

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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SENATE DRS85098-LN-45 (2/3)

Short Title: Pooled Trusts/Medicaid Reimbursement.

(Public)

Sponsors: Senator Rand.

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO AMEND THE GENERAL STATUTES WITH RESPECT TO POOLED
3 TRUSTS AND ESTATE RECOVERY UNDER MEDICAID.

4 The General Assembly of North Carolina enacts:

5 SECTION 1. Chapter 36D of the General Statutes reads as rewritten:

6 "Chapter 36D.

7 "North Carolina Community Trust for ~~Persons with Severe Chronic Disabilities.~~
8 Disabled Persons.

9 "§ 36D-1. Title; findings.

10 (a) This ~~Article~~ Chapter shall be known and may be cited as the "North Carolina
11 Community Trust for ~~Persons With Severe Chronic Disabilities Act~~ Disabled Persons Act."

12 (b) The General Assembly finds that it is in the public interest to encourage activities by
13 voluntary associations and private citizens that will supplement and augment those services
14 provided by local, State, and federal government agencies in discharge of their responsibilities
15 toward ~~individuals with severe chronic disabilities.~~ disabled individuals. The General Assembly
16 further finds that, as a result of changing social, economic, and demographic trends, families of
17 ~~persons with severe chronic disabilities~~ disabled persons are increasingly aware of the need for
18 a vehicle by which they can assure ongoing individualized personal concern for a ~~severely~~
19 disabled family member who may survive that disabled person's parents or other family
20 members, and provide for the efficient management of ~~small legacies or~~ trust funds to be used
21 for the benefit of that disabled person. In a number of other states, voluntary associations have
22 established foundations or trusts intended to be responsive to these concerns. Therefore, the
23 General Assembly finds that North Carolina will benefit by the enactment of enabling
24 legislation expressly authorizing the formation of ~~community-pooled~~ trusts in accordance with
25 42 U.S.C.S. § 1396p(d)(4)(C) and criteria set forth by statute and administered by the Secretary
26 of State, under Chapter 55A of the General Statutes. ~~These community trusts permit the pooling~~
27 ~~of resources contributed by families or persons with philanthropic intent, along with the~~
28 ~~reservation of portions of these funds for the use and benefit of designated beneficiaries.~~

29 (c) This Article shall be liberally construed and applied to promote its underlying
30 purposes and policies, which are, among others, to:

31 (1) Encourage the orderly establishment of community trusts for the benefit of
32 ~~persons with severe chronic disabilities;~~ disabled persons;

33 (2) Ensure that community trusts are administered properly and that the
34 managing boards of the trusts are free from conflicts of interest;



- 1 (3) Facilitate sound administration of trust funds for persons with severe chronic
2 disabilities by allowing family members and others to pool resources in
3 order to make professional management investment more efficient; disabled
4 persons by allowing the community trust to pool trust funds in order to make
5 professional management investment more efficient;
6 (4) Provide parents of ~~persons with severe chronic disabilities~~ disabled persons
7 peace of mind in knowing that a means exists to ensure that the interests of
8 their ~~children who have severe chronic disabilities~~ disabled children are
9 properly looked after and managed after the parents die or become
10 incapacitated;
11 (5) Help make guardians available for ~~persons with severe chronic disabilities~~
12 disabled persons who are incompetent, when no other family member is
13 available for this purpose;
14 (6) Encourage the availability of private resources to purchase for ~~persons with~~
15 ~~severe chronic disabilities~~ disabled persons goods and services that are not
16 available through any governmental or charitable program and to conserve
17 these resources by limiting purchases to those that are not available from
18 other sources;
19 (7) Encourage the inclusion, as beneficiaries of ~~community-pooled~~ trusts, of
20 persons who lack resources and whose families are indigent, in a way that
21 does not diminish the resources available to other beneficiaries whose
22 families have contributed to the pooled trust; and
23 (8) Remove the disincentives that discourage parents and others from setting
24 aside funds for the future protection of ~~persons with severe chronic~~
25 ~~disabilities~~ disabled persons by ensuring that the interest of beneficiaries in
26 ~~community-pooled trusts that meet the rules set forth by the Department of~~
27 Health and Human Services, Division of Medical Assistance, are not
28 considered assets or income that would disqualify them from any
29 governmental or charitable entitlement program with an economic means
30 test.

31 **"§ 36D-2. Definitions.**

32 As used in this Article, unless the context clearly requires otherwise:

- 33 (1) "Beneficiary" means any person ~~with a severe chronic disability who is~~
34 disabled as defined in 42 U.S.C.S. § 1382c(a)(3) who has qualified as a
35 member of the community trust program on whose behalf an individual trust
36 sub-account was established within the pooled trust by the parent,
37 grandparent, or legal guardian of such individual, by such individual, or by a
38 court before that individual reached the age of 65 and who has the right to
39 receive those services and benefits vested with the management of the
40 business and affairs of a corporation, formed for the purpose of managing a
41 community trust, irrespective of the name by which the group is designated.
42 provided by the community trust.
43 (2) "Community trust" means a nonprofit ~~organization-corporation~~ that offers
44 the following services:
45 a. Administration of ~~special trust funds for persons with severe chronic~~
46 ~~disabilities;~~ pooled trust funds for disabled persons;
47 b. Follow along services;
48 c. Guardianship for ~~persons with severe chronic disabilities~~ disabled
49 persons who are incompetent, when no other family member or
50 immediate friend is available for this purpose; and

1 d. Advice and counsel to persons who have been appointed as
2 individual guardians of the persons or estates of ~~persons with severe~~
3 ~~chronic disabilities~~ disabled persons.

4 (2a) "Department" means the North Carolina Department of Health and Human
5 Services.

6 (2b) "Disabled person" or "disabled individual" means any person who is
7 disabled as defined in 42 U.S.C.S. § 1382c(a)(3).

8 (3) "Follow along services" means (i) those services offered by community
9 trusts that are designed to ensure that the needs of each beneficiary are being
10 met for as long as may be required and may include periodic visits to the
11 beneficiary and to the places where the beneficiary receives services, (ii)
12 participation in the development of individualized plans being made by
13 service providers for the beneficiary, and (iii) other similar services
14 consistent with the purposes of this Article.

15 (3a) "Pooled trust" or "umbrella pooled trust" means a trust that contains the
16 assets of individuals who are disabled, which is established in accordance
17 with the rules set forth for pooled trusts by the Department and contains a
18 separate sub-account for each beneficiary of the trust, but the funds in the
19 accounts are pooled for purposes of investment and management of funds.
20 Sub-accounts in the pooled trust are established solely for the benefit of the
21 disabled individuals on whose behalf the sub-account is established. There
22 shall be one trust investment governing the umbrella pooled trust that shall
23 be approved by the Department.

24 (4) ~~"Severe chronic disability" means a physical or mental impairment that is~~
25 ~~expected to give rise to a long-term need for specialized health, social, and~~
26 ~~other services, and that makes the person with the disability dependent upon~~
27 ~~others for assistance to secure these services.~~

28 (5) "Surplus trust funds" means funds accumulated in the ~~trust~~ individual trust
29 sub-account from contributions made by or on behalf of an individual
30 beneficiary that, after the death of the beneficiary, are determined by the
31 board to be in excess of the actual cost of providing services during the
32 beneficiary's lifetime, including the beneficiary's share of administrative
33 costs.

34 (6) "Trustee" means any member of the board of a corporation, ~~formed for the~~
35 ~~purpose of managing a community trust,~~ whether that member is designated
36 as a trustee, director, manager, governor, or by any other title.

37 **"§ 36D-3. Scope.**

38 This ~~Article~~ Chapter applies to every community trust established in this State. In addition
39 to meeting the other requirements of this Article, every board that administers a community
40 trust shall incorporate as a nonprofit corporation under Chapter 55A of the General Statutes.
41 Except as otherwise provided in this Chapter, Chapter 55A of the General Statutes applies to
42 community trusts.

43 **"§ 36D-4. Administration; powers and duties.**

44 (a) Every community trust shall be administered by a board. The board shall be
45 comprised of no less than nine and no more than 21 members, at least one-third of whom are
46 parents or relatives of ~~persons with severe chronic disabilities.~~ disabled persons. No board
47 member shall be a provider of habilitative, health, social, or educational services to ~~persons~~
48 ~~with severe chronic disabilities~~ disabled persons or an employee of such a service provider. The
49 board may, however, allow service providers to serve on the board in an advisory capacity.
50 Board members shall be selected, to the maximum extent possible, from geographic areas
51 throughout the area served by the trust.

1 The certificate of incorporation filed with the Secretary of State under Chapter 55A of the
2 General Statutes shall, in addition to the requirements set forth in that Chapter, demonstrate that
3 the requirements of this section have been met.

4 (b) Notwithstanding any other law, no trustee may be compensated for services
5 provided as a member of the board of a community trust. No fees or commissions shall be paid
6 to these trustees; however, a trustee may be paid for necessary expenses incurred by the trustee
7 and may receive indemnification as permitted under Chapter 55A of the General Statutes.

8 (c) For every community trust incorporated under this Article, the corporation itself is
9 considered the trustee of any funds administered by it. No individual board member is
10 considered to be trustee of any fund deposited on behalf of any ~~individual beneficiary with~~
11 ~~severe chronic disabilities.~~ individual beneficiary.

12 (d) The board shall adopt bylaws that include a declaration delineating the primary
13 geographic area serviced by the trust and the principal services to be provided. The board shall
14 file the bylaws with the Secretary of State.

15 (e) The board may retain paid staff as it considers necessary to provide follow along
16 services to the extent required by each beneficiary. The community trust may authorize the
17 expenditure of funds from a beneficiary's sub-account for any goods or services, including
18 recreational services, but not including luxury items, which the ~~board, in its sole discretion,~~
19 ~~determines will promote the well being of any beneficiary.~~ community trust determines is for
20 the sole benefit of the beneficiary. The community trust may ~~pay~~ authorize the expenditure of
21 funds from a beneficiary's sub-account for the ~~burial~~ reasonable burial expenses of any
22 beneficiary. The community ~~trust, however, may not~~ trust may not, however, expend funds for
23 any goods or services of comparable quality to those available to any particular beneficiary
24 through any governmental or charitable program, insurance, or other sources. The community
25 trust may expend funds to meet the reasonable costs of administering the community trust.

26 (f) The community trust is not required to provide services to a beneficiary who is a
27 competent adult and who has refused to accept the services. Further, the community trust shall
28 not provide services of a nature or in a manner that would be contrary to the public policy of
29 this State at the time the services are to be provided. In either case, the community trust may
30 offer alternate services that are consistent with the purposes of this Article and in keeping with
31 the best interests of the beneficiary.

32 (g) The community trust may accept appointment as guardian of the person, guardian of
33 the estate, or guardian of both on behalf of any beneficiary. If the community trust accepts
34 appointment as guardian of the person of an individual, it shall assign a staff member to carry
35 out its responsibilities as the guardian. The community trust may, upon request, offer
36 consultative and professional assistance to an individual, private or public guardian of any of its
37 beneficiaries.

38 (h) The community trust may accept contributions, bequests, and designations under
39 life insurance policies to the community trust on behalf of ~~individuals with severe chronic~~
40 ~~disabilities~~ disabled individuals for the purpose of qualifying them as beneficiaries.

41 (i) At the time a contribution, bequest, or assignment of insurance proceeds is made,
42 the trustor shall receive a written statement of the services to be provided to the beneficiary.
43 The statement shall include a starting date for the delivery of services or the condition
44 precedent, such as the death of the trustor, which shall determine the starting date. The
45 statement shall describe the frequency with which services shall be provided and their duration,
46 and the criteria or procedures for modifying the program of services from time to time in the
47 best interests of the beneficiary.

48 (j) No trustee, board member, or paid staff member of a community trust shall
49 undertake legal representation or other professional services on behalf of the trust or its
50 beneficiaries.

51 "**§ 36D-5. Accountability.**

1 Along with the annual report filed with the Secretary of State under Chapter 55A of the
2 General Statutes, the community trust shall file an itemized statement that shows the funds
3 collected for the year, income earned, salaries, other expenses incurred, and the opening and
4 final ~~trust balances, pooled trust and individual trust sub-account balances.~~ A copy of this
5 statement shall be made available, upon request, to any beneficiary, trustor, ~~or~~ designee of the
6 ~~trustor, trustor, or the Department.~~ In addition, once annually, each trustor or the trustor's
7 designee shall receive a detailed individual statement of the services provided to the trustor's
8 beneficiary during the previous 12 months and the services to be provided during the following
9 12 months. The community trust shall make a copy of the individual statement available to any
10 ~~beneficiary, beneficiary or the Department,~~ upon request.

11 **"§ 36D-6. Gifts, surplus trust funds.**

12 The community trust may accept gifts and use surplus trust funds for the purpose of
13 qualifying as beneficiary any indigent person whose family members lack the resources to
14 make a full contribution on that person's behalf. A maximum of fifty percent (50%) of surplus
15 trust funds may be retained in the pooled trust account for this sole purpose. Upon termination
16 of an individual trust account, at least fifty percent (50%) of the surplus trust funds remaining
17 in the individual account shall be used to satisfy any claims or liens of the Department, up to an
18 amount equal to the total medical assistance paid on behalf of or to the disabled individual by
19 the Department. The amount retained by the trust shall be based on a sliding scale calculation,
20 based upon the number of years the disabled individual received services from the community
21 trust, but in no instance shall the pooled trust retain more than fifty percent (50%) of the surplus
22 trust funds. The community trust shall not distribute surplus trust funds to any remaindermen
23 identified in the trust document, nor shall it ~~The extent and character of the services and~~
24 ~~selection of beneficiaries are at the discretion of the community trust. The community trust may~~
25 ~~not~~ use surplus trust funds to make any charitable contribution on behalf of any beneficiary or
26 any group or class of beneficiaries. The community trust may accept gifts to meet start-up
27 ~~costs, costs and~~ reduce the charges to the trust for the cost of administration. ~~administration,~~
28 ~~and for any other purpose that is consistent with this Article.~~ Gifts made to the trust for an
29 unspecified purpose shall be used by the community trust either to qualify indigent persons
30 whose families lack the means to qualify them as beneficiaries of the trust or to meet any
31 start-up costs that the trust incurs.

32 **"§ 36D-7. Special requests on behalf of beneficiary.**

33 The community trust may agree to fulfill any special requests made on behalf of a
34 beneficiary as long as the requests are consistent with this ~~Article~~ Chapter and with federal law
35 concerning pooled trusts for the disabled, 42 U.S.C.S. § 1396p(d)(4)(C) and provided that an
36 adequate contribution has been made for this purpose on behalf of a beneficiary. The
37 community trust may agree to serve as trustee for any individual private trust created on behalf
38 of a disabled beneficiary, regardless of whether the trust is revocable or irrevocable, has one or
39 more remaindermen or contingent beneficiaries, or any other condition, so long as the
40 individual trust is consistent with the purposes of this Article. ~~condition. The fact that the~~
41 ~~community trust agrees to serve as trustee does not mean the private trust meets the rules~~
42 adopted by the Department or that the disabled beneficiary shall be eligible for public benefits.

43 **"§ 36D-8. Irrevocability; impossibility of fulfillment. Pooled trust rules.**

44 ~~A community trust for persons with severe chronic disabilities is irrevocable, but the trustees in~~
45 ~~their sole discretion may provide compensation for any contribution to the trust to any trustor~~
46 ~~who, upon good cause, withdraws a beneficiary designated by the trustor from the trust, or if it~~
47 ~~becomes impossible to fulfill the conditions of the trust with regard to an individual beneficiary~~
48 ~~for reasons other than the death of the beneficiary."~~

49 (a) The Department shall adopt rules, consistent with the purposes of this Chapter,
50 governing the eligibility of pooled trust beneficiaries for State medical assistance and
51 State-County Special Assistance.

1 (b) Rules adopted by the Department shall include pre-execution requirements,
2 permissible trust terms, accounting and termination requirements, disbursements, and other
3 rules necessary for the implementation of this Chapter, and shall establish a trust instrument
4 template to be used for the creation of each beneficiary's trust sub-account.

5 (c) Rules adopted by the Department shall specifically state the following:

6 (1) That the pooled trust is irrevocable;

7 (2) That the State shall be paid an amount equal to the total medical assistance
8 paid on behalf of the disabled individual by the Department from funds
9 remaining in the individual trust sub-account upon the death of the
10 beneficiary or termination of the trust; and

11 (3) That if the pooled trust is to be subject to the Department's subrogated rights
12 of recovery under G.S. 108A-57, such subrogated rights of recovery shall be
13 satisfied in full prior to execution or judicial approval of the trust.

14 **"§ 36D-9. Beneficiary's interest in trust not asset for income eligibility determination.**

15 ~~Notwithstanding any provisions of Chapter 108A of the General Statutes, the~~ The
16 ~~beneficiary's interest in any community-pooled trust is not considered to be~~ may not be
17 ~~considered an asset for the purpose of determining income eligibility for any publicly operated~~
18 ~~program, nor shall that interest be reached in satisfaction of a claim for support and~~
19 ~~maintenance of the beneficiary. No agency shall reduce the benefits of services available to any~~
20 ~~individual because that person is the beneficiary of a community trust.~~ may any agency reduce
21 the benefits or services available to any disabled individual because that person is the
22 beneficiary of a pooled trust, provided that the trust complies with rules adopted by the
23 Department. The beneficiary's interest shall not be reached in satisfaction of a claim for support
24 and maintenance of the beneficiary.

25 **"§ 36D-10. Trust not subject to law against perpetuities; restraints on alienation.**

26 A community trust shall not be subject to or held to be in violation of any principle of law
27 against perpetuities or restraints on alienation or perpetual accumulations of trusts.

28 **"§ 36D-11. Settlement; trustee limitations.**

29 (a) The community trust shall settle a community-the pooled trust by filing a final
30 accounting in the superior court. In addition, the trustee shall provide a final disbursement and
31 accounting for an individual sub-account to the Division of Medical Assistance, Third Party
32 Recovery Section, within 60 days of the date of the death of the beneficiary or the termination
33 of the trust. An individual trust account shall terminate upon the death of the beneficiary.

34 (b) In addition, at At any time before the settlement of the final account, the community
35 trust, the Secretary of State, or the Attorney General may bring an action for the dissolution of
36 a nonprofit corporation in the superior court for the purpose of terminating the trust or merging
37 it with another charitable trust.

38 (c) No trustee or any private individual is entitled to share in the distribution of any of
39 the trust assets upon dissolution, merger, or settlement of the community trust. Upon
40 dissolution, merger, or settlement, the superior court shall distribute all of the remaining net
41 assets of the community trust in a manner that is consistent with the purposes of this
42 Article.Chapter."

43 **SECTION 2.** This act is effective when it becomes law.