MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Irrevocable Trust of Mary Ruth Moeder

Susan Moeder,

Appellant-Respondent,

v.

Robert W. York,
Temporary Trustee of the Mary Ruth Moeder Trust,

Appellee-Petitioner

June 22, 2021

Court of Appeals Case No. 20A-TR-1654

Appeal from the Marion Superior Court

The Honorable Steven R. Eichholtz, Judge

Trial Court Cause No. 49D08-0510-TR-041012

Crone, Judge.

Case Summary

[1] Mary Ruth Moeder ("Mother") established the Mary Ruth Moeder Revocable Living Trust ("Trust") to benefit her children, John and Susan. After Mother died, Susan's half of the Trust was distributed to her, but John's half remained in the Trust. Several years later, the trial court modified an earlier order and part of the Trust to allow distribution of Trust assets to John. This modification set off a round of litigation as to how the Trust terms should be construed. In August 2020, the trial court held the trustee could distribute Trust assets to and for the benefit of John, including payment of creditors. Susan appeals, asserting the remaining terms of the Trust do not allow for such distributions by the trustee. We affirm and remand for an award of appellate fees to the trustee.

Facts and Procedural History

[2] The underlying facts are taken largely from this Court's two prior opinions in this matter, *In re Moeder*, No. 49A02-1205-TR-377, 2012 WL 5328124 (Ind. Ct. App. Oct. 30, 2012), and *In re Moeder*, 27 N.E.3d 1089 (Ind. Ct. App. 2015), *reh'g denied*, *trans. denied*.

[3] Mother established the Trust in November 1997 and named Susan and John, who is legally blind, the primary beneficiaries. The Trust provided that upon Mother's death, any assets would be divided equally between Susan and John. When Mother died in 2001, Susan became the successor trustee. In 2005, Susan filed a guardianship petition alleging John has "[m]ild mental retardation" and

is incapacitated. Appellee's App. Vol. II p. 46. In September 2006, the probate court declared John "an incapacitated person in that he is unable to manage his property" and appointed Salin Bank and Trust Company[1] (now Horizon Bank) as guardian of his estate. *Id.* at 59.

[4] In October 2006, the trial court issued an order ("the 2006 Order") authorizing Susan to resign as trustee, appointing Salin Bank and Trust Company as successor trustee, and ordering the distribution of Susan's one-half share of the Trust assets to her. John's share was not distributed, making him the primary beneficiary of the Trust. Per the terms of the Trust, Susan is the contingent remainder beneficiary of John's share of the Trust. The 2006 Order also provided that "[o]ther than fees, no [Trust] assets or funds shall be distributed to or expended for the benefit of [John] unless and until all assets in the John W. Moeder Revocable Trust have been exhausted."[2] *Id.* at 151.

[5] In 2011, John's guardian petitioned the trial court to modify the 2006 Order and Section 7.04 of the Trust to allow for the use of Trust assets to pay some of John's expenses, alleging John suffered from various medical conditions that made it difficult for him to work and he couldn't afford basic living expenses. Section 7.04 provided:

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[1] Salin Bank and Trust Company resigned as guardian in 2011, and First Merchant Trust Company was appointed successor guardian.

[2] The record does not contain information about the John W. Moeder Revocable Trust.

Any Beneficiary who is determined by a court of competent jurisdiction to be incompetent shall not have any discretionary rights of a Beneficiary with respect to this Trust, or to their share or portion thereof. The trustee shall hold and maintain such incompetent Beneficiary's share of the Trust Estate and shall, in the Trustee's sole discretion, provide for such Beneficiary as that Trustee would provide for a minor. **Notwithstanding the foregoing, any Beneficiary who is diagnosed for the purposes of governmental benefits (as hereinafter delineated) as being not competent or as being disabled, and who shall be entitled to governmental support and benefits by reason of such incompetency or disability, shall cease to be a Beneficiary of this Trust.** Likewise, they shall cease to be a Beneficiary if any share or portion of the principal or income of the Trust shall become subject to the claims of any governmental agency for costs or benefits, fees or charges.

The portion of the Trust Estate which, absent the provisions of this section, would have been the share of such incompetent or handicapped person shall be retained in trust for as long as that individual lives. The Trustee, at his or her sole discretion, shall utilize such funds for the maintenance of that individual. If such individual recovers from his or her incompetency or disability, and is no longer eligible for aid from any governmental agency, including costs or benefits, fees or charges, such individual shall be reinstated as a Beneficiary after 60 days from such recovery, and the allocation and distribution provisions as stated herein shall apply to that portion of the Trust Estate which is held by the Trustee subject to the foregoing provisions of this section. If said handicapped Beneficiary is no longer living and shall leave children then living, the deceased child's share shall pass to those children per stirpes. If there are no children, the share shall be allocated proportionately among the remaining Beneficiaries.

Appellant's App. Vol. II p. 90 (emphases added). John's guardian asserted Section 7.04 was contradictory—its first paragraph stated a beneficiary determined to be incompetent ceased to be a beneficiary, but then its second paragraph directed Trust assets still be used for their maintenance—and that it and the 2006 Order prevented distribution of Trust assets (at this point approximately $778,000) to John even though he could barely pay living expenses. Susan objected to any distribution of Trust assets to John, arguing he was no longer a beneficiary under Section 7.04 because he was declared "incompetent." *Id.*

[6] In 2012, the trial court issued orders in February ("February 2012 Order") and April ("April 2012 Order"), granting John's guardian's requests—removing the first paragraph of Section 7.04 and modifying the 2006 Order to allow the trustee to pay certain expenses of John's from the Trust and to thereafter distribute $1,500 a month to him to "supplement his meager earned income." *Id.* at 99. Susan appealed both the February 2012 Order and the April 2012 Order. This Court affirmed, stating,

> Given that the very purpose of Mother's Trust was to benefit John with half of the assets in Mother's Trust when [Mother] died, we have no hesitation in concluding that any failure to administer Mother's Trust in a manner that honors its provision authorizing the trustee to utilize trust funds for John's maintenance is a circumstance that was not anticipated by [Mother].

Moeder, 2012 WL 5328124, at *6.

[7] In June 2013, the trustee petitioned the trial court for instructions, stating the court orders and modifications had led to "a dispute" between the parties as to the handling of the Trust and requesting instructions on the following:

> 1) whether it has the discretion to distribute Trust income or principal to or for the benefit of John in such amounts and at such times as Trustee deems appropriate; and
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> 2) in particular, whether it is within the Trustee's discretion to pay the sum of $43,107.20 to [John's guardian's attorneys] as approved by this Court's October 9, 2012 Order and to pay future bills of the Guardian's attorney if approved in the Guardianship matter.

Appellee's App. Vol. III pp. 16, 17.

[8] In July, Susan responded, arguing in part that the trustee did not have discretion to distribute Trust assets to John or to pay attorney's fees. Specifically, she asserted that the Trust's spendthrift provision in Section 7.02 prevents Trust assets from being used to "pay the creditors of a beneficiary," including attorney's fees. *Id.* at 22. Susan also argued the trial court's modification of the Trust "amplified ambiguities" in the Trust including whether the trustee is "required to comply with Section 4.03(j)(2) of the Trust," which she asserted "requires that distributions for the benefit of someone who is under a legal disability—as John is—be made to others on his behalf[.]" *Id.* at 22, 23. Susan argued the trial court should resolve these ambiguities by interpreting the Trust as a special-needs trust.

[9] In October 2013, the trial court issued an order ("October 2013 Order") rejecting Susan's arguments and finding:

> 1. The Trustee has the discretion to distribute Trust income or principal to or for the benefit of John W. Moeder in such amount and at such times as the Trustee deems appropriate; and,
>
> 2. It is within the Trustee's discretion to pay the sum of $43,107.20 to [John's guardian's attorneys] as approved by the Court's Order of October 9, 2012, and to pay future bills of the Guardian's attorney if approved in the Guardianship matter.

Appellant's App. Vol. II p. 102.

[10] Litigation continued for the next several years, much of it focused on accounting, distributions, and the payment of attorney's fees.[3] In 2016, the trial court certified its October 2013 Order and Susan filed a notice to appeal it. However, she never filed a brief, and we dismissed her 2016 appeal "with prejudice." Appellee's App. Vol. III p. 199.

[11] In September 2019, the trial court ordered the parties to file statements outlining the current terms of the Trust, incorporating all previous court decisions interpreting, construing, or modifying the Trust. The trustee, Susan, and John's guardian all did so, although the trial court did not adopt any of the

[3] Most notably, in 2011 Susan objected to the trustee's accounting and alleged it was mismanaging the Trust. Eventually, a trial was held on the matter. The trial court found many of Susan's issues to be time-barred and the rest to be meritless. The trial court not only dismissed Susan's claims but required her to pay the trustee's attorney's fees. Susan appealed, and in our 2015 opinion we affirmed.

statements or otherwise make a ruling as to the terms of the Trust at that time. In April 2020, the trustee petitioned the court for instructions, citing the parties' differing beliefs regarding the Trust's construction as laid out in the 2019 statements and noting the "contentious history of this cause." Appellant's App. Vol. II p. 116.[4]

[12] In August 2020, the trial court issued its "Order Regarding Trust Construction" ("August 2020 Order"). *Id.* at 57. In part, the court found, "Pursuant to the principles of *res judicata*, the Court's [October 2013] Order is fully binding on the Court and parties." *Id.* at 64. The trial court then stated it construed the Trust

> in accordance with the foregoing findings and conclusions to have been modified by the Court's Orders and decisions by the Court of Appeals to permit the Trustee of the Trust to utilize the Trust funds for the maintenance of [John] **by making distributions from income and principal of the Trust directly to John, to John's creditors and to others for John's benefit**, as the Trustee deems appropriate at his or her sole discretion and with the understanding that the Trust is not construed to be a Special Needs or Supplemental Needs Trust.

Id. at 69 (emphasis added).

[4] In February 2020, the trial court authorized Salin Bank and Trust Company to resign as trustee. Robert York was appointed as temporary trustee and is the trustee involved in this appeal.

[13] Susan now appeals.[5]

Discussion and Decision

I. Findings

[14] Susan first argues the trial court erred because the August 2020 Order "reincorporates a provision from the [February 2012 Order] that was excised by the Trial Court." Appellant's Br. p. 14.

[15] There is no error here. While the August 2020 Order does incorporate findings from the February 2012 Order, we see no evidence in the record that any part of the February 2012 Order was ever "excised." Susan cites "App. V2 at 98" for her assertion that "[i]n February 2012, the Trial Court excised Paragraph 14 of the February [] 2012 Order." *Id.* at 17. But that page does not include any reference to the trial court "excising" a portion of the February 2012 Order. Nor does the record show any other orders in February 2012—or throughout the entire proceedings—that purport to do so.

[16] The trustee suggests Susan is referring to "handwriting" on the February 2012 Order that she believes "show[s] that paragraph was in fact stricken." Appellee's Br. p. 18. The February 2012 Order, which is otherwise typed, does

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[5] This is Susan's fifth appeal. As noted above, she also appealed in 2012 and 2015, and in both we affirmed. Her 2016 appeal was dismissed with prejudice after she failed to file a brief. She also filed an appeal in 2020 after the trial court in the guardianship matter approved the use of Trust assets to pay John's guardian's attorney's fees but agreed to dismiss it with prejudice as part of an agreement with the trustee and John's guardian.

appear to have some written markings around Paragraph 14. But if this is Susan's argument, she does not articulate it in her brief nor respond in her reply brief to the trustee's interpretation. In any event, we see no indication in the record that these markings were an attempt by the trial court to "excise" a portion of the February 2012 Order.

[17] The trial court did not err in including findings from the February 2012 Order in its August 2020 Order.

II. Res Judicata

[18] Susan also asserts the trial court's August 2020 Order is erroneous because it authorizes: (1) "the Trustee to make distributions 'directly to John' or 'to others for John's benefit' [which] is inconsistent and at odds with [Section] 4.03(j)" and (2) John's creditors to be paid by the Trust in violation of its spendthrift provision. Appellant's Br. p. 21. The trustee argues the trial court already decided these claims in its October 2013 Order and notes the trial court, in its August 2020 Order, found "[p]ursuant to the principles of res judicata, the [October 2013] Order is fully binding." Appellee's App. Vol. II p. 64. Therefore, the trustee asserts Susan's claims are barred by res judicata.

[19] Res judicata is a doctrine that prevents "repetitious litigation of disputes that are essentially the same." *Marion Cnty. Cir. Ct. v. King,* 150 N.E.3d 666, 672 (Ind. Ct. App. 2020), *reh'g denied*, *trans. denied*. The doctrine includes both claim preclusion and issue preclusion. *Dawson v. Est. of Ott*, 796 N.E.2d 1190, 1195 (Ind. Ct. App. 2003). Claim preclusion prohibits parties from litigating an

action when a final judgment on the merits has been rendered on the same claim between the same parties. *King*, 150 N.E.3d at 672. For claim preclusion to apply, four factors must be present: (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the former judgment must have been rendered on the merits; (3) the matter now in issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action must have been between parties to the present suit or their privies. *Id.*

[20] We agree with the trial court that the October 2013 Order is fully binding on the parties as res judicata. There is no dispute the trial court had competent jurisdiction and that Susan and the trustee were both parties. And the October 2013 Order was a judgment rendered on the merits. The October 2013 Order was made final in September 2016, and Susan initiated an appeal. That appeal was dismissed with prejudice, constituting a "dismissal on the merits" and "is conclusive of the rights of the parties and is res judicata as to any questions that might have been litigated." *Fox v. Nichter Const. Co.*, 978 N.E.2d 1171, 1180 (Ind. Ct. App. 2012), *reh'g denied*.

[21] That leaves only the third factor—whether Susan's current claims were or could have been determined in the October 2013 Order. In July 2013, in response to the trustee's Petition for Instructions, Susan asserted in part that: (1) the Trust's spendthrift provision does not allow the trustee "the discretion to pay the creditors of a beneficiary" and (2) "the removal of the first paragraph of Section 7.04 has amplified ambiguities within the four corners of the trust document"

including whether "the trustee [is] required to comply with Section 4.03(j)(2) of the Trust." Appellee's App. Vol. III pp. 22, 23. In its October 2013 Order, the trial court rejected these claims and found the trustee did have the discretion to distribute Trust assets to John and pay attorney's fees. Susan now asserts "essentially the same" claims—that the spendthrift provision in Section 7.02 prevents the payment of attorney's fees from the Trust and that Section 403(j) prevents direct payments to John. These matters were determined in the October 2013 Order.

[22] Because these claims were litigated and decided in the October 2013 Order, Susan is precluded from relitigating them in this appeal.

III. Appellate Attorney's Fees

[23] The trustee argues the Trust is entitled to damages under Indiana Appellate Rule 66(E), which provides "[t]he Court may assess damages if an appeal . . . is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorney's fees. The Court shall remand the case for execution." "Our discretion to award attorney fees under Ind. Appellate Rule 66(E) is limited to instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." *Staff Source, LLC v. Wallace*, 143 N.E.3d 996, 1012 (Ind. Ct. App. 2020) (quotation omitted).

[24] In this appeal, Susan's claims are without merit or an attempt to relitigate issues already decided. Furthermore, Susan's brief and appendix appear to be submitted "in a manner calculated to require the maximum expenditure of time

both by the opposing party and the reviewing court." *Thacker v. Wentzel*, 797 N.E.2d 342, 347 (Ind. Ct. App. 2003). Susan's brief leaves out essential facts—most notably any information regarding her appeal of the October 2013 Order. And Susan's appendix contains only ten documents, an astonishingly small amount considering this case has been heavily litigated since 2011. The trustee provided the case's complete record for our review, although its efforts to do so were "difficult and time consuming." Appellee's Br. p. 12. Susan argues any omitted documents are not relevant to the issues she raises on appeal, but a quick look at our citations above and the trial court's findings and citations in the August 2020 Order show many of these documents are relevant. In fact, the trial court found in its August 2020 Order that Susan's appeal of the October 2013 Order was dismissed with prejudice, making it "fully binding on the Court and parties" "pursuant to the principles of *res judicata*." Appellant's App. Vol. II p. 64. Susan's argument that this information is somehow not relevant to our review is not well taken.

[25] For these reasons, we find Susan's appeal to be frivolous, without merit, and in bad faith, and we believe an award of appellate attorney fees is appropriate. Therefore, we remand to the trial court with instructions to determine and award an appropriate amount of appellate attorney fees. *See Montgomery v. Trisler*, 771 N.E.2d 1234, 1239 (Ind. Ct. App. 2002) (finding bad faith where appellant failed to disclose there were two prior appeals in the case, and in one he had raised several of the same issues), *trans. denied*.

[26] Affirmed and remanded.

Bradford, C.J., and Brown, J., concur.