

In the
Supreme Court of Ohio

LORETTA PACK, : Case Nos. 06-1207
: 06-1343
Plaintiff-Appellee, :
: On Appeal from the
v. : Licking County
: Court of Appeals,
CHARLOTTE OSBORN, : Fifth Appellate District
: :
Defendant-Appellee, : Court of Appeals Case
: No. 05 CA 83
LICKING COUNTY DEPARTMENT OF :
JOB AND FAMILY SERVICES, :
: :
Defendant-Appellant. :

**REPLY BRIEF OF *AMICUS CURIAE*
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IN SUPPORT OF DEFENDANT-APPELLANT LICKING COUNTY DEPARTMENT OF
JOB AND FAMILY SERVICES**

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INTRODUCTION

As our opening *amicus* brief explained, this case involves a trustee's attempt to improperly use a declaratory judgment action to control the outcome of an administrative agency decision—here, a decision about whether the trust's beneficiary is eligible for Medicaid. Specifically, Loretta Pack, trustee of the Maebelle W. Osborn Trust (the "Trust"), filed a declaratory judgment action challenging a decision that Charlotte Osborn, a Trust beneficiary, was ineligible for Medicaid. The Licking County Department of Job and Family Services ("Licking JFS") made the initial decision that Osborn was ineligible for Medicaid, and the Ohio Department of Job and Family Services ("ODJFS") upheld that decision in an administrative appeal. As our *amicus* further explained, the administrative appeal is the only proper forum for resolving Osborn's Medicaid eligibility, and common pleas courts do not have jurisdiction to hear declaratory judgment actions that are aimed at controlling Medicaid eligibility decisions. That is true if a plaintiff seeks a conclusory judgment that a given applicant is entitled to Medicaid, and it is equally true if a plaintiff seeks a judgment regarding one of the factors that an agency considers, such as a judgment that a given asset is not "countable" in assessing financial need.

Pack now seeks to avoid defending the proposition that declaratory judgment can be used to control administrative decisions, so she instead tries to insist that "this is a trust case" that "does not resolve Charlotte Osborn's right to Medicaid benefits." Pack Br. at 7. While this attempt to recast the case is understandable, it fails for several reasons, as explained below. Most important, Pack's attempted use of declaratory judgment fails regardless of whether the judgment would control the Medicaid outcome. If the judgment would control, then such a bypass of the administrative scheme is improper. And if the judgment would not tip the scales in the Medicaid appeal, then the case should be dismissed as irrelevant, as Pack has never demonstrated that the case involves any controversy or meaning beyond its Medicaid impact.

As it happens, Pack’s case fits the first alternative, as it is indeed an improper attempt to control the administrative decision regarding Medicaid, and everything about the case demonstrates that Pack understood it as such all along. Pack told the Fifth District that her declaratory judgment involved “a trust beneficiary’s eligibility for Medicaid benefits and services.” Indeed, Pack’s attorney in this case represents Osborn—who is ostensibly an opposing party to Pack here—in Osborn’s Medicaid appeal. In his capacity as Osborn’s attorney in the administrative appeal of the Medicaid determination, he asked the common pleas court hearing *that* case to stay that one while this one proceeded; he argued that a favorable decision here, in Pack’s declaratory judgment action, would decide Osborn’s Medicaid appeal. Further, Pack named as a defendant here the Licking JFS, the first-tier *Medicaid* agency, and that would make no sense if the case were solely a private dispute between a trustee and beneficiary, with no effect on Medicaid. All this shows that Pack’s declaratory judgment is all about Osborn’s Medicaid eligibility, and claiming otherwise now is simply not tenable.

Nevertheless, even granting Pack the implausible notion that this case is *not* about Medicaid, or granting her the related idea that any Medicaid-related declaration here would not bind the administrative agency, the case should still be dismissed—as irrelevant. That is, the declaratory judgment statute still requires some live controversy, and here, the only such controversy involves Medicaid. Pack and Osborn have no real dispute about the Trust other than how the assets count for Medicaid purposes. So with no Medicaid effect, the case melts away.

Moreover, neither Pack nor her *Amici* have meaningfully responded to the second proposition of law, regarding Pack’s attempt to have Osborn’s Medicaid eligibility determined by older laws, rather than the laws in effect when she applied for benefits. Pack has failed to respond to our explanation of why *Ohio Citizens Bank v. Mills* (1989), 45 Ohio St.3d 153, does

not apply here, as this case is about eligibility for public benefits, not just about private trust relationships. And her *Amici* are wrong in arguing that this second proposition of law is moot because, in their view, it does not control the outcome of this case. The second proposition should, however, be a dead letter for a different reason—if the Court rules, as it should, that the entire declaratory judgment vehicle is improper here, then it need not reach the second issue.

Finally, *Amici*'s arguments regarding “special needs trusts” are irrelevant, as this case does not involve a special needs trust.

For these reasons, as well as the reasons below and in our opening brief, the Court should reject Pack's attempt to use a declaratory judgment case to bypass the administrative appeal process. And if the Court reaches the second issue, it should hold that Medicaid eligibility is determined by the law in effect when someone applies, not by some older law that may have been in effect when a trust was created.

ARGUMENT

A. **Pack’s declaratory judgment action is either an impermissible collateral attack on an administrative agency decision or an irrelevant action.**

Although Pack now claims that “this is a trust case,” about “trust interpretation,” and that it “does not resolve [Osborn’s] right to Medicaid benefits,” see Merit Brief of Plaintiff/Appellee Loretta Pack (“Pack Br.”) at 1, 7, the record shows otherwise. At every step of the way, Pack’s approach showed that she filed this declaratory judgment action to resolve Osborn’s Medicaid eligibility. At a minimum, she sought to reverse the decisions finding Osborn ineligible for Medicaid, even if she did not seek a final judgment here that Osborn was eligible, she sought to obtain a judgment that would tie the State and county agencies’ hands in reviewing Osborn’s application for Medicaid.

In Osborn’s Medicaid appeal, Osborn—again, through the same attorney serving as Pack’s counsel here—argued that Pack’s declaratory judgment action involves Osborn’s eligibility for Medicaid benefits. See Memorandum Contra Motion to Lift Stay at 1, in Case No. 04 CV 1494 TMM. Specifically, Osborn said, “[b]oth this matter and the Trustee’s civil case pending in the Fifth Appellate District involve Osborn’s eligibility for Medicaid benefits and the availability of the Trust’s assets to her, as a beneficiary.” *Id.* Osborn argued that the Medicaid appeal should be stayed while Pack’s declaratory case went forward, because, she said, the two cases involved conflicting standards of review and a risk of conflicting judgments, and because the decision in Pack’s declaratory judgment action could render Osborn’s Medicaid appeal moot. See *id.* at 2. Osborn was right that the cases overlapped and risked conflicting judgments, but the answer was not to stay the Medicaid appeal, which is the proper vehicle—the answer was, and still is, that this case should be dismissed entirely, so that the administrative appeal system can work the way it is supposed to.

Other features of the litigation further confirm Pack's earlier view that this case was all about Osborn's Medicaid eligibility. For example, in the Fifth District, Pack stated that her declaratory judgment involved "a trust beneficiary's eligibility for Medicaid benefits and services." Pack Appellant Brief at 2. And in the common pleas court, Pack showed that the case was about Medicaid when she named as a defendant the Licking JFS—the agency that first reviewed Osborn's application Medicaid appeal. If this case dealt solely with trust interpretation issues, as Pack now claims, she would have had no need to join the Licking JFS as a party. The only purpose for naming the Licking JFS was to bind it with a declaratory judgment, so that its hands would be tied in reviewing, or re-reviewing, Osborn's Medicaid application.

Pack's decision to name the Licking JFS also gives her a real adversary, as her other "defendant," Osborn, does not have any adverse interests at stake in this case. Were this truly a case involving conflicting interests of a trustee and beneficiary, such as a beneficiary's action to compel distribution of assets, then one would expect to see Pack and Osborn litigating *against* each other. Instead, Pack is using Osborn's Medicaid appeal lawyer. Meanwhile, Osborn has a guardian ad litem here to represent her ostensibly adverse interests, but she has made no appearance here to demonstrate any such interests. That is because Pack's and Osborn's interests are the same: to bind the Licking JFS in its Medicaid decisionmaking capacity.

In light of all of this, Pack cannot credibly argue that her declaratory judgment action is anything but an attempt to control an administrative agency adjudication regarding Osborn's Medicaid eligibility. And such a use of declaratory judgment is improper.

Nor is the impropriety here any less if it is aimed not at the ultimate administrative decision, i.e., Medicaid eligibility, but is aimed only at one constituent element of that determination, i.e., a declaration that the Trust assets are "uncountable" for Medicaid purposes. If

allowed, such a one-element approach could be used to pre-judge all sorts of decisions that are entrusted to agencies or other independent bodies. For example, an applicant to the bar must apply to this Court for admission, and she must meet several tests, including passing the bar exam, and including a review of her character and fitness. Suppose that an applicant first runs to common pleas court, declaring that she has the requisite character, fitness, and moral qualifications necessary for admission to the practice of law. See Gov.Bar.R. I(11)(B). Then with such a declaration in hand, she asks this Court to follow the declaration, so that she need meet only the other criteria to gain admission to the bar. Surely this Court would not feel bound by such a declaratory judgment. More important, no court should hear such a case to begin with, as such a case would not be a proper use of the declaratory judgment statute. Such a case should be dismissed for lack of subject matter jurisdiction, as the subject matter is in the exclusive jurisdiction of this Court and the Board of Commissioners on Moral Character and Fitness. The same is true here, where questions of Medicaid eligibility are committed to ODJFS, after a first review by a County JFS, and the declaratory judgment process should not be used to interfere.

Equally important, even if Pack could somehow succeed in her attempt to recast her case as “not a Medicaid case,” Pack. Br. at 1, then she should still lose, but for a different reason—her case is then irrelevant. That is, without a Medicaid effect, the “controversy” between Pack and Osborn goes away, and without a Medicaid effect, Pack surely has no controversy with the Licking JFS. Declaratory judgment actions are intended to resolve issues between parties quickly and conclusively. See *Ohio Farmers Indemnity Co. v. Chames* (1959), 170 Ohio St. 209, 213. Here, no issues between the “parties” exist, save the Medicaid issue. Neither Pack nor Osborn seek to change their legal duties or obligations to each other, so if they disclaim any intent to control the Medicaid issue, they have no case or controversy between them.

In sum, Pack loses either way, but of the two paths to her loss, the better one is recognizing that she is trying to use declaratory judgment to bypass the administrative process, and such a bypass should not be allowed. See *Shoemaker v. First National Bank of Ottawa* (1981), 66 Ohio St. 2d 304, 312 (declaratory judgment cannot substitute for statutory appeal of administrative action); *State ex rel. Albright v. Court of Common Pleas of Delaware County* (1991), 60 Ohio St. 3d 40, 42 (declaratory judgment inappropriate when it would result in bypass of special statutory procedures).

B. The General Assembly has entrusted Medicaid eligibility decisions to ODJFS, and allowing Pack's declaratory judgment action to proceed would undercut that legislative decision.

As explained above, despite Pack's current claim that her declaratory judgment case involves solely an issue of trust interpretation, the record here shows that she seeks to bypass the Medicaid administrative appeals process. See, e.g., Plaintiff's Motion for Summary Judgment at 6 ("Therefore, Plaintiff requests that the Court find this Trust is not a countable resource."); see also Complaint at ¶ 20 ("Plaintiff Trustee hereby requests that the Court declare that the [Trust] is consistent with the requirements of Ohio Rev. Code §5111.151(G)(4)."). Not only is that improper for the reasons above, but it is also improper because it undercuts the General Assembly's decision to entrust such Medicaid decisions to ODJFS, along with each County JFS, and to the administrative appeals process.

The General Assembly has expressly delegated to each County JFS the responsibility to first determine whether assets held in trust for a Medicaid applicant are part of an applicant's countable resources, so that a County JFS can determine whether an applicant's countable resources exceed Medicaid eligibility limits. See R.C. 5111.011, 5111.012, 5111.151(C) (2004); Ohio Admin. Code 5101:1-39-05(C)(1), 5101:1-39-27.1. If an individual disagrees with a County JFS's decision, she can ask ODJFS to review that decision through the administrative

appeals process. See R.C. 5101.35; Ohio Admin. Code Ch. 5101:1-6-2 – 5101:1-6-9. Contrary to Pack's claims, Pack's declaratory judgment action affects the ability of the Licking JFS and of ODJFS to administer the Medicaid program. It does so because a binding judgment would prevent the Licking JFS from determining whether the Trust assets were part of Osborn's countable resources, and that in turn would prevent ODJFS from reviewing that decision. It essentially cuts out of the loop the very administrative agencies that are uniquely qualified and established to deal with these issues.¹

Pack claims that ODJFS and the Counties have no authority to interpret trusts, but she misconstrues the authority of administrative agencies generally and of the Counties and ODJFS in particular. Administrative agencies were created, in part, to exercise their particular expertise in technical or complex matters, apply their valuable experience gained by reason of frequently addressing recurring issues, and uniformly apply laws in a way that would be impossible if administrative matters were resolved by the various courts of common pleas. See, e.g., *Stanton v. State Tax Comm.* (1926), 114 Ohio St. 658, 668. These concerns are amplified when dealing with Medicaid, which is, as courts have noted, a prototypical example of a complex and highly technical regulatory program benefiting from expert administration. See, e.g., *West Virginia v. Thompson* (4th Cir. 2007), ___ F.3d ___, 2007 U.S. App. Lexis 1143 at *19. Allowing courts to assume functions delegated to administrative agencies defeats the purpose of creating such

¹ Another problem with bypassing ODJFS's administrative procedures is that it bypasses ODJFS's administrative and legal staff, and it burdens county agencies with litigation instead. ODJFS's unique regulatory framework involves complex state and federal laws. Usually, issues involving these laws are not litigated in courts by each County JFS, as each County usually ends its involvement at the administrative level, when the case goes administratively to ODJFS. From there, ODJFS litigates in courts. But if declaratory judgment is used instead, it cuts out the state agency with expertise in litigating these issues. Further, each County JFS will be forced to allocate resources to litigating these cases and developing expertise, even though such resources already are in place at ODJFS.

agencies. *Lorain City Sch. Dist. Bd. of Ed. v. State Employment Relations Bd.* (1988), 40 Ohio St.3d 257, 260. In addition, such an end run undermines the whole administrative process. Allowing a declaratory judgment case, in addition to the administrative appeal, divides a single dispute between two separate forums with different parties, different standards of review, different rules of evidence, and different appeal rights, and it creates the opportunity for conflicting judgments.² At the extreme end, a robust declaratory judgment practice could strip administrative agencies of all authority except that of accepting the results of declaratory judgment actions and then using those court decisions as the basis for agency decisions, even if those agency decisions are pre-determined based on the nature of the particular declaratory judgments at issue. The problem is particularly acute here, because the General Assembly has expressly delegated to Counties and to ODJFS the responsibility of determining whether trust assets are countable resources of Medicaid beneficiaries. See R.C. 5111.011, 5111.012, 5111.151(C) (2004).

And even if the Counties and ODJFS had not been granted the express authority to determine whether trust assets were countable resources of Medicaid applicants, they would still have the implied authority to do so. Administrative agencies have those implied powers necessary to make their express powers effective. *Burger Brewing Co. v. Thomas* (1975), 42 Ohio St.2d 377, 383; *State ex rel. Bentley & Sons Co. v. Pierce* (1917), 96 Ohio St. 44, 47. See also, *State ex rel. Mallory v. Pub. Emp. Retirement Bd.* (1998), 82 Ohio St.3d 235, 240 (holding that administrative agency had authority to consider legal issues regarding statutes it neither

² Pack's attorney, who, again, represents Osborn in her Medicaid appeal, acknowledged this problem during Osborn's Medicaid appeal. He moved to stay Osborn's administrative appeal, arguing that if Osborn's Medicaid appeal were to proceed, the resulting decisions might conflict or Pack's declaratory judgment action would render Osborn's Medicaid appeal moot. See Memorandum Contra Motion to Lift Stay at 2.

administered nor enforced when “pertinent” to agency’s responsibilities). As stated above, Counties have the express authority to examine the assets of a Medicaid applicant, including assets held in trust, to determine whether the applicant has too much money to qualify for Medicaid. See R.C. 5111.011, 5111.012, 5111.151(C). In order to exercise that authority, Counties must be able to review trusts. Without this authority, Counties would not be able to carry out their statutorily-mandated responsibilities pursuant to R.C. 5111.012 and 5111.151(C).

Amici advance a different argument for the court’s authority to act here, but that argument fails as well. *Amici* claim that the lower courts properly exercised jurisdiction over Pack’s declaratory judgment action because: 1) the General Assembly granted the courts a narrow and specific role to determine whether certain trust beneficiaries can qualify for Medicaid assistance pursuant to R.C. 5111.151(G)(4)(e), (g), and (h); and 2) Pack’s declaratory judgment is the “*de facto* equivalent” of an action to compel a distribution, which courts have jurisdiction to hear. See OSBA Br. at 18-19. Although *Amici* are correct that courts have a role in determining factual and legal issues that could ultimately affect an individual’s Medicaid eligibility, that role is much narrower than *Amici* would have the Court believe, and more important, the situation that *Amici* describe does not exist here.

Under R.C. 5111.151(G)(4), a Medicaid applicant can exempt assets in certain kinds of trusts from his countable resources 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 Medicaid applicant presents a final judgment from a court showing that he was unsuccessful in a civil action against the trustee to compel payments from the trust; or

- The Medicaid applicant presents a final judgment from a court of competent jurisdiction showing that in a civil action against the trustee, the applicant was able to compel only limited or periodic payments.

R.C. 5111.151(G)(4)(e), (g), and (h). These provisions of R.C. 5111.151 implicitly recognize that courts can make decisions about how trust assets can be used and whether Medicaid applicants can compel distributions. But in the cases provided for, as in (g) and (h) in particular, a party has a concrete goal at issue—such as achieving a distribution of assets—and the effect on Medicaid is a byproduct. However, they do not confer jurisdiction upon courts to hear declaratory judgments regarding Medicaid eligibility *when no controversy is at stake other than Medicaid eligibility*. Nor do these provisions allow courts to determine whether trust assets are countable resources of Medicaid applicants, as that “countability” question has no meaning other than its Medicaid effect. The latter is an inquiry that has been specifically delegated to Counties and ODJFS. See R.C. 5111.012 and 5111.151(C); Ohio Admin. Code 5111:1-39-27.1(A). As discussed above and in our opening brief, courts should not exercise jurisdiction over issues specifically delegated to administrative agencies, as such issues belong *solely* in the administrative process.

Amici are simply wrong in claiming that Pack’s declaratory judgment is the “*de facto* equivalent” of an action to compel a distribution from a trust. An action brought by a Medicaid applicant to compel a distribution from a trust differs significantly from a declaratory judgment action brought by a Trustee to determine that trust assets are not countable resources of a Medicaid applicant. When a Medicaid applicant moves to compel a distribution from a trust, the Medicaid applicant truly intends to obtain trust assets. This is not true when a Medicaid applicant responds to a civil action filed by another party. Also, when a Medicaid applicant files a civil action to compel a distribution, the parties are truly adverse because the applicant seeks to

compel a distribution from the trust and the trustee (or another party, such as a competing beneficiary) must oppose the action to protect his interests. But when an individual seeks a declaration that trust assets are not countable resources of a Medicaid applicant, there is no true adversity because the applicant's interest and the other parties' interests are aligned. All parties benefit from preventing the trust assets from being countable resources of the applicant. The applicant benefits because he can show that he has less than \$1,500 and can qualify for Medicaid if otherwise eligible. Other parties benefit because if the applicant qualifies for Medicaid, trust assets will not need to be spent to pay for items and services paid for by the Medicaid program. Without true adversity among the parties, there is no assurance that all factual issues and legal theories will be adequately reviewed. Courts have dealt with this problem by requiring adversity between parties as prerequisite to a declaratory judgment. See *Burger Brewing Co.*, 34 Ohio St. 2d at 97. In this case, there is no such requisite adversity. Therefore, Pack's declaratory judgment action is not the *de facto* equivalent of a motion to compel a distribution from a trust. Even if R.C. 5111.151(G)(4)(e), (g), and/or (h) implicitly authorize motions to compel distributions from trusts in limited circumstances, they do not authorize individuals to file declaratory judgments like the one in this case.

For these reasons, the Court should hold that the lower courts had no jurisdiction to hear Pack's declaratory judgment action.

C. Pack's declaratory judgment action circumvented administrative procedures because it prevented Licking County from exercising its statutorily-mandated duties.

Pack's declaratory judgment action bypassed administrative process in another way because it prevented Licking County from exercising its statutorily-mandated duty to examine and categorize the Trust under R.C. 5111.151(C).

The relevant statutes outline a two-step process for determining whether trust assets are countable resources of a Medicaid applicant. First, the appropriate County must examine the Medicaid applicant's trust and determine what type of trust is at issue. R.C. 5111.151(C) (2004); Ohio Admin. Code 5101:1-39-27.1(A)(3). Second, the County must determine whether the Medicaid applicant's trust is a countable resource. *Id.* The County must first determine what type of trust is at issue, because different types of trusts must meet different criteria to avoid being countable resources. For example, in order to avoid being considered countable resources, assets in a "qualifying income trust" must meet the criteria of 5111.151(F)(2)(i)-(iv); assets in a "pooled trust" must meet the criteria of R.C. 5111.151(F)(3)(a)(i)-(v); and assets in a "supplemental services trust" must meet the criteria of R.C. 5111.151(F)(4)(a)-(f). Therefore, it is impossible to determine whether the assets in the trust should be considered to be a resource of a Medicaid applicant until the trust is categorized.

Because Pack's declaratory judgment action asked the court to determine that the Trust assets were not part of Osborn's countable resources for Medicaid, it required the court to categorize the Trust pursuant to R.C. 5111.151. The task of categorizing a trust for Medicaid eligibility purposes, however, is expressly delegated to Counties. R.C. 5111.151(C). Courts should not override this legislative grant of authority by issuing declaratory judgments that require them to categorize trusts and determine whether trust assets are countable Medicaid resources.

D. Osborn's Medicaid eligibility should be determined in accordance with the laws in effect on the date when the agency examined her Medicaid eligibility.

If the Court adopts the first proposition of law, Pack's declaratory judgment action should be dismissed for lack of jurisdiction, and Osborn's Medicaid appeal will proceed in accordance with R.C. 5101.35, like other Medicaid eligibility appeals. Therefore, the Court would not need

to reach the second proposition of law here, regarding whether current or prior law should govern Medicaid applications. This issue can and should be resolved in the first instance through the administrative appeals process.

If the Court does not adopt our first proposition of law, however, it should still adopt our second. Even if the *intent* of a grantor of a trust could be determined in accordance with the laws in effect at the time that the trust was created (see *Ohio Citizens Bank v. Mills* (1989), 45 Ohio St.3d 153), an individual's *Medicaid eligibility* must be determined under the law in effect when the individual applies for Medicaid.

Pack has not responded to this reasoning except to insist that the Fifth District's decision does not conflict with other district court decisions cited in our opening brief,³ despite conclusions by the Fifth District and this Court that a conflict does exist. See Pack Br. at 16. Pack's attempt to distinguish the conflict cases and this case does not address the arguments raised in our opening brief. In short, Pack makes no attempt to explain why an individual who applies for Medicaid today should have her Medicaid eligibility determined in accordance with prior laws.

Amici's argument—that the outcome of this case would be the same regardless of what Medicaid eligibility laws were applied to this case—fails. First, the argument conflicts with Pack's admission, below, that the issue of whether Trust assets are part of Osborn's countable resources depends upon what Medicaid eligibility laws are applied. Pack conceded that the Trust assets would be countable resources under then-current Medicaid eligibility laws. See Plaintiff's

³ See *Prior v. Ohio Dept. Hum. Servs.* (10th Dist. 1997), 123 Ohio App.3d. 381, 383 n.1; *Martin v. Ohio Dept. Hum. Servs.* (2nd Dist. 1998), 130 Ohio App.3d 512, 523-24; *Metz v. Ohio Dept. Hum. Servs.* (6th Dist. 2001), 145 Ohio App.3d 304, 315; *Miller v. Ohio Dept. Hum. Servs.* (8th Dist. 1995), 105 Ohio App.3d 539, 543. These cases hold that an application for Medicaid benefits should be reviewed in accordance with law in effect at the time the application is filed.

Reply to Defendant’s Motion [for Summary Judgment] at 3 (“[T]his Ohio Administrative Code provision unlawfully relied upon by [the County] makes the Maebelle Osborn Trust Agreement a countable resource for purposes of Medicaid eligibility. By rendering the trust a countable resource, Charlotte Osborn is precluded from receiving Medicaid benefits.”). Second, even if the Court address *Amici’s* argument despite Pack’s contrary admission, the Court should conclude that the outcome of this case does, in fact, change depending on whether the Medicaid eligibility laws from 1987 (the Trust creation date) or 2004 (the date of Osborn’s Medicaid application) are applied.

The Trust is not a Medicaid qualifying trust, a self-settled trust, a special needs trust, a qualifying income trust, a pooled trust, or a supplemental services trust. See R.C. 5111.151(D)(1) (defining “Medicaid qualifying trust”); 5111.151(E)(1) (defining “self-settled trust”); 5111.151(F)(1)(a) (defining “special needs trust”); 5111.151(F)(2)(a) (defining “qualifying income trust”); 5111.151(F)(3)(a) (defining “pooled trust”); 5111.151(F)(4) (defining “supplemental services trust”); and 5111.151(G)(1) (addressing trusts and other legal instruments and devices similar to trusts). But it does qualify as a “trust or legal instrument or device similar to a trust” pursuant to R.C. 5111.151(G)(1) (2004). Therefore, in order for the Trust to avoid being considered part of Osborn’s countable resources, the Trust must not, among other things, “permit the trustee to expend principal, corpus, or assets of the trust for [Osborn’s] medical care, comfort, maintenance, health, welfare, general well being, or any combination of these purposes.” R.C. 5111.151(G)(2). The Trust contains no such restriction. Therefore, the Trust assets are part of Osborn’s countable resources. *Id.*

Amici’s claim that the Trust assets are not countable resources is not helped by their reliance on pre-2004 cases such as *Young v. Ohio Dept. of Human Servs.* (1996), 76 Ohio St.3d

547, or *Carnahan v. Ohio Dept. of Human Servs.* (2000), 139 Ohio App.3d 214. Those cases predate the later versions of R.C. 5111.151 and Ohio Admin. Code 5101:1-39-27.1 that were in effect by the time that Osborn applied for Medicaid. Therefore, those older cases cannot govern whether the Trust assets are part of Osborn's countable resources.

E. *Amici's* discussions regarding special needs trusts are irrelevant.

All of *Amici's* arguments regarding special needs trusts are irrelevant, for the following reasons.

First, the Trust is not a special needs trust in any sense relevant to this case. In order to be a "special needs trust" for purposes of determining a Medicaid applicant's countable resources, the trust must state that, upon the death of the Medicaid applicant or recipient, the State will receive all amounts remaining in the trust, up to an amount equal to the amount that the State has paid in medical assistance on behalf of the Medicaid applicant or recipient. R.C. 5111.151(F)(1)(a)(iv) (2004); Ohio Admin. Code 5101:1-39-27.1(C)(3)(a)(iv) (2004). The Trust contains no such restriction. It states that upon the death of the Medicaid applicant (Osborn), the Trust will terminate and its assets will be paid to the Trustee's surviving children or their heirs. See Supplement to Pack Brief at 9, ¶(b). Therefore, it is not a "special needs trust."

Second, when Pack filed the declaratory judgment action, R.C. 5111.151(F)(1) controlled (and still controls) how and when special needs trusts would be considered to be countable resources. Neither *Amici* nor Appellant have ever argued that the Trust is exempt from Osborn's countable resources under R.C. 5111.151(F)(1). Therefore, even if the Trust were a special needs trust (and it is not), *Amici* have not even argued that the Trust meets applicable standards for being exempt from Osborn's countable resources.

Third, R.C. 5111.151(F)(1) reflects the General Assembly's compromise between the conflicting goals of preserving assets in special needs trusts and preventing wealthy individuals

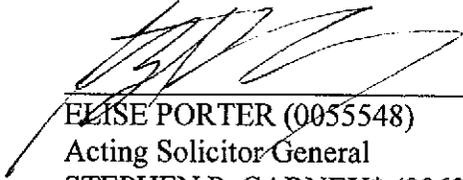
from exploiting and abusing the trust-exemption provisions of the Medicaid program. *Amici* have not explained why the Court should disturb this legislative decision or how this case would even provide an opportunity for doing so.

CONCLUSION

For the above reasons, this Court should adopt both of Appellant's propositions of law.

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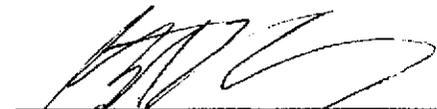
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