ORIGINAL

IN THE SUPREME COURT OF OHIO

13-1143

RUTH M. SMITH,	:	Case No. _____
Appellant,	:	On Appeal from the Third District Court of Appeals, Logan County
v.	:	
OHIO DEPARTMENT OF JOB AND FAMILY SERVICES,	:	Court of Appeals Case No. 8-12-18
Appellee.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION

Thom L. Cooper (0029169)
Elizabeth Durnell (0084081)
Cooper, Adel & Associates, L.P.A.
36 W. Main St., P.O. Box 747
Centerburg, Ohio 43011
Telephone: (800) 798-5297
Facsimile: (740) 625-5080
email: ldurnell@cooperandadel.com

Counsel for Appellant
Ruth Smith

Amy R. Goldstein (0015740)
MICHAEL DEWINE
Ohio Attorney General
Health and Human Services Section
26th Floor, 30 East Broad Street
Columbus, Ohio 43215-3400
Telephone: (614) 466-8600
Facsimile: (614) 466-6090

Counsel for Appellee
Ohio Dept. of Job & Family Services

FILED
JUL 18 2013
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

EXPLANATION OF THIS CASE'S APPLICABILITY TO THE PUBLIC OR GREAT GENERAL INTEREST 1

STATEMENT OF THE CASE AND FACTS 3

ARGUMENT IN SUPPORT OF THE PROPOSITIONS OF LAW 5

PROPOSITION #1: Ohio Admin. Code 5101:1-39-27.1 and 5101:1-39-07 permit the transfer of assets from a revocable trust to the community spouse and such transfer does not constitute an improper transfer of assets that would result in a period of restricted eligibility for Medicaid 7

PROPOSITION #2: Federal Medicaid law permits the transfer of assets from a revocable trust to a community spouse and such transfer does not constitute an improper transfer of assets that would result in a period of restricted eligibility for Medicaid 11

PROPOSITION #3: Transfers that fall under the spousal transfer exemption found in Ohio Admin. Code 5101:1-39-07(E) are not required to formally rebut the presumption of impropriety of the transfer pursuant to Ohio Admin. Code 5101:1-39-07(D) 13

CONCLUSION 15

EXPLANATION OF THIS CASE'S APPLICABILITY TO THE PUBLIC OR GREAT GENERAL INTEREST

As senior citizens and the elderly become a larger portion of the population, the need for medical coverage provided by Medicare and Medicaid will continue to grow at a remarkable rate. According to the American Association of Retired Persons, the first of the baby boom generation reached what used to be known as retirement age in 2011, and for the next 18 years, boomers, who comprise 26% of the population, will be turning 65 at a rate of about 8,000 a day. This generational shift, coupled with medical advancements that allow people to live longer with debilitating conditions, requires an increased role for Medicaid in providing longterm care for those who can no longer afford the costs of such treatment.

This fact not only requires the state and federal governments to change their planning, it also necessitates new planning on the half of individuals. Estate planning decisions made years earlier can have significant, unforeseen impacts on the availability of care in the future. The interplay of state and federal law in the administration of Medicaid further complicates these plans.

This case presents a question with broad applicability to the interests of an aging public. As applied, the case asks specifically whether a home transferred from a revocable living trust established by both spouses or even one of the spouses to a community spouse when an institutional spouse applies for Medicaid is considered an improper transfer under state and federal regulations. Taken more broadly, Appellant seeks to resolve the discrepancy between Medicaid regulations as written and as enacted in a manner that could effect thousands of

Ohioans.

More individuals are moving toward using revocable living trusts in their planning in order for their estate to pass without requiring probate administration. Ohio Elder Law §7:15 (2010); Baldwin's Ohio Prac. Merrick-Ripper Prob.L. §3:5(2009). In fact, the American Academy of Estate Planning Attorneys lists the revocable living trust as its number one estate planning technique. As an estate planning vehicle, the inter vivos trust has become common currency. *Second Bank-State St. Trust Co. v. Pinion*, 341 Mass. 366, 371 (1960). The National Network of Estate Planning Attorneys has found that most Americans now recognize that living trust-centered estate planning versus a traditional will is more suited for the modern, mobile society in which we now live.

As a matter of public policy, the prevalence of revocable trust requires that the relationship between Ohio's Medicaid laws and this popular estate planning tool be standardized. The interpretation advanced by the Ohio Department of Job and Family Services, that a transfer from a revocable living trust established by one or both spouses to a community spouse is an improper transfer under Ohio's Medicaid regulations, would have disastrous effects for coming generations of the aged and disabled. By holding that any transfer from a revocable trust is an improper transfer, these Ohioans are being penalized for proper estate planning. In order to standardize the law and prevent potential harm to thousands of Ohioans who have structured their assets with careful forethought, Appellant Ruth Smith requests this Court accept certiorari to reconcile the discrepancy between the state's rules and their application.

STATEMENT OF THE CASE AND FACTS

This is an appeal of the lower court's Judgment and Judgment Entry, which affirmed the Administrative Appeal Decision of Appellee the Ohio Department of Job and Family Services ("the Agency") that Mrs. Ruth M. Smith, the institutionalized spouse, was ineligible for Medicaid benefits for 13.49 months – more than a year – due to an alleged improper transfer of resources as a result of the transfer of her primary residence from a revocable living trust to his spouse. The Agency admits that Ms. Smith could transfer her primary residence to her husband and that this would not be an improper transfer, but claims that she could only do so directly and not via the revocable living trust jointly owned by Mrs. Smith and her husband.

On November 3, 1999, Mrs. Smith and her husband transferred the couple's primary residence – their homestead property – into a revocable living trust that they jointly owned. (September 14, 2011 Administrative Appeal Decision, p. 1, which is attached as Appendix B; July 8, 2011 State Hearing Decision, p. 2, which is attached as Appendix C) ("Agency Decision"). Appellant was institutionalized on June, 25, 2010, but did not apply for Medicaid coverage on January 14, 2011. (Appendix C, p. 1, Findings of Facts ¶1 & 3). At the time of application, Ruth Smith and her husband's resources totaled $191,371.53. (Appendix C, p. 2, Findings of Fact ¶9). On October 15, 2010, the home was transferred from the trust to the community spouse's name only. (Appendix C, p. 2 ¶7). The home was valued at $88,500. (Appendix B, p. 1; Appendix C, p. 2, ¶6).

In processing Appellant's Medicaid application, the Agency completed a "resource assessment" of the couple's total combined resources. Based on the resource assessment, the Agency determined that the couples total resources as of the application date was $191,371.53,

and that the community spouse was entitled to $95,685.76. (Appendix C, p. 2, ¶9). The Agency improperly determined that the transfer of the primary residence from a revocable trust to the community spouse constituted an "improper transfer of assets," but that only the amount transferred above the CSRA would be considered improper, and set a period of restricted Medicaid coverage under Ohio Admn. Code 5101:1-39-07 of 14.69 months beginning November 1, 2010. (Appendix C, p. 2 ¶12). This was reduced to 13.49 on appeal. (Appendix C, p. 1).

The Agency's contention that the transfer of the primary residence from a revocable trust to the community spouse constituted an improper transfer of resources was upheld by the July 8, 2011 State Hearing Decision and by the September 14, 2011 Administrative Appeal Decision. (Appendix B & C). The Agency's basis for the finding of an improper transfer was because "[w]hile we agree with the appellant that Ohio Admin. Code 5101:1-39-07(E) allows an individual to transfer a home to the individual's spouse without penalty, the transfer at issue here was not a transfer from the appellant to the community spouse. The transfer was from the revocable trust to the community spouse. The trust is a separate legal entity under the law." (Appendix B, p. 2-3). The Agency asserted that Ohio Admin. Code 5101:1-39-07(G) required that any transfer of resources above the CSRA must be permitted in a hearing decision, otherwise it will be presumed to be an improper transfer. (*Id.*, p. 3). As a result, the Agency's Decision held that the transfer of the home to the community spouse via the revocable trust was improper only to the extent that community spouse received assets in excess of the CSRA of $109,560. (Appendix B, p. 3-4).

Appellant has properly exhausted her administrative remedies. Pursuant to R.C. 119.12 and R.C. 5101.35, Appellant timely filed her Notice of Appeal to the Logan County Court of

Common Pleas. The trial court affirmed the Administrative Appeal Decision on October 22, 2013. Appellant then appealed to the Court of Appeals of Ohio, Third Appellate District, Logan. The Third District Court of Appeals affirmed the Logan County Court of Common Pleas decision on June 3, 2013. Appellant now files a discretionary appeal with the Supreme Court of Ohio.

ARGUMENT IN SUPPORT OF THE PROPOSITIONS OF LAW

Appellee's Decisions were contrary to law because the Agency erroneously found that Ohio Admin. Code 5101:1-39-07 and Ohio Admin. Code 5101:1-39-27.1 required that the transfer of the primary residence from a revocable trust to Frank Smith, the community spouse, be treated as an improper transfer the led to restricted coverage.

"Restricted coverage" is the term used to indicate the period of time during which a Medicaid case is open but nursing home vendor payments will not be made. An "improper transfer" of assets is defined as the transfer by an individual of "a legal or equitable interest in a resource for less than fair market value for the purpose of qualifying for Medicaid, a great amount of Medicaid, or for the purpose of avoiding the utilization of the resource to meet medical needs or other living expenses." Ohio Admin. Code 5101:1-39-07(B)(5).

Both federal and state law govern the Medicaid program. The Medicare Catastrophic Coverage Act of 1988 ("MCCA"), 42 U.S.C. 1396 *et seq.*, set forth rules that must be followed in instances such as this. The MCCA and federal Medicaid Act contain spousal impoverishment provisions that permit the spouse living at home, or community spouse, to reserve some income and assets while the other spouse is on Medicaid. *Wisconsin Department of Health and Family*

Services v. Blumer (2002), 534 U.S. 473, 478, 122 S. Ct. 962.

The aim of the MCCA was to protect community spouses from becoming impoverished while also barring couples from sheltering an excessive amount of resources in order to qualify for Medicaid. *Id.* at 480. To this end, the community spouse Resource Allowance ("CSRA"). *Id.* at 478. The CSRA is the amount of countable resources that the spouse of a Medicaid recipient is permitted to keep. In essence, it is calculated by dividing the total countable assets by two. Ohio Adm. Code 5101:1-39-36.1(C)(1). "Countable Assets" here does not include certain assets such as an automobile, personal effects, household goods, and most notably, a home. 42 U.S.C. 1396r-5(c)(1)(A). A Medicaid applicant may generally transfer assets, including a home, freely to his or her spouse so long as they are solely for the spouses' benefit. 42 U.S.C. 1396p(c)(2). In order to qualify for Medicaid, the amount of countable resources in excess of the CSRA must be spent down to within the applicable resource limits in order for the applicant to be eligible for Medicaid benefits. *Blumer,* 534 U.S. at 482-3.

PROPOSITION #1: Ohio Admin. Code 5101:1-39-27.1 and 5101:1-39-07 permit the transfer of assets from a revocable trust to the community spouse and such transfer does not constitute an improper transfer of assets that would result in a period of restricted eligibility for Medicaid.

In order to ensure that people are not able to transfer large amount of resources and immediately qualify for Medicaid, both the federal government and Ohio imposed a look-back period during which transfers prior to applying for Medicaid may result in a restricted period during which the applicant is not eligible for Medicaid. A transfer is defined under Ohio Admin. Code 5101:1-39-07(B) as an action that has the effect of changing an ownership of an asset form the individual to another person. A transfer is improper when the transfer is for less than full

market value and is made for the purpose of qualifying for Medicaid. Ohio Adm. Code 5101:1-39-07(B)(5). When an improper transfer has been made within five years prior to the date of application for Medicaid coverage, a penalty period is calculated by dividing the value of all such transfers by the average monthly private pay rate for a nursing facility, thus creating a number of months in which the applicant is ineligible for Medicaid coverage. Ohio Adm. Code 4101:1-39-0(J)2(a)-(d).

However, Ohio's own regulations permit transfers between spouses. Ohio Adm. Code 5101:1-39-07(E)(1)(a) specifically allows an individual to transfer the principal place of residence to the individual's spouse without the transfer being considered improper, subject to certain limitations on what that spouse may afterwards do with the property. This means that Appellee imposed a penalty on Appellant contrary to Ohio law for the transfer.

The regulations' definitions also supports the transfer. Ohio Admin. Code 5101:1-39-07(E) allows for the transfer of the home. For the purposes of that rule, the "home" is defined in Ohio Admin. Code 5101:1-39-31 as property that is still considered the individual's principal place of residence. Ohio Admin. Code 5101:1-39-31(B)(2), and as defined by the court in Paragraph 15, defines the home as any real property that the individual has an ownership interest in which serves as the individuals principal place of residence. Therefore, the 5101:1-39-07(E) exemption for transfers of the home does not incorporate the title requirements of the homestead exemption in Ohio Admin. Code 5101-39-31(C).

Ohio Admin. Code 5101:1-39-05 defines the term "resource." A resource is any property that the individual has an ownership interest in. This includes countable and exempt resources. When Ohio Admin. Code 5101:1-39-07 incorporates this definition of a "resource" from 5101:1-

39-05. A home's status as countable or exempt has no bearing on the determination of an improper transfers.

Ohio Admin. Code 5101:1-39-07(B)(7) defines the term "individual" for the purpose of the improper transfer provisions. The Ohio Admin. Code defines an "individual" not just as the applicant for benefits, but incorporates the applicant's spouse and any person who is acting in place of or acting at the direction of an applicant. Under this broad definition, actions taken by a trustee, who must act as the representative of the beneficiaries of a revocable trust, would be included under the definition of "individual."

The lower courts' opinions held that the transfer in question was an "indirect" transfer not contemplated by the code. This was not the case. Ohio Admin. Code 5101:1-39-07, by its plain language, does not incorporate the ownership requirements of Ohio Admin. Code 5101:1-39-31(C). It does not require the home to be exempt in order for the transfer to the community spouse to be exempt. It only requires that it be the home under Ohio Admin. Code 5101:1-39-31, meaning that it be the appellant's principal place of residence which an individual has an ownership interest in. There should be no dispute that the Smith' held an ownership interest in the property in question as it was counted as a countable resource prior to the transfer. In order to be a resource, it is required for an individual to have an ownership interest in the property. Because Appellant and her spouse maintained the property in question as their principal place of residence and held an ownership interest in the property, there should be no question that the property in question was the "home" under Ohio Admin. Code 5101:1-39-07(E).

The Court in paragraph 31 mistakenly construed Appellant's argument and held that the home must be exempt as a resource for the transfer to be exempt from penalty in Ohio Admin.

Code 5101:1-39-07(E) to apply. Appellant did not dispute that the homestead exemption did not apply while in the revocable trust. There is no support for this in the code. Ohio Admin. Code 5101:1-39-07(E) is not an exception for the transfer of an exempt property. Ohio Admin. Code 5101:1-39-07(E) does not reference the homestead exemption. The Court made an obvious error in holding that the Ohio Admin. Code 5101:1-39-07(E) was an exception for the transfer of an exempt asset. The plain language of the statute does not require the homestead exemption to be applied for the Ohio Admin. Code 5101:1-39-07(E) exception to apply. It applies to transfers of the "home" which under 5101:1-39-31(C) is not always exempt.

Because the court did not consider the definition of the "home" under Ohio Admin. Code 5101:1-39-07(E), it led them to conclude that the transfer in question was what they characterized as an "indirect transfer." According to the court, at paragraph 29, the court states that the provision requires an asset be transferred directly to the individual's spouse in order for the exemption to apply, characterizing the trust as an intermediary. However, this view of the transfer is unsupported. The home, which was both the "home" and a countable resource when in the trust, was transferred from the trust to Appellant's spouse. The property, which was the "home" was transferred by the "individual", acting as trustee of the trust, to the Appellant's spouse. This transfer, using the Court's distinction, was still the direct transfer of an asset of the individual to the spouse. Because the asset in question was the "home", the plain language of 5101:1-39-07(E) makes an exception for this transfer.

Even if the court finds the argument below in regards to the Supremacy Clause and the Ohio Admin. Code 5101:1-39-07 (G)(2) hearing requirement unpersuasive, it still would not apply in this case because the transfer falls under the exception contained in Ohio Admin. Code

5101:1-39-07(E).

The Court appeared to accept that had the transfer to Appellant's spouse fallen under the Ohio Admin. Code 5101:1-39-07(E) exception, the Ohio Admin. Code 5101:1-39-07(G)(2) provision would not apply. This view is correct. The result of holding otherwise would be to require a special hearing when any transfer under the exception was made. Appellant is unaware of any times when the State has allowed for such a transfer as falling under the exception, but required a hearing before granting the exception. This would fly in the face of common sense, as it would require a needless hearing to establish something, which is permitted by the plain language of the Ohio Administrative Code. Additionally, applying the hearing requirement in this way would be contra to the decision in *Morris,* which held that transfers in excess of the CSRA provision can be permitted, and the applying the (G)(2) requirement in this way would be more restrictive then federal law, as discussed below.

Because of this, the Court is correct in suggesting that the (G)(2) requirement would not apply where the 5101:1-39-07(E) exception is utilized.

PROPOSITION #2: Federal Medicaid law permits the transfer of assets from a revocable trust to a community spouse and such transfer does not constitute an improper transfer of assets that would result in a period of restricted eligibility for Medicaid.

Under the Supremacy Clause, state law must give way to federal regulations and may be no more restrictive than the federal provisions. *US. Const. Art. VI, cl. 2.* In addition to Ohio's rules permitting the transfer, 42 U.S.C. 1396p(c)(2)(A)(i) states that "an individual shall not be ineligible for medical assistance . . . to the extent that the assets transferred were a home and title to the home was transferred to the spouse of such individual." This statement should be

sufficient to end the inquiry, but the Agency confuses the issue with arguments about the CSRA.

Despite the clear permissive language contained in 42 U.S.C. 1396p(c)(2)(A)(i), there is a restriction in federal law on transfers from one spouse to another made after the date of eligibility on which the Agency and some of the decisions below rely. *See* 42 U.S.C. 1396r-5 (prohibiting transfers exceeding the CSRA "after the date of the initial determination of eligibility). While the transfer of the home would be permitted under 42 U.S.C. 1396p(c)(2), it is necessary to emphasize and clarify that 42 U.S.C. 1396r-5 only applies to post-eligibility transfers and not to those made prior to a finding of eligibility; to interpret it otherwise would be to "[render] § 1396p(c)(2)(B)(i) superfluous." *Morris v. Okla. Dept. of Human Svcs.* (10th Cir. 2012), 685 F.3d 925. Because statutes should be construed to not contradict each other where possible, transfers in excess of the CSRA are not improper if made before the determination of eligibility.

In addition to the plain language of the statute and case law, the federal agencies tasked with interpreting Medicaid regulations have come to the same conclusion. The Centers for Medicare and Medicaid Services (CMS), the branch of the Department of Health and Human Services (HHS) tasked with overseeing administration of Medicaid by the states, has stated in multiple opinion letters that 42 U.S.C. 1396r-5 does not apply to pre-eligibility transfers, only to post eligibility transfers. Recognizing the CMS's unique role in the administration of the joint federal-state program of Medicaid, the United States Supreme Court has recognized that courts should give unique deference to the agency's determinations. *See, e.g., Blumer*, 534 U.S. At 485, 496-7.

Federal law allows for an individual to transfer the primary residence to a spouse as part of the Medicaid qualification process. Even if this were a transfer that could be subject to 42

U.S.C. 1396r-5 and the CSRA limit, any transfer prior to the period of eligibility would not be so limited. Statutory construction, case law, and administrative policies all prevent this. Under federal law, as must be applied by the state, a transfer from a revocable trust to a spouse is not an improper transfer necessitating an ineligibility penalty.

The Supremacy Clause is implicated in this case because Ohio Admin. Code 5101:1-39-07(G) contains no distinction between *pre* and *post* eligibility transfers. Therefore, the Ohio Admin. Code is more restrictive than the federal Medicaid law and the Ohio Admin. Code 5101:1-39-07(G)(2) hearing requirement should be struck down under the Supremacy Clause.

The transfer of the home in this case was a pre-eligibility transfer, because as the court has stated the property was a countable resource while it held in the trust, which means Appellant had too many resources to be eligible for Medicaid. In other words, the home must have been removed from the trust for Appellant to be eligible. Therefore, the transfer from the trust was a pre-eligibility transfer which means that 42 U.S.C. § 1396r-5(f)(1) does not apply. The applicable statute here is 42 U.S.C. § 1396p(c)(2)(B)(i), which permits unlimited transfers between spouses without there being any resulting penalty period of ineligibility.

There was an Amicus Brief filed in the appeal of *Hughes et al v. Michael B. Colbert*, N.D. Ohio No. 5:10CV1781 (May 29, 2012), which is now being appeal in the United States Court of Appeals for the Sixth Circuit, by the National Academy of Elder Law Attorneys and the Ohio State Bar Association in support of Carole Hughes and Harry Hughes. In this brief, NAELA and the OSBA stated:

> What controls here is not that statute, but rather 42 U.S.C. § 1396p(c)(2)(B)(i), which permits unlimited transfers between spouses without there being any resulting penalty period of ineligibility. That makes perfect sense given that, for purposes of Medicaid eligibility, all the resources of both spouses

> in excess of the CSRA are attributed to the institutionalized spouse who is applying for Medicaid. 42 U.S.C. § 1396r-5(c)(2). The transfer of assets penalty rules are intended to address gifts to others because they artificially pauperize the applicant or spouse. Transfers to spouses, on the other hand, do not have that consequence because Medicaid will count the assets irrespective of which one of the spouses holds the assets.
> This critical distinction was missed by the court below, just like the district court in *Morris v. Okla. Dep't of Human Svcs.*, 758 F.Supp. 2d 1212 (W.D. Okla. 2010), on which the court below relied. That decision in *Morris* was reversed shortly after the decision below, 685 F.3d 925 (10th Cir. 2012), and the court of appeals corrected that error.
>
> Pgs. 14-15

Even when looking at the limitation contained in 42 U.S.C. 1396r-5, federal Medicaid law clearly permits the transfer of the primary residence to the community spouse. Doing so through a revocable trust does not change this fact.

> **PROPOSITION #3:** Transfers that fall under the spousal transfer exemption found in Ohio Admin. Code 5101:1-39-07(E) are not required to formally rebut the presumption of impropriety of the transfer pursuant to Ohio Admin. Code 5101:1-39-07 (D).

Under the Ohio Administrative Code, certain transfers bear a presumption of impropriety. This presumptions does not apply to transfers of the primary residence from one spouse to another. Even if this were a presumptively improper transfer, this presumption may be—and was—properly rebutted. Where there is a presumption of an improper transfer, it must be rebutted under Ohio Admin. Code 5101:1-39-07(D). Rebutting an improper transfer carries with it specific requirements, including providing a written accounting which explains the reason for making the transfer, documents attempts to sell the property, states reason for transferring it for less than fair market value, and who it was transferred to. No formal accounting was provided for the transfer in question.

The Court points to Ohio Admin. Code 5101:1-39-07(C) to indicate that the transfer in

question should have been presumed as an improper transfer and formally rebutted. The relevant section of Ohio Admin. Code 5101:1-39-07(C), as cited by the Court, applies to "any transfer by an individual of an *exempt* home as defined in Chapter 5101:1-39 of the Administrative Code, whether prior to or after the Medicaid application date." (emphasis added). This section, which is quoted in paragraph 16 of the Court's opinion, clearly only applies to the exempt home. The Court, held that the home did not qualify as an exempt asset when transfer. This finding is not disputed by the Appellant.

The only other section which could lead to a presumption of an improper transfer would fall under (G)(2), which as discussed in the above sections, does not apply.

Because the home was not an exempt asset when held in the trust, and because the (G)(2) requirement does not apply, there is no presumption of an improper transfer. Because no presumption existed, the Court's finding that Appellant was required to file a formal rebuttal with the Agency is an obvious error.

The formal rebuttal requirements for an improper transfer should not apply where an exception is applied under a different section of the improper transfer provisions. Ohio Admin. Code 5101:1-39-07(D) requires an individual to attempt to dispose of property for fair market value. This would render moot the exceptions listed in Ohio Admin. Code 5101:1-39-07(E) for any individual who could obtain fair market value for their property. The only property that would fall under these exceptions would be property that was nearly worthless. This would violate the clear intent of the State in creating exceptions for spouses and disabled children, among others. Applying Ohio Admin. Code 5101:1-39-07(D) in this way would also be more restrictive than federal law, and for reasons discussed below, would be impermissible. Because

the requirements of 5101:1-39-07(D) are incompatible with the exceptions listed in 5101:1-39-07(E), the (D) rebuttal requirement should not be applied to transfers that fall under the exception listed in (E).

Conclusion

Both Ohio law and federal law permit the transfer of a primary residence from an institutional spouse to a community spouse. Even the addition of a revocable trust should not complicate this situation. However, the Agency responsible for administering Ohio's Medicaid program has confused the simple statements in the law with needless limitations and complications of post-eligibilty transfers, CSRA limitations, and pre-approval. It is therefore necessary that this Court act to clarify matters and protect Ohioans who have done estate planning which may now ultimately injure them.

IN THE SUPREME COURT OF OHIO

RUTH SMITH,	:	Case No. _____
	:	
Appellant,	:	On Appeal from the Third District Court of Appeals, Logan County
	:	
v.	:	
	:	
OHIO DEPARTMENT OF JOB AND FAMILY SERVICES,	:	Court of Appeals Case No. 8-12-18
	:	
Appellee.	:	

APPENDIX TO MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT RUTH SMITH

Appendix A

OHIO DEPARTMENT OF JOB AND FAMILY SERVICES
BUREAU OF STATE HEARINGS

In the matter of:

RUTH M. SMITH PO BOX 747 CENTERBURG, OH. 43011	Case Number: 5090617910	County: LOGAN	
	Appeal: 1661778	Program: MED	Disposition: OVERRULED
	Compliance Required		
	Decision Date: Request Date: Hearing Officer:	07/08/2011 03/28/2011 DEBRA MARTEN	

State Hearing Decision

ISSUE SECTION

Appeal 1661778 – MEDICAID

On 02/25/11 the Logan County Job & Family Services (Agency) approved restricted Medicaid coverage for Appellant effective 11/01/10, denied vendor payment for Appellant, and determined an improper transfer of resources for 14.69 months beginning 11/01/10 based on a transfer of real property from a revocable trust to the Community Spouse (CS).Were the Agency's determinations correct?

After consideration of the evidence and testimony presented and the applicable regulations, I concur with the Agency's determinations that the transfer of the real property from the revocable trust to the CS is an improper transfer, causing a period of restricted Medicaid eligibility for Appellant. I have reduced the value of the improper transfer to be $81,261.95, reducing the period of restricted Medicaid coverage to 13.49 months beginning 11/01/10. It is recommended **appeal 1661778 be *overruled* with compliance.**

PROCEDURAL MATTERS

The Bureau of State Hearings received the state hearing request on 03/28/11. The state hearing was scheduled by the Bureau of State Hearings for 06/06/11. The parties were sworn in for testimony. Appellant and CS were represented by their legal representative, Attorney E. Durnell. Income Maintenance Administrator P. Furrow, Eligibility Referral Specialists C. Ward and C. Wood represented the Agency.

FINDINGS OF FACT

1. Application for Medicaid vendor payment was filed on Appellant's behalf with the Agency on 01/14/11. Retroactive Medicaid was requested back to 11/01/10.
2. The face-to-face interview was conducted on 02/01/11 with one of Appellant's authorized representatives.
3. The first period of institutionalization for Appellant began on 06/25/10.
4. Appellant has a Community Spouse.

5. The revocable living trust for Appellant and Community Spouse was created on 11/03/99. Appellant's property was transferred into the revocable living trust via a quit claim deed on 11/03/99.
6. The value of the real property in the trust was determined to be $88,500. The trust also included a vehicle which remains in the revocable trust with a value determined to be $1,500.
7. On 10/15/2010 the real property valued at $88,500 in the revocable living trust was transferred from the trust via a fiduciary's deed to the Community Spouse only.
8. The Community Spouse continues to reside in the home of the property. The property is an exempt resource for Medicaid as of the date of the transfer of the property into the Community Spouse's name.
9. The resource assessment was calculated by the Agency using the value of the property as a countable resource as of 06/25/10 (first period of institutionalization). The resources of the couple were determined to be $191,371.53, with a CSRA of $95,685.76.
10. The resources were updated by the Agency using the current value of the couple's resources of $88,447.71 as of 01/14/11 (date of Medicaid application), which excluded the value of the property as a resource. The Agency then allocated all of the current resources of $88,447.71 to the Community Spouse, based on the CSRA of $95,685.76.
11. The Agency determined Appellant's resources to be $0, allowing for Medicaid eligibility.
12. The Agency determined the value of the property ($88;500) was an improper transfer of resources. The Agency approved restricted Medicaid coverage for 14.69 months for Appellant. The Agency's computation involved dividing the $88,500 value of the property by the $6,023 monthly average private pay rate which equals the penalty months of 14.69, beginning 11/01/10 through 12/31/11, with a partial month penalty for the month of 01/12.
13. Notice of eligibility for the restricted Medicaid coverage for Appellant was mailed out by the Agency on 03/02/11.

CONCLUSIONS OF POLICY

Ohio Admin. Code § 5101:1-39-27.1 (2006)

(C)(2)Category two: self-settled trusts established on or after August 11, 1993.

(a) A trust, or legal instrument or device similar to a trust, falls under this category if it meets all of the following criteria:

(i) The assets of the individual were used to form all or part of the corpus of the trust;

(ii) The trust was not established by a will; and

(iii) The trust was established by the individual, the spouse of the individual, a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or on behalf of the spouse of the individual, or a person, including a court or administrative body, acting at the direction or upon the request of the individual or the spouse of the individual.

(b) Revocable trusts in this category are treated as follows.

(i) The corpus of the trust is considered a resource available to the individual.

(ii) Payments from the trust to, or for the benefit of, the individual are considered unearned income.

(iii) Any other payments from the trust are considered an improper transfer subject to the rules prohibiting the improper transfer of resources.

(d) Where a trust is funded with assets of another person or persons, as well as assets of the individual, the rule provisions governing this category of trust applies only to the portion of the trust attributable to the individual.

(e) The availability of a trust in this category is considered without regard to:

(i) The purpose for which a trust is established;

(ii) Whether the trustees have or exercise any discretion under the trust;

(iii) Any restrictions on when or whether distributions may be made from the trust; and

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

(f) The following are look-back periods for transfers of assets involving trusts under this category. The baseline date and the regulations relating to transfers of assets are defined in rule 5101:1-39-07 of the Administrative Code.

(i) For revocable trusts: when a portion of the trust is distributed to someone other than the individual, and the distribution is not for the benefit of the individual, the distribution is an improper transfer. The look-back period is sixty months from the baseline date. The transfer is considered to have taken place on the date upon which the payment to someone other than the individual was made.

Ohio Admin. Code §5101:1-39- 07 (2006) states:

(E) The following transfers for less than fair market value shall not be considered an improper transfer:

(1) The individual may transfer the home, as defined in rule 5101:1-39-31 of the Administrative Code, that is still considered the principal place of residence in accordance with Chapter 5101:1-39 of the Administrative Code to any of the following individuals:

(a) The individual's spouse, provided:

(i) The transfer is for the sole benefit of the spouse; and

(ii) The individual's spouse does not subsequently transfer the home for less than fair market value; and

(iii) Any transfer of the home by the spouse on or after the look-back date shall be reviewed by the administrative agency under the transfer of resources provisions in this rule; and

(iv) The amount of the transfer is equal to one hundred per cent of the value of the property established by the county auditor at the time of the transfer, less any amount or portion of the property that is not transferred.

(G) Any transfer between spouses in order to comply with the Medicaid community spouse resource allowance (CSRA) computed pursuant to Chapter 5101:1-39 and Chapter 5101:6-7 of the Administrative Code may not be applied inconsistently with the rules setting limits on the CSRA or the minimum monthly maintenance needs allowance (MMMNA).
(1) Any amount of a couple's resources exceeding the CSRA must be used for the benefit of the institutionalized spouse and/or community spouse.
(2) Any amount of a couple's resources exceeding the CSRA may not be transferred to the community spouse or to another for the sole benefit of the community spouse unless permitted in a hearing decision issued under Chapter 5101:6-7 of the Administrative Code.
(3) Any amount of a couple's resources exceeding the CSRA may not be converted to another form for the purpose of generating additional income for the community spouse unless permitted in a hearing decision issued under Chapter 5101:6-7 of the Administrative Code.
(4) Transfers in excess allowed by this rule, must be presumed an improper transfer.
(Emphasis added.)

Analysis

Application for vendor payment was submitted on Appellant's behalf with the Agency on 01/14/11. The first period of continuous institutionalization for Appellant was determined to be 06/25/10. In 11/99 the property where Appellant and Community Spouse resided was placed in a revocable living trust. The trust meets the above definition of a Category 2, self-settled trust. For the home to be considered exempt for the purposes of Medicaid nursing home vendor payment, the home must be the individual's or the individual's spouse principal place of residence, the deed to the home must be in the individual's or individual's spouse name, and the individual's equity in the home must not exceed the home equity limit provisions in the rule (Ohio Admin. Code 5101:1-39-35). Therefore, while the property was in the trust, the deed to the home was not in Appellant's name or her spouse's and was not exempt. Once the property was placed back into the Community Spouse's name, the home and surrounding property became exempt as a resource.

The resource assessment completed by the Agency included the real property as an available resource as of 06/25/10 because, at the time, the property was held in the revocable trust and was not in Appellant and/or the Community Spouse's names.
The value of the couple's resources including the real property as of 06/25/10 was $191,371.53, resulting in a Community Spouse's Resource Allowance (CSRA) of $95,685.76.

The value of the property was included in the resource assessment by the Agency and therefore must be included when determining the amount of resources transferred for CSRA purposes. While Ohio Admin. Code 5101:1-39-07(E) allows an individual to transfer a home to the individual's spouse without penalty; it must be read in conjunction with paragraph (G) of the same rule. By including the home in the resource assessment and then immediately removing it from the resources by transferring it to the Community Spouse, the couple was attempting to artificially inflate the value of the resources so that the Community Spouse received more of the couple's assets. By transferring the real property to the Community Spouse, a total of $88,500 of the couple's assets was transferred. The real property was removed from the countable resources when the property was transferred to the Community Spouse as his home, thereby allowing the remaining current assets of $88,447.71 to be allocated to the Community Spouse as part of the CSRA, which would then allow Medicaid eligibility for Appellant. Thus, the Community Spouse received in total all of the joint current assets of the couple of $176,947.71.

This amount exceeds the CSRA of $95,685.76 and is in conflict with Ohio Admin. Code §5101:1-39-07 (G). I find the transfer of the property from the trust to the Community Spouse to be an improper transfer. However, the improper transfer of resources should be reduced from $88,500 to $81,261.95 ($176,947.71 current assets including the value of the property - $95,685.76 CSRA = $81,261.95), reducing the number of months of restricted coverage to 13.49 months beginning 11/01/10.

HEARING OFFICER'S RECOMMENDATION

Appeal 1661778 – MEDICAID

Based on the record before me, it is recommended **appeal 1661778 be overruled with compliance.**

The Agency is directed to revise the period of restricted Medicaid coverage to 13.49 months beginning 11/01/10. The Agency is directed to send out a revised Medicaid Approval Notice with a Restricted Medicaid Coverage Period, in accordance with this state hearing decision.

FINAL ADMINISTRATIVE DECISION AND ORDER

Finding the Hearing Officer's decision to be supported by the evidence, the recommendation above is adopted, and **appeal 1661778 is overruled with compliance.**

The CDJFS is required to comply with the Hearing Officer's recommendations within fifteen calendar days from the date of the decision, but no later than ninety calendar days from the request date. Compliance shall be promptly reported to ODJFS, Bureau of State Hearings, via JFS 04068 compliance form with supporting documentation. Ohio Admin. Code § 5101:6-7-03(B)(1)(a) (2008)

Susan K. Lehmen-Sentle

Susan K. Lehmen-Sentle
Hearing Authority

July 8, 2011

Notice to Appellant

This is the official report of your hearing and is to inform you of the decision and order in your case. All papers and materials introduced at the hearing or otherwise filed in the proceeding make up the hearing record. The hearing record will be maintained by the Ohio Department of Job and Family Services. If you would like a copy of the official record, please telephone the hearing supervisor at the TOLEDO District hearing section at 1-866-635-3748.

If you believe this state hearing decision is wrong, you may request an administrative appeal by writing to: Ohio Department of Job and Family Services, Bureau of State Hearings, P.O.BOX 182825, Columbus, OH 43218-2825 or fax: (614) 728-9574. Your request should include a copy of this hearing decision and an explanation of why you think it is wrong. Your written request must be received by the Bureau of State Hearings within 15 calendar days from the date this decision is issued. *(If the 15th day falls on a weekend or holiday, this deadline is extended to the next work day.)* During the 15-day administrative appeal period you may request a free copy of the tape recording of the hearing by contacting the district hearings section.

If you want information on free legal services but don't know the number of your local legal aid office, you can call the Ohio State Legal Services Association, toll free, at 1-800-589-5888, for the local number.

Aviso a la Apelante

Esta es la decisión estatal administrativa de su caso. Todos los documentos y materiales presentados como prueba en la vista o de otra manera radicados componen el récord administrativo. El récord administrativo será mantenido por el Ohio Department of Job and Family Services.

Si usted cree que esta decisión estatal administrativa es erronea, usted puede solicitar una apelación administrativa escribiendo al: Ohio Department of Job and Family Services, Bureau of State Hearings, P.O. Box 182825, Columbus, Ohio 43218-2825 o facsimil (614) 728-9574. Su solicitud debe indicar por qué usted piensa que la decisión administrativa es erronea. Usted puede completar la solicitud de apelación incluida con esta decisión. Su solicitud escrita o formulario de apelación tiene que ser recibido por el Bureau of State Hearings dentro de los 15 días calendario desde la fecha en que esta decisión es expedida. (Si el 15to. día recae sobre un fin de semana o un día feriado, esta fecha límite es extendida al próximo día laborable). Durante el periodo de 15 días de apelación administrativa, usted o su representante pueden solicitar una copia gratuita del récord administrativo y de la grabación de la vista llamando al Bureau of State Hearings al 1-866-635-3748 (seleccione la opción 1 del menú principal).

Si usted quiere información sobre servicios legales gratuitos pero no sabe el número de su oficina local de servicios legales, usted puede llamar al Ohio State Legal Services Association, gratuitamente, al 1-800-589-5888, para el número local.

ELIZABETH DURNELL, ATTORNEY
THOM L COOPER CO LPA
130 EAST MAIN STREET
LEBANON, OH, 45036

Appendix

APPENDIX

Exhibits for Agency

A. Appeal summary prepared by the Agency (1 page)
B. Quit Claim Deed dated 11/03/99 (1 page)
C. Fiduciary's Deed dated 10/15/10 (1 page)
D. Real estate tax bills (3 pages)
E. Understanding Trusts (1 page)
F. Certificate of Trust dated 11/03/99 (19 pages)
G. Simply Sort Resources (1 page)
H. Restricted Medicaid Coverage Period Determination, Resource Assessment Worksheet, Resource Transfer Worksheet (5 pages)
I. Certificate of vehicle title and Kelly Blue Book value (2 pages)
J. Email from Agency to the County Technical Assistance and Compliance Unit, Office of Ohio Health Plans and response (1 page)

Exhibits for Appellant

1. State hearing request with signed authorization to represent (4 pages)
2. Appeal summary prepared by Attorney on Appellant's behalf (4 pages)
3. Quit Claim deed dated 11/03/99 (duplicate of Exhibit B)
4. Certificate of Trust dated 11/03/99 (duplicate of Exhibit F)
5. Fiduciary's Deed dated 10/15/10 (duplicate of Exhibit C)
6. Approval notice of Restricted Medicaid (2 pages)

Appendix B

OHIO DEPARTMENT OF JOB AND FAMILY SERVICES
BUREAU OF STATE HEARINGS

ADMINISTRATIVE APPEAL SECTION

In Re Appeal of:			
RUTH M. SMITH PO BOX 747 CENTERBURG, OH. 43011	Docket Number:	AA-7852	
	Appeal No(s)	1661778	MED
	AG No.	5090617910	
	Hearing Request Date:	03/28/2011	
	Hearing Decision Date:	07/08/2011 / DSM	
	Appeal Request Date:	07/22/2011	
	Agency:	LOGAN CDJFS	

Administrative Appeal Decision

Summary

The appellant, through her attorney, requests an administrative appeal of the state hearing decision issued on July 8, 2011. The appellant appealed the Agency's finding that the appellant had improperly transferred the appellant's homestead property from a revocable trust to the community spouse. The home is valued at $88,500.

The state hearing decision overruled the appellant's appeal, finding that the home was improperly transferred, but that only the amount transferred above the Community Spouse Resource Allowance (CSRA) would be considered improper. She, therefore, ordered the Agency to reacalculate the improper transfer period. On appeal, the appellant argues that the transfer of the home to the community spouse cannot be considered an improper transfer.

Analysis

On November 3, 1999, the appellant and her spouse (the Community Spouse) transferred the home into a revocable living trust. The home and the trust were both jointly owned by the institutionalized spouse and the community spouse. The home was the principal place of residence for the community spouse and for the appellant before she entered the nursing home. The home was valued at $88,500. The appellant was institutionalized on June 25, 2010. On October 15, 2010, the home was transferred from the trust to the community spouse's name only. The appellant applied for Medicaid on January 14, 2011.

For the home to be considered exempt for the purposes of Medicaid nursing home vendor payment, the home must be the individual's or the individual's spouse principal place of residence, the deed to the home must be in the individual's or individual's spouse name, and the individual's equity in the home must not exceed the home equity limit provisions in the rule.[1] Therefore, while the home was in the trust, the deed to the home was not in the appellant's name or her spouse's name and was not exempt. Once the house was placed back into the Community Spouse's name, the home was exempt as a resource. The Agency determined that the transfer of the home from the trust to the Community Spouse was improper and triggered the improper transfer period. The appellant argues that the transfer from the trust to the spouse is not improper pursuant to the provisions of Ohio Admin. Code 5101:1-39-07(E) and Ohio Admin. Code 5101:1-39-27.1.

Ohio Admin. Code 5101:1-39-35 defines a resource assessment as "*the process* where the resources of both the institutionalized spouse and the community spouse are assessed to determine the couple's total countable resources existing at the beginning of the **first continuous period of institutionalization.**" (Emphasis added.) The resource assessment correctly included the home as an available resource because, at the time, the appellant's homestead property was held in the revocable trust. Because the home was considered included in the resource assessment, the Community Spouse's resource allowance reflected the increased value of the couple's resources.

The value of the couple's resources including the house was $191,371.53, resulting in the institutionalized spouse being allocated a CSRA of $95,685.76. Without including the house, the couple's resources would total only $88,447.71, which would result in the community spouse receiving the CSRA minimum of $59,554. By including the home in the resource assessment and then removing it from the resources by transferring it to the Community Spouse, the couple was attempting to artificially inflate the value of the resources so that the Community Spouse received a larger CSRA, and therefore more of the couple's assets.

While we agree with the appellant that Ohio Admin. Code 5101:1-39-07(E) allows an individual to transfer a home to the individual's spouse without penalty, the transfer

[1] Ohio Admin. Code 5101:1-39-31

at issue here was not a transfer from the appellant to the community spouse. The transfer was from the revocable trust to the community spouse. The trust is a separate legal entity under the law. It is available to the institutionalized and community spouses because they have a beneficial interest in the trust. Therefore, it is countable as a resource. But the trust assets are not owned by the community and institutionalized spouses and therefore, the home is not exempt as homestead property. The appellant is attempting to use the vehicle of the trust to inflate the marital assets for purposes of the CSRA, but then ignore the trust and claim that the transfer is a transfer between the spouses to protect the transfer from the improper transfer penalty. The appellant cannot have it both ways.

Additionally, Ohio Admin. Code 5101:1-39-07(E) must be read in conjunction with paragraph (G) of the same rule. Ohio Admin. Code 5101:1-39-07(G) states:

> (G) Any transfer between spouses in order to comply with the Medicaid community spouse resource allowance (CSRA) computed pursuant to Chapter 5101:1-39 and Chapter 5101:6-7 of the Administrative Code may not be applied inconsistently with the rules setting limits on the CSRA or the minimum monthly maintenance needs allowance (MMMNA).
>
> (1) Any amount of a couple's resources exceeding the CSRA must be used for the benefit of the institutionalized spouse and/or community spouse.
>
> **(2) Any amount of a couple's resources exceeding the CSRA may not be transferred to the community spouse or to another for the sole benefit of the community spouse unless permitted in a hearing decision issued under Chapter 5101:6-7 of the Administrative Code.**
>
> (3) Any amount of a couple's resources exceeding the CSRA may not be converted to another form for the purpose of generating additional income for the community spouse unless permitted in a hearing decision issued under Chapter 5101:6-7 of the Administrative Code.
>
> (4) Transfers in excess allowed by this rule, must be presumed an improper transfer. (Emphasis added.)

The value of the home was included in the resource assessment and, therefore, must be included when determining the amount of resources transferred for CSRA purposes. By transferring the home to the Community Spouse, a total of $176,947.71 of the couple's assets was transferred. This exceeds the CSRA of $95,685.76, in violation of

the rules establishing the CSRA. Additionally, since the home had been removed from the resources when it was transferred to the Community Spouse, some or all of the remaining assets were allocated to the Community Spouse as part of the CSRA. The Institutionalized Spouse, therefore, received assets exceeding the CSRA and any amount transferred in excess of the CSRA is considered an improper transfer. The state hearing decision is correct.

Decision

Accordingly we must ORDER that the hearing decision AFFIRMED.

Margaret E. Adams
Administrative Appeal Officer

CONCUR:

Susan K. Lehman-Sentle

Administrative Appeal Officer

Joel D. Lodge, Chief
Bureau of State Hearings

Chief Legal Counsel

Date of Issuance: September 14, 2011

Notice to Appellant

This Administrative Appeal decision is the final decision on this appeal from the state department of job & family services. It is binding on the department and agency, unless it is reversed or modified on appeal to the court of common pleas.

An Appellant who disagrees with this decision may appeal it to the court of common pleas pursuant to sections 119.12 and 5101.35(E) of the Revised Code. The Appellant shall mail the original notice of appeal to the department at the following address:

Ohio Department of Job & Family Services
Office of Legal Services
30 E. Broad Street, 31st Floor
Columbus, OH 43215-3414

The Appellant must also file a copy of the notice of appeal with the court of common pleas in the county in which the Appellant resides (Franklin County, if the Appellant does not reside in Ohio). Please note: Both the mailing to the department and the filing with the court must occur within thirty (30) calendar days of the date of issuance of this decision.

If you have questions about appealing to a court, contact your attorney, local legal aid society, or bar association. If you want information about free legal services, you can call the Ohio State Legal Services Association, toll free, at 1-800-589-5888.

cc:
Director, LOGAN CDJFS
LEHMAS01, MARTED, Bureau of State Hearings
ELIZABETH DURNELL, ATTORNEY
THOM L COOPER CO LPA
130 EAST MAIN STREET
LEBANON, OH, 45036

Appendix C

IN THE COMMON PLEAS COURT OF LOGAN COUNTY, OHIO

RUTH M SMITH

CASE NO. CV 11 10 0428

VS.

NOTICE

OHIO DEPARTMENT OF JOB AND FAMILY SERVICES

You are hereby notified that on OCTOBER 22 2012 there was filed in this Court a Judgment Entry. While this office cannot provide you with legal advice, you should be aware that if you intend to appeal a matter, there are certain times within which the first step for that appeal must be taken. Generally, that time is thirty (30) days from a "Final Appealable Order". This office is not in a position to tell you specifically whether the above referenced Judgment Entry is a "Final Appealable Order" or if there is some matter peculiar to your case that would alter the general time requirement.

You should, therefore, discuss the matter with your legal advisor at once to determine whether an appeal is advisable as a result of the above Judgment Entry and what steps need to be taken and when regarding this case.

Witness my hand and seal of said Court, this
October 22, 2012

DOTTIE TUTTLE
Logan County Clerk of Courts

By: s/Elaine Berry
Deputy

LOGAN COUNTY
COMMON PLEAS COURT
FILED
2012 OCT 22 AM 9:53
DOTTIE TUTTLE
CLERK

IN THE COMMON PLEAS COURT OF LOGAN COUNTY, OHIO
GENERAL DIVISION

RUTH M SMITH,

Appellant,

vs. Case No. CV 11 10 0428

OHIO DEPARTMENT OF JOB AND FAMILY SERVICES,

Appellee.

* * *

JUDGMENT ENTRY

This cause comes before the Court on an administrative appeal filed by Ruth M. Smith from the August 15, 2011 administrative decision of the Ohio Department of Job and Family Services which was affirmed by the September 14, 2011 administrative appeal decision. On various theories the Appellant contends that these decisions improperly determined that the Appellant's transfer of her homestead property from a revocable trust to the community spouse constituted an improper transfer of assets and that such a transfer imposed a period of restricted Medicaid coverage during which the Appellant was ineligible for nursing home payments. The certified record of the administrative proceedings were filed with this Court on October 24, 2011. The Court conducted a scheduling conference on December 5, 2011. The Court issued a briefing schedule and assigned this matter for oral argument. Appellant's brief, Appellee's brief and Appellant's reply brief have all been timely filed and an oral argument was held on March 23, 2012. On July 17, 2012 Appellant filed a notice of supplemental authority. A notice of supplemental authority was also filed by the Appellee on May 31, 2012.

At the oral hearing Attorney Sarah Zaggart Morrison appeared for the Appellant and Amy R. Goldstein for the Appellee. Counsel agreed that there were no disputed facts and this was a question of law. Counsel also agreed that this case was similar to an earlier case that this Court had decided in *Helen Williams v. Ohio Department of Job and Family Services* being case number CV11-04-0153. This Court's decision was appealed to the Court of Appeals for Logan County (Third District). That case was decided by the Court of Appeals on October 9, 2012, 2012-Ohio-4659.

From the briefs it is not disputed that Appellant Ruth Smith was institutionalized in a nursing home on June 25, 2010. Prior to her institutionalization, in 1999, Ruth and her husband Frank transferred their home from their individual names to a revocable living trust (the Frank V. and Ruth M. Smith revocable living trust). After Ruth's institutionalization the husband, acting in his capacity of trustee, transferred the home out of the trust to himself on October 15, 2010. When the Appellant applied for Medicaid on January 14, 2011 it was determined that her assets and her husband's assets combined for $191,371.53 including the value of the home. The home was valued at $88,500.00. The county department of Job and Family Services approved Appellant's Medicaid application but determined that Mr. Smith's transfer of the house to himself was an "improper transfer". The county department imposed a 14.69 month period of restrictive coverage beginning November 1, 2010. The county decision was challenged and it was ultimately the state's decision that the county properly determined the transfer of the home to be improper. The hearing officer reduced the amount of the improper transfer to $81,261.94 and the period of restrictive coverage was reduced to 13.49 months. An administrative appeal to the director resulted in a decision by a panel of three administrative examiners finding the transfer of the home from the trust to be improper. That decision noted that the inclusion of the home in the resource assessment and then immediately removing it from the resources by transferring it to Mr.

Smith, the couple was attempting to artificially inflate the value of the resources so that Mr. Smith received a larger CSRA. The Appellant now appeals that decision to this Court.

Appellant filed her appeal to this Court pursuant to R.C. 5101.35 and 119.12. Pursuant to paragraph E of R.C. 5105.35 an Appellant disagreeing with the administrative decision of the director of Job and Family Services or the director's designee may appeal from the decision to the Court of Common Pleas pursuant to R.C. 119.12. The standard of review pursuant to R.C. 119.12 is that the court is to determine from the entire record and any additional evidence that was admitted, whether the order is supported by reliable, probative and substantial evidence and in accordance with the law.

ASSIGNMENTS OF ERROR

ASSIGNMENT #1 OF ERROR: Appellee's September 14, 2011 administrative appeal decision that Appellant's transfer of her home from a revocable trust to the community spouse constituted an improper transfer of assets that resulted in a period of restricted eligibility for Medicaid is not supported by reliable, probative, and substantial evidence. The evidence establishes that the transfer of the primary residence from a revocable trust to a Medicaid applicant's spouse was not an improper transfer for the purpose of Medicaid eligibility and should be treated the same as a transfer directly from the institutionalized spouse to the community spouse.

ASSIGNMENT #2 OF ERROR: Appellee's September 14, 2011 administrative appeal decision was not in accordance with law because (1) the transfer of Appellant's house from a revocable trust was not an improper transfer for purposes of Medicaid eligibility and coverage under Ohio Law; (2) Ohio Admin. Code 5101:1-39-07(E) and (G) do not require the value of the home to be included when determining the amount of resources transferred for CSRA purposes; (3) the decision is inopposite to and in violation of Ohio Admin. Code 5101:1-39-27.1 and 5101:1-39-07, which permit the transfer of assets from a revocable trust to the community spouse; (4) the decision is inopposite to and in conflict with prior determinations and state hearing decisions by Appellee with other applications for Medicaid benefits throughout the State of Ohio; and (5) Appellee is not permitted to interpret its rules so as to require different treatment of Medicaid applicants without a rational relationship to a legitimate state purpose.

ASSIGNMENT #3 OF ERROR: Appellee's September 14, 2011 administrative appeal decision and its interpretation of Ohio Adm. Code 5101:1-31 & 5101:1-39-27.1 are not in accordance with federal Medicaid law, which invalidates Appellee's own rules under the supremacy clause.

ASSIGNMENT #4 OF ERROR: Appellee's August 15, 2011 administrative appeal decision is not in accordance with law and is in violation of Ohio Admin. Code 5101:1-39-

27.1 and 5101:1-39-07, which permit the transfer of homestead property from a revocable trust to the community spouse.

ASSIGNMENT #5 OF ERROR: Appellee's September 14, 2011 administrative appeal decision is not supported by reliable, probative, and substantial evidence and is not in accordance with law because Appellant has rebutted the presumption of impropriety of the transfer pursuant to Ohio Admin. Code 5101:1-39-07(E) & (G).

ASSIGNMENT #6 OF ERROR: Appellee's September 14, 2011 administrative appeal decision is not supported by reliable, probative and substantial evidence and is not in accordance with law due to the collateral estoppel effect of Appellee's prior determinations and state hearing decisions with other applications from Medicaid benefits in the State of Ohio and its discriminatory and different treatment of Medicaid applicants without a rational relationship to a legitimate state purpose.

While the first assignment of error states that the administrative decision of September 14, 2011 is not supported by reliable, probative and substantial evidence, the parties agree that this is not a question of fact but a question of law. This Court finds that all of the assignments raising various issues of law have been addressed in the Williams case by the Third District which decision was announced October 9, 2012. In fact, the above assignments are in the same order and make the same allegations as appellant made in *Williams, supra.* The Third District affirmed this Court's decision. That Court found that it was a prerequisite that the residence be titled in the parties' name and not in the name of the trust for the transfer to be exempt. The Third District also addressed the issues of estoppel and consistency with federal law. The Court found that the doctrine of collateral estoppel or preclusion is not applicable at a hearing on a difference case; an administrative decision applies only to that individual, and it does not have state wide application. The Court further found that there were no inconsistencies between Ohio and federal law on the basis that the Appellant had contended. The same arguments are being made here and the Court reaches the same conclusion as the Court of Appeals. This Court finds therefore that the assignments of error are not well taken, that there is reliable, probative and substantial evidence to support the administrative decision and the administrative decision is in

accordance with the law. It is **ORDERED, DECREED** and **ADJUDGED** that the decision of the administrative body is affirmed. Pursuant to R.C. 119.12 it is **ORDERED** that the Clerk serve a certified copy of this decision upon the Appellee, the Ohio Department of Job and Family Services. Costs to Appellant.

s/Mark S. O'Connor

Mark S. O'Connor, Judge

ENDORSEMENT REGARDING NOTICE OF JUDGMENT

To the Clerk:

You are hereby directed to serve upon all parties Notice of Judgment and the date on which it was journalized pursuant to Civil Rule 58(B).

s/Mark S. O'Connor

Mark S. O'Connor, Judge

cc: DONALD C BREY
AMY R GOLDSTEIN

LOGAN COUNTY
COMMON PLEAS COURT
FILED
2012 OCT 22 AM 11:37
DOTTIE TUTTLE
CLERK

Appendix D

FILED
COURT OF APPEALS
JUN 03 2013
BARB McDONALD
CLERK, LOGAN COUNTY, OHIO

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
LOGAN COUNTY

RUTH M. SMITH,

APPELLANT, **CASE NO. 8-12-18**

v.

OHIO DEPARTMENT OF JOB AND FAMILY SERVICES, **JUDGMENT ENTRY**

APPELLEE.

This appeal, having been placed on the accelerated calendar, is being considered pursuant to App.R. 11.1(E) and Loc.R. 12. This decision is therefore rendered by summary judgment entry, which is only controlling as between the parties to this action and not subject to publication or citation as legal authority under Rule 3 of the Ohio Supreme Court Rules for the Reporting of Decisions.

Appellant, Ruth M. Smith ("Ruth"), appeals the October 22, 2012 judgment of the Logan County Court of Common Pleas affirming the administrative appeal decision of the Ohio Department of Job and Family Services finding that Appellee, the Logan County Department of Job and Family Services (the "Agency"), correctly identified an improper resource transfer which subjected Ruth to a period of restricted Medicaid coverage for her nursing home care.

The facts in this case are undisputed by the parties. On November 3, 1999, Ruth transferred her home via quit claim deed to the Frank D. and Ruth M. Smith Revocable Living Trust. Ruth and her husband, Frank, were designated as the primary trustees. Several years later, Ruth entered a nursing home care facility. Specifically, June 25, 2010, marked the beginning of Ruth's first period of continuous institutionalization for purposes of calculating Medicaid eligibility for coverage of her nursing home care. On October 15, 2010, Frank, acting as trustee, transferred the home from the trust to himself via a fiduciary deed. On January 14, 2011, Ruth applied for Medicaid coverage of her nursing home care.

The Agency subsequently conducted a resource assessment to determine the couple's "countable resources" as of Ruth's first period of continuous institutionalization—June 25, 2010. *See* OAC 5101:1-39-35. The value of the couple's countable resources was determined to be $191,371.53, resulting in a Community Spouse Resource Allowance ("CSRA") of $95,685.76. The CSRA is a capped, formula based amount of the couple's joint resources that the Community Spouse is allowed to retain to live on when the institutionalized spouse applies for Medicaid coverage of her nursing facility expenses. *See Wisconsin Dept. of Health and Family Services v. Blumer*, 534 U.S. 473, 482-83 (2002); Ohio Admin. Code 5101:1-39-36.1. [1] The home was valued at $88,500

[1] Pursuant to 5101:1-39-36.1 (B), Ruth is considered to be the "Institutionalized Spouse" and Frank is considered to be the "Community Spouse."

and was included in the resource assessment because it was deeded in the name of the revocable trust and not considered to be exempt as a resource.

The record indicates that the Agency subsequently "updated" the value of the couple's resources by using the current value of the resources as of the date of Ruth's Medicaid application—January 14, 2011. The Agency determined the "updated" value of the couple's resources to be $88,447.71, which excluded the value of the home as a resource because it was deeded in the name of the Community Spouse—i.e., Frank, on the date Ruth applied for Medicaid. As a result, the home was now considered exempt as a resource. The Agency then allocated all of the couple's current resources to Frank based on the CSRA of $95,685.76 and determined Ruth's resources to be $0, allowing for Medicaid eligibility. The Agency also determined that the transfer of the home from the revocable trust to Frank was an improper transfer and approved a restricted period of Medicaid coverage of 14.69 months for Ruth's nursing home care expenses.

Ruth requested a review of the Agency's determination. On July 8, 2011, in a state hearing decision, a hearing officer affirmed the Agency's determination of an improper transfer, but reassessed the value of the improper transfer and calculated the restricted period of Medicaid coverage to be 13.49 months. Ruth requested an administrative appeal of the state hearing decision and on September 14, 2011, a panel of three administrative appeal examiners affirmed the decision of the hearing officer.

Ruth appealed the administrative appeal decision to the Logan County Court of Common Pleas pursuant to R.C. 119.12 and R.C. 5101.35. On October 22, 2012, the trial court overruled Ruth's assignments of error and affirmed the administrative appeal decision, relying on this Court's recent opinion in *Williams v. Ohio Department of Job and Family Services*, 3d Dist. No. 8-11-18, 2012-Ohio-4659.

It is from this judgment that Ruth now appeals, asserting the following assignments of error.

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED IN AFFIRMING APPELLEE'S SEPTEMBER 14, 2011 ADMINISTRATIVE APPEAL DECISION THAT APPELLANT'S TRANSFER OF HER HOME FROM A REVOCABLE TRUST TO THE COMMUNITY SPOUSE CONSTITUTED AN IMPROPER TRANSFER OF ASSETS THAT RESULTED IN A PERIOD OF RESTRICTED ELIGIBILITY FOR MEDICAID IS NOT SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE. THE EVIDENCE ESTABLISHES THAT THE TRANSFER OF THE PRIMARY RESIDENCE FROM A REVOCABLE TRUST TO A MEDICAID APPLICANT'S SPOUSE WAS NOT AN IMPROPER TRANSFER FOR THE PURPOSE OF MEDICAID ELIGIBILITY AND SHOULD BE TREATED THE SAME AS A TRANSFER DIRECTLY FROM THE INSTITUTIONALIZED SPOUSE TO THE COMMUNITY SPOUSE.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT ERRED IN AFFIRMING APPELLEE'S SEPTEMBER 14, 2011 ADMINISTRATIVE APPEAL DECISION WAS NOT IN ACCORDANCE WITH LAW

BECAUSE (1) THE TRANSFER OF APPELLANT'S HOUSE FROM A REVOCABLE TRUST WAS NOT AN IMPROPER TRANSFER FOR PURPOSES OF MEDICAID ELIGIBILITY AND COVERAGE UNDER OHIO LAW; (2) OHIO ADMIN. CODE 5101:1-39-07(E) AND (G) DO NOT REQUIRE THE VALUE OF THE HOME TO BE INCLUDED WHEN DETERMINING THE AMOUNT OF RESOURCES TRANSFERRED FOR CSRA PURPOSES; (3) THE DECISION IS INOPPOSITE *[SIC]* TO AND IN VIOLATION OF OHIO ADMIN. CODE 5101:1-39-27.1 AND 5101:1-39-07, WHICH PERMIT THE TRANSFER TO ASSETS FROM A REVOCABLE TRUST TO THE COMMUNITY SPOUSE; (4) THE DECISION IS INOPPOSITE *[SIC]* TO AND IN CONFLICT WITH PRIOR DETERMINATIONS AND STATE HEARING DECISIONS BY APPELLEE WITH OTHER APPLICATIONS FOR MEDICAID BENEFITS THROUGHOUT THE STATE OF OHIO; AND (5) APPELLEE IS NOT PERMITTED TO INTERPRET ITS RULES SO AS TO REQUIRE DIFFERENT TREATMENT OF MEDICAID APPLICANTS WITHOUT A RATIONAL RELATIONSHIP TO A LEGITIMATE STATE PURPOSE.

ASSIGNMENT OF ERROR NO. III

THE TRIAL COURT ERRED IN AFFIRMING APPELLEE'S SEPTEMBER 14, 2011 ADMINISTRATIVE APPEAL DECISION AND ITS INTERPRETATION OF OHIO ADM. CODE 5101:1-39-31 & 5101:1-39-27.1 BECAUSE THE DECISIONS ARE NOT IN ACCORDANCE WITH FEDERAL MEDICAID LAW, WHICH INVALIDATES APPELLEE'S OWN RULES UNDER THE SUPREMACY CLAUSE.

ASSIGNMENT OF ERROR NO. IV

THE TRIAL COURT ERRED IN AFFIRMING APPELLEE'S AUGUST 15, 2011 *[SIC]* ADMINISTRATIVE APPEAL DECISION. THE DECISIONS IS *[SIC]* NOT IN ACCORDANCE WITH LAW AND IS IN VIOLATION OF OHIO ADMIN. CODE 5101:1-39-27.1 AND 5101:1-39-07 WHICH PERMIT THE TRANSFER OF HOMESTEAD

PROPERTY FROM A REVOCABLE TRUST TO THE COMMUNITY SPOUSE.

ASSIGNMENT OF ERROR NO. V

THE TRIAL COURT ERRED IN AFFIRMING APPELLEE'S SEPTEMBER 14, 2011 ADMINISTRATIVE APPEAL DECISION. THE DECISION IS NOT SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE AND IS NOT IN ACCORDANCE WITH LAW BECAUSE APPELLANT HAS REBUTTED THE PRESUMPTION OF IMPROPRIETY OF THE TRANSFER PURSUANT TO OHIO ADMIN. CODE 5101:1-39-07(E) & (G).

ASSIGNMENT OF ERROR NO. VI

THE TRIAL COURT ERRED IN AFFIRMING APPELLEE'S SEPTEMBER 14, 2011 ADMINISTRATIVE APPEAL *[SIC]*. THE DECISION IS NOT SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE AND IS NOT IN ACCORDANCE WITH LAW DUE TO THE COLLATERAL ESTOPPEL EFFECT OF APPELLEE'S PRIOR DETERMINATIONS AND STATE HEARING DECISIONS WITH OTHER APPLICATIONS FOR MEDICAID BENEFITS IN THE STATE OF OHIO AND ITS DISCRIMINTORY AND DIFFERENT TREATMENT OF MEDICAID APPLICANTS WITHOUT A RATIONAL RELATIONSHIP TO A LEGITIMATE STATE PURPOSE.

The First, Second, Third, Fourth, Fifth and Sixth Assignments of Error

This Court in *Williams v. Ohio Department of Job and Family Services*, 3d Dist. No. 8-11-18, 2012-Ohio-4659, *appeal not accepted,* ___ Ohio St.3d ___, 2012-Ohio-2178, has previously addressed the precise issues raised by Ruth in this appeal. *Williams* involved facts similar to the case sub judice. In that case, we affirmed the trial court's judgment finding that the Agency had correctly

determined that an improper transfer took place which required the imposition of a restricted period of Medicaid coverage upon the Medicaid applicant. Therefore, pursuant to our holding in *Williams*, we overrule Ruth's assignments of error and affirm the decision of the trial court.

Accordingly, for the aforementioned reasons, it is the order of this Court that the Judgment Entry of the Logan County Court of Common Pleas be, and hereby is, affirmed. Costs are assessed to Appellant for which judgment is hereby rendered. This cause is remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this judgment entry to the trial court as the mandate prescribed by App.R. 27, and serve a copy of this judgment entry on each party to the proceedings and note the date of service in the docket as prescribed by App.R. 30.

JUDGES

WILLAMOWSKI, J., Concurs in Judgment Only

DATED: June 3, 2013

/jlr

Certificate of Service

The undersigned hereby certifies that a copy of the foregoing ~~Notice of Appeal~~ Memorandum in support of Jurisdiction of Appellant Ruth Smith has been served by ordinary U.S. Mail service on Amy Goldstein, Attorney for Appellee, Ohio Attorney General, Health and Human Services Section, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215 this 18th day of July, 2013.

Elizabeth Durnell (0084081)
Cooper, Adel & Associates, LPA
36 W. Main Street
Centerburg, OH 43011
Telephone: (800) 798-5297
Facsimile: (740) 625-5080
Attorney for Appellant