

Explanatory Statement and Memorandum for 36C-4-401.2

Federal law, 42 U.S.C. §1396p(d)(4), allows for the creation of trusts for disabled individuals who still need medical assistance benefits. The relevant portion of 42 U.S.C. §1396p(d)(4) is attached hereto. North Carolina (just like all other states) has voluntarily chosen to participate in the federal medical assistance program by accepting federal funds, and therefore must comply with federal law governing medical assistance benefits. While it is clear that disabled individuals in North Carolina have the legal right to avail themselves of such trusts, the procedures for creating such trusts in North Carolina are not clear.

In lawsuits before our courts (such as personal injury or medical malpractice lawsuits), the court has the inherent authority to create such a trust. (It is hoped that this will be express, statutory authority by adopting the proposed amendment to N.C.G.S. §36C-4-401.) Furthermore, if the disabled individual is also incompetent, then his or her guardian is expressly authorized to create such a trust pursuant to N.C.G.S. §35A-1251 (23). In addition, under certain circumstances a parent or grandparent can create the trust for the disabled individual.

The problem arises when an adult individual is disabled, but he or she is still competent. Federal medical assistance law, by which North Carolina is bound, does not permit an individual to create a trust for himself or herself under 42 U.S.C. §1396p(d)(4)(A). Pursuant to the federal statute the trust must be created by a parent, grandparent, guardian, or court. If there is no living parent or grandparent of the disabled individual and the disabled individual is competent, then the only entity left that has the authority to create such a trust is the court.

Some attorneys on behalf of their disabled competent clients institute special proceedings and have the court create the trust. However, there is no express authority for this method and judges around the state interpret their authority differently. Some judges think this is allowed and will create the trust, while others refuse. This creates inconsistent results for our disabled citizens. It is as if we are discriminating against the disabled individual because he or she remains competent.

The main purpose of the proposed legislation is designed to remove the discrimination against competent disabled adults by providing a method for creating the trust which they are otherwise legally entitled to use under federal and North Carolina law governing medical assistance. We also want to be clear that this provision does not limit a court's authority to create a trust in a matter that is otherwise properly before of the court. In addition, we want to make clear that this method is not the exclusive method for creating a trust pursuant to 42 U.S.C. §1396p(d)(4). It is possible that the last sentence should be moved to the comment section rather than in the statute itself.

It is our understanding that the Association has not previously taken a position on the issue raised by this proposal. There are no known constitutional problems.

AN ACT TO PROVIDE A METHOD TO CREATE A TRUST PURSUANT TO 42 U.S.C. §1396p(d)(4), AND TO EXPRESSLY PROVIDE THAT THIS STATUTE IS NOT THE EXCLUSIVE MEANS OF CREATING SUCH A TRUST.

New Text Underlined - Entire Section is new.

The General Assembly of North Carolina enacts:

36C - 4 - 401.2 Trust Pursuant to 42 United States Code § 1396p(d)(4)

An individual may initiate a special proceeding before a court in accordance with the procedures of Article 33 of Chapter 1 of the General Statutes requesting the court to establish a trust pursuant to 42 United States Code § 1396p(d)(4). This section is not the exclusive method of establishing a trust pursuant to 42 United States Code § 1396p(d)(4); and the court shall maintain its authority to create any trust, including a trust pursuant to 42 United States Code § 1396p(d)(4), by means of judgment, order or decree in any matter properly before the court.

This act is effective when it becomes law.

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Groups outside the Association likely to be interested in the proposal:

The North Carolina Administrative Office of the Courts will probably be interested in this proposal. The court handles many special proceeding matters and this proposal will not create a huge additional burden on our courts. AOC may have some comments and suggestions, but hopefully they will support the legislation.

It is likely that the North Carolina Department of Health and Human Services, Division of Medical Assistance, will be interested in this proposal. 42 U.S.C. §1396p(d)(4) provides disabled individuals a legal right to avail themselves to the trusts described in federal law. North Carolina is mandated to follow the federal law on this matter. The proposed legislation simply creates a method for achieving an already legal right. Therefore, the Division of Medical Assistance may have comments and suggestions, but should not object to the goal of the proposed legislation.

The ARC of North Carolina, an organization committed to working with individuals with disabilities, would likely support the proposal.

Easter Seals UCP of North Carolina is another organization which works with individuals with disabilities which would likely support the proposal.

without regard to the exclusion described in subsection (a)(1) thereof.

(d) Treatment of trust amounts

(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

(2)(A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

(i) The individual.

(ii) The individual's spouse.

(iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.

(iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) In the case of a trust the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.

(C) Subject to paragraph (4), this subsection shall apply without regard to--

(i) the purposes for which a trust is established,

(ii) whether the trustees have or exercise any discretion under the trust,

(iii) any restrictions on when or whether distributions may be made from the trust, or

(iv) any restrictions on the use of distributions from the trust.

(3)(A) In the case of a revocable trust--

(i) the corpus of the trust shall be considered resources available to the individual,

(ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and

(iii) any other payments from the trust shall be considered assets disposed of by the individual for purposes of subsection (c) of this section.

(B) In the case of an irrevocable trust--

(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the

individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income--

(I) to or for the benefit of the individual, shall be considered income of the individual, and

(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c) of this section; and

(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

(4) This subsection shall not apply to any of the following trusts:

- (A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will 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 subchapter.
- (B) A trust established in a State for the benefit of an individual if--
 - (i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),
 - (ii) the State will 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 subchapter, and
 - (iii) the State makes medical assistance available to individuals described in section 1396a(a)(10)(A)(ii)(V) of this title, but does not make such assistance available to individuals for nursing facility services under section 1396a(a)(10)(C) of this title.
- (C) A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions:
 - (i) The trust is established and managed by a nonprofit association.
 - (ii) 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.
 - (iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.
 - (iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are

not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

(5) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency waives the application of this subsection with respect to an individual if the individual establishes that such application would work an undue hardship on the individual as determined on the basis of criteria established by the Secretary.

(6) The term "trust" includes any legal instrument or device that is similar to a trust but includes an annuity only to such extent and in such manner as the Secretary specifies.

(e)(1) In order to meet the requirements of this section for purposes of section 1396a(a)(18) of this title, a State shall require, as a condition for the provision of medical assistance for services described in subsection (c)(1)(C)(i) of this section (relating to long-term care services) for an individual, the application of the individual for such assistance (including any recertification of eligibility for such assistance) shall disclose a description of any interest the individual or community spouse has in an annuity (or similar financial instrument, as may be specified by the Secretary), regardless of whether the annuity is irrevocable or is treated as an asset. Such application or recertification form shall include a statement that under paragraph (2) the State becomes a remainder beneficiary under such an annuity or similar financial instrument by virtue of the provision of such medical assistance.

(2)(A) In the case of disclosure concerning an annuity under subsection (c)(1)(F) of this section, the State shall notify the issuer of the annuity of the right of the State under such subsection as a preferred remainder beneficiary in the annuity for medical assistance furnished to the individual. Nothing in this paragraph shall be construed as preventing such an issuer from notifying persons with any other remainder interest of the State's remainder interest under such subsection.

(B) In the case of such an issuer receiving notice under subparagraph (A), the State may require the issuer to notify the State when there is a change in the amount of income or principal being withdrawn from the amount that was being withdrawn at the time of the most recent disclosure described in paragraph (1). A State shall take such information into account in determining the amount of the State's obligations for medical assistance or in the individual's eligibility for such assistance.

(3) The Secretary may provide guidance to States on categories of transactions that may be treated as a transfer of asset for less than fair market value.

(4) Nothing in this subsection shall be construed as preventing a State from denying eligibility for medical assistance for an individual based on the income or resources derived from an annuity described in paragraph (1).

(f)(1)(A) Notwithstanding any other provision of this subchapter, subject to subparagraphs (B) and (C) of this paragraph and paragraph (2), in determining eligibility of an individual for medical assistance with respect to nursing facility services or other long-term care services, the individual shall not be eligible for such assistance if the individual's equity interest in the individual's home exceeds \$500,000.

(B) A State may elect, without regard to the requirements of section 1396a(a)(1) of this title (relating to statewideness) and section 1396a(a)(10)(B) of this title (relating to comparability), to apply subparagraph (A) by