SPECIAL NEEDS TRUSTS

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# TABLE OF CONTENTS

I  General Principles 3
II  Who May Create an SNT? 4
III  Common Law Third-Party-Settled SNT 5
IV  Third-Party-Settled SNT—O.R.C. §5815.28 Supplemental Services Trust 17
V  Third-Party-Settled SNT—“Sole Benefit” Trust for Coordination with Medicaid Planning for Parents 19
VI  Third-Party-Settled SNT – OUTC Wholly Discretionary Trust 22
VII  Self-Settled SNT – (d)(4)(A) Trusts 31
VIII  Self-Settled SNT—Pooled Trust Account-(d)(4)(C) Trusts 38
IX  Benefits of (d)(4)(A) and (d)(4)(C) Trusts 41
X  When to Use Third-Party Special Needs Trusts 42
XI  When to Use Self-Settled Special Needs Trusts 43
XII  What About Income Taxes and an SNT? 45
XIII  Alternatives to SNTs 46
XIV  Liability Traps for Attorneys 47
XV  What Conclusions Can We Reach? 50

Appendix A – Government Benefit Programs 53
Appendix B – Treatment of (d)(4)(A) and (d)(4)(C) by SSI and Medicaid 59
Appendix C – Ohio Modifications to UTC That Benefit SNTs 64
Appendix D – Case Summaries 74
Appendix E – Evolution of SNTs in Ohio 89
I. General Principles.

A. Purposes for Special Needs Trusts. A special or supplemental needs trust (both referred to in this outline as “SNT”) is a type of trust created for an individual (1) who is or who may become disabled and (2) who is or may become the recipient of means tested public benefits.

1. Special Needs Trusts. While this outline, for simplicity purposes, uses the term “SNT” generically, a pure SNT (as opposed to the supplemental needs trust described in the following paragraph 2) limits the discretion of the trustee to making in-kind distributions of items other than food or shelter. The term is sometimes used to refer to self-settled SNTs.

2. Supplemental Needs Trusts. A supplemental needs trust generally gives the trustee unlimited discretionary authority to make distributions, however the term is sometimes used to refer to third-party-settled SNTs.

3. Supplemental Services Trusts. A Supplemental Services Trust refers to Ohio’s statutory O.R.C. §1339.51 trust (renumbered §5815.28 under the Ohio Trust Code. The new numbering will be used throughout this outline).

The special or supplemental needs that such trusts are designed to provide are those that are not covered by the public benefits received by the SNT beneficiary. These include items such as:

- Eyeglasses
- Transportation (including vehicle purchase)
- Insurance premiums
- Hobbies
- Recreational activities
- Computers/electronic equipment
- Vacations/trips/entertainment
- Purchase of goods and services that add pleasure and quality to life: videos, furniture, or a television
- Athletic training or competitions
- Personal care attendant or escort

The goal of the SNT is to provide for these types of supplemental benefits without jeopardizing the beneficiary’s eligibility for public benefits. Unless extreme care is exercised in the drafting and administration of the SNT, it can be treated as a countable resource of the beneficiary, thereby defeating the trust’s primary purpose.

B. Definition of Disability. “Disabled” is defined in 42 U.S.C. §1382c(a)(3) as follows:

an individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or
mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.

C. **Types of Means Tested Public Benefits.** The drafter of the SNT and the trustee who administers it need to have a good understanding of the eligibility requirements of the public benefits for which the beneficiary is or may become eligible. A brief summary of the Medicaid, SSD, SSI, and Medicare is attached as Appendix A.

II. **Who May Create an SNT?**

Anyone may create an SNT; however the identity of the trust settlor has a dramatic impact on how the trust is treated for public benefit eligibility purposes. There are two main types of SNTs. Knowing which type of trust one is dealing with is critical.

A. **Third-Party SNTs.**

1. **SNTs For a Recipient of SSI or Medicaid.** An SNT may be created by a donor who would like to set aside, during life or upon death, assets for the benefit of the intended beneficiary (e.g. a child or a grandchild of the donor) without jeopardizing the beneficiary’s eligibility for public benefits.

   a) O.R.C. §1339.51 supplemental services trust (discussed in Article IV, and renumbered §5815.28 under the Ohio Trust Code);

   b) common-law third-party-settled SNT (discussed in Article III);

   c) statutory “wholly discretionary trust” (“WDT”) (discussed in Article VI).

2. **Third-Party SNTs Created for Another Where Donor Seeks Medicaid Eligibility for Him/Herself.** An SNT may also be established by a donor who is seeking Medicaid qualification for her/himself and who also wishes to create a trust to benefit the donor’s child, regardless of age, or any other disabled beneficiary who is under the age of 65. This is referred to as a “sole benefit” trust.

B. **Self-Settled SNTs.** A self-settled trust is one created by and funded with assets of the recipient of public benefits or by a court acting on behalf of such person. Generally speaking, self-settled trusts will render the settlor ineligible for most means tested public benefits. The Omnibus Budget Reconciliation Act of 1993 (“OBRA ’93”) created two types of self-settled special needs trusts that can be created with assets of an SSI or Medicaid recipient without losing eligibility for those benefits, provided that certain requirements are met.

1. Medicaid payback trust governed by 42 U.S.C. 1396p(d)(4)(A), referred to in this outline as a "(d)(4)(A) trust” (discussed in Article VII); and
2. Pooled trust account governed by 42 U.S.C. 1396p(d)(4)(C), referred to in this outline as a “pooled account” (discussed in Article VIII).

III. Common Law Third-Party-Settled SNT.

A. How Created. A third-party SNT may be created by revocable *inter vivos* trust, irrevocable trust, or by will. The trust, however, must be irrevocable by the time that it is funded for the benefit of the disabled beneficiary if eligibility for public benefits is to be preserved.

B. Advantages of Third-Party-Settled SNTs. An common law SNT established by a third party is not required to reimburse the State for the cost of Medicaid benefits expended on behalf of the SNT beneficiary upon the beneficiary’s death.

C. Make Sure Trust Will Not be Treated as a Resource. A determination must be made regarding which public benefits the beneficiary is receiving. The key is to make sure that the assets of the trust will not be treated as countable resources of the beneficiary. The Ohio Department of Jobs and Family Services has modified its rules so frequently, and has so aggressively challenged SNTs in court, making it difficult to draft third-party-settled SNTs. Ohio, however, has significantly tightened the parameters around third party settled SNTs that will not be counted as resources for Medicaid purposes. In November, 2002, the Ohio Department of Jobs and Family Services promulgated a new trust rule, O. A. C. 5101:1-39-27.1, which rule was subsequently codified as R. C. §5111.151. (See discussion in Paragraph H of this Article III.) Nevertheless, federal Medicaid and SSI law, which is binding on the states, basically assures that persons not responsible for the support of a Medicaid or SSI recipient may provide a source of funds to be used to enhance the quality of life of the beneficiary, and federal law restrains states from treating as resources trusts from which the beneficiary cannot compel distributions for support.

1. Medicaid. If the SNT beneficiary is receiving Medicaid, strict compliance with the requirements of the O.A.C. 5101:1-39-27 and O.R.C. §5111.151, is essential.

2. SSI. If the SNT beneficiary is receiving SSI, a thorough understanding of the SSA rules governing SSI is essential. SSI financial eligibility rules can be found at 20 C.F.R. 416.1200 *et seq* (for resources) and at 20 C.F.R. 416.100 *et seq* (for income.) While the C.F.R. contains the official regulations, the SSA relies primarily upon the sub-regulatory Program Operations Manual System (POMS)¹, published by the Social Security Administration (SSA). POMS can be found on the internet at https://s044a90.ssa.gov/apps10/poms.nsf/partlist!OpenView.

E. When is a Third-Party-Settled SNT a Resource? The answer depends upon the terms of the trust (e.g., whether the trust contains a support standard and the extent of discretion given to the trustee) and upon whether or not the beneficiary has the right to compel a distribution for food and shelter (for SSI) or for support (for Medicaid).

¹ Although these instructions are not the product of formal rule making, the Supreme Court has held that the POMS “warrant respect”.

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1. **Federal “Availability” Requirements.** A state may consider only the income and resources that are “available” to the applicant or recipient. Whether an interest in a trust is a “resource” is a matter of federal law, and while the meaning of “availability” in the context of a third-party-settled trusts is not specifically addressed in the United States Code or the Code of Federal Regulations, that issue is addressed squarely in the POMS, and was discussed in the legislative history of the Medicaid Act.

   a) **United States Code.** 42 U.S.C. 1396a requires:

   A State plan for medical assistance must . . . (17) . . . include reasonable standards . . . for determining eligibility . . . which . . . (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the beneficiary [and] . . . (C) provide for reasonable evaluation of any such income or resources. . . .

   b) **Code of Federal Regulations.** 20 CFR §416.1201(a)(1) clarifies this by providing:

   (a) Resources; defined. For purposes of this subpart L, resources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance. (1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).

   Similarly, 20 CFR §416.120(c)(3) states, “Resources means cash or other liquid assets or any real or personal property that an individual owns and could convert to cash to be used for support and maintenance. . . .”

   c) **POMS.** The POMS, at SI 01120.200, discusses “availability” in the context of trusts established by third parties. (D)(1)(a) of that section states:

   If an individual (claimant, recipient, or deemor) has legal authority to revoke the trust and then use the funds to meet his food, clothing or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust, the trust principal is a resource for SSI purposes.

   d) **Legislative History.** The issue of “availability” is also discussed in Medicaid’s legislative history. A 1965 Senate Report summarizing the newly enacted Medicaid Act stated:
Another provision is included that requires States to take into account only such income and resources as . . . are actually available to the applicant or recipient and as would not be disregarded. . . . Income and resources taken into account, furthermore, must be reasonably evaluated by the States. These provisions are designed so that the States will not assume the availability of income which may not, in fact, be available or over evaluated income and resources which are available.²

e) Court Decisions. State and federal courts have addressed the application of these federal “availability” requirements. The United States Supreme Court has stated that the “availability principle” is aimed primarily at preventing states from imputing or assuming financial assistance from sources that have no obligation to furnish it. The Connecticut Supreme Court stated:

[U]nder applicable federal law, only assets actually available to a medical assistance recipient may be considered by the state in determining eligibility for public assistance programs such as title XIX [Medicaid]. . . . A state may not, in administering the eligibility requirements of its public assistance program pursuant to title XIX . . . presume the availability of assets not actually available. . . . Zeoli v. Commissioner of Social Services, 179 Conn. At 94, 425 A.2d 553.

3. Importance of Settlor Intent. It is a fundamental principle of trust law that a grantor may dispose of his or her property in any manner desired, other than dispositions prohibited by law or contrary to public policy. The Comment to UTC §103 underscores the point that it is the settlor’s intent that is paramount. That comment states, “Except as limited by public policy, the extent of a beneficiary’s interest is determined solely by the settlor’s intent”. Intent is evidenced primarily by the trust’s distributive language, but it can also be determined by precatory statements, and the circumstances of the beneficiary at the time of the trust’s creation. This is illustrated in In Re Leona Carlisle Trust,³ where the court stated:

The intention of the settlor of the trust will be carried out if it is not contrary to law and public policy. . . . When the trust instrument states an intent to supplement rather than supplant any government financial assistance that is or may be available to the Medicaid recipient, most courts give effect to the settlor’s intent and find the trust is not an available asset. . . . The cases that involve both a discretionary trust and clear settlor intent to supplement rather than supplant government assistance conclude the trust is not an available asset. See id. [Trust Co. of Okla., 825 P.2d 1295], see also Zeoli v. Commissioner of Social Servs., 179 Conn. 83 (1979); Lineback by Hutchens v. Stout, 79 N.C.App 292 (1986).

Accordingly, if the settlor intends that the trust supplement rather than supplant the beneficiary’s government benefits, such intent should be controlling. Such a trust should not be deemed an available resource. In an attempt to treat SNTs as

available resources for Medicaid purposes, states occasionally have challenged SNTs (especially SNTs that do not clearly state their purpose of supplementing, rather than supplanting, public benefits) on the basis that the trustee owes an obligation of minimum support to the beneficiary.

Many cases, however, including Kreitzer\textsuperscript{4}, are notable for the fact that no examination is made regarding the settlor’s intention in creating the trust.

4. **Do Not Include a Support Standard.** On the other hand, there are cases in which trusts that contain an express support standard, but that also grant to the trustee uncontrolled discretion, have been held not to be available resources. As a general rule, purely support trusts are treated as available resources; but, purely discretionary trusts are rarely available resources. The difference typically hinges upon whether or not under state law the beneficiary has the right to compel a distribution for support.

If a trust is a support trust, a beneficiary generally has the right to compel the trustee to make distributions pursuant to the distribution standard. Accordingly, the trust is an available resource. There has been much litigation on the issue of whether or not a trust is a support trust. If the trust is discretionary with a support standard, some cases have held that the beneficiary cannot compel a distribution. In these cases, the trust property is not an available resource and the beneficiary is not disqualified from eligibility of means tested government benefits. Other cases have held that the beneficiary can compel a distribution and that the trust property is therefore an available resource.\textsuperscript{5}

5. **When Can a Beneficiary Compel a Distribution?** The answer to this question is important, because in Ohio (and most other states) a trust will be treated as a resource if the beneficiary can compel a distribution, especially a distribution for support.

6. **Treatment of Pure Discretionary Trusts.** If a trust is a pure discretionary trust with no distribution standard, the beneficiary generally has no ability to compel a distribution, especially if the trustee was given “sole,” “absolute,” or “uncontrolled” discretion; therefore, the trust is not an available resource.\textsuperscript{6}

F. **Proper Trust Administration is Essential.** A perfectly drafted trust can still result in disqualification if the trust is not administered properly.

\textsuperscript{4} Bureau of Support in the Dept. of Mental Hygiene and Correction v. Kreitzer, 16 Ohio St.2d 147, 243 N.E.2d (Ohio 1968), where the Ohio Supreme Court held that a discretionary support trust which presumably lacked a spendthrift provision was available to provide for the beneficiary’s care, comfort maintenance and general well being thereby making the trust liable to the state of Ohio for amounts paid by the state towards the beneficiary’s support in a state institution.

\textsuperscript{5} Clifton B. Kruse, Jr., Third-Party and Self Created Trusts – Planning for the Elderly and Disabled Client (3d ed. 2002), at 54-70.

G. **The Trust Must Have a Residuary Beneficiary.** Having the remaining assets payable to the beneficiary’s estate or heirs is not sufficient. There must be a named beneficiary.

H. **Ohio’s Medicaid Trust Statute**, O.R.C. Sec 5111.151, which is a codification of the ODJFS trust rule, O.A.C. 5101:1-39-27.1(C)(4)(b), provides that any portion of a third party settled SNT is an available resource *if the trust permits* the trustee to expend principal or corpus or assets of the trust for the applicant/recipient’s “medical care, care, comfort, maintenance, health, welfare, general well-being, or a combination of these purposes.” It is one thing if "permits" refers only to affirmative standards that provide for the proscribed distributions, but it is quite a different matter if "permits" is interpreted as "not prohibiting." The latter interpretation would effectively treat all third party settled SNTs as resources.

1. That provision goes on to state that the trust will be considered as an available resource even if it contains a *Young* or *Carnahan* type exclusionary clause that prohibits the trustee from making payments that would have an effect on the applicant/recipient’s ability to receive governmental assistance. O.R.C. 5111.151(G)(3) provides that a third party settled trust which permits the trustee to expend principal for the beneficiary’s “medical care, care, comfort, maintenance, health, welfare, general well-being, or a combination of these purposes” is an available resource even if the trust contains any of the following types of provisions:

   a. “A provision that prohibits the trustee from making payments that would supplant or replace medical assistance or other public assistance;”

   b. “A provision that 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 medical assistance or other public assistance;”

   c. “A provision that attempts to prevent the trust or its corpus or principal from being counted as an available resource.”

2. Any third-party SNT trust that would otherwise be counted as a resource shall not be treated as a resource if:

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7 *Young v. Ohio Department of Human Services*, 76 Ohio St.3d 547, 668 N.E.2d 908 (Ohio 1996). In this case, the trust’s “exclusionary clause” stated, “the Trustee shall not make any distributions of income or principal for the benefit of JANET LEE YOUNG which shall render her ineligible or cause a reduction in any benefit she may be entitled to receive, including, **Medicaid.”

8 *Carnahan v. Ohio Dept. of Human Serv.*, 139 Ohio App.3d 214 (2000). The trust in this case stated, “It is my further intent that no part of the corpus of the trust created herein shall be used to supplant or replace public assistance benefits of any county, state, federal or governmental agency that serves persons with disabilities that are the same or similar to the impairments of my daughter. For the purposes of determining my daughter’s eligibility for such benefits, no part of the principal or income of the trust estate shall be considered available to her.”
a. “the trust contains a ‘clear statement’ that requires the trustee to terminate the
trust if it is counted as an available resource….” This is referred to as a
“poison pill” provision.

b. “If an 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 trust shall
not be counted as an available resource and payments shall be treated in
accordance with rules adopted by the department of job and family services
governing income.”

c. “If an applicant or recipient provides written documentation showing that the
cost of a civil action brought to compel payments from the trust would be cost
prohibitive, the trust shall not be counted as an available resource.”

3. O. R. C. Sec. 5111.151 appears to allow the following types of third-party trusts
for the benefit of the applicant/recipient:

a) a purely discretionary SNT that makes no reference to the
applicant/recipient’s “medical care, care, comfort, maintenance, health,
welfare, general well-being”; especially if precatory language is included
stating the settlor’s intent that the trust be used only for the beneficiary’s
supplemental needs. While such a trust “permits,” in that it does not
prohibit, the trustee to make distributions for the beneficiary’s “medical
care, care, comfort, maintenance, health, welfare, general well-being,”
there is no Ohio case law that would permit the beneficiary to be able to
compel a distribution. Accordingly, the federal “availability”
requirements set forth in Article III, Paragraph E(1)(a) through (e), above,
would appear to prohibit a strict reading of “permits.” Moreover, the
beneficiary of such a trust should be able to qualify for either or both of
the exceptions quoted immediately above in paragraph (2)(b) or (c).

b) an SNT that permits distributions for any purpose other than the
applicant/recipient’s “medical care, care, comfort, maintenance, health,
welfare, general well-being”. If a trust states that principal can be
distributed for any purpose other than “the applicant/recipient’s medical
care, care, comfort, maintenance, health, welfare, general well-being”,
what type of distributions would actually be permitted, since “comfort”
and “well-being” are extremely broad standards?

c) any third-party trust that only permits distributions to be made from
income.

10 O.R.C. §5111.151(G)(4)(h)
11 O.R.C. §5111.151(G)(4)(i)
4. One thing that appears to be clear from the new trust rule is that if an SNT contains the new mandatory “poison pill” provision, neither types a) nor b) listed in ¶3, above, should be counted as a resource.

a) The lesson to be learned is that in preparing any type of third-party SNT the drafter should always include the mandatory poison pill provision.

b) The inclusion of the poison pill should not be considered as giving the drafter carte blanche, however. An attorney drafting a third-party SNT should not provide for distributions to be made pursuant to a loose “general benefit” of the beneficiary standard where the trust also contains a poison pill. Such a trust would be like “rolling-the-dice” as to whether the government will challenge this trust as an available resource. The unfortunate result of the government challenge is if it is determined that the trust is an available resource because of the loose distribution standard, then, in accordance with the poison pill, the trustee would be required to terminate the trust. In a sense, the government wins in that there would no longer be a trust providing improper resources to the applicant/recipient; however, in a sense, the attorney wins in that the government would not be able to obtain the assets in the trust as the trust would be terminated. In any case, however, the person with a disability loses in that there would no longer be a trust available to provide funds for supplemental needs.

c) The more conservative approach to third-party SNTs is also to include a poison pill provision but provide that the trustee has absolute and sole discretion to make distributions for purposes other than “necessities.”

4. *Park v. Osborn*12. A recent Ohio 5th District Court of Appeals case involved the application of O.R.C. 5111.151 to a pure discretionary trust. The distribution language in that case read as follows:

The Trustee may, until the death of her daughter CHARLOTTE OSBORN, distribute to or expend for the benefit of MAEBELLE W. OSBORN, CHARLOTTE OSBORN, ARTHUR ELWOOD OSBORN and LORETTA PACK so much of the principal and the current accumulated income therefrom, at such time or times and in such amounts and manner as the Trustee, in her sole discretion, shall determine. Any amounts of income which the Trustee shall determine not to distribute to or to expend for the benefit of MAEBELLE W. OSBORN, CHARLOTTE OSBORN, ARTHUR ELWOOD OSBORN and LORETTA PACK may be accumulated…. In making such distribution (sic) is my intent that my 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

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benefits."

The Licking County DJFS denied appellant’s application for Medicaid because of the existence of the Osborn trust, which it found to be an available resource under O.R.C. 5111.151. The appellant appealed the denial to the Court of Common Pleas referred the matter to a magistrate, who granted summary judgment in favor of the LCDJFS. The magistrate made the following findings:

"I. The Licking County Department of Job and Family Services correctly determined that the Trust is a countable resource for purposes of determining Medicaid eligibility because it correctly disregarded the discretionary clause contained in the Maebelle W. Osborn Trust, per the Ohio Revised Code and the Administrative Code.

"II. The Trustee of the Maebelle W. Osborn Trust can be compelled to invade the trust principal for the medical care and proper maintenance of Charlotte Osborn as she has an ownership interest in the Trust which she can access through the courts.

"III. The Young and Carnahan decisions are rendered moot by the amendments to Ohio Administrative Code Section 5101:1-39-27.1 and the enactment of Ohio Revised Code Section 5111.151."

The Court of Appeals reversed the decision of the trial court, not because of the magistrate’s interpretation of 5111.151, about which there was no discussion in the opinion, but on the basis that the case should be decided on the law that existed at the time of the creation of the trust.

This case is troubling in that ODJFS appears to be taking the position that all third party settled SNTs that lack the “poison pill” provision will be treated as countable resources, regardless of the inability of the beneficiary to compel a distribution for medical care, food, or shelter, thereby flouting the clearly enunciated federal “available” requirements discussed above.

I. **Distribution Standards.** Cynthia L. Barrett, a Certified Elder Law Attorney from Portland, Oregon, has developed a list of the following six types of distribution standards. The examples of each standard are those of Ms. Barrett.13

1. **Mandatory:** "My trustee shall distribute to or for the benefit of the beneficiary those amounts of income or principal necessary for his health, education, support, and maintenance." This standard will cause the trust to be treated as a resource of the beneficiary in Ohio as well as nearly every other state.

2. **Support Standard--Fully Discretionary:** "My trustee may distribute to or for the benefit of the beneficiary those amounts of income or principal which my

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trustee may determine, in my trustee’s sole, absolute and unfettered discretion, for
his health, education, support, and maintenance.”

a) This type of standard has been the subject of much litigation in Ohio, and
elsewhere. While this standard works in many states, it does not work in
Ohio, and will cause the trust to be treated as a resource of the beneficiary.

3. **Fully Discretionary, No Mention of Supplemental Needs:** “My trustee may
distribute to or for the benefit of the beneficiary those amounts of income or
principal which my trustee may determine, in my trustee’s sole, absolute and
unfettered discretion, to be appropriate, and my trustee may choose to make no
distributions whatsoever.”

a) Works in virtually every state.

b) Because of the beneficiary’s inability to compel a distribution from this
type of trust, it cannot properly be treated as an available resource under
applicable federal law. However, because this standard “permits” the
trustee to make distributions for the “medical care, care, comfort,
maintenance, health, welfare, general well-being,” a strict reading of
O.R.C. 5111.151 would treat such a trust as an available resource unless
the beneficiary can fall within either of the statutory exceptions set forth in
O.R.C. 5111.151(G)(4)(h) or (i).

c) Consider supplementing this language with an express declaration of the
supplemental nature of the permissible expenditures and the non-support
nature of the trust purpose.

d) Consider including the mandatory “poison pill”.

4. **Fully Discretionary, Precatory Language Mentioning Special Needs:** “My
trustee may distribute to or for the benefit of the beneficiary those amounts of
income or principal which my trustee may determine, in my trustee’s sole,
absolute and unfettered discretion, to be appropriate, and my trustee may choose
to make no distributions whatsoever. My son is disabled, and will rely on public
programs for much of his life I will not always be there to help him and oversee
his care. I know that he will have supplemental and special requirements,
including a need for advocacy, which will not be provided by the publicly funded
programs. I urge my trustee to, in the exercise of his unfettered discretion, make
distributions which permit my son dignity and grace, enhance my son’s day to day
existence, and allow him the highest possible development of his abilities.”

a) Perhaps the most common standard used in third-party SNTs.

b) Should work in Ohio, but see the discussion in paragraph (3)(b),
immediately above. Include the mandatory “poison pill” provision. This
is essentially a wholly discretionary trust with permitted precatory language. (See Article VI).

5. **Strict (Known as the SSI Standard), Prohibiting Food and Shelter:** “No part of the principal or income of this trust may be distributed for food or shelter, or to replace any public assistance benefits for which the beneficiary may be eligible through any county, State, Federal or other governmental agency.”

   a) Very commonly used standard.

   b) Too strict in situations in which the beneficiary is not receiving SSI but is receiving other benefits with more liberal eligibility standards.

   c) Families and trustees often desire to provide items (such as superior living quarters) in enhancement of the SSI limits but are concerned with breach of duty if the limitations are excluded. More importantly, such limitations may in fact never be needed.

   d) Because of SSA’s “presumed value” rule used for SSI purposes, except in the rare case of extremely low income, expenditures for in kind income cannot totally eradicate the entire SSI benefit.

   e) Note that §5111.151’s prohibition against certain types of distributions is broader than the SSI standard and includes “medical care, care, comfort, maintenance, health, welfare, general well-being, or a combination of these purposes”. As pointed out above, if all of these purposes or prohibited, what is left? §5111.151 would also result the last phrase of this standard, the “exclusionary clause”, being ignored.

   f) Again, include the mandatory “poison pill” provision.

6. **Fully Discretionary, Authority to Reduce Benefits (“On/Off,” or “Spigot”):** “It is the intention of the Grantor to create a supplemental fund for the benefit of the Beneficiary. The Trustee may make distributions of income and principal as the trustee may determine, in his or her sole, absolute and unfettered discretion, to supplement any governmental or private programs for which the beneficiary may be eligible. I ask the Trustee to make reasonable efforts to avoid making distributions that supplant services, benefits or medical care otherwise available to the Beneficiary from governmental or private sources, or both, unless the trustee has determined in his sole, absolute and unfettered discretion that the benefit to the Beneficiary from the particular trust distribution outweighs the reduction in a particular public benefit program that may be a consequence of the trust distribution.”

   a) While confirming that the principal intent is to create a supplemental needs only trust, this standard authorizes the trustee, if it deems
appropriate, to make distributions above program benefit levels in order to provide the beneficiary a higher standard of living. For example, a trustee may decide that paying for certain services or providers, or purchasing food or providing shelter outweighs the cost to the beneficiary of a reduced SSI monthly stipend.

b) This is a particularly useful standard in situations where the beneficiary will need costly medical treatment for just a limited time period. This standard allows the trustee to protect Medicaid benefits during that time without forcing the beneficiary to live the remainder of his/her life after that time period at minimal SSI/Medicaid income levels.

c) Some Trustees use this standard to intentionally cause the loss of SSI benefits for one month each year, during which month substantial clothing, food, home expenditures, etc., can be made.

d) In Ohio, the mandatory poison pill provision should be included.

J. Manner of Making Distributions, Regardless of Which Standard is Used.

1. Distributions must not be made directly to the beneficiary. They must be made to third parties.

2. Distributions to third parties that result in “in-kind support and maintenance (ISM)” — that is, food or shelter received because of the distribution — result in a reduction of benefits.

3. If the beneficiary has no right to revoke the trust or to compel distributions for his or her support and maintenance, the trust is not an available resource.

K. Power of Amendment. ALWAYS provide that the trustee can amend the trust to conform to later changes in public benefit law.14

1. All existing third-party SNTs that do not include the new mandatory poison pill should be amended to add it.

2. If existing third-party SNTs do not have provisions allowing amendment, judicial authority to make this amendment should be sought.

L. Termination Prior to Death. In some instances, it is not clear that the disabled beneficiary will remain disabled or will receive government entitlements based upon need. A Supplemental Needs Trust can provide for the termination of the trust prior to death.

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M. **Coordination With Self-Settled “Payback” Trusts.** If a parent establishes a third-party trust with no payback to the state upon death, but the disabled child has a self-settled OBRA 1993 42 U.S.C. 1396p(d)(4)(A) Trust, language may be included in the parent’s trust directing that the trustee of the third-party trust use trust assets only to the extent that the payback trust is not available to provide the same goods and services.

N. **Spendthrift SNTs.** If a beneficiary is not receiving government entitlements, but may in the future, and the testator wishes to provide creditor protection, the intent of the testator should encompass not only preserving eligibility for government benefits, but helping asset management.

IV. **Third-Party-Settled SNT--O.R.C. §5815.28 Supplemental Services Trust.** (renumbered 5815.28 under the Ohio Trust Code)

A. This trust is listed as an exempt trust under the ODJFS Medicaid trust rule, O.A.C. 5101:1-39-27.1, which means that assets in this type of trust will not be counted as being resources of a Medicaid applicant.

B. Requirements of this type of trust:

1. The beneficiary must meet one of the two following conditions:
   a) the individual has a physical or mental disability and is eligible to receive services through the department of mental retardation and developmental disabilities or a county board of mental retardation and developmental disabilities; or
   b) the individual has a mental disability and is eligible to receive services through the department of mental health or a board of alcohol, drug addiction, and mental health services.

2. The purpose of the trust must be limited to providing supplemental services as “specified by rule of the department of mental health under §5119.01 of the Revised Code or the department of mental retardation and developmental disabilities under section 5123.04 of the Revised Code 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”. O.R.C. §5815.28(A)(4).

3. Besides not being a resource of the beneficiary, the trust is exempt from the claims of creditors of the settlor and of the beneficiary.

4. The “maximum amount for a trust” under O.R.C. §5815.28 is $224,000 which maximum increases by $2,000 each year. Presumably this means the amount with which the trust is initially funded.
5. Upon the beneficiary’s death, the trust must provide that at least 50% of the remaining assets “will be deposited to the credit of the services fund for individuals with mental illness created by section 5119.17 of the Revised Code or the services fund for individuals with mental retardation and developmental disabilities created by section 5123.40 of the Revised Code”. O.R.C. §5815.28(D)(5).

6. If the trust is terminated before the beneficiary’s death, the trustee must pay into the services fund created pursuant to §5119.17 or §5123.40 of the Revised Code the lesser of the amount equal to the disbursements made on behalf of the beneficiary for medical care by the state from the date the trust vests, or 50% of the trust corpus.

7. The trust may be testamentary or *inter vivos*. (Prior to October 26, 2001, the trust was required to be testamentary.)

V. Third-Party-Settled SNT—“Sole Benefit” Trust for Coordination with Medicaid Planning for Parents.

A. Under OBRA ‘93 a donor may avoid the transfer of asset penalty by transferring assets to (1) his or her disabled child or to a trust “solely for the benefit of” the disabled child, regardless of the child’s age, or to (2) a trust for the sole benefit of any other disabled beneficiary under 65, regardless of the relationship to the settler, 42 U. S. C. §1396p(c)(2)(B)(iii) and (iv). This is of even greater benefit in light of the new draconian asset transfer penalties set forth in the Deficit Reduction Act of 2005. Besides all of the requirements set forth above in Article IV regarding third-party SNTs, a parent seeking his or her own Medicaid eligibility must meet one additional requirement.

B. “Solely for the benefit of” Requirement.

1. It is not sufficient for a parent seeking his or her own qualification for Medicaid to transfer assets to a previously existing (d)(4)(A) or (d)(4)(C) trust or to a new third-party SNT. In addition to meeting all of the requirements for those types of trusts, the trust must also meet the “solely for the benefit of” requirement.

2. The Health Care Financing Administration (HCFA) in its State Medicaid Manual Transmittal Letter No. 64 (hereinafter “Transmittal 64”) interpreted this requirement as follows:

[A] trust is considered to be established for the sole benefit of a ... disabled child, or disabled individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time in the future. However, the trust may provide for reasonable compensation, as defined by the State, for a trustee or trustees to manage the trust, as well as for reasonable costs associated with investment or otherwise managing the funds or property in the trust [without violating the concept of ‘sole benefit’]. Allowing the trustee to pay for the beneficiary’s funeral before the Medicaid payback will disqualify the trust....
In order for a transfer or trust to be considered to be for the sole benefit of one of these individuals, the instrument or document must provide for the spending of the funds involved for the benefit of the individual on a basis that is actuarially sound based on the life expectancy of the individual involved. When the instrument or document does not so provide, any potential exemption from penalty or consideration for eligibility purposes is void.

It should be noted that the above language is sub-regulatory and merely sets forth CMS’ interpretation of the requirement. The essential point, however, is that funds in a “sole benefit” trust cannot be hoarded indefinitely for lengthy periods of time, and all expenditures may only be made to or for the benefit of the intended disabled beneficiary.

3. ODJFS has interpreted the “sole benefit” requirement in O.A.C. 5101:1-39-07 as follows:

(E) As used in this rule, a ‘transfer for the sole benefit’ is a transfer that cannot under any circumstance benefit any individual or entity except the spouse, blind or disabled child, or disabled individual, at the time of the transfer or at any time after the transfer.

(1)… In order for a transfer to be considered for the sole benefit of the spouse, blind or disabled child, or disabled individual, the entity that receives or holds the transferred resource must, by the explicit terms of a contract, trust, or other binding instrument, be required to expend all the transferred resources for the benefit of the individual during that individual’s life expectancy.

4. When a parent seeking his or her own Medicaid eligibility creates a third-party SNT for the benefit of his or her disabled child, the trust must require that the corpus be expended for the benefit of the disabled child in an actuarially sound manner over the child's life expectancy. While the rule does not expressly state it, presumably the life expectancy tables set forth in the ODJFS Medicaid life estate rule, O.A.C. 5101:1-39-32, are to be used for this purpose.

5. The following is an example of language that has been suggested for use in a “sole benefit trust” for a disabled person; however, the author does not recommend its use:

Administration Of Trust During Lifetime of Beneficiary: The property shall be held in trust for the Beneficiary, and the Trustee shall collect income and, after deducting all charges and expenses attributed thereto, shall apply for the benefit of the Beneficiary, in-kind, so much of the income and principal (even to the extent of the whole) as the Trustee deems advisable in his sole and absolute discretion subject to the limitations set forth below. The Trustee shall add the balance of net income not paid or applied to the principal of the Trust. Notwithstanding the discretion given to the Trustee, the Trustee shall each year expend
1/32 of the Trust assets for the benefit of the Beneficiary such that all disbursements shall be actuarially sound based upon a 32-year life expectancy of the Beneficiary who is 43 years of age at the date of the establishment of this Trust.

The problems with this language are at least three. First, while the applicable tables may provide that the 43 year old beneficiary has a life expectancy of 32 years, the annual distribution of 1/32 of the trust assets would likely be less than the trust’s income, with the result that the principal would never be exhausted. If a formula such as this is to be used, it should require 1/32nd the first year, 1/31st the second year, etc. The second problem is that if the beneficiary survives her/his life expectancy (which the beneficiary should have a 50% chance of doing), no funds would remain for the final years of life. Third, such a provision would be treated as a mandatory distribution and arguably would be reachable by the beneficiary’s creditors (however if the required distribution is used for the supplemental benefit of the beneficiary and not paid to the beneficiary directly, that should not be the result). A better approach might be to provide the following:

During the lifetime of the Beneficiary, the Trustee may distribute to the Beneficiary or use for the Beneficiary’s sole benefit, such amounts of income or principal, or both, as the Trustee may, in her sole, absolute, and uncontrolled discretion, determine; provided, however, that pursuant to Section 5101:1-39-07 of the Ohio Administrative Code, or its successor, the Trustee is required to expend the entire trust corpus transferred by me to this trust for the benefit of the Beneficiary during the Beneficiary’s life expectancy. The Trustee may act unreasonably and arbitrarily, as I would do myself if I were living and in control of these funds. The Trustee’s discretion in making a distribution as provided for in this agreement is final as to all interested parties, even if the Trustee in any given year elects to make no distribution at all. No court or other persons may substitute its or their judgment for that of the Trustee, absent bad faith by the Trustee. Any income of the Trust not so distributed shall be added annually to principal.

C. Other Considerations.

1. Even though the sole benefit trust was created by OBRA ‘93, there is no “payback” requirement obligating the trust, following the beneficiary’s death, to reimburse the State for Medicaid benefits actually paid.

2. Overfunding a “sole benefit” trust may make it virtually impossible to expend the required amount for the benefit of the beneficiary, a problem that does not exist for any other type of SNT.
3. The statute does not specify whether the remainderman must be the beneficiary’s estate. Such a requirement would expose the remaining trust assets to Ohio’s expanded Medicaid estate recovery. While such a requirement would appear to be consistent with the “sole benefit” requirement, it has been the author’s experience that naming other remainder beneficiaries has not caused the denial of Medicaid eligibility for the trust settlor or termination of SSI for the trust beneficiary.

VI. Third-Party-Settled SNT—OUTC Wholly Discretionary Trust.

The Uniform Trust Code has a number of vocal critics, led by Mark Merric, who have raised several concerns. Because many, if not most, of their concerns were based upon an interpretation of the UTC that was not intended by NCCUSL; several amendments to the UTC text and to its comments were made in 2004 and 2005 to remove those ambiguities. Articles have been written by UTC proponents refuting the charges made by the UTC critics. Serious objections to the UTC as they relate to SNTs have been debated in various publications.

A. Objections, All Essentially Baseless, to the UTC’s Impact Upon SNTs:

1. The claim has been made that the UTC abolishes the distinction between discretionary and support trusts, the new continuum of discretionary trusts is heavily weighted in favor of creditors, and it is the protection afforded the common law discretionary trust that protects SNTs.

2. The mandatory good faith standard creates a property interest in almost all beneficial interests which, in turn, gives SNT beneficiaries enforceable rights to compel distributions, thereby causing the SNT to be treated as a countable resource of the beneficiary.


17 Articles claiming that the UTC would destroy SNT planning include: Mark Merric and Douglas W. Stein, A Threat to all SNTs, TRUSTS & ESTATES 38 (Nov. 2004); Mark Merric Douglas Stein, Carl Stevens, Eric Solen, Wayne Stewart and Mark Osborne, “The Uniform Trust Code: A Continued Threat to SNTs Even After Amendment”, JOURNAL OF PRACTICAL ESTATE PLANNING (Apr/May 2005); Articles asserting that the UTC does not harm, but actually helps SNTs include: Richard E. Davis, UTC is No Threat to SNTs, TRUSTS & ESTATES 12 (Jan. 2005); Stanley C. Kent and Richard E. Davis, The Uniform Trust Code and Supplemental Needs Trusts, 15 PROBATE LAW JOURNAL OF OHIO 53 (Jan/Feb. 2005); and Richard E. Davis and Stanley C. Kent, “The Impact of the Uniform Trust Code on Special Needs Trusts”, NAELA JOURNAL Fall, 2005.
a) OUTC §5808.14(A) sets forth the following mandatory good faith standard:

The judicial standard of review for discretionary trusts is that the trustee shall exercise a discretionary power reasonably, in good faith, and in accordance with the terms and purposes of the trust and the interests of the beneficiaries, except that a reasonableness standard shall not be applied to the exercise of discretion by the trustee of a wholly discretionary trust. The greater the grant of discretion by the settlor to the trustee, the broader the range of permissible conduct by the trustee in exercising it.

b) The UTC critics have focused on the words “good faith,” claiming that this is a major move away from the current “no bad faith” standard. This charge is brilliantly refuted by Prof. Alan Newman. Richard Covey, on the other hand, has questioned the italicized phrase quoted above:

Section 814(a) [the UTC equivalent of OUTC 5808.14(A)] illustrates the uncertainty that codifying the trust law may create. What do the words “and in accordance with the terms and purposes of the trust and the interests of the beneficiaries” mean? Do they create a stricter limit on the discretion that may be conferred upon a trustee than the common law test sets forth in the above quotation from Scott? It seems likely that courts will use them to do so in particular cases, yet their application to particular facts remains as hard to predict as that of the common law.”

If the italicized phrase in §5808.14(A) is the OUTC equivalent of Restatement (Third) Trusts, Sec. 50, and is judicially interpreted in the manner described in the 60 pages of comments and reporter’s notes to that section, then the law as it relates to the duties of trustees to beneficiaries and the rights of beneficiaries to compel distributions is in for a major shakeup.

Restatement (Third) Sec. 50. Enforcement and Construction of Discretionary Interests.

(1) A discretionary power conferred upon the trustee to determine the benefits of a trust beneficiary is subject to judicial control only to prevent misinterpretation or abuse of the discretion by the trustee.

(2) The benefits to which a beneficiary of a discretionary interest is entitled, and what may constitute an abuse of discretion by the trustee, depend on the terms of the discretion, including the proper construction of any accompanying standards, and on the settlor’s purposes in granting the discretionary power and in creating the trust.

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3. The UTC weakens spendthrift protection by giving governmental entities the status of “exception creditors”, thereby allowing them to reach all beneficial interests.

B. **OUTC Creates the Wholly Discretionary Trust.** The OUTC deviates from the UTC by including a safe harbor pure discretionary trust, which it refers to as a “wholly discretionary trust” (WDT). The benefit of having the status of a WDT is that none of the remedies in Chapter 5805 of the Ohio Trust Code are available to creditors of the WDT’s beneficiary.

1. The Joint Committee of the OSBA Estate Planning Council and the Ohio Bankers League determined the protection afforded beneficiaries of common law pure discretionary trusts to be significant.

2. While it is the feeling of the author and OUTC Reporter Alan Newman that those protections are not lost under the UTC, the Joint Committee, in keeping with its goal of codifying, but not changing, Ohio’s trust law in the area of creditor remedies, proposed the creation of a statutory safe harbor pure discretionary trust.

C. **The Definition of the “Wholly Discretionary Trust” (“WDT”) is Contained in §5801.01(Y)(1) of the OUTC:**

1. “(Y)(1) ‘Wholly discretionary trust’ means a trust to which all of the following apply:
   a) The trust is irrevocable.
   b) Distributions of income or principal from the trust may or shall be made to or for the benefit of the beneficiary only at the trustee’s discretion.
   c) The beneficiary does not have a power of withdrawal from the trust.
   d) The terms of the trust use ‘sole,’ ‘absolute,’ ‘uncontrolled,’ or language of similar import to describe the trustee’s discretion to make distributions to or for the benefit of the beneficiary.
   e) The terms of the trust do not provide any standards to guide the trustee in exercising its discretion to make distributions to or for the benefit of the beneficiary.
   f) The beneficiary is not the settlor, the trustee, or a co-trustee.
   g) The beneficiary does not have the power to become the trustee or a co-trustee.

2. A trust may be a wholly discretionary trust with respect to one or more but less than all beneficiaries.

3. If a beneficiary has a power of withdrawal, the trust may be a wholly discretionary trust with respect to that beneficiary during any period in which the beneficiary may not
exercise the power. During a period in which the beneficiary may exercise the power, both of the following apply:

a) the portion of the trust the beneficiary may withdraw may not be a wholly discretionary trust with respect to that beneficiary;

b) the portion of the trust the beneficiary may not withdraw may be a wholly discretionary trust with respect to that beneficiary.

4. If the beneficiary and one or more others have made contributions to the trust, the portion of the trust attributable to the beneficiary’s contributions may not be a wholly discretionary trust with respect to that beneficiary, but the portion of the trust attributable to the contributions of others may be a wholly discretionary trust with respect to that beneficiary. If a beneficiary has a power of withdrawal, then upon the lapse, release, or waiver of the power, the beneficiary is treated as having made contributions to the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greatest of the following amounts:

a) the amount specified in §2041(b)(2) or §2514(e) of the Internal Revenue Code;

b) if the donor of the property subject to the beneficiary’s power of withdrawal is not married at the time of the transfer of the property to the trust, the amount specified in §2503(b) of the Internal Revenue Code;

c) if the donor of the property subject to the beneficiary’s power of withdrawal is married at the time of the transfer of the property to the trust, twice the amount specified in §2503(b) of the Internal Revenue Code.

5. Notwithstanding divisions (Y)(1)(f) and (g) of this section, a trust may be a wholly discretionary trust if the beneficiary is, or has the power to become, a trustee only with respect to the management or the investment of the trust assets, and not with respect to making discretionary distribution decisions. *With respect to a trust established for the benefit of an individual who is blind or disabled as defined in 42 U.S.C. 1382c(a)(2) or (3), as amended, a wholly discretionary trust may include either or both of the following:*

a) *Precatory language regarding its intended purpose of providing supplemental goods and services to or for the benefit of the beneficiary, and not to supplant benefits from public assistance programs;*

b) *A prohibition against providing food, clothing, and shelter to the beneficiary.*” (emphasis added)

D. **Benefits of Qualifying as a WDT.**

1. The WDT should work well as an SNT, however additional evasion action may be needed to avoid problems with O.R.C. §5111.151 by, for example, including the “poison pill” provision.
2. No creditor can reach the beneficiary’s interest, including exception creditors, by any means. Period.

3. No “reasonableness” standard applies in the exercise of the trustee’s discretion. This lower standard of judicial review is designed to protect the trustee from attempts by the beneficiary to compel distributions. The absence of a reasonableness standard can be critical in protecting pure discretionary trusts from attacks by creditors. The lack of a reasonableness standard should also make it more difficult for a beneficiary to be able to compel a distribution, thereby falling within the exception set forth in O.R.C. §5111.151(G)(4)(h).

4. A WDT has no “exception creditors”.

E. **Why Ohio Does Not Need the WDT.**

1. By simply including a spendthrift provision, most creditors cannot reach a third-party-settled SNT.

2. The only extra protection is that exception creditors cannot reach a WDT, but that extra protection is limited. Because of preemption, claims of the federal government would not be barred by a WDT (except there are cases in which the IRS has not been able to reach assets held in pure discretionary trusts). If the State of Ohio wanted to reach WDTs, it would merely need to pass a statute specifying that it can reach discretionary distributions made from WDTs, just as it can pass legislation specifying that certain of its claims are not barred by spendthrift provisions.

3. The WDT statute, as the OUTC as a whole, fails to address to issue of whether or not, and when, a beneficiary could compel a distribution. A non-WDT discretionary trust without a support standard should be just as immune from attempts by its beneficiary to compel a distribution as a WDT would be (unless, of course, the court determines that the trustee’s action, though made in good faith, was not reasonable—in that situation the WDT would be protected, but the pure discretionary trust would not be.)

4. A WDT is just like “belt plus suspenders”.

F. **Why Ohio Needs the WDT.**

1. It is stated in the official comments to the UTC that the elimination of the distinction between discretionary and support trusts was made for creditor rights purposes only. Ohio does not recognize comments to uniform laws. If the

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20 See *In Re Jones*, 812 P.2d 1152 (Colo. 1991)
The lower judicial standard of review for WDTs could be critically important. If a WDT, which lacks a distribution standard, is construed as permitting (i.e. not prohibiting?) the trustee to expend assets of the trust for the beneficiary’s “medical care, care, comfort, maintenance, health, welfare, general well being, or any combination of these purposes,” then O.R.C. §5111.151(G)(2) would treat every WDT as an available resource of its beneficiary, unless, among other things, the beneficiary “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…..” The lower judicial standard of review for WDTs could be the deciding difference in the inability of the beneficiary to be able to compel a distribution.

3. There is case law that prevents governmental entities from being able to reach assets held in pure discretionary trusts on the basis that the beneficiary’s interest falls short of being a “property interest”. Having a safe harbor status of a pure discretionary trust should continue that protection against WDTs.

G. How a WDT Might Read.

**WDT as SNT**

_Discretionary Distributions by Trustee_. The trustee may distribute to, or use for the benefit of, the beneficiary such amounts of income and/or principal as the trustee, using sole, absolute and uncontrolled discretion, may determine. The trustee may choose to make no distributions whatsoever.

_Precatory Statement of Intended Purpose_. The beneficiary is disabled and will rely on public benefit programs for much of her life. I will not always be there to help her and oversee her care. I know that she will have supplemental and special requirements, including a need for advocacy, which will not be provided by the publicly funded programs. It is my desire, but not my direction, that the trustee, in the exercise of the trustee’s sole, absolute, and uncontrolled discretion, provide supplemental goods and services for the benefit of my daughter which will provide her dignity and grace, enhance her day to day existence, and allow her the highest possible development of her abilities, but in a manner that will not supplant or jeopardize benefits she may receive from public assistance programs. This paragraph shall be construed as being a precatory statement of my intent in creating this trust, and not as providing standards to guide the trustee in exercising its discretion to make distributions to or for the benefit of the beneficiary.
[Prohibited Distributions. No part of the principal or income of this trust may be distributed to, or for the benefit of, my daughter for food or shelter.] – optional provision.

Irrevocability. This trust is irrevocable and cannot be revoked by the grantor or the beneficiary, or terminated by a court. This trust shall terminate only upon ...

(Note: a WDT must be irrevocable. While the OUTC defines neither “revocable” nor “irrevocable,” O.R.C. §5111.151 defines both of those terms. Under those definitions, it appears that it is possible for one trust to meet the definitions of both terms. This would be the case where a trust cannot be revoked by the grantor, the beneficiary, or terminated by a court, but where the trust can be terminated upon the occurrence of and within the control of the trustee. The definitions of “revocable” and “irrevocable” are set forth below.)

(9) “Revocable trust” is a trust that can be revoked by the grantor or the beneficiary, including all of the following, even if the terms of the trust state that it is irrevocable:

(a) A trust that provides that the trust can be terminated only by a court;
(b) A trust that terminates on the happening of an event, but only if the event occurs at the direction or control of the grantor, beneficiary, or trustee.

(10) “Irrevocable trust” is a trust that cannot be revoked by the grantor or terminated by a court and that terminates only on the occurrence of an event outside of the control or direction of the beneficiary or grantor.

Termination of Trust. If it is finally determined that this trust is an available resource of the beneficiary for Medicaid purposes, the trustee shall terminate the trust and distribute the remaining trust assets in the manner set forth in Article________. [optional—see O.R.C. 5111.151(G)(4)(d)]

Defense of Trust. The trustee shall vigorously defend with all available resources, through all available judicial appeals, any attempt by the beneficiary to compel a distribution from this trust. [optional—see O.R.C. §5111.151(G)(4)(g) and (i).]

The inclusion of this provision is intended to make it easier for the beneficiary to demonstrate that it would be cost prohibitive to obtaining a “final” court order regarding the inability to force a distribution.

Savings Provision. The trust created by this article is intended to be a wholly discretionary trust as defined in Section 5801.01(Y) of the Ohio Revised Code, and its provisions shall be construed accordingly.
VII. Self-Settled SNT--(d)(4)(A) Trusts.

A. **OBRA ‘93** provides that a disabled individual may create a trust for her/his benefit, and fund it with his or her assets, without losing eligibility for Medicaid and SSI if certain requirements are met. (d)(4)(A) trusts are governed by 42 U.S.C. 1396p(d)(4)(A), which describes the requirements for the trust as follows: “A trust containing the assets of a disabled individual under the age of 65 which trust was established for the benefit of such individual by the parent, grandparent, legal guardian of the individual or a court if the State receives all amounts remaining in the trust on the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan is exempted.”

1. Generally referred to as “(d)(4)(A)” or “Medicaid payback” trusts.
2. SSI and Medicaid benefits will be lost if the requirements of this section are not met.
4. Can only be established and funded by a beneficiary under age 65.
5. There is no penalty for Medicaid or SSI for transfers into these trusts.

B. **Funding Sources**--Must be Funds of the Beneficiary.

C. **Who May Establish (d)(4)(A) Trusts?**

1. (d)(4)(A) trusts must be “established” by a court, a parent, a grandparent, or a guardian. They may NOT be established by the beneficiary.
2. There exists no specific legislative authorization in Ohio for courts to establish (d)(4)(A) trusts, but most probate courts routinely create them. This has presented problems in some Ohio counties for mentally competent, disabled beneficiaries who have no living parent or grandparent, as some probate courts, finding no specific authority permitting them to create such trusts, have refused to do so. This problem would be remedied by the OUTC.

D. **Who May Fund a (d)(4)(A) Trust?**

1. “Establishing” the trust is a completely different issue from “funding” the trust.
2. The beneficiary, if competent, may simply transfer the funds into the (d)(4)(A) trust.
3. Usually funded by a guardian.
4. Generally, neither the parents nor grandparents will have the authority to transfer an adult child’s assets to a (d)(4)(A) SNT.

E. **Under Age 65 Requirement.**

1. Can only be established for the benefit of a beneficiary under age 65.

2. The trust, if created and funded before age 65, the trust can continue for the benefit of the beneficiary after age 65.

3. No additional contributions can be made to an existing trust after the beneficiary attains age 65.

F. **Disability Requirement.** If the individual is already receiving SSI or Medicaid based upon disability, the “disability” determination has already been made and the ODJFS or SSA will accept the disability determination made for those programs; otherwise, there will have to be an independent determination of disability.

G. **The (d)(4)(A) Trust Must be Irrevocable.** SSA clings to an antiquated definition of “irrevocable” that traces its roots back to the Doctrine of Worthier Title and the Rule in Shelly’s Case. In order to satisfy SSA that a (d)(4)(A) trust is irrevocable, it must have a residual beneficiary who is a person or entity that is specifically identifiable.

1. The fact that ODJFS will be repaid upon the beneficiary’s death does not make ODJFS a residual beneficiary--it is a creditor.

2. If the trust states that at the death of the beneficiary the trust property will go the beneficiary’s heirs at law, as the beneficiary may provide by will, or to the estate of the beneficiary, the trust will not have a residual beneficiary, will not be considered as being irrevocable, and will result in SSA treating the trust as a resource of the SSI beneficiary.

3. Ohio courts that establish (d)(4)(A) trusts through guardianship proceedings do not have the power to name residual beneficiaries, as such a power has been construed as the exercise of a testamentary disposition which is prohibited by Ohio guardianship law.

4. This problem would be remedied by the OUTC.

H. **Upon Death,** the trust must provide the state with the right to 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.”

1. There is some authority for the proposition that only those assets used to fund the trust that came from the program recipient who benefited from the transfer exemption need to be paid back. For example, assume that the beneficiary’s
grandfather, by Will, added some of his own assets to a pre-established (d)(4)(A). In that case, perhaps only the assets of the trust beneficiary that were used to establish the trust would need to be paid back. Other authorities in this area feel that all funds contained in a (d)(4)(A) trust (including contributions from third parties) must be applied to repay Medicaid when the beneficiary dies. If the latter is correct, drafting for the former could result in disqualification of SSI and Medicaid benefits.

2. For nursing home resident/(d)(4)(A) trust beneficiaries, a big issue is whether the state can only require reimbursement for Medicaid “medical assistance,” as opposed to the total cost of the nursing home care, most of which is for expended for housing and food. States, including Ohio, generally seek reimbursement for all Medicaid expenditures. There is conflicting authority among the states regarding the amount of the payback requirement in this situation.

3. If the beneficiary has collected Medicaid in more than one jurisdiction and the trust is insufficient to pay back all jurisdictions, the trust must provide that the jurisdictions will be reimbursed proportionally.

4. Existing Medicaid liens, and any payments due under the Medicare secondary payor statute, must be paid “off the top” from the personal injury settlement at the time of creation of the trust, prior to the commencement of distributions to the beneficiary. This is a process that often takes several months, and failure to address the lien issue at the time of funding can result in liability against the drafting attorney.

5. The following expenses may be paid at the individual’s death before reimbursement of medical assistance to the state:

   a) Taxes due from the trust to the state or federal government because of the death of the beneficiary.

   b) Reasonable administrative expenses such as an accounting of the trust to the court, completion and filing of documents, or other required actions associated with termination of the trust.

   c) Funeral expenses may be prepaid during the beneficiary’s lifetime, but they may not be paid following death until the Medicaid payback requirement has been fully satisfied.

6. The following expenses and payments may not be permitted after the beneficiary’s death prior to the reimbursement of the state for medical assistance:

   a) payment of debts due third parties;

   b) funeral expenses;
c) payments to residual beneficiaries.

I. **Income Tax Considerations.** (d)(4)(A) trusts usually are drafted to have one or more of the I.R.C. sections 671-678 grantor trust provisions to clarify their status as grantor trusts for income tax purposes. A discussion of intentionally making an SNT attract grantor trust status is beyond the scope of this outline, but this issue is more complex than a reading of those code sections might indicate.22

J. **Treatment of Distributions.** The trustee of a (d)(4)(A) trust should retain public benefits counsel and hold regular meetings with the counsel to receive input and make decisions concerning distributions. A brief summary of how various types of distributions are treated is set forth in Appendix B.

K. The following table, from POMS SI 01120.203 sets forth guidelines used by SSA to evaluate (d)(4)(A) trusts:

<table>
<thead>
<tr>
<th>STEP</th>
<th>ACTION</th>
</tr>
</thead>
</table>
| 1    | Was the trust established with the assets of an individual under age 65? *(SI 01120.203B.1.b.)*  
• If yes, go to Step 2.  
• If no, go to Step 8. |
| 2    | Was the trust established with the assets of a disabled individual? *(SI 011203B.1.c.)*  
• If yes, go to Step 3.  
• If no, go to Step 8. |
| 3    | Is the disabled individual beneficiary of the trust? *(SI 01120.203B.1.d.)*  
• If yes, go to Step 4.  
• If no, go to Step 8. |
| 4    | Did a parent, grandparent, legal guardian or a court establish the trust? *(SI 01120.203B.1.e.)*  
• If yes, go to Step 5.  
• If no, go to Step 8. |
| 5    | Does the trust provide specific language to reimburse the State for medical assistance paid upon the individual's death as required in *(SI 01120.203B.1.f.)*?  
• If yes, go to Step 6. |

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L. Duty to Report Creation and Funding (d)(4)(A) Trust to SSA.

1. Notification is required in two circumstances:
   a) SSI and Medicaid recipients, and their representative payees, are under a continuing obligation to report any change in their income, resources, living arrangements or other conditions.
   b) The client must report the (d)(4)(A) trust when he or she is applying for SSI or Medicaid.

2. The failure to notify or report to the SSA can result in huge overpayment claims against the trust if the SSA becomes aware of the trust after the beneficiary has received significant SSI benefits and the SSA rules that it is a countable resource. The SSA will frequently become aware of the trust by an IRS computer check against the SSI rolls, which the SSA does constantly. If the trust is immediately reported to the SSA, corrective action can frequently be taken before the SSA has a large over payment claim.

3. The notification can be in the form of a letter to the local SSA office which should include i) the beneficiary’s name, ii) the beneficiary’s Social Security number, iii) a copy of the trust agreement, and iv) trust records showing the receipt of funds. The letter should expressly answer all of the questions in an SSI step action chart reproduced in this outline at ¶(K) of this article with references to the applicable sections of the trust agreement.

4. The beneficiary, or his/her representative payee, has the duty to report; however, it is a matter of good practice for the attorney to prepare and file the report. The report should be made by letter mailed to the local Social Security Administration.
office responsible for providing services to the beneficiary by certified mail. If filed by the attorney, it is good practice to attach SSA Form 1696, “Appointment of Representative,” and include with the cover letter a request that the SSA direct all correspondence and questions to the attorney.

5. The report is due as soon as the event occurs, but is late if not made by the 10th day of the following month.

6. Upon receipt of the notice, the Claims Representative (“CR”) reviews it in accordance with the action chart and approves it if appropriate. If the CR has questions, he or she will submit it to the Regional Office for an analysis and report. There may be no response for months, and if the trust is approved there may never be a response.

M. Duty to Report Creation & Funding of (d)(4)(A) Trust to CDJFS.

1. Medicaid recipients are under a continuing obligation to report any change in their income, resources, living arrangements or other conditions to the CDJFS.

2. The beneficiary must report the creation and funding of the trust to the local Medicaid eligibility office; however, it is a matter of good practice for the attorney to prepare and file the report.

3. If the beneficiary receives Section 8 vouchers, the beneficiary should report the creation and funding of the (d)(4)(A) trust to the local public housing authority. Once again, it is good practice for the attorney to prepare and file the report.

N. Transfer Penalties. SSI and Medicaid both impose ineligibility periods for the transfer of assets, but each in a different manner.

1. Transfer of assets out of the beneficiary’s name will ordinarily disqualify the beneficiary from receiving public benefits.

2. This penalty occurs even though the public benefits recipient does not personally make the transfer (e.g. as when the transfer is ordered by a court action on behalf of the recipient).

3. A transfer of assets to a (d)(4)(A) trust may avoid the ineligibility period.

VIII. Self-Settled SNT--Pooled Trust Account-(d)(4)(C) Trusts.

The pooled asset trust is a master trust established and maintained by a charitable organization with sub-trusts for individual beneficiaries. In exchange for consolidating management and administration, the charity is entitled to receive the balance of the individual accounts when the beneficiary dies. To the extent the charity does not receive the remaining assets, they are paid back to the state in repayment of its prior Medicaid expenditures. As with
the (d)(4)(A) trust, there are no transfer penalties for transfers made by a disabled beneficiary under age 65. The normal penalty period does apply for transfers made to a (d)(4)(C) account for a beneficiary age 65 or older.

A. **Statutory Requirements Are Set Forth in 42 U.S.C. §1396p(d)(4)(C):**

1. The trust is established by a non-profit association.

2. A separate account is maintained for each beneficiary of the trust but for purposes of investment and management of funds, the trust pools these accounts.

3. Accounts in the trust are established solely for the benefit of individuals who are disabled by the parent, grandparent, legal guardian of the individual, a court, or the individual herself/himself.

4. It contains the assets of a disabled individual of any age.

5. To the extent that amounts remaining in the beneficiary’s account on the death of the beneficiary that are not retained by the trust, the trust pays to the state from such remaining amounts up to an amount equal to the total medical assistance paid on behalf of the individual.

B. **An important difference between a (d)(4)(A) trust and a (d)(4)(C) trust** is the ability of the disabled individual to fund his or her own pooled account trust.

C. **Permitted distributions** are of the same type permitted under (d)(4)(A) trusts.

D. **Payback Requirement.** Upon the death of the disabled beneficiary, the funds remaining in the beneficiary’s account may either become the property of the master trust or be paid back to ODJFS to the extent of Medicaid benefits paid to the beneficiary.

E. **Pooled Trusts in Ohio.** There are two organizations which have established mater pooled trusts in Ohio.


2. The Disability Foundation, Inc., a part of the Dayton Foundation, operates the Ohio Community Pooled Trust. Its web site is [http://www.daytonfoundation.org/partorgs.html](http://www.daytonfoundation.org/partorgs.html)

F. The following table from POMS SI 01120.203 sets forth a table used by SSA to evaluate (d)(4)(C) pooled trust accounts:
<table>
<thead>
<tr>
<th>STEP</th>
<th>ACTION</th>
</tr>
</thead>
</table>
| 1    | Was the trust account established with assets of a disabled individual? (See SI 01120.203B.2.b.)  
  • If yes, go to Step 2.  
  • If no, go to Step 8. |
| 2    | Was the pooled trust established and maintained by a nonprofit association? (See SI 01120.203B.2.a, SI 01120.203B.2.c, and development instructions in SI 01120.203F.)  
  • If yes, go to Step 3.  
  • If no, go to Step 8. |
| 3    | Does the trust pool the funds, yet maintain an individual account for each beneficiary, and can it provide an individual accounting? (SI 01120.203B.2.d.)  
  • If yes, go to Step 4.  
  • If no, go to Step 8. |
| 4    | Is the disabled individual the sole beneficiary of the trust account? (SI 01120.203B.2.e.)  
  • If yes, go to Step 5.  
  • If no, go to Step 8. |
| 5    | Did the individual, parent(s), grandparent(s), legal guardian(s) or a court establish the trust account? (SI 01120.203B.2.a and SI 01120.203B.2.f.)  
  • If yes, go to Step 6.  
  • If no, go to Step 8. |
| 6    | Does the trust provide specific language to reimburse the State for medical assistance paid upon the individual's death from funds not retained by the trust as required in SI 01120.203B.2.g.?  
  • If yes, go to Step 7.  
  • If no, go to Step 8. |
| 7    | The trust meets the Medicaid pooled trust exception.  
  Is the trust irrevocable?  
  • If yes, the trust is not a countable resource. STOP.  
  • If no, evaluate the trust under SI 01120.200 to determine if it is a countable resource. |
| 8    | The trust does not meet the requirements for the Medicaid pooled trust exception. Determine if the undue hardship waiver applies under SI 01120.203E. |
IX. Benefits of (d)(4)(A) and (d)(4)(C) Trusts.

Although the trustee is required (in the case of a [(d)(4)(A) trust), or permitted (in the case of a [(d)(4)(C) pooled account) to reimburse the state for past benefits upon the disabled individual’s death, the beneficiary’s heirs are benefited by the deferral during his/her lifetime for the following reasons:

A. The main benefit of both (d)(4)(A) and (d)(4)(C) trusts is that they both allow for the supplemental needs of the beneficiary to be met—needs that most likely would not otherwise be met, thereby enhancing the beneficiary’s quality of life.

B. Even though Medicaid benefits may have to be paid back, states do not charge interest on the deferred payments; thus, the state is offering the equivalent of an interest free loan.

C. Should the (d)(4)(A) or (d)(4)(C) beneficiary ever require long-term care Medicaid benefits, both types of trusts eliminate any period of ineligibility for Medicaid caused by the creation of the trust, whether the individual is institutionalized or receiving community-based services. The corpus will not be deemed available to the beneficiary and the income need not be counted for Medicaid eligibility purposes.

D. The establishment of a (d)(4)(A) trust does not adversely affect the beneficiary’s Social Security Disability Income (SSD) benefits or Veterans Administration benefits.

E. If there is nothing left in the trust, Medicaid receives no reimbursement.

F. If additional funds remain after reimbursement of paid Medicaid benefits, the beneficiary can designate distributees to receive the surplus.

X. When to Use Third-Party Special Needs Trusts.

A. Contingent third-party SNT if beneficiary becomes disabled as part of parents’ or grandparents’ estate plan. Common situations include:
   1. Parents have a young developmentally disabled or mentally ill child, the extent of whose disabilities may not be known for years.
   2. Child suffers from a chronic disease or mental condition which is not currently severe enough for the child to be considered disabled, but which could result in total disability in the future.

B. Irrevocable Life Insurance Trust.
   1. Life insurance proceeds will provide for the supplemental needs of the beneficiary following the insured’s death.
2. **DO NOT** give the disabled beneficiary Crummey withdrawal powers, as the amount subject to the withdrawal right would be treated as a resource.

C. **Gift Receptacle SNT.** These are often established by relatives during lifetime to serve as a vehicle into which they or other family members can contribute funds for the benefit of the disabled beneficiary.

XI. **When to Use Self-Settled Special Needs Trusts.**

A. **Self-Settled SNTs** are often perfect receptacles to receive personal injury settlements, including structured settlement payments. The following four guidelines are suggested by ACTEC Fellow Andrew Hook.²³

1. For settlements of less than $100,000, it is frequently advisable that the entire amount be taken in a lump sum, because the cost of creating and administering a small (d)(4)(A) trust is large in relation to the trust assets. In these cases, the lump sum can often be spent down in such a way that will protect public benefits, such as by purchasing a home or motor vehicle.

2. For settlements between $100,000 and $500,000, the needs of the disabled person must be analyzed to determine whether a portion of the recovery might best be taken in the form of a lump sum and invested in exempt resources and another portion paid to a (d)(4)(A) trust.

3. For settlements of $500,000 or more, it is almost always beneficial to establish a (d)(4)(A) trust to manage the funds. The needs of the disabled person must be analyzed to determine what portion of the recovery should be structured and what portion should be in a lump sum. The structured portions should contain a commutation provision or payment on death provision, to permit the payment of estate taxes and the Medicaid claim.

4. For very large settlements, a (d)(4)(A) trust is not necessary when the amount is sufficient to provide for all of the beneficiary’s reasonably foreseeable future needs (including medical care and prescription drugs) during his or her lifetime.

C. **Unprotected Inheritances or Gifts.** Before distribution is made to the disabled beneficiary, a parent, grandparent, guardian, or court can authorize the creation of a self-settled SNT into which the following types of items can be distributed. (This assumes that the donor had provided for outright distribution to the disabled beneficiary.)

1. outright distributions from estate;

2. outright distributions from trusts;

²³ “What the Trust & Estates Lawyer Needs to Know About (d)(4)(A) Special Needs Trusts, ACTEC Journal, Fall, 2003.”
3. POD or TOD accounts;

4. life insurance death benefits;

5. custodial accounts.

a) Under the Ohio Uniform Transfers to Minors Act, a custodian has no authority to distribute custodial assets to a (d)(4)(A) trust.

b) If the distribution of the account would cause a loss of SSI benefits, the custodian should seek court authority to terminate the account and establish a (d)(4)(A) trust. The consent of the beneficiary, if competent and between 18 and 21, otherwise of a guardian *ad litem*, will be required.

**XII. What About Income Taxes and an SNT?**

If the trust is a grantor trust for income, all of the income, whether distributed or not, will be taxed to the grantor. In a trust accounting context, there are two kinds of income. “Ordinary income” is limited to income such as interest, dividends and rent. Treas. Reg. §1.671-2(b). Income that is attributable to growth on principal is not included in “ordinary income”. If the trust is a grantor trust for principal, then capital gains will also be taxed to the grantor. Treas. Reg. §671-3(b). As the income taxation of trusts is at a higher rate than that of individuals, taxation of all income to the disabled beneficiary/grantor is almost always beneficial.

**Grantor Trust Rules.** The grantor’s retention of certain control over trust assets will render the trust a grantor trust. Grantor trust rules that do not affect Medicaid eligibility are as follows:

A. The right to receive the income, without the consent of an adverse party, renders the trust a grantor trust for “ordinary income”. See I.R.C. §677.

B. The grantor’s retention of a Special Power of Appointment invokes the grantor trust rules as to capital gains so long as the capital gains are accumulated and added to corpus. See I.R.C. §674; Treas. Reg. 1.674(a).

C. In *Verdow v. Sukowy*, 2002 U.S. Dist. Lexi 16975 (NDNY, 9/10/02), the district court determined that a special power of appointment did not render trust assets available for Medicaid purposes.

D. The grantor’s retention of the power, without the approval or consent of a person in a fiduciary capacity, “to reacquire the trust corpus by substituting other property of an equivalent value” renders the trust a grantor trust as to principal. I.R.C. §675(4).

E. The grantor’s unrestricted power to remove the trustee. See Treas. Reg. §1.674(d)2.
XIII. Alternatives to SNTs.

Because the administration of SNTs can be expensive and burdensome, and because of the generally antagonistic approach to SNT regulation on the part of some governmental agencies, other alternatives should be considered to the use of SNTs in certain circumstances. The alternatives include:

A. **Disinheritance.** Rely on the other children to take care of their disabled sibling. This can be, but is often not, a good alternative.

B. **Purchase of Exempt Resources.** If the inheritance will be relatively modest, the purchase of exempt assets that a public benefits recipient can own without losing eligibility can be a good choice. These include the purchase of a home and/or vehicle. Plans must be in place for the payment of real estate taxes and maintenance expenses.

C. **Foregoing Public Benefits.** This is a good option for larger amounts, particularly where the public benefits recipient is medically stable.

D. **Planning for Future Eligibility.** Sometimes the best course of action is to have the beneficiary receive the disqualifying amount, embark on a concentrated effort of self-improvement, and then develop a spend down plan to regain eligibility later.
This appendix is a brief summary of governmental benefits that may be available to beneficiaries of SNTs, and is not intended to detail the very complex and comprehensive provisions of the various programs.

**Medicaid**

Federal Medicaid law is found in Title XIX of the Social Security Act, 42 U.S.C. §1396, and its regulations are in 42 C.F.R. Parts 430, 431, and 435. Medicaid is a joint federal-state program of medical assistance to eligible needy persons. SSI recipients are usually eligible for Medicaid, but states have the option to apply more or less restrictive guidelines and are known as Section 209(b) states. Ohio is a 209(b) state.

**Medicaid Description Of Benefits.** Medicaid is a financial means-tested program designed to provide payment for medical care for aged, blind and disabled individuals. There are over 50 different types of Medicaid programs. Unlike Social Security, which is based on an insurance model (i.e., benefits are based in part upon amounts contributed by the recipient), Medicaid is based on a welfare model (i.e., benefits are based upon need).

**Medicaid Eligibility Requirements.** In order to receive Medicaid benefits, the applicant must be "categorically needy" by being aged (age 65 or older), blind, or disabled. "Disabled" is defined as "the inability to do any substantial gainful activity by reason of any medically-determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." In addition, the person must be a citizen or resident alien, and a resident of the state providing the benefit.

**Income Limits.** Only low income individuals qualify for Medicaid. Some states, called "income cap states", only provide benefits to individuals with income of 300% or less of the federal SSI benefit rate. (Excess income, however, is disregarded if paid to a so-called Miller trust.) Other states, including Ohio, provide nursing home Medicaid to the extent that the recipient's actual income is less than the state reimbursement rate paid to the facility. Income is viewed in monthly periods. For institutionalized individuals, the recipient is generally only permitted to keep a small monthly personal needs allowance ($40 per month in Ohio) and an amount necessary to keep in force any supplemental health insurance policy, with the balance of the recipient's income being used to help pay for her or his care. For a married recipient who is institutionalized, the community spouse is permitted to keep all of his or her income, but if the community spouse's income is less than a certain amount (referred to as the Minimum Monthly Maintenance Needs Allowance [MMMA], which is between $1,562 and $2,378, with the amount in any given case being dependent upon a number of factors), the community spouse is permitted to receive that portion of the institutionalized spouse's income necessary to bring the community spouse's income up to the MMMNA, which portion is referred to as the Monthly Income Allowance (MIA).
**Resource Limits.** Medicaid treats assets as either countable or exempt. Exempt assets generally include the home, personal effects, one automobile, preneed funeral contracts, permanent life insurance with a stated death benefit of $1,500 or less, property essential for self-support, and a limited amount of rental property. For single Medicaid recipients, countable assets must be $2,000 or less (or $1,500 or less if residing in a §209[b] state.) For married couples, if both spouses are Medicaid recipients, their combined countable resources are limited to $3,000 (or $2,250 if residing in a §209[b] state.) For married couples where one spouse is institutionalized and one is living in the community, the institutionalized spouse is permitted to keep either $2,000 or $1,500, and the community spouse is permitted to keep a maximum of the "Community Spouse Resource Allowance" (CSRA), which for 2006 is $99,540. Many states, however, limit the CSRA to the lesser of $99,540 or one-half of the couple's countable assets determined as of the beginning of the first continuous period of institutionalization (usually the date the institutionalized spouse entered the hospital or nursing home). In no event may the CSRA be less than a certain minimum amount, which is $19,908 for 2006.

**Asset Transfers.** In determining whether or not an applicant meets the resource limits set forth above, the state will look for any uncompensated transfers made within 60 months prior to the filing of the Medicaid application. This is referred to as the "lookback period." Any uncompensated transfer creates a "period of ineligibility", the length of which, in months, is determined by dividing the value of the assets that were transferred by a "state divisor," which represents the average monthly cost of a nursing home care throughout the state. The period of ineligibility cannot exceed 60 months, unless a Medicaid application is filed during a period of ineligibility, in which case there is no limit on the actual period of ineligibility. The period of ineligibility does not begin until the applicant is institutionalized and would otherwise be eligible for Medicaid coverage but for the uncompensated transfer.

**Medicaid Card.** All Medicaid applicants who meet the categorical and financial eligibility requirements receive a Medicaid Card each month that entitles them to free medical care and prescriptions. A Medicaid Card may be issued to an institutionalized individual who does not qualify for nursing home benefits (e.g., because of an unexpired period of ineligibility), thereby enabling the recipient to be able to receive free physician care and prescription coverage but no assistance with payment of nursing home costs.

**Supplemental Security Income (SSI)**

The SSI statute can be found at 42 U.S.C §§1831 *et seq.*, and the regulations at 20 C.F.R. §§416.

Residents of public institutions are not eligible for SSI. Public institutions are those operated or controlled by a government entity that provide treatment or services in addition to food and shelter to four or more persons. Exceptions are persons who live in such institutions to receive vocational or educational training, persons who live in group homes or community residences with no more than 16 residents.

To be eligible for SSI benefits, the monthly income limit for an unmarried person in 2006 is $603. Married persons are entitled to benefits if combined monthly income is less than $904.
Income includes anything received in cash or in kind that can be used to meet the person's needs for food, clothing or shelter.

Deemed income is income of another attributed to the claimant. Generally, it is an issue when the claimant lives with an ineligible spouse or parent. “Deeming” stops applying in the month following a claimant's 18th birthday.

**Description Of Benefits.** SSI is a federal welfare program designed to pay for food and shelter for categorically needy individuals living below the poverty level. For 2006, the maximum monthly SSI benefit is $603. Most SSI recipients also receive Medicaid. All states other than the nine §209(b) states are required to use federal SSI eligibility requirements purposes of determining Medicaid eligibility for SSI recipients. Because of the inherent redundancy (e.g., Medicaid and SSI both use the same definition of “disabled”), many states automatically grant Medicaid coverage to SSI recipients; however, other states require SSI recipients to file a separate application for Medicaid. §209(b) states are permitted to have program requirements that are more restrictive than the federal requirements under SSI provided that those rules may not be more restrictive than their rules that were in effect on January 1, 1972. (Generally, the eligibility requirements in §209[b] are not significantly different than current SSI requirements.)

Because many disabled individuals have unusually high medical expenses, the ability to receive free medical care through Medicaid is often of far more importance than the monthly SSI check; however it is that SSI eligibility that makes Medicaid coverage available.

**SSI Eligibility Requirements.** Eligibility is not based on a person’s employment record, a person’s relationship to an injured worker, or employment taxes paid. As with Medicaid, an SSI recipient must be aged, blind, or disabled. The person must be a U.S. citizen or qualified immigrant. Social Security benefits reduce SSI benefits dollar for dollar, thus very few individuals over age 65 qualify for SSI. Individuals who qualify for Social Security Disability Income (SSD, discussed below), but whose SSD payment is less than $603 per month, will receive both SSD and SSI, with the SSI benefit being the difference between the amount of the SSI benefit and their SSD benefit. Therefore, in order to receive both SSD and SSI, the SSD must be less than $603. Note, however, that it is only SSI, not SSD, that carries with it Medicaid eligibility.

**Definition of Disability.** Social Security defines a disabled person as:

A. An adult (18 years or older) who is unable to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death, or which has lasted or can be expected to last for a continuous period of not less than 12 months.

B. A child under 18 is considered disabled if suffering from a medically determinable physical or mental impairment(s), which compare in severity to an impairment that would make an adult disabled

C. Persons diagnosed as addicted to alcohol or drugs will be found to be disabled
only if the disability is based on symptoms, signs, and laboratory findings independent of the addiction itself. If the drug addiction or alcoholism is found to be a contributing factor to the disability the person is required to participate in free treatment, if available, to maintain their eligibility.

**Income Limits.** For SSI purposes, "income" is defined as anything a person receives in cash or in-kind that can be used to meet a person’s needs for food or shelter. If the SSI recipient is living with an ineligible spouse or parent, the parent's or spouse's income is deemed to the recipient. The 2006 maximum SSI benefit of $603 is reduced by the recipient's actual unearned monthly income and by one-half of the recipient's earned income that is in excess of $65. For purposes of this benefit reduction, food or shelter provided by a third party is treated as income, for the reason that SSI is paid for the purpose of providing food and shelter. This is referred to as "in-kind support and maintenance" (ISM). The receipt of ISM will reduce the SSI benefit by either one-third or by the "presumed maximum value." If the recipient is living in the home of another, such as a relative or friend, the SSI benefit is reduced by one-third. If, however, an SNT is making a mortgage payment on behalf of an SSI recipient who is living either in his or her own home or in one owned by the SNT, then the presumed maximum value rule applies. The only difference between the one-third reduction rule and the presumed maximum value rule is an additional reduction of $20 beyond the one-third reduction under the PMV rule. Examples of “non-income” items include:

- medical care and services;
- social services;
- proceeds of sale of a resource; income tax refunds;
- payments from credit life or credit disability policies;
- proceeds of a loan (including reverse mortgage payments); bills for items which are not food or shelter paid by another;
- $400 per month of earned income (maximum $1,620 per calendar year) for a blind or disabled child regularly attending school;
- $20 per month of unearned income;
- $65 per month of earned income;
- one third of support payments made to or for a child by an absent parent;
- in kind assistance provided by a non-profit organization;
- the value of plane, train, bus tickets received as a gift.

**Resource Limits.** SSI and Medicaid have the same resource limits or $2,000/$1,500 for an individual or $3,000/$2,250 for a couple. The Medicaid concept of the Community Spouse Resource Allowance does not apply to SSI. As with income, SSI applies deeming rules for resources. An SSI recipient who accumulates more than $2,000 in cash resources will generally lose SSI and, possibly, Medicaid, until resources again drop below the maximum permitted level. Proceeds of sale of a resource are not income, but continue to be a resource. Countable resources are anything that the individual owns, has an independent legal right to negotiate, can be converted to cash, and is usable for food or shelter. Some excluded resources are:

- the value of the person's home and appurtenant land, as long as living there or with an intent to return;
- the value of household goods and personal effects up to $2,000;
- wedding and engagement rings and special equipment related to the disability;
- an automobile up to $4,500;
- life insurance policies with face value up to $1,500;
- burial spaces and irrevocable funeral and burial arrangements contracts.

**SSI And Transfers.** Gifts (or, as the statutes phrase it, “transfers of resources for less than fair consideration”) create a period of time (known as the “penalty period” or “period of ineligibility”) during which the person making the gift will be ineligible to receive SSI. For SSI, the penalty period is calculated by dividing the amount of the gift by the then current federal benefit rate (currently $603) plus the state supplement, if any.

Unlike Medicaid, there were no transfer penalties for SSI prior to passage of the Foster Care Independence Act of 1999. While the SSI and Medicaid transfer penalty rules are similar, they are not the same. For SSI purposes, the period of ineligibility that results from an uncompensated transfer made during the 36-month lookback period is computed by dividing the amount of the uncompensated value transferred assets by the amount of the then current maximum monthly benefit (currently $603), rounding the quotient up or down to the nearest whole number (when this calculation is made for Medicaid purposes, the result is always rounded down), with a cap of 36 months. Medicaid uses a 60-month lookback period and maximum period of ineligibility and with Medicaid, the period of ineligibility does not begin to run when the gift is made, but when the person would otherwise be eligible for Medicaid. Significantly, however, the transfer penalty rules do not apply when the assets transferred are those of the person called the “deemor” and not the actual SSI applicant. For instance, if a parent’s resources are deemed to an SSI applicant child, there will be no penalty if that parent transfers those resources to a non-spouse as to that child’s application. In addition, transfers to (d)(4)A) and (C) trusts are exempt; however, transfers to (d)(4)(A) trusts must be made before the applicant is age 65.

**Social Security Disability (SSD)**

The law governing SSD is found in Title II of the Social Security Act, 42 U.S.C. §401 et seq. There is much confusion between Social Security Disability (SSD) and SSI. Many disabled individuals who receive disability benefits are not aware of which they are receiving, as both are processed by the Social Security Administration. SSD is part of a larger program more fully known as Old Age Survivors and Disability Insurance (OASDI). SSD is not means tested, so the existence of an SNT for the benefit of a recipient of SSD would have no impact upon the SSD benefit. SSD is a cash benefit paid monthly to a disabled individual (SSI and SSD use the same "disability" definition) due to one of the following factual circumstances:

- The disabled wage earner is himself or herself entitled to benefits due to disability;
- The spouse and/or children of a disabled wage earner are entitled to dependent benefits; or
- A disabled surviving spouse and surviving disabled or healthy children can obtain survivor’s benefits.
SSI and SSD are similar, in that benefits are paid to individuals to meet a common definition of “disabled”. They differ in that SSI is a “welfare” program, while SSD is an “insurance” program. As a federal “insurance” program, SSD is not “needs based.”

**Medicare**

The Medicare regulations are in 42 C.F.R. parts 405-424. The Medicare statute begins at 42 U.S.C. §1395. Medicare is a federal health insurance program consisting of Parts A, B, C, and D. Except for the amount of the Part B co-pay beginning in 2007 (when singles with income over $80,000 and joint files with income over $160,000 will pay a higher premium), Medicare is not means tested, so the existence of an SNT for the benefit of the Medicare recipient would have no effect upon benefits.

Individuals most often qualify for Medicare by turning age 65 and receiving Social Security retirement benefits; however, persons under age 65 who have received, or been entitled to receive, SSD for 24 months are eligible for Part A Medicare benefits as well. There is a shorter waiting period for persons with ALS or renal failure. There are no resource or income limits for Medicare eligibility.

**Medicare Part A.** Part A covers inpatient hospital services, post-hospital extended care services, home health and hospice services. Psychiatric hospital stays are limited to 190 days in the beneficiary's lifetime. Skilled nursing facility stays are limited to 100 days and are 100% covered for only the first 20 days. There may also be substantial deductibles and co-pays under Medicare.

"Custodial care" is not covered. This is care that could be given safely and reasonably by a person who is not medically skilled and that is given mainly to help the patient with daily living such as walking, bathing and dressing. There is no coverage for custodial care even if performed in a skilled nursing facility or home health care environment.

**Medicare Part B.** Medicare Part B covers physicians, diagnostic tests, medical equipment, ambulances, outpatient physical and speech therapy. Any person eligible for Part A may enroll and pay the premium for Part B coverage. The 2006 premium is $88.50 per month.

**Premiums, Deductibles and Co-Pays.**

- Part B premium: $88.50/month
- Part B deductible: $124
- Part A deductible: $952
- Co-payment for hospital stay days 61-90: $238/day
- Co-payment for hospital stay days 91 and beyond: $476/day
- Skilled nursing facility co-payment, days 21-100: $119/day

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24 See 20 CFR §§ 416.1100 et seq.
Appendix B

Treatment of (d)(4)(A) and (C) SNTs
For Purposes of SSI and Medicaid25

A self-settled SNT created under 42 U.S.C. §1396(p)(d)(4)(A) or (C) allows disabled persons who are currently receiving Medicaid or SSI, or both, to continue to receive those public benefits when placing his or her own assets into the trust without penalty. Parents seeking their own eligibility for nursing home Medicaid may transfer their assets to one of these trusts for the sole benefit of their disabled child without a penalty period. In addition to the statutory law, rules applied by the Social Security Administration are found in its Program Operations Manual System (POMS). Here is where the attorney will discover the most detailed procedures for navigating through Supplemental Security Income (SSI) and Special Needs Trust treatment by SSI and Medicaid. The online version for the public of the POMS can be found at www.ssa.gov. While the POMS do not have the force of law, the Social Security Administration staff relies almost exclusively on them.

SNTs and Resources. The assets including a home placed into these self-settled SNTs bestow an equitable interest treated as an ownership interest and thus “belong” to the individual on Medicaid or SSI and yet, will not count as a resource. These trusts should not be used to protect an inheritance that a parent or other family member or friend wishes to leave for a disabled person. A third-party-settled SNT should be used on such an occasion because a Medicaid pay-back clause is not required. If on the other hand, the disabled individual has received an inheritance free and outright, he or she may use the self-settled SNT to protect the inheritance. Also common is the use of a (d)(4)(A) or (C) SNT to protect tort recoveries and divorce proceeds of alimony and equitable distribution of the disabled individual. Most significantly, the law requires for Medicaid to be reimbursed up to an amount equal to the total medical assistance paid on behalf of the individual from the SNT funds remaining at the death of the beneficiary.

Availability of Trust Resources. Whether the assets held in a (d)(4)(A) or (C) trust are deemed available turns on whether the beneficiary has a right to compel distribution or to revoke the trust. Mere discretion granted to the trustee should still retain the insulated status of the resources. In some states it is essential that a residual beneficiary other than the disabled person be designated after the Medicaid payback provisions. An ascertainable beneficiary or class of beneficiaries listed will be sufficient to have the trust’s required irrevocable status upheld. The Social Security Administration applies state law which may espouse a rule that if the grantor is also the sole beneficiary of a trust, then the trust is revocable even if the instrument recites that it is irrevocable. If, however, a trust provision names a residual beneficiary who is different from the grantor or beneficiary, then the trust is recognized as being irrevocable. POMS S.I.01120.200.D.1.A. provides that the SNT’s corpus will be deemed available if the individual has the legal authority to revoke the trust and then use the funds to meet the ISM of food, clothing, or shelter. Thus the litmus test is whether the beneficiary has demand access to trust

25 Much of this Appendix was excerpted, with permission, from a paper entitled, “Government Benefit Programs and SNT Impact” by G. Mark Shalloway, that was presented at the 2005 Advanced Practitioner’s Program of the National Academy of Elder Law Attorneys.
principal or income. If the individual does not have the right to revoke or direct the use of the trust assets for his or her own support, the trust corpus is not an available resource. State law determines whether the beneficiary has demand rights to support from the SNT pursuant to the Social Security Administration rules.

**SNT and Income.** The properly drafted and administered (d)(4)(A) and (C) trusts will insulate income and principal from being treated as being available to the beneficiary. The real concern lies in trust disbursements and the appropriate administration of the Special Needs Trust regarding use of the trust funds for the beneficiary whether or not those trust funds are deemed available.

**SNT and Transfers.** For the pooled trust known as the (d)(4)(C) trust, transfers can be made from the individual to the pooled trust without penalty regardless of age; however, for the (d)(4)(A) trust, the disabled beneficiary must be under the age of 65 to avoid having penalties for transfers assessed against him or her when placed into the SNT. When the (d)(4)(C) trust was originally created, there was a question as to whether the trust would function to effectively insulate the assets after the beneficiary had attained 65 years of age. The Health Care Financing Administration (HCFA as it was then called) issued a letter giving the disabled and their advocates a favorable response. The POMS provide the most practical day-to-day guidance in the administration of a SNT to remain compliant with Medicaid and SSI law. Although POMS do not have the true force of law they are, however, as a practical matter, what is followed by Social Security. If the SNT gives pure discretion as to the time, purpose and amount of distributions made by the trustee, the POMS indicate that the corpus and income held in the trust are exempt; however, bear in mind this merely refers to insulating the trust from being considered an available resource. This rule does not address how disbursements are actually to be treated. Different kinds of distributions or disbursements can be made from SNTs, each of which carries its own impact on SSI.

1. Disbursements of cash, or items that can be converted to cash, that are made directly to the SNT beneficiary are treated as countable income and reduce the SSI benefit on a dollar for dollar basis. If such distributions equal or exceed the monthly SSI benefit amount, Medicaid coverage may also be lost. For this reason, all distributions should be made to third parties.

2. (i) In-kind (non-cash) distributions directly to the SNT beneficiary that do not represent food or shelter, and (ii) cash distributions made to third parties to provide the SNT beneficiary with anything other than food or shelter, have no effect upon the SNT beneficiary’s SSI benefit. Examples of expenditures that would not be treated as income to the SNT beneficiary include:
   
   a) payments in a reasonable amount to a spouse or parent for attendant care, provided that there is a prior written personal care agreement that specifies how the amount to be paid will be determined;

   b) payments for medical and supportive services, supplies and equipment, including over-the-counter medications;
c) cosmetic, extraordinary, experimental, or elective mental or dental care, if not otherwise covered by Medicaid;

d) subscriptions/memberships for magazines, health clubs, video rentals;

e) purchase of appliances and electronic equipment such as TVs, DVD players, computers, stereos, kitchen or household appliances, exercise equipment, etc.;

f) payment for personal services such as mowing the lawn, doing the housecleaning, grocery shopping, haircuts and babysitting;

g) professional fees (legal, tax preparation, etc.);

h) travel and recreational expenses; vacations; sporting events;

i) expenses related to the purchase and maintenance of a car;

j) payment of insurance premiums (automobile, home and personal property);

k) Non-edible household supplies, such as Drano, laundry soap, kitty litter, paper products;

l) payment of telephone and cable TV.

3. (i) In-kind (non-cash) distributions directly to the SNT beneficiary that do represent food or shelter, and (ii) cash distributions made to third parties to provide the SNT beneficiary with food or shelter, reduce the SSI benefit—but only up to a certain limit. No matter how much money is spent for these items, no more than $221 (in 2006) will be subtracted from the SSI benefit for the month in which the beneficiary receives the items. Examples of these disbursements are:

- Food
- Mortgage payments
- Real property taxes
- Rent
- Heating fuel, gas, and electricity
- Water
- Sewer
- Garbage removal

Regarding the use of SNT funds for the purchase of a home or the payment of a mortgage on a home, the POMS give specific guidance. If the trustee of a trust which is not a resource for SSI purposes purchases and holds title to a house as a home for the beneficiary, the house would not
be a resource to the beneficiary. The trust holds legal title to the house, therefore the eligible individual would be considered to be living in his or her own home based on having an “equitable ownership under a trust”. Further, the beneficiary does not receive ISM in the form of rent-free shelter while living in the home in which he or she has an ownership interest. Remember an equitable home ownership interest under a SNT is deemed to be sufficient; however, the purchase of a home in the first month will result in being treated as a form of shelter and therefore ISM. This will reduce the SSI benefit by no more than the PMV. If the SNT continues to pay a mortgage on the home owned by the SNT, each mortgage payment will be treated as ISM and reduce the SSI benefit by the PMV rule. On the other hand capital improvement including a wheelchair ramp or assistance devices and the like will not be treated as ISM as they will serve to increase the value of the resource and not merely pay for ongoing household operating expenses. The POMS set forth a list of household operating expenses that a SNT may pay for which will be treated as ISM and are listed as follows: (1) food; (2) mortgage (including property insurance required by the mortgage holder); (3) real property taxes (less any tax rebate/credit); (4) rent; (5) heating; (6) fuel; (7) gas; (8) electricity; (9) water; and (10) sewer and garbage removal. Condominium fees in themselves are not household costs; however the fees may include charges which are household costs (e.g., garbage removal). To the extent that such charges are identifiable, they are used in the computation of ISM.

**SSD and Medicare.** As discussed in Appendix A, Social Security Disability and Medicare are not financial means tested programs and therefore there is no impact on those programs by the SNT.
Appendix C

Ohio Modifications to the UTC that Protect SNTs

This appendix lists several modifications made in the Ohio Uniform Trust Code, H.B. 416 that should have the effect of providing additional protection to SNTs. There can be no question but that under the OUTC, SNTs would have enhanced protections not available under current law.

Many more modifications were made than are listed below. Those that are described in this appendix were either made to help protect SNTs, or have the effect of providing additional protection to trust beneficiaries in general, which would include beneficiaries of SNTs. While some of these “protections” are most likely not needed, they nevertheless serve the purpose of removing potential uncertainty in key areas by maintaining the status quo and, in some cases, by affording more protections than are available either under current law or under the final version of the UTC.

A second factor that needs to be noted is the fact that Ohio, having no official “legislative history”, does not allow for official comments. Some substantive material that appears in the UTC comments was moved into the text of the OUTC to help assure the intended result.

1. **The “Wholly Discretionary Trust”**.

   The OUTC adds a safe harbor pure discretionary trust. See the main outline at Article VI (page 22).

2. **Remedies of Exception Creditors Limited against SNTs.**

   OUTC §5805.02 provides that the claims of exception creditors are not barred by spendthrift provision. Division D of that section, however, allows the court to limit the award to take into account the supplemental needs of SNT beneficiaries.

   **Sec. 5805.02**

   (B) Subject to section 5805.03 of the Revised Code, *a spendthrift provision is unenforceable against either of the following:*

   (1) *The beneficiary’s child or spouse who has a judgment or court order against the beneficiary for support, but only if distributions can be made for the beneficiary’s support under the terms of the trust;*

   (2) *A claim of this state or the United States to the extent provided by the Revised Code or federal law.*
(C) A spendthrift provision is enforceable against the beneficiary’s former spouse.

(D) A claimant described in division (B) of this section may obtain from the court an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to the relief that is appropriate under the circumstances, considering among any other factors determined appropriate by the court the support needs of the beneficiary, the beneficiary’s spouse, and the beneficiary’s dependent children or, with respect to a beneficiary who is the recipient of public benefits, the supplemental needs of the beneficiary if the trust was not intended to provide for the beneficiary’s basic support.

(E) The only exceptions to the effectiveness of a spendthrift provision are those described in divisions (B) and (D) of this section, in division (B) of section 5805.05 of the Revised Code, and in sections 5805.06 and 5810.04 of the Revised Code.

3. Remedies of All Creditors Limited against SNTs with respect to Mandatory Distributions.

As was done in OUTC §5805.02(D) (regarding the attachment of distributions by exception creditors), the OUTC adds express language to §5805.05 (dealing with the attachment of mandatory distributions) to permit a court to limit the award to take into account the supplemental needs of SNT beneficiaries. It should be noted, however, that most SNTs, with the possible exception of a “sole benefit” trust discussed at Article V of this outline, would not provide for mandatory distributions.

Definition of “Mandatory Distribution” - UTC §506(a) and OUTC §5801.02(M)

Prior to the 2005 Amendments to the UTC, “mandatory distribution” was not a defined term, at which time a definition of that term was added to UTC §506(a). The Ohio definition of “mandatory distributions” is included in the definitional section, OUTC §5801.01 and differs from the UTC definition primarily to state explicitly that a distribution pursuant to a support standard is not a “mandatory distribution” even if the trustee is directed to make support distributions and the trust instrument does not expressly grant the trustee discretion with respect to such distributions.

OUTC 5801.01

(M) “Mandatory distribution” means a distribution of income or principal, including a distribution upon termination of the trust that the trustee is required to make to a beneficiary under the terms of the trust. Mandatory distributions do not include distributions that a trustee is directed or authorized to make pursuant to a support or other standard, regardless of whether the terms of the trust provide that the trustee “may” or “shall” make the distributions pursuant to a support or other standard.
5805.05 Mandatory distribution trusts

(A) To the extent that a trust that gives a beneficiary the right to receive one or more mandatory distributions does not contain a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to attach present or future mandatory distributions to or for the benefit of the beneficiary or to reach the beneficiary’s interest by other means. The court may limit an award under this section to the relief that is appropriate under the circumstances, considering among any other factors determined appropriate by the court, the support needs of the beneficiary, the beneficiary’s spouse, and the beneficiary’s dependent children or, with respect to a beneficiary who is the recipient of public benefits, the supplemental needs of the beneficiary if the trust was not intended to provide for the beneficiary’s basic support. If in exercising its power under this section the court decides to order either a sale of a beneficiary’s interest or that a lien be placed on the interest, in deciding between the two types of action, the court shall consider among any other factors it considers relevant the amount of the claim of the creditor or assignee and the proceeds a sale would produce relative to the potential value of the interest to the beneficiary.

(B) Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution the beneficiary is entitled to receive if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

4. Spendthrift Exception Creditors.

OUTC 5805.02 was modified to drop two classes of exception creditors from the list of exception creditors found in the UTC, and to place limits on a third class.

No decisions were found in Ohio in which former spouses with judgments for unpaid alimony were able to enforce those judgments against spendthrift trusts of which their former spouses were beneficiaries, so former spouses were dropped from the list of exception creditors in the OUTC. For the same reason, dropped from the Ohio list of exception creditors was “a judgment creditor who has provided services for the protection of a beneficiary’s interest in the trust”. In the few Ohio cases in which current spouses and children with judgments for support were able to bypass spendthrift provisions, the subject trusts included a support standard. In order to codify these decisions, §5805.02 was modified as set forth below.

Lastly, because of concerns about the statement contained in Restatement (Third) that the list of exception creditors can increase over time with evolving public policy (a statement found nowhere in the UTC or its comments), this section adds a new division (E) to provide that the statutory list of exception creditors is exclusive.

§5805.02 was quoted in 2, above, in its entirety.
5. **Sec. 5805.03 Eliminates Creditor Remedies Against WDTs.**

“Notwithstanding anything to the contrary in division (B) of section 5805.02 of the Revised Code, no creditor or assignee of a beneficiary of a wholly discretionary trust may reach the beneficiary’s interest in the trust, or a distribution by the trustee before its receipt by the beneficiary, whether by attachment of present or future distributions to or for the benefit of the beneficiary, by judicial sale, by obtaining an order compelling the trustee to make distributions from the trust, or by any other means, regardless of whether the trust instrument includes a spendthrift provision.”

6. **Claims Against Self-Settled SNTs Limited.**

   While the SNT beneficiary is nominally the settler of (d)(4)(A) trusts, the trust must actually be created by a parent, grandparent, guardian, or by the court. The assets used to fund the trust can be assets of the beneficiary, but in almost all cases the trusts are, instead, funded with assets that the beneficiary was otherwise about to receive. Viewed in this light, the common law rule, codified by UTC §505, that permits the settlor’s general creditors to reach the trust assets, could be unduly harsh in certain circumstances. For this reason, the OUTC added a new paragraph (3) to division (A) in §5805.06, to allow the court to limit the award with respect to the OBRA ‘93 self-settled trusts.

   **5805.06 Creditor’s Claim Against Settlor.**

   (A) Whether or not the terms of a trust contain a spendthrift provision, all of the following apply:

   (1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor’s creditors.

   (2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor’s benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor’s interest in the portion of the trust attributable to that settlor’s contribution.

   (3) With respect to a trust described in 42 U.S.C. section 1396p(d)(4)(A) or (C), the court may limit the award of a settlor’s creditor under division (A)(1) or (2) of this section to the relief that is appropriate under the circumstances, considering among any other factors determined appropriate by the court, the supplemental needs of the beneficiary.

7. **SNTs May be Created by Court Order.**

   The methods of creating a trust listed in UTC §401 do not include court ordered special needs trusts that are authorized by OBRA ‘93, such as (d)(4)(A) trusts discussed in
Section 5804.01. A trust may be created by any of the following methods:

(A) transfer of property to another person as trustee during the settlor’s lifetime or by will or other disposition taking effect upon the settlor’s death;

(B) declaration by the owner of property that the owner holds identifiable property as trustee;

(C) exercise of a power of appointment in favor of a trustee;

(D) a court order.

8. (d)(4)(A) Trusts and (d)(4)(C) Pooled Accounts May be Created by Settlors Lacking Capacity or the Intention to Create a Trust.

UTC §402 includes among the requirements to create a trust that the settlor have capacity and express an intention to create the trust. Because self-settled (d)(4)(A) trusts and (d)(4)(C) pooled fund accounts are funded with assets of the beneficiary, the UTC treats the beneficiary as the settlor. The disabled beneficiary, however, may lack both the capacity to create a trust as well as the ability to indicate an intention to create a trust. For this reason, OUTC §5804.02 was modified as indicated below.

Section 5804.02. A trust is created only if all of the following apply:

(1) The settlor of the trust, other than the settlor of a trust created by a court order, has capacity to create a trust.

(2) The settlor of the trust, other than the settlor of a trust created by a court order, indicates an intention to create the trust.


Generally, UTC §411 allows the settlor and all beneficiaries to modify or terminate a trust. Because federal SSI requirement prohibit a beneficiaries of OBRA ‘93 self-settled SNTs from having the ability to terminate the trust, concerns were expressed that this section could be used by the Social Security Administration as a basis to deny SSI benefits to SNT beneficiaries in UTC states. Similarly, O.R.C. §5111.151 provides that a trust is not irrevocable if the settlor can terminate a trust ([d][4][A] trusts must be irrevocable). Those concerns were addressed by making that section inapplicable to those types of trust.
Sec. 5804.11.

(A) If upon petition the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, the court shall enter an order approving the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust. An agent under a power of attorney may exercise a settlor’s power to consent to a trust’s modification or termination only to the extent expressly authorized by both the power of attorney and the terms of the trust. The settlor’s guardian of the estate may exercise a settlor’s power to consent to a trust’s modification or termination with the approval of the court supervising the guardianship if an agent is not so authorized. The guardian of the settlor’s person may exercise a settlor’s power to consent to a trust’s modification or termination with the approval of the court supervising the guardianship if an agent is not so authorized and a guardian of the estate has not been appointed. This division applies only to irrevocable trusts created on or after the effective date of Chapters 5801. to 5811. of the Revised Code and to revocable trusts that become irrevocable on or after the effective date of Chapters 5801. to 5811. of the Revised Code. This division does not apply to a noncharitable irrevocable trust described in 42 U.S.C. 1396p(d)(4).

§5804.18. Irrevocability of OBRA ’03 Trusts.

In determining an SNT beneficiary’s eligibility for SSI, the Social Security Administration looks to state law to determine whether the trust is irrevocable. In a few states, including Ohio, the SSA takes the position that a trust which by its terms is irrevocable is nevertheless treated as being revocable if it fails to name a remainder beneficiary, or if the remainder beneficiaries are the settlor’s heirs. Many SNTs are created by the court through a guardianship. Because Ohio law does not allow a guardian to make a will for the ward, Ohio courts have required that OBRA ’93 SNTs name the ward’s “heirs” or the ward’s estate as beneficiary of any trust assets that might remain following the mandatory Medicaid payback upon the settlor’s death. Using the Doctrine of Worthier Title or the Rule in Shelley’s case, the SSA sometimes takes the position that such a trust is revocable, even if its terms state that it is irrevocable. The OUTC includes a new §5804.18 to address this situation.

Sec. 5804.18.

A trust described in 42 U.S.C. 1396p(d)(4) is irrevocable if the terms of the trust prohibit the settlor from revoking it, whether or not the settlor’s estate or the settlor’s heirs are named as the remainder beneficiary or beneficiaries of the trust upon the settlor’s death.


UTC §410 provides that a trust can be terminated if a court determines, among other things, that its purpose has become contrary to public policy. The reference to the possibility that an SNT could terminate upon the finding by any judge of a court of competent jurisdiction that it (or SNTs in general) is against public policy is a matter of concern to many
practitioners. In an Ohio case that achieved national notoriety, *Young v. Ohio Dept. of Human Services*, an Ohio Supreme Court Justice, Justice Stratton, in dissent, basically stated that SNTs are against the public policy of the state of Ohio:

“Where a child has reached the age of majority and the obligation to support has ceased, I strongly believe it would be against public policy to allow a parent to create a trust where the trust income or trust corpus can go to the child at the discretion of the trustee, except when such distributions would render the child ineligible for medical assistance from the government.”

With a significant number of judges coming down firmly on the side of so-called “personal accountability” and with growing pressures to cut virtually all types of social spending, “contrary to public policy” was removed from §5804.10 as a reason for judicial termination of a trust.

5804.10. Modification or Termination of Trust; Proceedings for Approval or Disapproval.

(A) In addition to the methods of termination prescribed by sections 5804.11 to 5804.14 of the Revised Code, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, a court determines that no purpose of the trust remains to be achieved, or a court determines that the purposes of the trust have become unlawful; contrary to public policy, or impossible to achieve.

12. Ability to Compel Distributions.

Because Ohio case law provides no basis upon which former spouses are able to compel distributions, the Joint Committee added a provision that states that a spouse who received a judgment while still married would not be able to enforce it against the former spouse following the termination of the marriage. In the one Ohio case in which a child was able to compel a distribution from a spendthrift support trust that had been established for the benefit of the child’s father, the court attached significance to the fact that the grantor had not expressed an intention to preclude the plaintiff (the grantor’s grandchild) from being able to benefit from the trust. For this reason, the OUTC allows the grantor to expressly provide that a spouse or child of the beneficiary is not to have the ability to compel distributions. Because there is no judicial precedent in Ohio for the judicial sale of discretionary interests, the OUTC added a new division (E) to prohibit such sales. It should be noted that of Division (C) was added to codify the holding of the Ohio Supreme Court in *Bureau of Support v. Kreitzer*, and that the addition of this provision in other states would likely result in a potentially significant expansion of State remedies. The decision was made in Ohio to codify the *Kreitzer* ruling in this manner so that the OUTC would remain revenue neutral to the state of Ohio, and also to prevent the judicial expansion of the *Kreitzer* decision by making it available to other types of creditors or in situations where the trust does include a spendthrift provision.

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26 76 Ohio St.3d 547, 668 N.E.2d 908 (1996)
27 243 N.E.2d 83 (Ohio 1968)
5805.04 Discretionary Trusts That Are Not Wholly Discretionary Trusts.

(A) As used in this section, “child” includes any person for whom an order or judgment for child support has been entered in this or any other state.

(B) Except as otherwise provided in divisions (C) and (D) of this section, whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee’s discretion, even if the discretion is expressed in the form of a standard of distribution or the trustee has abused the discretion.

(C) Division (B) of this section does not apply to this state for any claim for support of a beneficiary in a state institution if the terms of the trust do not include a spendthrift provision and do include a standard for distributions to or for the beneficiary under which the trustee may make distributions for the beneficiary’s support.

(D) Unless the settlor has explicitly provided in the trust that the beneficiary’s child or spouse or both are excluded from benefiting from the trust, to the extent a trustee of a trust that is not a wholly discretionary trust has not complied with a standard of distribution or has abused a discretion, both of the following apply:

(1) The court may order a distribution to satisfy a judgment or court order against the beneficiary for support of the beneficiary’s child or spouse, provided that the court may order the distributions only if distributions can be made for the beneficiary’s support under the terms of the trust and that the court may not order any distributions under this division to satisfy a judgment or court order against the beneficiary for support of the beneficiary’s former spouse.

(2) The court shall direct the trustee to pay to the child or spouse the amount that is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

(E) Even if a trust does not contain a spendthrift provision, to the extent a beneficiary’s interest in a trust is subject to the exercise of the trustee’s discretion, whether or not such discretion is subject to one or more standards of distribution, the interest may not be ordered sold to satisfy or partially satisfy a claim of the beneficiary’s creditor or assignee.

(F) If the trustee’s or co-trustee’s discretion to make distributions for the trustee’s or co-trustee’s own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor’s claim if the beneficiary were not acting as trustee or co-trustee.
13. **Rights of Creditors of Settlor of Revocable Trust after Settlor’s Death.**

UTC §505(a)(3), consistent with the laws of most states, provides that if the settlor’s probate estate is inadequate, creditors of the settlor may reach the trust assets after the settlor’s death. Because of a 1939 Ohio Supreme Court decision which held to the contrary, the OUTC removed this provision.
Appendix D

Case Summaries
SNTs, Medicaid Eligibility & Related Issues


On May 21, 1968, a father executed his will which contained a testamentary trust for the benefit of all of his children. The testator died less than five months later. The trust, funded with $118,000, was a discretionary trust limited by a support standard:

1. During the lifetime of my son, WILLIAM GEORGE LeVISEUR, if he survives me, the Trustee shall pay the income periodically to or for the support, maintenance, welfare and benefit of my said son or may, in the Trustee’s discretion, add part or all of the income to principal, to be invested as such.

2. The Trustee may distribute such part of the Income not necessary for the support of my son, in equal shares to my three children, MARGARET MARY SMITH, EDWARD JOHN LeVISEUR, JR. and ELIZABETH ELLEN LANG….

3. The Trustee shall use so much of the principal as may in her opinion be advisable therefore, for the support, maintenance, welfare, comfort and support of my son, WILLIAM GEORGE LeVISEUR. The Trustee shall have complete discretion as to how much shall be used for such purposes….

The question at issue was whether the testator created a duty in the trustee to provide for William’s basic support, regardless of the availability of other resources, including state assistance. If so, William arguably could compel a distribution.

“We reject as a matter of public policy Commonwealth Court’s implication that it is in a beneficiary’s interest not to be ‘forced to resort to public welfare.’” At 441.

Stating, “[a] settlor’s intent must be determined from all the language within the four corners of the trust instrument, the scheme of distribution and the circumstances surrounding the execution of the instrument”, the Court found several factors that supported a finding that the testator wanted the trustee to consider other resources.

- The testator established one trust to benefit all four children, rather than four trusts, one to support William.
- Income that was not necessary for William’s support was to go to the other three children.
- The testator wanted there to be assets remaining at William’s death to be distributed to his other three children.
• William was institutionalized at the time the testator signed the will.

• Before death, the testator had been paying $200 per month, less than 37% of the actual cost, per a written maintenance agreement with the state.

Regarding the classification of trusts as support trusts or discretionary trusts, the court stated: “We believe such a rigid categorization is unwarranted and ignores the intent of a settlor who includes both support and discretionary language in his trust instrument, by substituting mechanical rules for individual facts….We believe a settlor is entitled to maintain some control by means of a support standard, and at the same time reasonable flexibility through a grant of considerable discretion to the trustee, to ensure his purpose of providing reasonable care to the beneficiary who is or may be institutionalized without effectively disinheriting the other members of his family”.

“In this trust, the testator intended to provide support for William to the extent it was necessary. If state assistance is available for basic support, use of trust income or principal is not necessary for those basics…. The Trustee does not abuse the broad discretion granted her under this trust by refusing to use income or principal for William’s basic support when public funds are available from the Commonwealth.”

Based upon above factors, the court concluded that the testator “intended this trust to supplement other resources available to [the beneficiary] and to provide for his basic support only to the extent such other resources should provide inadequate or be discontinued.”


“I give to my Trustees hereinafter named, IN TRUST, the sum of $25,000… to pay the net income in at least quarterly installments to my Mother, JOAN S. FRYMIRE, during her lifetime… In addition… I hereby authorize my Trustees, in their uncontrolled discretion, but having in mind the income or principal that may be available to or for her from other sources, to pay over to my Mother so much of the principal of this trust as my Trustees shall deem needful or desirable for her support and maintenance, including medical surgical, hospital, or other institutional care….”

The Court held that this trust was an available resource of mom.

“The issue of ‘availability’ requires an inquiry into whether the T intended the funds to be utilized as a resource.

Citing an earlier case, “This Court noted that the subject trust conferred discretion upon the trustee but recognized that such ‘discretion is but a legal one, and whenever the law determines that a proper case has arisen in which the trustee’s discretion should have been exercised in a particular way, he will be constrained to act in accordance therewith.””
The Court distinguished this decision from its earlier Lang decision, discussed above:

- Lang trust was for four beneficiaries, this was for just one.
- In Lang the testator before death had been paying about one-third of the actual cost of his son’s care pursuant to a written agreement.
- In Lang, the testator owed no legal duty to support his adult son, but in this case the son did owe a duty to “care for his mother” under Pennsylvania’s “Support Law”.
- While trust did make reference to the ability of the trustee to consider other “income or principal that may be available,” such language did not make reference to public benefits.
- Unlike Lang, here there was no evidence that the testator intended the trustee to first look to the Commonwealth for the care of his mother.


This case involved a testamentary trust established by a mother for two of her children, which gave the trustee the following power:

“…to pay to and use as much of the net income as may be necessary or desirable for the support, maintenance and care of my daughter, ETHEL J. SNYDER, and my son JAY W. SNYDER, for and during their joint lives and the lifetime of the survivor, as well as so much of the principal; as in the Trustee’s discretion may be necessary or desirable for the support, maintenance and care of my two children….

“Any income or principal which may … become payable to any incompetent beneficiary … shall during said …. incompetency be held and expended by the Trustee directly and without the intervention of a guardian to or for the benefit of the incompetent or minor beneficiary for the support, maintenance and education of said beneficiary.”

Five months after the will was executed, Jay Snyder was struck by an automobile, necessitating his permanent placement in a nursing home. The mother died one year after the accident.

In finding that the trust was not an available resource, the Court noted:

“…[I]t is apparent from the four corners of the trust instrument that the testator/settlor intended the trustee to care for both of her children. Moreover, it is undisputed that at the time of her death Jay had been receiving public benefits for a number of months. The latter fact indicates to us an awareness on the part of the testator/settlor of the availability of these benefits….
“Here, Mrs. Snyder, at the time of her death, knew that her son was receiving public benefits. It is difficult if not impossible to believe that Mrs. Snyder intended by her beneficence to deprive her son of that to which he had previously become entitled; and by so doing also deprive her daughter of any benefit from the trust.”

This case was decided the same day as *Commonwealth Bank and Trust Co., N.A. v. Department of Public Welfare*, which is the case summarized immediately below.

A dissenting Justice stated, “Rather than examining the intent of the testator, the Court should concentrate on the resources available to the needy beneficiary under the trust, whether those funds be principal or interest… The existence of multiple beneficiaries should be irrelevant to such a determination; private citizens cannot be permitted to benefit at the expense of the public.”


$65,000 was held in a testamentary trust created by Louis Rosenberg for his wife, Mary. Louis died in 1976, and in 1992 Mary applied for Medicaid benefits. The trust contained the following language:

“[T]he Trustees shall pay the net income from this trust quarterly, to my said wife… [T]he Trustees are authorized, in their sole discretion, to use principal for the comfort, welfare, and maintenance and support, for educational requirements, medical and surgical expenses, and other unusual needs of my said wife.”

Held that the trust was an available resource. First, Mary was the sole beneficiary. Second, it clearly appeared that Louis intended that principal be an available resource to pay his wife’s medical bills. The court distinguished *Lang* and *Snyder*, which both had multiple beneficiaries. The court found that it was significant that Mary was not receiving any public benefits prior to her husband’s death.


A father created one testamentary trust to provide for his two mentally handicapped daughters, which was funded with $9,515. The trust was a pure discretionary trust, but with precatory support language (in italics). The distribution language authorized the trustees:

“To pay or apply so much of the net income or the principal of such trust to or among either one or both of my daughters … and in such proportions and amounts as my Trustee shall determine in his absolute and uncontrolled discretion. Such amounts… may be paid…without regard to equality of distribution and regardless of whether any one of my daughters may be totally deprived of any benefit hereunder. My Trustee, in exercising his absolute and uncontrolled discretion shall not be required to consider the amount of
income from other sources of any beneficiary…. My trustee shall not be required to
distribute any net income of such trust currently and may, in his absolute and
uncontrolled discretion, accumulate any part or all of the net income…. Without in any
way limiting the absolute discretion of my Trustee, it is my fond hope that my trustee pay
or apply the net income or principal of the trust for the maintenance, support, education,
health, and general welfare of those of my daughters who my Trustee believes would
benefit most from a share of the income of this trust after considering the income of the
beneficiaries from other sources.”

The state maintained that the plaintiffs have the right to compel distributions for their care and
support.

“To determine the discretionary powers provided, it is necessary to ascertain the dispositive
intention as expressed by the language of the entire will in the light of the circumstances
surrounding the testator when the instrument was executed, including the condition of his estate,
his relations to his family and beneficiaries and their situation and condition.” At 89.

Applying those principles, the court found that the testator intended that the trust be used solely
for supplemental support, basing its decision, in part, upon the following factors:

- The modest size of the trust which, at $9,500 was too small to provide for general
  support in an institution.
- The ability of the trustee to exclude one of the two beneficiaries shows an intent
to provide for only supplement support, as the one excluded would still have
general support needs.

“[P]ublic policy does not forbid the beneficiary of a private trust from receiving support at public
expense.” At 96-7.


In 1987, Lyman M. Corcoran executed a will that created a testamentary trust for his daughter,
Pamela D. Corcoran, who was mentally disabled. The case originated out of a request by the
trustees for the probate court to declare the trust to be a “special needs, discretionary trust” not
otherwise available to the state; after the state had already determined that the trust was an
available resource for Medicaid purposes. The Court held that the trust was an available
resource.

The trust language provided that the trustees were to pay to her “so much of the net income and
principal of said Trust as the Trustees, in their sole discretion shall deem proper for her health,
support in reasonable comfort, best interests and welfare…” The trustees were directed to take
into account “the other income and assets known to that beneficiary and the advisability of
supplementing such income or assets.”
Interesting facts and observations:

- From the time of its funding in 1992 through December 31, 2000, the trust had receipts of $854,307.95, paid trustee fees of $109,159.80, but only distributed $150 to the beneficiary.

- The Conn. Supreme Court held that it was impossible for this third-party-settled trust to be an SNT, because it lacked a Medicaid payback provision, a requirement that only exists for self-settled OBRA ’93 SNTs!

A grant of “sole” discretion confers a lesser amount of discretion than a grant of “absolute and uncontrolled” discretion.

**Martin v. Martin, 374 N.E.2d 1384 (Oh.Sup.Ct. 1978)**

In this case the plaintiff was the ex-spouse of a trust beneficiary who unsuccessfully attempted to compel a distribution of principal from the trust to satisfy her judgment for alimony. The trust contained the following distribution standard:

> “The Trustees shall from time to time pay . . . so much of the net income and, if necessary, of the principal of such trust as [the trustee], in his or her sole and absolute discretion, shall deem necessary or advisable for the comfort, care, support, and education of such . . . child.”

The Court noted, “[t]hat ‘absolute’ discretion, however, . . . is to be exercised with reference to needs for either the ‘comfort, care, support and education’ of the [beneficiary.]”

Because the former wife was no longer the current spouse, she does not fall within the provision which would entitle her, as spouse of the beneficiary, to support. But for that fact, however, the Court seemed willing to expand Ohio law by allowing creditors to compel distributions, a result not possible under UTC §504(b):

> “A trust conferring upon the trustees power to distribute income and principal in their ‘absolute discretion,’ but which provides standards by which that discretion is to be exercised with reference to the needs of the trust beneficiary for education, care, comfort or support, is neither a purely discretionary trust nor a strict support trust, and the trustees of such trust may be compelled to exercise their discretion to distribute income and principal for those needs.”

**Dept. of Mental Health v. First National Bank of Chicago, 432 N.E.2d 1086 (Ill. 1982)**

This case involved an action by the State of Illinois to recover the costs of providing institutionalized care to two sister “adult incompetents” by compelling distribution from strict spendthrift trusts that were created under the wills of their deceased parents…. 
“[T]he income of each was to be paid to or for the benefit of Janet and Constance, with
discretion given to the trustees to accumulate income and add it to principal and...to use such
principal for any ‘unusual expenses caused by illness, accident or other unexpected misfortune of
the beneficiaries.”” At 1086.

“1. If at any time any person to whom the Trustees are directed in this instrument to pay
any income is under legal disability or in the opinion of the Trustees is incapable of
properly managing her affairs, the Trustees may use so much of such income for her
support, maintenance and comfort as the Trustees determine to be required for those
purposes.”

“While none of the cases cited involved spendthrift trusts, it appears that a number of courts in
other jurisdictions have endorsed the view that a spendthrift trust created for the benefit of an
incompetent is vulnerable to the claims of public authorities for the care of such individual where
the authorities are permitted by statute to recover from the trust funds in satisfaction of their
claims.” At 1088.

An Illinois statute provided, “Each recipient of services of the Department and the estate of such
recipient is liable for the payment of sums representing charges for services to such recipient at a
rate to be determined by the Department in accordance with the Act.”

“[I]t is a long standing policy in this State to seek payment for its costs from those recipients of
services who can afford to pay and thereby to lessen the burden on taxpayers…. We conclude
that the interests of the beneficiaries in the trusts are ‘estates’ within the meaning of that term in
section 5-105 of the Code and that the refusal of the trustees to reimburse petitioner was against
the policy of the Code to provide cost-free care only to those in need.”

The case is notable in that there was no discussion of the trustee’s discretion, the distribution
standard contained in the trust, the judicial standard of review to be used in reviewing the
exercise of that discretion, the testators’ intention (although there was one brief reference to the
settlor’s intention, in general), or the probable fact that the testators’ daughters were incompetent
at the time the wills were executed. Virtually the entire opinion focused on Illinois’ public
policy of not giving away free care.

**Ralph Holmquist Trust, Christine Bennett, Trustee v. Sawyer County,** 357 N.W.2d 588
(Wisc.Ct.App, 1984)

Ralph Holmquist, deceased, had established a trust for the benefit of his wife, Sophie Holmquist,
who resided at the Trempealeau County Heath Care Center. Their daughter, Christine, was the
trustee and the remainder beneficiary.

Because Ralph’s will permitted the use of principal for Sophie’s support, the court, in this scant
two page opinion, had little trouble in concluding that the trust was an available resource. The
Court, however, did add this acerbic comment, “We consider absurd any result that shifts
responsibility to the public to support one of its members who has private assets available for her support.” At 590.


This case points out the importance of a clear statement of the settlor’s intention, as it can often prevent a trust, even a trust with a support standard, from being treated as an available resource of the beneficiary. Here, the settlor set forth the following precatory language:

“Grantor is creating this trust, and will transfer certain assets to the trust for the primary benefit of a five year old girl named Ellen Barker, who was severely injured in an automobile accident in which an employee of grantor was allegedly at fault. [Ellen was paralyzed from the neck down and unable to breathe without the assistance of a respirator]. . . . The primary purpose of this trust, therefore, is to furnish Ellen, during her lifetime, with the non-medical equipment, care, education, training, rehabilitation, entertainment, transportation, or assistance which she will need to assure her of as natural and pleasant a life as is possible in her condition. If for any reason, Ellen ceases to qualify for medical assistance, then the trustee may in its discretion, also provide any medical assistance which Ellen may require....” Held not to be an “available resource” under 42 U.S.C. §1396a(a)(17)(B).

“The courts holding that a trust is not an available resource give effect to the settlor’s intent, expressed through the trust instrument. They recognize that a settlor may want to supplement rather than to supplant public financial assistance. They reason that settlors attempting to provide for a handicapped person should not be required to either bankrupt estates or leave the disadvantaged party to the vagaries of public assistance programs. Additionally, these courts have not been willing to find that trust assets are available resources for medical assistance purposes when to do so would authorize a rapid and total dissipation of a trust estate intended to provide only supplementary benefits.”

Missouri Division of Family Services v. Wilson, 849 S.W.2d 104 (Mo. App. 1993)

Former employer established a trust with $90,000 for a long-term employee. Extensive precatory language regarding the settlor’s desire to provide a lifetime income to George H. Wilson, and his wife, Hazel Wilson was critical in the determination that this trust was not an available resource, even though the trust contained a support standard.

“[T]he Trustee shall pay and distribute to Wilson a pension at the rate of $5,200 per year, to be paid in monthly installments of $433.33 each... Such payments shall continue as long as Wilson shall live, and if he shall be survived by his wife..., as long as she shall live.... If... in the sole discretion of the Trustee, the aggregate payments to George H. Wilson or Hazel Wilson hereunder and the funds available from all other sources should be insufficient to provide adequately for the support, maintenance and health off said beneficiaries or their funeral
expenses..., the Trustee may pay to either of them … such sum or sums … as the Trustee, in its sole discretion shall deem advisable for such purpose.”

“Whether assets of a trust are ‘available’ depends on the settlor’s intent.” Here, the court found that the trust’s language clearly indicated the settlor’s intent that the monthly payments continue to Wilson for his lifetime, and that the power to pay out additional amounts was intended to supplement, not supplant, other financial support for Wilson, “as evidenced by the trust’s prohibiting the trustee from making any payments to Wilson until funds from all other sources were insufficient…”

In Re Leona Carlisle Trust, 498 N.W.2d 260 (Mn.Ct.App. 1993)

This case involved an SNT with a strict “SSI” standard. The use of this clear standard easily led to the result that the trust was held not to be an available resource. It involved a 56 year old appellant, James Carlisle, who had severe cerebral palsy since birth, and who lived with his parents until they died. His mother, Leona Carlisle, created a trust, which she funded with her savings of $125,000.

The Court summarized the trust’s distribution standard:

“The trustee is to distribute sums from the trust for the benefit of appellant only for purposes of his entertainment, education, travel, comfort (including home improvement), convenience, and reasonable luxuries as the trustee, in its full discretion, deems advisable. The trustee is precluded from making any distributions for appellant’s ‘food, shelter, clothing, medical care or other basic necessities as provided or to be provided by any governmental unit,’ and the trustee ‘shall make distributions only to supplement and not to supplant such public assistance available for maintenance, health care or other benefits.’”  At 262.

“In determining whether a trust is an available asset, case law focuses on two relevant factors: (1) the type of trust involved; and (2) the settlor’s intent in creating the trust. The trusts in MA eligibility cases are usually support trusts or discretionary trusts. . . . Courts usually conclude a support trust is an available asset, while a discretionary trust is not an available asset.” At 264.

“The intention of the settlor of the trust will be carried out if it is not contrary to law and public policy… When the trust instrument states an intent to supplement rather than supplant any government financial assistance which is or may be available to the MA recipient, most courts give effect to the settlor’s intent and find the trust is not an available asset.” At 265.

“The cases that involve both a discretionary trust and clear settlor intent to supplement rather than supplant government assistance conclude the trust is not an available assets. See id. [Trust Co. of Okla., 825 P.2d 1295], see also Zeoli v. Commissioner of Social Servs., 179 Conn. 83 (1979); Lineback by Hutchens v. Stout, 79 N.C.App 292 (1986).
Mary Strojek, a mentally handicapped 63 year old, was the beneficiary of a testamentary trust established by her father. Her sister, Caroline Mills, was the trustee. The trust was funded with $70,000 and a one-half interest in a 200-acre farm. The annual cost of her care was $21,900, and each year the trustee donated $10,000 from the trust to the county. The trust’s distribution standard, quoted below, led to the result that the trust was an available resource of the beneficiary:

“My trustee shall…pay to or apply for the benefit of my daughter, Marie Helen Strojek, such sums from the income and principal as my trustee in the exercise of her sole discretion deems necessary or advisable, to provide for her proper care, support, maintenance and education.”

“The definitional distinctions between support and discretionary trusts are limpid. Provisions of particular trusts muddy these clear demarcations. When the provision is equivocal or adheres to principles common to both types of trusts, interpretative inconsistencies abound. Compare *Dodge*, 281 N.W.2d at 450 (ruling a trust provision stating, ‘Each shall have the right to disburse any portion of the principal for the care and maintenance of the … beneficiary …’ a support trust), . . . and *Myers v. Kansas Dept. of Soc. & Rehab. Servs.*, 254 Kan. 467, 866 P.2d 1052, 1059 (1994), (ruling a trust provision stating, ‘[M]y trustee shall hold, manage, invest and reinvest, collect the income there from [and] pay over so much [of] the net income and principal … as my trustee deems advisable for his care, support, maintenance, emergencies and welfare,’ a discretionary trust)…”

“Any attempt by this court to hammer the language of this particular trust provision into one of these rigid categories would only breed further inconsistencies in the law…. The state of Nebraska remedied the inherent inconsistencies of forcing equivocal trust provisions into traditional categories by creating a third category, a discretionary support trust, which addresses the equivocal provision in its entirety and best contemplates the intent of the settlor…. A discretionary support trust is created when the settlor combines explicit discretionary language ‘with language that, in itself, would be deemed to create a pure discretionary trust.’ … The effect of a discretionary support trust is to establish the minimal distributions a trustee must make in order to comport with the settlor’s intent of providing basic support, while retaining broad discretionary powers in the trustee…. The rationale behind minimal support lies in the trustee’s fiduciary duties to the beneficiary… If a trustee abuses her discretion and violates her fiduciary duties, the beneficiary, through judicial action, may compel disbursements from the trust for minimal support.”

“A discretionary support trust harmonizes the seemingly inconsistent terms of the trust.”

“In interpreting wills and testamentary trusts, we are guided by settled principles. First, the intent of the testator is the polestar and must prevail…. Second, the testator’s intent must be derived from (1) the four corners of the will, (2) the scheme for distribution, and (3) ‘the surrounding circumstances at the time of the will’s execution.’“
Held--Because Strojek was born mentally handicapped and lived with her parents until she was 41, at the time the will was drafted, Strojek’s long-term needs were readily apparent.” Therefore, had the settlor wanted to limit the trust to the beneficiary’s supplemental needs, the trust would have so provided. Since no such provision was included, the trust assets could be considered when determining eligibility for Strojek’s living expenses.

Kryzsko v. Ramsey County Social Services, 607 N.W.2d 237 (ND 2000)

Margaret Kryzsko was a 52 year old mentally disabled woman, who was the beneficiary of a testamentary trust established by her father.

North Dakota had a statute that provided that support trusts are available to the applicant, but discretionary trusts are resources only to the extent amounts are actually distributed. The N.D. Admin. Code includes in the definition of “support trusts” “discretionary support trusts”.

The trust instrument provided that the trustee should administer the trust:

“…for the benefit of her by paying to or applying for her benefit so much of the income and/or principal of such share as the Trustee, in her sole discretion, thinks necessary or advisable to provide for the proper care, maintenance, support, and education of Margaret Lee Kryzsko….”

While the Court held that this language set forth an enforceable support standard, the court attached significance to the settlor’s intention: “There is no indication the trustor intended the trust should not be used to provide primary support.”

Estate of Michael DeMartino v. Division of Medical Assistance and Health Services, Superior Court of NJ, Appellate Div, Docket No. A-2807-02T2 (Oct. 4, 2004)

This case held that the Division of Medical Assistance and Health Services validly asserted a lien for recovery of Medicaid benefits against the assets of the testamentary trust established for Michael’s benefit by his wife.

In September, 1999, Michael transferred his interest in their home to his wife, Anne, and entered a nursing home in April, 2000. Anne died in October of that year, leaving a testamentary trust for the benefit of Michael that consisted of “that portion of the residue of the estate required to satisfy Michael’s elective share.” Anne left a net estate of $58,424 which included the sales proceeds from their residence. Michael died in May, 2001 (before the trust had been funded). The Division asserted a claim of $52,522.19.

The New Jersey definition of the recovery estate more or less follows federal law, and states, in part, that the term “estate” shall not include:
A testamentary trust established by a third party (including the spouse of the now-deceased Medicaid beneficiary) for the benefit of the now-deceased Medicaid beneficiary, provided that:

i. The trust is a discretionary trust, constructed in such a way that the Medicaid beneficiary could not compel distributions of the trust; and

ii. The trust contains no assets in which the Medicaid beneficiary held any interest within either five years prior to applying for Medicaid benefits, or five years prior to the beneficiary’s death… N.J.A.C. 10:49-14.1(n)(3).

Michael’s statutory share was one-third of the “augmented estate,” however N.J.S.A. 3B:8-17 provides,

In an action for an elective share, the electing spouse’s total or proportional beneficial interest in any life estate in real or personal property or in any trust shall be valued at one-half of the total value of the property or trust or of the portion of the property or trust subject to the life estate.

The estate argued that this provision specifically permits a decedent to bequest to the surviving spouse in an income-only trust an amount equal to twice what the statutory share would be, if left outright. Without citing a rationale, the court disagreed, stating, “[b]ut for the trust arrangement, Michael’s elective share would have been part of his own estate and those monies would have been available to the Division for the recovery of the Medicaid benefits paid for Michael’s care.”

The court held that Anne’s testamentary trust was an “other arrangement” described in the optional expanded definition of the recovery estate.

42 U.S.C. 1396p(b)(4)(B) For purposes of this subsection, the term “estate”, with respect to a deceased individual (B) may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

“Because Michael had a right under NJSA 3B:8-1 to an elective share of Anne’s estate, and because the trust was funded with an amount equal to Michael’s elective share, he clearly had an interest in the trust assets when the trust was created.”

It is interesting that the Court based its decision on its assertion that what Michael owned during the proscribed five-year period was not the house (which is what he actually did own), but the “elective share”.
Appendix E

Evolution of SNTs in Ohio

The Ohio Department of Jobs and Family Services (ODJFS), its predecessor, the Ohio Department of Human Services (ODHS), and the Social Security Administration (SSA), have challenged SNTs in order to deny benefits to disabled individuals.

The first important case in Ohio was *Bureau of Support v. Kreitzer*[^28] in which the Ohio Supreme Court held that the beneficiary of a trust whose interest is clearly defined by standard such as “care, comfort, maintenance and general well-being” could compel the trustee to exercise to exercise the trustee’s “sole and absolute discretion” to achieve the trust’s intended purpose. This right of the beneficiary was held to extend to the Ohio Department of Mental Hygiene and Correction, which in that case was permitted to reach reimbursement for services provided from the beneficiary’s interest in a discretionary support trust. The trust in *Kreitzer* presumably lacked a spendthrift provision, but for SNT purposes the key holding of this case is that the beneficiary of a “discretionary support” trust can compel distributions. Under O.R.C. 5111.151, that makes such trusts countable resources for Medicaid purposes.

The most significant case in Ohio on this issue is *Young v. Ohio Dept. of Human Services*[^29] in that case, the ODHS unsuccessfully tried to extend the Court’s holdings in *Kreitzer* to a trust that contained a so-called exclusionary clause. At issue was a testamentary trust funded with just $53,000 that was created by a father for the benefit of his daughter, who at the time the case arose was residing in a nursing facility. The trust provision at issue, with the exclusionary clause in italics, was:

> The Trustee shall pay such amounts of the net income and, if necessary, principal of this Trust as she deems necessary for the benefit of JANET LEE YOUNG, provided, however, that the Trustee shall not make any distributions of income or principal for the benefit of JANET LEE YOUNG 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. * * * Distributions of income or principal to or for the benefit of JANET LEE YOUNG shall be made liberally and generously, but not for the purpose of providing for anything which could otherwise be provided for her by governmental or other assistance.” (Emphasis added, at pp. 348-9)

Because of this exclusionary clause, the Supreme Court held that this trust was not a resource of Ms. Young. As simple as the ruling may appear, the decision is anything but simple. First, the case was decided by a four to three majority, with only three justices signing the majority opinion and with the concurring Justice, Justice Pfeifer, stating that exclusionary clauses are

[^28]: 16 Ohio St.2d 147, 243 N.E.2d 83 (1968)
[^29]: 76 Ohio St.3d 547, 668 N.E.2d 908 (1996)
against public policy.\textsuperscript{30} A troubling feature of the decision is that, but for the exclusionary provision, the distribution clause could most accurately be labeled as being a purely discretionary trust, however extended discretion (e.g. “sole,” “uncontrolled,” or “absolute”) was not given to the trustee, and distributions were to be made that the trustee “deems necessary.” The trust clearly lacked any semblance of a support standard. Query: would anything in Ohio’s common law of trusts permit the beneficiary to compel a distribution from this trust?

Four years after \textit{Young} was decided, \textit{Carnahan v. Ohio Dept. of Human Services},\textsuperscript{31} presented the Supreme Court with the perfect opportunity to overrule \textit{Young}, which, by denying a discretionary appeal, it declined to do. \textit{Carnahan} involved a Medicaid applicant who was the beneficiary of a $500,000 irrevocable trust that had been established by her mother and which contained an exclusionary clause similar to the one in \textit{Young}. The Eleventh District Court of Appeals held that O.A.C. 5101:1-39-271 (the version after the one analyzed in \textit{Young}, and the one that Justice Pfeiffer, in his concurring opinion in \textit{Young}, felt would have caused a different result had it been effect at the time the \textit{Young} Medicaid application was denied) did not result in the \textit{Carnahan} trust being a resource. The version of O.A.C. §5101:1-39-271(A)(2) that was analyzed in \textit{Carnahan} included the following provision that had not been in the rule at the time the Medicaid application in \textit{Young} had been denied by ODHS:

\begin{quote}
(e) No clause or requirement in the trust, no matter how specifically it applies to Medicaid, or other federal or state programs, precludes a trust from being considered under the policy in this rule.
\end{quote}

Despite the presence of this new provision in the ODHS trust rule, the Court nevertheless held that the evidence suggested that the trust in question was not a resource since the applicant did not create the trust, was not its trustee, and was not entitled to any fixed payments.

In 2001, \textit{Metz v. Ohio Department of Human Services},\textsuperscript{32} the Sixth District Court of Appeals analyzed the same rule that was discussed in \textit{Carnahan} but reached a different result. As the \textit{Metz} Court pointed out, however, the different result was reached solely because the \textit{Metz} trust did not contain an exclusionary clause of the type used in both \textit{Young} and \textit{Carnahan}, thereby allowing the case to be decided under \textit{Kreitzer}.

\textsuperscript{30} “I concur because of the limited effect our decision today will have. The loophole exploited in this case has been closed by the recently adopted Ohio Adm. Code 5101:1-39-271(A)(2)(e). While the exclusionary clause in the Albright trust constituted a nifty piece of legal craftsmanship, it would make for unacceptable public policy were it applicable in many cases beyond this one. The world of Medicaid eligibility is life with enough duplicity and treachery without this court allowing a further opportunity for abuse.” (at p. 552).

\textsuperscript{31} 139 Ohio App.3d 214 (2000). A discretionary appeal to the Supreme Court of Ohio was not allowed in (2001), 91 Ohio St.3d 1448, 742 N.E.2d 146.

\textsuperscript{32} 145 Ohio App.3d 304 (2001).