[Cite as *In re Rosenbaum Trust*, 2003-Ohio-1830.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81213

IN THE MATTER OF: DANIEL J. ROSENBAUM TRUST [Appeal by Charles Rosenbaum, Guardian]	: : : : : :	JOURNAL ENTRY and OPINION

DATE OF ANNOUNCEMENT OF DECISION	:	APRIL 10, 2003
CHARACTER OF PROCEEDING	: : : :	Civil appeal from Cuyahoga County Court of Common Pleas, Probate Division Case No. 2001 MPT 56246
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For appellant Charles Rosenbaum, Guardian:	SANDRA J. BUZNEY MARY B. MCKEE Attorneys at Law Hickman & Lowder Co., L.P.A. 1370 Ontario Street Suite 1620 Cleveland, Ohio 44113-1743

KENNETH A. ROCCO, J.:

{¶1} Charles Rosenbaum, guardian of the estate of Daniel J. Rosenbaum and trustee of the Daniel J. Rosenbaum Special Needs Trust, appeals from a probate court order denying his motion for leave to amend the trust. The guardian asserts that the court erred by holding that it did not have the power to approve the amendment. He argues that the amendment would not make a will for the ward (as the court found), and that the court failed to resolve a conflict between general guardianship law and the specific laws governing special needs trusts. He also claims the court's decision was against the ward's best interests.

PROCEEDINGS BELOW

{¶2} On November 29, 2001, the court appointed Charles C. Rosenbaum as trustee of the Daniel J. Rosenbaum Special Needs Trust. On March 13, 2002, the trustee filed a motion asking the court to amend the trust pursuant to the powers granted to the court by Article II of the trust document. The original trust agreement and the proposed amendment are attached to the motion to amend.

{¶3} The original trust agreement provided that funds from a settlement of a personal injury action would be delivered to the trustee. The trustee would administer the trust and pay income and/or principal for the benefit of the beneficiary "as the Trustee in his sole discretion may from time to time deem necessary or advisable. If [the beneficiary] is receiving Medicaid or other

need based benefits, and, in the trustee's sole and absolute discretion, maintenance of such benefits is in the best interest of [the beneficiary], such distributions shall be limited to the provision of supplemental services for the satisfaction of [the beneficiary's] special needs." Among other things, the trustee is required to obtain court approval before making any distribution and to take into consideration any "entitlement benefits" the beneficiary is receiving, including Supplemental Security Income, Medicare and Medicaid.

{¶4} The original trust agreement provides that the trust will terminate on the beneficiary's death. At that time, any remaining funds are to be paid proportionately to each state that provided medical assistance to him; any remaining assets are to be distributed to the beneficiary's estate. The trust agreement specifically states that it is governed by the laws of the state of Ohio.

{¶5} The original trust agreement states that it is irrevocable and cannot be amended, revoked or terminated. However, "the Trustee and the Guardian shall have authority to revoke this Trust or amend the terms hereof, with prior Court approval, to carry out the intention of the Court and the parties hereto or in the event that the laws or regulations concerning benefit programs change hereafter or if such revocation or amendment is in the best interest of [the beneficiary]."

{¶6} The trustee moved the court to amend the trust on March 13, 2002. The motion to amend asserted that the Social Security Administration ("SSA") had denied supplemental security income ("SSI") benefits to the beneficiary because the amount of funds in the trust exceeded the limit of allowable resources for an award of SSI. The SSA found the trust was revocable and therefore determined that the trust funds were available to the beneficiary. The trustee asserts that the reason for this finding was that the beneficiary's estate was the only residual beneficiary of the trust; to be considered irrevocable, a named residual beneficiary was required.

{¶7} The proposed amendment to the trust alters the final distribution of trust assets following the death of the beneficiary. Each state that has provided medical assistance to the beneficiary is given a proportionate share of the trust assets up to the total amount paid. The trustee may then pay funeral, burial, estate administration, probate and tax expenses. Any remaining assets are to be distributed as the beneficiary appoints in his will. If the beneficiary does not exercise his power of appointment, then the assets are to be distributed to his wife and/or issue under the then-current laws of intestacy. If he is not survived by a wife and/or issue, the trust assets are to be distributed equally to the beneficiary's parents or the survivor of them. If neither of them survives, the remaining assets are to be distributed to the beneficiary's sister.

{¶8} The court denied the motion to amend the trust. The court held that under R.C. 2111.50(B), it did not have the power to make or revoke a will for a ward of the court. The court found that the proposed amendment would amount to a testamentary disposition of property of a ward, and was therefore prohibited by R.C. 2111.50.

LAW AND ANALYSIS

{¶9} This case results from a convergence of the laws governing guardianships, trusts, and supplemental security income. It implicates the varying powers exercised by the social security administration, on the one hand, and the probate court, on the other. Though judicial economy would dictate that we resolve all aspects of this matter in a single proceeding, we must be mindful of the limits of our jurisdiction. The scope of the proceedings before the probate court limits the issues we may consider in this appeal. This court can only examine the question whether the probate court, as the superior guardian of all wards under its jurisdiction, had the power to amend a trust agreement to dispose of trust assets following the death of the beneficiary. We find that it did not.

{¶10} The original trust was established by the guardian of the disabled individual and the probate court. Pursuant to R.C. 2111.50, the probate court is the superior guardian of wards subject to its jurisdiction, and has all the powers the ward would have if he or she were not under a disability, "except the power to

make or revoke a will." "These powers include, *but are not limited to*, the power" to, e.g., "create revocable trusts of property of the estate of the person, that may not extend beyond the *** disability, or life of the person or ward." (Emphasis added.)

{¶11} We agree with the probate court that the proposed amendment to the trust document, specifically disposing of trust property following the death of the beneficiary, would effectively make a will for the ward and is therefore beyond the court's power as guardian. Although there is no specific statutory definition of a "will," case law and statutes make it clear that "a will must be in writing, executed with certain formalities and by its language demonstrate, at the minimum, a testamentary intent, i.e., a disposition of property to take effect only at death." *In re Estate of Ike* (1982), 7 Ohio App.3d 87, 88. "[T]he one basic irreducible minimum is that a will on its face must demonstrate some testamentary intention and have reference to a disposition conditioned upon being effective only upon the death of the maker." Id. at 89. When a guardian places the ward's assets in trust for the ward's benefit, a trust provision disposing of the assets upon the death of the ward effectively makes a will for the ward.

{¶12} It is irrelevant that the testamentary language follows the law of descent and distribution that would be followed in the absence of a will. The ward may or may not have the testamentary capacity to make a will on his own behalf. The guardian cannot exercise that power for the ward.

{¶13} Nor is there any conflict between R.C. 2111.50 and federal laws governing "special needs" trusts.[1] "Special needs" trusts are a means of removing assets from consideration in assessing an individual's eligibility for SSI or Medicaid benefits, which are distributed based on need.[2] The provisions governing

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[1]**{¶a}** We are not aware of any state statutes governing "special needs trusts." But cf. R.C. 1339.51 and 5111.15, concerning "supplemental needs trusts," which apparently are somewhat different from special needs trusts in that they are created by another person on behalf of the disabled individual.

{¶b} In fact, the only place in which the term "special needs trust" appears in the governing laws is a state regulation describing when trust funds are an available resource for purposes of determining Medicaid eligibility. Ohio Adm. Code 5101:1-39-271(C)(7). The elements of a "special needs trust" under this regulation appears to be the same as those for a trust which is not considered an available resource for purposes of Medicaid and SSI eligibility under 42 U.S.C. §§ 1382b(e)(5) and 1396p(d)(4).

[2]In general, the corpus of a revocable trust and the portions of the corpus of an irrevocable trust which are available for the benefit of the individual who established it are considered a resource available to the individual which must be depleted before he or she is eligible for SSI. 42 U.S.C. §1382b(e). However, this rule does not apply to a trust described in 42 U.S.C. §1396p(d)(4). 42 U.S.C. §1382b(e)(5). Section 1396p(d)concerns the treatment of trust funds for the purpose of determining eligibility for (or the amount of) Medicaid. Like §1382b(e), it provides that the corpus of a revocable trust and the portions of the corpus of an irrevocable trust which are available for the benefit of the individual who established it are a resource available to the individual which must be depleted before the individual is eligible for Medicaid. Subsection 4 of §1396p(d) describes three types of trusts to which this rule does not apply, only one of which is relevant here. A trust containing the assets of a disabled individual under age 65 which is established for the individual's benefit by a legal guardian or court is not considered a resource available to the individual for purposes of determining Medicaid eligibility "if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title."

special needs trusts do not require a testamentary disposition of trust property, the essential problem the probate court found with the proposed amendment to the trust here. While appellant urges that the social security administration requires named residual beneficiaries for all trust property in order to consider the trust to be irrevocable, the trust does not need to be irrevocable to meet the requirements of a "special needs trust" set forth in §1396p(d)(4); the exception makes no distinction between revocable and irrevocable trusts, so it appears that the trust may even be revocable and still be excepted. Therefore, we do not perceive any necessary conflict between R.C. 2111.50 and the laws governing special needs trusts.

{¶14} More important, the fact that federal law allows an individual to set aside assets in a trust so that they will not be included as an available resource for purposes of determining Medicaid or SSI eligibility does not mean that state law must allow him to do so. The general rule is that trust funds are considered available resources of the individual; §1396p(d)(4) represents an exception to that rule. We are not aware of any reason why state law must allow an individual to qualify for this exception.

{¶15} We recognize that the trustee's counsel is trying to preserve the assets of the disabled individual and obtain the maximum benefits available to him. We applaud this effort. However, Ohio guardianship law does not allow him to take this

shortcut around the social security administration's apparently mistaken concerns.[3]

Affirmed.

KENNETH A. ROCCO
JUDGE

TIMOTHY E. McMONAGLE, A.J. CONCURS IN JUDGMENT ONLY WITH ATTACHED SEPARATE CONCURRING OPINION

COLLEEN CONWAY COONEY, J. CONCURS IN JUDGMENT ONLY WITH JUDGE MCMONAGLE'S ATTACHED SEPARATE CONCURRING OPINION

TIMOTHY E. MCMONAGLE, A.J., concurring in judgment only:

{¶16} While I reluctantly agree with the ultimate decision in this case, I write separately because I disagree with the court's discussion regarding the interplay between state and federal law concerning special needs trusts.

{¶17} The majority states that it is unaware of any state statutes governing or otherwise referencing "special needs trusts" and that the law of Ohio references only "supplemental needs trusts,"[4] the latter of which the majority claims are created by

[3]Appellant has appealed the social security administration's decision; appellant advised the court that that matter remained pending at the time of oral argument. It appears that the social security administration is mistaken at two levels. First, its assertion that the trust is revocable was previously rejected by the United States District Court for the Southern District of Ohio in *Quinchett v. Massanari* (S.D. Ohio 2001), 185 F.Supp.2d 845. Second, under the terms of 42 U.S.C. §1396p(d)(4), it does not appear to matter whether a special needs trust is revocable or irrevocable.

[4]Also referenced as "supplemental services trusts." See, e.g., Ohio Adm. Code 5101:1-39-271, 5122-22-01 and 5123:2-18-01.

another person for the benefit of the disabled person.[5] I believe this is incorrect. Used almost interchangeably, a "special needs trust" is defined by Ohio Adm. Code 5101:1-39-271(C)(7)(a) and that definition essentially parallels the definition contained in 42 U.S.C. 1396p(d)(4)(A). The distinction, in my mind, is not the label given to the trust but the purposes of the trust and its source of funding.

{¶18} A trust established for the supplemental or special needs of a disabled person, needs that are above and beyond those services provided for under a government-supported assistance program, is just that: a "special needs" or "supplemental needs or services" trust. It appears that one is no different than the other in purpose. The source of funding, however, calls into play different governing rules.

{¶19} Under 42 U.S.C. 1396p(d)(4), the trust is funded with the assets of a disabled individual under the age of 65 and is established by a parent, grandparent or legal guardian of the disabled individual. R.C. 1339.51, on the other hand, makes no reference to the source of funds only that "any person may create a trust under this section to provide funding for supplemental services" for the benefit of a disabled individual. Although I am sure appellant's counsel will correct me if I am wrong, it would appear that a guardian could as similarly establish a trust under R.C. 1339.51 as it could under 42 U.S.C. 1396p(d)(4). The converse, however, is not necessarily true. An individual, other than a parent, grandparent or legal guardian, wishing to establish a trust with their own assets for the benefit of a disabled person could not establish such a trust under 42 U.S.C.

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[5]Actually, R.C. 1309.406 and 1309.408 also reference "special needs trusts" created under 42 U.S.C. 1396p(d)(4) as they pertain to provisions in Ohio's codification of the Uniform Commercial Code, R.C. Chapter 1309.

1396p(d)(4). Be that as it may, certain restrictions contained in R.C. 1339.51 may make the establishment of a trust by a guardian more attractive under 42 U.S.C. 1396p(d)(4) rather than under the state statute. Notwithstanding the above distinction, the establishment of the trust in this case is not at issue. Consequently, any discussion relative to the types of trusts available for the benefit of disabled persons or the validity of the trust already established, or its revocability for that matter, is unnecessary to this court's resolution of the issue before it; namely, whether the probate court erred when it denied the guardian's motion to amend the trust agreement.

{¶20} As so narrowed, I cannot find that the probate court erred in denying the guardian's motion to amend. R.C. 2111.50(B) prohibits a guardian from making a will for the ward. The prohibition stems from the inability of a guardian to make a testamentary disposition of the ward's property or otherwise alter a property disposition already made by the ward while competent. The effect of the trust amendment as proposed would do just that. By naming specific individuals, despite mirroring the laws of descent and distribution, the guardian is making a testamentary disposition expressly forbidden by R.C. 2111.50(B). It is true that a trust established under either statute must contain a payback provision for a government assistance provided and, as such, effectively makes a testamentary disposition with regards to those assets. Nonetheless, this specific statutory provision overrides the general provision precluding such a disposition. There is no similar specific provision as to the residuary of such a trust's assets.

{¶21} I am not unsympathetic to appellant's dilemma. If there was any way in which a contrary result could have been reached, I would have supported it wholeheartedly. Certainly the federal statute under which this trust was created, *and*

approved by the probate court, authorizes this type of trust. It appears, however, that federal and state laws governing such trusts need to be updated to coincide with the purpose of 42 U.S.C. 1396p(d)(4).[6] This includes laws affecting federal and state assistance programs as well as laws affecting guardianships. Because I am bound to follow the law as it now exists, I cannot say that the probate court erred when it denied the guardian's motion to amend the trust agreement under the facts and circumstances in this case.

{¶22} As correctly stated by the majority, it appears that other courts reviewing an SSA decision to terminate benefits when faced with an estate as a residual beneficiary of a special needs trust have found such a decision to be in error. *Quinchett v. Massanari* (S.D.Ohio 2001), 185 F.Supp.2d 845; *Lanoue v. Commr., Social Security Adm.* (2001), 146 N.H. 504, 774 A.2d 1236. That issue, however, is not our issue to decide. However tempting, we are not the arbiter of the disabled person's Medicaid eligibility and have no authority to render any opinion on that issue.

{¶23} I reluctantly, therefore, concur in judgment only.

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[6]While the majority's statement to the effect that it perceives no "conflict between R.C. 2111.50 and the law and the laws governing special needs trusts" may be technically correct, there certainly appears to be a conflict between these two statutes and the laws governing SSI eligibility.