

IN THE SUPREME COURT OF OHIO

LORETTA PACK, TRUSTEE OF THE
MAEBELLE W. OSBORN TRUST
Plaintiff-Appellee,

v.

CHARLOTTE OSBORNE
Defendant-Appellee
and

LICKING COUNTY DEPARTMENT OF
JOB AND FAMILY SERVICES,
Defendant-Appellant.

Discretionary Appeal
Case No. 2006-1207
Certified Conflict
Case No. 2006-1343

On Appeal from the
Licking County Court
of Appeals, Fifth
Appellate District

Court of Appeals
Case No. 05-CA-83

REPLY BRIEF OF DEFENDANT-APPELLANT
LICKING COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES

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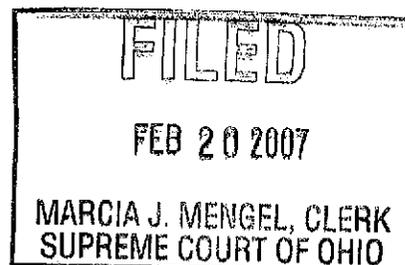
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ARGUMENT

This issue on appeal to this court concerned whether or not the rules for Medicaid eligibility are those in effect at the time an application and/or eligibility review is commenced for Medicaid and not those in effect at the time of the creation of an inter vivos trust. However, because this case began as a declaratory judgment action in the court of common pleas in Licking County there are concerns about the erosion of the Chapter 119 appeals process pertaining to Medicaid eligibility.

In this case the Plaintiff/Appellee and Amicus Curiae are attempting to avoid the entire Medicaid eligibility process and thus avoid the rules that determine eligibility by indicating to the court that a declaratory judgment action is proper.¹ Defendant/Appellant submits to this court that the declaratory judgment action is not proper for several reasons and therefore the rules in effect at the time an application for Medicaid benefits is filed should control and a determination by the Licking County Department of Job and Family Services (hereinafter referred to as "LCDJFS") and the administrative process should be allowed to work without interference from the courts.

Plaintiff/Appellee has waived her arguments that pertain to the reason for filing the declaratory judgment action because this is the first time such arguments were made. The arguments that the declaratory judgment action was brought to determine the rights of the parties and to assist Loretta Pack in the administration of the trust and to compel distribution of trust assets under Ohio Revised Code §5111.151(G)(4)(e) were raised for the first time to this court.² It was never raised in the Fifth District below. In addition, to include the trust code at this late date, is also improper considering the rules were only effective January 1, 2007. The

¹ See, Merit Brief of Plaintiff/Appellee Loretta Pack filed January 31, 2007 at page 7 and Amicus brief filed February 1, 2007 at page 18

² See, Merit Brief of Plaintiff/Appellee Loretta Pack filed January 31, 2007 at page 7

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Plaintiff/Appellee is arguing for rules in effect when the trust was created but also would like to apply rules that are current and recently enacted to stand for the notion that a declaratory judgment action can be used to avoid the administrative process.

By using a declaratory judgment action to declare that a trust is a countable resource, which is the original argument of Plaintiff/Appellee³ and the issue that was argued in the court below, the intent is to bypass the Section 119 appeals process. *See, George v. Ohio Dept. of Human Svcs., 2005 WL 1109658 (Ohio App. 10 Dist.) (unreported)* (This is a case where a claim for damages was filed that alleged that ODHS improperly applies Ohio law, which resulted in erroneous determinations that the plaintiff-institutionalized spouses were ineligible for Medicaid benefits). Such a declaratory judgment action would essentially attempt to bind the LCDJFS to a decision on whether a trust should be a countable resource without such a question making its way through the appeals process. The declaratory judgment action essentially legally binds the LCDJFS when they are not a party to the trust instrument. This is the reverse of the argument that Plaintiff/Appellee is trying to make when she states that the trustee is not bound by the administrative decision of a Section 119 appeal.

Plaintiff/Appellee contends that the appeals process would not be affected. This is completely wrong. By using the courts to declare that the trust is not a countable resource takes the Medicaid eligibility determination out of the hands of those who made the rules and puts such a determination straight into the court system where it does not belong prior to a review by an administrative agency.

³ See, Complaint for Declaratory Judgment and Reformation of Trust filed in the Licking County Court of Common Pleas on May 7, 2004, paragraph 21.

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When Medicaid eligibility is determined and it involves a trust, it is a two-step process. The county departments must first ascertain what type of trust they are dealing with and then determine whether that trust is a countable resource.

- I. **Plaintiff/Appellee has waived the following arguments: (1) that the declaratory judgment action was initiated to satisfy Ohio Revised Code Section 5111.151(G)(4)(e) and it is for the purpose of obtaining direction on the administration of the trust, (2) that the Trust code is applicable to the current litigation and (3) that the Maebelle W. Osborn Trust satisfies 5111.151(G)(4)(b)**

Plaintiff/Appellee argues that the trustee has both the right and obligation to seek a declaratory judgment action under Ohio Revised Code §2101.24(B)(1)(b) and as recognized by Ohio Revised Code §5111.151(G)(4)(e). This argument has been raised for the first time in this court. It was never raised in the court of appeals or for that matter at any time previous. In essence, Plaintiff/Appellee is arguing now that she brought the declaratory judgment action to help her administer the trust in accordance with the grantor's or settlor's intent when the original action and argument in the court of appeals was to declare the trust a countable resource being consistent with Ohio Revised Code §5111.151. The action was not initiated to declare that a portion of the trust is unavailable as stated in Ohio Revised Code §5111.151(G)(4)(e).

Issues not raised in the Court of Appeals are waived and will not be considered by the Supreme Court. See Wireman v. Keneco Distributors, Inc. (1996), 75 Ohio St.3d 103, 108.

"[I]n an appeal on questions of law [the Supreme Court] will not consider and determine errors which were not raised and preserved in the court from which an appeal is properly taken." State ex rel. Babcock v. Perkins (1956), 165 Ohio St. 185, 189.

The argument that Ohio Revised Code §5111.151(G)(4)(e) authorizes a declaratory judgment action has been waived because it brought up for the first time in this Court and was

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never addressed in the Fifth District. The same argument would apply to the introduction of the Trust Code at this late stage. In addition, the Plaintiff/Appellee now argues that her trust complies with Ohio Revised Code Section 5111.151(G)(4)(b) when in the original complaint she asserts that the language complies with Ohio Revised Code §5111.151(G)(4)(a).⁴ This argument is also waived because it was not presented to the Fifth District Court of Appeals.

Even if these arguments were not waived, the courts cannot determine under 5111.151, without administrative review, that the trust is a countable resource. The Plaintiff/Appellee in this case is confusing the issue. On one hand, she is asking for interpretation of a trust, which is an issue that requires different standards, applicable law and possibly court intervention. Then she is asking for a determination of whether the trust is a countable resource. This would not require court intervention but requires the application of the rules in effect at the time an application is filed by the appropriate agency that created those rules. The applicant and his or her representative, contrary to Plaintiff/Appellee's assertion, is required to take advantage of the appeals process afforded to them if there is a disagreement as to the Medicaid determination.

See, generally, George v. Ohio Dept. of Human Serv., 2005 WL 1109658 (Ohio App. 10 Dist.) (unreported), Morris v. Morris 2004 WL 2588108 (Ohio App. 2 Dist) (unreported), O.A.C. 5101:6-8-01 and O.R.C. §5101.35

The director of Job and Family Services is required to adopt rules establishing Medicaid eligibility requirements. **O.R.C. §5111.011(A)**. These standards are used to determine eligibility for Medicaid notwithstanding any provision of State law (including statutes, administrative rules, common law, and court rules) regarding real or personal property or domestic relations. **O.R.C. §5111.011(B)**. The Ohio Department of Job and Family Services, for the purposes of this case,

⁴ See, Complaint for Declaratory Judgment and Reformation of Trust filed in the Licking County Court of Common Pleas on May 7, 2004, paragraph 18.

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has established these rules under Ohio Administrative Code §5101:1-39 et seq. The General Assembly has codified some of those provisions regarding trust agreements in Ohio Revised Code Section 5111.151. Both of these sections assist each individual county department of job and family services in the administration of the Medicaid program. Section 5111.151(C)⁵ even states that the county department must treat the trust presented to them in accordance with the Revised Code. That section states:

If an applicant or recipient is a beneficiary of a trust, the county department of job and family services shall determine what type of trust it is and shall treat the trust in accordance with the appropriate provisions of this section and rules adopted by the department of job and family services governing trusts.

Therefore, to use Ohio Revised Code §5111.151(G)(4)(e) to say that a declaratory judgment is a proper vehicle that can be used to determine that the trust is a countable resource ignores the purpose for which the statute was enacted. If the General Assembly wished for this rule to be used in the interpretation of a trust, they would have put it in the Trust Code.

Defendant/Appellant submits to this court that 5111.151(G)(4)(e) speaks to obtaining a judgment in the form of a motion to compel distribution of trust assets that has failed or, as Plaintiff/Appellee stated in her merit brief⁶, that the other beneficiaries brought an injunction action after Medicaid eligibility has been determined to enjoin the trustee from making payments on behalf of Charlotte Osborne and won such a case. This case is neither a motion to compel distribution nor is it an injunction. Such a case would look completely different than the one presented to this Court. The determination in a declaratory judgment action that the trust is a

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⁵ The provisions of Ohio Revised Code Section 5111.151 that are being cited are those in effect that this litigation arose and when the application was filed. It has been subsequently amended since this litigation arose one amendment is effective March 30, 2006 in Am. Sub. HB 530 and one amendment effective January 1, 2007 in Sub. HB 416.

⁶ See, Merit Brief of Plaintiff/Appellee Loretta Pack filed January 31, 2007 at pages 10 and 11

countable resource is a Medicaid eligibility determination and not a determination of the trustee's fiduciary responsibilities.

II. The County Department of Job and Family Services cannot be bound by a decision in a declaratory judgment action not properly before the court when the purpose of such a declaratory judgment action as submitted by Plaintiff/Appellee is to determine the fiduciary duties of the trustee

The Plaintiff/Appellee in this case argues that she cannot be bound by a decision of the Defendant/Appellant and the Ohio Department of Job and Family Services because she is not a party to the application for Medicaid benefits.⁷ In addition, she argues that she has competing interests that must be sorted out by the courts and not Defendant/Appellant. Plaintiff/Appellee submits to this court that it cannot be bound by a decision of the court in a declaratory judgment action that would determine the fiduciary's responsibilities to the beneficiary. The only question the fiduciary has in this case is whether she is required to provide and expend funds for the benefit of Charlotte Osborn. The question has nothing to do with whether the Defendant/Appellant can make a determination of whether the trust is a countable resource and whether Charlotte Osborne is eligible for Medicaid. Whether an individual is eligible for Medicaid is a question that should be answered by the administrative agency prior to being presented to the court of common pleas or any subsequent court. The LCDJFS cannot be bound by the decision arrived at in the declaratory judgment action because the administrative appeals process has not been completed by the State administrative agency.

If this was a case filed to obtain a judgment to declare that some, or all, of the trust corpus is off limits then that case should have been brought by Charlotte Osborne against Loretta Pack and not the reverse. If the declaratory judgment action was properly before the court as

⁷ See, Merit Brief of Plaintiff/Appellee Loretta Pack filed January 31, 2007 at page 10

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indicated above, then the agency would be bound by such a decision under Ohio Revised Code §5111.151(G)(4)(e). However, this is not the case.

Plaintiff/Appellee states that a decision by ODJFS would not protect her from suit by another beneficiary. This is not something the Defendant/Appellant must review and determine when making Medicaid eligibility determinations and is not required to under applicable regulations.

III. This court should apply the Medicaid eligibility rules in effect at the time an application and/or eligibility review is commenced and not those in effect at the time of the creation of an inter vivos trust.

The original action began as a declaratory judgment action asking the court to determine if the Maebelle W. Osborn Trust should be counted as an available resource for Medicaid eligibility purposes. This is not a trust interpretation question. Therefore, the rules in effect at the time that the application for Medicaid benefits was filed should control.

When applying those rules, the court must first look to Ohio Administrative Code Section 5101:1-39-27.1, where there are five categories of trusts with specific criteria corresponding to each type. Applying the criteria that most resembles the trust in question, the Trust Agreement executed by Maebelle W. Osborn can be listed under category four. **OAC §5101:1-39-27.1(C)(4)**. This type of trust is a trust established by someone else, such as a parent or relative, for the benefit of the applicant or recipient of Medicaid benefits. The criteria does not establish this trust to be a special needs trust because the state does not receive payments of the amounts remaining in the trust upon the death of the beneficiary.

As stated in the rule, as well as Ohio Revised Code §5111.151, the Maebelle W.

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Osborn Trust cannot be found exempt from being counted as an available resource even if the trust contains any of the following types of provisions:

- (i) Any provision that prohibits the trustee from making payments that would supplant or replace Medicaid or public assistance, or other government assistance;
- (ii) Any provision that prohibits the trustee from making payments that would impact or have an effect on the applicant/recipient's right or ability or opportunity to receive Medicaid, or public assistance, or other government assistance.
- (iii) Any provision that attempts to prevent the trust or its corpus or principal from being counted as an available resource under this rule.

As stated above, the trust document provides for the distribution of principal and income to Charlotte Osborn at the discretion of the trustee. In addition, if Charlotte Osborn dies, the trust will terminate and whatever is left of the trust principal and income will be distributed to the remaindermen.

The Defendant/Appellant has examined all the criteria that could possibly make the trust exempt from being counted as an available resource. The Defendant/Appellant has determined that there have been no clear statements made requiring the trustee to preserve a portion of the trust for other beneficiaries as required by OAC 5101:1-39-27.1. In fact, the trust terminates upon the death of Charlotte Osborn and whatever is left is given to the remaindermen, this shows that the settlor of the trust expected the trust to be dissipated in favor of Charlotte Osborn. This cannot be considered a clear statement preserving a portion of the trust for the remaindermen as required by Ohio Administrative Code §5101:1-39-27.1(C)(4)(c)(i). In addition, there are no clear statements made limiting the discretion of the trustee to make distributions over and above Charlotte Osborn's general well-being as provided for in Ohio Administrative Code §5101:1-39-

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27.1(C)(4)(c)(ii). The Trust merely states that the intent of the settlor was to provide for those items that are above and beyond food, clothing, and shelter. There is no statement limiting the Trustee from spending the principal and income of the trust for medical care and the general well being of Charlotte Osborn. The trust makes general statements granting the trustee's discretion. These statements do not prevent the trust from being a countable resource as the Licking County Department of Job and Family Services is required to ignore such a general statement per the rule.

It has been established that The Maebelle W. Osborn Trust is considered a countable resource for purposes of the eligibility of Charlotte Osborn for Medicaid benefits. This, in turn, has the resources of Charlotte Osborn exceeding the \$1500 maximum limit. Based on the foregoing, Charlotte Osborn is not entitled to receive Medicaid benefits for her medical care. The Defendant/Appellant correctly determined that the Maebelle W. Osborn Trust is a countable resource for Medicaid eligibility purposes.

CONCLUSION

The rules in effect at the time of an application and/or eligibility review for Medicaid should apply to determine if a trust should be counted as an available resource. Those rules do not include in them a requirement that a declaratory judgment action be filed to make such a determination. Therefore, the Maebelle W. Osborn Trust should be counted as an available resource for Medicaid eligibility purposes.

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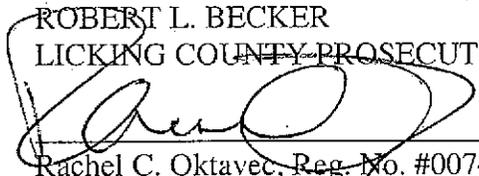
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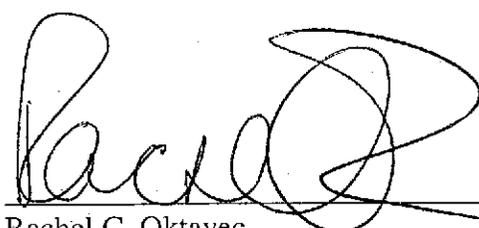


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Briefs and Other Related Documents

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 10 Dist., 2005.

CHECK OHIO SUPREME COURT RULES FOR
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 LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin
 County.

Evelyn GEORGE, Executrix, Etc.,
 Plaintiffs-Appellants, (Cross-Appellees),

v.

OHIO DEPARTMENT OF HUMAN SERVICES,
 Defendant-Appellee, (Cross-Appellant).

No. 04AP-351.

May 10, 2005.

Appeal from the Court of Claims of Ohio.

Graham, McClelland & Ransbottom, and Gary M.
 Smith; Browning & Meyer, and William J.
 Browning, for appellants.

Jim Petro, Attorney General, Peggy W. Corn and
 Velda K. Hofacker Carr, for appellee.

OPINION

KLATT, I.

*1 {¶ 1} Plaintiff-appellant, Evelyn George, on
 behalf of herself and the plaintiff class members,
 appeals from the judgment of the Court of Claims
 of Ohio in favor of defendant-appellee, the Ohio
 Department of Human Services ("ODHS").^{FN1}
 Because the Court of Claims lacked subject-matter
 jurisdiction over this case, we reverse.

FN1. This department is now known as the
 Ohio Department of Job and Family
 Services. However, because plaintiffs
 named the Ohio Department of Human
 Services as the defendant in this action, we
 will refer to it by that name.

*1 {¶ 2} At the heart of this case is plaintiffs'
 claim that the ODHS improperly denied them
 Medicaid benefits, thus forcing them to pay for
 nursing care out of their own assets. Plaintiffs assert
 that this denial of benefits resulted from the ODHS'
 disregard for the Ohio Administrative Code
 provisions enacted to implement the Medicare
 Catastrophic Coverage Act of 1988 ("MCCA"),
 Section 1396r-5, Title 42, U.S.Code, a part of the
 federal Medicaid statute.

*1 {¶ 3} The federal Medicaid program enables
 states to reimburse needy individuals for medical
 services they cannot afford. See Title XIX of the
 Social Security Act, Section 1396 et seq., Title 42,
 U.S.Code. In Ohio, the ODHS is responsible for
 administering the Medicaid program. R.C. 5111.01.

*1 {¶ 4} As part of the Medicaid program, married
 couples living in Ohio can apply to the ODHS for
 financial assistance when one spouse is
 institutionalized in a nursing facility. However, that
 institutionalized spouse is only eligible for
 Medicaid coverage if the couple's assets do not
 exceed proscribed limits. In 1988, Congress enacted
 the MCCA to establish a revised methodology for
 evaluating the amount of assets a couple could have
 and still be eligible for Medicaid benefits. Before
 the enactment of the MCCA, a spouse living at
 home (the "community spouse") was often left
 destitute by the drain on the couple's assets
 necessary for the institutionalized spouse to qualify
 for Medicaid. In enacting the MCCA, Congress
 intended to protect the community spouse from
 impoverishment by preserving some of the couple's
 income and resources for the community spouse's
 use.

*1 {¶ 5} After the MCCA became effective, the
 Ohio General Assembly directed the ODHS to "
 establish standards consistent with federal law for
 allocating income and * * * resources" of an
 institutionalized spouse who applied for Medicaid
 benefits and his ^{FN2} spouse. R.C. 5111.011(F) (as

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enacted by Am.Sub.H.B. No. 672, effective Nov. 14, 1989). In response to this directive, the ODHS promulgated Ohio Adm.Code 5101:1-39-22 through 5101:1-39-222 to address the allocation and transfer of income and Ohio Adm.Code 5101:1-39-35 through 5101:1-39-362 to address the allocation and transfer of resources. Originally filed as emergency rules, these provisions took effect on January 1, 1990, and were later readopted by the ODHS pursuant to normal R.C. 111.15 procedure effective March 1, 1990. Id., 1989-1990 Ohio Monthly Record, 1166-1168, 1171-1172.

FN2. Because the institutionalized spouse was most often the husband and the community spouse most often the wife, we will refer to the institutionalized spouse as "he" and the community spouse as "she."

*1 {¶ 6} Pursuant to these provisions, an institutionalized spouse's eligibility for Medicaid benefits turned upon the amount of his resources. When an institutionalized spouse applied for Medicaid, the county department of human services caseworker first completed Form 4076, "Resource Assessment Worksheet," which required the caseworker to list the value of each countable resource the couple owned and total the amount of the resources. Ohio Adm.Code 5101:1-39-35(A).

*2 {¶ 7} The caseworker next completed Form 4077, "Resource Transfer Worksheet," to determine how much of the couple's total resources could be transferred to the community spouse. Ohio Adm.Code 5101:1-39-361(A). In completing Form 4077, the caseworker first calculated the community spouse's resource allowance ("CSRA")-the amount of the couple's total countable resources preserved for the community spouse's use. Ohio Adm.Code 5101:1-39-361(A)(3). The caseworker then subtracted the CSRA from the couple's total countable resources. Ohio Adm.Code 5101:1-39-361(A)(4). The remaining sum was the institutionalized spouse's resources. If the amount of the institutionalized spouse's resources was equal to or less than \$1,500, the institutionalized spouse was eligible for Medicaid benefits. Id. If the amount of the institutionalized spouse's resources exceeded

\$1,500, the institutionalized spouse was not eligible for Medicaid benefits and the caseworker sent the institutionalized spouse a "Notice of Denial of Your Application for Assistance." Id. This notice stated:

*2 You have countable resources as specified on the attached ODHS 4076 "Resource Assessment Worksheet." It has been determined that you are over resources at this time. When your resources are reduced to approximately \$ _____, you should reapply for Medicaid.

*2 Id. Thus, in order to be eligible for Medicaid benefits, the institutionalized spouse was forced to "spend down" his resources to the specified amount.

*2 {¶ 8} Whether or not the amount of the institutionalized spouse's resources qualified him for Medicaid benefits, the caseworker next determined the amount of income the community spouse needed to live in her home and how much of that income could come from the institutionalized spouse. To do this, the caseworker completed Form 4078, "Monthly Income Allowance Computation Worksheet." This worksheet first required the caseworker to calculate the community spouse's minimum monthly maintenance needs allowance ("MMMNA") by combining the MMMNA need standard (set by the ODHS) with an excess shelter allowance. Ohio Adm.Code 5101:1-39-221(D)(1). The MMMNA represented the amount of income that the ODHS estimated a community spouse would need to meet her necessary monthly expenses.

*2 {¶ 9} Second, the caseworker subtracted the community spouse's monthly income from the MMMNA. Ohio Adm.Code 5101:1-39-221(D). The resulting number was the community spouse's monthly income allowance ("MIA")-the amount of income the institutionalized spouse could transfer from his income to the community spouse. Ohio Adm.Code 5101:1-39-221(A). The ODHS did not consider the MIA available to pay for the institutionalized spouse's care, thus requiring Medicaid to pay a greater portion of the institutionalized spouse's medical expenses than it would absent the MIA provision.

*2 {¶ 10} Each worksheet the caseworker completed contained on its reverse side a notice that

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the Medicaid applicant could request a state hearing to review the caseworker's resource and income determinations. In addition to reviewing the caseworker's determinations, a hearing officer could also alter the caseworker's calculations in certain ways. Specifically, Ohio Adm.Code 5101:1-35-73(D) (effective March 22, 1990), and its identical successor, Ohio Adm.Code 5101:1-6-7-02(A)(4) (effective June 1, 1993), provided that:

*3 If either the [institutionalized spouse] or the [community spouse] can document that the [community spouse] resource allowance (in relation to the amount of income generated by it) is inadequate to raise the [community spouse's] income to the MMMNA, a hearing decision may substitute a higher resource allowance to provide additional income as necessary.

*3 {¶ 11} In applying this provision, the ODHS adopted an income-first policy whereby the ODHS required the hearing officer to first transfer an institutionalized spouse's *income* (the MIA) to the community spouse to raise the community spouse's income to the MMMNA. If this transfer of income was insufficient to raise the community spouse's income to the MMMNA, then the hearing officer could also transfer some or all of the institutionalized spouse's resources so that the community spouse's income met the MMMNA. FN3 In other words, the ODHS only permitted the transfer of the institutionalized spouse's resources to the community spouse if the community spouse's income (including that part of the community spouse's income generated by her resources), plus the income of the institutionalized spouse (the MIA), did not equal the MMMNA. Under this approach, it was less likely that resources would be transferred, which in turn, left the institutionalized spouse with more available resources and made it less likely that the institutionalized spouse would qualify for Medicaid benefits.

FN3. Income generated from the institutionalized spouse's resources would increase the community spouse's income.

*3 {¶ 12} On November 27, 1995, Herman F. Seymour filed suit against the ODHS in the Court of Claims, challenging the ODHS' application of the income-first policy as part of its determination that Seymour's wife, Hazel E. Seymour, was ineligible for Medicaid benefits. Seymour maintained that the ODHS' income-first policy violated the plain meaning of Ohio Adm.Code 5101:6-7-02(A)(4), and that, instead, Ohio Adm.Code 5101:6-7-02(A)(4) required the ODHS to apply the resource-first policy.

*3 {¶ 13} Unlike the income-first policy, the resource-first policy mandated that the hearing officer first transfer the institutionalized spouse's *resources* to the community spouse in order to raise the community spouse's income to the MMMNA. Consequently, if the community spouse's income, without the MIA supplement from the institutionalized spouse's income, did not reach the MMMNA, then the hearing officer could raise the CSRA to reserve additional resources sufficient to generate enough income to meet the shortfall. By raising the CSRA, the institutionalized spouse was allocated less resources, thus decreasing or eliminating the overage of resources the institutionalized spouse would have to "spend down" to reach the \$1,500 Medicaid eligibility point.

*3 {¶ 14} On February 2, 1996, Seymour filed an amended complaint, seeking the certification of a class of individuals who unnecessarily "spent down" resources to become eligible for Medicaid benefits because of the ODHS' failure to apply the resource-first method. Seymour then also moved for class certification.

*4 {¶ 15} On April 1, 1997, both Seymour and the ODHS moved for summary judgment. As part of their summary judgment motion, the ODHS argued that the trial court should dismiss Seymour's action for lack of subject-matter jurisdiction.

*4 {¶ 16} On September 4, 1997, Seymour settled his action against the ODHS. However, rather than dismissing Seymour's action, the trial court allowed Bessie Quinan's motion to intervene and granted Quinan's motion to file a second amended complaint. In the second amended complaint,

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Quinan alleged:

*4 [I]t was the unlawful policy and practice of Defendant to (1) disregard Ohio Adm.Code § 5101:6-7-02(A)(4) and its predecessor, Ohio Adm.Code § 5101:1-35-73(D), and (2) *not* permit a revision of the community spouse resource allowance under Plaintiffs' circumstances or give notice of the right to such a revision. Defendant subjected Plaintiffs to said unlawful policy and practice, and their rights under Ohio law and the Ohio Administrative Code were violated by Defendant.

*4 For the ODHS' allegedly wrongful acts and omissions, Quinan sought damages in the amount she and her husband were required to "spend down" or in the amount she and her husband paid to nursing facilities after being denied Medicaid benefits.

*4 {¶ 17} In the same judgment entry granting the motion to file the second amended complaint, the trial court also certified a class of:

*4 All persons who, at any time from March 22, 1990 through December 31, 1995, were institutionalized spouses or community spouses who were deprived of their rights under Ohio Administrative Code 5101:6-7-02(A)(4) and/or 5101:1-35-73(D) or were not informed of their rights under Ohio Administrative Code 5101:6-7-02(A)(4) and/or 5101:1-35-73(D) and who have unnecessarily "spenddown" their resources.

*4 Further, the trial court denied all other pending motions, including the ODHS' motion for summary judgment.

*4 {¶ 18} Undeterred by the trial court's denial of its motion for summary judgment, the ODHS filed a motion for judgment on the pleadings, i.e., the second amended complaint and the answer thereto. Once again, the ODHS argued that the trial court lacked subject-matter jurisdiction.

*4 {¶ 19} On May 27, 1998, the Sixth Circuit decided *Chambers v. Ohio Dept. of Human Servs.* (C.A.6, 1998), 145 F.3d 793, in which it held that the ODHS' interpretation of Section

1396r-5(e)(2)(C), Title 42, U.S.Code, the Medicaid provision on which Ohio Adm.Code 5101:6-7-02(A)(4) and 5101:1-35-73(D) were modeled, and the ODHS' decision to apply the income-first approach were reasonable and permissible. Given this holding, the ODHS filed a motion to decertify the class in the Court of Claims. The ODHS argued that the *Chambers* decision resolved the issue the class sought to litigate, and thus, the class no longer met the Civ.R. 23(A) numerosity or typicality requirements.

*4 {¶ 20} On April 15, 1999, the trial court agreed with the ODHS and issued a judgment entry granting the ODHS' motion to decertify the class. In the same entry, the trial court denied the ODHS' motion for judgment on the pleadings without discussing the ODHS' jurisdictional argument.

*5 {¶ 21} Quinan appealed the trial court's April 15, 1999 judgment to this court, arguing that the *Chambers* decision did not effect either the numerosity or typicality factors. This court agreed with Quinan and held that, at most, the *Chambers* decision effected the commonality factor by answering one common question, i.e., whether federal law mandated the resource-first method. *Quinan v. Ohio Dept. of Human Servs.* (Mar. 30, 2000), Franklin App. No. 99AP-562 (Memorandum Decision). Thus, we remanded the case to the trial court to determine whether the remaining common questions of state law predominated over the individual questions.

*5 {¶ 22} On remand, the trial court first substituted Evelyn George, Quinan's executrix, as the named plaintiff due to Quinan's death. Then, on February 16, 2001, the trial court issued a judgment entry again decertifying the class, concluding that common questions did not predominate because, pursuant to the *Chambers* decision, the ODHS could adopt an income-first or resource-first method. George appealed from this judgment entry.

*5 {¶ 23} On appeal, we determined that the trial court inappropriately resolved the merits of the action in considering whether common questions predominated. *George v. Ohio Dept. of Human Serv.* (2001), 145 Ohio App.3d 681, 687, 763

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N.E.2d 1261. Further, we concluded that the only remaining (and, thus, predominate) issue was whether the ODHS' "income-first approach to determining Medicaid eligibility was proper under the applicable [state] law(s)." Id. at 688, 763 N.E.2d 1261. Accordingly, we remanded the case to the trial court with instructions to certify the class.

*5 {¶ 24} On March 5, 2002, the trial court recertified the same class it had previously certified. On the same day, the trial court issued a judgment entry ordering George to give notice of the pendency of the case to all potential class members. George complied.

*5 {¶ 25} On November 13, 2002, the ODHS again moved for summary judgment. For the third time, the ODHS argued that the trial court lacked subject-matter jurisdiction. Plaintiffs also filed for summary judgment. Without discussion, the trial court denied both motions.

*5 {¶ 26} On January 13 through 14, 2003, the trial court conducted a trial on the issue of the ODHS' liability only. On March 25, 2004, the trial court entered judgment in favor of the ODHS. In the accompanying decision, the trial court held that the ODHS could adopt the income-first method to determine whether a higher CSRA was warranted pursuant to Ohio Adm.Code 5101:6-7-02(A)(4) or 5101:1-35-73(D). Plaintiffs appealed from this judgment. Although the ODHS did not file a notice of cross-appeal, the ODHS' brief also included cross-assignments of error.^{FN4}

FN4. Presumably, the ODHS did not file a notice of a cross-appeal because it intended "to defend a judgment or order appealed by an appellant on a ground other than that relied on by the trial court," but did not "seek to change the judgment or order." App.R. 3(C)(2). Under such circumstances, an appellee need not file a notice of cross-appeal. Id.

*5 {¶ 27} On appeal, plaintiffs assign the following errors:

*5 [1.] The trial court erred as a matter of law when

it found that Ohio law in effect during the class period January 1, 1990-December 31, 1995 permitted the income first eligibility methodology applied to the Quinans.

*6 [2.] The trial court erred as a matter of law when it held that ODHS' application of the income first eligibility requirement was permissible, since the income first rule was never adopted as required by R.C. 5111.011 and R.C. 111.15.

*6 [3.] The trial court erred as a matter of law and awarded judgment against the manifest weight of the evidence when it held that Ms. George had not proven that ODHS' actual practice was not to revise any CSRA allowances (the "income only" policy).

*6 {¶ 28} The ODHS assigns the following cross-assignments of error:

*6 [1.] The Court of Claims erred in failing to hold that it lacked jurisdiction over the Class's claims.

*6 [2.] ODHS is immune from liability.

*6 [3.] The Court of Claims erred in failing to hold that the claims of many of the Class members are barred by the applicable statute of limitations.

*6 {¶ 29} Because the ODHS' first cross-assignment of error is dispositive of this case, we will address it first. Plaintiffs, however, argue that this court cannot even consider this cross-assignment of error because the ODHS did not file a notice of a cross-appeal. We disagree. Even if we did interpret Civ.R. 3(C) to require the ODHS to file a notice of cross-appeal (which we do not), we can still consider the ODHS' first cross-assignment of error because it challenges the Court of Claims' jurisdiction. This court may raise the issue of subject-matter jurisdiction sua sponte. *State ex rel. White v. Cuyahoga Metro. Hous. Auth.* (1997), 79 Ohio St.3d 543, 544, 684 N.E.2d 72.

*6 {¶ 30} By its first cross-assignment of error, the ODHS argues, in part, that the Court of Claims has no jurisdiction over matters, such as the present case, which are, in effect, attempts to appeal an administrative decision. We agree.

*6 {¶ 31} Although crafted as an action for damages, plaintiffs' action is in reality an appeal of

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the ODHS' Medicaid eligibility determinations. At its core, plaintiffs' "claim" is that the ODHS improperly applied Ohio law, resulting in erroneous determinations that the plaintiff-institutionalized spouses were ineligible for Medicaid benefits. Plaintiffs asked the Court of Claims to find unlawful the income-first method and to re-determine the institutionalized spouses' eligibility using the resource-first method. Thus, plaintiffs' claim requested the Court of Claims to review the ODHS' eligibility determinations for error, and correct that error by awarding damages.

*6 (§ 32) However, the right to dispute the validity of an administrative decision is only conferred by statute and, if such a statutory right exists, the party aggrieved by the administrative decision can only seek an appeal via the method articulated in the statute. *Midwest Fireworks Mfg. Co., Inc. v. Deerfield Twp. Bd. of Zoning Appeals* (2001), 91 Ohio St.3d 174, 177, 743 N.E.2d 894; *Harrison v. Ohio State Med. Bd.* (1995), 103 Ohio App.3d 317, 321, 659 N.E.2d 368. Here, both Ohio statute and administrative rules outlined the appellate process available to plaintiffs if they chose to challenge the ODHS' determinations of their eligibility for Medicaid benefits. First, plaintiffs could request a state hearing to review the ODHS' determination of the community spouse monthly income allowance (the MIA), the community spouse minimum monthly maintenance needs allowance (the MMMNA), the community spouse total gross income, the spousal share of assessed resources, the couple's countable resources and/or the community spouse resource allowance (the CSRA). R.C. 5101.35(B); Ohio Adm.Code 5101:1-35-036 (repealed June 1, 1993); Ohio Adm.Code 5101:6-3-01(A)(21) (effective June 1, 1993). If plaintiffs disagreed with the state hearing decision, they had the right to request an administrative appeal. R.C. 5101.35(C); Ohio Adm.Code 5101:1-35-08 (repealed June 1, 1993); Ohio Adm.Code 5101:6-8-01(A) (effective June 1, 1993). Then, if plaintiffs disagreed with the administrative appeal decision, they had the right to appeal that decision to the court of common pleas. R.C. 5101.35(E); Ohio Adm.Code 5101:1-35-089(A) (repealed June 1, 1993); Ohio Adm.Code 5101:6-9-01(A)(1) (effective June 1,

1993).

*7 (§ 33) Indeed, this is the appellate process that the plaintiff in *Kinnach* employed to challenge the ODHS' denial of his application for Medicaid benefits. *Kinnach v. Ohio Dept. of Human Servs.* (1994), 96 Ohio App.3d 640, 645 N.E.2d 825, abrogated by, *Wisconsin Dept. of Health & Family Servs. v. Blumer* (2002), 534 U.S. 473, 122 S.Ct. 962, 151 L.Ed.2d 935. On appeal from the Franklin County Court of Common Pleas to this court, Kinnach made, in part, the same argument plaintiffs now make, i.e., that the ODHS erroneously concluded that he was ineligible for Medicaid benefits after improperly using the income-first method to calculate the amount of resources attributable to himself and his wife, the community spouse, under Ohio Adm.Code 5101:6-7-02(A)(4). After a review of the record and the relevant federal and state law, we agreed with Kinnach and remanded his case to the trial court with instructions to remand the case to the ODHS for a re-determination of Kinnach's eligibility using the resource-first method. FN5

FN5. Our decision in *Kinnach* is not dispositive of the underlying merits at issue here because the reasoning underlying our holding that the federal statutes and Ohio rules mandated the resource-first approach was explicitly rejected by the United States Supreme Court in the *Blumer* decision.

*7 (§ 34) Notably, the Court of Claims is not a part of the only process available to plaintiffs to dispute the validity of the ODHS' eligibility determinations. Therefore, plaintiffs cannot seek relief from the ODHS' determinations in the Court of Claims.

*7 (§ 35) Furthermore, "[a]n action in the Court of Claims cannot become a substitute for a statutorily created right of appeal [of an administrative decision] in a different court." *Swaney v. Bur. of Workers' Comp.* (Nov. 10, 1998), Franklin App. No. 98AP-299. To hold otherwise would allow the Court of Claims to function as a

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court of review with the power to overrule an administrative decision by collateral attack. *Providence Hosp. v. McBee* (Mar. 17, 1983), Franklin App. No. 82AP-383. The Court of Claims lacks such appellate jurisdiction. *Bailey v. Ohio Dept. of Admin. Servs.* (Mar. 5, 2002), Franklin App. No. 01AP-1062. See, also, *Helfrich v. Ohio Unemployment Comp. Bd. of Rev.* (May 20, 1999), Franklin App. No. 98AP-1074 (because appellant had a remedy through the administrative appeals process, the Court of Claims did not err in dismissing the complaint for lack of jurisdiction); *Buemi v. Unemployment Comp. Bd. of Rev.* (Aug. 15, 1995), Franklin App. No. 95AP101-77 (appellant's action was "not cognizable in the Court of Claims as [it was] an attempt to challenge further the decision from an administrative tribunal * * * "); *Blinn v. Ohio Bur. of Emp. Servs.* (Nov. 24, 1992), Franklin App. No. 92AP-1088 ("The Court of Claims has no jurisdiction to hear administrative appeals."); *Campbell v. Indus. Comm. of Ohio* (Jan. 16, 1990), Franklin App. No. 89AP-929 ("The Court of Claims does not have jurisdiction to hear what, in effect, is simply an attempt to appeal from [an administrative agency's] decisions."); *Stauffer v. Ohio Dept. of Transp.* (1989), 63 Ohio App.3d 248, 253, 578 N.E.2d 542 (because an administrative agency had jurisdiction to hear the appellant's claim, the Court of Claims lacked jurisdiction to hear the case). Therefore, because the Court of Claims cannot review an administrative decision, that court lacked jurisdiction to hear plaintiffs' action.

*8 {¶ 36} Plaintiffs, however, argue that Court of Claims had subject-matter jurisdiction over their action because it is the only court that could hear it. Plaintiffs assert that their action is one for monetary damages, and only the Court of Claims has jurisdiction over actions seeking monetary damages from the state.

*8 {¶ 37} Plaintiffs' argument is unavailing because plaintiffs' positioning of this case as an action for monetary damages is not dispositive of jurisdiction. As we concluded above, plaintiffs' "claim" is in reality an appeal of the ODHS' Medicaid eligibility determinations. Plaintiffs had the opportunity to contest these determinations

through the administrative appellate process, as occurred in *Kinnach*, supra. In fact, plaintiffs had a statutorily-mandated process in which to contest their Medicaid eligibility determinations and, conceivably, prevent the economic injury for which they are now seeking redress. Incurring economic harm by forgoing the administrative appeal process does not invest jurisdiction in the Court of Claims. To hold otherwise would make the Court of Claims an alternative forum to which individuals aggrieved by an administrative decision could appeal that decision. As we stated above, the Court of Claims does not have such appellate jurisdiction.

*8 {¶ 38} Accordingly, we sustain the ODHS' first cross-assignment of error.

*8 {¶ 39} Because we have concluded that the Court of Claims lacked subject-matter jurisdiction over plaintiffs' action, plaintiffs' assignments of error and the remainder of the ODHS' cross-assignments of error are moot.

*8 {¶ 40} For the foregoing reasons, we sustain the ODHS' first cross-assignment of error and overrule plaintiffs' assignments of error and the ODHS' remaining cross-assignments of error as moot. Further, we reverse the March 25, 2004 judgment and remand this case to the Court of Claims for it to vacate its judgment and dismiss plaintiffs' action.

*8 *Judgment reversed and cause remanded.*

BRYANT and MCCORMAC, JJ., concur.
MCCORMAC, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.
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Briefs and Other Related Documents (Back to top)

• 2004 WL 3549679 (Appellate Brief) Reply Brief of Plaintiffs-Appellants Evelyn George, Executrix, et al. (Jul. 26, 2004) Original Image of this Document with Appendix (PDF)

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- 2004 WL 3549677 (Appellate Brief) Brief of Appellee Ohio Department of Human Services (Jul. 14, 2004) Original Image of this Document with Appendix (PDF)
- 2004 WL 3549680 (Appellate Brief) Brief of Appellee Ohio Department of Human Services (Jul. 14, 2004) Original Image of this Document with Appendix (PDF)

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C

Morris v. Morris Ohio App. 2 Dist., 2004.
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Clark
County.

Bryan Kirk MORRIS, et al. Plaintiff-Appellant
v.

Doris K. MORRIS, et al. Defendant-Appellee
No. 2003-CA-94.

Nov. 12, 2004.

Background: Nursing home resident's son filed action against county department of job and family services seeking to quiet title to real estate in county of which son contended he was fee simple owner. The Court of Common Pleas, Clark County, No. 03-CV-0873, granted summary judgment for department, and son appealed.

Holding: The Court of Appeals, Brogan, J., held that son, acting as resident's authorized representative pursuant to power of attorney, failed to exhaust administrative remedies with respect to state hearing examiner's determination that resident improperly transferred real property to son such that resident still owned real property which rendered her ineligible for Medicaid and Special Low-Income Medicare Beneficiary (SLMB) benefits, and thus, trial court lacked jurisdiction to address son's collateral attack on such determination in son's action to quiet title to real property.

Affirmed.

West Headnotes

Health 198H ⇌ 509

198H Health

198HIII Government Assistance

198HIII(B) Medical Assistance in General;
Medicaid

198Hk506 Judicial Review; Actions

198Hk509 k. Exhaustion of
Administrative Remedies. Most Cited Cases

Nursing home resident's son, acting as resident's authorized representative pursuant to power of attorney, failed to exhaust administrative remedies with respect to state hearing examiner's determination that resident improperly transferred real property to son such that resident still owned real property which rendered her ineligible for Medicaid and Special Low-Income Medicare Beneficiary (SLMB) benefits, and thus, trial court lacked jurisdiction to address son's collateral attack on such determination in son's subsequent action against county department of job and family services to quiet title to real property, where son failed to request administrative appeal of state hearing examiner's decision within requisite 15 days, which resulted in chief hearing examiner's dismissal of appeal. OAC 5101:6-8-01.

(Civil Appeal from Common Pleas Court).

James P. Glew, Atty. Reg.# 0069073, New Carlisle, Ohio, for Plaintiff-Appellant.

Johnny D. Pryor, Atty. Reg. # 0075999, Assistant Prosecuting Attorney, Clark County Prosecutor's Office, Springfield, Ohio, for Defendant-Appellee.

OPINION

BROGAN, J.

*1 {¶ 1} Bryan Kirk Morris appeals from the judgment of the Clark County Common Pleas Court in favor of the Clark County Department of Job and Family Services (hereinafter referred to as Clark County Family Services).

*1 {¶ 2} On July 25, 2003, Morris filed a complaint in the Clark County Common Pleas Court against Clark County Family Services and his mother, Doris Morris, seeking to quiet title to certain real estate in Clark County of which he contended he was the owner in fee simple. He

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asserted that his mother Doris Morris had conveyed the property to him by a quit claim deed executed on October 26, 1996. He contended he was unaware of any duty to record the deed and he did not record it until July 25, 2003. He asserted that he had resided in the property since it was deeded to him in 1996 and that he had paid all the real estate taxes and mortgages on the property.

*1 {¶ 3} Morris asserted in the complaint that Clark County Family Services claims an interest in the property adverse to him because it claimed the property is owned by his mother, Doris Morris, and is a resource which makes her ineligible for program benefits. Bryan Morris sought a declaration that he be declared the title owner of the subject property as of October 26, 1996, and for an order requiring Clark County Family Services to reinstate the Medicaid benefits of his mother.

*1 {¶ 4} Clark County Family Services answered the complaint and asserted several defenses including the claim that the plaintiff had failed to exhaust his administrative remedies, that the matter was barred by the defense of res judicata, and that the court lacked subject matter jurisdiction.

*1 {¶ 5} Both parties moved for summary judgment with supporting material and the trial court granted summary judgment to Clark County Family Services. The Court held the determination of who owned the subject real estate had previously been determined in a State hearing and thus the trial court lacked subject matter jurisdiction to hear the matter.

*1 {¶ 6} The facts underlying this appeal are set out in the appellant's brief and are not in dispute.

*1 {¶ 7} Doris Morris has been in a nursing facility since 2001, and receives Medicaid for the Aged benefits and Specified Low-Income Medicare Beneficiary benefits, which pay for her care. On or about April 1, 2003, Clark County Family Services received anonymous information that Doris had improperly transferred her home. On April 7, 2003, after investigation, Clark County Family Services determined that Doris still owned the home and thereafter issued notice that her benefits would be

terminated effective April 30, 2003, based on the value of her resources exceeding program eligibility limits (Exhibit D).

*1 {¶ 8} Appellant, acting as Doris' authorized representative pursuant to a duly executed power of attorney designation, appealed the decision of the agency to terminate benefits. At the administrative appeal hearing, appellant presented a copy of the quit claim deed given to him by Doris on October 26, 1996. The hearing officer made a finding of fact that the quit claim deed had not been recorded and for that reason concluded that the property is still a resource of Doris.

*2 {¶ 9} On April 20, 2003 appellant requested a State Hearing to appeal the determination that the real estate is a resource of Doris Morris. The agency decision was upheld by the State Hearing Authority. On May 30, 2003, appellant requested an Administrative Appeal of the state hearing decision rendered May 14, 2003. Since the request was received *one day* outside of the fifteen day time period set forth in O.A.C. 5101: 6-8-01, the Chief Hearing Examiner refused to consider the administrative appeal and the appeal was dismissed. On July 25, 2003 appellant filed the instant quiet title action.

*2 {¶ 10} In his sole assignment of error, Morris contends the trial court erred in finding that it did not have subject matter jurisdiction to hear the quiet title action.

*2 {¶ 11} Morris acknowledges that it is well established that exhaustion of administrative remedies is a prerequisite to further judicial review but he contends that resort to an administrative remedy would have been wholly futile because Clark County Family Services has no expertise in property law. He notes the case of *The Salvation Army v. Blue Cross & Blue Shield of N. Ohio* (1993), 92 Ohio App.3d 571, 636 N.E.2d 399, wherein the Eighth District Court of Appeals noted that the purpose of the administrative exhaustion defense is to "benefit the parties and the courts by virtue of the agency's experience and expertise...." Furthermore, Morris argues that Clark County Family Services was clearly wrong when it

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contended he was not the owner of the subject property because he contends that Ohio law established that legal title to real estate passes upon delivery not recording.

*2 {¶ 12} Clark County Family Services argues that the trial court judgment should be affirmed because Morris failed to exhaust his administrative remedies and the trial court was without jurisdiction to consider the quiet title action. In particular, the appellee notes that Morris missed two opportunities to appeal the State Hearing decision, an administrative appeal to the Chief Hearing Examiner pursuant to OAC 5101:6-8-01(C)(4) and an administrative appeal to the court of common pleas pursuant to R.C. 5101.35.

*2 {¶ 13} OAC 5101:6-8-01 provides in pertinent part:

*2 {¶ 14} "(A) An individual who disagrees with a state hearing decision, or with a decision by the hearing authority to deny or dismiss a hearing request, has the right to request an administrative appeal.

*2 {¶ 15} "The administrative appeal process does not apply to administrative disqualification hearing decisions.

*2 {¶ 16} "An administrative appeal may only be requested by or on behalf of an individual applying for or receiving benefits. An administrative appeal may not be requested by the local agency, the state agency, or another entity, such as a managed care plan, acting for or in place of the local or state agency.

*2 {¶ 17} "The administrative appeal process is the responsibility of the office of legal services, ODHS.

*3 {¶ 18} "(B) Notice of the right to and the method of obtaining an administrative appeal shall be included on the 'denial/dismissal notice,' ODHS 4000, on the 'state hearing decision,' ODHS 4005, and on the notice of failure to establish good cause for abandonment required by rule 5101:6-5-03 of the Administrative Code.

*3 {¶ 19} "(C) Administrative appeal requests

*3 {¶ 20} "(1) A state hearing decision, or a decision by the hearing authority to deny or dismiss a hearing request, may be administratively appealed only for one or more of the following reasons:

*3 {¶ 21} "(a) The decision is contrary to the weight of the evidence presented.

*3 {¶ 22} "(b) A prejudicial error was committed in the course of the proceedings.

*3 {¶ 23} "(c) The decision relies on an incorrect application of law or rule.

*3 {¶ 24} " * * *

*3 {¶ 25} "(2) A 'request for administrative appeal' is defined as a clear expression, by the individual or authorized representative, to the effect that he or she wishes to appeal a state hearing decision or a decision of the hearing authority to deny or dismiss a state hearing request, and which explains the reasons why the individual believes the decision was incorrect.

*3 {¶ 26} "(3) The request must be in writing and signed by the individual or authorized representative. Written authorization must accompany all requests made on the individual's behalf by an authorized representative, unless the representative was the authorized representative of record at a previous stage in the proceedings, or unless one of the conditions described in rule 5101:6-3-02 of the Administrative Code is met.

*3 {¶ 27} "(4) The request must be received by the office of legal services, ODHS, within fifteen calendar days from the date the decision being appealed was issued."

*3 {¶ 28} Revised Code Section 5101.35 states as follows:

*3 {¶ 29} "(E) An appellant who disagrees with an administrative appeal decision of the director of job and family services or the director's designee issued under division (C) of this section may appeal from

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the decision to the court of common pleas pursuant to section 119.12 of the Revised Code. The appeal shall be governed by section 119.12 of the Revised Code except that:

*3 {¶ 30} “ * * *

*3 {¶ 31} “(3) The appellant shall mail the notice of appeal to the department of job and family services and file notice of appeal with the court within thirty days after the department mails the administrative appeal decision to the appellant. For good cause shown, the court may extend the date the department mails the administrative appeal decision. Filing notice of appeal with the court shall be the only act necessary to vest jurisdiction in the court.”

*3 {¶ 32} On April 20, 2003 appellant requested a State Hearing to appeal the determination that the real estate is a resource of Doris Morris. The agency decision was upheld by the State Hearing Authority. On May 30, 2003, appellant requested an Administrative Appeal of the state hearing decision rendered May 14, 2003. Since the request was received *one day* outside of the fifteen day time period set forth in O.A.C. 5101:6-8-01, the Chief Hearing Examiner refused to consider the administrative appeal and the appeal was dismissed. On July 25, 2003 appellant filed the instant quiet title action.

*4 {¶ 33} It is a well-established principle of Ohio law that, prior to seeking court action in an administrative matter, the party must exhaust the available avenues of administrative relief through administrative appeal, *State ex rel. Lieux v. Westlake* (1950), 154 Ohio St. 412, 96 N.E.2d 414. However, courts have recognized exceptions to the general rule. For example, in *BP Communications Alaska, Inc. v. Cent. Collection Agency* (2000), 136 Ohio App.3d 807, 813, 737 N.E.2d 1050, the court stated as follows:

*4 {¶ 34} “Ordinarily, exhaustion of administrative remedies is considered a prerequisite to further judicial review. *Noernberg v. Brook Park* (1980), 63 Ohio St.2d 26, 17 O.O.3d 16, 406 N.E.2d 1095. Two exceptions to this general rule

appear to exist:

*4 {¶ 35} “First, if there is no administrative remedy available which can provide the relief sought, or if resort to administrative remedies would be wholly futile, exhaustion is not required. Second, exhaustion of remedies is unnecessary when the available remedy is onerous or unusually expensive.” (Citations omitted.) *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 17, 526 N.E.2d 1350, 1355.”

*4 {¶ 36} In *Salvation Army v. Blue Cross & Blue Shield, supra*, the Eighth District Court of Appeals addressed the issue of exhaustion of administrative remedies. In that case, the Salvation Army filed suit against Blue Cross for terminating its contract with it while an administrative appeal was pending before the Ohio Department of Insurance. The Salvation Army asserted two counts of “bad faith” breach of contract and defamation. The trial court dismissed the Salvation Army’s lawsuit because it found it failed to exhaust its administrative remedies. The Eighth District Court of Appeals affirmed the trial court’s dismissal of the bad faith claim because it fell squarely within the scope of review by the Superintendent of Insurance but reversed the dismissal of the defamation claim. The court found that the superintendent does not have primary jurisdiction over the defamation matter and the doctrine of exhaustion of remedies was not applicable.

*4 {¶ 37} Judge Spellacy wrote on behalf of the court at pages 576 and 577 of the opinion:

*4 {¶ 38} “Appellant’s complaint would fall within the Ohio Department of Insurance’s exclusive jurisdiction if that agency were vested by the legislature with the sole authority to resolve the issue. See *Pacific Chem. Products Co. V. Teletronics Serv., Inc.* (1985), 29 Ohio App.3d 45, 29 OBR 47, 502 N.E.2d 669. Primary jurisdiction does not allocate the power between an administrative agency and a court but resolves who shall make the initial determination. *Lugo v. Simon* (N.D. Ohio 1976), 426 F.Supp. 28, 31. Primary jurisdiction applies:

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*4 {¶ 39} “[W]here a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.” (Citations omitted.) *United States v. W. Pacific RR. Co.* (1956), 352 U.S. 59, 64, 77 S.Ct. 161, 165, 1 L.Ed.2d 126, 132. See, also, *Pinney Dock & Transport Co. V. Penn. Cent. Corp.* (C.A.6, 198), 838 F.2d 1445.

*5 {¶ 40} “The doctrine of primary jurisdiction will be utilized when the circumstances and their underlying legal issues would be better ascertained and interpreted by the agency specializing in that area. *W. Pacific, supra*, 352 U.S. at 65, 77 S.Ct. At 165-166, 1 L.Ed.2d at 132-133. The criteria used in making this determination are the ‘character of the controverted question and the nature of the inquiry necessary for its solution.’ *Great N. Ry. Co. v. Merchants Elevator Co.* (1922), 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943. The agency should make the determination in technical matters to maintain some uniformity in agency policy and to take advantage of the agency’s expertise. If a question of law is presented, the court should make the initial determination. The doctrine of primary jurisdiction comes into play if the use of administrative proceedings will contribute to a meaningful resolution of the lawsuit. If it will, the trial court should defer any action until that determination is made by the agency. *Lugo, supra*, 426 F.Supp. At 32.

*5 {¶ 41} “...

*5 {¶ 42} “The exhaustion of administrative remedies doctrine applies ‘where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course.’ *W. Pacific, supra*, 352 U.S. at 63, 77 S.Ct. At 164-165, 1 L.Ed.2d at 131-132. The doctrine is a court-made rule of judicial economy that allows the agency to function efficiently and to afford it an opportunity to correct its own errors while benefitting the

parties and the courts by virtue of the agency’s experience and expertise. In this way, a record adequate for judicial review will be compiled. *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St.3d 109, 111, 564 N.E.2d 477, 479. Failure to exhaust administrative remedies is not a jurisdictional defect, and such a failure will not justify a collateral attack on an otherwise valid and final judgment; it is an affirmative defense which must be timely asserted in an action or it will be considered waived. *Gannon v. Perk* (1976), 46 Ohio St.2d 301, 309-310, 75 O.O.2d 358, 363-364, 348 N.E.2d 342, 347-348.”

*5 {¶ 43} It is fundamental that a deed is effective for purposes of passing title to real estate when delivery and acceptance are completed. *Baldwin v. Banks of Massillon* (1853), 1 Ohio St. 141. R.C. 5301.25 provides that all deeds shall be recorded in the office of the county recorder of the county in which the premises are situated, and until so recorded are fraudulent, so far as relates to a subsequent bona fide purchaser having at the time of purchase, no knowledge of the existence of such former deed.

*5 {¶ 44} In this matter, the State Hearing examiner determined that Doris Morris “owned” the subject real estate as of April 2003 because the deed records of Clark County reflected that fact despite her delivery of a deed to her son in 1996. As such, since she had been in a nursing facility for more than six months as of April 2003 her homestead (the real estate in question) could no longer be considered an exempt source, and it was recommended that Doris Morris’ eligibility for Medicaid and SLMB benefits be terminated. It is that determination which Doris Morris failed to appeal to the Director within the required 15 days.

*6 {¶ 45} It is clear that the Clark County Family Services and the Ohio Department of Health Services are administrative agencies in the best position to administer their own regulations and to determine whether Mrs. Morris was eligible for continued benefits under the Medicaid for the Aged program. Typically, the agency must determine what assets are available to the applicant. The underlying issue in this case was the legal issue of

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who owned Mrs. Morris' former residence. Although the agency got its initial determination wrong, the agency was probably misled by the fact that Mrs. Morris was able before she entered the nursing home to obtain financing on her residence because the deed records reflected she still "owned" the subject property.

*6 {¶ 46} The legal issue involved was not complex and a timely appeal by Mrs. Morris of the initial agency decision might have been successful before the Hearing Examiner who was an attorney. Also Mrs. Morris might have appealed to the common pleas court in the event the Hearing Examiner got the legal issue wrong.

*6 {¶ 47} The trial court correctly recognized appellant's quiet title action as an improper collateral attack on the unappealed administrative determination. The appellant's assignment of error is overruled. The judgment of the trial court is Affirmed.

WOLFF, J., and GRADY, J., concur.

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