

IN THE SUPREME COURT OF OHIO

LORETTA PACK,

Plaintiff-Appellee,

vs.

CHARLOTTE OSBORN,

Defendant-Appellee,

LICKING COUNTY DEPARTMENT OF
JOB AND FAMILY SERVICES,

Defendant-Appellant

Case Nos. 06-1207
06-1343

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

Court of Appeals
Case No. 05 CA 83

AMICUS CURIAE BRIEF OF
OHIO STATE BAR ASSOCIATION,
NATIONAL ACADEMY OF ELDER OF ELDER LAW ATTORNEYS, AND
DOWN SYNDROME ASSOCIATION OF CENTRAL OHIO,
IN SUPPORT OF PLAINTIFF-APPELLEE LORETTA PACK

Robert Becker (0010188)
Licking County Prosecutor
Rachel O. Shipley (0074934)
(COUNSEL OF RECORD)
Assistant Prosecutor
20 South Second Street
Newark, Ohio 43055
(740) 670-5255
(740) 670-5241 Fax

William J. Browning (0010856)
(COUNSEL OF RECORD)
Browning & Meyer Co., L.P.A.
8108 North High Street
Columbus, OH 43235
(614) 471-0085
(614) 430-8132 Fax

COUNSEL FOR APPELLANT

FILED
JAN 31 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

Janet L. Lowder (0059689)
(COUNSEL OF RECORD)
David A. Myers (0018137)
Hickman & Lowder Co., L.P.A.
1300 East Ninth Street, Suite 1020
Cleveland, OH 44114
(216) 861-0360
(216) 861-3113 Fax

Richard E. Davis (0019229)
Jennifer L. Lile (0072316)
Krugliak, Wilkins, Griffiths & Dougherty Co.,
L.P.A.
4775 Munson Street, N.W.
Canton, Ohio 44735-6963
(330) 497-0700
(330) 497-4020 Fax
COUNSELS FOR AMICUS CURIAE, OHIO
STATE BAR ASSOCIATION NATIONAL
ACADEMY OF ELDER LAW
ATTORNEYS, AND DOWN SYNDROME
ASSOCIATION OF CENTRAL OHIO

Eugene P. Whetzel (0013216)
General Counsel
OHIO STATE BAR ASSOCIATION
1700 Lake Shore Drive
Columbus, OH 43204
614/487-2050
614/487-1008 Fax
CO-COUNSEL FOR AMICUS CURIAE
OHIO STATE BAR ASSOCIATION

Dennis R. Newman (0023351)
Jeffrey A. Stankunas (0072438)
Mark H. Troutman (0076390)
Isaac, Brant, Ledman & Teetor, L.L.P.
250 East Broad Street, Suite 900
Columbus, Ohio 43215
(614) 221/2121
(614) 365-9516 Fax
COUNSELS FOR PLAINTIFF-APPELLEE,
LORETTA PACK

Carolyn J. Carnes (0066756)
(COUNSEL OF RECORD)
Morrow, Gordon & Byrd, Ltd.
33 West Main Street
P.O. Box 4190
Newark, Ohio 43058
(740) 345-9611
(740) 349-9816 Fax
GUARDIAN AD LITEM FOR DEFENDANT-
APPELLEE, CHARLOTTE OSBORN

Mark Dann
ATTORNEY GENERAL OF OHIO
Stephen P. Carney (0063460)
State Solicitor
(COUNSEL OF RECORD)
scarney@ag.state.oh.us
Diane Richards Brey (0040328)
Deputy Solicitor
dbrey@ag.state.oh.us

Ara Mekhjian (0068800)
Assistant Solicitor
amekhjian@ag.state.oh.us
30 East Broad Street, 17th Floor
Columbus, OH 43215
(614) 466-8980
(614) 466-5087 Fax
COUNSELS FOR AMICUS CURIAE, OHIO
ATTORNEY GENERAL MARK DANN

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	v
I. INTEREST OF <i>AMICUS CURIAE</i>	1
II. SUMMARY OF ARGUMENT	1
III. LAW AND ARGUMENT	3
A. PUBLIC POLICY FAVORS THE USE OF SPECIAL NEEDS TRUSTS TO ENHANCE THE WELL-BEING OF OHIOANS WITH DISABILITIES	3
B. THE RESULT IN THIS CASE IS THE SAME REGARDLESS OF WHETHER THE LAW APPLIED IS THAT IN EFFECT AT THE TRUST'S CREATION, AT THE POINT OF CHARLOTTE OSBORN'S MEDICAID APPLICATION, OR CURRENTLY	9
C. DECLARATORY JUDGMENT IS THE FUNCTIONAL EQUIVALENT OF A MOTION TO COMPEL A DISTRIBUTION	18
IV. CONCLUSION.....	21
CERTIFICATE OF SERVICE	23

TABLE OF AUTHORITIES

PAGE

CASE LAW

<i>Application of Moretti</i> (1993), 159 Misc.2d 654, 661 (N.Y. Sup.)	5
<i>Bureau of Support in the Dept. of Mental Hygiene and Correction v. Kreitzer</i> (1968), 16 Ohio St. 2d 147	15, 16
<i>Carnahan v. Ohio Dept. of Human Serv.</i> (2000), 139 Ohio App. 3d 214	9
<i>Cocoran v. Dept. of Social Services</i> (2004), 859 A.2d 533	10, 14
<i>Evans v. Board of County Comm'rs of Boulder</i> (1993), 994 F.2d 755 (10 th Cir.)	6
<i>First Northwestern Trust Co. v. Internal Revenue Service</i> (1980), 622 F.2d 387, 390 (8 th Cir.) ..	12
<i>Martin v. Martin</i> (1978), 54 Ohio St. 2d 101	16
<i>McWilliams v. McWilliams</i> (1956), 74 Ohio Law Abs. 535	8
<i>Pacific Gas and Electric Co. v. State Energy Resources Conservation and Dev. Comm'n</i> (1983), 461 U.S. 190, 203-204	6
<i>Pack v. Osborn</i> , 2006 WL 1214835 at *1-2	16
<i>Schweiker v. Gray Panthers</i> (1981), 453 U.S. 34, 101 S.Ct. 2633	14
<i>Scott v. Bank One, N.A</i> (1991), 62 Ohio St. 3d 39	2, 9, 12
<i>Simpson v. Kansas Dept. of Social and Rehabilitation Services</i> (1995), 906 P.2d 174 (C.A.)	10
<i>United States v. Cohn</i> (1994), 855 F. Supp. 572 (D. Conn.)	12
<i>United States v. O'Shaughnessy</i> (1994), 517 N.W.2d 574 (Minn.)	12
<i>Wilder v. Virginia Hosp. Assn.</i> (1990), 496 U.S. 498	18
<i>Young v. Ohio Dept. of Human Serv.</i> (1996), 76 Ohio St. 3d 547, 550	8, 9
<i>Zeoli v. Commissioner of Social Services</i> (1979), 425 A.2d 553, 558	14

UNITED STATES CONSTITUTION

U.S. Const., art. VI, ¶ 2.....5

FEDERAL AND STATE STATUTES

42 U.S.C. § 1382c.....7

42 U.S.C. § 139612

42 U.S.C. § 1396a.....5, 12

42 U.S.C. § 1396p5, 6

20 C.F.R. § 416.1201.....13

Estates, Powers and Trusts Law5, 6

Ohio Admin. Code § 5101:1.....9, 14, 15, 19, 20

R.C. 119.12.....18

R.C. 1339.517

R.C. 5111.151.....2, 6, 7, 10, 11, 15, 16, 17, 18, 19, 20

R.C. 5119.177

R.C. 5123.40.....7

R.C. 5801.017, 8, 10

R.C. 5801.14.....18

R.C. 5804.018, 10

R.C. 5804.02.....8

R.C. 5804.18.....8

R.C. 5805.03.....7, 8, 10, 21

R.C. 5805.05.....8

R.C. 5805.06.....8

R.C. 5808.14.....7

R.C. 5815.28.....	7
Ohio Trust Code, H.B. 416.....	2
Omnibus Budget Reconciliation Act of 1993 (“OBRA 93”)	5, 6

OTHER AUTHORITIES

George G. Bogert and George T. Bogert, <i>The Law of Trusts and Trustees</i> § 182 (at pp. 424-428), §§ 228-230, 811 (rev. 2d. ed. 1979)	10
Natalie J. Kaplan, <i>New York Notes IV</i> , 9 NAELA News (February 1994).....	5
Clifton Kruse, <i>Third Party and Self-Created Trusts, Planning for the Elderly and Disabled Client</i> , (American Bar Association 2002).....	11, 14
<i>Restatement (Second) of Trusts</i>	10, 12
<i>Restatement (Third) of Trusts</i> § 50	6, 10
2 Austin W. Scott & William F. Fratcher, <i>The Law of Trusts</i> §§ 128.3 – 128.7.....	10, 12
Sen. Rpt. 404 (1965).....	14
<i>The Law of Trusts</i> , §155	11

I. **INTEREST OF AMICUS CURIAE**

The Ohio State Bar Association (“OSBA”), the National Academy of Elder Law Attorneys (“NAELA”) and the Down Syndrome Association of Central Ohio (“DSACO”) respectfully submit this brief amicus curiae in support of the Appellees.

OSBA is a professional association which represents 25,000 members in the State of Ohio. Its Board of Governors unanimously approved the filing of an amicus brief in this case on or about September 14, 2006.

NAELA is a professional association of approximately 14,900 attorneys across the nation who represents the elderly and people with disabilities. Its Board of Directors unanimously approved the filing of an amicus brief in this case on or about November 20, 2006.

DSACO is a network of individuals with Down syndrome, parents, professionals and health care providers working together to ensure that individuals with Down syndrome are given the opportunity to achieve their potential.

The organizations present this brief based upon their shared interest in the well-being of people with disabilities and their families, their desire for even and uniform interpretation of trust law, and their underlying concern about the fairness of the administrative review process that precedes an appeal under R.C. 119.

II. **SUMMARY OF ARGUMENT**

This case is of tremendous interest to OSBA, NAELA and DSACO, as its incorrect disposition would have severely adverse ramifications on both a state and national level. Through this *amicus* brief, our goals are to demonstrate to the Court that (1) that supplemental or special needs trusts (“SNTs”) are not only not against public policy, but are actually favored by national and state policy; (2) the result in this case would be the same regardless of whether it were to be decided

upon law in effect at the trust's creation, at the time the application for Medicaid was filed, or under current law¹; and (3) Appellee's filing of a declaratory judgment action is not an "end run" around mandatory administrative procedures, but rather is the functional equivalent of an action to compel a distribution as specifically authorized by R.C. § 5111.151.

This case involves the interpretation and treatment of a trust established in 1987 for the ultimate benefit of the since-deceased grantor Mable Osborn's three children. One of them, Charlotte Osborn, has been disabled her entire lifetime. In 2004 Loretta Pack, Trustee of the Mabel Osborn Trust, needed direction about whether her fiduciary authority and responsibility allowed use of trust assets to pay for Charlotte's medical care, and so she sought that direction *via* a declaratory judgment action. The trial court said she could so use trust assets, and the appeals court said she could not. It is that result which is under review here.

The complexity of this case arises not because of its fundamental issue, but because that issue is presented in the context of Charlotte Osborn's ancillary application for Medicaid assistance. That application was denied because the Licking County Department of Job & Family Services decided that the trust assets were available to Charlotte. The conflict that exists in this case has less to do with a disagreement among appeals courts and more to do with the proper interpretation of basic principles of trust law.² The courts below have either mistaken or not focused upon the heart of the matter.

¹ The Ohio Trust Code, H.B. 416 became effective January 1, 2007, and modifies the law regarding certain purely discretionary trusts in a minor way, as discussed below.

² While this Court has previously reviewed purely discretionary trusts (i.e. trusts which contain no distribution standard of any kind and which also grant to the trustee extended discretion) in *Scott v. Bank One, N.A* (1991), 62 Ohio St. 3d 39, the Court has not reviewed such a trust in the context of Medicaid eligibility.

III. LAW AND ARGUMENT

A. PUBLIC POLICY FAVORS THE USE OF SPECIAL NEEDS TRUSTS TO ENHANCE THE WELL-BEING OF OHIOANS WITH DISABILITIES

A fundamental expectation of our society is that its members be self-reliant and use all available means to support themselves. We also acknowledge that there are those whose disabilities limit their self-supporting capacity, and for them we provide public assistance of various kinds including through the Medicaid program. There is recognition that public assistance does not and cannot meet all needs of people with disabilities and so the federal and state governments have allowed the use of special needs trusts (SNTs) to fill that gap.

1. Summary of Supplemental/Special Needs Trusts

SNTs may be categorized in different ways. One fundamental distinction is made between “self-settled” SNTs funded with assets belonging to the disabled individual³ and “third party” SNTs established with assets that belonged to someone **other than** the disabled beneficiary. While variations of both types have been authorized by federal and state statute (see discussion below), it is the latter type at issue here.

Parents of children with disabilities commonly devote their lives to supporting and assisting their offspring. Those children’s basic financial needs, particularly medical ones, are often daunting and can only be met by reliance upon public assistance. Such assistance provides subsistence-level food, shelter and medical care. The parents naturally and willingly enhance their children’s lives by providing advocacy, socialization opportunity, transportation, and a host of other things.

³ While not at issue in the present case, even self-settled SNTs have built-in safeguards to protect against the abuse of such vehicles by disabled people sheltering their money in trust simply to qualify for public benefits. For example, a self-settled trust must be irrevocable, must be created by a parent, grandparent legal guardian or court, and must include a Medicaid “payback” provision.

Those parents face an almost insurmountable dilemma when doing financial and estate planning for the child. In almost all situations parents' limited resources, especially when divided equally among their other children following their deaths, are woefully inadequate to pay for a lifetime of basic support for the child with a disability. If that child's proportionate share of the parents' estate were required to be used to pay for basic support, the funds would be exhausted in short order, with the result that the child would live a most impoverished life. For most parents, the alternative option of disinheriting a disabled child and relying upon the voluntary largesse of others to replace what they have provided is intolerable.

Because of these concerns, parents of children with disabilities often seek to establish a fund, a SNT, to replace what they have been providing. Generally, the trustee is given broad discretionary powers to distribute (or choose not to distribute) income and principal to or for the child's benefit.

The SNT can be used for various expenditures not available under public assistance, such as:

- Out-of-pocket medical and dental expenses,
- Replacement eyeglasses,
- Annual independent check-ups,
- Transportation (including vehicle purchase),
- Maintenance of vehicles,
- Insurance (including payment of premiums),
- Special rehabilitation,
- Essential dietary needs,
- Materials for a hobby or recreation activity,
- A computer or electronic equipment,
- Socialization and entertainment (going to a movie, ballgame, concert).

2. Federal and Ohio Public Policy Favors SNTs.

Licking County Department of Job and Family Services would have this Court believe that SNTs are against public policy, by an allusion equating SNTs to trusts established to provide scholarships to public universities that enroll only whites and to trusts used to fund terrorist organizations. Appellant's Merit Brief at 9, ¶2. The "absurdity" however, lies in the fact that the County compares a parent's express intent to provide for a disabled child's well-being and achieve a modest degree of dignity, to propagating discriminatory and illegal activity of the most extreme nature. Providing a magazine subscription to a disabled child is hardly comparable to sending funds to Al Qaeda, as Appellant would have the Court believe.

Amici have found no case supporting the proposition that SNTs are *per se* against public policy. To the contrary, both federal and Ohio public policy favor the creation and protection of SNTs. With the passage of the Omnibus Budget Reconciliation Act of 1993 ("OBRA 93"), national policy favoring the sheltering of funds belonging to persons with disabilities is affirmed legislatively.⁴ To the extent that state statutes or regulations may be construed "... as being inconsistent with, more restrictive than, or in contravention of the spirit of O.B.R.A. '93, they are not binding on [the] court since any such inconsistency [is] violative of the supremacy clause⁵ of the United States Constitution." *Application of Moretti* (1993), 159 Misc.2d 654, 661 (N.Y. Sup.).⁶

⁴ 42 U.S.C. §§ 1396p(d)(4)(A), 1396p(d)(4)(C).

⁵ U.S. Const., art. VI, ¶ 2.

⁶ *Moretti* is discussed by Natalie J. Kaplan, *New York Notes IV*, 9 NAELA News (Newsletter of the National Academy of Elder Law Attorneys) (February 1994). Ms. Kaplan summarizes the facts in *Moretti* in this article: "Michael Moretti was severely brain damaged at the age of 15 in 1984 in a traffic accident. A law suit brought on his behalf netting him \$666,666. Nine years later, still comatose, after expenditures for a portion of a family home and unreimbursed medical care, he had only approximately \$200,000 remaining. A petition was originally brought in part to seek authority for his conservator (who was the petition and his mother) to transfer her ward's funds into a supplemental needs trust. That branch of the petition was denied on the grounds that such a trust would be a Medicaid Qualifying Trust [under 42 U.S.C. § 1396(a)(k)(2)] and self-settled in contravention of State law. Estates, Powers and Trusts Law (hereinafter "EPTL") §

Federal law is preeminent and supersedes state law where the latter otherwise prevents the objectives of the federal legislation.⁷

OBRA '93 created at least four types of SNTs: (1) a Pooled Account Trust (42 U.S.C. § 1396p(d)(4)(C)); 2) Self-Settled Trusts (42 U.S.C. § 1396p(d)(4)(A)); 3) Third-party funded trusts for the benefit of any disabled individual (42 U.S.C. § 1396p(c)(2)(B)(iv)); and 4) So-called "Miller Trusts" (42 U.S.C. § 1396p(d)(4)(B)).⁸

Further evidence that national public policy favors the protection of SNTs is found in the *Restatement (Third) of Trusts* § 50 (comment e), which provides:

Public benefits. If a discretionary beneficiary is or may be eligible to receive public benefits, this factor, like the availability of other resources generally, is to be taken into account by the trustee under the usual rule of construction. Thus, to the extent consistent with the terms and purposes of the trust, and allowable by applicable benefits statutes (see Reporter's Notes), the presumption is that *the trustee's discretion should be exercised in a manner that will avoid either disqualifying the beneficiary for other benefits or expending trust funds for purposes for which public funds would otherwise be available.*

(Emphasis added).

The public policy of Ohio favoring SNTs is demonstrated statutorily by the reiteration of the federally founded trusts in R.C. 5111.151, by creation of the Supplemental Services Trust under R.C.

7-3.1(a). Upon reargument, the petition was armed with the provision of O.B.R.A. '93 allowing Medicaid eligibility to disabled individuals under age 65 with self-settled trusts, if the trust provides reimbursement to the State for medical assistance after the lifetime of the beneficiary. 42 U.S.C. § 1396(a)(k)(2). The new State section against self-settled trusts was in conflict and had to bow to the Federal Act. EPTL. § 7-1.12(c); see also *Evans v. Board of County Comm'rs of Boulder* (1993), 994 F.2d 755 (10th Cir.).

⁷ Federal law preempts state law that is contrary. See *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Dev. Comm'n* (1983), 461 U.S. 190, 203-204.

⁸ The first two types are self-settled trusts, which require that any assets remaining in the trust at the death of the disabled beneficiary must be repaid to the state Medicaid agency, to the extent that Medicaid benefits were provided. Type 3 is a third party-settled trust, which contains no such payback requirement. Type 4 is a self-settled trust, with no payback requirement.

1339.51⁹ (renumbered by the Ohio Trust Code as R.C. § 5815.28), and the inclusion in the newly-enacted Ohio Trust Code of at least eight provisions designed to protect SNTs and their beneficiaries. For example, R.C. § 5805.03 created a “wholly discretionary trust” which was designed to serve as a creditor-proof third party-settled SNT from which no beneficiary would be able to compel a distribution.¹⁰ R.C. § 5801.01(Y), which defines the wholly discretionary trust, provides in paragraph (5),

... With respect to a trust established for the benefit of an individual who is blind or disabled as defined in 42 U.S.C. § 1382c(a)(2) or (3), as amended, a wholly discretionary trust may include either or both of the following: (a) Precatory language regarding its intended purpose of providing supplemental goods and services to or for the benefit of the beneficiary, and not to supplant benefits from public assistance programs; (b) A prohibition against providing food, clothing, and shelter to the beneficiary.

Further, R.C. 5808.14(A) provides a separate standard of judicial review for wholly discretionary trusts:

The judicial standard of review for discretionary trusts is that the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries, *except that a reasonableness standard shall not be applied to the exercise of discretion by the trustee of a wholly discretionary trust.* The greater the grant of discretion by the settlor to the trustee, the broader the range of permissible conduct by the trustee in exercising it.

(Emphasis added).

⁹ Ohio statutory R.C. 1339.51 trust, while not authorized by federal law, is an exempt trust under R.C. 5111.151. This trust can only be funded with a statutorily prescribed maximum amount, can only be established for an individual that meets one of two conditions, and must provide that, upon the death of the trust beneficiary, at least 50% of the remaining trust assets must be deposited to the credit of the services fund for individuals with mental illness created by R.C. 5119.17 or the services fund for individuals with mental retardation and developmental disabilities created by R.C. 5123.40.

¹⁰ From a review of the portions of the trust that were quoted in the opinions of the trial level and appellate court, the subject Maebelle W. Osborn trust appears to meet the requirements of the new wholly discretionary trust.

Also, R.C. 5805.03 limits the applicability of creditor remedies to the wholly discretionary trust, demonstrating the express legislative intent that these types of instruments be afforded favored protection. The legislature even authorized the courts to limit the award of creditors seeking to attach “mandatory distributions,”¹¹ by providing:

The court may limit an award under this section to such relief as is appropriate under the circumstances, considering among other factors determined appropriate by the court, if any, the support needs of the beneficiary, the beneficiary’s spouse, and the beneficiary’s dependent children, or, *with respect to a beneficiary who is the recipient of public benefits, the supplemental needs of the beneficiary if the trust was not intended to provide for the beneficiary’s basic support.*

R.C. 5805.05 (emphasis added).¹²

In light of these many federal and state provisions designed exclusively to foster and protect SNTs, the equating of attempts by parents to provide some degree of dignity after their deaths for their disabled children to the funding of terrorist organizations is not only wrong, but insulting to Ohioans with disabilities.

It is a fundamental principle of law that an individual may dispose of his or her property in any lawful manner. As to trusts, this Court in *Young v. Ohio Dept. of Human Serv.*, confirmed that “[i]t is axiomatic that a grantor may dispose of his or her property in any manner chosen so long as the disposition is not prohibited by law or public policy.” *Young* (1996), 76 Ohio St. 3d 547, 550; see also *McWilliams v. McWilliams* (1956), 74 Ohio Law Abs. 535.

¹¹ A “mandatory distribution” is a term defined in the Ohio Trust Code at R.C. 5801.01(M). The subject Maebelle W. Osborn provides for no mandatory distributions.

¹² In addition to the four OTC provisions delineated, the other four referenced protections for SNTs within the OTC are : 1) R.C. 5805.06, which deals with creditor claims against self-settled trusts and allows the court to limit the award to creditors seeking assets held in self-settled SNTs; 2) specific authority granting Ohio courts the same authority allowed under federal law to create self-settled SNTs by court order – R.C. 5804.01; 3) waiver in R.C. 5804.02 of the requirements, with respect to self-settled SNTs created by court order, that a trust settler must have the capacity, and indicate an intention, to create a trust; and 4) R.C. 5804.18 which prevents the application of the Doctrine of Worthier Title or the Rule in Shelley’s case from being used to defeat a self-settled SNT.

B. THE RESULT IN THIS CASE IS THE SAME REGARDLESS OF WHETHER THE LAW APPLIED IS THAT IN EFFECT AT THE TRUST'S CREATION, AT THE POINT OF CHARLOTTE OSBORN'S MEDICAID APPLICATION, OR CURRENTLY

Appellant would have this Court believe that the only method of construing Maebelle Osborn's trust as not affecting Charlotte Osborn's Medicaid eligibility is to interpret it under the law in effect at the time the trust was created. *Amici* agree with the ruling of the Fifth District Court of Appeals that the law in effect at the time the trust was created should govern. However, even if it is interpreted under any subsequent law or rule, the result is the same. The trust is a common law pure discretionary trust identical in its terms to that in *Scott*, or a wholly discretionary trust under the Ohio Trust Code. See *Scott*, 62 Ohio St. 3d 39. The trust terms make it impossible for Charlotte Osborn to compel a distribution or otherwise force the trustee to make trust assets available to her.

While the current Medicaid trust rule, Ohio Admin. Code § 5101:1-39-27.1, has undergone numerous changes since this Court's decision in *Young* (the same version of which was in effect at the time the Maebelle Osborn trust was created), two things that have remained constant: (1) the absolute and total inability of a beneficiary to compel a distribution from a common law purely discretionary trust, and (2) the mandatory federal "available" requirement. While the various versions of the trust rule would have caused different results in cases such as *Carnahan v. Ohio Dept. of Human Serv.* (2000), 139 Ohio App. 3d 214, and perhaps even *Young*, with respect to a purely discretionary trust such as the one here the result would be the same under any version of the rule.

1. **Beneficiary's Inability to Compel a Distribution.**

The Osborn trust gives the trustee absolute discretion regarding distribution and includes no distribution standard, making it, at the time of its creation, a common law "purely discretionary

trust,” and now, under the Ohio Trust Code, a “wholly discretionary trust.”¹³ If a trust is a pure discretionary trust with no distribution standard, the beneficiary generally has no ability to compel a distribution, especially if the trustee was given “sole,” “absolute,” or “uncontrolled” discretion.

Only if a beneficiary can compel a distribution from the trust, especially a distribution for support, will the trust be treated for Medicaid purposes as the beneficiary’s resource. *Cocoran v. Dept. of Social Services* (2004), 859 A.2d 533. It is in recognition of this fact that R.C. 5111.151(G)(4)(g) contains the exception providing that a trust will not be treated as a resource if the beneficiary can produce a final court order showing that he or she was unsuccessful in attempting to compel a distribution. Since most trust instruments contain a distribution standard of some sort, and grant to the trustee any one of several levels of discretion, a thorough analysis of all factors including grantor intent would usually need to be undertaken.

That, however, is not the case with respect to a purely discretionary trust such as the Osborn trust. If a trust is a pure discretionary trust with no distribution standard, the beneficiary has no ability to compel a distribution, especially if the trustee was given “sole,” “absolute,” or “uncontrolled” discretion. *Restatement (Third) of Trusts* § 50 cmt. b, notes to cmt. a. and b.; *Restatement (Second) of Trusts* § 187; 2 Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 128.3 – 128.7; George G. Bogert and George T. Bogert, *The Law of Trusts and Trustees* § 182 (at pp. 424-428), §§ 228-230, 811 (rev. 2d. ed. 1979). Therefore the trust corpus is not an available resource. *Simpson v. Kansas Dept. of Social and Rehabilitation Services* (1995), 906 P.2d 174 (C.A.).

¹³ The new Ohio Trust Code, effective January 1, 2007, refers to such a trust as a “wholly discretionary trust” R.C. 5801.01(Y). The Ohio Trust Code makes it clear that a beneficiary of a wholly discretionary trust may not compel payments under any circumstances. The Trustee’s discretion need not meet any reasonableness standards, and no creditor may reach the beneficiary’s interest. R.C. 5805.03.

Cases of this type are rare, because purely discretionary trusts with no support standard are infrequently used. In his seminal ABA treatise, *Third Party and Self-Created Trusts, Planning for the Elderly and Disabled Client*, Clifton Kruse analyzed 75 third party-settled trusts where public support of the beneficiary was, in one way or another, an issue. Kruse at 117-128. The cases generally fell within one of four types: (1) support trusts, (2) discretionary support trusts (which contain a support standard but which also granted the trustee discretion to apply the standard), and (3) discretionary supplementary care trusts (distribution standard limited to supplementing, but not supplanting, public benefits), and (4) pure discretionary trusts. (A few discretionary income trusts, not relevant to the instant case, were also analyzed.) All but one of the support trusts were “not protected,”¹⁴ approximately 40% of the discretionary support trusts were not protected, all of the discretionary supplemental care trusts were protected, and the five pure discretionary cases in the study were all protected.¹⁵ *Id.* In other words, Mr. Kruse was unable to find even one case in which a beneficiary of a purely discretionary was able to compel a distribution.

Scott & Fratcher, *The Law of Trusts* § 155 states:

Where by the terms of the trust a beneficiary is entitled only to so much of the income or principal as the trustee in his uncontrolled discretion shall see fit to give him, he cannot compel the trustee to pay to him or to apply for his use any part of the trust property. In such a case, an assignee of the interest of the beneficiary cannot compel the trustee to pay any part of the trust property, nor can creditors of the beneficiary reach any part of the trust property. This is true even in jurisdictions where spendthrift trusts are not permitted. If the beneficiary himself cannot compel the trustee to pay over any part of the trust fund, his assignee and his creditors are in no better position. It is the character of the beneficiary's interest, rather than the

¹⁴ “Not protected” is the term used by Mr. Kruse to refer to those trusts that were counted as resources of the beneficiary.

¹⁵ Note that the codification of the *Kreitzer* decision in R.C. 5111.151(G) would treat as resources all discretionary support trusts, compared with only 40% of such trusts discussed by Kruse.

settlor's intention to impose a restraint on its alienation, which prevents its being reached.

p. 157 (emphasis added).

Similarly, *Restatement (Second) of Trusts* §§ 155(1), 156.1 provide:

... if by the terms of a trust it is provided that the trustee shall pay to or apply for a beneficiary only so much of the income and principal or either as the trustee in his uncontrolled discretion shall see fit to pay or apply, a transferee or creditor of the beneficiary cannot compel the trustee to pay any part of the income or principal.

Even the federal government cannot compel a distribution from a purely discretionary trust in satisfaction of a federal tax lien, on the basis that the trust beneficiary's interest is too ephemeral to constitute a lienable property interest. *United States v. O'Shaughnessy* (1994), 517 N.W.2d 574 (Minn.) (holding that a beneficiary's interest in a purely discretionary trust is not "property" or "any right to property," within the meaning of the federal tax lien statute, before the trustee has exercised its discretionary power of distribution under the trust agreement); see also *First Northwestern Trust Co. v. Internal Revenue Service* (1980), 622 F.2d 387, 390 (8th Cir.).¹⁶ In Internal Revenue Service Office of Chief Counsel Release No. 200036045, the Chief Counsel's office stated: "Where a trust gives the trustee uncontrolled, absolute discretion with respect to the distributions, if any, made to a beneficiary, the beneficiary has no basis to compel the trustee to make a distribution. Therefore, he does not have any interest which is subject to the federal tax lien."

In *Scott*, this Court held that the trust beneficiary could not compel a distribution from a purely discretionary trust. *Scott*, 62 Ohio St. 3d at 39. The Court's ruling that a trust beneficiary has no greater interest in the trust property than that given by the trust agreement, necessitates a finding that the Osborn trust corpus is not reachable by or available to Charlotte Osborn. The overwhelming,

¹⁶ Under federal law, the only remedy of the United States would be to attach future distributions from the trust that the trustee might decide to make. *United States v. Cohn* (1994), 855 F. Supp. 572 (D. Conn.).

even total, support for the proposition that beneficiaries of purely discretionary trusts are unable to compel distributions clearly demonstrates that the Osborn Trust cannot be treated as a resource under any iteration of the Medicaid trust rule.

2. Federal “Availability” Requirement.

To determine whether a person is entitled to Medicaid benefits, a state may consider only the income and resources that are "available" to the applicant or recipient. The term “available” is construed to mean “actually available.” 20 C.F.R. § 416.1201. These concepts are primarily a matter of federal law. 42 U.S.C. § 1396(a) requires: “A State plan for medical assistance must ... (17) ... include reasonable standards ...for determining eligibility ...which ... (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, *available to the beneficiary* [and](C) provide for reasonable evaluation of any such income or resources....” (Emphasis added).

20 C.F.R. § 416.1201(a)(1) clarifies this by providing:

(a) Resources; defined. For purposes of this subpart L, resources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.

(1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).

Similarly, 20 C.F.R. § 416.1201 (c)(3) states, “Resources means cash or other liquid assets or any real or personal property that an individual owns and could convert to cash to be used for support and maintenance....”

With respect to the issue of “availability” in Medicaid’s legislative history, a 1965 Senate Report summarizing the newly enacted Medicaid Act stated:

Another provision is included that requires States to take into account only such income and resources as ...are actually available to the applicant or recipient and as would not be disregarded.... Income and resources taken into account, furthermore, must be reasonably evaluated by the States. These provisions are designed so that the States will not assume the availability of income which may not, in fact, be available or overevaluated income and resources which are available.

Sen. Rpt. 404 (1965).

State and federal courts have addressed the application of these federal "availability" requirements. The United States Supreme Court has stated that the "availability principle" is aimed primarily at preventing states from imputing or assuming financial assistance from sources with no obligation to furnish it. *Schweiker v. Gray Panthers* (1981), 453 U.S. 34, 101 S.Ct. 2633. The Connecticut Supreme Court stated:

[U]nder applicable federal law, only assets actually available to a medical assistance recipient may be considered by the state in determining eligibility for public assistance programs such as title XIX [Medicaid].... A state may not, in administering the eligibility requirements of its public assistance program pursuant to title XIX ... presume the availability of asset not actually available

Zeoli v. Commissioner of Social Services (1979), 425 A.2d 553, 558; see also *Cocoran*, 859 A.2d 533; Kruse, *Third Party & Self-Created Trusts, Planning for the Elderly and Disabled Client* at 52-54.

This is further reflected in Ohio's Administrative Code implementing the federal law, which counts as a resource only assets the individual "has an ownership interest in, has the legal ability to access in order to convert to cash ... and is not legally prohibited from using for support and maintenance." Ohio Admin. Code § 5101:1-39-05 (B)(10). The rule further states that "[p]roperty cannot be a resource if the individual Ohio Admin. Code §5101:1-39-05(B)(10)(b) and "[e]ven with ownership interest and legal ability to access property, a legal restriction against the property's use

for the owner's own support and maintenance means the property is not a resource.” Ohio Admin. Code § 5101:1-39-05(B)(10)(c) (emphasis added).

Because Charlotte Osborn is the beneficiary of a purely discretionary trust, she is unable to compel a distribution from it, the trust corpus is not available to her, and mandatory federal law clearly prohibits characterizing the trust as a resource of hers.

3. Evolution of R.C. 5111.151.

R.C. 5111.151(G)(2), governs Ohio’s treatment of third party-settled trusts for Medicaid eligibility purposes and declares that:

Any portion of a [third-party funded SNT]...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.

(Emphasis added.)

The prohibited purposes of “care, comfort, maintenance, and general well-being” in the statute were taken verbatim from the distribution standard contained in the trust at issue in *Bureau of Support in the Dept. of Mental Hygiene and Correction v. Kreitzer* (1968), 16 Ohio St. 2d 147. Ohio courts, beginning with *Kreitzer*, have determined that a beneficiary has a right to compel payments from a so-called “hybrid” trust—a discretionary trust that contain a support standard. In the *Kreitzer* case, the trust language read:

[I]n the event a share is established upon my death for the benefit of my daughter, Naomi M. Swallow, the trustee shall distribute, *in its sole and absolute discretion*, so much of the income and the principal of her share as it in its sole and absolute discretion, determines to be necessary *for her care, comfort, maintenance and general well-being* for and during her lifetime. Any income from her share of the trust estate not distributed by the trustee as hereinabove provided for her benefit shall be divided equally among the other shares of the trust. . .

Id. at 148 (emphasis added).

The Court held that, despite the trustee's discretion, "the words 'care, comfort, maintenance and general well-being' are to be deemed an enforceable standard of a fiduciary's conduct to the extent of providing minimal support for a destitute [beneficiary]." *Id.* at 150; see also *Martin v. Martin* (1978), 54 Ohio St. 2d 101 (stating that a trust conferring upon the trustees power to distribute income and principal in their "absolute discretion," but which provides standards by which that discretion is to be exercised with reference to needs of the trust beneficiary for education, care, comfort or support, is neither a purely discretionary trust nor a strict support trust, and the trustees of such trust may be required to exercise their discretion to distribute income and principal for those needs).

R.C. 5111.151(G)(2) codified the *Kreitzer* decision, making it clear that if a trust incorporates any of these standards into a trust, even a trust which gives the trustee absolute and uncontrolled discretion, the trust will be considered a resource available to its beneficiary unless it meets one or more of the exceptions included in the rule. The Osborn trust contains no such enforceable standard, so its beneficiary Charlotte Osborn simply lacks the ability to compel a distribution and the trust is not a countable asset under R.C. 5111.151(G)(2).¹⁷

In its first and second findings the Licking County Court of Common Pleas apparently concluded that a purely discretionary trust, which contains no distribution standard, would be treated as "permitting" the trustee to expend principal for the applicant's "medical care, care, comfort, maintenance, health, welfare, general well-being." *Pack v. Osborn*, 2006 WL 1214835 at *1-2. The

¹⁷ It should also be noted that Charlotte is not the sole beneficiary of the Osborn Trust. The trustee may also make distributions to her siblings under the same standard of sole and absolute discretion. The trustee could pay the entire trust principal to one of Charlotte's siblings at any time, and the trust would not longer be even theoretically available to Charlotte. Such an action would not affect Charlotte's eligibility, as R.C. 5111.151 (G)(5) provides that "[p]ayments 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 transfer of assets."

meaning of the word “permits” in R.C. 5111.151, however, refers to an express distribution standard in the trust agreement that specifically provides for distributions for the proscribed purpose.¹⁸ It cannot be read as requiring all trusts to expressly prohibit distributions for those purposes. Indeed, if a trust expressly prohibits any distributions for the beneficiary’s “medical care, care, comfort, maintenance, health, welfare, general well-being,” the trust would not be a trust inasmuch as it would lack a beneficiary. Those proscribed purposes are so all-inclusive that every conceivable distribution would be prohibited.

The apparent misinterpretation of “permits” by the Licking County Court of Common Pleas would also cause R.C. §5111.151 to violate the mandatory federal “available” requirements discussed above. It is a basic rule of construction that if a provision can be interpreted in one of two ways, one of which complies with applicable law and the other of which does not, the former must prevail.

The clear, plain English meaning of R.C. 5111.151 accomplishes what was sought—the treating of discretionary support trusts as available resources of SNT beneficiaries. The Licking County Court of Common Pleas’ interpretation, on the other hand, in addition to contradicting federal “available” requirements, would result in virtually all third party-settled trusts being seen as countable resources as **no trusts** are written that have an express prohibition against making distributions for the beneficiary’s “care and general well being.” If that were the intended result, the statute would merely have stated that all third party-settled SNTs are available resources.

¹⁸ The proscribed purposes are lifted almost verbatim from the express distribution standard that was contained in trust under review in *Kreitzer*, thereby confirming R.C. 5111.151 is designed to impact trusts which contain an express support standard. It is nonsensical to assume that a statute which codifies a court decision favorable to the State should be interpreted in a manner radically different from its genesis.

Regardless of the interpretation of “permit,” a purely discretionary trust should never be counted as an available resource, because R.C. 5111.151(G)(4)(g) provides an exception that protects such trusts from being so regarded. This section says that a third-party trust will not be counted if the “applicant or 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...” As discussed above, with respect to a purely discretionary trust, the law is absolutely clear that the beneficiary is not be able to compel a distribution, so the beneficiary would have no problem in securing a “final judgment” of the kind referred to in R.C. 5111.151 (G)(4)(g). That is especially true with respect to Ohio’s new wholly discretionary trust, of which the Osborn trust is one, in that the trustee’s actions are not held to a reasonableness standard. Instead, the trustee need only act in good faith. R.C. 5801.14(A).

C. DECLARATORY JUDGMENT IS THE FUNCTIONAL EQUIVALENT OF A MOTION TO COMPEL A DISTRIBUTION.

The Ohio Attorney General (OAG) argues variously that the Appellee’s use of a declaratory judgment action represents an end run around the R.C. 119.12 appeals process, impairs ODJFS’ ability to fairly administer the Medicaid program, and may be a death knell for all Ohio administrative agencies. Merit Brief of *Amicus Curiae* OAG, at 11. These overblown concerns fundamentally disregard the Ohio legislature’s specific and narrow grant of authority to courts of a direct role in determining whether the beneficiary of a third-party funded SNT can qualify for Medicaid assistance.¹⁹

With respect to a purely discretionary trust or a wholly discretionary trust, a declaratory judgment action of the type filed by Appellee is the *de facto* equivalent of an action to compel a

¹⁹ In *Wilder v. Virginia Hosp. Assn.* (1990), 496 U.S. 498, cited earlier, the Supreme Court concluded that Congress did not foreclose a private judicial remedy under the Medicaid Act, despite a State’s extensive administrative scheme.

distribution inasmuch as both actions are limited to the same narrow question. Whether or not a purely discretionary trust is a resource hinges upon whether or not the beneficiary can compel a distribution. This is the precise issue that the General Assembly, in R.C. 5111.151(G), directed SNT beneficiaries to take to court. R.C. 5111.151(G)(4) provides:

A [third-party funded special needs] trust... shall not be counted as an available resource if at least one of the following circumstances applies:

...(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.²⁰

This provision, as well as R.C. 5111.151(G)(4)(g-h), indicate that Appellant must defer to the court's determination of whether the beneficiary can compel distribution from the trust, which ultimately is the same as determining whether the trust is "available."²¹

This statute does not specify what label should be attached to action filed. Rather, it states the result that should be sought (i.e. a judgment holding that the beneficiary cannot compel a distribution.) A declaratory judgment that a purely discretionary trust is not a countable resource can be granted if, and only if, the beneficiary cannot compel a distribution. With respect to a purely discretionary trust, the answer to that question will always be "no," as discussed above and as this Court has held in *Scott*. How the complaint is titled should be irrelevant; it is the substance that matters.

²⁰ The quoted portions of R.C. 5111.151 are mirrored in the ODJFS rule (Ohio Admin. Code § 5101:1-39.27.1).

²¹ Note that the prior Medicaid rules even had a provision directing DFJS to provide legal counsel to assist the person in bringing an action to compel payments.

The OAG's claim that court action outside the realm of administrative appeals constitutes an improper bypass or "end run" is belied by R.C. 5111.151(G)(4)(e, g-h) where the Ohio Legislature specifically reposes in courts decision making authority concerning SNTs. See R.C. 5111.151(G)(4)(g-h) (regarding the legislative delegation to courts for determination of the availability of trust assets). These nearly unique²² provisions do not bear upon the multiplicity of other issues and considerations affecting an individual's Medicaid eligibility, nor is its scope such as to affect State agencies other than the Ohio Department of Job & Family Services.

The OAG argues that allowing a court determination *via* a declaratory judgment action "would prevent the county department of job and family services from examining" a trust, "takes the issue away from the body that has specialized expertise in the area," and "undermines the standard of review that would apply when a case goes from an administrative agency to the courts on appeal." OAG Amicus Brief, p. 2. These allegations are only partly true but, to that extent, represent precisely what the legislature both intended and accomplished by statute.²³

While counties are certainly not prevented from examining a trust, a court may also do so and bind the county's determination as to the availability of trust assets to a Medicaid applicant by ruling whether or not a beneficiary can compel a distribution. That the Medicaid administrative agency is a body having "specialized expertise" in divining a settlor's intent or the legal effect of particular trust language is not demonstrated by the record. As to "undermining a standard of review," the fact that

²² There is another instance of direct court involvement in a factor affecting Medicaid eligibility. If one of a married couple is in a nursing home, the other is entitled to keep a certain amount of the family's resources. How much can be kept is usually calculated based upon what the family owned when the ill spouse was first institutionalized. However, a court may establish a larger amount to be kept by the healthy spouse, and ODJFS is bound by that determination. Ohio Admin. Code § 5101:1-39-36.1(C)(3)(c).

²³ Prior to the enactment of R.C. 5111.151, ODJFS had changed its trust rule eight times. In 2003 and 2004, the Down Syndrome Association and the Ohio State Bar Association lobbied the legislature to bring stability by codifying the law. R.C. 5111.151 was the result.

the legislature has carved out a unique instance of court involvement on an issue that involves mixed questions of fact and law undermines nothing.

IV. CONCLUSION

The Appellant characterizes the issue solely as 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 the eligibility review. Such a distinction makes no material difference in the present case. The true substantive issue is whether Charlotte Osborn has any ability to compel distributions from the Osborn Trust (or, in “Medicaid-speak” whether trust assets are “available” to her).

The language of the Osborn trust provides that principal and income may be distributed to Charlotte and the other two beneficiaries “at such time or times and in such amounts and manner as the Trustee, in her sole discretion, shall determine.” Osborn Trust, at 2. This language, coupled with the settlor’s express intent, qualify this third-party SNT as a purely/wholly discretionary trust which under past law was excluded as a resource for Medicaid applicants, and under current law is specifically protected under R.C. 5805.03. As a beneficiary, Charlotte has no rights under the trust, merely privileges at the discretion of the trustee, and therefore no legal basis to sue the trustee to compel distributions. Without the ability to compel distributions, such assets are not available to her and cannot be view as her resource for purposes of Medicaid eligibility.

Public policy at both the national and state level supports the creation of SNTs in order to provide a safe vehicle by which parents may ensure that the inheritance they leave for their children, including those with disabilities, may be enjoyed and not consumed on mere subsistence. A decision upholding the Fifth District’s findings will result in far greater certainty for practitioners who draft, and parents who execute, SNTs in full compliance with existing law.

Respectfully submitted,

Janet L. Lowder by Eugene Whetzel per authorization

Janet L. Lowder (0059889)

(COUNSEL OF RECORD)

David A. Myers (0018137) of

HICKMAN & LOWDER CO., L.P.A.

1300 East Ninth Street, Suite 1020

Cleveland, OH 44114

(216) 861-0360

(216) 861-3113 Fax

Richard E. Davis by Eugene Whetzel per authorization

Richard E. Davis (0019229)

Jennifer L. Lile, (0072316) of

KRUGLIAK, WILKINS, GRIFFITHS

& DOUGHERTY CO., L.P.A.

4775 Munson Street, N.W./P.O. Box 36963

Canton, Ohio 44735-6963

(330) 497-0700

(330) 497-4020 Fax

COUNSELS FOR AMICUS CURIAE OHIO STATE BAR
ASSOCIATION, NATIONAL ACADEMY OF ELDER
LAW ATTORNEYS, AND DOWN SYNDROME
ASSOCIATION OF CENTRAL OHIO

Eugene P. Whetzel

Eugene P. Whetzel (0013216)

General Counsel

OHIO STATE BAR ASSOCIATION

1700 Lake Shore Drive

Columbus, OH 43204

614/487-2050

614/487-1008 Fax

CO-COUNSEL FOR AMICUS CURIAE OHIO STATE
BAR ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio State Bar Association, National Academy of Elder Law Attorneys, and Down Syndrome Association of Central Ohio, was served via regular U.S. mail on this 31st day of January, 2007, upon the following counsel:

Robert Becker (0010188)
Licking County Prosecutor
Rachel O. Shipley (0074934)
(COUNSEL OF RECORD)
Assistant Prosecutor
20 South Second Street
Newark, Ohio 43055
740/670-5255
740/670-5241 Fax
COUNSELS FOR DEFENDANT-
APPELLANT, LICKING COUNTY
DEPARTMENT OF JOB AND FAMILY
SERVICES

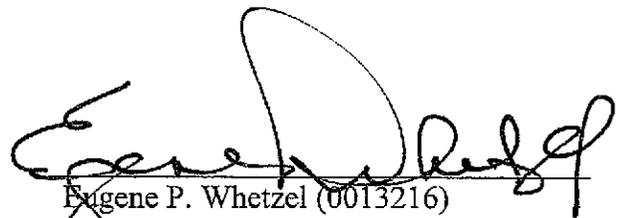
William J. Browning (0010856)
(COUNSEL OF RECORD)
Browning & Meyer Co., L.P.A.
8101 North High Street
Columbus, Ohio 43235
614/471-0085
614/430-8132 Fax

Dennis R. Newman (0023351)
Jeffrey A. Stankunas (0072438)
Mark H. Troutman (0076390)
Isaac, Brant, Ledman & Teetor, L.L.P.
250 East Broad Street, Suite 900
Columbus, Ohio 43215
614/221-2121
614/365-9516 Fax
COUNSELS FOR PLAINTIFF-APPELLEE,
LORETTA PACK

Carolyn J. Carnes (0066756)
(COUNSEL OF RECORD)
Morrow, Gordon & Byrd, Ltd.
33 West Main Street

P.O. Box 4190
Newark, Ohio 43058
740/345-9611
740/349-9816 Fax
GUARDIAN AD LITEM FOR DEFENDANT-
APPELLEE, CHARLOTTE OSBORN

Mark Dann
ATTORNEY GENERAL OF OHIO
Stephen P. Carney (0063460)
State Solicitor
(COUNSEL OF RECORD)
scarney@ag.state.oh.us
Diane Richards Brey (0040328)
Deputy Solicitor
dbrey@ag.state.oh.us
Ara Mekhjian (0068800)
Assistant Solicitor
amekhjian@ag.state.oh.us
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980 (telephone)
(614) 466-5087 (facsimile)
COUNSELS FOR AMICUS CURIAE, OHIO
ATTORNEY GENERAL MARK DANN



Eugene P. Whetzel (0013216)
General Counsel
OHIO STATE BAR ASSOCIATION