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Medicaid and “Special Needs Trusts” in Ohio

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Introduction

Over 300,000 Ohio adults receive Medicaid because of blindness or severe disability.¹ Because Medicaid is available only to those with limited resources² and very low incomes, a recipient who receives assistance from family members, proceeds from a trust, or compensation for an injury may be disqualified. This makes it difficult for family members to provide goods and services that Medicaid does not pay for, such as travel, equipment for sports and hobbies, and certain health services. A special needs trust can be established to provide for these extras without making the recipient ineligible for Medicaid, but the trust instrument must be carefully drafted.

Trusts--in general

A trust is a fiduciary relationship with respect to property by which a party (the grantor, trustor, or settlor) entrusts assets to a trustee to be used for the benefit of a person or charity (the beneficiary). The trust instrument tells the trustee how to pay out assets in the trust. Trusts may be used to withhold assets from an individual who may not be old enough, have enough experience, or have the ability to make wise decisions.³

Specific trusts used in special needs estate planning

The term, “special needs trust,” is used in a general sense to describe one or more types of trusts that can be used to provide financial support to an adult with special needs without affecting the adult’s eligibility for Medicaid and other government programs. Some special needs trusts are creatures of state law, while others are authorized by federal law. A description of specific types of trusts follows.

The term, “special needs trust,” is used to describe one or more types of state and federally authorized trusts that can be used to provide financial support to an adult with special needs without affecting eligibility for Medicaid and other government programs.



A support trust is a trust in which the trustee has the authority to pay the beneficiary only so much of the trust income as is necessary for the beneficiary's support, education, and maintenance.

A discretionary trust is a trust in which the trustee has absolute discretion to determine how the assets in the trust are invested and the authority to determine when, how much, and for whom the assets are distributed.

Support trusts

A support trust is a trust in which the trustee has the authority to pay the beneficiary only so much of the trust income as is necessary for the beneficiary's support, education, and maintenance. The beneficiary is supported from this trust as long as there are assets in it.⁴

Because beneficiaries of support trusts are generally ineligible for Medicaid, however, estate planning attorneys often discourage the use of these trusts for a family with a special needs member.⁵

Discretionary (or "supplemental needs") trusts

A discretionary trust is a trust in which the trustee has absolute discretion to determine how the assets in the trust are invested and the authority to determine when, how much, and for whom the assets are distributed.⁶ Such a trust established for the benefit of a person with a disability is sometimes referred to as a "supplemental needs trust." If properly drafted to ensure the trustee's absolute discretion, the discretionary trust provides certain benefits for a beneficiary with a disability and the beneficiary's family: the beneficiary retains Medicaid eligibility, the trustee can make expenditures for supplemental needs (other than food and rent) that the trustee believes are appropriate, and no assets remaining in the trust on the beneficiary's death must be turned over to the State.⁷

Ohio law governing discretionary trusts established for the benefit of disabled beneficiaries has centered on two Ohio Supreme Court decisions and a rule adopted by the Ohio Department of Job and Family Services (ODJFS) that was later enacted into statute. The cases highlight the importance of the language used in creating a discretionary trust.

In *Bureau of Support v. Kreitzer* (1968),⁸ the Ohio Supreme Court established that a trust in which the co-trustees had the "sole and absolute discretion" to make distributions that were for the disabled beneficiary's "care, comfort, maintenance and general well-being for and during her lifetime" was not purely discretionary and as a result, could be invaded by the State. The Court found that the words, "care, comfort, maintenance and general well-being," defined an enforceable standard by which the beneficiary could have compelled the co-trustees to provide for her support and that the State was subrogated to her right to do so.⁹

In *Young v. Ohio Dept. of Human Services* (1996),¹⁰ the Court, by a 4-3 vote, affirmed a Court of Appeals holding that a trust that clearly prohibited the trustee from making distributions that would result in a reduction in government benefits to the beneficiary could not be counted by the State as a countable resource for purposes of Medicaid eligibility. In this case, the trust specifically provided that "the Trustee shall not make any distribution of income



or principal for the benefit of [the beneficiary] which shall render her ineligible or cause a reduction in any benefit she may be entitled to receive, including, but not limited to, the following: institutional care provided by the State or Federal government, Social Security, Supplementary Security Income, Medicare, and Medicaid.”¹¹ Writing for the majority, Chief Justice Moyer found the guidance in the applicable administrative rule paramount: if the beneficiary’s access to the trust principal was restricted, the principal was *not* a resource to the individual. Here, he said, the beneficiary had neither a legal interest in the resource nor the legal ability to use or dispose of the resource. He also rejected the Department’s argument that because the trust document did not expressly state that the trust was meant to “supplement” Medicaid, the trust was open to invasion by the State.¹²

Justice Stratton, writing the dissenting opinion in *Young* on behalf of herself and Justice Sweeney, disagreed with the majority’s ruling on public policy grounds, finding that the precedent it established was negative in that it shifted “the beneficiary’s financial responsibility to the taxpayers despite the fact the beneficiary [had] the financial means to pay for his or her own medical expenses.”¹³

In November 2002, ODJFS amended Ohio Administrative Code § 5101:1-39-27.1, the rule specifying when a trust must be counted as a resource, income, or both, for

purposes of determining an individual’s eligibility for Medicaid, to, in part, incorporate the Ohio Supreme Court’s holdings in *Kreitzer* and *Young*. This rule was, in large part, enacted as R.C. 5111.151 in March 2004.¹⁴ Division (G) of R.C. 5111.151 now governs the extent to which a trust created by a third party to benefit a Medicaid applicant or recipient and funded with assets or property in which the applicant or recipient has never held an ownership interest must be considered an available resource for purposes of determining the applicant’s or recipient’s Medicaid eligibility. In general, such a trust is an available resource if it permits the trustee to expend principal, corpus, or assets of the trust for the applicant’s or recipient’s medical care, care, comfort, maintenance, health, welfare, general well-being, or any combination of these purposes. This rule applies even if the trust contains a provision that (1) attempts to prevent the trust or its corpus or principal from being counted as an available resource, (2) prohibits the trustee from making payments that would supplant or replace Medicaid or other public assistance, or (3) prohibits the trustee from making payments that would impact or have an effect on the applicant’s or recipient’s right, ability, or opportunity to receive Medicaid or other public assistance.

On the other hand, this law prohibits a trust from being counted as an available resource for purposes of Medicaid eligibility if *at least one* of the following circumstances applies:

A trust created by a third party to benefit a Medicaid applicant or recipient is an available resource if it permits expenditures for medical care, other care, comfort, maintenance, health, welfare, general well-being, or any combination of these purposes.



(1) The trust contains a clear statement requiring the trustee to preserve a portion of the trust for another beneficiary or remainderman. (However, only the portion of the trust preserved for the other beneficiary or remainderman is not to be counted as an available resource.)

(2) The trust contains a clear statement requiring the trustee to use a portion of the trust for a purpose other than the applicant's or recipient's medical care, care, comfort, maintenance, welfare, or general well-being. (However, only the portion of the trust for these other purposes is not to be counted as an available resource.)

(3) The trust contains a clear statement limiting the trustee to making fixed periodic payments. (The payments must be treated in accordance with rules ODJFS adopts governing income.)

(4) The trust contains a clear statement that requires the trustee to terminate the trust if it is counted as an available resource by a county department of job and family services. (This has been referred to as a "poison pill clause."¹⁵)

(5) 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. (Only the portion of the trust subject to the court order is not to be counted as an available resource.)

(6) The trust is specifically exempt from being counted as an

available resource by Ohio statutes or rules or by federal law.

(7) The applicant or recipient presents a final judgment from a court demonstrating that the applicant or recipient was unsuccessful in a civil action against the trustee to compel payments from the trust.

(8) The applicant or recipient presents a final judgment from a court demonstrating that in a civil action against the trustee the applicant or recipient was only able to compel limited or periodic payments. (The payments must be treated in accordance with rules ODJFS adopts governing income.)

(9) The applicant or recipient provides written documentation showing that a civil action to compel payments from the trust will be cost prohibitive.

One of the authors of *Anderson's Ohio Elder Law Practice Manual* (2006 ed.) stresses the importance of strictly following the administrative rule now codified in R.C. 5111.151(G) when drafting a discretionary trust to benefit a person with a disability. He states that "in virtually all cases a pure discretionary trust will be determined to be available at the [Medicaid] application stage and through the administrative appeal process unless the requirements of [the rule] are met exactly."¹⁶

Supplemental services trusts

A supplemental services trust is a type of trust created by the General Assembly in 1993 to benefit



individuals with a mental or physical disability¹⁷ who are eligible to receive services through the Ohio Department of Mental Retardation, a county board of mental retardation and developmental disabilities, the Ohio Department of Mental Health, or a board of alcohol, drug addiction, and mental health services.¹⁸ Such a trust is exempt from claims of creditors and the government and is not considered an asset or resource of the beneficiary for purposes of determining Medicaid eligibility if all of the following criteria are met:¹⁹

(1) Principal limitation. At the time the trust is created, the trust principal does not exceed the maximum amount prescribed in law²⁰ (for 2007, \$226,000; increases in increments of \$2,000 for each succeeding year).

(2) Prohibition on beneficiary. The trust instrument contains a statement of the settlor's intent, or otherwise clearly evidences the settlor's intent, that the beneficiary not have the 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.

(3) Limitation on services provided. The trust instrument provides that the trust assets can be used only to provide supplemental

services²¹ to a disabled individual described above.

(4) Restrictions on distribution and maintenance. The trust is maintained and the assets are distributed in accordance with rules adopted by the Director of Mental Health and the Director of Mental Retardation and Developmental Disabilities.²²

(5) Payback provision. The trust instrument provides that on the death of the beneficiary, a portion of the remaining assets of the trust, which cannot be less than 50% of the assets, must be deposited to the credit of the Services Fund for Individuals with Mental Illness²³ or the Services Fund for Individuals with Mental Retardation and Developmental Disabilities.²⁴

It is the payback provision that has been cited as the primary disadvantage of the supplemental services trust--at least 50% of whatever remains in the trust at the time of the beneficiary's death goes to the State of Ohio.²⁵

Medicaid payback trusts

Background. As part of the Omnibus Budget Reconciliation Act of 1993 (OBRA '93), Congress addressed how self-settled trusts²⁶ are to be treated in determining an individual's Medicaid eligibility. In short, this law provides that an individual's assets held in trusts created after August 11, 1993, must be counted as resources in determining Medicaid eligibility.²⁷

A supplemental services trust can benefit individuals with a mental or physical disability who are eligible to receive services through the Ohio Department of Mental Retardation, a county board of mental retardation and developmental disabilities, the Ohio Department of Mental Health, or a board of alcohol, drug addiction, and mental health services. However, at least 50% of whatever remains in the trust at the time of the beneficiary's death goes to the State of Ohio.



“Special needs trusts” and “pooled trusts” are generally known as “Medicaid payback trusts” because each must “pay back” Medicaid expenditures made on behalf of the beneficiary from the amount left in the trust at the beneficiary’s death.

Congress authorized exceptions to this requirement, however, for three types of trusts--two of which are generally known as “Medicaid payback trusts” and individually called “special needs trusts” and “pooled trusts.”²⁸ Special needs trusts and pooled trusts are generally called “Medicaid payback trusts” because each must “pay back” Medicaid expenditures made on behalf of the beneficiary from the amount left in the trust at the beneficiary’s death--even if repayment claims the entire amount left in the trust.²⁹

Special needs (or (d)(4)(A)) trust.

A special needs trust is another trust that can be used only to pay for supplemental services provided to a person with a disability.³⁰ In contrast to discretionary trusts described above, the state must receive, at the beneficiary’s death, all amounts remaining in the trust up to an amount equal to the amount of medical assistance paid on behalf of the beneficiary.³¹

Section 13611(b)(4)(A) of OBRA ‘93³² established the requirements for special needs trusts. These requirements were incorporated and enhanced in a rule adopted by the Director of Job and Family Services (O.A.C. 5101:1-39-27.1(C)(3)(a)) that became effective November 7, 2002, and were later codified when the General Assembly enacted R.C. 5111.151(F)(1) in March 2004.³³ This state law establishes the following requirements for a special needs trust:

(1) Disabled beneficiary under age 65. The trust must be established for the benefit of a Medicaid applicant or recipient who qualifies as “disabled” and has not reached age 65. An individual is disabled if the individual meets the criteria established in rules adopted by ODJFS.³⁴ These rules essentially provide that when the intended beneficiary of the special needs trust is receiving either Social Security Disability Income³⁵ or Supplemental Security Income³⁶ benefits as a disabled person, ODJFS accepts the disability determination made for those programs.³⁷ The beneficiary of a trust who is not receiving those benefits must either be (a) determined to be “presumptively disabled” by a county department of job and family services according to the requirements in O.A.C. 5101:1-39-03.1, or (b) have an SSI claim pending and be determined eligible by the county medical services section as provided in O.A.C. 1-39-03.2.³⁸

(2) Trust assets. The trust *must* contain assets of the Medicaid applicant or recipient and *may* contain the assets of others.

(3) Who can establish trust. The trust must be established for the benefit of the Medicaid applicant or recipient by a parent, grandparent, legal guardian, or a court.

(4) Payback provision. The trust must require that, on 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 total amount of Medicaid



paid on behalf of the applicant or recipient.

Transfers to the trust after the Medicaid applicant or recipient reaches age 65 are prohibited. Any additions to the trust after that time with assets of the beneficiary are subject to the rules governing the improper transfer of resources. Cash distributions from the trust to the Medicaid applicant or recipient must be counted as unearned income. All other distributions from the trust to the Medicaid applicant or recipient are treated under rules adopted by ODJFS governing in-kind income.

The determination of whether a special needs trust is advisable generally involves a weighing of various factors, including the extent of the individual's disability and the need for government assistance; the government benefits available; the individual's prognosis; the age, health, availability, and commitment of family caregivers; and the nature and amount of the individual's assets. Individuals with great needs and few assets are generally more suitable for a special needs trust than those with minor disabilities and substantial assets, although each situation is different and must be evaluated on its own.³⁹

Pooled (or (d)(4)(C)) trust. A pooled trust is a special arrangement with a nonprofit organization that serves as the trustee to manage assets belonging to many disabled individuals (with investments being pooled), but with separate trust "accounts" being maintained for each disabled

individual.⁴⁰ Like a special needs trust, a pooled trust can be used only to pay for supplemental services.⁴¹

Section 13611(b)(4)(C) of OBRA '93⁴² established the requirements for pooled trusts. These requirements were incorporated and enhanced in a rule adopted by the Director of Job and Family Services (O.A.C. 5101:1-39-27.1(C)(3)(a)) that became effective November 7, 2002, and were later codified in Ohio law when the General Assembly enacted R.C. 5111.151(F)(3) in March 2004. In short, this state law provides the following requirements for a pooled trust:

(1) **Disabled beneficiary of any age.** Like a special needs trust, a pooled trust must be established for the benefit of a Medicaid applicant or recipient who is "disabled" as that term is defined in rules adopted by ODJFS. However, in contrast to a special needs trust, there is no age limitation on the beneficiary.

(2) **Trust assets.** The trust *must* contain the assets of the applicant or recipient.

(3) **Who can establish trust.** Accounts in the trust can be established by the Medicaid applicant or recipient or the applicant's or recipient's parent, grandparent, or legal guardian, or a court.

(4) **Management by nonprofit association.** The trust must be established and managed by a nonprofit association.

(5) **Funds pooled.** A separate account is maintained for each beneficiary of the trust but, for purposes of investment and



management of funds, the trust pools the funds in these accounts.

(6) Payback provision. The trust must require that, to the extent that any amounts remaining in the beneficiary's account on the death of the beneficiary are not retained by the trust, the trust must pay to the State the amounts remaining in the trust up to an amount equal to the total amount of Medicaid paid on the beneficiary's behalf.

Cash distributions from the trust to the Medicaid applicant or recipient must be counted as unearned income. All other distributions from the trust to the Medicaid applicant or recipient, other than cash distributions, are treated under rules adopted by ODJFS governing in-kind income.

Pooled trusts have been cited as well suited for circumstances where the intended beneficiary does not have siblings or an extended family, the amounts to be retained are modest, there is a shortage of potential trustees in a family, or there is a desire to share administrative costs and disbursement control.⁴³

Pooled trusts that exist in Ohio include the Pooled Medicaid Payback Trust and the Roll-in Pooled Medicaid Payback Trust made available by the Community Fund Management Foundation in Cleveland; the Ohio Community Pooled Annuity Trust and the Ohio Community Pooled Flexible-Spending Trust made available by The Disability Foundation, Inc. in Dayton; and the Ohio McGivney Special Needs Trust made available by the Ohio State Charity Foundation.⁴⁴

New Ohio Trust Code

In June 2006, Governor Bob Taft signed Sub. H.B. 416, which adopted an "Ohio Trust Code" based largely on the Uniform Trust Code (UTC) developed by the National Conference of Commissioners on Uniform State Laws (NCCUSL). The OTC is codified in Revised Code Chapters 5801. to 5811. and provides that except as modified by it or another section of the Revised Code, the common law of trusts and principles of equity continue to apply.⁴⁵ The Act became effective January 1, 2007.

According to Richard E. Davis, an estate planning attorney who was a member of the Joint Committee of the Ohio Bankers League and Ohio State Bar Association on the Ohio Trust Code, a number of attorneys around the U.S. had expressed concerns that the UTC would have a detrimental effect on estate planning with supplemental and special needs trusts.⁴⁶ Mr. Davis dispels these concerns in a September 2005 article, stating "[a] critical analysis shows that the UTC, and particularly the OUTC, is not a threat to [supplemental and special needs trusts]."⁴⁷ In fact, Mr. Davis asserts that the UTC will actually enhance supplemental and special needs trust planning in Ohio because of several components of the law, including the following:⁴⁸

- The creation of a "wholly discretionary trust"--a statutory safe haven trust that permits language regarding the intended purpose of the

It has been asserted that the Ohio Trust Code, which became effective January 1, 2007, will enhance supplemental and special needs trust planning in Ohio because of several components of the law, including the creation of a "wholly discretionary trust."

supplemental or special needs trust and for which certain remedies are not available to creditors against interests in such trusts.⁴⁹

- The court's ability to limit a creditor's award to such relief as is appropriate under the circumstances.⁵⁰
- The prohibition against creditors compelling distributions.⁵¹

Trust comparison

The following table compares the trusts described in this brief that have been used in Ohio to provide supplemental goods and services to persons with disabilities without jeopardizing their eligibility for Medicaid and other public assistance programs. 

	Discretionary trust created by a third party	Supplemental services trust	Special needs trust	Pooled trust
Description	A trust created by a person other than the Medicaid applicant or recipient that is funded with assets or property in which the applicant or recipient never held an ownership interest and for which the trustee has absolute discretion to determine (1) how the assets in the trust are invested, and (2) when, how much, and for whom the assets are distributed.	A trust to benefit an individual with a mental or physical disability who is eligible to receive services through the Ohio Department of Mental Retardation, a county board of mental retardation and developmental disabilities, the Ohio Department of Mental Health, or a board of alcohol, drug addiction, and mental health services.	A trust to benefit an individual with a mental or physical disability who have not reached the age of 65.	A special arrangement with a nonprofit organization that serves as the trustee to manage assets belonging to many disabled individuals (with investments being pooled), but with separate trust “accounts” being maintained for each disabled individual.
Alternative name	Supplemental needs trust (if established for the benefit of a person with a disability)		(d)(4)(A) trust	(d)(4)(C) trust
Applicable statutes	R.C. 5111.151(G) and 5805.03 (wholly discretionary trusts)	R.C. 5815.28 (eff. 1/1/07) (formerly R.C. 1339.51)	42 U.S.C. 1396p(d)(4)(A); R.C. 5111.151(F)(1)	42 U.S.C. 1396p(d)(4)(C); R.C. 5111.151(F)(3)

	Discretionary trust created by a third party	Supplemental services trust	Special needs trust	Pooled trust
Notable restrictions	<ul style="list-style-type: none"> • Must meet at least one of the circumstances in R.C. 5111.151(G) to not be counted as an available resource. 	<ul style="list-style-type: none"> • Principal limitation of \$226,000 for 2007 (increases in increments of \$2,000 for each succeeding year). • Must provide that (1) the beneficiary does not have the authority to compel the trustee under any circumstances to furnish the beneficiary with minimal or other maintenance or support, (2) the trust assets can be used only to provide supplemental services, and (3) at least 50% of the assets remaining on the beneficiary's death must go to the State. • Must be maintained and assets distributed in accordance with rules adopted by the Director of Mental Health and the Director of Mental Retardation and Developmental Disabilities. 	<ul style="list-style-type: none"> • Must contain assets of the Medicaid applicant or recipient and may contain the assets of others. • Must be established by a parent, grandparent, legal guardian, or a court. • Must provide that on the beneficiary's death, the State will receive amounts remaining in the trust up to the total amount of Medicaid paid on the beneficiary's behalf. 	<ul style="list-style-type: none"> • Must contain assets of the Medicaid applicant or recipient. • The trust itself must be established and managed by a non-profit organization (although individual accounts in the trust can be established by the Medicaid applicant or recipient or the applicant's or recipient's parent, grandparent, or legal guardian, or a court). • Must provide that on the beneficiary's death, an amount that does not exceed the total amount of Medicaid paid on the beneficiary's behalf, and that is not retained by the trust, must be paid to the State.
Other	<p>Careful drafting of the trust instrument is crucial, although a new discretionary trust created by the Ohio Trust Code (the "wholly discretionary trust") permits the trust document to include precatory language regarding the intended purpose of the trust.</p>			



Endnotes

¹ Kaiser Family Foundation. *Ohio: Distribution of Medicaid Enrollees by Enrollment Group, FY2003* (last visited June 1, 2006), available at <<http://www.statehealthfacts.org/cgi-bin/healthfacts.cgi?action=profile&area=Ohio&category=Medicaid+%26+SCHIP&subcategory=Medicaid+Enrollment&topic=Distribution+by+Enrollment+Group%2c+FY2003>>.

² In Ohio, Medicaid has a resource limitation of \$1,500 for an individual. Ohio Administrative Code § 5101:1-39-05(9).

³ David A. Zwyer, Esq., Executive Director of the Ohio Developmental Disabilities Council. *Estate and Future Planning for Ohioans with Disabilities and Their Families* (Sept. 2005) (last visited June 29, 2006), available at <<http://www.ddc.ohio.gov/Pub/Estate2005.pdf>>; BLACK'S LAW DICTIONARY 1047-48 (Abr. 6th ed. 1991).

⁴ BLACK'S LAW DICTIONARY 1052 (Abr. 6th ed. 1991); Ohio Legal Rights Service, *Trusts* (last visited July 26, 2006), available at <http://olrs.ohio.gov/asp/olrs_Trusts.asp>.

⁵ Special Needs Alliance. *Trusts for Disabled Children* (last visited June 29, 2006), available at <http://www.specialneedsalliance.com/families/trusts_disabled.tpl>.

⁶ Zwyer, *supra* note 3, and BLACK'S LAW DICTIONARY, *supra* note 4 at 1049.

⁷ Browning and Meyer Co., L.P.A. *New Ohio Statute Provides Clarity for Special Needs Trusts* (last visited July 26, 2006), available at <<http://www.elderlaw.us/html/articles/article2.htm>>. Discretionary trusts are generally considered to be disadvantageous for Supplemental Security Income (SSI) recipients, however, because funds distributed from the trust directly to the beneficiary are counted as unearned income for the beneficiary and the total amount of the distributions in any month, in excess of the \$20 unearned income exclusion, will reduce the SSI benefit in that month dollar-for-dollar. Sterling L. Ross, Jr., Esq. *Conservatorship, Trusts and Wills – A Guide for Families* (last visited July 27, 2006), available at <<http://www.empowermentzone.com/conserv.txt>>.

⁸ 16 Ohio St.2d 147.

⁹ *Id.* at 151.

¹⁰ 76 Ohio St.3d 547.

¹¹ *Id.* at 549.

¹² *Id.* at 550-51.

¹³ *Id.* at 552-53.

¹⁴ R.C. 5111.151 was enacted by Am. Sub. H.B. 85 of the 125th General Assembly.

¹⁵ Zwyer, *supra* note 3, at 13.

¹⁶ GREGORY S. FRENCH ET AL., ANDERSON'S OHIO ELDER LAW PRACTICE MANUAL 203 (2006 ed.).

¹⁷ A "disability" is defined 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 (R.C. 5815.28(A)(2)).

¹⁸ R.C. 5815.28(B) (eff. Jan. 1, 2007) (formerly R.C. 1339.51(B).)

¹⁹ R.C. 5815.28(D) (eff. Jan. 1, 2007) (formerly R.C. 1339.51(D).)

²⁰ R.C. 5815.28(E) (eff. Jan. 1, 2007) (formerly R.C. 1339.51(E).)



²¹ Supplemental services are services specified in rules adopted by the Director of Mental Health and the Director 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. In general, these services are services other than basic necessities such as food, clothing, shelter, education, and medical care. Examples of supplemental services include reimbursement for attendance at or participation in recreational or cultural events; travel and vacations; participation in hobbies, sports, or other activities; items beyond necessary food and clothing; cosmetic, extraordinary, experimental, or elective medical or dental care, if not available through third party sources; visiting friends and companionship; exercise equipment or special medical equipment if not available through third party sources; the cost difference between a shared room and a private room; equipment such as telephones, cable television, televisions, radios, and other sound equipment, as well as cameras for private use by the individual; memberships in clubs such as book clubs, health clubs, or record clubs; subscriptions to magazines and newspapers; small, irregular amounts of personal spending money, including reasonable funds for the occasional purchase of gifts for family and friends, or for donations to charities or churches; and advocacy. R.C. 5815.28(D)(3) and O.A.C. 5122-22-01(D) and 5123:2-18-01(C).

²² These rules are in O.A.C. 5122-22-01(E) to (H).

²³ This fund is created in R.C. 5119.17.

²⁴ This fund is created in R.C. 5123.40.

²⁵ Zwyer, *supra* note 3, at 14.

²⁶ A “self-settled trust” is a trust that is funded, in whole or in part, with the beneficiary’s own funds.

²⁷ Thomas J. Bonasera & Michael A. Renne, Presentation at The Catholic Foundation’s Professional Advisors Estate Planning Seminar, 2003: *Special Needs Trusts* (Nov. 14, 2003) (written documentation on file with the author).

²⁸ *Id.*

²⁹ Zwyer, *supra* note 3, at 15.

³⁰ *Id.*

³¹ Bonasera & Renne, *supra* note 27.

³² Section 13611(b) of OBRA ‘93 is codified in 42 U.S.C. 1396p(d)(4)(A): that is why special needs trusts are sometimes referred to as “(d)(4)(A) trusts.”

³³ As noted in endnote 14, R.C. 5111.151 was enacted by Am. Sub. H.B. 85 of the 125th General Assembly.

³⁴ R.C. 5111.151(F)(1)(a)(ii).

³⁵ Social Security Disability Income (SSDI) is a disability insurance program that is part of the Social Security Program. It is funded by taxes withheld, in accordance with the Federal Insurance Contributions Act (FICA), from the wages of workers covered by Social Security. It is an entitlement for workers who have worked for at least 20 quarters and meet eligibility requirements. Monthly payments are graduated to reflect the level of the recipient’s earnings prior to the disability. Although the program is operated by the federal Social Security Administration, in Ohio the Bureau of Disability Determination in the Ohio Rehabilitation Services Commission conducts the eligibility evaluations. Howe and Associates, on behalf of the Ohio Developmental Disabilities Council. *Projecting Enrollment in a Medicaid Buy-in Program for Ohio* (Aug. 2004) (last visited June 1, 2006), available at <<http://www.ddc.ohio.gov/Pub/oddcrep2.htm>>; Tonya Gabbard. *Special Needs Trusts* (Mar. 2006) (last visited June 29, 2006), available at <<http://www.dcba.org/brief/marissue/2006/art40306.htm>>. It



should be noted that persons who qualify for SSDI are automatically eligible for health care coverage through Medicare, although a two-year waiting period applies. Centers for Medicare & Medicaid Services. *Overview: Medicare* (last visited June 29, 2006), available at <<http://www.cms.hhs.gov/MedicareGenInfo/>>.

³⁶ Supplemental Security Income (SSI) provides income for persons with disabilities who do not have sufficient quarters of work history and have \$2,000 or less in assets and limited income. Like SSDI, SSI is administered by the Social Security Administration, although in Ohio the Ohio Rehabilitation Services Commission, a state agency, conducts the eligibility determinations. *Id.*

³⁷ Bonasera & Renne, *supra* note 27, citing O.A.C. 5101:1-39-03(A)(1).

³⁸ O.A.C. 5101:1-39-03(A)(2) and (3).

³⁹ Bonasera & Renne, *supra* note 27.

⁴⁰ Jan P. Myskowski, *Special Needs Trusts in the Era of the Uniform Trust Code*, 46 N.H.B.J. 16, 16 (Spring 2005).

⁴¹ Zwyer, *supra* note 3, at 15.

⁴² Section 16311(b)(4)(C) is codified in 42 U.S.C. 1396p(d)(4)(C): that is why pooled trusts are sometimes referred to as “(d)(4)(C) trusts.”

⁴³ McGivney Master Pooled Trust, *Frequently Asked Questions . . .* (last visited Sept. 12, 2006), available at <<http://www.mcgivneytrust.com/faq-home.htm>>.

⁴⁴ Community Fund Management Foundation. *Trusts* (last visited Sept. 11, 2006), available at <<http://www.cfmf.org/trusts.html>>; Jesse B. Beasley, Esq. *The Ohio Community Pooled Flexible-Spending Trust: A New Option for Loved Ones with Disabilities* (last visited Sept. 11, 2006), available at <<http://www.daytonfoundation.org/pdfs/fut06wn.pdf#search=%22The%20Disability%20Foundation%2C%20Inc.%20pooled%22>>; McGivney Master Pooled Trust. *About The Trust . . .* (last visited Sept. 11, 2006), available at <<http://www.mcgivneytrust.com/about.htm>>.

⁴⁵ R.C. 5801.05.

⁴⁶ Richard E. Davis. *Treatment of Supplemental Needs Trusts Under the OUTC*, PROB. L. J. OF OHIO, Sept./Oct. 2005, at 17.

⁴⁷ *Id.* at 21.

⁴⁸ *Id.*

⁴⁹ R.C. 5805.03.

⁵⁰ R.C. 5805.02(D). A court is similarly authorized to limit a creditor’s award where a mandatory distribution trust, special needs trust ((d)(4)(A) trust) or pooled trust ((d)(4)(C) trust) has been created (R.C. 5805.05(A) and 5805.06(A)(3)).

⁵¹ R.C. 5805.03.

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