

APPENDIX

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

ENTERED
NOV 25 2014

ELAINE L. KOENIG, et al.,
Appellees,

APPEAL NO. C-140111



D108701108

vs.

ENTRY OVERRULING
APPLICATION FOR
RECONSIDERATION

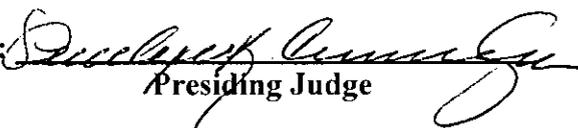
CYNTHIA C. DUNGEY, et al.,
Appellants.

This came to be considered upon the application of the appellant filed herein for reconsideration of this court's opinion dated October 22, 2014, the memorandum in opposition and the reply.

The Court finds that the application is not well taken and is overruled.

To The Clerk:

Enter upon the Journal of the Court on NOV 25 2014 per order of the Court.

By: 
Presiding Judge

(Copies sent to all counsel)

EXHIBIT 1

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

ELAINE L. KOENIG, :
Plaintiff, :

APPEAL NO. C-140111
TRIAL NO. A-1203492

and :

ELANIE L. KOENIG, :
ADMINISTRATOR OF THE ESTATE :
OF PAUL F. KOENIG, :

JUDGMENT ENTRY.

Plaintiff-Appellee, :

vs. :



D108307560

CYNTHIA C. DUNGEY, DIRECTOR OF :
OHIO DEPARTMENT OF JOB AND :
FAMILY SERVICES, :

and :

OHIO DEPARTMENT OF JOB AND :
FAMILY SERVICES, :

Defendants-Appellants. :

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed for the reasons set forth in the Opinion filed this date.

Further, the Court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

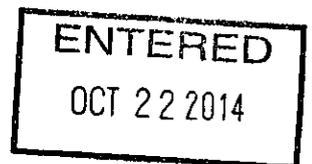
The Court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To the clerk:

Enter upon the journal of the court on October 22, 2014 per order of the court.

By  _____
Presiding Judge

EXHIBIT 2





D108307742

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

ELAINE L. KOENIG,

Plaintiff,

and

ELANIE L. KOENIG,
ADMINISTRATOR OF THE ESTATE
OF PAUL F. KOENIG,

Plaintiff-Appellee,

vs.

CYNTHIA C. DUNGEY, DIRECTOR OF
OHIO DEPARTMENT OF JOB AND
FAMILY SERVICES,

and

OHIO DEPARTMENT OF JOB AND
FAMILY SERVICES,

Defendants-Appellants.

APPEAL NO. C-140111
TRIAL NO. A-1203492

OPINION.

PRESENTED TO THE CLERK
OF COURTS FOR FILING

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CLERK OF COURTS
HAMILTON COUNTY

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CLERK OF COURTS
HAMILTON COUNTY, OH

Civil Appeal from: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: October 22, 2014

Beckman Weil Shepardson, LLC, Janet E. Pecquet and Ashley Shannon Burke, for Plaintiff-Appellee,

Michael DeWine, Ohio Attorney General, and Rebecca L. Thomas, Assistant Attorney General, for Defendants-Appellants.

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

FISCHER, Judge.

{¶1} Defendants-appellants the Ohio Department of Job and Family Services and Cynthia Dungey, in her official capacity as director of the Ohio Department of Job and Family Services, are charged with administering the federal Medicaid program in Ohio. Plaintiff-appellee Elaine Koenig, as the administrator of her late-husband's estate, sued defendants after the Ohio Department of Job and Family Services upheld an agency determination imposing a period of restricted coverage on her husband's Medicaid benefits on the basis that Mrs. Koenig had improperly transferred resources to purchase an annuity.

{¶2} Following *Hughes v. McCarthy*, 734 F.3d 473 (6th Cir.2013), we determine that Mrs. Koenig's annuity purchase with funds in excess of her community spouse resource allowance, after her husband's institutionalization, but before his Medicaid eligibility determination, was not an improper transfer for purposes of qualifying for Medicaid. We also determine that because the issue of whether Mrs. Koenig's annuity was an improper transfer for failing to meet the requirements of Ohio Adm.Code 5160:1-3-22.8 was never raised at the agency level, this court cannot conduct a meaningful review of that argument on appeal. Therefore, we affirm the decision of the trial court.

Federal Medicaid Statutes and Ohio's Regulations

{¶3} Medicaid is a federally-established program developed by Congress to provide state and federal funding to those individuals who cannot afford their medical care. See Title XIX of the Social Security Act, 79 Stat. 286 (1965). The state of Ohio, as a participant in the Medicaid program, develops its own rules for implementing the program, which must be consistent with the federal Medicaid

statutes. *See Wisconsin Dept. of Health & Family Servs. v. Blumer*, 534 U.S. 473, 480, 122 S.Ct. 962, 151 L.Ed.2d 935 (2002).

{¶4} Congress has sought to protect married individuals living in the community (“community spouses”) from financial hardship caused by their spouses’ institutionalization in a nursing-care facility (“institutionalized spouses”) by allowing community spouses to maintain some assets—the Community Spouse Resource Allowance—while still permitting institutionalized spouses to receive Medicaid. *See* 42 U.S.C. 1396r-5; Ohio Adm.Code 5160:1-3-36.1; *Blumer* at 480. In calculating the Community Spouse Resource Allowance (“CSRA”), a state agency first examines a couple’s total resources as of the beginning of institutionalization for the institutionalized spouse, divides that total by two, and then subjects that number to a minimum and maximum amount, adjusted for inflation, which will determine the CSRA. *See* Ohio Adm.Code 5160:1-3-36.1(C).

{¶5} The CSRA cannot be counted as an available resource in determining an institutionalized spouse’s Medicaid eligibility. *See id.* However, if a couple’s resources exceed the CSRA amount, after setting aside a minimal amount for the institutionalized spouse, then those resources must be disposed of in order for the institutionalized spouse to qualify for Medicaid. *See Blumer* at 482-483, citing 42 U.S.C. 1396r-5(c)(2); Ohio Adm.Code 5160:1-3-36.1(C).

{¶6} Even if a state agency deems an institutionalized spouse Medicaid-eligible, the agency can impose a period of restricted coverage on the institutionalized spouse, meaning that the agency will withhold Medicaid payments to the nursing-care facility, if the agency determines that an “improper transfer” of the couple’s resources occurred. *See* 42 U.S.C. 1396p; Ohio Adm.Code 5160:1-3-07.

{¶7} The treatment of resource transfers for Medicaid purposes is governed by Ohio Adm.Code 5160:1-3-07. An improper transfer occurs, in relevant part, when an individual applying for Medicaid, or that individual's spouse, disposes of a resource during the look-back period for "less than fair market value." *See Ohio Adm.Code 5160:1-3-07(B)(3), (5), (7), (9), and (10).* Generally, in a case where a Medicaid applicant is institutionalized at the time of the application, the look-back period begins 60 months prior to the application date. *See id.*

{¶8} Even if an individual or spouse transfers a resource for less than fair market value, Ohio Adm.Code 5160:1-3-07 provides that where the transfer occurs for the "sole benefit" of the spouse, the transfer will not be improper. *See Ohio Adm.Code 5160:1-3-07(E)(2)(a)-(b); 42 U.S.C. 1396p(c)(2)(B)(i)-(ii).* "In order for a transfer to be considered for the sole benefit of the spouse[,] * * * the entity that receives or holds the transferred resource must * * * be required to expend all of the transferred resources for the benefit of the individual during that individual's life expectancy." Ohio Adm.Code 5160:1-3-07(F)(1).

{¶9} Additionally, other provisions govern transfers of resources between spouses. 42 U.S.C. 1396r-5(f)(1) permits an institutionalized spouse to transfer an amount equal to the CSRA "but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse * * * as soon as practicable after the date of the initial determination of eligibility." Ohio Adm.Code 5160:1-3-07(G) provides that "[a]ny amount of a couple's resources exceeding the CSRA may not": (1) "be transferred to the community spouse or to another for the sole benefit of the community spouse unless permitted in a hearing decision"; or (2) "be converted to another form for the

purpose of generating additional income for the community spouse unless permitted in a hearing decision[.]” Ohio Adm.Code 5160:1-3-07(G)(2)-(3).

{¶10} Effective in 2006 with Congress’s passage of the Deficit Reduction Act of 2005, Pub.L.No. 109-171, 120 Stat. 4, 62-64, the purchase of an annuity is considered an improper transfer, unless certain criteria are met. *See* Ohio Adm.Code 5160:1-3-22.8; 42 U.S.C. 1396p(c)(1)(F)-(G). In relevant part, the annuity must name the state of Ohio as the first remainder beneficiary “for the total amount of medical assistance furnished to the individual” or name the state of Ohio as second remainder beneficiary after the individual’s spouse or minor or disabled child. Ohio Adm.Code 5160:1-3-22.8(C)(1). The annuity must also be “irrevocable, non-assignable, and actuarially sound * * * and provide[] for payments in equal amounts during the term of the annuity with no deferral and no balloon payments made.” Ohio Adm.Code 5160:1-3-22.8(C)(3).

Mrs. Koenig’s Annuity Purchase

{¶11} Paul Koenig entered a nursing-care facility on March 15, 2011. He later applied for Medicaid benefits with Hamilton County Job and Family Services (“HCJFS”) on October 18, 2011. At the time of Mr. Koenig’s institutionalization, Mr. and Mrs. Koenig had countable Medicaid resources of approximately \$349,806. The agency determined that the CSRA for Mrs. Koenig was \$109,560.

{¶12} On October 26, 2011, Mrs. Koenig purchased a single-premium annuity for \$121,783.56. The annuity provided immediate, monthly payments to Mrs. Koenig for five years—within her actuarial life expectancy at the time of nine and one-half years. The annuity contract was irrevocable, nonassignable, and did not contain a balloon payment or deferral. The annuity contract named the state of

Ohio as the first remainder beneficiary “up to amount of benefits received by Elaine Koenig.”

{¶13} The initial HCJFS caseworker responsible for Mr. Koenig’s Medicaid application approved his application, but instituted a period of restricted coverage from December 2011 through July 2013. The caseworker determined that the annuity purchase constituted an improper transfer of resources to Mrs. Koenig under former Ohio Adm.Code 5101:1-39-07(C), renumbered as Ohio Adm.Code 5101:1-3-07(C).

{¶14} Mr. Koenig requested a state hearing with the Ohio Department of Job and Family Services (“ODJFS”) under R.C. 5101.35(B). The hearing officer upheld the determination of the HCJFS caseworker. Mr. Koenig then sought an administrative appeal within ODJFS under R.C. 5101.35(C). Prior to the release of the administrative decision upholding the state hearing decision, Mr. Koenig passed away.

{¶15} Mrs. Koenig, on behalf of herself and as the administrator of her late-husband’s estate, filed an administrative appeal of ODJFS’s decision under R.C. 119.12 and 5101.35 with the Hamilton County Court of Common Pleas. She also filed claims for declaratory and injunctive relief and claims under 42 U.S.C. 1983. The trial court granted ODJFS’s motion to dismiss the claims of Mrs. Koenig in her personal capacity, as well as the declaratory- and injunctive-relief and the 1983 claims brought by Mr. Koenig’s estate. The administrative appeal on behalf of Mr. Koenig proceeded with briefing on the merits.

{¶16} In its trial-court brief seeking to uphold the hearing officers’ decisions, ODJFS argued that Mrs. Koenig’s annuity purchase was an improper transfer.

ODJFS also argued, for the first time, that Mrs. Koenig failed to comply with Ohio Adm.Code 5101:1-3-22.8(C), which requires that an annuity name the state as either a first beneficiary or a second beneficiary for the total amount of medical assistance paid on behalf of the institutionalized spouse.

{¶17} The trial court found that ODJFS waived its argument that Mrs. Koenig's annuity failed to comply with Ohio Adm.Code 5101:1-3-22.8(C), because that argument was not made part of the underlying administrative record. The trial court nevertheless determined that Mrs. Koenig's annuity fully complied with Ohio Adm.Code 5101:1-3-22.8(C), as well as Ohio Adm.Code 5160:1-3-07(E)(2)(a)-(b) governing transfers for the "sole benefit" of spouses. The trial court concluded that ODJFS erred when it treated Mrs. Koenig's purchase of the annuity as an improper transfer and erred in imposing a period of restricted coverage on Mr. Koenig's Medicaid payments. ODJFS now appeals the trial court's decision.

Standard of Review

{¶18} R.C. 5101.35(E) permits an appeal of an administrative decision issued by ODJFS to the court of common pleas under R.C. 119.12. The trial court must uphold the agency decision if it is supported by "reliable, probative, and substantial evidence and is in accordance with law." R.C. 119.12. When an agency appeals a trial court's decision to a court of appeals under R.C. 119.12, the appeal "shall be taken on questions of law relating to the constitutionality, construction, or interpretation of statutes and rules of the agency, and, in the appeal, the court may also review and determine the correctness of the judgment of the court of common pleas that the order of the agency is not supported by any reliable, probative, and substantial evidence in the entire record." *See Miller v. Dept. of Indus. Relations*, 17 Ohio St.3d

226, 479 N.E.2d 254 (1985). An appellate court reviews questions of law de novo; however, a court must defer to an administrative agency's construction of the statutes and rules it enforces unless such construction is unreasonable. *Weaver v. Ohio Dept. of Job & Family Servs.*, 153 Ohio App.3d 331, 2003-Ohio-3827, 794 N.E.2d 92, ¶ 3, 12 (1st Dist.).

Preeligibility Purchase of an Annuity is not an Improper Transfer

{¶19} In its first assignment of error, ODJFS argues that the trial court erred in reversing its determination that the annuity purchase by Mrs. Koenig was an improper transfer. ODJFS argues that Mrs. Koenig could not use funds in excess of her CSRA to purchase the annuity without seeking agency approval in a hearing. *See* Ohio Adm.Code 5160:1-3-07(G). ODJFS further argues that the annuity is not for the “sole benefit” of Mrs. Koenig as the community spouse. *See* Ohio Adm.Code 5160:1-3-07(F)(1); 42 U.S.C. 1396p(c)(2)(B).

{¶20} ODJFS's arguments have been considered and rejected by *Hughes*, 734 F.3d 473. In *Hughes*, the United States Court of Appeals for the Sixth Circuit considered whether a community spouse's transfer of resources to purchase an annuity after institutionalization, but preeligibility, constituted an improper transfer of resources. In that case, Mr. Hughes purchased an annuity four years after his wife had entered a nursing home, and the annuity provided income to Mr. Hughes for nine years and seven months, his actuarial life expectancy. The annuity named Mrs. Hughes as the first remainder beneficiary, and the state of Ohio as the second remainder beneficiary “for the total amount of medical assistance furnished to Mrs. Hughes.” *Id.* at 477. Three months after Mr. Hughes had purchased his annuity, Mrs. Hughes applied for Medicaid.

{¶21} The Ohio agency determined that Mrs. Hughes was eligible for Medicaid, but imposed a period of restricted coverage because of Mr. Hughes's annuity purchase. In temporarily withholding Medicaid funds, the Ohio agency relied on 42 U.S.C. 1396r-5(f)(1), which provides that an institutionalized spouse may transfer to a community spouse an amount equal to the CSRA, without penalty. Thus, the Ohio agency in *Hughes* argued that a transfer of resources for the benefit of the community spouse in excess of the CSRA after institutionalization is improper.

{¶22} The Sixth Circuit harmonized the unlimited-transfer provision of 42 U.S.C. 1396p(c)(2)(B)(i) with the CSRA-transfer cap in 42 U.S.C. 1396r-5(f)(1) by reasoning that 42 U.S.C. 1396r-5(f)(1) and 42 U.S.C. 1396p(c)(2)(B)(i) operated "at distinct temporal periods." *Hughes* at 480, relying on *Morris v. Oklahoma Dept. of Human Servs.*, 685 F.3d 925, 935 (10th Cir.2012). The Sixth Circuit reasoned that, prior to a determination of Medicaid eligibility, 42 U.S.C. 1396p(c)(2)(B)(i) permits unlimited transfers for the benefit of a spouse. *Hughes* at 480.

{¶23} The Sixth Circuit further determined that Mr. Hughes's annuity purchase was for his "sole benefit" under 42 U.S.C. 1396p(c)(2)(B), despite the presence of contingent beneficiaries. Although the federal statute does not define "sole benefit," the Sixth Circuit relied in part on Ohio's implementing regulation in determining that "so long as the financial instrument is actuarially sound and payments are made only to the spouse during his life[,] the transfer by Mr. Hughes was for his sole benefit." *Id.* at 481-82, relying on former Ohio Adm.Code 5101:1-39-07(F)(1). The Sixth Circuit concluded that the district court had erred in determining that the Ohio agency could impose restricted coverage on Mrs. Hughes because of the annuity purchase.

{¶24} Just as the community spouse in *Hughes* had transferred community resources to purchase an annuity after his spouse's institutionalization, but preeligibility, Mrs. Koenig purchased the annuity after her husband's institutionalization, but before Medicaid eligibility had been determined. Thus, ODJFS's reliance on the CSRA-hearing requirement in Ohio Adm.Code 5160:1-3-07(G) is misplaced. Following the reasoning of *Hughes*, the CSRA-transfer cap does not apply until after a determination of Medicaid eligibility. Here, the transfer by Mrs. Koenig occurred preeligibility, so the unlimited-transfer provision in Ohio Adm.Code 5160:1-3-07(F) controls. Moreover, Mrs. Koenig's annuity is actuarially sound and only benefits Mrs. Koenig during her life, just as the annuity in *Hughes*. Thus, the annuity constitutes a transfer of resources for Mrs. Koenig's sole benefit. See Ohio Adm.Code 5160:1-3-07(F)(1); 42 U.S.C. 1396p(c)(2)(B).

{¶25} Therefore, we determine that Mrs. Koenig's annuity purchase with funds in excess of the CSRA was not an improper transfer when the transfer occurred after institutionalization, but preeligibility.

{¶26} We note that the trial court and Mrs. Koenig rely heavily on a decision from this court, *Rorick v. Ohio Dept. of Job and Family Servs.*, 1st Dist. Hamilton No. C-090627, 2010-Ohio-5571. *Rorick*, which predated the Sixth Circuit's decision in *Hughes*, determined that a community spouse's purchase of an annuity, which complied with former Ohio Adm.Code 5101:1-39-22.8 (renumbered as Ohio Adm.Code 5160:1-3-22.8), was not an improper transfer even though the community spouse used resources above the CSRA limit. *Id.* at ¶ 16. In reaching its conclusion, the *Rorick* court relied on case law interpreting Medicaid countable-resource statutes. *Id.* at ¶ 11, 20, citing *Vieth v. Ohio Dept. of Job and Family Servs.*, 10th

Dist. Franklin No. 08AP-635, 2009-Ohio-3748; *James v. Richman*, 547 F.3d 214 (3d Cir.2008); *Weatherbee v. Richman*, 595 F.Supp.2d 607 (W.D.Pa.2009). In this case, ODJFS does not contend that the annuity purchased by Mrs. Koenig was a countable resource for purposes of determining Mr. Koenig's Medicaid eligibility; therefore, the reasoning of *Rorick* does not control here.

{¶27} We overrule ODJFS's first assignment of error.

The Annuity Requirements in Ohio Adm.Code 5160:1-3-22.8

{¶28} In its second assignment of error, ODJFS contends that the trial court erred in determining that it had waived the issue of whether Mrs. Koenig's annuity was an improper transfer for failing to meet the requirements of Ohio Adm.Code 5160:1-3-22.8. ODJFS contends that Mrs. Koenig's annuity contract named the state of Ohio as second remainder beneficiary "up to amount of benefits received by Elaine Koenig" when the Medicaid regulation requires that the annuity name the state as a remainder beneficiary for the amount of benefits paid to the Medicaid applicant—here Mr. Koenig. See Ohio Adm.Code 5160:1-3-22.8(C)(1); 42 U.S.C. 1396p(c)(1)(F).

{¶29} ODJFS failed to raise Mrs. Koenig's technical noncompliance with the annuity requirements as a basis for its decisions at the administrative level. Without the benefit of a developed administrative record, this court cannot conduct a meaningful review of ODJFS's argument in this appeal. We determine that it would be unfair to reinstate ODJFS's period of restricted coverage on the basis of Ohio Adm.Code 5160:1-3-22.8(C)(1), when that rule was not invoked by the agency at the administrative level. Therefore, we overrule ODJFS's second assignment of error.

Conclusion

{¶30} In conclusion, because we determine that the trial court properly found that ODJFS erred when it treated the purchase of Mrs. Koenig's annuity as an improper transfer for Medicaid purposes, and that ODJFS erred when it imposed a period of restricted coverage on Mr. Koenig's Medicaid payments, we affirm the judgment of the trial court.

Judgment affirmed.

DINKELACKER, P.J., and DEWINE, J., concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.



D105116387

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**COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**

ELAINE L. KOENIG, et. al.,

Appellant,

vs.

MICHAEL B. COLBERT, et al.

Appellees.

CASE NO.: A1203492

Judge Norbert A. Nadel

ENTERED
JAN 29 2014

DECISION AND ORDER

This appeal is filed from a Final Administrative Appeal Decision of the Ohio Department of Job and Family Services (“Appellee”), pursuant to sections 119.12 and 5101.35(E) of the Ohio Revised Code. Appellant Paul F. Koenig (“Mr. Koenig”) entered a skilled care facility on March 15, 2011. Record at p. 7. On that date, Mr. Koenig and his wife, Elaine Koenig (“Mrs. Koenig”), had countable Medicaid resources of \$349,806.89. *Id.* Under the Medicaid program, Mr. and Mrs. Koenig needed to reduce their “countable Medicaid resources”¹ to at or below \$111,060, \$109,560 of which was allocated to Mrs. Koenig as the “community spouse,”² and \$1,500 of which was allocated to Mr. Koenig. Ohio Adm. Code § 5160:1-3-35; R. at p. 81.

¹ “Countable Medicaid resources” are all assets belonging to Mr. and Mrs. Koenig, regardless of how those assets are titled, excluding the home, one car, and certain other personal items. Ohio Adm. Code § 5160:1-3-26 (previously Ohio Adm. Code § 5101:1-39-26; the Ohio Administrative Code provisions have been re-designated from 5101 to 5160; § 5101:1-39-26 is now § 5160:1-3-26).

² A “community spouse” is a term of art in the Medicaid program, meaning an individual who is not in a medical institution or nursing facility and who has an institutionalized spouse. Ohio Adm. Code § 5160:1-3-36.1(B)(2). The amount the spouse living in the community may keep is generally increased annually. When Mr. and Mrs. Koenig applied for Medicaid, the amount was \$109,560. R. at p. 81.

Mr. and Mrs. Koenig spent approximately \$117,024 of the \$349,806 assets on care and other items, and then Mrs. Koenig purchased a stream of income through a single premium, immediately payable, irrevocable annuity (the "Annuity") in the amount of \$121,783.56 on October 26, 2011. This annuity pays Mrs. Koenig income of \$2,081.50 per month. Record at pp. 7, 19-27. The Annuity was purchased from a commercial enterprise, the proceeds are dispersed in equal monthly payments with no lump sum, the Annuity is for Mrs. Koenig's sole benefit, it is actuarially sound, and it names the State of Ohio as the first remainder beneficiary, in compliance with Ohio Adm. Code § 5160: 1-3-22.8(C)(1) and (3). *Id.*

On October 18, 2011, a Medicaid Application for Mr. Koenig was filed with the Hamilton County Department of Job and Family Services. Record at pp. 2, 7. Mr. Koenig's Medicaid Application was approved beginning December 1, 2011, but Medicaid payments to the skilled nursing facility were denied from December 1, 2011 through July 2013 because the Agency found that Mrs. Koenig's purchase of the Annuity was an improper transfer. Record at pp. 75 and 77.

On January 17, 2012, a State Hearing was requested. Record at p. 11. On February 21, 2012, the Hearing Officer affirmed the Agency's determination that Mrs. Koenig's purchase of an annuity was an improper transfer for purposes of Mr. Koenig's Medicaid. *Id.* On March 6, 2012, an Administrative Appeal of the State Hearing Decision was requested. Record at p. 6. On April 6, 2012, the Administrative Appeal Officer agreed with the State Hearing Decision. Record at pp. 1-5. Thereafter, pursuant to Ohio Revised Code sections 119.12 and 5101.35, a complaint for judicial review was timely filed with this Court on May 4, 2012.³

Ohio has elected to participate in the Medicaid program; therefore, Ohio's Medicaid program must be in compliance with federal law and with the regulations promulgated by the

³ The Estate of Mr. Koenig was added as a party on June 25, 2012, following his death on March 4, 2012.

Secretary of the United States Department of Health and Human Services. *Gruber v. Ohio Dept. of Human Serv.* (Delaware Ct. App. 1994), 98 Ohio App.3d 72, 77, citing *Schweiker v. Gray Panthers* (1981), 453 U.S. 34, 47.

As part of the spend-down to Medicaid eligibility, Appellee's rules and federal law permit Mr. Koenig to transfer countable Medicaid resources to or for the sole benefit of Mrs. Koenig, to purchase of a stream of income through a single premium, immediately payable, irrevocable annuity. 42 U.S.C. § 1396p(c); Ohio Adm. Code § 5160:1-3-22.8(C) (previously § 5101:1-39-22.8(C)). The Hamilton County Court of Appeals in *Rorick v. Ohio Department of Job and Family Services*, 2010 WL 4683716 (1st Dist. 2010), Record at pp. 28-40, finds that such a purchase is proper, and that Appellee's treatment of this type of purchase as an improper transfer violates federal law. The Ohio Supreme Court declined to review *Rorick*,⁴ making the Hamilton Court of Appeals' decision the final binding authority in the matter.

The Annuity in this case was purchased with spend-down funds by Mrs. Koenig after Mr. Koenig entered care and before he was eligible for Medicaid. The Court in *Rorick* found this type of annuity "fully complies" with federal law and is a valid method of spending down assets to Medicaid eligibility as long as the annuity is irrevocable, non-assignable, actuarially sound with payments distributed in equal monthly amounts, and names the state as the primary beneficiary. The Annuity in this case fully complies with *Rorick* and follows state and federal law.

Rorick relies on and follows *Veith v. Ohio Department of Job & Family Services*, 2009-Ohio-3748 (10th Dist. 2009), another case analyzing the purchase of annuities as a proper use of spend-down funds. Record at pp. 41-62. *Veith* holds that "funds used to purchase an actuarially

⁴ *Rorick v. Ohio Dept. of Job and Family Servs.*, 2010 WL 4683716 (1st Dist. 2010), jurisdiction declined, 2011-Ohio-1049.

sound, non-revocable, non-transferable commercial annuity, for the sole benefit of the community spouse [Mrs. Koenig herein], are not countable resources.” The 10th District Court of Appeals in *Veith* further held that the annuities in that case, virtually identical to the Annuity in this case, were purchased for the sole benefit of the community spouse, were in compliance with the provisions of Ohio Adm. Code § 5160:1-3-22.8, and the department’s position that the purchases constituted an improper transfer of resources in excess of the CSRA is **inconsistent** with federal law. *Veith*, R. at pp. 38-59.

The *Rorick* and *Veith* decisions are consistent with six other federal Circuit Courts of Appeal which find that a “community spouse,” like Mrs. Koenig, may purchase an irrevocable, immediately payable, income-only annuity with the spend down funds as long as the annuity complies with the federal law as set forth above.⁵ Most recently in *Hughes v. McCarthy*, 734 F.2d 473 (6th Cir. October 25, 2013), the Sixth Circuit Court of Appeals found the community spouse’s purchase of an annuity is a proper transfer when determining the institutionalized spouse’s Medicaid eligibility. The Sixth Circuit specifically found that when the transfer occurs before the Ohio agency determines the institutionalized spouse’s eligibility for Medicaid coverage, federal law (42 U.S.C. § 1396p(c)(2)(B)(i)) permits the unlimited transfer of assets to the individual’s spouse to purchase a single premium, irrevocable annuity, and the State’s determination that such a purchase is an improper transfer is a violation of federal law. *Id.*, slip. op. at 2.

The record unambiguously reflects that Mrs. Koenig’s Annuity is irrevocable, nonassignable, and actuarially sound. There are no deferral or balloon payments. The Annuity

⁵ *Hughes v. McCarthy*, 734 F.3d 473 (6th Cir. October 25, 2013); *Lopes v. Department of Social Services*, 696 F.3d 180 (2nd Cir. 2012); *James v. Richman*, 547 F.3d 214 (3rd Cir. 2008); *Geston v. Anderson*, 729 F.3d 1077 (8th Cir. 2013); *Hutcherson v. Arizona Health Care Cost Containment System*, 667 F.3d 1066 (9th Cir. 2012); *Morris v. Okla. Dept. of Human Servs.*, 685 F.3d 925, 938 (10th Cir. 2012).

provides for fixed, monthly payments. The State of Ohio is named the remainder beneficiary.⁶ Based on *Rorick*, *Veith*, and *Hughes*, the Annuity purchased by Mrs. Koenig fully complies with the federal Medicaid laws and the Ohio Administrative Code.

Having reviewed the record, hearing oral argument, and reviewed the pertinent law as set forth above, this Court finds that Appellee's Administrative Appeal Decision dated April 6, 2012 is not in accordance with law and is not supported by reliable, probative, and substantial evidence, and it is therefore be reversed. Specifically, this Court finds:

1. The Appellee erred when it treated the purchase of Mrs. Koenig's annuity as an improper transfer of resources;
2. Appellee erred when it imposed a period of restricted Medicaid coverage which made Mr. Koenig ineligible for Medicaid to pay his nursing facility vendor payment costs.

It is ordered as follows:

1. Claim One of the First Amended Complaint filed by Appellant is hereby remanded to the Ohio Department of Medicaid to fully comply with this decision.
2. Appellant's 12/3/13 motion for reconsideration is hereby denied.
3. Costs taxed to Appellee.

COURT O
Norbert A. Nadel
Norbert A. Nadel, Judge
Date: 1/29/14
FILED
TAXED

⁶ Appellee's argument that this Annuity is an improper transfer because Mrs. Koenig did not name her husband as the first remainder beneficiary fails because Appellee never raised this issue in its Administrative Appeal Decision, and therefore, this is not part of the underlying record and cannot now be used to justify Appellee's Decision. See *Rorick*, R. at p. 64 (the Court is limited to the record before it, and the record cannot be supplemented). Even if Appellee is permitted to raise this issue now, this argument fails because the Annuity clearly complies with Ohio Adm. Code § 5160:1-3-22.8 since it names the State of Ohio as the first remainder beneficiary.

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