

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Virginia M. Cook,	:	
Appellant-Appellant,	:	
v.	:	No. 14AP-852 (C.P.C. No. 13CVF-11659)
Ohio Department of Job & Family Services,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	
Virginia M. Cook,	:	
Appellant-Appellee,	:	
[Jacqueline Breen, Trustee of the Virginia Mia Cook Trust,	:	
Appellant],	:	
v.	:	No. 14AP-853 (C.P.C. No. 13CVF-11659)
Ohio Department of Job & Family Services,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

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D E C I S I O N

Rendered on November 19, 2015

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*Browning & Meyer Co., LPA, and William J. Browning, for appellants.*

*Michael DeWine, Attorney General, Amy R. Goldstein and Jeffrey Jarosch, for appellee.*

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APPEALS from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} In these consolidated appeals, Virginia M. Cook ("Cook"), appeals the September 26, 2014 judgment of the Franklin County Court of Common Pleas, which affirmed the September 23, 2013 administrative appeal decision of appellee, Ohio Department of Job and Family Services ("ODJFS").<sup>1</sup> (Case No. 14AP-852.) Additionally, Jacqueline Breen, Trustee of the Virginia Mia Cook Trust ("Breen") appeals the September 26, 2014 judgment of the trial court which denied her May 23, 2014 motion to intervene. (Case No. 14AP-853.) For the reasons that follow, we affirm the judgment of the trial court.

### **I. Facts and Procedural History**

{¶ 2} Cook is the sole beneficiary of the Virginia Mia Cook Trust ("the trust"), which was established by her mother in 2000. From 2004 until July 2011, Cook received Medicaid benefits. Upon review of the trust, on July 22, 2013, the Franklin County Department of Job and Family Services ("FCDJFS") determined that the trust was an available resource for Cook, which caused her total resources to exceed the \$1,500 limit for Medicaid eligibility. As a result, FCDJFS found Cook to be ineligible for Medicaid and terminated her benefits.

{¶ 3} Cook appealed FCDJFS's decision, requesting a hearing by ODJFS. On August 20, 2013, ODJFS issued a state hearing decision, affirming Cook's ineligibility for Medicaid. Cook appealed. On September 23, 2013, ODJFS rendered an administrative appeal decision, which affirmed the state hearing decision.

{¶ 4} Pursuant to R.C. 5101.35 and 119.12, Cook appealed to the Franklin County Court of Common Pleas. On October 29, 2013, Cook filed a motion to stay the action pending the outcome of a declaratory judgment action in the Franklin County Probate Court. Following a hearing, on February 11, 2014, the trial court denied Cook's motion to

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<sup>1</sup> We note that, on July 8, 2015, ODJFS filed a suggestion of death as to Cook. On July 13, 2015, Cook's counsel filed a suggestion of death and stated that the action was not moot because costs associated with Cook's health care benefits remained in question. On July 27, 2015, this court filed a journal entry stating that the appeal would continue as if Cook was not deceased, pursuant to App.R. 29(A), which provides that "[i]f the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the court of appeals may direct." On July 29, 2015, ODJFS filed a motion for reconsideration of our July 27, 2015 journal entry or, in the alternative, to stay the appeal pending additional briefing. On August 4, 2015, we filed a journal entry denying the July 29, 2015 motion of ODJFS.

stay. On May 23, 2014, Breen filed a motion to intervene pursuant to Civ.R. 24(A) and (B). After being fully briefed by the parties, the trial court, on September 26, 2014, filed a judgment entry which denied Breen's motion to intervene and affirmed the September 23, 2013 decision of ODJFS terminating Cook's Medicaid benefits.

## II. Assignments of Error

{¶ 5} Cook appeals, assigning the following two errors for our review:

I. THE TRIAL COURT ERRED IN AFFIRMING THE DECISION OF THE DEPARTMENT OF MEDICAID'S FINDING THAT THE TRUST WAS A COUNTABLE ASSET.

II. THE TRIAL COURT ERRED IN NOT CONSIDERING OR DISREGARDING THE ENTIRE RECORD FROM THE OHIO DEPARTMENT OF MEDICAID, INCLUDING THE PREVIOUS THREE (3) STATE HEARING DECISIONS.

{¶ 6} Breen also appeals, assigning the following two errors for our review:

I. THE COMMON PLEAS COURT ERRED IN NOT STAYING THE ADMINISTRATIVE APPEAL AND DENYING THE MOTION TO STAY FILED NOVEMBER 12, 2013.

II. THE COMMON PLEAS COURT ERRED IN NOT GRANTING THE TRUSTEE'S MOTION TO INTERVENE.

We first address Cook's assignments of error.

### A. Cook's First Assignment of Error

{¶ 7} In her first assignment of error, Cook asserts that the trial court erred by affirming ODJFS's finding that the trust was a countable asset.<sup>2</sup>

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<sup>2</sup> We note that, in her assignments of error, Cook states that the decision affirmed by the trial court originated in the Ohio Department of Medicaid ("ODM"). However, the record reflects that the decision was issued by the administrative appeal section of ODJFS. In 2013, the General Assembly passed an act creating a separate state agency known as the Department of Medicaid, which was empowered as the single state agency charged with the supervision and administration of the Medicaid program in Ohio. See 2013 Am.Sub.H.B. No. 59. See also *Bryant Health Care Ctr., Inc. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 13AP-263, 2014-Ohio-92, ¶ 1, fn. 1. The act creating the agency specifically provided that "[n]o judicial or administrative action or proceeding pending on July 1, 2013, is affected by the transfer of functions from the Medical Assistance Director, Office of Medical Assistance, Director of Job and Family Services, or Department of Job and Family Services to the Medicaid Director or Department of Medicaid and shall be prosecuted or defended in the name of the Medicaid Director or Department of Medicaid." 2013 Am.Sub.H.B. No. 59, Section 323.10.10(E). Further, R.C. 5160.31(B)(2) authorizes ODM to contract with ODJFS to conduct the administrative appeal process in accordance with R.C. 5101.35 on behalf of ODM. Although we recognize that ODM is currently the sole state agency responsible for the supervision

### 1. Applicable Law

{¶ 8} Before considering appellant's contentions, we examine the law applicable to trusts and Medicaid eligibility determinations. Generally, a trust is " ' "the right, enforceable in equity, to the beneficial enjoyment of property, the legal title to which is in another." ' " *Pack v. Osborn*, 117 Ohio St.3d 14, 2008-Ohio-90, ¶ 7, quoting *In re Guardianship of Lombardo*, 86 Ohio St.3d 600, 603 (1999), quoting *Ulmer v. Fulton*, 129 Ohio St. 323, 339 (1935). "The beneficiary is said to have the equitable interest in the trust, whereas the trustee has the legal interest." *Pack* at ¶ 7, citing Restatement of the Law 2d, Trusts (1959), Section 2, comment f.

{¶ 9} "When a court reviews a trust, its primary duty is to ascertain, within the bounds of the law, the intent of the settlor." *Pack* at ¶ 8, citing *In re Trust U/W of Brooke*, 82 Ohio St.3d 553, 557 (1998), citing *Domo v. McCarthy*, 66 Ohio St.3d 312, 314 (1993). *See also Holdren v. Garrett*, 10th Dist. No. 09AP-1153, 2011-Ohio-1095, ¶ 18. "When the instrument is unambiguous, the settlor's intent can be determined from the trust's express language." *Pack* at ¶ 8. "The words in the trust are presumed to be used according to their common, ordinary meaning." *Id.* Generally, "a trust is construed according to the law in effect at the time it was created." *Id.*

{¶ 10} Congress established the Medicaid program in 1965 by adding Title XIX to the Social Security Act. *Kormanik v. Cooper*, 195 Ohio App.3d 790, 2011-Ohio-5617, ¶ 14 (10th Dist.), citing *Arkansas Dept. of Health and Human Servs. v. Ahlborn*, 547 U.S. 268, 275 (2006). "Through the Medicaid program, the federal government provides financial assistance to states that reimburse needy persons for the cost of medical care." *Kormanik* at ¶ 14, citing *Pharmaceutical Research & Mfrs. v. Walsh*, 538 U.S. 644, 650 (2003). Ohio, as a participant in the Medicaid program, has established rules governing a person's

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of the Medicaid program, since the proceedings at issue here were commenced before the creation of ODM, the record does not reflect the involvement of ODM, and because the administrative decisions from which this appeal originates were conducted by ODJFS, for purposes of clarity, we shall refer to ODJFS as the administrative agency in this appeal.

Additionally, for the first time on appeal, Cook asserts that we should not accord deference to ODJFS's interpretation of the statutes it is empowered to enforce because the Ohio General Assembly "limited the Agency's power as it relates to Special Needs Trusts \* \* \* by enacting [R.C. Chapters] 5163 and \* \* \* 5800 et seq." (Cook's Merit Brief, 7.) Although Cook does not fully explain these statements, Cook appears to contend that the creation of ODM stripped ODJFS of the deference ordinarily accorded administrative agencies. As Cook did not raise this issue at the trial level and fails to support her argument with reference to a specific statutory section or other relevant authority, we will not address this argument.

eligibility for Medicaid. *See* R.C. 5111.01 et seq., and Ohio Adm.Code 5101:1-39 et seq.<sup>3</sup> *See also Kormanik* at ¶ 18.

{¶ 11} In determining an applicant or recipient's eligibility for Medicaid, the reviewing agency must conduct a resource assessment to determine whether the applicant or recipient's aggregate resources exceed the "resource limit," which is defined as the "maximum combined value of all resources an individual can have an ownership interest in and still qualify for Medicaid." *See* Ohio Adm.Code 5101:1-39-05(B)(11). For an individual, the resource limit is \$1,500. *See* Ohio Adm.Code 5101:1-39-05(B)(11)(a).

{¶ 12} A trust's assets may or may not be a countable resource. R.C. 5111.151(C); *see* Ohio Adm.Code 5101:1-39-27.1. *See also* Ohio Adm.Code 5101:1-39-05(B)(3) (defining "countable resources" as "those resources remaining after all exemptions have been applied"). If an applicant or recipient is a beneficiary of a trust, the reviewing agency must determine what type of trust it is. R.C. 5111.151(C); *Pack* at ¶ 9. The nature of the trust determines whether its assets are available resources in determining whether the applicant or recipient's resources exceed the maximum limit for Medicaid eligibility. *Id.* After categorizing the trust, the reviewing agency must apply the appropriate provision of R.C. 5111.151 and Ohio Adm.Code 5101:1-39-27.1 to determine whether the trust's assets are countable resources. R.C. 5111.151(C).

{¶ 13} "The eligibility-review rules with respect to trust interests have been frequently amended" in order to, among other reasons, "close loopholes in the program so that taxpayers are not forced to accept primary responsibility for the care of persons who have access to resources that would allow them to pay for their own care." *Id.* at ¶ 10, citing *Young v. Ohio Dept. of Human Servs.*, 76 Ohio St.3d 547, 549 (1996). The public policy rationale underlying these amendments is that "'[t]he primary responsibility for the support of an individual lies with that individual.'" *Pack* at ¶ 10, quoting *Young* at 549. Nevertheless, "the General Assembly has also continued to recognize that public

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<sup>3</sup> We note that the Ohio General Assembly, in the act creating ODM, amended and renumbered sections of the Ohio Revised Code pertaining to Medicaid eligibility effective September 29, 2013. Sections of the Ohio Administrative Code were similarly renumbered effective October 1, 2013. As the relevant eligibility determinations in the present matter occurred prior to the renumbering and amendment of those sections, for purposes of clarity, we shall exclusively refer to the former versions of Ohio Revised Code and Ohio Administrative Code.

assistance does not, and cannot, meet all the needs of persons with disabilities." *Pack* at ¶ 11. Thus, assets in supplemental services and special needs trusts can be used to provide financial support to a person with special needs without affecting the person's eligibility for Medicaid. *Id.*

{¶ 14} The General Assembly possesses the authority to establish and alter the law applicable to Medicaid eligibility. *Id.* at ¶ 14. Thus, although a trust is generally construed according to the law in effect at the time of its creation, "when a trust beneficiary makes an application for participation in Medicaid, the Medicaid-eligibility-review rules in effect at the time the application is filed govern the applicant's eligibility." *Id.* This rule is premised on the danger that "if persons, through the creation of private trusts, were able to, in effect, suspend the legislature's authority to change the rules of eligibility pertaining to the beneficiaries of those trusts, it would not be long before the state would have very little control over who could receive benefits from this expensive program." *Id.* at ¶ 13.

## **2. Appeal Process and Standard of Review**

{¶ 15} R.C. 5101.35 specifies the appeal process for challenging a decision or order of an agency administering a family services program. *See Estep v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 12AP-438, 2013-Ohio-82, ¶ 12. First, an appellant may request a state hearing, which results in a state hearing decision that either sustains or overrules the issues that the appellant raised in the appeal. R.C. 5101.35(B). Second, "an appellant who disagrees with a state hearing decision may make an administrative appeal to the director of job and family services." R.C. 5101.35(C). The director or the director's designee may affirm, modify, remand, or reverse the state hearing decision. R.C. 5101.35(C). R.C. 5101.35(E) addresses the third level of appeal, permitting an administrative appeal to a court of common pleas "pursuant to section 119.12 of the Revised Code." Thus, an appeal based on R.C. 5101.35(E) must comply with the requirements of R.C. 119.12, subject to specified exceptions. *Id.* at ¶ 14.

{¶ 16} When reviewing an order of an administrative agency, pursuant to R.C. 119.12, a common pleas court must affirm the order if, upon consideration of the entire record, the order is in accordance with law and is supported by reliable, probative, and substantial evidence. *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992). In reviewing the decision of the trial court, an appellate court is limited to

determining whether the trial court abused its discretion. *Bryant Health Care Ctr., Inc. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 13AP-263, 2014-Ohio-92, ¶ 23. However, an appellate court has plenary review of purely legal questions. *Id.* Furthermore, a reviewing court should accord considerable "deference to an administrative agency's interpretation of its own rules and regulations where the interpretation is consistent with the statutory law and the plain language of the rules." *Alternative Residences, Two, Inc. v. Ohio Dept. of Job and Family Servs.*, 10th Dist. No. 04AP-306, 2004-Ohio-6444, ¶ 18, citing *State ex rel. Celebrezze v. Natl. Lime & Stone Co.*, 68 Ohio St.3d 377, 382 (1994).

{¶ 17} Because the issue before us is a question of law, our review is de novo. *Bryant Health Care* at ¶ 24.

### **3. Analysis of Whether Trust is Available Resource for Medicaid Eligibility**

{¶ 18} With the foregoing principles in mind, we next examine whether the trial court correctly found that the trust's assets were available resources in determining whether Cook's resources exceed the maximum limit for Medicaid eligibility.

{¶ 19} In determining the requirements of the statutes, we must "ascertain and give effect to the intention of the General Assembly." *Dodd v. Croskey*, 143 Ohio St.3d 293, 2015-Ohio-2362, ¶ 24, citing *Henry v. Cent. Natl. Bank*, 16 Ohio St.2d 16 (1968), paragraph two of the syllabus. In order to determine legislative intent, a court looks to the language of the statute and the purpose to be accomplished by the statute. *Dodd* at ¶ 24, citing *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, ¶ 20. When a statute is clear and unambiguous, " 'it "may not be restricted, constricted, qualified, narrowed, enlarged or abridged" under the guise of statutory construction.' " *Columbus Check Cashers, Inc. v. Cary*, 196 Ohio App.3d 132, 2011-Ohio-1091, ¶ 12 (10th Dist.), quoting *Taber v. Ohio Dept. of Human Servs.*, 125 Ohio App.3d 742, 747 (10th Dist.1998), quoting *Wachendorf v. Shaver*, 149 Ohio St. 231 (1948), paragraph five of the syllabus. *See also Dodd* at ¶ 24 ("When the statute's meaning is clear and unambiguous, we apply the statute as written and refrain from adding or deleting words."). Therefore, " '[i]t is only where the words of a statute are ambiguous or are based upon an uncertain meaning or there is an apparent conflict of some provisions that a court has a right to

interpret a statute.' " *Cary* at ¶ 12, quoting *Drake-Lassie v. State Farm Ins. Cos.*, 129 Ohio App.3d 781, 788 (10th Dist.1998), citing *Kroff v. Amrhein*, 94 Ohio St. 282 (1916).

{¶ 20} The parties agree that the trust at issue here is a "Category Four" trust,<sup>4</sup> i.e. a "trust established by an individual for the benefit of the applicant or recipient." R.C. 5111.151(G)(1); *see* Ohio Adm.Code 5101:1-39-27.1(C)(4). Category Four trusts are considered "a resource available to the applicant or recipient only if the trust permits the trustee to expend principal, corpus, or assets of the trust for the applicant's or recipient's medical care, care, comfort, maintenance, health, welfare, general well being, or any combination of these purposes." R.C. 5111.151(G)(2); *see* Ohio Adm.Code 5101:1-39-27.1(C)(4)(b).

{¶ 21} However, a Category Four trust will not be considered an available resource if at least one of the following exceptions applies:

(a) If a trust contains a clear statement requiring the trustee to preserve a portion of the trust for another beneficiary or remainder man, that portion of the trust shall not be counted as a resource available to the applicant or recipient. Terms of a trust that grant discretion to preserve a portion of the trust shall not qualify as a clear statement requiring the trustee to preserve a portion of the trust.

(b) If a trust contains a clear statement requiring the trustee to use a portion of the trust for a purpose other than medical care, care, comfort, maintenance, welfare, or general well being of the applicant or recipient, that portion of the trust shall not be counted as a resource available to the applicant or recipient. Terms of a trust that grant discretion to limit the use of a portion of the trust shall not qualify as a clear statement requiring the trustee to use a portion of the trust for a particular purpose.

(c) If a trust contains a clear statement limiting the trustee to making fixed periodic payments, the trust shall not be counted as a resource available to the applicant or recipient and payments shall be treated in accordance with rules adopted by the department of job and family services governing income. Terms of a trust that grant discretion to

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<sup>4</sup> *See* Cook's Merit Brief, 9-11 (stating that the trust "falls squarely under [R.C.] 5163.21(G)") and ODJFS's Merit Brief, 11.



limit payments shall not qualify as a clear statement requiring the trustee to make fixed periodic payments.

(d) If a trust contains a clear statement that requires the trustee to terminate the trust if it is counted as a resource available to the applicant or recipient, the trust shall not be counted as such. Terms of a trust that grant discretion to terminate the trust do not qualify as a clear statement requiring the trustee to terminate the trust.

(e) If a person obtains a judgment from a court of competent jurisdiction that expressly prevents the trustee from using part or all of the trust for the medical care, care, comfort, maintenance, welfare, or general well being of the applicant or recipient, the trust or that portion of the trust subject to the court order shall not be counted as a resource available to the applicant or recipient.

(f) If a trust is specifically exempt from being counted as a resource available to the applicant or recipient by a provision of the Revised Code, rules, or federal law, the trust shall not be counted as such.

(g) If an applicant or recipient presents a final judgment from a court demonstrating that the applicant or recipient was unsuccessful in a civil action against the trustee to compel payments from the trust, the trust shall not be counted as a resource available to the applicant or recipient.

(h) 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 a resource available to the applicant or recipient and payments shall be treated in accordance with rules adopted by the department of job and family services governing income.

(i) 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 a resource available to the applicant or recipient.

R.C. 5111.151(G)(4); *see* Ohio Adm.Code 5101:1-39-27.1(C)(4)(c).

{¶ 22} Thus, in order to ascertain whether a trust is an available resource under R.C. 5111.151(G), we must first determine whether the trust permits the trustee to expend the trust's assets for one or more of the specified purposes, including medical care, care, comfort, maintenance, health, welfare, or general well-being. If answered in the affirmative, we must next determine whether one of the specified exceptions applies.

{¶ 23} Here, the trust in Section 3.02 provides that the trustee "shall pay or apply for the benefit of [Cook] for her lifetime such amounts of income or principal or both, of this Special Needs Trust, up to the whole thereof, as the Trustee, in her sole and absolute discretion may from time to time deem advisable for the satisfaction of [Cook's] 'special non-support needs.' " Section 3.02 further provides that the trust defines Cook's "special non-support needs" as the "requisites for maintaining [Cook's] good *health*, safety and *welfare* when, in the discretion of the Trustee, such requisites are not being provided." (Emphasis added.) As the trust specifically mentions health and welfare as two of the specified purposes for which the trustee may distribute trust assets, we find that the trust must be considered an available resource under R.C. 5111.151(G)(2) unless one of the specified exceptions applies.

{¶ 24} Next, we consider whether one of the exceptions in R.C. 5111.151(G)(4) applies. Cook argues generally that the trustee "is given complete discretion and cannot be compelled to make a distribution." (Cook's Merit Brief, 13.) Although Cook does not identify a specific exception that applies to her trust, we discuss four of the exceptions listed under R.C. 5111.151(G)(4) that are relevant to her arguments.<sup>5</sup>

{¶ 25} The first exception under R.C. 5111.151(G)(4)(e) prevents a trust from being considered an available resource where a court of competent jurisdiction renders a judgment expressly preventing the trustee from using the trust for the purposes specified in R.C. 5111.151(G)(2); namely, the applicant or recipient's medical care, care, comfort, maintenance, welfare, or general well-being. The second exception under R.C. 5111.151(G)(4)(g) prevents a trust from being considered an available resource where the applicant or recipient presents a final judgment demonstrating that the applicant or

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<sup>5</sup> At oral argument, Cook's counsel argued that the exceptions listed in R.C. 5111.151(G)(4)(a), (b), and (d) applied. However, because such issues were not raised in Cook's Merit Brief and because cursory review indicates that they do not apply, we need not further consider them.

recipient was unsuccessful in a civil action against the trustee to compel payments from the trust. The third exception under R.C. 5111.151(G)(4)(h) prevents a trust from being considered an available resource where the applicant or recipient presents a final judgment demonstrating that the applicant or recipient was only able to compel limited or periodic payments from the trust. Under all three exceptions, the applicant or recipient must present a judgment from a court either preventing distributions for the specified purposes or demonstrating that the beneficiary was unsuccessful in compelling distributions. Here, Cook fails to present a judgment meeting such requirements. Therefore, as a matter of law, Cook cannot avail herself of the exceptions in R.C. 5111.151(G)(4)(e), (g), and (h).

{¶ 26} Finally, Cook's argument that the trust is a "wholly discretionary trust" under R.C. 5801.01(Y) and 5805.03 implicates the exception under R.C. 5111.151(G)(4)(f), which applies to trusts that are "specifically exempt" from being counted as an available resource by the Ohio Revised Code, rules, or federal law. We therefore consider whether R.C. 5801.01(Y) and 5805.03 specifically exempt the trust from being counted as an available resource. R.C. 5801.01(Y) provides as follows:

- (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 cotrustee.

(g) The beneficiary does not have the power to become the trustee or a cotrustee.

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(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 and shelter to the beneficiary.

{¶ 27} R.C. 5805.03 provides as follows:

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 terms of the trust include a spendthrift provision.

{¶ 28} Thus, R.C. 5801.01(Y) defines a "wholly discretionary trust" and allows for precatory language describing the purpose of the trust. R.C. 5805.03 prevents creditors or assignees of a beneficiary of a wholly discretionary trust from reaching the beneficiary's interest in the trust.

{¶ 29} In order for the exception under R.C. 5111.151(G)(4)(f) to apply, a statutory provision must "specifically exempt" a trust from being counted as an available resource. Here, neither R.C. 5801.01 nor 5805.03 specifically refers to an exemption from being

counted as an available resource for purposes of determining Medicaid eligibility. Further, R.C. 5805.03 applies to a "creditor or assignee of a beneficiary of a wholly discretionary trust." As such, it does not specifically include the state's consideration of trust assets when determining Medicaid eligibility. Therefore, because neither R.C. 5801.01(Y) nor 5805.03 specifically exempt the trust from being counted as an available resource, as required under the plain language of R.C. 5111.151(G)(4)(f), we find that the exception under R.C. 5111.151(G)(4)(f) does not apply.

{¶ 30} Although we have concluded that R.C. 5111.151(G)(4)(f) does not apply to the trust at issue here, Cook relies on *Pack*, 2008-Ohio-90, for the proposition that a "purely discretionary trust" cannot be counted as an available resource.<sup>6</sup> (See Cook's Merit Brief, 20.) In *Pack*, the trustee of a special needs support trust brought a declaratory judgment action against the local department of job and family services, requesting that the trial court declare the trust assets be declared unavailable and not a countable resource for purposes of determining the beneficiary's eligibility for Medicaid. The trial court determined that the trust was an available resource for Medicaid-eligibility purposes under the then-current guidelines. The court of appeals reversed, finding that the eligibility-review guidelines in place at the time the trust was created applied when making a Medicaid-eligibility determination.

{¶ 31} The Supreme Court of Ohio disagreed, holding that "when a trust beneficiary makes an application for participation in Medicaid, the Medicaid-eligibility-review rules in effect at the time the application is filed govern the applicant's eligibility." *Id.* at ¶ 14. The Supreme Court also found that the court of appeals failed to determine the nature of the trust, which was a "necessary first step in determining whether the trust assets are countable for purposes of a Medicaid-eligibility determination." *Id.* at ¶ 15.

{¶ 32} Addressing the different types of discretionary trusts, the Supreme Court defined a "pure discretionary trust" as a "trust that allows the trustee the uncontrolled

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<sup>6</sup> We note that Cook also points in support of this proposition to *Young v. Ohio Dept. of Human Servs.*, 76 Ohio St.3d 547 (1996). Appellant admitted at oral argument that R.C. 5111.151 was enacted by the Ohio General Assembly following *Young* and that the statutory enactment superseded the decision of the Supreme Court of Ohio in *Young*. Therefore, because the holding in *Young* interpreted Medicaid eligibility rules no longer in effect at the time of the instant matter, we need not further consider it here. See *Pack* at ¶ 19, fn. 6 (stating that "[t]he holding in *Young* is also reflected in R.C. 5111.151(G) and Ohio Adm.Code 5101:1-39-27.1.").

discretion to distribute income and principal as the trustee determines, without a support standard," and noted that such trusts are now legislatively recognized and sanctioned under R.C. 5801.01(Y). *Id.* at ¶ 18. Further, citing R.C. 5111.151(G)(4)(e), (g), and (h), the court stated that "[a] significant aspect of a pure discretionary trust is that its assets are not recognized as an available resource in the Medicaid-eligibility review process because a pure discretionary trust lacks a mechanism through which a beneficiary may compel a distribution." *Id.* at ¶ 19. The Supreme Court found that, pursuant to R.C. 2721.05(C) and 5802.01(C), "a trustee may bring a declaratory-judgment action to determine any question arising in the administration of a trust," and that pursuant to R.C. 5111.151(G)(4)(e), (g), and (h), "court involvement with respect to interpretation of a trust's terms in the Medicaid-eligibility context has been legislatively sanctioned." *Id.* at ¶ 22. Therefore, the Supreme Court found that the "trustee's request for a declaratory judgment was a proper method by which to obtain judicial guidance regarding her duties under the trust." *Id.* at ¶ 24.

{¶ 33} Unlike *Pack*, the present matter is not a declaratory judgment action but, rather, an administrative appeal from a Medicaid-eligibility determination. Notably, the Supreme Court in *Pack* did not state that a wholly discretionary trust qualifies under R.C. 5111.151(G)(4)(f) as a trust that is specifically exempt from being counted as a resource available to the applicant or recipient by a provision of the Revised Code. Instead, the Supreme Court stated that a court in a declaratory judgment action could provide judicial guidance as to whether a trust is a pure discretionary trust or a discretionary trust with a support standard. Such an interpretation of a trust could then be used in the Medicaid-eligibility review process to determine whether the trust qualifies under one of the exceptions in R.C. 5111.151(G)(4)(e), (g), and (h). Therefore, the proper method for determining whether a trust is a wholly discretionary trust under R.C. 5801.01(Y) for purposes of a Medicaid eligibility determination is through a declaratory judgment action. Such an interpretation could then be used in the Medicaid eligibility review process to determine whether the trust qualifies under the exceptions listed in R.C. 5111.151(G)(4)(e), (g), and (h). As Cook failed to present the trial court with such an interpretation from a declaratory judgment action, the trial court correctly determined that Cook failed to meet the requirements for the exceptions under R.C. 5111.151(G)(4).

Therefore, Cook's trust was properly counted as an available resource for purposes of determining Medicaid eligibility.

{¶ 34} Thus, although we acknowledge that the settlor's intent in constructing the trust was to prevent the trust's funds from impacting eligibility for public assistance benefits, the settlor's intent cannot control over legislative enactments defining the requirements for Medicaid eligibility. *Id.* at ¶ 11-14. Indeed, the legislature explicitly intended Category Four trusts, like the one at issue here, to be considered available resources despite provisions in the trust designed to prevent the trust from being counted as an available resource for public assistance eligibility. Section 3.03 of the trust provides that "[n]o part of the corpus of the Special Needs Trust shall be used to supplant or replace public assistance benefits of any county, state, federal or other governmental agency that has a legal responsibility to serve persons with disabilities that are the same or similar to those afflicting [Cook]." Pursuant to R.C. 5111.151(G)(3)(a)-(c), Category Four trusts are considered to be an available resource even if the trust contains any of the following types of provisions: (1) "[a] provision that prohibits the trustee from making payments that would supplant or replace medicaid or other public assistance"; (2) "[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 medicaid or other public assistance"; or (3) "[a] provision that attempts to prevent the trust or its corpus or principal from being a resource available to the applicant or recipient." R.C. 5111.151(G)(3)(a)-(c). *See* Ohio Adm.Code 5101:1-39-27.1(C)(4)(b)(i)-(iii).

{¶ 35} Cook's arguments regarding the purpose of the trust notwithstanding, absent the application of an exception under R.C. 5111.151(G)(4), a Category Four trust must be considered an available resource for purposes of Medicaid eligibility where the trust permits the trustee to expend principal, corpus, or assets of the trust for the applicant's or recipient's medical care, care, comfort, maintenance, health, welfare, general well-being, or any combination of these purposes. R.C. 5111.151(G)(2). Since we find that the trust permits the trustee to expend trust assets for Cook's health and welfare and that no exception applies, on the facts of this case, the trust's assets must be considered an available resource for purposes of determining Medicaid eligibility.

{¶ 36} Accordingly, we overrule Cook's first assignment of error.

### **B. Cook's Second Assignment of Error**

{¶ 37} In her second assignment of error, Cook asserts that we should apply the doctrine of equitable estoppel to prohibit ODJFS "from changing its position as it related to a trust it had reviewed and approved in 2004." (Cook's Merit Brief, 28.) Cook further asserts that, even if we do not apply equitable estoppel against ODJFS, we should not extend deference to the agency's decisions terminating Cook's benefits.

{¶ 38} The Supreme Court of Ohio has held that "the doctrines of equitable estoppel and promissory estoppel are inapplicable against a political subdivision when the political subdivision is engaged in a governmental function." *Hortman v. Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, ¶ 25. As relevant here, ODJFS is a state agency acting in a governmental function. *See generally* R.C. 5101.01 et seq.; *Morning View Care Center-Fulton v. Ohio Dept. of Human Servs.*, 148 Ohio App.3d 518, 2002-Ohio-2878, ¶ 29 (10th Dist.) (finding that ODJFS is an agency, not a person for purposes of 42 U.S.C. 1983); *Ohio State Bd. of Pharmacy v. Frantz*, 51 Ohio St.3d 143, 145-46 (1990). Cook provides no relevant support for her contention that equitable estoppel should be applied against an agency of the state in these circumstances. As a result, we cannot agree that equitable estoppel applies against ODJFS as it is a political subdivision engaged in a governmental function. *Hortman* at ¶ 25.

{¶ 39} Accordingly, we overrule Cook's second assignment of error.

### **C. Breen's First and Second Assignments of Error**

{¶ 40} We begin by noting that Breen fails to separately argue her assignments of error and provide reasons in support of the contentions. Pursuant to App.R. 16(A)(7), an appellant's brief must include "[a]n argument containing the contentions of the appellant *with respect to each assignment of error presented for review* and reasons in support of the contentions." (Emphasis added.) A court of appeals "may disregard an assignment of error presented for review if the party raising it \* \* \* fails to argue the assignment separately in the brief, as required under App.R. 16(A)." App.R. 12(A)(2). "It is the duty of the appellant, not the appellate court, to construct the legal arguments necessary to support the appellant's assignments of error." *Bond v. Canal Winchester*, 10th Dist. No. 07AP-556, 2008-Ohio-945, ¶ 16, citing *Whitehall v. Ruckman*, 10th Dist. No. 07AP-445, 2007-Ohio-6780, ¶ 20. *See also Young v. Locke*, 10th Dist. No. 13AP-608, 2014-Ohio-



2500, ¶ 16 ("App.R. 16(A)(7) requires that an appellate brief contain an argument in support of each assignment of error presented for review with citations to the authorities, statutes, and parts of the record on which appellant relies."). "It is not the duty of this court to search the record for evidence to support an appellant's argument as to alleged error." *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, ¶ 94 (10th Dist.). Here, Breen's brief does not contain specific arguments in support of her assignments of error. *See Young* at ¶ 16-17. Thus, pursuant to App.R. 12(A)(2), we disregard Breen's assignments of error because she does not separately argue them and provide reasons in support of the contentions. *See Bond* at ¶ 16-17; *Cook v. Wilson*, 165 Ohio App.3d 202, 2006-Ohio-234, ¶ 17 (10th Dist.). Accordingly, we overrule Breen's first and second assignments of error.

### **III. Disposition**

{¶ 41} For the foregoing reasons, both of Cook's assignments of error, as well as Breen's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

TYACK and LUPER SCHUSTER, JJ., concur.

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