

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2009

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SENATE BILL 765  
House Committee Substitute Favorable 7/1/10  
House Committee Substitute #2 Favorable 7/6/10  
House Committee Substitute #3 Favorable 7/8/10

Short Title: Pooled Trusts/Medicaid Reimbur.

(Public)

Sponsors:

Referred to:

March 24, 2009

A BILL TO BE ENTITLED

AN ACT TO AMEND THE GENERAL STATUTES WITH RESPECT TO COMMUNITY  
THIRD PARTY TRUSTS AND MEDICAID POOLED TRUSTS, AND TO PROVIDE  
FOR MEDICAID REIMBURSEMENT IN CERTAIN CIRCUMSTANCES.

The General Assembly of North Carolina enacts:

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

**"Chapter 36D.**

**North Carolina Community Third Party Trusts, Pooled Trusts. ~~Trust for Persons with  
Severe Chronic Disabilities.~~**

**"§ 36D-1. Title; findings.**

(a) This ~~Article-Chapter~~ shall be known and may be cited as the "North Carolina  
Community Third Party Trusts, Pooled Trusts Act."~~Trust for Persons With Severe Chronic  
Disabilities Act".~~

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

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

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



- 1           (2)    Ensure that ~~community trusts~~Community Third Party or Pooled Trusts for  
2           the benefit of persons with severe chronic disabilities are established and  
3           administered properly and that the managing boards of the trusts are free  
4           from conflicts of ~~interest;~~interest.
- 5           (3)    Facilitate sound administration of trust funds for persons with severe chronic  
6           disabilities by allowing family ~~members-~~members, persons with disabilities,  
7           and others to pool resources in order to make professional management  
8           investment more ~~efficient;~~efficient.
- 9           (4)    Provide parents of persons with severe chronic disabilities peace of mind in  
10          knowing that a means exists to ensure that the interests of their children who  
11          have severe chronic disabilities are properly looked after and managed after  
12          the parents die or become ~~incapacitated;~~incapacitated.
- 13          (5)    ~~Help make~~Assist in making guardians available for persons with severe  
14          chronic disabilities who are incompetent, when no other family member is  
15          available for this ~~purpose;~~purpose.
- 16          (6)    Encourage the availability of private resources to purchase for persons with  
17          severe chronic disabilities goods and services that are not available through  
18          any governmental or charitable program and to conserve these resources by  
19          limiting purchases to those that are not available from other ~~sources;~~sources.
- 20          (7)    Encourage the inclusion, as beneficiaries of ~~community-~~Community Third  
21          Party or Pooled Trusts,~~trusts,~~ of persons who lack resources and whose  
22          families are indigent, in a way that does not diminish the resources available  
23          to other beneficiaries whose families have contributed to the ~~trust;~~trust; and
- 24          (8)    Remove the disincentives that discourage parents and others from setting  
25          aside funds for the future protection of persons with severe chronic  
26          disabilities by ensuring that the interest of beneficiaries ~~in community~~of  
27          trusts that meet the rules set forth by the Department are not considered  
28          assets or income that would disqualify them from any governmental or  
29          charitable entitlement program with an economic means test.
- 30          (9)    Require, pursuant to 42 U.S.C. § 1396p(d)(4), the payback of monies from  
31          Pooled Trusts up to an amount equal to the total amount of assistance paid  
32          for by the Department on behalf of or to the beneficiary from any funds  
33          remaining in the beneficiary's individual trust account upon the death of the  
34          individual or the termination of the individual trust account.

35          (d)    Nothing in this Chapter shall affect the establishment, interpretation, or construction  
36          of Pooled Trust instruments which do not conform with the provisions of this Chapter, nor shall  
37          this Chapter impair the State's authority to be paid from or seek reimbursement from any  
38          Pooled Trust which does not conform with the provisions of this Chapter or to deem the  
39          principal or income of any nonconforming 36D Trust an available resource under any program  
40          of government benefits or assistance.

41          "**§ 36D-2. Definitions.**

42          As used in this ~~Article,~~Chapter, unless the context clearly requires otherwise:

- 43          (1)    "~~Beneficiary~~" means Beneficiary. – Any of the following persons:
- 44               a.    Any person of any age -any person- with a severe chronic disability  
45               who has qualified as a member of the Community Third Party Trust,  
46               funded with assets of a third party or by will.
- 47               b.    Any person who meets the definition of disability as defined in 42  
48               U.S.C. § 1382c(a)(3) on whose behalf an individual Medicaid Pooled  
49               Trust subaccount was established by the parent, grandparent, or legal  
50               guardian of the individual, by the individual, or by a  
51               court.~~community trust program and who has the right to receive~~

- 1                    those services and benefits vested with the management of the  
2                    business and affairs of a corporation, formed for the purpose of  
3                    managing a community trust, irrespective of the name by which the  
4                    group is designated.
- 5                    (2)    "Community trust" means a Community Third Party Trust. – A trust funded  
6                    with the assets of a third party for the benefit of a person of any age with  
7                    severe chronic disabilities, that is administered by a nonprofit organization  
8                    corporation that offers the following services:
- 9                    a.        Administration of ~~special-trust funds for persons with severe chronic~~  
10                    ~~disabilities; disabilities.~~
- 11                    b.        Follow along ~~services; services.~~
- 12                    c.        Guardianship for persons with severe chronic disabilities who are  
13                    incompetent, when no other family member or immediate friend is  
14                    available for this ~~purpose; and purpose.~~
- 15                    d.        ~~Advice and counsel~~ Information and referral services to persons who  
16                    have been appointed as individual guardians of the persons or estates  
17                    of persons with severe chronic disabilities.
- 18                    (2a)    Department. – The Department of Health and Human Services.
- 19                    (2b)    Family members. – Persons who are related by blood or marriage within the  
20                    sixth degree to the beneficiary.
- 21                    (3)    ~~"Follow along services"~~ Follow-along services. – Includes the following:  
22                    ~~means~~ (i) those services offered by ~~community trusts~~ Community Third Party  
23                    or Pooled Trusts that are designed to ensure that the needs of each  
24                    beneficiary are being met for as long as may be required and may include  
25                    periodic visits to the beneficiary and to the places where the beneficiary  
26                    receives services, (ii) participation in the development of individualized  
27                    plans being made by service providers for the beneficiary, and (iii) other  
28                    similar services consistent with the purposes of this ~~Article~~ Chapter.
- 29                    (3a)    Medicaid Pooled Trust, pooled trust, or umbrella pooled trust. – A trust  
30                    pursuant to 42 U.S.C. § 1396p(d)(4)(C) and the rules set forth for pooled  
31                    trusts by the Department that meets all of the following requirements:
- 32                    a.        The trust is irrevocable.
- 33                    b.        The trust contains a separate subaccount for each beneficiary of the  
34                    trust, but the funds in the accounts are pooled for the purpose of  
35                    investment and management of funds. Investment of funds pursuant  
36                    to this subdivision shall be in accord with G.S. 32-71, the Prudent  
37                    Person rule.
- 38                    c.        The beneficiary is disabled as defined by 42 U.S.C. § 1382c(a)(3).
- 39                    d.        The trust is established solely for the benefit of the beneficiary by a  
40                    parent, grandparent, legal guardian, by the beneficiary, or by a court.
- 41                    e.        The trust was created on or after April 1, 1994.
- 42                    f.        The trust provides that upon the death of the beneficiary the State  
43                    will receive all amounts remaining in the beneficiary's account up to  
44                    the total amount of medical assistance paid on behalf of the  
45                    beneficiary as set forth in G.S. 36D-6.
- 46                    g.        Trust language governing each Medicaid Pooled Trust shall be  
47                    approved by the Department.
- 48                    h.        A Medicaid Pooled Trust shall be established by a nonprofit  
49                    corporation that offers any of the following:
- 50                    1.        Administration of trust funds for persons with a disability as  
51                    defined in 42 U.S.C. § 1382c(a)(3).



1 Board members shall be selected, to the maximum extent possible, from geographic areas  
2 throughout the area served by the trust.

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

6 (b) Notwithstanding any other law, no trustee may be compensated for services  
7 provided as a member of the board of a Community Third Party or Pooled Trust. ~~community~~  
8 ~~trust~~. No fees or commissions shall be paid to these trustees; however, a trustee may be paid for  
9 necessary expenses incurred by the trustee and may receive indemnification as permitted under  
10 Chapter 55A of the General Statutes. Statutes as it applies to nonprofit organizations.

11 (c) For every Community Third Party or Pooled Trust ~~community trust~~ incorporated  
12 under this ~~Article~~, Chapter, the corporation itself is considered the trustee of any funds  
13 administered by it. No individual board member is considered to be trustee of any fund  
14 deposited on behalf of any individual beneficiary with severe chronic disabilities.

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

18 (e) The board may retain paid staff as it considers necessary to provide follow along  
19 services to the extent required by each beneficiary.

20 (e1) The Community Third Party or Pooled Trust ~~community trust~~ may authorize the  
21 expenditure of funds for any goods or services, including recreational services, which ~~the~~  
22 ~~board, in its sole discretion, determines~~ will promote the well-being of ~~and is for the sole benefit~~  
23 ~~of the~~ any beneficiary. The Community Third Party or Pooled Trust ~~community trust~~ may pay  
24 for the reasonable burial expenses of any beneficiary; however, if the beneficiary  
25 receives SSI benefits, burial expenses may be paid for only as allowed by Social Security  
26 Administration regulations. The Community Third Party or Pooled Trust ~~community trust~~,  
27 however, may not expend funds for any goods or services of comparable quality to those  
28 available to any particular beneficiary through any governmental or charitable program,  
29 insurance, or other sources. The Community Third Party or Pooled Trust ~~community trust~~ may  
30 expend funds to meet the reasonable costs of administering the Community Third Party or  
31 Pooled Trust. ~~community trust~~.

32 (f) The Community Third Party or Pooled Trust ~~community trust~~ is not required to  
33 provide services to a beneficiary who is a competent adult and who has refused to accept the  
34 services. Further, the Community Third Party or Pooled Trust ~~community trust~~ shall not  
35 provide services of a nature or in a manner that would be contrary to the public policy of this  
36 State at the time the services are to be provided. In either case, the Community Third Party or  
37 Pooled Trust ~~community trust~~ may offer alternate services that are consistent with the purposes  
38 of this ~~Article~~ Chapter and in keeping with the best interests of the beneficiary.

39 (g) The Community Third Party or Pooled Trust ~~community trust~~ may accept  
40 appointment as guardian of the person, guardian of the estate, or guardian of both on behalf of  
41 any beneficiary. If the Community Third Party or Pooled Trust ~~community trust~~ accepts  
42 appointment as guardian of the person of an individual, it shall assign a staff member to carry  
43 out its responsibilities as the guardian. The Community Third Party or Pooled Trust ~~community~~  
44 ~~trust~~ may, upon request, offer consultative and professional assistance to an individual, private  
45 or public guardian of any of its beneficiaries.

46 (h) The Community Third Party or Pooled Trust ~~community trust~~ may accept  
47 contributions, bequests, and designations under life insurance policies to the Community Third  
48 Party or Pooled Trust ~~community trust~~ on behalf of individuals with severe chronic disabilities  
49 for the purpose of qualifying them as beneficiaries.

50 (i) At the time a contribution, bequest, or assignment of insurance proceeds is  
51 ~~made~~, made to a Community Third Party Trust, or to a beneficiary of a Pooled Trust, the trustor

1 shall receive a written statement of the services to be provided to the beneficiary. The statement  
2 shall include a starting date for the delivery of services or the condition precedent, such as the  
3 death of the trustor, which shall determine the starting date. The statement shall describe the  
4 frequency with which services shall be provided and their duration, and the criteria or  
5 procedures for modifying the program of services from time to time in the best interests of the  
6 beneficiary. In addition, there shall be a properly executed trust agreement between the  
7 Community Third Party or Pooled Trust and the trustor.

8 (j) No trustee, board member, or paid staff member of a Community Third Party or  
9 Pooled Trust shall undertake legal representation or other professional services on behalf of the  
10 trust or its beneficiaries.

11 (k) The Department shall be given a minimum of 30 days notice if there is to be a  
12 change in trustee.

13 **"§ 36D-5. Community Third Party and Pooled Trust Accountability-accountability.**

14 (a) Along with the annual report filed with the Secretary of State under Chapter 55A of  
15 the General Statutes, the Community Third Party or Pooled Trust ~~community trust~~ shall file an  
16 itemized statement that shows the funds collected for the year, income earned, salaries, other  
17 expenses incurred, and the opening and final trust balances. A copy of ~~this statement~~ the annual  
18 individual accounting statement of each beneficiary's subaccount shall be made  
19 available, available by the trustee, upon request, to the Department, any beneficiary, guardian,  
20 trustor, or designee of the trustor. In addition, once annually, each trustor or the trustor's  
21 designee shall receive a detailed individual statement of the services provided to the trustor's  
22 beneficiary during the previous 12 months and the services to be provided during the following  
23 12 months. The Community Third Party or Pooled Trust ~~community trust~~ shall make a copy of  
24 the individual statement available to any beneficiary, upon request.

25 (b) The Department or its agents may perform annual audits of any Community Third  
26 Party or Pooled Trusts existing in the State.

27 **"§ 36D-6. Gifts, Community Third Party or Pooled Trust surplus trust funds.**

28 (a) Community Third Party and Pooled Trusts may accept gifts and use surplus trust  
29 funds to meet reasonable start-up costs and reduce the charges to the trust for the cost of  
30 administration and for the purpose of qualifying as beneficiary any indigent person whose  
31 family members lack the resources to make a full contribution on that person's behalf. A  
32 maximum of fifty percent (50%) of the surplus trust funds may be retained in the Community  
33 Third Party or Pooled Trust account for this purpose as well as to cover administrative costs.  
34 Gifts made to the Community Third Party or Pooled Trust for an unspecified purpose shall be  
35 used by the trust either to qualify indigent persons whose families lack the means to qualify  
36 them as beneficiaries of the trust or to meet any reasonable start-up or administrative costs that  
37 the trust incurs.

38 (b) For Community Third Party Trusts, remaining surplus trust funds may be distributed  
39 to additional beneficiaries as specified in the Trust Agreement.

40 (c) For Medicaid Pooled Trusts, upon termination of an individual trust account, the  
41 surplus trust funds remaining in the individual account shall be used to satisfy any claims or  
42 liens of the Department, up to an amount equal to the total medical assistance paid on behalf of  
43 or to the disabled individual by the Department. The amount retained by the trust shall be  
44 determined on a sliding scale calculation, based upon the number of years the disabled  
45 individual received services from the nonprofit corporation, but in no instance shall the trust  
46 retain more than fifty percent (50%) of the surplus trust funds, unless the claims or liens of the  
47 Department are less than fifty percent (50%) of the surplus trust funds.

48 (d) A Medicaid Pooled Trust may not distribute surplus trust funds to any  
49 remaindermen identified in the trust document unless there are funds remaining after all claims  
50 or liens of the Department have been satisfied, nor shall it use surplus trust funds to make any  
51 charitable contribution on behalf of any beneficiary or any group or class of beneficiaries.~~The~~

1 community trust may accept gifts and use surplus trust funds for the purpose of qualifying as  
2 beneficiary any indigent person whose family members lack the resources to make a full  
3 contribution on that person's behalf. The extent and character of the services and selection of  
4 beneficiaries are at the discretion of the community trust. The community trust may not use  
5 surplus trust funds to make any charitable contribution on behalf of any beneficiary or any  
6 group or class of beneficiaries. The community trust may accept gifts to meet start-up costs,  
7 reduce the charges to the trust for the cost of administration, and for any other purpose that is  
8 consistent with this Article. Gifts made to the trust for an unspecified purpose shall be used by  
9 the community trust either to qualify indigent persons whose families lack the means to qualify  
10 them as beneficiaries of the trust or to meet any start-up costs that the trust incurs.

11 **"§ 36D-7. Special requests on behalf of beneficiary.**

12 The ~~community trust~~Community Third Party Trust may agree to fulfill any special requests  
13 made on behalf of a beneficiary as long as the requests are consistent with this ~~Article~~Chapter  
14 and provided that an adequate contribution has been made for this purpose on behalf of a  
15 beneficiary. The Medicaid Pooled Trust may only disburse subaccount trust funds if such  
16 disbursement is in the sole benefit of the beneficiary. ~~The community trust may agree to serve~~  
17 ~~as trustee for any individual trust created on behalf of a beneficiary, regardless of whether the~~  
18 ~~trust is revocable or irrevocable, has one or more remaindermen or contingent beneficiaries, or~~  
19 ~~any other condition, so long as the individual trust is consistent with the purposes of this~~  
20 ~~Article.~~

21 **"§ 36D-8. Irrevocability; impossibility of fulfillment.**

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

27 **"§ 36D-9. Beneficiary's interest in trust not asset for income eligibility determination.**

28 ~~Notwithstanding any provisions of Chapter 108A of the General Statutes, the~~The  
29 ~~beneficiary's interest in any community trust 36D Trust is not considered to be an asset for the~~  
30 ~~purpose of determining income eligibility for any publicly operated program, nor shall that~~  
31 ~~interest be reached in satisfaction of a claim for support and maintenance of the beneficiary.~~  
32 The Department shall not reduce the benefits or services available to any individual because  
33 that person is the beneficiary of a 36D Trust. The Department may authorize termination of an  
34 individual's eligibility for medical assistance or impose sanctions as necessary for failure of a  
35 purported 36D Trust to comply with the requirements of this Chapter and any rules adopted by  
36 the Department pursuant to this Chapter. The Department may authorize termination of an  
37 individual's eligibility for medical assistance or impose sanctions as necessary for failure of the  
38 trustee to administer the 36D Trust in a manner consistent with this Chapter, the rules adopted  
39 by the Department pursuant to this Chapter, and federal law and policy. No agency shall reduce  
40 the benefits of services available to any individual because that person is the beneficiary of a  
41 community trust.

42 **"§ 36D-10. Trust not subject to law against perpetuities; restraints on alienation.**

43 A ~~community trust~~36D Trust shall not be subject to or held to be in violation of any  
44 principle of law against perpetuities or restraints on alienation or perpetual accumulations of  
45 trusts.

46 **"§ 36D-11. Settlement; trustee limitations.**

47 The ~~community trust shall settle a community trust by filing a final accounting in the~~  
48 ~~superior court. In addition, at~~

49 (a) The trustee of a Medicaid Pooled Trust shall provide a final disbursement and  
50 accounting for an individual Pooled Trust subaccount to the Division of Medical Assistance,  
51 Third Party Recovery Section, within 30 days of the receipt of an accounting of charges from

1 Medicaid, after the death of the beneficiary or other termination of the trust. An individual  
2 Pooled Trust subaccount shall terminate upon the death of the beneficiary and the satisfaction  
3 of all outstanding charges.

4 (b) At any time before the settlement of the final account, the ~~community~~  
5 ~~trust, Community Third Party or Pooled Trust,~~ the Secretary of State, or the Attorney General  
6 may bring an action for the dissolution of a nonprofit corporation in the superior court for the  
7 purpose of terminating the trust or merging it with another charitable trust.

8 (c) No trustee or any private individual is entitled to share in the distribution of any of  
9 the trust assets upon dissolution, merger, or settlement of the Community Third Party or Pooled  
10 Trust. ~~community trust.~~ Upon dissolution, merger, or settlement, the superior court shall  
11 distribute all of the remaining net assets of the Community Third Party or Pooled Trust  
12 ~~community trust~~ in a manner that is consistent with the purposes of this ~~Article~~.Chapter.

13 **"§ 36D-12. Administrative rules.**

14 The Department shall adopt rules pursuant to Chapter 150B of the General Statutes  
15 governing the eligibility of beneficiaries for State medical assistance and State-County Special  
16 Assistance, and to supplement and expand upon the general requirements set forth in this  
17 Chapter, including, but not limited to, rules that may be more restrictive than the general  
18 requirements of this Chapter. With respect to Medicaid Pooled Trusts, a subaccount is  
19 irrevocable. The State shall be paid an amount up to the total medical assistance paid on behalf  
20 of the beneficiary by the Department from funds remaining in the individual trust subaccount  
21 upon the death of the beneficiary or termination of the trust as described in this Chapter. If the  
22 pooled trust is to be funded with the proceeds of a settlement of a lawsuit against a third party,  
23 the settlement proceeds are subject to the Department's subrogated rights of recovery as set  
24 forth in G.S. 108A-57, and all such subrogated rights of recovery shall be satisfied in full prior  
25 to execution and judicial approval of the trust, or both."

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