Aida S. Montano *Legislative Service Commission*

H.B. 178

124th General Assembly
(As Introduced)

Rep. Salerno

BILL SUMMARY

- Permits the creation of any trust, rather than just a testamentary trust, to provide funding for supplemental services for certain beneficiaries with physical or mental disabilities.
- Subject to specified conditions, generally provides that such a trust that confers certain discretion upon the trustee is not an asset or resource of the beneficiary, the beneficiary's estate, the settlor, or the settlor's estate and is exempt from creditors' and other claims against the beneficiary, the beneficiary's estate, the settlor, or the settlor's estate.
- Applies the bill's provisions in determining the assets or resources of a recipient of medical assistance who is a beneficiary of that type of trust, the recipient's estate, the settlor, or the settlor's estate and to claims under the Medical Assistance Programs Law against the recipient, the recipient's estate, the settlor, or the settlor's estate.
- Applies the bill's provisions in determining the assets or resources of a patient or resident of a welfare institution or facility who is a beneficiary of that type of trust, the patient's or resident's estate, the settlor, or the settlor's estate for purposes of determining ability to pay, or to claims under the General Welfare Institutions Law against the patient or resident, the patient's or resident's estate, the settlor, or the settlor's estate.

CONTENT AND OPERATION

Fiduciary Law--Trusts for Supplemental Services for Beneficiaries with Disabilities

Existing law

Under existing law, any person may create a *testamentary trust* to provide funding for "supplemental services" for the benefit of another individual who meets either of the following conditions (R.C. 1339.51(B)) (see **COMMENT** 1):

(A) The individual has a physical or mental "disability" and is eligible to receive services through the Department of Mental Retardation and Developmental Disabilities (DMRDD) or a county board of mental retardation and developmental disabilities.

(B) The individual has a mental "disability" and is eligible to receive services through the Department of Mental Health (DMH) or a board of alcohol, drug addiction, and mental health services.

The trust may confer discretion upon the trustee and may contain specific instructions or conditions governing the exercise of the discretion.

To the extent permitted by federal law and subject to the provisions pertaining to the enforcement of specific instructions or conditions governing a trustee's discretion (see **COMMENT** 2(b)), a trust authorized as described above that confers discretion upon the trustee is not considered an asset or resource of the beneficiary, the beneficiary's estate, or the *testator's* estate and is exempt from the claims of creditors, political subdivisions, the state, other governmental entities, and other claimants against the beneficiary, the beneficiary's estate, or the *testator's* estate, including claims based on provisions of the Medical Assistance Programs Law, the General Welfare Institutions Law, and the DMRDD Law and claims sought to be satisfied by way of a civil action, subrogation, execution, garnishment, attachment, judicial sale, or other legal process, if all of the following conditions apply (R.C. 1339.51(D)):

(1) At the time the trust is created, the trust principal does not exceed the maximum amount determined under the Fiduciary Law. (See **COMMENT** 3.)

(2) The trust instrument contains a statement of the *testator's* intent, or otherwise clearly evidences the *testator's* intent, that the beneficiary does not have authority to compel the trustee under any circumstances to furnish the beneficiary with minimal or other maintenance or support, to make payments from the principal of the trust or from the income derived from the principal, or to convert

any portion of the principal into cash, whether pursuant to an "ascertainable standard" specified in the instrument or otherwise (see **COMMENT** 4).

(3) *The testator is deceased*.

(4) The trust instrument provides that trust assets can be used only to provide supplemental services, as defined by rule of the Director of Mental Health or the Director of Mental Retardation and Developmental Disabilities, to the beneficiary.

(5) The trust is maintained and assets are distributed in accordance with rules as described in paragraph (4), above.

(6) The trust instrument provides that on the death of the beneficiary, a portion of the remaining assets of the trust, which must be not less than 50% of those assets, will be deposited to the credit of the Services Fund for Individuals with Mental Illness or the Services Fund for Individuals with Mental Retardation and Developmental Disabilities.

R.C. 1339.51 does not limit or otherwise affect the creation, validity, interpretation, or effect of any trust that is not created under that section (R.C. 1339.51(F)).

Operation of the bill

The bill authorizes any person to create a *trust* (instead of just a *testamentary trust*) (see **COMMENT** 5) to provide funding for supplemental services for the benefit of another individual who meets either of the conditions described above in paragraphs (A) and (B) in "***Existing law***" with respect to the individual's disability (R.C. 1339.51(B)).

To the extent permitted by federal law and subject to the provisions pertaining to the enforcement of specific instructions or conditions governing a trustee's discretion (see **COMMENT** 2(b)), a trust authorized as described in the bill that confers discretion upon the trustee is not considered an asset or resource of the beneficiary, the beneficiary's estate, *the settlor* (added by the bill), or the *settlor's* (instead of *testator's*) estate and is exempt from the claims of creditors, political subdivisions, the state, other governmental entities, and other claimants against the beneficiary, the beneficiary's estate, *the settlor*, or the *settlor's* estate, including claims based on provisions of the Medical Assistance Programs Law, the General Welfare Institutions Law, and the DMRDD Law and claims sought to be satisfied by way of a civil action, subrogation, execution, garnishment, attachment, judicial sale, or other legal process, if all of the following conditions apply (R.C. 1339.51(D)):

(1) The conditions described in paragraphs (1), (4), (5), and (6) in "***Existing law***," above.

(2) The trust instrument contains a statement of the *settlor's* (instead of *testator's*) intent, or otherwise clearly evidences the *settlor's* intent, that the beneficiary does not have authority to compel the trustee under any circumstances to furnish the beneficiary with minimal or other maintenance or support, to make payments from the principal of the trust or from the income derived from the principal, or to convert any portion of the principal into cash, whether pursuant to an "ascertainable standard" specified in the instrument or otherwise (see **COMMENT** 4).

The bill removes the condition described above in paragraph (3) in "***Existing law***" that *the testator is deceased*.

Medical Assistance Programs Law

Existing law

Under existing law, if a recipient of medical assistance is the beneficiary of a trust created pursuant to the Fiduciary Law on Trusts for Supplemental Services for Beneficiaries with Disabilities, notwithstanding any contrary provision of the Medical Assistance Programs Law or of a rule adopted pursuant to that Law, R.C. 1339.51(C) and (D) (see "***Existing law***" under "***Fiduciary Law, etc.***," above, and **COMMENT** 2) apply in determining the assets or resources of the recipient, the recipient's estate, or the *testator's* estate and to claims arising under the Medical Assistance Programs Law against the recipient, the recipient's estate, or the *testator's* estate (R.C. 5111.15).

Operation of the bill

Under the bill, if a recipient of medical assistance is the beneficiary of a trust created pursuant to the Fiduciary Law on Trusts for Supplemental Services for Beneficiaries with Disabilities, notwithstanding any contrary provision of the Medical Assistance Programs Law or of a rule adopted pursuant to that Law, R.C. 1339.51(C) and (D) (see "***Operation of the bill***" under "***Fiduciary Law, etc.***," above, and **COMMENT** 2) apply in determining the assets or resources of the recipient, the recipient's estate, the *settlor* (added by the bill), or the *settlor's* (instead of the *testator's*) estate and to claims arising under the Medical Assistance Programs Law against the recipient, the recipient's estate, the *settlor*, or the *settlor's* estate (R.C. 5111.15).

General Welfare Institutions Law

Existing law

Under existing law, the DMH and the DMRDD must investigate the financial condition of patients in hospitals and residents in institutions, residents whose care or treatment is being paid for in a private facility or home under the control of the DMRDD, and certain relatives liable for the support of those patients or residents, in order to determine the ability of any patient, resident, or relative to pay for the support of the patient or resident and to provide suitable clothing as required by the superintendent of the institution. The DMH must investigate the financial condition of patients receiving state-operated community mental health services and of the liable relatives to determine the patient's or relative's ability to pay for the patient's support. In all cases, in determining ability to pay and the amount to be charged, due regard must be had for others who may be dependent for support upon those relatives or the estate of the patient. (R.C. 5121.04(A).)

The appropriate Department must follow specified provisions in the law in determining the ability to pay of a patient or resident or the patient's or resident's liable relatives and the amount to be charged that patient or resident or liable relatives. One of these provisions is that if a patient or resident with or without dependents is the beneficiary of a trust created pursuant to the Fiduciary Law on Trusts for Supplemental Services for Beneficiaries with Disabilities, notwithstanding any contrary provision of the General Welfare Institutions Law or of a rule adopted pursuant to that Law, R.C. 1339.51(C) and (D) (see "***Existing law***" under "***Fiduciary Law, etc.***," above, and **COMMENT** 2) apply in determining the assets or resources of the patient or resident, the patient's or resident's estate, or the *testator's* estate and to claims arising under the General Welfare Institutions Law against the patient or resident, the patient's or resident's estate, or the *testator's* estate. (R.C. 5121.04(B)(10).)

Operation of the bill

The bill modifies the provision described in the preceding sentence by providing that if a patient or resident with or without dependents is the beneficiary of a trust created pursuant to the Fiduciary Law on Trusts for Supplemental Services for Beneficiaries with Disabilities, notwithstanding any contrary provision of the General Welfare Institutions Law or of a rule adopted pursuant to that Law, R.C. 1339.51(C) and (D) (see "***Operation of the bill***" under "***Fiduciary Law, etc.***," above, and **COMMENT** 2) apply in determining the assets or resources of the patient or resident, the patient's or resident's estate, the *settlor* (added by the bill), or the *settlor's* (instead of the *testator's*) estate and to claims arising under the General Welfare Institutions Law against the patient or resident,

the patient's or resident's estate, the *settlor*, or the *settlor's* estate. (R.C. 5121.04(B)(10).)

COMMENT

1. R.C. 1339.51(A)(4) defines "supplemental services" as services specified by rule of the Department of Mental Health or the Department of Mental Retardation and Developmental Disabilities that are provided to an individual with a disability in addition to services the individual is eligible to receive under programs authorized by federal or state law. R.C. 1339.51(A)(2) defines "disability" as any substantial, medically determinable impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of at least 12 months, except that "disability" does not include an impairment that is the result of abuse of alcohol or drugs.

2. The general division of the court of common pleas and the probate court of the county in which the beneficiary of a trust resides or is confined have concurrent original jurisdiction to hear and determine actions pertaining to the trust. In any action pertaining to the trust in a court of common pleas or probate court and in any appeal of the action, all of the following apply to the trial or appellate court (R.C. 1339.51(C)):

(a) The court must render determinations consistent with the testator's or other settlor's intent in creating the trust, as evidenced by the terms of the trust instrument.

(b) The court may order the trustee to exercise discretion that the trust instrument confers upon the trustee only if the instrument contains specific instructions or conditions governing the exercise of that discretion and the trustee has failed to comply with the instructions or conditions. In issuing an order of that nature, the court must require the trustee to exercise the trustee's discretion only in accordance with the instructions or conditions.

(c) The court may order the trustee to maintain the trust and distribute assets in accordance with rules adopted by the Director of Mental Health or the Director of Mental Retardation and Developmental Disabilities if the trustee has failed to comply with those rules.

3. In 1994, the trust principal maximum amount for a trust created under the Fiduciary Law on Trusts for Supplemental Services for Beneficiaries with Disabilities was $200,000. The maximum amount for a trust created prior to November 11, 1994, could be increased to $200,000. In 1995, the maximum amount for a trust created under that Law was $202,000. Each year thereafter, the maximum amount is the prior year's amount plus $2,000. (R.C. 1339.51(E).)

4. R.C. 1339.51(A)(1) defines "ascertainable standard" as including a standard in a trust instrument requiring the trustee to provide for the care, comfort, maintenance, welfare, education, or general well-being of the beneficiary.

5. A *trust* is the right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title. It is a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*). A *testamentary trust* is a trust that is created by will and takes effect when the settlor (*testator*) dies. A testamentary trust is distinguished from an *inter vivos trust* (also termed *living trust*), which is a trust that is created and takes effect during the settlor's lifetime. (Black's Law Dictionary, 7th Edition, 1999.) The bill covers both testamentary and inter vivos trusts.

A *settlor* (also termed *creator*, *donor*, *trustor*, *grantor*, or *founder*) is a person who makes a settlement of property; especially, a person who sets up a trust. (Black's Law Dictionary, 7th Edition, 1999.)

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	03-22-01	p. 255

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