

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.

Discretionary Appeal
Case No.: 2006-1207

Certified Conflict
Case No. 2006-1343

On Appeal from the
Licking County Court of Appeals
Fifth Appellate District
Case No. 05 CA 83

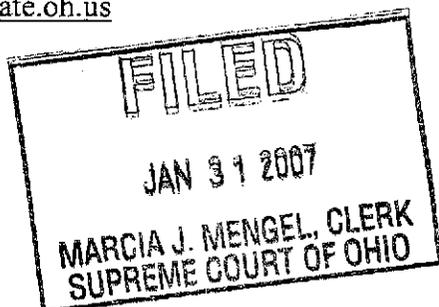
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INTRODUCTION

This action was filed by Loretta Pack, Trustee (the “Trustee”) of the Maebelle W. Osborn Trust dated October 7, 1987 (the “Trust”), to determine that the third party Trust for which she serves as Trustee satisfies the requirements of R.C. 5111.151(G)(4) so that it does not constitute a countable resource under Medicaid regulations. In addition, the Trustee asserted a second claim to reform the Trust to be consistent with the Grantor’s intentions in the event that the Trust was not found to conform with R.C. 5111.151(G)(4).

This is a trust case. This is not a Medicaid case or Medicaid appeal. It does have Medicaid consequences to Charlotte Osborn, who is one of three beneficiaries of the Trust.

The Trust complied with the law as it existed at the time the Trust was executed and at the time of Grantor’s death; it was not a countable resource under Medicaid rules. The Trust also complies with current law and is not a countable resource today under R.C. 5111.151, which gives increased precision to the Medicaid process, and which codified Ohio Supreme Court decisions and Medicaid rules. Courts are required to interpret and reform trusts in accordance with common law and the newly-enacted Uniform Trust Code, and as recognized by R.C. 5111.151(G)(4)(e). This Court should determine that the Maebelle W. Osborn Trust is not a countable resource for Charlotte Osborn under Medicaid rules because the Trust assets are not available to her.

STATEMENT OF THE CASE AND FACTS

A. The Maebelle W. Osborn Trust

Maebelle W. Osborn was the mother of three children—Loretta Pack, Charlotte Osborn, and Arthur Osborn. See Complaint for Declaratory Judgment, ¶¶ 4, 10; Supplement, pp. 2-3.

She executed a third party Trust in 1987 naming her three children as its beneficiaries. See Maebelle W. Osborn Trust, Supplement, p. 8. The Trust provided the terms by which her assets would be distributed and used following her death. It reflected the fact that her funds were limited and insufficient to provide for all of the needs of her children, one of whom was physically and mentally disabled.

The relevant portion of the Trust provides 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. 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 the supplemental needs over and above those met by entitlement benefits.

Termination of Trust

(b) Upon the death of my daughter, CHARLOTTE OSBORN, or MAEBELLE W. OSBORN, whichever is later, this trust shall terminate, and the entire trust estate as it shall then exist, both principal and income, shall be paid and distributed to my surviving children, ARTHUR ELWOOD OSBORN and LORETTA PACK or their heirs at law.

Maebelle W. Osborn Trust Agreement; Supplement, p. 9.

Grantor's intention is clearly stated in the three instructions that she gave to the Trustee:

- (1) distributions and expenditures from the Trust were to be made "as the Trustee in her sole discretion, shall determine;"
- (2) distributions were to be for the benefit of her children "only for purposes other than providing food, clothing, or shelter;" and,

- (3) distributions were to meet the supplemental needs of her children “over and above those met by entitlement benefits.”

Charlotte Osborn, the 61 year-old daughter of Maebelle Osborn, is both physically and mentally disabled today, just as she was when her mother created this Trust. See Complaint at 9; Supplement, p. 3. Charlotte lived with her brother, now deceased, and sister-in-law since her mother’s death in 1992. See *id.* at 4, 10; Supplement, pp. 2-3. Charlotte Osborn’s health has declined in the past several years, and her care has become more difficult due to the aging and deteriorating health of her current caretaker. See *id.* at 12, 13; Supplement, pp. 3-4.¹ As a result, Charlotte Osborn needs increased support and services, and she will be dependent upon such support and services for the rest of her life. *Id.* at 14, 15; Supplement, p. 4.

The Trust language used in 1987 stated Maebelle W. Osborn’s instructions that the Trust should not be used to provide “food, clothing or shelter” for her children. The Trust’s proceeds should not be construed as countable resources for the Trust beneficiaries for purposes of Medicaid resource limitations. Applicable rules regarding countable resources from trusts have changed at least eight times² since Maebelle Osborn created her Trust. Nevertheless, Maebelle Osborn’s intent is clear from the Trust language. Her Trust was not to be used for “food, clothing and shelter” for her children. It was to be distributed as determined in the sole discretion of the Trustee and only to meet supplemental needs over and above those met by entitlement benefits.

¹ In November 2006, one of Charlotte Osborn’s caretakers, Arthur Osborn, passed away. This exacerbates Charlotte Osborn’s need for immediate support services.

² Ohio Adm. Code 5101:1-39-27.1 was revised on all of the following dates: October 1, 1989; December 16, 1989; October 1, 1991; September 1, 1992; February 1, 1995; April 27, 1995; July 1, 1996; and, November 7, 2002.

B. The Litigation Below

The Maebelle W. Osborn Trust was the subject of two different cases. *Pack v. Osborn* is the case before this Court. See Licking Co. Case No. 04 CV 589. *Osborn v. Ohio Dep't of Job and Family Servs.* is an administrative appeal that was stayed by the Common Pleas Court, and it is not before this Court. Licking Co. Case No. 04 CV 140. The case before this Court arises from the declaratory judgment action filed by the Trustee for the Court's direction regarding her fiduciary duties. *Id.* In the administrative appeal, which was stayed, Charlotte Osborn appealed a denial of Medicaid benefits. See Stay of Administrative Appeal; Supplement, p. 15. The differences between these cases are important and described below.

1. The Trustee's Declaratory Judgment Action

The Trustee filed her action for a declaratory judgment on the same day that Charlotte Osborn filed her Medicaid application. See Complaint; Supplement, p. 1. In her declaratory judgment action, the Trustee sought direction on the proper administration of the Trust—specifically, a declaration that the Trust was not available to Charlotte Osborn, and that it did not constitute a countable resource. *Id.* In addition, the Trustee made an alternative request that the Court reform the Trust to comply with the Grantor's intentions in the event that the Court found the language was not sufficient to achieve her stated intent. *Id.*

It is significant that the parties to the two separate cases are not the same. For the convenience of the Court, the parties in each case are identified below:

**The Declaratory Judgment
(Now before this Court)**

**The R.C. Chapter 119 Appeal
(Stayed Below)**

| | |
|--|---|
| 1. Loretta Pack, Trustee of the Maebelle W. Osborn Trust | 1. Charlotte Osborn, Medicaid applicant |
| 2. Estate of Arthur Pack, beneficiary of Maebelle Osborn Trust | 2. Licking County Department of Job and Family Services, decisionmaker on Medicaid benefits |
| 3. Charlotte Osborn, beneficiary of Maebelle Osborn Trust by her <i>guardian ad litem</i> Carolyn Carnes | |
| 4. Loretta Pack, as beneficiary of Maebelle Osborn Trust | |
| 5. Licking County Department of Job and Family Services, decisionmaker on the application for Medicaid benefits filed by Charlotte Osborn, an incompetent. | |

As shown in the charts above, the parties to Loretta Pack’s declaratory judgment action included all of the parties who have a legal interest in the Maebelle W. Osborn Trust so that each would be bound by the Court’s Order. On the other hand, the parties to the Medicaid eligibility case are limited to Charlotte Osborn, a Medicaid applicant, and the Licking County Department of Job and Family Services. Neither the Trustee nor the beneficiaries of the Trust are a part of the Chapter 119 appeal, and none of them will or could be bound by the administrative proceedings or the appeal.

2. Charlotte Osborn’s Chapter 119 Appeal for Medicaid was Stayed below

The LCDJFS denied Charlotte Osborn’s Medicaid application on May 7, 2004 on the basis that she “exceeds program eligibility limits.” See Medical Denial Notice; Supplement, p. 17. The Licking County Common Pleas Court stayed Charlotte Osborn’s appeal of the administrative decision, and her appeal is not before this Court. See Stay of Administrative

Appeal; Supplement, p. 15. Charlotte Osborn's interest in the Trust as a Trust beneficiary is before this Court, but she is not here as a Medicaid applicant or as an administrative appellant.

3. The Declaratory Judgment case is before this Court

On appeal, the Fifth District Court of Appeals reversed the trial court's decision that the Maebelle W. Osborn Trust was a countable resource, interpreting the Maebelle W. Osborn Trust according to her intentions as she stated in the Trust. See *Pack v. Osborn* (5th Dist.), 2006 Ohio 2253, at ¶ 34. The Fifth District found that the trial court properly exercised jurisdiction in the declaratory judgment action and reversed the trial Court. *Id.* It applied the law in effect at the time that the Trust was created. *Id.* at 27-28. The Fifth District determined that the distribution of the principal and accumulated income is left to the discretion of the Trustee. *Id.* at 34. It found that the plain meaning of the Grantor's restrictive language is that the Trust was to provide Charlotte Osborn "with a source of supplemental support that would not jeopardize her access to basic assistance from Medicaid." *Id.*

ARGUMENT

PLAINTIFF/APPELLEE LORETTA PACK'S RESPONSE TO PROPOSITION OF LAW NO. 1: COURTS HAVE JURISDICTION OVER DECLARATORY JUDGMENT ACTIONS INVOLVING TRUSTS.

This is a trust case. Charlotte Osborn's Medicaid eligibility is not before this Court. This Court should determine that a trustee may seek a declaratory judgment from a court to interpret a trust and determine whether the trust is a countable resource. Loretta Pack, the Trustee, has a fiduciary obligation to each of the beneficiaries to properly administer this Trust. Separate from this case, Charlotte Osborn must still proceed with her own Medicaid benefits appeal. This action does not resolve Charlotte Osborn's right to Medicaid benefits. That appeal is stayed below. This action was limited to a declaration as to the character of the Trust as a countable resource and whether jurisdiction for such actions exists in Ohio law.

A. The Trustee may seek declaratory judgment for a court's direction to assist her with administration of the Maebelle W. Osborn Trust.

The Trustee has both the right and the obligation to seek a declaratory judgment action under R.C. 2101.24(B)(1)(b) and as recognized by R.C. 5111.151 (G)(4)(e) to determine that her administration of the Trust is consistent with the Grantor's intent as stated in the Trust instrument. R.C. 2101.24 vests concurrent jurisdiction with the probate court and court of common pleas. Similarly, R.C. 5111.151 (G)(4)(e) provides that trusts are not countable resources if a person obtains a judgment from a court of competent jurisdiction that the trust proceeds should not be used for "medical care, care, comfort, maintenance, welfare, or general well being of the applicant." Ohio has now adopted the Ohio Trust Code, which specifically authorizes a court to "intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person as provided by law." R.C. 5802.01(A). Jurisdiction is afforded

to a court of common pleas for trust interpretation. R.C. 5111.151 (G)(4)(e) and R.C. 5802.03 explicitly recognize such an action.

R.C. 2101.24(B)(1)(b) provides that the probate court and the court of common pleas have concurrent jurisdiction over trust matters. Specifically, R.C. 2101.24(B)(1)(b) states:

- (1) The probate court has concurrent jurisdiction with, and the same powers at law and equity as, the general division of the court of common pleas to issue writs and orders, and to hear and determine actions as follows:

* * *

- (b) Any action that involves an inter vivos trust; a trust created pursuant to section 5815.28 of the Revised Code; a charitable trust or foundation; subject to divisions (A)(1)(u) and (z) of this section, a power of attorney, including, but not limited to, a durable power of attorney; the medical treatment of a competent adult; or a writ of habeas corpus.

Such jurisdiction is also described in R.C. 5802.03, which provides:

The probate division of the court of common pleas has concurrent jurisdiction with, and the same powers at law and in equity as, the general division of the court of common pleas to issue writs and orders and to hear and determine any action that involves an inter vivos trust.

Modification of a trust is expressly permitted under R.C. 5804.12, which provides:

- (A) The court may modify the administrative or dispositive terms of a trust or terminate the trust if because of circumstances not anticipated by the settler modification or termination will further the purposes of the trust. To the extent practicable, the court shall make the modification in accordance with the settlor's probable intention.

Most importantly, R.C. 5111.151 (G)(4)(e) anticipates that courts will determine whether a particular trust is a countable resource. In subsection (G)(4), the statute states that:

- (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:

* * *

- (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.

Thus, the General Assembly has specifically recognized that courts have jurisdiction in these matters. There is no reason that she should not be afforded this statutory right just because Charlotte Osborn has separately applied for Medicaid. The Trustee is an “interested person” described in R.C. 5802.01(A). She is a person who requires judicial action to define her fiduciary duties.

The Trustee sought the Court’s interpretation of the Maebelle W. Osborn Trust. She was entitled to do so. Indeed, she needed to do so to determine her fiduciary responsibilities not only to Charlotte Osborn but to the other two beneficiaries as well. Without a Court’s interpretation of the Trust, the Trustee has two options:

- use the Trust corpus to pay for Charlotte Osborn’s medical care until all the money is gone. This would be to the detriment of the remaining beneficiaries and contrary to the terms of the Trust; or,
- refuse to pay for Charlotte Osborn’s medical care, even though Medicaid could determine that the Trust was a countable resource in the Medicaid application proceeding.

This Court should affirm the Trustee’s right to obtain judicial guidance when faced with such competing interests.

Although ODJFS lacks the authority to adjudicate any of Trustee Loretta Pack’s fiduciary duties, county departments of job and family services and ODJFS have responsibilities in the Medicaid application and eligibility system. See R.C. 5111.01 (ODJFS) and R.C. 329.04 (county departments of job and family services). However, trust cases, especially trust

interpretation cases, are outside their authority. This is the way it should be. Trust interpretation and reformation should be done by courts, not by non-attorney hearing officers employed by ODJFS. While the LCDJFS and ODJFS interpret eligibility rules, trust interpretation issues are legal issues that belong to the courts independent of the Medicaid application process. Non-lawyers are not allowed to draft trusts. See *Cleveland Bar Ass'n v. Sharp Estate Servs., Inc.*, 2005 Ohio 6267, at ¶ 17 (discipline case concerned with unlicensed attorneys' involvement in trusts in Ohio). Likewise, they should not be allowed to interpret them.

B. ODJFS retains authority over Medicaid eligibility so that the administrative appeal process is unaffected.

This case does not involve R.C. Ch. 119. It is not a 119 appeal. Nothing is taken away from ODJFS's authority under its Medicaid rules by the fact that a court has jurisdiction to interpret or reform the Maebelle W. Osborn Trust. The Attorney General's fears that R.C. Ch. 119's application will be eroded are exaggerated. Attorney General's *Amicus* Brief, pp. 2, 11. The State's argument notwithstanding, the Trustee is not a party to a Medicaid eligibility review. The Trustee is not bound by the agency decisions. The General Assembly, as discussed above, has provided that a trustee may seek the Court's direction in trust matters, and this Court should affirm the Trustee's access to the courts.

The Trustee is exposed to competing claims if she is not permitted to seek a Court's guidance concerning competing interest in the Trust. Neither the Trustee nor the Trust beneficiaries can become a party to Charlotte Osborn's administrative appeal, so none of them can be bound by the result. On the other hand, the Trustee can be sued by the remaining beneficiaries for distributing Trust proceeds for Charlotte Osborn's benefit contrary to the Grantor's intent, even if LCDJFS determines that the Trust is a countable resource in the disability case. Likewise, if the beneficiaries are successful, the Trustee could be enjoined from

paying for Charlotte Osborn's medical care, even though LCDJFS separately determined that the Trust was a countable resource. Here, however, the Trustee joined all interested parties so that each has an opportunity to be heard in the same lawsuit, and so each will be bound by the Court's decision to the character of the Trust.

ODJFS retains authority to determine the Medicaid eligibility of Charlotte Osborn, even if a Court finds that the Maebelle W. Osborn Trust proceeds are unavailable to Charlotte Osborn. Eligibility issues go beyond the characterization of the Maebelle W. Osborn Trust as a countable resource or not. Examples of other potential eligibility issues could include:

- her health under applicable standards. See Ohio Adm. Code Ch. 5101:1-38;
- her financial resources (irrespective of the Maebelle W. Osborn Trust) in excess of the \$1,500 resource limitations. *Id.*; or
- her receipt of funds or gifts from a third party.

As is evident, a host of factors remain for the attention and consideration of the LCDJFS and ODJFS in the determination of Charlotte Osborn's Medicaid eligibility. The agencies, however, should not be allowed to ignore the court order that determined the character of the Trust or the duties of the Trustee under that Trust.

Still, the Attorney General's Office erroneously characterizes the Trustee's declaratory judgment action as an "end-round" the administrative appeals process. If Charlotte Osborn is eligible after this Trust is reviewed, she is in fact and in law eligible for benefits. No end-round has occurred. If Charlotte Osborn had only chronic carpal tunnel syndrome rather than her actual physical and mental disabilities, the LCDJFS could still deny the application because the hypothetical carpal tunnel syndrome likely does not qualify her for Medicaid. See Ohio Admin. Code Ch. 5101:1-38. LCDJFS will continue to have responsibility for making the final

eligibility determination regardless of the Court's decision in this case. However, by statute, it will be bound by a court's determination whether the Trust is a countable resource. This is envisioned in R.C. 5111.151(G)(4) (e). Trustees are entitled to a Court's guidance, and they are authorized by statute to seek it. *Id.*; R.C. 5802.01(A-C). The Court's guidance is not an end-round. In fact, Charlotte Osborn, the Medicaid applicant, filed her application for benefits with ODJFS at the same time that the Trustee filed her action for a declaratory judgment.

Likewise, the Attorney General's argument that Loretta Pack serves as a "proxy" for Charlotte Osborn misconstrues and demeans her role as the Trustee of the Maebelle W. Osborn Trust. In law and fact, Loretta Pack is a Trustee with both fiduciary obligations and liability exposure if she acts outside of her authority. If she were a proxy or an agent, her duties would run only to Charlotte Osborn. As Trustee, her fiduciary duties run to each of the three Trust beneficiaries. R.C. 5808.02; R.C. 5808.03; R.C. 5808.04. Although the Attorney General claims that ODJFS should interpret the Maebelle W. Osborn Trust, the ODJFS decision would neither bind nor instruct the Trustee. ODJFS's decision would not protect her from suit by another beneficiary who asserted that she inappropriately used Trust funds to pay for Charlotte Osborn's care, contrary to the directions of the Grantor.

The Attorney General's arguments have drastic potential policy implications. He suggests that Ohio citizens can be charged with the cost of services needed by their adult, disabled children, and that such charges can be imposed upon trust assets after the death of the parent, even though the parent intended and stated otherwise in the trust. He also infers that Maebelle W. Osborn was obligated to provide for Charlotte Osborn. This is not true. Maebelle W. Osborn had no obligation to provide for Charlotte Osborn. She was not obligated to make any provision for her. She was fully entitled to make such provisions, if any, that she

believed to be appropriate with her limited resources. Contrary to the Attorney General's arguments, public policy in Ohio and the express provisions of R.C. 5111.151(G)(4) support testamentary freedom so that individuals can direct the use of their assets as they choose. *Scott v. Bank One Trust Co.* (1991), 62 Ohio St.3d 39, 47. Parents are not responsible for adult children whether they are unable to take care of themselves or not. *Young v. Ohio Dep't of Human Servs.* (1996), 76 Ohio St.3d 547, 549. They should not be deemed responsible for them after their own death beyond the provisions, if any, which are made in their wills and trusts.

Finally, the Attorney General alludes to "forum shopping." "Forum shopping" will not sweep over the State. As reviewed above, Ohio statutes expressly authorize "interested persons" to invoke the jurisdiction of the courts. The court below was not asked to declare Charlotte Osborn eligible for Medicaid. It was asked to declare that the Trust was not a countable resource. Indeed, the Trustee sought relief from the same court that would ultimately consider the 119 Appeal brought by Charlotte Osborn. This was not forum shopping. As such, this Court should affirm a trustee's right to seek the direction and guidance of the court regarding that administration.

PLAINTIFF/APPELLEE LORETTA PACK'S RESPONSE TO PROPOSITION OF LAW NO. 2: THIS COURT SHOULD LOOK TO THE GRANTOR'S INTENT AS EXPRESSED IN HER TRUST TO DETERMINE WHETHER THE TRUST IS A COUNTABLE RESOURCE UNDER STATE LAW.

A. Maebelle W. Osborn's intent should be determined using the law existing at the time that she created her Trust.

Maebelle W. Osborn's Trust is a third party trust with three beneficiaries. The Trust does not contain "ascertainable standards." It is a discretionary trust. See *Maebelle W. Osborn Trust; Supplement*, p. 8. This Court ruled when deciding to enforce spendthrift clauses in Ohio that a "beneficiary owns no greater interest in the trust property than the settlor has given to him."

Scott at 48. In deciding *Scott*, this Court acknowledged and affirmed that “as a matter of public policy, it is desirable for property owners to have, within reasonable bounds, the freedom to do as they choose with their own property.” *Id.* at 47, 49. *Scott* is significant in this matter because it acknowledges the public policy of allowing people the right to dispose of their property as they see fit. The policy is echoed in R.C. 5111.151(G)(4). The right to dispose of your property on “your terms or on your conditions” constitutes testamentary freedom.

This Court more recently stated that:

“It 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. Neither party to this dispute contends that George Albright was under any obligation to provide for the support of his adult child. Had Albright not chosen to establish the trust and name his daughter beneficiary, there would be no question as to her eligibility to receive Medicaid benefits.”

Young at 549. The Court reached its conclusion in *Young* by affirming that the beneficiary’s interest in the trust corpus is at most equitable, not legal. *Id.* at 551. Importantly, the Court recognized that the beneficiary had no control over any distributions made by the Trustee because the trust language gave sole discretion to the beneficiary to make that determination. *Id.* Contrary to the assertions of the county prosecutor, there were no “ascertainable standards” in the trust in *Young*, nor are there in the Trust before the Court in this case. The Court in *Young* concluded that the trust was not a countable resource for Medicaid eligibility purposes. As determined in *Young*, discretionary trusts are not countable resources for beneficiaries. See also *Carnahan v. Ohio Dep’t of Human Servs.* (11th Dist. 2000), 139 Ohio App.3d 214, 220 (Trustee had “absolute discretion” to make disbursements, but only when not otherwise paid for by public benefits, *e.g.*, a “discretionary trust”).

These cases are distinguishable from earlier cases where the grantor gave the trustee absolute discretion for disbursements related to the beneficiaries’ “care, comfort, maintenance,

and well-being.” *Bureau of Support v. Kreitzer* (1968), 16 Ohio St.2d 147. The *Kreitzer* trust imposed definite standards for the “care, comfort, maintenance and well-being of the beneficiary” on the trustee in determining how the fiduciary’s discretion could be properly exercised. *Id.* **Error! Bookmark not defined.** at 150; see also *Wagner v. Ohio Dep’t of Human Servs.* (5th Dist. Ct. App. Sept. 25, 2000), 2000 WL 1459599, at *2; *Metz v. Ohio Dept. of Human Servs.* (6th Dist. 2001), 145 Ohio App.3d 304, 315. In *Kreitzer*, this Court found that trust assets should be paid to a beneficiary for medical care where definite standards were used in the trust. *Kreitzer* at 150. Unlike in *Kreitzer*, Maebelle W. Osborn’s Trust did not impose definite standards on the Trustee. It is a discretionary trust without standards, similar to the trust in *Young*.

Young, like *Scott*, stands for the proposition that the trust is not a countable resource where the beneficiary of the trust has no “legal right” to force a distribution. *Young* at 551. Charlotte Osborn has no legal right to a distribution from the Trust. The Trustee’s declaratory judgment action was to obtain an order that affirmed that she had no duty as Trustee to make that distribution. The plain meaning of the Trust read along with *Young* makes clear that Maebelle W. Osborn intended that the Trust she created for her children be used in the Trustee’s sole discretion only to provide for needs other than “food, clothing or shelter,” and to meet their “supplemental needs over and beyond entitlement benefits.” As in *Young*, Maebelle W. Osborn was not obligated to provide anything from her Trust for her adult children. She provided only for those needs she felt to be important and within her limited means.

B. The Maebelle W. Osborn Trust reflected Ohio Law at the time of its execution.

The Fifth District Court of Appeals properly held that the Maebelle Osborn Trust should be construed according to the law in place at the time of the Trust’s creation. *Pack* at 24.

Indeed, the terms of an *inter vivos* trust “should be governed by law existing at the time of its creation, absent a contrary intent within the instrument itself.” *Ohio Citizens Bank v. Mills* (1989), 45 Ohio St.3d 153, paragraph 2 of the syllabus. “[A]n *inter vivos* trust speaks from the date of its creation—not the date upon which its assets are distributed.” *Id.* Thus, the Maebelle W. Osborn Trust should be reviewed under the law existing at the time that she executed the Trust in order to ascertain her intent.

This Court has long held that the intent of the grantor should be determined by the Court in light of the law existing when the trust was created. See *Ohio Citizens Bank v. Mills* (1989), 45 Ohio St.3d 153, 156 (overruled in part but on unrelated grounds). As stated in *Mills*, the intent of a grantor will be ascertained and given effect wherever legally possible. *Id.* at 155; *Townsend’s Executor v. Townsend* (1874), 25 Ohio St. 477; *Jones v. Lloyd* (1878), 33 Ohio St. 527. Thus, Maebelle W. Osborn’s Trust should be reviewed using the law as it existed when it was created in 1987.

Maebelle W. Osborn executed the Trust for her children under the same rules that existed when the *Young* trust was created. She is presumed to have known that she had no legal obligation to support her adult children. This is the law then and now.

The Fifth District Court of Appeals found four cases³ in conflict with its decision in this case. See Certification of Conflict. The perceived conflict, however, is illusory. Each of those cases dealt with administrative appeals under R.C. 119.12 and R.C. 5101.35. None of the four cases involved a declaratory judgment action brought by a trustee to interpret or reform a trust.

³ *Prior v. Ohio Dep’t of Human Servs.* (10th Dist. 1997), 123 Ohio App.3d 381, 383, n.1; *Martin v. Ohio Dep’t of Human Servs.* (2nd Dist. 1998), 130 Ohio App.3d 512, 523-24; *Metz v. Ohio Dep’t of Human Servs.* (6th Dist. 2001), 145 Ohio App.3d 304, 315; *Miller v. Ohio Dep’t of Human Servs.* (8th Dist. 1995), 105 Ohio App.3d 539, 543.

This case involves an action for a declaratory judgment of the Trustee's fiduciary duties and obligations under the trust, and specifically for a declaration that the Trust was not a countable resource. It is not an administrative appeal. The Trustee is not a party to an administrative appeal. The R.C. Chapter 119 appeal brought by a trust beneficiary, not the trustee, was stayed at the trial court level. Trust interpretation and reformation, when necessary, belong in this proceeding and not a 119 appeal.

In the "conflict cases," the Medicaid applicants appealed a Medicaid denial of benefits. Here, the court did not review a benefits denial; it reviewed the Maebelle Osborn Trust for trust interpretation, or, alternatively, trust reformation. *Pack* at 34. In the cases claimed to be in conflict, the Courts of Appeal could not consider trust reformation as an option because the administrative appeals process is not designed to reform trusts. Courts reform trusts. Administrative agencies do not reform trusts, nor should they. See R.C. 2101.24(B)(1)(b). In the cases cited as conflicts, the appellate courts were limited to reviewing the record from the county agency and never considered interpretation or reformation. Accordingly, there is no conflict with these cases. As a result, this Court should construe Maebelle W. Osborn's intent under the law existing when it was created.

C. The Maebelle W. Osborn Trust satisfies R.C. 5111.151(G)(4)(b) because it contains a clear statement that the Trust should only be used for needs in addition to those provided by entitlement benefits.

The Maebelle W. Osborn Trust contains a clear statement that prevents her Trust from being used for Medicaid services. The Trust language states that her Trust should only be used in the Trustee's sole discretion "and only for purposes other than providing food, clothing or shelter that is to be used only to meet the supplemental needs over and above those met by entitlement benefits." See Maebelle W. Osborn Trust; Supplement, p. 8. This statement of

intent was sufficient in 1987 when the Trust was drafted and executed. It is clear under *Young*. *Id.* at 551. It is also clear under R.C. 5111.151(G)(4) and the newly-enacted Uniform Trust Code. Ohio law is consistent. The Trustee has no obligation to pay for the needs of Charlotte Osborn except in her sole discretion and as limited by the Grantor's instruction. Conversely, Charlotte Osborn has no legal power to use or dispose of the Trust contrary to the limiting language in the Trust.

This Trust must be interpreted in accordance with Maebelle W. Osborn's intent. The trust language from the *Young* case is substantively the same as used in the Maebelle W. Osborn Trust. The Grantor intended to create a discretionary trust that could not be used to pay expenses that public benefits could cover. As such, it satisfied the current version of the former administrative rule, now codified as R.C. 5111.151(G)(4)(b).

The relevant portions of R.C. 5111.151(G) provide the following:

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

* * *

(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.

Maebelle W. Osborn's instructions that the Trust was to be used in the Trustee's "sole discretion" and "only for purposes other than providing food, clothing or shelter," and "only to meet supplemental need" beyond entitlement benefits constitutes a clear statement of her intention in 1987. It is also the "clear statement" that is called for under R.C. 5111.151(G)(4)(b).

She intended that the Trust would be used only to meet supplemental needs over and above those provided by entitlement benefits. No disbursement could be made except as determined by the Trustee in her sole discretion. She envisioned supplementing the benefits otherwise available to her children. Her intent was clear—her Trust was not to be used for items that could be covered by public assistance.

R.C. 5111.151(G)(3) does not make the Maebelle W. Osborn Trust a countable resource.

R.C. 5111.151(G)(3) provides:

(G)(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 the following types of provisions:

- (a) A provision that prohibits the trustee from making payments that would supplant or replace Medicaid or any other public assistance;
- (b) A provision that prohibits the trustee from making payments that would impact or have an effect on the applicant 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.

None of the enumerated provisions are contained in the Maebelle W. Osborn Trust. The Trust does not "prohibit" payments. The Trust provides that it can only be used to meet supplemental needs over and above those met by entitlement benefits. Indeed, the Trust contains a statement of intent consistent with the general language of R.C. 5111.151(G)(4)(b). To the extent that R.C. 5111.151(G)(3) and 5111.151(G)(4) are in conflict, subsection (G)(3) must yield to subsection (G)(4) in order that a just and reasonable result be obtained and a result feasible of execution be achieved as required under R.C. 1.47. R.C. 1.47(B) and R.C. 1.49. Therefore, this Court should

hold that R.C. 5111.151(G)(4)(b) provides that the Maebelle W. Osborn Trust is not a countable resource for its beneficiaries.

D. Alternatively, the Maebelle W. Osborn Trust should be reformed to satisfy the provisions of R.C. 5111.151(G)(4)(b).

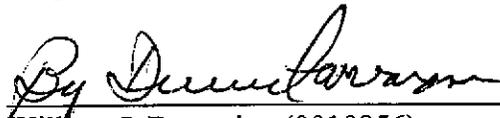
In light of the decisions made by the courts below, the Trustee's alternative prayer for reformation was not addressed. However, this Court should order the reformation of the Trust, if necessary, to conform with Maebelle W. Osborn's intent. The newly enacted Ohio Trust Code explicitly allows for the reformation of trusts. R.C. 5804.10 *et seq.* Under R.C. 5804.12(A) the Court may reform the terms of a trust if modification "will further the purposes of the Trust." Under 5804.15, the court can reform the terms of a trust, even if they are unambiguous to conform the terms to the Settlor's intention "if it is proved by clear and convincing evidence that both the Settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement."

The use of "rigid and formalistic rules" was rejected by the Court in *Young* where the use of one word was argued to be a "controlling word." *Young* at 551. The language used in the Maebelle W. Osborn Trust makes her intentions clear and convincing. If, however, its expression was inadequate, the language should be reformed. Courts have the authority to modify or reform the Trust so that it satisfies R.C. 5111.151(G)(4)(b), consistent with her clear intention. In the event that her words are determined not to satisfy the test in R.C. 5111.151(G)(4)(b), the Trust should be reformed because she clearly stated her intention to provide benefits that were limited to meeting "supplemental needs over and above entitlement benefits."

CONCLUSION

For all of the foregoing reasons, Trustee Loretta Pack requests that this Court affirm the decision of the Fifth District Court of Appeals and declare that the Maebelle W. Osborn Trust is not a countable resource under R.C. Ch. 5111. Alternatively, this Court should order that the Trust be reformed to satisfy R.C. 5111.151(G)(4)(b).

Respectfully submitted,



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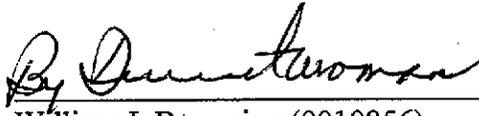
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