IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

PAUL RORICK,	:	APPEAL NO. C-090627 TRIAL NO. A-0900663
Plaintiff-Appellee,	:	
vs.	:	*D E C I S I O N.*
OHIO DEPARTMENT OF JOB AND FAMILY SERVICES,	:	
Defendant-Appellant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: November 19, 2010

Richard Cordray, Ohio Attorney General, *Mark W. Fowler*, and *William C. Greene*, Assistant Attorneys General, for Defendant-Appellant,

Donald C. Brey and *Elizabeth J. Watters*, for Plaintiff-Appellee.

Please note: This case has been removed from the accelerated calendar.

WILLIAM L. MALLORY JR., Judge.

{¶1} Defendant-appellant Ohio Department of Job and Family Services ("ODJFS") appeals from the judgment of the Hamilton County Court of Common Pleas reversing ODJFS's December 23, 2008, decision that plaintiff-appellee, Paul Rorick ("Rorick"), had improperly transferred community resources to his wife, Betty Rorick ("Betty"), in violation of the Ohio Administrative Code, for the primary purpose of becoming Medicaid-eligible and obtaining state funds for his nursing-home care. Finding no merit to ODJFS's challenges, we affirm the judgment of the trial court.

I. Statement of Facts and Procedural Posture

{¶2} Rorick was admitted to a nursing home on May 29, 2008, the "date of institutionalization." Betty was not institutionalized and remained living in the community.[1] At the time of his institutionalization, the combined resources of Rorick and Betty were approximately $74,224.61.[2] On July 21, 2008, Betty purchased for $14,562.55 an annuity that produced a monthly income for her benefit. On August 22, 2008, the "date of application," Rorick applied for Medicaid assistance for his nursing-home payments.

{¶3} At the time the Medicaid application was filed, the Hamilton County Department of Job and Family Services ("the County") conducted a "resource assessment" for the Rorick household to determine whether Rorick was entitled to Medicaid assistance. When a Medicaid applicant has a spouse living in the community, as Betty was, a resource assessment is conducted to determine the

[1] Throughout this decision, the term "institutionalized spouse" refers to Rorick, while the term "community spouse" refers to Betty.
[2] In its brief, ODJFS lists the Roricks' combined resources at the date of institutionalization as $74,274.61. This difference of $50 is immaterial to our discussion.

monetary amounts that will be allocated between the community spouse and the institutionalized spouse.[3] The assessment is made as of the date of institutionalization. "Resources" are defined as "cash, personal property, and real property an individual and/or the individual's spouse has an ownership interest in, has the legal ability to access in order to convert to cash (if not already cash), and is not legally prohibited from using for support and maintenance."[4] The amount allocated to the community spouse is known as the "community spouse resource allowance" ("CSRA").

{¶4} The County determined that the CSRA allocated to Betty was $37,137.30. The County further determined that Rorick was eligible for Medicaid assistance because the financial resources allocated to him were below the $1,500 limit needed to establish Medicaid eligibility.[5] But the County also determined that Betty's July 21, 2008, annuity purchase, paid for after the date of Rorick's institutionalization, constituted an "improper transfer of assets" made by the Roricks to reach the Medicaid eligibility limit.[6] Put another way, the County determined that Betty's purchase of the annuity for $14,562.55 was over and above her CSRA allocation of $37,137.30 and was made solely to reduce the collective assets of the Roricks that would typically be set aside for Rorick's nursing-home care. As a result, the County instituted a period of restricted coverage[7] and suspended Medicaid payments for Rorick's nursing-home care for a period of two and one-half months.

{¶5} Rorick appealed the County's suspension of Medicaid payments to the ODJFS's Bureau of State Hearings. On November 28, 2008, after a state hearing, an

[3] Ohio Adm.Code 5101:1-39-36.
[4] Ohio Adm.Code 5101:1-39-05(B)(10).
[5] Ohio Adm.Code 5101:1-39-05(B)(11)(a).
[6] See Ohio Adm.Code 5101:1-39-07(H).
[7] Ohio Adm.Code 5101:1-39-07(I)(1).

ODJFS hearing officer issued a decision denying Rorick's appeal. Rorick then requested an administrative appeal with the administrative-appeal section of the ODJFS. On December 23, 2008, the ODJFS issued an administrative appeal decision that affirmed the hearing officer's earlier decision.

{¶6} Pursuant to R.C. 119.12 and 5101.35(E), Rorick appealed the ODJFS's decisions to the Hamilton County Court of Common Pleas. The trial court reversed both the state hearing officer's decision and the administrative appeal decision, specifically ruling that ODJFS had erred in determining that Betty's purchase of the annuity was an improper transfer of assets. The court also concluded that ODJFS had erred in treating the annuity as a countable resource, that ODJFS had erred in imposing a period of restricted Medicaid coverage, and that ODJFS's findings were in violation of federal Medicaid law. In this appeal, ODJFS now asserts in its two assignments of error that the trial court erred in determining that Betty's purchase of the annuity was not an improper transfer of assets and in determining that ODJFS's imposition of restricted Medicaid coverage violated federal law.

{¶7} R.C. 119.12, states, "The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law." Appellate review of the trial court's decision is limited to an abuse-of-discretion standard.[8]

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[8] *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, 897 N.E.2d 1097, ¶41, citing *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 590 N.E.2d 1240.

II. ODJFS's Motion to Remand

{¶8} As a preliminary matter, we first address ODJFS's April 13, 2010, motion to remand. In its motion, ODJFS alleges that Rorick died on March 4, 2009. In a subsequent supplemental motion, ODJFS has submitted what appears to be Rorick's death certificate, which verifies the March 4, 2009, date of death. We note that Rorick's death took place over two months prior to the May 19, 2009, filing of the brief in his appeal in the trial court. A review of the record indicates that there was no notification of death filed on behalf of Rorick, and no substitution of parties was made in the trial court. Because Rorick allegedly died prior to the disposition of the administrative appeal, and because no party was substituted for him, ODJFS argues that the trial court lacked jurisdiction to decide the appeal before it as of March 4, 2009.

{¶9} It is well established that a deceased individual cannot be a party to an action.[9] However, it is also well established that our review of a trial court's proceedings is limited to the record before the trial court, and materials submitted directly to the appellate court cannot be added to the record on appeal.[10] The record before us contains no mention of Rorick's death. Therefore, ODJFS's motion to vacate and remand is denied.[11]

III. Betty's Annuity Purchase and State Law

{¶10} In its first assignment of error, ODJFS alleges that the trial court erred in interpreting Ohio Adm.Code 5101:1-39-07 when it found that Betty's annuity purchase was not an improper transfer of assets and that, therefore, ODJFS could

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[9] *Baker v. McKnight* (1983), 4 Ohio St.3d 125, 127, 447 N.E.2d 104.
[10] *Lamar v. Marbury* (1982), 69 Ohio St.2d 274, 277, 431 N.E.2d 1028, citing App.R. 12(A) and App.R. 9(A).
[11] See *Jones v. The Goodyear Tire and Rubber Co.*, 9th Dist. No. 21724, 2004-Ohio-2821, at ¶10 (remanded on other grounds).

not impose the period of restricted coverage. Specifically, ODJFS asserts that Ohio Adm.Code 5101:1-39-07 expressly requires it to treat the community spouse's use of resources above the CSRA limit as an improper transfer and to impose the period of restricted coverage. In addition, ODJFS argues that Ohio's "Annuity Rule,"[12] which specifies how an annuity must be structured to be considered a proper transfer, only applies to annuities purchased by the institutionalized spouse. Further, ODJFS argues that the trial court erred because it mistakenly believed that the County treated Betty's annuity as a countable resource, when in fact the County properly treated the annuity as an improper transfer.

{¶11} The annuity purchased by Betty was a "single premium immediate annuity" from the Shenandoah Life Insurance Company. The purchase contract provided a monthly payment to Betty of $136.22 for 120 months. Rorick was the primary beneficiary and the state of Ohio was the irrevocable secondary beneficiary. The annuity policy was not eligible for surrender or assignment, and the amount and frequency of the payments were fixed. With the exception of ODJFS's argument that the Annuity Rule does not apply to community spouses, both parties concede that the annuity purchased by Betty complied with the provisions of Ohio Adm.Code 5101:1-39-22.8 in all ways. In determining whether Betty's annuity purchase was an improper transfer, we are guided by the Tenth Appellate District's recent decision in *Vieth v. Ohio Dept. of Job & Family Servs.*[13]

{¶12} The facts of this case and *Vieth* are quite similar. In *Vieth*, the institutionalized spouse was admitted to a medical institution, and two months later the community spouse purchased two annuities. These annuities, like Betty's

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[12] Ohio Adm.Code 5101:1-39-22.8.
[13] *Vieth v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 08AP-635, 2009-Ohio-3748.

annuity, fully complied with Ohio Adm.Code 5101:1-39-22.8. The institutionalized spouse then applied for Medicaid benefits. The Franklin County Department of Job and Family Services conducted a resource assessment and determined that the community spouse's annuity purchase resulted in an improper transfer of assets, and the agency denied the institutionalized spouse's application for benefits. The decision was upheld throughout the agency's appeal process. The institutionalized spouse then appealed to the Franklin County Court of Common Pleas, which affirmed the agency's decision and dismissed the appeal.

{¶13} The Tenth Appellate District reversed the decision of the trial court, holding that the purchase of the two annuities did not constitute an improper transfer of assets.[14] The appellate court determined that the annuities in question fully complied with the provisions of Ohio Adm.Code 5101:1-39-22.8, and that they were "not countable resources for Medicaid eligibility purposes."[15] ODJFS, which did not argue that the community spouse was not entitled to the benefits of Ohio Adm.Code 5101:1-39-22.8, did not appeal the decision in *Vieth*.

{¶14} ODJFS attempts to distinguish *Vieth* by citing *McNamara v. Ohio Dept. of Human Servs.*[16] In *McNamara*, the institutionalized spouse entered a medical-care facility on October 5, 1997. Before applying for Medicaid benefits, the community spouse created an irrevocable trust, transferring a substantial portion of the couple's assets into the trust. The community spouse was to receive monthly income from the trust, as well as five annual payments from the trust's corpus. The institutionalized spouse was to receive no benefit from the trust. After the creation of the trust, the institutionalized spouse applied for Medicaid benefits.

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[14] Id. at ¶34.
[15] Id.
[16] (2000), 139 Ohio App.3d 551, 744 N.E.2d 1216.

{¶15} The agency determined that the creation of the trust was an improper transfer of assets and suspended payments for the institutionalized spouse's nursing-home care for a period of 30 months. The decision was eventually upheld by the common pleas court and affirmed by the Second Appellate District, which held that the transfer of assets into the trust was above the CSRA.[17] The court stated that because an annuity is typically purchased from an institution, such as a bank or an insurance company, it is properly considered a commodity. Therefore, unlike a trust, the buyer no longer owns the funds used to purchase an annuity. Because of this fundamental difference between an annuity and a trust, the Second Appellate District declined to treat the irrevocable trust as an annuity, which would have allowed the trust to be treated favorably under Ohio Adm.Code 5101:1-39-22.8.[18]

{¶16} We find the reasoning in *Vieth* to be applicable in this case. We hold that the annuity purchased by Betty was not an improper transfer of assets. Just as in *Vieth*, it is not disputed here that the annuity Betty purchased complied with Ohio Adm.Code 5101:1-39-22.8 in that it was a commercial annuity that was actuarially sound, irrevocable, nonassignable, without cash value, and that named the state as a remainder beneficiary. We find, as did the *Vieth* court in an entirely similar situation, that *McNamara* is distinguishable in that the trust established in *McNamara* was not a commercial annuity comparable to that purchased by Betty, and was not governed by the provisions of Ohio Adm.Code 5101:1-39-22.8.[19] In addition, *McNamara* was decided prior to the enactment of the Deficit Reduction Act of 2005, discussed infra. With the exception of *McNamara*, ODJFS cites no authority other than its own interpretation of the Ohio Administrative Code to

[17] Id. at 557.
[18] Id. at 558-559.
[19] See *Vieth*, supra, at ¶¶44-45.

demonstrate that Betty's annuity purchase was an improper transfer of assets. With the exception of whether the community spouse or the institutionalized spouse is entitled to purchase the annuity, an exception based upon its own interpretation of the administrative code, ODJFS has admitted that the annuity purchased by Betty complied with Ohio Adm.Code 5101:1-39-22.8. Therefore, we cannot say that the trial court abused its discretion when it determined that ODJFS erred in treating the annuity purchase as an improper transfer of assets. We accordingly overrule ODJFS's first assignment of error.

IV. Betty's Annuity Purchase and Federal Law

{¶17} In its second assignment of error, ODJFS argues that the trial court erred when it found that ODJFS's imposition of restricted coverage violated federal law. Specifically, ODJFS asserts that the Ohio Administrative Code provisions mirror federal Medicaid law regarding spousal resource allocation, calculation of the CSRA, and limitation of transfers above the CSRA limit. ODJFS also argues that the federal rules regarding annuities, like Ohio's Annuity Rule, do not apply to the community spouse.

{¶18} By way of background, in 1988 Congress enacted Section 1396r-5, Title 42, U.S. Code, a part of the "Medicaid Catastrophic Coverage Act" ("MCCA"). This particular section of the MCCA covered the treatment and resources of institutionalized spouses. Prior to the passage of Section 1396r-5, a married couple was treated as one economic unit for the purposes of Medicaid qualification. An institutionalized spouse was expected to "spend down" his or her resources, often to the economic detriment of the community spouse, before being qualified to receive Medicaid benefits. The passage of Section 1396r-5 "was designed, in part, to prevent

the impoverishment of one spouse when the other enters a nursing home."[20] The MCCA permitted a community spouse to reserve certain income and allowances that are not calculated in determining the institutionalized spouse's Medicaid eligibility. The CSRA established by the MCCA does not include the community spouse's income.[21]

{¶19} In addition, on February 8, 2006, as part of the "Deficit Reduction Act of 2005" ("DRA"), Congress enacted Section 1396p, Title 42, U.S. Code. This section of the DRA established that annuity purchases should be treated as improper transfers, unless the annuities are irrevocable, nonassignable, and actuarially sound with payments distributed in equal monthly amounts, are purchased with retirement or IRA funds, and name the state as either the primary or the remainder beneficiary.[22] Ohio's Annuity Rule, set forth in Ohio Adm.Code 5101:1-39-22.8, is modeled after Section 1396p.

{¶20} In our analysis, we are primarily guided by two federal court cases, *James v. Richman*[23] and *Weatherbee v. Richman*.[24]

{¶21} In *James* the community spouse purchased an irrevocable and nonassignable commercial annuity for $250,000. The payment period was for eight years, with monthly payments to the community spouse of $2,937.71. The purchase was made after the institutionalized spouse had been admitted to a health-care facility, but prior to the institutionalized spouse applying for Medicaid benefits. The state rejected the applicant's request for benefits, determining that the resource allocation was above the predetermined limit.

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[20] *Martin v. Ohio Dept. of Human Servs.* (1998), 130 Ohio App.3d 512, 518, 720 N.E.2d 576.
[21] Section 1396r-5(b)(1), Title 42, U.S. Code.
[22] Section 1396p(c)(1), Title 42, U.S. Code.
[23] (C.A.3, 2008), 547 F.3d 214.
[24] (W.D.Pa.2009), 595 F.Supp.2d 607, affirmed (Nov. 12, 2009), C.A.3 No. 09-1399.

{¶22} In *James*, the Third Circuit Court of Appeals held that the state could not use a methodology in evaluating a Medicaid applicant's income and resources that was more restrictive than that used by the federal Supplemental Security Income ("SSI") Program.[25] The annuity could not be treated as a countable resource because, similar to the SSI guidelines, the community spouse did not have the power to assign her annuity or otherwise change her ownership in it without incurring legal liability.[26] Addressing the argument that such a holding would undermine the purpose of Medicaid, the appellate court responded that "[w]e simply cannot allow a denial of eligibility if there is no statutory justification for that denial. Such justification is lacking here."[27]

{¶23} In *Weatherbee*, the community spouse purchased an irrevocable and nonassignable commercial annuity for $387,756.06. The payment period was for 107 months, with monthly payments to the community spouse of $4,423.47. Like the annuity purchased in *James*, the purchase was made after the institutionalized spouse had been admitted to a health-care facility, but prior to the institutionalized spouse applying for Medicaid benefits. The state rejected the institutionalized spouse's request for benefits, determining that the annuity and the income stream it produced were available resources.[28]

{¶24} In *Weatherbee*, the federal district court relied primarily on the analysis in *James* and determined that treating the annuity and its income stream as a countable resource would contravene the MCCA.[29] The court then held that the institutionalized spouse had incorrectly been denied benefits based upon the annuity

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[25] *James*, supra, at 218.
[26] Id.
[27] Id. at 219 (footnote omitted).
[28] *Weatherbee*, supra, at 609.
[29] Id. at 613.

purchase and the corresponding income stream.[30] In affirming the district court's decision, the Third Circuit Court of Appeals stated, "[I]t is clear that the community spouse gave up a 'resource' in exchange for a guaranteed 'income,' as it is defined in 42 U.S.C. §1382a(a)(2)(B)."[31]

{¶25} We hold that the trial court did not err when it found that ODJFS's treatment of Betty's annuity purchase violated the MCCA and federal Medicaid law. Based on the holdings in *James* and *Weatherbee*, we are convinced that the annuity Betty purchased fully complied with federal Medicaid laws in that it was irrevocable, nonassignable, and actuarially sound with payments distributed in equal monthly amounts. Betty's annuity was purchased with retirement and/or IRA funds, and it named the state as either the primary or the remainder beneficiary. In other words, it fully complied with the federal Annuity Rule as set forth in Section 1396p, Title 42, U.S. Code. As in *James*, there is no statutory justification for ODJFS's two-and-one-half-month denial of Medicaid benefits to Rorick, and as in *Weatherbee*, it is clear that Betty sacrificed a "resource" to be guaranteed an "income" that is not subject to countable-asset consideration. The trial court did not abuse its discretion when it determined that ODJFS violated the MCCA and federal Medicaid law when it instituted a period of restricted coverage for Rorick. ODJFS's second assignment of error is overruled.

V. Conclusion

{¶26} Finally, we note that the trial court specifically found that ODJFS had treated the annuity purchased by Betty as a countable resource. However, we have reviewed the ODJFS decisions on November 28, 2008, and December 23, 2008, and

[30] Id. at 618.
[31] *Weatherbee v. Richman*, supra, C.A.3 No. 09-1399.

we note that ODJFS never specifically determined that the annuity in question was considered a countable resource. The two decisions specifically focused on the purchase of the annuity itself. We therefore conclude that the trial court abused its discretion when it found that ODJFS had treated the annuity as a countable resource; however, having previously determined that the annuity purchase did not constitute an improper transfer, we acknowledge that this is immaterial to the outcome of this case.

{¶27} We affirm the judgment of the trial court.

Judgment affirmed.

HILDEBRANDT, J., concurs.
CUNNINGHAM, P.J., concurs in judgment only.

Please Note:

The court has recorded its own entry this date.