

Depublishing *Scott v. McDonald* Court of Appeals Decision Nearly Wreaks Havoc With SNTs

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It is easy to be complacent when people with disabilities enjoy more rights than at any other time in history. Thus, it was surprising to learn how little it takes to lose essential benefits that were so difficult to obtain. This became apparent when a recent California case nearly derailed the ability to use special needs trusts (SNTs) to enhance the lives of people with disabilities. This was an immediate danger to Californians with disabilities, but there was serious concern that this case would seriously impact many other parts of the country.

For many persons with disabilities, it is essential that they be allowed to use SNTs to improve their quality of life. Persons with disabilities oftentimes

must remain eligible for public benefits because it is the only way they can meet their needs for caregivers, therapies, and medical care. Federal and state governments recognize that public benefits like Supplemental Security Income (SSI) and Medicaid provide (at best) a marginal existence for persons with disabilities. To remain eligible for these programs, a person with a disability must follow stringent financial rules. In response to these harsh rules, Congress authorized the use of SNTs to provide people with disabilities with basic necessities and other extra goods and services that make life worth living without jeopardizing their eligibility for public benefits.

***McDonald* Court Ignores Basic Rules of Trust Construction**

At first blush, the *Scott v. McDonald* (2018) 26 Cal. App. 5th 463 Court of Appeal decision appeared reasonable. A professional trustee was surcharged more than \$92,000 due to several bad acts that included never filing court accounts and reports (as required by the SNT), not reading the SNT document, not obtaining approval before

paying herself (as required by law), and distributing money directly to the beneficiary's mother to buy a home but never checked if she had done so (she had not). This trustee had a history of poor performance and the surcharge appeared correct.

The concerns arose, however, when the California Court of Appeals attempted to support the trustee's surcharge by reviewing specific SNT distributions. Specifically, the court reviewed the SNT document's distribution standard and stated that the funds held in the SNT could only be used if an expenditure was made "reasonably necessary because of beneficiary's disability" and refused any disbursements for beneficiary's support, such as food, clothing, education, or shelter (even if it was reasonably necessary because of the person's disability). These two holdings were then used to review and disallow numerous disbursements the SNT trustee had made for rent, a car, clothing, a cell phone, vacations, and other items that enhanced the beneficiary's quality of life but were either not made reasonably necessary by the beneficiary's disability or were for support.

When initially reviewing the 33-page opinion, I believed that the SNT document must have been poorly drafted or had a stated intent different than any other SNT I had worked on over the past 25 years. However, an examination of the language relied upon

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by the Court of Appeals shows that this was not the case. The definition of “special needs” in this SNT document is the same or similar to many (if not all) SNTs in existence. The *McDonald* court ignored the basic rules of trust construction, foregoing analysis of the settlor’s intent and consideration of the trust document as a whole. Focusing instead on a few discrete sentences, the court misconstrued the meaning of the phrase “this is not a trust for the support of the beneficiary” to mean that no general support items could be paid for from the trust and disregarded trust language allowing discretionary disbursements for the beneficiary’s general health, safety, and welfare. The court upended the basic rules of trust construction and created a new standard for trust distributions at odds with the purpose of SNTs and more than two decades of practice.

If this case was allowed to be cited as precedent, it was going to devastate the future use of SNTs for all Californians with disabilities. Further, for all those SNT trustees who had been doing their jobs well, they would now be subjected to new rules of interpretation that fundamentally altered their fiduciary duty and made them liable for surcharge, breach of fiduciary duty, and potential loss of their professional license.

Impact Was Immediate

The impact of this decision was felt immediately. My office represents more than 100 SNT trustees in court-supervised trusts throughout California. A part of that supervision is doing court accounts and reports. Once this opinion was made available, our office immediately began receiving notes from the court asking why the SNT trustee was making disbursements for things not reasonably related to the



The court’s holding was inaccurate. The SNT was a discretionary, spendthrift trust, meaning the trustee has discretion to make a payment for rent or to not make a payment for rent. In fact, hundreds (if not thousands) of SNT trustees throughout California exercise their discretion under a discretionary, spendthrift standard by paying beneficiaries rent or buying houses, even though their SNT documents state they are not “support trusts.”

person’s disability or for support items — the same disbursements the court had approved in all prior years of administration. Other attorneys reported to me that their local jurisdictions were asking the same questions.

Under then-current California law, there is no case or direct precedent on how a SNT trustee should administer a SNT. If a trustee’s actions were called into question, the case law cited typically concerned the legal authority of a trustee to make distributions from a

fully discretionary, spendthrift trust. This left it up to the trustee to make (or not make) disbursements. The *McDonald* opinion provided the first legal roadmap for SNT trustees and its conclusion was to strictly limit the use of SNT funds.

The Decision Would Make Well-Intentioned SNT Trustees Liable for Breaches

As an example, in the *McDonald* case the SNT trustee paid for the

beneficiary's rent. The court held that "[r]ent is a general support item, and such expenditures are expressly disallowed by the trust instrument. Accordingly, the finding that Trustee breached her fiduciary duty by making a disbursement for rent is supported by substantial evidence." The court's holding was inaccurate. The SNT was a discretionary, spendthrift trust, meaning the trustee has discretion to make a payment for rent or to not make a payment for rent. In fact, hundreds (if not thousands) of SNT trustees throughout California exercise their discretion under a discretionary, spendthrift standard by paying beneficiaries rent or buying houses, even though their SNT documents state they are not "support trusts."

In fact, one of the best benefits a SNT trustee can provide a beneficiary with a disability is a safe and clean place to live. If this opinion was law, it took away the ability of SNT trustees to provide any type of housing for Californians with disabilities. Further, for the many SNT trustees who had been making disbursements for rent and housing, this opinion put their whole livelihood at risk. If paying a beneficiary's rent is a breach of fiduciary duty (as the *McDonald* opinion stated), then hundreds (if not thousands) of well-intentioned SNT trustees would be liable for breaches.

At this point, it was imperative that something be done. In California, there are two types of Court of Appeal decisions, those that are published and those that are not published. A published decision means that it can be cited as precedent and becomes the law in California. An unpublished decision means that the case is only law for that case and cannot be cited as precedent in any other matter. Un-

fortunately, this case was marked for publication.

There is a procedure to request that a case be depublished: A request to depublish must be made by letter to the California Supreme Court within 30 days of the opinion being final. After discussions with appellate specialists, it became clear that the more entities and people that signed onto the depublishing request, the better.

Actions Taken to Have the Decision Depublished

At this point (and with the help of many other attorneys who all volunteered their time), I created an initial draft of the letter requesting depublishing. I spoke to numerous groups about the impact this opinion would have on persons with disabilities. I was fortunate that the Academy of Special Needs Planners (ASNP) immediately agreed to support the letter. Soon thereafter, the following groups all signed on to support this letter: California's trial lawyer group, Consumer Attorneys of California (CAOC); California's elder law advocacy group, California Advocates for Nursing Home Reform (CANHR); California's licensed fiduciary group, the Professional Fiduciary Association of California (PFAC); and California's leading pooled special needs trust program, CPT Institute.

I also communicated with Ron Landsman, Rene Reixach, and John Callinan with NAELA's Litigation Committee. NAELA created a different letter in support of depublishing written by Ron Landsman and Gregory Wilcox. The Special Needs Alliance also signed on to support their letter. In addition, I reached out to the American College of Trust and Estate

Counsel (ACTEC), which agreed to submit a different letter in support of depublishing written by Margaret Lodise as chair of the ACTEC Amicus Review Committee.

In their separate letter to California's high court requesting depublishing, ACTEC wrote that the Court of Appeal's decision would "create chaos in the drafting and administration of" SNTs, and NAELA wrote that the decision would "cause real and serious harm" to SNT beneficiaries. Both ASNP and ACTEC note that the language used in the *McDonald* trust is the same language used in many SNTs throughout California and elsewhere, creating the likelihood of immediate and irreparable harm to beneficiaries who rely on their SNTs to provide for their basic needs. ACTEC warned of resulting "chaos in the drafting and administration of these trusts." All three letters urged the chief justice to depublish the opinion to avoid forcing thousands of individuals with disabilities into a "poverty existence" and jeopardizing trustees who have appropriately administered SNTs under commonly accepted legal standards.

On November 28, 2018, the California Supreme Court issued an order depublishing the *McDonald* decision.

Without the extraordinary efforts of so many people and groups, this case would have become law and caused much hardship for persons with disabilities and their trustees. It was a true pleasure to work alongside advocates willing to give so much of their time to protect persons with disabilities. But it serves as a stark reminder that without ongoing diligence and advocacy, it will be very easy for persons with disabilities to lose the rights and protections they have fought so hard to secure. ■