

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

KIMBERLY A. CAMPBELL by and through her Next Friend, Jacklyn Siders	:	
Appellant	:	CASE NO. 2012 CVF 002056
vs.	:	Judge McBride
MICHAEL B. COLBERT, et al.	:	DECISION/ENTRY
Appellees	:	

Beckman Weil Shepardson LLC, Janet E. Pecquet, attorney for the appellant Kimberly A. Campbell, by and through her next friend Jacklyn Siders, 300 Pike Street, Suite 400, Cincinnati, Ohio 45202.

Ohio Attorney General's Office, Henry G. Appel, Senior Assistant Attorney General, attorney for the appellees Michael B. Colbert, Director of Ohio Job and Family Services, and Ohio Job & Family Services, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215.

This cause is before the court for consideration of the administrative appeal of a decision issued by an Administrative Appeal Officer on October 11, 2012. The appeal was filed by the appellant Kimberly A. Campbell by and through her next friend Jacklyn K. Siders.

The court scheduled and held an oral argument on the administrative appeal on April 8, 2013. At the conclusion of that hearing, the court took the issues raised by the administrative appeal under advisement.

Upon consideration of the appeal, the record of the proceeding, the certified record presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On April 10, 2000, P. Donald Campbell and N. Jean Campbell, as grantors, established the Campbell Family Revocable Trust Agreement.¹ The trust provided that upon the death of the surviving grantor, the balance of the trust was to be transferred to a separate trust established for the benefit of their daughter Kimberly A. Campbell.² The trust provides in pertinent part as follows:

*“3.2(a) Distribution from Kim’s Trust. * * * The trustee may accumulate the net income of Kim’s Trust and add it to principal or pay or apply so much of its income and the principal of Kim’s Trust to or for the benefit of Kim in such amounts as the trustee may deem advisable in the trustee’s sole discretion. In exercising their discretion as to the amount (if any) of the income and principal which may be paid to Kim, the trustee shall consider to the extent the trustee deems advisable any other income or property which is available to Kim from any other source, and may require Kim to provide such documentation with respect to such income or property as the trustee may from time to time request as a condition of receiving such distributions. Grantor suggests that the principal of Kim’s personal estate be substantially depleted prior to any encroachments upon principal being made from Kim’s Trust for Kim’s benefit.*

¹ Certified Record (Initial), pg. 38.

² Id. at pgs. 39-40.

However, if the following suggestion appears unwise in light of the circumstances existing at the time such an encroachment needs to be made, encroachments may be made upon the principal of Kim's Trust for the benefit of Kim. These standards for distribution are intended to grant a liberal degree of fiduciary discretion to the trustee to make income and principal available to Kim for reasonable purposes, it not being intended to grant Kim a power to withdraw or appoint assets.

(b) Notwithstanding any provision of this Paragraph 3.2 to the contrary, any distributions made from this trust to or for the benefit of Kim shall only be to provide benefits for Kim in addition to any benefits Kim may otherwise receive as a result of Kim's disability or indigency from any local, state or Federal government, or from any private agencies which provide services or benefits to disabled, elderly or indigent persons. No distribution from this trust shall be made to or for the benefit of Kim which would otherwise be required to be paid to any government agency for any reason (other than taxes) or that would reduce any aid or benefits which would otherwise be available from any governmental or private source for Kim's education, support, maintenance or health."³

The trust is now irrevocable and Kimberly Campbell is its beneficiary as both her parents are now deceased.⁴ The value of the trust as of June 2012 was \$749,535.49.⁵ Campbell receives Medicaid vendor payment for the nursing facility in which she lives, as well as social security disability, and her Medicare premium is paid for by the state of Ohio.⁶

The Clermont County Department of Job and Family Services, upon learning about the trust, proposed to terminate Campbell's Medicaid benefits because it determined that Campbell's resources exceeded the resource limit.⁷ The State Hearing

³ Id. at 40.

⁴ Certified Record (Administrative Appeal) at pgs. 1 and 12.

⁵ Id. at pg. 1.

⁶ Id.

⁷ Id. at pg. 12.

Officer, in a decision issued on September 12, 2012, overruled the appeal of the termination of Campbell's benefits and concluded that "policy and the evidence supports the Agency's determination that the trust is an available resource."⁸ The Administrative Appeal Officer affirmed that decision, finding that the trust is an available resource.⁹

LEGAL ANALYSIS

Pursuant to R.C. 5101.35(E), "[a]n appellant who disagrees with an administrative appeal decision of the director of job and family services or the director's designee issued under division (C) of this section may appeal from the decision to the court of common pleas pursuant to section 119.12 of the Revised Code. The appeal shall be governed by section 119.12 of the Revised Code * * * ."

R.C. 119.12 provides in pertinent part:

"The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. The court shall award compensation for fees in accordance with section 2335.39 of the Revised Code to a prevailing party, other than an agency, in an appeal filed pursuant to this section."

The sole issue raised on this appeal is whether the agency's determination that the trust at issue is a resource available to Kimberly Campbell is supported by reliable, probative, and substantial evidence and is in accordance with law.

⁸ Id. at pg. 15.

⁹ Id. at pg. 5.

Pursuant to O.A.C. § 5101:1-39-27.1(C)(4):

“(4) Category four: trusts established by someone else for the benefit of the individual.

(a) A trust, or legal instrument or device similar to a trust, falls under this category if it meets the following criteria:

(i) The trust is created by someone other than the individual;

(ii) The trust names the individual as a beneficiary; and

(iii) The trust is funded with assets or property that the individual never held an ownership interest in prior to the establishment of the trust.

(b) Any portion of a trust in this category is an available resource only if the trust permits the trustee to expend principal, corpus or assets of the trust for the individual's medical care, care, comfort, maintenance, health, welfare, general well-being, or a combination of these purposes. The trust is still considered an available resource even if the trust contains any of the following types of provisions:

(i) Any provision prohibiting the trustee from making payments that would supplant or replace medicaid or public assistance, or other government assistance;

(ii) Any provision prohibiting the trustee from making payments that would impact or affect the individual's right or ability or opportunity to receive medicaid, or public assistance, or other government assistance; or

(iii) Any provision attempting to prevent the trust or its corpus or principal from counting as an available resource under this rule.

(c) A trust in this category normally considered as an available resource is not counted as an available resource under the following circumstances.

(i) If the trust contains a clear statement requiring the trustee to preserve a portion of the trust for another beneficiary or remainderman, then that portion of the trust is not counted as an available resource. Terms of a trust granting discretion to preserve a portion of the trust do not qualify as a clear

statement requiring the trustee to preserve a portion of the trust.

(ii) If the trust contains a clear statement requiring the trustee to use a portion of the trust for a purpose other than the medical care, care, comfort, maintenance, welfare, or general well-being of the individual, then that portion of the trust is not counted as an available resource. Terms of a trust that grant discretion to limit the use of a portion of the trust do not qualify as a clear statement requiring the trustee to use a portion of the trust for a particular purpose.

(iii) If the trust contains a clear statement limiting the trustee to making fixed periodic payments, then the trust is not counted as an available resource; however, the payments are treated under the rules governing income. Terms of a trust that grant discretion to limit payments do not qualify as a clear statement requiring the trustee to make fixed periodic payments.

(iv) If the trust contains a clear statement requiring the trustee to terminate the trust if it is counted as an available resource, then it is not counted as an available resource. Terms of a trust granting discretion to terminate the trust do not qualify as a clear statement requiring the trustee to terminate the trust.

(v) If any person obtains a judgment from a court of competent jurisdiction expressly preventing the trustee from using part or all of the trust for the medical care, care, comfort, maintenance, welfare, or general well-being of the individual, then the trust or that portion subject to the court order is not counted as a resource.

(vi) If the trust is specifically exempt from counting as an available resource by this rule, another rule, the Revised Code, or the U.S. Code, it is not counted as a resource.

(vii) If the individual presents a final judgment from a court demonstrating that he or she was unsuccessful in a civil action against the trustee to compel payments from the trust, then it is not counted as an available resource.

(viii) If the individual presents a final judgment from a court demonstrating that in a civil action against the trustee the individual was only able to compel limited or periodic

payments, then it is not counted as an available resource; however, the payments are treated under rules governing income.

(ix) If the individual provides written documentation showing the cost of a civil action brought to compel payments from the trust are cost prohibitive, then it is not counted as an available resource.

(d) For trusts under this category, even if the trust is not counted as an available resource, any actual payments from the trust to the individual are treated under the rules governing income. Payments to any person other than the individual are not income to the individual. Payment from the trust to any person other than the individual is not an improper transfer of assets.”

R.C. 5111.151(G)(2) contains identical language to the administrative code language above, stating that:

“Any portion of a trust that meets the requirements of division (G)(1) of this section shall be a resource available to the applicant or recipient only if the trust 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.”

The trust at issue was established by Campbell's parents and, as such, the trust is a “Category Four” trust, meaning a trust established by someone else for the benefit of the Medicaid recipient.

In the case of *Pack v. Osborn* (2008), 117 Ohio St.3d 14, 881 N.E.2d 237, 2008-Ohio-90, the Ohio Supreme Court examined a Category Four trust established by a parent for her children, including one child who had physical and mental disabilities.¹⁰ The pertinent provision of the trust permitted the successor trustee “to make income or principal distributions, in her sole discretion, for the benefit of [the grantor's] children

¹⁰ *Pack* at ¶ 2.

'only for purposes other than providing food, clothing or shelter that is to be used only to meet supplemental needs over and above those met by entitlement benefits.'¹¹

The court noted that “[w]hen a trust beneficiary requests public assistance, the state first determines the nature of the trust in which the applicant has an equitable interest.”¹² “The nature of the trust determines whether its assets are available resources in determining whether the applicant's resources exceed the maximum limit for Medicaid eligibility.”¹³ The court also noted that “[t]he eligibility-review rules with respect to trust interests have been frequently amended[,]” one reason being “to close loopholes in the program so that taxpayers are not forced to accept primary responsibility for the care of persons who have access to resources that would allow them to pay for their own care.”¹⁴

The *Pack* court, in considering the nature of the trust at issue in that case, discussed as follows:

“In a trust established by a settlor for the benefit of another who later applies for Medicaid, the assets are available resources only if the terms of the trust permit ‘the trustee to expend principal, corpus, or assets of the trust for the applicant's * * * medical care, care, comfort, maintenance, health, welfare, general well being, or any combination of these purposes.’ R.C. 5111.151(G)(2). See also Ohio Adm.Code 5101:1-39-27.1(C)(4)(b). Provided the trustee has the discretion to make distributions for the above purposes, the assets in the trust remain available notwithstanding a provision in the trust that clearly prohibits a trustee from making a distribution that would affect Medicaid eligibility. R.C. 5111.151(G)(3); Ohio Adm.Code 5101:1-39-27.1(C)(4)(b).

¹¹ Id. at ¶ 3.

¹² Id. at ¶ 9, citing R.C. 5111.51 and O.A.C. 5101:1-39-27.1.

¹³ Id.

¹⁴ Id. at ¶ 10.

Trusts that give the trustee the 'sole and absolute' discretion to make income and principal distributions for a beneficiary's medical care, care, comfort, maintenance, health, welfare, and general well-being are discretionary trusts, but the trustee must base his or her decisions on the needs of the beneficiary, and his or her discretion can be judged by that standard ('support standard'). Restatement of the Law 3d, Trusts (2003), Section 50. The common-law interpretation of such trusts is that a trustee may be compelled to make distributions consistent with the trust's support terms for the benefit of the beneficiary. * * *

In contrast, a trust that allows the trustee the uncontrolled discretion to distribute income and principal as the trustee determines, without a support standard, is a pure discretionary trust. * * * No court can compel a trustee of a pure discretionary trust to exercise the trustee's discretion to distribute income or principal, unless the trustee acts in bad faith, dishonestly, or with an improper motive. * * *

A significant aspect of a pure discretionary trust is that its assets are not recognized as an available resource in the Medicaid-eligibility review because a pure discretionary trust lacks a mechanism through which a beneficiary may compel a distribution. * * *¹⁵

The Administrative Appeal Officer in the present case reasoned that "[t]he trust at issue does allow the trustee to spend principal and interest to or for the benefit of the Appellant in such amounts as the trustee may deem advisable in the trustee's sole discretion[,]” and, as such, found that the trust is available under the provisions of O.A.C. 5101:1-39-27.1(C)(4).¹⁶ The appeal officer also noted that, pursuant to O.A.C. 5101:1-39-27.1(C)(4)(b)(i)-(iii), the trust is still considered an available resource even if it contains a provision prohibiting the trustee from making payments that would impact the individual's right to receive Medicaid or other public assistance.¹⁷

¹⁵ Id. at ¶¶ 16-19.

¹⁶ Certified Record (Administrative Appeal) at pg. 5.

¹⁷ Id.

The question before this court is whether this determination is supported by reliable, probative, and substantial evidence and is in accordance with law. While the result is somewhat unfortunate considering the general spirit and purpose of the Medicaid program, this court feels compelled to find that the decision was not in accordance with Ohio law as it currently stands.

The decision of the administrative appeal officer does not discuss the issue of what support standard, if any, is contained within the terms of the subject trust. Instead, the appeal decision merely states that the trustee has the discretion to spend principal and interest to or for the benefit of Campbell. The *Pack* court stated that a trust which gives the trustee the 'sole and absolute' discretion to make income and principal distributions for a beneficiary's medical care, care, comfort, maintenance, health, welfare, and general well-being is a discretionary trust but the trustee must base his or her decisions on the needs of the beneficiary, and his or her discretion can be judged by that standard. Distributions from such a trust can be compelled and the trust is considered an available resource. Conversely, a trust that allows the trustee the uncontrolled discretion to distribute income and principal as the trustee determines, without a support standard, is a pure discretionary trust, and is not recognized as an available resource in the Medicaid-eligibility review due to the inability to compel a distribution from such a trust.

Therefore, the issue in this case becomes whether trust language stating that a trustee may pay or apply income *to or for the benefit* of the individual in such amounts as the trustee may deem advisable in the trustee's sole discretion creates a support standard by which distributions from said trust can be compelled.

The Fifth District Court of Appeals addressed this issue when the *Pack* case was remanded to it by the Ohio Supreme Court. The pertinent language of the trust stated that the trustee may “distribute to or expend for the benefit of [the individual] so much of the principal and the current or accumulated income therefrom, at such time or times and in such amounts and manner as the Trustee, in her sole discretion, shall determine.”¹⁸ The grantor further provided in the trust that the “Trustee use income or principal for the benefit of my children only for purposes other than providing food, clothing or shelter that is to be used only to meet supplemental needs over and above those met by entitlement benefits.”¹⁹ The court concluded as follows:

“As the Ohio Supreme Court recognized in *Pack*, ‘[t]rusts that give the trustee the ‘sole and absolute’ discretion to make income and principal distributions for a beneficiary’s medical care, care, comfort, maintenance, health, welfare, and general well-being are discretionary trusts, but the trustee must base his or her decisions on the needs of the beneficiary, and his or her discretion can be judged by that standard (‘support standard’).’ *Id.* at ¶ 17, 881 N.E.2d 237, citing Restatement of the Law 3d, Trusts (2003), Section 50. Thus, as the Court observed in *Martin v. Martin* (1978), 54 Ohio St.2d 101, 108, 8 O.O.3d 106, 374 N.E.2d 1384, certain trusts which confer upon trustees total discretion, but also define the standard by which that discretion is to be employed, can be characterized neither as purely discretionary trusts nor as strict support trusts.

If the nature of Charlotte’s interest in the trust at issue is to be determined by the grantor’s intent, then a simple reading of the language in the trust will tell us what Charlotte’s interest was. In simple terms, Charlotte had an equitable interest in the trust assets. Charlotte had no legal interest in any of the assets in the trust. Her right to receive any assets from the trust rested upon the sole discretion of the trustee; no ‘shall’ language is utilized. See Trust Agreement at part 2(a), *supra*. Thus, nothing in the trust requires the trustee to make any distribution to Charlotte. Certainly, should the

¹⁸ *Pack v. Osborn* (Nov. 14, 2008), 5th Dist. No. 05-CA-83, 2008-Ohio-5956, ¶ 3.

¹⁹ *Id.* at ¶ 4.

trustee decide to make a distribution to Charlotte, the purpose for that distribution is limited. However, we are herein unable to find the existence of an ascertainable support standard such that Charlotte would be able to compel a distribution from the trust corpus. Accordingly, we hold the Osborn Trust is distinguishable from the type of hybrid trust referenced in *Martin*, supra, and must, instead, be classified as a purely discretionary trust.”²⁰

This analysis is directly applicable to the trust language utilized in the case at bar. There is no language in the Campbell trust which requires the trustee to make any distribution to or for the benefit of Kimberly Campbell. Like the trust in *Pack*, should the trustee decide to make a distribution, the trust limits the purposes for which a distribution may be made and defines certain considerations that should be heeded by the trustee. However, as in *Pack*, this court is unable to find the existence of any ascertainable support standard in the Campbell trust such that Kimberly Campbell would be able to compel a distribution from the trust corpus. As such, the Campbell trust is a purely discretionary trust and, as noted in the Ohio Supreme Court’s *Pack* decision, cannot be counted as an available resource in Medicaid-eligibility review.

The appellee emphasizes that the portions of the Ohio Supreme Court’s decision in *Pack* discussed above were not pertinent to the issue raised on appeal and, consequently, are dicta. This court agrees that this discussion was dicta in the *Pack* decision. However, this fact simply means that this discussion is not binding authority on this court. It does, however, constitute dicta from the highest court in this state and will be recognized as at least the court’s view on this matter. Similarly, while the decision made on remand by the Fifth District Court of Appeals is also merely authority

²⁰ Id. at ¶¶ 21-22.

which is to be weighted as deemed appropriate by this court, the court finds the reasoning of that decision, although brief, to be sound.

Finally, the court notes that the appellee argues in its brief that this conclusion makes certain provisions of R.C. 51115.151(G) superfluous. The court has examined the appellee's arguments on this matter and the statutory and administrative code sections discussed therein and does not find that the court's conclusion in the present decision renders any portion of R.C. 5115.151(G) superfluous.

CONCLUSION

Based on the above analysis, the court finds that the Administrative Appeal Decision rendered on October 11, 2012 is not in accordance with the law and must be reversed.

IT IS SO ORDERED.

DATED: _____

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 24th day of May 2013 to all counsel of record and unrepresented parties.

Administrative Assistant to Judge McBride