having the Public Guardian act as trustee, and further that he wanted the conservatorship terminated. The Public Defender asked for a further hearing to have a family member appointed to control the special needs trust because of a concern about the accruing expenses with the private fiduciary.

Plaintiff Thorpe, through his probate attorney, then petitioned to have himself appointed permanent trustee and remove Jolaine as trustee, and to

modify the trust. The trust provided that any successor trustee shall not be entitled to receive reasonable compensation for services in the administration of the trust, and plaintiff moved to have that language stricken from the trust. Plaintiff later filed an ex parte petition to release the trust money to himself for payment of ongoing expenses of the trust and the beneficiary. Plaintiff averred that money was needed to pay inspectors to go into the house to determine if it had adequate plumbing and lighting and also to insure the house. On Danny's behalf, the Public Defender objected, again stating the desire to appoint a family member and the concern about the expenses of a private fiduciary. Following a hearing, which included testimony from Danny expressing his objection, the probate court granted plaintiff's petition to release the trust funds.

Danny then filed an objection to plaintiff's petition for appointment as permanent trustee. He also filed a petition to remove plaintiff as temporary trustee and to appoint a different trustee, set for hearing on October 6, 2010. Prior to the hearing on Danny's petitions, the court terminated the conservatorship. The Public Defender entered an objection to the assertion by plaintiff's probate lawyer that the trust needed to be redrafted. Plaintiff stated that his greatest concerns were his ability to collect trustee and counsel fees, his ability to protect the trustee's liability on issues related to the trustee's control over the house and its cleaning and repair while the tenants resisted, and the petition to remove him as trustee.

Plaintiff Thorpe appeared on October 6<sup>th</sup> with his probate attorney and his litigation attorney. The litigation attorney asked for a continuance so that the plaintiff could petition for approval of his fees. Counsel stated that the plaintiff would resign if required by the court, but only after his accounting was approved and his fees ordered by the court. The Public Defender replied by asking the court to reconsider its approval of plaintiff as trustee, and to substitute Danny Reed's sister as trustee. She was willing to serve as trustee without cost to the trust. Plaintiff then resigned and Danny's sister was appointed trustee.

During the four and a half months that plaintiff was temporary trustee, he increased the insurance on Danny's home and pressed for necessary clean up and repair work. On November 22, 2010, plaintiff filed a petition for fees, seeking \$65,844 for himself, \$31,047 for his probate attorney, and \$11,879 for his litigation

attorney. Danny and his sister objected to the fee request by arguing the trust prevented compensation to the trustee and that the appointment of plaintiff was invalid. The trial court heard the matter over five days, and considered several hundred exhibits. The court then awarded plaintiff \$27,006, his probate attorney \$19,540, and his litigation counsel, \$4,739. The court noted it had properly executed its powers under the trust. Danny Reed and his sister, the trustee, appealed the court's ruling.

The Sixth District Court of Appeal began its discussion by noting a trustee is entitled to compensation for its services either as provided in the trust instrument, or "reasonable compensation," where the trust does not specify the trustee's compensation. (Probate Code sections 15680 & 15681) Where an instrument by which a trust is created fixes the compensation of the trustee they cannot claim a larger sum. Their acceptance of the trust will be held as an agreement to receive such compensation as the instrument directs. (Estate of Barton (1950) 9 Cal.App.2d 234) The trustor has the right to specify the compensation to be paid a trustee performing services on his behalf and if he does so it is not within the power of the court to change, alter or modify such provisions. (Estate of Bodger (1995) 130 Cal.App.2d 416)

Here, the instrument specifically states that a successor trustee, such as plaintiff, is not entitled to compensation. The probate court appointed plaintiff unconditionally, and plaintiff unconditionally accepted the appointment by performing duties. If plaintiff deemed the amount of compensation specified in the trust to be inadequate, he could have refused to act. (Estate of Whitney (1926) 78 Cal.App. 638) The trust having limited the amount which plaintiff should receive as compensation for his services and plaintiff having accepted the trust, he is bound thereby, and the order of the court allowing him a greater amount is without authority. (Whitney, at p. 650)

Plaintiff offers no explanation why the principle at issue in this case is not operative, and relies on the reasoning of the trial court. The court suggested the judgment was justified under the power given to it under Probate Code sections 15642 and 17026. The Justices disagreed. Under 15642(e), the court may suspend the powers of the trustee to the extent the court deems necessary. Section 17026 allows discretion to appoint a temporary trustee. Despite the apparent authority

to appoint a temporary trustee, there is neither mention of compensation generally, nor conferment of specific authority to compensate a temporary trustee differently from the amount specified in the trust instrument. The trial court's construction of the statutes is not only contrary to the plain words but also operates to eviscerate the specific statute that limits the compensation of a trustee to the amount fixed by the trust.

The Probate Court's judgment is reversed. The trial court is directed to deny plaintiff's petition for fees.

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