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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-913-98T2

IN THE MATTER OF
JONATHAN DAVID BOGGS,
an incompetent.

Argued December 8, 1999 - Decided

Before Judges Stern, Kestin and Wefing.

On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Hunterdon County.

Miles S. Winder, III, argued the cause for appellants Tony, Pamela, Michael, Jeffrey and Patrick Monroe (Mr. Winder, on the brief).

Frank P. DiPrima argued the cause for respondent Norman Tower Boggs III (DiPrima & Hoffman, attorneys; Mr. DiPrima, on the brief).

PER CURIAM

The appellants, certain nieces and nephews of Elizabeth Monroe Boggs (Elizabeth), the mother of incompetent Jonathan David Boggs (David), appeal from an order of August 25, 1998 which strikes paragraph 14 through 16 and footnote 1 of a complaint filed by David's guardian, thereby deleting all references to a "25/26 proposal" with respect to final distribution of a Special Needs Trust created for David's benefit, and providing "that if David is never hereafter adjudicated mentally competent, the assets remaining at his death

in any Special Needs Trust after providing for the trustee's obligations, shall be distributed to David's heirs under the laws that would govern David's intestate succession." The consequence of the order disapproves giving 25/26 of the remaining res of the Special Needs Trust created for David to certain of his heirs (the Monroe heirs) at the time of David's death. Twenty-five/twenty-sixths of the Special Needs Trust was funded by assets David received at the time of his mother's death in 1996. Those funds passed to David after her death because in 1943 Elizabeth relinquished her testamentary power of appointment over the trust assets.

On this appeal the Monroe heirs claim that under the "substituted judgment rule" the guardian had authority to determine that any remainder of the trust at David's death would pass to the "descendants who would have received Elizabeth's share of the trust [created by her McNairy grandparents] if Elizabeth had died without surviving issue." The guardian therefore proposed that 25/26 of any amounts remaining in David's Special Needs Trust "after repayment of Medicaid," be distributed "to the persons who would be entitled to receive Elizabeth's share of the [McNairy] trust if Elizabeth died without surviving issue on the date that David dies." The remaining 1/26 would go "to all of David's intestate heirs" because that portion was funded from a separate source. A footnote in the complaint indicated that the 25/26 proportion "is requested because

approximately 25/26 of the funds proposed to be placed into David's Special Needs Trust are derived from the McNairy Trust, and 1/26 are derived from the life insurance proceeds."

The Monroe heirs (also McNairy descendants) argue that under the substituted judgment rule the guardian had authority to make decisions with regard to the remainder of the Special Needs Trust and that there was no abuse of discretion by the guardian; any other distribution denied David equal protection of the laws; "[f]airness both to the incompetent and to his family was denied by the trial judge's failure to take testimony as to the considerations of the guardian in making the decision to exercise her discretion in favor of the Monroe heirs"; and that respondent, Norman Tower Boggs, III, the son of one of David's paternal uncles, "has no standing to litigate this matter as his interest in the estate is at best an expectancy."

We need not decide the standing issue, including the ability of the Monroe heirs to appeal in light of the guardian's failure to pursue her complaint on appeal and the contingent nature of the appellants' interest. There may be merit in these circumstances to await resolution of the issues raised until David's death when the surviving Monroe and Boggs descendants can be identified and speak for themselves. But the parties agree that approval of the Special Needs Trust is now before the court (although no party challenges approval of its creation by the trial judge), and the issue will be the same when David dies --

that is, should the remainder of the Special Needs Trust pass through the intestacy laws to all heirs, or only to the Monroe heirs as proposed by the guardian. Stated differently, the issue is whether the guardian has the power to make the requested disposition. Our determination of that question, in any event, moots the issue concerning appellants' standing to pursue the appeal.

In her decision, Judge Marilyn Rhyne Herr stated:

> While Ms. Kopen and Mr. Winder (attorneys) contend that the action being requested in this case is not the making of the will for the benefit of the [decedents] of the settl[o]rs who would have received Elizabeth's share of the trust if Elizabeth had died without surviving issue, the ultimate result is exactly that. There is no issue herein of a financially prudent course of action in this proposed distribution. It saves no money for the estate that has been brought to the attention of the Court. It simply favors some of [David's] heirs over others.
>
> It is, no matter how phrased, the making of a will, because it makes a distribution upon [David's] death that is inconsistent with intestate distribution. Neither is there any basis to argue that the proposed distribution would keep with the original intent of the settl[o]rs of the trust, and that is [David's] great grandparents. That trust could exist only for the term of the lives in being plus 21 years when created, and there's no legal basis to extend its life or make presumptions as to their intent at this point in time.
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> Neither is it consistent with the natural object of David's bounty because all his heirs at law are presumed to be natural objects of his bounty, not just his McN[ai]ry heirs.

We add only that there is no showing whatsoever that David would prefer one set of cousins or relatives over another, or that there is any benefit to David or to his estate by the proposed trust provision. Cf. In re Labis, 314 N.J. Super. 140, 147 (App. Div. 1998); In re Roche, 296 N.J. Super. 583, 588 (Ch. Div. 1996). Nor was the guardian's decision a mere tardy renunciation of David's interest in the McNairy trust. N.J.S.A. 3B:9-5; 3B:12-49. To the contrary, the trust corpus has been placed into a Special Needs Trust for David's benefit; nothing would pass immediately to the Monroes.

We affirm the judgment substantially for the reasons expressed by Judge Marilyn Rhyne Herr in her oral opinion of July 9, 1998. See also N.J.S.A. 3B:12-27; N.J.S.A. 3B:12-49; In re Estate of Bechtold, 150 N.J. Super. 550, 553 (Ch. Div. 1977), aff'd, 156 N.J. Super. 194 (App. Div.), certif. denied, 77 N.J. 468 (1978); Kronberg v. Kronberg, 263 N.J. Super. 632, 639 (Ch. Div. 1993). N.J.S.A. 3B:12-27 expressly provides that the property of a mental incompetent who dies without a will executed while competent "shall descend and be distributed as in the case of intestacy," and N.J.S.A. 3B:12-49 expressly prohibits the court and guardian from exercising "the power to make a will."

Finally, we reject the Monroes' argument about the "unfairness" of the disposition in this case and their claim that a hearing is required to determine what Elizabeth intended to accomplish by the renunciation of her testamentary power of

appointment. The short answer to both claims is that she relinquished her interest in 1943 and, therefore, achieved the benefit of her action at that time. She cannot, in any event, now control after her death what she voluntarily relinquished more than fifty years ago.[1]

Affirmed.

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[1]The McNairy trust was created in 1929. Elizabeth was apparently alive then, but David was not. David was born after 1943. We need not explore the impact of the Rule Against Perpetuities as it then existed with respect to this issue.