

IN THE SUPREME COURT OF OHIO

06-1207  
CASE NO. 06-1343

LORETTA PACK, TRUSTEE OF THE  
MAEBELLE W. OSBORN TRUST  
Plaintiff-Appellee,

v.

CHARLOTTE OSBORNE  
Defendant-Appellee  
and

LICKING COUNTY DEPARTMENT OF  
JOB AND FAMILY SERVICES,  
Defendant-Appellant.

On Appeal from the  
Licking County Court  
of Appeals, Fifth  
Appellate District

Court of Appeals  
Case No. 05-CA-83

MERIT BRIEF OF DEFENDANT-APPELLANT  
LICKING COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES

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Issue

**Whether the Medicaid eligibility rules are those in effect at the time of the creation of an inter vivos trust or those in effect on the date of eligibility review**

Proposition of Law No. 1

**The applicable Medicaid eligibility rules are those in effect at the time an application and/or eligibility review is commenced for Medicaid and not those in effect at the time of the creation of an inter vivos trust because rights to Medicaid have not vested in an individual who has not yet applied for, or is not eligible to receive, such benefits.**

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## STATEMENT OF THE CASE AND FACTS

Loretta Pack, trustee of the Maebelle W. Osborn Trust filed a declaratory judgment action in the Licking County Court of Common Pleas on May 7, 2004.<sup>1</sup> Charlotte Osborne is the sole beneficiary of the Maebelle W. Osborn Trust. This trust was created on October 7, 1987.<sup>2</sup> Charlotte Osborn applied for Medicaid benefits on May 7, 2004.<sup>3</sup> She was denied those benefits, by the Licking County Department of Job and Family Services (hereinafter referred to as "LCDJFS") because her assets exceeded the statutory threshold limit for eligibility due to her status as beneficiary of the Maebelle W. Osborn Trust.<sup>4</sup>

The complaint for a declaratory judgment that was filed on May 7, 2004 was filed against LCDJFS. The complaint requested that the common pleas court declare that the Maebelle W. Osborn trust should not be counted as an available resource for Medicaid eligibility purposes.<sup>5</sup> The answer of the LCDJFS was filed on May 27, 2004. Throughout these proceedings the LCDJFS indicated that the trust corpus, which consisted of \$265,000, exceeds the Ohio Administrative Code asset threshold amount of \$1500. An Order of Reference, Pursuant to Rule 53 of the Ohio Rules of Civil Procedure was entered and the matter was turned over to the magistrate on September 22, 2004. Plaintiff's motion for Summary Judgment was filed on October 12, 2004, indicating that the Maebelle W. Osborn Trust should not be counted as an

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<sup>1</sup>If this Court would like the Licking County Department of Job and Family Services to brief the issue of the appropriateness of filing a declaratory judgment action before the administrative remedies have been exhausted as raised in the Memorandum in Support Jurisdiction of Appellant Licking County Department of Job and Family Services, Appellant would supplement its brief accordingly.

<sup>2</sup> See Complaint for Declaratory Judgment and Reformation of Trust filed May 7, 2004.

<sup>3</sup> See Amended Magistrate's Decision with Findings of Fact of Conclusions of Law filed January 19, 2005.

<sup>4</sup> See Amended Magistrate's Decision with Findings of Fact of Conclusions of Law filed January 19, 2005.

<sup>5</sup> See Complaint for Declaratory Judgment and Reformation of Trust filed May 7, 2004.

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available resource for Medicaid eligibility purposes under the appropriate code sections as it contains "ascertainable standards" and therefore mirrors this Court's decision in Young v. Ohio Dept. of Human Serv. (1996), 76 Ohio St. 3d 547. However, the LCDJFS filed a Memorandum Contra Plaintiff's Motion for Summary Judgment on October 25, 2004, stating that the decision in Young was rendered moot by the enactment of Ohio Revised Code Section 5111.151. Upon hearing the oral arguments of both sides and a stipulation entered by the parties that the LCDJFS memorandum contra to Plaintiff's Motion for Summary Judgment also contained a Cross-Motion for Summary Judgment, the Plaintiff's Motion for Summary Judgment was denied on December 17, 2004. LCDJFS has denied and continues to deny that Charlotte Osborne is eligible for Medicaid benefits. Objections to the magistrate's decision were filed on September 22, 2004.

The Court of Common Pleas then affirmed the decision of the magistrate and as a result, Loretta Pack, filed an appeal in the Licking County Court of Appeals, Fifth Appellate District on July 25, 2005. Appellant's Merit Brief was filed on October 3, 2005. The Fifth District Court of Appeals opined that the lower court erred as a matter of law in denying trustee's motion for summary judgment because the laws and rules in effect at the time an inter vivos trust is created should be used to determine Medicaid eligibility. In this case, the trust corpus consisted of \$265,000 and the language at issue is as follows:

**Income and Principal**

(a) The Trustee may, until the death of her daughter, CHARLOTTE OSBORN, distribute to or expend for the benefit of MAEBELLE W. OSBORN, CHARLOTTE OSBORN, ARTHUR ELWOOD OSBORN and LORETTA PACK so much of the principal and the current or accumulated income therefrom, at such time or times and in such amounts and manner as the Trustee, in her sole discretion, shall determine. Any amounts of income, which the Trustee shall determine not to distribute to or expend for the benefit of MAEBELLE W.

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OSBORN, CHARLOTTE OSBORN, ARTHUR ELWOOD OSBORN and LORETTA PACK, may be accumulated.

In making such distribution is my intent that my Trustee use income or principal for the benefit of my children only for purposes other than providing food, clothing or shelter that is to be used only to meet supplemental needs over and above those met by entitlement benefits.

After the decision by the Fifth District Court of Appeals, the Licking County Department of Job and Family Services filed a Motion to Vacate for Lack of Subject Matter Jurisdiction and/or Motion for Reconsideration and/or Motion to Certify Conflict on May 17, 2006. The Appellee's (previously referred to as Appellant in the Court of Appeals) reply to said Motion was filed on May 31, 2006. The Court of Appeals denied the Motion to Vacate as well as the Motion for Reconsideration but granted the Motion to Certify Conflict. Then, the Licking County Department of Job and Family Services filed a Notice of Appeal and Memorandum in Support of Jurisdiction with this Court. This Court certified the conflict and accepted the appeal.

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## ARGUMENT

### Proposition of Law No. 1

The applicable Medicaid eligibility rules are those in effect at the time an application and/or eligibility review is commenced for Medicaid and not those in effect at the time of the creation of an inter vivos trust because rights to Medicaid have not vested in an individual who has not yet applied for, or is not eligible to receive, such benefits.

#### A. Introduction

Charlotte Osborn applied for Medicaid benefits on May 7, 2004.<sup>6</sup> The Appellant, Licking County Department of Job and Family Services, made the determination that Charlotte Osborn is not entitled to Medicaid benefits based on application of the criteria then in effect as established by the state of Ohio as a condition of participating in the federal Medicaid program.

Medicaid is not an entitlement. Medicaid was enacted for the purpose of providing “federal assistance to States that choose to reimburse certain costs of medical treatment for needy persons.” Harris v. McRae (1980), 448 U.S. 297, 301.

The history of Medicaid and its purposes is best described in the case of Estate of Marx v. Albers 97 CV 000791, Clermont County Court of Common Pleas, unreported (Slip Copy) as follows:

Title XIX of the Social Security Act established the Medicaid program. 42 U.S.C. 1396 et seq. The purpose of the program is to furnish medical care to those whose resources were insufficient to meet the costs of necessary medical services. 42 U.S.C. 1396. States participating in the program are required to develop a plan for determining the eligibility of individuals seeking medical assistance. 42 U.S.C. 1396a(a). The state plan is required to establish “reasonable standards” which takes into account these income and resources that are available to the applicant. 42 U.S.C. 1396a(a)(17).

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<sup>6</sup> See Amended Magistrate’s Decision with Findings of Fact of Conclusions of Law filed January 19, 2005.

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Two types of recipients have traditionally received Medicaid Assistance. The first group, the "categorically needy," are those already receiving general welfare payments under the Aid to Families with Dependant Children Program, 42 U.S.C. 601 et seq., or the Supplementary Security Income Program ("SSI"), 42 U.S.C. 1381 et seq.

The Medicaid laws require all participating states to provide benefits to the "categorically needy." These are persons whose incomes are too high to qualify for one of the categorical programs, but who need assistance base on the costs of their medical care. 42 U.S.C. 13969(a)(10)(A)(ii). Providing Assistant to the "medically needy" is optional for those states that participate in the general medical program. Id.

Ohio has chosen to participate in the federal Medicaid program. See, **O.R.C. 5111.01 et seq.** Therefore, Ohio has developed "reasonable standards" as mandated by federal law to determine the eligibility of applicants/recipients to receive Medicaid benefits. These standards are set forth in Ohio Administrative Code Section 5101:1-39 et seq. and Ohio Revised Code Section 5111.01 et seq.

The Ohio General Assembly has enacted Ohio Revised Code Section 5111.151 which provides rules for eligibility determinations involving Medicaid and trust assets. This section provides criteria for determining whether to count as an available resource a trust that has been created by the applicant or for the applicant by another individual. Section 5111.151 states, for our purposes, in relevant part, that:

(G)(1) A trust or legal instrument or device similar to a trust shall be considered a trust established by an individual for the benefit of the applicant or recipient if all of the following apply:

- (a) The trust is created by a person other than the applicant or recipient.
- (b) The trust names the applicant or recipient as a beneficiary

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- (c) The trust is funded with assets or property in which the applicant or recipient has never held an ownership interest prior to the establishment of the trust.
- (2) Any portion of the trust that meets the requirements of division (G)(1) of this section shall be an available resource only if the trust permits the trustee to expend principal, corpus, or assets of the trust for the applicant's or recipient's medical care, comfort, maintenance, health, welfare, general well being, or any combination of these purposes
- (3) A trust that meets the requirements of division (G)(1) of this section shall be considered an available resource even if the trust contains any of the following types of provisions:
  - (a) A provision that prohibits the trustee from making payments that would supplant or replace Medicaid or other public assistance;
  - (b) A provision that prohibits the trustee from making payments that would impact or have an effect on the applicant's or recipient's right, ability, or opportunity to receive Medicaid or other public assistance;
  - (c) A provision that attempts to prevent the trust or its corpus or principal from being counted as an available resource.
- (4) A trust that meets the requirements of division (G)(1) of this section shall not be counted as an available resource if at least one of the following circumstances applies:
  - (a) If a trust contains a clear statement requiring the trustee to preserve a portion of the trust for another beneficiary or remainderman, that portion of the trust shall not be counted as an available resource. Terms of a trust that grant discretion to preserve a portion of the trust shall not qualify as a clear statement requiring the trustee to preserve a portion of the trust
  - (b) If a trust contains a clear statement requiring the trustee to use a portion of the trust for a purpose other than medical care, care, comfort, maintenance, welfare, or general well being of the applicant or recipient, that portion of the trust shall not be counted as an available resource. Terms of a trust that grant discretion to limit the use of a portion of the trust shall not qualify as a clear statement requiring the trustee to use a portion of the trust for a particular purpose.

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The General Assembly, as required by federal law, has established criteria for determining Medicaid eligibility. The above rule was in effect at the time that Charlotte Osborne made her application for Medicaid benefits. Therefore, based on these rules and those contained in Ohio Administrative Code 5101:1-39-27.1, the Licking Department of Job and Family Services determined that Charlotte Osborne was not eligible to receive Medicaid benefits.<sup>7</sup> The Licking County Department of Job and Family Services applied the rules in effect at the time of the application/eligibility review.

*B. The intent of the legislature was to have the rules for Medicaid eligibility apply as they are written and in effect as of the date an application for benefits is made*

Eligibility for Medicaid benefits are determined based upon the regulatory language in effect at the time an application for benefits is commenced. Except for the Court of Appeals in this case, this rule has been consistently followed by the lower courts. See, Martin v. Ohio Dept. of Hum Svcs. (1998), 130 Ohio App. 3d 512, 524 (2<sup>nd</sup> Dist.); Metz v. Ohio Dept. of Hum Svcs. (2001), 145 Ohio App. 3d 304, 309 (6<sup>th</sup> Dist.); Prior v. Ohio Dept. of Hum. Svcs. (1997), 123 Ohio App.3d 381, 386; and, Miller v. Ohio Dept. of Hum. Svcs. (1995), 105 Ohio App.3d 539, 543.<sup>8</sup>

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<sup>7</sup> Appellee has never disputed that if this version of the rule is applied to her situation than she was properly determined to be ineligible for benefits. Instead, she has consistently argued that it is improper to apply this version of the rule to her. Rather, she has claimed that the Medicaid rules in effect at the time the trust was originally created (i.e. 1987) was the proper set of rules applicable to her situation.

<sup>8</sup> Indeed, this Court has itself chosen, in a somewhat analogous case, to apply Medicaid rules contained in "the plain regulatory language in effect *at the time this litigation arose*" rather than apply older or newer versions of Medicaid rules. See, Young v. Ohio Dept. of Hum. Svcs. (1996), 76 Ohio St.3d 547, 551. The same rules of eligibility were in effect both at the time of the appellee's application for benefits as well as at the time the appellee formally instituted litigation.

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“A former statute only applies if rights or obligations have been acquired under the former statute.” Miller v. Ohio Dept. of Hum. Svcs. (1995), 105 Ohio App.3d 539, 543 *citing Coca-Cola Bottling Corp. v. Lindley* (1978), 54 Ohio St.2d 1. In deviating from this well-established rule the Court of Appeals misconstrued the holding of this Court’s prior opinion in Ohio Citizens Bank v. Mills (1989) 45 Ohio St.3d 153. In that case this Court held that the law in effect at the time of the creation of an *inter vivos* trust was to be applied in order to determine the grantor’s intentions. What that case did *not* say, however, is that a grantor’s intention was paramount over and above a subsequent legislative enactment should the subsequent enactment conflict with the grantor’s intent. Indeed, this Court recognized that “[w]hile the general rule ... is that the law existing at the time an *inter vivos* trust is executed is the law which applies, a subsequent legislative enactment ... may apply, depending on the intent of the General Assembly.” *Id.* at 157. There can be no reasonable argument that the General Assembly intended for Medicaid rules in effect at the time of the creation of an *inter vivos* trust control Medicaid eligibility in perpetuity. This is especially so since so much of Medicaid eligibility (and funding) is controlled by the Federal government. The Court of Appeals herein entirely failed to take into account the fact that the General Assembly has the authority to modify the law notwithstanding it being contrary to the intentions of a grantor of an *inter vivos* trust. Such a application is not prohibited.

Applying the law in effect at the time an application for benefits is made is a “prospective” application of the law. Statutes that reference past events, in this case execution of a trust agreement, to establish current status have been held not to be retroactive. Playcan v. School Employees Retirement System (1994), 71 Ohio St.3d 240, 243 (disability determination necessarily takes place after application and thus in the present, although the

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timing of the benefits payments is related back to the date of the first incapacity or the date the applicant last received compensation). The right to receive benefits “flows from a current right to apply and a current computation of eligibility for benefits.” Id. at 243. “If the right to receive certain benefits is a present right, it is not retrospective simply because it references past events. Id. at 243 *citing* State ex rel. Bouse v. Cickelli (1956), 165 Ohio St. 191.<sup>9</sup>

Even if the intent of the grantor of the trust herein was to keep the trust from being counted as an available resource for purposes of Medicaid eligibility, that intent cannot be legally enforced because the law, as it stood at the time she applied for benefits, did not allow for that intent to be carried out. Indeed, if the Court of Appeal’s blanket determination that a grantor’s intention as gleaned from the law in effect at the time a trust is created is controlling above all else, including subsequent changes in the law, absurd possibilities exist.

For example, assume that a trust was created prior to the Civil Rights Acts of the 1960’s which provided for a donation to a publicly funded school or university but that this donation was expressly conditioned upon that school or university not enrolling any African-Americans. Would anyone doubt that despite the clear intention of the grantor, the law would not permit that intent to be carried into effect? Similarly, assume that a trust expressly provides for a donation to an organization that has, since the creation of the trust, become a known supporter of terrorism. Undoubtedly, Ohio law (and likely Federal law) would not permit the grantor’s intention to be carried into effect.

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<sup>9</sup> In this instance, even *if* seen as a retrospective application of law, it would be appropriate. “Section 28, Article II of the Ohio Constitution prohibits the General Assembly from passing retroactive laws and protects *vested* rights from new legislative encroachments.” Smith v. Smith (2006), 109 Ohio St.3d 285, 286, *citing*, Vogel v. Wells (1991), 57 Ohio St.3d 91, 99. Conversely, the General Assembly *is* empowered to apply new laws to old events as long as a party’s rights under the old law has not “vested”. Until a party’s eligibility for Medicaid benefits is determined (which, of course can only come after one has applied for benefits), no rights to such benefits are “vested”.

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The Court of Appeals decision improperly extrapolated the Mills holding that a grantor's *intention* is determined by then existing law, into a rule that the legal *effect* of that intention is also determined by then existing law. This was clearly not intended by the Mills Court as it would subjugate legislative policy changes to individual intent of all grantors of trusts. As applied to this situation, the intent of the grantor would control how Medicaid eligibility is determined at all times in the future. The grantor would, in essence, have the ability to tell the government how to administer a governmental program.

### CONCLUSION

Medicaid eligibility rules should be those in effect at the time an application and/or eligibility review is commenced for Medicaid and not those in effect at the time of the creation of an *inter vivos* trust. Any other conclusion improperly gives a grantor of a trust unlimited authority to define Medicaid eligibility. Rights to Medicaid have not accrued to an individual until an application is filed indicating that the individual would like to have their assets reviewed to determine their eligibility for Medicaid. Therefore, past events and the past intention of a settler of a trust agreement should not effect current rights and obligations related to the implementation of a governmental benefits program. Any contrary conclusion renders all sorts of governmental benefits programs – not just Medicaid – subject to the whims of individual grantors.

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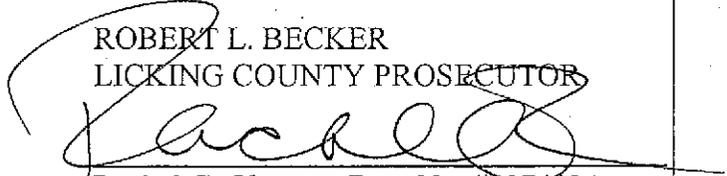
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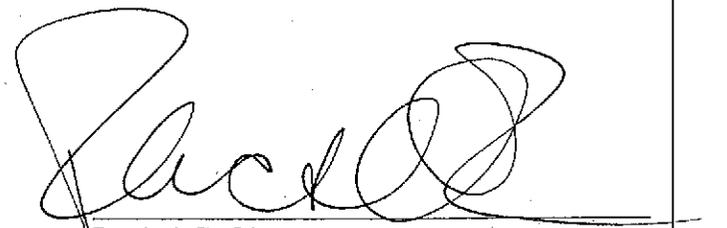


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The undersigned hereby certifies that a true copy of the foregoing was served by Ordinary U.S. Mail, postage prepaid, this 12<sup>th</sup> day of December, 2006 to, William J. Browning, CELA, Attorney for Plaintiff-Appellee, Browning & Meyer Co., LPA, 8101 N. High Street, Suite 370, Columbus, OH 43235; Carolyn J. Carnes, Esq., Guardian Ad Litem for Charlotte Osborn, Morrow, Gordon & Byrd, 33 West Main St., P.O. Box 4190, Newark, OH 43058-4190; and Ara G. Mekhjian, Assistant Attorney General, Counsel for *Amicus Curiae*, 30 East Broad Street, 17<sup>th</sup> Floor, Columbus, Ohio 43215.



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## APPENDIX

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**FELONY AND CIVIL  
DIVISIONS**  
670-5255

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**JUVENILE COURT  
DIVISION**  
670-5264

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**TAX FORECLOSURES**  
670-5021

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**FAX 670-5241**

In the Supreme Court of Ohio

LORETTA PACK,

Plaintiff-Appellee,

v.

CHARLOTTE OSBORN,

Defendant-Appellee,

LICKING COUNTY DEPARTMENT OF  
JOB AND FAMILY SERVICES,

Defendant-Appellant.

Case No.

**06-1207**

On Appeal from the  
Licking County  
Court of Appeals,  
Fifth Appellate District

Court of Appeals Case  
No. 05 CA 83

---

**NOTICE OF APPEAL OF APPELLANT  
LICKING COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES**

---

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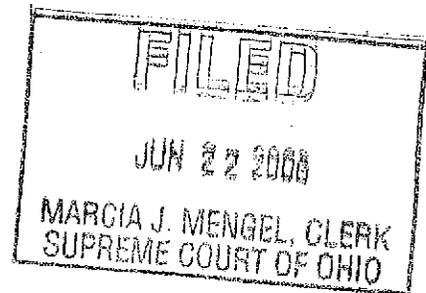
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Department of Job and Family Services



**NOTICE OF APPEAL OF APPELLANT  
LICKING COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES**

Appellant, the Licking County Department of Job and Family Services, gives notice of its discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule II, Section 1(A)(3), from a decision of the Fifth District Court of Appeals, journalized in Case No. 05CA83 on May 8, 2006. A date-stamped copy of the decision being appealed is attached to Appellant's Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public and great general interest.

Earlier this week, the Fifth District Court of Appeals certified a conflict in this case. Appellant will file a notice of certified conflict, pursuant to Ohio Supreme Court Rule IV, Section 1, forthwith.

Respectfully submitted,

 *per authority to E. Clark*  
RACHEL O. SHIPLEY (0074934)  
*\*Counsel of Record*  
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Department of Job and Family Services

**CERTIFICATE OF SERVICE**

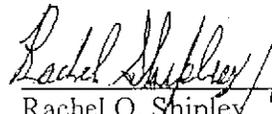
I hereby certify that a copy of the foregoing Notice of Appeal of Appellant Licking County Department of Job and Family Services was served by U.S. mail this 22nd day of June, 2006, upon the following counsel:

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Guardian ad litem for Appellee Charlotte Osborn

 / per authority to E. Clark  
Rachel O. Shipley  
Assistant Prosecutor

FILED

COURT OF APPEALS  
LICKING COUNTY, OHIO  
MAY -8 AM 8:13  
FIFTH APPELLATE DISTRICT

LORETTA PACK, TRUSTEE OF THE  
MAEBELLE W. OSBORN TRUST

Plaintiff-Appellant

JUDGES: LICKING COUNTY OH  
GARY R. WALTERS  
Hon. John W. Wise, P. J.  
Hon. W. Scott Gwin, J.  
Hon. William B. Hoffman, J.

-vs-

Case No. 05 CA 83

CHARLOTTE OSBORN, BENEFICIARY  
OF THE MAEBELLE W. OSBORN  
TRUST, et al.

Defendant-Appellee

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common  
Pleas, Case No. 04 CV 589

JUDGMENT:

Reversed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Appellant

For Appellee LCDJFS

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SCANNED

27/539

*Wise, P. J.*

{¶1} Appellant Loretta Pack, Trustee of the Maebelle W. Osborn Trust ("Appellant"), appeals the decision of the Licking County Court of Common Pleas that granted Appellee Licking County Department of Job and Family Services' ("LCDJFS") cross-motion for summary judgment and denied appellant's motion for summary judgment. The following facts give rise to this appeal.

{¶2} This case involves the right of Charlotte Osborn to receive Medicaid benefits and other services. Charlotte is a sixty-one year old woman who is physically and mentally disabled. Charlotte resides with her brother and sister-in-law. They have been providing in-home care for her since the death of her mother, Maebelle Osborn, in December 1991.

{¶3} During the past few years, Charlotte has experienced physical setbacks that have required three short-term rehabilitation stays in a nursing home. Charlotte does not presently receive services or medical benefits from LCDJFS. However, these health and support services are needed, for Charlotte, to maintain her present living arrangement. Charlotte will likely require Medicaid health care benefits, from LCDJFS, for the remainder of her life.

{¶4} On May 7, 2004, Charlotte applied for Medicaid and Home & Community Based Services. LCDJFS determined that Charlotte was not eligible for Medicaid benefits and services because of her beneficiary interest in the Osborn Trust, which has a corpus of approximately \$265,000.00. On this same date, appellant filed a civil complaint, for declaratory judgment, and in the alternative, reformation of the Osborn Trust. Three days after filing the complaint, the trial court appointed a guardian ad litem

for Charlotte Osborn. The trial court conducted a pretrial and referred this matter to a magistrate. On October 12, 2004, appellant filed a motion for summary judgment. LCDJFS responded to appellant's motion for summary judgment and filed a cross-motion for summary judgment.

{15} On December 17, 2004, the magistrate issued his decision granting LCDJFS' motion for cross-summary judgment and denying appellant's motion for summary judgment. Pursuant to Civ.R. 52, appellant requested the magistrate to issue separate findings of fact and conclusions of law. The magistrate filed an amended decision, on January 19, 2005, containing conclusions of law.

{16} In its amended decision, the magistrate made the following findings:

{17} "I. The Licking County Department of Job and Family Services correctly determined that the Trust is a countable resource for purposes of determining Medicaid eligibility because it correctly disregarded the discretionary clause contained in the Maebelle W. Osborn Trust, per the Ohio Revised Code and the Administrative Code.

{18} "II. The Trustee of the Maebelle W. Osborn Trust can be compelled to invade the trust principal for the medical care and proper maintenance of Charlotte Osborn as she has an ownership interest in the Trust which she can access through the courts.

{19} "III. The Young and Carnahan decisions are rendered moot by the amendments to Ohio Administrative Code Section 5101:1-39-27.1 and the enactment of Ohio Revised Code Section 5111.151.

{¶10} "IV. The Maebelle W. Osborn Trust cannot be reformed because the intent of the settlor cannot be ascertained within the bounds of law." Amended Magistrate's Decision with Findings of Fact and Conclusions of Law, Jan. 19, 2005, at 2-4.

{¶11} Thereafter, appellant filed objections to the magistrate's decision. On June 16, 2005, the trial court affirmed the magistrate's decision finding the Osborn Trust is required to be counted as an available resource in accordance with R.C. 5111.151(G)(2). The trial court also found that R.C. 5111.151(G)(4)(a) does not apply to the Osborn Trust because the trust does not require that any portion of the trust or any part of the income and principal be set aside for other beneficiaries or remaindermen. Judgment Entry, June 16, 2005, at 1. The trial court filed a judgment entry nunc pro tunc on June 30, 2005, reaching the same conclusion.

{¶12} Appellant timely filed a notice of appeal and sets forth the following sole assignment of error for our consideration:

{¶13} "I. THE LOWER COURT ERRED, AS A MATTER OF LAW, BY DENYING APPELLANT TRUSTEE'S MOTION FOR SUMMARY JUDGMENT AND GRANTING APPELLEE LCDJFS' CROSS-MOTION FOR SUMMARY JUDGMENT, IN ITS ENTIRETY."

Summary Judgment Standard

{¶14} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. As such, we must refer to Civ.R. 56 which provides, in pertinent part:

{¶15} \*\*\* Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. \*\*\* A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor.  
\*\*\*

{¶16} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, (1996), 75 Ohio St.3d 280. It is based upon this standard that we review appellant's sole assignment of error.

I

{¶17} Appellant maintains the trial court erred when it granted the cross-motion for summary judgment filed by the LCDJFS and denied her motion for summary judgment. We agree.

{¶18} Maebelle Osborn executed the trust at issue on October 7, 1987, and subsequently died on December 27, 1991. Between the date of the execution of the trust and the date of Charlotte's application for Medicaid benefits, Ohio's Medicaid regulations concerning trust beneficiaries changed eight times.<sup>1</sup>

{¶19} The language of the trust at issue in the case sub judice provides as follows:

{¶20} "2. Dispositive Provisions:

"\* \* \*

"Income and Principal

{¶21} "(a) The Trustee may, until the death of her daughter CHARLOTTE OSBORN, distribute to or expend for the benefit of MAEBELLE W. OSBORN, CHARLOTTE OSBORN, ARTHUR ELWOOD OSBORN and LORETTA PACK so much of the principal and the current accumulated income therefrom, at such time or times and in such amounts and manner as the Trustee, in her sole discretion, shall determine. Any amounts of income which the Trustee shall determine not to distribute to or to expend for the benefit of MAEBELLE W. OSBORN, CHARLOTTE OSBORN, ARTHUR ELWOOD OSBORN and LORSETTA PACK may be accumulated.

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<sup>1</sup> See O.A.C. 5101:1-39-27.1. This regulation was revised on the following dates: Oct. 1, 1989; Dec. 16, 1989; Oct. 1, 1991; Sept. 1, 1992; Feb. 1, 1995; Apr. 27, 1995; July 1, 1996; and Nov. 7, 2002.

544

{¶22} "In making such distribution (sic) is my intent that my Trustee use income or principal for the benefit of my children only for purposes other than providing food, clothing or shelter that is to be used only to meet supplemental needs over and above those met by entitlement benefits." Trust Agreement, Oct. 7, 1987, at 2.

{¶23} One aspect of an applicant's eligibility for Medicaid benefits and services concerns a person's available financial resources. In Ohio, a Medicaid recipient is limited to \$1,500.00 in countable resources. See O.A.C. 5101:1-39-05(A)(9). An applicant's resources includes cash, personal property, and real property that the applicant can use to pay for his or her own support and maintenance, either because of an ownership interest in the property or because the applicant may legally access the property and convert it into cash. See O.A.C. 5101:1-39-05(A)(8).

{¶24} In addressing the issues raised in this assignment of error, we find it is first necessary to determine the applicable law. Appellant maintains the applicable law is the law existing at the time of its creation, absent a contrary intent within the instrument itself. In support of this argument, appellant cites the Ohio Supreme Court's decision in *Ohio Citizens Bank v. Mills* (1989), 45 Ohio St.3d 153. In this case, the Court held as follows at paragraph two of the syllabus:

{¶25} "Provisions of an *inter vivos* trust shall be governed by the law existing at the time of its creation, absent a contrary intent within the instrument itself."

{¶26} LCDJFS disagrees and instead argues that because laws are presumed to operate prospectively, the rules in effect on the date of application for Medicaid benefits and services should apply. In support of its argument, LCDJFS cites the

following two appellate court cases: *Martin v. Ohio Dept. Human Serv.* (1998), 130 Ohio App.3d 512, and *Metz v. Ohio Dept. Human Serv.* (2001), 145 Ohio App.3d 304.

{¶27} Upon review of the cases cited by the parties, we find the Ohio Supreme Court's decision in the *Ohio Citizens Bank* case dispositive of the issue concerning the applicable law to apply to the trust agreement. Although this decision was subsequently overruled by statute, the portion that was overruled concerned the "stranger to the adoption" rule. The statute did not effect paragraph two of the syllabus regarding the law to apply when reviewing provisions of an inter vivos trust. Thus, we conclude the *Ohio Citizens Bank* decision is the law in the State of Ohio in determining what version of the law to apply to the provisions of an inter vivos trust. Further, we note the cases cited by LCDJFS are appellate court decisions, from other districts, and are not binding on this Court.

{¶28} Accordingly, having concluded that we must apply the law in effect at the time Maebelle Osborn executed the trust agreement, we must now determine what law was in effect on October 7, 1987. The history of O.A.C. 5101:1-39-05 establishes that the version of the code, in effect when Maebelle Osborn executed the trust agreement, was that dated June 10, 1985. The language in this version of O.A.C. 5101:1-39-05 is identical to the language the Ohio Supreme Court considered in *Young v. Ohio Dept. of Human Serv.*, 76 Ohio St.3d 547, 1996-Ohio-70. Therefore, we find the *Young* decision pertinent to the resolution of this matter.

{¶29} In *Young*, "[t]he issue to be decided \* \* \* [was] whether a testamentary trust that expressly prohibits the trustee from making any distributions that would affect the beneficiary's Medicaid benefits constitutes a 'countable resource' under the ODHS

Medicaid regulatory scheme set out in Ohio Adm.Code Chapter 5101:1-39." Id. at 547-548. Although the *Young* decision involves a testamentary trust, as opposed to an inter vivos trust, we find the Court's analysis applicable because it involved the interpretation of the same version of the Ohio Administrative Code.

{¶30} We would note that in *Young*, the Court applied the regulatory language in effect at the time the litigation arose as opposed to the regulatory language in effect at the time of its creation. Id. at 551. We find this distinction is based upon the fact that an inter vivos trust is created during the lifetime of a settlor and becomes effective in his or her lifetime. Therefore, the law in effect, at the time of its creation, should be applied. However, a testamentary trust takes effect at the death of the settlor or testator. Thus, the law in effect at the time of the settlor/testator's death or at the time litigation arises should apply.

{¶31} The dispositional language of the trust at issue in the *Young* case provided as follows:

{¶32} "(1) The share to be held for Grantor's daughter JANET LEE YOUNG, shall be held, managed and distributed by the Trustee as follows: The Trustee shall pay such amounts of the net income and, if necessary, principal of this Trust as she deems necessary for the benefit of JANET LEE YOUNG, provided, however, that the Trustee shall not make any distributions of income or principal for the benefit of JANET LEE YOUNG which shall render her ineligible or cause a reduction in any benefit she may be entitled to receive, including, but not limited to, the following: institutional care provided by the State or Federal government, Social Security, Supplementary Security Income, Medicare, and Medicaid. \* \* \* Distributions of income or principal to or for the benefit of

JANET LEE YOUNG shall be made liberally and generously, but not for the purpose of providing for anything which could otherwise be provided for her by governmental or other assistance." *Id.* at 548-549.

{¶33} The Ohio Supreme Court concluded the plain meaning of the above cited language was that the father intended to provide his daughter with a source of supplemental support that would not jeopardize her access to basic assistance from Medicaid. *Id.* at 551. The Court also found that under former O.A.C. 5101.1-39-05(8), a resource will not be counted unless the applicant has both a legal interest in the resource and the legal ability to use or dispose of the resource. *Id.* Because the daughter had no control over the distributions that the trustee decided to make for her benefit, she did not have the ability to use or dispose of the resource. *Id.* Thus, the trust did not meet the former requirements for accountability. *Id.*

{¶34} Although the language in the case sub judice is not identical to the language addressed by the Court in *Young*, the language used results in the same conclusion. First, the distribution of the principal and accumulated income is left to the discretion of the trustee. Second, and most importantly, the distributions are not to be made so as to eliminate eligibility for Medicaid benefits and services. Based upon this, we find, as did the Court in *Young*, that the plain meaning of the restrictive language in the Maebelle Osborn Trust is intended to provide Charlotte with a source of supplemental support that would not jeopardize her access to basic assistance from Medicaid.

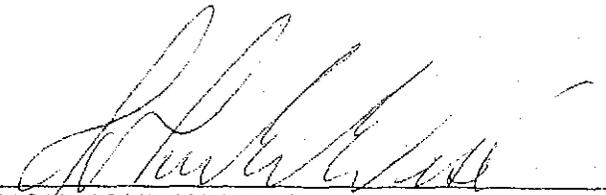
{¶35} Appellant's sole assignment of error is sustained.

{¶36} For the foregoing reasons, the judgment of the Court of Common Pleas, Licking County, Ohio, is hereby reversed.

By: Wise, P. J.

Gwin, J., and

Hoffman, J., concur.



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HON. JOHN W. WISE



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HON. W. SCOTT GWIN



---

HON. WILLIAM B. HOFFMAN

JWW/d 427

FILED

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

CLERK OF APPELLATE COURT  
LICKING COUNTY, OH  
GARY R. WALTERS

LORETTA PACK, TRUSTEE OF THE  
MAEBELLE W. OSBORN TRUST

Plaintiff-Appellant

-vs-

CHARLOTTE OSBORN, BENEFICIARY  
OF THE MAEBELLE W. OSBORN  
TRUST, et al.

Defendant-Appellee

JUDGMENT ENTRY

Case No. 05 CA 83

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio, is reversed.

Costs assessed to Appellee LCDJFS.

  
\_\_\_\_\_  
HON. JOHN W. WISE

  
\_\_\_\_\_  
HON. W. SCOTT GWIN

  
\_\_\_\_\_  
HON. WILLIAM B. HOFFMAN

SCANNED

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FILED

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

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CLERK OF APPEALS  
LICKING COUNTY, OH  
GARY R. WALTERS

LORETTA PACK, Trustee of the  
MAEBELLE W. OSBORN TRUST, et al

Plaintiff-Appellant

-vs-

CHARLOTTE OSBORN, Beneficiary of  
The MAEBELLE W. OSBORN TRUST,  
et al.

Defendants-Appellees

JUDGMENT ENTRY

Case No. 05 CA 83

This matter is before the Court upon Appellees' motion to vacate for lack of subject matter jurisdiction, or in the alternative, motion for reconsideration, or in the alternative, motion to certify a conflict.

A. Lack of Subject Matter Jurisdiction

As to the issue of subject matter jurisdiction, appellees maintain a declaratory judgment action is not available for the purpose of determining Medicaid eligibility. Specifically, appellees argue the Licking County Department of Job and Family Services ("LCDJFS") already determined the eligibility of Charlotte Osborn, pursuant to O.A.C. 5101:1-39-27.1 and found that she had available resources beyond those permitted in order to qualify for Medicaid benefits.

We disagree and conclude the trial court had jurisdiction to hear this matter for the following reasons. An appeal pursuant to R.C. Chapter 119, which LCDJFS

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contends is the appropriate action, is pending before the trial court. However, the trial court stayed the R.C. Chapter 119 appeal, from the denial of Medicaid benefits, while the declaratory judgment action was resolved by this Court on appeal.

Based upon these facts, we conclude the trial court properly exercised jurisdiction in the declaratory judgment action. The declaratory judgment action did not decide the issue pending in the administrative appeal (i.e. whether Charlotte Osborn is entitled to Medicaid benefits.) Rather, the declaratory judgment action merely determined whether the trust is intended to provide Charlotte with a source of supplemental support that would not jeopardize her access to basic assistance from Medicaid. Appellant correctly points out that the pending R.C. Chapter 119 appeal will determine Charlotte Osborn's eligibility for Medicaid benefits. While the trust was the only reason cited by LCDJFS for denial of benefits, there may be other reasons for denial which LCDJFS may raise.

Accordingly, the trial court did not lack subject matter jurisdiction to hear appellees' declaratory judgment action.

B. Motion for Reconsideration

LCDJFS next requests this Court to reconsider its decision pursuant to App.R. 26(A). We decline to do so finding, pursuant to *Ohio Citizens Bank v. Mills* (1989), 45 Ohio St.3d 153, that the law in effect at the time of the creation of an inter vivos trust governs, absent a contrary intent. See *Mills* at paragraph two of the syllabus.

Appellees' motion for reconsideration is denied.

C. Motion to Certify a Conflict

Pursuant to App.R. 25, LCDJFS maintains our judgment, in the case sub judice, is in conflict with judgments rendered by several other courts of appeals in this state on the same question. LCDJFS cites four cases which it represents are in conflict with our decision. These cases are as follows:

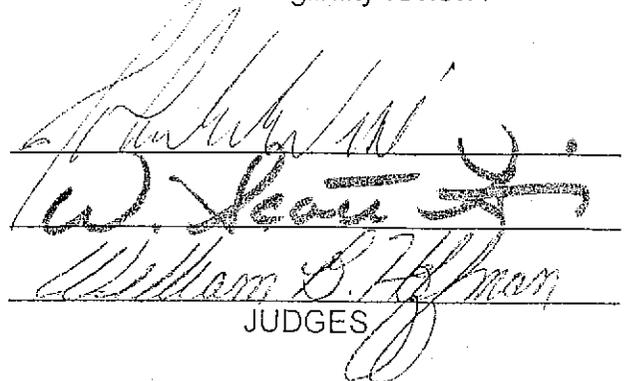
1. *Metz v. Ohio Dept. of Human Serv.* (2001), 145 Ohio App.3d 304;
2. *Martin v. Ohio Dept. of Human Serv.* (1998), 130 Ohio App.3d 512;
3. *Prior v. Ohio Dept. of Human Serv.* (1997), 123 Ohio App.3d 381;
4. *Miller v. Ohio Dept. of Human Serv.* (1995), 105 Ohio App.3d 539.

We have reviewed each of the above cases. We find our judgment is in conflict with all four cases. However, we would note that three of the cases cited by LCDJFS, *Martin*, *Prior* and *Miller*, hold that the law in effect on the date of the eligibility review applies. However, the *Metz* case holds that the law in effect at the time the trust became irrevocable applies. In any event, all four cases conflict with our holding.

Accordingly, we sustain the motion to certify a conflict with other appellate districts and submit the following issue to the Ohio Supreme Court for review and final resolution:

Whether the Medicaid eligibility rules are those in effect at the time of the creation of an inter vivos trust or those in effect on the date of eligibility review?

IT IS SO ORDERED.

  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
JUDGES

IN THE COURT OF COMMON PLEAS, LICKING COUNTY, OHIO

CLERK OF COMMON PLEAS CT  
LICKING COUNTY, OHIO  
GARY P. WATERS, CLERK

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2005 JAN 19 P 3:48

Loretta Pack, Trustee of  
the Maebelle W. Osborn Trust,

FILED

Plaintiff,

vs.

Case No. 04 CV 589

Charlotte Osborn, Beneficiary of  
The Maebelle W. Osborn Trust, *et al.*,

Defendants.

AMENDED MAGISTRATE'S DECISION WITH  
FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-captioned matter came before the Court on Motions for Summary Judgment filed by Plaintiff and Defendant, Licking County Department of Job and Family Services, hereinafter referred to as "LCJFS." On December 17, 2004, a Magistrates' Memorandum of Decision was filed finding in favor of LCJFS. Plaintiff filed a request for findings of fact and conclusions of law pursuant to Civil Rule 53. For this reason, this Court amends its previous Decision to include the following findings of fact and conclusions of law:

FINDINGS OF FACT

As indicated, this matter is before the Court on Cross-Motions for Summary Judgment. The Parties agree to the facts at issue, and each Party outlined the undisputed facts in their respective Memoranda. Therefore, this Court need not make findings of fact in order to make a determination of the legal issues at hand. Generally, however, the facts are as follows:

The Defendant, LCJFS, denied Medicaid benefits to Charlotte Osborn, beneficiary of the Maebelle W. Osborn Trust on the basis that the trust is a countable resource for Medicaid eligibility purposes. Applying Ohio Administrative Code Sections 5101:1-39-05 and 5101:1-39-27.1 as well as Ohio Revised Code Section 5111.151, the LCJFS determined that the resources of

Judge  
Thomas M. Marcelain  
740-349-6186

Judge  
Jon R. Spahr  
740-349-6181

Courthouse  
Newark, OH 43055

Charlotte Osborn exceeded the \$1500 resource limitation and therefore, denied Medicaid benefits.

#### CONCLUSIONS OF LAW

- I. The Licking County Department of Job and Family Services correctly determined that the Trust is a countable resource for purposes of determining Medicaid eligibility because it correctly disregarded the discretionary clause contained in the Maebelle W. Osborn Trust, per the Ohio Revised Code and the Administrative Code.

Laws are presumed to operate prospectively. Martin v. Ohio Dept. of Hum. Svcs. (1998), 130 Ohio St. App. 3d 512, 524 (2<sup>nd</sup> Dist.). See also Metz v. Ohio Dept. of Hum. Svcs. (2001), 145 Ohio App. 3d 304, 309 (6<sup>th</sup> Dist.). The LCJFS correctly applied the rules in effect at the time of the May 7, 2004 application for Medicaid benefits. These rules establish that an individual, in order to be eligible for Medicaid, cannot have resources that exceed \$1500.

In order for LCJFS to determine an applicant's resources, it has to look to the exemptions listed in Ohio Administrative Code Section 5101:1-39-27.1 and Ohio Revised Code Section 5111.151.

In this case, the Defendant LCJFS applied the exemptions and correctly determined that the discretionary clause is not a clear statement of intent of the settlor as required by the Ohio Revised Code. Therefore, the discretionary clause was correctly excluded and the Maebelle W. Osborn Trust is a countable resource for Charlotte Osborn's Medicaid eligibility.

- II. The Trustee of the Maebelle W. Osborn Trust can be compelled to invade the trust principal for the medical care and proper maintenance of Charlotte Osborn as she has an ownership interest in the Trust which she can access through the courts.

An applicant for Medicaid is not entitled to its benefits. The person applying for Medicaid benefits must be deemed eligible to receive them. The State is not required to pay for the medical care and maintenance of an individual who has the means to do so.

In this case, the person solely responsible for the support of Charlotte Osborn is Charlotte Osborn through her agent, the trustee of the Maebelle W. Osborn Trust. See Bureau of Support v. Kreitzer (1968), 16 Ohio St. 2d 147. Therefore, the trustee has an obligation and a fiduciary duty to provide for the care and maintenance of Charlotte Osborn. In re Gantz, 1986 WL 12960 (Ohio App. 5<sup>th</sup> Dist.). If the trustee has not done so or will not do so, Charlotte Osborn can compel the trustee through the court system to pay for her medical care and support. Kreitzer, 16 Ohio St. 2d 147.

III. The Young and Carnahan decisions are rendered moot by the amendments to Ohio Administrative Code Section 5101:1-39-27.1 and the enactment of Ohio Revised Code Section 5111.151.

In Young, the court has stated that “[w]e prefer to rely on the plain regulatory language in effect at the time this litigation arose.” Young v. Ohio Dept. of Hum. Svcs., 76 Ohio St. 3d 547.

Thus, relying on the current and plain regulatory language, it is clear that the holding in Young, in its interpretation and application of the former Ohio Administrative Code Section 5101:1-39-27.1, is not applicable to the case at bar. The Trustee applied for Medicaid benefits for Charlotte Osborn on May 7, 2004, well after the loophole was closed by the revision of Ohio Administrative Code Section 5101:1-39-27.1 effective April 27, 1995 and July 1, 1996.

The holding in Carnahan (2000), 139 Ohio App. 3d 214 is similarly inapplicable. That case also involved “restrictive language” in a trust. However, the newly amended Ohio

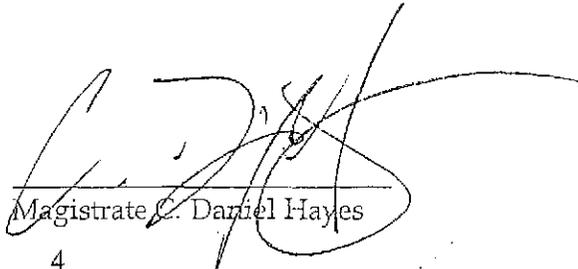
Administrative Code Section 5101:1-39-27.1 and newly enacted Revised Code Section 5111.151 clearly instructs the LCJFS to disregard such language and therefore renders Carnahan moot.

IV. The Maebelle W. Osborn Trust cannot be reformed because the intent of the settlor cannot be ascertained within the bounds of law.

In order for a trust to be reformed, the Court must interpret the trust according to the Grantor's intent. Domo v. McCarthy (1993), 66 Ohio St. 3d 312, 318. The interpretation of the trust must be done by looking at the Grantor's intent at the time of the creation of the trust and the applicable laws at that time will govern the terms of the trust. Central Trust Co. v. Bovey (1971), 25 Ohio St. 2d 187, 190 and Ohio Citizens Bank v. Mills (1989), 45 Ohio St. 3d 153, 156. In addition, the court must also assume that the Grantor is aware of laws that affect the trust are subject to change. See, generally, Fifth Third Bank, supra, citing Solomon v. Central Trust Co. of Northeastern Ohio, N.A. (1992), 63 Ohio St. 3d 35.

At this time, the Court cannot reform the Maebelle W. Osborn Trust to conform to Ohio Revised Code Section 5111.151(G)(4), as this was not the intent of the grantor. The statute did not exist at the time of the creation of the trust and therefore, it could not have been the intent of the grantor to state the statute in the trust word for word.

Upon due consideration, the court finds that reasonable minds can come to but one conclusion and that conclusion is adverse to the Plaintiff, therefore Defendant is entitled to judgment as a matter of law. Consequently, this Court finds Plaintiff's Motion for Summary Judgment not well taken, and hereby DENIES the same in its entirety. Further, this Court finds Defendants' Cross-Motion for Summary Judgment well taken, and hereby GRANTS the same in its entirety.

  
Magistrate C. Daniel Hayes

cc:

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Newark, OH 43055

IN THE COURT OF COMMON PLEAS, LICKING COUNTY, OHIO

Loretta Pack,

Plaintiff,

vs.

Case No. 04 CV 589

Charlotte Osborn, et al.,

Defendants.

JUDGMENT ENTRY NUNC PRO TUNC

.....

This matter is before the Court pursuant to cross-motions for summary judgment to which the magistrate entered a decision in favor of Defendant, Licking County Job and Family Services and Amended Decision and Findings of Fact and Conclusions of Law filed January 19, 2005. Objections were filed on behalf of Plaintiff Loretta Pack February 2, 2005 and Defendant Licking County Job and Family Services filed a response to those objections on February 25, 2005.

The Court is being asked to construe Ohio Revised Code Section 511.151, particularly whether a specific trust in which Plaintiff Loretta Pack is trustee and Charlotte Osborn beneficiary, is to be counted as an asset for purposes of Medicaid benefits.

Based on 511.151(G)(2), the Court finds, as did the magistrate, that the trust is required under current law to be counted as an available resource.

Plaintiff argues that the trust should not be a countable resource pursuant to Section 511.151(G)(4)(a). However, the trust simply does not require a portion of the trust or any part of income or principal to be set aside for other beneficiaries or remaindermen. The entire trust, principal and income could be used for its stated purpose, for the benefit of its primary beneficiary, Charlotte Osborn.

Judge  
Thomas M. Marcelain  
740-349-6186

Judge  
Jon R. Spahr  
740-349-6181

Courthouse  
Newark, OH 43055

The Court and the magistrate's duty is to follow the law to the best of their ability and understanding. Contrary to allegations of counsel for Plaintiff, (set out on page 10 of Objections to Amended Magistrate's Decision with Findings of Fact and Conclusions of Law; "Perhaps the magistrate in this matter would also come to a different conclusion if he cared for his own disabled child.") that ruling in favor of the Defendant, Licking County Job and Family Services attacks those people who attempt to leave trusts for disabled adult offspring (regardless of the express provisions of Ohio Revised Code Section 1139.51 and 5111.51) and despite any personal feelings, the oath taken by both the Court and the magistrate require rulings to be issued to the best of their legal determination, and without resort to bias, prejudice or sympathy.

Accordingly, pursuant to Civil Rule 53(E)(4)(b) the Court adopts the order of the magistrate as the order of the Court. It is so ORDERED. There is no just cause for delay.



Thomas M. Marcelain, Judge

Copies of this Judgment Entry were mailed by ordinary U.S. Mail to all persons listed below on the date of filing.

Carolyn J. Carnes, Esq., Guardian ad Litem for Charlotte Osborn  
Morrow, Gordon & Byrd, Ltd., 33 W. Main St., P. O. Box 4190, Newark, OH 43058-4190

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Attorney for Appellee ODJFS, 30 E. Broad St., 26<sup>th</sup> Flr., Columbus, OH 43215

IN THE COURT OF COMMON PLEAS, LICKING COUNTY, OHIO

Charlotte Osborn,

2005 JUL 16 A. 9 13

Plaintiff,

vs.

Case No. 04 CV 589

Ohio Department of Job & Family Services,

Defendants.

JUDGMENT ENTRY

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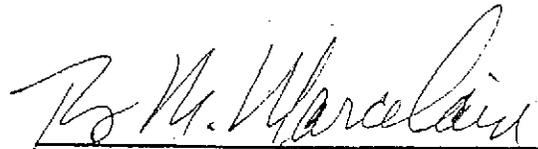
Judge  
Thomas M. Marcelain  
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Accordingly, pursuant to Civil Rule 53(E)(4)(b) the Court adopts the order of the magistrate as the order of the Court. It is so ORDERED. There is no just cause for delay.



Thomas M. Marcelain, Judge

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[§ 5111.15.1] § 5111.151. Eligibility determinations where applicant or recipient is trust beneficiary.

(A) This section applies to eligibility determinations for all cases involving medicaid provided pursuant to this chapter, qualified medicare beneficiaries, specified low-income medicare beneficiaries, qualifying individuals-1, qualifying individuals-2, and medical assistance for covered families and children.

(B) As used in this section:

(1) "Trust" means any arrangement in which a grantor transfers real or personal property to a trust with the intention that it be held, managed, or administered by at least one trustee for the benefit of the grantor or beneficiaries. "Trust" includes any legal instrument or device similar to a trust.

(2) "Legal instrument or device similar to a trust" includes, but is not limited to, escrow accounts, investment accounts, partnerships, contracts, and other similar arrangements that are not called trusts under state law but are similar to a trust and to which all of the following apply:

(a) The property in the trust is held, managed, retained, or administered by a trustee.

(b) The trustee has an equitable, legal, or fiduciary duty to hold, manage, retain, or administer the property for the benefit of the beneficiary.

(c) The trustee holds identifiable property for the beneficiary.

(3) "Grantor" is a person who creates a trust, including all of the following:

(a) An individual;

(b) An individual's spouse;

(c) A person, including a court or administrative body, with legal authority to act in place of or on behalf of an individual or an individual's spouse;

(d) A person, including a court or administrative body, that acts at the direction or on request of an individual or the individual's spouse.

(4) "Beneficiary" is a person or persons, including a grantor, who benefits in some way from a trust.

(5) "Trustee" is a person who manages a trust's principal and income for the benefit of the beneficiaries.

(6) "Person" has the same meaning as in section 1.59 of the Revised Code and includes an individual, corporation, business trust, estate, trust, partnership, and association.

(7) "Applicant" is an individual who applies for medicaid or the individual's spouse.

(8) "Recipient" is an individual who receives medicaid or the individual's spouse.

(9) "Revocable trust" is a trust that can be revoked by the grantor or the beneficiary, including all of the following, even if the terms of the trust state that it is irrevocable:

- (a) A trust that provides that the trust can be terminated only by a court;
  - (b) A trust that terminates on the happening of an event, but only if the event occurs at the direction or control of the grantor, beneficiary, or trustee.
- (10) "Irrevocable trust" is a trust that cannot be revoked by the grantor or terminated by a court and that terminates only on the occurrence of an event outside of the control or direction of the beneficiary or grantor.
- (11) "Payment" is any disbursement from the principal or income of the trust, including actual cash, noncash or property disbursements, or the right to use and occupy real property.
- (12) "Payments to or for the benefit of the applicant or recipient" is a payment to any person resulting in a direct or indirect benefit to the applicant or recipient.
- (13) "Testamentary trust" is a trust that is established by a will and does not take effect until after the death of the person who created the trust.
- (C) If an applicant or recipient is a beneficiary of a trust, the county department of job and family services shall determine what type of trust it is and shall treat the trust in accordance with the appropriate provisions of this section and rules adopted by the department of job and family services governing trusts. The county department of job and family services may determine that the trust or portion of the trust is one of the following:
- (1) A countable resource;
  - (2) Countable income;
  - (3) A countable resource and countable income;
  - (4) Not a countable resource or countable income.
- (D) (1) A trust or legal instrument or device similar to a trust shall be considered a medicaid qualifying trust if all of the following apply:
- (a) The trust was established on or prior to August 10, 1993.
  - (b) The trust was not established by a will.
  - (c) The trust was established by an applicant or recipient.
  - (d) The applicant or recipient is or may become the beneficiary of all or part of the trust.
  - (e) Payment from the trust is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the applicant or recipient.
- (2) If a trust meets the requirement of division (D)(1) of this section, the amount of the trust that is considered by the county department of job and family services as an available resource to the applicant or recipient shall be the maximum amount of payments permitted under the terms of the trust to be distributed to the applicant or recipient, assuming the full exercise of discretion by the trustee or trustees. The maximum amount shall include only amounts that are permitted to be distributed but are not distributed from either the income or principal of the trust.

(3) Amounts that are actually distributed from a medicaid qualifying trust to a beneficiary for any purpose shall be treated in accordance with rules adopted by the department of job and family services governing income.

(4) Availability of a medicaid qualifying trust shall be considered without regard to any of the following:

(a) Whether or not the trust is irrevocable or was established for purposes other than to enable a grantor to qualify for medicaid, medical assistance for covered families and children, or as a qualified medicare beneficiary, specified low-income medicare beneficiary, qualifying individual-1, or qualifying individual-2;

(b) Whether or not the trustee actually exercises discretion.

(5) If any real or personal property is transferred to a medicaid qualifying trust that is not distributable to the applicant or recipient, the transfer shall be considered an improper disposition of assets and shall be subject to section 5111.0116 [5111.01.16] of the Revised Code and rules to implement that section adopted under section 5111.011 [5111.01.1] of the Revised Code.

(6) The baseline date for the look-back period for disposition of assets involving a medicaid qualifying trust shall be the date on which the applicant or recipient is both institutionalized and first applies for medicaid.

(E) (1) A trust or legal instrument or device similar to a trust shall be considered a self-settled trust if all of the following apply:

(a) The trust was established on or after August 11, 1993.

(b) The trust was not established by a will.

(c) The trust was established by an applicant or recipient, spouse of an applicant or recipient, or a person, including a court or administrative body, with legal authority to act in place of or on behalf of an applicant, recipient, or spouse, or acting at the direction or on request of an applicant, recipient, or spouse.

(2) A trust that meets the requirements of division (E)(1) of this section and is a revocable trust shall be treated by the county department of job and family services as follows:

(a) The corpus of the trust shall be considered a resource available to the applicant or recipient.

(b) Payments from the trust to or for the benefit of the applicant or recipient shall be considered unearned income of the applicant or recipient.

(c) Any other payments from the trust shall be considered an improper disposition of assets and shall be subject to section 5111.0116 [5111.01.16] of the Revised Code and rules to implement that section adopted under section 5111.011 [5111.01.1] of the Revised Code.

(3) A trust that meets the requirements of division (E)(1) of this section and is an irrevocable trust shall be treated by the county department of job and family services as follows:

(a) If there are any circumstances under which payment from the trust could be made to or for the benefit of the applicant or recipient, including a payment that can be made only in the future, the portion from which payments could be made shall be considered a resource available to the applicant or

recipient. The county department of job and family services shall not take into account when payments can be made.

(b) Any payment that is actually made to or for the benefit of the applicant or recipient from either the corpus or income shall be considered unearned income.

(c) If a payment is made to someone other than to the applicant or recipient and the payment is not for the benefit of the applicant or recipient, the payment shall be considered an improper disposition of assets and shall be subject to section 5111.0116 [5111.01.16] of the Revised Code and rules to implement that section adopted under section 5111.011 [5111.01.1] of the Revised Code.

(d) The date of the disposition shall be the later of the date of establishment of the trust or the date of the occurrence of the event.

(e) When determining the value of the disposed asset under this provision, the value of the trust shall be its value on the date payment to the applicant or recipient was foreclosed.

(f) Any income earned or other resources added subsequent to the foreclosure date shall be added to the total value of the trust.

(g) Any payments to or for the benefit of the applicant or recipient after the foreclosure date but prior to the application date shall be subtracted from the total value. Any other payments shall not be subtracted from the value.

(h) Any addition of assets after the foreclosure date shall be considered a separate disposition.

(4) If a trust is funded with assets of another person or persons in addition to assets of the applicant or recipient, the applicable provisions of this section and rules adopted by the department of job and family services governing trusts shall apply only to the portion of the trust attributable to the applicant or recipient.

(5) The availability of a self-settled trust shall be considered without regard to any of the following:

(a) The purpose for which the trust is established;

(b) Whether the trustees have exercised or may exercise discretion under the trust;

(c) Any restrictions on when or whether distributions may be made from the trust;

(d) Any restrictions on the use of distributions from the trust.

(6) The baseline date for the look-back period for dispositions of assets involving a self-settled trust shall be the date on which the applicant or recipient is both institutionalized and first applies for medicaid.

(F) The principal or income from any of the following shall be exempt from being counted as a resource by a county department of job and family services:

(1) (a) A special needs trust that meets all of the following requirements:

(i) The trust contains assets of an applicant or recipient under sixty-five years of age and may contain the assets of other individuals.

(ii) The applicant or recipient is disabled as defined in rules adopted by the department of job and family

services.

(iii) The trust is established for the benefit of the applicant or recipient by a parent, grandparent, legal guardian, or a court.

(iv) The trust requires that on the death of the applicant or recipient the state will receive all amounts remaining in the trust up to an amount equal to the total amount of medicaid paid on behalf of the applicant or recipient.

(b) If a special needs trust meets the requirements of division (F)(1)(a) of this section and has been established for a disabled applicant or recipient under sixty-five years of age, the exemption for the trust granted pursuant to division (F) of this section shall continue after the disabled applicant or recipient becomes sixty-five years of age if the applicant or recipient continues to be disabled as defined in rules adopted by the department of job and family services. Except for income earned by the trust, the grantor shall not add to or otherwise augment the trust after the applicant or recipient attains sixty-five years of age. An addition or augmentation of the trust by the applicant or recipient with the applicant's own assets after the applicant or recipient attains sixty-five years of age shall be treated as an improper disposition of assets.

(c) Cash distributions to the applicant or recipient shall be counted as unearned income. All other distributions from the trust shall be treated as provided in rules adopted by the department of job and family services governing in-kind income.

(d) Transfers of assets to a special needs trust shall not be treated as an improper transfer of resources. Assets held prior to the transfer to the trust shall be considered as countable assets or countable income or countable assets and income.

(2) (a) A qualifying income trust that meets all of the following requirements:

(i) The trust is composed only of pension, social security, and other income to the applicant or recipient, including accumulated interest in the trust.

(ii) The income is received by the individual and the right to receive the income is not assigned or transferred to the trust.

(iii) The trust requires that on the death of the applicant or recipient the state will receive all amounts remaining in the trust up to an amount equal to the total amount of medicaid paid on behalf of the applicant or recipient.

(b) No resources shall be used to establish or augment the trust.

(c) If an applicant or recipient has irrevocably transferred or assigned the applicant's or recipient's right to receive income to the trust, the trust shall not be considered a qualifying income trust by the county department of job and family services.

(d) Income placed in a qualifying income trust shall not be counted in determining an applicant's or recipient's eligibility for medicaid. The recipient of the funds may place any income directly into a qualifying income trust without those funds adversely affecting the applicant's or recipient's eligibility for medicaid. Income generated by the trust that remains in the trust shall not be considered as income to the applicant or recipient.

(e) All income placed in a qualifying income trust shall be combined with any countable income not placed in the trust to arrive at a base income figure to be used for spend down calculations.

(f) The base income figure shall be used for post-eligibility deductions, including personal needs allowance, monthly income allowance, family allowance, and medical expenses not subject to third party payment. Any income remaining shall be used toward payment of patient liability. Payments made from a qualifying income trust shall not be combined with the base income figure for post-eligibility calculations.

(g) The base income figure shall be used when determining the spend down budget for the applicant or recipient. Any income remaining after allowable deductions are permitted as provided under rules adopted by the department of job and family services shall be considered the applicant's or recipient's spend down liability.

(3) (a) A pooled trust that meets all of the following requirements:

(i) The trust contains the assets of the applicant or recipient of any age who is disabled as defined in rules adopted by the department of job and family services.

(ii) The trust is established and managed by a nonprofit association.

(iii) A separate account is maintained for each beneficiary of the trust but, for purposes of investment and management of funds, the trust pools the funds in these accounts.

(iv) Accounts in the trust are established by the applicant or recipient, the applicant's or recipient's parent, grandparent, or legal guardian, or a court solely for the benefit of individuals who are disabled.

(v) The trust requires that, to the extent that any amounts remaining in the beneficiary's account on the death of the beneficiary are not retained by the trust, the trust pay to the state the amounts remaining in the trust up to an amount equal to the total amount of medicaid paid on behalf of the beneficiary.

(b) Cash distributions to the applicant or recipient shall be counted as unearned income. All other distributions from the trust shall be treated as provided in rules adopted by the department of job and family services governing in-kind income.

(c) Transfers of assets to a pooled trust shall not be treated as an improper disposition of assets. Assets held prior to the transfer to the trust shall be considered as countable assets, countable income, or countable assets and income.

(4) A supplemental services trust that meets the requirements of section 1339.51 of the Revised Code and to which all of the following apply:

(a) A person may establish a supplemental services trust pursuant to section 1339.51 of the Revised Code only for another person who is eligible to receive services through one of the following agencies:

(i) The department of mental retardation and developmental disabilities;

(ii) A county board of mental retardation and developmental disabilities;

(iii) The department of mental health;

(iv) A board of alcohol, drug addiction, and mental health services.

(b) A county department of job and family services shall not determine eligibility for another agency's program. An applicant or recipient shall do one of the following:

(i) Provide documentation from one of the agencies listed in division (F)(4)(a) of this section that establishes that the applicant or recipient was determined to be eligible for services from the agency at the time of the creation of the trust;

(ii) Provide an order from a court of competent jurisdiction that states that the applicant or recipient was eligible for services from one of the agencies listed in division (F)(4)(a) of this section at the time of the creation of the trust.

(c) At the time the trust is created, the trust principal does not exceed the maximum amount permitted. The maximum amount permitted in calendar year 2006 is two hundred twenty-two thousand dollars. Each year thereafter, the maximum amount permitted is the prior year's amount plus two thousand dollars.

(d) A county department of job and family services shall review the trust to determine whether it complies with the provisions of section 1339.51 of the Revised Code.

(e) Payments from supplemental services trusts shall be exempt as long as the payments are for supplemental services as defined in rules adopted by the department of job and family services. All supplemental services shall be purchased by the trustee and shall not be purchased through direct cash payments to the beneficiary.

(f) If a trust is represented as a supplemental services trust and a county department of job and family services determines that the trust does not meet the requirements provided in division (F)(4) of this section and section 1339.51 of the Revised Code, the county department of job and family services shall not consider it an exempt trust.

(G) (1) A trust or legal instrument or device similar to a trust shall be considered a trust established by an individual for the benefit of the applicant or recipient if all of the following apply:

(a) The trust is created by a person other than the applicant or recipient.

(b) The trust names the applicant or recipient as a beneficiary.

(c) The trust is funded with assets or property in which the applicant or recipient has never held an ownership interest prior to the establishment of the trust.

(2) Any portion of a trust that meets the requirements of division (G)(1) of this section shall be an available resource only if the trust permits the trustee to expend principal, corpus, or assets of the trust for the applicant's or recipient's medical care, care, comfort, maintenance, health, welfare, general well being, or any combination of these purposes.

(3) A trust that meets the requirements of division (G)(1) of this section shall be considered an available resource even if the trust contains any of the following types of provisions:

(a) A provision that prohibits the trustee from making payments that would supplant or replace medicaid or other public assistance;

(b) A provision that prohibits the trustee from making payments that would impact or have an effect on the applicant's or recipient's right, ability, or opportunity to receive medicaid or other public assistance;

(c) A provision that attempts to prevent the trust or its corpus or principal from being counted as an available resource.

(4) A trust that meets the requirements of division (G)(1) of this section shall not be counted as an available resource if at least one of the following circumstances applies:

(a) If a trust contains a clear statement requiring the trustee to preserve a portion of the trust for another beneficiary or remainderman, that portion of the trust shall not be counted as an available resource. Terms of a trust that grant discretion to preserve a portion of the trust shall not qualify as a clear statement requiring the trustee to preserve a portion of the trust.

(b) If a trust contains a clear statement requiring the trustee to use a portion of the trust for a purpose other than medical care, care, comfort, maintenance, welfare, or general well being of the applicant or recipient, that portion of the trust shall not be counted as an available resource. Terms of a trust that grant discretion to limit the use of a portion of the trust shall not qualify as a clear statement requiring the trustee to use a portion of the trust for a particular purpose.

(c) If a trust contains a clear statement limiting the trustee to making fixed periodic payments, the trust shall not be counted as an available resource and payments shall be treated in accordance with rules adopted by the department of job and family services governing income. Terms of a trust that grant discretion to limit payments shall not qualify as a clear statement requiring the trustee to make fixed periodic payments.

(d) If a trust contains a clear statement that requires the trustee to terminate the trust if it is counted as an available resource, the trust shall not be counted as an available resource. Terms of a trust that grant discretion to terminate the trust do not qualify as a clear statement requiring the trustee to terminate the trust.

(e) If a person obtains a judgment from a court of competent jurisdiction that expressly prevents the trustee from using part or all of the trust for the medical care, care, comfort, maintenance, welfare, or general well being of the applicant or recipient, the trust or that portion of the trust subject to the court order shall not be counted as a resource.

(f) If a trust is specifically exempt from being counted as an available resource by a provision of the Revised Code, rules, or federal law, the trust shall not be counted as a resource.

(g) If an applicant or recipient presents a final judgment from a court demonstrating that the applicant or recipient was unsuccessful in a civil action against the trustee to compel payments from the trust, the trust shall not be counted as an available resource.

(h) If an applicant or recipient presents a final judgment from a court demonstrating that in a civil action against the trustee the applicant or recipient was only able to compel limited or periodic payments, the trust shall not be counted as an available resource and payments shall be treated in accordance with rules adopted by the department of job and family services governing income.

(i) If an applicant or recipient provides written documentation showing that the cost of a civil action brought to compel payments from the trust would be cost prohibitive, the trust shall not be counted as an available resource.

(5) Any actual payments to the applicant or recipient from a trust that meet the requirements of division (G)(1) of this section, including trusts that are not counted as an available resource, shall be treated as provided in rules adopted by the department of job and family services governing income. Payments to any person other than the applicant or recipient shall not be considered income to the applicant or recipient. Payments from the trust to a person other than the applicant or recipient shall not be considered an improper disposition of assets.

**HISTORY:** 150 v H 85, § 1, eff. 3-9-04; 151 v H 530, § 101.01, eff. 3-30-06.

**5101:1-39-27.1 Medicaid trusts.****(A) Introduction, purpose, and scope**

(1) This rule governs when a trust is counted as a resource and/or income.

(2) This rule applies to eligibility determinations for all cases involving medicaid, QMB, SLMB, QI-1, QI-2, and covered families and children medicaid.

(3) All trusts fall into one of five categories. If the applicant/recipient is a beneficiary of a trust, the CDJFS must first determine which category the trust falls under. Then the CDJFS must apply the rules governing that category of trusts.

(4) The application of the rule to the trust will result in a determination that the trust or a portion of the trust is a countable resource, countable income, both income and a resource, or not countable as income or a resource. Paragraph (C) of this rule sets out the five categories of trusts.

**(B) Definitions as used in this rule**

(1) "Trust" – As used in this rule, a trust is any arrangement in which a grantor transfers property (real or personal) to a trust with the intention that it be held, managed, or administered by a trustee(s) for the benefit of the grantor or certain designated individuals (beneficiaries). As used in this rule, the term "trust" includes any "legal instrument or device that is similar to a trust."

(2) "Legal instrument or device similar to a trust" – Any legal instrument, device, or arrangement that is not called a trust under state law, but is similar to a trust. This includes (but is not limited to) escrow accounts, investment accounts, partnerships, contracts and other similar arrangements. To constitute a "legal instrument or device similar to a trust," all of the following must be present.

(a) There must be a person holding, managing, retaining, or administering the property. For the purposes of this rule, the person holding, managing, retaining or administering the property is referred to as the trustee.

(b) The trustee must have an equitable, legal, or fiduciary duty to hold, manage, retain, or administer the property for the benefit of another person. For the purposes of this rule, this other person is referred to as the beneficiary.

(c) There must be identifiable property held by the trustee for the beneficiary.

(3) "Grantor" – Any person who creates a trust. For purposes of this rule, the term "grantor" includes:

(a) An individual;

(b) An individual's spouse;

(c) A person, including a court or administrative body, with legal authority to act in place of, or on behalf of, an individual or the individual's spouse;

(d) A person, including a court or administrative body, acting at the direction or upon the request of an individual or the individual's spouse.

(4) "Beneficiary" – Any person benefiting in some way from the trust. The beneficiary can be the grantor, or another person. There may be more than one beneficiary of a trust.

(5) "Trustee" – Any person who manages a trust. A trustee manages a trust's principal and income for the benefit of the beneficiaries.

(6) "Person" – The term person has the same meaning as set forth in section 1.59 of the Revised Code and includes an individual, corporation, business trust, estate, trust, partnership and association.

(7) "Applicant/recipient" – The individual who applies for or receives medicaid benefits or the spouse of the individual.

(8) "Revocable trust" - A trust that can be revoked by the grantor or the beneficiary. For the purposes of the medicaid program, the following trusts are "revocable trusts" even if the terms of the trust state that it is irrevocable.

(a) A trust that provides the trust can be terminated only by a court;

(b) A trust that terminates upon the happening of an event, but only if the event can occur at the direction or control of the grantor, the beneficiary, or the trustee.

(9) "Irrevocable trust" – A trust that cannot be revoked by the grantor or terminated by a court. A trust that terminates only upon the occurrence of an event outside of the control or direction of the beneficiary or the grantor is irrevocable.

(10) "Payment" – Any disbursement from the principal or income of the trust. A payment may include actual cash, noncash or property disbursements, or the right to use and occupy real property.

(11) "Payments to or for the benefit of the applicant/recipient" – Any payment to any person resulting in any direct or indirect benefit to the applicant/recipient.

(12) "Testamentary trust" – A trust that is established by a will. This type of trust does not take effect until after the death of the person (testator) who created the trust.

#### (C) The five categories of trusts

(1) Category one: self-settled trusts established before August 11, 1993, also referred to as "medicaid qualifying trusts."

(a) A trust, or legal instrument or device similar to a trust, falls under this category if it meets all the following criteria:

(i) The trust was established before August 11, 1993:

(ii) The trust was not established by will:

(iii) The trust was established by the applicant/recipient:

(iv) The applicant/recipient is or may become the beneficiary of all or part of the trust:

(v) Payment from the trust is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the applicant/recipient.

(b) The amount of the trust deemed to be an available resource to the applicant/recipient is the "maximum amount" of payments that may be permitted under the terms of the trust to be distributed to the applicant/recipient, assuming the full exercise of discretion by the trustee or trustees. The "maximum amount" includes only amounts that may be but are not distributed from either the income (interest) or principal of the trust.

(c) Amounts that are actually distributed to the beneficiary for any purpose are treated under the rules governing income.

(d) The availability of a trust in this category will be considered without regard to:

(i) Whether or not the medicaid qualifying trust is irrevocable or is established for purposes other than to enable a grantor to qualify for medicaid, QMB, SLMB, QI-1 or QI-2, or covered families and children medicaid:

(ii) Whether or not the trustee actually exercises discretion.

(e) If there is any real or personal property transferred to a medicaid qualifying trust that is not distributable to the applicant/recipient, the transfer is an improper transfer subject to the rules prohibiting the improper transfer of resources.

(f) The following are look-back periods for transfers of assets involving trusts under this category. The baseline date is the date on which the applicant/recipient is both institutionalized and first applies for medicaid. Reference rule 5101:1-39-07 of the Administrative Code for the regulations relating to transfers of assets.

(i) For revocable trusts: When a portion of the trust is distributed to someone other than the applicant/recipient, and the distribution is not for the benefit of the applicant/recipient, the distribution is an improper transfer. The look-back period is sixty months from the baseline date. The transfer is considered to take place on the date upon which the payment to someone other than the applicant/recipient was made.

(ii) For irrevocable trusts: When a portion of the trust is not distributable to the applicant/recipient, it is an improper transfer. The look-back period is sixty months from the baseline date. The transfer is considered to have been made as of the date the trust was established, or, if later, the date upon which payment to the applicant/recipient was foreclosed. The value of these assets is not reduced by any payments from the trust that may be made from these unavailable assets at a later date.

(iii) For irrevocable trusts: When some or all of the trust can be disbursed to or for the benefit of the applicant/recipient, any payment that is made to another person is an improper transfer. The look-back period is thirty-six months from the baseline date. The transfer is considered to have been made as of the date of payment to another person.

(2) Category two: self-settled trusts established on or after August 11, 1993

(a) A trust, or legal instrument or device similar to a trust, falls under this category if it meets all of the following criteria:

(i) The assets of the applicant/recipient were used to form all or part of the corpus of the trust; and

(ii) The trust was not established by will; and

(iii) The trust was established by the applicant/recipient, the spouse of the applicant/recipient, a

person, including a court or administrative body, with legal authority to act in place of or on behalf of the applicant/recipient or on behalf of the spouse of the applicant/recipient, or a person, including a court or administrative body, acting at the direction or upon the request of the applicant/recipient or the spouse of the applicant/recipient.

(b) Revocable trusts in this category will be treated as follows:

(i) The corpus of the trust shall be considered a resource available to the applicant/recipient.

(ii) Payments from the trust to or for the benefit of the applicant/recipient shall be considered unearned income of the applicant/recipient.

(iii) Any other payments from the trust shall be considered an improper transfer subject to the rules prohibiting the improper transfer of resources.

(c) Irrevocable trusts in this category will be treated as follows:

(i) If there are any circumstances under which payment from the trust could be made to or for the benefit of the applicant/recipient, the portion from which payments could be made shall be considered a resource available to the applicant/recipient. The CDJFS shall not take into account when payments can be made. A payment that can be made only in the future satisfies this provision.

(ii) Any payments that are actually made to or for the benefit of the applicant/recipient from either the corpus or income shall be considered unearned income.

(iii) If a payment is made to someone other than to the applicant/recipient, and such payment is not for the benefit of the applicant/recipient, then such payment shall be considered an improper transfer subject to the rules prohibiting improper transfers.

(iv) If any portion of the trust could not under any circumstance be made to the applicant/recipient, then either the establishment of the trust, or the subsequent event that forecloses payment to the applicant/recipient, shall be considered an improper transfer subject to the rules prohibiting the improper transfer of resources.

(v) The date of the transfer shall be either the date of establishment of the trust, or the date of the occurrence of the event, whichever is later.

(vi) When determining the value of the transferred resource under this provision, the value of the trust shall be its value on the date payment to the applicant/recipient was foreclosed.

(vii) Any income earned or other resources added subsequent to the foreclosure date must be added to the total value of the trust.

(viii) Any payments to or for the benefit of the applicant/recipient after the foreclosure date but prior to the application date must be subtracted from the total value. Any other payments will not be subtracted from the value.

(ix) Any addition of resources after the foreclosure date shall be considered a separate transfer.

(d) Where a trust is funded with assets of another person or persons, as well as assets of the applicant/recipient, the rule provisions governing this category of trust applies only to the portion of the trust attributable to the applicant/recipient.

(e) The availability of a trust in this category shall be considered without regard to:

(i) The purpose for which a trust is established.

(ii) Whether the trustees have or exercise any discretion under the trust.

(iii) Any restrictions on when or whether distributions may be made from the trust, or

(iv) Any restrictions on the use of distributions from the trust.

(f) The following are look-back periods for transfers of assets involving trusts under this category. The baseline date is the date on which the applicant/recipient is both institutionalized and first applies for medicaid.

(i) For revocable trusts: When a portion of the trust is distributed to someone other than the applicant/recipient, and the distribution is not for the benefit of the applicant/recipient, the distribution is an improper transfer. The look-back period is sixty months from the baseline date. The transfer is considered to take place on the date upon which the payment to someone other than the applicant/recipient was made.

(ii) For irrevocable trusts: When a portion of the trust is not distributable to the applicant/recipient it is an improper transfer. The look-back period is sixty months from the baseline date. The transfer is considered to have been made as of the date the trust was established, or, if later, the date upon which payment to the applicant/recipient was foreclosed. The value of these assets is not reduced by any payments from the trust that may be made from these unavailable assets at a later date.

(iii) For irrevocable trusts: When some or all of the trust can be disbursed to or for the benefit of the individual, any payment that is made to another person is an improper transfer. The look-back period is thirty-six months from the baseline date. The transfer is considered to have been made as of the date of payment to another person.

(3) Category three: exempt trusts. The principal or income from any one of these trusts is exempt from being counted as a resource.

(a) "Special needs trusts" are not countable resources. A trust qualifies as a special needs trust under the following conditions:

(i) The trust contains the assets of an applicant/recipient under age sixty-five. (The trust may also contain the assets of other individuals.);

(ii) The applicant/recipient is disabled as defined in rules 5101:1-39-03 and 5101:1-39-03.1 of the Administrative Code;

(iii) The trust is established for the benefit of the applicant/recipient by a parent, grandparent, legal guardian, or a court;

(iv) The trust requires that upon the death of the applicant/recipient the state will receive all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the applicant/recipient; and

(v) When such a trust has been established for a disabled individual under age sixty-five, the exception for the trust continues even after the individual becomes age sixty-five, provided the individual continues to be disabled as defined in rules 5101:1-39-03 and 5101:1-39-03.1 of the

Administrative Code. However, with the exception of income earned by the trust, such a trust cannot be added to or otherwise augmented after the individual reaches age sixty-five. Any such addition or augmentation by the individual with his or her own assets after age sixty-five will be treated as a transfer of assets subject to the rules prohibiting the improper transfer of resources.

(vi) Cash distributions to the applicant/recipient are counted as unearned income. All other distributions from the trust are treated under the rules governing in-kind income.

(vii) Transfers of assets to a special needs trust are not subject to the improper transfer provisions in rule 5101:1-39-07 of the Administrative Code. However, assets held prior to the transfer to this trust are countable assets and/or income.

(b) "Qualifying income trusts" (QIT) are not countable resources. A trust qualifies as a QIT only under all the following conditions and with the following limitations:

(i) The trust is composed only of pension, social security, and other income to the individual, including accumulated interest in the trust.

(a) No resources may be used to establish or augment the trust.

(b) The income must be received by the individual, and the right to receive income cannot be assigned or transferred to the trust.

(c) If an individual has irrevocably transferred or assigned his or her right to receive income to the trust the trust will not meet this requirement of the rule, and will not qualify as a QIT.

(ii) The trust requires that upon the death of the individual the state will receive all amounts remaining in the trust up to an amount equal to the total amount of medical assistance paid on behalf of the individual.

(iii) Income placed in a QIT is not counted in determining the individual's eligibility for medicaid. Thus any income (e.g., VA pension, social security benefits, private pensions, etc.) can be placed directly into a QIT by the recipient of the funds without those funds adversely affecting the individual's eligibility for medicaid. Income generated by the trust that remains in the trust is not income to the individual.

(iv) All income placed in a QIT is combined with any countable income not placed in the trust to arrive at a base income figure to be used in post-eligibility calculations (i.e., patient liability or spenddown).

(a) The base income figure must be used for post-eligibility deductions, including but not limited to, personal needs allowance, monthly income allowance, family allowance, and medical expenses not subject to third party payment. Any income remaining must be used toward payment of the patient liability. Payments made from a QIT are not combined with the base income figure for the post-eligibility calculations.

(b) The base income figure must be used when determining the spenddown budget for the individual. Any income remaining after allowable deductions permitted in rule 5101:1-39-10 of the Administrative Code is the individual's spenddown liability.

(c) "Pooled trusts" are not countable resources. A trust qualifies as a pooled trust only under all the following conditions:

(i) The trust contains the assets of an individual of any age who is disabled as defined in rules 5101:1-39-03 and 5101:1-39-03.1 of the Administrative Code:

(ii) The trust is established and managed by a nonprofit association:

(iii) A separate account is maintained for each beneficiary of the trust but, for purposes of investment and management of funds, the trust pools the funds in these accounts:

(iv) Accounts in the trust are established solely for the benefit of individuals who are disabled, by the individual, by the parent, grandparent, legal guardian of the individual, or by a court:

(v) To the extent that any amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the state the amount remaining in the account equal to the total amount of medical assistance paid on behalf of the beneficiary. To meet this requirement, the trust must include a provision specifically providing for such payment.

(vi) Cash distributions to the applicant/recipient are counted as unearned income. All other distributions from the trust are treated under the rules governing in-kind income.

(vii) Transfers of assets to a special needs trust are not subject to the improper transfer provisions in rule 5101:1-39-07 of the Administrative Code. However, assets held prior to the transfer to this trust are countable assets and/or income.

(d) "Supplemental services trusts" are not countable resources. A trust qualifies as a supplemental services trust only if it meets the requirements of section 1339.51 of the Revised Code.

(i) Any person may establish a trust under section 1339.51 of the Revised Code only for another person who is eligible to receive services through one of the following agencies: the department of mental retardation and developmental disabilities, a county board of mental retardation and developmental disabilities, the department of mental health, or a board of alcohol, drug addiction, and mental health services. The CDJFS cannot determine eligibility for another agency's program. An applicant/recipient must provide documentation from one of these agencies establishing that the applicant/recipient was determined to be eligible for services from that agency at the time of the creation of the trust. Alternatively, an applicant/recipient may provide an order from a court of competent jurisdiction that states the applicant/recipient was eligible for services from one of the agencies at the time of the creation of the trust.

(ii) At the time the trust is created, the trust principal does not exceed the maximum amount permitted. In 2002, the maximum amount permitted is two hundred fourteen thousand dollars. The maximum amount each year thereafter shall be the prior year's amount plus two thousand dollars.

(iii) The CDJFS must review the trust to determine whether it complies with the remaining provisions of section 1339.51 of the Revised Code.

(iv) Payments from supplemental services trusts are disregarded as long as the payments are for supplemental services as defined by rule 5123:2-18-01 of the Administrative Code. All supplemental services must be purchased by the trustee, not through direct cash payments to the beneficiary.

(e) If a trust is represented to be an exempt trust, but the CDJFS determines that it does not meet the requirements for one of the exempt trusts, then it is not an exempt trust and will fall under one of the four other categories of trusts.

(4) Category four: trusts established by someone else for the benefit of the applicant/recipient

(a) A trust, or legal instrument or device similar to a trust, falls under this category if it meets the following criteria:

(i) The trust is created by someone other than the applicant/recipient; and

(ii) The trust names the applicant/recipient as a beneficiary; and

(iii) The trust is funded with assets or property that the applicant/recipient never held an ownership interest in prior to the establishment of the trust.

(b) Any portion of a trust in this category is an available resource only if the trust permits the trustee to expend principal or corpus or assets of the trust for the applicant/recipient's medical care, care, comfort, maintenance, health, welfare, general well-being, or a combination of these purposes. The trust will still be considered an available resource even if the trust contains any of the following types of provisions:

(i) Any provision that prohibits the trustee from making payments that would supplant or replace medicaid or public assistance, or other government assistance;

(ii) Any provision that prohibits the trustee from making payments that would impact or have an effect on the applicant/recipient's right or ability or opportunity to receive medicaid, or public assistance, or other government assistance.

(iii) Any provision that attempts to prevent the trust or its corpus or principal from being counted as an available resource under this rule.

(c) A trust in this category that would normally be considered an available resource shall not be counted as an available resource under the following circumstances.

(i) If the trust contains a "clear statement" requiring the trustee to preserve a portion of the trust for another beneficiary or remainderman, then that portion of the trust shall not be counted as an available resource. Terms of a trust that grant discretion to preserve a portion of the trust do not qualify as a clear statement requiring the trustee to preserve a portion of the trust.

(ii) If the trust contains a "clear statement" requiring the trustee to use a portion of the trust for a purpose other than the medical care, care, comfort, maintenance, welfare, or general well-being of the applicant/recipient, then that portion of the trust shall not be counted as an available resource. Terms of a trust that grant discretion to limit the use of a portion of the trust do not qualify as a clear statement requiring the trustee to use a portion of the trust for a particular purpose.

(iii) If the trust contains a "clear statement" limiting the trustee to making fixed periodic payments, then the trust shall not be counted as an available resource; however, the payments will be treated under the rules governing income. Terms of a trust that grant discretion to limit payments do not qualify as a clear statement requiring the trustee to make fixed periodic payments.

(iv) If the trust contains a "clear statement" that requires the trustee to terminate the trust if it is counted as an available resource, then it shall not be counted as an available resource. Terms of a trust that grant discretion to terminate the trust do not qualify as a clear statement requiring the trustee to terminate the trust.

(v) If any person obtains a judgment from a court of competent jurisdiction that expressly prevents the trustee from using part or all of the trust for the medical care, care, comfort, maintenance, welfare, or

general well-being of the applicant/recipient, then the trust or that portion subject to the court order shall not be counted as a resource.

(vi) If the trust is specifically exempt from being counted as an available resource by this rule, another rule, the Ohio Revised Code, or the U.S. Code, then it shall not be counted as a resource.

(vii) If the applicant/recipient presents a final judgment from a court demonstrating that he or she was unsuccessful in a civil action against the trustee to compel payments from the trust, then it shall not be counted as an available resource.

(viii) If the applicant/recipient presents a final judgment from a court demonstrating that in a civil action against the trustee they were only able to compel limited or periodic payments, then it shall not be counted as an available resource; however, the payments will be treated under rules governing income.

(ix) If the applicant/recipient provides written documentation showing that the cost of a civil action brought to compel payments from the trust would be cost prohibitive, then it shall not be counted as an available resource.

(d) For trusts under this category, even if the trust is not counted as an available resource, any actual payments from the trust to the applicant/recipient are treated under the rules governing income. Payments to any person other than the applicant/recipient are not income to the applicant/recipient. Payment from the trust to any person other than the applicant/recipient is not an improper transfer of assets.

(5) Category five: trusts established by will for the benefit of a surviving spouse

(a) A trust or legal instrument or device similar to a trust, can be established by the will of a deceased spouse.

(i) If there are any circumstances under which payment from the trust could be made to or for the benefit of the surviving spouse, the portion from which payments could be made, shall be considered an available resource. The CDJFS shall not take into account when payments can be made. A payment that can be made only in the future satisfies this provision.

(ii) Any payments that are actually made to or for the benefit of the surviving spouse from either the corpus or income shall be considered income.

(iii) If a payment is made to someone other than to the surviving spouse, and such payment is not for the benefit of the surviving spouse, then such payment shall be considered an improper transfer imputed to the surviving spouse subject to the rules prohibiting improper transfers.

(iv) If a payment is required to be made to someone other than to the surviving spouse, and such required payment is not for the benefit of the surviving spouse, then such amount shall be considered an improper transfer imputed to the surviving spouse subject to the rules prohibiting improper transfers.

(v) A surviving spouse will not be subject to a penalty for improper transfers under this subsection of this rule if the surviving spouse elects to take against the will.

(D) This rule supercedes all previous rules governing trusts and the CDJFS shall apply it prospectively to all determinations and redeterminations of eligibility for all applicants and recipients. Any determination or redetermination made in accordance with this rule shall not be affected by or governed by any prior eligibility determinations made under former rules governing trusts nor shall this rule be applied retroactively to determine an applicant/recipient's eligibility or liability for any prior period.

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